आयकर अपीलीय अधिकरण, दिल्ली पीठें, नई दिल्ली
INCOME TAX APPELLATE TRIBUNAL, DELHI
BENCHES, NEW DELHI

BENCH: C

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA 4273/DEL/2014 (निर्धारण वर्ष/Assessment Year: **2010-11**) **ITA 4429/DEL/2014** (निर्धारण वर्ष/Assessment Year: **2010-11**)		
M/S. BSES RAJDHANI POWER LIMITED BSES BHAWAN, NEHRU PLACE,, NEW DELHI-110020, DELHI	**Vs.**	**DCIT** CIRCLE-3(1), NEW DELHI-, DELHI
अपीलार्थी /**Appellant**		प्रत्यर्थी /**Respondent/Cross-Appellant**
PAN of Assessee:	**AAGCS3187H**	
अपीलार्थी द्वारा/Appellant represented by:	**Shri Rohit Jain, Adv., Ms. Deepashree Rao, Adv. (Virtual) & Ms. Aayushi Pragya, AR**	
प्रत्यर्थी द्वारा/Respondent represented by:	**Shri Vikram Singh Sharma, Sr. DR (Virtual)**	

सुनवाई की तारीख / Date of conclusion of hearing:	**09-Jul-2026**
घोषणा की तारीख / Date of pronouncement:	**07-Oct-2026**

आदेश / ORDER

PER SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER:

These assessee's and the Revenue's appeal and cross-appeals ie., ITA Nos. 4273 & 4429/Del/2014 for assessment year 2010-11, against the Commissioner of Income Tax(Appeals)-VI (for short, "CIT(A)"), New Delhi's order dated 30.05.2014 passed in case No. 189/13-14, involving proceedings u/s 143(3) of the Income Tax Act, 1961; hereinafter referred to as, "the Act".

www.taxcode.in

Heard both the parties. Case files perused.

2. The assessee raises the following substantive grounds and its appeal ITA No. 4273/Del/2014:

> "That on the facts and circumstances of the case and in law, the CIT(A) erred in not holding the assessment order dated 29.10.2013 as illegal and bad in law, being barred by limitation prescribed in section 153 of the Income Tax Act. 1961 (the Act')
>
> 1.1 That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the assessing officer in directing special audit under section 142(2A) of the Act. without there being any complexity in the accounts of the appellant
>
> 1.2. That on the facts and circumstances of the case and in law, th CIT(A) erred in holding that all necessary conditions for issuing directions for special audit u/s 142(2A) of the Act were duly followed by the assessing officer.
>
> 1.3 That the CIT(A) erred in holding that directions for special audit u/s 142(2A) are not appealable under section 246A of the Act.
>
> 2. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the assessing officer in making addition of Rs. 17.37.76,766/ on account of late payment surcharge ('LPSC').
>
> 2.1. That the CIT(A) erred on facts and in law in holding that appellant acquired legal right to receive income on account of late payment surcharge and theft billing, without appreciating that such amounts did not represent 'real' income taxable under the provisions of the Act.
>
> 2.2 That the CIT(A) erred in holding that the theory of real income could not be extended to exclude income which had accrued but suffered from high improbability of recovery.
>
> 2.3 That the CIT(A) erred on facts and in law in not appreciating that additions made by the assessing officer were, in any case, revenue neutral and conseqüently, there was no reason to interfere/ tinker with the consistent method of accounting followed by the appellant.
>
> 2.4 Without prejudice, that the CITIA) erred on facts and in law in not directing the assessing officer to exclude LPSC charged in the bills of the earlier year(s), but offered for taxation during the year under consideration on the basis of realization/acceptance.
>
> 3. That on the facts and circumstances of the case and in law. the CIT(A) erred in confirming the action of the assessing officer in making an addition of Rs.58,74,00,000/- on account of barter transactions of power.

www.taxcode.in

3.1 That the CIT(A) erred on facts and in law in holding that the Impugned amount represented income in the hands of the appellant under section 2(24) r.w.s 28(iv) of the Act. without appreciating that barter transactions were cash neutral involving no cash receipt/payment at the time of storing/withdrawing electricity.

3.2 Without prejudice, that the CIT(A) erred on facts and in law in confirming the action of the assessing officer in adopting average rate for retail sale of power to consumers for computing sales as against the average rate of bulk sale of power claimed in the alternative, by the appellant.

4 That on the facts and circumstances of the case and in law, the CIT(A) erred in not directing the assessing officer to exclude the amount of regulatory assets amounting to Rs.8.27,79,00,000/-. credited to the profit and loss account and mistakenly offered to tax by the appellant in the return of income for the relevant assessment year.

4.1 That on the facts and circumstances of the case and in law, the CIT(A) erred in holding that since the appellant acquired enforceable legal right to receive the aforesaid amount of Rs.827.79 crores on basis of true up order passed by the DERC and had credited the same in the profit and loss account, the said amount was taxable as income of the appellant.

4.2 The CIT (A) erred on facts and in law in not appreciating that no legal right to receive vested in the appellant in the absence of tariff order passed by the DERC.

4.3 That the CIT(A) erred on facts and in law in not appreciating that real income had accrued to the appellant since the appellant was not permitted to raise bills on consumers in respect of the said amount and no bills were, infact, raised.

5. That on the facts and circumstances of the case and in law. the CIT(A) erred in confirming the addition of Rs.72.16.42.513/- made by the assessing officer on account of unbilled revenue.

5.1 That the CIT(A) erred on facts and in law in not appreciating that method of accounting for unbilled revenue followed by the appellant on basis of last month's bill was scientific and rational and also accepted by the special auditor.

5.2 That the CIT(A) erred on facts and in law in not appreciating that the addition made to the income of relevant financial year by tinkering with the scientific method of accounting consistently followed by the appellant was revenue neutral.

6. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the addition of Rs. Rs.21.66.74.952/-made by the assessing officer on account of short capitalization of personnel cost and overheads to the value of assets.

www.taxcode.in

6.1 That the CIT(A) erred on facts and in law in alleging that personnel cost should be capitalized 10% of employee cost as per the directives of DERC, without appreciating that method adopted by the appellant was scientific and based on rational approach.

7. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the disallowance of Rs. 2.27.92,452 made by the assessing officer u/s 40(a)(ia) for alleged non deduction of tax at source under section 194J of the Act in respect of trading margin paid to RETL and BYPL.

8. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the assessing officer in not allowing deduction u/s 801A(4)(iv)(c) claimed by the appellant.

8.1 That the CIT(A) erred on facts and in law in holding that deduction under section 801A could not be allowed since the appellant failed to claim the deduction in the return of income as required in terms of section 80A(5) of the Act.

8.2 That the CIT(A) erred on facts and in law in holding that the deduction u/s 801A cannot be claimed on miscellaneous incomes viz maintenance charges, replacement of burnt meters. commission arrears, Inspection fees, reconnection fees, late payment surcharge, income from use of electric poles, subsidy etc. without appreciating that the same were intricately linked to the eligible business of distribution of electricity.

10. The appellant reserves to itself. the right to add, alter, amend. substitute and/or withdraw any Ground(s) of Appeal on or before the date of hearing."

3. The Revenue cross appeal ITA No. 4429/Del/ on the other hand canvasses the following substantive grounds:

"
1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the claim of depreciation of the assessee on recapitalized assets amounting to ₹ 66,27,782/-ignoring that
   (i) the expenditure incurred is expended on the assets to revenue account.
   (ii) the assessee failed to furnish documentary evidence in support of its claim during the assessment proceedings.
   (iii) there is no uniformity w.r.t. the recapitalized value of the assets under consideration.
2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that cost of repairs for old transformers amounting to ₹ 63,00,000/- is revenue in nature ignoring that such cost pertains to assets recapitalized later and the assessee co. falied to details of the cost of such repairs.
3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of ₹ 78,24,36,602/- on the issue of bad debts ignoring that the assessee failed to give relevant details of the debts claimed as bad like policy for writing off and when the same was booked as income.
4. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition made by the AO on account of unencashed/stale cheques amounting to ₹ 4,30,82,719/- ignoring that the said liabilities existed in the books of account of the assessee for more than three years and should have been taken as income as the assessee writes off the debts as bad after the same are irrecoverable after three years.

www.taxcode.in

4. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition made by the AO on account of unencashed/stale cheques amounting to ₹ 4,30,82,719/- ignoring that the said liabilities existed in the books of account of the assessee for more than three years and should have been taken as income as the assessee writes off the debts as bad after the same are irrecoverable after three years.

5. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition of ₹ 943,99,00,000/- on the issue of income recoverable from future tariff ignoring the fact that income as well as the right to receive the same has accrued to the assessee.

6. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition on account of disallowance of interest expenses of ₹ 8,52,90,253/- and processing fee of ₹ 2,07,40,536/- by ignoring that

   (i) The expenses are capital in nature.

   (ii) the processing fee in case of CAPEX loan has been booked as Capital in case of M/s BSES Yamuna Power Ltd., a co. run under same management and in same line of business operations.

7. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition on account of disallowance of Consumer Security Deposit ignoring the fact that the amount received from customers for service line is revenue in nature as the same is received for selling of electricity during normal business operations.

8. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of unmatched security deposits amounting to ₹ 12,36,00,000/- ignoring that the said liabilities existed in the books of account of the assessee since 2001 and should have been taken as income by the assessee.

9. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition on account of disallowance of unmatched consumer security deposit amounting to ₹ 77,09,00,000/- not recognized as liability in the balance sheet and interest expenses of ₹ 2,34,00,000/- thereon by ignoring that that the assesee has not accepted it as liability and filed writ before Hon'ble High Court but claiming interest expenses on it.

10. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition on account of disallowance of service line deposit amounting to ₹ 32,35,30,713/- ignoring that the amount so received is revenue in nature as these are the charges for service and not deposit.

11. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition on account of disallowance of Consumer Contribution to Capital Works amounting to ₹ 112,57,39,725/- ignoring that service line deposits are not in the nature of deposit but charges for service as they are non refundable and are received in lieu of service provided by the assessee.

12. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition on the issue of Sundry creditors amounting to Rs. 25,00,69,778/- by failing to examine all the three conditions for allowing such a claim i.e. identity, creditworthiness and genuineness of transaction.

13. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of disallowance of provision for retirement of fixed assets.

14. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on the issue of related party transactions amounting to ₹ 94,20,842/-

15. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition made by the AO on account of Arm's Length Price amounting to ₹38,58,60,000/-.

16. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition made by the AO on account of excess subsidy received amounting to ₹6,94,00,000/- ignoring that the assessee failed to submit substantiate its claim of adjustment of this subsidy by the govt. of NCT of Delhi with documentary evidence before the AO.

17. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of prior period expenses amounting to ₹98,49,970/- ignoring that the expenses does not pertain to period under consideration as the assessee is following mercantile system of accounting.

18. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of capital expenditure treated as Revenue expenditure amounting to ₹ 8,98,57,386/-.

19. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition made by the AO on account of premium paid on investment amounting to ₹47,60,696/- ignoring that the premium paid is part of investment and therefore capital in nature.

www.taxcode.in

20. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of legal claims amounting to ₹11,32,035/- ignoring that the amounts involved are penal in nature and hence not allowable.

21. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of disallowance of deduction claimed u/s 80IA ignoring that the assesee did not fulfil the conditions stipulated in the Income-Tax Act in this regard.

22. The appellant craves leave for reserving the right to amend, modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.

4. The assessee submits at the outset that it does not wish to press for its substantive ground No. 1 to 1.3 subject to all just exceptions. Rejected in very terms.

5. Coming to the assessee's substantive ground nos. 2.1 to 2.4 raising the issue of taxability of its late payment surcharge etc., on "accrual" basis, we note that the CIT(A) lower appellate discussion upholding the assessment findings to this effect reads as under:

5.4.1. It is contended that the Assessing Officer has erred in making addition of late payment surcharge (LPSC) amounting to Rs.17,37,76,766/. It has been pleaded that the appellant has been consistently following the mercantile basis of accounting while preparing the books of account & that it has recognized revenue from sale of energy on accrual or mercantile basis. Further, it has charged for electricity consumption at DERC approved rates & the bills have been raised periodically at those rates; that in accordance with the tariff provisions of DERC, the appellant was also required to charge the late payment surcharge (LPSC) @ 1.5% per month of the principal amount in the bills raised. The bills contained a notation that if payment has been made after due date, there would be an imposition of surcharge & such mention of surcharge was dependent on the contingency of the consumer defaulting on payment by 'due date' & to become payable only if the consumer did not pay the amount billed against energy consumption on time, i.e. by due date of payment. Further, though the appellant raised invoices for theft billing in accordance with the guidelines contained in the DERC Supply Code & Performance Standards Regulations, 2007, such billing is never recovered in full and are usually disputed by the consumers. Therefore, there is total uncertainty with regard to the extent of ultimate recovery based on final settlement of case/claim with the consumers in accordance with the facts and circumstances of individual cases, which is often based on the orders of Special Courts for Electricity/High Courts/District Courts/other forums. Therefore, the amount of LPSC and bills raised in case of power theft were accounted for on its acceptance by consumer which coincides with realization. This accounting policy followed by the appellant while recognized "income from operations" was duly disclosed vide Note No. 3(a) to the Notes to Accounts that Revenue from sale of energy is accounted for on the basis of bills raised on the consumers for the billing cycles falling due during the accounting year and also included unbilled revenues accrued upto the end of the accounting year but as per the

www.taxcode.in

requirement of Accounting Standard -9 (AS 9) issued by ICAI, on revenue recognition, Late Payment Surcharge (LPSC) on account of electricity charges billed and bills raised in case of power theft had been accounted for on realization from consumers i.e. on cash basis, which was mandatory to be followed in accordance with the provisions of Companies Act. Further, as per the tariff order of DERC dated 26.06.2003, LPSC was intended to act as a deterrent to the consumers so that payments were made in time and was not intended to act as a source of income to the DISCOM utilities. Therefore, it was emphasized by the appellant that the main objective of charging LPSC is to recover the principal amount. Further, there were instances where certain customers were defaulting on their payment for long time & LPSC got charged again and again on the same principal amount every time the bill was generated. Therefore, there had been a low probability of recovery of LPSC & only when, the claim for LPSC was accepted by the consumer, which coincided with realization, under the mercantile system of accounting & income by way of LPSC could be said to have accrued, in accordance with the requirements of AS 9, in the assessment year under reference. Therefore, the entire addition made on this account calls for being deleted.

5.4.2. The Assessing Officer made an addition of Rs.17,37,76,766/- as income from LPSC by stating that the same accrued to the appellant during the year under consideration and the said amount was computed on the basis of difference of LPSC income actually received & the amount charged in the bills raised. Further, in case of 'theft billing' since the amount accounted on the basis of realization exceeded the amount computed by the assessing officer on accrual basis, no addition was made by the Assessing Officer in respect of the said issue. The AO made the said addition on account of LPSC as he was primarily of the view that the assessee had not followed the principle of 'matching costs & revenue' which is a cardinal principle in determining real profits of the year.

5.4.3. It is true that the appellant company had maintained the books of account as per section 145 of the I.T. Act, 1961 read with AS 1 and AS 9. Therefore, it may be a view point that with the blended reading of AS 1 and AS 9, it is one of the fundamental principles of accounting that as a measure of

www.taxcode.in

prudence and following the 'principle of conservatism', the incomes are not taken into accounts till the point of time that there is a reasonable degree of certainty of its realization, while all anticipated losses are taken into account as soon as there is a possibility, howsoever uncertain of such losses being incurred & due to uncertainty attached to its collection, the appellant had recognized in its books of account Late Payment Surcharge (LPSC) & Power thefts on collection or receipt or cash basis, which it had been following consistently. The appellant also quoted a few legal pronouncements of various courts in support of its contention that even under mercantile method of accounting, there are good reasons for non recognition of revenue on accrual basis.

5.4.4. In the case of State Bank of Travencore (1986) 24 Taxman 337(SC), Hon'ble Supreme Court, has held that the question of how far the concept of real income entered into the question of taxability in the facts and circumstances of the case and how far and to what extent the concept of real income should intermingle with the accrual of income will have to be judged in the light of the provisions of the Act, the principles of accountancy recognized and followed the feasibility. The earlier circulars being executive in character, could not alter the provisions of the Act. An acceptable formula of correlating the notion of real income in conjunction with the method of accounting for the purpose of computation of income for the purpose of taxation is difficult to evolve. Besides, any strait jacket formula is bound to create problems in its application to every situation. It must depend on the facts and circumstances of each case when and how income accrues and what consequentially follow from the accrual of income. Whether an accrual has taken placed or not must, in appropriate cases, be judged on the principles of real income theory. After accrual, non charging of tax on the same because of certain conduct on the ipse dixit of a particular assessee cannot be accepted. In determining the question whether it is hypothetical income or whether real income has materialized or not, various factors will have to be taken into account. It would be difficult and improper to extend the concept of real income to all cases depending upon the ipse dixit of the assessee which would then become a value judgement only. What has really accrued to the assessee has to be found out & what has accrued must be considered from the point of view of real

www.taxcode.in

income, taking the probability or improbability of realization in a realistic manner and dovetailing these factors together, but once the accrual taken place, on the conduct of the parties subsequent to the year of closing, an income which was accrued cannot be made 'no income'. In this connection, the following proposition emerge.

(i)--- It is the income which was really accrued or arisen to the assessee that is taxable.

(ii) The concept of real income would apply where there has been a surrender of income which in theory may have accrued but in the reality of the situation no income had resulted because the income did not really accrue.

(iii) – Where a debt has become bad, deduction in compliance with the provisions of the Act should be claimed & allowed.

(iv) Where the Act applies, the concept of real income should not be so real as to defeat the provisions of the Act.

(v) If there is any diversion of income at source under any statue or by overriding title, than there is no income to the assessee.

(vi) The conduct of the parties in treating the income in a particular manner is material evidence of the fact whether income has accrued or not.

(vii) Mere improbability of recovery, where the conduct of assessee is unequivocal, cannot be treated as evidence of the fact that income has not resulted or accrued to the assessee. After debiting the debtor's account and not reversing that entry, but taking the interest merely in 'suspense account', cannot be such evidence to show that no 'real income' has accrued to the assessee or has been treated as such by the assessee.

(viii) The concept of 'real income' is certainly applicable in judging whether there has been income or not, but in every case, it must be applied with care and within well recognized limits and must not be called in aid to defeat the fundamental principles of law of income tax, as developed.

5.4.5. Keeping in view that ratio of decision of Hon'ble Supreme Court in State Bank of Travencore (1986) 24 Taxman 337 (SC) (Supra) where impugned

www.taxcode.in

interest on sticky advances was held taxable as the assessee's income in the years in question, the above clearly show that even the receipt of the assessee though in the nature of LPSC & power thefts is similar to the sticky loans as discussed above in the Apex Court's order, as above, in as much as that the principle behind both the receipts not being offered to tax was same for the appellant i.e. possibility of the same not being recovered/uncertainty by the assessee.

5.4.6. Further, it is the real income that is chargeable to tax under the Act & not any hypothetical income of an assessee & that u/s 28 of the Act in respect of business, the chargeability must attach to real profits & gains arising from the transactions of the previous year but under section 5 read with Section 28 of the Act, the liability attaches to profits which have been either received by the assessee or which have accrued to him, during the year of account & it is well settled that income accrues when it "falls due" i.e. becomes legally recoverable irrespective of whether actually received or not and 'accrued income' is that income, which the assessee has a legal right to receive. This view has been held in various cases such as CIT Vs. KRMTF Thiagaraja & Co (1953)24 ITR 525(SC) at pg No.531 & Morvi Industries Ltd. Vs. CIT (1971) 82 ITR 835 (SC) at Pg No. 840. Since the assessee admittedly has been maintaining its books of account on mercantile basis & the sum under the Head LPSC & power thefts, whether doubtful and uncertain, fell due & became payable to the assessee & constituted its accrued income & therefore, justifiably should be brought to tax in the concerned assessment year. Though, Courts of law of the country have, while imposing the tax liability under the Act, recognized the theory of real income by having regard to the business character of the transactions & realities of the situation but these aspects have been taken into account for the purpose of determining whether the income could be said to have legally accrued or not & once it is found to have legally accrued, it is brought to tax. All the decisions of various courts show that the theory has been invoked and confined only to two types of cases @ where there has been a surrender of income which may in theory have accrue and (b) where there has been diversion of income at source either under a statute or by overriding title but in none of these cases has the aspect of high improbability of recovery been regarded as sufficient to prevent accrual. The theory of real income

therefore should not be so extended as to exclude from chargeability such income which has accrued but merely suffers from high improbability of recovery. Such extension would be neither permissible nor advisable – not permissible because it goes against the very concept of accrued income and not advisable because if done, it will apply to all cases. Moreover, such extension will entrench upon section 36(1)(vii) which provides for deduction of a debt or part thereof on its becoming bad on fulfillment of certain conditions specified in sub-section(2) thereof. For these reasons, the extension of the theory of real income so as to take within its ambit the consideration of high improbability of recovery is not warranted.

5.4.7. Therefore, taxability is attracted even when income has accrued and it is clear that the receipt of income is not the sole test of taxability under the Act but whether on receipt basis or accrual basis, it is the real income & not any hypothetical income, which might have accrued, that is subject to tax under the Act.

5.4.8. For the content of taxable income one must have regard to the substantive charging provisions of the Act. This has emphasized two important aspects in regard to the two methods of accounting usually employed in business. In the first place, the courts have pointed out that both the methods are somewhat rough & in some cases, these methods may not give clear picture of the true profits earned & certainly not of taxable profits & secondly, whatever be the method regularly employed by an assessee, the same has to be adopted as the basis & is relevant only for the purpose of computation of income, profits & gains under section 28 & 56 of the Act but it cannot enlarge or restrict the content the taxable income, profits & gains under the Act. Thus, u/s 145 of the Act, the assessee's regular method of accounting determines the mode of computing the taxable income but it does not determine or even affect the range of taxable income or the ambit of taxation.

5.4.9. The assessee company followed the mercantile system of accounting, as per section 145 of the Income Tax Act, 1961, which has been regularly followed since inception & there has been no change in such method of accounting. In accordance with the mercantile system of accounting, revenue is recognized on due basis or an accrual basis, irrespective of the

www.taxcode.in

actual receipt of it. The income of the assessee for the year under consideration cannot be rightly computed as per accounting policies followed by the assessee. The accounting system and provisions of I.T. Act, may not march step by step together as per principles laid down by the Hon'ble Supreme Court in the case of Tuticorin Alkalis Chemicals & Fertilizers Ltd. Vs. CIT (SC) 227 ITR 172. Moreover, the assessee has attained the legal right to receive the amount by way of billing. The same, therefore cannot be shown as liability & should be considered as part of assessee's income of the year. The ratio of decisions of Hon'ble Apex Court in the case of M/s Shoorji Vallabdas & Co. (1962) 46 ITR 144 (SC) and in the case of M/s Godhra Electricity Co. Ltd. V. CIT (SC) 225 ITR 746 was on a different sets of facts altogether, wherein the Hon'ble Apex Court observed that the I.T. Act takes into account two points of time on which liability to tax is attracted (i) accrual of income (ii) receipt of income & that the substance of matter is 'income'. Here, the income has accrued once the bills have been raised by the assessee.

5.4.10. Moreover, it is seen that the appellant has failed to justify as to the fact of Accounting Standard 9 (AS9), issued by ICAI, regarding Revenue Recognition that is specifically applicable in the case of the appellant company, regarding postponement of Revenue Recognition, particularly when the appellant company is bound to follow the mercantile system of accounting. While an essential criterion for the recognition of revenue is that the consideration receivable for sale of goods, the rendering of services or from the use by others of use of enterprise resources is reasonably determinable & it is only when such consideration is not determinable, within the reasonable limits, the recognition of revenue is postponed. The appellant company in the present case has failed to show such reasonable limits or otherwise of its revenue recognition from income from late payment of surcharge (LPSC). Therefore, it cannot be said that as per Accounting Standard 9 (AS9) of ICAI, dealing with Revenue Recognition, income would invariably be accounted for on actual realization basis or cash basis or collection basis. Therefore, in addition to the disclosure required by Accounting Standard 1 on 'Disclosure of Accounting Policies (AS 1), an enterprise should also disclose the circumstances in which revenue recognition has been postponed, pending the resolution of significant, uncertainties, particularly when the bills have been raised by the appellant.

www.taxcode.in

> 5.4.11. Therefore, the appellant gets no relief on the ground of late payment surcharge (LPSC) & power theft. However, without prejudice to the same, it should not be added back again in subsequent Assessment Years, when the same is actually received by the appellant.

6. The assessee accordingly challenges both the learned lower authorities' action adding the amount in question of Rs. 17,37,76,766/- representing late payment surcharge "LPSC" in issue as its taxable income. There is hardly any dispute between the parties that the learned lower authorities have evoked "accrual" method whilst holding the impugned late payment surcharge of the corresponding electricity bills as taxable income. That being the case, it transpire during the course of hearing that this tribunal in ACIT vs Dakshin Haryana Bijli Vitran Nigam Ltd. (2013) taxmann.com 486 (Del) has settled the very issue in the assessee's favour and against the department that the same could not be held as taxable since it neither accrues nor forms the "real" income; as the case may be under the provisions of the Act. We are further informed that the same stands upheld in Revenue's SLP No. 181187/2015 filed in the hon'ble apex court decided on 17.7.2019. We thus conclude in the very factual backdrop that both the learned lower authorities have erred in law and on facts in holding the assessee's impugned late payment surcharge amount of Rs. 17,37,76,766/- as its taxable income. This addition is deleted therefore.

7. Next comes the assessee's 3 to 3.2 substantive grounds challenging both the learned lower authorities' respective assessment and lower appellate findings adding the amount in question of Rs. 58,74,00,000/- representing its alleged taxable income on account of barter transaction of power. Learned CIT(A) detailed discussion to this effect reads as under:

www.taxcode.in

5.8.1. It is contended that the AO has erred in making an addition of Rs.58,74,00,000/- on account of barter transactions of power.

5.8.2. The AO observed during the course of assessment proceedings that during the relevant year, the assessee has exchanged power with various companies under the barter arrangement. 'Banking' or 'Barter' is an agreement to exchange energy directly or through some trader without the use of money. The AO further noted that the assessee company had not offered for taxation income out of such barter transactions & therefore, came to the conclusion in this regard that the method of accounting as provided in Section 145(1) of the Act were not followed regularly by the assessee. Therefore, the AO rejected the books of account of the assessee u/s 145(3) of the Act & thereby computed income from such barter transactions as accruing to the assessee.

5.8.3. Appellant has however averred that Barter or Banking agreements are cash neutral transactions where surplus power is banked or returned back as per the terms and conditions of the barter agreement and are accounted for at a normative rate as per DERC guidelines/directive. In such transactions, Inward (Purchase) & Outward (Sales) Banking transactions are accounted for as per DERC specific guidelines at the rate of Rs.4 per unit & on receiving/returning back the banked power, the transaction which was initially booked as sale/purchase is reversed by booking a corresponding purchase/sale. Since electricity/power by its very nature cannot be stored & therefore as industry practice & in accordance with regulatory provisions as well as to conserve & optimally utilize procured electricity/power, cash neutral barter transactions are entered into for supply/receipt of electricity amongst various discoms/users. The appellant had similarly entered into barter transaction with other electricity companies pursuant to which the appellant received and/or supplied electricity; that both the transactions i.e. inward banking & outward

www.taxcode.in

banking are for control purposes booked at Rs.4 per unit, as per the acceptance of the same by DERC. It was also explained further by the appellant company that the said Banking/barter transactions are similar to transaction of storing goods/depositing money in Bank & later retrieving/withdrawing the same for consumption/use & in such transaction of deposition & withdrawal, there is no income as such, as they are cash neutral transactions. Moreover, the aforesaid method of accounting barter transactions was regularly followed by the appellant in the previous assessment year & also accepted by the Department.

