

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

In the matter of:-

M/s Harison Hydel Const. Co. Pvt. Ltd  
Akhara Bazar, Kullu Distt.  
Kullu-175101 (HP) .....**Petitioner**  
Versus  
The HP State Electricity Board Ltd.  
through its Chief Engineer (System Operation)  
Vidyut Bhawan, Shimla-171004 .....**Respondent**

**Petition No. 100 of 2020**

Heard on 24<sup>th</sup> July, 2021

**Decided on 7<sup>th</sup> Sept., 2021**

**CORAM**

**DEVENDRA KUMAR SHARMA  
CHAIRMAN**

**BHANU PRATAP SINGH  
MEMBER**

**YASHWANT SINGH CHOGAL  
MEMBER**

Counsel: -

For the Petitioner: Sh. Arijit Maitra, Advocate

For the Respondent: Sh. Surinder Saklani, Advocate  
a/w Sh. Kamlesh Saklani  
(Authorised Representative)

**ORDER**

This Petition has been moved by M/s Harison Hydel Construction Company Pvt. Ltd., a generating Company registered under the Companies Act, 1956, having its Registered Office at Akhara Bazar, Kullu Himachal Pradesh through Sh. Ghanshyam Sood S/o Late Sh. Hari Ram Sood, Executive Director (hereinafter referred as “the Petitioner”) seeking implementation of the Order dated 10.06.2010 passed in Petition Nos. 43 of

2008 (Revised Petition No. 209 of 2009) by the Himachal Pradesh Electricity Regulatory Commission (hereinafter referred as “the Commission”) in relation to the Petitioner’s Brahmanga Small Hydro Project of 5.00 MW capacity, located on Brahmanga Khad, a tributary of Parbati river, in Kullu Distt. HP (hereinafter referred as “the Project”).

2. Per the Petition the factual matrix of this case is that-

2.1 The Petitioner is a generation Company, having a Hydro Power Plant of the capacity of 5.00 MW (Brahmanga HEP) and is selling electricity generated by its said plant to the Himachal Pradesh State Electricity Board Ltd. (hereinafter referred as “the Respondent” or “the Respondent Board”) in accordance with the PPA dated 08.06.2004, executed between the Petitioner and the Respondent Board, pursuant to the Implementation Agreement dated 2<sup>nd</sup> August, 2002 entered into between the Petitioner and the Govt. of HP. Per clause 6.2 of the said PPA, the Respondent Board shall have to pay for the Net Saleable Energy delivered by the Petitioner to the Respondent Board at the Interconnection Point at the rate of Rs. 2.50 kWh which is firm and fixed without indexation and escalation and is not to be changed due to any reason whatsoever.

2.2 The Commission, vide its Order dated 18.12.2007 determined a generic tariff for small hydro projects, not exceeding 5 MW capacity for sale of power in the State of Himachal Pradesh at the fixed rate of Rs.2.87 kWh. This Order was made applicable to such PPAs which had already been approved by the Commission with the clause that “tariff terms and conditions of the PPA shall be subject to the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007

(hereinafter referred as “the RE Regulations, 2007”) and also the PPAs to be approved thereafter.

- 2.3 The said Order dated 18.12.2007 was challenged before the Hon’ble APTEL by way of **Appeal No. 50 of 2008 by M/s Techman Energy Ltd. and in Appeal No. 65 of 2008 by the HP State Electricity Board** and the Appeals were disposed of by a common Order dated 18.09.2009, upholding the Commission’s Order dated 18.12.2007 with the directions to this Commission to reconsider the issues of negative cash flow of the power producers, periodicity of levellised tariff and to remove the arithmetical errors, identified by the Hon’ble APTEL.
- 2.4 The Commission vide its Order dated 09.02.2010 after taking into consideration the directions given by the Hon’ble APTEL and the submissions made by the parties in Appeal before the Hon’ble APTEL recalculated the tariff at Rs.2.95 kWh by rectifying the arithmetical errors on account of royalty, Minimum Alternate Tax (MAT), transmission losses and moratorium; and further vide its Order dated 10.02.2010, the Commission after taking into consideration the fact that subsequent to the issuance of Order dated 18.12.2007, there had been material changes in the statutory provisions in relation to taxes and royalty (on free power), made the supplementary Order by devising formula for adjustment on account of change in the rate of MAT and Income tax.
- 2.5 Being aggrieved by the Order dated 18.12.2007 the Independent Power Producers (IPP), signing the PPAs before the 1<sup>st</sup> July, 2006 on a fixed tariff of Rs. 2.50 kWh moved Petitions, to reopen their PPAs and seeking increase in tariff to Rs. 2.95 kWh at par with the IPPs, who signed the PPAs, after July, 2006 onwards, mainly on the

ground of inflation of construction cost, requirement of the mandatory release of 15% water discharge, levy of forest charges, revision of fisheries charges and levy of Local Area Development Charges (LAD Charges) referred in the State Hydro Power Policy of Himachal Pradesh, 2006.

2.6 The Petitioner Company also moved Petition No. 43 of 2008 (Revised Petition No. 209 of 2009) to reopen its PPA and seeking increase in the tariff on account of the mandatory release of 15% water discharge, forests and fisheries charges, LAD Charge, change in royalty, additional 1% royalty for Local Area Development, increase in MAT structure and service tax structure.

2.7 The Commission in **Petition No. 11 of 2008- M/s Hydrowatt Ltd. V/s HPSEB and others** considered the issue of reopening of the PPAs and vide its Order dated 29.10.2009, held that-

- (i) under 2<sup>nd</sup> proviso to regulation 6(1) of the HPERC RE Regulations, 2007, the Commission can reopen concluded PPAs prospectively to cater the policy changes;
- (ii) impact of policy of 15% water release was to be considered on merit of each case vis-à-vis actual provisions for water release as per DPR/TEC;
- (iii) each Petition was to be considered on merit on furnishing necessary data/detailed calculations.

2.8 This Commission vide its Order dated 10.06.2010 passed in Petition No. 43 of 2008 (Revised Petition No. 209 of 2009) allowed increase in tariff of Rs.2.50 kWh by 15 paise on account of water discharge and for MAT, formula was devised, stating-

- (i) that the tariff shall be enhanced by 15 paise on account of impact of 15% mandatory release of water downstream of diversion structure. However, either party on the actual data

available for a period of 10 years may approach the Commission to review the said increase;

- (ii) that the claims for forest, fisheries and service tax are not acceded to;
- (iii) that any change in MAT after signing of PPA in the first 10 years of the generation of power from 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 signing of PPA)

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

- (iv) that the additional tariff component to offset the loss on account of LAD charge shall be calculated as per the following formula:-

$$x = \frac{PV}{8.80075y}$$

whereas

PV is the total amount in lacs paid on account of Local Area Development Charge minus amount payable for Local Area Development works specified in the approved DPR

x is Additional tariff component in Rs/unit levellised over a period of 40 years to offset the loss on account of LADC

y is Annual saleable energy units in lacs (as per approved DPR).

This tariff component shall be subject to the production of sufficient documentary proof to the satisfaction of the Board and shall be payable from the date of complete payment of

LAD Charges or Commercial Operation Date(CoD) whichever is later;

In view of the above, the tariff of Rs. 2.50 shall be increased by 15 paise per unit. The Order shall be applicable from the date it is made.

