

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.88 of 2007

Dated: 19th April, 2012

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

In the Matter of:

**NTPC Limited
NTPC Bhawan, Scope Complex,
7 Institutional Area,
Lodhi Road
New Delhi-110 003**

.....Appellant

Versus

**1. Central Electricity Regulatory Commission
7th Floor, Core-3, Scope Complex
Lodhi Road,
New Delhi-110003**

**2. GRIDCO Limited
Vidyut Bhawan,
Janpath,
Bhubaneswar-751 007
Orissa**

.....Respondents

**Counsel for the Appellant(s): Mr. M G Ramachandran
Ms. Swapna Seshadri
Mr. Anand K Ganesan**

**Counsel for the Respondent(s): Mr. R K Mehta
Mr. Antaryama Upadhyay
Mr. Mragank Sharma
Mr. Shobhit Jain
Ms. Suman Kukrety
Mr. David A
Mr. B Sree Kumar AC(L),CERC**

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

1. NTPC Limited is the Appellant. The Central Commission is the First Respondent. GRIDCO Limited is the Second Respondent.
2. The Appellant has filed this Appeal as against the impugned order dated 23.3.2007 passed by the Central Commission which relates to the tariff of Talcher Thermal Power Station which is a dedicated station from which the entire power is supplied to the State of Odisha. Since some of the claims have been disallowed by the Central Commission, the Appellant has filed this Appeal raising the following issues:
 - (a) Treating Depreciation available as Deemed Loan Repayment
 - (b) Cost of Maintenance Spares
 - (c) Non-consideration of Normative Transit Loss for coal received through Railway System
 - (d) Admissibility of Depreciation upto 90%
 - (e) Computation of Interest on loan
 - (f) Loss on account of de-capitalisation of assets- its impact on allowable O&M Expenditure for the period 2004-2009
 - (g) Depreciation
 - (h) Non recovery of full depreciation and interest on loan in tariff due to de-capitalisation of certain assets.

3. According to the Appellant some of the issues referred to above, have been dealt by this Tribunal and allowed those issues in favour of the Appellant and the said decision has been followed by this Tribunal in several other subsequent decisions and therefore, a similar order may be passed in respect of those issues in this Appeal as well.
4. We have heard the Learned Counsel for the Appellant as well as the learned Counsel for the Respondent on these issues.
5. The **first issue** is Treating Depreciation available as Deemed Loan Repayment.
6. This issue has been decided by this Tribunal in Appeal No.139 and 140 of 2006 dated 13.6.2007. In this decision this Tribunal held that the Depreciation is an expense and therefore it cannot be considered for deemed repayment of loan and therefore, the Central Commission shall make a fresh computation of outstanding loan. Since the depreciation is an expense it represents a decline in the value of assets because of use, wear or obsolescence.
7. On this point, the Hon'ble Supreme Court has also given a finding to this effect in (2007) 3 SCC 33 DERC v BSES Yamuna Power Limited & Others. As such, this issue has been covered in the earlier judgment and decided in favour of the Appellant. This is not disputed.
8. The **Second Issue** is Cost of Maintenance Spares.
9. This issue has also been dealt by this Tribunal in Appeal No.139 and 140 of 2006 decided on 13.6.2007 in favour of the Appellant. In this decision, it has been held by this Tribunal that under Clause 18 of the

CERC Regulations, the additional capitalisation after the date of commercial operation is recognised as part of the capital expenditure and the cost of the additional equipment is not included in the historical cost. The cost of maintenance spares limited to 1% of the historical cost would not cover the cost of spares for the maintenance of the additional equipment. Therefore, the Central Commission shall examine afresh and pass necessary orders. Thus, this point also has been covered by the judgment dated 13.6.2007 in favour of the Appellant.

10. The **third Issue** is Non-Consideration of Normative Transit Loss for coal received through Railway System.
11. It is pointed out by the Appellant that this issue has also been covered in the very same judgment dated 13.6.2007 in favour of the Appellant. In this judgment, the Tribunal directed the Central Commission to pass necessary consequential orders while deciding this issue in favour of the Appellant. Thus, this point also has been covered by the above judgment.
12. The **fourth Issue** is Admissibility of Depreciation upto 90%.
13. As pointed out by the Appellant , this issue also has been considered by this Tribunal in the very same judgment dated 13.6.2007. In this decision, the Tribunal held that the depreciation cannot be denied forever and directed the Central Commission to allow the unpaid portion of the depreciation (upto 90%)after the plant has lived its designated useful life. Thus, this issue also has been decided by this Tribunal in favour of the Appellant in the above judgment.
14. The **fifth issue** is Computation of Interest on loan.

15. In respect of this issue, as fairly admitted by the learned Counsel for the Appellant that this Tribunal in the judgment in Appeal No.14 of 2009 dated 8.12.2011 has rejected the contention on this issue urged by the Appellant by giving valid reasons. Thus, this issue has been decided by this Tribunal as against the Appellant. Therefore, the same has to be followed in this Appeal also.
16. The **sixth issue** is Loss on account of de-capitalisation of assets- its impact on allowable O&M Expenditure for the period 2004-2009.
17. This issue is a new issue which has to be considered afresh. We will consider this issue after giving our finding on other issues.
18. The **7th issue** is Depreciation.
19. In respect of this issue, the Appellant submitted that in view of the order passed by the Central Commission in the Review Petition dated 5.9.2008 and 3.2.2009, the Appellant is not pressing this issue. Therefore, no order need be passed on this issue.
20. The **last issue, namely 8th Issue** is Non Recovery of full depreciation and interest on loan in tariff due to de-capitalisation of certain assets.
21. In respect of the issue of non recovery of full depreciation, the first party, the Appellant is not pressing the point. However, he presses the second part of the issue i.e. interest on loan in tariff due to de-capitalisation of certain assets. It is submitted that this issue stands covered by the judgment dated 13.6.2007 by this Tribunal in Appeal No.139 of 2007. In this judgment it has been held by this Tribunal that the cumulative repayment of loan proportionate to the assets de-capitalised is required to be reduced and directed the Central

Commission to act accordingly. Therefore, the second part of the issue No.8 is also being decided in favour of the Appellant.

22. Though these issues have been dealt with by this Tribunal and decided in favour of the Appellant as indicated above, the Learned Counsel for the Respondents submit that as against the said judgment rendered by the Tribunal; the Central Commission filed Civil Appeal No.5434 to 5452 of 2007 before the Hon'ble Supreme Court and while passing interim orders the Learned Senior Counsel appearing for the Appellant NTPC before the Hon'ble Supreme Court gave an undertaking that they would not press the issues (a), (b), (d) and (h) (ii) and on this basis, the Hon'ble Supreme Court while passing interim order, recorded this undertaking and observed that the said undertaking shall apply to other cases as well. In the light of the said undertaking, it is submitted by the Learned Counsel for the Respondents that the Appellant cannot raise these issues namely (a), (b), (d) and (h) (ii) in this Appeal till the disposal of the Civil Appeal pending before the Hon'ble Supreme Court.
23. While dealing with similar Appeals, this Tribunal while passing final orders in those Appeals, held that the pendency of the Appeal before the Hon'ble Supreme Court or mere undertaking given by the Appellant that they would not press these issues would not render the earlier decision of this Tribunal non-est and non effective and therefore, the Tribunal is empowered to hear the Appellant on these issues. We have made those observations in the judgements rendered in various Appeals. In those decisions, we relied upon Sri Chamundui Mopeds Ltd Vs Church of South India Trust Association Madras in 1992 (3) SSC 1. The details of our judgments containing the relevant observations are given below:

“(a) NTPC Limited v. CERC & Ors 2011 ELR (APTEL)224 at 228

(Judgement and Order dated 4.2.2011 passed in Appeal No.92 of 2010)

It is submitted by the Learned Senior Counsel for the Central Commission that the judgment rendered by this Tribunal, referred to above, had been appealed before the Hon’ble Supreme Court and the same is pending. In our view, the pendency of the Appeal before the Supreme Court is not a ground to ignore the orders of this Tribunal. As a matter of fact, the Hon’ble Supreme Court also in 2007 (3) SCC 33 has decided the issue of depreciation as mentioned above. Hence, this point is also answered in favour of the Appellant.

(b) NTPC Limited v. CERC & Ors

(Judgement and Order dated 19.4.2011 passed in Appeal No.62 of 2010)

“It is submitted by the learned counsel for the Respondent that in respect of some of the issues, namely, (a) consequences of refinancing of loan (b) treating depreciation available as deemed repayment of loan (c) cost of maintenance of spares related to additional capitalisation (d) depreciation availability upto 90% in the event of disincentive and (e) impact of de-capitalisation of assets on cumulative loan repayment, already an undertaking has been given by the Appellant before the Hon’ble Supreme Court in Civil Appeal No.5634 of 2007 to the effect that the issues would not be pressed for fresh determination and therefore, now the learned counsel cannot press these issues in this Appeal.

(c) NTPC Limited v. CERC & Ors 2011 ELR (APTEL)924

(Judgement and Order dated 31.5.2011 passed in Appeal No.168 of 2010)

“10. It is pointed out by the learned Counsel for the Respondent that because judgment of this Tribunal has been challenged in the Hon’ble Supreme Court and in

that proceedings, NTPC has given undertaking that it will not press for some of the issues, including this issue before the Central Commission and, therefore, the issue cannot be pressed in this Tribunal. But as pointed out by the learned Counsel for the Appellant that mere pendency of the Appeal against the judgment of this Tribunal in the Hon'ble Supreme Court and mere undertaking given by the NTPC as to not to implement the order of the Tribunal pending decision in the second appeal does not dilute the ratio of the decision of this Tribunal which is binding on the Central Commission.

11. *Therefore, the issue is also decided in terms of the decision rendered by this Tribunal as referred to above. Accordingly, this issue is decided in favour of the Appellant.*

12. *The third issue is the cost of maintenance spares. According to the Appellant, the Central Commission disallowed the cost of maintenance spares without considering the impact of additional capitalisation on the maintenance spares to be considered for determination of working capital. This issue has also been decided in favour of the Appellant in the following judgments:*

(a) Judgment dated 13th June, 2007 in Appeal No.139 and 140;

(b) Judgment dated 21 August, 2009 in Appeal No.54 and 74 of 2009 NPTC v CERC and Ors, 2009 ELR (APTEL) 705

13. *Despite the ratio decided by this Tribunal , the Central Commission has not followed the principle decided on 13th June, 2007 and the similar arguments were advanced by the Respondent for the Counsel regarding the pendency of the Appeal before the Supreme Court.*

14. *As indicated above, the mere pendency of the appeal against the judgment of this Tribunal will not dilute the ratio of this Tribunal so long it is not set aside. Therefore, the issue is also allowed in terms of the said decision”.*

Note: The above has been followed in the following four judgments:

- (1) **NTPC Limited V CERC& ORS 2011 ELR (APTEL) 930**
- (2) **NTPC Limited V CERC& ORS 2011 ELR (APTEL) 931**
- (3) **NTPC Limited V CERC& ORS 2011 ELR (APTEL) 937**
- (4) **NTPC Limited V CERC& ORS 2011 ELR (APTEL) 941**

(d) NTPC Limited v. CERC & Ors 2011 ELR (APTEL)1241

(Judgement and Order dated 18.7.2011 passed in Appeal No.64 of 2010)

“9. In regard to all the issues, we have heard the Learned Counsel for the parties. The learned Counsel for the Appellant would submit that in respect of the issues No.1 to 6 this Tribunal already decided in favour of the Appellant and, therefore, a similar order may be passed. On the other hand, it is submitted by the Learned Counsel for the Respondent in respect of these issues already the Appeal has been filed before the Hon’ble Supreme Court which is pending and those issues cannot be pressed before the tribunal in view of the undertaking given by the Appellant before the Hon’ble Supreme Court to the effect that above issues would not be pressed for fresh determination.

10. On the other hand, the learned Counsel for the Appellant would bring to our notice the judgment of Hon’ble Supreme Court in Sree Chamundi Mopeds Ltd v Church of South India Trust Association Madras (1992) 3 SCC 1 in which it has been held that mere undertaking given by the parties and even on the stay of the order of this Tribunal in the earlier case do not render the decision of this Tribunal non-est or non-effective and the decision would continue to operate as a binding precedent till the decision is set aside in the second appeal by the Supreme Court.

11. The learned Counsel for the Appellant cited the judgment of this Tribunal in Appeal No.92 of 2010 dated 4th February, 2011 reported in 2011 ELR (APTEL) 224 and contended that these issues have been considered and the findings has been rendered in favour of the Appellant on the basis of the earlier judgment of this Tribunal.

12. We have gone through the judgment of the Hon'ble Supreme Court as well as the judgment of this Tribunal reported in 2011 ELR (APTEL) 224 and in the light of the view taken by us earlier, we are unable to accept the contention urged by this Respondent. Therefore, this appeal is allowed in respect of above issues No.1 to 6 in terms of the judgment referred above."

24. The above decisions would show that we have already taken a view on the strength of the Sri Chamundi Mopeds Ltd case.
25. However, the Learned Counsel for the Respondents distinguished the judgment of Hon'ble Supreme Court in Sri Chamundi Mopeds Ltd Vs Church of South India Trust Association Madras reported in 1992 (3) SCC 1 contending that the said judgment would not apply to the present facts of the case and as such the Appellant cannot be allowed to violate its own undertaking before the Hon'ble Supreme Court in view of the fact some effect has to be given to the interim order dated 10.12.2007 passed by the Hon'ble Supreme Court.
26. We are unable to accept this contention as we have considered the very same objection in other Appeals and rejected the said contention by giving our own reasons as mentioned above. Hence we are not inclined to take a different view from the earlier view taken by us in the other judgments.

27. Therefore, all the issues which have already been decided namely (a), (b), (c), (d) and (h) (ii) in favour of the Appellant are decided accordingly in this Appeal also as the same would apply to the present Appeal also. Therefore, the Central Commission may pass the consequential orders in terms of our finding on those issues.
28. As indicated above, in respect of issue No.(e), i.e. computation of Interest on loan we hold against this point rejecting the contention of the Appellant as we have already decided in Appeal No.14 of 2009 as against the Appellant.
29. In respect of the **Issue of Non Recovery of Full Depreciation**, as mentioned earlier, the Appellant himself stated that he is not pressing this issue.
30. So, only the fresh issue which has to be considered is issue No.(f) i.e. Loss on account of de-capitalisation of assets- its impact on allowable O&M Expenditure for the period 2004-2009.
31. According to the Appellant, the findings which have been given by the Central Commission that any loss or profit arising out of the assets de-capitalised after they have been taken out of service is to be retained by the generating company is patently wrong. The relevant finding is as follows:

“As regards the head others”, the Petitioner in its affidavit dated 22.12.2006 has explained that the cost of certain fixed assets de-capitalisation has been included therein. However, as per the policy of the Commission, any loss or profit arising out of assets de-capitalised after they have been taken out of service is to be retained by the generating company. Accordingly, an amount of Rs.245.89 lakh, Rs.263.27 lakh and Rs.490.08 lakh have been disallowed in the year 2000-01, 2001-02 and 2002-03”.

32. It is pointed out by the Appellant that when the Appellant took over the Talcher Station from the erstwhile Orissa Electricity Board it had almost outlived its useful life and consequently, the Appellant had to incur substantial expenditure on Renovation and Modernisation of the Talcher Station and the process the Appellant had incurred substantial loss on the de-capitalisation of the assets of the Talcher Station and therefore, the loss incurred by the Appellant on the de-capitalisation of assets during the process of Renovation and Modernisation of the Talcher Station should be allowed to be recovered through the tariff as part of the operation and modernisation expenditure.
33. On the other hand, the Learned Counsel for the Respondent submits that the Central Commission has rightly disallowed the said amount for the year 2001-02 and 2002-03 respectively considering its policy that any loss or profit arising out of the assets de-capitalised after they have been taken into service would be retained by the generating company.
34. We have carefully considered these submissions made by the Counsel for the parties.
35. According to Learned Counsel for the Respondent, as per the pre-conditions of R&M, the benefits under Renovation and Modernisation have to be shared between the beneficiary and the Generator. As a matter of fact, the NTPC has made huge profits on account of the Talcher Station as pointed out by the Central Commission. Therefore, the plea of the Appellant for further relaxation on the ground that the plant is old one and outlived its useful life is not tenable. Though, Ministry of Power guidelines envisaged that

Renovation and Modernisation period shall not exceed 30 months, it has become a long term process in the Talchar Power Station since 1995. As a matter of fact, the benefits of Renovation and Modernisation such as earning from relaxed operational norms, additional UI charges and incentive etc have been achieved but even then the same had not been passed on to the beneficiary consumers.

36. The Central Commission while rejecting the Review Petition filed by the Appellant by its order dated 28.9.2007 has observed that once the assets are taken out of service, they do not form part of the capital base for any purpose and the cost of the new assets placed in lieu of the assets de-capitalised form `the capital base which entitles the petitioner for a return.
37. Further, as per the policy of the Central Commission, any loss or profit arising out of the de-capitalised assets is to be borne/retained by the Appellant. That being the practice consistently followed by the Central Commission, we do not want to interfere with the same. There is also no Regulation on this aspect favouring the contention raised by the Appellant.
38. Therefore, we are of the view that the Central Commission is fully justified in not allowing the alleged loss on account of de-capitalisation of assets as part of the O&M expenditure.
39. In the light of our above findings we allow the Appeal only in respect of some of the issues indicated above and reject the other issues.

40. Thus, the Appeal is partly allowed. The Central Commission is directed to pass consequential orders in terms of the above finding after hearing the parties.

41. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 19th April, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~