

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT
ITR No.72345 of 2023
National Transmission & Despatch Company Ltd.
Versus

The Commissioner Inland Revenue & another

J U D G M E N T

Date of Hearing.	18-12-2023
APPLICANT BY:	Mr. Shoaib Rashid, Advocate.
RESPONDENTS BY:	M/s Asma Hamid, Hasan Ali, Noor Ahsan and Sana Azhar, Advocates.

Shahid Karim, J:- This judgment will also decide connected reference application ITR No.45067 of 2023 which relates to tax year 2014. For that tax year, the Commissioner Inland Revenue (Appeals) decided the appeal against the applicant which was affirmed by the Appellate Tribunal Inland Revenue. For the tax year 2015 which is the subject matter of ITR No.72345 of 2023, the CIR (A) taking a contrary view decided the issue engaged in favour of the applicant in the following terms:

“7.9 The arguments of the AR heard, record perused and ground of appeal and impugned order is consulted. In view of the above referred facts/submissions of the case and provisions of law, I find myself in agreement with the submissions made by the learned AR. The learned Additional Commissioner Inland Revenue was not justified in charging the minimum tax on turnover that do not pertains to the appellant and is being offered for tax by the respective Distribution Companies. The minimum tax u/ s 113 of the Ordinance can't be charged twice on the same turnover. The action of ADCIR is held illegal and findings in impugned order remain unimpressive. Hence, I am of the affirmed view that charge made by the ADCIR on this account is not maintainable being arbitrary, hence is deleted.”

2. In the opinion of CIR (A) the Additional Commissioner Inland Revenue (**ADCIR**) was not justified in charging minimum tax on turnover that did not relate to the applicant (National Transmission & Despatch Company) ("**NTDC**") and was being offered for tax by the distribution companies. In other words, the minimum tax under Section 113 of the Income Tax Ordinance, 2001 ("**the Ordinance**") in the opinion of CIR (A) cannot be charged twice on the same turnover. While so holding the order of ADCIR was set aside and the addition was deleted. The Appellate Tribunal by its two separate orders which are under challenge in these reference applications dismissed the appeal filed by NTDC while allowing the appeal of the Department (in the other case) and based its decision on similar premises. The controversy has generated the following questions of law which would be sufficient for decision on the issues raised in these reference applications:

- i) *Whether the learned Tribunal failed to apply the law laid down by the Hon'ble Supreme Court of Pakistan in the judgment reported as 2018 SCMR 894 in the case of PSO Vs. CIT, while the impugned demand of Rs.8,557,843,410/- evidently exceeds the declared income at Rs.278,482,391/- (even the income assessed by the respondent No.2 at Rs.2,175,592,464/-)?*
- ii) *Whether the learned Tribunal was justified to overrule the appellate order passed by the Commissioner Inland Revenue (Appeals) without any rebuttal of the findings in the appellate order and considering the reasons for annulling the impugned demand?*
- iii) *Whether the learned Tribunal proceeded whimsically in presuming imaginary business of sale and purchase of electricity by the applicant on its own behalf without reading the definition of "Transmission Business" under Clause (XXVII) of*

Article 1 of the Transmission License issued by NEPRA for the business regulated under the law?

- iv) *Whether the learned Tribunal's findings based upon the misdescription of procurement and delivery of electricity as purchases and sales thereof are inconsistent with the law laid down by the Hon'ble Supreme Court in the judgment reported as PLD 1985 SC 109 and the Sale of Goods Act, 1930?*
- v) *Whether the impugned demand of Rs.8,557,843,410/- is repugnant to section 113(2)(b) as the applicant did not derive any income at all from procurement and delivery of electricity at cost on behalf of DISCOs?*

3. The parties are on common ground that prior to June 3, 2015 NTDC was engaged in procurement of electricity and in providing transmission service to distribution companies (DISCOs). The procurement was made from Generation Companies (**GENCOs**). After June 3, 2015 another company was carved out viz. Central Power Purchasing Agency (Guarantee) Limited (**CPPA-G**) which was then tasked with the procurement of electricity from GENCOs for its onward sale to DISCOs. It was alleged in the show cause notices that NTDC had not charged minimum tax under Section 113 of the Ordinance on the total turnover of varying amounts given in the show cause notices and it was stated that NTDC was liable for charge of minimum tax on the total turnover at the rate of one percent. Therefore, deemed assessment was sought to be held prejudicial to the interest of the revenue and amendment was proposed under Section 122(5A) of the Ordinance.

4. NTDC mounted two arguments and contends that it acts as the agent for procurement of electricity on behalf of DISCOs and this is being done from GENCOs

under a license granted to NTDC by the National Electric Power Regulatory Authority (**NEPRA**). The license is granted pursuant to section 17 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (**NEPRA Act**). NTDC entirely relies on the terms of the licence to contend that it does not carry out sale of electricity to be caught by the mischief of ‘turnover’ in section 113(3)(a) of the Ordinance which provides that:

“113 (3) (a) “turn over” means gross sales or gross receipts, exclusive of Sales Tax and Federal Excise duty or any trade discounts shown on invoices, or bills, derived from the sale of goods, and also excluding any amount taken as deemed income and is assessed as final discharge of the tax liability for which tax is already paid or payable.”

5. The crucial aspect is regarding applicability of minimum tax under Section 113 of the Ordinance. For the purpose, the aggregate of a person’s turnover as defined in section 113 has to be treated as the income of the person for the year chargeable to tax. The definition of turnover peculiar to section 113 has been set out above. In order to attract minimum tax on the basis of turnover the gross receipts derived from the sale of goods has to be taken into consideration. NTDC contends that it does not derive any gross receipts from sale of goods (electricity in this case) and merely acts as the agent for procurement of electricity on behalf of DISCOs.

6. To resolve the issue engaged in these reference applications, the entire structure of regulation of

electricity has to be kept in view which is the centrepiece of the system of procurement and sale of electricity put in place. Hunch or personal apprehension of an officer of income tax department is not enough. In our opinion, NTDC is a special purpose vehicle incorporated for a specific purpose and regarding which a license has been granted to it by NEPRA. It must be borne in mind that NTDC is in possession of a transmission license and its powers are hedged in by the terms of that license. Primarily, NTDC is engaged in transmission business which according to the license means that:

“(xxvii) “Transmission Business” means ***the business of transmission of electric power*** carried on or to be carried on by the Licensee pursuant to and in accordance with the terms of this License in planning, development, construction and maintenance of the Licensee’s transmission system ***and operation of such system for the transmission and dispatch of electric power*** including the balancing services and inter-connection services.

7. Thus, the transmission business has been defined as the business of transmission of electric power and for the purpose to plan, develop, construct and maintain NTDC’s transmission system and operation of such system for the transmission and dispatch of electric power. That is the whole purpose of NTDC and NTDC is not expected to travel beyond that purpose and to engage in the sale and purchase of electricity. By Article 2, it is provided that:

(1) *This License is granted to the Licensee to engage in the transmission business within the territory as set out in Schedule 1 to this Licence.”*

8. The license is granted to NTDC to engage in the transmission business within the territory as set in the Schedule 1 to the license. Article 2 further provides that licensee /NTDC shall comply with and adhere to the rules, regulations and directions of NEPRA from time to time. The periphery of the powers of NTDC has been laid down in Article 2 which does not mention any activity relating to sale or purchase of electricity and is merely confined to the transmission business within the territory delineated in Schedule 1. Article 5 further provides the exclusivity regarding the activities in the territory specified in Schedule 1 in respect of the licensee. Learned counsel for the applicant laid stress upon Article 7 of the license which provides that:

“Article 7: Procurement of Electric Power

(1) Prior to the competitive market operation dated (CMOD) the “central power purchasing agency (CPPA) of the licensee to be established under Article 8 of this License may purchase or procure electric power to meet the demand of the eight ex-WAPDA distribution companies (XWDISCOS), on behalf of these distribution companies in the following terms:

- a) pending approval of Licensee’s power acquisition programme in terms of sub-article (4), the CPPA shall purchase or procure electric power on behalf of XWDISCOS to meet their demand through contracts with generation licensees duly approved by the Authority of a period not exceeding one year;*
- b) following the approval of Licensee’s power acquisition programme in terms of sub-article (4), the CPPA may purchase or procure all or part of its power supplies from any of generation licensees in accordance with the Licensee’s power acquisition programme.*

Provided that this sub-article shall not apply to existing contracts between the Licensee and generation licensees for the purchase of electric power duly approved by the Authority or contracts, which are backed by sovereign guarantees and all

such contracts shall continue to remain enforceable up to their full term.

(2) The CMOD is initially set as 1 July 2009. However the CMOD may be revised, (a) to an earlier date if the Authority after consultation and agreement of the Federal Government determines that infrastructure and market is developed to support a competitive trading arrangement, (b) to a later date in case the infrastructure or market is not adequately developed to support a competitive arrangement by 1 July 2009. In such case the Authority may in consultation with the Federal Government and stakeholders postpone the date by another year and further yearly extensions, subject to a maximum postponement of 3 years from 1 July 2009 i.e. latest up to 1 July 2012.

(3) After the CMOD, the Licensee shall ensure that neither the Licensee nor any of its affiliate or related undertaking on its own or in concert with others purchase or acquire electric power for the purpose of sale to a third party save for the purpose of balancing services for the provision of a safe and reliable transmission system.

Provided that: (a) all contracts approved by the Authority prior to CMOD for the purchase of electric power, or (b) contracts which are backed by sovereign guarantees, shall continue to remain enforceable up to their full term.

