Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 323 of 2013

Dated :31st October, 2014

Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of :

M/s Shasun Research Centre
No. 27, Vandaloor Kelambakkam Road,
Keelakottaiyur Village,
Melakottaiyur (Post),
Chennai – 600 0148 … Appellant(s)

Versus

1. The Tamil Nadu Electricity Regulatory Commission
No. 19A, Rukmini Lakshmipathy Salai,
Egmore,
Chennai – 600 008.

2. Tamil Nadu Generation & Distribution Corporation Ltd.,
NPKRR, Maaligai,
144, Anna Salai,
Chennai – 600 002

…Respondent(s)

Counsel for the Appellant(s) : Mr. Vijay Narayan Sr. Adv.
Mr D. R. Raghunath
Mr. J. R. Jayant
Mr. Swarnam J. Rajagopalan

Counsel for the Respondent(s): Mr. S. Vallinayagam for R-2

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. M/s Shasun Research Centre is the Appellant herein.

2. Aggrieved by the tariff Order passed in T.P. No. 1 of 2013 dated 20.06.2013 passed by the Tamil Nadu Electricity Regulatory Commission ("State Commission") re-classifying the Appellant from HT Tariff IIA to HT Tariff III (Commercial), the present Appeal has been filed by the Appellant.

3. The short facts leading to the filing of the Appeal is as follows:

i) The Appellant is a unit of Shasun Pharmaceuticals Ltd. established for the purpose of Research and Development in the process of development of drugs and pharmaceutical products. The Tamil Nadu State Commission is the 1st Respondent. The TANGEDCO (Tamil Nadu Generation and Distribution Corporation Ltd.) is the 2nd Respondent.

ii) The Appellant had applied for a service connection with Tamil Nadu Electricity Board for the research unit and the same was assigned service connection under HT Tariff IIA. The Appellant had secured necessary clearance from the Tamil Nadu Pollution Control Board through the consent order dated 17.08.2012. The Appellant Research Unit was also recognized by the Department of Science and Industrial Research, Ministry of Science and Technology, Government of India.

iii) The Appellant has not been carrying on any manufacturing work or other allied activities in the premises. It has been established for the purpose of conducting Research. Accordingly, the said activities in the premises are confined to Research and Development alone. All along, the Appellant had been charged for the under Tariff (HT) IIA in accordance with the respective tariff orders like that of the Government Institutes.

iv) At this juncture, the State Commission had all of a sudden, unilaterally reclassified the Research and Development units affiliated under HT IIA. In that process, the Research and Development unit run by private entities like the Appellant have been re-classified under HT Tariff III (Commercial) while retaining the Research and Development Unit run by State Government in the very same HT II A.

v) Feeling aggrieved over the said classification by which the Research and Development of private entities, like the Appellant are treated unequally, the Appellant has filed this Appeal challenging the said classification, on the main ground that the Research and Development units run by private entities as well as the units run by the Government entities cannot be differentiated as this is not permissible under law.

4. The learned Senior Counsel for the Appellant has urged the following grounds challenging the impugned order dated 20.06.2013:

I) The State Commission failed to take into consideration the nature of business of the Research and Development units and on the erroneous assumptions, it *suo moto* re-classified the High Tension Tariff II A that was being applied to the Research and

Development units run by private entities into HT Tariff III (Commercial).

II) The High Tension Tariff assigned to the Research and Development institutes run by Government is also performing the function which is similar to the one that is being carried on by the Appellant. Despite this, the Government run institutes are being continued to be placed in HT IIA, whereas the Appellant being the private entity is being placed under HT III (Commercial), which would *per se* discriminatory.

III) The Appellant's High tension services had all along been placed under HT IIA, since the tariff year 2007. Despite this, the State Commission had unilaterally re-classified the Research and Development units run by the private entity into High Tension III (Commercial) through the impugned order dated 20.06.2013 without giving valid reasons in the impugned order.

IV) The Research institutes run by private entities including the Appellant are involved primarily only in Research and Development of drugs and pharmaceuticals. They are neither involved in, nor carrying on any manufacturing activities in order to be placed under commercial tariff under HT III.

V) The present re-classification for the tariff applicable for the Research institutes run by the private entities would be detrimental to the field of Research and it would affect performance of the units as it would in the long run would be detrimental to the field of research and development in the country.

5. On the above grounds, the impugned Order is sought to be set aside.

6. Refuting these grounds, the learned counsel for the Respondent strenuously submitted that the impugned order

does not suffer from any infirmity and the classification in the instant case is perfectly justified and reasonable.

7. In the light of the above rival contentions, the questions that may be considered by this Tribunal in this Appeal are as follows:

(i) Whether the State Commission is justified in re-classifying the Research units run by Private entities including the Appellant under HT III (Commercial) while placing the Research Development institutes run by the Government under HT Tariff IIA?

(ii) Whether the State Commission was right in re-classifying the High Tension Tariff applicable for the Research units run by private entity?

(iii) Whether the decision of the State Commission for re-classification of Private Research Institutes alone is in violation of principles of equality?

8. Since these questions are inter related, let us take them up together to discuss these issues.

9. According to the learned Senior Counsel for the Appellant, the High Tension Tariff assigned to the Research and Development Institutes affiliated to the Government is performing the function that is similar to the one being carried on by the Appellant, which is a private entity, despite which, the Government run institutes are continued to be placed in HT II (A), whereas the Appellant being a private entity is being placed under HT III (Commercial), which would be discriminatory and would result in equals being treated as unequals and hence the impugned Order re-classifying the Appellant the private entity under HT III (Commercial) has to be set aside.

10. On going through the Appeal grounds, it is noticed that the Appellant has stated that the State Commission had placed both Research Institutes of the private entities as well as the

Research Institutes run by the Government under High Tension Tariff II A till the tariff Order of 2012 but, the State Commission in the Impugned Order for the year 2013 in T.P. No. 1 of 2013 dated 20.06.2013 had made all of a sudden distinction between Private Institutes and the Government run Institutes, and unilaterally placed the Private run Institutes under High Tension III (Commercial).

11. This statement is not factually correct. As pointed out by the State Commission as well as the TANGEDCO-Respondent No.2 the re-classification has been done by placing the Appellant under HT III (Commercial) even under the earlier tariff Orders, and those tariff Orders have been complied with by the Appellant by making the payments without raising any objection.

12. As seen from the records from 2010 onwards, the Appellant being the Private entity has been classified as HT tariff III (Commercial). The tariff Order No. 1 of 2010 had been passed

on 31.07.2010. By that Order the Appellant service connection was changed to HT Tariff III from HT Tariff II A with effect from 01.08.2010. Similarly, the same classification has been done and continued in the Order No. 1 of 2012, which was passed on 30.03.2012. The above details cannot be disputed now by the Appellant since the earlier Orders dated 31.07.2010 in the tariff Order No. 1 of 2010 and the tariff Order No. 1 of 2012 dated 30.03.2012 classifying the Appellant as HT tariff III (Commercial) have not been challenged.

13. On the basis of these undisputed facts, the Respondent raised the objection that this issue cannot be re-agitated in this Appeal. However, objection cannot be upheld since merely because those Orders have not been challenged it cannot be contended that the Appellant cannot challenge the present tariff Order of 2013, which was passed on 20.06.2013, which is subject matter of this Appeal.

14. As pointed out by the Appellant, this Tribunal has held in Appeal No. 133 of 2007 in the case of ***DELHI TRANSCO***

LIMITED V. DELHI ELECTRICITY REGULATORY COMMISSION *that the same is permissible in view of the* Judgment of the Hon'ble Supreme Court in the case of ***BHARAT SANCHAR NIGAM LIMITED & Anr. V. UNION OF INDIA & ORS*****.** **r**eported in (2006) 3 SCC 1.

15. In the said judgment it is held as follows:

> *"Since each tariff Order is distinct and separate, the Appellant would be fully justified in approaching this Tribunal to challenge the impugned Order vis a vis the year 2006-07.*

16. In view of the aforesaid decision, it has to be held that the objection raised by the Respondents that the Appellant would not be entitled to challenge the tariff Order No. 1 of 2013 dated 20.06.2013 in the absence of any challenge to the earlier tariff Orders is not legally valid.

17. In the present Appeal we are only concerned with the question as to "***whether the classification of the Appellant as the Private entity can be differentiated from the Government run Institutes?"***

18. Let us now discuss this issue.

19. At the outset, it shall be mentioned that the issue has already been dealt with by this Tribunal in the Judgment in Appeal No. 39 of 2012 dated 28.08.2012 holding that the different classification between the Private entities and the Government Institutes is permissible, in the light of the wordings contained in Section 62 (3) of the Electricity Act, 2003 that "purpose for which supply is required".

20. Let us refer to those observations made by this Tribunal:

> ***"23) As per the Appellant the State Commission has re categorised the Appellant from Mixed-load to Non-domestic category but Education Institutes run by Government have been kept under mixed-load category. Thus, the Commission has differentiated on the basis of ownership, which is not permissible under the law.***
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> ***24) It is true that Commission cannot differentiate on any other ground except those given in 2nd part of Section 62 (3) of the Act. However, the grounds mentioned in the Section are Macro level grounds and there could be many micro level parameters within the said macro grounds. The term 'purpose for which supply is required' is of very wide amplitude and may include many other factors to fix differential tariffs for various categories of consumers as explained below:***
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> ***25) It could be argued that while residential premises are charged at domestic tariff, the Hotels are being charged at Commercial tariff. Both, the residential premises and the***

hotels are used for purpose of residence and, therefore, cannot be charged at different tariff because purpose for the supply is same. The argument would appear to be attractive at first rush of blood, but on examination it would be clear the purpose for supply in both the cases is different. The 'Motive' of the categories is different. Whereas Hotels are run on commercial principles with the motive to earn profit and people live in residences for protection from vagaries of nature and also for protection of life and property. Thus 'purpose of supply' has been differentiated on the ground of motive of earning profit. The fundamental ground for fixing different tariffs for 'domestic' category and 'commercial' category is motive of profit earning. In this context it is to be noted that in even charitable 'Dharamshalas' are charged at Domestic tariff in some states. The objective of Dharmshalas and Hotels is same i.e., to provide temporary accommodation to tourists/pilgrims but motive is different; so is the tariff. Thus the 'Motive of earning profit' is also one of the accepted and recognized criterions for differentiating the retail tariff.

26. Again, on the issue of discrimination between two similarly placed consumers, this Tribunal in Northern Railway V. Delhi Electricity Regulatory Commission in Appeal No 268 of 2006 has held that differentiation can be made on the basis of age of the organization as well as on the financial condition of the organization. The case of Northern Railways in Appeal no. 268 of 2006 was similar to the case of Appellant before us. The grievance of Northern Railway in this case was although the purpose of supply is same for Railways and Delhi Metro i.e. traction, the Delhi Commission has shown undue preference to later by fixing lesser tariff as compared to the tariff for Railways.

27. The relevant portion of the judgment is reproduced below:

> ***…….***
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> ***Although the arguments made by the appellant are apparently quite sound, they lose their force when examined closely. The appellant is a massive organization established 150 years back and the proportion of its expansion and its consequent new infrastructure is nominal when compared to the proportion of the same factor vis-à-vis the DMRC. Unless DMRC is treated***

preferentially, its viability itself may be at stake. The purpose of supply of electricity to the two organizations can thus be distinguished. The DMRC can be distinguished from the appellant in terms of age. The purpose of supplying electricity to the two organizations namely the appellant and DMRC can also be said to be different. For the Railways, the purpose of supply of electricity is to maintain its operation at the existing level except for the nominal increase by the year whereas the purpose of supply of electricity to DMRC is to create an altogether new transport system for the City of Delhi.

It was pointed out at the time of arguments that the appellant is carrying passengers at a fare much lower than that charged by DMRC. This itself indicates the financial strength of the appellant vis-à-vis DMRC. This factor also can be included in understanding the purpose of the supply of electricity. The purpose of supporting the establishment of DMRC for providing the Mass Rapid Transit System, a crying need for the people of Delhi, is itself one great ground for treating the DMRC as a separate class of consumers. It can, therefore, be safely stated that the purpose of supply of electricity to the DMRC is different from the purpose of supply of electricity to the appellant and therefore, 62(3) of The Electricity Act 2003 permits preferential treatment to DMRC as compared to the appellant."{emphasis added}

28. From the above it is clear that the term 'purpose' includes many factors. However, the differentiation done by the Commission has to be tested on the anvil of 'undue preference' as per first part of Section 62(3). The Appellant has submitted that the Commission has given undue preference to the Government run institutes by keeping them in the mixed-load category and re-categorised the Appellant and shifted it to non-domestic category. According to the Appellant ownership cannot be the criteria to differentiate the tariff under section 62(3) of the Act. Both the government run institutes and institutes run by members of the Appellant society imparts education and therefore the purpose for supply is same. Article 14 of the Constitution prohibits Equals to be treated unequally.

29. The above contention of the Appellant that Government run educational institutes and institutes run by private parties are equal is misconceived and is liable to be rejected for the following reasons:

i) Government run institutes are controlled by the education departments and run on budgetary support. On the other hand private institutions are run by the Companies incorporated under Companies Act 1956 and operate on the commercial principles. The survival of Government run institutes very often depends upon the budgetary provision and not upon private resources which are available to the institutes in the private sector.

ii) Right to education is a fundamental right under Article 21 read with Articles 39, 41, 45 and 46 of the Constitution of India and the State is under obligation to provide education facilities at affordable cost to all citizens of the country. Private institutes are not under any such obligation and they are running the education institutes purely as commercial activity.

iii) Article 45 of the Constitution mandates the State to provide free compulsory education to all the children till they attain the age of 14 years. In furtherance to this directive principle enshrined in the Constitution, a Municipal School providing free education along with free mid-day meal to weaker sections of society cannot be put in the same bracket along with Public School with Air-conditioned class rooms and Air-conditioned bus for transportation for children of elite group of society. They are different classes in themselves and have to be treated differently. Where Article 14 of the Constitution prohibits equals to be treated unequally, it also prohibits un-equals to be treated equally.

iv) The same is true for hospitals. Right to health is a fundamental right under Article 21 of the Constitution and Government has constitutional obligation to provide the health facilities to all citizens of India. Therefore, Hospital run by the State giving almost free treatment to all the sections of society cannot be

> ***treated at par with a private hospital which charges hefty fees even for seeing a general physician.***
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> ***30. Hon'ble Supreme Court in Hindustan Paper Corpn. Ltd. Vs. Govt. of Kerala (1986) 3 SCC 398 has also held that Government undertakings and companies from a class by themselves."***

21. According to the Appellant, this Judgment would not apply to the present facts of the case, and on the other hand, the Judgment rendered in Appeal No. 110 of 2009 and Batch would be applicable to the present facts of the case, in which it was held that the classification or re-classification cannot be based on profit or no profit motive of the intended parties. The Appellant also cited another Judgment rendered by this Tribunal in Appeal No. 225 of 2012 & Batch in the case of ***NHAVA SHEVA INTERNATIONAL CONTAINER TERMINAL PVT. LTD V. MAHARASHTRA ELECTRICITY REGULATORY COMMISSION.***

22. In our view, the above Judgments would not be of any use to the Appellant and on the other hand, the observation made in those Judgments would support the case of the Respondents.

23. This Tribunal in Appeal No. 110 of 2009 & Batch dated 20.10.2011 with regard to the categorization of consumers had observed as follows:

> *"The real meaning of expression 'purpose for which the supply is required' as used in Section 62 (3) of the Act does not merely relate to the nature of the activity carried out by a consumer but has to be necessarily determined from the objects sought to be achieved through such activity…".*

24. In the light of the ratio and observation made by this Tribunal in the above judgments, let us discuss the issue framed in the present Appeal.

25. As indicated above, the Research and Development Units run by the Private entities were classified under the Commercial category in the Order dated 31.07.2010 and the same is being continued in the Order subsequently passed on 30.03.2012 as well as in the present impugned Order dated 20.06.2013. Apart from the fact that these earlier Orders have not been challenged, the Appellant did not choose to file its objection or furnish the materials before the State Commission to help the

State Commission in arriving at a proper conclusion with reference to the re-classification.

26. Now, it is mainly contended by the Appellant that the State Commission has discriminated the Research and Development Units run by the Government and by the Private entities. Section 61 (3) of the Act 2003 empowers the State Commission to differentiate the consumers according to the consumers load factor, power factor, voltage, total consumption 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 purpose for which the supply is required.

27. As per Section 61 of the Act, the State Commission is the Competent Authority to classify the consumers into various separate categories. Accordingly, the State Commission in the present case has differentiated the Research and Development Units run by the Government entities and Private entities

considering the objects sought to be achieved during the Research activities carried out by the Appellant.

28. Section 62 (3) of the Act permits differentiation between consumers. The first part of Section 62 (3) provides that the State Commission shall not show any **undue preference** to any consumers, which means that **due preference** can be given to some categories. The second part of Section 62 (3) provides that the Appropriate Commission may differentiate consumers on the basis of several factors including the purpose for which supply is required. The benefit accrued out of the Government run Research Units will be driven to the Public welfare and the profit earning is a secondary one, whereas in a Private owned Research Units, the profit earning is the prime object and public cause is relegated to next level. Therefore, both can be classified as separate categories for the purpose of levying tariff. Such classification is based on an intelligible criteria and such classification has nexus to the

purpose sought to be achieved. The Government run Units are not profit oriented and purely service oriented. Thus, there is a clear distinction between the Research Units recognized by the Government and the Research Units which are Government owned and Government affiliated.

29. Section 61 (b) of the Electricity Act postulates that the Appropriate Commission shall ensure that the affairs of the distribution licensee are conducted on commercial principles while making Regulations. A conjoint reading of Section 61 (b) and Section 62 (3) of the Electricity Act, 2003 would make it clear that the State Commission is empowered to make a reasonable differentiation between Government Laboratories and Private run Laboratories. The Government has multifarious role to perform under the Electricity Act, such as electrification of all parts of the State under Section 6 of the Act, 2003 and to promote generation of electricity under the National Electricity Policy, which is not the case with the

Appellant. Therefore, the Appellant cannot claim parity with the Government owned Research Units as mere recognition by the Government does not amount to affiliation. The present issue of classification cannot be viewed in isolation from the point of view of the Appellant. But it has to be viewed in the larger context of the role played by the Appropriate Government under the Act of 2003.

30. According to the Appellant, for the earlier years the Appellant was put in the category of HT tariff II A. Mere fact that the Appellant was placed under HT tariff II A in the earlier years for some time would not give it a conclusive right to be placed in the said category. The State Commission is empowered under the Act to re-visit the tariff structure and make necessary changes. The Appellant raises the question of equals being treated as unequals. The concept of equality as sought for by the Appellant cannot be put in a straightjacket formula and it has to be examined on case to case basis. In the present

case, it is not the case of the Appellant that it is not carrying on its activities for commercial purpose or no case of commercial nature is involved in its dealing. Such being the case, the classification of the Appellant under HT II A would not be in the commercial interest of the distribution licensee.

31. At the risk of reputation, it is to be stated that the impugned classification does not amount to discrimination but amounts to preferential treatment which is permissible under Section 62 (3) of the Act, 2003.

32. The State Commission has not created a residual category and classified all the Research Institutions into a commercial category. On the other hand, it has made a reasonable classification so as to ensure that classification of Research Institutions into two categories, namely, Private owned and Government owned, since it has nexus to the purpose sought to be achieved. This means only such Research Units which serve the public purpose can be given tariff concession.

33. It is submitted on behalf of the Appellant that the Appellant has suffered loss for some years. This argument does not merit consideration. A Unit which sustained a loss in some years may turn to be a profit making one in the subsequent years. Therefore, the fact which decides whether the Unit is a service oriented or profit oriented is the inherent nature of the Unit and not profit or loss earned or suffered in a period of time.

34. In view of the above, there is no case of violation of Article 14 of the Constitution of India as alleged by the Appellant, particularly when the Appellant has failed to establish that it is not a profit oriented Unit. Hence, it cannot claim parity with the Government Laboratories, which serve the public purpose.

35. <u>SUMMARY OF OUR FINDINGS.</u>

(a) **Section 62(3) of the Act provides that the Appropriate Commission may differentiate the consumers on the basis of several factors including the purpose for which the supply is required. The**

benefit accrued out of the Government run Research Units will be driven to public welfare and the profit earning is a secondary one, whereas in private owned Research Units, the profit earning is the prime object and public cause is relegated to next level. Therefore, the two can be classified as separate categories for the purpose of tariff. Such classification is based on an intelligible criteria and such classification has nexus to the purpose sought to be achieved. The Government run Units are not profit oriented and purely service oriented. Thus, there is a clear distinction between the Research Units recognized by the Government and the Research Units which are Government owned and Government affiliated.

(b) **Section 61 (b) of the Electricity Act, 2003 stipulates that the Appropriate Commission while making Regulations shall ensure that the affairs of the**

distribution licensee are conducted on commercial principles. A conjoint reading of Sections 61 (b) and 62 (3) of the Electricity Act, 2003 would make it clear that the State Commission is empowered to make a reasonable differentiation between Government Laboratories and Private Laboratories.

(c) **The impugned classification does not amount to discrimination but amounts to preferential treatment which is permissible under Section 62 (3) of the Electricity Act, 2003.**

(d) **The above issue is already covered by the Judgment dated 28.08.2012 in Appeal No. 39 of 2012 of this Tribunal holding that the different classification between the Private entities and the Government Institutes is permissible, in the light of the wordings contained in Section 62 (3) of the Electricity Act, 2003 that allows differentiation of**

consumer tariff according to the purpose for which supply is required.

36. In view of the above discussion and the findings, we find that there is no merit in the Appeal. Consequently, the same is dismissed. However, there is no order as to costs.

37. Pronounced in Open Court on this **31st** day of **October, 2014**.

(Rakesh Nath) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**
Dated:31st Oct, 2014

√REPORTABLE/~~NON-REPORTABALE~~