GUJARAT URJA VIKAS NIGAM LIMITED

v.

EMCO LIMITED & OTHERS

(Civil Appeal No. 1220 of 2015)

FEBRUARY 02, 2016

[J. CHELAMESWAR AND ABHAY MANOHAR SAPRE, JJ.]

Electricity – Tariff determination – For procurement of power by Distribution Licensees in Gujarat from Solar Energy Projects – Tariff determination by order dated 29.1.2010 (first tariff order) taking into account the benefit of accelerated depreciation under s.32 of the Income Tax Act and Rules – The order also provided for determination of separate tariff for the project which did not get the benefit of accelerated depreciation – Appellant entered into Power Purchase Agreement (PPA) for sale and purchase of electricity with the respondent-power producer for the project to be established by it – However, could not commence generation of power within control period stipulated under first tariff order – Another order dated 27.1.2012 (second tariff order) determining the tariff applicable to the projects to be commissioned on or after 29.1.2012 – The power producer commenced generation of power subsequent to second tariff order – The power producer's petition to State Commission for permission to claim tariff as per second tariff order, allowed – Order of State Commission confirmed by the Appellate Tribunal – On appeal, held: The terms of the PPA does not entitle the power producer to the tariff as determined by the Second tariff order – 'The benefit of accelerated promotion' flows from the Income Tax Act which was dependent on the option of the power producer – PPA does not make any reference to such benefit – The availability of the option does not relieve the power producer of the contractual obligations incurred under the PPA – Therefore,the power producer is not entitled to tariff as per second tariff order.

Allowing the appeal, the Court

HELD: 1. An undertaking engaged in generation of power has an option to claim depreciation on its assets in accordance with the scheme under Section 32(1)(i) of the Income Tax Act.

A **Such an option could be exercised at the relevant point of time as indicated in the second proviso to Rule 5(1) of Income Tax Rules, 1962.[Para 15][869-C-D]**

2. The 2nd respondent proposed the tariff for all classes of PROJECTS taking into account that all of them would be entitled
B **to claim the 'benefit of accelerated depreciation' under Section 32 of Income Tax Act. The 2nd respondent must be presumed to have known at the time of propounding the 1st tariff order that the Income Tax Act and the Rules thereunder provide an option to the assessee (producer of power) either to claim or not the**
C **'benefit of accelerated depreciation'. Hence, the stipulation. Therefore, it cannot be said that the tariff under the 1st Tariff Order is not applicable to those power generating PROJECTS which by operation of law are not entitled to claim the benefit of the scheme under Section 32(1)(i) of the Income Tax Act. [Paras 18 and 16][869-E-F; 870-D-E]**

D **3. The PPA does not give any option to the respondent to opt out of the terms of the PPA. It only visualises a possibility of the producer not commissioning its PROJECT within the "control period" stipulated under the 1st Tariff Order and provides that in such an eventuality what should be the tariff applicable to the**
E **sale of power by the 1st respondent. Secondly, the PPA does not 'entitle' the 1st respondent to the "tariff as determined by the" 2nd respondent by the 2nd Tariff Order. [Para 26][875-A-B]**

4. The right of the 1st respondent not to avail the "benefit of accelerated depreciation" flows from the Income Tax Act. It
F **is only the 1st Tariff Order which gives an option to the 1st respondent (for that matter to all the power producers who are similarly situated as the 1st respondent) not to sell the power produced by it at the price specified in the 1st Tariff Order but seek the determination of a separate tariff. Such a right and option is available to the power producers only in one contingency i.e.,**
G **that they are not inclined to avail the 'benefit of accelerated depreciation'. [Para 26][875-D-E]**

5. The Income Tax Act gives an option to the producers of power either to avail the 'benefit of the accelerated depreciation' or not. It also specifies the point of time at which such an option
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could be exercised. The right to exercise such option at a point of time specified in the 2nd proviso to Rule 5(1A) is limited only for the purpose of availing the benefits flowing from the Income Tax Act. The PPA does not make any reference to the "benefits of accelerated depreciation". It simply specified the price to be paid by the appellant for the power purchased by it from the 1st respondent. The appellant determined the said price after taking into consideration various factors. One of them happened to be that the Power Producers are entitled to certain 'benefits' under the Income Tax Act. The availability of such 'benefit' is dependent upon the option of the power producers. Though the 1st Tariff Order employs the expression 'benefit' in the context of the AD Scheme under Section 32 of the IT Act, the applicability of the provision to a power producer depends upon the choice of the power producer. Whether the availability of the AD Scheme is beneficial to the power producer or not in a given case depends on various factors. It is for the power producer to make an assessment whether the availing of the AD is beneficial or not will take a decision if the scheme under Section 32 IT Act should be availed or not. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.[Paras 28 and 29] [875-G-H; 876-A-D]

6. The 1st respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that "the tariff is determined by the Commission vide tariff order for solar based power project dated 29.1.2010. Apart from that both the respondent No. 2 and the appellate tribunal failed to notice and the 1st respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA. The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the "control period" stipulated

A **in the 1st tariff order. It also visualised that for the subsequent control period, the tariffs payable to a PROJECTS/power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st respondent would be**
B **entitled only for lower of the two tariffs. The said stipulation is totally overlooked by the second respondent and the appellate tribunal. [Paras 30 and 31][876-E-H; 877-A-B]**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1220 of 2015

C From the Judgment and Order dated 20.11.2014 of the Appellate Tribunal for Electricity, New Delhi in Appeal No. 252 of 2013

C. A. Sundaram, MG. Ramachandran, Hemantika Wahi, Anand Ganeshan, Shubham Arya for the Appellant.

Vikas Singh, Hemant Sahai, Puja Priyadarshini, Saoloni Tangri,
D Nar Hari Singh, Sakya Singha Chaudhuri, Shekhar Prit Jha, Dr. Richa Dubey for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. The 2nd respondent herein, the Gujarat
E Electricity Regulatory Commission is a body constituted under Section 82 of the Electricity Act, 2003 (hereinafter referred to as "the Act"). In exercise of its statutory powers under Sections 61(h), 62(1)(a) and 86(1)(e) of the Act the 2nd respondent issued Order No.2 of 2010 dated 29.01.2010 (hereinafter referred to as the "1st Tariff Order") determining the tariff for procurement of power by the Distribution Licensees in
F Gujarat from Solar Energy Projects[1]. The said order was issued after an elaborate consideration of the various relevant factors including the policy guidelines of the State of Gujarat and Union of India. Under the said order, tariff for procurement of electricity generated by PROJECTS employing Solar Photovoltaic (SPV) Technology was fixed at Rs.15 per
G kWh for the initial 12 years starting from the date of commercial operation of the project and Rs.5 per kWh from the 13th year to 25th year. The said order was declared to have had come into force w.e.f. 29.01.2010.

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[1] The Tariff Order uses the term 'Solar Energy Projects ' and the PPA uses the term 'Solar Power Projects '. The terms 'Solar Power Projects ' and 'Solar Energy Projects
H ' are identical. Hereinafter, we use the term 'PROJECTS ' to denote them.

Various financial and operational parameters taken into consideration for determining the tariff are mentioned at para 4 of the said Order[2]. One of the factors taken into consideration is the 'Rate of Depreciation'. It is specified at para 5 of the Order that the tariff fixed under the said Order "took into account the benefit of accelerated depreciation under the Income Tax Act and Rules". It is further declared that "for a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts."

2. The 1st respondent produces electric energy (power) from one of the PROJECTS. The appellant and 1st respondent[3] entered into a Power Purchase Agreement (PPA) dated 09.12.2010 for sale and purchase of electricity from the 5 MW project to be established by the 1st respondent in Surendra Nagar district of Gujarat. The provisions relevant for the dispute in the present appeal are Clauses 5.1 & 5.2,

> "Article 5: Rates and Charges
>
> 5.1 Monthly Energy Charges: GUVNL shall pay to the Power Producer every month for Scheduled Energy/Energy injected as certified in the monthly SEA by SLDC the amounts (the "Tariff") set forth in Article 5.2.
>
> 5.2 GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25 years for all the Scheduled Energy/Energy injected

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[2] **Para 4. Components of Tariff**
The following financial and operational parameters have been considered while determining the tariff.

1. Capital cost
2. Evacuation cost
3. Operations & Maintenance charges
4. Debt – Equity Ratio
5. Loan Tenure
6. Interest rate on loan
7. Return on equity
8. Rate of Depreciation
9. Interest on Working Capital
10. Capacity Utilization Factor
11. Duration of Tariff
12. Auxiliary Consumption

[3] Described as power producer in the PPA

A as certified in the monthly SEA by SLDC. The tariff is determined by Hon'ble Commission vide Tariff Order for Solar based power project dated 29.01.2010.

Tariff for Photovoltaic Project: Rs.15/kWh for First 12 years and

B Thereafter Rs.5/kWh from 13th Year

To 25th Year.

Above tariff shall apply for solar projects commissioned on or before 31st December 2011. **In case, commissioning of Solar**

C **Power Project is delayed beyond 31st December 2011, GUVNL shall pay the 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."**

D and Clauses 12.8[4] & 12.10[5] of the said PPA.

3. However, after entering into the abovementioned PPA, respondent no.1 decided to change the PROJECT'S location. Therefore, a Supplemental Agreement was entered into between the appellant and respondent no.1 on 07.05.2011 making appropriate and necessary

E [4] 12.8 Amendments:

This Agreement shall not be amended, changed, altered, or modified except by a written instrument duly executed by an authorized representative of both Parties. However, GUVNL may consider any amendment or change that the Lenders may require to be made to this Agreement.

F [5] 12.10 Entire Agreement, Appendices:

This Agreement constitutes the entire agreement between GUVNL and the Power Producer, concerning the subject matter hereof. All previous documents, undertakings, and agreements, whether oral, written, or otherwise, between the Parties concerning the subject matter hereof are hereby cancelled and shall be of no further force or effect and shall not affect or modify any of the terms or obligations set forth in this Agreement, except as the same may be made part of this Agreement in accordance

G with its terms, including the terms of any of the appendices, attachments or exhibits. The appendices, attachments and exhibits are hereby made an integral part of this Agreement and shall be fully binding upon the Parties.

In the event of any inconsistency between the text of the Articles of this Agreement and the appendices, attachments or exhibits hereto or in the event of any inconsistency between the provisions and particulars of one appendix, attachment or exhibit and those of any other appendix, attachment or exhibit GUVNL and the Power

H Producer shall consult to resolve the inconsistency.

modifications to the PPA dated 09.12.2010. However, Articles 5.1 and 5.2 of the original PPA remained unaltered.

4. 2nd respondent passed another order dated 27.01.2012 (hereinafter referred to as the "2nd Tariff Order") determining the tariff applicable to the PROJECTS to be commissioned on or after 29.01.2012. The tariff fixed under the said order for the PROJECTS generating electrical Energy through Solar Photovoltaic (SPV) Technology "availing the benefit of accelerated depreciation under the Income Tax Act" is less favourable to the power producers and the tariff payable by the appellant to the power producers which do not avail "the benefit of accelerated depreciation" under the Income-tax Act is more favourable to such power producers.

5. The 1st respondent commissioned its PROJECT only on 2.3.2012, i.e., beyond the "control period[6]" Para 7.2 Control Period "of tariff specified under the 1st Tariff Order. The said "control period" ended on 28.01.2012. The 1st respondent admittedly did not avail the accelerated depreciation under Section 32 of the Income-tax Act.

6. The 1st respondent, therefore, filed a petition no.1270 of 2012 before the State Commission invoking Section 86(1)(f) of the Act praying "(A) This Hon'ble Commission be pleased to hold and declare that the Petitioner is entitled to claim the tariff applicable to megawatt scale solar photovoltaic projects not availing of accelerated depreciation as per tariff order dated 27.1.2012; and (B) This Hon'ble Commission be pleased to quash and set aside the decision of the Respondent taken in letters dated 20.4.2012, 22.6.2012 and 20.11.2012 for denying the tariff applicable to megawatt scale solar photovoltaic projects not availing of accelerated depreciation as per tariff order dated 27.1.2012 to the Petitioner and direct the Respondent to forthwith make payment of a sum of Rs. 59,50,260/- to the Petitioner being the differential amount of invoices which is unpaid by the Respondent;"

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[6] Para 7.2 Control Period
The Commission had proposed a control period for this order as the period from the date of final order of the Commission to 31.12.2011.
Commission's Ruling-
"It has been observed that the capital cost of the solar power project might reduce drastically as time elapses. However, since the gestation period for Solar PV projects is about 6 months and that for Solar Thermal Projects is 18-24 months, the Commission decides that the control period for this order will be 2 years."

A 7. The 2nd respondent by its order dated 08.08.2013 held that the 1st respondent is entitled for the benefit of the tariff specified in the 2nd Tariff Order dated 27.01.2012[7]. The 2nd respondent also held that the benefit of its adjudicatory order should not only go to the 1st respondent but also to others who have commissioned their PROJECTS subsequent to the 2nd Tariff Order.

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8. Aggrieved by the order dated 08.08.2013, the appellant herein preferred an appeal before the Appellate Tribunal for Electricity (hereinafter referred to as "the Appellate Tribunal"), constituted under Section 110 of the Act invoking its jurisdiction under Section 111 of the Act.

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9. By the impugned order dated 20.11.2014, the Appellate Tribunal confirmed the order of the 2nd respondent.

"Para 62. Summary of Findings:

(a) The PPA dated 19.12.2010 entered into between the Appellant and the Respondent No.1 provided for tariff as determined by the State Commission vide order dated 30.1.2010, viz. Rs.15 per kWh for first 12 years and thereafter Rs.5 per kWh from 13th year to 25th year, provided the Solar Project is commissioned on or before

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[7] Para 7. Considering the above, we decide that the petition succeeds. We decide that the petitioner's project, which is not availing the benefit of Accelerated Depreciation is entitled to the tariff of Rs.11.25/Unit for the first 12 years of the project and Rs.7.50/ Unit for the subsequent 13 years. The respondent is directed to pay the amount of difference of Rs.11.25 – Rs.9.98 = 1.27/KWh to the petitioner for the invoices so far raised by the petitioner and payment of which have already been made by the respondent.

F The respondent is further directed that he shall pay the above tariff now onward also to the petitioner for energy supplied by him.

Para 8. Before parting with the judgment, we would like to observe that the issue raised in the present petition is in fact on interpretation of the Order No.1 of 2012 dated 27.01.2012; and hence the decision in this case would impact not only the petitioner,

G but also other developers who have either commissioned or are likely to commission their projects within the control period of the said order. Some of such developers might not avail the benefits of accelerated depreciation and it would be unfair if all of them are required to file separate petitions to seek justice, especially when we have already decided that in the Order No.1 of 2012, the Commission has determined separate tariff for such projects. We, therefore, in the interest of justice and fairness, decide that the present order shall be applicable in all such cases. The onus of proof regarding non-

H availing of accelerated depreciation shall, however, be on such developers.

31st December 2011. However, in case commissioning of the project is delayed beyond 31st December, 2011, the Appellant has to pay the tariff as determined by the State Commission effective on the date of commissioning of Solar Power Project. The Solar Project of the Respondent No.1 was commissioned on 2.3.2012. Therefore, the tariff as determined by the State Commission by the Order dated 27.1.2012 for the next control period from 29.1.2012 to 31.3.2015 will be applicable to the Respondent No.1.

(b) In order dated 27.1.2012, the State Commission has determined the tariff for Solar Project availing accelerated depreciation and without availing the accelerated depreciation. As the Respondent No.1 has not availed the accelerated depreciation, the tariff determined without accelerated depreciation in the order dated 27.1.2012 will be applicable in terms of the PPA and the tariff order of the State Commission dated 27.1.2012.

(c) Complete reading of the Tariff Order dated 27.1.2012 clearly indicates that the State Commission has determined tariff for both, the projects availing accelerated depreciation and those not availing accelerated depreciation. The order gives a choice to the Solar Developer to avail or not to avail the benefit of accelerated depreciation."

Hence, the instant appeal under Section 125 of the Act.

10. Both the 1st Tariff Order and the 2nd Tariff Order issued by the 2nd respondent deal with the tariff payable to the producers of power. The distinction between both the tariff orders insofar as it is relevant for the purpose of the present case is that:

(I) 1st Tariff Order fixed the tariff for the PROJECTS which get the "benefit of accelerated depreciation" under Section 32 of the Income Tax Act.

"Based on the various parameters as discussed above, the levelised tariff including RoE of Solar PV power generation, using a discounting rate of 10.19% works out to Rs. **12.54** per kWh and levelised tariff using the same discounting factor for Solar Thermal Power generation works out to Rs. **9.29** per kWh. However, the Commission feels that it would be appropriate to determine tariff for two sub-periods: 12 years and 13 years instead of the same tariff for 25 years. Hence, the Commission determines the tariff

A for generation of electricity from Solar PV Power Project at **Rs. 15** per kWh for the initial 12 (twelve) years starting from the date of Commercial operation of the project and **Rs. 5** per kWh from the 13th (Thirteenth) year to 25th (twenty fifth) year. The Commission also determines the tariff for generation of electricity from Solar Thermal Power project at **Rs. 11** per kWh for the initial 12 (twelve) years starting from the date of Commercial operation of the project and **Rs. 4.00** per kWh from the 13th (Thirteenth) year to 25th (twenty fifth) year.

The above tariffs take **into account the benefit of accelerated depreciation** under the Income Tax Act and Rules. For a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts."

(II) 2nd Tariff Order, on the other hand, fixed the tariff for both the classes of PROJECTS[8] i.e. those which "avail" the "benefit of accelerated depreciation" (under Section 32 of the Income Tax Act) and those which do not "avail" the "benefit of accelerated depreciation".

"Based on these technical and financial parameters, the levelized tariff including return on equity for megawatt-scale solar photovoltaic power projects **availing accelerated depreciation** is calculated to be **Rs. 9.28 per kWh**, while the tariff for similar projects not availing accelerated depreciation is calculated to be **Rs. 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 **Rs. 9.98 per kWh** and for the subsequent 13 years shall be **Rs. 7 per kWh**. Similarly, for megawatt-scale photovoltaic projects **not availing accelerated depreciation**,

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[8] There is some dispute between the parties in this regard and the Appellate Tribunal recorded:-

"36. . The Tariff Order 2012 determines both the tariffs i.e. with or without accelerated depreciation."

In our opinion, the conclusion of the Tribunal in this regard is right. The Tenor of the two tariff orders (relevant portions of which are extracted above) is too obvious and does not call for any further explanation to justify the above conclusion of the Appellate Tribunal.

the tariff for the first 12 years shall be **Rs. 11.25 per kWh** and for the subsequent 13 years shall be **Rs. 7.50 per kWh**."

11. The case of the 1st respondent is that notwithstanding the fact that it entered into a PPA during the "control period" specified in the 1st tariff order, it is not obliged to sell power to the appellant for the price specified in Article 5.2 of the PPA and is legally entitled to seek (from the 2nd respondent) fixation of a separate tariff. It is the further case of the 1st respondent that under the PPA, the appellant is under an obligation to procure the power from the 1st respondent for a period of 25 years if the 1st respondent commences the generation of power within the "control period" and is also obliged to pay for the power procured by it at the rates specified in Article 5.2 of the PPA. But the obligation of the 1st respondent to sell power generated by it to the appellant at the rates specified in Article 5.2 of the PPA comes into existence only on the happening of the two contingencies, i.e., the 1st respondent (i) commencing the generation of power within the "control period" stipulated under the 1st Tariff Order; and (ii) choosing to avail the "benefit of accelerated depreciation" under the Income Tax Act. According to the 1st respondent, the stipulation under the 1st Tariff Order that the tariff fixed thereunder is not applicable to those PROJECTS which "does not get such benefit, the Commission would on a petition in that respect determine a separate tariff taking into account all the relevant facts from not" would only imply that tariff fixed under the 1st Tariff Order is not applicable to those PROJECTS/power producers which do not avail the "benefit of accelerated depreciation" under the Income Tax Act.

12. On the other hand, the case of the appellants throughout has been that the 1st respondent clearly knew when it entered into the PPA that the tariff propounded under the 1st Tariff Order is applicable only for those PROJECTS which avail the "benefit of accelerated depreciation" under the Income Tax Act. If the first respondent did not intend to avail the "benefit of the accelerated depreciation" under the Income Tax Act, it ought not to have entered into the PPA without first seeking the determination of the tariff by the 2nd respondent. Having chosen to enter into a PPA, the 1st respondent cannot decide not to avail the "benefit of accelerated depreciation" at a later point of time i.e. beyond the control period prescribed under the 1st Tariff Order and claim the benefit of a more advantageous tariff fixed in the 2nd Tariff Order in favour of the PROJECTS which do not avail the "benefit of accelerated depreciation".

A 13. We have already noticed that the 1st respondent did not commence generation of power within "control period" stipulated under the 1st Tariff Order and also did not avail the "benefit of the accelerated depreciation" under the Income Tax Act.

14. It is admitted on all hands that the "benefit of accelerated
B depreciation" mentioned in the 1st Tariff Order and the PPA is the stipulation contained in Section 32 (1)(i) of the Income Tax Act read with Rule 5(1A) of the Income Tax Rules. They provide for the method and manner in which depreciation of the assets of an assessee is to be calculated. Section 32 of the Income Tax Act (insofar as relevant)
C stipulates as follows:-

"32(1) in respect of depreciation of –

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar
D nature, being intangible assets acquired on or after the 1st day of April, 1998.

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed –

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(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be **prescribed**."

F The prescription contemplated is found in Rule 5(1A) of the Income Tax Rules, 1962 which reads as follows:-

"(1A) The allowance under clause (i) of sub-section (1) of section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of
G these rules on the actual cost thereof to the assessee as are used for the purposes of the business of the assessee at any time during the previous year:"

Under the second proviso to the said Rule, it is further provided;

H **"Provided further** that the undertaking specified in clause (i) of

sub-section (1) of section 32 of the Act may, instead of the depreciation specified in Appendix IA, **at its option**, be allowed depreciation under sub-rule (1) read with Appendix I, if such option is exercised before the due date for furnishing the return of income under sub-section (1) of section 139 of the Act,

(a) for the assessment year 1998-99, in the case of an undertaking which began to generate power prior to 1st day of April, 1997; and

(b) for the assessment year relevant to the previous year in which it begins to generate power, in case of any other undertaking:"

15. It can be seen from the above extracted proviso, an undertaking engaged in generation of power has an option to claim depreciation on its assets in accordance with the scheme under Section 32(1)(i) of the Income Tax Act. Such an option could be exercised at the relevant point of time as indicated in the said proviso.

16. The argument of the first respondent throughout has been that the stipulation in the 1st Tariff Order that "a project that does not get such a benefit...." only means that the tariff propounded under the said order does not apply to PROJECTS which do not choose to exercise the option to be governed by the scheme under Section 32 of the Income Tax Act. On the other hand, the argument by the appellant throughout has been that such a clause only implies that the tariff under the 1st Tariff Order is not applicable to those power generating PROJECTS which by operation of law (but not because of the violation of the assessees) are not entitled to claim the benefit of the scheme under Section 32(1)(i) of the Income Tax Act.

17. We do not wish to examine the question whether there is a possibility under the Income Tax Act for any PROJECT/ undertaking engaged in the generation of power[9] not to fall within the operation of Section 32(1)(i) apart from those cases where the "undertaking" chooses not to be governed by such regime. Neither of the parties made the

[9] The relevant portion of Section 32 of the Income Tax Act reads as under:
"..... undertaking engaged in generation .... of power ....."
The said Section covers not only Solar Power Projects but also all kinds of Power Projects.

A submission that in law there is a possibility of a power project not getting the benefit of the accelerated depreciation.

18. Assuming for the sake of argument that in law such a possibility exists, the construction such as the one sought to be placed on the relevant portion of para 5 of the 1st Tariff Order by the appellant cannot be B accepted because it would be inherently illogical. At the cost of repetition, we reproduce that portion of the para 5 of the 1st Tariff Order:

> The above tariffs take into account the benefit of accelerated depreciation under the Income Tax Act and Rules. For a project that **does not get such benefit**, the Commission would, on a C petition in that respect, determine a separate tariff taking into account all the relevant facts."

It is not the case of either the appellant or the 2nd respondent that Section 32(1)(i) of the Income Tax Act does not apply to some PROJECTS. The tenor of the statement is clear. The 2nd respondent D proposed the tariff for all classes of PROJECTS taking into account that all of them would be entitled to claim the 'benefit of accelerated depreciation' under Section 32 of Income Tax Act. The 2nd respondent must be presumed to have known at the time of propounding the 1st tariff order that the Income Tax Act and the Rules thereunder provide an option to the assessee (producer of power) either to claim or not the E 'benefit of accelerated depreciation'. Hence, the stipulation. The submission of the appellant regarding the construction of the above extracted clause of the 1st Tariff Order is rejected.

19. However, that does not solve the problem on hand. Two questions still remain to be examined, (i) Even if the interpretation placed F by the 1st respondent on the above extracted portion of para 5 of the 1st Tariff Order is correct (in fact it would be the logical consequence of the rejection of the submission of the appellant), would the 1st respondent have a right to exercise the choice not to avail the 'benefit of accelerated depreciation' after signing the PPA? (ii) Whether the 1st respondent's G right under the Income Tax Act to make such a choice could be so exercised which would result in a situation whereby the appellant would be obliged under the PPA to purchase the power generated by the 1st respondent for a period of 25 years without knowing the price at which the 1st respondent would be obliged to supply the power?

H 20. These questions were raised and argued before the 2nd

respondent but unfortunately the issue was unnecessarily complicated by the arguments based on promissory estoppel[10]. After noticing the issue, the appellate tribunal elaborately extracted from the order of the 2nd respondent dated 8.8.2013. The relevant part of which reads as under:

> "6.16. However, it is also a fact that the parties to the above PPA agreed in the second para of the Article 5.2 of the PPA that if the project of the Petitioner is not commissioned during the control period of the Order No.2 of 2010 dated 29.1.2010, **either the tariff that was agreed in Article 5.2 of the PPA or the tariff determined by the Commission as on the date of commissioning of the project, whichever is lower, will be applicable. Thus, the aforesaid PPA recognizes the two tariffs applicable to the Petitioner case.** As the Petitioner's project was commissioned on 2.3.2012, it falls under the control period of Order No.1 of 2012 dated 27.01.2012, for tariff purposes, relevant para of which is reproduced below:
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> XXX XXX XXX XXX
>
> The above table reveals that both the tariffs i.e. one for the project availing the benefit of Accelerated Depreciation and another for the project not availing the benefit of accelerated Depreciation is allowed by the Commission for the projects commissioned during the control period of 29.01.2012 to 31.03.2015. Such being the case, on the cogent reading of the Article 5.2 of the PPA and the tariff Order No.1 of 2012 dated 27.01.2012, we are of the view that the Principle of Promissory Estoppel is not applicable in the present case."
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> [Extracted portion of the order of the 2nd respondent in the impugned order]

It can be seen from the above that the 2nd respondent noticed the stipulation in the PPA that if the 1st respondent does not commission the PROJECT during the control period specified under the 1st Tariff Order

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[10] 18. One other issue raised by the Appellant before the State Commission is that the choice to sell electricity at the tariff with or without accelerated depreciation was to be exercised by the Developer only at the relevant time and such a claim made subsequently is barred by the principles of estoppel.

A "....either the tariff that was agreed ... or the tariff determined by the Commission ... whichever is lower will be applicable but reached a conclusion that ..... on a cogent reading of the Article 5.2 ..... and the tariff order No.1 of 2012 dated 27.01.2012, we are of the view that the Principle of Promissory Estoppel is not applicable in the present case." The 2nd respondent noticed the stipulation of the PPA regarding the applicable tariff in the event of the 1st respondent not commissioning the PROJECT would be the lower of the two tariffs. Without examining the legal effect of such stipulation, the 2nd respondent went into the analysis of the 2nd Tariff Order which is neither necessary (nor called for) for determining the legal effect of the stipulation of the PPA.

C 21. The appellate Tribunal after noticing the issue and the elaborate consideration bestowed on it by the 2nd respondent did not record in the impugned order its view regarding the correctness of the above extracted conclusion of the 2nd respondent. We can only presume that the appellate tribunal approved the reasoning and the conclusion of the 2nd respondent D since it did not reverse the 2nd respondent's order.

22. One of the submissions of the 1st respondent which was accepted by the Tribunal is that the issue is covered by an earlier judgment of the Tribunal in Appeal No.111 of 2012 dated 30th April, 2013[11] pertaining to ***Rasna Marketing Services LLP v. Gujarat Urja Vikas*** E ***Nigam Limited & Another*** (hereinafter referred to as "***RASNA case***").

23. The facts of ***RASNA case*** are: that Rasna, a power producer, entered into a power purchase agreement on 8.12.2010 with the appellant (GUVNL) herein. Under the said PPA, Rasna agreed to sell power at the rate prescribed by the 1st Tariff Order. Eventually, Rasna

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[11]. 29. According to the Respondent, the issue has already been decided in favour of the Developer in judgment dated 30.4.2013 in Appeal No.111 of 2012.

31. In the above judgment in Rasna case, the Tribunal decided that there is no infirmity in the State Commission determining the tariff for the Solar Power Projects of Rasna Marketing Services Ltd. without considering the benefit of accelerated depreciation in G terms of the Order No.2 of 2010 dated 29.1.2010. In that case, Rasna Marketing Services Ltd. had commissioned its project within the Control Period specified in the State Commission's order dated 29.1.2010. The order dated 29.1.2010 determined the tariff for Solar Projects with accelerated depreciation but provided that for a project that does not get the accelerated depreciation benefit, the Commission on a Petition filed by the Developer would determine a separate tariff without accelerated H depreciation.

commissioned its power plant on 31.12.2011 within the control period stipulated in the 1st Tariff Order. However, Rasna filed a petition before the 2nd respondent praying for determination of specific tariff for the sale of power on the ground that Rasna would not be availing accelerated depreciation benefits. The said application of Rasna was resisted by the GUVNL. A preliminary objection that such an application is not maintainable was raised by GUVNL on the ground that Rasna having received the benefit of the PPA and also the payment pursuant thereto is debarred from seeking the relief such as the one sought by it. The 2nd respondent overruled the preliminary objection. Therefore, GUVNL went before the appellate tribunal. Dealing with the said appeal, the Tribunal took note of the categoric objection raised by the GUVNL that the application for determination of a separate tariff by Rasna could not be entertained after Rasna had signed the PPA.[12]

24. The Tribunal rejected the said objection of GUVNL.[13] In substance, the conclusion of the Tribunal in ***RASNA case*** was that the execution of the PPA does not put any embargo on the right of Rasna to seek the determination of a specific tariff. The tribunal's reasons for such a conclusion are that (i) the 1st Tariff Order recognises the right of

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[12] 21. The main ground of objection raised by the Appellants before the State Commission was that Rasna Marketing Services Limited, R-2 could not be permitted to file the said application after having signed the PPAs both on 08.12.2010 and 8.6.2011 with the Appellants and such a petition could be entertained by the State Commission only before the signing of the PPAs and Rasna Marketing Services Ltd. R-2 having preferred to sign the PPA as per the tariff order dated 29.1.2010 fixing the generic tariff cannot take a different stand and maintain the petition for determination of project specific tariff on the pretext of not availing the accelerated depreciation benefits.

[13] 22.(ii) **It can not be contended that the subsequent execution of PPA would in any manner put an embargo on the jurisdiction of the State Commission for such a specific tariff determination especially when the PPA itself recognised** the fact that the tariff shall be as per the order No.2 of 2010 dated 29.01.2010 and particularly when the said order also recognised the right of the developers who are not willing to get the benefit of accelerated depreciation to approach the State Commission for determining the specific tariff for those projects.
(iii) According to the Appellants, if Rasna Marketing Services LL (R-2) did not want to avail accelerated depreciation benefits, the same should have been intimated to the Appellants even before signing of the PPAs. This contention is not tenable because there is no such reservation either in the tariff order No.2 of 2010 or in the PPA entered into between the parties.

A the power producers like Rasna either to opt for or not to opt for the benefit of accelerated depreciation; (ii) there is no specific stipulation in the Tariff Order that the power producers like Rasna which do not wish to avail the benefit of accelerated depreciation should intimate the same to the appellant before entering into the PPA; (iii) nor there is any obligation under any law by which Rasna is bound to disclose the fact before signing the PPA that it would not avail the benefit of accelerated depreciation.

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25. Relying on the judgment of the ***RASNA case***, the Tribunal recorded a conclusion in the impugned order:

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> "32. In the present case, the Solar Project could not be commissioned during the control period specified in the State Commission's Order dated 29.1.2010. **Therefore, in terms of the PPA, the Respondent No.1 is entitled to tariff as determined by the State Commission in the subsequent order dated 27.1.2012.**"

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We do not wish to make any comment on the correctness of the order of the tribunal in ***RASNA case***. We are not sure whether the order has become final. But we are of the opinion that the reliance by the tribunal in the instant case on ***RASNA case*** order is clearly wrong. In ***RASNA case***, the prayer was for the determination of a separate

E tariff applicable to it. In the instant case, the prayer of the 1st respondent is not for fixation of separate tariff but for a declaration that the 1st respondent is entitled for claiming the benefits of the tariff determined under the 2nd Tariff Order.

26. Apart from that, the conclusion of the Tribunal in the instant

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(iv) Rasna Marketing Services LLP (R-2) is not mandated under any provision of law to disclose to the Appellants that it would not be availing the benefit of accelerated depreciation before signing the PPA. It is the discretion of the project developer not availing the benefit of accelerated depreciation to move the State Commission in a

G separate petition for determination of project specific tariff as permitted by the State Commission in the tariff order No.2 of 2010 dated 29.1.2010. The said tariff order is a statutory order binding on the project developers and licensees such as the Appellants and the developers.

v) If the option of signing or not signing the PPA was contingent on the developers in exercise of option, then that option should have been specifically sought for by the Appellant and ensured that the same was incorporated in the PPA. This admittedly has

H not been done.

case is wrong. First of all the PPA does not give any option to the respondent to opt out of the terms of the PPA. It only visualises a possibility of the producer not commissioning its PROJECT within the "control period" stipulated under the 1st Tariff Order and provides that in such an eventuality **what should be the** tariff applicable to the sale of power by the 1st respondent. Secondly, the PPA **does not 'entitle'** the 1st respondent to the "tariff as determined by the" 2nd respondent by the 2nd Tariff Order. On the other hand, the PPA clearly stipulates that in such an eventuality;

> "Above tariff shall apply for solar projects commissioned on or before 31st December 2011. **In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the 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."**

The right of the 1st respondent not to avail the "benefit of accelerated depreciation" flows from the Income Tax Act. It is only the 1st Tariff Order which gives an option to the 1st respondent (for that matter to all the power producers who are similarly situated as the 1st respondent) not to sell the power produced by it at the price specified in the 1st Tariff Order but seek the determination of a separate tariff. Such a right and option is available to the power producers only in one contingency i.e., that they are not inclined to avail the 'benefit of accelerated depreciation'.

27. The real question is: what is the point of time at which the power producer can exercise such right to seek the determination of a separate tariff.

28. The Income Tax Act gives an option to the producers of power either to avail the 'benefit of the accelerated depreciation' or not. It also specifies the point of time at which such an option could be exercised. The right to exercise such option at a point of time specified in the 2nd proviso to Rule 5(1A) is limited only for the purpose of availing the benefits flowing from the Income Tax Act. The PPA does not make any reference to the "benefits of accelerated depreciation". It simply specified the price to be paid by the appellant for the power purchased by it from the 1st respondent. The appellant determined the said price

A after taking into consideration various factors. One of them happened to be that the Power Producers are entitled to certain 'benefits' under the Income Tax Act. The availability of such 'benefit' is dependent upon the option of the power producers. Though the 1st Tariff Order employs the expression 'benefit' in the context of the AD Scheme under Section 32 of the IT Act, the applicability of the provision to a power producer depends upon the choice of the power producer. Whether the availability of the AD Scheme is beneficial to the power producer or not in a given case depends on various factors the details of which we do not propose to examine. It is for the power producer to make an assessment whether the availing of the AD is beneficial or not will take C a decision if the scheme under Section 32 IT Act should be availed or not.

29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under D the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.

30. The 1st respondent knowing fully well entered into the PPA in E question which expressly stipulated under Article 5.2 that "the tariff is determined by Hon'ble Commission vide tariff order for solar based power project dated 29.1.2010"

31. Apart from that both the respondent No. 2 and the appellate tribunal failed to notice and the 1st respondent conveniently ignored one F crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:-

> "In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of G commissioning of solar power project or above mentioned tariff, **whichever is lower.**"

The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the H generation of electricity within the "control period" stipulated in the 1st

tariff order. It also visualised that for the subsequent control period, the tariffs payable to a PROJECTS/power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st respondent would be entitled only for lower of the two tariffs. Unfortunately, the said stipulation is totally overlooked by the second respondent and the appellate tribunal. There is no whisper about the said stipulation in either of the orders.

32. The 1st respondent created enough confusion. While on one hand the 1st respondent asserted a right to seek determination of a separate tariff independent of the tariff fixed under the 1st Tariff Order in view of the stipulation contained in the 1st Tariff Order that "for a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts" did not seek a relief before the 2nd respondent to determine a separate tariff but claimed the benefit of the 2nd Tariff Order. Assuming for the sake of argument that the petition filed by the 1st respondent (1270/2012) is to be treated as an application for determination of separate tariff which would be identical with the tariff fixed under the 2nd Tariff Order, whether the 1st respondent would be entitled for such a relief depends, if at all he is entitled to seek such a determination, on a consideration of "all the relevant facts" but not by virtue of the operation of the 2nd Tariff Order.

33. For all the above-mentioned reasons, we are of the opinion that the impugned order cannot be sustained and the same is therefore set aside. As a consequence, the order of the 2nd respondent dated 8.8.2013, which was the subject matter of appeal in the impugned order, is also set aside.

34. At this juncture, we need to mention that the learned counsel for the respondents very vehemently argued that the instant appeal is not maintainable because Section 125 of the Electricity Act mandates that an appeal to this Court under the said provision is maintainable only where there is a substantial question of law and the parties seeking to invoke the appellate jurisdiction of this Court must clearly indicate as to what is the substantial question of law that arises for consideration of this Court. According to the respondents, the memorandum of appeal does not disclose any substantial question of law which arises for the consideration of this Court.

A 35. We do not find any substance in the submission. We believe that debate in the foregoing paragraphs of this judgment revolved around more than one substantial question of law justifying the exercise of the appellate jurisdiction of this Court. The appeal is allowed with costs quantified at Rs. 2 lakhs payable by the 1st respondent herein. The interim orders granted earlier stand dissolved. The amounts, if any, paid by the B appellant pursuant to the interim orders of this Court shall be adjusted towards the payments due to the 1st respondent for future procurement of power by the appellant in such manner as the appellant deems fit and proper.

C Kalpana K. Tripathy Appeal allowed.