(4) The Licensee shall, no later than 90 days following the date of notification of NEPRA rules pursuant to section 32 of the Act, submit its power acquisition programme to the Authority for approval.”

9. Article 7 mentions a competitive market operation date (**CMOD**) which is June 5, 2015 as stated above. Prior to that the Central Power Purchasing Agency (CPPA) of the licensee was to be established under Article 8 of the License to purchase or procure electric power to meet the demand of eight-ex-WAPDA distribution companies on behalf of those distribution companies and the terms were also given in Article 7. The entire structure under which (CPPA) was to procure electric power on behalf of DISCOs to meet their

demands through contracts with generation licensees was spelt out in Article 7. It also states in clause (2) that competitive market operation date was initially set as July 1, 2009 which was revised to a later date since the infrastructure or market was not adequately developed to support a competitive arrangement by July 1, 2009. Articles 7 and 8 read cumulatively obliged NTDC to establish a central power purchasing agency (CPPA) for the procurement of power on behalf of DISCOs and other related matters primarily relating to re-organization for the maintenance of transmission system and reliable operation, control, switching and dispatch of transmission system and generation facilities and provision of balancing services.

10. NTDC submits that the functions of procurement of electric power on behalf of DISCOs as well as maintenance of transmission system were being undertaken jointly by NTDC and later on as explicated the business of procurement of electric power was carved out of NTDC and CPPA-G was established which now carries on the business of procurement of electric power exclusively.

11. As adumbrated, the initial onus lay on the department to establish that NTDC was actually engaged in the business of selling of electric power and thereby gross receipts were accumulated which were derived from the sale of goods (electric power in this case). In our opinion the department has failed to establish any

such activity to have been undertaken by NTDC. Seeking footing in the terms of the license which have been brought forth above and which leave it in no manner of doubt that the cardinal feature of the business of NTDC is circumscribed by the terms of the license which by Article 2 clearly states that it can only engage in the transmission business. If the allegations made in the show cause notices are taken as true then it must be established as a fact in the first instance that NTDC is in breach of its license granted by NEPRA. It is nobody's case that NEPRA has taken any action against NTDC for falling in breach of the terms of the license and, therefore, it can be presumed that NTDC is only engaged in undertaking the transmission business in accordance with the terms of the license.

12. Through C.M No.3 of 2023, learned counsel for NTDC has filed documents in support of oral arguments made on the first day of hearing. These documents can be looked at by this Court while deciding these reference applications, firstly because they are undisputed and secondly they are public documents and this Court can take notice of these documents in any case.

13. Learned counsel for NTDC referred to decision of NEPRA on a petition filed by NTDC for determination of its transfer / billing charges for the financial year 2012-13. In the order itself NEPRA has determined that NTDC shall charge such tariff and on such terms and conditions as provided in the decision so made. In the

background column as well the decision alludes to the structure and purpose of NTDC which is engaged in the exclusive transmission business for a term of 30 years and under the regime set out in the license, NTDC is entrusted to act as System Operator, Transmission Network Operator, Central Power Purchasing Power Agency and Contract Registrar & Power Exchange Administrator. It further mentions that NTDC operates and maintains a network system consisting of Grid Station and Transmission Lines. The tariff was determined by NEPRA consisting of charge through its users for provision of transmission and allied services and two-part tariff was approved by the order of NEPRA. Collating different parts of the NEPRA decision captures the Applicant's case in its true essence. Clause 31.2.1 of the decision clearly states that:

“31.2.1 NTDC shall charge the DISCOs a transfer charge for procuring power from approved generating companies and its delivery to DISCOs for a billing period.”

14. The above portion of the decision by NEPRA establishes that NTDC shall charge DISCOs a transfer charge for procuring power from approved generating companies and its delivery to DISCOs for a billing period mentioned in the clause. There could not be a more clear expression of the purpose for which NTDC operates and conducts its business. Moreover, clause 31.2.2 provides that:

“31.2.2 NTDC shall, for the purpose of clarity intimate to all DISCOs/KESC the generation part of the Transfer Charge during a billing period by deducting from the Transfer Charge the Transmission Charge or Use of System Charges.”

15. Once again, further explanation can be gleaned from the above part of the decision which requires NTDC to intimate DISCOs the generation part of the transfer charge during a billing period by deducting from the Transfer charge the Use of System Charges. Learned counsel for NTDC has attached with the application by way of illustration an invoice for Energy Payment. NTDC then on its terms generates a power-electricity sales bill which includes Use of System Charges which is the amount that NTDC claims from the DISCOs. The amounts under the head capacity transfer charges, energy transfer charges and total transfer charges are to be transferred to the respective GENCOs in proportion of their shares as calculated under the formula devised for the purpose. These documents have also been relied upon by learned counsel for the Federal Board of Revenue (FBR) to submit to the contrary. However, we harbour no doubt in our minds that NTDC generates Electricity Sales Bills to be paid by different DISCOs and the only amount that it retains is regarding Use of System Charges. This is also established from the audited accounts of NTDC and the financial statement for the year ended June 30, 2014 placed on record. Clause 23 of the audited report relates to sales which includes use of system/ billing charges

and the cost of electricity. Clause 24 elaborates the term ‘cost of electricity’ as well as specifies the distribution company-wise breakup. The cost of electricity due to GENCOs from the DISCOs has been elaborately dealt with in the audited accounts of NTDC as well.

16. Learned counsel for NTDC next referred to the Power Procurement Agency Agreement (“**the Agreement**”) made on third day of June, 2015 between CPPA-G and Lahore Electricity Supply Company (**LESCO**). Similar agreements were executed with other DISCOs, too. This Agreement elaborately laid out the structure of procurement of electric power from GENCOs and for its onward transmission to the DISCOs and from June 3, 2015 onwards this was now being handled by CPPA-G. The recitals to the Agreement shed light on the background of the Agreement as also the circumstances under which the Agreement is to operate as well as the bifurcation of the functions of NTDC which carved out the procurement of electric power from its primary business and devolved it upon CPPA-G. The recitals are being reproduced *in extenso* hereunder:-

1. *The DISCOs is a distribution company, having the Distribution License to provide distribution services.*
2. *Pursuant to unbundling and corporatization of WAPDA’s Power Wing, an Electricity Supply Agreements (ESA) were executed between WAPDA and XWDISCOs, including the DISCOs, whereby WAPDA was to sell electrical energy to the XW DISCOs and the XW DISCOs were to purchase electrical energy from WAPDA on the terms and conditions stated therein.*
3. *Upon incorporation of NTDC the ESA was novated in favour of NTDC by way of execution of Novation of*

ESA. The Transmission License was also granted by NEPRA to NTDC.

- 4. Article 8 of the Transmission License prescribed organizational restructuring plan for NTDC to inter alia establish the CPPA of NTDC. Consequently, NTDC through CPPA of NTDC has been procuring power on behalf of the distribution companies. The DISCOs is desirous to record its ratification of such procurement of power by CPPA of NTDC for and on behalf of DISCO as its agent in terms of Article 7 and 8 of the transmission license.*
- 5. The transmission license and more particularly articles 7 and 8 thereof also envisage transition of power market in phases towards Competitive Trading Bilateral Contract Market (CTBCM). The transmission license also prescribed that NTDC shall also establish the Contract Registrar and Power Exchange Administrator (CRPEA), for recording and notification of contracts and other matters relating to bilateral trading between generation licensees and Bulk Power Consumers/ distribution companies for their future capacity needs.*
- 6. In view of the GOP Policy and so as to pave the way towards the next market development phase, CPPA-G was incorporated. As a consequence the transmission license has been modified in order to carve out the CPPA functions and the CRPEA Functions from NTDC. Pursuant to this a Business Transfer Agreement (BTA) has also been executed between NTDC and CPPA-G vesting the CPPA Functions and CRPEA functions with CPPA-G. Further the commercial code shall also be proposed by CPPA-G and submitted to NEPRA for approval and notification.*
- 7. The DISCOs is desirous to confirm and record its agreement with respect to carving out of the CPPA function and the CRPEA function and vesting the same to CPPA-G on terms and conditions set forth in the BTA. In furtherance of above CPPA-G in the first phase of its operation, on behalf of the distribution companies including the DISCOs is to enter into Administration Agreement for Power Purchase Agreements (the "Administration Agreements). Subsequently in the second phase to be achieved on or before the Completion Date (as defined in the Business Transfer Agreement, CPPA-G on behalf of the distribution companies including the DISCOs is also to enter into (the Post Closing Agreements).*
 - 7.1 Power Purchase Agreement with WAPDA for its hydro electric station.*
 - 7.2 The Power Purchase Agreement with each of the GENCOs for each of the operational thermal power plant; and*
 - 7.3 Assignment by way of Novation of all or any parts of the Power Purchase Agreement of Independent Power Producers under the 2002 Policy or any other power policy of the GOP with NTDC.*
- 8. As a consequence of implementation of actions envisaged in recital 6 to 7 above, CPPA-G is to*

perform the Designated Purposes and procure power for an on behalf of the distribution companies as per the regulatory framework prescribed by NEPRA and / or under the Commercial Code.

9. *The DISCOs is desirous of appointing the CPPA-G as its agent to perform the Designated Purposes, so as to meet its licensed obligation of supply to its customers on terms and conditions set forth herein.*

10. *CPPA-G is desirous to confirm and record its agreement to act as agent of the Distribution companies (including the DISCOs) to perform the Designated purposes, on the terms and conditions set forth in this agreement subject to the stipulations prescribed as per the regulatory framework by NEPRA and/ or under the Commercial Code.*

17. It is clear from the recitals set out above that a reference was made to Article 8 of the Transmission License granted to NTDC which prescribes an organizational restructuring plan for NTDC to establish CPPA of NTDC. NTDC through CPPA of NTDC had been procuring power on behalf of distribution companies and in the recitals too DISCOs recorded ratification of such procurement of power by CPPA of NTDC for and on behalf of DISCOs and as its agent in terms of Articles 7 and 8 of the transmission license. This puts paid to the contention raised by the counsel for FBR that after June 3, 2015 a new restructuring plan was put in place and prior to that NTDC was acting in a different capacity and so the two capacities cannot be intermingled. It is clear that NTDC through CPPA of NTDC had been procuring power on behalf of distribution companies and was acting as their agent which has now been carved out to be converted in CPPA-G by the Agreement. Subsequent to that date, an elaborately structured plan was put in place which will be adverted to in the proceeding paragraphs and from

which it would become evident that CPPA-G was established as the arm of NTDC for the purposes of settlement and billing in respect of procurement of electricity from the GENCOs and onward transmission to the DISCOs.

18. Prior to that the issue which was confronted to NTDC must be stated once again and which can be culled out from the order to amend the assessment in terms of section 122(5A) of the Ordinance:

“Perusal of Audited Accounts reveals that till June 3, 2015 the company was engaged both in purchase/sale of electricity and in providing transmission services to DISCOs. On the said date the company had transferred its functions, operations, assets and liabilities related to CPPA and CRPEA to Central Power Purchasing Agency (Guarantee) Limited (CPPA-G). The company however has not declared revenue earned on and before this Business Transfer Agreement (BTA) which is at Rs.827,021,821,665/- as given at note 23 of the Audited Accounts. Scrutiny of your income tax return for the tax year 2015 reveals that you have charged turnover tax u/s 113 of Rs.222,357,419/- and Alternate Corporate Tax (ACT) U/S 113-C at Rs.1,736,362,714/-. Scrutiny of your income tax return further reveals that you have not charged tax u/s 113 on your total turnover of Rs.849,257,563,606/-. Actually you were liable to charge tax u/s 113 of the Income Tax Ordinance, 2001 on your total turnover @ 1% which comes out to Rs.8,492,575,636/-. This discrepancy leads to infer that your deemed assessment is erroneous in so far as prejudicial to the interest of revenue and requires amendment under section 122(5A) of the Income Tax Ordinance, 2001 by charging minimum tax under section 113 at Rs.8,492,575,636/-.

19. The recitals further allude to the Government of Pakistan Policy to pave the way towards the next market development phase and for which CPPA-G was incorporated. Recital 6 clearly mentions that transmission license has been modified in order to carve out the CPPA functions from NTDC and pursuant to this

a Business Transfer Agreement has also been executed between NTDC and CPPA-G vesting CPPA functions with CPPA-G. A Commercial Code was also required to be proposed by CPPA-G and submitted to NEPRA for approval. Commercial code has been approved by NEPRA to which a reference shall be made shortly. The recitals in categoric terms confirmed and recorded the agreement with respect to carving out of CPPA function and vesting the same to CPPA-G. Recital 9 is crucial for our purposes which states the desire of DISCOs of appointing CPPA-G as their agent to perform the designated purposes (also defined in the power purchase agreement) so as to meet the licensed obligations of supply to its customers. CPPA-G in turn confirmed and recorded its agreement to act as agent of the distribution companies and to perform the designated purposes. Article 3 of the Agreement is the ratification clause whereby once again the DISCOs to the agreement confirmed and recorded the historical facts leading to the execution of PPA and acknowledged that overtime CPPA of NTDC entered into power purchase agreements for and on behalf of the distribution companies and proceeded to ratify and confirm that the acts, deeds and things done for and on behalf of the distribution companies including the DISCOs in question shall be deemed to have been carried for and on account of and for the benefit of the distribution companies. By clause 3.1.4 the individual DISCO

appointed CPPA-G as its agent for the designated purposes and CPPA-G agreed to act in that capacity. This constitutes an unarguable explanation of the role of CPPA-G as well as an affirmation of the historical function carried out by CPPA of NTDC prior to incorporation of CPPA-G.

20. Clause 3.1.6 refers to the scope of authority of CPPA-G and provides that:

“3.1.6. The CPPA-G shall be entitled without prior reference to the disco to enter into: (a) Administration Agreements; 9b) the Novation Agreement or the Power Purchase Agreements with GENCOs and WAPDA Hydel (as per the Administration Agreement); (c) new Power Purchase Agreements for procurement of Contracted Products in the name and on behalf of the DISCO or the distribution companies (as the case may be) with the DISCO or the distribution companies being the principal and primary obligor (s) under such agreements.”

*“3.1.7....
Provided that, title to the purchased electrical energy and generation capacity procured by CPPA-G for and on behalf of the DISCO as well as obligation of the DISCO to make payment of transmission charge or use of system charge shall always vest in DISCO and shall not pass to CPPA-G at any time.”*

21. The above clause entitles CPPA-G to enter into agreements with GENCOs for procurement of contracted products (supply of electricity) in the name and on behalf of particular DISCO. The proviso to clause 3.1.7 set out above emphatically provides that title to the purchased electrical energy and generation capacity procured by CPPA-G for and on behalf of DISCO shall always vest in the DISCO in question and shall not pass on to CPPA-G at any time. This has been affirmed in clause 5.6.1 in the following words:

“5.6.1 The DISCO shall honor any power purchase agreements entered into by the CPPA-G on behalf of the DISCOs pursuant to this agreement. The DISCOs shall be the principal and primary obligor in respect of all payments and obligations of the purchaser towards the seller or supplier under the power purchase agreements and the transmission use of system charge regulated and determined by NEPRA.”

22. It is evident that the DISCOs are obligated to honour the PPA entered into by CPPA-G on behalf of DISCOs and that DISCOs are to remain the principal and primary obligor in respect of all payments and obligations of the purchaser towards the seller (GENCOs).

23. The next phase in the restructuring was the Commercial Code which too has been approved by NEPRA under Section 35 of the NEPRA Act vide SRO 542(I)/2015. The Commercial Code further casts light on the role of CPPA and, in fact, removes the cobwebs surrounding the entire controversy. By clause 5.2.1 the legal capacity of CPPA-G has been brought forth and states that:

“5.2.1 CPPA-G has entered into back to back arrangements with NTDC to ensure that, following the transfer of business from NTDC to CPPA-G the functions and obligations to be performed by NTDC or WAPDA under power purchase contracts signed by NTDC or WAPDA, will continue to be assumed and exercised by NTDC as per its transmission license and the Grid Code, while CPPA-G will assume and exercise the functions assigned to it under the Market Rules, this Code and the agency agreements signed between CPPA-G and DISCOs. CPPA-G has through back to back arrangements with NTDC/ WAPDA,, the power to succeed to all the other rights and obligations of NTDC/ WAPDA under the existing power purchase contracts upon execution of appropriate contractual instruments between the relevant contracting parties to those instruments.”

24. Clause 5.2.1 further clarifies that the functions and obligations performed by NTDC will continue to be assumed and exercised as per its transmission license and the Grid Code while CPPA-G will assume and exercise the functions assigned to it under the market rules, the Commercial Code and the agency agreements signed between CPPA-G and DISCOs. Clause 6 refers to the commercial transactions envisaged by the Commercial Code and includes the Transfer Pricing Mechanism for each billing period and the formula on the basis of which CPPA-G shall calculate the capacity transfer rate and energy transfer rate in accordance with NEPRA approved Transfer Pricing Mechanism for the purposes of invoices against each distribution company against energy and capacity purchased during the previous month. The Commercial Code further alludes to new settlement and billing procedures to be drafted by CPPA-G which have to be approved within three months from the date of registration. Under that procedure an escrow account has to be established by each distribution company and CPPA-G shall confirm the amount to be deposited into the ESCROW account of each Distribution company based on the price of generation, NTDC charges and the CPPA-G Market Operation fee. Clause 8.4 relates to market settlement system and this, in our opinion, is at the heart of the entire transaction and constitutes its core. Primary purpose of CPPA-G (and CPPA of NTDC previously) is

to administer Market Settlement System. The procedure has been delineated in clause 8.4.4 which constitutes the following:

- i) “Calculate the settlement of PPAs and generation charges;*
- ii) Calculate the settlement of NTDC use of system charges (UoS);*
- iii) Calculate the CPPA-G Market Operation fee which shall be shared among the distribution companies on the basis of the energy (measured in KWh) delivered.*
- iv) Calculate the actual deficit or surplus with respect to the Distribution companies Escrow Accounts for payments at the payment Due Date after the full or partial payment by the distribution companies of its final settlement statement.”*

25. The above Market Settlement System envisages calculations of varying natures and includes settlement of power purchase agreement and generation charges, settlement of NTDC Use of System Charges and the market operation fee of CPPA-G. It is by now clear that three accounts of charges are recovered under the Market Settlement System and the only charge for the settlement of NTDC is the use of system charges which was the case previously too. Likewise, CPPA-G recovers its market operation fee and the generation charges are settled with the GENCOs under the CPPA-G. The entire Commercial Code of the restructuring to which reference has been made above constitutes the Market Settlement System at its core. It is primarily for this reason that CPPA-G has been incorporated as without such a system in place the settlement of dues to different entities and persons would be well-nigh impossible. Hence a central body has been incorporated

through which the entire settlement system operates. The rest of the clauses of the Commercial Code relate to the settlement system invoicing etc. Clause 8.8.2 reiterates that CPPA-G shall act as the agent of DISCOs without assuming payment responsibilities and the payment and debts shall remain with the DISCOs. The ineluctable inference is that the primary and sole obligation for payment of supply of electric power to DISCOs is that of DISCOs and no such obligation attaches to CPPA-G. Under the circumstances, how can it be held that CPPA-G is engaged in the sale of electric power while the payment obligation remains that of the DISCOs. The purchase of electric power is made by a DISCO from different GENCOs; only it is done through CPPA-G and by CPPA of NTDC, priorly.

26. A reading of the documents referred above would ineluctably leads to the conclusion that there is no difference in the functions of CPPA-G as it exists now and the functions being performed by CPPA of NTDC prior to June 3, 2015. Further CPPA-G has been incorporated as a special purpose vehicle and is tasked with administering a Market Settlement System for the commercial transactions envisaged by the Agreement. The DISCO shall remain the principal and primary obligor in respect of payments and obligations of the purchaser (a DISCO in a particular case) towards the seller or supplier (GENCOs) under the power purchase agreement. NTDC merely recovers the Use of System

Charges and similarly CPPA-G is entitled to a Market Operation fee while operating the Market Settlement System.

Statutory Framework:

27. The case of the applicants will find further support by studying the statutory framework, that is, provisions of NEPRA Act which sets up NEPRA under Section 3 of the said Act. From the applicants' point of view section 16 assumes significance and relates to the grant of transmission licenses. Section 17 sets up a National Grid Company to engage in the transmission of electric power. It is a special purpose transmission license as evident from section 19 of the NEPRA Act and authorises the licensee construction, ownership, maintenance and operation of specified transmission facilities on the conditions set out in the license. The responsibility of the National Grid Company is to operate and provide safe, reliable transmission and inter-connected services on a non-discriminatory basis. Without prejudice to these responsibilities, by subsection (2) of section 18, the National Grid Company shall:

(a) make available to the general public the tariff specifying the Authority's approved rates, charges and other terms and conditions for transmission and inter-connection services;

(b)...

(c) not cause a division or any associated undertaking to engage in generation and distribution:

28. Section 20 of the Act relates to distribution license which is granted to distribution of electric power

companies and likewise the duties and responsibilities of distribution license have been spelt out in Sub-section (2) of section 21 which provides that:

“(2) The licensee shall— (a) possess the exclusive right to provide, for such period as may be specified in the licence, distribution service and to make sales of electric power to consumers in the territory specified in the licence and to frame schemes in respect of that territory:

Provided that a generation company may make sales of electric power to bulk-power consumers within such territory as the Authority may. subject to section 22, for a period of fifteen years, allow:

(b) be responsible to provide distribution service and make sales of electric power within its territory on a non-discriminatory basis to all the consumers who meet the eligibility criteria laid down by the Authority:

29. Therefore, it is clear that the grant of transmission license is distinct and separate from the issuance of a distribution license and distribution company in whose favour the license has been issued has the exclusive right to provide distribution services and to **make sales of electric power to the consumers.**

30. We now turn to SRO 541(I)/2015 which enacts National Electric Power Regulatory Authority (Market Operator Registration Standards and Procedure) Rules, 2015. These rules define the Central Power Purchasing Agency (Guarantee) Ltd. to mean that:

(d) "Central Power Purchasing Agency (Guarantee) Limited or "CPPA-G" means; an entity established to conduct the market operations, pursuant to re-organization of business of NTDC in furtherance of reform of CPPA, which presently is a division of NTDC.

(g) "market operator" means the entity authorized or registered by the Authority under these rules to carry out and discharge the market operations;

(h) "market operations" means the functions, operations and responsibilities to be performed and

discharged by the market operator, as specified in Schedule—II;

31. CPPA-G is an entity established to conduct the market operations pursuant to re-organization of business of NTDC in furtherance of reform of CPPA which at the relevant time was a division of NTDC. Under the Rules, it has to act as market operator which means an entity authorized by the Authority to carry out and discharge the market operations as specified in Schedule-2 as under:

“1. The operations and responsibilities to be performed and discharged by the market operator, shall include the following in accordance with the grid code and the commercial code:

- (a) To acquire, take over or assume the functions and business of settlement and development of competitive power market from CPPA of NTDC and to carry on these functions and business;*
- (b) Procurement of electric power on behalf of the DISCOs, including import of power from other countries;*
- (c) Generation invoice verification on the basis of meter reading or dispatch scheduling report and terms of the respective Power Purchase Agreements;*
- (d) Billing to the DISCOs based on the meter readings at Common Delivery Points as per the procedure defined in the commercial code;*
- (e) Collection from the DISCOs and settlement to the market . participants as per the commercial code; and*
- (f) Management of cash flow, treasury management and other relevant banking functions for the purposes of collection and disbursement as per the commercial code.*

32. The functions specified in Schedule 2 to the Rules and set out above leave it in no manner of doubt that CPPA-G acquired the function and business of settlement and development of competitive power market from CPPA of NTDC. This proves beyond any shadow of doubt that CPPA-G is merely a successor of CPPA of NTDC and continues to carry on those

functions and business. This would be enough to stunt the argument of the learned counsel for FBR that the situation prior to incorporation of CPPA-G must be dealt with on a separate set of circumstances. Schedule 2 set out above further provides the procurement of electric power on behalf of DISCOs by CPPA-G and to issue a bill to DISCOs based on meter readings at common delivery points as per the procedure defined in the Commercial Code. Further, CPPA-G is tasked with collection from the DISCOs and settlement to the market participants as per the Commercial Code. It is clear that CPPA-G has been assigned the task of settlement in respect of market participants which term has been defined in the Rules and comprises a generation company, NTDC and distribution companies. It operates a common delivery point and manages the cash flow for the purposes of collection and disbursement and in sum carries out the business of settlement as per Commercial Code. Priorly, this function and business was being performed by CPPA of NTDC as one of the divisions of NTDC. The remainder of the Rules refer to the obligations of the market participants towards the market operator, financial organizational affairs, accounting practices and audit and matters relating to resolution of disputes. Learned counsel for FBR besides challenging the very basis of NTDC to act as the agent for DISCOs and GENCOs, took exception to the documents produced before this Court by NTDC and

states that fresh documents could not be allowed to be considered at this stage. This is a fallacy; firstly because these documents are public documents and were required to be produced by this Court in order to understand the historical basis of setting up of NTDC and its purpose. None of these documents are disputed by FBR. Secondly, FBR also produced a paper book which contained most of the documents relied upon by NTDC.

33. Learned counsel next contended that regardless of whether purchase of electric power is on behalf of the DISCOs, it constitutes sale/ purchase in its essence. This contention has no basis as the entire statutory and structural framework brought forth above clearly shows that although the invoice is issued by NTDC, this does not constitute sale and the purpose of NTDC was merely to act as an agent for settlement and this purpose cannot be lost sight of at the whims of FBR. The power/ electrical sales bill issued by NTDC for collection from DISCOs has also been relied upon by learned counsel for FBR and it clearly contains separate heads under which the invoice is being raised and includes the component to be paid by the DISCOs in respect of sale of electricity.

34. Learned counsel for FBR laid great stress on clause 5 of Second Schedule to the Ordinance which was amended on 21.2.2008 by SRO 171(I)/2008 and provides that:

“Where the corporatized entities of Pakistan Water and Power Development Authority (DISCOs) and National Transmission and Despatch Company (NTDC), are required to pay minimum tax under Section 113, the purchase price of electricity shall be excluded from the turnover liable to minimum tax up to the year 2013”.

35. The above clause introduced reduction in tax liability of DISCOs and NTDC which was omitted by Finance Act, 2014. By the omission learned counsel invites this Court to hold that after July, 2014 the purchase price of electricity shall be included in the turnover of NTDC. This argument ignores the words “where the corporatized entities of Pakistan Water and Power Development Authority (DISCOs) and National Transmission and Despatch Company (NTDC), are required to pay minimum tax under Section 113”. These words clearly mean that the clause will apply where NTDC is required to pay minimum tax under Section 113 and not otherwise. Be that as it may, the exclusion of the clause through Finance Act, 2014 will have no impact on the controversy involved and which it turn on the true construction of the word “turnover” in section 113 of the Ordinance as applicable to NTDC. This construction has already been made in the forthcoming paragraphs by this Court and we are constrained to hold that notwithstanding an exemption or reduction in tax liability, NTDC does not carry out sale of goods, that is, electric power in the present case to be included in the term ‘turnover’ as defined in section 113 of the Ordinance. It is admitted by learned counsel for FBR

that at present DISCOs are paying minimum tax on turnover including purchase price of electricity. Thus, the electricity which is purchased from GENCOs by DISCOs is made liable to minimum tax on the turnover of DISCOs and FBR cannot be heard to demand that tax from NTDC as well. Obviously, it is not the case of FBR that firstly the purchase of electricity is done by NTDC and thereafter NTDC sells electric power to DISCOs at inflated price. No evidence has been produced to that effect and in any case NTDC would be falling in breach of its transmission license if it were to engage in such a business.

36. As a result, we answer the questions of law raised in these Reference Applications in favour of the applicant/ NTDC. The Reference Applications are allowed. The impugned orders are set aside.

A copy of this order shall be sent to the Tribunal under the Seal of the Court.

(ASIM HAFEEZ)
JUDGE

(SHAHID KARIM)
JUDGE

Approved for reporting.

JUDGE

JUDGE

Announced in open Court on 28.12.2023

(MUHAMMAD RAZA QURESHI)
JUDGE

(SHAHID KARIM)
JUDGE

★

Rafiqat Ali