CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 304/MP/2022

Coram:

Shri Jishnu Barua, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Date of Order: **30th Nov 2023**

In the matter of

Petition under section 61(d), 79 & 94 of the Electricity Act, 2003 read with regulations 79, 86, 111 & 114 of CERC (Conduct of Business) Regulations, 1999 and Regulation 44 of CERC (Terms & Conditions of Tariff) Regulations, 2009, Regulation 54 & 55 of CERC (Terms & Conditions of Tariff) Regulations, 2014 and Regulation 76 & 77 of CERC (Terms & Conditions of Tariff) Regulations, 2019 for recovery of additional income tax paid by NHPC Limited on account of Advance Against Depreciation (AAD) since 01.04.2009 from the beneficiaries of 8 generating stations.

And

In the matter of

NHPC Limited,
(A Govt. of India Enterprise)
NHPC Office Complex, Sector-33,
Faridabad (Haryana) - 121 003. …. **Petitioner**

Vs.

1. Punjab State Power Corporation Ltd., **…. Respondents**
   The Mall, Near Kali Badi Mandir,
   Patiala-147 001 (Punjab) & 18 others.

2. Haryana Power Purchase Centre (HPPC),
   Shakti Bhawan, Sector - 6
   Panchkula-134 109 (Haryana).

3. BSES Rajdhani Power Ltd.,
   BSES Bhawan,
   Nehru Place, New Delhi-110019

4. BSES Yamuna Power Ltd.,
   Shakti Kiran Building,
   Karkadooma, Delhi-110072.

5. Tata Power Delhi Distribution Ltd.,
   (A Tata Power and Delhi Govt. Joint Venture)
   Grid Sub-station Building, Hudson Lines,
   Kingsway Camp, Delhi-110009.

6. Himachal Pradesh State Electricity Board,
   Vidyut Bhawan, Kumar House,
   Shimla - 171 004 (Himachal Pradesh).

7. Uttar Pradesh Power Corporation Ltd.,
   Shakti Bhawan, 14-Ashok Marg,
   Lucknow-226001 (Uttar Pradesh).

8. Ajmer Vidyut Vitaran Nigam Ltd.,
   Old Power House,
   Hatthi Bhatta, Jaipur Road, Ajmer - 305 001 (Rajasthan).

9. Jaipur Vidyut Vitaran Nigam Ltd. (JVVNL),
   Vidyut Bhawan,Janpath, Jyoti Nagar,
   Jaipur-302005 (Rajasthan)

10. Jodhpur Vidyut Vitaran Nigam Ltd.,
    New Power House,
    Industrial Area, Jodhpur - 342 003 (Rajasthan).

11. Uttarakhand Power Corporation Ltd., Urja Bhawan,
    Kanwali Road, Dehradun - 248 001 (Uttrakhand)

12. Engineering Deptt., 1st Floor,
    UT Chandigarh, Sector-9 D,
    Chandigarh-160009.

13. Power Development Department,
    New Secretariat
    Jammu -180001 (J&K)

14. West Bengal State Electricity Distribution Company Ltd.,
    Vidyut Bhawan (8th Floor)
    Block-DJ, Sector-II, Salt Lake,
    Kolkata -700091 (West Bengal).

15. Damodar Valley Corporation,
DVC Towers, VIP Road,
Kolkata -700054 (West Bengal).

16. Jharkhand Bijli Vitran Nigam Ltd.,
(Formerly Jharkhand State Electricity Board),
Engineering Building, H.E.C Dhruwa,
Ranchi, Jharkhand - 834 002.

17. North Bihar Power Distribution Company Ltd.,
Vidyut Bhawan, Bailey Road,
Patna - 800001 (Bihar).

18. South Bihar Power Distribution Company Ltd.
Vidyut Bhawan, Bailey Road,
Patna - 800001 (Bihar).

19. Department of Power,
Govt. of Sikkim, Kazi Road,
Gangtok -737101 (Sikkim).

Parties Present:

Shri Ved Jain, Advocate, NHPC
Shri Ankit Gupta, Advocate, NHPC
Shri Venkatesh, Advocate, NHPC
Shri Ashutosh K.Srivastava, Advocate, NHPC
Shri Shivam Kumar, Advocate, NHPC
Shri Aashwyn Singh, Advocate, NHPC
Shri Ravi Kant Singh, NHPC
Shri Deepak Kumar Garg, NHPC
Shri Parthajit Dey, NHPC
Shri Kunal Singh, Advocate, TPPDL
Shri Tanmay Jain, Advocate, TPPDL
Shri Buddy Ranganathan, Advocate, BYPL
Shri Rahul Kinra, Advocate, BYPL
Shri Aditya Ajay, Advocate, BYPL
Shri Isnain, Advocate, BYPL
Shri Mohit K. Mudgal, Advocate, BRPL
Shri Sachin Dubey, Advocate, BRPL

ORDER

1. This petition has been filed by the Petitioner, NHPC Limited, under Section 61(d), 79 & 94 of the Electricity Act, 2003 read with Regulation 79, 86, 111 & 114 of CERC (Conduct

of Business) Regulations, 1999 and Regulation 44 of CERC (Terms and Conditions of Tariff) Regulations, 2009, Regulation 54 & 55 of CERC (Terms and Conditions of Tariff) Regulations, 2014 and Regulation 76 & 77 of CERC (Terms and Conditions of Tariff) Regulations, 2019 to allow recovery of Income tax liability on account of Advance Against Depreciation (in short AAD) from the beneficiaries after grossing-up without casting any additional tax liability on the generating stations of the Petitioner. Accordingly, the Petitioner has sought the following relief(s):

a) By exercising the inherent powers of the Commission under Regulation 44 of CERC (Terms & Conditions of Tariff) Regulations, 2014, Regulation 54 & 55 of CERC (Terms & Conditions of Tariff) Regulations, 2014 and Regulation 76 & 77 of CERC (Terms & Conditions of Tariff) Regulations, 2019, allow recovery of income tax liability on account of "Advance Against Depreciation" from the beneficiaries after grossing up without casting any additional tax liability on the generator.

b) Allow the petitioner to recover the tax liability on account of "Advance Against Depreciation", as claimed by the petitioner from the period 01.04.2009, by grossing up the same with tax rate as prayed at Serial No.1 and 2 above.

*c) Issue necessary directions to the respondents, to make payment of income tax due to adjustment of 'Advance Against Depreciation' (income tax amounting to Rs **129,36,92,960/-** plus grossing-up thereof with applicable/ effective tax rate of the year in which above recoveries shall be made from the beneficiaries through Billing of Sales.*

d) Allow the petitioner to recover the balance tax liability, whenever it arises after filing of return, from the beneficiaries without making an application.

e) Allow the petitioner to recover from the respondents the above income tax liability in proportion to their capacity share allocation as on 31.03.2009 in respective generating station.

f) Allow the petitioner to recover the petition fee amounting to Rs.3,00,000/- (Rs Three Lakh only) from the respondents.

g) Pass such other and further order / orders as are deemed fit and proper in the facts and circumstances of the case.

Submission of the Petitioner

2. The Petitioner vide affidavit dt.30.9.2022 has submitted as follows:

a) The tariff regulations notified by CERC are guided by the principle set out under Section 61 of the Electricity Act, 2003. Section 61(d) of the Electricity Act, 2003 provides for recovery of cost to generating station in a reasonable manner.

b) Before the commencement of operation by the regulatory commissions under the Electricity Regulatory Commissions Act 1998, the tariff of central generating stations was determined by the Central Government under the Electricity (Supply) Act 1948. The Central Government in the exercise of powers under Section 43A (2) of the Electricity (Supply) Act, 1948, issued a Notification dated 30.03.1992 laying down the factors in accordance with which tariff was to be determined. The said notification dt.30.03.1992 covered all the generating stations, including Thermal and Hydro.

c) Para 2 of notification dtd. 30.03.1992 was applicable for the determination of the tariff of hydro generating stations. The two-part tariff, namely energy charges and capacity charges, comprises Interest on Loan, Depreciation including Advance against Depreciation, O&M expenses, Tax on Income, Return on Equity, Interest on Working Capital and other miscellaneous charges.

d) Para 2.6(b) of ibid notification provided for computation of 'depreciation' under capacity charges, and 2.8(b) provided for recovery of 'tax on income', which are reproduced as under:

> *"2.6(b) The rates of depreciation shall be applicable as notified by the Central Government from time to time; or* ***Advance Against Depreciation shall be applicable at an annual amount not exceeding one-twelfth of the loan amount*** *and* ***limited to the actual loan liability of the year****, as per the approved financial package.*
>
> *Explanation-I: The total of depreciation including Advance Against Depreciation, charged through the tariff shall not exceed 90 per cent of the approved capital cost during the life of the project.*
>
> *Explanation-II: In case a generating company takes assets on lease, the leasing charge as approved by the Authority, shall be considered in the capacity charge in lieu of depreciation and interest liability."*
>
> *2.8 (b)* ***Tax on income****, if any, shall be computed as expense at actuals. Any over recoveries or under recoveries of tax on income shall be adjusted every year on the basis of a certificate of Auditors."*

e) Since the formation of the Central Electricity Regulatory Commission in July 1998 under the ERC Act 1998, the Commission has been determining the tariff of generating stations of the petitioner company.

f) The Commission, under Section 79(1)(a) and Section 62 of the Electricity Act, 2003, is vested with the jurisdiction to regulate/determine the tariff of the Generating Companies owned or controlled by the Central Government, including that of NHPC.

g) In the exercise of powers under section 28 of the ERC Act, 1998, CERC notified its first set of tariff regulations on 26th March 2001, which was applicable for the tariff period 2001-04. From 1998 (after the formation of CERC) to 31.03.2001 (till the first tariff regulations were issued by CERC), the tariff determined by the central government was adopted by CERC, and where tariff was not determined by the central government, the same was determined by CERC based on the principle of GOI tariff notifications, 1992.

h) The CERC Tariff Regulations, 2001, applicable for the tariff period 2001-04 and CERC Tariff Regulations, 2004, applicable for the tariff period 2004-09, also provided

for depreciation along with advance against depreciation. The relevant clauses are reproduced as under:

CERC Tariff Regulations, 2001

"3.5.1 ***(b) Depreciation***

(i) The value base for the purpose of depreciation shall be the historical cost of the asset.

(ii) Depreciation shall be calculated annually as per straight line method at the rate of depreciation as prescribed in the Schedule attached to this notification as ***Appendix-II****.*

Provided that the total depreciation during the life of the project shall not exceed 90% of the approved original cost. The approved original cost shall include additional capitalization on account of foreign exchange rate variation also.

*(iii)****Advance against depreciation (AAD), in addition to allowable depreciation, shall be permitted wherever originally scheduled loan repayment exceeds the depreciation allowable as per schedule*** *and shall be computed as follows:*

AAD = Originally scheduled loan repayment amount subject to a ceiling of 1/12th of original loan amount minus Depreciation as per schedule

(iv)On repayment of entire loan, the remaining depreciable value shall be spread over the balance useful life of the asset.

(v) Depreciation shall be chargeable from the first year of operation. In case of operation of the asset for part of the year, depreciation shall be charged on pro-rata basis.

(vi) Depreciation against assets relating to environmental protection shall be allowed on case-to-case basis at the time of fixation of tariff subject to the condition that the environmental standards as prescribed have been complied with during the previous tariff period."

CERC Tariff Regulations, 2004

"38.(ii) ***Depreciation, including Advance Against Depreciation***

(a) ***Depreciation***

For the purpose of tariff, depreciation shall be computed in the following manner, namely:

(i) The value base for the purpose of depreciation shall be the historical cost of the asset.

(ii) Depreciation shall be calculated annually based on straight line method over the useful life of the asset and at the rates prescribed in Appendix II to these regulations.

The residual life of the asset shall be considered as 10% and depreciation shall be allowed up to maximum of 90% of the historical capital cost of the asset. Land is not a depreciable asset and its cost shall be excluded from the capital cost while computing 90% of the historical cost of the asset. The historical capital cost of the asset shall include additional capitalisation on account of Foreign Exchange Rate Variation up to 31.3.2004 already allowed by the Central Government/ Commission.

(iii) On repayment of entire loan, the remaining depreciable value shall be spread over the balance useful life of the asset.

(iv) Depreciation shall be chargeable from the first year of operation. In case of operation of the asset for part of the year, depreciation shall be charged on pro rata basis."

(b) ***Advance Against Depreciation***

In addition to allowable depreciation, the generating company shall be entitled to Advance Against Depreciation, computed in the manner given hereunder:

AAD = Loan repayment amount as per regulation 38 (i) subject to a ceiling of 1/10th of loan amount as per regulation 36 minus depreciation as per schedule

Provided that Advance Against Depreciation shall be permitted only if the cumulative repayment up to a particular year exceeds the cumulative depreciation up to that year;

Provided further that Advance Against Depreciation in a year shall be restricted to the extent of difference between cumulative repayment and cumulative depreciation up to that year.

i) The concept of Advance Against Depreciation has been discontinued since 1.4.2009.

j) The Commission in the exercise of its powers conferred under Section 178 of the Electricity Act, 2003 and all other powers enabling it in this behalf, has notified the tariff regulations specifying terms & conditions of tariff determination for the different control periods viz. 2001-04, 2004-09, 2009-14, 2014-19 & 2019-24. The tariff orders for the different control periods up to 2014-19 had been notified by the Commission in respect of NHPC Power Stations based on the above tariff regulations. Accordingly, the energy bills for the above-mentioned periods had been raised by the Petitioner to beneficiaries of its Power Stations as per the provisions of relevant regulations & tariff orders from time to time. Similarly, tax on income has also been recovered from the beneficiaries as applicable for the relevant year.

Notification of Central Government for Fixation of Tariff for Supply of Electricity.

