

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

COURT-II

APPEAL NO. 242 OF 2015

Dated: **29.08.2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

**MAHARASHTRA STATE ELECTRICITY
TRANSMISSION CO. LIMITED (MSETCL),**
'Prakashganga', Plot No.C-19,
E-Block, Bandra Kurla Complex,
Bandra (East), Mumbai-400 515.
Maharashtra

.....Appellant

Versus

**1. MAHARASHTRA ELECTRICITY REGULATORY
COMMISSION (MERC)**

Through its Secretary
13th Floor, Centre No.1,
World Trade Centre,
Cuffe Parade, Mumbai – 400 005,
Maharashtra

**2. MAHARASHTRA STATE ELECTRICITY DISTRIBUTION
COMPANY LTD. (MSEDCL)**

Through its Managing Director
"Prakashgad", Plot No.G-9,
Prof. Anant Kanekar Marg,
Bandra (E), Mumbai- 400 051

3. TATA POWER COMPANY LTD.

Through its Director
Bombay House,
24, Homi Mody Street,
Fort, Mumbai – 400 001

4. RELIANCE INFRASTRUCTURE LIMITED

H-Block, 1st Floor,
Dhirubhai Ambani Knowledge City,
Navi Mumbai – 400 710

**5. BRIHAN-MUMBAI ELECTRIC SUPPLY AND
TRANSPORT UNDERTAKING**

Through its Director
Electric House, Colaba Causeway,
Mumbai- 400 020

....Respondent(s)

Counsel for the Appellant(s) : Mr. Sudhanshu S. Choudhary
Mr. Mahesh P. Shinde

Counsel for the Respondent(s) : Ms. Pratiti Rungta for R-1

J U D G M E N T (Oral)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The appellant, *Maharashtra State Electricity Transmission Company Limited* (“MSETCL”) is a transmission licensee operating in the State of Maharashtra. It has come up by the appeal at hand to assail certain disallowances by order dated 26.06.2015 passed by first respondent i.e. *Maharashtra Electricity Regulatory Commission* (“MERC” or “the State Commission”) on petition registered as case no.207/2014 which was presented by the appellant for mid-term performance review for Multi-Year Tariff (MYT) second control period for financial year (FY) 2012-2013 to FY

2015-2016. It may be noted here that prior to the said petition being decided by the impugned order dated 26.06.2015, the petitioner had approached the State Commission by a petition (case no.39/2013) seeking truing up for FY 2011-2012 as also for Annual Performance Review (“APR”) of FY 2012-2013 and Aggregate Revenue Requirement (“ARR”) for MYT second control period from FY 2013-2014 to FY 2015-2016 which was decided by order dated 13.02.2014. It also needs to be noted here that some of the issues agitated before us in the appeal at hand were subject matter of certain dispensation by the said previous order dated 13.02.2014, principles or methodology governing the claims having been decided by the Commission at that stage. It is not in dispute that the appellant herein did not bring any challenge to the previous order dated 13.02.2014, by any appeal or petition of other nature, before any forum, the said order having thus attained finality.

2. In the present appeal, besides the State Commission, the distribution licensees operating in the State of Maharashtra (second to fifth respondents) have also been shown in the array. At the hearing, however, the said entities have not appeared to participate or make any submissions.

3. The disallowances with which the appellant is aggrieved include some respecting which principles and methodologies were decided by the Commission by order dated 13.02.2014 in case no. 39/2013, the same being inclusive of (a) disallowance of Interest During Construction (“IDC”) for FY 2007-2008 and FY 2008-2009; and (b) disallowance of prior period expenses for FY 2011-2012 / 2012-2013 and 2013-2014.

4. Previously, by its findings through order dated 13.02.2014 in case no.39/2013, the Commission on the subject of IDC had ruled as under:

“4.9.4. It may be noted that till FY 2006-07, the interest expenses were approved based on the actual gross interest expenses less actual IDC as per the audited annual accounts. This was subsequently changed in FY 2007-08 to normative gross interest expenses calculated considering opening balance as per previous year’s closing balance and addition in loan on account of increase in capitalisation. Further, IDC was deducted to arrive at approved interest expenses. Subsequently, the Commission, on request of MSETCL, stopped deducting IDC as addition in loan was considered only on account of capitalised assets. However, it was observed that some portion of loan due to work-in-progress remained included in the opening balance of loan, whose impact was not getting neutralised as IDC was not reduced from interest expenses calculated. Therefore, the Commission has adjusted opening balance of FY 2011-12 downwards by Rs 273.79 crore, calculated as grossed up capitalised interest expenses of FY 2006-07 by average interest rate of that year. The Commission has made this adjustment to reduce loans pertaining to work-in-progress to arrive at adjusted loan balance, which considered addition in loan due to disallowed capitalisation as detailed in para 3.7.10 of Section 3.”

5. By the impugned decision the State Commission has ruled on the issue of disallowance of IDC, as under:

“3.9.12 In its MYT Order, the Commission had deducted IDC from the interest expenses while computing the revised interest expenses following approval of previously disallowed capitalisation for FY 2007-08 to 2009-10. The Commission had discontinued such deduction from FY 2010-11 onwards. In its Order, the Commission had mentioned that, on MSETCL’s request, it had stopped deducting IDC as addition in loan was considered only on account of capitalised assets:

...

3.9.13 The methodology for approval of interest charges after deduction of IDC has been settled in various past Orders pertaining to FY 2007-08 to FY 2009-10. The change in the methodology from FY 2010-11 was based on MSETCL’s request, as reflected in its Order in Case No. 39 of 2013. Accordingly, the Commission is not inclined to review the treatment of deduction of IDC while computing interest expenses on account of disallowed capitalisation for FY

2007-08 to FY 2009-10. The True-up for those has been completed in the past, and the present approvals are being given only to enable MSETCL to recover the impact of the previously disallowed capitalisation in the ARR for those years.”

6. The second of the above two issues i.e. Disallowance of Past Period Expenses relates to two subjects viz. (i) Disallowance of Prior Period Employee Expenses for FY 2012-2013; and (ii) Disallowance of Material Related Prior Period Items to FY 2012-2013).

7. On the first subject (Disallowance of Prior Period Employee Expenses) the Commission had ruled thus in order dated 13.02.2014:-

“4.12.5. The Commission opines that such expenses, being O&M in nature, is not considered in this Order, as prudent O&M expenses of previous years were approved by the Commission in previous True-up Orders after detailed scrutiny. Allowing prior period O&M expenses in this Order will lead to approval of certain imprudent expenses disallowed previously. Similarly, prior period expenses on account of interest and finance charges need not be considered as interest expenses were approved in previous Orders on the basis of normative loan balance and considering prior period interest expenses will lead to approval of interest expenses over and above the normative interest, which is not desirable. Hence, the Commission disallows prior period expenses claimed by MSETCL in the Petition.”

8. By the impugned order, the Commission has held as under:-

“4.4.13 The Commission explained the disallowance of prior period expenses as follows in Case No. 39 of 2013:

...

4.4.14 Similarly, the Commission is not inclined to review the O&M expenses of previous years, which were approved by it in the respective Orders for previous Trued-up years after detailed scrutiny. Accordingly, the Commission disallows prior period employee

expenses claimed by MSETCL for FY 2012-13 in the present Petition.”

9. On the other subject (Disallowance of Material Related Prior Period Items) the decision of the Commission in earlier order was as under:-

“4.17.8. As regards valuation of stores, the Commission opines that there is no merit in spreading an amount of Rs 152.48 crore over five years. This amount was treated as R&M expense in previous years, which was passed on to the consumers by way of higher Tariff. Treating this expense over a period of five years from FY 2013-14 onwards will not only result in delay in passing of this income to the consumers, but will also fail to reduce the revenue gap of MSETCL on which carrying cost is levied while determining transmission Tariff for future years. The Commission opines that expense incurred in a year should be passed on to the consumers as far as possible in True up of the same year. Similarly, benefit from income earned in a year should also be passed on to the consumers as far as possible in the same year in which True up is conducted. As a result, the Commission considers this entire amount of Rs 152.48 crore as Prior period income and considered while determining ARR of FY 2011-12.”

10. By the impugned order, the Commission has reiterated:

“4.14.8 These expenses mainly relate to payments pertaining to contractors, including recovery/refund of the LD charged / refunded back to contractors and inventory related expenses. In its MYT Order, the Commission had considered Rs. 152.48 Crore on account of revaluation of stores due to discovery of inventory upon physical verification during implementation of SAP software system for FY 2011-12, as follows:

...

4.14.9 The Commission had observed that these expenses would have been recovered in the past, and hence allowed inclusion of income on this account as a prior period income. In the present case, MSETCL has claimed prior period expenses mainly pertaining to the impact of physical inventory verification, price variation payable on inventory purchased, etc. It has also proposed to pass on past period income as part of ‘other expenses’. In line with its previous Order, the Commission has considered these expenses and income for pass-through in the present Order.

4.14.12 MSETCL has also sought approval for the material related prior period expenses for FY 2011-12 which were

disallowed in the MYT Order. The Commission is not inclined to revisit the approval for past years which have been Trued-up after prudence check. MSETCL had also not appealed against such disallowances following the MYT Order. The Commission has taken a stand in this Order of not revisiting the methodology adopted by it in the past for approval of expenses during the True up process and re-approving them in the present Order. The Commission has revisited the past dispensations only in case of an error apparent, which has not been pointed out by MSETCL. Accordingly, the Commission does not approve the recovery of those material-related prior period expenses for FY 2011-12 which were earlier disallowed in the MYT Order.”

11. We agree with the Respondent Commission that the methodology adopted for true up for FY 2007-08 not having been challenged in any manner, the decision cannot be now questioned when it is followed by the order impugned by the appeal at hand. Thus, we reject the appeal to the above extent.

12. The appeal also raises five other challenges they being on the subjects of (a) disallowance of interest paid under Section 234B & Section 234C of the Income Tax Act, 1961 for FY 2012-13 and FY 2013-14 (the amount claimed being Rs.5.39 crores); (b) disallowance of efficiency gain in Operation & Maintenance (O&M) expenses for FY 2013-14 (the amount in dispute being Rs.142.03 crores); (c) disallowance of carrying costs on revenue gaps (incentives on higher cost of transmission availability) and impact of past period disallowed capitalisation (the amount covered being Rs.100.53 crores); (d) non-consideration of income tax as part of ARR while approving of incentive for higher availability for FY 2012-13 and FY 2013-14 (the amount in issue being Rs.16.96 crores); and (e) treatment of Delayed

Payment Charges (DPC) for ARR in FY 2015-16 (the amount denied being Rs. 502.14 crores).

13. The third of the abovementioned five issues viz. carrying cost on revenue gaps involves three sub-heads vis-a-vis carrying cost for incentive for FY 2012-13 and FY 2013-14; reduction of incentives on higher transmission system availability for FY 2012-13 and FY 2013-14 from the revenue for computing the income tax liability for the corresponding year period; and disallowance of carrying on impact for past period disallowed capitalization of Rs.82.53 crores. As in the first two issues which have already been rejected by us above, the third sub-head of this issue also cannot be considered in the present appeal because it seeks to revive a subject which has already been finally determined by the Commission by its previous order dated 13.02.2014. To make it clear, we quote the present order of the Commission on this sub-head as under:-

“3.9.23 In the MYT Order, the impact of disallowed capitalisation on IoWC, contribution to contingency reserves, sharing of gains and losses and carrying cost on increase in ARR due had not been considered. In line with the principles adopted for these parameters in that Order, the Commission has not considered the impact on these items due to the disallowed capitalisation approved in this Order.”

14. Previously by order dated 13.02.2014, the Commission had decided as under:-

“3.8.1. MSETCL submitted that on account of disallowance of capitalisation in past years, it could not recover the required revenue for those years. MSETCL requested the Commission to consider appropriate carrying cost on the impact of disallowed capitalisation of the past years and allow the same to be recovered.

3.8.2. The Commission opined that MSETCL hasn't been able to recover the revenue for the past years because MSETCL did not seek the Commission's In-principle approval before executing the scheme. Hence, the schemes were initially disallowed by the Commission and later,

approval was granted based on submission of relevant documents by MSETCL. The delay in getting approval is on account of MSETCL's delayed submission. The Commission calculated impact of disallowed capitalisation on ARR as and when the capitalisation is approved and pass on the impact on ARR in the Tariff of subsequent years. Thus, the Commission hasn't allowed any carrying cost on the impact of disallowed capitalisation of previous years as the delay in recovery is attributed to MSETCL alone.

3.8.3. Therefore, the net impact of Rs 92.28 crore without any carrying cost would be added to the cumulative revenue gap and recovered in the subsequent Tariff”.

15. Following the view taken respecting the first two issues, we reject the appeal at hand to the extent it relates to grievance of the appellant concerning disallowance of carrying cost on the impact for past period capitalisation of Rs.82.53 crores.

16. The disallowance of interest paid under Section 234B and 234C of Income Tax Act upon truing up for FY 2012-13, 2013-14 has been considered by the State Commission in the impugned order as under:-

“4.16.8 The Commission scrutinized the Tax Return Acknowledgement (ITR-6) for AY 2013- 14 submitted by MSETCL regarding Income Tax paid during the year. MSETCL has paid interest of Rs. 3.72 Crore under Sections 234 A, 234 B and 234 C of the Income Tax Act. The Income Tax Act prescribes various types of interest for different kinds of delays/defaults. These Sections deal with interest levied for (i) delay in filing the return of income; (ii) non-payment or short payment of advance tax; and (iii) nonpayment or short payment of individual instalment or instalments of advance tax (i.e., deferment of advance tax). Hence, this interest levied on MSETCL is a kind of penalty in respect of the above. While the Tariff Regulations specify approval of Income Tax expense based on the actual amount paid, the Commission cannot permit such penal charges to be passed on to the TSUs and consequently to the consumers through the Transmission Tariff.

Accordingly, the Commission disallows the interest paid by MSETCL under Sections 234 A, 234 B and 234 C of the Income Tax Act as a pass through in the ARR on True up for FY 2012-13.”

17. The appellant has argued that the interest paid under the aforesaid provisions of law is not penalty but shortfall in advance income tax payment made by it which were purely on estimation basis. Reliance is placed on the decision of High Court of Delhi by judgment dated 27.02.2009 in *ITA 116 of 2007 Commissioner of Income Tax Delhi (ii) Vs. Anand Prakash* particularly the observations recorded as under:-

“Coming back to the present appeals, we are of the view that Section 234A, Section 234B and Section 234C are of the same class. On going through these provisions, it is clear that interest is sought to be charged on account of the fact that the Government is deprived of its revenue. Under Section 234A, interest is charged if tax whichever to be paid at the time of filing of the return is not paid at that point of time, Section 234B provides for levy of interest for default in payment of advance tax and Section 234C stipulates the charging of interest for default in the payments of advance tax on the appointed dates of payment. It is clear that under the said Act tax is payable at different dates and, through different modes. Where specific dates of payment of tax are not adhered to, it can be said that the Government is deprived of tax on those dates. Interest is chargeable under the provisions of the Act such as Section 234A, 234B and 234 C in order to compensate the Government for such deprivation. It is clear from the scheme of the Act and the nature of these provisions that they are compensatory and not penal. We, therefore, conclude that the levy of interest under Section 234B of the Income Tax Act is compensatory in nature. The Tribunal, having taken a contrary view has clearly erred”.

18. We are not impressed in as much as the view taken in the case of *Anand Prakash* by the High Court of Delhi was against the backdrop where compensation on account of acquisition of land had come in the hands of the assessee much beyond the period in question, this being the prime reason why the interest on such income reported subsequently was not considered as penalty. In the case at hand, however, it is not in dispute that the appellant was in default in not reporting full income during the

relevant period, the delays in payment of the advance tax resulting in levy of tax having gone unexplained.

19. In these circumstances, we uphold the view taken by the State Commission on the subject in the impugned order and reject the contention in appeal.

20. On the subject of disallowance of carrying cost on revenue gaps, two claims of the appellants survive for consideration they being the disallowance of carrying cost on incentives for FY 2012-13 and FY 2013-14 *and* reduction of incentives of higher transmission system availability for FY 2012-13 and FY 2013-2014. The appellant has argued that though incentives are computed at the end of the control period they are earned during the true-up year and must be paid by the end of that year. It contends that relevant regulations do not have clarity on this and the appellant is, therefore, relying on prudent financial practices. The issue relates to Regulation 60.2 of MERC MYT Regulations, 2011, which reads as under:-

“The Transmission Licensee shall be entitled to incentive on achieving annual availability beyond the target availability, in accordance with the following formula:

Incentive= Annual Transmission Charges X [Annual availability achieved – Target Availability] /Target Availability;

Where,

Annual transmission Charges shall correspond to Aggregate Revenue Requirement for each year of the Control Period for the particular Transmission Licensee within the State:

Provided that no incentive shall be payable above the availability of 99.75% for AC system and 98.5% for HVDC system:

Provided further that the computation of incentive / disincentive shall be undertaken during mid-term performance review and at the end of Control Period”.

21. The second proviso of Regulation 60.2 quoted above, thus, leaves no room for doubt that computation of incentive/disincentive is required to be undertaken during mid-term performance review, *ex-post facto* upon completion of the financial years in question. In these circumstances, we do not find any merit in the contentions urged by the appellant.

22. We now proceed to delineate the remaining three issues.

23. The claim of the appellant on the subject of disallowance of efficiency gain on O&M expenses for FY 2013-2014 essentially depends upon the construction to be placed on Regulation 12 of MYT Regulations, 2011. The prime contention of the appellant is that the increase in the O&M expenses which also need to be allowed was the additional burden consequential to the periodic wage revision not necessarily limited to the revision in the wage bill on account of increments etc.

24. On the issue of non-consideration of income tax as part of ARR while approving the incentives for higher availability for FY 2012-13 and FY 2013-14, the submission of the appellant is that the State Commission could and should have availed of its power to remove difficulties as available under Regulation 100 of MYT Regulations, 2011. Reference is made to such approach taken in MYT Order dated 13.02.2014 in case no.39/2013.

25. On the issue of treatment of delayed payment charges for ARR for FY 2015-2016, the appellant relies on judgment dated 29.05.2019 of this Tribunal in appeal no.250/2016 *Adani Transmission (India) Limited v. MERC* (2019 SCC Online APTEL 30).

26. The learned counsel for the State Commission, having taken instructions, submitted that the Commission is ready and inclined to revisit the above three issues and for which necessary order of remit may be passed. We order accordingly. In this view of the matter we refrain from recording any observation on the merits of the said claims of the appellant at this stage.

27. The appeal limited to the last above mentioned three issues is allowed and the impugned order dated 26.06.2015 of the State Commission set aside accordingly to that extent only. The rest of the contentions of the appellant have been rejected and the appeal to that extent is disallowed.

28. The issues which have been remitted shall be taken up by the State Commission for fresh consideration at an early date. Needless to add the State Commission shall approach the matter in such respect feeling uninfluenced by the view previously taken in the matter.

29. The appeal is disposed of in above terms.

Pronounced in Open Court on this 29th Day of August, 2022.

(Sandesh Kumar Sharma)
Technical Member

pr/tp

(Justice R. K. Gauba)
Officiating Chairperson