

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION SHIMLA**

In the matter of:-

The HP State Electricity Board Ltd. thro' its,
Chief Engineer (Commercial)
Vidyut Bhawan, Shimla-171004

....Petitioner

Versus

M/s Ascent Hydro Project Ltd,
6, Shiv-Wastu, Tejpal Scheme,
Road No5, Vile Parle (East)
Mumbai-400057

Administrative Office at
Building No.2, R.H.-1, Visava Enclave
D.P. Road, Aundh, Pune-4112007 and

Branch Office at House No.16,
H.P. Officers Colony (West End)
Panthagati, Shimla-171009

....Respondent

Petition No. 23 of 2018

(Decided on **26th April, 2019**)

CORAM

**S.K.B.S NEGI
CHAIRMAN**

**BHANU PRATAP SINGH
MEMBER**

Counsels: -

for Petitioner:

Sh. Surinder Saklani,
Standing Counsel
a/w Sh. Kamlesh Saklani
(authorised Representative)

for Respondent :

Sh. Ajay Vaidya, Advocate

ORDER

(Last heard on 2nd March, 2019 and orders reserved with liberty to the parties to file their written argument within two weeks)

The Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as “the petitioner” or “the HPSEBL”), who is a deemed licensee under the first proviso to Section 14 of the Electricity Act, 2003 (hereinafter referred as “the Act”), for distribution and

supply of electricity in the State of Himachal Pradesh, has moved this petition under Sections 62, 86(1)(a) and (b) and 94 of the Act, seeking revision in tariff applicable to the petitioner under the PPA dated 25.10.2007 (in short the PPA) for supply of power generated from its (4.5 MW) Sechi Hydro Electric Project located in Kullu Distt. (HP) (hereinafter referred as “the project”) by M/s Ascent Hydro Power Limited; 6, Shiv-Wastu, Tejpal Scheme, Road No. 5, Vile Parle(East) Mumbai-400057, having its Administrative Office at Building No.2, R.H.-1, Visava Enclave D.P. Road, Aundh, Pune-4112007 and Branch Office at House No.16, H.P. Officer’s Colony (West End) Panthagati, Shimla-171009 (hereinafter referred as “the Respondent” or “the Respondent Company”).

2. A very brief resume of the relevant facts is as under:-

- (a) The Respondent Company entered into with the GoHP, an Implementation Agreement (IA) on 03.08.2001 and the Supplementary Implementation Agreement on 18.05.2007 to establish, operate and maintain at their cost the project i.e. 4.5 MW Sechi Hydro Electric Project on Sechi Khad in Distt. Kullu HP and executed the PPA on 25.10.2007 with the petitioner, stipulating that the petitioner Board shall pay for the net saleable energy delivered by the Respondent to the Board at the inter-connection point at a rate fixed by the State Govt. in the year 2000 @ Rs. 2.50 p. kWh with no escalation.
- (b) Clause 15 of the PPA stipulates that the PPA can be amended with the written consent of both the parties, in other words, the terms of the agreement can be indisputably altered or modified with the unqualified consent of the parties to the agreement.
- (c) The Hydro Policy of Himachal Pradesh; 2006 made it obligatory for the developers to cater to the stipulations such as mandatory 15% water release, Local Area Development Charges (LADC), payment of revised compensation to fisheries and towards the use of forest land etc. The policy maintained the tariff rate of Rs. 2.50 kWh.
- (d) In compliance with the statutory provisions in Sections 61(h) and 86(1)(e) of the Act, the policy guidelines given in the National Policy and the National Tariff Policy, the Commission made the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007. The regulation 5 whereof provided that energy, from renewable sources (including upto 25 MW capacity hydro projects) and co-generation available after the captive use and third party sale outside the State, shall be purchased by the distribution licensee. The second proviso to sub-regulation (1) of regulation 6 of the Regulations (ibid), read with clauses (b) and (e) of sub-section (1) of section 86 of the Act, empowered the Commission to review or modify the PPA, where, after the approval of the PPA, there is change in statutory laws; rules or State

Govt. Policy. Pursuant to regulation 6 (ibid), the Commission issued Order dated 18.12.2007 (in brief SHPs Order), determining the general tariff for SHPs, and the allied issues linked with non-conventional sources based on generation and co-generation. The said Order fixed the rate of Rs. 2.87 kWh which was applicable to further agreements and the existing agreements approved by the Commission and after the year 2006, with the special clause that “the tariff and other terms and conditions of the PPA shall be subject to the provisions of the Commission’s Regulations on the Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee.

- (e) A number of Independent Power Producers, including the Respondent Company in this case, moved petitions for upward revision of the generalised tariff of Rs.2.87 kWh mainly on the ground of inflation of construction cost, requirement of mandatory release of 15% water discharge levy of forest charges w.e.f. 30.10.2002, revision of fisheries charges w.e.f. 30.04.2007 and levy of Local Area Developers Charges referred to in the Hydro Policy of Himachal Pradesh, 2006.
- (f) The Commission vide its common Order dated 28th Oct., 2009 decided inter alia to consider each petition on its merits and to issue individual project-wise orders based on furnishing of necessary data/detailed calculations (alongwith supporting documents). The said data was to be furnished within a period of two weeks’ time reckoned from the date of Commission’s Order dated 29th October, 2009, which period, at the request of the parties thereto was extended upto 16th April, 2010.
- (g) In the meanwhile, the Commission issued the Order dated 10.02.2010 supplementing the provisions of the SHPs Order dated 18.12.2007, wherein the adjustments on account of the change in the Minimum Alternate Tax/ Income Tax and Royalty were dealt with.
- (h) The Respondent Company moved petition No. 206 of 2009 for increasing the tariff, in relation to its project i.e. Sechi Hydro Project from Rs. 2.50 p.u. to Rs. 3.27 p.u. on various factors inter alia the payment of MAT stating that-

“Consequent upon the issuance of the Government of Himachal Pradesh Notification dated 6th May, 2000, additional taxation has been imposed through change in rate in Minimum Alternate Tax (MAT) on book profit is payable by the Company. The rate is applicable in FY 2000-2001 has been increased from 8.25 % to the current rate of 16.995%. Therefore, the petitioner Company deserves to be compensated for additional liability accrued on account of change in the MAT. The additional component of MAT, as calculated comes out to be 8.745% and the additional per unit cost in this account during initial 10 years based upon the profit before tax (PBT) as per approved DPR as paise 11 to 15.4 per unit.”

- (i) In response to petition No. 206 of 2009 the HPSEBL submitted that-

“ Though the Commission’s Order dated 29.10.2009 does not require any submissions for the calculation and impact on account

of MAT, the petitioner Company has claimed the impact of increased MAT from 8.25 % as applicable during the year 2000-01 and current rate of 16.99% and on this differential component it has worked out the additional cost of paise 11 to 15.4 p/unit. This additional cost is not justified due to reasons that the actual rate of MAT which have been taken into consideration at the time of working out the cost of Rs. 2.50 unit has not been supplied. The Board submits that there is no justification of taking into account the differential component of MAT as calculated by the Company, at the present rate.”

(j) The Commission vide its Order dated 22.05.2010 held that-

“As pointed out in para 10 of this Order, the Commission has already stated in clear terms that the Commission shall, after consideration of each, petition on its merits, issue individual project-wise order based on furnishing of necessary data/documents with respect to the claim regarding mandatory release of water discharge, payment of differential amount on account of fisheries and forest and local area development charges. However, the Commission considers change in MAT after the signing of the PPA as change of goal post and, therefore, feels that the IPP should be compensated as has been done for all the IPPs, falling within the ambit of Commission’s SHPs Order dated 18.12.2007, through the supplementary Order dated Feb., 10, 2010.

The Commission, therefore, concludes that any change in MAT from the one existing at the time of signing of PPA in the first 10 years of the generation of the project shall be payable by the respective party as per the following formula-

(Total amount on account of revised effective MAT)- (Total amount on account of MAT at the time of signing of PPA)

The adjustment on account of change in the MAT shall be subject to the furnishing, to the satisfaction of the Board, documentary proof of the actual payment by the petitioner Company to the Board and shall be made at the end of each financial year as per the above formula.”

3. With the background as set out in preceding para 2 of this Order, the petitioner i.e. the Himachal Pradesh State Electricity Board Ltd, submits that-

(a) Article 8.8 of the PPA, which is relevant for the present case, inter-alia reads as under:

“Taxes, duties, cess or any other kind of impositions including tax on generation of electricity whatsoever imposed/charged by any Government (Central/State) or any statutory/or any other local bodies/authorities on generation of electricity, after the Effective Date, shall be reimbursement by the Board to the Company on the quantum of Net Saleable Energy.”

(b) in terms of the PPA, the Respondent was only entitled to the fixed tariff of Rs. 2.50 per unit for supply of electricity to the petitioner. The Renewable

Energy Regulations, 2007 of the Commission do not apply to the case of the Respondent as the PPA was approved by the Commission prior to the coming into force of the said Regulations. The only provision in the Regulations applicable to the Respondent is in regard to the change in law which increase the cost of generation to the Respondent;

- (c) the Respondent had filed petitions No. 267 of 2008 and 206 of 2009 before the Commission seeking revision in tariff on various grounds, including on Minimum Alternate Tax (MAT) payable under the provisions of the Income Tax Act. the Minimum Alternate Tax was claimed by the petitioner in terms of Article 8.8 of the PPA;
- (d) the said petitions of the Respondent were disposed of by the Commission vide Order dated 22.05.2010, inter-alia, holding that MAT is to be allowed as a pass thru to the Respondent;
- (e) that at the time of the proceedings in the above matter, the issue whether MAT is permissible in terms of Article 8.8 of the PPA was not raised by the petitioner before the Commission, particularly in regard to the wordings of Article 8.8 which restricts the taxes as applicable on generation of electricity;
- (f) that the Commission had no occasion to deal with the issue of permissibility of MAT being a pass thru under Article 8.8 of the PPA on the question whether tax on events other than generation can be allowed. It was in this background that the Commission had considered reimbursement of MAT which is a tax, on income to be payable to the Respondent under Article 8.8 of the PPA;
- (g) the petitioner had successfully raised the defence of MAT not being permissible under Article 8.8 of the PPA in the petition filed by **M/s KKK Hydro Petition No. 47 of 2017**, wherein the Commission by Order dated 15.02.2017 has held as under:

*“The reimbursement of MAT to M/s Ginni Global Ltd., under the Commission’s Order dated 22.05.2010, relied upon by the petitioner, and the other similarly situated SHPs was not allowed under Clause 8.8 of the PPA and as such there was no need for the Respondent Board to raise any objection to the reimbursement of the MAT on the ground that it is not a tax on generation of electricity. In fact bare perusal of the said Order dated 22.05.2010, reveals that reimbursement of MAT was allowed in pursuance of the Commission’s Order dated 29th October, 2009- rendered in the case **M/s DSL Hydrowatt Ltd. V/s State Electricity Board and others**, which clearly distinguishes between the PPAs signed by the power producers prior to the formation of the Commission and those PPAs approved by the Commission in different time frames. Only such PPAs as were approved by the Commission after its formation and before the commencement of 2007 Regulations, were opened to the limited extent and reimbursement of MAT under a formula was allowed in such cases. The PPA of M/s Ginni Global Ltd. clearly falls in such category of PPAs. The PPA signed by the petitioner Company with the Respondent Board cannot be treated at par with that*

of M/s Ginni Global Ltd. and other similarly situated Small Hydro Power Producers. Thus the Commission is unable to agree with the contention of the petitioner that he has been discriminated with M/s Ginni Global Ltd. and other similarly situated Small Hydro Power Producers have been reimbursed the MAT

This issue is decided against the petitioner.

*25. The **third issue** is whether in the facts and circumstances of the case the petitioner Company is entitled to any reimbursement of MAT and if so to what extent?*

26. The petitioner has primarily claimed, under Clause of 8.8 of the PPA, the reimbursement of his entire outgo on account of MAT. The Commission has already concluded in relation to the issue No. 1 that the clause No. 8.8 is applicable for tax on generation and does not envisage reimbursement of MAT which is a tax on income. It was for the petitioner to satisfy its entitlement in terms of the PPA, as the rights and obligations of the parties are captured in the specific terms of the PPA. He has not been able to establish his entitlement for reimbursement of the MAT under the PPA. The Commission, therefore, does not agree with the petitioner that all outgo of the petitioner is to be covered by the PPA by way of adjustment of tariff and is of the view that the reimbursement/adjustment on account of changes in rates of the MAT is essentially to be regulated as per the provision of the PPA read with the terms and conditions, if any, of the constituent tariffs forming the basis of the composite rate of Rs. 2.60 per kWh incorporated in the PPA. In fact para 24 of the Commission's Order dated 11th June, 2015, as reproduced in the paragraph 11 of this Order, already makes such stipulation. The Commission, therefore now proceeds further to ascertain the petitioner's entitlement in this regard."

- (h) that the issue of MAT has been dealt with in detail and adjudicated by the Commission in the above matter of KKK Hydro Ltd. in petition No. 47 of 2017 and Order dated 15.02.2017 holding that the IPP is only entitled for reimbursement of the tax which is imposed on the generation of electricity and none others. MAT has been held to be a tax on income hence the same is not reimbursable. This was based on the specific contention of the petitioner on the admissibility of MAT in terms of Article 8.8 of the PPA. However, this contention was not raised in any of the earlier matters;
- (i) it was stated that based on the legal position, the tariff of the Respondent is liable to be revised as MAT is not a tax on generation of electricity. The Commission has the right to revise and re-determine the tariff at any stage and there are no fetters on the jurisdiction of the Commission in this regard. Reference may be had to the decision of the Hon'ble Supreme Court in the case of **Uttar Pradesh Power Corporation Limited V/s NTPC Limited (2009) 6 SCC 235 and Gujarat Urja Vikas Nigam Limited V/s Tarini Infrastructure Ltd. & Ors. (2016) 8 SCC 743; 2016 ELR (SC) 899.**

It is further stated that such revision in tariff is in public interest as the entire burden of the tariff is on the consumers at large. Therefore, the

revision and/or re-determination of tariff would serve public interest. In these circumstances, the MAT is not payable to the Respondent in terms of Article 8.8 of the PPA and the tariff as made applicable by the Commission ought to be revised.

4. In view of foregoing facts and circumstances, the petitioner i.e. the HPSEBL, prays this Commission to revise the tariff applicable to the respondent Company after removing the element of MAT, as made applicable in the Order dated 22.05.2010.
5. In response to the petition, the respondent Company submits that-
 - (a) that the petition as filed by the petitioner is neither competent nor maintainable as the petitioner has preferred the petition for direction and revision of tariff with regard to the Minimum Alternate Tax (MAT). It is submitted that the Order which has been passed by this Commission regarding MAT was passed on 22.05.2010 in petitions No. 267 of 2008 and 206 of 2009 as filed by the respondent and this order has attained finality since the order has neither been challenged in the APTEL or in any other court so far MAT is concerned;
 - (b) that no such power is with the Commission to revise the order as the equally efficacious remedy was available to the petitioner earlier to challenge the Order dated 22.05.2010 before the appropriate Forum/Court etc;
 - (c) that the person who has signed the petition has not been authorised by the petitioner (HPSEBL) to sign and file the revision petition hence on this very ground the revision petition deserves to be dismissed;
 - (d) that the petitioner has participated in all court proceedings and filed reply rejoinders/objections when petitions No. 267 of 2008 and 206 of 2009 were heard by this Commission. Not only this the petitioner filed review petition before this Commission in the year 2014, the petitioner did not raise any of the issues regarding MAT, in the review petition, which it is now seeking to raise in the revision petition that too after a gap of 8 years;
 - (e) that in the present case, the petitioner has not mentioned even single ground as to indicate that how the revision and under which provision of the law the petition is maintainable. The present revision petition is an abuse of process of law, as the petitioner has filed the revision petition on vague allegations, and without any specific legal challenge therefore the revision petition is liable to be dismissed;
 - (f) that the revision petition so filed is devoid of merit and has been filed to deny the legitimate claim of the respondent Company to which the respondent Company is entitled for. The present petitioner has filed the revision petition without any basis whatsoever and there is no basis in the present litigation and therefore the petition is liable to be dismissed;

- (g) that the Board being Public Authority, cannot discriminate between similarly placed Small Hydro Projects in the matter of reimbursement of MAT;
- (h) that the contention of the petitioner that the respondent Company is only entitled to the fixed tariff of Rs. 2.50 per unit for supply of the electricity to the HPSEBL, or that Regulations 2007 do not apply to the respondent Company is incorrect on the contrary the respondent is entitled to the tariff which has been determined as per regulations from time to time. The MAT as is determined by Order dated 22.05.2010 is fully applicable to the respondent Company. It is submitted that without prejudice under the 2nd proviso to Regulation 6 of the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007 also the Commission is empowered to modify the PPAs executed before the constitution of the Commission for reason of change in Statutory Laws, Rules or State Govt. Policy. In fact it was held by the Commission in the case of DSL Hydro Watt that the Small Hydro Power Plants (SHPs) have to be compensated for any change in taxation structure levies and fees post-2000;
- (i) that Clause 8.8 is in wide terms and includes within its ambit all statutory taxes, levies, etc. including any tax on the generation of Electricity and not only taxes on generation of Electricity. MAT is imposed by the Central Govt. and was/is being paid by the respondent Company from year to year. The respondent Company is, therefore, clearly entitled to reimbursement of MAT and the Board is under obligation to reimburse the MAT under Clause 8.8 of the PPA. It is further submitted that MAT by its very nature is not a tax on any particular activity. MAT is paid under Section 115 JB of the Income Tax Act, 1961 in case the income tax payable on the total income of the assessee from any activity as computed under the Act is less than 18% of its book profit. In such a case, the book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of tax @ 18%. In the context of the present case, MAT is a tax on the total income of the respondent arising out of 'the revenue from generation of electricity' and is as such fully covered by the Clause 8.8 of the PPA. Since the Income Tax payable by the respondent on the total income from generation of electricity as computed under the Income Tax Act is less than 18% as per the provisions of Section 115 JB of the Income Tax Act, 1961, it is clearly reimbursable under Clause 8.8 of the PPA. It is submitted that the Board was not justified in taking a contradictory stand with regard to reimbursement of MAT in the case of the respondent and M/s Ginni Global Limited since both the Small Hydro Plants are similarly situated and Clause 8.8 of the PPA in both the cases is pari-materia;
- (j) that the petitioner have no locus-standi in filing the present revision petition on the ground that the petitioner has not challenged the Order dated 22.05.2010 so far MAT is concerned and it has attained finality. It is

further submitted that an alternative remedy was available under Section 111 of the Electricity Act, 2003 in case the petitioners were aggrieved of the Orders of the Commission, they could have filed the appeal before the appropriate Court, hence, without exhausting the statutory remedy, which was available to the petitioner under Section 111 of the Act, the revision petition filed by the petitioner is abuse of process of law and on this ground, the revision petitions is liable to be dismissed;

- (k) that there is no ground on which the petitioners could have filed the revision proceedings before this Commission as the decision taken by the Commission cannot be corrected in revision proceedings. The Apex Court has, in a catena of judgments, held that scope of revision proceedings is limited and the decisions taken by the Court after due deliberations with application of mind and perusing all the facts before the Court, the decisions cannot be reheard and corrected in the revision proceedings. The Apex Court has held that revision cannot be an appeal in disguise. If the petitioner is aggrieved by the order of the Commission, he could have filed the appeal before the appropriate Court. It is a settled law that any decision must be corrected in appeal and not in revision proceedings. Scope of the revision proceedings is much more restricted than that of an appeal. It is the fundamental principle of law that a revision can only be permitted if the order leads to failure of justice. The petitioner have failed to show even a single ground in his revision petitions that how the impugned order leads to the failure of justice;
- (l) that while passing the Order dated 22.5.2010, the Commission has taken into consideration all replies, rejoinders and oppositions and thereafter passed a detailed, reasoned and speaking Order. As per the National Electricity policy and Tariff Policy, the action taken by the Commission is in consonance with the provisions of the Act as well as with the National Electricity Policy and Plan. The contents of these paras as well as the cases cited by the petitioner are totally misplaced. Such an objection, as has been raised in revision proceedings deserves to be rejected.

6. The petitioner has filed the rejoinder to the response of the respondent Company stating -

- (a) that the petition is very much maintainable because the petition, as preferred, is with respect to directions and revision of tariff with respect to the respondent Company with regard to the Minimum Alternate Tax (MAT) as a part of the tariff; this Commission is vested with ample powers to revise the tariff with regard to MAT as part of tariff;
- (b) that MAT is to be allowed as a pass through to the respondent Company, but the issue of MAT and permissibility of MAT under article 8.8 of the PPA on the question whether tax on events other than generation can be allowed and MAT not being permissible under article 8.8 of the PPA as has been held by this Commission in the matter of KKK Hydro Ltd., vide

Order dated 15.02.2017. As such the petition is very much maintainable before this Commission;

- (c) that the law has now been settled by the Hon'ble Supreme Court, holding that the PPA is a binding document. The terms and conditions of the PPA are binding on the parties and it is not open to the petitioner to unilaterally seek any increase in such tariff; this Commission is vested with ample powers to revise the tariff with regard to MAT as part of tariff;
- (d) that the Chief Engineer (System Operations) is authorised to file and maintain the petition before this Commission and authorization to this extent is being placed on record;
- (e) that the respondent Company is trying to twist the arm of law by time and again saying that the petitioner Board is seeking review whereas, as a matter of fact, if the petition, as preferred by the petitioner Board, is perused, the same is with respect to revision of tariff with regard to MAT as a part of the tariff and the respondent Company is trying to confuse the matter;
- (f) that it is vehemently denied that the petition has been filed on vague allegations and without any specific legal challenge, if the respondent Company has perused the revision petition, the provisions have been mentioned and further in view of the judgment of the Hon'ble Apex Court, even if wrong provision is mentioned or even if no provision is mentioned, even in that eventuality, the same cannot be taken as a ground for dismissal of the petition;
- (g) that it is denied that the petition has been filed to deny the legitimate claim of the respondent Company, rather the present petition has been filed to safeguard the interests of the State as despite the fact that IPP is only entitled for reimbursement of the tax which is imposed on generation of electricity and MAT has been held to be a tax on income, hence the same is not reimbursable as has been held by this Commission in KKK Hydro Ltd. in petition No. 47 of 2017. It is further submitted that MAT ought not to have been allowed at all, in view of the now prevailing law as settled by the Hon'ble Supreme Court. Further, there is no provision in the PPA for allowing taxes such as MAT to be a pass through. Article 8.8 of the PPA in relation to levies taxes etc. are only limited to those taxes and levies applicable on generation of electricity;
- (h) that MAT is in the nature of a direct Tax, which is made applicable under the provisions of the Income Tax Act. As is a well settled principle in law that direct taxes can be passed on to another person only by a specific agreement and restricted to the specific terms of the Agreement, therefore, MAT cannot be considered as an indirect tax and in any event it is not applicable on the generation of electricity. The calculation of MAT is on book profits of the Company based on its income tax accounting and is

payable in particular circumstances when the regular income tax assessment is less than the tax on book profits;

- (i) that this Commission, vide Order dated 22.5.2010, has not specifically dealt with the issue with respect to MAT and the same was dealt by this Commission in the matter of KKK Hydro Ltd. whereas in the earlier Order dated 22.05.2010 it has been mentioned that MAT is allowed as pass through;
- (j) that this Commission in Order dated 22.05.2010 has not specifically dealt with the issue of MAT as have been dealt in Order dated 15.02.2017 in the matter of KKK Hydro Ltd. and the petition as preferred by the petitioner Board is very much maintainable before this Commission as the petition is with respect to revision of tariff and not for review of Order dated 22.05.2010 as is being projected by the respondent Company just with the sole motive to mislead this Commission;
- (k) that as submitted in earlier paras, the present petition is only with respect to revision of tariff with regard to MAT as part of tariff and by no stretch of imagination, the same can be equated with Order dated 22.05.2010 as is being time and again averred by the respondent Company. There is no question of exhausting the remedy or challenging the Order dated 22.05.2010 as this Commission has specifically held that MAT is a pass through under Order dated 22.05.2010. As such, the revision petition is very much maintainable.

7. The respondent Company, in rebuttal of the assertions made by the petitioner in the rejoinder, has made the following additional submissions-

- (a) that the petitioner Board has recently made payments for the differential amount of Minimum Alternate Tax (MAT) to couple of IPPs, during the pendency of this matter in this Commission; the respondent Company is also similarly situated with the other IPPs to whom MAT has been reimbursed and is also qualified, in all aspects, for being considered for the reimbursement of MAT. All relevant consideration being the same, persons/entities in similar situations cannot be treated differently merely on whims and fancies. There is no reasonable basis not to pay/reimburse MAT to the respondent Company. Rule of equality, as embodied in the Constitution of India is a basic feature of Constitution, which the petitioner Board is flouting with impunity. Not paying /reimbursing MAT to the respondent Company amounts to an unequal treatment of equals without any rationale and is thus unconstitutional and discriminatory;
- (b) that the petitioner has adopted a policy of pick and choose. The same is detrimental to healthy competition between similarly situated persons/entities. Such an action on the part of the petitioner Board is liable to be declared illegal, null and void, and petitioner Board may be directed to make payments of MAT bills submitted by the respondent Company way back on 9th October, 2015, with documentary evidences, to the petitioner Board and, thereafter, additional information/documents as

directed by the petitioner Board through its letters dated 18th April, 2017 and 2nd June, 2017, along with interest of 1.5% per month;

- (c) that the petitioner Board has an obligation to act fairly and objectively while dealing matters concerning individual IPPs. The action on the part of the petitioner Company by not paying the MAT to the respondent Company is nothing but colourable exercise of powers. That petitioner Board has failed to carry out duties that appertains to their office in a just, fair, transparent and objective manner and, therefore, the petitioner Board is required to be directed to make all the payments of MAT as submitted by the respondent Company to the petitioner Board in time bound manner along with interest of 1.5% per month;
- (d) that the Orders passed by this Commission on 22.05.2010 in petition No. 70 of 2008 and 202 of 2009 and in petition Nos. 267 of 2008 and 206 of 2009 squarely covers the contents of MAT which is applicable to M/s Ginni Global Private Limited (MAT already paid by petitioner Board twice) and the respondent respectively;
- (e) that the respondent Company reserves the right to file the response/sub-rejoinder to the response filed by the petitioner Board.

8. The matter was heard on 2nd March, 2019. During the hearing Sh. Surinder Saklani Advocate, appearing for the petitioner, argues as under.-

- (a) that the respondent Ascent Hydro has executed the Power Purchase agreement with the petitioner on 25th October, 2007 in which there is no provision of the reimbursement of the MAT to the respondent. In fact, clause 8.8 of the PPA provides for levies, taxes, duties, cesses etc. which runs as under:

“any statutory taxes, levy, duties, cess or any other kind of imposition(s) including tax on generation of electricity whatsoever imposed/charges by any Government (Central/State) and/or any other local bodies/authorities on generation of electricity, after the Effective Date, shall be reimbursed by the Board to the Company on the quantum of Net saleable energy.”

Perusal of the clause ibid shows that the tax on the generation of the energy is to be reimbursed by the Board but the MAT since is the tax on income and not the tax on generation, the petitioner is not liable to reimburse the same to the Respondent;

- (b) that tax on income being in the nature of direct tax cannot be passed to a third party without there being a specific agreement to the effect and it is the settled position of law that any agreement between the parties also needs to be construed in the straight manner.

Moreover, the MAT is akin to payment of advance tax and the tax liability would get crystallized only after the expiry of the 10 assessment years as observed in the matter of **Commissioner of Income Tax versus Jindal Exports Ltd. (2009) 314 ITR 137 (Delhi High Court)**, in which it was held that MAT credit represents that portion of MAT, which was not actually payable by the Company assessee, but has all the same been

collected by the Government. The MAT is form of direct tax. The direct tax liability is on the assesee directly and cannot be passed on the third party, unless and otherwise specifically agreed between the parties;

- (c) that the Commission in its judgment on the MAT claim filed by M/s KKK Hydro Ltd. in the Order dated 15.02.2017, in which it is specifically mentioned that clause No. 8.8 is applicable for tax on generation and does not envisage reimbursement of MAT which is tax on income. The relevant part of the Order is reproduced as under:

