

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 130 of 2006**

**Dated: December 10, 2009.**

Present: - Hon'ble Mrs. Justice Manju Goel, Judicial Member  
Hon'ble Shri H.L. Bajaj, Technical Member

National Hydroelectric Power Corporation Ltd.  
NHPC Office Complex  
Sector-33  
Faridabad (Haryana)

.....Appellant

Versus

1. The Chairman  
Punjab State Electricity Board  
The Mall  
Patiala
2. The Chairman  
Haryana Power Generation Corporation Ltd.  
Haryana Civil Secretariat  
Chandigarh
3. The Chairman & Managing Director  
Delhi Transco Ltd.  
Shakti Sadan, Rouse Avenue  
New Delhi
4. The Chairman  
Uttar Pradesh Power Corporation Ltd.  
Shakti Bhawan, 14, Ashok Marg  
Lucknow-226001

5. The Managing Director  
Jaipur Vidyut Vigtaran Nigam Ltd.  
Vidyut Bhawan, Janpath  
Jaipur
  
6. The Chairman  
Rajasthan Rajya Vidyut Prasaranj Nigam Ltd.  
Jaipur Vidyut Vitran Nigam Ltd.  
Jodhpur Vidyut Vitaran Nigam Ltd.  
Ajmer Vidyut Vitaran Nigam Ltd.  
Vidyut Bhawan Janpath  
Jaipur
  
7. Chairman-cum-Managing Director  
Power Transmission Corporation  
Of Uttaranchal Ltd.  
Urja Bhawan, Kanwali Road  
Dehradun-248001
  
8. The Managing Director  
Jodhpur Vidyut Vitaran Nigam Ltd.  
New Power House Industrial Area  
Jodhpur-342003
  
9. The Chairman  
Himachal Pradesh State Electricity Board  
Vidyut Bhawan Kumar House  
Shimla
  
10. The Managing Director  
Ajmer Vidyut Vitaran Nigam Ltd.  
Old Power House  
Hatthi Bhatta Jaipur Road  
Ajmer

11. Chief Engineer and Secretary  
Engineering Deptt. Ist floor  
Secretariat Sector 9-D  
Chandigarh-160009

12. The Principal Secretary  
Power Development Department  
New Secretariat  
Srinagar (J&K)

13. Central Electricity Regulatory Commission  
Chanderlok, Janpath  
New Delhi-110001

.....Respondents

Counsel for the appellant: Mr. Sachin Datta

Counsel for the respondent: Mr. Pradeep Misra and  
Mr. Daleep Kr. Dhyani for  
Respondent No. 1, 2 and 7

### **Judgment**

**Per Hon'ble Mr. H.L. Bajaj, Technical Member.**

This appeal challenges the order dated May 09, 2006 passed by the Central Electricity Regulatory Commission (CERC or the Commission in short) in petition No. 197/2004 read with Review Order dated February 05, 2007 in Review Petition No. 46 of 2006 passed by the Commission whereby

the Commission has determined the tariff in respect of SALAL Hydro Electric Project of NHPC for the period from April 01, 2004 to March 31, 2009.

2. During the course of hearing before us counsel for the parties agreed that there are only two issues which need to be examined. In this regard our order dated December 10, 2008 is reproduced below:

*“ So far as this appeal is concerned, as pointed out by the counsel for the parties there are two issues:*

- (i) Has the Commission erred in coming to the conclusion that when depreciation recovered in a year is more than the amount of repayment during that year, the entire amount of depreciation is to be considered as repayment of loan for tariff computation?*
  
- (ii) Has the Commission erred in concluding that because there is zero loan repayment during 2005-06, therefore it is a case of moratorium?*

*No other issues arise in this appeal. Therefore appeal will be heard only on these two issues.*

3. Learned counsel Mr. Sachin Datta appearing for the appellant contends that the Commission has acted against its own regulations namely Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 which have been extracted at para 9 of the impugned order itself and which provide` as under:-

*38(i)(f) In case any moratorium period is availed of by the generating company or the transmission licensee, depreciation provided for in the tariff during the years of moratorium is treated as repayment during those years and interest on loan capital is calculated accordingly.*

*38(ii)(a)(ii) Depreciation is calculated annually based on straight line method over the useful life of the asset and at the rates prescribed in the regulations.*

*The residual value of the asset is considered as 10% and depreciation is allowed up to maximum of 90% of the historical capital cost of the asset. Land is not a depreciable asset and its cost is excluded from the capital cost while computing 90% of the historical cost of the asset. The historical capital cost of the asset includes additional capitalization on account of Foreign Exchange Rate Variation up to March 31, 2004 already allowed by the Central Government/Commission*

*38(ii)(a)(iii) On repayment of entire loan the remaining depreciable value is to be spread over to the balance useful life of the asset.*

*38(ii)(b) In addition to allowable depreciation, the generating company or the transmission licensee is entitled to advance against depreciation, computed in the manner given hereunder:*

*AAD= Loan repayment amount as per regulation 38(i) subject to a ceiling of 1/10<sup>th</sup> of loan amount as per*

*regulation 36 minus depreciation as per schedule.*

*Provided that Advance Against Depreciation shall be permitted only if the cumulative repayment up to a particular year exceeds the cumulative depreciation up to that year.*

*Provided further that Advance Against Depreciation in a year shall be restricted to the extent of difference between cumulative repayment and cumulative depreciation up to that year.*

4. Learned counsel Mr. Datta stated that there is no provision contained in the regulations which provides that if depreciation recovered in a year is more than the amount of repayment during the year the entire amount of depreciation is to be considered as repayment of loan for tariff computation.

5. Mr. Datta drew our attention to the following observations of the Commission in the impugned order.

*“17. It would, however, be seen that when the terms and conditions for determination of tariff applicable from April 01, 2004 were being formulated, the issue was raised on behalf of the state beneficiaries to co-relate depreciation with repayment of loan so that depreciation recovered should be treated as repayment in case of loans with moratorium period. The issue of adjusting excess depreciation against repayment of loan generally was not raised or considered or decided.*

*20 The strict application of the principle will lead to the conclusion that when depreciation recovered exceeds the amount of repayment, the excess amount cannot be considered as repayment since the express provisions in the 2004 regulations are made for other purposes, and not for this purpose.*

*21. ....It was an omission not to consider the matter in the context of the issue presently before us.....”*

6. Learned counsel Mr. Datta averred that the Commission, in giving the aforesaid observations in its order has virtually reviewed and re-written its own regulations framed under

Section 178 of The Electricity Act, 2003. The Commission has caused a serious infraction of the provisions of the Act by suo moto disregarding its own statutory regulations in determination of the tariff. He contended that even in the amended regulation 38, there is no provision to the effect that “ *when depreciation recovered in a year is more than the amount of repayment during the year, the entire amount of depreciation is to be considered as repayment of loan for tariff computation*”. He stated that even the amended regulation only provides that “*in case any moratorium period availed of by the generating company, depreciation provided for in the tariff during the years of moratorium shall be treated as repayment during those years and the interest on loan capital shall be calculated accordingly*”.

7. It has been contended before us that the Commission has not considered the facts and circumstances regarding loan repayment by the appellant in respect of project in question. Actual loan repayment details of the project in the past reveal

that the appellant has been making loan repayment over and above the amount of depreciation plus the Advance Against Depreciation (AAD). This has resulted in considerable hardship to the appellant in the initial years of the project but has benefited the respondents in terms of lower interest charges for subsequent years. Depreciation has exceeded the actual repayment due to the earlier loan repayment record of the appellant. The appellant is aggrieved because initially it has borne financial hardship in making loan repayment over and above the depreciation amount plus AAD and subsequently when the depreciation has exceeded the actual repayment, the Commission has now limited it to the amount of loan repayment.

8. Mr. Datta drew our attention to the following table giving detailed information regarding cumulative repayment vis-a-vis cumulative depreciation including AAD.

(Rs. In lacs)

SN	Particulars	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
1.	Depreciation during the year		2125.02	2125.02	2125.02	1833.18	1833.18
2.	AAD during the year		1470.32	0.00	0.00	0.00	0.00
3.	Cumulative Depreciation Including AAD recovered up to the year	30332.77	33928.11	36053.13	38178.15	40011.33	41844.51
4.	Repayment during the year (Normative)		3595.34	0.00	1982.58	0.00	0.00
5.	Cumulative repayment up to the year	37373.26	40968.60	40968.60	42951.18	42951.18	42951.18
6.	<b>Difference (cumulative) (3-5)</b>	<b>-7040.49</b>	<b>-7040.49</b>	<b>-4915.47</b>	<b>-4773.03</b>	<b>-2939.85</b>	<b>-1106.67</b>

9. He asserted that from the above table it is evident that the cumulative repayment up to any year is always higher than the cumulative depreciation including AAD up to that year. During the years falling within the tariff period 2001-2004, NHPC itself did not claim any advance against any depreciation in its petition as per the then prevailing regulation. However, the factual position remains that in case of each of the NHPC's project the cumulative repayment from the beginning of tariff period 2004-09

has always been in excess of cumulative depreciation including AAD.

10. Mr. Datta, learned counsel for the appellant stated that NHPC resorted to swapping/refinancing the costlier loans purely with a view to reduce the burden of debt repayment on SEB's so as to afford relief to the ultimate consumers which has been appreciated by CERC also at para A1(ix) of impugned order. It was not anticipated by NHPC that its bonafide act of replacing expensive loans with cheaper ones would be used by the respondents to impose additional liability/penalty on NHPC. He submitted that had NHPC simply allowed the expensive loans to continue as per the original repayment schedule there would have been no occasion for the NHPC to have been deprived of depreciation to which it is legitimately entitled to. Further, assuming that NHPC had continued with costlier loans, the SALAL project would have become debt free in the year ending 2004-05 with no further loans to be paid, the question of treating the

depreciation as repayment of loans for the subsequent years would not have arisen at all. NHPC is, therefore, aggrieved with the fact that its bonafide act of refinancing costly loans by cheaper loans has resulted in a situation where instead of being rewarded for its bonafide action benefiting the respondent Boards, NHPC has been penalized.

11. Mr. Misra, learned counsel appearing for the respondents 2 and 4 contended that the tariff is a complete package and one or two elements of the same cannot be considered in isolation unless it is shown that the generator is not getting adequate return on equity as prescribed under the Regulations. In the present case the appellant has not shown that during the period 2004-09 it has not received adequate return on equity and, therefore, the issues raised by the appellant may not be considered in isolation as per provisions of Section 61(d) of the Act. This being a basic issue, we proceed to analyse and decide this issue below:

12. In order to advert to this basic issue we set out Section 61(d) below:

*“ 61. Tariff Regulation- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following namely;*

*(a).....*

*(d) Safeguarding of consumers” interest and at the same time recovery of the cost of electricity in a reasonable manner”*

13. In a cost plus regulatory regime, tariff is to be determined by the Commission as per the Regulations which set out *inter alia* various components of tariff. The generator is entitled to each component; Interest on Loan, Return on Equity, Depreciation, Interest on Working Capital etc. all have to be worked out separately. It cannot be argued that once the generator has recovered its return on equity, it may be denied interest on loan or depreciation etc. admissible as per the Tariff Regulations. In view of this we are not able to agree with the aforementioned contention put forth by Mr. Misra that the

issues raised by the appellant may not be considered in isolation.

14. Mr. Misra, learned counsel appearing for respondents 2 and 4 contended that there is a clear correlation between repayment of loans and depreciation as Regulation 38(i)(f) provides that depreciation availed during moratorium period shall be treated as repayment of loan. He stated that the appellant has filed annexures to Form-13 which shows that LIC loan was repaid from April 01, 2004 till February 15, 2005. Thus no payment of LIC loan was made during the period 2005-06. This loan was swapped by loan given by Dena Bank. However, the details of that loan are not on record. The outstanding Government of India loan amounting to Rs. 1378.58 lakhs was converted into M-series loan, payment of which started from April 01,2006. Thus no payment towards loan was made during the period 2005-06. The details of M-series loan has been given. It has been shown that there was five years moratorium period which

starts from January 07, 2002. Thus during 2005-06 the appellant has not made any payment as it was availing moratorium period and according to Regulation 38(i)(f) of Regulations, 2004, the depreciation recovered during this year shall be treated as repayment of loan and the loan capital will be computed accordingly.

15. Mr. Datta averred that Government of India loan of Rs. 1378.58 lakhs which carried an interest rate ranging from 14.5% to 15% p.a. was contracted in the 1980s. Had these loans not been replaced by cheaper M series Bonds, then the entire loans pertaining to SALAL project itself would have been repaid by March 30, 2005. However, in such a situation additional burden would have been passed on to the consumers as a result of the costlier loans whereas M Series Bonds carrying only 9.55% interest p.a. resulted in relief to the consumers. It is only for this reason that the debt liability in respect of the SALAL project was not exhausted by March 30, 2005 and the occasion arose for the Commission to

notionally treat depreciation during the year 2005-06 as notional loan repayment because of no actual repayment during this year. He submitted that it would be extremely inequitable if NHPC is penalized for its bonafide actions.

16. Mr. Datta conceded that no repayment of loan was made during the year 2005-06. However, the same was occasioned by NHPC's act of replacing the more expensive loans with cheaper M Series Bonds in respect of which bullet repayment was to be made in the year 2006-07. Had NHPC allowed the more expensive loans to continue, its repayment obligation would have become debt free in the financial year 2004-05 and there would have been no occasion for treating depreciation as loan repayment in 2005-06.

17. Mr. Datta further contended that the statement of the respondents that the details of Dena Bank loan are not on record is wrong. The details of Dena Bank loan were furnished to the CERC which were taken into cognizance by

the Commission at para 41(viii) of the impugned order. He asserted that legally speaking the M Series Bonds did not result in any moratorium period from 2001-02 till 2006-07 for the following reasons:

(a) In any HE project, there are a large number of loans for different repayment schedules, moratorium period can never be determined with reference to a single loan.

(b) Moratorium period implies suspension of repayment in the sense of temporarily extinguishing/abating the same. In the case of NHPC, there is no such abatement or suspension of repayment schedule, the terms of repayment is contractually governed and there is no respite or relief or any concession whatsoever to NHPC.

18. Mr. Datta further clarified that the expression moratorium period as used in Form-8 has only been used to indicate the tenure of the loan and has no further connotation whatsoever. Further it is pertinent to note that replacement of

costlier loans by cheaper loans was also done in URI project case but there was no instance of Zero repayment in any year of tariff period 2004-09. In every project, there are many loans, all entailing different repayment schedules depending upon terms of the loan contract. In such a situation, if by sheer chance there is zero repayment in any particular year, the same cannot be construed as a moratorium period by any stretch of imagination. Similarly in SALAL HE project, there were a large number of loans which have already been repaid and all the loans were governed by different repayment conditions and schedules. Zero repayment in the year 2005-06 was completely non-volitional. If NHPC would have known that having zero repayment in the year 2005-06 would entail depreciation being notionally treated as repayment then the NHPC would have articulated loans so as to make some loan repayment even during 2005-06. This itself demonstrates the bonafide of the NHPC. If the respondents contention is accepted, it would evidently be an invitation to other generating companies to articulate their loan repayments for

future tariff period regardless of hardships caused to the consumers.

### **Analysis and decision**

19. We have considered the respective contentions advanced on either side as well as the grounds in the appeal and their written submissions.

20. We now proceed to examine the two surviving issues before us together as these are inter-related. The CERC (Terms and Conditions of Tariff) Regulations, 2004 clause 38(i): Interest on Loan Capital and clause 38(ii): Depreciation including Advance Against Depreciation are relevant which have been profusely referred by the parties are reproduced below:

*38. Computation of Annual Fixed Charges: The annual fixed charges shall be computed on the following basis:*

*(i) Interest on loan capital*

- (a) Interest on loan capital shall be computed loan wise on the loans arrived at in the manner indicated in regulation 36.*
- (b) The loan outstanding as on April, 01, 2004 shall be worked out as the gross loan as per regulation 36 minus cumulative repayment as admitted by the Commission up to March 31, 2004. The repayment for the period 2004-09 shall be worked out on a normative basis.*
- (c) The generating company shall make every effort to swap the loan as long as it results in net benefit to the beneficiaries. The costs associated with such swapping shall be borne by the beneficiaries.*
- (d) The changes to the loan terms and conditions shall be reflected from the date of such swapping and benefit passed on to the beneficiaries.*
- (e) In case of any dispute, any of the parties may approach the Commission with proper application. However, the beneficiaries shall not withhold any payment as ordered by the Commission to the*

*generating company during pendency of any dispute relating to swapping of loan*

- (f) *In case any moratorium period is availed of by the generating company, depreciation provided for in the tariff during the years of moratorium shall be treated as repayment during those years and the interest on loan capital shall be calculated accordingly.*
- (g) *The generating company shall not make any profit on account of swapping of loan and interest on loan.*

(ii) *Depreciation, including Advance Against Depreciation*

(a) *Depreciation*

*For the purpose of tariff, depreciation shall be computed in the following manner, namely:*

- (i) *The value base for the purpose of depreciation shall be the historical cost of the asset.*
- (ii) *Depreciation shall be calculated annually based on straight line method over the useful life of the asset and at the rates prescribed in Appendix II to these regulations.*

*The residual life of the asset shall be considered as 10% and depreciation shall be allowed up to maximum of 90% of the historical*

*capital cost of the asset. Land is not a depreciable asset and its cost shall be excluded from the capital cost while computing 90% of the historical cost of the asset. The historical capital cost of the asset shall include additional capitalization on account of Foreign Exchange Rate Variation up to March 31, 2004 already allowed by Central Government/Commission.*

- (iii) On repayment of entire loan, the remaining depreciable value shall be spread over the balance useful life of the asset.*
- (iv) Depreciation shall be chargeable from the first year of operation. In case of operation of the asset for part of the year, depreciation shall be charged on pro rata basis.*

*(b) Advance Against Depreciation*

*In addition to allowable depreciation, the generating company shall be entitled to Advance Against Depreciation computed in the manner given hereunder:*

*AAD= Loan repayment amount as per regulation 38(i) subject to a ceiling of 1/10<sup>th</sup> of*

*loan amount as per regulation 36 minus depreciation as per schedule.*

*Provided that Advance Against Depreciation shall be permitted only if the cumulative repayment up to a particular year exceeds the cumulative depreciation up to that year;*

*Provided further that Advance Against Depreciation in a year shall be restricted to the extent of difference between cumulative repayment and cumulative depreciation up to that year.*

21. From the table giving detailed information regarding cumulative repayment viz-a-viz cumulative depreciation including AAD (Supra) given at page 24 of the appeal (which is not disputed by the respondents) brings out that cumulative repayment during the years 2003-04 to 2008-09 has indeed exceeded the cumulative depreciation including AAD recovered up to the year.

22. The SALAL Project has been financed by drawing loans from various sources, some of which have already been pre-

paid so as to reduce the burden of excessive rates of interest. Concedingly, there has been no repayment during the year 2005-06. So as to conclude whether or not “no repayment” during the year 2005-06 would tantamount to an year of moratorium for the SALAL Project, it is necessary to understand the word moratorium: As per Black’s Law Dictionary moratorium is defined as:

*“Moratorium:*

- 1. An authorized postponement, usu. a lengthy one, in the deadline for paying a debt or performing an obligation.*
- 2. The period of this delay*
- 3. The suspension of a specific act*