- 2.9 The Respondent Board i.e. HPSEBL filed Writ Petitions before the High Court of Himachal Pradesh bearing CWP Nos. 7649, 8285, 8426, 8427, 8472, 8492, 8531 and 8532 of 2010, challenging the HPERC (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) (First Amendment) Regulations, 2007, Order dated 29.10.2009, Order dated 10.06.2010 and other orders making increase in the tariff. The Hon'ble High Court of Himachal Pradesh dismissed the aforesaid Writ Petitions filed by the HPSEBL, vide its Judgment dated 06.08.2013.
- 2.10 The Respondent Board filed Review Petitions No. 11 of 2014, 12 of 2014, 14 of 2014, 15 of 2014, 16 of 2014, 30 of 2014, 62 of 2014 and 64 of 2014 (including Review Petition No. 30 of 2014 relating to the Brahmnganga Project HEP of the present Petitioner), seeking review of the number of the Commissioner's Orders allowing enhancement in tariff, due to the 15% mandatory water discharge, with respect to various PPAs where enhancement had been granted due to retrospective imposition of the lean period discharge. These Petitions had arisen out of the formulation of the Policy of Himachal Pradesh in 2005, regarding release of minimum normative quantum of water downstream the project and the consequent impact of such policy on the tariff of projects allotted prior to the introduction of such minimum quantum.

2.11 In Order to promote renewable energy, the GoHP notified on 22.11.1994, a special promotional scheme for development of the Small Hydro Projects (SHPs), which was amended, from time to time, and per policy dated 06.05.2000, the SHPs upto 5 MW had an option to sell power to the Board at a fixed rate of Rs.2.50 per kWh, for which they had to sign Implementation Agreement (IA) with the GoHP as well as the Power Purchase Agreement (PPA) with the Board. Therefore, the tariff was part of the project allotment condition followed by PPA, which is a binding contract. The Commission, while finalizing Model PPA and also approving specific PPA under section 86(1) (b) of the Electricity Act, 2003(hereinafter referred as “the Act”), concurred in the said rate. In 2007 the Commission made the HPERC (Power Procurement from for Renewable Sources and Co-generation by Distribution Licensee) Regulations, 2007 for determination of tariff of the SHPs upto 25 MW and the said Regulations were made applicable to the PPAs approved by the Commission from July, 2006 onwards. The IAs provide that water will be released down the stream and diversion structure of the hydel projects as per Orders of the State Govt. and no normative or specific quantification was provided. As a practice, the release of water was decided while appraising/approving the DPR or granting the TEC. However, the tariff was fixed at Rs.2.50 per kWh irrespective of release of water down the stream. In the year 2005, the GoHP, the Deptt. of Pollution Control, issued directions under the Environment (Protection) Act, 1986, to existing and upcoming hydel projects to release and maintain minimum flow immediately down the stream of the diversion structure of the hydel projects, throughout the year at the threshold value of not less than 10% of the minimum inflow observed in the lean season in the main

water body, whose water is being harnessed and subsequently on 09.09.2005 the quantum was raised to 15%.

- 2.12 Prior to 2005, the condition of release of water was applicable, but there was no minimum normative quantum laid down. If the developers sell power to the HPSEB, the tariff fixed by the GoHP was Rs. 2.50 per kWh upto 5 MW Projects. In 2007, the Commission made the RE Regulations, 2007 for determination of the tariff for SHPs and in accordance with the RE Regulations, the revised tariff on account of policy changes (including minimum 15% water release) after signing of the PPA on fixed rate of Rs. 2.50 per kWh was allowed by the Commission by a generic Order dated 29.10.2009, followed by a case specific Order in relevant cases.
- 2.13 On 18.04.2012 the State Cabinet took the decision on Notification dated 09.09.2005 relating to water discharge as under-
- (i) the notification is to apply prospectively only on projects commissioned after 09.09.2005;
  - (ii) where IAs/PPAs are executed before 09.09.2005, but the projects are commissioned after 09.09.2005, minimum discharge is to be determined, based on long term study and till then minimum discharge is to be as per TEC/MOU/IA/PPA.

Subsequently, the GoHP issued revised Policy decision dated 21.04.2012 stating that the Policy of minimum 15% water release will not apply retrospectively on projects which are not commissioned prior to 09.09.2005 and those which are not commissioned, but the Implementation Agreements (IAs) are signed prior to 09.09.2005 and, therefore, the increased tariff allowed by the Commission is required to be reviewed and withdrawn. The GoHP asked the Respondent Board to approach the Commission for review of Orders passed in Tariff Petitions with respect to the PPAs, where



tariff increase was granted due to the retrospective imposition of lean period discharge and accordingly the Board has filed the aforesaid Review Petitions. Considering the importance of these issues involved, the Commission passed the Interim Order dated 25.04.2014 to the extent that the operation of the Orders passed in the Tariff Petitions with respect to the PPAs, where enhancement has been granted on account of 15% mandatory water release, shall remain stayed till the disposal of the Review Petitions unless altered or modified.

- 2.14 This Commission, taking note of the fact that the directions in GoHP letter dated 21.04.2012 were to the Board and were not directions to the Commission under section 108 of the Electricity Act, 2003 and water availability and its potential is the key determinate in project design and consequent designed generation, which forms the basis for tariff determination, gave to parties and other stakeholders, irrespective of whether the decision dated 21.04.2012, is of the nature of policy or not, and after, due consideration, the Review Petitions No. 11,12,14,15,16,30,62 and 64 of 2014, filed by the Respondent Board, with respect to minimum 15% release of water as per letter dated 21.04.2012, were partly allowed on 10<sup>th</sup> Sept., 2014 and the Commission Orders were modified to that extent.
- 2.15 In the case of Revision Petition No. 16 of 2014 (**HPSEBL V/s M/s Harison Hydel Construction Co (P) Ltd.**), the enhancement in tariff in relation to the Brahamganga HEP, allowed on account of impact of 15% mandatory water release stood withdrawn w.e.f. 25.04.2014 and the Commission Order dated 10.06.2010 was modified to that extent. Consequently, the tariff in relation to Brahamganga HEP is Rs.2.50 per kWh w.e.f. 25.04.2014.

- 2.16 The Respondent Board filed SLPs alongwith a stay Application before the Hon'ble Supreme Court challenging the HP High Court Judgment dated 06.08.2013 but the Stay Application has been dismissed on 24.03.2014. During the pendency of the Writ Petitions before the Hon'ble High Court, the operation of the Orders passed by the Commission and proceedings before the Commission on the Review Petitions, filed by the IPPs, remained stayed. The Commission disposed of the Review Petitions filed by the IPPs, by a common Order dated 10.09.2014, whereby the increase allowed on account of impact of 15% mandatory water release was withdrawn w.e.f. 25.04.2014
- 2.17 The Commission Order dated 10.09.2014 stand challenged by the IPPs, before the Hon'ble APTEL and the verdict thereon is yet awaited.
- 2.18 Significantly, the Petitioner Company alongwith two other power producers moved Petition No. 91 of 2016, to initiate appropriate proceedings against the Respondent Board under Sections 142 and 146 of the Electricity Act, 2003, for non-compliance of the Commission Orders dated 22.05.2010, 10.06.2010 and 10.09.2014 and to impose penalty and to direct the Respondent Board to make payments pursuant to the aforesaid Orders alongwith interest @ 1.5% p.m. and further interest. During the admission hearing of the said Petition, the Respondent Board contended that the said Petition was not maintainable and deserved outright dismissal, as the allegations leveled against the Respondent Board did not constitute the contravention of any provisions or directions issued under the Act and according to the Order dated 10<sup>th</sup> Sept., 2014 the revised bills were required to be raised by the IPPs, alongwith the data of

minimum 15% water discharge from their respective projects, but the Petitioners have not raised the revised bills and have not furnished the requisite water data. Further, the operation of the Commission Orders remained suspended due to the stay Order of the High Court of HP in Writ Petitions and Impugned Order is still under adjudication before the Hon'ble APTEL. Hence, the question of non-compliance of the provisions of the Act or any directions issued thereunder did not arise. However, the Petitioners were asked to submit the water discharge data, alongwith supporting documents. The Commission, taking a lenient view afforded sufficient time to the Petitioner to furnish the water discharge data with supporting documents. The Petitioner, though, made the additional submissions in relation to their projects but had not been serious to furnish the water discharge data with supporting documents.

