Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 44 of 2009 and Appeal No. 76 of 2009

Dated: 19th January, 2010.

Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. BAJAJ, Technical Member

Appeal No. 44 of 2009

In the matter of:

Gujarat Paguthan Energy Corporation Ltd., …Appellant
6th Floor, "Chanakya"
Off Ashram Road
Ahmedabad, Gujarat

Versus

1. Gujarat Urja Vikas Nigam Limited …
Respondents
Sardar Patel Vidyut Bhavan
Race Course Road
Vadodra – 390007

2. Gujarat Electricity Regulatory Commission
5th Floor, Centre Point, Panchvati
Ellisbridge, Ahmedabad - 380006

Counsel for the Appellant(s) : Mr. K. G. Raghvan, Sr. Advocate
Mr. Uttam Datt, Ms. Swati Grover, Advs.

Counsel for the Respondent (s): Mr. M.G. Ramachandran,
Mr. Anand K. Ganeshan,
Ms. Swapna Seshadri
Mr. Achintya Dvivedi

Appeal No. 76 of 2009

Gujarat Urja Vikas Nigam Limited …Appellant
Respondents
Sardar Patel Vidyut Bhavan
Race Course Road
Vadodra – 390007

Vs.

Gujarat Electriciy Regulatory Commission & Anr. …Respondents
5th Floor, Centre Point, Panchvati
Ellisbridge, Ahmedabad - 380006

Counsel for the Appellant(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganeshan,
Ms. Swapna Seshadri

Counsel for the Respondent (s): Mr. A. Dvivedi

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

The common judgment is being rendered in both these Appeals No. 44 & 76 of 2009 as both the Appeals would arise out of the common order passed by the Gujarat State Commission dated 18.2.2009.

2. The Gujarat Electricity Board (GEB) presently called as Gujarat Urja Vikas Nigam Limited (GUVNL) filed a petition before the State Commission in Petition No. 870 of 2006 under Section 86 (1)(f) of the Act for recovery of the deemed generation incentive already paid to the Gujarat Paguthan Energy Company Limited (GPEC). The State Commission ultimately passed the impugned order dated 18.2.2009 which allowed the claim for refund of the Deemed Generation Incentive in respect of the period subsequent to 14.9.2002 but rejected its claim in respect of the earlier period. The State Commission further rejected the claim of the Electricity Board regarding the refund of the interest also.

3. Challenging the said order directing the refund of the Deemed generation incentive for 3 years period from 14.9.2002 the Appellant, Gujarat Paghuthan Energy Corporation Ltd. (GPEC) has filed an Appeal No. 44 of 2009 before this Tribunal.

4. Challenging the other portion of the order passed by the State Commission disallowing the claim of the refund of the incentive already paid to GPEC for the earlier period prior to 14.9.2002, Gujarat Urja Vikas Nigam Ltd. filed an Appeal No. 76 of 2009.

Short Facts which are relevant for the disposal of these two Appeals are as follows:-

i) GPEC, the Appellant in Appeal No. 44 of 2009 is a generating company using both natural gas and Naptha as fuel for generation of electricity. GUVNL (erstwhile Electricity Board), the Respondent is a Distribution Company.

ii) On 3.2.1994 a Power Purchase Agreement (PPA) was entered into between the two parties i.e. generating company and the distribution company. Under the terms of the PPA, the GUVNL (EB) the Appellant in Appeal No. 76 of 2009 has an obligation to purchase 635 MW of

electricity from the generating company namely GPEC. The period of the PPA is 20 years.

iii) Under Section 43(A) of the Electricity Supply Act, 1948, the generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board and the tariff for the sale of electricity shall be determined by the Authority through the notification issued by the Central Government.

iv) Accordingly, a notification was issued by the Govt. of India on 30.03.1992 specifying the norms and parameters as well as the terms and conditions for determination of tariff for sale of electricity by the generating company to the Electricity Boards. On 17.1.1994 an amendment to the notification dated 30.3.1992 was made providing for Note (1) stating that the incentive for generation above the target availability of 68.49% for fixed cost recovery shall be capped.

v) At that stage the PPA was entered into on 3.2.1994 between GPEC, the Appellant in Appeal No. 44/09 and the GEB, the Respondent in this Appeal. This agreement was finalized with regard to the purchase of power from the 647.5 MW power plant. As per the PPA, the plant was entitled for incentive on deemed generation.

vi) After the PPA dated 3.2.1994 was signed, an amendment notification dated 06.11.1995 was issued by the Central Government amending the notification dated 30.03.1992. By this notification the Central Government provided that there would not be any Deemed Generation Incentive payable to any generating company on available declaration of Naptha as fuel. On the strength of this notification, the Electricity Board sought to enforce the said notification claiming that this generating company is not entitled to get the incentive for Deemed Generation. So the Electricity Board sent a letter dated 18.4.1996 informing the GPEC, the Appellant, that in pursuance of

the amendment to the notification dated 6.11.1995, it proposes to amend the Clause 7.5.2.1 of the PPA to the effect that no deemed generation shall be admissible beyond the level of generation in respect of Naptha.

vii) The GPEC the Appellant in Appeal No. 44 of 2009 did not agree to the proposal sent by the Electricity Board, the Respondent, and requested the Electricity Board to withdraw its letter dated 18.4.1996 through its reply letter dated 24.5.1996 stating that the said notification dated 6.11.1995 would not be applicable to the GPEC, since it was not Naptha based plant as Naptha was used as only an alternative fuel during contingency. Due to this letter correspondence, the dispute arose between these two parties on the admissibility of Deemed Generation Incentive, when Naptha was used as a fuel. There were series of meetings and negotiations between the parties. The Government also participated in the discussion and tried to solve the issue with reference to this.

viii) Ultimately, on 27.7.2005 a High Level Committee was constituted by the Government of Gujarat. It submitted its report to government recommending that the dispute relating to issue of Deemed Generation Incentive be referred to the Gujarat State Commission. On the basis of the said recommendation the Electricity Board, namely, GUVNL, the Respondent herein filed a Petition on 14.9.2005 in Petition No. 874 before the State Commission for the adjudication in respect of the issue relating to the recovery of incentive already paid and also regarding the interest liability. The State Commission passed the impugned order in the said Petition after hearing the parties by allowing the one part of the prayer in respect of the incentive paid only for 3 years prior to filing the petition and disallowed the other claims. Hence these two appeals before this Tribunal filed by both the parties in respect of the issues decided against both the parties through the common order.

5. Let us now deal with the issue raised in the Appeal No. 44 of 2009 filed by the GPEC as against the order of the State Commission in respect of the direction to refund the deemed generation incentive as per the notification dated 6.11.1995 in respect of 3 years; the period subsequent to 14.9.1992.

6. Mr. Raghavan, learned senior counsel for the Appellant challenged the impugned order on the following grounds:-

i) The generation station of GPEC is a Gas based station and not a Naptha based station. The notification dated 6.11.1995 applies only to 100% Naptha based station and not to the Gas based station like that of Appellant, where Naptha was used as a secondary fuel when the Gas was not available. The Expression "Naptha based station" used in the Notification is a term of art. It refers only to the physical characteristic of the plant and not to the nature of fuel to be used.

ii) The notification dated 6.11.1995 itself makes a distinction between Gas based stations and Naptha based stations. The Appellant's plant, even as per PPA is a Gas based station not Naptha based station and, therefore, the notification dated 6.11.1995 would not apply to the Appellant's plant.

iii) The PPA in the instant case had been entered between the parties on 3.2.1994. The amendment Notification was issued only on 6.11.1995. Therefore, this notification would not apply to the pre-existing PPA, since it has only a prospective effect.

iv) The last part of Clause 6.5 of the PPA dated 3.2.1994 regarding the change of law is only a clarificatory in nature. It deals only with the earlier part to protect the interest of the GPEC for change in law. "The change in law" as referred to in Clause 6.5 of the PPA will cover amendment to notification dated 30.3.1992. Therefore the financial complications resulted from the amendment notification

dated 6.11.1995 are to be compensated in favour of the GPEC, the Appellant.

7. Mr, M.G. Ramachandran, the learned counsel for the Respondent would make the following reply refuting the grounds urged by the learned senior counsel for the Appellant.

i) The PPA was executed between the parties on 3.12.1994. On that day the law applicable governing the sale of power by the generating company to the Electricity Board was the Electricity Supply Act 1948. The Government of India issued notification dated 30.3.1992 under this Act. But the said notification had been amended subsequently by the Govt. of India by issue of another notification dated 6.11.1995. This notification included both the Gas and Naptha based stations. As per the PPA both gas and Naptha are

primary fuel, therefore the notification dated 6.11.1995 would apply to the GPEC, the Appellant.

ii) Even though the agreement dated 3.12.1994 would provide for application of existing law, the Clause 6.5 of the PPA would envisage that any amendment of the notification dated 30.3.1992 in future shall be taken into account for tariff calculation. Therefore, the notification dated 6.11.1995, even though it was issued subsequent to the agreement dated 3.12.1994 would certainly apply to all the parties including the Appellant and the Respondent as provided by the PPA.

iii) The notification dated 6.11.1995 was issued in the larger public interest. This was issued only to save the utilities purchasing the electricity from the generating companies from the liability to pay Deemed Generation Incentive to the generating companies because of the fact that the Naptha was so costly fuel. Even the generating company will not be able to get the incentive

because they will get the full fixed cost by taking into account the Deemed Generation when there is declaration of availability with regard to Naptha.

iv) The intention of the notification dated 6.11.1995 is only to deny Deemed Generation Incentive on Naptha as the said incentive would cost additional burden to the consumers and the said additional payment is over and above the recovery of the full fixed cost.

v) The language of the last part of the clause 6.5 is clear and unambiguous. It states that any amendment in Govt. of India notification dated 30.3.1992 shall be taken in to account for tariff calculation. The above means, any amendment to the notification dated 30.3.1992, notwithstanding that the said modification of the notification is positive or negative shall be taken into account for tariff calculation.

vi) The initial part of the Clause 6.5 can only remove the effect of any change to the notification dated 30.3.1992.

> While the Central Government provides for the restrictions on the payment of incentive, the said amount can not be claimed indirectly under the first part of the Clause 6.5 on the ground of adverse financial implications. When the restriction was imposed by the Central Government on the payment of deemed generation incentive in larger public interest, the contractual provision in the initial part have to give way to such a statutory notification. Therefore, there can not be any claim for compensation under the first part for equivalent amount.

8. In the light of the rival contentions urged by the learned counsel for the parties, the following questions are raised for consideration:-

I. Whether the Appellant's plant is a Naptha based plant for the purpose of applicability of the notification dated 6.11.1995 issued by the Government of India ?

II. Whether the notification dated 6.11.1995 can be applied to the existing PPA dated 3.2.1994 by which the parties have already negotiated the tariff as per the ceiling norms prescribed under the tariff notification dated 30.3.1992 issued by the Government of India?

III. Whether the GUVNL is not contractually bound to protect the GPEC, the Appellant from adverse economic consequences due to the amended notification under Clause 6.5 of the PPA, by making good the loss of incentive suffered by the Appellant on account of said notification dated 6.11.1995 ?

IV. Whether it is illegal to have a change of law in respect of protection provided by one contracted party to other party in PPA against the adverse economic consequences due to ''change in law'?

9. In elaboration of these questions Mr. Raghavan, learned senior counsel for the Appellant would vehemently contend that Note (2) of the amended notification dated 6.11.1995 states in a clear and unambiguous term that it applies only to Naptha based stations for whom generation incentive was not applicable and therefore the attempt to apply Note (2) of the notification to Gas based stations like the Appellant which use Naptha only as an alternative fuel or substitute fuel is not legally permissible and, therefore, the finding given by the State Commission giving its own interpretation to the effect that the Naptha based station would mean a station which is capable of firing Naptha also as a fuel and not mean that plant which is capable of firing only Naptha, is wrong.

10. In the alternative, the learned senior counsel for the Appellant contended that even if it is held that the Note (2) of the amendment notification would apply to the gas based station like

the Appellant still by virtue of the Clause 6.5 of the PPA, the adverse economic effect of such amendment was agreed to be compensated or absorbed in cost of the electricity as a part of risk allocation arrangement between the parties but this aspect has not been considered by the State Commission which has given a wrong finding that the change in the law in the PPA was not legal since the parties to the contract can not defeat the object of the amendment of the notification.

11. Let us now deal with these issues:-

i) The main issue which has been urged by the Appellant is with reference to the non-applicability of the notification dated 6.11.1995 to the Appellant. On this issue, it has been submitted by the Appellant that the amendment notification dated 6.11.1995 does not apply to a Gas based plant even when Naptha is used as a secondary fuel as the amendment notification would apply only to plant where Naptha is used as a primary fuel. According to the Appellant, at any rate the

notification issued on 6.11.1995 would not apply to PPA dated 3.2.1994 which has already been signed.

ii) Both the learned counsel for the parties would lay their claims on the basis of the two notification dated 30.3.1992 and 6.11.1995. These Notifications had been issued under Section 43 (A) of the Electricity Supply Act 1948. It could not be disputed that these notifications issued under the Act are statutory in nature and are binding on the parties. Any PPA between a generating company and the purchaser of electricity shall be subject to such statutory notification. In other words, the parties by agreement can not override the statutory provision. Therefore, the rights and obligations of the parties under the PPA have to be read subject to the statutory provisions. The provisions of the PPA, if they are contrary to the statutory provisions, can not be given effect to.

(iii) According to the learned counsel for the Respondent, the purpose of the notification dated 6.11.1995 amending the earlier notification was to save the utilities purchasing electricity from the generating companies liability from making payment of incentive on deemed generation when the utility does not schedule the power because of high cost of Naptha. Only in the public interest, this prohibition was imposed by the Central Government on payment of incentive on Deemed Generation when the declaration of availability was based on Naptha as fuel. The intention of the notification is only to deny the Incentive on Deemed Generation on Naptha which incentive is additional payment over and above the full cost recovery of the fixed charges.

(iv) It can not be disputed that the generating company will get the full fixed cost (namely the cost expenses and post tax return on equity). In other words the Central Government sought to have prohibited through this notification in the

interest of general body of consumers as any tariff paid by the purchasing utility is a pass through eventually to the consumers.

12. In the light of the above concept, as pointed out by the learned counsel for the Respondent, let us deal with the question as to whether the generating station in question is only a gas based and not a Naptha based. To answer this question we have to see the relevant Clause of the PPA and also the documents both before and after the execution of the agreement dated 3.2.1994. The term fuel is defined in the PPA, which is as follows:-

"Fuel natural gas and/or any liquid fuel selected by Gujarat Torrant Electricity Company (GTEC) for use in power station for generating electricity"

The term 'fuel management' is defined as under:-

*"**Fuel Management**:- The power station of the GTEC is designed to use natural gas and liquid fuel as fuel. GTEC shall*

decide selection and use and proportion gas and other fuel in best economic way depending on the situation from time to time."

13. Therefore, the kind of alternative fuel and its long term purchase contract only should be jointly decided by GTEC and GEB. The cost of the alternate fuel when used by the GTEC shall be taken into account for calculation for variable charges as defined in Schedule 7.

14. There is description of the power station in the PPA. According to this, this power station is a Gas and Steam Turbine Combined Cycle Station with an installed capacity of 654.7 MW. It will consist of 3 HRSG plant and one steam turbine. These gas turbines shall be capable of burning natural gas as well liquid fuel.

15. The Schedule 1 to the PPA gives the nature of fuels permitted to be used. (i) Natural gas from Gandhar gas field (ii) Naptha/liquid fuel in the Schedule 7, the variable charges have

been referred to. According to this the variable charges shall be calculated on the following basis:-

(a) Primary fuel namely gas, quantity shall be computed on the basis of the station heat rate and gas calorific value of the gas actually fired.

(b) ……..

(C) In case of Naptha also the energy charges shall be determined on the basis of (a) above. The station heat rate in respect of Naptha will mutually decided between the parties.

16. Reading of the above clauses in the PPA would make it evident that the generating station of GPEC is a mix fuel station i.e. both gas and Naptha based. In fact Schedule 1 of the PPA specifically recognizes Naptha as a fuel for generation. Thus, both Gas and Naptha have been recognized as a primary fuel and in the absence of Naptha there is no question of GPEC generating even to the extent that of 50% of the installed capacity.

17. It is also seen from the above clauses that the principal fuel recognized is not merely natural gas but also includes liquid fuel to be selected by the generating company for the use in power station. This is clear from the definition of the term “fuel.”

18. As indicated above, the PPA recognizes through Schedule 1 that the power station with the gas turbine shall be capable of burning both natural gas as well as liquid fuel. While dealing with the characteristics of the plant, the PPA would prescribe that the fuel permitted are natural gas and Naptha/liquid fuel. That apart the clause 5.3 has indicated in the Central Electricity Authority’s note would specifically state that this power station is designed for use of dual fuel namely Natural gas and Naptha and the long term purchase contract should only be jointly decided by GTEC and GEB and any other alternative fuel which is more expensive than the long term purchase price of the main fuel shall not be used by the GTEC. On this basis, GTEC approached the Govt. of India for approval for the foreign investment board on the fact that it is a

mixed fuel station and not on the basis that it was a gas based station.

19. It is also pointed out by the learned counsel for the Respondent that Government of India in its approval dated 27.5.1994 has given the consent for establishment of a 615 MW gas based mixed fuel combined cycle power project. This approval was mainly because when the Natural gas availability was not at all sufficient to operate more than 50% of the capacity of the plant it can use the other fuel. The term 'Gas based station' is used merely to refer to the gas turbine not to mean that it can only use natural gas as a fuel. The very fact that the gas turbines are designed and or envisaged to be used for use of both gas and Naptha as a fuel, the station is to be considered both as gas based station and Naptha based station. The term gas based or Naptha based is with reference to the fuel used for generation and not to any physical characteristics of the generation station.

20. Clause 5.3 deals with the fuel management. As per this clause, that the power station is designed to use both natural gas and liquid fuel in the best economical way depending upon the circumstances from time to time. Clause 5.3 specifically refers to liquid fuel as a primary fuel and not as a secondary fuel. The following factors would emerge from the reading of the various provisions of the PPA.

(i) The power plant which has been designed by the Appellant can use both natural gas and liquid fuel for generating power.

(ii) Both the fuel natural gas and Naptha are primary fuel and not secondary fuel.

(iii) The decision on the proportion for the use of each fuel is not on the basis of the availability of gas first and liquid fuel thereafter, but on the basis that would repeat the best economic way depending on the circumstances available then.

(iv) The concept of secondary fuel has no application whatsoever to a gas based and Naptha based generating station. It has its

application only to coal based thermal power station where secondary oil is used for supporting coal firing including start-up etc. There is no such thing in the case of gas or Naptha based station. Depending upon the prevalent price of the gas or Naptha, as the case may be, from time to time, cheaper fuel has to be used so as to ensure that the variable cost is kept minimum.

(v) The above factors, as culled out from the PPA would go to establish that both Naptha and Gas are primary fuel and principal fuel recognized under the PPA and both can be used alternatively as well as simultaneously as primary fuel.

21. The term 'Naptha based plant' refers to a plant which is capable of firing Naptha as a fuel. It does not mean a plant which is capable of firing only Naptha. If the generation can be done through firing Naptha, to that extent the station is Naptha based. If it is done through firing gas, to that extent the station is called as gas based. In the light of the above, Naptha based means where

Naptha can also be used as a fuel for generation and not that Naptha alone can be used for cent per cent generation.

22. It is contended by the learned counsel for the Appellant that Note (2) of the notification dated 6.11.1995 does not deal with the use of Naptha as distinct from Clause 1.7 of the notification dated 30.3.1992 and hence it should be taken that wherever the Govt. of India decides to pass clarification on the use of fuel it has been specifically stated so. This contention may not be correct because if the quantum of the fuel is to be calculated as per Clause 1.7, then the reference must be made to the nature of the fuel only. Similarly, if the generation is based on Naptha it has to be described as Naptha based station. In the case of deemed generation the actual quantum of fuel can not be the criteria.

23. Hence it has to be held that the Appellant's plant is Naptha based also and as such the contention urged by the learned counsel

for the Appellant that the amending notification does not apply to the Appellant is liable to be rejected.

24. The next contention urged by the learned counsel for the Appellant is that the notification dated 6.11.1995 has no application to the existing PPA, which was entered into as early as on 3.2.1995. This contention can not also be accepted on two reasons:-

(i) The amendment notification is a statutory in nature issued in exercise of the power under Section 43 (A) of the Electricity Supply Act 1948 and therefore binding.

(ii) The last sentence of the Clause 5 clearly provides that the changes that may be effected to the notification dated 30.3.1992 in the future shall be binding on the parties.

25. On going through the notification dated 6.11.1995 it is clear that the said notification was issued by the Central Government in larger public interest. Therefore, it will be applicable even to the

PPA which was entered into prior to the date of notification. But it shall be noticed that said notification would not be applicable prior to the period 6.11.1995 but it should be applicable only from 6.11.1995. In other words, the prospective effect alone has to be given for the notification issued on 6.11.1995 in respect of PPA entered into between the parties prior to the said date.

26. It is a settled law as laid down by the Hon'ble Supreme Court merely because PPA was entered into on 3.2.1994 i.e. prior to the date of notification dated 6.11.1995, it would not confer vested right on the Appellant to claim non-applicability of the provisions imposing prohibition of payment of deemed generation incentive for the future period. In other words there is no vested right which can be claimed contrary to law and particularly when the law intervened and makes a provision in public interest. As a matter of fact, in the present case the Appellant had itself agreed before the Electricity Board in the last part of the clause 6.5 of the PPA that any amendment to the notification dated 30.3.1992 shall be taken

into account for tariff calculation and this clause will be binding on both the parties. Therefore, the notification dated 6.11.1995 shall be constituted to be a part of the PPA by this clause. In other words, the term of non-deemed generation incentive has become a part of the PPA from 6.11.1995 onwards.

27. It is contended that the last part of the Clause 6.5 of the PPA is only clarificatory and the first part of the Clause 6.5 will protect GEPC as it will cover even the changes made in the notification dated 30.3.1992 also. This contention also does not merit acceptance. As referred to above. In the light of the provision of 43(A) of the Act and the notification issued thereunder the PPA need to be read subject to the provisions of the said Act and the notification. While the PPA specifically provides that any changes to the notification dated 30.03.1992 shall be taken into account for tariff calculation, the initial part of the Clause 6.5 can never remove any changes to the effect of notification dated 30.3.1992. In the light of this the interpretation projected by the learned

counsel for the Appellant can not be accepted. If such an interpretation is accepted, then the prohibition imposed by the Central Government through the notification becomes meaningless. In other words, when the Central Government provides for restrictions on payment of Deemed Generation Incentive through the notification issued under the Act, the said amount of the incentive cannot be claimed indirectly under the first part of the clause 6.5 on the ground of the adverse financial implications. As a matter of fact, the notification dated 6.11.1995 is not a provision imposing any change, it provides for restrictions on the payment of incentive in the larger public interest. It is a settled law that even the contractual provisions in the initial part which is in favour of the Appellant has to give way to the statutory intervention through notification issued by the Central Government.

28. The proper interpretation of Clause 6.5 of the PPA shall be that if there is no change in other laws, the financial implications

restrict them from adjustment but this will not be the same if there is a change in the notification dated 30.3.1992 issued under Section 43(A) of the Electricity Supply Act 1948. In other words the PPA can be interpreted and finalized between the parties only consistent with the provision of Section 43(A) of the Electricity Supply Act 1948. That is why the Clause 6.5 having dealt with other aspects, specifically clarifies that the changes in the notification dated 30.3.1992 will be given effect to.

29. One other contention raised during the hearing was that Naptha based plant was recognized for the first time only at the time when the notification dated 6.11.1995 was issued and there was no Naptha based concept before that date. In this regard, the Appellant has pointed out to the resolution of the Government of India dated 6.11.1995. This contention also is not a valid one since the resolution of the Govt. of India dated 6.11.1995 does not deal with the liquid fuel Naptha. It deals with other aspects such as High Speed Diesel (HSD) oil etc. The resolution merely speaks

about quick capacity addition by setting up of diesel generating units. It has nothing to do with the Naptha based plant. The performance budget report in which there is a reference of liquid fuel generation along with HSD etc. can not be relied upon to substantiate the plea that the Naptha based plant was recognized for the first time.

30. The learned counsel for the Appellant further submitted that the Respondent has already waived the rest of the claim of refund of the incentive amount already paid through its conduct and the relevant documents. The documents referred to by the Appellant clearly indicate that at no point of time there had been any expression or implied representation by the Electricity Board that it would not insist on the claim against the Appellant for the Deemed Generation Incentive as an issue. On the other hand, there has been a persistent insistence by the GEB by way of discussions and deliberations claiming for the refund of the incentive amount already paid. Though the Government of Gujarat on the

representation made by the Appellant directed the Electricity Board to continue to pay the deemed generation incentive, it is the Central Government which directed through the communication dated 27.7.2005 the Electricity Board to file petition before the State Commission so that this issue could be adjudicated and resolved by the State Commission. So mere payment of the Deemed Generation Incentive, pending adjudication by the State Commission can not be termed to a waiver or estoppel. There can not be any estoppels or waiver pleaded against the enacted public interest. The notification dated 6.11.1995 being statutory in character is binding on the parties can not give any right to GEB/GUVNL especially when this notification was issued in public interest and to protect the interest of the consumers at large. In these circumstances, it has to be held that GEB has not waived its claim at any point of time. Merely because there was a supplemental agreement dated 5.12.2003 entered into between these parties in respect of other pending issues, it can not be held that all the issues including the present one had already been

settled. In the supplemental agreement there is a clear reference to the agreement reached in respect of the specific issues and items. In that list the issue about Deemed Generation Incentive on Naptha does not find place. Therefore, it is clear that the Deemed Generation Incentive was not a part of any agreement reached. Therefore, this contention also is rejected.

31. In the impugned order, the State Commission has elaborately dealt with these issues and given a categorical finding over these issues with the correct and valid reasonings. Therefore, there is no merit in Appeal No. 44 of 2009.

32. Let us now deal with the other Appeal filed by the Electricity Board in Appeal No. 76 of 2009.

33. This Appeal has been filed by the GUVNL (GEB) challenging the impugned order dated 18.2.2009 passed by the State Commission as against the finding to the effect that the

Appellant's claim for the refund of the Deemed Generation Incentive on Naptha paid earlier by the Appellant to the GUVNL, the Respondent prior to 14.9.2002 is barred by limitation. Thus the claim made by the Appellant before the State Commission with regard to the recovery of the Deemed Generation Incentive paid from January 1998 up to 14.9.2002 was rejected. Hence, this Appeal.

34. This claim is based upon the notification dated 6.11.1995 by which the Appellant claimed that the Respondent, GPEC is not entitled to collect Incentive on Deemed Generation basis when Naptha was used as a fuel. This claim for the period up to 14.09.2002 was objected to by way of a preliminary objection by the Respondent before the State Commission. The ground of objection was that the intervention was sought to be enforced for the first time by the Appellant by way of a letter dated 18.04.1996 sent to the Respondent demanding for the return of the Incentive paid to them and the Respondent immediately refuted the

applicability of the notification dated 06.11.1995 as early as 25.04.1996 and as such, the cause of action had started only from 25.04.1996 onward that date only and under Section 56 or 13 of the Limitation Act, the Appellant had to file the petition seeking for the declaration or for recovery of Incentive amount within a period of 3 years and since this petition has been filed after nearly 10 years i.e. on 14.9.2005, the claim for the period prior to 3 years prior to the date of filing of the petition i.e. 14.9.2005 is barred by limitation. This preliminary objection was upheld by the State Commission hence this Appeal by the Appellant.

35. The learned counsel for the Appellant, as against the rejection of the said claim, has urged the following contentions:-

(i) The State Commission did not follow the principle laid down in Hari Shankar Singhania V. Gaur Hari Singhania (2006) 4 SCC 658 and Sri Ram Mills Ltd. V. Utility Premises Ltd (2007) 4 SCC 599 in considering the question of limitation. On the other hand, it wrongly distinguished the

principles laid down in those cases by observing that they are applicable only to family disputes and not other disputes. This reason is not correct. Though, Hari Shankar Singhania V. Gaur Hari Singhania (2006) 4 SCC 658 case relates to the family dispute, Ram Mills Ltd. V. Utility Premises Ltd (2007) 4 SCC 599 which relate to the general dispute has upheld this principle holding that where the negotiations are still on, there will not be any question in regard to the commencement of the limitation period. Therefore, so long as the parties are going on in a bonafide manner of deliberating for a possible settlement, the cause of action does not start and this aspect had not been taken care of by the State Commission.

(ii) From 18.4.1996 on which date the letter was sent to the Respondent to which reply was sent on 25.4.1996, the discussions had started at various levels and attempts were made by both the parties to settle the issue. Ultimately, on 27.07.2005 the Government of Gujarat directed the

Appellant, the Electricity Board to approach the State Commission to resolve the issue on the basis of the recommendation of the High Power Committee constituted by the Govt. of Gujarat and thereupon within a period of 2 months from the date of the direction of the Govt. of Gujarat, the Appellant had filed the petition and hence the petition was within the time. Therefore the claim ought not to have been rejected on the ground that it was barred by limitation.

36. On this point we have heard the learned counsel for the Respondent as well.

37. There is no dispute in the fact that the Appellant filed a petition for recovery of the Deemed Generation Incentive money from the Respondent which was paid from January 1998. The main ground urged by the Appellant before the State Commission is that the Respondent is not entitled to get incentive on deemed generation. Virtually the Appellant wanted a declaration to this

effect. If the party has sued against the other party seeking declaration, the litigation must be started within 3 years as provided under Article 56 of the Limitations Act. But the Appellant had chosen not to seek declaration, instead he sought for the relief for the recovery of the money on the ground that the Appellant petitioner was not liable to pay and as such Respondent is not entitled to receive the same. Even though this claim is not categorized under any single Article under the Limitation Act, those claims are to be made within 3 years. The Appellant started paying the incentive from January 1998 and paid it all along. Therefore, it is pointed out that the Appellant could claim for recovery of money only for the 3 years prior to the date of filing of the petition on 14.9.2005 and not for the period prior to that i.e. 14.09.2002.

38. Though it is strenuously contented by the learned counsel for the Appellant, that so long as there was continuous talks going on for settlement, the period of limitation would not start on the

strength of various decisions rendered by the Supreme Court, the learned counsel for the Respondent would make a fervent Appeal to this Tribunal to look into the first principle as contemplated in the Limitation Act. It can not be debated that the time for calculating the limitation began to run, the moment the party claims/becomes entitled to claim and the other parties denied the same. It does not stop there and it runs continuously. Only certain time periods are exempted. Under Section 18 of the Limitation Act, if there is a acknowledgement of liability by the party against whom the claim is made, the limitation period is extended from the date of acknowledgement.

39. In the present case the claim of the Appellant to seek recovery of the incentive on deemed generation was made on 18.4.1996 through its letter. This claim was immediately refuted by the Respondent through their reply letter dated 25.4.1996. This rejection of this claim is quite explicit in its letter. At no point of time, there was any representation made by the Respondent to the

Appellant that the Respondent would consider the claim of the Appellant. Thus it is clear that the limitation started running against the Respondent from 25.4.1996 onwards when the claim was first refuted and same ended on 14.09.2005 when the petition was filed by the Appellant before the State Commission. Admittedly, there had not been a single acknowledgement of the claim by the Respondent. Similarly, there is no record to show that at any point of time the liability for the said claim was admitted by the Respondent or impression was created in the mind of the Appellant that the Respondent was inclined to consider the claim.

40. The learned counsel for the Respondent has cited a number of decisions rendered by the Hon'ble Supreme Court on this effect. As per these decisions, the mere correspondence exchanged between the parties through discussion or reconciliation subsequent to the denial of the claim of the party against whom the claim is made would not extend the period of limitation. In other words, the party must enforce its claim within a prescribed

limitation period unless such correspondence or discussion or means of settlement indicating the acknowledgement of the claim. According to the law of limitation laid down by the Hon'ble Supreme Court in its various pronouncements the correspondence exchanged between the parties subsequent to the denial of claim by the party against whom the claim is made would not extend the period of limitation and the party must enforce its claim within the prescribed limitation period unless such correspondence or meetings suggest acknowledgement of claim. Reference be had to **Food Corporation of India Vs. Assam State Cooperative Marketing and Consumer Federation Ltd. And Ors. (2004) 12 SCC 360**

"According to Section 18 of the Limitation Act an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect

of commencing a fresh period of limitation from the date on which the acknowledgement of liability was so signed.

In Bootamal Vs Union of India AIR 1962 1716 of Hon'ble Supreme Court has held that the correspondence between the parties shall not stop the period of limitation from running unless the correspondence reflects acknowledgement of liability. Following is the relevant from the said judgment:-

"….Not do we think that their could be generally speaking any question of estoppel in the matter of the starting point of limitation because of any correspondence carried on between the carrier and the person whose goods are carried. But undoubtedly, if the correspondence discloses anything which may amount to an acknowledgement of liability of the carrier that will give a fresh starting point of limitation".

