

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

Appeal Nos. 41 of 2009 59 of 2009 and 60 of 2009

Dated: 6th August, 2009

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

IN THE MATTER OF:

Tamil Nadu Electricity Board Appellant, TNEB
No. 144, Anna Salai, Chennai -60002

Versus

1. M/s. PPN Power Generation Co. Ltd.
III Floor, Jhaver Plaza
1A, Nungambakkam High road
Chennai – 600034

2. Tamil Nadu Electricity Regulatory Commission
19A, Rukmani Lakshmi Pathy Road,
Egmore, Chennai – 60008

..... Respondents

Counsel for the Appellant, TNEB s(s) : Mr. G. Masilamani, Adv, Gen.
Mr. K. Surendranath, asst. Counsel
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Ms. Geetha

Counsel for the Respondent(s) : Mr. Jayant ***Bhushan***, Sr. Adv.
Mr. Senthil Jagadeesan & Mr. Rahul ***Balaji***
Mr. Vijay Thakur, Mr. Santosh Krishnan

Per Hon'ble Mr. A.A.Khan, Technical Member

JUDGMENT

1. The Tamil Nadu Electricity Board (TNEB) is the Appellant, in these Appeals.

2. The Commission vide the impugned order in DRP No. 7 of 2008 dated 27.11.2008 directed the Appellant, TNEB to pay the claims made by the Respondent Company, PPN alongwith interest. The Appellant, TNEB filed an interlocutory application in Miscellaneous Petition 45 of 2008 (M.P. 45 of 2008) before the Commission for extension of time for filing of amended claim as against the claim made by the Respondent company, PPN in DRP No. 7 of 2008. The Respondent Company filed Interlocutory Application in Miscellaneous Petition No. 46 of 2008 (M.P. 46 of 2008) before the Commission praying to direct the Appellant TNEB for immediate compliance of the order dated 27.11.2008. The Commission in the aforesaid two Miscellaneous Petition passed a common order dated 25.02.2009. The Appellant, TNEB has, therefore, filed two additional appeals against the Commission's common order dated 25.02.2009 before this Tribunal and which relate to the payment of outstanding dues to the Respondent company decided in the impugned order dated 27.11.2008 in Appeal No. 41 of 2009. All the aforesaid appeals are, therefore, being considered together.

Facts of the case

3. Tamil Nadu Electricity Board entered into a Power Purchase Agreement (PPA) with the R-1 herein, M/s. PPN Power Generating Company Ltd. (hereinafter referred to as 'PPN') on 03.01.97. The company which is an Independent Power Producer (IPP) agreed to sell their entire electrical energy generated to the Appellant, TNEB. As per Article 10(2)(a) of the PPA, the Respondent, PPN was to submit to the Appellant,

TNEB the invoice on the first of every month for all the amounts accrued in the preceding month under the tariff. According to Article 10(1)(d) of the PPA, the specified taxes on income will not form part of the regular billing. However, it was agreed that any advance tax payable in any month supported by a certificate of a Chartered Accountant approved by the Board will be reimbursed in the succeeding month.

4. The Respondent, PPN company gave its first invoice dated 26.06.2001 for reimbursement of the Minimum Alternate Tax (MAT), but the Appellant, TNEB returned that claim through a letter dated 31/7/01 stating that they are not liable to reimburse the MAT. Similar claims made subsequently also by the Respondent, PPN were not considered. Even though the agreement provides for resolution of the disputes by arbitration, the Respondent company, PPN did not take any steps to refer the dispute to arbitration. This went on for seven years. However, the Appellant, TNEB in 2006, on the basis of the opinion of their tax consultant decided to reimburse the MAT to the Respondent.

