

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.19/RP/2022

in

Petition No. 296/GT/2020

Coram:

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri Pravas Kumar Singh, Member

Date of Order: 5th January, 2023

IN THE MATTER OF

Review of Commission's Order dated 30.4.2022 in Petition No. 296/GT/2020 in the matter of truing-up of tariff in respect of Loktak Hydroelectric Power Station (105 MW) for the period from 1.4.2014 to 31.3.2019.

AND

IN THE MATTER OF

NHPC Limited,
NHPC Office Complex,
Sector 33, Faridabad – 121003, Haryana

.... Review Petitioner

Vs

1. Assam State Electricity Board,
Bijuli Bhawan, Paltan Bazar
Guwahati – 781 001
2. Department of Power,
Government of Arunachal Pradesh,
C-Sector, Itanagar – 799 111,
3. Electricity Department,
Government of Mizoram,
Aizawal – 796 001
4. Tripura State Electricity Corporation Limited,
Vidyut Bhawan, North Banamalipur,
Agartala – 799 001
5. Meghalaya State Electricity Board,
Meter Factory Area, Short Round Road,
Shillong – 793 001



6. Electricity Department,
Government of Manipur,
Imphal – 795 001

7. Electricity Department,
Government of Nagaland,
Kohima – 797 001

Parties Present:

Shri Ved Jain, Advocate, NHPC
Shri Piyush Kumar, NHPC
Shri S.K. Meena, NHPC
Shri Jitender Kumar, NHPC
Shri R.D. Shende, NHPC

ORDER

Petition No.296/GT/2020 was filed by the Review Petitioner, NHPC Limited, for truing-up of tariff of Loktak Hydroelectric Power Station (105 MW) (in short 'the generating station') for the period 2014-19, in accordance with the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (in short 'the 2014 Tariff Regulations') and the Commission vide order dated 30.4.2022 (in short 'the impugned order') disposed of the said petition. Aggrieved by the impugned order dated 30.4.2022, the Review Petitioner has filed this Review Petition, on the ground that there is error apparent on the face of the record on the following issue:

(a) Error in grossing up of Return on Equity with Minimum Alternate Tax (MAT) Rate instead of the effective Tax Rate.

Hearing dated 12.8.2022

2. The Review Petition was heard through virtual conferencing, on 12.8.2022. During the hearing, the learned counsel for the Review Petitioner made detailed submissions in the matter. Considering the submissions of the Review Petitioner, the Review Petition was 'admitted' on the issue raised in paragraph 1 above, vide order



dated 23.8.2022. Notice was ordered on the Respondents with directions to complete pleadings in the matter. The Review Petitioner has also filed additional information vide affidavit dated 18.10.2022, after serving copy on the Respondents. None of the Respondents have filed replies in the matter.

Hearing dated 2.11.2022

3. The matter was heard on 2.11.2022. During the hearing, the learned counsel for the Review Petitioner made detailed oral submissions in the matter and prayed that error apparent on the face of the order dated 30.4.2022 may be reviewed. None appeared on behalf of the Respondents, despite notice. The Commission, after hearing the learned counsel of the Review Petitioner, directed the Review Petitioner, to file the '*Tax Audit Report and Income Tax assessment order for the 2014-19 tariff period*' and reserved its order in the matter. The Review Petitioner vide affidavit dated 1.12.2022 has filed the said information.

4. Based on the submissions and the documents available on record, we proceed to examine the issue raised by the Review Petitioner in the subsequent paragraphs.

Error in grossing up of Return on Equity with Minimum Alternate Tax (MAT) Rate instead of effective Tax Rate;

Submissions of the Review Petitioner

5. The Review Petitioner has made the following submissions:
- (a) The Commission has grossed up Return on Equity (ROE) with MAT rate (which was applicable tax rate for the Petitioner's company during 2014-19) and not with effective Tax Rate, and the same is not in accordance with Regulation 25 (3) of the 2014 Tariff Regulations.
 - (b) The concept of effective Tax Rate was introduced by the Commission to allow the pre-tax ROE of 15.5%/16.5% for the period 2014-19 and considering the applicable tax rate, instead of the effective tax rate, is not in line with the provisions of the said Regulations. By using the applicable tax rate for grossing up of base rate of ROE, the Commission has moved back to the 2009 Tariff Regulations.



- (c) The Review Petitioner has grossed up the ROE with effective Tax Rate as per Regulation 25(3) of the 2014 Tariff Regulations, which is 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.
- (d) The actual tax paid is excluding the tax on other income stream and penalty, if any, arising on account of delay in deposit or short deposit of tax amount by the generating company, which is as per Regulation 25(3) of the 2014 Tariff Regulations. Although the Review Petitioner's company fall under the MAT regime, but as effective Tax Rate calculated as per provisions of Regulation 25 (3) for grossing up of ROE for truing up purpose, the effective Tax may be higher or lower as compared to MAT rate.
- (e) By claiming the effective Tax rate in place of the MAT rate, the Review Petitioner is adopting the tax neutral approach, which is the basic intention of the Tariff Regulations.
- (f) In view of above, it is clear that the Commission, while grossing up the ROE, has considered the MAT rate, in place of the effective Tax Rate, which is a gross error.

6. Accordingly, the Review Petitioner has submitted that there has been an under recovery of Rs.50.84 lakh in ROE (pre- tax) for the period 2014-19 on account of the error, while grossing up of ROE in paragraph 40 of the impugned order dated 30.4.2022 and the same may be reviewed.

7. We have examined the matter. The ROE worked out and allowed by impugned order dated 30.4.2022 and the ROE, ought to have been allowed, as per submissions of the Review Petitioner, are tabulated below:

	(In Rs Lakh)				
	2014-15	2015-16	2016-17	2017-18	2018-19
ROE allowed by impugned order dated 30.4.2022 (a)	1577.89	1613.76	1630.14	1639.27	1650.11
ROE ought to have allowed by Commission (b)	1593.99	1626.30	1629.83	1649.98	1663.06
Difference {(a) – (b)}	(-)16.10	(-)12.54	(+)1.46	(-)10.71	(-)12.95



8. Regulation 24 of the 2014 Tariff Regulations, relating to ROE is extracted below:
“24. Return on Equity: (1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with regulation 19.

(2) Return on equity shall be computed at the base rate of 15.50% for thermal generating stations, transmission system including communication system and run of the river hydro generating station, and at the base rate of 16.50% for the storage type hydro generating stations including pumped storage hydro generating stations and run of river generating station with pondage:

Provided that:

i. in case of projects commissioned on or after 1st April, 2014, an additional return of 0.50 % shall be allowed, if such projects are completed within the timeline specified in Appendix-I:

ii. the additional return of 0.5% shall not be admissible if the project is not completed within the timeline specified above for reasons whatsoever:

iii. additional RoE of 0.50% may be allowed if any element of the transmission project is completed within the specified timeline and it is certified by the Regional Power Committee/National Power Committee that commissioning of the particular element will benefit the system operation in the regional/national grid:

iv. the rate of return of a new project shall be reduced by 1% for such period as may be decided by the Commission, if the generating station or transmission system is found to be declared under commercial operation without commissioning of any of the Restricted Governor Mode Operation (RGMO)/ Free Governor Mode Operation (FGMO), data telemetry, communication system up to load dispatch centre or protection system:

v. as and when any of the above requirements are found lacking in a generating station based on the report submitted by the respective RLDC, RoE shall be reduced by 1% for the period for which the deficiency continues:

vi. additional RoE shall not be admissible for transmission line having length of less than 50 kilometers.”

9. Also, Regulation 25 of the 2014 Tariff Regulations provides as under:

“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 income on other income stream (i.e., income of non-generation or non-transmission business, 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.

(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."

10. Further, the observations of the Commission, in the Statement of Objects and Reason (SOR) to the 2014 Tariff Regulations, 2014 on this issue, are as follows:

*"25.6 The Commission observed that various stakeholders have suggested to retain the existing pre-tax return on equity approach. On the other hand, beneficiaries have suggested that utilities should recover income tax from their profit and not separately from the beneficiaries. The Commission has analysed the suggestions and observations received from various stakeholders and observed that both the approaches have their own merits and demerits. However, the major disadvantage, which the Commission envisages in implementation of post-tax approach is the incremental effect of income tax liability, which will arise as the reimbursement of income tax shall again be considered as income in the hands of the generator/licensee and the same will defeat the entire purpose of adopting this approach. Thus, with due regard to the suggestions of the stakeholders and the complexities involved in computing income tax liability, it will be appropriate to retain the existing pre-tax rate of return approach. **In order to pass on the benefits and concessions available in income tax, the income tax rate to be considered for grossing up purpose shall be Minimum Alternate Tax (MAT) rate, if the generating company, generating station or the transmission licensee is paying MAT, or the effective Tax Rate, if the generating company or the transmission licensee is paying income tax at corporate tax rate. Accordingly, the Commission has decided to allow pre-tax rate of return on equity which shall be grossed up with the effective tax rate of the financial year or MAT rate and the tax on other income stream will not be considered for the calculation of the effective tax rate.**"*

11. It is noticed that Tax on ROE, has been defined in Regulation 25 of the 2014 Tariff Regulations. It is also noticed that in case the generating station is paying MAT (Minimum Alternate Tax), the rate of ROE is required to be grossed up with MAT rate only and the MAT rate does include surcharge and cess. Further, as per observations in the SOR to the 2014 Tariff Regulations (as quoted above), it is evident that in order



to pass on the benefits and concessions available in income tax, the income tax rate to be considered for the purpose of grossing up shall be the MAT rate, if the generating company, generating station or the transmission licensee is paying MAT. On perusal of the documents and the submissions of the Review Petitioner, it was observed that the Review Petitioner is covered under MAT regime and since the Petitioner was paying MAT (Minimum Alternate Tax), the grossing up of ROE is required to be done based on the MAT rate. Since the provisions of the aforesaid regulations, mandates the grossing up ROE with the MAT rate, if the generating company is paying MAT, the Commission in impugned order dated 30.4.2022 had considered the same, while working out the ROE and grossing up the ROE based on MAT rate. As the ROE had been worked out and allowed in terms of the aforesaid regulations read with the SOR to the said regulations, we find no force in the submissions of the Review Petitioner, to review the impugned order. Accordingly, we hold that there is no error apparent on the face of the impugned order dated 30.4.2022 and review on this ground is not maintainable. The prayer of the Review Petitioner for review, is therefore rejected.

12. Review Petition No. 19/RP/2022 is disposed of in terms of the above.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I. S. Jha)
Member

