

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Review Petition No. 8 of 2011

In Appeal No.193 of 2010

Dated 10th May, 2012

Coram : Hon'ble Mr. Rakesh Nath, Technical Member

Hon'ble Mr. Justice P.S. Datta, Judicial Member

Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001.

....Review Petitioner / Respondent (s)

Vs.

1. Power Grid Corporation of India Ltd.
Saudamini, Plot No. 2,
Sector 29, Gurgaon – 122001,
Haryana --- Respondent/Appellant
2. Karnataka Power Transmission Corp.Ltd.
Kaveri Bhavan, K.G. Road,
Bangalore – 560 009.
3. Transmission Corporation of Andhra Pradesh Ltd.
Vidyut Soudha, Khairatabad,
Hyderabad – 500 082.
4. Tamil Nadu Electricity Board,
144, Anna Salai,
Chennai – 600 002.
5. Electricity Department,
Government of Puducherry,
58, NSC, Bose Salai,
Puducherry – 605 001.

6. AP Eastern Distribution Company Ltd.
Sai Shakthi Bhavan,
30-14-09, Near Saraswathi Park,
Vishakhapatnam-530 020 (AP)
7. AP Southern Power Distribution Company Ltd.
H.No.193-93 (M) Upstairs
Renigunta Road, Tirupathi-517501 (AP)
8. AP Northern Power Distribution Company Ltd.
H.No.1-1504, Opp. NIT Petrol Pump,
Chaitanyapuri, Warangal-506 004 (AP)
9. AP Central Power Distribution Company Ltd.
Singareni Bhavan, Red Hills, Hyderabad – 500 063.
10. Bangalore Electricity Supply Company Ltd.
Krishna Rajendra Circle
Bangalore – 560 009
11. Mangalore Electricity Supply Company Ltd.
Paradigm Plaza,
A.B. Shetty Circle,
Mangalore – 517001.
12. Chamindeshwari Electricity Supply Company Ltd.
Corporate Office, 927, L.J. Avenue,
New Kantharairs Road, Saraswathi Puram,
Mysore
13. Gulbarga Electricity Supply Company Ltd.
Main Road, Gulbarga,
Gulbarga-585102,
Karnataka
14. Electricity Supply Company Ltd.
P.B. Road, Nava Nagar,
Hubli,
Karnataka – 580025.

15. Kerala State Electricity Board,
Vydyuthi Bhavana
Thiruvananthapuram – 695004.

16. Electricity Department,
Government of Goa, Vidyut Bhawan,
Panaji, Goa – 403001.

----- Proforma Respondents

Counsel for the Review Petitioner Mr. SS Chaudhari
Mr. Anand Kr. Srivastava

Counsel for the Respondents: M.G.Ramachandran for R-1
Mr. S. Vallinayagam for TNEB

JUDGEMENT

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

1. The Central Electricity Regulatory Commission who was the respondent no 1 in the Appeal No. 193 of 2010 which by the decision of this Tribunal dated 5th. April,2011 was decided in favour of the appellant of the said appeal namely, Powergrid Corporation of India Limited ,is the Review Petitioner in this review petition under section 120(2)(f) of the Electricity Act,2003 .

2.The Powergrid Corporation of India Limited (for short, the Corporation) being aggrieved with the CERC's order dated 20.8.2010 whereby the CERC in Petition No.235 of 2009 determined the revision of transmission tariff for the period 2004-09 on account of additional capitalisation incurred during FY 2008-09 by the said Corporation preferred the Appeal No.193 of 2010 in which two questions emerged for consideration of the Tribunal, namely a) whether the Central Commission was right in following the principle of depreciation amount to be considered for adjustment against the repayment of loan and b) whether in terms of Regulation 54 and 56 of the Tariff Regulations,2004, while considering the apportionment of interest on loan to be allowed the CERC can determine the adjustment of depreciation amount of the entire asset against the repayment of loan connected with the additional capitalisation.

3. By the order dated 5th of April, 2011 the Tribunal inter alia held as follows:-

“10. Having heard the learned Counsel for the Appellant, it appears that the Commission proceeded on the basis that depreciation allowed is intended for repayment of loan and there will be deemed repayment of loan to the extent of the depreciation as made available. So far as this Tribunal is concerned, it had occasion to examine this

exact issue in a batch of appeals being No. 139 & 15 others of 2006 and 10, 11 to 23 of 2007 (NTPC Ltd. V/s. CERC & Others) where it was held that the computation of outstanding loan would be on a normative basis only instead of normative or actual whichever is higher, and this being so, there is no question of any adjustment of the depreciation amount to a deemed repayment of loan. It was clarified that the depreciation is an expense and not an item allowed for repayment of loan because if an entity does not borrow, it would not mean that it would not be given any depreciation. Being an expense, it represents a decline in the value of asset because of wear and tear. In this decision there is reference to the Accounting Principles Board of USA defining depreciation as under: "The cost of productive facility is one of the costs of the service it renders during its useful economic life. Generally accepted accounting principles require that this cost be spread over the expected useful life of the facility in such a way as to allocate it as equitably as possible to the periods during which services are obtained from the use of the facility. This procedure is known as depreciation accounting, a system of accounting which aims to distribute the cost or other basic value of tangible capital assets, less salvage (if any), over the estimated useful life of the unit (which may be a group of assets) in a systematic and rational manner. It is a process of allocation, not of valuation".

This position was confirmed by the Hon'ble Supreme Court in the decision reported in Delhi Electricity Regulatory Commission V/s BSES Yamuna Power Limited & Others (ibid). It appears that the Central Commission referred to Regulations 54 and 56 of the CERC (Terms and Conditions of Tariff) Regulations 2004 in support of their proposition that depreciation is considered for repayment of loan. Regulation 56(i)(f) of the said Regulation runs thus "In case of any moratorium period is availed of by the transmission licensee, depreciation provided for in the tariff during the years of moratorium shall be treated as repayment during those years and interest on loan capital shall be calculated accordingly" The Commission referred to Regulation 56 (ii)(a)(iii) to say that on repayment of the

entire loan, the depreciable value shall be spread over the balance useful life of the asset. The Commission further read Regulation 56 (ii)(b) which provides that the transmission licensee shall be entitled to advance against depreciation in the manner as laid down therein. The learned Counsel for the appellant rightly submitted that Regulation 56 (i)(f) is totally inapplicable in the instant case. There was no question of transmission licensee having availed of moratorium period, as such, there is no question of depreciation being considered as repayment and accordingly interest on loan capital cannot be calculated in the manner as made by the Commission. None of the provisions of regulation 56 of the Regulation, 2004 account for the factual conditions as presented above, and they do not give rise to any premise that depreciation has to be linked to repayment of loan. The finding of the Commission militates against the decision of this Tribunal according to which depreciation is an expense and cannot be deployed for deemed repayment of loan. The appellant incurred capital expenditure on additional capitalization of Rs.293.07lacs and after adjusting the value of de-capitalized assets, the net capital expenditure came to Rs.205.21lac. It implies that transmission licensee was denied interest on loan of additional capitalization by adjusting the total depreciation that covered the entire capital assets. In the normative debt equity ratio of 70 : 30 the amount of interest on the normative loan of Rs.143.65lac would have been legitimately due to the appellant.

11. *In this view of the matter, the respondent No. 1 is required to make a fresh computation of interest on loan in the light of the settled principle as formulated in the decision above.*
12. *Accordingly, the appeal is allowed and the impugned order is set aside. The matter is remitted back to the respondent No.1 for fresh decision in the light of the observations made above.”*

4. Against this order dated 5th of April, 2011 the CERC preferred the instant review petition on the following grounds:-

a) The Corporation did in fact avail itself of the moratorium period during the year 2008-09 and the information furnished by the said Corporation was incorrect and the Tribunal has per force relied upon such incorrect representation of the Corporation.

b) If the order is allowed to stand then grave prejudice will be caused in as much as non-adjustment of depreciation against repayment of loan where depreciation is more will lead to illogical results and may afford an opportunity to the transmission licensee for manoeuvring their affairs in such a manner that that they contract loans in such a manner that the loan repayments always remain outstanding, and this is not the intention of the Regulations, 2004. Where depreciation recovered in year is more than the amount of repayment during that year, the entire amount of depreciation is to be considered as repayment of loan for tariff computation.

5. The Corporation in its reply has contended that the issue that the Corporation has raised in the Appeal was that the Central

Commission had proceeded on the basis that depreciation can be adjusted against normative loan repayment despite the judgements to the contrary rendered by the Tribunal and the Hon'ble Supreme Court of India in DERC vs. CERC & Ors reported in (2007) 3 SCC 33. Secondly, the CERC was bound to follow the principles laid down by this Tribunal when the same pertains to the tariff period 2004-09 itself and concerning the Tariff Regulations, 2004. In fact, the order passed by the CERC was not on the basis of the Regulation 56 (i)(f) of the Tariff Regulations, 2004 dealing with moratorium of the loan. The reference to Regulation 56 (i)(f) and other parts of the regulation 56 were in the context of drawing analogy and taking a support to the decision made by the CERC that the depreciation should be equated with the repayment of loan under all circumstances. The Corporation has referred to the moratorium in the context of the decision made by the Central Commission. In the Review Petition the Central Commission is referring to the submissions of the Corporation out of context to contend that the Corporation has not placed before the Tribunal the correct facts of the case in regard to the moratorium. Thirdly, regulation 56(i)(f) deals with the case where there is a moratorium period given for repayment of loan or interest on loan and it is a different matter. Fourthly, the CERC tried to justify that

