



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad - 500004

O.P. No.26 of 2012

Dated 27.11.2012

Sri A.Raghotham Rao, Chairman
Sri C.R.Sekhar Reddy, Member
Sri R.Ashoka Chari, Member

Between:

M/s GMR Vemagiri Power Generation Limited
Skip House, 25/1, Museum Road, Bangalore - 560025

... Petitioner

AND

1. Andhra Pradesh Power Coordination Committee
2. Transmission Corporation of Andhra Pradesh Limited
3. Andhra Pradesh Central Power Distribution Company Limited
4. Andhra Pradesh Southern Power Distribution Company Limited
5. Andhra Pradesh Northern Power Distribution Company Limited
6. Andhra Pradesh Eastern Power Distribution Company Limited

....Respondents

This petition is coming up for hearing on 30.06.2012 in the presence of Sri S.Niranjan Reddy, Advocate for the petitioners and Sri P.Shiva Rao, Advocate for the respondents, the Commission passed the following:

ORDER

This petition is filed by the petitioner under section 86 1 (f) of the Electricity Act, 2003 (the Act). The case of the petitioner is briefly as hereunder:

- a) The petitioner is entitled for reimbursement of Advance Income Tax / Minimum Alternative Tax (for short, 'MAT') as per Article 3.8 of the Power Purchase Agreement (for short 'PPA') dated 13-3-1997 as amended from time to time and consequently direct the respondents 1 to 6 to reimburse an amount of Rs.15,35,61,653 /- as claimed vide Bill Nos. Tax Reimbursement / 2010-11 / 1 dated 30.9.2010, Tax Reimbursement / 2010-11 2 / 2 dated 22.3.2011, Tax

Reimbursement / 2011-12 / 1 dated 28.6.2011 and Tax Reimbursement / 2011-12 / 2 dated 30.9.2011 for the period from September, 2010 to September, 2011.

b) The petitioner is entitled for late charges / interest on account of delay in reimbursement of Advance Income Tax in terms of Articles 5.11 of the said Power Purchase Agreement and consequently direct the respondents 1 to 6 to pay the late charges / interest in terms of Article 5.11 of the PPA ; and

c) Consequently, direct the respondents to make the payments from time to time within the due date against the claims for advance tax invoices to be raised by the company in accordance with the Power Purchase Agreement.

d) Pass such other order or orders as this Hon'ble Commission may deem fit and proper in the interest of justice.

2. The material grounds mentioned in the petition are briefly as follows:

Fact of the case

a) The petitioner is in the business of generation and sale of electricity and set up a 387.625 MW combined cycle power project at Vemagiri, Rajahmundry. The project was awarded through tariff based competitive bidding. It has completed the project and commissioned it on 16.09.2006.

b) On 31.03.1997, the petitioner entered into a PPA with respondent No. 2. It was amended twice on 18.06.2003 and 02.05.2007. As per Article 3.8 of the PPA, any advance income tax payable for the project in any month, supported by certificate of Chartered Accountant. Provisions of the PPA, viz., Article 1 (38) relating to meaning of law; Article 3 (8) 'Claims for Taxes on Income'; Article 3 (9) 'Minimization of Liability due to Taxes on Income' and Article 11 (1) 'Definition of 'Law', have been extracted and explained.

c) The petitioner addressed by a letter dated 30.09.2009 it had sought approval for inclusion of Chartered Accountant name. The petitioner is required to provide the certification from a Chartered Accountant along with the claims for advance tax in order to comply with provisions of the PPA. However, the approval has been unreasonably withheld contrary to the provisions of Article 3.8 of the PPA leaving the

petitioner with no choice but to submit the invoice without Chartered Accountant certification and to take the invoices raised by the petitioner as deemed due for payment on September 2010 and March 2011 respectively. In terms of the above Article of the PPA, the petitioner had called upon the respondents to make payment by issuing Supplemental Bills dated 30.09.2010, 22.03.2011, 28.06.2011 and 30.09.2011 for a total tax reimbursement of Rs. 15,35,61,653. However, the respondents in breach of their aforesaid obligation, have failed to make any payment. Therefore, the petitioner had written letters to respondents 1 and 2 about outstanding bills which are pending.

