

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APL No. 332 OF 2024 &  
IA No. 1282 OF 2024**

**Dated: 15<sup>th</sup> October, 2024**

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson  
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

**In the matter of:**

**DAMODAR VALLEY CORPORATION (DVC),**

*Through its Manager (Commn.)*

DVC Headquarters, DVC Towers,

VIP Road Kolkata - 700054.

... Appellant(s)

**VERSUS**

1. **JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION**  
*Through its Secretary,*  
1<sup>st</sup> Floor, Jharkhand State Housing Board (Old Headquarter)  
Harmu Housing Colony, Ranchi,  
Jharkhand-834002. ... Respondent No.1
  
2. **ASSOCIATION OF DVC HT CONSUMERS OF JHARKHAND**  
*Through its Joint Secretary,*  
Kalyani Apartment, 1<sup>st</sup> Floor,  
Gandhi Chowk, Giridih,  
Jharkhand – 815301. ... Respondent No.2
  
3. **STEEL AUTHORITY OF INDIA LIMITED**  
*Through its Chief General Manager (Law) & Principal Law Officer,*  
Ispat Bhawan, Lodhi Road,  
New Delhi – 110003 ... Respondent No.3

Counsel on record for the Appellant(s)

: Shri Venkatesh  
Shryeshth Ramesh Sharma  
Ashutosh Kumar Srivastava  
Bharath Gangadharan  
Akash Lamba  
Nihal Bhardwaj  
Siddharth Nigotia

Shivam Kumar  
Kartikay Trivedi  
Mohit Gupta  
Manu Tiwari  
Aashwyn Singh  
Harsh Vardhan  
Suhael Buttan  
Priya Dhankar  
Anant Singh  
Vineet Kumar  
Nikunj Bhatnagar  
Kunal Veer Chopra  
Vedant Choudhary for App. 1

Counsel on record for the Respondent(s) : Aditya Kumar Choudhary for Res. 1

Rajiv Yadav for Res. 2

Rajiv Yadav for Res. 3

## **ORDER**

**(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)**

### **IA No. 1282 OF 2024** (for interim relief)

1. The instant application being IA No. 1282 of 2024 has been preferred by the Appellant- Damodar Valley Corporation (“DVC”) in Appeal No 332 of 2024 challenging the Order dated 23.07.2024 (“**Impugned Order**”) passed by Jharkhand State Electricity Regulatory commission (“**Respondent No 1/State Commission/JERC**”) in Case (Tariff) No. 09 of 2020, seeking *ex parte ad interim stay* of the order in respect of re-determination of Non-Tariff Income for the Appellant-DVC for FY 2006-07 to 2011-12.

2. Though there is a chequered history of the facts, the facts, in brief, that are required for the disposal of this application are stated as under:

The Appellant-Damodar Valley Corporation is a public sector undertaking performing multifarious functions, viz., generation of electricity, sale of electricity to West Bengal State Electricity Distribution Company Limited (“**WBSEDCL**”) and Jharkhand Bijli Vitran Nigam Limited (“**JBVNL**”), transmission of electricity in the Damodar Valley area which falls within the territorial limits of the two states namely, West Bengal and Jharkhand, inter-state transmission of electricity, retail sale and supply of electricity to the consumers in the Damodar Valley area. The Respondent No. 1 is the Jharkhand State Electricity Regulatory Commission (“**State Commission/JERC**”). The Respondent No. 2 is the Damodar Valley Power Consumers’ Association is a collective body representing the members who are *HT* consumers of DVC. The Respondent No. 3 is the Steel Authority of India (SAIL)-Bokaro, is one of the consumers of the distribution business of DVC in the state of Jharkhand.

3. The State Commission issued Tariff Order dated 30.09.2020 for True up for FY 2018-19, APR for FY 2019-20 and ARR & Tariff for FY 2020-21, wherein the State commission considered the Road Map of DVC and *inter alia* directed DVC to submit a separate Petition alongwith requisite details such as consumer wise and category wise billing details for FY 2006-07 to FY 2011-12 for determination of Category-wise tariff. Accordingly, Appellant on 03.12.2020 filed a petition before the State Commission vide Petition No. 09 of 2020 for determination of the ARR and category wise tariff schedule for the period from FY 2006-07 to FY 2011-12 for distribution of electricity in the State of Jharkhand. The State Commission on 31.10.2023, passed an Order in the said Petition re-

determining the trued-up Non-Tariff Income (NTI) i.e. considering entire NTI from generation, transmission and other business as NTI for the distribution business in the State of Jharkhand, that consequently led to the reduced ARR and ACoS for the Appellant for the period FY 2006-07 to FY 2011-12.

4. Assailing the said Order dated 31.10.2023 passed by the State Commission, the Appellant had approached this Tribunal by way of an appeal being Appeal No. 845 of 2023. This Tribunal *vide* its Order dated 05.02.2024 in the said appeal, while setting aside the findings of the State Commission in respect of re-determination of NTI, remanded the matter to the State Commission with a direction to consider only the NTI generated from the distribution business in the State of Jharkhand and holding that the State Commission does not have jurisdiction to determine the income of the Appellant arising from its businesses other than distribution in the State of Jharkhand.