depreciation on the original capital block of assets could be adjusted against the repayment of loan taken for funding the additional capitalisation by relying on regulation 56 (i)(f) along with other provisions but this has been set aside by the Tribunal. Fifthly, the Corporation had raised the loan by bonds with redemption period specified in the terms of the bonds. Sixthly, The Corporation has not raised any term loan or other borrowings from the Banks or Financial Institutions which are subject to repayment from the date of the loan unless the moratorium is availed of. The said regulation cannot be applied to the bonds raised which are redeemed over a period of time. The bonds are never repayable from the first year of issue. The bonds are always redeemable only after a specified period. And, there is no moratorium on the interest payment on the bonds. As such, by its very nature the bonds issued are not covered by the regulation 56 (i)(f). Seventhly, interest on loan is one of the components of tariff fixation, as such,, there cannot be any question of any moratorium on the principal loan being relevant for adjusting depreciation against interest on loan.

6. The petitioner - CERC in its rejoinder to the reply of the Corporation has contended that the Corporation availed of the

moratorium period for deferment of payment of loan taken through issuance of bonds .Secondly, the decisions relied on by the Corporation did not concern with the treatment of moratorium period under regulation 56(i)(f) of the Tariff regulations. Thirdly, the mere fact that regulation 56(i) (f) was not specifically referred to does not lead to the conclusion that the Review Petitioner did not proceed on the basis of the said regulations. Despite enjoying moratorium on the repayment period the Corporation made an incorrect statement that the present case is not one of moratorium. The bonds issued is another form of borrowing where there is a deferment in repayment of loan and is covered under the regulation 56(i)(f) of the Tariff Regulations. Thirdly, no interest can be allowed when the entire loan stands adjusted against the depreciation for the year.

7. The point for consideration is whether the review petitioner's petition needs acceptance on the major plea that the Corporation availed itself of moratorium in connection with repayment of loan that included borrowings through issuance of bonds and that the regulation 56(i)(f) of the Tariff Regulations is liable to be invoked on the facts and circumstances of the case.

8. We have heard the learned counsels for the parties. In the Appeal No. 193 of 2010 the questions which this Tribunal was required to answer were whether the Central Commission was right in following the principle of depreciation amount to be considered for adjustment against the repayment of loan and whether in terms of Regulations 54 and 56 of the Tariff Regulations 2004, while considering the apportionment of interest on loan to be allowed can the Central Commission determine the adjustment of the depreciation amount of the entire asset against the repayment of loan connected with the additional capitalisation. In essence, the Tribunal was considering the justifiability of linking depreciation with repayment of loan through adjustment. It is on this issue that this Tribunal in Appeal No. 193 of 2010 referred to Regulation 56 of the Tariff Regulations 2004. While answering the question we referred to the two decisions of which one was the decision of the Supreme Court in Delhi Electricity Regulatory Commission vs. BSES Yamuna Power Limited and Others reported in (2007) 3 SCC 33 wherein the Hon'ble Court held that depreciation should not be considered as normative loan repayment and depreciation and normative loan repayment are not to be equated with each other. In the order of this Tribunal in

NTPC vs. CERC it was held that the computation of outstanding loan would be on a normative basis only instead of normative or actual whichever is higher because basically depreciation is an expense and not an item allowed for repayment of loan. For, an entity would be entitled to depreciation even when it does not borrow. Now, the CERC, though its role was not adversarial in nature it preferred not to contest the appeal even though the copy of the memorandum of appeal with all annexure were served upon it, nor other respondents despite service appeared. Now, paragraphs 10 and 11 of the review petition are the grounds of review. It is contended that the appellant in the appeal did in fact avail itself of the moratorium period during the year 2008-09 , and if the order of the Tribunal is allowed to stand then grave prejudice will be caused in as much as non adjustment of depreciation against repayment of loan where depreciation is more will lead to illogical results in this way that the transmission licensee will always ensure that repayments always remain outstanding. It is argued that when depreciation recovered in a year is more than the amount of repayment during that year the entire amount of depreciation is to be considered as repayment of loan for tariff computation. The alleged error is not the error apparent on the face of the record. We in fact followed the principle established by

the Hon'ble Supreme Court and a decision of this Tribunal. It could not be a case of overlooking the documents or that important materials were not considered.. It must not be missed that the impugned order in respect of which the decision of this Tribunal was rendered in the Appeal no 193 of 2010 proceeded not on the basis of the alleged moratorium and there was no whisper to the regulation 56(i)(f) of the Tariff Regulations,2004, and it proceeded on the general principle of connectivity of depreciation with repayment of loan.. It is in the review petition that specifically issuance of bonds as kind of loan is talked of.

9. In the circumstances, the review petition, which actually takes the colour of appeal, filed by the respondent- petitioner who preferred not to enter appearance in the main Appeal no.193 of 2010 does not succeed. Accordingly, we dismiss the review petition but without costs.

(P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE