

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 28th November, 2013

Present: MR. JUSTICE KARPAGA VINAYAGAM, CHAIRPERSON
MR. V J TALWAR, TECHNICAL MEMBER,

REVIEW PETITION NO. 6 OF 2013

IN

APPEAL NO. 47 OF 2012

IN THE MATTER OF:

Maharashtra State Power
Generation Company Limited.
Prakashgad,
Plot No. G-9, Bandra (East)
Mumbai-400 051

... REVIEW PETITIONER

VERSUS

1. Maharashtra Electricity Regulatory Commission
13th Floor, Centre No.1, World Trade Centre,
Cuffe Parade, Colaba Mumbai-400005

2. Maharashtra State Electricity Distribution Company
Limited,
Prakashgad,
Plot No. G-9, Bandra (East)
Mumbai-400051.

3. Prayas (Energy Group)
Amrita Clinic, Athvale Corner,
Lakdipool, Karve Road Junction
Deccan Gymkhana, Karve Road
Pune – 411004
4. Mumbai Grahak Panchayat
Grahak Bhavan, Sant Dynaneshwar Marg,
Behind Cooper Hospital (Vile Parle West)
Mumbai – 4000056
5. The Vidarbha Industries Association
1st Floor, Udyog Bhawan,
Civil Line, Nagpur – 440001
6. The General Secretary,
Thane Belapur Industries Association
Rabale Village, Post Ghansoli,
Plot P – 14, MIDC
Navi Mumbai – 400701

... RESPONDENTS

- | | |
|----------------------------|---|
| Counsel for the Appellant | :Mr Sanjay Sen Sr. Advocate
Mr. Heman Singh
Mr. Anurag Sharma
Mr. Ramandeep Singh
(Rep. for MSPGCL) |
| Counsel for the Respondent | : Mr Buddy Ranganathan for R-1
Ms. Richa Baradwaja |

ORDER

Per: Mr. V J Talwar, Technical Member

1. This Review Petition has been filed against the judgment dated 14.12.2012, rendered by this Tribunal, in Appeal No. 47 of 2012.
2. This Tribunal rendered this judgment in the Appeal, which was filed by the Review Petitioner challenging an order dated 30.12.2011 passed by the Maharashtra State Commission (Respondent No. 1) in Case No. 107 of 2011 for final Trueing up for FY 2009-10 and Annual Performance Review (APR) for FY 2010-11 of the Review Petitioner.
3. The Review Petitioner had preferred the Appeal with regard to the following issues:
 - (i) True up for FY 2009-10:
 - fuel cost;
 - operation and maintenance cost;
 - other debits, as mentioned in the audited expenses for the Financial Year 2009-10 under the head "Miscellaneous Losses and write-off";
 - pro rata reduction in fixed cost due to availability;
 - prorated reduction in fixed cost due to recertified availability;
 - depreciation
 - (ii) Provisional true up for FY 2010-11:

- capital expenditure and capitalization;
 - impact of pay revision;
- (iii) True up for FY 2009-10 for Paras Unit 3 and Parli Unit 6:
- reduction in the Annual Fixed Cost and disallowance due to lower technical performance.
4. This Tribunal disposed of the above Appeal by rendering a judgment on 14.12.2012.
5. Thereupon, the Review Petitioner has filed the present Review petition being aggrieved by the ruling of this Tribunal on the following issues, namely:
- (i) Operations and maintenance cost with regard to the True-up for FY 2009-10.
 - (ii) Other debits, as mentioned in the audited expenses for the Financial Year 2009-10 under the head "Miscellaneous Losses and write-off".
 - (iii) Capitalisation of the assets costing less than Rs. 10 crores in the year 2010-11 with regard to the provisional True-up for FY 2010-11.
6. We shall now take of each of the above mentioned issues one by one. The first ground on which the petitioner has asked for

Review is related to Operations and maintenance cost with regard to the True-up for FY 2009-10.

7. The learned Senior Counsel for the Appellant made elaborate submissions on this issue. Most of the contentions raised by the learned Senior Counsel were also raised in the main Appeal No. 47 of 2012. The crux of the submissions made by the Review petitioner are as under:

a) In the impugned order, the Tribunal gave the following finding with respect to the issue of “gross” or “net” O&M expenses:

“19.

Thus, there is no such term as ‘gross O&M’ expense or ‘net O&M’ expenses. The acceptance of the Contention of the Appellant would amount to allowing such amounts both as a revenue expense and also form a part of the capital base on which the Appellant could claim RoE, depreciation etc resulting in to double-accounting and, therefore, not permissible.

(underline
supplied)

b) From the above, it is apparent that the Tribunal has based the above finding on two premises: viz. a)

O&M expenses of employees involved in construction of projects cannot be included in the gross expenses. B) In case such gross expenses are allowed, it leads to double accounting of expenses i.e. the same expenses will be allowed in the subsequent year as revenue expenses and at the same time the capitalized amount continues to earn depreciation, ROE and financing costs.

- c) In order to point out the error apparent on the fact of the Records, it is necessary to appreciate that as regards the observation of the Tribunal that Gross expenses cannot include expenses of employees engaged in construction of projects, it is submitted that there are two categories of employees of the Review Petitioner (i) Category employed in Construction and Erection of upcoming new units and, (ii) Category employed in capital works implemented for Operation and Maintenance existing units. The expenses of employees working on construction and erection of projects and on capital works implemented for Operation and Maintenance in existing units are fully capitalized in the books of accounts. Salaries of balance employees in the

operations and maintenance department are booked as revenue expenses as per the relevant accounting standards applicable for a financial year.

- d) In the present case, the Review Petitioner is only considering the gross expenses of employees working under the operations of the generation stations. The rationale for the same is that employees at an existing station are engaged in Operations and Maintenance of the existing station as well as in capital works for performance improvement schemes for the existing station and not for new upcoming unit project. These employees are on the pay roll of the existing station and in normal course the expenses on these employees are booked as the Gross Employee expenses which are part of Gross O & M expenses. The expenses on these employees only to the extent of their contribution in the capital works for performance improvement schemes for the existing station are capitalized and hence deducted from the Gross O & M expenses to arrive at the Net O & M expenses. Thus when there is no capital work undertaken at the station in a particular year, all these employees are

still on pay roll of the station and all the expenses will be booked as Gross O & M expenses and there will be no deduction from the Gross O & M expenses.

8. The learned counsel for the State Commission vehemently refuted the submissions of the Review Petitioner and submitted that the Review petitioner has not demonstrated to show that there was any error on face of Record and the Review petitioner has merely re-iterated what it had stated in the original Appeal.
9. We have heard the learned counsel for the parties.
10. This Tribunal in the Judgment dated 14.12.2012 has taken the view that there was no concept of “gross O&M” and “net O&M”. An expense is either a Revenue Expenditure or a Capital Expenditure. It cannot be both if an amount is capitalized and added to the cost of an Asset, the generator gets the benefit of Return on Equity and Depreciation etc. Whilst getting the said benefits the self same expenses cannot be treated as Revenue Expenses whether in the next year or otherwise as this would amount to double counting. The relevant parts of the Judgment are as under:-

“We have heard the contentions of the learned Counsels of both the parties. The issue before us for consideration is as to whether the employees’ cost that had been capitalized in the past is to be

considered as O&M expenses for that particular year for the purpose of projecting O&M expenses for the future years.

The Annual Revenue Requirement comprises of two expenditures viz Capital Expenditure and Revenue Expenditure. Capital Expenditure includes Return on Equity, Financing Costs and Depreciation of the Capital cost of the asset. Revenue Expenditure includes Operation and Maintenance (O&M) expenditure, interest on working capital etc. The O&M expenditure has three components viz, Employees Cost, Administrative and General Expenses and Repair and Maintenance Costs. As the nomenclature O&M indicates, employees costs includes the salaries and other allowance payable to employees employed in Operation and Maintenance of the projects. Utilities, like the Appellant herein, have two categories of employees viz (i) category employed in Construction and Erection of projects and (ii) category employed in Operation and Maintenance of projects. The cost of employees employed in construction activity is capitalized along with capital cost of the asset and the utility earns Return on Equity, Depreciation, financing costs etc for the life time of the project. The cost of employees involved in the O&M activity is added to O&M expenses. O&M expenses are the expenses which have been incurred in operation and maintenance of the project and would not include the expenses which had been incurred in construction of the project. All

those expenses, including employees cost, which have been capitalized and entitles the utility to earn RoE and other benefits for the life time of the project cannot be considered as O&M expenses for that year. Only the expenditure which has been actually incurred in operation and maintenance can form part of O&M expenses. Thus, there is no such term as 'gross O&M expense' or 'net O&M expenses'. The acceptance of the Contention of the Appellant would amount to allowing such amounts both as a revenue expense and also form a part of the capital base on which the appellant could claim RoE, depreciation etc resulting in to double accounting and, therefore, not permissible.

Accordingly, the question is answered against the Appellant.”

11. The Review petitioner has again raised the issue of net O&M and gross O&M. However, nowhere in the Review Petition or in the written submission has the Review Petitioner been able to show any error apparent on the face of the Judgment dated 14.12.2012. Further on page 8, para 5 of the written submissions of the Review Petitioner the following submission has been made:-

“5. The impugned order is an error apparent **since it is leading to huge financial impact upon the Petitioner. The said error is a result of a mistake**

and the impugned judgment would not have been passed but for the erroneous conclusion drawn, and its perpetration will result in severe miscarriage of justice for the Petitioner. *In fact the case of the Petitioner is that although the issue was raised in all the proceedings before the Respondent Commission, as well as this Hon'ble Tribunal, however, the issue has not been addressed as per the real facts and circumstances of the case.”*

12. The aforesaid submission will clearly show that there is no error in the said Judgment. The mere fact that the finding of this Tribunal has a financial impact on the Review Petitioner cannot be considered to be an apparent error on face of the Record.
13. The issue is accordingly decided against the Review petitioner.
14. The next ground raised by the Review petitioner is related to Other debits, as mentioned in the audited expenses for the Financial Year 2009-10 under the head “Miscellaneous Losses and write-off”.
15. The learned Senior Counsel made the following submissions:
 - a. In the order impugned the Tribunal had upheld the Respondent Commission decision that allowing only Rs. 4.2 Crores as “other debits” thereby disallowing

the loss incurred by the Review Petitioner to the tune of Rs 37.62 Crores on obsolete spares. The said disallowance was done in the category of “Miscellaneous Losses and write-off”. The observation rendered by the Tribunal, while upholding the finding of the Commission, is given herein below:

“25. According to the Appellant, the Accounting Standards prescribed under the Companies Act are being followed. In accordance with provisions of Accounting Standards, the Appellant conducts annual physical verification of inventory. As a part of this exercise, it also identifies, slow-moving, non-moving and obsolete items in the inventory and provides for 30% value of slow moving, 60% value of non-moving and 100% value of obsolete items in the Books of Accounts. The difference between provision of previous year (i.e. opening provision) and Closing Provision is debited / credited to Profit & Loss Account i.e. Loss on obsolescence of stores. If that be so, the provision of slow moving, non-moving and obsolete spares should have been reduced year after year. However, as observed by the Commission in the Impugned Order, there has been increase in inventory year after year. The Appellant, in its submission before this Tribunal has accepted that “the Appellant carried out the exercise of proper classification of inventory and it was observed that certain capital/ insurance spares which have been retained for future use as standby, were wrongly

classified as non-moving spares instead of capitalizing them. Subsequently in FY 2010-11, as a result of completion of exercise of identification of capital/ insurance spares and capitalizing them by power stations, this position has been corrected which has resulted into reduction in provision on account of slow / non-moving / obsolescence stock/ spares.”

26. The above submission of the Appellant has clearly established that there was some problem with the accounting of spares till the year 2009-10 and the same was rectified in the year 2010-11. Thus, the Commission had rightly disallowed the ‘loss’ incurred on account of spares.

27. *The issue is decided against the Appellant.”*

(underline supplied)

- b. Thus, the Tribunal based its finding on the basis that there were certain problems with the accounting of spares in the FY 2009-10.
- c. The Petitioner routinely conducts annual physical verification of its inventory. Towards the same, the Petitioner identifies slow-moving, non-moving and obsolete items in the inventory and provides for 30%

value of slow moving, 60% value of non-moving and 100% value of obsolete items in the Books of Accounts. The difference between provisions of previous year (i.e. opening provision) and Closing Provision is debited/ credited to Profit & Loss Account i.e. Loss on obsolescence of stores.

- d. There are certain items which do not get consumed in a routine manner but the same are utilized during annual and capital overhauls hence consumption pattern of such items appear irregular. Such items create increase/ decrease in slow/ non-moving inventory. Further, the inventory items also get shifted from slow moving to non-moving category and increase the provision amount from 30% to 60%.
16. None of the contentions raised in the Review Petition or in the written submission would come within the accepted parameters of Review Jurisdiction in law. Once again the Petitioner is seeking to re-argue its case before this Tribunal. This is not permissible in law.
17. The third ground raised by the Review petitioner is regarding Capitalisation of the assets costing less than Rs. 10 crores in the year 2010-11 with regard to the provisional True-up for FY 2010-11.

18. The learned senior Counsel for the Review petitioner submitted that the error apparent in the impugned order over the issue of capitalisation of non-DPR schemes is that the Tribunal based the same on an earlier judgment rendered in Appeal No. 199 of 2010. However, the Tribunal, while passing the impugned order, has ignored the judgment passed in Appeal No. 17, 18 & 19 of 2011, titled as *Tata Power Company Limited vs. Maharashtra Electricity Regulatory Commission*. The said judgment is a later one and ought to have been considered.
19. The learned counsel for the Commission made very elaborate submissions on this ground differentiating the present case from the matter in Appeal No. 17, 18 & 19 of 2011 which relates to Tata Power, another licensee in the State of Maharashtra.
20. Having heard the learned counsel for the parties on the issue we are of the view that the Review petitioner could not make a case for an error on face of record. Tribunal's reliance on the judgment in the case of Review petitioner and not some other judgment in the case of other licensee. This can not be held to be an error on face of record. This could be ground for Appeal but not for Review.

21. Thus, on all the aforesaid 3 grounds raised, the Review Petitioner has not been able to make out any error apparent on the face of the Judgment dated 14.12.2012. None of the requirements for Review have been made out by the Review Petitioner in the Review Petition. The contentions of the Review Petitioner are not maintainable in law in view of the fact that we cannot exceed our jurisdiction and scope of Review proceedings.
22. In the Review Petition, strangely the Review Petitioner is seeking not only for rehearing of the entire Appeal but also is seeking to contend that the Judgment dated 14.12.2012 was wrong and the same is liable to be set aside. This could be done only in Appeal and not in Review.
23. In view of above, the Review petition is dismissed. No order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 28th November, 2013

REPORTABLE/~~NOT REPORTABLE~~