

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

Petition No. 06 of 2023  
Alongwith IA No. 01 of 2023  
Date of Order: 05.09.2023

Petition under 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 Regulation), 2005 seeking quashing of PSPCL's recovery notices dated 11.08.2022 and 26.12.2022 citing reduction in tariff on account of availing the Capital Subsidy and Accelerated Depreciation by the petitioner.

AND

In the matter of: Chandigarh Distillers and Bottlers Limited (CDBL), 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

Petitioner: Sh. Munish Thakur, Advocate

PSPCL: Ms Poorva Saigal, Advocate

**ORDER**

1. The petitioner has filed the present petition for setting aside the notice dated 11.08.2022, issued by Punjab State Power Corporation

Limited (PSPCL) demanding a sum of Rs. 1,62,42,924/- on account of availing capital subsidy by the Petitioner and the notice dated 26.12.2022, demanding a sum of Rs. 1,08,69,120/- on account of availing Accelerated Depreciation. The Petitioner also filed an IA alongwith the Petition praying for stay of the operation of the recovery notices, pending in the Petition. The Petition was admitted vide order dated 07.05.2023.

## **2. Submissions of the Petitioner**

The petitioner had setup an 8.25 MW Co-generation biomass project in 2007 and was selling surplus power upto 5.25 MW to PSPCL by way of signing short term power purchase agreements. The Tariff under the short term PPA's of the Petitioner ranged from Rs. 3.49 to Rs. 4.04 per unit, whereas the Tariff to the similarly placed projects having long term PPA was fixed by the Commission in the range of Rs. 4.87 to 4.94 per unit. As the Petitioner was getting very low tariff, it approached the Commission by way of filing Petition No. 64 of 2012 for determination of a remunerative Tariff for the petitioner's project and direction to PSPCL to execute a long term PPA for sale of its surplus renewable energy. The Commission disposed of the Petition vide Order dated 28.02.2013, determining the tariff for the Petitioner's project and the PPA was executed between the petitioner and PSPCL on 22.03.2013 incorporating therein the directions of the Commission. In accordance with Regulation 22 of the RE Regulations 2012, any incentive or subsidy offered by the Central or the State Govt, including accelerated depreciation if availed by the generating company for the renewable energy plant(s) is to be deducted while determining tariff. PSPCL was directed to work out subsidy/incentive, if availed by the petitioner as per the schemes of Ministry of New and Renewable Energy (MNRE) Govt. of India and

reduce the tariff to that extent for the period of 12 years. Tariff adjustment was also to be made on account of subsidy/grant/incentive of the Govt. of Punjab if any availed by the Petitioner.

2.1 The Petitioner had received an amount of Rs. 4.9 crores on account of capital subsidy for installation of 8.25 MW co-generation plant on 27.03.2009 from the MNRE.

a) PSPCL was very well aware of the fact of capital subsidy having been availed by the Petitioner in the Year 2009 because all the documents pertaining to the same were duly shared by the petitioner with PSPCL and even an undertaking was given to this effect which is also mentioned in the PPA. However, for the reasons best known to it, PSPCL did not take any action under Clause 2 (iii) to reduce the tariff by adjusting the financial impact of capital subsidy. The Petitioner continued to supply power to PSPCL under its long term PPA from 01.04.2013 till 14.09.2021.

b) The petitioner was shocked to receive communication dated 14.09.2021 from PSPCL intimating that there is an entry of Rs. 5,05,50,000 as on 31.03.2010 and Rs. 15,50,000/- as on 31.03.2007 titled "capital subsidy" in the balance sheets ending 31.03.2010 and 31.02.2007. It further mentioned that as per CA certificate capital subsidy availed from MNRE on 16.04.2009 has been mentioned as Rs. 4.9 Crore and asked for explanation of the same. The Petitioner replied to the same Vide letter dated 23.10.2021.

c) Vide letter 16.06.2022, the petitioner was informed by PSPCL that impact of capital subsidy availed by the petitioner is required to be taken into account for determination of tariff and

from amendment to the PPA dated 22.03.2013. The petitioner informed PSPCL vide letter dated 27.06.2022 that the claim being raised after 9 years of signing the PPA is time barred and that no amendment is required in the PPA.

- d) However, PSPCL did not consider the contentions of the Petitioner and illegally and arbitrarily worked out the levellised financial impact of 13 paise reduction from the fixed component of tariff recoverable from 28.02.2013 and issued notice dated 11.08.2022 for recovering Rs. 1,62,42,924/- (1,04,07,353 principal amount + Rs. 58,35,571/- interest amount), further intimating that LPS on the total amount shall be applicable upto the date of deposit of the amount.
- e) The Petitioner objected to the notice dated 11.08.2022 submitting that the Petitioner never made any concealment and there is no question of recovery as the fault is on the part of the PSPCL. However, PSPCL rejected the objections raised by the Petitioner vide letter dated 08.09.2022, intimating that PSPCL is entitled to reduction in tariff on account of any subsidy/grant received by the Petitioner from the Central/State Govt. and pressed its claim for recovering the amount.
- f) The Petitioner vide letter dated 07.11.2022, invoked article 16.1.0 of the PPA dated 22.03.2013 to settle the matter by way of mutual agreement. Keeping in view the long association and good relations with PSPCL, the Petitioner also offered to make a one-time payment of the principal amount subject to waiver of interest by PSPCL. However, the offer of the Petitioner was not accepted by PSPCL and thus is no more valid now.
- g) The demand of recovery by PSPCL for the past 09 years i.e. 28.02.2013 to 02.08.2022 along with penal interest is illegal and

against the well settled canons of law. The limitation act is applicable to the proceedings under the Electricity Act, 2003 and no claim for recovery of dues lies beyond the past three years. The principal amount of recovery has to be reduced to the past three years and accordingly the amount has to be reduced by around 2/3<sup>rd</sup>

h) Further, PSPCL is not entitled for levy of penal interest because there is no delay or concealment on the part of the petitioner and the interest amount of Rs. 58,35,571/- is liable to be set aside.

2.2 PSPCL, vide letter dated 14.09.2021, enquired from the Petitioner as to whether accelerated depreciation has been claimed by the Petitioner at any point of time.

a) In response, the Petitioner replied vide letter dated 23.10.2021 that accelerated depreciation is not available to the companies involved in biomass generation and is only available to solar power generation. The Petitioner further submitted that the Petitioner had been availing only normal depreciation as per Section 32 of the Income Tax Act and also provided the CA certificate dated 25.10.2021 in this regard to PSPCL which clearly shows that Petitioner has not availed accelerated depreciation at any time from the Year 2007-08 and has only been claiming normal depreciation specified under Section 32 of the Income Tax Act.

b) PSPCL however illegally and arbitrarily issued recovery notice dated 26.12.2022 intimating that in terms of clause 2.1.1 (ii) of the PPA fixed component of Tariff stands reduced by 8 paise per unit from 28.02.2013. The Petitioner was directed to refund the principal amount of Rs. 64,04,529/- along with penal interest

thereon of Rs. 44,64,591/-, totalling 01,08,69,120/- for the period 28.02.2013 to 23.11.2022 along with late payment surcharge.

- c) PSPCL's notice dated 26.12.2022 is bereft of any details and is bad in law because PSPCL has given no reasoning as to when and how the Petitioner availed the accelerated depreciation under Section 80 (1)(A) of the Income Tax. The Petitioner had only been claiming normal depreciation under Section 32 of the Income Tax Act.
- d) PSPCL has failed to comply with its statutory obligations and the action of PSPCL of unilateral determination of a dispute and imposing recovery for past more than 09 years is in contravention of the provisions of the Electricity Act, the terms of the long term PPA dated 22.03.2013 as well as the promotion of co-generation of electricity from renewable sources energy by providing suitable measures for sale of electricity.

2.3 The present matter is clear case of dominance abuse at the part of PSPCL as the Petitioner is having no other option. PSPCL, without referring the dispute to the arbitration or this Commission has unilaterally issued the recovery notices and then forced the recovery of the said amount by adjusting the same from the monthly tariff bills of the petitioner. PSPCL being a state instrumentality is in dominant position and the same results in unfair and unreasonable bargains between the parties and the respondent possessing wholly disproportionate and unequal bargaining power.