3. The Central Government, in 1997, had devised a mechanism to help power generating companies to raise funds to meet loan repayments in time. On 23.05.1997, Central Government issued its tariff fixation notification under section 43-A of the Electricity (Supply) Act, 1948 where under it, for the first time, permitted power generating companies to collect an amount in advance in the years in which the normal depreciation (90% of the original cost of the Plant spread equally over the useful life of Plant) otherwise allowed to be recovered was not sufficient to meet loan repayment schedule (capped at 1/12th of the original loan) and called it "Advance against Depreciation".

4. In other words, once the loan is fully repaid, the advance so collected would get reduced/ adjusted from the normal depreciation allowable to be included in the tariff of

such later years, and, such reduced depreciation would be included in the tariff, in turn lowering future tariff.

The opinion of ICAI with regard to accounting treatment.

5. Being unclear as to how to account for such an advance in the books of accounts, the Company, in 1997, wrote to the "Expert Advisory Committee of the Institute of Chartered Accountants of India (hereinafter referred to as "committee") for its opinion. The committee, vide its letter dated March 17, 1998, confirmed that such an advance must be reduced from the sales owing to its nature as an advance and clarified that the same should be reflected in the balance sheet as a separate line item appearing between 'Unsecured Loans' and 'Current Liabilities and Provisions'. The opinion is as follows:

> *"The committee is of the view that the advance against depreciation is allowed with the objective of enabling the electricity company to recover depreciation higher than that as would be allowed as per the rates of depreciation applicable as notified by the Central Government from time to time for the purposes of fixation of electricity tariff so that the company, may be able to generate internal resources for the payment of loans. The Committee further notes from the facts of the query that this advance against depreciation will be adjusted in the later years when the depreciation at the rates fixed for tariff purposes exceed the advance against depreciation, in other words, the advance against depreciation is basically a timing difference.*
>
> *The committee notes that as per the accrual basis of accounting "revenue is recognized as it is earned" [Para 2.5(i) of the Guidance Note on Accrual Basis of Accounting, issued by the Institute of Chartered Accountants of India]. The Committee further notes that where revenue, or a part thereof, received / receivable, during a particular period, is to be adjusted in future, to that extent the revenue received / receivable is not considered as earned, but is treated as revenue received in advance. The Committee is accordingly, of the view that in the present case that part of the tariff which arises because of inclusion of advance against depreciation, should be treated as revenue received in advance since the said advance will be adjusted in later years against the depreciation.*
>
> *On the basis of the above, subject to the presumption stated in para 3 above, the Committee is of the opinion that advance against depreciation may be shown as a deduction from the sale of power as suggested by the querist in para 7 of the query. It should not be shown as a capital reserve but as the income received in advance in the balance sheet".*

6. The advisory committee of the apex Accounting Body of the country concurred with the Petitioner's view that AAD is an advance only.

7. As per Govt. of India notification dated 26.5.1997, applicable for the period 1.4.1997 to 31.3.2001, CERC tariff notification dated 25.3.2001 for tariff period 1.4.2001 to 31.3.2004 and CERC tariff notification dated 25-3-2004 for the tariff period 1.4.2004 to 31.3.2009 read with project-specific tariff fixation notification the total of depreciation

including advance against depreciation to be charged/ collected through tariff is not to exceed 90% of the approved capital cost during the life of the project and the advance against depreciation for any particular year shall not exceed 1/12th / 1/10th of the loan amount limited to actual loan liability of the year less depreciation recovered through tariff. Since Advance against Depreciation is given for repayment of loans, the tariff notification permits recovery of a higher amount in the initial years of the project while in the subsequent years i.e. on repayment of loan, the tariff gets reduced to provide credit for advance already received.

8. The normal income (excluding the amount received as Advance against Depreciation) U/s 28(1) of the Income Tax Act, 1961 of the company was determined on the basis of opinion from the Expert Advisory Committee of the Institute of Chartered Accountants of India (ICAI) which inter-alia stated that Advance against depreciation may be shown as a deduction from the sale of power and carried over to the Balance Sheet as income received in advance.

9. From AY 2001-02, Section 115JB was inserted in the Income Tax Act, 1961 by the Finance Act, 2000 and generating companies came in the purview of MAT u/s 115JB. An opinion was obtained from M/s Price Waterhouse & Co. (PWC), a leading Chartered Accountants firm and it was opined by M/s PWC that Advance against Depreciation should not be considered while calculating book profit for MAT purposes and should also not be considered for computation of regular income u/s 28(1) of the Income Tax Act, 1961.

10. As an abundant precaution, the Petitioner filed an application u/s 245Q of the Income Tax Act,1961, before the Hon'ble Authority for Advance Ruling (AAR) to get an advance ruling regarding the taxability of advance against depreciation. The AAR, vide it order dt.19th January 2005 ruled that the amount of advance against depreciation is to be included in the computation of book profit under section 115JB of the Income Tax Act in the year of receipt.

11. Since the AAR had not given any ruling regarding the treatment of Advance against Depreciation while calculating normal income under Section 28(1) of the Income Tax Act, 1961, NHPC filed a Special Leave Petition before the Hon'ble Supreme Court of India against the order of the Authority for Advance Ruling.

12. Based on the submission before the Hon'ble Supreme Court, the Court decided the issue of Advance against Depreciation in favour of the assessee vide order dt.05.01.2010. The relevant portion of the order of the Hon'ble Supreme Court (para 11 of the order) is as follows:

"Since the amount of AAD is reduced from sales, there is no debit in the profit and loss account. The amount did not enter the stream of income for the purposes of determination of net profit at all, hence clause (b) of Explanation-I was not applicable. Further, "reserve" as contemplated by clause (b) of the Explanation-I to Section 115JB of the 1961 Act is required to be carried through the profit and loss account. At this stage it may be stated that there are broadly two types of reserves, viz, those that are routed through profit and loss account and those which are not carried viz profit and loss account, for example, a Capital Reserve such as Share Premium Account. AAD is not a reserve. It is not appropriation of profits. AAD is not meant for an uncertain purpose. AAD is an amount that is under obligation, right from the inception, to get adjusted in the future, hence, cannot be designated as a reserve. AAD is nothing but an adjustment by reducing the normal depreciation includible in the future years in such a manner that at the end of useful life of the plant (which is normally 30 years) the same would be reduced to nil. Therefore, the assessee cannot use the AAD for any other purpose (which is possible in the case of a reserve) except to adjust the same against future depreciation so as to reduce the tariff in the future years. As stated above, at the end of the life of the Plant AAD will be reduced to nil. In fact, Schedule-XII-A to the balance sheet for the financial years 2004-05 onwards indicates recouping. In our view, AAD is "income received in advance". It is a timing difference. It represents adjustment in future which is in built in the mechanism notified on 26.05.1997. This adjustment may take place over a long period of time. Hence, we are of the view that AAD is not a reserve.

For the aforestated reasons, we hold that AAD is a timing difference, it is not a reserve, it is not carried through profit and loss account and that it is "income received in advance" subject to adjustment in future and, therefore, clause (b) of Explanation – I to Section 115JB is not applicable. Accordingly, the impugned ruling is set aside and the civil appeal filed by the assessee stands allowed with no order as to costs."

The above judgement of the Hon'ble Supreme Court settled the following aspects in respect of AAD:

- AAD is income received in advance.
- It is a timing difference
- It represents an adjustment in future, which is built in the mechanism notified on 26.5.1997 by Central Government.

13. Though the issue before the AAR and the Hon'ble Supreme Court was regarding the taxability of AAD under section 115JB of the Income tax Act, the judgement of the Hon'ble Supreme Court is based on the facts of the basis of the amount received by the assessee towards AAD ,its accounting treatment in the books as per the guidelines given by the ICAI and conclusion that AAD is income received in advance and not a reserve, therefore

the Hon'ble Supreme Court judgment is applicable for taxability of AAD under normal income tax under section 28.

14. The stand of the Assessing Officer in respect of the taxability of AAD under the Normal provision of the Income Tax Act, 1961 did not change, and all the income tax assessments i.e. from FY 2000-01 to FY 2008-09, have been done with the conclusion that the decision of Hon'ble Supreme Court is not for the purpose of computation of income under Normal Provision of Income Tax Act and accordingly, Assessing Officer added the AAD to the income computed under Normal Provision of the Act. However, all the appellate authorities including the Hon'ble Punjab and Haryana High Court, dismissed the view of the Assessing Officer and allowed the issue in favour of NHPC Limited for all the years.

15. In view of the favourable judgment on the issue of Advance against Depreciation, the tax on such AAD was not recovered from the beneficiaries and the Petitioner NHPC Limited was required to pay income tax on AAD being reversed and getting included in the sales. Due to the change in the recovery method of income tax clause in Tariff Regulation from 1.4.2009 onwards, NHPC could not recover the tax paid due to reversal of AAD, which was, in fact, deducted from the sales in the year of receipt and benefit thereof was also passed on to the beneficiaries. From the tariff period 1.4.2009 onwards any addition in the taxable income of NHPC due to AAD recovery has no effect on the applicable rate/effective rate of tax, which is used for grossing up of ROE, so actual tax paid on AAD reversal could not be recovered from the beneficiaries due to no change in the applicable rate of tax/effective rate of tax of these particular years.

16. Refund of income tax under MAT due to AAD relating to the period up to 31.03.2009 has been passed on the beneficiaries by NHPC Limited from time to time, but due to the issue of AAD under normal computation pending with the Hon'ble Punjab and Haryana High Court, NHPC has not made any adjustment in the accounts like MAT Credit etc. which arose after the order of Hon'ble High Court. Simultaneously, NHPC has not been claiming tax which was paid for adjustment of AAD in books of accounts since 1.4.2009 as it was deemed fit that the above recovery of income tax for adjustment of AAD ought to be made after the issue is finally decided by the Court.

17. During the signing of the reconciliation statement the pending issue of Income Tax with different Appellate Authority [including the Hon'ble Supreme Court] with the Income Tax Department under the Vivaad Se Vishwas Act' 2020, it was noticed that Income Tax Department have not filed any appeal against the order of Hon'ble Punjab and Haryana High Court which had earlier decided in favour of NHPC Limited on the issue of

adjustment of AAD under computation of taxable income under normal provision of income tax.

18. In view of the above, it has now been concluded that since the issue of AAD under the Normal Provision of Income Tax Act has been finally settled, and it involves no further development so far as the issue of MAT Credit, refund of Income Tax etc. are concerned, so NHPC needs to recover the income tax, which has been paid by NHPC since FY 2009-10 on account of reversal of AAD. The year wise write back of AAD and income tax details from FY 2009-10 to FY 2021-22 is as follows: -

Year	AAD Amount (Rs crore)	MAT Rate	Tax amount before grossing-up (Rs crore)
2009-10	29.84	16.995%	5.07
2010-11	47.16	19.930%	9.40
2011-12	47.16	20.010%	9.44
2012-13	50.17	20.010%	10.04
2013-14	50.17	20.961%	10.52
2014-15	50.17	20.961%	10.52
2015-16	50.17	21.342%	10.71
2016-17	60.68	21.342%	12.95
2017-18	60.68	21.342%	12.95
2018-19	60.72	21.549%	13.08
2019-20	44.72	17.472%	7.81
2020-21	48.38	17.472%	8.45
2021-22	48.25	17.472%	8.43
Total	**648.28**		**129.37**

19. The Petitioner has also submitted power station-wise and year-wise details of AAD reversed and has also submitted relevant extracts from their annual accounts of the relevant financial years starting from FY 2008-09 to FY 2021-22.

20. Due to a change in the recovery method of Income tax in the Tariff Regulation from the 2009-14 tariff period onwards i.e. grossing up of the ROE with applicable/effective tax rate, the AAD reversal w.e.f.1.4.2009 is not impacting the Applicable Tax Rate [for Tariff period 2009-14] and for Effective Tax Rate [from Tariff period 2014-19 onwards] as can be seen from the following Illustration:

Particulars	Computation of Effective Tax Rate with AAD	Computation of Effective Tax Rate without AAD
INCOME		
1. Sales	100	100
2. Other Income	25	25

3. AAD – written back during the year	5	
4. Total Income [1+2+3]	**130**	**125**
EXPENSES		
5. Generation Exp	20	20
6. Employee Cost	20	20
7. Depreciation	10	10
8. Finance Cost	10	10
9. Other Expenses	5	5
10. Total Expenses [5+6+7+8+9]	**65**	**65**
11. Profit Before Tax [4-10] [Assumed as Taxable Income for the year]	**65**	**60**
12. Tax @ 20% [assumed tax rate] on PBT [i.e. 20% on sl.no. 11]	**13**	**12**
13. Effective Tax [12/11 * 100]	**20%**	**20%**

From the above illustration, it can be seen that in spite of the increase in taxable income in respect of FY 2009-10 onwards on account of the reversal of the amount of AAD in that year, there is no change in the applicable/effective tax rate. This is due to the fact of proportionate change in the amount of tax payable vis-à-vis the amount of Profit Before Tax [i.e. Taxable Income]. As such, no tax could be recovered from the beneficiaries on account of the reversal of AAD (in FY 2009-10 onwards), whereas the benefit of lower tax has already been passed by NHPC Limited to the beneficiaries before 31.03.2009 by reducing the amount of AAD from the taxable Income.

The Detail of date wise event in r/o Advance Against Depreciation [AAD]

<table>
<tr><th>Sl. No.</th><th>Date</th><th>Particulars</th></tr>
<tr><td>1.</td><td>05.01.2010</td><td>The Hon’ble Supreme Court of India has decided the issue of taxability of Advance Against Depreciation under 115JB (MAT) in favour of the assessee. However, it is pertinent to note that Hon’ble Supreme Court of India has given its judgement on the merit of the case including treatment given by NHPC in the Books of Accounts regarding amount received as “Advance Against Depreciation”. Therefore, the above judgment also holds good for taxability of ‘Advance Against Depreciation’ under Normal Provisions. Despite of Hon’ble Supreme Court Order ibid, The Assessing Officer continuously added the amount of Advance Against Depreciation’ under Normal Provisions.</td></tr>
<tr><td>Detail of order passed by different Appellate Authorities</td><td colspan="2"><table>
<tr><th>Sl. No</th><th>Assessment Year</th><th>Order u/s 143(3)</th><th>CIT (A), Faridabad Order dated</th><th>ITAT, Delhi Order dated</th><th>Hon’ble High Court, Punjab & Haryana order dated</th></tr>
<tr><td>1.</td><td>2001-02</td><td>12.03.2004</td><td>05.04.2010</td><td>30.09.2014</td><td>14.02.2018</td></tr>
<tr><td>2.</td><td>2004-05</td><td>29.12.2006</td><td>18.06.2010</td><td>04.02.2015</td><td>28.02.2018</td></tr>
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<tr><th>Sl. No.</th><th>Date</th><th>Particulars</th></tr>
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<tr><td>3.</td><td>2005-06</td><td>27.12.2007</td><td>28.05.2008</td><td>30.09.2014</td><td>21.03.2018</td></tr>
<tr><td>4.</td><td>2006-07</td><td>30.12.2008</td><td>03.03.2009</td><td>17.10.2014</td><td>21.03.2018</td></tr>
<tr><td>5.</td><td>2007-08</td><td>11.12.2009</td><td>29.04.2010</td><td>30.09.2014</td><td>28.02.2018</td></tr>
<tr><td>6.</td><td>2008-09</td><td>27.12.2010</td><td>02.01.2012</td><td>17.10.2014</td><td>28.02.2018</td></tr>
<tr><td>7.</td><td>2009-10</td><td>30.12.2011</td><td>29.01.2012</td><td>26.08.2015</td><td>28.02.2018</td></tr>
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</td></tr>
<tr><td>2.</td><td>14.02.2018</td><td>The Hon’ble High Court of Punjab and Haryana has decided in the issue of taxability of ‘Advance Against Depreciation’ under Normal Provision of Income Tax Act in favour of NHPC Limited for AY 2001-02.</td></tr>
<tr><td>3.</td><td>28.02.2018</td><td>The Hon’ble High Court of Punjab and Haryana has decided in the issue of taxability of ‘Advance Against Depreciation’ under Normal Provision of Income Tax Act in favour of NHPC Limited for AY 2004-05, AY 2007-08, AY 2008-09 and AY 2009-10.</td></tr>
<tr><td>4.</td><td>21.03.2018</td><td>The Hon’ble High Court of Punjab and Haryana has decided in the issue of taxability of ‘Advance Against Depreciation’ under Normal Provision of Income Tax Act in favour of NHPC Ltd for AY 2005-06 & AY 2006-07</td></tr>
<tr><td>5.</td><td>03.03.2020</td><td>Joint Reconciliation Statement regarding amount payable/refundable and cases pending with different appellate authorities, signed between Income Tax Department, Faridabad and NHPC Limited under The Direct Tax Vivaad se Viswas Act’ 2020.</td></tr>
<tr><td>6.</td><td>27.01.2021</td><td>Order for full and final settlement of Tax arrears under the Direct Tax Vivaad se Vishwas Act, 2020 has been issued by the Income Tax Department. After receiving of order of full and final settlement under the Direct Tax Vivaad se Vishwas Act, 2020 from the Income Tax Department, it has been learnt that the Income Tax Department has not gone to appeal in Hon’ble Supreme Court in respect of appeals, which have been decided by the Hon’ble High Court of Punjab and Haryana [Sl No. 2 to 4 as above] in favour of NHPC Limited on the issue of Advance Against Depreciation.</td></tr>
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21. The various provisions of CERC Tariff Regulations on ‘tax on income’ & ‘deferred tax’ is submitted as follows

a. <u>CERC Tariff Regulations, 2001:</u>

“3.7 <u>Tax on Income</u>

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 the 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 also be given in an equitable manner for all stations.
(v) The tax allocated to stations shall be charged to the beneficiaries on the same proportions as annual fixed costs."

b. CERC Tariff Regulations, 2004:

Regulation 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."

c. CERC Tariff Regulations, 2009:

15. Return on Equity. *(1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 12.*
(2) Return on equity shall be computed on pre-tax basis at the base rate of 15.5% to be grossed up as per clause (3) of this regulation:
Provided that in case of projects commissioned on or after 1st April, 2009, an additional return of 0.5% shall be allowed if such projects are completed within the timeline specified in Appendix-II:
Provided further that the additional return of 0.5% shall not be admissible if the project is not completed within the timeline specified above for reasons whatsoever.
(3) The rate of return on equity shall be computed by grossing up the base rate with the normal tax rate for the year 2008-09 applicable to the concerned generating company or the transmission licensee, as the case may be:

Provided that return on equity with respect to the actual tax rate applicable to the generating company or the transmission licensee, as the case may be, in line with the provisions of the relevant Finance Acts of the respective year during the tariff period shall be trued up separately for each year of the tariff period along with the tariff petition filed for the next tariff period.

(4) Rate of return on equity shall be rounded off to three decimal points and be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate / (1-t)

Where t is the applicable tax rate in accordance with clause (3) of this regulation.

Illustration. -

In case of the generating company or the transmission licensee paying Minimum Alternate Tax (MAT) @ 11.33% including surcharge and cess:

Rate of return on equity = 15.50/ (1-0.1133) = 17.481%

In case of generating company or the transmission licensee paying normal corporate tax @ 33.99% including surcharge and cess:

Rate of return on equity = 15.50/ (1-0.3399) = 23.481%

"39. Tax on Income. Tax on the income streams of the generating company or the transmission licensee, as the case may be, shall not be recovered from the beneficiaries, or the long-term transmission customers, as the case may be:

Provided that the deferred tax liability, excluding Fringe Benefit Tax, for the period up to 31st March, 2009 whenever it materializes, shall be recoverable directly from the beneficiaries and the long-term customers:"

d. <u>CERC Tariff Regulations, 2014:</u>

"25. Tax on Return on Equity:

(1) The base rate of return on equity as allowed by the Commission under Regulation 24 shall be grossed up with the effective tax rate of the respective financial year. For this purpose, the effective tax rate shall be considered on the basis of actual tax paid in the respect of the financial year in line with the provisions of the relevant Finance Acts by the concerned generating company or the transmission licensee, as the case may be. The actual tax on income from other business streams including deferred tax liability (i.e. income on business other than business of generation or transmission, as the case may be) shall not be considered for the calculation of effective tax rate.

(2) Rate of return on equity shall be rounded off to three decimal places and shall be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate / (1-t)

Where "t" is the effective tax rate in accordance with Clause (1) of this regulation and shall be calculated at the beginning of every financial year based on the estimated profit and tax to be paid estimated in line with the provisions of the relevant Finance Act applicable for that financial year to the company on pro-rata basis by excluding the income of non-generation or non-transmission business, as the case may be, and the corresponding tax thereon. In case of generating company or transmission licensee paying Minimum Alternate Tax (MAT), "t" shall be considered as MAT rate including surcharge and cess.

Illustration. -

In case of the generating company or the transmission licensee paying Minimum Alternate Tax (MAT) @ 20.96% including surcharge and cess:

Rate of return on equity = 15.50/ (1-0.2096) = 19.610%

In case of generating company or the transmission licensee paying normal corporate tax including surcharge and cess:

(a) Estimated Gross Income from generation or transmission business for FY 2014-15 is Rs 1000 crore.

(b) Estimated Advance Tax for the year on above is Rs 240 crore.

(c) Effective Tax Rate for the year 2014-15 = Rs 240 Crore/Rs 1000 Crore = 24%

(d) Rate of return on equity = 15.50/ (1-0.24) = 20.395%

(3) The generating company or the transmission licensee, as the case may be, shall true up the grossed-up rate of return on equity at the end of every financial year based on actual tax paid together with any additional tax demand including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities pertaining to the tariff period 2014-15 to 2018-19 on actual gross income of any financial year. However, penalty, if any, arising on account of delay in deposit or short deposit of tax amount shall not be claimed by the generating company or the transmission licensee as the case may be. Any under-recovery or over-recovery of grossed up rate on return on equity after truing up, shall be recovered or refunded to beneficiaries or the long-term transmission customers/DICs as the case may be on year to year basis.

"49. Deferred Tax liability with respect to previous tariff period:

"The deferred tax liability before 1.4.2009 shall be recovered from the beneficiaries or the long-term transmission customers/DICs as the case may be, as and when the same gets materialised. No claim on account of deferred tax liability arising from 1.4.2009 up to 31.03.2014 shall be made from the beneficiaries or the long-term transmission customers/DICs as the case may be."

e. CERC Tariff Regulations, 2019:

***31. Tax on Return on Equity**. (1) The base rate of return on equity as allowed by the Commission under Regulation 30 of these regulations shall be grossed up with the effective tax rate of the respective financial year. For this purpose, the effective tax rate shall be considered on the basis of actual tax paid in respect of the financial year in line with the provisions of the relevant Finance Acts by the concerned generating company or the transmission licensee, as the case may be. The actual tax paid on income from other businesses including deferred tax liability (i.e. income from business other than business of generation or transmission, as the case may be) shall be excluded for the calculation of effective tax rate.*

(2) Rate of return on equity shall be rounded off to three decimal places and shall be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate / (1-t)

Where "t" is the effective tax rate in accordance with clause (1) of this Regulation and shall be calculated at the beginning of every financial year based on the estimated profit and tax to be paid estimated in line with the provisions of the relevant Finance Act applicable for that financial year to the company on pro-rata basis by excluding the income of non-generation or non-transmission business, as the case may be, and the corresponding tax thereon. In case of generating company or transmission licensee paying Minimum Alternate Tax (MAT), "t" shall be considered as MAT rate including surcharge and cess.

Illustration-

In case of a generating company or a transmission licensee paying Minimum Alternate Tax (MAT) @ 21.55% including surcharge and cess:

Rate of return on equity = 15.50/ (1-0.2155) = 19.758%

In case of a generating company or a transmission licensee paying normal corporate tax including surcharge and cess:

(a) Estimated Gross Income from generation or transmission business for FY 2019-20 is Rs 1,000 crore;

(b) Estimated Advance Tax for the year on above is Rs 240 crore;
(c) Effective Tax Rate for the year 2019-20 = Rs 240 Crore/Rs 1000 Crore = 24%;
(d) Rate of return on equity = 15.50/ (1-0.24) = 20.395%.
(3) The generating company or the transmission licensee, as the case may be, shall true up the grossed-up rate of return on equity at the end of every financial year based on actual tax paid together with any additional tax demand including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities pertaining to the tariff period 2019-24 on actual gross income of any financial year. However, penalty, if any, arising on account of delay in deposit or short deposit of tax amount shall not be claimed by the generating company or the transmission licensee, as the case may be. Any under-recovery or over-recovery of grossed up rate on return on equity after truing up, shall be recovered or refunded to beneficiaries or the long-term customers, as the case may be, on year to year basis.

"67. Deferred Tax liability with respect to previous tariff period:

"Deferred tax liabilities for the period up to 31st March, 2009 whenever they materialise shall be recoverable directly by the generating companies or transmission licensees from the then beneficiaries or long-term customers, as the case may be. Deferred tax liabilities for the period arising from 1.4.2009 to 31.3.2014 if any, shall not be recoverable from the beneficiaries or the long-term customers, as the case may be."

22. During the Tariff period 2004-09, the actual tax liability on the core business of the generating companies was being recovered from the beneficiaries through sales, while from the tariff period 2009-14 onwards, the method of recovery of income tax was changed and new method of grossing up of the rate of ROE with applicable tax/effective tax rate was introduced i.e. beneficiaries were not liable to pay the actual income tax on the generating income tax streams and the liability of the beneficiaries was only limited to paying a rate of return on equity grossed up with the applicable/ effective tax rate.

23. Further, the deferred tax up to 31.3.2009, which would reverse in future in the shape of additional income tax liability to the generator was also allowed by CERC. Therefore, the intention of the CERC Tariff Regulations was to allow a tax on income pertaining to the period prior to 31.3.2009; however, tax on deferred income such as AAD was not incorporated in the relevant tariff regulations after 1.4.2009 which has resulted in angularities in the tariff regulations and hence called for rectification through exercising the power vested with the Hon'ble Commission through 'Power to Relax' and 'Power to Remove Difficulties".

24. The Petitioner submits that the Income tax being claimed by NHPC from FY 2009-10, pertains to Advance against Depreciation collected up to 31.3.2009 and is due to write back of AAD after 1.4.2009 only and is a legitimate expense of the generating company related to the tariff. There are angularities in the CERC tariff regulations wherein the deferred tax is incorporated in the tariff regulations even after 31.3.2009, but a tax on

deferred revenue pertaining to the tariff period up to 31.3.2009 was not incorporated in the tariff regulations after 31.3.2009.

25. The Petitioner submits that they may be allowed the recovery of taxes from the beneficiaries in proportion to their capacity share in the respective power station as on 31.3.2009.

Submission by Respondent No.7 Uttar Pradesh Power Corporation Ltd. (UPPCL)

26. The Petitioner was allowed Advance Against Depreciation by the Central Government by Notification NO. S.O. 410 (E) dated 23.05.1997. The Institute of Chartered Accountants of India (ICAI) opined on how to account for AAD in the books, recommending it be treated as 'revenue received in advance'. The Central Electricity Regulatory Commission (CERC) also allowed AAD in its tariff regulations till the tariff period 31.03.2009.

27. The Petitioner came under the preview of MAT from the assessment year 2001-02 under Section 115JB of the Income Tax, 1961. Price Water House & Co. advised that AAD should not be considered for MAT calculations. The Petitioner sought a ruling from the Authority of Advance Ruling (AAR). The AAR, in its Order dated 19.01.2005, ruled that AAD is to be included for the computation of book profit under Section 115 JB of the Income Tax Act, 1961.

28. The Hon'ble Supreme Court overturned the AAR ruling, stating that AAD is not a reserve and is to be treated as income received in advance. Despite the Hon'ble Supreme Court order, the assessing officer added AAD to the income under the normal provision of the Act,1961. However, all appellate authorities and the High Court of Punjab & Haryana ruled in favour of the Petitioner.

29. The High Court decided in favour of the Petitioner for various assessment years, stating that AAD should not be included in the computation of normal income. The Petitioner received refunds related to AAD up to March 31, 2009, which were passed on to beneficiaries.

30. Considering the advice of ICAI, Price Water House, the Hon'ble Supreme Court's judgment, and the Hon'ble High Court rulings, it is established that AAD should not be accounted for with normal income for tax purposes in the year it is received. Instead, it should be counted as income and taxed in the year it is reversed.

31. CERC introduced Tariff Regulations for different control periods, stating that beneficiaries are liable to reimburse tax paid by the generating company on Return on Equity (ROE) grossed up by applicable MAT rate. The Petitioner is entitled to recover income tax on grossed-up ROE since April 1, 2009. The tax on other income streams,

including depreciation and AAD reversal, is to be borne by the Petitioner. Since 1.4.2009, on reversal of AAD, it becomes a case of normal depreciation in the relevant year(s) similar to a generating commissioned on or after 1.4.2009 onwards, wherein all elements of income, including depreciation, would be reflected together and accounted for tax purpose.

32. Prior to the period the Central Commission was in existence, the tariff was regulated as per the provisions of the Electricity (Supply) Act,1948, whereby the Central Government vide notification dated 23.5.1997 allowed Advance against Depreciation from the future year(s) for making repayment of the loan in case the depreciation in any year(s) falls short of full repayment AD. This notification was in effect till CERC Tariff Regulations came into effect on 1.4.2021, wherein similar provisions for AAD were allowed. Subsequently, the CERC Tariff regulations also continued the AAD provisions until 31.3.2009.

33. Since April 1, 2009, the generating companies could not take an advance against depreciation for repayment of the loan, so the reversal of AAD is an accounting matter. It must be included in income along with normal depreciation for tax purposes, as it wasn't considered in the year of receipt. Therefore, the Petitioner is liable for income tax on AAD reversal.

34. The Respondent's stance is that AAD is an "advance income" for loan repayment. It is not taxed in the year of receipt but must be accounted for upon reversal. Up to 30.3.2009, the beneficiaries reimbursed income tax paid by the Petitioner since the CERC regulations required it to do so. However, w.e.f.1.42009, the CERC regulations has made the beneficiaries liable to reimburse the income tax paid by the Petitioner on ROE grossed by effective MAT rate.

35. There is no provision in the CERC Tariff Regulations 2009, 2014, and 2019 which calls upon the beneficiary to pay income tax arising from the reversal of AAD.

36. In summary, the Respondent is liable to reimburse income tax paid by the Petitioner on grossed-up ROE only and has no liability to pay any tax on AAD because it was an advance taken by the Petitioner for repayment of the loan and the same was not considered in normal income in that year for the purpose of income. The Petitioner is responsible for paying income tax on the reversal of AAD in the relevant future year with effect from 1.4.2009.

Hearing dated 13.4.2023

37. The Petition was listed for hearing on admission on 13.4.2023, and the Commission, after hearing the learned counsel for the Petitioner, admitted the Petition and ordered notice on the Respondents.

Rejoinder of NHPC in respect of submissions made by UPPCL

38. The Petitioner clarified that Advance Against Depreciation (AAD) was received as a component of tariff in the initial years of operation of a power station to facilitate repayment of loans in respect of that power station until FY 2008-09, but CERC removed this concept of AAD from the Tariff Regulations starting from 2009-14 onwards.

39. As of 31.3.2009, the Advance Against Depreciation (AAD) recorded in NHPC's books is being systematically reversed from FY 2009-10 onwards. This process applies specifically to Power Stations that have received AAD and have subsequently completed 12 years of life.

40. Due to a change in the income tax recovery method in the 2009-14 Tariff from 1.4.2009 onwards, the Petitioner could not recover the tax paid due to the reversal of Advance Against Depreciation (AAD), because in the new tariff regulation, only the tax on Return on Equity (ROE), after grossing-up, was allowed. In the year of receipt, the AAD amount was initially deducted from the sales amount, ultimately benefiting the beneficiaries with a lower tax recovery compared to what would have been achievable if AAD had been considered as income in that year. Respondent No.-7 UPPCL has acknowledged this factual situation.

41. During the tariff period 2004-09 onwards, any increase in the Petitioner's taxable income resulting from the recovery of Advance Against Depreciation (AAD) has not affected the applicable or effective tax rate used for grossing up Return on Equity (ROE). So, despite the rise in taxable income due to AAD recovery, the actual tax paid on AAD reversal could not be recovered from the beneficiaries since there was no change in the applicable or effective tax rate for those specific years.

42. The Petitioner has refunded the income tax under MAT due to Advance Against Depreciation (AAD) up to March 31, 2009, to the beneficiaries from time to time after receipt of the refund amount, but since the issue of AAD under normal computation was pending with the Hon'ble Punjab and Haryana High Court, the Petitioner did not make any adjustment in the MAT credit account. Further, the Petitioner did not claim any tax from the beneficiaries in respect of tax paid due to adding back of the AAD since 1.4.2009 as they felt that such recovery should only be made once the issue is finally decided in the Hon'ble Punjab and Haryana High Court.

43. In the reconciliation process under the 'Vivaad Se Vishwas Act' of 2020, it was noted that the Income Tax department had not appealed against the order of the Hon'ble Punjab and Haryana High Court concerning the adjustment of AAD in the computation of taxable income under normal provisions of income tax. Consequently, the issue of AAD under normal provisions of the Income Tax Act was considered resolved, and there will be no further developments regarding MAT Credit, income tax refunds, and related matters.

44. The contention put forth by the Beneficiary, claiming that Advance Against Depreciation (AAD) is a form of advance income designated specifically for loan repayment when yearly depreciation falls short; therefore, income tax on AAD reversal is not applicable, is deemed untenable. This matter regarding the nature of AAD as "advance income" has already been conclusively settled by the Hon'ble Supreme Court in the Petitioner's case on January 5, 2010, and further affirmed by the Punjab & Haryana High Court against the Revenue's appeal in orders dated February 14, 2018, February 28, 2018, and March 21, 2018. Prior to the Hon'ble Supreme Court's judgment, AAD was treated as taxable income, and all the Generating and Transmission Companies, except the Petitioner, had paid taxes on AAD and subsequently recovered the same from the Beneficiaries.

45. The Petitioner has persistently contested this issue with the Income Tax Department, which imposed a tax on AAD to safeguard the interests of the Respondent. It is noteworthy that had those appeals been decided in favour of the Income Tax Department, the Respondent would have been liable to pay the tax on AAD in those respective years itself. Consequently, the deferment of tax payment on AAD during that period benefited the Respondent exclusively, and therefore, they are now liable to pay this tax, which they would have been liable to pay in those years.

46. The Respondent's attempt to draw parallels with generating stations commissioned on or after 1.4.2009, where all elements of depreciation are accounted together in normal income for tax purposes, overlooks the distinction between projects commissioned before 1.4.2009 and after 1.4.2009. For projects commissioned on or before 1.4.2009, CERC Regulations 2001-04 and 2004-09 apply, mandating the recovery of actual tax payments from the beneficiaries. If any tax liability pertains to a period up to 31.3.2009 but materializes after 1.4.2009, it is termed a 'deferred tax liability,' which can be directly recovered from beneficiaries and long-term customers. This exemption has also been established in subsequent Tariff Regulations, such as Regulation 39 of Tariff Regulations 2009-14, Regulation 49 of Tariff Regulations 2014-19, and Regulation 67 of Tariff

Regulations 2019-2024. Hence the concept of return on equity envisaged in such Regulations shall not be applicable.

47. Moreover, the Respondent has overlooked the fact that depreciation is an integral component of the generation stream of business, rendering tax on AAD a tax on 'generation income' rather than 'other income' earned by the Petitioner. Consequently, the Beneficiary cannot be absolved of their responsibility to pay tax on AAD in accordance with the preceding and current regulations of 2001-04 and 2004-09, merely because the tax liability materialized during a period when subsequent Regulations introduced a new method of tax recovery.

Hearing dated 12.7.2023

48. The Petition was listed for the first hearing on 12.7.2023, and the Commission, after hearing the parties, directed the Petitioner to file the following additional information after serving a copy to the Respondents:

(a) Whether addition in taxable income of the Petitioner on account of reversal of AAD from 1.4.2009 has been considered while computing book profit for MAT (Section 115 JB of the IT Act), which is linked with grossing up of ROE, after 1.4.2009.

(b) Details of the amount of Refund of Income Tax passed on to the beneficiaries due to Advance Against Depreciation (AAD) relating to the period up to 31.3.2009.

(c) Whether tax lability on account of the reversal of AAD has been considered as Deferred Tax Liability in the Balance Sheet.

49. In response, the Petitioner has filed the additional information vide affidavit dt 7.8.2023 after serving a copy on the respondents, and the replies are as follows:

(a) The Petitioner confirms that the reversal of AAD after 1.4.2009 has been considered while computing the book profit for MAT as per Section 115 JB of the Income Tax Act. However, due to a change in the method of recovery of income tax after 1.4.2009, there is no impact on the Effective Tax Rate (albeit under MAT), and hence, the Petitioner has not been able to recover any income tax from the beneficiaries on account of such reversal of AAD.

(b) The Petitioner confirms that they have already refunded the tax amount along with interest amounting to Rs.72,55,34,441/- to the beneficiaries, and the balance amount of Rs.36,23,31,467/- plus interest is in the process of refund due to the Hon'ble Supreme Court Order in Civil Appeal No. 6 of 2010.

(c) The Petitioner confirms that the tax liabilities on account of the reversal of AAD had not been considered in the amount of Deferred tax liability in the balance sheet as on 31.3.2009 or for any year thereafter.

Submission by Respondent No.3 BSES Rajdhani Power Ltd. (BRPL)

50. The Commission discontinued the provision of Advance Against Depreciation (AAD) through its Tariff Regulations in 2009. As such, what has been explicitly discontinued under the current Tariff Regulations cannot be granted to NHPC through the utilization of the “powers to relax” and “power to remove difficulties”.

51. The Order dated 14.10.2009 issued by this Commission in Petition No. 153 of 2009, Paragraph 16, stated, among other things:

> *"...While formulating the 2009 regulations, the Commission done away the provisions for 'in principle' approval of the project capital cost applicable to thermal power generating stations through a conscious decision. Under the circumstances, granting approval to the estimated completion cost for the generating station by relaxing the provisions of the tariff regulations through invoking Regulation 44 may amount to restoring the repealed provision, through back door."*

52. The exercise of the 'Power to Relax' and 'Power to Remove Difficulties' must be exercised in a conditioned and restricted manner, and such exercise of power should not change the basic structure, scheme and essential provisions of the statute. This principle is supported by the judgment of the Hon'ble Supreme Court in M.U. Sinai v. Union of India & Ors., (1975) 3 SCC 765 [Para. 40], and a decision by the Hon'ble Appellate Tribunal for Electricity ("Hon’ble APTEL") in NTPC Ltd. v. Madhya Pradesh State Electricity Board, 2007 ELR APTEL 7 [Para. 22 to 25].

53. NHPC's claim for Advance Against Depreciation (AAD) in the Control Periods governed by the Tariff Regulations of 2009, 2014, and 2019 amounts to an attempt to amend the applicable Tariff Regulations through a petition, which is not permissible as per the precedent set by this Hon’ble Commission, including the Order dated 5.8.2018 passed in Petition No. 215/MP/2018. NHPC did not challenge the Tariff Regulations of 2009, which discontinued the provision for AAD. Similar treatment was continued by the Commission in subsequent Tariff Regulations of 2014 and 2019. Therefore, NHPC cannot now seek recovery of Income Tax paid on AAD, as there are no provisions allowing such recovery from the beneficiaries and their consumers. The reliance on a Hon’ble Supreme Court judgment regarding AAD does not grant NHPC the right to recover additional Income Tax on AAD under the discontinued Tariff Regulations.

54. The Tariff Regulations of 2009 were already in force when the proceedings took place before the Hon’ble Supreme Court in the case of National Hydroelectric Power Corpn. Ltd. v. CIT, (2010) 3 SCC 396, where a judgment was issued on 05.01.2010. However, there was no specific finding or directive regarding the refund of Income Tax on Advance

Against Depreciation (AAD) to NHPC, nor was any submission made by NHPC on this matter that was recorded in the said Judgment. Further, APTEL in Judgement dated 17.10.2022 in Appeal No.s 212 of 2020 and 335 of 2020 stated that :

> *". 22.No doubt, tariff determination is a continuous process. At the same time, however, it has to be borne in mind that tariff is determined by formal orders for specified control periods, Financial Year wise. The tariff determination for a particular control period regulates the affairs of the parties and stakeholders involved for the period to which it is made applicable. A tariff determined on the basis of projections presented by petitions in the nature of Average Revenue Requirement ("ARR") or Annual Performance Period ("APR") is generally followed up by true-up orders based on audited accounts wherein suitable corrections are incorporated. It is with the objective of maintaining regulatory certainty that the law inhibits routine or frequent amendment to the tariff orders, once exception to this general principle being the changes necessary under the terms of fuel surcharge formula [Section 62(4)]. The law qualifies this inhibition by using this expression "ordinarily". The amendments to tariff orders do become necessary in case errors are found in the tariff order upon appellate scrutiny or, as in the case of UPPCL (supra) some other factors supervene e.g. on account of additional expenditure burden (in that case due to wage revision)"*
>
> *".23. The NTPC judgements (dated 22.1.2007 and 13.06.2007) of this tribunal were not in a lis wherein the appellants were involved. It was a matter essentially involving another entity (NTPC). The principles concerning interpretation of Tariff Regulations, 2001 and Tariff Regulations, 2004 were decided by this tribunal which statedly showed the views taken by the Central Commission in the original Tariff Orders dated 23.11.2005, 24.10.2006 and 20.10.2010 to be incorrect. There was no directive of this tribunal, or of any statutory authority, for such orders to be revisited pursuant to the interpretation given by this tribunal in the NTPC judgements. The respondent PGCIL took the matter to the Central commission with a prayer for implementation of the NTPC judgements in its case. This in effect, was a prayer seeking review and not revision of the tariff orders in the general sense of the term. Such prayer couched in the language of seeking implementation of the law settled by the NTPC judgements being essentially a prayer for review, was impermissible given the specific inhibition there-against by the explanation appended to Rule (1) of Order 47 CPC. There is precisely the view taken by this tribunal in judgement reported as Madhya Pradesh Power Trading Co. Ltd vs Central Electricity Regulatory Commission 2009"*

55. NHPC has filed the present petition to request the Commission to use its "Power to Relax" and "Power to Remove Difficulty". NHPC is aware that there is no provision within the existing Tariff Regulations permitting the recovery of additional Income Tax paid on Advance Against Depreciation (AAD). The exercise of these powers by the Hon'ble Commission is a judicial discretion, and it cannot be invoked to grant NHPC's claim, especially when the provision of AAD has been explicitly discontinued in the applicable Tariff Regulations of 2009. As such, what has been expressly discontinued in these

regulations cannot be reinstated for NHPC through the application of 'Power to Relax' and 'Power to Remove Difficulties'. It is settled law that the “Power to Relax” and “Power to Remove Difficulties” must be exercised in a conditioned and restricted manner and such exercise should not change the basic structure, scheme, and essential provisions of the statute. This principle is supported by the judgment of the Hon'ble Supreme Court in M.U. Sinai v. Union of India & Ors., (1975) 3 SCC 765 [Para. 40], and a decision by the Hon'ble Appellate Tribunal for Electricity ("Hon’ble APTEL") in NTPC Ltd. v. Madhya Pradesh State Electricity Board, 2007 ELR APTEL 7 [Para. 22 to 25].

56. In Tata Power Company Limited vs Jharkhand State Electricity Regulatory Commission 2012 SCC Online APTEL 155, has laid down the scope of Power to Relax and Remove Difficulties vested with the Hon’ble Commission as under

".29. The principles relating to the exercise of power of relaxation laid down the above decisions referred to above are as follows:

57. The Regulation gives judicial discretion to the Commissions to relax norms based on the circumstances of the case. Such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation which has to be exercised only in the exceptional case where non-exercise of the discretion would cause hardship and injustice to a party.

i. *If there is a power to relax the regulation, the power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some party and to disfavour some other party.*
ii. *The party who claims relaxation of the norms shall adduce valid reasons to establish to the State Commission that it is a fit case to exercise its power to relax such Regulation. In the absence of valid reasons, the State Commission cannot relax the norms for mere asking. When the state commission has given reasoned order as to why the power for relaxation cannot be exercised, the same order cannot be interfered with by the Appellate Forum.*
iii. *The power of the Appellate Authority cannot be exercised normally for the purpose of substituting one subjective satisfaction with another without there being any specific and valid reasoning for such a substitution*

58. NHPC has failed to satisfy any of the aforesaid conditions laid down by the Hon’ble APTEL to substantiate its prayer for invocation of the Power to Relax and Power to Remove Difficulties.

59. NHPC cannot seek amendment of Tariff Regulations by way of a Petition. NHPC did not challenge the discontinuation of the AAD provision in the Tariff Regulations of 2009, and this same treatment was maintained in the subsequent Tariff Regulations of 2014 and 2019. Consequently, NHPC cannot now seek to claim the Income Tax paid on AAD, as there are no provisions enabling such recovery from beneficiaries and consumers. It

is established that the Commission, during Tariff determination proceedings, is bound by its own Regulations, as affirmed by the Constitution Bench Judgment of the Hon'ble Supreme Court in PTC India Ltd. v. CERC, (2010) 4 SCC 603 [Para. 54, 55, 58 & 92].

60. NHPC has erred in placing reliance on the judgement of the Hon'ble Supreme Court in the case of National Hydroelectric Power Corpn. Ltd. v. CIT, (2010) 3 SCC 396. The said judgement held that AAD is a timing difference, not a reserve, not carried through the Profit and Loss account, and it is income received in advance subject to adjustment in future. The Hon'ble Supreme Court judgement has not conferred any right on NHPC to recover additional income tax on AAD under the Tariff Regulations 2009 or subsequent tariff regulations. The tariff regulations of 2009 were already in force when the proceedings took place before the Hon'ble Supreme Court in the case of National Hydroelectric Power Corpn. Ltd. v. CIT, (2010) 3 SCC 396, where a judgment was issued on 05.01.2010. There was no specific finding or directive regarding the refund of Income Tax on Advance Against Depreciation (AAD) to NHPC, nor was any submission made by NHPC on this matter that was recorded in the said Judgment.

61. In view of the above, it is submitted that the prayers sought by NHPC in the present petition are baseless and untenable and thus liable to be disallowed.

Rejoinder of NHPC in respect of BRPL

62. The Petitioner submits that their claim is not towards recovery of AAD, but only towards tax paid on AAD. Since only AAD was discontinued w.e.f.1.4.2009 onwards, and there was nothing specific regarding the non-allowance of tax paid on AAD, the Petitioner did not challenge the Tariff Regulations 2009, 2014 and 2019. Hence, when the Petitioner is not claiming any AAD per se by the present petition, the judgements relied upon by the respondent regarding restoring the repealed provision through the back door are entirely misplaced and liable to be rejected.

63. In the judgment of the Tata Power case relied upon by the respondent, the Hon'ble APTEL has categorically stated that in exceptional circumstances where non-exercise of discretion would result in hardship and injustice, relaxation can be applied. It is a settled legal principle that tax should be recovered on a 'no-profit no-loss' basis. In this instance, the project was commissioned before 1.4.2009, and all the tax being sought for recovery pertains to that period. Therefore, disallowing the recovery of tax paid for this period would cause undue hardship and injustice to the Petitioner, justifying the invocation of 'Power to Relax' and 'Power to Remove Difficulties'.

64. The respondent's argument that since the Petitioner had not challenged the Tariff Regulations 2009,2014 and 2019 or raised any objections during the public hearing, the

Petitioner cannot wake from its slumber now, the Petitioner reiterates that since their claim is not about the recovery of 'AAD' itself, they had no objections to the discontinuation of 'AAD'. Rather the Petitioner is seeking recovery of tax paid on account of AAD and the Petitioner is raising the claim at this stage since the Petitioner was contesting the income tax issue before different forums for the benefit of the respondents, and it is only now that the Petitioner noticed that the income tax department has not appealed against the decision of the Hon'ble Punjab & Haryana High Court which had decided in favour of the Petitioner, so the issue had attained finality. This prompted the Petitioner to file the present petition. Since the tax paid on AAD did not have any impact on the "effective tax rate", the Petitioner was unable to recover the tax paid on AAD; therefore, they filed the petition, praying before the Hon'ble Commission to utilize its inherent powers, i.e., 'Power to Relax' and 'Power to Remove Difficulties'.

65. The Petitioner submits that Section 61 of the Electricity Act, 2003, mandates the Commission to specify the terms and conditions for tariff determination. This includes the principle of safeguarding consumer interests while ensuring the recovery of the cost of electricity in a reasonable manner, as outlined in Section 61(d) of the Act. The Hon'ble Supreme Court, in the case of BSES Rajdhani Power Ltd. v. DERC, (2023) 4 SCC 388 [Para 44-45], affirmed this position.

66. Further, even if the Regulations do not explicitly provide for a mechanism to allow the recovery of income tax paid on AAD by the Petitioner, it is argued that the Commission's regulatory authority under section 79(1)(a) of the Act is broad enough to allow the same. In this regard, reliance is placed on the case of PTC India Limited v. CERC & Ors.,(2010) 4 SCC 603, wherein the Hon'ble Supreme Court has held that regulatory power can be exercised even when there is no provision in the regulations framed under section 178 of the Act. The relevant extract is being reproduced hereunder:

> *"40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These*

measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178……."

67. The scope and meaning of Power to Regulate is now no more res integra as the Hon'ble Supreme Court held in numerous decisions. The relevant extract of the various decisions is reproduced below:

Energy Watchdog v. CERC & Ors.; (2017) 14 SCC 80: [Para 20]

"20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743: [Para 17.2]

17.2. K. Ramanathan v. State of T.N. [K. Ramanathan v. State of T.N., (1985) 2 SCC 116: 1985 SCC (Cri) 162]: (SCC pp. 130-31, paras 18-19)

19. It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word "regulate" is not synonymous with the word

"prohibit". This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word "regulation" cannot have any inflexible meaning as to exclude "prohibition". It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy."

68. The Hon'ble Commission under Regulation 111 of the CERC (Conduct of Business) Regulations,1999 has inherent powers to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission.

69. The practice of AAD was discontinued from the Tariff Period of 2009 by the Commission, as higher depreciation rates were now equivalent to the previous depreciation rate plus AAD. Therefore, there was no need for the Petitioner to raise objections during the public hearings for Tariff Regulation 2009 and onwards.

70. The present petition is specifically related to the recovery of income tax, borne by the Petitioner from FY 2009-10 onwards. It is entirely unrelated to the inclusion of AAD in the Tariff Regulation of 2004-09. The Petitioner's request is solely for the recovery of income taxes not collected from beneficiaries due to changes in the tax recovery method after 1.4.2009.

71. The tax collected from beneficiaries up to 31.3.2009, was refunded following the Hon'ble Supreme Court's judgment on 5.1.2010. However, the reversal of AAD in the profit and loss account is now taxable income in the year of reversal from 1.4.2009, onwards for both Minimum Alternate Tax (MAT) and Normal Computation.

72. In reference to BRPL's assertion that the Petitioner's reliance on the Hon'ble Supreme Court's judgment in National Hydroelectric Power Corporation Ltd. vs CIT (2010) 3 SCC 396 dated 05.01.2010 is misplaced, since the Court did not grant NHPC the right to recover additional income tax on AAD under Tariff Regulations, 2009, or subsequent Regulations where the provision of AAD was discontinued, the Petitioner submits as follows:

i) The Hon'ble Supreme Court's judgment settled certain aspects of AAD, i.e., AAD is income received in advance, it is a timing difference, and represents an adjustment in the future as a built-in mechanism notified by the Central Government on 26.05.1997.

ii) Following the Hon'ble Supreme Court's judgment, refunds related to the period up to 31.3.2009, which became due to NHPC on account of AAD, have been refunded to the beneficiaries as and when income tax refunds were received from the Income Tax Department. In the absence of the Hon'ble Supreme Court's Order, the AAD amount would have been taxable, and all beneficiaries would have been obligated to reimburse the tax to NHPC.

iii) Due to changes in the method of recovery of income tax after 1.4.2009, NHPC was unable to recover any income taxes from the beneficiaries on account of the reversal of AAD and whatever was collected prior to 1.4.2009 on account of AAD, have either been refunded or are in the process of being refunded in accordance with the Hon'ble Supreme Court's judgment.

iv) The Petitioner rebutted BRPL's contention at Paragraph 17, emphasizing that the Hon'ble Supreme Court's judgment was pronounced under the Income Tax Act, 1961 and did not pertain to the recovery of tax paid on AAD under Tariff Regulations. The Petitioner also states that all other events following the Hon'ble Supreme Court's order have been detailed in the accompanying petition and are not reiterated for brevity.

73. From the CERC Regulation 2009-14, beneficiaries were no longer responsible for paying actual Income Tax on the generation income streams of generating companies and the liability of the beneficiaries was only limited to paying a rate of return on equity, grossed up at the applicable/effective tax rate.

74. Consequently, no tax could be recovered from beneficiaries due to the reversal of AAD from FY 2009-10 onwards, while at the same time, the benefits of lower tax had already been passed on to beneficiaries before 31.3.2009, by reducing the amount of AAD from taxable income. The Income Tax being claimed by the Petitioner from FY 2009-10 onwards relates exclusively to the Advance Against Depreciation collected up to 31.3.2009 only, and whose write-back has merely occurred after 1.4.2009 only.

75. The Commission, under the provisions of CERC Tariff Regulations, has the power to remove difficulty (if any) in implementing the provisions of said regulations and also has the power to relax the same.

76. In view of the above submissions, it is humbly prayed that the contentions raised by the Respondent in its reply be rejected by this Commission and that the prayers sought by the Petitioner in its accompanying Petition be allowed.

Submission by Respondent No.5 Tata Power Delhi Distribution Ltd. (TPDDL)

77. The Petitioner is only concerned with the change in the method of recovery of tax from the 2009 Regulations onwards and not with the discontinuation of the option to avail AAD from the 2009 regulations onwards. The various opinions and judgments from the Hon'ble Supreme Court and Hon'ble Punjab & Haryana High Court submitted by the Petitioner affirm that tax on AAD is only payable in the year of reversal, not when AAD was initially received, as it represents income received in advance against future adjustments. These judgments, however, do not have any relevance to the Petitioner's case, as they only address when tax is due on AAD, not the recovery of such tax from beneficiaries under the tariff regime. The Petitioner's plea pertains specifically to their alleged inability to recover tax paid upon AAD reversal from FY 2009-10 onwards. Any recovery or refund of these amounts before FY 2009-10 is not relevant to the current petition and is mentioned by the Petitioner only to mislead or confuse the Commission.

78. The Petitioner admits that the provisions from the 2009 Tariff Regulations onwards do not allow for what they are seeking, and therefore, they are asking the Commission to use its powers to relax and remove difficulties in order to grant the relief they seek.

79. The Petitioner's plea is non-maintainable, and the Petitioner is barred from seeking the sought-after relief. The Petitioner, ostensibly seeking the exercise of the Commission's powers to relax and remove difficulties, is actually pursuing amendments to the Commission's applicable Tariff Regulations from 2009 onwards and a review of tariff orders for their eight generating stations. This approach is impermissible, as emphasized by the Commission in numerous prior judgments, including the Order of August 5, 2018, in Petition No. 215/MP/2018.

80. We have heard learned counsel for the Petitioner. The Petitioner is basically seeking the indulgence of the Commission to revisit the provisions regarding revenue sharing for other businesses due to the latest development in the telecommunication sector and the revenues earned by PGCIL from sharing its assets for that purpose. The Commission has taken a consistent view that the filing of a petition is not the proper way to seek amendment to the Regulations. Therefore, the present petition cannot be entertained on merit.

81. A similar view was taken by the Hon'ble APTEL in Judgment dated 17.10.2022 in Appeal No. 212 of 2020, wherein the Hon'ble Tribunal held that:

> *The NTPC judgments (dated 22.01.2007 and 13.06.2007) of this tribunal were not in a lis wherein the appellants were involved. It was a matter essentially involving another entity (NTPC). The principles concerning interpretation of Tariff Regulations, 2001 and Tariff Regulations, 2004 were decided by this tribunal which statedly showed the views taken by the Central Commission in the original Tariff Orders dated*

23.11.2005, 24.10.2006 and 20.10.2010 to be incorrect. There was no directive of this tribunal, or of any statutory authority, for such orders to be revisited pursuant to the interpretation given by this tribunal in the NTPC judgments. The respondent PGCIL took the matter to the Central Commission with a prayer for implementation of the NTPC judgments in its case. This, in effect, was a prayer seeking review and not revision of the tariff orders in the general sense of the term. Such prayer couched in the language of seeking implementation of the law settled by the NTPC judgments being essentially a prayer for review, was impermissible given the specific inhibition there-against by the explanation appended to Rule (1) of Order 47 CPC. This is precisely the view taken by this tribunal in judgment reported as Madhya Pradesh Power Trading Co. Ltd. V. Central Electricity Regulatory Commission (2009) APTEL 107 [see, para 11(v)]

82. The Petitioner's grievance regarding the tariff regime change, implemented in the 2009 Tariff Regulations and continued in the 2014 and 2019 Regulations, is not sustainable. The Petitioner has to date never challenged any of these regulations and taken benefit thereunder; as such, it is not open to the Petitioner to now, after 14 years, effectively challenge these regulations, particularly when it is well settled that what cannot be done directly cannot be done indirectly.

83. Moreover, any claim for recovery must be filed within three years of the cause of action. In this case, the Petitioner paid tax on the reversal of AAD in FY 2009-10 onwards and therefore, any claim for recovery thereof should have been made within the limitation period. Failing to make a recovery claim within the stipulated time frame renders it time-barred. The argument that pending cases in the Hon'ble Punjab & Haryana High Court prevented earlier action is not valid, as those cases were limited to when income tax and MAT were payable on AAD and had nothing to do with recovery of tax paid on reversal of AAD from beneficiaries under the electricity tariff regime. Even in the worst case, the Hon'ble High Court decided the matter in 2018, and as such, any claim could have been made until 2021. However, the Petitioner, having lodged their claim in 2022, is clearly barred by limitation.

84. The respondent submits that the Commission's powers to relax and remove difficulties within the Tariff Regulations must be exercised judiciously and only under exceptional circumstances. These powers cannot be exercised in contravention of or to change the scheme, structure and essential provisions of the Tariff Regulations, as doing so would not only render the scheme and the express provisions of the Tariff Regulations meaningless but also set a wrong precedent.

85. The Tariff Regulations from 2009 onward expressly limit beneficiaries' liability for tax to the base rate of return on equity, combined with the effective tax rate of the respective financial year. Other taxes, including those related to depreciation like AAD, are the

responsibility of the generating company, in this case, the Petitioner. The parties, as well as the Commission, are bound by these explicit provisions, as confirmed by the Hon'ble Supreme Court in PTC India Ltd. v. CERC [(2010) 4 SCC 603], and no deviation can be allowed from the same.

86. It is well settled that the 'power to relax' and the 'power to remove difficulty' vested with the Hon'ble commission while discretionary are to be exercised non-arbitrarily, sparingly and for cogent reasons and certainly not where such exercise would render otherwise mandatory provisions otiose. Moreover, such powers cannot be exercised to alter the basic structure, scheme and essential provisions of the Regulations. In this context, reliance is placed on the judgement of Hon'ble APTEL in Tata Power Co.Ltd. vs Jharkhand State Electricity Regulatory Commission 2012 SCC Online APTEL 155. Further reliance in this regard is placed on the Hon'ble Supreme Court's judgement passed in M.U.Sinai v. Union of India & Ors.(1975) 3 SCC 765 and the Hon'ble APTEL's judgement passed in MPPGCL v MPERC (Appeal No.170 of 2011).

87. In the present case the Petitioner is seeking recovery of tax paid towards reversal of AAD despite admitting that the Petitioner is not entitled to such recovery under the applicable provisions of the Tariff Regulations relating to taxes and being aware that the Hon'ble Commission consciously amended the Tariff Regulations in 2009 to expressly limit the recovery of taxes to the RoE grossed up with the effective tax rate, excluding recovery on other income streams like AAD. The Petitioner has not presented compelling reasons justifying the exercise of the Commission's inherent powers in this matter.

88. Furthermore, the Petitioner's request effectively seeks an amendment to the Tariff Regulations under the pretext of invoking the Commission's inherent powers. This is unacceptable, as it would essentially revert to the pre-2009 Regulations, a deliberate change made by the Commission which the Petitioner has never challenged. In this regard, reliance is placed on this Commission's Order of October 14, 2009, in Petition No. 153 of 2009, which supports this standpoint.

> *"16. …While framing the 2009 regulations, the Commission has done away the provisions for 'in principle' approval of the project capital cost applicable to thermal power generating stations, through a conscious decision. Under the circumstances, granting approval to the estimated completion cost for the generating station by relaxing the provisions of the tariff regulations through invoking Regulation 44 thereof may amount to restoring the repealed provision, through back door."*

89. The Petitioner is bound by the express scheme of the Regulations relating to recovery of taxes. Since the enactment of the 2009 Tariff Regulations, the Commission implemented a revised method for determining the beneficiaries' liability to reimburse

taxes paid by the generating companies. This approach restricts beneficiaries' responsibility to reimburse taxes only on the base rate of return on equity, adjusted with the effective tax rate or the MAT rate, as applicable in the respective financial year. This new method was envisaged in Regulation 15 of the 2009 Tariff Regulations, Regulation 25 of the 2014 Tariff Regulations, and Regulation 31 of the 2019 Tariff Regulations.

90. As such, the liability of the reimbursement of tax on the beneficiaries remains only to the extent provided in the Tariff Regulations. The Petitioner post 31.3.2009, is only entitled to recover income tax on grossed-up ROE, and the income tax paid on all other income streams, including depreciation such as AAD, has to be borne by the generating company, that is, the Petitioner in this case. The absence of express provisions for reimbursement or recovery of tax in the 2009 Tariff Regulations and tariff regulations for the later years also indicates that the Commission intended that the generating companies should bear the tax burden on these other income streams from 2009 onwards.

91. The regulations framed and formulated by the Commission are absolute, and neither the Petitioner nor the respondent can go beyond the confines of the said regulations. The tariff regulations have to be followed to the letter without deviating from the same in any way. In the present case, if the tax liability against AAD is not given in the regulations, it is evident that the same was intended by the Commission to be borne by the Petitioner itself and thus cannot be recovered from the beneficiaries. The Commission, in tariff determination proceedings, is bound by its own regulations, as affirmed by the Supreme Court in PTC India Ltd. v. CERC, (2010) 4 SCC 603. Both parties and the Commission are bound by the express provisions of the regulations and no deviation from the same can be allowed from the said regulations.

92. The beneficiaries are only liable to reimburse tax as per the provisions for recovery of taxes given in the applicable tariff regulations for the relevant years, and the Petitioner's claim for reimbursement of tax paid on reversal of AAD reversal ought to be rejected.

Rejoinder of NHPC in respect of TPDDL

93. The Petitioner reiterates that their claim is not towards the recovery of AAD, but it is rather only towards tax paid on AAD. Since only AAD was discontinued w.e.f.1.4.2009 onwards, and there was nothing specific regarding the non-allowance of tax paid on AAD, the Petitioner did not challenge Tariff Regulations 2009,2014 and 2019. The judgements of the Hon'ble Supreme Court and the Hon'ble Punjab & Haryana High Court are relevant in as much as the Petitioner is raising a claim at this stage since it was contesting the issue before different forums, and it is only now it had noticed that the Income tax

department had not preferred any further appeal against the decision of the Hon'ble Punjab & Haryana High Court against merits of the issue, and hence the decision has attained finality.

94. The Petitioner had not approached the Commission as it was diligently contesting the issue before different forums and was waiting for the finality of the issue. Further, the claim of the Petitioner is not barred by limitation in as much as assuming without admitting the contentions made by TPDDL, the COVID-19 period from 15.3.2020 till 28.2.2022 has to be excluded for the purposes of calculating the limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings has to be excluded from the computation (as has been held in the order dated 10.1.2022 in Suo Motu writ petition (C) No.3 of 2020 of the Hon'ble Supreme Court) contrary to what is being canvassed by TPDDL. So, the petition is well within the period of limitation.

95. Due to the change in the recovery method of the income tax clause in Tariff Regulation from 1.4.2009 onwards, wherein tax on ROE (after grossing up) has only been specifically envisaged, the Petitioner could not recover the tax paid due to reversal of AAD which was in fact deducted from the sales in the year of receipt and benefit thereof was also passed on to the beneficiaries by way of refund of taxes already recovered and recovering lower tax than what would be recoverable from the beneficiaries if AAD had been considered in the year of receipt.

96. The claim of the Petitioner is not towards the recovery of AAD, but it is rather only towards tax paid on AAD, which the Petitioner has saved for the respondent's beneficiaries by contesting right up to the Hon'ble Supreme Court/ High Court. Since only AAD was discontinued w.e.f.1.4.2009 onwards, and there was nothing specific regarding the non-allowance of tax paid on AAD, the Petitioner did not challenge Tariff Regulations 2009,2014 and 2019. Hence, when the Petitioner is not claiming any AAD per se by the present petition, the judgements sought to be relied upon by TPDDL regarding restoring the repealed provision through the back door are entirely misplaced and liable to be rejected.

97. In the judgement of Tata Power(supra) relied upon by the Respondent, the Hon'ble APTEL has categorically stated at Para 29(a) that in exceptional cases where non-exercise of the discretion would cause hardship and injustice to a party, relaxation has to be exercised. It is a settled principle in law that tax has to be recovered on a no-profit no-loss basis. In the instant case, it is undisputed that the project of the Petitioner was commissioned before 1.4.2009, and the entire amount of tax sought to be recovered pertains to such period. Therefore, when non-allowance of tax paid pertaining to periods

prior to 1.4.2009 has otherwise been protected in the subsequent tariff regulations and when the same would lead to undue hardship and injustice to the Petitioner, then the Petitioner can clearly be said to satisfy the conditions laid down by APTEL to substantiate its prayer for invocation of "power to relax' and 'power to remove difficulties' as opposed to the contentions raised by the respondent. Accordingly, the judgments relied upon by the respondent, even on this footing, are misplaced.

98. With respect to the argument of TPDDL that since the Petitioner had not challenged the tariff regulations in 2009,2014 and 2019 or raised any objections during the public hearing, the Petitioner cannot wake from its slumber now, it is once again reiterated that the claim of the Petitioner is not w.r.t. recovery of AAD and hence the Petitioner had no concerns against the discontinuance of AAD. Rather, the Petitioner is seeking recovery of tax, which it has earlier saved for the Respondent's beneficiaries and is now being paid on account of AAD due to complying with the judgement of the Hon'ble High Court/ Supreme Court.

99. The Petitioner is raising a claim at this stage since it was contesting the issue before different forums for the benefit of the respondents only, and it is only now it has been noticed that the Income tax department had not preferred any further appeal against the decision of Hon'ble Punjab & Haryana High court against merits of the issue and hence the decision has attained finality. Thus, the portioner has filed the present petition praying that this Commission invoke the inherent powers i.e. 'Power to relax' and 'Power to remove Difficulties'.

100. In response to TPDDL's contention that the Petitioner is bound by the express scheme of the Regulations relating to recovery of taxes, the Petitioner submitted that Section 61 of the Electricity Act,2003 provides that the Commission shall specify the terms and conditions of the determination of tariff for which the principles that shall guide the Hon'ble Commission include safeguarding of consumer interest while at the same time ensuring the recovery of the cost of electricity in a reasonable manner as provided under section 61(d) of the Electricity Act,2003. This position has been affirmed by the Hon'ble Supreme Court in BSES Rajdhani Power Ltd vs DERC (2023) 4 SCC 388. Even in case the regulations do not provide or recognise a mechanism for allowing the recovery of income tax paid on AAD by the Petitioner, it is humbly submitted that the power to 'regulate' under section 79(1)(a) of the Act is wide enough to enable this Commission to allow the same. In this regard, reliance is placed on the case of PTC India Limited v CERC & ors (2010) 4 SCC 603, wherein the Hon'ble Supreme Court has held that

regulatory power can be exercised even when there is no provision in the regulations framed under section 178 of the Act.

101. The Petitioner submits that the scope and meaning of Power to Regulate is no more res integra as has been held by the Hon'ble Supreme Court in numerous decisions viz Energy Watchdog v CERC & Ors (2017) 14 SCC 80, V.S.Rice and Oil Mills v State of Andhra Pradesh, AIR 1964 SC 1781 and Gujarat Urja Vikas Nigam Ltd v Tarini Infrastructure Ltd.(2016) 8 SCC 743. Even otherwise, the Hon'ble Commission under Regulation 111 of the CERC (Conduct of Business) Regulations 1999 has inherent powers which can be exercised by the Hon'ble Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the commission.

102. Up to 2008-09, Advance against Depreciation (AAD) was receivable as part of the tariff to facilitate loan repayment. However, AAD was removed from the Tariff Regulations from 2009-14 onwards. The AAD standing in the books of NHPC as of 31.03.2009 is systematically being written back from FY 2009-10 onwards in respect of Power stations where AAD has been received and which has completed 12 years of life. Due to the change in the income tax recovery method from 1.4.2009 onwards, wherein tax on ROE (after grossing up) has only been specifically envisaged, the Petitioner couldn't recover the tax paid due to the reversal of AAD, which was, in fact, deducted from the sales in the year of receipt and tax benefit was also passed on to the beneficiaries by way of refund of taxes already recovered and recovering lower tax than what would be recoverable from the beneficiaries if AAD had been considered as income in the year of receipt.

103. Since tariff period 1.4.2009 onwards, any addition in the taxable income of the Petitioner due to AAD reversal has no effect on the applicable/effective rate of tax used for grossing up of the ROE, the actual tax paid on AAD reversal could not be recovered from the beneficiaries. Though Refunds of income tax under MAT for periods until 31.03.2009 were passed on to beneficiaries, but adjustments in the accounts like MAT credit etc were not done, nor the tax paid due to reversal of AAD in the books since 1.4.2009 was claimed as it was felt that such adjustment and claim should be made only after the issue is finally decided in the Court.

104. During the reconciliation of the pending issues under the Vivaad se Vishwas Act 2020 with the Income Tax Department, it was noticed that the Income Tax Department has not filed any appeal against the order of the Hon'ble Punjab & Haryana High Court, which was decided in favour of the Petitioner on the issue of adjustment of AAD under computation of taxable income under normal provisions of income tax. This settled the

issue of AAD under normal provisions of the Income Tax Act, and there will be no further development with regard to the issue of MAT credit, refund of Income Tax, etc.

105. The Petitioner's issue regarding AAD under normal Income Tax Act provisions has been settled. AAD is considered "advance income," as ruled by the Supreme Court for both MAT and Normal Computation. Before the Supreme Court's MAT judgment, AAD was treated as part of the taxable income, and all Generating Companies/ Transmission Companies except the Petitioner have paid tax on AAD and recovered the same from the beneficiaries. The Petitioner agitated this issue with the Income Tax Department to protect the Respondent's interests only. Had those appeals been decided in favour of the Income tax department, the respondent would have been liable to pay the tax on this AAD in those years, so the deferment of tax payments on AAD is to the benefit of the respondents only. Depreciation is part of the generation stream of business only, hence, tax on AAD is a tax on 'generation income' and not a tax on other income of the beneficiary. So, the beneficiary cannot be absolved from its liability to pay tax on such AAD in terms of the erstwhile/extant regulations 2001-04 and 2004-09, merely because such tax liability has materialised in a period when subsequent regulations have introduced a new manner of tax recovery.

106. The present petition aims to recover the tax paid due to the reversal of AAD after 1.4.2009, as AAD was allowed as part of the tariff up to 31.3.2009, in addition to depreciation to meet the loan repayment obligations. While discontinuing the AAD provisions in the 2009 tariff regulations, CERC had increased the rate of deprecation from 2.57% to 5.28% so that the loan repayment obligation of the generating company could be met from depreciation. The amount of AAD received by the Petitioner is an income during the year as per the applicable tariff regulations; however, as per the Income tax, it is not an income for that year, so the Petitioner could not recover the income tax on this amount.

107. The Judgments/orders cited by the Respondent do not relate to the issue at hand and are liable to be disregarded by the Commission. The Petitioner submits that this case is a fit case for the Commission to invoke its powers to relax and remove difficulties, countering the contentions raised by TPDDL. They request the Commission to grant the reliefs outlined in the accompanying Petition.

Hearing dated 13.9.2023

108. The Petition was listed for final hearing on 13.9.2023, and the Commission, after hearing the parties and at their request, permitted the parties to file their written submissions on or before 31.10.2023, and the order in the petition was reserved.

Analysis and Decision

109. The rival submissions of the parties have been considered. The chronology for dates of events, based on which the Petitioner has sought the recovery of additional income tax paid by it on account of reversal of Advance Against Depreciation (AAD) since 1.4.2009 onwards in respect of 8 generating stations has been tabulated below for better appreciation:

S.N	Date	Particulars
1.	23.05.1997	Central Government issued its tariff fixation notification under Section 43A of the Electricity (Supply) Act, 1948, wherein it permitted power-generating companies to collect an amount in advance in the years in which the normal depreciation (90% of the original cost of the Plant spread equally over the useful life of Plant) otherwise allowed to be recovered was not sufficient to meet loan repayment schedule (capped at 1/12th of the original loan) and called it "Advance against Depreciation". In other words, AAD=1/12th of the loan amount (-) normal depreciation Once the loan is fully repaid, the advance so collected from the beneficiaries in the initial years would get reduced/ adjusted from the normal depreciation allowable to be included in the tariff of subsequent years, in turn lowering future tariffs.
2.	1997	The Petitioner, in order to seek clarity regarding accounting of such advance against depreciation in its books of accounts, wrote to the "Expert Advisory Committee" of the Institute of Chartered Accountants of India ("Committee") seeking its opinion.
3.	17.03.1998	The Expert Advisory Committee of the Institute of Chartered Accountants of India opined that advance against depreciation may be shown as a deduction from the sale of power as suggested by the querist in para 7 of the query. It should not be shown as a capital reserve but as the income received in advance in the balance sheet. The committee confirmed that such an advance should be shown as a deduction from the sale of power owing to its nature as 'revenue received in advance" and clarified that the same should be reflected in the balance sheet as "Income received in advance".
4.	26.03.2001	In the CERC (Terms & Conditions of Tariff) Regulations, 2001 applicable for the tariff period 2001-04 ("Tariff Regulations 2001"), under Regulation 3.5.1(b) of the Tariff Regulations, 2001, this Commission allowed the recovery of AAD in addition to depreciation and the recovery mechanism was also kept same as the previous notification i.e. as an expense at actuals

S.N	Date	Particulars
5.	2001-2002	Section 115JB was inserted in the Income Tax Act, 1961 by the Finance Act, 2000 and all generating companies came under the purview of MAT u/s 115JB. An opinion was obtained by the Petitioner from M/s Price Waterhouse & Co. (PWC), a leading Chartered Accountants firm and it was opined by PWC that Advance against Depreciation should not be considered while calculating book profit for MAT purposes and should also not be considered for computation of regular income under section 28(1) of the Income Tax Act, 1961.
6.	2001-2002	As an abundant precaution, the Petitioner filed an application before the Authority for Advance Ruling ("AAR") under Section 245Q of the Income Tax Act, 1961 to get an advance ruling regarding the taxability of Advance against Depreciation.
7.	26.03.2004	In the CERC (Terms & Conditions of Tariff) Regulations, 2004 applicable for the tariff period 2004-09 ("Tariff Regulations 2004"), under Regulation 38(iii)(b) of the Tariff Regulations, 2004, this Commission allowed the recovery of AAD in addition to depreciation and the recovery mechanism was also kept same as the previous notification i.e. as an expense at actuals.
8.	19.01.2005	The AAR passed its Order in the Application filed by NHPC ruling that the amount of Advance against Depreciation is to be included for the computation of book profit under section 115JB of the Income Tax Act in the year of receipt. However, no specific ruling had been given regarding the treatment of Advance against Depreciation while calculating normal income under Section 28(1) of the Income Tax Act, 1961.
9.	22.12.2006	NHPC filed a Special Leave Petition No. 4378 of 2007 before the Hon'ble Supreme Court against the Order passed by the AAR which was later converted to Civil Appeal No. 6 of 2010. NHPC submitted that had the Petitioner accepted the ruling of AAR and paid tax on AAD in the year of receipt itself, such tax would have been directly recovered from the beneficiaries as an expense in line with the tariff regulations. However, to protect the beneficiary's interest, the Petitioner kept on contesting the issue.
10.	19.01.2009	CERC notified the Tariff Regulations 2009, wherein the recovery of AAD was discontinued, and further, the mechanism for recovery of tax was also changed to grossing up of ROE on the basis of the applicable tax rate.
11.	05.01.2010	Hon'ble Supreme Court passed its Order in Civil Appeal No. 6 of 2010, which held that AAD is a timing difference and not a reserve. Further, it held that AAD is merely income received in advance and represents an adjustment in the future, as built into the mechanism notified by the Central Government on 26.05. 1997.Consequent to the SC Judgment, the refunds pertaining to

S.N	Date	Particulars
		the period up to 31.03.2009, which became due on NHPC on account of AAD, have been refunded to the beneficiaries as and when the income tax refund along with interest was received from the Income Tax Department.
12.	AY 2001-02 to AY 2009-10	Without considering the Hon'ble Supreme Court judgment, the Petitioners Assessing Officer concluded the assessments for AY 2001-02 to AY 2009-10, holding that the benefit of the above SC judgment shall be limited to MAT, and hence, under the normal provisions of the Income Tax Act, AAD shall be taxable in the year of receipt/recovery only (i.e., on or before 31.3.2009).
13.	2015-2016	The Petitioner filed appeals against the above assessment orders and kept agitating this issue with the Income Tax Department. It is pertinent to note that had the Petitioner not filed such appeals or the outcome of the appeals had been in favour of the Income Tax department, the Petitioner would have been liable to pay tax in the year of receipt/ recovery only (i.e. on or before 31.3.2009). Further, under the CERC Tariff Regulations 2001-04 and 2004-09, the actual tax paid on income was allowed to be recovered from the beneficiaries, and hence, the Beneficiaries would have been liable to pay tax on this AAD in those years itself.
14.	14.2.2018, 28.2.2018 and 21.3.2018	The outcome of the above appeals was finally settled in favour of the Petitioner by the Hon'ble Punjab & Haryana High Court. After the Hon'ble Punjab & Haryana High Court decision, the Petitioner was under the impression that the Income tax department may have preferred an appeal before the Hon'ble Supreme Court against the orders of the Hon'ble Punjab & Haryana High Court.
15.	3.3.2020	Joint Reconciliation Statement regarding the amount payable/refundable and cases pending with different appellate authorities was signed between the Income Tax Department, Faridabad and the Petitioner.
16.	17.3.2020	The Government of India notified the Direct Tax Vivaad se Vishwas Act, 2020 to provide for resolution of disputed tax and for matters connected therewith or incidental thereto.
17.	27.1.2021	Order for full and final settlement of Tax arrears under the Direct Tax Vivaad se Vishwas Act, 2020 was issued by the Income Tax Department. After receiving the Order, the Petitioner learnt that the Income Tax Department, had not preferred any Appeal against the Orders passed by the Hon'ble Punjab and Haryana High Court.
18.	30.9.2022	The present Petition was filed before the Commission.

110. Before we proceed to examine the prayer of the Petitioner on merits, it is considered appropriate to deal with some of the main objections of the Respondents, namely:

(a) Petitioner is trying to seek the revision/amendment of existing regulations by invoking the Commission's power to relax and remove difficulties:

The respondent BRPL contends that the Commission has discontinued the provision of Advance Against Depreciation (AAD) through its 2009 Tariff Regulations, and what has been explicitly discontinued under the current Tariff Regulations cannot be granted to the Petitioner through the utilization of the "Powers to relax" and "Power to remove difficulties" as this would amount to restoring the repealed provisions through the back door. The other respondent TPDDL, has contended that the Petitioner is bound by the express scheme of the regulations relating to the recovery of taxes. The Petitioner submits that their claim is not towards the recovery of AAD but only towards the tax paid on the reversal of AAD. Hence, when the Petitioner is not claiming any AAD per se in the present petition, the judgements relied upon by the respondent regarding restoring the repealed provision through the back door are entirely misplaced and liable to be rejected. Tax recovery must be made on a 'no-profit, no-loss' basis. In this instance, the projects were commissioned before 1.4.2009, and all the tax being sought for recovery pertains to that period. Therefore, disallowing the recovery of tax paid for this period would cause undue hardship and injustice to the Petitioner, justifying the invocation of 'Power to Relax' and 'Power to Remove Difficulties'.

We have considered that the present petition is not for recovery of AAD but specifically relates to the recovery of income tax on AAD amounting to Rs.1329.47 crores outstanding as on 31.3.2009, which has been reversed since 1.4.2009 in respect of the eight generating stations of the Petitioner that had availed themselves of the benefit of AAD and have completed 12 years of life. The beneficiaries have benefited from the recovery of lower tax earlier when the AAD amount was received and shown as an advance by the Petitioner, and now when the AAD amount is getting reversed in the profit and loss account, it is now taxable income from 1.4.2009 onwards. We are of the view that a peculiar situation has arisen in order to remove the difficulties and anomalies 'Power to Remove Difficulties' is justified, and the objections of the respondents are not tenable.

(b) Commission's inherent powers must be exercised judiciously and in exceptional circumstances:

Both the respondent's BRPL and TPDDL contend that the exercise of the 'Power to Relax' and 'Power to Remove Difficulties' must be exercised in a conditioned and restricted manner, and such exercise of power should not change the basic structure, scheme, or essential provisions of the statute. The Petitioner submits that even the Hon'ble APTEL has categorically stated that relaxation can be applied in exceptional circumstances where non-exercise of discretion would result in hardship and injustice. It is a settled legal principle that tax should be recovered on a 'no-profit, no-loss' basis. In this instance, the projects were commissioned before 1.4.2009, and all the tax being sought for recovery pertains to that period. Therefore, disallowing the recovery of tax paid for this period would cause undue hardship and injustice to the Petitioner, justifying the invocation of 'Power to Relax' and 'Power to Remove Difficulties'.

The matter has been examined, and we are of the view that the tax being claimed by the Petitioner pertains to the period prior to 31.3.2009 when the CERC tariff regulations allowed recovery of actual tax paid on generating income from the beneficiaries. Had the Petitioner paid the tax prior to 1.4.2009, they could have recovered the tax directly from the beneficiary as an expense. It is only because the Petitioner kept on agitating the issue for the benefit of the respondents that during the period when the matter was still under appeal/adjudication, there were changes in the recovery method of the income tax clause in the Tariff Regulation from 1.4.2009 onwards, so the Petitioner could not recover the tax paid due to the reversal of AAD (i.e. post 1.4.2009). So by parity of reasoning, we are of the considered view that the Petitioner should get back the amount already paid for the additional tax due to the reversal of AAD from 1.4.2009 onwards, more so in view of the fact that the beneficiaries have earlier received the benefit of lower income tax and have also received the refund of income tax amount along with applicable interest (Rs.72,55,34,441/- already received and further Rs.36,23,31,467 plus interest under process of refund) due to the Hon'ble Supreme Court Order in Civil Appeal No. 6 of 2010 filed by the Petitioner to safeguard the beneficiaries interest. We feel that non-exercise of discretion would result in undue hardship and injustice to the Petitioner, so the invocation of 'Power to Relax' and 'Power to Remove Difficulties' is justified.

(c) Beneficiaries are liable to reimburse tax paid by the generating company only on ROE grossed by the MAT rate since 1.4.2009:

The respondent UPPCL contends that since 1.4.2009, they are only liable to reimburse tax paid by the generating company on the Return on Equity (ROE)

grossed up with the applicable MAT rate. Further, since 1.4.2009, the tax on other income streams, including depreciation and AAD reversal, becomes a case of normal depreciation in the relevant year(s), similar to a generating station commissioned on or after 1.4.2009 onwards, wherein all elements of income, including depreciation, would be reflected together and accounted for tax purposes.

The Petitioner submits that the matter regarding the nature of AAD as "advance income" has been conclusively settled by the Hon'ble Supreme Court in the Petitioner's case on 5.1.2010, and further affirmed by the Punjab & Haryana High Court. Prior to the Hon'ble Supreme Court's judgment, AAD was treated as taxable income, and all the Generating and Transmission Companies, except the Petitioner, had paid taxes on AAD and subsequently recovered the same from the Beneficiaries. To safeguard the respondent's interest, the Petitioner has persistently contested this issue with the Income Tax / appellate authorities, and the deferment of tax payment on AAD has exclusively benefited the Respondent, and therefore, they are now liable to pay this tax, which they would have been liable to pay in those years. The respondent has failed to consider the difference between the commissioning of projects before 1.4.2009 and after 1.4.2009. In cases of projects commissioned on or before 1.4.2009, CERC tariff Regulations 2001-04 and 2004-09 apply, wherein actual tax paid is required to be recovered from the beneficiaries, and in cases where any tax liability pertains to a period up to 31.3.2009 but materializes after 1.4.2009, it can be directly recovered from beneficiaries and long-term customers. Depreciation is an integral component of the generation stream of business, rendering tax on AAD a tax on 'generation income' rather than 'Other Income' earned by the Petitioner.

The matter has been examined, and we are of the view that from 1.4.2009 onwards, the tariff regulations only allowed grossing up of ROE, so any addition in the taxable income of the Petitioner due to the reversal of AAD had no effect on the applicable tax rate/effective rate of tax of these particular years, which was used for grossing up of ROE. However, in respect of those projects that were commissioned prior to 1.4.2009, the CERC tariff regulations 2001-04 and 2004-09 are applicable in terms of which actual tax paid is required to be recovered from the beneficiaries, and in case any tax liability pertains to a period up to 31.3.2009 but materialises after 1.4.2009 then the same can be directly recovered from the beneficiaries, and the concept of return on equity shall not be applicable. In this case the beneficiaries have earlier received the benefit of lower income tax and have also received the refund of the income tax amount along with applicable interest due to the Hon'ble Supreme

Court Order in Civil Appeal No. 6 of 2010, so the beneficiaries cannot be absolved of their responsibility to pay tax on AAD in accordance with the regulations of 2001-04 and 2004-09, merely because the tax liability materialized during a period when subsequent regulations introduced a new method of tax recovery. So, by parity of reasoning, we are of the considered view that the objection of the Respondent UPPCL on this ground is not tenable.

(d) The Tariff Regulations 2009 and subsequent tariff regulations wherein the Commission had discontinued the provision of AAD were never challenged by the Petitioner:

The respondent BRPL contends that the Tariff Regulations 2009 and the subsequent tariff regulations 2014 and 2019, wherein the provision for AAD was discontinued, were never challenged by the Petitioner, so now the Petitioner cannot claim Income tax on AAD in the absence of any such provisions in the tariff regulations 2009 onwards. The Petitioner submits that their claim is not towards the recovery of AAD, but only towards the tax paid on AAD. Since only AAD was discontinued w.e.f.1.4.2009 onwards and there was nothing specific regarding the non-allowance of tax paid on AAD, the Petitioner did not challenge the Tariff Regulations 2009, 2014, and 2019. When the Petitioner is not claiming any AAD per se in the present petition, the judgements relied upon by the respondent regarding restoring the repealed provision through the back door are entirely misplaced and liable to be rejected.

The matter has been considered, and we agree that the Petitioner's claim is not for the recovery of AAD but only for the recovery of income taxes not collected from the beneficiaries due to changes in the tax recovery method after 1.4.2009 onwards. As already discussed in the earlier paragraphs, the petitioner had availed of AAD in terms of the existing tariff regulations up to 1.4.2009, but by treating the AAD as advance income, the beneficiaries have earlier received the benefit of lower income tax and have also received the refund of the income tax amount along with applicable interest due to the Hon’ble Supreme Court Order in Civil Appeal No. 6 of 2010. The reversal of AAD in the profit and loss account is now taxable income in the year of reversal from 1.4.2009 onwards, but since the tax paid on AAD is not impacting the 'effective tax rate', so the Petitioner is unable to recover the additional income tax, so they have filed the petition, seeking direction from the Commission to allow the recovery of additional income tax paid by it on account of the reversal of AAD since 1.4.2009 onwards. Therefore, the contention of the respondent is not tenable.

(e) The Petitioner’s claim is not maintainable and time barred:

The respondent, TPDDL, contends that the Petitioner's claim is not maintainable since the Petitioner is seeking the Commission's powers to relax and remove difficulty in revising/amending the existing regulations, which cannot be allowed. Further, the Petitioner is not entitled to raise a claim for recovery of tax paid from 2009 onwards since any claim for recovery has to be made within three years of the cause of action having arisen, so the petition is barred by limitation. The Petitioner submits that it was only after the settlement of tax liabilities under the Vivad se Vishwas Act, 2020, that the Petitioner became aware that the Income Tax Department had not filed any further appeal against the orders of the Hon'ble Punjab & Haryana High Court, and hence the tax issue had attained finality both under normal as well as MAT income tax provisions. Further, the Hon'ble Supreme Court, vide its Order dated 10.01.2022 in Suo Moto Writ Petition (C) No. 3 of 2020, held that the COVID period of 15.03.2020 till 28.02.2022 has to be excluded for the purposes of calculating limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

111. The matter has been examined. As regards the maintainability and the Petitioner seeking the Commission's powers to relax and remove difficulty, the same has already been deliberated and concluded in objections no. (a) and (b) above. To protect the interest of the respondents, the Petitioner persistently contested the issue with the Income Tax Department, and the issue attained finality only after the order for full and final settlement of tax arrears was issued under the Direct Tax Vivaad se Vishwas Act 2020 by the Income Tax Department on 27.1.2021, and the Petitioner became aware that the Income Tax Department had not filed any further appeal against the orders of the Hon'ble Punjab & Haryana High Court., which were in favour of the Petitioner. This settled the matter that tax on AAD was payable in the year of reversal (i.e. post 1.4.2009) and not in the year of receipt (i.e. prior to 31.3.2009). Further, as held by the Hon'ble Supreme Court in an order dated 10.1.2022, the COVID-19 period of 15.3.2020 until 28.2.2022 has to be excluded for the purpose of calculating the limitation period. Moreover, the deferment of tax payment on AAD has exclusively benefited the respondents, and therefore, they are now liable to pay this tax, which they would have been liable to pay in those years. Therefore, the contention of the respondent is not tenable.

112. In view of the rival submissions, the Petitioner's financial statements have been examined on merits, and we find and recapitulate view that:

a) The petition is for recovery of income tax from the beneficiaries on the outstanding AAD amount of Rs.1329.47 cr. (as on 31.3.2009) in respect of eight generating

stations which were commissioned on or before 1.4.2009. Only because of the change in the recovery method of the income tax clause in the tariff regulations from 1.4.2009 (i.e. 2009-14 tariff period) onwards, the Petitioner could not recover the tax paid due to the reversal of AAD because the addition in the taxable income of the Petitioner due to AAD recovery has no effect on the applicable/effective rate of tax, which is used for grossing up ROE for those particular years. All other generating/transmission companies except the Petitioner had treated AAD as part of taxable income, paid tax on AAD and recovered the same from the beneficiaries.

b) In order to check the veracity of the claimed amount, the financial statements of the Petitioner and the Income tax MAT rates for the relevant FYs have been relied upon, and it is observed that there is a slight difference in the AAD amount in FY 2009-10 and FY 2012-13 and rounding off the difference in the MAT rate in FY 2010-11, 2011-12, and 2012-13. Accordingly, the audited financial statement AAD figures and Income tax MAT rates will be considered as follows: -

Year	AAD Amount *(Rs.Cr)*		MAT Rate		Tax Amount *(Rs.Cr)**	
	Claimed	As per Balance Sheet	Claimed	As per Income tax	Claimed	As per Balance Sheet
2009-10	29.84	29.78	16.995%	16.995%	5.07	5.06
2010-11	47.16	47.16	19.930%	19.931%	9.40	9.40
2011-12	47.16	47.16	20.010%	20.008%	9.44	9.44
2012-13	50.17	49.34	20.010%	20.008%	10.04	9.87
2013-14	50.17	50.17	20.961%	20.961%	10.52	10.52
2014-15	50.17	50.17	20.961%	20.961%	10.52	10.52
2015-16	50.17	50.17	21.342%	21.342%	10.71	10.71
2016-17	60.68	60.68	21.342%	21.342%	12.95	12.95
2017-18	60.68	60.68	21.342%	21.342%	12.95	12.95
2018-19	60.72	60.72	21.549%	21.549%	13.08	13.08
2019-20	44.72	44.72	17.472%	17.472%	7.81	7.81
2020-21	48.38	48.38	17.472%	17.472%	8.45	8.45
2021-22	48.25	48.25	17.472%	17.472%	8.43	8.43
Total	**648.27**	**647.38**			**129.37**	**129.19**

**Tax amount before grossing up, Outstanding AAD amount as on 31.3.2022 is Rs.836.10 cr.*

From the above facts, it can be concluded that by agitating and pursuing the issue with the tax / appellate authorities, the Petitioner had deferred the income tax impact on the beneficiaries, i.e. the benefit of time value of money has been enjoyed by the beneficiaries. Further, the beneficiaries have also been refunded the income tax amount along with interest received pursuant to the Hon'ble Supreme Court Order in

Civil Appeal No. 6 of 2010 filed by the Petitioner to safeguard the beneficiary's interest. Section 61 of the Electricity Act, 2003, provides that the Commission shall specify the terms and conditions of the determination of tariff for which the guiding principle shall be safeguarding the consumer interest and, at the same time, ensuring recovery of the cost of electricity in a reasonable manner. This has been recognised and affirmed by the Hon'ble Supreme Court in *BSES Rajdhani Power Ltd. V DERC, (2023).* Further, the Hon'ble Supreme Court, in the case of *PTC India Ltd. v. CERC, (2010) 4 SCC 603,* held that regulatory power can be exercised even when there is no provision in the regulations framed under section 178 of the Act. The scope and meaning of Power to regulate is no more res integra as has been held by the Hon'ble Supreme Court in numerous judgements viz *Energy Watchdog v. CERC & Ors.; (2017) 14 SCC 80: [Para 20], Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743: [Para 17.2] etc.*

c) Therefore, the commission believes that for equity and restitution, the additional tax due to the reversal of AAD after 1.4.2009, now being claimed, must be compensated to the Petitioner. Though deferred tax liability with respect to the previous tariff period is covered, tax on deferred income such as AAD is not specifically covered by the 2009, 2014, and 2019 tariff regulations, the matter being sub-judice for an extended period of time and the finality of the matter coming after the passage of the relevant control period, it has become imperative for this Commission, to deal with this matter in the exercise of 'Power to Relax' and 'Power to Remove Difficulties' as per the provisions of Regulation 44 of the 2009 tariff regulation, Regulation 54 & 55 of the 2014 tariff regulations, and Regulation 76 & 77 of the 2019 tariff regulation, respectively.

113. Accordingly, in terms of Regulation 44 of CERC (Terms & Conditions of Tariff) Regulations, 2009, Regulation 54 & 55 of CERC (Terms & Conditions of Tariff) Regulations, 2014 and Regulation 76 & 77 of CERC (Terms & Conditions of Tariff) Regulations, 2019:

i. We allow the recovery of income tax liability on account of "Advance Against Depreciation" from the beneficiaries after grossing up with applicable/MAT tax rate of the year in which such recoveries shall be made through billing of sales in proportion to their capacity share allocation as on 31.3.2009 in respective generating stations;

ii. Further, the arrears payments on account of the income tax liability of Rs.129.19 crore up to the period 31.3.2022, after grossing up with applicable/MAT tax rate is

payable by the beneficiaries in six equal monthly instalments starting from December, 2023. Moreover, keeping in view, the passage of time and in consumers' interest we hereby direct that no interest shall be charged by the Petitioner on these arrear payments. This arrangement, in our view, will balance to a large extent the interest of both, the Petitioner and the Respondents.

114. Petition No. 304/MP/2022 is disposed of in terms of the above

Sd/-	**Sd/-**	**Sd/-**	**Sd/-**
(Pravas Kumar Singh)	**(Arun Goyal)**	**(I. S. Jha)**	**(Jishnu Barua)**
Member	**Member**	**Member**	**Chairperson**