Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 262 of 2014

Dated: 14th January, 2016

Present: **HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**
HON'BLE MR. T. MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

Punjab State Transmission Corporation Ltd.
PSEB Head Office
The Mall, Patiala – 147 001
Punjab. **... Appellant/Petitioner**

Versus

1. **Punjab State Electricity Regulatory Commission**
SCO No. 220-221, Sector-34-A,
Chandigarh – 160 022.

2. **Punjab State Power Corporation Limited**
The Mall, Patiala – 147 001
Punjab. **... Respondent(s)**

Counsel for the Appellant(s) : Mr. M. G. Ramachandran,
Mr. Avinash Menon,
Mr. Shubham Arya,
Ms. Anushree Bardhan,
Ms. Poorva Saigal and
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s) : Mr. Sakesh Kumar, Adv.
Mr. B. S. Kamboj, Registrar and
Mr. Maninder Singh, Jt. Director/PSERC

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

This is an appeal under section 111 of the Electricity Act, 2003 by the appellant, a transmission licensee, against the orders dated 22.08.2014 and 05.09.2014 passed by the Punjab State Electricity Regulatory Commission (hereinafter referred to as the "***State Commission***") in Petition No. 62 of 2013 and 30 of 2014, respectively.

02) The State Commission vide the first Impugned order dated 22.08.2014 passed in Petition No. 62 of 2013 has, while approving the Annual Revenue Requirement (hereinafter referred to as the “***ARR***”) of the appellant for the year 2014-15 and determination of Tariff for FY 2014-15, reviewed the ARR estimates for 2013-14 and audited data for FY 2011-12 and 2010-11 for final truing up, has disallowed the costs and expenses of the appellant contrary to the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 (hereinafter referred to as “***the Tariff Regulations 2005***”) notified by the State Commission.

03) The State Commission, vide the second Impugned Order dated 05.09.2014 passed in Petition No. 30 of 2014 has disallowed the claim of the appellant for pass through of substantial part of the Minimum Alternate Tax (MAT) paid by Punjab State Transmission Corporation Limited (PSTCL) (appellant herein) during Financial Year 2013-14 in the ARR for FY 2014-15 pursuant to Regulation 32 read with Regulation 45 of the Tariff Regulations 2005 and its subsequent amendments.

04) Following are the grievances of the appellant in this appeal:

(i) Wrongful reduction, on the basis of actual expenditure, in the true up proceedings of Operation and Maintenance Expenses (O&M) for the FY 2010-11 and FY 2011-12:

According to the appellant, in the Impugned Order dated 22.08.2014, while truing up for the financials of FY 2010-11 and 2011-12, the State Commission had deviated from the normative O&M expenses allowed in the main tariff order as per the Tariff Regulations and restricted such O&M expenses to actual. The State Commission cannot act contrary to the statutory Regulations which provide for normative O&M expenses and not normative or actual O&M expenses, whichever is lower. The State Commission has not considered Operational & Maintenance Expenses relating to Employee cost, R&M expenses and A&G expenses correctly. While truing up the financials of the year 2010-11 and 2011-12, the O&M expenses have been reduced by the State

Commission on the basis of actual expenditure incurred by the appellant. Once O&M expenses fixed on normative basis and allowed in the main tariff orders for the FY 2010-11 and 2011-12, the State Commission cannot change the methodology at the truing up stage to reduce O&M expenses relating to Employees Cost, R&M Cost and A&G Cost for FY 2010-11 and 2011-12. Thus the State Commission committed an error in adopting the principle of normative or actual, whichever is lower, at the time of truing up.

(ii) Tax on income:

According to the appellant, the State Commission has restricted tax on income to tax on Return on Equity applicable for a particular year without taking into account the impact of increase and decrease in the cost or carrying forward of the revenue gap upto FY 2012-13 along with the carrying cost related to previous years on the taxable income of the year under review. Thus the State Commission had not considered the tax paid/payable on income in excess of tax on Return on Equity of a particular year. The State Commission has also failed to appreciate that the actual net revenue i.e., taxable income of a particular financial year gets reduced by reason of review/truing up in the subsequent years, resulting in less net revenues, not only on account of the financials pertaining to subsequent years but also on account of adjustment of the revenue surplus of the previous years. As a result thereof, the implication of the taxes paid on the estimated net revenue in the previous years will be more and the actual taxes paid in the subsequent years will be less. However, for the purpose of tariff, the tariff reimbursement is limited to tax calculated on the equity investment. Accordingly, when there are adjustments in the tariff determination process for revenues and expenditures as well as revenue surplus/gap of any particular year, in other year or years, the State Commission should consider the reimbursement of taxes on the notionally determined tax payable, if there was no such adjustment for other years. Thus, the State Commission ought to have considered the tax reimbursement to the appellant cumulatively for the FY 2010-11 to 2013-14. In the present case, the State Commission had not accepted the claim of the appellant to reduce the revenue flow to the appellant by directing PSPCL to not pay the

charges, as stated in the Petition filed by the appellant for the determination of tariff.

(iii) Additional Capitalization Employees Cost on New Installations:

(a) In the Impugned Order, the State Commission had not allowed additional capitalization for FY 2014-15 on the ground that it will be considered at the time of review next year. The State Commission had not considered requirement of employees for Operation and Maintenance of the new installations established by the appellant during the FY 2013-14 and 2014-15. Though the State Commission had duly allowed the R&M expenses and A&G expenses in regard to the above new installation during the FY 2013-14 but it has not allowed the same for FY 2014-15 on the sole ground that the same shall be considered at the time of review of next year when more accurate figures of asset addition are available. There is no justification for not allowing the O&M cost additionally in regard to the new installations to be maintained and operated by the appellant which is permissible under the Tariff Regulations, 2005. The State Commission wrongly proceeded on the basis that the appellant failed to submit the O&M expenses at the relevant time and the O&M expenses submitted by the appellant for the financial year 2014-15 was not based on the true up of the financial year 2011-12 and there was, therefore no necessity for giving details of such expenses. In any event, it is always open to the State Commission to call for any details required by it for applying prudent check and then the appellant would have furnished the same. Further, the admissibility of such a claim cannot be denied on the basis that it encourages inefficiency or it leads to lack of economic use of resources or interest of the consumer is not safeguarded.

(b) Additional capitalization of employee cost of new installation is very much admissible under the Tariff Regulations 2005. Such additional cost ought to have been allowed on projected basis, particularly, in the context of such employees cost is to be allowed on the normative basis under the Tariff Regulations. The State Commission ought not to have deferred the consideration of such additional costs, till true up because the appellant has to

have appropriate cash flow to meet the expenses in the operation and maintenance of the transmission system. The appellant will undoubtedly suffer, irreparably, if such legitimate expenses incurred by the appellant and to which the appellant is entitled in terms of the Electricity Act, 2003 are deferred to be considered only after a period of time. The revenue gap in the current year will increase and will have a serious impact on the financial viability of the appellant.

(iv) Depreciation on additional installation:

(a) The State Commission has not considered that the disallowance of depreciation on additional installation during the FY 2013-14 will have a consequential effect on the financials of the FY 2014-15 as the appellant will be placed in a precarious situation of not being able to service the repayment of debt for FY 2013-14.

(b) In the Impugned Order dated 22.08.2014, while reviewing the ARR estimates of the financials of the FY 2013-14, the State Commission has not considered the depreciation on additional installation during FY 2013-14 and 2014-15. The State Commission has simply deferred depreciation on additional installation during the FY 2013-14 on the simplicitor ground that the appellant had not submitted Audited Annual Accounts for the year 2012-13.

(c) The State Commission ought to have considered the claim of the appellant based on the statement made of the expenditure incurred and capitalized even pending the finalization and placing the Audited Accounts. The servicing of the capital assets put to use through the tariff element of depreciation ought not to have been postponed for non-availability of audited accounts.

(v) Interest on Loan:

(a) The State Commission has not considered the changes in the actual loan taken by the appellant from the year 2012-13 to 2014-15 as well as expected loan to be taken during the FY 2014-15 on the simplicitor ground that the appellant had not filed the final true up for FY 2012-13. Irrespective of the true up

Petition being filed, the actual loan with particulars from the bank were available and the State Commission ought to have considered the changes.

(b) The State Commission has artificially reduced the loan amount as on 01.04.2013 from Rs.3097.12 crores (excluding GPF loan) to Rs.2267.97 crores (excluding GPF loan) whereas in its true up order for the FY 2011-12, the State Commission itself had determined the loan amount as Rs.2338.80 crores (excluding GPF loan) as on 31.03.2012. The State Commission ought to have considered that the reduction in the loan amount will have an adverse financial impact on the financials for the year 2014-15 as well.

(c) That both the claims relating to depreciation of additional installation and interest on loan have wrongfully been deferred by the State Commission. The State Commission ought to have considered the same instead of deferring the claims on account of non-availability of annual audited accounts for the FY 2012-13 and ought to have allowed all such legitimate expenses, as claimed by the appellant, subject to adjustment at the time of true up instead of deferring the entire amount.

(vi) Investment plan for Transmission Business:

(a) In the Impugned Order dated 22.08.2014 while reviewing the ARR estimates of the financials of the year 2013-14, the State Commission has not considered the projected investment as submitted by the appellant and has substantially reduced the same.

(b) The State Commission has prorated the expenditure incurred up to November 2013 without considering the fact that the project work normally picks up after November. This approach of the State Commission has resulted in substantial reduction of projected investment. The investment made during the FY 2013-14 is about Rs.780 crores.

(c) That the State Commission has substantially reduced the projected investment related to strengthening of transmission system. The appellant had duly

placed the details of the actual/projected investments made/to be made during the FY 2013-14 which subject to some marginal adjustments would clearly be the investment required to be serviced in the tariff. The State Commission ought to have considered at least 85% of such investment for the purpose of transmission system strengthening with the principles adopted by the Central Commission for provisional tariff.

(d) That the appellant had projected the investment based on its bonafide assessment. It was never the intention of the appellant to project initially higher investment. The appellant had projected Rs.1100 crores for the ARR for the FY 2012-13, which was revised by the appellant to Rs.1069 crores in the ARR Petition of FY 2013-14. The State Commission reviewed it to only Rs.800 crores. However, as per the audited accounts of FY 2012-13, the expenditure was Rs.865 crores which is near to the revised figures submitted by the appellant. Similarly for the FY 2013-14 the appellant projected Rs.990 crores and revised it to Rs.851 crores in its ARR of 2014-15. However, the State Commission has reviewed it to Rs.450 crores, whereas, as per the provisional accounts available this figure comes to around Rs.800 crores.

(e) Thus the appellant had not in any manner envisaged the concocted investment but the estimations were based on the transmission system requirement and the field circumstances. However, while execution, the appellant faced difficulties and hurdles like Right Of Way (ROW) problem, law and order problem etc.

(vii) Carrying Cost:

(a) That the carrying cost allowed by the State Commission in the Impugned Order is not compensatory as it is limited to simple interest, while the appellant is paying carrying cost with monthly rest. Further the State Commission has not computed the carrying cost for FY 2014-15, correctly and has wrongly passed on the impact of carrying cost of Rs.39.05 crores to the Government of Punjab.

(b) That the State Commission has not calculated the carrying cost fully based on the expenditure actually to be incurred by way of interest payment to the lenders and has instead, limited such allowance to simple interest.

(c) That the State Commission has computed the carrying cost without considering the real effect net of taxes and expenses. The non consideration of the effect of taxes and expenses while computing carrying cost is inequitable and does not provide the carrying cost implication to the appellant.

(d) That the State Commission has assumed the recovery of carrying cost of Rs.39.05 crores from the Government of Punjab on the premise that the appellant was unable to furnish Audited Accounts for FY 2010-11 for true up in time i.e. for the true up of FY 2012-13, due to the late finalization of opening balance sheet of the appellant by the Government of Punjab. Since the finalization of balance sheet under the provisions of transfer scheme in pursuant to the re-organization of the Punjab State Electricity Board is the prerogative of the State Government and is not open to the State Commission to question the same or disallow the expenditure resulting from such re-organization.

(e) That the Government of Punjab vide its letter dated 18.02.2014 to the State Commission clearly took the decision that it is not liable to meet the carrying cost and the delay in the notification of the opening balance sheet on 24.12.2012 has not burdened the consumers who have the benefit of lower ARR (tariff) for financial year 2010-11 and 2011-12. Therefore, the revenue gap as determined by the State Commission ought to be allowed to be recovered through tariff along with carrying cost. In the absence of any commitment from the State Government, the appellant can recover the carrying cost only in the tariff.

(f) That the State Commission ought to have considered the matter as per the provisions of the Electricity Act and ought not to have directed the appellant to recover the money from the Government of Punjab as held by this Appellate

Tribunal in its judgment dated 13.09.2012 in Appeal No. 202 and 203 of 2010 in the matter of *Reliance Infrastructure Limited Vs. The Maharashtra Electricity Regulatory Commission,* in Appeal No. 173 of 2009 in *Tata Power Company Limited Vs. The Maharashtra Electricity Regulatory Commission* and also in *Delhi Electricity Regulatory Commission Vs. BSES Yamuna Power Limited and Others reported in (2007) 3 SCC 33.*

(viii) Progressive Funding:

(a) That the State Commission has not considered the progressive funding of the terminal benefit trusts while determining the ARR estimates for the FY 2014-15.

(b) That the State Commission failed to appreciate that the expenditure on funding the unfunded past liabilities of pension etc. is mandatory and pursuant to statutory requirement. Therefore, it ought not to have disallowed for FY 2014-15, the claim of the appellant towards progressing funding of unfunded past liability of pension and gratuity assigned to the appellant in accordance with the transfer scheme.

(c) That the said claim has wrongly been rejected by the Commission on the premise that it was not reflected in the opening balance sheet of the successor entity because under clause 6(8) of the transfer scheme, the State Government assumed the responsibility for funding of trusts and that there could not be any charge on the tariff in view of the specific provisions of Regulation 33 of the Tariff Regulations 2005, which being in the nature of subordinate legislation, cannot be over ruled or abrogated by the transfer scheme.

(d) That the State Commission has wrongly rejected the claim on the basis that debiting these unfunded past liabilities in the profit and loss account would be in contravention of accounting standard 5.