5. In the meantime, the State Commission notified the terms and conditions for determination of tariff on 03.08.05, in which the return on equity is fixed at 14% p.a. as against 16% p.a. mentioned in the PPA between the parties. The Appellant, TNEB decided to release the MAT payment till the date of notification. It was decided to negotiate with the Respondent, PPN to reduce the return on equity based on the

notification. After talks, the Respondent, PPN executed *an undertaking* on 07.03.07 with the Appellant, TNEB at the time of release of 75% of the payment of MAT, up to 3.8.05.

6. On 1.8.08, the Appellant, TNEB wrote a letter to the Respondent, PPN calling for some documents. At this stage, the Respondent, PPN company filed a Petition before the State Commission praying that the Board has not complied with the provisions of the PPA which requires the Appellant, TNEB to pay the full amount of the disputed charges and further praying for directions to the Appellant, TNEB to clear all the dues to the Respondent, PPN with regard to the specified taxes amounting to more than Rs.40 crores and interest amounting to more than Rs.12 *crores*. Again, the Appellant, TNEB during the proceedings of the said petition, wrote a letter to the Respondent, PPN on 25.8.08 requesting documents by reply dated 4.9.08, the Respondent, PPN refused to furnish those documents to the Appellant, TNEB, as the matter was sub-judice. Then the Appellant, TNEB filed a Counter Affidavit before the State Commission raising objection to its jurisdiction that the Petition is not maintainable as Article 16 of the Agreement contemplates for arbitration of disputes and also contending that the Respondent, PPN had not submitted all the required documents so as to enable the Appellant, TNEB to determine the actual tax to be reimbursed.

7. The State Commission, by the Order dated 27.11.08, directed the Appellant, TNEB to pay the claims made by the Respondent, PPN company, along with interest and further ruled that the said payment should be made to the Respondent, PPN in six equal monthly installments. After the State Commission's Order, the Appellant, TNEB wrote letters to the Respondent, PPN on 4.12.08 and 8.12.08 respectively requesting for certain documents, but the Respondent, PPN refused to furnish the same by its reply letters. Hence, this Appeal 41 of 2009.

8. According to the Appellant, TNEB the State Commission has failed to consider that the claim of the Respondent, PPN company was not in terms of the PPA. The R-1 herein failed to furnish the invoice for advance tax along with the certificate of the Chartered *Accountant* approved by the Appellant, TNEB. In spite of executing the undertaking for furnishing of documents at the time of receiving payment, the Respondent, PPN has failed to furnish the same and consequently, as per Article 10 of the PPA, only the specified taxes on income will not form part of the regular billing and therefore, the question of payment of interest on the claim will not arise. Hence, this Appeal.

Issues

9. The main issues in the appeal before us are:

- A. **Whether the State Commission has the jurisdiction to entertain the dispute between the parties?**

- B. Whether the time limit of one year for raising disputes is applicable in the case of dispute relating to reimbursement of specified taxes on income also?**
- C. Whether claims made by Respondent, PPN no. 1 (PPN) regarding payment of taxes are in terms of the PPA arrived at between TNEB and PPN keeping in view that the Respondent, PPN no. 1 did not submit the supporting documents demanded by TNEB?**
- D. Whether Specified taxes on income form part of the regular billing so that delay in reimbursement of these taxes would attract interest as per Article 10.6 of the PPA?**

10. We will now discuss and analyse the contention of rival parties on each core issue framed herein above separately.

Jurisdiction Of The State Commission

Contention Of The Parties

11. The Appellant, TNEB referred to Article 16.2 of PPA which provided for resolution of disputes between parties by way of arbitration. Hence, The Appellant TNEB submitted, the State Commission had no jurisdiction to entertain the dispute for adjudication. The Appellant, TNEB also submitted that reimbursement of specified tax expenses is not part of tariff under the PPA and that only tariff related disputes could be adjudicated upon by the State Commission.

12. The Respondent, no.1, PPN on the other hand submitted that in view of the judgment of the Supreme Court in the case of **Gujarat Urja Vikas Nigam Ltd. v. Essar Power Limited (2008) 4 SCC 755**, the State Commission is empowered to entertain the dispute between the parties despite there being a provision for arbitration in the PPA.

