

**IN THE COURT OF JHARKHAND STATE ELECTRICITY
REGULATORY COMMISSION
RANCHI
(Case No 16 of 2014)**

Dated 27th November, 2016

**CORAM: Hon'ble Mr. Justice N.N.Tiwari, Chairperson
Hon'ble Mr. R.N.Singh, Member (Engg.)**

IN THE MATTER OF:

Petition for Revised True up for FY 2011-12;

And

Petition for True up for FY 2012-13;

And

Annual Performance Review for FY 2013-14;

And

For Revised ARR for FY 2014-15 to FY 2015-16;

And

IN THE MATTER OF:

M/s Tata Power Company Limited

Jojobera Power Plant, Jamshedpur-831 016 Petitioner

Representative: Mr. Aveek Chatterjee

JUDGMENT

The appellant above named had filed an appeal u/s 111 of the Electricity Act, 2003 before the Appellate Tribunal for Electricity (hereinafter referred to as 'APTEL') challenging order dated 31.05.2015 passed by this Commission in case No. 16 of 2014 pertaining to Annual Performance Review (APR) for FY 2013-14 including trueing up for FY 2011-12, FY 2012-13 and revised estimates for FY 2014-15 to 2015-16 for the Unit No.2 and 3 of Jojobera Power Plant. The said order dated 31.05.2015 was assailed before the APTEL on different grounds touching the issues as indicated below:

- I Issues relating to disallowance of ash disposal expenses.
- II Issues relating to the Income Tax (Minimum alternative tax or 'MAT') on incentive due to over performance with respect to availability of Units.
- III Issues relating to retention of 100% financial gains on account of savings in the consumption of Light Diesel Oil (LDO), a secondary fuel and corresponding Income Tax.
- IV Disallowances of increase in Capital Cost of already approved Capex Scheme for the coal shed for Coal Handling Plant (CHP).

V Computational Error on account of incorrect energy charges to the tune of Rs. 1.05 crores and MAT on lower auxiliary consumption to the tune of Rs. 5 lacs.

The Hon'ble APTEL by its order dated 10.08.2016 passed in Appeal No. 195/2015 has been pleased to remand the matter to this Commission for consideration of first three issues and redetermination of true up for FY 2012-13 and pass order accordingly.

The fourth issue relating to disallowance of increase in Capital Cost of already approved Capex Scheme for the Coal Shed for Coal Handling Plant (CHP) has been rejected by the Hon'ble APTEL by the said order dated 10.08.2016.

With respect to fifth issue, the Commission has been asked to look into the computational error as pointed out by the said appellant and take corrective action in that regard, subject to its prudent check.

Now matter again came up before the Commission on remand for consideration of issues as stated above. Accordingly Commission after re-consideration of issues have addressed the issues afresh as under:

(a) Partial disallowance of actual ash disposal expenses for FY 2012-13

The Commission had in the APR Order for FY 2013-14 relied on Regulation 6.14 (a) of Generation Tariff Regulations and had accordingly disallowed the actual ash disposal expenses for FY 2012-13.

The Petitioner had in Appeal No. 195 of 2015 prayed before the Hon'ble Tribunal to allow actual Ash Disposal Expenses for FY 2012-13 as against the Normative Ash Disposal Expenses approved in the MYT Order dated 31.05.2012 considering the same as uncontrollable in view of compliance with the mandates laid down by Jharkhand State Pollution Control Board ("JSPCB") in its Consent to Operate dated 13.08.2012 barring the Petitioner to dispose of Ash in nearby areas & Ministry of Environment and Forest ("MoEF") in its notification dated 03.11.2009 wherein it directed to cover the low lying areas filled by Ash with Top Soil. Further, the Commission in the APR Order for FY 2013-14 dated 31.05.2015 had directed the Petitioner to ensure 100% Fly Ash utilization as per MoEF notification.

The Petitioner submitted that in compliance with the above statutory directives from the Commission, JSPCB and MoEF, the Petitioner had to undertake such Ash disposal activity to distant low lying areas and covering the same with Top Soil in view of inherent space constraint in existing Ash Pond. This has significantly increased the Ash Disposal Expenses due to increase in transportation distance and procurement of Top Soil which was beyond the control of the Petitioner.

The Hon'ble Tribunal in paragraph no. I.(C)(iii) of the Judgment in the Appeal No. 195 of 2015 dated 10.08.2016 observed as under:

“(iii) The State Commission while approving true up of FY 2012-13 allowed Rs. 2.49 Cr as Ash disposal expenses against the claim of Rs. 4.09 Cr submitted by the Appellant for the Unit No. 2 and Rs. 2.58 Cr against the claim of Rs. 4.44 submitted by the appellant for Unit 3 resulting into disallowing of the Ash Disposal Expenses to the tune of Rs. 3.46 Cr stated to have been incurred by the Appellant during the year FY 2012-13.

(iv) In our considered opinion, the Ash disposal activity undertaken by the generator is in compliance with the statutory requirements prescribed by the State Pollution Control Board as well as by the Ministry of Environment and Forest, Government of India. In this present case, we have noted that the Jharkhand State Pollution Control Board (“JSPCB”) issued Consent to Operate dated 13.08.2012 for the project prohibiting the generators in the State from disposing Ash in the nearby areas of the project and as a result the Appellant was required to transport Ash to farther places.

(v) In compliance to this condition imposed by the State Control Pollution board, the Appellant has claimed transportation charges etc. to dispose off the fly ash in the areas located around 20-25 km from the project.

(vi) Ministry of Environment and Forest, Government of India by its Notification dated 03.11.2009 mandated that low lying areas used to fill ash must be covered with top soil after disposing Ash in the Area. The Appellant in compliance to this directive of Ministry of Environment and Forest, Government of India had to procure top soil for covering Ash filled in the low lying areas and for the same, the Appellant made claim in the Ash disposal expenses.

(vii) As per clause 2.1 (13) of the State Commission’s Generation Tariff Regulations, 2010, change in law means occurrence of any of the following events;

.....change by any competent authority, in any consent, approval or license or obtained for the project.....

As per Clause 7.41 (e) of State Commission’s Generation Tariff Regulation, 2010 states as under:-

e) Increase in O&M on account of war, insurgency or changes in laws, or like eventualities where the Commission is of the opinion that an increase in O&M charges is justified, may be considered by the Commission for a specified period.”

(viii) In light of the Regulations 7.41 (e) read with 2.1 (13) of the State Commission’s Generation Tariff Regulation’s, 2010, we do not have any doubt in our minds that the Appellant was required to comply with the both the Notifications i.e Notification issued by the State Pollution Control Board as well Notification issued by Ministry of Environment and Forest, Government of India since they are statutory in nature and mandated by the statutory authorities and compliance of the same is must for the Appellant which resulted in additional expenditure towards disposal of Ash generated by its plant and the same should have been allowed by the State Commission while approving true up of the Appellant for the FY 2012-13 subject to its prudent check for the expenses incurred as claimed by the Appellant.

In light of the above, we decide this issue in favour of the Appellant and remand the matter to the State Commission for the Consideration of the same.”

- 1.1 In compliance of directions of the Hon’ble Tribunal, the Commission in order to verify the actual ash disposal expenses, directed the Petitioner to submit vouchers and auditor certificate against the actual ash disposal expenses.
- 1.2 The Petitioner submitted samples vouchers and auditor’s certificate against the actual ash disposal expenses.

On perusal and scrutiny of the sample vouchers as well as the auditor’s certificate against the actual as disposal expenses, the Commission approves the actual ash disposal expenses for the year FY 2012-13.

The revised ash disposal expenses and subsequent increment in O&M expenses are given in the following table:

Table 1: Summary of O&M Expenses approved for FY 2012-13 (Rs Cr)

Particulars	Unit 2		Unit 3	
	Approved in 31.05.15 order	Revised Hon'ble Tribunal order	Approved in 31.05.15 order	Revised Hon'ble Tribunal order
<i>O&M Expenses</i>				
Employee Cost	5.5	5.50	5.50	5.50
Employee Expenses without Terminal Liabilities	4.66	4.66	4.66	4.66
Terminal Liabilities	0.84	0.84	0.84	0.84
R&M Expenses	10.30	10.30	6.41	6.41
A& G Expenses	9.53	11.19	9.05	10.97
Ash Disposal Expenses	2.49	4.09	2.58	4.44
Raw Water Expenses	1.60	1.60	1.61	1.61
Other A&G Expenses (including HO Expenses)	5.18	5.18	4.60	4.60
Application Fees & Publication Expenses	0.32	0.32	0.32	0.32
Total O&M Expenses	25.39	26.99	21.02	22.88

(b) Disallowance in income tax (minimum alternate tax or MAT on incentive)

The Petitioner had in its Appeal No. 195 of 2015 submitted that disallowance of MAT on incentive due to high Plant Availability of the Units is contrary to the approach adopted by the Commission in MYT Order dated 31.05.2012. Further, as per Regulation 7.48 read with Regulations 6.12 and 6.13 of the Generation Tariff Regulations, Income Tax liability on Incentives for improved performance has to be recovered from the beneficiaries.

The Commission in its written submission before the Hon'ble Tribunal admitted the same as an arithmetical mistake arising from an accidental omission. The Commission had asked the Petitioner to approach it for reconsideration of such impact along with the next Tariff Petition. The relevant submissions of the Hon'ble Commission is reproduced below.

"Disallowance of Income Tax (MAT) on incentive for FY 2012-13

...

1.15 The submission of appellant specifically with respect to grossing up of incentive on account of higher availability with applicable MAT rate is an arithmetical mistake arising from an accidental omission. In line with the aforesaid Regulation, Appellant should have approached the Commission by filing a review petition for clarifying the same. The impact of the same can be considered along with the next Tariff Petition to be filed by Appellant."

The Hon'ble Tribunal in the Judgment in the Appeal No. 195 of 2015 dated 10.08.2016 observed the following:

"II. Issue relating to Income Tax (Minimum Alternate Tax or "MAT") on Incentive due to over performance with respect to availability of the Units.

(C) After having careful examination of the submissions made by the rival parties, our observations on this issue are as follows; We are not inclined to accept the above Impugned findings on this issue since in terms of Regulation 6.13 of the Generation Tariff Regulations, 2010 issued by the State Commission, any financial gain on account of over performance with respect to plant availability factor is to the benefit of the Appellant and the same shall not be adjusted in the tariffs. Regulation 7.48 of the Generation Tariff Regulations, 2010 provides that any tax liability on incentives and savings on account of improved performance of any parameters shall be considered for passing on to the beneficiaries in the ratio of the sharing of the gains as prescribed under the Regulations.

In our considered opinion, the Impugned Order disallowing MAT on incentive on account of better performance is not in line with the above Regulations.

We decide this issue in favour of the Appellant and remand the matter to the State Commission for consideration of the same subject to its prudence check."

In view of the above direction of the Hon'ble Tribunal, the Commission has recalculated the incentive allowed to the petitioner, which is given in the table below

Table 2: Summary of Incentive approved for FY 2012-13 (Rs Cr)

Particulars	UoM	Unit 2		Unit 3	
		Approved in 31.05.15 order	Revised after Hon'ble Tribunal order	Approved in 31.05.15 order	Revised after Hon'ble Tribunal order
Actual Plant Availability	%	94.10%	94.10%	98.81%	98.81%
Normative Plant Availability	%	85%	85%	85%	85%
Annual Fixed Charges without Incentive	RsCr	73.31	75.05	69.29	71.31
Annual Fixed Charges with Incentive	RsCr	81.16	83.08	80.55	82.90
Computation of Incentive					
Incentive(Post-Tax)	RsCr	7.85	8.03	11.26	11.59
MAT Rate	%		20.01%		20.01%
Incentive(Pre-Tax) for FY 2013-14	RsCr		10.04		14.48

(c) Disallowance of retention of 100% financial gain due to savings in the consumption of LDO and corresponding income tax thereon

The Petitioner in its Appeal No. 195 of 2015 submitted that the Commission had allowed only 50% of the financial gain on account of lower consumption of LDO and corresponding Income Tax thereon. The Petitioner further submitted that Regulation 6.12 read with Regulation 6.13 of JSERC Generation Tariff Regulations, 2010 stipulates that any financial loss/gain on account of under/over performance with respect to the controllable parameters inter-alia including Secondary Fuel Oil Consumption is to the generating company's account and not to be adjusted in the Tariff. Further, Regulation 8.4 of the Generation Tariff Regulations stipulates the Normative Secondary Fuel Oil Consumption for Unit 2 and Unit 3 of Jojobera Power Plant.

The Commission while truing up had relied upon Regulation 7.52 of JSERC Generation Tariff Regulations, 2010 which specifies the following

"The savings on account of secondary fuel oil consumption in relation to norms specified in clause 8.4, 8.6 of these Regulations, shall be shared with Beneficiaries in the ratio of 50:50..."

Accordingly the Commission had allowed only 50% financial gain on lower LDO Consumption to the beneficiary.

The Hon'ble Tribunal has observed as under:

"III. Issue relating to retention of 100% financial gains on account of savings in the consumption of Light Diesel Oil ("LDO"), a secondary fuel and corresponding Income Tax.

...

(iii) We are in agreement with the Appellant's arguments that the Regulation 6.13 of the Generation Tariff Regulations, 2010 of the State Commission is a specific provision dealing with the control period whereas Regulation 7.52 is a general provision and in our considered opinion, the specific provision overrides the generation provision and therefore, we decide this issue in favour of the Appellant since as per the specific Regulation 6.13 of the State Commission, the Appellant is entitled to the 100% financial gains on account of over performance in respect of lower consumption of LDO.

This issue is hereby remanded to the State Commission for passing on the benefit on account of lower consumption of LDO to the Appellant subject to its prudent check."

The Commission after due prudence check and based on submission of Petitioner has re-calculated the sharing of gains on LDO consumption for FY 2012-13 as given in the following table:

Table 3: Computation of Sharing of gains on LDO consumption for FY 2012-13 (Rs Cr)

Particulars	UoM	Unit 2		Unit 3	
		Approved in 31.05.15 order	Revised after Hon'ble Tribunal order	Approved in 31.05.15 order	Revised after Hon'ble Tribunal Order
Normative Gross Generation	MU	895.97	895.97	895.97	895.97
Actual Gross Generation	MU	866.92	866.92	886.48	886.48
Normative Specific LDO Consumption	ml/kWh	1.00	1.00	1.00	1.00
LDO Consumption at NAPAF	kL	895.97	895.97	895.97	895.97
Actual LDO Consumption	kL	262.3	262.3	304.50	304.50
Difference in LDO Consumption (Consumption at NAPAF Actual Consumption)	kL	624.88	624.88	588.21	588.21
LDO Landed price	Rs/kL	58434	58434	58879	58879
Gain/(Loss) on LDO Consumption (Post tax)	Rs Cr	3.65	3.65	3.46	3.46
MAT rate	%	20.01%	20.01%	20.01%	20.01%
Gain/(Loss) on LDO Consumption (Pretax) – retained by TPCL	Rs Cr	4.56	4.56	4.33	4.33
Sharing of Gain/(Loss) with Beneficiary (TSL)	Rs Cr	2.28	-	2.16	-
Tax liability to be recovered from Beneficiary	Rs Cr	0.46	0.91	0.43	0.87

(d) Computational error in computing Landed Price of Coal

The Petitioner in its Appeal No. 195 of 2015 submitted that the Commission has committed an inadvertent error in the calculation of the landed price of coal by assuming an incorrect base price of coal. The Petitioner mentioned that the landed price submitted before the Commission was inclusive of normative transit loss of 0.8% and not the actual transit loss of 1.16% which the Commission had inadvertently worked out to arrive at the base price of coal.

The Hon'ble Tribunal has in the Judgment dated 10.08.2016 observed as under:

“Since for the first three issues mentioned above, we have remanded the matter to the State Commission for redetermination of true up for the FY 2012-13 of the Appellant, the State Commission is hereby directed to look into the computational errors as stated above by the Appellant and take corrective in this regards, subject to its prudent check.”

The Petitioner in its submissions on this matter in the Petition for APR for FY 2013-14 had not clearly provided the transit loss considered for arriving at the base price of coal. The petitioner has now explained the basis of claiming landed price of coal. Considering the clarification provided by the Petitioner, the Commission has revisited the calculation for base price of coal and re-worked the prices by deducting the normative transit loss of 0.8% to arrive at the base price and then adding 1% of approved transit loss which was provisionally approved in the APR order for FY 2013-14 dated 31.05.2015.

Table 4: Approved Weighted Average Landed Price of Coal for Unit 2

Particulars	Unit 2	
	Approved in True up order dated 31.05.2015	Corrected landed price
MCL Coal	1586	1592
Middling Coal	3519	3532

Table 5: Approved Weighted Average Landed Price of Coal for Unit 3

Particulars	Unit 3	
	Approved in True up order dated 31.05.2015	Corrected landed price
MCL Coal	1601	1608
Middling Coal	3544	3557

(e) Computational error in determining the income tax liability due to lower auxiliary consumption

The Petitioner submitted that the financial gain due to lower auxiliary consumption had been incorrectly determined in the previous order dated 31.05.2015.

The Hon'ble Tribunal has observed as under:

“Since of the first three issues mentioned above, we have remanded the matter to the State Commission for redetermination of true up for the FY 2012-13 of the Appellant, the State Commission is hereby directed to look into the computational errors as stated above by the Appellant and take corrective in this regards, subject to its prudent check.”

The Commission has, accordingly, re-worked out the incentive and the income tax liability using the following formula

$$\text{Financial Gain} = (\text{ECR}_N - \text{ECR}_A) \times \text{Net Generation}$$

Table 6: Income tax on financial gain due to lower Auxiliary consumption in FY 2012-13

Particulars	FY 2012-13	
	Approved in True up order dated 31.05.2015	Corrected
Unit 2	0.26	0.28
Unit 3	0.32	0.34

Revised ARR for FY 2012-13

The revised true up of ARR for FY 2012-13 has been provided in the following tables for Unit 2 and Unit 3

Table 7: Revised Annual Revenue Requirement for the year 2012-13 for Unit 2

Particulars	Units	Approved in order dated 31.05.2015	Revised post Hon'ble Tribunal Judgment dated 10.08.2016
Depreciation	RsCrores	4.31	4.31
Interest on Loan	RsCrores	1.15	1.15
O&M Expenses	RsCrores	25.39	26.99
Return on Equity (Pre-Tax)	RsCrores	25.85	25.85
Interest on working Capital	RsCrores	11.38	11.52
Cost of Secondary Fuel Oil	RsCrores	5.22	5.22
Annual Fixed Charges	RsCrores	73.31	75.05
Projected Incentive (Pre-tax)	RsCrores	7.85	10.04
Annual Fixed Charges (including Incentive)	RsCrores	81.16	85.09
Rate of Energy Charges	Rs/kWh	2.180	2.187
Energy charge	RsCrores	171.22	171.77
Annual Revenue Requirement	RsCrores	252.38	256.87
Less: Sharing of Gain on LDO consumption	RsCrores	1.83	-
Add: Tax on the Gain on LDO Consumption retained by TPCL	RsCrores	0.46	0.91
Add: Tax on the Gain on Auxiliary Power Consumption	RsCrores	0.26	0.28
Annual Revenue Requirement (including Tax on Efficiency Gains)	RsCrores	251.27	258.05

Table 8: Revised Annual Revenue Requirement for the year 2012-13 for Unit 3

Particulars	Units	Approved in order dated 31.05.2015	Revised post Hon'ble Tribunal Judgment dated 10.08.2016
Depreciation	RsCrores	5.89	5.89
Interest on Loan	RsCrores	0.81	0.81
O&M Expenses	RsCrores	21.02	22.88
Return on Equity (Pre-Tax)	RsCrores	24.89	24.89
Interest on working Capital	RsCrores	11.43	11.59
Cost of Secondary Fuel Oil	RsCrores	5.26	5.26
Annual Fixed Charges	RsCrores	69.29	71.31
Projected Incentive (Pre-tax)	RsCrores	11.26	14.48
Annual Fixed Charges (including Incentive)	RsCrores	80.55	85.79
Rate of Energy Charges	Rs/kWh	2.213	2.221
Energy charge	RsCrores	177.95	178.60
Annual Revenue Requirement	RsCrores	258.50	264.39
Less: Sharing of Gain on LDO consumption	RsCrores	1.73	-

Particulars	Units	Approved in order dated 31.05.2015	Revised post Hon'ble Tribunal Judgment dated 10.08.2016
Add: Tax on the Gain on LDO Consumption retained by TPCL	RsCrores	0.43	0.87
Add: Tax on the Gain on Auxiliary Power Consumption	RsCrores	0.32	0.34
Annual Revenue Requirement (including Tax on Efficiency Gains)	RsCrores	257.52	265.60

Gap/Surplus for the year FY 2012-13

The Commission approves revised revenue gap for FY 2012-13 including carrying cost for the relevant period. **The Petitioner shall recover the gap in six equal monthly instalments from the beneficiary starting within three months from the date of this order, in accordance with Regulation 6.18 of the JSERC Generation Tariff Regulations, 2010.**

The case is, accordingly, disposed of.

Sd/-
(R.N. Singh)
Member (Engg.)

Sd/-
(N.N.Tiwari,J)
Chairperson