5.8.4. Income for income-tax matters is what is understood commercially as income computed under ordinary principles of commercial accounting. IN Kamaksya Narain Singh Vs. CIT (1943) 11 ITR 513 (PC), it has been observed by Lord Wright that "Income", it is true, is a word difficult and perhaps impossible to define in any precise general formula. It is a word of broadest connotation. "Even though the definition of "income" in section 2(24) of the Act is inclusive, the same shall be construed as comprehending only such things which are "income" according to the natural import of the term, as observed In Lachit Films Vs. CIT(1992) 195 ITR 402 (Gauh). The Hon'ble Supreme Court in Doors Tea Co. Ltd. Vs. CAgIT(1962) 44 ITR 6 (SC) held that the word 'income' is formidably wide & vague in its scope & that it is a word of elastic import & its extent and sweep are not controlled or limited by the use of words "profits and gains". In CIT Vs. Karthikeyan (GR) (1993) 201 ITR 866 (SC), it was held that the word 'income' is of widest amplitude & it must be given its natural and grammatical meaning & that the purpose of the inclusive definition u/s 2(24) of the Act is not to limit the meaning but to widen its net and the several clauses therein are not exhaustive of the meaning of income, even if a receipt did not full within the ambit of any clauses, it might still be income, if it partakes the nature of income. Again in Emil Webber Vs. CIT(1993) 200 ITR 483 (SC), the Hon'ble Court held that though the inclusive definition adds several artificial categories to the concept of income but, on that account, the expression income does not lose its natural connotation. Therefore, Income is a periodical return in money or money's worth coming with regularity or expected regularity. But this definition of income is not comprehensive. Therefore, Income Tax law would include income as generally understood but also income deemed under

www.taxcode.in

the Act, specified in section 2(24), as well as other sections eg. Section 41(1). Further section 2(24)(vd) rws 28(iv) taxes the value of any benefit or perquisite as income. In terms of section 28(iv) of the Act, the value of any benefit or perquisite, whether convertible into money or not, arising from business or profession are chargeable to income tax under the Head "Profits and Gains of business or profession". For taxing a receipt u/s 2(24)(vd) rws 28(iv), two conditions need to be satisfied. First, the receipt should signify "income" according to the natural import of the term & secondly, in relation to a business, the receipt should be a product of the normal working of the business activities. In the matter under consideration, since both the conditions are held to be satisfied, the stand taken by the AO on account of addition made for Banking/Barter transactions are held to be legally & factually tenable and the appellant gets no relief on this ground of appeal.

8. It is in this factual backdrop that both the parties vehemently reiterate their respective stands i.e., the assessee's bank on neutrality of the impugned barter transactions of power i.e., inward and outward banking whereas the department's case is that the revenue therefrom ought to have been recognized by adopting average purchase and sale price thereof; respectively. We find no reason to sustain the impugned addition. We make it clear that the assessee is a power company governed by the relevant provisions of the Electricity Act, 2003 wherein section 86(1)(a) thereof empowers the State Electricity Regulatory Commission to determine the tariff on generation, supply, transmission etc.; as the case may be. We, further wish to emphasize here that the State Electricity Regulatory Commission in the assessee's case itself is stated to have fixed the rate of the above impugned barter transactions @ Rs. 4/unit as per its guidelines in the tariff order dated 28.05.2009. We thus conclude in this factual backdrop that once the

www.taxcode.in

above statutory authority has decided the assessee's barter power transactions rate, it could not have recognized income more than the said price as is the Revenue's case before us. We thus accept the assessee's instant 3 to 3.2 substantive grounds in very terms.

9. The assessee's substantive ground nos. 4 to 4.3 seek to reverse both the learned lower authorities' action including the amount of "regulatory assets" to the tune of Rs. 8,27,79,00,000/- credited to the P&L account as its taxable income in Assessing Officer's assessment order in the CIT(A) lower appellate discussion; reading as under:

5.9-10.2 The AO observed from the perusal of discussion under Terms of Reference-4 (TOR-4) of Special Audit that from April 1, 2007 till 31st March, 2011, determination of retail supply tariff chargeable by the assessee company to its customers is governed by DERC (Terms & Conditions for determination of wheeling tariff and retail supply tariff) Regulation 2007, dated 30 May, 2007 (MYT Regulation), whereby DERC, the regulatory authority would determine the tariff in a manner that the assessee company recovers its purchase cost as well as other prudently incurred expenses and can earn an assured return of 14% plus supply margin upto 2% per annum on DERC approved equity. Therefore, the AO came to a view that the business of the assessee company has been having assured return of income and as such, there could not be any loss to the assessee company as the asssessee company has been entitle4d to recover all the uncontrollable expenses as well as prudently incurred controllable expenses along with an assured return of 16%. As purchase & sale are uncontrollable factor and as such the same were allowed on actual basis by.

www.taxcode.in

DERC. With regard to the controllable parameters as per clause 4.7 of the MYT Regulations, the regulatory body has specified targets for controllable parameters which inter alia, include operation and Maintenance Expenditure (Comprising employee expenses, repair & maintenance expenses, administration & general expenses and other miscellaneous expenses viz audit fees, rent, legal fees), Return on capital employed and depreciation. The AO – emphasized that in any commercial accounting practice, the concept of matching costs' and revenues in determining real profits of the year has been a cardinal principle & following the above principle of matching cost & revenue during the F.Y. 2009-10 (A.Y. 2010-11), the assessee company changed its accounting policy, as follows "Revenue from sale of energy is accounted for on the basis of bills raised on the consumers for the billing cycle falling due during the accounting year and also includes unbilled revenues accrued upto the end of the accounting year". According to the AO, the above change in accounting policy was done to conform to the principle of matching revenue with costs incurred during the relevant financial year, since the power purchase cost and other servicing costs were charged to Profit & Loss Account for the entire year, on accrual basis, it would be correct to book the entire sales of the corresponding period on accrual basis. The AO also noted that the DERC while determining the income recoverable from future tariff (regulatory assets), includes the business loss i.e. the difference between the value of units purchased and value of units billed to the consumers, under achievement or over achievement of ATC (Aggregate Transmission & Commercial) loss targets, shortfall in recovery of allowable expenses and an assured return on the capital employed. The revenue gap for the appellant company in this regard pertaining to F.Y. 2009-10 (A.Y. 2010-11) as approved by the DERC was Rs.943.36 crores, as per the DERC Order and as the cost relating to the revenue gap of Rs.943.36 crores had already been claimed in the Profit & Loss Account for the F.Y. 2009-10, and as such Revenue of Rs.943.36 should have been recognized in the P&L A/c for the F.Y. 2009-10 by the appellant. The AO therefore caused the appellant to explain as to why the amount of Rs.943.36 crores should not be added to the taxable income of the appellant company. In response to the same, the assessee company submitted that it had accounted for an amount of Rs.827.79 crores as income recoverable from future tariffs,

www.taxcode.in

accordance revenue gaps/surplus, as approved by DERC and the same are as per Accounting Standard 9 (AS 9), issued by the ICAI. The assessee company further submitted that there is no loss to revenue as the same have been recognized in the F.Y. 2010-11 (A.Y. 2011-12) & F.Y. 2011-12 (A.Y. 2012-13). It was further pleaded before the AO that it was not a real income of the assessee company & as this income being hypothetical, the same was not liable to be taxed, in view of the findings of the Hon'ble Supreme Court in the case of M/s Godhra Electricty Co. Ltd. Vs. CIT 225 ITR 746 (SC) and CIT Vs. M/s Excel Industries Ltd. 358 ITR 295 (SC). It was also contended by the assessee company that even the revenue gaps pertaining to F.Y. 2008-09 & 2009-10 were not recognized as Regulatory Assets during the F.Y. 2009-10 on self true up basis owing to uncertainties of recovery of these gaps as at the time which is in line with Accounting Standard 9 (AS 9). However, the AO came to the conclusion that assessee company's contention that Accounting Standards issued by the ICAI were also to be followed for computing the taxable income as per the provisions of I.T. Act, 1961 were not acceptable because the concept of income and method of computing the income for taxability under the I.T. Act were different from the provision of Companies Act & therefore, it might not be necessary that Accounting Standards issued by the ICAI were also to be followed for computing the taxable income as per the provisions of the I.T. Act. The AO examined by AS 9 (issued by ICAI) regarding Revenue Recognition that requires revenue to be measurable and that at the time of sale or the rendering of service, it would not be unreasonable to expect ultimate collection. The AO further stated that in the case of income under revenue gaps, as per AS 9 also, it is required to recognize the revenue. as per following discussions:

(a) At the close of Financial Year, the assessee company is required to get the accounts finalized and audited as per the Companies Act, 1956 and I.T. Act, 1961. Once the books of accounts are completed and have been audited, the assessee company can very much compute the differential Revenue recoverable as per the DERC guidelines on self true up basis. Therefore, income recoverable from future tariff is very much measurable. The Special Auditor in its audit report dated 30.08.2013 under section 142(2A) has also discussed under TOR7.

www.taxcode.in

(b) As per the AS-9 on revenue recognition also, the assessee company being a service provider should recognize the revenues on completion of services basis. Since, in the present case, the assessee company has already provided the service/energy to the consumers, regulatory assets would be part of income.

(c) There is no un-reasonability to expect ultimate collection at the close of the financial year when the differential revenue could have been recognized. From the DERC regulations, it is clear that the business of the company is assured return business and as such there cannot be loss to the company as the assessee is entitled to recovery all the uncontrollable expenses as well as prudently incurred controllable expenses along with assured return of 16%. The assessee company is only worried as to how the DERC intended to true up and in what time frame which are actually only apprehensions and not based on facts. The DERC is also bound by the regulations and government guidelines under which it has to complete true up within a set time frame. If not actual the assessee company could have recognized the differential revenue recoverable on self true up basis which would have been incompliance to the matching accounting principles.

(d) Further, the AR has submitted that government of NCT Delhi had sought statutory advice of DERC on 04.05.2010 and directed not go issue the tariff order till the advice is examined by GoNCTD. The submissions has been examined and the found that in response to the GoNCTD letter dated 04.05.2010 DERC has submitted its advice on 30.06.2010 after which GoNCTD must have issued a go ahead for passing the tariff orders. It is noticed that it is a only one time advice by GoNCTD and that to on the basis of representations by private distribution licencee in Delhi where the assessee company is one of the distributions licencee. From the above, it is clear the GoNCTD advice was only temporary and does not impose any uncertainty over future tariff recovery and thus assessee's submissions are only misleading and an afterthought. It is also noticed that the assessee company has filed the True up petition for F.Y. 2008-09 and 2009-10 on 01-122009 and 01.06.2010 respectively and they were admitted on 05.01.2010 and 11.10.2010 respectively. Therefore, there is no unreasonability to expect the ultimate collection of revenue gap.

www.taxcode.in

The AO also considered the Hon'ble Supreme Court of India judgement in M/s Godhra Electricity Company Ltd. Vs. CIT 225 ITR 746, but made a distinction as follows, based on assessee's submission viz.

a) M/s Godhra Electricity Com. Ltd was governed under Electricity Act, 1948 but the assessee company is governed under Electricity Act, 2003.

(b) Under Electricity Act, 1948, M/s Godhra Electricity Com. Ltd was entitled to enhance the tariff unilaterally. However, DERC (Delhi Electricity Regulatory Commission) which derives the mandates from Delhi Electricity Regulatory Act, (DERA) determines the tariff charge by the assessee company.

(c) There was no Regulatory Body like DERC, available at the times of M/s Godhra Electricity Com. Ltd who determines the tariff on the basis of true up of expenses.

(d) The business of the assessee company is assured return business and as such there cannot be loss to the company as the asessee is entitled to recover all the uncontrollable expenses as well as prudently incurred controllable expenses along with assured return of 16% in accordance with DERC (terms and conditions for determination of wheeling tariff and retail supply tariff) Regulation 2007 dated 30 May, 2007 (MYT Regulation). Accordingly, it can be scientifically concluded that the income has accrued to the assessee and the right to receive the same has also arisen.

The AO also made a distinction of the case of assessee company with the ratio of decision of Hon'ble Supreme Court in CIT Vs. M/s Excel Industries Ltd. 358 ITR 295 (SC) & relied on the ratio of decision of Hon'ble Apex Court In Morvi Industries Ltd. Vs. CIT 82 ITR 835 (SC). Further, the assessee company has itself offered the said amount of Rs.943.99 crores in A.Y. 2011-12 and 2012-13 as income in its P&L A/c as noticed by the AO & hence the contention of the assessee company that the same was hypothetical income was not found tenable by the AO & considering that the assessee company had acquired the right to receive the said amount as income, he added the impugned amount to the Total Taxable Income of the assessee company.

www.taxcode.in

has spent more and is entitled to be compensated by an increase in the tariff for the subsequent years. However, since in practice, electricity tariff cannot be increased beyond a limit, the revenue gap remains uncollected for several years which is accounted for in the books of account by crediting the 'P&L A/c' & debiting 'Regulatory Asset' A/c. But the same does not mean that 'real income' has accrued to the appellant as the said amount is not due or recoverable from a particular consumer but only signifies 'a right to recover' through future tariff as & when announced by the Regulator. There is however no right in the appellant to recover the said amount from the consumers during the relevant year or even at a later date, unless & until the DERC permits the same to be recovered from the consumers. Therefore, it has been stated by the appellant that the AO failed to appreciate that unless and until the appellant is permitted, by virtue of specific tariff order, to increase tariff to recover the revenue gap, there was in the first instance, no "accrual" of income & income would accrue in future when DERC permits the appellant to raise bill for recovering the revenue gap. The appellant also seeks support from the apex court decision in Godhra Electricity Case (Supra) & stated that the case of the appellant, is in fact on a much better footing qua the taxability of revenue gap/regulatory assets on account of the fact that in case of appellant (a) no tariff order has been passed by the regulator & importantly & consequential to the above (b) the appellant has not raised bills on the customer on account of the same. I tend to agree with the appellant & this issue of the appellant is at variance with the issue of Late Payment Surcharge (LPSC) & theft billing as in that particular issue the appellant raised the bills where the appellant was required to charge the Late Payment Surcharge (LPSC) @ 1.5% per month of the principal amount in the bills raised & that too on DERC approved rates but in the instant case, no real income has accrued to the assessee, in real sense of the term as the appellant is not in a position to raise bills unless approved by the DERC. Regulatory assets are in fact in the nature of non cash assets recorded in the books of discoms in cases where the regulator does not raise power tariff to compensate for higher costs for any reason. The loss in such cases is classified as a regulatory assets that can be liquidated in future via tariff raises. The appellant also submitted that the revenue gaps pertaining to

www.taxcode.in

FY 2009-10, owing to uncertainties of recovery of these gaps at that time, which is in line with the Accounting Standards 9 (AS-9) of ICAI on Revenue Recognitions. Therefore, the amount of Rs.943.99 crores as added by the AO as income from future tariff or regulatory assets is liable for deletion. However, the appellant has credited an amount of Rs.827.79 crores in (after adjustments) its Profit & Loss Account and offered to tax in the original return of "income as "income recoverable from future tariff on the basis of DERC order dated 26.05.2009, by which the DERC had trued up the accounts for the Assessment years 2003-04 to 2008-09 and determined the revenue gap of Rs.575.63. The appellant had itself account for the revenue gap upto 31.03.2008 (AY 2003-04 to 2008-09) as increased by carrying costs and impart of Sixth Pay Commission liability by crediting the P&L A/c (except for difference of rounding off of accumulated revenue gap upto F.Y 2007-08) that was offered to tax in the succeeding assessment year. Therefore, the amount credited of Rs.827.77 crores to the P&L Account for the relevant financial year i.e F.Y 2009-10, was duly offered to tax. The appellant's plea is that though it had offered the said amount of Rs.827.79 crores to tax in the relevant assessment year, the said amount are not assessable as income until & unless, the regulator DERC Passes further order permitting the appellant to recover the said amounts from consumers by an appropriate increase in tariff i.e there is no tariff order passed by DERC, by virtue of the 'True up' order of DERC, dated 26.05.2009, for the AY 2003-05 to 2008-09 resulting in Regulatory Assets in favour of the appellant to the extent of recognizing the legal right to recover the additional amount. Therefore, the facts can be examined from three different points in time or three different perspective/situations.

- Self true up by the assesse of the Regulatory Assets, where due to great uncertainties, by following AS-9 issued by ICAI, no real income can said to have accrued, even if the assessee is following the mercantile (Accrual) System of accounting.
- True up Order passed by the regulator (DERC for the appellant), where the assessee has the enforceable legal right at least to the extent of assured rate of return, though the assessee may also claim that due to tentativeness, the accrual of income could only be notional due to pendency of arbitration or adjudication or passing of order by DERC

fixing enhanced tariff and not real as billing for the additional amount is subject to tariff determination by the regulator and hence no crystallisation or quantification of the amount due.

- Tariff Order/Notification passed by the regulator (DERC for the appellant), paving the way for bills being raised for additional tariff, resulting in crystallisation of income accrued leading to legal enforceable right to receive the additional amount.

Considering the legal matrix and factual canvas, I am of the view that since the appellant had itself offered for taxation, the said amount of Rs.827.79 crores by way of crediting the same in its P&L A/c based on culmination of enforceable legal right to receive the assured return on the passing of trueup order under reference of DERC dated 26.05.2009, for the Asstt. Years 03-04 to 2008-09, the said amount of Rs.827.79 crores is hereby held to be taxable for the relevant financial year, under consideration, in the absence of True up 'Tariff' order of DERC, determining the Tariff rate. In any case, there cannot be any strait jacket determination of accrued income in such cases as even a 'True up' order could lead to enforceable legal rights as the appellant is entitled to an enforceable legal assured return. Even the appellant has itself Flip Flopped on this issue and changed its method of accounting as regards Regulatory assets, though it is a fact on record that no tariff order for True up order has been passed by the DERC in the relevant financial year. The appellant partly succeeds on this ground of appeal.

10. That being the case, we must take notice of the relevant proceedings initiated at the assessee's behest in civil writ petition no. 104 of 2014 against Union of India & Ors. regarding the very "regulatory asset" which came to be decided in their lordships detailed adjudication on 06.08.2025; as under:

www.taxcode.in

2025 INSC 937

REPORTABLE

IN THE SUPREME COURT OF INDIA
ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (C) 104 OF 2014

BSES RAJDHANI POWER LTD. & ANR. ...PETITIONER(S)

VERSUS

UNION OF INDIA AND ORS. ...RESPONDENT(S)

WITH

WRIT PETITION (C) 105 OF 2014

WITH

CIVIL APPEAL No. 4010 OF 2014

WITH

CIVIL APPEAL No. 4013 OF 2014

WITH

WRIT PETITION (C) 1005 OF 2021

J U D G M E N T

Table of Contents

1. Introduction.....4

2. Concept of a Regulatory Asset. 7

3. Facts.....9

Submissions of Parties. 11

5. Impleadment of the State Commissions and Governments.....20

Signature Not Verified
Digitally signed by KAPIL TANDON
Date: 2025.06.06 19:12:21 IST
Reason:

www.taxcode.in

5 (i). Affidavits by State Commissions. 21

5 (ii). Affidavits by State Governments. 25

6. Law Governing the Electricity Sector Prior to 2003. 26

7. Electricity Act, 2003. 28

8. Provisions of the Electricity Act relating to determination of Tariff. 31

9. Provisions of Act, Policies, Rules, Regulations, and Orders having a bearing on creation of a Regulatory Asset. 35

9 (i). National Electricity Policy, 2005. 35

9 (ii). National Tariff Policy, 2006. 36

9 (iii). DERC Tariff Determination Regulations, 2007. 37

9 (iv). DERC Statutory Advice dated 15.12.2010. 38

9 (v). Ministry of Power's Letter to the APTEL. 40

9 (vi). APTEL's Order dated 11.11.2011. 40

9 (vii). DERC Tariff Determination Regulations, 2011. 41

9 (viii). DERC's Tariff Order dated 26.08.2011 (FY 2011-12). 42

9 (ix). DERC's MYT Order dated 13.07.2012 (FY 2012-15). 43

9 (x). DERC's Statutory Advice dated 01.02.2013. 43

9 (xi). DERC's Tariff Order dated 31.07.2013 (FY 2013-14). 44

9 (xii). APTEL's Order dated 14.11.2013. 45

9 (xiii). APTEL's Order dated 11.03.2014. 46

9 (xiv). National Tariff Policy, 2016. 47

www.taxcode.in

9 (xv). DERC Tariff Determination Regulations, 2017. 48

9 (xvi). Ministry of Power's Affidavit dated 10.08.2022. 49

9 (xvii). Ministry of Power's Affidavit dated 12.12.2022. 51

9 (xviii). Electricity (Amendment) Rules, 2024 introducing Rule 23. 52

9 (xix). DERC's Order dated 19.07.2024 (true-up till FY 2020-21).....53

10. Analysis. 53

10 (i). Electricity is a public good and is regulated under the Act. 54

10 (ii). Tariff determination is governed by the Act, which entrusts this function to independent Regulatory Commissions. 54

10 (iii). Collaborative effort of the Regulatory Commissions to balance social justice obligations with efficiency. 57

10 (iv). Tariff fixation takes into account multiple variables and requires flexibility. Regulatory asset is a measure adopted during tariff fixation that recognises right of recovery. 58

10 (v). Factors leading to an unmanageable regulatory asset, and consequent 'regulatory failure'. 59

10 (vi). Law that governs creation, continuation and liquidation of regulatory asset.. 62

10 (vii). Accountability of the Regulatory Commissions. 67

10 (viii). Powers of the APTEL. 69

11. Conclusions. 77

12. Directions. 80

www.taxcode.in

1. Introduction.

1. We are entertaining these writ petitions[1] and civil appeals[2] only for examining a limited question as to the law that governs the creation of a "regulatory asset" during the process of tariff determination by the Electricity Regulatory Commissions, its impact on the rights and liabilities of the stakeholders, the limits within which it can be operated, and finally the regulatory duties that it invokes for the Regulatory Commissions. We also clarify that through these proceedings, we are not determining the rights and liabilities of the parties, which will anyways be considered in the pending civil appeals against the orders of the Appellate Tribunal of Electricity[3].

2. In these writ petitions and civil appeals, the three distribution companies that supply electricity to consumers in the National Capital Territory of Delhi[4], namely BSES Rajdhani Power Ltd.[5], BSES Yamuna Power Ltd.[6], and Tata Power Delhi Distribution Limited[7], have challenged the manner in which the Delhi

---

[1] W.P. (C) No. 104/2014, W.P. (C) No. 105/2014 and W.P. (C) No. 1005/2021 under Article 32 of the Constitution.
[2] C.A. No. 4010/2014 and C.A. No. 4013/2014 against the order dated 11.03.2014 passed by the Appellate Tribunal for Electricity in I.A Nos. 364-365/2013 in Appeal Nos. 265-266/2013.
[3] Hereinafter "APTEL".
[4] Hereinafter "NCT of Delhi".
[5] Hereinafter "BRPL".
[6] Hereinafter "BYPL".
[7] Hereinafter "TPDDL".

www.taxcode.in

Electricity Regulatory Commission[8] has determined the tariff for retail supply of electricity over the years, leading to the creation and continuation of a "regulatory asset". The prayers in W.P. (C) Nos. 104 and 105/2014 by BRPL and BYPL[9] are similar, which we may formulate as follows:

i. To hold and declare that the petitioners are entitled to prudently incurred cost and allowances in terms of Sections 61 and 62 of the Electricity Act, 2003[10] and Multi Year Tariff Regulations;
ii. To direct the DERC to give effect to the deferred cost creating a regulatory asset in accordance with Para 8.2.2 of the National Tariff Policy;
iii. To direct the respondent-generating companies to not disconnect or discontinue power supply or take any other coercive steps till this Court determines an appropriate mechanism for adjustment of dues owed by the distribution companies from the amounts due and owed to them; and
iv. To protect their investment and assured return from the licensed business.

3. TPDDL has also filed W.P. (C) No. 1005/2021, where it has prayed for the following reliefs:

---

[8] Hereinafter "DERC".
[9] Hereinafter collectively referred to as "BSES Discoms".
[10] Hereinafter "the Electricity Act".

www.taxcode.in

i. To direct DERC to recognise its regulatory asset and formulate and implement a clear roadmap for the liquidation of the regulatory asset in a time-bound manner of 3 years;

ii. In the alternative, to direct DERC to increase the Deficit Recovery Surcharge to 20% to amortise the regulatory asset as per the National Tariff Policy;

iii. To direct DERC to implement various judgments of the APTEL in appeals against tariff orders by the DERC.

4. In order to consider these prayers as well as the maintainability of the writ petitions, which has been contested by the respondents, we will have to examine the concept of a 'regulatory asset' and its creation and continuation in the context of the law that may govern it. Further, we will also examine whether the law creates any statutory duties and whether failure to fulfil the same gives rise to an enforceable legal right. For this purpose, we will commence with examining the Electricity Act, and the rules, regulations, and policies framed thereunder as well as judicial precedents and necessary practices for good governance of the electricity sector.

www.taxcode.in

2. Concept of a Regulatory Asset.

5. A "regulatory asset" in the context of tariff determination for electricity utilities is an intangible asset that is created by the Regulatory Commissions in recognition of an uncovered revenue gap or revenue shortfall when a distribution licensee could not fully recover the costs reasonably incurred by it through revenue from tariff.[11] This portion of the revenue requirement is not included while determining the tariff for the particular year. Rather, the distribution company is entitled to receive or recover such revenue in the future, over a period of time.

6. There are several situations and factors leading to the creation of such a regulatory asset. It is generally created when the projected revenue based on the determined tariff is significantly lower than the revenue required by the distribution company to recover reasonably-incurred costs as well as for return on investment. When it is not feasible to recover this gap either by increasing tariffs or through other means such as government subsidy during that year, a regulatory asset equivalent to the uncovered expenses is created. Another situation requiring the

[11] See *Tamil Nadu Electricity Consumers' Association v. Tamil Nadu Electricity Board*, Appeal Nos. 192 and 206 of 2010, APTEL order dated 28.07.2011.

www.taxcode.in

creation of a regulatory asset is at the time of truing up, if the actual revenue realisation from tariffs is much lesser than the Annual Revenue Requirement[12].

7. This revenue gap can be recovered through government subsidies or by increasing the tariff. However, the latter may lead to a tariff shock to consumers in a given year. Hence, to protect consumer interests, the Regulatory Commission may choose to direct recovery of only some portion of the gap while creating a regulatory asset for the remaining portion, which can be recovered in the subsequent years. At the same time, the financial health and commercial viability of the distribution company must be ensured by the Regulatory Commission. Hence, the Regulatory Commission must ensure that if a regulatory asset is created, the same is recovered in a time-bound manner.

8. The creation and continuation of a regulatory asset is neither a statutory concept nor a power granted under the Electricity Act. Rather, it is a measure adopted by the Regulatory Commissions, which are statutory bodies, in exercise of their powers and functions under the Act. It is hence guided by the legal regime of the Electricity Act and the rules, regulations, and policies framed

[12] Hereinafter "ARR".

www.taxcode.in

thereunder, along with their interpretation in various judicial precedents.

3. *Facts.*

9. Initially, the Delhi Vidyut Board was responsible for generation, transmission and distribution of electricity in NCT of Delhi. With the Delhi Electricity Reform Act, 2000 and the Delhi Electricity Reform (Transfer Scheme) Rules, 2001, these functions were unbundled and different entities were made responsible for each function. Until 2007, the Delhi Transco Limited[13] was solely responsible for bulk procurement and bulk supply of power in Delhi, and all distribution companies were required to purchase power from it. After 31.03.2007, the responsibility for power purchase in Delhi was transferred to the distribution companies.

10. DERC adopted the Multi Year Tariff[14] framework in generation, transmission, and distribution businesses so as to bring certainty regarding tariff and its annual basis during each control period.

---

[13] Hereinafter "DTL".
[14] Hereinafter "MYT".

www.taxcode.in

11. A regulatory asset was first created by the DERC in the tariff order dated 09.06.2004 for North Delhi Power Limited[15] and orders dated 11.06.2004 for BRPL and BYPL. In these orders, the DERC introduced the regulatory asset as a mechanism to bridge the revenue gap in the tariff order for FY 2004-05, and it amounted to a total of Rs. 696 crores across BRPL, BYPL, NDPL and DTL.

12. Over the years, various orders of the DERC determining ARR for each year, MYT orders, and truing-up orders demonstrate an increase in the quantum of the regulatory asset across all three distribution companies before us. The DERC also provided for carrying costs on the regulatory asset to each distribution company, which further contributed to its ballooning. We are informed that as on 31.03.2024, the regulatory asset including carrying costs is Rs. 12,993.53 crores for BRPL, Rs. 8419.14 crores for BYPL, and Rs. 5,787.70 crores for TPDDL, totally amounting to Rs. 27,200.37 crores across all three distribution companies. During this time, the DERC has taken note of this increase and introduced various measures like increasing tariffs, Deficit Recovery Surcharge[16], fuel price adjustment charge and Power

[15] Hereinafter "NDPL", which is now TPDDL.
[16] Hereinafter "DRS".

www.taxcode.in

Purchase Adjustment Charge[17]. These measures are byproducts of the regulatory asset and are intended for its liquidation.

13. After setting out the submissions of the parties as well as views of various State Commissions and State Governments, we will examine framework within which the regulatory asset is created, continued, and liquidated. We will refer to the relevant provisions of the Electricity Act, National Tariff Policies, the Electricity Rules, DERC's Tariff Determination Regulations, and introduction of various measures by the DERC, either as mitigative or alleviative to deal with the problem. Following this, we will determine the status of the regulatory asset and the consequential directions that may be passed in these writ petitions and civil appeals.

4. Submissions of Parties.

14. We have heard Mr. Kapil Sibal and Dr. Abhishek Manu Singhvi, learned senior counsels and Mr. Amit Kapur, learned counsel for the three distribution companies, who are the petitioners and appellants. On behalf of the respondents, we have heard Mr. Nikhil Nayyar, learned senior counsel for the DERC,

[17] Hereinafter "PPAC".

www.taxcode.in

Mr. R. Venkataramani, learned Attorney General of India for certain generating and transmission companies, Mr. K.M. Nataraj, learned ASG for the Ministry of Power, Union of India, and Mr. Siddharth Dave and Mr. Shadan Farasat, learned senior counsels for the Government of NCT of Delhi.

15. Mr. Sibal made the following submissions:

i. Referring to the Statement of Objects and Reasons of the Electricity Act, he submitted that the statute intends to distance the government from tariff regulation and determination by establishing independent regulators, and it aims to encourage private sector participation in the electricity sector.

ii. Mr. Sibal then referred us to various provisions of the Electricity Act, including factors guiding tariff determination under Section 61, tariff determination for retail supply of electricity under Sections 62 and 64, and advance payment of government subsidies under Section 65. He also took us through the mandatory and advisory functions of the State Commission under Section 86, emphasising that the Commission must be guided by the policies and plans formulated under the Act in discharge of its functions.

iii. He then referred us to the relevant portions of the statutory advice issued by the DERC to the Government of NCT of Delhi by letters dated 15.12.2010 and 01.02.2013, which we will deal with in more detail at a later stage.

www.taxcode.in

iv. Referring to Clause 8.2.2 of the National Tariff Policy, 2006, he submitted that a regulatory asset must be created only in exceptional circumstances that are clearly defined in the regulations and that only include natural causes or force majeure conditions. Further, that the regulatory asset must be recovered in a time-bound manner in 3 years, and preferably within the control period. These conditions are also incorporated in Regulation 5.42 of the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007[18] and Regulation 5.40 of the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011[19], which we will deal with at a later stage. Mr. Sibal submitted that these conditions for creation of a regulatory asset have not been complied with by the DERC.

v. He then referred us to the Electricity (Amendment) Rules, 2024 (notified on 10.01.2024) that inserts Rule 23 in the Electricity Rules, 2005, which stipulates various conditions for creation, continuation, and recovery of a revenue gap or regulatory asset.

vi. To conclude, Mr. Sibal submitted that the creation, continuation, and expansion of the regulatory asset over the years can be attributed to the following causes: (i) assumed power purchase cost for tariff determination is lower than the actual cost; (ii) assumption of inflated

[18] Hereinafter "Tariff Determination Regulations, 2007".
[19] Hereinafter "Tariff Determination Regulations, 2011".

www.taxcode.in

revenue; (iii) tariffs determined by the DERC are not cost-reflective; (iv) the orders of the APTEL and this Court regarding tariff fixation are not implemented; (v) the state government has not paid the subsidy amount in advance as per Section 65; (vi) payment of Late Payment Surcharge[20] @ 18% on late payments to the generating companies; and (vii) the truing-up exercise is not carried out properly.

16. Mr. Amit Kapur, for the BSES Discoms has submitted that currently, the regulatory asset is about Rs. 26,000 crores (including the carrying cost payable to date). The continuation of the revenue gap, without liquidating it in a time-bound manner undermines the very purpose of the Electricity Act to promote private sector participation and to provide for cost-reflective tariffs. He submits that there is a creeping acquisition of private distribution companies due to this.

17. Dr. Singhvi appearing for TPDDL then addressed us and made the following submissions:

i. To liquidate the regulatory asset, certain measures may be taken such as increasing the DRS, increasing tariffs payable by consumers, and through government support. Further, there must be a fixed timeline for liquidation as

[20] Hereinafter "LPS".

www.taxcode.in

the quantum of the regulatory asset only increases with the passage of time due to accumulation of carrying costs.

ii. While the DERC's roadmap for liquidation submitted before this Court estimated recovery of the entire regulatory asset by 2022, this has not fructified. In this context, he submitted that DRS of 8% is wholly inadequate as it is insufficient to even meet the carrying cost on the regulatory asset.

18. Mr. Nikhil Nayyar, learned senior counsel appearing on behalf of the DERC then addressed us. He took us through the scheme of the Electricity Act and its provisions, and also traced the history of the creation and continuation of a regulatory asset by the DERC. While doing so, he made the following submissions:

i. The DERC's tariff order dated 11.06.2004 shows that the BSES Discoms themselves suggested the creation of a regulatory asset to enable recovery of the revenue gap over a period of time through gradual increase in tariffs.

ii. Over the years, the DERC introduced various measures to liquidate the regulatory asset, including tariff hikes, 8% DRS, carrying cost, fuel purchase adjustment charge, and PPAC. Currently, TPDDL, BRPL, and BYPL levy 29.13%, 27.08%, and 31.60% PPAC respectively and between FY 2018-19 to FY 2022-23, they have earned Rs. 3,230.48 crores, Rs. 4,399.48 crores, and Rs. 2,210 crores through PPAC. The DERC also increased the tariff by 50% between

www.taxcode.in

FY 2011-15 as follows - 22% by order dated 26.08.2011), 23% by order dated 13.07.2012, 5% by order dated 31.07.2013, and 8.32% by order dated 23.07.2014.

iii. However, these measures were not sufficient as between 2007 and 2012, the power purchase cost, which constitutes 80% of the ARR, increased by more than 80% from Rs. 2.86 to Rs. 5.16 per unit. The regulatory asset ballooned during this period due to this unprecedented increase in power purchase costs, which is attributable to the increase in coal and gas prices. Further, the introduction of CERC (Unscheduled Interchange charges and related matters) (Amendment) Regulations, 2010 prevented the use of UI mechanism for sale of surplus power at profitable rates.

iv. While the roadmap submitted by the DERC before this Court estimated that the regulatory asset would be liquidated by 2022, this did not materialise for several reasons such as the distribution companies not achieving the estimated 15% growth rate and carrying cost on the regulatory asset being a compound interest that itself amounts to Rs. 8,692 crores across BRPL, BYPL, and TPDDL from FY 2012-13 to FY 2019-20, while DRS @ 8% led to a collection Rs. 11,073 crores.

v. He submitted that the regulatory asset could not be liquidated as planned as the amount does not remain static. With each tariff order, some portion is recovered while other factors lead to an increase in the regulatory

www.taxcode.in

asset. Further, considering that the roadmap for liquidation was prepared in 2014, it needs to be revised.

vi. Mr. Nayyar also disputed the maintainability of these writ petitions as there is a statutory mechanism under the Electricity Act for tariff determination, which is a quasi-judicial exercise by an expert body and the scope of judicial review is limited. Further, the Act also provides for appealing the DERC's decision before the APTEL under Section 111. Finally, there is no allegation regarding violation of any fundamental right for this Court to exercise writ jurisdiction.

vii. Finally, Mr. Nayyar averred to tariff determination and regulatory assets created by other State Commissions. He submitted that 15 states have implemented an automatic pass-through for fuel costs, which means that the distribution companies in these states can pass on the rise in power purchase costs to the consumers. He also submitted that other than Delhi, regulatory assets have been created in Tamil Nadu, Rajasthan, Kerala, and Maharashtra.

19. We then heard the learned Attorney General for the generating and transmission companies namely Indraprastha Power Generation Company Limited[21], Pragati Power Corporation Limited[22], and DTL. He submitted that while the DERC has

[21] Hereinafter "IPGCL".
[22] Hereinafter "PPCL".

www.taxcode.in

recognised a revenue gap for all three distribution companies, BRPL and BYPL are not making regular payments to IGPCL, PPCL and DTL, despite making regular payments to other power utilities. He also submitted that TPDDL has been regularly paying the bill amounts. With regard to non-payment by BRPL and BYPL, he submitted that these dues cannot be set-off/netted-off/squared off against the unrecovered tariff, which must be realised by the distribution companies from consumers in accordance with DERC orders. He also submitted that the adjustment of any payments against past dues is in accordance with the provisions of their power purchase agreements and Rule 4 of the Electricity (Late Payment Surcharge) Rules, 2022.

20. We then heard Mr. K.M. Nataraj, learned ASG appearing for the Ministry of Power, Union of India. He submitted that a regulatory asset is created when State Commission determines tariffs while ignoring the principles laid down in Section 61 of the Electricity Act, specifically in sub-sections (b), (c), and (d). In such situations, the approved tariff and revenue generated from it is lower than the actual ARR of the distribution company. Further, the regulatory asset is created without following the conditions specified in Clause 8.2.2 of the National Tariff Policy, 2006 and

www.taxcode.in

without a specific time period for liquidation. In order to recover this amount, he submits that the tariffs may be increased, the state government may provide additional subsidies to reduce the burden on the consumers due to increased tariffs, and through financial support by the state government. He also submitted that liquidation must be in accordance with Rule 23 of the Electricity (Amendment) Rules, 2024.

21. Finally, Mr. Shadan Farasat and Mr. Siddharth Dave, learned senior counsels for the Government of NCT of Delhi addressed us. They submitted that the regulatory asset is not attributable to the subsidies granted by the Government and its payments under Section 65 of the Electricity Act.

22. By order dated 23.10.2024, this Court directed the Government of NCT of Delhi to respond to the subsisting regulatory asset. When the matters were listed on 20.11.2024, Mr. Shadan Farasat, learned senior counsel appeared for the Government and expressed that the Government has not yet taken its decision regarding subsidies and creation of the regulatory asset, the reasons for which we directed be placed in an affidavit before us. An affidavit dated 06.01.2025 was filed by the Government of NCT of Delhi indicating that the Department of

www.taxcode.in

Power had prepared a cabinet note for circulation on 29.10.2024, which was circulated for comments. The same received concurrence from the Law Department on 01.11.2024 but the comments of the Finance and Planning Departments are awaited. It was also stated that the Government of NCT of Delhi is releasing the subsidy amounts without default, and there is no relation between the grant of electricity subsidy and accumulation of the revenue gap. The amounts payable to the BSES Discoms are directly released to IPGCL, PPCL, and DTL for adjustment against outstanding dues, in accordance with interim orders of this Court in these writ petitions and civil appeals.

5. Impleadment of the State Commissions and Governments.

23. After hearing the learned counsels for the parties, by this Court's order dated 23.10.2024 we directed the impleadment of State Governments and State Electricity Regulatory Commissions to gather their views in light of the large-scale and nation-wide implications of creation and continuation of regulatory assets on the electricity sector. Subsequently, by order dated 20.11.2024, we directed the State Governments and State Commissions to express their views through affidavits. Upon perusing these affidavits, the

www.taxcode.in

position of each state vis-à-vis regulatory assets can be captured as follows:

5 (i). Affidavits by State Commissions.

24. Following is the gist of the affidavits filed by various Commissions.

i. The State Commissions of Andhra Pradesh, Assam, Haryana, Himachal Pradesh, Jharkhand, Madhya Pradesh, Odisha, Punjab, Sikkim, Telangana, and Uttar Pradesh have submitted that they have not created any regulatory asset at any point in time.

ii. The Maharashtra Electricity Regulation Commission submits that in compliance with Clause 8.2.2 of the National Tariff Policy, 2016 and Rule 23 of the Electricity (Amendment) Rules, 2024, it has not created a regulatory asset since March 2020 in respect of any distribution licensee in the state.

iii. The Joint Electricity Regulatory Commission for UT of Jammu and Kashmir and UT of Ladakh also submits that it has not created any regulatory asset since FY 2019-2020 and tariff determination is such that the ARR of the distribution companies is met from the revenue from consumers and grant-in-aid from the UT Government.

iv. The Chhattisgarh State Electricity Regulatory Commission submits that there was a revenue gap of Rs. 343 crores in FY 2011-12, even after tariff increase by 14%, but the same was fully apportioned in FY 2012-13 with carrying cost. In FY 2012-13, there was a cumulative deficit of Rs. 1752 crores

www.taxcode.in

that was partially apportioned by a 17% tariff increase and the remaining revenue gap of Rs. 828 crores was carried forward as a regulatory asset, which was subsequently apportioned in FY 2013-14 with carrying costs. There was no regulatory asset between FY 2013-14 and FY 2015-16. Then in FY 2016-17, the State Commission had to allow Rs. 1130.80 crores over and above the ARR to comply with an APTEL order. To prevent a tariff shock, it allowed recovery of Rs. 370 crores in that year, and created a regulatory asset for Rs. 760.80 crores that was recovered in FY 2017-18. There was no regulatory asset created or carried forward between FY 2017-18 to FY 2019-20. In FY 2020-21, considering the COVID-19 pandemic and to avoid increasing tariffs, the Commission created a regulatory asset of Rs. 213 crores that was recovered in FY 2021-22. Post-COVID, the Commission increased tariff by 6.19% and 2.31%, with no regulatory assets. However, as of FY 2023-24, there was a cumulative revenue deficit of Rs. 2924.53 crores as the tariff hikes were insufficient to meet expenditure. The Commission implemented various rationalisation measures to reduce the regulatory asset to Rs. 2528 crores, which would be recovered with carrying cost during the true-up for FY 2023-24 and tariff determination of FY 2025-26. It also submitted that no further regulatory asset has been crated in the tariff order dated 01.06.2024 for ARR of FY 2024-25.

v. Kerala State Electricity Regulatory Commission has submitted that till FY 2022-23, the regulatory asset is Rs. 7123 crores as per the Commission's order dated 25.06.2022.

www.taxcode.in

Against this, the average GPF balance estimated by the Kerala State Electricity Board at the end of FY 2026-27 is about Rs. 3500 crores, and the average surplus security deposit at the end of FY 2026-27 is Rs. 285 crores. Considering these funds available with the Kerala State Electricity Board, the Commission decided to amortise the balance gap of about Rs. 3350 crores during the control period while avoiding tariff shock and financial burden to the consumers, in the following manner: Rs. 850 crores each year from FY 2022-23 to FY 2024-25, Rs. 500 crores in FY 2025-26, and Rs. 300 crores in FY 2026-27.

vi. The Rajasthan Electricity Regulatory Commission has submitted that as per its orders dated 31.03.2023 and 26.07.2024, the regulatory asset across the three distribution companies in the state is Rs. 47,578 crores upto FY 2023-24 and Rs. 47,114 crores upto FY 2024-25. Various measures have been taken for recovery of the accumulated regulatory assets including financial support from the state government and introduction of monthly fuel surcharge to account for increasing power purchase costs. The Commission also noted that decision regarding regulatory surcharge, tariff increase, and adjustment of regulatory asset against revenue surplus will be taken in the successive years. It has also submitted that under the Draft RERC (Terms and Conditions for Determination of Tariff) Regulations, 2025, Regulation 91 provides for the creation of a regulatory asset only in exceptional circumstances under natural calamity conditions. Even then, it shall not be more than 3% of the

www.taxcode.in

approved ARR and it shall be liquidated with carrying costs in maximum 3 equal yearly instalments. Existing regulatory asset, along with the carrying costs, shall be liquidated in a maximum of 7 equal yearly instalments. In case there is surplus in any financial year, it shall be adjusted first against regulatory assets. This is exactly what is prescribed in Rule 23 of the Electricity Rules made by the Central Government, which we will refer to in further detail at a later stage.

vii. The Tamil Nadu Electricity Regulatory Commission submits that the regulatory asset in the State of Tamil Nadu till FY 2021-22, including carrying cost, is estimated at Rs. 89,375.09 crores. The Commission submits that this is more than 100% of the ARR, and hence a tariff-based liquidation would not be feasible as it would excessively burden consumers. Rather, the same must be recovered by upgrading transmission infrastructure, reducing aggregate technical and commercial (AT&C) losses, and sourcing low-cost renewable energy sources. Essentially, the cost of procurement must be lowered such that the revenue requirement of the distribution company is on par with the consumers' paying capacity. It further submits that in the true-up order for FY 2022-23, the Commission directed the Tamil Nadu Generation and Distribution Corporation to seek approval from the Government of Tamil Nadu to liquidate the revenue gap till FY 2021-22 of Rs. 83,000 crores through government resources. Based on the Government's decision, the Commission submits that it will finalise the strategy for amortisation of the regulatory asset. It also submits that it

www.taxcode.in

has endeavoured to not create any new regulatory asset from FY 2022-23 by proposing a tariff increase in a socially balanced manner.

5 (ii). Affidavits by State Governments.

25. Following is the gist of the affidavits filed by various State Governments.

i. The State of Nagaland has filed an affidavit stating that it is a bulk power customer and is allotted power by the Government of India from generating stations within and outside the state. The tariff for the same is determined by the Central Electricity Regulatory Commission.

ii. The State of Odisha submitted that as per its communication with the Odisha Electricity Regulatory Commission, the Commission has never created a regulatory asset.

iii. The Government of Madhya Pradesh also filed its affidavit through the Madhya Pradesh Power Management Co. Ltd., which has submitted that the State Commission has always followed a cost-reflective tariff and has not created any regulatory asset.

26. We would have expected the State Governments to take a clear stand on the social justice obligations of the State in the context of the power of the Regulatory Commissions to determine tariff. The Regulatory Commissions are required to balance the interplay of the obligations of the State to ensure access to

www.taxcode.in

electricity on the one hand, and the right of the utilities to recover cost-based expenses on the other. We are aware of the autonomy that the Regulatory Commissions exercise in the context of tariff determination, as well as of applicability of the National Tariff Policy and Rules formulated by the Central Government on regulatory asset. We were conscious of this aspect and the same is reflected in our consideration.

6. Law Governing the Electricity Sector Prior to 2003.

27. The supply and use of electricity was originally governed under the Indian Electricity Act, 1910, which provided the legal framework for laying cables and other works. With independence and industrialisation, the need for electricity in urban as well as rural areas increased, leading to enactment of the Electricity (Supply) Act, 1948 that mandated State Governments to constitute separate State Electricity Boards that would be responsible for arranging supply of electricity in each state and administering the grid system. It also provided for a Central Electricity Authority[23] for planning and development of the national power system.[24]

---

[23] Hereinafter "CEA".

[24] *Tata Power Co. Ltd. v. Reliance Energy Ltd.*, (2009) 16 SCC 659, paras 67-71; *BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission*, (2023) 4 SCC 788, paras 11-13.

www.taxcode.in

These were the regulators, but the governments exercised substantial control on policy as well as management of the sector.

28. Over time it was noticed that these State Electricity Boards were unable to respond to the rapidly growing demand of electricity due to financial losses, low tariffs, lack of budgetary support from the governments, or investments.[25] Further, various problems plagued the power sector, namely the lack of rational retail tariffs, high level of cross-subsidies, poor planning and operation, inadequate capacity, neglect of consumer interest, limited involvement of the private sector's skills and resources, and the absence of an independent regulatory authority.[26] This led to the enactment of the Electricity Regulatory Commissions Act, 1998 with the objective of reforming the electricity sector by establishing Central and State Electricity Regulatory Commissions, rationalising electricity tariffs, transparent policies regarding subsidies, and promoting efficient and environmentally benign policies.[27]

---

[25] Statement of Objects and Reasons, Electricity Regulatory Commissions Act, 1998.
[26] ibid.
[27] The Preamble of this Act reads:

> *"An Act to provide for the establishment of a Central Electricity Regulatory Commission and State Electricity Regulatory Commissions, rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and matters connected therewith or incidental thereto. "*

www.taxcode.in

29. In the NCT of Delhi, the Delhi Electricity Reforms Act, 2000 was enacted to restructure the electricity industry by unbundling generation, transmission and distribution, to increase avenues for private sector participation, and to take measures conducive to the development and management of the electricity industry in an efficient, commercial, economic, and competitive manner.[28]

7. Electricity Act, 2003.

30. The Electricity Act, 2003 was enacted by the Parliament as a complete and comprehensive law for regulating the generation, transmission, distribution, and use of electricity in India. The Preamble of the Act reads:

> *"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."*

---

[28] *BSES Rajdhani Power Ltd* (supra), para 15. The Preamble of the Delhi Electricity Reform Act, 2000 reads:

> *"An Act to provide for the constitution of an Electricity Regulatory Commission, restructuring of the electricity industry (rationalisation of generation, transmission, distribution and supply of electricity), increasing avenues for participation of private sector in the electricity industry and generally for taking measures conducive to the development and management of the electricity industry in an efficient, commercial, economic and competitive manner in the National Capital Territory of Delhi and for matters connected therewith or incidental thereto."*

www.taxcode.in

31. Further, the purpose of the enactment is explained in detail in its Statement of Objects and Reasons, the relevant portions of which are extracted hereinbelow:

> *"3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The Bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalised after extensive discussions and consultations with the States and all other stake holders and experts."*

32. Through reading the Statement of Objects and Reasons as well as the Preamble, the salient features of the Act are:

i. The Act is a comprehensive code to regulate the generation, transmission, distribution, trading and use of electricity and replaces the erstwhile 1910 Act, 1948 Act, and 1998 Act that governed electricity supply and use;[29]

---

[29] *Tata Power Co Ltd* (supra), para 76.

www.taxcode.in

ii. The State Electricity Boards are unbundled into separate utilities for electricity generation, transmission, and distribution,[30] and private sector participation is encouraged in these activities;[31]

iii. The Act provides for development of the electricity sector through coordinated efforts of the Central Government, State Governments, and various statutory authorities and regulators by institutionalising electricity policies and plans;

iv. While generation has been delicensed, the transmission, distribution, and trading of electricity are licensed activities;[32]

v. The Act provides for a price discovery mechanism through tariff fixation;

vi. The Act entrusts the performance of regulatory and adjudicatory functions, including licensing and tariff fixation, to permanent, independent Regulatory Commissions that act as expert and specialised bodies.[33] It also enables dispute resolution through arbitration in specified cases;

vii. The Act established the APTEL as a specialised appellate forum;[34]

viii. The Act provides for offences as well as their penalties.

www.taxcode.in

8. Provisions of the Electricity Act relating to determination of Tariff.

33. Section 3 of the Electricity Act provides for the preparation, publication, review, and revision of the National Electricity Policy and tariff policy by the Central Government in consultation with the State Governments and the CEA for development of the power sector through optimal utilisation of resources. Sub-section (4) also provides for the CEA to prepare a National Electricity Plan as per the National Electricity Policy.

34. A distribution licensee is defined under Section 2(17) as a licensee operating and maintaining a distribution system for supplying electricity to consumers in its area of supply. Electricity distribution is a licensed activity as per Section 12, and the license is granted by the Regulatory Commission under Section 14. Part VI of the Act deals with distribution of electricity – Sections 42 and 43 set out of the duties of a distribution licensee and open access, Sections 45 and 46 provide for the power to recover charges and expenditure for supply of electricity, Section 47 provides for the power to require security, and Sections 48 and 49 empower the distribution licensee to impose restrictions and enter into agreements for supply of electricity.

www.taxcode.in

35. The Electricity Act also lays down a regulatory mechanism as follows: Section 2(4) defines "Appropriate Commission" as meaning the Central, State, or Joint Electricity Regulatory Commission, as the case may be. The Central Commission is constituted under Section 76, its functions are stipulated under Section 79, and its regulation-making powers are provided under Section 178. Sections 80 and 81 deal with the Central Advisory Committee and its objects.

35.1 Similarly, the State Commissions are constituted under Section 82 and their functions are provided in Section 86, which include both mandatory and advisory functions. The relevant mandatory function for our purpose is under sub-section (1)(a), which provides for tariff determination for retail supply of electricity within the State. Sub-section (4) provides that the State Commission shall be guided by the National Electricity Policy, tariff policy, and National Electricity Plan formulated under Section 3. The State Commission can also make regulations in exercise of its powers under Section 181, including on the terms and conditions for determination of tariff under Section 61 (sub-section (2)(zd)), methodologies and procedures for calculating expected revenue from tariff and charges under Section 62(5) (sub-section (2)(zf)), the

www.taxcode.in

manner of making an application and fee payable under Section 64 (sub-section (2)(zg)), and modifications or conditions under Section 64(3) (sub-section (zh)). Sections 87 and 88 deal with State Advisory Committees and their objects.

35.2 The Joint Regulatory Commission is constituted under Section 83, and its functions and powers are under sub-sections (4) and (5).

35.3 Lastly, it is important to note that Section 142 empowers the Commissions to punish for non-compliance of their directions, or any provision of the Act or rules or regulations made thereunder.

36. The Central and State Governments are also given the power to make rules under the Act, under Sections 176 and 180 respectively. Beyond rule-making, the Central and State Governments can issue policy directions to the Central and State Commissions respectively in matters involving public interest under Sections 107 and 108. These directions "shall guide" the Regulatory Commissions, but shall not be binding on them.[35]

37. In exercise of their powers and functions, the Central and State Commissions are required to determine tariff as per Part VII of the Electricity Act. Section 61 lays down the guiding principles

---

[35] *Kerala State Electricity Board Ltd. v. Jhabua Power Ltd.*, 2024 SCC OnLine SC 2819.

www.taxcode.in

for the Commissions to specify the terms and conditions of tariff determination, of which the following are relevant:

> "***Section 61. (Tariff regulations):*** *The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*
> ***
> *(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
> *(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
> *(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
> *(e) the principles rewarding efficiency in performance;*
> *(f) multi year tariff principles;*
> *(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;*
> ***
> *(i) the National Electricity Policy and tariff policy..."*

38. While these principles have a bearing on making the regulations for tariff determination, tariff is fixed under Section 62, inter alia, for retail supply of electricity. Sub-section (5) also provides for compliance with procedures specified for calculating expected revenues from tariff and charges that can be recovered. Section 63 deals with tariff determination through bidding, and Section 64 provides the procedure for application for tariff determination. Section 65 mandates that if the State Government requires the grant of subsidy to any class of consumers in tariff, it

www.taxcode.in

shall pay the amount of such subsidy in advance to compensate the person affected by the grant of subsidy.

9. Provisions of Act, Policies, Rules, Regulations, and Orders having a bearing on creation of a Regulatory Asset.

9 (i). National Electricity Policy, 2005.

39. The Central Government notified the National Electricity Policy under Section 3 of the Electricity Act on 12.02.2005, which laid down guidelines for development of the power sector, providing electricity supply to all areas, and protecting consumer and other stakeholders' interests keeping in view availability of energy resources, technology, and energy security issues.

40. On 01.01.2006, the DERC issued a Public Awareness Bulletin setting out the major components of ARR for Delhi's distribution companies as well as the approximate ratio of each component in the tariff. Power purchase costs are 80% of the tariff, operations and maintenance expenses are 9-10% of the tariff, depreciation is 3-4%, return on capital employed is 6-7%, and income tax is 0.5-1%.

www.taxcode.in

9 (ii). National Tariff Policy, 2006.

41. On 06.01.2006, the Central Government notified the National Tariff Policy, 2006 under Section 3 of the Act. Clause 8.2.2 of the Policy provides for the creation of a regulatory asset, as well as certain restrictions on time-period and circumstances. It reads:

> *"8.2.2. The facility of a regulatory asset has been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year. This should be done only as exception, and subject to the following guidelines:*
> *a. The circumstances should be clearly defined through regulations, and should only include natural causes or force majeure conditions. Under business as usual conditions, the opening balances of uncovered gap must be covered through transition financing arrangement or capital restructuring;*
> *b. Carrying cost of Regulatory Asset should be allowed to the utilities;*
> *c. Recovery of Regulatory Asset should be time-bound and within a period not exceeding three years at the most and preferably within control period;*
> *d. The use of the facility of Regulatory Asset should not be repetitive.*
> *e. In cases where regulatory asset is proposed to be adopted, it should be ensured that the return on equity should not become unreasonably low in any year so that the capability of the licensee to borrow is not adversely affected."*
>
> (emphasis supplied)

41.1 As stated above, Section 86(4) provides that the State Commission shall be guided by the National Tariff Policy in discharging its functions, and the Policy is also a guiding principle for tariff determination as per Section 61(1)(i). This Court has held that while the Policy does not bind the State Commission, it is a material consideration that must guide tariff determination.[36]

---

[36] *Tata Power Co. Ltd. v. Maharashtra Electricity Regulatory Commission*, (2023) 11 SCC 1, para 122.

www.taxcode.in

41.2 Nothing can be clearer than the mandate under Clause 8.2.2 of the National Tariff Policy, 2006. The real issue is to examine the circumstances and the compelling reasons for the creation and undue extension of the regulatory asset over a period of time, which we will undertake in our Analysis.

9 (iii). DERC Tariff Determination Regulations, 2007.

42. On 30.05.2007, the DERC framed the Tariff Determination Regulations, 2007 for the first control period (FY 2007-2011), under which Regulation 5.42 deals with regulatory asset. It stipulates that at the time of truing up, if variations on account of uncontrollable items like energy sales and power purchase costs are large and it is not feasible to recover them in one year, the Commission can create a regulatory asset as per Clause 8.2.2 of the National Tariff Policy, 2006. Regulation 5.42 in fact incorporates the National Tariff Policy and makes it a part of the enforceable regime. The relevant portion is extracted below for ready reference:

> *"5.42 Variations on account of uncontrollable items like energy sales and power purchase cost shall be trued up. Truing-up shall be carried out for each year based on the actual/audited information and prudence check by the Commission;*
> *Provided that if such variations are large, and it is not feasible to recover in one year alone, the Commission may take a view to create a regulatory asset, as per the guidelines provided in clause 8.2.2 of the National Tariff Policy."*
>
> (emphasis supplied)

www.taxcode.in

194

9 (iv). DERC Statutory Advice dated 15.12.2010.

43. On 15.12.2010, the DERC issued a statutory advice to the Government of NCT of Delhi regarding the financial position of BRPL and BYPL and whether they are able to meet expenses from tariff revenue and return on equity. In this letter, the DERC stated that the tariffs for FY 2008-09 to FY 2010-11 are not cost-reflective and they do not account for the increase in power purchase costs during this period, which constituted more than 80% of the tariff. While generating companies recover the increase in cost from the distribution companies, the latter are unable to recover the same from consumers under the present tariff. Distribution licensees resorted to extensive borrowing to sustain operations, resulting in substantial interest costs and a precarious financial position. The DERC noted that this is against consumer interests as these costs must ultimately be recovered from consumers with carrying cost, and would burden future consumers with previously incurred costs. The relevant portions of the DERC's letter are extracted below:

> *"16. The Commission has analysed the ability of the distribution licensees to meet their expenses and has considered the revenue from retail sale of electricity at the tariffs determined by the Commission. These have been compared with various heads of expenditure i.e. power purchase cost, operating expenses including interest and*

38

www.taxcode.in

depreciation, to determine the extent of surplus available towards the return on equity allowed by the Commission.

18. Power purchase cost should not be exceeding 80% which was in the range of 73-80% in the year 2008-09, 77-98% in the year 2009-10 and 113-135% in the first six months of 2010-11.

20. Power purchase and revenue recovered from sale of energy are not within the control of the distribution licensees. Power purchase cost is mostly dependent upon the fuel cost which is market driven. The generating company recovers the increase in the fuel cost and other variable expenses every month from the distribution licensees, who in turn are not able to recover timely from the consumers under the present dispensation. Thus, the operations of the distribution companies are dependent on borrowings over a period of 18-24 months which entails substantial interest cost. This, in any case, is detrimental to consumer Interest as all power purchase costs whether short term or long term are passed through to the consumers (and recovered from the consumers along with the carrying cost).

*****

Conclusion

The Commission is of the view that the tariff during previous years has not been cost effective. The distribution licensees have had to resort to extensive borrowing to sustain their operations.

*****

(3) Accumulation of Revenue gaps beyond sustainable levels

Analysis of the Audited Accounts of the distribution licensees in Tables 1-3 would indicate that there is shortfall in the years 2009-10 and 2010-11 beyond sustainable levels. Thus, it would be quite obvious that in the absence of tariff revision there is a growing revenue gap which is to be funded out of borrowings which are increasing from year to year.

*****

(5) Power purchase cost/quantum

Analysis carried out for the years 2008-09 and 2009-10 in Tables 1-4 would indicate that there has been a steep increase in the power purchase cost. These issues would get addressed while taking the ground realities into consideration and estimating the quantum and the cost based upon the current data based upon the latest bills available from the generating companies, power purchase rates in the Power Exchange, Ul and bilateral contracts."

www.taxcode.in

9 (v). Ministry of Power's Letter to the APTEL.

44. On 21.01.2011, the Minister of Power issued a letter to the APTEL to take suo motu cognisance and issue necessary directions under Section 121 of the Electricity Act regarding periodical tariff revisions for improving the long-term financial health and viability of the electricity sector.

9 (vi). APTEL's Order dated 11.11.2011.

45. Pursuant to this letter, the APTEL passed an order dated 11.11.2011[37] wherein it issued various directions to Regulatory Commissions regarding timely tariff determination, truing up, and creation, continuation, and recovery of the regulatory asset. The directions issued by the APTEL are as follows:

> *"65. In view of the analysis and discussion made above, we deem it fit to issue the following directions to the State Commissions:*
> *(i) Every State Commission has to ensure that Annual Performance Review, true-up of past expenses and Annual Revenue Requirement and tariff determination is conducted year to year basis as per the time schedule specified in the Regulations.*
> *(ii) It should be the endeavour of every State Commission to ensure that the tariff for the financial year is decided before 1st April of the tariff year. For example, the ARR & tariff for the financial year 2011- 12 should be decided before 1st April, 2011. The State Commission could consider making the tariff applicable only till the end of the financial year so that the licensees remain vigilant to follow the time schedule for filing of the application for determination of ARR/tariff.*
> *(iii) In the event of delay in filing of the ARR, truingup and Annual Performance Review, one month beyond the scheduled date of*

[37] In O.P. No. 1/2011, order dated 11.11.2011.

www.taxcode.in

submission of the petition, the State Commission must initiate suo-moto proceedings for tariff determination in accordance with Section 64 of the Act read with clause 8.1 (7) of the Tariff Policy.

(iv) In determination of ARR/tariff, the revenue gaps ought not to be left and Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period. Carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which the Regulatory Assets are created to avoid problem of cash flow to the distribution licensee.

(v) Truing up should be carried out regularly and preferably every year. For example, truing up for the financial year 2009-10 should be carried out along with the ARR and tariff determination for the financial year 2011-12.

(vi) Fuel and Power Purchase cost is a major expense of the distribution Company which is uncontrollable. Every State Commission must have in place a mechanism for Fuel and Power Purchase cost in terms of Section 62 (4) of the Act. The Fuel and Power Purchase cost adjustment should preferably be on monthly basis on the lines of the Central Commission's Regulations for the generating companies but in no case exceeding a quarter. Any State Commission which does not already have such formula/mechanism in place must within 6 months of the date of this order must put in place such formula/mechanism.

66. We direct all the State Commissions to follow these directions scrupulously, and send the periodical reports by 1st June of the relevant financial year about the compliance of these directions to the Secretary, Forum of Regulators, who in turn will send the status report to this Tribunal and also place it on its website."

9 (vii). DERC Tariff Determination Regulations, 2011.

46. The DERC then issued the Tariff Determination Regulations, 2011 for the second control period (FY 2012-2015, later extended till 31.03.2017), under which Regulation 5.40 is relevant and deals with regulatory asset. Similar to Regulation 5.42 of the Tariff

www.taxcode.in

Determination Regulations, 2007, it provides for creation of a regulatory asset when the variations at the truing up stage are large and cannot be recovered in one year. Further, the regulatory asset must be created as per the guidelines in Clause 8.2.2 of the National Tariff Policy, 2006. The Regulation reads:

> *"5.40 Truing-up shall be carried out in accordance with Regulation 4.21, for each year based on the actual/audited information and prudence check by the Commission;*
>
> *Provided that if such variations are large, and it is not feasible to recover in one year alone, the Commission may take a view to create a regulatory asset, as per the guidelines provided in clause 8.2.2 of the National Tariff Policy.*
>
> *Provided further that under business as usual conditions, the Commission, to ensure tariff stability, may include the opening balances of uncovered gap / trued-up costs in the subsequent Control Period's ARR instead of including in the year succeeding the relevant year of the control period after providing for transition financing arrangement or capital restructuring."*

9 (viii). DERC's Tariff Order dated 26.08.2011 (FY 2011-12).

47. The DERC also passed an order dated 26.08.2011 wherein it determined the ARR for FY 2011-12 and the true-up for FY 2008-2010. In this order, it increased the tariff by 22% across the board for all consumer categories and also introduced a fuel price adjustment charge.

www.taxcode.in

9 (ix). DERC's MYT Order dated 13.07.2012 (FY 2012-15).

48. In its subsequent MYT order dated 13.07.2012 determining ARR for FY 2012-2015 and true-up for FY 2010-11, the DERC approved tariff increase of 23%, introduced the DRS @ 8%, and the PPAC. The fuel price adjustment charge was absorbed into these.

9 (x). DERC's Statutory Advice dated 01.02.2013.

49. On 01.02.2013, the DERC issued another statutory advice to the Government of NCT of Delhi, wherein it noted that the revenue gap was Rs. 19,505.04 crores, including carrying costs, across BRPL, BYPL, and TPDDL since FY 2009-10. The DERC also specified various measures taken to recover the revenue gap, including the 23% tariff hike w.e.f. 01.07.2012 and the DRS of 8%, but that these were insufficient. In this light, the DERC recommended that the Government of NCT of Delhi may take steps to ensure that benefits of Central Government sponsored schemes, direct subsidies from state governments, and additional budgetary support are extended to the distribution licensees. The relevant recommendations of the DERC to the Government of NCT are extracted below:

"14. Recommendations:-

***

www.taxcode.in

i) ...The Commission recommends that Govt. of NCT of Delhi may take urgent steps so that the benefits of various Central Government sponsored schemes are extended to the Delhi distribution utilities and, in tum, to the electricity consumers in Delhi. Unless this is done, tariffs in Delhi could become unsustainable, especially when compared to other States in the country where State owned utilities not only avail the benefits of the centrally sponsored schemes but also avail direct subsidies from the State Governments as well as additional budgetary support for lower tariff levels.

ii) In case of APDRP, R-APDRP and JNNURM schemes of the Central Govt., the view of the Govt. been that privately managed distribution entities should not be allowed to avail the benefits of these programmes. The Commission is of the view that denial of the benefits of these programmes to the distribution entities of Delhi does not affect the managements of these distribution companies but, in fact, denies the benefit of the schemes to the consumers of electricity of Delhi who are as a result required to pay higher tariffs than are paid by the electricity consumers in other States which avail of the benefits of these schemes. Thus, the Govt. of NCT of Delhi may take up with the Ministry of Power that these schemes are availed of by the Delhi distribution utilities for the benefit of the consumers in the NCT of Delhi.

iii) The financial bailout package introduced by the Central Govt. for financial restructuring of State distribution entities with certain conditions including support from the State Govt. is also being denied to the distribution entities in Delhi. Here again, this view does not impact the private managements of these companies but has a direct impact on their revenue requirements and consequently, the tariff required to be paid by electricity consumers in the city. The Govt. of NCT of Delhi may take up with the Ministry of Power to sanction the bail-out package for the DISCOMs of Delhi. This would be the single most important measure for deferring the incidence of high levels of past revenue gaps on the tariff determination process."

9 (xi). DERC's Tariff Order dated 31.07.2013 (FY 2013-14).

50. In the next tariff order dated 31.07.2013 to determine ARR for FY 2013-14 and true-up for FY 2011-12, the DERC increased

www.taxcode.in

the tariff by 5% and continued the existing DRS @ 8% over and above the revised tariff. It also allowed carrying cost on the regulatory asset to all distribution companies. At this stage, the regulatory asset amounted to Rs. 8060 crores across the BSES Discoms and Rs. 3370 crores for TPDDL.

9 (xii). APTEL's Order dated 14.11.2013.

51. The APTEL also passed the order dated 14.11.2013[38], wherein it reiterated its direction to the DERC to provide for recovery of the regulatory asset in 3 years as per its order dated 11.11.2011 and to implement the judgments of the APTEL. The DERC has filed civil appeals against this order, which have been dismissed by this Court's order dated 01.12.2021 as there was no substantial question of law.[39] This Court also directed the DERC to implement the issues decided by the APTEL, if not already complied, within a period of 3 months and to file a compliance report in 2 weeks thereafter.[40] The relevant portion of the APTEL order is as follows:

> *"37. As regards recovery of the Regulatory assets/amortization schedule and fuel and power purchase adjustment mechanism, this Tribunal in OP No.1 of 2011*

[38] In O.P. Nos. 1 and 2/2012, order dated 14.11.2013.
[39] In C.A. No. 1854-1855/2014, order dated 01.12.2021.
[40] ibid.

www.taxcode.in

dated 11.2011 has given the following directions to the State Commission...

38. In view of the above, we direct the State Commission to take immediate steps for recovery of the admitted revenue gap and decide amortization schedule and also ensure that the Fuel and Power Purchase costs are passed on regularly and effectively as per the above directions of this Tribunal to avert the problems of cash flow experienced by the Petitioners which may come in the way of smooth operation of the distribution system and meeting the requirements of electricity of the consumers in the national capital in a reliable manner if not remedied in time.

39. In view of the categorical stand taken by the Delhi Commission now, it is enough for us to direct the Delhi Commission to implement the directions of this Tribunal given in the decisions referred to above and pass an order in terms of those directions in future."

9 (xiii). APTEL's Order dated 11.03.2014.

52. The above-referred tariff order dated 31.07.2013 was appealed before the APTEL by BRPL in Appeal No. 266/2013 and by BYPL in Appeal No. 265/2013 on the ground that the tariff order did not provide a roadmap for recovery of the regulatory asset. In these appeals, BRPL and BYPL filed IA 365/2013 and 364/2013 respectively for an order to increase the DRS to meet carrying costs upto 31.03.2014, to repay one-third of the principal component of the regulatory asset, and to provide a plan for completely recovery of the regulatory asset in 3 years as per the National Tariff Policy, 2006.

53. The APTEL rejected the prayer for liquidating the regulatory asset in 3 years by order dated 11.03.2014, which has been

www.taxcode.in

appealed by BRPL and BYPL in the present civil appeals. However, the APTEL directed the DERC to prepare a roadmap for liquidation of the regulatory asset, both principal amount and carrying cost, keeping in mind the interests of consumers and the distribution licensees.

54. In the present civil appeals (C.A. No. 4010 and 4013/2014) against the APTEL's order dated 11.03.2014, as well as writ petitions by BRPL and BYPL, this Court by order dated 26.03.2014 directed the DERC to submit a roadmap for liquidation of the regulatory asset and also directed BRPL and BYPL to pay the current dues to the generating and transmission companies. In compliance with this order, the DERC submitted a liquidation schedule on 01.05.2014 before this Court, in which it proposed to liquidate the regulatory asset including carrying cost in 6-7 years (by FY 2020-21) by taking the average growth rate of distribution companies at 15%.

9 (xiv). National Tariff Policy, 2016.

55. On 28.01.2016, a revised National Tariff Policy, 2016 was notified by the Central Government, wherein Clause 8.2.2 deals with regulatory asset. While the other conditions for creation of a regulatory asset are similar to the National Tariff Policy, 2006, the

www.taxcode.in

time-period for recovery was increased from 3 to 7 years. The relevant portion is extracted below:

> *"8.2.2 The facility of a regulatory asset has been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year. This should be done only as a very rare exception in case of natural calamity or force majeure conditions and subject to the following:*
> *a. Under business as usual conditions, no creation of Regulatory Assets shall be allowed;*
> *b. Recovery of outstanding Regulatory Assets along with carrying cost of Regulatory Assets should be time bound and within a period not exceeding seven years. The State Commission may specify the trajectory for the same."*
> (emphasis supplied)

9 (xv). DERC Tariff Determination Regulations, 2017.

56. The DERC then framed the DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017, which contains a separate section on regulatory asset. Regulation 154 provides that an accumulated revenue gap approved by the Commission in the relevant tariff order shall be treated as a regulatory asset, and that such revenue gap shall be computed on the basis of excess of ARR over revenue approved after truing up for the relevant year. Regulation 155 provides for carrying cost, and Regulation 156 deals with the how the regulatory asset must be shown in the books of accounts. On a perusal of these regulations, it is clear that Clause 8.2.2 of the National Tariff Policy, 2016 has not been

www.taxcode.in

referred, nor are there any conditions on when a regulatory asset can be created, its quantum, and the time-period for its recovery.

9 (xvi). Ministry of Power's Affidavit dated 10.08.2022.

57. On 10.08.2022, the Ministry of Power, Union of India submitted an affidavit before this Court in the present writ petitions. It submitted that while the DERC created the regulatory asset as an exception, it is now being continued in a manner inconsistent with the Electricity Act and its larger objective of a healthy and economical electricity sector. The affidavit also relied on the APTEL's judgment dated 11.11.2011[41] where it was held that the regulatory asset must be recovered in a time-bound manner within 3 years, and preferably within the control period. The Ministry of Power prayed that this Court direct DERC to devise a roadmap or plan for amortisation of the regulatory asset in a time-bound manner as per the National Tariff Policies, to direct the State Commissions to determine cost-reflective tariffs, and that no new regulatory asset be created except as per the National Tariff Policy, 2016. The relevant portions of the affidavit are extracted below:

[41] In O.P. No. 1/2011 (supra).

www.taxcode.in

"10. That creation of Regulatory Asset essentially requires deferment of admitted cost due to a Distribution Company to a future period in order to avoid tariff shock. This concept was adopted by the Respondent No. 2 as an exception, however, gradually the exercise of creation of Regulatory Asset seems to have become a trend and is now being done on year to year basis. Such an approach is not only inconsistent with the Act but is also irreconcilable with the larger objective to have a healthy and economical electricity sector in the country.

11. That in order to address this situation, the Answering Respondent in compliance with section 3 of the Act, notified the National Tariff Policy ("NTP, 2006") on 06.01.2006, wherein the Answering Respondent had directed that the 'Regulatory Asset' should not be created under usual business condition and the recovery of Regulatory Asset should be timebound, within a period of three years. Following are the relevant extracts of the NTP, 2006...

12. That despite the above mandate, it was observed that the SERCs have failed/or are reluctant to conduct the tariff determination exercise in consistency with the Act. In this respect, on 21.01.2011, the Answering Respondent issued a Letter to the Appellate Tribunal for Electricity ("Appellate Tribunal"), inter alia, requesting the Appellate Tribunal to issue necessary directions to the SERCs to revise the tariff periodically for improving the financial health and long-term viability of the electricity sector, particularly for distribution utilities. Basis the letter issued by the Answering Respondent, the Appellate Tribunal initiated a Suo- Moto proceeding being O.P. No. 01 of 2011 wherein, various issues with respect to power of SERCs to determine tariff were discussed...

14. That the Answering Respondent on 28.01.2016 issued the National Tariff Policy, 2016 ("NTP, 2016"). Clause 8.2.2 of NTP, 2016, provided that the SERCs cannot continue to delay the liquidation of Regulatory Assets and the recovery of outstanding Regulatory Assets along with the Carrying Cost should be done in a time bound manner not exceeding 7 years...

15. That it is evident from the above that Answering Respondent has taken steps and mandated that the SERCs (including the Respondent No.2) cannot create Regulatory Asset as a matter of routine and the Regulatory Asset and directed the SERCs to recover the outstanding Regulatory Assets in a time bound manner...

18. That in view of the above, it is submitted that the creation of a Regulatory Asset' with no mechanism for recovery is contrary to the Act's legislative intent, as it amounts to artificially keeping the tariff low while

www.taxcode.in

prejudicing the efficient recovery of the tariff. Answering Respondent vide the statutory policies and various communications have directed the Commissions to refrain from creating Regulatory Asset and to amortise the Regulatory Asset within a time bound manner. However, as evident in the present case, the Respondent No. 2 has not acted in the compliance of the Act, Statutory policies issued by the Answering Respondent and the Judgments/Order of the Appellate Tribunal and deferred the recovery of recognised revenue gap for 17 years by creating the Regulatory Asset.

19. That it is therefore submitted that this Hon'ble Court may be pleased to direct the Respondent No. 2 to devise a roadmap/plan to amortise the Regulatory Asset in a time-bound manner as mandated under the Tariff Policies notified by the Answering Respondent or any other methodology as this Hon'ble Court may deem fit in the present situation. Since such problem is also observed in other State Commissions also, Hon'ble Court may also be pleased to direct all State Commission for determination of cost reflective tariff and no new regulatory assets be created as stipulated in the Tariff Policy 2016. State Commission may also be directed to devise a roadmap/plan to amortise the Regulatory Asset in a time-bound manner as mandated under the Tariff Policies notified by the Answering Respondent."

9 (xvii). Ministry of Power's Affidavit dated 12.12.2022.

58. In another affidavit dated 12.12.2022, the Ministry of Power submitted that the LPS fixed by the State Commissions was 18%, which is "usurious" as bank lending rates are 6-7%. This higher LPS means that distribution companies bear a heavy burden in case of delayed payments, which is subsequently passed on to consumers. Hence, LPS must be linked to the Bank Lending Rate to make it reasonable. Though this issue does not directly arise for our consideration, we are aware that it has a bearing on the tariff,

www.taxcode.in

if not for the present but in future. Eventually, the burden is shifted on the consumer. The Ministry also submits that taking into account these concerns, it has notified the Electricity (LPS) Rules, 2022. The relevant portions of the affidavit are extracted below:

> *"In the absence of any Rules or directions with regard to the specific rates for Late Payment Surcharge (LPS), the CERC and SERCS notified their respective Tariff Regulations from time to time wherein different rates of the LPS were specified and which were exorbitant- as high as 18 percent- whereas Banks are charging an interest of only 6 to 7 percent on their loans. The extortionate rate of LPS lead to higher cost of electricity for the common man; and a heavy burden on the distribution companies putting them virtually into a debt trap."*

9 (xviii). Electricity (Amendment) Rules, 2024 introducing Rule 23.

59. On 10.01.2024, the Central Government notified the Electricity (Amendment) Rules, 2024 by which it inserted Rule 23, which deals with regulatory asset, in the Electricity Rules, 2005. This was in exercise of its rule-making powers under Section 176 of the Electricity Act. Rule 23 prescribes as a first principle that tariff shall be cost-reflective and that there shall not be any gap between the ARR and the estimated revenue from approved tariff. The only exception to this rule is natural calamity conditions. Four conditions are formulated for the creation, management, and

www.taxcode.in

liquidation of a regulatory asset under Rule 23: First, the regulatory asset shall not be more than 3% of the ARR. Second, the revenue gap shall be liquidated within 3 years. Third, the existing regulatory assets shall be liquidated within 7 years. Fourth, the regulatory asset will have carrying cost as prescribed under the Rules. We will deal with Rule 23 in more detail at a later stage.

9 (xix). DERC's Order dated 19.07.2024 (true-up till FY 2020-21).

60. Finally, in its orders dated 19.07.2024 for truing-up till FY 2020-21, the DERC implemented various decisions of the APTEL and this Court. Pursuant to this, the regulatory asset including carrying costs is as follows: Rs. 12,993.53 crores for BRPL, Rs. 8419.14 crores for BYPL, and Rs. 5,787.70 crores for TPDDL. This amounts to Rs. 27,200.37 crores across all three distribution companies until the end of FY 2020-21.

10. Analysis.

61. We are considering the legal position and status of a regulatory asset, the rights and liabilities of stakeholders, consequences of regulatory failure to manage the regulatory asset

www.taxcode.in

as a reasonable measure, and the appellate and review powers of the APTEL and this Court to ensure accountability and restitution.

10 (i). Electricity is a public good and is regulated under the Act.

62. Since electricity is a material resource, the State has a public interest in ensuring that its ownership and control is so distributed as best to subserve the common good. Therefore, the public policy that governs purchase, sale and distribution of electricity is not based on market forces of demand and supply but by regulation through statute. The Electricity Act 2003, the policies and plan(s) formulated under Section 3 of the Act, rules made by the Central and State Governments, and more importantly, the regulations formulated by the Regulatory Commissions, followed by the precedents laid down by the APTEL and this Court form the legal regime, by which tariff is determined, restructured, and reviewed from time to time.

10 (ii). Tariff determination is governed by the Act, which entrusts this function to independent Regulatory Commissions.

63. The Electricity Act unbundled generation, distribution and transmission of electricity, and at the same time, institutionalised

www.taxcode.in

important functions such as grant of licenses and determination of tariff through the establishment of Regulatory Commissions. These Regulatory Commissions have autonomy as provided in the statute, expertise through human resource, continuation through seal and succession, plurality by composition, and accountability by transparency. With the powers that they are granted, coupled with autonomy that they enjoy, these Commissions are the primary duty bearers to implement the provisions of the Act.

63.1 Tariff determination is the exclusive province of the Regulatory Commissions. In performance of their functions, the Central and State Electricity Regulatory Commissions determine tariff for supply of electricity by generating companies to distribution licensees, for transmission, wheeling, and also for retail sale of electricity.[42] Section 61 provides the guiding

---

[42] Section 62 of the Electricity Act, which reads:

"***Section 62. (Determination of tariff):*** ---

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity."

www.taxcode.in

principles for good governance for development, sale, and distribution of power and also emphasises the overarching principle of subserving the interests of consumers. The journey as well as the destination of tariff determination indicates that the Commissions shall adopt commercial principles, encourage competition, promote efficiency, use resources economically, perform efficiently and optimise investments. The purpose of adopting such measures is to "*safeguard and protect the interest of the consumers*". Section 61 also recognises the vulnerability of the electricity sector to undue political posturing, and therefore emphasises that the Commission shall ensure that "*the tariff progressively reflects the cost of supply of electricity and also,*

Sections 79 sets out the functions of the Central Commission. The relevant portion is as follows:

"***Section 79. (Functions of Central Commission):*** *—*
(1) The Central Commission shall discharge the following functions, namely:-
(a) to regulate the tariff of generating companies owned or controlled by the Central Government;
(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
*****
(d) to determine tariff for inter-State transmission of electricity;..."

Section 86 sets out the functions of the State Commission. The relevant portion is as follows:

"***Section 86. (Functions of State Commission):*** *—*
(1) The State Commission shall discharge the following functions, namely:-
(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:
(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;..."

56

www.taxcode.in

reduce cross-subsidies".[43] In this endeavour the National Electricity Policy and the National Tariff Policy shall also be guiding factors.[44]

10 (iii). Collaborative effort of the Regulatory Commissions to balance social justice obligations with efficiency.

64. The Electricity Act contemplates multiple stakeholders, in other words, a plurality of collaborators – the Central Government, the State Governments, Regulatory Commissions, the Appellate Tribunal, statutory policy makers, and the utilities. These authorities collaborate to ensure that the purpose of the Act is subserved and, in this endeavour, the Regulatory Commissions share the social justice obligations of the State. Since electricity is a public good,[45] Regulatory Commissions must undertake joint and collaborative efforts with the other authorities to enable access to electricity across urban and rural areas[46] and affordability through rationalisation of tariffs[47]. The statutory authorities must work in cohesion towards a common goal of ensuring supply of electricity across regions and terrains, and cheaper and affordable

[43] Section 61(1)(g) of the Electricity Act.
[44] Section 61(1)(i) of the Electricity Act.
[45] See *K.C. Ninan v. Kerala State Electricity Board*, (2023) 14 SCC 431, para 93.
[46] See Preamble of the Electricity Act; Section 6 of the Electricity Act that places the responsibility of rural electrification jointly on the Central and State Governments.
[47] See Preamble of the Electricity Act.

www.taxcode.in

supply of electricity to those sections of society who cannot afford it.[48] At the same time the Regulatory Commissions maintain their independence and autonomy and ensure that the final decision with respect to fixation of tariff will be that of the Regulatory Commissions alone.

10 (iv). Tariff fixation takes into account multiple variables and requires flexibility. Regulatory asset is a measure adopted during tariff fixation that recognises right of recovery.

65. A regulatory asset is adopted as a measure by the Regulatory Commissions when the gap between the revenue required by the distribution company to meet its costs and expenditure and the actual revenue realised through immediate tariff is so high that it would not only prejudice the consumer but lead to what is called a tariff shock. By adopting such a measure, the Commission liquidates the revenue required by the utility through future tariff

[48] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015), 305-306. The relevant portion is extracted hereinbelow:

> *"Regulation as an enterprise conceives regulators as governments in miniature, in which efficiency and distributive goals are both legitimate regulatory concerns, and anyway are inseparable'. The regulatory goals may include social cohesion, and this function may be shared with government Regulatory independence is not regarded as central, because regulation is conceived as a collaborative project between agencies and other organs of government. Regulation in this mould is seen as delegation by government of its inherent powers to act in the public interest. The emphasis is on different actors working towards a common enterprise, with accountability conceived primarily in terms of public law mechanisms such as proceduralization, judicial review and parliamentary scrutiny. For Prosser this model has the virtue of rendering it easier to understand in areas where regulation has a social rationale, and is not driven by considerations of economic efficiency."*

58

www.taxcode.in

determinations. 'Revenue assets' are costs incurred by power distribution companies that are recognised as recoverable from consumers in future tariffs but are not immediately recovered in the current bills.

65.1 The measure adopted by the Commissions in creating a 'regulatory asset' can also be seen as an accounting treatment. Regulatory assets are treated as assets in the balance sheet and are liquidated over a defined period of time through tariff adjustments or government subsidies. The regulatory asset is a cost incurred by the utility that the Regulatory Commission allows to be deferred on the balance sheet instead of being immediately expensed. It enables the distribution company to utilise the 'recognition' of a regulatory asset to obtain bridge funds from bankers and the financial institutions as they have the confirmation that the said amount will be recovered in the ensuing financial years.

10 (v). Factors leading to an unmanageable regulatory asset, and consequent 'regulatory failure'.

66. While determining tariff, Regulatory Commissions have to deal with situations where there could be a sudden increase in the fuel cost, infrastructure investments, or some extraordinary

www.taxcode.in

expenditure. Further, lack of discipline followed by delays in filing the ARR leads to uncertainties. Equally, not conducting quick and effective truing up multiplies the problem of ascertaining the actual cost incurred. The failure to file ARR in time and the Regulatory Commissions not invoking their suo motu powers to rectify the same are not addressed. There is a lack of accountability here. Further, even though Section 65 provisions that State Governments shall pay in advance the subsidy to subserve social justice obligations, it is alleged that such payments are not made in time. The decisions taken by the Regulatory Commissions, which were considered in appeal by the APTEL and this Court, give a clear impression that the Regulatory Commission is not able to take firm decisions. Instead of taking strong decisions on the basis of the statutory mandate, we see instances where the Regulatory Commissions manage and manoeuvre to arrive at a tariff by creating regulatory assets over and above all permissible limits. This is where the problem lies. Though the Electricity Act envisages functional autonomy for Regulatory Commissions[49] and the statutory scheme is complete in all respects, the decisions taken by the Commissions, many a time, have not inspired confidence of

[49] See *Transmission Corporation of Andhra Pradesh Ltd. v. Sai Renewable Power (P) Ltd.*, (2011) 11 SCC 34, para 59; *Kerala SEB Ltd.* (supra), paras 16 and 17.

www.taxcode.in

independence and autonomy. The reasons are not difficult to conceive as there is an issue about the appointment process. The assertion of independence, however, comes through individual volition and that is where the mandate of transparency leads to accountability. The decisions taken by the Commission, rather the Regulatory Commissioners, are subject to scrutiny in the appellate and the review jurisdiction of the APTEL and thereafter by the Supreme Court. We have dealt with this issue in more detail while considering accountability of the Regulatory Commissions and powers of the APTEL. All these factors give rise to a situation where the tariff for the subsequent years has to be substantially increased to meet the ARR of the previous years.

66.1 A Regulatory Commission's power to create a regulatory asset is part of the tariff fixation process, as long as it is in reasonable measure. However, in an egregious situation where the regulatory asset has grown beyond proportion and is also extended from time-to-time inefficiently, there is a compelling need to deal with it. In this context, the Regulatory Commissions have twin obligations: *first*, the Commission must enable an efficient and effective recovery of the regulatory asset by the utility, and *second*, more importantly, it must manage the regulatory asset in a manner that

www.taxcode.in

does not transgress the principles that inform and govern tariff determination. The regulatory asset cannot be permitted to balloon into such proportions or continued for such periods, year after year, that the governance of the sector is set in peril, affecting the rights of the utilities and at the same time jeopardising the consumer interest, who eventually end up bearing the burden. Creation, management and dissolution of regulatory assets are subject to law and regulation. In performance of these duties, the orders of the Regulatory Commissions are subject to the orders, instructions, and directions of the APTEL issued in exercise of its statutory powers. When they fail to comply with these statutory and other requirements, one can infer regulatory failure.

10 (vi). Law that governs creation, continuation and liquidation of regulatory asset.

67. In the context of creation, management and liquidation of a regulatory asset, the Regulatory Commissions are bound by the mandate of the Electricity Act, the National Electricity Policy, the National Tariff Policy, the Electricity Rules, the Tariff Determination Regulations applicable at the relevant period, and the precedents of the APTEL. We have already indicated that the Central Government recently notified the Electricity (Amendment)

www.taxcode.in

Rules, 2024 by which it inserted Rule 23 that deals with regulatory asset. Prior to the notification, the Central Government elicited comments from various statutory authorities, including the CEA, the Central and State Commissions, the State Governments, generating and distribution utilities, etc. The reason for introduction of this rule is evident from the circulation of the Draft Rules for stakeholder comments, wherein the Central Government has expressed the need for a statutory rule on the conditions for creation and management of a regulatory asset as follows:

> *"3. In order to remove difficulties/challenges faced by various entities and to facilitate development of the power sector some more reforms are proposed. The issues and the reforms proposed to resolve them are mentioned below:*
> ***
> *iii) To ensure financial sustainability of the power sector, it is necessary that the tariff is cost reflective and all the prudent cost is pass through. However, it has been observed that in many States there is large gap in approved ARR and estimated revenue on approved tariff. To discourage such practice there is need to make statutory provisions to avoid such gap. It is also imperative that liquidation of any such gaps in revenue required and estimated approved tariff is done in a time bound manner. New rules are proposed to ensure that revenue gap/regulatory assets is not created except in extraordinary circumstances and to provide for time bound liquidation of the same."*

67.1 In furtherance of this object and purpose, Rule 23 provides as follows:

> ***"Rule 23. Gap between approved Annual Revenue Requirement and estimated annual revenue from approved tariff.–*** *The tariff shall be cost reflective and there shall not be any gap between approved Annual Revenue Requirement and estimated annual revenue from approved tariff except under natural calamity conditions:*

www.taxcode.in

Provided that such gap, created if any, shall not be more than three percent of the approved Annual Revenue Requirement:

Provided further that such gap along with the carrying costs at the base rate of Late Payment Surcharge as specified in the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022, as amended from time to time shall be liquidated in maximum three numbers of equal yearly installments from the next financial year:

Provided also that any gap between approved Annual Revenue Requirement and estimated annual revenue from approved tariff existing on the date of notification of these rules, along with the carrying costs at the base rate of Late Payment Surcharge as specified in the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022, as amended from time to time shall be liquidated in maximum seven numbers of equal yearly installments starting from the next financial year."

67.2 The rule has come into existence after detailed consultation with all the stakeholders. It subserves a salutary purpose and sets a normative principle in motion. Rule 23 is issued in exercise of powers under Section 176, which enables the Central Government to make rules to carry out the provisions of the Act.[50] Sub-section (2)(z) of the Section 176 provides that without prejudice to the generality of the rule-making power, the Central Government may also provide for, by way of a rule, "*any other matter which is required to be, or may be, prescribed*". The expression "prescribed" is defined in Section 2(52) to mean "*prescribed by rules made by the Appropriate Government under this Act*". It may sound

---

[50] The relevant portion of Section 176 of the Electricity Act reads:

"***Section 176. (Power of Central Government to make rules):*** ---

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: -

***

(z) any other matter which is required to be, or may be, prescribed."

64

www.taxcode.in

tautological, but the correct way to examine the legal position is to look at the provisions with respect to which the Central Government or the State Governments may make rules for carrying out the provisions of the Act. The province or domain with respect to which rules can be made is based on the functions that have been assigned to the Government(s) and the Regulatory Commissions. Tariff determination is provisioned in Sections 61 and 62 of the Act, and this must be read with the functions of the Regulatory Commissions under Sections 79 and 86 and the power of the Central and State Commissions to make regulations under Sections 178 and 181.

67.3 The creation of a regulatory asset, being a measure undertaken by the Regulatory Commissions as part of tariff determination, such exercise is informed by Section 61 read with Sections 79 and 86. It is also important to note that Rules made by the Central Government under Section 176 are binding on the Regulatory Commissions when they make regulations because Sections 178 and 181 provide that the "*Commission may make regulations consistent with the Act and the rules*". In any event of the matter, the principle that one must adopt is that the adverse effect of an overbearing regulatory asset extended beyond

www.taxcode.in

proportion is an anathema to good governance of the Electricity Act. It affects every stakeholder, the worst of all being the consumer who is burdened, rather over-burdened, from time to time because of the lapses of the regulators or the manipulation of the utilities or the indifference of the government. Therefore, the principle formulated in Rule 23, consistent with Clause 8.2.2 of the National Tariff Policy, 2016 and the scheme of the Act, must be the normative principle which must invariably be followed. Wherever Rule 23 is incorporated into the Tariff Determination Regulations of the State Commission, it shall be complied with.

67.4 We have dealt with the legal regime in detail and have also extracted the relevant provisions, rules, regulations, policies, instructions and precedents. A combined effect of these can be restated as follows: (i) As a first principle, tariff shall be cost-reflective; (ii) The revenue gap between the approved ARR and the estimated annual revenue from approved tariff must be only in exceptional circumstances; (iii) The regulatory asset should not exceed a reasonable percentage, which can be arrived on the basis of Rule 23 of the Electricity Rules that prescribes 3% of the ARR as the guiding principle; (iv) If a regulatory asset is created, it must be liquidated within a period of 3 years from 01.04.2024, taking

www.taxcode.in

Rule 23 as the guiding principle; (v) The existing regulatory asset must be liquidated in a maximum of 7 years starting from 01.04.2024, taking Rule 23 as the guiding principle; and (vi) Regulatory Commissions must provide the trajectory and roadmap for liquidation of the regulatory asset, which will include a provision for dealing with carrying costs. Regulatory Commissions must also undertake strict and intensive audit of the circumstances in which the distribution companies have continued without recovery of the regulatory asset.

10 (vii). Accountability of the Regulatory Commissions.

68. A Regulatory Commission must perform its functions as per the provisions of the Electricity Act, the National Electricity Policy, the National Tariff Policy, the relevant rules and regulations made under the Act, and the APTEL's directions[51]. In performance of its functions, the Regulatory Commission's decisions are subject to appeal before the APTEL as well as the Supreme Court.[52] The APTEL has also issued directions under Section 121 from time to time for timely determination of tariff, regular truing up, and

[51] Section 121 of the Electricity Act.
[52] Sections 111 and 125 of the Electricity Act.

www.taxcode.in

management of a regulatory asset, as indicated hereinabove[53]. The Regulatory Commissions must abide by and implement the directions of the APTEL. That is how accountability can be ensured. The need for accountability and its dimensions have been explained by this Court in *Vijay Rajmohan v. CBI*[54] as follows:

> *"34. Accountability in itself is an essential principle of administrative law. Judicial review of administrative action will be effective and meaningful by ensuring accountability of the officer or authority in charge.*
> *35. The principle of accountability is considered as a cornerstone of the human rights framework. It is a crucial feature that must govern the relationship between "duty bearers" in authority and "right holders" affected by their actions. Accountability of institutions is also one of the development goals adopted by the United Nations in 2015 and is also recognised as one of the six principles of the Citizens Charter Movement.*
> *36. Accountability has three essential constituent dimensions: (i) responsibility, (ii) answerability, and (iii) enforceability. Responsibility requires the identification of duties and performance obligations of individuals in authority and with authorities. Answerability requires reasoned decision-making so that those affected by their decisions, including the public, are aware of the same. Enforceability requires appropriate corrective and remedial action against lack of responsibility and accountability to be taken. Accountability has a corrective function, making it possible to address individual or collective grievances. It enables action against officials or institutions for dereliction of duty. It also has a preventive function that helps to identify the procedure or policy which has become non-functional and to improve upon it."*

[53] In O.P No. 1/2011 (supra) and O.P. Nos. 1 and 2/2012 (supra).
[54] (2023) 1 SCC 329.

www.taxcode.in

10 (viii). Powers of the APTEL.

69. Under Section 110 of the Act, the Central Government establishes the Appellate Tribunal for Electricity to hear appeals against orders of the Adjudicating Officer or the Appropriate Commission. Section 111 is the statutory remedy for any person aggrieved against an order made by the Adjudicating Officer or that of the Appropriate Commission as it provides for the appellate power of the Tribunal, which reads as follows:

> "***Section 111. Appeal to Appellate Tribunal:*** *--- (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity..."*

69.1 While exercising appellate jurisdiction, the APTEL routinely interprets the Act and the rules and regulations framed thereunder, by which process it systematically evolves legal principles. These very principles are applied consistently for a structural evolution of sectoral laws. This freedom to evolve and interpret laws must belong to the APTEL to subserve the regulatory regime for clarity and consistency. In a similar context, while interpreting the scope of appellate jurisdiction of the Securities

www.taxcode.in

Appellate Tribunal against orders of the regulator, the SEBI, this Court in *SEBI* v. *Mega Corporation*[55] held as under;

> *"20. ... Being a permanent body, apart from acting as an appellate Tribunal on fact, the Tribunal routinely interprets the Act, Rules and Regulations made thereunder and evolves a legal regime, systematically developed over a period of time. The advantage and benefit of this process is consistency and structural evolution of the sectorial laws.*
> *21. ... This freedom to evolve and interpret laws must belong to the Tribunals to subserve the regulatory regime for clarity and consistency and it is with this perspective that the Supreme Court will consider appeals against judgment of the Tribunals on questions of law arising from its orders.*
> ***
> *23.2 ... The Tribunal while exercising jurisdiction under Section 15-T, apart from acting as an appellate authority on fact, also interprets the Act, Rules and Regulations made thereunder and systematically evolves a legal regime. These very principles are applied consistently for structural evolution of the sectorial laws...."*

69.2 The power under Section 111 is that of an appeal and as such the decision of the APTEL shall be after re-appreciation of facts and by applying the law on the subject. The APTEL will also examine the legality, propriety or correctness of the orders made by the Regulatory Commissions, and it may also on its own motion make such orders as are appropriate for adjudication and determination of the case.

69.3 Apart from Section 111 under which the APTEL is granted appellate jurisdiction, it is significant to note that the Parliament has also empowered the APTEL with important jurisdiction and

[55] (2023) 12 SCC 802.

www.taxcode.in

powers under Section 121, which is reproduced hereinunder for ready reference.

> *"**Section 121. (Power of Appellate Tribunal):** ---*
> *The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act."*

69.4 We can explain the significance of Section 121 in the context of the facts of these very writ petitions and civil appeals. The facts relating to the performance of DERC present a classic case of 'regulatory failure'. Typically, 'regulatory failure' does not come under scrutiny when the APTEL considers appeals from orders of the Regulatory Commissions as the focus at that time is on the merits of the decision made by the Commission. The institutional failures or the shortcomings of the regulatory bodies are often ignored and an appellate forum or even constitutional courts proceed to resolve the issue by addressing the merits of the case. In *Lifecare Innovations Pvt. Ltd. v. Union of India*[56] this Court had an occasion to reflect on this problem and held as follows;

> *"21. Having considered the provisions of the Act and the MSE Procurement Preference Policy, 2012, we are of the opinion that there is no mandatory minimum procurement 'right' of an individual MSE. However, there is certainly a statutory foundation for the Procurement Preference Policy, 2012, having force of law as it 'encapsulates a mandate*

[56] 2025 INSC 269.

www.taxcode.in

and discloses a specific purpose'.[57] Clause 3 of the policy mandating procurement of 25 per cent of supply from MSEs is simply the statutory duty of the bodies constituted under the Act and the Policy. The significance of creation and establishment of these statutory and administrative bodies is not difficult to conceive. If these institutions and bodies work effectively and efficiently, it is but natural that the purpose and object of the legislation will be achieved in a substantial measure. It is, therefore, necessary to ensure that in the functioning of these bodies, there is efficiency in administration, expertise through composition, integrity through human resources, transparency and accountability, and response-ability through regular review, audits and assessments.

22. While exercising judicial review of administrative action in the context of Statutes, laws, rules or policies establishing statutory or administrative bodies to implement the provisions of the Act or its policy, the first duty of constitutional courts is to ensure that these bodies are in a position to effectively and efficiently perform their obligations. This approach towards judicial review has multiple advantages. In the first place, while continually operating in the field with domain experts, these bodies acquire domain expertise, the consequence of which would also be informed decision-making and consistency. Further, the critical mass of institutional memory acquired by these bodies will have a direct bearing on the systematic development of the sector and this will also help handling polycentric issues. Thirdly, while continuously being on the field, and having acquired the capability of making real-time assessments about the working of the policies, these bodies will be in a position to visualize course correction for future policymaking."

69.5 In the above referred matter, this Court was considering the duty to ensure institutional integrity and efficiency of the

---

[57] Gulf Goans Hotels Co. Ltd v. Union of India, (2014) 10 SCC 673 *"...a government policy may acquire the 'force of 'law' if it conforms to a certain form possessed by other laws in force and encapsulates a mandate and discloses a specific purpose"*; Bennett Coleman & Co. v. Union of India (1972) 2 SCC 788 *"What is termed 'policy' can become justiciable when it exhibits itself in the shape of even purported 'law'. According to Article 13(3)(a) of the Constitution, 'law' includes 'any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law'. So long as policy remains in the realm of even rules framed for the guidance of executive and administrative authorities it may bind those authorities as declarations of what they are expected to do under it."*

www.taxcode.in

regulators under the MSME Act. A similar approach was adopted by this Court in *T.N. Godavarman Thirumulpad*[58] for reviving and effectuating the environment regulators, rather than taking over or routinely reviewing their decision making.

69.6 'Regulatory failure' occurs due to ineffective functioning of the Regulatory Commissions, excessive governmental interference, or 'regulatory capture'. We cannot wish away these real and imminent dangers that affect effective functioning of the Regulatory Commissions. These issues could have the effect of completely eclipsing regulatory functions, thereby losing the very purpose and object of restructuring the electricity sector by unbundling the functions of generation, distribution, and transmission and more importantly, establishing independent regulatory institutions and granting them the exclusive jurisdiction over grant of licenses and tariff determination. Section 121 is intended to ensure that in the functioning of the Regulatory Commissions, there is efficiency in administration, expertise through human resource, integrity through transparency, and accountability and responsibility through review audit and assessment. For enforcing these values, Section 121 empowers the

[58] *In Re: T.N. Godavarman Thirumulpad v. Union of India*, 2024 INSC 78, paras 27-30.

www.taxcode.in

APTEL to issue such orders, instructions or directions as it deems fit, to the Commission for performance of its statutory functions under the Act.

69.7 The power of the APTEL to issue such orders and directions takes within its sweep the power to enforce such orders, as provided in Section 120(3) of the Act.[59] The power under Section 121 is extremely important as it is intended by the Parliament that the APTEL must be the guiding force to ensure that Regulatory Commissions across the length and breadth of the nation perform their statutory functions with efficiency and integrity.

69.8 This position is already recognized by the APTEL, as is evident from its order in O.P. No. 1 of 2011, relevant portion of which has already been reproduced in this judgment. It is necessary to restate the directions issued by the Appellate Tribunal in its orders dated 11.11.2011 and 14.11.2013, as it is relevant for the present purpose:

i. The APTEL has the power and the duty to issue directions to Regulatory Commissions when they fail to comply with the Act, rules or regulations, fail to perform their

[59] Section 120(3) of the Electricity Act reads:
"***Section 120. (Procedure and powers of Appellate Tribunal):*** ---
***
(3) An order made by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court and, for this purpose, the Appellate Tribunal shall have all the powers of a civil court."

74

www.taxcode.in

statutory functions and duties, or perform the same negligently, improperly or poorly.[60] Such directions are intended to secure compliance with the letter and spirit of the Electricity Act, and the APTEL can monitor the same through periodical status reports and by setting timelines for the Regulatory Commissions.[61]

ii. Tariff determination is a statutory function entrusted to the Regulatory Commissions, and it must be undertaken on a regular, timely, and annual basis.[62]

iii. Regulatory Commissions must undertake truing up on a regular basis, immediately at the end of the financial year so that any discrepancies between the ARR and the revenue realised through tariffs is brought to notice and can be rectified in a timely manner.[63] This is necessary so that the burden or benefit of present years is not carried forward to future consumers, and delay in truing up could lead to imposition of carrying costs and cash-flow problems for the utility.[64]

iv. The tariff determined by the Regulatory Commissions must be cost-reflective as per Section 61 of the Electricity Act.[65]

v. Regulatory Commissions must not ordinarily leave revenue gaps or create regulatory assets, and when it does so in exceptional circumstances, it must comply

---

[60] O.P. No. 1/2011 (supra), para 47-48; O.P. Nos. 1 and 2/2012 (supra), para 15.
[61] O.P. No. 1/2011 (supra), para 66.
[62] O.P. No. 1/2011 (supra), paras 59, 65(i) and (ii); O.P Nos. 1 and 2/2012 (supra), para 15.
[63] O.P. No. 1/2011 (supra), para 65(i) and (iii).
[64] ibid, para 57.
[65] ibid, para 65(iv).

www.taxcode.in

with the provisions of the Act, rules and regulations on the issue;[66]

vi. In case a Regulatory Commission creates a regulatory asset, it must allow carrying costs to the distribution utility, time-bound recovery and a liquidation schedule, and ensure that neither the financial position and liquidity of the distribution company nor consumer interests are jeopardised.[67]

69.9 We reiterate that the Regulatory Commissions must call for ARR, ensure that tariffs are determined, and that truing up is conducted in a timely manner, by exercising suo motu powers if necessary. In case of non-compliance with these directions, the APTEL has the power and duty to call for an explanation, ensure accountability, and monitor compliance by the Regulatory Commissions. Similarly, the APTEL must exercise its powers under Section 121 to ensure that the legal principles on regulatory asset laid down by us in paragraph 67.3 hereinabove are complied with by the Regulatory Commissions, and it must monitor the same. In case of non-compliance, the APTEL must issue such orders, directions, or instructions to the Commissions as may be necessary to hold them accountable.

---

[66] ibid, paras 62, 65(iv).
[67] ibid, para 62(iv); O.P. Nos. 1 and 2/2012, para 38.

www.taxcode.in

11. Conclusions.

70. In the following ten *sutras*, we have examined the issue relating to *regulatory asset*, its position in the regulatory regime for determination of tariff, the duties and accountability of the regulators - the Regulatory Commissions and then powers of the Appellate Tribunal for Electricity to avert a regulatory failure.

I. Electricity is a public good. Its generation, transmission, and distribution are statutorily regulated to ensure access to supply, on a non-rival and non-exclusive basis.

II. Being a material resource within Article 39 of the Constitution of India, Part-IV of the Constitution must inform the generation, transmission, and distribution of electricity.

III. The statutory regulators, i.e. the Central and State Regulatory Commissions alongwith Union and State Governments and other stakeholders are equally bound by the mandate under Part-IV of the Constitution for its equitable distribution. This duty is predicated on the independent, efficient, objective functioning of the electricity commissions. They must guard themselves against 'regulatory failure' and in particular 'regulatory capture'. The interpretation of the powers and function of the Regulatory Commissions have to be

www.taxcode.in

such that there is no regulatory vacuum, in that there is no unallocated residue of power of regulation.

IV. Tariff determination is a regulatory function and it is the exclusive province of the Regulatory Commissions. Tariff determination involves multiple variables requiring the regulators to act with expertise and also with certain amount of flexibility. Creation of regulatory asset is a 'measure' that the Commission adopts for good governance of tariff. It is also a recognition of revenue recoverable by distribution companies, and as such, it is an enforceable right, though only through tariff determination for later years. This 'measure' gives rise to correlative obligations of the Regulatory Commissions to manage it efficiently and allow easy liquidation.

V. Disproportionate increase and long pending regulatory asset depict a 'regulatory failure'. It has serious consequences on all stakeholders and the ultimate burden is only on the consumer.

VI. Laws encompassing the creation, continuation, and liquidation of a 'regulatory asset' are located in the Act, National Tariff Plan and Policy, Rules, and Regulations made under the Act, as interpreted

www.taxcode.in

by the APTEL. The combined effect of this legal regime is the statutory obligation on the regulator(s).

VII. Ineffective and inefficient functioning of the Regulatory Commissions, coupled with acting under dictation can lead to regulatory failure. The commissions are accountable for their decisions, and they are subject to judicial review.

VIII. Apart from examining the legality and propriety of the orders of the Commissions in appeal, the APTEL has extraordinary powers under Section 121 to issue orders, instructions or directions for effective enforcement of the regulatory regime. This is one of the most important powers allocated to APTEL by the Parliament.

IX. We have affirmed the limits of creation, continuation and liquidation of the regulatory asset, recognised the obligations of the Regulatory Commissions, and directed that they will be accountable and subject to such orders, instructions or directions as the APTEL may issue in this regard under Section 121.

X. The regulatory regime under the Act is a complete code enunciating rights, prescribing obligations, and laying down the mechanism for course correction. The effectiveness of these laws will be reflected in the will to enforce them.

www.taxcode.in

12. Directions.

71. For the reasons state above, we issue the following directions:

(i) As a first principle, tariff shall be cost-reflective;

(ii) The revenue gap between the approved ARR and the estimated annual revenue from approved tariff may be in exceptional circumstances;

(iii) The regulatory asset should not exceed a reasonable percentage, which percentage can be arrived on the basis of Rule 23 of the Electricity Rules that prescribes 3% of the ARR as the guiding principle;

(iv) If a regulatory asset is created, it must be liquidated within a period of 3 years, taking Rule 23 as the guiding principle;

(v) The existing regulatory asset must be liquidated in a maximum of 4 years starting from 01.04.2024, taking Rule 23 as the guiding principle;

(vi) Regulatory Commissions must provide the trajectory and roadmap for liquidation of the existing regulatory asset, which will include a provision for dealing with carrying costs. Regulatory Commissions must also undertake strict and intensive audit of the circumstances in which the

www.taxcode.in

distribution companies have continued without recovery of the regulatory asset;

(vii) Regulatory Commissions shall in general follow the principles governing creation, continuation and liquidation of the regulatory asset, as laid down in paragraph 70, and also abide by the directions of the APTEL summarised in paragraph 69.8;

(viii) The APTEL shall invoke its powers under Section 121 and issue such orders, instructions or directions as it may deem fit to the Regulatory Commissions for performance of their duties with respect to regulatory asset as enunciated by us in this judgment and as per the orders of the APTEL in O.P. No. 1/2011 dated 11.11.2011 and O.P. Nos. 1 and 2/2012 dated 14.11.2013.

(ix) The APTEL shall register a suo moto petition under Section 121 of the Act to monitor implementation of above directions (v) and (vi) till the conclusion of the period mentioned therein.

72. With these directions, the present writ petitions in W.P. (C) No. 104/2014, W.P. (C) No. 105/2014 and W.P. (C) No. 1005/2021 and the present civil appeals in C.A. No. 4010/2014 and

www.taxcode.in

238

C.A. No. 4013/2014 against the APTEL's order dated 11.03.2014 stand disposed of.

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

.....J.
[SANDEEP MEHTA]

NEW DELHI;
AUGUST 06, 2025

12. Learned counsel further invites our attention to the assessee's detailed synopsis at pages 239 to 243 that the Delhi Electricity Regulatory Commission "DERC" therefore filed its Miscellaneous Application nos. 1699 & 1700/2025 before their lordships on 05.09.2025 which are yet to attain finality. Meaning thereby that the above issue of the assessee's recognition of revenue regarding its regulatory assets amounting to Rs. 8,27,79,00,000/- is yet to attain finality so as to be held has to have accrued as income in its favor without any reasonable certainty forming a condition precedent in light of Chainrup Smapatram vs CIT (1953) 24 ITR 481(SC); reading as under:

> *"While anticipated loss is thus taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into the account, as no prudent trader would care to show increased profit before its actual realisation. This is the theory underlying the rule that the closing stock is to be valued at cost or market price whichever is the lower, and it is now generally accepted as an established rule of commercial practice and accountancy. As profits for income-tax purposes are to be computed in conformity with the ordinary principles of commercial accounting, unless of course, such principles have been superseded or modified by legislative enactments unrealised profits in the shape of appreciated value of goods remaining unsold at the end of an accounting year and carried over to the following year's account in a business that is continuing are not brought into*

www.taxcode.in

the charge as a matter of practice, though, as already stated, loss due to a fall in price below cost is allowed even if such loss has not been actually realised."
(emphasis supplied)

13. It is in this factual backdrop that we first of all observe that so far as the learned lower authorities' action making the impugned addition of Rs. 8,27,79,00,000/- regarding the assessee's "regulatory asset" (*supra*) is concerned, we find not merit to sustain the same since it could not be held to have accrued as a taxable income going by the "reasonable certainty" principle. Coming to the latter head of notional income addition of un-billed revenues, we deem it appropriate to grant it part relief to the extent it has already recognized the very revenue in the subsequent year A.Y. 2011-12. Coming to the remaining amount if any, we are of the considered view that going by the very analogy of notional income based on unbilled revenues, the same could not be held to have accrued in light of Chainrup Smapatram vs CIT (1953) 24 ITR 481(SC) for lack of any reasonable certainty thereof. The assessee's instant substantive ground no. 4 to 4.3 are accepted and its substantive ground nos. 5 to 5.2 are partly accepted in very terms. Necessary computation shall follow as per law.

14. The assessee's substantive ground nos. 6 to 6.1 plead that both the Assessing Officer as well as the learned CIT(A) have erred in law and on facts in making addition of Rs. 21,66,74,952/- on account of short capitalization of personnel cost and overheads to the value of assets. The assessee submits in this factual backdrop that the learned CIT(A) could not have held that personnel cost in its case ought to be capitalized @ 10% of the employee cost as per the "DERC" directions without appreciating that its method going by the book entries was very much a scientific one based on a rational approach.

www.taxcode.in

15. We have given our thoughtful consideration to the assessee's and the Revenue's vehement submissions reiterating their respective stands. We are of the considered view that once the prescribed authority i.e., the DERC has already settled the issue with 10% of the employee cost to be considered for capitalization as per its statutory jurisdiction vested under the Electricity Act, 2003(*supra*), the same ought to be prevail being the expert body in the specified sector. We thus find no merit in the assessee's instant substantive grounds which are hereby rejected in very terms therefore.

16. The assessee's substantive ground no. 7 pleaded in the instant appeal challenges both the learned lower authorities' respective assessment and lower appellate findings invoking section 40(a)(ia) disallowance of Rs. 2,27,92,452/- for non-deduction of tax deducted at source "TDS" u/s 194J of the Act in respect of trading margin paid to RTL and BYPL. After vehemently arguing for sometime that TDS is not liable to be deducted on wheeling and transmission charges as well as an instance of genuine non-tax deduction it may be allowed in the subsequent year(s) in which the payee concerned has paid his taxes *qua* the impugned payments. Faced with this situation, we deem it appropriate to direct the learned Assessing Officer to verify all the relevant facts regarding the assessee's preceding alternative plea as per law in consequential proceedings. The assessee's substantive ground no. 7 is partly accepted for statistical purposes to this limited extent.

17. Lastly comes the assessee's section 80IA(4) deduction claim raised in both the lower proceedings which stand declined in the assessment order as upheld in the lower appellate discussion. The learned CIT(A) detailed discussion to this effect reads as under:

www.taxcode.in

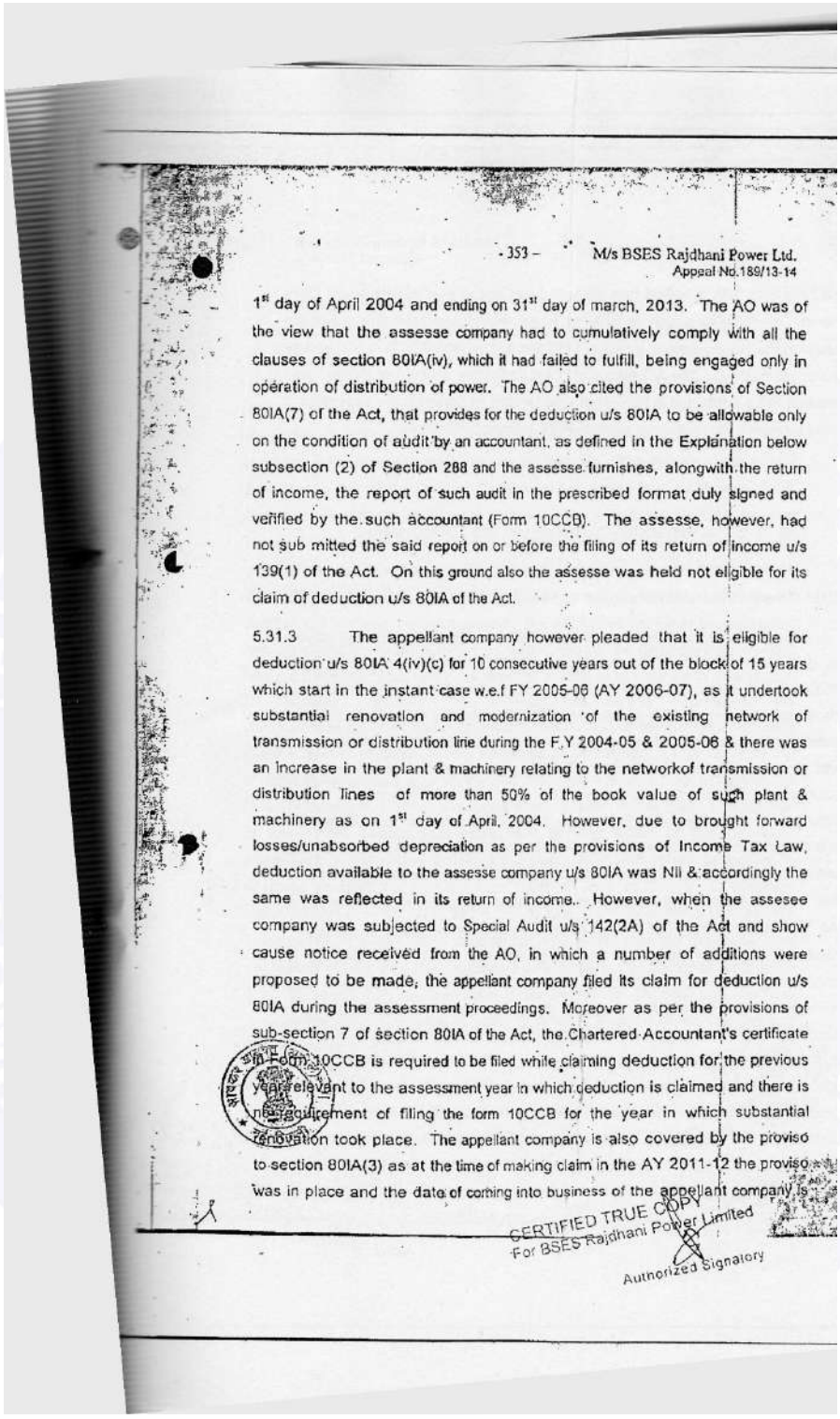
5.31.1 It is contended that the AO has erred in not allowing the deduction u/s 80IA of the Income Tax Act, 1961.

5.31.2 The AO observed during the course of assessment proceedings that the assesse company filed a claim on 04.01.2013 claiming it to be eligible of deduction u/s 80IA(iv) of the Act and hence the same should be allowed. However, the AO was of the view that there is no provision under the Income Tax Act, 1961 to make amendment in the return of income by modification, based on an application at the assessment stage, without revising its return of income, as per the provisions of Section 139(5) of the Act which ought to have been filed on or before 31.03.2012. However, the claim was made only on 04.10.2013, which was beyond the prescribed period for filing the revised "Return of Income" for the AY 2010-11. Hence the AO treated the claim of the assesse for deduction u/s 80IA as invalid. The AO also considered the issue for determination as to whether Income, as claimed by the assessee, eligible for deduction u/s 80IA(4)(iv)(c) is 'derived from eligible business' or 'attributable to eligible business". The AO held that the assesse company had not fulfilled the condition laid down u/s 80IA(1) r.w.s (4) of the Act and therefore, not eligible for deduction u/s 80IA. The AO followed the ratio of decision of the Hon'ble Supreme Court of India Leather Corporation (P) Ltd. V. CIT (SC) 227 ITR 552, where the Hon'ble Court held that if any income of the assesse company is held to be eligible for deduction u/s 80IA, than it has to be compulsorily derived from the eligible business. The AO further noted that in the case of the assesse, it had not given full details of other entire income as to which part of the income is 'derived' from eligible business and which part of income is 'attributable' to the eligible business as the assesse had been claiming the deduction u/s 80IA on the entire income, but many component of its income eg. Interest income, late payment surcharge (LPS), income from use of electric poles, subsidiary received by the assesse etc could not be said to be derived from eligible business. Moreover, the AO was also of the opinion that the assesse has not fulfilled the condition laid down in Section 80IA(2) of the Act that prescribes that the deduction u/s 80IA could be claimed by the assesse company for any 10 consecutive assessment year out of 15 years beginning from the year in which the undertaking generates power or commences transmission or distribution of power or under takes substantial renovation and modernization of the existing transmission or distribution lines and this duration of 10 years is at the option of the assesse that whether the assesse wants to

www.taxcode.in

claim the deduction u/s 80IA & from which assessment year i.e the assesse has to exercise the option every year, whether the assesse desires to claim the deduction u/s 80IA for current year or not. In case of the assesse, the first year of operation was F.Y 2002-03 (AY 2003-04), in which the assesse company had to exercise the option of claiming the deduction u/s 80IA. However, the assesse company did not exercise such option in its return filed for the AY 2003-04 or in subsequent assessment years upto AY 2009-10. Even the claim was not put forward for the AY 2010-11, under consideration and therefore, the assesse had lost the right to exercise the option. The AO further stated that the assesse did not fulfil the condition laid down in 80IA (3) of the Act i.e it is not formed by splitting up or the reconstruction of a business already in existence and it is not formed by the transfer to a new business of machinery or plant previously used for any purpose and that section 80IA(3) is applicable for all deductions claimed under the provisions of section 80IA. The AO emphasized, that the assesse company was formed by splitting up or reconstruction of erstwhile Delhi Vidyut Board (DVB) and therefore, the condition as specified in clause (i) of subsection 80IA(3) remained uncomplied with. The AO further held that the assesse is not even covered by 'proviso' of section 80IA(3), that stipulates that nothing contained is subsection 80IA(3) should apply in the case of transfer, either in whole or in part, of machinery or plant previously used by a State Electricity Board referred to in clause (7) of section 2, of the Electricity Act, 2003 (36 of 2003), whether or not such transfer is in pursuance of the splitting up or reconstruction or reorganization of the Board, Under Part-XIII of the Act, that applies to any State Electricity Board. The AO cited the non-applicability of the said 'proviso on the ground that the said proviso came into effect from April 1, 2003, but the assesse company came into operation in F.Y 2002-03. The AO further held that provisions of Section 80IA(4)(iv) are not fulfilled by the assesse company as a perusal of Section 80IA(4)(iv) shows that the deduction under section 80IA(4)(iv) could be claimed by an assesse who fulfills all the conditions i.e. it starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on 1st day of April 1999 and ending on the 31st March, 2013 and it undertakes substantial renovation and modernization of the existing network of transmission or distribution lines at any time during the period beginning on the

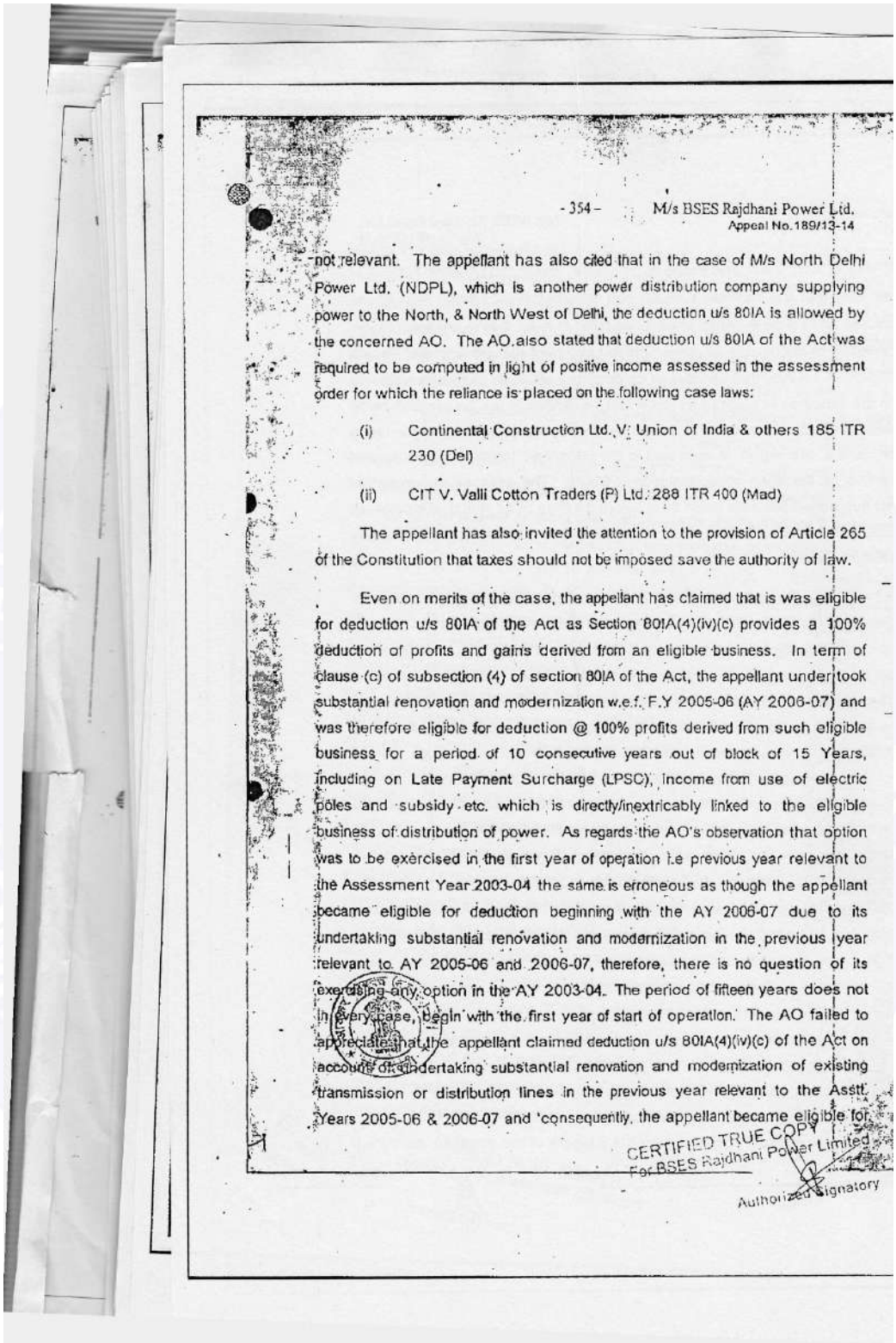
www.taxcode.in



1st day of April 2004 and ending on 31st day of march, 2013. The AO was of the view that the assesse company had to cumulatively comply with all the clauses of section 80IA(iv), which it had failed to fulfill, being engaged only in operation of distribution of power. The AO also cited the provisions of Section 80IA(7) of the Act, that provides for the deduction u/s 80IA to be allowable only on the condition of audit by an accountant, as defined in the Explanation below subsection (2) of Section 288 and the assesse furnishes, alongwith the return of income, the report of such audit in the prescribed format duly signed and verified by the such accountant (Form 10CCB). The assesse, however, had not sub mitted the said report on or before the filing of its return of income u/s 139(1) of the Act. On this ground also the assesse was held not eligible for its claim of deduction u/s 80IA of the Act.

5.31.3 The appellant company however pleaded that it is eligible for deduction u/s 80IA 4(iv)(c) for 10 consecutive years out of the block of 15 years which start in the instant case w.e.f FY 2005-06 (AY 2006-07), as it undertook substantial renovation and modernization of the existing network of transmission or distribution line during the F.Y 2004-05 & 2005-06 & there was an increase in the plant & machinery relating to the networkof transmission or distribution lines of more than 50% of the book value of such plant & machinery as on 1st day of April, 2004. However, due to brought forward losses/unabsorbed depreciation as per the provisions of Income Tax Law, deduction available to the assesse company u/s 80IA was Nil & accordingly the same was reflected in its return of income. However, when the assesee company was subjected to Special Audit u/s 142(2A) of the Act and show cause notice received from the AO, in which a number of additions were proposed to be made, the appellant company filed its claim for deduction u/s 80IA during the assessment proceedings. Moreover as per the provisions of sub-section 7 of section 80IA of the Act, the Chartered Accountant's certificate in Form 10CCB is required to be filed while claiming deduction for the previous yearrelevant to the assessment year in which deduction is claimed and there is nearequirement of filing the form 10CCB for the year in which substantial renovation took place. The appellant company is also covered by the proviso to section 80IA(3) as at the time of making claim in the AY 2011-12 the proviso was in place and the date of coming into business of the appellant company is

CERTIFIED TRUE COPY
For BSES Rajdhani Power Limited
Authorized Signatory



- 354 - M/s BSES Rajdhani Power Ltd.
Appeal No.189/13-14

not relevant. The appellant has also cited that in the case of M/s North Delhi Power Ltd. (NDPL), which is another power distribution company supplying power to the North, & North West of Delhi, the deduction u/s 80IA is allowed by the concerned AO. The AO also stated that deduction u/s 80IA of the Act was required to be computed in light of positive income assessed in the assessment order for which the reliance is placed on the following case laws:

(i) Continental Construction Ltd. V. Union of India & others 185 ITR 230 (Del)

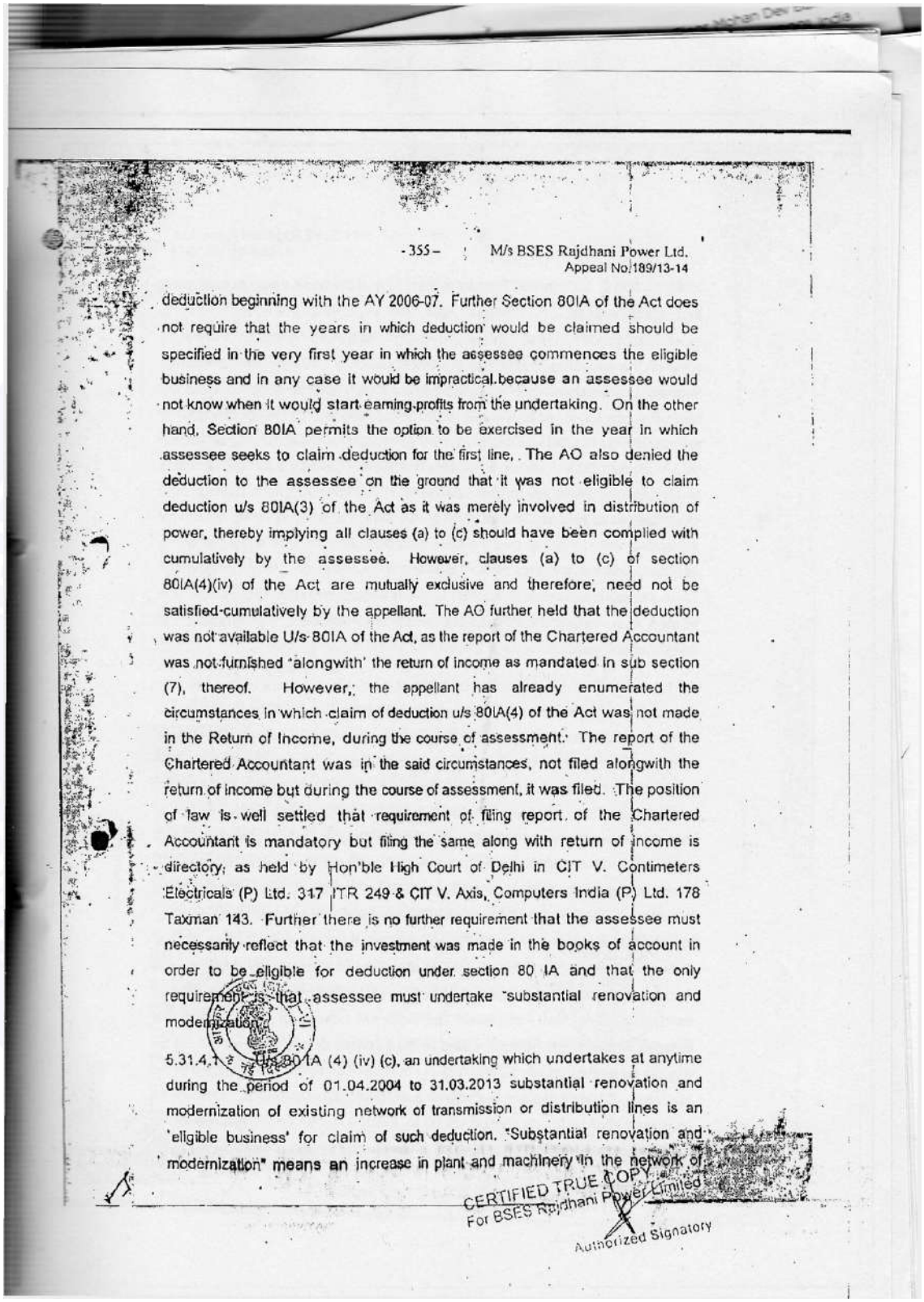
(ii) CIT V. Valli Cotton Traders (P) Ltd. 288 ITR 400 (Mad)

The appellant has also invited the attention to the provision of Article 265 of the Constitution that taxes should not be imposed save the authority of law.

