

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

**APPEAL No. 277 of 2023**

Dated : 7<sup>th</sup> March, 2024

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member  
Hon`ble Mr. Virender Bhat, Judicial Member

**In the matter of :**

Rajasthan Rajya Vidyut Prasaran  
Nigam Limited  
Having its Registered office at Vidyut  
Bhawan, Janpath, Jyoti Nagar, Jaipur-302005  
Rajasthan, Through its Chairman and  
Managing Director  
Email: [sr.ao.br@rvpn.co.in](mailto:sr.ao.br@rvpn.co.in)

...Appellant

Versus

1. Rajasthan Electricity Regulatory Commission  
Vidhyut Viniyamak Bhawan  
Sahakar Marg, near State Motor Garage,  
Jaipur, Rajasthan-302001  
Through its Secretary  
Email: [recjpr@yahoo.co.in](mailto:recjpr@yahoo.co.in)

2. M/s. Shree Cement Limited  
A Company incorporated under  
the Companies Act, 1956,  
Having Its Office at: SB-187, 4<sup>th</sup> Floor,  
Opp. Rajasthan University, J.L.N. Marg,  
Bapu Nagar, Jaipur, Rajasthan-302015  
Through its Joint Vice-President  
Email: [singhamarjit@shreecement.com](mailto:singhamarjit@shreecement.com)

...Respondents

Counsel on record for the  
Appellant(s)

: G. Umopathy, Sr. Adv.  
Anish Maheshwari  
Samir Malik

Yunus Malik  
Aman Malik  
Harsha Vinoy for App. 1

Counsel on record for the Respondent(s) : for Res. 1  
Kumar Mihir for Res. 2

## **JUDGEMENT**

### **PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER**

1. The short question which arises for determination of this Tribunal in this Appeal is as under :-

(i) Where, the 2<sup>nd</sup> Respondent Company qualifies as 'Beneficiary' as defined in Clause 2(11) of RERC (terms and conditions for determination of tariff) Regulations, 2014 and thus liable to pay income-tax on return on equity".

2. The 2<sup>nd</sup> Respondent is a company engaged in the business of cement manufacturing and generation of power. In order to meet its power requirements for cement operations, it has set up Captive Generating Plants (CPPs) having capacity of 310 MW at Beawer/RAS Rajasthan which are connected to the system of Appellant Rajya Vidyut Prasaran Nigam Limited (RVPNL), Rajasthan Discom at RAS through 220 KV- LILO at Beawer Jethana line. The power generated by the 2<sup>nd</sup> Respondent in its captive power plant is wheeled under medium term and short-term open access for which it has executed transmission and wheeling agreements with RVPNL and concerned distribution licensee.

3. In consideration of availing of mid-term open access facility for wheeling of power from RAS-Beawer by the 2<sup>nd</sup> Respondent to its grinding units situated at Jobner, Kushkhera and Suratgarh in the Financial Year 2017-18, the Appellant, RVPNL raised bills for recovery of income-tax on return on equity. Aggrieved by these bills, the 2<sup>nd</sup> Respondent sent letters dated 29<sup>th</sup> July, 2020 and 3<sup>rd</sup> September, 2020 requesting the Appellant RVPNL to withdraw the same on the contention that these are not as per the relevant provision of the tariff Regulations of the year 2014. Since no action was taken by the Appellant on the said representation of the 2<sup>nd</sup> Respondent, it was constrained to make payment of these bills for the amount of Rs.3,82,425/- under protest. At the same time, the 2<sup>nd</sup> Respondent also approached the 1<sup>st</sup> Respondent, Rajasthan Electricity Regulatory Commission (RERC) with a petition under Section 142 of the Electricity Act, 2003 with following prayers :-

- a) *Set aside the bills of Income Tax on Return on Equity raised by Respondent for FY2017-18.*
- b) *Impart directions to RVPN to refund the amount of Rs 3,82,425/- to the Petitioner along with the interest which was collected by RVPN towards Income Tax on Return of Equity.*

4. The Commission, vide the impugned order dated 3<sup>rd</sup> August, 2021, held that the 2<sup>nd</sup> Respondent cannot be termed as 'Beneficiary' under the tariff regulations of the year 2014 and in case of a

transmission licensee, the income-tax on return on equity shall have to be shared by the distribution licensee. Accordingly, the Commission directed the Appellant to refund/adjust the recovered amount collected from 2<sup>nd</sup> Respondent towards income-tax on return on equity.

**5.** It was vehemently argued by the Learned Senior Counsel appearing on behalf of the Appellant that the petition filed by the 2<sup>nd</sup> Respondent before the Commission for quashing of the bills raised towards recovery of income-tax on return on equity and for return of the amount of Rs.3,82,425/- already collected in pursuance of these bills, was not maintainable under Section 142 of the Electricity Act which deals with punishment for non-compliance of directions by the appropriate Commission. He would submit that in this case, the 2<sup>nd</sup> Respondent nowhere contends that the Appellant has not complied with the directions of the first Respondent Commission. According to the Learned Senior Counsel, the Commission has erred in entertaining the petition in the first place.

**6.** On merits, Learned Senior Counsel submits that the Appellant has rightly issued the bills in question as per RERC tariff Regulations, 2014. He argued that as per clause 29(1) of these Regulations, the tax on income corresponding to return on equity for the generating companies or licensee has to be directly recovered from the beneficiaries and the 2<sup>nd</sup> Respondent herein being an open access

consumer having benefitted from the generation of power from its captive power plants at Kushkhera, Surat and Jobner, is liable to pay tax on return on equity as per the said clause. In this regard, he referred to the MTOA agreements dated 23<sup>rd</sup> June, 2017 and 27<sup>th</sup> November, 2017 executed by the 2<sup>nd</sup> Respondent with the Appellant for wheeling of power from its captive power plants to its grinding units situated at Kushkhera, Surat and Jobner. The Learned Senior Counsel would further argue that the Commission has erroneously referred to the tariff Regulations 2019 in the impugned order whereas the bill in question is related to the FY 2017 i.e. during the control period of the tariff Regulations of 2014. According to the further submission of the Learned Counsel, while determination of tariff for transmission charges, Return on Equity (RoE) is allowed by the Commission and the same is a part of Annual Revenue Requirement (ARR) which is being charged from Discoms, LTOA and MTOA consumers on account of annual transmission charges in view of Tariff order of RERC from time to time and it seems reasonable that, when tariff is determined by RERC which includes Return on Equity (RoE) as a part of tariff for Discoms as well as Long Term and Medium Term Open Access Consumers then, corresponding tax liability should also be recovered from Long Term and Medium Term Open Access Consumers.

7. Per contra, the impugned order is defending in all respects on behalf of the 2<sup>nd</sup> Respondent. Its counsel has based his arguments on clause 29(1) of RERC tariff Regulations of 2014 stating that the tax on return on equity is to be recovered from the beneficiaries only who are basically the distribution licensees having long-term open access. He argued that though the definition of term 'Beneficiary' in the tariff Regulations, 2014 is very concise, same has been explained/expanded in clause 10 of the subsequent RERC tariff Regulations of 2019 and on combined reading of both the clauses, it is clear that the intention of the Commission was never to recover the tax on return on equity from an entity other than a distribution licensee. He submitted that in the instant case, the 2<sup>nd</sup> Respondent is only availing mid-term open access for wheeling of power from its captive power plant and, therefore, cannot be treated as a beneficiary. According to him, the distribution licensee alone is the beneficiary in the instant case and, therefore, no legal infirmity can be found in the impugned order of the Commission. So far as the filing of petition under Section 142 of the Electricity Act is concerned, the Learned Counsel submitted that this legal provision can be invoked in the cases of non-compliance of the provisions of the RERC Regulations also by anybody and, therefore, it cannot be said that the petition filed by the 2<sup>nd</sup> Respondent was not maintainable. To buttress his submission on this aspect, the Learned Counsel relied upon

the judgement of the Hon'ble Supreme Court in M/s Frick India Ltd. v. Union of India (1990)1 SCC 400. On these submissions he prayed for dismissal of the Order.

8. We have considered the rival submissions made on behalf of the parties by their learned counsels and impugned order of the Commission as well as the entire record.

9. We will first deal with the preliminary objection raised on behalf of the Appellant with regard to the maintainability of the petition of 2<sup>nd</sup> Respondent before the Commission. It is argued on behalf of the Appellant that the petition filed under Section 142 of the Electricity Act, 2003, which deals with punishment for non-compliance of directions by the appropriate Commission, was not maintainable for the reason that the petitioner/2<sup>nd</sup> Respondent had nowhere alleged that the Appellant had not complied with any direction issued by the First Respondent Commission. We find it appropriate to quote Section 142 of the Electricity Act, 2003 hereunder :-

*Section 142. (Punishment for non-compliance of directions by Appropriate Commission):*

*In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case*

*of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.*

**10.** A bare perusal of the said legal provision would reveal that a petition alleging contravention by any person of the provisions of the Electricity Act or the Rules or Regulations made thereunder is maintainable before the Commission under Section 142. In the instant case, it has been the contention of the 2<sup>nd</sup> Respondent before the Commission that the bills in question have been raised by the Appellant in contravention of the tariff Regulations issued by the Commission in exercises of the powers conferred upon it under Section 61 read with Section 181 of the Electricity Act, 2003. Therefore, it is difficult to hold that the petition filed under Section 142 of the Electricity Act was not maintainable. Even otherwise also, we find that the dispute involved herein is between a generating company and the distribution licensee which falls within the jurisdiction of the State Commission under Section 86(f) of the Electricity Act, 2003. It is settled position of law that mentioning of wrong provision of law on a petition/application etc. does not make it not maintainable before any forum when the forum has got jurisdiction to deal with the disputes mentioned in the petition. Therefore, the Commission was having the competence and jurisdiction to adjudicate upon the issues raised by the 2<sup>nd</sup> Respondent in the petition and was well within its rights to entertain as well as decide the same.



Thus, we find no force in the submissions made on behalf of the Appellant on this aspect.

11. Coming to the merits of the case, we find it necessary to reproduce clause 2(11) and clause 2(29) of the RERC Regulations of 2014 hereunder :-

*“2. Definitions*

11. *“Beneficiary” in relation to a Generating Company means a person sharing the capacity charges under these Regulations;*

29. *Tax on Return on Equity*

(1) *Tax on the income corresponding to Return on Equity approved by the Commission for the generating company or the licensee, as the case may be, shall be directly recovered from the beneficiaries. Tax on the income shall be computed with reference to the total actual income tax paid by the generating company or the licensee as the case may be, on pro-rata basis with respect to return on equity. The tax on any other income stream (including efficiency gains, incentive, etc) other than Return on Equity shall not be recovered from beneficiaries, and tax on such other income shall be payable by the generating company or licensee, as the case may be.*

(2) *In case the profit before tax for a particular year is higher than the Return on Equity as approved by the Commission for any year, the Income Tax on Return on Equity to be recovered from the beneficiaries on pro-rata basis in the following manner:*

*Income Tax to be recovered = Total Income Tax Paid x  
RoE approved by the Commission/Profit before Tax.*

(3) *In case the Profit before Tax for a particular year is lower than the Return on Equity as approved by the Commission for any year, the actual Income Tax paid by the Generating Company or Transmission Licensee shall be recovered from beneficiaries.*

(4) *Any under-recovery or over-recovery of tax on income shall be adjusted every year on the basis of income-tax assessment under the Income-Tax Act, 1961, as certified by the statutory auditor:*

*Provided that income-tax allocated to the thermal generating*

*station shall be charged to the beneficiaries in the same proportion as annual fixed charges, and the income-tax allocated to the hydro generating station shall be charged to the beneficiaries in the same proportion as annual capacity charges, and in case of transmission licensee, the sharing of income-tax shall be in the same proportion as annual transmission charges, and in case of distribution licensee, the sharing of income-tax shall be in the proportion of monthly bill:*

*Provided further that the generating company and licensee shall bill the Income Tax under a separate head called 'Income Tax Reimbursement' in their respective bills.*

- (5) *The tax computation on ROE as approved by the Commission may be made based on advance tax assessed or deposited subject to adjustment on actual at the end of the year. The recovery or refund of tax, if any, in comparison with actual tax shall be made along with interest as determined by the assessing officer of Income Tax department. The penalty, if any, arising on account of delay in deposit of tax or short deposit of tax amount shall not be claimed by the generating company or the licensee as the case may be:*

*Provided that the deferred tax liability before 1.4.2009 shall be recovered from the beneficiaries as and when the same gets finalized. No claim on account of deferred tax liability arising after 1.4.2009 shall be made from the beneficiaries.*

**12.** Clause 29 of these Regulations provides that the tax on income corresponding to return on equity in case of a generating company or the licensee shall be recovered from the beneficiaries. Clause 2(11) of the Regulations defines 'Beneficiary' in relation to a generating company as a person sharing the capacity charges under these Regulations. This definition of the term 'Beneficiary' clearly envisages that the generating company cannot itself be a beneficiary and it has to be some person other than the generating company with whom the generating company shares the capacity charges. Therefore, even if the

2<sup>nd</sup> Respondent supplies power from its generating unit to its grinding units situated at different places under mid-term and short-term open access, it cannot be termed its own beneficiary under Clause 2(11) of the Regulations.

**13.** Proviso attached to Clause 29(4) of the Regulations, already quoted hereinabove, also becomes material with regard to the aspect under consideration. It lays down the proportion in which tax on income is to be recovered from various types of beneficiaries. There is no mention of the generating unit or captive power plant in the said proviso. It envisaged that in case of transmission licensee the sharing of income tax shall be in the same proportion as annual transmission charges and in case of distribution licensee, the sharing of income-tax shall be in the proportion of monthly bill. As rightly observed by the Commission in the impugned order, the annual transmission charges are determined by it for distribution licensee only and, therefore, in case of transmission licensee income-tax has to be recovered from the distribution licensee in the same proportion as annual transmission charges. Therefore, there is nothing in the entire Regulations which provide for recovery of tax on return on equity from the generating unit or the captive power plant.

**14.** Further, we may note that both i.e. clause 2(11) of RERC Regulation of 2014 and clause 2(10) of subsequent Regulation of the

year, 2019, define the term “Beneficiary” in a relation to generation stations only and not in relation to the transmission licensees. These also provide for recovery of tax on the income corresponding on return on equity from the beneficiaries. Therefore, such tax on return on equity cannot be recovered from the user of a transmission line through MTOA or STOA under these provisions. It is a settled position of law that where regulations framed by the State Commission are notified, the State Commission becomes bound by the same. Hence, the 2<sup>nd</sup> Respondent cannot be held liable to pay income tax on return on equity.

15. We also find it profitable to refer to the definition of term beneficiary in the subsequent Regulations of the year 2019 issued by the Commission, even though the same are not relevant to the dispute involved in this appeal. Clause 2(10) of these Regulations defines beneficiary as :-

*“2. Definitions*

**(10) “Beneficiary” shall mean**

*(a) in relation to Generating Station/unit(s) of a Generating Company, a person sharing the capacity charges under these Regulations or purchaser of electricity generated at such Station whose Tariff is determined under these Regulations;*

*(b) in relation to a Transmission Licensee and SLDC, the Distribution Licensees;*

*(c) in relation to a Distribution Licensee, the consumers;*

16. It appears that the Commission realized the shortcomings in the brief Definition of term 'Beneficiary' in clause 2(11) of 2014 Regulations and, therefore, thought it necessary to explain/expand the same in 2019 Regulations. On considering the definition of term 'Beneficiary' given in 2019 Regulations in juxtaposition its definition in 2014 Regulations, it becomes clear that the intention of the Commission was never to recover tax on return on equity on an entity other than a distribution licensee in Regulation to a generating stations/unit.

17. Hence, we find no good reason to intervene in the impugned order of the Commission. The appeal is found to be sans any merit and hereby dismissed. Accordingly all the pending IAs also stand disposed off.

**Pronounced in the open court on this 7<sup>th</sup> day of March, 2024.**

(Virender Bhat)  
Judicial Member

(Sandesh Kumar Sharma)  
Technical Member (Electricity)

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REPORTABLE / ~~NON-REPORTABLE~~

*Js*