Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No.193 of 2011

Dated 3rd October, 2012

Coram : Hon'ble Mr. Justice P.S. Datta, Judicial Member
Hon'ble Mr. V.J. Talwar, Technical Member

In the matter of:

M/s DLF Utilities Limited,
DLF Gateway Tower,
7th Floor, DLF City, Phase-III.
Gurgaon – 122002.
(Through its Authorized Signatory Mr. Ajay Gupta)

…Appellant(s)

Versus

1. Haryana Electricity Regulatory Commission
   Bays No. 33-36, Sector-4,
   Panchkula-134112.
   (Represented by its Secretary)

2. Dakshin Haryana Bijli Vitran Nigam Limited,
   C-Block, Vidyut Sadan,
   Vidyut Nagar, Hissar – 125 005.
   (Represented by its Chairman & Managing Director)

…Respondent(s)

Counsel for the Appellant (s) : Shri S.Ganesh, Senior Advocate
Shri V.P. Singh, Advocate
Shri Dushyant Manocha, Advocate
Shri Paresh Bihari Lal, Advocate

Counsel for the Respondent (s) : Shri Amit Kapur, Advocate
Shri Vishal Anand, Adv. for R-2
Ms. Shikha Ohri for R-1

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The appeal presents a pure legal question as to whether the appellant which is a Company engaged in the generation of electricity is liable to pay cross-subsidy surcharge even when no open access has been availed of by it and uses its own dedicated transmission lines and does not use the network of Dakshin Haryana Bijli Vitran Nigam Ltd., the respondent no.2 herein. The Haryana Electricity Regulatory Commission by the impugned order dated 11.08.2011 held that even though open access on the distribution system of the respondent No.2 was not availed of by the appellant it was required to pay cross-subsidy surcharge in view of the fact that the appellant has been providing electricity to the owners of seven commercial buildings who are allegedly engaged in the business of leasing out space to numerous tenants so as to enable them to operate their respective businesses. The case of the appellant that the appellant was providing electricity without using open access to the co-owners of the power plant through dedicated transmission lines as envisaged under Section 10 (2) of the Electricity Act, 2003 and, therefore, not liable to pay cross subsidy surcharge was negated by the Commission in the impugned order now under challenge in this appeal.

2. So far as the Memorandum of Appeal is concerned, it presented the aforesaid legal question as to whether the appellant was liable to pay cross subsidy surcharge even when no open access was availed of by it

through the use of the network of the respondent No 2, but as will be seen in the sequel the magnitude of the appeal has been widened at the instance of the respondent No 2 by raising the question that how far could it be legal for the building owners to distribute electricity to their tenants who have been running their commercial establishments from the main receiving panel (HT/LT) of each of the commercial buildings, if the appellant is not a captive power plant. In the course of this judgment, we have found it absolutely proper to traverse this legal point also on the grounds as will be noticed hereinafter even though no cross appeal / cross objection was preferred against the observation of the Commission on this point that went in favour of the appellant.

3. There are seven commercial buildings owned by the DLF Group of Companies which are being provided with electricity by M/s. DLF Utilities Ltd., a power generating company and admittedly the said building owners have let out their respective spaces to various tenants. The respondent no.2 filed a petition before the Commission praying for levying electricity duty, cross-subsidy and additional surcharge on the ground that the building owners who are a cross-subsidizing category are provided with electricity by the owners of the building without paying any cross-subsidy surcharge. The appellant filed a written response maintaining that the question of payment of cross-subsidy surcharge under Section 42(2) of the Act would arise only when open access was sought for and granted by the Commission. According to the appellant, open access as defined under the Act means the use of 'transmission lines' or 'distribution system' and the words 'transmission lines' are clearly distinguishable from 'dedicated transmission lines', the latter having been defined in Section 2 (16) of the Act. The use of dedicated

transmission lines has no nexus with open access. Therefore, the question of applicability of Section 42(2) and the consequent open access Regulations framed thereunder do not have application in the present situation. Secondly, the Haryana Open Access Regulations clearly provide that they are applicable only in cases when open access is sought for. The reasoning of the Commission that the appellant was liable to pay cross-subsidy surcharge on account of the fact that but for the appellant the building owners who belong to cross-subsidizing category would have taken electricity from the respondent no.2 at the prevalent tariff having an element of cross subsidy is erroneous because it was not obligatory on the part of the building owners to mandatorily seek electricity connection from the respondent no.2 alone and it cannot be taken for granted that the building owners, but for the presence of the appellant, would have been the valued customers of the respondent no.2. The Act 2003 has for the first time introduced the concept of open access which has been introduced for the expansion of the sector rather than restricting its development. Thirdly, the building owners who are also the co-owners of the appellant's power plant collectively hold 98% of the equity share of the appellant and they do not have any connection with the respondent no.2 for receiving electricity. That is to say, the building owners are not the consumers of the respondent no.2. In the Aggregate Revenue Requirement petition the respondent no.2 does not show the possible revenue earnable from the building owners. Fourthly, the argument of the respondent no.2 that it needs to be compensated for the loss sustained by it because of loss of customers on account of the presence of the appellant is untenable in view of the grounds as above. Cross-subsidy surcharge is not to be treated as a compensatory charge because it is the established legal position, maintains the appellant, that in matters of taxes, the

provisions of the statutes should be strictly construed. The decision of the Tribunal in *Aryan Coal* case is not applicable to the facts and circumstances of the present case because CERC Regulations expressly provide for payment of cross-subsidy irrespective of the mode of supply and that the said CERC Regulations are distinct from the Haryana Open AccessRegulations,2005

4. The respondent no.2 in its counter-affidavit contends that the appellant does not qualify itself to be a captive power plant and when it is not a captive generation plant, the supply of power would be subject to the provisions of the Act and that cross-subsidy surcharge is leviable and payable by a power plant despite the fact that electricity is being supplied from the dedicated transmission lines to the building owners. The appellant is supplying electrical energy from its power plant to various independent commercial establishments in the DLF owned buildings, and had not there been any power plant of the appellant in the complex of the DLF Utilities, then the building owners or their tenants who are running commercial establishments would have been subjected to tariff of the respondent which undoubtedly would have within it an element of cross-subsidy. Thirdly, Sections 9 and 10 make it clear that the generating companies or the captive power plants supplying electricity to end users are subject to the provisions of the Section 42(2) which has two aspects, namely, (a) Open Access and (b) Cross-subsidy. Section 42(2) has not restricted it to open access on the lines of the distribution licensee, meaning thereby that this Section cannot be read to confuse open access with a distribution licensee. Cross-subsidy is payable as a charge to be paid in compensation to the distribution licensee irrespective of whether its system is or is not used and this is

the ratio of the decision in *Aryan Coal* case decided in Appeal No. 119 of 2009 and Appeal No. 125 of 2009 on 09.02.2010. The decision in *Aryan Coal* case is clearly pointer to the fact that cross-subsidy surcharge is payable irrespective of whether the lines of the distribution licensee are used or not, and even without obtaining open access upon payment of cross-subsidy surcharge. A generating plant is entitled to supply power to consumers using the dedicated transmission lines which are laid from the place of generation to the place of consumption on payment of cross-subsidy. It is by creation of balance of interest of the entities and the interest of the distribution licensee that the scheme of the Act is achieved. Merely because the Regulations do not specify levy of cross-subsidy surcharge the appellant cannot run away from its liability to pay cross-subsidy surcharge. The Regulations framed by the Commission do not override the substantive provisions of the Act; therefore, it cannot be said that the Regulations which were considered in *Aryan Coal* case did provide for payment of cross-subsidy regardless of the mode of supply do not apply in the present case because the Haryana Regulations do not provide for such payment of cross-subsidy. Dedicated transmission lines is only for evacuation of power from a particular project, while transmission lines can be used by any utility subject to availability of capacity in the lines and payment of transmission charges. Therefore, even if the sale of electricity is being undertaken through dedicated transmission line, cross-subsidy surcharge and additional surcharge will be applicable. Thus, the alleged exclusive use of dedicated transmission lines is no ground for refusal to pay cross-subsidy surcharge in view of a conjoint reading of Sections 10 (2) and 42 (2) of the Act. Under the Haryana Open Access Regulations, cross-subsidy surcharge is leviable even if the appellant is supplying electricity from dedicated lines. The second proviso to Section 42 (2) of

the Act specifically provides that surcharge levied under that Section shall be utilized to meet the requirements of current level of cross-subsidy within the area of supply of the distribution licensee. Therefore, the appeal of the appellant has no merit.

5. The Commission in its written submission submits that Section 10 (2) provides that a generation Company may supply electricity to any consumer subject to the Regulations made under sub-Section (2) of Section 42 of the Act and the Haryana Open Access Regulations notified by the Commission under sub-Sections (2), (3) and (4) of Section 42 of the Act squarely apply to the appellant for levy of cross-subsidy surcharge. The decision in *Aryan Coal* case has in fact been followed in the impugned order. The appellant supplies electrical energy to seven commercial buildings owned by DLF Group of Companies who are engaged in the business of letting out space in the buildings to various tenants who operate their own businesses and commercial ventures. Furthermore, the building owners have entered into energy purchase agreement with the appellant to set up power plant for them in the basement of the building or near the buildings. The electricity from the generating plant is transmitted to the building owners through dedicated electrical cables up to the main electricity receiving panel of each building. The respondent no.2 took objection to the supply of such electricity from the generation plant of the appellant to the seven commercial buildings through the dedicated transmission lines and then further to the companies occupying those building without obtaining a license and this objection raised by the respondent no.2 was found to have merit in it particularly when the generation plant of the appellant does not qualify itself to be a captive generation plant in view of the fact

that 51% of the power so produced by the appellant is not used by the building owners who are said to be the co-sharers of the plant but is being used by the companies occupying these buildings as tenants which is not in conformity with Rule 3(1) of the Electricity Rules, 2005. The licensee accordingly issued a notice on 17.9.2010 to the appellant directing it to submit an affidavit within seven days along with supporting documents to prove bona fide consumption of 50% of electricity for its own use, but as the reply of the appellant was not satisfactory, the licensee filed a petition before the Commission which passed an impugned order dated 11.8.2011 in Case No.8 of 2011. According to the Commission, under Section 7 of the Electricity Act, 2003, a Generation Company can establish, operate and maintain a generation plant without obtaining a license and Section 9(1) and 10(1) respectively provide that a captive Generation Company as also a Generation Company can establish, operate and maintain 'dedicated transmission lines'. Section 10(2) provides that a Generation Company may supply electricity to any consumer subject to the regulations made under sub-section (2) of Section 42 of the Act. The building owners are in the business of letting out space in the buildings to various tenants / companies to operate their business. In terms of the lease agreements, the building owners are required to provide air-conditioning, electric supply, water supply, security, horticulture, operation of common facilities to the occupants and for supply of electricity and chilled water the building owners have entered into an energy purchase agreement with the appellant to set of power plant for them in the basement of the building or near the buildings and supply electrical energy to them and chilled water on payment of charges / tariff as per the agreement. The appellant has accordingly set up a 40 MW co-generation plant and a chilling unit at building no.10 (one out of the seven buildings), Energy

Center, Phase-II, Gurgaon. The electricity from the generating plant is transmitted to the building owners through dedicated electrical cables up to the main electricity panel (HT/LT) of each building. According to the Commission, cross subsidy surcharge is payable on the supply of electricity from the generation plant of the appellant to the tenants / companies occupying the buildings from the date of commencement of supply to the buildings and the open access regulations notified by the Commission under sub-section (2), (3) & (4) of Section 42 of Electricity Act, 2003 will squarely apply to the appellant for levy of cross subsidy surcharge and the Commission's decision is based on the decision of this Tribunal in Aryan Coal Beneficiations Pvt. Ltd. Vs. Chhattisgarh State Electricity Board dated 9.2.2010.

6. The appellant filed a rejoinder with a supporting affidavit on 27.3.2012 contending that the reply of the respondent no.2 is based on an incorrect appreciation of the appellant's case. The Commission, the respondent no.1 herein, did not act upon and follow its own Regulations, 2005. The appellant did not suppress any material fact from the Commission. Levy of cross subsidy surcharge on the appellant can be done only in accordance with the Regulations,2005 and can in no manner be done de hors the Regulations,2005 in terms of which levy of cross subsidy is not dependent upon the captive status of the appellant. On the contrary, the levy of cross subsidy depends upon the question whether open access has been availed or not. The issue of captive status is unrelated to the issue of cross subsidy. Regulations, 2005 provide for levy of cross subsidy on the consumers availing open access to the transmission lines or distribution system of the licensee. The appellant has not been using the transmission line or distribution system

of the licensee. Section 42 of the Act also relates to levy of cross subsidy when open access is used of the licensee. The decision of the Hon'ble Supreme Court in *U.P. State Electricity Board Vs. City Board, Mussorie (1985) 2 SCC 16* is misplaced in this connection because in the reported case, it was held that tariff can be fixed by the Commission having jurisdiction to do that even where there are no Regulations. But when Regulations have been framed, the fixation of tariff has to follow the Regulations. Similarly, the reliance placed on the decision of this Tribunal in *SIEL Ltd. Vs. PSERC, 2007 (APTEL) 931* is also inapplicable. The words 'subject to rules' imply 'in accordance with the Rules'. Since, the building owners are not consumers of the respondent no.2, the latter would not have considered any alleged revenue to be realized from the building owners in its ARR. The contention of the respondent no.2 that providing of electricity by the appellant to its building owners has resulted in loss of revenue to be generated though cross subsidy from such consumers is not based on the provisions of the Act, 2003. As is evident from the statutory definition of Open Access under the 2003 Act, it means the non-discriminatory provision for the use of transmission lines or distribution system. As can be seen from Section 2(72) and 2(16), the "transmission lines" and "dedicated transmission lines" are separately defined terms in the 2003 Act. Thus, when the 2003 Act provides "open access" as the usage of transmission lines, it means that "open access" does not apply to the situation wherein dedicated transmission lines are used by consumers. It is apparent that the term "non-discriminatory provisions for use" does not apply for one's own private / dedicated transmission line and it would be applicable only when common facilities of a licensee are apportioned for usage without discrimination between various applicants for such usage. Wheeling applies only to the facilities of distribution licensee or

transmission licensee. In other words, there cannot be a case where open access is applicable for the usage of an entity's own 'dedicated transmission lines'. It is submitted that if the intention of the legislature was that cross subsidy is payable for the usage of one's own dedicated transmission lines, so that "open access" is applicable to dedicated transmission lines also, then the statutory definition of the "open access" would have included dedicated transmission lines also (since it is separately defined in the 2003 Act and the same would have been incorporated in Section 42(2) of the 2003 Act.

7. Upon the pleadings as aforesaid, the point for consideration is whether the appellant is liable to pay cross subsidy surcharge as has been levied upon it by the Commission in the Impugned Order when open access is not availed of by the appellant. The further point is whether the tenants / lessees under the building owners can legally receive distribution of electricity by the building owners beyond the delivery point or the load centre.

8. We have heard Mr. S.Ganesh, Learned Sr.Advocate appearing for the appellant, Ms. Sikha Ohri, Learned Advocate appearing for the respondent no.1 and Mr. Amit Kapur Learned Advocate appearing for the respondent no.2.

9. Learned advocate for the appellant makes the following submissions:-

a) Legality of supply of power by the appellant to the building owners as has been raised by the learned advocate for respondent no.2 in course of hearing of the appeal is beyond the purview of the appeal in view of the fact that the same has attained finality and challenge has not been made thereto.

b) The Commission does not dispute the correctness of supply of power by the appellants to the building owners.

c) The appellant has been utilizing its own dedicated transmission lines and has not applied for open access.

d) The appellant is supplying electricity under Section 10(2) of the Act which is subject to Section 42 (2) of the Act and the Regulations made thereunder. The Open Access Regulations, 2005 notified by the Commission which is consistent with Section 42 (2) of the Act makes it clear that when open access is availed of, levy of cross subsidy surcharge is justified.

e) The Commission's order makes it clear that the appellant has not been using open access.

f) 'Open access' as defined is Section 2 (47) of the Act implies "non-discriminatory provisions for use" of transmission lines or the distribution system for the use to a licensee, consumer or a person engaged in the generation. The definition of open access consciously uses the term 'transmission lines' as opposed to 'dedicated transmission lines' which amply clarifies the legislative intent that open access and its consequent charges would be applicable only in case where transmission lines as opposed to dedicated transmission lines are utilized.

g) The definition of open access involves a non-discriminatory usage of transmission lines, the underlying rationale being "non-discriminatory." It is difficult to fathom as to how would the same

apply to one's own dedicated transmission lines, where the question of non-discrimination, would not arise at all.

h) Open access is necessarily limited to the usage of the licensee's network. The definition of open access under Section 2 (47), the definition of transmission lines under Section 2 (72) and the definition of dedicated transmission line under Section 2 (16) of the Act – all read together with Section 42 (2) of the Act makes the position clear that open access is inter-related to the distribution system of the licensee.

i) The Commission was wrong in holding that but for the appellant the building owners would have taken their quantum of power from the respondent no.2 and would have paid the consequent cross subsidy surcharge because the Act, 2003 does not provide that a person has to take necessarily electricity energy from a specified licensee.

j) The Commission was wrong in invoking the 'spirit' behind Section 42(2).

k) No surcharge can be levied without the authority of law. In this connection, the decisions in *The State of Kerala and Ors. Vs. K.P.Govindan, Tapiocs Exporter and Ors. (1975) 1 SCC 281, A.V. Subha Rao Vs. State of Andhra Pradesh, AIR 1965 State Commission 1773 and Bansal Wire Industries Limited & Anr. Vs. State of Uttar Pradesh & Ors. (2011) 6 SCC 545* have been cited.

l) The Commission cannot follow the decision in *Aryan Coal Case* because in that case, it was held that payment of cross subsidy arises when open access is used. Moreover, the decision in *Jindal Steel and Power Ltd. Vs, CSERC and Ors, 2008 ELR (APTEL) 628, OCL India Limited Vs. Orissa Electricity Regulatory Commission, 2009 ELR (APTEL) 0765 and Kalyani Steels Limited,*

Karnataka Vs. Karnataka Power Transmission Corporation Limited, 2007 APTEL 895 fortify this position.

m) The Commission did not correctly interpret its own Regulation 11 (6) (b)(2) of the Chhattisgarh State Electricity Regulatory Commission (Intra-state open access in Chhattisgarh) Regulations, 2005.

n) The Commission could not have levied cross subsidy surcharge upon the appellant in the absence of a mechanism to compute the same. The decisions *in C.I.T. vs. B.C. Srinivasa Setty (1981) 2 SCC 460 and PNB Finance Limited Vs. CIT –I, New Delhi (2008) 13 SCC 94* have been cited.

o) Cross subsidy is not payable by a generator because the appellant is not a consumer in view of Regulation 14 of the open access Regulations, 2005.

p) The argument of the respondents with reference to paragraph 16 & 17 of the decision in the *Aryan Coal case* and that cross subsidy surcharge is in the nature of compensatory charge is not acceptable as being devoid of merit.

q) The argument of respondents that the Commission has power to levy cross subsidy surcharge in view of Section 86 (1)(a) and (c) of the Act, 2003 is not acceptable in view of the fact that the Commission was not determining the tariff under the aforesaid provision of the Act but was adjudicating upon the complaint lodged by the respondent no.2.

r) The Tribunal must not adjudicate upon the issue of legality of providing a power by the appellant to the building owners because that issue has not been appealed against and the Commission did not question such legality. Reference in this connection has been made to the decisions in *Badri Narayan Singh Vs. Kamdeo Prasad*

Singh and Anr. AIR 1962 State Commission 338, Premier Tyres Limited Vs. Kerala State Road Transport Corporation, (1993) 2 SCC 146 and K.K.John Vs. State of Goa (2003) 8 SCC 193.

10. Ms. Sikha Ohri, learned advocate appearing for the Commission has in her oral submissions elaborated the points canvassed in the written submissions and reiterated the findings made by the Commission in the impugned order, as such repetition of oral submissions is not necessary.

11. The Learned Advocate for the respondent no.2, Mr. Amit Kapur makes the following submissions:-

a) The appellant is supplying electricity at the main receiving panel of the building to the several companies which are all building owners (DLF Group of Companies which own seven buildings in DLF Cyber City) by using its dedicated transmission line.
b) There is Energy Purchase Agreement between the appellant and the building owners in terms of which the appellant raises invoices upon the building owners for supply of such electricity and the building owners leased out spaces to various tenants to operate their businesses which implies that consumption of electrical energy is mainly for the use of the tenants and not for the building owners.
c) The building owners pay to the appellant on account of electrical energy.
d) The Delivery/Metering Point for the electricity would be at the main receiving panel (HT/LT) of each of the buildings. This implies that

the distribution of electricity beyond the Delivery Point is sub-distribution of electricity by the building owners.

e) The building owners and the tenants have entered into by and between them lease deeds.

f) The building owners are operating and maintaining a sub-distribution system for supplying to the consumers.

g) The building owners do not have any license to supply electrical energy to the traders and businessmen occupying spaces of the building owners, nor do they have franchise from any licensee.

h) Thus, Sections 12 & 14 of the Act are violated because in terms of the aforesaid two sections, such supply requires a license and in absence of such license / franchise, the appellant or the building owners cannot supply electricity to tenants occupying different apartments in the building in DLF Cyber City on rental basis.

i) Though the Commission did not find illegality or violation of any provisions of the Act in the matter of supply of electricity from the generation plant of the DLFU to the DLF group of companies i.e. building owners who are said to be the co-sharers / owners and though such alleged legality has not been questioned in the counter-affidavit of the respondent no.2, the said respondent no.2 is entitled to raise the question as it is a pure question of law which can be raised at any stage in course of the hearing of the appeal particularly when this is not disputed that the distribution of electricity to the tenants happens at the behest of the building owners beyond the delivery point and that lease deeds have been entered into by and between the building owners and the tenants which imply that the ultimate end-users are the tenants who run their commercial establishments through use of such electrical energy.

j) Under Section 2 (16) of the Act, the dedicated transmission lines which a Generation Company can establish can go up to load centre which has been interpreted by this Tribunal in *Nalwa Steel and Power Ltd. Vs. Chhatisgarh State Power Distribution Co. Ltd. : 2009 ELR (APTEL) 609* and such load centre can also be a consumer.

k) Thus, if a generation company instead of establishing a dedicated transmission line from its generating station up to a particular load centre wants to supply electricity to a large group of consumers in a particular area then supply beyond the load centre for consumption to a large group of consumers does not become a supply through a dedicated transmission line.

l) It is the settled position of law that in order to ascertain whether the building owners are distributing electricity or not the content and substance of the agreement with all its surrounding circumstance is relevant. The observation of the Commission in this respect is not legal.

m) In terms of Section 9 or Section 10 of the Act, it is open to the generation Companies as also the captive power plant to supply electricity to the end users subject to Section 42 (2) of the Act. Section 42 (2) deals with two aspects namely i) open access and ii) cross subsidy. Open access has not been restricted on the lines of distribution licensee.

n) Cross subsidy surcharge is a compensatory charge and it does not depend upon the use of the distribution licensee's line. It is a charge to be paid as compensation to the distribution licensee irrespective of whether its line is used or not because but for the open access, the consumers would have taken power from a

distribution licensee through a tariff that has an element of cross subsidy.

o) Section 86 (1) (a) read with Section 62 of the Act gives the Commission the power the to determine tariff for generation of wheeling of electricity. Therefore, the appellant cannot question the power of the Commission to determine cross subsidy surcharge which has been done in terms of Regulations 33 of the Tariff Regulations framed by the Commission.

p) Merely because Regulations do not specify levy of cross subsidy surcharge and additional surcharge, the appellant cannot run away from its liability to pay towards its liability on account of cross subsidy surcharge.

q) The appellant suppressed a material fact from this Tribunal to the effect that it had preferred a review application before the Commission against the impugned order dated 11.8.2011 which inter alia held that the appellant does not qualify to be a captive generation plant.

12. As said at the beginning, though the appeal presented a legal question as to whether the appellant which is a company engaged in the generation of electricity is liable to pay cross subsidy surcharge when no open access is availed of by it as it uses its own dedicated transmission line and does not depend upon the distribution network of the respondent no.2, the dimension of the appeal has now been widened in this that in course of hearing of the appeal, the respondent no.2 has also presented a legal point as to whether a generation company, if it is not a captive power plant, or for that matter the building owners can distribute electrical energy to divergent people who are the end users by supply of

electrical energy beyond the load centre up to which it can supply electrical energy through dedicated transmission lines. It was the argument of the learned senior counsel for the appellant that since the respondent no.2 has not preferred any cross appeal and when the Commission upon examination of all the facts has come to the conclusion that supply of energy to the end users who were in this case are tenants under the building owners is not illegal because of such supply being made through dedicated transmission lines, it is no longer open to the respondent no.2 now to question the legality of such finding, as such this Tribunal must restrict itself to the deliberation of the question as to whether when open access is not availed of by the appellant in supplying electricity energy to the occupants under the building owners cross subsidy surcharge is payable in terms of Section 42 (2) of the Act. It has been the counter argument of the respondent no.2 that even though no cross appeal has been preferred by the respondent no.2 it is still eligible to ventilate the point, it being a pure question of law and this Tribunal like the court of appeal in a civil court can traverse apart from the question of fact a question of law too even when such question is not raised because a question of law need not be originated through pleading and when this is a Tribunal to hear appeal under Section 111 of the Act both on the question of fact as well as law the pleading on the question of law is neither necessary nor is it important, rather it being a redundancy altogether.

13. Having heard the learned counsels for the parties, we are firm of the opinion that the argument of the respondent no.2 cannot be brushed aside because it is the settled position of law established through a catena of decisions that a first appellate court, as this Tribunal is,

obligated upon examining both the material questions of fact and law and simply because a finding on law has not been challenged by a party affected by such finding it cannot be said that such a finding of law must escape the scrutiny of the first appellate court particularly when arguments are placed questioning the legality of such finding. This is also so when the finding is the finding of mixed question of fact and law. The Honourable Supreme Court in *Chhatisgarh Vidyut Mandal Abhiyanta Sangh Vs. CSERC : (2007) 8 SCC 208* is referable in this connection. In *Cellular Operators Assn. of India Vs. Union of India : (2003) 3 SCC 186*, it has been held that TDSAT's jurisdiction extends to examine the legality propriety and correctness of a direction / order or decision of the Authority, TDSAT being an expert body is entitled to exercise its appellate jurisdiction both on facts as also in law over a decision of the Authority and the Tribunal's decision on facts and law is final and the appeal lies to the Hon'ble Supreme Court only on substantial question of law. Though a Tribunal can mould its own procedure, the age-old tested fundamental principles enunciated through different provisions of Civil Procedure Code cannot be departed from, and Order 41, Rule 33 that delineates the power of the appellate court is relevant for reproduction:

" Power of Court of Appeal- The Appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require , and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that***(omitted as being not necessary)"***

This Tribunal in *New Bombay Ispat Udyog Ltd. vs. MSEDCL: (2010 ELR (APTEL) 653* has held as follows:-

"Provisions of section 120(1) of the Electricity Act,2003 was not enacted with the intention to curtail the power of the Tribunal with reference to the applicability of the Code of Civil Procedure to the proceedings before the Tribunal. On the contrary, the Hon'ble Supreme Court has clearly held that the words 'shall not be bound by' do not imply that the Tribunal is precluded or prevented from invoking the procedure laid down by the CPC. It further sways that the words " shall not be bound by the procedure laid down by the CPC'' only imply that the Tribunal can travel beyond the CPC and the only restriction on its power is to observe the principles of natural justice."

The matter of the fact is that a point of law is not required to be pleaded and a Court of law cannot turn its eye when it is raised at any stage of the proceeding , and the Tribunal is well within its jurisdiction to adopt its own procedure as well as the provisions of the CPC. The learned counsel for the respondent no 2 referred to the decisions in *Prahlad vs. State of Maharashtra: (2010) 10 SCC 458, Banarasi vs. Ram Phal: (2003) 9 SCC 606, Gosu Jairami Reddy vs. State of APPEAL: JT 2011 (8)State Commission 263, and Jagadish Singh vs. Madhuri Devi: (2008) 10 SCC 497.* Accordingly, the legality of raising the legal issue by the respondent no 2 has to be answered in favour of the respondent no 2 in the light of the above discussion. The decision in *Badri Narayan Singh vs. Kamdev Prasad Singh and Anr., AIR 1962 SCC 388,* as referred to by the learned senior advocate for the appellant is not helpful because the appellant in that case did not appeal against the High Court's Order in the Appeal no.7 confirming the Order of the Election Tribunal setting aside the election of the appellant and on that ground Appeal no.8 was not maintainable. In *Premier Tyre Limited Vs. Kerala State Road*

Transport Corporation, it was held that the effect of non-filing of appeal against a judgment or decree is that decree becomes final and cannot be taken away. This is a brief judgment but it has reference to *Badri Narayan Singh*. These two decisions relate to matter of fact in different suits, while in our case, it was the question of law that was raised in course of hearing of the arguments. K.*K. John vs. State of Goa (2003) 8 SCC 193* is in a different fact situation not applicable to the present case. Learned senior advocate for appellant refers to *State of Kerala Vs. M/s Vijaya Store, (1978) 4 SCC 41*, but there the question was raised whether the Tribunal had power to enhance assessment when no cross objection by the department was filed praying for enhancement. This decision is not helpful to us. The decision of the Delhi High Court in *Satish Kumar Vs. Prem Kumar : MANU/DE/2423/2008* was one under the Hindu Succession Act. Similarly, the decision of the Allahabad High Court in *Chitranjan Singh vs. Samarpal Singh : MANU/UP/3416/2011* is a case under Small Causes Court Act and it is not understood as to how these decision become relevant to the case of the appellant. The *Vodafone International Holdings B.V. vs. Union of India and Another reported in [2012] 341 ITR 1 (SC)* is a very lengthy decision relating to capital gains and capital asset of a corporate entity under Income Tax Act and we do not think that this decision has any manner of application so far as the ratio of the decision is concerned.

14. We, however, do not attach too much of importance to the submission of the learned Counsel for the respondent no 2 to the effect that the appellant suppressed the fact it had filed a review petition before the Commission against the impugned order dated 12.08.2011 particularly in view of the fact that the appeal encompasses in it all

questions of facts and law though , of course, non- disclosure was unfortunate and must not have happened.

15. Let it be said at the outset that the issue raised in the Memorandum of Appeal and the issued raised by the learned counsel for the respondent no-2 in course of hearing of the appeal are not too remote from each other in as much as the answer to both the issues are available from thorough reading of Sections 9, 10, 42 read with Section 2(15), 2(16), 2(72) amongst other provisions of the Act. Since as a judicial body, we are inclined to follow the precedents, it can be said at the beginning itself that both the issues are covered by the four decisions of the Tribunal namely *M/s Jindal Steel and Power Ltd. Vs. Chhatisgarh State Electricity Regulatory Commission 2008 ELR (APTEL) 0628, Nalwa Steel and Power Ltd. vs. Chhatisgarh State Power Distribution Ltd., Raipur, 2009 ELR (APTEL) 060, Chhatisgarh State Power Distribution Ltd. Vs. Aryan Coal Benefactions Pvt. Ltd. and Anr. 2010 ELR (APTEL) 0476 and Chhatisgarh State Power Distribution Ltd. Vs. Salasar Steel & Power Ltd. & Chhatisgarh State Electricity Regulatory Commission 2010 ELR (APTEL) 0616.* The *Jindal* decision was rendered on 7.5.2008, *Nalwa Steel* was rendered on 20.5.2009, *Aryan Coal* came into being on 9.2.2010 and *Chhatisgarh State Power Distribution Ltd. Vs. Salasar Steel & Power Ltd*. was pronounced on 28.4.2010.

16. For proper appreciation of the issues involved in the appeal, we are further to observe that the *Jindal Steel* which was first in the series in this connection had occasion to deal with the question as to whether

JSPL which set up a captive power plant at Raipur required a distribution license in the face of provision of Section 10 (2) of the Act and this was dealt with at Paragraph No. 48 onwards. It transpired from this case that a generation company instead of establishing a dedicated transmission line from its generating station up to a particular load centre wanted to supply electricity to a large number of consumers not through dedicated transmission line. In *Nalwa*, the scope and ambit of dedicated transmission line was considered after considering the second proviso to Section 9 (1) read with Section 42 (2) of the Act. *The Aryan Coal Case* which directly answers the issue raised by the appellant in the appeal and which was third in the series of the four judgments as aforesaid had occasion to consider both *Jindal and Nalwa* with approval. The last mentioned case decided on 28.4.2010 again considered the question whether levy of cross subsidy surcharge is permissible even when dedicated lines are used but without availing of the open access and this decision refers to again *Aryan Coal Case* and also *OCL India Ltd. vs. OERC.* Accordingly, a composite treatment for both the issues is called for particularly when concerning both the issues, the learned counsel for both the parties relied upon the same judgments but according to their own ways.

17. Having said as above, the first question is whether the appellant, a generation company, is liable to pay cross subsidy surcharge even when no open access has been sought for and availed of and the distribution network is not used of the distribution licensee. The bare undisputed facts are that there are seven commercial buildings owned by DLF Group of companies which are being provided by the DLF Utilities Ltd. and admittedly the building owners have let out their respective

accommodations to various commercial establishments who have been carrying out their commercial venture through use of the electrical energy supplied to them by virtue of bilateral agreements entered into by and between the building owners and such lease-holders/ tenants. The building owners may be the co-owners /shareholders of the appellant's power plant but the ultimate end-users of electricity generated by the appellant's plant are the tenants. That the generation plant of the appellant does not qualify itself to be captive power plant in view of the fact that 51 % of the power so produced by the appellant is not used by the appellant but by the commercial establishments using the spaces as tenants admits of no dispute in view of rule 3 (1) of the Electricity Rules, 2005. Use of not less than 51% of the aggregate electricity generated in such plant determined on an annual basis is one of the legal criteria for a generating plant to be a captive user. It is not a case that the appellant is a special purpose vehicle formed in terms of rule 3 (1) (b) of the Electricity Rules, 2005. It goes undisputed that by virtue of energy purchase agreement between the appellant and the building owners the appellant raises invoice on the building owners and the said agreement disclosed that building owners have leased out their respective spaces in the buildings to various persons / establishments who have undertaken commercial ventures for commercial gain. The simple fact is that as the appellant is paid for supply of electricity to the building owners, the latter are being paid for in turn by the tenants.

18. Keeping these broad facts in mind it is necessary to examine whether cross subsidy surcharge is payable for supply of electricity even if such supply is made through dedicated transmission line. Though transmission lines and dedicated transmission lines are not one and the

same the definition of dedicated transmission lines as it occurs in Section 2 (16) of the Act requires mentioning:

"(16) dedicated transmission lines means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plan referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be."

Therefore, a generating company using dedicated transmission line can go upto any transmission lines or sub-stations or generating stations or the load centre. For continuation of the discussion reference to Section 9 & Section 10 will be necessary. These two sections are reproduced below:-

9. (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for thepurposes of carrying electricity from his captive generating plant to thedestination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmissionfacility shall be adjudicated upon by the Appropriate Commission.

10. (1) Subject to the provisions of this Act, the duties of a generating

company shall be to establish, operate and maintain generating stations, tie-lines,sub-stations and dedicated transmission lines connected herewith in accordance with the provisions of this Act or the rules or regulations made thereunder.

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer.

(3) Every generating company shall -
(a) submit technical details regarding its generating stations to the Appropriate Commission and the Authority;
(b) co-ordinate with the Central Transmission Utility or the State Transmission Utility, as the case may be, for transmission of the electricity generated by it.

Section 42 (2) with its four provisos are reproduced below:-

"42. (2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission :

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee :

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use."

Thus, it is seen that both the generation company and captive power plant can supply electricity to the end users through dedicated transmission lines and Section 10 (2) clearly provides that supply to any consumer even through dedicated transmission lines is subject to sub-

section (2) of Section 42 of the Act, and Section 42(2) refers to cross subsidy. Open access, though it is commonly presumed to have co-relation with cross subsidy a closer look at the said section read with the decision *Aryan Coal* case of this Tribunal rendered hitherto before on this point and in this connection has made the position clear that even though open access may not be used by a generation company cross subsidy is leviable upon it in favour of a distribution licensee as a compensatory charge. The logic behind such provisions is that but for the open access the consumers would have taken electrical supply from the licensee. The decision in *Aryan Coal* Case is relevant in this connection.

"12. The perusal of these Sections would make it clear that the first and 2nd proviso to Section 9 when it is read together would clearly envisage for the supply of electricity generated to any consumer subject to regulations made under sub-section 2 of Section 42. Similarly, subs-section 2 of Section 10 also would envisage for the supply of electricity by a generating company to a consumer by a generating company to any licensee in accordance with this Act and the rules and regulations made thereunder and subject to the regulations made under sub-section (2) of Section 42. While the proviso to section 9 uses the expression "the supply of electricity by generating plant through the grid", there is no such qualification provided for in sub-section 2 of section 10. Thus, these sections would make it evident that it is open to the generating company as well as captive plant to supply electricity to end users.

13. Further the consumption by a non-captive generating plant of its own electricity generation by itself is not prohibited under the Act. Similarly, the transmission of electricity by a non-captive generating plant for self-consumption by a dedicated transmission line is also not prohibited. It is well settled in law that what is not barred or what is not prohibited is permissible and there can be no action at all for carrying out which is not prohibited by the statutory provisions. The following is the relevant portion of observations made by the Hon'ble Supreme Court in the case of Suresh Jindal Vs BSES Rajdhani Power Ltd. – (2008) Vol-1 SCC 341. "Section 20 operates one filed namely, conferring a power of entry on the licensee. The said provision empowers the licensee inter-alia to alter a meter which would include replacement of a meter. It is an independent general provision. In the absence of any statutory provision, we do not see any reason to put a restrictive meaning thereto. Even under the General Clauses Act, a statutory authority while exercising the statutory power may do all things which are necessary for giving effect thereto. There does not exist any provision in any of statutes referred to hereinbefore which precludes or prohibits the licensee to replace one set of meter by another."

14. It can not be disputed that when the power plant from which electricity is made available is a captive power plant, no cross subsidy charge is payable. In the same way, if it is not a captive power plant then the cross subsidy is payable. Since Aryan Plant was not paying cross subsidy surcharge, on the finding that it is not a captive power plant, the Aryan Plant had been asked to pay the cross subsidy surcharge for the past use, especially when the plant itself filed an application before the State Commission in Petition No. 11 of 2008 stating that it was prepared to pay the cross subsidy surcharge.

15. The Distribution licensee cannot have any grievance in regard to the order directing the Aryan Plant to pay the cross subsidy charge towards the past use, since the Distribution Licensee in fact is actually benefited, since it is getting cross subsidy surcharge which is higher than the parallel operation charges which was being paid earlier. Once it is held that the generating plant was not operating as a captive generating plant then there was no liability to pay parallel operation charges.

16. Section 42 (2) deals with two aspects; (i) open access (ii) cross subsidy. Insofar as the open access is concerned, Section 42 (2) has not restricted it to open access on the lines of the distribution licensee. In other words, Section 42 (2) cannot be read as a confusing with open access to the distribution licensee.

17. The cross subsidy surcharge, which is dealt with under the proviso to sub-section 2 of Section 42, is a compensatory charge. It does not depend upon the use of Distribution licensee's line. It is a charge to be paid in compensation to the distribution licensee irrespective of whether its line is used or not in view of the fact that but for the open access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers. On this principle it has to be held that the cross subsidy surcharge is payable irrespective of whether the lines of the distribution licensee are used or not.

18. In this context, the next question that would arise for consideration is whether the generation plant can use its own dedicated transmission line to supply power to its own coal washeries without obtaining open access. This point has been held in favour of the generating plant by this Tribunal in Nalwa Steel & Power Ltd. Vs CSPDCL & Anr. [Appeal No. 139 & batch – 2009 ELR (APTEL) 609] dated 25.5.2009. In this decision it has been held that the dedicated transmission line can be laid by generating company to the place of consumption of the consumer when a place of consumption is a load centre. This is also held valid in another decision in Appeal No. 10 of 2008 on 22.9.2009 in the case of Dakshin Gujarat Vidyut Vitran Nigam Ltd. Vs. Gujarat Electricity Regulatory Commission."

It is also relevant to refer to the decision in *Nalwa Steel and Power Ltd. vs. Chhatisgarh State Power Distribution Co. Ltd. : 2009 ELR (APTEL) 609.*

"*11) The new Act envisages grant of transmission license. The new Act also envisages supply by the generating company and the captive generating*

company to a consumer. When a captive generating company supplies to a consumer, as permitted by the second proviso to Section 9(1) of the Act, such supply would be subject to the regulation for open access [Section 42(2) of the Act]. Obviously such open access regulations are required to be followed when open access is availed of, if no open access is availed of, as not necessary or because no existing network is available, it cannot be said that the captive generating company cannot supply under the enabling provision because the generating company has laid its own lines and the existing transmission utility has not laid its lines so far. If the term 'subject to' is interpreted to mean 'only under' it may lead to absurd result. For example, if the consumer is situated at a close proximity to the captive generating station and the existing network is at a distance of several kilometers, the captive generating company will then have to route the electricity first to the existing lines and then back to the consumer and pay the charges for using open access. The legislature, we can safely conclude, meant that if a captive generator wants to supply electricity to a consumer, it will be entitled to use the lines of any transmission or distribution licensee on complying with the relevant rules and on payment of the required charges and not that even if the existing lines are too far away, the generating company cannot directly supply to a consumer.

12) The Act permits a captive generating company and a generating company to construct and maintain dedicated transmission lines 'Dedicated Line' as per Section 2(16) means any electric supply line for point to point transmission which connects electric lines or electric plants to "any transmission lines or sub stations, or generating stations or load centers". Load centre, it is said is conglomeration of load and not an individual industry/factory as consumer. According to Mr. Ramachandran, advocate for the Commission, a load centre cannot be a consumer because if the two could be the same, Section 10 would permit a generating company to reach a consumer through such dedicated line which will amount to distribution which is not permissible except with a license. We are not in agreement with Mr.Ramachandran. A dedicated line can go, admittedly, from the captive generating plant to the destination of its use. Such destination, i.e. the point of consumption, has to be covered by the term 'load centre'. The consumption point is neither electricity transmission line nor substation or generating station. Hence, the only way such a line can be termed dedicated transmission line when we treat the point of consumption as a 'load centre'. In other words, a single consumer can be a load centre. A dedicated transmission line can go from the captive generating station to a load centre and such load centre can also be a consumer. Section 9 of the Act with the amendment of 2007 specifically provides that to supply to a consumer, the captive generating station shall not need a license. No such exemption has been given to a generating station under Section 10 of the Act. In this view one may say that a generating company may need license to supply to a consumer through a dedicated line. For our purpose, the issue is irrelevant and we need not delve much into it. JSPL is supplying from its captive generating plant to Nalwa for which it needs no license."

The above decision leads us to the position that a generating station can supply electricity on sale to a consumer through dedicated transmission lines upto the load centre which may mean a single consumer subject to Regulations framed under Section 42 (2) of the Act. What is noticed is that in the case at hand the generation company is supplying electricity to a group of consumers on commercial basis which in fact amounts to use of distribution system which has been defined in Section 2 (19) as

"distribution system means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers."

19. The *Jindal* Judgment which has been extensively considered in the *Aryan Coal Case* requires to be quoted because it covers both the issues mostly. We quote Paragraph 48 to 52 of this decision as follows:-

"48) We can now proceed to examine to what extent the JSPL's supply to the Industrial Park can be held to be permissible activity by virtue of section 10(2) of the Electricity Act 2003. We have already extracted section 10(2) in paragraph 24 above. It allowed a generating company to supply electricity to any licensee or to any consumer. It further prescribes that supply to the licensee will be in accordance with the Act, Rules and Regulations made under the Act. It says further that supply to a consumer will be subject to the Regulations made under sub-section 2 of section 42. The Act does not make supply as a licensed activity. But how does a generating company supply? "Supply" in the Electricity Act 2003 has been defined as sale of electricity to a licensee or consumer. Section 2(70) provided the definition of "supply" which is as under: "2(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer."

49) A sale can be done at bus bar of the generating company. If it is so done, a purchaser of power, whether it is a licensee or a consumer, has to organize its wheeling up to the load centre. However, if this function is not undertaken by a consumer then the wheeling or carrying of electricity from the generating station up to the load centre has to be done either by a licensee or by a generator. Section 12 speaks of license for transmission, distribution and trading. The transmission and distribution can be done only by a licensee. A transmission licensee cannot reach upto the load centre. In order to reach the loads centre the generating company can take the help of a distribution licensee by using the distribution system of the distribution licensee. Here we

may briefly say that 'distribution' is not defined in the Act although distribution licensee, distribution main and distribution system have been defined in section 2 (17), (18) and (19). Distribution system means the wires and associated facilities between the delivery points on the transmission lines or generating station connection and the point of connection to the installation of the consumer. The distribution licensee operates and maintains a distribution system for supplying electricity to the consumer. "Transmission" on the other hand is defined in section 2(72) as under:
"2(72). "transmission lines" means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gear and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works."

50) In view of this definition, transmission lines cannot be any essential part of the distribution system of a licensee and would not reach the load or installation of a consumer.

51) The generating company can reach the consumer for "supplying" electricity through dedicated transmission lines as defined in section 2(16). Section 10(1) says that the duties of a generating company shall be to establish, operate and maintain generating stations, tie lines, sub-stations and dedicated transmission lines connected therewith. The "dedicated transmission lines" as defined in 2(16) is as under:
"2(16). "dedicated transmission lines" means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be;"

52) ***Thus dedicated transmission lines which the generating station can establish can go upto the load centre. Therefore, a generating station can sell electricity to a consumer through dedicated transmission lines upto the load centre. However, if the generating company, instead of establishing a dedicated transmission line from its generating station upto a particular load centre wants to supply electricity to a large group of consumers in a particular area then what he requires is not a dedicated transmission line but a distribution system for he is certainly not contemplating to have dedicated transmission line for such consumer. If this is the situation i.e. a generating company intends to supply to a group of consumers but not through a dedicated transmission line, does the intended activity become distribution. In that case section 12 of the Electricity Act 2003 makes no exception for him and he would need a license".(Emphasis ours)***

20. Referring to the decision in *Nalwa Steel and Power Ltd. vs. Chhatisgarh State Power Distribution Co. Ltd*, this Tribunal held in *Aryan Coal case* further as follows:-

"27. The energy can be generated and same can be supplied to the consumer within the premises. Similarly where the electricity is generated at one place it may be transmitted to a place of consumption other than the place of generation. In the former case, it can be consumed through internal wiring. In the later case, there is necessity to lay down electricity line from the place of generation to place of use by using the existing line of the licensee through the open access.

28. In the case of Nalwa Steel & Power Ltd. V CSPDCL & Anr. (Appeal 139/2007 & batch- 2009 ELR (APTEL) 609 at para 12 it has been held that the term load centre can be interpreted to mean that even the place of single consumer can be a load centre.

29. If the said finding which is a ratio is followed, then it has to be held that the dedicated transmission line which is laid for supply from the place of generation to the place of consumption can be used on payment of cross subsidy charges".

21. In Kalyani Steels Ltd. Vs. KPTCL : 2007 ELR (APTEL) 895, it has been held inter alia as follows:-

"40. In the present case and on the admitted facts, no part of the distribution system and associated facilities of the first Respondent transmission licensee or the second Respondent distribution licensee is sought to be used by the appellant for the transmission of power from Grid Corporation, from injecting point (sub-station) to appellant's plant. Therefore, the definition as it stands, the appellant is not liable to pay wheeling charges and additional surcharge for the Open Access in respect of which it has applied for. In terms of Sub-section (4) of Section 42, the payment of additional surcharge on the charges of wheeling may not arise at all. Yet the appellant is liable to pay surcharge, whether he is liable to charges for wheeling or not and on the second point we hold that the appellant is liable to pay surcharge and not additional surcharge which may be fixed by the third Respondent, State Regulatory Commission.