- 2.19 The Commission vide Order dated 14<sup>th</sup> March, 2017 disposed of the said Petition No. 91 of 2016. Para 6 of the Order is reproduced as under-

*“ Mere change in the tariff is not sufficient for initiating the penal proceedings under sections 142 and 146 of the Act. The Petitioner should have raised the revised bills and in the absence of any valid reasons the DISCOM must have declined to entertain the revised bills. From the contents of the Petition, it is not clear whether the Respondent Board declined to entertain the Petitioner’s claim and Petitioners exhausted the specific remedy available to them under the PPA; especially when the PPA provides in Article 8 specific billing procedure and provisions for adjustments through supplementary bills, and also for resolution of billing disputes, failing which the provisions of Article 13 are to be attracted with respect to the disputed amount of such bills. Only after exhausting the dispute resolution mechanism laid down in PPA, the recourse could be taken to section 86(1)(f)*

*of the Electricity Act, 2003, and the provisions of sections 142 and 146 of the said Act, could not be invoked directly”.*

2.20 Subsequently on 05.06.2018, the Petitioner submitted the documentary evidence in regard to mandatory release of minimum 15% water discharge stated to be duly certified by the State Pollution Control Board vide Certificate dated 02.12.2017 alongwith bills dated 05.06.2018 for the period 10.06.2010 to 25<sup>th</sup> April, 2014, for an amount of Rs.1,53,57,654/- on account of 15% water release and for an amount of Rs.1,74,74,204/-being interest @ 1.5% pm. The Petitioner made the request, on 05.06.2018, to commence the Good Faith Negotiations, per provisions of Article 13 of the PPA and the Negotiation Meeting was conducted on 12.02.2019. During the discussion, the HPSEBL informed that it could not process the request for release of payment on account of 15% mandatory release of water, due to the fact that the SLPs are still pending before the Hon'ble Supreme Court in a similar case. The representative of M/s Harison Hydel Construction Company Private Limited (HHCCPL) apprised that the Hon'ble High Court had dismissed the CWP No. 7649 of 2010, alongwith other Writ Petitions by Order dated 06.08.2013 and Stay Application was dismissed by the Hon'ble Supreme Court vide Order dated 01.04.2015 in SLPs and is also of the firm opinion that there is no stay granted by the Hon'ble High Court or the Supreme Court and payment for the period 01.06.2010 to 25.04.2014 may be settled to meet the honest billing dispute resolution claims raised by the Petitioner in consonance with the mechanism set out in the PPA as per the HPERC Order dated 14.03.2017 passed in Petition No. 91 of 2016. The Petitioner stated that mere filing of appeal does not operate as stay as per the settled law. The meeting ended with the statement that the HPSEBL will get

the matter examined from their Legal Unit and shall inform the outcome to the Petitioner in due course of time. Subsequently, on furnishing the undertaking by the Petitioner i.e. M/s Harison Hydrel Construction Company Private Limited (HHCCPL) that the Petitioner will abide by the subsequent Orders, if any, passed by the Appropriate Commission or Courts, the HPSEBL informed the Petitioner Company that the proposal has been considered and the management of the HPSEBL is of the opinion that the outcome of Hon'ble APTEL in Appeal No. 15 of 2015 and Hon'ble Supreme Court in Appeals No. 3326-3345 may be awaited. The Petitioner has also requested the HPSEBL through its letter dated 06.06.2019 to make the payments towards MAT pursuant to the HPERC Order dated 14.03.2017.

2.21 With the background and above factual matrix, delineated in the preceding paras of this Order, the Petitioner has moved this Petition, praying this Commission-

- (a) to direct the HPSEBL to pay the amount on account of 15% mandatory water release, as per the HPERC Orders, from the CoD i.e 02.04.2008 to 25.04.2014, as allowed by the Commission;
- (b) to direct the HPSEBL to pay the impact of MAT, as directed by the Commission vide its Order dated 10.06.2010.

3. In response to the Petition, the Respondent Board has submitted, as under that-

- (a) the Respondent Board, being aggrieved by the Judgment, of the Hon'ble High Court of HP dated 06.08.2013, has filed the SLPs before the Hon'ble Supreme Court and the matter is still under adjudication;

- (b) the Good Faith Negotiation Meeting was conducted on 12.02.2019, with the Petitioners and the Respondent Board informed that the Board is of the opinion that the outcome of Appeal No. 15 of 2015 before the APTEL and **Civil Appeal Nos. 3326-3345 of 2015 before the Supreme Court** be awaited;
- (c) regarding impact of 15% mandatory water release, the Respondent Board concedes that there is no stay on the Orders of the High Court of HP and the Board is ready to pay the amount on account of 15% mandatory water release, subject to the decision of the Hon'ble Supreme Court on the pending SLPs;
- (d) as per the Commission Order dated 10.06.2010, either party on the actual data available for a period of 10 years may approach the Commission to review the said increase of 15 paise per unit. Since the actual data of more than 9 years is available the Commission may consider to review the said increase;
- (e) regarding MAT bills, the Respondent Board states that the payment of the MAT for FY2015-16 and FY2016-17 has been made, as the Petitioner had raised the bills in accordance with the stipulation laid down in the Commission's Order dated 10.06.2010 passed in Petition No. 43 of 2008, but the Petitioner has failed to seek the said relief in the specified time period and raised the bills, on account of differential MAT for FY 2008-09 to FY 2014-15, on 19.06.2018 (i.e. after the lapse of more than 7 years). The Respondent Board has already tried up upto 2014-15 by 17.04.2017. Now therefore, the differential MAT bill as revised by the Petitioner cannot be processed.

4. The Petitioner Company, in its rejoinder to the reply of the Respondent Board, has submitted that the reply of the Respondent Board is entirely misleading and averred as under:-

- (a) The Commission Orders are required to be implemented as there is no stay on the Orders sought to be implemented. The Hon'ble Supreme Court of India has dismissed the Stay Application of the Respondent Board and hence there is absolutely no ground on which the Respondent Board could decline to give effect to the Order passed by this Commission.
- (b) The plea raised by the Respondent Board to seek review of 15 paise increase based on actual data is misplaced. The Respondent is not entitled in law to deprive the Petitioner of the increase of 15 paise per unit on the ground that the Respondent Board is in possession of actual generation data for the period of more than 9 years for a review of the quantum of increase of 15 paise as has been awarded by this Commission vide its Order dated 10.06.2010. Per Commission's observations, the Brahamganga Project of the Petitioner was yet to be commissioned and as such the generation data was not available to draw any analysis, the Commission after due prudence check allowed the increase of 15 paise per unit as per the mandatory release of water discharge impact assessment carried out by the Board, with the liberty to either party to approach the Commission to review the said increase on the availability of the generation data for a period of 10 years. Thus, the payment of increase of 15 paise per unit is neither subject to nor conditioned upon review of the actual data available for a period of 10 years. The Respondent Board has to comply with and give effect to the increase of 15 paise per unit in the tariff and only thereafter, it can initiate any proceedings

seeking review of the increase based on purported actual data after the period of 11 years from the passing of Order dated 10.06.2010.

- (c) Mere pendency of Appeals filed by the Respondent Board before the Hon'ble Supreme Court challenging the Commission's Order dated 06.08.2013 passed by the Hon'ble High Court of HP in the aforesaid Writ Petition against the Commission's Order dated 10.06.2010, could not be a ground for the Respondent Board to prefer review based on actual data for a period of more than 9 years. If the argument of the Respondent Board to seek review based on actual data for a period of more than 9 years is to be accepted, then in that event all tariff Orders for generation utilities which have been passed since the enactment of the 2003 Act, can be reopened at any point of time. Apart from this, the aforesaid argument of the Respondent Board would be contrary to the verdict of the Hon'ble Supreme Court given in **U.P. Power Corporation Ltd. V/s NTPC Ltd. (2009) 6 SCC 235** for the reasons that-

- “ (i) the Commission should not have been asked to revisit the tariff after five years and when every body had arranged its affairs;*
- (ii) framing of tariff is made in several stages and GENCOs get enough opportunity to put forth their case and hence can not be permitted to re-agitate the question after passing of many stages;*
- (iii) additional costs may be absorbed in the new tariff, as some consumers may not continue to be the consumers and some new consumers might have come in. There is no reason as to why they should bear the brunt;*



*(iv) Such quick-fix attitude was not contemplated as framing of forthcoming tariff is put subject to fresh regulations and not to the old regulations.*

- (d) The so-called 9 years of actual data is based on liberty granted by the Commission vide Order dated 10.06.2010 and the liberty sought to be taken advantage of by the Respondent is contrary to the law laid down by the Hon'ble Supreme Court in **Kewal Chand Mimani V/s S.K. Sen (2001) 65 SCC 512** holding that liberty can not be used as means to achieve an advantage which is not otherwise available in the law. Thus the question finally decided can not be reopened.
- (e) With regard the MAT claim, the Petitioner submits that the Petitioner has been continuously asking for reimbursement of the MAT, by submitting bills for the FY 2008-09 to FY 2014-15 and the FY 2015-16 and FY 2016-17. The statement of the Respondent Board that the bills for the period FY 2008-09 to FY 2014-15, after the True-up for the relevant financial year had been carried on, cannot affect the payment of the differential MAT.

5. In rebuttal, the Respondent Board has filed the sur-rejoinder to the rejoinder filed by the Respondent Board averring that-

- (a) the generation of power from the Petitioner's project w.e.f. 2008-09 to 2014, i.e. period prior to the Commission's Order for withdrawal of increase in tariff on account of 15% mandatory water discharge should have been on lower side as compared to the generation recorded post withdrawal Order i.e. during the period from 2014 onwards;
- (b) so far as the MAT is concerned, the financial relief on account of MAT for the period 20.08.2009 to 2014-15 cannot be given effect

to for the reason that the true up to the financial year 2014-15 has been done on 17<sup>th</sup> April, 2017, much before the submission of the bills on 19.06.2018.

(c) unless the Lis is decided finally, the Order can not be given effect.

6. The Petitioner Company, has filed the Sur-sur-rejoinder to the sur-rejoinder i.e. counter to the rejoinder of the Respondent Board averring that-

**A. Mandatory Release of water**

(a) The Respondent is factually incorrect while stating that the quantum of generation from the project during 2008 to 2014, should have been lower than the quantum of generation after the year 2014. The Respondent has speculated the quantum for the period after 2014 i.e. when the Commission withdrew the increase in tariff on account of mandatory water release, hence the requirement of water release was not in existence.

(b) The Respondent has presented the quantum of generation by the power plant of the Petitioner from (02.04.2008) 2008-09 (CoD) till 25.04.2014 (date of withdrawal of tariff increase, since the mandatory water release, ceased to exist). The Respondent has not disputed the generation between the period i.e. from 2008-2009 to 2014. Hence the Respondent has admitted the quantum of generation by the power plant during the period from 2008-09 to 2014. Therefore, no question survives for review of the tariff enhancement of 15 paise per unit for the mandatory release during the said period, since the Respondent has admitted the quantum of generation during the said period.

(c) The scope of the present Petition is limited to the period from 02.04.2008 (CoD) till 25.04.2014 (withdrawal of

enhancement in tariff), hence the contention that the quantum of generation after 2014 should have been lower than the period prior to 2014 is beyond the scope of the present Petition.

- (d) The quantum of generation of Hydro Power Project is dependent upon various factors and cannot be the same in each year as the water availability is dependent upon the act of God.
- (e) the Commission in its Order dated 10.06.2010 has assessed the mandatory water release impact based upon 75% dependable discharge as approved in the DPR and by deducting the sacrificial discharge from it (which is average of 3 lean months) to get the net discharge available for power generation. The loss in generation has been assessed by this Commission which, in terms of energy worked out to 15 paise per unit. Hence the tariff increase based on actual data for a period of 10 years does not arise, since the Commission has withdrawn the tariff increase from the tariff year 2014 itself. The Petitioner has not disputed at all the quantum data presented by the Respondent.
- (f) The contentions of the Respondent that it has filed an appeal against the Commission's Order and the said Order cannot be implemented is *ex-facie* legally untenable. Mere filing of an appeal does not operate as a stay or suspension of the Order appealed against. In its support, the Petitioner has cited the verdicts of Hon'ble Supreme Court and the APTEL as under-
  - (i) **Collector Of Customs, Bombay vs M/S. Krishna Sales (P) Ltd. 1994 Supp(3) SCC 73;**

- (ii) **Federation of Karnataka Chamber of Commerce and Industry Federation House V/s Karnataka ERC 2013 SCC online APTEL,[2013] APTEL, 59;**
- (iii) **Atma Ram Properties (P) Ltd. V/s Federal Motors (P) Ltd. (2005) 1 SCC 705;**
- (iv) **Madan Kumar Singh V/s District Magistrate Sultanpur (2009) 9 SCC 79.**

**B. Minimum Alternate Tax**

The contention of the Respondent that the financial relief on account of MAT cannot be given effect to for the reason that the same has been tried up to the financial year 2014-15 on 17<sup>th</sup> April, 2017, is devoid of any merit for the reasons that the ARR of the Respondent Board having been tried up has nothing to do with meeting the legitimate MAT claims of the Petitioner, as per the Commission's Order.

7. The Petitioner has placed on record, in support of its Sur-sur-rejoinder, the following documents.-

- (a) Water Discharge Data (of April, 2021 releasing water in excess) to demonstrate that the Petitioner is continuously releasing 15% water as is mandated in the law.
- (b) NGT Order dated 03.12.2019 and Order dated 07.09.2020 passed in OA No. 425 of 2019- in the matter of **Vijay Kumar V/s State of HP** holding that HEPs (upto 25MW) whereunder the power producers are mandatorily required to comply with 15% water release.

The Petitioner submits that pursuant to the aforesaid Order dated 03.12.2019 of the National Green Tribunal (NGT), even after the year 2014, the requirement of mandatory release of water was there, though, the

Commission had withdrawn the 15 paise increase per unit. The NGT had vide its Order dated 07.09.2020 has taken up the issue of enforcement of requirement of releasing minimum water downstream by the HEPs in Himachal Pradesh. As such, the Commission's Order dated 10.09.2014 withdrawing the 15 paise increase per unit on the premise of the absence of a requirement of the mandatory release of water, is legally sustainable. The Petitioner has preferred an Appeal No. 15 of 2015, before the Hon'ble APTEL. The Petitioner submits that the Respondent is factually incorrect while stating that the quantum of generation from the Petitioner's project during the period 2008-2009 to 2014 should have been lower than the quantum of electricity generated after the year 2014 and as such has speculated that the quantum of generation after 2014 should have been higher as compared to the quantum of generation during the period 2008-2009 to 2014.

8. The Respondent never raised the issue as to whether or not the Petitioner is releasing mandatory water in the Good Faith Negotiations that were directed by this Commission, but as an afterthought, has raised this issue. The contention of the Respondent Board is completely misleading and devoid of any merit and deserves to be rejected. The renewable energy generators are expected to invest money towards installation of generation capacity, pay salaries to their employees and undertake maintenance activities of their plants, require a continuous cash flow. To not to pay revised tariffs on account of water release and MAT is a clear breach of contract. The illegal and inequitable approach of the Respondent Board refusing to comply with the binding Orders of this Commission to pay the enhanced tariff on account of mandatory water discharge as well as the differential MAT liability will drive many to bankruptcy proceedings as they will not be able to service their debts.

9. We have heard learned Counsel for the parties and perused the record carefully. The following issues arise for consideration and determination.-

- (1) Whether in view of the pendency of Appeals before the Hon'ble Supreme Court and the APTEL, the Respondent Board is justified to keep the implementation of the Orders passed by the Commission, in abeyance?
- (2) Whether the Petitioner Company is entitled to the benefit of increase in tariff due to the 15% mandatory water release with effect from the CoD of the project i.e. 02.04.2008 to 25.04.2014 i.e. the date of withdrawal of the enhancement in tariff by the Commission, alongwith carrying cost?
- (3) Whether the Petitioner is entitled for reimbursement of the MAT, as directed by the Commission vide its Order dated 10.06.2010, alongwith the interest/carrying cost?

10. Now let us consider these issues one by one.

**Issue No.1 Whether in view of the pendency of Appeals before the Hon'ble Supreme Court and the APTEL, the Respondent Board is justified to keep the implementation of the Orders passed by the Commission in abeyance?**

11. From the averments made by Parties to this Petition, it is evident that the Commission vide its Order dated 10.06.2010 passed in Petition No. 43 of 2008 (Revised Petition No. 209 of 2009) allowed increase in tariff from Rs.2.50 per kWh by 15 paise on account of 15% mandatory water discharge. The Respondent Board i.e. HPSEBL filed a bunch of Writ Petitions before the Hon'ble High Court of Himachal Pradesh, challenging the HPERC RE Regulations, 2007, and other Orders including the impugned Order dated 10.06.2010. The Hon'ble High Court dismissed the aforesaid Petitions filed by the Respondent Board, vide its Order dated 06.08.2013.

The Respondent being aggrieved by the Order passed by the High Court of HP, filed SLPs before the Hon'ble Supreme Court of India, which are still pending for adjudication.

11.1 Subsequently, taking into consideration revised HP Govt. Policy decision dated 21.04.2012, the Commission passed the interim Orders dated 25.04.2014 to the extent that the operation of Orders passed in the Tariff Petitions with respect to the PPAs, where enhancement in tariff has been granted on account of 15% mandatory water release, shall remain stayed till the disposal of the Review Petitions unless allowed or modified. In **Review Petition No. 30 of 2014 HPSEBL V/s Harison Hydel Construction Co. (P) Ltd.**, the enhancement in relation to the Brahamganga HEP, allowed on account of 15% mandatory water release stood withdrawn w.e.f. 25.04.2014 and the Commission Orders dated 10.06.2010 was modified to that extent, vide this Commission's Order dated 10.09.2014, which now stands challenged by the IPPs, before the Hon'ble APTEL and the verdict thereon is yet awaited.

11.2 The Petitioner approached the Respondent Board to release the payment on account of 15% mandatory release of water for the period from 2<sup>nd</sup> April, 2008 to 25<sup>th</sup> April, 2014, but the Respondent Board declined to release the payment due to the fact that the Appeals are still pending before the Hon'ble Supreme Court and stated that the outcome of the decision of the **Hon'ble Supreme Court in Appeal Nos. 3326-3345 and Hon'ble APTEL in Appeal No. 15 of 2015** may be awaited.

11.3 Sh. Arijit Maitra, learned Advocate, appearing for the Petitioner, has strenuously argued that the contention of the Respondent Board that it has filed an Appeal against the Commission Order and the said Order

cannot be implemented is ex-facie legally untenable and the refusal on the part of the Respondent Board to implement the aforesaid Order of the Commission is unlawful and contrary to the law settled by the Hon'ble Supreme Court that without obtaining an Order of stay, an order cannot be refused to be implemented. As well known, mere filing of an appeal does not operate as a stay or suspension of the Order appealed against. In his support, he has cited the verdicts of the Hon'ble Supreme Court rendered in *Collector of Customs, Bombay V/s Krishna Sales (P) Ltd.* 1994 Supp (3) SCC 73, *Atmaram Properties (P) Ltd. V/s Federal Motors (P) Ltd* (2005) 1 SCC 705 and *Madan Kumar Singh V/s Distt. Megistrate, Sultanpur* (2009) 9 SCC 79. Sh. Arijit Maitra, learned Advocate for the Petitioner also submits that the Hon'ble APTEL in **Federation of Karnataka Chamber of Commerce and Industry Federation House V/s Karnataka ERC, 2013 SCC online APTEL 1: [2013] APTEL 59**, has implemented the law settled by the Supreme Court stating that "the contention of the Appellant that the Commission should not have implemented the directions of the Appeal No. 15 of 2009 while an appeal against the said Order is pending in the Supreme Court is misconceived.

- 11.4 Sh. Arijit Maitra, Advocate for the Petitioner further highlights the fact that the Hon'ble Supreme Court of India by its Order dated 01.04.2015 in SLPs (arising out of the Hon'ble High Court of HP Judgment and Order dated 06.08.2013, under which the Commission Order dated 10.06.2010 was challenged) dismissed the stay application filed by the Respondent Board.
- 11.5 The Respondent Board, also concedes that there is no stay on the Orders of the High Court of HP and submits that the Board is ready to



pay the amount on account of 15% mandatory water release, subject to the Hon'ble Supreme Court decision on the pending Appeals.

11.6 The Petitioner has also furnished on 16<sup>th</sup> Sept., 2019 an undertaking in relation to the amount which is to be released on account of increase in tariff, in respect of the excess discharge of water as per HPERC Order dated 10.06.2010 that the Petitioner will abide by subsequent Orders to be made in future by the Commission and the Courts.

11.7 In view of the above discussion, Law cited by the learned Counsel for the Petitioner and taking into consideration that there is no stay granted by the Hon'ble Supreme Court and dismissal of Writ Petitions by the Hon'ble High Court and undertaking furnished by the Petitioner, the arguments addressed by the Petitioner have merits. Accordingly, we are of the considered view that the Respondent Board is not justified to keep the implementation of the Order of the Commission in abeyance and decide this issue in favour of the Petitioner.

**Issue No.2** Whether the Petitioner Company is entitled to the benefit of increase in tariff due to the 15% mandatory water release from the CoD of the project w.e.f. 10.06.2010 to 25.04.2014, i.e. the withdrawal of enhancement in tariff by the Commission alongwith the carrying cost?

