

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

Appeal No. 237 of 2022

&

Appeal No. 267 of 2022

Dated: 07th March, 2024

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

In the matter of:

M/s. Rubber Park India Private Limited,
Through its Managing Director,
2 A, Kautileeyam, Valayanchirangara,
Ernakulam District, Kerala – 683556.

... Appellant

Vs.

1) Kerala State Electricity Regulatory Commission
Through its Secretary,
C. V. Raman Pillai Road,
Vellayambalam,
Thiruvananthapuram -695010.

2) Kerala State Electricity Board Limited,
Through its Chairman & Managing Director,
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram,
Kerala – 695004.

...Respondent(s)

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
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Mr. Somanadri Goud Katam
Mr. Shashwat Singh
Mr. Naveen Dogra
Mr. Ayan Rai for R-1

Mr. P. V. Dinesh
Mr. Ashwini Kumar Singh
Mr. Bineesh K.
Mr. Rahul Raj Mishra For R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The Appeal No. 237 of 2022 and Appeal No. 267 of 2022 have been filed by M/s. Rubber Park India Private Limited (hereinafter referred as "Appellant") under Section 111 of the Electricity Act, 2003 against order dated 15/07/2019 ("Impugned Order-1") in OP 14/2018 ("Petition") and order dated 19/10/2020 ("Impugned Order-2") in OA11/2017 ("Remand Petition"), respectively, passed by the Kerala State Electricity Regulatory Commission (hereinafter referred as "KSERC" or "State Commission") whereby the State Commission has tried up the financials of the Appellant for the year 2016-17 in the first captioned appeal and in the second captioned appeal has proceeded on the same basis, for trying up of

the financials for the year 2015-16, as in the last order dated 13/12/2017 passed in the RP 09/2017, despite the order of the Tribunal remanding the matter to the State Commission with a direction to hear the parties afresh and decide the issues, and not on the basis of the previous order passed.

2. The Appellant, M/s. Rubber Park India Private Limited is a company incorporated under the provisions of the Companies Act, 2013 *inter-alia* a joint venture between the Rubber Board, a statutory body under the administrative control of Government of India (“GoI”) and KINFRA, a statutory body under the administrative control of the Government of Kerala, granted distribution licence under the provisions of the Electricity Act, 2003 for the specified area of operation at Irapuram, in Mazhuvannoor Panchayath near Perumbavoor, Ernakulam Dist, in the State of Kerala.

3. The Kerala State Electricity Regulatory Commission, the Respondent No. 1 is the Electricity Regulatory Commission for the State of Kerala, exercising powers and discharging functions under the provisions of the Electricity Act, 2003, vested with the powers and functions of regulating distribution and retail supply activities of the Appellant.

4. The Kerala State Electricity Board Limited (“KSEBL”), Respondent No. 2 is the distribution licensee operating in the State of Kerala.

5. The factual matrix of the appeals is noted in brief, the State Commission has framed and notified the Kerala State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2014 (hereinafter referred as “MYT Regulations”), inter-alia, providing for Multi Year Principles for tariff determination of distribution licensees including the Appellant.

6. In pursuance of the MYT Regulations, the State Commission passed an order dated 03/09/2015 (hereinafter referred as “Tariff Order”) in OA No. 10/2015 whereby the State Commission determined the Annual Revenue Requirements (ARR) and Expected Revenue from Charges (ERC) for the Appellant for the control period 2015-16 to 2017-18.

7. In the above order dated 03/09/2015, the State Commission had approved Rs. 35.57 lakhs as interest on normative loan for the year 2016-17 and had also approved other elements of the Revenue Requirements of the Appellant for the control period.

8. The Appellant, thereafter, filed a petition being OA-11/2017 seeking truing up of the financials of the Appellant for the year 2015-16, the above petition was disposed of by the State Commission vide order dated 26/07/2017, whereby the State Commission did not fully allow the claims of the Appellant and particularly with regard to the interest and finance charges, return on equity, repair and maintenance expenses etc.

9. The Appellant submitted that in the circumstances and in view of the fact that there were errors apparent on the face of the record, filed a review petition before the State Commission seeking review of the order dated 26/07/2017, which in turn was disposed of by order dated 13/12/2017 of the State Commission, *inter-alia*, partly allowing the review petition and modified the order dated 26/07/2017, however on other issues and in particular the issues of Interest and Finance Charges and Return on Equity, the State Commission rejected the claims of the Appellant.

10. Being aggrieved by the order dated 13/12/2017 and in the circumstances that the order dated 26/07/2017 had merged into the review order dated 13/12/2017, the Appellant filed an appeal being Appeal No. 114 of 2018 before this Tribunal, which has been disposed of with the judgment dated 18.06.2020 (the remand judgment), relevant extract is quoted as under:

“11. At the hearing, a suggestion came up to the effect that the matter may require revisit by the State Commission in as much as the full import and effect of the 2014 Regulations, as read conjointly with 2006 Regulations does not seem to have been comprehensively examined by it (KSERC) and further because (on the second issue) there is prima-facie material available on record which does not find reflected in the impugned decision. On request of the counsel for the respondents, the

matter was adjourned so that they could seek appropriate instructions in this regard.

12. It has been submitted before us today that the respondents are agreeable for remit in light of the above noted contentions of the appellant. Thus, with the consent of all sides, we dispose of the appeal by directing remit of the above-mentioned two issues to the State Commission for reconsideration and fresh adjudication after hearing all sides in accordance with law. Needless to add that the consent given for remit, or the direction for remit by us, will not be construed as concession given by the parties or expression of opinion rendered by us.

13. The parties are directed to appear before the State Commission on 13.07.2020 for further proceedings.

14. The instant appeals, and pending application, if any, are disposed of in above terms.”

11. The matter, as such, was remanded for considering the two issues i.e. interest on normative loan and Return on Equity (“RoE”) for the additions to the assets during 2015-16.

12. Separately, for the year 2016-17, the Appellant had filed a petition being OA 01/2016 before the State Commission seeking revision in the Annual Revenue Requirements and Expected Revenue from Charges.

13. The above petition No. 01/2016 was disposed of by the State Commission vide order dated 10/05/2016, the Appellant claimed higher interest on normative

loan than the tariff order dated 03/09/2015 on account of the capital additions during the year 2015-16 in the revised ARR & ERC petition for the year 2016-17, however, the State Commission had stated in the order that the higher amount of interest and finance charges claimed by the Appellant will be considered subject to prudence check while finalizing the Truing Up accounts for the year 2016-17.

14. Upon the completion of the year 2016-17, the Appellant on 13/03/2018 filed a petition being OA No. 14 of 2018 seeking true up of the financials of the Appellant for the year 2016-17.

15. By the impugned order dated 15/07/2019, the State Commission has trued up the financials of the Appellant for the year 2016-17 *inter-alia* vide the Impugned Order-1, the State Commission has however disallowed interest on loan to the Appellant, which the Appellant claimed as not only erroneous but also contrary to the main tariff order.

16. Therefore, aggrieved by the above and claiming errors apparent on the face of the record, the Appellant filed a review petition being RP No. 4 of 2019 before the State Commission.

17. By order dated 03/12/2019, the State Commission had dismissed the review petition filed by the Appellant.

18. In the circumstances and aggrieved by the Impugned Orders dated 15.07.2019 and 19.10.2020, the Appellant has preferred the present captioned appeals before the Tribunal.

19. The issue in hand in the two captioned Appeals is whether the State Commission should have allowed Interest on Loan, the Interest and Finance Charges as per the applicable Regulations, also, whether the State Commission having followed a principle while passing the tariff order can deviate from the same at the stage of truing up, it is important to note here that the entire assets have been created against the grant provided by the Government of India and State of Kerala.

20. The submissions of the Appellant are noted in the succeeding paragraphs.

21. The State Commission vide order dated 03.09.2015, has approved and allowed interest on normative loan under the head interest and finance charges for the Appellant, considering that the entire assets were funded by the Appellant with equity, the return on equity has to be restricted only to 30% and the balance is to be treated as normative loan as per the Regulations, which reads as under:

“28. The licensee sought interest on normative loan based on the provisions in the KSERC (Terms and Conditions for Determination of Tariff) Regulations 2014. As per the details given by the licensee, the distribution business is completely funded through equity contribution from promoters. As per regulation 27 the normative debt equity ratio of 70:30 has to be considered and where equity is more than 30%, the

equity for the purpose is to be limited to 30% and the balance amount has to be treated as normative loan and interest on the same has to be allowed at the weighted average rate of interest of the actual loan portfolio. As per regulation 30, if there is no loan portfolio available, interest shall be allowed at the base rate.

29. Based on the above provisions, the licensee is eligible for the normative interest for the excess portion of the equity i.e., equity beyond the normative level of 30%. Since the loan is treated on a normative basis, while calculating the interest to be allowed, sufficient amount should be factored in to reflect the repayment of the principal amount of the normative loan, such that the interest liability gets reduced on a year to year basis, based on the repayment of the principal part. If this is not done, at the end of the estimated life of the asset, if the gross fixed asset (GFA) is not withdrawn from the books of accounts and the new asset too is accounted, there can be double counting of Interest on the old asset figures too. Hence, it would be prudent to assume that the principal amount will be reduced based on the accumulated depreciation provided and interest be calculated on the net assets. Hence interest is provided on the proportion of net assets financed by the normative loan (ie 70%). Since the licensee has no actual loan portfolio, the interest is to be allowed at the base rate of SBI. The ruling base rate is 9.7%. Thus the allowable interest is estimated as shown below:

Table 16

Approved interest on normative loan for the control period

	2015-16	2016-17	2017-18
Opening level of NFA (Rs. Lakhs)	573.90	523.85	473.80
70% of the Net Fixed Assets (Rs. Lakhs)	401.73	366.70	331.66
Base Rate (%)	9.70%	9.70%	9.70%
Normative interest (Rs. Lakhs)	38.97	35.57	32.17

As shown above, the normative interest charges allowable for the control period is Rs. 38.97 lakhs for 2015-16, Rs. 35.57 lakhs for 2016-17 and Rs. 32.17 lakhs for 2017-18.”

22. Thereafter, the State Commission passed the order dated 10/05/2016 revising the estimates of the Appellant for the year 2016-17, wherein again, the State Commission allowed the interest on normative loan for the year 2016-17, the order reads as under:

“18. The licensee has claimed a higher interest and financing charge in the revised application for the year 2016-17 The licensee has claimed an interest on normative loan of Rs.40.27 lakh. The normative interest charges allowed for the control period is Rs 38.97 lakh for 2015-16, Rs.35.57 lakh for 2016-17 and Rs.32.17 lakh for 2017-18 as shown below:

Table 6

RPIL- Approved interest on normative loan for the control period

	2015-16	2016-17	2017-18
Opening level of NFA (Rs. Lakh)	573.90	523.85	473.80
70% of the Net Fixed Assets (Rs. Lakhs)	401.73	366.70	331.66
Base Rate (%)	9.70%	9.70%	9.70%
Normative Interest (Rs. Lakh)	38.97	35.57	32.17

