

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:9th Apr, 2014

Present:

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

Appeal No. 133 of 2013

Tata Power Company Limited (Transmission Business)
Bombay House,
Homi Mody Street,
Fort,
Mumbai-400 001

... Appellant

Versus

Maharashtra Electricity Regulatory Commission,
World Trade Centre,
Centre No.1,
13th Floor, Cuffe Parade,
Mumabi-400 005

Respondent

Counsel for the Appellant : Mr. Amit Kapur
Mr. Vishal Anand
Mr. Gaurav Dudeja

Counsel for the Respondent (s): Mr. Buddy A Ranganadhan for R-1

J U D G M E N T

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

1. Tata Power Company Limited (Transmission) is the Appellant herein.
2. The Appellant in this Appeal has challenged the Tariff Order dated 30.3.2013 passed in the Petition filed by the Appellant Transmission Company seeking for the approval of The True-Up for the Financial Year 2011-12 and ARR for the Second Control Period from FY 2012-13 to FY 2015-16.
3. The short facts are as follows:
 - (a) The Maharashtra State Commission issued MERC Tariff Regulations, 2005 on 26.8.2005. After prolonged public consultation, the State Commission notified the MYT Regulations, 2011 repealing 2005 Regulations on 4.2.2011.
 - (b) On 23.2.2011, the State Commission issued Removal of Difficulty Order in view of difficulty arising in adhering to the timeline specified in the Regulations.
 - (c) On 25.3.2011, the State Commission directed all the Licensees and the Generating Companies to

submit their MYT Business Plan and MYT Petition for the Control Period from the Financial Year 2011-12 to 2015-16.

(d) The Appellant on 9.8.2011, filed the Petition for approval of the MYT Business Plan under MYT Regulations, 2011.

(e) On 4.11.2011, the State Commission directed the Appellant to file a Petition for the Financial Year 2011-12 under the Tariff Regulations, 2005 on the ground that order on approval of the Business Plan is likely to be issued only by the end of Financial Year 2011-12.

(f) Accordingly, on 30.11.2011, the Appellant filed a Petition in No.178 of 2011 for approval of tariff for Second Control Period under MYT Regulations, 2011.

(g) On 28.6.2012, the State Commission disposed of Petition in No.168 of 2011. Against this order, the Appellant filed an Appeal in Appeal No.158 of 2012 before this Tribunal.

(h) Since no stay was granted by this Tribunal, the Appellant in compliance of the directions of the State Commission filed the revised Petition on 28.8.2012 for true-up of the Financial year 2011-12 and approval of MYT for the Second Control Period from the Financial Year 2012-13 to 2015-16. The Appellant admittedly,

revised the MYT Petition in pursuance of the Order passed by the State Commission and issued public notice in the newspapers inviting the objections from the stake holders.

(i) Ultimately, the State Commission passed the Impugned Order dated 30.3.2013. In this Order, the State Commission has allowed income from gain/loss on foreign exchange as part of non tariff income resulting in unjust denial of Rs.2.91 Crores thereby depriving the Appellant of its entitlement of the reasonable returns.

(j) As against this Order, dated 30.3.2013, the Appellant has filed this Appeal.

4. The Appellant's Transmission Division has challenged this Order passed by the State Commission finalizing the true-up for the Financial Year 2011-12 and determining the ARR and Transmission Tariff for the Financial year 2012-13 to Financial year 2015-16. The Appellant has raised the following three issues:

(a) The State Commission has wrongly treated the entire income from gain/loss on foreign exchange as part of the non tariff income;

(b) The State Commission has wrongly applied the MERC (Terms and Conditions of Tariff) Regulations,

2005 for truing-up of the Financial year 2011-12 instead of Tariff Regulations, 2011.

(c) The State Commission has failed to allow pass through of income tax to the Appellant in terms of the judgment rendered by this Tribunal dated 14.2.2011 in the case of Tata Power Company Ltd Vs MERC, 2011 ELR (APTEL) 371;

5. According to the Appellant all these issues have already been decided in the earlier judgments of this Tribunal in favour of the Appellant. Therefore, it is prayed that this Appeal also may be allowed in terms of those judgments.
6. In respect of the first issue namely, wrongfully treating the entire income from gain/loss on foreign exchange as part of non tariff income, this Tribunal even during the pendency of this Appeal gave a decision in judgment dated 28.11.2013 rendered by this Tribunal in the previous financial year in Appeal No.106 of 2012 in favour of the Appellant.
7. With regard to the second issue i.e. Wrongfully applying the Tariff Regulations, 2005 instead of 2011 Regulations, this Tribunal during the pendency of the above Appeal has rendered a judgment dated 28.11.2013 in Appeal No.158 of 2012 in favour of the Appellant.
8. In respect of the 3rd issue namely failure to allow pass through of income tax to the Appellant, the judgment

rendered by this Tribunal in Appeal No.106 of 2012 dated 28.11.2013 in favour of the Appellant.

9. According to the Appellant this Appeal has to be allowed in respect of all the issues in terms of the judgments referred to above.
10. However, the State Commission has contested the Appeal only with regard to the first issue namely the treatment of income from gain/loss on foreign exchange as part of non tariff income.
11. It is not disputed that in respect of other issues, they have already been decided by this Tribunal in favour of the Appellant by the judgment in Appeal No.106 of 2012 and Appeal No.158 of 2012. Accordingly, the Issues No.2 and 3 are decided in terms of those judgments in favour of the Appellant.
12. As indicated above, the State Commission has contested the first issue alone on the basis of the following submissions:
 - (a) The facts involved in the judgment dated 28.11.2013 in Appeal No.106 of 2012 which is relied upon for the first issue by the Appellant is distinguishable.

(b) (i) In the Impugned Order, the State Commission has allocated gain from corporate treasury in the same proportion in which the expenses of the corporate treasury have been allocated (ii) The State Commission has taken only a part of the gains on exchange as non-tariff income which has been allocated to Mumbai licensed area and (iii) The State Commission has ruled that all cost incurred by the Appellant at the Head Office and support staff cannot be allocated to Mumbai licensed area.

(c) The contention of the Appellant that all the FCCB realignment related gains losses are not allocable to the licensed area business is not correct. The tax audit report for 2009-10 shows that the Tata Power Company partially utilized the 1.75% Foreign Currency Convertible Bonds towards purchase of indigenous/imported capital equipment for Mumbai licensed business.

13. On the strength of these submissions, the learned Counsel for the State Commission ventured to justify the findings by the State Commission with reference to the First Issue.
14. This contention, in our view is misconceived for the following reasons:

“The State Commission in the Impugned Order adopted the same approach taken in its previous truing up Order dated 15.2.2012 to consider gain from Corporate Treasury function as part of non-tariff income for the purpose of truing up of non-Tariff Income for FY 2011-12. The relevant observation of the State Commission is as follows:

“3.9.....The Commission in accordance with the approach adopted in its previous truing up Order in Case No.106 of 2011, has considered gain from Corporate Treasury function as part of non-tariff income, for the purpose of truing up of non-Tariff Income For Financial Year 2011-12.”

15. In fact, as correctly pointed out by the Appellant, this approach to ignore the information submitted by the Appellant and to allocate income from corporate Treasury on the basis of the operating revenue of the Mumbai licensed area to total operating revenue in its order dated 15.02.2012 has already been set-aside by this Tribunal by the judgment dated 28.11.2012 in Appeal No.106 of 2012.

16. The relevant findings rendered in the above judgment is as follows:

“111. The Appellant has earned certain amount due to gains in Corporate Treasury function and exchange rate. The State Commission has allocated such gains to Regulated Business in the same proportion as the expenses of the Corporate Treasury functions. The approach of the State Commission appears to be

logical at first glance. But, it is too simplistic. In any business, the expenses and gains are not necessarily be in the same proportion. For example, an establishment is involved in manufacturing as well as trading of its product. The expenses in the manufacturing process would be much higher than the it's' marketing. But profit margin could be higher in marketing than manufacturing.

112. Had the Appellant not furnished the requisite information, the approach adopted by the State Commission would have been the correct approach. However, in this case the Appellant had furnished full details of gains the State Commission ought to have considered the same and gave reason for rejection of the same. The State Commission simply brushed aside the details furnished by the Appellant and adopted an erroneous simplistic approach. Therefore, the State Commission would consider the issue in the light of our above observations and pass the orders accordingly.”

17. Therefore, the State Commission cannot now make a justification in their submissions before this Tribunal. It is a settled law that the State Commission is only permitted to make submissions only on the basis of the Impugned Order and it cannot travel beyond the Impugned Order.
18. This principle has already been settled in the case of Mohinder Singh Gill Vs Chief Election Commissioner, (1978) 1 SCC 405 and Manohar Joshi Vs State of Maharashtra (2012) 3 SCC 619. Therefore the contention of the State Commission is misplaced.

19. That apart, during Technical Validation Session in response to the query raised by the State Commission, the Appellant specifically clarified that gain of Rs.96 Crore in the treasury was not on account of Mumbai Licensed Area.

20. The said response made by the Appellant is as follows:

“We wish to submit that during Financial Year 2011-12, Tata Power had foreign exchange gains/loss on account of realignment and settlement of the followings:

(1) Long term borrowings comprising of Euro Note (2017) and FCCB which were allocated to divisions outside License Area.

(2) Buyer’s credit taken for financing purchase of imported coal and corresponding hedge contracts which were used for funding imported coal purchased for Tata Power-G.

(3) Fuel payments made for Tata Power-G.

(4) Others (includes long term loans given to wholly owned subsidiaries, overseas bank deposits and others).

The detailed break-up of the amounts charged to P&L Accounts during the Financial Year 2011-12 with respect to the above items are as summarized below:

Table 1: Foreign Exchange Gain/(Loss) during FY 2011-12

S. No	Particulars	Rs. (Cr)	Remarks
	Licensed Area		
1.	<i>Realignment/settlements of Buyers Credit and corresponding hedge</i>	<i>(-) 56</i>	<i>These are used for funding the purchase of imported fuel used for Tata Power-G. However, it is not considered under Non Tariff Income as it is in nature of the working</i>

	<i>contracts</i>		<i>capital funding.</i>
2.	<i>Fuel payment made for Tata Power-G</i>	<i>(-) 21</i>	<i>Fuel payments made for imported fuels used for Tata Power-G and hence considered under the Fuel Cost.</i>
3.	Total License Area	<i>(-) 77</i>	
	Non License Area		
4.	<i>Realignment of Long term borrowings (Euro Notes and FCCB)</i>	<i>(-) 34</i>	<i>Allocated to projects outside Mumbai Licensed Area</i>
5.	<i>Others</i>	<i>207</i>	<i>Pertains to realignments/settlements of loans given to wholly owned subsidiaries, overseas FCCB Bank deposits and miscellaneous. These are not used for the purpose of Mumbai Licensed area hence the same is not considered as Non Tariff income.</i>
5.1	<i>Realignment/Settle ment of loans given to wholly owned subsidiaries</i>	<i>139</i>	
5.2	<i>Realignment of overseas FCCB Deposits</i>	<i>60</i>	
5.3	<i>Miscellaneous</i>	<i>8</i>	
6.	Total Non License Area	<i>173</i>	
7= 2+ 6	Total Gain Losses	<i>96</i>	

From the above it is clear that the amount of Rs. -77 Crores was charged to the License Area since the same was pertaining to the License Area expenditure. While the rest is allocated to Non-License area where the projects and the areas have been clearly identified and the same cannot be considered as the HO and SS Costs.”

21. The above response would indicate the following:

- (a) The amount of Rs.96 Crore income arises out of a Foreign Exchange Loss of Rs (-) 77 Crores which is

on account of the Mumbai Licensed Area and a gain of Rs.173 Crores arising out of the exchange gains on foreign loans taken for outside Mumbai Licensed Area. Under those circumstances, the gain of Rs.96 Crores are not attributable to the Mumbai Licensed Area. As such, the State Commission has wrongly included to arrive at non tariff income for Mumbai.

(b) Out of the Loss of Rs.(-) 77 Crores, the loss of Rs. (-) 21 Crores alone was included in the Mumbai Licensed area by the Appellant. The remaining loss of Rs (-) 56 Crores on account of actual interest on Working Capital paid for the Buyer's credit was not included by the Appellant while calculating the ARR. This occurred since interest on Working Capital is charged on normative basis and hence actual interest of Rs (-) 56 Crores was not included by the Appellant in its ARR calculation.

22. As regards the utilization of \$25 million shown under the tax audit report for the Financial Year 2009-10, it is submitted by the Appellant that the issue pertains to Truing Up of FY 2011-12 and not FY 2009-10. Therefore, this issue has already been decided by this Tribunal in favour of the Appellant in Appeal No.106 of 2012.

23. Therefore it is concluded that all the issues raised in this Appeal are decided in favour of the Appellant.

24. **Summary of Our Findings**

(i) All the three issues raised in this Appeal are covered by the judgment of this Tribunal in Appeal No.106 of 2012 and 158 of 2012.

(ii) The 1st issue regarding wrongfully treating the income from gain/loss on foreign exchange as part of non tariff income has been decided by this Tribunal in Judgment dated 28.11.2013 rendered by this Tribunal for the previous financial year in Appeal No.106 of 2012 in favour of the Appellant.

(iii) Wrongfully applying the Tariff Regulations, 2005 instead of 2011 Regulations for trueing-up for Financial Year 2011-12 has been decided by this Tribunal during the pendency of this Appeal in Judgment dated 28.11.2013 in Appeal No.158 of 2012 in favour of the Appellant.

(iv) The third issue regarding failure to allow the pass through of income tax has also been decided by this Tribunal in judgment dated 28.11.2013 in Appeal No.106 of 2012 in favour of the Appellant.

Thus, all these issues have already been decided by this Tribunal in the other Appeals and those decisions would apply to this Appeal also. As such, the Appellant succeeds in all the issues.

25. Consequently, the Impugned Order is set aside and Appeal is allowed. No order as to costs.

26. The State Commission is directed to pass consequential orders in terms of the findings rendered by this Tribunal as reported above.

27. Pronounced in Open Court on 9th Day of April, 2014.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 9th Apr, 2014

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