12. The next issue pertains to the implementation of the Commission Order dated 10.06.2010 in **Petition No. 43 of 2008 (Revised Petition No. 209 of 2009)**. The Commission, after taking into consideration the conclusions drawn in Commissions Order dated 29.10.2009, passed in **Petition No. 11 of 2008-M/s Hydrowatt Ltd. V/s HPSEBL** and others and further submissions made, calculations/data supplied by the Petitioner, the HPSEBL, and Himurja, passed the Order dated 10.06.2010 stating that-

*“The tariff shall be enhanced by 15 paise per kWh on account of impact of 15% mandatory release of water down the stream of diversion structure. However, either party on the actual data available for a period of 10 years may approach the Commission to review the said increase.”*

- 12.1 The aforesaid Order was effective from the date on which the order allowing the increase was made by this Commission. The said increase was challenged by the Respondent Board by way of 8 Writ Petitions before the Hon’ble High Court of HP, which were disposed of by the Hon’ble High Court on 06.08.2013. The Respondent Board filed SLPs alongwith stay application before the Hon’ble Supreme Court, challenging the said Order of the HP High Court dated 06.08.2013. The Stay Application was dismissed by the Hon’ble Supreme Court. During the pendency of the Writ Petitions, the operation of the Orders passed by the Commission and proceedings before the Commission in the Review Petitions filed by the IPPs remained suspended. Thereafter, the Commission disposed of the Review Petitions filed by the IPPs by a common Order dated 10.09.2014, whereby the increase on account of impact of 15% mandatory water release was withdrawn w.e.f. 25.04.2014.
- 12.2 The Commission Order dated 10.09.2014 also stands challenged by the IPPs before the Hon’ble APTEL and verdict, thereon is yet awaited. The Hon’ble Supreme Court by its Order 01.04.2015, in SLPs, dismissed the stay application filed by the Respondent Board. The submission of the Respondent Board is that the payment to the Petitioner is subject to the raising of bills. From the above facts, it is amply clear that the revised bills on account of enhancement in tariff due to the impact of 15% mandatory water release, could have been raised after 06.08.2013 i.e. the date on which the Writ Petitions filed

by the Respondent Board were dismissed by the Hon'ble High Court of HP. The Petitioner has claimed for reimbursement of the enhancement in tariff for the period w.e.f. 10<sup>th</sup> June 2010 i.e. the date on which impugned Order was passed by the Commission to 25.04.2014 i.e. date w.e.f. which the enhancement in tariff was withdrawn. The Petitioner submitted on 5<sup>th</sup> June, 2018, the documentary evidence in regard to mandatory release of minimum 15% water discharge duly Certified by the State Pollution Control Board vide certificate dated 02.12.2017 alongwith bills dated 2<sup>nd</sup> June, 2018 for the period from 10.06.2010 to April, 2014 for an amount of Rs. 1,53,57,654/- on account of 15% water release and for an amount of Rs.1,74,74,204/- being interest @ 1.5 % p.m.

- 12.3 It would be appropriate to examine the relevant provisions of the PPA to reach to a just conclusion. Article 8 of the PPA deals with Billing and Payment. The relevant clauses of Articles 8 and 10 of PPA are reproduced below:-

**ARTICLE -8  
BILLING AND PAYMENT**

“ 8.1 The Company shall prepare the monthly bills for the Saleable Deemed Generation and the Net Saleable Energy in accordance with the jointly signed statements as per Sections 7.16 and 7.17, respectively and shall furnish the same to the Board, in triplicate, on or after 5<sup>th</sup> day of each succeeding month. The bills for supply of Energy by the Board to the Company pursuant to Section 6.1 shall be prepared by the Board and served on the Company in the same manner.

The Board shall make payments of the bills raised on above basis within 30 days from the Date of Presentation of the bill by the Company to the Board. The Date of

Presentation of the bill shall mean the date on which the bill is received by the designated office of the Board as notified from time to time. The payments shall be made through crossed cheques drawn on the banks acceptable to the Company and the Board.

xxx xxx xxx xxx xxx xxx xxx

## 8.2 **REBATE**

xxx xxx xxx xxx xxx xxx xxx

## 8.3 **LATE PAYMENTS**

In case the un-disputed amount of a bill is not paid within the Due Date of Payment, the unpaid and un-disputed amount shall bear penalty at a rate of 1.5% per month. For this purpose the month shall be considered to be comprising of thirty days. The penalty shall be payable for each day of delay in making such payment beyond the Due Date of Payment.

## 8.4 **SUPPLEMENTARY BILLS**

The adjustments, if any, on account of errors and omissions in the billing for a month, shall be made through supplementary bills, which shall also be paid/adjusted on the above lines but through crossed cheques only.

## 8.5 **BILLING DISPUTES**

- (a) Notwithstanding any dispute as to all or any portion of monthly bill/supplementary bill submitted by the Company to the Board, the Board shall pay the undisputed amount of the bill by the Due Date of Payment; provided that the amount of the bills is based on joint meter readings/jointly signed statements and applicable tariff.

(b) In case of dispute on any of the bills, the Board shall notify the Company of any disputed amount within 15 days of receipt of bills, and the Company shall rectify the errors/shortcomings or otherwise notify its rejection of the disputed amount, with reasons thereto, within 5 days of the reference by the Board, failing agreement on which the provisions of Article 13 shall apply with respect to the disputed amount of such bill. If resolution of any dispute requires the Company or the Board to reimburse to the Board or to the Company, the amount to be reimbursed shall bear interest, for the number of days from the Due Date of Payment by the Board or by the Company upto the Date of Reimbursement, at the rate equivalent to the prevailing Prime Lending Rate of the State Bank of India.

xxx            x x x            xxx            xxx

#### **8.7 DATE OF PAYMENT/DATE OF REIMBURSEMENT**

For the purpose of this Article, the Date of Payment/Date of Reimbursement shall mean the date on which the crossed cheque is delivered in person to the representative of the Company or the Board, as the case may be, or the day immediately succeeding the day on which such a cheque is sent through the registered post.

#### **8.8 LEVIES, TAXES, DUTIES, CESS ETC**

Any statutory taxes, levy, duties, cess or any other kind of imposition(s) including tax on generation of electricity, whichever is imposed/charged by any Government (Central or State) and/or any other Local body/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.

**8.10 SET OFF OF AMOUNT**

Any amount due to one Party by the second Party may be set off against the amount(s) due to the second Party by the first Party. However, such set offs of amounts due to a Party may not be applied against amounts that may become due at a future date to the second Party by the first Party.

**ARTICLE-10**

**TERM, EVENTS OF DEFAULT AND TERMINATION**

10.4 The occurrence and continuation of any of the following events, unless any such event occurs as a result of Force Majeure event or a breach by the Company of its obligations under the Agreement, shall constitute the “Board Event of Default”-

xxx            xxx            xxx            xxx

(c) if the Board fails to make, payment of undisputed amount of the monthly bill amounting to Rs. one lac and above within three months after the Due Date of Payment for that monthly bill;

(d) the Board commits material breach of the Agreement.”

xxx            xxx            xxx            xxx            xxx

12.4 Bare reading of the above clauses in the PPA, would reveal that while it was incumbent on the part of the Petitioner to prepare the bills in triplicate and raise the supplementary/revised bills for the differential amount by serving on the Board in its designated office, the Board was duty-bound to make payment or in the alternative for any valid reasons, the Board must have declined to entertain the revised bills. From the contents of the present Petition and the

counter filed by the Board, it is not clear whether the Respondent Board declined to entertain the Petitioner's claim for enhanced tariff on account of 15% mandatory water release especially when the PPA provides in Article 8 specific billing procedure and provisions for adjustment through supplementary bills and also for resolution of billing disputes. But the Respondent Board informed the Petitioner vide its letter dated 13.12.2019, that "the management of the HPSEBL is of the opinion that the outcome of the APTEL Appeal No. 15 of 2015 and Hon'ble Supreme Court Civil Appeal Nos. 3326-3345 of 2015 may be awaited.

12.5 This Commission, while considering Issue No.1 in this case, has already concluded that the contention of the Respondent Board not to implement the Commission's Order dated 10.06.2010, on the ground that an Appeal is pending against the Order appealed against is misconceived. Further, in its pleadings, the Respondent Board has conceded that there is no stay on the Order sought to be implemented and the Board is ready to pay the amount on account of 15% mandatory water release, subject to the Supreme Court decision on the pending Appeals. The Petitioner has also furnished on 16<sup>th</sup> Sept., 2019 an undertaking in relation to the amount which is to be released on account of increase in tariff in respect of release of water as per HPERC's Order dated 10.06.2010 that the Petitioner will abide by any subsequent decision as may be taken in future by the Appropriate Commission and the Court.

12.6 The Petitioner has submitted:-

- (a) that the Commission directed increase of 15 paise per kWh in the tariff of the Petitioner's project i.e. Brahamganga Small Hydro Project of 5 MW capacity, payable by the Respondent vide its Order dated 10.06.2010 and the said Order is required

to be implemented, which the Respondent is refusing to do so on fictitious grounds. The Supreme Court has already dismissed the stay application moved by the Petitioner. Thus, there is absolutely no legal ground on which the Respondent Board could decline to give effect to the aforesaid Order;

- (b) that so far as raising of the bills is concerned, the bills claiming enhanced tariff towards mandatory release of water alongwith the generation data, duly certified by the State Pollution Control Board, have been furnished, hence the submission of the Respondent Board that the payment to the Petitioner is subject to the raising of bills stands fully satisfied;
- (c) that the arguments that the dispute has to be first decided by the Supreme Court and then only the payment will be made by the Respondent Board, is patently wrong and unlawful. Further, the implementation of the Order of the Commission has already been delayed for a period of 11 years.
- (d) that the contention of the Respondent Board that they would like to seek a review of enhanced tariff on the actual data available for a period of 10 years is misconceived. Firstly, the direction of the Commission to the Board to pay enhanced tariff to the Petitioner is neither subject to nor conditioned upon a review of the data available for a period of 10 years. Secondly, the claim of the Petitioner is only for the period from the date of the Order of the Commission, allowing the increase in tariff i.e. w.e.f. 10.06.2010 till 25.04.2014 (i.e. the data on which enhancement in tariff on account of 15% mandatory release was withdrawn) and, therefore, the availability of data for a period of 10 years does not arise;



(e) that the Petitioner is in Appeal before the Hon'ble APTEL challenging the withdrawal of the enhancement in tariff from 25.04.2014. The present Petition is limited w.e.f. the period from the issuance of the Order of the Commission, allowing the increase in tariff i.e. 10.06.2010 till the Order of the Commission passed in 2014, withdrawing the enhanced tariff. Hence there will be no impact of decision of the APTEL in Appeal, on the claim raised in the present Petition. The Respondent Board is bound in law to make the payment arising out of this Commission's Order dated 10.06.2010 forthwith to the Petitioner alongwith appropriate interest/ carrying cost to be awarded by this Commission.

12.7 Contra Shri Surinder Saklani, the Learned Advocate representing the Respondent Board has reiterated the contents of the Board's response to the Petition, rejoinder and additional submissions made by the Respondent. The Respondent Board has not placed on record any material to refute the arguments addressed on behalf of the Petitioner and to establish that the revised bills raised on account of enhancement in tariff due to the 15% mandatory water release alongwith the generation data presented by the Petitioner on 5<sup>th</sup> June, 2018 were deficient or incorrect or the Board has notified, the disputed amount, in terms of clause 8.5 (b) of the PPA, to the Petitioner to rectify the errors/shortcomings or otherwise notified its rejection of the disputed amount, with reasons thereto.

12.8 Therefore, keeping in view the above discussion, perusal of record and submissions made and the specific provisions contained in Article 8 of the PPA, it is held as under:-

(a) the Respondent Board is bound to implement the Order dated 10.06.2010 passed in Petition No. 43 of 2008 (Revised No. 209

of 2009), subject to outcome of the decision of the Civil Appeals pending in the Hon'ble Supreme Court and Appeal before the Hon'ble APTEL;

- (b) the bills dated 2<sup>nd</sup> June, 2018 for the period 10.06.2010 to 25<sup>th</sup> April, 2014 on account of 15% mandatory water release are to be taken as presented and received in the designated office of the Respondent Board on 5<sup>th</sup> June, 2018 and the due date of payment shall be the date on which the period of 30 days, after the presentation of the bills, expires;
- (c) for non-payment for bill amount, the Petitioner shall be entitled to the payment of interest under Clause 8.5 of the PPA @ equivalent to the Prime Lending Rate of the State Bank of India, for the period intervening the Due Date of Payment and actual Date of Payment i.e. to say the day on which a cheque is sent to the Petitioner through registered post or is delivered in person to the representative of the Petitioner Company. The interest to be paid shall not be a pass-through;
- (d) there is undue delay, on the part of the Petitioner, in the presentation of bills, the Petitioner shall not be entitled to claim the interest/carrying cost, with effect 10.06.2010, as claimed by him.

**Issue No.3** Whether the Petitioner Company is entitled to reimbursement of the MAT, as directed by the Commission vide its Order dated 10.06.2010, alongwith interest/carrying Cost?

13. MAT was introduced on 01.04.1988 but was withdrawn w.e.f. 01.04.1991. On 01.04.1997, MAT was reintroduced in the Income Tax Act, 1961, by insertion of Section 115 JA. However, MAT was not applicable to power generating Companies till 31.03.2001. Section 115 JA of Income Tax Act was withdrawn w.e.f. 01.04.2001

and MAT, was reintroduced by insertion of Section 115 JB in the Income Tax Act and made applicable to all corporate entities including power generating companies.

- 13.1 The PPA was signed on 08.06.2004. At that time the Hydro Plant of capacity of 5 MW Brahamganga HEP was exempt from the payment of Income Tax for a period of 10 years from the Commercial Operation Date (CoD) under Section 80-1 A of the Income Tax Act, 1961.
- 13.2 The Petitioner commenced the generation of power w.e.f. 2<sup>nd</sup> April, 2008 and is, therefore, entitled to tax holiday from FY 2008-2009 onwards for a period of 10 years as per Section 80 -1 A of the Income Tax Act.
- 13.3 This Commission vide its Order dated 10.06.2010, passed in Petition No. 43 of 2008 (Revised Petition No. 209 of 2009), stated-
- “(iii) that any change in MAT, after signing of PPA in the first 10 years of the generation of power from 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 the signing of the PPA)
- The adjustment on account of change in the MAT shall be subject to furnishing to the satisfaction of the Board, of documentary proof of the actual payment and shall be made at the end of each financial year as per the above formula.”
- 13.4 As a sequel to the Commission's Order dated 10.06.2010, the Petitioner submitted the bill for an amount of Rs.99,50,000/- lacs for reimbursement of MAT payable to the Petitioner for the financial years 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, and 2014-15, on 19.06.2018, alongwith the working sheets to enable the

Board to process their bills and to reimburse the payment of the MAT. The Respondent Board has released the payment of the MAT bills for FY 2015-16 and 2016-17 as the Petitioner has raised the MAT bills for FY 2015-16 and FY 2016-17 in accordance with the stipulations laid down in Commission's Order dated 10.06.2010.

