

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffee Parade, Mumbai 400 005
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@mercindia.org.in
Website: www.mercindia.org.in

Case Nos. 117 & 118 of 2011

In the matter of
Petitions seeking clarification of Order dated November 24, 2003
in Case No. 17 (3), 3,4,5 of 2002 passed by the Commission.

Shri V. P. Raja, Chairman

Case No. 117 of 2011

M/s. Borax Morarji Ltd. Petitioner
V/s.
Maharashtra State Electricity Distribution Company Ltd.Respondent

Case No. 118 of 2011

M/s Superfine Photo Pvt. Co. Ltd. Petitioner
V/s.
Maharashtra State Electricity Distribution Company LimitedRespondent

ORDER

Dated: 20th October, 2011

M/s. Borax Morarji Ltd. in Case no. 117 of 2011 herein “the Petitioner – I” and M/s. Superfine Photo Pvt. Co. Ltd. in Case no. 118 of 2011 herein “the Petitioner – II”, have filed the present Petitions before this Commission on August 16, 2011, *inter alia*, seeking clarification of this Commission’s Order dated November 24, 2003, in Case No. 17 (3), 3, 4 & 5 of 2002. As both the petitions raise similar issues, both of these cases are being dealt with by a common Order.

2. The prayers of Petitioners – I and Petitioner – II are as follows:

“

- a) *Hon'ble Commission be pleased to clarify that the observation by Hon'ble Commission in Case No. 17 of 2002 that" Such benefits (capital subsidy) if materializing in future should be equitably shared between the developer and purchasing agency" is not applicable in the case of the Petitioner herein view of the various order passes by Hon'ble Commission.*
- b) *Hon'ble Commission to hold and declare that demand of MSEDCL of the share of 50% of the capital subsidy received by Petitioner is illegal and the same be refunded i.e. Rs.10 lacs (50% of the capital subsidy recovered illegally by the Respondents) to the Petitioner.*
- c) *Any other directions that the Hon'ble Commission may deem fit and power in the facts and circumstances of the case.*

”

3. The Petitioners, in their Petitions have raised similar issues which are briefly summarized as follows :

3.1 The Petitioners had applied for capital subsidy in accordance with Government of Maharashtra (herein “GoM”) Wind Power Policy dated 12th March, 1998 (Resolution No. NCP 1097/CR-57/NRG-7), for establishing the Wind farm at Satara, Maharashtra.

3.2 The Petitioners were granted capital subsidy of Rs. 20 Lacs each by Maharashtra Energy Development Agency (“MEDA”) in the year 2007. MEDA was the nodal agency which was authorized by the Government of Maharashtra (“GoM”) to disburse the capital subsidy. The wind project of Petitioner –I was commissioned in the year of 1998-99, whereas the wind project of Petitioner –II was commissioned in the year 2001. Therefore, the both the projects fall within the categories of Group –I and Group – II wind projects, respectively.

3.3 The Petitioner – I received various letters from the Maharashtra State Electricity Distribution Company Limited, Satara (herein after referred to as “the Respondent”) in the F.Y 2008-09 whereas the Petitioner –II received various letters from the Respondent in the F.Y 2007-08, calling upon the Petitioners to pay the Respondent Rs. 10 Lacs each being 50% of the capital subsidy received by them from GoM.

3.4 At the time of receipt of aforesaid letters, the power generated from wind project of the Petitioner-I was for self use and sale to the third party/consumers, whereas in case of Petitioner-II, the power generated from wind project was 100% for self use. In both cases, the power generated was not at all sold to the Respondent.

3.5 The Respondent took an arbitrary stand for accelerating its demand of share of 50% of the capital subsidy by holding up the issuance of Credit Notes which were otherwise due to the Petitioners. Constrained by such an illegal action on the part of the Respondent which was affecting the cash flow of the Petitioners, there was no other option but to make payment of Rs. 10 Lacs each to the Respondent.

3.6 The Petitioners were not liable to share the amount of capital subsidy which they had received from GoM, with the Respondent and the demand imposed by the Respondent was wholly illegal and unjustified.

3.7 In the meanwhile the Commission passed the Order dated December 19, 2009 in Case No. 30 of 2009 (M/s Nav Maharashtra Chakan Oils Mills Ltd.) and held that the observation in the Order dated November 24, 2003 in Case No. 17 (3), 3, 4 & 5 of 2002 does not apply to the Wind Mills who are under the category of “Self Use and sale to Third Party”.

3.8 Furthermore, the Commission vide its Order dated April 23, 2010 in Case No. 70 of 2009, made it crystal clear about any ambiguity of the Order dated November 24, 2003 in Case No. 17 (3), 3, 4 & 5 of 2002. Similarly, the

Commission passed the Orders in Case No.75 of 2009 dated April 13, 2010, in case of M/s. Dhariwal Industries & other 9 (nine) Petitioners. Recently, the Commission passed similar type of Order in Case No. 96 of 2010 in case of M/s. M-Tech Innovations Ltd. & other 3 (three) Petitioners and in Case No.98 of 2010 in case of M/s. Shreem Electric Ltd. & M/s. JSON Foundry Pvt. Ltd., dated January 27, 2011.

3.9 In view of above mentioned Orders, the Petitioners therefore filed many representations before the Respondent stating that they are not liable to refund the 50% capital subsidy and there is no ambiguity in the Order dated 24th November, 2003 passed in Case No. 17(3), 3, 4 & 5. The Petitioners further represented that their cases fall within the ambit of the aforementioned Orders and requested for the refund of 50% capital subsidy received by the Respondent. However, the Respondent has yet not refunded the same to the Petitioners.

3.10 The capital subsidy disbursed to the Petitioners was in accordance with the Policy declared by GoM, Industries, Energy & Labour Department by Resolution No. NCP 1097/CR-57/NRG – 7 dated March 12, 1998, on due compliance with necessary conditions. The purpose of the aforesaid Resolution was to promote generation of energy through Non-conventional energy sources and in particular through wind energy. The only condition stipulated for grant of the subsidy was successful operation of the wind power plant with minimum 12% plant load factor for at least one year. The amount had vested in the Petitioners and due disbursement were made by MEDA and therefore any subsequent recovery of such amounts would constitute forfeiture which is not in accordance with law and is in violation of the Constitution of India.

3.11 Recovery of 50% of the capital subsidy in the instant case amounts to imposition and compulsory extraction of money for which the Respondent is not authorized to do so and consequently the entire recovery or collection is illegal and ought to be set aside. Recovery of such amount is arbitrary and not in accordance with the law and principles of natural justice.

3.12 While claiming 50% of the capital subsidy the Respondent has solely relied upon the Commission's Order dated November 24, 2003, Case No. 17 (3), 3, 4 & 5 of 2002, wherein the Commission was pleased to give its observation as under:-

“such benefits (capital subsidy) if materialized in future, should be equitably shared between the developer and the purchasing agency.”

3.13 In view of the Commission's clarification about the ambiguity of the Order dated November 24, 2003, if at all understood by the Respondent, the Order passed by the Commission in Case No. 30 of 2009 in case of M/s. Nav Maharashtra Chakan Oils Mills Ltd., dated December 19, 2009, and also the Order dated April 23, 2010 in Case No. 70 of 2009 in case of M/s. Pidilite Industries Pvt. Ltd., and Case No.75 of 2009 of M/s. Dhariwal Industries & 9 (nine) other Petitioners dated April 13, 2010, in Case No. 96 of 2010 in case of M/s. M-Tech Innovations Ltd. & other 3 (three) Petitioners and in Case No.98 of 2010 in case of M/s. Shreem Electric Ltd. & M/s. JSON Foundry Pvt. Ltd., dated January 27, 2011, the Respondent should have respected the said ruling, since the case of the Petitioners squarely falls within the ambit of the said Orders.

3.14 The above quoted observation of this Commission in Case No. 17 (3), 3, 4 & 5 of 2002 is not at all applicable to the Petitioners as the Respondent is not the “purchasing agency”. Hence, the Respondent's claim is not only unjustified but is also patently illegal which ought to be set aside.

4. Based on the submission of the Petitioners, the Commission admitted both the Petitions and the notice was issued to the Petitioners, Respondent and four authorized consumer representatives on August 24, 2011. As common issues of law and fact have been raised in the present Petitions, both the Petitions were clubbed together and heard accordingly, on September 19, 2011. Shri. Ratnakar Singh, an Authorised Representative appeared on behalf of the Petitioners. Shri. M.S. Kele, SE appeared on behalf of the Respondent.

5. During the hearing, the Commission observed that the Commission has passed the Order dated December 19, 2009 in Case No.30 of 2009 of M/s. Nav Maharashtra Chakan Oils Mills Ltd., the Order dated April 23, 2010 in Case no.70 of 2009 of M/s. Pidilite Industries Pvt. Ltd., the Order dated April 13, 2010 in Case no. 75 of 2009 of M/s. Dhariwal Industries and other 9 (nine) Petitioners. Recently, the Commission also passed a similar type of Order in Case No. 96 of 2010 in case of M/s. M-Tech Innovations Ltd. & other 3 (three) Petitioners and Order in Case No.98 of 2010 in case of M/s. Shreem Electric Ltd. & M/s. JSON Foundry Pvt. Ltd., dated January 27, 2011.
6. The Commission's ruling in its Order dated November 24, 2003, Case No. 17 (3), 3, 4 & 5 of 2002, is extracted as below;

“such benefits (capital subsidy) if materialized in future, should be equitably shared between the developer and the purchasing agency.”

7. The Petitioners relied upon the Commission's ruling in the Order dated December 19, 2009 (Case No. 30 of 2009) as follows :

“17. In the circumstances, letters issued by the Respondent demanding share in the Capital Subsidy from Group I projects and from those Group II projects which have yet not received Capital Subsidy, are hereby set aside. The Commission is also of the view that it would be in the interests of justice to direct MSEDCL, the Respondent herein, to immediately stop and desist from stopping issuance of credit notes to Group-I projects, Group-II Wind Mills who have not received the capital subsidy and where MSEDCL is not the purchasing agency that is it is hereby clarified that the observation in the aforesaid Order that “.... such benefits (capital subsidy) if materializing in future, should be equitably shared between the developer and the purchasing agency” does not apply to the wind Mills who are under the category of “Self-use and Sale to Third Party”. In case the Respondent has deducted any amounts on account of sharing of Capital Subsidy from the categories clarified

above, being unauthorized in law to do so, Respondent is directed to immediately refund such amounts to such Wind farm developers.”

8. The Petitioners also relied upon the Commission’s ruling in the Order dated April 23, 2010(Case No. 70 of 2009) as follows:

“13.The Commission is also of the view that it would be in the interest of justice to direct MSEDCL, the Respondent herein, to immediately stop and desist sharing of the Capital Subsidy from Group-II Wind Mills where MSEDCL is not the purchasing agency that is it is hereby clarified that the observation in the aforesaid Order that “.... such benefits (capital subsidy) if materializing in future, should be equitably shared between the developer and the purchasing agency” does not apply to the wind Mills who are under the category of “Self-use and Sale to Third Party” and where MSEDCL is not the purchasing agency. The Respondent has not disputed that it is not the purchasing agency.”

9. Furthermore, pertaining to the clarification of the Commission’s Order dated November 24, 2003 in Case No. 17(3), 3, 4 & 5 of 2002, the Commission has already made it crystal clear vide its Order dated January 27, 2011 in Case No. 96 & 98 of 2010 that the demand of the Respondent of sharing of 50% of capital subsidy from the Petitioners is not in accordance with the Commission’s observation in the Order dated November 24, 2003, Case No. 17 (3), 3, 4 & 5 of 2002, which is reproduced as below;

“The Commission observed that the demand of the Respondent of sharing of 50% of capital subsidy from the Petitioners is not in accordance with the Commission’s observation in the Order dated November 24, 2003, Case No. 17 (3), 3, 4 & 5 of 2002, which does not apply to the Petitioners category and same has also been clarified in the Commission’s Order dated December 19, 2009 in Case No. 30 of 2009, in the Order dated April 23, 2010 in Case No. 70 of 2009.”

10. In response to the Petitioners contention, the Respondent admitted that whatever subsidy has been received from the Petitioners will be refunded to the Petitioners.
11. The Commission is of the view that it had specifically directed the Respondents herein vide its various Orders dated 19.12.2009 in Case No. 30 of 2009 and 23.4.2010 in Case No. 70 of 2009 etc. to immediately stop and desist sharing of the Capital Subsidy from Group-I projects and Group-II Wind Mills where MSEDCL is not the purchasing agency and had also clarified that the observations made by this Commission vide its Order dated November 24, 2003, Case No. 17 (3), 3, 4 & 5 of 2002 does not apply to the wind Mills who are under the category of “Self-use and Sale to Third Party”. It is further observed that in various proceedings before this Commission the Respondent has also not disputed that it is not the purchasing agency. However, by way of the present Petitions it can be seen that the Respondent has chosen not to comply with the Orders of this Commission. Such a practice is unfair, irregular and illegal and thus deserves to be deprecated.
12. Having heard the parties and after considering the materials placed on record, the Commission directs the Respondent to refund the amount of Rs. 10 lacs each i.e. 50% of the capital subsidy to both the Petitioners within 30 days from the date of this Order. Furthermore, the Commission directs the Respondent to refund such a capital subsidy amount, if any, to all the wind generators in the State, which is retained by the Respondent, without driving wind developers to file cases against the Respondent.
13. Accordingly, with the above clarifications and directions to the Respondent the present Case No. 117 of 2011 and Case No. 118 of 2011 stand disposed of.

Sd/-
(V. P. Raja)
Chairman