23. West Encyclopedia of American Law defines moratorium as:

- a. An authorization to a debtor, such as a bank or nation, permitting temporary suspension of payments.*

b. *An authorized period of delay in performance of an obligation.*

24. As per P. Ramanatha Aiyar's Advanced Law Lexicon the moratorium is defined as:

*“Moratorium. Authorization of suspension of payment by a debtor for a stated time (Finance)*

*Grant of an extended period in which to repay a loan, or a period during which the repayment schedule is suspended. Usually, it refers only to the repayment of capital, and interest payments may still be required.*

*(Insurance; Investment; Business Term: International Accounting)*

*Generically means the time period allowed before repayments or payment of interest on a loan begin.*

*In the context of credit derivatives, as a credit event, moratorium means the statutory or other action by a reference entity whereby the reference entity grants to itself a moratorium during which interest and*

*principal payments will stands deferred. Usually, such action is taken by sovereigns during financial difficulties. See also credit event. (Kothari's Credit Derivatives)*

*A legal authorization to a debtor to postpone payment for a certain time. (Sch. Art 53, Asian Development Bank Act (18 of 1966))*

25. Mr. Misra brought to our notice the following definitions of Moratorium:

*“ Dictionary>Mop-Muc >Moratorium*

*Moratorium Meaning and Definition*

*1/ (n) A period during which an obligor has a legal right to delay meeting an obligation, esp. such a period granted, as to a bank, by a moratory law.*

*Moratorium: words in the definition*

*A, An, As, Bank, By, Delay, During, Granted, Has, Law, Legal, Meeting, Moratory, Obligation, Obligor, Period, Right, Such, To, Which.”*

26. It is clear from the aforementioned definitions that moratorium is an authorized postponement in the deadline for paying a debt or performing an obligation. This authorized period of delay or suspension of a specific act is termed as moratorium. Generically moratorium also means the time period allowed before repayment or payment of interest on a loan commences.

27. In the context of the case before us factually the Salal Project has been financed through various loans. Admittedly, no repayment of loan or interest payment had to be made during 2005-06. The appellant has already discharged its liability of payments in respect of the costlier loans. As far as the M –Series Bonds alone are concerned, by definition the year 2005-06 is covered by the generic definition of moratorium. The LIC loan was repaid from April 01, 2004 till February, 2005. It is also a fact that no repayment of LIC loan was made during the year 2005-06 as this loan was swapped by Dena Bank loan. The outstanding Government of India

loan amounting to Rs. 1378.58 lakhs was converted to 9.5% M-Series Bonds whose repayment started only from April, 2006 as the appellant was availing 5 year moratorium period from January 07, 2002. Government of India loan of Rs. 1378.58 lakhs carried an interest rate of 14.50 to 15%. Had these loans not been swapped by cheaper M-Series Bonds then the entire loan pertaining to Salal Project would have been anyway repaid by March 30, 2005 and there would be no occasion to repay loan for the year 2005-06 in question. The appellant has carried out financial restructuring in the overall interest of the consumers by pre payments which required the appellant to pay over and above the depreciation and the Advance Against Depreciation.

28. It has also to be kept in mind that there is a bullet repayment to be made for M-series Bonds for the year 2006-07. It is a normal practice for any prudent enterprise to continually save sufficient funds before the due date for bullet payment arrives. Had the costlier loans not been

repaid earlier, the same would have been paid during the subsequent years including the year 2005-06 in question.

29. We do appreciate the spirit behind the CERC Regulation 38(i)(f) whereby depreciation during the moratorium period is treated as repayment during those years. Whenever a borrower avails moratorium, the lender suitably adjusts the rate of interest on the loan towards the financing cost during the moratorium period. However, in the present context as far as the year 2005-06 is concerned, the appellant has already pre-paid previous costlier loan by making payment over and above the depreciation and Advance Against Depreciation (AAD). Factually the appellant, by making loan prepayments over and above the depreciation and AAD has already sacrificed its financing cost for prepayments.

30. A careful reading of the various definitions of 'moratorium' certainly brings us to the conclusion that going by any of the definitions, the year 2005-06 is an year of no repayment and is covered by moratorium.

31. Even upto the end of FY 2005-06 the Appellant had made cumulative repayments over and above the depreciation and Advance Against Depreciation to pre-pay loans with higher interests. Had the loans not been pre-paid, installments would certainly had to be made during the year 2005-06 also. It can be argued that had there been no moratorium for the M-Series Bonds, the rate of interest would have been lesser. However, it is also a fact that the Appellant has discharged costlier loans earlier by organizing funds over and above the cumulative depreciation and AAD in earlier years. We feel that this aspect merits consideration. However, Regulations do not provide for dealing such a situation and, therefore, we cannot interfere with the decision of the Commission who have decided this issue as per the then prevailing Regulations. We decide that as moratorium has been availed by the Appellant and admittedly no repayment has been made during 2005-06, the depreciation provided for in the tariff during the year of moratorium is to be treated as repayment during the year and the interest on loan capital has to be calculated accordingly.

32. We now specifically advert to the following Issue:

Has the Commission erred in coming to the conclusion that when depreciation recovered in a year is more than the amount of repayment during that year, the entire amount of depreciation is to be considered as repayment of loan for tariff computation?

33. Here it will be relevant to refer to the discussions and conclusions of the Commission at paras 17,18,20, 21 and 22 of the impugned order which are reproduced below:

*17. It would, however, be seen that when the terms and conditions for determination of tariff applicable from April 01, 2004 were being formulated the issue was raised on behalf of the state beneficiaries to co-relate depreciation with repayment of loan so that depreciation recovered should be treated as repayment in case of loans with moratorium period. The issue of adjusting excess depreciation against repayment of loan*

*generally was not raised or considered or decided.*

*18. The argument for adjusting excess amount of depreciation against repayment of loan is that the 2004 regulations provide for considering depreciation against repayment of loan where there is a moratorium period. The 2004 regulations also provide for Advance Against Depreciation where depreciation is less than the amount of repayment, (subject to 1/10<sup>th</sup> of the gross loan) to provide for cash flow to facilitate repayment. It has been urged that though the 2004 regulations are silent on the question of adjustment of depreciation, when depreciation exceeds repayment amount, provision has to be read into these regulations by implication, that being a situation in between the two positions expressly covered. It is also urged that unless the provision is so implied, the central power sector utilities, by not repaying the loans or contracting loans with longer tenure, be able to recover depreciation at accelerated rates, since so long as loan is outstanding, and is not fully paid, depreciation is recoverable in tariff based*

*on the depreciation rates specified by the Commission and after entire repayment of loan, the amount of depreciation each year gets considerably reduced, because in such case, balance recoverable depreciation is spread over the balance useful life of the asset, in accordance with para 9( c) above.*

*20 The strict application of the principle will lead to the conclusion that when depreciation recovered exceeds the amount of repayment, the excess amount cannot be considered as repayment since the express provisions in the 2004 regulations are made for other purposes, and not for this purpose.*

*21. But, such an interpretation will appear to be consistent with the other provisions of the 2004 regulations and will do injustice to the state beneficiaries. The 2004 regulations provide that whenever the repayment amount exceeds the depreciation recovered, excess amount is to be allowed as Advance Against Depreciation. The converse of it should also be taken as true, which would mean that where depreciation exceeds the actual payment the excess amount is taken as repayment of loan; otherwise the state*

*beneficiaries will be put in hardship and will be subjected to injustice. It is also to be noted that under the 2004 regulations when there is no actual repayment, (as during the moratorium period) the depreciation recovered is adjusted against loan repayment. Non-adjustment of depreciation against repayment of loan where depreciation is more will lead to illogical results. For example, where amount of repayment is only nominal, depreciation is not adjusted against repayment of loan, but when repayment is nil, depreciation is considered as repayment of loan. This interpretation may afford opportunity to the central power sector utilities for maneuvering their affairs in such a manner that they contract loans in such a manner that the loan repayments, however, small in amount, always remain outstanding. This cannot be the intention of the 2004 regulations which were based on equitable considerations, as extracted at para 14 above. Thus, rigid observance of the maxim “expression unius est exclusion alterius” in this case would lead to a wholly irrational situation, make other provisions of the 2004 regulations inconsistent and absurd, and result in injustice.*

*Therefore, strict interpretation of the 2004 regulations based on the rule should not be permitted. It was an omission not to consider the matter in the context of the issue presently before us. The conclusion, therefore, is that when depreciation recovered in a year is more than the amount of repayment during that year, the entire amount of depreciation is to be considered as repayment of loan for tariff computation. This interpretation will coexist with the specific provisions of the 2004 regulations, adverted to at para 8 above, and will be in consonance with the intent and object the provision of these regulations which lays down that in case of moratorium, depreciation will be considered as repayment of loan.*

*22. Similar approach has been adopted by the Commission, while approving tariff in respect the generating stations owned by NTPC and of the transmission assets of PGCIL and in the interest of consistency and continuity of approach same methodology needs to be followed in case of the petitioner also.*

34. Though from the aforesaid Regulation (supra) it is clear that these Regulations do not require that when in a particular year depreciation recovered is more than the repayment during that year, the entire amount of depreciation is to be considered as repayment of loan for tariff computation, yet the Commission after discussing this issue in para 17, 18 and 20 has concluded in para 21 that as the CERC Regulations 2004 provide that whenever the repayment amount exceeds the depreciation recovered, excess amount is to be allowed as Advance Against Depreciation (AAD) and, therefore, converse of this should also be taken as true. It would mean that where depreciation exceeds the actual repayment, the difference between depreciation and repayment amount is taken as normative repayment of loan. We are unable to agree with this view of the Commission as the Regulations regarding depreciation reproduced above explicitly state that AAD is to be paid where the amount of repayment exceeds the depreciation in the concerned year. If the intention of the

Regulations was to also mean that the converse is true the same could also have been so stated in the Regulations.

35. This Tribunal vide its judgment dated June 13, 2007 in Appeal NO.139 of 2006 has already ruled as under with regard to treatment of depreciation.

*“ It is to be understood that the depreciation is an expense and not an item allowed for repayment of loan. If a corporation does not borrow, it would not mean that the corporation will not be allowed any depreciation. Depreciation is an expense it represents decline in the value of asset because of use, wear or obsolescence. The Accounting Principles Board of USA defines depreciation as under:-*

*“ The cost of a productive facility is one of the costs of the service it renders during its useful economic life. Generally accepted accounting principles require that this cost be spread over the expected useful life of the facility in such a way as to allocate it as equally as possible to the periods during which services are obtained from the use of the facility. This procedure is known as depreciation accounting, a system of accounting which aims to distribute the cost or other*

*basic value of tangible capital assets, less salvage (if any), over the estimated useful life of the unit which may be a group of assets) in a systematic and rational manner. It is a process of allocation, not of valuation”*

*It is well established that the depreciation is an expense and therefore, it cannot be deployed for deemed repayment of loan. In this view of the matter the CERC shall need to make a fresh computation of outstanding loan in the light of the aforesaid observations.*

36. We are unable to agree with the view of the Commission that when depreciation exceeds the actual repayment the difference between depreciation and repayment amount be taken as normative repayment of loan as regulations only state that whenever the repayment amount exceeds the depreciation recovered, excess amount is to be allowed as Advance Against Depreciation. In our earlier judgment cited above this Tribunal has ruled that depreciation is an expense and not an item allowed for repayment of loan. In our view the Commission, in the absence of any Regulation to this effect,

has erred in coming to the conclusion that when depreciation recovered in an year is more than the amount of repayment during that year, the entire amount of depreciation is to be considered as repayment of loan for tariff computation.

37. In conclusion the appeal is allowed in part to the extent indicated in para 36 but with no order as to costs.

38. Pronounced in the open court on 10<sup>th</sup> December, 2009.

(H.L. Bajaj)  
Technical Member

(Mrs. Justice Manju Goel)  
Judicial Member