IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 255 OF 2015
AND
I.A. No. 405 of 2015

Dated: 21st March ,2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of:-

BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED
K.R. Circle,
Bangalore- 560001
Represented by its authorized representative
... Appellant(s)

AND

1. **KARNATAKA ELECTRICITY REGULATORY COMMISSION,**
6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2, M.G. Road,
Bangalore – 560001

2. **M/S CLP WINDFARMS(INDIA) PRIVATE LIMITED**
Flat No.D-1, 3rd Floor,
Salcon Ras Vilas,
District Centre, Saket,
New Delhi-110 017.
... Respondents

Counsel for the Appellant(s) : Mr. Sandeep Grover
Ms. Pankhuri Bhardwaj
Ms. Mansi Kumar
Ms. Trisha Ray Chaudhuri

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Sandeep Rajpurohit for **R.1**

Mr. Sitesh Mukherjee
Mr. Jafar Alam
Mr. Deep Rao for **R.2**

J U D G M E N T

1. The Appellant - Bangalore Electricity Supply Company Limited is a distribution licensee within the State of Karnataka. Respondent No.1 is the Karnataka Electricity Regulatory Commission (**"the State Commission"**). Respondent No.2 M/s CLP Windfarms (India) Private Limited, owns and operates wind based generating stations. In this appeal the Appellant has challenged order dated 14/8/2014 passed by the State Commission on the petition filed by Respondent No.2.

2. Gist of the facts leading to this appeal needs to be stated. Respondent No.2 generating company has a wind energy based generating station having capacity of 39.6 Mega Watts (MW) at Harapanahalli village of Karnataka (**"the Project"** for convenience). Respondent No.2 has executed a PPA dated 28/12/2010 with the Appellant for sale of electricity generated from the Project. The said Project has commenced operation in February 2011.

3. As per Section 80 IA of the Income Tax Act, 1961 Respondent No.2 was exempted from payment of Income Tax for the initial period of ten years commencing from the Commercial Operation Date (**"COD"**). However, Respondent No.2 was required to pay Minimum Alternate Tax (**"MAT"**) in relation to the Project. According to Respondent No.2, the Appellant is liable to reimburse MAT when paid by Respondent No.2 as per the State Commission's generic Tariff Order dated 11/12/2009 (**"Tariff Order 2009"**) relating to the Renewable Sources of Energy. According to Respondent

No.2, it actually paid MAT for FY 2012-13 and vide its letter dated 10/04/2013 requested the Appellant to confirm as to which documents were necessary to claim reimbursement of MAT. The Appellant vide its letter dated 04/05/2013 replied that as Respondent No.2 was exempted from payment of Income Tax under Section 80 IA of the Income Tax Act,1961 for the initial ten years commencing from the COD it was not liable to reimburse any Income Tax up to the end of the 10 year period from the COD. Relying on Section 115 JB of the Income Tax Act,1961 the Appellant stated that MAT amount, if any, paid by Respondent No.2 was entitled to be adjusted against the regular Income Tax liability arising after 10 years of the payment of MAT and there was no current liability to reimburse MAT. Respondent No.2 therefore filed a petition in the State Commission under Section 86(1)(f) of the Electricity Act, 2003 (**"the said Act"**) praying *inter alia* that the Appellant be directed to refund/reimburse MAT to Respondent No.2 for the period FY 2012-13 attributable to the Project and to reimburse MAT. Respondent No.2 also sought a direction to the Appellant to reimburse MAT or any

other Income Tax, surcharge and cess paid in relation to the Project, upon Respondent No.2 furnishing proof of such payment of tax, on an ongoing basis during the term of the PPA.

4. While dealing with the rival contentions the State Commission referred to the correspondence between the parties, relevant tariff orders and relevant judgment of this Tribunal and by the impugned order rejected the contentions of the Appellant. Gist of the impugned order needs to be stated.

