

ORDER

Per Hon'ble Shri Rakesh Nath, Technical Member:

1. This Review Petition has been filed by Gujrat Electricity Regulatory Commission against the judgment of this Tribunal dated 23.03.2010 in Appeal No. 68 of 2010. This judgment was rendered by this Tribunal in the Appeal filed by Torrent Power Limited against order dated 17.1.2009 passed by the State Commission determining the Annual Revenue Requirement for the control period FY 2008-09 to FY 2010-11 and truing up for the FY 2007-08. In this judgment, the Tribunal had allowed the Appeal in part and had directed the State Commission to reconsider the claims of Torrent Power Limited, the Appellant, in view of the findings of the Tribunal during the process of truing up.

2. The State Commission has preferred this Review Petition in respect of the following issues:-

A) Coal Transit Losses:

- i) The main plea of Torrent Power Limited in the Appeal was that the coal transit loss of 1.4% for the generating stations at Gandhinagar and Wanakbori power stations, owned by state generating company can not be basis of comparison with the transit losses in respect of the Appellant because it procures coal directly from mines unlike in case of Gandhinagar and Wanakbori which are procuring washed coal. The Tribunal found force in the plea of the Appellant and held that in view of ground reality, some consideration in coal transit loss for washed and unwashed coal was to be given and therefore, directed the State Commission to decide increased percentage of allowable coal transit losses for the Appellant.

- ii) According to the Petitioner State Commission, the above directions of the Tribunal are based on erroneous facts and constitute an error apparent on the face of the record. The State Commission in its written submissions, earlier filed in the Appeal before the Tribunal on 12.1.2010 had clarified that in respect of GSECL, the state owned generating company, for washed coal no transit loss had been allowed and for raw coal transit loss of 1.4% had been allowed. To substantiate its claim, the State Commission had enclosed a copy of its order in case No. 943 of 2009 which was annexed with the written submission filed by the State Commission. It is stated that the Tribunal has passed para 43 of the judgment without considering these facts.

- iii) According to the State Commission, GSECL units utilize both washed coal and raw coal at their Wanakbori and Gandhinagar stations and

the State Commission had not allowed any transit loss for the washed coal. For imported coal also no transit loss had been allowed for these plants. For raw coal, the Commission had allowed only 1.4% transit loss for Gandhinagar and Wanakbori Thermal Power Stations.

(B) **Disallowance of Income Tax to earn ROE as post Tax:**

- i) The Tribunal had set aside the order of the State Commission in respect of Income Tax and directed the State Commission to allow the Income tax by grossing up to ensure the stipulated post tax return to the Appellant, Torrent Power Limited.
- ii) The Petitioner State Commission has stated that it had vide its written submissions before the Tribunal on 16.11.2009 had submitted that the Appellant for the Assessment Year 2009-10 (FY 2008-09) had paid total income tax of

Rs. 56.65 crores. However, the State Commission on the basis of the existing Regulations had approved income tax of Rs. 76.69 crores which is much more than the actual tax payment. Thus it may not be proper for the State Commission to allow any further claim on account of income tax, which had not been paid at all.

- iii) Allowing excess income tax than what had been paid by the Appellant will burden the consumers. The State Commission as per Regulation 66 (20) of its Regulations 2005 had allowed income tax on approved return at 33.99%. Regulation 7 alone can not be interpreted in a manner that defeats Regulation 66 (20). Principle of harmonious construction has to be adopted so as to ensure that both the Regulations survive.

- 3.(I) This apart, Shri Sanjay Sen, the Learned Counsel for the Petitioner State Commission further pointed out that certain factual inaccuracies existed in relation to the transit loss for coal. The Tribunal in its judgment dated 23.3.2010 had held that the percentage of allowable transit loss should be increased without any direction on what should be the nature of increase keeping in view the fact that the State Commission's Regulations provided for 0.85% transit loss against which it allowed 1.4%.
- (II) Regarding income tax he, stated that the State Commission Regulations provide that income tax can be allowed as a pass through on actual basis. The Tribunal had not dealt with Regulation 66(20). Further, this Regulation is different and distinct from the Central Commission's Regulations and therefore requires to be specifically dealt with.

4. According to Ms. Deepa Chawan, Learned Counsel for Torrent Power Limited (the Appellant), the Respondent herein, the plea of the Respondent/Appellant related to lack of uniformity in the principles adopted by the State Commission in not incentivising for achieving better distribution loss but penalizing for not achieving target transit loss which is an uncontrollable factor. Coal procured by Torrent Power Limited is of higher grade as compared to that procured by the State Generation company and therefore more vulnerable to pilferage. Moreover, contrary to the claim of the State Commission, it had allowed 1.4% transit loss to State Generation Company for both raw and washed coal. Regarding income tax, she argued that the judgment dated 23.3.2010 had thereafter been relied upon and affirmed by this Tribunal in subsequent decisions reported in 2010 ELR (APTEL) 1073 TNEB Vs. NLC and judgment dated 19.11.2010 in Appeal No. 134 of 2010 in the matter

of TNEB Vs. NTPC. According to her, the Review Petition is not maintainable as the Petitioner has failed to make out a case of the existence of error apparent on the face of the record.