d) The respondents vide their letter dated 08.12.2010 stated that the claim is not admissible or payable on the grounds viz., (i) respondents 3 to 6 are liable to pay the net taxable income from the Project only and will not cover the deemed income of the petitioner and (ii) the petitioner is eligible for 100% tax exemption on profit under Section 80 IA of the Income Tax Act 1961, which effectively means that it will become a zero-tax paying company after being moved out of the MAT purview and the liability of respondents 3 to 6 under Section 115 JB would arise only when the Company is not in the tax holiday regime.

e) The petitioner clarified vide its reply dated 27.12.2010 that the taxable income is computed under the regular tax provisions as well as under section 115 JB of the Income Tax Act, 1961 and it is accordingly liable to pay tax whichever is higher. The liability of tax u/s 115 JB is applicable in each year where company earned book profits and it is irrelevant whether the company is under tax holiday or not. Under the Income Tax Act, the petitioner is liable to pay the advance tax on the taxable income of the project for the year 2010-11 u/s 115 JB of the I.T. Act. Respondent Nos. 3 to 6 in their reply dated 05.05.2011 communicated to the petitioner that they (DISCOMs) are not liable to reimburse the claim made by the petitioner under Article 3.8 of the PPA for taxes on income and returned the bills on the grounds, viz., (i) that MAT liability of DISCOMs gets “nullified” as the petitioner is covered by “the Tax Holiday regime”; (ii) that once the petitioner avails exemption u/s 115 JB of the Income Tax Act, the taxable project income becomes nil and there will be no taxable project income on which tax can be levied as per the provision of PPA; and (iii) that tax

liability under Section 115 JB of the Act is the liability of the petitioner as this is a special provision.

f). The petitioner in its reply dated 13.05.2011 clarified that it continues to be liable to pay tax under section 115 JB of the Income Tax Act 1961 even during the tax holiday period and requested for payment of all the outstanding amount towards the claim for reimbursement of Advance Income Tax failing which it will lead to irrefutable conclusion that a 'Dispute' has arisen under the PPA and the Informal Dispute Resolution in accordance with Article 14.1 of the PPA may be initiated. Respondent No. 1 in its letter dated 02.06.2011 once again rejected the claim of the petitioner and stated that there is no dispute on Advance Tax Reimbursement as per PPA and accordingly, there is no need to appoint a representative from respondent No. 1 / 3 to 6 for informal dispute resolution in terms of the provisions of PPA.

g) The petitioner issued another letter dated 05.07.2011 explaining the dispute and requesting for appointment of representative to settle the dispute. This Commission had dealt with identical issue in O.P. No.18 of 2009 filed by M/s. Lanco Kondapalli Power Limited. The Commission by its order dated 13.06.2011 has allowed the claim of the said company and directed respondents therein to reimburse the taxes claimed within limitation. The said decision of the Commission is based on a decision rendered by the Hon'ble Appellate Tribunal in Appeals Nos. 41, 59, and 60 of 2009.

h) In spite of the said judgment of the Commission, the respondent No.1 by its letter dated 27.07.2011 refused to designate a representative for dispute resolution. The petitioner having waited for long time after complying with the provisions of the PPA is constrained to approach the Commission for dispute resolution.

i) The action of the respondents in rejecting the claim of tax reimbursement as per the terms of the PPA is in gross violation of the contractual terms and contrary to the terms of understanding of the PPA. The petitioner has submitted invoices on different dates for a total tax reimbursement of Rs. 15,35,61,653/- and the respondents are liable to refund the said amount to the petitioner along with interest. The terms of the PPA are clear and the respondents are liable to reimburse the Advance Income Tax as per Article 3.8 of the PPA.

