# Appellate Tribunal for Electricity
## (Appellate Jurisdiction)

## APPEAL NO.104, 105 and 106 of 2012

**Dated: 28th Nov, 2013**

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON**
**HON'BLE MR. V J TALWAR, TECHNICAL MEMBER**

## APPEAL NO.104 of 2012

**In the Matter of:**

**The Tata Power Company Limited (Transmission)**
**Bombay House, Homi Mody Street, Fort**
**Mumbai – 400 001**

**.....Appellant(s)**

**Versus**

**Maharashtra Electricity Regulatory State Commission**
**World Trade Centre, Centre No. 1,**
**13th Floor, Cuffe Parade,**
**Mumbai – 400 005.**

**….. Respondent(s)**

Counsel for the Appellant : Mr. Amit Kapur
Mr. Vishal Anand
Ms. Awantika Manohor
Mr. Gaurav Dudeja
Ms. Sugandha Somani

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Ms. Richa Bharadwaja
Mr. Hasan Murtaza

## APPEAL NO.105 of 2012

**In the Matter of:**

**The Tata Power Company Limited (Generation)**
**Bombay House, Homi Mody Street, Fort**
**Mumbai – 400 001**

**..... Appellant(s)**

**Versus**

**Maharashtra Electricity Regulatory State Commission**
**World Trade Centre, Centre No. 1,**
**13th Floor, Cuffe Parade,**
**Mumbai – 400 005.**

**….. Respondent(s)**

Counsel for the Appellant : Mr. Amit Kapur
Mr. Vishal Anand
Ms. Awantika Manohor
Mr. Gaurav Dudeja
Ms. Sugandha Somani

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Ms. Richa Bharadwaja
Mr. Hasan Murtaza

**APPEAL NO.106 of 2012**

**In the Matter of:**

**The Tata Power Company Limited (Distribution)**
**Bombay House, Homi Mody Street, Fort**
**Mumbai – 400 001**

**..... Appellant(s)**

**Versus**

**Maharashtra Electricity Regulatory State Commission**
**World Trade Centre, Centre No. 1,**
**13th Floor, Cuffe Parade,**
**Mumbai – 400 005.** **….. Respondent(s)**

Counsel for the Appellant : Mr. Amit Kapur
Mr. Vishal Anand
Ms. Awantika Manohor
Mr. Gaurav Dudeja
Ms. Sugandha Somani

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Ms. Richa Bharadwaja

Mr. Hasan Murtaza

## J U D G M E NT

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

**1.** Tata Power Company is the Appellant herein.

**2.** The Appellant has been carrying out the business in Generation, Transmission and Distribution in Mumbai along with some other business outside Mumbai area.

**3.** The Appellants have filed these three Appeals which are directed against the impugned orders of the Maharashtra State Commission undertaking the True-Up for the Financial Year 2009-10 and Annual Performance Review for the Financial Year 2010-11.

**4.** Appeal No.104 of 2012 is in respect of Distribution Business. This Appeal is directed against the impugned order dated 14.2.2012 passed by the State Commission.

**5.** The next Appeal No.105 of 2012 filed is with regard to Generation Business of the Appellant. The said Appeal is directed against the impugned order dated 15.2.2012.

**6.** The last and 3rd Appeal is Appeal No.106 of 2012 which has been filed by the Transmission Business of the Appellant as against the Impugned Order dated 14.2.2012.

**7.** Though the Impugned Orders are different and passed on different dates, most of the issues raised by the Appellant in these Appeals are common and hence all these Appeals are disposed of through this common judgment.

**8.** The Appellant in these Appeals while arguing the matter has divided the issues in five broad categories which are referred to as Part-A to Part E as under:

(a) Part A deals with the issues agreed to be implemented by the State Commission;

(b) Part B deals with the issues involving contravention of the earlier judgments of this Tribunal;

(c) Part C deals with the issues involving contravention of the Tariff Regulations, 2005;

(d) Part D deals with the issues involving Generation Business only;

(e) Part E deals with the issues involving other wrongful disallowances

**9.** The issues involved in Part-A deal with the issues agreed to be implemented by the State Commission as under:

**(a) Disallowance of carrying costs for the past period;**

**(b) Denial of gain on account of savings in interest on working capital;**

**(c) Disallowance of carrying costs on Revenue Gap;**

**(d) Denial of capitalization of non DPR scheme for FY 2009-10 and 2010-11;**

**(e) Disallowance of interest on IDFC loan; and**

**(f) Disallowance of costs towards procurement of renewable energy purchased from bilateral sources.**

**10.** The issues involved in Part-B deal with the issues involving contravention of earlier judgments of this Tribunal as under:

**(a) Disallowance of Income Tax for FY 2007-08, FY 2008-09 as also for FY 2009-10 and 2010-11;**

**(b) Disallowance of O&M expenses with respect to Corporate Social Responsibility; and**

**(c) Disallowance of de-capitalization of asset.**

**11.** Part C relates to the issues involving contravention of the Tariff Regulations, 2005 as under:

**(a) Disallowance of interest towards IDBI loan-2; and**

**(b) Disallowance of interest on refinancing of loans.**

**12.** Part D relates to the following issues relating to Generation Business only in Appeal No.105 of 2012:

**(a) Disallowance of actual auxiliary consumption and Heat Rate at Trombay Unit-4; and**

**(b) Disallowance of actual auxiliary consumption and Heat Rate at Trombay Unit-6.**

**13.** Part E relates to the issues involving other wrongful disallowances as under:

**(a) Consideration of treasury income from "gain on exchange", as part of non-tariff income; and**

**(b) Disallowance of O&M expenses on gifts.**

**14.** Let us discuss the above issues one by one.

**15.** The issue in **Part-A** deals with the **issues agreed to be implemented by the State Commission.**

**16.** As far as the Issues mentioned in Part-A are concerned, the State Commission has stated in its reply Affidavit giving undertaking that these issues will be implemented subject to the outcome of the Appeals filed by the State Commission before the Hon'ble Supreme Court which are pending. Now, the learned Counsel for the Appellant has admitted that these issues have in fact, been given effect to in the latest tariff order in June, 2013 subject to the outcome of the Appeals pending in the Hon'ble Supreme Court.

**17.** In view of the above, no further order is necessary on this issue.

**18.** Let us now deal with the issues referred to in **Part-B** which relate to **involving contravention of earlier judgments of this tribunal.** There are three sub issues in Part-B which are as under:

(a) **Disallowance of Income Tax for FY 2007-08, FY 2008-09 as also for FY 2009-10 and 2010-11;**

(b) **Disallowance of O&M expenses with respect to Corporate Social Responsibility; and**

(c) **Disallowance of de-capitalization of asset.**

***19.*** According to the learned Counsel for the State Commission **with regard to the Wrongful disallowance of income tax for the Financial Year 2007-08, 2008-09 as also for FY 2009-10 and 2010-11,** the State Commission has not rejected the said issue but has been kept in abeyance to await the requisite details to be furnished by the Appellant as required by the State Commission. The relevant portion of the impugned order is as follows:

> *"From the various pronouncements of Hon. APTEL the principle that clearly emerges is that the income tax of a licensee that should be passed through in the tariff is to be based on the actual tax impact. For working out actual tax impact working out the segmental income is necessary. Income tax emerges from segmental working and that leads to segmental calculations. Segmental calculations should be based on regulated income if tax is actually paid on regulated income. If income tax is actually calculated and paid by the Licensee Company on book profits under MAT*

*method then the segmental division has to be based on book profit and not on regulated profit; because regulated profit is not what has suffered actual tax but book profit has suffered the actual tax.*

*It is clear from the licensee's own submissions before Hon. APTEL and various observations made by Hon. APTEL, that income tax has to be considered at actual as pass through expense. Further in case of true up applications the claim has to be sanctioned on the basis of actual tax payments because all the details are available by that time. State Commission accordingly sought the information related to actual tax payments made by the licensee to determine the correct claim. The information sought was basic information such as copy of income tax return filed; the statement of computation of income which is invariably submitted along with the returns along with some other relevant information like break of various additions and deductions claimed in tax computation in G-T-D and other segments. Further it was noted that the licensee had claimed credit for tax paid by it under MAT mechanism in earlier year; which being tax already recovered in tariff of earlier years should now be reversed in the appropriate proportion from G-T-D and other segments.*

*The State Commission is of the view that appropriate claim for actual income tax paid by the company cannot be found out without these very basic documents viz. copy of income tax return filed; the statement of computation of income which is invariably submitted along with the returns along with some other relevant information like break of various additions and deductions claimed in tax computation in G-T-D and other segments.*

*The licensee responded with partial information and in some case information which was submitted proved to*

*be incorrect. For example initially incorrect computation statement was furnished which did not match with figures appearing in income tax return filed.*

*Thereafter on pointing out the fact the further information provided as computation of income contained calculations of income taxable under head "Business and Profession" only and was not total computation statement. Till date licensee has not submitted complete and correct statement of computation of income as matching with the income tax return filed. Licensee has also not submitted underlying break-up of allowances / disallowances for tax purposes into G-T-D and other segments. Licensee has also not submitted break up of MAT paid in earlier year, the part of which has been claimed as credit in current year into G-T-D and other segments. There has been fair amount of follow up on this issue with the licensee and ultimately vide mail dated 8th February, 2012 the licensee has communicated that they do not have the relevant information.*

*Considering the fact that out of information sought; statement of computation of tax is really mandatory statutory filings and the segmental breakup is obviously the base on which licensees would have staked their claim for reimbursement; inability of the licensee to produce these evidentiary documents is incomprehensible. However to be just and fair to the licensee considering that they may have some issues in record retrieving, the State Commission is of the opinion that the licensee should claim income tax during the next year after the licensee is able to produce the information sought for, because the present orders cannot be held back on this account.*

***20.*** On this basis, it is contended by the learned Counsel for the State Commission that the State Commission, has in the order itself indicated that it will consider the same upon requisite information and documents being provided by the Appellant and therefore, there cannot be any grievance for the Appellant.

***21.*** In respect of the disallowance of the Income Tax for the Financial Year 2009-10 and 2010-11, the following findings has been given in the impugned order which is as follows:

> ***"RE: for FY 2010 and 2011:***
>
> *"Hence, it was incumbent upon the State Commission to examine this issue in consultation with professional consultants. Having so examined this subject matter, the State Commission proposes to adopt the actual tax computation statement of the Petitioners and supporting Returns of Income filed i.e., the documentary evidence as submitted by them as the base for true-up petitions. The segmental allocation of taxable income and tax thereon is being done on line by line basis based on segmental allocation of income and expenses as approved.*
>
> *The method is based in actual tax computation statement and segmental break up will be always the one that is used for approval of tariff / plan. The weighted income tax deductions / accelerated depreciation / income tax exemptions will be allocated to underlying segment to which they pertain as is clearly mandated by regulation. Cross tally of every line item in the computation of income statement is key demonstrative strength of methodology and would preclude the unwarranted disputes on the issue.*

*Accordingly computation of income statement was sought from petitioners and income tax reimbursement claim is sanctioned on the basis of the same. It was observed from computation statement that in the year under consideration the petitioner was liable to pay the tax based on Minimum Alternate Tax (MAT) mechanism under the Income Tax Act, which is higher than the normal tax on taxable income. In view of APTEL's pronouncements as aforesaid, this higher impact is being considered for sanctioning of the claim and this higher tax impact under MAT which has been actually suffered by the petitioner is allocated to various segments as per Annexure A hereto. In case of MAT the same is charged on the book profits. Book Profits are always calculated as income minus expenses as per books and accordingly book income minus book expenses of various regulated business segments have been considered as base as per audited allocation statements submitted by Licensee. This clearly is in conformity with the directives of Hon. APTEL which has directed income minus expenses approach to be used vide its Judgment in case of Appeal No. 173/2009 as referred to hereinabove. Further since the actual tax suffering in case of MAT happens on the basis of book profits without any consideration to any other figures, the same base of book profits of the relevant regulated segment has to be adopted. Accordingly the allocation of book profit statement was sought from Licensee duly audited by their auditors. This audited statement submitted by Licensee themselves has been considered as for arriving at book profits attributable to concerned regulated segment. As will be apparent from Annexure A; the MAT tax has been calculated on all the segments in accordance with this audited statement submitted by Licensee themselves. The total MAT liability of company is duly reconciled with the total tax liability of all the segments taken together thereby the correctness of tax calculations stands duly*

*demonstrated. In short following the Hon. APTEL verdicts the actual tax payment of Licensee has been allocated to various segments. Further in this case since the tax suffering is on MAT; which is based solely on book profits irrespective of any other considerations, the same base of book profits on which Licensee has actually paid the tax has been used to ensure that base remains the same base on which the Licensee has actually suffered the tax.*

*As would be apparent from the Annexure B; the tax allocable to segment under consideration of this order is Rs. 19.76 crore which is being sanctioned against the claim of Rs. 17 crores under this petition. Further the MAT paid is not actual expenditure because credit of such tax paid is available to Licensee in subsequent years. Needless to add that the credit of this tax paid under MAT mechanism as permissible to be taken by the petitioner in the subsequent years under the provisions of the Income Tax Act, 1961 will be adjusted on proportionate basis of allowance made by this order, in subsequent year/s in which the petitioner actually takes such credit at total company level."*

**22.** On this point, the learned Counsel for the Appellant has made the following submissions:

(a) The State Commission has wrongly mixed up the corporate accounts and tax with division specific regulatory accounts as detailed below, to justify its refusal to implement the decision of this Tribunal in:-

(i) *Judgment dated 15.02.2011 in Appeal No. 173 of 2009:* ***2011 ELR (APTEL) 336*** *(Para 31 to 37)*

(ii) *Judgment dated 31.08.2011 in Appeal No. 17-19 of 2011 (Para 24)*

(b) No appeal was filed by State Commission against the Judgment in Appeal No. 173 of 2009. Neither the issue of Income Tax has been raised by the State Commission in Civil Appeal Nos. 9003-9005 of 2012 filed before Supreme Court against the judgment dated 31.08.2011 passed by this Tribunal in Appeal No. 19 of 2011. Hence, both the above Judgments have attained finality.

(c) Despite, the clear Judgment and finding of this Tribunal prescribing the method of calculating Income Tax i.e. income tax payable of Regulated Income before Tax, State Commission has sought to deviate from the said findings. The State Commission has sought segmentation of the income tax paid by the Appellant on the basis of actual income Tax paid by the Appellant as an entity and not on the basis of Income Tax payable by Appellant. The said approach of State Commission is contrary to the directions of this Tribunal. Any action or omission by a subordinate authority/court which negates or violates or refuses to give effect to a direction given by a superior court/tribunal has been repeatedly held to be a denial of justice which is destructive of basic principles in the

administration of justice and majesty of courts. In support, reliance is placed on:-

(i) ***Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal****: AIR 1961 SC 182 (Paras 7-10 and 12*)

(ii) ***RBF Rig Corporation, Mumbai Vs. State Commissioner of Customs (Imports), Mumbai*****:** *(2011) 3 SCC 573* (*Paras 17-19, 23 to 27*)

(iii) ***Smt. Kausalya Devi Bogra & Ors. Vs Land Acquisition Officer:*** *(1984) 2 SCC 324 (Paras 6- 8 & 14)*

(d) The Income Tax claimed by the Appellant in the ARR is based on the values considered in the ARR i.e. Sales, Interest, O&M Expenditure etc. Hence the term “Regulated Profit Before Tax”. It cannot be linked to the IT Returns or the balance sheet of the company, but has to be derived based on the regulatory regime. As such, State Commission erred in insisting upon the same IT Returns.

(e) Regulatory Profit is different from actual profit, which is used for praying Income Tax, on various counts, like:-

(i) The method for calculation of depreciation is different in Companies Act as compared to the Tariff Regulations framed by State Commission.

(ii) State Commission disallows certain expenses based on prudence check viz. Interest on Loan, O&M expenditure etc. which will impact the Regulatory Profit Before Tax whereas the actual Profit Before Tax is based on actual Revenue and Expenditure.

(f) State Commission changed the methodology for computation of income tax retrospectively contrary to the judgment of this Tribunal and disallowed income tax claims of the Appellant.

(g) All data sought by the State Commission as existing was given at the stage of truing up, which is different from what is being sought after expiry of four years.

(h) No unjust enrichment is accruing to the Appellants. The income tax payable by the Appellant as a corporate entity is not only dependant on the regulated Mumbai business of the Appellant but also dependant on other businesses. The balance sheet of entire company is common and therefore tax is paid on the Appellant as one unit rather than separate tax for each division.

(i) Once the tax calculation is done. The Appellant is required to pay higher of Normal Tax or Minimum Alternate Tax. Appellant's balance sheet also includes other businesses such as Wind Energy Business. The depreciation available on Wind Energy Business is very high as compared to other businesses of the Appellant. Due to higher depreciation the normal tax comes lower for the Appellant as compared to Minimum Alternate Tax and therefore the Tax was paid by the Appellant as a whole under Minimum Alternate Tax method.

(j) Evidently the tax computation on the basis of Regulated Profit as against the actual profit of the Appellant as a whole will be different, adjusting for (a) Division- wise variations and (b) various tax benefits available to the Appellant including that of wind energy business. However, when division-wise calculation is made, the said benefit is not available to regulated business of the Appellant. Therefore, there is huge difference in actual tax paid by the Appellant as a Company as compared to tax assessed separately for each division of the Appellant. The said difference is because of the tax incentives on the other businesses.

(k) In view of the same, the Appellant has prayed before this Tribunal to direct the State Commission to re-calculate the Income Tax liability of the Appellant

on the basis of its judgment in the case of *Tata Power Co. Ltd. Vs. MERC, 2011 ELR (APTEL) 336*.

**23.** The learned Counsel for the State Commission submits the following by way of reply:

(a) The issue raised on Income Tax in respect of FY 2007-08 and FY 2008-09 has not been rejected by the State Commission but has been kept in abeyance to await the requisite details to be furnished by the Appellant as required by the State Commission.

(b) Hence the State Commission has in the Order itself indicated that it will consider the same upon the requisite information and documents being provided by the Appellant.

(c) The Appellant has sought to contend that the aforesaid information and documents as required by the State Commission are not necessary. It is submitted that the necessity of the information and documents as required by the State Commission will be eminently clear from the treatment of Income Tax as undertaken by the State Commission for the subsequent two Financial Years 2009-10 and 2010-11.

(d) The State Commission has dealt with the issue in respect of the Income Tax treatment for the year FY

2009-10 and 2010-11 in the Impugned Order in Appeal No. 105/2012 at pages 186 (for FY 2009-10) and page 268 (for FY 2010-11) in full details including citing various judgments of this Tribunal on the issue of Income Tax.

(e) Therefore, the State Commission has followed the principles laid down in the various judgments of this Tribunal which would have a bearing on the present issues. The State Commission has after applying all the principles laid down by this Tribunal from time to time has dealt with the Income Tax issues.

(f) All the principles laid down above, have been given effect to in the impugned order. However the issue of grossing up has not arisen in the impugned order since the issue of grossing up would be considered by the State Commission as and when the net revenue gap in the current impugned order is in fact recovered as tariff and offered to tax in the subsequent tariff order.