The higher amount of interest and finance charge claimed by the licensee will be considered subject to prudence check while 11apitalize the truing up of accounts of 2016-17. Hence in the revised application also, the Commission approves the interest & finance charges at the same level as approved by the Commission vide the order dated 03-09-2015 for the control period 2015-16 to 2017-18

Table 7

RPIL- Approved interest on normative loan for 2016-17

	2016-17
Opening level of NFA (Rs. Lakh)	523.85
70% of the Net Fixed Assets (Rs. Lakh)	366.70
Base Rate (%)	9.70%
Normative interest (Rs. Lakh)	35.57

”

23. The State Commission, while considering the Petition being OA-14/2018 for the truing up the financials of the Appellant, disposed of the said petition vide the Impugned Order dated 15/07/2019, disallowing the entire interest and finance charges on the premise that there is no loan portfolio with the Appellant, without considering the fact that the entire cost was funded through equity as was observed and decided while passing the ARR order dated 03.09.2015 and further, revising it vide order dated 10.05.2016, the relevant extract of the Impugned Order is quoted as under:

“66. As shown above, Rubber park has no actual loan portfolio as per the accounts from the 2004-05, the period from where, the Commission has been approving the ARR&ERC and Truing up of accounts. Till 2015-16, the licensee had neither raised any claim on interest charges in the ARR&ERC petitions, nor had the Commission approved any interest

charges as there were no loans or cash out flow Until 2015-16, the licensee has not challenged any of the truing up orders of the Commission and had not raised any dispute regarding interest charges. Hence the decision of the Commission has become final which is consistent with the provisions of the Regulation 12 of the KSERC (terms and conditions of tariff for retail sale of electricity) Regulations 2006. It is to be noted that the provisions of the Tariff Regulations 2014 is a continuation of the earlier Regulations.

67. It is worthwhile to note that the RPL was established with the grants from Government of India and State Government for Research activities relating to Rubber and rubber industries. The license was granted for providing reliable power to the rubber based industries in the park at lower cost. There is no profit motive behind the establishment of the enterprise as the company has so far not declared any dividend to the promoter Kinfra or Rubber Board. In such circumstances, providing interest on free money would be undue enrichment for the licensee as there is no corresponding cash outflow. In this context it is pertinent to note that the licensee has not claimed any interest and financing charges either normative or actual till the year 2014-15 in the ARR&ERC petition and truing up petitions as per the provisions of KSERC (terms and conditions of tariff for distribution and retail sale of electricity under MTY framework) Regulation 2006. Since there is no normative loan outstanding as on 31-3-2015 as per the regulatory accounts, the Commission is of the considered view that the licensee is not eligible for interest on normative loan under the provisions of Regulation 27(4) of

Tariff Regulations, 2014. Accordingly no interest on normative loan is admissible.”

24. The Appellant argued that the State Commission has committed an error in not allowing the interest and finance charges of the Appellant in accordance with the provisions of the MYT Regulations, in particular Regulation 27, even after recognizing the cost of the assets put in operation inter-alia has not considered the 70% of the cost of the asset for servicing in the form of loan and equity.

25. The Appellant has claimed that the interest on normative loan is well settled principle, the Regulations of the State Commission, as well as of other Regulatory Commissions including the Central Commission limit the servicing of the equity only to 30% of the capital cost and the balance amount is to be treated as normative loan, the 2006 as well as the 2014 MYT Regulations of the State Commission also have *pari-materia* provisions on this, further, the interest on normative loan was allowed in the tariff order dated 03/09/2015 and 10/05/2016 in accordance to such provision, it is only in the truing up process that this has been reversed.

26. We agree with the contention of the Appellant that it is well settled principle of law that truing up process is not an exercise to reconsider the principles for tariff determination, but it only deals with the adjustment of the estimates made at the beginning of the year with the actual figures available after the end of the period or year, reliance is placed on various judgments of this Tribunal titled (a) *Karnataka Power Transmission Corporation Limited v. Karnataka Electricity Regulatory*

Commission, Appeal No. 100 of 2007 dated 4.12.2007, para 28, (b) North Delhi Power Limited v. Delhi Electricity Regulatory Commission, Appeal No. 265 of 2006 dated 23.5.2007, para 47, 48 and 60 and (c) Karnataka Power Transmission Corporation Limited v. Karnataka Electricity Regulatory Commission, Appeal No. 9 of 2008 dated 9.5.2008, para 31

27. Further, reliance was placed on the judgment dated 18.10.2022 of the Supreme Court in the case of *BSES Rajdhani Power Ltd v. Delhi Electricity Regulatory Commission, 2022 SCCOnline SC 1450*, which reads as under:

“52. As noticed above, a tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority. Apart from this, we are also of the view that at the stage of ‘truing up, the DERC cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR.

53. ‘Truing up’ has been held by APTEL in SLDC v. GERC to mean the adjustment of actual amounts incurred by the Licensee against the estimated/projected amounts determined under the ARR. Concept of ‘truing up’ has been dealt with in much detail by the APTEL in its judgment in NDPL v. DERC wherein it was held as under:—

“60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by

a particular utility and such assessment should be based on practical considerations. ... The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence.”

54. *This view has been consistently followed by the APTEL in its subsequent judgments and we are in complete agreement with the above view of the APTEL. In our opinion, ‘truing up’ stage is not an opportunity for the DERC to rethink de novo on the basic principles, premises and issues involved in the initial projections of the revenue requirement of the licensee. ‘Truing up’ exercise cannot be done to retrospectively change the methodology/principles of tariff determination and re-opening the original tariff determination order thereby setting the tariff determination process to a naught at ‘true-up’ stage.”*

28. Further, it has also been settled by Supreme Court that the Regulations are binding and cannot be deviated from by the State Commission in judgment titled *PTC India Limited v. Central Electricity Regulatory Commission, (2010) 4 SCC 603* at para 49.

29. Therefore, the only other contention raised by the State Commission is that the debt:equity as on 01/04/2014 is to be followed for the future period also, the methodology of tariff of the Appellant in the truing up process cannot be reopened, once the State Commission has accepted the normative loan for the assets created upto 01.04.2014, the same principle has to be adopted in the truing up processes and the future years, the truing up process is only for considering the difference between the actual value and the estimated value, and not for considering whether the interest on normative loan itself is to be allowed or not, once it is settled in the ARR determination.

30. It is the submission of the Appellant that the State Commission has not even finalized the equity base of the Appellant for the period till 2014-15, the State Commission has only provided the same on provisional basis, therefore, when the equity base itself is not finalized by the State Commission and the equity base is only allowed on a provisional basis, the question of the State Commission relying on the debt: equity ratio as on 01/04/2014 does not arise.

31. Further, the Appellant also challenged the finding that there was no claim of the Appellant for normative loan in the past prior to 2014, on the basis that in tariff proceedings, each tariff period is a separate cause of action and as such there is no res-judicata applicable in respect of treatment of tariff elements in the past for future tariff orders, placing reliance on the decision of this Tribunal in Appeal No. 133 of 2009 dated 13.04.2009 titled *Delhi Transco Limited v. Delhi Electricity Regulatory Commission & ors*, para 15 to 17, further, argued that when the equity base itself has not been finalized by the State Commission, the question of

finalizing the debt : equity ratio, interest on loan, normative loan etc. does not arise, therefore, the question of the Appellant not claiming normative loan and the tariff orders attaining finality does not arise.

32. Further, it cannot be disputed at this stage that the State Commission, in the Truing Up order 2015-16 dated 26.07.2017, has held that it had not approved any debt:equity ratio in the order of Truing Up accounts of the company for the year 2014-15 *inter-alia* it was only on a provisional basis that it has been allowed.

33. The counter submissions of the Respondents are noted as under.

34. The State Commission submitted that the principal issue before this Tribunal is regarding the correctness of the impugned orders whereby the State Commission has disallowed the interest on normative loan for existing Assets for the financial years 2015-2016 and 2016-2017 on the ground that there was no normative loan outstanding for the Appellant in terms of Regulations 30(2) nor any actual loan outstanding as on 1.4.2015, further, prior to 2015-2016, the Appellant had neither raised any claim on interest charges in the ARR and ERC petitions, nor had the State Commission approved any interest charges as there were no loans or cash out flow.

35. It cannot be disputed that the Appellant was established with the grant

provided by the Government of India and the State Government for Research activities relating to Rubber and Rubber based Industries and the distribution licence was granted for providing reliable power to the Rubber based industries in the park at the lowest cost, there is no profit motive behind the establishment of the enterprise and the Appellant company has so far not declared dividend to the promoters KINFRA or Rubber Board, therefore, providing interest on free money would be undue enrichment for the licensee as there is no corresponding cash outflow.

36. The Respondent No. 1 further submitted that the appellant had been provided depreciation allowance for the entire assets, which itself would take care of the decrease in the value of the existing assets over time, therefore treating the same asset as normative loan and providing interest on normative loan would amount to granting double benefits for the same asset which is against the statutory provision contained in section 61(b) of the Electricity Act 2003 that the generation, transmission distribution and supply of electricity are conducted on commercial Principles.

37. The Respondent No. 2, KSEBL submitted that the Impugned Order dated 19.10.2020 was passed in remand proceedings, pursuant to the order dated 18.06.2020 of this Tribunal in Appeal No. 114 of 2018 wherein the matter was remanded for reconsideration by the State Commission.

38. Further, submitted that the Appellant's argument is that the Commission has not defined debt equity ratio in 2014-15 true up order, however, the Appellant itself has not claimed any interest and finance charges for any loan including normative

loan and in case no claim is put up before the State Commission to claim interest on loan (including normative loan), there is no requirement to decide the debt equity ratio in the order, also added that the Appellant has failed to establish the capital as equity or grant, if they would have established the capital as equity without doubt, above 30% equity could have been treated as normative loan, therefore, for the period prior to April, 2015, the State Commission has not decided on the normative loan or the firmed up equity or interest on loan.

39. It is the argument of the Respondent No. 2 that the Appellant is entitled to get the interest and finance charges and return on equity only if the Appellant has fulfilled the conditions as per the MYT regulations and accordingly, the normative loan would be allowed on the assets created after 1.4.2015, however, the Appellant had created the asset prior to April 2015 without availing any loan and as per MYT regulations, the Appellant is not entitled to claim any interest, additionally, the Appellant, in the true up petition for 2014-15, has not claimed any amount for interest and finance charges, further, contended that the Appellant has not challenged the regulations in any legal forum so far.

40. The Respondent No. 2 also argued that the State Commission has after considering whether there is any loan actually availed, observed that there is no loan component in their investment, also the normative loan is applicable or not on the basis of provisions contained in the MYT Regulations, the MYT Regulations mandate that only for the assets created after 1.4.2015, the normative loan would be allowed, and in the instant case, the Appellant had created the asset prior to April, 2015, interest on loan is not applicable on these assets created before 1st

April, 2015.

41. Further, pleaded that the return on equity can be allowed on a maximum of 30% of equity only, even if the capital cost is financed by 100 % equity as per 27(2) of MYT regulations, accordingly, the State Commission has allowed return on 30 % of equity, hence the State Commission has fully justified in allowing return on equity.

42. It is also submitted that the Appellant in his petition before the State Commission has challenged the interest on normative loan and return on equity and has not challenged any other expenditure allowed or disallowed by the Impugned Order, the State Commission allowed Interest on loan and return on equity as per the regulations and all other costs are as per the Revenue requirements in accordance with the regulations and the Appellant has not challenged the cost approved by the Commission, the State Commission has followed the regulations in force applicable for the period, in case the Appellant has difference of opinion, the regulation itself should have been challenged in appropriate legal forum, however, the appellant has not challenged the Regulations.

43. The Respondent No. 2 vehemently argued that the truing up process was completely based on Regulation, the State Commission in truing up process, in accordance with the MYT Regulations, considered the actuals only and not deviated from the methodology as specified in the said Regulations, the appellant himself has failed to convince the State Commission that the assets created out of equity after 1st April 2015, which is the requirement as per regulations, on the

other hand, in the true up process, the State Commission has arrived on the conclusion that date of creation of assets was prior to the date specified in the Regulations and disallowed the interest on normative loan, additionally, argued that the Appellant failed to justify the Government fund as equity capital and the State Commission has only allowed provisional ROE.

44. In accordance with the said Regulations, the State Commission cannot allow the financial support provided by grant, consumer contribution, deposit work and capital subsidy for the claim of equity capital, which is to be considered for Gross Asset Value, since the Appellant failed to clearly substantiate, with documents, the financial support provided by the Government as equity capital, the State Commission allowed only notional return, it is clear that no loan was availed by the Appellant, upto 2014-15, it is meaningless to allow normative loan above 30 % equity if quantum of equity employed itself is not proved sufficiently.

45. The Respondent No. 2, also, argued that there is no claim on the part of the Appellant on true up petitions from 01.04.2007 to 31.03.2015 and there is no claim for interest charges, also the provisions of regulations and orders are not challenged by the Appellant up to 2014- 2015, the funding by the Government has not been categorized whether the same is equity or loan, therefore, return on equity cannot be allowed, certainly, the ARR is based on estimation of figures and the State Commission approves ARR&ERC based on the estimated figures in the petition, evaluation of actual accounts is done during the true up process in accordance with the methodology adopted, accordingly, in the truing up process, the State Commission noted the deviation from MYT regulation specifically on 27 (4) inter-alia corrected the same based on actual information/ details provided by

the Appellant, the Impugned Order dated 26.7.2017 was also the true up order for 2015-16 is also based on MYT regulations.

46. The Respondent No. 2 claimed that the State Commission has not considered the asset acquired prior to 1st April, 2015 for arriving normative loan as per Regulations, the Appellant has failed to establish its equity contribution before the State Commission reasonably and appropriately from 2005-06 onwards, in accordance with the MYT Regulations, the asset created through consumer contribution, grant etc will be excluded from claiming ROE or interest as per regulation, also, till 2014-15, the appellant has failed to establish its financial support from KINFRA and Rubber Board as its equity contribution, however, depreciation was allowed for the entire capital without loan repayment, which is meant for repayment of loan in regulatory regime.

47. Our observations and Conclusion are noted in the following paragraphs.

48. We find merit in the submission of the Respondent, the Appellant is bound to prove the creation of assets by way of either equity infusion or availing loan, creation of asset through investment by way of Government grant, cannot be considered for determining the asset value for the determination of normative loan, separately, the Appellant also failed to prove the Government grant or fund as equity capital, accordingly, the State Commission has not decided the debt equity ratio in the absence of such information, therefore, the finalization of funding

pattern, the debt equity ratio cannot be fixed.

49. From the above, the issue in hand revolves around the provisions contained in the 2006 and 2014 MYT Regulations vis-à-vis the grant provided by the Government and its treatment as equity or loan, the relevant extract of the MYT Regulations is quoted as under:

Tariff Regulations 2006

17. Debt-Equity Ratio:- (1) For financing of future capital cost of projects, a Debt : Equity ratio of 70:30 should be adopted. The Distribution Licensee would be free to have higher quantum of equity investments. The equity in excess of this norm should be treated as loans advanced at the weighted average rate of interest and for a weighted average tenor of the long term debt component of the project after ascertaining the reasonableness of the interest rates and taking into account the effect of debt restructuring done, if any. In case of equity below the normative level, the actual equity would be used for determination of Return on Equity in tariff computations.

(2) Debt including its tenure shall be structured with a view to reduce the tariff. Savings in cost on account of subsequent restructuring of debt shall be allowed to be shared between the Licensee and the Consumers in the ratio of 70:30 during the first Control Period and in such proportion as may be decided by the Commission in the subsequent Control periods.

18. Interest on loan Capital. (1) *Interest on loan capital shall be computed loan wise on the loans arrived at in the manner indicated in sub clause 17(1) above.*

(2) *The loan outstanding as on 1.4.2007 shall be worked out as the gross loan minus cumulative repayment as admitted by the Commission up to 31.3.2007. The repayment for the period FY08 to FY10 shall be worked out on normative basis*

(3) *In case any moratorium period is availed of by the Distribution Licensee, depreciation provided for in the tariff during the years of moratorium shall be treated as repayment during those years and interest on loan capital shall be calculated accordingly.*

(4) *Foreign exchange variation risk, if any, shall not be a pass through. In the case of projects where tariff has not been determined on the basis of competitive bids, appropriate costs of hedging and swapping to take care of foreign exchange variation will be allowed for debt obtained in foreign currencies*

Tariff Regulations 2014

“27. Debt-equity ratio. – (1) *For the purpose of determination of tariff, debt-equity ratio as on date of commercial operation in the case of a new generating station, transmission line and distribution line or substation commissioned or capacity expanded on or after the First day of April 2015, shall be 70:30 of the capital cost approved by the Commission:*

Provided that the debt-equity ratio shall be applied only to the balance of such approved capital cost after deducting

the financial support provided through consumer contribution, deposit work, capital subsidy or grant, if any.

(2) Where equity employed is more than thirty percent of the approved capital cost, the amount of equity for the purpose of tariff shall be limited to thirty percent and the balance amount shall be considered as normative loan and interest on the same may be allowed at the weighted average rate of interest of the actual loan portfolio.

(3) Where actual equity employed is less than thirty percent of the approved capital cost, the actual equity shall be considered.

(4) If any fixed asset is capitalised on account of capital expenditure incurred prior to the First day of April, 2015, debt-equity ratio allowed by the Commission for determination of tariff for the period ending the Thirty First day of March, 2015 shall be considered.

(5) The equity invested in foreign currency shall be designated in equivalent Indian rupees as on the date of each investment.

(6) In the case of retirement or replacement of assets, the equity capital approved as mentioned above, shall be reduced to the extent of thirty percent or actual equity component based on documentary evidence, if it is lower than thirty percent of the original cost of the retired or replaced asset.

(7) (a) Swapping of foreign currency loans shall be permitted provided it does not have the effect of increasing the tariff;

(b) Cost of swapping and interest expenses thereon, shall be allowed by the Commission only after prudence check;

I The generating business/company or transmission business/licensee or distribution business/licensee shall provide full particulars of the swapped loans.

(8) (a) Restructuring of capital in terms of relative share of equity and loan shall be permitted during the life of the project provided it does not have the effect of increasing the tariff.

(b) Any benefit from such restructuring shall be shared in the ratio 1:1 among,-

(i) the generating business/company and the persons sharing the capacity charge; or

(ii) transmission business/licensee and long-term intra-State open access customers including distribution business/licensee; or

(iii) distribution business/licensee and consumers.”

30. Interest and finance charges. – (1) (a) The loans arrived at in the manner indicated in Regulation 27 shall be considered as gross normative loan for calculation of interest on loan.

(b) The interest and finance charges on capital works in progress shall be excluded from such consideration.

I In the case of retirement or replacement of assets, the loan amount approved by the Commission shall be reduced to the extent of outstanding loan component of the original cost of the retired or replaced assets, based on documentary evidence.

(2) The normative loan outstanding as on the First day of April, 2015, shall be worked out by deducting the amount of cumulative repayment as approved by the Commission up to the Thirty First day of March, 2015, from the normative loan.

50. The State Commission vide Impugned Order-2 dated 19.10.2020 in the remand proceedings has noted as under:

“

1. The instant case has been initiated based on the directions in the Order of the Hon. APTEL dated 18.06.2020 in Appeal No.114 of 2018 filed by M/s Rubber Park India (P) Ltd. (hereinafter referred to as RPIL or licensee or the petitioner) against the Orders dated 26.07.2017 and 13.12.2017 of the Commission in the matter of Truing up of Accounts for the year 2015-16 and the Review thereof. In the said appeal, the appellant, RPIL raised as the first issue the disallowance of interest on normative loan for the existing assets for the year 2015-16 and the second issue as the disallowance of Return on Equity for the addition of assets during 2015-16, in connection with the truing up of accounts of the licensee for the year 2015-16.

2. The Hon. APTEL in its remand Order dated 18.06.2020 directed remission of the issues to the State Commission for re-consideration and fresh adjudication in accordance with law and also directed the petitioner to appear before the State Commission on 13.07.2020 for further proceedings. -----

3. In the said remand Order, Hon. APTEL mentioned that in the first issue of interest on normative loan, the licensee is primarily arguing that the omission on its part to claim the interest on normative loan in the previous year(s) ought not to be a reason for it being denied of such benefit as would otherwise be available in terms of the provisions of the KSERC (Terms and conditions for determination of Tariff) Regulations, 2014 (hereinafter referred to as the Tariff Regulations, 2014) read with KSERC (Terms and conditions of Tariff for Distribution and Retail sale of Electricity under MYT framework) Regulations, 2006 (hereinafter referred to as Tariff Regulations, 2006). Regarding the second issue, Return on Equity, the focus of the argument of the licensee is on the second proviso to clause (1) of Regulation 29 of the Tariff Regulations 2014, which provides that at the time of truing up for the licensee, return on equity shall be allowed on pro-rata basis taking into consideration the documentary evidence provided for the assets put to use during the financial year. The case being that the licensee had demonstrated with relevant data and information regarding certain assets having been put to use during FY 2015-16, but the State commission decided not to provide RoE for the said addition of assets.

4. Based on the APTEL's direction, a hearing was conducted by the Commission on 13.07.2020. After hearing the arguments of the petitioner and respondent KSEB Ltd, the Commission vide Daily Order dated 14.07.2020 directed the petitioner to furnish a detailed write-up specifying the issues and prayers to be considered, in the light of the Order of Hon. APTEL.

5. *In compliance to the Daily Order, the petitioner submitted a write-up dated 17.08.2020 with the following prayers.*
- a. *Approve the interest on normative loan amounting to Rs.60 lakhs for the year 2015-16 in terms of Regulation 27 and 30 of Tariff Regulations 2014.*
 - b. *Approve the ROE of Rs.39.74 lakh in place of Rs. 37.80 lakh approved in the Truing up order for 2015-16 dated 26.07.2017 by considering the assets 29apitalized during 2015-16 on pro-rata basis.*
6. *The Commission took note of the write up and thereafter a second hearing was conducted on 16.09.2020. During the hearing the petitioner argued that the entire assets of the distribution business was funded out of equity and hence they have requested to allow the interest on normative loan for 2015-16 by treating 70% of the total investment as on 31.03.2015 as normative loan. Further, the petitioner also requested to allow the Return on Equity on pro-rata basis for the capital additions of Rs.66.49 lakh made during 2015-16 considering the provisions in Tariff Regulations 2014.*
7. *KSEB Ltd., as a respondent submitted that there is no merit in the arguments of the petitioner, which are not tenable as per the provisions of Regulations and hence the claims of the petitioner should not be allowed. KSEB Ltd in their remarks vide letter dated 15.09.2020 stated that the Rubber park is set up by the Government with a specific purpose and the funding by the Government for promotion of a specific industry. KSEB Ltd also stated that claiming return on the funding by Government either as return on equity or as*

interest on normative loan is a violation from the basic purpose of the Investment.”

51. Thus, the State Commission has passed the Impugned Order-2 in compliance to the directions, i.e., “*directing remit of the above-mentioned two issues to the State Commission for reconsideration and fresh adjudication after hearing all sides in accordance with law*”, issued by this Tribunal while remanding the matter.

52. It cannot be disputed that the Appellant has created the assets during the applicability of 2006 MYT Regulations and additionally in 2014 MYT Regulations, as claimed by the Appellant, accordingly, the State Commission while passing the Impugned Orders has duly considered the applicability of the two Regulations in respect of Assets created prior to 1.4.2015 and on and after 1.4.2015, inter-alia, observed as under:

“19. Tariff Regulations, 2006 provide for separate treatment in the case of loans outstanding as on 01.04.2007 and future loans after 01.04.2007. In the case of any existing loans, the loan outstanding as on 01.04.2007 is to be worked by deducting the cumulative repayment as admitted by the Commission. However, in the case of future asset additions, normative debt equity of 70:30 is to be considered.

20. Hence, the said Regulation distinctively treats financing of existing assets and future assets separately. As per Regulation

17, funding for the future assets additions are considered on normative basis of 70:30 Debt-equity, whereas the funding of loans for the existing assets up to 01.04.2007 as per Regulation 18 are treated in the same manner as it was treated before or as approved by the Commission. However, for existing loans also repayment for future period is to be treated on normative basis. Accordingly, any loan outstanding is to be worked out by deducting the cumulative repayment upto 31.03.2007 from the gross existing loans. In the case of the petitioner, there were no loans outstanding as on 31.03.2007. It was also an admitted fact that there was no claim on interest and financing charges by the petitioner not just 2006-07 but till 2014-15.

21. Thus there were no provisions for treatment of funding of existing assets as on 01.04.2007 in a normative manner, and the only treatment mentioned in the Regulation is on allowing actual basis or as approved by the Commission in case there is any loans. In other words, in the case of existing assets, whatever is approved in the previous occasions are to be taken as a base. On the other hand the future addition of assets that is assets added after 01.04.2007 can be treated with normative debt -equity ratio of 70:30. Hence, normative treatment is possible for the addition of assets from 01.04.2007 to 31.03.2014 as per Regulations and interest charges on the said loan is allowable.”

53. The State Commission, in respect to 2014 MYT Regulations observed as

under:

“23. As shown above, Regulation 27 (1) to (3) provides for treatment of new assets for which the date of commercial operation is after 01.04.2015 whereas Regulation 27(4) provides for treatment of assets capitalised prior to 01.04.2015. In the case of new assets, the debt-equity ratio is to be considered in the normative manner of 70:30, whereas for the existing assets, the treatment is on the basis of what is approved by the Commission up to 31.03.2015.

24. Thus, it can be seen that in both Regulations, treatment of existing assets as on the first day of the control period and additions during the control period are treated distinctively and separately. The funding of existing assets as on the date of effect of the control period is to be treated in the same manner as the day prior to beginning of the control period as approved by the Commission. The normative treatment of funding of asset is with respect to future asset additions during the control period only.”

54. Therefore, it is important to note the status of debt and equity as on the date of 31.03.2007, additions during 01.04.2007 to 31.03.2015 and additions on and after 01.04.2015, the State Commission concluded as under:

26. Regulation 17 of the Tariff Regulations 2006 provides for treatment of funding of future assets or assets created from

01.04.2007 as with a debt equity ratio of 70:30. Regulation 18 provides for interest charges on loan capital. As per Regulation 18(1), interest charges for the assets created from 01.04.2007 is to be treated in the manner mentioned in Regulation 17(1) i.e., normative debt-equity ratio of 70:30, whereas the Regulation 18(2) provides for treatment of loan outstanding as on 01.04.2007. Since the petitioner had no actual loan outstanding, there is no provision for allowing interest charges. It is pertinent to mention that as per the said Regulations, there is no provision for the normative treatment for funding of existing assets (assets as on 31.03.2007). Since there is no provision in the Regulations for normative treatment for funding of existing assets, normative treatment as contented by the petitioner is not possible. It is also a settled position of law that what is not provided directly cannot be allowed in the indirect manner also.

27. Regarding assets added from 01.04.2007 to 31.03.2014, the licensee has not claimed any interest charges till 2014-15 on normative basis and no interest charges was allowed. Thus, the status as on 01.04.2015 is that there was no normative loan outstanding for the licensee in terms of Regulation 30(2). Considering the fact that there was neither normative loan nor actual loan outstanding as on 01.04.2015, interest charges for the assets as on 01.04.2015 were not allowed.

28. It is also pertinent to add that based on the above Regulations, the licensee was filing the ARR&ERC petitions and Truing up of Accounts. Though the petitioner is eligible for interest on loan as per Tariff Regulations 2006 for the addition of assets from 01.04.2007 to 31.03.2014, there was no claim for interest charges till 2014-15 for the existing assets i.e., the assets as on 01.04.2007 and additions from 01.04.2007 to 31.03.2014. Further, there were no challenges so far neither on the provisions of the said Regulations nor the Orders of the Commission on truing up of accounts. Hence the said treatment has become final.

55. The Appellant has not disputed that it has not claimed interest charges from 01.04.2007 to 31.03.2014, even in the truing petitions for the said period, however, on being asked, submitted that their failure to claim the interest charges cannot be decided against them at this stage, the State Commission has rightly observed that the Appellant is eligible for interest on loan as per 2006 Tariff Regulations.

56. The main contention of the Appellant was that the decision of the State Commission was contrary to the MYT Regulations and also the settled practice in regulatory tariff determination in respect of disallowance of the entire interest and finance charges on the ground that there is no loan portfolio with the Appellant, without appreciating the fact that the entire asset cost was funded through equity, further, submitted that in terms of the MYT Regulations, the cost of the asset over 30% is to be treated as normative loan and this was the precise principle followed in the tariff order passed by the State Commission which was being deviated from

in the truing up order, additionally, the State Commission also disallowed the return on equity in terms of the MYT Regulations.

57. We agree with the Appellant to the extent that the State Commission, in accordance with the 2006 MYT Regulations, is bound to consider the equity contribution above 30% as normative loan for the assets created after 01.04.2007, however, for such consideration, the Appellant is required to justify the capital expenditure made through equity contribution, however, from the submission and documents placed before us, the Appellant has failed to justify the grant provided by the Government as equity contribution.

58. Further, proviso to Regulation 27(1) mandates that ***the debt-equity ratio shall be applied only to the balance of such approved capital cost after deducting the financial support provided through consumer contribution, deposit work, capital subsidy or grant, if any***, and in case, the entire capital employed is from grants provided, the debt equity ratio shall be considered accordingly.

59. The State Commission, while deciding the matter, has observed that there is no loan portfolio in the accounts of the Appellant as on 31.03.2015, accordingly, disallowed the claims, even when the Appellant has made submissions that the assets were created with 100% equity, and both the Regulations do provide for normative loan as against the equity contribution of above 30%.

60. The State Commission also held as under:

“46. The licensee could also not produce any documentary evidence to the effect that the Board had approved earmarking the enhanced paid up equity capital for the distribution business to the tune of increase in assets. In the above circumstances, and based on the details furnished by the licensee, it is not established that the licensee has infused the paid up equity capital for the asset addition of Rs.66.49 lakhs during 2015-16. However, considering the fact that the said asset addition has been approved by the Commission and there is no grants or contribution received by the licensee, the said amount is treated as normative loan and allowed interest on pro rata basis, as mentioned in the previous sections.

47. Hence, the petitioner is eligible for the return on equity on 30% of Rs.900 lakhs only and not on any additions unless there is an increase in the paid up equity capital corresponding to the GFA additions claimed. The Commission had therefore approved an amount of Rs. 37.80 lakh towards Return on Equity for 2015-16 at the time of truing up considering Rs.900 lakhs as the share of total paid up capital for the distribution business.”

61. The State Commission by treating Rs. 900 lakhs as 100 % equity capital, has granted return on 30% of Rs. 900 lakhs, however, has not allowed interest on the balance 70%, stating that since the same cannot be considered as normative loan.

62. Once the State Commission has considered Rs. 900 lakhs as 100% equity capital, it is bound to treat the balance as normative loan under the provisions of the relevant Regulations for the respective financial years.

63. Considering the above, we find it just and reasonable to remand the matter to the State Commission for reconsideration in the two captioned Appeals and decide whether the grant received by the Appellant can be treated as equity capital or loan *inter-alia* any other expenditure made by the Appellant in creating the assets prior to and after 1st April, 2015 in clear terms after hearing the parties afresh, also the date of investment of such capital has also to be placed on record.

64. The failure to claim interest on normative loan during the period 01.04.2007 to 031.03.2015 cannot be reasoned for denial of such interest during the control period starting from 01.04.2015, the State Commission is bound to determine the debt equity ratio as on 31.03.2015 vis-à-vis the capital outlay employed by the Appellant and therefore, is directed to determine the same.

65. The Impugned Orders dated 15.07.2019 and 19.10.2020 are set aside to the above extent.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned appeals nos. 237 of 2022 and 267 of 2022 have merit and are remanded to the State Commission for a clear finding on i) the capital investment made by the Appellant in terms of grants/ equity/ loan alongwith the date of investment

made, ii) whether the grant provided by the Government is to be considered as equity capital or loan, and iii) the debt equity ratio as on 31.03.2015, and pass consequential orders afresh.

Needless to say, that the issue is pending for long, the State Commission shall pass fresh orders expeditiously with clear findings after giving opportunities to all the contesting parties before passing the necessary orders.

The captioned appeals and pending IAs, if any, are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 07th DAY OF MARCH, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj