

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,  
BANGALORE**

**Dated : 14<sup>th</sup> August, 2014**

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar        | Member   |
| 3. Sri D.B. Manival Raju      | Member   |

**OP No.21/2013**

**BETWEEN :**

M/s.CLP wind Farms (India) Private Limited,  
Flat No.D-1, 3<sup>rd</sup> Floor,  
Salcon Ras Vilas,  
District Center, Saket,  
NEW DELHI – 110 017.  
*[Represented by M/s. Trilegal, Advocates]*

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**PETITIONER**

**AND:**

Bangalore Electricity Supply Company Limited,  
K.R. Circle,  
BANGALORE – 560 001.  
*[Respondents represented by M/s. ALMT Legal, Advocates]*

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**RESPONDENT**

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1) The Petitioner has prayed for a direction against the Respondent to refund/reimburse the Minimum Alternate Tax (MAT) paid by it for the period FY2012-13, attributable to the Wind Mill Project of the Petitioner, and to reimburse MAT or any other Income-tax, surcharge and cess, paid in relation to the said Project, upon the Petitioner furnishing proof of such payment of the MAT or other income, tax, on an ongoing basis during the term of the Power Purchase Agreement (PPA), and for such other reliefs.

- 2) The material facts required for disposal of this Petition are stated as follows:
- (a) The Petitioner is a generating company, having a wind power generating station having capacity of 39.6 Mega Watts (MW) at Harapanahalli village, Karnataka (hereinafter referred to as the Project) and has executed a PPA dated 28.12.2010 (ANNEXURE A-1) with the Respondent for sale of electricity generated from the Project. The said Project has been commissioned in February, 2011.
- (b) The Petitioner, though exempted from payment of regular income tax u/s 80IA of the Income Tax Act, 1961, for ten years from the Commercial Operation Date (COD), but is required to pay the MAT in relation to the Project, and the Respondent is liable to reimburse the MAT when paid by the Petitioner, as per the Commission's generic Tariff Order dated 11.12.2009 relating to the Renewable Sources of Energy. The Petitioner had actually paid MAT for FY 2012-13. The Petitioner, vide its letter dated 10.4.2013 (ANNEXURE A-10), requested the Respondent to confirm as to which of the documents that were necessary to claim reimbursement of the MAT.
- (c) The Respondent, vide letter dated 4.5.2013 (ANNEXURE A-11) replied that as the Petitioner was exempted from payment of income tax u/s 80IA of the Income Tax for the initial period of ten years commencing from the

COD, it was not liable to reimburse any income tax up to the end of the 10-year period from the date of the commercial operation. Further, the Respondent, relying on Section 115JB of the Income Tax Act, stated that the MAT amount, if any, paid by the generator was entitled to be adjusted against the regular income tax liability arising after ten years of the payment of MAT and there was no current liability to reimburse the MAT. Aggrieved by the reply, the Petitioner has filed the present Petition.

3) The Respondent appeared through its counsel and filed its Statement of Objections on 10.7.2014, wherein it has contended as follows :

(a) As per Article 4.1(ix) of the PPA dated 28.12.2010, it was the Petitioner's obligation to make all statutory payments, such as income tax, cess and duty on it, etc. At the time of executing the PPA, the Petitioner had suggested to include a clause in it to facilitate reimbursement of the amount of income tax (including MAT) paid by it from the Respondent, on production of the documentary proof for the payment. In this regard, the Respondent has contended that after discussion and negotiation, the said amendment suggested by the Petitioner was left out; however the other amendment suggested by the Petitioner for sharing the Clean Development Mechanism Development (CDM) Benefits was included in the PPA. Therefore, the Respondent has contended that the Petitioner is not entitled to claim reimbursement of the income tax (including MAT) paid by it.

(b) The Respondent has further contended that the primary objective of introducing the MAT was to ensure payment of tax by companies popularly known as, "Zero Tax Companies", i.e., companies having book profits, but which have no significant taxable income because of exemptions, deductions and incentives. That the MAT paid by a company under Section 115JB of the Income Tax Act is allowed as tax credit, which may be set-off within a period of ten years, in accordance with Section 115JAA of the Income Tax Act, against the regular income tax that becomes payable by the Company. Further, that unutilized MAT credit cannot be carried forward beyond ten years from the year of the MAT payment. Therefore, it has contended that, if at all the MAT is to be reimbursed to the Petitioner, such reimbursement is to be made only subsequent to the set-off of the MAT amount paid against the regular income tax payable, i.e., when the actual tax liability of the Petitioner is crystalized.

4) We have heard the learned counsel for the parties. They have reiterated the contentions taken in their pleadings.

5) The following points would arise for our consideration :

(1) Whether the Petitioner is entitled to reimbursement of the MAT paid by it in respect of its Project, by furnishing proof of such payment? If yes, to what extent?

(2) What Order?

