PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

Order in Petition No. 06 of 2023
in compliance of the
Order dated 19.03.2024
passed by the Hon'ble APTEL
in Appeal No. 60 of 2024.
Date of Order: 05.12.2024

Petition under Section 86(1)(b), 86(1)(c), 86(1)(e), 86 (1)(f), 86(1)(k) and 86(4) of Electricity Act, 2003 read with Regulation 9(1), 69, 72 and 74 of the PSERC (Conduct of Business) Regulations, 2005 seeking quashing of PSPCL's recovery notices dated 11.08.2022 and 26.12.2022 for reduction in tariff citing the availing of 'Capital Subsidy' and 'Accelerated Depreciation' by the petitioner.

In the matter of: Chandigarh Distillers and Bottlers Limited (CDBL), Regd. Office, Banur, Tehsil Mohali, District SAS Nagar– 140601, Head office: SCO 140-141, Sector 34A, Chandigarh.

... Petitioner

Versus

Punjab State Power Corporation Limited (PSPCL)
The Mall, Patiala, Punjab -147001.

.....Respondent

Commission: Sh. Viswajeet Khanna, Chairperson
Sh. Paramjeet Singh, Member

ORDER

1. The present petition has been revived pursuant to the Order dated 19.03.2024 passed by Hon'ble APTEL, in Appeal No. 60 of 2024 filed by PSPCL against the Commission's order dated 05.09.2023, remanding back the case to the Commission to adjudicate upon the issue of 'Accelerated Depreciation'. The

relevant extract of the Judgment dated 19.03.2024, reads as under:

"Neither Chapter VI nor any other Chapter of the Income Tax Act contains any provision numbered as Section 80(1)(A) at all. Accelerated depreciation is provided for under Section 32 of the Income Tax Act. While the PSERC may not have been amiss in holding that an error in the PPA would not disentitle the said provision from being enforced, the fact remains that reference in Clause 2.1.1(ii) of the PPA was to a nonexistent statutory provision. Since no provision called Section 80(1)(A) has been made in the Income Tax Act, it is an error which goes to the root of the agreement, and such a fundamental error, which is incapable of correction, must necessarily be ignored.

Accepting the construction, placed on Clause 2.1.1(ii) of the PPA by the PSERC, would mean that the 1st Respondent-Petitioner would be entitled, even if it has availed accelerated depreciation, to the higher tariff of Rs.4.95 per unit, for it can never be said to have availed the benefit of accelerated depreciation under the non-existent Section 80(1)(A) of the Income-Tax Act. Such an absurd and convoluted construction of Clause 2.1.1(ii) of the PPA does not merit acceptance. Consequently, Clause 2.1.1(ii) of the PPA must be read deleting the words "under Section 80(1)(A) of the Income Tax Act" there from. To the extent indicated hereinabove, the impugned order must be and is accordingly set aside.

…….

Since Section 80(1)(A) does not form part of the Income Tax Act, the PSERC shall ignore that part of Clause 2.1.1(ii), and instead examine whether the 1st Respondent-Petitioner had availed the benefit of accelerated depreciation in terms of the remaining part of Clause 2.1.1(ii) of the PPA, and pass appropriate orders thereafter in accordance with law. Needless to state that all other issues, which the Commission had chosen not to examine and decide in the light of its conclusions in the earlier order, are left open for examination consequent on the matter being remanded to the Commission."

2. In compliance of the above remand Order by Hon'ble APTEL, the Commission issued notice to the parties to file their respective submissions with a copy to each other. In response, PSPCL and CDBL filed their written submissions on 26.04.2024 and 07.06.2024 respectively.

