

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

(APPELLATE JURISDICTION)

APPEAL NO. 27 OF 2013

Dated: 18th February, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

IN THE MATTER OF:

Punjab State Transmission Corporation Limited
PSEB Head Office
The Mall, Patiala – 147001 Appellant

Versus

1. Punjab State Electricity Regulatory Commission
SCO No 220-221, Sector 34-A,
Chandigarh – 160 022
2. Punjab State Power Corporation Limited
The Mall, Patiala – 147 001
Punjab Respondents

Counsel for the Appellant(s) ... Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent(s) ... Mr. Sakesh Kumar
Mr. Praveen Kumar Singla (Rep)
for R-1

JUDGMENT

PER HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The present Appeal has been preferred under Section 111 of the Electricity Act, 2003 against the Order dated 16.07.2012 passed by the Punjab State Electricity Regulatory Commission (hereinafter called the 'State Commission') passed in Petition No. 67 of 2011 whereby the State

Commission has approved the Annual Revenue Requirement (ARR) of the Appellant for the year 2012-13 and also reviewed the revenue requirements for the year 2011-12. The State Commission has, by the impugned order, allowed the return on equity only at the rate of 15.5% without giving effect to the entire provision under Regulation 15 of the Tariff Regulations of the Central Commission, 2009 applicable in the State of Punjab, namely; grossing up (23.481%) of the return on equity. The State Commission has, by the impugned order also not allowed the Review Petition filed by the Appellant.

2. The present Appeal raises an issue as to whether the tax has to be grossed up on the equity despite the fact that the Appellant is not paying any tax being a loss making licensee and even when the regulations provide for allowing tax as a pass-through?

3. The relevant facts giving rise to the present Appeal are as under:

(a) that the Appellant is a company incorporated under the provisions of the Companies Act, 1956 and is vested with the function of transmission of electricity in the State of Punjab. The Appellant is also the State Transmission Utility (STU) and the State Load Despatch Centre (SLDC) for the State of Punjab.

(b) that till 16.04.2010, the Punjab State Electricity Board was undertaking the functions of generation, transmission, distribution and retail supply of electricity as an integrated utility. The Board was unbundled to form two successor entities, Punjab State Power Corporation Limited, Respondent No.2 herein and Punjab State Transmission Corporation Limited, the Appellant herein, under the Punjab Power Sector Reforms Transfer Scheme, 2010 (hereinafter referred to as 'Scheme') with effect from 16.04.2010. The appellant has also been notified as the State Transmission Utility and operates the State Load Dispatch Centre (hereinafter referred to as "SLDC"). As per the Transfer Scheme, the transfer of assets and liabilities was provisional and would be final upon expiry of 12 months from the

effective date of transfer or 6 months after the audited accounts as on the Effective date of transfer are available, whichever is later.

- (c) that the Respondent No.1, State Commission is the Regulatory Commission for the State of Punjab discharging functions and exercising powers under Section 61, 62, 64, 86 and other applicable provisions of the Electricity Act, 2003.
- (d) that the Respondent No.2 is the distribution licensee in the State of Punjab and is the beneficiary of the transmission system of the Appellant.
- (e) that on 21.11.2005, the State Commission notified the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 and amended the same on 27.07.2009 (hereinafter referred to as 'Tariff Regulations')
- (f) that the State Tariff Regulations, did not provide for independent norms and parameters for the transmission of electricity, but adopted the norms and parameters as provided for in the Regulations of the Central Commission to be adopted in the State of Punjab. This included the applicable return on equity to be provided to the transmission licensee.
- (g) that the State Commission had been earlier following the practice of allowing the return on equity in terms of the Tariff Regulations, 2004 framed by the Central Commission, which has been adopted by the State Commission in the State of Punjab. Under the Central Tariff Regulations, 2004, return on equity was allowed post tax @ 14%. The income tax paid was treated as an expenditure in the hands of the licensee and was allowed to be recovered as a part of the annual revenue requirements of the licensee.
- (h) that the Central Commission has replaced the Tariff Regulations, 2004 with Tariff Regulation, 2009 with effect from 01.04.2009 for the purposes of transmission and in particular the applicable return on equity. In this regard, Regulation 15 of the Tariff Regulations 2009 of the Central Commission inter-alia, reads as under:

“15. Return on Equity. (1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with Regulation 12.

