



**WEST BENGAL ELECTRICITY REGULATORY COMMISSION**

**Petition No. OA-211/15-16**

**Date of hearing: 26<sup>th</sup> June, 2020**

**Time of hearing: 14.00 hours**

**Coram:**

**Shri Sutirtha Bhattacharya, Chairperson**

**Shri Durgadas Goswami, Member**

**Shri Pulak Kumar Tewari, Member**

**In the matter of**

**Application seeking appropriate recovery plan for reimbursement of statutory liability of additional levy paid for the period upto financial year 2013 – 2014 which forms part of the demand raised under the Coal Mines (Special Provisions) Ordinance, 2014 read with the Coal Mines (Special Provisions) Rules, 2014 framed thereunder, Coal Mines (Special Provisions) Second Ordinance, 2014 and the Coal Mines (Special Provisions) Act, 2015.**

**And**

**In the matter of**

**CESC Limited**

**CESC House**

**Chowringhee Square**

**Kolkata 700 001.**

..... **Petitioner**



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Representatives attended:

**CESC Limited [Petitioner]**

1. Mr. M G Ramachandran, Senior Advocate,
2. Mr. Shubham Arya, Advocate
3. Ms. Divya Chaturvedi, Advocate
4. Mr. Saransh Shaw, Advocate
5. Mr.Utpal Bhattacharyya, President, Regulatory Affairs & Corporate Services, CESC Limited
6. Ms. Gargi Chatterjee, Executive Director, Regulatory Affairs & Corporate Services, CESC Limited

**CASE IN BRIEF**

CESC Limited ( in short ' CESC ' ) has submitted a petition under the provisions of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011 ("Tariff Regulations, 2011") seeking appropriate recovery plan for reimbursement of statutory liability of additional levy paid for the period up to financial year 2013 – 2014 which forms part of the demand raised under the Coal Mines (Special Provisions) Ordinance, 2014 read with the Coal Mines (Special Provisions) Rules, 2014 framed thereunder, Coal Mines (Special Provisions) Second Ordinance, 2014 and the Coal Mines (Special Provisions) Act, 2015 ( in short ' Coal Mines Act' ).

Upon receipt of the petition, the Commission has decided to hear CESC in order to make the Commission understand fully as to how the petition of CESC, in question, is fit for consideration by the Commission. Accordingly, a hearing was fixed on 26<sup>th</sup> June, 2020 at 14.00 hours at the office of the Commission and CESC was heard on the date as scheduled.



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## SUBMISSION DURING HEARING

At the outset Chairperson of the Commission stating the background for taking up the petition for hearing explained that in the event it is taken forward, public notice will have to be issued so that the public views can be obtained. Stating this, Chairperson invited CESC to make their submission/presentation

Mr. M G Ramchandran, Sr. Advocate on behalf of CESC Limited made the following submission:

1. The issue relates to the additional levy of Rs. Rs.896,73,10,585/- paid by the Petitioner to the Government of India in terms of the decision of the Hon'ble Supreme Court of India in the coal mines cancellation order dated 25.08.2014 followed by a consequential Order dated 24.09.2014.
2. Referring the different paragraphs of the consequential order dated 24.09.2014 Mr. Ramachandran stated that -
  - a. The basis of additional levy of Rs 295/- per metric tonne of coal extracted from the date of extraction are the financial loss caused to the exchequer by the illegal and arbitrary allotments of coal mines.
  - b. Ease of allotment is by the Government authorities. In the judgement as well as in the pleadings there is no allegation that CESC was a party to any of the illegal and arbitrary allotment. Allotment cancellation is for more than 250 blocks and there is no finding that any of the coal allotments are proper.
  - c. The figure of loss of revenue to the exchequer to the extent of Rs 295 per metric tonne of coal extracted is borrowed from the Report of CAG.
  - d. No proceeding was initiated against CESC.
  - e. The consequence proceedings were intended to correct the wrong done by the Union of India and to compensate the exchequer for the loss caused to it, in the manner suggested by the learned Attorney General.



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3. It is clear from the above that there is no whisper or even remote reference, much less finding of any wrong doing, against the coal block allottees including the Petitioner. The Consequential Order clearly establishes that the wrong doing was in the internal working of the Government department and not because of any act on the part of the Petitioner. Further, the amount of Rs. 295/- per metric tonne had been arrived at without going into any issues related to the Coal allottees like the Petitioner and uniformly for all, in aggregate more than 250 in number. Therefore, the Additional Levy under the Coal Block Cancellation Judgment of the Supreme Court is not a penalty on the coal block allottees or otherwise any imposition of charges or compensation for any act on the part of the coal allottees. It is in the nature of re-assessment of the price payable for the natural resources being put to use for commercial purposes.
4. The Coal Mine Ordinance and the Coal Mines Act (Collectively referred to as "Coal Statutes") have been notified in furtherance of the above Coal Block Cancellation Judgment of the Hon'ble Supreme Court.
5. The additional levy is a statutory levy by virtue of the provisions contained in the Coal Statutes mentioned above. In terms of the aforesaid Coal Statutes, there is a clear statutory mandate/ command to pay the amount of Rs. 295/- per metric tonne. In this context, references are made to Sections 3(1)(a), 4(4), 5(2), 16(4), 22 and 31(2) of the Coal Mines Act.
6. Further, the decision of the Hon'ble Supreme Court deciding on the liability to pay is a direction in law in terms of Articles 141 and 142 of the Constitution of India.
7. Now on the basis of above discussion the amount is payable to CESC in terms of Tariff Regulations 2011.



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8. Regulation 5.14.1 of the Tariff Regulations, 2011 allows the licensee to consider any statutory fee or charge paid by it under the Regulations as expenses in the determination of tariff.
9. Regulation 2.5.5 of the Tariff Regulations, 2011 allows for recovery of all uncontrollable factors during Annual Performance Review as pass through in tariff. Regulation 2.5.5.1 treats taxes on income, duties, levies, cess, etc. as “uncontrollable” factor.
10. Regulation 8.1(iii) read with Regulation 8.2(ii) of Schedule-1 of the Tariff Regulations, 2011 considers royalty, taxes and duties as part of fuel cost.
11. Regulation 3.11.1 and Regulation 3.11.2 of the Tariff Regulations, 2011 allows for recovery through creation of Regulatory Asset to avoid tariff shock.
12. Regulation 5.6.5.5 of the Tariff Regulations, 2011 provides for allowing of carrying costs.
13. Regulations 2.2.4, 2.5.3, 5.14.1 and Schedule 7A of the Tariff Regulations, 2011 provides for prior period expenses of the Utility to be recovered in the subsequent financial year particularly when the liability gets crystallized as in the present case, when the additional levy had to be paid in terms of the above decision of the Hon’ble Supreme Court and the Ordinances mentioned above.
14. There are enough provisions in the Tariff Regulations, 2011 to pass through this additional levy in tariff.
15. Additional Levy, in principle and essence is not distinct from royalty, which is fixed by the Central Government in terms of the Mines and Minerals (Development and Regulation) Act, 1957 (“MMDR Act”) and is payable to the States. Additional Levy may be construed as part and parcel of the same royalty.



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16. The Petitioner made a payment of Rs.995,51,95,670/- to the Coal Controller's account for the coal extracted till 24.09.2014. In the present Petition, *inter alia*, the petitioner seeks an appropriate recovery plan for reimbursement of additional costs towards increased fuel expenditure incurred by the Petitioner due to the Additional Levy imposed on it equivalent to Rs.896,73,10,585/- only for the amount paid towards Additional Levy for the coal used for Budge Budge TPP and other generating stations of CESC Limited up to FY 2013-14 and excluding the inferior quality coal extracted. The payment of such Additional Levy was sine qua non for the Petitioner to participate in coal block auctions
17. The payment of Additional Levy is a statutory liability of the prior allottee which is imposed, enforced and recovered as per the provisions of the Coal Statutes. The Petitioner, as a prior allottee, was required to pay the levy despite being declared as a successful bidder for Sarisatolli coal mine and managing to get it back.
18. There is no denying the fact that the benefits of the Sarisatolli coal block have ultimately accrued in favour of the Petitioner's consumers since the Petitioner, as a distribution licensee with own generating stations, had used the coal for supply of the affordable and reliable power to its consumers.
19. The supply of coal from Sarisatolli mine was beneficial for the consumers of the Petitioner, even after considering this Rs 896.73 Crores since the same was cheaper and ensured availability of coal. The coal supplied from the Sarisatolli mine averaged at a better level than the minimum quality level coal supplied by the Coal India Limited.
20. In view of the above submissions, the Petitioner prayed before the Commission –
- i) To admit the petition and considers the merit on claim of Rs 896.73 crores;



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- ii) Also, on fixing a public hearing, people can have opportunity to make their suggestions and obligation; and
- iii) To pass an appropriate order.

21. Upon presentation/submission by the learned Counsel on behalf of CESC, Shri Sutirtha Bhattacharya, Chairperson raised the following issues for clarification by CESC:

- i) The sections viz. 3(1)(a), 4(4), 5(2) and 16(4) of the Coal Ordinance, 2014 regarding additional levy; non-payment of additional levy will disallow prior allottee to participate in the statutory auction / allotment of coal blocks; etc., as has been referred by the petitioner, has relevance in the case. But, the definition of “prior allottee” and “allottee” are the important issues in this case which need to be looked into in the true spirit of the Acts. ‘Prior allottee’ means allottee by process of non-transparent nomination and ‘allottee’ means allottee by process of transparent action. These are the two different legal entities. Sub section (5) of section 14 of the Coal Mines (Special Provisions) Act, 2015 provides that any additional levy imposed against the prior allottee shall continue to remain the liability of such prior allottee and should not be passed on to the allottee. The allottee, in the present case, may have the same name but is legally different from the prior allottee. Therefore, the liability of prior allottee should not be passed onto the allottee.
- ii) In para 15, sub-para 5 of Supreme Court’s Order dated 24<sup>th</sup> September, 2014, the Hon’ble Supreme Court while passing the order has recorded the argument of Sri K. K. Venugopal of describing the additional levy of Rs. 295.00 per metric tonne as a penalty. Para 4.3 of the CAG Report 7 of 2012-13 heading ‘Performance Audit, Allocation of Block and Augmentation of Coal Production’ refers to the financial gain to private parties. The genesis of the additional levy of Rs. 295.00 per metric tonne came from the table given in the CAG Report 7 of 2012 – 2013. As per



the table given therein, the cost of coal shown on par with Coal India is Rs. 1028.00 per metric tonne. But average cost to the prior allottees is Rs. 583.00 per metric tonne towards cost of coal extraction and another Rs. 150.00 per metric tonne as financing charges. Thus Rs. 295.00 per metric tonne is gain to such allottee being the balance amount of the actual cost of Rs. 1028.00 per metric tonne. This was also the submission of the Attorney General in the Hon'ble Supreme Court and the Hon'ble Supreme Court has accepted the same. This attracts the question of financial gains to private parties. Given this context of submission by the Ld. Attorney General, given the context of submission by Sri K. K. Venugopal as manifest in the order and given the context of CAG report 7 of 2012-13 to be read with the order of the Hon'ble Supreme Court questions emerge whether the present allottee acquiring by the same name is the prior allottee and whether the liability of the prior allottee can be passed on to the present allottee. CESC may come up with clarifications on those two aspects.

22. In reply to above two queries of the Chairperson, Mr. Ramachandran states on behalf of CESC Limited that they will submit their detailed written reply to the above queries. But, presently he mentioned certain material points which are as follows:

- i) Sub section (5) of section 14 of the Coal Mines Act, says that additional levy imposed against the prior allottees of Schedule II coal mines shall continue to remain liability of such prior allottees and such additional levy shall be collected by the Central Government. Similarly, sub section (3) of section 14 provides that every liability of any prior allottee in relation to a Schedule I coal mine in respect of any period prior to the vesting order or allotment order shall be liability of such prior allottee and shall be enforceable against it and not against the successful bidder or allottee of the Central Government. Sub section (3) of section 16 of the Act provides that if the successful bidder or allottee is a prior allottee of



any of the Schedule I coal mines, then, the compensation payable to such successful bidder or allottee shall be set off or adjusted against the auction sum payable by such successful bidder or allottee, as the case may be, for any of the Schedule I coal mines. The sum total of these provisions is that the parliament has considered the four expressions 'prior allottee', 'successful bidder', 'allottee' and 'allottee when is the prior allottee'. The sub section (5) of Section 14 of the Coal Mines Act, that is a general provision which says that the liability of a 'prior allottee' should not be passed on to Central Government, should not be passed on to 'successful bidder' who may or may not be a 'prior allottee' or a 'allottee'. But this section is not applicable in the present case. The prior period expenses of a 'prior allottee' shall come under the purview of the Regulations of the Commission. As per the provisions of the Tariff Regulations, in case of deferred payment or any statutory payment shall be dealt with in determination of tariff.

