**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

**APPEAL NO 217 OF 2014 &
IA No. 336 of 2014**

Dated: 11th April, 2018

**Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IN THE MATTER OF:

Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan
Race Course, Vadodara – 390 007
Gujarat
….Appellant

VERSUS

1. Gujarat Electricity Regulatory Commission
6th Floor, GIFT ONE,
Road 5C, Zone 5, GIFT CITY,
Gandhinagar, Gujarat – 382355

2. Gujarat Energy Transmission Corporation Limited
Sardar Patel Vidyut Bhavan,
Race Course, Vadodara – 390007

3. Dakshin Gujarat Vij Company Limited,
Nana Varachha Road,
Kapodara Char Rasta, Surat – 395006

4. State Load Despatch Centre (Gujarat),
132 KV Gotri Sub Station Compound,
Near T.B. Hospital, Gotri Road,
Vadodara- 390021, Gujarat

5. Torrent Power Limited,
Electricity House, Lal Darwaja,
Ahmedabad-380001

6. The Under Secretary,
Energy and Petrochemicals Department,
Block No. 5, 5th Floor, New Sachivalaya,
Gandhinagar, Gujarat-382010

7. Rudraksh Energy,
R-15A, Yudhisthir Marg,
C-Scheme, Jaipur-302005, Rajasthan

8. The Director,
Gujarat Energy Development Agency,
4 th Floor, Block No. 11 & 12,
Udyog Bhavan, Sector-11,
Gandhinagar-382017, Gujarat

9. Essar Power Gujarat Limited,
Essar house, 11- Keshavrao Khadye Marg,
Mahalaxmi, Mumbai - 400 034

10. Jaihind Projects Limited,
3rd floor, Venus Atlantis Corporate Park,
Nr. Prahlad Nagar AUDA, Garden Satellite,
Ahmedabad – 380015

11. Acme Tele Power Limited,
A-509, Smita Tower, opposite Vishramnagar,
Gurukul Road, Ahmedabad-3820052

12. Moserbaer Clean Energy Limited,
43B, Okhla Industrial Estate,
New Delhi - 110020, India

13. Abellon Clean Energy Limited,
10th floor, Sangeeta Complex,
Nr. Parimal Railway Crossing,
Ellisbrige, Ahmedabad – 380006

14. Welspun Renewables Energy Limited,
Welspun House, 7th Floor,
Kamala City, Senapati Bapat Marg,
Lower Parel, Mumbai – 400013

15. Kiran Energy Solar Power Private Limited,
3, Advani Chambers, August Kranti Road,
Mumbai – 400036

16. Solarfield Energy Private Limited,
3, Advani Chambers, August Kranti road,
Mumbai – 400036.

17. EMCO Limited,
Corporate Division
Plot No.F-5, Road No. 28,
Wagle Industries Estate,
Thane – 400604.

18. Joseph Mathews,
ENAM Holdings Private Limited,
11th floor, Express Towers,
Nariman Point, Mumbai – 400021.

19. Yantra eSolar India Pvt. Limited,
D # 8-2-596/C/1, Ascent Towers,
First Floor, Road # 10, Banjara Hills,
Hyderabad – 500034.

20. Atulkumar and Kalidas Patel,
27-B, Mayurvila Residency,
Berna Road, Himatnagar
Dist: Sabarkantha-383001

21. Rajkot Municipal Corporation,
Commissioner office, Dr. Ambedkar Bhavan,
Dhebarbhal Road, Rajkot – 360001

22. Lanco Solar Energy Private Limited,
Office Plot - 229, Udyog Vihar,
Phase – 1, Gurgaon – 122016,
Haryana, India.

23. Adani Power Limited,
Achalraj, Opp. Mayor Bunglow,
Law Garden, Ahmedabad – 380009.

24. Cargo Solar Power (Gujarat) Private Limited,
Cargo House, Opp. Gandhi Ashram,
Ashram Road, Ahmedabad-380009

25. Surat Municipal Corporation,
Main office building,
Muglisara, Surat – 395003.

26. Applied Materials India Private Limited,
9th Floor, Tradex Tower II
B-4, Commercial Strip
(Facing Jaypee Green Golf Course)
Sector Alpha – I, Greater Noida – 201306,
Uttar Pradesh, India

27. Senior Research Associate,
Prayas Energy Group, Athawle Corner,
Karve Road, Pune – 411004

28. Sun Edison Energy India Private Limited,
Menon Eternity, 10th Floor New # 165
Old No # 110, St. Marys Road,
Alwarpet Chennai – 600018

29. Solar Energy Society of India
A-14, Mohan Operative Industrial Estate,
Mathura Road, New Delhi – 110044

……Respondents

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
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Ms. Ranjitha Ramachandran
Ms. Parichita Chowdhury
Ms. Poorva Saigal
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Ms. Anushree Bardhan
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Mr. Rohit Bhardwaj
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Mr. Vikas Singh
Ms. Meghana Aggarwal
Ms. Devika Chowdhary
Mr. Varun Singh Kapur
Ms. Mazag Andrabi
Ms. Pooja Priyadarshini
Ms. Anushka Arora
Mr. Saraswat Mahapatra
Mr. Sakya Singha Chaudhuri
Mr. Anand Srivastava
Mr. Neel Mani Pant
Mr. Mahija Sharma
Mr. Nishtha Sikroria
Mr. Kumar Harsh
Mr. S. Venkatesh
Ms. Deepeika Kalia
Mr. J.P. Agarwala
Mr. Kapish Seth
Mr. Anuj Agrawal

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by Gujarat Urja Vikas Nigam Limited under Section 111 of the Electricity Act, 2003 against the order dated 07.07.2014 read with the corrigendum dated 11.07.2014 passed by the Gujarat Electricity Regulatory Commission (hereinafter called the '**State Commission**') in the *Suo Motu* proceedings in Order No. 1 of 2012, whereby the State Commission has proceeded to re-determine the tariff for procurement of power by the distribution licensees and others from Solar Energy Projects for the Control Period from 29.01.2012 to

31.03.2015 in pursuance to the directions of this Appellate Tribunal by order dated 17.04.2013 passed in Appeal No. 75 of 2012.

2. **BACKGROUND AND FACTS OF THE CASE**

2.1 The Appellant, Gujarat Urja Vikas Nigam Limited, is a Government of Gujarat Undertaking and incorporated under provisions of the Companies Act, 1956, having registered office at Sardar Patel Vidyut Bhawan, Race Course, Vadodara, Gujarat - 390007.

2.2 The Appellant undertakes the purchase of electricity in bulk from the generating companies and others, and supplies electricity in bulk to the distribution companies in the State to enable distribution and retail supply of electricity by the distribution companies to the consumers and end users. The cost of power purchase of the Appellant is paid for by the distribution licensees and consequently passed on to the consumers in the State of Gujarat.

2.3 The Respondent No. 1, Gujarat Electricity Regulatory commission (**`State Commission')** is the Regulatory Commission for the State of Gujarat and discharges functions and exercises jurisdiction under the provisions of Electricity Act, 2003. The purchase of electricity by the Appellant and the tariff for sale of electricity by generating companies to the Appellant are determined and regulated by the State Commission under Section 61, 62 read with Section 86 of the Electricity Act, 2003. **The Solar Energy Society of India has been established with the objective of advancing, promoting and propagating the use of renewable energy. The members of the Society include the developers of Solar Projects.**

2.4 The State Commission vide its order dated 29.1.2010 determined the tariff for Procurement of Power by the Distribution Licensees and others from Solar Energy Projects which governed the tariff for the control period of two years (i.e. from 29.1.2010 to 28.1.2012).

2.5 The State Commission later initiated a proceeding for determination of promotional tariff for the next control period from 29.1.2012. After due consultation and hearing of the interested parties and in exercise of its power under Section 61(h), 62(1) (a) and 86 (1) (e) of the Electricity Act, 2003, the State Commission passed the Order dated 27.01.2012 and determined the tariff for procurement of power by distribution licensees from Solar Power Projects in the State of Gujarat for the second control period namely from 29.1.2012 to 31.3.2015.The operative portion of order dated 27.1.2012 provides as under:-

"COMMISSION'S ORDER

The Commission approves the tariff for Procurement by the Distribution Licensees and others from Solar Energy Projects for the Control Period from 29 January, 2012 to 31 March, 2015 as outlined in the table below:

Period →	**29 Jan. '12 to 31 Mar. '13**	**1 Apr. '13 to 31 Mar. '14**	**1 Apr. '14 to 31 Mar. '15**
For megawatt-scale photovoltaic projects availing accelerated depreciation			
Levelized Tariff for 25 years	**₹ 9.28 per kWh**	**₹ 8.63 per kWh**	**₹ 8.03 per kWh**
For first 12 years	**₹ 9.98 per kWh**	**₹ 9.13 per kWh**	**₹ 8.35 per kWh**
For subsequent 13 years	**₹ 7.00 per kWh**	**₹ 7.00 per kWh**	**₹ 7.00 per kWh**
For kilowatt-scale photovoltaic projects availing accelerated depreciation			
Levelized Tariff for 25 years	**₹ 11.14 per kWh**	**₹ 10.36 per kWh**	**₹ 9.63 per kWh**

Levelized Tariff for Solar Thermal Projects	
With accelerated depreciation benefit:	**₹ 11.55 per kWh** for 25 years

2.6 The Appellant states that the Order dated 27.1.2012 of the State Commission relates to the procurement of electricity from the Solar Energy Projects by the distribution licensees in pursuance of the provisions of Section 86 (1) (e) read with Section 61 of the Electricity Act, 2003 providing for a Renewable Purchase Obligation and payment of promotional/concessional tariff for the Renewable Power Projects. The Order dated 27.1.2012 is in the context of the Renewable Purchase Obligation which the distribution licensees in the State are required to fulfil as per the directions of the State Commission.

2.7 The Appellant states that in so far as the Developers who had signed the Power Purchase Agreement with Appellant based on the earlier tariff order dated 29.1.2010 passed by the State Commission in Order No 2 of 2010, the rights and obligations are to be governed by the Order dated 29.1.2010 read with the terms and conditions contained in the Power Purchase Agreement. In respect of such Project Developers, Article 5.2 of Power Purchase Agreements provides as under:

"5.2 Above tariff shall apply for solar projects commissioned before 31st December, 2011. In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUNVL shall pay tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower."

Thus, the tariff for those Project Developers who had acted under the earlier tariff Order dated 29.1.2010, but not establishing the Project with the control period of earlier order (i.e. by 28.1.2012) was agreed to be the tariff as applicable for the next control period or the tariff applicable under the Order dated 29.1.2010 whichever is lower.

2.8 Aggrieved by the order dated 27.1.2012 the Respondent No.29 herein filed an appeal being Appeal No. 75 of 2012 before this Tribunal.

2.9 By judgment and Order dated 17.04.2013 this Tribunal had partly allowed the appeal filed by the Respondent No.29 and has directed the State Commission to consider the consequential orders in terms of the observations and directions made by this Tribunal in regard to Operation and Maintenance Cost, Inverter Replacement Cost, Annual Degradation of Solar Power Plant and recovery of revenue permissible to the developers in the life cycle of Solar PV Power Plant at the energy sent out with degradation, grossing of income tax etc.

2.10 Aggrieved by the Order dated 17.4.2013 passed by the Appellate Tribunal, the Appellant herein, filed second appeal being Civil Appeal No. 5218 of 2013 before the Hon'ble Supreme Court. The Civil Appeal was admitted by the Hon'ble Supreme Court vide Order dated 5.8.2013 which reads as under:

> *"Appeal admitted.*
> *No interim order at this stage."*

2.11 In pursuance of the Order dated 17.4.2013 passed by this Tribunal, the State Commission initiated a *suo motu* proceeding in Order No. 1 of 2012. In the said proceedings, the Appellant and some of the Respondents filed their respective reply and written submissions.

2.12 By its Order dated 7.7.2014, the State Commission has decided the suo motu proceeding and re-determined the tariff payable by the Appellant to the Solar Energy Projects for the control period 29.1.2012 to 31.3.2015. The operative part of the State Commission's Order dated 7.7.2014 reads as under:

"COMMISSION'S ORDER

The Commission approves the tariff for Procurement by the Distribution Licensees and others from Solar Energy Projects for the Control Period from 29 January, 2012 to 31 March, 2015 as outlined in the table below:

Period →	**29 Jan. '12 to 31 Mar. '13**	**1 Apr. '13 to 31 Mar. '14**	**1 Apr. '14 to 31 Mar. '15**
For megawatt-scale photovoltaic projects availing accelerated depreciation			
Levellised Tariff for 25 years	**Rs. 9.70 per kWh**	**Rs. 9.02 per kWh**	**Rs. 8.39 per kWh**
For first 12 years	**Rs. 10.52 per kWh**	**Rs. 9.64 per kWh**	**Rs. 8.82 per kWh**
For subsequent 13 years	**Rs. 7.00 per kWh**	**Rs. 7.00 per kWh**	**Rs. 7.00 per kWh**
For kilowatt-scale photovoltaic projects availing accelerated depreciation			
Levellised Tariff for 25 years	**Rs. 11.64 per kWh**	**Rs. 10.82 per kWh**	**Rs. 10.07 per kWh**

Levellised Tariff for Solar Thermal Projects	
With accelerated depreciation benefit:	**Rs. 11.83 per kWh** for 25 years

2.13 Subsequent to the above, on 11.7.2014 the State Commission issued a Corrigendum Order to the order dated 7.7.2014 as under:-

"[1]The Commission passed consequential Order dated 7.07.2014 in Suo Motu proceedings in Order No. 1 of 2012 as per the Judgment dated 17.04.2013 in Appeal No. 75 of 2012 passed by Appellate Tribunal for Electricity, New Delhi.

[2] On verification of the order dated 7.07.2014 in Suo-Motu proceedings in order No. 1 of 2012, we observed that an inadvertent error occurred in Commission's order stated on page 35 and 36 of the said order. In the said order it is stated about the levelised tariff for (i)

MW scale photovoltaic projects, (ii) for Kilowatt scale photovoltaic projects and (iii) Solar Thermal Projects, which are availing accelerated depreciation. In the table of the said order there is no mention about the tariff for (i) MW scale photovoltaic projects, (ii) for Kilowatt scale photovoltaic projects and (iii) Solar Thermal Projects, which are not availing the accelerated depreciation, though the calculation included at sheets enclosed with the order at page 37, 38 and 39 show the levelised tariffs without accelerated depreciation. It is therefore necessary to correct the above errors in the order dated 7.07.2014. We, therefore, decide to correct above stated error and pass necessary order for incorporating corrections as state below:

COMMISSION'S ORDER

The Commission approves the tariff for Procurement by the Distribution Licensees and others from Solar Energy Projects for the Control Period from 29 January, 2012 to 31 March, 2015 as outlined in the table below:

Period →	**29 Jan. '12 to 31 Mar. '13**	**1 Apr. '13 to 31 Mar. '14**	**1 Apr. '14 to 31 Mar. '15**
For megawatt-scale photovoltaic projects availing accelerated depreciation			
Levellised Tariff for 25 years	**Rs. 9.70 per kWh**	**Rs. 9.02 per kWh**	**Rs. 8.39 per kWh**
For first 12 years	**Rs. 10.52 per kWh**	**Rs. 9.64 per kWh**	**Rs. 8.82 per kWh**
For subsequent 13 years	**Rs. 7.00 per kWh**	**Rs. 7.00 per kWh**	**Rs. 7.00 per kWh**
For megawatt-scale photovoltaic projects not availing accelerated depreciation			
Levellised Tariff for 25 years	**Rs. 10.92 per kWh**	**Rs. 10.15 per kWh**	**Rs. 9.44 per kWh**

For first 12 years	**Rs. 11.97 per kWh**	**Rs. 10.96 per kWh**	**Rs. 10.03 per kWh**
For subsequent 13 years	**Rs. 7.50 per kWh**	**Rs. 7.50 per kWh**	**Rs. 7.50 per kWh**
For kilowatt-scale photovoltaic projects availing accelerated depreciation			
Levellised Tariff for 25 years	**Rs. 11.64 per kWh**	**Rs. 10.82 per kWh**	**Rs. 10.07 per kWh**
For kilowatt-scale photovoltaic projects not availing accelerated depreciation			
Levellised Tariff for 25 years	**Rs. 13.10 per kWh**	**Rs. 12.18 per kWh**	**Rs. 11.33 per kWh**

Levellised Tariff for Solar Thermal Projects availing accelerated depreciation	
With accelerated depreciation benefit:	**Rs. 11.83 per kWh** for 25 years
Levellised Tariff for not Solar Thermal Projects not availing accelerated depreciation	
Without accelerated depreciation benefit:	**Rs. 13.23 per kWh** for 25 years

2.14 The Appellant has alleged that in the Order dated 7.7.2014 and the Corrigendum Order dated 11.7.2014 passed in *Suo Motu* proceedings held in pursuance to the Order dated 17.4.2013 passed by this Tribunal, the State Commission had exceeded the scope of the direction given by this Tribunal and has decided on issues beyond the directions given by this Tribunal and further even decided the aspects which were not the subject matter of Appeal No. 75 of 2012.

2.15 Aggrieved by the Order dated 7.7.2014 read with the Corrigendum dated 11.7.2014 passed by the State Commission in *Suo Motu* proceedings relating to the Order No. 1 of 2012, the Appellant has filed the present appeal before this Appellate Tribunal.

2.16 The Appellant's prayer is for the following reliefs:

a) Allow the Appeal and set aside the order dated 07.07.2014 along with corrigendum issued on 11.07.2014 passed by the

State Commission to the extent challenged in the present Appeal.

b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

3. **QUESTIONS OF LAW:**

A. Whether in the facts and circumstances of the case, where the *suo motu* proceedings are in the nature of a proceeding on remand, the State Commission was entitled to enlarge the scope of consideration and deal with the matters other than those specifically directed by the Appellate Tribunal in Appeal No. 75 of 2012?

B. Whether the State Commission is right in issuing a Corrigendum to the Order dated 7.7.2014 providing for a tariff where the accelerated depreciation is not availed by the project developers when the operative part of the original tariff order dated 27.1.2012 provides for single tariff considering the benefit of the accelerated depreciation is being availed and not when the accelerated depreciation being not availed?

C. Whether the State Commission is right in determining the Operation and Maintenance Expenses to be allowed at 0.91% of the capital cost and in excess of 0.85%of the capital cost on the basis of the escalation in the cost, whereas part of O & M Expenses has been related to the capital cost and admittedly such capital cost is at a reducing level as compared to the previous years?

D. Whether the State Commission is right in allowing grossing up of Income Tax when the statutory Regulations notified by the State Commission provides for no such grossing up and reimbursement of any tax and in any event not restricting the grossing up of the tax on the basis of rate of tax to the actual amount of tax paid by the Project Developers?

E. Whether the State Commission is right in considering the levelisation of year on year generation due to annual degradation of the Solar Power Projects for the purpose of tariff more specifically when the State Commission has already considered the effect of annual degradation of PV module in the reduction in year on year generation and Capacity Utilisation Factor (CUF)?

F. Whether the Order of the State Commission in regard to the splitting of the levelised tariff in two sub period, namely, first 12 years and later 13 years has resulted in an error leading to the increase in the effective levelised Gross tariff from Rs 10.92 per unit to Rs 11.02 per unit and increase in Net tariff from ₹9.70 per unit to 9.77 per unit and whether such increase in tariff is justified?

G. Whether the State Commission is right in allowing the entire difference in the tariff determined in the Order dated 7.7.2014 and the tariff earlier determined in the Order dated 27.1.2012 to be recovered in the first 12 years (front loading) instead of apportioning such excess recovery between the two periods, namely, the first 12 years and later 13 years?

4. **The following are the gist of written submissions made by Mr. M.G. Ramachandran, the learned counsel for the Appellant**

A. Scope of Remand Proceedings

4.1 The settled principles laid down by the Hon'ble Supreme Court and this Tribunal is that in the remand proceedings, the lower court (State Commission) is not entitled to inquire into or decide matters other than those directed by the Appellate Authority. In this regard reference may be made to the following judgments:-

(i) K. P. Dwivedi v. State of U.P. and Ors (2003) 12 SCC 572 Paras 11 and 12

(ii) Sarkar on Code of Civil Procedure

(iii) Mulla on Code of Civil Procedure

(IV). Meghalaya State Electricity Board v Meghalaya State Electricity Regulatory Commission (Appeal No. 37 of 2010 in the Order dated 10.08.2010) after analyzing the decisions of the courts

The principles laid down in these authorities are given below:-

(i) *The Court below to which the matter is remanded by the Superior Court is bound to act within the scope of remand. It is not open to the Court below to do anything but to carry out the terms of the remand in letter and spirit.*

(ii) *Ordinarily, the Superior Court can set aside the entire judgment of the Court below and remanded to the subordinate court to consider all the issues afresh. This is called 'open Remand'. The subordinate court can decide on its own afresh on the available materials.*

(iii) *The Superior Court can remand the matter on specific issues with a specific direction through a "Remand Order". This is called 'Limited Remand Order'. In case of Limited Remand Order, the jurisdiction of the Court below is confined only to the extent for which it was remanded".*

4.2 The summary of finding of this Hon'ble Tribunal and the operative part in the order dated 17.04.2013 under remand are as under:

18*. Summary of our findings*

i) *Operation & Maintenance Expenses: The State Commission should have maintained O&M expenses in absolute value at least at the same level as approved for FY 2010-1 i.e.* ₹ *8.25 lakhs/MW. Accordingly, we direct the State Commission to re-determine the O&M cost and allow at *least 0.825% of the capital cost.*

ii) *Inverter replacement cost: We do not want to interfere with the assessment of cost reduction for inverter @ 10% p.a. made by the State Commission for the reason indicated in paragraph 9.4 of the judgment. However, the State Commission has incorrectly computed the inverter replacement cost at 3.81% of the capital cost in the 13th year. With annual reduction of 10% in inverter cost the cost in the 13th year would work out to 4.24% of the capital cost and not 3.81%. Accordingly, the State Commission shall correct the inverter replacement cost.*

iii) Return on Equity: The State Commission is not bound to adopt the RoE as provided in the Central Commission's Regulations. If the State Commission has decided to allow post tax RoE of 14% to renewable energy projects as applicable to power projects of conventional energy sources, we cannot find fault with the same. However, the State Commission should have followed the] principle of grossing up of the income tax as decided by this Tribunal in Appeal no. 174 of 2009, 68 of 2009 and Review Petition no. 9 of 2010 in Appeal no. 68 of 2009. Accordingly, directed.

iv) Annual degradation of Solar Plant: We feel that the issue raised by the Appellant needs to be considered to examine if the levelising tariff allowed by the State Commission ensures recovery of the revenue permissible to the Developers in the life cycle of the solar plant at the energy sent out with degradation. Accordingly, the matter is remanded to the State Commission.

v) Tariff for first 12 years: We find that the State Commission has balanced the interests of the project developer and the consumer by allowing a tariff of only about 8.5% higher than the levelised tariff during the first 12 years. We do not find any reason to interfere with the findings of the State Commission in this regard.

vi) Successive revision in tariff: This issue does not survive as the learned counsel for the Appellant during the rejoinder submission decided not to press the issue.

vii) Clean Development Mechanism: In view of the clarification given by the State Commission that the CDM benefit has to be shared by the Project Developer with GUVNL on cash basis, the issue would not survive.

viii) Project specific tariff: We do not find force in the argument of the Appellant regarding option for project specific tariff. The findings of the Tribunal in Techman case (Appeal nos. 50 & 65 of 2008) for hydro projects will not be applicable to the present case.

19. In view of above, the Appeal is partly allowed to the extent as indicated above. The State Commission shall pass the *consequential order in terms of the observations and directions referred to above. No order as to costs.*

4.3 The State Commission has wrongly considered the following aspects which do not fall within the scope of the Remand Proceedings:

(i) The issue of Corrigendum to virtually amend the earlier Order dated 27.1.2012 passed by the State Commission, which was the subject matter of the Appeal before this Tribunal in Appeal No 75 of 2012 and decided by the Order dated 17.04.2013. The Order dated 27.01.2012 merged in the Appeal Order dated 17.4.2013/Review Order dated 29.05.2013 and the State Commission was entitled to consider only the Limited aspects remanded.

(ii) Allowing grossing up of tax based on the rate of tax disregarding the actual quantum of tax payable on admissible Return on Equity and not clarifying the grossing up shall be restricted to actual tax paid on the return of equity contrary to specific directions contained in the Order dated 17.04.2013 passed by the Tribunal

(iii) Determining the Operation and Maintenance Expenses in excess of what has been directed by the Hon'ble Appellant Tribunal, that too without any prudent justification, more specially when the capital cost has been substantially reduced and maintenance spares expenses to be allowed as a part of the O&M expenses etc. depend upon the quantum of the capital cost;

(iv) Has generally proceeded to deal with matters not dealt at all by the Tribunal and has exceeded the directions given in respect of some of the aspects in the Order dated 17.4.2013 in Appeal No. 75 of 2012;

B. ISSUANCE OF CORRIGENDUM DATED 11.7.2014

4.4 In the Order dated 27.1.2012 which was challenged before the Tribunal in Appeal No 75 of 2012 leading to the passing of the order dated 17.4.2013, the operative part contained only the tariff on the basis that the Project Developers will avail the accelerated depreciation.

4.5 By the Corrigendum order dated 11.7.2014 the State Commission has incorporated in the operative part of the said Order dated 7.7.2014 to provide for tariff for the Solar PV Projects on the basis that the Project Developers may not avail the accelerated depreciation.

4.6 As mentioned above the above aspect was never dealt by the Tribunal in the Order dated 17.4.2013 passed in Appeal No 75 of 2012 and therefore could not have been considered at all by the State Commission.

4.7 The Order dated 27.1.2012 implemented the tariff for the projects where the Project Developer decides not to avail the accelerated depreciation. The Order dated 27.1.2012 only provides for computation of the tariff which would be there in case of accelerated depreciation being not available. The operative part of the Order did not decide to implement the tariff without accelerated depreciation being availed.

4.8 In the above context the Corrigendum issued by the State Commission on 11.7.2014 after a period of about 2 and half years from the order dated 27.1.2012 is patently erroneous and is liable to be set aside. There was absolutely no cause or occasion for issue of a Corrigendum on 11.7.2014., even by stating that the same was classificatory in nature.

4.9 In the reply the Respondent have raised the issue that in Gujarat Urja Vikas Nigam Limited v. EMCO Limited(2016) 11 SCC 182, the Hon'ble Supreme Court considering the same order dated 27.1.2012 of the State Commission has proceeded on the basis that there are two alternate tariffs decided in the said Order dated

27.1.2012 – one for projects availing accelerated depreciation and another for projects not availing accelerated depreciation. Accordingly it is submitted by the Respondent that the corrigendum issued by the State Commission is consistent with the decision of the Hon'ble Supreme Court. This claim of the Respondent in support of the second impugned order dated 11.7.2014 is to be rejected for the following reasons:

4.10 While none of the parties can question the implications and effect of the decision of the Hon'ble Supreme Court which is definitely binding on the Appellant also, the issue in the present case is the power and jurisdiction of the State Commission to issue the corrigendum in the remand proceedings after the decision of the Tribunal dated 17.4.2013. As mentioned above the corrigendum was issued after 2½ years of the order dated 27.1.2012. There was no occasion or justification for the State Commission to issue such corrigendum;

4.11 the decision of the Hon'ble Supreme Court was in the context that even if the order dated 27.1.2012 had provided for two alternate tariffs namely (a) one with the developer availing depreciation and (b) another without availing depreciations, the Solar Developers, who had signed PPAs with the Appellant accepting the Tariff based on projects availing accelerated depreciation, cannot change thereafter to the tariff of not availing accelerated depreciation. Accordingly as per the decision of the Hon'ble Supreme Court if the Corrigendum is to be maintained, it is necessary to clarify that the Solar Power Developers who have signed PPAs with the Appellant at any time prior to 11.07.2014 including prior to 27.1.2012 and also those who have signed PPAs after 11.07.2014 cannot seek to change to tariff based on accelerated depreciation benefit being not availed. The decision of the Hon'ble Supreme Court in EMCO Case (Supra) is specific in this regard and binding. The Appellant also crave reference to the following decisions of the Hon'ble Supreme Court:

I. Gujarat Urja Vikas Nigam Limited v. Acme Solar Technologies (Gujarat) Pvt Ltd and Ors (2017) 11 SCC 801

II. Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Limited and Others (2017) 12 SCALE 781

C. Operation & Maintenance Expenses (O&M Expenses)

4.12 The Tribunal in its judgment dated 17.04.2013 had directed as under::

> "*18. i) Operation & Maintenance Expenses: The State Commission should have maintained O&M expenses in absolute value at least at the same level as approved for FY 2010-1 i.e. ₹ 8.25 lakhs/MW. Accordingly, we direct the State Commission to re-determine the O&M cost and allow at *least 0.825% of the capital cost."*

4.13 The ratio of the Tribunal's judgment is clearly that the O&M expenses for the projects for the second control period under Tariff Order dated 27.01.2012 should be considered at the level of O&M expenses applicable for FY 2010-11 i.e. ₹ 8.25 lakhs per MW and should not be lower.

4.14 Accordingly, the State Commission was required to compare the O&M expenses for the project life of 25 years which a project developer under Tariff order dated 27.01.2012 will be entitled to considering 0.825% of Capital Cost vis-à-vis O&M expenses that a project developer in FY 2010-11 would be entitled to under Tariff Order dated 29.01.2010.

4.15 However, the State Commission has proceeded to consider O&M Expenses for the year 2012-13 instead of 2010-11. Further the State Commission equated the O&M expenses of a single year (i.e. 2012) for both types of projects i.e. projects under tariff order 29.01.2010 vis-à-vis projects under tariff order 27.01.2012 and adopted the same as the basis for parity without considering the levelised O&M expenses for the entire life of the project.

4.16 The finding of the State Commission in the First Impugned Order is as under:

(8.3)

………

The O & M expenses consists of administrative expenses, maintenance spares, etc. which remain same for the project commissioned/operating during the same period. The project which were commissioned during the control period of Order No. 2 of 2010 dated 29.01.2010 were receiving O & M expenses during the FY2012-2013 @ ₹9.10 Lakhs/MW with consideration of the O & M expenses of ₹8.25 Lakhs/MW for FY 2010-2011 and escalate it by 5% per annum. While the project which was commissioned during the FY 2012-2013 onward i.e. control period of Order No. 1 of 2012 dated 27.01.2012 receive the O & M expenses @ ₹8.25 Lakhs/MW which is lower than ₹9.10 Lakhs/MW received by the project developers who commissioned the plant during the control period of Order No. 2 of 2010 dated 29.01.2010. Thus, O & M expenses which consist of the same components of Administrative expenses, repair and maintenance expenses, spares etc allowed different by the Commission for some project commissioned during different control period is a discriminatory amongst different Solar PV Power Project Developers which is not permissible. We therefore, decide that the O & M expenses for tariff determination of Order No. 1 of 2012 dated 27.01.2012 at ₹ 9.10 lakhs/MW for tariff determination purpose and the same may be escalated at the rate of 5.72% per annum thereafter.

4.17 The above consideration of O&M expenses at 0.91% of Capital Cost for 2012 by the State Commission is not in line with the directive of the Hon'ble Tribunal which required the O&M expenses to be 0.825% of the Capital Cost being ₹8.25 lakhs per MW as absolute value for FY 2010-11.

4.18 Further, the State Commission while allowing O&M expense at 0.91% of Capital Cost so as to equate the O&M expenses available to the projects under Tariff Order 2010 in year 2012 has ignored the fact that the year on year escalation in the O&M costs available under Tariff Order 2012 at 5.72% per annum as against 5% available under Tariff Order 2010 is higher. .

