

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

Petition No. 45 of 2023
Date of Order: 06.03.2024

Petition Under Section 86 (1) (f) of the Electricity Act, 2003 for quashing/setting aside the demand/recovery notice dated 24.01.2023 issued by PSPCL as well as minutes of meeting dated 22.03.2023.

AND

In the matter of M/s Chadha Sugars and Industries Pvt. Ltd. Regd. office 24-A, Ground Floor, Bharat Nagar, New Friends Colony, New Delhi - 110025, through its authorized representatives Nitin Sharma son of Sh. Purshotam Sharma, resident of House No. 506-B, Sector-61, Chandigarh-160047.

.....Petitioner

Vs.

1. State of Punjab, through Special Secretary/Power, Department of Power, Civil Secretariat, Sector 1, Chandigarh.
2. Punjab State Power Corporation Limited, through its Chairman-cum-Managing Director, The Mall, PSEB Head Office, Baradari Patiala (Punjab)-147001

.....Respondents

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

Petitioner: Sh. Sunil Chadha, Advocate

State of Punjab: None

PSPCL: Ms. Poorva Saigal, Advocate
Ms. Harmohan Kaur, CE/ARR&TR

ORDER

1. The petitioner has filed the present petition seeking to set aside the notice dated 24.01.2023, issued by Punjab State Power Corporation Limited (PSPCL) demanding a sum of Rs. 13,25,46,541/- on account of

availing Accelerated Depreciation as well as minutes of meeting dated 22.03.2023. Submissions made in the petition are summarized as under:

- 1.1 The petitioner had setup a 23 MW Non Fossil Fuel Based Co-Generation Project. The Petitioner generates electricity for captive consumption and sells the surplus power to PSPCL between 16 to 20.5 MW by way of signing short term/long term power purchase agreements.
- 1.2 The Commission vide Order dated 30.09.2010 in Petition No. 32 of 2010 (Suo-Motu) determined the tariff in conformity with Orders dated 03.12.2009 in Petition No. 284 of 2009 (Suo-Motu) and 26.04.2010 in Petition No. 53 of 2010 (Suo Motu) passed by the CERC setting out a fresh criteria for determination of tariff. Wherein, the tariff for Non-Fossil Fuel Power Projects commissioned in FY 2010-11 was determined as Rs. 4.57 (i.e., with levelized fixed tariff of Rs. 1.73 and variable tariff for FY 2010-11 as Rs. 2.84), benefit of availing accelerated depreciation as (-) Rs. 0.18 and net applicable tariff (upon adjusting for accelerated depreciation benefit, if availed) as Rs. 4.39. Thereafter, a long term PPA was executed between the petitioner and PSPCL on 10.09.2012 for a period of 20 years from the date of commissioning i.e. 20.12.2010.
- 1.3 The petitioner filed income tax returns for the Assessment Years 2011-12 and 2012-13, on the basis of which PSPCL vide letter dated 01.11.2022 alleged that the petitioner had claimed the benefit of accelerated depreciation and is thus liable for reduction of Rs. 0.18/unit from the levelised fixed cost component of tariff (Rs. 1.73/unit) in terms of clause 2.1.1 of the PPA and called upon

the petitioner to submit its reply within 15 days. In response, the petitioner vide letter dated 28.11.2022 replied that though it had availed additional depreciation of Rs. 9,37,419/- and Rs. 9,32,15,582/- for the Assessment Years 2011-12 and 2012-13 respectively, the same was reversed in the Assessment Year 2020-21. However, PSPCL rejected the plea of the petitioner and issued the demand notice dated 24.01.2023 for recovery of Rs. 13,25,46,541/-. The petitioner, vide its reply dated 27.01.2023, 21.03.2023 as well as during the personal hearing given by PSPCL on 22.03.2023 raised its objections to the said demand notice and submitted that since the petitioner was not in profit during the Assessment Years 2011-12 and 2012-13, therefore, it could not have availed Accelerated Depreciation. However, PSPCL without taking into consideration the plea of the petitioner, rejected its objections summarily vide minutes of meeting dated 22.03.2023.

1.4 Aggrieved against the recovery action under taken by PSPCL, the petitioner approached the Hon'ble Punjab and Haryana High Court vide CWP No. 8748 of 2023 seeking quashing of the said demand notice dated 24.01.2023 as well as the Minutes of Meeting dated 22.03.2023. The said writ petition was disposed of with, a direction to PSPCL to clear the arrears of the petitioner (beyond the disputed amount as claimed in the demand notice dated 24.01.2023), and the observation that it is not disputed that the petitioner has a remedy under Section 86 (1) (f) of the Act against the impugned demand notice dated 24.01.2023, which has been recognized under the agreement itself. Hence the present petition has been filed by the petitioner.

1.5 The petitioner has submitted that as per the provisions contained in the Electricity Act, 2003, PSPCL was required to approach the Commission for determination of the issue as only the Commission has the power to determine, alter, modify or amend the tariff. Thus, by unilaterally reducing the tariff by invoking clause 2.1.1 of the PPA and issuing the demand notice dated 24.01.2023, PSPCL has acted beyond its jurisdiction. Further, the petitioner had only availed additional depreciation for the Assessment Years 2011-12 and 2012-13 which was reversed in the Assessment Year 2020-21. PSPCL is wrongly claiming that there is a distinction between accelerated and additional depreciation. The petitioner has contended that PSPCL has wrongly interpreted the provisions of Section 32 and Section 80(1)(A) of Income Tax Act, 1961.

1.6 The petitioner had availed the benefit of reduced Corporate Tax rates for domestic companies in terms of Section 115 BAA as per certificate issued by Chartered Accountant dated 24.04.2023. Further, the petitioner had sustained a total loss of Rs. 9,41,53,000/- for the Assessment Year 2011-12 and 2012-13 due to the unabsorbed depreciation, therefore, the said unabsorbed depreciation of Rs. 9,41,53,000/- was added in the opening balance of the written down value of plant and machinery during the Assessment Year 2020-21 in terms of the schedule depreciation on plant and machinery in the Income Tax Return filed on 23.01.2021. As per the calculation of the petitioner, Rs. 32,11,84,005/- is recoverable from PSPCL for the period from Nov. 2022 to March 2023.

2. After hearing the Ld. Counsel for the petitioner, the Petition was admitted vide order dated 21.08.2023, with the direction that the

respondents may file their reply to the petition with a copy to the petitioner. In compliance thereof, PSPCL filed its reply dated 28.09.2023, submitting that:

2.1 On 30.09.2010, the Commission in Petition No. 32 of 2010 (Suo Moto) adopted the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2009 (**CERC RE Regulations 2009**) and determined the generic tariff for RE Power Projects commissioned in FY 2010-11. The Commission had specifically stated that for Non-Fossil Fuel based Co-Generation Projects, the applicable Tariff Rate shall be Rs. 4.57/kwh and if the benefit of Accelerated Depreciation is availed, the tariff shall be reduced by Rs. 0.18/kwh. Therefore, the net tariff payable shall be Rs. 4.39/kwh. Based on the same, a Long Term PPA dated 10.09.2012 was executed between the Petitioner and PSPCL for supply of Surplus Power between 16 to 20.5 MW generated from the Power Project.

2.2 As per the terms of the PPA, PSPCL had agreed to purchase power at the approved tariff in terms of the Order dated 30.09.2010 passed by the Commission. The PPA also contemplated that the levelized fixed tariff would stand reduced to the extent of the Accelerated Depreciation (if any) availed by the Petitioner. It is submitted that prior to entering into the PPA dated 10.09.2012 the Petitioner also gave an undertaking to PSPCL that it is availing only normal depreciation and In case it avails Accelerated Depreciation benefit in future, it shall abide by the decision of the PSPCL for reduction in Tariff on account of the

same as per PSERC Orders and CERC RE Tariff Regulations 2009 as applicable.

2.3 In terms of Article 2.1.1 (ii), (iii) and (vi) of the PPA, the petitioner is required to pass on the benefits of accelerated depreciation on to PSPCL and consequently to the consumers of the State of Punjab. Accordingly, in accordance with Article 2.1.1 of the PPA, PSPCL has issued a recovery Demand Notice dated 24.01.2023 in relation to the benefit of the Accelerated Depreciation availed by the Petitioner. The petitioner was granted personal hearing on their request on 16.02.2023 and 22.03.2023 and it was after taking into account the objections of the petitioner that PSPCL issued the demand notice dated 24.01.2023 to the petitioner for recovery of Rs. 13,25,46,541/-.

2.4 Aggrieved by the said demand notice as well as Minutes of Meeting dated 22.03.2023, the petitioner filed the CWP No. 8748 of 2023 before Punjab and Haryana High Court, which was disposed of by Hon'ble High Court vide order dated 04.05.2023 with a direction to PSPCL to clear the arrear of the petitioner (beyond the disputed amount as claimed in the demand notice dated 24.01.2023). PSPCL, in compliance of the said order dated 04.05.2023 has released/adjusted the arrears of the petitioner except the disputed amount as claimed in the demand notice dated 24.01.2023.

2.5 It is submitted that, pursuant to notification of the CERC RE Tariff Regulations 2009, CERC determined the tariff for the projects commissioned in FY 2010-11 vide its Generic RE Tariff Order dated 26.04.2010 in Petition No. 53 of 2010 (Suo Motu)

distinguishing between the depreciation as per the Straight Line Method and the Written Down Value Method. In line with the same, the Commission, vide order dated 30.09.2010, while determining tariff for the RE projects commissioned in FY 2010-11 in terms of CERC RE Tariff Regulations/Orders, had also determined the impact of availing Additional Depreciation on Written Down Method as Rs. (-)0.18/kWh for Non-Fossil Fuel based Co-Generation Projects.

2.6 It is submitted that as per rule 5(1A) of the Income Tax Rules, 1962 the depreciation rates as specified in Appendix-IA are based on Straight Line Method. However, the Company may, at its option avail depreciation at rates as specified in Appendix-I which is based on Written Down Value method. The depreciation rate as specified in Appendix-I is much higher as compared with the depreciation rate of Appendix-IA. Depreciation as per Section 32 of the Income Tax Act, 1961 read with Rule 5 of the Income Tax Rules, 1962 makes it crystal clear that Depreciation calculated by virtue of Written Down Value method, is nothing but Accelerated Depreciation. The Hon'ble Supreme Court in the case of *Gujrat Urja Vikas Nigam Limited Vs. EMCO Limited and Ors.* [(2016) 11 SCC 182] has also observed 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.

2.7 In the present case, as per Article 2.1.1(vi) of the PPA, the Petitioner was under an obligation to submit the requisite financial documents every year. However, the same was not complied with. In this regard, PSPCL vide its letters dated 28.09.2018 and

27.08.2019 had repeatedly requested the Petitioner to submit the mandated financial documents; however, the complete financial documents were only submitted to PSPCL in the FY 2021-22.

2.8 On examining the financial documents, PSPCL observed that as per the ITRs, the Petitioner had claimed depreciation on Plant & Machinery @ 80%/60% during FY 2010-11 to 2016-17 and @ 40% during FY 2017-18 to 2019-20. Thus, the petitioner had depreciated its Plant and Machinery assets at 80% on Written Down Value Method under Section 32 of Income Tax Act, 1961 which constitutes Accelerated Depreciation in terms of applicable CERC RE Tariff Regulations 2009 read with CERC RE Tariff Order for FY 2010-11 and the Commission's Order dated 30.09.2010. The petitioner has also failed to adhere to its undertaking given in terms of Article 2.1.1(ii) of the PPA dated 10.09.2012.

2.9 The CA Certificate dated 31.08.2019 submitted by the Petitioner merely records that the Petitioner has not claimed the benefit of accelerated depreciation from FY 2010-2011 to FY 2018-19. However, it nowhere provides the details of the documents on the basis of which the certificate was issued. Thus, the said CA certificate has been issued in a mechanical manner, without application of mind and/or examination of financial documents. Moreover, it admits that the petitioner is availing depreciation on Written Down Value Method which is nothing but accelerated depreciation.

2.10 PSPCL had repeatedly sought justification from the Petitioner with regard to availing of benefit of accelerated depreciation; however,

no satisfactory explanation has been furnished by the Petitioner. Under Section 32(1)(ii) (A) of the Income Tax Act 1961, additional depreciation was introduced to provide incentive for assesseees whereby additional depreciation @ 20% is available in the first year of purchase in addition to the regular depreciation that can be claimed on the assets. However, vide the demand notice dated 24.01.2023, PSPCL is only claiming the amount pertaining to the benefit of Accelerated Depreciation and not additional depreciation. The companies availing the benefit of Section 115 BAA are not allowed to claim additional depreciation and therefore the petitioner has reversed only the additional depreciation benefits in order to claim the concessional tax rate and not the accelerated depreciation.

2.11 On the issue of linking benefits of Additional Depreciation with 'Section 80(1)(A)' of the IT Act, it was submitted that:

- a) The nomenclature of 'Section 80(1)(A)' used in Article 2.1.1(ii) of the PPA is an inadvertent error, since the Depreciation is only provided for under Section 32 of the Income Tax Act, 1961 and no such section as Section 80(1)(A) exists in the Income Tax Act, 1961. Even Section 80-IA of the Income Tax Act, 1961 does not deal with accelerated depreciation in any manner; it deals with the deductions from the profits and gains for a specified period to the undertakings engaged in infrastructure development etc. It is a settled rule of interpretation that provisions of the contract should not be interpreted in a manner to lead to an anomalous or absurd result rather the words of a contract must be given a purposive meaning, therefore, to equate Accelerated Depreciation with Section 80(1)A or Section

80-IA would lead to an absurdity and cannot be the intent of the parties. In support of this, PSPCL has relied on the decision of Hon'ble Supreme Court titled as Dr. Jai Shri Laxman Rao Patil vs. The Chief Minister and Anr. (2021) 8SCC1.

- b) The articles and clauses of an agreement cannot be read in isolation and must be read harmoniously to gather the true intentions of the parties to the agreement. Thus, the Article 2.1.1 (ii)&(vi), recitals of the PPA and the undertaking dated 06.09.2012 have to be read together. Further, Section 80(1)(A) does not find any mention in the undertaking given by the petitioner on 06.09.2012 and the same has been inadvertently mentioned in the PPA. Reliance in this regard has been placed on the judgment passed by the Hon'ble Appellate Tribunal in M/s Ind-Bharath Energies (Maharashtra) Ltd. vs. Maharashtra State Electricity Distribution Co. Ltd. in Appeal No. 91 of 2010.
- c) In case a mistake has crept in a particular clause and is advertent or palpable in nature, then the Courts have inherent powers to rectify the same to bring out the effect of that particular clause of the contract. Qua this issue, PSPCL has relied upon the judgment dated 28.03.2012 passed by the Hon'ble High Court of Gauhati in Sukhendu Bikash Lashkar vs. Narayan Chandra Bhowmik.
- d) The wrong mentioning of a section/clause/provision would not be a ground to refuse relief to a party if it is otherwise entitled thereto. Reliance in this regard is placed on judgment dated 16.12.2005 by the Hon'ble Supreme Court in Shree Hari Chemicals Export Limited vs. Union of India and Ors. (2006) 1

SCC 396. Further, as per Hon'ble Appellate Tribunal's decision in Appeal No. 83 of 2018 titled as Ultratech Cement Limited vs. Gujrat State Electricity Commission and Ors. a party cannot be prevented from recovering its legitimate dues.

3. Petitioner's Rejoinder

The petitioner filed its rejoinder on 06.11.2023. While reiterating its submissions made earlier it has further stated that Section 80-IA of the IT Act refers to eligible tax exemptions in case of profits and not to accelerated depreciation. Also, it is wrong to state that the impugned notice is in accordance with Article 2.1.1 of the PPA. As per the said Article 2.1.1, PSPCL could have revised the tariff only after getting a confirmation from PEDDA. PSPCL has straightway issued the impugned demand notice, that too on an absolutely false premise. There is no quarrel to the proposition that the Commission alone has the jurisdiction to rectify any inadvertent/clerical error that may have crept into the PPA. However, it is wrong to state that the nomenclature of Section 80(1)(A) used in Article 2.1.1 (ii) of the PPA is an inadvertent error. The petitioner has also contended that though the undertaking dated 06.09.2012 has lost its significance after execution of PPA dated 10.09.2012, nevertheless, it does not anywhere mention that the petitioner will not avail the benefits of accelerated depreciation under the Income Tax Act, 1961. It is also wrong to state that the petitioner is mixing accelerated depreciation with additional depreciation and that it has only reversed the additional depreciation availed by it. Further, the judgments cited by PSPCL are not relevant to the facts of the present case as it has never claimed any alleged accelerated depreciation. Moreover, these judgments do not state that the terms and conditions

of a contractual relationship between the parties are not governed by the PPA alone.

4. The petition was taken up for hearing/arguments on 24.01.2024. After hearing Ld. Counsel of both the parties, Order was reserved vide order dated 29.01.2024 and the parties were allowed to file written submissions, if any, within one week. The petitioner and the respondent PSPCL filed their written submissions on 07.02.2024 and 08.02.2024 respectively, reiterating their earlier submissions.

5. Observations and Decision of the Commission

The Commission has carefully gone through the petition, reply by PSPCL, rejoinder by the Petitioner, arguments thereon and written submissions given by the parties. The petitioner is disputing the demand/recovery notice dated 24.01.2023 issued by PSPCL citing applicability of reduced tariff on account of availing 'Accelerated Depreciation' by the petitioner as well as minutes dated 22.03.2023 of meeting held between parties on the same issue. The Commission examines the same as under:

- 5.1 The petitioner's plea is that the impugned demand notice issued by PSPCL is beyond its power/jurisdiction. It was pleaded that only the Commission has the power to determine, alter, modify or amend the tariff. Also, Article 2.1.1(vi) of the PPA dated 10.09.2012 specifically states that PSPCL could revise the tariff and effect such recovery only after getting confirmation from the PEDDA.

On the other hand, PSPCL's contention is that the complete set of financial documents as demanded by PSPCL were submitted by the Petitioner only in 2021-22. On examining of the same it was observed that the Petitioner had availed the benefit of Accelerated Depreciation in terms of applicable CERC RE Tariff

Regulations/Orders as adopted by the Commission. Since the petitioner has failed to adhere to its undertaking/PPA dated 10.09.2012 on the issue of accelerated depreciation, PSPCL issued the said notice to give effect to the Commission's Order dated 30.09.2010, mandating applicability of a reduced tariff determined there under in case a project avails the benefit of Accelerated Depreciation.

In order to examine the issue, the Commission refers to its Order dated 30.09.2010 and Article 2.1.1(vi) of the PPA dated 10.09.2012 cited by the Petitioner, as under:

a) Order dated 30.09.2010 in Petition No. 32 of 2010 (Suo Moto):

"6. On the basis of CERC RE Regulations along with modifications referred to above, tariff for biomass units and non-fossil fuel based co-generation projects has been reworked..... Accordingly, tariff for different types of RE projects will be as hereunder:

<i>Levellised Fixed Tariff</i>	<i>Variable Tariff (FY 2010-11)</i>	<i>Applicable Tariff Rate (FY 2010-11)</i>	<i>Benefit of Accelerated Depreciation (if availed)</i>	<i>Net Applicable Tariff (upon adjusting for Accelerated Depreciation benefit, if availed)</i>
<i>(Rs/kWh)</i>	<i>(Rs/kWh)</i>	<i>(Rs/kWh)</i>	<i>(Rs/kWh)</i>	<i>(Rs/kWh)</i>
Non- Fossil Fuel based Co-Generation Projects				
1.73	2.84	4.57	(0.18)	4.39

b) Article 2.1.1(vi) of the PPA:

" vi)In case it is found at any later Stage by PSPCL/PEDA that the Company has, in spite of giving the undertakings, availed the benefits of accelerated depreciation and/or any subsidy/ grant etc., PSPCL after confirmation from PEDA shall revise the Tariff as per RE Regulations and Commission's Orders dated 30.09.2010 and shall recover the excess amount

paid through tariff with penal interest as SBI short term PLR +4.25% worked out on day to day basis”

From the conjoint reading of the above, it is evident that, though the Commission had specified the Generic Tariff for both eventualities, i.e. with or without availing of the benefit of Accelerated Depreciation, the PPA executed between the parties specifically provides for obtaining of PEDDA's confirmation before revising/changing of tariff in terms of the generic RE Tariff Order dated 30.09.2010, in case it is found at any later Stage that the Company has availed the Accelerated Depreciation in spite of giving the undertaking to the contrary. However, no such confirmation by PEDDA has been provided on the record by PSPCL. In the absence of the same, the Commission agrees with the Petitioner's plea that the impugned notice issued by PSPCL cannot be considered to be fulfilling the terms of Article 2.1.1(vi) of the PPA.

5.2 The petitioner has further pleaded that the impugned notice is based upon a wrong assumption that the petitioner has availed the benefit of Accelerated Depreciation in terms of Section 80(1)(A) of the Income Tax Act 1961. The availed additional depreciation, of Rs. 9,37,419/- and Rs. 9,32,15,582/- for the Assessment Years 2011-12 and 2012-13 respectively, was reversed in the Assessment Year 2020-21. However, PSPCL is wrongly claiming that there is a distinction between accelerated and additional depreciation. Also, since the petitioner was not in profit during the Assessment Years 2011-12 and 2012-13, therefore, it could not have availed the Accelerated Depreciation.

On the other hand, PSPCL's contention is that, the nomenclature of 'Section 80(1)(A)' used in Article 2.1.1(ii) of the PPA is an inadvertent error. The Depreciation is only provided for under Section 32 of the IT Act. In fact, Section 80(1)(A) does not exist at all in the IT Act. Even Section 80-IA does not deal with the concept of accelerated depreciation in any manner. The PPA needs to be read in consonance with the Commissions Generic RE Tariff Order dated 30.09.2010 and the Petitioner undertaking pursuant to which the PPA was entered into between the parties. The petitioner is confusing the 'additional depreciation' allowed @ 20% in the first year of acquisition/installation with the concept of 'accelerated depreciation'. The Petitioner has reversed only the additional depreciation benefits in order to claim the concessional tax rate under Section 115BAA of the Income Tax Act and not the accelerated depreciation. The ITRs of the Petitioner clearly indicate that the Plant & Machinery has been depreciated on Written Down Value method @ 80%, which constitutes accelerated depreciation.

The Commission refers to the relevant extracts of the applicable Regulations, Orders, undertaking by the Petitioner, and the PPA referred to by the parties, as under:

- a) The CERC (Terms and Conditions for tariff determination from Renewable Energy Sources) Regulations 2009 as adopted by the Commission for determination of generic RE tariff in the State, reads as under:

"15. Depreciation

(2) Depreciation per annum shall be based on 'Differential Depreciation Approach' over loan tenure and period beyond loan tenure over useful life computed on 'Straight Line Method'....

.....
22. Subsidy or incentive by the Central / State Government

The Commission shall take into consideration any incentive or subsidy offered by the Central or State Government, including accelerated depreciation benefit if availed by the generating company, for the renewable energy power plants while determining the tariff under these Regulations.”

- b) In pursuant to the above Regulations, the CERC in Petition No. 53/2010 (Suo-Motu), while determining the generic tariffs for RE projects commissioned in FY 2010-11 in accordance with the above RE Regulations, has dealt with the issue of depreciation as under:

“63. In terms of the above regulation..... For the purpose of determining net depreciation benefits, depreciation @ 5.28% as per straight line method (Book depreciation as per Companies Act, 1956) has been compared with depreciation as per Income Tax rate i.e. 80% on the written down value method.....”

- c) Accordingly, and in line with the same, the Commission vide its Order dated 30.09.2010 in Petition No. 32 of 2010 (Suo Motu) had determined the generic tariff for RE Power Projects commissioned in FY 2010-11. Wherein, the impact for availing Accelerated Depreciation by a Non-Fossil Fuel based Co-Generation Project was quantified as Rs. 0.18/kWh and the net applicable Tariff upon adjusting for the same, if availed, was stated to be Rs. 4.39/kWh in place of Rs. 4.57/kWh applicable otherwise.
- d) Further, prior to entering into the PPA, the Petitioner gave an undertaking dated 06.09.2012 to PSPCL, as under:

“.....That the Company is not availing Accelerated Depreciation benefit. The Company is availing only normal depreciation.

In case we avail such Accelerated Depreciation benefit in future, we shall inform the Punjab State Power Corporation Ltd and shall abide by the decision of the PSPCL for reduction in Tariff on account of the above benefit as per PSERC Orders, CERC RE Tariff Regulations as applicable in our case.....

That in case of any default, the Company would agree to abide by the actions taken by PSPCL in this regard, they have full right to recover the tariff / damages as deemed fit.”

- e) The provisions, as incorporated subsequently in the PPA dated 10.09.2012, executed between the parties with mutual consent, state as under:

“2.1.1 ii) The Generating Company has undertaken not to avail the benefits of accelerated depreciation under section 80(1)(A) of the Income Tax Act and the tariff will be based on this undertaking. If availed the benefits of Accelerated depreciation under section 80(1)(A) of the Income Tax Act then reduction of 18 paise per unit specified for Non-Fossil based Co-Generation Projects for the year 2010-11 or as applicable / specified by PSERC for the year of commissioning will be made from the levellised fixed cost component of Tariff stated in Para (i) above and net Tariff payable shall be Rs. 4.39/- unit or net tariff as applicable as per the year of commissioning.”

As is evident, for the purpose of determining the impact of availing benefit of ‘Accelerated Depreciation’ for the projects commissioned in FY 2010-11, the CERC Regulations/Orders as adopted by the Commission has considered the “depreciation @ 5.28% as per straight line method (Book depreciation as per Companies Act, 1956)” as distinct from the “depreciation as per Income Tax rate i.e. 80% of the written down value method”. In line with the same, the Commission, had determined the impact of the benefit of

Accelerated Depreciation as Rs. (-) 0.18 /kWh in the case of adoption of the written down value method by the Generator.

In this regard, PSPCL's statement that the Petitioner ITRs indicates that it had depreciated its Plant and Machinery assets at 80% on Written Down Value Method under Section 32 of Income Tax Act 1961 has not been refuted, implying that the Petitioner had indeed availed the same. However, the Commission notes that, while entering into the PPA for supply of power from the impugned project, the parties specifically choose to link the reduction/adjustment in tariff on account of availing of the benefit of accelerated depreciation with 'Section 80(1)(A)' under the Income Tax Act 1961, though neither the Commission's Order dated 30.09.2010 in Petition No. 32 of 2010 (Suo-Motu), which determined the Generic Tariff for RE Projects for 2010-11, nor CERC Regulation/Order have any mention of same.

The Commission observes that the provisions of the applicable Regulations/Orders/PPA and the issue of the Petitioner claiming depreciation on the Written Down Value method at the IT Rate of 80%, mentioning of the 'accelerated depreciation under Section 80(1)(A)' in the PPA along with PSPCL's submission of there being an inadvertent error in mentioning of the same and the Petitioner's claim to the contrary is similar to the issue already dealt with in Petition No. 06 of 2023 titled M/s Chandigarh Distillers and Bottlers Limited Vs. PSPCL, wherein it was held as under:

"....As contended by PSPCL, the Petitioner's ITRs indicates 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. The Commission notes that PSPCL has tried to assert that the nomenclature of 'Section 80(1)(A)' used in the PPA is a mistake and an inadvertent error. However, PSPCL's reliance, on the Hon'ble Supreme Court judgment dated 16.12.2005 (Civil Appeal No. 7534 of 2005 in the matter of Shree Hari Chemicals Export Ltd Vs Union of India & Ors), citing that wrong mentioning of a section would not be a ground to refuse relief if it is otherwise entitled thereto cannot be accepted in the impugned matter as the issue dealt therein was not the sanctity of the written contract entered into by the parties with mutual consent. It is evident that while the details mentioned in the Commission's Order on accelerated depreciation preceded the signing of PPA, yet a specific section 80(1)(A) 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. This section 80(1)(A) was not a part of the Commission's Order dated Thus, at this stage, PSPCL cannot contend that it was an inadvertent error and a mistake in order to obtain a financial recovery. It is bound by the Clauses of the PPA signed by it.

Thus, the Commission is of the view that the recovery notice dated 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."

Similar is the case in the present petition. PSPCL and the Petitioner entered into the contract through the PPA after the Commission's Order have inserted Section 80(1)(A) specifically linking it to the issue of accelerated depreciation to which both parties are now bound. Thus, the Commission, keeping in view the sanctity of the PPA, has to take the specific PPA clause into consideration while deciding the Petition. PSPCL is seeking to interpret the various appendices and sections of the IT Act to interpret the Written Down Value Method as per Appendix 1 as

“nothing but accelerated depreciation”. In doing so it is ignoring the Clause 2.1.1 of the PPA and the specific Section 80(1)(A) contained in it and passing it off as an inadvertent error. However, its plea that the insertion of Section 80(1)(A) in Clause 2.1.1 of the PPA is an inadvertent error cannot be accepted or considered at this stage. If it were so accepted, a similar plea could be used for any other clause too in the PPA by either party, leading to a complete negation of the PPA or the sanctity of a Contract.

In light of the above observations, the Commission is of the firm view that a mutually negotiated and contracted PPA is sacrosanct and its provisions must be adhered to. Thus, PSPCL’s impugned demand/recovery notice dated 24.01.2023 issued under Article 2.1.1 of the PPA is not in order and is set aside. PSPCL is directed to refund/pay the amount deducted (if any) from the Petitioner’s bills on this account along with applicable late payment surcharge.

The petition is disposed of with the above directions.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: **06.03.2024**