(2) Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per clause (3) of this Regulations:

Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in Appendix-II:

Provided further that the additional return of 0.5% shall not be admissible if the project is not completed within the timeline specified above for reasons whatsoever.

(3) The rate of return on equity shall be computed by grossing up the base rate with the normal tax rate for the year 2008-09 applicable to the concerned generating company or the transmission licensee, as the case may be:

Provided that return on equity with respect to the actual tax rate applicable to the generating company or the transmission licensee, as the case may be, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued up separately for each year of the tariff period along with the tariff petition filed for the next tariff period.

(4) Rate of return on equity shall be rounded off to three decimal points and be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate / (1-t)

Where t is the applicable tax rate in accordance with clause (3) of the Regulation.

Illustration:

(i) *In case of the generating company or the transmission licensee paying Minimum Alternate Tax (MAT) @ 11.33% including surcharge and cess:*

Rate of return on equity = 15.50 / (1-0.1133) = 17.481%

(ii) *In case of generating company or the transmission licensee paying normal corporate tax @ 33.99% including surcharge and cess:*

Rate of return on equity = 15.50 / (1-0.3399) = 23.481%”

- (i) that by the order dated 09.05.2011, the State Commission had disposed of the tariff petition filed by the Appellant for the year 2011-12 and determined the transmission charges applicable. The State Commission by the order dated 09.05.2011, had also reviewed the Annual Revenue Requirements (ARR) of transmission and State Load Despatch Activities (SLDA) for the year 2010-11.

(j) that the Appellant feeling aggrieved by the order dated 09.05.2011 had filed an appeal being Appeal No. 76 of 2011 reported in 2012 ELR(1) 0506 before this Tribunal. This Tribunal had, vide judgment and order dated 02.03.2012, allowed the appeal of the Appellant on the issue of return on equity, inter-alia, holding as under:

*“43. So far, we have covered one aspect of the matter. Given the language employed in Regulation 25 of the State Regulations, 2005 we have held that the principles adopted in Regulation 25 was in the light of the regulation 21 (iii) of the CERC Regulations, 2004 and with the change of the Regulations of the CERC, the CERC Regulations, 2009, will apply. This is regulation 15 of the CERC Regulations, 2009. There is a rider in this that CERC Regulations, 2004 which deals with return on equity (regulation 21 (iii)) is intrinsically related to regulation 7 dealing with tax on income. In the State Regulations similar provision has been made in Regulation 32. Since regulation 25 of the State Regulations speaks of being guided by the Central Regulations as amended from time to time and as the CERC has framed new Regulation in 2009 (regulation 15), the said regulation 15 which is applicable in the instant case shall be applied sans the regulation 7 of the Central Regulation, 2004 inasmuch as regulation 15 of the CERC Regulations, 2009 has abolished the provision of regulation 7 of the CERC Regulations, 2004 and there cannot be double advantage accruable to a transmission company who is of course entitled to the benefit of the CERC Regulations, 2009 (regulation 15). Once we hold that regulation 15 of the CERC Regulations, 2009 will become applicable it is implied as also it becomes explicit that **tax on income cannot be a pass through to the beneficiaries**. Regulation 15 of the CERC Regulations, 2009 has spoken so in express language so that there cannot be any misapprehension on the question of application of regulation 7 of the CERC Regulations, 2004 or regulation 32 of the State Regulations, 2005. A question may arise as to why then regulation 25 read with regulation 32 of the State Regulations, 2005 should not be applied. Answer is two fold, namely:*

a) Analysis of regulation 25 of the State Regulations, 2005 as made above makes it clear that it was the intention of the Authority that passed the order impugned to follow the CERC Regulations, 2009. The State Commission was quite conscious of the necessity of following the norms, principles and methodologies enunciated by the CERC. The norms, principles and methodologies must be such as are prevalent at a given point of time.

b) It is also the settled position of law that if two interpretations are possible then the interpretation which is beneficial to the subject should be accepted.

We answer the point accordingly.”