Grounds for relief

J) The petitioner is subject to the regular tax provision as well as MAT provision u/s 115 JB of Income Tax Act., 1961 and liable to pay advance tax whichever is higher. The liability of tax u / S 115 JB is applicable in each year on which the petitioner is having Book Profits and it is irrelevant whether it is under tax holiday period or not. The petitioner is liable to pay the advance tax on the income of the project for the FY 2010-11 and, hence, continues to pay income tax under the existing provisions of Income Tax Act, 1961.

k) The petitioner is engaged in the generation of power and the revenue consists of proceeds from sale of this power to APDISCOMs. Apart from that, the petitioner is having the treasury income from its short term deployment of surplus fund, which is excluded from computation of reimbursement of advance tax. So, the tax payable under the provision of Income Tax Act, 1961 is on the income from the Project only and not on the deemed income as raised in the respondent's replies. Hence it is clearly evident that the petitioner has raised its claims towards the reimbursement of advance income tax in accordance with the provision of Article 3.8 of the PPA.

l) In view of the huge outstanding payment receivable from the Respondents, the petitioner is put to severe financial inconvenience as it has to meet the commitments for the purchase of fuel, spares, tools, operation and maintenance cost besides meeting expenses on account of administrative overheads which run into several crores of rupees besides repayment of various loans availed from the banks and financial institutions.

m) The judgment in the Lanco Kondapalli case (referred to supra) was based on the recorded statement of the respondents that MAT was reimbursable to the petitioner therein. The said judgment applies in the case of the petitioner herein.

3. On 21.06.2012, the respondents filed their counter. The material averments mentioned in the counter are briefly as follows:

a) From the provisions of PPA, it can be safely inferred that MAT will not form a part of the regular billing, which is levied on book profits of the assessee company as per S.115 JB of the Income Tax Act.

b) MAT reimbursement claim of the petitioner is not admissible because respondents are liable to pay the net taxable income from the project only and will not cover the deemed income of the petitioner. The petitioner is eligible for 100% tax exemption on profit under section 80 IA of the Income Tax Act 1961, which effectively means that the petitioner became a zero-tax paying company. Liability of respondents under section 115 JB of the IT Act would arise only when a company is not in the tax holiday regime.

c) The respondents in their reply dated 05.05.2011 informed the petitioner that respondents are not liable to reimburse the claim made by petitioner under Art 3.8 of the PPA (i) MAT liability of respondents got “nullified” as the petitioner is covered by “the Tax Holiday regime”, (ii) that once the petitioner avails exemption u/s 115 JB of the IT Act, the taxable project income becomes nil and there will be no taxable project income on which tax can be levied as per the provisions of PPA and (iii) tax liability u/s 115 JB of the Act is the liability of the petitioner as this is a special provision.

d) The tax liability on books profits or the notional income is not covered under PPA and Art 3.8, fixes the liability only on apparent project income from the operation of the project.

e) The case dealt by the Commission in an identical issue referred to by the petitioner in its petition are challenged before the Hon'ble APTEL in Appeal. The orders of the Hon'ble ATE passed in Appeal No.41 etc are not applicable to this case, as the PPA in that case is different to the PPA of this case. Moreover, the respondents herein learnt that the said order of ATE is also under challenge. Therefore, they cannot be relied upon the order of the Commission.

f) There is difference between Taxable Income under normal provision which is project income of the generator and Deemed income on books profits u/s 115 JB

which is the notional income. The PPA does not provide for the tax reimbursement on the deemed income/notional income. The strict interpretation of the word “Net Taxable Income” used in the Art.3.4.1 of PPA, the liability to tax that is to be reimbursed by the respondents can arise only in such cases where the petitioner made certain income in respect of which there shall be the levy of tax under regular provisions of the Act, but not otherwise. In the instant case, the tax was on account of the applicability of the provisions of MAT u/s 115 JB of the Act, and not on the net profit.

g) Since there is no liability of MAT, the respondents are not liable for interest on the alleged claim of MAT.

h) For the aforesaid reasons, it is prayed that the Commission may be pleased to dismiss the petition under reply with costs.

4. On 29.06.2012, the counsel for the petitioner filed rejoinder stating that :

a) As per clause 3.8 of the PPA, “Any advance income tax payable for the Project in any month.....shall be reimbursed by the Board....” As per the provisions of the Income Tax Act, 1961, the taxable income of any particular year is computed under the regular tax provision as well as under Section 115 JB of the Act. It is accordingly liable to pay tax whichever is higher. It is irrelevant whether the company is under tax holiday period or not. Under the Act, the Company is liable to pay tax on the taxable income of the project. Therefore, any advance tax paid by the company has to be reimbursed as per the provisions of the PPA.

b) A plain reading of S.115 JB of the Income Tax Act clearly shows that MAT is a liability that arises on book profit of the assessee and as per the terms of the PPA executed between the parties, the petitioner is entitled to reimbursement of the tax payable as per clause 3(8) of the PPA that deals with Claims for taxes on Income. An artificial distinction is sought to be made by the respondents between book profits and actual tax liability without appreciating the fact that according to S.115 JB of the IT Act, the petitioner is liable to be assessed for the tax leviable on book profit also and therefore, the said amounts are reimbursable.

c) The contention of reimbursement not being applicable to deemed income is totally untenable and baseless. Moreover, even though the petitioner company is eligible for 100% exemption of profit under section 80 IA of the Act for 10 consecutive years out of 15 years, the petitioner continues to be liable to pay tax under section 115 JB of the Act even during the tax holiday period. Therefore, the said tax paid by the petitioner is reimbursable as provided under the PPA.

e) The issue raised has already been dealt with by this Commission and also the Appellate Tribunal and the contention of the respondents has been rejected. The contention that there is no similarity between the case decided by this Commission and the present one is incorrect. The clauses pertaining to advance tax reimbursement in the two said cases are identical. Therefore, it can be reasonably concluded that the issue has already been adjudicated upon and confirmed by this Hon'ble Commission in O.P. No. 18 of 2009 vide order dated 20.03.2012 and also the Appellate Tribunal in the decision in Appeal No. 39 of 2010 dated 21.10.2011. The said decisions are squarely apply to the present case.

5. The learned advocate for the petitioner addressed his arguments projecting mainly the following grounds:

- (i) The petitioner has clarified by addressing a letter that he is liable to pay tax u/s 115 JB of Income Tax Act, 1961 even during tax holiday period, they have not paid the amount.
- (ii) This Commission has already delivered its judgement in OP 18/2009 filed by M/s. Lanco confirming by the Appellate Authority directing the respondents to pay the MAT. They have not adhered to the orders of the Commission as well as request of the petitioner.
- (iii) They have insisted to designate a representative for dispute resolution but they have not made any effort on those lines and that the petitioner is constrained to approach the Commission for dispute resolution.
- (iv) The Commission has nominated an auditor as per the terms of the PPA. The respondents have not accepted the same and he is constrained to submit the invoices on different dates for a total tax reimbursement of Rs.15,35,61,653/- and they are liable to pay the same.

- (v) The petitioner is entitled to recover the tax paid by him as is directed to pay under regular tax provision as well as MAT provision u/s 115 JB of Income Tax Act, 1961 and liable to pay advance tax whichever is higher. The petitioner is liable to pay advance tax on the income from the project for the year 2010 – 2011 and continues to pay income tax under the existing provisions of IT Act, 1961. The tax paid by the petitioner on the income from the project but not on deemed income as raised in the respondent's replies.
- (vi) The petitioner is facing lot of financial crisis in meeting the expenses on account of administrative overheads which run into several crores of rupees apart from repayment of various loans availed from various banks and financial institutions.

6. The learned advocate for the respondents addressed his arguments projecting the case of the respondents as hereunder:

- (i) The petitioner is eligible for 100% tax exemption on profit u/s 80 IA of Income Tax Act, 1961, which effectively says that that the petitioner is zero –tax paying company. The liability of the respondents u/s 115 JB of the IT Act would arise only when a company is not in the tax holiday regime. The petitioner is covered by the tax holiday regime and thereby MAT liability of respondents is nullified.
- (ii) The tax liability on book profits or the notional income is not covered under the PPA and Art. 3.8 fixes the liability only on apparent project income from the operation of the project.
- (iii) The order of the Hon'ble ATE in Appeal No. 41 is not applicable to the facts of this case, as the PPA in that case is different to the PPA of this case. It is learnt that the order of Hon'ble ATE is also challenged and thereby they cannot rely upon the said order.
- (iv) The tax was on account of applicability of the provisions of MAT u/s 115 JB and not on the net profit. Hence, the petition is liable to be dismissed as they are not entitled for any interest as claimed of MAT.

7. Now, the points for consideration are:

- (i) Whether the petitioner is entitled for reimbursement of MAT as prayed for?
- (ii) Whether the petitioner is entitled to claim MAT on the ground of reimbursement of Tax Holiday as pleaded in the counter?

Point Nos.1 & 2

8. Both the points are inter-connected hence, it is necessary to answer both the points at one and the same time.

It is necessary at this stage to extract relevant paras of the PPA to appreciate the above said point before proceeding further.

Clauses 3.8, 3.9, 11.1 and 5.5 of PPA are extracted and reproduced as hereunder:

“3(8) Claims for Taxes on Income

Any advance income tax payable for the Project in any month supported by a certificate of chartered accountant approved by the Board (such approval not to be reasonably withheld or delayed) shall be reimbursed by the Board. After the tax assessment is completed for any year, and the liability thereon is determined by the taxation authorities in India, the excess or shortfall in the tax liability so determined will be adjusted in the supplementary bill (as defined in Article 5.5) for the succeeding month or on the due date of payment thereof whichever is later, subject to Article 3.9. Tax to be reimbursed will be calculated on the income from the Project only, and calculated on the assumption that the Company is engaged solely in the ownership, design, financing, construction, operation and maintenance of the Project and will not include tax reimbursements of the previous year.

The respondents claimed that the clauses in the PPA of Lanco are different with the PPA of the petitioner is incorrect. The relevant clauses are same in both the PPAs. As per the above said clause, any advance IT payable for the period in any month supported by a certificate of chartered accountant approved by the board not to be reasonably withheld or delayed shall be reimbursed by the board. The record clearly shows that efforts are made to obtain consent for approval of a Chartered Account by the petitioner but they did not respond to it. This shows the very reluctance in resolving the issue by the respondents.

3(9) Minimisation of Liability due to Taxes on Income

The Company shall take all reasonable steps to ensure that its liability due to taxes on income in respect of its income from the project is minimized, by obtaining or by suitable arrangement, all permissible benefits, rebates, concessions and the like, in accordance with law. The Company, however, is not required, under this Article 3.9 to pass on to the Board any benefits, rebates, concessions and the like in taxation obtained; by it as a result of any tax planning or otherwise, not connected with the income, expenditure and operations of this project.

11(1) Definition of Law

For the purpose of this Agreement, "Law" means the constitution of India and any act, rule, regulation, directive, notification, order or instruction having the force of Law enacted or issued by any competent legislature, or Government agency.

5.5 Supplementary Bills

For payments due to the company for reimbursement of taxes on income, incentives or taxes and duties levied on generation and/or sale of electricity, payments for periods of Political Force Majeure affecting either Party or Non-Political Force Majeure affecting the Board or any other adjustments or payments due to the company hereunder, the company shall present a supplementary bill, in such form as may be mutually agreed upon by the Board and the Company, (duly supported by supporting data). Each supplementary bill shall be payable by the Board on the due date of payment, except in case of supplementary bill for taxes on income. At least thirty days prior to the date when income tax is required to be paid by the company, the company shall submit to the Board a supplementary bill for the same. This bill shall be payable by the Board within twenty five days of its presentation to the Board or by the Company or at least five days before the date on which the tax is required to be paid by the Company, whichever is later."

9. The main contention raised by the respondent is with regard to Tax Holiday envisaged u/s 80-IA of IT Act, 1961. Section 80-IA reads as follows:

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

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility.

*(4) This section applies to.....
(iv) an undertaking which-*

(a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April 1993 and ending on the 31st day of March, 2011.”

10. On 01.04.1988, section 115J was introduced in the IT Act, 1961. MAT was made applicable to all corporate entities including the power generating companies. On 01.04.1989, 115J was amended and power generating companies were exempted from MAT. Again, from 01.04.1991 to 31.03.1997 application of section 115J was withdrawn from IT Act, 1961. Applicability of MAT was withdrawn w.e.f. 01.04.1991. Again on 01.04.1997 to 31.03.2001 MAT was re-introduced in IT Act, 1961 by insertion of Section 115JA but MAT was not made applicable to power generating companies. On 01.04.2001 Section 115JA was withdrawn, MAT was re-introduced by insertion of Section 115JB in the Act and MAT was made applicable to all corporate entities including power generating companies. The conjoint reading of both the sections, it is clear that MAT was introduced to collect the tax on the book profits of the project.

Section 115JB (1) reads as follows:

“115JB. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of (seven and one-half percent).

Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of the Schedule VI of the Companies Act, 1956 (1 of 1956):

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

(i) The accounting policies;

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

(iii) The method and rates adopted for calculating the depreciation.

Shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general

meeting in accordance with the provisions of Section 210 of the Companies Act, 1956 (1 of 1956)”.

11. As per the above said section 115JB(1), the petitioner is subjected to MAT on the book profit derived from profit and loss account even during the period of Tax Holiday under section 80-IA i.e., 10 years period from FY 2003-04.

12. The learned advocate for the petitioner relied upon a decision of Hon'ble APTEL in Appeal No. 39 of 2010. In this a clear cut observation is made as hereunder:

“Tax holiday under Section 80-IA was applicable to the petitioner at the time of signing of the PPA. Section 80-IA is still in vogue. Accordingly, the petitioner is availing tax holiday for 10 years beginning from the year of commercial operation of its Project i.e. from FY 2003-04 onwards. However, by insertion of Section 115 JB in the Income Tax Act w.e.f. 1.4.2001, the petitioner and such other companies availing tax holiday under Section 80-IA are subjected to payment of MAT.”

13. The above said decision is directly on the point in issue before the Commission, since the observations and the finding made by the Hon'ble APTEL are directly applicable to the facts of the case on hand. In that case tax holiday was also availed invoking Section 80-IA and finding is given that MAT is made applicable to all the corporate entities including power generating companies. MAT is in the nature of tax on the income and has been dealt with clause 3.8, clause 11.1 also dealt with change in law. Though MAT is a tax on income, the methodology in determination of MAT is different from that of the normal corporate tax applicable to the companies. MAT is a tax payable on book profit as determined by profit and loss account of the company under section 115JB of the IT Act. The reading of clauses 3.8, 3.9, 11.1 of the PPA and section 80-IA, 115JA and 115 JB of IT Act, 1961 it has to necessarily arrives at a conclusion that the change of law as per PPA would clearly establish that introduction of S.115JB would squarely fall under the definition of change of law under clause 11.1 of PPA to this case on hand taken into account to determine the tax.

14. Section 80 IA deals with the deduction of the tax on the gross total income, provided the gross total income of an assessee includes any profits and gains derived from the eligible business since 115JB is concerned with the computation of

book profit, and not the total income. The terms 'book profit' and 'total income' both are having different meanings. 'Book Profit' is defined under Explanation 1 to section 115JB, while the 'total income' is defined under section 66. Under Section 115JB, one is concerned with the determination of the book profit, and not the total income or the gross total income. Every income required to compute tax both under the income tax and under sec. 115 B. Profit computed under the income tax is called regular profit and the tax under this method is called regular tax. Profit computed under sec.115JB is called Book Profit and the tax computed is called MAT. Every year a company required to compute the tax under both the methods and required to pay higher of those. The company which has paid the MAT in any year can carry forward to the next subsequent years to set off against the tax liability in which it pays the regular tax.