4.19 Thus, the consideration of O&M expenses at 0.91% of Capital Cost is not commensurate to the justification provided by the State Commission that both the projects i.e. those under Tariff Order 2010 and under Tariff Order 2012 should get same O&M expenses. Per contra, it would clearly show that with O&M expenses at 0.91% of Capital Cost to be escalated at 5.72% per annum for projects under Tariff Order 2012 will get levelised O&M expenses of around ₹138 lakhs per MW for the project life of 25 years whereas the projects under Tariff Order 2010 will get levelised O&M expenses of around ₹117 lakhs per MW for the project life of 25 years.

4.20 The objective behind the directive of the Tribunal of working out the O&M expenses on the basis of 0.825% of the Capital Cost for projects under Tariff Order 2012 namely the O&M expenses that the projects will get irrespective of the tariff order would be almost similar. The O&M expenses at 0.825% of the Capital Cost to be escalated at 5.72% per annum for projects under Tariff Order 2012 will get levelised O&M expenses of around ₹125 lakhs per MW for the project life of 25 years which comparable to the levelised O&M expenses of around ₹117 lakhs per MW for the project under Tariff Order 2010.

4.21 Further, the State Commission was required to decide on the aspect of O & M Expenses by applying proper prudent check. There is no justification provided by the State Commission as to why the project under Tariff Order 2012 ought to get higher O&M expenses (₹138 lakhs per MW) as compared to projects under Tariff Order 2010 (₹117 lakhs per MW). On the contrary the State Commission itself has noted in the impugned order that apart from maintenance spares other expenses like administrative expenses, employee cost etc. will remain same for projects under both the control period. Since, the Capital Cost has significantly come down under Tariff Order 2012 the maintenance spares etc. related cost will be less when compared to project under Tariff Order 2010.

4.22 The co-relation of the O&M Expenses to the capital cost of the project is not totally unfounded. The O&M Expenses primarily consist of the employees' expenses, maintenance spares, repair expenses and administrative and general expenses. The maintenance spare components are an important part of the O&M Expenses. The cost of maintenance spares is directly related to the cost of the capital assets. When the cost of the capital assets had reduced substantially in the subsequent control period commencing from 27.1.2012, the cost of maintenance spares also stands reduced. Accordingly, it was not appropriate for the State Commission to have considered the escalation for all the components of O&M Expenses as compared to the first control period commencing from the year 2010. The State Commission ought to have gone into the specific aspects of where there is reduction in the cost and where there is possible increase in the cost. The State Commission has proceeded entirely on the wrong premise that the Tribunal's Order dated 17.4.2013 requires O& M Expenses to be allowed above the rate specified in the first control period. The computation made by the Respondents in the reply purporting to be in contrast to the computation given by the Appellant herein suffers from serious mistakes as it proceeds on the basis that there will be escalation of all the components.

4.23 Thus, the State Commission itself has taken divergent view while giving higher O&M expenses for the projects under Tariff Order 2012, ignoring the interests of the consumers and which is also in contravention to the directive under the Tribunal judgment which clearly provides that the State Commission shall maintain the absolute value of O&M expenses at 0.825% of Capital Cost so that the O&M expenses available to project developers are same irrespective of the control period.

D. GROSSING UP OF TAX

4.24 The grossing up of the tax directed by this Tribunal in the Order dated 17.4.2013 should be on the basis of the earlier decisions of this Hon’ble Tribunal in Appeal No. 174 of 2009, 68 of 2009 and Review Petition No. 9 of 2010. The Tribunal had specifically held that even where there is grossing up of tax based on the rate of tax applicable, the actual tax paid on the equity capital only ought to be allowed and there cannot be any gain or loss on account of payable income tax.

4.25 Accordingly, if no tax is paid or if actual tax paid is less than the rate of tax for grossing up, the actual tax only could be reimbursed in the tariff. In the case of some developers , equity investment by the project developers is just at ₹0.01 Crores/MW as against normative equity of ₹3.0 Crores/MW considered in the tariff order dated 27.1.2012.Therefore, the income tax liability based on actual equity investment is much less then the income tax expenditure considered in the tariff order dated 27.1.2012.

4.26 Accordingly, allowing grossing up of the income tax in the tariff without limiting to the actual tax paid would result into undue benefit to the developers in name of income tax. The actual income tax is to be reimbursed. The developers cannot be allowed to make any profit on this account.

4.27 Without prejudice to the above, the Tariff Regulations notified by the State Commission and referred to by the State Commission while passing the solar tariff order dated 27.1.2012 does not provide for grossing up of income for income tax purpose. The State Commission has, in fact, followed such Regulations in the case of Torrent Power Limited whose tariff was the subject matter of the proceedings in Appeal No. 68 of 2009 and Review Petition of 9 of 2010. The State Commission ought to have followed its own Regulations in regard to the grossing up of the tax. The same regulation is also followed in tariff determination process for other Renewable Energy projects such as Wind, Biomass etc.

4.28 It is incorrect on the part of the Respondents to proceed on the basis that the Tribunal in the Order dated 17.4.2013 has directed the grossing up of taxes to be allowed to the Solar Power Developers irrespective of whether the actual tax has been paid or not and contrary to the statutory Regulations applicable.

4.29 The Respondent's interpretation of the order dated 17.4.2013 passed by the Tribunal in Appeal No. 75 of 2012 is not correct. The directions relating to the grossing up of Income Tax and methodology contained in the said order has been in the context of the earlier orders passed by the Tribunal. It is not correct that this Tribunal intended to deviate from the earlier orders in regard to the grossing up of the Income Tax.

4.30 The order dated 17.4.2013 of this Tribunal in Appeal No. 75 of 2012 had not decided on the statutory Regulations notified by the State Commission on the aspect of grossing up of tax. This Hon'ble Tribunal in number of cases has held that matters provided for in the statutory Regulations cannot be a subject matter for consideration in the appeal. Accordingly, the State Commission ought to have followed the statutory Regulations and same principle as it had adopted in the case of Torrent power Limited in the proceedings held in pursuance of judgment dated 23.3.2010 & 5.1.2011 passed by Tribunal in the Appeal No. 68 of 2009 and Review Petition No. 9 of 2010 respectively which has been relied by Tribunal while passing the judgement dated 17.04.2013.

4.31 In the context of the above, the Statutory Regulations of the State Commission in regard to the grossing up of the tax is conditional upon restricting the reimbursement to the actual tax that may be paid by the Project Developers. It is inconceivable that the Project Developers will get as reimbursement all taxes at the rate of tax without the Project Developers actually being required to pay the tax to the said extent.

D. ANNUAL DEGRADATION AND LEVELISATION

4.32 The Tribunal in the Order dated 17.04.2013 has directed as under:

> *"13.5 We feel that the issue raised by the Appellant needs to be considered by the State Commission to examine if the levelising tariff allowed by the State Commission ensures recovery of the revenues permissible to the Developers during the life cycle of the plant at the energy sent out with degradation. Accordingly, the State Commission shall consider the submissions of the Appellant and decide the matter."*

4.33 The levelisation of generation due to annual de-gradation ought not to have been considered additionally when the Capacity Utilisation Factor (CUF) allowed at 18% duly takes into account the year-on-year energy generation including the de-gradation of a Solar Power plant in the computation of tariff. The Capacity Utilisation Factor as fixed at a reduced level adequately protects the interest of the Project Developers in regard to de-gradation of the solar model. Additionally allowing the levelisation of generation due to annual de-gradation would result in un-intended double benefit to the Solar Project Developers.

4.34 As mentioned above the capacity utilisation factor allowed at 18% is duly factoring the year-on-year energy generation including the de-gradation of a Solar Power Plant in the computation of tariff. The capacity utilisation factor as fixed at a reduced level adequately protects the interest of the Project Developers in regard to de-gradation of the solar model. Additionally allowing the levelisation of generation due to annual de-gradation would result in un-intended double benefit to the Solar Power Developers.

E. APPORTIONMENT OF LEVELLED TARIFF IN TWO PERIODS

4.35 There is an obvious error in apportioning the levelised tariff (Gross tariff of ₹10.92 per unit and net tariff of Rs 9.70 per unit)determined by the State Commission for 25 years in the two tariff periods, namely, the first 12 years and later 13 years, the tariff will be ₹10.43/Unit in the first 12 years and ₹7.32/Unit thereafter in the next13 years in place of tariff of ₹ 10.52/Unit of first 12 years and ₹7.00/Unit thereafter for 13 years for the project availing accelerated depreciation. Similarly, the tariff will be ₹ 11.85/Unit of first 12 years and ₹7.90/Unit thereafter for 13 years in place of tariff of ₹11.97/Unit of first 12 years and ₹7.50/Unit thereafter for 13 years for the project not availing accelerated depreciation. The relevant computation is contained in the rejoinder to the Interim application. The tariff fixed for such two sub period of 12 years and 13 years lead to effective levelised gross tariff of ₹11.02 per unit and levelised net tariff of ₹9.77 per KwH instead of ₹10.92 per unit and ₹9.70 per unit, respectively. The above will increase in the levelised tariff for 255 MW falling in the control period by ₹ 66 Crores during the lifetime of 25 years, a significant quantum unintended additional cash flow.

4.36 In addition to the above, the State Commission has apportioned the entire difference between the tariff determined in the earlier Order dated 27.1.2012 and in the Order dated 7.7.2014 as front loading in the first 12 years itself instead of apportioning the same between the first 12 years and later 13 years in a proportionate manner i.e. in the proportion to the earlier tariff determined in the Order dated 27.1.2012. The difference ought to have been apportioned between two sub period namely first 12 years and later 13 years in the same earlier proportion as to maintain parity.

4.37 If the increased tariff had been considered in the initial tariff Order dated 27.1.2012, the State Commission would have logically, apportioned the increased tariff (in the impugned order) as per the earlier proportion between the two periods instead of loading the entire increased tariff in the first 12 years. While, allowing entire increased tariff as front loaded (initial 12 years), the State Commission has forgotten to consider the issues related to significant cash out flow and related liquidity issues of the Distribution Licensee which will arise due to such significant front loading in the tariff during the initial 12 years. Further, the State Commission has not given any justification for such skewed apportionment of tariff between two sub periods.

4.38 The Respondents are wrongly alleging that the Appellant is challenging the basic methodology of front loading of the tariff decided by the State Commission in the Order dated 27.1.2012 or in the decision dated 17.4.2013 of this Tribunal. The Appellant submission is that the State Commission ought to have apportioned the increased tariff proportionately between the two periods, namely, the first 12 years and the balance 13 years. If the tariff is proportionately apportioned between the two periods, the tariff will be ₹ 10.43/Unit in the first 12 years and ₹ 7.32/Unit thereafter in the next13 years in place of tariff of ₹ 10.52/Unit of first 12 years and ₹ 7.00/Unit thereafter for 13 years for the project availing accelerated depreciation. Similarly, the tariff will be ₹11.85/Unit of first 12 years and ₹7.90/Unit thereafter for 13 years in place of tariff of ₹11.97/Unit of first 12 years and ₹ 7.50/Unit thereafter for 13 years for the project not availing accelerated depreciation.

5. **The following are the gist of submissions made by Mr. Hemant Sahai, Ld. Counsel for the Respondent No. 29, Solar Energy Society of India (SESI):**

A. CORRIGENDUM DATED 11.07.2014

5.1 The Tariff Order, 2012 "determines" both tariffs i.e. with and without accelerated depreciation and this interpretation of the Tariff Order, 2012 has been clarified by the Ld. Commission vide its' Order dated 08.08.2013 in Petition No. No. 1270 of 2012. Relevant extracts of the Ld. Commission's Order dated 08.08.2013 in *EMCO Ltd. vs. GUVNL [Petition No.1270 of 2012]* are reproduced herein below:

"6.22. Therefore, <u>it is incorrect to say that, if only the operative portion of the order, or explanation given below the table is to be taken as decision of the Commission and the analysis part mentioned in the earlier part of the order is not a part of the final order, then the analysis and determination of tariff for a project not availing the benefit of Accelerated Depreciation, which was determined by the Commission in the earlier part of the said order becomes redundant and has no meaning. This is not the intent of the order passed by the Commission. Hence, we decide that the tariff determined for projects, which are not availing the benefit of Accelerated Depreciation is also part of the Order No. 1 of 2012 dated 27.01.2012. Therefore, the contention of the petitioner that the Commission has not decided any tariff for the Solar Projects not availing the benefit of accelerated depreciation is not accepted.</u>";

5.2 The Corrigendum issued by the Ld. Commission is merely a clarification and rectification of an inadvertent error, as admitted by the Ld. Commission in the Corrigendum, the issuance of which was necessary in view of the growing confusion and litigation on the issue of accelerated depreciation. The Ld. Commission, as expressly admitted in the Corrigendum, had inadvertently not mentioned the tariff for projects not availing the benefit of accelerated depreciation even though the same had been determined at Pages 37, 38 and 39 of the Tariff Order, 2012;

5.3 The Corrigendum is consistent with the earlier determination of Tariff by the Ld. Commission for the Second Control Period;

5.4 It is a settled principle that a court may rectify its order/judgment to include in the decree (operative portion) something that has been decided in the judgment but mistakenly omitted in the operative portion. In *Jayalakshmi Coelho vs Oswald Joseph Coelho* (2001) 4 SCC 181, it was held that:

"*13. So far legal position is concerned, there would hardly be any doubt about the proposition that in terms of Section 152 C.P.C., any error occurred in the decree on account of arithmetical or clerical error or accidental slip may be rectified by the court. The principle behind the provision is that no party should suffer due to mistake of the court and whatever is intended by the court while passing the order or decree must be properly reflected therein, otherwise it would only be destructive to the principle of advancing the cause of justice. A reference to the following cases on the point may be made:*

The basis of the provision under Section 152 C.P.C. is found on the maxim "Act us Curiae Neminem Gravabit" i.e. an act of Court shall prejudice no man (Jerk Cent-118) as observed in a case reported in Assam Tea Corporation Ltd. versus Narayan Singh. Hence, an unintentional mistake of the Court which may prejudice cause of any party must be rectified…."

In *State of Punjab vs Darshan Singh* (2004) 1 SCC 328, it was held that:

"*Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or* *order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very Court or the tribunal cannot, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefore and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order…"*

5.5 It is a further settled principle of law that an Order of a Court has to be read in its' entirety and not in parts to understand the true intent of the Order. The Appellant is, in the instant case, while ignoring the express determination of tariff for projects not availing the benefit of accelerated depreciation by the Ld. Commission, relying only on the conclusion of the Tariff Order, 2012 to establish that the Ld. Commission had only determined tariff for projects which would be availing the benefit of accelerated depreciation. The reference to the Judgment of Hon'ble Supreme Court of India in *Islamic Academy of Education and Anr. vs. State of Karnataka and Ors. [(2003)6SCC697]*:

5.6 Further, as regards the submission of the Appellant that the Ld. Commission has exceeded its jurisdiction in a limited remand by issuing Corrigendum dated 11.07.2014, this Tribunal has, in ***Haryana Vidyut Prasaran Nigam Limited vs. Haryana Electricity Regulatory Commission & Ors. [Appeal No.2 of 2013 | Judgment dated 06.09.2013]*** held that the State Commission is within its powers in correcting inadvertent patent errors in its orders even in a limited remand**.**

5.7 In the above case, Tribunal has upheld that while passing an Order in remand proceedings the Commission can make correction of a patent error discovered in the Original Order. In the present case, the inadvertent error of non- inclusion of the tariff for projects not availing accelerated depreciation in the operative part of the Order dated 07.07.2014 was rectified.

5.8 In fact, the issue whether Ld. Commission has determined two separate tariffs – one for projects availing accelerated depreciation and the other for those not availing accelerated depreciation- in Tariff Order 2012 has been put to rest by Tribunal in a separate Judgment in Appeal No. 252 of 2013 dated 20.11.2014**.** The Appellant has chosen not to refer to this Judgment at all. In this Judgment, Tribunal has solely dealt with this issue and after considering exactly same arguments of the Appellant, rejected them all and decided in categorical terms that Tariff Order 2012 has determined two separate tariffs and not the only one given in operative portion of the said Order. The Appellant is, therefore, barred by Res-judicata to canvass same issues once again before Tribunal in these proceedings.

