CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 163/2008
with
IA Nos. 17/2009 and 50/2009

Coram:
Dr Pramod Deo, Chairperson
Shri R.Krishnamoorthy, Member
Shri V.S.Verma, Member

Date of final hearing: 12.11.2009 **Date of Order: 7.1.2010**

In the matter of

Accumulation of dues - Seeking the Commission's intervention and direction for TNEB to clear the Income Tax dues and excess rebates availed.

And

In the matter of

Neyveli Lignite Corporation Limited, Chennai ……. **Petitioner**

Versus

Tamil Nadu Electricity Board, Chennai …… **Respondent**

The following were present:

1. Shri. N.A.K. Sharma, Advocate, NLC
2. Shri. R. Suresh, NLC
3. Shri. Gnanaprakasam, NLC
4. Shri.P.H. Parekh, Senior Advocate, TNEB
5. Shri Ashis Vaid, Advocate, TNEB
6. Shri. S. Soumyanarayanan, TNEB
7. Smt. Maheswari Bai, TNEB

This petition has been filed by the Neyveli Lignite Corporation Limited seeking directions to Tamil Nadu Electricity Board, the respondent herein, to refund the excess rebate of Rs,79.52 crore retained by it and to reimburse the Income Tax dues of Rs.481.46 crore paid by the petitioner in advance to Income Tax authorities.

2. The Commission after hearing the parties issued a reasoned and detailed order dated 31.3.2009 on the issue of refund of excess rebate. The following directions were issued by order dated 31.3.2009:

a) The amount of Rs.79.52 crore claimed as refund by NLC which has been worked out on the basis of the directions of the Commission in order dated 19.10.2005 in Petition No.97/2005 and order dated 14.9.2006 in Petition No.17/2006 shall be refunded by TNEB latest by 30.4.2009.

b) NLC's claim for interest on the amount withheld by TNEB was left open to be considered at the stage of final disposal of the proceedings.

c) TNEB was directed to show cause latest by 30.4.2009 as to why penalty under Section 142 of the Act be not imposed on it for contravention of and non-compliance with the Commission's directions noted in the orders dated 19.10.2005 and 14.9.2006.

d) As parties were not heard on the issue of refund of income tax, the Commission directed to re-notify the petition for hearing.

3. After the issue of the order dated 31.3.2009, the respondent filed three appeals, namely, Appeal Nos. 78/2009, 79/2009 and 80/2009 challenging the Commission's order dated 31.3.2009 in Petition No.163/2008, order dated 19.10.2005 in Petition No.97/2005 and order dated 14.9.2006 in Petition No.17/2006 respectively, before the Appellate Tribunal for Electricity (hereinafter "the Appellate

Tribunal"). The respondent sought to withdraw Appeal Nos. 79/2009 and 80/2009 to approach the Commission with review petitions against the orders dated 19.10.2005 and 14.9.2006. The Appellate Tribunal dismissed the appeals along with the applications for condonation of delay as withdrawn, without expressing any opinion on the maintainability of the review petitions to be filed before the Commission. The order of the Appellate Tribunal is extracted as under:

> "Heard Mr. P.H. Parekh, the learned Senior Counsel appearing for the Appellant and Mr. R. Chandrachud, the learned Counsel appearing for the Neyveli Lignite Corporation Ltd.
>
> Mr. P. H. Parekh, the learned Senior Counsel appearing for the Appellant has made his submissions with regard to the merits of the Appeals as well as the Applications for the condonation of delay. However, at the end he wanted the permission to withdraw these Appeals and Applications to condone the delay to enable him to approach the Central Commission for filing Review Petitions as against the impugned orders in these Appeals.
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> Mr. R. Chandrachud, the learned Counsel appearing for the Neyveli Lignite Corporation Ltd. would submit that he does not want to stand in the way of withdrawal of these Appeals and Applications to condone the delay, but this Tribunal may not give any liberty to the Appellants to file the Review Petition before the Commission, in view of the fact that the Review Petitions before the Commission at this length of time are not maintainable.
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> Taking into consideration of the submissions made by the learned Senior Counsel for the Appellant as well as the learned Counsel for the Respondent, we permit the learned Senior Counsel for the Appellant to withdraw all these Appeals and Applications to condone the delay and accordingly the same are dismissed as withdrawn.
>
> We make it clear that we are not expressing any opinion with reference to the maintainability of the said Review Petitions that may be filed by the Appellants before the Commission."

4. The Appellate Tribunal in a separate order dated 20.5.2009 disposed of the Appeal No.78/2009 as under:

> “Heard the learned counsel for the parties. Several issues have been raised by Mr. P.H. Parekh, learned senior counsel assailing the order impugned. One of the points raised by Mr. Parekh is that one of the Commission Members was a party to the proceedings which culminated into the order passed by the Commission earlier on 19.10.2005 and 14.09.2006.
>
> As fairly conceded by Mr. Parekh, this point regarding the bias has never been raised before the Commission. However, on seeing some documents, it is clear that one of the Members of the Commission has had correspondence with the Appellant through letters. Therefore, it would be appropriate to remand the matter to the Commission to give opportunity to the Appellant to argue the point regarding bias and the Commission can consider the same and decide about the matter in accordance with law.
>
> With regard to the other issues, we are not inclined to give any opinion especially when it is admitted that in respect of the two orders earlier passed on 19.10.2005 and 14.09.2006, the review applications have been filed by the Appellant before the Commission on the basis of some fresh documents. We make it clear, we are not expressing any opinion over the documents referred to above.
>
> Accordingly, the impugned order is set aside and the matter is remanded to the Commission for considering the matter on the aspect above indicated.”

5. The respondent filed Review Petition Nos. 98/2009 and 99/2009 seeking review of the orders dated 19.10.2005 in Petition No.97/2005 and order dated 14.9.2006 in Petition No.17/2006 on the ground that subsequent to orders dated 19.10.2005 and 14.9.2006, it has discovered certain material documents, that is, letters dated 5.6.2003 and 26.10.2004 and the Minutes of Meeting dated 26.12.2003 which go to the root of the matter to establish that the Petitioner had been allowing and had agreed to allow rebate of 2.5% without insisting on opening of LC in case the payment was made within three days of raising of bills by the Petitioner. The review petitions were filed on the following grounds:

(a) Discovery of new and important matter or evidence,

(b) Error apparent on face of the record,

(c) Order passed is without jurisdiction and a nullity in law,

(d) Order obtained by fraud and suppression of material documents,

(e) Other sufficient reasons.

6. The Commission in its order dated 17.12.2009 dismissed the Review Petitions as barred by limitation and on the ground of not meeting the requirements of Order 47 Rule 1 of Code of Civil Procedure.

Refund of excess rebate availed

7. In our order dated 31.3.2009, we had directed the respondent to refund Rs.79.52 crore on account of excess rebate retained by it by 30.4.2009. The respondent without complying with our order dated 31.3.2009 filed Appeal Nos. 79/2009 and 80/2009 challenging the orders dated 19.10.2005 in Petition No.97/2005 and order dated 14.9.2006 in Petition No.17/2006 in the Appellate Tribunal. Subsequently, the respondent choose to withdraw the Appeal Nos.79/2009 and 80/2009 in order to file the review petitions against the said orders dated 19.10.2005 and 14.9.2006. The review petitions filed by the respondent having been dismissed, our order dated 31.3.2009 regarding refund of excess rebate remains to be complied with by the respondent.

8. During the pendency of the appeals, the respondent filed IA No.17/2009 seeking extension of time for making the payment of Rs.79.52 crore to the Petitioner (NLC) and in replying to the show cause notice, from 30.4.2009 till the disposal of the appeals. Though the Appellate Tribunal dismissed the appeal by its order dated 20.5.2009, the IA was kept pending since the review petitions filed by the respondent were under consideration of the Commission. As the review petitions have been dismissed, we direct the respondent to refund the excess rebate of Rs.79.52 crore to the Petitioner and report compliance by 15.1.2010. IA No.17/2009 is disposed of accordingly.

Refund of Income Tax

9. The Petitioner has submitted that after one time settlement reached as on 30.9.2001under Tripartite Agreement, the respondent has paid IT dues thrice viz. Rs.28.67 crore in December 2007, Rs.23.75 crore in July 2008 and Rs.23.75 crore in August 2008 amounting to a total of Rs.76.17 crore. The outstanding IT amount after payment of Rs.76.17 crore is Rs.481.46 crore which remains to be settled by the respondent. It has been submitted that IT dues have been paid by the Petitioner in advance which are required to be reimbursed by the Electricity Boards including the respondent based on the Auditor's certificate in line with the regulations of the Commission. The distribution companies of Andhra Pradesh and Pudducherry Electricity Department have settled their IT dues regularly in full and the responses from the ESCOMs of Karnataka and KSEB are encouraging. In the above

background, the Petitioner has sought a direction to the respondent to reimburse Rs.481.46 crore which has been paid by the Petitioner as advance tax.

10. The respondent has denied that Rs. 481.46 crore as on 30.10.2008 is outstanding against it on account of IT dues. It has been submitted that IT reimbursement is based on the actual tax paid on the core business supported by Statutory Auditor's certificate. Based on the earlier claims of the Petitioner for Rs.356.24 crore, the respondent was reimbursing the IT claims in instalments with the concurrence of NLC and in fact had released 3 instalments totaling Rs.76.17 crore, leaving a balance of Rs.280.07 crore. As the reconciliation was not carried out for a long time since August 2007, the respondent requested the Petitioner in October 2008 to reconcile the difference between the amount certified by the Statutory Auditor and the amount claimed by NLC, the reasons for not acknowledging and adjusting the payment already made by the respondent towards income tax by way of securitization and payment based on MOM dated 22.12.2003. As the Petitioner did not explain the claim with regard to Auditor's certificate, the respondent did not continue with the release of further instalment payment. The respondent has submitted that the claim of the Petitioner along with its Auditor's Certificate was referred to the Tax Consultant of TNEB and in the opinion of the Tax Consultant, the claim of the Petitioner is not duly supported with the relevant documents required for admitting the bill. The respondent has placed on record the opinion dated 3.3.2009 received from Brahmaya & Co., Chartered Accountants. The respondent has further submitted that the Petitioner may be directed to implead all

beneficiaries from whom reimbursement of income tax claim is pending before deciding the petition.

11. The Petitioner in its rejoinder has submitted that the accumulated dues against the respondent are on account of differential income tax reimbursement from the period 2001-02 to 2005-06 and the entire income tax for 2006-07 and its claim is supported by the Auditor's certificate issued subsequent to the order dated 23.3.2007 in Petition No.5/2002. Refuting the allegation of the respondent regarding wide difference between the amount certified by the Auditor and the claim raised by NLC, the Petitioner has explained that prior to the regulations of the Commission, the claims were raised by it as per clause 6 of the BPSA along with the Auditor's certificate and was restricted to the grossed up tax payable on the notional income derived on the investment as per the terms of BPSA. However, after the regulations of the Commission came into force, the claims are based on the actual as per the regulations. The difference between the actual tax paid on the core business such as mines and thermal generating station and the claim already made as per the BPSA has been claimed from the beneficiaries along with the Auditor's certificate for the years 2001-02 to 2005-06 in the year 2006-07. While claiming the difference, the grossed up tax for the year 2001-02 to 2005-06 could be done in the year 2006-07 only. Hence the calculation has been made without the grossed up position for the year 2001-02 to 2005-06. The Petitioner has submitted that this fact has been clearly mentioned in the Auditor's certificate that "in any year if the tax recoverable from the State Electricity Boards is more than the tax claim already made, the

balance tax recoverable has to be calculated without grossing up otherwise the net tax refundable is calculated after grossing up as per the provisions of the IT ACT." The Petitioner has placed on record at pages 52-53 of the rejoinder a statement of working of differences stated to be prepared consequent to the Commission's order dated 23.3.2007 in Petition No.5/2002. It has been explained that column 11 of the statement reflects the difference between income tax already paid by the respondent on grossed up basis (col 6) and the income tax payable on grossed up basis for the respective years after the Commission's order dated 23.3.2007 abid and accordingly, the Petitioner's claim of Rs.518.85 crore up to 3rd quarter of 2008-09 is in order. Refuting the opinion of the Tax Consultant of the respondent that the grossing up of income tax is not correct, the Petitioner has placed on record an opinion dated 14.3.2009 from PKF Sridhar & Santhanam, Chartered Accountant in support of its contention that the grossing up of income tax is in line with the regulations of the Commission and the Income Tax Act, 1961. It has been prayed by the Petitioner that the respondent be directed to reimburse the IT dues of Rs.481.46 crore which has been paid by Petitioner as advance tax.

12. The respondent vide its affidavit dated 20.6.2009 has filed a reply to the rejoinder of the Petitioner in which the following submissions with regard to the Petitioner's claim towards income tax dues of Rs.481.46 crore as on 30.11.2008 and of Rs. 518.85 crore up to third quarter of 2008-09 have been made:

(a) Based on the Ahluwalia Committee report, a Tripartite Agreement was executed between the Government of Tamil Nadu, RBI and CPSU during 2002 to securitise the accumulated arrears to PSUs up to 30.9.2001 by issuing the bonds with interest redeemable in 15 years. As per the securitization scheme, the arrears up to 30.9.2001 was fully settled by issue of bonds which includes an amount of Rs.41.65 crores relating to Income Tax for the period 2001-02.

(b) In addition to Rs. 41.65 crore, the respondent has released by way of direct payment Rs.42.81 crore for 2001-02, Rs.89.21 crore for 2002-03 and Rs.88.27 crore for 2003-04. TNEB has thus paid Rs. 261.94 crore from 2001-02 to 2003-04 prior to the determination of tariff by the Commission for TPS-I and TPS-II for the period 2001-04.

(c) After determination of tariff by the Commission in order dated 14.9.2006 in Petition No. 17/2006 and order dated 23.3.2007 in Petition No. 5/2002, the Petitioner has revised the income tax claim for the period 2001-02 to 2005-06 during 2007. As per the Auditor's certificate enclosed by the Petitioner, the income tax assessed by the Income Tax department for the period 2001-02 to 2005-06 is Rs.435.16 crore. While the Petitioner has shown an outstanding amount of Rs.277.51 crore, as per the calculation of the respondent the amount should have been Rs.168.79 crore after accounting for the payment already made and the credit of Rs.4.43 crore being the difference in tariff for 150 hours of generation beyond 68.49% PLF against the dues of income tax. The respondent has claimed that the difference of Rs.108.72 crore

(Rs.277.51 crore-Rs.168.75 crore) has not been properly explained by the Petitioner.

(d) The Income Tax reimbursement claim for the period 2006-07 upto 3rd quarter of 2008-09 as per the Auditor's certificate totals to Rs.317.51 crore. After accounting for the release of Rs.76.17 crore, the total outstanding amount up to 3rd quarter of 2008-09 should be Rs.410.13 crore as per the respondent as against the claim of the Petitioner for Rs.518.85 crore.

(e) The respondent has attributed the difference in the claim of the Petitioner to the grossing up of income tax by the Petitioner. Referring to the Commission's observations in orders dated 21.12.2009 in Petition No.4/2000 and the order dated 29.3.2009, and Regulation 3.7 of the Central Electricity regulatory Commission (Terms and Conditions of Tariff) Regulations, 2001(hereinafter "2001 regulations") and Regulation 7 of Central Electricity regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 (hereinafter "2004 regulations"), the respondent has submitted that right from 2001, the Commission has consciously ordered reimbursement of tax on the net income without grossing up in order to pass on the benefit of tax holiday and other benefits under this method to the beneficiaries.

(f) The Petitioner has grossed up the tax on the net income which is evident from the claim. The respondent has explained the Petitioner's claim with and without grossing up as per the table given at page 8 which is extracted below:

(Figures in Rs. Crs)

Year	NLC claim-without grossing	NLC claim-with grossing	Payment made by TNEB/Credit TPA incentive@		Amount due as per NLC	Amount due as per TNEB
1	2	3	4		5	6
b/f					-5.04	-67.98
2004-05	194.52	306.78	0		228.18	194.52
2005-06	42.23	63.66	0	**101.33**	54.37	42.23
2006-07*		131.23	0		131.23	131.23
2007-08*		89.39	0		89.39	89.39
2008-09* upto III qtr		96.89	0		96.89	96.89
Adhoc Payments			**76.17**		-76.17	-76.17
Total		687.95	76.17	101.33	518.85	410.11

*-NLC has not mentioned in column 2 of page 53 of their Rejoinder, whether it is with or without grossing up. TNEB has assumed that it is after grossing up. Though this is shown as payable by in col 6 above, TNEB objects to this grossed up valued being claimed.

@-TPA incentive credit adjustment not made in the amount due, in col 5 & 6.

(g) The respondent has submitted that it is liable to reimburse only an amount of Rs.410.11 crore after adjusting the amount already paid, as against the Petitioner's claim of Rs.518.85 crore up to the third quarter of 2008-09, subject to the confirmation that no grossing up is included in any of these years.

13. In our order dated 31.3.2009, we had directed to re-notify the petition for hearing as the parties were not heard on reimbursement of income tax. The hearing was originally scheduled on 12.5.2009 which was postponed to 9.6.2009 and thereafter to 9.7.2009. Meanwhile, the respondent had challenged the order dated 31.3.2009 by filing Appeal No.78/2009 which was remanded by the Appellate Tribunal vide order dated 20.5.2009 to the Commission to give an opportunity to the respondent (TNEB) to argue the point regarding bias and to decide the issue in accordance with law. When the matter was heard on 9.7.2009, the learned counsel for the respondent did not argue the question of bias. It is worth mentioning that the respondent had neither raised the point of bias in any of its replies/affidavits before the Commission nor during the hearing prior to the order dated 31.3.2009 which fact has also been admitted by the respondent before the Appellate Tribunal. Therefore, we conclude that the respondent has nothing to say or argue on the question of bias and the allegation was made in the appeal on frivolous grounds. The respondent is a public sector utility and its conduct in leveling an allegation of bias against one of the members of the Commission without any material evidence is highly reprehensible. We strongly deprecate such practice. As mentioned above, the respondent sought to argue on other issues, raising new points and arguments, which only appeared as an act of delaying the proceedings for a final order.

14. During the hearing of the petition on 9.7.2009, the parties advanced their extensive arguments mainly on the line of their written pleadings on record which have been extensively discussed in paras 9 to 13 above. The Commission desired

to know how the respondent had been paying income tax to the generating companies like NTPC for which the respondent was granted a short time to file its submissions. The respondent was further directed to submit relevant documents relating to calculation of income tax within one week. The order in the petition was reserved and the Record of Proceedings was accordingly issued.

15. After the issue of the Record of Proceedings, the respondent filed an affidavit dated 25.7.2009 contending that the arguments remained inconclusive on 9.7.2009 and prayed for listing of the case for further hearing the parties on the issue as to whether grossing up of income tax is permissible under the regulations of the Commission, whether the application was within the jurisdiction of the Commission and for directions to the Petitioner to furnish year wise details of income tax and how much was the amount of grossed up income tax year wise and to revise the claims of income tax without grossing up. The Petitioner has filed an affidavit dated 22.8.2009 in response to the respondent's reply to the rejoinder and the additional affidavit of the respondent.

16. The respondent filed IA No.50/2009 for listing the petition for hearing on the ground that the hearing held on 9.7.2009 remained inconclusive. The respondent also placed on record a letter dated 7.9.2009 from NTPC regarding the reimbursement of income tax in which it has been explained that the income tax recovery by NTPC is done as per the applicable CERC regulations issued from time to time and the

provisions of the Income Tax Act, 1961 (hereinafter "IT Act"). The petition was heard on 12.11.2009. IA No.50/2009 stands disposed accordingly.

Findings of the Commission on the issue of reimbursement of income tax

17. One of the objections taken in the affidavit of the respondent dated 25.7.2009 is that the present proceedings being in the nature of recovery proceedings, the Commission does not have the jurisdiction u/s 79 of the Electricity Act, 2003 and the claim, if any, should be filed by the petitioner in the civil court. We are not inclined to agree with the contention of the respondent. First of all we note that the respondent had not taken this objection in its reply affidavit or its reply to the rejoinder of the Petitioner. This objection has been taken in its affidavit dated 22.8.2009 filed for listing the case for hearing. In other words, this objection is an after- thought aimed at delaying the resolution of the dispute. Section 79 (1)(f) provides for adjudication of disputes involving generating companies and transmission licensees as mentioned in clauses (a) to (d) of the said sub-section. The dispute pertains to reimbursement of income tax dues as per the provisions of the regulations of the Commission. Moreover, income tax is reimbursable on the income of the Petitioner from the core business which is serviced through tariff. The Commission having the power to regulate the tariff of the Petitioner under Section 79(1)(a), we have no manner of doubt that the dispute has to be adjudicated by the Commission. In this connection, we are fortified by the following observations of the Appellate Tribunal in its judgement dated 10.12.2009 in Appeal No.161/2009 (Damodar Valley Corporation Ltd. V. BSES Rajdhani Power Ltd. & Ors):

> "18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term 'regulate' as contained in Section 79(1)(a) is a broader

term as compared to the term 'determined' as used in Section 86(1)(a). In various authorities, the Supreme Court, while discussing the term 'regulation' has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms. This aspect has been discussed in detail in the *Judgments of the Supreme Court in 1989 Supp(2) II SCC 52 Jiyajirao Cotton Mills vs. M.P.Electricity Board, D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S.Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781*, and also in *Tata Power Ltd. vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513."*

18. The main dispute between the Petitioner and respondent lies in a narrow compass i.e. whether the tax on the income of the generating company which is treated as an expense shall be grossed up before recovery from the beneficiaries. The provisions of the 2001 regulations are extracted as under:

"2.12 **Tax on income**
Tax on income from core-activity of the Generating Company, if any, is to be computed as an expense and shall be recoverable by the Generating Company from the beneficiaries. Any under or over recoveries of tax shall be adjusted every year on the basis of certificate of statutory auditors.

Provided that:
i) Tax on any income streams other than income from core-activity, if any, accruing to the Generating Company shall not constitute as a pass through component in the tariff. Tax on such other income shall be payable by the Generating Company.

ii) The station-wise profit before tax as estimated for a year in advance shall constitute the basis for distribution of the Corporate tax liability to all the stations.

iii) The benefit of Tax Holiday where applicable as per the provisions of the Income Tax Act, 1961 shall be passed on to the respective stations.

iv) The credit for carry forward losses, if any, shall be given in an equitable manner for all stations.

v) The tax allocated to stations shall be charged to the beneficiaries in the same proportion as annual fixed charges."

The provisions of 2004 regulations are extracted as under:

> "7. **Tax on Income:** (1) Tax on the income streams of the generating company or the transmission licensee, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries.
>
> (2) Any under-recoveries or over-recoveries 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 auditors.
>
> Provided that tax on any income stream other than the core business shall not constitute a pass through component in tariff and tax on such other income shall be payable by the generating company or transmission licensee, as the case may be.
>
> Provided further that the generating station-wise profit before tax in the case of the generating company and the region-wise profit before tax in case of the transmission licensee as estimated for a year in advance shall constitute the basis for distribution of the corporate tax liability to all the generating stations and regions.
>
> Provided further that the benefits of tax-holiday as applicable in accordance with the provisions of the Income-Tax Act, 1961 shall be passed on to the beneficiaries.
>
> Provided further that in the absence of any other equitable basis the credit for carry forward losses and unabsorbed depreciation shall be given in the proportion as provided in the second proviso to this regulation.
>
> Provided further that income-tax allocated to the thermal generating station shall be charged to the beneficiaries in the same proportion as annual fixed charges, 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 interstate transmission, the sharing of income-tax shall be in the same proportion as annual transmission charges."

19. From the above provisions of the regulations, it is evident that the tax on the income from core business of the generating company has to be borne by the beneficiaries in the proportion to their share in the annual fixed charges. It is

further provided that any over recovery or under recovery shall be adjusted on the basis of the certificate of the statutory auditors. The tax liabilities are borne by the beneficiaries and accordingly, the tax liability has to be considered as per the relevant provisions of the IT Act. Section 195A of the IT Act which is relevant to this case is extracted as under:

> **`Income payable "net of tax"**
> 195A. In a case other than that referred to in sub-section (1A) of section 192,the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.'

20. We are of the view that the 2001 and 2004 regulations of the Commission provide for the arrangement as to how the tax liability on the income from core business of the generating company has to be serviced. The regulations are to be read and interpreted along with the relevant provisions of the IT Act. The calculation for servicing the tax liability has to be done as per the provisions of the IT Act. Section 195A of the IT Act clearly provides that liability to pay the tax is to be borne by the person by whom the income is payable. Such income for the purpose of deduction of tax shall be increased to such amount which after the deduction of the tax shall be equal to the net amount payable under the arrangement. In view of the aforesaid statutory provisions in the IT Act read with 2001 and 2004 regulations of the Commission, the tax on the core business of

the generating company has to be grossed up before recovery from the beneficiaries.

21. In view of our finding in the preceding paragraph that grossing up is mandatory in terms of Section 195 A of IT Act, and since the bills have been prepared by the statutory auditor after grossing up, the respondent is liable to pay the income tax dues as determined by the statutory auditor. Since the only objection of the respondent pertains to grossing up income tax which has been decided as above, we direct that the respondent shall reimburse Rs.481.46 crore to the petitioner by 15.1.2010.

Interest on rebate and outstanding IT dues

22. In our order dated 31.3.2009, we had left the issue of payment of interest on amount withheld by the respondent to be decided at the stage of final proceedings of the case. Despite the orders of the Commission dated 19.10.2005 and 14.9.2006, the respondent has not refunded the excess rebate availed by it thereby, depriving the Petitioner of the benefits from the refund amount which legitimately belonged to it. On the other hand, the respondent has also reaped benefits by withholding the amount over which it had no right. Therefore, the Petitioner needs to be compensated for the loss suffered on account of non-payment of the rebate by the respondent. The Petitioner has not made any specific prayer for payment of interest from any particular date, though a standard prayer "to pass such order as deemed fit by the Commission" has been made. Considering the totality of the circumstances leading to the filing of the petition

and the conduct of the respondent after issue of the order dated 30.3.2009, we are of the view that ends of justice will be met if the respondent is made liable for payment of interest on the withheld rebate amount. As the respondent failed to make the refund by 30.4.2009 as directed in our order dated 30.3.2009, we direct the respondent to pay interest at the rate of 1.25% per month on Rs.79.52 crore from 1.5.2009 till the date of payment.

23. We have directed the respondent in Para 21 above to reimburse the IT dues of Rs.481.46 crore by 15.1.2010. We further direct that in case of delay in payment, the respondent shall be liable to pay interest @ 1.25% per month from the date of this order till the date of reimbursement.

Action under section 142 of the Act

24. The Commission has directed the respondent in its order dated 31.3.2009 to show cause as to why action under Section 142 of the Act should not be taken against it for its failure to comply with the order of the Commission dated 19.10.2005 in Petition No.97/2005 and order dated 14.9.2006 in Petition No.17/2006. The respondent in IA No.17/2009 had requested for extension of time in reply to the show cause notice till the disposal of the appeal filed by it in the Appellate Tribunal. The appeals were disposed by the Appellate Tribunal vide order dated 20.5.2009. However, the respondent has not filed any reply to the show cause notice so far. Since we have issued fresh directions regarding the payment of rebate and reimbursement of income tax to be complied with by the respondent by 15.1.2010, we discharge the present notice under Section 142 of

the Act against the respondent. It is clarified that if the respondent fails to comply with our directions by the due date, the Commission will be constrained to initiate proceedings *suo motu* under Section 142 of the Act, against the respondent, for non-compliance of the directions of the Commission.

25. Petition No. 163/2008 along with I.A. Nos. 17/2009 and 50/2009 are disposed of in terms of our directions contained in this order.

Sd/-	**sd/-**	**sd/-**
[V S VERMA]	**[R. KRISHNAMOORTHY]**	**[Dr PRAMOD DEO]**
MEMBER	**MEMBER**	**CHAIRPESON**