

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

Dated : 10th October, 2013

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| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member (will pronounce
separate order) |

OP No.49/2012

BETWEEN :

The Tata Power Company Limited
Bombay House
24, Homi Mody Street
MUMBAI -400 001

[Represented by M/s. Trilegal, Advocates]

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PETITIONER

AND

1) Power Corporation of Karnataka Limited
Room No.501, 5thFloor
KPTCL Building
Cauvery Bhavan
Bangalore-560 009

2) Bangalore Electricity Supply Company Limited
2nd Floor, 2nd Block
K.R. Circle
BANGALORE-560 001

3) Mangalore Electricity Supply Company Limited,
Paradigm Plaza, A.B. Shetty Circle
MANGALORE-575 001

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RESPONDENTS

*[R1 and R2 represented by M/s. ALMT Legal, Advocates and
R3 represented by M/s. Justlaw, Advocates]*

1) This Petition has been filed by M/s. The Tata Power Company Limited, Mumbai, praying for:

- (a) Issuance of appropriate directions to the Respondents (subject to prudence check), to pay an amount of Rs.16.30 Crores to the Petitioner towards refund / reimbursement of the Minimum Alternate Tax (MAT) paid by the Petitioner for the period 2006-07 to 2009-10 in respect of the power supplied from its Belgaum Unit along with interest at the Default Rate as prescribed in the Power Purchase Agreement (PPA);
- (b) Issuance of an appropriate direction to the Respondents to reimburse all such other amounts paid by the Petitioner towards MAT in relation to the Belgaum unit during the subsistence of the PPA, upon the Petitioner making such payment and raising an invoice in respect thereof;
- (c) Quashing the letter dated 10.10.2011 issued by Respondent No.1 and letters dated 28.10.2011 and 8.02.2012 issued by Respondent No.2 to the effect that the Petitioner's claim for refund of MAT may be entertained after the expiry of ten years from the date of payment of MAT by the Petitioner, to the extent that credit for the MAT paid is not set off against the Petitioner's regular income tax liability at the end of such period;
- (d) Passing any other and further orders / directions as this Commission may deem fit.

2) The Petitioner had signed a PPA with the then Karnataka Electricity Board (KEB) on 10.2.1999 for developing, procuring finance, constructing, owning, operating and maintaining a generating plant in Belgaum District to supply electricity for a period of 12 years. Consequent to the dissolution of the KEB and

replacement of the same initially by the Karnataka Power Transmission Corporation Limited (KPTCL), and later by the Bangalore Electricity Supply Company Limited (BESCOM) pursuant to the provisions of the Karnataka Electricity Regulatory Reforms Act, 1999 and the Electricity Act, 2003, the said PPA came to be assigned to BESCOM.

3) In accordance with the above PPA, the Petitioner has supplied electricity and the Assignee-Companies have paid for the same at the agreed rate and there is no dispute between the parties on this.

4) The dispute that has arisen between the parties is on the question of reimbursement of the Minimum Alternate Tax (MAT) paid by the Petitioner-Company as per Section 115 JB of the Income Tax Act, 1961, which has been introduced with effect from 1.4.2001.

5) It is the case of the Petitioner that under Clauses 11.4 and 11.5 of the PPA, the tax liability under Section 115 JB of the Income Tax Act, 1961, incurred by it is over and above what was contemplated when the PPA was signed and therefore the same has to be reimbursed by the Assignees who received the power under the agreement.

6) On Notice, the Respondents have appeared through their counsel and have filed detailed Statement of Objections on 4.4.2013.

7) The Respondents have contended that they are not liable to reimburse the MAT alleged to have been paid by the Petitioner immediately, as under Section 115 JAA of the Income Tax Act, the Petitioner is at liberty to set-off the MAT paid against the actual tax liability within the next 10 years from the year of payment of MAT and therefore in the event of the Petitioner setting off the MAT, the said set-off would be treated as tax paid by the Petitioner, and that such tariff has already been accounted for in the tariff of the Petitioner and hence the Respondents are not liable to reimburse any amount towards MAT to the Petitioner. Further, it is contended that in the event of the Petitioner not setting off the MAT within the period of 10 years, it would then be a liability that the Petitioner would have incurred, and only when the liability is crystallized, the Petitioner will have a right to pass on the liability to the Respondents.

8) We have heard the counsel appearing for both the parties and also considered the pleadings filed by both the parties in the light of the relevant provisions of the Income Tax Act, 1961, viz., Sections 115 JAA and 115 JB, the provisions of the PPA and the Judgments cited.

9) The dispute that needs to be decided is, "Whether the Respondents are liable to reimburse the MAT alleged to have been paid by the Petitioner under Clauses 11.4 and 11.5 of the PPA dated 10.2.1999 or not?"

10) Before dealing with the question to be decided, we may notice the relevant provisions contained in Article 11 of the PPA dated 10.2.1999 (ANNEXURE-A1), which are extracted below, as the entire dispute revolves around them :

11) **“11. CHANGE IN LAW**

11.1 Definition of Change in Law:

For the purposes of this Agreement, “Change in Law” means (i) any Permit required to be obtained by the Company from any Government Instrumentality due to any enactment or issue of any new Law, (ii) any amendment, alteration, modification or repeal of any existing Law by Government Instrumentality or through any interpretation thereof, (iii) any change in any Permit requirement or amendment, alteration, modification or repeal of any Permit in each case coming into effect after the date of this Agreement, provision for which has not been made elsewhere in the Agreement.

11.2 Extra-ordinary Change in Import Duties:

The amount of any additional capital expenditure or reduced capital expenditure incurred by the Company prior to the Date of Commercial Operation in relation to Project, due to increase or decrease in import duties by more than 10 (Ten) percentage points respectively over the prevailing import duties at the time of submission of the bid documents, shall be vetted by the Board and the implications on Fixed Charges for any such additional or reduced capital expenditures would be mutually decided by the Board and the Company.

11.3 Additional Capital Expenditures during Operation Phase:

Where any Change in Law coming into force after the Date of Commercial Operation of the Project requires material additional capital expenditure to be incurred, the Company may incur such additional capital expenditures after prior approval of the Board, to comply with such Change in Law. Material additional capital expenditure shall mean an amount exceeding Rupees 3 Lakhs per MW of Contracted Capacity and this amount shall be escalated on first day of each Tariff Period with reference to the Indian WPI on January 1, 1996. The implications on Monthly Fixed Charge Payments for any such additional capital expenditures would be mutually decided by the Board and the Company.

11.4 Additional Tax:

Any statutory levy / duty imposed by State Competent Authorities or GOI Competent Authorities on Electricity despatched to the Board by the Company and paid by the Company, shall be payable by the Board.

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 assumptions 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).

11.6 Change in Operating Expenses:

Where any Change in Law coming into force after the Date of Commercial Operation of the Project results in material increase or decrease in operating expenses in a Tariff Period to be incurred by the Company including material increase or decrease in Fuel expenses to the extent not included in Variable Charges, equitable adjustments in Tariff Payments for any such increase or decrease in operating expenses shall be mutually decided by the Board and the Company. Material increase or decrease shall mean an increase or decrease by an amount exceeding Rupees 1.5 Lakhs per MW of Contracted Capacity and this amount shall be escalated on first day of each Tariff Period with reference to the Indian WPI on January 1, 1996.

11.7 Notice of Change in Law:

The date on which the Company becomes aware that any Change in Law pursuant to Section 11.2, 11.3, 11.4, 11.5 and 11.6 has become effective, it shall promptly notify the Board of the same."

12) The Petitioner, relying upon the wordings of Clauses 11.4 and 11.5 of the PPA extracted above, has sought reimbursement of Minimum Alternate Tax (MAT) paid by it. According to the Petitioner, though it was entitled to a tax holiday under Section 80-IA of the Income Tax Act, 1961, for a period of 10 years, it had to pay MAT for the profit made by the Project out of the income as per Section 115 JB of the Income Tax Act, 1961, which came into effect from 1.4.2001 and therefore the same has to be reimbursed by the Respondents under Clauses 11.4 and 11.5 of the PPA. The stand taken by the Respondents that refund of MAT by it has to be considered only after a lapse of 10 years in view of Section

115 JAA of the Income Tax, 1961, is not tenable, as under Clause 11.5 of the PPA, the tax paid more than what is assumed at the time of calculating the tariff has to be reimbursed immediately.

13) The Respondents have argued that though the Petitioner has paid MAT, which has to be reimbursed by the Respondents under Clause 11.5 of the PPA, the right to reimbursement does not accrue immediately on payment of MAT, as under Section 115 JAA of the Income Tax Act, 1961, the Petitioner is at liberty to set off the said MAT paid against the actual tax liability arising in the next 10 years, i.e., unless the MAT is crystallized, the Petitioner will not be entitled to the refund and demand for refund for the present is totally premature. The Respondents, in support of their contention, have relied upon the opinion dated 22.8.2011 (produced as ANNEXURE-A5 to the Petition by the Petitioner) of M/s.Navaneeth N. Kini, Chartered Accountants, Bangalore, obtained by Respondent No.1-PCKL on the issue of MAT. The Chartered Accountants, in their opinion, have stated that Section 115 JB of the Income Tax Act, 1961 provides that if tax liability under normal provisions of the Income Tax Act, 1961 is based on the prescribed rate of book profits, then the book profits shall be deemed as total income and the tax liability will be at the prescribed rate. It is further opined by the Chartered Accountants that Section 115 JB allows for carry forward and set off of the above MAT paid; that the MAT paid can be carried forward and set off any time in the next 10 years, i.e., the MAT paid on 2006-07 can be carried forward up to the Financial Year 2016-17, and that in view of the credit allowed, MAT paid is payment of tax in advance and only after expiry of the 10-year

period, it can be said that the MAT is borne by TPCL (Petitioner) and reimbursement of the same can be entertained after the expiry of 10 years.