- 13.5 Contra, the Respondent Board has submitted that the Petitioner has failed to seek the above claim within the specified period and raised the bills on account of differential MAT for FY 2008-09 to FY 2014-15 on 19.06.2018, much after the lapse of more than (7) seven years. The True-up for the years upto 2014-15 has already been completed by 17.04.2017 and there being a cash flow problem facing the Respondent Board, which is hindering to make of payments to the Petitioner.
- 13.6 Sh. Arjit Maitra, the Learned Advocate appearing for the Petitioner, argues that in case the contention of the Respondent Board that True-up for the years upto 2014 has already been completed on 17.04.2017 and due to cash flow problem, it feels handicapped to process the MAT bills is to be accepted, then the Respondent Board will be exempted from making payment to any party on the premise that True-up for the years in question has been completed. He has also submitted that the contention of the Board is not only misleading but is to be abhorred which does not befit a Public Utility and deserves to be rejected in limine and that this is an illegal and inequitable approach.
- 13.7 Sh. Arjit Maitra, the Learned Advocate further argues that the renewable energy generators are expected to invest money towards installing generation capacity, pay salaries to their employees and undertake maintenance of their plants and, therefore, requires a continuous cash flow. To not to pay revised tariff on account of

water release and MAT, is a clear breach of Contract. As per him, it is very likely that this situation will drive many to bankruptcy proceedings, as they will not be able to service their debts.

- 13.8 We have gone through the submissions and records and observe that the contention of the Respondent Board that the Petitioner has submitted the MAT bills only on 19.06.2018, after the lapse of more than seven (7) years, when the True-up for the claim period i.e. upto 2014, had already been completed and as such these bills presented cannot be processed for payment, has no merits. Firstly, the Respondent itself challenged the Commission Order 10.06.2010, by way of Writ Petitions and procured the stay from the High Court and delayed the implementation of the Commission's Order for one reason or other. Secondly, the claim for reimbursement of MAT rests on the concept that any advance income tax payable for the income from the project only had to be reimbursed by the Respondent Board. Per Commission's Order dated 10.06.2010, the adjustment on account of change in the MAT is subject to the furnishing to the satisfaction of the Board, of documentary proof of the actual payment. Hence, on presentation of the bills, the Board has only to satisfy that the Petitioner has made the actual payment of the MAT. Where the Petitioner claims reimbursement of MAT paid, the Board has to reimburse the MAT to the Petitioner per concessions provided under the Income Tax Act. It is immaterial whether the accounts for the particular year have been tried up or not.
- 13.9 Per Article 8 of the PPA dated 08.06.2004, the Respondent Board, on receipt of the Supplementary MAT bills from the Petitioner, was required to process the bills as envisaged in the specific billing procedure and provisions for adjustment and resolution of the billing disputes. Even after 19.06.2018, the date on which the Board itself

admitted the presentation of MAT bills, the Board has neither processed the bills, nor accorded its satisfaction per the Commission Order dated 10.06.2010 nor notified the rejection of the MAT claims to the Petitioner.

13.10 It is a matter of great concern that the implementation of Commission Orders has been taken up in a causal manner and the payment/adjustment has been considerably delayed. It is settled law, that the legitimate claims should not be rejected merely on technical grounds.

13.11 Therefore, on examining the record and submissions made by the learned Counsel appearing for the Parties on Issue No.3, it is held as under:-

- (a) The Petitioner is entitled to the reimbursement of the MAT, as directed by the Commission vide its Order dated 10.06.2010.
- (b) The MAT bills, are to be taken to be presented on 19.06.2018 and due date for the reimbursement of the MAT, shall be the due date, on which the period of 30 days, after the presentation of the bills, expires.
- (c) The Petitioner shall be entitled for interest under Clause 8.5 of the PPA, for the period from the due date of reimbursement by the Board upto the date of actual reimbursement, at the rate equivalent to the Prime Lending Rate of the State Bank of India.
- (d) The amount of interest payable to the Petitioner shall not be a pass through.

#### **14. Summary of Finding**

- (i) the Respondent Board is not justified to keep in abeyance the implementation of the Orders passed in Petition No. 43 of 2008

(Revised Petition No. 209 of 2009) as the mere filing of appeal does not operate as a stay or suspension of the Order appealed against;

- (ii) the Respondent Board is bound to implement the Commission's Orders dated 10.06.2010 and the bills dated 02.06.2018, for the period 10.06.2010 to 25.04.2014, on account of 15% Mandatory Water Release Obligation, are to be taken to have been presented to the Board on 5<sup>th</sup> June, 2018, and the due date of payment shall be the date on which the period of 30 days, after the presentation of the bills, expired. The Petitioner shall be entitled to the payment of interest under Clause 8.5 of the PPA @ equivalent to the Prime Lending Rate of the State Bank of India for the period intervening the Due Date of payment and the Actual date of payment and the paid interest shall not be pass through.
- (iii) the Petitioner is entitled to the reimbursement of MAT, as directed by the Commission vide its Order dated 10.06.2010. The MAT bill shall be taken to be presented on 19<sup>th</sup> June, 2018 and the Petitioner shall be entitled for interest under Clause 8.5 of the PPA for the period from the Due Date of Payment up to the date of reimbursement @ equivalent to prevailing Prime Lending Rate of the State Bank of India and the payment of interest shall not be a pass-through.

15. In view of the above findings, there are merits in the Petition. Consequently, we allow the Petition and direct the Respondent Board to implement Order dated 10.06.2010 passed in Petition No. 43 of 2008 (Revised Petition No. 209 of 2009), as modified by Order dated 10.09.2014, within three months, reckoned from the date of the issuance of this Order.

This decision will be subject to the outcome of the Appeals pending before the Hon'ble APTEL against the Commission Order dated 10.09.2014, passed by the Commission and also the Civil Appeals pending in the Hon'ble Supreme Court against the order of the Hon'ble High Court of HP dated 06.08.2013. It is made clear that this Order shall not be quoted as precedent in other cases which would be considered on merits of respective case. It is also made clear that the non-compliance of these directions, without prejudice to any other action permissible under the Law, shall be considered to be the non-compliance of the directions, given by the Commission, for the purpose of initiation of the penal action under Section 142 of the Electricity Act, 2003.

16. Before parting with this case, the Commission would like to make it clear that the matter was last heard on 24<sup>th</sup> July, 2021 and both the Petitioner and the Respondent Board putforth their respective arguments and Order stood reserved, giving liberty to the contesting parties to file their written submissions. The Petitioner filed the written submissions only on 06.08.2021. Therefore, the detailed Order had to be made out and finalised, after taking into consideration the aforesaid written submissions. Hence, despite the due diligence, the exercise in making out and pronouncement of this Order has taken some time.

<b>-Sd-</b> <b>(Yashwant Singh Chogal)</b> <b>Member</b>	<b>-Sd-</b> <b>(Bhanu Pratap Singh)</b> <b>Member</b>	<b>-Sd-</b> <b>(Devendra Kumar Sharma)</b> <b>Chairman</b>
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