IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 254 OF 2015

Dated: 3RD APRIL, 2018

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

IN THE MATTER OF

Neyveli Lignite Corporation Limited
Neyveli House, 135, EVR Periyar Road
Kilpauk,
Chennai – 600 010 **.....** **Appellant**

Versus

1. **Tamil Nadu Generation and Distribution Company**
   800, Anna Salai,
   Chennai – 600002

2. **Kerala State Electricity Board,**
   VaidyuthiBhavanam,
   Pattam
   Thiruvanathapuram - 695004.

3. **Puducherry Electricity Department**
   Beach Road,
   Puducherry - 605001

4. **Banglore Electricity Supply Company (BESCOM)**
   2nd Floor, II Block, KR Circle,
   Bangalore – 560001

5. **Chamundeswari Electricity Supply Company (CESCOM),**
   927, LJ Avenue, New KantharajUrs Road,
   Saraswathipuram,
   Mysore – 570009

6. **Hubli Electricity Supply Company (HESCOM),**
   2nd Floor, Eureka Junction, Navanagar,
   P.B. Road,
   Hubli – 570025

7. **Mangalore Electricity Supply Company**
   Corporate Office, Paradigm Plaza,
   A.B. Shetty Circle,
   Mangalore – 575001

8. **Gulbarga Electricity Supply Company**
   Station Road, Gulbarga-585102,
   Karnataka

9. **Jaipur VidyutVitran Nigam Limited,**
   400kV GSS Control Room, Ground Floor,
   Heerapura,
   Jaipur – 302024

10. **Jodhpur VidyutVitran Nigam Limited,**
    400kV GSS Control Room, Ground Floor,
    Heerapura,
    Jaipur – 302024

11. **Ajmer VidyutVitran Nigam Limited,**
    400kV GSS Control Room, Ground Floor,
    Heerapura,
    Jaipur – 302024

12. **Transmission Corporation of Andhra Pradesh Limited**
    (APPCC/ APTRANSCO)
    Room No. 447, A Block,
    VidyutSoudha,
    Hyderabad – 500049

13. **Transmission Corporation of Telangana Limited**
    (TSPCC/ TSTRANSCO)
    Room No. 447, A Block,
    VidyutSoudha,
    Hyderabad – 500049

14. **Central Electricity Regulatory Commission**
    3rd&4thFloor,Chanderlok Building,
    36, Janpath,
    New Delhi- 110001 **..... Respondents**

Counsel for the Appellant	…	Mr. M.G. Ramachandran Ms. Ranjitha Ramachandran Mr. Shubham Arya Ms. Anushree Bardhan Ms. Poorva Saigal
Counsel for the Respondent(s)	…	Mr. S. Vallinayagam for R-1 Mr. Pradeep Misra Mr. Manoj Kumar Sharma for R-9 to R-11 Mr. Nikhil Nayyar Mr. Dhananjay Baijal for R-14

(I) **Neyveli Lignite Corporation Limited,** Appellant herein**,** questioning the legality, validity and proprietary of the Impugned Order dated 05.08.2015 passed in Petition No. MP/521/2014 on the file of the **Central Electricity Regulatory Commission, New Delhi** (hereinafter referred to as, **"Central Commission"**) presenting this Appeal, being Appeal No. 254 of 2015 on the file of the Appellate Tribunal for Electricity, New Delhi seeking following reliefs as under:

A. Allow the appeal and set aside the order dated 05.08.2015 passed by the Central Commission in Petition No. MP/521/2014.

B. Pass such other Order(s) as this Hon'ble Tribunal may deem just and proper.

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

i. Whether in the facts and circumstances of the case, the Central Commission is right in rejecting the claim of NLC for relaxation under Regulation 44 of the Tariff Regulations,

2009 and treating the pass through of the tariff elements of incidence of tax on Return on Equity in a combined manner for the financial year 2011 – 12 and 2012-13?

ii. Whether in the facts and circumstances of the case, where there was a mismatch in the year in which the contribution to the Superannuation Fund was considered for Income Tax purposes under Section 43B of the Income Tax Act viz-a-viz the said contribution for tariff purpose in computation of the applicable tariff, the Central Commission ought to have exercised the power to relax, instead of implementing the Tariff Regulations, 2009 in a mechanical manner ?

J U D G M E N T

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

1. **Neyveli Lignite Corporation Limited,** (hereinafter referred in short as "the Appellant") has filed the instant Appeal, being Appeal No. 254 of 2015, under Section 111 of the Electricity Act 2003, on the file of the Appellate Tribunal for Electricity, New Delhi , questioning the legality, validity and proprietary of the Impugned Order dated 05.08.2015 passed in Petition No. MP/521/2014 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.

BRIEF FACTS OF THE CASE:

2. The Appellant has filed a Petition No. MP/521/2014 on the file of the Central Electricity Regulatory Commission, New Delhi seeking the following reliefs:

(a) Exercise "Power to Relax" and allow the reimbursement of actual tax paid by the petitioner treating period 2011-2012 and 2012-2013 cumulatively, namely, twice the tax rate admissible to Corporate Tax subject to maximum of the actual tax paid relating to the Financial Years 2011-12 & 2012-13 instead of restricting the tax paid during the Financial Year 2012-13 to Minimum Alternate Tax;

(b) Pass such further Order or Orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.

3. Contending that the Appellant is a Central Public Sector undertaking engaged in the business of Lignite Mining-cum-Lignite based thermal power at its power generating stations in Neyveli and Rajasthan. The power generated by the Appellant is supplied to the Respondents based on the tariff determined by the Central Commission in exercise of the power under Section 79 read with Section 62(1)(a) of the Electricity Act, 2003 (hereinafter referred as in short, ***"2003 Act"***).

4. Respondent Nos. 1 to 13 are the Distribution Companies Limited and Respondent No. 14 is the Central Electricity Regulatory Commission.

5. The tariff of the Appellant generating stations is determined in terms of the Tariff Regulations as framed by the Central Commission from time to time. In the present case, for the period 2011-12 and 2012-13, the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (in short, the **Tariff Regulations, 2009**) are applicable.

6. The Appellant is an assessee under the Income Tax Act, 1961 and has been regularly assessed in regard to its revenues from the business of generation and sale of electricity. For the Financial Year 2011-12 (Assessment Year 2012-13), in the tax assessment proceedings, there was substantial disallowance of the provisions made in the accounts of the Appellant as per section 43B of the Income Tax Act, 1961. A sum of Rs 355.69 crores was disallowed claimed towards non-funding of the expenses like the contribution made to Superannuation Fund on the basis that there was no actual cash outflow during the said Financial Year 2011-12. As a result of the above disallowance, the taxable income of the Appellant increased

and during the Financial Year 2011-12 (Assessment Year 2012-13), the Appellant paid Income Tax much higher than the Income Tax related to the Return on Equity determined by the Central Commission under the Tariff Regulations, 2009.

7. It is, further, the case of the Appellant that, in the subsequent Financial Year 2012-13 (relevant to the Assessment Year 2013-14) Appellant's tax liability was subject to the Minimum Alternate Tax (hereinafter referred to as **"MAT")** under section 115JB of the Income Tax Act, 1961. This was due to the fact that the contribution to the Superannuation Fund which was disallowed in the previous year i.e. in the Financial Year 2011-12 was duly considered by the Income Tax Authorities in the Financial Year 2012-13 based on the actual cash outflow, and such amount was duly paid into the respective Trust maintaining such funds.

8. The applicable tax rate on MAT basis during the relevant year was 20.008% including surcharge and cess as against the normal corporate tax rate of 32.445% including surcharge and cess as per the relevant provisions of the Income Tax Act.

9. As per Regulation 15 of the Tariff Regulations, 2009 as amended is different than the tax determined for the purpose of Income Tax

Act. The tax allowed under the Tariff Regulations, 2009 is restricted to computation on the regulated return on equity of 15.5% and not on the taxable income as such determined as per the provisions of the Income Tax Act, 1961. In the instant case, the circumstances leading to the payment of MAT in the Assessment Year 2013-14 after paying substantially higher amount of tax in the earlier Assessment Year 2012-13 was on account of the special provisions of the section 43 B of the Income Tax Act and has nothing to do with the determination of tax on return on equity for the purposes of the Tariff Regulations, 2009.

