

Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 17

No. F. 11(1245)/DERC/2015-16/4862

Petition No. 39/2015

In the matter of: Petition filed against the Commission's letter no. F.17(44)/Engg./DERC/2013-14/4532/2079 dated. 26.11.2014 for specifying the methodology for treatment of de-capitalization of assets in the petitioner's distribution business.

Tata Power Delhi Distribution Ltd.
Through its Managing Director
Grid Sub Station Building
Hudson Lines, Kingsway Camp,
Delhi 110 009

....**Petitioner**

Coram: Sh. P. D. Sudhakar, Chairperson
Sh. J. P. Singh, Member &
Sh. B. P. Singh, Member

Appearance:

1. Mr. Gopal Jain, Sr. Advocate, TPDDL
2. Mr. Alok Shankar, Adv. TPDDL
3. Mr. Anand Shrivastava, Adv., TPDDL
4. Mr. Anurag Bansal, TPDDL
5. Mr J.K. Sinha, TPDDL
6. Ms. Ritu Gupta, TPDDL
7. Mr. Mithun Chakraborty, TPDDL
8. Ms. Nayantara, TPDDL

ORDER

(Date of Hearing 27.11.2015)

(Date of Order: 07.01.2016)

1. The instant petition has been filed by M/s TPDDL is in respect of letter dated 26.11.2014, whereby the methodology for treatment of de-capitalization of assets was prescribed. The contention of the Petitioner is that such direction through a letter tantamount to amendment of the Regulations, which was issued without authority of Law and is contrary to the express provision of the Electricity Act, 2003 with regard to framing of the Commission's Regulations.
2. The Counsel for the Petitioner forwarded the following arguments ;
 - (i) That the Commission vide letter dtd. 26.11.2014 has prescribed the methodology for treatment of de-capitalization of the assets. According to the Ld. Counsel for the Petitioner the aforesaid letter has been issued without the authority of law and is contrary to the

express provision of the Electricity Act, 2003 with regard to framing of Regulations by the Commission.

- (ii) That the above mentioned letter cannot be treated as a decision or order of the Commission.
- (iii) That no opportunity of a hearing was given to the Petitioner prior to the communication being issued.
- (iv) The methodology for de-capitalization of assets is a matter of policy and it is inextricably linked and related to Regulation of Tariff.
- (v) The Supreme Court of India in its Order dated 25.04.2013 in CA No. 1145 of 2004 with Nos. 5736-45 of 2004 has held :

"The Position of law is well settled by this Court that if the statute prescribes a particular procedure to do an act in a particular way, that act must be done in the manner, otherwise it is not at all done. In Babu Verghese v. Bar Council of Kerala, after referring to this Court's earlier decisions and Privy Council and Chancellor's it was held as under: (SCC pp. 432-33, para 31-32)

31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor which was followed by Lord Roche in Nazir Ahmad v. King Emperor who stated as under:

32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh and again in Deep Chand v. State of Rajasthan. These cases were considered by a three-Judge Bench of this Court in State of U.P. v. Singhara Singh and the rule laid down in Nazir Ahmad case was again upheld. This rule has since been applied to the exercise of jurisdiction by the courts and has also been recognized as a salutary principle of administrative law."

- 3. There are basically two issues agitated by the petitioner, firstly no prescribed procedure for amendment in Regulations was followed while prescribing the methodology for treatment of de-capitalization of assets as conveyed through the letter dated 26.11.2014, which is without authority; and secondly a letter cannot be treated as an Order of the Commission.

4. Before we deliberate on the issue of not following the prescribed procedure for amendment in Regulation, it has to be seen whether prescribing the methodology for treatment of de-capitalisation of assets through the letter dated 26.11.2014 is akin to amendment in Regulations or not.
5. The Tariff Regulations issued by the Commission for determination of tariff of power utilities, inter-alia, covered detailed terms and conditions stipulating the general approach and guiding principles for determination of tariff/ARR (specifying, inter-alia, calculation of ARR, O&M expenses, RoCE, Return on Equity, Interest on Loan, Depreciation, Income Tax, treatment of Non-Tariff Income, other Income etc.), Multi Year Tariff process and Tariff Filings etc. However, methodology for de-capitalization of assets has not been provided in the Regulations and the letter dated 26.11.2014 was basically an attempt for providing a methodology for de-capitalization of assets which has not otherwise been provided in the Regulations. Whereas, the matter related to retirement of assets has been dealt through Tariff Regulations issued by this Commission. However, the procedure for de-capitalisation was not specified. It had come to the notice of the Commission that the assets are being retired by the utilities regularly from their books of accounts but are not treated for computation of Aggregate Revenue Requirement (ARR) as there was no uniform procedure for de-capitalisation of assets. The retirement of assets will reduce the ARR, which in turn will reduce the tariff and hence the issue is one of urgent public interest.
6. It is observed that the Regulation 13.1 of MYT Regulations, 2007 and corresponding Regulation in MYT Regulations, 2011 provide that the Commission may, from time to time, issue Orders and Practice directions in regard to the implementation of the Regulations and procedure to be followed on various matters. Thus, the Commission has been empowered by the Regulations to direct and issue orders on matters incidental or ancillary thereto. Such directions, which are necessary for effective implementation of the Regulations in public interest, may not be treated as amendment in Regulation and therefore, it does not warrant that the procedure for amendment in Regulations such as previous publication etc. be followed.

7. It is an established law that where the rules are silent, administrative instructions can be relied upon. The administrative instructions operate when there are gaps in the rules and they are meant for supplementing the rules or legislation.
8. The executive instruction can supplement a statute or cover areas to which the statute does not extend, but it cannot run contrary to the statutory provisions or whittle down their effect. (State of M.P. & Anr. v. M/s. G.S. Dall & Flour Mills (1992) supp. 1 SCC 150).
9. A Constitution Bench of the Supreme Court in Sant Ram Sharma v. State of Rajasthan & Ors., AIR 1967 SC 1910 held as under:

"It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."
10. The Supreme Court in Pilot Association of India v DGCA (AIR 2011 SC 2220) held that the executive instructions can be issued by the Competent Authority for guidance and to implement the scheme of the Act and the law merely prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable therein.
11. Thus, the Commission in exercise of its inherent power to prescribe the procedure in public interest has prescribed the methodology for de-capitalization of assets and treatment of non tariff income being incidental to electricity business and derived by the utilities from profit derived from disposal of retired assets, through the letter dated 26.11.2014. In order to have uniformity in methodology for de-capitalization of assets and to avoid a vacuum in the Regulations at any stage of the Regulatory period, the aforesaid methodology has been made applicable from FY 2002-03.
12. On the issue whether a letter can be treated as an order of the Commission, it is held that through the letter a decision of the Commission was communicated and as such has the full force of an order of the Commission. It is misconstrued by the petitioner that through the letter the Regulation was amended and therefore, it should be issued in the form of

an Order and after following the due procedure for amendment in Regulations.

13. Keeping in view the above, no infirmity is found in prescribing the methodology for treatment of de-capitalization of assets vide letter dated 26.11.2014.
14. The petition is dismissed and the matter stands disposed off.
15. Ordered accordingly

Sd/-
(B.P. Singh)
Member

Sd/-
(J. P. Singh)
Member

Sd/-
(P. D. Sudhakar)
Chairperson