5. Gist of the impugned order:

The State Commission referred to Article 4.1(ix) of the existing standard PPA and observed that under the Tariff Order 2005 the liability to pay the Income Tax by the generator was factored in the tariff itself and it was not a pass through to the distribution licensee. Therefore, Article 4.1(ix) was introduced in the standard PPA fixing liability in respect of Income Tax etc on the generator. However, subsequent to

the passing of the Tariff Order 2009 no corresponding amendment was made in the existing standard PPA, regarding pass through of the liability of Income Tax etc paid by the generator to the distribution licensee. Respondent No.2 therefore requested for clarification by letter dated 17/08/2010. The State Commission in its reply dated 31/08/2010 stated that since in the standard format of the PPA there is no provision regarding treatment of Income Tax paid by the generator, it is governed by the orders issued by the State Commission from time to time. Hence, if the developer has entered into a PPA for NCE Projects on or after 01/01/2010 (the date from which the order came into effect) it has to claim the amount of Income Tax from the concerned ESCOM after producing the proof of payment of Income Tax. The State Commission further noted that subsequently Respondent No.2 by letter dated 21/12/2010 requested the Appellant that appropriate

amendments be made in the existing standard PPA format *inter alia* regarding reimbursement of the amount of Income Tax paid by the generator. Respondent No.2 also sent a draft PPA incorporating amendment. However, the Appellant did not send reply to the said letter. Respondent No.2 then wrote a letter dated 12/01/2011 to the State Commission stating that the PPA dated 28/12/2010 was before the State Commission for grant of approval and that appropriate clause regarding reimbursement of Income Tax (including MAT) was necessary. The State Commission intimated to Respondent No.2 that instructions contained in earlier letter dated 31/08/2010 would hold good and that it could claim reimbursement of Income Tax paid on production of proper documents. The State Commission against the backdrop of the above facts held that the parties are bound by the terms of the tariff order. In the present case, the liability of the Appellant to reimburse Income Tax (including MAT)

fixed by the State Commission is an integral part of the generic tariff. Relying on this Tribunal's judgment in ***BESCOM and Ors. v. Tata Power Company Limited and Anr.*** **("Tata Power Case")**. dated 02/05/2014 in Appeal No.330 of 2013, the State Commission rejected the contention of the Appellant that the question of reimbursement of MAT paid would arise only subsequent to Respondent No.2 setting off MAT amount paid against the Income Tax payable i.e. when the actual tax liability is crystallized. In the circumstances the State Commission declared that Respondent No.2 is entitled for reimbursement of MAT paid by it during the subsistence of the PPA dated 28/12/2010 subject to the maximum limit specified for Wind Projects by the Tariff Order 2009. The State Commission directed Respondent No.2 to furnish security in the form of a bank guarantee or in any other form acceptable to the Appellant in respect of

MAT credit that gets set-off in future years after the expiry of the term of the PPA dated 28/12/2010.

6. We must now go to the rival contentions. We have heard Mr. Sandeep Grover learned counsel appearing for the Appellant and perused the written submissions filed by him. Gist of the submissions is as under:

(a) Reliance placed by the State Commission on ***Tata Power case*** is misplaced because in that case this Tribunal had allowed reimbursement of MAT in view of the clauses 11.4 and 11.5 of the PPA which stipulated that any increase or decrease in tax liability of the company would be payable by the purchaser through supplementary bills within 90 days of the end of the financial year.

(b) In this case there is no provision in the PPA executed between the parties entitling Respondent No.2 to be reimbursed of MAT. In

fact, Clause 4.1(ix) of the PPA provides that Respondent No.2 would be responsible for all payments on account of any taxes, cesses, duties etc as imposed by the Government or its competent statutory authority.

(c) In this case the parties negotiated to include CDM benefits only in the PPA and agreed not to include the clause relating to the reimbursement of MAT in the PPA.

(d) Judgment of this Tribunal in ***Jaiprakash Hydro Power Limited v. Himachal Pradesh State Electricity Regulatory Commission and Ors in Appeal No.39 of 2011*** **("Jaiprakash Hydro")** is also not applicable to this case because in that case reimbursement of MAT was allowed in terms of clause 20.21 of the PPA.

(e) The submission that Tariff Order 2009 makes it mandatory for the Appellant to reimburse MAT to

Respondent No.2 is untenable for the following reasons:

i) Tariff Order 2009 only allows the Income Tax, surcharge and cess as a pass through without factoring in the same for tariff computation. Therefore, it is for the parties to negotiate amongst themselves to incorporate a clause in the PPA to that effect. Inclusion of reimbursement of MAT is purely a contractually negotiated issue which cannot be claimed by way of a right.

ii) Even otherwise, under Section 62 of the said Act, the power of the State Commission is limited to the determination of tariff. It does not include issue of MAT or its reimbursement per se. This is also borne out by the difference in language used by the State Commission.

iii) In view of the above the clause provided in the PPA which pertains to taxes shall bind the parties and not Tariff Order 2009.

