
March 2024

# Consumption of power from fossil fuel-based co-generation is neither entitled for exemption nor set-off against applicable renewable purchase obligations

On February 20, 2024**,** the Appellate Tribunal for Electricity ("**APTEL / Hon'ble Tribunal**") rendered its judgment in ***Tata Steel Ltd. v Odisha Electricity Regulatory Commission & Ors***[1] *inter-alia* holding that: (a) consumption of power from fossil fuel-based co-generation plants are not entitled to exemption and/ or set-off against applicable renewable purchase obligations ("**RPO**"); and (b) neither Section 86(1)(e) nor Section 61(h) of the Electricity Act, 2003 ("**Electricity Act**") expressly stipulate that co-generation and generation of electricity from renewable sources of energy should be promoted '*equally*'**.** Accordingly, APTEL upheld Odisha Electricity Regulatory Commission's ("**OERC**") order dated February 1, 2023 ("**Impugned Order**")[2].

Further, APTEL has also held that the law down by its division bench in *Century Rayon Ltd. v Maharashtra Electricity Regulatory Commission*[3] ("**Century Rayon Judgement**") and other judgments of APTEL which have followed the Century Rayon Judgement are *per-incuriam*.

## Brief Facts

Tata Steel Limited ("**Appellant**") owns and operates a 323 MW (three hundred and twenty-three megawatt) captive generating plant, out of which 258 MW (two hundred and fifty-eight megawatt) is a captive co-generation plant (based on waste heat recovery) ("**Captive CGP**") and the rest 65 MW (sixty-five megawatt) is a coal-based captive generating plant.

Appellant invoked the jurisdiction of OERC under Regulations 16, 17 and 20 of the OERC (Procurement of Energy from Renewable Sources and its Compliance) Regulations, 2021 ("**2021 Regulations**"). Appellant *inter alia* submitted before the OERC that its Captive CGP captures the waste heat released from various processes and converts it into electricity, thereby minimizing the huge amount of pollution resulting from waste heat that would have released into the atmosphere. Appellant's waste heat recovery system ("**WHRS**") does not involve any supplementary burning of fuel and thereby helps in utilisation of resources and minimises use of fossil fuel for power generation.

Appellant *inter alia* prayed:

1. for a declaration and exemption that the Appellant was not an 'obligated entity', and was not required to fulfil the RPO targets in relation to their Meramundali Unit for the period FY 2021 onwards, and for future periods, as long as generation from their Captive CGP was in excess of their presumptive RPO requirements for the same period;

[1] APTEL Judgment in Appeal No. 337 of 2023 dated February 20, 2024.
[2] OERC Order in Case No. 71 of 2022 dated February 1, 2023.
[3] Century Rayon Ltd v MERC (Appeal No. 57 of 2009 dated April 26, 2010).

2. To hold and declare that their Captive CGP is exempt from fulfilling its RPO from 2021 onwards under the 2021 Regulations; and

3. To declare that they were entitled to set-off their presumptive RPO targets qua the consumption from the 65 MW (sixty-five megawatt) coal-based captive generating plant against the electricity generated and consumed from their captive co-generation plants, irrespective of the fuel utilized in such plants.

By the Impugned Order, OERC disallowed the Appellant's prayers. The Appellant was fastened with the liability of RPOs under Regulation 4.2 of the 2021 RPO Regulations qua consumption from their Captive CGP (which included 258 MW of captive co-generation) with RPOs with effect from the date notification of the 2021 Regulations, i.e. from February 15, 2022.

However, OERC granted the Appellant exemption from fulfilment of RPOs for consumption from its 258 MW (two hundred and fifty-eight megawatt) captive co-generation plant for the period 2015 onwards under the OERC (Procurement of Energy from Renewable Sources and its Compliances) Regulations, 2015 ("**2015 RPO Regulations**").

## Findings

APTEL, *inter alia,* held that:

1. Neither Section 86(1)(e) nor Section 61(h) of the Electricity Act expressly stipulate that co-generation and generation of electricity from renewable sources of energy should be promoted '*equally*'. Granting the relief sought by Appellant would mean adding the word '*equally*' to Section 86(1)(e), amounting to judicial legislation, which is impermissible.

2. Since OERC has chosen to be guided by Clause 6.4 of the Tariff Policy in making the RPO Regulations, which are in the nature of a subordinate legislation, their validity cannot be examined in appellate proceedings under Section 111 of the Electricity Act.

3. The intention of the legislation must be found in the words used by the legislature itself. If the provision is unambiguous and if, from that provision, the legislative intent is clear, the court need not call into aid other rules of construction of statutes. The power conferred on State Electricity Regulatory Commissions ("**SERCs**") under Section 86(1)(e) of the Electricity Act is confined only to renewable sources of energy, and not from co-generation.

4. "*Co-generation*", as defined in Section 2(12) of the Electricity Act is only a process of generation of electricity and another form of energy and cannot be termed as a 'source of electricity' like renewable sources of energy.

*5.* In terms of Section 86(1)(e) of the Electricity Act, SERCs can promote fossil fuel-based co-generation plants by other measures such as facilitating sale of surplus electricity available with such co-generation plants to any person *et al.*

6. The manner in which the 'source' from which electricity should be purchased, as also the percentage of purchase from such 'source' to the total consumption of electricity in the area of a distribution licensee, is left to be determined by the SERCs either in the exercise of its regulatory power under Section 86(1)(e) of the Electricity Act, or by way of Regulations to be made under Section 181 of the Electricity Act. It is impermissible for APTEL to place any fetters on the exercise of powers or the discharge of regulatory functions by the SERCs.

7. None of the judgments relied on behalf of the Appellant, state why both "co-generation" and "generation of electricity from renewable sources of energy" should be promoted equally. The Century Rayon Judgement and the judgments following the Century Rayon Judgement do not consider this aspect. A decision cannot be relied upon as a precedent in support of a proposition that it did not decide. Further, a decision, which is neither founded on reasons nor it proceeds on a consideration of an issue, cannot be deemed to be a law declared to have a binding effect. Therefore, the decision in the Century Rayon Judgement and judgments following it are *per incuriam* in this regard.

8. Appellant's consumption from fossil fuel-based cogeneration, cannot be set off against its RPO targets.

 

9. Regulations made by the SERCs are statutory in character and binding. The exercise of the power either to read down statutory regulations or to ignore them on the premise that they fall foul of or run contrary to the parent act amounts to exercise of the power of judicial review, which power cannot be exercised by APTEL.

10. While promoting generation of electricity from renewable sources of energy, it is open to the concerned SERC to promote one source of renewable energy over another or to fix different percentages for the minimum procurement from such sources. For instance, while promoting generation of electricity from renewable sources of energy, it is open to the SERC to fix a higher percentage, of the total consumption of a captive consumer, to be purchased from solar energy as compared to wind or hydel energy or vice versa.

11. In doing so, APTEL held that it is the judgement of the full bench in *Lloyds Metal & Energy Ltd*[4]. which is binding and not the law declared in the Century Rayon Judgement and the judgments of the 2 (two) member benches of APTEL following it. APTEL, reasoned that in light of the principle that larger bench judgments are binding on smaller benches, the Century Rayon Judgement and those following it are *per incuriam.*

## Conclusion

APTEL, through this judgment has clarified that, neither Section 86(1)(e) nor Section 61(h) of the Electricity Act expressly stipulate that co-generation and generation of electricity from renewable sources of energy should be promoted 'equally'. APTEL has further held that once SERCs have framed regulations not treating co-generation plants/ WHRS plants at par with renewable energy sources, the remedy available is only by seeking judicial review of such regulations. APTEL's power under Section 111 of the Electricity Act does not extend to "read down regulations". As a result of this judgment, a settled position for over a decade qua renewable purchase obligations of co-generation plants has been disturbed. The impact of the said judgment on the actions of the entities treating co-generation based waste heat recovery systems at par with renewable energy is worth keeping an eye on.

[4] APTEL Judgment dated December 2, 2013, in Appeal No. 53 of 2012.

## Energy (Clean Energy & Climate Change) Practice

We are known for our specialist domain-focused Energy practice - acknowledged for strengths in grappling with complex legal issues involving public policy, market economics, technology, finance, project management. Our practice has contributed to several landmark and precedent-setting work related to legislative and policy framework governing the industry, commercial strategies for regulated industry, presenting cases before various regulatory and judicial fora in the country, advice on tariff, licensing, market development and design, de-regulation and dispute resolution.

As part of our Energy practice, we are also involved in advising clients in the renewable energy and cleantech space. Our team has been part of complex corporate transactions involving entities engaged in the renewable energy sector including solar and wind energy entities, drafting as well as advising clients on issues related to commercial agreements such as power purchase agreements, EPC contracts and O&M contracts, advising on regulatory issues being faced by clients in the renewable energy sector as well as representing such clients before various judicial and regulatory fora. Our team is leading the green hydrogen sector and are advising clients in the public and private sector in relation to some of the first green hydrogen related acquisitions in India.

**This Prism has been prepared by:**


**Abhishek Munot**
Partner

**Kunal Kaul**
Partner

**Samikrith Rao**
Senior Associate

**Purvi Shrivastava**
Associate

| | | |
|---|---|---|
| Chambers TOP RANKED Asia-Pacific 2024 JSA | The LEGAL 500 | GCR 100 2024 |
| 18 Practices and<br>25 Ranked Lawyers | 13 Practices and<br>38 Ranked Lawyers | Recognised in World's 100 best competition practices of 2024 |
| asialaw OUTSTANDING FIRM 2023-24 | IFLR 1000 TOP TIER FIRM 2023 | INDIA BUSINESS LAW JOURNAL BEST OVERALL LAW FIRMS 2023 |
| 19 Practices and<br>19 Ranked Lawyers | 12 Practices and<br>42 Ranked Partners<br>**IFLR1000 APAC Rankings 2023**<br>---<br>Banking & Finance Team of the Year<br>---<br>Fintech Team of the Year<br>---<br>Restructuring & Insolvency Team of the Year | Among Top 7 Best Overall Law Firms in India and<br>9 Ranked Practices<br>---<br>11 winning Deals in IBLJ Deals of the Year<br>---<br>12 A List Lawyers in IBLJ Top 100 Lawyer List |
| ALB | Chambers TOP RANKED Global 2024 | vahura |
| Innovative Technologies Law Firm of the Year 2023<br>---<br>Banking & Financial Services Law Firm of the Year 2022<br>---<br>Dispute Resolution Law Firm of the Year 2022<br>---<br>Equity Market Deal of the Year (Premium) 2022<br>---<br>Energy Law Firm of the Year 2021<br>---<br>Employer of Choice 2021 | 7 Ranked Practices,<br>16 Ranked Lawyers<br>---<br>Elite – Band 1 - Corporate/ M&A Practice<br>---<br>3 Band 1 Practices<br>---<br>4 Band 1 Lawyers,1 Eminent Practitioner | **Ranked #1**<br>**The Vahura Best Law Firms to Work Report, 2022**<br>---<br>Top 10 Best Law Firms for Women in 2022 |
| | | BENCHMARK LITIGATION |
| | | 7 Practices and<br>2 Ranked Lawyers |

For more details, please contact km@jsalaw.com

jsa
advocates & solicitors

Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi