

DELHI ELECTRICITY REGULATORY COMMISSION

Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi- 110017.

F.11(1546)/DERC/2017-18/6012

Petition No. 62/2017

In the matter of: Remand Back matter in Appeal No. 255 of 2013.

Delhi Transco Ltd.

...Petitioner

Vs.

BSES Rajdhani Power Ltd. & Ors.

...Respondents

Coram: Hon'ble Mr. Justice S S Chauhan, Chairperson

ORDER

(Date of Order: 30.12.2019)

1. The Petitioner Delhi Transco Ltd. (DTL) had filed Appeal No.255 of 2014 before Hon'ble APTEL against the Order dated 31.07.2013 passed by this Commission in respect of Annual Revenue Requirement and Tariff for the Petitioner for FY 2013-14. The APTEL vide its judgment dated 01.02.2016 has, inter alia, remanded back to this Commission the issue of Income Tax paid by the Petitioner.
2. Hon'ble APTEL vide the aforesaid judgement, on the issue whether the State Commission was justified in directing the Appellant to refund the Income tax paid by the distribution companies even before deciding the issue on the petition filed by a distribution company pending before the State Commission has observed the following: -

"In our opinion, the Commission has to consider the income tax actually paid by the Appellant with due verification and the same has to be included in the Tariff Computation and shall be passed on to the beneficiaries. Further, tax on any income other than that through its licensed business shall not be passed through, and it shall be payable by the Transmission Licensee itself. Accordingly, the issue is decided in favour of the Appellant and the issue is remanded back to consider

the Income Tax amount paid with due verification and prudence check."

PETITIONER'S SUBMISSIONS

3. The petitioner in its claim has filed the documents showing the payments of Income Tax for the following years:

Assessment Year	Amount Paid (in Rs.)		
	Income tax	FBT	Total
FY 2008-09	6,95,58,000	48,31,323	7,43,89,323
FY 2009-10	8,24,79,999	60,56,814	8,85,36,813
FY 2010-11	16,63,98,376	-	16,63,98,376
FY 2011-12	41,75,34,726	-	41,75,34,726
FY 2012-13	209,76,44,089	-	209,76,44,089

4. The Petitioner has further submitted that the abovementioned amounts need to be allowed as a pass through in terms of the Judgment of the Hon'ble Tribunal. The amount, so allowed, may also be paid by the beneficiaries/distribution companies in a time bound manner upon the petitioner raising a supplementary invoice for the same. Further, the carrying cost for the period in delay in allowing the above amounts also needs to be allowed. Carrying cost is a natural corollary of regulatory jurisprudence and when amount spent earlier are going to be recovered after substantial delay, the carrying cost on the same need to be given.
5. The Hon'ble APTEL on the issue of Income Tax, in its judgment dated 01.02.2016 in Appeal No. 255 of 2013 has absolutely made it clear that the petitioner is entitled to claim the Income Tax "actually" paid by it. The Hon'ble APTEL in the above judgment has in fact rejected the Respondents contention that Tax is to allowed only on the Return on Equity component.
6. While it is not disputed that the income tax on income which is not related to transmission business is not to be allowed as per the judgment of the Hon'ble Tribunal. However, the Respondents cannot be allowed to again raise the very same issue of tax being restricted to return on equity, when the Hon'ble APTEL has rejected the same.
7. The Respondents have misunderstood the scope of the present proceedings which have been initiated pursuant to a remand direction by the Hon'ble APTEL. The Respondents have not challenged the judgment of the Hon'ble APTEL or sought any clarification whatsoever, but are again resorting to raise the same issue which has been rejected by the Hon'ble APTEL in the Judgment.
8. The petitioner has already filed all necessary details before the Commission and for further clarity is also attaching the details of "actual" tax paid by the petitioner separately showing the proportionate tax on "transmission income" as

well showing proportionate tax on "non-Transmission income" along with the copies of the year-wise details of income tax paid by the petitioner.

9. It is a frivolous contention that the total transmission business does not include the impact of other parameters i.e. incentives, saving in O&M Expenses and other income not offered as Non-Tariff Income (NTI). With regard to this it is submitted that the petitioner has no other business apart from transmission business and all incomes are arising out of the transmission business only and are in fact part of the tariff. It is a baseless argument that since the benefits of the profit parameters are not passed to the beneficiaries, the corresponding income tax liability shall also not be borne by the beneficiary, it is submitted that incentives, saving in O&M expenses etc. are part of the transmission business.
10. The respondents are contradicting their own submission by stating that in case the income tax is paid lower than the tax on ROE on account of any benefit of tax holiday/or credit for carry forward losses, then the benefit of tax holiday/or credit for carry forward losses shall be passed to the beneficiary. The respondents have in fact admitted the case of the petition which is that income tax actually paid by it ought to be allowed as a pass through and there is no question of normative. As per the respondents, if the actual tax is less than the tax on ROE, the benefits of the same shall be passed on to it. The very same logic has been applied to APTEL which has held that the income tax actually paid is relevant and should be entitled to pass through in the tariff.
11. Regarding the carrying cost, it is a natural corollary of the regulatory jurisprudence and the petitioner is entitled to full recovery of the amount spent earlier. Further, all the necessary documents and details are already filed before the Commission.

RESPONDENT'S SUBMISSIONS

12. The petitioner by the present affidavit has not provided details as to whether its claim of Income Tax is on account of Income Tax paid by it, limited to the Return of Equity component of capital employed or Income Tax pertaining to other components of Profits also.
13. In view of the findings of the Hon'ble Tribunal in Appeal No. 138 of 2012, the tax on income for the petitioner must be limited to the Tax payable in respect of the licensed business, i.e. the Tax payable in respect of the Return on Equity component of the capital employed, as provided for in Regulation 5.23, 5.24 of the MYT Transmission Regulations, 2007 and the same cannot be extended to other business of the Petitioner/DTL which does not form part of the regulatory/licensed business of the licensee.

14. As such, unless the petitioner is able to establish its claim as to whether the amount sought from the Commission on account of Income Tax paid by it is pertaining to the Return on Equity component of the capital employed or Income tax pertaining to other components of Profits which do not form part of regulated business of the Petitioner for the purpose of allowance of Income tax, the Commission should not allow the claim of the Petitioner, otherwise the same would be against this Commission's own MYT Transmission Regulations 2007, which categorically provides that the Income Tax would be allowed limited to the Return on Equity component of capital employed.

As per the ITR forms attached by the Petitioner for FY 2008-09 to FY 2012-13, it appears that NET Profit of the petitioner is more than the ARR approved by this Hon'ble Commission in the relevant Tariff Orders, i.e., as per the ITR for FY 2011-12 the profit before Tax is approx. Rs. 1005 crores. As against the same, this Commission has approved Rs. 407.43 crores as the ARR for the petitioner for FY 2011-12.

17. As such, the profit of the petitioner cannot be more than the revenue allowed by the Commission. Therefore, the Actual Tax sought by the petitioner includes substantial incomes earned by the petitioner which do not form part of the regulated business. Accordingly, the petitioner cannot be permitted to seek actual Income tax from the beneficiaries for incomes earned by the petitioner, which do not form part of its regulated business, as the same would be against the mandate of the Transmission Regulations, 2007.

18. In view of the same, it is submitted that the Commission should therefore exercise prudence check and allow the Income tax limited to the regulated business.

19. The petitioner has sought additional claim on account of Fringe Benefits Tax. This issue was not dealt by the Hon'ble APTEL in Appeal no. 255 of 2013. The Tribunal dealt only with the claim on account of Income Tax and remanded the matter to the Commission. Accordingly, the claim on account of Fringe Benefits Tax is unjustifiable, unreasonable and against the interest of consumers.

20. The petitioner is seeking actual pass through of Income Tax paid which should not be considered by the Commission as the petitioner has yet to establish that the said Income tax claim is attributed to the Return on Equity component of the Capital employed and not pertaining to other components of Profits which do not form part of the regulated business of the petitioner for the purpose of allowance of Income tax. Further, any such allowance of Income tax would lead to a rise in Tariff and the same would have to be ultimately borne by the end consumers of the NCT of Delhi.

21. The Petitioner by an affidavit had submitted the year wise details of the Income Tax paid by it for FY 2007-08 to FY 2011-12. The respondent has analysed the data submitted by the petitioner in terms of which the actual Tax paid by DTL is more than allowed to it in terms of Regulations, 2007, as follows:

Particulars	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	FY 2011-12
Tax approved by this Commission (Rs. Cr.)	3.08	3.57	5.7	3.4	23.51
Tax paid by DTL as per (DTL's submission) (Rs. Cr.)	7.09	8.67	16.64	33.40	209.76

22. The income tax paid by the Petitioner cannot be segregated towards its transmission business (i.e. licensed business) and non-licensed business. It is further clarified that total transmission profit includes impact of other profit parameters (i.e. incentives, saving in O&M Expenses and other income not offered as NTL etc.) As the benefits of these savings are not passed on to beneficiary, hence, the corresponding income tax liability for these components shall not be transferred to beneficiary. Thus, the beneficiary liability to reimburse the income tax to DTL shall be restricted to Tax on ROE only or amount of Income Tax paid whichever is lower.
23. In view of the above, the contention of the seeking actual pass through of Income tax paid by it should not be considered by this Commission as the Petitioner has yet to establish that the said Income Tax claim is attributed to the Return on Equity component of the Capital employed and not pertaining to other components of Profits which do not form part of the regulated business of the Petitioner. Further, any such allowance of carrying cost would lead to a rise in tariff and the same would have to be ultimately borne by the end consumers of the NCT of Delhi.

COMMISSION'S ANALYSIS

24. It is important to note that the Hon'ble APTEL vide judgment dated 01.02.2016 has deliberated, inter alia, on the issue whether the State Commission was justified in directing the Appellant to refund the income tax paid by the distribution companies even before deciding the issue on the Petition filed by the distribution company pending before the State Commission. Thus the basic reason for remanding back the matter to the Commission was that the aspect of income tax was pending before this Commission which was yet to be heard.
25. Hon'ble APTEL directed the Commission to consider the income tax actually paid by the Appellant with due verification, which has to be included in the Tariff computation and shall be passed on to the beneficiaries. It has been further directed that the tax on any income other than that through licensed business of

the Petitioner shall not be passed through, and shall be payable by the Transmission Licensee itself. While giving the aforesaid direction, Hon'ble APTEL has referred to the DERC (Transmission Tariff) Regulations 2007.

26. A State Commission has to act and exercise its powers as per the provisions of the extant Regulations, unless modified/ repealed/amended or set aside. Therefore, the direction of the Hon'ble Tribunal has to be complied with as per the provisions of the extant Regulations. Extant regulations in respect of Income Tax in MYT Transmission Tariff Regulations, 2007 are as under: -

“Corporate Income Tax

5.23 *Income Tax, if any, on the Licenced Business of the Transmission Licensee shall be treated as expense and shall be recoverable from its beneficiaries. However, tax on any income other than that through its Licenced Business shall not be a pass through, and it shall be payable by the Transmission Licensee itself.*

5.24 *The income tax actually payable or paid shall be included in the Tariff computation. The actual assessment of income tax should take into account benefits of tax holiday, and the credit for carry forward losses applicable as per the provisions of the Income Tax Act 1961 shall be passed on to the Beneficiaries.*

5.25 *Tax on income, if any, liable to be paid shall be limited to tax on return on the equity component of capital employed. However, any tax liability on incentives due to improved performance shall not be considered.*

27. In view of the foregoing, to adjudicate the matter following issues have to be decided:
- i. What constitutes “income other than that through Licensed Business”; and
 - ii. Whether actually paid income tax means tax actually paid on ROE.

Issue No. 1

What constitutes “income other than that through Licensed Business”?

28. The issue of income from other business has been deliberated in light of the contention of Respondent that incentives etc. are not income through the licensed business. The licensed business is defined as functions and activities, which the licensee undertakes in terms of the license granted by the Commission. As per the Regulations the “non-tariff income” means income relating to the licensed business other than from tariff (intra state transmission electricity) and excluded any income from other business. The other business has been defined as other business of the transmission licensee u/s 41 of the Electricity Act, 2003. Section 41 of the Electricity Act, 2003 provides as under:

“...A transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilisation of its assets:

Provided that a proportion of the revenues derived from such business shall, as may be specified by the Appropriate Commission, be utilised for reducing its charges for transmission assets in any way to support such business:

Provided also that no transmission licensee shall enter into any contract or otherwise engage in the business of trading in electricity."

29. The Respondent has submitted that for the FY 2007-2008 to FY 2011-12, the actual tax paid by the Petitioner is more than allowed to it in terms of Regulations 2007. The Respondent has further submitted that from the submissions made by the Petitioner it is difficult to segregate the income tax paid by the Petitioner towards its licensed business (transmission business) and non-licensed business and Petitioner has yet to establish that the said income tax claim is attributed to the licensed business only.
30. By going through the definition of other business as given in the Electricity Act, 2003, it is evident that incentives, saving in O&M expenses etc. may not be treated as income from business other than the licensed business. As much it is related to segregation of income from the licensed business and income from business other than the licensed business, the same shall be verified at the time of prudence check.

Issue No. 2

Whether actually paid income tax means tax actually paid on ROE

31. As already discussed, Hon'ble APTEL while giving direction to the Commission has made reference to the provisions of the MYT Tariff Regulations, 2007 related to Income Tax. Hon'ble APTEL's direction has to be implemented in consonance with the provisions of the extant regulations.
32. The State Commission is bound by the Act and the Regulations framed thereunder. One of the primary functions of the State Commission is to regulate the Electricity Sector in the State. In order to do so, the State Commission is empowered to frame regulations on all issues which are enumerated in Section 181 of the Act. Once the State Commission has framed Regulations, it can exercise powers only in accordance with such regulations and not otherwise.
33. Hon'ble Supreme Court of India in PTC India vs. CERC (Civil Appeal No. 3902 of 2006) has held the following:

"37. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we

have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also part of administrative process resembling a judicial decision by a court of law.

38. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of Tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "Tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the Appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff.

40.....if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178....."

34. The process of tariff determination involves safeguarding of the interest of the consumer as well as recovery of the cost of the licensee. Section 61 of the Electricity Act, 2003 provides that the Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided, inter alia, by the following, namely safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner.
35. Regulation 5.24 of the MYT Regulations, 2007 provides that the income tax actually payable or paid shall be included in the Tariff computation, whereas, Regulation 5.25 of the MYT Regulations, 2007 provides that tax on income, if any, liable to be paid shall be limited to tax on return on the equity component of capital employed. It further provides that any tax liability on incentives due to improved performance shall not be considered. Even the equity demands that

if benefits of something are not pass through, the burden of the same shall also not pass through on the consumers. If income tax is allowed to the Petitioner on such income, which has not been part of the ARR, it will result in increase in Tariff, ultimately being paid by the consumer. If any income is not considered in ARR for the purpose of reducing tariff, how can tax on such income be allowed to be passed on the consumers. Therefore, tax on any income on the incentive (as per the regulation), interest on security, saving in O&M expenses and other income not offered as NTI etc. may not be allowed to be passed through on beneficiaries.

36. Further from the direction of Hon'ble APTEL that the Commission has to consider the income tax actually paid by the Appellant with due verification, it is evident that the word "actually paid" cannot be construed to mean that the Income tax be allowed over and above the RoE component, in contradistinction to the provisions of the extant Regulations.
37. By the conjoint reading of provisions of Regulations 5.24 & 5.25 of MYT Regulations, 2007 and direction of the Hon'ble APTEL, it is clear that actually paid income tax means tax actually paid on RoE. Thus the Petitioner is entitled for income tax actually paid on return on the equity component of capital employed.
38. The claim of the Petitioner regarding income tax 'actually paid' on RoE of its licensed business shall be considered in the next tariff order; and after due verification as directed by the Hon'ble APTEL, the admissible claim shall be allowed in the ARR.
39. The Petition is disposed of accordingly.

Sd/-

**(Justice S S Chauhan)
Chairperson**