10. The Central Commission had allowed contribution to the Trust to be recovered through the tariff in the Financial Year 2011-12, the Appellant is required to declare the same as revenue although the actual contribution has been made in the subsequent Financial Year 2012-13 and the provisioning made by the Appellant for such contribution in the previous Financial Year 2011-12 was not accepted by the Income Tax Authorities. Accordingly, when the taxable income is more, the Appellant pays higher Income Tax but will get lesser tax amount restricted to the Return on Equity as a pass through in the tariff and when the contribution is duly adjusted in the subsequent year the Appellant pays less tax to the Income Tax Authority and the

tax allowed to be a pass through in the tariff in terms of Regulation 15 is restricted to the actual taxable amount and to the MAT.

11. In the facts and circumstances of the case, as stated above, an anomaly had arisen on account of the difference in the treatment of the taxable income under the Income Tax Act and the methodology followed for determination of revenues and expenditure under the Electricity Act, 2003.

12. The Appellant has filed a Petition No. MP/521/2014 on 03.12.2014 on the file of the Central Electricity Regulatory Commission to consider to exercise its power to relax and treat part of the excess tax paid over and above the tax admissible as related to the Return on Equity for Financial Year 2011-12 (Assessment Year 2012-13) as admissible reimbursement in the subsequent Financial Year 2012-13 (Assessment Year 2013-14) or consider the tax reimbursement to the Appellant on a cumulative basis, i.e. for Financial Years 2011-12 and 2012-13 to the extent twice the tax admissible on the Return on Equity subject to maximum of the tax actually paid during the said year.

13. The Petition No. MP/521/2014 filed by the Appellant had come up for consideration before the Central Commission, New Delhi on

05.08.2015 and prayer sought therein was rejected and, accordingly, disposed of holding that the Generating Companies are expected to recover the tax from the consumers to the extent of Return on Equity and the tax paid over and above the Return on Equity is to be borne by them. Therefore, the Appellant's claim regarding the reimbursement of excess tax paid for Financial Years 2011-12 & 2012-13 or consideration of tax on cumulative basis for Financial Year 2011-12 (Assessment Year 2012-13) and Financial Year 2012-13 (Assessment Year 2013-14) is not admissible. Assailing the correctness of the order impugned, as stated supra, the Appellant herein, felt necessitated and present this Appeal.

SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR THE APPELLANT ARE AS FOLLOWS:

14. The learned counsel, Mr. M.G. Ramachandran, appearing for the Appellant submitted that, by reason of the above treatment of income and expenditure for the purpose of MAT or regular Income Tax under the Income Tax Act, 1961 and treatment of income and expenditure by the Appellant as a generating company regulated by the Central Commission for the tariff can be different. There will be a mismatch in the consideration of the income on which the tax is to be levied under the Income Tax Act and the revenue computed or the fixed charges payable for the purpose of tariff under the Electricity Act, 2003

15. The above mismatch in the treatment of income and expenditure under the Income Tax Act, 1961 and under the provisions of the Electricity Act, 2003 need to addressed in a manner that there is no adverse consequence to the utility and at the same time the utility does not make any gain. The mismatch needs to be appropriately and in a pragmatic manner resolved so that the utility does not suffer in the determination of the annual fixed charges for the purpose of tariff determination and recovery.

16. It is the case of the Appellant that, in the present case, there is such a mismatch in the treatment of income and the consequential tax applicable under the Income Tax Act *viz-a-viz* financial estimates including the ROE etc for the purpose of tariff determination under the Electricity Act, 2003. This mismatch had occurred in respect of two Financial Years, i.e. 2011-12 & 2012-13.

17. It is the case of the Appellant that, a sum of Rs. 355.69 crores was considered in the Financial Year 2011-12 on estimate basis by the Appellant. The said amount was claimed by the Appellant as expenditure for the contribution towards superannuation fund of the employees of the Appellant. There was, however, no actual cash outflow to this account during the said Financial Year 2011-12. The expenditure was, however, claimed under the Income Tax Act based on

the estimation made by the Appellant as per the tariff determination process under the Electricity Act, 2003.

18. While the Annual Revenue Requirements was considered by the Central Commission for Financial Year 2011-12 factoring such expenditure estimated to be incurred by the Appellant, the Income Tax Authorities, however, disallowed the same for the Financial Year 2011-12 but considered the same in the subsequent Financial Year 2012-13.

19. As a result of the above, namely the consideration of the amount of Rs 355.69 crores by the Income Tax Authorities in the Financial Year 2012-13 instead of Financial Year 2011-12, there was an impact on the quantum of tax for the purposes of return on equity to be allowed in terms of Regulation 15 of the Tariff Regulations, 2009. Since, the expenditure was not factored in Financial Year 2011-12 on the basis that there was no actual cash outflow, the Appellant was assessed to regular Income Tax since there were business profits. In the subsequent Financial Year, i.e. 2012-13, the Income Tax Authorities considered the contribution of Rs 355.69 crores as allowable expenditure. This resulted in the Appellant not having regular profit but only an operating profit and, therefore, the Appellant was required to pay the MAT.

20. The Appellant contended that in the event the expenditure had been considered with reference to Financial Year 2011-12, the result would have been that the Appellant would have been subjected to payment of MAT for Financial Year 2011-12 also. The difference between rate of return on equity due to payment of MAT and the regular Income Tax during the Financial Years 2011-12 & 2012-13 was about 6%, i.e., 23.481% in case of regular income tax and 17.481% in case of MAT. Therefore, as mentioned above, the Appellant had been allowed tariff for the Financial Years 2011-12 & 2012-13 on the basis of the expenditure of Rs 355.69 crores having been incurred in Financial Year 2011-12 and as per the above, the Appellant would have been required to pay only the MAT for both the financial years. The Income Tax Authorities did not recognise the incurring of Rs 355.69 crores as expenditure in Financial Year 2011-12. As a result of disallowing the expenditure of substantial amount of Rs 355.69 crores, the taxable income of the Appellant for the Financial Year 2011-12 increased substantially requiring the Appellant to pay regular tax much above what the Appellant would have been entitled to adjust as tax on ROE as provided in Regulation 15 of the Tariff Regulations, 2009. In the subsequent year the Appellant was allowed only the MAT on ROE because of the absence of the operating profit.

21. Taking into consideration the facts and circumstances of the case, the Appellant had submitted before the Central Commission that the power to relax should be exercised and for the purpose of computing the admissible tax on ROE, the two Financial Years, i.e. 2011-12 & 2012-13 should be considered in a cumulative manner. The Appellant submits that, if the contribution to the superannuation fund in the sum of Rs 355.69 crores is considered in the same financial year say Financial Years 2011-12 or 2012-13, as the case may be, both for the tariff computation purpose and for the purpose of claiming adjustment under section 43B of the Income Tax Act, the Appellant would have recovered a post-tax return of 15.5% as envisaged in Regulation 15 of the Tariff Regulations, 2009 on the basis that the Appellant will be subjected to regular Income Tax and not that it is liable only for MAT. Thus, instead or recovering the tax element of 23.481% the Appellant was allowed only 17.481% on account of the mismatch in the treatment of the Income Tax. Therefore, a substantial un-intended loss has occurred to the Appellant in the recovery of the tariff elements, i.e., tax on income or tax on ROE as provided under the Regulation 15 of the Tariff Regulations, 2009.

22. The learned counsel for the Appellant vehemently submitted that, the power to relax or power to exempt as envisaged under the Tariff Regulations, 2009 should have been exercised by the Central

Commission on the ground that such powers, it is well settled is a judicial discretion and ought to be exercised having regard to the peculiar facts and circumstances of the case taking into consideration that the Appellant is a Government of India Enterprise.

23. Further, he submitted that, the basic working details of Income tax of the Appellant for the Financial Years 2011-12 & 2012-13 are reproduced as under:

			Rs.Cr.
CORPORATE TAX			MAT
	2011-12	2012-13	2012-13
Profit before tax	1983.89	2047.65	2047.65
Add: Disallowance of contribution to superannuation fund under section 43B	355.69		
Less: Other adjustments, such depreciation,			
80IA deduction	635.21	621.28	
Less: Allowance under section 43B		369.27	
Add: Adjustment for MAT computation			1.74
Taxable Income	1704.37	1057.1	2049.39
Tax rate (Including surcharge and education cess)	32.445%	32.445%	20.008%
Total Income Tax liability (Corporate Tax)	552.98	342.98	410.03
Adopted tax rate for IT	Corp. Tax		MAT
Increased Financial outlay towards IT due to MAT in FY12-13			67.05

Therefore, he quick to point out and submitted that, the Appellant has paid Rs. 67.05 crore more tax in regard to Financial Year 2011-12 due to disallowance of Superannuation fund contribution under Sec 43B of IT Act in the Financial Year 2011-12

and allowance of the same in the subsequent Financial Year 2012-13. Effectively, the Appellant has paid more quantum of tax, than the tax corporate at Corporate Tax rate.

24. To substantiate its submission, he placed reliance on the judgment of the Hon'ble Supreme Court in the case of *Premium Granites & Anr. v State of Tamil Nadu & Ors (1994) 2 SCC 691* at paras 48 to 50 of the said judgment and also he quick to point out and placed reliance on the judgment of this Hon'ble Tribunal dated 23.11.2007 passed in Appeal Nos. 271, 272, 273, 275 of 2006 and Appeal No. 8 of 2007 and taken through paras 11 to 13 of the said judgment. Ratio laid down by the Hon'ble Supreme Court and this Appellate Tribunal aptly applicable to the facts and circumstances of the case, and applying the same, the impugned Order passed by the Central Regulatory Commission, Respondent No. 14 herein, is liable to be set-aside.

25. It is the case of the Appellant that, the Appellant has paid substantial higher tax during the Assessment Year 2012-13 on account of the entire provisioning for superannuation fund etc being disallowed in the said year and substantially lower tax in the subsequent Assessment Year 2013-14 on account of the entire provisioning being allowed in the later assessment year. The

provisioning for superannuation fund etc are not confined to the expenditure related to any particular assessment year but for the overall provisioning for the past unfunded pension and superannuation liabilities. If the two Assessment Years, i.e. 2012-13 & 2013-14 are considered together and the provisioning is treated as related to the expenditure of both the years, the Appellant would have been entitled for ROE at the corporate tax rate. This aspect of the matter has not been looked into and considered and appreciated by the Central Commission, Respondent No.14 herein. It is manifest on the face of the reasoning given by the Appellant for rejecting the prayer of the Appellant on the sole ground that the Appellant has not made any sincere effort nor produced any relevant document to show the bonafide that they are not paid for the Financial Year 2011-12. Therefore, taking into consideration all the facts and circumstances of the case in hand as made out by the Appellant, the impugned order passed by the Central Commission, Respondent No. 14 herein, is liable to be set-aside and prayer sought by the Appellant in the instant Appeal may be allowed in toto in the interest of justice and equity.

***PER-CONTRA*,**

SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR THE FIRST RESPONDENT ARE AS FOLLOWS:

26. Learned counsel, Mr. S. Vallinayagam, appearing for the first Respondent vehemently submitted that, the instant Appeal filed by the

Appellant is liable to be dismissed as devoid of merits confirming the Order passed by the Central Regulatory Commission on the ground that the Order impugned is well reasoned and after considering the grounds and submissions made by the learned counsel appearing for the Appellant by assigning valid and cogent reasons has recorded the findings holding that inspite of having sufficient opportunity, the Appellant has failed to comply-with the relevant provisions of the Electricity Act, 2003 for the Financial Year 2011-12 and this fact has not been disputed by the learned counsel appearing for the Appellant. The only ground and submission of the learned counsel appearing for the Appellant is that, due to money inflow, they could not comply with the relevant provisions of the Electricity Act, 2003 but, however, they have got opportunity to avail relaxation under Regulation 44 of the Tariff Regulations, 2009 for Financial Year 2011-12. The said principal submission and principal ground urged by the Appellant has rightly been considered by the Respondent No. 14/Central Regulatory Commission under the heading *"Analysis and Decision"* in paragraph 12 of the impugned Order dated 05.08.2015. Therefore, the instant Appeal filed by the Appellant is liable to be dismissed as misconceived and they have not made out any good ground to grant relief sought in this Appeal.

27. To substantiate his submissions, the learned counsel, Mr. S. Vallinayagam, appearing for the first Respondent has taken through the written submission filed on behalf of the first Respondent. The Appellant in its Petition No.521/MP/2014 filed before the Respondent No. 14 requested the Central Regulatory Commission to exercise its power to relax and treat part of the excess paid tax of Rs.67.05 Crores out of the total tax amounting to Rs.410.03 Crores calculated under Minimum Alternate Tax for Financial Year 2012-13 which is more than the tax calculated under Corporate Tax rate amounting to Rs.342.98 Crores as related to the Return on Equity for Financial Year 2011-12 as admissible reimbursement in the subsequent Financial Year 2012-13 or consider the tax reimbursement to the Appellant on a cumulative basis for Financial Years 2011-12 & 2012-13.

28. Further, he vehemently submitted that, the claim of the Appellant has rightly been rejected by the Respondent No. 14. The Central Commission in its Order has assigned a valid and cogent reason holding that the Appellant cannot be allowed to gross up ROE at Corporate Tax rate of 32.445% which the Appellant is not paying to the Income Tax authorities. The prayer of the Appellant if considered will allow the Appellant to retain a part of tax which is neither entitled under the law nor under the regulations.

29. Learned counsel for the first Respondent quick to point out and submitted that, Respondent No. 14 in its Statement of objects and reasons issued for determination of Tariff Regulations, 2009 has stated that the Return on Equity with respect to the actual tax rate applicable to the generating company is to be in line with the provisions of the relevant Finance Acts of the respective years during the tariff period. In view of the above statement, it is submitted that the Appellant cannot claim Corporate Tax rate for grossing up of ROE when the same is covered under MAT rate for the Financial Year 2012-13. Therefore, the first Respondent humbly submitted that, it is a fundamental principle of construction that Rules made under the statute are to be treated as exactly if they were in the Act and are of the same effect. Regulations, 2009 having been notified by the Central Commission in exercise of its powers conferred under section 178 of the Electricity Act, 2003 are part of the statute and are subordinate legislation. If the Appellant is aggrieved of the Regulations, the Regulations are required to be challenged before the appropriate Legal Forum. Therefore, the Appellant cannot seek implementation of the Regulations in a manner contrary to the relevant Regulations applicable in the facts and circumstances of the case in hand.

30. It is the case of the Appellant that an anomaly had arisen on account of difference in the treatment of the taxable income under the

Income Tax Act and the methodology followed for determination of revenues and expenditure under the Electricity Act, 2003. And, that the Central Commission has not followed the well-established principles of law on the exercise of the power of exemption or the power of relaxation in the delegated legislation.

31. Further, he submitted that, the Appellant in Para 9(A) of the Appeal, has stated that the existence of power to relax in Regulation 44 of Tariff Regulations, 2009 is precisely for the purpose of dealing with such situation where the enforcement of the Tariff Regulations will cause injustice and prejudice to the utility without there being any reason or factor attributable to the utility. The respondent submits that the situation in which the Appellant has placed itself is due to the lapse of the Appellant alone. Therefore, the Appellant cannot pass on the financial implication of its wrong and lapse on the beneficiaries, who are not responsible for the acts and omissions of the Appellant. The financial implication being a pass-through in the tariff affecting the public at large cannot be permitted under Power to Relax when the Regulations were not complied with by the Appellant scrumptiously. Therefore, he submitted that, the Appeal filed by the Appellant is to be dismissed at threshold on this ground also.

32. Learned counsel for the first Respondent, further, submitted that, the terms and conditions specified by the Central Commission under the Tariff Regulations cannot be categorized as unreasonable so long as to justify resort to exercise of general power of relaxation and hence there cannot be any omnibus relaxation in the manner sought by the Appellant. Hence, the Appellant's prayer for relaxation is beyond the scope of Regulation 44 'Power to Relax' of the Tariff Regulations, 2009. In paragraph 9(B) of the present Appeal, the Appellant contended that the Central Commission has failed to apply the Tariff Regulations, 2009 in a manner that the Appellant is not penalized on account of any mismatch arising out of the recognition of the contribution to the Superannuation Fund for tariff purposes in Financial Year 2011-12 and for the Income Tax purposes in Financial Year 2012-13. The excess tax paid in the year 2012-13 due to disallowance in FY 2011-12 cannot be claimed as difference in tax from the beneficiaries is not permissible under the law.

33. The Respondent submitted that, no change has been made in section 43-B of the Income Tax Act, 1961 as contended by the Appellant in support of its claim quoting the Income Tax Act. It is also submitted that, the difference in tax liability should not be passed on to the beneficiaries unless there is any amendment in the provisions in Income Tax Act providing retrospective effect. As per section 43-B of

the Income Tax Act provides that the contribution towards superannuation fund will be considered for deduction only in the event of actual payment to the fund. The Respondent submitted that disallowance made by the tax authorities during the year 2011-12 is due to the fact that the Appellant has made only the provisions during the year 2011-12 and the actual payment were made only during 2012-13 and the same is allowed for deduction under Section 43-B by the tax authorities for Financial Year 2012-13.

34. Learned counsel for the first Respondent, further, submitted that, the statement made by the Appellant that, it has paid income tax much higher than the income tax related to the Return on Equity determined by the Central Commission is not tenable. As per Section 115-JB of the Income Tax Act, income tax payable by a company shall be higher of the corporate tax rate (or) MAT rate. The tax calculated under MAT for the Financial Year 2012-13 is on the higher side when compared with the corporate tax rate. Also due to disallowance of provisions made towards contribution for pension fund in Financial Year 2011-12 the taxable income of the Appellant increased thus resulting in excess tax outgo. Because of lapses on the part of the Appellant alone, such defaulter cannot redress their grievances by seeking relaxation under Regulation 44 of the Tariff Regulations, 2009.

Therefore, he submitted that, on this ground also the Appeal filed by the Appellant is liable to be vitiated.

35. Learned counsel for the first Respondent, further, submitted that, the Amended Regulation 15(3) of CERC Tariff Regulations, 2011 provides that the rate of return on equity shall be computed by grossing up the base rate with the MAT/Corporate Tax rate for the year as per the Income Tax Act, 1961 as applicable to the concerned generating company or the transmission licensee, as the case may be. The Appellant has collected a sum of Rs. 24699.50 lakhs towards the Return on Equity for Financial Year 2012-13 (Detailed in Annexure) in respect of TPS-1, TPS-I Expansion and TPS-II (Stage-I & II) by grossing up the Return on Equity considering the corporate tax rate @ 33.99%, now due to change in the rate of actual tax rate (MAT), the difference in ROE collected excessively from the beneficiaries amounting to Rs.4317.29 lakhs needs to be refunded along with interest as applicable.

36. It is the case of the Appellant that it has paid Rs.67.05 Crore more tax in Financial Year 2012-13 on account of disallowance of Superannuation Fund contribution under Section 43-B of the Income Tax Act for Financial Year 2011-12. The Respondent states that only due to excess tax paid in the FY 2012-13 for the disallowance in

Financial Year 2011-12 the Appellant cannot claim the difference in tax from the beneficiaries and is entitled for grossing up of ROE only on the actual tax paid during the respective financial year. Therefore, the claim of the Appellant is unsustainable.

37. Lastly, learned counsel for the first Respondent, at the outset, submitted that, Respondent No. 14/Central Commission, after duly considering the oral and documentary evidence available on the file strictly in consonance with the relevant provisions of procedures rules and regulations of the Electricity Act, 2003 and by assigning valid and cogent reasons, has rightly justified in rejecting the prayer sought by the Appellant in the petition and there is no error or illegality in the Order impugned passed by the Respondent No. 14/Central Regulatory Commission. Therefore, he submitted that, the interference by this Tribunal does not call for.

SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR THE RESPONDENT NOS. 9 TO 11 ARE AS FOLLOWS:

38. Learned counsel, Mr. Pradeep Misra, appearing for the Respondent Nos. 9 to 11 submitted that, the Appellant has filed Petition before the Respondent No. 14/Central Regulatory Commission for Adoption of corporate tax for grossing up Return on Equity for the Financial Year 2012-13 and to claim Return on Equity with grossed up

Corporate Tax rate for Financial Year 2012-13 (Assessment Year 2013-14), considering the implied disallowance of contribution towards superannuation fund under 43-B of Income Tax Act in Financial Year 2011-12 and allowance of the same in Financial Year 2012-13. The Central Commission had allowed contribution to the Trust to be recovered through the tariff in the year 2011-12, the Appellant is required to declare the same as revenue although the actual contribution has been made in the subsequent year 2012-13 and the provisioning made by the Appellant for such contribution in the previous year 2011-12 was not accepted by the Income Tax Authorities. Accordingly, when the taxable income is more, the Appellant pays higher Income Tax but will get as a pass through in the tariff lesser tax amount restricted to the Return on Equity and when the contribution is duly adjusted in the subsequent year the Appellant pays less tax to the Income Tax Authority and the tax allowed to be a pass through in the tariff in terms of Regulation 15 is restricted to the actual taxable amount and to the MAT

39. As per Section 43-B of the Income Tax Act, 1961, it is crystal clear that, if the actual payment is made towards superannuation fund, then only deduction is permissible under the said Section. The Appellant has recovered Rs.355.69 crores through the tariff towards contribution to superannuation fund during the Financial Year 2011-

12 which has been shown in its books of accounts as revenue earned. However, since the actual payment of the said amount has not been made into the superannuation fund in the same year i.e. Financial Year 2011-12, hence, the said amount has been added in the income of Appellant and the income tax was imposed accordingly. The Appellant has paid Rs. 369.27 crores in the Financial Year 2012-13 in the pension fund, hence, as per the provision of income tax, minimum alternative tax has been imposed and paid by the Appellant. It is relevant to submit that, since the Appellant has not paid the amount of Rs.355.69 crores towards contribution in the superannuation fund, hence, the same was not allowed. It was the accounting mistake on the part of Appellant alone. Now, the Appellant wants that for the both years corporate tax will be applied for grossing up on return-on-equity subject to the actual tax paid by Appellant.

40. Further, he submitted that, Regulation 15(3) of 2009 Tariff Regulations provides that Return-on-Equity shall be computed by grossing up of base rate with minimum alternative/corporate income tax for the year 2008-2009 as per Income Tax Act as applicable to the generation station or the transmission licensee and ROE shall be trued up in line with the provisions of relevant Finance Act of respective year of the tariff period. The relevant Regulations are being reproduced herein below:

"(3) The rate of return on equity shall be computed by grossing up the base rate with the Minimum alternate/Corporate Income Tax Rate for the year 2008-09, as per the Income Tax Act, 1961, as applicable to the concerned generating company or the transmission licensee, as the case may be."

(4) Rate of return on equity shall be rounded off to three decimal points and be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate/(1-t)

Where t is the applicable tax rate in accordance with clause (3) of this regulation.

(5) The generating company or the transmission licensee, as the case may be, shall recover the shortfall or refund the excess Annual Fixed charges on account of Return on Equity due to change in applicable Minimum Alternate/Corporate Income Tax Rate as per the Income Tax Act, 1961 (as amended from time to time) of the respective financial year directly without making any application before the Commissioner:

Provided further that Annual Fixed Charge with respect to tax rate applicable to the generating company or the transmission licensee, as the case may be, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued upon in accordance with Regulation 6 of these regulations."

41. Taking into consideration the relevant provision of the Regulations, as stated supra, the Commission has given cogent finding for not exercising the power to relax because it has been held as follows:

> *"Moreover, allowing the prayer of the Petitioner will increase the liability of the Respondent beneficiaries who are not responsible for the additional tax liability on the Petitioner. In fact, the beneficiaries have serviced the contribution towards superannuation fund through tariff which has not been actually paid by the Petitioner in the relevant year."*

42. Further, he vehemently submitted that, the preamble of the Electricity Act reads as follows:

> *"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein,* ***protecting interest of consumers*** *and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."*

43. Section 61(d) of the Act also places an obligation on the appropriate Commission to safeguard the interest of the consumers which is as follows:

> *"Section 61. (Tariff regulations):*
>
> *The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;"

44. Learned counsel appearing for the Respondent Nos. 9 to 11 submitted that, it is an admitted case of the Appellant that it has recovered Rs.355.69 crores in the year 2011-12 through tariff towards superannuation fund but did not paid the said amount. Hence, the Income Tax Authorities has rightly not granted the deduction of the said amount from the income of the Appellant.

45. The learned counsel appearing for the Appellant placed reliance on the judgment of this Tribunal dated 23.11.2007 passed in Appeal Nos. 271, 272, 273, 275 of 2006 and Appeal No. 8 of 2007 in the case of Damodar Valley Corporation v Central Electricity Regulatory Commission & Ors. The reliance by the Appellant in DVC case is not applicable in the facts and circumstances of the present case because in that case the Tariff Regulations with respect to depreciation and interest on capital were inconsistent with the provisions of DVC Act itself whereas, in the present case the provisions of Income Tax Act or Section 43B is not inconsistent with any provisions of the Tariff Regulations. Therefore, on account of the fault on the part of the Appellant the beneficiaries cannot be saddled with the further recovery of tax. Hence, the Appeal has no merits and is liable to be dismissed in limn.

SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR THE RESPONDENT NO. 14/CERC ARE AS FOLLOWS:

46. The learned counsel, Mr. Nikhil Nayyar, appearing for the Respondent No.14/Central Regulatory Commission contended that, the Appellant through its present Appeal has assailed the Order of the Central Commission, dated 05.08.2015 on account of the fact that the Central Commission has allegedly committed an error by not exercising its power to relax under Regulation 44 of the CERC (Terms and Conditions of Tariff) Regulations, 2009. It is submitted that, the present appeal is wholly without merit, since the Appellant has failed to establish any legitimate reason for the exercise of such powers by the Respondent Commission.

47. The Respondent No.14/Central Commission wishes to place on record brief written submissions to make good the following propositions:

a. The Appellant cannot be allowed to pass on liabilities accruing due to its own inefficiency upon the consumers.
b. The Regulations do not permit clubbing of years.
c. The decision of this Hon'ble Tribunal in DVC v CERC is not at all applicable to the facts of this case.

48. The Appellant cannot be allowed to pass on liabilities accruing due to its own inefficiency upon the consumers. The Appellant's admitted case is that it was unable, for reasons best known to it, to make the mandatory payments towards the superannuation funds during the Financial Year 2011-12. The Appellant was allowed to recover and has, in fact, recovered the entire component due towards the superannuation fund as part of the O&M expenses in its tariff. The inability of the Appellant to claim the requisite deduction under Section 43B of the Income Tax Act, 1961 is wholly a failure on the part of the Appellant and cannot be a reason for the exercise of the power to relax under the Regulations.

49. It is submitted that, the Appellant in its petition before the answering Respondent has stated on account of the aforesaid non-payment, an anomaly has arisen on account of the difference in the treatment of taxable income under the Income tax Act and the methodology followed for determination of revenues and expenditure under the Electricity Act, 2003. It is submitted that, no explanation has been given as to the reasons for not making the payments towards superannuation funds during FY 2011-12, as recorded in Para 10 of the impugned Order. It is, further, submitted that, in the course of oral arguments, the learned counsel for the Appellant has advanced the proposition that the reason for non-payment was on account of certain

cash flow problems. It is submitted that such an explanation is vague and most certainly cannot be made the basis for a relaxation under Regulation 44.

50. It is, further, the case of the Respondent No. 14 that, the very basis of the Appellant's claim before the Respondent Commission was flawed. It is submitted that the Appellant in its Appeal has stated that the Income Tax authorities disallowed a sum of Rs. 369.29 crores due to non-funding of the expenses like contribution made to the Superannuation Fund. It is submitted that if the Appellant has admittedly not made the contribution, there was no question of the same being disallowed. It is submitted that the Appellant has no legal basis to even claim the said deduction in the Financial Year 2011-12 and, therefore, the entire edifice of their petition before the answering Respondent and in this Appeal, is non-existent. It is, therefore, submitted that there is no occasion for the answering Respondent to relax the regulatory regime to give the Appellant a benefit under the Electricity Act, which by its own laxity it has squandered under the Income Tax Act.

51. Learned counsel for the Respondent No.14 vehemently submitted that, the Regulations do not permit clubbing of years. The Appellant has advanced the argument that Financial Years 2011-12 & 2012-13

are required to be clubbed since the contribution to the superannuation fund that was not made in 2011-12 was made only in 2012-13 is not in dispute. It is submitted that such a submission is wholly unacceptable and untenable because the proviso to Regulation 15(4) clearly establishes that the provisions of tariff have to be in line with the respective financial years. The proviso is reproduced as follows:

> "*Provided further that Annual Fixed Charge with respect to tax rate applicable to the generating company or the transmission licensee, as the case may be, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued up in accordance with Regulation 6 of these regulations*."

52. It is humbly submitted by the learned counsel appearing for the Respondent No.14 that, the accounting practice being suggested by the Appellant is neither permitted under the Electricity Act nor the Income Tax Act. When the Appellant cannot go to the Income Tax authorities to claim retrospective benefit in the year 2011-12 for a deduction finally claimed in 2012-13, it cannot expect the Respondent Commission to violate its express regulations to club Financial Years 2012-13 with 2011-12, especially when the Appellant has failed to provide any reasons for the failure to claim a deduction in the Financial Year 2011-12. Therefore, the Appellant is not entitled to

redress their grievances before this Tribunal. Hence, the instant Appeal filed by the Appellant is liable to be dismissed.

53. The learned counsel for the Respondent No.14 submitted that, the decision of this Tribunal in DVC v CERC is not at all applicable to the facts of the case in hand. The Appellant's reliance upon the decision of this Tribunal is wholly misplaced. In the above decision, this Tribunal has held that the regulations made under the Electricity Act cannot violate the provisions of any plenary legislation like the DVC Act. The Appellant has not alleged a single instance of their existing any conflict between the CERC tariff regulations and the Income Tax Act. Income Tax is required to be paid by the Appellant on its own income. The Income Tax Act does not require the answering Respondent or any other body to compensate the Appellant for the tax it is assessed to pay. The Income Tax Act and the Electricity Act operate in wholly different fields. The Income Tax Act is only concerned with the Appellant's liability to pay tax on its own income. The Income Tax Act cannot govern either the beneficiaries or the end consumers' liability to compensate the Appellant for its tax liability. It is, therefore, submitted that, there is no conflict between the Income Tax Act and the CERC Tariff Regulations since they operate in their own field.

54. Lastly, learned counsel appearing for the Respondent No. 14 submitted that, in view of the above submissions, the Appellant has failed to satisfy the test for exercise of the relaxation powers of the Respondent Commission, which have been crystallized by this Appellate Tribunal in its judgment dated 20.09.2012 passed in Appeal No. 189 of 2011 in the case of The Tata Power Company Limited v Jharkhand State Electricity Regulatory Commission & Ors. Therefore, in the light of the aforementioned submissions made by the learned counsel for the Respondent No.14, the instant Appeal filed by the appellant on the file of the Appellate Tribunal for Electricity, New Delhi is liable to be dismissed with costs.

OUR CONSIDERATION AND CONCLUSION :

55. We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent Nos. 1, 9 to 11 and 14. Other respondents are served unrepresented.

56. We have gone through the grounds urged by the Appellant in the Memo of Appeal and also carefully considered the written submissions filed by the Appellant and the Respondent Nos. 1, 9 to 11 and 14. Further, we have gone through the impugned Order dated 05.08.2015 passed in Petition No. MP/521/2014 on the file of the Central Electricity Regulatory Commission, New Delhi and other relevant

material available on record. The issues that arise for our consideration in the instant Appeal are as follows:

(a) Whether the Central Commission is right in rejecting the claim of the Appellant for relaxation under Regulation 44 of the Tariff Regulations, 2009 and treating the pass through of the tariff elements of incidence of tax on Return on Equity in a combined manner for the Financial Year 2011–12 and 2012-13.

(b) Whether the Central Commission having regard to the facts of the case, where there was a mismatch in the year in which the contribution to the Superannuation Fund was considered for Income Tax purposes under Section 43B of the Income Tax Act viz-a-viz the said contribution for tariff purpose in computation of the applicable tariff, the Central Commission ought to have exercised the power to relax, instead of implementing the Tariff Regulations, 2009 without application of mind is sustainable under law.

57. Having regard that the nature of both the issues involved in the instant case are inter-connected, we consider the same together in the interest of justice.

58. The Appellant herein, redressed his prayer to exercise power to relax and allow the Appellant the reimbursement of actual tax paid by

the Appellant treating the period 2011-12 and 2012-13 cumulatively, namely, twice the tax rate admissible to Corporate Tax subject to maximum of the actual tax paid relating to the Financial Years 2011-12 and 2012-13 instead of restricting the tax paid during the Financial Year 2012-13 to Minimum Alternate Tax in the interest of justice and equity.

59. To substantiate the prayer sought by the learned counsel appearing for the Appellant, he placed reliance on the Regulation 44 of the Tariff Regulations, 2009, which is read thus:

> ***"44. Power to Relax. The Commission, for reasons to be recorded in writing may relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person."***
>
> (emphasis supplied)

60. It is the case of the Appellant that, the treatment of income and expenditure for the purpose of MAT or regular Income Tax under the Income Tax Act, 1961 and treatment of income and expenditure by the Appellant as a generating company regulated by the Central Commission for the tariff can be different. There will be a mismatch in the consideration of the income on which the tax is to be levied under the Income Tax Act and the revenue computed or the fixed charges payable for the purpose of tariff under the Electricity Act, 2003. This mismatch in the treatment of income and expenditure under the

Income Tax Act, 1961 and under the provisions of the Electricity Act, 2003 need to addressed in a manner that there is no adverse consequence to the utility and at the same time the utility does not make any gain. The mismatch needs to be appropriately and in a pragmatic manner resolved so that the utility does not suffer in the determination of the annual fixed charges for the purpose of tariff determination and recovery. In the instant case, there is such a mismatch in the treatment of income and the consequential tax applicable under the Income Tax Act viz-a-viz financial estimates including the ROE etc for the purpose of tariff determination under the Electricity Act, 2003. This mismatch had occurred in respect of two Financial Years, i.e., 2011-12 & 2012-13.

61. It is the case of the Appellant that, a sum of Rs 355.69 crores was considered in the Financial Year 2011-12 on estimate basis by the Appellant. The said amount was claimed by the Appellant as expenditure for the contribution towards superannuation fund of the employees of the Appellant. **There was, however, no actual cash outflow during the said Financial Year 2011-12.** The expenditure was, however, claimed under the Income Tax Act based on the estimation made by the Appellant as per the tariff determination process under the Electricity Act, 2003. While the Annual Revenue Requirements was considered by the Central Commission for Financial

Year 2011-12 factoring such expenditure estimated to be incurred by the Appellant, the Income Tax Authorities, however, disallowed the same for the Financial Year 2011-12 but considered the same in the subsequent Financial Year 2012-13. This aspect of the matter ought to have been considered by the Respondent No.14/Central Commission while considering the prayer sought by the Appellant.

62. The submission of the learned counsel appearing for the Appellant that, the consideration of the amount of Rs 355.69 crores by the Income Tax Authorities is in the Financial Year 2012-13 instead of Financial Year 2011-12, there was an impact on the quantum of tax for the purposes of return on equity to be allowed in terms of Regulation 15 of the Tariff Regulations, 2009. Since, the expenditure was not factored in Financial Year 2011-12 on the basis that there was no actual cash outflow, the Appellant was assessed to regular Income Tax since there were business profits. In the subsequent financial year, i.e. 2012-13, the Income Tax Authorities considered the contribution of Rs 355.69 crores as allowable expenditure. This resulted in the Appellant not having regular profit but only an operating profit and, therefore, the Appellant was required to pay the MAT.

63. The Appellant had been allowed tariff for the Financial Years 2011-12 & 2012-13 on the basis of the expenditure of Rs 355.69 crores having been incurred in Financial Year 2011-12 and as per the above, the Appellant would have been required to pay only the MAT for both the financial years. The Income Tax Authorities did not recognise the incurring of Rs 355.69 crores as expenditure in Financial Year 2011-12. As a result of disallowing the expenditure of substantial amount of Rs 355.69 crores, the taxable income of the Appellant for the Financial Year 2011-12 increased substantially requiring the Appellant to pay regular tax much above what the Appellant would have been entitled to adjust as tax on ROE as provided in Regulation 15 of the Tariff Regulations, 2009. In the subsequent year, the Appellant was allowed only the MAT on ROE because of the absence of the operating profit. Taking this fact into consideration, the Appellant had submitted before the Central Commission that, the power to relax should be exercised and for the purpose of computing the admissible tax on ROE, the two financial years, i.e. 2011-12 & 2012-13 should be considered in a cumulative manner. It is the case of the Appellant that, if the contribution to the superannuation fund in the sum of Rs 355.69 crores is considered in the same financial year say 2011-12 or 2012-13, as the case may be, both for the tariff computation purpose and for the purpose of claiming adjustment under section 43B of the Income Tax Act, the Appellant would have recovered a post-tax return of

15.5% as envisaged in Regulation 15 of the Tariff Regulations, 2009 on the basis that the Appellant will be subjected to regular Income Tax and not that it is liable only for MAT. Thus, instead or recovering the tax element of 23.481%, the Appellant was allowed only 17.481% on account of the mismatch in the treatment of the Income Tax. Therefore, there is a substantial un-intended loss to the Appellant in the recovery of the tariff elements, namely, tax on income or tax on ROE as provided under the Regulation 15 of the Tariff Regulations, 2009. The power to relax or power to exempt, as envisaged under the Tariff Regulations, 2009, should have been exercised by the Central Commission. Such powers, it is well settled is a judicial discretion and ought to be exercised in the circumstances where it warrants. In this regard, the Appellant placed a reliance on the judgment of the Hon'ble Supreme Court in the case of *Premium Granites & Anr. v State of Tamil Nadu & Ors (1994) 2 SCC 691* at paragraphs 48 & 49 and also placed reliance on the judgment of this Appellate Tribunal dated 23.11.2007 passed in Appeal Nos. 271, 272, 273, 275 of 2006 & Appeal No. 8 of 2007 in the case of *Damodar Valley Corporation v Central Electricity Regulatory Commission & Ors* at paragraphs 11 & 13.

64. Taking into consideration the law laid down by the Hon'ble Apex Court and this Appellate Tribunal, as stated supra, this is a fit and proper case where the discretion ought to have been exercised by the

Central Commission for considering the prayer sought by the Appellant. These aspects of the matter have not been considered nor appreciated by the Central Commission and without application of mind the Central Commission has declined the reliefs sought by the Appellant in its petition filed before the Central Commission. Therefore, the impugned Order dated 05.08.2015 passed in Petition No. MP/521/2014 on the file of the Central Electricity Regulatory Commission, New Delhi is liable to be set-aside and the prayer sought by the Appellant in the instant Appeal may be granted.

65. ***Per-contra***, the learned counsel appearing for the Respondent Nos. 1, 9 to 11 and 14, inter-alia, contended and vehemently submitted that, the prayer sought by the Appellant is misconceived and is liable to be dismissed at threshold on the ground that the Central Commission has given cogent finding for not exercising the power to relax. It was held that,

> *"Moreover, allowing the prayer of the Petitioner will increase the liability of the Respondent beneficiaries who are not responsible for the additional tax liability on the Petitioner. In fact, the beneficiaries have serviced the contribution towards superannuation fund through tariff which has not been actually paid by the Petitioner in the relevant year."*

66. Further, they placed the reliance on Section 43B of the Income Tax Act, 1961 which reads as follows:

> *"43B. Certain deductions to be only on actual payment notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act in respect of.*
>
> *(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called under any law for the time being in force; or*
>
> *(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees, or*
>
> *(c) xxxxx"*

67. After careful perusal of the relevant provision of Section 43B of the Income Tax Act, 1961, as stated supra, it is clearly established that, if the actual payment is made towards superannuation fund, then only deduction is permissible under the said Section. The Appellant has recovered Rs. 355.69 crores through the tariff towards contribution to superannuation fund during the Financial Year 2011-12 which has been shown in its books of accounts as revenue earned. However, since the actual payment of the said amount has not been made into the superannuation fund in the same year i.e. 2011-12, therefore, the said amount has been added in the income of the Appellant and the income tax was imposed accordingly. The Appellant has paid Rs. 369.27 crores in the Financial Year 2012-13 in the pension fund, hence, as per the provision of income tax minimum alternative tax has been imposed and paid by the Appellant. It is not

in dispute that the Appellant has not paid the amount of Rs. 355.69 crores towards contribution in the superannuation fund, therefore, the Central Commission has rightly justified the same was not allowed. It is strictly in consonance with the provisions of the Electricity Act. It is pertinent to note that, it is also not in dispute that it was the accounting mistake on the part of Appellant only, hence, things thus stood. Now, the Appellant wants that for the both years, corporate tax will be applied for grossing up on return-on-equity subject to the actual tax paid by the Appellant. As per Regulation 15(3) of 2009 Tariff Regulations provides that Return-on-Equity shall be computed by grossing up of base rate with minimum alternative/corporate income tax for the year 2008-2009 as per Income Tax Act as applicable to the generation station or the transmission licensee and ROE shall be trued up in line with the provisions of relevant Finance Act of respective year of the tariff period.

68. The Central Regulatory Commission has assigned cogent reasons and recorded finding for not exercising the power to relax because it has been held that, "moreover, allowing the prayer of the Petitioner will increase the liability of the Respondent beneficiaries who are not responsible for the additional tax liability on the Petitioner. In fact, the beneficiaries have serviced the contribution towards superannuation fund through tariff which has not been actually paid by the Petitioner

in the relevant year. As rightly pointed out by the learned counsel appearing for the Respondent Nos. 9 to 11, it is crystal clear after careful reading of the preamble of the Electricity Act, 2003, we must bear in mind that protecting the interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto and as per Section 61 (d) of the Act, it is the obligation on the appropriate Commission to safeguard the interest of the consumers and at the same time, recovery of the cost of electricity in a reasonable manner. It is admitted case of the Appellant that it has recovered Rs. 355.69 crores in the year 2011-12 through tariff towards superannuation fund but did not paid the said amount. Therefore, the Income Tax Authorities has rightly not granted the deduction of the said amount from the income of the Appellant.

69. The learned counsel appearing for the Respondent No.14, vehemently submitted that, the present appeal filed by the Appellant is wholly without merit since the Appellant has failed to establish any legitimate reason for the exercise of such powers by the Respondent Commission. The Appellant's admitted case is that it was unable, for

reasons best known to it, to make the mandatory payments towards the superannuation funds during the Financial Year 2011-12. The Appellant was allowed to recover and has, in fact, recovered the entire component due towards the superannuation fund as part of the O&M expenses in its tariff, the inability of the Appellant to claim the requisite deduction under Section 43B of the Income Tax Act, 1961 is wholly a failure on the part of the Appellant and cannot be a reason for the exercise of the power to relax under the Regulations.

70. Further, the Appellant has stated on account of the aforesaid non-payment, an 'anomaly' has arisen on account of the difference in the treatment of taxable income under the Income tax Act and the methodology followed for determination of revenues and expenditure under the Electricity Act, 2003. It is specifically pointed out that no explanation has been given as to the reasons for not making the payments towards superannuation funds during Financial Year 2011-12, as recorded in Para 10 of the impugned order. It is, further, submitted that, in the course of oral arguments, the counsel for the Appellant has advanced the proposition that the reason for non-payment was on account of certain cash flow problems. It is submitted that that such an explanation is vague and most certainly cannot be made the basis for a relaxation order under Regulation 44. The very basis of the Appellant's claim before the Respondent Commission was

flawed. The Appellant, in its Appeal, has stated that the Income Tax authorities disallowed a sum of Rs. 369.29 crores due to non-funding of the expenses like contribution made to the Superannuation Fund. It is submitted that, if the Appellant has admittedly not made the contribution, there was no question of the same being disallowed. Therefore, the Appellant has no legal basis to even claim the said deduction in the Financial Year 2011-12 and, therefore, the entire edifice of their petition before the answering Respondent and in this Appeal, is non-existent. Therefore, he submitted that, there is no occasion for the answering Respondent to relax the regulatory regime to give the Appellant a benefit under the Electricity Act, which by its own laxity it has squandered under the Income Tax Act.

71. Further, as rightly pointed out by the learned counsel appearing for the Respondent No.14 that, the regulations do not permit the clubbing of years. The Appellant has advanced the argument that Financial Years 2011-12 & 2012-13 are required to be clubbed since the contribution to the superannuation fund that was not made in 2011-12 was made in 2012-13 is wholly untenable because the proviso to Regulation 15(4) clearly establishes that the provisions of tariff have to be in line with the respective financial years. Therefore, he submitted that, the submissions made by the learned counsel appearing for the Appellant is neither permissible under the Electricity

Act nor under the Income Tax Act. When the Appellant cannot go to the Income Tax authorities to claim retrospective benefit in the year 2011-12 for a deduction finally claimed in 2012-13, it cannot expect the Commission to violate its express regulations to club Financial Years 2012-13 with 2011-12, especially when the Appellant has failed to provide any reasons for the failure to claim a deduction in the Financial Year 2011-12.

72. The reliance placed by the learned counsel appearing for the Appellant on DVC v CERC case, as referred above, is not at all applicable to the facts of the present case and is wholly misplaced. In the above decision, this Appellate Tribunal has held that the regulations made under the Electricity Act cannot violate the provisions of any plenary legislation like the DVC Act. Therefore, he submitted that, the Appellant has failed to satisfy the test for exercise of the relaxation powers of the Respondent Commission, which have been crystallized by this Appellate Tribunal in Appeal No. 189 of 2011 dated 20.09.2012. Therefore, he submitted that, the instant Appeal filed by the Appellant is liable to be dismissed with costs.

73. The learned counsel appearing for the first Respondent, inter-alia, contended and fairly submitted that, he adopt the submissions made by the learned counsel appearing for the Respondent Nos. 9 to

11 and Respondent No. 14. He quick to point out and submitted that, the Appellant in its Petition No.521/MP/2014 filed before Central Electricity Regulatory Commission has stated that only because of decision of Income Tax authorities to disallow the contribution in the year 2011-12 there has been a significant increase in the taxable amount. The Appellant ought to have preferred an appeal against the disallowance under the relevant provisions of the IT Act. Therefore, he submitted that, the instant Appeal filed by the Appellant may be dismissed as devoid of merits.

74. It is manifest on the face of the Order impugned passed by the Central Electricity Regulatory Commission, New Delhi dated 05.08.2015 in Petition No. MP/521/2014, we do not find any error or material irregularity. The Central Commission, after due appreciation of the oral and documentary evidence and other relevant material available on records, considered the case made out by the Appellant as well as the Respondents and decided the above petition as follows:

> *"Analysis and Decision*
>
> *.....*
>
> *12. Thus as per Regulation 15 (3) of the 2009 Tariff Regulations, Return on Equity shall be computed by grossing up of the base rate with the Minimum Alternate/ Corporate Income Tax for the year 2008-09 as per the Income Tax Act, 1961 as applicable to the generating station or transmission licensee as per regulation 15 (3) the ROE shall be trued-up in line with the provisions of the relevant Finance Act of the respective year of the tariff period.*

Therefore, there is provision for year wise computation for truing up of ROE with the applicable tax rate. The petitioner has prayed for relaxation of the regulation treating the financial years 2011-12 and 2012-13 cumulatively in order to gross up the ROE with corporate tax rate. This is in our view is not a fit case for exercise of the power of relaxation under Regulation 44 of the 2009 Tariff Regulations for the following reasons:

(a) Power to relax shall be exercised in extreme cases where the operation of the regulation causes hardship to a person. The Appellate Tribunal for Electricity in its judgment dated 20.9.2012 in ……

In the present case the petitioner is not subjected to any hardship on account of the operation of the 2009 tariff Regulations. The petitioner had higher taxable income during the financial year 2011-12 as it included the contribution towards superannuation fund under deductible income without incurring the actual expenditure for the same which was not admissible under Section 43B of the Income Tax Act and was accordingly disallowed.

Therefore, the situation has arisen on account of the failure of the petitioner to incur the expenditure towards contribution to superannuation fund in the year in which it is claimed and it cannot be said that the operation of the regulation has caused any hardship to the petitioner. Moreover, allowing the prayer of the petitioner will increase the liability of the respondent beneficiaries who are not responsible for the additional tax liability on the petitioner. In fact, the beneficiaries have serviced the contribution towards superannuation fund through tariff which has not been actually paid by the petitioner in the relevant year.

(a) If the prayer is allowed there will be an anomaly between the rate of tax used for grossing up of the Return on Equity and the income tax actually paid to the Income tax authority. While the petitioner has actually paid the tax at corporate tax rate in the financial year 2011-12 and MAT rate in the financial year 2012-

13, granting the prayer would amount to grossing up of the Return on Equity with the Corporate tax rate for both the years. This will be against the regulation which provides for grossing up with applicable tax rate.

(b) As per the examples cited by the NLC in the table under para 7, the tax liability during the financial year 2012-13 calculated at the rate of corporate tax (32.445%) is `342.98 crore and the total income calculated under the applicable MAT rate (20.008%) is `410.03 crore and as per Section 115JB ofthe Income Tax Act, 1961, the liability of NLC during 2012-13 is `410.03crore. Section 115 JB of the Income Tax Act, 1961 is extracted as under:-

……

As per the above provision, if the income tax payable on the total income as computed is less than eighteen and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent.

Accordingly, the tax rate calculated under MAT for the year the financial year2012-13 is higher in comparison to the tax calculated under the Corporate Tax Rate for the financial year 2012-13, which has resulted in excess tax outgo to NLC amounting to `67.05 crore.

Therefore, the applicable tax rate including surcharge is 20.008% during the financial year 2012-13. NLC is entitled to grossing up the RoE at 20.008% during the financial year 2012-13 at the rate at which it is paying to the Income tax Authorities. NLC cannot be allowed to gross up RoE at Corporate tax rate of 32.445% which NLC is not paying to the Income tax authorities.

The prayer of NLC if considered will allow NLC to retain a part of tax which is not entitled under the law.

(c) Under the 2009 Tariff Regulations, management of portfolio is in the exclusive domain of the generating company and the

beneficiaries are required only to revise the ROE grossed up at applicable tax rate. The Generating Companies are expected to recover the tax from the consumers to the extent of Return on Equity and the tax paid over and above the Return on Equity is to be borne by them. Accordingly, the petitioner's claim regarding the reimbursement of excess tax paid for FY 2011-12 and FY 2012-13 or consideration of tax on cumulative basis for FY 2011-12 (assessment year2012-13) and FY 2012-13 (assessment year 2013-14) is not admissible."

75. It is, further, observed in the Impugned Order that the Appellant is not subjected to any hardship on account of the operation of the 2009 tariff Regulations. The Appellant had higher taxable income during the Financial Year 2011-12 as it included the contribution towards superannuation fund under deductible income without incurring the actual expenditure for the same which was not admissible under Section 43B of the Income Tax Act and, was accordingly, disallowed. It is significant to note that the situation has arisen on account of the failure of the Appellant to incur the expenditure towards contribution to superannuation fund in the year in which it is claimed and it cannot be said that the operation of the regulation has caused any hardship to the Appellant. The relief sought by the Appellant is considered, it will increase the liability of the respondent beneficiaries who are not responsible for the additional tax liability on the Appellant. In fact, the beneficiaries have serviced the contribution towards superannuation fund through tariff which has

not been actually paid by the Appellant in the relevant year is not in dispute. As per Tariff Regulations, 2009, management of portfolio is in the exclusive domain of the generating company and the beneficiaries are required only to revise the ROE grossed up at applicable tax rate. Therefore, the generating companies are expected to recover the tax from the consumers to the extent of Return on Equity and the tax paid over and above the Return on Equity is to be borne by them. Therefore, the Central Commission has rightly held that the Appellant's claim regarding the reimbursement of excess tax paid for Financial Year 2011-12 & FY 2012-13 or consideration of tax on cumulative basis for Financial Year 2011-12 (Assessment Year2012-13) and Financial Year 2012-13 (Assessment Year 2013-14) is not at all admissible in law.

76. The reliance placed by the learned counsel appearing for the Appellant that the Central Electricity Regulatory Commission has not followed the well established principles of law on the exercise of the power of exemption or the power of relaxation in the statute or in the delegated legislation. In the cases of Premium Granites &Anr. v State of Tamil Nadu &Ors (1994) 2 SCC 691 at paragraphs 48 & 49; Hindustan Paper Corporation Limited v Government of Kerala (1986) 3 SCC 398; and M.P. Jain – Cases and Materials on Indian Administrative Law – 1994 Edition Volume 1, Page 117, contended that "At times, a statute may contain a "removal of difficulty" clause.

The need for such a clause arises because at the time of passing a new law, it may not be possible to foresee all the difficulties which might arise in its working etc. and also the judgment of this Appellate Tribunal in the case of Damodar Valley Corporation v Central Electricity Regulatory Commission & Ors. Dated 23.11.2007 passed in Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007 in paragraphs 11 to 13. The ratio of the well settled principle of law on exercise of power of exemption or power of relaxation in the statue have not been looked into nor considered by the Central Regulatory Commission. Therefore, he submitted that following ratio of these cases, as stated supra, the Impugned Order passed by the Central Electricity Regulatory Commission is liable to be set-aside.

77. The learned counsel, Mr. Pradeep Misra, appearing for the Respondent Nos. 9 to 11, submitted that, the judgment dated 23.11.2018 of this Appellate Tribunal relied upon by the Appellant in DVC case is not at all applicable to this case because in that case the Tariff Regulations with respect to regarding depreciation and interest on capital were inconsistent with the provisions of DVC Act itself whereas in the present case the provisions of Income Tax Act or Section 43B is not inconsistent with any provisions of the Tariff Regulations.

78. The learned counsel, Mr. Nikhil Nayyar, appearing for the Respondent No.14, submitted that, this Hon'ble Tribunal's judgment in DVC v CERC case is not applicable to the facts and circumstances of the present case and Appellant's reliance upon this judgment is wholly misplaced. In the above decision this Hon'ble Tribunal has held that the regulations made under the Electricity Act cannot violate the provisions of any plenary legislation like the DVC Act. It is not in dispute the well settled law laid down by the Hon'ble Apex Court in the cases of Premium Granites & Anr. v State ofTamil Nadu & Ors, Hindustan Paper Corporation Limited v Government of Kerala and M.P. Jain – Cases and Materials on Indian Administrative Law and also judgment of this Tribunal in Damodar Valley Corporation v CERC & Ors. The ratio of the said judgments is not applicable to the facts and circumstances of the case in hand as rightly pointed out by the learned counsel appearing for the Respondent Nos. 1, 9 to 11 and 14. The Central Regulatory Commission has rightly justified in passing the Impugned Order in accordance with law.

79. We are of the opinion that, the reliance placed by the learned counsel appearing for the Appellant in the cases of Premium Granites & Anr. v State of Tamil Nadu & Ors (1994) 2 SCC 691; Hindustan Paper Corporation Limited v Government of Kerala (1986) 3 SCC 398;

and M.P. Jain – Cases and Materials on Indian Administrative Law – 1994; and also the judgment of this Appellate Tribunal in case of Damodar Valley Corporation v Central Electricity Regulatory Commission & Ors. passed in Appeal Nos. 271, 272, 273, 275 of 2006 & 8 of 2007, as stated supra, is misplaced and hence these judgments are not applicable to the facts and circumstances of the case in hand.

80. The reasoning given by the Central Commission for rejecting the prayer sought in the petition is well founded and well reasoned. We do not find any error, illegality or perversity in the impugned Order nor we find any good ground, as such, made by the Appellant to consider the relief sought in this Appeal.

81. Taking all these relevant facts into consideration, as stated supra, we are of the considered view that the Appeal filed by the Appellant, being Appeal No. 254 of 2015, on the file of the Appellate Tribunal for Electricity, New Delhi, is liable to be dismissed as devoid of merits.

O R D E R

82. We are of the considered opinion that the issues raised in the present Appeal, being Appeal No. 254 of 2015, on the file of the Appellate Tribunal for Electricity, New Delhi, have no merit, as stated supra. Appeal is dismissed.

The Impugned Order dated 05.08.2015 passed in Petition No. MP/521/2014 on the file of the Central Electricity Regulatory Commission, New Delhi is hereby upheld.

No order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 3rd DAY OF APRIL, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

√ **REPORTABLE**
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