(ix) Minimum Alternate Tax (MAT):

(a) The State Commission while disallowing the claim of the appellant for pass through of entire Minimum Alternate Tax paid by the appellant during FY 2013-14 in the ARR for FY 2014-15, vide the second Impugned Order dated 05.09.2014 has not considered the fact that the appellant had to pay tax more than the tax on return on equity due to generation of additional revenue but there is no provision for submission of revised return on MAT in the Income Tax Act. For claiming refund of MAT already paid on the basis that excess revenue will be adjusted by the State Commission in the subsequent years.

b) That the claim of the appellant for pass through of the entire tax (MAT) paid by it should have been allowed in exercise of the power to relax/remove difficulties under Regulation 45 of the Tariff Regulations 2005, particularly, as the cash flow of the appellant will be adversely affected because the State Commission had adjusted the entire revenue surplus of FY 2013-14 together with the cost of holding such surplus without considering the tax paid on such surplus amount.

(c) That when the State Commission provides for revenues and expenditure on estimate basis and actual revenue is more or the expenditure is less, the appellant is required to pay taxes on the actual net revenue i.e., taxable income but in realty such excess income gets adjusted in the subsequent year depressing the income and consequently taxes payable in the subsequent year. However, the tax reimbursement is being allowed calculated in the normative rate specified in the Tariff Regulations. Accordingly when the taxable income is more the appellant has to pay higher Income Tax but gets pass through in the tariff lesser tax amount restricted to return on equity and when the surplus is adjusted in the future years the appellant pays less tax to the Income Tax authorities and tax allowed to be a pass through in the tariff is restricted to actual tax paid. The element of the financials of the previous year impacts the financials of the subsequent years. There is no provision in the Income Tax Act of adjusting the tax payable giving effect to such adjustment of revenues or financials of one year in the subsequent years for the computation of tax payable. Logically in such an event where the Income Tax Authorities had not

recognized such retrospective adjustments and the taxes paid, the State Commission ought to have considered the taxes on Return on Equity to be allowed on a cumulative basis, namely, considering the impact on all years of such adjustment i.e. in the present case from 2010-11 onwards till 2013-14 and allow the taxes to the said extent.

(x) Interest on working capital:

That the State Commission has wrongly calculated interest on working capital to be allowed to the appellant. The State Commission had determined the interest on working capital at 6.77% in case of State Load Despatch Centre (SLDC) which is a way below the applicable SBI rate. The appellant had filed another appeal, being Appeal No.259 of 2013 on the same issue of determination of interest on working capital (applicable for earlier years), which appeal had been decided by this Appellate Tribunal by judgment dated 26.11.2014. The said issue is covered by the judgment dated 26.11.2014 of this Appellate Tribunal and should be decided in favour of the appellant.

05) We have cited above the grievances of the appellant with relevant facts. The appellant herein is the State Transmission licensee, the respondent No.1 is the State Regulatory Commission which is the authority empowered to discharge various functions as per the Electricity Act 2003 and respondent No.2 is the distribution licensee and is also engaged in the business of generation in the State of Punjab.

06) Till 16.04.2010 Punjab State Electricity Board (PSEB) was undertaking the functions of generation, transmission, distribution and retail supply of electricity as integrated utility. The PSEB was unbundled to form two successor entities, namely, Punjab State Power Corporation Ltd., Respondent No.2 and the appellant, Punjab State Transmission Corporation Ltd., herein under the Punjab Power Sector Reforms Transfer Scheme, 2010 w.e.f. 16.04.2010. As per this Statutory Transfer Scheme, the transfer of assets and liabilities was provisional, subject to alteration and amendments and would be final upon expiry of 12 months from the date of transfer or 6 months after the

audited accounts as on the effective date of transfer are available, whichever is later. The State transfer scheme was subsequently amended by the State Government on 24.12.2012 through a scheme called the Punjab Power Sector Reforms Transfer (1st amendment scheme) 2012, which contained the opening balance sheet of appellant as on 16.04.2010. Thus respondent No.2 is a beneficiary of the services rendered through the transfer system of the appellant.

07) That the appellant filed a Petition on 29.11.2013, being Petition No. 62 of 2013 before the State Commission, for approval of Annual Revenue Requirement (ARR) and determination of Tariff for FY 2014-15, revised ARR estimates for 2013-14 and audited data for FY 2011-12 and 2010-11 for final truing up. The State Commission has disposed or decided the Petition No.62 of 2013 by order dated 22.08.2014.

08) That the appellant filed a Petition/Application being Case No. 30 of 2014 on 19.05.2014 before the State Commission for pass through of entire Minimum Alternate Tax (MAT) paid by the Appellant during FY 2013-14 in the ARR for FY 2014-15 pursuant to Regulation 32 read with Regulation 45 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 and its subsequent amendments. The State Commission had decided the Case No.30 of 2014 by order dated 05.09.2014. The said petition was filed in the peculiar circumstances of the need to consider and adjust the consequences of difference in the liability to pay Minimum Alternate Tax (MAT) under the Income Tax Act based on taxable revenue accrued in the year irrespective of whether such revenue pertains to a different year for the purpose of tariff determination under the Electricity Act, 2003. In the tariff determination process the State Commission determines the Revenue Requirements and tariff design at the beginning of a financial year based on estimates of expected expenditure, expected sales etc. without the knowledge of how the financials would actually be. There are also implications of the Revenue Surplus/Gap of a financial year getting adjusted in the other financial years in the tariff determination process whereas for the purposes of

taxes under the Income Tax Act such revenues are computed on accrual basis without the implication of surplus or gap not affecting such computation and payment of taxes. The Appellant therefore claimed appropriate adjustments for the above in the determination of taxes on return on equity to be allowed as a tariff element.

09) We have heard Mr. M. G. Ramachandran learned counsel for the appellant and Mr. Sakesh Kumar learned counsel for the respondent/Commission. We have also gone through the written submissions and also gone through the material on record, including the Impugned Orders passed by the State Commission.

10) Now we deal with the point-wise grievances/issues raised by the appellant:

<u>Reduction of O&M expenses on the basis of actual expenditure:</u>

(a) The first grievance of the appellant is that the State Commission had deviated from the normative O&M expenses allowed in the main tariff order as per the Tariff Regulations and restricted such O&M expenses to actual in the Impugned Order dated 22.08.2014 while truing up financials of FY 2010-11 and 2011-12. According to the appellant, the State Commission cannot act contrary to the statutory regulations which provide for normative O&M expenses and not normative or actual O&M expenses whichever is lower. Further the State Commission has failed to consider the O&M expenses relating to Employee Cost, Repair and Maintenance and Administrative and General Expenses correctly while truing up financials of FY 2010-11 and 2011-12. The O&M expenses have wrongly been reduced by the Commission on the basis of actual expenditure incurred by the appellant because once O&M expense is fixed on normative basis and allowed in the main tariff order, the State Commission cannot change the methodology at the truing up stage to reduce O&M expenses relating to employee cost, R&M cost and A&G cost for the FY 2010-11 and 2011-12.

(b) The main thrust of the arguments by the appellant on this issue is that the State Commission had committed an error in adopting the principle of

normative O&M expenses or actual expenditure, whichever is lower, at the time of truing up.

(11) Against the above contention of the appellant on this issue, the learned State Commission has urged as under:

(a) *That the Regulation 28 of Punjab State Electricity Regulatory Commission (Terms and Conditions of Tariff Determination) Regulations 2005 deals with the operation and maintenance expenses.* The word '*normative*' as claimed by the appellant/petitioner has neither been prescribed in original Regulation 28 of Tariff Regulations 2005 nor in its first amendment dated 27th July 2009 or second amendment dated 17.09.2012. It is clear from the perusal of Regulation 28, clause 3(a)(ii), as amended by first and second amendment, that "the other employee expenses" under sub-head shall be limited to the increase in Whole Sale Price Index (all commodities). Thus the cost component of terminal benefits and BBMB expenses shall be allowed on actual basis and increase in all other expenses under different sub-heads shall be limited to increase in Whole Sale Price Index (all commodities) as per clause 2(b) of Regulation 28. Thus the meaning of '*limited to the increase in WPI (all commodities)'* can easily be interpreted as incurred should either be for WPI or the actual, 'Other employee cost' whichever is lower. Similarly, the O&M expenses (except Employee cost) for transmission licensee is to be allowed as the provisions of clause 2(b) of Regulation 28 which states that based on O&M expenses (except Employee cost) shall be adjusted according to variation in the average rate (on monthly basis) of WPI (all commodities) over the year to determine the O&M expenses for subsequent years.

(b) The word '*adjusted*' in Regulation 28 clearly shows that the O&M expense (other than Employee Cost) is to be restricted/limited to increase in the Whole Sale Price Index and have the same implication and interpretation which is considered for 'other employee cost'. Further, as per Section 61(a) to (i) of the Electricity Act, 2003, the appropriate Commission has to specify the terms and conditions for the determination of tariff and in doing so it has to be guided by

the provisions of Section 61(a) to (i). Section 61(c) and (d) of the Electricity Act, 2003 states as under:

> "*(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
>
> *(d) 'safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner."*

(c) Thus the State Commission has to be guided by safeguarding of consumers' interest and at the same time, recovery of cost of electricity in a reasonable manner. Also it has to be guided by the fact that it has to encourage efficiency and economic use of resources and to ensure this the Commission has to restrict these expenses in the interest of the consumers.

12) **<u>Our consideration and conclusion on this issue:</u>**

Regulation 10 of the Tariff Regulations 2005 provides as under:

> "***10. EXCESS OR UNDER RECOVERY WITH RESPECT TO NORMS AND TARGETS***
>
> ***i)*** *The generating company or the licensee, as the case may be, shall retain the entire gain arising from over achievement of the norms laid down by the Commission in these Regulations or targets set by the Commission from time to time.*
>
> ***ii)*** *The generating company or the licensee, as the case may be, shall bear the entire losses on account of its failure to achieve the norms laid down by the Commission or targets set by the Commission from time to time."*

(a) The perusal of this Regulation 10 makes it abundantly clear that this Regulation 10 only deals with excess or under-recovery with respect to norms and targets and it does not specifically provide for the manner in which under-achievement and over-achievement of the normative parameters are to be adjusted. It merely provides that the generating company or the licensee shall retain the entire gain arising from over-achievement of the norms laid down by the Commission in these Regulations or the targets set by the Commission

from time to time. The generating company of the licensee shall bear the entire losses on account of its failure to achieve such norms laid down by the Commission or targets set by the Commission from time to time.

(b) The Commission followed Regulation 28 of the State Regulations 2005 and it provides for A&G expenses for the previous years according to average variation in WPI over the year to determine the O&M expenses for the subsequent year. The Commission adhered to the principle of consideration of actual cost while the appellant claimed normative consideration. The plea of the appellant PSTCL, a transmission licensee in the State of Punjab was that once normative approach has been adopted by the Commission there cannot be any further adjustments on the basis of actual expenses on account of it being less because when the State Tariff Regulations 2005 make the provision on this issue, no different norm does call for any consideration. In those circumstances this Appellate Tribunal held that since the true up for the relevant period is yet to come the Commission will have a relook into the matter according to the Regulation in vogue, thus proposition of law laid down by this Appellate Tribunal in judgment dated 18.10.2012 does not squarely apply to the matter in hand on the issue before us. In the matter of *Haryana Power Generation Corporation Ltd. Vs. Haryana Electricity Regulatory Commission* this Appellate Tribunal in judgment dated 31.07.2009 had observed that it is true that the consumer should not be burdened with un-necessary costs, but the same is equally applicable to the appellant, a power generating company when it is denied recovery of costs incurred by it if the same is not in line with the norms. This Appellate Tribunal while passing judgment dated 14.11.2006 in the matter of *NTPC Vs. CERC* was dealing with the normative debt equity ratio of 50:50 hence the proposition of law laid down therein is not applicable to the issue before us.

(c) It appears from paragraph 2.4.3 of the Impugned Order that the appellant/petitioner in its ARR Petition for FY 2014-15 had claimed Rs.232.32 Crores on account of Employee Cost based on audited accounts for FY 2010-11. This includes Rs.129.96 crores on account of terminal benefits. The

learned State Commission in paragraph 2.4.4 of the Impugned order had stated as under:

> *"2.4.4. The provisions of the PSERC Tariff Regulations provide for determination of employee cost in two parts, as under:*
>
> - *Terminal benefits on actual basis*
> - *Increase in other expense limited to average increase in WPI*
>
> *PSTCL has claimed terminal benefits of Rs.129.96 crore based on the Audited Accounts and in line with amended Transfer Scheme notified by Govt. Of Punjab vide Notification dated 24.12.2012.*
>
> *Since terminal benefits are to be allowed on actual basis as per PSERC Tariff Regulation 28(8), the Commission allows terminal benefits of Rs.129.96 crore for FY 2010-11 to PSTCL for its Transmission and SLDC business."*

(d) The learned State Commission in paragraph 2.4.12 of the Impugned Order has approved the Employee Cost of Rs.232.32 crores (129.96 + 102.36) to the appellant for FY 2010-11 for transmission and SLDC business as per the actual expenses incurred and claimed by PSTCL (appellant herein). Thus the amount claimed in the ARR Petition for 2014-15 by the appellant on account of Employee Cost including the amount of Rs.129.96 crores on account of terminal benefits has been allowed. Thus the learned State Commission in the Tariff order for 2014-15 has allowed the O&M expenses for FY 2010-11 and 2011-12 as per the requirements of the appellant/petitioner after recording cogent and sufficient reasons. The State Commission in its tariff order had recorded the reasons for allowing O&M expenses as given below:

> *"Actual employee cost, Repair & Maintenance expenses and Administrative & General expenses for FY 2010-11 was Rs.232.32 crore, Rs.16.33 crore and Rs.10.70 crore against increased amount by WPI Rs.248.92 crore, Rs.51.89 crore and Rs.11.94 crore respectively. The Commission had re-determined the base of O&M expenses in FY 2011-12 as per*

amended regulations. Accordingly, the Commission had re-determined the base of employee expenses as Rs.263.75 crore, R&M expenses as Rs.27.85 crore and A&G expenses as Rs.12.15 crore for FY 2011-12 and subsequent years. The O&M expenses as claimed by the petitioner in FY 2010-11 being more than base expenses of FY 2011-12 in the same Tariff Order neither seems to be logical nor in the interest of consumers."

(e) The claim of the appellant was Rs.232.32 crores and the same was granted. The appellant PSTCL never intended to invoke CERC Regulations but actual. In fact, the appellant contradicts its own stand by asking for normative.

(f) This Appellate Tribunal in judgment dated 04.12.2007 in Appeal No. 100 of 2007 in the matter of *Karnataka Power Transmission Company Limited Vs. Karnataka Electricity Regulatory Commission & Ors.* in paragraph 29 thereof clearly noted that the Commission has been carrying out the truing up exercise on year to year basis but had not given effect to the results of such exercise during all these years and once the true up exercise has been carried out, the Commission is not permitted again to take up the true up exercise based on new assumptions. This Appellate Tribunal, in the matter of *North Delhi Power Limited Vs. Delhi Electricity Regulatory Commission & Ors.* reported at 2007 ELR (APTEL) 193 observed that while considering the tariff petition of the utility the Commission has to reasonably anticipate the revenue required by a particular utility and such assessment should be based on practical considerations. It cannot take arbitrary figures of increase over the previous period's expenditure by an arbitrarily chosen percentage and leave the actual adjustment to be done in the truing up exercise. The truing up exercise is mentioned to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence. In the said

ruling this Appellate Tribunal has tried to make the Commission understand the real concept of truing up.

(g) We are unable to accept this contention of the appellant that the State Commission in the truing up of O&M expenses for the FY 2010-11 and 2011-12 has given retrospective effect to the second amendment Regulation dated 17.09.2012 and more specifically Regulation 28 thereto.

(h) In the light of the above discussions, the contentions of the appellant on this issue do not have any merit, so this issue is decided against the appellant.

12) **Tax on income:**

(a) According to the appellant, the State Commission had not considered the tax paid/payable on income in excess of tax on return on equity of a particular year. Further, the State Commission has also not appreciated that the actual net revenue i.e. taxable income of a particular FY gets reduced by reason of revenue/truing up in the subsequent years, resulting in less net revenues, not on account of financials pertaining to subsequent years but also on account of adjustment of the revenue surplus of the previous years. The main thrust of the appellant on this issue is that the State Commission has restricted tax on income to tax on return on equity applicable for a particular year without taking into account the impact of increase and decrease in the cost or carrying forward of the revenue gap upto FY 2012-13 along with carrying cost related to previous years on the taxable income of the year under review. As a result thereof, the implications of tax paid on the estimated net revenue in the previous years will be more and the actual tax paid in the subsequent years will be less. However, for the purpose of the tariff, the tariff reimbursement is limited to tax calculated on equity investment. Thus when there are adjustments in the tariff determination process for revenue and expenditures for revenues as well as revenue from surplus/gap of any particular year, in other year or years, the State Commission should have considered the reimbursement of tax on the notionally determined tax payable, if there was no such reimbursement for other years. Hence, the State Commission ought to

have considered the tax reimbursement to the appellant cumulatively for the FY 2010-11 to 2013-14. According to the appellant as the State Commission do not allow the above claim, the appellant had to pay much higher tax i.e. Rs.47.13 crores and in the peculiar circumstances of the case, the Commission ought to have relaxed the effect of the Regulations and allowed such excess tax paid as reimbursement for 2013-14 because the regulatory asset or revenue gap of FY 2010-11 and 2011-12 will result in difference in income/revenue to the appellant in future and when such amounts are considered and allowed, the same will involve payment of corporate tax on such income at the relevant time. If the State Commission had allowed such amounts to be recovered without any gap in the respective years, the appellant would have paid tax on return on equity as there would have been profit in the business of the appellant and the appellant ought not to be deprived of such reimbursement of deferment of recovery of revenue gap. Further the State Commission ought to have directed relaxed tax amount being allowed as a pass through in the current year or as and when a gap is allowed to be recovered in future.

13) **Per contra**, the learned counsel for the State Commission has submitted as under:

(a) That the appellant has claimed the increase in the cost or carrying forward of the revenue gap upto 2012-13 along with carrying cost related to previous years for the revenue for 2013-14. The learned State Commission has however, limited the same to the return on equity applicable for a particular year in view of Regulation 32 of the State Tariff Regulations 2005. The Regulation 32 of the Tariff Regulations 2005 deals with tax on income. This Regulation clearly provides that tax on income, if actually liable to be paid, shall be limited to tax on return on equity allowed, excluding incentives.

14) <u>Our consideration and conclusion :</u>

(a) On giving our thoughtful consideration to the above contentions of the rival parties, we do not find any merit in the contentions of the appellant on this issue on tax on income because the appellant's claim of carrying forward of revenue gap after 2012-13 along with carrying cost related to previous years for

the review (2013-14) is not in line with Regulation 32 of the State Tariff Regulations 2005. Regulation 32 of the State Tariff Regulations provides as under:

"*32. TAX ON INCOME*

1. Obligatory taxes, if any, on the income of the generating company or the licensee from its core/licensed business shall be computed as an expense and shall be recovered from the customers/consumers.

   Provided that tax on any income other than the core/licensed business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or the licensee.

2. Tax on income, if actually liable to be paid, shall be limited to tax on return on equity allowed, excluding incentives.

3. The Tax on income shall be considered at income tax rate including surcharge, cess, etc. as applicable during the relevant year in accordance with the provisions of Income Tax Act, 1961 duly amended from time to time.

4. The benefits of tax holiday and the credit for carrying forward losses applicable as per the provisions of the Income Tax Act, 1961 shall be fully passed on to the customers/consumers."

(b) Thus a perusal of the Regulation 32 makes it clear that the tax on income if actually liable to be paid shall be limited to tax on return on equity allowed excluding incentives. This issue is accordingly decided against the appellant.

15) **Additional capitalization Employee Cost on new installations:**

(a) The learned State Commission in the Impugned Order had not allowed additional capitalization for 2014-15 on the ground that it will be considered at the time of review next year. According to the appellant the State Commission had not considered requirements of employees, for operation and maintenance of new installations established by the appellant during 2013-14 and 2014-15, though the Commission had duly allowed R&M expenses and A&G expenses in

regard to the above new installations during 2013-14 but had not allowed the same for 2014-15 just on the ground that the same shall be considered at the time of review next year when more accurate figures of asset addition would be available

(b) According to the appellant, the learned State Commission ought not to have deferred consideration of such additional cost till true up because the appellant has to have appropriate cash flow to meet the expenses in the O&M of the transmission system and the appellant will suffer irreparably if such legitimate expenses incurred by the appellant are not allowed and are simply deferred to be considered only at the time of true up.

16) **Per contra**, it has been submitted by the respondent Commission that based on the track record of the appellant, expenses on account of new installations have not been considered and same shall be considered at the time of true up because the projections are resulting into false book profit.

17) Our consideration and conclusion :

The learned State Commission has simply deferred the said claim of additional capitalization employee cost of new installations of the appellant for 2014-15 simply on the ground that the same will be considered at the time of review/true up next year. It is true that the State Commission had duly allowed R&M expenses and A&G expenses with regard to the above new installations during 2013-14 but has simply deferred the same for 2014-15. On careful consideration of the fact that the same shall be considered at the time of review of the next year when some accurate figures of asset addition would be available we are not inclined to accept this contention of the appellant that the State commission has wrongly proceeded on the basis that the appellant failed to submit the O&M expenses at the relevant time and R&M expenses submitted by the appellant for 2014-15 was not based on the true up of the FY 2011-12 and there was no necessity for giving details of such expenses. This said claim of the appellant has rightly been deferred on the basis that it encourages inefficiency or leads to lack of economic use of

resources or the interest of the consumers are not safeguarded. The said claim of the appellant has not been disallowed by the appellant in the Impugned Order but has simply been deferred till the true up of the next year when more accurate figures of asset addition would be available. Thus we do not find any merit in the contention of the appellant and the said issue is decided against the appellant.

18) **Depreciation on additional installation and Interest on loan:**

Since both these issues are interrelated they are being decided simultaneously.

(a) The main contention of the appellant on this issue, relating to depreciation on additional installation, is that it had deferred the claim of depreciation on additional installation during the FY 2013-14 on the simplicitor ground that the appellant had not submitted the audited annual accounts for the FY 2012-13. The State Commission should have considered the claim of the appellant based on the statement made of the expenditure incurred and capitalized even pending the finalization and placing the audited accounts because the servicing of the capital assets to be used through the tariff element of depreciation ought not to have been postponed/deferred for non-availability of audited accounts. This action of the State Commission namely, disallowing depreciation on additional installations during FY 2013-14 and 2014-15 has placed the appellant in a position of not being able to service the repayment of debt and thereby suffer the adverse consequential impact on the financials for the year 2014-15. Countering the said contention of the appellant, on this issue, the learned counsel for the State Commission has meekly submitted that the Commission has deferred the said claim of the appellant due to non-submission of audited annual accounts for FY 2012-13. In the absence of audited annual accounts for 2012-13 and sub-head-wise detail of asset the State Commission has rightly not considered the said claim due to addition of assets, added during FY 2013-14 and 2014-15. Moreover the track record of the company/appellant for non-completion of projects/works in the FY 2012-13 and 2013-14 creates a situation to pay a Minimum Alternate Tax (MAT) as explained in a detailed reply. Similarly, due to non-availability of audited annual accounts for FY 2012-13 the Commission has to consider loan amount

as on 01.04.2013 as Rs.2267.97 cores based on opening balance determined in tariff order for the FY 2013-14. Since the appellant has not provided any detail for repayment of loan during FY 2012-13, the State Commission had no alternative except to consider the opening balance as per review of 2012-13 in tariff order for 2013-14.

19) <u>Our consideration and conclusion on the issues relating to depreciation on additional installation and interest on loan:</u>

(a) On careful consideration of rival contentions, we do not find any merit in the contentions of the appellant on this issue because the Commission has not disallowed the said claim but has simply deferred the said claim due to non-submission of annual audited accounts for FY 2012-13 by the appellant and further in the absence of sub-head-wise detail of assets, the State Commission has not considered addition on assets added during FY 2013-14 and 2014-15. Further the non-completion of projects/works in FY 2012-13 and 2013-14 by the appellant has created a situation to pay the Minimum Alternate Tax and similarly due to non-availability of annual audited accounts for the FY 2012-13, the Commission had to consider loan amount as on 01.04.2013 as Rs.2267.97 crores based on opening balance determined in tariff order for FY 2013-14. Since the appellant has not provided any details for repayment for loan during 2012-13, the Commission had to consider the opening balance as per review of FY 2012-13 in the tariff order for 2013-14.

(b) Further we are unable to accept this contention of the appellant that the Commission has not properly considered the changes in the actual loan taken by the appellant from the year 2012-13 to 2014-15 as well as expected loan to be taken during FY 2014-15 on the ground that the appellant had not filed the final true up for the FY 2012-13.

We find that the learned State Commission has legally and rightly deferred both the claims of the appellant relating to depreciation of additional installation and interest on loan. Consequently, both these issues are decided against the appellant.

20) **Investment plan for transmission business:**

The main contention of the appellant on this issue is that the State Commission in the Impugned Order, has not considered the projected investment submitted by the appellant and has substantially reduced the same by pro-rating the expenditure included up to November, 2013 without considering the fact that the projected work begins after November and this approach of the State Commission has resulted in substantial reduction of projected investment. Thus the State Commission has substantially reduced the projected investment related to strengthening of the transmission system in spite of the fact that the appellant had duly placed the details of the actual/projected investments made/to be made during FY 2013-14, which, subject to some marginal adjustments would clearly be the investment required to be serviced in the tariff and the State Commission ought to have considered at least 85% of such investment for the purpose of transmission system strengthening consistent with the principles adopted by the Central Commission for provisional tariff.

21) **Per contra**, the learned counsel for the respondent/Commission submits that the State Commission has allowed the investment plan on the basis of capital expenditure + some enhancement. The Commission has observed that the appellant had proposed an ambitious investment plan for its transmission business for FY 2013-14. The appellant had furnished the actual expenditure up to November, 2013 at Rs.281.24 crores against proposed capital expenditure of Rs.851.60 crores in the Revised Estimate (RE) for FY 2013-14. Based on the actual capital expenditure up to November, 2013, likely capital expenditure for the FY 2013-14 works out to Rs.421.86 crores. The Commission has approved the capital expenditure of Rs.450 crores for FY 2013-14 based on actual capital expenditure and some enhancements. The appellant had also shown consumer contribution of Rs.0.67 crore in the first half for FY 2013-14 and thus the loan requirement for transmission business of the appellant works out to Rs.449.33 crores. The appellant has proposed to capitalize its assets to the extent of Rs.1579.27 crores in the revised estimate

for FY 2013-14 against the projected capital expenditure of Rs.851 crores. Hence, the State Commission has correctly and legally approved the investment of Rs.450 crore and the corresponding capitalization works out to Rs.1307.71 crores.

22) Our consideration and conclusion :

After perusing and considering the rival contention of the parties on this issue and scanning paragraph 5.8.3 of the Impugned Order, we find no infirmity and illegality in the findings recorded by the Commission on this issue. The learned State Commission has rightly decided the issue of investment plan for transmission business of the appellant. This issue is decided against the appellant.

23) **Carrying Cost:**

According to the appellant, the carrying cost allowed by the Commission in the Impugned order is not a compensatory one as it is limited to simple interest while the appellant is paying carrying cost with monthly rest and further the State Commission has not computed the carrying cost for FY 2014-15 correctly and wrongly passed on the impact of carrying cost of Rs.39.05 crores to the Government of Punjab. Further contention of the appellant is that the State Commission has not calculated the carrying cost fully based on the expenditure actually to be incurred by way of interest payment to the lenders and further the State Commission has computed the carrying cost without considering the real effect of net taxes and expenses which is quite inequitable. The State Commission has assumed the carrying cost of Rs.39.05 crores from Government of Punjab on the premise that the appellant was unable to furnish audited accounts for the FY 2010-11 for true up in time i.e. for the true up of FY 2012-13, due to late finalization of opening balance sheet of the appellant by Government of Punjab and since the finalization of opening sheet under the provisions of transfer scheme is prerogative of the Government and is not open to the State Commission to question the same or disallow the expenditure resulting in such reorganization. Therefore, the revenue gap as determined by the State Commission ought to be allowed to be recovered through tariff along

with carrying cost. Further submission of the appellant on this issue is that the State Commission ought not to have directed the appellant to recover the money from Government of Punjab.

24) **Per contra**, it has been argued on behalf of the State Commission that there is no provision in Regulation 32 of the State Tariff Regulations 2005 to gross up the carrying cost and as such no grossing up of taxes is allowable.

25) Our consideration and conclusion:

(a) We have seriously considered the contentions of the rival parties on this issue of carrying cost. We found that there is no provision in Regulation 32 of the State Tariff Regulations 2005 with regard to carrying cost with grossing up of taxes and expenses and as such no grossing up of taxes is allowable. This Appellate Tribunal in judgment dated 18.02.2014 in Appeal No.27 of 2013 filed by the same appellant, i.e. PSTCL, upheld the decision of the State Commission in tariff order dated 16.07.2012 for the FY 2012-13 whereby the claim of the appellant for grossing up the ROE for payment of income tax was declined by the State Commission. This Appellate Tribunal in judgment dated 18.02.2014 (supra) in Appeal No. 27 of 2013 filed by the same appellant has observed as under:

> *"20. Since the State Commission has already by implementing the judgments of this Tribunal, allowed Return on Equity @ 15.5% citing the sufficient and cogent reasons by changing its old view and now the State Commission after the amendment of Regulation 25 dealing with Return on Equity of State Commission Tariff Regulations, 2005 vide Notification dated 17.09.2012 has deleted or scraped the provision of grossing up of the Return on Equity, the controversy or dispute for the future period has been brought to an end. The State Commission is justified in passing the Judgment in impugned order and no illegality or infirmity has been committed by the State Commission.*
>
> *21. In view of the above discussion, since the Appellant has not paid any income tax or obligatory tax during the relevant period, being a loss making licensee, the Appellant has rightly been disallowed the grossing up of the Return on Equity by the tax rate applicable to the Appellant. The*

learned State Commission has given complete effect to the provisions of Regulation 15 of the Central Commission Tariff Regulations, 2009 in passing the impugned order. The impugned order is perfectly just and legal one requiring no interference by us at this stage, particularly, when the relevant Regulation 25 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 has been amended by Notification dated 17.09.2012 settling the whole controversy for the future."

(b) We have studied the rulings cited by the appellant on this issue of carrying cost. In the matter of *Reliance Infrastructure Limited Vs. The Maharashtra Electricity Regulatory Commission* in Appeal No. 202 and 203 of 2010, the question was that the carrying cost is legitimate expense and therefore, the recovery of such carrying cost is legitimate expenditure of the entity. In judgment dated 06.10.2009 reported in 2009 ELR (APTEL) 0880, this Appellate Tribunal had clearly explained the concept of true up and made the appropriate Commission to understand the real concept of true up and its purpose. Since in the present matter there is no provision in Regulation 32 of the State Tariff Regulations 2005 to gross up the carrying cost, the same has legally and correctly not been allowed by the State Commission and the rulings cited by the appellant, namely, in paragraph vii(f) above, of this present judgment they do not enure to the benefit of the appellant. In view of the above discussions, we decide this issue against the appellant.

26) **<u>Progressive funding:</u>**

On this issue of progressive funding, the urge of the appellant is that the State Commission has not appreciated that the expenditure on funding the unfunded past liability of pension etc. is mandatory and therefore, it ought not to have disallowed the claim of the appellant towards progressive funding of unfunded past liability of pension and gratuity assigned to the appellant for the FY 2014-15 on the ground that the same was not reflected in the opening balance sheet of the successor entity because under clause 6(8) of the transfer scheme, the State Government assumed the responsibility for funding of trusts and that there could not be any charge on the tariff in view of the specific provisions of

Regulation 33 of the State Tariff Regulations 2005. Further the State Commission has wrongly rejected the said claim that debiting these unfunded past liabilities in the profit and loss account would be in contravention of Accounting Standard 5.

27) Contrary to the above, following are the contentions of the respondent/Commission.

(a) The appellant has submitted that the Commission has not considered the progressive funding of the terminal benefits trusts, while determining the ARR estimates for the FY 2014-15, for which the examination of transfer scheme and State Regulations 2005 is necessary. Clause 6 of the main transfer scheme which pertains to transfer of personnel is quoted below as far as it is relevant:

> *"6(8) Powercom shall be responsible to ensure that the Terminal Benefit Trusts including Pension, Gratuity and Leave encashment of the Board personnel are progressively funded to meet the pension, gratuity and leave encashment payments pertaining to the years of service rendered by the personnel of the Board including retired personnel in the Board as determined as per actuarial valuation to be determined as per actuarial valuation to be done for the purpose. The State Government has also assumed the responsibility of making appropriate arrangement/or the funding of Terminal Benefits.*
>
> *6(10) All obligations in respect of pension, gratuity, leave encashment and other retirement benefits including provident fund, Superannuation and Gratuity to the employees who have retired from the services of the Board before the Effective Date of Transfer, shall be discharged by Powercom."*
>
> *Vide the amendment dated 24th December, 2012 clause 6 was further amended to include sub-clause i.e. 8-A & 10-A, amongst others. The same is quoted below for ready reference;*
>
> *"(8-A). The funding of the Terminal Benefit Trust in respect of pension, gratuity and leave encashment of the personnel shall be a charge on the tariff of Powercom and*

Transco, respectively, on yearly basis, as may be decided by the Punjab State Electricity Regulatory Commission."

(b) That clause 8(a) has been added without removing earlier clause which clearly postulates that the State Government shall make appropriate arrangement for funding of trusts. The liability of Rs.14,346 crores on account of Terminal Benefits determined by the Actuary has not been reflected in the opening balance sheets of successor entities i.e. Powercom and Transco, presumably because of the spirit of clause 6(8) wherein the State Government assumed the responsibility.

(c) The Regulation 33 of State Tariff Regulations 2005 provides as under:

"33. Unfunded liability of pension and gratuity. With regard to unfunded past liabilities of pension and gratuity the Commission will follow the principle of 'pay as you go' The Commission shall not allow any other amount towards creating fund for meeting unfunded past liability of pension and gratuity."

(d) In view of the Regulation 33 there cannot be any charge on the tariff. It is a common rule of interpretation that a scheme cannot over rule or abrogate the legislation or subordinate legislation. The Hon'ble Supreme Court in *PTC India Ltd. Vs. CERC* reported in (2010) 4 SCC 603 has specifically held that this Appellate Tribunal has no power to decide the legality of the Regulations, the Regulations being in the nature of subordinate legislation but this Appellate Tribunal has power to interpret the said Regulations. If a dispute arises in adjudication on interpretation of a regulation made under Section 178 of the Electricity Act, 2003, an appeal would certainly lie before the Appellate Tribunal under Section 111; however, no appeal to the Appellate Tribunal shall lie on the validity of regulation made under Section 178 of the Act.

28) Our consideration and conclusion:

On consideration of rival contentions, we do not find any merit in the contentions of the appellant on this issue. Unfunded terminal liability of Rs.14,346 crores has not been reflected in the opening balance sheet dated 16.04.2010 of the erstwhile Punjab State Electricity Board as well as in the opening balance sheets of the successor entities. In the transfer scheme notification dated 24.12.2012 sub-clause 8A of clause 6 clearly provides that liability in respect of Pension, Gratuity and Leave Encashment of the personnel shall be a charge to the tariff which means that these expenses need to be routed through profit and loss account from FY 2014-15. However, debiting of such liability in profit and loss account is in contravention of Accounting Standard 5. Accounting Standard 5 provides for debiting prior period expenses in the books. The terminal benefit of PSEB cannot be termed as a 'prior period item' as it is not a result of error or omission. Even if such a liability is treated as 'prior period item' the same cannot be charged to current profit or loss. The decision of Government of Punjab to charge prior period liability to consumers of State for 15 years seems to be a contravention of Accounting Standard 5 notified by Ministry of Corporate Affairs, New Delhi. Though the accounting standards may only have persuasive and accounting value but the Commission has all the jurisdiction to decide if a parameter has wrongly been fixed or adhered to especially in the interest of the consumers. Hence, due to these twin reason firstly not being part of opening balance sheets and secondly due to the specific provision of the Regulation, the terminal benefits trust as on 16.04.2010 cannot be a charge on tariff and passed on to the consumers. As the State Commission shall only apply its regulations while determining the tariff and not take any governmental directives on this behalf. This is also the duty of the Commission to ultimately see the interest of the consumer as per National Electricity Policy and National Tariff Policy. The terminal benefit of Rs.188.93 crore for transmission business for FY 2014-15 has been allowed on actual basis as per Regulation 33 of the State Tariff Regulations 2005. On perusal of Regulation 33, we find that the Commission shall not allow any other amount towards creating fund for meeting unfunded past liability of pension and gratuity. In this view of the matter we do not find any merit in the

contentions of the appellant ton this issue of progressive funding of unfunded past liability and it is also decided against the appellant.

29) **Minimum Alternate Tax (MAT):**

The main contention of the appellant on this issue is that the State Commission, by the second Impugned Order dated 05.09.2014, has not appreciated the fact that the appellant had to pay tax more than the tax on return on equity due to generation of additional revenue on the ground that there is no provision for submission of revised return on MAT in the Income Tax Act for claiming refund of MAT already paid on the basis that excess revenue will be adjusted by the Commission in the subsequent years. According to the appellant, the claim of the appellant for pass through of entire MAT paid by it should have been allowed in the exercise of power to relax/ remove difficulties under Regulation 45 of the State Tariff Regulations 2005 as the cash flow of the appellant will be adversely affected because the State Commission had adjusted the entire revenue surplus of FY 2013-14 together with the cost of holding such surplus without considering the tax paid on such surplus amount. Accordingly, when the taxable income is more, the appellant has to pay higher income tax but gets pass through in the tariff. Lesser tax amount restricted to return on equity and when the surplus is adjusted in the future years, the appellant pays less tax to the Income Tax authorities and tax allowed to be a pass through in the tariff is restricted to actual tax paid.

30) **Per contra**, following submissions have been made by the Commission on this issue:

(a) that the appellant generally projects an ambitious investment plan each year. During FY 2011-12, appellant originally projected an investment plan of Rs.1,367.44 crores with loan requirement of Rs.1,270.29 crores. At the time of true up of FY 2011-12 during FY 2014-15, the appellant claimed based on audited annual accounts an investment plan of Rs.922.66 crores against which the requirement of loan was Rs.824.11 crores. The exaggerated claim for investment plan by the appellant affected the amount of depreciation charges, interest on loan, R&M and A&G expenses by the Commission in tariff orders

which resulted in excessive income which ultimately resulted into payment of MAT.

(b) The State Commission on considering the submissions of the appellant PSTCL and PSPCL along with Tariff Regulations 2005 has observed that wind fall, book profit made by the appellant is on account of non-execution of projects/works included in ARR for FY 2012-13 and FY 2013-14 and admittedly not on account of any efficiency on the part of the appellant in execution of these projects/works. Further observation of the Commission in the Impugned Order is that it is expected from every licensee to plan its project carefully and only then include the necessary amount that could be expended during the year, in its ARR for that FY. On account of this huge book profit, PSTCL has to pay MAT exceeding the maximum limit as provided in Regulation 32 of the Tariff Regulations 2005 as this Regulation limits the tax on income due to return on equity only.

(c) That invocation of Regulation 45 of the Tariff Regulations 2005, for removing the non-existing difficulty, is not justified. The State Commission has noted that MAT order in Petition No. 30 of 2014 paid during FY 2013-14 will be adjusted by Income Tax Department during subsequent years after setting off all losses of previous years of the appellant. As per Section 115JAA of the Income Tax Act, 1961, which provides for calculation and carry forward of MAT credit in respect of MAT paid under Regulation 115 JB(1) in the assessment year commencing on 01.04.2006 and any subsequent assessment year. Further the amount of tax paid under Section 115 JB is allowed to be carried forward to the extent of MAT paid in excess of the regular income tax and is set off against tax payable upto the tenth assessment year immediately succeeding the assessment year in which tax credit becomes allowable under provisions of section 115JAA. Thus on considering these facts and legal provisions, observation of the State Commission is that excess amount of MAT paid by the appellant in FY 2013-14 would be taken care of during the next ten years through tax adjustments allowed under the Income Tax Act 1961.

31) <u>Our consideration and conclusion :</u>

The Commission has observed as under:

> *"This Commission has already passed the tariff Orders for PSTCL and PSPCL for FY 2014-15 and has allowed tax of Rs.19.68 crore for FY 2013-14 limited to RoE in accordance with PSERC (Terms and Conditions for Determination of Tariff) Regulations, 2005 towards ARR for PSTCL and has consciously rejected the pass through of excess MAT paid by PSTCL during previous years".*

On taking a look in the provisions of the Income tax, so far as the payment of MAT is concerned, we do not find any merit in the contentions of the appellant. Further, we do not find it a fit case where the State Commission should have exercised the power to relax or remove difficulties under the provisions of Regulation 45 of Tariff Regulations 2005. In this view of the matter, this issue is also decided against the appellant.

32) **Interest on working capital**:

(a) According to the appellant, the State Commission has wrongly calculated interest on working capital to be allowed to the appellant. The State Commission had determined the interest on working capital at 6.77% in case of state load despatch centre which is a way below the applicable SBI rate. The appellant argues that in another appeal, being Appeal No. 259 of 2013, which was also filed by the appellant on the same issue of determination of interest on working capital (applicable for earlier years) has already been decided by this Appellate Tribunal vide judgment dated 26.11.2014 and hence the judgment covers the said issue and in the same light this issue should be decided in favour of the appellant. The learned counsel for the State Commission candidly admits that the said issue is fully covered by judgment dated 26.11.2014 of this Appellate Tribunal in Appeal No. 259 of 2013.

(b) Since both the parties agree to the legal position that the same issue of determination of interest on working capital (applicable for earlier years) has

been decided by this Appellate Tribunal, vide judgment dated 26.11.2014 in Appeal No. 259 of 2013 in the appeal filed by the same appellant, hence, this issue is covered by our earlier judgment. This issue is accordingly decided in favour of the appellant.

(c) In the light of the above analysis, all the issues except the last one have been decided against the appellant. The last issue relating to interest on working capital has been decided in favour of the appellant hence, this appeal is liable to be partly allowed to the extent of issue on interest on working capital.

O R D E R

The instant appeal, being Appeal No.262 of 2014, captioned as *Punjab State Transmission Corporation Ltd. Vs. Punjab State Electricity Regulatory Commission and Punjab State Power Corporation Limited* is hereby partly allowed to the extent indicated above namely, on the issue of interest on working capital.

No costs.

Pronounced in the open court on this ***14th day of January, 2016.***

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~