APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

IA NO. 1766 OF 2022 IN APPEAL NO. 334 OF 2021

Dated: 23rd March, 2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

Tata Power Delhi Distribution Limited
Through its Head-Corporate Legal
NDPL House, Hudson Lines,
Kingsway Camp, Delhi – 110009 …. Appellant(s)

Versus

Delhi Electricity Regulation Commission
Through its Secretary
Viniyamak Bhawan, 'C' Block,
Shivalik, Malviya Nagar,
New Delhi – 110017 .... Respondent(s)

Counsel for the Appellant(s)	:	Mr. Shri Venkatesh Mr. Ashutosh Kumar Srivastava Mr. Nihal Bhardwaj Mr. Shivam Kumar
Counsel for the Respondent(s)	:	Mr. Sujit Ghosh Mr. Md. Munis Siddique

O R D E R

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

1. The present appeal has been filed questioning the Order passed by the Delhi Electricity Regulatory Commission ("DERC" for short) in Petition No. 3 of 2021 dated 30.09.2021. In the said Tariff petition filed by the

Appellant, DERC had disallowed certain of their claims. Relying on its letter dated 16.11.2018, DERC determined the banking transactions for the Financial Years 2018-19 and 2019-20 resulting in disallowance of Rs.88.79 crores to the Appellant.

2. By way of the present Interlocutory application, the Appellant prays that the letter dated 16.11.2018 issued by the DERC be set aside/suspended, since it is in violation of its own Regulations; for a direction to the DERC to follow the methodology, to compute banking transactions, as prescribed in Regulation 121 of the Tariff Regulations, 2017 for the upcoming control period rather than the letter dated 16.11.2018; and to allow carrying cost on the Appellant's claims.

3. Earlier in its Tariff Order dated 28.08.2020, passed for the true-up for the Financial Year ("FY" for short) 2018-19, DERC had approved Banking Import (purchase) for the FY 2018-19 as 852.65 MU at Rs. 3.94/kWh. A part of this power was exported earlier in FY 2018-19 and partially in FY 2017-18. The partial power exported in FY 2018-19 was trued-up by Order dated 28.08.2020 as 79.79 MU at Rs.2.89/kWh; and the partial power exported in FY 2017-18 was trued-up by Order dated 31.07.2019 as 756.59 MU at Rs.4/kWh. The DERC had approved Rs.336.06 crores as Banking Import and Rs. 325.70 crores as Banking Export including compensation of financing charges, making such banking a revenue neutral transaction.

4. However, by the Order under Appeal dated 30.09.2021, the DERC re-determined the banking transactions for the FY 2018-19 on the basis of the letter dated 16.11.2018, and considered both purchase and sale elements, of the banking transactions, only at the variable cost of Rs.2.90 for the FY 2018-19, and disallowed Rs.88.79 crores on this score. This

disallowance of Rs.88.79 crores, on the basis of the letter dated 16.11.2018, was from the already allowed amount of Rs.336.06 crores.

5. The Appellant contends that it was not open to the DERC to change the basic principles, premises and issues involved in the initial projection of the ARR; revision/re-determination of the already determined tariff, on the pretext of prudence check, would amount to amendment of the Tariff Order, which can only be undertaken in terms of Section 64(6) of the Electricity Act within the period for which the Tariff Order was applicable; and the exercise of re-determination undertaken by the DERC, on the basis of its letter dated 16.11.2018, is against its own settled principles of power banking that a banking transactions should be revenue neutral in character.

6. The Appellant submits that the present control period, i.e. FY 2020-21 to FY 2022-23, would come to an end in March 2023; if this issue is not examined at the interlocutory stage of the Appeal, DERC would, on the basis of the methodology adopted in its letter dated 16.11.2018, continue to deny the Appellant its legitimate claim; the State of Delhi has surplus power in winter (from November to February) and the Appellant had, therefore, issued a tender for banking of surplus power of 200 MW for the period 01.11.2022 to 30.09.2023 on a short term basis; and, if the present issue is not considered before export/sale of power by them, the Appellant is bound to suffer loss of a similar magnitude.

7. The Appellant contends that the concept of banking of power is based on the principle that the transaction should be revenue neutral i.e., there should be no loss to the licensee in the case of forward/reverse banking of power; Regulation 121 of the Tariff Regulations, 2017 provides that the normative cost of banking transactions would be considered at the rate of the average power purchase cost of the portfolio of the distribution licensee;

the DERC had erroneously changed this methodology, by its letter dated 16.11.2018 purportedly issued as a clarification, with respect to the rate of banking transactions and the mechanism for incentive of surplus power; the clarification issued in the letter dated 16.11.2018 is contrary to Regulation 121 (3) of the Tariff Regulations 2017; while the Tariff Regulations (which are also binding on the DERC) stipulates that the normative cost of banking transactions shall be at the rate of average power purchase cost of the portfolio of the distribution licensee, determination on the basis of variable cost in terms of the letter dated 16.11.2018 would be in clear contravention of Regulation 121(3); unless deemed imprudent, all costs associated with the power purchase should be allowed by the DERC; the DERC could not have amended the Tariff Order in the guise of a prudence check as the relevant Financial Year was over, and the same was replaced by a subsequent Tariff Order; and, consequently, this exercise would amount to a retrospective revision of the tariff when the relevant period for such a Tariff Order is already over. Reliance is placed by the Appellant, in this regard, on the Order of the Supreme Court in Civil Appeal No. 4323-24 of 2015 dated 18.10.2022.

8. The Appellant states that the subject banking transaction was completed before 30.09.2018 long prior to the DERC letter dated 16.11.2018 and, consequently, the said letter cannot be applied retrospectively; the Regulations made by the Commission under Section 181 requires a consultative process with the stakeholders, and it is accompanied by a Statement of Reasons recording the objections raised by the stakeholders and the reasons for accepting/rejection such objections; the Regulations also follow the procedure of prior publication as envisaged under Section 181 (3) of the Act; such mandatory procedure has been prescribed, since the Regulations are delegated legislation and

must comply with the principles of equity and fair play; it is for this reason that a Regulation can be subjected to challenge only before a Court exercising the powers of judicial review; the Commission is bound by its own Regulations, and could not have amended the Regulations by way of a letter dated 16.11.2018, without complying with the provisions of Section 181 (3) of the Act; an administrative order cannot negate subordinate legislation; by its letter dated 16.11.2018, the DERC has amended the Tariff Regulations, and has subjected the *"normative rate of banking to weighted average rate of all long term sources considering only variable cost for the relevant year"* instead of *"average power purchase cost of the portfolio"* as prescribed under the Tariff Regulations 2017; this Tribunal, in Appeal No. 14 of 2012, has held that banking arrangement tariff should be revenue neutral; having considered the regulated notional rate of Rs. 4/kWh for the power exported in FY 2017-18, the DERC, while considering the rate of the same set of energy (imported), erroneously adopted the average energy charge rate of Rs. 2.90/kWh; this is against the well settled principle that banking transactions are revenue neutral in nature; the prescription that the banking transactions should be revenue neutral ensures that no loss is caused to the licensee; however, by the present approach of the DERC, the Appellant has suffered a loss of Rs.88.79 crores.

9. In its reply, the DERC stated that the prayer to set aside/suspend the letter dated 16.11.2018 is essentially in the nature of a final relief, and cannot be granted at an interlocutory stage; such a relief cannot also be granted, since quashing of the said letter is not prayed for in the main Appeal; an interim relief is granted only in the aid of the main relief, and not independent of and dehors the same; and, where the final relief cannot be granted, an interim relief cannot also be granted. It is further stated that prayer (c) cannot also be granted as it is in the nature of a final relief, since

it seeks an unconditional direction in *future qua* the upcoming control period by putting the letter dated 16.11.2018 into a state of non-operation with no possibility of its revival; the main Appeal is restricted to a challenge to the Order dated 30.09.2021 passed in Petition No. 3 of 2021 which pertains to the true-up of ARR for FY 2019-20, approval of the ARR and Tariff for FY 2021-22; an interlocutory relief, being in aid of the main relief, cannot extend to a future period, and to actions not covered by the said main Appeal; the letter dated 16.11.2018 can only be challenged before the appropriate forum having jurisdiction to try such action, and no direction can be issued to the DERC to ignore the same while discharging its statutory functions; this is more so, as the said letter dated 16.11.2018 was issued by the Respondent in the exercise of its statutory powers to interpret the provisions of the Regulations as prescribed under Regulation 173 of the Tariff Regulations, 2017, and has the force of law; the clarification dated 16.11.2018 was issued on the express request made by BYPL in their letter dated 11.10.2018, which letter was submitted after a meeting was held between the Respondent with all the Discoms including the Appellant; the said letter reveals that, during the course of the meeting, a clarification was sought by all the Discoms, which was ultimately responded to by the Respondent by its letter dated 16.11.2018; if the Appellant had any grievance, they ought to have challenged it immediately; no petition has been filed by them before the appropriate forum seeking a prayer to quash the said letter; no direction can be sought to disregard the clarification in the letter dated 11.10.2018 in a petition under Section 111 of the Act, as this Tribunal is not clothed with any such power thereunder; the present application is not referable to Section 111, and this Tribunal lacks jurisdiction to try this issue; and, as no petition has been filed under Section 121, the interlocutory application is not maintainable.

10. The Respondent further states that they are only interpreting the ambiguous term "power purchase cost" in Regulation 121 of the Tariff Regulations in response to the clarification sought by BYPL in its letter dated 11.10.2018; the term 'power purchase cost' is neither defined nor explained by the Regulations; the said term can cover fixed cost, variable cost etc. under the head long term charges under the PPA; at the time of determination of the ARR for a given FY, banking charges are not considered as a matter of practise; consequently, while determining ARR for the FY 2019-20, banking charges were not considered while issuing the Tariff Order dated 31.07.2019; it is only at the time of truing-up for the FY 2019-20 that the Respondent took cognizance of the Tariff Regulations, 2017 and its letter dated 16.11.2018, and implemented the same by the impugned Tariff Order dated 30.09.2021; the Respondent has not changed the rules/methodology used at the time of determination of the ARR for FY 2019-20 qua banking charges, since banking charges were not even considered at the time of determination of the ARR for the FY 2019-20; and, as such, the question of changing any rules/methodology, midway does not arise. The Respondent prays that the application be dismissed as neither has a prima facie case been made out nor does any irreparable injury accrue to the applicant/Appellant in case the relief sought for is denied.

11. Elaborate submissions, both Oral and Written, were made by Mr. Shri Venkatesh, Learned Counsel for the Appellant and Sri Sujith Ghosh, Learned Counsel for the Respondent. It is convenient to consider the rival submissions, both on maintainability and on merits, under different heads.

I. CONTENTIONS ON MAINTAINABILITY:

(a) HAS THE APPELLANT FAILED TO SEEK THE RELIEF TO QUASH THE LETTER DATED 16.11.2018?

12. Sri Sujith Ghosh, Learned Counsel for the Respondent, would submit that, in the absence of a specific prayer seeking quashing of the letter dated 16.11.2018, presence of pleadings in this respect at para 9.219 of the appeal memo would not be a mitigating factor; in such a situation, this Tribunal ought not to grant the relief considering that the Respondent is contesting this aspect; in the context of granting relief of a substantive nature, of issuing a writ of mandamus, the Supreme Court, in **Joshi Technologies International Inc. v. Union of India, (2015) 7 SCC 728**, has observed that, ordinarily, it would be difficult to read into a general prayer, (i.e., issuance of such other writ, order or direction as may deem be deemed just and proper), a relief of a substantive nature of issuing a writ of mandamus; in the said case, the Supreme Court was inclined to examine the plea on merits, though reluctantly, on the special features in the said case; in the present case, considering the fact that the Respondent is specifically objecting to the relief of quashing of the letter dated 16.11.2018 (unlike in the case of **Joshi Technologies**), and as the same is in the nature of a substantive relief, this Tribunal ought not to entertain such a prayer even on an application, on the threshold of reluctance at this interlocutory stage; to allow a relief not prayed for, merely because there is a plea to that effect, would create a wrong precedent allowing parties thereby to ignore the requirement to state its prayer, and file its appeal mainly on the basis of its pleadings, thereby setting at naught the requirement of a prayer clause in the appeal memo.

13. On the other hand, Mr. Shri Venkatesh, Learned Counsel for the Appellant, would submit that the contention of the Respondent that the Applicant has neither prayed for the letter dated 16.11.2018 to be quashed nor was it even prayed for in the main Appeal, and therefore this Tribunal cannot grant any relief in respect of such an issue, is not tenable; these

contentions of the DERC are misconceived as the Applicant at Para 9.219 of the Appeal has specifically prayed to set aside the Letter dated 16.11.2018; further, the Applicant at Para 21 of the Appeal has prayed to set aside the Impugned Order to the extent challenged in Para 9 of the Appeal; and therefore, in terms of the Para 9.219 and Para 21 of the Appeal, the Applicant has clearly prayed for setting aside the Letter dated 16.11.2018.

(i) PRAYER IN THE MAIN APPEAL

14. In examining the respondent's contention regarding absence of a specific prayer, seeking quashing of the letter dated 16.11.2018, it is necessary to note the relevant paragraphs of the Appeal memo. The reliefs sought by the Appellant, in Appeal No. 334 of 2021, is that, in view of the facts mentioned in Paragraph 7, the questions of law set out in Paragraph 8, and the submissions made in Paragraph 9 of the Appeal Petition, this Hon'ble Tribunal may be pleased to (a) admit the appeal; (b) set aside the Impugned Order dated 30.09.2021 passed by the DERC in Petition No. 3 of 2021 to the extent challenged in the above Paragraphs; (c) allow Carrying Costs on the claims of the Appellant; and (d)pass any such other or further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

15. Para No. 9 of Appeal No. 334 of 2021 details the ground of challenge, and thereunder the appellant states that they have filed the present appeal, *inter alia*, on the following grounds, which are in the alternative and without prejudice to each other. Para 9 A of the appeal details the issues involving violation of the applicable binding regulations and precedents, which are:- (I) re-determination of AT&C loss trajectory; (II) erroneous redetermination of O&M expenses of the past period (FY 2012-13 to FY 2016-17); (III)

disallowance of other expenses; (IV) erroneous computation of working capital; (V) erroneous disallowance of Rs.25 crores in power purchase adjustment charges on account of Maithon Power Ltd; (VI) wrongful allowance of O&M expenses for FY 2019-20; (VII) non-consideration of carrying cost in computation of working capital for FY 2019-20; (VIII) wrongful computation of return on equity and weighted average cost of capital; (IX) wrongful allowance of income tax in bd expenses; (X) non-consideration of the impact of allowed income tax on net income from other business income while computing the non-tariff income for FY 2019-20; (XI) wrongful disallowance of bd expenses for FY 2019-20; (XII) erroneous adjustment of 8% deficit recovery surcharge against the revenue deficit/gap for the year; (XIII) incorrect consideration of advances from consumers as non-tariff income for FY 2019-20; (XIV) non-consideration of carrying cost in computation of ARR for working capital for FY 2021-22; (XV) wrongful computation of ROE/WACC for FY 2021-22; (XVI) wrongful increase in pension trust surcharge from 5% to 7%; (XVII) banking transaction for FY 2018-19 & FY 2019-20; (XVIII) erroneous computation of consumer security deposit for FY 2019-20; (XIX) related party trading margin; (XX) incentive on refinancing of loan for FY 2017-18 and FY 2018-19; (XXI) incentive on refinancing of loan for FY 2019-20; (XXII) merit order despatch for FY 2013-14; (XXIII) Rithala power purchase cost for FY 2010-11 to FY 2017-18; (XXIV) Rithala power purchase cost for FY 2019-20; (XXV) penalty for non-achievement of rpo targets; (XXVI) erroneous deduction of additional UI charges and sustained deviation charges from power purchase cost for FY 2019-20; (XXVII) disallowance of incentive on sale of surplus power; (XXVIII) disallowance of financing cost of power banking for FY 2019 20; (XXIX) non-allowance of loss on sale of retirement of assets; (XXX) wrongful computation of carrying cost rate at 10.21% for FY 2019-20; (XXXI) restricted allowance of O&M expenses and arbitrary

consideration of capitalisation at 80% for FY 2021-22; and (XXXII) wrongful disallowance of legal expenses for FY 2021-22.

16. Of the aforesaid 32 issues raised in the main appeal, only issue No. XXVIII ie the issue of disallowance of financing cost of power banking for FY 2019 20 arises for consideration in the present I.A.

17. In Para 9.199, the findings of the DERC, assailed by the Appellant, are reproduced as under:

> *"3.212. During the prudence check sessions and further scrutiny of the information submitted by the Petitioner, it is observed that the Petitioner has not considered the Variable Cost for the relevant year for evaluating the normative cost of Banking transactions for FY 2019-20 & FY 2018-19 as mandated in above mentioned letter;*
>
> *3.213. It is pertinent to state that when Delhi Distribution Licensee is in Surplus, then they Bank their Surplus Energy to those entities (especially outside Delhi) which are in power deficit. This Surplus Banked power is out of the Long Term sources of Delhi Distribution Licensee whose Fixed Cost is borne by them, however, the power not being put to use in Delhi is being Banked to other Deficit State. Accordingly, the Commission vide its letter dated 16/11/2018, has considered the Variable Cost of Weighted Average Rate of all Long-Term Sources as the Normative Cost of Banking Transactions.*
>
> *3.214. Further, it is pertinent to state that the Banking Transactions are revenue neutral in nature i.e., the variable cost considered for Forward Banking & Reverse Banking leads to no impact in Power Purchase Cost since the Forward Banking & Reverse Banking transactions spill over to multiple years after considering the impact of Banking Return Ratio. The concept of revenue neutral in Banking transactions has also been endorsed by Hon'ble APTEL in Appeal No. 14 of 2012, wherein Hon'ble APTEL rejected the claim of the*

Distribution Licensee related to Financing Cost incurred in relation to Power Banking, as follows:

"113. The learned Counsel for the Delhi Commission submits that the Banking contracts have to be revenue neutral in nature and hence if power has been bought under "banking arrangement", then the same power will be sold back by the utility with 4% extra power. This extra power that is sold at the rate at which it had bought power at the first place serves like the financing cost of the power banked. Hence, no additional funding cost for banked power has been allowed.

117. Thus, the licensee looses carrying cost for Rs 40 Cr. However, in order to make banking arrangements tariff neutral some element of interest is also added. Accordingly, the utility which had banked energy would get 4% additional energy at the time of return to offset the carrying cost for the banked energy.

118. Thus the Licensee gets Rs 1.6 Cr extra as Notional cost of additional energy received to offset the carrying costs. Accordingly, the issue is decided against the Appellant."

3.215 In view of above and taking the cognizance of the above stated Clarification letter dated 16/11/2018 on DERC Tariff Regulations, 2017 and DERC (Business Plan) Regulations, 2017, the Commission has revised the Normative Cost of Banking transactions i.e., considering Variable Cost of weighted average rate of all Long-Term Sources for FY 2018-19 and FY 2019-20 as follows:

Table 3. 56: Revised working of Normative Cost of Banking Transactions

Particulars	***UoM***	***FY 2018-19***	***FY 2019-20***
Banking Export - As per True-up Order	*MU*	*(701.39)*	*(198.37)*
Banking Import - As per True-up Order	*MU*	*852.65*	*723.06*

Banking Export Rate- As per Petitioner	*Rs./kWh*	*2.89*	*2.75*
Banking Import Rate- As per Petitioner	*Rs./kWh*	*3.94*	*2.64*
Banking Export - As per True-up Order	*Rs. Cr.*	*(202.85)*	*(54.50)*
Banking - Import - As per True-up Order	*Rs. Cr.*	*336.06*	*190.69*
Net Banking (Import - Export)	*MU*	*151.26*	*524.69*
Normative Cost on Banking i.e., Variable Cost of Weighted Average Rate of all Long-Term Sources - as per Clarification issued vide DERC letter dated 16.11.2018 on DERC Tariff Regulations, 2017 and BPR, 2017	*Rs./kWh*	*2.90*	*2.97*
Net Normative Cost/ (Sale) to be allowed	*Rs. Cr.*	*43.86*	*155.63*
Net Cost/(Sale) approved	*Rs. Cr.*	*133.21*	
Differential Cost/ (Sale) approved	*Rs. Cr.*	*(89.35)*	*155.63*
Total Normative Cost of Banking approved	*Rs. Cr.*	***66.28***	

18. In Para 3.213, of the tariff order impugned in the main appeal, the DERC had noted that the Commission, vide its letter dated 16/11/2018, had considered the variable cost of weighted average rate of all long-term sources as the normative cost of Banking Transactions. In Para 3.214, the DERC stated that the Banking Transactions are revenue neutral in nature i.e., the variable cost considered for Forward Banking & Reverse Banking leads to no impact in Power Purchase Cost since the Forward Banking & Reverse Banking transactions spill over to multiple years after considering the impact of Banking Return Ratio (the variable cost referred to in Para 3.214 having been introduced only by way of the letter dated 16.11.2018). Thereafter in Para 3.215 of the Tariff Order, the DERC has stated that

taking into account the clarification letter dated 16/11/2018 on DERC Tariff Regulations, 2017, and the DERC (Business Plan) Regulations, 2017, the Commission had revised the normative cost of Banking transactions i.e., considering the variable cost of weighted average rate of all long-term sources for FY 2018-19 and FY 2019-20

19. After extracting Paras 3.213 to 3.215 of the Tariff Order, it is stated, thereafter, in Paragraph 9.200 of the Appeal Petition, that these findings of the DERC are liable to be set aside as being contradictory and against its own Regulations; and that the DERC, while allowing the normative cost of Banking, has erroneously relied upon its letter dated 16.11.2018. Again, in Paragraph 9.214 of the Appeal Petition, it is stated that the DERC had erroneously, by its letter dated 16.11.2018, purportedly issued a clarification with regard to the rate of banking transaction and mechanism for incentive of surplus power, and inter alia clarified as follows:

> *"the normative cost of banking transactions shall be weighted average rate of all long term sources considering only variable cost for the relevant year. Further the sample calculation for incentive on sale of surplus power is annexed herewith."*

20. In Paragraph 9.219 of the Appeal Petition it is stated that, in the present scenario, the DERC, vide its letter dated 16.11.2018, has essentially amended the Tariff Regulations, and has subjected the normative rate of banking to '*weighted average rate of all long-term sources considering only variable cost for the relevant year*', instead of '*average power purchase cost of the portfolio*' as prescribed under the delegated legislation viz. Tariff Regulations, 2017; and, therefore, the said conduct of the DERC ought to be deprecated and set aside by this Tribunal. In Paragraph 9.222 of the Appeal Petition it is stated that, in view of the foregoing submissions, it is humbly prayed that this Tribunal take judicial

note of the arbitrary conduct of the DERC, and consequently direct the DERC to allow the claim of the Appellant.

21. Not only have the relevant paragraphs of the tariff Order, which refer to and rely on the letter dated 16.11.2018, been extracted in the appeal petition, the relevant portion of the letter dated 16.11.2018 has also been extracted, and the appellant has contended that the DERC has erroneously relied upon its letter dated 16.11.2018, and had thereby purportedly issued a clarification with regard to the rate of banking transaction and mechanism for incentive of surplus power; the DERC, vide its letter dated 16.11.2018, has essentially amended the Tariff Regulations, and has subjected the normative rate of banking to a criteria different from the one prescribed under the delegated legislation viz. Tariff Regulations, 2017; and, therefore, the said conduct of the DERC ought to be deprecated and set aside by this Tribunal.

22. As noted hereinabove, prayer (b) is to set aside the Impugned Order dated 30.09.2021 passed by the DERC in Petition No. 3 of 2021 to the extent challenged in Paragraphs 7 to 9 of the Appeal memo. It is evident from the above referred paragraphs of the Appeal Memo, that the Appellant has contended that the tariff Order passed by the DERC, in Petition No,3 of 2021 dated 30.09.2021, should be set aside, among others, because the letter dated 16.11.2018 is contrary to the 2017 Regulations which are in the nature of delegated legislation. In Paragraph 9.219 of the Appeal Petition, while stating that the DERC, vide its letter dated 16.11.2018, has essentially amended the Tariff Regulations, it is contended that the said conduct of the DERC ought to be set aside by this Tribunal. While the language employed may be inelegant, the essence thereof is to have the letter dated 16.11.2018 set aside. Even otherwise, as the relief, to have the tariff Order set aside on this ground, has been specifically sought, grant of the said

relief in the main appeal would render the letter dated 16.11.2018 otiose and of no consequence.

(ii) JUDGEMENT RELIED ON BEHALF OF THE RESPONDENT:

23. In **Joshi Technologies International Inc. v. Union of India, (2015) 7 SCC 728,** on which reliance had been placed on behalf of the Respondent, the appellant had preferred a writ petition under Article 226 of the Constitution of India in the High Court of Delhi with the following prayers ie to issue: (*i*) A writ, direction or order declaring that the petitioner is entitled, in respect of the two production sharing contracts, to the benefit of the said deductions under Section 42 of the Income Tax Act, 1961, from the date of these production sharing contracts, as has been stated and declared by Respondent 1 (i.e. the Ministry of Petroleum and Natural Gas) in several of its communications; and that the petitioner is entitled to the said deductions on the same footing as all other contractors who have executed PSCs with the Union of India; (*ii*) A writ, order or direction in the nature of certiorari quashing the impugned order dated 31-12-2007 issued by Respondent 1, the notice dated 28-3-2008 for reopening of the petitioner's income tax assessments for the Assessment Years 2001-2002, 2002-2003 and 2003-2004, and the notice dated 1-5-2008 for reopening the assessment for the Assessment Year 2004-2005; and (*iii*) such other writ, order or direction as this Hon'ble Court may deem just and proper in the circumstances of the case and in the interest of justice, be passed in favour of the petitioner.

24. On this writ petition being dismissed by the High Court, holding that the appellant was not entitled to any deductions under Section 42 of the Act in the absence of stipulations to this effect in the contracts signed between the parties, the appellant carried the matter in appeal to the Supreme Court.

25. On the issue regarding a mandamus to be issued to the respondents for amending the contract, and including a clause for granting the benefit of Section 42 of the Act, it was contended on behalf of the appellant that this issue was not even gone into, though it was specifically argued; and when the other contracting parties, namely MoPNG, had specifically admitted that this provision was left out inadvertently, the High Court should have given a direction for amendment of the contract.

26. On the issue relating to the jurisdiction of the High Court under Article 226 of the Constitution to issue a mandamus for amending the PSCs, the Supreme Court formulated these issues:(*iii*) Whether there was any intention between the contracting parties, namely, MoPNG and the appellant for giving benefit of deductions under Section 42 of the Act; (*iv*) If so, whether non-inclusion of such a provision in the contract can be treated as an accidental and unintentional omission? and (*v*) If the answer to Question (*iv*) is in the affirmative, whether mandamus can be issued by the Court to the parties to amend the contract and incorporate provisions to this effect?

27. While answering Questions (iv) and (v), the Supreme Court held that these had three facets, namely: (*i*) Whether there is a prayer to this effect in the writ petition?, (*ii*) If it was intended to give such a benefit before entering into the agreement, whether this intention gives any right to the appellant to seek an amendment?, and (*iii*) Whether the Court has the power to issue mandamus or direction to the Government?. After reproducing the prayers made in the writ petition, the Supreme Court held that no prayer for issuance of a writ of mandamus or direction of this nature was specifically made; the prayer clause showed that there were two prayers made in the writ petition; the first related to directing the authorities to grant benefit under Section 42 of the Act in terms of PSCs dated 22-2-

1995 i.e. it was confined within the scope of the said contracts; though, the appellant wanted that, while construing these contracts, MPSCs and other several communications between the parties should be looked into and given effect to, all such communications would be extraneous and it is only the terms of PSCs dated 20-2-1995 which could be looked into; and the second prayer aimed at seeking quashing of orders dated 31-12-2007 and notices dated 28-3-2008 and 1-5-2008 vide which income tax assessments for Assessment Years 2001-2002, 2002-2003, 2003-2004; and 2004-2005 respectively were sought to be reopened.

28. The Supreme Court then noted the submission urged on behalf of the appellant that such a prayer should be culled out from Prayer (*iii*) which was residual in nature. It then held that, ordinarily, it would be difficult to read into this prayer clause a relief of a substantive nature of issuing the writ of mandamus; however, they found that there were specific averments to this effect in the body of the writ petition as well as in the grounds; more pertinently this relief was specifically pressed and argued in the High Court which was even entertained by the High Court without any objections from the respondent to the contrary; and they were, therefore, inclined to examine the plea on merits, though reluctantly.

29. Prayer (*iii*), in **Joshi Technologies International Inc,** is to issue such other writ, order or direction as may be deemed just and proper in the circumstances of the case and in the interest of justice. This prayer is similar to prayer (d) in the main appeal which is to pass any such other or further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case. The challenge to the validity of the letter dated 16.11.2018 is referrable not to prayer (d), but to prayer (b) in the main appeal which is to set aside the Impugned Order dated 30.09.2021 passed by the DERC in Petition No. 3 of 2021 to the extent challenged which,

among others, is on the ground that the letter dated 16.11.2018 is contrary to the 2017 Regulations which are in the nature of delegated legislation. Grant of the main relief, to have the tariff Order set aside on this, among other, grounds would result in the computation of banking charges, on the basis of the letter dated 16.11.2018, also being set aside, thereby rendering the said letter redundant. As shall be elaborated later in this Order, the validity of the letter dated 16.11.2018 can also be examined by this Tribunal under Section 111(6) of the Act.

30. Reliance placed on behalf of the DERC, on the judgement of the Supreme Court in **Joshi Technologies International Inc**, is misplaced, and the objection to the I.A. being entertained, on the grounds urged by them under this head, necessitate rejection.

(b) IS THE RELIEF SOUGHT FOR IN THIS IA IN THE NATURE OF A FINAL RELIEF?

31. Sri Sujith Ghosh, Learned Counsel for the Respondent, would submit that the prayer seeking suspension of operation of the letter dated 16.11.2018 is not maintainable; an interim prayer is essentially in aid of the main relief (**State of Orissa vs Madan Gopal Rungta: 1951 SCR 1024**); accordingly, where no prayer has been made in the main appeal seeking quashing of the letter dated 16.11.2018, interim relief in respect thereof can never be granted; at para 9.219 of the main appeal there is a plea by the Applicant that the said letter dated 16.11.2018 may be set aside by this Tribunal; notwithstanding such a plea, in the absence of a specific prayer in this regard in the main appeal, relief as sought cannot be granted in the main appeal and, consequentially, interim relief in this regard cannot also be granted; Order VII Rule 7 of the Code of Civil Procedure ("***CPC***") requires every plaint to specifically state the relief which the Plaintiff claims either simply or in the alternative; even though the said provision of the

CPC also provides that it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for, such a dispensation cannot be read to mean that a substantive prayer, not made out can be granted, by the Court (Refer: **Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi, (2010) 1 SCC 234**); while the said decision was rendered in the context of Article 226 of the Constitution, the same principle must also be made applicable to proceedings under the Electricity Act, 2003 ("***EA***") considering that both Section 141 of the CPC as also Section 120 of the EA provide a rider on the strict application of the provisions of the CPC to proceedings under the writ jurisdiction, and the appellate jurisdiction under the EA respectively; notwithstanding such a rider, the Supreme Court, in **Public Service Commission v. Mamta Bisht, (2010) 12 SCC 204**, held that principles akin to that provided under the CPC can be made applicable to writ jurisdiction; similarly in the context of the EA, the applicability of the provisions of the CPC has been well endorsed by this Tribunal in a catena of cases including in Appeal No 185 of 2015 decided on 25.10.2018; in any case, reference may also be made to Section 175 of the EA which provides that the provisions of the EA are in addition to and not in derogation of any other law for the time being in force which would include Order VII Rule 7 of the CPC; and the entire jurisprudence covering the aspect that, unless a relief has been specifically prayed for, the same cannot be granted by the Court, has been well documented in the decision of the Supreme Court in **Manohar Lal v. Ugrasen, (2010) 11 SCC 557**, the last paragraph, being the crux of the principle of law governing this field. Reliance is also placed on the decision of the Supreme Court in **Fertilizer Corpn. of India Ltd. v. Sarat Chandra Rath, (1996) 10 SCC 331**.

32. On the other hand, Mr. Shri Venkatesh, Learned Counsel for the Appellant, would submit that the contention of the Respondent that the Applicant's prayer, seeking to have the letter dated 16.11.2018 set aside, is a relief essentially in the nature of a final relief and cannot be granted at an interlocutory stage, is not tenable; the issue pending in the Appeal is with respect to the effect of the Letter dated 16.11.2018 on the tariff of FY 2018-19 and FY 2019-20; by way of the instant Application, the Appellant is seeking suspension of operation of the Letter dated 16.11.2018 on a prospective basis for the future period; therefore, the claim of the DERC that the Applicant is seeking a final relief at the interlocutory stage is incorrect; operation of the letter dated 16.11.2018 should be suspended as it is contrary to the Regulations; and the DERC should, therefore, be directed to implement and give effect to the banking transactions as per Regulation 121 of the Tariff Regulations, 2017.

(i) APPLICABILITY OF CPC TO APPELLATE PROCEEDINGS BEFORE APTEL:

33. Section 120(1) of the Electricity Act provides that the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have the power to regulate its own procedure.

34. Reliance is placed by Sri Sujith Ghosh, Learned Counsel for the Respondent, on **Public Service Commission v. Mamta Bisht, (2010) 12 SCC 204,** and **Kalani Industries Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission (RERC) (Order in APL No. 185 of 2015 Dated 25.10.2018),** to contend that this Tribunal is bound by the provisions of the CPC.

35. Relying on **Gulabchand Chhotalal Parikh v. State of Gujarat: AIR 1965 SC 1153, Babubhai Muljibhai Patel v. Nandlal Khodidas Barot: (1974) 2 SCC 706,** and **Sarguja Transport Service v. STAT: (1987) 1 SCC 5,** the Supreme Court, in **Public Service Commission v. Mamta Bisht, (2010) 12 SCC 204,** held that, undoubtedly, provisions of the CPC are not applicable in writ jurisdiction, by virtue of the provision of Section 141 CPC, but the principles enshrined therein are applicable.

36. Relying on its earlier Order in **New Bombay Ispat Udyog Limited v. MSEDCL (Judgment dated 06.05.2010 in Appeal No. 55 of 2009)**, this Tribunal, in **Kalani Industries Pvt. Ltd. v. Rajasthan Electricity Regulatory Commission (RERC) (Order in APL No. 185 of 2015 Dated 25.10.2018),** held that Section 175 of the Electricity Act, 2003 provides that the provisions of the Electricity Act are in addition to and not in derogation of any other law for time being in force; the provisions of the CPC, in so far as they are not inconsistent with the provisions of the Electricity Act, apply to the proceedings before the Commission under Section 86(1)(f) of the Electricity Act; this Tribunal is adequately empowered to regulate its own procedure, and there is no embargo on its invoking the provisions of the CPC; the Commission is also adequately empowered to regulate its own procedure, and there is no embargo on its invoking the provisions of the CPC as they are not inconsistent with the provisions of the Electricity Act, and will apply to proceedings before the Commission under Section 86(1)(f) of the Electricity Act; and the very purpose of specifically excluding the provisions of the CPC in the Electricity Act, is defeated if, through the backdoor, the ghost of CPC affects the decision making of the authorities in the power sector.

37. In **Gujarat Urja Vikas Nigam Ltd. V Essar Power in 2008 (4) SCC 755,** the Supreme Court held that when there is any express or implied

conflict between the provisions of the Electricity Act and any other Act, the provisions of the Electricity Act, 2003 would prevail but when there is no conflict, express or implied, both the acts are to be read together.

38. In **A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., (2016) 3 SCC 468,** the Supreme Court held that when the provisions of the Electricity Act are in conflict with any other law, then the said Act will have overriding effect as per Section 174; otherwise, in view of Section 175, the provisions of the Electricity Act will be an additional provision without adversely affecting or subtracting anything from any other law which may be in force.

39. In **Maharashtra State Electricity Distribution Co. Ltd. Versus Maharashtra Pradesh Electricity Regulatory Commission and Others:** (Order in Appeal No. 77 of 2018 and IA Nos. 318 of 2018 & 125 of 2019 dated April 27, 2021), this Tribunal, while holding that the appellant should pay the liability on account of LPS to the contesting respondents not later than four weeks from the date of the judgment, had directed the Maharashtra State Electricity Regulatory Commission to take up the matter after four weeks to ascertain if the appellant had discharged its liability towards LPS unto the second to fifth respondents for the period in question in compliance with the above directions. In the appeal preferred against the aforesaid order of this Tribunal, the Supreme Court, in **Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission: (2022) 4 SCC 657,** the Supreme Court held that APTEL was not bound by the procedure laid down in the Civil Procedure Code; one of the objectives of the Electricity Act was time-bound disposal of matters; this was evident from various provisions of the said Act including in particular Section 111(5); APTEL and MERC were not bound by the procedure laid

down in the Civil Procedure Code; and it was open to APTEL to pass such orders as would finally put an end to litigation.

40. Akin to Section 120(1) of the Electricity Act, Section 22 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 prescribes the procedure and powers of the Tribunal and that of the Appellate Tribunal. Sub-section (1) thereof stipulates that the Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure. While considering the scope of this provision, the Supreme Court, in **Industrial Credit and Investment Corporation of India vs. Grapco Industries Ltd & Ors: 1999 (4) SCC 710,** opined that, when Section 22 of the Act says that the Tribunal shall not be bound by the procedure laid by the CPC, it does not mean that it will not have jurisdiction to exercise powers of a Court as contained in the CPC. Rather, the Tribunal can travel beyond the CPC and the only fetter that is put on its power is to observe the principles of natural justice.

41. While construing a similar provision ie Section 18(1) of the Railway Claims Tribunal Act, 1987, the Supreme Court, in **A.A. Haja Muniuddian vs. Indian Railways**: **(1992) 4 SCC 736,** held that nowhere in the said Act is there any provision which runs counter to or is inconsistent with the provisions of Order XXXIII of the Code; although the Act and the rules do not provide for application of Order XXXIII of the Code, there is nothing in the Act or in the rules which preclude the Tribunal from following that procedure if the ends of justice so require; and Section 18(1) only says that the Claims Tribunal shall not be bound by the procedure laid down by the Code but does not go so far as to say that it shall be precluded from

invoking the provisions laid down by the Code even if the same is not inconsistent with the Act and the Rules.

42. In **New Bombay Ispat Udyog Ltd. V.Maharashtra State Electricity Distribution Co. Ltd./Maharashtra Electricity Regulatory Commission (Order in Appeal No.55 of 2009 dated 06.05.2010),** this Tribunal held that a careful perusal of the judgments of the Supreme Court, in **A.A. Haja Muniuddian vs. Indian Railways**: **(1992) 4 SCC 736,** and **Industrial Credit and Investment Corporation of India vs. Grapco Industries Ltd & Ors: 1999 (4) SCC 710,** make it abundantly clear that Section 120(1) of the Electricity Act was not enacted with the intention to curtail the power of this Tribunal with reference to the applicability of the Code of Civil Procedure to the proceedings before it; on the contrary, the Supreme Court has clearly held that the words "shall not be bound by" do not imply that the Tribunal is precluded or prevented from invoking the procedure laid down by the CPC; the words "shall not be bound by the procedure laid down by CPC" only imply that the Tribunal can travel beyond the CPC; the only restriction on its power is to observe the principles of natural justice; the right of Appeal, under Section 111 of the Electricity Act, 2003, is neither an unrestricted nor an unfettered right; Section 111 of the Electricity Act, 2003 should, necessarily, be read harmoniously along with the other provisions in the Electricity Act, 2003 namely Section 120 of the Act; a conjoint reading, of both Sections 111 and 120 of the Electricity Act, would make it clear that the right of appeal, available to an aggrieved person under Section 111 of the Electricity Act 2003, is subject to the procedure adopted by this Tribunal under Section 120 of the Electricity Act, 2003; this Tribunal is not precluded from invoking the provisions of, and the procedure contemplated under, the CPC; this Tribunal is well within its right to adopt its own procedure as well as the procedure contemplated under the CPC;

there is nothing to indicate that the provisions of the CPC are in conflict with the provisions of the Electricity Act; when there is no conflict, express or implied, both the Electricity Act and the CPC should be read together; and this tribunal can establish its own separate procedure or it may invoke the provisions of the CPC in respect of the same for which there is no bar.

43. In **BSES Rajdhani Power Limited V. Delhi Electricity Regulatory Commission/Government of National Capital Territory of Delhi (Order in R.P. No. 1 of 2012 in Appeal No. 142 of 2009 & R.P. No. 2 of 2012 in Appeal No. 147 of 2009)**, this Tribunal held that, in terms of Section 120(1) of the Electricity Act, 2003, the Tribunal is not bound by the procedure laid down in the Code of Civil Procedure, 1908, but is to be guided by the principles of natural justice and, subject to the other provisions of the Act, the Tribunal has the powers to regulate its own procedure; and, as the Tribunal has not laid down its own procedure in this regard, applicability, of the relevant provision contained in the CPC, will have to be considered.

44. As Section 120(1) of the Electricity Act provides that the Appellate Tribunal shall have the power to regulate its own procedure and can even travel beyond the provisions of CPC to meet the ends of justice, this Tribunal is entitled to draw upon the principles underlying the provisions of the CPC while adopting its own procedure under Section 120(1) of the Electricity Act. **(New Bombay Ispat Udyog Ltd v Maharashtra State Electricity Distribution Co. Ltd & Anr., 2010 SCC OnLine APTEL 44; Southern Power Distribution Company of AP Limited V. Andhra Pradesh Electricity Regulatory Commission (Order in APPEAL NO. 397 OF 2022 AND APPEAL NO. 147 OF 2021 dated 14.11.2022).**

45. As this Tribunal can, in the absence of any procedure having been stipulated by it to the contrary, always be guided by the provisions of the

CPC we shall proceed on the basis that Order VII Rule 7 CPC is applicable to the case on hand. Order VII Rule 7 CPC requires the relief to be specifically stated, and provides that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for.

46. The plaintiff need do no more than suggest the relief to which he is entitled, and it is for the Court to determine what relief could be given on the facts found. Where all the facts are stated in the plaint and the plaintiff claims only one relief, although he could have claimed another alternative relief, the Court can grant the latter relief. When necessary facts are stated in the plaint which, if established, entitle the plaintiff in law to obtain certain reliefs, it is open to the Court to grant him such reliefs if established, although the reliefs asked for and the issues raised may be inartistically framed. Judicis est judicare secundum allegate et probata, it is the duty of a Judge to decide according to facts alleged and proved. **(Kesavalu Naidu v. Doraiswami Naidu (died) and others**: **1958 2 MLJ 189)**.

47. Where the Plaintiff claims more than what he is entitled to, the Court will not dismiss the Suit, but give the Plaintiff only such relief as he is entitled to.(***Lakshman* v. *Hari*,I.L.R.4Bom584; *Venkataramana* v. *Verabalu*, A.I.R. 1940 Mad 308; *Khamta Mandalassi* v. *Hem Kumari*, A.I.R. 1941 Pat 29; *Bhiku* v. *Puttu*, (1905) 8 Bom L.R. 106 (D.B.); *Pitambar* v. *Ram Joy*, 1867 South W.R. 93; Angammal v. Komara Gounder, 2002 SCC OnLine Mad 23 (Madras HC); Sopanrao v. Syed Mehmood, (2019) 7 SCC 76).**The Court should not refuse to grant a relief not specifically claimed in the plaint, if such relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised

by the pleadings. (***Hindalco Industries Ltd.* v. *Union of India* 1994 (2) SCC 594).** It is the duty of the Court to mould the relief to be granted to the parties according to the facts proved which, however, should not be inconsistent with the pleadings. ***(Meher Chand* v. *Milkhi Ram*, A.I.R. 1932 Lah 401 (F.B.)**; (***Hindalco Industries Ltd.* v. *Union of India* 1994 (2) SCC 594).**

48. In the light of the law declared by the Supreme Court, in ***Hindalco Industries Ltd.* v. *Union of India* 1994 (2) SCC 594,** it is the duty of this Tribunal to mould the relief to be granted to the parties according to the facts proved as long as it is not be inconsistent with the pleadings. As the interim relief sought, to suspend the letter dated 16.11.2018, is not inconsistent with the relief specifically claimed and raised by the pleadings in the main appeal, the appellant cannot be denied interim relief on this score.

49. Let us now take note of the judgements relied on behalf of the Respondent.

(ii) JUDGEMENTS RELIED ON BEHALF OF THE RESPONDENTS:

50. In **State of Orissa v. Madan Gopal Rungta: AIR 1952 SC 12,** the question which arose for determination was whether directions in the nature of interim relief *only* could be granted under Article 226 of the Constitution, when the High Court had expressly stated that it had refrained from determining the rights of the parties on which a writ of mandamus or directions of a like nature could be issued. It is in this context that the Supreme Court held that Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application, as the High Court had purported to do; an interim relief can be granted only in aid

of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit; and when the Court had declined to decide on the rights of the parties and had expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunction under Article 226 of the Constitution.

51. Unlike in **State of Orissa v. Madan Gopal Rungta: AIR 1952 SC 12**, where the High Court, despite having expressly stated that it had refrained from determining the rights of the parties on which a writ of mandamus or directions of a like nature could be issued, had nonetheless issued an order giving interim relief as the only and final relief on the application, in the present case the appellant has sought to have the tariff order passed by the DERC set aside on several grounds, including on the ground that the letter dated 16.11.2018 is contrary to and falls foul of the 2017 Regulations.

52. In **Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi, (2010) 1 SCC 234,** the Supreme Court held that the approach of the High Court, in granting a relief not prayed for, could not be approved; every petition, under Article 226 of the Constitution, must contain a relief clause; whenever the petitioner is entitled to or is claiming more than one relief, he must pray for all the reliefs; under the provisions of the Code of Civil Procedure, 1908, if the plaintiff omits, except with the leave of the court, to sue for any particular relief which he is entitled to get, he will not afterwards be allowed to sue in respect of the portion so omitted or relinquished; though the provisions of the Code are not made applicable to proceedings under Article 226 of the Constitution, the general principles in the Civil Procedure Code will apply even to writ petitions; it was, therefore, incumbent on the petitioner to claim all reliefs he sought from the court; normally, the court will grant only those reliefs specifically prayed for by the

petitioner; and though it has very wide discretion in granting relief, the Court cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for.

53. As has been rightly contended on behalf of the Respondent, the decision of a case cannot be based on grounds outside the pleadings of the parties, and it is the case pleaded that has to be found. The Court is not entitled to grant a relief not asked for or claimed. Though it has very wide discretion in granting relief, the Court cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner.(**Krishna Priya Ganguly v. University of Lucknow; (1984) 1 SCC 307; Om Prakash v. Ram Kumar: (1991) 1 SCC 441;Trojan & Co. v. Nagappa Chettiar: AIR 1953 SC 235; Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi: (2010) 1 SCC 234; Fertilizer Corpn. of India Ltd. v. Sarat Chandra Rath: (1996) 10 SCC 331; Manohar Lal v. Ugrasen, (2010) 11 SCC 557).**

54. In the present case, the interim relief sought by the appellant is to have the letter of the DERC dated 16.11.2018 suspended prospectively, in order to prevent it from applying a criteria, for determining the rate of banking of power, different from what has been stipulated in the 2017 Regulations, till the main appeal is heard and disposed of. The main relief sought, among others, is to set aside the determination of banking of power, for the Tariff years in question, by the DERC in the order under appeal dated 30.09.2021. The interim relief sought for in the present case is not the main relief sought for in the appeal. Consequently grant of interim relief, as sought for, would not amount to granting the final relief sought in the main appeal. The interim relief sought for does not go beyond the pleadings, as the appellant has, as noted earlier in this Order, specifically

contended that the letter dated 16.11.2018 should be set aside as it falls foul of the 2017 Regulations.

55. The contentions, urged on behalf of the Respondents under this head, also necessitate rejection.

(c) SECTION 111(6): ITS SCOPE:

56. Mr. Shri Venkatesh, Learned Counsel for the Appellant, would submit that Parliament, in its wisdom, has also conferred on this Tribunal power under Section 111(6) of the Act to examine the legality, propriety and correctness of any proceeding which may be brought for consideration in an Appeal under Section 111(1) of the Act; in discharging such functions, this Tribunal has also been vested with wide powers to call for the records of such proceeding which form the basis of an Appeal under Section 111(1) of the Act; in the present case, the Letter dated 16.11.2018 forms the basis of the Order under challenge; and the action of DERC, in seeking to amend the statutory Regulations framed under Section 181 of the Act vide letter dated 16.11.2018, in the garb of a clarification, can be examined in the present Appellate Proceedings before this Tribunal.

57. On the other hand, Sri Sujith Ghosh, Learned Counsel for the Respondent, would submit that the test of general application was applied by the Supreme Court, in **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603,** where, while interpreting the scope of the term 'order' in Section 111 of the Electricity Act, it was held that, since Regulations have general application, the same cannot be considered to be orders which can be appealed against under Section 111 of the EA; in the light of this test of general application, since the letter dated 16.11.2018 was issued to all Discoms and had a general application, and as the said letter per se did not make any decision or adjudication on any right/liability/

claim/regulatory act or adjudication, it cannot be said to be an order for the purposes of Section 111 of the Electricity Act; further, Section 111(6) of the EA also cannot be pressed into service to invalidate the said letter dated 16.11.2018 since that power is to be used in the aid of Section 111 (1) of the EA and not as an independent appellate power through which the meaning of the term 'order' under Section 111 can be expanded to include those actions which meet the test of general application for, if such was the case, then Section 111 (6) could very well be used to invalidate Regulations, (which meets the test of general application), which would clearly go against the grain of the judgment of the Supreme Court in **PTC India Ltd;** the observations in the said judgement that an appeal would lie before the Tribunal if a dispute arises in adjudication on interpretation of a regulation, cannot be so understood to mean that the Supreme Court had cleared the way of treating an interpretation of a regulation, through a formal document, as an appealable order; all that it meant was that, in adjudication of a dispute involving interpretation of a regulation, an appeal would lie, and thus, by necessary implication, the underlying subject matter of appeal would be an adjudication order which involved a *lis*/dispute inter-se between a proposer and an opposer qua interpretation of a Regulation which, consequentially, would indicate that the subject matter of appeal would be an adjudication order and not a clarificatory letter issued in rem having general application.

58. Learned Counsel would rely on **Shankarlal Aggarwala v. Shankarlal Poddar, (1964) 1 SCR 717,** where the distinction between an administrative order and a judicial order was set out, to submit that, even otherwise, a decision is an authority for what it decides and not the conclusion that emanates therefrom (**State of Orissa vs Sudhanshu Shekar Mishra: AIR 1968 SC 647**); and therefore the Judgment in **PTC**

India Ltd cannot be said to be an authoritative decision laying down the law that a document, through which an interpretation of a regulation has been interpreted in rem, is per se an appealable order under Section 111 of the EA since that aspect was not the subject matter of adjudication before the Supreme Court; during the course of the hearing, the Applicant had made an oral submission that the letters issued by the Commission has already been held by this Tribunal, in **Appeal No. 123 of 2008 dated 08.09.2009**, as an appealable order; the issue decided in that case was not whether the impugned letter dated 16.05.2008 (as was challenged in the said decision) was appealable or not; instead the issue framed by the Court was whether the Appellant was a person aggrieved within the meaning of Section 111 of the EA, and whether it had the locus standi to challenge the Impugned Order; it is in that context that this Tribunal had held that the appellant was a person aggrieved by the Impugned order, and therefore had the locus standi to prefer an appeal under Section 111 of the EA; and, therefore, the aforementioned decision of this Tribunal has no application in the present case.

59. Section 111 (6) of the Act enables the Appellate Tribunal, for the purpose of examining the legality, propriety or correctness of any order made by the Appropriate Commission under the Electricity Act, in relation to any proceeding, on its own motion or otherwise, to call for the records of such proceedings and make such order in the case as it thinks fit.

60. The jurisdiction conferred by Section 111(6) is akin to the power of revision (**PTC India Ltd. v. Central Electricity Regulatory Commission: (2010) 4 SCC 603; Indian Wind Power Association v. Tamil Nadu Generation & Distribution Corporation Limited, 2020 SCC OnLine APTEL 52).** Under Section 111(6), the appellate Tribunal has a revisional jurisdiction, *suo motu* and otherwise over the State as well as the Central

Commission.**(Eastern Power Distribution Company of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd., 2018 SCC OnLine Hyd 758).** Under Section 111(1) of the Electricity Act, the merits of an individual case can be examined by this Tribunal. Under Section 111(6) of the Electricity Act, for the purpose of examining the legality, propriety or correctness of any order made by the Appropriate Commission under the Electricity Act, this Tribunal may in relation to any proceedings, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit. **(Reliance Gas Transportation Infrastructure Limited v. Petroleum and Natural Gas Regulatory Board, 2015 SCC OnLine APTEL 115).**

61. The revisional jurisdiction under the Code applies to cases involving questions of jurisdiction i.e. questions regarding the irregular exercise or non-exercise of jurisdiction or the illegal assumption of jurisdiction by a court (**Manindra Land and Building Corpn. v. Bhutnath Banerjee, (1964) 3 SCR 495; *Balakrishna Udayar* v. *Vasudeva Aiyar* [LR 44 IA 261](PC); Vora Abbasbhai Alimahomed v. Haji Gulamnabi Haji Safibhai, (1964) 5 SCR 157; D.L.F. Housing & Construction Co. (P) Ltd. v. Sarup Singh, (1969) 3 SCC 807).** In cases where a revision is provided, and a complaint is made against the decision of the subordinate court on the ground that it has misconstrued the relevant provisions of the statute, the Court must enquire whether the alleged misconstruction of the statutory provision has any relation to the erroneous assumption of jurisdiction, or the erroneous failure to exercise jurisdiction, or the exercise of jurisdiction illegally or with material irregularity by the subordinate court. **(Pandurang Dhondi Chougule v. Maruti Hari Jadhav, (1966) 1 SCR 102).**

62. In **India Cements Ltd. v. Chairman, APSERC, 2011 SCC OnLine AP 417,** it has been held that the Appellate Tribunal can, under Section

111(6), interfere with the Respondent Commission's order fixing FSA on the grounds of “legality, propriety or correctness” of any order made by the Regulatory Commission.

63. Since the jurisdiction of this Tribunal, under Section 111 (6) of the Electricity Act, has been held to be akin to the power of revision, if the said letter dated 16.11.2018 is held to have been issued by the DERC in the exercise of a jurisdiction not vested in it by law, the said letter dated 16.11.2018 can be set aside in the exercise of the revisional jurisdiction under Section 111 (6) of the Act. It is open to this Tribunal, in the exercise of its powers of revision under Section 111 (6) of the Electricity Act, to examine the validity of the contents of the letter dated 16.11.2018, while adjudicating the appeal under Section 111(1) of the Act. In the light of Section 111 (6), this Tribunal has the power, for the purpose of examining the legality/correctness of the order of the DERC dated 30.09.2021, to call for the records of the proceedings of the DERC in its letter dated 16.11.2018 and make such orders in the case (ie Appeal No. 334 of 2021) as it deems fit.

64. The submission of Sri Sujith Ghosh, learned Counsel for the Respondent, is that the Supreme Court, in **PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603,** has held that Regulations have general application, and are therefore not orders which can be appealed against under Section 111 of the EA; and as the letter dated 16.11.2018 also has general application, and per se did not make any decision or adjudication on any right/liability/claim/regulatory act or adjudication, it cannot also be said to be an order against which an appeal would lie under Section 111 of the Electricity Act. It is necessary therefore to examine what the Supreme Court has laid down in this regard in **PTC India Ltd.**

(i) "GENERALITY VS ENUMERATION" PRINCIPLE:

65. While examining the **"generality versus enumeration"** principle, the Supreme Court, in **PTC India Ltd. v. Central Electricity Regulatory Commission: (2010) 4 SCC 603,** referred with approval to its earlier judgement in **Hindustan Zinc Ltd vs Andhra Pradesh State Electricity Board: (1991) 3 SCC 299** wherein the scope of Sections 49(1) & (2) of the Electricity Supply Act, 1948 fell for consideration. Under Section 49(1), a general power was given to the Board to supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and the Board may, for the purposes of such supply, frame uniform tariff under Section 49(2). The Board was required to fix uniform tariff after taking into account certain enumerated factors. In this context the Supreme Court, in **Hindustan Zinc Ltd,** held that the power of fixation of tariff in the Board ordinarily had to be done in the light of specified factors; however, such enumerated factors in Section 49(2) did not prevent the Board from fixing uniform tariff on factors other than those enumerated in Section 49(2) as long as they were relevant and in consonance with the Act.

66. The Supreme Court, in **PTC India Ltd,** then referred with approval to its judgment in **Shri Sitaram Sugar Co. Ltd vs Union of India: (1990) 3 SCC 223** wherein it was held that the enumerated factors/topics in a provision did not mean that the authority cannot take any other matter into consideration which may be relevant; and the words in the enumerated provision are not a fetter; they are not words of limitation, but are words for general guidance.

67. The Supreme Court, in **PTC India Ltd,** further held that, under Section 58 of the RBI Act, 1934, which falls in Chapter IV dealing with general provisions, the Board of Directors of RBI are given the power to

make regulations consistent with the 1934 Act to provide for all matters for which provision is necessary; the principle of "generality versus enumeration" is also applicable to Section 58, because, under Section 58(2), there is a list of topics enumerated on which regulations could be made; and, in other words, Sections 58(1) & (2) of the 1934 Act are similar to Sections 178(1) & (2) of the Electricity Act, 2003.

68. In this context it is useful to note that Section 178 of the Electricity Act, 2003 relates to the powers of the Central Commission to make regulations and, under sub-section (1) thereof, the Central Commission may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act. Section 178 (2) stipulates that, in particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the matters in clauses (a) to (ze) thereof. Section 178(2) (ze) provides for any other matter which is to be, or may be, specified by Regulations. It is in this context that the Supreme Court, in **PTC India Ltd.**, held that, apart from Section 178(1) which deals with "generality", even under Section 178(2)(*ze*), the CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of the 2003 Act; and, applying the principle of **"generality versus enumeration",** it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(*ze*) of the Act.

69. The "**Generality vs Enumeration**" principle lays down that, where a statute confers particular powers without prejudice to the generality of a general power already conferred, the particular powers are only illustrative of the general power, and do not in any way restrict the general power. (**BSNL v. TRAI, (2014) 3 SCC 222; King Emperor v. Sibnath Banerji: AIR 1945 PC 156; Afzal Ullah v. State of U.P: AIR 1964 SC 264; Rohtak**

and Hissar Districts Electric Supply Co. Ltd. v. State of U.P:AIR 1966 SC 1471; K. Ramanathan v. State of T.N: (1985) 2 SCC 116; D.K. Trivedi and Sons v. State of Gujarat:1986 Supp SCC 20). Consequently, even in cases where none of the enumerated clauses (a) to (zd) of Section 178(2) are attracted, it is open to the CERC to make a regulation in the exercise of its general power under Section 178(1) read with the residuary clause in Section 178(2)(ze) of the Act.

70. A regulation under Section 181 is made under the authority of delegated legislation, and consequently its validity cannot be tested by way of an appeal under Section 111 of the Act. The word "order" in Section 111 of the 2003 Act, does not include the Regulations made under Section 181 of the 2003 Act. (**PTC India Ltd. v. Central Electricity Regulatory Commission: (2010) 4 SCC 603).** As against the Regulation framed by Commission, which is a legislative function as a subordinate Legislative authority, no appeal is provided for in terms of Section 111. (**M/s Tata Power Trading Company Limited Vs. The Central Electricity Regulatory Commission: (Order in Apl No. 43 – 45 of 2006 dated 20.04.2006**).

71. The Supreme Court, in **PTC India Ltd,** has opined that, if there is a Regulation, then the measure under Section 79(1) (ie exercise of a regulatory power) has to be in conformity with such regulation under Section 178; applying the test of "general application", a regulation stands on a higher pedestal vis-à-vis an order (decision) of the CERC in the sense that an order has to be in conformity with the regulation. It is only if the letter dated 16.11.2018 is held to be an amendment to the existing Regulations, and to be in the nature of subordinate legislation, would this Tribunal then be barred from examining its validity as that would amount to exercising the power of judicial review, which power has not been conferred on it. If,

however, it is held to be a mere clarification of the Regulation, or an interpretation of the Regulations by the DERC, then this Tribunal would undoubtedly be entitled to examine its legality, for the Supreme Court, in **PTC India Ltd,** has held that if a dispute arises in adjudication, on the interpretation of a Regulation made under Section 181, an appeal would lie before the Appellate Tribunal under Section 111.

72. A challenge to the validity of a Regulation is impermissible in appellate proceedings under Section 111 of the Act, because the Regulations are in the nature of subordinate legislation, and this Tribunal has not been conferred the power of judicial review to examine its validity. Even if it is presumed that the letter dated 16.11.2018 is not applicable merely to the appellant, as it has been addressed to all distribution licensees, it cannot be elevated to the status of subordinate legislation, to contend that its validity is immune from examination in appellate proceedings under the Electricity Act. The distinction sought to be made between a proceedings in rem and those in personem is wholly irrelevant in the present context.

(ii) JUDGEMENT RELIED ON BEHALF OF THE RESPONDENT:

73. In **Shankarlal Aggarwala v. Shankarlal Poddar, (1964) 1 SCR 717,** the Supreme Court held that it was not possible to formulate a definition which would satisfactorily distinguish between an administrative and a judicial order; an administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the Court; the essence of a judicial proceeding or of a judicial order is that there should be two parties and a lis between them which is the subject of adjudication, as a result of

that order or a decision on an issue between a proposal and an opposition; and absence of a lis necessarily negatives the order being judicial.

74. Reliance placed on behalf of the Respondent, on **Shankarlal Aggarwala,** is misplaced as the said judgement only seeks to explain the distinction between a judicial and an administrative order. It is nobody's case that the letter dated 16.11.2018 is a judicial order. The question whether the validity of the letter dated 16.11.2018, the criteria prescribed in which has been applied in the tariff order under appeal dated 30.09.2021, can be examined in an appeal against the said tariff order either under Section 111(1) or Section 111(6) did not arise for consideration in the aforesaid judgement of the Supreme Court.

75. Even if the said letter dated 16.11.2018 is held to be an administrative order, which has been issued to all the distribution licensees, it does not follow from the judgement of the Supreme Court, in **Shankarlal Aggarwala**, that the validity of the said proceedings cannot be examined at all. In this context it must be borne in mind that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. As a case is only an authority for what it actually decides, it cannot be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas it must acknowledged that the law is

not always logical. *(**Quinn** v. **Leathem*** **[1901] AC 495; State of Orissa v. Sudhansu Sekhar Misra, (1968) 2 SCR 154).** Reliance placed on behalf of the Respondents, on **Shankarlal Aggarwala**, is therefore of no avail.

(d) DOES THIS TRIBUNAL LACK JURISDICTION TO EXAMINE THE VALIDITY OF THE LETTER DATED 16.11.2018?

76. Sri Sujith Ghosh, Learned Counsel for the Respondent, would submit that the prayer, as sought for, is not maintainable as the scope of an appeal under Section 111 is restricted to orders, and does not extend to communication which are in the nature of clarifications issued by the Respondent interpreting the provisions of its own Regulations in exercise of its statutory powers under Regulation 173 of the 2017 Tariff Regulations; this interpretation is not directed to any specific transaction/party/contract affecting the rights/liabilities/claims thereunder; instead, they have a general application *in rem*; and the term 'order', under Section 111(1), would mean a decision or adjudication which directly affects rights/liabilities/claims or regulatory acts or adjudication by the specific authority, and not those which have a general application *in rem.* Reliance is placed on the decision of this Tribunal in **Appeal No. 43-45 of 2006 dated 20.04.2006.**

77. On the other hand, Mr. Shri Venkatesh, Learned Counsel for the Appellant, would state that the submission of the Respondent that this Tribunal lacks jurisdiction under Section 111 of Act to adjudicate the present Application, as the letter dated 16.11.2018 is not an 'Order' but a clarification issued by the DERC invoking its 'power to interpret' under Regulation 173 of the Tariff Regulations 2017, is not tenable; on the scope of jurisdiction of this Tribunal under Section 111 of the Act, the Supreme Court, in ***PTC India Ltd. vs. CERC (2010) 4 SCC 603*****,** held that, if a dispute arises in the interpretation of a Regulation, an Appeal would lie before this

Tribunal under Section 111 of the Act; even according to the DERC, the Letter dated 16.11.2018 is merely an interpretation of Regulation 121(3); therefore, as a sequitur, this Tribunal has the jurisdiction under Section 111 of the Act; in ***Emmar MGF Construction Pvt. Ltd. vs. DERC & Ors, (Order in*** **Appeal No. 123/2008 dated 08.09.2009**) this Tribunal has held that a letter issued by the DERC can be challenged under Section 111 of the Act; and, therefore, this Tribunal has ample jurisdiction under Section 111 of the Act to adjudicate the present issue, which arises out of the Letter dated 16.11.2018.

78. It is true that Section 111 (1) of the Act provides for an appeal against an order made by the appropriate Commission. The order under challenge is the order of the DERC dated 30.09.2021 and since that part of the said order, whereby the claim of the Appellant with respect to banking transaction for the Financial Year 2018-19 and 2019-20 was disallowed, was based on the earlier letter of DERC dated 16.11.2018, the Appellant had perforce to subject the said letter dated 16.11.2018 also to challenge in the appeal. By way of the said letter dated 16.11.2018, the DERC has sought to interpret the 2017 Regulations. While absence of the power of judicial review would disable this Tribunal from examining the validity of the 2017 regulations as they are in the nature of the subordinate/delegated legislation, this Tribunal undoubtedly has the power to consider whether the interpretation placed by the DERC on the 2017 Regulations, in terms of its letter dated 16.11.2018, is in accordance with or contrary to the said Regulations itself. If the letter dated 16.11.2018 is not an amendment to, and is found to be contrary to, the 2017 Regulations, then the DERC must be held to lack jurisdiction to issue the said letter, and this question can, undoubtedly, be examined in revision under Section 111(6) while adjudicating an appeal under Section 111(1) of the Act. The Respondent's

plea, of this Tribunal lacking jurisdiction to examine the interpretation placed on the 2017 Regulations, by way of its letter dated 16.11.2018, must therefore fail.

(i) AN ORDER PASSED BY THE COMMISSION CAN BE CHALLENGED UNDER SECTION 111, AND NOT A REGULATION:

79. The jurisdiction of the Tribunal is clearly defined, and is limited to the matters enumerated in Section 111 and 121. Within the bounds of its jurisdiction, the Tribunal has all the powers expressly and impliedly granted. It, therefore, follows that this Tribunal would have such powers as are truly incidental and ancillary for doing of such acts employing all such means as are reasonably necessary to make the grant effective. (**M/s Tata Power Trading Company Limited Vs. The Central Electricity Regulatory Commission: (Order in Apl No. 43 – 45 of 2006 dated 20.04.2006)**. The entirety of power as spelt out in Section 111 can be exercised by this Appellate Tribunal as against an "order" passed by the Appropriate Commission. The word "order", as appearing in Section 111, means a decision or adjudication on certain rights or liabilities or claims or regulatory acts or adjudication by the specified authority, and an appeal is provided for in the Act against such an order. (**Central Coalfields Limited v. Jharkhand State Electricity Regulatory Commission, 2006 SCC OnLine APTEL 35; M/s Tata Power Trading Company Limited Vs. The Central Electricity Regulatory Commission: (Order in Apl No. 43 – 45 of 2006 dated 20.04.2006**). An Order, passed pursuant to the decision making process of the Commission, can be the subject-matter of challenge before the appellate tribunal under Section 111. (**PTC India Ltd. v. Central Electricity Regulatory Commission: (2010) 4 SCC 603; *Southern Technologies Ltd.* v. *CIT* (2010) 2 SCC 548**).

(ii) JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

80. In **Emmar MGF Construction Pvt. Ltd. Vs. Delhi Electricity Regulatory Commission and Ors. (Order in Apl no. 123 of 2008 dated 08.09.2009)**, the appeal related to sharing of the cost of electrification of the Commonwealth Games Village Complex which was being constructed by the appellant as a contractor engaged by the Delhi Development Authority (respondent No.3). Electrification of the complex was assigned to the 2nd respondent ie the distribution licensee of the area. The respondent-Commission had intimated the 2nd respondent, vide letter dated 16.05.2008, that the estimated cost was Rs.49.12 Crores for establishment of a grid station, and Rs.10 Crores for electrification of the Commonwealth Games Village complex for supply of power to 1186 flats. With respect to sharing of the cost of electrification, the Commission ruled that the cost should be funded by the developing agency ie the DDA, so that the other consumers of Delhi were not unduly burdened with these high development costs.

81. The 2nd respondent called upon the appellant to pay Rs.10 Crores being the estimated cost of the external electrification at the project site. The appellant responded contending that, as per the Electricity Supply Code, only 50% of the cost was needed to be borne by the developing agency. The appellant challenged the letter of the Commission dated 16.05.2008, placing reliance on Regulation 30 (i) of the Delhi Electricity Supply Code & Performance Standards Regulations, which stipulated that, for areas developed by the Delhi Development Authority, electrification shall be carried out by the Licensee after charging 50% of the cost towards HT feeders, sub-station including civil works, LT feeders and 100% cost towards service line and street lights. The appellant prayed for the letter of

the Commission dated 16.05.08 to be set aside, and to hold that the DDA was required to pay only 50% of the project cost.

82. Among the questions that arose for consideration, in the appeal before this Tribunal, were whether the appellant was a 'person aggrieved', and whether he had the locus standi to challenge the letter dated 16.05.2008. On the appellant's locus standi, this Tribunal held that Section 111 of the Act gives any person, aggrieved by an order of an appropriate Commission, the right to prefer an appeal; and for filing an appeal under Section 111 of the Act, it was not necessary that the appellant should be a party to the proceedings before the Commission which had passed an order prejudicially affecting the DDA; it was not disputed that Regulation 30 was in place when the contract was entered into; accordingly, the legal liability of the contractor/appellant, on the date he entered into the contract, was only 50% of the cost of construction of HT and LT system; the DDA had pushed the liability of paying the 100% cost of electrification including HT & LT on to the appellant; BYPL had sent a bill to the appellant, and had insisted that the appellant pay the same; the expression "person aggrieved" should be given the widest possible meaning; and the appellant, who as a contractor of the DDA was made to comply with this order (letter dated 06.05.2008), was a person aggrieved by the order, although the order directly mentioned DDA as a person who had to bear the extra burden; and the appellant was therefore eligible to file an appeal under Section 111 of the Act.

83. The appeal was allowed, the impugned order, as contained in the letter dated 06.05.08, to the extent it prejudicially affected the appellant namely deposit of 100% of the cost of HT & LT electrification work in the Commonwealth Games Village, was set aside, and a direction was issued

to determine the liability of the appellant under Regulation 30(i) of the Supply Code.

84. Following the judgements of the Supreme Court, in **Bar Council of Maharashtra Vs. Dabholkar & Others 1975 2 SCC 702,** and **J. M. Desai V. Roshan Kumar AIR 1976 SC 578**, this Tribunal, in **Emmar MGF Construction Pvt. Ltd. v. Delhi Electricity Regulatory Commission: (Order in APL No. 123 of 2008 dated 08.09.2009),** held that to satisfy the test of a "person aggrieved", one is required to establish that one has been denied or deprived of something to which one is legally entitled; a person can be aggrieved if a legal burden is imposed on him; the scope and meaning of the words "aggrieved person" depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him; as the expression "person aggrieved" has not been defined in the Act, it should be given it its natural meaning, which would include a person whose interest is, in any manner, affected by the order; and these words are of the widest amplitude.

85. This Tribunal, in **Emmar MGF Construction Pvt. Ltd**, held that the appellant could mount a challenge to the letter dated 06.05.2008 as he was a person aggrieved thereby. It is only because the validity of the letter dated 06.05.2008 could be examined in appeal, that a challenge thereto was permitted to be made by the appellant therein. In the present case also, the appellant is aggrieved by the criteria laid down in the letter of the DERC dated 16.11.2018, which has been applied in the tariff order dated 30.09.2021, and is therefore entitled to challenge its validity in proceedings under Section 111(1) r/w 111(6) of the Act.

(e) DELAY AND LATCHES:

86. Sri Sujith Ghosh, Learned Counsel for the Respondent, would submit that, assuming arguendo that the letter dated 16.11.2018 is an order within the meaning of Section 111, even then the present claim of the Applicant is not only hit by delay and latches, but also hit by the limitation period prescribed under the Act; as per Section 111 (2), an appeal shall be filed within 45 days from the date on which a copy of the order in appeal was received, and such limitation can be further extended by the Tribunal on showing sufficient cause for not filing it within the period of limitation; even assuming that absence of a specific prayer clause in the main appeal is not fatal and assuming that the said letter dated 16.11.2018 was per se an appealable order, giving rise *per se* to evil and civil consequences for the applicant, then it ought to have preferred an appeal against it within 45 days from 16.11.2018 failing which it ought to have filed an application for condonation of delay; since, the main appeal was filed only on 26.11.2021 (i.e., after more than 3 years), and no prayer seeking condonation was filed, the said appeal qua the letter dated 16.11.2018 is barred by limitation; in fact, at para 6.1 of the main appeal, there is a specific averment that the said appeal is being filed within the limitation period; every cause of action must be independently assailed on its own merits; as per Order VII Rule 8, where the Plaintiff seeks relief in respect of several cause of action founded upon separate and distinct grounds, they shall be stated as far as maybe separately and distinctly; therefore, the letter dated 16.11.2018, being an independent cause of action, and assuming it had the character of an appealable order, it should have been specifically challenged within the limitation period: and strict principles of limitation must apply to such cause of actions as well.

87. What has been subjected to challenge in Appeal No. 334 of 2021 is the order of the DERC in Petition No. 3 of 2021 dated 30.09.2021. It is for the first time, in the said order dated 30.09.2021, that the DERC had applied the mode of computation prescribed in the letter dated 16.11.2018 to disallow the claim of the Appellant with respect to banking transactions for the Financial Years 2018-19 and 2019-20. It is not in dispute that the Appellant has preferred Appeal No.334 of 2021, against the Tarif Order dated 30.09.2021, within the period of limitation stipulated in Section 111 (2) of the Electricity Act. Since an appeal can be preferred under Section 111 (1) by a person aggrieved, by an order of the appropriate Commission, the Appellant could have only challenged the Tariff Order, since it is only in the said order that the DERC had disallowed the claim of the Appellant with respect to banking transaction for the Financial Year 2018-19 and 2019-20.

88. The Appellant is aggrieved only by the order of the DERC dated 30.09.2021 and, since the disallowance in the said order was based on the letter dated 16.11.2018, a challenge was required to be mounted thereto while seeking to have a part of the Tariff Order dated 30.09.2021 set aside on this score. The cause of action for filing the Appeal arose only on the letter dated 16.11.2018 being applied by the DERC to disallow the claim of the Appellant, with respect to banking transaction for the Financial Years 2018-19 and 2019-20, in its order dated 30.09.2021, and not when the DERC had issued the letter dated 16.11.2018. The Respondents' objection to a challenge to the letter dated 16.11.2018, on the ground of delay and latches, therefore necessitates rejection.

II. CONTENTIONS ON MERITS:

(a) STATUTORY REGULATIONS CANNOT BE AMENDED BY EXECUTIVE INSTRUCTIONS:

89. Mr. Sri Venkatesh, Learned Counsel for the Appellant, would submit that Regulations are framed by a State Commission under Section 181 of the Act following a mandatory consultative process with the stakeholders; it is accompanied by a Statement of Reasons recording the objections raised by the Stakeholders, and the reasons for accepting/rejecting such objections; the Regulations also require prior publication as envisaged under Section 181(3) of the Act, and Rule 3 of Electricity (Procedure for Previous Publication) Rules, 2005; the said procedure is the *sine quo non* for issuance of a Regulation by the State Commissions including the DERC; such a mandatory procedure has been prescribed as Regulations are delegated legislation, and must comply with the principles of transparency, equity and fair play; it is for this reason that a Regulation can be subjected to challenge only before a court exercising the power of judicial review; the Commission, discharging functions either under the Regulations or under Section 86(3), is required to act in a transparent and objective manner; this transparency stands mutilated if the State Commission is permitted to override its own Regulations by issuing executive instruction in the form of a letter; the DERC, *vide* its letter dated 16.11.2018, has essentially amended the Tariff Regulations, and has subjected the normative rate of banking to '*weighted average rate of all long-term sources considering only the variable cost for the relevant year'* instead of '*average power purchase cost of the portfolio*' as specified under the delegated legislation viz. Tariff Regulations, 2017; the DERC could not have amended the mandatory prescription of the Regulation by way of a letter dated 16.11.2018 which was issued in an administrative capacity; in its Order in Appeal No. 332 of 2021 & batch dated 24.05.2022, this Tribunal has held that Orders which impact the tariff cannot be passed under an administrative process; and, therefore, issuance of the Letter dated 16.11.2018 amounts to judicial overreach and contravenes the basic tenets of law.