Analysis And Decision

13. The Appellant, TNEB submitted that reimbursement of specified taxes on income does not form part of the tariff as per the PPA. Section 86 of the Electricity Act, 2003 specifies the functions of the State Commission. The Appellant, TNEB felt that the term ‘tariff’ as per the PPA does not cover reimbursement of specified taxes on income. Since the dispute is about reimbursement of specified taxes, its resolution is outside the jurisdiction of the State Commission.

14. The PPA defines Tariff as:

“the rates for Capacity, Net Electrical Output and Deemed Generation to be charged by the Company and paid by TNEB under this Agreement, all as set forth in Schedule A hereto.”

Fixed capacity charge (FCC) is defined as under:

“Fixed Capacity Charge or FCC with respect to any month the sum of O&M expenses, Debt Payment, Interest on working Capital, Depreciation, Return on Equity and Specified Taxes, applicable to that month, as further described in the Tariff.”

15. Clause 2(a) of Schedule ‘A’ states that the Appellant, TNEB shall pay monthly tariff payment for all capacity and energy for each part of the month. Clause 2 (c) of the Schedule A provides that

“FCC for each month shall be paid monthly to the Company in accordance with Article 10.2 of the Agreement, with the exception of Specified Taxes, which shall be paid in accordance with Article 10.1(d).”

16. The formula for calculation of FCC as contained in Schedule A refers to ‘cost’ which comprises of 6 items specified in the clause and includes ‘specified tax’ as one of these items.

17. We see that tariff is the rates for capacity charge and other charges. Further, the capacity charge have been defined as comprising of six items, including specified taxes on income. A combined reading of the above provisions leave no doubt that reimbursement of specified taxes by the Appellant, TNEB to the Respondent, PPN is a part of the tariff contemplated under the PPA. The exception recognized under Clause 2 (c) of the Schedule A to the PPA deals with mode of recovery i.e. whether on monthly basis or otherwise.

18. Having a mode of recovery different from certain other items of tariff does not mean that specified tax liability is not part of the tariff. Merely because there is different methodology provided in the PPA for recovery of specified taxes and other components of the tariff, we cannot conclude that specified taxes are not part of tariff. The tariff as contained in the PPA broadly comprises of two categories; one belonging to items which are linked to actual expenditure incurred and the other which is based on normative parameters. The first category covers payments relating to debt repayment, interest on long-term loans, specified taxes, etc. while the second category covers items such as payment on account of fuel expenses, etc. For the purpose of recovery, specified taxes have been given a different treatment but that does not mean that specified taxes are not part of the tariff under the PPA.

19. The Respondent no. 1, PPN in its support, cited the decision of the Supreme Court in the case of **Gujarat Urja Vikas Nigam Ltd. v. Essar Power Limited (2008) 4 SCC 755**. In this case there was a PPA executed between GUVNL and EPL on 30.05.1996, before the Electricity Act, 2003 was enacted. Dispute arose due to supply of power by EPL to Essar Steel Limited when GUVNL did not off-take its share of power in the PPA. GUVNL contended that supply of power by EPL to ESL was out of GUVNL share in the PPA and should be treated as sale of power by GUVNL to ESL and that accordingly on such power GUVNL is entitled to recover the applicable HT

tariff. This was disputed by EPL. The PPA provided for referring disputes between the parties for settlement by arbitrator, in case of the dispute between the parties. One party desired to approach the State regulatory commission while the other desired that matter be referred for arbitration. Deciding the matter, the Supreme Court held that:

“60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30.05.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f 10.06.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.06.2003, there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes and not merely those pertaining to matters referred to in Clauses (a) to (e) and (q) to (k) in Section 86(1), between the licensees and generating companies can only be adjudicated the State Commission or the arbitrator (or arbitrators) nominated by it. This is because there is no restriction in Section 86 (1) (f) about the nature of the dispute.”

