

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:20th Nov, 2014

Present:

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

APPEAL NO.252 OF 2013

In the Matter of:

Gujarat Urja Vikas Nigam Limited
Sardar Patel,
Vidyut Bhavan,
Race Course,
Vadodara-390 007, Gujarat

..... Appellant

Versus

- 1. EMCO Limited**
N-104, MIDC Area,
Mehrun, Jalgaon-425 003
Maharashtra

- 2. Gujarat Electricity Regulatory Commission**
First Floor, Neptune Tower,
Opposite Nehru Bridge,
Ashram Road,
Ahmedbad-380009

...Respondent(s)

Counsel for the Appellant(s) : Mr. M G Ramachandran
Ms. Swapna Seshadri
Mr. Anand K Ganesan
Ms. Anushree Bardhan
Ms. Swagatika Sahoo
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Counsel for the Respondent(s): Mr. Sanjay Sen, Sr. Adv.
Ms. Shikha Ohri
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Mr. S R Pandey
Mr. Matrugupta Mishra
Mr. Ruth Elwin for R-2
Mr. Vikas Singh Sr Adv.
Mr. Kumar Rachit
Mr. Hermant Sahai
Mr. Venkatesh for R-1,
Mr. Shekhar Prit Jha
Mr. Sunil Puri
Mr. Dhruv Chopra for Intevener

J U D G M E N T

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

1. Gujarat Urja Vikas Nigam Limited (Gujarat Urja) is the Appellant herein.
2. Aggrieved by the Impugned Order dated 8.8.2013 passed by the Gujarat State Commission holding that the EMCO Limited, the Generating Company is entitled to higher tariff of Rs.11.25 per unit, the Appellant has filed this Appeal.
3. The short facts leading to the filing of this Appeal are set-out as under:

(i) The Appellant, Gujarat Urja is an unbundled entity of the erstwhile Gujarat Electricity Board.

(ii) The Appellant procures electricity on behalf of the Distribution Licensees in the State of Gujarat and accordingly enters into PPA with Generating Companies.

(iii) EMCO Limited, the first Respondent herein is a developer which has established a 5 MW Solar Photovoltaic at village Fatehpur, Taluka Dasada, District Surendranagar in the State of Gujarat.

(iv) The State Commission by the order dated 29.1.2010, determined the tariff for procurement of power by the Distribution Licensees in the State from Solar Energy Projects. By this order, the promotional tariff was determined for solar power projects which may be established in the State of Gujarat during the control period of two years from the date of the order dated 29.1.2010.

(v) As per the order dated 29.1.2010, the State Commission determined the tariff for generation of electricity from Solar PV Power project at Rs.15 per KWh for initial 12 years and starting from the date of

commercial operation of the project and determined Rs.5/ KWh from the 13th year to 25th year, taking normal depreciation rate of 6% for first 10 years and 2% from the 11th year onwards.

(vi) The State Commisison also determined the tariff for generation of electricity from Solar Thermal Power project at Rs.11/KWh for initial period of 12 years starting from the commercial date of the operation and determined Rs.4.00/KWhrs from the 13th year to 25th year.

(vii) The above tariffs took into account the benefit of accelerated depreciation under the income tax Act and Rules. For a project that does not get such benefit the Commission would, on a Petition in that respect, determine a separate tariff taking into account all the relevant facts.

(viii) In terms of the above order dated 29.1.2010, the State Commission decided the tariff for the Solar Power Projects on the basis that they would generally get the accelerated depreciation benefits under the income tax Act, 2003.

(ix) At this stage, M/s. Cargo Motors Private Limited filed a Petition in Petition No.1031 of 2010 seeking approval of the project specific tariff for its Solar Thermal Power Project without availing the accelerated depreciation benefits under the Income Tax Act and Rules.

(x) The State Commission passed an Order on 7.8.2010 in this Petition and considered the scope of the earlier order dated 29.1.2010 when the Solar Power project Developer had chosen to sign the PPA with the Appellant on the basis of the tariff determined in the said order dated 29.1.2010 but decided to change the tariff on the ground that it had chosen not to avail the accelerated depreciation benefits.

(xi) The Power Purchase Agreement was entered into between the Appellant and the EMCO Limited, the first Respondent, whereby the EMCO Limited agreed to supply the power to the Appellant on various conditions what was executed on 9.12.2010 for sale and purchase of electricity from 5 MW Solar Power Project to be established by the EMCO Limited, the first Respondent.

(xii) Thereafter, the EMCO Limited decided to change the location of the Solar Power Project. In view of the same, the Supplemental Agreement was entered into on 7.5.2011.

(xiii) Thereafter, on 27.1.2012, the State Commission issued the Second Tariff Order determining the tariff for procurement of power for the Distribution Licensees in the State from Solar Energy Projects commissioned in the next control period from 29.1.2012 to 31.3.2014. In this order, the State Commission determined the tariff for the Megawatt Scale photovoltaic projects availing accelerated depreciation; the tariff for first 12 years shall be Rs.9.98 per kWh and for the subsequent 13 years Rs.7 per kWh. Similarly for Megawatt Scale photovoltaic project not availing accelerated depreciation, the tariff for the first 12 years shall be Rs.11.25 per kWh and for the subsequent 13 years Rs.7.50 per kWh. In the present case, the Solar Project of EMCO Limited, the 1st Respondent was commissioned on 2.3.2012.

(xiv) At this stage, the Developer namely Rasna Marketing Services Limited executed a PPA with

Gujarat Urja on the basis of the generic tariff determination by the State Commission dated 29.1.2010. The developer subsequently filed a Petition before the State Commission for determination of project specific tariff as the project developer did not want to avail the benefit of accelerated depreciation benefit. The State Commission admitted this Petition by the Order dated 15.5.2012.

(xv) In addition to the passing of the order dated 27.1.2012 in regard to Solar Power Project, the State Commission passed the order dated 8.8.2012 determining the tariff for wind power project. By this order, the State Commission calculating the tariff considering both the scenarios namely with and without additional depreciation benefit. However, the final tariff was allowed and approved for procurement of electricity from the wind energy generators was only after considering the depreciation benefit.

(xvi) Aggrieved by the wind tariff order dated 8.8.2012 some of the Wind Generators filed Review Petition before the State Commission seeking tariff

without accelerated depreciation benefits also. This Petition was dismissed on 7.1.2013.

(xvii) Subsequently, the EMCO Limited filed a Petition before the State Commission in order to claim tariff applicable to the Solar Photovoltaic Power Project not availing the accelerated depreciation in accordance with the Tariff Order dated 27.1.2012. In this Petition, the EMCO Limited prayed that tariff of Rs.11.25 per unit be paid by the Appellant as they are not availing the accelerated depreciation.

(xviii) The Appellant contested the case by filing the reply before the State Commission contending that the EMCO Limited represented that it was availing the accelerated depreciation and the tariff was to be made applicable as per both the PPA as well as the Supplemental Agreement and hence at this stage, it was not open to the EMCO Limited to claim the higher tariff. However, the State Commission by the Order dated 8.8.2013, allowed the Petition filed by the EMCO Limited (R-1) and held that the EMCO Limited is entitled of Rs.11.25 per unit as it is not availing the accelerated depreciation.

(xix) Having aggrieved over this order, the Gujarat Urja has filed this appeal.

4. The learned Counsel for the Appellant has made the following submissions:

(i) The Order dated 27.1.2012 passed by the State Commission does not provide for two separate tariff to be given effect to have supply of Solar Power to the Appellant namely (a) With accelerated depreciation benefit being availed and (b) without accelerated benefit being availed. In the Impugned Order dated 27.1.2012, it was provided for only one tariff namely with accelerated depreciation being factored.

(ii) There is a rational of not providing the tariff without accelerated depreciation in the operative part. This is because the signing of the PPA by the Appellant for projects of Solar Power over and above the Renewable Purchase Obligation is not mandatory and is optional. The Appellant can therefore, decide not to purchase solar power at a tariff calculated without accelerated depreciation. By the Order dated 2012, the Appellant had entered in PPA with developers for purchase of solar power

much in excess of the renewable purchase obligation specified. It is in this context that the state Commission decided not to provide for any order for purchase of solar power when the accelerated depreciation is not there.

(iii) The appropriate interpretation of the order dated 29.1.2010 is that the project specific tariff was to be applicable only in the event the project developer is not entitled to accelerated depreciation. It cannot apply to a situation where the project developer is entitled to but chooses not to avail the benefit of accelerated depreciation under the income tax Act.

(iv) The order dated 29.1.2010 did not give the option to the project developers to avail or not to avail the accelerated depreciation benefit under the income tax Act. In other words, if the income tax benefit was available, there cannot be any option to the project developer to choose not to avail the same.

(v) The consistent approach followed by the State Commission for determination of generic tariff for renewable energy projects during the relevant time was that there would only be one tariff. This tariff

was considering the accelerated depreciation benefit since the same is available to the RE projects. Similar was the situation with the wind energy generators as per the order dated 8.8.2013 in which it has been held that though in the calculation and discussion, the tariff under both the situation namely with or without depreciation benefit was provided for the approval and the operative portion of the Order provided only for one tariff considering the accelerated depreciation benefit. The same principle applies squarely to the present case as well.

(vi) It is not the case of the EMCO Limited that it is not entitled to claim and avail the accelerated depreciation benefit under the income tax act. If the Respondent is so entitled and there is no prohibition for first Respondent to take such a benefit, the EMCO Limited cannot voluntarily choose not to avail the benefits and claim higher tariff i.e. increase of tariff by Rs.1.27 per unit for 12 years and Rs.0.5 per unit thereafter at the cost of consumers. The tariff without considering the accelerated rate depreciation is available only to those projects where the project developers is not entitled in law to claim such

accelerated depreciation benefits. This aspect has been interpreted by this Tribunal in the order dated 30.4.2013 passed in Appeal No.111 of 2012.

(vii) The First Respondent and other Solar Power Developers had actually signed the Power Purchase Agreement in accordance in pursuance to the previous order dated 29.1.2010 specifically agreeing to the tariff which was on the basis of the developers agreeing to avail accelerated depreciation, also further agreeing to take the tariff applicable in the next control period in case of failure to establish the project by the order dated 28.1.2012. Then the Respondent No.1 is entitled to claim only the corresponding tariff determined in the order dated 27.1.2012 namely Rs.9.98 for first 121 years and Rs.7 per unit thereafter 13 years which is approved in the order based on availing the accelerated depreciation by the project developers.

(viii) The State Commission in addition to the said findings held that the effect of the Impugned Order would apply to all the project developers who do not take the accelerated depreciation benefit. This order was passed only in the Petition filed by

the R-1 u/s 86 (1) (f) of the Electricity Act, 2003 seeking adjudication of the disputes under the PPA with the Appellant. The proceedings were not proceedings in rem for the State Commission to hold that all the project developer who are not availing the accelerated depreciation benefit shall be paid a higher tariff of Rs.11.25 per unit.

5. On these grounds, the Appellant seeks to set aside the Impugned Order on the grounds that it suffers from infirmity.
6. In reply to the above submissions, both the learned Counsel for the EMCO Limited and the Commisison have made elaborate submissions in justification of the Impugned Order. The following are the gist of the reply:
 - (i) The developer is entitled at its complete discretion to choose to avail or not to avail accelerated depreciation. This choice given to the developer is conscious and deliberate. The State Commission always intended to provide this choice to the Developer in consistent with the Income Tax Act.
 - (ii) The issues raised by the Appellant in the instant case have already been dealt with and settled by this

Tribunal in Appeal No.111 of 2012 in Rasna Case on 30.4.2013. There is no occasion for the Appellant to re-open and re-agitate this issue.

(iii) The Appellant has placed reliance in the order in Petition No.1030 of 2010 Cargo Motor case dated 7.8.2010 which would not apply to the present case. The said order was not a decision on the legal issues. The order in that case was limited to the facts of that case. The order in the Cargo Motor case passed by the State Commisison has no application to the present facts. In any event, the decision of this Tribunal in Appeal No.111 of 2012 in the Rasna case would supersede the decision taken by the State Commisison earlier.

(iv) The Tariff Order dated 27.1.2012 determines both the tariff i.e. with and without accelerated depreciation.

(v) If the intention of the Appellant was to sign the PPA with only those developers availing the benefit of accelerated depreciation, the Appellant should be incorporated the same into the PPA. This is not mentioned in the PPA.

(vi) The Impugned Order which has been passed by the State commission is in consonance with the PPA and it cannot be considered to be against the terms of the PPA.

7. On these points, elaborate arguments have been advanced by the Respondent in justification of the Impugned Order.
8. In the light of the above contentions, the questions that may arise in this Appeal are as follows:

(i) Whether the EMCO Limited, the Developer is entitled to claim tariff without accelerated depreciation by unilaterally deciding not to avail accelerated depreciation benefit under the income tax Act though being available that too after entering into Power Purchase Agreement for a tariff with accelerated depreciation benefits?

(ii) Whether the Order dated 27.1.2012 passed by the State Commission provides for PPA to be signed with project developers at the tariff without considering the benefit of accelerated depreciation even in the case same is being available under the Income Tax Act but

the Developers did not choose to avail the same?

(iii) Whether the State Commission is justified in holding that the EMCO Limited (R-1) is entitled to claim higher tariff of Rs.11.25 per unit without accelerated depreciation in the facts and circumstances of the present case?

(iv) Whether the State Commission is justified in only adjusting the tariff upwards for accelerated depreciation portion without undertaking the project specific tariff determination as per the principles laid down in the Order dated 29.1.2010 particularly when the Appellant had become entitled to various other benefits including the custom duty exemption, etc ?

(v) Whether the State Commission having treated the Petition filed by the Developer EMCO Limited u/s 86 (1) of the Electricity Act to adjudicate the dispute between the Appellant and the EMCO Limited, is justified in rendering a judgment in rem applicable to all the cases without considering the facts of each individual case ?

9. Since all these issues are interconnected and inter related, we may take up all these issues together for discussion.
10. According to the Appellant, the tariff order dated 27.1.2012 passed by the State Commission does not provide for two separate tariff and it only provides for tariffs with accelerated depreciation factored in. The correct interpretation of the first tariff order dated 29.1.2010 is that the project specific tariff was to be applicable only in the event the project is not entitled to accelerated depreciation and it cannot apply to the situation where the project developer is entitled to avail the benefit of accelerated depreciation and even then not getting the said benefit.
11. According to the Respondent, the developer is entitled to its complete discretion to choose to avail or not to avail accelerated depreciation and this choice given to the Generator is deliberate and the State Commission always intended to provide this choice to the Developer consistent with the Income Tax Act.
12. The Respondent also have pointed that this issue has already been decided by this Tribunal in Appeal No.111 of 2012 dated 13.4.2013 and the ratio decided in that case would apply to the present case also.

13. Before dealing with the issue in detail, we will refer to the relevant extract of the Impugned Order on this issue.
14. The Appellant submits that the relief sought for by the Developer is against the terms of the PPA. It should be taken note of in this context that while the Power Purchase Agreement executed between the parties refers to the tariff fixed by the State Commission in the order No.2 of 2010, the Agreement clarifies that in case the commissioning of the project was delayed, it would be entitled to the tariff as may be determined by the Commission for the projects commissioned on the date of actual commissioning date of the project. Accordingly, the tariff applicable to the project was as per the Order-1 of 2012.
15. Let us see the relevant findings in the Impugned Order after referring to the various Articles of the PPA:

“6.4. In order to examine the first issue raised by the respondent, let us see the Article-5.2 of the PPA signed by the Petitioner and the Respondent on 19.12.2010 which reads as under:

Article- 5.2 of the PPA:

“5.2 GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25 years for all the Scheduled Energy / Energy injected as certified in the monthly SEA by SLDC. The tariff is determined by

Hon'ble Commission vide Tariff Order for Solar based power project dated 30.1.2010.

Tariff for Photovoltaic project: Rs.15 / KWh for First 12 years and thereafter Rs. 5 / KWh from 13th Year to 25th Year.

Above tariff shall apply for solar projects commissioned on or before 31st December 2011. In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower.”

Thus, it was agreed between the parties that if the project is commissioned on or before the original SCOD, the tariff of Rs. 15/- per unit for initial 12 years and Rs. 5/- per unit for the subsequent 13 years shall be payable by the respondent GUVNL, which is in accordance, with the Commission's Order No. 2 of 2010 dated 29.1.2010. Thus, the tariff agreed between the parties is as per Order No. 2 of 2010.

6.5. A plain reading of the article 5.2 of the PPA, implies that if the project was commissioned by 31.12.2011, the petitioner was entitled to tariff determined in the Order No. 2 of 2010; and if the commissioning was delayed, it will be entitled to the tariff as may be determined by the Commission for the projects commissioned on the date of actual commission of the project.

6.6. In the present case, the project was commissioned on 02.03.2012 and the applicable tariff for the project was as decided by the Commission in its Order No. 1

of 2012 dated 27.01.2012. In this order, the Commission has determined two separate tariffs for the projects availing benefit of accelerated depreciation and those not availing benefit of accelerated depreciation. The point of dispute between the parties is regarding which of these two tariffs is applicable in the present case. There may be difference of opinion between the parties on this issue, but simply demanding tariff as determined by the Commission for the projects not availing the benefit of accelerated depreciation, cannot be construed as against the terms of the PPA. As such, we decide that the contention of the respondent on this issue is not acceptable”.

- 16.** The Appellant, before the State Commission urged that the contextual construction should be provided to Article 5.2 of the PPA and the benefit of tariff without accelerated depreciation benefit ought to be made available to only those projects which do not entitle to get such a benefit and not to those developers who choose not to avail the benefit.
- 17.** While dealing with this argument, the State Commission has given the following reasons for rejecting the said argument. The same is as follows:

“6.8.....

The respondent has contended that the petitioner is trying to read the second part of the article disjointed and independent of the main provision of the article. The main part of the article provides for payment of tariff @ Rs. 15 per Kwh for first 12 years and Rs. 5 per

Kwh for the subsequent 13 years. The respondent has submitted that the said tariff was determined by the Commission in its order dated 29.01.2010 taking into account benefit of accelerated depreciation. The Commission has in the said order held as under:

5. Tariff for solar PV and Solar Thermal Power projects

*“Based on the various parameters as discussed above, the levelised tariff including RoE of Solar PV power generation, using a discounting rate of 10.19% works out to Rs. **12.54** per kWh and levelised tariff using the same discounting factor for Solar Thermal Power generation works out to **Rs.9.29** per kWh. However, the Commission feels that it would be appropriate to determine tariff for two sub-periods: 12 years and 13 years instead of the same tariff for 25 years. Hence, the Commission determines the tariff for generation of electricity from Solar PV Power project at **Rs.15** per kWh for the initial 12 (twelve) years starting from the date of Commercial operation of the project and **Rs.5** per kWh from the 13th (Thirteenth) year to 25th (twenty fifth) year. The Commission also determines the tariff for generation of electricity from Solar Thermal Power project at **Rs.11** per kWh for the initial 12 (twelve) years starting from the date of Commercial operation of the project and **Rs.4.00** per kWh from the 13th (Thirteenth) year to 25th (twenty fifth) year.*

The above tariffs take into account the benefit of accelerated depreciation under the Income Tax Act and Rules. For a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts...”

The respondent has laid emphasis on the words “project developer who do not get such benefit” and alleged that the petitioner has chosen not to take the Accelerated Depreciation benefit. As such, the petitioner cannot claim now a higher tariff available to the projects who are not eligible for Accelerated Depreciation benefit.

6.9. In this context, we observe that the Commission determined the generic tariff with consideration of various normative parameters like ROE 14%, Debt Equity ration 70:30, Income tax amount, accelerated depreciation benefits as per the Income Tax Act, 1961. Hence, if the project developer if, not availing the accelerated depreciation he must be entitled to get the compensated tariff for it otherwise he will be deprived from the normative return ensured in the order of the Commission. While determining the generic normative tariff, the Commission was of the view that neither the project developer nor the distribution licensee will get undue advantage of the tariff determination process and the normative parameters adopted by the Commission in the tariff determination process must be followed by the project developers.

6.10. Further, though the PPA was signed during the control period of Order No. 2 of 2010 dated 30.01.2010, the project was actually commissioned during the control period of Order No. 1 of 2012 dated 27.01.2012; and in terms of the PPA, the applicable tariff has to be as determined in the Order No. 1 of 2012. It is, therefore, important to read both the Orders together. In the Order dated 27.01.2012, the Commission has determined tariff for Solar Projects in the table given in para 2.5.3, which is reproduced below:

Period	29 Jan2012 to 31 March, 2013	1 April, 2013 to 31st March, 2014	01 April, 2014 to 31st March, 2015
For Megawatt-scale-photovoltaic projects availing accelerated depreciation			
<i>Levelized Tariff for 25 years</i>	<i>Rs.9.28 per kWh</i>	<i>Rs.8.63 per kWh</i>	<i>Rs.8.03 per kWh</i>
<i>For first 12 years</i>	<i>Rs.9.98 per kWh</i>	<i>Rs.9.13 per kWh</i>	<i>Rs.8.35 per kWh</i>
<i>For subsequent 13 years</i>	<i>Rs.7.00 per kWh</i>	<i>Rs.7.00 per kWh</i>	<i>Rs.7.00 per kWh</i>
For Megawatt-scale-photovoltaic projects not availing accelerated depreciation			
<i>Levelized Tariff for 25 years</i>	<i>Rs.10.37 per kWh</i>	<i>Rs.9.64 per kWh</i>	<i>Rs.8.97 per kWh</i>
<i>For first 12 years</i>	<i>Rs.11.25 per kWh</i>	<i>Rs.10.30 per kWh</i>	<i>Rs.9.42 per kWh</i>
<i>For subsequent 13 years</i>	<i>Rs.7.50 per kWh</i>	<i>Rs.7.50 per kWh</i>	<i>Rs.7.50 per kWh</i>
For Kilowatt-scale-photovoltaic projects availing accelerated depreciation			
<i>Levelized Tariff for 25 years</i>	<i>Rs.11.14 per kWh</i>	<i>Rs.10.36 per kWh</i>	<i>Rs.9.63 per kWh</i>
For Kilowatt-scale-photovoltaic projects not availing accelerated depreciation			
<i>Levelized Tariff for 25 years</i>	<i>Rs.12.44 per kWh</i>	<i>Rs.11.57 per kWh</i>	<i>Rs.10.76 per kWh</i>

In the above table, the words used are “projects not availing accelerated depreciation”. As such, the contention of the Respondent on this issue is also not sustainable.

18. One other issue raised by the Appellant before the State Commission is that the choice to sell electricity at the tariff with or without accelerated depreciation was to be exercised by the Developer only at the relevant time and such a claim made subsequently is barred by the principles of estoppel.
19. On this issue, the State Commission has given a findings which is as follows:

“6.11. The third ground taken by the respondent is that there was a choice in the order dated 29.01.2010 to the developer which had to be exercised at the relevant time. He has submitted that at the time of allotment of 2nd phase of Solar Projects, it was made clear to all the developers that the PPA is being signed only with such developers who were availing/taking benefit of accelerated depreciation. However, no document in support of this claim has been produced. We have gone through the process of allotment of Solar Projects and note that the Government of Gujarat had in July 2010 invited application from the project developers who had earlier submitted their EOI, for allotment of capacity in Phase-II. The letter No. SLR-II-2010-573493-B dated 28.07.2010 for the Principal Secretary, Energy & Petrochemical Department, Government of Gujarat, lists the pre-requisites for allotment along with the guidelines for allocation of Solar Capacity. Neither the said letter nor the guidelines attached with the letter stipulation any condition regarding availing of accelerated depreciation benefit. As such, averment at para 27 of the written submission dated 30.04.2013

of the respondent is misleading and not correct/factual.

6.12. It has further been submitted by the respondent that there were a number of developers, who were ready to develop solar power project at the tariff determined by the Hon'ble Commission applicable to the project availing the benefit of accelerated depreciation. As such, no PPA was signed with any developer not availing the benefit of accelerated depreciation. To examine this submission, we revert back to the process of allotment of Solar Projects and signing of PPA. After inviting the applications from the prospective project developers, the Government of Gujarat scrutinized the applications as per the guidelines issued under the letter dated 28.07.2010; and selected 88 projects totaling to 971.5 MW capacity. Allotment letters were issued to all these developers and they were directed to sign the PPA with the respondent within a specified time frame. As such, the respondent had neither a choice in selection of the of the project developers nor any opportunity to distinguish between the projects availing the Accelerated Depreciation benefits and those not availing the benefits.

6.13. In the same context, the respondent has raised the issue of applicability of Principle of Promissory Estoppels and submitted that the Petitioner is not eligible for the benefit of subsequent order passed by the Commission, in which the Commission has decided the tariff for the project which are not availing the benefit of Accelerated Depreciation.

6.14. The Petitioner has argued that there is no question of applying the Principle of Estoppels, in the

present case. There is nothing on facts to establish the same. The Principle of Promissory Estoppels is not applied to Law. It is applied to the conduct of the parties. In this context, it is necessary to refer to Section 115 of the Evidence Act.

"115. Estoppel - When-one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

.....
.....

The above principle states that whenever any person by his declaration or Act or intentionally informed to the other person to believe a thing to be true and to act upon such belief and the parties act accordingly are stopped from denial of such representation.

6.15. In the present case, it is undisputed between the parties that the Petitioner opted and agreed for tariff as determined in the Order No. 2 of 2010 dated 29.1.2010, which is the tariff with accelerated depreciation benefit. The agreed tariff in the PPA is a conduct of the petitioner based on the Order No. 2 of 2010 dated 29.1.2010 of the Commission. By the said agreement he might have given a belief to the respondent that he will avail the benefit of the Accelerated Depreciation. Thus, only by reading of para 1 of Article 5.2 of the PPA, it appears that Principle of Promissory Estoppels applies to the Petitioner who agreed for tariff available which is

based on the availing the benefit of Accelerated Depreciation.

6.16. However, it is also a fact that the parties to the above PPA agreed in the second para of the Article 5.2 of the PPA that if the project of the Petitioner is not commissioned during the control period of the Order No. 2 of 2010 dated 29.1.2010, either the tariff that was agreed in Article 5.2 of the PPA or the tariff determined by the Commission as on the date of commissioning of the project, whichever is lower, will be applicable. Thus, the aforesaid PPA recognizes the two tariffs applicable to the Petitioner case. As the Petitioner's project was commissioned on 2.3.2012, it falls under the control period of Order No. 1 of 2012 dated 27.01.2012, for tariff purposes, relevant para of which is reproduced below:

2.5.3 Successive Revisions to Tariff

Due to the steadily decreasing cost of solar technology, reducing the burden on the end user of electricity, and ensuring timely commissioning of projects, the Commission, in its Discussion Paper, had indicated a year-on-year reduction for the 25-year applicable tariff. Hence, the Commission had considered a conservative decline in the tariff for both megawatt-scale and kilowatt-scale photovoltaic projects at 7% decline for 1 April, 2013 to 31 March, 2014, and a further 7% decline for 1 April, 2014 to 31 March, 2015.

Suggestions from Objectors:

Some Developers suggested that as CERC and Rajasthan Electricity Regulatory Commission (RERC)

have provided 15 months for setting up 10-20 megawatt-sized photovoltaic power plants, the Commission should in the same lines also provide 15 months for the new tariff before declining it by 7%; further, it requires longer time due to limited availability of equipment and service providers, as well as it takes more time in Gujarat to acquire land for solar projects. One of the Developers indicated that the 7% decline was very steep, and should be about 4% after 31 March, 2014 due uncertainty in decreasing cost trends of photovoltaic modules and balance of system. Some Developers requested the Commission to reconsider the entire proposal of successive revision in the tariff as it was too premature and pre-emptive, and that the market forces as well as rupee value have been greatly fluctuating.

Certain Developers and a Distribution Company suggested reviewing the rate of revision of the tariff each year before finalizing it. One of the Distribution Companies requested the Commission to consider a higher rate of decline in tariff as the decrease in capital cost of photovoltaic power projects since the Commission's last Tariff Order has annually been around 15%.

Commission's Ruling:

The commission has considered an annual reduction of 7% in the tariff for solar photovoltaic power projects considering various factors including the capital and financial costs of such projects, as well as to encourage projects coming up and being commissioned at a regular pace. Removal of the provision for year-on-year decrease in the tariff and

resultantly keeping a fixed tariff up to 31 March, 2015 may cause most of the projects to be commissioned very close to the end of this period leaving a void in deployment of photovoltaic power plants. Leaving the year-on-year rate of revision open-ended in the current order would create uncertainty for the solar and related industries for the long term, and hence, should be fixed.

Hence, the Commission has decided to retain the decline in the applicable tariff for both megawatt-scale and kilowatt-scale photovoltaic projects at 7% decline for 1 April, 2013 to 31 March, 2014 and a further 7% decline for 1 April, 2014 to 31 March, 2015 as follows:

Summary of tariffs for solar photovoltaic power plants commissioned between 29 January, 2012 and 31st March, 2015

Period	29 Jan2012 to 31 March, 2013	1 April, 2013 to 31 st March, 2014	01 April, 2014 to 31 st March, 2015
For Megawatt-scale-photovoltaic projects availing accelerated depreciation			
Levelized Tariff for 25 years	Rs.9.28 per kWh	Rs.8.63 per kWh	Rs.8.03 per kWh
For first 12 years	Rs.9.98 per kWh	Rs.9.13 per kWh	Rs.8.35 per kWh
For subsequent 13 years	Rs.7.00 per kWh	Rs.7.00 per kWh	Rs.7.00 per kWh
For Megawatt-scale-photovoltaic projects not availing accelerated depreciation			
Levelized Tariff for 25 years	Rs.10.37 per kWh	Rs.9.64 per kWh	Rs.8.97 per kWh
For first 12 years	Rs.11.25 per kWh	Rs.10.30 per kWh	Rs.9.42 per kWh

For subsequent 13 years	Rs.7.50 per kWh	Rs.7.50 per kWh	Rs.7.50 per kWh
For Kilowatt-scale-photovoltaic projects availing accelerated depreciation			
Levelized Tariff for 25 years	Rs.11.14 per kWh	Rs.10.36 per kWh	Rs.9.63 per kWh
For Kilowatt-scale-photovoltaic projects not availing accelerated depreciation			
Levelized Tariff for 25 years	Rs.12.44 per kWh	Rs.11.57 per kWh	Rs.10.76 per kWh

The above table reveals that both the tariffs i.e. one for the project availing the benefit of Accelerated Depreciation and another for the project not availing the benefit of accelerated Depreciation is allowed by the Commission for the projects commissioned during the control period of 29.01.2012 to 31.03.2015. Such being the case, on the cogent reading of the Article 5.2 of the PPA and the tariff Order No.1 of 2012 dated 27.01.2012, we are of the view that the Principle of Promissory Estoppel is not applicable in the present case”.

20. Another issue was raised by the Appellant before the State Commission that the State Commission by the Order dated 27.1.2012 determined the only one tariff taking into consideration the benefit of accelerated depreciation.
21. According to the Appellant, the operative portion of the Order only contained details of the tariff taking into consideration the benefit of accelerated depreciation.
22. On this issue, the State Commission has held as follows:

“6.17. Now we deal with the issue as to whether the Commission has decided only one tariff in Order No. 1 of 2012 dated 27.01.2012 or two tariffs. The respondent has raised the issue that only single (one) tariff has been decided by the Commission in the Commission’s Order No. 1 of 2012 dated 27.01.2012. Accordingly the petitioner is entitled to the tariff @ Rs. 9.98/Unit for initial 12 years and Rs. 7.00/unit for subsequent period applicable to the petitioner project. It is, therefore, necessary to refer to para 2.5.3 Of the Commission’s Order No. 1 of 2012 dated 27.1.2012 which reads as under:

.....
 6.18. *However, the Respondent has relied only on the final order recorded in order dated 27.01.2012 of the Commisison in the Order No.1 of 2012, which is as under:*

.....
 6.19. *The table provided in Para 2.5.3 of the Order No. 1 of 2012 states that the Commission had determined tariff with consideration of Accelerated Depreciation and also without Accelerated Depreciation. The same comes as part of analysis for determination of tariff. It is also a fact that the Commission’s final order mentions only the tariff for Megawatt Scale Solar Photo Voltaic Power Project who are availing the benefit of Accelerated Depreciation. The contentions of the respondent is that the Commission had decided tariff only for Megawatt scale Solar Photo Voltaic power project, which are availing the benefit of Accelerated Depreciation as per clarification issued under the Table 2.5.3 of the order and Commission’s Final Order in the Order No. 1 of 2012 dated 27.1.2012, which is the operative part of the order and decree in terms of the Order No. 1 of 2012 dated 27.01.2012. Hence, the distribution licensee is liable to*

pay only the tariff incorporated in the final order. The above contentions of the respondent that the Operative portion of Order No. 1 of 2012 dated 27.1.2012, which is decree and binding is incorrect and invalid because while deciding the tariff, the Commission had analyzed the submissions made by the parties and determined the tariff for Megawatt Scale Photovoltaic Projects (i) who are availing the benefit of Accelerated Depreciation and (ii) who are not availing the benefit of Accelerated Depreciation, which is stated in the Commission's ruling in Table given in para 2.5.3 of the Order.

6.20. In this context, let us examine the provision of the Civil Procedure Code, 1908.

Sub-Section 2 of Section 2 of the Civil Procedure Code, 1908 defines a "Decree" as under:-

"Decree" as the formal expression of an adjudication which, so far as the court expressing it, conclusively determines the rights of the parties in respect of all or any of the matters in contrivers in the suit".

Section 2 (14) of the Civil Procedure Code, 1908 defines the Order which reads as under:

"Order" means the formal expression of any decision of a Civil Court which is not a decree";

6.21. The order is a formal expression of the decision of a civil court. The order is not a decree. The Decree/Final decision is derived from the earlier part of the Order/Judgment which consist of brief introduction, petitioner's case, Defendant's case, procedures, of the Arguments etc. based on which,

issues been framed, analysis of the facts, evidence and law referred by the parties, by the adjudication/decision maker, and operative portion – final relief. Thus, the final operative portion the order is based on the earlier discussion about facts, evidences, pleadings of the parties, analysis of issues on facts and Law. It derives from earlier part of the Judgment.

6.22. Therefore, it is incorrect to say that, if only the operative portion of the order, or explanation given below the table is to be taken as decision of the Commission and the analysis part mentioned in the earlier part of the order is not a part of the final order, then the analysis and determination of tariff for a project not availing the benefit of Accelerated Depreciation, which was determined by the Commission in the earlier part of the said order becomes redundant and has no meaning. This is not the intent of the order passed by the Commission. Hence, we decide that the tariff determined for projects, which are not availing the benefit of Accelerated Depreciation is also part of the Order No. 1 of 2012 dated 27.01.2012. Therefore, the contention of the petitioner that the Commission has not decided any tariff for the Solar Projects not availing the benefit of accelerated depreciation is not accepted”.

- 23.** The State Commission by its Impugned Order has decided that the Order would be applicable to other similar cases as under:

“Before parting with the judgment, we would like to observe that the issue raised in the present petition is

in fact on interpretation of the Order No.1 of 2012 dated 27.01.2012; and hence the decision in this case would impact not only the Petitioner, but also other developers who have either commissioned or are likely to commission their projects within the control period of the said order. Some of such developers might not avail the benefits of accelerated depreciation and it would be unfair if all of them are required to file separate petitions to seek justice, especially when we have already decided that in the Order No.1 of 2012, the Commission has determined separate tariff for such projects. We, therefore, in the interest of justice and fairness, decide that the present order shall be applicable in all such cases. The onus of proof regarding non-availing of accelerated depreciation shall, however, be on such developers”.

- 24.** The State Commission stated that as the issue raised in the present Petition is interpretation of Order No.1 of 2012 dated 27.01.2012 hence the decision would also affect other similar developers. Accordingly, in the interest of justice and fairness, the State Commission decided that its order shall be applicable to similar cases.
- 25.** The reading of the above paragraphs would show that the issue has been adequately dealt with by the State Commission in its Impugned Order in various paragraphs.
- 26.** The State Commission has itself used the words “availing” and “not availing” accelerated depreciation in the tariff order dated 27.1.2012 to clarify the confusion with the word “get”

in its previous Tariff Order. In this order, the State Commission determined the generic tariff after due consideration of the various normative parameters like ROE 14% Debt Equity ratio 70:30, Income Tax amount, accelerated depreciation benefits etc., as per Income Tax Act, 1961 in its Tariff Order dated 27.1.2012.

- 27.** According to this Tariff Order, if the project developer does not avail accelerated depreciation, it must be entitled to get the compensatory tariff or else it will be deprived of the normative return ensured under the Tariff Order, 2010. Admittedly, the tariff order dated 27.1.2012 and the findings on various aspects remain unchallenged.
- 28.** Therefore, the Appellant cannot now be allowed to re-agitate the issue.
- 29.** According to the Respondent, the issue has already been decided in favour of the Developer in judgment dated 30.4.2013 in Appeal No.111 of 2012.
- 30.** The relevant extract of the judgment of this Tribunal in Appeal No.111 of 2012 are reproduced as under:

22. This contention, in our view, is not sustainable for the following reasons:-

i) *“The State Commission has categorically held while determining the tariff under its order No.2 of 2010 dated 29.1.2010 that the projects that are not availing the benefit of accelerated depreciation could separately in the form of petition approach the State Commission for determination of project specific tariff. The observation referred to above giving such a liberty in future would make it clear that the State Commission was conscious that there may be certain solar power developers who do not want to avail the benefit of accelerated depreciation. Only on the basis of that impression, the State Commission categorically gave option to such a developer to approach the State Commission separately for determination of project specific tariff.*

ii) *It can not be contended that the subsequent execution of PPA would in any manner put an embargo on the determination especially when the PPA itself recognised the fact that the tariff shall be as per the order No.2 of 2010 dated 29.01.2010 and particularly when the said order also recognised the right of the developers who are not willing to get the benefit of accelerated depreciation to approach the State Commission for determining the specific tariff for those projects.*

iii) *According to the Appellants, if Rasna Marketing Services LL(R-2) did not want to avail accelerated depreciation benefits, the same should have been intimated to the Appellants even before signing of the PPAs. This contention is not tenable because there is no such*

reservation either in the tariff order No.2 of 2010 or in the PPA entered into between the parties.

iv) Rasna Marketing Services LLP(R-2) is not mandated under any provision of law to disclose to the Appellants that it would not be availing the benefit of accelerated depreciation before signing the PPA. It is the discretion of the project developer not availing the benefit of accelerated depreciation to move the State Commission in a separate petition for determination of project specific tariff as permitted by the State Commission in the tariff order No.2 of 2010 dated 29.1.2010. The said tariff order is a statutory order binding on the project developers and licensees such as the Appellants and the developers.

v)If the option of signing or not signing the PPA was contingent on the developers in exercise of option, then that option should have been specifically sought for by the Appellant and ensured that the same was incorporated in the PPA. This admittedly has not been done”.

- 31.** In the above judgment in Rasna case, the Tribunal decided that there is no infirmity in the State Commission determining the tariff for the Solar Power Projects of Rasna Marketing Services Ltd without considering the benefit of accelerated depreciation in terms of the Order No.2 of 2010 dated 29.1.2010. In that case, Rasna Marketing Services Ltd had commissioned its project within the Control Period specified in the State Commission’s order dated 29.1.2010.

The order dated 29.1.2010 determined the tariff for Solar Projects with accelerated depreciation but provided that for a project that does not get the accelerated depreciation benefit, the Commission on a Petition filed by the Developer would determine a separate tariff without accelerated depreciation.

- 32.** In the present case, the Solar Project could not be commissioned during the control period specified in the State Commission's Order dated 29.1.2010. Therefore, in terms of the PPA, the Respondent No.1 is entitled to tariff as determined by the State Commission in the subsequent order dated 27.1.2012. In the Order dated 27.1.2012, the tariff for Solar Project with and without accelerated depreciation benefit was determined by the State Commission. Therefore, the tariff determined for Megawatt scale PV Solar projects not availing accelerated depreciation for projects commissioned from 29.1.2012 to 31.3.2013 is Rs.11.25 per kWh for first 12 years and Rs.7.50 for the subsequent 13 years as determined in the Order dated 27.1.2012 will be applicable to the respondent No.1 in terms of the PPA, tariff order and the above judgment of the Tribunal instead of Rs.15 per kWh for first 12 years and Rs.5 per kWh for the next 13 years if the

project had been commissioned during the control period of the order dated 29.1.2010. Effectively, there has been reduction in the tariff payable to the Respondent No.1 due to application of the tariff order dated 29.1.2012 due to delay in commissioning of the project.

33. The Appellant has relied upon the Cargo Motors case in which the Order has been passed by the State Commission on 7.8.2010.

34. On going through the judgment, it is clear that it has no application to the present facts of the case. The following are the reasons:

(a) Cargo Motors was developing the project by the parent Company which was earning profits and hence could absorb the AD benefits in very first year. However, in the instant case, the projects have been developed through Special Purpose Vehicle (SPV) or Independent Power Producers (IPPs) starting with their own and clean balance sheet having a regulated profit which is not sufficient to absorb the entire AD benefit of 80% in initial years.

(b) The Cargo Order dated 7.8.2010 relates to the first Tariff Order dated 29.1.2010 and not to the Tariff

Order dated 27.1.2012 that admittedly is applicable to the Respondent.

(c) Cargo Order dated 7.8.2010 was passed on the particular facts of the Petition in which the Petitioner was not an SPV/IPP but the parent Company with the balance sheet and would not be applicable to other Generating Companies under SPV/IPP mode.

(d) Even in the Order dated 7.8.2010 in Cargo Motor case, the State Commission observed that the PPA is silent about the benefit of accelerated depreciation and Cargo Motors had accepted the tariff without accelerated depreciation in parent Company's name. Accordingly, the State Commission in that Order examined this aspect in its entirety.

(e) In any case, even assuming that the said order dated 7.8.2010 would be applicable, the ratio given by this Tribunal in judgment in Appeal No.111 of 2012 over rides the said order.

(f) It has been held that the Developers do not avail benefit of accelerated depreciation and commissioned their project in the first control period covered under the Order dated 29.1.2010 can approach the Commission

for specific determination of tariff in the said Order and an option was given to the developers to approach the State Commission for the same.

(g) Therefore, Cargo Motor Case will not be applicable to the present case as the same deals with the projects which are being commissioned by the parent Company and the said Company was already Generating profits. Whereas, the EMCO Limited is a project which has been commissioned through Special Purpose Vehicle and the same is not in a position to avail the benefit of accelerated depreciation.

- 35. The Appellant has argued that the tariff in the tariff order, 2012, the State Commission only approved tariff with Accelerated Depreciation.
- 36. This argument is not sustainable. The Tariff Order 2012 determines both the tariffs i.e. with or without accelerated depreciation.
- 37. The relevant extract of the above Tariff Order, 2012 is reproduced below:

“2.5 Tariff for Photovoltaic Power Projects-

.....

.....

*Based on these technical and financial parameters, the levelized tariff including return on equity for megawatt-scale solar photovoltaic power projects availing accelerated depreciation is calculated to be Rs. **9.28 per kWh**, while the tariff for similar projects not availing accelerated depreciation is calculated to be Rs. **10.37 per kWh**. The Commission also decides to determine the tariff for two sub-periods. For megawatt-scale photovoltaic projects availing accelerated depreciation, the tariff for the first 12 years shall be Rs. **9.98 per kWh** and for the subsequent 13 years shall be Rs. **7 per kWh**. Similarly, for megawatt-scale photovoltaic projects not availing accelerated depreciation, the tariff for the first 12 years shall be Rs. **11.25 per kWh** and for the subsequent 13 years shall be Rs. **7.50 per kWh**.*

2.5.3.....

Hence, the Commission has decided to retain the decline in the applicable tariff for both megawatt-scale and kilowatt-scale photovoltaic projects at 7% decline for 1st April, 2013 to 31st March, 2014 and a further 7% decline for 1 April, 2014 to 31st March, 2015 as follows:

Table: Summary of tariffs for Solar Photovoltaic Power Plants commissioned between 29th January, 2012 and 31st March, 2015:

<i>Period</i>	<i>29 Jan2012 to 31 March, 2013</i>	<i>1 April, 2013 to 31st March, 2014</i>	<i>01 April, 2014 to 31st March, 2015</i>
<i>For Megawatt-scale-photovoltaic projects availing accelerated depreciation</i>			
<i>Levelized Tariff for 25 years</i>	<i>Rs.9.28 per kWh</i>	<i>Rs.8.63 per kWh</i>	<i>Rs.8.03 per kWh</i>
<i>For first 12 years</i>	<i>Rs.9.98 per kWh</i>	<i>Rs.9.13 per kWh</i>	<i>Rs.8.35 per kWh</i>
<i>For subsequent 13 years</i>	<i>Rs.7.00 per kWh</i>	<i>Rs.7.00 per kWh</i>	<i>Rs.7.00 per kWh</i>
<i>For Megawatt-scale-photovoltaic projects not availing accelerated depreciation</i>			
<i>Levelized Tariff for 25 years</i>	<i>Rs.10.37 per kWh</i>	<i>Rs.9.64 per kWh</i>	<i>Rs.8.97 per kWh</i>
<i>For first 12 years</i>	<i>Rs.11.25 per kWh</i>	<i>Rs.10.30 per kWh</i>	<i>Rs.9.42 per kWh</i>
<i>For subsequent 13 years</i>	<i>Rs.7.50 per kWh</i>	<i>Rs.7.50 per kWh</i>	<i>Rs.7.50 per kWh</i>
<i>For Kilowatt-scale-photovoltaic projects availing accelerated depreciation</i>			
<i>Levelized Tariff for 25 years</i>	<i>Rs.11.14 per kWh</i>	<i>Rs.10.36 per kWh</i>	<i>Rs.9.63 per kWh</i>
<i>For Kilowatt-scale-photovoltaic projects not availing accelerated depreciation</i>			
<i>Levelized Tariff for 25 years</i>	<i>Rs.12.44 per kWh</i>	<i>Rs.11.57 per kWh</i>	<i>Rs.10.76 per kWh</i>

.....

3.5 Tariff for Solar Thermal Power Projects-Commission’s Ruling

Based on these technical and financial parameters, the levelized tariff including return

on equity for solar thermal power projects availing accelerated depreciation is calculated to be Rs.11.55 per kWh, while the tariff for similar projects not availing accelerated depreciation is calculated to be Rs.12.91 per kWh.

38. The Tariff Order 2012 has to be read as a whole and not in parts. The earlier portions of the Tariff Order, 2012 'determine' both tariffs i.e. projects availing accelerated depreciation and projects not availing accelerated depreciation. Para 2.5.3 quoted by the Appellant is on the issue of tariffs for subsequent years in the Control Period ending on 31st March, 2015, i.e. successive Revisions to Tariff. This paragraph deals only with the issue of annual tariff reduction of 7% decided by State Commission over the first year of the Control Period i.e. the base tariff computed in the Tariff Order.
39. Thus, in the present case, two separate tariffs are clearly specified by the 2012 Tariff Order. Before the State Commission it was contended by the Appellant that in the operative part, there was only one tariff determined by the State Commission namely tariff taking into consideration the AD benefits. However, the State Commission has clearly distinguished between the Order and the Decree in its order dated 8th August, 2013.

- 40.** Now the Respondent has pointed out one more judgment rendered by this Tribunal in Appeal No.75 of 2013 dated 17.4.2013.
- 41.** In this judgment, this Tribunal has analysed the tariff determined in the Tariff Order dated 27.1.2012 and recorded the finding that the tariff has been determined by the State Commission for Solar Project not availing accelerated depreciation.
- 42.** The relevant extract is as follows:
- “14.3 We find that the State Commission for megawatt scale projects not availing accelerated depreciation has calculated the levelised tariff at Rs.10.37/kWh. The State Commission decided the tariff for first 12 years as Rs.11.25 per kWh i.e. 8.5% higher than the levelised tariff and Rs.7.50 per kWh for the subsequent 13 years i.e. about 27.7% lower than the levelised tariff...”*
- 43.** As indicated above, with regard to the Solar tariff under the first tariff order dated 29.1.2010, this Tribunal has already held in Appeal No.111 of 2012 that the option of choosing the tariff without accelerated depreciation is available with the Solar Developer.
- 44.** Therefore, the contention of the Appellant that the State Commission has determined only one tariff is misplaced.

45. On this issue, the State Commission has interpreted its own tariff order 2012 and held that the tariff order, 2012 determines both the tariffs i.e. with and without accelerated depreciation.
46. The relevant extract of the Order is as follows:

“6.22. Therefore, it is incorrect to say that, if only the operative portion of the order, or explanation given below the table is to be taken as decision of the Commission and the analysis part mentioned in the earlier part of the order is not a part of the final order, then the analysis and determination of tariff for a project not availing the benefit of Accelerated Depreciation, which was determined by the Commission in the earlier part of the said order becomes redundant and has no meaning. This is not the intent of the order passed by the Commission. Hence, we decide that the tariff determined for projects, which are not availing the benefit of Accelerated Depreciation is also part of the Order No. 1 of 2012 dated 27.01.2012. Therefore, the contention of the petitioner that the Commission has not decided any tariff for the Solar Projects not availing the benefit of accelerated depreciation is not accepted”.

47. The Appellant has submitted that the State Commission has for “all renewable” energy including solar generators specified “only one tariff” i.e. tariff including Accelerated Depreciation benefit and thereby has always passed on the “benefits” of accelerated depreciation to the consumers. The reliance by the Appellant on the Order No.2 dated

8.8.2012 relating to the Wind Tariff Order and the same has no relevance to the present case for the following reasons:

The Wind tariff order dated 8.8.2012 which is only applicable to Wind Generators and not solar Generators which are governed by a separate tariff orders dated 29.1.2010 and 27.1.2012. The relevant extract of the said order dated 8.8.2012 are reproduced below:

“2.4.3 Subsidy and Incentive by the Central/State Government

Benefit due to Accelerated Depreciation: *The Commission noted that the accelerated depreciation available under Section 32 Rule 5 of the Income Tax Act for wind power projects is discontinued from 1 April 2012 by Government of India. Wind power projects are now allowed to avail 15% normal depreciation as per Income Tax (4th amendment) Rules 2012, Notification No. 15/2012 [F.No.149/21/2010-SO (TPL)] S.O.694 (E), dated 30-3-2012. In addition to the above 15% depreciation, the recent amendment in the Finance Act had allowed an additional depreciation of 20% to the wind power projects during the first year of commissioning. With this, wind power projects can avail 35% depreciation in the first year of commissioning. The Commission while calculating the tariff had factored in 35% depreciation during first year and 15% thereafter and proposed the same to be passed on to the utility through reduced tariff .*

Commission’s Decision

The Commission has noted that the benefit of 20% depreciation is available during the first year only; thereafter the 15% depreciation is available to both IPP as well as balance sheet financed projects. The Commission also noted that the Regulation 22 of the CERC RE tariff Regulations 2012 states that

“.....(i) Assessment of benefit shall be based on normative capital cost, accelerated depreciation rate as per relevant provisions under Income Tax Act and corporate income tax rate.....”

The Commission decides to calculate per unit benefit due to depreciation as per the above method. Further, the Commission decides to factor in the benefit of depreciation while calculating the tariff and specify a single generic levellized tariff for the new control period starting from 11 August 2012”.

- 48.** The perusal of the above order clearly indicates that the option of availing accelerated depreciation the rate of 80% extended to the Wind Power Generators has been discontinued and only normal depreciation at the rate of 15% is available to them.
- 49.** The relevant IT Notification has been referred to by the State Commission. Whereas, the Solar Power Generators are continuing to be eligible to opt either for Accelerated or Normal Depreciation. Hence, there was no occasion for the State Commission to determine two separate tariff one with

accelerated depreciation and other in normal depreciation for wind Generators.

- 50.** Therefore, the contention of the Appellant for similar treatment to Solar and Wind is legally untenable due to different IT Rules for both the sources of energy.
- 51.** This argument of the Appellant is incorrect on the other grounds too.
- 52.** This can be exhibited by referring to the Order No.4 of 2013 passed by the State Commission for determination of tariff for procurement of power by the Distribution Licensees and Others from Biomass based Power Projects and Bagasse based Co-generation Projects.
- 53.** The State Commission has given choice to the biomass developers to avail or not to avail Accelerated Depreciation and the only requirement is undertaking.
- 54.** Regarding the allegations with reference to the execution of the PPAs only with the Generators that agreed to avail the accelerated depreciation, it is to be pointed out that if the intention of the Appellant was to sign the PPAs only with those Developers availing the benefit of accelerated depreciation, the Appellant should have incorporated the

same into the PPA. But the same is not referred to in the PPA.

- 55.** The State Commission in the Impugned Order has clearly brought out that there is no declaration on behalf of the Developers with regard to the accelerated depreciation in the second part of the Clause 5 of the PPA that deals with the tariff under the new control period of the order 27.1.2012.
- 56.** The Agreement between both the parties was that the tariff shall be determined by the State Commission and in the tariff order dated 27.1.2012; two separate tariffs have been given based on the option exercised by the developers. The Appellant had entered into the PPAs with the developers without specifying any condition about the accelerated depreciation.
- 57.** In view of the above, it cannot be said that the Developers had agreed or represented not to avail the accelerated depreciation.
- 58.** In view of the above, we are of the opinion that the State Commission has correctly interpreted the relevant Articles of the PPA as well as the other orders passed by the State Commission.

- 59.** We wish to add one more aspect. The aggregate amount of depreciation available to the Generators under the Income Tax Act remains the same in either with accelerated depreciation and without accelerated depreciation.
- 60.** Under the income tax Act, every Solar Developer is entitled to claim accelerated depreciation and there are no pre-condition to be fulfilled for the same. Once the accelerated depreciation is availed, it is for the life of the project and cannot be changed. If the Solar Power Generator is not able to off set the accelerated depreciation due to the lack of profits then the Generator should have option to choose not to avail the accelerated depreciation. If the Solar Power Generator is forced to absorb the accelerated depreciation even if it is not in a position to do so, it will result in denying the stipulated return that it is entitled to under the State Commission's tariff order.
- 61.** Further the conventional generating stations are also provided normal depreciation. In case of Solar Generators who are entitled to avail accelerated depreciation, a choice has been given to them to avail accelerated depreciation.

62. Summary of Our Findings

(a) The PPA dated 19.12.2010 entered into between the Appellant and the Respondent No.1 provided for tariff as determined by the State Commission vide order dated 30.1.2010, viz. Rs.15 per kWh for first 12 years and thereafter Rs.5 per kWh from 13th year to 25th year, provided the Solar Project is commissioned on or before 31st December, 2011. However, in case commissioning of the project is delayed beyond 31st December, 2011, the Appellant has to pay the tariff as determined by the State Commission effective on the date of commissioning of Solar Power Project. The Solar Project of the Respondent No.1 was commissioned on 2.3.2012. Therefore, the tariff as determined by the State Commission by the Order dated 27.1.2012 for the next control period from 29.1.2012 to 31.3.2015 will be applicable to the Respondent No.1.

(b) In order dated 27.1.2012, the State Commission has determined the tariff for Solar Project availing accelerated depreciation and without availing the accelerated depreciation. As

the Respondent No.1 has not availed the accelerated depreciation, the tariff determined without accelerated depreciation in the order dated 27.1.2012 will be applicable in terms of the PPA and the tariff order of the State Commission dated 27.1.2012.

(c) Complete reading of the Tariff Order dated 27.1.2012 clearly indicates that the State Commission has determined tariff for both, the projects availing accelerated depreciation and those not availing accelerated depreciation. The order gives a choice to the Solar Developer to avail or not to avail the benefit of accelerated depreciation.

(d) Findings of the Tribunal in judgment dated 30.4.2013 in AppealNo.111 of 2012 will squarely apply to the present case. In this judgment, the Tribunal decided that there is no infirmity in the order of the State Commission determining the tariff for the Solar Power projects of the Rasna without considering the benefit of accelerated depreciation.

(e) Regarding the allegations with reference to the execution of the PPAs only with the Generators that agreed to avail the accelerated depreciation, it is to be pointed out that if the intention of the Appellant was to sign the PPAs only with those Developers availing the benefit of accelerated depreciation, the Appellant should have incorporated the same into the PPA. But the same is not referred to in the PPA.

(f) The State Commission has correctly interpreted its own tariff order and the PPA in the Impugned Order.

(g) The State Commission has correctly decided to make the Impugned Order in rem, applicable to all similar cases, as the order dealt with the interpretation of its Order dated 27.1.2012.

63. In view of the above, the Appeal is dismissed as devoid of merits. The State Commission's Impugned order is confirmed.

64. No order as to costs.

65. Pronounced in the Open Court on this 20th day of November, 2014.

(Rakesh Nath)
Technical Member

Dated: 20th Nov, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

√REPORTABLE/~~NON-REPORTABLE~~