

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

**APPEAL No.164 of 2012**

**Dated: 18<sup>th</sup> Oct, 2012**

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON  
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**In the Matter of:**

**Sree Rayalaseema Alkalies &  
Allied Chemicals Ltd.,  
Gondiparla,  
Kurnool-518 004 (AP)**

**And also at:-  
No.25, Shankara Park Road,  
Bangalore-560004**

**...Appellant**

**Versus**

- 1. Karnataka Electricity Regulatory Commission  
6<sup>th</sup> & 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
No.9/2, M G Road,  
Bangalore-560 001**
- 2. Karnataka Power Transmission Corporation Ltd.,  
(Formerly know as Karnataka Electricity Board)  
Cauvery Bhavan,  
Bangalore-560 009**
- 3. Power Company of Karnataka Ltd.,  
KPTCL Building, Cauvery Bhavan,  
Bangalore-560 009**

4. **Bangalore Electricity Supply Company Ltd.,  
Corporate Office, K R Circle,  
Bangalore-560 001**
5. **Mangalore Electricity Supply Company Ltd.,  
5<sup>th</sup> Floor, Paradigm Plaza,  
A.B. Shetty Circle,  
Mangalore-575 001**

**.....Respondent(s)**

Counsel for the Appellant(s) : Mr. Shiridhar Prabhu,  
Mr. Mukul Chandra  
Mr. Vikas Mehta  
Mr. Lokesh

Counsel for the Respondent(s): Ms. Swapna Seshadri for R-2  
Mr. D Praveen for R-3,R-4 & R-5

## **J U D G M E N T**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. Sree Rayalaseema Alkalies & Allied Chemicals Ltd has filed this Appeal challenging the main order dated 24.11.2011 passed in the OP No.24 of 2011 holding that the Appellant is liable to refund the tax collected from the purchasers as well as the order dated 17.5.2012 passed in Review Petition

No.2 of 2012 holding that no ground was made out for Review of the main order.

2. The short facts are as follows:

- (a) The Government of Karnataka had invited bids for setting up of multi fuel power plants in Karnataka through its Notification dated 25.11.1995.
- (b) In response to the said notification, the Appellant, M/s. Royalaseema Alkalies & Allied Chemicals Ltd. submitted its bid to set up a multi fuel power plant at Tagginabudihal village of Bellary District. This was accepted by the Government. Accordingly, the PPA was entered into between the Appellant and the Karnataka Electricity Board on 15.12.1977.
- (c) The Appellant, accordingly set up the plant and was supplying the electricity initially to Karnataka Electricity Board and thereafter to the Bangalore

Electricity Supply Company Limited, the 4<sup>th</sup> Respondent and Mangalore Electricity Supply Company Limited, the 5<sup>th</sup> Respondent as the PPA came to be assigned to them.

(d) During the discussion with the Karnataka Power Transmission Company Limited, the 2<sup>nd</sup> Respondent, the issue relating to refund of income tax as per Article 11.5 of the PPA arose.

(e) The Appellant sent a letter dated 17.10.2006 to State Power Procurement Co-ordination Centre seeking advice on evaluation of the differential amount towards corporate tax envisaged in the tariff and the current tax structure. The Coordination Centre in response, informed the Appellant that as per Clause 11.5 of the PPA the passing of tax refund is based on the actual performance of the project and savings in corporate tax should be passed on the power procurer within 90 days of the end of the Financial Year.

(f) The Appellant in reply dated 25.8.2007 stated that it had not derived savings in income tax liability for the financial year 2005-06 and

therefore, no amount was to be refunded on account of changes in the Income Tax Act.

- (g) Thereafter, several letters had been exchanged between the parties on the issue of refund of income tax. Ultimately, a decision was arrived at by the Power Company of Karnataka Limited, the 3<sup>rd</sup> Respondent that a total amount of Rs.16.09 crores was refundable by the Appellant towards corporate tax. Consequently, the Power Procurement Company, i.e. Mangalore Electricity Supply Company, the 5<sup>th</sup> Respondent, had made the claim for refund from the Appellant, by sending the note dated 21.3.2011.
- (h) The Appellant had challenged the said demand dated 21.3.2011 before the State Commission. The State Commission, after hearing the parties, by the order dated 24.11.2011 concluded that the Appellant in terms of the PPA is liable to refund the tax collected from the purchasers over and above which was assumed at the time of submitting the bid i.e. 30% exemption over the second five year period notwithstanding that Appellant had not actually paid any income tax on

account of losses incurred in the First five year period.

(i) Aggrieved by this order dated 24.11.2011, the Appellant filed a Review Petition before the State Commission in RP No.2 of 2012. However, the State Commission by the order dated 17.5.2012, dismissed the said Review Petition holding that the grounds stated in the Review petition do not satisfy the requirements for review of the main order dated 24.11.2011. Hence, the Appellant has filed this Appeal No.164 of 2012; challenging both the orders dated 24.11.2011 and 17.5.2012.

3. In this matter, there was a delay of 182 days in filing the Appeal as against the main order. Hence, along with the Appeal, the Appellant filed an application for condonation of the delay of 182 days.
4. The learned Counsel for the Respondent objected to the application for condonation of delay in filing the Appeal mainly questioning the maintainability of Appeal. Since considerable period was taken for the disposal of Review Petition, we condoned the delay after giving liberty to the learned Counsel for the Respondent to raise the objection of the maintainability of the Appeal at the time of admission by the order dated 3.9.2012.

5. Accordingly, the matter was posted for admission. After getting the Appeal numbered in Appeal No.164 of 2012, the matter came up for admission on 26.9.2012.
6. In view of the fact that already liberty was given to the learned Counsel for the Respondent to make submission with regard to maintainability of the Appeal at the time of admission, we have heard the learned Counsel for the Appellant as well as the learned Counsel for the Respondent mainly on the question of maintainability. The learned counsel for the Respondent has also filed a memo of objection on the question of maintainability.
7. The learned Counsel for the Appellant has submitted that he has merits in the Appeal and so the Appeal may be admitted. On the other hand, the learned Counsel for the Respondent argued questioning the maintainability of the Appeal and that this Appeal does not deserve to be admitted.
8. Before dealing with the question of maintainability, we deem it appropriate to refer to the discussion as well as the findings contained in the impugned order passed by the State Commission on the issue raised. They are as follows:

**6.** *The question that arises for consideration and decision is whether the petitioner is liable to refund a part of the fixed charges as per Clause 11.5 of the*

*PPA even though the petitioner has not actually availed the extended tax holiday on the income from the project.*

.....  
.....

**9..** *As the issue revolves around the interpretation of Clause 11.5 of the PPA, we deem it necessary to extract the same in verbatim.*

*“11.5 Change in corporate tax :*

*An increase or reduction in tax liability of the Company in respect of the income related to Project operation on account of the changes in the tax rate and the assumption stated in this Section 11.5, would be passed on to the Board through Supplementary Bills within 90 Days of the end of each financial year during the term of this Agreement.*

- *100 % tax holiday for initial 5 financial years of operations.*
- *30 % tax holiday for the next 5 financial years of operations.*
- *Indian Corporate Tax Rate = 46 % (40% + 15 % surcharge)”.*

**10.** *There is no dispute between the parties that the PPA dated 15.2.1997 was signed consequent to the bids that were called by the Government of Karnataka. The bid notification dated 25.11.1995 has been produced by the respondents as Annexure-A. According to the said notification, while quoting the fixed charge, the bidders were required to quote the*



*fixed charge component of tariff considering all costs including the income tax liability either under Structure 'A' or under Structure 'B'. Both Structure 'A' and Structure 'B' included income tax as one of its components (this is found at Page 14 of the Annexure-A in the 'Information Requirement for Volume-3). Further, Annexures–C&D produced by the respondents containing clarifications given while evaluating the bids also reiterate the same. This is further confirmed by the Company's revised bid which is produced at Annexure-E at Page 67. It states at Item 10 that "In case of reduced tax liability due to changes in the above assumptions pertaining to corporate tax, the developer would reimburse the tax savings to the KEB". Further, M/s. Sree Rayalaseema Alkalies and Allied Chemicals Limited vide their Communication No. SRAAC/KEB/BEL/75/96, dated 7<sup>th</sup> December 1996 (Annexure-F Para 2) have confirmed that originally they were under Structure 'A' and were requesting KEB to consider their inclusion under Structure 'B'. This clarifies the position that M/s. Sree Rayalaseema Alkalies and Allied Chemicals Limited have, while submitting their quotation been aware of the Structure 'A' and Structure 'B' of the tariff proposal. It is already brought out herein above that both Structure 'A' and Structure 'B' included income tax as one of the components of tariff. Thus, it is clear that the fixed cost quoted by the company was inclusive of the corporate tax amount payable based on the assumed liability towards tax (Annexure-M). Though it is later contended that the same was not considered during subsequent negotiations, we have go by the bid notification and the revised bid submitted by the petitioner in the absence of any documentary evidence to the contrary.*

**11.** *In our view Clause 11.5 of the PPA has to be read in the light of the bid notification, the bid submitted by the petitioner and the correspondence made by the petitioner with the respondent (which is produced as Annexure-E) to ascertain the intention of the parties in including Clause 11.5 of the PPA. Once these are read together, it becomes clear that the fixed charges quoted by the petitioner were inclusive of income tax. Therefore, the fixed charges recovered by the petitioner from the respondent included the income tax component assuming 30 % tax holiday only and not the actual tax payable. In our considered view, for any change in the rates of income tax by way of reduction in the assumed tax liability, the petitioner has to give appropriate credit in favour of the power procurers namely BESCO and MESCOM. The words ‘increase or reduction of tax liability of the company in respect of income related to the project operation on account of the changes in the tax rate and the assumptions stated in this section would be passed on to the Board’ (emphasis added) will mean that what has to be looked into is reduction in the tax liability arising as a result of changes in the tax rate and not the actual fact of whether income tax is paid or payable by the petitioner. Therefore we hold that notwithstanding that the petitioner has not paid the income tax on account of the losses incurred in the first five years period and adjusting the said losses against the income earned in the subsequent years, the petitioner in terms of PPA is liable to refund the tax collected from the purchasers over and above what was assumed at the time of submitting the bids, i.e., 30 % exemption over the second five year period.*

9. The perusal of the above order make it clear that this case is purely related to the interpretation of Clause 11.5 of the

PPA. The State Commission in the impugned order while interpreting the Clause 11.5 of the PPA has come to the conclusion that though the Appellant has not paid income tax on account of losses incurred in the first five years period and adjusted the said losses against the income earned in the subsequent years, it has wrongly collected the same from Purchasers, and therefore, the Appellant, in terms of the PPA was liable to refund the said tax collected over and above what was assumed at the time of submissions of the bids.

10. The learned Counsel for the Appellant is not able to point out any infirmity in the interpretation of clause 11.5 of the PPA. On the other hand, he pointed out that discrimination aspect referred to in the Review Petition has not been given due consideration by the Appellant. We are not concerned with the merits of the Review Order. We are now concerned with the question whether there is prima-facie case for admission of this Appeal challenging the main order and whether this Appeal is maintainable.
11. With regard to maintainability, the learned Counsel for the Respondent strenuously submits that the Appeal is not bona fide as the same has been filed before this Tribunal by making attempt to create confusion by raising the same issue before various forums and courts somehow or the

other for obtaining some order or the other for the purpose of dragging on the matter. It is also pointed out by the learned Counsel for the Respondent that the Appellant has been indulging in the forum shopping and seeking the same relief by raising the very same issue of liability of the Appellant to refund the corporate tax to the Respondent in terms of the PPA before various forums and in various proceedings thereby preventing the Respondent to get the fruits of the impugned order in time.

12. In order to show that the Appellant lacks bona fide and it approached the several forums raising the very same issue thereby to delay the proceedings in order to avoid the refund of corporate tax wrongly collected from the purchasers, the learned Counsel for the Respondent has given the following particulars indicating the chronological events:

(a) In the year 1996, the Appellant and the Karnataka Electricity Board entered for supply of power from multi fuel generating station of the Appellant.

(b) Clause 11.5 of the PPA and the bids submitted by the Appellant and the correspondence made between the two parties would make it clear that the fixed charges collected by the Appellant were inclusive of income tax. Therefore, the fixed charges recovered by the Appellant from the purchasers included the

income assuming 30% tax holiday for the second 5 financial years of operation only and not the actual fixed charges.

(c) Between 1997-2011, the Karnataka Power Transmission Corporation Limited (2<sup>nd</sup> Respondent) made regular payments for the supply received from the Appellant. However, the law was amended to provide an exemption from the payment of income tax for the 6<sup>th</sup> to 10<sup>th</sup> year also. In terms of above, the Appellant had benefited against the projected tariff. Therefore, the Appellant was liable to refund the excess tax collected from the purchasers.

(d) At that stage in 2001, the Appellant filed a WP before the High Court of Karnataka on the issues of operationalization of an Escrow Account in terms of the PPA by the 2<sup>nd</sup> Respondent.

(e) The single bench of High Court by the order dated 23.2.2004 held that the Transmission Company (2<sup>nd</sup> Respondent) was liable to put in place the Escrow Account in terms of Article 9.5 of the PPA.

(f) As against this order, the Transmission Company filed an Appeal before the Division Bench of the High Court and the Division Bench by the order dated

25.8.2010, directed the Respondent to maintain the Escrow Account.

(g) At that stage, the Appellant chose to file a Writ Petition in March, 2011 before the Karnataka High Court challenging the letters of the Respondent calling upon the Appellant to refund the corporate tax. However, the High Court by the order dated 28.4.2011, directed the Appellant to approach the State Commission for adjudication of the same. Accordingly, the Appellant filed OP No.24 of 2011 for adjudication of the dispute in terms of the PPA challenging the demand to refund the tax amount collected.

(h) The State Commission, after hearing the parties, by the order dated 24.11.2011, held that the Appellant was liable to refund the tax collected by virtue of Clause 11.5. It also directed that calculation issues can be worked out by the parties and final claim would be raised by the Respondent No.2 within 30 days from the date of receipt of the comments from the Appellant.

(i) But without sending any comments as directed by the State Commission, the Appellant filed a Review Petition before the State Commission for the Review of the order dated 24.11.2011.

(j) While the Review Petition was pending, the Appellant filed contempt petition before the High Court of Karnataka as against the Transmission Company (R-2) raising the very same issue of refund of corporate tax liability. When the contempt petition was pending, the Appellant again approached the State Commission and filed another OP No.12 of 2012 by raising the very same issue on the very same ground of interpretation of Article 11.5 of the PPA which was already decided by the State Commission by the order dated 24.11.2011.

(k) Curiously, on the very same day, the Appellant filed another application before the State Commission to refer the issue of liability for refund of the tax to the Arbitrator on the ground that the State Commission was not competent to decide the issue.

(l) On 17.5.2012, the State Commission dismissed the Review Petition No.2 of the 2012. The High Court also dismissed the contempt application on 13.6.2012.

(m) Thereafter, the Appellant on 13.7.2012 filed the present Appeal challenging both the main order dated 24.11.2011 and Review Order dated 17.5.2011 of the State Commission.

13. According to the learned Counsel for the Respondent, the sequence of events would make it evident that the Appellant has been dragging on the matter by raising the very same issue before various Courts and trying to get some orders or the other somehow or other from some Forum or the other with a view to delay the refund of corporate tax and this conduct of indulgence in resorting to forum shopping by the Appellant would show that this Appeal is not bona fide and as such the Appeal is liable to be dismissed as this is a case of gross abuse of process of court and a case of forum shopping.

14. This objection raised by the learned Counsel for the Respondent to the maintainability of this Appeal which lacks bona fide, in our view, is a formidable one. The chronological events pointed out by the learned Counsel for the Respondent reveals three aspects:

- (a) Even though the Appellant has not paid the tax on the basis of the amendment of law providing an exemption from the payment of income tax, the Appellant went on collecting the corporate tax from the purchasers. Instead of refunding the excess tax collected from the purchasers, the Appellant rushed to the High Court on several occasions after bypassing the State Commission



under the garb of challenging the letters of demand sent by the Respondent. Only when the High Court by the order dated 28.4.2011, directed the Appellant to approach the State Commission for the said relief, the Appellant was constrained to file the Petition before the State Commission for adjudication of the dispute challenging the demand to refund the tax amount collected in terms of the PPA.

- (b) The State Commission after hearing the parties, passed an order dated 24.11.2011, holding that the Appellant was liable to refund the tax and directed the parties to make calculations and to ensure that the tax collected is refunded to the purchasers. Despite that, the Appellant did not comply with the orders within the time frame as specified by the State Commission. On the other hand, the Appellant filed a Review Petition before the State Commission. Thus, the matter was dragged on by the Appellant for a considerable length of period.
- (c) Even when the Review Petition was pending, without requesting the State Commission to dispose the Review, the Appellant rushed to the

High Court and filed a contempt petition raising the very same issue of corporate tax liability. This Contempt Petition was ultimately dismissed on 13.6.2012. In the meantime, the Appellant again approached the State Commission and filed another Petition in OP No.12 of 2012 by raising the very same issue with regard to refund of corporate tax liability and kept the same pending for a long time in order to avoid the payment of the refundable amount. In the mean time the Review Petition also was dismissed on 17.5.2012. Till then, no effort was made to comply with the main order passed by the State Commission dated 24.11.2011.

- (d) To make the matters worse, the Appellant again moved another independent application before the State Commission raising the very same question regarding the liability for refund of the corporate tax. This time the Appellant asked the State Commission to refer the said issue to an Arbitrator, in view of the fact that the State Commission has no jurisdiction to decide that issue. As indicated above, regarding the very same issue, the Appellant himself approached the State Commission as per the directions of the

High Court by filing OP No.24 of 2011 raising the issue of liability to refund the tax amount. In that petition the jurisdiction issue was not raised. Again the Appellant after disposal of the said OP No.24 of 2011, approached the very same State Commission for review of the main order dated 24.11.2011. In this review petition also, the question of the jurisdiction of the State Commission was never raised. The Appellant filed yet another petition in OP No 12/2012 seeking for the same relief. In this petition also, issue of jurisdiction was not raised. After having failed in all the Forums including the High Court, the Appellant had filed a fresh petition application before the State Commission questioning the jurisdiction of the State Commission contending that the State Commission has no jurisdiction to decide the issue relating to the refund of the tax amount collected and therefore, the matter shall be referred to the Arbitrator to decide the issue regarding the liability of the Appellant to refund the Corporate Tax.

15. The above three factual aspects clearly would indicate that the Appellant has not only been indulging in forum shopping but also has been raising the very same issue time and

again before the different Forums taking contrary stand in order to delay the proceedings thereby preventing the Respondents and the Purchasers to get the refund of the tax amount wrongly collected by the Appellant. This conduct of the Appellant is highly reprehensible.

16. In view of the above facts, we deem it appropriate to dismiss the Appeal not only on the ground of maintainability but also on the ground that there is no prima-facie case made out for admission of this Appeal.

17. Accordingly, the Appeal is dismissed at the admission stage itself. However, there is no order as to costs.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 18<sup>th</sup> Oct, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~