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APPEAL PETITION No. P/020/2018
(Present: A.S. Dasappan)
Dated: 25th May 2018

Appellant	:	Sri. Sifi Thomas Proprietor, M/s. Revron Industrial Gases, Kanjikode, Palakkad
Respondent	:	The Assistant Executive Engineer, Electrical Sub Division, KSE Board Ltd., Kanjikode, Palakkad

ORDER

Background of the case:

The appellant is a consumer under Electrical Section, Kanjikode and the said connection No.18403 was provided w.e.f. 09-01-2014. The purpose for which is the connection is being used for Carbon dioxide bottling. From the very beginning of the firm, the KSEB started billing the consumer under LT VI F tariff. After 3 years, the tariff was converted into LT VII A. The appellant's request to change the tariff, to LT 4A was not considered by KSEB, in spite of complaint submitted by him. Being aggrieved by this action of KSEBL, the appellant filed a complaint before the CGRF, Kozhikode vide OP No. 128/2017-18, and the same was disposed of by disallowing the petition, on 30-01-2018. Aggrieved by the said order of CGRF, the appellant has filed the appeal Petition, before this Authority.

Arguments of the appellant:

The appellant is the proprietor of M/s REVRON INDUSTRIAL GASES, a small scale industry which is run with consumer number 18403 under the Kanjikode Electrical Circle. This concern is registered with the District Industries Centre, Palakkad as a 'Carbon dioxide manufacturing enterprise'.

While inception of the firm even though they have applied for LT IV (A) tariff, the appellant was given connection on LT VI (F) tariff and since no other alternative, the appellant has to run the enterprise at a higher tariff. After a long period of 3 years, it was converted into LT VII (A) which is again a commercial tariff with effect from 01-09-2017.

Section 2(XXXII) of the Gas Cylinders Rules 2004, which sets out the law applicable to the industry defines 'manufacture' of gas as 'filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder', which is precisely the same activity carried on by the appellant in their enterprise.

Besides, the Hon'ble Supreme Court of India in Civil Appeals Nos. 9295 of 2017 to 9308 of 2017 has ruled that bottling/refilling of L.P.G.in cylinders is 'production'. Although the cases referred to above pertains to bottling/ refilling of L.P.G., as the process involved in this enterprise/ industry is the same, the dictum laid down by the Hon'ble Supreme Court would be applicable to appellant's case also.

The appellant is currently being charged by K.S.E.B. under the tariff LT VII (A) which provides for high charges for the energy consumed. Whereas as per the judgment and dictum laid down by the Hon'ble Supreme Court of India appellant's enterprise should be considered as one engaged in production and hence tariff under LT IV (A) should be applied which carries lower charges for the energy use and for which appellant is entitled to.

The order of Consumer Grievance Redressal Forum (KSEB), Northern Region, Kozhikode dated 30th January, 2018 (OP no. 128/2017-18) that the bottling of Carbon Di-oxide gas which is not manufactured in the premises will not be eligible for attracting a lower tariff LT IV (A) and that change from LT VII (A) to LT IV (A) cannot be allowed, is illegal and baseless. The premise that Tariff Regulatory Committee of KSEB will have primacy over the judgment of Supreme Court of India is bad in law and against all principles of law and justice in the country. The Supreme Court categorically decided that manufacture and production are words interchangeable and used in place of other and has gone to lengths explaining the process involved in bottling of gas which is decided as manufacture/production. In the light of the above judgment and in the circumstances that it has not been appealed against or overruled, the Supreme Court diktat shall form law of the land which is applicable to KSEB as well.

The appellant has prayed to allow the appeal and convert the tariff from LT VII A to LT IV A.

