

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 131 of 2013**

**Dated: 7<sup>th</sup> August, 2014**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**In the matter of:**

**1. Vianney Enterprises ...Appellant(s)  
Through its Proprietor  
Deepu James, Son of  
James Mathew,  
Resident of S/403, Chandra Nagar  
P.O., Palakkad – 678 007**

**Versus**

**1. Kerala State Electricity Regulatory ...Respondent(s)  
Commission  
K.P.F.C. Bhavanam  
C.V. Raman Pillai Road,  
Vellayambalam  
Thiruvananthapuram – 695 010**

**2. Kerala State Electricity Board  
Vaidyuthi Bhavanam  
Kerala**

**Counsel for Appellant(s) : Mr. Ramji Srinivasan, Sr. Adv,  
Mr. Sumeet Lall  
Mr. Shwetabh Sinha  
Mr. Ujjal Banerjee**

**Counsel for the Respondent(s): Mr. Ramesh Babu  
Mr. M.T. George  
Ms. Kavita K.T.  
Mr. G. Sreenivasan**

### **JUDGMENT**

#### **RAKESH NATH, TECHNICAL MEMBER**

The present Appeal has been filed by Vianney Enterprises challenging the order dated 28.1.2013 passed by Kerala State Electricity Regulatory Commission (“State Commission”) approving the recovery of arrears from the Appellant demanded by Kerala State Electricity Board due to reclassification of the consumer category considering the nature of activity in the Appellant’s unit with effect from 10.3.2008.

2. The Appellant is a proprietary concern engaged in the business of filling and packing of coconut oil. The State Commission is the Respondent no.1. Kerala State Electricity Board, hereinafter referred to as “Electricity Board”, is the Respondent no.2.
  
3. The facts of the case are as under:
  - a) The Appellant started its operations in 2002 and obtained power connection under Industrial Category. The initial connected load of the Appellant was 15.65 kW in 2002 which was enhanced to 63.65 kW in 2003 and then to 78.75 kW in 2007. In all the applications for release of electricity connection and enhancement of load, the Appellant had specifically indicated that the operation in the Appellant’s unit was limited to filling and packing of coconut oil. All these years the Appellant was being billed as per LT IV tariff.

- b) On 01.12.2007, tariff revision was affected by the State Commission by its order. Even after this tariff order, the Appellant was continued to be billed at LT IV - Industrial tariff.
  
- c) The State Commission in another case relating to M/s. KPM Oil Mills Pvt. Ltd., which was carrying out grading, filtering and packing of coconut oil, passed an order dated 09.01.2008 holding that the KPM Oil mills was not eligible for tariff under LT IV – Industry tariff as the extraction of oil was not being carried out and should be billed under LT VII (A) – Commercial tariff.
  
- d) Pursuant to the inspection conducted by the Anti Theft Squad of the Electricity Board on the Appellant’s unit on 10.03.2008, the Respondent Electricity Board issued a demand notice stating that no oil production was being carried out in the Appellant’s unit and only

- filling/repackaging of oil is carried out hence the Electricity Board issued a demand notice for Rs. 57,77,077 reclassifying the Appellant's unit under LT VII (A) - Commercial tariff, from the date of providing electric connection i.e. from September 2002. The Electricity Board also issued bill for the month of February 2008 under LT VII (A) - Commercial tariff.
- e) The Appellant filed a writ petition being no. 9962 of 2008 before the High Court of Kerala challenging the demand notice and reclassification of Appellant's unit under Commercial category. The High Court in the interim order directed that the Appellant would be offered an opportunity of being heard when the State Commission is called upon by the Electricity Board to decide the issue.

- f) Thereafter, the Electricity Board, the Respondent no.2, moved before the State Commission *inter alia* seeking recategorization of units carrying out extraction of oil along with filtering, packing and other associated activities in the same premises under LT IV – Industrial category for its entire consumption.
- g) The State Commission allowed the prayer of the Electricity Board vide order dated 02.12.2009 permitting billing of the units carrying out extraction of oil along with filtering, refining, bottling, packing etc. under LT IV – Industry. In view of order dated 02.12.2009, the Electricity Board issued a circular dated 13.1.2010 notifying decision of the State Commission clearly indicating applicability of LT – VII (A) tariff for units carrying out filtering, packing etc. using extracted oil brought from outside and LT IV tariff for units carrying out extraction in addition to filtering and packing

- activities in the same premises under same service connection.
- h) Subsequently, the Writ Petition was also disposed of by the High Court vide judgment dated 16.02.2011 holding that the Electricity Board has to first get the approval from the State Commission for recovering the arrears from the Appellant.
  - i) In view of the above judgment of the High Court, the Electricity Board filed the petition being OP No. 13 of 2012 before the State Commission praying that the Appellant be permitted to be billed under LT VII (A) - Commercial category with effect from the date of providing electric connection.
  - j) In the meantime in a separate proceeding in OP no. 23 of 2012 the State Commission approved tariff order for

FY 2012-13 accepting the recategorization proposal of the Electricity Board putting the units carrying out filtering and packing and other associated activities under LT VII (A) – Commercial category with effect from 01.07.2012 to 31.07.2013.

- k) The State Commission vide the impugned order dated 28.01.2013, relying upon the orders passed in cases of M/s. KPL Oil and M/s Mithun Agro Oil earlier, held that the activity of exclusive storing and packing of oil is commercial in nature and not manufacturing activity and further as a consequence of it, approved recovery of arrears from the Appellant considering the nature of activity in Appellant's unit from the date of detection of error i.e. 10.03.2008.
  
- l) Aggrieved by the impugned order dated 28.01.2013, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:
  - a) The edible oils such as coconut oil, palm oil, soyabean oil, sunflower oil, etc., are processed by crushing the seed. In the Appellant's case, the seeds/copra is procured from Indonesia, Philippines, Sri Lanka, Goa, Tamil Nadu and Kerala, etc. If the seeds are collected from each of these locations and transported to the Appellant's unit for crushing and packing, the cost of production will be higher and will result in unnecessary wastage of time, manpower and fuel. However, transportation of oil instead of copra from a distant location like Indonesia and Philippines can save a huge cost of transportation resulting in lower cost of production. Hence, in edible oil industry, packing and filling has to be carried out at a separate location as it is cost effective. Further, transportation of bulk oil is more cost effective than transportation of finished product

- due to weight of carton, bottles, etc. Therefore, for a big country like India, it would be ideal to have many packaging locations.
- b) The impugned order is passed on the basis of order dated 09.01.2008 in the case of KPL Oil Mills which was itself bad in law as the State Commission had itself observed in the order that during the currency of dispute, LT IV - Industrial tariff was applicable to oil mills. Further oil mills were specifically included under LT IV Industrial category under tariff orders of 2001, 2002 and 2007 and, therefore, there was no basis for tariff revision/reclassification.
- c) The activities carried out by the Appellant are manufacturing activities for the purpose of the Central Excise Act and other industrial enactments such as Factories Act, EPF Act and likes.

- d) The retrospective recovery of arrears with effect from 10.03.2008 is contrary to the provisions of the Regulation 4(2) of Tariff Regulations, 2003. In any case prior to 13.01.2010 when the Appellant was classified under LT VII (A) tariff by the Electricity Board based on the order dated 02.12.2009 of the State Commission, the arrears could not have been collected as per law.
- e) The Appellant availed service connection on 10.09.2002 specifically stating the purpose for availing electric connection. Further, the enhancement of load on two occasions was also sanctioned by the Electricity Board after satisfying themselves about the process involved at the Appellant's unit. The tariff revisions of 2002 and 2007 also permitted categorization of the Appellant's Industrial unit under LT IV category.

f) The demand notice and tariff revision/reclassification is wholly illegal and arbitrary and violative of the rights of the Appellant under Article 14 of the Constitution of India as there are other competitors of Appellant outside Kerala who are still categorized under Industrial category as per the orders of the respective Regulatory Commissions even when their activity is *pari materia* to the Appellants.

5. The Respondent no.2, Electricity Board, in its counter affidavit has made the following submissions:

a) The oil filling and packing units are not reclassified by the order dated 02.12.2009 of the State Commission. The order dated 02.12.2009 was applicable only for units carrying out activities like filtering, refining, bottling, packing, etc., along with extraction of oil. Since the Appellant was engaged in oil filling and packing

- alone, the said order does not have any application to the Appellant as in their case the same classification under LT VII (A) has been continued.
- b) The activities carried out by the Appellant are same as that of M/s. KPL Oil Mills and M/s. Mithun Agro Oil and, therefore, the State Commission has correctly relied on the earlier orders dated 09.01.2008 and 08.10.2009.
- c) The demand of arrears was made only after the Electricity Board realized its mistake of billing the Appellant's unit under a wrong category. Thus, the demand is not a fresh bill but correction of the previous bills.
- d) Regulation 24(5) of the Supply Code, 2005 establishes the right of the Respondent no. 2 to recover the undercharged portion of chargeable tariff. However, the

- State Commission has allowed recovery of arrears only from the date of detection of the error.
- e) Section 62 of the Electricity Act, 2003 empowers the State Commission to fix tariff based on *interalia*, “purpose of usage of electricity.” Thus, differentiation of tariff for the Appellant category from oil mills that produce oil is perfectly legal.
  - f) The issuance of licences by the State Government to use the premises as a factory and for manufacturing unit subject to Factories Act is not a parameter for tariff categorization.
  - g) The tariff orders of the other State Commissions are of no relevance as each State Commission is free to decide the tariff categories and tariff applicable to its respective State.

6. We find that the Appellant has also raised issue regarding legality of revision and reclassification of their tariff by tariff order dated 25.07.2012 for the period 01.07.2012 and 31.03.2013. However, the Appellant has filed the present Appeal challenging the impugned order dated 28.01.2013 only and, therefore, we would not be considering the issues relating to tariff order dated 25.7.2012 which are outside the scope of the present Appeal.
  
7. On the above issues we have heard Shri Ramji Srinivasan, Sr. Advocate representing the Appellant, Shri Ramesh Babu, Learned Counsel for the State Commission and Shri M.T. George, Learned Counsel for the Electricity Board, Respondent no.2.

8. On the basis of the contentions of the rival parties the following issues would arise for our consideration:

**i) Whether the State Commission is correct in holding that the Appellant's unit engaged in business of filling and packing of coconut oil would fall under LT VII (A) – Commercial category as per the 2007 tariff order?**

**ii) Whether the State Commission has erred in allowing recovery of arrears on account of recategorization of the Appellant from LT IV – Industrial to LT VII (A) – Commercial tariff category with effect from the date of detection of the alleged error by the Electricity Board i.e. 10.3.2008?**

**iii) Whether the State Commission was correct in relying on its earlier orders dated 9.1.2008 and**

**8.10.2009 in the matter of KPL Oil Mills and Mithun Agro Oil respectively in passing the impugned order?**

9. All the above issues are interwoven and, therefore, we would be considering them together.
  
10. Let us examine the impugned order dated 28.01.2013 in petition no. OP no. 13 of 2012 filed by the Electricity Board regarding applicability of the tariff on the Appellant's unit, in compliance to judgment dated 16.02.2011 of the High Court. In the proceedings before the State Commission, the contention of the Appellant was that the demand for reassessment of the bill prior to January 2010 was illegal.
  
11. The findings of the State Commission in the impugned order are summarized as under:

- i) Vide order dated 09.01.2008, the State Commission in case of M/s. KPL Oil Mills has interpreted the matter. Again in order dated 08.10.2009 in the matter of M/s. Mithun Agro Oil it has been concluded that the unit having activity of packing oil is to be billed under LT VII (A) - Commercial. Thus the contention of the Respondent (Appellant in the present case) that the matter was clarified only in order dated 20.12.2009 only is not correct.
  
- ii) Clause 24(5) of the Supply Code 2005 allows recovery of amount undercharged by the licensee from the consumers. However, the Regulation does not provide unrestricted authority to the licensee to reopen the assessment for any period. The reassessment has to be reasonable and fair and consumer should not be penalized for the incompetence of the licensee.

- iii) The Commission in the order dated 18.03.2009 in another similar case relating to LPG bottling plant has ordered that arrears shall be realized only from the date of inspection.
  
- iv) The Respondent consumer is not responsible for the incorrect categorization at the time of connection in Industrial category instead of Commercial category and incorrect billing in the wrong category thereafter till the error was detected in the inspection on 10.03.2008. Therefore, it is unreasonable to reopen the reassessment from the date of connection on the basis of wrong categorization. Hence, reassessment is allowed only from 10.03.2008 i.e. the date which the error was detected by the Electricity Boards.

12. Thus, according to the State Commission the correct tariff which should have been charged from the Appellant's unit was under LT VII (A) – Commercial category.
  
13. Let us now examine the schedule of tariff and terms and conditions for retail supply with effect from 01.12.2007 issued by the State Commission by its 2007 tariff order. According to the 2007 tariff order, the tariff under LT IV – Industry is applicable to the following:

*“Tariff applicable for general purpose industrial loads (single or three phase) viz., grinding mills, flour mills, oil mills, rice mills, saw mills, ice factories, rubber smoke houses, prawn peeling units, floriculture activities, tyre vulcanizing/ retreading units, workshops using power mainly for production and/or repair, pumping water for non-agricultural purpose, public water works, sewage pumping, power laundries, hatcheries, screen printing of glass ware or ceramic, printing presses, bakeries (where manufacturing process and sales are carried out in the same premises) diamond-cutting units, stone crushing units, book binding units with allied activities, garment making units, electric crematoria, pyrolators*

*installed by local bodies, mushroom farms, shrimp farms, SSI units engaged in computerized colour photo printing, computer consultancy service units with SSI registration engaged in software services and data processing activities and desktop publishing, software units, audio/video cassette/CD manufacturing units, dairy farms, agricultural nurseries (without sale) and tissue culture units.”*

14. The tariff category under LT VII (A) – Commercial as per 2007 tariff order is described as under:

*”Tariff for commercial consumers such as display lights, cinema studios, commercial premises, hotels and restaurants (having connected load exceeding 1000 W), showrooms, business houses, private hostels/lodges/guest/rest houses, freezing plants, cold storages, milk chilling plants, bakeries (without manufacturing process), Audio/video cassette recording/duplication units, CD recording units, self financing educational institutions (including hostels), petrol/diesel/LPG/CNG bunks, Automobile service stations, all construction works, installations of cellular mobile communications/cable TV networks, satellite communications, offices/exchanges of telecom companies, Offices or institutions of AIR, Doordarshan, radio stations, insurance companies, call centers and marble cutting units.”*

15. The same categorization of LT IV and LT VII (A) has been continuing since 2002.

16. We find from the classification in tariff schedule that the Appellant's unit which is carrying out only filling and packing of oil does not fall under the Industrial category (LT IV) which is applicable to industrial loads. There is no oil extraction or milling activity in the Appellant's unit and therefore it cannot be categorized as 'oil mill' under LT IV - Industry. The purpose for which electricity is used in the Appellant's unit are akin to the categories covered under LT VII (A) Commercial, viz. freezing plants, cold storage, milk chilling plants, bakeries (without manufacturing process), petrol/diesel/LPG/CNG bunks, etc.

17. We find that the State Commission in its order dated 09.01.2008 in the matter of M/s. KPL Oil Mills Pvt. Ltd. which was having a unit for filtering and packing oil, similar to the Appellant, held that since the nature of

use of the premises of the concerned oil mills was not for the purpose of milling oil and, therefore, it should be billed under LT VII (A) tariff. Similarly in another order dated 08.10.2009 in the case of M/s. Mithun Agro Oil which was also having unit similar to the Appellant, the State Commission held that they would fall under LT VII (A) – Commercial category. In both these cases the State Commission decided that the arrears would be collected by the Electricity Board from the date of detection of error. Thus, the State Commission has been adopting a consistent approach in the matter.

18. Let us now examine order dated 02.12.2009 passed by the State Commission in a petition of the Electricity Board regarding rationalization of existing tariff. Public notice was given in the matter inviting objections from the stakeholders. The proposal also included tariff recategorization of some of the consumer categories.

One of the proposal of the Electricity Board was that LT VII (A) tariff is applicable to filtering and packing units using extracted oil brought from outside but if the activities such as filtering, refilling, bottling, packing, etc. are carried out in the same premises with extraction also being done under the same service connection, the entire consumption should be billed under LT IV Tariff. The State Commission in this regard held as under:

*“62. Regarding the request of filtering and packing units, the extraction of oil is at present billed under LT IV industrial (Oil mills). The commission in its order dated 18-3-2009 categorised filtering and packing units using extracted oil brought from outside under LT VII(A). Hence the Commission is of the view that the request of KSEB be allowed and orders that if the activities like filtering, refining, bottling, packing etc., are carried out in the same premise where extraction of oil is also being done under the same service connection, if that be billed under LT-IV Industrial Tariff. Similarly, the request of KSEB on Gymnasium is also allowed. In the case of Agricultural nurseries with sale, existing tariff schedule comes under LT VII (A).*

*Based on the request of KSEB, the ATM counters of Banks will be billed in the same tariff applicable to Banks. Regarding colour photo printing at present SSI units engaged in computerized colour photo printing are included under industrial bill. Hence, the Commission is of the view that present system need not be disturbed.”*

19. Thus, in the order dated 02.12.2009, the State Commission stated that it had in its order dated 18.03.2009 categorized filling and packing units using extracted oil brought from outside under LT VII – (A). The State Commission also accepted the proposal of the Electricity Board for billing the entire consumption of units carrying out extraction of oil along with packing and other activities in the same premises under LT IV – Industrial Category.
  
20. We find that the order dated 18.03.2009 pertains to a petition filed by the Board before the State Commission requesting for an order to classify LPG bottling plant of

a consumer federation under commercial tariff and direct them to clear outstanding dues. The State Commission in this order clarified that the activities of LPG bottling plants should be treated as commercial activity and be classified as such. In that case the Board had been charging LPG bottling units under commercial tariff and the State Commission had held that they never objected to the categorization in the public hearing for finalization of 2007 tariff order. The purpose of electricity use in a LPG bottling plant is akin to the purpose for which electricity is used in Appellant's plant.

21. According to Learned Senior Counsel for the Appellant, even if they had to be charged in Commercial category, it should have been done from January 2010 when the Electricity Board issued a circular regarding categorization of consumers based on the order dated 2.12.2009 of the State Commission clearly putting them

under Commercial category. We are not inclined to accept the contention of Learned Senior Counsel for the Appellant as categorisation of units which were only using electricity for filtering and bottling of oil were already under LT VII (A) – Commercial category. The issue raised by the Electricity Board was regarding units which were carrying out extraction of oil along with filling and packing activities in the same premises, whether their entire consumption was to be reckoned under LT IV – Industrial category. The proposal of the Electricity Board for such units was accepted by the State Commission. No issue was raised by the Electricity Board regarding filling and packing units which according to them were categorized under LT VII (A) – Commercial category.

22. The State Commission has correctly held that the arrears have to be collected by the Electricity Board

from the Appellant from the date of detection of error i.e. 10.03.2008. We are in full agreement with the findings of the State Commission.

23. The Appellant has also raised the following issues for continuation of their classification under LT IV Industrial category:

- i) Unit being recognized as industry under Factory's Act etc.
- ii) Bottling and packing activity is being considered as industrial in other States for the purpose of electricity tariff.

24. In our view the above two arguments are not valid. The categorization of consumer for the purpose of electricity tariff is under the domain of the State Commission

under the Electricity Act, 2003. Under Section 62(3) of the Electricity Act, the State Commission can differentiate between the tariffs based on *interalia*, purpose for which the supply is required. Accordingly, the State Commission is empowered to differentiate in tariff based on a purpose for which the supply is required. In this case the State Commission has differentiated between the units which use electricity for extracting oil from seeds which is a manufacturing activity and those units which are only engaged in packing of oil brought from outside which has been considered as commercial activity. Secondly, each State Commission is empowered to decide the retail supply tariff and categorization of consumers for its State. It is not binding for the State Commission to follow the categorization of consumers for tariff purpose decided by the Regulatory Commissions of other States.

25. Accordingly, we reject the contention of the Appellant regarding categorization of their unit under LT IV – Industry category.

**26. Summary of our findings:**

i) According to the tariff schedule decided by the State Commission in the 2007 tariff order, the Appellant's unit engaged in the activities of filling and packing of oil falls under LT VII (A) – Commercial category. The Electricity Board had wrongly been billing the Appellant under LT IV – Industrial category.

ii) The State Commission has consistently maintained in the various orders dated 09.01.2008 and 08.10.2009 in case of similar units carrying out filling and packing of oil that they would fall under LT VII (A) - Commercial

category and that the arrears for difference in tariff could be recovered from the date of detection of the error.

iii. The State Commission on the basis of its earlier findings in orders dated 09.01.2008 and 08.10.2009 has correctly decided that the Appellant would be charged under the LT VII (A) – Commercial category from the date of detection of the error i.e. 10.03.2008.

27. Accordingly, the Appeal is dismissed. No order as to costs.

28. Pronounced in the open court on this 7<sup>th</sup> day of August, 2014.

(Justice Surendra Kumar)  
Judicial Member

(Rakesh Nath)  
Technical Member

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