- ii) As far as the second query is concerned, it is a pure financial loss incurred by the Government as per the CAG Report and not a financial gain as has been argued by Sri K. K. Venugopal during the proceedings of the case in the Hon'ble Supreme Court. It was a mistake of Government in charging the coal price to the allottees of the coal mines, which was specifically mentioned by the Hon'ble Supreme Court and therefore no one was allowed to file any appeal against the order of the Hon'ble Supreme Court or the Government whatsoever.

However, Mr. Ramachandran has confirmed that he will submit his detailed submission along with all relevant data / documents within the date fixed by the Commission.

23. Shri Durgadas Goswami, Member, endorsed the views of the Chairperson and put emphasis on the difference in definition between "allottee" and "prior-



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allottee” in the ‘Coal Mines Special Provisions Act 2015’. In addition, he raised the following queries to understand the matter in the perspective:

- i) The report of CAG on the basis of which Hon’ble Supreme Court decided to charge additional levy @Rs 295 has considered Rs 583.01 as the raising cost as per the same of the CIL for the FY 2010-11. The difference between the cost of raising and selling coal was Rs. 445.00 per metric tonne. Rs. 150.00 per metric tonne was allowed as additional financing costs and by subtracting the same net gain to prior allottee was fixed at Rs. 295.00 per tonne. On the same logic CESC has already recovered Rs. 295.00 per metric tonne in excess from the consumers. Now, in case the consumers are made to pay again this amount of Rs. 295.00 per metric tonne, then it would be double payment by the consumers. Therefore, it is to be decided whether at all, this amount of additional levy is recoverable by CESC Limited or not. This needs to be clarified by the petitioner.
- ii) The next question arises as to whether CESC Limited was at all required to pay this additional levy. Punjab State Power Corporation Limited (in short ‘PSPCL’) filed an appeal petition before the Hon’ble Appellate Tribunal for Electricity (in short ‘APTEL’) for recovery of this additional levy. Hon’ble APTEL in its order dated 31.07.2018 held that the liability on account of this additional levy was payable by the PANEM i.e the JV company and not the PSPCL and therefore this amount of additional levy was not at all payable by PSPCL. Moreover, West Bengal Power Development Corporation (WBPDC), under clause (n) of sub section (1) of section 3 of Coal Mines Act was not treated as prior allottee and hence WBPDC was not required to pay this additional levy to the Government. In fact, as per the decision of the Hon’ble APTEL, this amount of additional levy which has been paid by CESC, should have been paid by their Joint Venture Company which was formed by the CESC with the Integrated Coal Mines Limited (in short ‘ICML’).



24. In reply, Mr. Ramachandra said that –

- i) This is an under-recovery by the Government and not the penalty as there was no fault on the part of CESC Limited;
- ii) If this would have been a penalty for any fault on the part of CESC, CESC would have never come to the Commission for recovery of the same from its consumers;
- iii) As regards the question of ICML and CESC, ICML was constituted by CESC as a special purpose vehicle. The Government of India has considered CESC as the assessee liable to pay the additional levy, and not the ICML. ICML was doing only the mining of the coal to give it to CESC. In this regard, the case of Renusagar may be referred to which is identical to the case, in question. There the subsidiary company established captive power plant where generation is considered to have for holding company;
- iv) The payment of additional levy to the Government was made due to the fact that the prior allottee will not be allowed to submit bid unless the payment of additional levy is made.

Sri Durgadas Goswami, Member, WBERC, upon hearing Mr. Ramachandran, stated that the points raised here need to be clarified through written submission.

Sri Pulak Kumar Tewari, Member, WBERC endorsed the views of Sri Sutirtha Bhattacharyya, Chairperson and Sri Durgadas Goswami, Member.

At the end of the hearing, Chairperson of the Commission advised CESC Limited to come with their submission on the above referred issues keeping in mind that addition of Rs. 295.00 per metric tonne will exceed the maximum coal price limit of Coal India price which is already being charged by CESC Limited considering the provisions of Regulations of WBERC.



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## ORDER

The Commission directed the petitioner to file their written arguments on points raised as above and take further steps as will be communicated to them in due course.

Sd/-  
(PULAK KUMAR TEWARI)  
MEMBER

Sd/-  
(DURGADAS GOSWAMI)  
MEMBER

Sd/-  
(SUTIRTHA BHATTACHARYA)  
CHAIRPERSON

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Dated: 31.07.2020



*T.K. Mukherjee*  
31/07/20

(T. K. MUKHERJEE)  
SECRETARY

