

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.113 OF 2012

Dated:20th July, 2012

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

- 1. Andhra Pradesh Power Co-ordination Committee
Vidyut Soudha,
Hyderabad-580 082
Andhra Pradesh**
- 2. Transmission Corporation of Andhra Pradesh Ltd.,
Vidyut Soudha,
Hyderabad-580 082**
- 3. Central Power Distribution Company of Andhra Pradesh Ltd.,
Mint Compound Hyderabad-560 082
Andhra Pradesh**
- 4. Southern Power Distribution Company of Andhra Pradesh Ltd.
19-3-13 (M) Upstairs
Renigunta Road,
Tirupati-506 001,Andhra Pradesh**
- 5. Northern Power Distribution Company of Andhra Pradesh Ltd.,
1-1-503, NIT Main Road,
Chaitanyapuri Kazipet,
Warangal-506 004
Andhra Pradesh**

6. **Eastern Power Distribution Company of Andhra Pradesh Ltd.,
Sai Shakti, Opp. Saraswati Park,
Dhaba Gardens,
Vishakhapatnam-606 124
Andhra Pradesh**

...Appellant (s)

Versus

1. **Andhra Pradesh Electricity Regulatory Commission
4 & 5th Floors,
Singareni Bhavan, Red Hills,
Hyderabad-500 004**

2. **M/s. Lanco Kondapalli Power Pvt Ltd.,
Plot No.4, Soft Sol Building
Software Units Layout,
HITEC City, Madhapur,
Hyderabad-500 081**

...Respondent(s)

Counsel for the Appellant(s) : Ms. Surbhi Sharma

Counsel for the Respondent(s): Mr. Krishnan Venugopal, Sr Adv.
Mr. Sitiesh Mukherjee,
Mr. Sakya Singha Chaudhuri

Ms. Anusha Nagarajan for R-2

J U D G M E N T

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

1. This case has got a chequered history.
2. M/s. Lanco Kondapalli Power Limited filed a Petition before the Andhra Pradesh State Commission claiming the reimbursement of Minimum Alternate Tax (MAT) from the

Respondents in OP No.18 of 2009 for the period from 2001 to 2009. The State Commission after hearing both the parties, passed the impugned order dated 13.6.2011 rejecting its claim for Minimum Alternate Tax (MAT) in respect of the period 2001 to 2005 as barred by limitation. However, the State Commission allowed its claim for MAT in respect of the period 2006 to 2009 as the same was not barred by limitation.

3. As against the disallowance of the claim for MAT in respect of the period from 2001 to 2005, the Lanco Kondapalli Power Limited (Lanco) filed an Appeal before this Tribunal in Appeal No.128 of 2011 praying for the claim of Minimum Alternate Tax (MAT) in respect of the earlier period also.
4. The Appeal was admitted and both the parties made their submissions in the said Appeal.
5. During the pendency of the Appeal, the LANCO Kondapalli filed a Petition before this Tribunal in IA no.207 of 2011 seeking for a direction to the Respondents to reimburse to the LANCO Kondapalli, the MAT for the period 2006 to 2009 along with the interest as ordered by the State Commission.

6. This Tribunal, after hearing the parties, deemed it fit to direct the LANCO Kondapalli to approach the State Commission and to file an application seeking for the consequential orders in pursuance of the earlier order passed by the State Commission on 13.6.2011 by allowing the claim for the MAT for the period 2006 to 2009. Accordingly, LANCO Kondapalli was directed by the order dated 11.11.2011.
7. On the strength of this order, the Lanco Kondapalli filed a Petition before the State Commission in IA No.140 of 2011 praying for the consequential orders to direct the Respondent to reimburse the MAT for the said period amount along with the interest. The State Commission, after hearing the party passed the consequential order on the basis of its earlier findings that the LANCO is entitled to re-imburement of MAT for the period 2006-2009 and directed the Respondents therein through its consequential orders dated 20.3.2012 to reimburse the MAT amount as claimed by the Lanco Kondapalli along with the interest as per the PPA after rejecting objection of the Respondents therein against the said consequential orders.
8. Challenging this order dated 20.3.2012, the Andhra Pradesh Power Coordination Committee and Others, the Respondents in the Petition No.140 of 2011 have filed this

Appeal No.113 of 2012 on the ground that the impugned order is not valid in law.

9. We have heard the Learned Counsel for the Appellant as well as the Learned Senior Counsel for the Caveator appearing for the Lanco Kondapalli, the Respondent.
10. According to the Appellant, the Respondent Lanco Kondapalli would not be entitled to claim the amount made under the MAT in respect of the period 2006 to 2009 as they have availed the tax holiday under Section 80-IA of Income Tax Act, 1961 and as such the impugned order is wrong.
11. On this point, we have heard both the learned Counsel for the Appellant and the Learned Senior Counsel appearing for the Caveator Lanco Kondapalli.
12. Having considered the submissions made by both the parties and having gone through the impugned order and other records, we are of the view that the ground urged by the Counsel for the Appellant assailing the impugned order is totally untenable. The reasons are as follows:

(a) The Lanco Kondapalli filed a Petition claiming reimbursement of MAT for the whole period from 2001-2009. The Appellants herein have conceded before the State Commission with reference to the

claim of the Lanco Kondapalli for the period 2006 to 2009 since the said claim was within the period of limitation, but objected to the claim for the period 2001-2005 as it was barred by limitation. On that basis, the State Commission allowed the claim for the period 2006 to 2009 but disallowed the claim relating to the payment of MAT from 2001 to 2005 upholding the objection raised by the Appellant herein holding that the Lanco would not be entitled for the said claim as the said claim was barred by limitation. The relevant portion of the Commission order passed on 13.6.2011 is as under:

“11. However, in the conclusion part of the written arguments, the Respondents have conceded to the claim of MAT for the period 2006 to 2009 in the light of the latest judgment of the Appellate Tribunal dated 06.08.2009 in Appeal No.41, 59 & 1160 of 2009. Hence, there is no need to this Tribunal to decide this issue specifically, about the entitlement. Hence, this issue is answered in favour of the Petitioner and against the Respondents for the period which is not barred by time”.

The Commission has thus granted the claim for MAT from 2006 to 2009 by concluding that Lanco Kondapalli was entitled for the said claim. The conclusion is as follows:

“Hence this issue is answered in favour of the Petitioner and against the Respondents for the period which is not barred by time”.

Thus, it is clear that there was no objection raised by the Appellants herein before the State Commission as Respondents with reference to the MAT in respect of the period 2006 to 2009. In fact, they conceded that Lanco Kondapalli was entitled for the claim of MAT for the period 2006-2009 in view of the ratio decided by the Appellate Tribunal in Appeal No.41, 59 and 60 of 2009 and requested the State Commission to pass the order accordingly. On the strength of this specific stand taken by the Respondents therein, the order had been passed on 13.6.2011 by the State Commission in favour of Lanco Kondapalli. This order has not been challenged. Thus, it has attained finality.

(b) The order dated 13.6.2011 was challenged by the LANCO in Appeal No.128 of 2011 in respect of disallowance for the reimbursement of MAT with reference to the period 2001 to 2005. When this Appeal was argued, the Respondent therein (Appellants in the present Appeal) have never raised any objection either by filing a separate Appeal or cross Appeal or cross objection with reference to the

findings of the State Commission in respect of the period 2006-2009 in favour of Lanco Kondapalli on the basis of No Objection pleaded by the Respondents therein.

(c) That apart, LANCO Kondapalli, the Appellant in Appeal No.128 of 2011 during the pendency of the said Appeal, filed an application in IA No.207 of 2011 for giving a direction to the Respondents therein to reimburse MAT amount in respect of the period 2006-2009 along with the interest as ordered by the State Commission. This Tribunal heard the parties including the Respondents therein and passed the order dated 11.11.2011 directing Lanco Kondapalli to approach the State Commission to file the necessary application seeking for the consequential directions on the strength of the order earlier passed by the State Commission in respect of the said period and directing the State Commission to pass appropriate consequential orders after hearing the parties. It is interesting to note that, when this order had been passed by this Tribunal, the Respondents therein (the Appellant herein) have never objected with reference to the entitlement of the claim for payment of MAT raised by Lanco Kondapalli in respect of the said period. As a matter of fact, the Respondents therein

i.e. Appellants, in this Appeal did not think it fit to ask for any liberty from this Tribunal to raise a fresh objection before the State Commission. Therefore, the issue with reference to entitlement of the claim or MAT for this period has been once for all decided and it has attained finality. That apart, there was no attempt on the part of the Respondent i.e. the Appellant herein to re-open the said issue while the Appeal No.128 of 2011 was heard.

(d) Strangely, when the Lanco Kondapalli as directed by this Tribunal filed an Application in IA No.140 of 2011 before the State Commission seeking for the consequential order, the Respondents therein (the Appellants herein) made an objection stating that the Lanco Kondapalli would not be entitled to the payment of MAT in respect of the said period since the tax holiday under Sec 80-IA of the Income Tax Act had been availed. The State commission after hearing both parties passed the impugned order dated 20.3.2012 dealing with the said issue in detail, gave a finding that the Lanco Kondapalli is entitled for the reimbursement in respect of the period 2006-2009 on the strength of the judgement of this Tribunal in Appeal No.39 of 2010 and directed the Respondents therein to reimburse the said amount with interest.

The relevant discussions and conclusion of the State Commission are as follows:

29. *The Learned Advocate for the Petitioner relied upon a decision of Hon'ble APTEL in Appeal No.39 of 2010. In this a clear cut observation is made as hereunder:*

“Tax holiday under Section 80-IA was applicable to the Petitioner at the time of signing of the PPA. Section 80-IA is still in vogue. Accordingly, the Petitioner is availing tax holiday for 10 years beginning from the year of commercial operation of its Project i.e. from FY 2003-04 onwards. However, by insertion of Section 115 JB in the Income Tax Act w.e.f. 1.4.2001, the Petitioner and such other companies availing tax holiday under Section 80-IA are subjected to payment of MAT.”

30. *The Learned advocate for the Respondent in his additional counter stated that the above said ruling is not applicable to the facts of the case by raising a ground that the four issues are framed by the Hon'ble APTEL and the crux of the issue in this case does not form part of these four points.*

31. *The ground mentioned in the counter on the non-applicability of the above said ruling is not tenable and moreover it is directly on the point in issue before the Commission, since the observations and the finding made by the Hon'ble APTEL are directly applicable to the facts of the case on hand. In that case, tax holiday was also availed invoking Section 80-IA and finding is given that MAT is made applicable to all the corporate entities including power generating companies. MAT is in the nature of tax on the income and has been dealt with clause 3.8, clause 11.1 also dealt with change in law. Though MAT is a tax on income, the methodology in determination of MAT is different from that of the normal corporate tax applicable to the companies. MAT is a tax payable on book profit as determined by profit and loss account of the company under*

Section 115JB of the IT Act. On the conjoint reading of clauses, 3.8, 3.9, 11.1 of the PPA and section 80-IA, 115JA and 115 JB of IT Act, 1961 it has to necessarily conclude that the change of law as per PPA would clearly establish that introduction of S.115JB would squarely fall under the definition of change of law under Clause 11.1 of PPA to this case on hand taken into account to determine the tax.

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34. In the above said decision in Appeal No.39 of 2010 of Hon'ble APTEL Jaiprakash Hydro Power Ltd (JHPL), (now known as Jaiprakash Power Ventures Ltd) (JPVL) JUIT Complex, Waknaghat, P.O Dumehar Bani, Kandaghat-173215, Distt Solan (H.P), Vs H.P.E.R.C & H.P State Electricity Board, the Hon'ble APTEL has ultimately held:

" (i) The definition of 'law' and 'change in law' as per the PPA would clearly establish that the amendment of Income Tax Act, 1961 by introduction of Section 115 JB by legislature squarely falls under the definition of change in law under clause 20.21 of the PPA.

(ii) The Appellant is entitled to payment of MAT by the Respondent No.2 under clause 20.21 of the PPA as per actuals during the tax holiday period available to the appellant under Section 80-IA of Income Tax Act, 1961. After the expiry of the tax holiday period, the Appellant will be entitled to payment of Tax on Income as per Clause 8.11 of the PPA".

35. When the finding is taken to consideration and the grounds raised by both parties, we are of the considered opinion that the issue involved in the above said decision is applicable to the facts of the case, since it deals with the issue involved i.e. MAT in that case and the same issue is pending before us. So, the plea taken by the Respondent that since the Petitioner has availed tax holiday, they are not liable to pay MAT is not correct. The other plea raised by

the Respondent that the above said decision is not applicable to the facts of the case is also not correct. The Respondent has ignored not only the legal aspect but also the record produced by the Petitioner. In the orders of the Deputy Commissioner of Income Tax, they have clearly disclosed the applicability of S.80-IA for other claims but not MAT. It is clear from the orders that the Petitioner has availed tax holiday for IT. Introduction of 115 JB is only for application of MAT to the companies and non-applicability of S.80-IA to the MAT. This demarcation has been lost sight of by the Respondents.

36. Hence, we are of the considered opinion that the Petitioner is entitled for payment of MAT by the Respondents under Clause 3.8, 3.9 and 11.1 as per the actuals even during tax holiday period available to the Petitioner under Section 80-IA of IT Act, 1961. After expiry of the tax holiday period, the petitioner will be entitled for payment of tax on income as per Clause 3.8 of the PPA.

The perusal of the impugned order as quoted above would show that the State Commission elaborately considered the objection regarding the claim of the MAT with reference to tax holiday Under Section 80-IA and came to the conclusion that the fact that the Lanco Kondapalli had availed the tax holiday would not disentitle them from claiming the said amount made under the MAT in respect of the period 2006-2009.

As a matter of fact, even though this objection was not raised earlier when the matter was decided by the State Commission in favour of the Lanco Kondapalli

by the order dated 13.6.2011, the State Commission allowed the Appellants herein to raise that objection while considering the application filed by the Lanco Kondapalli and passed the considered order granting consequential relief. Having not satisfied with that, the Appellants have presented this Appeal raising the same objection before this Tribunal.

(e) The issue relating to the fact that whether the party which has availed the tax holiday, is entitled for reimbursement of MAT in the impugned order, has already been decided in Appeal No.39 of 2010 i.e. Jai Prakash Hydro Power Limited Vs Himachal Pradesh State Electricity Board by this Tribunal as pointed out by the State Commission. In the said decision of this Tribunal, it has been categorically held that the Jai Prakash Power Ventures, the Appellant is entitled to payment of MAT as per actuals during the tax holiday period availed by Appellant under Section 80-IA of the Income Tax Act, 1961. The findings in this matter also attained finality as the ratio decided in that case has not been set aside. This finding is squarely applicable to the present case also, as concluded by the State Commission.

9. When such being the factual situation, we are unable to appreciate the conduct of the Appellant who have raised the fresh objection before the State Commission with a new ground even though such an objection was never raised either before the State Commission while deciding with regard to the claim for the period 2006-2009 nor before this Tribunal while deciding the Appeal No.128 of 2011 filed by the Lanco Kondapalli.

10. There is one more aspect to be taken note of. The impugned order had been passed on 20.3.2012. Against the said order, this Appeal has been filed as early as on 7.5.2012. In the meantime, the Appeal No.128 of 2011 was heard and the matter was reserved for judgment on 12.4.2012. The judgment in Appeal No.128 of 2011 has been delivered by this Tribunal on 2.7.2012. In this Appeal, this Tribunal confirmed the order of the State Commission in respect of the entitlement of the Lanco Kondapalli for re-imbusement with reference to the claim for the period 2006-2009 taking into consideration of the fact that the Respondents therein (Appellants herein) have conceded for the reimbursement of the claim for the period 2006-2009. Despite the fact the judgment has been rendered in Appeal No.128 of 2011 on 2.7.2012 endorsing the order of the State Commission in respect of the claim for the period 2006-2009 in the light of the fact that the

Respondent therein themselves have conceded that Lanco Kondapalli would be entitled to the claim for that period, the Appellant has brought this Appeal before this Tribunal on 16.7.2012 for pursuing the Appeal even though the Appellant knew about the nature of the judgment dated 2.7.2012 rendered by this Tribunal.

11. The conduct of the Appellants namely the Government authorities does not sound well as they bent upon taking a different stand before the different forums.
12. The Leaned Senior Counsel for the Caveator would strenuously argue that the Appellants herein have played all sorts of tricks to see that the legal claim made by the Lanco Kondpalli is denied despite the orders of the State Commission which was passed as early as on 13.6.2011. We find force in the submissions made by the Senior Counsel appearing for the Caveator.
13. As a matter of fact, the State Commission while allowing the Petition filed by the Lanco Kondapalli directed the Respondents (the Appellants herein) to re-imburse the MAT within three weeks after getting particulars from the Lanco Kondapalli along with the interest at the rate prescribed in the PPA. The relevant portion of the order is as follows:

“41. The first part of Clause 3.8 cannot be invoked as the assessment orders have already been finalised. The Respondents have to reimburse the MAT after verifying the said orders and the bank challans thoroughly and if at all if there is any ambiguity, they can get it clarified from the IT department and soon after the finalization of the scrutiny, they have to reimburse the said payments made by the Petitioner together with interest as claimed. The Petitioner is directed to submit the assessment orders and the payment particulars to the Respondent within a week and the respondent shall finalise and pay the amounts within three weeks from the date of receipt of the same from the Petitioner.

42. It is also further directed that, as prescribed in the PPA, the Respondents shall pay interest at the rate prescribed in the PPA till realisation of the said amount”.

14. Since we find that there is no merit in the Appeal for the reasons mentioned above, we dismiss the Appeal with a direction to the Appellants to comply with the impugned order passed by the State Commission on 20th March, 2012 and pay the amount along with the interest to Lanco Kondapalli (the Respondent herein) within the time limit stipulated by the State Commission.

15. The State Commission is also directed to ensure the compliance of the impugned order dated 20.3.2012 by the Appellants within the time frame fixed by the State Commission. If the said direction has not been complied with, as directed in the impugned order, the State

Commission shall take suitable action by issuing notice to the Appellant proposing for taking penal action under Section 142 of the Act in order to see that the order is complied with by the Appellant without making any further delay.

16. Before parting with this case, we have to express our displeasure over the conduct of the Appellants who are the statutory authorities in adopting all sorts of tactics to circumvent the orders passed by the State Commission as well as by this Tribunal which is most unfair.
17. This is a suitable case where the exemplary cost should be imposed on the Appellants. However, we refrain to do so as we feel that it would suffice by issuing a warning or advice to the Appellants that the Appellants should not resort to adopt such unfair practice in future.
18. With these observations, we dismiss the Appeal as devoid of merits. No order as to cost.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:20th July, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~