5. We have heard the submissions of both the parties and we have examined the above points.

6. Let us first discuss the issue of maintainability of the Review Petition. In our view the Petitioner, the State Commission has made some submissions which need to be looked into. The Review Petition has also been filed within a reasonable time after the judgment was pronounced. If the State Commission is raising same issues regarding implementation of the Tribunal's judgment, it has to be looked into. In this case, we do not find that we can reject the Review Petition on the face of it without going into the details. Thus we do not accept the arguments of the Learned Counsel for Respondent that the Petition is not maintainable.

7. On the issue of transit loss for coal, the Tribunal in its judgment has noted that the transit loss was not under the control of the generating company and has only observed that in view of ground reality same consideration is to be given in coal transit loss for washed and unwashed coal. As submitted by the Appellant-Torrent Power Limited, it procures mainly raw coal of better quality. On the other hand the generating stations of the State owned company procure mainly washed coal. The Tribunal has also left it to the discretion of State Commission to decide increased percentage of allowable coal transit losses for the Torrent Power Limited, Respondent herein. The State Commission has contended that the Tribunal has not indicated the nature of increase of transit loss. We do not feel it would be correct for this Tribunal to determine the transit loss as it would require detailed examination of the documents which do not form part of Appeal/ Review Petition.

8. In our opinion the State Commission is in a better position to determine the same keeping in view the actual information furnished by the Respondent and other relevant documents. Thus we do not find any error apparent on the face of records with respect to coal transit loss. The State Commission is free to analyze the relevant data and records submitted by Torrent Power Limited and determine the transit loss afresh without linking it to values already adopted for other power plants.

9. Regarding income tax, the State Commission has contended that the Tribunal has not considered Regulation 66 (20) and the same has to be considered alongwith Regulation 7 to have harmonious interpretation of the Regulations. Let us first examine Regulation 7 and Regulation 66 (20) of the State Commission's Regulations. The relevant portion of the Regulation is reproduced

below:

“7. Tax on income:

- (1) *Tax on the income streams of the generating company or the transmission licensee or the distribution licensee, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries.*
- (2) *Under-recovery or over-recovery of any amount from the beneficiaries or the consumers on account of such tax having been passed on to them shall be adjusted every year on the basis of income-tax assessment under the Income-Tax Act, 1961, as certified by the statutory auditors. The generating company, or the transmission or distribution licensee, as the case may be, may make such adjustments directly and without making any application to the Commission in this regard.*

Provided that on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be borne by the generating company or transmission licensee or the distribution licensee, as the case may be.

66. Principles, terms and conditions for determination of tariff with their application for distribution licensee

(20) Expenses arising from and ancillary or incidental to other business of licensee for which income have been included, but limited to amount of income so included.

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The Commission may also allow reasonable expenditure to be incurred actually and properly on the following:

(i) All taxes on income and profit calculated on permissible return as allowed by the Commission relating to business of electricity and also subject to the condition that the amount of taxes is actually paid as tax after taking into account refunds into consideration”.

10. Regulation 7 clearly stipulated that the tax on income stream of the generating company from its core business shall be computed as expense and shall be recovered from the beneficiaries. The adjustment for under or over recovery of any amount from beneficiary has to be made by the generating company directly on the basis of income

- tax assessment under the Income Tax Act as certified by the statutory auditors. Regulation 66(20) only restricts the income tax to be allowed on the permissible return subject to actual payment.
11. This is the only difference in the State Commission's Regulations with reference to the Regulations of 2004 of the Central Commission in respect of Income Tax. The Central Commission's Regulations of 2004 allow income tax as pass through even on income over and above the permissible return on equity due to better performance over the generation norms. However, the State Commission's Regulations allow the income tax on the permissible return. The principle of grossed up tax is applicable to both as decided by this Tribunal in the impugned judgment and in various other cases referred to by the Respondent.
 12. Conjoint reading of the Regulations of the State Commission will imply that income tax has to be

taken as expense subject to adjustment as per actuals as per audited accounts by the statutory auditors and to the extent of permissible return. However, tax on income on permissible return has to be 'pass through'. Thus the intent of the Regulations is that income on permissible return on core business in the hands of the generating company has to be net of tax. Thus the entire tax inclusive of grossed up tax is relatable to the core activity of the generating company. However, if there is any over-recovery of tax, the generating company has to reimburse the same as the same is adjustable as per actuals as per audited accounts by the statutory auditors.

13. The Tribunal's judgment dated 23.03.2010 in para 52 clearly shows that the Tribunal has considered Regulation 7 and Regulation 66 and Section 195 (A) of the Income Tax Act to arrive at the decision that grossing up of the tax has to be carried out to ensure that after paying the tax, the admissible post

tax return is assured to the Appellant (Respondent in Review Petition), Torrent Power Limited. The Tribunal has also held in the judgment that the Appellant, Torrent Power Limited should neither benefit nor loose on account of tax payable which is a pass through in the tariff. Thus, there is no question of the generating company making profit on account of income tax. The excess recovery of income tax if any has to be reimbursed by the generating company to the distribution company as per the Regulations of the State Commission. In this case the excess recovery of income tax if any has to be adjusted in the true up of the financials. Thus the judgment dated 23.3.2010 needs no review.

14. In view of above, we find no merit in the Review Petition .
15. Accordingly the Review Petition is dismissed. No order to costs.

16. Pronounced in the open court on this 5th_day of January, 2011.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

_INDEX : REPORTABLE / NON-REPORTABLE.

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