(g) The treatment undertaken by the State Commission in the impugned order will show that:

(i) Each regulated business like Generation, Transmission and Distribution have been treated as separate independent water tight

compartments and the tax effect of each of the compartments has been assessed.

(ii) The State Commission has considered the income and expenses of the three segments on the basis of the allocation statement submitted by utility itself.

(iii) The State Commission has not treated RoE as the only income of the utility;

(iv) The State Commission has allowed the actual tax impact ascribable to each of the three segments of the regulated business such that there is no profit on tax that would accrue to the utility.

(v) The summation of the actual tax impact of each of the three regulated business plus the tax impact of the non regulated business equals the total tax actually paid by the Company as a whole and hence the dispensation of the State Commission is in accordance with the principle laid down by this Tribunal that the utility ought not to profit from tax.

(h) The only contention raised by the Appellant throughout is that the State Commission has allegedly violated the earlier judgments of this Tribunal. At no

point of time, has the Appellant been able to identify as to which dispensation, or which part of the State Commission's Order is considered in violation of which principle laid down by this Tribunal.

(i) Therefore, one consistent principle which is the fundamental basis for all the aforesaid judgments is that the utility ought not to profit from tax. Income Tax has to be treated as an actual expense which this Tribunal has been pleased to direct must be permitted to be recovered. Hence the utility is not permitted to recover an inflated amount in the name of Income Tax which is more than the tax actually paid and/or ascribable to each of the related segments. If any such inflated recovery in the name of Income Tax is recovered, the same would amount unjust enrichment.

(j) The Regulations of the State Commission also bring out that the "Income Tax on the income of the ……..business of the …….company shall be allowed for inclusion in the Annual Fixed Charges…..". Hence what is to be recovered is the tax and not what the utility claims as an artificially inflated amount in the name of Income Tax.

(k) As a matter of fact, none of the Judgment of this Tribunal have dealt with the issue of MAT Vs Normal Tax. Hence, there is no question of having violated

any of the prior judgment of this Tribunal. If the company as a whole has paid tax on MAT, the Appellant could not be permitted to claim tax on normal basis for each of its Regulated businesses and thereby claim to recover something more than the actual tax paid by the Company and ascribable to the regulated business.

(l) In the present case, the Appellant has claimed, in the year 2009-10 a total income tax of Rs.233 Cr. on normal basis whereas the actual MAT paid is Rs.186 Cr.

(m) Similarly, in FY 2010-11 the Appellant has claimed tax on normal basis at Rs.184.87 Cr whereas the actual MAT paid by the Company as a whole Rs.174.76 Cr. The breakup of the same is shown as under:-

**CLAIM**

| **Year** | **G** | **G-8** | **D** | **T** | **Total** |
|---|---|---|---|---|---|
| 2009-10 | 152 | 10 | 30 | 41 | 233 |
| MAT paid | | | | | 186 |
| 2010-11 | 109 | 18 | 16.87 | 41 | 184.87 |
| MAT paid | | | | | 174.76 |

(n) In this connection, with reference to a query graciously posed by this Tribunal during the course of

hearing that as to the claim made by the Tata Power Company Unit-8 on MAT basis, the Appellant has in its written submission admitted that since Unit-8 was a new unit, if Unit-8 pays income tax as a separate entity, it is liable to pay Minimum Alternative Tax (MAT).

If such is the case, then in the present matter, the Appellant would be estopped from claiming normal tax payable by Unit-8 when the company has a whole including Unit-8 pay tax on MAT basis.

(o) Therefore, the Income Tax treatment in the impugned order on MAT vis a vis Normal Tax is completely in keeping with the principles laid down by this Tribunal and not in violation of any of the judgments of this Tribunal.

**24.** We have carefully considered the submissions made by both the parties.

**25.** On going through the records, it is noticed that the issue of MAT has come up for our consideration for the first time.

**26.** In order to understand the issue in its correct prospective, we have to understand the principles behind MAT, our findings in various judgments relating to the issue of Income Tax and true import thereof and to examine as to whether these principles laid down by us in earlier

judgments have been applied by the State Commission or not.

**27.** Let us examine what is Minimum Alternate Tax (MAT).

**Minimum Alternate Tax**

**Companies find various loop-holes to avoid paying income tax by using several exemptions. MAT is a way of making companies pay a minimum amount of tax..**

Albert Einstein once said that the hardest thing in the world to understand is income tax. The statement rings true as tax laws are quite complicated and requires a great deal of time and effort to understand them. Most of us get by with a basic understanding of tax matters. Buy help is not at hand

Direct tax in lay man's terms is a tax on income that you have to pay, it cannot be shifted to others. Some of its forms include income tax, wealth tax, etc. Direct taxes are directly levied on individuals, corporations and organisations and collected by way of income tax returns to be filed each year

An indirect tax is collected by an intermediary (such as a retail store) from the person who bears the ultimate economic burden of the tax (such as the customer). Indirect taxes include sales tax, service tax, value-added tax, commodity transaction tax and securities transaction tax among others

One such indirect tax is the minimum alternate tax (MAT). Going forward, we will explain what MAT is, the reasons for its introduction, and who is liable to pay the tax

Normally, a company is liable to pay tax on the income computed in accordance with the provisions of the Income-Tax Act, but the profit and loss account of the company is prepared as per provisions of the Companies Act

In the past, a large number of companies showed book profits on their profit and loss account and at the same time distributed huge dividends. However, these companies didn't pay any tax to the government as they reported either nil or negative income under provisions of the Income-Tax Act

These companies were showing book profits and declaring dividends to their shareholders but were not paying any tax. These companies are popularly known as 'zero tax' companies.

The Indian Income-Tax Act allows a large number of exemptions from total income. Besides exemptions, there are several deductions permitted from the gross total income. **Further, depreciation allowable under the Income-Tax Act, is not the same as required under the Companies Act. The latter provides a lower rate viz-a-viz the I-T Act which computes a higher rate of depreciation. For example, IT Act provides depreciation for solar plants as high as 80% but Companies Act provides only 6-7%. Thus, for showing book profit depreciation as per Company Act is taken in account. But for Income tax purposes, depreciation as per Company Act is added and depreciation as per Income Tax is subtracted from Book Profit. Thus, income for Income tax purposes becomes negative of near zero.**

The result of such exemptions, deductions, and other incentives under the Income-Tax Act in the form of

liberal rates of depreciation is the emergence of zero tax companies, which in spite of having high book profit are able to reduce their taxable income to nil.

In order to bring such companies under the I-T net, Section 115JA was introduced from assessment year 1997-98. Now, all companies having book profits under the Companies Act shall have to pay a minimum alternate tax at 18.5%

MAT is a way of making companies pay minimum amount of tax. It is applicable to all companies.

For example, book profit before depreciation of a company is Rs. 7 lakh. After claiming depreciation and other exemptions, gross taxable income comes to Rs. 4 lakh. The income tax applicable Rs. 1.2 lakh at a rate of 30%. However, MAT would be Rs. 1.29 lakh (Rs. 7 lakh at 18.5%).

The MAT paid can be carried forward and set-off (adjustment) against regular tax payable during the subsequent five-year period subject to certain conditions.

***Procedure for Computation of MAT u/s 115JB:-***

The provisions of section 115JB provide for working out the income-tax payable as MAT on a deeming basis. The MAT tax liability under section 115JB can be worked out by undergoing the following steps:-

(a) Compute the total income of the company (ignoring the provisions of u/s115JB).
(b) Compute the income-tax payable on total income is worked out under (i) above.
(c) Work out the Book Profit under the provisions of section 115JB.

(d) Calculate 10 per cent of book profit (as per provisions of section 115JB).
(e) MAT tax liability as worked out under (iv) above would be the tax payable if it is more than the amount of tax worked out (ii) above.

**A numerical illustration:-**

ABC Ltd. had its computed total income at Rs.100 lakhs and its book profit as computed under section 115JB is Rs.600 lakhs. In such an event, the following would be the calculation of MAT tax liability under section 115JB for assessment year 2007-2008 as discussed above :

| | | |
|---|---|---|
| i) | Total Income | = Rs.100 lakhs |
| ii) | 33.66% of total income being tax payable (30%+10% surcharge+2% E.Cess) | =Rs.33.66 lakhs |
| iii) | Book Profit | = Rs.600 lakhs |
| iv) | 11.22% of the Book Profit (10% + 10% surcharge + 2% E.Cess) | =Rs.67.32 lakhs |
| v) | Income tax payable under MAT (since higher than tax on total income at (ii) above) | =Rs.67.32 lakhs |

Hence, the tax payable by ABC Ltd. for assessment year 2007-08 would be Rs.67.32 lakhs since the tax payable on book profit under section 115JB is higher than the tax payable on computed Total Income

***MAT Credit :-***
As per section 115JAA, MAT credit can be carried forward for set-off against regular tax payable during the subsequent years subject to certain conditions.

**28.** The principle which emerges from the aforesaid is that MAT is payable by a company when its taxable income is diminished as a result of permissible exemptions, deductions, and other incentives under the Income-Tax Act in the form of liberal rates of depreciation. Tata Power Company as a whole has paid MAT during the relevant period. The question would arise that which business of the Company took benefit of IT rules. Was it regulated business (GTD) or other business?

**29.** The learned Counsel for the Appellant submitted that other business include Solar Power and Wind Power. These projects entails higher rate depreciation in the beginning (Accelerated Depreciation) as a result of which, the income of company get reduced to a level that MAT, payable of book profit became higher than the Normal Tax.

**30.** Let us now examine the findings of this Tribunal in various judgments. The Ratio laid down in this judgments is culled out below:

(a) First of such judgment is **Reliance Energy Ltd Vs MERC in Appeal No.251 of 2006 (2007 APTEL 164) dated 4.4.2007.** In this Judgment this Tribunal Held that the consumers in the licensee's area must be kept in a water tight compartment from the risks of other business of the licensee and the Income Tax payable thereon. Under no circumstance, consumers

of the licensee should be made to bear the Income Tax accrued in other businesses of the licensee. **Income Tax assessment has to be made on stand alone basis for the licensed business so that consumers are fully insulated and protected from the Income Tax payable from other businesses.**

(b) **In Reliance Infrastructure Ltd Vs MERC in Appeal No.111 of 2008 (2009 ELR(APTEL 560) dated 28.5.2009 it was held that** for income tax on incentives is to be given to it as a pass through.

(c) **Again in Reliance Infrastructure Ltd Vs MERC in Appeal No.115 of 2008 dated 28.5.2009 it was held that** the part of the incentive which is subjected to income tax shall pass through in tariff."

(d) **This Tribunal in Torrent Power Ltd Vs GERC in Appeal No.68 of 2009 23.3.2010** laid down the principle of grossing up of Income tax. Grossing up of the income tax would ensure that after paying the tax, the admissible post tax return is assured to the Appellant. In this way the Appellant would neither benefit nor loose on account of tax payable which is a pass through in the tariff.

(e) **In Tamil Nadu Electricity Board Vs National Thermal Power Corporation & Ors in Appeal No.134 of 2010 (2010 ELR APTEL 1280)** this

Tribunal relying upon its earlier judgment in Appeal No.49 of 2010 in the matter of Tamil Nadu Electricity Board Vs. Neyveli Lignite & ors. dated 10.9.2010, up held the principle of Grossing up of Income Tax

(f) **In Gujarat Electricity Regulatory State Commission Vs Torrent Power Limited in Review Petition No.09 of 2010 in Appeal No. 68 of 2009 dated 5.01.2011** this Tribunal has observed that the Utility should neither benefit nor loose on account of tax payable which is a pass through in the tariff. Thus, there is no question of the company making profit on account of income tax.

(g) **In Tata Power Company Limited Vs Maharashtra Electricity Regulatory State Commission in Appeal No.174 of 2009 Dated 14.02.2011 and in Tata Power Company Limited Vs Maharashtra Electricity Regulatory State Commission in Appeal No.173 of 2009 Dated 15.02.2011** this Tribunal held that Profit Before Tax should be basis for assessment of income tax during truing up and restated the principles of Grossing up and income tax on incentives to be pass through.

**31.** The broad principles which have been laid down by this Tribunal in these judgments could be summarized as under:-

(i). Each regulatory business is to be treated as if in a water tight compartment and Income Tax assessment has to be made on stand alone basis for the licensed business so that consumers of the regulated business must not be exposed to the risks of the non regulated business and are fully insulated and protected from the Income Tax payable from other businesses.

(ii). Return on Equity is not the only income of the utility. There are other incomes such as interest, incentives, etc and non-tariff income etc. Hence, the State Commission ought not to proceed on the basis that RoE is the only income of the utility. The State Commission must consider income minus allowable expenses of the regulated business.

(iii). The Income Tax must be grossed up to ensure that the tax implication which itself is regarded as an inflow in the ARR and attracts tax. Hence, such impact must also be passed through in the tariff.

(iv). The utility cannot profit on tax i.e. whatever tax is actually paid by the utility, must be reimbursed to it.

**32.** The Appellant has relied on the judgment in Appeal No. 251 of 2006 and 173 of 2009. Principles laid down in these judgments are that the income tax of regulated business of a utility must be commuted on stand alone basis so that the

consumers are not exposed to the risks of other businesses and must be assessed on Profit Before Tax (BPT) and has alleged that the State Commission did not follow these judgments.

**33.** The learned Counsel for the State Commission submitted that it had followed the principles laid down in these judgments and further has placed reliance on judgment in RP-9 of 2010 wherein the Tribunal has held that utility cannot profit on tax.

**34.** Since the issue before us is very important and is being dealt for the first time as indicated above, it may have large ramifications on the power sector in future. Therefore, both the possible views are being discussed below.

**35.** Let us discuss the **First View Point** upholding the State Commission's Order.

**36.** The learned Counsel for the State Commission has submitted that the State Commission has implemented the directions of the Tribunal propounded in various judgments in letter and spirit. The Appellant has been taxed on the basis of MAT. The Appellant has claimed the tax to be assessed on individual segment basis and to be paid accordingly. This would result in unjust enrichment. The State Commission has allocated around Rs 86 Crores to the three G T D segments. The Appellant's claim is over Rs 200 Crores. This claim is not in accordance with the Tribunal's judgment in Torrent

matter wherein the Tribunal has specifically held that the utility must not gain or loose on tax.

**37.** Let us see the **Second View Point** against the State Commission's order.

**38.** The contention of the State Commission that the utility cannot profit on tax appears to be attractive and logical on first rush of blood. But, seeing it along with the first principle that the assessment of regulated business should be done on standalone basis, there appears to be some contradiction, especially, in the present context when the company has been assessed on MAT. This aspect is elaborated in the ensuing paragraphs.

**39.** Before we go into the veracity of the above statement, let us examine the context in which the Tribunal has observed this aspect.

**40.** Let us now examine the context of RP-9 of 2010, which is reproduced below:

> *"9. Regarding income tax, the State Commission has contended that the Tribunal has not considered Regulation 66 (20) and the same has to be considered alongwith Regulation 7 to have harmonious interpretation of the Regulations. Let us first examine Regulation 7 and Regulation 66 (20) of the State Commission's Regulations. The relevant portion of the Regulation is reproduced below:*
>
> *"7. Tax on income:*

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

*(2) Under-recovery or over-recovery of any amount from the beneficiaries or the consumers on account of such tax having been passed on to them shall be adjusted every year on the basis of income-tax assessment under the Income-Tax Act, 1961, as certified by the statutory auditors. The generating company, or the transmission or distribution licensee, as the case may be, may make such adjustments directly and without making any application to the State Commission in this regard.*

*Provided that on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be borne by the generating company or transmission licensee or the distribution licensee, as the case may be.*

*66. Principles, terms and conditions for determination of tariff with their application for distribution licensee*

*(20) Expenses arising from and ancillary or incidental to other business of licensee for which income have been included, but limited to amount of income so included.*

*xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*

*The State Commission may also allow reasonable expenditure to be incurred actually and properly on the following:*

*(i) All taxes on income and profit calculated on permissible return as allowed by the State Commission relating to business of electricity and also subject to the condition that the amount of taxes is actually paid as tax after taking into account refunds into consideration".*

*10. Regulation 7 clearly stipulated that the tax on income stream of the generating company from its core business shall be computed as expense and shall be recovered from the beneficiaries. The adjustment for under or over recovery of any amount from beneficiary has to be made by the generating company directly on the basis of income tax assessment under the Income Tax Act as certified by the statutory auditors. Regulation 66(20) only restricts the income tax to be allowed on the permissible return subject to actual payment.*

*11. This is the only difference in the State Commission's Regulations with reference to the Regulations of 2004 of the Central State Commission in respect of Income Tax. The Central State Commission's Regulations of 2004 allow income tax as pass through even on income over and above the permissible return on equity due to better performance over the generation norms. However, the State Commission's Regulations allow the income tax on the permissible return. The principle of grossed up tax is applicable to both as decided by this Tribunal in the impugned judgment and in various other cases referred to by the Respondent.*

*12. Conjoint reading of the Regulations of the State State Commission will imply that income tax has to be Page 14 of 17 RP 9 0f 2010 in Appeal No. 68 of 2009 taken as expense subject to adjustment as per actuals as per audited accounts by the statutory auditors and to the extent of permissible return.*

*However, tax on income on permissible return has to be 'pass through'. Thus the intent of the Regulations is that income on permissible return on core business in the hands of the generating company has to be net of tax. Thus the entire tax inclusive of grossed up tax is relatable to the core activity of the generating company. However, if there is any over-recovery of tax, the generating company has to reimburse the same as the same is adjustable as per actuals as per audited accounts by the statutory auditors.*

*13. The Tribunal's judgment dated 23.03.2010 in para 52 clearly shows that the Tribunal has considered Regulation 7 and Regulation 66 and Section 195 (A) of the Income Tax Act to arrive at the decision that grossing up of the tax has to be carried out to ensure that after paying the tax, the admissible post tax return is assured to the Appellant (Respondent in Review Petition), Torrent Power Limited.* ***The Tribunal has also held in the judgment that the Appellant, Torrent Power Limited should neither benefit nor loose on account of tax payable which is a pass through in the tariff. Thus, there is no question of the generating company making profit on account of income tax. The excess recovery of income tax if any has to be reimbursed by the generating company to the distribution company as per the Regulations of the State Commission.*** *In this case the excess recovery of income tax if any has to be adjusted in the true up of the financials. Thus the* judgment dated *23.3.2010 needs no review."*

**41.** The judgment referred to in para above in the Tribunal's judgment in Appeal No. 68 of 2009, which was challenged in Review Petition No. 9 of 2010. The relevant portion of this judgment is reproduced below:

*"52. A conjoint reading of the Regulation 7, Regulation 66 of the State Commission and Section 195(A) of the Income Tax Act, 1961 leaves no doubt that the recovery of income tax paid as an expense from the beneficiaries requires to be grossed up in such a manner as to ensure that the actual tax paid is fully recovered through tariff.* ***Grossing up of the return would ensure that after paying the tax, the admissible post tax return is assured to the Appellant.*** ***In this way the Appellant would neither benefit nor loose on account of tax payable which is a pass through in the tariff.*** *This would ensure that the Appellant earns permissible return of 14% stipulated in Regulation 66 of the Regulations and mandate of Section 195A of the Income Tax Act is also complied with. The National Tariff Policy stipulates that the Regulatory State Commission may adopt rate of return as notified by the Central State Commission with appropriate modifications taking into view the higher risk involved in distribution and that a uniform approach is desired in respect of return on investment.*

***42.*** Conjoint reading of the aforesaid order along with the judgment in Appeal No. 68 of 2009 would make it clear that the issue before this Tribunal was grossing up of income tax and observation of the Tribunal that the utility would not gain or loose in the context of grossing up of income tax.

***43.*** Thus, the reliance of the State Commission on aforesaid judgment is misplaced. However, it cannot be denied that the utility must not profit on income tax.

**44.** The State Commission's Regulations 34.2.2. provides that the benefits of any income-tax holiday, credit for unabsorbed losses or unabsorbed depreciation shall be

taken into account in calculation of the income-tax liability of the generating station of the Generating Company, provided that where such benefits cannot be directly attributed to a generating station, they shall be allocated across the generating stations of a Generating Company in the proportion of the generating station-wise profit before tax. Thus, the regulations provide for station-wise allocation of benefit arising out of tax holiday etc. The same would be applicable for inter-business assessment. The benefit of tax holidays or accelerated depreciation would be available to the concerned business only.

**45.** CERC 2004 Regulations provided for station wise allocation of benefits of tax holidays and accelerated depreciation etc. Such a dispensation was a must for CERC as the beneficiaries of CPUs like NTPC, NHPC etc. were different. Benefit accrued to one power station must be shared by the beneficiaries of that power station alone. For example the power from Badarpur Power station is allocated fully to Delhi. Any benefit under Income Tax laws must be passed on to Delhi alone. NTPC, like the Appellant herein, files one income tax return. CERC had been assessing Income Tax liability of each power station on standalone basis and would pass through the income tax levied on each power station to its beneficiaries in the proportion of their share in the installed capacity.

**46.** It would pertinent to note that perhaps realizing the difficulty being faced in station-wise allocation of benefits, the Central Commission has changed the concept of post-tax RoE to pre-tax RoE. The Central Commission's 2009 Regulations provide for pre-tax RoE grossed up for income tax. As per 2009 Regulations, the utility would get pre-tax RoE irrespective of whether the utility pays the income tax or not. Thus, the concept that the utility must not gain on tax has been given a good bye under CERC 2009 Regulations. MERC MYT Regulations 2011 also specified pre-tax RoE on the lines of CERC 2009 Regulations.

***47.*** Let us now examine the context in which the Tribunal has observed in Appeal No. 251 of 2006 that the income tax assessment of an utility must be done on standalone basis. The relevant extract of the judgment is quoted below:

> *"32. We see force in the arguments put forth by the counsel for the appellant as truing up for the years 2004-05 and 2005-06 has to be carried out only as per the Sixth Schedule.* ***The consumers in the licensee's area must be kept in a water tight compartment from the risks of other business of the licensee and the Income Tax payable thereon. Under no circumstance, consumers of the licensee should be made to bear the Income Tax accrued in other businesses of the licensee. Income Tax assessment has to be made on stand alone basis for the licensed business so that***

***consumers are fully insulated and protected from the Income Tax payable from other businesses."***

**48.** Perusal of the above would indicate that there is no conjunction in first two lines. Still, there cannot be two opinions that the consumers of regulated business must be insulated from the risks of the other business and income tax assessment of the utility should be done on standalone basis. This direction of the Tribunal is in line with the State Commission's Regulations 34.2.2 (for Generation business) and similar Regulations for Transmission and Distribution business. The converse of the Tribunal's direction that under no circumstances, the consumers of the licensee should be made to bear the Income Tax accrued in other businesses of the licensee is also true i.e. under no circumstances the consumers of the licensee should be benefitted from the permissible deductions in the form of accelerated depreciation and from Tax holidays given to other businesses (unregulated by MERC) of the utility. That is the only way to treat the regulated and other business unregulated in water tight compartments.

**49.** The real issue to be resolved in the present case is to see what is the correct methodology for giving effect to the following two Judgments of this Tribunal and whether the State Commission has correctly implemented them:

**50.** Paragraph 32 of the Judgment in Appeal No. 251 of 2006 reads as under:

*"The consumers in the licensee's area must be kept in a water tight compartment from the risks of other business of the licensee and the Income Tax payable thereon. Under no circumstance, consumers of the licensee should be made to bear the Income Tax accrued in other businesses of the licensee. Income Tax assessment has to be made on stand alone basis for the licensed business so that consumers are fully insulated and protected from the Income Tax payable from other businesses."*

**51.** Paragraph 14 of the Judgement in Appeal No. 174 of 2009 reads as under:

*"Thus the intent of the Regulations is that the actual income tax paid by the transmission licensee in the business of transmission is included in the ARR and the licensee does not gain or lose on account of income tax which is a pass through in tariff."*

**52.** The Judgment in Appeal No. 251 of 2006 is based on the principle that regulated business in question that is within the jurisdiction of the Regulatory State Commission, should neither subsidise nor get subsidy from other businesses whether unregulated or regulated by the same or different regulator. In other words, the Judgment mandates that the taxable income of the regulated business within the jurisdiction of the Regulatory State Commission should be computed on stand alone basis, irrespective of what is the impact of this business or other businesses on the overall tax liability. There is a possibility

of distortion when the impact of regulated business or other businesses on total tax liability is considered or the overall tax liability is allocated for determining the tax liability for regulated business.

**53.** For example, when on standalone basis the regulated business has taxable income to be taxed at normal rates, there may be losses/tax exemptions in other businesses which may result in overall taxable income being less than the regulated taxable income and, hence, actual tax liability for all businesses being less than that of regulated business on standalone basis. In case, actual tax liability is allowed by the regulator whether in full or in proportion of profit of regulated business, it obviously amounts to less than due tax allowance for regulated business due to exemptions/losses of other business being utilised for subsiding the regulated business, which is not permissible as per the above Judgment. The impact is more pronounced when the overall taxable income becomes so small or even negative that the tax rate applicable is MAT, which not only artificially reduces the tax liability for regulated business due to lower rate, but also creates an incorrect impression that this tax allowed at MAT rate is to be reversed in future as MAT credit allocating MAT credit. This is obviously not permissible and for giving effect to the said Judgment in Appeal No. 251 of 2006 tax computation for regulated business has to be done on standalone basis

at normal rates even though it may result into tax allowance higher than actual tax payment for overall business.

**54.** The above example, however, raises a doubt whether it will be in contradiction to the Judgment in Appeal No. 174 of 2009, where the ratio was that income tax cannot be used as a means of earning profit in regulated business. That is to say that income tax to be allowed should be equal to, i.e. neither more nor less than actual tax liability. It appears that the interpretation in the above example allows tax higher than actual tax liability, which is in contradiction to Judgment in Appeal No. 174 of 2009.

**55.** However, a careful analysis of the above example with the ratio of the Judgment in Appeal No. 174 of 2009 would reveal that this Judgment is specifying tax allow ability for regulated business only and does not in any manner deal with implications on tax for regulated business due to other businesses. Further, the ratio is with regard to tax liability on the regulatory income, computed with permissible profits and applicable tax depreciation to be considered as taxable income, and not on the actual taxable income. Hence, any notional or actual income even within regulated business that is not permissible to be considered as regulatory taxable income cannot be allowed as it would amount to allowance of more than warranted regulatory tax liability/profits. As such, the above example when seen only

with reference to the regulated business allows just the real tax payable for regulated business without taking or giving any support from other businesses and, hence, does not amount to making profit from tax. The tax benefit of exemptions/losses in other businesses should only be available to those businesses. In case, the situation would have been reverse in the above example, i.e. the regulated business had exemptions/losses then the tax benefit of such exemptions should have been attributable only to regulated business. As such, there is no conflict in the above two Judgments and both can be implemented simultaneously with regulated business being treated separately on a standalone basis and tax liability computed as per applicable tax laws for that business only considering notional regulatory taxable income. This concept is followed by regulators for all items of ARR/Revenue which are considered on normative basis, where irrespective of actual expense/revenue normative expense/revenue is considered for tariff purposes. Accordingly, there is no requirement of allocating the overall tax liability on regulated and unregulated businesses.

**56.** It is also to be noted that for difference in book depreciation and tax depreciation, the tax laws provide for creating Deferred Tax Liability (DTL) which gets amortised with time when tax depreciation becomes lower than book

depreciation. However, in regulated business DTL is not considered as it is not the current tax liability. Thus, in case the benefit of accelerated tax depreciation for one year in regulated business may result in lower overall tax on overall book profit (due to MAT) and may seem to subsidise other businesses. However, in subsequent years the overall tax liability may be more than tax on overall book profit, which would seem to given subsidy from other businesses to regulated business. In both these situations, the methodology of standalone tax computation and allowance would give correct picture.

**57.** In the present case, the State Commission has worked out the book profit of each segment separately. It observed that the Appellant has paid MAT. It did not worked why and how the tax liability of the company, under normal income tax rates, got reduced to such a level that it came under MAT. Was it due to regulated business or unregulated business? Was the regulated business enjoying any tax holiday or accelerated depreciation or other tax deductions? Book Profit calculations in the Impugned order do not reflect any such deductions in the regulated businesses of G, T & D. Obviously, it was due to other business (unregulated by MERC) of the Appellant which caused massive permissible deductions. The benefit of such deduction must be shared by the beneficiaries of such business only and not by the consumers of regulated business. Presently, those

businesses may be getting tax rebates due to tax holidays or accelerated depreciation. But in the future at the end of tax holidays and reduced depreciation, these deductions would not be available to those companies and their tax liability would increase. Under those circumstances, the tax burden of the unregulated business would not be allowed to be shared by regulated business of MERC.

**58.** The Tribunal in Appeal No. 251 of 2006 has laid down the ratio that the income tax assessment of the licensee must be done on standalone basis. In Appeal No. 173 of 2011 the Tribunal has provided the methodology for assessing the income tax liability of the licensee. The State Commission did not follow these directions and got carried away with the observations that the utility must not gain or loose on account of income tax made in the context of grossing up of income tax. It simply allocated the actual tax paid by the Appellant, for the company as a whole, in proportion to their respective book profit.

**59.** <u>The issue is decided accordingly. The Commission is directed to reassess the Income tax liability of the Appellant as per our findings above and issue consequential orders.</u>

**60.** The next sub issue in Part-B is relating to Disallowance of O&M Expenditure with respect to Community Service Responsibility Expenditure in Financial Years 2009-10 and 2010-11.

**61.** In order to discuss the said issue let us refer to the findings of the State Commission on this issue in the Impugned Order:

> ***"Re. FY 2009-10***
>
> *"**4.4.2 Administrative and General Expenditure***
>
> *…The State Commission observed that TPC has spent an amount of Rs 6.75 crore (combined for generation, transmission and distribution businesses) towards community welfare expenses. In reply to the State Commission's query, TPC clarified that the community welfare expenses are mainly for educational/vocational training, health care, environment, infrastructure and other social welfare initiatives. Further, the main activities include training to youth, medical camps, HIV AIDS awareness programs/ rallies, training volunteers, afforestation, environment education, etc.*
>
> *…The State Commission is of the view that these costs are towards TPC's Corporate Social Responsibility and are not necessary for the functioning of any Utility. In any case, these expenses should not be passed on to the consumers of TPC as the consumers are not benefiting from the same and thus, these expenses should be borne by TPC. TPC-D is free to incur such expenses from the returns earned out of the business. TPC-D's share against Community Welfare Expenses and Gifts is Rs. 0.07 Crore and Rs. 0.66 Crore, respectively, which has been disallowed from the A&G expenses, under the truing up exercise and for the purpose of sharing of gain and losses…"*
>
> ***Re. FY 2010-11***
>
> *"**5.4.2 Administrative and General (A&G) Expenses***
>
> *…The State Commission observes that TPC has spent an amount of Rs 5.25 Crore (combined for Generation,*

*Transmission and Distribution businesses) towards Community Welfare Expenses. In reply to the State Commission's query, TPC clarified that the community welfare expenses are mainly for Educational/vocational training, health care, environment, infrastructure and other social welfare initiatives. Further, the main activities include training to youth, medical camps, HIV AIDS awareness programme/ rallies, training volunteers, afforestation, environment education, etc. The State Commission has disallowed these expenses, because if the Company or the shareholders of the Company wish to contribute/donate towards community welfare expenses, the same should be contributed from the return earned out of the business, rather than passing on such costs to the Utility's consumers…"*

**62.** Assailing the above findings, the Appellant has made the following submissions:

(a) The State Commission disallowed the expenses incurred by the Appellant towards "*Community Welfare Expenses*" falling under head '*others'* in A&G expenses.

(b) The impugned findings of the State Commission are:-

(i) Contrary to the earlier tariff orders wherein State Commission had allowed the costs incurred by the Appellant for undertaking Corporate Social Responsibility (CSR) activities under the head of A&G expenses.

(ii) State Commission in the present year has allowed A&G expenses by applying the respective growth rate on the previous year's allowed expense, the said growth will automatically get applicable on expenditure incurred by Appellant towards Corporate Social Responsibility also.

(iii) It is settled position of law that at the stage of truing up State Commission cannot re-open the basis of determination of tariff. The State Commission at the time of truing up can only compare the estimated figures projected at the start of the financial year with the actual figures at the end of the year, as held in:-

(a) **Meghalaya State Electricity Board vs. Meghalaya SERC** reported as 2010 ELR (APTEL) 940 (Para 34)

(b) **North Delhi Power Limited vs. Delhi ERC** reported as 2007 ELR (APTEL) 193 (Para 60)

(c) The format prescribed by State Commission for submitting A&G expenses, inter alia, includes sub-head 'others'.

(d) The Appellant towards the fulfilment of its duties of a model corporate citizen has been pursuing for the

welfare of the local communities CSR programs in the vicinity of Appellant's generating plants, as under:-

(i) Asphalting of Roads;
(ii) Afforestation Program;
(iii) Support to Mahul Fisherman;
(iv) Training to local youth

(e) The cost towards CSR programme the Appellant was always booked under the sub-head '*Others*' by the Appellant and was always allowed State Commission.

(f) The State Commission directed the Appellant to submit the response to Additional data gaps including breakup of the expenses booked under "Community Welfare Expenses". The same was replied by the Appellant.

(g) The initiatives undertaken by the Appellant as a part of the CSR program are not only aimed at providing benefits to the local communities in the vicinity of Appellant's operational facilities but also provide a significant intangible benefits to consumers by ensuring smooth business operations. Any negligence towards such areas can lead to unrest amongst these communities which may hamper the business operations and affect the reliability of power supply to the consumers.

(h) These activities are required for smooth operation of the business. Such smooth operation ultimately benefits the consumer in terms of higher availability, generation and optimizing fuel cost. The Appellant incurs such expenditure even outside Mumbai Licensed Business. For the years under consideration i.e. FY 2009-10, the total expenditure incurred towards CSR was Rs. 7.12 crore out of which Rs. 0.35 crore was outside Mumbai Licensed business and the balance was in Mumbai Licensed business. Similarly, total Expenditure for FY 2010-11 towards CSR was Rs. 6.26 crore out of which about Rs. 1 crore was outside Mumbai Licensed business and balance was in Mumbai Licensed business. The Appellant has therefore claimed the expenditure pertaining to Mumbai Licensed business only.

(i) Section 135 of the Companies Act, 2013 requires for companies having net worth of rupees five hundred crores or more, or turnover of rupees one thousand crores or more or a net profit of rupees five crores or more during any financial year to constitute a corporate social responsibility committee. Further, such committee as per Section 135 is charged with the duty of framing and implementing a corporate social responsibility policy. Section 135 further mandates that such company shall make every endeavor to spend at

least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. State Commission has failed to appreciate this aspect.

**63.** In reply to above submissions, the learned Counsel for the State Commission submits the following:

(a) The expenses towards community welfare/Corporate Social Responsibility (CSR) cannot be passed on to the consumers, since it is the social obligation of the corporate entity and the same cannot be passed on to the consumers. The Appellant is free to undertake such activities by funding the same from its returns, based on how it desires to utilize its profits/returns from the business.

(b) The Appellant has provided certain heads against which these expenses have been incurred, however, the Appellant in its Appeal has contended that these expenses are necessary for its electricity business and are related to the same. The Appellant cannot be permitted to change its submissions in this manner to suit its convenience.

(c) The State Commission has never discussed CSR expenses as part of A&G expenses in its previous Orders and has never knowingly allowed this expense

to be recovered as a part of the ARR. Merely because the State Commission has not raised a query in this regards, does not mean that the State Commission can never raise queries in this regard and take a considered view on the matter in future orders.

(d) In the original order for the year in question, the State Commission has allowed the expense by allowing the respective growth rate on the previous year's allowed expenses and the State Commission has not allowed the expenses by undertaking a head-wise prudence check, wherein the CSR expenses were allowed.

(e) The Companies Bill, 2011 has not been enacted yet. Moreover, even the provision in the Companies Bill, 2011 provides for spending at least 2% of the 'net profit' of the company, which makes it clear that the same has to come out of the net profits/returns of the company, and are intended to reflect the organization's seriousness to contribute to the welfare of the community as a whole, and the Appellant cannot expect that such contribution should be recovered from the consumers.

(f) The State Commission has undertaken a prudence check at the true up stage and has

disallowed the portion of the expenses on the ground that they are being imprudently incurred.

(g) If the Appellant shows increased expenses on account of Corporate Social Responsibility, such expenses have to be met by the Corporate itself. A utility ought not to be permitted to discharge its Corporate Social Responsibility at the cost of the consumer.

(h) If the Appellant's contention was to be accepted then the consumers of the Appellant would be paying for the discharge of the Appellant's social responsibility. It is for the Appellant to shoulder the burden of its Corporate Social Responsibility and ought not to be permitted to shift the burden to the consumer.

(i) The Appellant has sought to contend that the State Commission could not have in the truing up deviated from the principles as laid down in the original tariff determination. The State Commission has not deviated from any so called principle laid down in the tariff determination process. On the other hand the State Commission has followed and implemented the law laid down by this Tribunal in numerous judgments that a true up must always be conducted with a prudence check. If a particular expense is unjustified and imprudent the same would not be a justifiable

recovery from the consumer. In the present issue, all the State Commission has done is disallowed the items of expenses in the truing up process while conducting the prudence check.

(j) In the original tariff determination the State Commission has merely allowed an expense under the A&G head by the permissible percentage increase over the previous year's expenses under such head. The prudence check of such expenses has now been considered in the impugned order.

**64.** We have carefully considered the said submissions on the issue.

**65.** At the outset, it shall be mentioned that the Community Social Responsibility is the responsibility of the Company. The contention of the Appellant that the State Commission had approved these expenses in the ARR petition and that therefore, it cannot change during true up exercise is not tenable.

**66.** In fact, the State Commission is duty bound to apply prudency check while truing up otherwise no purpose would be served in truing up.

**67.** On going through the impugned order on this point as well as the submissions made by the learned Counsel for the State Commission, it is clear that the conclusion on this point

arrived at by the State Commission is valid and the reasons for such conclusions are justified.

**68.** The **third sub-issue** in **Part-B** is **Disallowance of De-capitalization of assets approved earlier for the Financial Year 2008-09.**

**69.** Let us refer to the findings of the State Commission in the Impugned Order:

> *"**4.1.8 Past De-Capitalisation***
> *….*
> *Further, TPC in its Truing up Petitions for FY 2008-09 in Case No. 96 of 2009, Case No. 97 of 2009 and Case No. 98 of 2009 for its Generation, Transmission and Distribution businesses, respectively, had submitted details of certain assets, which were de-capitalised during FY 2008-09. As regards the nature of the assets, TPC had stated that the de-capitalised assets were corporate assets, which were being used as facilities meant for outside Mumbai Licensed Area operations, which amounted to a total of Rs. 34.62 Crore. The same was further allocated to TPC-G, TPC-T and TPC-D businesses on the basis of the ratio of their respective GFA. Accordingly, for TPC-G, an amount of Rs. 22.22 crore was considered as the net asset de-capitalisation in FY 2008-09. However, since there were no loans that were outstanding against such assets de-capitalised, TPC had considered the pertaining impact on Equity portion only. Accordingly, TPC-G claimed a reduction in Regulatory Equity for FY 2008-09 to the extent of Rs. 22.22 crore on account of the entire asset de-capitalisation considered for the year. Based on the submissions made by TPC-G in the matter, the State Commission allowed the impact of such asset de-capitalisation vide its Order dated September 8, 2010.*

*However, during the TVS for the current Petition, the State Commission raised a few related queries to TPC in this regard. TPC's replies to such queries and the State Commission's decision in the matter are given in the following paragraphs:*

*In response to the State Commission's specific query regarding de-capitalisation of assets such as Guest Houses at book value, rather than market value, even though the market value of such assets would be many times the book value, TPC submitted that the assets, which have been de-capitalized were secretarial and administrative in nature and have been capitalised in the Corporate Office and that these assets were not in the exclusive use of any licensed business of the Company. TPC submitted that the assets were further allocated to the two licensed businesses, namely TPC-T and TPC-D and the power generation business (which is de-licensed) as per the allocation methodology filed with the State Commission. TPC further submitted that the allocation between TPC-G, TPC-T, and TPC-D was done on the basis of the Opening GFA for FY 2008-09 of the respective business.*

*In reply to the State Commission's query regarding whether the de-capitalisation or asset transfer from one Division to another should be done at book value or market value, TPC submitted that the subject assets were corporate assets, which are no longer used in Mumbai Licence area operations. TPC submitted that the de-capitalisation also ensured that no burden was passed on to the consumers of the licensed area on account of assets, which are no longer used in Mumbai License area. Further, the State Commission observed that Guest House Expenses have been claimed by TPC-G as HO & SS expense allocation to TPC-G, under the head 'Cost of*

*services' under A&G expenses for FY 2010-11. The State Commission asked TPC to give details of services at various Guest Houses and also confirm whether these Guest House expenses pertain to the assets transferred from Regulated Business to Other Business in past years. TPC submitted that few Guest Houses are maintained by TPC for the benefit of guests of the Company. The cost involves maintenance and care-taker charges and though the expenses are booked under head office, a part is allocated to Mumbai License Area as the Guest Houses are mostly located in and around Mumbai. TPC also clarified that the expenses included in the ARR do not pertain to the Guest Houses that have been transferred out of Licensed Area.*

*TPC further submitted* ***that de-capitalisation had to be done at Book Value*** *as there was no transfer of the assets in question and were merely stopped from being allocated to Mumbai activities.*

*TPC submitted that as per the Accounting Standards, the transfer of assets from one division to another division of the same Company can only be done at book value.*

*In this regard, the State Commission has re-considered the issue, since it has larger implications, and there is a possibility that the consumers, who have contributed towards creation of certain assets, may be deprived of realising the benefits in case of realisation from sale of the assets. The issue of de-capitalisation of assets such as Guest Houses, etc., without any replacement of asset, should be considered differently from asset replacement exercises, where the State Commission has rightly ruled that the equity component of the GFA of the replaced asset, should be reduced from the equity*

*base, so that the Utility does not continue to earn RoE on an asset which no longer exists in its books of accounts, and also earns RoE on the new asset that has replaced the old asset. In case of de-capitalisation of assets such as Guest Houses, etc., where no replacement of asset is involved, the State Commission is of the view that TPC's contention that any transfer of assets within the same Company can only be done at book value, and market valuation would be relevant only if the assets were being sold, is correct, on a stand-alone basis. However, the issue is not so simple. Consider an instance, wherein, today, the assets are being transferred at book value to an unregulated business under the same Balance Sheet, and the asset is sold say, two years later, then the sale transaction will be valued at market value, however, all the benefits of the market valuation will be realised by the other unregulated business to whom the asset has been transferred, and the regulated business, which has contributed towards creation of the assets will not benefit in any manner.*

*However, this will ensure that as and when such assets are sold, then the benefit of market valuation will be realised by the regulated business. It is understood that the same principle would be applicable, irrespective of whether the asset has appreciated in value or depreciated in value.*

*In view of the above, the asset de-capitalisation approved earlier for TPC-G for FY 2008-09 is disallowed now, and the corresponding Equity disallowed, i.e., Rs 22.22 Crore, has been re-instated for the year (the same assets have been entirely funded by TPC-G through equity). Thus, TPC-G is entitled to additional RoE for FY 2008-09 to this extent which works out to Rs 3.11 Crore. In addition, based on rationale explained in the above paragraphs of this*

*Order, carrying cost is allowable for the period when the recovery was deferred, i.e., from the issuance of the original Truing up Order to the actual date of recovery of the said expenses.*

*Accordingly, the net impact of disallowance of Asset De-capitalisation in FY 2008-09, i.e., additional RoE allowed due to equity re-instatement for FY 2008-09 and the corresponding carrying cost allowed works out to Rs. 3.33 Crore.*

**70.** Assailing this findings, the learned Counsel for the Appellant as made elaborate submissions which are as follows:

(a) The Appellant had sought de-capitalization of certain corporate assets in the previous years, which was allowed by State Commission in its earlier Orders and accordingly the Return on Equity was reduced by Appellant to that extent. However, by the Impugned Order, State Commission revisited its earlier decision and disallowed the de-capitalisation of the de-capitalised assets in the FY 2008-09.

(b) The order of State Commission to disallow de-capitalization of assets in truing up process is contrary to settled position of law that at the stage of truing up State Commission cannot re-open the basis of determination of tariff as held in:-

*(i)* ***Meghalaya State Electricity Board vs. MSERC****: 2010 ELR (APTEL) 940*

(ii) ***NDPL vs. DERC****: 2007 ELR (APTEL) 193*

(c) Without prejudice to the above, the Appellant in its APR Petition 2009 sought de-capitalization of certain assets on the book value in FY 2008-09 on account of the fact that the said assets were now primarily being used as facilities for the unregulated business of Appellant concerning operations outside Mumbai Licensed Area which included guesthouses maintained by Appellant for the company operations. The reason for seeking permission of State Commission for de-capitalization of assets were, as under:-

(i) There is no Accounting Standard which addresses the issue directly, Accounting Standard 10 (Accounting for Fixed Assets) provides that:-

> "*The gross book value of a fixed asset should be either historical cost or a revaluation computed in accordance with this Standard*."

(ii) The Historical cost concept states that all assets are recorded in the books of accounts at their purchase price rather than the "true worth" or current market value and no cognizance is taken of any change in their market value – mainly because the market values change so often that allowing reporting of assets and liabilities at

current values would distort the whole fabric of accounting.

(iii) Regulation 8.8.1 of the MERC (General Conditions of Distribution License) Regulations 2006 provide that the State Commission may specify a threshold 'book value' of assets, and any transfer of assets over and above such book value can only be done with the approval of the State Commission. In this regard, the State Commission has not prescribed any specific threshold 'book value' under Regulation 8.8.1. However, as a matter of abundant caution, the Appellant sought permission of State Commission.

(d) State Commission by its order dated 12.09.2010 allowed de-capitalisation of the said assets and accordingly reduced the regulated equity of the Appellant.

(e) Subsequently, State Commission in the Impugned Order re-considered the de-capitalisation of the assets and proceeded to withdraw its approval for such de-capitalisation contrary to truing up principles.

(f) No opportunity was granted to the Appellant before withdrawing the approval and hence the impugned findings are against principles of natural justice.

(g) The reasoning of State Commission that the consumers for the regulated Mumbai business have contributed to the creation of the said assets and hence should continue to remain in the books of the regulated business is contrary to the judgment of the Supreme Court in the case of **Tata Power Company vs. Maharashtra Electricity Regulatory State Commission**: 2009 ELR (SC) 0246.

**71.** In reply, the learned Counsel for the State Commission submits the following:

(a) The Impugned Finding clearly shows that the State Commission asked the Appellant several queries in this regard, and the Appellant's replies in this regard have also been captured and countered in the Impugned Order. The Appellant's contention that no opportunity was granted to the Appellant before withdrawing the approval and hence, the Impugned findings are against the principles of natural justice does not hold good.

(b) The State Commission has in impugned order applied the guiding principle that the Consumers of the regulated business ought not be deprived of the benefit of the assets created by the regulated business. The State Commission has also been mindful of the fact that such intra company transfers

would have a very high potential of depriving the regulated business of the benefit of assets which are in its books. The matter has been considered by the State Commission and its decision is in the following terms:

> *"Consider an instance, wherein, today, the assets are being transferred at book value to an unregulated business under the same Balance Sheet, and the asset is sold say, two years later, then the sale transaction will be valued at market value,* ***however, all the benefits of the market valuation will be realized by the other unregulated business to whom the asset has been transferred, and the regulated business****, which has contributed towards creation of the assets will not benefit in any manner."*

(c) The Appellant has not been able to place any material before this Tribunal to contend that the possibility of the aforesaid example being put effectuated is wrong. If such is the case, the State Commission has under the act a bounden duty to balance the interests of the licensee and the consumers. By the impugned order the State Commission has done precisely that.

(d) The Appellant in this issue seeking to take advantage of its consolidated balance sheet by transferring an asset at book value from a regulated business to a non-regulated business of the same entity. If the principle that each business segment is

to be kept in a water tight compartment is to be applied, then each business segment must be deemed to be fictionally treated as an independent entity.

(e) In the aforesaid circumstances the State Commission has taken the view that the assets of the regulated business ought to be within the regulatory jurisdiction over such regulated business. If a de-capitalization as proposed by the Tata Power Company were to be permitted such assets would escape the regulatory scrutiny of the State Commission.

(f) However having regard to the effect that the RoE on such assets was not considered by the State Commission for the period of their de-capitalization, the State Commission has granted the Appellant RoE with carrying costs in terms of the regulation for the previous period of such de-capitalisation. The relevant part of the order is extracted again herein as under:-

> *"In addition, based on rationale explained in the above paragraphs of this Order, carrying cost is allowable for the period when the recovery was deferred, i.e., from the issuance of the original Truing up Order to the actual date of recovery of the said expenses. Thus, for recoveries pertaining to FY 2008-09 the Truing up Order was issued on September 8, 2010 therefore, the*

*State Commission has considered 7-months carrying cost for FY 2010-11 (at an interest rate of 12.24% based on SBI PLR). Thus, the carrying cost on the additional ROE for FY 2008-09 currently allowed, works out to Rs 0.22 Crore. The carrying cost for FY 2011-12 will have to be considered at the time of considering the carrying cost for FY 2011-12 for all the heads of deferred recovery. Accordingly, the net impact of disallowance of Asset De-capitalisation in FY 2008-09, i.e., additional RoE allowed due to equity re-instatement for FY 2008-09 and the corresponding carrying cost allowed works out to Rs. 3.33 Crore."*

**72.** The learned Counsel for the State Commission's submissions can be summarized as under

(a) The Appellant has not clarified how it is losing out an account of the State Commission's treatment of this issue, since the asset continues to appear under the same integrated Balance Sheet.

(b) The Appellant has also not clarified how the interest of the consumers of the regulated business will be protected in case such assets are sold at a later stage, under the mechanism proposed by the Appellant.

(c) The State Commission respectfully submits that the State Commission's decision in this regard is in larger public interest. The consumers will actually be burdened if the Appellant's contentions in this regard are accepted, since, these assets do not contribute

significantly to the cost, however, the possible gains to the consumers is significantly higher.

(d) The truing up for FY 2008-09 was done in the previous Order. In the Impugned Order, the State Commission consciously re-looked at this issue, and corrected a wrong, after giving a considered decision in this regard and giving due justification for the same. Moreover, the State Commission has reversed all the consequential impacts of the same, along with carrying cost.

(e) The impugned decisions are not contrary to the Judgment of the Supreme Court in this regard, as the State Commission has not ruled that the consumers 'own' the asset because they have contributed towards its cost in the past. Rather, the State Commission has ruled that the asset, which is on the books of the regulated/ licenced business, should continue to remain on the books of the regulated/ licenced business, so that the consumers are able to realize the benefits of the sale of such assets, as and when the same is done.

**73.** We have carefully considered the above submissions.

**74.** The Issue before us is recapitalization of de-capitalized assets. The Appellant applied for transfer of its assets to its other Division (not regulated by MERC). It applied to the

State Commission for permission to transfer the assets under Regulation 8.8 of General Conditions of Distribution License Regulations, 2006. The State Commission gave permission for such transfer at book value of such assets and de-capitalized the same from the GFA of the Appellant. It also reduced the equity base of the Appellant (for RoE purposes) by the said Book Value of the assets. Later, in the Impugned Order, the State Commission has sought to bring back such de-capitalized assets in to the account books of the Appellant. In the words of the learned Counsel for the Appellant, the State Commission has tried to put the Fish back in to the Sea.

**75.** The transfer of assets of distribution licensee is governed by Regulation 8.8 of the MERC General Conditions of Distribution License, 2006. The same is reproduced as under:

***8.8 TRANSFER OF ASSETS***

*8.8.1 Save as provided in this Regulation, the Distribution Licensee shall not, in a single transaction or a set of related transactions, transfer or relinquish Operational Control over any asset whose book value at the time of the proposed Transfer exceeds the amount decided by State Commission by directions or by a general or special order.*

*8.8.2 The Distribution Licensee shall give to the State Commission prior written notice of its intention to transfer or relinquish Operational Control over any*

*asset whose value exceeds the amount decided by the State Commission above and the Distribution Licensee shall disclose to the State Commission full details of the assets, the reasons for disposal and all other relevant facts to the State Commission.*

*Provided that the State Commission may, within thirty (30) working days of the receipt of the notice, seek further information in support of the transaction and shall, generally within thirty (30) working days of such further information being submitted by the Distribution Licensee, and where no such further information is sought by the State Commission as above, within sixty (60) days of the filing of the application, approve the Transfer arrangement subject to such terms and conditions or modifications as is considered appropriate or reject the same, for reasons recorded in writing .*

*8.8.3 The Distribution Licensee may Transfer or relinquish Operational Control over any asset referred to above, where:*

*(a) the State Commission confirms in writing that it consents to such Transfer or relinquishment of Operational Control subject to such conditions or restrictions as the State Commission may impose; or*

*(b) the State Commission does not inform the Distribution Licensee in writing of any objection to such Transfer or relinquishment of Operational Control within the period referred to in Regulation 8.8.2 and the transfer is effected by adopting the transparent process specified by the State Commission in other applicable Regulations.*

*Provided that the Distribution Licensee shall provide full details of such transactions to the State Commission as part of his application to the State Commission, for calculation of the aggregate revenue requirement and expected revenue from tariffs and*

*charges in accordance with the Regulations of the State Commission specifying the terms and conditions for the determination of tariff.*

*8.8.4 The Distribution Licensee may also Transfer or relinquish Operational Control over any asset where:*

*(a) the State Commission has issued directions for the purposes of this Regulation containing a general consent to:*

*(i) the transactions of a specified description, and/or*

*(ii) the Transfer or relinquishment of Operational Control over assets of a specified description, and/or*

*(iii) the Transfer or relinquishment of Operational Control is in accordance with any conditions to which the consent is subject, or*

*(b) the Transfer or relinquishment of Operational Control in question is required by or as mandated under any other law for the time being in force; or*

*(c) the asset in question was acquired and used by the Distribution Licensee exclusively in connection with any Other Business and does not constitute a legal or beneficial interest in land, or otherwise form part of the Distribution System or is not otherwise an asset related to or required for the Licensed Business.*

*8.8.5 The Distribution Licensee shall be entitled to utilise the assets for facilitating financing its investment requirement subject to the conditions:*

*(a) that the Distribution Licensee will inform the State Commission about such arrangements at least fifteen (15) working days prior to the effective date of the relevant agreements.*

*(b) that the financing arrangement is for a period not exceeding seven (7) years or such other period as the State Commission may specifically direct;*

*(c) the Distribution Licensee acts in a prudent and reasonable manner in such utilisation of assets; and*

*(d) the Distribution Licensee retains the Operational Control over assets in the Distribution System.*

**76.** Perusal of the aforesaid Regulation 8.8 would indicate that the Licensee was required to take prior permission of the State Commission for transfer of any asset in case such asset exceed the predetermined thresh hold value as determined by the State Commission. In this case the State Commission did not determine the thresh hold value of assets. However, the Licensee has taken prior permission of the State Commission and the equity base of the Appellant was reduced by the Book Value of the asset. Thus, procedure prescribed by the Regulation had been followed and complied with. The Asset was legally and validly transferred. The Appellant reflected the reduction of equity base in its subsequent ARR filing and the State Commission approved Return on Equity on reduced equity in its tariff order. This aspect of the tariff order was not challenged and has, therefore, attained finality. It is not open to any person including the State Commission to open this issue in subsequent proceedings. It is required to be clarified here that re-capitalization of an asset is not a part of true up exercise. True up exercise encompasses redetermination of expenses based on prudence checks. It does not involve capitalization of any asset. Capitalization can only be done at the instance of the Appellant.

**77.** The reasoning given by the State Commission that the consumers for the regulated Mumbai business have contributed to the creation of the said assets and hence should continue to remain in the books of the regulated business is misplaced as has been laid down by the Hon'ble Supreme Court in Tata Power Company Vs Maharashtra Electricity Regulatory Commission.

**78.** The State Commission is a statutory body. It is not expected to 'blow hot and cold'. The sector needs certainty and clarity in the policies. Such an action on part of the State Commission would create confusion and uncertainty in the minds of developers and financers. The State Commission should have applied its mind before de-capitalizing the assets. Once the assets have been de-capitalized by the State Commission, there is no provision to re-capitalize it.

**79.** So, this issue is answered accordingly.

**80.** Let us now deal with the issues raised in **Part C** i.e **involving contravention of MERC Tariff Regulations, 2005**.

**81.** The **first issue in Part 'C'** is **disallowance of interest towards IDBI Loan in contravention of Regulations 17 and 18 of the MERC Tariff Regulations**.

**82.** Let us see the findings of the State State Commission in the impugned order on this issue which reads as under:

***4.7.1 INTEREST ON DEBT***

*…For computation of interest on loan on IDBI 2, TPC has submitted interest rate as 12.47%. However, the State Commission in its Order dated September 12, 2011 in Case No. 98 of 2009 has already determined the interest rate as 11.48% for IDBI-2 loan for FY 2009-10 and the same has been considered by the State Commission for computation of interest..."*

**83.** As against the findings, the learned Counsel for the Appellant has made the following submissions:

(a) Similar issue was pending before the Tribunal in Appeal No. 19 of 2011 with regard to IDFC loans which was decided in favour of the Appellant at Para 18 of the judgment dated 31.08.2011. The Appellant prays that the present issue should be decided in its favour by applying the ratio in the judgment dated 31.08.2012.

(b) Without prejudice to aforesaid, Appellant submits that the Findings of the State Commission in the Impugned Order are flawed and unsustainable, in view of the fact that:-

(i) The interest rate in terms of the MERC Tariff Regulations is an uncontrollable factor and as such is a pass through (Regulations 17 & 18 of the MERC Tariff Regulations 2005).

(ii) The settled principles that the interest rate has to be allowed at actual.

(iii) When the State Commission fixed the interest rate at 11.48%, it had done so taking into consideration the interest rate payable under the IDBI Loan-1. Ignoring the actual rate of interest payable to IDBI under the IDBI Loan-2 i.e. 12.47%

(iv) IDBI Loan-1 and IDBI Loan -2 has been contracted by the Appellant on different terms and conditions and at a different point of time and the interest rate structure for any loan from the same financial institution may vary from time to time according to market conditions.

(v) State Commission has not appreciated the prevalent market conditions and the fluctuations in the interest rate at the time of IDBI Loan -2.

(c) Regulation 34.3.3 of the MERC Tariff Regulation 2005 mandates that AS16 (Accounting standard) shall apply for the determination of the interest on Loan capital. AS-16 provides borrowing cost of the enterprises. State Commission erred in disallowing the actual rate of interest paid for funding its capitalization contrary to Regulation 34.3.3.

(d) Reliance is placed on ***Tata Power Vs MERC:*** *2009 ELR APTEL 0622*, which provided that the uncontrollable factors do mean the factor which cannot be controlled and, therefore, any additional

expenditure due to uncontrollable factors needs to be deemed as pass through.

(e) The State State Commission is bound by its regulations and therefore while dealing with interest on working capital, it should have taken Regulations 17, 18 and 34.3.3 into consideration. Reliance is placed on:-

(i) **PTC Vs CERC** reported as *(2010) ELR (SC) 0269*;

(ii) **NDPL vs. DERC**: *2011 ELR (APTEL) 944*;

(iii) **In re. tariff revision**, Judgment dated 11.11.2011 reported as 2011 ELR (APTEL) 1742

**84.** The learned Counsel for the State Commission submits the following:

(a) The issue raised by the Appellant in the heading is that the dispensation of the Appellant is contrary to the Regulations, however the entire contention of the Appellant is that the dispensation of the State Commission is violative of the earlier Judgment of this Hon'ble Tribunal in Appeal No. 17-18-19 of 2011.

(b) It is submitted that the disallowance of interest on the IDBI loan-II has nothing whatsoever to do with the

disallowance of interest on the IDFC loan which was the subject matter of Appeal No. 17-18-19 of 2011.

(c) The findings of the State Commission for the disallowance of interest on IDBI Loan-2 as contained in the Impugned Order in Appeal No. 105/2012 as under:-

***"IDBI-2 Loan***

| *As submitted by TPC, it had raised a loan of Rs. 300 crore from IDBI to fund its current capital expenditure on the following terms:* ***IDBI LOAN-2*** | |
|---|---|
| *Tenor* | *2 year moratorium+5 years* |
| *Repayment* | *4 yearly instalments of 10% in the 3rd, 4th , 5th and 6th year followed by 60% repayment in the 7th year* |
| *Interest rate* | *12.5% for the first year; Subsequent reset on annual basis to an interest rate linked to IDBI's BPLR with a maturity agreeable spread.* |

*…..*

*The State Commission has gone through the submissions made by TPC-G and is of the view that interest expenses should be allowed only on the loan corresponding to approved capitalisation and has hence, recomputed interest expenses corresponding to approved capitalisation.*

*Accordingly, for computation of interest on loan, the State Commission has considered the closing balance of loan as approved for FY 2008-09 as the opening balance of loan for FY 2009-10, which includes the*

*impact of Rs 2.52 crore allowed as additional Capex in the Order dated November 30, 2010 in Case No. 71 of 2010. In addition, the State Commission has considered loan availed as IDBI 2 loan for funding approved capitalisation for FY 2009-10, which works out to Rs 67.12 crore as against TPC-G submission of Rs 107.54 Crore. The loan amounts considered for computing interest expenses for FY 2009-10 are as shown in the Table below.*

*…..*

***For computation of interest on loan from IDBI 2, TPC has submitted interest rate as 12.47%. However, the State Commission in its Order dated September 8, 2010 in Case No. 96 of 2009 has already determined the interest rate as 11.48% for IDBI-2 loan for FY 2009-10 and the same has been considered by the State Commission for computation of interest for truing up.*** *For computation of interest on loan from IDFC, TPC has submitted interest rate as 11.69%. However, the State Commission has already determined the interest rate as 10.25% for IDFC loan for FY 2009-10 in the APR Order and the same has been considered by the State Commission for computation of interest for truing up.*

*Accordingly, the State Commission has computed the interest expenses for FY 2009-10 and approved interest on loan as Rs. 47.83 crore as against Rs 57.82 crore submitted by TPC-G. The summary of loan and interest expenses approved by the State Commission for FY 2009-10 is given in the following table…"*

(d) The Order of 8th September 2010 was the subject matter of Appeal No. 17-18-19 of 2011 with respect to

the IDFC loan interest rate and not the IDBI interest rate.

(e) The crux of the findings of the State Commission in re IDBI Loan-2 in the Order dated 8-9-2010 are, inter alia, as under:-

> *"….As regards the initial terms of the IDBI loan as per the IDBI sanction letter, the State Commission had also asked TPC-G to clarify the reason for a different repayment schedule of 7 years of the IDBI Loan (Rs 300 Crore) as against the repayment period of 10 years as agreed for other loan availed from IDBI. In response, TPC-G submitted that the said loan was taken as a corporate loan with an understanding and agreement with IDBI that this loan would be converted to Project Loan in due course with longer repayment period. Further, the repayment period of 7 years was considered as was mentioned in the Sanction Letter dated December 2008. TPC-G further submitted that however, as per the revised terms, the loan shall be repaid in 47 quarterly instalments and in any case, for FY 2009-10, as mentioned in the sanction letter dated December 2008 (read with the modification), the repayment shall commence from October 1, 2010 and thus there is no repayment in FY 2009-10. TPC-G further submitted that the interest rate for FY 2009-10 would be 12.5% upto March 25, 2010 and 10.75% (IDBI PLR minus 200 bps) effective from March 26, 2010. In reply to the State Commission"s query, TPC submitted that the Company"s Board of Directors has authorised its Executive Committee of the Board (ECOB) to approve the borrowings and they in turn had approved this borrowing from IDBI. As discussed*

*in earlier paragraphs, the State Commission has approved the capitalisation of Rs. 55.48 Crore for FY 2009-10 against Rs. 237.92 Crore as submitted by TPC-G in its Petition. The State Commission has considered the entire debt funding (70% of approved capitalisation) during FY 2009-10 through IDBI Loan, i.e., Rs. 38.84 Crore.*

*As regards rate of interest of IDBI Loan-2 in FY 2009-10, the State Commission has considered same rate of interest (from April 1, 2009 to March 25, 2010) as was considered for IDBI Loan-1 (discussed in earlier section). However, from March 26, 2010 to March 31, 2010, the rate of interest has been considered as 10.75% in accordance with submission of TPC. Therefore, the State Commission has considered a weighted average rate of interest of 11.48% for FY 2009-10. For FY 2010-11, the State Commission, has considered the interest rate of 10.75% (IDBI PLR minus 200 bps) effective from March 26, 2010, as submitted by TPC…."*

(f) In the same earlier Order of 8-9-2010, the crux of findings of the State Commission in re the IDFC Loan which were the subject matter of Appeal No. 17-18-19 of 2011 are as under:-

*"It can be observed that around 82% of the total revenue earned by TPC during FY 2008-09 is from the Mumbai Licenced Area. Hence, it is logical to draw the conclusion that the rating of AAA was more on account of the stable Mumbai Licenced Business as against other businesses, more so, when read against the backdrop of the reasons given by the Credit Rating Agencies for downgrading TPC from AAA to AA. Therefore,*

*the State Commission is of the view that the impact on the interest cost on account of change in the rating of TPC from AAA to AA, should not be passed on to the consumers and accordingly, the State Commission has not considered the impact of the change in interest rate of the IDFC loan to 13% for computing the interest cost pertaining to the IDFC loan, which was triggered by the downgrading of TPC's rating.*

*Accordingly, for the purpose of truing up of interest expenses towards IDFC loan for FY 2008-09, the State Commission has considered an interest rate of 8.90% till the first reset date of September 29, 2009 and an interest rate of 10.09% from the reset date onwards, which is based on the then prevailing 5-year G-Sec rate as submitted by TPC (8.643%) and the original spread of 1.45%. Thus, a weighted average interest rate of 9.50% has been considered for truing up the interest expenses on IDFC loan of TPC for FY 2008-09."* ….

(g) The contentions of the Appellant in Appeal No. 17-18-19 of 2011 as recorded in the said Judgment, are as under:-

*"8.1 With regard to Issue No. a) – it is contended that Tata Power had availed itself of a total loan of Rs.450 crore from* ***IDFC*** *and entered into Rupee Loan Agreement on 28.9.2006 which is Annexure A-5 to this appeal. The interest rate was linked to the credit rating by Credit Rating Information Services of India Ltd. (CRISIL) or International Credit Rating Agency (ICRA). At the time, when the loan was availed of, its credit rating was AAA and the rate of interest was 8.9% per annum but in September, 2008,* ***the IDFC*** *communicated by letter dtd.29.9.2008 that it was*

*resetting interest rate at 13 % for a period of one year from 29.9.2008. Unfortunately, the State Commission by ignoring the submission of the appellant allowed interest only at a rate of 1.45 % over 5-year G-sec rate (8.64%) although the appellant paid interest rate of 13%. This increase in the rate of interest was due to bad market conditions when the liquidity had dried up and the banks were lending even at the rate up to 18% per annum. In September, 2008, the appellant took loan of Rs.500 crore from the State Bank of India for six months at the rate of interest of 13.52% per annum. Interest rates of loans availed by the appellant for other business then the Mumbai licensed area was in the same range as applicable to the interest rates as applied to Tata Power-T* ***under the IDFC loan****. Thus, disallowance of actual interest rate was arbitrary."*

(h) The findings of this Hon'ble Tribunal in Appeal No. 17-18-19 of 2011 on the IDFC loan issue are as under:-

*"The State Commission made a special reference to the review of rating by ICRA according to which huge capacity expansions and the risks attached to the implementation of the projects significantly alters the Tata Power's business risk profile from that of the earlier licensee model. The CRISIL observes:-"This will result in gradual but inevitable shift in Tata Power's Business risk profile from the existing stable licensee business, to bid out generation projects supplying powers to new areas; the shift exposes the company likely higher counterparty risk, and to constraints in passing on cost increase to its buyers". It may be that the rating was for the entire Company and not on account*

*of a particular business of the Company, but the State Commission was not totally unjustified in holding that the credit rating at AAA was definitely on account of secured licensed business and not on account of other businesses which is supported by the details of the operative income earned by the Company during Financial Year 2008-09 between the Mumbai licensed area and the other business. The table at page 74 of the order of the State Commission reveals that around 82% of the total revenue earned by the TPC during the Financial Year 2008-09 was so earned from the Mumbai licensed area. The State Commission thus considered weighted average interest of 9.50% for truing up the interest expenses on IDFC loan of TPC for Financial Year 2008-09. But then the ICRA was not oblivious of the financial flexibility of all the businesses of the Company, although the increase in the interest rate was mainly linked to the risk associated with other projects of the Company. The appellant points out bad market conditions due to which interest rates were higher. True it is, the review of the ICRA and that of CRISIL singularly point out that there has been a shift in the business risk profile of the appellant. When the loan came up for reset in September, 2008 the IDFC revised the rate of interest due to the rating trigger clause. The rate of interest in respect of the short term loan does not appear to have any nexus in the present situation. Therefore, the anxiety of the State Commission to insulate the consumers of the Mumbai regulated business from the risks associated with the non-regulated businesses of the appellant is well understood, but the fact remains that the corporative entity is one and the same and even though credit rating fell down from AAA to AA it cannot be denied that the rate of interest*

*increased not solely due to decrease in the credit rating of the Company. In this connection reference to the decision dated 04.04.2007 in Appeal no.251 of 2006 may not be relevant because that case related to the payment of income tax. Though the IDFC communicated that it was resetting interest rate to 13% for two years due to fall of credit rating it reset the interest rate on 06.10.2009 to 10.40% per annum from 29.09.2009 to 28.09.2012.*

*Tata Power Company claimed weighted average of 10.95% although for one year it paid interest rate of 13% per annum and this interest rate cannot be solely related to the non-regulated business. The interest rate is based on the credibility of the corporate entity as a whole and not on the profitability of a particular business segment. It is submitted not unjustifiably that the benefit of lower interest rate on account of Tata Power's credibility as a 'Corporate entity' in the earlier years has been enjoyed by Mumbai Consumers. Hence, consumers are liable to bear the burden of higher interest rate due to a temporary change in the credit rating which also included the regulated business. We cannot fail to notice regulation 34.3.3 of the MERC Tariff Regulations mandates that AS 16 (Accounting Standards) shall apply for the determination of the interest on loan capital. This regulation stipulates that provisions of statements of Accounting Standard (AS16):Borrowing Costs of the Institute of Chartered Accountants of India shall apply to the extent not inconsistent with the provisions of the regulations, in determination of interest on loan capital Relevant AS-16 provides for borrowing costs of the enterprise and not of a specific carved out business component. Further, regulation 17 of the MERC Tariff Regulations, 2005 takes cognizance of market interest rate as*

*one of the uncontrollable factors. According to the explanation under the Tariff Regulation 17.6, the uncontrollable factors include economy-wide influences such as market interest rates. The interest rate is not covered by controllable factors indicated in the illustration under the regulation 17.6.2. However, it is accepted that the approval of the interest rate is subject to prudence check by the State Commission. Tariff Regulation 18 stipulates that the approved loss or gain due to uncontrollable factors shall be passed through as adjustment in tariff. So far as income tax is concerned the appellant has been showing separately its tax liabilities in respect of each of its business so that decision of this Tribunal in Appeal 251 of 2006 may not be relevant. There is a flaw on the logic of the State Commission to the effect that if benefits accrue to the Company on account of new business than the consumers must not get that benefit. The fact is that the State Commission approved the interest rate for the Mumbai regulated area after the reset for the second time i.e. from September 2009 onwards when the interest rate came down to 10.4% per annum. So long as the case of the utility is covered by the Regulations it cannot be denied interest as it claimed in Aggregate Revenue Requirement Petition. Whatever merit there might be in the State Commission's approach made from the pragmatic stand point the issue has to looked at purely from the legal point of view and when the regulation in particular supports the case of the appellant the issue rests there and it is of no avail to say that had the appellant not launched new projects the credit rating might have remained at AAA and consequently there would have not arisen increase in the rate of interest. If this practical consideration is taken to its logical extreme than*

*there will be ample scope of counter argument and the fact is that the appellant is a corporate entity and when there is no legal inhibition of launching new power project having implication definitely of risk factor the rate of interest that a financial institution charges and which cannot be questioned because of being an uncontrollable factor has to be accepted. Tata Power is an enterprise and is seen as a corporate entity based on corporate accounts. The financial institutions provide loans based on the balance sheet of a corporate entity. The credit rating reflects the confidence of the credit rating agencies with respect to all the businesses of a corporate entity. The interest rate was subsequently negotiated by Tata Power with IDFC and IDFC agreed to remove the rating trigger. Accordingly, IDFC reset the loan at 10.4% on 6.10.2009 on the basis of IDFC's PLR. As per information submitted by Tata Power in respect of IDBI loan of Rs.400 crores the interest rate for disbursement made at the end of March 2008 was 10.5% which was increased to 11.5% for disbursement made in August, 2008 and to 14% for disbursement made in October, 2008.*

*The IDBI loan was based on BPLR. This indicates rising trend of interest rate around the time when the reset of interest rate was effected by IDFC. . The State Commission has not considered the fact from the review of ICRA (reproduced in the impugned order) that the cash infusion through the preferential offer of Rs.12 billion to Tata Sons Ltd. is positive from the credit perspective and that the rating continues to be supported by financial flexibility derived from being a part of the Tata group besides stable cash flows from its license business. It is difficult to imagine that the entire increase in interest rate from 8.9% to 13% was governed by the credit*

*rating of the appellant and not market conditions. As submitted by the learned counsel for the appellant the interest rates in domestic market were affected by the global melt down post-Lehman collapse in September, 2008."*

(i) It is clear that the contentions of the Appellant and the findings of the State Commission as also the findings of this Hon'ble Tribunal in re the IDFC loan have nothing whatsoever to do with the impugned findings in re the IDBI loan-2.

(j) It is clear that the disallowance of actual interest rates of the IDFC loan were on account of the higher risk associated with the non-regulated businesses of the Appellant. Further, the disallowance of the actual interest rate on the IDBI loan rate on the ground that the allowable interest rate had been determined in the APR Order and having become final are binding on the Appellant.

(k) It is therefore submitted that the entire contention of the Appellant that the impugned Order is violative of the judgment in Appeal No. 17-18-19 of 2011 is misplaced.

(l) Without prejudice to the above, it is submitted that the Appellant is, in fact, barred from questioning the interest rate on the IDBI loan 2 on the principle of constructive res-judicata. This principle of constructive res-judicata has been upheld and applied by this

Hon'ble Tribunal in the judgment dated 18-5-2011 in Appeal No. 172 of 2010 titled Bihar Steel Manufacturers Association Vs BERC in the following terms:-

> *"33. As regards the argument of the learned Counsel for respondent No. 2 that the instant appeal is barred by the principle of constructive res judicata as provided in the Explanation iv to section 11 of the CPC we are to observe that the submission is not without any merit. It is settled law that in every proceeding the whole of the claim which is a party is entitled to make should be made and where a party omits to sue in respect of any portion of the claim he cannot afterwords sue for the portion omitted. The decision in Forward Construction Co.(ibid) it has been held that adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might an ought to have had decided as incidental to the subject matter of litigation. Evidently in the earlier appeals formulation of the FPPCA formula as was made in the tariff order dated 26th August, 2008 was not challenged. In the impugned orders simply the formula has been applied for so as to find out the adjustment charges. The decision in Alka Gupta vs Narinder Kumar Gupta(ibid), Deva Ram & Anrs. Vs Ishwar Chand & Anr. and direct recruit class II Engineers Association the principle was reiterated in different languages but essentially the matter is the same as we have reproduced above. Thus constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised. The principle of Order 2 Rule 2 CPC as has been invoked here by respondent No.2 is not without absolute*

*irrelevance because the said principle relates to reliefs which ought to have been claimed on the same cause of action what not claimed. It was opened to the appellant to have challenged the provision of levy of FPPCA charges and also the formula specified therein in the earlier appeals but the appellant did not do so. …"*

(m) Hence, the Appellant not having challenged the earlier APR Order on the point of the IDBI loan-2 is estopped from questioning the same in these proceedings.

**85. The Crux of State Commission's Findings has been set out below:**

(a) The State Commission has not mixed up the interest rates as alleged by the Appellant. The State Commission has adopted the interest rate for IDBI Loan- 2, based on the on the interest rate already approved by the State Commission for IDBI Loan-2 in the previous order as is clearly documented in the previous Order of the Appellant [Case No. 98 of 2009 dated September 12, 2010].

(b) The Appellant has not challenged this decision of the Respondent State Commission in the previous order dated 12.09.2010 in Case No. 98 of 2009 and thus, this decision has achieved finality and cannot be challenged by the Appellant through this Appeal.

(c) Though economy-wide influences such as market-interest rates are included in the list of uncontrollable factors, Regulation 17.6 clearly state that the same have to be "as determined by the State Commission", which clearly addresses the requirement that the State Commission has to admit the purported interest rate to be an uncontrollable factor, for the same to be considered as an uncontrollable factor. This requirement in the Regulations mandates the State Commission to undertake a prudence check on the purported uncontrollable expenses being claimed by the Utility.

**86.** Considering the submissions made by both the parties, the learned Counsel for the State Commission has raised the issue of constructive res judicata. He has contended that the Appellant had filed Appeals before the Tribunal in Appeal Nos 17,18 and 19 of 2011. The subject matter in these Appeals was, inter alia, APR for 2009-10. The Appellant did not raise the issue of interest on IDBI loan and had chosen to raise issue of interest of IFDC loan only. Thus, the interest rate for IDBI loan approved by the State Commission in APR order became final. The Appellant cannot be allowed to challenge the same in Appeal against subsequent True up order more so when the State Commission has adopted the same rate of interest on IDBI loan as in APR order.

**87.** We feel that the State Commission's contention carries some force. In Appeal No. 17, 18, and 19 of 2011 the Appellant had challenged the rate of interest on IFDC loan only. In case the Appellant was aggrieved by the rate of interest on IDBI loan approved by the State Commission it should have challenged the same in those Appeals itself. It appears that the Appellant waited for the outcome of those Appeals. Once it obtained favourable order in those Appeals in respect of interest rate on IDFC loan, it decided to challenge the interest rate on IDBI loan too adopted by the State Commission in true up order.

**88.** Accordingly, the issue is decided against the Appellant.

**89.** The **next issue in Part-C** is **Disallowance of Refinancing of Loans against previous years in contravention of Regulations 17 and 18 of the MERC Tariff Regulations**.

**90.** Let us first refer to the findings of the State Commission in the impugned order on this issue:

> ***Re. FY 2009-10***
>
> ***"4.7.1 <u>INTEREST ON DEBT</u>***
>
> *…Further, for the interest on normative loan drawn in FY 2007-08, TPC has submitted interest rate as 10%. However, the State Commission has already determined the interest rate on normative loan as 8.90% for FY 2009-10 in the APR Order and the same has been considered by the State Commission for computation of interest…"*
>
> ***Re. FY 2010-11***

***"5.7 INTEREST EXPENSES***

*Further, as regards the refinancing of the normative loans as proposed by TPC, the State Commission is well aware that in the past, the entire capitalisation undertaken by TPC was funded by its own funds (equity) and the State Commission was considering the equity in excess of 30% of capital cost as normative loan (considering the normative Debt: Equity ratio as 70:30) and allowing normative interest expense on the normative loan component. Only recently (from FY 2006-07 onwards), TPC has started taking actual loans to part fund its capitalisation. TPC has now proposed to refinance the 'normative loans' used for funding capitalisation (from FY 2004-05 to FY 2008-09). In other words, TPC has proposed to withdraw its own funds that have been used to fund capitalisation but are in excess of the 30% equity ceiling.*

*Since, the normative loans were considered at lower interest rates and the actual interest rates at present are higher, the refinancing of normative loans by actual loans has the effect of increasing the interest expenses and hence, the ARR and tariff. Had the actual loans been taken in the respective years for which such refinancing is proposed, the interest rates would have been lower (same as that considered for the normative loans). However, since, the refinancing is being proposed now, at a time when the interest rates are higher, the consumers will be adversely affected by this transaction. TPC has also not submitted any justification for this transaction. Further, there is no such provision in the MERC Tariff Regulations, 2005 for refinancing of normative loans. In view of all the above, and keeping in mind the consumer interest and welfare, the State Commission has not allowed the refinancing of the normative loans proposed by TPC and thus, the corresponding part of*

*HDFC Bank loan and ICICI Bank loans have not been considered under the current truing up exercise.…*

*Further, for the interest on normative loan drawn in FY 2007-08, TPC has submitted interest rate as 10%. However, the State Commission has already determined the interest rate as 8.9% for FY 2010-11 in the APR Order and the same has been considered by the State Commission for computation of interest…"*

**91.** Against the findings, the learned Counsel for the Appellant has made the following submissions:

(a) Appellant in its APR Petition gave details of all the re-financing undertaken by it including details of re-financing of normative loans taken in the past and prayed before the State Commission to allow the actual interest rate on the said loan. However, State Commission disallowed the same on the pretext that the rate of interest at which the actual loan is being taken now is more than the rate of interest which was allowed on the normative loan.

(b) Appellant in the past has undertaken the entire capitalisation for projects through its own equity funds. In this regard, it is noteworthy that Regulation 31.2 and 31.3 of the MERC Tariff Regulations 2005 specifically prescribe that the capital expenditure shall be assumed to be financed at a normative debt: equity ratio of 70:30.

(c) Accordingly, State Commission was considering the equity in excess of 30% of capital cost as normative loan considering the normative Debt: Equity ratio as 70:30 and was allowing interest expenditure on the normative loan component. Since no actual loan has been taken, and therefore normative loans do not result in any additional cash inflows. Accordingly, the Appellant has to rely on internal accruals for meeting its capital expenditure and capitalization.

(d) The State Commission has erred by assuming that the Appellant would continue with these normative loans independent of the requirements of capital of the Appellant. Variations in the cash position of the Appellant has entailed borrowing in the forms of the loans to refinance (or replace) these normative loans. Accordingly, the Appellant in its APR Petition had considered refinancing some of the normative loans against the equity through actual loans availed from HDFC and ICICI banks.

(e) The State Commission has dis-allowed the actual interest rate applicable for re-financed loan only on the ground that actual interest rates on loans are higher than normative interest rate for the Normative Loans.

(f) The State Commission had been constantly approving lower interest rate for normative loan @ 8.9/9% as against the actual interest paid by Appellant over the previous years for different loans which is evident from the chart at page 71 of the Appeal.

(g) The State Commission failed to consider that interest rates are uncontrollable factors under MERC Tariff Regulations 2005. State Commission by assuming constant normative interest rates and dis-allowing refinancing has violated Regulations 17 & 18 of the MERC Tariff Regulations, 2005.

(h) Reliance is placed on ***Tata Power Vs MERC:*** *2009 ELR APTEL 0622*, which provided that the uncontrollable factors do mean the factor which cannot be controlled and, therefore, any additional expenditure due to uncontrollable factors needs to be deemed as pass through.

(i) The State Commission failed to take into consideration that internal funds can also be employed elsewhere and Appellant can earn interest on the same. It is not obligatory on the Appellant to put the said amount towards capital expenditure. ***Tata Power Vs MERC:*** *2009 ELR APTEL 0622 (Para 20)*

(j) Similar issue was pending before the Tribunal in Appeal Nos. 17-19 of 2011 with regard to IDFC loans

which was decided in favour of the Appellant at Para 18 of the judgment dated 31.08.2011. The Appellant prays that the present issue should be decided in its favour by applying the ratio in the judgment dated 31.08.2012.

**92.** The learned Counsel for the State Commission has made the following submissions:

(a) The re-financing of the normative loans is based on the over-arching principle that the MERC Tariff Regulations do not provide for re-financing of normative loans, and moreover, the re-financing of normative loans proposed by the Appellant has the effect of increasing the interest burden and hence, the ARR, and hence, cannot be permitted by the Respondent State Commission.

(b) The State Commission has in its earlier Orders assumed a constant interest rate of 8.9%/9% over the years for the normative loans. Hence, the decision of the State Commission in this regard has achieved finality and cannot be challenged by the Appellant through this Appeal.

(c) The Appellant's contention that the interest rates are an uncontrollable factor under the MERC Tariff Regulations, do not have any relevance in this issue, because the issue in question here is whether re-

financing of normative loans can be allowed, and the Regulations clearly do not have any provisions for the same.

(d) The concept of normative loan prevails in the electricity sector on account of normative debt: equity ratio being considered by the State Commission in accordance with the MERC Tariff Regulations, and there is no linkage to income tax. Under the approach adopted by the State Commission for allowing the income tax on actual, there is no impact of normative loan vs. actual loan, and the actual income tax is allowed to be recovered from the consumers.

**93.** In the light of the rival submissions, let us discuss the issue.

***94.*** The issue has been decided in favor of Appellant in Appeal no. 52 of 2008. The relevant extracts of judgment in Appeal No. 52 of 2008 is quoted below:

*"28. The next issue is with reference to the lower interest rate allowed on notional loan. According to the Appellant, the State Commission has allowed the interest rate on notional loan for financing of capital expenditure for FY 2006-07 only @ 8.5% p.a. instead of 9.2% p.a. It is further contended by the Appellant that the interest rate of notional loan works out to 9.2% p.a. for the FY 2006-07 and the same should be used for calculation of rate of debt on the notional loan for MYT period.*

*29. According to the State Commission, the State Commission has allowed the actual interest rate of*

*loan taken by the Appellant towards re-financing of the Delhi Power Company Limited in 2007. It is further contended by the State Commission that the State Commission has allowed the interest on notional loan in 2007 @ 8.5% which was in addition to the interest allowed on Delhi Power Company Limited re-financed loan and since the Appellant has not taken any loan in 2007 the interest allowed @ 8.5% was assumed as a notional loan. The relevant extracts of the impugned order in effect disallowing appropriate interest is as follows:*

*"3.80. For 2007, the State Commission has approved the total debt financing of Rs. 125.62 Cr. For Capital expenditure as per the means of finance approved for 2007. The Petitioner has not taken any debt in 2007. The State Commission approves normative loan of Rs. 125.62 Cr. The State Commission approves interest rate of 8.5% on the normative loan with moratorium period of one year repayment period of 10 years."*

*30. The investments referred to by the Delhi State Commission to support the lower rate are investments relating to contingency reserves and not the surplus funds available with North Delhi Power Limited contingency reserve invested in Government securities and RBI bonds as per the Regulation 4.20. Such securities are risk free securities and carry lower interest rate than other investment instruments such as Mutual Funds, Equity etc. Therefore, the State Commission's comparison with the Government securities is misconceived.*

*31, Further, this issue is governed by the principle settled by this Tribunal in its judgment dated 30.07.2010 in Appeal No. 153/09 in which it has been held that:*

*"47. The State Commission instead of applying the principle of allowing the prevailing market rate for debt*

*for the carrying cost, has allowed the rate of 9% on the strength of the Tribunal judgment even though the present interest rate has increased significantly. As pointed out by the Counsel for the Appellant, the State Commission in the earlier case had decided tariff on 9.06.2004 and that on commercial borrowings on interest rate of 9% had been applied considering the then prevalent prime lending rates.* ***Therefore, the State Commission before fixing the rate of carrying cost has to find out the actual interest rates per the prevailing lending rates. Admittedly, this has not been done.***

*50. The working capital is being allowed by the State Commission on normative basis in line with the MYT Regulations. These Regulations would imply that it is controllable parameters which is not to be trued up. Any loss/saving in interest on working capital is to the account of the distribution company. When there is some savings on this account, the State Commission cannot deny the benefit of the same to the distribution company to enable it to utilize the same to meet the other requirements. As a matter of fact, the Appellant claim is in line with the State Commission view that the carrying cost is to be allowed in the ratio of 70:30.*

*51. It cannot be disputed that the State Commission shall be guided by the principles that reward efficiency in performance as provided under section 61(e) of the Electricity Act, 2003. Similarly, the said section provide that State Commission shall be guided by the National Electricity Policy and Tariff Policy. Therefore, the State Commission should have allowed the carrying cost at he prevailing market lending rate for the carrying cost so that the efficiency of the distribution company is not affected. The State Commission is required to take the truing up exercise to fill up the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. The Tribunal in various*

*judgments rendered by it held in Appeal No. 36 of 2008 in the judgment dated 06.10.2009 reported in 2009 ELR *APTEL) 880 has held that "the true up exercise is to be done to mitigate the difference between the projection and actuals and true up mechanism should not be used as a shelter to deter the recovery of legitimate expenses/revenue gap by over-projecting revenue for the next tariff", **Therefore, the fixation of 9% carrying cost, in our view, is not appropriate. Therefore, the State Commission is hereby directed to reconsider the rate of carrying cost at the prevailing market rate and the carrying cost also to be allowed."***

*32. The above observation would reveal that the Delhi State Commission has approved the interest rate of 8.5% for notional loan for 2007 since the Appellant has not taken any new loan for capital expenditure for the said year. The only loan taken by the Appellant for the FY 2007 was for re-financing of old Delhi Power Company Limited loan. It is pointed out that in the previous tariff orders for 2002-03, 2003-04, 2004-05 and 2005-07, the Delhi State Commission had adopted the principle that while computing the rate of interest on notional loan, the State Commission is to be guided by the interest rate on actual loan availed during the year or the prevailing interest rate if no new loan is contracted during the year.*

*33. It is not debated that the rate of 8.5% considered by the Delhi State Commission was based on the loan taken by the Appellant in the FY 2004-05. It is noticed that the interest rates have subsequently increased which is evident from the movement in the prime lending rate fixed by the State Bank of India. The Delhi State Commission has not considered the cost of re-financed Delhi Power Company Limited loan for allowing interest on notional loan. **The purpose of allowing interest rate on notional loan with that of interest rates of loans actually drawn is to ensure***

***that the costs allowed are in line with the actual cost of loans available in the market.***

*34. The State Commission has ignored the re-financing of Rs. 552 crores of loan. The case of the Appellant before the Delhi State Commission that the interest rate to be worked out on a loan must be raised on the prevalent market rates. The Delhi State Commission has ignored the fact that the capital interest rate to be applied is for the period 2006-07. The total impact of such lower allowance is 0.44 Crores for the FY 2006-07 and Rs. 0.99 crores from the FY 2007-08 onwards.*

*35. Under those circumstances,* ***the Delhi State Commission is directed to allow interest on notional loan for this particular year based on the market related interest rate prevailing in that year i.e. either the interest rate approved in FY 2004-05 duly adjusted for change in the State Bank of India prime lending rate or 9.2% per annum based on the loan obtained by the Appellant.*** *The said claim may be considered by the State Commission along with carrying cost. Accordingly this issue is answered in favour of the Appellant.*

**95.** Since the issue has already been decided in Appeal No.52 of 2008, the same is decided in this Appeal also in favour of the Appellant.

**96.** Let us now deal with the issues raised in **Part D,** which consists of two issues. The first issue is with regard to disallowance of operation norms pertaining to impugned order in Appeal No.105 of 2012. The second issue is regarding disallowance of actual Auxiliary Consumption for

Financial Year 2009-10 and 2010-11 and Station Heat Rate for the Financial Year 2009-10 for Trombay Unit-6.

**97.** Let us now deal with the first issue which is with reference to the disallowance of operational norms.

**98.** The learned Counsel for the Appellant has made the following submissions:-

i) The Appellant claimed actual station heat rate and Auxiliary Consumption for Trombay Unit-4 for the reasons submitted by Appellant as part of replies to data gap queries raised by The State Commission. However, The State Commission observed that since, the State Commission had allowed Unit# 4 to be operated as a standby unit during FY 2009-10, the State Commission is of the view that the approved auxiliary consumption of Unit# 4 can be relaxed to 11.84% against the normative and actual consumption of 8.00% and 22.02% respectively. On similar ground heat rate 2683 kcal/kWh was allowed ignoring the actual heat rate.

ii) Auxiliary consumption is the quantum of energy consumed by the generator as percentage of the sum of gross energy generated at the generator terminal. Auxiliary consumption will be high in case

(a) Gross energy generated is less.

(b) Consumption of generating company is high.

iii) State Commission, while disallowing actual claim of Appellant, failed to consider the peculiar circumstances under which Unit-4 is operating - which warrant The State Commission to relax the operational norms, being:

(a) Unit-4 was State Commissioned in 1968: 41 year old.

(b) Both oil and gas are used as fuel for generation of power in Unit-4. No normative parameters have been specified for such generating unit.

(c) Till 2000, i.e., before de-State Commissioning, Unit-4 was able to achieve its targets. Since 2009-10, Unit-4 is being maintained as a standby unit and is operational only during the planned/forced outages of other thermal Units to ensure continuous supply of electricity to the consumers.

(d) Being used as stand by unit, Unit-4 encounters many more start-ups and shut-downs as compared to normal operating units. Every time the Unit was brought on line, it undergoes a stabilization phase before the unit generates its full load. During which stabilization phase, consumption of fuel, water and auxiliary power is much higher than normal.

(e) As Unit-4 is operated only during the period of outages, it results in higher auxiliary consumption and a higher heat rate.

(f) Whenever Unit 4 starts up, it gets a cold start which takes about 24 hours and requires high auxiliary consumption and fuel, the temperature of steam is also relatively low resulting in higher heat rate.

iv) The State Commission, while disallowing the actual claim of Appellant, unjustifiably departed from the principle laid down in the Order dated 08.09.2010 passed by it in the APR for 2009-10 observed that:

> "*State Commission will consider the actual auxiliary consumption for FY 2009-10 during the truing up of performances for FY 2009-10 based on the full year actual performance and prudence check*".

v) At the time of filing of the APR Petition 2009, the actual auxiliary consumption of Unit-4 in standby mode was not available with the Appellant. As such, Appellant requested the State Commission to "provisionally" allow auxiliary consumption of 11.84%. The State Commission while disposing of Petition No. 96 of 2009 by its order dated 08.09.2010 had itself observed that while truing up it will consider actual auxiliary consumption for 2009-10.

vi) The State Commission at the stage of allowing 11.84% of auxiliary consumption was aware that Unit 4 cannot achieve the norm of 8% during stand-by mode. Even the calculation of 11.84% was based on

the actual data for the first six months (H1) and projection for the other six months (H2).

vii) As per the data provided for FY 2010 in the APR filing for FY 2009-10:-

- Actual auxiliary consumption for H1 of FY 2009-10 (1 half) was 33.10 % with a generation of 16 MUs.
- While Appellant expected the generation in 2nd Half to be higher at 128 MUs with an auxiliary consumption of 9.27 % thereby bringing the average consumption to 11.84 %, the actual generation for 2nd Half was 32 MUs with an auxiliary consumption of 16.64%. Therefore, the average auxiliary consumption worked out to 22.02%.

viii) The State Commission cannot bind the Appellant to achieve this auxiliary consumption when the generation was not in line with the projection.

ix) While operating Unit 4 as a standby for 2010, the Appellant was able to reduce auxiliary consumption for 2011 to 12.13%. Accordingly for 2010-11, the Appellant requested The State Commission to allow actual auxiliary consumption @ 12.13% for Unit 4.

x) However, The State Commission disallowed the prayer of the Appellant and allowed auxiliary consumption of 11.84% without assigning any reasons.

xi) Heat rate is the heat energy input in Kcal required to generate one kWh of electrical energy. Heat Rate is dependent on the PLF and the Fuel mix that is fired in the Unit.

xii) In FY 2009-10, at four occasions Unit -4 went for cold start which resulted in higher heat rate. Accordingly, the Appellant in its APR Petition had sought approval of a heat rate of 2683 kcal/kWh for Unit-4. However, The State Commission ignored peculiar facts of Unit-4 to approve a heat rate of only 2575 kCal/kWh based on figures provisionally allowed in its earlier order dated 08.09.2010.

xiii) The State Commission failed to appreciate principles laid down by this Tribunal in *Dodson-Lindblog Hydro Power Case:* 2010 ELR (APTEL) 0137, where The State Commission was directed to revisit the operation parameters taking into consideration peculiar facts of the case

xiv) Generation from Unit 4 was very low and its performance parameters assumed by the State Commission in the Impugned Order were based on

earlier projections. However, once actual data was available with the State Commission, the same should have been considered at the time of determination of tariff.

xv) The unit was run in November and December 2009 very large fraction of Gas. Such large fraction of gas deteriorates the Heat Rate of the Unit. For comparison, the heat rate for 1st Half of FY 2009 was 2790 Kcal/Kwh but the Oil to Gas Ratio in 1st Half of FY 2010 was 100:0 while the Oil to Gas Ratio was 13:87 in the 2nd Half of FY 2010 thereby increasing the Heat Rate in 2nd Half of FY 2010 leading to higher overall heat rate.

xvi) There are sufficient justification for relaxation of norms in the present case for The State Commission to have exercised its power as held in:-

(a) ***NTPC Vs MPSEB:*** *2007 ELR (APTEL) 7*

(b) ***MPPTCL Vs Torent Power Ltd.:*** *2009 ELR (APTEL) 124*

**99.** The learned Counsel for the State Commission submits the following reply:-

i) State Commission in the APR Order for FY 2009-10 had held that it will "consider" actual auxiliary consumption for FY 2010 while truing of performance based on full year actual performance and prudence

check. Appellant has misinterpreted the Respondent State Commission's ruling.

ii) Appellant itself, after considering the peculiar operating conditions of Unit requested the Respondent State Commission to approve Auxiliary Consumption at 11.84%.

iii) The State Commission has clearly relaxed norm of Auxiliary Consumption from 8.0% to 11.84% based on estimations and request of the Appellant in the APR petition for FY 2010. There has to be a limit by which the norm can be relaxed - relaxation of norm from 8.00% to 22.02% means a deviation by around 3 times, which cannot be justified.

iv) Reasons submitted by the Appellant for higher auxiliary consumption are the same as the reasons submitted by the Appellant in its earlier Petition. Respondent State Commission has allowed auxiliary consumption of 11.84% estimated by the Appellant in its Petition in 2009 considering the peculiar operating conditions in which Unit 4 is operated.

v) State Commission has gone through submissions made by the Appellant and found that there was no difference in the way Unit was perceived to be operated during FY 2010 and FY 2011 at the time of filing the Petition 2009 and in 2011. State Commission

has considered the previously requested auxiliary consumption so that the consumers are not unnecessarily burdened due to inefficiencies of the Appellant.

vi) For FY 2010, State Commission has approved Heat rate for Unit 4 as 2683kcal/kWh and not the provisionally approved Heat Rate of 2575 kcal/kWh. The Appellant, in its APR Petition for FY 2009-10, after due consideration to the age of the generating Unit, its operation under the standby mode and other peculiar conditions, itself requested the Respondent State Commission to approved the Heat Rate of 2683 kcal/kWh.

vii) State Commission in the impugned Order has taken cognizance of the peculiar operating conditions of Unit 4 and has accordingly relaxed the Heat Rate norm of unit 4 for FY 2009-10 to 2683 kcal/kWh as estimated by the Appellant in its APR Petition for FY 2009-10.

viii) There have been operational inefficiencies on behalf of the Appellant, which have led to higher heat rate. If the Unit can operate at heat rate of 2790 kcal/kWh at a meager PLF of 2.35% in the first half of 2009-10, then it is difficult to comprehend why it should operate at 3021kcal/kWh for the entire FY 2009-10 (which means a heat rate of 3132 kcal/kWh in the second half

of FY 2009-10) and 2763kcal/kWh for FY 2010-11 at higher load factors.

ix) Taking cognizance of the submissions made by the Appellant and the impact of the PLF on the Heat Rate, the achievable Heat rate at PLF higher than 2.35% should obviously be lower than 2790 kcal/kWh.

x) Relaxation in heat rate by only 10kcal/kWh results in an increase in generation cost by around 2 paise kcal per kWh, and this increase in generation cost due to operational inefficiency of the Appellant cannot be fully passed on to the consumers.

xi) Appellant is effectively suggesting that no part of the efficiency losses should be borne by the Appellant, whereas 2/3rd of the efficiency gains should be retained by the Appellant.

xii) State Commission has already adjusted the norm and considered relaxed norms for Auxiliary Consumption and Heat Rate for Unit 4 for computing the efficiency loss.

**100.** Before dealing with above the submissions lets now refer to the impugned findings given in the impugned order relating to Appeal No.105 of 2012:-

> *"4.1.2 Auxiliary Consumption (FY 2010): …Also, in reply to the State Commission's query, TPC-G submitted the details of auxiliary consumption of Unit#*

*4 for the time when it was in operation during FY 2009-10. It was observed by the State Commission that the average auxiliary consumption for the unit when it was in operation was within the norm of 8.00%, as approved by the State Commission in its APR Order. Since, the State Commission had allowed Unit# 4 to be operated as a standby unit during FY 2009-10, the State Commission is of the view that the approved auxiliary consumption of Unit# 4 can be relaxed to 11.84% against the normative and actual consumption of 8.00% and 22.02% respectively, i. e., auxiliary consumption proposed by TPC-G in the Petition for APR for FY 2009-10 after considering the operation of Unit# 4 as a standby unit." [Pg. 148 of the Appeal]*

*"5.1.2 Auxiliary Consumption (FY 2010-11): …As regards the auxiliary consumption of Unit# 4, as discussed in the previous Section where the State Commission has approved the auxiliary consumption of 11.84% for FY 2009-10 (i.e., auxiliary consumption proposed by TPC-G in its APR Petition FY 2009-10), the State Commission, considering the fact that the unit has operated as a Standby unit approves the auxiliary consumption for FY 2010-11 also as 11.84%."[Pg. 236 of the Appeal]*

*"4.1.3 Heat Rate (FY 2009-10): …The State Commission agrees with the fact that Unit- 4 was operated as a standby unit during FY 2009-10, due to which the heat rate of the unit was more than the approved heat rate of 2575 kcal/kWh. TPC-G considered the operation of Unit-4 as standby unit and proposed a heat rate as 2683 kcal/kWh for FY 2009-10 with estimated gross generation of 144 MU. The State Commission is of the view that TPC-G was well aware that Unit-4 would operate in standby mode, and TPC-G in its APR Petition for FY 2009-10 had accordingly estimated the generation and proposed the heat rate for Unit# 4. The State Commission,*

*therefore, has approved the heat rate of 2683 kcal/kWh as estimated by TPC-G.[Pg.152 of the Appeal]".*

***101.*** In the light of the above submissions and impugned findings we shall deal with the issue:-

**102.** Admittedly, unit 4 of the Trombay Power Station runs on Standby basis i.e. normally it is kept shut down and operated only when any requirement of power arises due to shut down on any generating unit elsewhere in Maharashtra. It is run on liquid fuel or CNG. It is a fact that any thermal unit's auxiliary consumption varies with PLF and also with number of stops and starts. Units' efficiency improves at higher PLF meaning thereby the percentage of auxiliary consumption decreases with higher PLF and vise-a-versa. There are certain auxiliaries which are required to be run periodically even when the unit is under shut down. Certain auxiliaries, such as unit transformer, have to be kept operational all the time. These requirements increase auxiliary consumption in percent. The same is true for Heat rate. Heat rate also increases with decrease in PLF. Heat rate also increases substantially with increase in cold start of the unit.

**103.** Unit 4 is gas/liquid fuel fired boiler type generating unit. It works on the same principle as a coal fired unit. Water is converted in to high pressure steam which runs the

turbines to generate electricity. When the unit is in running mode, water is preheated by the high temperature flue gases (before the gases are permitted to escape to atmosphere). In case of cold start additional gas firing is required to preheat the water. This is one of the reasons for higher heat rate during cold starts.

**104.** The State Commission in its APR Order has recorded that it will approve the actual Auxiliary Consumption and Heat Rate at the time of truing up. However, the State Commission adopted the same values for both in true up order. The approach of the State Commission is faulty on this count. Either the State Commission should have given detailed reasons for not approving the actual figures or should have approved the same. The State Commission has only mentioned consumer's interest for not approving the actual. It has recorded that the consumers cannot be burdened with operational inefficiency of the Appellant. It has not analyzed the benefit to the consumers in operating this unit vis-à-vis its operational costs. The unit has provided power to the state under emergent conditions. In case the unit was completely shut down, the state would have to procure power from other sources at much higher market price. The State Commission should have carried out cost benefit analysis before disapproving actual auxiliary consumption and heat rate more so when it had

promised in its APR Order to consider the same at time of true up. Accordingly, decided.

***105.*** Let us now deal with the second issue i.e. Trombay Unit 6 Disallowance of Actual Auxiliary Consumption and Heat Rate for FY 2010-11.

***106.*** The learned Counsel for the Appellant made the following submissions:-

i) The State Commission by its order dated 08.09.2010 in APR Petition 2009 had projected the operating norms for Unit-6 during FY 2010-11, as under:

(a) Heat rate of 2514k kcal/kwh with oil and gas combination of 50:50.

(b) Auxiliary consumption of 3.50%

ii) In APR Petition, the Appellant requested that heat rate and auxiliary consumption of Unit-6 should be allowed as per actual by The State Commission on account of following:-

(a) Fuel cost is an uncontrollable factor.

(b) Unit-6 (500 MW) was State Commissioned in 1990. It was primarily oil fired but with spiraling oil prices, modifications were made to allow gas fired operations. Although firing of gas instead of oil has resulted in significant savings in fuel cost,

the same has resulted in the increase in heat rate.

(c) Higher gas firing was in the interest of consumer due to the price differential (oil vs. gas) was Rs. 1313/MKcal leading to significant saving in fuel cost (and hence tariff) of Rs 291 crores in FY 2010 and Rs 517 crores for FY 2011.

(d) Due to high variable cost, Unit-6 is high on merit order and is consistently backed down. As such, actual PLF of Unit-6 for FY 2011 was only 52% and consequentially auxiliary consumption becomes a higher percentage of lower generation.

iii) Norms set by the State Commission was on the basis that Gas: Oil firing ratio of 50:50, while in actual the fuel mix was in the ratio of 68:32. Accordingly, auxiliary consumption and heat rate of Unit-6 should have been further relaxed by the State Commission and granted actual.

iv) The State Commission has not considered the above facts - that the increase in auxiliary consumption and heat rate with respect to Unit-6 is due to uncontrollable factors.

v) The Appellant had requested IIT-Mumbai to conduct a study on the impact of gas firing on the Unit-6 boiler

efficiency. The study indicated an adverse impact of gas firing on the heat rate of Unit-6. Accordingly, the Appellant in its APR Petition 2009 had requested The State Commission to approve the Heat Rate of 2750 kcal/kWh for 100% Gas firing in Unit 6 and provide the normative heat rate for the time period when the Unit is firing both Oil and Gas based on the mix of the two fuels.

vi) In reply to Appellant's contention that tariff be adjusted to at least avoid losses to the Appellant, The State Commission has relied on a fallacious argument that for past four years Appellant has enjoyed "efficiency gains" on account of heat rate being lower than normative value. The variation in actual PLF in the previous three years, i.e., FY 2008 to FY 2010 is minimal with respect to the normative PLF of 80%, whereas the PLF in FY 2011 is very low i.e., at 51.8% (@ 30% lower than normative PLF). PLF was low on account of higher cost of generation of the Unit and not on account of unit performance. The Unit was capable of generating and available but generation was restricted due to its higher cost for consumer benefit.

vii) With the large variation in the PLF of Unit 6 in FY 2011, the Appellant is seeking a relaxation in the heat rate as well as auxiliary consumption. In response,

while relaxing the Heat Rate norm for Unit 6 to account for higher firing of gas, The State Commission has not taken into account following factors:

(a) The base Heat Rate considered (2514 kcal/kWH) for arriving at the new Heat rate is for a condition when the Unit is running on full load. However, Unit 6 has not been permitted to perform on full load during the year and has been able to achieve a PLF of only 51.8%.

(b) Impact of lower PLF on the Heat rate of Unit 6

viii) There exist sufficient justifications for relaxation of norms in the present case, accordingly the Appropriate State Commission should have exercised its power to relax the norms as held in:

(a) ***NTPC Vs MPSEB****: 2007 ELR (APTEL) 7*

(b) ***MPPTCL Vs Torrent Power****: 2009 ELR (APTEL) 124*

**107.** The learned Counsel for the State Commission submits the following reply:-

i) State Commission in line with its previous approach for truing up, considered normative auxiliary for Unit #6 and hydel generating stations approved for FY 2011, and the difference between actual and normative auxiliary consumption for computing sharing of efficiency gain/loss for FY 2011, after due consideration of the submissions made by Appellant during the truing up.

ii) For the years FY 2008 to FY 2011, actual gross generation and the PLF of Unit 6 in FYs 2008, 2009 and 2010 was on the higher side, and the auxiliary consumption for same period was lower than the norm. Appellant in the above mentioned years has achieved better Auxiliary Consumption of 3.08%, 3.07% and 3.10% respectively, as compared to normative Auxiliary Consumption of 3.50%. During truing up for the said years, State Commission considered the difference between the normative and actual auxiliary consumption as efficiency gain in accordance with MERC Tariff Regulations, 2005. The incentive, i.e., 2/3rd of this gain was allowed to be retained by the Appellant.

iii) Appellant's contention that higher Auxiliary Consumption during FY 2011 in percentage terms is on account of the lower actual generation in the year is equally applicable for FYs 2008, 2009 and 2010, when actual generation is on higher side and auxiliary consumption has been reported lower - which Appellant claimed and State Commission as efficiency gains to Appellant.

iv) If Appellant's claim of actual Auxiliary Consumption is allowed that would pass on the entire loss of revenue to the consumers, and no part of the efficiency losses

should be borne by the Appellant though the Appellant retained 2/3rd of the efficiency gains.

v) Appellant's Tariff Petition for FY 2011 preferred the same contentions on firing gas in Unit 6 as were made by the Appellant in 2009. State Commission after considering various facts and views of expert agencies, approved Heat Rate of 2514 kcal/kWh at the optimum firing condition with gas:oil ratio of 50:50; and specified that the Utility is expected to optimize its operations at the levels specified.

vi) State Commission in its Impugned Order has considered the actual fuel mix of 68:32 which is in variation with the optimum fuel mix of 50:50 on the basis of which the Heat Rate norm was approved for Unit 6 for FY 2011 in its Order dated 08.09.2010. State Commission has considered that such variation in fuel mix has resulted in reduction in the total fuel cost for Unit-6.

vii) State Commission has clearly relaxed the norm of heat rate from 2514 kcal/kWh to 2543 kcal/kWh for the reasons set out in the Impugned Order.

viii) If Appellant's claim of actual Heat Rate is allowed that would pass on the entire loss of revenue to the consumers, and no part of the efficiency losses should

be borne by the Appellant though the Appellant retained 2/3rd of the efficiency gains.

**108.** Before dealing with the rival contentions let us now refer to the impugned findings:-

*Re. Auxiliary Consumption for FY 2011*

*"5.1.2 Auxiliary Consumption: …… The State Commission has, therefore, in line with its previous approach for Truing up purposes, considered normative auxiliary consumption for Unit# 6 and hydel generating stations approved for FY 2010-11, and has considered the difference between actual auxiliary consumption and normative auxiliary consumption for computing the sharing of efficiency gain/loss for FY 2010-11."*

*Re. Heat Rate for FY 2011:*

*"5.1.3 Heat Rate ……As regards Unit# 6, TPC-G submitted that the State Commission had approved the heat rate of 2514 kcal/kWh for FY 2010-11 with oil and gas combination of 50:50. TPC-G submitted that the actual heat rate achieved in FY 2010-11 is 2559 kcal/kWh, which is because of increased proportion of gas based generation during FY 2010-11.*

*……The State Commission, while Truing up for FY 2010-11, on the basis of the CPRI's findings and also considering the actual Gas: Oil mix of 68:32 as submitted by TPC-G, has computed the heat rate for Unit# 6 as 2543 kcal/kWh on pro-rata basis and has thus, approved the heat rate of 2543 kcal/kWh as against the actual heat rate of 2559 kcal/kWh for FY 2010-11."*

**109.** In the light of the above submissions let us now discuss the issue.

**110.** State Commission's approach relating to auxiliary consumption appears to be sound. Having been enjoyed the gain in lesser auxiliary consumption during previous three years due to higher PLF, the Appellant cannot not complain about loss due to higher auxiliary consumption on account of lower PLF. Loss or gain for same reasons have to be treated in a same way.

**111.** As regards Heat Rate, the State Commission should have conducted cost-benefit study to ascertain over loss or gain to consumers due to higher gas component in the fuel mix. Accordingly, decided.

**112.** Let us now deal with the issues raised in **Part E,** which relates to wrongful disallowances. The first issue is with reference to consideration of treasury income from 'gain on exchange' as part of non tariff income for FY 2009-10 and FY 2010-11. The second issue is regarding disallowance of O&M expenditure with respect to gifts in FY 2009-10 and FY 2010-11.

**113.** Let us now come to the first issue. The learned Counsel for the Appellant has made the following submissions on this issue:-

i) Findings of the State Commission in the Impugned Order considering treasury income from 'gain on exchange' as part of Non-Tariff Income are flawed and deserve to be set aside as State Commission has

failed to appreciate that the Appellant sought grant of the following as non-tariff income, per Regulation 2.1(zg) of MERC Tariff Regulations:-

(a) For FY 2009, Rs.11.14 Crores comprising of Recurring Items (Rs.4 Crores) & Non Recurring Items (Rs.6 Crores).

(b) For FY 2011, Rs. 13.28 Crores of Recurring Item (Rs. 5.37 Crores) and Non-Recurring items (Rs. 7.92 Crores).

ii) The State Commission partly disallowed the said claim holding that though expenses pertaining to corporate treasury function have been allocated to Mumbai license area, the gain on exchange amounting to Rs.50.61 crores for FY 2010 has not been allocated to Mumbai licensed area. It was ruled that since the expenses related to corporate treasury function have been allocated to the regulated business in Mumbai, the income earned from the corporate treasury function should be allocated to regulated business in Mumbai in same proportion.

iii) The State Commission have not appreciated and considered the following facts:-

(a) Gains and loss on foreign exchange arise out of loans and transactions pertaining to both Mumbai

Licensed Area and out of Mumbai Licensed Area as under:

| | | | Gain/Loss | |
|---|---|---|---|---|
| **SL No** | **Particulars** | **Area of Working** | **FY 2009-10** | **FY 2010-11** |
| 1 | Euro Notes | Jojobera /Treasury | 34.84 | 2.84 |
| 2 | FCCB | Treasury | 49.72 | 14.33 |
| 3 | FCCB Premium | Treasury | 4.71 | 1.36 |
| 4 | Hedge Gain (Option) | Treasury | 0 | 15.09 |
| 5 | Loss on Forward Contact for Buyer's Credit | Mumbai LA | 0 | -9.01 |
| 6 | Loans to Tata Power SPV's | Treasury | -17.55 | -1.43 |
| 7 | FCCB- New Deposits | Treasury | -37.1 | 9.40 |
| 8 | Exim Bank Loan | PSD | -3.44 | 0 |
| 9 | Fuel Payments and Others | Mumbai LA | 20.8 | 18.03 |
| | **Total** | | **51.98** | **50.61** |

- ve figure indicates a loss

(b) Since the regulated business has to be operated in a water-tight compartment from the other businesses of the Appellant, the entire amount of 'gains on exchange including the income related to Non-Mumbai Licensed Area could not have been treated as non-tariff income.

iv) The State Commission while determining the Non-Tariff Income has wrongfully observed that "Gains on Foreign Exchange" amounting to Rs. 50.61 Crores for FY 2009-10 and Rs. 51.98 Crores for FY 2010-11 has not been allocated to Mumbai Licensed Business. The amount with respect to Mumbai Licensed area has been treated as a part of the non-tariff income.

v) Treasury function manages the long term borrowings, working capital borrowings and surplus cash investments for the entire the Appellant. These borrowings are assigned to different divisions based on the purpose for which the loans were raised and also hedging instruments are used against foreign currency borrowings to mitigate the risk of currency fluctuation to the extent possible.

vi) The Maharashtra Commission in the Impugned Order has considered all the transactions for calculating non-tariff income, which either pertain to the "Treasury function" or other areas which are outside the Mumbai Licensed Area.

vii) For Appellant's regulated Mumbai Licensed Area business most of the borrowings are Indian Currency. Thus, income earned by the Appellant through gain on exchange cannot be linked to any cost item forming part of the ARR Petition and cannot be adjusted in ARR as held in ***Maharashtra State Power Gen Co Ltd v. MERC****: 2010 ELR (APTEL) 189.*

*viii)* State Commission has failed to appreciate that the income earned by the Appellant through gains on exchange cannot be reasonably linked to any cost item allowed by the State Commission as a part of the APR Petition and thus should not be considered as a

part of the Non-Tariff Income of the Appellant, as held by this Tribunal.

108. Learned Counsel for the State Commission submits the following reply:-

i) State Commission has allocated the gain from Corporate Treasury in the same proportion in which the expenses of the Corporate Treasury have been allocated (as proposed by the Appellant and accepted by the State Commission), i.e., on the basis of the operating revenue of Mumbai LA to total operating revenue.

ii) State Commission has not considered the entire amount of Gains on Exchange as non-tariff income of the Mumbai Licence Area, and only a part of the amount has been allocated to the Mumbai Licence Area.

iii) If the Appellant was well aware of the actual amount of gains that could be allocated to the Mumbai Licence Area, why did they:

(a) Fail to consider these gains under the regulated business and provide relief to that extent to consumers of the regulated business;

(b) Did not allocate expenses of the Treasury function in the same known proportion, which

was lower, rather than allocating the expenses in the ratio of operating revenue, resulting in a higher allocation of expenses for the regulated business.

iv) Appellant is being selective by allocating expenses in a greater proportion to the regulated business, and not allocating any part of the revenue at first, and now contending that a lower part of the revenue should have been allocated.

v) Appellant has contended that it has considered the gains/losses pertaining to Mumbai Licence Area in the ARR Petition and passed on the benefits and cost to the consumers of the Mumbai Licence Area. There is no such entry in the ARR either under non-tariff income or any other head. Hence, State Commission has considered a part of the non-tariff income earned by the Appellant against the regulated business.

vi) Since the Appellant has allocated the expenses of the Corporate Treasury to the regulated business, Appellant's cannot contend that since the regulated Mumbai Licence Area business is in Indian currency, hence income earned through gain or exchange cannot be linked to any cost them as part of the ARR Petition.

vii) State Commission proceeded on the premises that since the expenses of the Corporate Treasury function have been allocated to the regulated business, the income earned by the Corporate Treasury function should also be considered and should be allocated in the same ratio.

109. Before dealing with this issue, let us now refer to the impugned findings:-

> *"**4.13 Non Tariff Income***
>
> *The State Commission observes that though the expenses pertaining to Corporate Treasury have been allocated to Mumbai Licence Area [in the ratio of operating revenue of Mumbai Licence Area (LA) to total operating revenue], the 'gain on exchange' amounting to Rs. 50.61 Crore for FY 2009-10 has not been allocated to Mumbai LA. The State Commission is of the view that since, the expenses related to Corporate Treasury function have been allocated to the regulated business in Mumbai, the income earned from the Corporate Treasury function should also be allocated to the regulated business in Mumbai in the same proportion. If this is not done, it will amount to undue enrichment of the unregulated business of TPC, since the consumers of the regulated business are bearing the costs, but are being deprived of the benefits of the income earned from the Corporate Treasury function. Accordingly, the State Commission has allocated this gain from the Corporate Treasury function to Mumbai LA on the basis of operating revenue of Mumbai LA to total operating revenue, and further allocated the same to the regulated business of Generation, Transmission and Distribution on the basis of operating revenue.*

***Table: Allocation of Gain on Exchange (Rs. crore)***

| *Particular* | *Total Income* | *Allocated Income to other than Mumbai LA* | *Income allocated to Mumbai LA* | *Gen.* | *Trans* | *Dist* |
|---|---|---|---|---|---|---|
| *Gain on exchange* | *50.61* | *15.18* | *35.42* | *24.70* | *9.01* | *1.71* |

*The State Commission has added the gain from Corporate Treasury function in addition to the actual non-tariff income reported by TPC-D under the truing up exercise, as shown in the table below:*

***Table: Non-Tariff Income (Rs. crore)***

| *Particulars* | *APR Order* | *Actuals* | *Allowed after truing up* |
|---|---|---|---|
| *Non-Tariff Income* | *14.22* | *11.14* | *12.85* |

*…"*

***" 5.15 NON-TARIFF INCOME FOR FY 2010-11***

*The State Commission observes that though the expenses pertaining to Corporate Treasury have been allocated to Mumbai Licence Area (in the ratio of operating revenue of Mumbai Licence Area (LA) to total operating revenue), the 'gain on exchange' amounting to Rs. 51.98 Crore for FY 2010-11 has not been allocated to Mumbai LA. The State Commission is of the view that since, the expenses related to Corporate Treasury function have been allocated to the regulated business in Mumbai, the income earned from the Corporate Treasury function should also be*

*allocated to the regulated business in Mumbai in the same proportion. If this is not done, it will amount to undue enrichment of the unregulated business of TPC, since the consumers of the regulated business are bearing the costs, but are being deprived of the benefits of the income earned from the Corporate Treasury function. Accordingly, the State Commission has allocated this gain from the Corporate Treasury function to Mumbai LA on the basis of operating revenue of Mumbai LA to total operating revenue, and further allocated the same to the regulated business of Generation, Transmission and Distribution on the basis of operating revenue.*

*Table: Allocation of Gain on Exchange* *(Rs. Crore)*

| Particulars | Total Income | Allocated Income to other than Mumbai LA | Income allocated to Mumbai LA | Generation | Transmission | Distribution |
|---|---|---|---|---|---|---|
| Gain on exchange | 51.98 | 15.07 | 36.91 | 19.22 | 15.60 | 2.08 |

*The State Commission has considered the actual non-tariff income reported by TPC-D, except interest on contingency reserve and gain from Corporate Treasury function, under the truing up exercise, as shown in the table below:*

*Table: Non-Tariff Income* *(Rs. Crore)*

| Particulars | APR Order | Actuals | Allowed after truing up |
|---|---|---|---|
| Non-Tariff Income | 14.22 | 13.28 | 15.95 |

*...”*

110. Having regard to the rival contentions, let us now discuss the issue:-

*111.* The Appellant has earned certain amount due to gains in Corporate Treasury function and exchange rate. The

State Commission has allocated such gains to Regulated Business in the same proportion as the expenses of the Corporate Treasury functions. The approach of the State Commission appears to be logical at first glance. But it is too simplistic. In any business, the expenses and gains are not necessarily be in the same proportion. For example, an establishment is involved in manufacturing as well as trading of its product. The expenses in the manufacturing process would be much higher than the its' marketing. But profit margin could be higher in marketing than manufacturing.

*112.* Had the Appellant not furnished the requisite information, the approach adopted by the State Commission would have been the correct approach. However, in this case the Appellant had furnished full details of gains the State Commission ought to have considered the same and gave reason for rejection of the same. The State Commission simply brushed aside the details furnished by the Appellant and adopted an erroneous simplistic approach. Therefore, the State Commission would consider the issue in the light of our above observations and pass the order accordingly.

113. The second issue is with regard to disallowance of O&M expenditure with respect to gifts in FY 2009-10 and FY 2010-11.

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

i) The Disallowance by State Commission of the gifts, which were actually in the form of employee expense is erroneous. This expenditure was for small gold coins gifted to employees due to the achievement of significant milestone i.e. State Commissioning of a new 250 MW Unit at Trombay in March 2009.

ii) This was given in the nature of a one-time perquisite/ non-recurring expense, which was duly included as a part of the taxable income of the employees. Thus, the nature of this expense although booked under 'Administration and General' expenses was primarily an 'employee welfare' expense in the form of additional one-time perquisite.

iii) Such gift is necessary in the interest of maintenance of good relations and motivation of the workforce necessary for the smooth functioning of the utility. Further, in the light of competitive scenario such initiatives are pertinent with a view to retain a highly skilled and experienced workforce to conduct efficient and un-interrupted business operations.

iv) By disallowing such expenditure, State Commission has sought to question the employee welfare policies of the management which is totally outside the

purview of its regulatory jurisdiction and amounts to micro management of the utility as held by this Tribunal in **KPTCL vs. KERC & Ors**.: *2007 ELR (APTEL) 223*

v) It is denied that 100 MW of Unit 8 was a merchant capacity and in no way linked to the consumers of Mumbai. It was merchant capacity for a very short duration of two and a half years (considering the lifespan of a generating unit which is more than twenty five years). In October, 2011 the 100 MW Unit 8 has been approved under a PPA by State Commission for Distribution division of the Appellant which in turn supplies power to Mumbai.

vi) With regard to the contention as to why Distribution and Transmission division of the Appellant should bear the cost of achievement of Generation Division, it is submitted that In order to set up Unit-8, employees from Distribution and Transmission business also contributed and therefore Gold Coins were given to employees who worked towards achievement of the said milestone.

115. The learned Counsel for the State Commission submit the following reply:-

i) Had the expense been part of the employee expenditure, then the same would have been

booked under the employee expenses rather than the A&G expenses.

ii) The consumers cannot be asked to pay for such unnecessary expenses.

iii) During this period, out of the 250 MW of the generating capacity of Unit 8, 100 MW was considered as merchant capacity and was not contracted to the Mumbai License Area. Under such a circumstance, it does not appear reasonable that the consumers of the Mumbai License Area be asked to share an expense incurred by the Appellant to celebrate an event from which the consumers are not going to benefit.

iv) State Commission has not sought to question the employee welfare policies of the management. The Appellant is well within its rights to give such gifts, and the same is not being stopped, however, it is not proper to pass on this expense to the consumers of the regulated business. The issue is clearly within its jurisdiction, since State Commission has to ensure that only prudently incurred expenses are passed on to the consumers.

v) It does not appear logical for the Distribution Division and the Transmission Division of the Appellant to bear expense of this expense when the achievement of the Generation division, which is a separate entity for the regulatory purposes.

vi) The parallel drawn by the Appellant to the State Commission's treatment of FBT has no relevance here, as FBT was a tax that had to be passed through and the only expense head was re-grouped, whereas the present expense on gold coins is an unnecessary expense that is sought to be passed on to the consumers.

116. Before dealing with this issue, let us refer to impugned findings:-

*"**4.4.2 Administrative and General Expenditure***

*…Further, in reply to the State Commission's query, TPC clarified that commemorative gold coins were distributed to employees on the occasion of State Commissioning of Unit-8 and the expense on the same has been claimed under "Gifts" amounting to Rs. 4.52 Crore in A&G expenses.*

*The State Commission is of the view that these costs are towards TPC's Corporate Social Responsibility and are not necessary for the functioning of any Utility. In any case, these expenses should not be passed on to the consumers of TPC as the consumers are not benefiting from the same and thus, these expenses should be borne by TPC. TPC-D is free to incur such*

*expenses from the returns earned out of the business. TPC-D's share against Community Welfare Expenses and Gifts is Rs. 0.07 Crore and Rs. 0.66 Crore, respectively, which has been disallowed from the A&G expenses, under the truing up exercise and for the purpose of sharing of gain and losses…"*

***Re. FY 2010-11***

*"**5.4.2 Administrative and General (A&G) Expenses***

*…Further, in reply to the State Commission's query, TPC clarified that commemorative gold coins were distributed to employees on the occasion of State Commissioning of Unit-8, and the expense on the same has been claimed under "Gifts" amounting to Rs. 0.74 Crore under A&G expenses. As discussed in Section 4 of this Order, the State Commission has disallowed these expenses from the A&G expenses, under the truing up exercise and for the purpose of sharing of gain and losses…"*

117. In the light of above, let us discuss this issue:-

118. MYT Regulations 2005, provide O&M expenses as controllable item. The Commission has fixed base value for O&M expenses and provide yearly escalation at 4% over the base value. If the O&M expenses are well within the normative O&M expenses then the savings would be shared between the company and the consumers as per Regulation 17 of the 2005 Tariff Regulations. On the other hand, if the actual O&M expenses are more than the normative value, the loss is also to be shared between the company and the consumers.

**119.** The records available with us do not show as to whether the unit-8 was Commissioned ahead of scheduled date of State Commissioning or it was Commissioned as per schedule. If the unit was Commissioned much ahead of schedule the consumers of Mumbai were benefitted for getting additional power before scheduled time. Thus in case the unit was Commissioned ahead of schedule, say more than six months, the employees deserve to be motivated. Cash or Gold Coins is immaterial. But if the unit was Commissioned within scheduled date, the Commissioning is routine and the employees cannot be said to have put extra efforts. Accordingly, decided.

**120.** **<u>Summary of the findings.</u>**

**a) The Tribunal in Appeal No. 251 of 2006 has laid down the ratio that the income tax assessment of the licensee must be done on standalone basis. In Appeal No. 173 of 2011 the Tribunal has provided the methodology for assessing the income tax liability of the licensee. But, the State Commission did not follow these directions and got carried away with the observations that the utility must not gain or loose on account of income tax made in the context of grossing up of income tax. It simply allocated the actual tax paid by the Appellant, for the company as a whole, in**

**proportion to their respective book profit. The issue is decided accordingly. The Commission is directed to reassess the Income tax liability of the Appellant as per our findings above and issue consequential orders.**

**b) At the outset, it shall be mentioned that the Community Social Responsibility is the responsibility of the Company. The contention of the Appellant that the State Commission had approved these expenses in the ARR petition and that therefore, it cannot change during true up exercise is not tenable. In fact, the State Commission is duty bound to apply prudency check while truing up otherwise no purpose would be served in truing up. On going through the impugned order on this point as well as the submissions made by the learned Counsel for the State Commission, it is clear that the conclusion on this point arrived at by the State Commission is valid and the reasons for such conclusions are justified. The issue is decided as against the Appellant.**

**c) The State Commission is a statutory body. It is not expected to 'blow hot and cold'. The sector needs certainty and clarity in the policies. Such an action**

**on part of the State Commission would create confusion and uncertainty in the minds of developers and financers. The State Commission should have applied its mind before de-capitalizing the assets. Once the assets have been de-capitalized by the State Commission, there is no provision to re-capitalize it. Accordingly, the issue is decided in favour of the Appellant.**

d) **We feel that the State Commission's contention of constructive resjudicata carries some force. In Appeal No. 17, 18, and 19 of 2011 the Appellant had challenged the rate of interest on IFDC loan only. In case the Appellant was aggrieved by the rate of interest on IDBI loan approved by the State Commission it should have challenged the same in those Appeals itself. It appears that the Appellant waited for the outcome of those Appeals. Once it obtained favourable order in those Appeals in respect of interest rate on IDFC loan, it decided to challenge the interest rate on IDBI loan too adopted by the State Commission in true up order. The issue is decided as against the Appellant.**

e) **Since the issue has already been decided in Appeal No.52 of 2008, the same is decided in this Appeal also in favour of the Appellant.**

f) **The State Commission in its APR Order has recorded that it will approve the actual Auxiliary Consumption and Heat Rate at the time of truing up. However, the State Commission adopted the same values for both in true up order. The approach of the State Commission is faulty on this count. Either the State Commission should have given detailed reasons for not approving the actual figures or should have approved the same. The State Commission has only mentioned consumer's interest for not approving the actual. It has recorded that the consumers cannot be burdened with operational inefficiency of the Appellant. It has not analyzed the benefit to the consumers in operating this unit vis-à-vis its operational costs. The unit has provided power to the state under emergent conditions. In case the unit was completely shut down, the state would have to procure power from other sources at much higher market price. The State Commission should have carried out cost benefit analysis before disapproving actual auxiliary consumption and heat rate more so when it had promised in its APR Order to consider the same at time of true up. Accordingly, the issue is decided in favour of Appellant.**

g) As regards Heat Rate, the State Commission should have conducted cost-benefit analysis to ascertain loss or gain to consumers due to higher gas component in the fuel mix. Accordingly, decided.

h) Had the Appellant not furnished the requisite information, the approach adopted by the State Commission would have been the correct approach. However, in this case the Appellant had furnished full details of gains the State Commission ought to have considered the same and gave reason for rejection of the same. The State Commission simply brushed aside the details furnished by the Appellant and adopted an erroneous simplistic approach. Therefore, the State Commission should consider the issue in the light of our above observations and pass the order accordingly. The issue is decided in favour of the Appellant.

i) The records available with us do not show as to whether the unit-8 was Commissioned ahead of scheduled date of Commissioning or it was Commissioned as per schedule. If the unit was Commissioned much ahead of schedule the consumers of Mumbai were

**benefitted for getting additional power before scheduled time. Thus in case the unit was Commissioned ahead of schedule, say more than six months, the employees deserve to be motivated. Cash or Gold Coins is immaterial. But if the unit was commissioned within scheduled date, the Commissioning is routine and the employees cannot be said to have put extra efforts. Accordingly, decided.**

121. In view of the above findings, the Appeals are allowed in part. The State Commission is directed to pass the consequential orders in terms of our findings referred to above.

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

***(V J Talwar)*** ***(Justice M. Karpaga Vinayagam)***
***Technical Member*** ***Chairperson***

Dated: 28th Nov, 2013
√REPORTABLE/~~NON-REPORTABALE~~