Arguments of the respondent:

The respondent has refuted all the contentions raised by the appellant. It is true that the purpose for which connection being used is for LPG bottling purpose. The Gas Cylinders Rules 2004 quoted by the Appellant and also the Gas Cylinders Rules 2016 defines "manufacture of gas". Section 2(xxxix) of Rules 2016 [previously Section 2(xxxii) in Rules 2004] defines manufacture of gas and has no relevance to the tariff to be applied. The relevant portion is reproduced below:

(xxxix) "Manufacture of gas" means filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder"

This is the definition of manufacture of gas and does not imply that filling of a gas cylinder with a compressed gas is a manufacturing process. Moreover, the definition clause does not set out any rules as pointed out by the appellant in the Petition. The appellant is trying to mislead the Hon'ble Authority by quoting a mere definition.

Order dated 03-08-2017 of the Hon'ble Supreme Court of India in Civil Appeal No. 9295/2017 and connected cases is related to a petition filed for claiming the benefits under Sections 80 HH, 80 I and 80 IA of Income Tax Act, 1961. These sections deal with deduction in respect of profit and gains from industrial establishments engaged in backward areas, after a certain date and in infrastructure development respectively. This order has no relevance to the tariff to be applied. The authority for determination of tariff of Electricity is not the Income Tax Authority. The only question of law considered by the Apex Court herein is "Whether bottling of LPG, as undertaken by the assessee, is a process which amounts to 'production' or 'manufacture' for the purposes of Sections 80HH, 80-1 and 80-IA of the Act". This is amply evident from the relevant extracts reproduced here.

Para 14 - "We have given adequate consideration to the respective submissions of both the parties, which they deserve. As is clear from the facts and arguments noted above, the question of law which is involved (already mentioned) is: Whether bottling of LPG, as undertaken by the assessee, is a process which amounts to 'production' or 'manufacture' for the purposes of Sections 80HH, 80-1 and 80-IA of the Act.

Para 15 – "At the outset it needs to be emphasized that the aforesaid provisions of the Act use both the expressions namely "manufacture" as well as "production". It also becomes clear after reading these provisions that an assessee whose process amounts to either 'manufacture' or 'production ' (i.e. one of these two and not both) would become entitled to the benefits enshrined therein. It is held by this Court in Arihant Tiles and Marbles P. Ltd. case that the

word 'production' is wider than the word 'manufacture'. The two expressions, thus, have different connotation. Significantly, Arihant Tiles judgment decides that cutting of marble blocks into marble slabs does not amount to manufacture. At the same time, it clarifies that it would be relevant for the purpose of the Central Excise Act. When it comes to interpreting Section 80-IA of the Act (which was involved in the said case), the Court was categorical in pointing out that the aforesaid interpretation of 'manufacture' in the context of Central Excise Act would not apply while interpreting Section 80-IA of the Act as this provision not only covers those assessees which are involved in the process of manufacture but also those who are undertaking 'production' of the goods. "

3. Para 20- " in the cases of Servo-Med Industries Private Limited and Tara Agencies, which were cited by the learned counsel for the Revenue, may not apply to the present case. They dealt with the provision of the Central Excise Act and, therefore, test of 'manufacture 'propounded on that case would not be applicable when dealing with the cases under the provisions of Sections 80HH, 80-1 and 80-IA of the Act which use both the expressions 'manufacture ' and 'production'."

It is indisputable that Section 62 of the Electricity Act. 2003 stipulates that the State Regulatory Commission is the authority to determine the Tariff in accordance with the provisions of that Act. When the commission in its wisdom has accorded LT IV (A) tariff only for manufacture and not for production, the respondents cannot go beyond it. The Hon'ble Supreme Court, in the civil appeals 9295 of 2017 to 9308 of 2017 has drawn a clear distinction between "manufacture" and "Production". The nature of operation of the appellant is defined as "production" but not as "manufacture (industry)" by the Apex Court. The tariff LT IV A is applicable to "Industry" only and not for other activities covered under the term "Production". Therefore, the claim of the appellant for LT IV-A tariff is not admissible and the applicable tariff is LT VII A, as explained under.

As per the provisions contained in the Electricity Act, Kerala State Electricity Regulatory Commission issues Tariff order categorizing each class of consumers under a particular tariff. Accordingly as per the latest tariff order the Appellant and like consumers are included in LT VII A Commercial tariff. The extracts of the Tariff Order connected to LT VII A Tariff is reproduced.
Low Tension VII Commercial (A) {LT VIIA} – Tariff for commercial consumers such as shops, other commercial establishments for trading, showrooms, display outlets, business houses, hotels and restaurants(having connected load exceeding 1000 W), private lodges, private hostels, private guest houses, private rest houses, private travelers bungalows, freezing plants, cold storages, milk chilling 'plants, bakeries (without manufacturing process), petrol/diesel/ LPG /CNG bunks, automobile service stations, computerized wheel alignment centres, marble and granite cutting units, LPG bottling plants, house boats, units carrying

out filtering and packing and other associated activities using extracted oil brought from outside, share broking firms, stock broking firms, marketing firms.

In a Petition filed by the KSEB in TP 59/2008, the Kerala State Electricity Regulatory Commission ordered on 18.3.2009 that the bottling plant transferring gas received from the Company into marketable size is only a commercial activity and hence shall be classified as LT VII (A) Commercial as is done by the Board at present in the case of LPG bottling units.

On a similar petition in the dispute of tariff applicable to LPG bottling plants filed by Hindustan Petroleum Corporation Ltd, the Regulatory Commission on 17-2-2014, dismissing the Petition, ordered that the appropriate Tariff for LPG bottling plants is LT VII A Commercial Tariff. The Commission took this view on the direction of the Hon'ble High Court of Kerala in WPC 6530/2009 and WPC 1866/2009 and as per order of the Hon'ble Appellate Tribunal.

In order dated 08-09-2016 in Appeal No. 265/2014, the Hon'ble Appellate Tribunal for Electricity clarified that the Commission is the authority to determine the tariff and hence it is up to the State Commission to decide whether there is a need for reclassification of Bottling plants in to separate category other than Commercial in compliance to the provisions contained in Section 62 (3) of the Electricity Act.

In a similar case disposed off by the Hon'ble High Court of Madhya Pradesh (WPC 4564/1999), the Hon'ble Court on 7.3.2017 ordered that the activities carried out by the Petitioner, i.e. LPG bottling and filling of Petromax is not a manufacturing or industrial activity but is purely a commercial activity. The Respondents (State Electricity Board) are justified in charging the tariff at commercial rate.

The appellant has himself pointed out in the Appeal that "although the cases referred to in the Appeal pertains to bottling / refilling of LPG, as the process involved in the Appellant's industry is the same".

The appellant herein has already submitted a request to change his tariff to LT IV A on 25-08-2017. In response to this request, this Respondent conducted a site visit at their premises on 07-09-2017 and found that the activity being carried out in the premises was procurement of gas in bulk from outside, storing the gas in an outdoor tank, taking the gas through pipelines from the outdoor tank into the factory and filling it in cylinders. The process is not different from the activity carried out in LPG bottling plants.

The Appeal filed is false and frivolous, and not based on facts or settled law.

Analysis and Findings: -

The hearing of the case was conducted on 30-04-2018, in the office of the State Electricity Ombudsman, Edappally, Kochi and the appellant was represented by Sri Sifi Thomas and Sri P.V. Sreeram, Assistant Executive Engineer, KSEBL, Electrical Sub Division, Kanjikode appeared for the respondent and they have argued the case, mainly on the lines stated above.

On examining the Petition and argument notes filed by the Appellant, the statement of facts of the Respondent, perusing all the documents and considering the facts and circumstances of the case, this Authority comes to the following findings and conclusions leading to the decisions thereof.

The Appellant is engaged in the procurement of gas in bulk from outside, storing the gas in an outdoor tank, taking the gas through the pipelines from the outdoor tank into the factory and filling it in cylinders. As per the Agreement entered into with Respondent for purchase of electricity, the Appellant was categorized as LT VI F and corresponding tariff was charged from the Appellant. And later it was converted to LT VII A commercial. The Appellant has been raising objections on the tariff categorization with the Respondent and also in the proceedings before the CGRF, Kozhikode. However, the respondent and the Forum had held that the appellant is eligible to be categorized under the Commercial category only.

On the specific issues raised in the present Appeal, the appellant has made the following submissions for consideration:

i) The respondent and the CGRF have not considered the submissions of the Appellant on the rationale of the categorization in the Industrial Category.
ii) The appellant has contended that Under Section 2(XXXII) of the Gas Cylinders Rules 2004, which sets out the law applicable to the industry defines 'manufacture' of gas as 'filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder', which is precisely the same activity carried on by the appellant in their enterprise.
iii) Besides the Hon'ble Supreme Court of India in Civil Appeals Nos. 9295 of 2017 to 9308 of 2017 has ruled that bottling/refilling of L.P.G.in cylinders is 'production'. Although the cases referred to above pertains to bottling/ refilling of L.P.G., as the process involved in this enterprise/ industry is the same, the dictum laid down by the Hon'ble Supreme Court would be applicable to appellant’s case also.

The Respondent has made following submissions on the issues raised in the Appeal for consideration.

i) The activity performed is the process of refilling of LPG Cylinders and it does not involve any manufacturing process or production of any new item from raw materials or any transformation of input raw materials into a new product.

ii) It is a well known fact that no physical or chemical change of any commodity is taking place at any stage of the refilling process in the premises.

iii) Manufacture is the process of conversion of raw materials into different finished products as in the case of sugarcane to sugar, cotton to textiles, oil seeds to oil and so on.

iv) The Kerala State Regulatory Commission has in its Order dated 18.03.2009 while disposing of T.P. No. 59 of 2008 on the very issue recorded its findings as the bottling plant transferring gas received from the company into marketable size is only a commercial activity and hence shall be classified as LT VIIA Commercial.

v) The order dated 03-08-2017 of the Hon'ble Supreme Court of India in Civil Appeal No. 9295/2017 and connected cases has no relevance to the tariff to be applied since the only question of law considered by the Apex Court herein is "Whether bottling of LPG, as undertaken by the assessee, is a process which amounts to 'production' or 'manufacture' for the purposes of Sections 80HH, 80-1 and 80-IA of the Act".

vi) The tariff LT IV A is applicable to "Industry" only and not for other activities covered under the term "Production". As the Commission has accorded LT IV A tariff only for manufacture and not for production, the respondents cannot go beyond it.

vii) In order dated 08-09-2016 in Appeal No. 265/2014, the Hon'ble Appellate Tribunal for Electricity has upheld the order dated 14-08-2014 passed by the Kerala State Regulatory Commission and also held that it is up to the State Commission to decide whether there is a need for reclassification of Bottling plants in to separate category other than Commercial in compliance to the provisions contained in Section 62 (3) of the Electricity Act.

The main dispute in this case relates to the tariff assigned to the appellant's firm. The tariff of a consumer is fixed based on the nature of activity or the purpose for which the electrical energy was used by him. The KSEB is supposed to assign the tariff of a consumer based on the directions, guide lines and notifications issued from time to time, by the Hon KSERC, which is the empowered body to classify the appropriate tariff of a particular class of consumers. It is very clear that the 'tariff fixation' is not at all depend on the appellant's concern registered with District Industries Centre, but as per Hon: KSERC notifications only. The certificate issued by the DIC that the concern is

a small scale industry only indicates the purpose for LPG bottling and not the manufacturing of gas/LPG or the cylinders.

On going through the contention of both parties it can be seen that the power is used neither for manufacturing nor for any production in the appellant's premises. Here in this case, the gas brought from outside in tanker which is pumped into the tank in the appellant's premises with the help of motors and filling the same in cylinders alone. As per Schedule of Tariff and Terms & Conditions for Retail Supply of Electricity by the KSEB Limited and all other licensees with effect from 16-08-2014 issued by the Commission vide order dated 14-08-2014 in OP No. 9/2014, LPG bottling plants are classified under Low Tension VIIA commercial.

Hence the appellant's unit is not eligible for industrial tariff LT IV A. The purpose or the activity for which the electrical energy is being used is considered primarily for determining the tariff. As per Section 61 of the Electricity Act, 2003, *the Appropriate Commission shall subject to the provisions of the Act specify the terms and conditions for the determination of tariff by safeguarding of consumers' interest and at the same time recovery of the cost of electricity in a reasonable manner.* In order to cater the genuine need of different types of consumers and also to rectify the anomalies in the prevailing tariff, the Hon'ble Commission introduced new tariff depending upon the purpose for which supply is used.

The appellant places reliance on the definition of the expression "manufacture of gas" as contained in Section 2(xxxix) of Rules 2016 [previously Section 2(xxxii) in Rules 2004] of the Gas Cylinder Rules 2016. In this context, relevant discussion contained in a case disposed off by the Hon'ble High Court of Madhya Pradesh (WPC 4564/1999), needs to be reproduced which is as under:

"The Electricity Act 2003 does not define the terms "manufacture", "industry" and "commercial" as relevant for any consumer category. However Section 62(3) of the Electricity Act 2003 states as follows:

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required".

Hence while deciding the categorization of consumers, the basic principles as defined in Section 62 (3) of the Electricity Act, 2003 needs to be taken into consideration by the State Commissions."

The Hon'ble Supreme Court in its judgment dated 7th May 2015 in Civil Appeal No.583 of 2005 in Servo-Med Industries Private Ltd v/s Commissioner of Central Excise, Mumbai, has identified the following four categories to ascertain if any process of manufacturing is involved.

"1) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved, processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category.

2) Where the goods remain essentially the same after the particular process, again there can be no manufacture. This is for the reason that the original articles continue as such despite the said process and the changes brought about by the said process.

3) Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable. Examples within this group are cases where the transformation of goods having a shelf life which is of extremely small duration. In these cases also no manufacture of goods takes place.

4) Where the goods are transformed into goods which are different and/or new after, a particular process, such goods being marketable as such. It is in this category that manufacture of goods can be said to take place".

The appellant's activity did not come under any process of manufacturing as specified in the above four categories.

If the consumer has a complaint that his tariff is wrongly fixed, it is the respondent's duty to visit the site, verify the same and set it right if the complaint is genuine. In this case the respondent had inspected the premises of the appellant, verified the activity going on and determined the purpose for which the electrical energy is being used and then proceeded to fix the eligible tariff accordingly. There is nothing to disbelieve the contentions of the respondent in this regard that the appellant's firm is a bottling unit and this Authority is inclined to accept the argument that the electric supply is used for filling the gas in cylinders. The Kerala State Regulatory Commission has also clarified that the bottling plant transferring gas received from the company into marketable size is only a commercial activity and hence shall be classified as LT VIIA Commercial. Hence the respondent is justified in charging the tariff under commercial rate and this Authority also endorse the decision of the CGRF.

Decision

In view of the factual position I don't find any reason to interfere with the findings and decision taken by the CGRF, Kozhikode in this case and hence the order of CGRF is upheld. The appeal is found devoid of any merits and hence dismissed. Having concluded and decided as above, it is ordered accordingly. No order on costs.

ELECTRICITY OMBUDSMAN

P/020/2018/ /

Delivered to:

1. Sri Sifi Thomas, Proprietor, M/s. Revron Industrial Gases, Kanjikode, Palakkad
2. The Assistant Executive Engineer, Electrical Sub Division, KSE Board Ltd., Kanjikode, Palakkad

Copy to:

1. The Secretary, Kerala State Electricity Regulatory Commission, KPFC Bhavanam, Vellayambalam, Thiruvananthapuram-10.
2. The Secretary, KSE Board Limited, Vydhyuthibhavanam, Pattom, Thiruvananthapuram-4.
3. The Chairperson, Consumer Grievance Redressal Forum, Vydhyuthibhavanam, KSE Board Ltd, Gandhi Road, Kozhikode