15. The Hon'ble APTEL also dealt with change of law in Appeal No. 39 of 2010 and held

“(i) The definition of ‘law’ and ‘change in law’ as per the PPA would clearly establish that the amendment of Income Tax Act, 1961 by introduction of Section 115 JB by legislature squarely falls under the definition of change in law under clause 20.21 of the PPA.

(ii) The appellant is entitled to payment of MAT by the respondent no. 2 under clause 20.21 of the PPA as per actuals during the tax holiday period available to the appellant under Section 80-IA of the Income Tax Act, 1961. After the expiry of the tax holiday period, the appellant will be entitled to payment of Tax on Income as per clause 8.11 of the PPA.”

16. The above said finding directly dealt with the issue involved in this matter since it dealt with the issue involved i.e, MAT in that case and the same issue is pending before the Commission. So, the plea urged by the respondent that since the petitioner has availed tax holiday, they are not liable to reimburse MAT is not correct.

17. The counsel for the petitioner filed the orders passed by the Commission in I.A.140/2011 and the orders passed by the ATE in Appeal No. 113/2012 in 128/2011 in support of his contention. So, it is necessary at this stage to discuss about the finding given in OP No. 18/2009 filed by M/s. Lanco Kondapalli against the respondents claiming the payment of MAT. This Commission passed an order directing the respondents to pay the MAT for a period three years i.e., 2006-2009

and beyond that period was rejected on the ground of limitation. Against that M/s Lanco Kondapalli preferred an appeal 128/2011 in ATE. They have also filed I.A.207/2011 seeking orders to pay the MAT for the period 2006-2009. The above said I.A. was disposed with a direction to the petitioner to approach the Commission by filing an application seeking consequential direction and also directed the Commission to pass appropriate orders after hearing both the parties. In pursuance of the said direction, M/s Lanco Kondapalli filed an IA 140/2011 and this Commission passed an order on 20.03.2012 directing the respondents to pay the MAT for the period 2006-2009. In this petition a new plea of Tax Holiday was raised in the counter filed by the respondents, though they did not mention in the counter filed by them in the main OP itself. This Commission also dealt with the issue holding that it was a legal aspect which could be raised at any point of time. The Commission passed its order giving direction to the respondents to pay the amount after verifying the assessment orders finalised by the IT department and held that even if Tax Holiday is availed, MAT has to be reimbursed. Against that order, the respondents filed an appeal 113/2012 and the same was dismissed on 20.07.2012. There is no record with the respondents to show that they preferred an appeal to the Apex court on the said order. The said order has become final upholding the findings given by the Commission in the above said I.A.140/2011. When the issue of Tax Holiday was discussed and negated the contentions of the respondents even then they have again raised the same issue in this matter ignoring the finding given by the ATE. The clauses of the PPA in M/s Lanco and PPA in this case are one and the same. Hence, the said ruling is applicable to the facts of this case also. There is no other option except to rely on the finding given by this Commission in I.A. 140/2011 and Appeal No. 113/2012 of the Hon'ble ATE.

18. Hence, we are of the considered opinion that the petitioner is entitled for payment of MAT by the respondents under clauses 3.8, 3.9 and 11.1 as per the actuals even during tax holiday period available to the petitioner under Section 80-IA of IT Act, 1961. After expiry of the tax holiday period, the petitioner will be entitled for payment of tax on income as per clause 3.8 of the PPA.

19. The first part of clause 3.8 can be invoked as the assessment orders have not been finalized. The respondents have to verify the bank challans pertaining to MAT

payments by the petitioner to the I.T. department thoroughly and after due scrutiny of the MAT claim, they have to reimburse the said payments made by the petitioner together with interest as per the terms of PPA. The petitioner is directed to submit the counterfoils of challans evidencing the payment of M.A.T. to the respondent within a week and the respondent shall finalise and pay the amounts within three weeks from the date of receipt of the same from the petitioner.

This order is corrected and signed on this 27th day of November, 2012

**Sd/-
(R.ASHOKA CHARI)
MEMBER**

**Sd/-
(C.R.SEKHAR REDDY)
MEMBER**

**Sd/-
(A.RAGHOTHAM RAO)
CHAIRMAN**