CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 163/2008

Coram:
Dr Pramod Deo, Chairperson
Shri M Deena Dayalan, Member

Date of Hearing: 19.04.2011
Date of Order : 19.12.2012

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 N. Rathinasabapathy, NLC
3) Shri R. Suresh, NLC
4) Shri P.H. Parekh, Sr. Advocate, TNEB
5) Shri E.R. Kumar, Advocate, TNEB
6) Shri K. Shashank, Advocate, TNEB
7) Shri Debjyothi Bhattacharya, Advocate, TNEB
8) Shri Vishal Prasad, Advocate, TNEB
9) Ms. Shweta Sharma, Advocate, TNEB
10) Ms. Maheshwari Bai, TNEB
11) Shri Jameel Pasha, TNEB

ORDER

The present petition was filed for directions to the respondent for refund of an amount of ₹79.52 crore allegedly withheld in breach of this Commission's regulations and also seeking reimbursement of the Income Tax dues of ₹481.46 crore paid by the petitioner to the Income-tax authorities. The petition was disposed

of by this Commission's order dated 7.1.2010. This Commission directed the respondent to refund the withheld sum of ₹79.52 crore and also to reimburse the income-tax dues. The respondent filed an appeal before the Appellate Tribunal, being Appeal No 49/2010 against the said order dated 7.1.2010. The appeal was disposed by the Appellate Tribunal by its judgment dated 10.9.2010, partly allowing the appeal. The Appellate Tribunal upheld this Commission's direction for reimbursement of income-tax, but remitted the matter to this Commission for reconsideration as regards the direction for refund of the amount of ₹79.52 crore. Therefore, for the present we are considering the petitioner's claim seeking refund of the amount of ₹79.52 crore.

2. The case has a chequered history. For proper appreciation of the dispute, we first take note of the background against which the present petition has been filed.

3. The petitioner is a generating company supplying power to the respondent and other States in Southern Region. The petitioner and the beneficiaries in Southern Region, including the respondent, executed the Bulk Power Supply Agreement dated 18.2.1999, valid up to 31.3.2001 for supply of power from the petitioner's Thermal Power Station-II, which *inter alia* provided that the beneficiaries would make the payment of the dues through an irrevocable Letter of Credit opened in favour of the petitioner. The agreement also provided that the petitioner would allow a rebate of 2.5% when the payments were made through the Letter of Credit. The agreement further provided for rebate of 2.5% of the billed amount if the payment was made within 3 working days from the date of receipt of bills, even

without opening of the Letter of Credit. It was further provided that in case the payment was delayed beyond 30 days from the date of receipt of the bill by the respondent, it would pay surcharge @ 1.5% per month on the amount of the bill for the period of delay. Another Bulk Power Supply Agreement dated 9.3.2001 was executed between the petitioner and the respondent for supply of power from the petitioner's Thermal Power Station I, valid up to 31.3.2002. The third Bulk Power Supply Agreement dated 20.9.2001 was entered into between the petitioner and the respondent for the supply of power from Thermal Power Station-I (Expansion). The provisions regarding rebate on timely payments of the bills in the agreements dated 9.3.2001 and 20.9.2001 were similar to those of the agreement dated 18.2.1999.

4. This Commission on 26.3.2001 notified the terms and conditions for determination of tariff, applicable from 1.4.2001 to 31.3.2004. These regulations provided for rebate of 2.5%, if the payment was made through the Letter of Credit and for rebate of 1%, if the payment was made within 1 month. The notification provided for levy of the late payment surcharge of 1% per month in case the payment was delayed beyond sixty days from the date of presentation of the bills. The fresh regulations notified by this Commission on 26.3.2004 and applicable from 1.4.2004 also made similar provision for rebate except that the rate of rebate was reduced from 2.5% to 2% in case of payments made through the Letter of Credit.

5. Despite the provisions of the Bulk Power Sale Agreements, the respondent did not open the Letter of Credit in favour of the petitioner, but was availing of rebate @ 2.5% whenever payment of the bills was made within 3 days of receipt thereof, based on the agreements executed.

6. It appears that there was accumulation of arrears of ₹191.62 crore for the period commencing on 1.10.2001. The petitioner addressed a letter 5.6.2003 to the respondent requesting to settle the arrears accumulated together with surcharge. In a meeting held subsequently the respondent agreed to pay the total outstanding amount in 10 equal monthly instalments starting January 2004. On 26.10.2004, the petitioner sent another letter informing the respondent that rebate of 2.5% already availed by it from 1.4.2004 would be retrospectively adjusted with effect from 1.4.2004 as rebate was payable at the rate of 2% in accordance with this Commission's notification dated 26.3.2004. The petitioner filed a petition (No. 97/2005) on 9.8.2005 before this Commission seeking a direction to the respondent to refund the amount of ₹79.52 crore deducted as rebate in excess of 1% on the ground that deduction contravened this Commission's notifications. The petition was allowed by this Commission by order dated 19.10.2005, holding that in accordance with this Commission's notifications dated 26.3.2001 and 26.3.2004 the claim for rebate of 2.5% or 2% could be allowed only when the bills were settled by opening the Letter of Credit. The Commission noted that the respondent could not claim rebate @ 2.5% or 2% unless the payment was made through the Letter of Credit. The respondent was directed to refund or adjust the excess amount of rebate recovered, within a period of three months. The relevant part of the order is extracted hereunder:

> *"In terms of these regulations, liberty is granted to the beneficiaries to make payment by any mode other than the letter of credit. In such cases, the beneficiaries can claim a rebate of 1% in case the payment is made within a period of one month and in case the payments are withheld beyond 60 days, the beneficiaries become liable to pay late payment surcharge. It is however, made clear that in case, payment is made through a mode other than the letter of credit, the respondent as a beneficiary cannot claim rebate @ 2.5 or*

2% even if the payment of bill is made within 3 days of raising by the petitioner or earlier. Therefore, in future, the respondent will be entitled to claim rebate strictly in accordance with the Commission's regulations on the subject. We further direct that the respondent shall refund or adjust the excess amount of rebate withheld for the past period, in variance, with the Commission's regulations within a period of three months from the date of this order."

7. The order dated 19.10.2005 had not been questioned before any superior forum and thus became final. Thereafter, the meetings were held between the petitioner and the respondent whereat the petitioner accepted the respondent's proposal to open the back-up Letter of Credit. However, no positive further positive steps were taken in the direction of opening of back-up Letter of Credit.

8. For reason of non-payment of the amount ordered in its favour, the petitioner filed another petition (17/2006), seeking a fresh direction for the refund of excess rebate detained by the respondent. This petition was also allowed by order dated 14.9.2006. This Commission directed the respondent to refund or adjust the entire excess rebate amount in compliance with the order dated 19.10.2005. The extracts from the order dated 14.9.2006 are reproduced hereunder:

"27. In the light of the above order which leaves no room for any doubt, we find the respondent's contention and reliance on the expired BPSA is wholly unjustified. We once again make it clear that the respondent in the past was entitled to claim 1% rebate on all payments made within one month from the date of raising of the bills by the petitioner, till such time it opens LC. Accordingly we direct the respondent to refund or adjust the excess amount withheld within a period of two months from the issue of this order. Any default or non-compliance may be a cause for invoking penal provisions under the Electricity Act, 2003."

9. Like the previous order, this order too was not challenged by the respondent. However, the respondent, on 31.12.2007, opened the back-up Letter of Credit and thereafter the respondent has been availing the rebate in accordance with this

Commission's notifications. In this manner, the dispute is confined to the rebate applicable for the period 1.4.2001 to 31.3.2007.

10. Despite the orders passed by this Commission, the amount of excess rebate withheld by the respondent prior to 31.12.2007 was not refunded. Hence the present petition was filed for a direction to refund the excess rebate to the tune of ₹79.52 crore up to 31.12.2007. This Commission after hearing the parties in its order dated 31.3.2009 allowed the petition again directing the respondent to refund the excess rebate of ₹79.52 crore unilaterally withheld by the respondent. The direction was based on the earlier orders dated 19.10.2005 and 14.9.2006 of this Commission. Challenging the said order dated 31.3.2009, the respondent filed an appeal (No. 78/2009) before the Appellate Tribunal and also filed appeals (Nos. 79/2009 and 80/2009) against the orders dated 19.10.2005 and 14.9.2006. The appeals filed against the orders dated 19.10.2005 and 14.9.2006 were subsequently withdrawn to enable the respondent to seek review the orders from this Commission. As regards the appeal against this Commission's order dated 31.3.2009 (Appeal No 78/2009), by judgment dated 20.5.2009 the Appellate Tribunal remanded the matter to this Commission for fresh consideration on the ground that one of the Members who passed the order happened to be the Chairman and Managing Director of the petitioner company during the relevant period of exchange of correspondence between the parties. Pursuant to the directions of the Appellate Tribunal, this Commission passed the order dated 7.1.2010 again allowing the present petition.

11. Aggrieved by this Commission's order dated 7.1.2010 ibid, decided in favour of the petitioner, the respondent filed another appeal, being Appeal No 49/2010. In this appeal, the respondent pointed out that this Commission in its order dated 7.1.2010 had not considered the letters dated 5.6.2003 and 26.10.2004 as also the decision arrived at in the meeting held on 22.12.2003, recorded in the Minutes of Meeting . The submissions of the respondent in this regard are noted in para 19 (B) of the Appellate Tribunal's judgment dated 10.9.2010 as extracted hereunder:

> *"(B) The earlier orders passed by the Central Commission on 19.10.2005 and 14.09.2006 directing for the refund of excess rebate did not consider the material documents namely the letter dated 05.06.2003 sent by the Chairman of the Corporation to the Chairman of the Electricity Board and the letter dated 26.10.2004 sent by the General Manager (Commercial) of the Corporation to the Chief Financial Controller, TNEB. Both these documents would clearly indicate that the Corporation admitted that the NLC, even though the Electricity Board had not opened the LC, granted 2% rebate on the bill amount on the basis of payments made by the Electricity Board within 3 working days from the date of presentation of the bills. This fact also has been acknowledged by the Corporation to the Power Ministry through its letter dated 14.07.2003. In addition to this, the minutes of the meeting held between both the parties, held on 22.12.2003 decided about the issue and sorted out their dues. Without referring to these documents, the Central Commission passed the earlier order."*

12. The Appellate Tribunal by judgment dated 10.9.2010 upheld the respondent's contention and observed that this Commission did not go into the aspect of refund of excess rebate on merits, but was influenced by dismissal of the Review Petitions filed against the orders dated 19.10.2005 and 14.9.2006. The Appellate Tribunal made *inter alia* the following order in the operative part of the judgment:

> *"The order passed by the Central Commission on 31.03.2009 with reference to refund of Excess Rebate was challenged by the Appellant in Appeal No. 78/09 before the Tribunal. The said order was set aside by this Tribunal on 20.05.2009 directing the Central Commission to re-hear the matter on this issue afresh. Therefore, the order dated 31.03.2009 passed by the Central Commission was no longer in existence. In the present case, the Central Commission did not decide the said issue afresh as directed by the Tribunal. Instead it simply*

constituted a fresh Bench and heard the matter on other issue namely reimbursement of income tax and gave finding only on that issue and retained its earlier order dated 31.03.2009, ignoring the directions of the Tribunal. Therefore, the impugned order dated 07.01.2010 is set aside on this issue and the matter remanded to the Central Commission to hear the matter on the issue of refund of Excess Rebate afresh and decide the matter according to law. However, it is made clear that we have not considered the issue on merits and as such we are not expressing any opinion on this issue. Consequently, it is open to the Central Commission to decide the issue on the basis of the submissions and materials placed by the parties and pass the order in accordance with law."

13. At this stage it may be pointed out that the respondent filed the petitions (Nos. 98/2009 and 99/2009) seeking review of this Commission's orders dated 19.10.2005 and 14.9.2006. It was submitted that subsequent to the orders dated 19.10.2005 and 14.9.2006, the respondent discovered certain material documents that went to the root of the matter to establish that the petitioner had agreed to allow rebate of 2.5% without insisting on opening of the Letter of Credit in case the payment was made within three days of raising of the bills. The respondent explained that these documents could not be produced previously even after exercise of due diligence, as the previous petitions were handled by the Planning Department, whereas the documents were held by the Accounts Department. The respondent further submitted that it came across these documents when details relating to the petitioner's claim for income-tax raised in the present petition were being verified. The Review Petitions were dismissed by this Commission by the common order dated 17.12.2009. It was held that the two departments (Planning Department and Accounts Department) of the respondent were the limbs of the same organization and the respondent as a legal entity could not rely upon lack of internal co-ordination or inter-departmental consultations as the ground for review. To this Commission it appeared to be the case of want of due diligence on the part

of the respondent. The operative part of the order of this Commission is extracted below:

> *"50. In view of our discussion in the preceding paragraphs, the review petitions are not maintainable on the ground of limitation as well for the failure on the part of the review petitioner to make out a case for review under Order 47 Rule 1 of the Code."*

14. Against the order of dismissal of the Review Petitions, the respondent filed an appeal (No. 50/2010) before the Appellate Tribunal. The Appellate Tribunal by its order dated 24.5.2010 dismissed the appeal on ground of maintainability. After dismissal of the appeal, the respondent filed the fresh appeals (Nos. 132/2010 and 133/2010) again challenging this Commission's orders dated 19.10.2005 and 14.9.2006. As there was a delay in filing of the appeals, the respondent filed applications for condonation of delay. The Appellate Tribunal by its judgment dated 5.1.2011 declined to condone the delay, dismissed the applications seeking condonation of delay and consequently the appeals. However, the Appellate Tribunal in its judgment observed that –

> *"65. Alternatively, the Appellant has now sought for a liberty to the Appellant to raise the issue in respect of the entire period from 2001 till 30th November 2007 and prayed for the direction to the Central Commission to decide the Petition No. 163/2008 which was remanded earlier in respect of the entire subject matter from 1.4.2010 till 31.12.2007 on its merit.*
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> *66. At this stage, we may point out that already we have given direction while remanding the matter in Appeal No. 49/2010 after setting aside the orders passed in Petition No. 163/2008 to allow the Appellant to make his submissions with regard to the documents referred to in the reply filed in Petition No. 163/2008. The relevant direction is as follows:*
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> > *"We make it clear that we are not expressing any opinion on the points urged by the learned counsel for the Appellant on this issue on the strength of various documents produced before this Tribunal as we are of the considered view that it is for the Central Commission to consider those documents and submissions made by the parties and to decide the said issue."*
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> *67. As pointed out by the learned Counsel for the Appellant, the Respondent has mentioned in its Written Submission dated 29.9.2010 stating that the*

Appellant Tamil Nadu Electricity Board is at liberty to raise the grounds of waiver and unjust enrichment in the remand proceedings and as such the Appellant does not require any more direction or grant of liberty to raise these grounds In view of the same, we are not inclined to give any more direction to the Central Commission.

68. It is made clear that the Central Commission is open to decide the relevant issue in the Petition No. 163/2008 based on the materials placed by the parties in that proceedings and the submissions of the parties thereto in accordance with law. We reiterate that we do not enter into the merits of the matter as we are concerned only with reference to the prayer to condone the inordinate delay of 1668 days and 1338 days in filing the Appeals.

69. In the above circumstances, the Appellant may approach the Central Commission and make submissions on the basis of the new documents introduced by the Appellant through his reply in Petition No. 163/2008 as directed earlier and to raise only the relevant issue as mentioned above." (Emphasis added)

15. In terms of the Appellate Tribunal's judgments dated 10.9.2010 and 5.1.2011, this Commission's mandate is to consider the documents introduced by the respondent for the first time in its reply to the present petition. In this regard the respondent has relied upon three documents; these documents are the letters dated 5.6.2003 and 26.10.2004 and the Minutes of Meeting dated 22.12.2003. According to the respondent, these documents show that the petitioner had consented to give rebate as per the agreements between the parties. We consider these documents one-by-one.

Letter dated 5.6.2003

16. The then Chairman and Managing Director of the petitioner wrote letter dated 5.6.2003 to the Chairman of the respondent, wherein it was *inter alia* stated that

"11.1 TNEB has been making monthly payments directly by cheque. In view of our long association, NLC did not object for direct payment instead of LC payment and allowed rebate on the amount settled within three days of presentation of bills as per the expired BPSA."

"11.3 The scheme also envisages referring the disputes to arbitration. In our case, there is no dispute between NLC and TNEB as all the issues are dealt with strictly in accordance with BPSA pending new tariff to be fixed by the Central Electricity Regulatory Commission (CERC)."

"12. We therefore request you to settle the arrears accrued after 1.10.2001 in full together with surcharge accrued. The monthly payments may also be made in full in accordance with BPSA and not to invoke "Dispute clause" as really there is no dispute."

17. The above communication by the petitioner does not contain any commitment on its part to continue to allow the respondent to avail of rebate in accordance with the agreements between them. The letter notes that in the past, the petitioner allowed rebate when the bills were settled within three days of their presentation. From para 12 of the letter dated 5.6.2003 extracted above it appears that the respondent had not made full payments of the dues and was in arrears. The respondent has clarified that the arrears were on account of increase in Return on Equity from 12% to 16% and were not of the regular bills raised by the petitioner. Be that as it may, according to the respondent's own admission, the supplementary bills raised by the petitioner on account of retrospective increase of Return of Equity were not paid in accordance with the agreements. In that context, the petitioner addressed the letter dated 5.6.2003 and called upon the respondent to make full payment of the arrears with late payment surcharge in accordance with the agreement between them. It is pertinent to note that the respondent did not avail of the offer and did not make the payments. Accordingly, by virtue of the said letter dated 5.6.2003 no rights accrued in favour the respondent to insist on availing of rebate based on the agreements which had already become defunct by efflux of time.

Minutes of Meeting dated 22.12.2003

18. A meeting was held between the petitioner and the respondent on 22.12.2003 to settle the payment of arrears. The Minutes of Meeting drawn recorded the following decisions:

> *"NLC expressed its inability to waive the surcharge totally and indicated that waiver of 60% of the accumulated surcharge could be considered as a special case, as extended as per the Board's decision. With regard to incentive under securitization scheme, TNEB requested NLC to allow one time incentive of 2% for the agreed mode of the bills from 1.10.2001. Though TNEB has not settled the bills even at 95% of the disputed items, in view of cordial relation with `on the nominal value of the power bonds issued by the Government of Tamil Nadu, which amounts to Rs. 25.33 crores. NLC also agreed to extend the incentive of 6% for the year 2002-03 and 2.5% for the half year 2003-04 amounting to Rs. 107.65 crores as incentive payable for fulfilling the performance based milestone as per the securitization scheme."*

19. From the above, it is clear that the meeting was held in the context of settlement of dues in the background of the securitization scheme. There is no indication that the petitioner agreed to continue to permit the respondent rebate of 2.5% when the payments were made within three days of presentation of the bills as provided under the agreements between them. These minutes recorded the following decisions:

(a) The petitioner agreed as a special case to waiver of 60% of the accumulated surcharge.

(b) With regard to incentive under the securitization scheme, on specific request of the respondent the petitioner as a goodwill gesture agreed to onetime rebate of 2%, amounting to ₹25.33 crore on the nominal value of the power bonds issued by the State Government of Tamil Nadu.

(c) The petitioner also agreed to extend the incentive of 6% for the year 2002-03 and 2.5% for the half year 2003-04 amounting to ₹107.65 crore as incentive payable for fulfilling the performance based milestone as per the securitization scheme.

20. The Minutes of Meeting thus do not in any matter support the respondent's claim that the petitioner had agreed to allow rebate in terms of the agreements entered into between the parties.

Letter dated 26.10.2004

21. The other letter that has been pressed into service by the respondent is dated 26.10.2004 addressed by General Manager (Commercial) of the petitioner to the Chief Financial Controller of the respondent stating *inter alia* that:

> *"NLC, hitherto, is allowing rebate of 2.5% for the timely payment of power Bills as per clause 8.2 of the Bulk Power Supply Agreement entered between TNEB and NLC signed on 20 Sep 01 for TPS-I Expn. However, it may be seen that clause 25 of the CERC Notification dated 26.3.2004 provides that rebate of 2% shall be allowable for the payment of bills of power supply through a Letter of Credit. However rebate of 1% is allowed if the payment is made other than LC but made within one month from the date of presentation of bills. Though the revised tariff petition for all the Thermal Power Stations for the period from 01.04.2004 to 31.3.2009 is yet to be filed, we wish to inform you that the rebate allowable shall be 2% as per clause 25 of the notification dated 26.3.2004. Accordingly rebate from 1.4.2004 shall be retrospectively adjusted. From Nov 2004 onwards, rebate of 2% on the bill amount excluding duties, cess, royalty and other statutory levies can be availed for the payment made within 3 working days from the date of presentation of bills.*
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> *Though the revised tariff pertaining for all the Thermal Power Stations for the period from 01.04.2004 to 31.3.2009 is yet to be filed, we wish to inform you that rebate allowable shall be 2% as per clause 25 of the notification dated 26.3.2004. Accordingly rebate from 1.4.2004 shall be retrospectively adjusted. From Nov 2004 onwards, the rebate of 2% on the bill amount excluding duties, cess, royalty and other statutory levies can be availed for the payment made within 3 working days from the date of presentation of bills. "*

22. The above letter is important. From the letter the following inferences can be drawn:

(a) Till 26.10.2004 the petitioner was allowing rebate of 2.5% in terms of clause 8.2 of the agreement dated 20.9.2001 pertaining to TPS I (Expansion) on payment of bills within three days of presentation thereof.

(b) Under clause 25 of this Commission's notification dated 26.3.2004, rebate of 2% only was permissible.

(c) With effect from 1.4.2004, rebate of 2% was to be allowed when the respondent made payment within 3 working days from the date of presentation of the bills and the rebate availed with effect from 1.4.2004 was to be adjusted accordingly.

(d) With effect from 1.11.2004, rebate of 2% would be allowed.

23. The petitioner's letter dated 26.10.2004 as regards the rate of rebate is based on this Commission's notification dated 26.3.2004, which specified rebate of 2% against rebate of 2.5% applicable prior thereto on payments made by opening the Letter of Credit. Though the petitioner pointed out that rebate of 2% was payable with effect from 1.4.2004, it did not insist on the respondent to open the Letter of Credit and rather agreed to allow rebate of 2% in future, with effect from 1.11.2004, on the respondent making payment within three days of presentation of the bills in accordance with the agreement dated 20.9.2001 in respect of TPS-I (Expansion). It is on record that the respondent made payment of extra rebate availed from 1.4.2004 to 31.10.2004. In other words, despite the notification dated 26.3.2004, the petitioner conceded to extend the benefit under the agreement

dated 20.9.2001. Although the letter dated 26.10.2004 was in respect of TPS I (Expansion), it can be safely concluded that the petitioner had no objection to extend similar benefit in respect of other generating stations as well since no action was taken by the petitioner in respect of those stations despite its knowledge of this Commission's notification dated 26.3.2004 that rebate of 2% was allowed on payments made against the Letter of Credit. The petitioner has contended that the letter dated 26.10.2004 was in the context of recovery of dues after securitization of past dues. We don't find any such indication from the said letter. On the contrary the said letter specifically refers to the Bulk Power Sale Agreement dated 20.9.2001.

24. The question that arises whether the petitioner could agree to allow rebate in a manner different from that specified in this Commission's notifications. For an answer to this question, the legal position on this aspect has to be examined. It is settled principle of law that a person for whose benefit a statutory provision has been made can waive the benefit, unless the statutory provision serves the public purpose or is in public interest. In support of this proposition, the law laid down by the Hon'ble Supreme Court can be conveniently noticed. The Hon'ble Supreme Court in **Shri *Lachoo Mal vs Shri Radhey Shyam, 1971 (1) SCC 619***, held that everyone has the right to waive and to agree to waive the advantage of a law or rule made solely for the benefit of the individual in his private capacity without infringing any public right or public policy. In ***Commissioner of Customs, Mumbai Vs. Virgo Steels, Bombay, 2002 (4) SCC 316*** after noticing the earlier precedents it was held by the Hon'ble Supreme Court that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual

rights of the person concerned and is for his benefit, the said person can always waive such a right. The Hon'ble Supreme Court ruled as under:

> *"9. The next question for our consideration is: can a mandatory requirement of a statute be waived by the party concerned? In answering this question, we are aided by a catena of judgments of this Court as well as of the Privy Council. We will first refer to the judgment of the Privy Council which has been consistently followed by the Supreme Court in a number of subsequent cases involving similar points. In Vellayan Chettiar v. Government of Province of Madras (AIR 1947 PC 197), the Privy Council held that even though S. 80, C.P.C. is mandatory, still non-issuance of such notice would not render the suit bad in the eye of law because such non-issuance of notice can be waived by the party concerned. In the said judgment, the Privy Council held that the protection provided under S. 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right.*
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> *10. In the case of Dhirendra Nath Gorai and Sabal Chandra Shaw and Ors. v. Sudhir Chandra Ghosh and Ors. (1964 (6) SCR 1001), this Court followed the judgment of the Privy Council in Vellayan Chettiar (supra) and held that even though the requirement of S. 35 of the Bengal Money Lenders' Act is mandatory in nature, such mandatory requirement could be waived by the party concerned. On a true construction of S. 35 of that Act, this court held that the said Section is intended only for the benefit of the judgment debtor and, therefore, he can waive the right conferred on him under the said section.*
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> *11. In the case of S. Raghbir Singh Gill v. S. Gurucharan Singh Tohra and Ors. (1980 Supp SCC 53), this Court negatived an argument that the requirement of S. 94 of the Representation of the People Act, 1951 cannot be waived. This argument was based on the principle that public policy cannot be waived. Rejecting the said argument, this court held that the privilege conferred or a right created by a Statute, if it is solely for the benefit of an individual, he can waive it. It also held that where a prohibition enacted is founded on public policy, Courts should be slow to apply the doctrine of waiver but if such privilege granted under the Act is for the sole benefit of an individual as is the case under S. 94 of the Representation of the People Act, the person in whose benefit the privilege was enacted has a right to waive it because the very concept of privilege inheres a right to waiver. .*
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> *12. In Krishan Lal v. State of J and K (1994 (4) SCC 422), this Court while considering the requirement of furnishing copy of inquiry proceedings under S. 17(5) of the J and K (Government Servants) Prevention of Corruption Act, 1962 held following the judgment in V. Chettiar's case (supra) and D. N. Gorai (supra) that though the requirement mentioned in S. 17(5) of the Act was mandatory, the same can be waived because the requirement of giving a copy of the proceedings of the inquiry mandated by S. 17(5) of the Act is one which is for the benefit of the individual concerned.*
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> *13. In Martin and Harris Ltd. v. 6th Additional Distt. Judge and Ors. (1998 (1) SCC 732) : (1998 AIR SCW 77 this court while considering the provision of S. 21(1)(a) first proviso of the U.P. Urban Buildings (Regulation of Letting, Rent*

and Eviction) Act, 1972 negatived a contention advanced on behalf of the appellant therein that the said provision was for public benefit and could not be waived. It held that it is true that such benefit enacted under the said proviso covered a class of tenants, still the said protection would be available to a tenant only as an individual, hence, it gave the tenant concerned a locus poenitentiae to avail the benefit or not. It also held that the benefit given under the said section was purely personal to the tenant concerned, hence, such a statutory benefit though mandatory, can be waived by the person concerned.

14. From the ratio laid down by the Privy Council and followed by this Court in the above-cited judgments, it is clear that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of persons concerned and is for his benefit, the said person can always waive such a right."

25. The provisions made in this Commission's notifications were for the benefit of the generating companies like the petitioner and the transmission licensees. The aim was to ensure timely recovery of the dues. Nevertheless, they could adopt any other mode, according to their convenience or wisdom, for recovery of dues by mutually agreeing to any other arrangement. This Commission's notifications in relation to operational norms specifically provided that the norms were the ceiling norms and did not preclude the generating company or the transmission licensee, as the case may be, and the beneficiaries from agreeing to improved norms of operation and in case the improved norms were agreed to, such improved norms would be applicable for determination of tariff. Even if the norms relating to rebate do not fall within the category of operational norms, yet the same principles should apply while seeking enforcement of the norms governing recovery of rebate in view of the law declared by the Hon'ble Supreme Court and adverted to above. Accordingly, the petitioner's action to allow rebate on the respondent making direct payment of the billed amounts within three days of presentation of the bills and still avail rebate of 2.5% or 2% do not involve infringement of this Commission's notifications in the legal sense.

26. The petitioner first filed the petition on 9.8.2005 seeking directions to the respondent to refund the excess amount by placing reliance on this Commission's notifications dated 26.3.2001 and 26.3.2004. This means that on filing of the petition the petitioner withdrew the benefit allowed to the respondent. Accordingly, during the period from 9.8.2005 to 31.12.2007, the petitioner cannot be said to have acquiesced to allow rebate in a manner different from that provided in the notification dated 26.3.2004. Therefore, the respondent is found to be entitled to avail the relief of rebate in accordance with this Commission's notification. Since the respondent had not opened the Letter of Credit during this period and made payments within one month from the date of presentation of the bills, it can avail rebate of 1% during this period.

27. The respondent has placed on record certain letters procured from other beneficiaries of the petitioner's generating station in Southern Region to claim that it cannot be discriminated against and is therefore entitled to claim the rebate in accordance with the agreements entered into with the petitioner when payments were made within three days after receipt of the bills. The beneficiaries whose letters have been filed in support of the contention are Kerala State Electricity Board and Power Company of Karnataka Ltd. KSEB under its letter dated 19.6.2009 informed the respondent that the funds were being transferred directly to the petitioner's account within three working days from the date of receipt of the invoices after deducting 2% rebate by maintaining the Letter of Credit as back-up. Power Company of Karnataka by its reply dated 20.8.2009 similarly informed the respondent that irrevocable/back-up Letters of Credit were opened in favour of the

petitioner for releasing the monthly energy charges. It has been added that rebate of 2.5%/2.25% was availed of on the Letter of Credit amount paid within three days from the date of presentation of bills and of 1% for the bill amount paid within one month. The respondent has further pointed out that Andhra Pradesh was allowed rebate on payments made against the Letter of Credit in two instalments.

28. The above submissions of the respondent have been considered carefully. In our opinion, the respondent has not been able to make out the case of discrimination. From the letters filed by the respondent from the utilities in the States of Kerala and Karnataka it is crystal clear that they had opened irrevocable/back-up Letters of Credit in favour of the petitioner. Similar Letter of Credit was not opened by the respondent till 31.12.2007. After opening of the Letter of Credit on 31.12.2007, the respondent has been availing of the rebate in accordance with this Commission's notifications. Even in case of Andhra Pradesh, of the respondent's own submission, the Letter of Credit has been opened in favour of the petitioner. Under these circumstances, the respondent cannot be heard to allege discrimination on the part of the petitioner.

29. The respondent has alleged that this Commission in its order dated 31.8.2004 approved the tariff for the period 1.4.2002 to 31.3.2004 in respect of TPS-I (Expansion) in Petition No 33/2004 based on the terms and conditions contained in the Bulk Power Purchase Agreement. It however needs to be pointed out that the tariff was approved for the period ending 31.3.2004. For the tariff period commencing on 1.4.2004, the tariff of all generating stations of the petitioner has been determined under the terms and conditions contained in this Commission's

notification dated 26.3.2004 and not on any agreement between the parties. We have taken a view that during the period 9.8.2005 to 31.12.2007 the respondent is to be allowed rebate of 1% since during this period the respondent had not opened the Letter of Credit. Therefore, the ground of attack has lost significance. Similarly, the objection on ground of limitation and other similar grounds raised by the respondent also do not survive and are not available to the respondent.

30. For the foregoing reasons, we direct that the respondent shall refund or adjust the amount of excess rebate withheld by it for the period 9.8.2005 to 31.12.2007 latest by 31.1.2013, with interest @ 9% per annum from 1.9.2005 till the date of refund or adjustment.

31. With the above, the present petition stands disposed of.

sd/-
(M Deena Dayalan)
Member

sd/-
(Dr. Pramod Deo)
Chairperson