“the petitioner has primarily claimed under clause of 8.8 of the PPA, the reimbursement of his entire outage on account of MAT. The Commission has already concluded in relation to the issue No.1 that the clause No. 8.8 is applicable for tax on generation and does not envisage reimbursement of MAT which is a tax on income. It was for the petitioner to satisfy its entitlement in terms of the PPA as the rights and obligations of the parties are captured in the specific terms of the PPA. He has not been able to establish his entitlement for reimbursement of the MAT under the PPA. The Commission therefore, does not agree with the petitioner that all outgo of the petitioner is to be covered by the PPA by way of the adjustment of tariff and is of the view that the reimbursement/adjustment on account of changes on rates of MAT is essentially to be regulated as per the provisions of the PPA read with the terms and conditions, if any, of the constituent tariffs forming the basis of the composite rate of 2.60 per kWh incorporated in the PPA.”

- (d) that the subject matter of the tax is tax on income and the levy of MAT is a part of the Income Tax Act. The incidence of tax is on the respondent, who is the assesee under the Income Tax Act. The principle of the subject matter of tax is well established. In this regard the petitioner craves to refer the decision of the constitution Bench of the Hon’ble Supreme Court in the case of **Godfrey Philips India Ltd. versus State of Uttar Pradesh (2005) 2 SCC 515;**
- (e) that in the present case it is evident that what is provided for in the PPA for re-imbursement is the tax on generation of Electricity, which is a tax on the activity of generation and in the nature of indirect tax. The subject matter of taxation is generation of Electricity. But, in the case at hand, the rights and obligations of the parties flow from the terms and conditions of the power purchase agreement (PPA). PPA is contract entered between the petitioner and the respondents with the clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per terms and conditions of the PPA in the present case, there is no provision regarding re-imbursement of the MAT being the tax on income;
- (f) furthermore, this Commission in the case M/s KKK Hydro has come to the conclusion that the MAT since being the tax on income cannot be reimbursed to the power producers hence, the ratio of the judgment of the KKK Hydro is ipso facto applicable to the present case.

In these circumstances it is prayed that this Commission may allow the petition in the interest of justice and fair play.

9. In rebuttal the Respondent M/s Ascent Hydro Project Ltd. reiterates its submissions as set out in paras 5 and 7 of this Order.

10. With the background, as delineated in foregoing paragraphs, the main issue which arises for consideration and determination in this petition is whether the tariff of the Respondent i.e. M/s Ascent Hydro Project Ltd. is liable to be revised after removing the element of MAT as prayed by the petitioner.

11. We observe that the petitioner has pleaded that since clause 8.8 of the PPA does not permit the pass through of the MAT component in the tariff, the tariff needs to be revised by removing the element of MAT. In this connection we like to point out here that this Commission has, time and again, held that the said clause 8.8 of the PPA does not cover MAT. The adjustment on account of MAT was allowed by this Commission by its Order dated 22.05.2010 by treating it is a change in goal post keeping in view the provisions under the second proviso to sub-regulation (1) of regulation 6 of the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007, read with clauses (b) and (e) of sub-section (1) of section 86 of the Act, which empowered the Commission to review or modify the PPA, where, after the approval of the PPA, there is change in statutory laws; rules or State Govt. Policy. The petitioner has also pleaded in support of their claim that the MAT should be disallowed in this case keeping in view the Order dated 15.02.2017 passed by this Commission in the matter of **M/s KKK Hydro petition No. 47 of 2016**. This contention of the petitioner is totally misplaced as the project covered in the said petition (47 of 2016) falls in different category of projects vis-à-vis the time frame in which the process of execution of the PPAs was undertaken.

12. In view of foregoing findings we decline to accept the prayer made by the petitioner and hold that this Commission's Order dated 22.05.2010 shall continue to hold good in relation to MAT. However, in view of the pleadings made by the petitioner in sub-paragraph of 8 (b) of the Order, we decide that the MAT credit, if any, available to the respondent shall be adjusted suitably against the MAT payment as and when such MAT credit falls due.

The petition is disposed of accordingly.

No orders as to costs.

--Sd/-
(Bhanu Pratap Singh)
Member

--Sd/-
(S.K.B.S. Negi)
Chairman