(i) FUNCTIONS OF THE COMMISSION:

90. The 2003 Act mandates the establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives, inter alia, including protection of the consumers of electricity. The Commission is both a decision-making as well as regulation-making authority. The functions of the Commission enumerated in Section 86 are separate and distinct from the functions of the Commission under Section 181. The former are administrative/adjudicatory functions, whereas the latter are legislative. (**PTC India Ltd. v. Central Electricity Regulatory Commission: (2010) 4 SCC 603**).

(ii) COMMISSION CAN EXERCISE ITS REGULATORY POWER EVEN IN THE ABSENCE OF REGULATIONS:

91. Exercise of the decision-making power is not dependent upon the existence of Regulations. To regulate is an exercise which is different from making of the Regulations. If there is a Regulation, then the measure under Section 86(1) should be in conformity with such Regulations made under Section 181. However, making of a Regulation under Section 181 is not a pre-condition to the Commission taking steps/measures under Section 86(1). An order can be passed by the Commission even in the absence of a regulation under Section 181. (**PTC India Ltd. v. Central Electricity Regulatory Commission: (2010) 4 SCC 603**)

(iii) JUDGEMENT RELIED ON BEHALF OF THE APPELLANT:

92. In **TATA POWER DELHI DISTRIBUTION LIMITED Vs. DELHI ELECTRICITY REGULATORY COMMISSION: (Order in Apl No. 332 of 2021 and Batch dated 24.05.2022**), the dispute related to the effect of the adjudicatory orders passed with respect to the claims of the appellant on

the subject of Aggregate Technical & Commercial (AT&C) loss trajectory, and the impact of increase in the rate of service tax. By its judgment, in Appeal No. 246 of 2014 dated 30.09.2019, this Tribunal found substance in the contentions of the appellant. These directions were reiterated by a series of orders, primarily in Appeal No. 213 of 2018 which was filed challenging the subsequent tariff order. Thereafter the State Commission passed a Compliance Order on 04.02.2021 acceding, in principle, to the request of the licensee for requisite relief on both the above aspects. The effective relief was, however, not reflected in the subsequent tariff order which led to directions being reiterated by this Tribunal by its subsequent order in IA No.1615 of 2020 in Appeal No. 213 of 2018 dated 09.04.2021. Instead of following up on the compliance order, the Commission eventually opted to recant and recall, modifying its terms, by a Suo Motu order passed on 29.09.2021. Immediately after passing the Suo Motu order, modifying the Compliance Order dated 04.02.2021, taking back the relief earlier accorded, the Commission proceeded to pass the next tariff order, on 30.09.2021, declining any relief to the appellant under various heads, including on the aforesaid two subjects.

93. In appeal, this Tribunal held that tariff orders, being amenable to appellate scrutiny, resemble a judicial decision by a court of law; such orders are passed by the Commission in the exercise of its powers as a quasi-judicial authority; the orders passed are then the subject matter of the appellate jurisdiction of this tribunal; compliance orders, passed pursuant to the directions given by the appellate forum in adjudicatory process, could not be tinkered with by the Commission under an administrative process.

(iv) PREVIOUS PUBLICATION:

94. Section 181(3) of the Electricity Act stipulates that all Regulations, made by the State Commission under this Act, shall be subject to the condition of previous publication. For the letter of the DERC dated 16.11.2018 to be equated to a Regulation made under Sections 181(1) & (2) of the Act, the condition of previous publication, as stipulated under Section 181(3) of the Act necessitated compliance.

95. In exercise of the powers conferred by sub-section (1) and clause (z) of sub-section (2) of Section 176 of the Electricity Act, 2003, the Central Government made the Electricity (Procedure for Previous Publication) Rules, 2005 (hereinafter called the "2005 Rules"), which came into force on its publication in the official gazette on 09.06.2005. Rule 3 of the 2005 Rules prescribes the procedure of previous publication and stipulates that, for the purpose of previous publication of the Regulations under sub-section (3) of Section 177, sub-section (3) of Section 178 and sub-section (3) of Section 181 of the Act, the following procedure shall apply: (1) the Authority or the Appropriate Commission shall, before making regulations, publish a draft of the regulations for the information of persons likely to be affected thereby; (2) the publication shall be made in such manner as the Authority or the Appropriate Commission deems to be sufficient; (3) there shall be published, with the draft regulations, a notice specifying a date on or after which the draft regulations will be taken into consideration; and (4) the Authority or the Appropriate Commission, having powers to make regulations, shall consider any objection or suggestion which may be received by the Authority or the Appropriate Commission from any person with respect to the draft before the date so specified.

96. The requirement of previous publication inviting objections and suggestions is not an empty formality. It is with an intention to enable persons likely to be affected to be informed, so that they may take steps as

may be open to them and the objections/suggestions made would be required to be taken into consideration by the authorities before issuing a final notification. Such a statutory provision is mandatory, and any departure therefrom is not sustainable in law. **(Avinash Ramkrishna Kashiwar (Dr.) v. State of Maharashtra, 2014 SCC OnLine Bom 1834; State of Punjab v. Tehal Singh: (2002) 2 SCC 7).** The provision regarding previous publication should be strictly complied, as it vitally affects those who have the valuable right to object to the Regulations when its draft is published. In the absence of previous publication, the earlier Regulations would continue to apply and prevail. **(Ramakrishna Vivekananda Mission v. State of W.B., (2005) 9 SCC 53).**

97. It is only if the letter dated 16.11.2018 has been subject to the process of the DERC having published a draft thereof for the information of persons likely to be affected thereby, the publication is made in a sufficient manner, a notice is published, with the draft of the said letter, specifying a date on or after which the draft letter will be taken into consideration, and the DERC has considered the objection or suggestion received from any person with respect to the draft before the date so specified, can the process of previous publication be said to have been complied, after which alone could the said letter be held to be an amendment to the 2017 Regulations. None of these pre-conditions have been followed in the present case, and consequently the letter dated 16.11.2018 cannot be held to be an amendment to the existing “2017 Regulations”.

98. As the 2017 Regulations also bind the DERC, it could not, even in the exercise of its regulatory power, prescribed criteria, in its letter dated 16.11.2018, contrary to the 2017 Regulations. Consequently such an administrative exercise of issuing the said letter, in violation of subordinate legislation which has the force of law, must be held to be illegal and invalid.

(b) IS THE LETTER DATED 16.11.2018 CONTRARY TO THE 2017 REGULATIONS:

99. Mr. Sri Venkatesh, Learned Counsel for the Appellant, would submit that the DERC has erroneously changed the purport and import of Regulation 121 by its letter dated 16.11.2018; the letter dated 16.11.2018 runs contrary to Regulation 121(3) of the Tariff Regulations, 2017 which is binding on the DERC; Regulation 121(3) prescribes that the normative cost of a banking transaction shall be at the rate of the Average Power Purchase Cost of the portfolio of the Distribution Licensee; consequently, in ascertaining the rate of export as well as import of power, the Average Power Purchase Cost of the portfolio of the Distribution Licensee should be the criteria; there is no bar placed under the Regulations restricting the normative cost to one particular year only, which would alter the normative figure at which power is exported/imported; in contravention of Regulation 121(3) of the Tariff Regulations, 2017, the DERC has issued the Letter dated 16.11.2018, and has thereby stipulated that the variable cost for a relevant year should be considered for calculation of banking transactions, which invariably leads to different values being applied for export and import of power, and is against the principle of revenue neutrality; in its Order in Appeal No. 14 of 2012 dated 28.11.2013, this Tribunal held that the cost at which power is imported should be at the same cost at which power is exported; and if the cost of import and export of power is different, then the principle of revenue neutrality is mutilated. Learned Counsel would further submit that the export of banking power by the appellant is adjusted by its import within a maximum period of two years.

100. On the other hand, Sri Sujith Ghosh, Learned Counsel for the Respondent, would submit that the meaning of the term '**power purchase cost'**, in Regulation 121(3), should be discerned from a reading of

Regulation 118 to Regulation 123 contextually with emphasis on Regulation 123; Regulation 123 specifically deals with the sale of surplus power through bilateral and power exchange transactions and also through banking; banking per se may not be a sale under the Sales Tax Law (involving exchange of monetary consideration); the meaning of the term sale as understood under the Sales Tax law was not deployed in Regulation 123, for then the Regulations would not have referred to banking in the very same provision dealing with the sale of surplus power; banking involves consideration in the form of barter of an equivalent amount of electricity and, therefore, has the trappings of a contract of sale involving reciprocal promises; the said regulation, in the context of banking, contemplates that the distribution licensee shall ensure the cost benefit for rate of sale of surplus power *inter-alia* through banking in comparison with the next higher '**variable cost'** of the generating station from which the power is surplus; the guidance provided in Regulation 123, of factoring the variable cost, was considered in interpreting the word power purchase cost as referred to in Regulation 121 (3), and in determining the normative cost of the banking transaction; in Appeal No. 14 of 2012, this Tribunal endorsed that under the Banking arrangement, if power has been bought, then the same will be sold back to the utility; there is a sale and purchase of electricity under the banking arrangement and, as such, Regulation 123 is applicable to Banking transactions as well; the letter dated 16.11.2018 espouses the principle laid down in Regulation 123; if the meaning of the word "power purchase cost" provided in Regulation 121 (3) was indeed clear, there would have been no need for the Applicant along with other Discoms to seek clarification during their meetings with the Respondent, followed by issuance of a formal letter seeking clarification issued by one of the Discoms alluding to the said meeting; to permit the distribution licensee to claim fixed cost, in addition to variable cost for purposes of computing the normative cost of banking

transaction, would amount to double accounting to the extent of Banking Return Ratio, since Fixed cost + Variable cost will also be considered on the Import side, if it was considered on the Export side to the distribution licensee; this would lead to an adverse impact on the consumer; a situation of double accounting would arise because as, in ARR determination, the entire fixed cost payable under the PPA, incurred by the distribution licensee to the generating company, is allowed in its entirety in determining the revenue requirement; the said fixed cost has no bearing on the demand/supply fluctuation that the distribution licensee may face; the demand/supply fluctuation (which leads to the concept of banking) only affects the variable cost incurred by the distribution licensee in purchase of power, and the revenue it must earn in respect thereof; to illustrate when the demand for supply is less than the quantum of power purchased, it then results in a situation where the distribution licensee having paid the entire variable cost for the power it has purchased needs to earn revenue on the entirety of the variable cost so incurred, which it is unable to do because of the shortfall in the demand, and finds itself in a surplus position; in respect of such surplus, it has the option of either selling the surplus power through the exchanges, but that is often not remunerative as it yields a much lesser per unit revenue in comparison to the variable cost it had paid to purchase the surplus power from the generator; to obviate such a loss, which has a direct effect on the computation of the ARR of the distribution licensee and a consequential effect on the consumer through higher cost of tariff, the concept of banking was introduced as a means to deal with such demand/supply fluctuation without causing any loss to the distribution licensee; the idea behind banking is to achieve a revenue neutral position qua the variable cost incurred in purchase of the surplus power from the generating company which is achieved by parking the surplus power with another entity which may have the demand, and receiving an equal amount

of power back from them (subject to Banking Return Ratio) at a time when the concerned distribution licensee is in deficit; the entire concept of banking is directed towards achieving revenue neutrality, and protecting the variable cost of the distribution licensee during ARR determination; to once again give them the benefit of fixed cost, which has already been given in computation of the ARR, would amount to double accounting; the principle of revenue neutrality qua banking transaction, which requires the cost incurred in power imported and the revenues earned on power exported to square off the transaction, ought not to lead to any undue gains or profits (unlike what the applicant has done); and, under such circumstances, the values contained on the cost side and that under the revenue side ought to be identical.

101. Sri Sujith Ghosh, Learned Counsel for the Appellant, would further submit that, for the FY 2018 – 19, the cost has been shown by the Appellant as Rs. 2.89/- for export and Rs. 3.94/- for import; in contrast, through the Impugned Tariff Order, the Respondent has pegged their value at Rs. 2.90/- for both export and import, relying upon its letter dated 16.11.2018, factoring the variable cost to achieve the spirit of revenue neutrality; this figure of Rs. 2.90/- was arrived at based upon a detailed calculation; since the True Up exercise is carried out on a FY basis, it is of necessity that a single value is taken for a given financial year to maintain consistency and therefore, in the said letter dated 16.11.2018, the Respondent had specifically stated that the variable cost for the relevant year shall be taken; and the words “relevant year” is significant since, while carrying out the True Up for a given FY, it is necessary that a single rate for export and import of banked power be taken, else certainty and finiteness of the true up exercise can never be achieved.

(i) RELEVANT PROVISIONS OF THE 2017 REGULATIONS:

102. In exercise of the powers conferred under Section 181 read with Sections 61 and 86(1)(b) of the Electricity Act, the DERC made the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2017 (the '2017 Regulations' for short), which came into force on 01.02.2017.

103. Regulation 118 of the 2017 Regulations stipulates that the cost of power procurement, in the case of a Distribution Licensee, shall be computed on the basis of the quantum of power required to meet the demand in the licensed area of supply, based on the sales forecast and distribution loss approved by the Commission for the relevant year. Regulation 119 requires the distribution Licensee to be allowed to recover the net cost of power purchase from long term sources whose PPAs are approved by the Commission, assuming maximum normative rebate available from each source, for supply to consumers. Regulation 120 requires the distribution licensee to be allowed to recover the cost of power purchase, under short term arrangements, for the deficit in quantum of power requirement for sale in its area and power available through Long term sources as specified in Regulation 119, such as Banking, Bilateral, Exchange, Inter DISCOM Transfer and Unscheduled Interchange etc.