Even on merits of the case, the appellant has claimed that is was eligible for deduction u/s 80IA of the Act as Section 80IA(4)(iv)(c) provides a 100% deduction of profits and gains derived from an eligible business. In term of clause (c) of subsection (4) of section 80IA of the Act, the appellant under took substantial renovation and modernization w.e.f. F.Y 2005-06 (AY 2006-07) and was therefore eligible for deduction @ 100% profits derived from such eligible business for a period of 10 consecutive years out of block of 15 Years, including on Late Payment Surcharge (LPSC), income from use of electric poles and subsidy etc. which is directly/inextricably linked to the eligible business of distribution of power. As regards the AO's observation that option was to be exercised in the first year of operation i.e previous year relevant to the Assessment Year 2003-04 the same is erroneous as though the appellant became eligible for deduction beginning with the AY 2006-07 due to its undertaking substantial renovation and modernization in the previous year relevant to AY 2005-06 and 2006-07, therefore, there is no question of its exercising any option in the AY 2003-04. The period of fifteen years does not in every case, begin with the first year of start of operation. The AO failed to appreciate that the appellant claimed deduction u/s 80IA(4)(iv)(c) of the Act on account of undertaking substantial renovation and modernization of existing transmission or distribution lines in the previous year relevant to the Asstt. Years 2005-06 & 2006-07 and consequently, the appellant became eligible for

CERTIFIED TRUE COPY
For BSES Rajdhani Power Limited
Authorized Signatory

www.taxcode.in



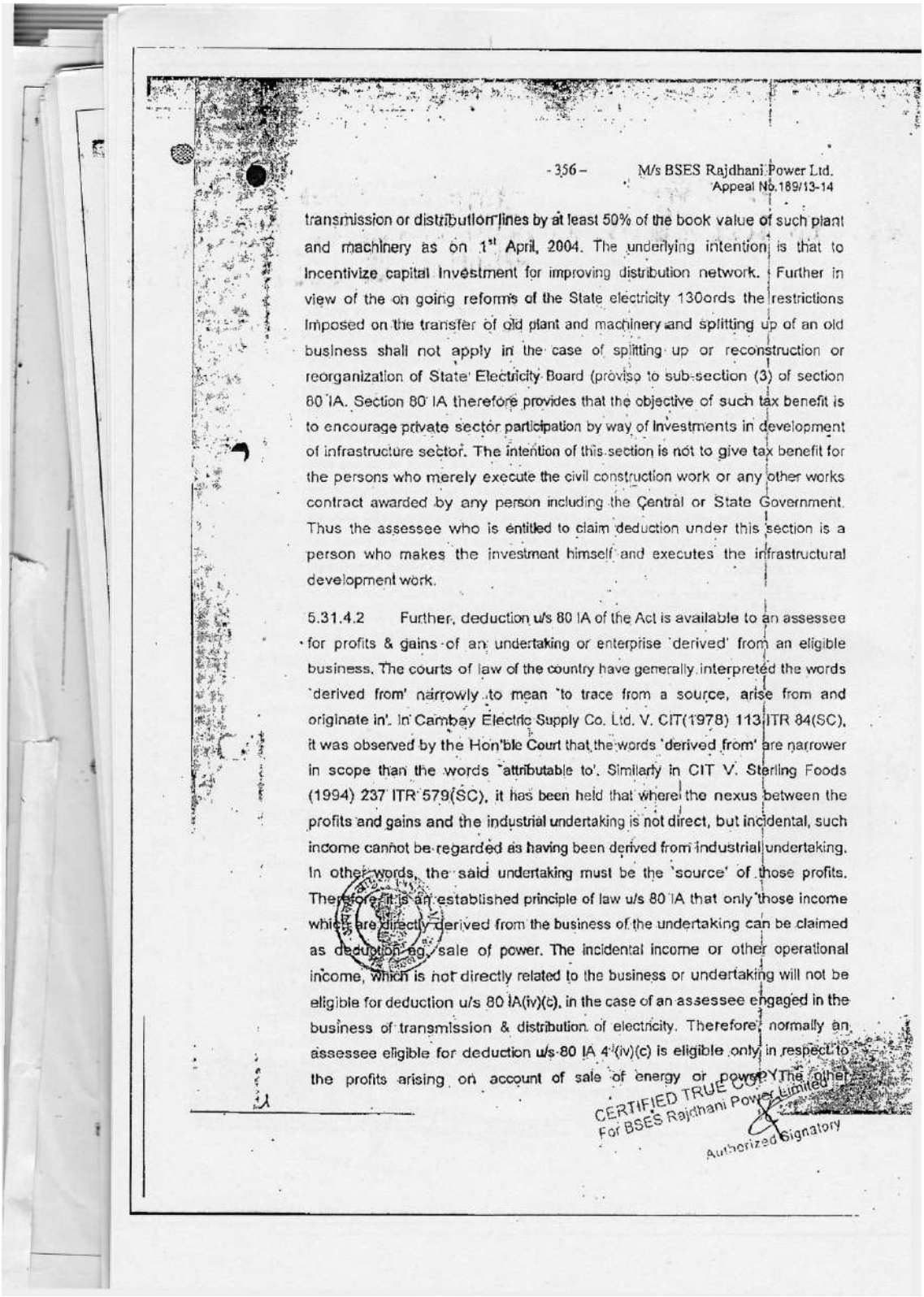
-355- M/s BSES Rajdhani Power Ltd.
Appeal No.189/13-14

deduction beginning with the AY 2006-07. Further Section 80IA of the Act does not require that the years in which deduction would be claimed should be specified in the very first year in which the assessee commences the eligible business and in any case it would be impractical because an assessee would not know when it would start earning profits from the undertaking. On the other hand, Section 80IA permits the option to be exercised in the year in which assessee seeks to claim deduction for the first line. The AO also denied the deduction to the assessee on the ground that it was not eligible to claim deduction u/s 80IA(3) of the Act as it was merely involved in distribution of power, thereby implying all clauses (a) to (c) should have been complied with cumulatively by the assessee. However, clauses (a) to (c) of section 80IA(4)(iv) of the Act are mutually exclusive and therefore, need not be satisfied cumulatively by the appellant. The AO further held that the deduction was not available U/s 80IA of the Act, as the report of the Chartered Accountant was not furnished 'alongwith' the return of income as mandated in sub section (7), thereof. However, the appellant has already enumerated the circumstances in which claim of deduction u/s 80IA(4) of the Act was not made in the Return of Income, during the course of assessment. The report of the Chartered Accountant was in the said circumstances, not filed alongwith the return of income but during the course of assessment, it was filed. The position of law is well settled that requirement of filing report of the Chartered Accountant is mandatory but filing the same along with return of income is directory, as held by Hon'ble High Court of Delhi in CIT V. Contimeters Electricals (P) Ltd. 317 ITR 249 & CIT V. Axis, Computers India (P) Ltd. 178 Taxman 143. Further there is no further requirement that the assessee must necessarily reflect that the investment was made in the books of account in order to be eligible for deduction under section 80 IA and that the only requirement is that assessee must undertake "substantial renovation and modernization".

5.31.4 U/s 80IA (4) (iv) (c), an undertaking which undertakes at anytime during the period of 01.04.2004 to 31.03.2013 substantial renovation and modernization of existing network of transmission or distribution lines is an 'eligible business' for claim of such deduction. "Substantial renovation and modernization" means an increase in plant and machinery in the network of

CERTIFIED TRUE COPY
For BSES Rajdhani Power Limited
Authorized Signatory

www.taxcode.in

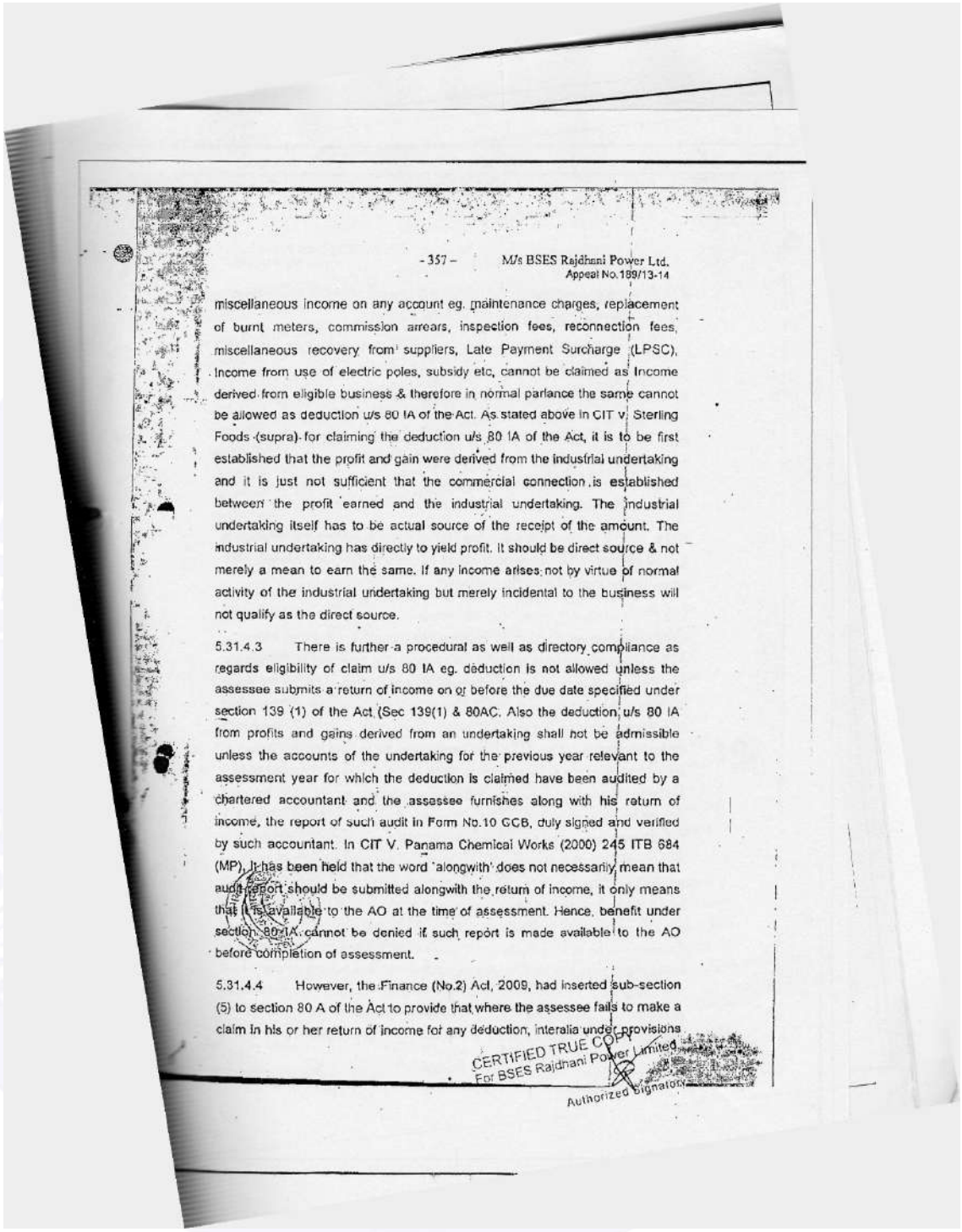


transmission or distribution lines by at least 50% of the book value of such plant and machinery as on 1st April, 2004. The underlying intention is that to incentivize capital investment for improving distribution network. Further in view of the on going reforms of the State electricity 130ords the restrictions imposed on the transfer of old plant and machinery and splitting up of an old business shall not apply in the case of splitting up or reconstruction or reorganization of State Electricity Board (proviso to sub-section (3) of section 80 IA. Section 80 IA therefore provides that the objective of such tax benefit is to encourage private sector participation by way of investments in development of infrastructure sector. The intention of this section is not to give tax benefit for the persons who merely execute the civil construction work or any other works contract awarded by any person including the Central or State Government. Thus the assessee who is entitled to claim deduction under this section is a person who makes the investment himself and executes the infrastructural development work.

5.31.4.2 Further, deduction u/s 80 IA of the Act is available to an assessee for profits & gains of an undertaking or enterprise 'derived' from an eligible business. The courts of law of the country have generally interpreted the words 'derived from' narrowly to mean 'to trace from a source, arise from and originate in'. In Cambay Electric Supply Co. Ltd. V. CIT(1978) 113 ITR 84(SC), it was observed by the Hon'ble Court that the words 'derived from' are narrower in scope than the words 'attributable to'. Similarly in CIT V. Sterling Foods (1994) 237 ITR 579(SC), it has been held that where the nexus between the profits and gains and the industrial undertaking is not direct, but incidental, such income cannot be regarded as having been derived from industrial undertaking. In other words, the said undertaking must be the 'source' of those profits. Therefore it is an established principle of law u/s 80 IA that only those income which are directly derived from the business of the undertaking can be claimed as deduction eg. sale of power. The incidental income or other operational income, which is not directly related to the business or undertaking will not be eligible for deduction u/s 80 IA(iv)(c), in the case of an assessee engaged in the business of transmission & distribution of electricity. Therefore, normally an assessee eligible for deduction u/s 80 IA 4 (iv)(c) is eligible only in respect to the profits arising on account of sale of energy or power. The other

CERTIFIED TRUE COPY
For BSES Rajdhani Power Limited
Authorized Signatory

www.taxcode.in



- 357 - M/s BSES Rajdhani Power Ltd.
Appeal No.189/13-14

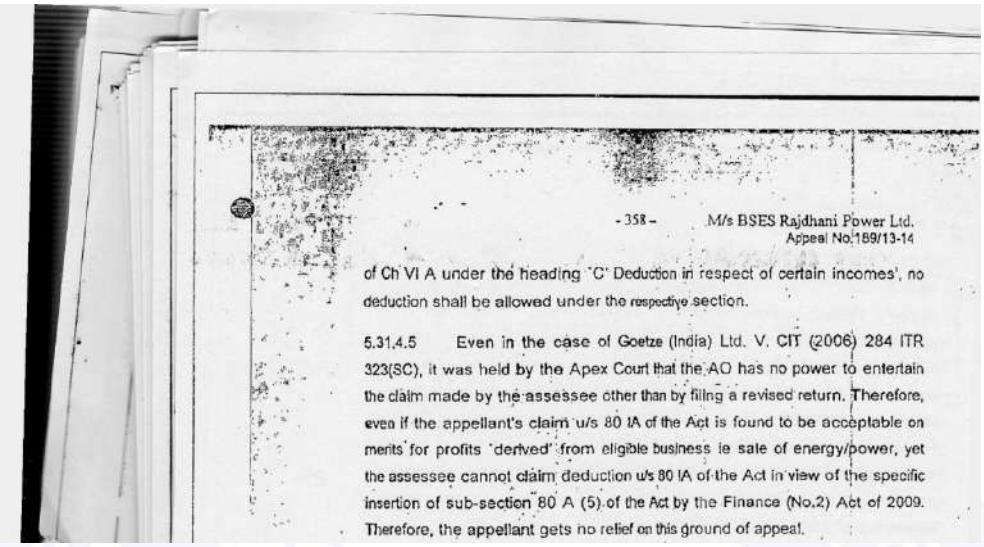
miscellaneous income on any account eg. maintenance charges, replacement of burnt meters, commission arrears, inspection fees, reconnection fees, miscellaneous recovery from suppliers, Late Payment Surcharge (LPSC), Income from use of electric poles, subsidy etc, cannot be claimed as Income derived from eligible business & therefore in normal parlance the same cannot be allowed as deduction u/s 80 IA of the Act. As stated above in CIT v. Sterling Foods (supra) for claiming the deduction u/s 80 IA of the Act, it is to be first established that the profit and gain were derived from the industrial undertaking and it is just not sufficient that the commercial connection is established between the profit earned and the industrial undertaking. The industrial undertaking itself has to be actual source of the receipt of the amount. The industrial undertaking has directly to yield profit. It should be direct source & not merely a mean to earn the same. If any income arises not by virtue of normal activity of the industrial undertaking but merely incidental to the business will not qualify as the direct source.

5.31.4.3 There is further a procedural as well as directory compliance as regards eligibility of claim u/s 80 IA eg. deduction is not allowed unless the assessee submits a return of income on or before the due date specified under section 139 (1) of the Act (Sec 139(1) & 80AC. Also the deduction u/s 80 IA from profits and gains derived from an undertaking shall not be admissible unless the accounts of the undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by a chartered accountant and the assessee furnishes along with his return of income, the report of such audit in Form No.10 CCB, duly signed and verified by such accountant. In CIT V. Panama Chemical Works (2000) 245 ITB 684 (MP), it has been held that the word 'alongwith' does not necessarily mean that audit report should be submitted alongwith the return of income, it only means that it is available to the AO at the time of assessment. Hence, benefit under section 80-IA cannot be denied if such report is made available to the AO before completion of assessment.

5.31.4.4 However, the Finance (No.2) Act, 2009, had inserted sub-section (5) to section 80 A of the Act to provide that where the assessee fails to make a claim in his or her return of income for any deduction, interalia under provisions

CERTIFIED TRUE COPY
For BSES Rajdhani Power Limited
Authorized Signatory

www.taxcode.in



- 358 - M/s BSES Rajdhani Power Ltd.
Appeal No.189/13-14

of Ch VI A under the heading 'C' Deduction in respect of certain incomes', no deduction shall be allowed under the respective section.

5.31.4.5 Even in the case of Goetze (India) Ltd. V. CIT (2006) 284 ITR 323(SC), it was held by the Apex Court that the AO has no power to entertain the claim made by the assessee other than by filing a revised return. Therefore, even if the appellant's claim u/s 80 IA of the Act is found to be acceptable on merits for profits 'derived' from eligible business ie sale of energy/power, yet the assessee cannot claim deduction u/s 80 IA of the Act in view of the specific insertion of sub-section 80 A (5) of the Act by the Finance (No.2) Act of 2009. Therefore, the appellant gets no relief on this ground of appeal.

18. We have given our thoughtful consideration to the assessee's and the Revenue's vehement submissions reiterating their respective stands. We find that there is one crucial fact which clinches the issue against the assessee and in the department's favour. We notice from a perusal of the case records that it had admittedly filed a letter dated 04.10.2013 along with Form 10CCB audit report claiming section 80IA deduction herein (page 449 of the paperbook). It is in this factual backdrop that we are of the considered view that the learned lower authorities could not have accepted the same going by section 80A(5) of the Act that such a claim ought to be raised in a return only as held in EBR Enterprises vs Union of India (2019) 415 ITR 139(Bom.).

19. We further make it clear whilst holding so that although the hon'ble jurisdictional high court in Principal Commissioner of Income Tax v. Shri Jai Shiv Shankar Traders Pvt. Ltd. (2016) 383 ITR 448(Del.) has treated even a letter as a return for the purpose issuance of section 143(2) notice, the very analogy could not be held as applicable in an instance involving Chapter VI deduction claim wherein the legislature has specifically prescribed that the claimant ought to file its return to the very effect as is the case made out in both the lower proceedings before us. We thus find no merit in the assessee's instant substantive ground no. 8 to 8.2 which stand rejected *in limine* .

www.taxcode.in

No other ground or argument has been pressed before us.

20. This assessee's appeal ITA No. 4273/Del/2014 is partly accepted.

21. We now advert to the Revenue's cross appeal ITA No. 4479/Del/2014 wherein its first and second substantive grounds seek to reverse the learned CIT(A) action accepting the assessee's contentions directed against the Assessing Officer's assessment findings disallowing depreciation on recapitalized assets amounting to Rs. 66,27,782/- as well as against all repairs for old transformers amounting to Rs. 63 lakhs claimed as revenue in nature; respectively. The learned CIT(A) impugned lower appellate discussion to this effect reads as under:

5.5.1. It is contended that the AO has erred in making the disallowance aggregating to Rs.1,29,27,782/- on account of addition of recapitalized assets.

5.5.2. The AO noted that total assets recapitalized during the year amounts to Rs.6,44,81,091/-. However, since the assessee had failed to furnish documentary evidence for the cost recognized, the claim of depreciation amounting to Rs.66,27,782/- calculated @ 15% based on assets put to use was disallowed by him. The AO also held that cost of repairs for old transformer as debited in P&L A/c are capital in nature as these cost of repairs pertains to the assets recapitalization and the assessee also failed to provide the details of such cost of repairs. The total addition to assets were at Rs.298,93,99,553/- and total recapitalized assets were at Rs.6,44,81,091/-. Accordingly, 0.63 crores [(6,44,81,091/298,93,99,553)x 29.06 crores)] out of total expenses amounting to Rs.29.06 crores was disallowed by him.

www.taxcode.in

5.5.3. The appellant had capitalized the value of fixed assets at Rs. 298,93,99,553/-, that included an amount of Rs. 6,44,81,091/- on account of recapitalized assets. Further expenditure incurred on account of repairs to old transformers was claimed as revenue deduction by the appellant. However, the appellant pleaded that the AO on an ad hoc basis disallowed depreciation of Rs.66,27,782/- & further disallowed Rs.63,00,000/- as expenditure incurred on repairs of old transformers, holding the same to be capital in nature. The appellant emphasized the fact that it used transformer in its business of distribution of power & when the said transformers become defective &/or require repairs/or replacement on account of enhanced load etc, the said transformers are replaced by new transformers, which are duly capitalized in the books of account at actual cost, at the time of their installation. Even though, under the block of asset concept, depreciation is allowed on 'block of assets', such transformers continue to form part of the block, the old transformers, for sake of control, returned to stores in used batch with "Zero Value". Therefore, the transformer is repaired & the cost of repairs, being

'Repair & Maintenance Expenses' simpliciter, is charged to revenue & the said repaired transformer are thereafter reissued or reinstalled at other place at 'Zero Value' only & thus they are recapitalized at Zero Value Plus cost of installation, departmental charges & borrowing costs. In fact, additional cost on account of recapitalized assets represented additional capitalization of installation costs in respect of the old transformers at new location, the original cost of which had already been capitalized in the books of accounts earlier at the time of original installation & formed part of relevant 'block of assets', that the AO while comparing capitalized cost of new transformer with the recapitalized transformer failed to appreciate that in case of new transformers, the capitalized value includes the cost of transformers along with other costs of installation but on the other hand, reissued old transformers to various sites are capitalized with installation costs only. Moreover, no adverse comments were offered by the auditor, while conducting special audit u/s 142(2A) of the Act.

""

www.taxcode.in

The AO in fact failed to point out any discrepancy in amount of expenditure incurred on reinstallation of old transformers which was capitalized as part of the cost of the assets falling in that block & therefore, the appellant had rightly capitalized the aforesaid expenses to the cost of various fixed assets & claimed depreciation thereon u/s 32 of the Act, at the prescribed percentage on the 'written down value' of the fixed assets, as defined u/s 43(6) of the Act, to mean in the case of any block of assets, the aggregate of the 'written down value' as on 01.04.1988 as increased by the 'actual cost' of any asset falling within the block, acquired during the previous year, where the expression "actual cost" has been defined in section 43(1) of the Act to mean the actual cost of the asset to the assessee reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any person or authority. Therefore, the action of the AO in disallowing depreciation of Rs.66,27,782/- on the cost of recapitalized assets calls for deletion. Similarly, the further disallowance of Rs.63,00,000/- on ad hoc basis by the AO as capital expenditure on account of repair expenses, on the ground that the same pertain to assets recapitalized during the year also calls for deletion, as the said expenses were incurred by the appellant on 'Repair & Maintenance' of existing old defective transformers, that were used for the business purpose & moreover the same did not result in acquisition of new assets or benefits of enduring nature to be in the capital domain or accretion to the profit earning apparatus.

www.taxcode.in

5.5.4. Written down value of block of assets for purpose of charging depreciation of current year u/s 43(6) means:

(i) in the case of assets acquired before the previous year, the actual cost to the assessee of all the assets falling within the block less all depreciation actually allowed to him. Here actually allowed means actually taken into account and given effect to. Any unabsorbed depreciation carried forward is deemed to be depreciation actually allowed.

(ii) in the case of assets acquired in the previous year, the actual cost to the assessee, as defined u/s 43(1) of the Act. As per section 43(1), "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority.

5.5.5. The Hon'ble Supreme Court held in the Challapalli Sugars Ltd. Vs. CIT (1975) 98 ITR 167(SC) held that the term 'actual cost' should be construed in the sense which no commercial man would misunderstood and that the accepted rules of accounting should be adopted for determining the actual cost. The accepted accountancy rule is to include all expenditure necessary to bring such assets into existence and to put them in working condition and it is wholly irrelevant whether the asset was acquired prior to the commencement of business or subsequent to such commencement.

5.5.6. However, capital expenditure, unless they are part of cost of fixed assets will get lost or disallowed for the purposes of deduction u/s 37(1)/31(1)/36(1)(iii). Therefore, all those expenses relating to erecting, commissioning and installation would normally required to be capitalized. However such capitalization should be in accordance with accounting principles, the publication by the Institute of Chartered Accountants of India (ICAI) on Guidance Note on Treatment of Expenditure during 'Construction Period' and Accounting Standards 6 and 10 (Accounting for fixed assets) issued by the ICAI that also offer guidelines on capitalization & its acceptance, as also elaborated by the appellant company.

www.taxcode.in

5.5.7. Therefore, I am of the opinion that expenditure incurred by the appellant, including inter alia, the installation cost, borrowing cost and other charges etc; were relating directly or indirectly to the installation of the transformers & are therefore, eligible to be included in the actual cost of the relevant block of fixed assets & therefore, the AO is hereby directed to allow depreciation on the cost of recapitalized assets.

5.5.8. As regards the disallowance of Repair Expenses on the ground that same pertains to assets recapitalized during the year & were thus capital in nature, it is seen that the said expenses were incurred on repair and maintenance of old defective transformers, used for the purpose of business & that the said expenditure did not result in acquisition of any new assets or benefit of enduring nature to be in the capital field. The AO has failed to make a distinction between replacement of part of the machinery & the machinery as a whole.

5.5.9. In CIT Vs. India Ocean Garnet Sands Company(P) Ltd. (2007) 290 ITR 312 (Mad), it has been held that based on the facts of each case, amounts expended forwards replacement of machinery would be considered Revenue in nature as they do not result in acquisition of any new asset nor any capital of enduring nature. Similarly, in CIT Vs. Gitanjali Mills Ltd. (2004) 265 ITR 681 (Mad), it has been held that an expenditure that is not deducible u/s 30 to 36 of the Act, can still be allowed as a deduction under the residuary Section 37 i.e. expenditure on replacement of old machinery is in the nature of accumulated repairs & not current repairs. Therefore, the Hon'ble High Court allowed such deduction u/s 37 in place of Section 31 of the Act.

5.5.10. Explaining the distinction between Capital and revenue expenditure, the Full Bench of Hon'ble Delhi High Court, in the case of Airport Authority of India Vs. CIT(2011) 340 ITR 407 (Del) held that expenditure incurred to fine tune trading operations to enable the management to run the business effectively, efficiently and profitably, leaving the fixed assets untouched would be an expenditure of a revenue nature even though the advantage obtained may last for an indefinite period.

www.taxcode.in

5.5.11. The Hon'ble Supreme Court in CIT Vs. Madras Auto Services (P) Ltd. (1998). 233 ITR 468 (SC) held that by constructing a new building, which belonged to the lessor from the beginning, the assessee only obtained an advantage of securing a long lease of new and suitable business premises at a lower rent & that the assessee did not get any capital asset by spending the amount. Thus, it was held that the expenditure was revenue in nature.

5.5.12. The Hon'ble Supreme Court in the case of Empire Jute Company Ltd. Vs. CIT (1980) 124 ITR 1 (SC) held that the purchase of loom hours for removing restriction on the number of working hours for operating the looms with a view to increasing the profits is in the nature of revenue expenditure u/s 37(1) of the Act. While holding so, the Hon'ble Supreme Court observed the following:

"There may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee business to be carried out more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future".

5.5.13. Therefore, considering the fact of the matter that the appellant had not received any enduring benefit out of incurring of such expenses, that were incurred by way of replacement of old & worn out parts etc of the machinery, for running the business efficiently & for the purpose of business expediency as such & not as enhancement in the capacity of the transformers, the AO should allow the same as deduction u/s 31(1)/37(1) of the Act. The appellant, therefore, succeeds on this ground of appeal.

www.taxcode.in

22. It is in this factual backdrop that the assessee clarifies that it had capitalized value of fixed assets at Rs. 2,98,93,99,553/- including recapitalized assets of Rs. 6,44,81,091/- reinstallation of old transformers at new locations after repairs, installation, departmental charges as well as borrowing costs in relation thereto. And that it had claimed expenses incurred on repairs to old transformers as revenue in nature. The Assessing Officer in his assessment order *inter alia* alleged that the assessee had failed to furnish its detailed evidence regarding cost of recapitalized assets to disallow its impugned depreciation and further rejected revenue expenditure claim on repairs of old transformers thereby holding it as capital in nature.

23. Both the parties vehemently reiterate their respective stands against and in support of the learned CIT(A) above detailed discussion. We first of all deem it appropriate to observe that the assessee has all alone filed its duly audited books of accounts wherein no specific defect has been found. The very factual position continues regarding written-down value of its fixed assets eligible for depreciation which includes actual cost as well as which is defined as aggregate of the written-down value increased by actual cost falling within that block acquired during previous year. We would again deem it appropriate to observe that the assessee is a power distribution company wherein such repairs and maintenance as well as recapitalization of its transformers and other equipment ; involving varying sums, could not be altogether ruled out. Learned counsel further quotes *Challapalli Sugars Ltd. v. Commissioner of Income Tax* ([1975] 98 ITR 167 (SC) that cost of fixed assets in such an instance ought to include expenses incurred for bringing such assets into existence to put them in working condition. The assessee's further case before us is the its repair expenses of Rs. 63 lakhs had been mechanically disallowed on *adhoc* basis despite the fact that the same had been incurred on day-to-day maintenance and upkeep of the corresponding fixed assets. Mr. Jain quotes Commissioner of Income Tax & Another v. Sagar Talkies (2010) 325 ITR 133 (Kar) that till

www.taxcode.in

the time there is no increase in overall capacity, such an item of expenditure ought to be treated under the revenue head only. The Revenue could hardly dispute that there is not even a iota of allegation in the assessment finding that the assessee's impugned repair expenses resulted in acquisition of any new asset or increase in overall capacity; as the case may be. We thus upheld the learned CIT(A) impugned lower appellate finding that both these grounds i.e., depreciation claim on recapitalized assets as well as disallowance of Rs. 63 lakhs; in very terms therefore. Both these Revenue's ground nos. 1 & 2 failed therefore.

24. The Revenue's 3rd substantive ground raised in the instant appeal is that the learned CIT(A) has erred in law and on facts in deleting the bad debt disallowance of Rs. 72,24,36,602/- made in the Assessing Officer's assessment order. We notice herein as well that the Assessing Officer had rejected the assessee's impugned claim on the ground that it had failed to establish the same as having become actually bad which could no more be held sustainable as per TRF Limited vs CIT (2010) 323 ITR 397 (SC). This is what made the learned CIT(A) to delete the impugned disallowance which hardly deserves to be interfered with. This Revenue's instant third substantive ground is rejected accordingly.

25. Next comes the Revenue's 4th substantive ground that the learned CIT(A) has erred in law and on facts in deleting section 41(1) cessation of liability addition of Rs. 4,30,82,719/- made in the assessment order. We notice herein as well with the able assistance coming from both the parties that this is not even the learned Assessing Officer's allegation in the assessment order that it was an instance of actual cessation of liability so as to trigger section 41((1) addition held mandatory in **Commissioner of Income Tax, Calcutta vs. Sugauli Sugar Works (P) Ltd.** (1999) 236 ITR 518 (SC). We thus find no reason to disturb the learned CIT(A) deleting

www.taxcode.in

section 41(1) addition in the assessee's case. The Revenue's 4th substantive ground is hereby rejected therefore.

26. The Revenue's 5th substantive ground raised herein is that the learned CIT(A) has erred in law and on facts in deleting addition of Rs. 9,43,99,00,000/- on the issue of income recoverable from future tariff ignoring the fact that income as well as right to receive the same had duly accrued to the assessee. Both the parties very fairly inform us that the same is very much related to the assessee's substantive ground nos. 4 to 4.3 which already stand decided against the department. We draw the very analogy herein to conclude that the learned CIT(A) has rightly held the impugned future tariff income as not having accrued to the assessee as its taxable income in very terms. Rejected accordingly.

27. Next comes the Revenue's sixth substantive ground seeking to revive the Assessing Officer's action disallowing the assessee's interest expenses of Rs. 8,52,90,253/- with processing fee of Rs. 2,07,40,536/-, thereby holding it as capital in nature, and the latter item, CAPEX loan, booked as capital in case in M/s BSES Yamna Power Limited, which happens to be a company run under the same management and in the same line of business operations. We first of all observe that merely because the assessee's group company being run under the same management has booked the expenditure as a capital, the same does not affect its right to maintain its books at all. This is further coupled with the fact that it seeks to clarify before us that it duly satisfies the relevant conditions under section 36(1)(iii) of the act i.e., interest is paid in respect of capital borrowed which is utilized for the purpose of business, and such an item of interest expenditure does not relate to the period up to the date of the capital asset being put to use where the same is acquired for extension of an existing business, respectively. We make it clear that there is no finding in the assessment order that the assessee has violated any of these

www.taxcode.in

three conditions. Learned counsel further quotes DCIT vs Core Healthcare Limited, 298 ITR 194(SC) that interest on borrowings utilized for purchasing machinery items are indeed allowable as revenue expenditure. Learned counsel further quotes **India Cements Ltd. v. Commissioner of Income Tax** ([1966] 60 ITR 52 (SC) dealing with identical provision under the old act i.e., the Income Tax Act, 1922 u/s 10(2)(iii) of the Act that processing fee is also allowable as an expenditure item on obtaining business loans etc. We just draw analogy therefrom to conclude that the learned CIT(A)'s findings hardly call for any interference on our part. Upheld accordingly.

28. The Revenue's, 7th , 10th , and 11th substantive grounds raising as many connected issues of disallowance/addition of consumer security deposits, service line deposits, and consumer's contribution to capital works; involving varying sums, as held taxable in the Assessing Officer's assessment order reversed in the lower appellate discussion. We are informed during the course of hearing that these tribunal's earlier learned co-ordinate bench in the assessee's appeal pertaining to assessment years 2005-06 & 2008-09 has already decided the very issue(s) against the department thereby observing that such items could not be held as revenue in nature leading to assessment thereof as its corresponding taxable income. Hon'ble jurisdictional high court also appears to have upheld the same as per the assessee's written synopsis filed before us. We thus adopt judicial consistency to uphold the learned CIT(A)'s impugned findings on all these three substantive grounds i.e., Nos. 7, 10 and 11 in very terms.

29. The Revenue's 8th substantive ground raised in the instant appeal seeks to revive the Assessing Officer's action adding the assessee's unmatched security deposits of Rs. 12,36,00,000/- as its taxable income, which stands reversed in the CIT(A)'s lower appellate discussion; reading as under:

> "*5.15.1 It is contended that the AO has.erred in making the addition of Rs. 12,36,00,000/- on account of unmatched consumer security deposit.*

www.taxcode.in

5.15.2 The AO noticed from the perusal of discussions under TOR-9 of Special Audit Report that there is a unmatched consumer Security Deposit (CDS) amounting to Rs.54.51 crores as per financial books and the database in respect of pre privatization (DVB) period, ie. Out of the total amount of consumer security deposit of Rs.372.37 crores, consumer wise details in respect of security deposit of Rs.317.86 haye been available, leading to a gap of Rs.54.51 crores, out of which due to reconciliation/matching with the consumer data base, the outstanding amount that remained as on 31.03.2013 Was Rs.12.36 crores, that was added by the AO to the Total Income of the assessee.

5.15.3 The appellant has however submitted that is has been in the process of completing the reconciliation done for the CSD amount and there is no justification for adding the said amount of CSD to taxable amount, as the company is liable to pay the said amounts to the consumers on disconnection. Moreover, the said amount has not been written back by the appellant so as to tax the same as income for the relevant year in term of section 41(1) of the Act.

5.15.41 tend to agree with the appellant that since the appellant had duly recognized the said amount as liability in the books of account and as the same has not been written back so as to tax the same as income u/s 41(1) of the Act on account of remission or cessation of liability no addition could be made. The appellant gets relief on this ground of appeal."

30. Suffice to say, it has come on record that the assessee had duly recognised this aforesaid amount as a liability in the books of accounts which has nowhere been specifically rejected. And also we further reiterate that the said amount has neither seen any actual cessation or remission, as the case may be, which could be either held as taxable income both on accrual as well as receipt bases. With thus see no reason to disturb the learned CIT(A)'s detailed findings deleting the impugned addition in the assessee's favour.

31. The outcome of the Revenue's 9th substantive ground raised in the instant appeal that the CIT(A) has erred in law and on facts in reversing the Assessing Officers' action making addition of Rs. 77,09,00,000/- representing the assessee's unmatched consumer security deposits also is no different as the matter is still stated to be pending before hon'ble

www.taxcode.in

jurisdictional high court claiming the above security deposits as well as interest expenditure thereupon. Learned counsel has invited our attention to the case records indicating the assessee to have filed its writ petition no. 2396/2006 before hon'ble jurisdictional high court seeking directions to the Government of National Capital Territory of Delhi for transfer of additional funds pertaining to the consumer security deposits of the pre-privatization part followed by their lordship's directions on 26.3.2008. We are accordingly of the considered view that given the fact that as the matter is yet to attain finality, the impugned addition amount could not be held as taxable in the assessee's hands as rightly held in the CIT(A)'s order. We thus reject the Revenue's instant 9th substantive ground as well in very times.

32. The revenues 12th substantive ground raised in the instant appeal is that the Assessing Officer had rightly treated the assessee's cash credits of Rs. 25,00,69,778/- as unexplained u/s 68 of the Act which have been wrongly deleted in the CIT(A)'s lower appellate discussion; reading as under:

> *"5.18.1 It is contended that the AO has erred in making an addition of Rs.25,00,69,778/- to the total income as unexplained cash credit.*
>
> *5.18.2 The AO based on the finding of the special auditor under TOR 12 of the Special Audit Report asked the assessee to furnish confirmation from its Sundry Creditors. Further, notices u/s 133(6) of the Act were also issued to certain parties mostly in the public sector or even the public authorities requiring them to provide details opening and closing balances and the assessee was asked to reconcile in case of any difference. Replies from all the concerns were received except for two parties namely M/s Delhi Transco Ltd. & M/s Delhi Transco Limited SLDC. Since the confirmation was neither received direct from the said companies nor received through the assessee the AO added the sum u/s 68 of the Act, to the total income of the assessee. A minor variation in the closing balance was also added for difference in reconciliation of Rs.8512/- in the case of M/s Lenco Electric Utility another government concern.*
>
> *5.18.3 The appellant however contended the additions are on account of inon feceipt of confirmations u/s 133(6) from M/s Delhi Transco Ltd. (DTL) and M/s Delhi Transco Ltd. SLDC (DTL-SLDC) in respect of their outstanding balances at the year end of Rs.12,80,70,280/- and Rs. 12,09,90,986/-respectively, which were in the nature of*

www.taxcode.in

current balances and were in respect of Government Companies, namely M/s DTL, involved in providing power transmission services to the company and M/s DTL-SLDC, involved in supply of Ul power. Therefore, their identity, capacity or creditworthiness and genuineness of the transaction cannot be doubted and moreover, the appellant has filed a rectification petition u/s 154 of the Act, before the AO for subsequent filing of such confirmation. Citing ratio of decisions of a number of court pronouncements in its favour, that appellant has sought the deletions of the said addition of Rs.25,00,61,266/.

5.18.4 Under section 68 of the Act, where any sum is found credited in the books of an assessee maintained for any previsous year and the assessee offers no explanation about the nature and source thereof, or the explanation offered is not satisfactory, the sum so credited maybe charged as income of the assessee for that previous year. For the purpose of avoiding the applicability of section 68 the initial burden is on the assesse to prove that;

a) the identity of the creditor is established
b) the capacity of the creditor is beyond doubt
c) the transaction is genuine

Further, u/s of the 68 onus is on the assessee to prove the creditworthiness of the creditors as held in CIT vs V.P. Mohanakala (2007) 291 ITR 278 (SC). Once the asseseee fulfills this burden, it is not the business of the assessee to find out the source of money of his creditors or the genuineness of the transaction, which took place between the creditors and sub creditor or the creditworthiness of the sub creditor as held in Nemi Chand Kothari V. CIT (2004) 264 ITR 254 (Gau); Bansrsi Prasad V CIT (2008) 304 ITR 239 (All). In the instant case the creditors of the assessee company were Government Companies and moreover they have subsequently furnished confirmations. I have no reason to doubt that the appellant has not discharged it initial burden u/s 68 of the Act. Therefore additions made u/s 68 of the Act are liable to be deleted except for the minor variation, as stated above."

33. Suffice to say, it has come on record that the impugned addition amount pertains to the twin government companies herein, ie., M/s Delhi Transco Limited, and M/s Delhi Transco Limited-SLDC involving varying sums. We are unable to understand as to how the said companies could be held as lacking genuineness or creditworthiness as is the case sought to be made out by the learned departmental authorities all along. This is further coupled with the fact that the assessee has filed all of its details proving identity, genuineness, and creditworthiness which have nowhere been specifically rebutted at the Assessing Officer's behest. We thus

www.taxcode.in

uphold the learned CIT(A)'s action deleting the impugned section 68 unexplained cash credits addition in the assessee's favour.

34. The Revenue's 13th substantive ground raised in the instant appeal pleads that the CIT(A) has erred in law and on facts in reversing the Assessing Officer section disallowing/holding the assessee's provision for retirement of fixed assets amounting to Rs. 7,70,97,594/- in question. That being the case, the assessee invites our attention to para 5.20.4 in the learned CIT(A) order that it had itself added back in that amount of provision debited in in its P&L account of Rs. 14,48, 33,501/- to the taxable income with results in double addition; reading as under:

> "*5.20.1 It is contended that the AO has erred in making an addition of Rs.7,70,97,594/- on account of provision for retirement of fixed assets.*
>
> *5.20.2 The AO noticed from perusal of TOR-14 of the Special Audit Report that in respect of asset discarded, demolished, destroyed during the year, only the scrap value of the assets was reduced from the Written Down Value of the assts, while working out the depreciation but from the perusal of the working of depreciation as per Income Tax Act and computation of taxable Act income, the assessee had not reduced the sale value of scrap sold from the WDV but the same had been reduced from provision 'for retirement of fixed assets. On being asked, the assessee replied that during the year, a provision for retirement of fixed assets was made of an amount of Rs.21,18,74,887/- in the P&L Account. Further, the assessee sold scrap for a sum of Rs.6,70,41,386/- relating to the asset in respect of which the provisions for retirement of fixed assets was created and the said amount of scrap sale was credited to Profit & Loss Account and infact, there was the net provision for the retirement of fixed assets amounting to Rs.14,48,33,501/- and the above net provision was added back in the computation of income by the assessee itself, in respect of provision for retirement of fixed assets and therefore, a sum of Rs.1,00,56,208/- in respect of disallowance due to such excess depreciation claimed and Rs.6,70,41,386/- for disallowance under the computation of book profit was added by the AO, that pertains to sale proceeds of assets that were credited to P&L Account but reduced from the amount of provision added back.*

www.taxcode.in

5.20.3 The appellant was therefore, of the view that from of the point of View of Income Tax, there are separate provisions of fixed assets which require the sale proceeds to be reduced from the relevant block of assets resulting in lesser allowance of depreciation and therefore, the addition of Rs.6,70,41,386/- made twice would lead to double disallowance, as such scrap sale is not in the nature of revenue receipt but is a capital receipt which is required to be reduced from the plant & Machinery resulting in lower depreciation of Rs.1,00,56,208/-. The appellant, while computing the depreciation u/s 32 of the Act, however erroneously did not reduce scrap sales aggregating to Rs.6,70,41,386/- from the written down value of the relevant block of fixed assets and scrap being on capital account, were required to be adjusted being on capital account, were required to be adjusted from the Written Down Value (WDV) of the relevant block of assets and hence depreciation of Rs. 1,00,56,208/- claimed by the appellant was offered for tax during the course of assessment but the AO without judiciously appreciating the facts, made an addition of Rs.7,70,97,594/- on account of excess claim of depreciation of Rs.1,00,56,208/- and scrap sales of Rs.6,70,41,386/-. Effectively, the appellant stated that it had added back the entire provision of Rs.21,18,74,887/- while computing the taxable income. In any case, Rs.6,60,41,386/- represented scrap sales that was required to be reduced from the WDV of the relevant block i.e from the provision made for the retirement of fixed asset on which depreciation is required to be allowed, due to the following accounting treatment by the Assessee.

Provision for retirement of fixed assets:	*Rs.21,18,74,887/-*
Less: Scrap Sales credited to P&L A/c and required To be adjusted against WDV of that block	*Rs. 6,70,41,386/-*
Net Amount debited to P&L A/c (As added back In computation of Income.	*Rs. 14,48,33,501/-*

5.20.4 The contention of the appellant is found to be legally and factually tenable as the appellant had itself added back the net amount of provision debited in its P&L Account of Rs.14,48,33,501/- to the taxable income, in the computation of income and offered for taxation and the scrap sales have been reduced from the WDV of the relevant block and excess depreciation of Rs.1,00,86,208/- offered for taxation during the course

www.taxcode.in

of assessment. Therefore, the AO is hereby directed to delete the said addition resulting in double disallowance. Appellant to get relief on this ground of appeal."

We thus find no reason to interfere with CIT(A)'s above extracted detailed discussion, deleting the impugned addition made in the assessee's hands.

35. The Revenue's 14th substantive ground in the instant appeal is that the learned CIT(A) has erred in law and on facts in reversing the Assessing Officer's action invoking section 40A(2) disallowance of Rs. 9,42,842/- involving the assessee's expenditure payments made to its twin related parties i.e., M/s BSES Yamuna Power Limited and Delhi Power Company Limited. Suffice to say, we are of the considered view not only in light of the CBDT's landmark circular issued wayback on 06.07.1968 that the impugned disallowance does not apply in an instance of involving both the payer and the payee getting assessed at the same rate but also **CIT v. Indo Saudi Services (Travel) P. Ltd. [2009] 310 ITR 306 (Bom)** has settled the issue against the department in very terms. We thus uphold the learned CIT(A) lower appellate discussion deleting the impugned section 40A(2) disallowance. The Revenue fails in its instant 14th substantive ground therefore.

36. Next comes the Revenue's 15th substantive ground that the Assessing Officer had rightly made arms' length price adjustment of Rs. 38,58,60,000/- involving the assessee's power purchases made from its related part M/s Reliance Energy Trading Limited @ 20% of the total amount of Rs. 192.9. crores which has been wrongly deleted in the learned CIT(A) lower appellate discussion. We notice herein again as well that all what the learned Assessing Officer had done was to invoke *ad hoc* disallowance of 20% than finding the specific market comparables in light of the prescribed methods; more particularly, under Chapter X of the Act. This is further coupled with the fact that the assessee; a company engaged in power distribution business etc, is already governed by the relevant provisions of the Electricity Act (*supra*) and

www.taxcode.in

bound by various directions issued by the statutory authorities from time to time. We thus see no reason to interfere with the learned CIT(A) detailed discussion deleting the impugned addition in the assessee's favour and against the department. Rejected accordingly.

37. The Revenue's 15th substantive ground reads that the learned CIT(A) has erred in law and on facts in reversing the Assessing Officer's action making the assessee's excess subsidy addition of Rs. 6,94,00,000/- in lower appellate discussion; reading as under:

> *"5.25.1. It is contended that the AO has erred in making an addition of Rs. 6,94,00,000/- on account of excess subsidy received.*
>
> *5.25.2. The AO on the perusal of assessee's submissions during the course of assessment proceedings noticed that there was an excess subsidy received from the Govt. of NCT of Delhi during the month of June 2009 and accordingly the AO asked the assessee to explain as to why the same should not be added to the Total Income of the assessee. The appellant confirmed the receipt of excess subsidy but stated before the AO that it acted as an agent of the Government of NCT of Delhi in respect of disbursement of subsidy to the consumers and in view of a large number of consumers eligible for subsidy as per the 'subsidy orders' of the government issued from time to time, it was neither possible nor practical for the government to verify the eligibility of the consumers and its disbursement, accordingly and to avoid such cumber some process, subsidy was paid direct to the assessee company by the Government for its disbursement to the eligible consumers and that any subsidy amount that was excess/short received was adjusted during the subsidy disbursement, in subsequent period. Hence, there is no element of profit at any stage in the subsidy amount received from the government for its disbursement to the eligible consumers. Moreover, the assessee company submitted quarter wise details of the subsidy received and disbursed to the Delhi Electricity Regulatory Commission (DERC) for its verification and reporting to the government. The excess subsidy, received in June 2009 had already been adjusted in the subsequent disbursement by the assessee to the eligible consumers and in fact as on 31.03.2010, a sum of Rs.5.69 crores (as. further revised) was receivable from the Government against the subsidy account. Since the assessee failed to submit any documentary evidence and also substantiate its point of view, particularly with regard to the adjustment of Government subsidy, the AO added the said sum to the total taxable income of the assessee.*
>
> *5.25.3 The appellant reiterated its submission that there is no element of-profit at any stage in the subsidy amount received from the Government for its distribution to the eligible consumers as subsidy for each quarter was projected in advance, based on past trends, consumer growth, consumption growth, weather conditions, change in subsidy*

slabs/order or any other factor, which was later trued up on the bais of actual subsidy released to the consumers and the difference, if any, between the provisional subsidy and the actual subsidy released to consumers were adjusted by Go NCTD/DERC in the forth coming quarter. I tend to agree with the submission in this regard that in accordance with provisions of the appellant of Section 65 of the Electricity Act, 2003, the subsidy was released by the Govt. of NCT of Delhi in advance for each quarter at the beginning of that quarter, for which all discoms including appellant were to furnish separate data in respect of subsidy disbursed on a quarterly basis to the DERC, immediately, so that effects would be made available to the GONCTD by the DERC for further action by them. Considering the totality of facts on record, I am of the opinion that the appellant had discharged the onus of substantiating that the excess amount received by it by way of Govt. subsidy was not assessable as income as the same is adjustable against next billings and at the end of the financial year under reference, there was, in fact an amount receivable by the appellant from GoNCTD. Moreover, the appellant was only acting as an agent for the GoNCTD. The appellant succeeds on this ground of appeal."

38. That being the case, the Revenue is hardly able to rebut the clinching factual fact that the assessee had received the impugned subsidy from the Government of National Capital Territory of Delhi (GoNCTD) during the period ending June, 2009, as adjustable against in the next billing cycle(s). We, accordingly conclude in this factual backdrop that the Assessing Officer's action adding the impugned alleged subsidy could not be treated as the assessee's income going by the relevant provisions of the Electricity Act, 2003 which is a complete code in itself. Rejected accordingly.

39. The Revenue's 17th substantive ground raises the next issue of prior period expenditure disallowance amounting to Rs. 98,49,970/- made in the assessment order which has been reversed in the learned CIT(A) lower appellate discussion. It is in this factual backdrop that we hereby quote ***CIT vs Modipon Limited (2015) 57 taxmann.com 360 (Del)*** that such prior period expenditure is a revenue neutral instance only once the assessee is all along assessed at the same rate. We accordingly decline the Revenue's instant substantive ground in very terms.

www.taxcode.in

40. The Revenue's 18th substantive ground is that the learned CIT(A) has erred in law and on facts in treating the assessee's expenditure claim of Rs. 8,98,57,386/- which was held as capital in nature in the Assessing Officer's assessment discussion. Learned counsel has invited our attention to the assessee's relevant records that it had not even claimed the former sum of Rs. 8,20,10,823/- in its P&L account which could be disallowed in the Assessing Officer's assessment order. The factual position is a little bit different but the outcome remains the same regarding the assessee's balance amount of repair expenditure incurred on day-to-day maintenance of its fixed assets etc. Rejected accordingly.

41. The Revenue's 19th substantive ground is that the Assessing Officer had rightly disallowed the assessee's claim of premium paid on investments amount Rs. 47,60,696/- as capital in nature which has been wrongly reversed in the CIT(A) lower appellate discussion. We notice that the assessee had acquired government securities and what all it had done was to credit the net amount of interest ie., interest accrued/ received or reduced by the amortization of investments as income from "other" sources which forms subject matter of addition in the Revenue's instant substantive ground. Learned counsel invites the tribunal's attention to ACIT vs Ozer Merchant Co-operative Limited 41 taxmann.com 110 (Pune) deciding the very issue against the department such that a security premium paid could indeed be amortized going by the matching principle. Rejected accordingly.

42. The Revenue's 20th substantive ground raised in the instant appeal is that the Assessing Officer had rightly disallowed the assessee's legal expenses claim of Rs. 45 lakhs @ 25% amounting to Rs. 11,32,035/- on *ad hoc* basis as penal in nature which has been wrongly reversed in the CIT(A) lower appellate discussion. We notice in this factual backdrop that there is not even an iota of indication in the learned Assessing Officer's assessment findings as to in what manner the assessee's regular legal expenses could be held as not liable to be accepted

www.taxcode.in

once he had himself accepted the balance 75% in question. We thus hold that the CIT(A)'s lower appellate findings, deleting the impugned addition of 25% of the assessee's day-to-day routine legal expenses in very terms. Upheld accordingly.

43. Lastly comes the Revenue's 21st substantive ground seeking to reiterate the assessment findings that assessee had been rightly held as not eligible for section 80IA deduction claim which already stands decided in its favour in the assessee's 8th to 8.2nd substantive grounds in preceding detailed discussion. We draw the very analogy to accept the same in the department's favour in very terms. It's instant 21st substantive ground succeeds in principle.

No other ground or argument has been pressed.

44. This Revenues cross appeal ITA No. 4429/Del/2014 is partly accepted in preceding terms.

45. To sum up, both these assessee's and the Revenue's appeals ie., ITA Nos. 4273 & 4429/Del/2014 are partly allowed in above terms. A copy of this common order be placed in the respective case files.

Order is pronounced in the open court on 07.10.2026.

Sd/-	*Sd/-*
NAVEEN CHANDRA	**SATBEER SINGH GODARA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

New Delhi
Dated:07.10.2026
Pooja Mittal, Sr. PS
Copy to:

M/S. BSES RAJDHANI POWER LIMITED BSES BHAWAN, NEHRU PLACE,, NEW DELHI-110020, DELHI	**DCIT** CIRCLE-3(1), NEW DELHI-, DELHI

TRUE COPY

ASSISTANT REGISTRAR, I.T.A.T., DELHI

www.taxcode.in