43. As regards fifth point, liability to pay cross subsidy, which cross subsidy is part of the tariff as notified by the Commission to all consumers within the area of distribution of second Respondent distribution licensee so long as the appellant seeking for stand by supply of power, it is liable to pay cross subsidy surcharge and there is no escape. The cross subsidy surcharge, which is an element which has gone in the fixation of tariff, would be compulsory in terms of statutory provision. It is not as if the contractual relationship with the second Respondent is severed. The appellant wants to retain its service connection as a consumer and to draw power depending upon the exigency and for the quantum of power drawn as a standby source, the liability to pay the all consequential charges are automatic. We do not

find any illegality in the methodology adopted by the Commission with respect to determination of cross subsidy surcharge."

22. In *OCL India Ltd. Vs. OERC : 2009 ELR (APTEL) 765*, it has been held inter alia that the underlying philosophy behind cross subsidy surcharge is that a consumer has to compensate for the loss sustained by the distribution licensee. Thus necessarily open access has not been restricted by Section 42 (2) on the lines of the distribution licensee. It is a compensatory charge payable to the distribution licensee on the logic that but for the open access a consumer would have taken quantum of power from a distribution licensee in which case a consumer was required to pay a tariff that definitely has an element of cross subsidy. Reference to sub-section (2) of Section 42 in sub-section (2) of Section 10 is significant and when the two sub-sections of the two respective sections are read together makes the position clear that while there is no legal impediment for a generation company to supply to any consumer, it is always subject to the provision of sub-section (2) of Section 42. Further, the second proviso to sub-section (2) of Section 42 makes it evident that cross subsidy surcharge is intended to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee. A generation company does not require any license unlike a distribution or transmission licensee to generate electrical energy and may also supply electricity to any consumer. It is noticeable that sub-section (2) of Section 10 has two parts, namely a) a generation company may supply electricity to any licensee; and b) it may supply electricity to any consumer. The words "*subject to the regulations made under sub-section (2) of Section 42"* as it occurs in sub-section (2) of Section 10 qualifies supply to 'any consumer' . Therefore, when a generation company makes supply to any consumer,

such supply is always subject to the regulations made under sub-section (2) of Section 42 which, as held in the *Aryan Coal* case, means that irrespective of whether open access is used or not, it is liable to pay cross subsidy and a conjoint reading of Section 10(2) and Section 42 (2) implies that cross subsidy surcharge is payable not only when open access is availed of but also when supply is made by a generation company to a consumer, or else there would not have been any reference to Section 42 (2) in Section 10 (2). The fourth proviso to Section 42(2) further makes it clear that '*such surcharge*' is not leviable in case of captive generating plant using open access for carrying the electricity to the destination of its own use. That the appellant is not a captive generating plant, that the ultimate user is not the captive generating plant and that the ultimate users are the commercial establishments admit of no dispute. In the *Aryan Coal* case, the identical question was raised to the effect as to whether the plant was liable to cross subsidy surcharges for the past use of the electricity generated by it for supply to its own coal washeries to the distribution licensee and consequently the parallel operational charges which were paid earlier by the plant to the distribution licensee shall be adjusted towards the cross subsidy surcharges for the past use. It was held that as consumption by a non-captive generating plant of its own electricity generation by itself is not prohibited under the law, transmission of electricity by a non-captive generating plant for self-consumption by a dedicated transmission line is also not prohibited. It was clearly held in Paragraph 16 that Section 42(2) cannot be read in a manner as if open access is only intrinsically related to the lines of the distribution licensee as a generation company is legally enjoined to supply electricity to a consumer. It has its own fetter in this that such supply is limited and qualified by Section 42(2).The learned senior advocate for the appellant

refers to paragraph 61 of the decision in *Jindal Steel* to argue that in that case it was clearly held that the provision of section 42(2) would be attracted only when the access through the existing distribution system is sought, and when no such access is sought the question of application of section 42(2) will not arise. Apparently, it would seem that the observation runs counter to the decision in *Aryan Coal* case, but it must not be missed that in *Jindal Steel* case the question was whether JSPL was governed by section 9 or by section 10 of the Act, and the Tribunal held that it was a captive power plant under section 9 of the Act. So far as the issue in the present appeal is concerned, there is no conflict between *Jindal Steel and Aryan Coal.* The argument of the CSEB was that the supply from a CPP or even under section 10 (2) is permissible only when the same is made by use of the grid or the transmission lines of the distribution licensee by use of open access, and unless open access is availed of supply cannot be made. This contention was negated by the Tribunal holding that it will not be correct to say that even if electricity generated by a CPP or a generation company can be supplied to a consumer without the use of the grid such a supply will not be permissible. The observation was made in that context. What has been provided in sub-section(2) of section 9 has been incorporated through amendment by the Amending Act 26 of 2007 with the qualification that in case of a captive generating plant no license is required for the purpose and the Tribunal after discussing the effect of amendment in section 9 of the Act vis-s vis section 10 held that section 10 even before the aforesaid amendment did not allow distribution.

23. The second question of law canvassed only during the course of argument by the respondent no.2 as to whether any illegality or violation of any provisions of the Act does occur in the matter of supply of

electricity from the generation plant of DLFU to the DLF Group of companies who were building owners goes to the root of the matter Taking a cue from the decision *in Nalwa Steel and Power Ltd. vs. CSPDCL and Anr. (Appeal No.139 of 2009),* the Commission held that if a consumer can be a load centre then a generation company can supply electricity over a dedicated transmission line to such a consumer or a load centre without any license and accordingly no provision of law is violated. Learned senior advocate for the appellant makes the submission that if supply to the building owners is opposed on the ground that it amounts to the character of distribution then the express provision of Section 10(2) is violated and the Commission has rightly held that such supply is legally justified. Necessarily, the question arises as to the scope and ambit of the concept of 'dedicated transmission line'. We have seen in Section 2(16) that a dedicated transmission line as opposed to transmission lines is electric supply line for point to point transmission for the purpose of connecting electric lines or electric plants of a captive generating plant or a generating station to any transmission line or sub-station or generating station or the load centre. Load centre has not been defined in the Act or in the Regulations. It is true that in *Nalwa Steel and Power Ltd.,* it has been held through interpretation of Section 10 read with Section 2(16) by this Tribunal that the dedicated transmission line can go up to the load centre and such load centre may be the point of consumption or point of destination. It is important to notice that the Tribunal held that a view is possible when one says that a generation company may need license to supply to a consumer through a dedicated transmission line. This observation was made of course after rejection in that case of Mr. Ramachandran's argument that a load centre cannot be consumer because in that case Section 10 would permit a generation company to reach a consumer through such

dedicated line which will amount to distribution which is impermissible under the law. Rejection of the argument was made on the basis of the definition of the dedicated transmission lines which comprised amongst others a load centre. We, therefore, can now say that a generating station can sell electricity to a consumer through dedicated transmission lines. Now, the question arises whether a dedicated transmission line still remains a dedicated transmission line if a generation company instead of establishing a dedicated transmission line from its generating station up to a particular load centre wants to supply electricity to a large group of consumers covered under the area of a distribution licensee. In *Jindal Steel and Power Ltd. vs. Chhatisgarh State Electricity Regulatory Commission: 2008 ELR (APTEL) 628*, this question has been answered as above. It is only to be noticed that in the *Jindal Case* this Tribunal noticed and traversed the distinction between the second proviso to Section 9 which came by way of amendment and the provision of Section 10(2) to observe that JSPL's function does not extend to distribution in the name of dedicated transmission line under the law.

24. The point is raised to the effect that Regulation 14 of the Terms and conditions for Open Access for Intra-State Transmission and Distribution System Regulations, 2005 (Open Access Regulations, for short) notified by the Haryana Electricity Regulatory Commission on 19.5.2005 does not speak of levy of cross subsidy surcharge upon a generation company when such company supplies electricity to a consumer without use of open access and only through dedicated transmission line. It is argued that when Section 10(2) speaks of "*subject to the regulations* under Section 42(2)", there cannot be levy of such surcharge in the absence of regulations. It has been rightly argued

by the learned counsel for the respondent no.2 that when statute clearly provide that supply by a generation company to a consumer is subject to levy of cross subsidy surcharge under Section 42(2) absence of regulation which in effect is supplementary to the statute is of no avail. When a consumer receives supply from a distribution licensee, it makes payment according to a tariff which definitely has an element of cross subsidy; as such it cannot be argued that when the same consumer is supplied electricity directly by generation company, it is exempt from paying any amount that would not have partaken of the character of cross subsidy surcharge. The law does not contemplate any such situation where two consumers located in the same area would be discriminated against each other. Therefore, we do not find any fault with the finding of the Commission in this respect.

25. It may be logically conceivable to say that a load centre can be consumer in view of a generation company having power to reach a consumer through dedicated transmission line, though of course a consumer means under Section 2(15) a person receiving electricity by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public in terms of the Act, 2003. The factuality suggests that there remains no problem when the appellant is supplying electricity at the main board of each of the seven buildings to the respective building companies, but the core of the issue is whether the building owners can in turn supply electricity to the individual occupants / owners of the apartments in that building without any license or a franchise to distribute or supply electricity. It is the individual occupants of the buildings who occupy different spaces in the

apartments to promote their commercial ventures and they receive electricity from the building owners in lieu of payments made to them who in turn have entered into the agreements with the appellant for the purpose. This, in fact is distribution beyond the load centre which does not come within the purview of dedicated transmission line. In *Jindal Steel* there is a reference to a decision of the Supreme Court in *A.P. Gas Power Corporation Ltd. vs. A.P. State Electricity Regulatory Commission; JT 2004 (3) 600* where the Hon'ble Court had occasion to deal with the provisions relating to licensee under the Andhra Pradesh Electricity Reforms Act. The Supreme Court held that while no license was required to be taken by a generation company consuming electricity generated by itself but when the question comes with regard to supply of sister concern, it was held that the sister concerns were independent entities and supply to them would amount to supply to a non-participating industry and it would be necessary to have license under the relevant provisions of law. *In K. Raheja Corporation Pvt. Ltd. Vs. MERC 2011 ELR (APTEL) 1170,* the facts were exactly similar and there the building owners receiving electrical energy at a single point were distributing electricity to numerous traders /businessmen running their commercial establishments by occupying different spaces of those buildings without having their separate meters without liability to pay charges to a distribution licensee or any franchise. We may reproduce Paragraph 21 of this judgment in this connection which will be relevant.

" If according to the learned counsel for the appellant, sub-distribution of electricity to the occupants of a building by the owner or consumer of such building is not unlawful then the provision of Sections 12 and 14 would be nugatory and self-defeating. Learned counsel for the appellant reads the definition of "consumer" in conjunction with the definition of 'person'. So far so there is no harm ,but he is mistaken when he says that a consumer includes a group of consumers. A consumer may mean

*a person, and a person may mean a company or a body corporate or association or body of individuals whether incorporated or not or artificial juridical person but the concept of consumer does not extend to a situation where number of end users each living separately in a building and connected to consumer or owner of a building are conjoined together. A body of individuals is comprised within the definition of 'person' but such body of individuals cannot be construed to mean a countless number of independent end users who do not form a body of individuals. The word "group of consumers' is absent in the definition of the word 'consumer'.*****. A consumer does not include a group of consumers in terms of the definition. If a consumer upon receipt of electrical energy distributes such energy to different end users according to their need and if such end users are not consumers within the meaning of the Act and they are charged tariff or fee for such consumption of electrical energy with which a distribution licensee is not concerned then the question may arise definitely whether such distribution of power to different end users within a complex in lieu of a tariff or fee charged by a consumer would amount to unauthorized sale of electricity. A consumer receives electricity only "for his own use" and this excludes a situation where a consumer can on receipt of electrical energy sell a part of that energy or the entire energy itself to different people for their respective consumption. It is only for HT VI category consumer, namely, Group Housing Society where perhaps such single point supply is permitted. Thus, a consumer cannot have his own distribution system for distribution of electrical energy in turn to his tenants/occupiers/users etc. The concept of dedicated distribution facility cannot be invoked in the circumstances of the case.*

Thus supply to a consumer through a dedicated transmission line is not objected to but what is objected to is supply to numerous persons in the name of dedicated transmission line but beyond the same in furtherance of commercial interest of the building owners who let out their spaces to their tenants / lessees.

26. It is now necessary to refer to certain decisions cited by the learned senior advocate for the appellant and before we do so we have to observe that the concept of open access is not necessarily limited to the usage of the licensee's network. Whoever a consumer may be,

supplied by a generation company to a consumer is subject to the provisions of Section 42 (2) read with Section 10(2) and when the law is explicit, it cannot be said with the aid of the decision in "*The State of Kerala and Ors. Vs. K.P. Govindan, Tapioca Exporters and Ors., (1975) 1 SCC 281*" that no surcharge can be levied without the authority of law. In the reported case, it was held that imposition of administrative charge was without the sanction of the law because the State of Kerala had no power under Section 3 of the Essential Commodities' Act to levy such charge. In *A.V. Subha Rao Vs. State of Andhra Pradesh, AIR 1965 State Commission 1773*, what appeared was that surcharge as a tax was levied by executive order and not by any law. This is a voluminous judgment against the State of Andhra Pradesh at the instance of 35 appellants in the matter of a Procurement Order. In this case, tax was imposed in the name of surcharge without authority of law. *In Bansal Wire Industries Limited and Another Vs. State of Uttar Pradesh and Others (2011) 6 SCC 545*, pronouncement was made to the effect that in taxing statute, one has to fairly look at the language. This decision does not appear to be helpful to the appellant because it dealt with the connotation of the expression "tool, alloy and special steels" as occurred in Central Sales Tax, 1956 and the question was whether stainless steel wire was a declared good under that Act. Again, *Aryan Coal Case and Jindal Steel* are not of any aid to the appellant. So, also is the decision in *OCL India Ltd. Orissa vs. OERC (2009) ELR (APTEL) 0765* where it has been held in Paragraph 18 that the underlying philosophy behind levy of surcharge is that the consumer must compensate for the loss of cross subsidy to the distribution licensee. In *Kalyani Steels Ltd*., it was held that the appellant was liable to pay cross subsidy surcharge for supply to all consumers within the area of distribution of the second distribution licensee so long as the appellant was seeking for standby

supply of power. The facts of the case are slightly different and the ratio of the decision is not commensurate to the arguments advanced by leaned senior advocate of the appellant. In *C.I.T. Vs. B.C. Srinivasa Setty, (1981) 2 SCC 460*, it was held that goodwill is intangible in nature, insubstantial in form and nebulous in character and denotes benefit arising from connection and reputation and it is an asset of the business. This observation was made while interpreting Section 45 of the Income Tax, 1961. It was held that transfer of goodwill is not subject to income tax under the head "Capital Gains". In *PNB Finance Limited vs. CIT-I, New Delhi (2008) 13 SCC 94,* the question was whether transfer of banking undertaking gives rise to taxable capital gains under Section 45 of the Income Tax Act and the Supreme Court answered it in the negative. These decisions ,as we read, are not applicable to the facts and circumstances of the case. In J*.K. Industries Limited and Others Vs. Chief Inspector of Factories and Boilers and Ors. (1996)* 6 *SCC 665,* the Supreme Court dealt with the question whether in the case of a company running a factory, it is only a Director of the company who can be notified as the occupier of the factory. This decision dealt with how to seek a balance between individual freedom and social control and held that the reasonableness of a provision has to be tested on the basis of the circumstances of training at a particular time and urgency of the evil sought to be controlled. In *Haryana Financial Corporation and Anr. Vs. Jagdamba Oil Mills and Anr., (2002) 3 SCC 496,* the Court dealt with fairness or otherwise in administrative action.

27. In ultimate analysis, we are to hold two things namely i) the appellant is liable to pay cross subsidy surcharge; and ii) supply to the commercial establishments by the building owners from the main receiving panel (HT/LT) under the guise of dedicated transmission line

is not in accordance with the law and, therefore, has to be stopped. However, to safeguard the interests of the individual and consumers, we direct the Commission to regularise the supply to such consumers by 31st March, 2013.

28. Accordingly, with the observation as above, the appeal is dismissed but without cost.

(V.J. Talwar)
Technical Member

(P.S. Datta)
Judicial Member

Reportable/not-reportable

pratibha