104. Regulation 121 stipulates that, while approving the cost of power purchase, the Commission shall determine the quantum of power to be purchased considering:(1) availability of Generating Stations which may be based on Load Generation Balance Report published by the Central Electricity Authority (CEA) for the relevant Financial Year; (2) principles of merit order schedule and despatch based on the ranking of all approved sources of supply in the order of their variable cost of power purchase on

monthly basis; (3) normative cost of banking transaction at the rate of average power purchase cost of the portfolio of the distribution licensee; and (4) the gap between average Power Purchase Cost of the power portfolio allocated and average revenue due to different consumer mix of all the distribution licensees. The proviso enables the Commission to adjust the gap in power purchase cost by re-assigning the allocation of power amongst the distribution licensees out of the overall power portfolio allocated to the National Capital Territory of Delhi by the Ministry of Power, Government of India.

105. Regulation 122 stipulates that the Annual Fixed Cost of all approved Long Term sources, as specified in Regulation 119, shall be allowed to be recovered in the ARR of the relevant Financial Year, however Variable Cost shall be allowed to be recovered in the ARR on Merit Order basis as specified in Regulation 121. Regulation 123 provides that, to promote economical procurement of power as well as maximizing revenue from Sale of Surplus Power, the distribution licensee shall ensure the cost benefit for rate of sale of surplus power in the relevant slots through Banking, Bilateral and Power Exchange transactions other than the forced scheduling, as certified by the SLDC, in comparison with the next higher variable cost of the generating stations from which power is surplus after meeting the demand of power in its area of supply.

(ii) CONTENTS OF THE LETTER DATED 16.11.2018

106. The subject letter dated 16.11.2018 was addressed by the DERC, in reply to the letter dated 11.10.2018, to the Chief Executive Officer, M/s BSES Rajdhani Power Ltd; the Chief Executive Officer, M/s BSES Yamuna Power Ltd; the Managing Director, Tata Power Delhi Distribution Ltd; and

the Chairperson, New Delhi Municipal Council, by way of a clarification regarding the rate of banking transaction.

107. The DERC informed, vide its letter dated 16.11.2018, that a clarification was sought, by way of letter dated 11.10.2018, on the rate of banking transaction and mechanism for incentive of Surplus Power as per various provisions of the DERC Tariff Regulations, 2017 and Business Plan Regulations, 2017; and, with the approval of the Commission, it was being conveyed that the normative cost of Banking transaction shall be the weighted average rate of all long term sources considering only variable cost for the relevant year. A sample calculation, for incentive on sale of surplus power, was annexed to the said letter.

(iii) "BANKING OF POWER": ITS SCOPE:

108. It is unnecessary for us to analyse the submissions urged on behalf of the Respondent, justifying the change in mode of computation brought about by the letter dated 16.11.2018, for the concept of banking of power has been explained by this Tribunal, in **North Delhi Power Limited v. Delhi Electricity Regulatory Commission, (Order in APL No. 14/2012 dated 28.11.2013),** wherein it was held that, in case of power banking, surplus power is banked by a utility with the other utility to be returned later with some additional power (interest); there are two types of banking: **(a) Forward Power Banking**- distribution licensee banks excess power with other utilities, and draws banked power later when required, and **(b) Reverse power banking**- excess power banked by another utility is with the distribution licensee and the same is returned at a later date; forward banking for one utility is reverse banking for the other utility; there would be no issue, if the power is banked and returned within the same financial year; however, issue of financial charges arise in case power is banked during a

year, and returned during the next financial year; when power is banked during a financial year, it is shown as a notional sale of the distribution licensee at a pre-determined rate, and the amount so arrived is deducted from the ARR of the licensee; when the power is returned, it is shown as notional purchase at the same rate and the cost is added to its ARR; the licensee has paid the power purchase cost and did not get any revenue from such notional sale; however, in order to make banking arrangements tariff neutral, some element of interest is also added; and, accordingly, the utility which had banked energy would get a small percent of additional energy, at the time of return, to offset the carrying cost for the banked energy.

109. The possibility of export of power banking and its import later, falling in two different years, has been taken note of by this Tribunal in the aforesaid judgement, and emphasis is placed on the need to make banking arrangements revenue neutral. The appellant's grievance is not only that the mode of computation prescribed in the letter dated 16.11.2018 mutilates the principle of revenue neutrality but also that the process adopted therein, confining application of the criteria only to one year, ignores the possibility of different treatment being meted out to the same banking of power transaction, if its export is in one year and its import is in another. The appellant claims that, unlike the formula provided in the DERC letter, the formula in Regulation 121(3) is not confined to transactions falling only within one year, and thereby revenue neutrality is maintained even where export and import of power banking transactions take place in two different years.

110. The power to issue clarifications, under the letter dated 16.11.2018, is traced by the Respondents to Regulation 173 of the 2017 Regulations, which relates to interpretation, and stipulates that, if a question arises

relating to the interpretation of any provision of these Regulations, the decision of the Commission shall be final. In the guise of interpretation of the 2017 Regulations, the DERC is not empowered to prescribe a criteria, to determine the normative cost of banking transactions, different from that prescribed in the 2017 Regulations, as that would amount to an amendment of the Regulations, and not its interpretation.

111. Under the head *"Computation of cost of power procurement"*, Regulation 121(3) stipulates that, while approving the cost of power purchase, the Commission shall determine the quantum of power to be purchased considering the normative cost of banking transaction at the rate of average power purchase cost of the portfolio of the distribution licensee. As against the normative cost of banking transaction, stipulated in Regulation 121(3) to be at the rate of average power purchase cost of the portfolio of the distribution licensee, the letter dated 16.11.2018 stipulates that the normative cost of Banking transaction shall be the weighted average rate of all long term sources considering only variable cost for the relevant year. The normative cost of banking transaction stipulated in the 2017 Regulations has been altered by a new prescription in the letter dated 16.11.2018 which is impermissible, as the DERC is also bound by the 2017 Regulations, and cannot, without amending the said Regulations, prescribe a norm contrary thereto.

GOLDEN RULE OF INTERPRETATION:

112. Sri Sujith Ghosh, Learned Counsel for the Respondent, would submit that the general meaning as understood in industrial parlance, that the term power purchase cost means not only variable cost but also fixed cost, cannot be made applicable to every situation in a statute, particularly where the said term is not defined either under the EA or the concerned

Regulation; and interpretation of a provision must not only be based on a textual reading but also on a contextual reading. Reliance is placed by the Learned Counsel on "*In Reading Law: The Interpretation of Legal Text Thomson West 2012 Edition" to submit that Justice Antonin Scalia & Bryan Garner had formulated the supremacy of text principle, which they defined as under: "the words of a governing text are of paramount concern and what they convey in their context is what the text means".* Reliance is also placed on the observation of Justice Holmes according to whom a word is not a crystal, transparent and unchanged: it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time when it is used.

113. It is a cardinal principle of interpretation of statutes that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver **(Gurudevdatta VKSSS Maryadit v. State of Maharashtra, (2001) 4 SCC 534).** The intention of the legislature is primarily to be gathered from the language used in the statute, thus paying attention to what has been said as also to what has not been said. When the words used are not ambiguous, a literal meaning has to be applied, which is the golden rule of interpretation. (**Dental Council of India v. Hari Prakash, (2001) 8 SCC 61).**

114. It is only where the words used are capable of bearing two or more constructions, would it be necessary to adopt a purposive construction, to identify the construction to be preferred. Such an exercise, involving ascertainment of the object of the provision and choosing the interpretation that will advance the object of the provision, can be undertaken, only where the language of the provision is capable of more than one construction. (***Bengal Immunity Co. Ltd.* v. *State of Bihar*: AIR 1955 SC 661; *Kanai Lal Sur* v. *Paramnidhi Sadhukhan*: AIR 1957 SC 907; *Grid Corpn. of Orissa Ltd. v. Eastern Metals & Ferro Alloys*, (2011) 11 SCC 334)**

115. On a plain reading thereof, Regulation 121(3) of the 2017 Regulations, prima facie, does not suffer from ambiguity or absurdity. On a literal construction thereof, the normative cost is the rate of average power purchase cost of the portfolio of the distribution licensee. The DERC has, under the guise of interpreting Regulation 121(3), prescribed a different criteria which is the weighted average rate of all long term sources considering only variable cost for the relevant year. Considering only the variable cost, that too for the relevant year, would violate not only the basic principle of revenue neutrality which governs all banking transactions, but also fall foul of the judgement of this Tribunal in **North Delhi Power Limited v. Delhi Electricity Regulatory Commission, (Order in APL No. 14/2012 dated 28.11.2013).**

(c) COMPUTATION OF THE BANKING RATE:

116. Sri Sujith Ghosh, Learned Counsel for the Respondent, would submit that the Distribution Licensees - BRPL, BYPL & TPDDL had claimed Banking Purchase and Banking Sale, in their Tariff Petitions for True-up of FY 2019-20, at an arbitrary high rate which was against the clarification issued by the Respondent vide its letter dated 16.11.2018; as per the said

clarification, the normative cost of Banking Transactions shall be the weighted average rate of all long-term sources considering only variable cost for the relevant year. After tabulating the claim of Banking Export (Sale) and Import (Purchase) for Distribution Licensees as per their Audited Accounts for FY 2019-20, it is submitted that, from above tables, it is observed that the Distribution Licensees have claimed excess amount by considering the arbitrary high rate of Banking Transactions; there is huge variation in the Banking Rates considered among themselves by DISCOMs; banking transactions are "*Spillover in Nature*" i.e., the power banked in winters of a financial year is received back in summers of subsequent year in full or in part after factoring in the Banking Return Ratio; Power banked in winters of FY 2017-18 was received in the summers of Financial Year 2018-19, but only FY 2018-19 power, either on Purchase side or Sale side, has been (at weighted average rate of all long-term sources considering only variable cost) considered by the Respondent in Tariff Order dated 30/09/2021; as the Banking transactions are on *Rolling Basis*, the Respondent has considered the cumulative Banking Transactions for FY 2018-19 (first year when clarification letter was issued) and FY 2019-20 considering the rate of Banking Transactions as weighted average rate of all long-term sources considering only variable cost for the relevant year; when a Delhi Distribution Licensee is in Surplus, they then Bank their Surplus Energy with those entities (especially outside Delhi) which are in power deficit; this Surplus Banked power is from out of the Long-Term sources of the Delhi Distribution Licensee whose Fixed Cost is borne by them – as per PPA; however the power, not put to use in Delhi, is banked with other deficit States; and the Respondent, in its letter dated 16.11.2018, has considered the Variable Cost of Weighted Average Rate of all Long-Term Sources as the Normative Cost of Banking Transactions.

117. It is unnecessary for us, at the interlocutory stage of these proceedings, to examine the validity of the mode of computation of Banking of power in the tariff Order dated 30.09.2021, as we are only considering the normative rate to be applied to banking transactions henceforth till the final disposal of the main appeal.

(III) CONCLUSION:

118. Viewed from any angle, we are satisfied that application of the formula prescribed in the DERC letter dated 16.11.2018 falls foul of the prescription in Regulation 121(3) of the 2017 Regulations. As there are other distribution licensees falling within the jurisdiction of the DERC, and it is only the appellant which has questioned the validity of the letter dated 16.11.2018, there shall be interim suspension of the letter dated 16.11.2018, in so far as the Appellant is concerned, during the pendency of the present appeal before this Tribunal. Needless to state that the Order now passed by us shall be subject to the result of the main appeal. This I.A. is, accordingly, disposed of.

Pronounced in the open court on this the **23rd day of March, 2023**.

(Sandesh Kumar Sharma)	**(Justice Ramesh Ranganathan)**
Technical Member	Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd/ks

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

COURT I

IA NO. 1766 OF 2022 IN
APPEAL NO. 334 OF 2021

Dated : 23.03.2023

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

Tata Power Delhi Distribution Ltd. .... Appellant(s)

Vs.

Delhi Electricity Regulatory Commission .... Respondent(s)

Counsel for the Appellant(s) : Mr. Shri Venkatesh
Mr. Ashutosh Shrivastav

Counsel for the Respondent(s) : Mr. Md. Munis Siddique

ORDER

IA NO. 1766 OF 2022

Order on this IA (for directions) is pronounced today and disposed of accordingly.

APPEAL NO. 334 OF 2021

Mr. Md. Munis Siddique, Learned Counsel for the Respondent-Commission, seeks six weeks' time to file reply. Time is granted. He may file the reply on or before 04.05.2023, with advance copy to the other side. Thereafter the Appellant may file rejoinder, if any, within four weeks, ie on or before 01.06.2023 with advance copy to the other side.

After pleadings are complete, and after verification by the Registry, let this Appeal be included in the '**List of Finals**' to be taken up from there, in its turn.

(Sandesh Kumar Sharma)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

tpd/mkj/dk