B. GROSSING UP OF INCOME TAX

5.9 The Ld. Commission has, while grossing up the income tax in *suo moto* Proceedings in Order No.1 of 2012, complied with directions passed by this Tribunal in its' Judgment in Appeal No. 75 of 2012;

5.10 The Ld. Commission cannot be said to have erred in either grossing up income tax or not subjecting it to any condition of restricting it to actuals as per MYT Regulations when the entire exercise of tariff determination is on normative basis. Admittedly, MYT Regulations are applicable to conventional projects and there are no regulations for renewable projects like solar projects issued by Ld. Commission. Hence, the principles of MYT Regulations, based on actual parameters or truing up, would not apply in the instant case when Ld. Commission has decided to determine tariff on normative parameters;

5.11 This Tribunal in the case of ***GUVNL v. GERC & Ors.*** reported as ***Appeal No. 279 of 2013*** has held that revisiting a generic tariff order based on normative principles on the basis of actuals in not permissible. The relevant findings of this Hon'ble Tribunal has been reproduced herein below-

<u>Therefore, the generic tariff order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred especially when the Tariff Order, 2010 did not reserve with itself the power to re-visit if the actual parameters applied by the Generators vary with the normative parameters.</u>"

"177. <u>Summary of Findings</u>
3(d) Generic Tariff Order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred in setting-up the Project and actual equity deployed."

5.12 The issue of allowing actual income tax as per the MYT Regulations applicable to conventional projects in line with the previous Judgments of Tribunal and Ld. Commission has already been agitated by the Appellant in earlier proceedings before the Tribunal. The relevant extracts of Appellant's pleadings and Tribunal's directions regarding grossing up of Income Tax in Judgment in Appeal No. 75 of 2012 are reproduced herein below:

(a) Appellant's submission in its Reply Note for Arguments in Appeal No. 75 of 2012

"Ground (d): Return on Equity

…

- *The Judgment of the Tribunal regarding grossing up of post tax return was interpreting the Regulations of the Central Commission in the respective cases.*

- *There is no grossing up under the MYT Regulations, 2011 of the State Commission. The MYT Regulations, 2011 of the State Commission in all cases provide for ROE + the tax on ROE at the applicable rate without grossing up. In no case, conventional or non-conventional generators, the State Commission has allowed ROE and taxes with grossing up. This is a conscious decision by the State Commission and no exception has been made in the case of Solar Projects. Accordingly, the claim by the developers I appellants on grossing up of tax is wrong.”*

(b) Tribunal’s decision as regards grossing up of Income Tax in Judgment dated 17.04.2013

“11.8 In Review order also, the Tribunal has decided that the principle of grossed up tax is applicable to the Central Commission’s Regulations as well as the State Commission’s Regulations.

11.9 The findings of the Tribunal in the above cases will also be applicable to the present case. Therefore, the issue regarding grossing up of income-tax is decided in favour of the Appellant

...

18. Summary of findings

…

(iv) …However, the State Commission should have followed the principle of grossing up of the income tax as decided by this Tribunal in Appeal no. 174 of 2009, 68 of 2009 and Review Petition no. 9 of 2010 in Appeal no. 68 of 2009. Accordingly, directed.”

5.13 The decision relied upon by the Appellant in its written submissions is not relevant to the present case and is clearly distinguishable for the following reasons:

a) The said case relates to the truing up of expenditure towards income tax under the MYT Regulations. The MYT Regulations are not applicable to non-renewable projects.

b) The referred case relates to project specific tariff. The same principles cannot be applied to generic tariff orders where a normative approach is adopted for all generating units. The suggestion made by the Appellant would convert the process for generic tariff into one for project specific tariff since income tax would differ from project to project.

c) Section 86(1) e contemplates preferential tariff for renewable generation, wherein the principles of strict prudent check as per actual costs is not applicable.

The afore-quoted direction of this Tribunal to the Ld. Commission to follow the principle of grossing up of income tax is also challenged by the Appellant before the Hon'ble Supreme Court. The relevant extracts of Civil Appeal No. 5218 of 2013 filed by the Appellant herein before the Hon'ble Supreme Court are reproduced herein below:

"O. Because the Appellate Tribunal erred in holding that State Commission should have followed the principle of grossing up of the income tax when the State Commission had been consistently following the methodology of allowing income tax on actual basis independently and not through grossing up. There is therefore no justification whatsoever for giving any direction to the State Commission.";

5.14 The Appellant having challenged the decision of Tribunal itself cannot now say that when Ld. Commission has implemented this decision of grossing up of income tax in remand it has gone beyond the scope of remand.

5.15 Further, it is established principle of law that, in the cases where tariff is determined on normative/generic basis, it cannot be revisited on the basis of actual cost incurred. Thus, tax having been allowed on normative basis cannot be now re-visited based on actual tax. This Tribunal in appeal no. 279 of 2013 vide judgment dated 22.08.2014 has upheld the aforementioned principle. The relevant extract of the judgment dated 22.08.2014 is reproduced herein below:

"Generic Tariff Order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred in setting-up the Project and actual equity deployed."

C. <u>O&M EXPENSES</u>

5.16 The submission of the Appellant that the Ld. Commission has not considered the aspect of determining the O&M Expenses with respect to the reduced capital cost and has, in fact, provided for escalation is not only incorrect and misleading, but is also reiteration of the same submission which has already been rejected by Tribunal vide its' Judgment in Appeal No. 75 of 2012. The relevant extracts of the pleadings filed by the Appellant and other parties and of the Judgment in Appeal No. 75 of 2012:

(a) **Appellant's submission in its Reply to Appeal No. 75 of 2012**

"9. …. O&M Cost

It is submitted that the O&M Cost is related to the capital cost in many respects and are not entirely independent of the capital cost as alleged by the Appellant. The material portion of the O&M Cost such as maintenance, spares etc. are directly linked to the capital cost. Furthermore, the O&M Cost being linked to the capital cost has been an accepted norm. It is wrong and denied that the O& M Cost will remain the same irrespective of the reduction in the capital cost. The cost in *respect of Operating and Maintenance of the Solar Power Projects also gets significantly reduced with innovation in technology and reduction in the total capital cost. The allegations to the contrary are wrong and are denied…"*

(b) **Appellant's submission in its Reply Note for Arguments in Appeal No. 75 of 2012**

"Ground (a) O&M Cost

O&M Cost is related to the capital cost in many respects and are not Independent of the capital cost as alleged by the Appellant. The material portion of the O&M Cost such as maintenance, spares etc are directly linked to the capital cost

Since the capital cost of the solar project has substantially reduced, the 0 & M cost has also come down correspondingly"

(c) **Hon'ble Tribunal's Judgment dated 17.04.2013**

"8.2 Learned Counsel for GUVNL (R-2) argued that O&M cost is related to capital cost in many respects and is not independent of the capital cost. The State Commission has infact increased the O&M by allowing it at 0.75% of the capital cost as against 0.5% of the capital cost allowed in the earlier tariff order dated 29.1.2010…."

(d) **GERC's Submissions in its' Written Submissions in Appeal No. 75 of 2012**

"7. Admittedly, operation and maintenance costs are mostly human resource related. Solar photovoltaic power plants are characterized by their simple and low-cost operation and maintenance not involving a large human resource base. The requirement of skilled manpower is limited. Therefore, the Respondent Commission in the impugned order allowed O&M cost @0. 75% of the capital cost. ***Taking into consideration the inflation, the Respondent Commission has increased the escalation rate on the above O&M cost from 5% to 5.72%****."*

(e) **Hon'ble Tribunal's Judgment dated 17.04.2013**

"8.3 Shri Sanjay Sen, learned Senior Counsel for the State Commission has submitted that solar photovoltaic power plants have very low cost of Operation & Maintenance and the ***State Commission in the impugned order has tried to strike a balance between the low cost of maintenance of the solar power plants and the concerns of the developers on account of high inflation rates****. The State Commission has in fact increased the O&M cost from 0.5% to 0.75% of the capital cost."*

(f) **Hon'ble Tribunal's decision as regards O&M cost in Judgment dated 17.04.2013**

"8.8 ***As rightly pointed out by the Appellant and also indicated by the State Commission in the discussion paper, the employees' expense is a major component of O&M expenses of solar power project. The reduction in cost of Solar Power Projects is basically for the solar power module only. Therefore, the reduction of the capital cost should not impact the O&M cost appreciably.*** *The intention of the State Commission in the discussion paper was also by providing O&M expenses at 0.75% of the proposed capital cost of ₹11 crores/MW i.e. at ₹8.25 lakhs/MW. However, the State Commission decided to reduce the capital cost to ₹10 crores/MW in the impugned order but maintained the O&M cost at ₹0.75% only. No explanation was given in the impugned order for effectively reducing the O&M expenses. We feel that the State Commission should have maintained O&M expenses in absolute value at least at the same level as approved for the FY 2010-11 i.e. at ₹8.25 lakhs/MW. Accordingly,* ***we direct the State Commission to reconsider the O&M cost and allow at least *0.825%****"*

(g) **Ld. Commission's decision as regards O&M Cost in Remand Order dated 07.07.2014**

"[8.3] The principle of associating O &M expenses to the capital cost has not been disturbed by the Hon'ble APTEL but decided that the O & M expenses should be at least the same amount as was existing before the impugned order. Moreover, the cost of spares which is a part of the O & M

*expenses has also reduced significantly. Hence, the O& M expenses can be kept at the rate of ₹ "8.25 Lakhs/MW. The contentions raised by the GUVNL are not acceptable. The O & M expenses consists of administrative expenses, maintenance spares, etc. which remain same for the project commissioned/operating during the same period. The project which were commissioned during the control period of Order No. 2 of 2010 dated 29.01.2010 were receiving O & M expenses during the FY2012-2013 @ ₹9.10 Lakhs/MW with consideration of the O & M expenses of ₹8.25 Lakhs/MW for FY 2010-2011 and escale it by 5% per annum. While the project which was commissioned during the FY 2012-2013 onward i.e. control period of Order No. 1 of 2012 dated 27.01.2012 receive the O & M expenses @ ₹8.25 Lakhs/MW which is lower than ₹9.10 Lakhs/MW received by the project developers who commissioned the plant during the control period of Order No. 2 of 2010 dated 29.01.2010. Thus, **O & M expenses which consist of the same components of Administrative expenses, repair and maintenance expenses, spares etc allowed different by the Commission for some project commissioned during different control period is a discriminatory amongst different Solar PV Power Project Developers which is not permissible. We therefore, decide that the O & M expenses for tariff determination of Order No. 1 of 2012 dated 27.01.2012 at ₹9.10 lakhs/MW for tariff determination purpose and the same may be escalated at the rate of ₹5.72 per annum thereafter**.";*

5.17 This Tribunal having rejected the Appellant's plea that O&M expenses reduce with reduction in capital cost, directed the Ld. Commission to allow at least ₹8.25 lakh/MW in absolute terms leaving the issue of escalation to be decided by the Ld. Commission. The Ld. Commission in the Impugned Order implemented the said direction and allowed inflation for 2 years @5% p.a. to arrive at base O&M expense of ₹9.10 lakh/MW over the 2010-11 level of ₹8.25 lakh/MW in line with its submissions before Tribunal to account for impact of inflation;

5.18 The Appellant has contended in its Written Submissions that while Ld. Commission has given the reason of parity in O&M Expenses for projects covered under Tariff Order 2010 and Tariff Order 2012, it has actually not maintained the parity. By escalating 2010 level base expense twice @5% p.a. to arrive at 2012 base expense of ₹9.10 Lakh/MW, the Ld. Commission has given higher O&M Expense for projects under Tariff Order 2012 at the rate of .910% of capital cost, which is higher than that available to projects under Tariff Order 2010. Ld. Commission should not have escalated 2010 base expense of ₹8.25 Lakh/MW when Tribunal had directed to allow O&M Expenses of at least ₹8.25 Lakh/MW. By resorting to first Table in its Written Submission, the Appellant has shown that NPV of the O&M Expenses for entire life of the Project as allowed in Tariff Order 2010 was ₹117 Lakh/MW whereas that allowed in the Impugned Orders dated 07.07.2014/11.07.2014 for 2012 is ₹138 Lakh/MW. It has also shown in the second Table that Ld. Commission maintained the 2010 level base expense for 2012 i.e. at ₹8.25 Lakh/MW without considering any escalation, the NPV under Tariff Order 2010 and Tariff Order 2012 would have been ₹117 Lakh/MW and ₹125 Lakh/MW respectively. Thus, Ld. Commission has expanded the scope of remand by considering the escalation in base O&M Expenses.

5.19 With regard to the above submission of the Appellant it is submitted that the Ld. Commission had considered Discount Factor (DF) of 10.19% and Escalation Factor (EF) of 5.00% p.a. in Tariff Order 2010 whereas, the same were considered as 10.74% and 5.72% respectively in Tariff Order 2012 based on the market conditions prevailing at respective point of time. In computing the NPVs of O&M Expenses allowed in the two Orders, the Appellant has considered DF and EF as 10.74% and 5% respectively for Tariff Order 2010 and 10.74% and subsequently as 5.72% respectively. Thus, the Appellant has taken correct figures of these two factors for arriving at NPV under Tariff Order 2012. However, it has wrongly calculated the NPV of 117 for O&M cost (at DF of 10.74%) as given in Tariff Order 2010. The correct calculation (with DF of 10.19% as taken in Tariff Order 2010) gives NPV of O&M Cost for projects covered under Tariff Order 2010 of ₹123 Lakh/MW. Thus, correct NPVs under the two Orders are 123 and 138 respectively and not 117 and 138 respectively.

5.20 With correct figures as above, the argument of Appellant is with first Table is that since NPV of 138 under Tariff Order 2012 is much higher than NPV of 123 under Tariff Order 2010, the Ld. Commission has not maintained the parity between the projects under the two Orders, which has been stated to be the reason for escalating base figure of ₹8.25 Lakh/MW. This argument is conceptually incorrect. While the Appellant calls both the figures as NPVs under the two Orders, it forgets that the NPVs are computed for converting all future expenses to base year by considering time value of money, i.e. discounting. Thus, the NPV of ₹123 Lakh/MW under Tariff Order 2010 reflects the value of 25 years expenses represented together in the year 2010 and the NPV of ₹138 Lakh/MW under Tariff Order 2012 reflects the value of 25 years expenses represented together in the year 2012. In other words, the expense allowed in the year 2010 is 123 whereas that in the year 2012 is 138. Obviously, these two will be different and if expenses increase due to inflation the subsequent expense is bound to be higher. If an escalation of 5% pa. is considered in the expense level of 123 in 2010 for two years, we arrive at 2012 level expense of 136, which is very close to what Ld. Commission has allowed. The slight difference between 136 and 138 is due to the fact that for arriving at 123, and hence 136, an escalation of 5% p.a. was considered for 25 years, whereas for arriving at 138 the escalation considered was 5.72%. Thus, comparing 2010 figure of 123 with 2012 figure of 138, without adjusting them for inflation above, will not be a correct approach. **In fact, while computing the NPVs, the Appellant has considered annual escalations of 5% and 5.72% under the two Orders for 25 years, but it does not acknowledge the escalation in first two years considered by Ld. Commission. It has also failed to see from its own Tables that the first Order relates to the period 2010 to 2034 while the second Order relates to the period 2012 to 2036. Needless to say that expenses in two periods of the same duration but in different years would not be the same if annual escalation is considered. What Ld. Commission has equated is the absolute value of expense only for the year 2012 which projects under Tariff Order 2010 and Tariff Order 2012 will incur in the year 2012 as both are expected to incur same expense in the same year. This will also be evident from the Tables given by the Appellant itself. It may kindly be noted that Ld. Commission has not equated NPV over 25 years under both the Orders, which as stated earlier would not be a correct comparison.**

5.21 There is no need to now dwell into the argument of Appellant regarding second Table showing impact of maintaining O&M expense at ₹8.25 Lakh/MW. Obviously, with corrected values the NPVs of 123 and 125 under the two Orders are bound to be same if expense is maintained in 2012 at the 2010 level. The slight difference is due to difference in EFs of 5% and 5.72%.

5.22 **While directing Ld. Commission to allow at least ₹8.25 Lakh/MW expense, it is clear that the intent of the Hon'ble Tribunal was not to bind the Ld. Commission with a fixed escalation factor and left the same to the discretion of the Commission since these computations would require detailed consideration of inflation and discounting factors. Since escalation of 5% was determined for 2010 onwards and 5.72% for 2012 onwards, the escalation for two years between 2012 and 2010 could have been 5% only. Thus, Ld. Commission has rightly calculated the base O&M cost of ₹9.10 Lakh/MW for 2012 by escalating ₹8.25 Lakh/MW (allowed in 2010) @ 5% for two years.**

D. <u>APPORTIONMENT OF LEVELISED TARIFF IN TWO PERIODS</u>

5.23 The submissions of the Appellant that after determining the levelised tariff (Gross tariff of ₹10.92/unit and net tariff of ₹ 9.70/unit), the Ld. Commission has apportioned the same between 12 years and later 13 years in a manner to result in increase in the levelised tariff (Gross tariff to ₹11.02/unit and net tariff to ₹ 9.77/unit) and that the increase in levelised tariff (Gross tariff from ₹10.37/unit to ₹10.92/unit and net tariff from ₹9.98/unit to ₹ 10.54/unit) has been entirely loaded as an increased tariff in the first 12 years (front loading) instead of the same being apportioned proportionately between the first 12 years and later 13 years are not only incorrect and misleading but are contrary to Appellant's earlier submissions regarding correctness of the Ld. Commission's methodology for apportionment between two sub-periods, which was accepted by the Appellant and upheld by Tribunal;

5.24 The Ld. Commission has followed the same methodology for apportionment, which was used in the Tariff Order, 2012 dated 27.01.2012 and which has been upheld by Tribunal in its Judgment in Appeal No. 75 of 2012;

5.25 In the Impugned Order, the Ld. Commission has retained the level of second sub-period tariff applicable for 13 years constant for each of the three years of Control Period (Gross tariff of ₹ 7.50/unit and net tariff of ₹7.00/unit) although the levelised tariff was reducing each year by 7% and had worked out the tariff for first sub-period of 12 years such that the tariff for two sub-periods equates to the given levelised tariff;

5.26 Although the levelised tariff has been reduced by 7% next year, the Ld. Commission did not reduce the 13 years (second sub-period) tariff by 7% and kept it constant for the three years at a level of ₹7.50/unit (for projects not availing AD benefit) or ₹ 7.00/unit (for projects availing AD benefit) and computed corresponding tariffs for first 12 years. Same would be true when the tariff has increased due to directions of Hon'ble Tribunal, where after again the Ld. Commission should have and has actually kept it at the same level of ₹7.50/unit or ₹7.00/unit as above. The validity of this formula may be seen from the following computation, which yields the approved levelised tariff with the above two sub-period tariffs.

$$T_{25} = \frac{7.279 \times T_{12} + 2.225 \times T_{13}}{9.504}$$

$$= \frac{7.279 \times 11.97 + 2.225 \times 7.50}{9.504} = 10.92$$

(₹ 10.92/unit is same as the levelised tariff fixed by Ld. GERC);

5.27 The Ld. Commission had followed the same methodology in its first Tariff Order dated 29.01.2010, wherein the values of constants D_t's were to be obviously different as the discount rate used in that Order was 10.19% against 10.74% in the Second Tariff Order dated 27.01.2012. With discount rate of 10.19%, the values of constants were $D_{25} = 9.858,\ D_{12} = 7.439\ and\ D_{13} = 2.419$;

5.28 The same methodology has been used by the Ld. Commission in the Impugned Order dated 07.07.2014 read with the corrigendum dated 11.07.2014 for apportionment of the levelised tariff of 25 years into tariff for first 12 years and next 13 years as has been consistently followed throughout.

5.29 The Appellant cannot now take a position that the same methodology now applied in Remand Order is erroneous or the increase in tariff should now have been distributed proportionately which is a different methodology than the one used in the Original Order that has already been supported by the Appellant and upheld by Tribunal.

5.30 The plea of the Appellant is barred by the principle of Res-Judicata as it has chosen not to challenge or object to the methodology followed by the Ld. Commission in the Tariff Order dated 27.01.2012. It is not open to the Appellant to now challenge the principle and methodology of apportionment that has already been settled both by the Ld. Commission and the Tribunal. *This Hon'ble Tribunal after finding the methodology of front loading followed by the Ld. Commission has held that there is no reason to interfere with the finding of the State Commission in regard to front loading of the tariff. It was also not open to the Ld. Commission to re-open* *the methodology and adopt a different methodology than that approved and upheld by Tribunal. In fact, doing so would have enlarged the scope of remand, which has rightly not been done by the Ld. Commission. This will be evident from the following extracts of the documents on record in Appeal No. 75 of 2012:*

(e) **Decision of Hon'ble Tribunal in Judgment dated 17.04.2013**

"14.5 Thus, we do not find any merit in the contention of the Appellant that the tariff for the first 12 years should be 20% higher than the levelised tariff as in the previous tariff order dated 29.1.2010. The first tariff order was for solar power plants which were to be commissioned within two years of the date of the order with different capital cost and tariff. ***The same ratio of tariff in first 12 years and the levelised tariff cannot be applied to the tariff of the projects which have to be commissioned in the ensuing control period of three years from 29.1.2012****. The Appellant has also not indicated any difficulty in meeting of the debt liability or getting the specified Return on Equity. We feel that the State Commission in the impugned order has balanced the interests of the project developers and the consumers. Thus,* ***we do not find any reason to interfere with the finding of the State Commission in regard to front loading of the tariff****."*

(f) **Remand Order by Ld. GERC dated 07.07.2014**

"The Commission approves the tariff for Procurement by the Distribution Licensees and others from Solar Energy Projects for the Control Period from 29 January, 2012 to 31 March, 2015 as outlined in the table below:

Period	***29 Jan. '12 to 31 Mar. '13***	***1 Apr. '13 to 31 Mar. '14***	***1 Apr. '14 to 31 Mar. '15***
For megawatt-scale photovoltaic projects availing accelerated depreciation			
Levelised	*Rs. 9.70 per*	*Rs. 9.02 per*	*Rs. 8.39 per kWh*

Tariff for 25 years	*kWh*	*kWh*	
For first 12 years	*Rs. 10.52 per kWh*	*Rs. 9.64 per kWh*	*Rs. 8.82 per kWh*
For subsequent 13 years	*Rs. 7.00 per kWh*	*Rs. 7.00 per kWh*	*Rs. 7.00 per kWh*
For megawatt-scale photovoltaic projects not availing accelerated depreciation			
Levelised Tariff for 25 years	*Rs. 10.92 per kWh*	*Rs. 10.15 per kWh*	*Rs. 9.44 per kWh*
For first 12 years	*Rs. 11.97 per kWh*	*Rs. 10.96 per kWh*	*Rs. 10.03 per kWh*
For subsequent 13 years	*Rs. 7.50 per kWh*	*Rs. 7.50 per kWh*	*Rs. 7.50 per kWh*

….”

E. LEVELISATION OF THE GENERATION

5.31 The Appellant’s contention that the Ld. Commission has erred in considering aspects such as levelisation of the generation which have already been considered while determining the Capacity Utilization Factor and has further provided annual de-gradation is not only incorrect and misleading, but is, again, a reiteration of the submission which have already been heard and rejected by this Tribunal;

5.32 The Tribunal had remanded back the issue to the Ld. Commission and the Ld. Commission had changed the levelisation formula from levelisation of Tariff Stream to levelisation of Revenue Stream as the effect of degradation was not correctly factored by Tariff Stream formula as it gave lower NPV of revenue than was allowed without levelisation. Moreover, it was also pointed out by Respondent No.29 that Ld. CERC also computes levelised tariff by Levelised Revenue and Levelised Generation. In fact, the issue of capturing degradation effect by taking Revenue Stream and not Tariff Stream has also been recently re-examined by Ld. RERC in its Order dated 21.08.2014, wherein it has also come to the conclusion that tariff needs to be levelised by computing Levelised Revenue and Levelised Generation instead of Levelisation of Tariff Stream. Relevant extract of the Order is reproduced herein below:

"(3) Tariff Levelisation

31. Commission in the levelised tariff computations, discounted the year wise calculated tariff. However, some of the stakeholders have submitted that levelised tariff is a uniform tariff which gives revenue stream whose NPV (Net Present Value) shall be the same as the NPV of revenue stream of year wise calculated tariff. It has been further submitted that the normative annual generation from solar power plants would not be the same during the entire life due to de-ration and on account of this, levelised tariff shall have to be worked out by discounting of revenue stream as well as generation.

Commission's views/decision

32. Commission agrees with the suggestion of the stakeholders. The levelised tariff has been worked out by discounting the revenue stream and generation separately and now the NPV of the revenue stream with levelised tariff is same as the NPV of revenue stream of year wise calculated tariff stream."

5.33 The Appellant is not only making incorrect submissions, but also the same have been agitated before and rejected by Hon'ble

Tribunal and, therefore, barred by Res Judicata. The incorrect and repeated submissions of the Appellant will be evident from the following extracts of the documents on record in Appeal No. 75 of 2012:

(a) **Appellant's submissions in Reply to Appeal No. 75 of 2012**

"Para 9. Formula used for levelising tariff

With regard to the contents of Para E (f) on the issue of the formula used for levelising tariff, it is submitted that the methodology used by the State Commission is correct. While carrying on any exercise to determine the levelised tariff, only the monetary value of the assets needs to be discounted. ***While working out the levelised tariff, the State Commission has already taken into consideration degradation in generation for computing year on year tariff i.e. Annual fixed charges for the year divided by available generation (after degradation) for that year.*** *Therefore, there is no question of further hypothetically following the formula suggested by the Appellant."*

(b) **Appellant's submissions in its Reply Note for Arguments in Appeal No. 75 of 2012**

"Ground (f) - Formula for levelising tariff
While discounting the tariff, the ***State Commission has already considered the generation that will be available from the solar power developers after applying degradation****. Therefore, there is no question of further hypothetically following the formula suggested by the Appellant."*

(c) **Hon'ble Tribunal's Judgment dated 17.04.2013**

"13.2 According to learned counsel for the Respondent no. 2, the State Commission has already considered the generation that will be available from the Solar Power Developers after applying degradation factor."

(d) **GERC's submissions in its Written Submissions in Appeal No. 75 of 2012**

"F. Formula for levelising Tariff
14. While determining the levelised tariff, the Respondent Commission has adopted the same formula as provided by the Central Commission. Accordingly year wise tariff (year wise expenses/net MU) has been discounted by taking annual discount rate. Levelised tariff is the arithmetic summation of year wise discount tariff divided by the arithmetic summation of the discount factor. The discount rate notified by the Central Commission for computing levelised tariff under competitive bidding guidelines has been adopted by the Respondent. ***It is further submitted that performance degradation has been taken into account by the Commission while determining the year to year tariff and the same has also been given effect while determining the levelised tariff****."*

(e) **Judgment dated 17.04.2013 of Hon'ble APTEL**

"13.3 Learned Sr. counsel for the State Commission has informed that ***performance degradation has been taken into account by the State Commission while determining the year to year tariff and the same has also been given effect while determining the levelised tariff.*** *The State Commission has also furnished calculation sheet indicating the gross generation after taking into account the performance degradation.*

(f) **Decision of Hon'ble Tribunal in Judgment dated 17.04.2013**

"13.5 We feel that the issue raised by the Appellant needs to be considered by the State Commission to examine if the levelising tariff allowed by the State Commission ensures recovery of the revenues permissible to the Developers during the life cycle of the plant at the energy sent out with degradation. Accordingly, the State Commission shall consider the submissions of the Appellant and decide the matter."

(g) **Remand Order by Ld. GERC dated 07.07.2014**

"15. …It is found that the tariff determined by the Commission with the formula of levelisation is different from the formula proposed by the petitioner and levelisation of tariff on revenue stream basis seems to be higher than the tariff determined by the Commission. Moreover, the revenue stream based levelised tariff seems to be valid as proposed by the petitioner in which the annual fixed charge with consideration of degradation of the Solar Power Project be given effect. ***We also note that while determining the present value in case of levelised tariff determined by the Commission, the present value worked out is different from the tariff determined with the formula suggested by the Solar Energy Society of India and Others. It works out which is equal to Present Value without levelisation.*** *We therefore, decide that the levelised tariff be determined with consideration of revenue based formula proposed by the Solar Energy Society and Others.*

Based on the above, ***we decide to determine the levelised tariff by considering levelised fixed charges and levelised net generation separately****."*

5.34 The submissions of the Appellant that annual degradation in generation has been already factored through a lower CUF of 18% are also incorrect. The CUF is based on a variety of factors some of which are uncontrollable in nature, e.g. Radiation quality and intensity, presence of aerosol and dust etc. Therefore, CUF does not reflect degradation of generation.

5.35 In view of the above submissions, it is prayed that the Appeal is devoid of merits and Hon'ble Tribunal may be pleased to dismiss the same with a direction to the Appellant to make the payment of all pending arrears in terms of the tariff given in Order dated 07.07.2014 read with corrigendum dated 11.07.2014 according to the option exercised by the developer for availing or not availing accelerated depreciation.

6. **The following are the gist of Written Submissions made by Ms. Suparna Srivastava, Ld. Counsel of Respondent No. 1, Gujarat Electricity Regulatory Commission**

6.1 For the operation and maintenance (O&M) cost and its escalation, the Commission decided to maintain the first year O&M cost for PV power plants at 0.75% of the capital cost. Further, considering the concerns of the developers regarding the high inflation rate and in line with the guidelines of the Central Commission as well as the Multi Year Tariff Regulations, 2011 notified by the Commission, the Commission decided to adopt an annual escalation in operation and maintenance cost of 5.72%. This annual escalation was not modified by this Hon'ble Tribunal in its remand Judgment and even for the previous control period, the annual escalation on O&M cost as decided by the Commission (of 5%) had been applicable during that period;

6.2 For the Capacity Utilization Factor (CUF) of the solar PV power plants, the Commission, based on various suggestions from developers, consecutive calculations, reliable weather data and experience from best practices, decided to reduce the CUF to 18% for all solar PV power plants. It may be mentioned that CUF denotes the performance of a solar PV power plant and is the ratio of actual output over the year to the maximum possible output from it for that year under ideal conditions, expressed in percentage. The CUF for a solar PV power plant depends on solar radiation received and the number of clear sunny days experienced at the plant location. CUF is thus an aspect of design parameter of the plant and is akin to Plant Load Factor (PLF) in a conventional power project;

6.3 For the annual degradation in performance of a solar PV plant, the Commission observed and decided as under:

"***2.3.3 Annual Degradation in Performance***

A performance warranty for 25 years on photovoltaic modules is an industry standard today. Typical warranties guarantee a performance of more than 90% for the first 10 years, and a performance of more than 80% for the next 15 years, adding to a total of 25 years. This implies an annual degradation rate of 0.9% for the photovoltaic modules. No substantial degradation is expected in the performance of the balance of system.

Hence, the Commission decides to consider the annual degradation in the performance of photovoltaic systems at 1%."

The solar panels in a solar PV power plant consist of crystalline silicon, which, when coming into contact with the environment, experience a gradual degradation over the life of the plant. Corresponding to such degradation, the performance of the solar power plant also deteriorates over the life of the project. The degradation rates are used in order to estimate the energy production over the life of a system and to calculate the return on investment. Annual degradation is directly related to the CUF of a solar PV project with the degradation resulting in a reduced CUF. Degradation and CUF are thus inter-linked and are not separate and distinct aspects of the performance of a solar PV power project as has wrongly been perceived by the Appellant. It is, therefore, incorrect to state that because CUF has been taken into account, the annual degradation cannot be considered. The Commission has taken the annual degradation into account and given its effect in total energy output over the life of the project and thereafter, levelised it by applying the discount factor.

6.4 For return on equity, the Commission observed that it had provided in its Multi Year Tariff Regulations, 2011, indicated in the Discussion Paper as well as had considered the return on equity for all projects, renewable and non-renewable, at 14% per annum. As such, the Commission decided to retain the return on equity at 14% per annum.

6.5 For the discounted rate for levelised tariff calculation, the Commission decided as under:

> *"The discount rate for calculating the levelised tariff is computed based on the time series for latest twelve calendar years, and is based upon weighted average cost of capital (WACC). The discount rate due to cost of debt is calculated based on market interest rate and corporate tax rate, while the discount rate due to equity is calculated based on the risk free rate, beta, and equity market risk premium. ……… Further, this methodology is also adopted by the CERC for calculating discount rates.*
>
> *Hence, the Commission shall retain the annual discount rate of 10.74% to calculate the levelised tariff over the 25 year life of the solar project."*

6.6 Based on these technical and financial parameters, the levelised tariff including return on equity for megawatt-scale solar photovoltaic power projects availing accelerated depreciation is calculated to be ₹9.28 per kWh, while the tariff for similar projects not availing accelerated depreciation is calculated to be ₹10.37 per kWh. The Commission also decides to determine the tariff for two sub-periods. For megawatt-scale photovoltaic projects availing accelerated depreciation, the tariff for the first 12 years shall be ₹ 9.98 per kWh and for the subsequent 13 years shall be ₹7 per kWh. Similarly, for megawatt-scale photovoltaic projects not availing accelerated depreciation, the tariff for the first 12 years shall be ₹11.25 per kWh and for the subsequent 13 years shall be ₹7.50 per kWh."

The Commission thus decided the tariff for two sub-periods: for first 12 years and thereafter, for subsequent 13 years. This division in sub-periods was not disturbed by this Hon'ble Tribunal in its remand Judgment; rather, this Hon'ble Tribunal specifically held that the Commission had balanced the interest of the project developer and the consumer by allowing a tariff of only about 8.5% higher than the levelised tariff during the first 12 years which did not require any interference. Further, while deciding the above tariff, the Commission also noted that due to the steadily decreasing cost of solar technology, reducing the burden on the end-user of electricity and ensuring timely commissioning of projects, the Commission in its Discussion Paper had indicated a year-on-years reduction for the 25 year applicable tariff. Hence, the Commission considered a conservative decline in tariff for both megawatt-scale and kilowatt-scale PV projects at 7% decline for 1.4.2013 to 31.3.2014 and a further 7% decline for 1.4.2014 to 31.3.2015. In this manner, the Commission duly factored in the consumer interest as well.

Thus, though tariff computations were elaborately done in the Order for all solar projects availing accelerated depreciation and also not availing accelerated depreciation, the final tariff computation table did not contain the tariff approved for projects not availing accelerated depreciation. The same was an inadvertent omission/slip on part of the Commission and it was this omission/slip which was corrected by it in the Corrigendum dated

11.7.2014 as would be evident from a perusal of the said Corrigendum:

> *"(2) On verification of the order dated 7.07.2014 in Suo-Motu proceedings in order No.1 of 2012, we observed that an inadvertent error occurred in Commission's order stated on page 35 and 36 of the said order. In the said order it is stated about the levelised tariff for (1) MW scale photovoltaic project, (ii) for Kilo watt scale photovoltaic projects and (iii) Solar Thermal Projects, which are availing accelerated depreciation. In the table of the said order there is no mention about the tariff for (i) MW scale photovoltaic projects, (ii) for Kilo watt scale photovoltaic projects and (iii) Solar Thermal Projects, which are not availing the accelerated depreciation, though the calculation included at sheets enclosed with the order at page 37, 38 and 39 show the levlised tariffs without accelerated depreciation. It is therefore necessary to correct the above errors in the order dated 7.07.2014. We, therefore decide to correct above stated error and pass necessary order for incorporating corrections as stated below:"*

Thus, there was no variation in the original Order dated 27.1.2012 in so far as the approved tariff was concerned. The Appellant's apprehensions in this regard are therefore misplaced. It is submitted that as per the provisions of Regulation 58(3) of the Gujarat Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, the Commission is vested with the following powers as regards rectification of accidental slip or omissions in its Orders:

> *"(3) The judgment shall be dated and signed by the Commission, at the time of pronouncing it, and once signed shall not be afterwards altered, or added to, unless and except there is any clerical or arithmetical mistake in it or errors arising therein from any accidental slip or omission or on review of the judgment in accordance with Clause 72."*

By exercising the above power, the Commission rectified the accidental omission/slip in the Order and not amended the same.

The said rectification was not a part of the remand, nor could it be, but was in exercise of the Commission's aforesaid powers and as such, it could not be said that by issuing the Corrigendum, the Commission had exceeded the terms of the remand or had modified its Original Order after a long period.

<u>The impugned Order dated 7.7.2014</u>:

(i) *<u>Operation and Maintenance Expenses</u>:*

6.7 While dealing with the issue of O&M expenses, the Commission proceeded by taking into account the findings of this Hon'ble Tribunal as under:

> *"[7] Now, we deal with Issue No.1 which pertains to Operation and maintenance charge. The Hon'ble APTEL in its order dated 17.04.2013, in para 8.7, 8.8, 8.9, and 8.10 decided about the O&M Charges as under:*
>
> > *"……8.7 We find that at the reduced the capital cost of ₹10 crores/MW, the O&M expenses at 0.75% of the capital cost work out to ₹ 7.5 Lakhs/MW. As against this, in the order dated 29.1.2010, the State Commission allowed O&M expenses at 0.5% of the capital cost of ₹16.5 crores/MW which works out to ₹ 8.25 Lakhs/MW for FY 2010-11. In the discussion paper the State Commission had proposed O&M expenses at 0.75% of the capital cost of ₹11 crores/MW i.e. ₹8.25 Lakhs/MW, which is the same level as decided for 2010-11 by order dated 29.1.2010.*
> >
> > ***8.8 As rightly pointed out by the Appellant and also indicated by the State Commission in the discussion paper, the employees' expense is a major component of O&M expenses of solar power project. The reduction in cost of Solar Power Projects is basically for the solar power module only. Therefore, the reduction of the capital cost should not impact the O&M cost appreciably. The intention of the State Commission in the discussion paper was also by providing O&M at***

> ***0.75% of the proposed capital cost of ₹11 crores/MW i.e. at ₹8.25 lakhs/MW. However, the State Commission decided to reduce the capital cost to ₹10 crores/MW in the impugned order but maintained the O&M cost at ₹0.75% only. No explanation was given in the impugned order for effectively reducing the O&M expenses. We feel that the State Commission should have maintained O&M expenses in absolute value at least at the same level as approved for the FY 2010-11 i.e. at ₹ 8.25 Lakhs/MW. Accordingly, we direct the State Commission to reconsider the O&M cost and allow at least 8.25% of the capital cost.***
>
> *8.9 Learned counsel for GUVNL has argued that the State Commission has also allowed insurance cost in addition to O&M cost in the impugned order. We find that in the earlier order dated 29.1.2010 also the State Commission had allowed 0.35% of the net assets of the project as insurance charges in addition to O&M charges. Therefore, there is no force in the arguments of the Respondent no. 2 regarding insurance charges.*
>
> *8.10 Accordingly, the State Commission is directed to re-determine the O&M charges….."*

Thus, in the aforesaid findings, the Hon'ble APTEL directed the Commission to re-determine the O&M Charges as directed by the Hon'ble APTEL."

This Hon'ble Tribunal thus observed that while reduction in cost of solar power projects was basically for solar power modules only, it was the employees' expenses which constituted major component of O&M expenses. As such, reduction of capital cost was not to impact the O&M cost appreciably. It was in this light that this Hon'ble Tribunal directed the Commission to reconsider the O&M cost and to allow at least 0.825% of the capital cost. The word "at least" indicated that the O&M cost should have been more than 0825% of the capital cost. The Commission's reconsideration of

O&M cost was based on the above observations of this Hon'ble Tribunal.

6.8 After considering the submissions of the parties and keeping in view the observations of this Hon'ble Tribunal in which light of which the Commission was to reconsider the remanded issue of O&M expenses, the Commission held as under:

> *"[8] We have carefully considered the submissions made by the parties. The issue emerged for the decision of the Commission is as to whether the project which are commissioned during the control period of the Order No. 1 of 2012 dated 27.01.2012 are entitled for O & M expenses as ₹8.25 Lakhs/MW or ₹9.10lakhs/MW. It is therefore necessary to refer the para 8.7 to 8.10 of the Hon'ble APTEL order as stated above.*
>
> *[8.1] According to the aforesaid decision, the O&M cost is required to re-determined at least at 0.825% of the Capital Cost which works out to ₹8.25 Lakhs/MW. The Commission has in Order No. 1 of 2010 considered the Capital Cost as ₹ 10 crores/MW. Therefore, the 0.825% of the said capital cost works out to ₹8.25 Lakhs/MW. The aforesaid amount is an absolute value of ₹8.25 Lakhs/MW as considered by the Commission in earlier Order No. 2 of 2010 dated 29.01.2010.*
>
> *……..*
>
> *[8.3] The principle of associating O&M expenses to the capital cost has not been disturbed by the Hon'ble APTEL but decided that the O&M expenses should be at least the same amount as was existing before the impugned order. Moreover, the cost of spares which is a part of the O & M expenses has also reduced significantly. Hence, the O&M expenses can be kept at the rate of ₹8.25 Lakhs/MW. The contentions raised by the GUVNL are not acceptable. The O & M expenses consists of administrative expenses, maintenance spares, etc. which remain same for the project commissioned/operating during the same period.* ***The project which were commissioned during the control period of Order No. 2 of 2010 dated 29.01.2010 were receiving O & M expenses during the FY2012-2013 @ ₹***

9.10 Lakhs/MW with consideration of the O & M expenses of ₹8.25 Lakhs/MW for FY 2010-2011 and escale it by 5% per annum. While the project which was commissioned during the FY 2012-2013 onward i.e. control period of Order No. 1 of 2012 dated 27.01.2012 receive the O & M expenses @ ₹8.25 Lakhs/MW which is lower than ₹9.10 Lakhs/MW received by the project developers who commissioned the plant during the control period of Order No. 2 of 2010 dated 29.01.2010. Thus, O & M expenses which consist of the same components of Administrative expenses, repair and maintenance expenses, spares etc allowed different by the Commission for some project commissioned during different control period is a discriminatory amongst different Solar PV Power Project Developers which is not permissible. We therefore, decide that the O & M expenses for tariff determination of Order No. 1 of 2012 dated 27.01.2012 at ₹9.10 lakhs/MW for tariff determination purpose and the same may be escalated at the rate of ₹5.72 per annum thereafter.

The above findings of the Commission do not suffer from any infirmity inasmuch as they have been arrived at by following spirit of the remand made by this Hon'ble Tribunal to ensure appropriate O&M expenses to the developer and are based on cogent considerations. Considering that escalation in O&M cost provided for in the Tariff Order for the previous control period has already taken effect by operation of the Tariff Order, the Appellant is misplaced in contending that such escalation factor should not be taken into account while computing O&M expenses for the next control period. The “illustration” given by the Appellant in this behalf in its Notes for Arguments also proceeds on this misplaced contention and as such, is erroneous.

6.9 In the above Appeal before this Hon'ble Tribunal, there are no grounds raised by the Appellant as regards O&M expenses; only a Question of Law (C) has been raised in that behalf. Elaborate submissions have, however, been made in the Notes for Arguments submitted by the Appellant at the time of hearing before this Hon'ble Tribunal which, not being part of pleadings, are not liable to be considered by this Hon'ble Tribunal. Also, a perusal thereof would show that the Appellant has raised new factual issues which have not been pleaded or argued before the Commission and the Commission cannot be said to be “in error” in that behalf. The legal position as regards requirement of pleadings has been laid down in various judicial pronouncements as under:

(i) ***Prudential Assurance Co Ltd V Revenue And Customs Commissioners****. [2017] 1 All ER 815*

“[20] ... Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case. We were told that by the time that skeleton arguments for trial were served each party would know what points were in issue. We do not regard that as sufficient. In this case, for example, HMRC's skeleton argument was served about ten days before the trial started. If (as in fact happened in this case) HMRC wished to argue that the evidence proposed to be called by Prudential was directed at the wrong issue (being an issue that had not been raised before) ten days' prior notice was manifestly inadequate.

[21] Although in days gone by the court would routinely allow late amendments to statements of case, in more recent time attitudes have changed. It is now the case that the court requires strong justification for a late amendment. This is not only in the interest of the opposing party but also consonant with the interests of other litigants in other cases before the

court and the court's duty to allocate a proportionate share of the court's resources to any particular case. Where a new issue arises which is not foreshadowed in a statement of case, a party needs the court's permission to advance it. The court is then faced with a discretionary case management decision, to be exercised in accordance with the overriding objective.”

(ii) ***S.S. Sharma And Ors. Vs. Union of India (UOI) And Ors.*** *1981 AIR SC 588*

“6.........No grounds have been taken in the writ petitions assailing the validity of the office memorandum on the bases now pressed before us. We are of opinion that the Courts should ordinarily insist on the parties being confined to their specific written pleadings and should not be permitted to deviate from them by way of modification or supplementation except through the well-known process of formally applying for amendment. We do not mean that justice should be available to only those who approach the Court confined in a strait-jacket. But there is a procedure known to the law, and long established by codified practice and good reason, for seeking amendment of the pleadings.”

(iii) ***Trojan & Co. V. Nagappa.****1953 AIR SC 235*

"22…………..it is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

(iv) ***Ram Sarup Gupta V. Bishun Narain Inter College.****1987 AIR SC 1242*

"6……….it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading

is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise."

(v) ***National Textile Corporation Ltd. V. Naresh Kumar Badrikumar Jagad*** *[(2011) 12 SCC 695]*

"12 Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: M/s. Trojan and Company v. RMN.N. Nagappa Chettiar AIR 1953 SC 235; State of Maharashtra v. Hindustan Construction Company Ltd.: AIR 2010 SC 1299; and Kalyan Singh Chouhanv. C.P. Joshi AIR 2011 SC 1127)

……..

18 In view of the above, the law on the issue stands crystallized to the effect that a party has to take proper pleadings and prove the same by adducing sufficient evidence. No. evidence can be permitted to be adduced on an issue unless factual foundation has been laid down in respect of the same.

19. There is no quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings."

(vi) ***Commissioner of Central Excise vs. Connaught Plaza Restaurant*** *[(2012) 13 SCC 639]*

"53. We are afraid we are unable to take this argument into account since such a plea was not urged before the Tribunal

in the first place. Given that this is a statutory appeal under Section 35L of the Act, it is not open to either party, at this stage of the appeal, to raise a new ground which was never argued before the Tribunal. Our scrutiny of the arguments advanced has to be limited only to those grounds which were argued by the parties and addressed by the Tribunal in its impugned order. Since, the impugned orders at hand do not reflect the argument raised by the learned Counsel for the Assessee; we do not find any justification to entertain this submission……"

(ii) <u>*Return on equity and income-tax*</u>*:*

6.10 On the issue of return on equity and income tax, the findings of the Commission were as under:

"[12] We have carefully considered the submissions made by the parties. The aforesaid issue was decided by the Hon'ble Tribunal in para 11 to 11.9 as stated above, and summaries the same in para 18 (iv) of the Judgment dated 17.04.2013 in Appeal No. 75 of 2012.

[12.1] According to the above decision, the Hon'ble APTEL has considered the 14% RoE considered by the Commission seems as per the GERC (MYT) Regulations, 2011 and allowed the same to all renewable energy projects also. Now, the issue emerges for decision of the Commission is as to whether Income Tax paid to the Solar Project developers be allowed post-tax RoE at the rate of 14% by grossing up or by allowing the actual Income Tax paid by the Solar Power Developers in addition to 14% RoE and the Hon'ble APTEL has relied on its judgment dated 14.02.2010 in Appeal No. 174 of 2009 in which the Tribunal has decided that the State Commission ought to have grossed up Income Tax computed by it and pass the same to the appellant. The same decision was also reiterated by the Hon'ble APTEL in Appeal No. 68 of 2009 dated 23.03.2010 in the matter of TPL V/s. GERC and Others. The Hon'ble Tribunal had also considered its decision in Review Petition No. 09 of 2010 in Appeal No. 68 of 2009, order dated 05.01.2011 in which the Hon'ble Tribunal decided that the Grossing up of tax has to be carried out to ensure that after paying the tax, the admissible post tax return is assured to TPL. The Hon'ble

Tribunal had also held in its judgments that TPL should neither be benefited nor lose on account of tax payable which is to pass through in the tariff. Thus, there is no question of generating company making profit on account of income tax. The excess recovery of income tax, if any, has to be reimbursed by the generating company to the distribution company as per the regulations of the Commission. Thus, the Hon'ble Tribunal decided in the aforesaid judgment to allow the principle of gross up while deciding the tariff subject to final adjustment as per the actual payment of income tax by the generating company.

[12.2]The Solar Energy Society & Other project developers have submitted that the actual return on equity available to the project developer for initial 12 years is 13.44% and 12.53 % for the remaining 13 years. Therefore, RoE available to the Solar Generator will be less than 14 % granted by the Commission in its tariff order. We note that the RoE available to the Solar Power Developers if grossing up of tax not allowed, it works out as under:

……….

From the above calculations, it seems that the plea of the Solar Energy Society of India and Others seems to be valid that they are not getting the RoE @ 14% as granted by the Commission if the post-tax RoE @ 14% is not allowed to be grossed up for Income Tax. The respondent GUVNL raised the issue that the Solar Project Developers are entitled for the actual tax paid by them and not eligible for grossing up is not valid because the Hon'ble Tribunal has in para 11.8 of its order dated 17.04.2013 in Appeal No. 75 of 2012 decided that the principles of Gross Up tax is applicable to the CERC as well as State Commission regulation also.

[12.3]Considering the above, we decide that the Solar Power Project Developers are eligible for RoE available 14% post-tax with grossing up of Income Tax and accordingly the effect of the same be given in the tariff determination.

A perusal of the aforesaid discussions and findings shows that the Commission has considered the issue strictly in accordance with the mandate of the remand made by this Hon'ble Tribunal and as such, cannot be faulted for the same.

(iii) *<u>Annual degradation of solar power plant and formula for levelised tariff</u>*

6.11 The issue of annual degradation of solar power plants and the formula used for levelised tariff had been adjudicated by this Hon'ble Tribunal as under (as recorded in the Commission's impugned Order):

> *"[13] Now we deal with the issue raised by the Solar Energy Society with regard to annual degradation of Solar Plant and the formula for levelised tariff is concerned and the finding of Hon'ble Tribunal on the above issue is as under:*
>
> *"…..13. The sixth issue is regarding the consideration of 1% annual degradation of plant and formula used for levelised tariff. ……*
>
> *13.4 We find from these calculations that the State Commission has taken into account the annual degradation of 1% while working out the gross in the tariff stream of 25 years. The State Commission has computed year-wise tariff from year wise expenses and net generation which has been discounted by taking annual discount rate. Levelised tariff has been determined by dividing the arithmetic summation of year wise tariff divided by the arithmetic summation of discount factor.* ***Learned senior counsel for the Appellant argued that with equated levelised tariff, the cash stream for 25 years is constant only if generation is assumed to be constant. But since the State Commission has allowed annual degradation @ 1%, the annual cash flows will also reduce each year by 1% as tariff is constant. The reduction in cash flows is solely due to reduction in generation. Hence the levelised tariff has to be computed with cash flows reducing in the same proportion as generation. The Appellant in the written submission gave illustration to explain their point.***
>
> *13.5 We feel that the issue raised by the Appellant needs to be considered by the State Commission to examine if the levelising tariff allowed by the State Commission ensures recovery of the revenues permissible to the Developers during the life cycle of the plant at the energy sent out with degradation. Accordingly, the State Commission shall*

consider the submissions of the Appellant and decide the matter….."

This Hon'ble Tribunal had thus directed the Commission to examine, based on the parties' contentions, whether the levelising tariff allowed by the Commission in its original Order has ensuring permissible revenue recovery to the developer during the life cycle of the plant during sent out with degradation.

6.12 Keeping in view the mandate of the remand, the Commission considered and decided the issue as under:

"[14] Learned Advocate Shri M.G. Ramchandran, on behalf of the GUVNL, submitted that the Commission has considered the lowering the PV Module capacity of Solar Power Plant or by progressively reducing the capacity utilization factor taking into account that the Solar PV System will be degraded and the generation will be reduced. The Commission has considered the CUF @ of 18% and the energy generation with consideration of degradation of Solar PV Module. Thus, the Commission had considered the effect of annual degradation of Solar PV Power Projects. The decision of the Hon'ble APTEL cannot be considered as directions to the Commission to give double benefit i.e. both the reduction in CUF and also reduction in capacity of Solar Power Plant for the purpose of deciding the annual fixed charges to be apportioned amongst the unit generated for recovery of the Tariff.

[15] We have carefully considered the submissions made by the parties. The issue emerged for the decision of the Commission is as to whether the Commission has considered the degradation of the Solar Plant and the effect of the degradation on gross energy generation, net energy available to the distribution licensees and effect of the above degradation on levelised tariff while determining the revenue permissible to the developer in the life cycle of the Solar Power Plant.

[15.1]We note that the Commission has determined the tariff under Order No. 1 of 2012 dated 27.01.2012, with consideration of the degradation of the Solar Power Plant at

the rate of 1 % per annum as per para 2.3.3 of the Order which read as under:

…………

Accordingly, the Commission has given effect of the degradation in the tariff determination by the Commission and considered that the gross generation reduced on year to year basis after first year up to 25th year of the Solar Power Plant. The effect of the same also reflected in the net energy generation available from the Solar PV Power Plant. The Commission has also determined year to year tariff component i.e. (i) RoE, (ii) depreciation, (iii) auxiliary consumption, (iv) interest on working capital, (v) interest on loan, (vi) Income Tax payable and also considered the discount rate for levelisation of the tariff. Thus, the Commission has determined year to year tariff which gives Annual fixed charges available to the project developers. While deciding the levelised tariff, the Commission has considered the 'Tariff Stream' formula for determination of tariff.

[15.2] According to this formula, the annual tariff and discount rate works out based on the annual fixed charges. The above formula state that the tariff of every year and the discount factor is considered for determination of the tariff. While deciding the revenue, it is necessary to consider the annual fixed charge and generation approved by the Commission and discount rate considered by the Commission while determining the levelised tariff from the formula proposed by the Solar Energy Society which is revenue based. It is found that the tariff determined by the Commission with the formula of levelisation is different from the formula proposed by the petitioner and levelisation of tariff on revenue stream basis seems to be higher than the tariff determined by the Commission. Moreover, the revenue stream based levelised tariff seems to be valid as proposed by the petitioner in which the annual fixed charge with consideration of degradation of the Solar Power Project be given effect. We also note that while determining the present value in case of levelised tariff determined by the Commission, the present value

worked out is different from the tariff determined with the formula suggested by the Solar Energy Society of India and Others. It works out which is equal to Present Value without levelisation. We therefore, decide that the levelised tariff be determined with consideration of revenue based formula proposed by the Solar Energy Society and Others.

Based on the above, we decide to determine the levelised tariff by considering levelised fixed charges and levelised net generation separately.”

The Commission thus duly took the submissions of the Appellant into account and based on the effect of annual degradation on the energy output [the inter-linked CUF and degradation as submitted hereinabove], rightly levelised the net generation over the life of the project commensurate with the levelised revenue receipts. There was thus no exceeding of the remand by the Commission. It is submitted that like in the case of O&M expenses, the Appellant has made elaborated submissions in its Note for Arguments on this issue and has advanced arguments based thereon, which submissions and arguments not being supported by pleadings, cannot be taken into consideration by this Hon'ble Tribunal for the reasons set out hereinabove.

7. **We have heard at length the learned counsels for the rival parties and considered carefully their written submissions, arguments put forth during the hearings, etc. The following main issues arise in the present appeal:**

(A) Issuance of Corrigendum dated 11.07.2014

(B) Operation and Maintenance Charges

(C) Return on Equity and Grossing up of Tax

(D) Annual Degradation of Solar Plant

(E) Apportionment of Levelised Tariff in two sub-periods

8. **Our Findings and Analysis on the above issues**

9. **Issue No. A: Issuance of Corrigendum dated 11.07.2014**

9.1 The Appellant has submitted that the State Commission passed the Corrigendum Order dated 11.07.2014 by which the findings for the Solar PV projects not availing accelerated depreciation has been incorporated in the operative part of the Order dated 07.07.2014. The Appellant has contended that this aspect was never dealt by the Tribunal in its Order dated 17.04.2013 passed in Appeal No. 75 of 2012 and, therefore, could not have been considered at all by the State Commission. It has been alleged that the Corrigendum issued by the State Commission after a period of about two and half years is patently erroneous and absolutely there was no cause or occasion for issuance of such a Corrigendum. As per the Appellant, the issue in the present case is relating to the power and jurisdiction of the State Commission to issue the Corrigendum in the remand proceedings after the decision of the Tribunal dated 17.04.2013. The Appellant to support its contention, has relied upon the following authorities:

(i) Gujarat Urja Vikas Nigam Limited vs. EMCO Limited (2016) 11 SCC 182.

(ii) Gujarat Urja Vikas Nigam Limited v. Acme Solar Technologies (Gujarat) Pvt Ltd and Ors (2017) 11 SCC 801.

(iii) Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Limited and Others (2017) 12 SCALE 781.

9.2 It has further been argued by the Appellant that as per the decision of the Hon'ble Supreme Court, if the Corrigendum is to be maintained, it is necessary to clarify that the solar power developers who have signed Power Purchase Agreements (PPAs) with the Appellant at any time prior to 11.07.2014 including prior to 27.01.2012 and also those who have signed PPAs after 11.07.2014 cannot seek to change to tariff based on accelerated depreciation benefit being not availed.

9.3 **Per Contra,** The Respondent No. 29, Solar Energy Society of India (SESI) has submitted that a Corrigendum issued by the State Commission is merely a clarification and rectification of an inadvertent error, as admitted by the Commission in the Corrigendum, the issuance of which was necessary in view of the growing confusion and litigation on the issue of accelerated depreciation. The State Commission as expressly admitted in the corrigendum, had inadvertently not mentioned the tariff for projects not availing the benefit of accelerated depreciation even though same has been computed and determined in the tariff order, 2012. It is settled principle of law that a court may rectify its order/judgment to include in the decree (operative portion) something that has been decided in the judgment but mistakenly omitted in the operative portion. The learned counsel appearing for the Respondent No. 29 placed the reliance on the Judgments as follows:

(i) *Jayalakshmi Coelho vs. Oswald Joseph Coelho (2001) 4 SCC 181.*

(ii) *State of Punjab vs. Darshan Singh (2004) 1 SCC 328.*

9.4 In view of the findings of the above authorities, it is a settled principle of law that an Order of the court has to be read in its' entirety and not in its parts to understand the true intent of the Order. The Appellant is, in the instant case, while ignoring the express determination of tariff for projects not availing the benefit of accelerated depreciation by the State Commission, relying only on the conclusion of the Tariff Order, 2012 to establish that the Commission had only determined tariff for projects which would be availing the benefit of accelerated depreciation only. As regard the claim of the Appellant that the State Commission had exceeded its jurisdiction in a limited remand by issuing Corrigendum dated 11.07.2014, it is brought out that **this Tribunal has in its Judgment dated 06.09.2013 in Appeal No. 02 of 2013 between Haryana Vidyut Prasaran Nigam Limited vs. Haryana Electricity Regulatory Commission** held that the State Commission is within its powers in correcting inadvertent patent errors in its orders even in a limited remand**.**

9.5 The learned counsel for the Respondent Commission submitted that though the tariff computations were elaborately done in the Order for all solar projects availing accelerated depreciation and also not availing accelerated depreciation, the final tariff computation table did not contain the tariff approved for projects not availing accelerated depreciation. The same was an inadvertent omission/slip on part of the Commission and it was this omission/slip which was corrected by it in the Corrigendum dated 11.07.2014. In fact, there was no variation in the original order dated 27.1.2012 in so far as the approved tariff was concerned. As per the provisions of Gujarat Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, the Commission is vested with the powers as regards rectification of accidental slip or omissions in its order. As such, in exercise of its powers, the Commission rectified the accidental omission in the order and not amended the same. The said rectification was not part of the remand, nor could it be, but was in exercise of Commission's Regulatory powers.

Our Findings:

9.6 The contention of the Appellant in this issue is that this aspect was never dealt by this Tribunal in its Order dated 17.04.2013 and hence could not have been considered at all by the State Commission. On the other hand, the Respondent, SESI and the State Commission have submitted that the Corrigendum Order dated 11.07.2014 issued by the State Commission is merely a clarification and rectification of an inadvertent error, the issuance of which was necessary in view of the growing confusion and litigation on the issue of accelerated depreciation. We have gone through the judicial pronouncements of the various quoted authorities by both the parties and find that the Corrigendum dated 11.07.2014 has been issued by the State Commission only to rectify its inadvertent omission well within its jurisdiction. The State Commission had carried out tariff computations for all solar projects availing accelerated depreciation and also, not availing accelerated depreciation but the final tariff computation table missed the tariff approved for projects not availing accelerated depreciation. It is noted that the Corrigendum contain only the missed out tariff computations leaving other aspects untouched. **In a similar matter, this Tribunal in its Judgment dated 06.09.2013 in the Appeal No. 02 of 2013 between Haryana Vidyut Prasaran Nigam Limited vs. Haryana Electricity Regulatory Commission held that the State Commission is within its powers in correcting inadvertent patent errors in its orders even in a limited remand. We, therefore, uphold that the Corrigendum Order passed by the State Commission is**

well within the ambit of settled principles of law and its statutory powers.

10. **Issue No. B: Operation and Maintenance Charges**

10.1 The Appellant has submitted that the ratio of the Tribunal's Judgment was clearly that the O&M expenses for the projects for the second control period under Tariff Order dated 27.01.2012 should be considered at the level of O&M expenses applicable for FY 2010-11 i.e. ₹ 8.25 lakhs per MW and should not be lower. Accordingly, the State Commission was required to compare the O&M expenses for the project life of 25 years which a project developer under Tariff order dated 27.01.2012 will be entitled vis-à-vis O&M expenses entitled under tariff order dated 29.01.2010.

10.2 The Appellant has further brought out that the consideration of the State Commission for O&M expenses at 0.91% of Capital Cost for Tariff Order, 2012 is not in line with the directive of the Hon'ble Tribunal which required the O&M expenses to be 0.825% of the Capital Cost as absolute value for FY 2010-11. The State Commission has ignored the fact that the year on year escalation in the O&M costs available under Tariff Order 2012 at 5.72% per annum as against 5% available under Tariff Order 2010 is higher.

10.3 As per the Appellant, consideration of O&M expenses at 0.91% is not commensurate to the justification provided by the State Commission that both the projects i.e. those under Tariff Order 2010 and under Tariff Order 2012 should get same O&M expenses. The Appellant has contended that the State Commission itself has taken a divergent view while giving higher O&M expenses for the projects under Tariff Order, 2012 ignoring the interest of consumers and this is also in contravention to the directive under the Tribunal's Judgment.

10.4 **Per Contra:** The Respondent has submitted that the Tribunal having rejected the Appellant's plea that O&M expenses reduce with reduction in capital cost, directed the State Commission to allow at least ₹8.25 lakh/MW in absolute terms leaving the issue of escalation to be decided by the State Commission. The State Commission has rightly implemented the said direction of the Tribunal and has allowed inflation for 2 years @5% p.a. over the 2010-11 level to arrive at base O&M expense of ₹9.10 lakh/MW.

10.5 It has further been brought out by the Respondent that the calculation shown by the Appellant is erroneous as the Appellant has considered same discount factor and escalation factor as 10.74% and 5.72%, respectively for both control periods. While the Appellant has taken correct figures of these two factors for arriving at NPV under Tariff Order 2012, it has wrongly calculated the NPV for Tariff Order 2010 considering same DF and EF. The correct calculation could have been carried out considering DF of 10.19% and EF of 5% as taken in Tariff Order 2010. With these factors, the cumulative O&M cost for projects covered under Tariff Order, 2010 and Tariff Order 2012 works out to be almost same. In fact, while computing the NPV of O&M expenses, the Appellant has considered only escalation of 5% and 5.72% under the two control periods for 25 years but it does not consider the escalation in first two years considered by the State Commission. From the computation tables depicted by the Appellant, it is noted that the first order relates to the period 2010-34 while second order relates to period 2012-36.

10.6 The Respondent has further submitted that the State Commission has determined 5% escalation for 2010 onwards and 5.72% for 2012 onwards and accordingly, the escalation for two years between 2010-12 could have been 5% only. Thus, the State Commission has rightly calculated the base O&M cost of Rs. 9.10 lakhs /MW for 2012 by escalating Rs. 8.25 lakhs/MV (allowed in 2010) @ 5% for two years.

10.7 As per the learned counsel for the Respondent Commission, the findings of the State Commission do not suffer from any infirmity inasmuch as they have been arrived at by following spirit of the remand made by this Hon'ble Tribunal to ensure appropriate O&M expenses to the developers. Considering that escalation in O&M cost provided for in the Tariff Order for the previous control period has already taken effect by operation of the Tariff Order, the Appellant is misplaced in contending that such escalation factor should not be taken into account while computing O&M expenses for the next control period.

10.8 The Respondent Commission has further submitted that the notes for arguments submitted by the Appellant now before the Tribunal not being part of pleadings, are liable to be not considered by this Tribunal. Further, a perusal thereof would show that the Appellant has raised new factual issues which have not been pleaded or argued before the State Commission. The learned counsel for the Respondent Commission further cited legal position as regards requirement of pleadings laid down in various judicial pronouncements as under:

(i) ***Prudential Assurance Co Ltd V Revenue And Customs Commissioners****. [2017] 1 All ER 815*

(ii) ***S.S. Sharma And Ors. Vs. Union of India (UOI) And Ors.*** *1981 AIR SC 588*

(iii) ***Trojan & Co. V. Nagappa.****1953 AIR SC 235*

(iv) ***Ram Sarup Gupta V. Bishun Narain Inter College.****1987 AIR SC 1242*

(v) ***National Textile Corporation Ltd. V. Naresh Kumar BadrikumarJagad*** *[(2011) 12 SCC 695]*

(vi) ***Commissioner of Central Excise vs. Connaught Plaza Restaurant*** *[(2012) 13 SCC 639]*

Our Findings:

10.9 We have evaluated the various pros and cons associated with the Operation and Maintenance charges for two control periods as brought out by the rival parties. While taking note of the remand directives dated 17.04.2013 of this Tribunal, we find that the State Commission has allowed O&M expenses considering at least Rs. 8.25 lakhs/MW at the base level of 2010-11 and escalated the same at the rate of 5% per annum for two years so as to arrive at Rs. 9.10 lakhs/MW for the subsequent control period of 2012-15. **It is an admitted fact that the adequate provision for O&M expenses is an essential element for the efficient and successful running of the solar plant and hence, the State Commission has rightly provided for the same in accordance with the ethics of the Tribunal's remand. Therefore, we do not find any infirmity or ambiguity in the impugned order on this account.**

11. **Issue No. C: Return on Equity and Grossing up of Tax**

11.1 The Appellant has submitted that the grossing up of the tax directed by this Tribunal in the Order dated 17.4.2013 should be on the basis of the earlier decisions of this Tribunal in Appeal No. 174 of 2009, 68 of 2009 and Review Petition No. 9 of 2010. The Tribunal had, *inter alia,* held that even where there is grossing up of tax based on the rate of tax applicable, the actual tax paid on the equity capital only ought to be allowed and there cannot be any gain or loss on account of payable income tax.

11.2 It is further argued by the Appellant that allowing grossing up of income tax in the tariff without limiting to the actual tax paid would result into undue benefit to the developers in name of income tax. The actual income tax only is to be reimbursed and the developers cannot be allowed to make any profit on this account.

11.3 The Appellant has further submitted that the State Commission while passing the solar Tariff Order dated 27.01.2012 does not provide for grossing up of income for income tax purpose. Accordingly, the State Commission ought to have followed its own regulations in regard to the grossing up of the tax which is also followed in tariff determination process for other RE projects such as Wind, Biomass etc.

11.4 While passing the impugned order at the remand of the Tribunal, the State Commission has gone beyond its own regulations and it is inconceivable that the Project Developers will get reimbursement of all taxes at the rate of tax without the Developers actually being required to pay the tax to the said extent.

11.5 **Per Contra:** The Respondent has stated that the State Commission has not erred in either grossing up income tax or not subjecting it to any condition of restricting it to actuals as per MYT Regulations when the entire exercise of tariff determination is on normative basis.

11.6 This Tribunal in the case of **GUVNL v. GERC & Ors. in Appeal No. 279 of 2013** has held that revisiting of a generic tariff order on normative principles on the basis of actuals in not permissible. The relevant findings of this Tribunal are reproduced below:-

<u>"Therefore, the generic tariff order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred especially when the Tariff Order, 2010 did not reserve with itself the power to re-visit if the actual parameters applied by the Generators vary with the normative parameters.</u>"

"*177. <u>Summary of Findings</u>*
3(d) Generic Tariff Order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred in setting-up the Project and actual equity deployed."

11.7 In fact, aforesaid direction of this Tribunal to the State Commission to follow the principle of grossing up of income has also been challenged by the Appellant before the Hon'ble Supreme Court in Civil Appeal No. 5218 of 2013. Having challenged the decision itself, the Appellant cannot now say that when the State Commission has implemented this decision of grossing up of income tax in remand it has gone beyond the scope of remand. The Respondent has reiterated that the tax having been allowed on normative basis cannot now be re-visited based on actual tax. This Tribunal in appeal no. 279 of 2013 vide judgment dated 22.08.2014 has upheld the aforementioned principle.

11.8 The learned counsel for the State Commission submitted that the issue relating to Return on Equity and grossing up of income tax was decided by the Hon'ble Tribunal in the Judgment dated 17.04.2013 in Appeal No. 75 of 2012. The State Commission after careful consideration of all the matters produced before it has rightly decided that the solar power project developers are eligible for RoE available at 14% post tax grossing up of income tax and accordingly the effect of the same has been given in the tariff determination. The perusal of the aforesaid discussions and findings show that the Commission has considered the issue strictly line with the mandate of the remand made by this Tribunal.

Our Findings:

11.9 The Appellant has contended that allowing grossing up of income tax in the tariff without limiting to the actual tax paid would result into undue benefit to the developers in the name of income tax. On the other hand, the Respondent and the State Commission have refuted the claim of the Appellant and stated that putting any pre-condition or otherwise, restricting the grossing up to actuals as per MYT Regulations cannot be permitted when the entire exercise of tariff determination has been done on normative basis. We have examined the details and contents of various judgments put forth by the parties and find that the determination of tariff and associated factors should be seen in different perspective for the cases firmed up on normative basis or project specific cost basis. The Tribunal in its various judgments has upheld that the generic tariff order on normative parameters is not permissible to be re-visited on the basis of the actuals (Judgment dated 22.08.2014 in the Appeal No. 279 of 2013). **We, therefore, conclude that the State Commission has passed the impugned order taking into account various judgments of this Tribunal and well within the periphery of its remand dated 17.04.2013.**

12. **Issue D: Annual Degradation of Solar Plant**

12.1 The Appellant has contended that the levelisation of generation due to annual de-gradation ought not to have been considered additionally when the Capacity Utilisation Factor (CUF) allowed at 18% duly takes into account the year-on-year energy generation including the de-gradation of a Solar Power plant in the computation of tariff. The Capacity Utilisation Factor as fixed at a reduced level adequately protects the interest of the Project Developers in regard to de-gradation of the solar module. Additionally allowing the levelisation of generation due to annual de-gradation would result in un-intended double benefit to the Solar Project Developers.

12.2 **Per Contra:** The Respondent has contended that the Tribunal has remanded back the issue to the State Commission for due examination if the levelising tariff allowed by the State Commission ensures recovery of the revenues permissible to the Developers during the life cycle of the plant at the energy sent out with degradation. The State Commission changed the levelisation formula from levelisation of Tariff Stream to levelisation of Revenue Stream as the effect of degradation was not being correctly factored by Tariff Stream formula as it gave lower NPV of revenue than was allowed without levelisation. The Respondent pointed out that other Commissions including CERC are also following the similar formula for tariff determination and its levelising. The submission of the Appellant that annual degradation in generation has also been factored to a lower CUF of 18% is also incorrect. The CUF is based on a variety of factors some of which are uncontrollable in nature, e.g. Radiation quality and intensity, presence of aerosol and dust etc. Therefore, CUF does not reflect degradation of solar module and in turn, the generation.

12.3 The learned counsel for Respondent Commission has submitted that the Commission duly took the submissions of the Appellant into account and based on the effect of annual degradation on the energy output, the inter-linked CUF and degradation as submitted herein above, rightly levelised the net generation over the life of the project commensurate with the levelised revenue receipts. There was thus no exceeding of the remand by the Commission. It is submitted that like in the case of O&M expenses, the Appellant has made elaborate submissions in its Note for Arguments on this issue and has advanced arguments based thereon, which submissions and arguments not being supported by pleadings, cannot be taken into consideration by this Hon'ble Tribunal for the reasons set out hereinabove.

Our Findings:

12.4 The Appellant has submitted that the annual degradation of solar plant ought not to have been considered additionally when lower capacity utilization factor (CUF) at 18% has been allowed which would result into un-intended double benefit to solar project developers.

Per Contra, the Respondent and the State Commission have contended that annual degradation and CUF are entirely different elements and cannot be presumed to be inter-se-factored. While CUF is based on a variety of factors such as radiation quality and intensity, presence of aerosol and dust etc., the annual degradation reflects the deration of the solar module affecting the actual generation. While taking the spirit of the remand of this Tribunal, requiring the State Commission to examine whether the levelising tariff ensures recovery of the revenues permissible to the developers during the life cycle of the plant at the energy sent out with degradation, we find that the State Commission has followed revenue stream against the tariff stream to arrive at the same NPV of revenue with or without levelisation. **As such, the State**

Commission has considered the effect of annual degradation on the energy output and rightly levelised the net generation over the life of the project commensurate with the levelised revenue receipts. We, therefore, find that the approach and computations made by the State Commission are just and right in line with the remand decision made by this Tribunal.

13. **Issue No. E: Apportionment of Levelised Tariff in two sub-periods**

13.1 The Appellant has contended that there is an obvious error in apportioning the levelised tariff in the two sub periods, namely, the first 12 years and later 13 years. The proposed apportionment of tariff for such two sub-periods will increase in the levelised tariff for 255 MW falling in the control period by ₹ 66 Crores during the lifetime of 25 years, a significant quantum unintended additional cash flow.

13.2 The Appellant has further submitted that the State Commission has apportioned the entire difference between the tariff determined in the earlier Order dated 27.1.2012 and in the Order dated 7.7.2014 as front loading in the first 12 years itself instead of apportioning the same between the first 12 years and later 13 years in a proportionate manner. In the process, the State Commission has forgotten to consider the issues related to significant cash out flow and related liquidity issues of the Distribution Licensees which will arise due to such significant front loading in the tariff during the initial period. The Appellant has alleged that the State Commission has not given any justification for such skewed apportionment of tariff between the two sub periods.

13.3 **Per Contra:** The Respondent has pointed that the State Commission has followed the same methodology for apportionment, which was used in the Tariff Order, 2012 dated 27.01.2012 and which has been upheld by Tribunal in its Judgment in Appeal No. 75 of 2012. The submission of the Appellant is not only incorrect but also contrary to its earlier submission regarding correctness of the State Commission's methodology for apportionment between two sub-periods. The Respondent has further indicated that the validity of this formula used by the State Commission has been tested by detailed computation, which yields the same levelised tariff of Rs. 10.92/unit with adopted tariff for the two sub-periods. The State Commission has followed the same methodology in its first tariff order dated 29.01.2010 and also, used in the Impugned Order dated 07.07.2014 read with the corrigendum dated 11.07.2014 as regard to apportionment of the levelised tariff for 25 years into tariff for two sub periods.

13.4 The Respondent had further submitted that the plea of the Appellant is barred by the principle of Res-Judicata as it has chosen not to challenge or object to the methodology followed by the State Commission in the Tariff Order dated 27.01.2012. It is not open to the Appellant to now challenge the principle and methodology of apportionment that has already been settled by the both authorities i.e. State Commission and this Tribunal. The Hon'ble Tribunal has held in its Judgment dated 17.04.2013 that there is no reason to interfere with the findings of the State Commission in regard to front loading of the tariff. It was also not open to the State Commission to re-open the *methodology and adopt a different methodology than that approved and upheld by*

Tribunal. In fact, doing so would have enlarged the scope of remand, which has rightly not been done by the State Commission.

13.5 The learned counsel for Respondent Commission has submitted that based on the technical and financial parameters, the levelised tariff including Return on Equity for MW scale solar *photovolt*aic power projects which are availing accelerated depreciation as well as projects availing accelerated depreciation has been calculated by the State Commission. The Commission has decided the tariff for two sub-periods for first 12 years and thereafter, for subsequent 13 years. It is relevant to note that the division in two sub-periods was not disturbed by this Hon'ble Tribunal in its remand Judgment; rather, it specifically held that the Commission had balanced the interest of the project developer and the consumers. Further, while deciding the above tariff, the Commission also noted that due to the steadily decreasing cost of solar technology, reducing the burden on the end-user of electricity and ensuring timely commissioning of projects, the Commission in its Discussion Paper had indicated a year-on-year reduction for the 25 year applicable tariff. Keeping this in view, the Commission considered the conservative decline in the Tariff at the rate of 7% which is in interest of the consumers as well.

Our Findings:

13.6 The Appellant has submitted that there is an obvious error in apportioning the levelised tariff in two sub-periods viz. the first 12 years and later 13 years claiming to be highly front loaded. On the other hand, the Respondent as well as the State Commission have contended that the State Commission has followed the same methodology in its first tariff order dated 29.01.2010 and also, the impugned order dated 07.07.2014 read with the corrigendum dated 11.07.2014. It is relevant to note from above that there is no variance in the rationale for splitting the levelised tariff in two sub-periods i.e. first 12 years and later 13 years and taking into account the same with other associated factors, the levelised tariff for the entire life of the plant remains same (Rs. 10.92/kwh). The Tribunal in its Judgment dated 17.04.2013 has held that there is no reason to interfere with the findings of the State Commission to front loading of the tariff and also, specifically remarked that the State Commission has balanced the interest of the project developers and the consumers. **Keeping the facts and circumstances of the matter in view, we agree with the computations made by the State Commission regarding apportionment of the levelised tariff into two sub-periods.**

14. **Summary of Our Findings & Analysis:**

14.1 We are of the considered view that we do not find any legal infirmity in the impugned order. It is manifest on the face of the order that the State Commission has not committed any error of law. The State Commission has rightly justified by assigning valid and cogent reasons. Therefore, the Appeal filed by the Appellant is liable to be dismissed.

14.2 In view of our deliberations and findings in the issues at supra, we conclude that the impugned order dated 07.07.2014 read with the corrigendum dated 11.07.2014 passed by the State Commission is in line with remand Judgment dated 17.04.2013 of this Tribunal and also, under its statutory powers. The Impugned Order(s) are beyond any infirmity and ambiguity and hence, do not attract any further interference by us.

ORDER

We are of the considered opinion that issues raised in the present Appeal are devoid of merit and hence, the Appeal No. 217 of 2014 is dismissed. The Impugned Order dated 07.07.2014 read with the corrigendum dated 11.07.2014 passed by the Gujarat Electricity Regulatory Commission, is hereby upheld.

In view of this, IA No. 336 of 2014 has become infructuous and disposed of.

No order as to costs.

Pronounced in the open Court on this **11th day of April, 2018.**

(S.D. Dubey)	**(Justice N.K. Patil)**
Technical Member	**Judicial Member**

REPORTABLE / ~~NON-REPORTABLE~~