20. The provisions of Section 86.1.(f) are reproduced below:

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

21. In view of the above, even if we agree that the dispute between the parties is not related to tariff, the State Commission has full jurisdiction to entertain the dispute between the parties. Hence, we do not agree with the contentions raised by the Appellant, TNEB regarding jurisdiction of the State Commission. **Issue ‘A’** is decided against the Appellant, TNEB.

Right To Dispute The Correctness Of The Specified Tax-Whether Barred By One Year Time Limit

Contention Of The Parties

22. PPN submitted that Articles 10.2 (e) of the PPA provides that when the Appellant, TNEB dispute an invoice, the Appellant, TNEB has to first pay the bill and thereafter raise a dispute. The Appellant, TNEB did neither. The PPA provides for safeguards in the form of interest of 0.50% over the applicable rate of interest in favour of the *Appellant, TNEB*. According to the Respondent no. 1, PPN given the size of power projects and the stakes involved, uncertainty is required to be removed within reasonably short time frames and that it is for this reason, Article 10.2(e) provides that no dispute could be raised beyond a period of one year from the due date for payment.

23. Per contra, the Appellant TNEB submitted that Article 10.1(d) of the PPA provided that after tax assessment is completed for any year and the liability is determined by the income tax authorities, the excess or shortfall in the tax liability will be adjusted in the invoice in the next following month. It is submitted by the Appellant, TNEB that final determination of income tax liability is known only after assessment by the income tax authorities. Hence, it is not possible for TNEB to raise objections with regard to specified tax claims of the Respondent no. 1, PPN within a period of one year from the due date of the invoice in which such claim was first made by the Respondent, PPN no. 1. And if the time limit of one year to raise dispute within a period of one year, as provided under Article 10.2(e), is taken as applicable to specified tax claims also, TNEB can never raise any dispute about the amount claimed by PPN under the head specified tax. The Appellant, TNEB further submitted that provision for interest on extra payment to TNEB is not a justification for PPN claiming reimbursement of amount not due and payable.

24. For better appreciation of the controversy, we may refer to the provisions of Article 10.2(e), which are reproduced below:

(e) Disputes: In the event of any dispute as to all or any portion of an Invoice, TNEB shall nevertheless pay the full amount of the disputed charges when due and may serve a notice on the Company that the amount of an Invoice is in dispute, in which event the provisions of Article 16 shall be applicable.....TNEB shall not have the right to dispute any Invoice after a period of one year from the Due Date of such Invoice.

25. Article 16 is titled as 'Resolution of Disputes' and contains provisions for dispute resolution mechanism between the parties.

26. The Appellant, TNEB contended that reimbursements of specified taxes are 'claim' and not 'invoice' and since Article 10.2.(e) refers only to 'invoice' and does not cover 'claim', the provisions of Article 10.2.(e) are not applicable in respect of claims for reimbursement of specified taxes on income. During pleadings, the Appellant, TNEB also submitted that such reimbursements being in the nature of claims, there is no 'due date' and consequently the time limit of one year under Article 10.2.(e) is not applicable to such claims.

Analysis And Decision

27. Before we proceed further we may have a look at the provisions of Article 10.2(a), which we feel are relevant in this regard. Article 10.2(a) is reproduced below:

“Company shall submit to TNEB after the first day of each month that commences after the COD an Invoice (“Invoice”) for all amounts accrued in the preceding month under the Tariff and other applicable Sections in this Agreement for the estimated FCC, VFC and Incentive Charge....”

28. We have already discussed that the term ‘tariff’ under the PPA includes claim for specified taxes, which we do not want to repeat. From the provisions of Article 10.2(a) quoted above, it is clear that all charges payable under tariff are covered within the term invoice and there is no differentiation made in this regard in the PPA. In our view the words stating ‘**for all amounts accrued in the preceding month under the Tariff and other applicable Sections**’ indicate that all payments which are claimed under the provisions of the PPA are covered within the term ‘invoice’ under Article 10.2(e). Hence, the time limit of one year is equally applicable to claims on account of specified taxes and we are of the view that the State Commission has rightly held that the Appellant, TNEB cannot seek to raise disputes after the 1-year period prescribed under the PPA particularly in the background that it conveyed through letters that it has accepted the invoices of the Respondent, PPN no. 1 for payment in full.

29. The Respondent no. 1, PPN referred to certain letters written by the Appellant, TNEB to the Respondent reading as under:

‘TNEB is currently undergoing temporary financial strain resulting in its inability to make full payment against Tariff Invoices.... Your invoices have been accepted for payment in full by TNEB. TNEB herewith accepts liability to pay the said outstandings and reconfirms its commitment to meet all dues of its contractual obligations under the PPA.’

30. The above clearly gives an impression that the Appellant, TNEB acknowledged the liability as stated in the invoices raised by the Respondent No. 1, PPN. Hence, it is not open for the Appellant, TNEB to raise the dispute after the expiry of one year as provided under Article 10.2(e) of the PPA. Thus, **Issue ‘B’** is decided in favour of the Respondent, PPN.

Need For Submission Of Documents For Reimbursement Of Specified Taxes In Income

Contention Of The Parties

31. It is the case of the Appellant, TNEB that in terms of the PPA, the Respondent, PPN is entitled for the reimbursement of actual tax computed as per the definition contained under the heading 'Specified Taxes on Income' contained in the Addendum of the PPA dated 06.08.1998 and not on the entire income of PPN. As the Respondent, PPN is having other incomes also, there was a need for PPN to segregate the income tax pertaining to income relevant for tax reimbursements as per the PPA and income tax pertaining to other incomes. To further emphasize its viewpoint, the Appellant, TNEB submitted that profit and loss accounts furnished by the Respondent, PPN did contain other incomes also. The Appellant, TNEB submitted that the Income Tax Challan submitted by the PPN to TNEB for reimbursement, includes income tax paid by PPN in respect of other incomes of PPN worth crores and TNEB is not liable to reimburse the entire amount thus claimed by PPN. And since the claim by the Respondent, PPN for reimbursement of the entire income tax paid under the challan is not proper, the Appellant, TNEB can not be accused of non payment/delayed payment. As a corollary to that, taking the argument further, the Appellant, TNEB is not liable for any consequence that may be related with non-payment/delayed payment of the claim as it is the Respondent PPN which is responsible for not submitting the correct and proper claim. The Appellant, TNEB submitted that only if the Respondent no. 1, PPN furnishes all required documents, the final amount to be reimbursed under the head 'Specified Taxes on Income' could be reimbursed to PPN. Based on the assessment orders furnished by PPN, the Appellant TNEB has submitted that for certain years, the income tax authorities have determined refund, whereas PPN had claimed entire advance tax paid by PPN. Failing proper proof by the production of required documents of the actual specified tax on income to be reimbursed, TNEB will be forced to pay whatever amount is demanded by the Respondent, PPN no. 1. The Appellant, TNEB

has submitted that Article 10.1(d) of the PPA necessitates that after the tax assessment is completed for any year and tax liability is determined by the tax authorities, the excess or shortfall is required to be adjusted in the invoice for the next following month. According to TNEB, PPN never submitted documents showing final tax assessment in the earlier period. Only during 2006, the Respondent, PPN no. 1 furnished certain documents after TNEB called for them. Further, Article 10.1. (d) contemplates reimbursement by TNEB of the specified taxes paid by PPN on the basis of certificate to be given by an approved chartered accountant. The Appellant, TNEB also contended that PPN despite giving an undertaking for furnishing documents at the time of receiving the part reimbursement of Minimum Alternate Tax (MAT) liability did not submit the required documents.

32. The Appellant, TNEB also laid emphasis on the following wordings appearing in the impugned order:

*‘if the Respondent, **TNEB** (i.e. TNEB which is the Appellant, TNEB herein) accepts the claim, payment shall be made to the petitioner in six equal monthly installments.’*

33. The Appellant, TNEB feels that from the above it is clear that the Appellant, TNEB should satisfy itself that the claim made by the Respondent, PPN is correct before the payment is released and for ensuring that certain documents are required. Accordingly, the Appellant, TNEB sought additional documents from the Respondent no. 1, PPN which were allegedly not furnished to the Appellant.

34. The Respondent, PPN submitted that the Appellant, TNEB after acknowledging its liability for payment towards invoices in 2001 and 2004, conveyed that it would be reimbursing payment towards taxes and that only subsequently the Appellant, TNEB sought for production of documents despite having been provided sufficient documentation in support of the claims of the Respondent, PPN. This the Respondent,

PPN No.1 feels, amount to dilatory tactics by the Appellant, TNEB. The Appellant, TNEB on the contrary, submitted that as per the terms of the PPA, TNEB is obliged to reimburse the tax applicable on the return on equity and foreign exchange variation related to the equity and on nothing else. TNEB explained that it is not possible to work out the tax liability applicable on the return on equity and foreign exchange variation portion as envisaged under the PPA based on the profit and loss account submitted and calculation process suggested by the Respondent, PPN No.1. There are items such as depreciation which are given different treatment while preparing profit and loss accounts and for the purpose of determination of income tax liabilities.

35. The Respondent No.1 PPN, to further emphasize its point that it had furnished all the relevant documents necessary to work out the tax liability as per the PPA, furnished before this Tribunal a formula for calculating the specified taxes and details required for the same. It further submitted the manner in which the tax can be calculated on the basis of the documents admitted to have been already received by the Appellant, TNEB .

36. Per contra, the Appellant, TNEB submitted that the above understanding of the Respondent, PPN No.1 is not correct and that it is not possible to calculate liability for specified taxes as per the PPA based on the formula suggested by the Respondent No.1, PPN. The Appellant, TNEB reiterated its submissions before the State Commission and submitted that it is liable to pay tax only on the return on equity and foreign exchange variation component and on nothing else.

37. As regards the requirement of submitting chartered accountant's certificate as contemplated under Article 10.1.(d) of the PPA, the Respondent PPN submitted that it would be clearly unfair on the part of the Appellant, TNEB to keep quiet for such a long duration, not nominate any chartered accountant, not return any invoice on the ground that it was not accompanied by a chartered accountant's certificate and also

make part payment thereafter upon initiation of legal proceedings, to take such a stand. It is the case of the Respondent, PPN no. 1 that the Appellant, TNEB has waived its right in respect of all the invoices submitted till date. To this, TNEB submitted that to constitute waiver there should be an intentional abandonment which is essential for the waiver. The principle of waiver connotes issuance of notice and non-response thereto. The Respondent, PPN had at no point of time requested the Appellant, TNEB to approve a chartered accountant or to furnish the list of chartered accountant.

Analysis And Decision

38. In our view the reasoning of the Appellant, TNEB relating to interpretation of the impugned order that the Appellant, TNEB should satisfy itself that the claim made by the Respondent, PPN is correct before the payment is released and for ensuring that certain documents are required, is not correct. We feel that with the above directions what the State Commission meant was that if TNEB was willing to accept the claims of PPN as it was submitted to TNEB then the same can be paid in six equal monthly installments. There was no scope left at that stage for TNEB to satisfy itself about the claims of PPN. This becomes more clear when the State Commission after the next sentence in the same paragraph of the impugned order, stated that

*‘If the Respondent, **TNEB** disputes any part of the claim, he may file the amended claim with the Commission within one month from the date of submission of the claim by the petitioner.’*

39. The reimbursement of liability for specified taxes is provided for in Article 10.1(d) of the PPA, which is reproduced below:

“10.1 Payment Obligation

(a)

(b)

(c)

(d) Specified Taxes on Income will not form part of the regular billing. However, any advance tax payable for the Project in any Month supported by a certificate of a chartered accountant approved by TNEB will be reimbursed in the succeeding Month. After the tax assessment is completed for any Year and the liability therefore is determined by the taxation authorities in India, the excess of shortfall in the tax liability so determined will be adjusted in the Invoice for the Month next following.”

40. The Addendum dated 06.08.1998, as regards Specified Taxes provides as under:
‘The existing definition of Specified Taxes is deleted and is substituted with the following:

“Tax on the following income streams, if any, to be computed as an expense at actuals:-

- a. Sixteen percent Return on Equity;*
- b. The extra rupee liability on account of foreign exchange rate variation in computing the return on equity not exceeding 16% in the currency of the subscribed capital;*
- c. The amount of grossed up tax that is payable and actually paid under income streams mentioned as items (i) and (ii);*
- d. Any under or over recoveries of tax shall be adjusted every year on the basis of a certificate statutory auditors.*

Provided however, tax on other streams, if any, accruing to the Company shall not constitute a pass through component in the tariff. Tax on such other incomes shall be payable by the Company.”

41. We are of the view that the Appellant, TNEB is liable to reimburse only on the income attributable to return on equity and any foreign exchange rate variation. The formula suggested by the Respondent, no. 1 PPN, in our view, does not capture the scheme of the PPA for calculation of tax liability. The reason for this is that it is not

possible to work income tax liability on the basis of audited profit and loss account as required under the Companies Act, 1956. This is so because the treatment given to various items (e.g. depreciation) is different under the Companies Act and the Income Tax laws. Further, after the amended definition of the specified taxes as per the Addendum to the PPA, the liability for income tax has been restricted to two specific items. Earlier the liability effectively included income related to power operations but now even entire power business income tax is not liable for reimbursement. We can safely give the example of income accruing to PPN in the form of incentive is now not covered under for reimbursement whereas the earlier definition covered that. We feel that when the State Commission in the last para of the impugned order stated that:

*“If the Respondent, **TNEB** disputes any part of the claim, he may file the amended claim with the Commission within one month from the date of submission of the claim by the petitioner.”*

The State Commission gave an opportunity to the Appellant, TNEB to submit its calculation regarding determination of applicable tax liability for consideration of the State Commission and then at that stage the State Commission would have sought necessary details from the parties to assess the rival claims and settle the dispute. Unfortunately, the Appellant, TNEB did not avail that opportunity. Under the circumstances, we are not inclined to grant any relief to the Appellant, TNEB in this regard and **Issue ‘C’** is accordingly decided against it.

Specified Taxes On Income Forms Part Of The Regular Billing, Delay In Payment Of Which Would Attract Interest As Per Article 10.1(D)?

Contentions Of The Parties

42. The Appellant, TNEB further submitted that claims for specified taxes are not eligible for any late payment charges as the late payment charges provided under Article 10.6 of the PPA are applicable only to ‘Invoice’ referred to in the article 10.1.(d) of the PPA. The Appellant, TNEB feels that specified income on taxes does not

form part of the regular billing; hence there is no question of interest if the same is not paid timely.

Analysis And Decision

43. The above issue does not survive as we have already held that claims for reimbursement of specified taxes are also part of the tariff and accordingly would also attract interest for late payment if not paid on time. **Issue ‘D’** is, thus, decided against the Appellant.

44. In view of the above, the decision in all core issues framed in the main Appeal No. 41 of 2009 before us being against the Appellant the Appeal is accordingly dismissed. With the dismissal of the aforesaid Appeal, Appeal Nos. 59 of 2009 and 60 of 2009 also do not survive as the main contention in this appeal relate to immediate liquidation of overdue payment by the Appellant, TNEB as decided by the Commission in the impugned order dated 27.11.2008.

45. This disposes of the Appeal Nos. 41 of 2009, 59 of 2009 and 60 of 2009 with no costs.

(A.A.Khan)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: August, 2009

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