6) After considering the rival submissions of the learned counsel for the parties, our findings on the above points are as follows :

7) **ISSUE No.(1) :**

(a) The first contention of the Respondent is that even after the generic Tariff Order dated 11.12.2009 passed by this Commission for renewable sources of energy, the parties had discussed and negotiated regarding the liability to reimburse the income tax (including the MAT) by the Respondent and the Petitioner had agreed to give up its claim for reimbursement of the income tax (including MAT) paid by it. Therefore, the Respondent contended that it is not liable to reimburse the income tax (including MAT) paid by the Petitioner. The Petitioner has denied that it was a consenting party for such an understanding. Further, it has contended that legally the Respondent cannot take such defense.

(b) Upon consideration of the facts and the issues of law involved in this regard, we are of the view that the contention of the Petitioner has to be accepted. It is not in dispute that this Commission passed the generic Tariff Order dated 11.12.2009 for Renewable Sources of Energy, and in respect of the MAT, the following is the provision :

*"The Commission, in its earlier order had factored in MAT for the Tariff Computations. Income tax (IT), surcharge & cess are statutory payments and would vary from year to year, depending upon IT policy of the GoI. Hence, the Commission decides to allow Income tax, surcharge & cess as a pass through without factoring in the same for tariff computations.*

*The amount of tax, surcharge & cess that has to be claimed shall be worked out considering the amount of RoE approved in this order and the tax rate (including surcharge & cess) prevailing in the relevant years and shall be claimed separately from the ESCOMs."*

- (c) This Commission had approved the Standard Terms and Conditions of PPA subsequent to passing of the generic Tariff Order dated 18.1.2005 for Renewable Sources of Energy. The relevant clause regarding payments on account of any taxes, etc., is contained in Article 4.1(ix) of the existing Standard PPA, which reads thus :

**"4.1 Obligations of the Company:**

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*(ix) The Company shall be responsible for all payments on account of any taxes, cesses, duties or levies imposed by the GoK, or its competent statutory authority on the land, equipment, material or works of the Project or on the Electricity generated or consumed by the Project or by itself or on the income or assets owned by it."*

- (d) Under the generic Tariff Order dated 18.1.2005, the liability to pay the income tax by the generator was factored in the tariff itself and it was not a pass through to the distribution licensee. Therefore, Article 4.1(ix) was introduced in the Standard PPA, fixing the liability in respect of income tax, etc., on the generator. However, subsequent to passing of the generic Tariff Order dated 11.12.2009, there should have been corresponding amendment in the existing Standard PPA, regarding pass through of the liability of income tax, etc., paid by the generator to the distribution licensee. Admittedly, such change in the clause was not effected in the Standard PPA. For this reason, the Petitioner requested clarification by letter dated 17.8.2010 (ANNEXURE A-4) and this Commission replied as per letter dated 31.8.2010 (ANNEXURE A-5) addressed to the Petitioner, stating that:

*"In the Standard Format of the PPA for NCE Projects, since there is no specific clause regarding treatment of Income tax paid by the generator, the same is governed by the orders issued by the Commission from time to time. Hence, if the developer has entered into a PPA for NCE Projects on or after 1.1.2010 (the date from which the order comes into effect), he has to claim the amount of Income tax from the concerned ESCOM after producing the proof of payment of Income tax."*

- (e) Subsequently, the Petitioner, by letter dated 21.12.2010 (ANNEXURE A-6), requested the Respondent for appropriate amendments to the existing

Standard PPA Format regarding reimbursement of the amount of the income tax paid by the generator and also regarding sharing of the Clean Development Mechanism (CDM) Benefits, to comply with the terms of the generic Tariff Order dated 11.12.2009. The Petitioner, incorporating the suggested terms in the PPA in this regard, also sent the draft PPA to the Respondent, to be executed between the parties. The Respondent has not replied in writing to this letter of the Petitioner. Thereafter, the parties entered into the PPA in question. Admittedly, this PPA does not contain the amendment suggested by the Petitioner regarding reimbursement of income tax paid by it.

- (f) The Respondent has contended that after receipt of the draft PPA containing the suggested amendments, the parties had discussed and negotiated the proposed amendments, and it was agreed to accept the clause regarding sharing of the Clean Development Mechanism (CDM) Benefits and to reject the clause regarding reimbursement of income tax (including MAT). On the other hand, the Petitioner has contended that there was no such discussion or negotiation between the parties in this regard. The Petitioner has contended that the Respondent had assured that the clause regarding reimbursement of income tax (including MAT) would be included at the time of obtaining approval of the PPA from the Commission. As already noted, the PPA is dated 28.12.2010. Immediately thereafter, on 12.1.2011, the Petitioner wrote a letter (ANNEXURE A-7) to the Commission, stating that the said PPA was then before the Commission for



considering grant of its approval and that incorporation of an appropriate clause regarding reimbursement of income tax (including MAT) was necessary. In response to the letter ANNEXURE A-7, this Commission intimated the Petitioner that the instructions contained in its earlier letter dated 31.8.2010 (ANNEXURE A-5) would hold good. Under letter ANNEXURE A-5, this Commission had informed the Petitioner that it could claim the reimbursement of income tax paid on production of proper documents.

(g) The above sequence of facts certainly leads to an inference that the Petitioner had not voluntarily agreed to give up its claim regarding reimbursement of income tax (including MAT) paid. There is merit in the contention of the Petitioner that it was led to believe by the Respondent that, at the time of approval of the PPA or subsequently, a proper clause regarding reimbursement of income tax (including MAT) would be suitably incorporated in the PPA with the approval of the Commission, and therefore, it signed the PPA in its present form. In view of the above facts, we are of the view that the first contention of the Respondent is liable to be rejected.

(h) The determination of generation tariff for supply of electricity to the distribution licensee is within the exclusive jurisdiction of the appropriate Commission. The parties are bound by the said terms of tariff. If for any reason, the generator agrees for a lesser tariff, such agreement should be

clearly established by the distribution licensee, by producing unimpeachable evidence. Such evidence is not produced by the Respondent. In the present case, the liability of the Respondent for reimbursement of income tax (including MAT) fixed by this Commission is an integral part of the generic tariff. Therefore, we are of the view that the Respondent has failed to establish that the Petitioner had given up a part of tariff fixed by the Commission. In view of this finding, the first contention of the Respondent is legally untenable.

- (j) The second contention of the Respondent is that the question of reimbursement of the MAT paid would arise only subsequent to the Petitioner setting off the MAT amount paid against the income tax payable, i.e., when the actual tax liability of the Petitioner is crystalized. In other words, the Respondent contended that the MAT paid prior to set-off is only in the nature of advance tax paid and cannot be passed on as a tax liability. On the other hand, the Petitioner has contended that the MAT is not in the nature of an advance tax and the Petitioner is entitled to claim from the Respondent the reimbursement of the MAT immediately after the same is paid by it, from time-to-time. This controversy is already settled by the Hon'ble Appellate Tribunal for Electricity (ATE) by its Order dated 2.5.2014 in Appeal No.330/2013, in the case of *BESCOM and others -Vs- Tata Power Company Limited and another*. In the said Appeal, the Order dated 10.10.2013 passed by this Commission in OP No.49/2012, which involved the same question as in the present case, as to when the liability

for reimbursement of the MAT to the generator by the distribution licensee would arise, was under challenge. Considering the relevant clauses in the PPA in question in that case, this Commission had taken the view that the liability to reimburse the MAT by the distribution licensee would arise soon after its payment by the generator. We find that the facts and circumstances of the present case are similar to that of the facts and circumstances in the above-said Appeal, with regard to reimbursement of the MAT paid by the Petitioner. Therefore, the second contention of the Respondent is also liable to be rejected.

- (k) The generic Tariff Order dated 11.12.2009 for Renewable Sources of Energy passed by this Commission allows the income tax, surcharge & cess as a pass through and stipulates that such income tax, surcharge & cess shall be worked out, considering the amount of RoE and the tax rate, including surcharge and cess, prevailing in the relevant years. In the said Tariff Order, for Wind Projects, this Commission has approved Rs.4.70 Crores/MW as the capital cost, including transmission infrastructure costs, Debt Equity Ratio of 70:30 and RoE of 16%. The above terms in the generic Tariff Order dated 11.12.2009, make it clear as to what would be the maximum liability of income tax that could be passed on to the distribution licensee, who purchases the electricity. We are therefore of the opinion that this maximum limit equally applies to the reimbursement of the MAT in a particular year.

- (l) It may be noted that the year in which MAT set-off is claimed, tax liability for that year would be consequently reduced by the set-off amount and it is such reduced liability that would normally have been passed on to the distribution licensee in the subsequent year, had the PPA been subsisting. The benefit of the set-off of the MAT at credit, at the time of expiry of the PPA in respect of the Project, requires to be passed on to the distribution licensee, as and when such credit gets set-off in the subsequent years. For securing repayment of such set-off of the MAT credit to the distribution licensee by the generator, proper security would have to be taken from the generator. In the present case, the term of the PPA is for 20 years from the COD, i.e., from February, 2011. Therefore, we are of the view that the Petitioner may have to be directed to furnish security in the form of a bank guarantee or in any other form acceptable to the Respondent, for securing repayment of such set-off of the MAT credit.
- (m) For the foregoing reasons, we hold Issue No.(1) in affirmative.

8) **ISSUE No.(2) :**

As we have held Issue No.(1) in affirmative, we pass the following :

**ORDER**

- (i) The Petitioner is entitled for reimbursement of the MAT paid by it during the subsistence of the PPA dated 28.12.2010 (ANNEXURE A-1), subject to the

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maximum limit specified for Wind Projects in the generic Tariff Order dated 11.12.2009 (ANNEXURE A-2); and

- (ii) The Petitioner shall furnish security in the form of a bank guarantee or in any other form acceptable to the Respondent in respect of the MAT credit that gets set-off in future years after the expiry of the term of the PPA dated 28.10.2010.

Sd/-

(M.R. SREENIVASA MURTHY)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER