Clarification on

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Securities and Exchange Board of India

In exercise of the powers conferred by Section 11(1) of Securities and Exchange Board of India Act, 1992, the Securities Exchange Board of India ("**SEBI**") vide its *Circular dated June 01, 2021* ("**Circular**") issued guidelines pertaining to 'Off – Market' transfer of securities by Foreign Portfolio Investor ("**FPI**").

The Finance Act, 2021 provides for tax incentives for relocating foreign funds to International Financial Services Centre ("**IFSC**") so as to make the IFSC in GIFT City a global financial hub. SEBI vide its said Circular with a view to facilitate such 'relocation', decided that a FPI ('original fund' or its wholly owned special purpose vehicle) may approach its Designated Depository Participant ("**DDP**") for approval of a one - time 'off-market' transfer of its securities to the 'resultant fund'. However, the terms 'original fund', 'relocation' and 'resultant fund' shall have the same meaning as assigned to them under the Finance Act, 2021.

It is to be noted that Para 3, Part C of SEBI *Circular dated November 05, 2019* bearing Circular No. IMD/FPI&C/CIR/P/2019/124 stands modified to the extent of above mentioned paras.

Further, the DDP are required to accord its approval for a one-time 'off-market' transfer of securities for such relocation after appropriate due diligence. The relocation request shall imply that the FPI has deemed to have applied for surrender of its registration and the DDP may be guided by the guidelines pertaining to surrender of FPI registration. Also, the 'off-market' transfer shall be allowed without prejudice to any provisions of tax laws and Foreign Exchange Management Act,1999.

Securities and Exchange Board of India

In exercise of the powers conferred by Section 11(1) of the Securities and Exchange Board of India Act, 1992 read with Regulation31 (2) (b) of SEBI (Issue and Listing of Debt Securities) Regulations, 2008 the Securities Exchange Board of India ("**SEBI**") vide its *Circular dated June 04, 2021* bearing Circular No.: SEBI/HO/DDHS/DDHS1/P/CIR/2021/572 ("**June 04, 2021 Circular**") issued guidelines for Centralised Database for Corporate Bonds/Debentures which will be applicable for debt securities issued on or after August 01, 2021.

SEBI vide its *Circular dated October 23, 2013* bearing Reference No. CIR/IMD/DF/17/2013 ("**October 23, 2013 Circular**") on 'Centralized Database for Corporate Bonds/ Debentures' mandated Depositories to jointly create, host, and maintain a Centralized Database of corporate bonds held in dematerialised form. Pursuant to discussions with market participants, it was decided to further streamline the database and provide further ease of access of information for investors. In view of the same, it is proposed to supersede the above referred October 2013, Circular and provide an updated list of data fields to be maintained in the database along with the manner of filing the same as prescribed in the succeeding paragraphs.

Responsibilities of parties involved, contents of the database and manner of submitting the information

1. **Depositories:**

- Depositories shall continue to jointly create, host, maintain and disseminate the centralized database of corporate bonds, which are available in dematerialised form. All historical data available in database in terms of October 23, 2013 Circular issued by SEBI shall continue to be hosted by the Depositories.
- Depositories shall ensure to have adequate systems and safeguards to maintain the integrity of data and to prevent manipulation of data.
- Each Depository shall synchronize the database in consultation with the other Depository.
- The Depository which receives information from an issuer shall host the same as well as share it with the other Depository for hosting within three working days from the date of receipt of the information.
- Depositories shall categorise investors as per the SEBI *Circular dated November 30, 2015*.

- Depositories shall provide secure login credentials to Issuers, Stock Exchanges, Credit Rating Agencies and Debenture Trustees for updating and verifying requisite information in the corporate bind database within timelines as mentioned in this June 04, 2021 Circular.

2. Issuers:

- Issuers shall fill all the requisite fields as provided in format attached with June 04, 2021 Circular on the website in the Centralised Database at the time of allotment of the ISIN. Depositories shall verify the information as provided by issuer at the time of activation of ISIN.
- Post filing of securities, Issuers shall submit information to any of the Stock Exchanges where their securities are listed on a periodical basis and/or 'as and when' basis. The Stock Exchange shall indicate the format of filing to the Issuers in this regard.

3. Stock Exchanges:

- Stock Exchanges and Depositories shall develop a system such that information received by them is updated on the Centralized Database on a daily basis.
- Stock Exchanges shall verify listing details from the Centralized Database.
- Stock Exchanges shall update event based and periodical information in the Centralized Database when received from the issuers.

4. Credit Rating Agencies:

Credit Rating Agencies shall access the database to verify the rating information uploaded by the Issuer. In case of any discrepancy, Credit Rating Agencies shall notify the same to Stock Exchanges and update the correct information in the database within the stipulated time.

5. Debenture Trustees:

Debenture Trustees shall access the database to verify the information regarding default history and other relevant information. In case of any discrepancy, Debenture Trustee shall notify same to the Stock Exchanges and update the correct information in the database within the stipulated time.

Further SEBI has instructed the Depositories to provide the information available with respect to the Redeemable Preference Shares and Securitized Debt Instruments, in a separate section within the database, in form as available with them, sharing the same with the other depository for synchronizing and updating the database.

Ministry of Corporate Affairs

In exercise of the powers conferred by Sections 173, 177, 178 and Section 186, read with Section 469 of the Companies Act, 2013, the Central Government amended the Companies (Meetings of Board and its Powers) Rules, 2014 ("**Companies Rules, 2014**") vide its *Notification dated June 15, 2021* ("**Notification**"). These amended rules shall be called as the Companies (Meetings of Board and its Powers) Amendment Rules, 2021 which shall come into force on the date of their publication in the Official Gazette.

By taking into consideration the pandemic situation caused by the spread of COVID-19 various Circulars and Notifications were issued allowing the Companies to carry on their business activities through Audio Visual means. However, there were certain restrictions imposed by the Companies Rules, 2014 under which business activities including approval regarding Annual Financial Statements, Board's Report and prospectus, etc., were not permitted to be transacted through Video Conferencing.

Under the said Notification, the Ministry of Corporate Affairs have now removed these restrictions by omitting Rule 4 of the Companies Rules, 2014. The extract of Rule 4 of the Companies Rues, 2014 which now stand omitted is reproduced herein below for ready reference -

> *"4. Matters not to be dealt with in a meeting through video conferencing or other audio visual means-*
>
> *(1) The following matters shall not be dealt with in any meeting held through video conferencing or other audio visual means-*
>
> *(i) the approval of the annual financial statements;*
> *(ii) the approval of the Board's report;*
> *(iii) the approval of the prospectus;*
> *(iv) the Audit Committee Meetings for consideration of accounts; and*
> *(v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover."*

Ministry of Corporate Affairs

In exercise of the powers conferred by sub-sections (1) and (2) of section 469 of the Companies Act, 2013 the Central Government vide Notification dated June 07, 2021 ("**Notification**") amended the Companies (Incorporation) Rules, 2014 ("**Companies Rules, 2014**") to be called the Companies (Incorporation) Fourth Amendment Rules, 2021 which shall come into force on the date of its publication in the Official Gazette. Accordingly, e-Form INC 35 which is required to be filed pursuant to Rule 38A of the Companies Rules, 2014 has been amended and format of same has been provided in the said Notification.

The Ministry of Corporate Affairs vide its Notification substituted Form AGILE-PRO with a new Form called AGILE-PRO-S where "S" stands for Shop and Establishment Registration. In other words, any company being incorporated with effect from February 23, 2020 through SPICe+ Form shall be able to apply for the Shop and Establishment registration as well through same form which was used to obtain Goods and Services Tax Identification number, Employees State Insurance Corporation Registration plus Employees Provident Fund Organization Registration, Professional Tax Registration and Opening of bank account.

Thus, in the Companies (Incorporation) Rules, 2014 in rule 38A,-

- in the marginal heading, for the words, "and Opening of Bank Account", the words, ",Opening of Bank Account and Shops and Establishment Registration", shall be substituted;
- in the opening portion, for the letters "AGILE-PRO", the letters "AGILE-PRO -S" shall be substituted;
- for clauses "(c) and (d)" relating to "Profession Tax Registration and Opening of Bank Account", the following clauses shall be substituted, namely-

> *"(d) Profession Tax Registration with effect from the 23rd February, 2020;*
>
> *(e) Opening Bank Account with effect from the 23rd February 2020;*
>
> *(f) Shops and Establishment Registration."*

Reserve Bank of India

The Reserve Bank of India ("**RBI**") with a view to infuse greater transparency and uniformity in practice of Non-Banking Financial Companies ("**NBFCs**"), issued *a Notification dated June 24, 2021* ("**Notification**") wherein it has laid down various guidelines on distribution of dividend by NBFCs.

The guidelines mentioned in said Notification shall be applicable to all NBFCs regulated by RBI as defined in Paragraph 2(2) of Non-Banking Financial Company -Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016; and in Paragraph 2(2) of Non-Banking Financial Company – Non-Systemically Important Non-Deposit taking Company (Reserve Bank) Directions, 2016. These guidelines shall be effective for declaration of dividend from the profits of the financial year ending March 31, 2022 and onwards.

The said Notification has laid down directions for the Board of Directors of NBFCs which stated that while considering the proposals for dividend, it shall take into account the following aspects:

a. Supervisory findings of the Reserve Bank (National Housing Bank ("**NHB**") for Housing Finance Companies ("**HFCs**")) on divergence in classification and provisioning for Non-Performing Assets ("**NPAs**").
b. Qualifications in the Auditors' Report to the financial statements; and
c. Long term growth plans of the NBFC.

It was also directed that the Board shall ensure that the total dividend proposed for the financial year does not exceed the ceilings as specified. The ceilings on dividend payout ratios for NBFCs eligible to declare dividend are as under:

Ceilings on Dividend Payout Ratio		
Sr. No.	Type of NBFC	Maximum Dividend Pay-out Ratio (percentage)
1.	NBFCs that do not accept public funds and do not have any customer interface	No ceiling specified
2.	Core Investment Company	60
3.	Standalone Primary Dealers	60
4.	Other NBFCs	50

The Notification clearly stated that RBI shall not entertain any request for ad-hoc dispensation on declaration of dividend.

The Notification also lays down the eligibility criteria for NBFCs to declare dividend along with the approved Quantum of such dividend. A NBFC (other than Standalone Primary Dealers ("**SPDs**") which does not meet the applicable prudential requirement prescribed in the said Notification for each of the last three (3) financial years, may be eligible to declare dividend, subject to a cap of ten (10) percent on the dividend payout ratio, provided the NBFC complies with the following conditions:

a. meets the applicable capital adequacy requirement in the financial year for which it proposes to pay dividend; and
b. has net NPA of less than 4 per cent as at the close of the financial year.

As for the reporting required to be done for declaring dividend during the financial year it shall be done as per the format prescribed in *Annex 2* and shall be furnished within a fortnight after declaration of dividend to the Regional Office of the Department of Supervision of the Reserve Bank/ Department of Supervision of NHB, under whose jurisdiction it is registered.

CASE SUMMARY

Case Name	:	***Tamil Nadu Power Producers Association Vs. Tamil Nadu Electricity Regulatory Commission and Ors. – Appeal No. 131 of 2020***
Court	:	Appellate Tribunal for Electricity at New Delhi ("**Hon'ble APTEL**").
Order	:	June 07, 2021 uploaded on June 11, 2021.

ISSUES BEFORE THE COURT AND ITS ANALYSIS

Issue I	Is appointment of Tamil Nadu Generation and Distribution Corporation Limited ("**TANGEDCO**") as the verifying, as well as adjudicating, authority valid?
Analysis of issue and APTEL's ruling	• Tamil Nadu Electricity Regulatory Commission ("**TNERC**") videits Order dated January 28, 2020 in R.A No. 7 of 2019 ("**Impugned Order**") held that TNERC can delegate its power under Section 97 of Electricity Act, 2003 ("**EA, 2003**") and the power to verify the captive status in Tamil Nadu within EA, 2003 and Electricity Rules, 2005 ("**Rules, 2005**") to TANGEDCO. • The Hon'ble APTEL examined the reasons behind promulgating EA, 2003, National Electricity Policy, 2005 and National Tariff Policy, 2016 and observed that the impetus is always to encourage the captive industry in India, specially to cater the 'dynamic and dedicated power requirement of industries and take adequate measures to develop a conducive electricity industry to promote competition and protect interests of consumers'. It was also observed that establishment of CGPs was as a means of securing reliable, quality and cost effective power. • Hon'ble APTEL further took note of Section 42(2) of EA, 2003 as well as Rule 3 of Rules, 2005 and clarified that in the event, captive users and captive generating plant

("**CGP**"), fail to fulfil the criteria specified under Rule 3, then such users shall be liable to make payment of Cross Subsidiary Surcharge ("**CSS**") to the distribution licensee.

- Delegating essential functions such as verification of CGP, to an authority who is a direct beneficiary cannot be said to be free and fair. It was held that vesting the power and function of verification upon TANGEDCO would be against principle of fair play and transparency. Reliance was placed on *Uma Nath Pandey & Ors. v. State of Uttar Pradesh & Anr. (2009) 12 SCC 40, J. Mohapatra and Co. & Anr. v. State of Orissa & Anr. (1984) 4 SCC 103, Order dated February 21, 2011 of Hon'ble APTEL in Appeal No. 270 of 2006 titled as Chhattisgarh State Power Distribution Co. Ltd. v. Shri J.P. Saboo, Urla Industries Association Ltd. & Ors. and Order dated May 18, 2010 of Hon'ble APTEL Appeal No. 116 of 2009 titled as Chhattisgarh State Power Distribution Co. Ltd. v. Hira Ferro Alloys Ltd. & Anr.* to construe that verification of captive status is the function of the concerned commission.

- Therefore, the Hon'ble APTEL set aside the directions at paragraph Nos. 6.1.4 to 6.1.6 and 7.9.6 to 7.9.10 of the Impugned Order which dealt with holding TANGEDCO as an appropriate authority and allowing TANGEDCO for determination of captive status of a power generator. It was held **that TANGEDCO can be appointed to undertake an exercise of collecting and verifying the data for the purpose of verification of CGP status without any coercive action against the CGP / captive users.** It also clarified that any action to be initiated against the captive users or CGP for recovery of CSS as per law needs to be through an appropriate proceeding before the concerned commissions and in the present Appeal, TNERC.

Conclusion:

Distribution utility can undertake exercise of collecting and verifying data for determining captive status but cannot take any coercive steps unless same is decided by State Commission.

Issue II

Whether documents required for availing open access ("**OA**") under Section 9 of the EA, 2002 and linking of Wheeling/ Open Access with captive verification was enough?

Analysis of issue and APTEL's ruling

- After analyzing open access and CGP as provided under Section 2(47), Section 9 and Section 42(2) of EA, 2003 the Hon'ble APTEL held that verification of Rule 3 qua shareholding cannot be a mandatory precondition for grant of open access.

- The Hon'ble APTEL examined whether verification mandated under Rule 3(1)(a)(i) of Rules, 2005 has to be undertaken annually, that is, at the end of financial year or not. To decide upon this question, reliance was placed on *Order dated May 17, 2019 of Hon'ble APTEL in Appeal No. 02 of 2018 and Appeal No. 179 of 2018 in Prism Cement Limited v. MPERC & Ors*. Accordingly, it has been held by Hon'ble APTEL that verification of minimum shareholding and minimum shareholding on proportionate basis for CGPs and captive users has to be done strictly in terms of Rule 3 of Rules, 2005 without any deviation and verification under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) of Rules, 2005 has to be done at the end of financial year only. **If the distribution licensee delays or denies open access, with the intent to defeat the concept of captive generation and consumption then, verification will have no meaning.** Then such a case, TANGEDCO cannot benefit from its own default and if found that the delay or denial was wrongful, TANGEDCO cannot levy CSS at the end of financial year [Paragraph No. 11.22]

- It was held that documents enumerated in TNERC Grid Connectivity and OA Regulation, 2014 were held to be sufficient for granting approval of OA/ wheeling which is to be submitted to the Nodal Agency and not to TANGEDCO. **In other words, there is no power, whatsoever, vested with TANGEDCO for prior verification of documents for the purpose of grant of OA.** It also referred to Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) (P) Limited (2017) 16 SCC 498 and N.C. Dhoundial v. Union of India (2004) 2 SCC 579*.

- While setting aside the directions of TNERC in Impugned Order which held that in case of change of shareholding in existing captive users the same is to be furnished to TANGEDCO within ten (10) days of such change, **the Hon'ble APTEL held that documents for every change in shareholding, ought not to be provided during the subsistence of a financial year, as Rule 3 clearly specifies that such verification has to be done at the end of the financial year.**

Conclusion:

No prior verification of captive status by distribution utility, such verification has to be undertaken only at the end of financial year. Only documents required for open access to be submitted at the time of seeking open access. No need to intimate change in shareholding to distribution utility.

Issue III

Whether the treatment of Special Purpose Vehicle ("**SPV**") as an Association of Persons ("**AOP**") was correct?

Analysis of issue and APTEL's ruling

- The Impugned Order equated a SPV with an AOP which resulted in subjecting a CGP, by way of SPV with regards to proportionate consumption test, which is otherwise applicable only to an AOP.

- The Hon'ble APTEL pointed out that CGP and captive users have to comply with the conditions mentioned under Rules 3(1)(a)(i) and 3(1)(a)(ii) of Rules, 2005 whereas the second proviso to Rule 3(1)(a) is a stand-alone provision and cannot be intermingled with sub-rule (b) in any manner. In the case of an SPV, the test of proportionality is not applicable as the legislature in its wisdom has created an intelligible differentia, between an AOP and SPV, which ought to have been given effect to by TNERC in the Impugned Order and the said distinction cannot be diminished by equating the two. It was also argued by the Appellant that courts cannot rewrite or recast legislation, they should not act as law makers where there is no ambiguity in the language of legislation. Reliance was placed on judgments of Hon'ble Supreme Court in *Vemareddy Kumaraswamy Reddy v. State fi A.P (2006) 2 SCC 670, Mohd. Shahabuddin v. State of Bihar (2010) 4 SCC 553 and ESI Corporation v. TELCO (1975) 2 SCC 835*.

- The Hon'ble APTEL observed that TNERC at paragraph 6.4.4 of Impugned Order has sought to apply second proviso to Rule 3(1)(a) to Rule 3(1)(b) of Rules, 2005 **thereby equating a SPV with an AOP and that the Impugned Order has committed an error.** The Hon'ble APTEL also relied upon *State of Punjab v. Kailash Nath (1989) 1 SCC 321 and Union of India v. Sanjay Kumar Jain (2004) 6 SCC 708* to hold that a proviso is an exception and it cannot travel beyond the provision to which it is a proviso. Therefore, TNERC could not have applied the second proviso to Rule 3(1)(a) to Rule 3(1)(b) of Rules, 2005.

- The Appellant also challenged the reliance placed on *Kadodara Power Private Limited & Ors. v. Gujarat Electricity Regulatory Commission & Anr. [2009] APTEL 119* ("**Kadodara Case**") by TNERC on the ground that the said decision ought to be treated per-incuriam i.e., not with due regard to the prevalent laws. Reliance was placed on *Delhi Municipal Corporation v. Gurunam Kaur AIR 1989 SC 38,*

Seema Begum & Anr. v. Maryum Bibi & Ors. (2012) 1 ICC 321 Cal(DB) and Order dated May 29, 2019 of Hon'ble APTEL in Appeal No. 250 of 2016- Adani Transmission Limited v. Maharashtra Electricity Regulatory Commission. The Hon'ble APTEL observed that **decision in Kadodara Case did not consider the established tenet that an AOP and SPV under general law as well as Rule 3 of Rules, 2005 cannot be equated on a similar footing.** It also did not consider that a SPV is a company and an AOP is an unincorporated entity and once incorporated becomes a company. Therefore, it held that the decision in Kadodara Case to the extent that it equates a SPV and an AOP is per-incuriam and the directions at paragraph Nos. 6.4.4, 6.4.5 and 7.6.4 of the Impugned Order are set aside wherein TNERC had treated SPVs as AOPs.

Conclusion:

In case of SPV, no proportional consumption requirement can be applied. Only requirement for captive status is minimum shareholding of 26% and minimum consumption of 51% of power generated by the captive users.

Issue IV

Whether the State Commission is justified in implementation of the proposed draft amendment to Electricity Rules, 2005 proposed by Ministry of Power which are yet to approved and notified?

Analysis of Issue and Aptel's ruling

- It was pointed out by the Appellant that paragraph Nos. 6.4.8 and 7.6.8 of the Impugned Order mandate the verification of ownership and consumption for any change in the group captive structure to be done for each corresponding period of such change. The said directions have been passed by TNERC based on proposed draft amendment to Rules, 2005 particularly proviso to Clause 3(6) of such draft. The proposed amendment has not attained the force of law and yet to be notified.

- The Hon'ble APTEL observed that the Appellant has not challenged any vires of the proposed guidelines or any law.
- It was held that verification of ownership and consumption for any change in the group captive structure for each corresponding period of such change cannot be sustained.
- It was reiterated by the Hon'ble APTEL held that any determination of ownership and consumption for CGPs and captive users under Rule 3 of Rules, 2005 being an independent exercise, has to be done on an annual basis, that is, at the end of financial year.

Conclusion:

Draft amendments to Electricity Rules cannot be applied. Determination of captive status is required to be undertaken at the end of financial year, on annual basis only.

Issue V Whether the State Commission has correctly followed the criteria for verification of consumption provided under Rule 3?

Analysis of issue and APTEL's ruling

- It was submitted by the Appellant that where the minimum requirement of twenty-six percent (26%) shareholding and fifty-one percent (51%) consumption are met, but if any captive user fails to fulfil the proportionality consumption criteria, such user is to be declared non-captive while the users who fulfil the above the test remain as captive. The same is contrary to Rule 3 of Rules, 2005.
- A two-fold submission was made by the Appellant. Firstly, it was submitted that the requirement of having twenty six percent (26%) of equity share capital with voting rights and consumption of fifty one percent (51%) of the electricity generated is a prerequisite, and that no further requirement arises for fulfillment of test of proportionate consumption. Secondly, the consumption of balance forty nine percent (49%) power generated by CGP shall have to be treated as captive consumption. Reliance was placed in Hon'ble APTEL's judgment vide Order dated June 3, 2016 in Appeal

No. 252 of 2014- Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission & Anr., Order dated February 18, 2013 in Appeal No. 33 of 2012- Godawari Power & Ispat Limited v. The Chhattisghar State Electricity Regulatory Commission & Ors.

- It was further contented that if the captive users comply with twenty six percent (26%) and consume fifty one percent (51%), then there is no obligation after that, no requirement arises for fulfilment of the test of proportionate consumption. Further, beyond 51% consumption, the captive user(s) can consume power in any quantity or ratio, whatsoever and any power consumed by the captive users, qua the balance 49% power generated by the Captive Generating plant, shall have to be treated as captive consumption. Therefore, there cannot be any liability to make payment of CSS by defaulting captive users if the rest of the captive users fulfil the minimum requirements.

- The Hon'ble APTEL was of the view that this proposition has already been settled in Appeal No. 252 of 2014 and Appeal No. 316 of 2013, complying with twenty six percent (26%) and fifty one percent (51%) consumption are the minimum requirements, and **the rest of the captive users not fulfilling the above conditions will have no impact to the overall captive structure**. There cannot be any liability to make payment of CSS by defaulting captive users if the rest of captive users fulfill the minimum requirements. It was therefore held **that the requirement of paying CSS by any defaulting captive users is not required if the remaining captive users have fulfilled the conditions.**

Conclusion:

Once minimum consumption of 51% of power generated is fulfilled by captive users, there is no further requirement or condition on balance 49%. The defaulting users cannot be imposed with cross subsidy surcharge if other captive users have consumed 51% of power generated.

Issue VI Whether retrospective applicability of proposed procedure / guidelines is justified under the law?

Analysis of issue and APTEL's ruling

- It was argued by the Appellant that TNERC has prescribed to apply the procedure retrospectively, that is, from financial year 2014-15.

- It was submitted that delegated legislation can be retrospective only when the parent act permits it to be applied retrospectively. EA, 2003 which is the parent act in the present Appeal EA, 2003 nowhere provides for delegated legislation with retrospective effect. Reliance was placed on *Panchi Devi v. State of Rajasthan (2009) 2 SCC 589, M.D University v. Jahan Singh (2007) 5 SCC 77 and State of Rajasthan v. Basant Agroteach (India) Limited (2013) 15 SCC 1.*

- It was observed by the Hon'ble APTEL that Impugned Order of TNERC is an attempt to open the already concluded transactions by requiring additional documents over and above the documents already furnished by CGP's and captive users who have availed OA in the past and such requirement of additional documents for such concluded transactions would amount to changing rules of the game after the game has started, which is impermissible under law. Reliance was placed on *K. Manjusree v. State of Andhra Pradesh & Anr. (2008) 3 SCC 512*.

- However, the Hon'ble APTEL clarified that TANGEDCO can verify data for purpose of verification of CGP status in the State of Tamil Nadu, on the basis of the data already furnished by CGP / captive users while availing OA.

Conclusion:

No order or regulation can be retrospectively applied. Determination of captive status is required to be undertaken at the end of financial year, on annual basis only.

Issue VII	Whether the proposed methodology for verification of change in ownership and consumption which is by considering the proportionate generation for the corresponding period and the energy consumed by the captive user(s), is in accordance with law?
Analysis of issue and APTEL's ruling	• While dealing with the above issue, the Hon'ble APTEL agreed with the views expressed by the Appellant that the nature of a captive structure is fluid and dynamic. The existing captive users within the captive structure can choose to give up its ownership along with consumption of captive power at any point of time if it considers no usage for the same. • The Respondents had relied on an order passed by MERC in case of Sai Wardha Power Generation Limited with regard to weighted average calculation in terms of shareholding as well as generation for FY 2014-15 and 2015-16 which was reviewed by MERC in Case No. 132 of 2018 and Case No. 133 of 2018. • The Hon'ble APTEL noted that order passed by MERC has been challenged vide Appeal No. 340 of 2018 and Appeal No. 341 of 2018 which pending adjudication. **Therefore, the concept of weighted average cannot be applied.** [paragraph no. 16.7]. • As observed by the Hon'ble APTEL, if the shareholding along with consumption is not done annually, but at different periods of the year, it would create unforeseen difficulties for a CGP. It was held that the concept of weighted average would create difficulties. It was observed that existing captive users within a captive structure can choose to give-up its ownership along with consumption of captive power at any point of time if it considers no usage for the same. In such a scenario, if no new captive user(s) is added then the shareholding along with consumption is accordingly adjusted. **It was reiterated that the verification mandated under the Rule 3 has to be done annually, by considering the shareholding existing at the end of the financial year.**

- It is further observed with an illustration that while **computing shareholding on annual basis the shareholding of the captive users who had been consuming captive power but stopped sourcing captive power in the middle of the financial year, shall also be considered**. The relevant extract is reproduced below for ready reference:

> *"16.10*
>
> *In light of our findings, we also observe that suppose there are ten (10) captive users who avail open access for captive use under Section 9 of the Act at the start of the financial year, and in the event three (3) of such captive users stops sourcing captive power after six months, and instead three new captive users are introduced within the captive structure by subscribing equity shareholding with voting rights immediately thereafter, then when the verification of captive status will be done annually on the basis of the shareholding existing at the end of such financial year, in that case the total number of captive users throughout the financial year would be treated as thirteen (7+3+3) and not 10. This is because the shareholding of the three captive users who stopped sourcing captive power, cannot have a zero/nil shareholding, as they sourced captive power for the first six months. While verifying the condition under Rule 3(1)(a)(i) and (ii) of the Rules, the consumption of captive power has to be done by captive users holding a minimum of 26% shareholding. Therefore, in the event shareholding of a captive user is considered as zero/nil after a few months into the financial year, then such user cannot be permitted to take benefit of availing captive power thereby seeking exemption from payment of CSS.*

captive power thereby seeking exemption from payment of CSS. In any event, the applicability of CSS will also depend upon the observations made by us in Appeal No. 38 of 2013 titled as "M/s. Steel Furnace Association of India v. PSERC & Anr."

- It was held that the Statement of Object and Reasons of EA, 2003 along with the intent behind National Electricity Policy, 2005 and the National Tariff Policy, 2016 is always to promote the captive industry without any unnecessary hindrance or obstacles. **The twin requirement under Rule 3 of Rules, 2005 have to be determined at the end of the financial year together, and there cannot be application of the concept of weighted average for verifying shareholding at any given point of time in financial year**.

- Hon'ble APTEL held that **CGP does not lose its character by transfer of the ownership or any part thereof.** A generating plant produces power primarily for the user of its owner(s) and this can be done within the confines of a financial year. Reliance was placed on Kadodara Power Private Limited & Ors. v. Gujarat Electricity Regulatory Commission & Anr. [2009] APTEL 119.

- Therefore, the direction at paragraph no. 7.6.9 of the Impugned Order was set aside where it was held by TNERC that when the weighted average of shareholding of captive users change, the same has to be intimated within ten (10) days of such change to TANGEDCO.

Conclusion:

Weighted average shareholding cannot be applied. No restriction on change in shareholding in captive power plant. Twin requirement of shareholding and consumption to be applied and captive status to be determined at the end of financial year, on annual basis only. No need to intimate change in shareholding to distribution utility.

Case Summary

Case Name	**: *Mahindra Sanyo Special Steel Private Limited v. Maharashtra State Electricity Distribution Company Limited***
Court Name	: Maharashtra Electricity Regulatory Commission ("**MERC**")
Order Dated	: June 17, 2021
Sections cited	: Section 86 of Electricity Act, 2003 ("**EA, 2003**"), Section 142 of EA, 2003, Section 146 of EA, 2003 and Section 149 of EA, 2003, Regulation 4.1 of MERC (Distribution Open Access) Regulations, 2016 ("**MERC DOA Regulations 2016**"), Regulation 20 of MERC DOA Regulations, 2016

Facts of the case

- Eternity Legal represented Mahindra Sanyo Special Steel Private Limited ("**Petitioner**") in Case No. 06 of 2021 ("**Petition**") which was filed for adjustment of units and revision of bills for FY 2016-17, FY 2017-18 and FY 2018-19 according to Order dated August 11, 2017 passed in Case No. 139 of 2016 - *Ultra Tech Cement Limited v. Maharashtra State Electricity Distribution Company Limited* by Hon'ble MERC ("**Order dated August 11, 2017**").
- The Open Access ("**OA**") bills received, first gave adjustment to power from renewable power first and then Captive Power Plant ("**CPP**") conventional power.
- The Petitioner had been consuming conventional power from the Group Captive Power Plant ("**GCPP**") of Sai Wardha Power Generation Limited ("**SWPGL**") from 2012 till about FY 2018-19. Along with consuming conventional power from SWPGL, MSSSPL consumes renewable power from Daksha Infrastructure Private Limited, New Patel Saw Mills, Mandrup, Solapur and Serum Institute of India, Pune to fulfill its Renewable Purchase Obligations. The power consumed by the Petitioner from SWPGL is not bankable, being firm conventional power, whereas Renewable Energy ("**RE**") power is of non-firm and 'must-run' status. Therefore, conventional power should be adjusted first and then RE power.
- In Order dated August 11, 2017, Hon'ble MERC unambiguously directed Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**") to adopt correct billing methodology, that is, conventional power has to be adjusted first and then RE power and further directed MSEDCL to correct bills not only of Ultra Tech Cement Limited, but also of similarly affected consumers within two (2) months, that is, on or before October 10, 2017.

COMMISSION'S ANALYSIS

Issue I: Non-compliance of Order dated August 11, 2017 and issue of limitation period

Non-compliance on part of MSEDCL is evident as neither it corrected and issued revised bills for all OA consumers, provided adequate reasons for delaying in complying nor approached Hon'ble MERC seeking extension in case of any difficulty in implementing directions of Order dated August 11, 2017. In view thereof, Hon'ble MERC was of the view that there is an element of omission / negligence on part of MSEDCL and in the future, MSEDCL shall ensure compliance with orders of Hon'ble MERC within stipulated timeframe, failing which, the Hon'ble MERC would be compelled to take appropriate action against the concerned officers of MSEDCL in accordance with provisions of EA, 2003.

Issue II: Revision of OA bills for the period from April 2016 to March 2018

The parties were directed to reconcile any inconsistency noticed in revised bills for the period of April, 2016 to March, 2018.

Issue III: Adoption of correct practice of set-off OA power, i.e., first conventional OA power and then RE power for the period from April, 2018 to October, 2018

- Hon'ble MERC had vide Order dated October 23, 2018 in Case No. 71 of 2018- *Mahindra CIE Automotive Limited v. MSEDCL*, directed MSEDCL to adopt the correct billing methodology and revise bills of all OA consumers. However, MSEDCL failed to comply with Order dated October 23, 2018 and Mahindra CIE Automotive Limited ("**MCIE**") was compelled to approach Hon'ble MERC in Case No. 93 of 2019.
- It was contented by the Petitioner that the issue of adjustment of conventional Independent Power Plant ("IPP") OA power first and then RE power for period from April, 2018 to October, 2018 is an issue which has not been dealt by Hon'ble MERC and that the Petitioner has approached afresh as per directions in Order dated September 16, 2019 in Case No. 93 of 2019.
- Hon'ble MERC noted that vide Order dated September 16, 2019 had held that since the issue of adjustment of conventional IPP OA power first and then RE power was not decided in Case No. 139 of 2016 and Case No. 71 of 2018, therefore, Hon'ble MERC had directed the Petitioner therein (MCIE) to approach Hon'ble MERC afresh.

- It further noted that MCIE has preferred Appeal No. 424 of 2019 ("**Appeal**") before the Hon'ble Appellate Tribunal for Electricity ("APTEL") against Order dated September 16, 2019. One of the issues raised by MCIE relates to adjustment of conventional IPP OA power first which is identical to the one in present Petition, therefore, the Petitioner shall wait for Hon'ble APTEL's orders in Appeal.
- Petitioner is granted the liberty to approach the Hon'ble MERC depending upon the outcome in Appeal No. 424 of 2019.

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Warm Regards,

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