Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 26th Mar, 2014
Present:
HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 86 of 2012

NTPC Limited
NTPC Bhavan, Scope Complex,
Core-7, Institutional Area, Lodhi Road,
New Delhi-110003

... Appellant

Versus

1. Central Electricity Regulatory Commission
   3rd & 4th Floor, Chandralok Building,
   36, Janpath,
   New Delhi-110 001

2. West Bengal State Electricity Distribution Company Ltd
   Vidyut Bhawan, Block 'DJ'
   Sector-11, Salt Lake City,
   Calcutta-700 091

3. Bihar State Electricity Board,
   Vidyut Bhawan, Bailey Road,
   Patna-800 021

4. Jharkhand State Electricity Board
   Engineering Bhawan, HEC,
   Dhurwa, Ranchi-834 004

5. Grid Corporation of Orissa Ltd.,
   Vidyut Bhawan, Janpath,
   Bhubaneshwar-751 007

6. **Damador Valley Corporation**
   DVC Towers, VIP Road,
   Calcutta-700 054

7. **Power Department,**
   Government of Sikkim,
   Gangtok-737 101

8. **Tamil Nadu Electricity Board,**
   800 Anna Salai,
   Channai-600 002

9. **Union Territory of Pondicherry**
   Electricity Department,
   58, Subhash Chandra Bose Salai,
   Pondicherry-605 001

10. **Uttar Pradesh Power Corporation Ltd.,**
    Shakti Bhawan, 14, Ashoka Marg,
    Lucknow-226 001

11. **Power Development Department,**
    Government of Jammu and Kashmir,
    Secretariat, Srinagar-190009

12. **Power Department,**
    Union Territory of Chandigarh,
    Additional Office Building,
    Sector-9 D, Chandigarh-160009

13. **Madhya Pradesh Power Trading Co. Ltd.,**
    Shakti Bhawan, Vidyut Nagar,
    Jabalpur-482 008

14. **Gujarat Urja Vikas Nigam Ltd.,**
    Bidyut Bhawan,
    Race Course, Vadodara-390 007

15. **Electricity Department,**
    Administration of Daman & Diu,
    Daman-396 210

16. **Electricity Department,**
    Administration of Dadra and Nagar Haveli,
    U.T. Silvassa-396 230

17. **BSES Rajdhani Power Limited.,**
    BSES Bhawan, Nehru Place,
    New Delhi-110 019

18. **BSES Yamuna Power Limited.,**
    Shakti Kiran Building,
    Karkardooma, Delhi-110 092

19. **North Delhi Power Limited.,**
    Grid substation, Hudson Road,
    Kingsway Camp, Delhi-110 009

20. **Maharashtra State Electricity Distribution Co. Ltd.,**
    Plot No.G-9, Pradashgad,
    Bandra (East), Prof. Anant Kanekar Marg,
    Mumbai-400 051

Respondent(s)

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

Counsel for the Respondent (s): Mr. R B Sharma for 4 to 5 & 17
Mr. Manoj Kumar Sharma
Mr. Daleep Kr. Dhayani
Mr. Suraj Singh

Mr. Pradeep Misra for R-10
Mr. Manoj Dubey for R-13
Mr. Mohit Kumar Shah
Ms. Shilpi Shah for R-3

J U D G M E N T

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

1. NTPC is the Appellant herein.

2. Challenging the Impugned Order dated 22.2.2012 passed by the Central Commission in the Review Petition filed by the Appellant, the present Appeal has been filed.

3. The short facts are as follows:

(a) The Appellant is the Generating Company owned and controlled by the Central Government. It maintains various Generating Stations all over India.

(b) It is engaged in the business of generation and sale of electricity to various purchasers and beneficiaries who are Respondents 2 to 20. The Central Commission is the First Respondent.

(c) One of the Generating Stations of the NTPC is the Farakka Super Thermal Power Station.

(d) NTPC on 20.7.2009, filed Petition No.150 of 2009 in respect of the Farakka Station before the Central Commission praying for the revision of tariff on account of additional expenditure incurred by it for the period 2006-07 to 2008-09.

(e) The Appellant in the above Petition claimed various issues including the following claims:

(i) De-capitalization of unserviceable wagons.