14) It is observed that virtually there is no dispute between the parties on the question of liability of the Petitioner to pay MAT, the quantum of MAT and reimbursement of the same by the Respondents 2 and 3. This is clear from paragraph-9 of the Statement of Objections dated 4.4.2013 filed by the Respondents, which states that:

"... there is no quarrel about the introduction of Section 115 JB being treated as change in law. The issue which arises for consideration is when the MAT should be refunded. ..."

Therefore, the only dispute is, 'Whether the Respondents shall reimburse the MAT paid by the Petitioner immediately or only after the end of the set-off period allowed under Section 115 JAA of the Income Tax Act, 1961?'

15) We have considered the respective contentions of the parties on the issue that has arisen for adjudication .

16) Under Section 115 JB of the Income Tax Act, 1961, if the income tax payable by a Company on its total income is less than a specified percentage of the Book Profit of the Company for that year, the Book Profit of the Company is deemed to be the total income of the Company for that year and income tax

is payable at the specified rate on such total income. This is known as the Minimum Alternate Tax (MAT). This MAT paid is allowed as tax credit, which may be set-off within a period of 10 years under Section 115-JAA of the Income Tax Act, 1961. Further, the unutilized MAT credit cannot be carried forward beyond 10 years of MAT payment.

17) It is submitted by the Petitioner that as per the above provision, it has paid MAT (as no income tax on profit was paid by it as per exemption granted under Section 80-IA of the Income Tax Act, 1961), and as per Clause 11.5 of the PPA, the same is reimbursable to it by the Respondents. Since it has not claimed MAT paid by it while passing on the benefit that became available under Section 80-IA of the Income Tax Act, 1961, which got modified after signing of the PPA, the Respondents are liable to repay the same. Further, in support of its contention, the Petitioner has produced the 'Guideline Note on Accounting for Credit Available in respect of Minimum Alternate Tax under the Income-tax Act, 1961', issued by the Institute of Chartered Accountants, dated 24.3.2006, which states at paragraph-15 that :

"... MAT is a current tax. Accordingly, the tax expense arising on account of payment of MAT should be charged at the gross amount, in the normal way, to the profit and loss account for the year of payment of MAT. ..."

18) It is submitted by the Respondents that MAT, though liable to be reimbursed by them, this would arise only after expiry of the set-off period and not for the present. This is also the view of the Tax Consultant of the Respondents.

19) A careful reading of the provisions of the PPA dated 10.2.1999 relating to the reimbursement of income tax, according to us, leaves no doubt that the Respondents are liable to reimburse the MAT paid by the Petitioner once the same is paid. Clause 11.5 of the PPA dated 10.2.1999 specifically states that any increase or reduction of the tax liability of the Company in respect of the income related to a Project operation on account of the changes in the tax rate and the assumptions stated in the said Section would be passed on to the Board / Purchaser through supplementary bills within 90 days of the end of the financial year during the term of the Agreement [emphasis supplied]. In other words, the right of the Petitioner to pass on the burden incurred by it under the Income Tax Act, 1961, accrues immediately on paying the MAT and within 90 days of the end of each financial year. The Respondents have not been able to point out any of the provisions of the PPA dated 10.2.1999 which gives them time to defer the reimbursement to a later date. The contention of the Respondents that they become liable to reimburse the MAT under Clause 11.5 of the PPA, accrued in favour of the Petitioner, only after the expiry of the set-off period allowed for the MAT paid under Section 115 JAA of the Income Tax Act, 1961, cannot be accepted, as the same is not supported by the PPA dated 10.2.1999. Further, as

pointed out in the 'Guideline Notes on Accounting' issued by the Institute of Chartered Accountants for Credit Available in respect of Minimum Alternate Tax under the Income-tax Act, 1961, referred to above, produced by the Petitioner, MAT is a current tax and has to be taken into account in the year of payment of MAT. Therefore, we hold that the Petitioner is entitled to reimbursement of the amount paid as MAT in terms of Clause 11.5 of the PPA dated 10.2.1999, and also direct the Petitioner to submit to the Respondents, within 2 (two) weeks from the date of this Order, all the working details in support of its claim for reimbursement of MAT, with documentary proof. Within 2 (two) weeks thereafter, the Respondents shall verify the claim and finalize the amount to be paid to the Petitioner. The Respondents are also entitled to seek any additional information to satisfy themselves about the Petitioner's claim for reimbursement of MAT.

20) Though we have held that the Petitioner is entitled for reimbursement of MAT without waiting for expiry of the period of set-off, in order to secure the interest of the Respondents, we direct the Petitioner to furnish a Bank Guarantee, in a form acceptable to the Respondents and keep it valid for next 10 (ten) years, undertaking to repay the amount paid to it towards MAT liability, which does not get set-off in future years as provided under section 115JAA of the Income Tax Act, 1961.

21) Consequently, it is ordered as follows :

- (a) The Petitioner is entitled for reimbursement of the MAT paid by it during the subsistence of the PPA dated 10.2.1999; and,
- (b) The Petitioner shall furnish a Bank Guarantee, in a form acceptable to the Respondents and keep it valid for next 10 (ten) years, undertaking to repay the amount paid to it towards MAT liability, which does not get set-off in future years as provided under section 115JAA of the Income Tax Act, 1961.

Sd/-

(M. R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

No.: N/94/12

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION, BANGALORE**Dated : 10th October, 2013**

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| 4. Sri M.R. Sreenivasa Murthy | Chairman | } (Will pronounce
separate Order) |
| 5. Sri Vishvanath Hiremath | Member | |
| 6. Sri K. Srinivasa Rao | Member | |

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PETITIONER**AND**

- 1) Power Corporation of Karnataka Limited
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 - 3) Mangalore Electricity Supply Company Limited,
Paradigm Plaza, A.B. Shetty Circle
MANGALORE-575 001
- [R1 and R2 represented by M/s. ALMT Legal, Advocates and
R3 represented by M/s. Justlaw, Advocates]*

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RESPONDENTS

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I am in general agreement with the facts and details of submissions brought out in the Order of my colleagues. However, since my analysis and decision in the above Petition being different, they are given separately as follows:

The essence of the prayers of the Petitioner is for direction to the Respondents to reimburse MAT payments effected by it to the income tax department to the tune of Rs.16.30 Crores for the period 2006-07 to 2009-10 along with the interest at the default rate as prescribed in the Power Purchase Agreement till the date of actual payment of the dues.

1. A Power Purchase Agreement (PPA) dated 10th February 1999, for developing, procuring finance, constructing, owning, operating and maintaining generating plant in Belgaum district comprising five diesel generating sets totaling to 81300 KW for selling electrical energy generated therefrom, for a period of 12 years i.e. for 12 tariff periods from date of commercial operation, was entered into by the Petitioner with erstwhile KEB. This PPA was executed pursuant to a competitive bidding process.

2. The Belgaum unit, though a unit of the Petitioner, is an independent undertaking with its operations & profits/losses and is a standalone unit from taxation and accounting perspective. The PPA was finally assigned to BESCO and MESCOM with the obligation cast on them to purchase the entire electricity generated from the project from

the date of commercial operation, by the Petitioner. The details of consideration amount to be paid by way of tariff were as specified under the Article-7 of the PPA. The tariff, which consists of monthly fixed charge payment, monthly variable charge payment, incentive payments was allowable through monthly invoices and supplementary invoices, as the case may be.

2.1 It is the Petitioner's submission that Article-11 of the PPA also provides for adjustment in tariff on account of change in laws, including fiscal laws, which may result in the increase or decrease in the tax liability of the Petitioner. The project was awarded to the Petitioner through competitive bidding process, as explained earlier. The tariff for bidding purposes was worked out after factoring in the estimated tax liability having regard to the corporate tax rate and tax holiday provisions as specified in clause-11.5. It is submitted by the Petitioner that subsequent to the PPA, amendments were made to section 80 IA of the Income tax Act extending the tax holiday of 100% for the entire period of 10 years with effect from 1st April 2002 and that the Petitioner had passed on the benefits realized to the respondents; also that, with effect from 1st April 2001 section 115JB was introduced in the income tax Act. The date of commercial operation was from March 2001. Under section 115 JB of the Income Tax Act, in cases where the income tax payable by a company on its total income, as computed

under the IT Act for any financial year, is less than a specific percentage of the book profit of that year, the book profit of the company is deemed to be the total income of the company for that year and income tax is payable at specified rate on such total income, known as Minimum Alternative Tax (MAT).

2.2 The Petitioner pleaded that MAT is also applicable to the companies like Petitioner's, availing tax holiday under Income Tax Act. Even though the Petitioner was availing tax holiday under section 80IA of the income tax Act, it was liable to pay MAT for any year for which the income tax payable by the Petitioner was less than the MAT payable for such year.

2.3 It is the Petitioner's submission that the benefit of tax holiday amendment has been passed on by it to the respondents and has been accepted by them. The Petitioner, availing tax holiday under section 80 IA had paid MAT on its book profits for the period 2006-07 to 2009-10, in accordance with section- 115JB of the income tax Act. The total amount of MAT paid by the Petitioner up to 2010-11 amounted to Rs.16.30 Crores. According to the Petitioner, its liability under section-115JB was required to be passed on to the respondents under Article 11.5 read with Article 11.4 of the PPA.

- 2.4 In the backdrop of the Petitioner making MAT payments to the Income tax department, the Petitioner has been corresponding with the respondents for reimbursement of the same and providing information and documentation to substantiate its claim for MAT to the respondents.
- 2.5 It is submitted by the Petitioner that the respondents provided a copy of the opinion furnished by their Chartered Accountants regarding MAT reimbursement, according to which MAT paid by the Petitioner was indicated to be in the nature of payment of tax in advance with the Petitioner being entitled to carry forward and set off MAT paid against the regular income tax liability incurred, subsequently over the next 10 years. The opinion was provided on the basis that, MAT could be entertained after the expiry of 10 years since then it could conclusively be said that MAT, to the extent not set off against regular tax is borne by the Petitioner. In terms of the above opinion, the claim for MAT reimbursement for the period 2006-2007 could be made only in the year 2017-18.
- 2.6 The Petitioner submitted that PCKL, though did not deny its liability to Petitioner for the amount paid as MAT took a stand that the said claim could only be entertained after the expiry of 10 years. The Petitioner had been indicating to the respondent by its communications that even though Belgaum unit was a division of

- Tata Power Company Limited, it was an independent undertaking having its own operations and profit/losses under the relevant regulations for the purposes of tax liability - with its tax liability/tax benefit separate from tax benefit/tax liability of the Company.
- 2.7 The Petitioner is also citing reason of increasing fuel and other costs for Belgaum unit not being in a position to be able to absorb its MAT liability to the tune of Rs.16.3 Crores and for seeking reimbursement from the respondent.
- 2.8 Petitioner submits that BESCO also vide their letter of 8th February 2012 have informed that as per the opinion of their Chartered Accountants the Petitioner's claim for reimbursement of MAT can be entertained only after the expiry of 10 years and accordingly it decided that adjustment of MAT against regular tax claim could be done by them starting only from financial year 2017-18.
- 2.9 Petitioner has produced the legal opinion of Justice Shivashankar Bhatt according to which in terms of PPA and various judgments of Hon'ble ATE, the Petitioner was entitled to the reimbursement of MAT under PPA, on actual basis.
- 2.10 The Petitioner in response to the request of PCKL to furnish the bid documents including tariff workings and components of tax

amount included in the fixed and other costs submitted at the time of bid submission had replied vide its communication dated 13th June 2012 that the tariff working during bid submission was not necessary for reimbursement of MAT. It referred to Article-11.5 of the PPA to point out that this particular stipulation in the PPA alone formed the basis of Pass through of any decrease or increase in tax liability and hence bid document need not be looked into to determine the basis or quantum of pass through of tax liability.

2.11 PCKL, however, insisted that the issue of MAT payment would not be considered unless the bid documents including tariff working details were produced. According to the Petitioner, respondents have wrongfully refused to reimburse MAT paid pursuant to change in law caused by the introduction of Section 115JB. MAT is in the nature of income tax introduced w.e.f. 1.4.2001, which the petitioner has the statutory liability to pay. Since levy of MAT was not provided under IT Act at the time of signing the PPA, came be introduced only subsequent to signing of PPA, such additional liability towards income tax/ statutory duties will fall within the definition of change in law as contemplated in Article-11.4 of the PPA and was liable to be passed on as additional cost to the respondents.

2.12 Petitioner submitted that, introduction of 115JB of the Act is clearly on change in law under Article-11.4 read with assumption related to tax liability under Article-11.5 of the PPA and hence any increase on that account ought to be passed on to the board. Further, insistence of the respondents to produce the tariff working for bids submission for reimbursement of MAT is unreasonable and unwarranted, since levy of MAT and its quantum have not been contemplated in the tariff working . Petitioner's contention further, is that the view taken by the respondents on the basis of the opinion of their Chartered Accountant that MAT is in the nature of advance income tax and reimbursement can be claimed only after the expiry of 10 years is erroneous and contrary to the provisions of law. According to the Petitioner MAT is tax liability under Section-115JB for a particular financial year in which it is imposed and is not in the nature of advance tax, against the regular income tax that may become payable by the petitioner at a future date. The mere fact that MAT paid by the petitioner can be adjusted against the regular income tax payable by the petitioner does not render MAT as a tax in the nature of advance income tax.

2.13 The Petitioner contends further that under Article-9.4(f) of the PPA respondents are duty bound to pay the entire MAT. Citing the Judgment of the Hon'ble Supreme Court in the case of Ajanta

Pharma Limited reported in (2000) no.9 SCC 455, the Petitioner said, Section-115JB is a self-contained code that taxes deemed income and begins with a non-obstante clause and thereby claiming that it is an independent obligation irrespective of whether the company is otherwise enjoying tax holiday under any other provision of the Act. The Petitioner relying on judgment of the Hon'ble ATE in the case of Jayaprakash Hydro Power Limited (Appeal No.39/2010) and that of TNEB (Appeal No.177 of 2010) contended that MAT is reimbursable to it and in case of any delay was entitled to interest payment for MAT claim.

2.14 The Petitioner contended that MAT credit is contingent upon variety of factors and therefore not directly relatable to the MAT paid during a particular financial year. Therefore, respondents cannot be allowed to avoid their present liability in the PPA against enabling provisions, merely because of available provisions in the IT Act allowing adjustment of the MAT paid to an assessee in some future years. Further, the Petitioner contended that tariff that were determined and admitted in the PPA were on the basis of competitive bidding and the Petitioner was not required to quote the tax component and provide derivation of such tariff to the respondents. The Petitioner denied that in the event of respondents' reimbursement of MAT claim, the same would result in Petitioner making dual benefits – both by refund as well as setoff. It

is also denied that its claim for MAT was premature. The claim of MAT is always a liability for the current as is evident from Section-115JB of the Act.

3. The prayers in the petition are reproduced below :

- (a) Issue appropriate directions to the Respondents (subject to prudence check) to pay an amount of Rs.16.30 Crores to the petitioner towards refund/reimbursement of the MAT paid by Petitioner for the period 2006-07 to 2009-10 in respect of the Belgaum unit along with interest at the Default Rate as prescribed in the PPA from the due date of the concerned invoice till the date of actual payment;
- (b) Issue appropriate directions to the Respondents to reimburse all such other amounts paid by the Petitioner towards MAT in relation to the Belgaum unit during the subsistence of the PPA, upon the Petitioner making such payment and raising an invoice in respect thereof;
- (c) Quash the letter dated 10.10.2011 issued by Respondent No.1 and letters dated 28.10.2011 and 8.2.2012 issued by Respondent No.2 to the effect that the Petitioner's claim for refund of MAT may be entertained after the expiry of ten years from the date of payment of MAT by the Petitioner, to the extent that credit for the MAT paid is not set off against

the Petitioner's regular income tax liability at the end of such period;

4. The 1st and 2nd respondents, viz., PCKL and BESCO respectively, have contended that the petitioner is not entitled for reimbursement of MAT, for the present. BESCO adopted PCKL's response. It is relevant to note that tariff for supply of power was inclusive of tax component and in the event of petitioner receiving any benefit due to the change in the stated assumptions it was required to pass on the same, while the petitioner at the same time would be entitled to reimbursement in the event of it being burdened with additional tax due to change in stated assumptions in Article 11.5. As per their contention, MAT paid by a Company under the provisions of Section 115JB of the Income Tax Act is allowed as tax credit which would be set off within a period of 10 years in accordance with Section 115-JAA of the Income Tax Act. The unutilized MAT credit cannot be carried forward beyond 10 years from year of MAT payment.

4.1 At the time of entering into the PPA, MAT was not applicable to the petitioner which, however, became liable to pay MAT with effect from 1.4.2001. It is the view of the respondents that MAT paid by the petitioner can, at best, be an advance tax paid to the revenue department and does not reflect the actual liability of the petitioner. As per Section 115JAA of the Income Tax Act, the

petitioner is at liberty to set off MAT against actual liability within 10 years from the date of payment of MAT. In the event of the petitioner claiming the set off of MAT, then the said set off be treated as tax paid by the petitioner. Such tax is already accounted for in the tariff of the petitioner and hence the respondents would not have to reimburse any amount to the petitioner. In the event of petitioner not setting off of MAT within the statutory period of 10 years it would be a liability that the petitioner would have incurred and only when the liability gets crystallized the petitioner would have a right to pass on the liability to the respondents.

4.1.1 The Chartered Accountant of the respondents endorsed their views. The views of the Chartered Accountant were furnished to the petitioner. Copy of Chartered Accountant's letter giving views is reproduced hereunder:

*"NAVANEETH N. KINI & CO.
Chartered Accountants
775/A, 9th 'A' Main
Indiranagar 1st Stage
Bangalore-560 038
Tel.: 080-25204103
Telefax : 080-25287870
www.nnkandco.com*

August 22, 2011

Additional Director (Projects)
Power Company of Karnataka Ltd.
KPTCL Building, Kaveri Bhavan
Bangalore-560 009

Re.: Opinion on MAT reimbursement to
M/s.Tata Power Company Ltd. (TPCL)

This has reference to your letter NO.PCKL/A12/23(b)/2006-07/2079-81 dated 20/07/2011, wherein you have sought my opinion on reimbursement of Minimum Alternate Tax (MAT) to TPCL for the period 2006-07 to 2009-10.

Statutory Provision:

1. Section 115JB of the Income Tax Act, 1961, regulates the provisions relating to Minimum Alternate Tax.
2. The above section provides that, if tax liability under normal provisions of the Income Tax Act, 1961 is less than prescribed rate (10% for the period 2006-07 to 2008-09 and 15% for the period 2009-10) of the book profits, then book profits shall be deemed as total income and the tax liability will be at the prescribed rate.
3. Sec.115JB allows for only forward and set off of the above MAT paid.
4. The MAT paid can be carried forward and set off against regular taxes, anytime in the next ten years. This MAT paid for period 2006-07 can be carried forward unto the financial year 2016-2017.

Opinion:

1. TPCL is entitled to carry forward and set off the MAT paid against regular tax, over the next ten years.

2. *In view of credit allowed, MAT to a certain extent is payment of tax in advance.*
3. *Only after the expiry of the 10 year period, it can be said that MAT (to the extent not set off against regular tax) is borne by TPCL.*
4. *TPCL claim for reimbursement of MAT can be entertained after the expiry of 10 years. Thus, claim for MAT reimbursement, for the period 2006-07 can be made in the year 2017-18.*
5. *TPCL needs to share with PCKL, year wise for specific unit,*
 - a. *Book profits,*
 - b. *MAT paid,*
 - c. *Regular tax,*
 - d. *Set off claimed and MAT carried forward.*

Trust this clarifies the issue on hand and revert back in case you need further clarification.

For Navaneeth N. Kini & Co.

Chartered Accountants

Sd/-

Navaneeth N. Kini"

- 4.1.2 With a view to ascertain actual amount that would be due and payable to the respondents by the petitioner owing to the extended tax holiday, the 1st respondent (R1) requested the petitioner to share with it the office copy of the bid document, which however was not agreed to be provided.

4.1.3 It is the contention of the respondent that R-1 has never disputed the fact that introduction of Section 115-JB as “change in law”. It has written to the petitioner and indicated that the MAT refund would be considered only the petitioner does not set off the MAT paid by it. The issue that arises for consideration is when MAT should be refunded in the context of the petitioner having failed to state any cogent reasons for immediate refund of MAT. Unless the MAT has crystallized, the petitioner would not be entitled to a refund. The petitioner's demand in the current circumstances is totally premature.

4.1.4 The Chartered Accountant of the respondent has examined the provisions of law and stated the manner in which Section 115JB of the Income Tax Act gets exercised. When the law probates that the MAT can be carried forward for a period of 10 years and considering that the petitioner is at liberty to set off the said MAT towards actual income tax allowing claim of the petitioner would result in it enriching itself at the cost of the respondent. The concept of MAT was introduced with a view to ensure that the Companies like that of the petitioner, which earned profit but need not pay any income tax pays a certain amount to the Government. The

petitioner is then allowed to set off the MAT against future income tax liability. Therefore, MAT is not a liability which the petitioner has already incurred. MAT is, as opined by the Chartered Accountant, advance payment to the revenue department and can be set off for future tax liability. The term of the PPA having lapsed assuming the respondents refund the MAT, there would arise a situation, wherein the petitioner could at a later point of time set off MAT against actual income tax liability for a future profit while actually not having any transaction with the respondents. In effect, the petitioner would have got this income tax paid by the respondents while actually not having any transaction with the respondents. It is for this reason the Chartered Accountant opined that the refund of MAT can be entertained only after the statutory period of 10 years is completed. Per contra, the petitioner has not stated any cogent reasons to be entitled to immediate refund of MAT.

4.2 JUDGEMENT OF HON'BLE ATE IN THE CASE OF JAYAPRAKASH HYDRO POWER LIMITED :

4.2.1 In the said case the main discussion by the Hon'ble ATE was whether the introduction of MAT could be classified as change in law as per the terms of the Agreement between

the parties in the appeal. In the circumstances of the case, the Hon'ble ATE concluded that the definition of law and "change in law" as per the PPA would establish that introduction of Section 115-JB squarely falls under the definition of "change in law" under Clause 20.21 of the PPA and the appellant in the case would be entitled to payment of MAT by the respondent No.2 under Clause 20.21 of the PPA.

4.2.2 A perusal of the Judgment would reveal that the Hon'ble ATE has not considered the issue of set off of MAT paid by generator. It is apparent that there is no reasoning forthcoming as to why MAT has to be refunded immediately without waiting for the statutory period of 10 years.

4.3 JUDGEMENT OF HON'BLE ATE IN THE CASE OF TNEB –VS- GMR POWER CORPORATION LIMITED :

TNEB directed to pay interest on MAT payable. The respondent contended that the petitioner relied on the Judgment in TNEB – Vs – GMR Power Corporation Limited to contend that MAT cannot be withheld for undue period of time. It would attract interest if so withheld.

4.3.1 In the case relied on by the petitioner, it was the contention of the respondent GMR Power Corporation that MAT was being reimbursed based on a settlement between the parties and therefore MAT had to be accepted on the actual amount and that no interest would be attracted. The Hon'ble TNERC, in that case was of the view that MAT was being reimbursed as a matter of right and hence it would attract interest. In the instant case of the petitioner herein the liability to reimburse MAT is not established and in such circumstances reliance on the Judgment to claim the interest payment is not tenable.

5. Considering the submissions and contentions of the petitioner and the respondents, I would broadly finalize the issues that need addressing keeping in view the prayers of the petitioner.

5.1 The gist of the prayers of the petitioner is :

- (i) for directions to the respondents to pay Rs.16.30 Crores towards reimbursement of paid MAT for the period 2006-07 to 2009-10, along with default rate of interest till final date of settlement.
- (ii) Also direct reimbursement of future amounts of MAT payments by the petitioner till the subsistence of PPA.

- (iii) Quash letters of respondents expressing that MAT refund claimed would be entertained after expiry of 10 years from date of payment of MAT, to the extent MAT paid is not set off against petitioner's regular income tax liability at the end of such period.

5.2. The broad issue that arises consequentially is :

“Whether annual MAT payments made by the petitioner during the subsistence of the PPA are to be reimbursed, and if so, whether to be done as and when claims are made through invoices?”

5.3 I will consider the issues in detail :

- (a) Whether each instalment of MAT payment by the petitioner has to be reimbursed simultaneously on submission of invoices?

I will consider the issue of whether each instalment of MAT payment by the petitioner has to be reimbursed simultaneously on submission of invoices in detail.

5.3.1 Petitioner's claims are detailed hereunder :

- (a) that its liability under Section 115 (JB) was eligible to be passed on to the respondents under Article 11.5 of PPA r/w Article 11.4;

- (b) that reason of increasing fuel and other costs for Belgaum unit, renders it unable to absorb its MAT liability to the tune of Rs.16.30 Crores; hence claiming from respondent;
- (c) legal opinion of Justice Shivashankar Bhat;
- (d) Contention that Article 11.5 of PPA alone formed the basis for pass through of any decrease or increase in tax liability;
- (e) Additional MAT liability introduced subsequent to PPA signing qualifies for reimbursement, falling within the definition of change in law as contemplated under Article 11.4 of PPA;
- (f) MAT is a tax liability u/s 115 (JB) of the Income Tax Act for the particular financial year in which it is imposed and not in the nature of advance tax though it can be adjusted against regular income tax payable in future years;
- (g) Article 9.4 (f) of PPA renders respondents duty bound to pay MAT;
- (h) Reliance on Hon'ble ATE and Supreme Court Judgments;
- (i) Denying concept of double benefit, in case MAT's reimbursement, on account of MAT credit.

5.4 Let me now analyze the claims of the petitioner.

5.4.1. I will commence analysis by reproducing Sections 80-1A, 115-JAA and 115-JB for ready reference:

“Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

80-IA.(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or develops a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines:

Provided	XXX	XXX	XXX
(2A)	XXX	XXX	XXX
(3)	XXX	XXX	XXX

(4) This section applies to—

- (i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining]any infrastructure facility which fulfils all the following conditions, namely :—

- (a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;
- (b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;
- (c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:

Provided	XXX	XXX	XXX
<i>Explanation.</i>	XXX	XXX	XXX

- (ii) XXX XXX XXX XXX
- (iii) XXX XXX XXX XXX

(iv) an undertaking which,—

- (a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2013;
- (b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, 2013:

Provided that the deduction under this section to an undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;

- (c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time

during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March, 2013.

Explanation.—For the purposes of this sub-clause, "substantial renovation and modernisation" means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004;

(v) XXX XXX XXX

(vi) *** (Omitted)

(5) XXX XXX XXX

(6) XXX XXX XXX

(7) XXX XXX XXX

(8) XXX XXX XXX

(9) XXX XXX XXX

(10) XXX XXX XXX

(11) XXX XXX XXX

(12) XXX XXX XXX

(12A) XXX XXX XXX

(13) XXX XXX XXX"

"Tax credit in respect of tax paid on deemed income relating to certain companies.

115JAA. (1) XXX XXX XXX

tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012, is less than eighteen and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent.

(2) Every assessee,—

(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956 (1 of 1956); or

(b) being a company, to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956) is applicable, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of the Act governing such company:

Provided that while preparing the annual accounts including profit and loss account,—

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956) :

Provided further that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act,—

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.

Explanation 1.—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), **as increased by**— [EMPHASIS SUPPLIED]

(a) To (j),

*if any amount referred to in clauses (a) to (i) is debited to the profit and loss account or if any amount referred to in clause (j) is not credited to the profit and loss account, and **as reduced by**,*— [EMPHASIS SUPPLIED]

(i) to (iii),

(iv) to (vi) *** (Omitted)

(vii) and (viii).

(3) Nothing contained in sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section (2) of [section 32](#) or sub-section (3) of [section 32A](#) or clause (ii) of sub-section (1) of [section 72](#) or [section 73](#) or [section 74](#) or sub-section (3) of [section 74A](#).

(4) Every company to which this section applies, shall furnish a report in the prescribed form from an accountant as defined in the *Explanation* below sub-section (2) of [section 288](#), certifying that the book profit has been computed in accordance with the provisions of this section along with the return of income filed under sub-section (1) of [section 139](#) or along with the return of income furnished in response to a notice under clause (i) of sub-section (1) of [section 142](#).

(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.

(5A) The provisions of this section shall not apply to any income accruing or arising to a company from life insurance business referred to in [section 115B](#).

(6) The provisions of this section shall not apply to the income accrued or arising on or after the 1st day of April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or Special Economic Zone, as the case may be:

Provided that the provisions of this sub-section shall cease to have effect in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2012.”

5.4.2 Further, it is seen that a comprehensive analysis of Article 11 is required to understand the implication of the provisions.

Analysis of Article 11 :

For the sake of immediate reference I reproduce Article 11 hereunder:

“11. CHANGE IN LAW

11.1 Definition of Change in Law:

For the purposes of this Agreement, “Change in Law” means (i) any Permit required to be obtained by the Company from any Government Instrumentality due to any enactment or issue of any new Law, (ii) any amendment, alteration, modification or repeal of any existing Law by Government Instrumentality or through any interpretation thereof, (iii) any change in any Permit requirement or amendment, alteration, modification or repeal of any Permit in each case

coming into effect after the date of this Agreement, provision for which has not been made elsewhere in the Agreement.

11.2 Extra-ordinary Change in Import Duties:

The amount of any additional capital expenditure or reduced capital expenditure incurred by the Company prior to the Date of Commercial Operation in relation to Project, due to increase or decrease in import duties by more than 10 (Ten) percentage points respectively over the prevailing import duties at the time of submission of the bid documents, shall be vetted by the Board and the implications on Fixed Charges for any such additional or reduced capital expenditures would be mutually decided by the Board and the Company.

11.3 Additional Capital Expenditures during Operation Phase:

Where any Change in Law coming into force after the Date of Commercial Operation of the Project requires material additional capital expenditure to be incurred, the Company may incur such additional capital expenditures after prior approval of the Board, to comply with such Change in Law. Material additional capital expenditure shall mean an amount exceeding Rupees 3 Lakhs per MW of Contracted Capacity and this amount shall be escalated on first day of each Tariff Period with reference to the Indian WPI on January 1, 1996. The implications on Monthly Fixed Charge Payments for any such additional capital expenditures would be mutually decided by the Board and the Company.

11.4 Additional Tax:

Any statutory levy / duty imposed by State Competent Authorities or GOI Competent Authorities on Electricity

despatched to the Board by the Company and paid by the Company, shall be payable by the Board.

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 assumptions 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).*

11.6 Change in Operating Expenses:

Where any Change in Law coming into force after the Date of Commercial Operation of the Project results in material increase or decrease in operating expenses in a Tariff Period to be incurred by the Company including material increase or decrease in Fuel expenses to the extent not included in Variable Charges, equitable adjustments in Tariff Payments for any such increase or decrease in operating expenses shall be mutually decided by the Board and the Company. Material increase or decrease shall mean an increase or decrease by an amount exceeding Rupees 1.5 Lakhs per MW of Contracted Capacity and this amount shall be escalated on first day of each Tariff Period with reference to the Indian WPI on January 1, 1996.

11.7 Notice of Change in Law:

The date on which the Company becomes aware that any Change in Law pursuant to Section 11.2, 11.3, 11.4, 11.5 and 11.6 has become effective, it shall promptly notify the Board of the same."

It is the contention of the petitioner that while it was availing tax holiday under Section 80IA of the Income Tax Act, the petitioner paid MAT on its book profits with respect to Belgaum unit for the period 2006-07 to 2009-10 in accordance with Section 115JB of the Income Tax Act. This liability of the petitioner incurred under newly inserted Section 115JB of the Income Tax Act was required to be passed on to the respondents under Article 11.5 r/w Article 11.4 of the PPA.

5.4.3 As the petitioner has relied on Article 11.5 r/w 11.4 of PPA as the provision relating to reimbursement of MAT paid u/s 115JB of the Income Tax Act, it would be of interest to analyze various provisions of Article 11 of the PPA.

5.4.3.1 As far as Article 11.1 pertaining to definition of *change in law* is concerned, it provides for the definition of change in law which covers;

- Any permit required to be obtained by the Company on account of enactment or issue of any new law;
- Any amendment, alteration, modification or repeal of any existing law by Government instrumentality or through any interpretation thereof;
- Any change in any permit requirement or modification, alteration, modification or repeal of any permit, in each case coming into effect after the date of the Agreement (PPA), provision for which has not been made elsewhere in the Agreement.

5.4.3.2 Essentially Article 11.1 defines situations contributing to *Change in Law*.

Further, changes that occur prior to the commercial operation date and after the commercial operation date are dealt with by the various articles extending from 11.2 to 11.7.

- 5.4.3.3 As far as prior to date of commercial operation is concerned any increase or decrease in import duty beyond 10% points provides for vetting by the Board and the consideration of implication on fixed charges for any additional or reduced capital expenditure in terms of Article 11.2.
- 5.4.3.4 Concerning factors coming into force after the date of commercial operation, any additional capital expenditure beyond the set limit per MW of contracted capacity linked with certain other conditions and the corresponding financial implication on the performance is provided for under Article 11.3.
- 5.4.3.5 Further, Article 11.6 provides for *change in law* coming into force after the date of commercial operation resulting in material increase or decrease in operating expenses including material increase or decrease in fuel expenses and the resulting escalation prevailing under certain conditions is detailed.

5.4.3.6 The petitioner has relied on Article 11.4 and 11.5 and hence these require a detailed analysis. We will consider whether introduction of MAT under Section 115 (JB) of the Income Tax Act is covered by Article 11.5 r/w Article 11.4, as contended by the petitioner. Article 11.4 covers any statutory levy/tax/duty imposed by the State Competent Authorities or by the Government of India Competent Authorities on Electricity dispatched to the Board (emphasis supplied) and paid by the Company, which would be payable by the Board. This means that the levy/duty/tax has to be on electricity that is dispatched to the Board and not on anything else.(emphasis supplied). However, implication of MAT imposition on zero tax Companies by the Income Tax Department is of general nature involving the Book-Profit of the company and not related in any manner to the electricity dispatched to the Board (respondent) by the Company (petitioner). Book-Profit, as seen from the definition under section 115(JB) of the

Act is dependent on the various accounting/ financial actions of a company to be able to compute Book-profit from net profit from its Profit & Loss Account and, to reiterate, not on the electricity dispatched by a company/unit like that of the petitioner. Hence, pass through of MAT liability to respondents could be clearly understood to be not having anything to do with the provisions of Article 11.4 of the PPA.

5.4.3.7 As far as Article 11.5 'change in corporate tax' of PPA is concerned, it mentions that the increase or reduction in tax liability of the Company in respect of the income related to project operation on account of changes in the tax rate and assumptions stated in Article 11.5 would be passed on to the Board during the term of the Agreement. Accordingly, Article 11.5 is seen to cover only change in the corporate tax rate provided therein and assumptions stated therein in regard to tax holiday during the term of the Agreement influencing the tax liability of the Company in respect of income related to project operation

i.e. 12 years of PPA term and nothing else like the MAT payments introduced by Section 115(JB).

5.4.3.7.1 According to the respondents, the petitioner is not entitled for reimbursement of MAT, at this juncture, as MAT paid by a Company under the provisions of Section 115(JB) of the Income Tax Act is allowed as tax credit for set off within a period of 10 years, as provided under Section 115(JAA) of the Income Tax Act. It is seen that the respondents have not offered comments on MAT getting/not getting covered by Article 11.5 r/w Article 11.4, as contended by the petitioner.

5.4.3.8 As far as Article 11.7 'Notice of Change in Law' is concerned, the petitioner-Company has a duty to promptly notify to the Board any *change in law* pursuant to Article 11.2, 11.3,

11.4, 11.5 and 11.6 as soon as it become aware of the date on which the same has become effective. The petitioner, although commenced paying MAT to the Income Tax Department with effect from 2006-07, has not furnished any information relating to its intimating/ notifying PCKL/ESCOM of the introduction of MAT with effect from 1.4.2001 u/s 115(JB) resulting in change of tax liability to it by way of MAT payments to be incurred by it. The action of the petitioner in claiming MAT payment thus appears to be an act of after-thought.

5.4.3.9 However, from my analysis above it can be seen that no link exists between articles 11.4 and 11.5 and the contention of the petitioner in regard to reimbursement of its MAT payment to Income Tax Department. Accordingly, it gets clear that petitioner's MAT liability under Section 115JB does not become eligible to be passed on to the respondents under Article 11.5 of PPA read with Article 11.4, as contended by it.

5.4.3.10 Although the petitioner has ascribed the reason of not being able to absorb its MAT liability on account of increasing fuel and other costs to the tune of Rs.16.30 Crores, the same cannot be accepted as a valid cause to allow pass through of MAT liability to respondents.

5.4.4 On MAT liability qualifying for pass on for reimbursement on account of change in law contemplated under Article 11.4 of PPA and the contention that MAT is a liability u/s 115 (JB) for the particular financial year and not in the nature of advance tax:

5.4.4.1 ADVANCE TAX

The petitioner has claimed that MAT as a tax liability u/s 115-JB of the Income Tax Act for the particular financial year in which it is imposed and not in the nature of advance tax that it can be adjusted as regular income tax payable in future years.

In the context of the petitioner's contention we intend to consider various Circulars and

orders on the subject. While on this we reproduce Sections Income Tax Department's Circular No.13/21 dated 9.11.2001, Judgment of the Hon'ble Supreme Court reported in (2011) 2 SCC dated 16.2.2010 in the case of Commissioner of Income Tax - Vs - Tulsyam Limited, Judgment of the Hon'ble Supreme Court reported in (2010) 9 SCC 455 in the case of Ajanta Pharma Limited - Vs - CIT and the Judgment of the Hon'ble High Court of Delhi in CIT - Vs - Jindal Exports & Others reported 2009(22) CTR (del). 115 (JB) and 115 (JAA) hereunder for ready reference.

**5.4.4.1.1 Circular No.13 of 2001, dated 9.11.2001
of the Income Tax Department:**

"744. Liability for payment of advance tax under new MAT provisions of section 115JB of the Income-tax Act

The Finance Act, 2000, inserted section 115JB of the Income-tax Act, 1961, with effect from 1-4-2001, i.e., from the assessment year 2001-02 providing for levy of Minimum Alternate Tax on companies. Section 115JB conceptually differs from erstwhile section 115JA, which provided for MAT on companies, so far as it does

not deem any part or the whole of book profit as total income. However, the new provision of section 115JB provides that if tax payable on total income is less than 7.5% of book profit, the tax payable under this provision shall be 7.5% of book profit.

2. Instances have come to the notice of the Board that a large number of companies liable to tax **under** the new MAT provisions of **section 115JB** are not making **advance tax payments** (emphasis supplied) It may be emphasized that the new provision of section 115(JB) is a self-contained code. Sub-section (1) lays down the manner in which income-tax payable is to be computed. Sub-section (2) provides for computation of "book profit". Sub-section (5) specifies that save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company mentioned in that section.---- In other words, except for substitution of tax payable under the provision and the manner of computation of book profits, all the provisions of the tax including the provision relating to charge, definitions, recoveries, payment, assessment, etc., would apply in respect of the provisions of this section.-----

3. The scheme of the Income-tax Act also needs to be referred to. Section 4 of the Income-tax Act charges to tax the income at any rate or rates which may be prescribed by the Finance Act every year. Section 207 deals with the liability for payment of advance tax, and section 209 deals with its computation based on the rates in force for the financial year, as are contained in the Finance Act. The rates of tax are provided in the finance Act."

The first proviso to section 2(8) of the Finance Act, 2001, reads as under :

*“Provided that in cases to which the provisions of Chapter XII or Chapter XII-A or **section 115JB** or sub-section (1A) of section 161 or section 164A or section 167B of the Income-tax Act apply, ‘**advance tax**’ shall **be computed** with reference to the rates imposed by this sub-section or the rates as specified in that Chapter or section, as the case may be :”* (emphasis supplied).

*The **third proviso** to section 2(8) of the Finance Act, 2001, further provides that the **tax payable by way of advance tax** in respect of income chargeable **under section 115JB**, shall be increased by a surcharge of 2%. The Finance Act, 2000, also contained similar provisions.*

4. It is, thus, abundantly **clear** that **all companies are liable for payment of advance tax** having regard to the provisions contained in new **section 115JB** (emphasis supplied). Consequently, the provisions of sections 234B and 234C for interest on defaults in payment of advance tax and deferment of advance tax would also be applicable where facts of the case warrant.

5. This may be brought to the notice of all officers working in your region.”

It is seen from Circular 13 of 2001 quoted hereinabove that under paragraph-2 the Income Tax Department has recognized the MAT payments under Section 115 JB of the Act as Advance Tax payment, as

observed from the first sentence of paragraph-2. It states that, 'instances have come to the notice of the Board that a large number of Companies liable to pay tax under the new MAT provisions of Section 115 JB of the Act are not making advance tax payment.'

Further, it has been mentioned vide the first proviso to Section 2(8) of the Finance Act 2001 that in cases where provision of section 115JB of IT Act apply advance tax shall be computed with reference to rates as specified.

Similarly, the third proviso to Section 2(8) of the Finance Act provides advance tax chargeable under section 115JB shall be increased by a surcharge.:

From the above, it can be appreciated that the levy of MAT under Section 115 JB has been intended and treated by the Income-tax Department clearly as an 'advance tax'. This is further corroborated by the fact that every year the MAT credit available in the account of the Petitioner is allowed to be set off only against the regular income-tax liability, subject to certain conditions.

5.4.4.1.2 Reproduced herein below is a tabular statement giving a numerical illustration of how as per Section 115 (JAA), MAT credit can be carried forward for set-off against regular tax payable during subsequent years subject to certain conditions (Table from page 45).

Table – Numerical illustration:

A.Y.	Normal Tax liability	Tax liability u/s 115JB	Tax payable By the Assessee [Higher of (2) and (3)]	Additional Tax Liability (4) – (2)	Credit u/s 115JAA utilized	Credit available for carry forward
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2006-07	100	300	300	200	-	200
2007-08	120	90	120	Nil	30#	170
2008-09	150	110	150	Nil	40	130
2009-10	180	200	200	20	-	150
2010-11	200	150	200	Nil	50	100
2011-12	225	175	225	Nil	50	50*

Even though credit of 200 is available, only 30 can be utilized so that the tax payable by the assessee does not go below the amount computed u/s. 115JB.

* Out of the credit of 50, 30 is belonging to A.Y. 2006-07 and 20 belongs to A.Y. 2009-10. In view of provisions of sub-section (3) of section 115JAA the credit of 30 will not be allowable after A.Y. 2011-12 and would accordingly lapse. However, credit of 20 pertaining to A.Y.2009-10 would be allowed to be carried forward till A.Y. 2014-15.

From the above table it is clear that MAT credit, after meeting regular income tax liability remains with the ITAX department as a zero interest credit, as per provisions, till it is finally set off after 10 years.

5.4.4.1.3 Hon'ble Supreme Court Judgment reported in (2011)2 SCC dated 16th December 2010:

The Hon'ble Supreme Court, in its Judgment reported in (2011) 2 SCC 1, in the case of *Commissioner, Income Tax –Vs- Tulsyan EC Ltd.*, has dealt with the subject of payment of MAT under Section 115 JA (applicable to that case). The case of MAT payment under Section 115JB, in the case of the petitioner is identical to that of the MAT payment under Section 115 JA of Income Tax Act in the Supreme Court case involving TULSYAN Ltd. and the MAT credit admissible is allowed to be set off against the regular income tax liability as per provisions of Section 115 JAA, whether payment of MAT is done under Section 115 JA or Section 115 JB of the Act.

The relevant observations of the Hon'ble Supreme Court in the said case in respect of Advance Tax are extracted hereunder:

"13. ----- Although Section 209(1)(d) does not make any specific provision either before or after the amendments carried out by the Finance Act, 2006 to the effect that an assessee is entitled to set off the tax credit that would be available in terms of Section 115-JAA(1) [Section 115-JAA(1A) in the case of the Petitioner in this petition] while computing the quantum of advance tax that is to be paid, it must follow that an assessee would be entitled to do so otherwise it results in absurdity viz. that an assessee pays advance tax on the footing that it is not entitled (when in fact it is so entitled as discussed above) to the credit and thereafter claims a refund of such advance tax paid as a consequence of the set-off.

a) In para 13 of the judgment the Hon'ble Supreme Court has ruled that available tax credit is entitled to be set off in terms of Section 115 JAA (1) while computing advance tax. This shows MAT that MAT credit available consequent to MAT payments under Section 115 JB is also entitled to be set off in terms of Section 115 JAA (1A) while computing advance tax; thus MAT credit is identical to advance tax in its character.

14. Section 143(1) ... itself makes it clear that whilst AO determines the tax payable he has to give credit for all taxes paid either by way of deduction at source, advance tax, self-assessment tax or tax paid otherwise **which would include or which cannot exclude tax credit under Section 115 JAA(1)** [115 JAA(1A) in the case of Petitioner](emphasis supplied).

b) Para 14. Clearly identifies MAT credit among advance tax.

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16. The issue which crops up for decision is – how should the advance tax be calculated when the Company has MAT credit?

17. ... The definition, thus, at the relevant time excluded MAT credit for arriving at assessed tax. This led to immense hardship. The position which emerged was that due to omission on the one hand MAT credit was available for set-off for five years under Section 115-JAA but the same was not available for set-off while calculating advance tax. This dichotomy was more spelt out because Section 115-JAA did not provide for payment of interest on the MAT credit (emphasis supplied). To avoid this situation, Parliament amended explanation 1 to Section 234-B by the Finance Act, 2006 w.e.f. 1.4.2007 to provide along with the tax deducted or collected at source, MAT credit under Section 115-JAA also to be excluded while calculating assessed tax.

c) The Hon'ble Supreme Court have opined that set off u/s 115 JAA has to be available while computing Advance Tax.

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19. We reiterate that we cannot accept the case of the Department because it would mean that even if the assessee does not have to pay advance tax in the current year, because of his brought forward MAT credit balance, he would nevertheless be required to pay advance tax, and if he fails, interest under Section 234-B would be chargeable. The consequence of adopting the case of the Department would mean that MAT credit would lapse after five succeeding assessment years under Section 115-JAA(3); that no interest would be payable on such credit by the Government under the proviso to Section 115-JAA(2) and that the assessee would be liable to pay interest under

Sections 234-B and C on the shortfall in the payment of advance tax despite existence of MAT credit standing to the account of the assessee. Thus, despite MAT credit standing to the account of the assessee, the liability of the assessee gets increased instead of it getting reduced."

From paragraph 17. It is clear that the Hon'ble Supreme Court has categorically ruled that the brought forward MAT credit should be available for set-off while calculating its contribution to advance tax of an assessee.

Further, in paragraph 19, the Hon'ble Supreme Court has come down heavily on the fact that assessee would be required to pay advance-tax, even if it were not required to do so because of brought forward MAT credit.

All the extracted paragraphs herein above reveal the strong views expressed by the Hon'ble Supreme Court in regard to how MAT credit should get an identical treatment to that of advance

tax paid by the assessee, akin to the petitioner.

5.4.4.1.4 (2010) 9 SCC 455 : Case of Ajantha Pharma Ltd. v. CIT (Relevant Extracts):

“11. By the Finance Act, 2000, Section 115-JB was inserted w.e.f. 1.4.2001 providing for levy of MAT on certain companies. Section 115-JB, though structured differently, stood inserted to provide for payment of advance tax by MAT companies. Section 115-JB is the successor section to Section 115-JA. In essence, it is the same excerpt that Section 115-JA provided for MAT on companies, so far as it does not deem the book profit as total income. Under Section 115-JB, however, clause (viii) of Section 115-JA is renumbered as clause (iv). Section 115-JB continues to be a self-contained code.

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It is clear from the extracted paragraph 11. of the Judgment that the Hon'ble Supreme Court have asserted that Section 115 JB stood inserted to provide for 'advance tax' payment by MAT Companies, like that of petitioner.

5.4.4.1.5 (Hon'ble High Court of Delhi - CIT – Vs – Jindal Exports and others decided on 6.2.2009)

Equivalent citation: (2009) 22 CTR (Del).

"41. ... The MAT credit under Section 115JAA is nothing but credit for tax paid under Section 115JA of the said act. Both the sections are part of the said Act. MAT credit is granted for tax already paid under Section 115JA. Thus, the sum represented by the available MAT credit would fall within the expression 'tax ... already paid under any provision of this Act'. This means that the expression 'such tax' refer to Section 140A(1) would mean the tax payable on the basis of the return minus, inter alia, the available MAT credit which represents the tax already paid under a provision (s.115JA) of the said Act. The adjustment or the set off in respect of the available MAT credit is implicit in the meaning of "such tax". However, after the amendment introduced by the Finance Act, 2006, this has been made explicit....

140A. Self-assessment-(1) Where any tax is payable on the basis of any return required to be furnished under Section 139 or Section 142 or Section 148 or Section 153A or, as the case may be, Section 158BC, after taking into account:

- (i) the amount of tax, if any, already paid under any provision of this Act;
- (ii) any tax deducted or collected at source;
- (iii) any relief of tax or deduction of tax claimed under Section 90 or Section 91 on account of tax paid in a country outside India;
- (iv) any relief of tax claimed under Section 90A on account of tax paid in any specified territory outside India referred to in that section; and

(v) **any tax credit claimed to be set off in accordance with the provisions of Section 115JAA.**" (emphasis supplied)

- a) From the above, it is clear that the Hon'ble High Court of Delhi has placed tax credit claimed to be set off under Section 115 JAA of the Act for the payment made under Section 115JA/115JB of the Act, on par with the tax already paid, TDS, tax deducted at source, etc., in advance.

"43. ... It cannot be denied that an assessee who makes a payment of tax under Section 115JA makes such payment as per the provisions of the said Act. However, not all of it is to be accounted in the year it is paid. Part of it is accounted in the same year and the remainder is to be carried forward as MAT credit under Section 115JAA. To make it clear, MAT credit under Section 115JAA is not given in respect of the entire tax, (viz., MAT) paid under Section 115JA in a year. MAT credit is given only in respect of the amount of MAT which is in excess of the tax payable for that year by the assessee under the normal provisions (i.e., other than the special provisions of Section 115JA). It represents the amount of Tax paid by the assessee in excess of what it would be required to make under the normal provisions only because of the special provisions requiring company assesses to pay a minimum tax each year. It is for this reason that credit is given to the assessee for such payment and an assessee can, as a matter of right, subject to certain conditions, carry forward and set

off the tax credit against the tax payable in a subsequent year. There can be no doubt that the entire amount of MAT paid under Section 115JA would be towards tax. Part of it may be towards tax for that year and part of it, for which credit is given, is towards tax for a subsequent year. Thus, the tax credit which has been carried forward and is available for set off under the provisions of Section 115JAA in a subsequent year would qualify as tax paid 'otherwise'. ..."

- b) Whatever is described by the Hon'ble High Court, Delhi, for Section 115 JA applies identically to 115 JB, because provisions of Section 115 JAA are common to both 115 JA and 115 JB for set-off of MAT credit. From the above, it is clear that MAT paid in an assessment year, after meeting regular income tax liability, is available to the assessee (Petitioner in this case) as MAT credit with the Income-tax Department till it is completely set off, in terms of provisions of section 115JB. The case of the Petitioner that MAT payment done by it as per the obligation under Section 115 JB has to be reimbursed, thus holds no water, because the tax paid under MAT in excess of regular income tax liability is

available with the Income-tax Department as MAT credit. As contended by the respondents, in the event of the petitioner claiming the set off of MAT, then the said set off is treated as tax paid by the petitioner. Such tax is already accounted for in the tariff of the petitioner and hence the respondent would not have to reimburse any amount to the petitioner. Each instalment of MAT payment does not get crystallized till such time the set off is carried out in the final assessment year of the allowed period of set off for each such instalment.

"44. ... It is also noteworthy that the said Circular No.14 of 2006 itself recognizes the fact that the amendment was introduced because it had been represented from several quarters that the tax credit allowed under Section 115JAA was no different from the tax paid in advance and credit for having paid the MAT ought to be allowed against the tax liability determined on assessment. This circumstance is another indicator that the amendments were clarificatory in nature."

From paragraph 44 above, it is clear that the Hon'ble High Court of Delhi was

categoric in agreeing with the recognition of the fact expressed by the Income-tax Department, vide its Circular No.14 of 2006, that MAT credit allowed under Section 115 JAA (for the MAT payment effected under Section 115 JB in the case of the petitioner) was no different from the tax paid in advance and MAT credit ought to be allowed against the tax liability determined on the assessment. The point to note here is that the Hon'ble High Court of Delhi has clearly distinguished MAT credit as 'advance tax' and not as a regular income tax liability, and also that the adjustment of MAT credit, which is an 'advance tax', is made against the Income-tax liability determined on assessment. Thus, it gets established that MAT payment is only a payment towards advance tax and not a regular income tax liability. However, the Petitioner is claiming it as a regular income tax liability and seeking

reimbursement from the Respondents, it is seen.

It gets further corroborated by the following analysis of the Hon'ble High Court of Delhi at paragraph-45 of its Judgment, which is reproduced hereunder:

"45. ... Since we are dealing with tax credit which has been carried forward from a prior year, it is obvious that the tax would be deemed to have been paid on the very first day of the year in question, even prior to the due dates of payment of advance tax. The implication of this is that no interest would be chargeable on such amount. From this it follows that interest under Section 115JAA is to be charged after the carried forward tax credit (MAT credit) available under Section 115JAA is set off. ...

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50. It is apparent that because of the manner in which the two provisions work, it is ensured that a company assessee always pays its MAT computed on the basis of 30 per cent of its book profit. Even the tax credit which is allowed to the assessee can only be set off against the tax payable in excess of the MAT of that year. It is also apparent that the tax credit obtained in a particular year is a part of the MAT of that year. It represents tax aid by the assessee to the Government of India. In the year in which such tax credit is set off in terms of Section 115JAA, it is clear that such tax credit was available on the first day of that year. So, in such a

year, the tax credit, to the extent it can be set off, represents tax already paid and available as credit at the beginning of the year. Consequently, the assessee cannot be charged interest on something which it had already paid."

- d) From the above, it is clear that not only the MAT payment made is 'advance tax', but after adjustment for tax liability it is available with the Income-tax Department as 'MAT credit'. Further, it is also that such credit is available on the very first day of the year in which such credit is set off in terms of Section 115 JAA of the Act. Accordingly, the plea of the Petitioner for reimbursement of the amount, which is available as credit with the Income-tax Department, from the Respondent, does not carry any significance.

"Purposive meaning to be ascribed to 'advance tax'

54. We feel that it would be fruitful to remember what was said by Sinha C.J. (as his Lordship then was), while speaking for a Division Bench of this Court in Dr.Pronnoy Roy v. CIT (supra), with regard to the interpretation to be placed on the term "advance tax"

as defined in Section 2(1) of the said Act. It was observed that an interpretation clause, as is well-known, is not a positive enactment. It was specifically noticed that Section 2 of the said Act began with the words "unless the context otherwise requires". The Division Bench held that though "advance tax" has been defined to mean the advance tax payable in accordance with the provisions of Chapter XVII-C, such a definition is not an exhaustive one and that "advance tax", apart from being used only for the purpose of Chapter XVII-C, may be held to be tax paid in advance before its due date. In other words, the term "advance tax" is not restricted to mean the advance tax payable in accordance with the provisions of Chapter XVII-C. If the context requires, "advance tax" may extend beyond the territory of Chapter XVII-C and could very well refer to any tax paid in advance before its due date. MAT credit represents that portion of MAT which was not actually payable by the company assessee but, has all the same, been collected by the Government. It represents the tax paid before it is due. In our view, the MAT credit which is available for set off in a year falls within the meaning of 'advance tax' because the context requires us to give such a purposive meaning."

- e) From the above, it is seen that the Hon'ble High Court of Delhi is again categorical in that if the context so requires, 'advance tax' may extend beyond the territory of Chapter XI-C of Income Tax Act and that MAT credit represents that portion of MAT which was not set-off by the company-

assessee, but however has been collected by the Government.

In the view of the Hon'ble High Court of Delhi, MAT payment, which is available for set off in a year, falls within the meaning of 'advance tax', because the context requires giving such a purposive meaning.

5.4.4.2 TAX HOLIDAY AND HENCE SET OFF NOT

POSSIBLE:

It is contended by the petitioner that Section 80 IA initially provided for tax holiday of 100% of the income for initial period of 5 years of the tax holiday period and 30% for the next 5 years. Subsequently tax holiday for the entire period of 10 years was allowed at 100% with effect from 1.4.2002.

5.4.4.2.1 Section 115 JB being self contained Code and commencing with a Non-Obstante Clause which provides for

payment of MAT at a specific percentage of the book profits in case the income tax payable during a particular financial/assessment year is less than the specified percentage of the book profit. The Income Tax Act has made it mandatory by Section 115 JB for payment of MAT irrespective of benefits of tax avoidance enjoyed by the assessee, if any, under any other Section of the Income Tax Act. It is the claim of the petitioner that although it enjoys tax holiday of 100% for the 10 successive years it is mandated to pay MAT u/s 115- JB.

In other words, it is the claim of the petitioner that the MAT is also applicable to Companies like the petitioner which are availing tax holiday u/s 80 IA of the Income Tax Act for the reason that the regular income tax for such Companies stand reduced to nil as per provisions of Section

80(I)(A). Thus, even though the petitioner was availing tax holiday u/s 80(I)(A) of Income Tax Act it was liable to pay MAT for any year for which the income tax payable by the petitioner was less than the MAT payable for such year. It is submitted that the liability of the petitioner incurred under the newly inserted Section 115 JB of the Act was required to be passed on to the respondents under Article 11.5 r/w Article 11.4 of the PPA.

5.4.4.2.2 However, what is required to be examined is whether the MAT payments made by the petitioner to the Income Tax Department u/s 115 JB of the Income Tax Act qualifies for reimbursement. On perusal it is observed that introduction of Section 115 JB of the Act may have brought in a paradoxical situation for Companies like that of the petitioner, wherein on the one hand they are provided with

tax holiday of 100% for 10 years as per Section 80(l)(A) of the Income Tax Act, whereas by another Section 115 JB, which is a self contained Code and carries a Non-Obsante Clause, the assessee like the petitioner is under compulsion to make MAT payments under certain conditions.

Now, this could possibly be a paradoxical situation which affects the finances of the MAT paying Companies. However, it is not for anyone other than the assessee-petitioner to take up its cause appropriately, even by way of appropriate legal recourse to challenge such an enactment, if so felt by it that it gets affected by such an enactment and by no reason, on account of its supposed inaction, if any, in appropriate time, it earns any right to claim automatic pass on of such payments for reimbursement just because they get burdened with a mandatory provision

on account of enactments akin to Section 115 JB, to anyone else. In other words, it does not confer any right on the petitioner to pass on its additional financial commitments, in the form of MAT payments, to the respondents taking support from its supposed inaction, if any, in respect of enforcement of its rights.

Accordingly, in my view, the petitioner earns no automatic right to pass on its acquired problem to any other. As such, MAT payments made by the petitioner do not qualify for being passed on to the respondents during the ten successive assessment years of each annual instalment of MAT payment.

5.4.4.2.3 Further, it has already been discussed in the earlier paragraphs that even if MAT payments are to be considered for passing on to the respondents by

the petitioner MAT payments do not get qualified as regular income tax liability of the petitioner, at least for the 10 successive years. It only may qualify for set-off against the regular tax liability under certain conditions, after 10 years, since it has been well established in law that MAT credits of each assessment year are only in the nature of advance tax. It is well established, that advance tax is not a regular tax liability and is used only to be set off against regular income tax liability. Paid instalment of MAT and resultant MAT credits arising after set-off of regular tax liability do not qualify for consideration of any reimbursement till MAT credit crystallizes, till after the set offs are allowed during the 10 successive financial/assessment years for each annual instalment of MAT payment made to the Income Tax Department.

Further, as contended by the respondents and as already established by us, MAT credits are available with the Income tax department for 10 years and hence the same amount cannot be claimed as reimbursement. Besides, any set off during the 10 year period against any regular income tax liability is any way included in the tariff that is paid by the respondents. Accordingly, any reimbursement of MAT payments/credit during the 10 year period, therefore does not arise.

5.4.4.3 JUDGEMENT OF HON'BLE ATE IN THE CASE OF JAYAPRAKASH HYDRO POWER LIMITED CASE:

It is the petitioner's contention that the Hon'ble ATE in the case of JP Hydro Power Ltd Vs HPSEB in appeal no. 39 /2010 directed the power purchaser in that case to reimburse MAT payments as per actuals to the Generating company who had paid MAT during the tax

holiday period. Hon'ble ATE held MAT to be reimbursable in that case on account of introduction of Section 115 JB in the Act amounting to change in Law in terms of the PPA between the generator and the power purchaser.

Per contra, the respondents have submitted that the Hon'ble ATE in the judgment concluded that the definition of law and "change in law" as per the PPA would establish that introduction of Section 115-JB squarely falls under the definition of "change in law" under Clause 20.21 of the PPA and that the appellant in the case would be entitled to MAT reimbursement by the respondents. It is further their contention that the perusal of the judgment in JP Hydro case would reveal that Hon'ble ATE has not considered the issue of set-off of MAT paid by generator . Hon'ble ATE has examined, at length, whether introduction of MAT amounts to *change in Law* and based on the issues framed by ATE and from the discussions it is apparent that no reasoning is

forthcoming as to why MAT has to be refunded immediately without waiting for the completion of the statutory period of 10 years. It is, therefore, essential to examine the reason put forth by them for deferment of reimbursement of MAT credit, until it is crystallized.

On an analysis of the Judgment of the Hon'ble ATE, I see that it is the decision of the Hon'ble ATE that the appellant in the case would be entitled to reimbursement of MAT by the respondent No.2 under Clause 20.21 of the PPA. I have seen that in terms of the judgments of the Hon'ble Supreme Court and the High Court of Delhi cited in my discussions and the Circular of Income tax department that the MAT payments are in the form of advance payments of tax and the MAT credits after set-off against regular income tax liability remain with the income tax department as credit without any interest for 10 successive years. I have also seen that it is the claim by the respondents, that the same amount cannot remain with the income tax department as a

credit as well as be allowed to be reimbursed by the respondent in the name of tax liability, meriting acceptance.

Further, in the case between petitioner Tata Power Company Limited on the one part and PCKL and ESCOMs on the other, it is seen by me that Article 11.5 r/w 11.4 of the PPA does not establish that MAT payment, though gets covered u/s 11.1 "change in law", is not falling into any of the provisions u/s 11.5 of the PPA in regard to corporate tax rate and assumptions in regard to tax holiday provisions. Accordingly, the Judgment in the case of Jayaprakash Hydro Power Limited, in my view, is in a different context that the PPA therein provides for MAT payment to be reimbursed by the respondent in terms of Clause 20.21 of their PPA and the PPA in the context of the petitioner and the respondents does not provide for MAT payment reimbursement. The other justification in regard why MAT payment does not qualify for reimbursement within 10

years as per statute has also been detailed in the foregoing paragraphs.

5.4.4.4 JUDGEMENT OF HON'BLE ATE IN THE CASE OF TNEB (Appeal No.177 of 2010):

Relying on the Judgment of the ATE in the said case of TNEB, the petitioner has contended that the MAT amount reimbursement cannot be withheld for undue period of time, lest it would attract interest in favour of itself.

The respondents submitted that In the case of TNEB Vs GMR Power corporation (GMRPC) the contention of TNEB was that MAT was being reimbursed to GMRPC based on a settlement between the parties, therefore the MAT has to be accepted on the actual amount and that no interest would be attracted. The State Commission TNERC was of the view that MAT was being reimbursed as a matter of right and hence it would attract interest, which was upheld by Hon'ble ATE. The respondents herein submit that in the instant case (the case of Tata Power Company Limited – Vs – PCKL & Others),

the liability to reimburse MAT is not established and in such circumstances payment of interest on MAT does not arise, which merits acceptance.

Accordingly, I am of the view that the petitioner is not entitled for any interest on reportedly pending MAT payment. The judgment of Hon'ble ATE does not apply in this case for the reason that there is no agreed settlement between the parties that MAT will be reimbursed and hence no interest becomes payable by the respondents.

5.4.4.5 OPINION OF HON'BLE JUSTICE SHIVASHANKAR BHAT :

Justice Shivashankar Bhat, in response to the query whether MAT paid by TPTCL ought to be reimbursed by PCKL/KPTCL, maintains that since Article 11 of PPA stipulates that tax payment is to be passed on and paid by PCKL/KPTCL. MAT payment under section 115JB has to be reimbursed by PCKL/KPTCL.

Further, in regard to query, "if MAT is reimbursable, can immediate reimbursement be denied maintaining that the obligation arises only after 10 years for remnant MAT credit after set-off", Justice Bhat has maintained that in the light of the provisions of the PPA and the Judgments discussed – Supreme Court judgment in AJANTA PHARMA case, Hon'ble ATE judgments on JP HYDRO and TNEB-certified MAT payments on annual basis are liable to be reimbursed and that denial goes against the PPA provisions; interest at default rates becomes due in case reimbursement is delayed beyond due date.

In view of my analysis carried out on Article 11 of the PPA and the various judgments analyzed, it emerges that based on the position that results on issues of Advance Tax and MAT credit remaining with the ITAX department, the opinion of Justice. Bhat in regard to reimbursement of MAT cannot be considered as applicable to the respondents.

6. I have seen that the Project's date of commercial operation was March 2001. Accordingly, the PPA has already expired after 12 tariff periods after March 2001. MAT payments, to the tune of Rs.16.30 Crores, have been made from 2006-07 to 2009-10 by the Petitioner, as submitted.

7. It has been established that on account of MAT payment, the resultant MAT credit after set-off of regular income tax liability is advance tax and is available as MAT credit for 10 successive years for set-off.

8. The prayers of the Petitioner, therefore, do not qualify to be granted. In view of the above, the petition is liable to be dismissed and therefore dismissed.

Sd/-

(K.SRINIVASA RAO)
MEMBER