

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 237 OF 2014

Dated: 23rd November, 2015

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. T. Munikrishnaiah, Technical Member**

IN THE MATTER OF

West Bengal State Electricity Transmission Company Limited

Registered Office : Vidyut Bhavan,
Block-DJ, Sector-II, Bidhannagar,
Kolkata-700091

..... Appellant/Petitioner

VERSUS

West Bengal Electricity Regulatory Commission

Registered Office : FD-415 A, Poura Bhawan,
3rd Floor, Sector-III,
Bidhannagar, Kolkata – 700106

..... Respondent

Counsel for the Appellant	...	Mr. Avijeet Lala Mr. Anand K. Shrivastava
Counsel for the Respondent(s)...		Mr. Pratik Dhar, Sr. Adv. Mr. C.K. Rai

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by West Bengal State Electricity Transmission Company Limited (in short, the '**Appellant**'), against the Impugned Order, dated 10.6.2014, in Case No. APR-37/13-14 passed under sections 62 and 86 of the Electricity Act, 2003 on the Appellant's petition for Annual Performance Review (**APR**) for FY 2012-13, by the West Bengal Electricity Regulatory Commission (in short, the '**State Commission**'). In its APR petition, the Appellant had claimed an amount of Rs.2,749.95 lakhs as amount to be further recovered for FY 2012-13 over and above Rs.83,757.38 lakhs which was originally determined by the State

Commission while fixing ARR for FY 2012-13 in the MYT Order, dated 1.12.2012. In the impugned order, the State Commission has, however, allowed only a sum of Rs.583.03 lakhs as further realizable for FY 2012-13 as against Appellant's claim of Rs.2,749.95 lakhs. The State Commission has disallowed the Appellant's claims towards the following heads:

- (i) Interest on capital borrowings to the extent of Rs.1,709.72 lakhs;
- (ii) Advance Against Depreciation of Rs. 302.79 lakhs; and
- (iii) Wrong deduction of Interest Credit of Rs.206.12 lakhs.

2. The relevant facts for the purpose of deciding this Appeal are as under:

- (a) that the Appellant was incorporated as a public limited company under the Companies Act, 1956 on 16.2.2007 to take over the activities relating to transmission and Load Despatch of West Bengal State Electricity Board under the West Bengal Power Sector Reforms Transfer Scheme, 2007 formulated by the Government of West Bengal under Section 131 of the Electricity Act, 2003. The Appellant was also designated as the State Transmission Utility in the state of West Bengal and is a deemed transmission licensee under the second proviso of Section 14 of the Electricity Act, 2003.
- (b) that the sole Respondent is the State Electricity Regulatory Commission which is authorized to discharge the various functions and duties as provided under the Electricity Act, 2003.
- (c) that as per Regulation 2.6 of the Tariff Regulations, 2011, a generating company or a licensee shall be subjected to an Annual Performance Review ("APR") covering annual fixed charges, fixed cost, prescribed incentives and effect of gain sharing on the parameters prescribed under the relevant schedules of the Tariff Regulations, 2011 and for such purpose, the licensee is required to make an application seeking APR for an ensuing year or a base year with statutory audited data and copy of the audited Annual

Accounts for the year by November of the immediate next ensuing year as per formats prescribed for the tariff application. Based on such application, the State Commission, after applying the principles laid down in the Tariff Regulations, 2011, determine the fixed cost under the APR and also determine under the order of APR the amount to be adjusted with the ARR of the ensuing year for which tariff order is going to be issued.

- (d) that pursuant to the provisions of the Tariff Regulations, 2011, the Appellant filed its Annual Performance Review Petition for the year 2012-13 before the State Commission, which was registered as Case No. APR-37/13-14. In the said APR petition, the Appellant prayed for determination of the Gross Revenue Requirement as Rs. 95,465.28 lakhs, revised Revenue realizable through tariff as Rs. 86,590.60 lakhs as against Rs. 83,757.38 lakhs determined as per the Tariff Order for the year and the further amount realizable on such basis as Rs. 2,833.22 lakhs. The said APR petition has been disposed of by the impugned order.
- (e) that the following reliefs have been sought by the Appellant/petitioner in the instant Appeal:
- (i) that the Appellant is entitled to Interest on Capital Borrowings of Rs. 19,200.31 lakhs for the year 2012-13;
 - (ii) that the Appellant is entitled to an Advance Against Depreciation (AAD) for the year 2012-13 of Rs. 2,058.57 lakhs;
 - (iii) that there is no scope for levying Interest Credit in terms of Regulation 5.5.3 of the Tariff Regulations, 2011 and the amount of Rs. 206.12 lakhs set-off in the determination of the revised Aggregate Revenue Requirement is erroneous and, hence, set aside;

(iv) that the revised Aggregate Revenue Requirement for the year 2012-13, exclusive of amount on account of SLDC, is determinable as Rs. 96,210.22 lakhs in place of Rs. 90,416.67 lakhs as determined by the State Commission in its APR Order and that, after adjustment of Revenue already realized during the year of Rs. 89,878.64 lakhs, the Net additional revenue recoverable is determinable as Rs. 6,331.58 lakhs.

3. We have heard Mr. Avijeet Lala, the learned Counsel for the Appellant/petitioner and Mr. Pratik Dhar, the learned senior counsel for the Respondent and gone through the written submissions filed by the rival parties. We have deeply gone through the evidence and other material available on record including the impugned order passed by the State Commission.

4. The following issues arise for our consideration in the instant Appeal:

- (A) Whether the State Commission has rightly disallowed the claim of interest on capital borrowings to the extent of Rs.1,709.72 lakhs?**
- (B) Whether the State Commission has rightly disallowed the claim for advance against depreciation (AAD) of Rs.302.79 lakhs?**
- (C) Whether the State Commission has rightly disallowed the claim towards wrong deduction of interest credit of Rs.206.12 lakhs?**

OUR ISSUE-WISE CONSIDERATIONS ARE AS FOLLOWS:

5. Issue (A) : Interest on Capital Borrowings:

5.1 On this issue, the following submissions have been made on behalf of the Appellant/petitioner:

- (a) that the impugned order to disallow interest on normative loan is based on assumptions and surmises.

- (b) that the interest on normative loan has to be computed as per the principle prescribed in Regulation 5.4.2 of the WBERC (Terms & Conditions of Tariff) Regulations, 2011 (in short, the **Tariff Regulations, 2011**). It provides that for the purposes of tariff determination debt-equity ratio as on COD of the asset shall be 70:30. However, where equity employed is more than 30%, the amount of equity shall be limited to 30% and the balance amount shall be considered as normative loan capital.
- (c) that, accordingly the Appellant claimed a sum of Rs.1,709.72 lakhs towards interest on normative loan for the period 2012-13 in its APR petition.
- (d) that, however, the State Commission denied Appellant's claim. The State Commission adopted the approach of taking consolidated debts and capital additions made by the Appellant ever since it came into existence in the year 2007. The State Commission, thus, tabulated under paragraph 2.7.2 of the impugned order, the additions to debt by the Appellant over the period 2007-08 to 2012-13 and the actual additions to fixed assets during the same period.
- (e) that, however, in arriving at the aggregate addition to fixed assets during the period 2007-08 to 2012-13, the State Commission chose to exclude actual capital additions of Rs.79,477.82 lakhs that took place in 2007-08. The State Commission, in the impugned order, has given no reasons as to why the actual capital additions made in the year 2007-08 had been ignored while computing Appellant's claim for interest on normative loan.
- (f) that, subsequently, in its counter affidavit to the present appeal, the State Commission has sought to supply reasons for its decision. The justifications sought to be given by the State Commission for disallowing interest on normative loan to the Appellant are as under:

- (i) that even while computing the normative loan in the APR order, dated 19.10.2012, in respect of the Appellant for the year 2010-11, the State Commission had excluded the amount of Rs.79,477.82 lakhs being capital expenditure transferred to fixed assets during the year 2007-08, which was not challenged by the Appellant at that time but, the same has now been challenged by the Appellant in another appeal being Appeal No. 20 of 2015 which is filed after the instant appeal.
- (ii) that the Appellant had no accumulated profit (Free Reserve) as on 1.4.2007. The capital addition of Rs.79,477.82 lakh made by the Appellant came out of Capital Work-in-Progress of Rs.962 crores allotted to the Appellant by the State Government at the time of its formation. Therefore, the State Commission did not take into consideration actual addition to fixed asset during the year 2007-08 for Rs.79,477.82 lakhs for determination of normative debt, as the Appellant had not made any additional employment of fund for this purpose.
- (g) that the purported explanations, given by the State Commission in its counter affidavit justifying the decision taken in the impugned order, cannot be accepted for the following reasons:
- (i) because the State Commission, as an adjudicatory authority, has to be limited to the reasons mentioned in the impugned order alone, as held in *Mohinder Singh Gill vs. Chief Election Commissioner*, (1978) 1 SCC 405.
- (ii) that the fact that the Appellant did not challenge the view taken by the State Commission on this issue in the past APR orders does not prevent the Appellant from challenging the same in the present appeal because each year's tariff fixation exercise is an independent proceeding

and each assessment year of a tariff through tariff order gives rise to a fresh cause of action and can be challenged separately as observed in Delhi Transco Ltd. vs. DERC & Ors. in Appeal No. 133 of 2007, in judgment, dated 13.1.2009 of this Appellate Tribunal.

- (iii) that it is factually incorrect that the Appellant has not questioned the State Commission's views on interest on normative loan. The Appellant has, subsequently, filed an appeal against the APR order, dated 19.10.2012, for the year 2010-11 before this Appellate Tribunal being Appeal No. 20 of 2015 which Appeal has been admitted on 14.1.2015 by this Appellate Tribunal.
- (iv) that the State Commission has wrongly assumed and wrongly decided that the Appellant had no free reserves in FY 2007-08 so as to meet capital additions. It is clearly borne out from the Audited Cash Flow Statement for the year 2007-08, a copy of which formed part of the Annual Accounts submitted to the State Commission as Volume III of the APR petition for the year 2007-08, that during the aforesaid year, the Appellant generated Net Cash from Operating Activities of Rs.54,067.93 lakhs, there was left a net surplus of Rs.38,554.24 lakhs. After net loan drawals of Rs.30,627.33 lakhs during the year, the Appellant was able to meet addition to Capital Works in Progress of Rs.67,111.80 lakhs, as disclosed in Schedule 6 of the Annual Report for the year 2007-08. Hence, State Commission's argument that the entire amount of Fixed Assets in the year 2007-08 have been created out of the Opening Capital Work in Progress balance as re-vested to the Appellant is based on no evidence and/or incorrect appreciation of facts.

- (h) that the State Commission has misconstrued the scope of APR by taking consolidated debts and capital additions for computing interest on normative loan. Regulations 2.6.1 read with 2.6.9 of the Tariff Regulations outline the scope of APR exercise. Regulation 2.6.9 provides as under:

“The scope of the annual performance review shall be a comparison of the actual performance of the generator/licensee with the approved projection of ARR as given in the tariff order of the first ensuing year of the control period.

- (i) that it is clear that the scope of APR exercise is restricted to comparing the audited/actual performance for the year under review with the projected performance as determined in the ARR, and then to carry out necessary adjustments arising out of the difference between the two in the manner as specified in the tariff Regulations, 2011.
- (j) that the reference period for determining the variations in costs and/or performances of the licensee is the year which is the subject matter of review. The State Commission cannot take into account historical figures and data for period(s) outside and/or extraneous to this reference period for the purpose of APR.
- (k) that the approach adopted by the State Commission in the impugned order of taking consolidated debts and capital additions made by the Appellant ever since it came into existence in the year 2007 while computing interest on normative loan is contrary to the provisions of the Tariff Regulations, 2011. This approach also betrays State Commission’s own practice followed in the past wherein the State Commission has considered the actual additions to debts and to fixed assets made in the year under review to calculate Appellant’s entitlement for interest on normative loan.
- (l) that the State Commission has adopted a different approach for FY 2012-13 (that is subject matter of present appeal) and FY

2010-11. The State Commission has assigned no reasons in the impugned order as to why it chose to follow a different approach for the period in question, which runs contrary to the express provisions of its own Tariff Regulations, 2011. The flip flop approach being followed by the State Commission leads to regulatory uncertainty and smacks of arbitrariness.

5.2 **Per contra**, on this Issue (A), the following submissions have been made on behalf of the State Commission:

- (a) that the approach followed by the State Commission is not only in accordance with the Regulations but also based on the principle of prudence check.
- (b) that the main issue is how much amount should be allowed under the head Normative Loan for the year 2012-13. The Regulation 5.4.2 restricts normative loan exceeding 70:30 ratio. While determining the APR for the year 2012-13 on the basis of facts and figures brought out by the Appellant, the State Commission found that if the amount towards normative loan as claimed by the Appellant is allowed, the same will violate the principle laid down in Regulation 5.4.2 regarding the ratio of the loan being restricted to 70%. In that circumstances, the State Commission, on the principle of prudence check, sought to know whether the loan and/or normative loan taken by the licensee was actually resulting in creation of asset or not. The only way to find out such was to get the total amount of loan claimed and/or received by the licensee and the total amount of fixed assets being created by the licensee since its inception i.e. from year 2007-08. In that respect, the State Commission found upon calculation (based on the figures provided by the Appellant) of Rs.1,63,120.68 lakhs towards actual addition to debt upto the year 2012-13 whereas, upto the year 2012-13 the amount towards addition to fixed assets was only Rs.1,96,821.16 lakhs. In those circumstances,

the ratio of 70:30 as contemplated in Regulation 5.4.2 of the Tariff Regulations, 2011 disentitles the Appellant to claim any amount exceeding Rs.1,37,774.81 lakhs (i.e. 70% of Rs.1,96,821.16 lakhs).

- (c) That, since, the Regulation 5.4.2 is not under challenge, the Appellant cannot ask for any amount towards normative loan which will resultantly exceed the 70% ratio as mentioned in the said regulation. Allowing of any normative loan in the year 2010-11, does not entitle the Appellant to claim an amount towards normative loan exceeding the 70% ratio. When the State Commission found that the normative loan is being claimed by the Appellant but, there has not been corresponding proportionate creation of asset, such prudence check by the State Commission based on the principles of 70:30 ratio had to be applied. If this is not applied by the State Commission, it will result in unjust enrichment at the cost of the consumers particularly allowing of a normative loan exceeding the statutory limit without creation of corresponding proportionate asset in the licensing business.
- (d) that determination of tariff within the scope of regulating the licensee is a continuous process. There is no presumption that the State Commission would require to disbelieve the licensee in the very first year of claim. However, the licensee is also not entitled to continue to have any unjust enrichment solely on the ground that previously such unjust enrichment was not checked and/or was not looked into. In fact, on the basis of the facts brought out by the Appellant, when the State Commission found, in the year 2012-13, that there has been lack of corresponding proportionate creation of fixed asset despite normative loan being taken by the licensee/Appellant, the State Commission had to bank on the principles of prudence check to ensure that the 70:30 ratio as contemplated in the statutory regulations being Regulation 5.4.2 of Tariff Regulations, 2011, is not given a go by.

- (e) that prior to creation of the Appellant, it was a part of erstwhile State Electricity Board. It was only in the year 2007-08, the State Transmission and Distribution Licensees were created. As per the West Bengal Power Sectors Reforms Transfer Scheme, 2007 under sub-section 5 of Section 131 of the Electricity Act, 2003, the Appellant could have an amount of Rs. 962 crores towards capital work in progress (CWIP). **This amount of Rs. 962 crores being revested by the State of West Bengal because of creation of the Appellant in the year 2007-08 cannot be called to be an amount being accumulated by the Appellant, after its creation on the basis of its loan and/or normative loan. In fact, such Rs.962 crores was allotted from the fund of the erstwhile State Electricity Board. In the year 2007-08, the actual addition to fixed asset was of Rs.79,477.82 lakhs out of the amount towards capital work in progress. The actual addition of fixed assets for the year 2007-08 was Rs. 79,477.82 lakhs which was the result of the capital work in progress (CWIP) for Rs. 962 crores being allotted and/or revested to the Appellant.**
- (f) that cash generated from the operating activities is only a part of total cash flow chart of the utility. The cash generated through cumulative effect of operating, investing and financing activities is the cash surplus. The Appellant had net increase in cash and cash equivalents to the extent of Rs. 2,178.33 lakhs during the year 2007-08. The capital works-in-progress related during 2007-08 for Rs. 67,711.80 lakh was out of the loan of Rs.30,6627.33 lakh drawn during 2007-08 and balances of earlier loan.
- (g) that, even if, total amount of CWIP opening balance for 2007-08 is not transferred to fixed asset during the year, the balance amount must have been converted to asset in subsequent years i.e. 2008-09, 2009-10 or even after. CWIP of Rs. 962 crores was created out of loan drawn prior to the year 2007-08.

- (h) that it is thus evident that fresh loan in a year is drawn for creation of CWIP, but creation of fixed asset may take longer time based on the completion of works and commissioning of the asset, which otherwise, confirms that assets capitalized in a year may be created out of loan drawal of earlier year/years and loan drawn in a year may not be utilized for the asset created during that year. So, in a given year created asset and its corresponding normative loan (70%) may not be matching with the actual loan drawn during the year. Debit equity ratio is a project specific concept. If the Appellant can submit project-wise commencement and completion of works along with drawal of loan for completion of the project for each year, requirement of normative loan for the project can be rightly worked out along with actual component of interest to be capitalized.
- (i) that there are few elements of fixed cost where cumulative effect of past performances factors for determination of such cost. Interest on normative loan falls under such category.
- (j) that interest on normative loan is an uncontrollable factor for determination of tariff. Regulation 2.6.10(iii) of the Tariff Regulations, 2011 regulates determination of allowable cost of uncontrollable items. **This Regulation contemplates that ‘For any uncontrollable factor, the Commission shall apply prudence check and admit such amount under APR according to Commission’s discretion.** For the uncontrollable factor based on the aforesaid prudence check, the State Commission computed the requirement of normative loan on the basis of consolidated addition to debt and fixed asset from 2007-08 to 2012-13.
- (k) that the computation of admissible normative loan is a continuous process. For computation of normative opening balance of gross normative loan is required and to compute admissible opening balance of normative loan at the beginning of the year computation is carried out from 2007-08. Thus, the State

Commission correctly considered the computation of normative loan taking actual data for the years from 2007-08.

5.3 Our consideration and conclusion on this issue No.(A):

5.3.1 We have cited above the relevant facts of the matter and the contentions raised by the rival parties in the upper part of this judgment. We have also gone through the relevant part of the impugned order on this issue. We do not feel any need to reiterate the same again. Now, we directly proceed to decide this issue of disallowance of interest on capital borrowings/ normative loan.

5.3.2 It is true that the Appellant claimed a sum of Rs. 1,709.72 lakhs towards interest on normative loan for the period 2012-13 in its APR petition. The interest on normative loan has to be computed as per the Tariff Regulations, 2011. Regulation 5.4.2 of the said Regulations provides that for the purpose of tariff determination, debt-equity ratio as on COD of the asset shall be 70:30. However, where equity employed is more than 30%, the amount of equity shall be limited to 30% and the balance amount shall be considered as normative loan capital.

5.3.3 The learned State Commission has completed the exercise based on the principle of prudence check and submitted that the main issue is how much amount should be allowed under the head Normative Loan” for the year 2012-13. The Regulation 5.4.2 of the Tariff Regulations, 2011 clearly restricts normative loan exceeding 70:30 ratio. The learned State Commission, while determining the APR for the year 2012-13 on the basis of facts and figures brought out by the Appellant, found that if the amount towards normative loan as claimed by the Appellant is allowed, the same will be against the principle laid down in Regulation 5.4.2, regarding the ratio of the loan being restricted to 70%. The learned State Commission, in the said circumstances and facts of the matter on the principle of prudence check, sought to know from the Appellant whether the loan and/or normative loan taken by the Appellant was actually resulting in creation of asset or not. According to the State Commission,

the only way to find out such was to get the total amount of loan claimed and/or received by the licensee and the total amount of fixed assets being created by the licensee since its inception i.e. from year 2007-08, then the State Commission found upon calculation (based on the figures provided by the Appellant) of Rs.1,63,120.68 lakhs towards actual addition to debt upto the year 2012-13, whereas, upto the year 2012-13 the amount towards addition to fixed assets was only Rs.1,96,821.16 lakhs. In the said circumstances, the ratio of 70:30 as contemplated in Regulation 5.4.2 of the Tariff Regulations, 2011, disentitles the Appellant to claim any amount exceeding Rs.1,37,774.81 lakhs (i.e. 70% of Rs.1,96,821.16 lakhs).

5.3.4 It is further true that the said Regulation 5.4.2 of the Tariff Regulations, 2011 has not been challenged hence; we are to consider the regulation as it exists now. We are of the view that in these circumstances, the Appellant cannot ask for any amount towards normative loan which will resultantly exceed 70% ratio as mentioned in Regulation 5.4.2 of the Tariff Regulations, 2011.

5.3.5 The facts as established from the record are that prior to the creation of West Bengal State Electricity Transmission Company Limited, it was a part of the erstwhile State Electricity Board and it was only in the year 2007-08, the transmission licensees and distribution licensees were created. As per West Bengal Power Sector Reforms Transfer Scheme, 2007, issue under Section 131(5) of the Electricity Act, 2003, the Appellant could have an amount of Rs. 962 crores towards capital work in progress, which amount was revested by the State of West Bengal at the time of the creation of the Appellant in the year 2007-08. The said amount cannot be called to be an amount being accumulated by the Appellant, after its creation on the basis of its loan and/or normative loan. In fact, the amount of Rs.962 crores was allotted from the fund of the erstwhile State Electricity Board. Thus, the capital works in progress related during 2007-08 for Rs.67,711.80 lakh was out of the loan of Rs. 30,627.33 lakhs drawn during 2007-08 and balances of earlier loan. Even it, total amount of CWIP opening balance for 2007-08 is not transferred to fixed asset during

the year, the balance amount must have been converted to asset in subsequent years i.e. 2008-09, 2009-10 or even after.

5.3.6 We have thoroughly and deeply considered this fact that the State Commission had allowed normative loan in the year 2011 but, we are of the firm view that allowing of normative loan in the year 2010-11 does not entitle the Appellant to always claim an amount towards normative loan exceeding 70% ratio. We agree to the findings recorded in the impugned order by the State Commission on this issue that since, the normative loan was being claimed by the Appellant but, there had not been any corresponding proportionate creation of asset. The State Commission had to apply the prudence check based on the principles of 70:30 ratio. Thus, we clearly observe that the findings recorded in the impugned order by the State Commission are based on correct, legal and proper appreciation of the material on record and the same cannot be disturbed in this Appeal. Even allowing of a normative loan exceeding the statutory limit without creation of corresponding proportionate asset in the licensing business of the Appellant does not appear to be legal and correct and the State Commission has rightly disallowed the said claim of the Appellant. **In view of this, the Issue No. (A) is decided against the Appellant.**

6. **Issue (B) : Advance Against Depreciation:**

6.1 On this issue, the following submissions have been made on behalf of the Appellant/petitioner:

- (a) that Regulation 5.5.2 of the Tariff Regulations, 2011 provides that if the actual amount of admissible depreciation for a year falls short of the actual amount of loan repayment for that year, such shortfall shall be allowed as an advance against depreciation (AAD).
- (b) that in accordance with the above, the Appellant had claimed an amount of Rs.302.79 lakhs as AAD for FY 2012-13 as the difference between the total repayments of borrowings amounting to Rs.14,052.99 lakhs (which included repayment of normative

loan of Rs.587.63 lakhs) and the admissible depreciation allowance of Rs.13,750.20 lakhs for the year.

- (c) that the State Commission, however, disallowed claim made by the Appellant for AAD. At paragraph 2.12.2 of the impugned order, the State Commission tabulated the actual amounts repaid against different borrowings made by the Appellant. However, in arriving at the total amount of borrowings repaid during the year, the State Commission omitted there-from repayment of Rs.1,830.00 lakhs made of the 9.75% Bonds of Rs.18,300 lakhs, purportedly on the ground that the said amount was utilized by the Appellant for swapping/ refinancing of loan. The State Commission also excluded repayment of normative loan of Rs.587.63 lakhs, without assigning any reason.
- (d) that the proceeds of the 9.75% Bonds of Rs.18300 lakhs, issued in the year 2009, was fully utilized for repayment of high cost borrowings from Power Finance Corporation Ltd. (PFC). The loan from PFC having been refinanced out of the proceeds of the 9.75% Bond issue, such repayment of the PFC loan was not considered for the purpose of arriving at the eligibility for AAD during the relevant year, i.e., in FY 2009-10. However, since the 9.75% Bonds were repayable in 10 equal installments from the year 2010-11, repayment of Rs.1,830 lakhs made from the year 2010-11 onwards have been included in the total repayments to be considered for arriving at amount admissible as AAD.
- (e) that, since, all repayments as per the loan terms are allowable as per Regulation 5.5.1 and repayment of the refinanced PFC loan had not been considered in arriving at the AAD claim for 2009-10, exclusion of the repayment of the 9.75% Bonds from 2010-11 onwards will result in denial of the legitimate right of the Appellant for claiming such repayment for consideration in arriving at the admissible AAD for the year, as envisaged under Regulation 5.5.2 of the Tariff Regulations, 2011, even though the

benefit of lower interest outgo on the refinanced loan was being passed on to the transmission system user.

- (f) that it needs to be appreciated that contrary to State Commission's contention, Regulation 5.5.1 in fact, encourages the utility to swap/replace existing costlier loans with low cost new loans. In accordance with this regulatory mandate, the Appellant had used proceeds of 9.75% Bonds issue to replace costlier PFC loans, which resulted in a saving of Rs.442.48 lakhs. All of this saving was passed on to the customer of the Appellant.
- (g) that as regards the claim for consideration of the repayment of normative debt is concerned, it may be appreciated that since in the computation of allowable interest on normative loan, a portion of such loan is considered as being repaid during the year and interest is not allowed on such cumulative normative repayment amount, failure to consider such repayment of the normative loan amount in the computation of AAD would result in double jeopardy. Therefore, the repayment of Rs.587.63 lakhs of the normative loan is needed to be considered in the computation of AAD.

6.2 **Per contra**, on this issue No. (B) relating to advance against depreciation, the following contentions have been made on behalf of the Respondent/State Commission:

- (a) that actual addition to debt up to the year 2012-13, since incorporation is much higher than addition to fixed assets during the aforesaid period, the question of normative loan as well as repayment of normative loan does not arise and, accordingly, no repayment against normative loan was considered for the computation of advance against depreciation in the impugned order on annual performance review of the Appellant for the year 2012-13.

- (b) that the Appellant, in the Form-C of the APR petition for the year 2012-13 indicated that 9.75% Bonds of Rs. 18,300 lakhs was drawn for the purpose of swapping of high cost PFC loan. Accordingly, the same was excluded from the total of repayment of loan in the APR order for the year 2009-10. Again, repayment of normative loan of Rs. 587.63 lakhs was not considered due to the aforesaid reasons.
- (c) that the Appellant also indicated in the Form C of the APR petition for the year 2009-10 that actual repayment of PFC loan was indicated for Rs. 198.93 crores during the year 2009-10. The State Commission, accordingly, considered actual repayment of Rs. 421.11 lakhs against the said PFC loan in paragraph 2.12.2 of the impugned order. Swaping of high cost PFC loan with outstanding balance of Rs. 225.95 lakhs at the beginning of the year with lower interest bearing 9.75% Bond was done during the year 2009-10. Since, the licensee had resorted to replace existing loan through swapping by new loan as per regulation 5.5.1 of the Tariff Regulations, 2011, such repayment of loan was not considered for the year 2009-10, while computing the actual repayment of loan for the purpose of advance against depreciation and similar practice was followed for the subsequent years except that for the year 2010-11.
- (d) that the disallowance of repayment of normative loan amounting to Rs. 587.63 lakhs was made, such repayment was not considered while computing advance against depreciation.
- (e) that as per Regulation 5.5.2 of the Tariff Regulations, 2011, the admissible amount of loan repayment amounting to Rs.11,635.36 lakhs is lower than the admitted amount of depreciation of Rs. 13,749.37 lakhs for the year 2012-13 as indicated under para 2.12.4 of the impugned order.

6.3 **Our consideration and conclusion on this issue No.(B):**

6.3.1 Since, we have cited above the rival contentions made by the parties on this issue No. (B) relating to advance against depreciation, we do not think it necessary to repeat the same here again. Now, we proceed directly to the issue requiring our consideration. Regulation 5.5.2 of the Tariff Regulations, 2011 clearly provides that if the actual amount of admissible depreciation for a year falls short of the actual amount of loan repayment for that year, such shortfall shall be allowed as an advance against depreciation (AAD). The Appellant, resorting to Regulation 5.5.2, had claimed an amount of Rs.302.79 lakhs as AAD for FY 2012-13 as the difference between the total repayments of borrowings and the admissible depreciation allowance for the year 2012-13. The State Commission, by citing reasons in para 2.12.2 of the impugned order, has disallowed the said claim of the Appellant for advance against depreciation clearly tabulating the actual amounts repaid against different borrowings made by the Appellant.

6.3.2 The main contention of the Appellant on this issue is that the State Commission has wrongly omitted there-from repayment of Rs. 1830 lakhs made of the 9.75% Bonds of Rs. 18,300 lakhs while arriving at the total amount of borrowings repaid during the year, on the ground that the said amount was utilized by the Appellant for swapping/refinancing of loan excluded repayment of normative loan of Rs. 587.63 lakhs. Further contention of the Appellant on this issue is that the proceeds of the 9.75% Bonds of Rs.18,300 lakhs, issued in the year 2009, was fully utilized for repayment of high cost borrowings from Power Finance Corporation Ltd. (PFC) and since such repayment of loan from PFC having been refinanced out of the proceeds of 9.75% Bonds issue, such repayment of PFC loan was not considered by the State Commission for the purpose of arriving at the eligibility for advance against depreciation during the relevant year i.e. in FY 2009-10. Further, since, all repayments as per the loan terms are allowable as per Regulation 5.5.1 of the Tariff Regulations, 2011 and repayment of the refinanced PFC loan had not been considered in arriving

at the AAD claim for 2009-10, exclusion of the repayment of the 9.75% Bonds from 2010-11 onwards will result in denial of the legitimate right of the Appellant, even though particularly the benefit of lower interest outgo on the refinanced loan was being passed on to the transmission system user.

6.3.3 On our careful and deep consideration of the contentions of the Appellant on this issue, we find no merit in the said contentions of the Appellant because the actual addition to debt up to the year 2012-13, since incorporation is much higher than addition to fixed assets during the said period, the question of normative loan as well as repayment of normative loan does not arise here. The State Commission has not committed any illegality in not considering repayment against normative loan for computation of advance against depreciation in the impugned order. Further, the Appellant in Form C of the APR petition for the year 2012-13 had indicated that 9.75% Bonds of Rs. 18,300 lakhs was drawn for the purpose of swapping of high cost PFC loan, the same was excluded from the total of repayment of loan in the APR order for the year 2009-10. We note that the State Commission has rightly considered actual repayment of Rs. 421.11 lakhs against the said PFC loan in paragraph 2.12.2 of the impugned order. Swapping of high cost PFC loan with outstanding balance of Rs. 225.95 lakhs at the beginning of the year with lower interest bearing 9.75% Bond was done during the year 2009-10. We further hold that as per Regulation 5.5.2 of the Tariff Regulations, 2011, the admissible amount of loan repayment amounting to Rs. 11,635.36 lakhs is lower than the admitted amount of depreciation of Rs. 13,749.37 lakhs for the year 2012-13, which has been properly and correct explained in paragraph 2.12.4 of the impugned order passed in APR petition of the Appellant for the year 2012-13. **In view of the above discussions, we agree to the findings recorded by the State Commission in the impugned order on this issue and this issue No. (B) is, accordingly, decided against the Appellant.**

7. **Issue (C) : Disallowance of Interest Credit:**

7.1 On this issue, the following submissions have been made on behalf of the Appellant/petitioner:

- (a) that the State Commission has wrongly deducted from the Gross Revenue Requirement, an Interest Credit of Rs.206.12 lakhs on alleged excess of depreciation charge for the year over the loan repayment obligation for the year.
- (b) that in paragraph 2.13.1 of the impugned order, the State Commission has concluded that since the amount of loan repayment of Rs.11,635.36 lakhs made during the year 2012-13 fell short of the admissible depreciation of Rs.13,749.37 lakhs, therefore, there was an excess of depreciation over loan repayment of Rs.2,114.01 lakhs on which interest at the weighted average rate of 9.75% was chargeable and adjustable as 'interest credit' against the APR for the year as per the provisions of Regulation 5.5.3 of the Tariff Regulations, 2011. The State Commission accordingly set off an interest credit amounting to Rs.206.12 lakhs from the revised Revenue Requirement for the year.
- (c) that the State Commission, while arriving at the total repayments during the year 2012-13 has failed to consider the repayment of 9.75% Bonds of Rs.1,830 lakhs and repayment of normative loan of Rs.587.63 lakhs as the total repayment amount. Had the correct repayment figure of Rs.14,052.99 lakhs been considered by the State Commission, it would be seen that the depreciation charge for the year of Rs.13,749.37 lakhs fell short of the repayment obligation by Rs.303.62 lakhs. Thus, there can be no question of application of the provisions of Regulations 5.5.3 of the Tariff Regulations, 2011 in the present case and the interest credit of Rs.206.12 lakhs deducted from the revised Revenue Requirement is liable to be struck down.

7.2 **Per contra**, the main contention of the Respondent/State Commission on this issue No. (C) relating to disallowance of interest credit is that since the admissible repayment of loan during the year 2012-13 was less than the amount of depreciation for the year 2012-13, the amount of interest credit of Rs.206.12 lakhs was considered and deducted from the gross aggregate revenue requirement of the Appellant in the APR for the year 2012-13 in terms of regulation 5.5.3 of the Tariff Regulations, 2011 by the State Commission. The computation of interest credit was shown in the impugned order by the State Commission, and so any claim of set off by the Appellant towards interest credit for the year 2012-13 does not arise.

7.3 **Our consideration and conclusion on this issue No.(C):**

7.3.1 Without adverting to the rival contentions of the parties, we directly deal with this issue No. (C) relating to disallowance of interest credit. According to the Appellant, the State Commission has wrongly deducted from the Gross Revenue Requirement, an Interest Credit of Rs.206.12 lakhs on alleged excess of depreciation charge for the year 2012-13 over the loan repayment obligation in that year. The State Commission, in the impugned order, in paragraph 2.13.1, has concluded that since the amount of loan repayment of Rs.11,635.36 lakhs made during the year 2012-13 fell short of the admissible depreciation of Rs.13,749.37 lakhs, therefore, there was an excess of depreciation over loan repayment of Rs.2,114.01 lakhs on which interest at the weighted average rate of 9.75% was chargeable and adjustable as interest credit against the APR for the year as per the provisions of Regulation 5.5.3 of the Tariff Regulations, 2011. The State Commission, accordingly, set off an interest credit amounting to Rs.206.12 lakhs from the revised Revenue Requirement of the Appellant for FY 2012-13.

7.3.2 The main grievance of the Appellant on this issue is that the State Commission, while arriving at the total repayments during the year 2012-13 has wrongly omitted the repayment of Rs. 1830 lakhs made of 9.75% Bonds of Rs.18,300 lakhs and excluded repayment of normative

loan of Rs.587.63 lakhs. Had the correct repayment figure of Rs.14,052.99 lakhs been considered by the State Commission, the depreciation charge for the year 2012-13 of Rs.13,749.37 lakhs fell short of the repayment obligation by Rs.303.62 lakhs. In the said circumstances, Regulation 5.5.3 of the Tariff Regulations, 2011 has no applicability. We have considered the said contention of the Appellant on this issue in the light of Regulation 5.5.3 of the Tariff Regulations, 2011, but we do not find any merit in the said contention of the Appellant on this issue. We hold that since the admissible repayment of loan during the year 2012-13 was less than the amount of depreciation for the year 2012-13, the amount of interest credit of Rs. 206.12 lakhs has correctly and legally been deducted from the gross aggregate revenue requirement of the Appellant in the APR for the year 2012-13 in terms of Regulation 5.5.3 of the Tariff Regulations, 2011. **In view of the above discussions, this issue No. (C) is also decided against the Appellant.**

8. Since, all the issues have been decided against the Appellant, the instant Appeal, being Appeal No. 237 of 2014, is liable to be dismissed.

ORDER

The present Appeal, being Appeal No. 237 of 2014, is hereby dismissed and the impugned order, dated 10.6.2014, passed in Case No. APR-37/13-14, by the State Commission is hereby affirmed. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 23RD DAY OF NOVEMBER, 2015.

**(T. Munikrishnaiah)
Technical Member**

**(Justice Surendra Kumar)
Judicial Member**

√ REPORTABLE/NON-REPORTABLE

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