41. According to the learned counsel for the Appellant, all the issues have already been settled. As a matter of fact, the Appellant indicated to the Govt. of Gujarat about the denial of incentive on

deemed generation on Naptha as a fuel. When the issues between the parties were negotiated, it was decided to execute the supplemental agreement. Accordingly, the same was executed on 05.12.2003. This issue was not one of the issues raised. The Appellant also did not raise the issue there by clearly recognizing the same as a non issue. Thereafter, on 2.2.2005 after a gap of more than one year the Appellant once again raised the issue of deemed generation incentive on Naptha as a fuel. Once again the Respondent rejected such claim. Subsequently in March 2005, the Respondent re-confirmed its stand at this meeting held between the parties. These things would show that there was no acknowledgement on the part of the Respondent at any point of time in regard to the liability to refund the amount. The Appellant has incorrectly stated that the PPA provides for a prior recourse to conciliation before arbitration proceedings could be commenced. Arbitration of disputes is covered under Article 12 of the PPA and the said Article does not mandate pre-arbitration conciliation.

Thus, it is the Appellant who took ten years to take recourse before the State Commission.

42. During this period the Respondent has consistently denied the applicability of Note No. (2) of the notification dated 6.11.1995 throughout through various correspondence. The various citations shown, by the learned counsel of the Appellant, would not decide the ratio and on the other hand those observations were made in those decisions in light of facts of those cases. But Supreme Court in Food Corporation of India Vs. Assam State Cooperative Marketing and Consumer Federation Ltd & Ors (2004) 12 SCC 360 has specifically rendered the ratio holding that unless there was the acknowledgement of liability, as provided under Section 18 of the Limitation Act, the commencement of the period of limitation can not start.

43. The Appellant has referred to several correspondence exchanged between the parties between 1996 and 2005 showing

the attempt to settle the issue. These attempts through the meetings and discussions can not be taken to be an acknowledgement on the part of the Respondent to consider the refund of the claim. In view of this, the whole claim of the Appellant beyond 3 years before the date of the filing of the present Application is patently time barred and therefore, the finding given by the State Commission with regard to the limitation does not warrant interference.

44. One another ground is raised by the Appellant assailing the finding rendered by the State Commission to the effect that the Appellant is not entitled to refund of the interest on own capital paid by the Appellant prior to 1st July 2003. It is submitted by the learned counsel for the Appellant that the State Commission is not right in holding that the interest was not to be paid on the deployment of funds from its internal account was not on reducing balance method. It is elaborated by the learned counsel for the Appellant contending that it is well settled principle of electricity

laws and the consistent practice being followed that any contribution by the developer in excess of the physical equity are to be treated as loan and if it is treated as loan then interest on loan will be applicable to such loan and as such he is entitled to get interest as well.

45. It is pointed out by the learned senior counsel for the Respondent that there is an amendment in the PPA in order to reduce the interest payment on deemed loan by virtue of the Clause 7.5.14 (a) which came into force on 5.12.2003. The Appellant in consonance with the aforesaid agreement and understanding between the parties, continued to pay interest on the deemed loan of Rs. 53.9 crores for almost for 2 years. To the surprise of the Respondent, vide a letter dated 27.01.2005, for the very first time the Appellant raised the issue of the interest payable in respect of the deemed loan. The interpretation of clause 7.5.14 (A) sought to be placed is contrary to the legal principle of interpretation. According to this, the retrospective operation of the provision

could not be assumed, unless it is the explicit intention of the parties. The impugned clause 7.5.14 (A) in no manner postulate that the Respondent has agreed to refund the interest paid thereto prior to 01.07.2003. By agreeing to treat the equity of Rs. 53.9 crores as a deemed debt, the Respondent has already lost its right of interest @ 16% p.a. Therefore, it is not correct for the Appellant to contend that the Respondent would further agree to forego the interest on the deemed loan. The Appellant is not correct in expecting that no repayment schedule has been agreed upon between the parties.

46. The only agreement between the parties was to the effect that the loan was to be paid as a bullet payment at the end of 12 years on 31.12.2009. The bullet form of payment is neither contrary to the principles of debt financing nor does the said industrial practice disallow such bullet payment. So, the Appellant cannot merely take advantage of the language employed in the amended clause 7.5.14 (A) in order to avoid the liability.

47. As such the Appellant's claim for refund of interest paid on deemed loan prior to 1.7.2003 also does not bear merit.

48. In view of the above discussions, we are of the considered opinion that the grounds urged in this Appeal do not merit consideration and consequently the Appeal is liable to be dismissed. In the result both the Appeal Nos. 44 of 2009 and 76 of 2009 are dismissed as devoid of merits. No costs.

(H.L. Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 19th January, 2010.

INDEX: Reportable / Non-Reportable