(ii) Claim for Rs.61.49 lakhs on communication network augmentation;

(iii) Claim for expenditure of Rs.289.40 lakhs for procurement of 10 wagons;

(iv) Claim for Rs.225.54 lakhs on account of capitalization for the implementation of SAP programme in the ERP system

(f) The Central Commission dismissed the said Petition by the Order dated 28.4.2011 by disallowing the above four claims.

(g) The Appellant aggrieved in respect of 4th claim filed Review Petition No.11 of 2011 before the Central Commission on 16.6.2011. This Review Petition was confined only to the disallowance of 4th claim namely Rs.225.54 lakhs incurred in the year 2008-09. The

Appellant did not challenge the finding with reference to other three claims in the Review Petition which were disallowed by the Central Commission by the Original Order dated 28.4.2011.

(h) Ultimately, by the order dated 22.2.2012, the Central Commission has allowed the Review Petition on the issue of 4th claim regarding the capitalization of the amount incurred for implementing the ERP system.

(i) Though the Review Petition was allowed in respect of the 4th claim, the Appellant has filed this Appeal against the Review Order dated 22.2.2012 as against the disallowance of other three claims in the Original order contending that the Review Order got merged with the said Original Order dated 28.4.2011.

4. This Appeal was admitted and notice was issued to the Respondent.

5. On receipt of the notice, Uttar Pradesh Power Corporation Limited (R-10) appeared and raised a preliminary objection stating that the Appeal filed against the Impugned Order dated 22.2.2012 is not maintainable since the claims in question were disallowed only in the Original Order dated 28.4.2011 and the said issues were not raised in the Review Petition and since the Central Commission allowed the said

Review Petition in respect of the 4th claim, the Appellant cannot be construed to be an aggrieved person as against the Review Order dated 22.2.2012.

6. In view of the preliminary objection raised regarding the maintainability of the Appeal, we felt that it would be appropriate to decide the question of maintainability first.

7. Therefore, we have asked both the parties to make their submissions and to file written submission on the question of maintainability of the Appeal alone before considering the merits of the Appeal.

8. Accordingly, the learned Counsel for both the parties made elaborate submissions on the question of maintainability of the Appeal and filed their respective written submissions.

9. According to the Appellant, the original order dated 28.4.2011 in which the claims in question were disallowed, got merged with the Review Order dated 22.2.2012 and therefore, the Appeal as against the Review Order dated 22.2.2012 is maintainable.

10. On the other hand, the learned Counsel for the Respondent refuted the said contention stating that the issues raised in this Appeal were not raised in the Review Petition filed by the Appellant and the lone issue which had been raised in the Review Petition was decided by the Central Commission in favour of the Appellant and that therefore, in the absence

of the Appeal as against the main order dated 28.4.2011 in which these claims have been disallowed, the Appellant cannot maintain this Appeal as against the Review Order dated 22.2.2012.

11. The learned Counsel for both the parties cited various authorities on this issue.

12. Let us now deal this issue.

13. The question that may arise in this issue is this: **Whether the contention of the Appellant that it is entitled to file the Appeal as against the Review Order dated 22.2.2012 though allowed the claim of the Appellant since the original order got merged with the Review Order dated 22.4.2011 in which other claims were disallowed got merged with the Review order?**

14. The following facts are undisputed:

    (a) The Appellant being a Generating Company of Farakka Station filed Petition in No.150 of 2009 before the Central Commission on 20.07.2009 praying for the revision of tariff on account of additional capital expenditure incurred by NTPC for the period from 2006-07 to 2008-09. In this Petition, among other claims, the Appellant claimed the additional capitalization in respect of four claims as under:

(i) De-capitalization of unserviceable wagons;

(ii) Claim for Rs.61.49 lakhs on communication network augmentation;

(iii) Claim for expenditure of Rs.289.40 lakhs for procurement of 10 wagons;

(iv) Claim for 225.54 lakhs on account of capitalization of SAP in ERP system.

(b) The Central Commission by the Original Order 28.4.2011 disallowed all the four claims.

