

No.N/52/11

BEFORE THE KARNATAKA +ELECTRICITY REGULATORY COMMISSION BANGALORE

Dated 24th November 2011

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member |

OP No. 24/2011

BETWEEN

1. M/s Rayalaseema Alkalies & Allied Chemicals Ltd.
No.25, Shankara Park Road
BANGALORE – 560 004
 2. Sri G. Krishna Murthy
S/o Late P. Goura Swamy Setty
No.3058, Maa Illu
9th Main, 17th Cross, BSK II Stage
BANGALORE – 560 070
 3. Sri B.S. Chandrasekhar
S/o Late B.L. Satyanarayana Shetty
No. 167/4, 7th Cross, 2nd Block, Jayanagar
BANGALORE – 560 011
(Represented by M/s. Holla & Holla Advocates)
- ... Petitioners

AND

1. Karnataka Power Transmission Corporation Limited
Kaveri Bhawan, Kempegowda Road
BANGALORE – 560 009
 2. Power Company of Karnataka Ltd.
KPTCL Building, Cauvery Bhavan
BANGALORE – 560 009
 3. Bangalore Electricity Supply Company Limited
K.R. Circle
BANGALORE – 560 001
 3. Mangalore Electricity Supply Company Limited
5th Floor, Paradigm Plaza, A.B. Shetty Circle
MANGALORE – 560 001
(Represented by M/s. ALMT Legal)
- ... Respondents

1. This petition is filed by M/s. Royalaseema Alkalies & Allied Chemicals Ltd. (hereinafter referred to as 'Petitioner') against KPTCL and others seeking a declaration that the petitioner is not liable to pay a sum of Rs. 16.08 crores to the respondent as the demand made by Respondent 2 based on Clause 11.5 of the PPA and consequently the letters issued by PCKL and others are invalid and non-est in the eye of law.

2. The respondents have put in appearance through their counsel and have filed their statement of objections and sought dismissal of the petition.

3. We have heard the arguments addressed by Sri Vivek Holla, Counsel appearing for the generator and Sri Kamat, Counsel appearing for the purchasing companies. We have also considered the terms of the PPA and all other supporting documents produced in support of the respective contentions.

4. The Government of Karnataka had invited bids for setting up of multi fuel power plants in Karnataka vide its Notification dated 25.11.1995. The bid notification is produced by the Respondents as Annexure-A to the Statement of Objections. In response to the said notification, the petitioner M/s. Royalaseema Alkalies & Allied Chemicals Ltd. had submitted its bid to set up a multi fuel power station at Tagginabudihal village of Bellary District comprising three diesel engine generating sets of 12,600 KW each. This was accepted by the Government and a PPA came to be signed between the petitioner and the then KEB on 15.12.1977. The Company accordingly has set up the plant and was supplying the electricity initially to KEB and thereafter to the 3rd & 4th Respondents as the PPA came to be assigned to them.

5. It is submitted by the petitioner that during the discussion with KPTCL the issue relating to refund of income tax as per Article 11.5 of the PPA arose. The petitioner wide its letter dated 17.10.2006 addressed to Director (Procurements), State Power Procurement Co-ordination Centre (SPPCC) sought advise on evaluation of the differential amount towards corporate tax envisaged in the tariff and the current tax structure. In response, Director (Procurement), SPPCC informed the petitioner on 1.12.2006 that as per Clause 11.5 of the PPA the passing of tax refund is based on the actual performance of the project and savings in corporate tax should be passed on to the power procurers within 90 (ninety) days of the end of the financial year. The Petitioner in reply on 25th August 2007 stated that it has not derived any savings in income tax liability for financial year 2005-06 and therefore no amount is to be refunded on account of changes in the Income Tax Act compared to assumptions made in Clause 11.5 of the PPA. Thereafter, several letters have been exchanged between the parties on the issue of refund of income tax. Ultimately on 20.1.2011 a view was taken by PCKL on behalf of the power procurers that a total amount of Rs.16.09 crores is refundable by the petitioner towards corporate tax in view of the extension of tax holiday benefit though the company has not availed the benefit under Section 80(1)(a) of the Income Tax Act, 1961. Consequently the power procurer company MESCOM has made the claim for refund. The petitioner in the present petition is challenging the said communication of PCKL as well as the consequential communication of MESCOM dated 21.3.2011.

6. The question that arises for consideration and decision is whether the petitioner is liable to refund a part of the fixed charges as per Clause 11.5 of the PPA even though the petitioner has not actually availed the extended tax holiday on the income from the project.

7. It is vehemently contended by the petitioner's counsel Sri Vivek Holla that even though under Clause 11.5 of the PPA, any reduction in the tax liability of the company on account of change in the tax rate and deviations from the assumptions stated in the said provision, has to be passed on to the purchasers, there is no amount to be refunded towards the corporate taxes as the petitioner incurred losses in the first five year period of the project and has set off the income earned in the next five years towards the losses suffered in the first five years. The change in the Income Tax Law allowing higher exemptions has thus made no difference to the petitioners unit, as even without those changes the tax liability was nil in the relevant years. The petitioner has not actually made use of the benefits of the change in the income tax holiday of 100 % in the second five year period.

8. Per contra it is contended by Mr. Kamat, learned counsel for the respondents that as per Clause 11.5 of the PPA, if there is reduction in the tax liability of the company on account of any change in the tax rate from the one assumed, the same has to be passed on to the purchasers irrespective of the fact whether the petitioner did pay the tax or not. As the income tax liability for the 2nd Five Year Period has changed with the tax holiday being increased from 30% to 100%, the benefit of the said change has to be passed on by the

petitioner to the purchaser companies as mandated under Clause 11.5 of the PPA.

9. As the issue revolves around the interpretation of Clause 11.5 of the PPA, we deem it necessary to extract the same in verbatim.

“11.5 Change in corporate tax :

An increase or reduction in tax liability of the Company in respect of the income related to Project operation on account of the changes in the tax rate and the assumption stated in this Section 11.5, would be passed on to the Board through Supplementary Bills within 90 Days of the end of each financial year during the term of this Agreement.

- 100 % tax holiday for initial 5 financial years of operations.
- 30 % tax holiday for the next 5 financial years of operations.
- Indian Corporate Tax Rate = 46 % (40% + 15 % surcharge)”.

10. There is no dispute between the parties that the PPA dated 15.2.1997 was signed consequent to the bids that were called by the Government of Karnataka. The bid notification dated 25.11.1995 has been produced by the respondents as Annexure-A. According to the said notification, while quoting the fixed charge, the bidders were required to quote the fixed charge component of tariff considering all costs including the income tax liability either under Structure ‘A’ or under Structure ‘B’. Both Structure ‘A’ and Structure ‘B’ included income tax as one of its components (this is found at Page 14 of the Annexure-A in the ‘Information Requirement for Volume-3). Further, Annexures–C&D produced by the respondents containing clarifications given while

evaluating the bids also reiterate the same. This is further confirmed by the Company's revised bid which is produced at Annexure-E at Page 67. It states at Item 10 that "In case of reduced tax liability due to changes in the above assumptions pertaining to corporate tax, the developer would reimburse the tax savings to the KEB". Further, M/s. Sree Rayalaseema Alkalies and Allied Chemicals Limited vide their Communication No. SRAAC/KEB/BEL/75/96, dated 7th December 1996 (Annexure-F Para 2) have confirmed that originally they were under Structure 'A' and were requesting KEB to consider their inclusion under Structure 'B'. This clarifies the position that M/s. Sree Rayalaseema Alkalies and Allied Chemicals Limited have, while submitting their quotation been aware of the Structure 'A' and Structure 'B' of the tariff proposal. It is already brought out herein above that both Structure 'A' and Structure 'B' included income tax as one of the components of tariff. Thus, it is clear that the fixed cost quoted by the company was inclusive of the corporate tax amount payable based on the assumed liability towards tax (Annexure-M). Though it is later contended that the same was not considered during subsequent negotiations, we have to go by the bid notification and the revised bid submitted by the petitioner in the absence of any documentary evidence to the contrary.

11. In our view Clause 11.5 of the PPA has to be read in the light of the bid notification, the bid submitted by the petitioner and the correspondence made by the petitioner with the respondent (which is produced as Annexure-E) to ascertain the intention of the parties in including Clause 11.5 of the PPA. Once these are read together, it becomes clear that the fixed charges quoted by the petitioner were inclusive of income tax. Therefore, the fixed charges recovered

by the petitioner from the respondent included the income tax component assuming 30 % tax holiday only and not the actual tax payable. In our considered view, for any change in the rates of income tax by way of reduction in the assumed tax liability, the petitioner has to give appropriate credit in favour of the power procurers namely BESCO and MESCOM. The words 'increase or reduction of tax liability of the company in respect of income related to the project operation on account of the changes in the tax rate and the assumptions stated in this section would be passed on to the Board' (emphasis added) will mean that what has to be looked into is reduction in the tax liability arising as a result of changes in the tax rate and not the actual fact of whether income tax is paid or payable by the petitioner. Therefore we hold that notwithstanding that the petitioner has not paid the income tax on account of the losses incurred in the first five years period and adjusting the said losses against the income earned in the subsequent years, the petitioner in terms of PPA is liable to refund the tax collected from the purchasers over and above what was assumed at the time of submitting the bids, i.e., 30 % exemption over the second five year period.

12. It is contended by the petitioner's counsel that the conduct of the parties namely BESCO shall be considered while giving meaning to Clause 11.5 of the PPA as according to him, BESCO had understood Clause 11.5 in the same way as it has been understood by the petitioner. In our view, the conduct of the parties will be relevant only if the wordings of the document are not clear. In our view, the wordings in Clause 11.5 are clear and unambiguous and therefore one need not see the parties' conduct for interpreting the document.

13. The judgments cited on behalf of the petitioner namely 1975(1) SCC 199, 2005(9) SCC 174, 2003(8) SCC 593 and (2007) 13 SCC 236 do not advance the case of the petitioner any further as we have interpreted Section 11.5 precisely keeping in view the principles laid down by the Hon'ble Supreme Court in various judgments including the ones cited by the petitioner's counsel.

14. The contention of the petitioner's counsel that it was not given proper opportunity of being heard before the decision was taken and the demand raised is also untenable. It is observed from the material placed before the Commission that before the decision was taken and demand was made by the Respondents, there has been correspondence between the petitioner and the respondents in relation to the very issue in dispute and the decision is taken only after considering the view of the petitioner.

15. As regards the submission on the correctness of the calculations, we are of the opinion that we need not go into the correctness of the calculation as sought by the petitioner's counsel. This may have to be discussed by the parties. Accordingly, we reserve the liberty of the petitioner to submit its comments on the calculations to the respondents and the respondents shall consider the same within 30 (thirty) days after giving an opportunity of hearing to the petitioner and issue a final claim with all the relevant details.

Sd/-
(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-
(VISHVANATH HIREMATH)
MEMBER

Sd/-
(K. SRINIVASA RAO)
MEMBER