(f) The judgment of this Tribunal in ***Gujarat Urja Vikas Nigam Limited v. Green Infra Corporation Power Limited in Appeal No.198 of 2014*** **("Green Infra"**) is not applicable to this case because ***Green Infra*** discusses whether a PPA could be reopened for modification of tariff or not. In this case the issue involved does not pertain to determination of tariff at all.

(g) In view of the foregoing submissions Respondent No.2 is not entitled for reimbursement of MAT on an ongoing basis but may have the same set off/adjusted over a period of 10 years from the PPA against its tax liability. The impugned order is therefore liable to be set aside.

7. We have heard Mr. Mukherjee learned counsel appearing for Respondent No.2. We have perused the written

submissions filed by him. Gist of the submissions is as under:

(a) The only question to be decided in this appeal is whether in pursuance of the Tariff Order 2009, the Appellant has to reimburse the amount paid as MAT by Respondent No.2 notwithstanding that there is no clause to this effect in the PPA.

(b) Tariff Order 2009 specifically provides that MAT paid by a renewable energy generator which entered into a PPA on or after 01/01/2010 must be reimbursed by the Karanataka distribution licensees purchasing power from the Project. The PPA was executed on 28/12/2010 and is therefore governed by the Tariff Order 2009. Tariff Order 2009 has never been challenged and has therefore become final.

(c) Tariff Orders are statutory in nature and cannot be derogated from by the parties (See: ***Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and Ors.***[1], ***Gujarat Urja Vikas Nigam Limited v. Green Infra Corporate Wind Power Limited***[2])

(d) The issues raised in this appeal are covered by the judgment of this Tribunal in ***Tata Power*** where it is held that MAT is an actual tax liability, which is reimbursable on an annual basis.

(e) It is not open for the Appellant to argue that the non-inclusion of a provision in the PPA would override the express provisions of the Tariff Order 2009 relating to the Appellant's liability to reimburse MAT.

(f) As a distribution licensee operating in the State of Karnataka the Appellant is bound by

[1] 2016-8-SCC 743
[2] Appeal No.198 of 2014

Regulation 1(2) read with Regulation 5.1 of the Tariff Regulations to purchase power in accordance with the tariff determined by the State Commission and not otherwise. By refusing to reimburse MAT, the Appellant is acting in contravention of the Tariff Regulations which cannot be countenanced.

(g) MAT is an integral component of tariff. The mode of recovery of a particular component of tariff does not alter the legal position that such component forms part of the tariff.

(h) The settled position that Income Tax reimbursements are an integral part of the tariff is borne out by Regulation 5.3 of the KERC (Power Procurement from Renewable Sources by Distribution Licensees) Regulations 2004 (**"Tariff Regulations"**)read with Regulation 23 of the CERC (Terms and Conditions for Tariff Determination from

Renewable Energy Regulations 2009 (**"CERC Tariff Regulations"**).

(i) National Tariff Policy 2016 states that tax is an uncontrollable cost which should be recovered speedily.

(j) Respondent No.2 has not waived MAT reimbursement. Relevant correspondence substantiates this fact.

(k) MAT is Income Tax computed in a manner different from the regular Income Tax (***Commissioner of Income Tax, Chennai v. Tulsyan NEC Ltd***[3]***).***

(l) MAT is a current liability incurred in the year it accrues (See: Judgment of the Supreme Court in ***Tulsyan NEC Ltd*** and judgment of this Tribunal in ***Tata Power case***).

[3] (2011)-2-SCC 1

(m) MAT being a definite statutory liability that arises in a particular financial year and is required to be discharged by payment in the assessment year corresponding to the financial year in which the liability arises, is an actual liability.

(n) In view of the above it is clear that there is no merit in the appeal. The appeal deserves to be dismissed.

8. At the outset we must deal with the issue of absence of MAT reimbursement clause in the PPA. It is submitted that because the PPA does not contain a provision for MAT reimbursement, Respondent No.2 has waived its right to claim MAT reimbursement. To examine this submission it is necessary to have a look at the correspondence between the parties. On 17/08/2010 Respondent No.2 addressed a letter to the State Commission drawing its attention to Tariff Order

2009 which allows the project developer to claim Income Tax, surcharge and cess separately from the distribution licensees as pass through computed on the basis of approved RoE and prevailing tax rates. Respondent No.2 further requested that considering that this has not yet been incorporated in the standard PPA approved by the State Commission, the process by which project developers can claim the same from the distribution licensee may be clarified considering the fact that timely disbursement of this claim is critical to the commercial viability of the projects. The State Commission by its letter dated 31/08/2010 clarified that since the standard form of power purchase agreement for NCE projects did not contain any specific provision regarding treatment of Income Tax paid by the generator, the same is governed by the orders of the State Commission issued from time to time. Pursuant to this clarification Respondent No.2 vide its letter dated 21/12/2010, requested the Appellant to revise the draft PPA to include a clause with respect to reimbursement of

Income Tax including MAT. According to Respondent No.2, the Appellant took the stand that the draft power purchase agreement could not be modified without the approval of the State Commission and the parties could seek a specific approval from the State Commission for inclusion of the said clause when the PPA is presented to the State Commission for approval. Accordingly when the PPA was submitted by the parties to the State Commission for approval, Respondent No.2 vide its letter dated 12/01/2011 requested the State Commission to approve inclusion of the tax reimbursement clause in the PPA. Respondent No.2 forwarded copy of this letter to the Appellant also. The Appellant did not respond to this letter. The State Commission vide its letter dated 14/03/2011 reiterated the clarification given vide its letter dated 31/08/2010 i.e. the Income Tax paid by the generator is governed by the orders of the State Commission. This response has to be considered against the backdrop of the fact that Tariff Order 2009 provides that the project developer can

claim Income Tax (including MAT), surcharge and cess separately from the distribution licensee as a pass through. This correspondence clearly establishes that Respondent No.2 wanted MAT reimbursement clause to be included in the PPA. Respondent No.2 never waived MAT reimbursement.

9. While it is the case of Respondent No.2 that this case is clearly covered by the judgment of this Tribunal in ***Tata Power case,*** where incidentally, the Appellant was a party, it is the case of the Appellant that ***Tata Power case*** judgment has no application to this case because in that case in the PPA there was a clause relating to MAT reimbursement while in the instant case there is no such clause. It is therefore necessary to turn to ***Tata Power case,*** where this Tribunal has also discussed the concept of MAT.

10. In ***Tata Power case***, Tata Power Company Ltd (***"Tata Power"***) had entered into a PPA with the Appellant-Bangalore Electric Supply Limited for supply of electricity pursuant to which Tata Power had supplied the electricity. Dispute arose between the parties on the question of reimbursement of MAT paid by Tata Power as per Section 115 JB of the Income Tax Act 1961. Tata Power filed petition in the State Commission seeking directions to the Appellant to pay the amount paid by it towards MAT for the period 2006-07 to 2009-10 for the power supplied in terms of PPA dated 10/02/1999. Before the State Commission the Appellant contended that the Appellant will not be able to reimburse MAT paid by Tata Power immediately under Section 115 JAA of the Income Tax Act 1961 and that Tata Power is at liberty to set-off the MAT amount paid against the actual tax liability within the next ten years from the year of payment of MAT and in the event of Tata Power not setting off MAT within the period of 10 years, it would then be a liability incurred upon Tata Power and Tata Power will have a right to pass on the

said liability to the Appellant only after the said liability is crystallized/fixed/determined.

11. This Tribunal considered Section 115 JB and Section 115 JAA of the Income Tax Act 1961, considered the Supreme Court's judgment in ***Commissioner of Income Tax, Chennai v. Tulsyan NEC Ltd***[4] and examined the concept of MAT. This Tribunal observed that Section 115 JB of the Income Tax Act deems the book profits to be the "total income" of the company chargeable to tax, upon satisfaction of the condition that the regular tax payable under the Income Tax Act is less than the specified percentage of the book profits, in which case, such specified percentage of the book profits becomes payable as MAT or the tax payable for that year. All other provisions of the Income Tax Act are applicable to tax paid as MAT, just as the same are applicable to regular income tax payable under the Income Tax Act. This Tribunal further clarified that MAT is an actual tax liability and is not an advance payment of income tax which is not crystallized.

[4] (2011) 2 SCC 1

This Tribunal further observed that under Section 115 JB, MAT is payable by a company when the normal tax liability of the company is below 18.5% of its book profit and therefore MAT is a tax, on income, computed in a manner different from regular income tax. Benefit of MAT credit was stated to be contingent upon following factors:

> "(i) The credit available to an assessee in respect of MAT paid by it under Section 115 JB of the Income Tax Act is limited to the extent of difference between the regular tax liability and the MAT that was paid in respect of a particular year.
>
> (ii) Such MAT credit can be set off anytime during the ten years following the payment of MAT in a year in which the assessee is liable to pay regular income tax and not MAT.
>
> (iii) The extent to which the available MAT credit can be set off in a year is limited to the difference between the regular income tax

payable in respect of that year and the MAT calculated on its book profits for that year.

(iv) For MAT credit to be set off, the assessee must be assessed for regular income tax liability and not MAT i.e. MAT can only be set off against regular income tax and not MAT in subsequent years."

12. This Tribunal referred to its several judgments in which generating companies are held to be entitled to reimbursement of MAT in terms of various PPA clauses. Reference was made to ***Jaiprakash Hydro Power Ltd v. HPSEB*** where it was held that MAT was reimbursable on account of the introduction of Section 115 JB of the Income Tax Act amounting to change in law under the PPA between the generator and the power purchaser. After analyzing the law this Tribunal held therein that it was not possible to accept the Appellant's contention that the reimbursement of MAT paid by Tata Power in relation to the project in terms of

the relevant Articles may be reimbursed only after the expiry of set-off period of 10 years from the year of payment of MAT by Tata Power. Pertinently, this Tribunal held that this contention is contrary to the terms of the PPA and is based on wrong interpretation of the provisions of the Income Tax Act. This Tribunal concluded that MAT has to be reimbursed by the Appellant to Tata Power. However, Tata Power has to repay the amount of MAT which gets set-off in future years as provided under Section 115 JAA of the Income Tax Act,1961.

13. We have no reason to differ from the above view. We respectfully concur with it. Needless to say that it is binding on us. After considering relevant provisions of the Income Tax Act and the judgment of the Supreme Court in ***Tulsyan NEC Ltd,*** this Tribunal has in its judgment in ***Tata Power*** clearly stated that MAT is an actual tax liability which is reimbursable on an annual basis and is not an advance payment of Income Tax which is not crystallized and that MAT is a tax on income computed in a manner different from

regular Income Tax. It is clear therefore that MAT is Income Tax.

14. We are inclined to take a view that the judgment in ***Tata Power case*** covers present case. But the Appellant has, as already stated, vehemently urged that in this case there is no clause relating to MAT reimbursement, like the clause in the PPA in ***Tata Power case*** and therefore the said judgment is not applicable to this case. We will have to therefore consider whether absence of the said clause makes any difference.

15. Admittedly, the State Commission has determined the tariff for renewable energy projects vide Tariff Order 2009 passed under Section 62 of the said Act and in accordance with Tariff Regulations issued by the State Commission. Admittedly Tariff Order 2009 is applicable to the Project of Respondent No.2. Tariff Order 2009, did not factor in MAT for tariff computations but instead allowed Income tax, surcharge and cess as a pass through, as tax rates keep on

varying from year to year. It further provides that Income Tax, surcharge and cess can be claimed by the generating companies separately from the State distribution companies i.e. power procurers and such amounts can be computed on the basis of the amount of RoE approved by the order and prevailing tax rate in a particular year. Relevant extract of Tariff Order 2009 is as under:

> ***"Commission's decision:***
>
> *The Commission had fixed 16% as RoE in its earlier order. This has been implemented by all the stakeholders. RoE has to be kept higher than interest on debt to cover some of the risks involved in the investment. Hence, the RoE of 16% is considered to be adequate to meet the risks. As such the Commission approves a RoE of 16%. Further, the Commission has decided to allow tax as a pass through as tax rates keep on varying.*
>
> ***(5) Minimum Alternative Tax (MAT):***
>
> ***...***
>
> ***Commission's Decision***
>
> *The Commission, in its earlier order had factored in MAT for the Tariff Computations. Income Tax(IT), surcharge, & cess are statutory payments and would vary from year to year depending upon IT policy of the GoI.* ***Hence, the Commission decides to allow Income tax, surcharge & cess as a pass through without factoring in the same for tariff computations****.*

> *The amount of tax, surcharge & cess that has to be claimed, shall be worked out considering the amount of RoE approved in this order and the tax rate (including surcharge & cess) prevailing in the relevant years and* ***shall be claimed separately from the ESCOMs." (emphasis supplied)***

16. The above extract from Tariff Order 2009 makes it clear that the State Commission has allowed Income Tax, surcharge and cess paid in relation to the renewable energy projects to be recovered separately from the distribution licensees as and when the liability is incurred.

17. Our attention was drawn by counsel for Respondent No.2 to Tariff Order 2005, in terms whereof MAT paid on RoE of renewable energy projects was to be reimbursed to the generating company as part of the tariff payable by the power procurers. From Tariff Order 2005 and Tariff Order 2009, it is clear that the State Commission has adopted two different modes of providing for reimbursement of MAT to the generator i.e. either by factoring it at the prevailing rate uniformly for all projects while computing the tariff itself or by allowing it to be a pass through without factoring it in the

tariff computations. Thus, the State Commission has allowed the generators to get a reimbursement of Income Tax including MAT either as a part of tariff or separately as pass through on an ongoing basis during the applicability of the tariff order.

18. We are not impressed by the submission that it is for the parties to negotiate amongst themselves to incorporate a clause relating to MAT reimbursement in the PPA and reimbursement of MAT is a contractually negotiated issue which cannot be claimed by way of a right. It is true that under Section 62 of the said Act, the State Commission determines the tariff. But it is not possible to hold that in this case determination of tariff does not include issue of MAT or its reimbursement, because the pass through of Income Tax including MAT is an integral component of the tariff determined by the Tariff Order 2009. In this connection reliance is rightly placed by Respondent No.2 on relevant provisions of the Tariff Regulations and CERC Tariff

Regulations. It would be appropriate to quote them. Regulation 5.3 of the Tariff Regulations reads as under:

> ***"5. Determination of Tariff for electricity from Renewable Sources:***
>
> *…*
>
> *5.3 The Commission shall as far as possible be guided by the principles and methodologies if any specified by the CERC, National Electricity Policy and Tariff policy, while deciding the terms and conditions of tariff for renewable sources of energy. The Commission may deviate from the above by giving the reasons in writing in order to accommodate the specific nature of renewable sources.*
>
> *…"*

19. Regulation 23 of the CERC Tariff Regulations reads as under:

> **"23. Taxes and Duties**
>
> *Tariff determined under these regulations shall be exclusive of taxes and duties as may be levied by the appropriate Government.*
>
> *Provided that the taxes and duties levied by the appropriate Government shall be allowed as pass through on actual incurred basis."*

20. Clause 5.11 (h) (4) of the National Tariff Policy, 2016 through notified on 28/01/2016 can also throw some light. It reads thus:

> ***"h) Multi Year Tariff***
>
> *4) Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess, variations in power purchase unit costs including on account of adverse natural events."*

Thus the National Tariff Policy states that an uncontrollable cost should be recovered speedily.

21. We find substance in the contention that the above provisions clearly establish that in this case recovery of tax payments by generating companies is a key component of tariff. If tax reimbursements were not a part of tariff, it would have been unnecessary to make any reference to Income Tax reimbursements.

22. Once it is held that in this case MAT is an integral part of Tariff it is not possible to agree with the submission that determination of tariff does not include issue of MAT. As we have already noted that in the Tariff Order 2009, the State Commission has allowed Income Tax including MAT, surcharge and cess as pass through. Tariff Order 2009 is not challenged and hence it is binding. It is well settled that Tariff Orders are passed in exercise of statutory powers and cannot be derogated from by parties. It is not open for the Appellant to derogate from tariff orders by contract or otherwise. Tariff Order 2009 is binding on the Appellant. Therefore absence of a provision in the PPA relating to reimbursement of MAT is of no significance. The submission that absence of a clause in the PPA relating to MAT reimbursement disentitles Respondent No.2 from getting MAT reimbursement must fail.

23. The next point which needs to be dealt with is the presence of Clause 4.1(ix) in the PPA. It is contended that

Clause 4.1(ix) of the PPA provides that Respondent No.2 would be responsible for all payments on account of any taxes, cesses, duties etc as imposed by the Government or its competent statutory authority and therefore there is no question of MAT reimbursement. The State Commission has dealt with this issue. We concur with the said reasoning. It would be advantageous to recapitulate the said reasoning. The State Commission has observed that under the Tariff Order 2005, the liability to pay the Income Tax by the generator was factored in the tariff itself and it was not pass through to the distribution licensee. Therefore, Article 4.1(ix) was introduced in the Standard PPA, fixing the liability in respect of Income Tax etc. on the generator. However, subsequent to passing of Tariff Order 2009 there would have been corresponding amendment in the standard PPA, regarding pass through of the liability of Income Tax etc paid by the generator to the distribution licensee. Since no change was effected Respondent No.2 requested the State Commission vide its letter dated 17/08/2010 to clarify the position. The State Commission responded vide its letter

dated 31/08/2010. This letter is very important. We need to quote the relevant paragraph.

> "In the Standard Format of the PPA for NEC Projects, since there is no specific clause regarding treatment of income tax paid by the generator, the same is governed by the orders issued by the Commission from time to time. Hence, if the developer has entered into a PPA for NEC Projects on or after 01/01/2010 (the date from which the order comes into effect), he has to claim the amount of income tax from the concerned ESCOM, after producing the proof of payment of income tax".

Thereafter, Respondent No.2 sent a draft PPA to the Appellant incorporating the suggested term. The Appellant did not respond to the same. It is Respondent No.2's case that thereafter PPA dated 28/12/2010 was executed which did not contain the MAT reimbursement clause. It is the case of Respondent No.2 that the Appellant had assured Respondent No.2 that MAT

reimbursement clause would be included in the PPA at the time of approval of the PPA from the State Commission. Respondent No.2 wrote a letter to the State Commission stating that the PPA was before the State Commission for grant of approval and that incorporation of an appropriate clause regarding MAT reimbursement was necessary. In response to this letter the State Commission vide its letter dated 14/03/2011 reiterated its stand that since in the standard format of the PPA there is no specific clause regarding treatment of Income Tax paid by the generator the same would be governed by the orders passed by the State Commission from time to time. The State Commission had also informed Respondent No.2 that it could claim reimbursement of Income Tax paid on production of proper documents. These facts very succinctly narrated by the State Commission lead us to concur with the conclusion drawn by the State Commission that Respondent No.2 was led to believe by the Appellant that at the time of approval of the PPA or subsequently a proper clause regarding

reimbursement of Income Tax (including MAT) would be suitably incorporated in the PPA with the approval of the State Commission and therefore it signed the PPA in the present form. It is clear from the sequence of events that the Appellant refused to cooperate. We have already discussed Tariff Order 2009. We repeat that parties are bound by Tariff Order 2009 which allows Income tax including MAT as pass through. In any event it is held by the Supreme Court in ***Tarini Infrastructure*** that the power of regulation of the State Commission is indeed of wide import. The Supreme Court has clarified that tariff determination is a statutory exercise and is not based on mutual agreement of the parties. The Supreme Court has further held that the courts must lean in favour of flexibility and not read inviolability in terms of the PPA. Therefore the stipulation in Tariff Order 2009 regarding reimbursement of MAT must be adhered to by the Appellant. In view of this authoritative pronouncement of the Supreme Court and in the circumstances of the case, it is not possible to come to a conclusion that because a

clause relating to MAT reimbursement was not incorporated in the PPA and in view of clause 4.1(ix) of the PPA Respondent No.2 is not entitled to reimbursement of MAT.

25. We have already noted that the instant case is covered by the judgment of this Tribunal in ***Tata Power case.*** It was sought to be distinguished on the ground that in that case there was a MAT reimbursement clause in the PPA which is absent here. We have made it clear that absence of MAT reimbursement clause makes no difference in view of Tariff Order 2009 which is binding on the Appellant. The parties cannot derogate from Tariff Orders. But we would like to make it clear that judgment of this Tribunal in ***Tata Power case*** does not merely rest on the MAT reimbursement clause in the PPA. That judgment has discussed the concept of MAT in light of relevant Sections of the Income Tax Act and judgment of the Supreme Court in ***Tulsyan NEC Ltd.*** It is therefore

not possible to hold that judgment in ***Tata Power case*** is not applicable to this case.

26. In the view that we have taken we find no substance in this appeal. The appeal is dismissed. Needless to say that IA No.405 of 2015 also stands disposed of.

27. Pronounced in the open court on this **21st day of March,2017.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√**REPORTABLE/~~NON-REPORTABALE~~**