(c) Although the claim in respect of all these four issues have been disallowed by the Central Commission, the Appellant filed a Review Petition No.11 of 2011 before the Central Commission only in respect of the claim No.4 namely the claim of Rs.225.54 lakhs. In this Petition, the Appellant had not chosen to challenge the disallowance of the Central Commission in respect of other claims i.e. Issue No.1 to 3.

(d) In fact, the Appellant in the Review Petition has specifically stated that it was confined **only in respect of the 4th claim.**

(e) We will now refer to the averments in the Review Petition as well as the prayer:

*"**<u>Para 2</u>**: NTPC is filing the present Review Petition **limited** to the following aspects of the above order namely:*

(i) Disallowance of claim of capitalization of SP license under SAP implementation for Rs.225.54 lakhs during the period 2008-09.

<u>Prayer:</u>

(a) Review the order dated 28.4.2011 passed by this Hon'ble Commission in Petition No.150 of 2009 and;

(i) Allow the claim of capitalization of SAP licenses under SAP implementation of Rs.225.4 lakhs during the period 2008-09.

(f) The averments as well as the prayer made in the Review Petition would clearly indicate that the Appellant was aggrieved only in respect of the 4th claim which is the only issue raised in the Review Petition and not with reference to the other claims 1 to 3.

(g) In other words, the Appellant had chosen not to agitate those three claims in the Review Petition, which were disallowed by the Original Order dated 28.4.2011.

(h) Ultimately, the Central Commission by the Order dated 22.2.2012, allowed the Review Petition in favour of the Appellant in respect of the claim No.4.

15. The above facts would clearly indicate that whatever the prayer that was sought for by the Appellant before the Central Commission in the Review Petition was granted by the Central Commission.

16. In other words, the Appellant did not agitate over the other claims in the Review Petition as the Appellant was confined itself only to the 4th claim which was ultimately allowed and granted in favour of the Appellant. Therefore, the Appellant cannot be said to be aggrieved by the Review Order dated 22.2.2012 in which the claim made by the Appellant was allowed in favour of the Appellant.

17. The grievance of the Appellant in the present Appeal is only with reference to other three claims namely claims No.1 to 3 which were disallowed by the Central Commission through the Original Order dated 28.4.2011. There cannot be any grievance with reference to the claim made in Review since it was allowed in favour of the Appellant.

18. If at all, the Appellant felt aggrieved over the disallowance of those three claims also , the Appellant must have filed the Review Petition in respect of all the four claims. But the Appellant, as indicated above, did not feel aggrieved in respect of these three claims and the Appellant felt aggrieved over the disallowance only in respect of 4th claim for which the Appellant filed the Review Petition.

19. From the above, it is evident that the Appellant must be construed to be an aggrieved person only as against the

Original order dated 28.4.2011 in which the claims 1 to 3 were disallowed and not against the Review Order dated 22.2.2012 in which the 4th claim of the Appellant was allowed. The point urged by the Appellant in support of the maintainability of the Appeal is that the Review Order dated 22.2.2012 got merged with the original Order dated 28.4.2011 in as much as by virtue of the Review Order, the Original order dated 28.4.2011 got modified.

20. On the other hand, the learned Counsel for the Respondent submits that the Appellant cannot be allowed to raise such a plea in view of the fact that the Appellant having chosen not to agitate the other three claims in the Review Petition, cannot claim itself as aggrieved over the Review Order with which the Original Order dated 28.4.2011 is said to have been merged.

21. The learned Counsel for the Respondent points out the following example in order to show that the plea of the Appellant with regard to maintainability of this Appeal is misconceived. The following is the example:

> "For example, a person chooses to file an Appeal before the Tribunal only in respect of one claim which was disallowed by the State Commission without challenging other claims which were disallowed. In the final disposal, the said Appeal is allowed in its

favour in respect of the said claim by this Tribunal. In that case, the question arises as to whether that person could be entitled to file the second Appeal before the Hon'ble Supreme Court against the Tribunal's judgment questioning the disallowance of the claims in the Original Order passed by the State Commission on the ground that the Original Order passed by the State Commission got merged with the judgment of Appellate Tribunal. The answer is 'emphatic' no".

22. This example which would apply to the present Appeal would make it clear that the plea raised by the Appellant with regard to maintainability of this Appeal showing the merger has no substance.

23. The learned Counsel for the Appellant also cited the following decisions in support of his plea:

(a) Sushil Kumar Sen Vs State of Bihar AIR 1975 SC 1986;

(b) Rekha Mukherjee Vs Ashis Kuamr Das & Ors 2005 (3) SCC 427;

(c) DSR Steel (Private) Limited Vs State of Rajasthan & Ors 2012 (6) SCC 728;

(d) Kothari Industrial Corporation Ltd., Vs Agricultural Income Tax Officer 1998 (230) ITR 306

(e) Kunhay Ammed And Others Vs State of Kerala & another 2000 (6) SCC 359;

24. In regard to the first decision in the case of Sushil Kumar Sen Vs State of Bihar AIR 1975 SC 1986 it is noticed that the ratio of the judgment is that the State of Bihar could have filed an Appeal as against the Original judgment dated 18.8.1961 before the same was superceded by the decree passed in the Review Petition and as the State of Bihar did not challenge the decree, it became final.

25. In the present case, NTPC did not challenge the original order in respect of the first three claims in the Review Petition. Only after the Review was allowed in respect of 4th claim, the Appellant has now challenged the Original order passed by the State Commission. The Appellant without challenging the original order which became final in respect of claims 1 to 3 cannot now file the Appeal against the Review order on the ground that the Original Order got merged with the Review Order.

26. The Second decision is the case of Rekha Mukherjee Vs Ashis Kuamr Das & Ors 2005 (3) SCC 427 in which the Hon'ble Supreme Court has reversed the decision of the High Court by holding that the Appeal filed by the Appellant against the Original Order alone, is maintainable. So this also would not be of any use to the Appellant.

27. The 3rd decision is in the case of DSR Steel (Private) Limited Vs State of Rajasthan & Ors 2012 (6) SCC 728. In this

case, the Hon'ble Supreme Court has held that different situation arises in relation to the review Petition filed before the Tribunal and considered its effects. So, this case also has no application to the present case.

28. In the other two decisions i.e. Kothari Industrial Corporation Ltd., Vs Agricultural Income Tax Officer 1998 (230) ITR 306 and Kunhay Ammed And Others Vs State of Kerala & another 2000 (6) SCC 359, it has been held by the Karnataka High Court as well as the Hon'ble Supreme Court respectively that if the Appeal is restricted to a portion of the original order or one of the issues dealt in the original order then that part of the original order which is the subject matter of the Appeal or revision alone would merge and the other portion would remain undisturbed.

29. Therefore, none of the decisions cited by the learned Counsel for the Appellant had decided that even though the Review Order was allowed in favour of the Appellant in respect of the sole issue raised, the Original Order in relation to the other issues gets merged with the Review Order.

30. The similar issue was raised before this Tribunal in Appeal No.88 of 2013. In the said Appeal, we have decided that the Appeal as against the Review Order is not maintainable in the absence of any Appeal as against the Original Order.

31. In that case, the Appellant NTPC is the Appellant. The facts of that case are as follows:

    (a) The Appellant has filed a Petition before the Central Commission raising various claims with reference to the Badarpur Generating Station.

    (b) The Central Commission while determining the tariff disallowed some of the claims.

    (c) Aggrieved by the Order, the Appellant sought review on four claims.

    (d) Ultimately, the Central Commission allowed the review on the two claims i.e. Claim 3 and 4 but disallowed the review in respect of the claim No.1 and 2 by confirming the findings of the Original Order. As against the disallowance of the said two claims in the Review Order, the Appellant filed the Appeal as against the said Review Order which confirmed the findings of the original order with reference to claim 1 and 2. In that Appeal, the Respondent has raised similar objection to the maintainability of the Appeal on the basis of the Order 47 Rule-7 of the CPC. In that Appeal also, the decisions cited by the Appellant in the present Appeal were placed in order to support the contention that the Appeal was maintainable.

32. The relevant portion of the discussions and findings in the judgment rendered by this Tribunal on 2.12.2013 in Appeal No.88 of 2013, is as follows:

> *"19. The question is whether the doctrine of merger would apply to the cases where the rejection of particular issues in the main order has been confirmed in the Review Order.*
>
> *20. In this context, it would be appropriate to refer to the principles laid down on this issue by the Karnataka High Court in the case of Kothari Industrial Corporation Ltd., V Agricultural Income Tax Officer, ILR 1998 Karnataka 1510.*
>
> *21. As per this decision, when the subject matter of the order of the lower court is the same, as of the subject matter of the order of the Appellate Court, the order of the lower Court gets merged with the order of the Appellate Court so that there is only one order holding the field. But, if the order of the subordinate authority related to the several distinct issues and the Appeals are reviewed, is filed only in regard to one or few matters, then there cannot be merger of the entire order of the lower court with the order of the Appellate Court. In that event what will merge in the order of the Appellate Court is not the entire order of the lower court but only that part of the order which relates to the subject matter of the Appeal.*
>
> *22. On the basis of these observations, the High Court has laid down the principles with regard to doctrine of merger. They are as follows:*
>
> > *(a) Where any order of decree of a Court, authority or Tribunal is subjected to an appeal or revision and the appellate or revisional authority*

passes an order modifying, reversing or affirming the original order, the original order merges with the order of the superior authority on the principle that there cannot be more than one order operating at the same time.

(b) If the appeal or revision is restricted to a part or portion of the original order or one of the several matters or issues dealt by the original order, then, only that part of the original order which is the subject-matter of the appeal or revision will merge in the order of the superior authority and the remaining portion of the original order which is not subjected to appeal or revision will remain undisturbed.

(c) Where the Appellate authority has given plenary jurisdiction over the entire matter dealt with by the original order, irrespective of the fact whether Appeal is filed in regard to the entire matter or part of the matter, the entire original order will merge in the order of the Appellate Authority. However, where such appellate authority entrusted with plenary jurisdiction consciously restricts the scope of scrutiny to only a part of the original order, then, whether only that part of the original order which is subjected to scrutiny and not the entire order will get merged with the order of the appellate authority, is a matter on which there is divergence of views. The view of this Court in such cases has been that the merger will be in respect of the entire order.

(d) There will be no merger at all where the subsequent order is passed by the same authority, either by way of review or rectification. Where an order is passed on review, the original order gets wiped out as it is set aside by the

> *order granting review and is superseded by the order made on review. There is thus no 'merger' where an order is passed rectifying any mistake in the original order; there is neither 'merger' nor 'supersession'. The original order gets amended by the order of rectification by correcting the error."*

23. These principles would make it clear that the purpose of doctrine of merger is to ensure that at one time, one order is operative. This means that part of the order which is not the subject matter of the Appeal cannot be said to have merged with the order passed by the Superior Court. The said principle would apply even in the case of Review. This is because while the Doctrine of Merger is applicable in case of an Appeal or Revision even if the same is dismissed by the Superior Court, the Doctrine of Merger will not be applicable in the event, the Review is rejected.

26. In other words, if the Review Petition raises several distinct issues and the some are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. If this is applied to the present case, then we are constrained to hold that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that the issue has been decided in the main order itself.

31. Summary of Our Findings

If the Review Petition raises several distinct issues and the some of them are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. When this principle is applied to the present case, then we are constrained to hold

> ***that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that these issues have already been decided in the main order itself. Thus, we uphold the objection regarding the Maintainability of the Appeal.***

33. The above discussion and finding in the above judgment would indicate that this Tribunal has decided that even when all the issues raised in the Review in which some claims were allowed and some issues were disallowed, the party cannot be permitted to file the Appeal as against the Review Order rejecting those claims in the absence of any Appeal as against the Original order in which those claims were disallowed.

34. Thus, a ratio has been decided by this Tribunal in that Appeal that even when those issues were raised in the Review Petition and they were rejected, the Appeal could not be maintained as against the Review Order rejecting the claims.

35. But, in the present case, as narrated above, even those issues were not raised in the Review Petition but the same have been raised for the first time in this Appeal. The Appeal as against the Review Order in the light of the present facts of the case, cannot be allowed to be maintained mainly on two reasons:

(i) The Appellant is not aggrieved person over the Review Order which is passed in favour of the Appellant allowing the 4th claim made by the Appellant.

(ii) The Appellant had not chosen to challenge the Original Order in respect of the claims 1 to 3 in the Review Petition where the 4th claim alone was made which has been allowed.

36. The Appellant has not given any explanation as to why it had chosen not to challenge those findings in respect of the claims 1 to 3 in the Original Order before the Central Commission in the Review Petition. Similarly, there is no reason adduced by the Appellant as to why those findings on the claims 1 to 3 have been challenged for the first time only in this Appeal without challenging the same in the Review Petition.

37. The facts of this case would clearly indicate that the Appellant who has not chosen to file the Review with regard to the Claims No.1, 2 and 3, cannot be construed to be an aggrieved person, in as much as the Appellant has not challenged those findings in the Review Petition. In the same way, the Appellant cannot be considered to be an aggrieved person over the Review Order since the Review Order was passed in favor of the Appellant.

38. Therefore, we are of the view that the 'Doctrine of Merger' in so far as the issues which were rejected in the original order would not apply to the Review Order which has been allowed in favour of the Appellant.

39. Accordingly, we are constrained to hold that the Appeal is not maintainable while upholding the preliminary objection raised by the Respondent regarding the maintainability of the Appeal.

40. However, there is one more aspect to be pointed out at this stage.

41. Initially, we have heard the learned counsel for both the parties in respect of the question of maintainability of the Appeal alone for deciding the said question first. After hearing the parties on the question of maintainability, we felt that the question regarding maintainability could be considered at the end along with the merits of the Appeal.

42. Accordingly, we have asked the learned Counsel for both the parties to argue the Appeal on the merits also. Accordingly, the learned Counsel for the Appellant argued the Appeal at length and filed its written submission. The learned Counsel for the Respondents- 5,10,13 and 17 i.e. the Grid Corporation of Orissa Ltd (R-5), Uttar Pradesh Power Corporation Ltd (R-10), Madhya Pradesh Power Trading Co. Ltd (R-13) and BSES Rajdhani Power Limited

(R-17) also argued at length and filed their Written Submission.

43. Though we have decided that the Appeal is not maintainable as mentioned above, we felt it appropriate to consider the merits of the Appeal also since we have heard both the parties who made their elaborate submissions with regard to the merits.

44. Accordingly, we would like to consider the merits of the matter also in the light of the submissions made by both the parties.

45. In this appeal three issues which have been decided as against the Appellant in the Original Order passed by the State Commission are raised. They are as follows:

(a) Disallowance of Expenditure of Rs.61.49 lakhs on communication network augmentation;

(b) Disallowance of expenditure of Rs.289.40 lakhs on capitalization of 10 new wagons;

(c) Not allowing NTPC to treat de-capitalization of wagons amount to Rs.529.57 lakhs as exlusion;

46. In regard to the 1st issue, the Appellant submits that the expenditure claimed on communication network augmentation was fully justified despite the amount earlier allowed on account of data communication network; the NTPC had given justification for incurring the expenditure but the Central Commission has not dealt with the above

justification given by the NTPC on the nature of expenditure claimed by the NTPC.

47. According to the Respondent, the findings of the Central Commission after prudence check clearly show that there is no justification for the expenditure of Rs.61.49 lakhs by the Appellant.

48. Let us refer to the relevant findings of the Central Commission on this issue:

> *“40. The Petitioner has claimed an expenditure of Rs.51.73 lakhs on account of data communication network and an expenditure of Rs.9.78 lakhs for data acquisition system for ABT during 2006-07. It is observed that an amount of Rs.277.00 lakhs was allowed during the period 2001-04 for augmentation of IT and communication network. Also, an expenditure of Rs.17.13 lakhs was allowed during 2004-05 for supply, installation and communication of ABT meters and Rs.4.41 lakhs was allowed for 2005-06 for augmentation of communication network. In view of this, further capitalization of Rs.51.73 lakhs and Rs.9.78 lakhs during 2006-07 is not justified and has not been allowed”.*

49. The term additional capitalization has been defined in Regulation 14 (ii) of the CERC (Terms and Conditions of Tariff) Regulations 2004. The same is as follows:

> **`(ii) *Additional Capitalisation'*** *means the capital expenditure actually incurred after the date of commercial operation of the generating station and admitted by the Commission after prudence check subject to provisions of regulation 18;*

Regulation 18 of the CERC (Terms & Conditions of Tariff) Regualtions, 2004 inter-alia states that-

*18. **Additional capitalization:** (1) The following capital expenditure within the original scope of work actually incurred after the date of commercial operation and up to the cut off date may be admitted by the Commission, subject to prudence check:*

(i) Deferred liabilities;
(ii) Works deferred for execution;
(iii) Procurement of initial capital spares in the original scope of work, subject to ceiling specified in regulation 17;

(iv) Liabilities to meet award of arbitration or for compliance of the order or decree of a court; and

(v) On account of change in law.

Provided that original scope of work along with estimates of expenditure shall be submitted along with the application for provisional tariff.

Provided further that a list of the deferred liabilities and works deferred for execution shall be submitted along with the application for final tariff after the date of commercial operation of the generating station.

(2) Subject to the provisions of clause (3) of this regulation, the capital expenditure of the following nature actually incurred after the cut off date may be admitted by the Commission, subject to prudence check:

(i) Deferred liabilities relating to works/services within the original scope of work;

(ii) Liabilities to meet award of arbitration or for compliance of the order or decree of a court;

(iii) On account of change in law;

(iv) Any additional works/services which have become necessary for efficient and successful operation of the generating station, but not included in the original project cost; and

(v) Deferred works relating to ash pond or ash handling system in the original scope of work.

(3) Any expenditure on minor items/assets like normal tools and tackles, personal computers, furniture, air-conditioners, voltage stabilizers, refrigerators, fans, coolers, TV, washing machines, heat-convectors, carpets, mattresses etc. brought after the cut off date shall not be considered for additional capitalisation for determination of tariff with effect from 1.4.2004.

Note

The list of items is illustrative and not exhaustive.

(4) Impact of additional capitalisation in tariff revision may be considered by the Commission twice in a tariff period, including revision of tariff after the cut off date.

Note 1

Any expenditure admitted on account of committed liabilities within the original scope of work and the expenditure deferred on techno-economic grounds but falling within the original scope of work shall be serviced in the normative debt-equity ratio specified in regulation 20.

Note 2

Any expenditure on replacement of old assets shall be considered after writing off the gross value of the original assets from the original project cost, except such items as are listed in clause (3) of this regulation.

Note 3

Any expenditure admitted by the Commission for determination of tariff on account of new works not in the original scope of work shall be serviced in the normative debt-equity ratio specified in regulation 20.

Note 4

Any expenditure admitted by the Commission for determination of tariff on renovation and modernization and life extension shall be serviced on normative debt equity ratio specified in regulation 20 after writing off the original amount of the replaced assets from the original project cost.

50. The Commercial Operation date of the plant is 1.4.1995. The Availability Based Tariff was introduced in 2002-2003. Farakka Station was performing its functions properly under Availability Based Tariff (ABT) regime. The ABT was implemented in the Eastern Region on 1.5.2001. All equipments including the ABT meters have to be in place on the date of the implementation of the Availability Based Tariff (ABT). The Central Commission in the impugned order has stated that an amount of Rs.277 lakh was allowed during the period 2001-04 for augmentation of IT and communication network. Further, an expenditure of Rs.17.13 lakh was allowed during 2004-05 for ABT meters and r.41 lakh during 2005-06 for augmentation of communication network. In view of the above expenditure allowed for ABT metering IT and communication network as additional capitalization in the earlier orders during the

period 2001-04 and 2004-06, the Central Commission rightly did not allow the additional capitalization claimed for data communication network and data acquisition system for ABT. We are in agreement with the findings of the Central Commission.

51. In the light of the above facts, the Central Commission has disallowed the said claim. In fact, the Appellant has failed to put forth valid justification in support of the above expenditure. An amount of Rs.61.49 lakhs in the year 2006-07 towards the data acquisition system and communication network augmentation would not give any direct benefit to the beneficiaries of the generating plant. Therefore, the Central Commission has correctly concluded that the said expenditure was already allowed and therefore, this expenditure which would not give any benefit to the beneficiaries cannot be allowed. So, the finding by the Central Commission on the 1st issue is justified.

52. The **Second Issue** is with reference to the disallowance of the expenditure of Rs.289.40 lakhs on capitalization of 10 new wagons.

53. According to the Appellant, the Central Commission has not applied its mind and consequently disallowed the amount of Rs.289.40 lakhs.

54. The finding on this issue are as follows:

> *"41. Expenditure for Rs.289.40 lakh has been claimed during 2006-07 on account of procurement of 10 nos of wagons against replacement of 10 nos of wagons rendered unserviceable in 2003-04. These wagons were procured and put to use during June, 2006. It is observed that the Petitioner has transferred 30 nos of wagons during 2006-07 to its other generating station namely, Talcher TPS-II. From the above, it is clear that procurement of new wagons was not necessary for the generating station. In view of this, it would not be justifiable and prudent to capitalize the cost of new wagons and burden the beneficiaries when 30 nos of wagons have been transferred to other generating station of the Petitioner. Also, the corresponding de-capitalization of Rs.283.90 lakh has been ignored".*

55. Challenging this finding, it is submitted by the Appellant that the railway wagons are used for transportation of the coal from the coal mines to the place of generation and despite this, the Central Commission has disallowed this claim without considering the salient aspects of the working of the NTPC station.

56. The Central Commission in its finding has observed that corresponding de-capitalization of Rs.283.90 lakhs has not been taken into account as only Rs.85.20 lakhs have been proposed to be de-capitalized by the Appellant for the year 2003-04.

57. The Appellant has not established before the Central Commission that there was any need of these wagons at the Generating Stations.

58. According to the Respondent, maintaining the assets which are more than the requirement is unnecessary and against the interest of the beneficiaries. Generating Companies should not increase the assets even when the same are not necessary. The more assets provide huge operating flexibility which is at the cost of the consumer who is supposed to foot the bill through the tariff.

59. Therefore, the finding on the second issue by the Central Commission is justified.

60. The **last issue** is de-capitalization of unserviceable wagons amount to Rs.529.17 lakhs.

61. According to the Appellant, they must be paid through the tariff for those assets which have become unserviceable and do not render any useful service to the generating station but, the Central Commission did not allow the retention of the capital value of unserviceable wagons amounting to Rs.529.17 lakhs on account of de-capitalization of the wagons for the purpose of tariff.

62. The finding given by the Central Commission on this issue is as under:

> *"(g)* ***De-capitalization of unserviceable wagons:*** *The Petitioner has excluded amounts of Rs.126.91 lakhs for de-capitalization of 9 (nine) nos of unserviceable wagons during the year 2006-07, Rs.193.66 lakhs for de-capitalization of 15 (fifteen)*

nos of unserviceable wagons for the year 2007-08 and Rs.208.60 lakhs for de-capitalization of 11 (eleven) nos. of unserviceable wagons during 2008-09. The Petitioner has submitted that action for procurement of wagons is in progress and accordingly de-capitalization of these wagons may be considered at the time of capitalization. Since de-capitalization of these assets should be effected immediately when the assets have been taken out from use, the submission of the Petitioner is not acceptable. Hence, the exclusion of unserviceable assets which are not in use, have not been allowed".

63. On the basis of this finding, it is submitted by the Respondent that when these wagons are de-capitalized in the bills of accounts and they are not rendering any useful services, they cannot be considered as part of capital cost and rightly have been de-capitalized.

64. The Appellant claims that the action for procurement of wagons is in progress and accordingly de-capitalization of the wagons may be considered at the time of capitalization.

65. As rightly pointed out by the Respondent that based on the cost plus tariff structure any assets which have been taken out from the use, cannot be considered as part of the capital base.

66. In view of the above, the rejection of this claim by the Central Commission is also justified.

67. **Summary of Our Findings**

(a) **The ratio decided by this Tribunal in the Judgment dated 2.12.2013 in Appeal No.88 of 2013 will also be applicable to the present case. Accordingly, the Appeal filed as against the Review Order dated 22.2.2012 is not maintainable.**

(b) **We have also examined the claims for additional capitalization/de-capitalization of NTPC on merits and we do not find any infirmity in the order of the Central Commission disallowing these claims.**

68. In view of the above, the Appeal is dismissed not only as not maintainable but also as devoid of merits. No order as to costs.

69. Pronounced in open Court on this day of **26th March,2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 26th Mar, 2014
√REPORTABLE/~~NON REPORTABLE~~