IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 206 OF 2024 &

IA No. 619 OF 2024

Dated: **22.11.2024**

Present: **Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson**
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

PUNJAB STATE POWER CORPORATION LIMITED
Through its Chairman-Cum-Managing Director,
The Mall, Patiala,
PSEB Head Office,
Baradari, Patiala - 147001 … Appellant

VERSUS

1. **M/S CHADHA SUGARS AND INDUSTRIES PVT. LTD.**
Through its authorized representatives Nitin Sharma,
Regd. Office 24-A, Ground Floor,
Bharat Nagar, New Friends Colony,
New Delhi-110025 ... Respondent No.1

2. **PUNJAB STATE ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
Site No.3, Block B,
Sector-18 A, Madhya Marg,
Chandigarh – 160018 ... Respondent No.2

3. **STATE OF PUNJAB,**
Through its Special Secretary/Power,
Department of Power,
Room No.210, 2nd Floor,
Civil Secretariat-2, Sector 9,
Chandigarh-160009 ... Respondent No.3

Counsel on record for the Appellant(s) : Poorva Saigal
Shubham Arya

Pallavi Saigal
Ravi Nair
Reeha Singh
Anumeha Smiti
Devyanshu Sharma for App. 1

Counsel on record for the Respondent(s) : Karan Nagrath
Niharika Nagrath
Ambuj Tiwari
Arjun Nagrath
B.P. Sharma for Res. 1

Gargi Kumar for Res. 2

Nupur Kumar
Niharika Tanwar for Res. 3

JUDGMENT

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)

1. The present appeal is filed by the Appellant-Punjab State Power Corporation Limited (for short **"PSPCL"**) against the Order dated 06.03.2024 passed by the Punjab State Electricity Regulatory Commission in Petition No. 45 of 2023 filed by Respondent No. 1 – Chadha Sugars and Industries Pvt. Ltd. (for short "**Chadha Sugar"**) for setting aside/quashing the recovery/demand notice dated 24.01.2023 issued by PSPCL as well as the Minutes of Meeting dated 22.03.2023 for reduction in Tariff on account of Accelerated Depreciation in terms of the Power Purchase Agreement ('**PPA**') dated 10.09.2012 as entered into between PSPCL and Chadha Sugar.

2. The Appellant, Punjab State Power Corporation Limited, is a company incorporated under the Companies Act and is a successor entity to the functions of electricity distribution and generation of the

erstwhile Punjab State Electricity Board ('**PSEB'**) upon its re-organisation under the provisions of Section 131 of the Electricity Act, 2003 (**'the Act'**). All the agreements entered into by PSEB for procurement of power came to be vested in the Appellant.

3. Respondent No. 1 – Chadha Sugars and Industries Pvt. Ltd. ("**Chadha Sugar'"**) is a company incorporated under the Companies Act, which has established a 23 MW Non-Fossil fuel based Co-generation Power Project in the State of Punjab (**"Project"**). Respondent No. 2, Punjab State Electricity Regulatory Commission, (**for short "State Commission / PSERC'**) is the State Commission for the State of Punjab under Section 82 of the Electricity Act, 2003.

4. During the year 2010-2011, various short-term Power Purchase Agreements **('PPA')** were executed between Chadha Sugar and PSPCL for supply of surplus power from Chadha Sugar's 23 MW Non-Fossil fuel based Co-generation Power Project. While determining generic levelised tariff based on CERC RE Regulations, 2009, the Central Commission vide its order dated 26.4.2010 in Suo Moto Petition No. 53 of 2010 has distinguished Depreciation as per straight line method based on Companies Act, 1956, and Depreciation based on Income Tax Act, 1961. The Relevant portion of the said order reads as under:

> *"63. In terms of the above regulation, for the projects availing the benefit of accelerated depreciation as per applicable Income tax rate @ 33.99% (30% IT rate+ 10% surcharge +3% Education cess) has been considered.* ***For the purpose of determining net depreciation benefits, depreciation @ 5.28% as per straight line method (Book depreciation as per Companies Act, 1956) has been compared with depreciation as per Income Tax rate i.e. 80% of the written down value method*** *and depreciation for the first year has been calculated at the rate of 50% of 80% i.e. 40%, as project is capitalized during the second half of the financial year as per proviso (ii) to Regulation*

22…….tax benefits has been worked out as per normal tax rate on the net depreciation benefit. Also, the per unit levellised accelerated depreciation benefit has been computed considering the weighted average cost of capital as discount factor."

5. On 30.09.2010, the State Commission in Suo Moto Petition No. 32 of 2010, while adopting the CERC RE Regulations 2009 had determined the generic levelized tariff for Renewable Energy Power Projects for the Financial Year 2010-11 and stated that for a Non-Fossil Fuel based Co-Generation Projects, the applicable Tariff Rate shall be Rs. 4.57/kwh and in case the benefit of Accelerated Depreciation is availed, the tariff shall be reduced by Rs. 0.18/kwh. Therefore, the net tariff payable shall be Rs. 4.39/kwh.

6. On 06.09.2012, Respondent No.1-Chadha Sugar had given an undertaking to the Appellant-PSPCL stating that it will not avail the benefits of Accelerated Depreciation under the Income Tax Act, 1961. Subsequently on 10.09.2012, a Long Term PPA was executed between Chadha Sugar and PSPCL for supply of Surplus Power up to 16-20.5 MW generated from the Power Project. The Commercial Operation Date ('**COD**') of the project was already achieved on 20.12.2010.

7. In terms of Article 2.1.1 (vi) of the PPA, the Respondent No.1-Chadha Sugar was under an obligation to submit the requisite financial documents every year, however, the same was not complied with. The Appellant-PSPCL vide letters dated 28.09.2018 and 27.08.2019 requested the Chadha Sugar to submit the said financial documents in terms of Article 2.1.1 (vi) of the PPA. Subsequent thereto, on 31.08.2019, Chadha Sugar submitted a Chartered Accountant (CA) Certificate stating that Chadha Sugar has not claimed the benefit of Accelerated Depreciation from FY 2010-11 to FY 2018-19. Further, on 18.12.2019,

Chadha Sugar submitted only the Annual Financial Report for the period 2010-11 to 2018-19 and the CA Certificate, which was received by PSPCL on 20.12.2019. The Income Tax Returns were not submitted by Respondent No.1-Chadha Sugar despite being sought by the Appellant-PSPCL. Similarly, on 03.05.2021, Chadha Sugar submitted only the Annual Financial Report for the period 2019-20 and the CA Certificate without the Income Tax Return. The complete Income Tax Return (ITR) for the period 2010-11 to 2019-20 were received by the Appellant in the FY 2021-22. After scrutiny of the said documents, it was discovered by the Appellant that Respondent No.1-Chadha Sugar was in fact availing Accelerated Depreciation under the Income Tax Act, 1961 as per Written Down Value method at the rates prescribed in the Appendix I of Rule 5 of the Income Tax Rules,1962 which includes 80% Depreciation rates on Plant & Machinery**.** Thereupon, the Appellant-PSPCL vide its letter dated 01.11.2022, informed the Chadha Sugar that in spite of Clause 2.1.1 (ii) of the PPA, Chadha Sugar has availed the benefit of the Accelerated Depreciation and therefore, PSPCL is entitled to reduction of tariff to the extent of Rs. 0.18 per Unit. In response thereto, Chadha Sugar vide its letter dated 28.11.2022, while intimating the Appellant that it is charging depreciation on straight line basis, further informed that Accelerated (additional) depreciation was only availed in the Assessment Year 2011-12 and 2012-13, however the same had been reversed in the Assessment Year 2020-21.

8. According to the Appellant, in terms of Article 2.1.1 (ii), (iii) and (vi) of the PPA, Respondent No.1-Chadha Sugar is obliged to pass on the benefits of Accelerated Depreciation (if availed) to PSPCL, and consequently, to the consumers of the State of Punjab. Therefore, in terms of Article 2.1.1 of the PPA, the Appellant issued a recovery Demand

Notice dated 24.01.2023 in relation to the benefit of the Accelerated Depreciation availed by Chadha Sugar. Pursuant thereto, on the request of Chadha Sugar vide their letter dated 27.01.2023 for a personal hearing, a meeting between the PSPCL and Chadha Sugar was held on 16.02.2023 and also on 22.03.2023, wherein the Respondent agreed that they have claimed the benefits of accelerated depreciation but the accelerated depreciation has remain unabsorbed during the period AY 2011-12 and AY 2020-21. Relevant extract of the Minutes of Meeting (MOM) of above meetings is as under:

Extract from MOM dated 16.02.2023

> *"….The firm agreed that they have claimed the benefit of accelerated depreciation.*
>
> *The firm M/s Chadha Sugars has intimated that they have adjusted the depreciation benefit under section 115BAA in AY2020-21 and stated that no benefit of accelerated depreciation has been availed because Accelerated Depreciation had remained unabsorbed during the period AY 2011-12 to AY 2020-21. PSPCL informed that there is no such clause in PPA regarding adjustment of accelerated depreciation in subsequent years."*

Extract from MOM dated 22.03.2023

> *"M/s Chadha Sugars contended that they have adjusted the depreciation benefit under Section 115BAA in AY 2020-21 and stated that no benefit of accelerated depreciation has been availed because accelerated depreciation had remained unabsorbed during the period AY 2011-12 to AY 2020-21. Hence recovery notice dated 24.01.2023 need to be withdrawn.*
>
> *PSPCL replied to Firm's contention that only additional depreciation benefit to the tune of Rs.9,41,53,001/- taken by firm in AY 2011-12 and 2012-13 have been adjusted in AY 2020-21 under section 115BAA of the*

income Tax act. Further, accelerated depreciation benefit is different from additional depreciation benefit. Therefore, M/s. Chadha Sugar has availed the benefit of accelerated depreciation. Accordingly, in terms of clause 2.1.1 of the PPA, the levelized fixed cost component of tariff stands reduced by Rs. 0.18 per unit. Thus, the recovery notice dated 24.01.2023 issued by PSPCL is correct."

9. Subsequently, on 24.04.2023, Chadha Sugar submitted another CA Certificate, which relates only to the Additional Depreciation. In fact, the said certificate specifically states that the amount of unabsorbed depreciation '*was added in the Opening Balance of Written Down Value of Plant and Machinery*'.

10. On 25.04.2023, Chadha Sugar filed a Writ Petition (C.W.P 8748/2023) before the Hon'ble Punjab and Haryana High Court seeking to quash/set aside the above-mentioned notice dated 24.01.2023. The said Writ Petition was disposed of vide Order dated 04.05.2023, the relevant portion reads as under:

"5. Mr. Bali, learned Senior Counsel appearing on behalf of the petitioner assisted by Mr. Saron could not dispute that the petitioner has a remedy under Section 86 (1) (f) against Annexure P-13 and the same has been recognized under the agreement itself.

6. In view of the above, the present writ petition is disposed off with a direction to the respondents to clear the arrears of the petitioner (beyond the disputed amount as claimed in demand notice dated 24.01.2023 (Annexure P-13) within a period of four weeks from the date of receipt of certified copy of this order."

11. In May–June 2023, PSPCL, in compliance with the above Order, has released/adjusted the arrears of Chadha Sugar except the disputed amount as claimed in demand notice dated 24.01.2023 amongst others.

12. On 03.07.2023, Chadha Sugar filed Petition No. 45 of 2023 before the Commission seeking to quash/set aside the demand/recovery notice dated 24.01.2023 issued by PSPCL as well as Minutes of Meeting dated 22.03.2023. The Commission vide its order dated 06.03.2024 has disposed of the said petition and held that the Appellant's – PSPCL recovery notice dated 24.01.2023 is not in order in terms of the PPA and has set aside the same and Appellant –PSPCL was directed to refund/pay the amount along with applicable late payment surcharge. Aggrieved thereby and challenging the said order, PSPCL has approached this Tribunal.

Appellant submissions:

13. Learned counsel for the Appellant-PSPCL submitted that the Commission had rejected its claim on the grounds that Article 2.1.1(ii) of the PPA was specifically linked to Section 80(1)(A) of the Income Tax Act, 1961, and PSPCL had not sought confirmation from PEDA before issuing the said Demand Notice. As regards the issue of Section 80(1)(A), it was decided by this Tribunal vide its Judgement dated 19.03.2024 in Appeal No. 60 of 2024, wherein it was held that "….. *the fact remains that reference in Clause 2.1.1(ii) of the PPA was to a non- existent statutory provision. Since no provision called Section 80(1)(A) has been made in the Income Tax Act, it is an error which goes to the root of the agreement, and such a fundamental error, which is incapable of correction, must necessarily be ignored."* This aspect has not been disputed by Respondent No.1.

14. Learned counsel for the Appellant as regards the confirmation from PEDA submitted that the governing provision i.e., Article 2.1.1 (ii) of the PPA **(Accelerated Depreciation)** does not stipulate for any such confirmation and it is only with respect to Article 2.1.1 (iii) (Grant/Subsidy) that PEDA's confirmation is required. Article 2.1.1 (vi) needs to be given a harmonious construction along with Articles 2.1.1 (ii) and (iii) and the same cannot be construed in isolation. Additionally, Article 2.1.1 (vi) refers to Undertakings and in fact there was no undertaking in Article 2.1.1 (i). Further, in Halsbury Vol 13, 4th Edition, 2007 it is stated that '*if the provisions and expressions are contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the word'.*

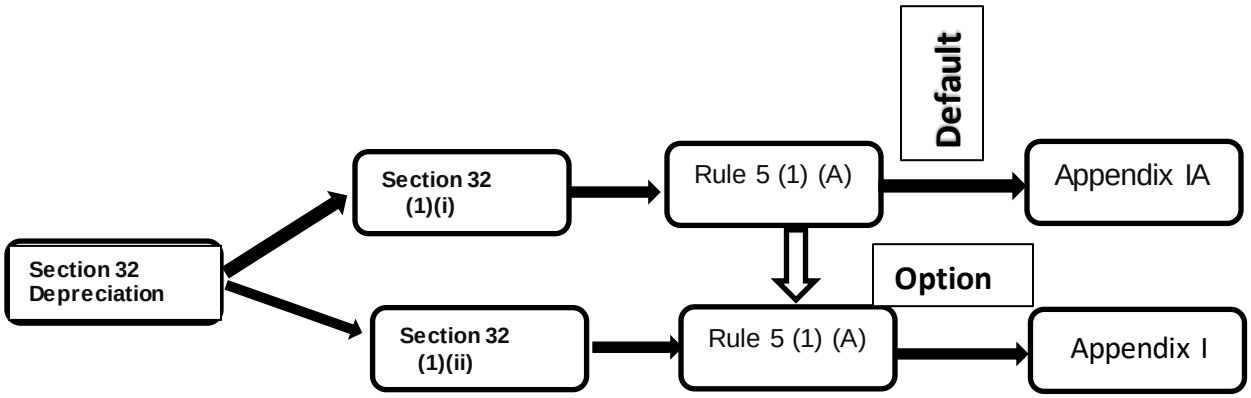
15. Therefore, the rationale for the aforementioned distinction is clear, meaning thereby, that PEDA was not privy to the financial documents of Respondent No.1 and thus could not confirm whether Accelerated Depreciation had been availed. As per the PPA, the Respondent No.1 is under obligation to submit ITRs and related documents to PSPCL and not to PEDA. However, on 30.08.2024, PEDA, after examining the financial documents provided by PSPCL, confirmed that Respondent No.1 has availed the Accelerated Depreciation.

16. So far as the contention of *contra proferentem* raised by Respondent No.1, learned counsel for the Appellant while contending that it is settled position of law that the said rule does not apply to commercial contracts, refers to Article 31 of the PPA, which provides that *'no party shall be deemed to be drafter of this Agreement',* and *'they shall not construe this Agreement or any provision hereof against either party as the drafter of the Agreement'.* In this regard, learned counsel placed its reliance on ***"Export***

Credit Guarantee Corporation of India Vs. Garg Sons International", (2014) 1 SCC 686.

17. Learned counsel for the Appellant further submitted that during the course of hearing, Respondent No. 1 though admitted that they have availed Accelerated Depreciation, however, further stated that no 'benefit' from availing the same had been accrued to them till FY 2021-22. Such a contention is untenable. Further, the contention of Respondent No. 1 that their business was suffering from losses, as a result of which they have not benefitted from Accelerated Depreciation is liable to be rejected since profits or losses of a company are of no consequence to PSPCL and it is not required to delve into the reasons for why Respondent No.1 is a profit/loss making entity. Such an inquiry is neither stipulated in the PPA nor in the Commission's Order dated 30.09.2010, however, it is conclusively established that Respondent No.1 has claimed the Accelerated Depreciation benefit. Without prejudice, it is submitted that a company has the option to carry forward the unabsorbed depreciation and offset the same against the profits in subsequent years, as per Section 72 of the Income Tax Act, 1961. In any case, the financial distress of a company cannot be taken as a valid ground for claiming a higher tariff in contravention of the terms of the PPA.

18. Learned counsel for the Appellant submitted that as per Section 32 of the Income Tax Act 1961, depreciation calculated in terms of Rule 5 of the Income Tax Rules 1962 along with Appendix I, whether claimed in terms of Section 32(1) (i) or Section 32(1) (ii) would amount to Accelerated Depreciation as explained from following Chart:



The depreciation rate as specified in Appendix I (which includes 80 % depreciation rate) are on much higher side as compared to depreciation rate of Appendix IA and same amounts to availing Accelerated Depreciation.

19. Learned counsel for the Appellant further submitted that the parties are governed by the PPA, which expressly provides that, in the event the Accelerated Depreciation is availed, there shall be a reduction in tariff by Rs. 0.18. In this regard, Respondent No.1 had also furnished an undertaking to PSPCL on 06.09.2012, and also stated that it shall not avail Accelerated Depreciation under the Income Tax Act, 1961 in future. If the Accelerated Depreciation is availed, then the amount can be recovered along with interest. Accordingly, PSPCL is entitled to recover the amount Rs. 13.25 crores (inclusive of interest as on 24.01.2023).

Respondent No.1 submissions:

20. Learned counsel for the Respondent No.1 categorised the issues involved in the instant appeal as 1) Whether Respondent No. 1 ought to be paid lower tariff meant for having availed accelerated depreciation and; 2) Whether the Appellant could have claimed a demand/ refund of the

differential tariff, without the confirmation of PEDA, in terms of the Power Purchase Agreement dated 10.09.2012.

21. As far as the issue No. 1 is concerned, learned counsel for the Respondent submitted that the Commission has rightly held this issue in negative inasmuch as Clause 2.1.1(ii) of the PPA clearly dealt with availing accelerated depreciation under Section 80(1A) of the Income Tax, which is a non-existent provision. Even if Respondent No. 1 had actually availed accelerated depreciation (albeit under any other provision), the lower tariff would not be applicable as per the PPA and its terms. However, this issue was concluded against Respondent No. 1 by the judgment and final order dated 19.03.2024 in Appeal No. 60 of 2024, wherein this Tribunal held that the non-existent provision must be disregarded and remanded the matter to the Commission for consideration on merits. Basing on this, though the Respondent No. 1 has agreed for remand on similar terms, but the Appellant has chosen to argue the matter afresh on merits. On merits, although Respondent No. 1 has claimed accelerated depreciation in its Income Tax returns for the years in question, factually such depreciation still remains unabsorbed in its books due to sustained losses all these years. The PPA, Regulations, Generic Tariff Order, and Undertaking dated 06.09.2012, all contemplate that if Respondent No. 1 avails the "benefit" of accelerated depreciation, a lower tariff would be applicable, however, which has not been the case. The benefit of accelerated depreciation lies only in lower incidence of income tax by inflating the expense on depreciation. Since Respondent No. 1 has incurred losses over the years, it has not availed the benefit of accelerated depreciation. However, this contention was not dealt with by the Commission, as the Commission on some other points held in favor of Respondent No. 1.

Therefore, Respondent No. 1 is entitled for a trial on this issue before the Commission.

22. So far as the issue No. 2 is concerned, learned counsel for the Respondent No.1 contended that this issue is fully covered by Clause 2.1.1(vi) of the PPA, which clearly states that in case it is found at any later stage by PSPCL/PEDA that the Company has, in spite of giving undertakings, availed the benefits of accelerated depreciation and/or any subsidy / grant etc, PSPCL after confirmation from PEDA shall revise the tariff as per the RE Regulations and Commission's Orders.

23. On one side, the Appellant contended that a complete reading of Clause 2.1.1 of the PPA would shows that no confirmation from PEDA is required for accelerated depreciation, however, the entire concept of a holistic reading would only arise if there is any ambiguity in the said provision. Learned Counsel states that the said provision is very clear, but the so-called ambiguity is being introduced by the Appellant. On the other side, despite consistently arguing that PEDA confirmation is not required, the Appellant has submitted a confirmation from PEDA dated 30.8.2024 along with its Rejoinder. Therefore, the contention of the Appellant that PEDA's confirmation was not required is contradicted by its own actions; moreover PEDA's confirmation, which was issued without taking into account the Respondent No. 1's contentions on merits, further underscores the need to remit the matter back to the Commission for a hearing on merits; and the original demand, as per the Demand Notice dated 24.01.2023, was issued without PEDA's confirmation, and in the light of PEDA's subsequent confirmation dated 30.08.2024, the Appellant's Demand Notice of 24.01.2023 is, in any case, contrary to the terms of the PPA and needs to be set aside on that ground alone.

Discussion and Analysis.

24. Heard Ms Poorva Saigal, learned counsel for the Appellant, and Mr Buddy Ranganathan, learned counsel for the Respondent. The main contention of the learned counsel for the Appellant is that as per applicable tariff order, and the PPA, there is a reduction in tariff by Rs 0.18 / kwh in case of availing benefits under Accelerated Depreciation. From the Income tax return for the period 2010-11 to 2019-20, received by the Appellant in FY 2021-22, the Appellant discovered that the Respondent had claimed Accelerated Depreciation, despite providing an undertaking that it had not claimed and it shall not avail Accelerated depreciation in future and in case it avails it shall inform the Appellant and shall be liable to refund extra amount recovered along with the interest. Per contra, learned counsel for the Respondent, though did not dispute that Respondent has availed accelerated Depreciation, but refuted the claim of Appellant on twin grounds; firstly since no actual benefit has been availed by it, and as such depreciation still remains unabsorbed in its books as it has sustained losses all these years; and secondly, as per Clause 2.1.1 (vi) of the PPA, PEDA confirmation is required before any revision to the tariff can be implemented. The State commission in the impugned order, referencing Clause 2.1.1 of the PPA dated 10.09.2012, executed between the Appellant and Respondent and referring its order in Petition No 06 of 2023 titled *M/s Chandigarh Distillers and Bottlers Limited Vs PSPCL*, held that recovery notice darted 24.01.2023, issued by the Appellant under Article 2..1.1 (ii) of the PPA is not in order and the Appellant was thereby directed to refund the amount recovered from the Respondent's bill on this account, along with the applicable late Payment

Surcharge; relevant extract from the order of the State Commission in Petition No. 06 of 2023 is as follows:

"....As contended by PSPCL, the Petitioner's ITRs indicates availing of depreciation at 80% on the Written Down Value method. However, keeping in view the settled position of maintaining sanctity of the contracts, the Commission is Inclined to agree with the Petitioner that the terms and conditions of the contractual relationship between the parties are governed by the PPA alone. The Commission notes that PSPCL has tried to assert that the nomenclature of 'Section 80(1)(A)' used in the PPA is a mistake and an inadvertent error. However, PSPCL's reliance, on the Hon'ble Supreme Court judgment dated 16.12.2005 (Civil Appeal No. 7534 of 2005 in the matter of Shree Hari Chemicals Export Ltd Vs Union of India & Ors), citing that wrong mentioning of a section would not be a ground to refuse relief if it is otherwise entitled thereto cannot be accepted in the impugned matter as the issue dealt therein was not the sanctity of the written contract entered into by the parties with mutual consent. It is evident that while the details mentioned in the Commission's Order ... on accelerated depreciation preceded the signing of PPA ....., yet a specific section 80(1)(A) of the IT Act was inserted as a part of Article 2.1.1 of the PPA which was signed mutually by the present contesting parties. This section 80(1)(A) was not a part of the Commission's Order dated .... Thus, at this stage, PSPCL cannot contend that it was an inadvertent error and a mistake in order to obtain a financial recovery. It is bound by the Clauses of the PPA signed by it.

25. This Tribunal in its order dated 19th March 2024 in APL No. 60 of 2024, has interfered with the above referred order of the State Commission in Petition No 06 of 2023 titled M/s Chandigarh Distillers and Bottlers Limited Vs PSPCL and had set aside the same; the relevant extract is reproduced below:

> *"Accepting the construction, placed on Clause 2.1.1(ii) of the PPA by the PSERC, would mean that the 1st Respondent-Petitioner would be entitled, even if it has availed accelerated depreciation, to the higher tariff of Rs.4.95 per unit, for it can never be said to have availed the benefit of accelerated depreciation under the non-existent Section 80(1)(A) of the Income-Tax Act. Such an absurd and convoluted construction of Clause 2.1.1 (ii) of the PPA does not merit acceptance. Consequently, Clause 2.1.1 (ii) of the PPA must be read deleting the words "under Section 80(1)(A) of the Income Tax Act" therefrom. To the extent indicated hereinabove, the impugned order must be and is accordingly set aside".*

> *"It is because of this construction placed by it, on Clause 2.1.1(ii) of the PPA, that the PSERC has not undertaken the exercise of examining whether or not the 1st Respondent-Petitioner had, in fact, availed accelerated depreciation. While Ms. Poorva Saigal, learned Counsel for the Appellant, would contend that the 1st Respondent-Petitioner has availed the benefit of accelerated depreciation, Mr. Munish Thakur, learned Counsel for the 1st Respondent-Petitioner, would deny that the 1st Respondent-Petitioner had availed any such benefit. This issue necessitates examination by the PSERC. Since Section 80(1)(A) does not form part of the Income Tax Act, the PSERC shall ignore that part of Clause 2.1.1(ii), and instead examine whether the 1st Respondent-Petitioner had availed the benefit of accelerated depreciation in terms of the remaining part of Clause 2.1.1(ii) of the PPA, and pass appropriated orders thereafter in accordance with law. Needless to*

state that all other issues, which the Commission had chosen not to examine and decide in the light of its conclusions in the earlier order, are left open for examination consequent on the matter being remanded to the Commission."

Accordingly, the similar finding of the State Commission in the impugned order is liable to be set aside.

26. In the present case, it is not in dispute that Respondent has availed Accelerated Depreciation, but the main contention of the Respondent is that since no actual benefits have accrued to them from this, and, in the absence of confirmation from PEDA as required under Clause 2.1.1(vi) of the PPA, such a claim by the Appellant is impermissible. We will deliberate with the contentions raised by the Appellant and the Respondent.

Issue No 1: **Is lower tariff payable by the Appellant on account of Accelerated Depreciation availed by Respondent, when no actual benefit has been accrued to Respondent on this account.**

27. The entire issue revolves around the accelerated Depreciation as per Income Tax Act; Section 32 of the Income tax Act 1961 deals with Depreciation and Section 32 (1) read as under :

"32. (1) In respect of depreciation of-

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trademarks, licences, franchises or

any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, [not being goodwill of a business or profession] owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed-

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed

The prescription contemplated is found in Rule 5 (1A) of the Income Tax Rules, 1962 which reads as follows:

5. (1) Subject to the provisions of sub-rule (2), the allowance under clause (ii) of sub- section (1) of section 32 in respect of depreciation of any block of assets shall be calculated at the percentages specified in the second column of the Table in Appendix I to these rules on the written down value of such block of assets as are used for the purposes of the business or profession of the assessee at any time during the previous year:

[Provided that the allowance under clause (ii) of sub-section (1) of section 32 in respect of depreciation of any block of assets entitled to more than forty per cent. shall be restricted to forty per cent. on the written down value of such block of assets in case of -

(i) a domestic company which has exercised option under sub-section (4) of section 115BA, or under sub-section (5) of section 115BAA, or under sub-section (7) of section 115BAB; or

(ii) an individual or Hindu undivided family which has exercised option under sub-section (5) of section 115BAC; or

(iii) a co-operative society resident in India which has exercised option under sub-section (5) of section 115BAD:

…..

(1A) The allowance under Clause (i) of Sub- section (1) of Section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of these rules on the actual cost thereof to the Assessee as are used for the purposes of the business of the Assessee at any time during the previous year:

Under the second proviso to the said Rule, it is further provided;

Provided further that the undertaking specified in Clause (i) of Sub-section (1) of Section 32 of the Act may, instead of the depreciation specified in Appendix IA, at its option, be allowed depreciation Under Sub- rule (1) read with Appendix I, if such option is exercised before the due date for furnishing the return of income Under Sub-section (1) of Section 139 of the Act,

(a) for the assessment year 1998-99, in the case of an undertaking which began to generate power prior to 1st day of April,1997; and

(b) for the assessment year relevant to the previous year in which it begins to generate power, in case of any other undertaking:

Provided also that any such option once exercised shall be final and shall apply to all the subsequent assessment years.]

From the above it is understood that:

(i) In the case of assets of an undertaking engaged in generation or generation and distribution of power, as per clause (i) of sub-section (1) of section 32 of Income tax Act, 1961, the depreciation percentage shall be calculated on the actual cost according to Rule 5(1A) of the Income Tax Rules, 1962.

(ii) Rule 5 (1A) of Income Tax Rules, 1962 provides that the depreciation allowed under Section 32(1)(i) of the Act shall be calculated at the percentage specified in the second column of the Table in Appendix IA as per Straight Line Method (**'SLM**'), however, the company can avail Depreciation under Rule 5(1) at the rates as specified in Appendix I (based on Written Down Value method).

Thus, by default, normal depreciation as per Straight line method is applicable. However, the company has the discretion to opt for accelerated depreciation, and once this option is exercised, it is irrevocable and shall apply to all subsequent years. There is no option available with the company to flip flop between Normal depreciation or accelerated depreciation for the subsequent years depending upon the amount of benefit or loss that will accrue to them. As such, the generic Tariff order dated 30.09.2010, for Non-fossil fuel based co-generation plant specifies applicable tariff of Rs 4.57/Kwh and a net applicable tariff of Rs 4.39/kWh after adjusting for the benefit of accelerated depreciation , if availed, as given below :

"Extract from Generic Tariff order of State Commission dated 30.09.2010 in Petition No 32 of 2010 (Suo Motu)"

Biomass Power Projects				
Levellised Fixed Tariff	*Variable Tariff (FY 2010-11)*	*Applicable Tariff Rate (FY 2010-11)*	*Benefit of Accelerated Depreciation (if availed)*	*Net Applicable Tariff (upon adjusting for Accelerated Depreciation benefit, if availed)*
(Rs/kWh)	*(Rs/kWh)*	*(Rs/kWh)*	*(Rs/kWh)*	*(Rs/kWh)*
1.92	*3.13*	*5.05*	*(0.19)*	*4.86*
Non-Fossil Fuel based Co-Generation Projects				
1.73	***2.84***	***4.57***	***(0.18)***	***4.39***
Small Hydro Power Co-Generation Projects				
Particular	*Levellised Total Tarif (FY 2010-11)*		*Benefit of Accelerated Depreciation (if availed)*	*Net Levellised Tariff (upon adjusting for Accelerated Depreciation benefit, if availed)*
	(Rs/kWh)		*(Rs/kWh)*	*(Rs/kWh)*
Below 5 MW	*4.26*		*(0.57)*	*3.69*
5 to 25 MW	*3.65*		*(0.51)*	*3.14*
Wind Energy Power Projects				
Wind Zone-1	*5.07*		*(0.78)*	*4.29*

28. The generic tariff has quantified/capped the amount at Rs. 18/Kwh to be reduced from the Applicable tariff on account of availing the benefits of accelerated depreciation irrespective of the actual benefit or loss incurred. The Respondent is well aware of these provisions and has provided an undertaking dated 06.09.2012, stating that it is availing only normal depreciation and if they avail such Accelerated Depreciation benefits in the future, they shall inform the Appellant and shall abide by the decision of the state Commission regarding reduction in tariff on account of this benefit. An extract of the undertaking is reproduced below:

Extract from Undertaking dated 06.09.2012 furnished by Respondent:

UNDERTAKING

"I, Har Kirat Singh s/o Late Shri Mohan Singh, an authorised signatory of M/S Chadha Sugars & Industries (P) Ltd, a company registered under the Companies Act 1956 having its Registered Office at 24 A Bharat Nagar, New Friends Colony, New Delhi, do hereby undertake on behalf of the Company.

That the Company has been declared as NRSE Project under NRSE Policy 2006 by the Punjab State Electricity Regulatory Commission (PSERC) vide its order, dated 26.11.2010. That the company is not availing Accelerated Depreciation benefit. The company is availing only normal depreciation.

In case we avail such Accelerated Depreciation benefit in future, we shall inform the Punjab State Power Corporation Ltd and shall abide by the decision of the PSPCL for reduction in Tariff on account of the above benefit as per PSERC Orders. CERC RE Tariff Regulations 2009 as applicable in our case. The Company will submit its Balance Sheet copy as documentary evidence to PSPCL.

That in case of any default, the company would agree to abide by the actions taken by PSPCL in this regard they have full right to recover the tariff / damages as deemed fit."

29. Furthermore, the Respondent in the PPA signed with the Appellant has agreed for a reduced tariff of Rs 4.39 / kWh, if they availe the benefits of accelerated depreciation. The Respondent, though at the time of signing of PPA has not availed the accelerated depreciation, but for the subsequent years, has availed the option of accelerated depreciation

knowing fully well of the consequences of applicability of reduced tariff and that they can't go back to availing normal depreciation if they so desire in future irrespective of the fact whether such an exercise of option results in intended benefit or loss. In our view, the Respondent is not justified in claiming that since no benefit accrued to it on account of accelerated depreciation, reduction in tariff is not applicable to it emphasising on the word "benefit". Based on the forgoing deliberations, in our view, benefit under the accelerated depreciation has been quantified as Rs .18/kwh to be reduced from the Applicable Tariff, in case a generating company elects to avail accelerated depreciation, irrespective of actual gain or otherwise; it is incumbent upon the generating company to carefully evaluate the pros and cons of exercising such an option. Accepting the contention of the Respondent means that when a generating company avails the option of accelerated depreciation, it will have different tariff applicable i.e. normal or reduced, depending upon whether the generating company post profit or loss, which, in our view, would lead to an absurdity. We are not going into the issue as to how the unabsorbed depreciation is treated in subsequent years when the generating company posts a profit. In our view, it is the responsibility of the generating company to thoroughly examine the consequences of availing accelerated depreciation, leading to reduction in tariff. Thus, we hold this point in favour of the Appellant that reduced tariff shall be applicable from the year of availing accelerated depreciation by the Respondent and the impugned order is therefore set aside on this aspect.

Issue No 2: **Is confirmation of PEDA required for the applicability of a reduced tariff upon exercising the option of accelerated depreciation by the Respondent.**

30. Learned counsel for the Respondent, referring to Clause 2.1.1 (vi) of the PPA, contended that the Appellant, only after getting confirmation

from PEDA can revise the tariff as per RE Regulations and commission's order, in case of availing of benefits under accelerated depreciation and/or any subsidy/Grant etc. by the Respondent; the Original demand notice dated 24.01.2023 was issued pertinently without such PEDA's confirmation, and, in the light of PEDA confirmation dated 30.08.2024, the Appellants' Demand Notice dated 24.01.2023 is contrary to the terms of PPA and therefore needs to be set aside.

31. Per Contra, learned counsel for the Appellant submitted that the governing provision i.e., Article 2.1.1 (ii) of the PPA (Accelerated Depreciation) does not stipulate for any such confirmation and it is only with respect to Article 2.1.1 (iii) (Grant/Subsidy) that PEDA's confirmation is required. Article 2.1.1 (vi) needs to be given a harmonious construction along with Articles 2.1.1 (ii) and (iii) and the same cannot be construed in isolation. Additionally, Article 2.1.1 (vi) refers to Undertakings and in fact there was no undertaking in Article 2.1.1 (i).

32. An agreement is a mutual understanding between the two or more parties regarding their respective rights and responsibilities. A valid agreement legally obligates each party to fulfil their responsibility and obligation in the contract. In this context, relevant clauses of the PPA dated 10.09.2012 are reproduced below:

> *"2.1.0 Sale of energy by Generating Company*
>
> *2.1.1 The PSPCL shall purchase and accept all energy made available at the interconnection point from the Co-Generation facility, pursuant to the terms and conditions of this Agreement at the following rates approved by the Commission in its generic levellised generation tariff Renewable energy power projects (other than Solar) order dated 30.09.10, which is set out below:*

i) The applicable tariff for Non-Fossil Fuel based co-Generation project is Rs 4.57P (Rs 1.73P/Unit for fixed tariff + Rs 2.84P/Unit for variable tariff) as applicable to projects to be commissioned in FY 2010-11 However, the Company shall be eligible for getting the applicable tariff for the project commissioning year as per further tariff orders notified by PSERC. The variable tariff for subsequent years will be worked out as per para (v) below for tariff period of 13 years from the actual Date of Commercial Operation. At the end of the above specified tariff period, the tariff payable for the balance term of the Agreement, till the useful life of 20 years of the project, shall be AS determined by the Commission. In case there is delay in determining the tariff by commission, the tariff payable shall be the last escalated tariff for the 13th year till the Commission determines the new tariff.

The tariff for the remaining ten years of the agreement term, beyond the useful life of the project of 20 years, shall also be as decided and approved by the Commission.

ii) The Generating Company has undertaken not to avail the benefits of accelerated depreciation under section 80(1) (A) of the Income Tax Act and the tariff will be based on this undertaking. If availed the benefits of Accelerated depreciation under section 80(1)(A) of the Income Tax Act then reduction of 18 paise per unit specified for Non- Fossil based Co-Generation Projects for the year 2010-11 or as applicable / specified by PSERC for the year of commissioning will be made from the levelised fixed cost component of Tariff stated in Para (1) above and net Tariff payable shall be Rs 4.39P/ unit or net tariff as applicable as per the year of commissioning.

iii) The Generating Company has given undertaking that it has neither availed nor shall avail any grant/subsidy from GOI/GOP for the project. PSPCL shall confirm the same from PEDA. The Company will submit Copies of the Annual Financial Reports and copies of the Income Tax

Returns for 10 years to PSPCL from the Year of Commissioning as a proof to have complied with the Undertakings. If availed the admissible grant/subsidy from GOI/GOP for the project. PSPCL shall confirm the same from PEDA and work out the levellised financial impact for the amount of grant/subsidy so claimed to be claimed as per commission's orders dated 30.9.2010. The fixed cost component of Tariff stated in Para (i) will be reduced by the financial impact so worked out in consultation with PEDA for grant/subsidy. The period for reduction in fixed coast component of Tariff on account of impact of Capital Subsidy being granted by MNRE shall be for first Ten (10) years of the commercial operation of the project.

vi) The Company will submit Copies of the Annual Financial Reports and copies of the Income Tax Returns regularly for 10 years from the Year of Commissioning as a token of proof within six months from the close of financial year and in any case not later than the end of next financial year, In case the Company shall have not avail the benefits of Accelerated Depreciation and/or Grant / Subsidy, so as to have complied with the Undertakings referred to in Para (i) and (ii) above. In case it is found at any later Stage by PSPCL/PEDA that the Company has, in spite of giving the undertakings, availed the benefits of accelerated depreciation and / or any subsidy / grant etc,. PSPCL after confirmation from PEDA shall revise the Tariff as per RE Regulations and Commission's Orders dated 30-09-10 and shall recover the excess amount paid thro' tariff with penal interest as SBI short term PLR +5% worked out on day to day basis."

33. The Article 2.1.1 (i) of the PPA specifies an applicable tariff for Non –Fossil based co-generation project of Rs 4.57/kwh as applicable for projects commissioned in FY 2010-11, which the Appellant is obligated to pay the Respondent in normal circumstances. Further, the Article 2.1.1 (ii) refers to the undertaking given by Respondent that it shall not avail

accelerated depreciation and applicable tariff is based on that undertaking; however, this article further stipulates that the net tariff payable shall be Rs 4.39/kwh in case the Respondent avails the benefits of Accelerated depreciation. Thus, Article 2.1.1 (i) & (ii) provides that the applicable Tariff payable by the Appellant to Respondent is Rs 4.57 /Kwh under normal circumstances (i.e, depreciation as per the Straight line Method) and Rs 4.39/ kwh in case benefits of accelerated depreciation is availed by the Respondent. From the bare reading of the Article 2.1.1 (i) and (ii), reveals that there is no prerequisite of availing certification by PEDA. The financial impact of availing accelerated depreciation has been pre-defined and mutually agreed upon by the parties and there is no need to work out the financial impact on this account.

34. As per Article 2.1.1 (iii), in case the Appellant has availed any grant and subsidy from GOI/GOP, the Appellant is required to obtain confirmation from PEDA regarding the same and work out the levelized financial impact and fixed cost component of the Tariff is to be reduced by the financial impact so worked out in consultation with PEDA for Grant/ Subsidy. This Article mandates confirmation from PEDA on two specific matters: firstly, the amount of the grant or subsidy claimed or to be claimed by the Respondent, and secondly, the financial impact to be incorporated into the tariff based on such grant or subsidy**.**

35. We also note from the submissions made by learned counsel for the Appellant that Respondent has not complied with the relevant provisions of the PPA (Article 2.1.1 (iii)) that even after availing Accelerated Depreciation, the Respondent did not inform the Appellant and also did not submit income tax returns despite multiple reminders from the Appellant. The complete set of Income Tax returns (ITR) for the period from 2010-11 to 2019-20 of the Respondent were received by the Appellant during 2021-22, upon scrutiny of which it was discovered by the

Appellant that Respondent is availing Accelerated Depreciation under the Income Tax Act 1961, as per written down value method at the rates prescribed in the Appendix I of Rule 5 of the Income Tax Rules 1962 which includes 80 % depreciation rates on plant and Machinery. This seems to be a breach of the terms of PPA and we are not required to delve further into it or the intention behind such a non- disclosure by the Respondent, however, it is likely that neither the Appellant nor the PEDA could have found that Respondent have availed accelerated Depreciation in the absence of the Income tax Return/disclosure from the Respondent. While the involvement of PEDA is easily understood as far as issue of Grant/ Subsidy is concerned, since it is the nodal agency responsible to promote and implement renewable energy and energy conservation and amount of subsidy/Grant is likely to be with the involvement of PEDA and under Article 2.1.1 (iii), the parties have agreed for confirmation of subsidies from PEDA and consultation with PEDA for the financial impact to be effected in the Tariff on this account, while such a consultation/ confirmation with PEDA was not there as per Article 2.1.1 (i) and (ii) on availing benefits under accelerated depreciation, presumably and as such PEDA is not privy to the financial documents of the Respondent.

36. The Reliance placed by the Respondent only on Article 2.1.1 (vi), which states that PEDA confirmation is required not only for the subsidy/ grants but for accelerated depreciation as well, is devoid of merit, in view of the pre-determined applicable tariff as per Article 2.1.1 (i) and (ii), which do not require PEDA confirmation; Article 2.1.1 (iii) refers to PEDA confirmation only in case of grant and subsidy. As such, Article 2.1.1 (vi) refers to the *'undertaking referred to in Para (i) and (ii) above'* whereas there is no undertaking in Article 2.1.1 (i). Thus, in our opinion, Article 2.1.1 (vi) is to be read along with Articles 2.1.1 (ii) and (iii), and the PEDA

confirmation is required only in the event the Respondent has claimed or to be claimed Grant/ subsidiary.

37. In view of the above discussion and deliberation, the impugned order dated 06.03.2024 passed by the State Commission is hereby set aside to the extent challenged. The Appeal is, accordingly, disposed of in the above stated terms. All the pending IAs shall stand disposed of. There shall be no order as to costs.

Pronounced in open court on this 22nd Day of November, 2024

(Seema Gupta)	**(Ramesh Ranganathan)**
Technical Member (Electricity)	**Chairperson**

REPORTABLE/~~NON-REPORTABLE~~

ts/dk/ag