5. In pursuance of the directions of this Tribunal in Appeal No. 845 of 2023, the details were submitted by the Appellant. Thereafter, on 02.04.2024, State Commission re-directed the Applicant to submit the NTI duly segregated between its Generation, Transmission, Distribution and other businesses and also directed to submit a clarification regarding Revenue Surplus to the tune of Rs. 1755.21 Crores, which was determined by State Commission by its Order dated 18.05.2018 in Case (T) No. 05 of 2016 and 02 of 2017, which was submitted by the Appellant on 15.04.2024. The case of the Appellant is that the State Commission passed the impugned order dated 23.07.2024 in abject disregard to the submissions made and documents filed by the Appellant.

## **Appellant submissions**

6. Learned senior counsel for the Appellant submitted that in the Order dated 05.02.2024 passed in APL No. 845 of 2023 ("Remand Order"), this Tribunal held that the JSERC had erroneously included non- tariff income from DVC's generation, transmission, and other businesses while calculating Non-Tariff Income (NTI) for its Distribution Business in the State of Jharkhand. This Tribunal directed JSERC to consider only the NTI from DVC's Distribution Business, while determining the ARR for calculating the Retail Supply Tariff for FY 2006-07 to 2011-12. In compliance to the undertaking given by DVC, other Income of DVC (FY 2006-07) for the power division as indicated in the statement of accounts, was segregated by DVC into NTI emanating from G, T&D and other businesses and submitted vide its Affidavits dated 23.02.2024 and 15.04.2024 to JSERC.

7. JSERC, in disregard to the directions of this Tribunal, refused to consider or even provided reasons for rejecting the segregated NTI/Other Income of DVC's Distribution Business. Instead, JSERC arbitrarily treated the entire "Other Income" from all DVC businesses, after apportioning, as NTI for its Distribution Business in the state of Jharkhand. JSERC, on a baseless plea that due to the lack of account segregation and/or lack of evidence proving that the entire other Income did not originate from the power business, passed the Impugned Order. It is submitted that JSERC, in its letter dated 13.02.2024 and Order dated 02.04.2024, never sought segregation of accounts and/or proof that other income is not emanating from the power business.

8. Learned senior counsel for the Appellant further contended that the DVC is regulated by CERC, WBERC, and JSERC, and other than in the impugned order, no commission has asked DVC to segregate its

accounts. The Impugned Order is perverse, as JSERC has exceeded its jurisdiction under the Act and Rule 8 of the Electricity Rules, 2005, and failed to comply with the binding directions of this Tribunal. These factors provide a strong prima facie case for setting aside the Impugned Order.

9. It is further submitted that in the Impugned Order, JSERC failed to distinguish between the scope and treatment of NTI and Other Income under the applicable JSERC Tariff Regulations. As per applicable tariff Regulations for FY 2006-07 to FY 2011-12, the NTI is defined as income generated from activities related to the Licensed Business, i.e., the distribution of power in the state of Jharkhand and thus income generated from businesses other than distribution cannot and ought not to be considered as the NTI for the distribution business. "Other Business" means any business of the Licensee other than the Licensed business that utilizes distribution assets of the Licensee.

10. Learned senior counsel for the Appellant contending that the Impugned Order materially departs from the past tariff order of JSERC, submitted that JSERC, in its past Tariff Order dated 22.11.2012 in respect of DVC, determined the ARR for its distribution business by considering only the Delayed Payment Surcharge (DPS) as NTI, following a review of DVC's Tally records. Further, JSERC, in its Tariff Orders dated 19.04.2017 and 18.05.2018, while truing up the ARR for DVC, also considered only DPS as NTI.

11. JSERC, in the Impugned Order, has erroneously stated that, by its Tariff Order dated 19.04.2017, it directed the Appellant to provide the segregation of its NTI and based on the said information, the Commission was to consider the NTI towards the distribution business of the Appellant. In fact, no such direction was ever issued by JSERC. DVC was merely asked to clarify whether NTI had been reduced from its

generation/transmission tariff, to which DVC duly responded by its letter dated 17.05.2017. Further, JSERC has committed a grave error by including non-distribution incomes as NTI for DVC's distribution business, contrary to its previous Tariff Orders where only DPS was treated as NTI. Revising an already determined tariff on this basis is legally impermissible, and thus, the Impugned Order is liable to be set aside.

12. Learned senior counsel for the Appellant also asserted that the maintenance of segregated accounts is an excuse to include all other income as NTI for distribution business. Section 51, read with the third proviso of the Electricity Act 2003, requires prior permission and maintenance of separate accounts of other business activities undertaken by distribution licensees. DVC neither has any distribution assets and is in any case, required to maintain its accounts in accordance with the DVC Act, 1948 ("**DVC Act**"). The Hon'ble Supreme Court, in the "**Bhaskar Shrachi Alloys Limited vs. Damodar Valley Corporation & Ors.**" (2018) 8 SCC 281, dated 23.07.2018 has held that Sections 41 and 51 of the Electricity Act are not in collision with the provisions of the DVC Act. Further, the issue of maintenance of segregated accounts of DVC's GT&D businesses has also already been settled by this Hon'ble Tribunal in the Judgement dated 29.10.2018 in APL No. 206 of 2015, wherein it was contended by the Consumer Association therein, that DVC be directed to maintain segregated accounts, however, this Hon'ble Tribunal rejected the said contention on the premise that DVC does not have any identifiable distribution asset relying upon the Judgement dated 23.11.2007.

13. Learned senior Counsel for the Appellant further asserts that the Impugned Order mandates a refund of approximately Rs. 2000 crore to consumers, along with existing surplus amounts, which shall significantly

weaken its financial position unreasonably and arbitrarily; additionally, the ongoing under-recovery due to low Average Billing Rates (ABR) compared to the Average Cost of Supply (ACoS) in terms of Impugned order has created a total revenue gap of Rs. 3400 crores for Jharkhand consumers from FY 2022-23 to July 2024, with an ABR shortfall of Rs. 1.50/kWh. This under recovery of mere 2 years and 4 months is more than the Revenue Surplus to be refunded to consumers (along with carrying cost) for the period 2006-07 to 2011-12 as per the Impugned Order. DVC also has equity requirements of Rs. 18,317 crore for its mandated expansion projects in thermal power, solar energy and storage solutions by FY 2032. This immense financial burden, coupled with refund obligations, jeopardizes DVC's ability to sustain and expand its operations effectively.

14. Learned Senior counsel submitted that the balance of convenience lies in favor of DVC and against the Respondents and granting a stay to DVC as prayed for would prevent the imposition of an arbitrary and unjust financial burden on DVC, while ensuring stability in the power sector.

### **Respondent submissions**

15. Per contra, learned counsel for the Respondent No. 2 & 3 submitted that following the remand, the JSERC, through its order dated 13.02.2024, directed DVC to submit details of NTI, segregated between Generation, Transmission, and Distribution activities. However, DVC failed to provide the required segregation, even the Auditor's Certificates submitted by DVC provided consolidated "Details of Other Income of Power Head of DVC" without any segregation. Consequently, JSERC, vide order dated 02.04.2024, reiterated its directive for DVC to furnish segregated NTI information.

16. In its Additional Submissions dated 15.04.2024, DVC admitted that it “cannot segregate its annual accounts into Generation, Transmission, Distribution business.”. This purported explanation, unsupported by any relevant Regulation, was rightly rejected by JSERC. DVC’s failure to comply with its unequivocal undertaking undermines its entitlement to interim relief. The financial impact of the impugned order remains indeterminable until DVC complies with the directive under para 85(a) of the impugned order, which is essential for verifying any figures, that DVC claims as the financial impact.

17. DVC deliberate delay in compliance amounts to a stalling of the fact-finding process necessary to assess the financial impact spread over 24 months. DVC's contention in its IA is misleading, as the purported difference between the Average Billing Rate and Average Cost of Supply pertains to FY 2023-24, while the impugned order pertains to FY 2006-12; as such DVC is a profit-making entity and recorded a profit after tax of Rs. 704 Crore in FY 2022-23.

18. Learned Counsel for the Respondent No. 2 & 3 asserted that the DVC reliance on the APTEL’s judgment dated 23.11.2007 in Appeals No. 271/2007 and related matters, which arose from the CERC generation tariff order of 03.10.2006, is misplaced. The said judgment does not hold that “DVC does not have a distribution system.” Notably, DVC’s contention in para 104 of the judgment dated 23.11.2007 is limited to its transmission system only, which reads thus:

*“The Appellant has submitted that **its transmission system** which is spread across the two states being integrated on, is to be considered as inter-State transmission and not intra-State transmission”. In fact, DVC concurred that that “the “State Commission should have the jurisdiction over the distribution and determination for retail tariff supply of electricity.”*

Thus, DVC concurred that *“the State Commission should have jurisdiction over the distribution and determination of retail tariff for supply of electricity.”* DVC submission is recorded: *“that **the transmission assets** and capital costs thereof, spread in two states of West Bengal and Jharkhand, are not amenable to segregation”*. The judgment dated 23.11.2007 also records the findings of CERC order dated 03.10.2006 as regards allocation of capital cost between transmission and distribution at the ratio of 87:13, which is neither challenged by DVC nor has been set aside by this tribunal. This ratio, derived from a Single Member’s order, was adopted by the CERC in tariff order dated 03.10.2006. Moreover, APTEL Judgment dated 23.11.2007 explicitly makes a mention with respect to the determination of the *“distribution network capital base”* by the Appropriate Commission (JSERC/WBERC). JSERC, in the impugned order has rejected the DVC’s contention as regards lack of distribution assets, citing CERC order dated 06.08.2009 in C.No 66/2205, wherein O&M expenses of entire transmission and distribution network has been allowed and it also stated that cumulative depreciation recovered in case of transmission system is inclusive of the distribution assets. CERC’s tariff order dated 03.10.2006 records DVC’s submission on affidavit, that it is *“now required to carry out its activities related to generation, transmission, and distribution of electricity as independent activities.”*

19. Learned counsel for respondents 2 & 3 further contended that the Retail supply to consumers requires a “distribution system” as defined under Section 2(19) of the Electricity Act, 2003. Section 2(17) defines a *“distribution licensee” as a ‘ licensee authorised to operate and maintain a distribution system for supplying electricity to consumers’*. Without a distribution system, DVC cannot qualify as a distribution licensee under the Electricity Act 2003. The definition of “transmission lines” under

Section 2(72) does not include supply to consumers; therefore, any wire supplying electricity to 'consumer premises' cannot be called a 'transmission line' as it will necessarily be a part of 'distribution system'.

20. As such, NTI dispensation under the JSERC Tariff Regulations of 2004 and 2010 does not require a capital expenditure criterion; NTI has to be determined as per the Tariff Regulations, and the existence or otherwise of distribution assets is not at all germane to such determination.

21. Learned counsel also submitted that the Electricity Act, 2003 provides no exemption for DVC regarding the maintenance of separate accounts and/or otherwise. Section 51 of Electricity Act 2003 requires all distribution licensees to maintain separate accounts for their other businesses to ensure that only reasonable costs related to electricity are allowed as pass through in tariffs and to prevent cross-subsidization of other business activities by distribution activities. This requirement is essential for transparency and regulatory compliance.

22. DVC's reliance on the Hon'ble Supreme Court's judgment in "***Bhaskar Shrachi Alloys Limited vs. Damodar Valley Corporation & Ors.***" (2018) 8 SCC 281," dated 23.07.2018 is misplaced as it merely observes that DVC's other activities, being in the nature of "*socially beneficial measures*" which "*do not entail earning of any revenue so as to require maintenance of separate accounts*". However, the said judgment does not exempt DVC from maintaining separate accounts for its Generation, Transmission, and Distribution activities.

23. Learned counsel also contended that the DVC's reliance on APTEL's judgment dated 29.10.2018 in Appeal No. 206/2015 is misplaced, as the judgment does not hold that DVC is not required to maintain separate accounts. Additionally, Section 47 of the DVC Act

cannot override the provisions of Section 51 of the EA, 2003; This Tribunal judgement in **“Tata Power Delhi Distribution Ltd. v. DERC,” 2019 SCC OnLine APTEL 106** underscores maintenance of separate accounts.

24. Learned counsel also submitted that JSERC, vide order dated 19.4.2017, had also directed DVC *“to submit information on non-tariff income, as per audited accounts, segregated into generations, transmission and distribution business”*. Furthermore, the non-maintenance of separate accounts has been raised as a specific ground in **“Association of DVC HT Consumers of Jharkhand v. JSERC & Ors.”** in Appeal No. 306/2018, which is pending before this Tribunal. Relying on Section 61 proviso, Sections 172, 173 and 175 of the EA 2003, it is submitted that DVC does not have any special status under the said enactment. Learned counsel opposed the IA for grant of Interim Stay. Respondent No. 1 in its submission relied on justification provided in impugned order.

## **ANALYSIS**

25. The main contention emerged from the submissions of the Appellant is that JSERC, in the Impugned order, has acted in abject contravention of this Tribunal’s remand order dated 05.02.2024 in APL 845 of 2023, by failing to consider segregated NTI of DVC, as reflected in the audited accounts for FY 2006-07 to FY 2011-12, between generation, transmission, distribution and other business and to consider only the income generated from the distribution business to determine the NTI for DVC’s ARR for FY 2006-07 to FY 2011-12; and DVC was not required to maintain segregated accounts for generation, transmission, distribution and other business as settled by Hon’ble Supreme Court’s judgment in **“Bhaskar Shrachi Judgment, (2018) 8 SCC 281,”** dated 23.07.2018 and

this Tribunal's Judgement dated 29.10.2018 in APL No. 206 of 2015. Per Contra, Respondents contention is that DVC is obligated to maintain separate accounts for generation, transmission, distribution and other Business relying on Section 51 of the Electricity Act and it was a failure on the part of DVC to provide segregated details of income from their various business verticals and thus JSERC is justified in considering the entire other income as NTI for distribution business as segregated details were not provided by DVC in spite of undertaking given by it with respect to providing non-tariff income details.

