



November 2024

Consumption test for captive generating plants is 'power plant/generating plant' centric and not 'ownership centric'

The Hon'ble Appellate Tribunal for Electricity ("APTEL") on November 18, 2024, rendered its judgment in ***Tamil Nadu Generating and Distribution Corporation Ltd. vs. Tamil Nadu Electricity Regulatory Commission and Ors.***¹ holding that, consumption from each captive generating plant must be considered separately for compliance of 'consumption test' under Rule 3 of the Electricity Rules, 2005 ("**Electricity Rules**").

Brief facts

1. Chettinad Cement Corporation Private Limited, respondent No. 2, has 3 (three) cement manufacturing units in the State of Tamil Nadu ("**CCCPL**"). CCCPL had set-up co-located power plant inside the premises of its cement manufacturing plants for captive consumption of power.
2. As per the data submitted by CCCPL, 2 (two) out of 3 (three) power plant failed to meet the minimum consumption test of 51%. Accordingly, on September 23, 2020, the appellant herein issued a show cause notice and raised a demand of INR 95,02,09,269 (Indian Rupees ninety-five crore two lakh nine thousand two hundred and sixty-nine) towards payment of cross subsidy surcharge. The demand raised by the appellant was disputed. Consequently, the appellant filed a petition² before the Tamil Nadu Electricity Regulatory Commission ("**TNERC**").
3. On July 13, 2023, TNERC passed an order (impugned in the aforementioned appeal) in MP No. 36 of 2020 holding that, the captive user is a single entity, hence, the energy generated by all the 3 (three) generating plants be aggregated for the purpose of compliance of consumption test under Rule 3 of the Electricity Rules. Consequently, TNERC held that CCCPL has met the consumption test and no cross subsidy surcharge is payable.
4. Aggrieved by the decision of TNERC, the appellant preferred an appeal before the APTEL.

Issue

The issues framed by the APTEL are as under:

1. whether generation and consumption from different power plants, set up for captive use by the same user, can be aggregated for the purpose of ascertaining compliance with Rule 3 of the Electricity Rules? and

¹ Judgment dated November 18, 2024, in Appeal No. 76 of 2024

² MP No. 36 of 2020

- whether the petition, filed by the appellant before the TNERC claiming payment of cross-subsidy surcharge from CCCPL was time-barred?

Submissions before the APTEL

- The appellant contended that the eligibility criteria for a captive generating plant, as provided in the Electricity Act, 2003 ("**Electricity Act**") read with Electricity Rules, is plant centric. Hence, the ownership and consumption criteria ought to be met by each generating plant/ unit.
- CCCPL contended that the Appellant's contention is not only contrary to the object and scheme of the Electricity Act but the same is only contrary to the Hon'ble Supreme Court's decision in the case of *CSPDCL vs. CSERC*³, and APTEL's judgment in the case of *Prism Cement Limited vs. MPERC*⁴.

Findings and analysis

The APTEL allowed the appeal holding that:

- Section 2 of the Electricity Act commences with the words "*In this Act, unless the context otherwise requires*". The definitions of various words and expressions, in sub-section (1) to (77) of Section 2 (which includes the definition of 'captive generating plant'), must be given the meaning in terms of the definition, unless a meaning contrary thereto arises in the context of the provision under consideration;
- Section 2(8) of the Electricity Act defines 'captive generating plant' to mean a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of the members of such co-operative society or association. There are 2 (two) limbs to the definition of '*captive generating plant*' under Section 2(8) of the Electricity Act. use of the word 'means', in the first limb of Section 2(8) of the Electricity Act, suggests that the definition of 'captive generating plant' is intended to cover only those captive generating plants specified therein. Further, Section 2(48) of the Electricity Act defines a 'person' to include any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person. In order to fall within the first limb of Section 2(8), and to be held to be a captive generating plant, the power plant should be set up, among others, by a company to generate electricity primarily for its own use. The second limb of Section 2(8) of the Electricity Act, by use of the word 'includes', conveys an extensive meaning. Thus, power plants set up by any person, company, association of persons and cooperative society would also fall within the definition of captive power plants;
- use of the word 'primarily', both in the first and second limbs of Section 2(8) of the Electricity Act, is not without significance. The said word means 'mainly'. As long as the power plant is set up by a person to generate electricity mainly for his own use, it would satisfy the requirement of a captive generating plant. In other words, it is not necessary that the power plant should be set up by a company exclusively for its own use, and it would suffice if it is set up primarily or mainly by a company for its own use;
- Rule 3 of the Electricity Rules provides for the requirements of captive generating plant. Rule 3(1)(a) stipulates that no power plant will qualify as a 'captive generating plant' under Section 9 read with Section 2 (8) of the Electricity Act unless: (a) in case of a power plant: (i) not less than 26% of the ownership is held by the captive user(s); and (ii) not less than 50% of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use. Explanation (1) below Rule 3(1) states that the electricity required to be consumed by captive users will be determined with reference to such generating unit or units in aggregate identified for captive use, and not with reference to the generating station as a whole;

³ 2022 SCC OnLine SC 604

⁴ Judgement in Appeal No. 2 of 2018 dated May 17, 2019

5. the usage of the words “no power plant shall qualify” and ‘such’ used in Rule 3(1) of the Electricity Rules clearly suggests that the minimum consumption requirement of 51% is to be met by each power plant. Further, ‘Explanation’ is not an exhaustive provision but the same only explains the provision, to clear its meaning. In other words, the test is ‘power plant centric’ and not ‘ownership centric’;
6. in view of the aforesaid, the order passed by the TNERC was set-aside; and
7. as regards the issue of limitation in recovering cross-subsidy surcharge, since the said issue was not decided by the TNERC, the said issue is remanded to the TNERC to decide.

Conclusion

The APTEL has applied the principle of ‘strict interpretation’ to the scheme of the captive power plant and held that the compliance of ‘consumption test’ is ‘power plant/generating plant’ centric and not ‘ownership centric’. The judgment brings clarity regarding captive compliance where a single captive user owns multiple captive power plants and captively consumes power at various locations. The judgment further balances the interest of captive power plants and distribution licensees since genuine structures created for self-consumption is promoted. The APTEL has also not interfered with the earlier orders passed by the TNERC, where aggregation of power generation from wind power plants were permitted.

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