

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 180 OF 2015

Dated: 22nd February, 2018

**Present: HON'BLE MR. N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IN THE MATTER OF

M/s Shreenath Mhaskoba Sakhar Karkhana Ltd

Shreenath Nagar Pathethan, Post Rahu,
Tal-Daund, Distt. Pune - 412207

..... Appellant

VERSUS

1. Central Electricity Regulatory Commission

3rd & 4th Floor, Chandralok Building,
36, Janpath,
New Delhi-110 001

2. National Load Despatch Centre

Through General Manager
B-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi-110 016

3. Maharashtra State Load Despatch Centre

Through Chief Engineer
Thane-Belpur Road, P.O. Airoli,
Navi Mumbai -400709

..... Respondents

Counsel for the Appellant ... Ms. G. Umapathy
Mr. Aditya Singh
Ms. R. Mekhala

Counsel for the Respondent(s)... Mr. Arjun Krishnan
Mr. Ankur Singh
Mr. Sumit Srivastava for R-2

(I) The Appellant has sought the following reliefs in Appeal No. 180 of 2015:

- (a) Set aside the impugned order dated 29.5.2015 passed by CERC in Petition No. 64/MP/2014 to the extent it holds that the appellant is disqualified from participating in the REC scheme by virtue of the second proviso to Regulation 5(1)(c) of the REC Regulations; and
- (b) Pass such other and further orders as the Hon'ble Tribunal may deem fit and appropriate in the interest of natural justice.

(II) The Appellant herein presented this Appeal for considering following substantive questions of law:-

- (i) Whether the decision rendered by CERC with regard to REC Generators in the State of UP would not be applicable to all the cogeneration plants in the Country?
- (ii) Whether the decision dated 13.3.2015 passed in Petition No. 84/2015 would be applicable to the facts of the present case?
- (iii) Whether the refusal to issue RECs to the appellant on the ground that it being exempted from payment of electricity duty by State, is disqualified from participating in the REC Scheme by virtue of the second

proviso to Regulation 5 (1) (c) of the REC Regulations is at all sustainable?

J U D G M E N T

PER HON'BLE JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. **M/s Shreenath Mhaskoba Sakhar Karkhana Ltd**, the Appellant herein, has filed the instant Appeal, being Appeal No. 180 of 2015, under Section 111 of the Electricity Act 2003, on the file of the Appellate Tribunal for Electricity, New Delhi, questioning the legality and validity of the Impugned Order dated 29.05.2015 passed in Petition No. 64/MP/2014 on the file of the **Central Electricity Regulatory Commission, New Delhi** (hereinafter referred to as, "**Central Commission**") and to pass such other and further order or orders as this Hon'ble Tribunal may deem fit and proper under the facts and circumstances of the present case and in the interest of justice and equity.

The brief facts of the case, inter-alia, are as follows:-

2. The Appellant is a company engaged in manufacture of sugar and has set up a bagasse based co-generation power plant with a total installed capacity of 9.250 Megawatt in Baramati Taluka of Pune District in the State of Maharashtra. The co-generation plant was commissioned on 20.01.2012.

3. The Appellant entered into an Energy Purchase Agreement (EPA) dated 24.01.2011 with Maharashtra State Electricity Distribution Company Ltd (hereinafter referred to as “MSEDCL”) for sale of surplus power over and above its requirement of self-consumption.

4. Accordingly, the Appellant was granted accreditation by Maharashtra Energy Development Agency (hereinafter referred to as “MEDA”) vide communication dated 28.08.2012 for 4.545 Megawatt of power used for self-consumption by the Appellant herein. The Appellant was registered under Renewable Energy Certificates (hereinafter referred to as “REC”) mechanism by the Respondent on 26.10.2012. Thereafter, the Appellant applied for issuance of RECs to Respondent for its self-consumption for a period from October, 2012 to March, 2013.

5. It is, however, the case of the Appellant that National Load Despatch Centre (hereinafter referred to as “NLDC”) after issuing the REC for the month of October, 2012, the eligibility to the REC mechanism is established. The process of accreditation and registration takes care of the eligibility requirement. As per the regulations, NLDC is required to approve the issuance of certificates within a stipulated time which was not followed for later applications and the RECs for the months of November, 2012 to March, 2013 were

denied by the Respondent without any justification. Hence, this Appeal is filed.

6. The Respondent by its communication dated 29.05.2013 informed the Appellant that since self-consumption has been exempted from payment of electricity duty, such exemption amounts to waiver of electricity duty under the second proviso to Regulation 5 of the REC Regulations and accordingly, RECs for self-consumption cannot be issued.

7. Be that as it may, the communication issued by the Respondent has been set aside by the Central Commission vide Order dated 14.11.2013 in Petition No. 122/MP/2013 and other related matters. It is the claim of the Appellant that Respondent ought to have issued RECs to all the eligible entities for their self-consumption. The Central Commission in the said Order observed that abolition of electricity duty on consumption from own sources of generation cannot be treated as waiver of electricity duty for the purpose of REC Regulations and such directions are equally applicable to other co-generation plants located in other states.

8. As Section (4) of the Bombay Electricity Duty Act, 1958 (hereinafter referred to as "BED Act, 1958) provides for self-consumption of power from one's own source of generation and the said provision can be relaxed by the State Government by invoking

Section 5A, therefore, the Government of Maharashtra is empowered to exempt any category of generators from electricity duty. The Government of Maharashtra vide its Notification dated 18.11.2010 exempted RE generators from payment of electricity duty on self-consumption of renewable power for a period of ten years from the date of commencement/implementation of non-conventional energy projects which have been established on or after 14.10.2008. It is the case of the Appellant that the Appellant has been exempted from payment of electricity duty in respect of consumption of renewable power generated by its bagasse based co-generation unit.

9. The Central Commission by its Order dated 14.11.2013 set aside the Respondent's communication dated 29.09.2013 and issued appropriate direction that first Respondent has not issued RECs in respect of self-consumption of renewable energy during the period from November, 2012 to March, 2013. Therefore, being aggrieved by non-issuing of renewable energy certificates of self-consumption during the said period, the Appellant was constrained to file a Petition No. 64 of 2014 on the file of the Central Commission, New Delhi, seeking a direction directing the NLDC – the second Respondent, to forthwith issue RECs in respect of self-consumption of renewable energy generated by the Appellant.

10. It is the case of the Appellant that, the first Respondent in its reply dated 01.07.2014 has submitted that in terms of the Central Commission's Order dated 18.10.2012 passed in Petition No. 36/MP/2013 and the Order dated 08.01.2013 in Review Petition No. 25/2013, an RE generator whether qualifying as Cogeneration Plant (hereinafter referred to as "CGP") or other RE generator, cannot obtain the benefit of RECs for self-consumption so long as it takes the benefit of electricity duty waiver and Order dated 18.10.2012 passed by the Central Commission is applicable in all cases having similar facts and circumstances of the case. The first Respondent is required to satisfy itself regarding eligibility for grant of RECs which included its satisfaction that the applicants have not availed the benefits of waiver of electricity duty. The Respondent sent a communication to all the State Agencies to furnish certificates that CGPs falling under category of Captive Power Plant (hereinafter referred to as "CPP") had not availed any benefits which are admissible to the CPPs/CGPs/Co-generation plants.

11. Further, the Appellant has filed a Rejoinder stating, inter alia, that the first Respondent's contention that by reason of availing electricity duty waiver, Appellant is disentitled for grant of RECs is not only baseless, but also against the reasoned Order passed by the Central Commission dated 14.11.2013 wherein the Central Commission has passed the Order to incur the disqualification under

second proviso to Regulation 5(1)(c) of REC Regulations, the benefit of electricity duty waiver must have been voluntarily availed by an eligible entity.

12. The action of the first Respondent to debar the Appellant from grant of RECs on the ground that the Appellant is availing electricity duty waiver is unjustified, arbitrary and not sustainable in law.

13. It is further the case of the Appellant that, he has filed detailed written submissions before the Central Commission contending, inter-alia, that from the current dispensation in the State of Maharashtra, it is evident that electricity duty in respect of self-consumption of renewable energy has been abolished/ exempted for all practical purposes. Such exemption has, admittedly, not been applied for and / or voluntarily availed by the Appellant. Further the expression "*waiver of electricity duty*" has been previously interpreted by the Central Commission as meaning a waiver in response to a voluntary availment of the benefit of electricity duty exemption by a renewable generator. The Appellant has relied on the Order of the Central Commission where it has taken a view that for incurring the disqualification under the second proviso to Regulation 5(1)(c), a renewable generator must have willfully exercised the choice to opt for exemption from payment of electricity duty. The Central Commission ought to have considered the request of the Appellant.

14. The second Respondent has filed detailed reply statement stating that in terms of the Central Commission's Order dated 18.10.2012 in Petition No. 36/MP/2013 and the Order dated 08.01.2013 in Review Petition No. 25/2013, an RE generator whether qualifying as CGP or other RE generator, cannot obtain the benefit of RECs for self-consumption so long as it takes the benefit of electricity duty waiver.

15. The second Respondent has submitted that, the decision of the Central Commission in the Order dated 18.10.2012 is applicable in all cases having similar facts and circumstances of the case. Moreover, the second Respondent is required to satisfy itself regarding eligibility of the Applicant for grant of RECs which included its satisfaction that the applicants have not availed the benefits of electricity duty waiver. Accordingly, the second Respondent stated that the applicants have not availed the benefit of electricity duty waiver. Accordingly the second Respondent sent a communication to all the State Agencies to furnish certificates that co-generation plants falling under category of CPP had not availed any benefits which are admissible to the CPPs/CGPs/Co-generation plants.

16. In response, MEDA vide its letter dated 28.02.2013 informed the second Respondent that 72 projects were accredited as CPPs for the self-consumption and were availing the benefits of electricity duty

waiver/exemption. MEDA had further informed the second Respondent that the Government of Maharashtra vide notification dated 18.11.2010 has exempted the captive consumption of energy generated through non-conventional energy projects from payment of electricity duty for the first 10 years from the date of implementation/commencement of the projects established on or after 14.10.2008. MEDA has also stated that some generators had voluntarily been paying electricity duty even though self-consumption was exempted from payment of electricity duty, though MEDA was not aware of the rates at which such duty was being paid.

17. Further, it is the case of the second Respondent that while rejecting the applications of the generators, including the applicant, for grant of RECs, the second Respondent considered the legal position regarding electricity duty prevailing in the State of Maharashtra and also sought legal opinion on the same, before coming to a conclusion that renewable energy generators are exempted from payment of electricity duty. The second Respondent has submitted that electricity duty can be waived by the State Government under Section 5A of the BED Act, 1958 and the notification dated 18.11.2010 has been issued by the Government of Maharashtra in exercise of power under Section 5A of the BED Act, 1958 granting exemption to renewable energy captive power plants from the payment of electricity duty. The second Respondent stated that it has examined whether such an exemption

amounted to waiver of electricity duty within second proviso to sub-clause (c) of clause (1) of Regulation 5 of the REC Regulations and came to the conclusion that the exemption granted from payment of electricity duty to the generating units for self-consumption was indeed a benefit or concession and as such, electricity duty was deemed to have been waived by the Government of Maharashtra. The second Respondent further submitted that its communication dated 29.05.2013 regarding non-issuance of RECs was challenged by the different co-generating plants of UP and two RE generators from Maharashtra. Subsequently, the Commission vide order dated 14.11.2013 directed the second Respondent to process the case of UP's co-generation plants for issuance of RECs for the period from November, 2011 till July, 2013. However, the order with regard to Maharashtra was reserved. The second Respondent has submitted that since the present petition is also similar with the petitions filed by co-generation plants of Maharashtra, the RECs of the petitioner for the period from November, 2012 to March, 2013 could not be issued by it. The second Respondent has further submitted that in the case of Maharashtra, exemption from levy of electricity duty is only for a period of 10 years and cannot be stated to have been abolished. Therefore, the exemption by the Govt of Maharashtra amounts to a waiver. At the end of 10 years' time period, these generators shall be

entitled to avail RECs in terms of the relevant provisions of REC Regulations.

18. The Central Commission, after hearing learned counsel appearing for both the parties and after perusal of material available on record and going through the written submissions filed by the Appellant and reply filed by the second Respondent, framed the following necessary issues for consideration:-

- (i) Whether the case of the Appellant is covered under Commission's direction dated 14.11.2013 in Petition No. 122/MP/2013 and other related matters.
- (ii) Whether there is waiver of electricity duty in the State of Maharashtra in so far as renewable energy generators are concerned.

Issue No. 1

19. After careful evaluation of the material available on records and after critical evaluation of the oral and documentary evidence and the case made out by the Appellant and the Respondent, it is observed that in case a co-generation plant was availing any concessional benefits or banking facility or waiver of electricity duty etc, it would be required to forgo these benefits before availing the RECs for the entire generation from the plant including self-consumption. M/s Dhampur Sugar Mills Limited, the Appellant in Petition No. 36/MP/2012 filed Review Petition No. 25/2012 seeking review of the order dated

18.10.2012 to the extent it envisages the ability of the RE generator to forgo the benefits of abolition of electricity duty on consumption of electricity from one's own source of generation. Two other RE generators filed IAs in Petition No. 45/MP/2012 and Petition No. 46/MP/2012 for clarifications that forgoing of waiver of electricity duty cannot be a condition precedent to the participating in REC scheme. The Commission in its order dated 08.01.2013 decided that a co-generation plant which does not qualify to be a CGP, its entire generation including self-consumption shall be deemed to be generation of electricity by a generating company. Such a plant shall be entitled for grant of REC. However, such a plant, not being a CGP, shall not be entitled for any benefit available to CGP and if any co-generation plant is availing any of the concessional benefits available to CGP, it shall be required to forgo the same before availing the REC for its entire generation including self-consumption.

20. However, in Petition No. 122/MP/2013, an issue was arisen whether the co-generation plants in Uttar Pradesh are availing waiver of electricity duty. The Commission after examining the provisions of UP Electricity Duty Act, 1952, the Notifications dated 03.01.1997, 06.02.1998, 13.09.2012 and 12.12.2012 issued by the Government of Uttar Pradesh came to the conclusion that the electricity duty on consumption of electricity from own sources of generation has been abolished by the Government of Uttar Pradesh in exercise of its power

under Section 3 of the Uttar Pradesh Electricity (Duty) Act, 1952 vide Notification dated 06.02.1998 and there is no change in the policy of the Government of Uttar Pradesh. The other question that it considered was whether such abolition of electricity duty amounted to waiver of electricity duty for the purpose of grant of RECs. The Commission after examining the provisions of REC Regulations and UP Electricity Duty Act, 1952 and the notifications issued thereunder, came to conclusion that the abolition of electricity duty on consumption from own sources of generation prevalent in the State of Uttar Pradesh cannot be treated as waiver of electricity duty under fourth proviso to Regulation 5(1)(c) of REC Regulations.

21. It is the case of the Appellant that since the Order dated 14.11.2013 had attained finality, it should be available to all REC generators in the country. It is clarified that the order was passed in case of the cogeneration plants in the State of UP in the light of the provisions of UP Electricity Duty Act, 1952 and taking into consideration relevant Notifications issued by the Government of UP under the said Act. The provisions of Electricity Duty Act differ from State to State and their actual operation also differs from State to State depending upon the policy decision of the concerned State Government. Therefore, the decision in the order dated 14.11.2013 cannot be automatically extended in case of the Appellant which is a cogeneration plant operating in the State of Maharashtra. The Order

dated 14.11.2013 has attained finality in so far as the cogeneration plants in the State of UP are concerned and the said order does not address the issue of cogeneration plants of other States. Therefore, the Central Commission has rightly considered the case of the Appellant on its own merits and, in the light of the Maharashtra Electricity Duty Act and the notifications issued by the Government of Maharashtra with regard to the electricity duty, has answered issue No. 1 against the Appellant.

Issue No.2 :

22. As held by the Central Commission in its Orders dated 18.10.2012 and 08.01.2013 and as per the governing principle, the entire generation including self-consumption of a cogeneration plant which does not qualify to be a CGP, shall be deemed to be generation of electricity by a generating company and accordingly such a plant shall be entitled for grant of REC. However, such a plant not being a CGP shall not be entitled for any of the benefits available to CGP and if any co-generation plant is availing any of the concessional benefits admissible to CGP, it shall be required to forgo the same before availing REC for its entire generation including self-consumption.

23. However, it is observed that the benefits admissible to a CGP are envisaged in fourth proviso to Regulation 5(1)(c) of REC Regulations. It has been considered whether the Appellant is availing any of the

benefits in the form of concessional/promotional transmission or wheeling charges, banking facility benefit or waiver of electricity duty and if so, the Appellant is required to forgo the same for the purpose of availing RECs. The Appellant's cogeneration plant is located in Maharashtra and it was commissioned on 20.01.2012. The Government of Maharashtra issued a Policy Resolution dated 14.10.2010 extending certain benefits and facilities to the renewable energy based generators including the projects based on Bagasse. As per Para 4.2 of the Policy Resolution, developers using electricity generated from the projects commissioned under the Policy for their captive consumption shall not be levied electricity duty for the first 10 years from the date of commissioning. Since the Appellant's plant is availing the benefits of non-levy of electricity duty on self-consumption as per the policy of State Government, the Appellant is not eligible for grant of RECs unless it forgoes the same.

24. The Appellant's claim is that its case stands on a similar footing as the cases decided in order dated 14.11.2013 in Petition No. 126/MP/2013. The issue whether electricity duty has been abolished or waived in Maharashtra has been considered in detail by the Commission in its order dated 13.3.2015 in Petition No. 84/MP/2015 and it held that it cannot be said that the Appellant is exempted from the payment of electricity duty for self-consumption in terms of Government of Maharashtra Notification dated 18.11.2010 as

applicable pan-industry and amounts to abolition of electricity duty. It may be noted that unlike in the case of Maharashtra, there is abolition of electricity duty in Uttar Pradesh which has been dealt with by the Commission in its order dated 14.11.2013 in Petition No. 122/MP/2013. Therefore, the present case is distinguishable from the case of Uttar Pradesh.

25. The Central Commission, after due appreciation of the oral and documentary evidence and other relevant material available on file, has held in paras 21 & 22 of the impugned Order that the above decision is distinguishable with the case of RE generators in the State of Uttar Pradesh from the RE generators in the State of Maharashtra in so far as the electricity duty is concerned.

26. Further, it is held that it has been conclusively established that there is waiver of electricity duty in the State of Maharashtra. The Appellant shall be considered as eligible for grant of RECs if it forgoes the benefits of waiver of electricity duty for the relevant period i.e. from November, 2012 to March, 2013.

27. Considering the above facts and circumstances of the case, the Petition was allowed in part, with the direction to the second Respondent herein to consider the case of the Appellant for grant of RECs for the period from November, 2012 to March, 2013 for 4.545 Megawatt if the Appellant produces the documentary evidence that it

has forgone the benefits of electricity duty by making payment for the same. The second Respondent was directed to issue RECs for the said period within 15 days of the Appellant satisfying the second Respondent regarding payment of electricity duty on the power generated and consumed for captive use. Accordingly, the Petition filed by the Appellant was disposed of in terms of the above order. Not being satisfied of the impugned order, passed by the Central Commission, the Appellant herein felt necessitated to present this Appeal.

Submissions of the learned counsel appearing for the Appellant are as follows :

28. The bone contention of the learned counsel appearing for the Appellant is that it is a company engaged in the manufacture of sugar and has set up a bagasse based cogeneration power plant with a total capacity of 9.250 MW in Baramati Taluka of Pune District in the State of Maharashtra.

29. The cogeneration plant of the Appellant was commissioned on 20.01.2012. It also entered into Energy Purchase Agreement (hereinafter referred to as "EPA") dated 24.01.2011 with MSEDCL for sale of surplus power over and above its requirement of self-consumption. Accordingly, the Appellant was registered under REC mechanism by Respondent on 26.10.2012. The Appellant applied for issuance of RECs to Respondent for its self-consumption during the period from October, 2012 to March,

2013 and further, the submission of the Appellant is that the decision of the Central Commission in matter relating to UP would be applicable in Maharashtra and that the denial of REC on the ground that it is exempted from payment of electricity duty by the State of Maharashtra, and hence not entitled to participate in REC scheme is unjustified. Further, he submitted that the Order dated 14.11.2013 passed by the CERC is squarely applicable under the facts and circumstances of the case in hand and the CERC erred in not extending the direction contained in the UP case which was applicable for cogeneration plants as well. It was specifically observed that abolition of electricity duty on consumption from own sources of generation would be treated as waiver of electricity duty for the purpose of REC Regulation. Therefore, the impugned Order is inconsistent with the directions of the CERC Order dated 14.11.2013, which based on the notification of the Government of UP abolishing electricity duty, ought to have been made applicable to the case of Appellant in Maharashtra State also. The Appellant further submitted that the relevant notification of the Government of UP, abolishing electricity duty in respect of consumption of power from own sources of generation was universally applicable. The CERC was pleased to hold that “REC should not be denied to the co-generation plants including the Appellant on the ground that the co-generation plants are not required to pay the electricity duty in the State of UP”. It was specifically observed that abolition of electricity duty on consumption

from own sources of generation cannot be treated as waiver of electricity duty for the purpose of REC Regulations. Further, it is vehemently submitted that the decision of the CERC ought to have been extended by the second Respondent to the Appellant, as such directions were equally applicable to other co-generation plants in the other States also.

30. Be that as it may, the Government of Maharashtra abolished electricity duty on self-consumption of non-conventional energy. Levy of electricity duty on captive consumption of electricity under Section 4(5) of the BED Act, 1958 has to be read subject to the State Government's powers under Section 5 A to grant exemption in respect thereof. Under the statutory scheme of the BED Act, 1958 the levy is subject to the overriding statutory power of the State Government to exempt, in public interest, any category of consumers from payment of electricity duty.

31. However, he further contended that, in exercise of its powers under Sec 5A, the Government of Maharashtra issued notification, whereby the non-conventional energy projects were exempted from payment of electricity duty payable under clause (b) of Part (G) of the Schedule to the said Act for a period of 10 years from the date of commencement. The disqualification under Regulation 5(1)(c) can only be attracted when the State Government additionally provides for an optional exemption category for availing exemption by generators and only in such a case,

the generators may stand disqualified under the second proviso to Regulation 5(1)(c).

32. The learned counsel appearing for the Appellant submitted that levy of electricity duty is subject to the overriding statutory power of the State Government to exempt, in public interest, any category of consumers from payment of duty. The Appellant having commissioned its plant in January, 2012 is not required to pay the electricity duty in respect of captive consumption of renewable power from such plant for a period of 10 years. The case of the second Respondent that the exemption from levy of electricity duty is only for a period of 10 years and cannot be held to be abolished is wholly untenable. Further the submission of the second Respondent that the order dated 14.11.2013 passed in the case of UP pertaining to the provisions of UP Electricity Duty Act, 1952 and that the provisions of the Act differ from State to State and their actual operation also differs from State to State is equally untenable and unsustainable in law. He submitted that the expression “waiver of electricity duty” has been previously interpreted by CERC in similar circumstances – as meaning a waiver in response to a voluntary availment of the benefit of electricity duty waiver by a renewable generator. Thus, for incurring the disqualification under the second proviso to Regulation 5(1)(c), a renewable generator must have willfully exercised the choice to opt for waiver from payment of electricity duty. Further, he is quick to point out the relevant portion of the order dated

14.11.2013 passed by the Central Commission in Para 14 of the said Order.

33. It is not a case where the Appellant has applied to the State Government under Section 3(4) of the UP Electricity Duty Act, 1952 and has been granted exemption from payment of electricity duty on self-consumption which is otherwise payable. In the present case, electricity duty on self-consumption is not payable at all and therefore, availing the benefit of waiver of electricity does not arise.

34. The learned counsel appearing for the Appellant further submitted that the term waiver means the voluntary relinquishment of known right of privilege. He submits that the word 'exemption' does not have a materially different connotation from the word 'abolition'. In Central Electricity Regulatory Commission's Order, it has interpreted the Uttar Pradesh notification as mandating as abolition/exemption of electricity duty, and both the terms have been used interchangeably.

35. For incurring the disqualification under the second proviso to Regulation 5(1)(c), a renewable generator must have willfully exercised the choice to opt for waiver from payment of electricity duty. However, the same is not applicable in the case of Maharashtra since in exercise of its powers under Section 5A of the 1958 Act, the Government of Maharashtra issued Notification No. ELD.2010/CR-256/NRG-1 which exempted the Captive Power from payment of electricity duty.

36. Despite taking into consideration the order of CERC dated 14.11.2013, the second Respondent is keen on implementing the scheme that generators should voluntarily pay electricity duty for being considered eligible for RECs, even though such an action would be in contravention of Sec 5A of the BED Act, 1958, which has granted exemption for a period of 10 years.

37. However, he pointed out towards third proviso to Regulation 5(1)(c) and submitted that such generators, who are ostensibly making voluntary payment of electricity duty, should be denied RECs for a period of three years from the date of such payment. The paragraph in the Resolution which is relevant, reads as under:

“All promoters/developers/investors who do not wish to obtain facilities-concession under this policy and then in that case, they need not to take infrastructural clearance from the Government.”

38. The above provisions in the Non-Conventional Energy Generation Policy, 2008 and the subsequent amendment thereto make it clear that Government may reject an RE generator from being eligible for benefits/concession under the Policy. An RE generator may opt not to avail the benefits/concession under the Policy. The RE generators who are not covered under the Non-Conventional Energy Generation Policy, 2008 are liable to pay electricity duty. It is pertinent to mention that the Notification dated 18.11.2010 has been issued to give effect to the Non-

Conventional Energy Generation Policy, 2008. Clause (b) of Part G of Schedule to Bombay Act is still on the statute and governs the payment of electricity duty for self-consumption. Those RE generators who do not avail the benefits of Non-Conventional Energy Generation Policy, 2008 have the obligation to make payment of electricity duty as per clause (b) of Part G of Schedule to the Bombay Act.

39. The learned counsel submitted that, the second Respondent's stand that payment of electricity duty is a necessary pre-condition for availing REC benefits, even after rejection thereof by CERC in its Order dated 14.11.2013, is wholly inexplicable. The second Respondent, who is entrusted with the task of ensuring smooth implementation of REC scheme, introduced with the laudatory objective of encouraging renewable energy generation by providing additional incentive in the form of RECs. Instead of issuing RECs to generators in Maharashtra on parity with the beneficiaries of CERC order dated 14.11.2013, the second Respondent is insisting that generators should voluntarily pay electricity duty for being considered eligible for RECs, even though issuance of RECs to such generators is in the teeth of the embargo stipulated under the third proviso to Regulation 5(1)(c). Given the clear language of the third proviso to Regulation 5(1)(c), it is submitted that it is such generators, who are ostensibly making voluntary payment of electricity duty, that should be denied RECs for a period of three years from the date of such payment.

40. Finally, the learned counsel appearing for the Appellant submitted that the decision rendered by CERC with regard to REC Generators in the State of UP ought to have been made applicable to all the cogeneration plants in the Country and the refusal to issue RECs to the Appellant on the ground that the payment of electricity duty is exempted by the State of Maharashtra as a disqualification for participating in the REC scheme by virtue of the second proviso to Regulation 5(1)(c) of the REC Regulations is wholly unsustainable. Further, the learned counsel appearing for the Appellant submitted that the Central Commission has failed to consider the relevant Regulations. He submitted that the Order passed by the Central Commission so far it relates to not considering the reliefs sought in the instant Appeal in favour of the Appellant is not at all sustainable. Rejecting the prayer of the Appellant on a technical ground by the Central Commission will be contrary to the relevant Regulations. Therefore, he submitted that the impugned Order passed by the Central Commission is liable to be modified granting the reliefs sought in the instant Appeal as prayed for by the Appellant in the interest of justice and equity.

Submissions of the learned counsel appearing for the Respondent are as follows :

41. The learned counsel appearing for the second Respondent, *inter-alia*, submitted that, the case of the Appellant is premised on the Order dated 14.11.2013 wherein the Central Commission decided that the

abolition of electricity duty on self-consumption would not amount to waiver of electricity duty since there was no option for CPP/CGP/Cogeneration Plan to voluntarily opt for forgoing the benefit of electricity duty. In the instant case, there is an important distinction from the order dated 14.11.2013 passed by the Central Commission. The electricity duty has not been abolished, rather, there is a limited exemption that is granted for projects that have been commissioned after 14.10.2008 and for a limited period of 10 years. Admittedly, the Appellant has been availing the benefit of exemption, which is nothing but 'waiver of electricity duty'. Further, he vehemently submitted that another distinction in the present case is that it is very much possible for the Appellant to opt not to take the benefit of exemption by either not making an application to MEDA in terms of para 2.0 of the Policy or by not submitting the Infrastructure clearance in terms of resolution dated 03.08.2009. Here it is relevant to mention that the Appellant was well aware about the proviso to Regulation 5(c) introduced by the amendment to the REC Regulations as well as the provisions relating to exemption from electricity duty much prior to commencement of the project. If the ground urged by the Appellant is accepted, it would render the expression 'waiver of electricity duty' in Regulation 5(c) as meaningless and otiose or redundant. The Central Commission in its order dated 14.11.2013 has held that 'abolition' would not amount to waiver of electricity duty because the proviso to Regulation 5(c) and the expression

‘waiver’ implies an element of voluntariness in not availing of the benefit. If the Appellant’s case is upheld, it would mean that even where it was possible for the Appellant not to take the benefit of the exemption, it would not amount to waiver of duty. Therefore, he submitted that the Central Commission has taken all the relevant facts into consideration while passing the order impugned and has rightly justified in granting the relief as sought for by the Appellant as they are entitled that has been considered and extended the benefit in favour of the Appellant. Therefore, he submitted that the Impugned Order passed by the Central Commission is well-founded and well-reasoned and any interference by this Tribunal is uncalled for.

42. Further, the learned counsel appearing for the second Respondent, to substantiate and justify the order passed by the Central Commission, pointed out that on 14.10.2008, the Maharashtra Government issued a Policy Resolution for incentivizing power generation from non-conventional sources of energy. The Resolution of the Maharashtra Government was amended vide Resolution dated 03.08.2009 clarifying that those who did not wish to avail the benefit of the Policy need not take Infrastructure clearance from the Government. All the promoters/developers/investors who do not wish to obtain facilities-concession under this policy and then in that case, they need not to take infrastructure clearance from the Government.

43. On 14.01.2010, the Central Commission issued the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificates for Renewable Energy Generation) Regulation, 2010 (hereinafter referred to as “REC Regulations”). REC Regulations were amended on 29.09.2010 to include proviso to Reg. 5 that requires a CPP to forgo any benefits/concessions/waiver of electricity duty to be eligible to participate in the REC Scheme. On 18.11.2010, in terms of the Policy resolution, the Maharashtra Government issued a notification under section 5A of Bombay Electricity Duty Act, 1958 exempting RE generators from payment of electricity duty on self-consumption of renewable power for a period of 10 years from the date of commencement/implementation of non-conventional energy projects established on or after 14.10.2008. On 20.01.2012, the Appellant’s co-generation plant was commenced. The Appellant company is engaged in manufacture of sugar and has set up a bagasse based cogeneration power plant with total installed capacity of 9.250 MW in Baramati Taluka, Pune in Maharashtra State. Admittedly, the Appellant has been availing of the benefit of exemption under the 2008 Maharashtra State Policy. On 18.10.2012, the Central Commission passed an order in *Mawana Sugar v. UPSLDC etc* (Petition No. 34/MP/2012) whereby Bagasse based co-generation plants were held to be eligible to participate in the REC scheme in accordance with the REC Regulations, even though these plants did not fulfill the requirements of the Captive

Generating Plant (CGP), but only if they forgo the concessional benefits including waiver of electricity duty (if any availed by them).

44. The Appellant was registered under REC mechanism on 26.10.2012. Thereafter, the Respondent issued RECs for October, 2012 but denied RECs for the months of Nov 2012 to March 2013 when it became clear that the Appellant was availing of electricity duty exemption. Once he availed the benefit of electricity duty exemption, he is not entitled to redress for this relief and further he vehemently submitted that the Appellant has taken redress to grievance only after the Order dated 14.11.2013 passed by the Central Commission (concerning plants situated in UP) where it was clarified that the exemption availed by the cogeneration plants should be voluntary and by choice in order to amount as a waiver under second proviso to Regulation 5. It is only after the order dated 14.11.2013 passed by the Central Commission that the Appellant has filed a belated Petition being Petition No. MP/64/2014 before the Central Commission for grant of RECs for the period Nov 2012 to March, 2013. Therefore, he submitted that on the ground of delay and latches, the Appeal filed by the Appellant is liable to be dismissed.

45. Finally, he submitted that, the order dated 13.03.2015 passed by the Central Commission in the similar case of Shree Renuka Sugar case (Petition No. 84/MP/2013) holding that there is exemption of

electricity duty in Maharashtra which does not amount to abolition as in UP. The Test for when an exemption is a waiver laid down. Therefore, on this ground also, the Appeal is liable to be dismissed. Also, the learned counsel appearing for the second Respondent vehemently submitted that the Central Commission after considering the factual and legal aspect of the matter and strictly in consonance with the relevant Regulations and also taking into consideration the relevant provisions of the Electricity Act and Rules, and after critical evaluation of the oral and documentary evidence available on record has rightly justified in passing the impugned order by assigning the just, valid and cogent reasons. Therefore, interference by this Tribunal does not call for. Hence, the Appeal filed by the Appellant may be dismissed as misconstrued in the interest of justice and equity.

46. The Respondent No. 1 and Respondent No.3 served unrepresented.

47. After careful consideration of the submissions made by the learned counsel appearing for the Appellant and the second Respondent and after careful perusal of the written submissions filed by the learned counsel appearing for the Appellant the second Respondent and after perusal of the impugned Order passed by the Central Commission, the issues that arise for our consideration are as follows :

- (i) Whether the Central Commission is right in holding that the decision rendered by the CERC with regard to the REC Generators in the State of Uttar Pradesh not applicable to all cogeneration plants in the other States is justiciable in law; and
- (ii) Whether the Central Commission has justified to the extent it holds that the Appellant is disqualified from participating in the REC Scheme by virtue of the second Proviso to Regulation 5(1)(c) of the REC Regulations is sustainable in law.

Re : **Issues No. 1 & 2**

48. The principal submission of the learned counsel appearing for the Appellant, at the outset, is that the Order of the CERC dated 14.11.2013 would be squarely applicable to the facts of the present case and the CERC erred in not extending the benefit of the same to the Appellant. Further, he is quick to point out and submitted that the directions contained in the UP Case are applicable to other cogeneration plants as well, because it was specifically observed that the abolition of electricity duty on consumption from own sources of generation cannot be treated as waiver of electricity duty for the purpose of REC Regulations. Therefore, the impugned Order passed by the Central Commission is inconsistent with the directions of the CERC Order dated 14.11.2013 and is based on the notification of the Government of Uttar Pradesh, abolishing the electricity duty, and the same ought to have been made applicable to the Appellant in the Maharashtra State. As per the relevant

notification of Government of Uttar Pradesh, abolishing electricity duty in respect of consumption of power from one's own source of generation was universally applicable. Therefore, the CERC was pleased to hold that RECs should not be denied to the cogeneration plants including the Appellant on the ground that the cogeneration plants are not required to pay the electricity duty in the State of UP. Further, it is specifically pointed out that the abolition of electricity duty on consumption from own sources of generation cannot be treated as waiver of electricity duty for the purpose of REC Regulations. Therefore, he submitted that the decision in the above case ought to have been extended by the first Respondent to the Appellant also. As such, the directions were equally applicable to the other cogeneration plants. This aspect of the matter has not been considered or appreciated by the Central Commission. Therefore, the Order is liable to be set aside so far it relates to not extending the benefit to the Appellant. In exercise of its power under 5A Regulation of the Bombay Electricity Duty Act, 1958, the Government of Maharashtra issued notification, whereby the Non-Conventional Energy projects were exempted from payment of electricity duty payable under clause (b) of Part G of the Schedule to the said Act for a period of 10 years from the date of commencement. The disqualification under Regulation 5(1)(c) can only be attracted when the State Government, additionally provides for an optional exemption category for availing exemption by generators and only in such a case, the generators may

stand disqualified under the second proviso to Regulation 5 (1)(c). Therefore, he submitted that the impugned order is liable to be modified granting the prayer as sought for in the instant Appeal on this ground also.

49. The learned counsel appearing for the second Respondent, inter alia, contended and submitted that the Resolution of the Maharashtra Government was amended vide its Resolution dated 03.08.2009 clarifying that those who do not wish to avail the benefit of the Policy, need not take infrastructural clearance from the Government. All promoters/developers/investors who do not wish to obtain facility/concession under this Policy and then in that case, they need not take infrastructure clearance from the Government. The CERC issued the CERC (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (REC Regulations). The REC Regulations were amended to include proviso to Regulation 5 that requires a CPP to forgo any benefit/concession/waiver of electricity charge to be eligible to participate in the REC scheme. He further submitted that in terms of the Policy Resolution, the Maharashtra Government issued a Notification under Section 5 A of the BED Act, 1958 exempting the RE generators from payment of electricity duty on self-consumption of renewable power for the period of 10 years from the date of commencement/implementation of non-conventional energy projects

established on or after 14.10.2008. It is not in dispute that the Appellant's cogeneration plant was commissioned on 20.01.2012. The Appellant is a company engaged in manufacture of sugar and has set up a bagasse based cogeneration power plant with a total installed capacity of 9.250 MW in Baramati Taluka of Pune District in the State of Maharashtra and it is not disputed that the Appellant has been availing the benefit of exemption under the 2008 Policy. The CERC passed an Order in *Mawana Sugar v. UPSLDC etc* (Petition No. 34/MP/2012) whereby Bagasse based co-generation plants were held to be eligible to participate in the REC scheme in accordance with the REC Regulations, even though these plants did not fulfill the requirements of the Captive Generating Plant (CGP), but only if they forgo the concessional benefits including waiver of electricity duty (if any availed by them). On 26.10.2012, the Appellant was registered under the REC mechanism. Thereafter, the Respondent issued REC for October, 2012 but denied REC for the period of November, 2012 to March, 2013 when it became clear that the Appellant was availing the electricity duty exemption. The CERC passed an Order dated 14.11.2013 concerning plants situated in UP, whereby it was clarified that the exemption availed by the cogeneration plants should be voluntary and by choice in order to amount as a waiver under second Proviso of Regulation 5. It is only after the Order dated 14.11.2013 that the Appellant filed a belated Petition

being Petition No. MP/64/2014 before the Central Commission for grant of RECs for the period Nov 2012 to March, 2013.

50. Finally, he submitted that, the order dated 13.03.2015 passed by the Central Commission in the similar case of Shree Renuka Sugar case (Petition No. 84/MP/2013) holds that there is exemption of electricity duty in Maharashtra which does not amount to abolition as in UP. The test for when an exemption is a waiver laid down.

51. In the instant case, there is an important distinction from the order dated 14.11.2013 passed by the Central Commission. The electricity duty has not been abolished, rather, there is a limited exemption that is granted for projects that have been commissioned after 14.10.2008 and for a limited period of 10 years. Admittedly, the Appellant has been availing the benefit of exemption, which is nothing but 'waiver of electricity duty'.

52. The another distinction in the present case is that it is very much possible for the Appellant to opt not to take the benefit of exemption by either not making an application to MEDA in terms of para 2.0 of the Policy or by not submitting the Infrastructure clearance in terms of resolution dated 03.08.2009. The Appellant was well aware of the proviso to Regulation 5(c) introduced by the amendment to the REC Regulations as well as the provisions relating to exemption from electricity duty much prior to commencement of the project. If the

submission of the learned counsel for the Appellant is accepted, it would render the expression 'waiver of electricity duty' in Regulation 5(c) as meaningless and redundant. The Central Commission in its order dated 14.11.2013 has held that 'abolition' would not amount to waiver of electricity duty because the proviso to Regulation 5(c) and the expression 'waiver' implies an element of voluntariness in not availing of the benefit. If the Appellant's case is upheld, it would mean that even where it was possible for the Appellant not to take the benefit of the exemption, it would not amount to waiver of duty. This aspect of the matter has been considered by assigning valid and cogent reasons and recording the findings to that effect by the Central Commission is just and reasonable. We do not find any error or arbitrariness in the impugned Order passed by the Central Commission.

53. It is pertinent to note that the Appellant's Plant is availing the benefit of non-levy of electricity duty on self-consumption from the Policy of the State Government and it will not be eligible for grant of REC unless it forgoes the same. The Appellant contended that its case stands on the similar footing as the case decided in the Order dated 14.11.2013 in Petition No. 126/MP/13. The issue whether electricity duty has been abolished or waived in Maharashtra has been considered in detail by the Commission in its order dated 13.3.2015 in Petition No. 84/MP/2015 and it held that it cannot be said that the Appellant is exempted from the payment of electricity duty for self-consumption in

terms of Government of Maharashtra Notification dated 18.11.2010 as applicable pan-industry and amounts to abolition of electricity duty. It may be noted that unlike in the case of Maharashtra, there is abolition of electricity duty in Uttar Pradesh which has been dealt with by the Commission in its order dated 14.11.2013 in Petition No. 122/MP/2013. Therefore, the Central Commission has rightly justified holding that the present case is distinguishable from the case of Uttar Pradesh. The said finding recorded by the Central Commission is strictly in consonance with the relevant Regulations. Therefore, interference by the Tribunal does not call for.

54. Therefore, the CERC has rightly observed and held that the above decision distinguishes in the State of UP from the RE Generators in the State of Maharashtra in so far as electricity duty is concerned. Further, it has been conclusively established that there is a waiver of electricity duty in the State of Maharashtra. The Appellant shall be considered as eligible for grant of RECs if it forgoes the benefits of waiver of electricity duty for relevant period i.e. from November, 2012 to March, 2013.

55. Taking into consideration the totality of the case in hand, we are of the considered view that the Central Commission, after due critical evaluation of oral and documentary evidence and considering the Orders passed by it and keeping in view the relevant provisions of the Regulations, Government Orders and Notifications, by assigning valid

and cogent reasons, has rightly justified holding that in spite of given sufficient opportunity, the Appellant failed to make out a case for consideration.

ORDER

56. In the light of the foregoing reasons, as stated above, the instant Appeal, being Appeal No. 180 of 2015 on the file of the Appellate Tribunal for Electricity, New Delhi is hereby dismissed and the Impugned Order dated 29.05.2015 passed in Petition No. 64/MP/2014 on the file of the Central Electricity Regulatory Commission, New Delhi is hereby confirmed. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 22ND DAY OF FEBRUARY, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

√ **REPORTABLE**

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