2.4 The Hon'ble Supreme Court in case of AP Power Co-ordination and Ors Vs. M/s Lanco Kondapalli Power Ltd & Ors. 2016 (3) SCC 468 has held that no period of limitation has been prescribed in the electricity Act for raising any claim but it does not mean that the adjudicatory power of the Commission has been enlarged to

entertain time barred claims. If a claim is legally not recoverable in a regular suit on account of law of limitation then the Commission cannot also allow or entertain such a claim and defence of limitation is a valid defence. Therefore, the claim of the Petitioner to recover the amounts for the past more than 9 years is time barred and no claim can be made for the recovery of the past dues beyond the past 3 years.

2.5 The petitioner is being financially impacted and discouraged due to the arbitrary actions of PSPCL which will hamper the growth of RE in the state. The petitioner has fully complied with the obligations under the PPA and should not be subjected to such illegal and arbitrary treatment at the hands of PSPCL. PSPCL is required to adhere to and strictly comply with the terms of the PPA and any divergence from or non-compliance by PSPCL of the clear and unambiguous terms of the PPA will constitute a breach on the part of PSPCL.

2.6 The petitioner has prayed to:

- a) *Set aside the recovery notice dated 11.08.2022 sent by PSPCL seeking refund of the principal amount of Rs. 1,04,07,353/- for the period from 28.02.2013 till 02.08.2022 on account of the capital subsidy availed by the petitioner being bad in law "to the extent" that the said claim beyond the past 3 years is time barred as per the law laid down by the Hon'ble Apex Court and in unrecoverable and the PSPCL is only eligible for amount so due for the past 3 years;*
- b) *Set aside the inclusion of interest of Rs. 58,35,571/- in recovery notice dated 11.08.2022 as being absolutely illegal and arbitrary because there was no delay or concealment on the part the petitioner and the delay is only on account of PSPCL which was well aware of the facts and thus petitioner cannot be penalized for no fault of theirs by imposition of any such interest, which is akin to a penalty;*

- c) *Set aside order of reduction in tariff issued by the PSPCL vide letter dated 26.12.2022 reducing tariff by 08 paise per unit under Clause 2.1.1. (ii) of PPA being totally wrong, illegal and arbitrary because the petitioner has not claimed accelerated depreciation under Section 80(1)(A) of the Income Tax Act at any time and has only been claiming normal depreciation under Section 32 of the Income tax Act and the letter dated 26.12.2022 is totally non-speaking and unreasoned on that part;*
- d) *Set aside the recovery notice dated 26.12.2022 sent by PSPCL seeking refund of Rs.1,08,69,120/- (Principal Refund Amount Rs. 64,04,529/- and Penal Interest Rs. 44,64,591/-) for the period from 28.02.2013 till 23.11.2022 along with Late Payment Surcharge "in its entirety" because the petitioner has not availed accelerated depreciation under Section 80(1)(A) of the Income Tax Act at any time and the said assertion of the PSPCL is bereft of any substance ;*
- e) *to stay the operation of the notice dated 11.08.2022 and 26.12.2022 till the decision of the present petition by this Hon'ble Commission and to direct the PSPCL not to forcibly adjust the alleged amount either by stoppage of monthly tariff bills submitted by the petitioner or by unilaterally deducting the said amount from the monthly tariff bills submitted by the petitioner till the decision of the present petition;*
- f) *Direct the PSPCL to refund the amount wrongly deducted from the due tariff bills of the petitioner in pursuance to the above said recovery notices along with interest @ 18% per annum from the date of deduction till the date of payment;*
- g) *pass any other order or direction as this Commission may deem fit in the facts and circumstance of the case;*

### **3. Submissions of PSPCL:**

PSPCL filed reply to the petition submitting that pursuant to the Order dated 28.02.2013 passed by the Commission, a long term



power purchase agreement dated 22.03.2013 was executed between the petitioner and the respondent for supply of upto 5 MW of surplus power from the 8.25 MW Biomass based co-generation project. In terms of Article 2.1.1 (ii), (iii) and (vi) of the PPA, the Petitioner is obligated to pass on the benefits of the subsidy/ incentive received from the Government and accelerated depreciation (if availed) on to PSPCL and consequently to the consumers of the State. Accordingly, PSPCL has issued the recovery notices dated 11.08.2022 and 26.12.2022 on account of reduction in the applicable tariff for availing the benefits of Capital Subsidy and Accelerated Depreciation by the petitioner.

3.1 It has been alleged by the Petitioner that both the recovery notices dated 11.08.2022 and 26.12.2022 are barred by limitation. PSPCL submits that there is no bar of limitation in respect of the regulatory functions of the State Commissions as held by the Hon'ble Supreme Court in the case of *A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd.* (2016) 3 SCC 468, that the provisions of the Limitation Act, 1963 applies only in respect of the adjudicatory powers of the Regulatory Commissions. Even otherwise as per Section 17 of the Limitation Act, 1963, in case of a mistake of fact/law, the limitation shall begin to run from the date of discovery of the mistake or the date from which the Applicant has knowledge of the mistake. Further, it has been held by the Hon'ble Courts that a benefit given, or excess payment made by mistake cannot act as estoppel for correction of such mistake as held in catena of judgments i.e. *Arun Kumar Kashyap v. State of Jharkhand and Ors.*, (2008) 4 JLR 177(HC) (Jharkhand), *Bejgam Veeranna, Venkata Narasimhulu and Ors. v. State of Andhra Pradesh and Ors.*, AIR 1981 Andhra Pradesh 350, *Chandi Prasad Uniyal v. State of Uttarakhand and Others*, (2012) 8 SCC 417 and *Sales Tax*

*Officer, Banaras and Others v. Kanhaiya Lal Makund Lal Saraj, (1959) SCR 1350.* PSPCL came to know of the mistake in respect of the capital subsidy only in 2021 and in respect of the issue relating to Accelerated Depreciation in 2022 after the financial documents were finally furnished by the Petitioner. Therefore, the Recovery Notices cannot be said to be barred by limitation.

3.2 The Petitioner has, admittedly, availed a benefit of capital subsidy from the MNRE for an amount of Rs. 4.9 Crores on installation of 8.25MW Co-generation plant. Accordingly, in terms of the PPA, the Commission's Order dated 28.02.2013 as well as applicable regulations, the Petitioner is required to reduce the tariff to the extent of the capital subsidy availed.

a) On 10.03.2021, PSPCL sought confirmation from PEDDA and the Petitioner regarding the benefit of Capital Subsidy availed by the Petitioner. The same was replied to by the Petitioner on 17.03.2021 providing the documents in relation to the capital subsidy. Accordingly, the reduction in the fixed component of the tariff, on account of Capital Subsidy of an amount of Rs. 4.90 crores availed by the Petitioner, worked out to be Rs. 0.13/kwh, with effect from 28.02.2013. Further, vide letter dated 19.11.2022, the Petitioner had also admitted to its liability to pay the principal amount of Rs. 1.04 crores to the Respondent on account of the Capital Subsidy benefit availed by it.

b) Therefore, the allegations made regarding the recovery notice dated 11.08.2022 being bad in law are misconceived. The adjustments made by the Respondent to the extent of reduction of Tariff by Rs. 0.13/kwh are legal and valid. During the period from 28.02.2013 to 31.05.2022, Rs. 0.13/kwh reduction in the fixed

levelized cost of Rs. 1.53/kwh works out to approx. Rs. 1.0407 crores. Such benefit availed by the Petitioner amounts to unjust enrichment of the Petitioner and the respondent is entitled to interest on the above amount (calculated upto 02.08.2022) and Late Payment Surcharge for the period from 03.08.2022 till the date of recovery, as the interest is a natural corollary for any delay in payments.

3.3 The PPA dated 22.03.2013, specifically deals with the contingency wherein accelerated depreciation has been availed by a generating company, namely that same would amount to a reduction of 8 paisa per unit in the tariff. Further, the order dated 28.02.2013 passed by the Commission, stated that the applicable Tariff Rate shall be Rs. 4.95/kwh and if the benefit of Accelerated Depreciation is availed, the tariff shall be reduced by Rs. 0.08/KWh.

- a) Prior to entering into the PPA, the Petitioner gave an undertaking dated 18.03.2013 that the Company is not availing Accelerated Depreciation benefit 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 PSERC Orders.
- b) As per CERC RE tariff Regulations 2012, one of the factors taken into consideration for determination of Tariff is '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 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.
- c) 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. 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 value of the asset during the initial years of ownership, thereby, reducing the greater proportion of taxable income. In light of the above, 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 as well which is based on Written Down Value method. The depreciation rate as specified in Appendix-I are on much higher side as compared with 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 above mentioned principle has also been adopted by various State Commissions.

- d) Further, nomenclature of 'Section 80-IA' used in Article 2.1.1(ii) of the PPA is an inadvertent error, since for all intents and purpose, Accelerated Depreciation is only provided for under Section 32 of the Income Tax Act, 1961. It is a settled rule of interpretation that the words of a contract must be given a purposive meaning. 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. To equate Accelerated Depreciation with Section 80-IA would lead to

an absurdity and cannot be the intent of the parties. It is also a settled principle that provisions of the contract should not be interpreted in a manner to lead to an anomalous or absurd result.

- e) 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, the Respondent vide letters dated 28.09.2018, dated 27.08.2019 and default notice dated 05.08.2020 repeatedly requested the Petitioner to submit the financial documents in terms of Article 2.1.1(vi) of the PPA. The complete financial documents were only submitted to the Respondent on 25.11.2020 after the issuance of default notice dated 05.08.2020 to the Petitioner.
- f) PSPCL, on examining the financial documents observed that as per the ITRs, it is clear that the Petitioner has depreciated its Plant & Machinery assets at 80% under Section 32 of Income Tax Act, 1961 (Written Down Value method) and the same constitutes Accelerated Depreciation in terms of CERC RE Regulation, 2012 read with Commission's order dated 28.02.2013.
- g) The CA Certificate submitted by the Petitioner merely records that the Petitioner is claiming normal Deprecation in terms of Section 32 of the Income Tax Act, 1961. It has been erroneously stated that the benefit of Accelerated Depreciation is not applicable to Biomass based Power Projects which is contrary to CERC RE Regulations, 2012 as well as the Commission's Order dated 28.02.2013. It also nowhere provides the details of the documents examined, on the basis of which the certificate is issued. No details have been provided in the certificate, which has been

issued in a mechanical manner, without application of any mind and/or examination of financial documents.

h) The Respondent had duly sought for the justifications from the Petitioner in this regard. No satisfactory explanation has been furnished by the Petitioner. Therefore, the recovery notice dated 26.12.2022 issued by the Respondent for recovering an amount of Rs. 1,08,69,120/- on account of reduction of 08 paise from the fixed component of tariff for claiming benefit of Accelerated Depreciation is correct and valid in law.

3.4 As stated hereinabove, the claim of the Respondent is in accordance with the terms of the PPA, the Order dated 28.02.2013 and the applicable regulations. It is denied that there has been any abuse of its dominant position by the Respondent. The Petitioner has been the beneficiary of the preferential tariff under the long term PPA and cannot now raise any issues regarding "unequal bargaining power".

4. The Petitioner filed a rejoinder to the reply filed by PSPCL reiterating its earlier submissions. Petitioner has further submitted that the impugned matter has nothing to do with the regulatory functions of the Commission. The, reference to Section 17 of the limitation Act by the Respondent is also not relevant. The case of the petitioner is entirely different and at best the respondent is entitled for recovery, if any, only for the preceding 3 years and not 9 years as claimed by PSPCL.

5. After hearing the parties on 03.08.2023, Order was reserved.

#### **6. Findings and Decision of the Commission**

The Commission has carefully gone through the petition, reply by PSPCL, rejoinder by the Petitioner and the arguments thereon by the parties. The petitioner is disputing the recovery notices dated

11.08.2022 and 26.12.2022 sent by PSPCL citing applicability of reduced tariff for availing of 'Capital Subsidy' and 'Accelerated Depreciation' by the Petitioner for its project. The Commission examines the same as under:

## 6.1 Issue of Limitation

The Petitioner's plea is that the notices dated 11.08.2022 and 26.12.2022 issued by PSPCL claiming refund on account of reduction in applicable tariff for the past more than 9 years are bad in law as the claims for dues beyond the past 3 years are barred by the limitation Act which is applicable under the Electricity Act also, as held by the Hon'ble Apex Court in '*AP Power Co-ordination Committee & Ors Vs. M/s. Lanco Kondapalli Power Ltd & Ors*' – 2016 (3) SCC 468'.

The Commission refers to the relevant extract of the judgement cited by the Petitioner, which reads as under:

***“30. .... Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act. .... In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. ....”***

As is evident, the matter dealt herein is the issue of entertainment of claims raised before the Commission and not otherwise. On the other side, PSPCL seems to be confusing the Commission's adjudication of disputes between the parties under Section 86(1)(f) with the regulatory actions of the Commission. However, as already observed in various earlier Orders of the Commission, the Limitation Act only bars the remedy, but does not destroy the right. The debt is not extinguished, only the remedy to enforce the liability in a court of law lapses. That right can be exercised in any other manner than by means of a suit as held by the Hon'ble Supreme Court in its judgment dated 05.10.2021 (Civil Appeal No. 7235 of 2009), reproduced below:

*“Under the law of limitation, what is extinguished is the remedy and not the right. To be precise, what is extinguished by the law of limitation, is the remedy through a court of law and not a remedy available, if any, de hors through a court of law.”*

**Thus, the Commission is of view that the Petitioners' plea that PSPCL's action of recovering the excess amounts is barred by 'Limitation' is not sustained in the impugned matter.**

#### **6.2 Issue of reduction in tariff on account of availing the Capital Subsidy:**

The Commission observes that the Petitioner is neither disputing the availing of subsidy nor the consequent reduction in tariff by PSPCL. 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.

Whereas, PSPCL's contention is that it only came to know about non-consideration of capital subsidy in the tariff in 2021 and the recovery of the excess amounts paid along with the penal interest on the same and applicable Late Payment Surcharge for any delay in the refund is justified as interest is a natural corollary of any delayed payment.

The Commission refers to the relevant extracts of its Order dated 28.02.2013 determining the tariff for the impugned project and the PPA executed between the parties as under:

a) Commission's Order dated 28.02.2013 in Pet 64 of 2012

*"6.(vii)....., the normative capital cost for the petitioner's project ..... 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.....*

*.....*

*x) Further, in accordance with Regulation 22 of the RE Regulations, 2012, any incentive or subsidy offered by the Central or State Governments if availed by the generating company for the renewable energy power plant(s), is to be deducted while determining tariff. Although per unit reduction on account of accelerated depreciation benefit has been quantified, reduction in tariff on account of other incentives and subsidies has not been specified. In the circumstances, the Commission directs that PSPCL will work out subsidy/incentive, if any, availed by the petitioner as per the scheme(s) of the Ministry of New and Renewable Energy, Govt. of India and reduce the tariff to that extent for the period of 12 years....."*

b) Article 2.1.1 of the PPA dated 22.03.2013

*“iii). The generating company has given undertaking that it has received admissible grant/subsidy from Ministry of New and Renewable Energy (MNRE) GOI/GOP for the project. PSPCL shall confirm the same from PEDDA and work out the levellised financial impact for the amount of grant/subsidy so claimed as per the Commission’s order dated 28.02.2013. The cost component of tariff stated in para (i) will be reduced by the financial impact so worked out for the grant/subsidy. ...*

*.....*

*vi). .....In case it is found at any later Stage by PSPC/PEDA that the Company has, in spite of giving the undertakings, availed the benefits of accelerated depreciation and/or any subsidy/grant etc., PSPCL ..... 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.”*

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.**

**However, since the Petitioner has availed a higher tariff than that he was actually entitled to in terms of the Commission's Order and the PPA; PSPCL is justified in recovering the surplus amount so received by the Petitioner. Also, in view of the well settled law that money has a time value; the Petitioner is also required to bear only the carrying cost on the same but not the penal interest. The rate of carrying cost shall be as allowed by the Commission to PSPCL in its Tariff Orders for the respective years. Accordingly, PSPCL is directed to the refund the excess amount so recovered from the Petitioner's bills along with the applicable late payment surcharge.**

**6.3 Issue of reduction in tariff citing availing of 'Accelerated Depreciation' by the Petitioner:**

6.3.1 The Commission refers to the relevant Regulations, Orders and the PPA as under:

a) The applicable regulations i.e. the CERC (Terms and Conditions for tariff determination from Renewable Energy Sources) Regulations 2012 adopted by the Commission for determination of RE tariffs in the State, provides as under:

*"15. (2) Depreciation per annum shall be ..... computed on 'Straight Line Method'. The depreciation rate for the first 12 years of the Tariff Period shall be 5.83% per annum and the remaining depreciation*

shall be spread over the remaining useful life of the project from 13th year onwards.

.....

## **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.

Provided that the **following principles shall be considered for ascertaining income tax benefit on account of accelerated depreciation**, if availed, for the purpose of tariff determination:

- i) Assessment of benefit shall be based on normative capital cost, **accelerated depreciation rate as per relevant provisions under Income Tax Act** and corporate income tax rate.
- ii) Capitalization of RE projects during second half of the fiscal year. Per unit benefit shall be derived on levellised basis at discount factor equivalent to Post Tax weighted average cost of capital”.

b) Also, the CERC in Petition No. 35/2012 (Suo-Motu) while determining the generic tariffs for RE projects in accordance with the above RE Regulations has dealt with the issue of depreciation as under:

“54. In terms of the above regulation, for the projects availing the benefit of accelerated depreciation as per applicable Income tax rate @ 32.445% (30% IT rate+ 5% surcharge +3% Education cess) has been considered. **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% of the written**

**down value method** ..... *Income tax benefits of accelerated depreciation, has been worked out as per normal tax rate on the net depreciation benefit. .... “*

c) The Commission’s Order dated 28.02.2013 in Petition No. 64 of 2012 filed by the Petitioner for determination of tariff for its project, reads as under:

“vii) ....., *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. ....*

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

Tariff for the year 2012-2013				
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

ix) *The above tariff shall be payable to the petitioner prospectively with effect from the date of issue of this Order but shall be paid after signing of the PPA for supply of Power on long term basis with PSPCL. Both the parties are directed to sign the PPA afresh for supply of power on long term basis expeditiously. The levellised fixed component will remain the same during the Tariff Period. ....*

x) *Further in accordance with Regulation 22 of the RE Regulations 2012 any incentive or subsidy offered by the Central or the State Govt. if availed by the generating company for the renewable energy plant(s) is*

*to be deducted while determining tariff. Although per unit reduction on account of accelerated depreciation benefit has been quantified reduction in tariff on account of other incentives and subsidies has not been specified. In the circumstances the commission directs the PSPCL will work out subsidy/incentive if any availed by the petitioner as per the Schemes of Ministry of New and Renewable Energy Govt of India and reduce the tariff to that extent for the period of 12 years. ....”*

d) Undertaking by the Petitioner/provision made in the PPA:

(i) Prior to entering into the PPA, the Petitioner gave an undertaking dated 18.03.2013 to PSPCL, as under:

*“.....That the Company is not availing Accelerated Depreciation benefit...*

*In case we avail such Accelerated Depreciation benefit in future, we shall inform the Punjab State Power Corporation Limited (PSPCL) and shall abide by the decision of the PSPCL for reduction in Tariff on account of the above benefit as per PSERC Orders. ....”*

*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 of applicable tariff as incorporated in the PPA signed on 22.03.2013, states 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 08 paise 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 evident from above, 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 by taking into account depreciation at standard book depreciation rate of 5.28% per annum (based on Straight Line Method), 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 The Petitioner’s plea is that PSPCL has misconstrued the terms of the PPA. It was pleaded that as per Clause 2.1.1(ii) of the PPA, it had undertaken not to claim accelerated depreciation benefits u/s 80-1A of the Income Tax Act. The Petitioner submitted that its company is not entitled for accelerated depreciation and had been

claiming only normal depreciation under Section 32 of the Income Tax Act. The action is warranted only on violation of the said provision i.e. if it avails the accelerated depreciation under Section 80-IA of the Income Tax Act as stated in the PPA.

On the other hand, PSPCL has submitted that, the nomenclature of 'Section 80-IA' used in Article 2.1.1(ii) is an inadvertent error, since for all intents and purpose, Accelerated Depreciation is only provided for under Section 32 of the Income Tax Act, 1961. PSPCL further submitted that ITRs of the Petitioner belies the Petitioner's claim and indicates that the Plant & Machinery has been depreciated at 80% on Written Down Value method, which constitutes Accelerated Depreciation.

The Commission notes that the Petitioner has availed depreciation u/s 32 of the IT Act, 1961 which is an admitted position of the Petitioner even during arguments by Ld. Counsel. . 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-IA' 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 Commissions 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. This section 80-IA was not a part of the Commission's Order dated 28.02.2013. 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 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.**

The Petition and the IA are disposed of in light of the above analysis, observations and directions of the Commission.

**Sd/-**

(Paramjeet Singh)

Member

**Sd/-**

(Viswajeet Khanna)

Chairperson

Chandigarh

Dated: 05.09.2023