3. Submissions of PSPCL made on the issue are summarized as under:

3.1 On 28.02.2013, the Commission in Petition No. 64 of 2012 determined the tariff for the Petitioner's project. The relevant extract of the Order reads as under:

"vi) The Commission determines the tariff for the renewable energy projects in accordance with its Regulations. For the purpose, the Commission in its Order dated 19.07.2012 adopted the Central Electricity Regulatory Commission (Terms and Conditions for tariff determination from Renewable Energy Sources) Regulations, 2012 with State specific modifications …. The Commission has already determined the generic tariff for various RE technologies for the year 2012-13 in its Order dated 19.07.2012 in accordance with the aforementioned RE Regulations…..

vii) For working out the levellised fixed cost of the petitioner's project for the year of applicability of tariff i.e. FY 2012-13, the Commission intends to determine the capital cost of the petitioner's co-generation project commissioned in FY 2007-08 for that year by applying the capital cost indexation mechanism as specified in the RE Regulations, 2012, on the normative capital cost of Rs. 420 lac per MW for non-fossil fuel based co-generation projects for the year 2012-13 and then depreciate it to the applicable year of tariff i.e. FY 2012-13. Accordingly, the normative capital cost for the petitioner's project for the year 2007-08 comes to Rs. 356.735 lac per MW which, after depreciation at the standard book depreciation rate of 5.28% per annum upto FY 2012-13, works out to Rs. 271.99 lac per MW for the year 2012-13. With this capital cost and using normative parameters for FY 2012-13, the levellised fixed cost works out to Rs.1.53 per kWh. The variable cost for FY 2012-13 for the petitioner's

project would be the same as allowed to other such projects to be commissioned in the State in the year 2012-13 as per Commission's Order dated 19.07.2012 i.e. Rs. 3.42 per kWh.

viii) Accordingly the tariff payable for the petitioner's project is depicted in the following table:-

Tariff for the year 2012-2013 (Rs/kWh)				
Levellised fixed cost	*Variable Cost (FY2012-13)*	*Applicable Tariff Rate*	*Benefit of Acc.Dep., if availed*	*Net Applicable Tariff Rate Adjusting for Acc. Dep. Benefit (III-IV)*
I	*II*	*III*	*IV*	*V*
1.53	*3.42*	*4.95*	*0.08*	*4.87*

3.2 Prior to entering into the PPA, the Petitioner gave an undertaking that it is not availing the benefit of Accelerated Depreciation and in case such benefit is availed in future, it shall abide by the decision of the PSPCL for reduction in Tariff on account of the same as per the PSERC Order. The said undertaking was also got incorporated in the Long Term PPA dated 22.03.2013 executed between the parties for the supply of upto 5 MW of surplus power. The said PPA specifically provides that in case the benefit of Accelerated Depreciation is availed by the Petitioner Company, it would amount to a reduction of 8 paisa per unit in the tariff. Accordingly, as per Article 2.1.1(vi) of the PPA, the Petitioner is also under an obligation to submit the requisite financial documents every year, however, the same was not complied with.

3.3 Therefore, PSPCL issued letters dated 28.09.2018 and 27.08.2019 requesting CDBL to submit its financial documents in terms of Article 2.1.1(vi) of the PPA. However, the Petitioner responded by only furnishing a

Chartered Accountant's (**CA**) Opinion dated 27.02.2020, stating that the company is not entitled for accelerated depreciation as it is engaged in Biomass based Power generation and not Solar Power generation and that it is claiming depreciation as per the normal rate of depreciation applicable to co-generation power units as specified under Section 32 of the Income Tax Act 1961, which are normal depreciation rates. The complete financial documents were submitted only on 25.11.2020 after the issuance of the default notice dated 05.08.2020 by PSPCL.

3.4 Further, in response to PSPCL's letter dated 14.09.2021 stating that, it is not clear from the CA Opinion dated 27.02.2020 submitted by CDBL, whether the benefits of Accelerated Depreciation has been availed or not, CDBL, vide its reply dated 23.10.2021 reiterated that it is only claiming normal depreciation. On 25.10.2021, the Petitioner submitted another Certificate by the CA indicating that the Accelerated Depreciation claimed for FY 2007-08 to FY 2019-20 as Nil.

3.5 After scrutinizing the said financial documents, PSPCL discovered that CDBL has depreciated its Plant & Machinery assets @ 80% on 'Written Down Value' method amounting to availing the benefit of Accelerated Depreciation in terms of this Commission's order dated 28.02.2013 read with CERC RE Regulation 2012/ CERC RE Tariff Order for FY 2012-13. Accordingly, PSPCL issued a letter dated 13.10.2022 to CDBL stating that it has availed the benefits of the Accelerated Depreciation

and is therefore, subject to reduction of the Tariff to the extent of 8 paisa per unit in terms of the PPA. However, the Petitioner vide its letter dated 05.12.2022 stated that the said claim is barred by limitation as the financial documents were submitted at the time of signing of the PPA and the position regarding depreciation was always within the knowledge of PSPCL.

3.6 It may be noted that no such documents were submitted by CDBL at the time of signing of the PPA. Further, as no satisfactory explanation was furnished by CDBL, PSPCL issued a notice dated 26.12.2022 for recovering an amount of Rs. 1,08,69,120/- (principal amount of Rs. 64,04,529/- and interest amount of Rs. 44,64,591/- (calculated upto 23.11.2022) on account of reduction of tariff by 8 paisa per unit as a result of Accelerated Depreciation availed by CDBL in terms of the Income Tax Act, 1961. The relevant extracts of the Recovery Notice dated 26.12.2022, is reproduced below :

"PSPCL is hereby serving M/s CDBL with a Recovery Notice as under:

(a) PSPCL has worked out recoverable principal amount of Rs.64,04,5291- and interest amount of Rs. 44,64,591/- (calculated upto 23.11.2022) on account of reduction of 08 paise from fixed component of tariff w.e.f. 28.02.2013. The detailed calculation sheets are attached with this letter. Further, the future bills will be passed with the reduction of 08 paise per unit in the fixed cost component of tariff.

(b) It is therefore requested that the above total amount aggregating to Rs. 1,08,69.120/- (i.e Rs. 64,04,529 + Rs. 44,64.591) payable to PSPCL be deposited with the O/o of Accounts Officer/R&P under O/o CE/PP&R, PSPCL, Patiala within 10 days of issue of this letter.

Please be informed that the LPS on this total amount shall be applicable up to the date of deposit of above amount."

3.7 That the depreciation is an accounting concept that allocates an asset's cost towards expense during its period of useful life. As with other expenses, Depreciation is deducted as an expense before calculating the taxable profit, thus reducing the tax burden on a company. An 'Accelerated Depreciation' increases the depreciation on the assets during the initial years of the asset's useful life, which allows the asset owner to write off more of the value of the asset during the initial years of ownership, thereby, reducing the greater proportion of taxable income. In this regard it is submitted that:

a) As per CERC RE tariff Regulations 2012 adopted by the Commission read with CERC RE Tariff Order for FY 2012-13 issued in terms of the same, one of the factors taken into consideration for determination of Tariff is 'Depreciation'. Further, for the purpose of determining net depreciation benefit for the projects availing the benefit of accelerated depreciation as per applicable Income tax rate, depreciation @ 5.28% as per straight line method (Book depreciation as per Companies Act, 1956) was compared with depreciation as per Income Tax rate i.e. 80% of the written down value method. The same principle has also been adopted by various State Commissions such as; Gujarat Electricity Regulatory Commission in its Order No. 4 of 2013 dated 08.08.2013 for 'Determination of Tariff for Procurement of Power by the Distribution Licensees and Others from

Biomass based Power Projects & Bagasse based Co-generation Projects' and Maharashtra Electricity Regulatory Commission in its Order No. 10 of 2012 dated 30.03.2012 for 'Determination of Generic RE Tariffs for the third year of the first Control Period'.

b) The Hon'ble Supreme Court, in the case of '*Gujrat Urja Vikas Nigam Limited Vs. EMCO Limited and Ors. [(2016) 11 SCC 182]',* has observed as under:

> *14. It is admitted on all hands that the "benefit of accelerated depreciation" mentioned in the 1st Tariff Order and the PPA is the stipulation contained in Section 32(1)(i) of the Income Tax Act read with Rule 5(1A) of the Income Tax Rules. They provide for the method and manner in which depreciation of the assets of an Assessee is to be calculated. Section 32 of the Income Tax Act (insofar as relevant) stipulates as follows:*
>
> *"32(1) in respect of depreciation ….., the following deductions shall be allowed-*
>
> *(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the Assessee as may be prescribed."*
>
> *The prescription contemplated is found in Rule 5(1A) of the Income Tax Rules, 1962 which reads as follows:*
>
> *"(1A) The allowance under Clause (i) of Sub-section (1) of Section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of these rules on the actual cost thereof to the*

Assessee as are used for the purposes of the business of the Assessee at any time during the previous year:"

Under the second proviso to the said Rule, it is further provided;

"Provided further that the undertaking specified in Clause (i) of Sub-section (1) of Section 32 of the Act may, instead of the depreciation specified in Appendix IA, at its option, be allowed depreciation Under Sub-rule (1) read with Appendix I, if such option is exercised before the due date for furnishing the return of income Under Sub-section (1) of Section 139 of the Act,…."

As evident, as per rule 5(1A) of the Income Tax Rules 1962, the Depreciation rates specified in Appendix-IA are applicable which is based on Straight Line Method, however, the Company may at its option, avail Depreciation at rates as specified in Appendix-I as well which is based on Written Down Value method and also on much higher side as compared with Depreciation rates of Appendix IA.

c) In light of the above, reading of Section 32 of the Income Tax Act 1961 with Rule 5 of the Income Tax Rules 1962 makes it crystal clear that Depreciation calculated at 80% rate by virtue of Written Down Value method, is nothing but Accelerated Depreciation.

d) Further, the Finance Bill 2016 has also clarified that Accelerated Depreciation is provided for under Section 32 of the Income Tax Act 1961 read with Rule 5 of Income Tax Rules 1962.

3.8 The Petitioner is availing the benefit of Accelerated Depreciation. In this regard it is brought out that:

a) The Income Tax Returns (**ITRs**) of the Petitioner for FY 2007–08 to FY 2020-2021 indicate that it has depreciated its Plant & Machinery assets at 80% on 'Written Down Value' method under Section 32 of Income Tax Act 1961 amounting to the availing of benefit of Accelerated Depreciation in terms of applicable CERC RE Regulations/Order and this Commission's Order dated 28.02.2013, and thus CDBL has failed to adhere to the undertaking dated 18.03.2013 as well as the terms of the PPA.

b) CDBL has also not denied that it has not depreciated its assets at 80% rate on Written Down Value method in terms of Section 32 of the Income Tax Act 1961. Further, the CA Opinion/Certificates submitted by CDBL merely records that CDBL is claiming normal depreciation in terms of Section 32 of the Income Tax Act 1961 and it is not entitled to claim Accelerated Depreciation as the benefit of Accelerated Depreciation is not applicable to Biomass based Power Projects. Also, it nowhere provides the details of the documents examined, on the basis of which the certificate is issued. The CA Certificate/Opinion has been issued in a mechanical manner, without application of any mind and/or examination of financial documents.

c) A perusal of its ITRs of CDBL, without an iota of doubt shows that that it is in-fact, availing Accelerated Depreciation under Section 32 of Income Tax Act, 1961 as per Written Down Value method at the rates prescribed in the Appendix I of Rule 5 of the Income Tax

Rules 1962 which includes 80% depreciation rates on Plant & Machinery. Therefore, the contention of CDBL that it has not availed the benefit of Accelerated Depreciation is wrong.

d) In this regard, PSPCL would also crave leave to refer to the case of another Developer i.e. Magnet Buildtech Pvt. Ltd for illustrative purposes. In terms of the CA Certificate submitted by Magnet Buildtech and the requisite ITRs, it can be clearly seen that the availing of depreciation at the rate of 80% on Written Down Value method is accepted as Accelerated Depreciation.

e) Thus, the contention of CDBL that it has not availed the benefit of Accelerated Depreciation is wrong and it has failed to adhere to the undertaking dated 18.03.2013 as well as the terms of the PPA. Further, Article 2.1.1 (vi) of PPA specifies that, if at a later stage, it has been found by PSPCL that CDBL has availed the benefit of Accelerated Depreciation, then the same is recoverable along with penal interest at SBI short term PLR +4.25%.

f) Therefore, the recovery notice dated 26.12.2022 issued by PSPCL on account of reduction of 8 paise from the fixed component of tariff as a result of claiming Accelerated Depreciation is correct and valid in law.

4. Submissions of the Petitioner (CDBL) are summarized as under:

4.1 That the notice dated 26.12.2022 issued by PSPCL is bad in law because it gives no reasoning as to when and how the petitioner has availed accelerated depreciation. There is

no mention as to how the PSPCL defines accelerated depreciation claimed by the petitioner which led to invocation of clause 2.1.1 (ii) of PPA. Nothing has been pointed out from the IT returns of the petitioner to show availing of accelerated depreciation and the relevant calculations etc. It was only after filing of the present petition by the petitioner that PSPCL has come up with the theories around accelerated depreciation. But, at that time, when the notice dated 26.12.2022 was passed, there was no application of mind and no reasoning was given rather a cryptic order was passed which is against the principles of natural justice.

4.2 In response to PSPCL's letter dated 14.09.2021, enquiring whether it has claimed accelerated depreciation at any point of time, CDBL vide its letter dated 23.10.2021 has submitted that accelerated depreciation is not available to the companies involved in biomass generation and it was availing only normal depreciation as per the Income Tax Act and has also provided the CA certificates/opinion in this respect. It was further submitted that:

a) Petitioner has claimed depreciation under Section 32(1)(ii) read with rule 5(1) which is for block of assets and figures are specified under Appendix-I as per written down value method, which is not accelerated depreciation.

b) The Judgment of the Hon'ble Supreme Court in the case of "Gujarat Urja Vikas Limited vs. EMCO Limited and Other" 2016 (11) SCC 182, has clearly held that the

depreciation claimed under Section 32(1)(i) read with Rule 5(1A) is the accelerated depreciation. PSPCL is confounding the said Supreme Court Judgment by mixing up two clauses provided thereunder which are independent and separate.

c) That the reliance placed by PSPCL on provision of Finance Bill 2016 is also of not any help because there are two types of depreciation available under Section 32 which the finance bill does not clarify at all. The Petitioner has claimed depreciation under Section 32(1)(ii) as per the Income Tax Returns which is normal depreciation.

d) That the reliance placed by PSPCL on CERC RE Tariff Regulation 2012 is misplaced. It is submitted that the said regulations define a methodology to only quantify the net depreciation benefits for the purpose of tariff determination and do not define the 'Accelerated Depreciation' to be a particular method or of a particular percentage as rather it says that Accelerated depreciation is to be as per relevant provisions of the Income Tax Act.

e) That the Order dated 28.02.2013 passed by this Commission also does not define accelerated depreciation but has quantified the depreciation benefits for the purpose of tariff determination, if availed. Even the said order is referring to accelerated depreciation under the Income Tax Act.

f) That the reliance placed by PSPCL on the orders passed by Gujarat Electricity Regulatory Commission and

Maharashtra Electricity Regulatory Commission are also not relevant because firstly they are not binding on this Commission and secondly the Supreme Court Judgment in the case of "Gujarat Urja Vikas Limited vs. EMCO Limited and Other" 2016 (11) SCC 182 already settles the matter. Moreover, these orders do not refer or discuss the provisions of the Income Tax Act which deals with the depreciation and are for the purpose of tariff determination and to quantify the net depreciation benefits but do not define accelerated depreciation themselves which has to be taken from Income Tax Act.

g) Therefore the decision whether the accelerated depreciation benefits has been taken or not has to be made solely on the basis of provision of the Income Tax Act and the methodology of calculation of net depreciation benefits in the tariff order is not the basis to decide whether the accelerated depreciation has been taken or not.

h) It is reiterated that written down value method is provided under Section 32(1)(ii) read with Rule 5(1) which is not for power generation units but for block of assets and rather it is Section 32(1)(i) which deals with power generation units and the same is prescribed under Rule 5 (1A) and in this case there is no reference to written down value method.

4.3 PSPCL's action in claiming recovery for the past more than 9 years along with penal interest from 28.02.2013 till date by alleging that accelerated depreciation has been availed by

the petitioner is wrong, unfair, illegal, arbitrary and contractual violation of the terms of the PPA because:

a) The delay and fault lies with the PSPCL alone for remaining silent on the matter for so many years when they already knew the position and all the financial documents from 2007-08 onwards were taken by the PSPCL before the signing of the PPA itself on 22.03.2013 and the yearly financial documents were shared with them on yearly basis. These ITRs and balance sheets need to be necessarily shared with the PSPCL to prove the financial capability of the developer before the PPA.

b) A similar issue of the delay and laches on the part of the PSPCL has already been decided by this Commission in favor of the petitioner while deciding the issue of capital subsidy as under:

"The Petitioner's case is that, since there has been no concealment or delay on its part, imposition of the penal interest for any delay by PSPCL itself is not justified. It was pleaded that PSPCL was very well aware of the factum of capital subsidy having been availed by it, in fact, an undertaking given by the Petitioner to this effect is also mentioned in Clause 2.1.1(iii) of the PPA.

……

As is evident, it has been specifically recorded in the PPA executed between the parties that the Petitioner generating company has given an undertaking that it has received admissible grant/subsidy from MNRE for its project. Further, as per the directions contained in the Commission's Order dated 28.02.2013 determining the tariff for the Petitioner's project in Pet 64 of 2012 and the provisions of the PPA, it

was the responsibility of PSPCL to work out the impact of subsidy and reduce the fixed component of tariff payable to the Petitioner accordingly. The provision of penal interest is applicable, on the excess amount paid through tariff, only in case of concealment or submission of wrong undertaking regarding the availed subsidy/grant etc., by the Petitioner.

Thus, it is clear that the Petitioner has neither concealed nor submitted any wrong undertaking regarding the receipt of benefits of subsidy/grant for its project. The delay in working out the financial impact of the same in the payable tariff is on PSPCL itself. Therefore, the Commission is of the view that PSPCL's action, of imposing penal interest on the Petitioner, is not in accordance with the provisions of the PPA."

c) Needless to state that in the case of accelerated depreciation also the petitioner has not concealed anything from the beginning, PSPCL is claiming that Accelerated depreciation was availed by relying on Income Tax Returns from the year 2008-09 onwards. It is incomprehensible that none of these documents were looked at by PSPCL before signing PPA.

d) Therefore, without prejudice to the submissions made hereinabove, if at all this Commission comes to the ultimate conclusion that accelerated depreciation was availed by the petitioner then at least the imposition of penal interest by PSPCL is totally wrong and illegal and the same has to be set aside in similar manner as the penal interest was set aside in the case of capital subsidy.

4.4 It is therefore prayed that the recovery notice dated 26.12.2022 be quashed in its entirety and the illegally and unlawfully deducted amount along with Late Payment Surcharge may kindly be returned to the petitioner, in the interests of justice, equity and fair play.

5. In the final hearing, held on 07.08.2024, the Ld. Counsel of the parties reiterated their respective position. After hearing the parties, order was reserved.

