

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

Appeal no. 265 of 2014

Dated: 8th September, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of

Hindustan Petroleum Corporation Ltd.

Kochi LPG Regional Office,
Irumpanam, P.O. Kochi – 682309

... Appellant

Versus

1. Kerala State Electricity Regulatory Commission

K.P.F.C. Bhavanam, C.V. Raman Pillai Road,
Vellayambalam , Thiruvananthapuram
695 010, Kerala

....Respondent No 1

2. Kerala State Electricity Board,

Vydyuthi Bhavan,
Pattom, Thiruvananthapuram,
695004, Kerala

....Respondent No 2

Counsel for the Appellant(s):

**Mr. Anand K. Ganesan
Ms Swapna Sheshadri
Ms Mandakini Ghosh
Mr Ishan Mukherjee
Mr Akshi Seem
Ms Neha Garg**

Counsel for the Respondent(s):

**Mr Ramesh Babu M.R.
Mr Paramhans for R-1**

**Mr M.T. George
Mr Katitha K.T. for R-2**

JUDGMENT

PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal has been filed by Hindustan Petroleum Corporation Ltd. (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 14.08.2014 passed by the Respondent No. 1, Kerala State Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in OP No. 9 of 2014 dealing with the approval of the Annual Revenue Requirements of the Kerala State Electricity Board (hereinafter referred to as “**Respondent No.2**”) and the tariff applicable for the Appellant and all consumers in the State of Kerala for FY 2014-15 wherein the State Commission has erroneously categorized Liquefied Petroleum Gas ('LPG') Cylinder bottling plants, and Petroleum Terminals (POL Terminals) under the HT-IV Commercial category along with other commercial establishments such as malls and multiplexes, hotels etc. as against the claim of the Appellant for categorisation under the HT-1 Industry category.
2. The Appellant is a Government of India undertaking and is engaged in the refining and marketing of Petroleum products including LPG and allied products. The Appellant has got two LPG Bottling Plants, one POL Terminal and a Petroleum Depot in the State of Kerala.
3. The Respondent No 1 is the Electricity Regulatory Commission for the State of Kerala exercising jurisdiction and discharging functions in terms of the Electricity Act 2003. The Respondent No 2 is Kerala State

Electricity Board (hereinafter called “**KSEB**”) is the Distribution Licensee in the State of Kerala.

4. Aggrieved by the Impugned Order dated 14.08.2014 passed by the State Commission, the Appellant has preferred the present appeal on following grounds:

- a) Whether the process of bottling the LPG being carried out at the Appellant's factories can be termed as a mere commercial activity as against the claim of the Appellant of it being an industrial activity?
- b) Whether the processes carried out at the Appellant's Petroleum Terminal and Depot (Factories) including blending and manufacture of consumable petroleum products can be termed as mere commercial activity as against the claim of the Appellant of it being an industrial activity?
- c) Whether at all any commercial activity is being carried out in the factories of the Appellant where the final product is derived and moved to various destinations for distribution?
- d) Whether the process at the factory of the Appellant, that of converting the LPG in bulk to cylinder, after the cylinders are cleaned, repaired, filled, and sealed to get the product is an industrial process?

5. Facts of the present Appeal:

- i. The Appellant is engaged in the refining and marketing of Petroleum products including LPG and allied products. It has two LPG Bottling plants in the State of Kerala which carry out the operations of LPG cylinder bottling for retail supply of such LPG cylinders. It also has Petroleum Terminals in the State of Kerala, which are ancillary to the manufacture and supply of petroleum products and LPG.

- ii. The Appellant entered into an Agreement with Respondent No. 2 during October 1991 for purchase of electricity at its plant at Kanjikode LPG Bottling Plant.
- iii. As per the Agreement entered into with Respondent No. 2 during October 1991 for purchase of electricity at its plant at Kanjikode LPG Bottling Plant, the Appellant was categorized as "H.T. Industrial" and corresponding tariff was charged from the Appellant. However, without revising the Agreement, after a few years, Respondent No. 2 started to charge the Appellant under "H.T. Commercial" tariff without any prior authorisation or consent of the Appellant and without due notice to the Appellant.
- iv. The Appellant has been raising objections on the tariff categorisation with the Respondent No. 2 and also in the proceedings before the State Commission. However, the LPG Bottling plants and the other facilities were continued to be categorised under the Commercial category.
- v. Against this action, the Appellant as well as other LPG Bottlers approached the High Court of Kerala by way of Writ Petitions challenging the vires of the categorization of the Appellant under 'Commercial' instead of 'Industrial' as being inequitable and unjustified. The Kerala High Court by order dated 03.04.2012 referred the matter to the State Commission for consideration.
- vi. By Order dated 25.07.2012, the State Commission maintained the categorisation of the Appellant under the commercial category without appreciating or considering any of the material including the view taken and Orders passed by the other Regulatory Commissions

and Ombudsman, the provisions of the various Legislations and the registration of the Appellant under the Factories Act.

- vii. Aggrieved by this, the Appellant approached the Kerala High Court by filing Writ Petition No. 25684 of 2012. By Order dated 13.12.2012, the High Court held that since an order has been passed by the State Commission against which the statutory remedy by way of appeal lies against the Orders passed by the State Commission to this Tribunal under Section 111 of the Electricity Act, the Appellant ought to approach this Tribunal.
- viii. In compliance to the aforementioned order, the Appellant filed an appeal bearing number - DFR 788 of 2013. However due to a delay of 215 days in filing the appeal, this Tribunal was not inclined to condone the delay and vide order dated 31.5.2013 had dismissed the application for condonation of delay along with the appeal. This Tribunal while dismissing the appeal had also observed that the order dated 31.5.2013 would not prevent the Appellant to seek re-categorization of tariff category in future proceedings.
- ix. In furtherance to the order of this Tribunal dated 31.5.2013, the Appellant filed a petition before the State Commission on 2.8.2013 for re-categorization of tariff category of the LPG Cylinder Bottling Plants in the State. On 17.2.2014, the State Commission dismissed the Appellant's petition with an observation that the Appellant should approach the State Commission during the proceedings for determination of the Board's retail supply tariff for FY 2014-15.
- x. Accordingly, the Appellant approached the State Commission by way of objections in the retail supply tariff petition of the Respondent No. 2. The Appellant had filed detailed written submissions dated 2.7.2014

for the re-categorization of the Appellant' tariff category. The State Commission had directed the Appellant to file a clarification explaining the process at the LPG Cylinder Bottling Plants, petroleum installation/factories to establish that the Appellant conducts manufacturing processes. The Appellant had accordingly filed detailed clarification and submissions dated 22.7.2014 on the nature of the activities carried out and to substantiate its claim for application of Industrial Tariff.

- xi. By the impugned order dated 14.08.2014, the State Commission determined the tariff for the year 2014-15 wherein the State Commission has categorised the Appellant under the Commercial category.
- xii. Aggrieved by the Impugned Order, Appellant has preferred the present Appeal.

6. QUESTIONS OF LAW

As per Appellant, following questions of law arise in the present Appeal:

- a) **Whether the State Commission is justified in categorizing the Appellant's LPG bottling/filling plants under the commercial category as against the industrial category?**

- b) **Whether the State Commission is justified in neglecting the submissions made by the Appellant with regard to the tariff recategorization of its Petroleum Terminal at Irumpanam, Ernakulum District and Petroleum Depot at Elathur, Kozhikode District?**

- c) **Whether the considerations applicable for high tariff in case of HT-IV commercial category would be applicable to the nature of operations carried out by the Appellant?**
 - d) **Whether in the facts and circumstances of the present case and in view of section 62(3) of the Act, the Appellant may be treated at par with establishments like shopping malls and multiplexes falling under the HT-IV Commercial category?**
 - e) **Whether in the facts and circumstances of the present case, the Appellant is entitled to be re-categorized into a separate category other than HT-IV Commercial or be continued in the HT-Industrial category as has been done in the past having regard to the nature of services provided and also the nature and purpose of consumption of electricity by the Appellant and in view of the significant increase in tariff and cross-subsidy resulting in tariff shock to them?**
 - f) **Whether the State Commission while classifying consumers ought to be guided by the Orders passed and views taken by the other Electricity Regulatory Commissions/CGRF/ Ombudsman?**
7. We have heard at length Mr. Anand K. Ganesan, the learned counsel for the Appellant and Mr. Ramesh Babu H.R., the learned counsel for Respondent No.1 and Mr. M.T. George, the learned counsel for Respondent No.2 and considered the arguments put forth by the rival parties and their respective written submissions on various issues identified in the present Appeal. Gist of the same is discussed hereunder.

8. On the specific issues raised in the present Appeal, the learned counsel for the Appellant has made the following submissions for our consideration:
- a) The State Commission has not considered the submissions of the Appellant on the rationale of the categorisation in the Industrial Category. The impugned order has been passed by the State Commission in a cursory manner without dealing with the objections raised.
 - b) Consequent to the categorisation of the Appellant in the Commercial Category, the tariff fixed is exorbitantly high with the highest cross subsidy burden falling on the Appellant for the electricity consumed in the LPG Cylinder Bottling Plants, POL Terminal and Depot. The State Commission has not taken into consideration the activities/operations of the Appellant and without having regard to the purpose for which supply of electricity is required by them.
 - c) Under Section 62(3) of the Electricity Act, the State Commission is required to classify consumers based on the various criteria as provided therein. In terms of the above, the State Commission has in the tariff schedule provided for various categories which includes the Commercial and Industrial categories. Once the tariff categories are provided, the various consumers are required to be classified in the relevant category considering the nature of the activities and the voltage level of supply (LT or HT). The present case of categorization of Appellant should be based on the nature of the activity and whether it would be purely commercial or whether it includes manufacture, the profitability or public nature of the activities, the classification and treatment given by the various other Regulatory Commissions in the

country, the treatment under various other enactments etc. Under each of the criteria, the Appellant for its LPG Bottling Plants and the Terminals clearly fall under the HT-I Industrial category and not the HT-IV Commercial category.

- d) The nature of the activities being carried out at the premises of the Appellant are highly complex involving mechanised process to produce and fill LPG cylinders for retail use, which cannot be compared with mere packing. Similarly, the petroleum terminals and depots also are not in the nature of commercial activities, but are ancillary to the manufacturing processes and activities of the Appellant.
- e) The present issue is also covered by the decision of this Tribunal dated 16/08/2007 in the case of M/s Kailas Cashew Exports v/s. Kerala State Electricity Board, in Appeal No. 50 of 2007, wherein this Tribunal while appreciating the various activities and processes that go into packing of cashew for use has termed the same as manufacturing activity as against a purely commercial activity. The process in LPG is of course much more complex and is fully covered by the above reasoning given by this Tribunal.
- f) The LPG bottling plants of the Appellant are installations which require the permission under the Explosives Act, 1884 for its functioning. Section 4 (h) of the Explosives Act defines the manufacturing process as under -
- "**manufacture**" in relation to an explosive includes the process of - (1) dividing the explosive into its component parts or otherwise breaking up or unmaking the explosive, or making fit for use any damaged explosive; and (2) re-making, altering or repairing the explosive;

Therefore, Bottling of bulk LPG into cylinders is essentially dividing the explosive into its component parts or otherwise breaking up or unmaking the explosive and therefore is a manufacturing process.

- g) The Gas Cylinders Rules, 2004 issued by the Government of India in exercise of the powers conferred by Sections 5 and 7 of the Explosives Act, 1884 exhaustively deals with the filling, possession, handling, safety etc., of Gas Cylinders. Rule 2 (xxi) of the Gas Cylinder Rules, 2004 defines gas cylinder as under-

"Gas Cylinder" or **"Cylinder"** means any closed metal container having a volume exceeding 500 ml but not exceeding 1000 litres intended for the storage and transport of compressed gas, including any liquefied petroleum gas (LPG) container / compressed natural gas (CNG) cylinder fitted to a motor vehicle as its fuel tank but not including any other such container fitted to a special transport or under-carriage and includes a composite cylinder, however, the water capacity of cylinders used for storage of CNG, nitrogen, compressed air, etc. may exceed 1000 litres up to 2500 litres provided the diameter of such cylinder does not exceed 60 cm;

All LPG containers are Gas Cylinders. The Gas Cylinder Rules 2004 further states that the filling of a cylinder with any compressed gas also includes manufacturing of gas. Under Rule 2 (xxxii) defines manufacture of gas means;

"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;

- h) In view of the above, bottling of bulk LPG into cylinders is a manufacturing process under the Gas Cylinders Rules, 2004 and the Appellant's LPG Bottling plants are essentially involved in the manufacturing of consumable petroleum gas and as such Industrial Tariff of Electricity is applicable to them.
- i) The words industrial, commercial and manufacturing are not defined in the Electricity Act, 2003. These words are to be understood in the generic legal meaning with reference to relevant statutes like the Explosives Act, 1884, the Gas Cylinder Rules, 2004, the Factories Act, 1948 and the Kerala Shops and Commercial Establishments Act 1960.
- j) While other enactments and statutes may not be determinative for the purpose of electricity classification, there ought to be uniformity unless there are compelling reasons to the contrary. The State Commission has erred in ignoring the fact that the Appellant's plant is a factory registered under the Factories Act and is not a commercial establishment as defined under the Kerala Shops and Commercial Establishments Act.
- k) The State Commission failed to appreciate that in all other States, the LPG Cylinder Filling Plants are treated as an industrial category so far as consumption of electrical energy is concerned. There is no justification for the State Commission of Kerala to take a different view.
- l) The treatment of LPG Bottling Plant, POL Terminal and Depots in the Impugned Order is contrary to the provisions of the Electricity Act, 2003 and as also against the principles enunciated by this Tribunal. The Appellant respectfully submits that the principles of tariff classification under section 62(3) of the Electricity Act, 2003 have been considered and declared by this Tribunal in the following cases:

- Mumbai International Airport Pvt. v. MERC & Anr. (Appeal No. 195 of 2009 dated 31.5.2009)
 - Association of Hospitals v. MERC & Anr. (Appeal No. 110 of 2009 and batch dated 20.10.2011)
- m) In the above cases, this Tribunal has held that the classification needs to be necessarily based on the nature and purpose of use and the activity. Further, the classification ought to have a nexus to the purpose sought to be achieved. This Tribunal has analysed and settled the interpretation of section 62(3) of Electricity Act, 2003 while also considering the principles under Article 14 of the Constitution of India. It is not correct to treat unequally placed persons equally. Different types of consumers ought not to be bunched upto one category without considering the inherent differentiation that exists between them, based on the purpose for which electricity is required.
- n) The State Commission has failed to realize that one of the factors contained in section 62 (3) of the Electricity Act, 2003 to be considered while determining the tariff is the '**purpose for which the supply is required**'. The purpose of supply is the object for which supply is taken, which in the present case, may be for domestic use, agriculture, industry, education, research, public transportation, medical treatment, public water supply, public lighting, etc. Further, LPG continues to be a subsidised commodity and it cannot be treated as a purely commercial product and the process as a commercial process.

- o) Applying the above principles and considering the facts of the present case, the State Commission has gravely erred in not including the Appellant for its LPG Bottling units and Terminals under the Industrial category and treating the same under the commercial category together with malls, multiplex etc.
 - p) Due to this unreasonable categorization under the HT-IV Commercial category, the Appellant is required to bear the tariff of Rs 6.30/- per unit for all units up to 30,000 units and Rs 7.30/- per unit for all units consumed above 30,000 units, whereas under the HT-I Industrial category, the Appellant would have to pay a tariff of Rs 5.2 per unit. Consequently the Appellant is bearing the burden of high levels of cross subsidy burdens of about 80% more above the cost of supply.
 - q) In the facts and circumstances, it is submitted that the impugned order holding that LPG Bottling plants and the Petroleum Terminals/Factories of the Appellant fall into the HT IV Commercial category instead of the HT-I Industrial category is erroneous and is liable to be set aside. The said facilities are required to be categorised under the HT-I Industrial category with the relevant tariff to be made applicable.
9. The learned counsel for the Respondent No. 1 and 2 have made following submissions on the issues raised in the Appeal for our consideration
- a) The State Commission on the matter remanded by the High Court of Kerala vide judgment dated 03.04.2012, vide its order dated 25.07.2012 in petition No. O.P. 23 of 2012 filed by KSEB had held that *"The contention of the petitioners that LPG Bottling is an industrial activity and it is so classified in other States could not be established.*

Considering all relevant aspects, the Commission is of the considered view that the appropriate category of LPG bottling plants for HT connections shall be HT-IV Commercial category."

- b) The Appellant along with M/s. IOCL- a similar consumer, had contended for categorization under Industrial category before the State Commission during the course of the hearing of ARR & ERC for the year 2014-15 and the tariff petition filed by Respondent No. 2. The State Commission after having given an opportunity of being heard (on 30.06.2014 at Kozhikode, on 02.07.2014 at Ernakulam and on 04.07.2014 at Thiruvananthapuram) and placed on record in the Impugned Order categorized the Appellant along with similar consumers under "Commercial category". Thus, the State Commission has issued orders after following due procedure and after considering all aspects with regard to disposal of the petition in respect of approving the ARR & ERC of Respondent No. 2 for the year 2014-15 and revising the tariff applicable to all categories of consumers including the Appellant as well as re-categorisation of certain group of consumers.
- c) The Clause 6(a), 9 (a)(ii) and 9 (b) of the Agreement executed by the Appellant and the Respondent No 2, clearly specify the terms and conditions of payment of electricity supplied, category classification and rate applicable to the Appellant. The same are reproduced as:
"**Clause 6(a):**Payment for power and energy supplied shall be made by the consumer for the quantity of power and energy computed as aforesaid and at the rate specified in the schedule....."

Clause 9 (a)(ii): The consumer shall pay for all the electrical energy supplied to him by the Board under this agreement and ascertained as herein before provided, at an amount calculated in accordance with the terms given in the Schedule to this agreement. Nothing in this agreement shall affect the liability of the consumers to discharge the dues to the Board on account of supply of energy during the term prior to the date of this agreement, as per prior agreements, if any and or as per rules, terms and conditions of supply prevalent from time to time from the date of service connection.

Clause 9(b): The tariff applicable shall be as per tariff notification in force from time to time for the category of service shown in the schedule. The consumer also agrees that the Board will be free to alter the method of billing whenever it chooses to do so. The tariff notification issued by the Board from time to time shall form part of this agreement and this agreement shall stand modified to that extent."

Hence the contention of the Appellant that the Respondent No. 2 after a few years started to charge the Appellant under "H. T. Commercial Tariff" without any prior authorization or consent of the Appellant and without due notice to the Appellant and revision of Agreement is not valid.

- d) The facts leading to the categorization of LPG bottling plants under Commercial category are as follows:
 - 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. As per the Standard Industrial and Occupation Classification 1962, based on United Nations International Industrial Classification (UNISIC) of Economic Activities "Manufacturing" is defined as follows:
"Manufacturing comprises units engaged in the physical or chemical transformation of materials, substance or components into new products. The materials, substances or components transformed are raw materials that are products of agriculture, forestry, fishing, mining or quarrying as well as products of other manufacturing activities.
The units in manufacturing section are often described as plants, factories or mills and characteristically use power driven machines and materials handling equipment. However units that transform materials or substances into new products by hand or in the workers home and those engaged in selling to general public products made on the same premises from which they are sold, such as bakeries and custom tailors, are also included in this section. Manufacturing units may process materials or may contract with other units to process their material for them. Both types of units are included in manufacturing"
- v. No manufacturing activity is carried out in the premises of the Appellant. There the Liquefied Petroleum Gas (**"LPG"**) from bulk containers is bottled in smaller cylinders for facilitating convenient retail distribution. This activity is similar to packing an item received in bulk quantity into marketable smaller packs to suit market conditions. This is purely a commercial activity and hence to be categorized under commercial tariff.

- e) The State 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:

“3.1.4 The activity performed is the process of refilling 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. 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. Manufacture is the process of conversion of raw materials into different finished products as in the case of sugar cane to sugar, cotton to textiles, oil seeds to oil and so on. As per the Standard Industrial and Occupation Classification 1962, based on United nations International Industrial Classification (UNISIC) of Economic Activities “Manufacturing” is defined as follows.

“Manufacturing” comprises units engaged in the physical or chemical transformation of materials, substance or components into new products. The materials, substances or components transformed are raw materials that are products of agriculture, forestry, fishing, mining or quarrying as well as products of other manufacturing activities.

The units in manufacturing section are often described as plants, factories or mills and characteristically use power driven machines and materials handling equipment. However units that transform materials or substances into new products by hand or in the workers home and those engaged in selling to general public products made on the same premises from which they are sold, such as bakeries and custom tailors, are also included in this section. Manufacturing units may process materials or may contract with other units to process their material for them. Both types of units are included in manufacturing.

It may be noted that no manufacturing activity is carried out in the premises of the respondent. There, liquefied Petroleum Gas from bulk containers is bottled in smaller cylinders for facilitating

convenient retail distribution. This activity is similar to packing an item received in bulk quantity into marketable smaller packs to suit market conditions. This is purely a commercial activity and hence to be categorized under commercial tariff. So the contention of the respondent that industrial tariff is applicable to their bottling plant is not sustainable.”

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- 4.3 The contention of the respondent that LPG Bottling Plants are industries by quoting definition of "industry" from Industrial Disputes Act is not maintainable as in the tariff order it is specifically mentioned that LT IV Industry tariff is applicable for general purpose industrial load (single or three phase).

Electricity consumer classification and categorization for the purpose of electricity charges are made on the basis of the purpose of use of the electricity, and are not related to the classification made by different departments of State Government or Central Government for other purposes. Thus the classification followed either in State Government, or in other States is not a guiding principle for fixation of tariff for any particular class of consumers. The Commission, however, recognizes the cardinal principle that any reasonable classification should have a rationale that has nexus to the objective sought to be achieved by such classification. From this point of view, the Commission concludes that activities of LPG Bottling Plants shall be treated only as commercial activity and be classified as such."

- f) The State Commission on 18.03.2009, while disposing the petition No. TP 59 of 2008 filed by Respondent No. 2 ordered that M/s. Kerala State Co-operative Consumers Federation Limited, Ernakulum, an LT consumer, has to be classified under LT-VII (A) (Commercial) tariff considering the purpose of usage of electricity. The State Commission

has ordered that "The Commission after examining the matter in detail, decides to accept the arguments of the petitioner **that since the processes of LPG Bottling plant is transferring the gas received from the company into cylinders of marketable size which is only a commercial activity and hence shall be classified as LT-VII(A) Commercial as is done by the Respondent No. 2 at present in the case of other LPG bottling units.**"

- g) The State Commission in its order dated 25.07.2012 in petition No. O.P.23 of 2012 had decided as under:

"SECTION 2: RECATEGORISATION OF CONSUMER CATEGORIES

102. KSEB in their petition proposed various proposals for re-categorization of certain tariff categories. The recategorisation was proposed as per the direction of the Commission, orders of Ombudsman and CGRF, recommendations from field offices etc., Further, certain consumers and consumer organisations through written responses and also in their submissions during the public hearings conducted at Thiruvananthapuram, Ernakulum and Kozhikode have also put up various proposals for re-categorization of certain categories. Each of the proposals are dealt below:

LPG Bottling Units: According to KSEB, the Commission in its order dated 19-3-2009 had brought LPG bottling units with LT connections under LT-VII (A) tariff. However, no classification is specified for HT category. KSEB requested that, the same principles may be followed for all LPG Bottling plants for HT connection also and thus they may be categorized under HT-IV Commercial category.

The Commission has examined the proposal. In the Order dated 19-3-2009, the Commission had concluded that LT Commercial Tariff could be applied for LPG bottling plants. Hon. High Court of Kerala in its order dated 3-4-2012 (in WPC 6530/2009, WPC

13747/2009 WPC 1866/2012 Indian Oil Corporation Vs KSEB, HPCL Vs KSEB) had referred the matter to the Commission for appropriately deciding on categorisation of LPG bottling plants, after affording opportunity of hearing for the petitioners, within three months. The Commission heard the matter on 28-6-2012. The contention of the petitioners that LPG Bottling is an industrial activity and it is so classified in other States could not be established. Considering all relevant aspects, **the Commission is of the considered view that the appropriate category of LPG bottling plants for HT connections shall be HT IV Commercial category."**

- h) The Appellant is refilling the finished product for the sake of convenience for retail sale, that too in different capacities - viz. smaller sized cylinders for sale in domestic premises and bigger sized cylinders for commercial establishments like hotels, restaurants etc. The Appellant is carrying out the following activities viz. washing, cleaning, quality checking of cylinders repairing, rectifying, and replacing defective valves. All the above activities are for making the container / cylinder, re-usable for repacking / refilling the finished product of LPG brought from outside, and as such there is no manufacturing of LPG - the main product. The only activity carried out in the premises with respect to the main finished product - LPG is re-filling/repacking using pressure pumps. Thus the activities carried out at LPG bottling plants and petroleum Terminal and Depot are purely a commercial activity and it cannot be treated as an industrial activity enhancing the character and complexion of the LPG.

10. After having a careful examination of all the issues brought before us for our consideration, we decide as follows:-

11. On Issue No 1 i.e. Whether the State Commission is justified In categorizing the Appellant's LPG bottling/filling plants under the commercial category as against the industrial category?, we decide as follows:

- a) The key issue for our consideration is to decide whether bottling of the LPG is a Commercial activity or an Industrial activity and whether the categorisation of the State Commission to the Appellant LPG bottling/filling plants under the commercial category is justified.
- b) The Appellant has made detailed submissions before the State Commission during the public consultation process regarding re-categorization of the Appellant's LPG Bottling plant under Industrial category in place of Commercial Category.
- c) In the Impugned order, the submissions made by the Appellant have been duly recorded under Annexure "KSEB's Comments and Objections on the 'Responses of Stake Holders on ARR / ERC & Tariff Petition filed by KSEB for the year 2014-15". Respondent No.2, on issue regarding re-categorization of tariff for LPG Bottling Plants under HT IV (A) commercial activity, has observed that-
"As per the Standard Industrial and Occupation Classification 1962, based on United Nations International Industrial Classification (UNISIC) of Economic Activities "Manufacturing" is defined as follows:
"Manufacturing comprises units engaged in the physical or chemical transformation of materials, substance or components into new products. The materials, substances or components transformed are raw materials that are products of agriculture, forestry, fishing, mining or quarrying as well as products of other manufacturing activities." The

units in manufacturing section are often described as plants, factories or mills and characteristically use power driven machines and materials handling equipment. However units that transform materials or substances into new products by hand or in the workers home and those engaged in selling to general public products made on the same premises from which they are sold, such as bakeries and custom tailors, are also included in this section. Manufacturing units may process materials or may contract with other units to process their material for them. Both types of units are included in manufacturing “

As per this, no manufacturing activity is carried out in the LPG bottling plants. There, liquefied Petroleum Gas from bulk containers is bottled in smaller cylinders for facilitating convenient retail distribution. This activity is similar to packing an item received in bulk quantity into marketable smaller packs to suit market conditions. This is purely a commercial activity and hence to be categorized under commercial tariff.

Citing this, Honourable Commission vide order dated 18.03.2009 has ordered to categorise LPG bottling plants under commercial tariff.”

d) The information as submitted by the Appellant on the process carried out at LPG Plants and Terminals states as follows:-

A. PROCESS AT LPG PLANTS -

i. In the supply chain of petroleum products; the main activity of refining of crude oil is carried out at the refineries that are located across India. Out of the various products that are the outcome of the refining at refineries; one product is a flammable mixture of hydrocarbon gases

- namely propane and butane. When the said gas is compressed it changes its state and becomes liquid which is called Liquefied Petroleum Gas (LPG).
- ii. This LPG which is produced in the refineries cannot be used as such as a fuel. Whereas, when the said gas is packed in cylinders under high pressure by employing certain processes; it becomes a consumable product i.e. packed LPG/cooking gas which is the most popular kitchen fuel. For the purpose of manufacturing the consumable LPG i.e. LPG packed in Cylinders; the LPG produced in refineries is transferred to LPG Bottling factories/plants by various modes of transportation like pipelines, railway wagons, water vessels, tank trucks etc. At the said LPG Bottling Factories/Plants; the bulk LPG is filled in to cylinders and thereby manufacture a consumable product i.e. LPG packed in cylinders which can be used as fuel.
- iii. Hence, the activity carried out at the LPG Bottling Factory is essentially a continuation of the manufacturing process which generates consumable LPG cylinders from the crude oil. The process involves the usage of various high technology machineries and equipment for decantation of Bulk LPG Trucks, Pumping of LPG through pipelines, storage of Bulk LPG, cleaning of cylinders, pressure testing of cylinders, water testing of cylinders, changing of the O ring at the cylinder neck, filling of LPG at high pressure into the cylinders and weighing of cylinders. The filling is carried out by most advanced technology wherein it is ensured that the Cylinders will be filled up to 85% by LPG and the remaining 15% is kept as vapour space so that when the knob is opened the LPG becomes gas and escaped through the pipe to the Burner of the Stove.

- iv. LPG becomes the final product of cooking gas only when it is reduced into cylinders under high pressure. The application of high pressure makes it the cooking gas. The LPG that comes in the tanker lorries or pipelines is not termed as cooking gas unless and until it is filled into cylinders at high pressure.
- v. Over and above the filling process at high pressure, other activities carried out at the LPG factory includes washing, cleaning and drying of the cylinders, checking the same, repairing, rectifying, replacing defective valves etc. using electrical, electronic and mechanical equipments and gadgets like motors, pumps, high speed electronic weighing machines, compressors, controlling devices, dispensing units, pressure gadgets etc., none of which is a commercial activity, but purely manufacturing in nature and hence industrial activity.

B. Process at Terminals -

- i. In the supply chain of petroleum products; the main activity of refining of crude oil is carried out at the refineries that are located across India. The products that are the outcome of the refining at refineries are transferred to various storage points called petroleum installations/terminals which are essentially factories through various modes of transportation like pipelines, railway wagons, water vessels, Tank Trucks etc. The products that are stored at these petroleum installations/ terminals are subjected to further manufacturing processes like blending with additives etc. to make final petroleum products that are consumable as fuel by the consumers.
- ii. As per the Oil Industry guidelines the petrol to be marketed is to be mixed with 5% ethanol and the said activity is carried out at the

terminal/factory which is essentially a continuation of the manufacturing process which converts the Motor Spirit received from refinery in to a consumable product i.e. petrol which is an automobile fuel.

- iii. There is also blending of Blue dye in to Kerosene for marketing the same as kitchen fuel through the public distribution system of the state which is also a continuation of the manufacturing process which converts the Kerosene received from refinery in to a consumable product i.e. PDS Kerosene which is a kitchen fuel.
- iv. Furthermore, the branded fuels like Turbojet Diesel and Power Petrol are manufactured at the Terminal by blending patented additives (organic chemicals) in to Diesel & Petrol respectively. This is nothing but the continuation of manufacturing process which converts the petrol and Diesel received from refinery in to Turbojet Diesel and Power Petrol which are trademarked premium motor fuels.

From the above, it can be seen that the LPG is refinery product of crude oil and mixture of propane and butane gases in liquid state. The process of bottling of LPG involves refilling and packing of LPG under high pressure into cylinders appropriately following due process for use as a final product of cooking gas by end consumers. The processes at Terminals involved mixing of Petrol/ Kerosene with other chemicals/ additives as per industry guidelines.

- e) Electricity Act 2003 does not define the terms “manufacture”, “industrial” 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.

- f) The State Commission in its Impugned Order while determining tariff for different category of consumers, has identified HT-IV Commercial consumers as all class of consumers listed in LT-VII (A) and LT-VII (C) categories availing supply of electricity at high tension (HT). Under LT-VII (A) category, the various class of commercial consumers have been identified 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 travellers, 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.

- g) In Para 8.47 of the Impugned Order, the State Commission has mentioned that it has considered all the applications received by it for recategorization of the consumers and has decided that no re-categorization is necessary except in the cases indicated in para 8.33 to 8.46 of the Impugned Order. However, the Impugned Order does not include the views of the State Commission on the submissions made by Appellant for re-categorization of LPG Bottling plants to HT Industry category during the hearing process conducted.
- h) The State Commission in its Order dated 18.3.2009 in Petition No 59 of 2008 has held that “The contention of the respondent that LPG Bottling Plants are industries by quoting definition of “industry” from Industrial Disputes Act is not maintainable as in the tariff order it is specifically mentioned that LT IV Industry tariff is applicable for general purpose industrial loads (single or three phase) and the electricity consumer classification and categorization for the purpose of electricity charges are made on the basis of the purpose of use of the electricity, and are not related to the classification made by different departments of State Government or Central Government for other purposes and even the classification followed either in State Government, or in other States is not a guiding principle for fixation of tariff for any particular class of consumers and concluded that activities of LPG Bottling Plants shall be treated only as commercial activity and be classified as such.
- i) Hon’ble Supreme Court in its judgment dated 7th May 2015 in Civil Appeal No 583 of 2005 in Servo-Med Industries Private Limited v/s Commissioner of Central Excise, Mumbai has identified four categories

to ascertain if any process of manufacturing is involved. These categories are as follows:

- 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 article continues 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.

In our considered opinion, the present case of Appellant falls under the category no 2 where the goods remain essentially the same despite the particular process and the changes brought out about by the said process, there can be no manufacture.

- j) Further Hon'ble Supreme Court in another judgment dated 16th September 2008 in Civil Appeal No 4363 of 2002, while deciding the

issue that whether the activity of repacking from bulk to a form suitable to the consumer undertaken by the assessee amounts to manufacture or not, has held that the Tribunal recorded a finding of fact that repacking of the product from bulk to small containers does not amount to manufacture and decided that the finding recorded by the Tribunal is a finding of fact which does not require any interference.

- k) In light of the above findings in the judgments of the Hon'ble Supreme Court and considering the process of Appellant's LPG Bottling plant and Terminal where in the process/activity performed by the Appellant, the goods (LPG/ Petrol/Kerosene) essentially remain the same, we conclude that the process at Appellant's plant is not to be termed as manufacturing process.
- l) The categorization of consumers depends upon the factors which are relevant to the Electricity Act, 2003 particularly, sub section (3) of Section 62 i.e. consumer load factor, power factor, voltage, total consumption of electricity during any specified period or at time at which supplies are required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. This Tribunal in its earlier judgment dated 04.10.2007 in Appeal No. 116 of 2006 has held that under section 62 (3) of the Electricity Act 2003, it is for the State Commission to decide the category in which a consumer should be placed. Even in its other judgment dated 07.08.2014 in Appeal No. 131 of 2013, this Tribunal has held that the categorization of consumer for the purpose of electricity tariff is under the domain of the State Commission.

m) In view of the above, we find no infirmity in the decision of the State Commission in categorizing the Appellant's LPG bottling/filling plants under the commercial category as against the industrial category.

n) Hence this issue is decided against the Appellant.

12. On Issue No 2 i.e. Whether the State Commission is justified in neglecting the submissions made by the Appellant with regard to the tariff recategorization of its Petroleum Terminal at Irumpanam, Ernakulum District and Petroleum Depot at Elathur, Kozhikode District?, we decide as follows;

a) In view of our findings while deciding on the Issue No 1, we have concluded that the process of Appellant's LPG Bottling plant and Terminal is not to be considered as manufacturing process. The same squarely applies to this issue also. Hence we are in agreement with the State Commission's decision while dealing with the Appellant's submissions regarding re-categorization of tariff category of the Petroleum Terminal at Irumpanam, Ernakulum District and Petroleum Depot at Elathur, Kozhikode District

b) Hence this issue is also decided against the Appellant.

13. On Issue No 3 i.e. Whether the considerations applicable for high tariff in case of HT-IV commercial category would be applicable to the nature of operations carried out by the Appellant?, we observe as follows;

a) We have already dealt with the main issue in Para 11 while deciding the Issue No 1. It was observed that while deciding the categorization

for applicability of tariff, the State Commission shall decide the category in which a consumer should be placed.

- b) The State Commission has placed the Appellant plant under HT Commercial category and the tariff applicable for such category shall be applicable for the Appellant's plants.
- c) Hence this issue is also decided against the Appellant.

14. On Issue No 4 i.e. Whether in the facts and circumstances of the present case and in view of section 62(3) of the Act, the Appellant may be treated at par with establishments like shopping malls and multiplexes falling under the HT-IV Commercial category?, our observations are as follows;

- a) In the para 11 of this judgment while deciding the Issue No 1, we have already dealt with the main issue of whether process of LPG bottling / Terminal can be categorised as Manufacturing process or not .
- b) The State Commission in its Impugned Order has while determining tariff for different category of consumers, has identified Appellant Plant under HT-IV Commercial consumers which include various class of 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 travellers, 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. It can be seen that there is wide spectrum of consumers which have been categorised under HT-IV Commercial category.

- c) We have already observed that while deciding the categorization for applicability of tariff, the State Commission shall decide the category in which a consumer should be placed.
- d) The State Commission at Para 8.27 of the Impugned Order has acknowledged the principles identified in Section 62 (3) of the Electricity Act In the Para 8.28 of the Impugned Order, the State Commission has observed that

“The categorisation or classification of consumers is based on appropriate criteria and justified by reasons. The tariff for electricity in the state has been structured mainly based on voltage level at which supply is given and the purpose for which electricity supply is used. Accordingly tariff is being determined at LT, HT and EHT levels as well as based on purposes such as domestic, industrial, agricultural and commercial.”

- e) In view of the facts as considered by the State Commission while acknowledging the principles set out in Section 62 (3) of the Act, we do not like to interfere in the decision of the State commission while considering Appellant plant at par with wide spectrum of consumers as indicated above under HT Commercial category.
- f) Hence this issue is also decided against the Appellant.

15. On Issue No 5 i.e. Whether in the facts and circumstances of the present case, the Appellant is entitled to be re-categorized into a separate category other than HT-IV Commercial or be continued in the HT-Industrial category as has been done in the past having regard to the nature of services provided and also the nature and purpose of consumption of electricity by the Appellant and in view of the significant increase in tariff and cross-subsidy resulting in tariff shock to them?, we decide as follows;

- a) In view of our decision on previous issues, we do not like to interfere in the decision of the State Commission while dealing with this issue of the Appellant. It is upto the State Commission to decide whether there is a need for re-categorisation of Appellant into a separate category other than HT-IV Commercial category, in compliance to the provisions contained in Section 62 (3) of the Electricity Act, 2003.
- b) Hence this issue is also decided against the Appellant.

16. On Issue No 6 i.e. Whether the State Commission while classifying consumers ought to be guided by the Orders passed and views taken by the other Electricity Regulatory Commissions / CGRF/ Ombudsman?, our observations are as follows;

- a) We have observed that State Commissions have to consider the principles set out in Section 62 (3) of the Electricity Act, 2003 while deciding the categorization of consumers for tariff applicability.
- b) The State Commission may take reference from the orders passed by other State Regulatory Commissions while considering the categorization of various class of consumers for tariff applicability but it is not mandatory for compliance, however, the State Commissions

have to comply with the principles set out in Sec 62 (3) of the Electricity Act, 2003.

c) Hence this issue is also decided against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present Appeal have no merits and Appeal needs to be dismissed.

The Impugned Order dated 14.08.2014 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **8th day of September, 2016.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~
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