



ORDER

OF THE

WEST BENGAL ELECTRICITY REGULATORY COMMISSION

IN THE MATTER OF

CASE NO: APR(R)-12/21-22

IN REGARD TO PETITION SUBMITTED BY DAMODAR VALLEY CORPORATION (DVC) FOR REVIEW OF THE ORDER DATED 19.07.2021 ISSUED BY THE COMMISSION IN CASE NO. APR-81/20-21 IN RESPECT OF DVC FOR THE YEARS 2006 – 2007 TO 2008 – 2009 UNDER SECTION 94(1)(F) OF THE ELECTRICITY ACT, 2003 READ WITH REGULATION 1.7.5 AND 3.3 OF THE WBERC (CONDUCT OF BUSINESS) REGULATIONS, 2013 FOR REVIEW AND RECTIFICATION OF THE ORDER.

PRESENT:

**DR. MALLELA VENKATESWARA RAO, CHAIRPERSON
SRI PULAK KUMAR TEWARI, MEMBER**

DATE: 18.10.2022



In regard to petition submitted by Damodar Valley Corporation (DVC) for review of the order dated 19.07.2021 issued by the Commission in case no. APR-81/20-21 in respect of DVC for the years 2006 – 2007 to 2008 – 2009 under section 94(1)(f) of the Electricity Act, 2003 read with regulation 1.7.5 and 3.3 of the WBERC (Conduct of Business) Regulations, 2013 for review and rectification of the order.



CASE IN BRIEF

- 1.0 This is in regard to the application submitted by Damodar Valley Corporation (in short 'DVC') for review of the APR order dated 19.07.2021 (Impugned Order) issued by the Commission in case no. APR-81/20-21 for the years 2006 – 07 to 2008 – 09.
- 2.0 The Commission disposed DVC's APR application dated 28.01.21 and subsequent additional information as was sought for vide order dated 19.07.2021
- 3.0 It is submitted that DVC is filing this Review Petition on single issue whereby the Commission having disallowed the claim of DVC towards income tax paid for the years 2006 – 07, 2007 – 08 and 2008 – 09. i. The detailed submission of DVC on the issue is as follows:

3.1 RECOVERY OF INCOME TAX:

DVC's submission:

- 3.1.1 DVC submits that the electricity bills for FYs 2006 – 07 to 2008 – 09 were preferred as per DVC's own tariff approved by the DVC Board in terms of Section 20 of DVC Act pending determination of retail tariff by the Commission due to interim orders of APTEL dated 14.03.2007 and 16.09.2009 restraining the State Commission from determination of tariff and DVC was directed by an interim order dated 16.09.2009 of the Hon'ble APTEL to continue with the existing tariff. Accordingly, the revenue from sale of power on which DVC paid the income tax during the period 2006 – 07, 2007 – 08 and 2008 – 09 were not based on any tariff approved either by the Central Commission or State Commission and instead was in terms of tariff approved by DVC Board.
- 3.1.2 DVC revised the bills preferred during FYs 2006 – 09 based on the tariff approved by the Commission vide order dated 19.06.2020 and has been adjusting the arrear with individual consumers starting from the electricity bills on and from 01.01.2021 along with applicable carrying cost. As a consequence, DVC will be paying lower Income Tax during FY 2020 – 21 and onwards, as the revenue for the same will get reduced due to adjustment of the refundable amount for the period 2006 – 09



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- i.e. after approval of regulatory tariff for the period FY 2006 – 09 and consequent adjustment of arrear due to tariff differential during 2006 – 09 period.
- 3.1.3 DVC mentioned that tax on income for the period 2006 – 09 has already been settled with the Income Tax Department based on the tax assessment orders and therefore they do not have any scope for adjustment of the tax allowed to DVC by the Commission in the APR order dated 19.07.2021. Hence, there will be a burden to be faced on DVC's part for disallowed portion of Income Tax paid in actuals for the period 2006 – 09 if not allowed to recover from the consumers.
- 3.1.4 Recovery of Income Tax during determination of tariff by CERC for the relevant period i.e. 2006 – 07 to 2008 – 09 is guided by Regulation 7 of the CERC 'Terms and Conditions of Tariff' Regulations, 2004. In the judgment dated 23RD March, 2010 in Appeal No.68 of 2009 (Torrent Power Ltd. Vs. GERC), Hon'ble Appellate Tribunal was pleased to hold as under at para 54 on the afore stated Regulation 7 of CERC
- "54. The above provisions of Regulations, 2004 also make it clear that income tax payable on the income from the core business of the company is to be treated as an expense and recovered from the tariff payable by beneficiaries. The income earned by the licensee is net of tax and the tax payable is treated as a separate expenditure recoverable from the beneficiaries."*
- 3.1.5 It is submitted that DVC complied all the conditions of CERC Regulations required for recovery of actual income tax and thus claimed the actual income tax paid as per the Income Tax assessment orders for respective years in APR petition for final settlement with the consumers and it is for core business only. Since DVC claimed this for the first time, there was no issue of under / over recovery. However, the Commission re-determined the income tax instead of considering the entire tax paid at actuals.
- 3.1.6 It is further submitted that the Commission re-computed the allowable income tax for DVC's distribution activity in the order dated 19.07.2021 based on the following methodology:
- a. Actual income tax paid for the years 2006 – 07, 2007 – 08 and 2008 – 09 have been taken as base for re-computation of the allowable income tax.



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- b. ROE allowed by CERC in respect of generation and transmission tariff for the respective years considered after due apportionment of ROE of MTPS Units 5,6 for distribution activity only, since except MTPS Units 5,6 the rest of the generation and transmission network were utilized for distribution activity only.
- c. Tax rate has been computed at the ratio between the actual tax paid to profit before tax in respect of power business as per the Audited Annual Accounts of the respective years.
- d. Yearly tax rates so computed have been applied on the ROE allocated for distribution activity to arrive at the allowable income tax for distribution activity.

3.1.7 DVC accordingly prayed before the Commission to consider revised computation of allowable income tax as stated under:

- i. To consider total actual Income Tax paid in terms of the tax assessment order for respective years.
- ii. Profit on income due to sale of electricity from MTPS Units 5,6 be recomputed based on its sale rate (to beneficiaries other than the consumers in bilateral mode) after adjustment with the cost.
- iii. Proportionate Profit for sale of MTPS Units 5,6 for sale utilized in distribution activity be recomputed.
- iv. Total profit for distribution activity be recomputed out of total PBT minus profit for MTPS Unit 5,6 through bilateral sale.
- v. Applying the actual tax rate, allowable income tax for distribution activity be re-determined and allowed to DVC.

3.1.8 In terms of the Regulation 2.5.6.3 and 4.13 of WBERC (Terms and Conditions of Tariff) Regulations, 2007 and Regulation 4.11 of WBERC (Terms and Conditions of Tariff) Regulations, 2005, DVC becomes eligible to recover from the beneficiaries/consumers the income tax actually paid by DVC (duly apportioned for its Distribution activity) based on the assessment order for respective years of the relevant period.



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- 3.1.9 In view of above DVC has submitted revised computation of allowable Income Tax to DVC based on the income tax assessment orders for the financial years 2006 – 07, 2007 – 08 and 2008 – 09 which is attributable to its distribution activity alone duly certified by Auditor. In the said certified calculation, Rs 72.08 crore, Rs 43.97 crore and Rs 25.23 crore for the years 2006 – 07, 2007 – 08 and 2008 – 09 respectively have been claimed for income tax over and above the amount already allowed by the Commission in the Order dated 19.07.2021.
- 3.1.10 DVC in this regard prayed to allow the actual income tax paid by DVC for the years 2006 – 07, 2007 – 08 and 2008 – 09 in respect of its distribution activity in the State of West Bengal only without any gain or loss on this account.

OBSERVATION OF THE COMMISSION

- 4.0 Now, the Commission proceeds to find whether any case for review has been made out by the Petitioner in terms of Section 114 read with Order 47 Rule 1 of CPC, according to which a person aggrieved by an order of a Court can file review on the following grounds, if no appeal against the said order has been filed:
- (a) Discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.
 - (b) On account of some mistake or error apparent on the face of record; and
 - (c) For any other sufficient reason.
- 4.1 In this connection, reference could be made to the following judgments:

- (a) In **Lily Thomas & Ors. vs. Union of India & Ors. [(2000) 6 SCC 224]** Judgment, the Hon'ble Supreme Court has held as under:

“56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review....”



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(b) In **Union of India vs. Sandur Manganese and Iron Ores Limited & others** **{(2013) 8 SCC 337}**, the Hon'ble Supreme Court has held as under:

“23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In Parsion Devi & Others Vs. Sumitri Devi & Others, this Court held as under:

“9. Under Order 47 Rule 1 of CPC, a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be “reheard and corrected”. A review petition, it must be remembered has limited purpose and cannot be allowed to be “an appeal in disguise.”

(c) In **M/S Goel Ganga Developers India Pvt. Ltd. vs. Union of India 2018 SCC Online SC 930**, the Hon'ble Supreme Court has held the view that one must remind oneself that the power of review is a power to be sparingly used. The power of review is not like appellate power. It is to be exercised only when there is an error apparent on the face of the record. Therefore, judicial discipline requires that a review application should be heard by the same Bench. Otherwise, it will become an intra-court appeal to another Bench before the same court or tribunal. This would totally undermine judicial discipline and judicial consistency”

Review is a process whereby an inadvertent mistake may be corrected but a view which is required to be searched out cannot be substituted.

4.2 The Commission in Paragraph 4.5.1 and 4.5.2 of the APR Order dated 19.07.2021 had explained the procedure applicable for determination of Tariff in terms of Section 79(1)(a), 79(1)(c), 79(1)(d) of the Electricity Act, 2003 and provisions of Section 62 read in conjunction with Section 86(1) of the Electricity Act as applicable to DVC. Principles taken by the Commission on income tax has been explained under para 4.15 of the said APR order.



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- 4.3 Review sought for on the issue raised above has challenged the principles followed by the Commission in the APR order. The Commission is of the view that such issues do not come within the provisions under section 94 of the Electricity Act 2003 read with Order 47 Rule 1 read with Section 114 and 151 of Civil Procedure Code. As such, the Commission has no jurisdiction to entertain review petition in regard to the issue raised in the Petition.

ORDER

- 5.0 On the basis of findings above, the Commission finds that there is no error on the face of the order and decides that issue raised by DVC in the instant petition is not reviewable as per Order 47 Rule 1 of CPC in strict terms of the decisions of the Hon'ble Apex Court pointed out in the foregoing discussion.
- 6.0 DVC is to take note of this order.
- 7.0 The Review petition of DVC is, thus, disposed off. Let a copy of this order be served upon DVC.

Sd/-
(PULAK KUMAR TEWARI)
MEMBER

Sd/-
(MALLELA VENKATESWARA RAO)
CHAIRPERSON

DATE: 18.10.2022

Sd/-
SECRETARY