4. The following submissions have been made on behalf of the Appellant:

- (i) that in the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005, the State Commission did not specify separate norms and parameters for transmission business, but decided to adopt the norms as notified by the Central Electricity Regulatory Commission (Central Commission) from time to time including for the return on equity.

In this regard, Regulation 25(1) of the Tariff Regulations of the State Commission provided that return on equity shall be computed on the paid-up equity capital determined in accordance with Regulation 24 and shall be guided by Central Regulations, 2004 as amended by the Central Commission from time to time. The same principle was required to be applied for distribution business as far as possible.

- (ii) that the Central Commission had earlier framed the Tariff Regulations 2004 which were applicable for the period from 01.04.2004 to 31.03.2009. The Central Commission has for the control period from 01.04.2009 to 31.03.2014 framed the Tariff Regulations, 2009 and repealed the Central Commission Tariff Regulations, 2004. Thus, the Central Commission Tariff Regulations, 2004 have been repealed by the Central Commission Tariff Regulations, 2009.
- (iii) that consequently, with effect from 01.04.2009, the State Commission was required to follow the norms of return on equity as provided in the Tariff Regulations, 2009 of the Central Commission.
- (iv) that the methodology of calculation of return on equity and the treatment of income tax has been substantially changed by the Central Commission in the Tariff Regulations, 2009 as compared to the Tariff Regulations, 2004. The Tariff Regulations, 2004 of the Central Commission provided for return on equity to be provided

@ 14%. Thus, under Central Tariff Regulations, 2004, return on equity was allowed post tax @ 14%. The income tax was to be provided/treated separately as an expense to be recovered in the Tariff. To further clarify the income tax paid under Central Tariff Regulations, 2004 was treated as an expense in the hands of the licensee and was allowed to be recovered as a part of the Annual Revenue Requirement of the licensee.

In this regard, **Regulation 7 of the Tariff Regulations, 2004** of the Central Commission provides as under:

“7. Tax on Income: (1) *Tax on the income streams of the generating company or the transmission licensee, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries.*

(2) *Any under-recoveries or over-recoveries of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income-Tax-Act, 1961, as certified by the statutory auditors.*

.....

Return on Equity:

Return on equity shall be computed on the equity base determined in accordance with regulation 20 @ 14% per annum.”

- (v) that the Tariff Regulations, 2009 made a departure the principle of calculation of return on equity and treatment of taxes. The Tariff Regulations, 2009 of the Central Commission as per Regulation 15 thereof has provided for a return on equity @ 15.5% to be grossed up by the applicable tax rate. The taxes as an expenditure in the Tariff is not allowed in the Tariff Regulations, 2009 of the Central Commission.
- (vi) that in other words, the annual tax paid by the licensee is irrelevant under the Tariff Regulations, 2009 of the Central Commission, but only the tax rate that is applicable is considered and grossed up on the 15.5% return on equity as provided in Regulation 15.
- (vii) that the State Commission in the tariff order for the year 2011-12 did not allow return on equity in terms of Tariff Regulations, 2009 of the Central Commission, but allowed the same only at 14%

which was in terms of the Tariff Regulations, 2004 of the Central Commission.

- (viii) that aggrieved by the tariff order for the year 2011-12, the Appellant filed an appeal being Appeal No. 76 of 2011 before this Tribunal when this Tribunal vide judgment dated 02.03.2012 while allowing the Appeal of the Appellant on the issue of return on equity clearly held that Regulation 25 of the State Regulations, 2005 was in the light of Regulation 21(iii) of the CERC Regulations, 2004 and with the change of the Regulations of the CERC, Regulation 15 of the CERC Regulations, 2009 will apply. Regulation 21(iii) of the Central Regulations, 2004 dealing with return on equity is intrinsically related to Regulation 7 dealing with tax on income. Since, Regulation 25 of the State Regulations speaks of being guided by the Central Regulations as amended from time to time, the Regulation 15 of Central Regulations shall be applied without Regulation 7 of the Central Regulations, 2004 because Regulation 15 of Central Regulations, 2009 has abolished the provisions of Regulation 7 of Central Regulations, 2004 and there cannot be double advantage accruable to a transmission company which is of course entitled to the benefit of Regulation 15 of the Central Regulations, 2009. This Tribunal clearly held in its judgment dated 02.03.2012 that Regulation 15 of Central Regulations, 2009 will become applicable and tax on income cannot be a pass through to the beneficiaries.
- (ix) that the State Commission, by the impugned order while determining tariff for the subsequent period 2012-13 dealing with issue of return on equity allowed the return on equity @ 15.5% and State Commission has failed to gross up the return on equity with the applicable tax rate in terms of Regulation 15 of the Central Tariff Regulations, 2009.
- (x) that the learned State Commission, in the impugned order on page 92 to 93 has held that the Appellant has claimed a Return on

Equity of Rs.89.09 crore for the transmission business for FY 2011-12 @ 15.5% (pre-tax) to be grossed up to 23.48% as per the Central Regulations on the opening equity of Rs.379.42 crore. The opening equity, considered by the Commission for FY 2011-12 in the Tariff Order for FY 2011-12, was Rs.328.50 crore and the same is considered as the opening equity for purposes of allowing Return on Equity as discussed in para 3.8.6 of this order.

- (xi) that the Commission in the past, had been allowing return on equity of 14% as per Central Regulations, 2004 prior to amendment of the same in 2009. In 2009 Central Regulations adopted a figure of 15.5% (pre-tax) for allowing Return on Equity to power utilities which was to be grossed up as per tax paid by the utility. The Commission took refuge that "CERC Regulations will be followed as far as possible" and refrained from PSERC Tariff Order FY 2012-13 for PSTCL adopting a figure of 15.5% (pre-tax) holding that PSPCL had not shown requisite improvement in the critical parameters like employee cost. This Tribunal clearly in its judgment dated 02.03.2012 in Appeal No. 76 of 2011 held that Regulation 15 of the Central Regulation, 2009 will become applicable and the tax on income cannot be a pass through to the beneficiaries. In compliance of the order of this Tribunal, the State Commission allows Return on Equity on Rs.50.92 crore @ 15.5% on the equity amount of Rs.328.50 crore.

5. Per contra, the learned counsel on behalf of the Respondent No.1, State Commission, has made the following submissions:

- (a) that the State Commission, in the impugned order, has allowed the Return on Equity @ 15.5% without giving effect to the provision of grossing up (23.481%) of the Return on Equity as per the applicable Tariff Regulations. The Tariff Regulations of the State Commission, as was then existing, did not provide for independent norm of Return on Equity but only as per the applicable Regulations of the Central

Commission. Taking guidance from the observation of this Tribunal in its judgment dated 02.03.2012 passed in Appeal No. 76 of 2011, the State Commission was of the view that since Regulation 32 of the State Tariff Regulation, 2005 is in position which provides for allowing taxes as expense separately, the Commission was justified in allowing Return on Equity to the transmission company @ 15.5% without grossing up in the Tariff Order for FY 2012-13. Had the Commission allowed Return on Equity at the grossed up rate it would have amounted to allowing double benefit to the utility to the detriment of the consumers.

(b) that the Petitioner's contention that the amount of tax paid by the licensee is irrelevant also has no locus standi. It is amply clear that the licensee will not get the benefit of the grossed up rate of Return on Equity in case he is not liable to pay any tax. It is equally true that under Regulation 32 of the State Tariff Regulations, 2005, any payment of tax allowed as expense will also be trued up. The intention of the Appellant in claiming Return on Equity at the grossed up rate implies that the Appellant petitioner will claim a tax amount in advance whether his liability to pay the obligatory taxes arises or not. It also needs to be stressed that in case the liability of tax payment of the licensee is ascertained as nil/less during true up, the amount allowed in excess, if any, by way of applying grossed up rate will become recoverable from it along with interest at the SBI Advance Rate. This principle is applicable in order to maintain parity with allowability of interest to the licensee on the amount of revenue gap for any year.

(c) that the State Commission in the impugned order also noted that Petitioner Appellant had not claimed any tax liability for its ARR for the years 2011-12 and 2012-13. Thus, the impugned order of the Commission to allow Return on Equity for FY 2011-12 and FY 2012-13 @ 15.5% without giving effect to the entire provision of grossing up is a well considered and conscious one, keeping in view the existing provisions of Regulation 25 and 32 of the State Tariff

Regulations, 2005 which provide for allowing Return on Equity and obligatory taxes under two separate Regulations. The State Tariff Regulations, 2005 are in conformity with the Central Commission Regulations, 2009 in as much as they both provide for allowing Return on Equity as also any obligatory taxes paid by the licensee. The only difference is that the Central Commission has embodied that the two provisions under Regulation 15 of Central Commission Regulations, 2009 whereas both these have been provided under two separate Regulations namely; Regulations 25 and 32 of the State Tariff Regulations, 2005. The application of grossed up rate of Return on Equity is not automatic but will be applied only in case the licensee pays tax on its income. Regulation 15 (3) of the Central Regulations, 2009 provides for that Return on Equity with respect to the actual tax rate applicable to the generating company or the transmission licensee, as the case may be in line with the provisions of the relevant Finance Acts.

(d) that in its Appeal, the Appellant had stressed the need for allowing Return on Equity to the Appellant in terms of Regulation 15 of the Central Commission Tariff Regulations, 2009 which provides for Return on Equity @ 15.5% (pre-tax) and grossed up rate of 23.48% (post-tax). The Appellant has stated that with the change in Central Commission Tariff Regulations, 2009, Return on Equity at the grossed up rate at 23.48% should be allowed. The State Commission in the Tariff Order for the Appellant for FY 2012-13 which contained review for FY 2011-12 as well, had allowed Return on Equity at the rate of 15.5% in the Review of 2011-12 as well as in determination of the ARR of the petitioner for FY 2012-13. The State Commission adopted and approved Return on Equity @ 15.5%, at par with the Return on Equity notified under Regulation 15 of the Central Commission Tariff Regulations, 2009 keeping in view the existing provisions of Regulation 32 of the State Tariff Regulations, 2005, which provides for allowing obligatory taxes, if any on the income of

the generating company/licensee from its core/licensed business as an expense in the ARR of the licensee.

- (e) that the State Commission in the impugned order has adopted the Central Commission Tariff Regulations, 2009 while allowing Return on Equity to the licensee Appellant @ 15.5% and it was also allowing the obligatory taxes on the income from the licensed business of the licensee as provided under Regulations 25 and 32 of the State Tariff Regulations, 2005 respectively and, thus, the licensee Appellant was not put to any loss on this account. The licensee Appellant was allowed Return on Equity @ of 15.5% i.e. at par with the rate of Return on Equity under the Central Commission Tariff Regulation and in addition entire obligatory taxes were also allowable as laid down in Regulation 32 of the State Commission Tariff Regulations, 2005.
- (f) that this Tribunal in its judgment dated 02.03.2012 ruled that in case Return on Equity is allowed to the Licensee at the grossed up rate of 23.48% in terms of Regulation 15 of the Central Commission Regulations, 2009, the benefit of passing on the payment on account of obligatory taxes, if any, separately to the consumers is not justified since no one should get double benefit.
- (g) that the Commission in its order dated 07.01.2013 passed in Petition No. 57 of 2012 (suo-motu) in compliance of this Tribunal's judgment dated 18.10.2012 in Appeal No. 7, 46 and 122 of 2011 in the case of PSPCL had allowed Return on Equity @ 15.5% in place of 14% approved earlier for FY 2009-10. Total additional amount of Return on Equity allowed is Rs.67.61 crore inclusive of carrying cost of Rs.23.42 crore for the period from 2009-10 to 2013-14. In its order, the Commission observed:

“The Commission is convinced that the ROE at the grossed up rate is not admissible to PSPCL since it has accumulated losses of Rs.1150.82 crore at the end of FY 2009-10 and as such it is not in profit and therefore not paying tax on its income.”

By the same rational Return on Equity to PSPCL (Appellant herein) was not allowed at the grossed up rate.

By making the aforesaid counter submissions, the learned counsel for the State Commission prays for the dismissal of Appeal with costs as the Appeal has no merits.

6. After hearing the learned counsel for the contesting parties and going through their respective written submissions and the material on record, the following issues arise for our consideration:

- (I) whether the tax has to be grossed up on the equity despite the fact that the Appellant is not paying any tax being a loss making licensee and even when the regulations provide for allowing tax as a pass-through?
- (II) whether the State Commission in the impugned order did not apply Central Commission Tariff Regulations, 2009 correctly and did not allow grossing up of the Return on Equity by the applicable tax rate in clear violation of the decision of this Tribunal dated 02.03.2012 in Appeal No. 76 of 2011?
- (III) whether the State Commission is justified in not fully implementing the Regulation 15 of Tariff Regulations, 2009 of the Central Commission in regard to the applicable rate of return on equity?

7. Before considering the issue before us, we deem it proper to reproduce Regulation 25 and 32 of the PSERC Tariff Regulations, 2005 which are as follows:

“25. RETURN ON EQUITY

1. *Return on Equity shall be computed on the paid up equity capital determined in accordance with Regulation 24 and shall be guided by the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 as amended by the*

CERC from time to time. The same principles will apply for distribution business also as far as possible.

2. *Equity invested in foreign currency shall be allowed a return up to the prescribed limit under clause (1) of this Regulation in the same currency and the payment on this account shall be made in Indian Rupees based on the exchange rate on the date of declaration of dividends. The difference in actual exchange rate and the provisional exchange rate considered while determining the ARR and Tariff shall be taken into consideration at the time of Truing Up.*
3. *The premium raised by the generating company or the licensee while issuing share capital and investment of internal resources created out of free reserve, if any, shall also be reckoned as paid up equity capital for the purpose of computing return on equity, subject to limit prescribed in Regulation 24, provided such premium amount and internal resources are actually utilized for meeting capital expenditure.*

32. TAX ON INCOME

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

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

2. *Tax on income, if actually liable to be paid, shall be limited to tax on return on equity allowed, excluding incentives.*
3. *The Tax on income shall be considered at income tax rate including surcharge, cess, etc as applicable during the relevant year in accordance with the provisions of Income Tax Act, 1961 duly amended from time to time.*
4. *The benefits of tax holiday and the credit for carrying forward losses applicable as per the provisions of the Income Tax Act, 1961 shall be fully passed on to the customers/consumers.”*

8. The main thrust of the arguments of the learned counsel for the Appellant is that the impugned order of the State Commission is incorrect because after coming into force of the Central Tariff Regulation, 2009 as adopted by the State Commission, the Return on Equity of 15.5% has to necessarily be grossed up by the applicable tax rate. The question of allowing taxes separately does not arise. As per the decision of this

Tribunal dated 02.03.2012 in Appeal No. 76 of 2011, the Regulation 32 of the State Commission Tariff Regulations, which provides for allowing tax on actual basis as expense cannot be applied as the return on equity is to be grossed up by the applicable tax rate and there cannot be two implications of income tax (a) by grossing up of return on equity; and (b) allowing tax as an expenditure. The income tax is only to be grossed up to the Return on Equity and cannot be allowed as an expense.

9. The last submission on behalf of the Appellant is that the State Commission by amendment of the Tariff Regulations by Notification dated 17.09.2012 has provided for Return on Equity at the fixed rate of 15.5% without any gross up. The tax is to be allowed as an expense. This itself establishes that the Tariff Regulations as prior to the said amendment provided for the Return on Equity to be treated in terms of the Central Commission's Regulations and the amendment was required to change the treatment of the return on equity. The above amendment incorporated by Notification dated 17.09.2012 by State Commission in the State Commission's Tariff Regulations would apply to Tariff Orders passed by the State Commission after the date of notification of the said amendment and not to orders passed prior to the date of notification.

10. Thus, the learned counsel for the Appellant submits that since by the Notification dated 17.09.2012, the amendment has been made by the State Commission in its Tariff Regulations, after passing of the impugned order, there remains no controversy in future on this aspect. The State Commission, after the amendment of Tariff Regulations by Notification dated 17.09.2012, which provides for the Return on Equity @ 15.5% without any grossing up will follow the amended regulations in the subsequent Tariff orders.

11. A careful and close scrutiny of both the judgments of this Tribunal namely; judgment dated 02.03.2012 in Appeal No. 76 of 2011 as well as in the subsequent judgment dated 18.10.2012 in Appeal Nos. 7, 46 and 122

of 2011 passed by the same Bench of this Tribunal depicts that the same Punjab State Commission allowed Return on Equity @ 14% (post tax) instead of 15.5% (pre-tax) in each of the FYs 2009-10, 2010-11 and 2011-12 in accordance with Regulation 15 of CERC (Terms & Condition of Tariff) Regulations, 2009. The view of the State Commission in those judgments while disallowing the Return on Equity @ 15.5% (pre-tax) to be grossed up on the basis of Regulation 15 of Central Commission's Tariff Regulations, 2009 was that the erstwhile Board was unable to effect requisite improvements in critical performance parameters and the State Commission allowed Return on Equity @ 14% only following Central Commission Tariff Regulations, 2004. This Tribunal in the aforesaid judgments gave consistent finding that regulation 25 of the State Regulations speaks of being guided by the Central Regulations as amended from time to time and as the CERC has framed new Regulations in 2009. Regulation 15 of the CERC Regulations, 2009 is applicable to the cases after coming into force of Central Commission Regulations, 2009. The Tariff Regulations, 2009 of the Central Commission came into force from 01.04.2009 and in both the aforementioned cases, Regulation 15 of the Tariff Regulation, 2009 of the Central Commission has been found applicable by this Tribunal.

12. In the instant case, the State Commission has, by the impugned order while determining tariff for FY 2012-13 allowed Return on Equity @15.5% without grossing up with the applicable tax rate in terms of Regulation 15 of the Central Tariff Regulation, 2009. The only point for our consideration remains is whether the Appellant is entitled to grossing up of the Return on Equity @ 15.5% with the applicable tax rate in terms of Regulation 15 of Central Tariff Regulations, 2009?

13. The Appellant has claimed Return on Equity of Rs.89.09 crore for the transmission business for FY 2011-12 @ 15.5% (pre-tax) to be grossed up to 23.48% as per Regulation 15 of the CERC Regulations, 2009 on the opening equity of Rs.379.42 crore. The State Commission found the

opening equity for FY 2011-12 in Tariff Order for FY 2011-12 as Rs.328.50 crore and the Commission has considered the same as opening equity for the purposes of allowing Return on Equity.

14. The State Commission in the impugned order has observed that in 2009 amendment, CERC adopted a figure of 15.5% (pre-tax) for allowing Return on Equity to power utilities which was to be grossed up as per tax paid by the utilities. The State Commission, in the impugned order, after complying with the aforesaid judgments of this Tribunal allows Return on Equity of Rs.50.92 crore @ 15.5% on the equity amount of Rs.328.50 crore. The Commission at page 93 of the impugned order regarding Return on Equity has observed as follows:

“In the ARR Petition for FY 2012-13, PSTCL has claimed Rs.0.11 crore towards Return on Equity for SLDC business at an effective rate of 23.48% as per CERC Regulations after showing an equity addition of Rs.0.94 crore based on equity on accrual basis. The Commission observes that opening balance of equity in the books of SLDC is nil. Also the Commission has not accepted the proposal of PSTCL to fund the projected capital expenditure through ploughing back of ROE as discussed in Para 3.8.6. The Commission, therefore, does not consider any ROE due on SLDC business for FY 2011-12.”

15. Since all the three issues raised in this case are interlinked, we are taking up and deciding them simultaneously.

16. It is evident that the learned State Commission in the subsequent order dated 07.01.2013 passed in Petition No. 57 of 2012 (suo-motu) in compliance of this Tribunal's judgment dated 18.10.2012 in Appeal Nos. 7, 46 and 122 of 2011 had allowed Return on Equity @ 15.5% in place of 14% approved earlier for FY 2009-10. It is true that the State Commission, in the impugned order has allowed Return on Equity @ 15.5% without any grossing up to the Appellant, which is a transmission utility, for FY 2012-13 for the reason, had the Commission allowed Return on Equity at the grossed up rate, it would have amounted to allowing double benefit to the utility to the detriment of the consumers. Since, the Appellant was not liable to pay any income tax or obligatory tax it was not given the benefit of

grossing up rate of the Return on Equity. While claiming the grossing up of Return on Equity by the Appellant, its impliedly intension was that the Appellant would claim tax amount in advance whether the liability of the Appellant is to pay the obligatory taxes arises or not. The State Commission in the impugned order has clearly noted that the Petitioner Appellant had not claimed any tax liability for its ARR for the years 2011-12 and 2012-13. The impugned order to allow Return on Equity for FY 2011-12 and 2012-13 @ 15.5% without any grossing up with the tax rate seems to be well considered view.

17. The Regulation 15 of the Central Commission Tariff Regulations, 2009 lays down that the Return on Equity shall be computed on the equity base determined in accordance with Regulation 12 thereof and the Return on Equity shall be computed on pre tax basis at the base rate of 15.5% to be grossed up as per clause 3 of this Regulation 15. Clause 3 of Regulation 15 further states that rate of Return on Equity shall be computed by grossing up the base rate with the normal tax rate for the relevant year applicable to the concerned generating company or to the transmission licensee with a proviso which provided that Return on Equity with respect to actual tax rate applicable to the generating company or transmission licensee, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued up separately for each year of the tariff period along with the Tariff Petition filed by the next tariff period. Since the Petitioner Appellant did not claim any tax liability for its ARR for the years 2011-12 and 2012-13 and the Appellant was a loss making entity, the Return on Equity was allowed @ 15.5% without any grossing up by the tax rate. The application of grossed up rate of Return on Equity is not automatic but will be applied only in case the licensee pays tax on its income. The State Commission was bound to follow or comply with all the provisions with conditions prescribed under Regulation 15 of the Central Commission Tariff Regulations, 2009 and the provision of the same could not be considered in isolation but the cumulative and combined effect of all the provisions of

the said Regulation 15 was to be considered which has been rightly considered by the learned State Commission.

18. The position as admitted by the learned counsel for the contesting parties is that after passing of the impugned order, the State Commission vide Notification dated 17.09.2012 has incorporated an amendment to the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 by making amendment in Regulation 25 relating to Return on Equity. By the said amendment under Regulation 25 of the State Commission Regulations, 2005, Return on Equity shall be computed @ 15.5% on the paid up equity capital determined in accordance with Regulation 24. Thus, after passing of the impugned order, the important amendment has been made in the State Regulations, 2005 by the learned State Commission and the provision of grossing up has been done away with bringing the whole controversy or dispute, which would have arisen in future, to an end.

19. As discussed above, the State Commission has not committed any kind of violation of the decision of this Tribunal dated 02.03.2012 in Appeal No. 76 of 2011 because after the judgment dated 02.03.2012 and one more judgment dated 18.10.2012 in Appeal Nos. 7, 46 and 122 of 2011 the State Commission in the aforesaid suo-motu petition complied has already with the judgment of this Tribunal.

20. Since the State Commission has already by implementing the judgments of this Tribunal, allowed Return on Equity @ 15.5% citing the sufficient and cogent reasons by changing its old view and now the State Commission after the amendment of Regulation 25 dealing with Return on Equity of State Commission Tariff Regulations, 2005 vide Notification dated 17.09.2012 has deleted or scraped the provision of grossing up of the Return on Equity, the controversy or dispute for the future period has been brought to an end. The State Commission is justified in passing the

impugned order and no illegality or infirmity has been committed by the State Commission.

21. In view of the above discussion, since the Appellant has not paid any income tax or obligatory tax during the relevant period, being a loss making licensee, the Appellant has rightly been disallowed the grossing up of the Return on Equity by the tax rate applicable to the Appellant. The learned State Commission has given complete effect to the provisions of Regulation 15 of the Central Commission Tariff Regulations, 2009 in passing the impugned order. The impugned order is perfectly just and legal one requiring no interference by us at this stage, particularly, when the relevant Regulation 25 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 has been amended by Notification dated 17.09.2012 settling the whole controversy for the future.

22. All the aforesaid issues are decided against the Appellant and Appeal merits dismissal. The Appeal is consequently dismissed without any order as to costs.

Pronounced in open Court on this 18th day of February, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ REPORTABLE/NON-REPORTABLE

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