26. Before deliberating the rival submissions, let us see the scope of remand order dated 05.02.2024 of this Tribunal, relevant portion of which is reproduced as under:

*“The 1st Respondent Commission’s jurisdiction to determine the tariff is confined only to the retail supply business of the Appellant within the State of Jharkhand, and not beyond. Consequently, the 1st Respondent Commission lacked jurisdiction to include the non-tariff income of the Appellant arising from its generation, transmission and other businesses as its non-tariff income with respect of its distribution business. The tariff of the Appellant, with respect to its generation and transmission business, is determined by the CERC in terms of its Regulations; determination of the tariff for its distribution business in the State of West Bengal falls within the jurisdiction of WBERC, and in the State of Jharkhand within the jurisdiction of the 1st Respondent Commission. Even if the CERC had not taken into consideration the non-tariff income derived by the Appellant from its generation, transmission and other businesses, in determining its tariff, such an error could only have been corrected by the CERC; and the mere fact that it may have a bearing on the input cost, while determining the tariff of the Appellant’s distribution business in*

*the State of Jharkhand, would not confer jurisdiction on the 1<sup>st</sup> Respondent to reduce such non-tariff income from the annual revenue requirement of the Appellant for its distribution business in State of Jharkhand. While it does appear that the 1<sup>st</sup> Respondent Commission had addressed two letters calling upon the Appellant to furnish the break-up of its non-tariff income between its generation, transmission, other businesses, and its distribution business, the fact remains that, in the impugned order, the 1<sup>st</sup> Respondent has not faulted the Appellant on this score while treating the entire non-tariff income as non-tariff income relating to its distribution business. If the 1<sup>st</sup> Respondent was constrained, because of lack of information to treat the entire non-tariff income, as reflected in the audited accounts of the Appellant, as the non-tariff income arising from the distribution business of the Appellant, the 1<sup>st</sup> Respondent could well have recorded, in the impugned order, that its conclusions were as a result of the Appellant's failure to provide the information sought for. The impugned order does not record any such conclusions having been arrived at by the 1<sup>st</sup> Respondent Commission for treating the entire non-tariff income of the Appellant, as the non-tariff income relating to their distribution business.....*

*We consider it appropriate, in such circumstances, to set aside the impugned order and remand the matter to the 1<sup>st</sup> Respondent Commission to ascertain the break-up of the non-tariff income of the Appellant, as reflected in the audited accounts for FY 2006-07 to FY 2011-12, between its generation, transmission, distribution and other businesses; and treat only the non-tariff income, relating to the Appellant's distribution business in the State of Jharkhand, as its nontariff income which*

*is required to be reduced from its ARR for FY 2006- 07 to FY 2011-12, and then pass an order afresh in accordance with law.”*

27. Thus the remand order categorically states that i) Jurisdiction of JSERC is limited to retail supply business of DVC i.e Distribution business in the state of Jharkhand ii) JSERC has no jurisdiction to include NTI of DVC arising out from Generation, transmission and other business as its NTI with respect to distribution business iii) JSERC to ascertain the break-up of the non-tariff income of the Appellant, as reflected in the audited accounts for FY 2006-07 to FY 2011-12, between its generation, transmission, distribution and other businesses; and treat only the non-tariff income, relating to the Appellant’s distribution business in the State of Jharkhand, as its non-tariff income for working out the requirement of ARR for FY 2006-07 to FY 2011-12.

28. The main principles of limited remand has been laid by this Tribunal in its judgement dated 10.05.2010, as quoted below:

*“ (i) When a matter is remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgment, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or do novo hearing.*

*(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit.*

*(iii) When the matter comes back to the superior court again on appeal after the final order upon remand is passed by the Court below, the matter/issues finally disposed of by order of remand, cannot be reopened.*

*(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court can set aside the entire judgment of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited Remand Order, the jurisdiction of the court below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.*

*(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded nor before the superior court where the order passed upon remand is challenged in the Appeal".*

29. It is settled law that matters finally disposed of by the order of remand cannot be reopened when the matter comes back after the final order upon remand on appeal or otherwise to the Court remanding the matter. If no appeal is preferred against the order of remand, the matters finally decided in the order of remand can neither be subsequently re-agitated before the Court to which it was remanded nor before the Court where the order passed upon remand is challenged in appeal or otherwise from such order. The Court, to which the matter is remanded, has to act within the order of remand. It is not open to such Court or authority to do anything but to carry out the terms of the remand even if it considers it to be not in accordance with law. Once a finality is reached, it cannot be reopened. (*Bidya Devi v. Commissioner of Income-tax, Allahabad: AIR 2004 Cal 63 (Calcutta HC DB); Uttar Haryana Bijli Vitran Nigam Limited & others vs CERC & others (Judgement of APTEL in Appeal No. 383 of 2022 dated 02.02.2024).*)

30. From the Impugned order, It has been observed that though NTI has been apportioned to Jharkhand based on ratio of sales in Jharkhand

area to total DVC area, but entire Non-Tariff Income of the Appellant from various business like Generation, Transmission, as appearing in their audited accounts for the concerned period has been considered as NTI for Distribution Business, which, in our view, is in contravention of observation made by this Tribunal and Direction issued to JSERC in the remand order dated 05.02.2024 of this Tribunal. We understand that the remand order dated 05.02.2024 has not been challenged before the superior court, and therefore, the principle laid down for consideration of Non-Tariff Income pertaining to Distribution business has attained finality and JSERC could not have considered entire non-tariff income, pertaining to Generation, Transmission and other business, as NTI for distribution business of DVC, albeit any reason, as stated in the impugned order, as given below:

*“79. In compliance of the direction of Hon'ble APTEL, the petitioner-DVC had submitted the data/information/material vide letter no. Coml./Tariff/JSERC/1568 dated 23.02.2024. However, the Commission on scrutinizing and analyzing the data/information submitted by the petitioner has observed that the relevant Non-Tariff Income was not segregated under different heads pertaining to the Generation, Transmission and Distribution as specified by this Commission. Accordingly, the Commission had re-directed the petitioner to submit the Non-Tariff Income duly segregated between its generation, transmission, distribution and other businesses.*

*80. In reply to data discrepancies the petitioner has failed to provide any such segregation of account in its submission dated 23.02.2024, 15.04.2024 and 05.07.2024, despite of the several directions by this Commission and the Hon'ble Tribunal in this regard. The same is also evident from the reasons mentioned hereinabove.*

81. Furthermore, the Commission holds the opinion that Non-Tariff Income (NTI), as per the Electricity Act, 2003, and the JSERC Tariff Regulation, includes both income generated from the licensed business (i.e., the retail supply activity of petitioner's distribution business) aside from tariff income, as well as income generated from its other businesses.

82. Therefore, the Commission is the view that the entire 'Other Income' based on the audited accounts, in absence of any segregation for the reasons set out hereinbefore is liable to be deducted from the ARR of the distribution/retail supply tariff of petitioner.”

In view of the above, we are of the view that since, in the impugned order, JSERC has not abided by the directions issued under the remand order dated 05.02.2024, which is binding not only on the JSERC, but also on the parties involved and this Tribunal as well, thus the Appellant has been able to make out a *prima facie* case and one of the other two tests of balance of convenience or irreparable injury must be satisfied for grant of interim relief.

31. The “balance of convenience” must be in favour for granting interim relief. The Court/Tribunal, while granting or refusing to grant interlocutory relief, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if interim relief is refused, and compare it with that which is likely to be caused to the other side if the interim relief is granted. If, on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the Appeal, status quo should be maintained, interim relief would be granted. (“**Dalpat Kumar v. Prahlad Singh**”, (1992) 1 SCC 719 : AIR 1993 SC 276). The Court/Tribunal must satisfy itself that the comparative hardship or mischief or inconvenience

which is likely to occur from withholding grant of interim relief will be greater than that would be likely to arise from granting it (Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276).

32. JSERC vide its order dated 12.02.2024 and through subsequent communication has sought from the Appellant, segregation of NTI into Generation, Transmission, Distribution and other Business along with its rationale as well as relevant clauses of JSERC Regulations. From the submission made by the Appellant, vide its letter dated 23.02.2024, it is observed that for the period under consideration, income from Delayed payment Surcharge has been shown as NTI for distribution business, while rest of the income has been shown under the head of Generation and Transmission mainly stating that it does not have any distribution asset; this, do not assign jurisdiction to JSERC in considering entire NTI as NTI from distribution business as already directed in the Remand order of this Tribunal dated 05.02.2024 .

33. Regarding the distribution assets of the Appellant, it is learnt from the findings in the order of CERC dated 03.10.2006 that capital cost was allocated between transmission and distribution in the ratio of 87:13, as also contended by the respondents that CERC had earlier worked out transmission tariff considering capital base allocation of 87%. However, this Tribunal in its order dated 23.11.2007 has set aside the referred CERC order dated 03.10.2006 and concluded that Transmission system of DVC be considered as unified deemed inter-state transmission system in so far as the determination of tariff is considered and as such regulatory power for the same be exercised by the Central Commission. Relevant portion is given as under:

*“109. It may be mentioned that the definitions of ‘inter-State transmission system’ and ‘intra-State transmission system’ as given in Section 2(3) are identical to Section 2(gb) of Indian Electricity Act,*

1910, Section 2(e) of Electricity Regulatory Commission Act, 1998 and Section 2(gc) of Indian Electricity Act, 1910 respectively. The term 'transmission lines' as defined in Section 2(72) of the Act is para-materia to the definition of "Main transmission lines" provided in Section 2(7) of The Electricity (Supply) Act, 1948.

110. Taking an integrated view of the above provisions and applying them to the instant case, it is clear that any 'transmission line' i.e. high pressure (HT) Cables and overhead lines (HT), excluding the lines which are essential part of Page 67 of 102 Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007 distribution system of a licensee (WBSEB and JSEB as the case may be), used for the conveyance of electricity from a generating station owned by DVC and located in the territory of one State (either State of West Bengal or Jharkhand) to generating station or a sub-Station located in the territory of another State (either in the State of Jharkhand or West Bengal) together with any step-up and step down transformer, switch gear and other works necessary to and used for the control of such cables or overhead lines and such building or part thereof as may be required to accommodate such transformers, switch-gear and other works shall constitute the "Inter-State Transmission system" of DVC. Further, the transmission segments from the generating Stations to HT Consumers located in the same territory of a State are deemed 'dedicated transmission lines' and are to be maintained and operated by DVC.

111. DVC has been supplying power from its generating stations to West Bengal Electricity Board and Jharkhand Electricity Board along with nearly 120 HT-Consumers either through inter-state transmission lines or through the point-to-point 'dedicated transmission lines'. We, therefore, conclude that all transmission systems of DVC be considered as unified deemed inter-state transmission system, insofar as the determination of tariff is

*concerned and as such regulatory power for the same be exercised by the Central Commission.”*

34. Regarding the capital base allocation between transmission and distribution system in the ratio of 87:13, the APTEL order dated 23.11.2007 records as under :

*“K.1 One of the Respondents (GoWB) has challenged the capital base adopted by the CERC while determining the tariff. GoWB has contended that certain assets should have been treated as part of the distribution network and hence should have been taken out of the purview of tariff determined by the CERC. While the impact of the above would be revenue neutral on DVC as assets forming part of the distribution network would be eligible for tariff determination at the retail end. However, it would impact the power purchase bills of the beneficiary states. We feel that when the process of tariff determination for distribution segment of DVC takes place, the appropriate Commission would also determine the distribution network capital base. At that time DVC may approach the CERC again for adjustment of its revenue requirement and corresponding tariff.”*

35. While the learned counsel for Respondents contended that Section 61, 172, 173 and 175 of the Electricity Act 2003 do not provide any special status to DVC, and accordingly, as per Section 51 of the Act , DVC, the distribution licensee is to maintain separate accounts for each business, learned senior counsel for the Appellant contended that it does not have any distribution assets and it is required to maintain its accounts in terms of DVC Act. Learned Senior Counsel for the Appellant has further relied on this Tribunal’s judgement dated 29.10.2018 in APL No. 206 of 2015,

where the issue raised by Consumer Association to maintain segregated accounts by DVC was rejected.

36. We note from the Judgement dated 29.10.2018 of this Tribunal, that Consumer association has assailed the Tariff order dated 25.05.2015 of WBERC and one of the plea raised was that DVC be directed to maintain segregated accounts, without which the tariff should not be determined; however, this Tribunal has held that “**By and large, all the physical assets of DVC are entirely either generation or transmission assets which are taken into account by the Central Commission while deciding input cost for determination of retail Tariff. Hence, we do not observe any ambiguity in the order of the state commission relating to retail tariff.**” Thus, the plea of Consumer Association for non determination of tariff in view of non segregation of the Accounts by DVC has not been accepted by this Tribunal.

37. Though the Learned counsel for the Respondents has again strongly contended that since DVC did not maintain segregated accounts so mandated under section 51 of the Electricity Act 2003, JSERC is justified in including entire NTI as NTI from the Distribution Business, which has already been held above that it is in contravention of the direction issued to JSERC under Remand order of this Tribunal dated 05.02.2024.

38. Regarding the Appellant contention that DVC is not obligated to maintain Segregated accounts as the issue has been settled in the Supreme court judgment in “**Bhaskar Shrachi Judgment, (2018) 8 SCC 281,**” dated 23.07.2018; we observe from the referred judgement that the Supreme court held that as other business is in the nature of socially beneficial measures, which *per se* do not entail earning of any revenue, has obviated the need of maintaining separate accounts by DVC. However in the present case, NTI earned from Power Business is under

consideration, which need to be apportioned for Distribution Business, if any, and as such audited accounts of the Appellant has details of NTI from power Business, and the said Supreme Court Judgement has not deliberated on the need or otherwise of maintaining segregated accounts for various segments of Power Business i.e generation, Transmission and Distribution, and therefore, the said judgement is not applicable to this case.

39. Section 51 of Electricity Act 2003 provides that Distribution licensee, with prior intimation to the appropriate commission can engage in any other business for optimal utilisation of its assets and the proviso therein mandates Distribution licensee to maintain separate accounts to ensure that Distribution business neither subsidizes in any way such business undertaking nor encumbers its distribution assets in any way to support such business. It is a fact that the Appellant - DVC, under DVC Act 1948 has been mandated to undertake various activities besides distribution of electrical energy and learned senior counsel for the Appellant informed that neither any permission is required nor it has been taken under Section 51 to undertake other business activities, therefore, proviso under Section 51 of the Act to maintain separate account is not applicable to DVC. *Prima facie*, we find force in the submission of learned senior counsel for the Appellant and in any case by no stretch of imagination, NTI of other business like generation and transmission could have accrued by utilising the distribution assets, so considering entire NTI as NTI for Distribution business is not justified.

40. As such, the provisions of DVC Act vis-à-vis the Electricity Act to address the issue of maintaining segregated accounts by DVC as well as applicability of APTEL judgement dated 30.09.2019 in the case of "**Tata**

**Power Delhi Distribution Limited Vs DERC**", regarding maintaining segregated accounts for various businesses, on which reliance has been placed by Respondents shall be dealt with while dealing with the main appeal since DVC is covered under DVC Act 1948 as well as Electricity Act 2003 while Tata Power is solely covered under the Electricity Act.

41. In the Impugned order, total Non-Tariff Income for the period under consideration is about Rs 1769 Crore, out of which about Rs 82 Crore is pertaining to Delayed Payment Surcharge, which was already assigned to Distribution Business, and the balance of about Rs 1687 Crore is on various heads like Rental income, Scrap sale, Interest on Bonds, Interest from short Term deposit, dividend income, LD recovery etc. This Tribunal in its Judgment dated 23.11.2007 in Appeal No 271 of 2006 & Batch has set aside CERC tariff order which has considered capital base allocation between Transmission : Distribution in the ratio of 87:13 and has considered the entire transmission system (including dedicated transmission lines from generation stations to HT consumers) as deemed inter-State Transmission system and left the issue open for appropriate commission to determine distribution network capital base when process of tariff determination of Distribution segment of DVC takes place. However, till date, no such tariff determination for distribution segment has been undertaken by the appropriate commission and in true up orders for the period under consideration, only delayed Payment surcharge was considered as NTI for distribution business by JSERC.

42. JSERC (Terms and Conditions for Distribution Tariff) Regulations 2004 and JSERC (Terms and Conditions for Distribution Tariff) Regulations 2010 (for short "**JSERC Regulations 2004**" and "**JSERC Regulations 2010**") defines the non-tariff income and other relevant terms as under:

## **JSERC Regulations 2004**

### ***“21 Non tariff Income***

*21.1 Non tariff income shall be the revenue in excess of the revenue collected on account of tariffs, as approved by the Commission; and shall include such items as Delayed Payment Surcharge (DPS) and Meter rent.”*

## **JSERC Regulations 2010 (Relevant Extracts are as under):**

*“k) "Licensed Business" shall mean the functions and activities, which the Licensee is required to undertake in terms of the Licence granted or being a deemed Licensee under the Act;*

*l) “Licensee” means a person who has been granted a Distribution Licence and shall include a deemed Licensee;*

*m) "Non-Tariff Income" means income relating to the Licensed business other than from tariff (Wheeling and Retail Supply), and excluding any income from Other Business, cross-subsidy surcharge and additional surcharge;*

*n) "Other Business" means any business of the Licensee other than the Licensed Business that utilizes the distribution assets of the Licensee*

### **Non-Tariff Income**

*6.49 All incomes being incidental to electricity business and derived by the Licensee from sources, including but not limited to profit derived from disposal of assets, rents, delayed payment surcharge, meter rent (if any), income from investments other than contingency reserves, miscellaneous receipts from the consumers and income to Licensed business from the Other Business of the Licensee shall constitute non-tariff income of the Licensee;*

*6.50 The amount received by the Licensee on account of non-tariff income shall be deducted from the aggregate revenue requirement in calculating the net revenue requirement of such Licensee.”*

As contended by learned counsel for the Respondent, it is fact that the non-tariff income as per JSERC Regulations 2004 and JSERC Regulations 2010 does not specify a capital expenditure criteria, however, in our view, the above referred Regulations refers the non-tariff income which is incidental to the distribution business and has been derived by the distribution licensee using the distribution assets, and the amount received by the licensee on this account is only to be deducted while calculating the net revenue requirement of the distribution licensee.

43. In view of above deliberations, we are of the view that balance of convenience lies in favour of Appellant and the impugned order with regard to treatment of entire NTI as NTI for distribution business besides being in contravention of Remand order of this Tribunal, is also not justified to include entire NTI as its NTI from distribution business to work out the ARR, without ascertaining NTI from Distribution business alone for consideration in ARR. The obligation of the Appellant to maintain segregated accounts for its various power businesses as well as its distribution assets base, as detailed above, shall be deliberated during the hearing of the main appeal.

44. JSERC vide remand order was directed to ascertain the component of NTI which is attributable to distribution business, there is no deliberation on this issue in the impugned order as well as whether some or all component of NTI shown under Generation and Transmission head by Appellant could be assigned to Distribution Business. The JSERC could also have undertaken the exercise of approximation on any rational basis which they choose not to do. Initially we contemplated remanding the

matter again to the JSERC to undertake a rational exercise of approximation to determine the non-tariff income of the Appellant relating to its distribution business. However, Mr. Rajiv Yadav, learned Counsel for the Respondent made it clear that their submissions were confined to the IA, and they reserved their right to put forth elaborate submissions during the final hearing of the main appeal.

45. Based on the above deliberations, the impugned order is stayed to the extent that it considers entire balance NTI, other than DPS, as NTI for distribution business and JSERC is directed, as observed in the impugned order, to calculate category wise tariff for the period under consideration, taking into account only delayed payment Surcharge (DPS) as non-tariff Income for Distribution Business, after apportioning it to Jharkhand area of sales vs total sales of DVC. Needless to state that the above directions are subject to the result of main appeal.

46. With the above directions, the IA is disposed of. After pleadings are complete, Registry to verify the same and then include the appeal in the 'List of finals' to be taken up from there, in its turn.

**Pronounced in open court on this the 15<sup>th</sup> Day of October, 2024**

**(Seema Gupta)**  
**Technical Member (Electricity)**

**(Justice Ramesh Ranganathan)**  
**Chairperson**

**REPORTABLE / NON-REPORTABLE**

*ts/ag/dk*