

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

**(APPELLATE JURISDICTION)**

**APPEAL NO. 330 OF 2013**

**Dated: 2<sup>nd</sup> May, 2014**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**IN THE MATTER OF**

1. Bangalore Electricity Supply Company Limited,  
2<sup>nd</sup> Floor, 2<sup>nd</sup> Block, K.R. Circle,  
Bangalore-560 001
  2. Mangalore Electricity Supply Company Limited,  
Paradigm Plaza, A.B. Shetty Circle,  
Mangalore-575 001
  3. Power Corporation of Karnataka Limited,  
Cauvery Bhavan, K.G. Marg,  
Bangalore-560 009
- .... Appellants

***VERSUS***

1. Tata Power Company Limited,  
Bombay House, 24, Homi Mody Street,  
Mumbai-400 001
  2. Karnataka Electricity Regulatory Commission,  
6<sup>th</sup> & 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
No. 9/2, M.G. Road,  
Bangalore-560 001
- .... Respondent/  
Petitioner
- .... Respondent

Counsel for the Appellant(s) ... Mr. Sanjay Sen, Sr. Advocate  
Mr. Anand K. Ganesan

Counsel for the Respondent(s) ... Mr. Sakya Siungha Chaudhuri  
Ms. Shagun Jain

## **JUDGMENT**

### **PER HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

1. This is an Appeal filed under Section 111 of the Electricity Act, 2003 against the Order dated 10.10.2013 passed by the Karnataka Electricity Regulatory Commission (hereinafter called the '**State Commission**') in Petition No. 49 of 2012 in the matter of *The Tata Power Company Limited vs Power Corporation of Karnataka Limited & Ors* whereby, the learned State Commission has held that the Respondent No.1, Tata Power Company Limited (hereinafter called '**Tata Power**'), who was the petitioner before the learned State Commission, is entitled for reimbursement of Minimum Alternate Tax (MAT) paid by it during the subsistence of the Power Purchase Agreement (PPA) dated 10.2.1999 and, further, directed that the Respondent No.1/Petitioner shall furnish a Bank Guarantee, in a form acceptable to the Appellants and keep it valid for next 10 years, undertaking to repay the amount paid to it towards MAT, which gets set-off in future years against the regular income tax liability of Tata Power as provided under Section 115JAA of the Income Tax Act, 1961. At the outset, we may clarify that in the impugned order passed by the learned State Commission, inadvertently or due to typographical error in the operative part of the impugned order, the word 'which does not get set-off in future years' have been written, whereas, the word 'not' should not have been used because the intention and purpose of the State Commission in the impugned order, while drafting the operative part was that the Petitioner-Tata Power shall furnish a bank guarantee for a period of next 10 years undertaking to repay the amount paid to it towards MAT liability which gets set-off in future years.

2. The relevant facts for deciding this Appeal are as follows:-

- (a) that the Respondent No.1, Tata Power Company Limited (Petitioner before the State Commission), filed the Original Petition being O.P. No. 49 of 2012 against the Appellants praying for:

- (i) issuance of appropriate directions to the Appellants (subject to prudence check), to pay an amount of Rs.16.30 crores to the Petitioner, Tata Power towards refund/reimbursement of the Minimum Alternate Tax (MAT) paid by the Petitioner for the period 2006-07 to 2009-10 in respect of the power supplied from its Belgaum Unit along with interest at the Default Rate as prescribed in the Power Purchase Agreement (PPA);
  - (ii) issuance of an appropriate direction to the Appellants to reimburse all such other amounts paid by the Petitioner, Tata Power towards MAT in relation to the Belgaum Unit during the subsistence of the PPA, upon the Petitioner making such payment and raising an invoice in respect thereof;
  - (iii) quashing the letter dated 10.10.2011 issued by Appellant No.3, Power Corporation of Karnataka Limited and letters dated 28.10.2011 and 8.2.2012 issued by Appellant No.1, BESCO to the effect that the Tata Power/Petitioner's claim for refund of MAT may be entertained after the expiry of ten years from the date of payment of MAT by the Petitioner, to the extent that credit for the MAT paid is not set-off against the Petitioner's regular income tax liability at the end of such period;
  - (iv) Passing any other and further orders/directions as this Commission may deem fit.
- (b) that the Respondent No.1/Petitioner had signed a Power Purchase Agreement (PPA) with the then Karnataka Electricity Board (KEB) on 10.2.1999 for developing, procuring finance, constructing, owning, operating and maintaining a generating plant in Belgaum District to supply electricity for a period of 12 years. Consequent to the dissolution of the KEB and replacement of the same initially by the Karnataka Power Transmission Corporation Limited

(KPTCL), and later by the Bangalore Electricity Supply Company Limited (BESCOM), pursuant to the provisions of the Karnataka Electricity Regulatory Reforms Act, 1999 and the Electricity Act, 2003, the said PPA came to be assigned to BESCOM.

- (c) that in accordance with the aforesaid PPA, the Respondent No.1/Petitioner has supplied electricity and the Assignee-Companies have paid for the same at the agreed rate and there remains no dispute between them on this score.
- (d) that the Appellant No.1 and 2 are the distribution licensees in the State of Karnataka discharging functions of distribution and retail supply of electricity in their respective specified areas and Appellant No.3 has been incorporated to undertake the activities of coordination of power purchases to be made by the distribution licensees in the State of Karnataka and to represent their interests.
- (e) that the Respondent No.1, Tata Power, is a generating company having a generating capacity of 81.3 MW in Belgaum District in the State of Karnataka.
- (f) that the dispute between the parties has arisen on the question of reimbursement of the MAT paid by the Respondent No.1/Tata Power as per Section 115 JB of the Income Tax Act, 1961 which had been introduced with effect from 1.4.2001.
- (g) that the case of the Respondent No.1/Tata Power is that under Clauses 11.4 and 11.5 of the PPA, the tax liability under Section 115 JB of the Income Tact Act, 1961, incurred by it is over and above what was contemplated when the PPA was signed and, therefore, the same has to be reimbursed by the Assignees (Appellants herein) who received the power under the agreement.
- (h) That, on Notice by the State Commission, the Appellants have appeared through their counsel and have filed detailed Statement of Objections on 4.4.2013 before the State Commission contending that they are not liable to reimburse the MAT alleged to have been

paid by the Respondent No.1/Petitioner immediately, under Section 115 JAA of the Income Tax Act, the Respondent No.1/Petitioner is at liberty to set-off the MAT paid against the actual tax liability within the next 10 years from the year of payment of MAT and, therefore, in the event of the Respondent No.1/Petitioner setting off the MAT, the said set-off would be treated as tax paid by the Respondent No.1/Petitioner and that such tariff has already been accounted for in the tariff of the Respondent No.1/Petitioner and, hence, the Appellants are not liable to reimburse any amount towards MAT to the Respondent No.1/Petitioner (Tata Power).

- (i) that the Appellants, further contended before the State Commission that in the event of Tata Power not setting off the MAT within the period of 10 years, it would then be a liability that the Tata Power would have incurred, and only when the liability is crystallized, the Tata Power will have a right to pass on the liability to the Appellants.
- (j) that the issue before the State Commission was whether the Appellants are liable to reimburse the MAT alleged to have been paid by the Tata Power under Clauses 11.4 and 11.5 of the PPA dated 10.2.1999?
- (k) that the learned State Commission after hearing the submissions of both the parties and going through the legal provisions, passed the aforesaid impugned order dated 10.10.2013, which is under challenge before this Appellate Tribunal in this Appeal.

3. We have heard the arguments of Mr. Sanjay Sen, Sr. Advocate and Mr. Anand K. Ganesan, the learned counsel for the Appellants and Mr. Sakya Singha Chaudhuri and Ms. Shagun Jain, learned counsel for the Respondents. We have deeply gone through the evidence and other material available on record including the impugned order and written submissions filed on behalf of the rival parties.

4. Now, we deal with the submissions made by the rival parties in this Appeal. The following submissions have been advanced on behalf of the Appellants:

(a) that at the time when the PPA was entered into between the parties, Tata Power was entitled to the tax holiday to the extent of 100% for the initial 5 financial years of operation and to the extent of 30% for the next 5 financial years of operation. The corporate tax rate at the relevant time was 46% (40% tax plus 15% surcharge). The PPA in Article 11.5 provided for any increase or reduction in the tax liability of the company in respect of the income related to the project operation on account of change in tax rate and assumptions to be a pass through payable by the purchaser through supplementary bills within 90 days of the end of the financial year.

(b) that Article 11.5 of the PPA inter alia provides as under:

***“11.5 Change in corporate tax:***

***An increase or reduction in tax liability*** of the Company in respect of the income related to Project operation on account of the changes in the tax rate and the assumptions stated in this Section 11.5, would be passed on to the Board through Supplementary Bills within 90 days of the end of each financial year during the term of this Agreement.

*100% tax holiday for initial 5 financial years of operation.*

*30% tax holiday for the next 5 financial years of operations*

*Indian Corporate Tax Rate = 46% (40% + 15% surcharge)”*

(c) that in the year 2001 and with effect from 1.4.2001, the Government of India introduced Section 115 JB in the Income Tax Act, 1961 providing for special provision with regard to payment of tax by companies, according to which, in case the income tax payable for the company on the total income as computed under the provisions of the Income Tax Act, 1961 is less than the specified MAT rate on the book profits of the Company, the company is liable to pay the MAT on the book profits (which was

- 10% for the years 2006-07 to 2008-09 and 15% for the year 2009-10)
- (d) that with effect from 1.4.2006, the provision in Section 115 JAA of the Income Tax Act for adjustment of tax credit with respect to MAT paid was inserted, in which case, the MAT paid by the assessee company, Tata Power in the present case was to be treated as tax paid for which tax credit is given and such tax credit is adjustable within a period of 10 years.
  - (e) that since Tata Power claimed an amount of Rs.11.77 crores on account of MAT liability paid by Tata Power, on 6.1.2011, and requested the same to be adjusted against the tax refund which Tata Power was entitled to and was required to be passed on to the Appellants.
  - (f) that the Appellants denied the said claim of refund of the Tata Power on the ground that without the liability getting crystallized after adjustment as provided for in Section 115 JAA of the Income Tax Act, 1961, the Tata Power is not entitled to the said claim of refund.
  - (g) that in terms of Section 115 JAA of the income Tax Act, a tax credit was allowed to the assessee company for the MAT paid over and above the income tax payable under the provisions of the Income Tax Act. Such tax credit was allowed to be carried forward and adjusted by the assessee company within 10 assessment years from the assessment year in which the MAT was paid.
  - (h) that in terms of the above, the payment of MAT was not the actual tax liability of the company but was only in the nature of tax paid in advance for which credit is given and such credit is adjustable against the income tax assessed over a period of 10 financial years. Only after the end of the 10 financial year if the tax credit is not adjusted against the income tax assessed and paid by the assessee company, the MAT liability gets crystallized.

- (i) that the provision in Section 115 JAA of the Income Tax Act for adjustment of tax credit with respect to MAT paid was inserted with effect from 1.4.2006, the MAT paid by the Tata Power was to be treated as tax paid for which tax credit is given and such tax credit is adjustable within a period of 10 years. Therefore, for the MAT paid by Tata Power in the year 2006-07, the same is adjustable over a ten-year period and carried forward up to the financial year 2016-17 and only if the same is not adjusted against the regular income tax assessed, then the MAT liability would get crystallized. Thus, from 1.4.2006, the MAT paid by the Tata Power would entitle Tata Power to tax credit adjustable on the regular income tax payable by Tata Power for the next 10 years.
- (j) that during the period of hearing before the State Commission, the Appellants sought an opinion from their chartered accountants in regard to the validity of the claim of Tata Power and their chartered accountants opined that the MAT paid by Tata Power was in the nature of advanced access/tax, the said payment was entitled to tax credit adjustable over a period of 10 years. Based on the said opinion of the chartered accountants, the Appellants denied the said refund of claim of Tata Power for payment of MAT paid by the Tata Power without the liability getting crystallized after adjustment as provided for in Section 115 JAA.
- (k) that the State Commission has erred in holding that the Appellants were liable to reimburse the MAT paid by Tata Power during the financial years 2006-07 to 2009-10 without set-off against the tax liability of Tata Power during the 10 financial years after the MAT paid by Tata Power. The State Commission has failed to appreciate that the liability of Tata Power under the Income Tax Act does not get crystallized till the set-off is done within the 10 years period.



- (l) that the State Commission has failed to appreciate that the MAT is only in the nature of an advance payment of income tax for which tax credit is provided for under Section 115 JAA of the Income Tax Act. The payment towards MAT is only a tax credit and the same is liable to be adjusted and given set-off for the liability that accrues to the assessee during 10 years from the year of payment for income tax. Only in case the total MAT paid is not adjusted or given set-off during the period of 10 years, the excess tax credit is not to be refunded or adjusted, which becomes the tax liability of the assessee for the said year. The State Commission has failed to appreciate that the MAT paid, prior to set-off is only a tax credit in the nature of advance tax paid and cannot be passed on as tax liability.
- (m) that the State Commission has failed to appreciate that Section 115 JB of the Income Tax Act ought not to be read in isolation in a manner to conclude that the MAT is a tax liability on Tata Power in the year when the payment is required to be paid. The State Commission has failed to appreciate that the tax liability gets crystallized only after the entire MAT paid is adjusted/given set off over the income tax payable by Tata Power within 10- years from the payment of MAT. Only any unadjusted amount of MAT is the tax liability of the Company for the year in which the MAT payment has been made. The State Commission has erred in concluding that the Appellants are liable to reimburse the MAT in the year, the payment is made by Tata Power.
- (n) that the State Commission has failed to appreciate the nature of MAT under the provisions of the Income Tax Act, 1961. The State Commission has failed to appreciate that on a comprehensive and combined reading of Sections 115 JAA and 115 JB of the Income Tax Act, the MAT is only an advance payment of tax by the assessee, subject to adjustment of the actual tax payable under the provisions of the Income Tax Act, 1961 within a period of 10 years from the year of payment. The State Commission has failed

to appreciate that the MAT payment under Section 115 JB of the Income Tax Act is not the actual tax liability of the assessee, but is only an advance payment for which the tax credit is provided for.

- (o) that the State Commission has failed to appreciate that tax on income being in the nature of direct tax cannot be passed through to a third party without there being a specific agreement to the effect. Any agreement between the parties also needs to be construed in a straight manner.
- (p) that the MAT is akin to payment of advance tax and the tax liability would get crystallized only after the expiry of the 10 assessment years as observed in the matter of Commissioner of Income Tax vs Jindal Exports Ltd. [2009] 314 ITR 137 (Delhi High Court), in which, it was held that *MAT credit represents that portion of MAT which was not actually payable by the company assessee but, has all the same, been collected by the government.*
- (q) that the MAT is in the form of direct tax. The direct tax liability is on the assessee directly and cannot be passed on to a third party, unless and otherwise specifically agreed to between the parties. In the present case, the agreement between the parties clearly provide for only any increase or decrease in tax liability to be passed on to the Appellants.
- (r) that the parties are governed strictly and solely by the terms and conditions of the Power Purchase Agreement (PPA) entered into. Merely because the payment of MAT causes cash flow problems to the Tata Power, namely by payment in the present assessment year and being subjected to adjustments at a subsequent point of time and to be reimbursed by the Appellants after the tax liability is crystallized, the same does not justify the reimbursement of MAT before the expiry of the 10 assessment years.

5. **Per contra**, the learned counsels for the Respondents have taken the following pleas:-

- (a) that the project was awarded to Respondent No.1, Tata Power through a competitive bidding process, the tariff for bidding purposes was worked out after factoring in the estimated tax liability having regard to the corporate tax rates provisions prevailing at the relevant time, as specified in Article 11.5 of the Power Purchase Agreement (PPA)
- (b) that according to the Clauses 11.4 and 11.5 of the PPA, any tax liability in relation to the income from the project and the electricity sold to the Discoms was required to be borne by the Discoms i.e. the Appellants herein.
- (c) that subsequently, during the terms of the PPA, the Income Tax Act, 1961 was amended to extend 100% tax holiday for the entire period of 10 years under Section 80IA, w.e.f. 1.4.2002 (Section 80 IA initially provided for tax holiday of 100% of the income for an initial period of 5 years of the tax holiday period and 30% for the next 5 years, which was the assumption at the time the PPA was entered into).
- (d) that the Respondent No.1, Tata Power had started claiming tax benefit of tax holiday under Section 80 IA of the Income Tax Act from FY 2002-03, under which provision, the Tata Power availed benefits to the tune of Rs.43.29 crores for the sixth to tenth year of the tax holiday period, which benefit has already been passed on to the Appellants/Discoms by Tata Power.
- (e) that further, w.e.f. 1.4.2001, Section 115 JB i.e. the provision of Minimum Alternate Tax (MAT) was introduced in the Income Tax Act. Under Section 115 JB, in cases where the income tax, payable by a company on its total income as computed under the Income Tax Act for any financial year, is less than a specified percentage of the book profit of the company for that year, the book profit of the company is deemed to be the total income of the company for that year and income tax is payable at the specified rate on such total income. This is known as the MAT. The Tata

Power, in accordance with the provision of Section 115 JB became liable to pay MAT for the years 2006-07 to 2012-13 to the tune of Rs.16.30 crores. Tata Power (Respondent No.1) requested the Appellants/Discoms to reimburse MAT in terms of Articles 11.4 and 11.5 of the PPA but the Appellants had refused to reimburse the Tata Power on the ground that the said claim of Tata Power could only be entertained after the expiry of 10 years when the MAT carry forward/set off period was over.

- (f) that there is no dispute between the parties on the Tata Power's statutory obligation to pay MAT under the Income Tax Act, or the factum of MAT paid by Tata Power in relation to Belgaum unit and the obligation of the Appellants/Discoms to reimburse the same under the PPA. The dispute only pertains as to whether the Appellants/Discoms shall reimburse the MAT paid by Tata Power (Respondent No.1) immediately or only after the end of the set-off period allowed under Section 115 JAA of the Income Tax Act.
- (g) that MAT is an actual tax liability of the company and is not an advance payment of income tax which is not crystallized. It is clear on a reading of Section 115 JB of the Income Tax Act that MAT is payable by a company when the normal tax liability of the company is below 18.5% of its book profits. Therefore, MAT is a tax on income computed in a manner different from the regular income tax.
- (h) that Section 115 JB of the Income Tax Act deems the book profits to be the "**total income**" of the company chargeable to tax, upon satisfaction of the condition that the regular tax payable under the Act is less than the specified percentage of the book profits, in which case, such specified percentage of the book profits becomes payable as MAT or the tax payable for that year. All the other provisions of the Income Tax Act are applicable to tax paid as MAT, just as the same are applicable to regular income tax payable under the Income Tax Act.

- 
- (i) that according to the law laid down by the Hon'ble Supreme Court in the Commissioner of Income Tax, Chennai v. Tulsyan NEC Ltd, reported in (2011) 2 SCC 1, the "**MAT**" is nothing but "**tax on income**" of an "**assessee**" computed on an alternative basis than the regular income tax liability and is payable on assessment of an assessee under the Income Tax Act in the same manner as the regular income tax liability.
- (j) that the Hon'ble Supreme Court in *Ajanta Pharma Limited v. CIT* reported in (2010) 9 SCC 455 held that Section 115 JB of the Income Tax Act, 1961 is a self-contained code that taxes deemed income, and begins with a non obstante clause meaning thereby that being an independent obligation, MAT is payable irrespective of whether a company is otherwise enjoying a tax holiday under any other provision of the Income Tax Act. Therefore, once the Tata Power is assessed to be liable to pay MAT in terms of Section 115 JB, it is the statutory liability of Tata Power to pay MAT for that particular year at the end of the financial year just as the assessee would have otherwise paid its regular income tax.
- (k) that MAT is a current liability and incurred in the year in which the liability accrues. The Appellants/Discoms rationale, for deferring reimbursement of MAT for 10 years from the year in which MAT is paid by the Tata Power, is based on a completely incorrect premise that the assessment and the tax liability in respect of MAT are crystallized for a particular assessment year, when the 10 year set-off period in respect of MAT credit is over. Such contention of the Appellants is premised on Section 115 JAA of the Income Tax Act which allows the assessee, a credit in respect of the tax paid by the assessee under Section 115 JB as MAT for a period of 10 years i.e. the MAT paid by the assessee can be set off against the regular income tax liability of the assessee over the next 10 years, subject to certain conditions.

- (l) that the mere fact that the Income Tax Act allows a credit in respect of the **“tax so paid”** under Section 115 JB of the Income Tax Act does not imply that tax liability under the said provision is not crystallized until the available credit period is over. In fact, as is evident from Section 115 JAA, the set off is available in respect of the **“tax so paid”** i.e. the MAT paid under Section 115 JB, that is the liability already incurred in the year in respect of which such liability to pay MAT accrued. Therefore, MAT is a current tax and is paid in a particular financial year on which such liability arises. It is not in the nature of an advance tax against the regular income tax that may become payable at a future date by Tata Power. Hence, the MAT credit available to Tata Power does not imply that the liability to pay MAT is not crystallized.
- (m) that the mere fact that the MAT paid by Tata Power can be adjusted during a subsequent year against the regular income tax payable by Tata Power does not convert the liability to pay MAT into a contingent liability. The settled law is that if the incurring of the liability is certain, ‘a condition subsequent, the fulfillment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability’ as observed by the Hon’ble Supreme Court in *Metal Box Company v. Workmen* reported at (1969) 1 SCR 750. Hence, MAT is a definite statutory liability that arises in a particular financial year and is required to be discharged by payment in the assessment year corresponding to the financial year in which the liability arises.
- (n) that the year in which MAT set off is claimed, tax liability for that year would be consequently reduced by the set off amount and it is such reduced liability that would normally have been passed to BESCO in the subsequent year, had the PPA been subsisting. However, it may be noted that the PPA expired in February, 2013. Accordingly, since, it would have been difficult to pass on the benefit of the set off of available MAT credit in respect of Project to

BESCOM, post the expiry of the PPA. This was the only reason that the State Commission, in the impugned order, in order to protect the interest of BESCOM (Discom) directed the Tata Power to provide a bank guarantee valid for a period of 10 years in favour of the Appellants, undertaking to repay the amount reimbursed to it, by the Appellants, towards MAT liability, which gets set off in future years under Section 115 JAA of the Income Tax Act.

- (o) that the advance tax is a mechanism to discharge one's liability towards income tax in advance, the entire amount of which is definitely adjustable against the tax ultimately assessed to be payable by an assessee, MAT represents a final income tax liability for the year in which the assessee is required to pay MAT, calculated on an alternative basis. This is also clear from reference to Form 29B prescribed under the Income Tax Rules which is a report under Section 115 JB of Income Tax Act for computing the book profits of the company, requiring the assessee to give details regarding the regular tax liability as well as MAT liability in respect of a particular year, and a comparison of both to assess final income tax required to be paid by the assessee under Section 115 JB of the Income Tax Act. It is only for the purposes of computation of interest under Section 234 B/C, which provide for compensatory interest to the exchequer on the shortfall in payment of tax due, that MAT credit is allowed to be adjusted against the shortfall in a manner similar to advance tax.
- (p) that MAT cannot be linked to the implementation of the terms of the PPA with regard to reimbursement of MAT. The Appellants cannot be allowed to avoid their present liability provided under the PPA against a probable and notional adjustment of the MAT in some future year. There is no provision for deferment of tax liability to be reimbursed by the Appellants as has been rightly held in the impugned order.

- (q) that though the levy of MAT was not provided under the Income Tax Act at the time of signing the PPA and came to be introduced only subsequently after the signing of the PPA, such additional liability towards income tax/statutory duties falls within the ambit of “any increase or reduction in tax liability” under Article 11.5 of the PPA. The Tata Power, Respondent No.1 has paid MAT as a statutory levy under the provisions of the Income Tax Act and is, therefore, entitled to pass on the MAT under the PPA.

6. The only issue, which requires our consideration after going through the counter submissions and written arguments filed by the rival parties in the instant Appeal, is:

*whether the Appellants are liable to reimburse the Minimum Alternate Tax (MAT) alleged to have been paid by the Respondent No.1, Tata Power under Clauses 11.4 and 11.5 of the PPA, dated 10.2.1999?*

7. On the aforementioned issue, our considerations are as follows:

7.1 The Respondent No.1, Tata Power is a power generating company and had signed a Power Purchase Agreement (PPA) on 10.2.1999 with the then Karnataka Electricity Board, replaced by Karnataka Power Transmission Corporation Limited and lastly replaced by Bangalore Electricity Supply Company Limited (BESCOM), pursuant to the provision of Karnataka Electricity Regulatory Reforms Act, the said PPA came to be assigned to BESCOM/Distribution Licensee, which is bound by the terms and conditions of the PPA, being the assignee company. Tata Power entered into the aforesaid PPA for supplying electricity and the assignee companies have been purchasing the electricity at the agreed rate and there is no dispute between them on this aspect of the matter.

7.2 The Appellant No.1 and 2 are the Distribution Licensees involved in the business of distribution and retail supply of electricity in their respective specified areas in the State whereas, Appellant No.3 is the



coordinator of power purchases to be made by the Distribution Licensees in the State and authorized to represent their interests.

- 7.3 The dispute, which has arisen between the rival parties, is on the question of reimbursement of the MAT paid by the Tata Power as per Section 115JB of the Income Tax Act, 1961 which had been introduced w.e.f. 1.4.2001.
- 7.4 The Tata Power filed the Original Petition being O.P. No. 49 of 2012 seeking directions to the Appellants to pay the amount running into Rs.16.30 crores paid by Tata Power, towards MAT for the period 2006-07 to 2009-10 for the power supplied in terms of PPA dated 10.2.1999. Thus, Tata Power simply sought refund/reimbursement of the MAT paid by it, for the aforesaid period from the Appellants which has been allowed, as stated above by the State Commission in the impugned order dated 10.10.2013.
- 7.5 First of all, we may note that there is no dispute between the parties on the Tata Power's statutory obligation to pay MAT under the Income Tax Act or the effect of MAT paid by Tata Power in relation to Belgaum Unit and obligation of Appellants/Discoms to reimburse the same under the PPA. The only dispute is whether the Appellants/Discoms are liable to reimburse the MAT paid by Tata Power immediately or only after the end of the set off period of 10 years allowed under Section 115 JAA of the Income Tax Act.
- 7.6 The admitted position is that Tata Power had already paid the claimed amount of Rs.16.30 crores on account of MAT for the period 2006-07 to 2009-10 and this fact is very well admitted by the Appellants also. Tata Power filed the Original Petition before the State Commission seeking refund/reimbursement of the MAT already paid by it for the aforesaid period under the terms of the Clauses 11.4 and 11.5 of the subsisting PPA. The Appellants vehemently contended and took the stand, before the learned State Commission, while opposing the refund/reimbursement, that they are not liable to

reimburse the MAT paid by the Tata Power, immediately under Section 115 JAA of the Income Tax Act, 1961 and the Tata Power is at liberty to set-off the MAT amount paid against the actual tax liability within the next 10 years from the year of payment of MAT and in the event of Tata Power not setting off the MAT within the period of 10 years, it would then be a liability incurred upon Tata Power and Tata Power will have a right to pass on the said liability to the Appellants only after the said liability is crystallized/fixed/determined.

- 7.7 Section 115 JB of the Income Tax Act deems the book profits to be the **“total income”** of the company chargeable to tax, upon satisfaction of the condition that the regular tax payable under the Act is less than the specified percentage of the book profits, in which case, such specified percentage of the book profits becomes payable as MAT or the tax payable for that year. All the other provisions of the Income Tax Act are applicable to tax paid as MAT, just as the same are applicable to regular income tax payable under the Income Tax Act.
- 7.8 We may note that MAT is an actual tax liability of the company like Tata Power herein, and is not an advance payment of income tax which is not crystallized. Under Section 115JB of the Income Tax Act, the MAT is payable by a company when the normal tax liability of the company is below 18.5% of its book profit. Therefore, we observe that MAT is a tax, on income, computed in a manner different from regular income tax.
- 7.9 By introducing the provisions of MAT under Section 115JB of the Income Tax Act, w.e.f. 1.4.2001, the intention was that where the income tax payable by a company on its total income, as computed under the Income Tax Act, for any financial year is less than a specified percentage of the book profit of the company for that year, the book profit of the company is deemed to be the total income of

the company for that year and income tax is payable at the specified rate on such total income which is known as the MAT.

7.10 Section 115 JB of the Income Tax Act, 1961 is reproduced as under:

*“115JB. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1<sup>st</sup> day of April, 2001, is less than eighteen and one half percent 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 percent.*

....

*(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every Assessee, being a company, mentioned in this section.”*

Thus, we find on a reading of Section 115 JB of the Income Tax Act that MAT is payable by a company when the normal tax liability of the company is below 18.5% of its book profit and, therefore, is a tax on income computed in a manner different from the regular income tax.

7.11 The Hon’ble Suprme Court in Commissioner of Income Tax, Chennai v. Tulsyan NEC Ltd, (2011) 2 SCC 1, on Section 115JA of the Income Tax Act, has observed as under:

*“Section 115-JAA. ....*

*4. As per provisions of Section 115JA, a company is liable to pay tax on 30% of book profits, if the income computed under normal provisions of the Act is less than 30% of the book profits. Thus, the Assessee is required to compute income chargeable to tax on two alternative basis – (i) income computed under normal provisions of the Act and (ii) 30% of book profits as disclosed in the P&L Account prepared in accordance with Part II and III of Schedule VI to the Companies Act, 1956, subject to the adjustments specified in the Explanation to Section 115JA. The higher of the two computations is deemed to be the “total income” chargeable to tax and tax is payable accordingly. Thus, Section 115JA enacts a deeming fiction by deeming 30% of book profits to be the “total income” chargeable to tax. The amount of tax paid*

*under Section 115JA is held to be a “tax payable under the Act, as defined in Section 2(43) [See NTPC Ltd. V. Union of India.*

5. *The relevant provisions under Section 115 JAA of the Act, introduced by the Finance Act, 1997 w.e.f. 1.4.1997 i.e. applicable for Assessment Years 1997-1998 and onwards, governing the carry forward and set-off of credit available in respect of tax paid under Section 115-JA, show that when tax is paid by the assessee under Section 115JA, then the assessee becomes entitled to claim credit of such tax in the manner prescribed. Such a right gets crystallized no sooner the tax is paid by the assessee under Section 115-JA, as per the return of income filed by that assessee for a previous year (say, year one). [See Section 115-JAA(1).] The said credit gets limited to the tax difference between tax payable on book profits and tax payable on income computed under the normal provisions of the Act [see Section 115-JAA(2)] in year one. Such credit is, however, allowable for a period of five succeeding assessment years, immediately succeeding the assessment year in which the credit becomes available (say years 2 to 6) [see Section 115-JAA(3)]. However, MAT credit is available for set-off against the tax payable in succeeding years where the tax payable on income computed under the normal provisions of the Act exceeds the tax payable on book profits computed for that year [see Sections 115-JAA(4) and (5)]*

6. *At this stage, we would like to emphasize the word “allowed” in all the sub-sections of Section 115-JAA. The statute envisages under Section 115-JAA “credit in respect of tax so paid” because the entire tax is not an automatic credit but has to be calculated in accordance with sub-section (2) of Section 115-JAA. Sub-section (4) to Section 115-JAA allows “tax credit” in the year tax becomes payable. Thus, the amount of set-off is limited to the tax payable on the income computed under the normal provisions of the Act less the tax payable on book profits for that year.”*

7.12 We see that the benefit of MAT credit available under Section 115JAA of the Income Tax Act is contingent upon several factors, and is not directly relatable to the MAT paid during a particular year. We note as follows:

- (i) The credit available to an assessee in respect of MAT paid by it under Section 115JB of the Income Tax Act is limited to the extent of difference between the regular tax liability and the MAT that was paid in respect of a particular year.

- (ii) Such MAT credit can be set off anytime during the ten years following the payment of MAT in a year in which the assessee is liable to pay regular income tax and not MAT.
- (iii) The extent to which the available MAT credit can be set off in a year is limited to the difference between the regular income tax payable in respect of that year and the MAT calculated on its book profits for that year.
- (iv) For MAT credit to be set off, the assessee must be assessed for regular income tax liability and not MAT i.e. MAT can only be set off against regular income tax and not MAT in subsequent years.

7.13 It is pertinent to note that this Appellate Tribunal from time to time has held generating companies to be entitled to reimbursement of the MAT amounts paid by them in relation to the power plant in terms of various PPA clauses. This Appellate Tribunal, in Appeal No. 39 of 2010, in the case of Jaiprakash Hydro Power Ltd. V. HPSEB, directed the power purchaser to reimburse MAT payments “as per actuals” to the generating company who had paid MAT during the tax holiday period. It further held the MAT to be reimbursable, in that case, on account of the introduction of Section 115JB in the Income Tax Act amounting to change in law under the PPA between the generator and the power purchaser.

7.14 This Appellate Tribunal in, Appeal No. 113 of 2012, in the case of Andhra Pradesh Power coordination Committee & ors. vs. Andhra Pradesh Electricity Regulatory Commission & Ors., has also held that MAT is in the nature of tax on the income and has to be dealt with under Change in law clause and accordingly reimbursement of MAT was allowed.

7.15 This Appellate Tribunal again in Appeal No. 177 of 2010, in the case of Tamil Nadu Electricity Board vs. GMR Power Corporation Pvt. Ltd. has held the generating company to be entitled to interest on the

amount of MAT, to be reimbursed to it, by the power purchaser in that case.

7.16 In view of the above discussions, we are unable to accept the Appellants' contention that the reimbursement of MAT paid by Tata Power in relation to the project in terms of Articles 11.4 and 11.5 of the PPA may be reimbursed only after the expiry of set-off period of 10 years from the year of payment of MAT by Tata Power. This contention of the Appellants is contrary to the terms of the PPA and is, in our opinion, based on wrong interpretation of the provisions of Income Tax Act, 1961. In our opinion, MAT has to be reimbursed by the Appellant to Tata Power. However, Tata Power has to repay the amount of MAT which gets set-off in future years against its tax liability as provided under Section 115JAA of the Income Tax Act, 1961. We find that the impugned order, dated 10.10.2013, is perfect, just and legal and does not suffer from any illegality or perversity and is required to be affirmed. **This issue is decided against the Appellants.**

## 8. SUMMARY OF FINDINGS

8.1 In view of the above discussions, we hold that the Appellants are liable to reimburse the MAT paid by Respondent No.1, Tata Power under Clauses 11.4 and 11.5 of the PPA dated 10.2.1999 and we agree with all the findings recorded, by the learned State Commission, in the impugned order. We do not find any convincing or cogent reason to differ from the findings recorded in the impugned order. The interpretation of Section 115-JB and Section 115-JAA of the Income Tax Act, 1961 are involved and the same has rightly and legally been done by the learned State Commission in the impugned order dated 10.10.2013.

8.2 The learned State Commission has passed a legal and valid impugned order in a balancing way, on one hand holding the Tata Power entitled to reimbursement of MAT paid by it during the subsistence of the

Power Purchase Agreement (PPA) dated 10.2.1999 and, on the other hand, directed that the Respondent No.1, Tata Power shall furnish a Bank Guarantee, in a form acceptable to the Appellants and keep it valid for next 10 years, undertaking to repay the amount paid to it towards MAT liability, which gets set-off in future years as provided under Section 115 JAA of the Income Tax Act, 1961. Thus, Tata Power has been directed by the learned State Commission to furnish a Bank Guarantee and that too for the next 10 years undertaking to repay the amount, if any becomes due in future at the end of 10 years.

9. Accordingly, this Appeal is dismissed since it has no merits and the impugned order dated 10.10.2013 is hereby affirmed. No order as to costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 2<sup>ND</sup> DAY OF MAY, 2014.**

**(Justice Surendra Kumar)  
Judicial Member**

**(Rakesh Nath)  
Technical Member**

**√ REPORTABLE/NON-REPORTABLE**

vt