

FORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION,
SHIMLA

In the matter of-

M/s Jaiparkash Power Ventures Ltd.,
JUIT Complex, Wagnaghat,
P.O. Domehar Bani,
Kandaghat-173215,
Distt. Solan (HP)

.....Petitioner

Versus

1. HP State Electricity Board Ltd. thro' its
Executive Director (Pers.)
Vidyut Bhawan, Shimla-171004
.....Respondent No. 1
2. The State of Himachal Pradesh thro' its
Principal Secretary (MPP & Power)
to the GoHP, Shimla-02
.....Respondent No. 2

Petition No. 60 of 2015
(Decided on **4-8- 2015**)

CORAM
Subhash C. Negi
CHAIRMAN

Counsels:-

for the petitioner

Sh. Pawan Upadhya, Advocate

for the Respondent No.1

Sh. Ramesh Chauhan
(Authorised Representative)

for the Respondent No. 2

Sh. Shanti Sawaroop Bhatti,
(Legal Consultant)

ORDER

The petition No. 60 of 2015 has been moved by M/s Jaiparkash Power Ventures Ltd., (formerly known as Jaiparkash Hydro Power Ltd.) JUIT Complex, Wagnaghat, PO Dumehar Bani, Kandaghat (hereinafter referred as "the petitioner"), seeking review of the Order dated 30.3.2015 passed in the petitioner's petition No. 171/2014, in respect of true up of the tariff for the control period FY 11-12 to FY 13-14 of 300 MW BASPA-II Hydro Power Plant located on riverlet Baspa (tributary of River Satluj) in Kinnaur Distt., (HP).

2. The petitioner asserts that there are certain legal and factual inaccuracies in the impugned order, which require consideration, and the petitioner has raised two issues relating to calculations of the interest on arrears and of Income Tax/Minimum Alternate Tax (M.A.T.).

3. In response to the review petition, the respondent Board submits that the review petition is not maintainable and deserves to be dismissed for the reason that the grounds for the review are the same which had already been considered while making the original order, now sought to be reviewed.

4. In review proceedings the scope of interference is very limited, the review can be granted only in case of glaring omission, mistake or the like grave error and not for rehearing the case.

5. The Hon'ble Appellate Tribunal in its two judgments delivered in **Appeal Nos. 18 and 30 of 2009–Ispat Industries Ltd; Mumbai V/s Maharashtra Electricity Regulatory Commission Mumbai (2009 ELR (APTEL) 0618)** and **review petition No, 5 of 2008-Maharashtra State Electricity Distribution Co. Ltd; Mumbai V/s Erotex Industries and Exports (Ltd) and one another (2009 ELR (APTEL) 0700)**, has concluded that section 94(1)(f) of the Electricity Act, 2003 empowers the Commission to review its decisions, directions and orders and provides that they are vested with the same power which is given to a Civil Court under Order 47 rule 1 of the Code of Civil Procedure, 1908. Thus the power of the Commission to review its own orders flows from Section 94(1)(f) of the Electricity Act, 2003, read with regulation 63 of the HPERC (Conduct of Business) Regulations, 2005 as the same is conferred on a Civil Court by the Code of Civil Procedure (CPC). These powers have been spelt out in Section 114, read with Order 47, of the CPC. The review application has, therefore, to necessarily meet the requirements of Section 114 and Order 47 of the CPC.

6. As per the said provisions, the specific grounds on which an order already passed can be reviewed are-

- (a) if there are mistakes or errors apparent on the face of the record, or
- (b) on discovery of new and important matter or evidence which, after due diligence, was not within the knowledge or could not be produced at the time of making the order, or
- (c) if there exist other sufficient reasons.

7. The power of review, legally speaking, is permissible where some mistake or error apparent on the face of record is found and the error apparent on record must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. A review cannot be equated with the original hearing of a case. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that decision was erroneous on merits. But simultaneously the materials on record, which on proper consideration may justify the claim, cannot be ignored.

8. Clerical or arithmetical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any stage also be corrected by the Commission under Section 152 of the CPC, either of its own motion or on the application of any of the parties. The use of word “may” shows that no party has a right to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court. Such discretion is required to be exercised judiciously to make corrections necessary to meet the ends of justice. The word “accidental” qualifies the slip/ omission. Therefore, this provision cannot be invoked to correct an omission which is intentional, however erroneous. Because Section 152 does not countenance a re-argument on merits of facts or law, the Commission has the limited powers to correct any clerical or arithmetical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission.

9. In view of the above discussion and limited scope of review, the Commission now, keeping in view the pleadings made by the parties, proceeds to examine the claim raised by the petitioner in its review petition as under-

(i) **Interest on arrears-**

In the impugned Order, the Commission has allowed a carrying cost on the arrears based on the SBI PLR @ 13%, 14.75% and 14.45% for the years 2011-12, 2012-13 and 2013-14 respectively (up to 31.03.2015) on the annual average balance duly taking into consideration, the trued up amount of the annual fixed charges vis-a-vis the jointly reconciled statement of payments made by the HPSEBL to the JPVL.

The petitioner contents in this Review Petition that interest is calculated on the basis of considering the payments made by the HPSEBL against the tariff in a tariff year. However during the said Control Period there was substantial delay by the HPSEBL in making the payments of monthly bills/supplementary bills as per the due date of payments of bills mentioned in the PPA. Ignoring this, the Commission has allowed interest on total tariff due for the year instead of monthly basis.

In response to the Review Petition, the HPSEBL has submitted that the matter of rate of interest on payment of arrears in terms of clause 10.11 of PPA is sub-judice before the Hon’ble Supreme Court in Civil Appeal No. 8768/2012. The Hon’ble Supreme Court has stayed the Order of the Hon’ble APTEL on allowing the interest on arrears @ SBI PLR+3% p.a. (making it clear that in the event of dismissal of Civil Appeal, appellant shall have to pay the amount due with 12% rate of interest); and also dismissed the application, of the petitioner i.e. M/s JPVL, on modification of Hon’ble Supreme Court Order for deleting the rate of interest @ 12% and substituting it by SBI

PLR+3% p.a. The Commission, in its Interim Order dated 04 April 2015 in Petition No. 84/2012 filed by M/s JPVL claiming interest on arrears as per the Order of the Hon'ble APTEL, has made the proceedings *sine die* till the decision of the Apex Court.

The Commission has examined the submissions made by both the Parties. The contention of the Petitioner points out that its grievance is on the issue of interest on payments delayed by the HPSEBL on the monthly/supplementary bills as per provisions of the PPA and not on the carrying cost allowed by the Commission. The Commission understands that the parameters governing the sale of power generated from Baspa II HEP and associated payment mechanism, like invoicing, payment time-frame, related rebates, interest on delayed payments etc. and the responsibilities of each of the party thereto are clearly mentioned in the PPA entered into between both the parties, viz. the HPSEBL and the Petitioner. The scope of the true-up Order is limited to the re-computation of ARR parameters in view of the additional capitalization, actual income tax, secondary energy generated, etc. Therefore, the true-up mechanism provides for an annual reconciliation of the ARR vis-a-vis the actual audited figures; and, on account of such revision in parameters, the Commission allows carrying cost on the resulting amount as pass through. The Commission further clarifies that the payment and settlement of dues between the two parties in the PPA is a recurring activity during a year and provisions of the PPA clearly provides for suitable mechanism for dealing with such operational procedures and requires no specific intervention of the Commission.

Accordingly, the Commission is of the view that this being essentially an issue arising out of and governed in terms of the PPA, entered into between the Petitioner and the HPSEBL, both the parties are directed to mutually reconcile/settle the issue as per the provisions of the PPA. In case of any dispute in mutual settlement of the issue, the parties shall be at liberty to approach the Commission for redressal of the same through a separate Petition by invoking the provisions of section 86 (1)(f) of the Electricity Act, 2003.

No review is made out as to this issue. The first issue of Interest on arrears is decided accordingly.

(ii) **MAT issue-**

As per the impugned Order, Income tax for the FY 2014 has been approved based on the average proportion of tax claim of M/s JPVL for Baspa II HEP for the FY 2012 and 2013 vis-à-vis the total amount of tax paid by the Company (as a

whole), which corresponds to 39% and 30% respectively. This was done as the total tax paid for Baspa II HEP (as per the auditor's certificate) was equal to the total tax paid by the petitioner Company (as a whole). Further despite assurance no further clarifications were received from the petitioner Company on this issue.

The Commission has computed the MAT liability for the FY 2012 to 2014 following the approach similar to the approach followed in its Order dated 6th September 2012 and approved lower of MAT computed and actual MAT paid provisionally for the FY 2012, 2013 and 2014.

The petitioner Company i.e. M/s JPVL contends that as per the terms of PPA, Income tax is allowed at actual as per the profit and loss account of Baspa II HEP. The documents have been submitted for Rs. 33.14 crores, but the Commission has allowed only Rs. 12.15 crores. Therefore the Income tax be allowed based on the terms of the PPA.

In response the respondent Board submits that in the absence of requisite documents pertaining to Baspa II HEP, the Commission has rightly considered the amount of tax provisionally for FY 2014 based on proportion of the average of last two years Baspa II HEP tax claim to the total tax paid.

The Commission has already examined the documents placed on record by the petitioner regarding MAT/Income tax at the time of processing of true-up Petition. A conference call was also arranged by the office to clear the issue of tax; however, the claim for the year 2014 could not be substantiated by the petitioner Company i.e., despite assurance. Therefore the Commission was constrained to consider the claim of tax based on proportion of average proportion of two years (2012 and 2013) tax paid for Baspa II HEP vis-à-vis total tax paid for the Company as whole; and, apply the same to FY 2014. It is worthwhile to note that the tax amount approved by the Commission for the FY 2012, 2013 and 2014 are provisional. Neither new document/material has been placed on record nor any error/ mistake has been pointed out. Thus the review on this account also is not maintainable.

The review petition is disposed of accordingly.

--Sd--
(Subhash C. Negi)
Chairman