6. **Commission's Analysis and Decision**

The Commission has examined the submissions and arguments thereon made by the parties. The issue for consideration is Hon'ble APTEL's directions issued vide its Order dated 19.03.2024 which states that, since Section 80(1)(A) does not form part of the Income Tax Act, the PSERC shall ignore that part of Clause 2.1.1(ii), and instead examine whether the Petitioner had availed the benefit of accelerated depreciation in terms of the remaining part of Clause 2.1.1(ii) of the PPA, and pass appropriate orders thereafter in accordance with law.

The Petitioner's submission is that the impugned notice dated 26.12.2022 issued by PSPCL is bad in law as it neither gives any reasoning as to when and how the petitioner has availed accelerated depreciation nor does it mention as to how the PSPCL defines accelerated depreciation which led to invocation of clause 2.1.1(ii) of the PPA. It has been pleaded by the Petitioner that, in terms of the PPA, the decision whether the accelerated depreciation benefits has been taken or not has to be made solely on the basis of the provisions of the Income Tax

Act and the methodology of calculation of net depreciation benefits in the tariff order is not the basis to decide whether the accelerated depreciation has been taken or not. Whereas PSPCL's contention is that the ITRs of the Petitioner (CDBL) indicate that it has claimed depreciation for its Plant & Machinery @ 80% on 'Written Down Value method' which amounts to an 'Accelerated Depreciation' in term of the Commission's Order read with CERC Regulations/order.

The Commission refers to Clause 2.1.1(ii) of the PPA executed between the parties, ignoring the words "section 80(1)(A)" there from as directed by Hon'ble APTEL. It states as under:

> *"2.1.1 ii). The generating company has undertaken not to avail the benefits of accelerated depreciation under …the Income Tax Act and the tariff will be based on this undertaking. If availed the benefits of Accelerated depreciation under … the Income Tax Act then reduction of 08 paisa per unit specified for Non-Fossil based Co-Generation Projects for the year 2012-13 or as applicable/ specified by PSERC for the year of commissioning will be made from the levelised fixed cost component of Tariff stated in Para (i) above and net Tariff payable shall be Rs. 4.87/- Unit or net tariff as applicable as per the year of commissioning."*

As is evident, the PPA provides for adjustment/reduction in tariff of the Petitioner project in event of availing of the benefits of accelerated depreciation under the Income Tax Act. The Commission observes that:

a) The Income Tax Act 1961 neither defines nor mentions the term 'Accelerated Depreciation'. PSPCL has placed reliance on the Hon'ble Supreme Court's observation in the case of Gujrat Urja Vikas Nigam Limited Vs. EMCO Limited and Ors.

[(2016) 11 SCC 182], that the principle of Accelerated Depreciation is provided for under Section 32 (1)(i) of the Income Tax Act 1961 read with Rule 5(1A) of the Income Tax Rules 1962, however, it also do not help as the case of the Petitioner is that it is availing depreciation only under Section 32(1)(ii) of the Income Tax Act 1961 since the commissioning of its project.

b) Even, PSPCL itself does not appear to be fully convinced that the depreciation availed by the Petitioner is an 'Accelerated depreciation' in terms of the Income Tax Act, as evidenced from its letter dated 14.09.2021 asking the Petitioner to clarify whether the benefits of Accelerated Depreciation have been availed or not, in-spite of having received the Petitioner's financial documents/ITRs on 25.11.2020 as per its own admission. Also, PSPCL's impugned notice does not contain any reasoning/details as to how the depreciation availed by the Petitioner has been considered as accelerated depreciation in terms of Article 2.1.1(ii) of the PPA in line with the provisions of the Income Tax Act as mandated in this article of the PPA.

c) Further, the contention of PSPCL, that the ITRs of the Petitioner indicate availing of depreciation for its Plant & Machinery @ 80% on Written Down Value method "which is nothing but Accelerated Depreciation" in terms of the Commission's Order read with CERC Regulations/Order, already stands dealt in the Commission's Order dated 05.09.2023 as under:

"6.3.1 ……

As is evident, for determining the net depreciation benefits of availing 'Accelerated Depreciation', the CERC has compared the "depreciation @ 5.28% as per straight line method (Book depreciation as per Companies Act, 1956)" with the "depreciation as per Income Tax rate i.e. 80% of the written down value method".

6.3.2 In line with the same, the Commission, while determining tariff for the Petitioner's project at Rs. 4.95/kwh .., has also quantified further reduction of 08 paise/unit in the tariff in case of availing the Accelerated Depreciation. However, while incorporating the provision of the tariff determined by the Commission in the PPA, reduction in tariff on account of accelerated depreciation has been specifically linked to availing of the same under the 'Section 80- 1A', though the Commission's Order dated 28.02.2013 based on CERC's determination in its Order in its suo-motu Petition No. 35/2012 referred to above does not mention Section 80-1A. The PPA could have incorporated the parameters as stated in the Commission's Order reproduced in Para 6.3.1 (c) above.

6.3.3 …… As contended by PSPCL, the Petitioner's ITRs indicate availing of depreciation at 80% on the Written Down Value method. However, keeping in view the settled position of maintaining sanctity of the contracts, the Commission is inclined to agree with the Petitioner that the terms and conditions of the contractual relationship between the parties are governed by the PPA alone……It is evident that while the details mentioned in the Commission's Order dated 28.02.2013 on accelerated depreciation preceded the signing of PPA dated 22.03.2013, yet a specific section 80-IA of the IT Act was inserted as a part of

Article 2.1.1 of the PPA which was signed mutually by the present contesting parties."

In view of above, the Commission concludes that, even after ignoring of the non-existent term 'section 80(1)(A)' as ordered by Hon'ble APTEL, the PPA cannot be interpreted to give a meaning to "Accelerated Depreciation' as is being propagated by PSPCL since the PPA's terminology links Accelerated Depreciation specifically to the Income Tax Act, which does not define Accelerated Depreciation. The amendments to the Income Tax Rules issued vide Finance Bill 2016 cited by PSPCL also does not clear the picture, since it reads as under:

"Table 2

Sl. No.	*Section*	*Incentive available in the Income-tax Act before amendment by Act 2016*	*Phase out of incentive vide Amendment of Income-tax Act by Act 2016*
1	*32 read with rule 5 of Income-tax Rules 1962- Accelerated Depreciation.*	*Accelerated depreciation is provided to certain Industrial sectors in order to give impetus for investment. The depreciation under the Income-tax Act is available up to 100% in respect of certain block of assets.*	*The New Appendix I read with rule 5 of Income-tax Rules, 1962 is amended to provide that highest rate of depreciation under the Income-tax Act shall be restricted to 40% w.e.f 01.4.2017. …*

The above table 2 cannot be interpreted to squarely cover the present issue or the petitioner's project. It only refers to available depreciation going upto 100% to certain block of assets with a view to providing Accelerated Depreciation in order to encourage investment.

The Hon'ble Supreme Court judgment quoted by the Petitioner links Accelerated Depreciation to only Section 32(1)(i) of the Income Tax Act as agreed by both parties to

that case, while the Petitioner contends that it has availed of only normal depreciation under Section 32 (1) (ii) as per the Schedule which covers projects like those of the Petitioner and not Accelerated Depreciation under Section 32(1)(i) as decied by the Supreme Court.

Therefore, since it cannot be conclusively established that the Petitioner has availed the Accelerated Depreciation under the provisions of the Income Tax Act as mandated in the PPA Clause 2.1.1(ii), the Commission reiterates its decision and direction stated in its order dated 05.09.2023 that, "*the recovery notice dated 26.12.2022 issued by PSPCL under Article 2.1.1 (ii) of the PPA is not in order. PSPCL is directed to refund the amount recovered from the Petitioner's bills on this account, if any, along with applicable late payment surcharge*".

Sd/-	Sd/-
(Paramjeet Singh)	(Viswajeet Khanna)
Member	Chairperson

Chandigarh
Dated: 05.12.2024