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Appeal Petition No. P/018/2024
(Present A. Chandrakumaran Nair)
Dated: June-019-2024

Appellant : M/s Bharat Petroleum Corporation Ltd,
Cochin-Coimbatore-Karur-Pipeline-Irimpanam installation, Ernakulam Dist., Pin-682309.

Respondent : Special Officer Revenue, Vydyuthi Bhavanam, Pattom, Thiruvananthapuram.

The Chief Engineer, Distribution Circle, KSE Board Limited, Ernakulam, Ernakulam District.

The Deputy Chief Engineer, Transmission Circle, KSE Board Limited, Kalamassery, Ernakulam.

ORDER

Background of the case

The appellant M/s Bharat Petroleum Corporation Ltd is a Public Sector undertaking engaged in refining and marketing of petroleum products in India. M/s BPCL is on EHT consumer of the licensee KSEBL availed power for the storage, pumping through pipe lines and filling to tank wagon and tank lorry. The tariff applied to the consumer no. LCN -16/1666 is EHT industrial tariff. When the licensee inspected on later it is found there is no manufacturing allied activities are carried out there. As this is only a storage cum dispatch unit, the tariff has been changed retrospectively to EHT commercial. The short assessment was prepared for Rs.7,74,63,150/- for a period from 01/05/2013 to 31/07/2023 and demand notice has been sent to the appellant. The appellant objected the re-categorization and filed the petition to CGRF. The CGRF issued order on 06/03/2024 stating that the tariff decided by the licensee is appropriate and the appellant is liable to pay the amount as per short assessment bill. Aggrieved by the decision of the CGRF, this appeal petition is filed to this authority.

Arguments of the Appellant

Briefly stated, Bharat Petroleum Corporation Ltd. ('BPCL/ Appellant') is engaged in refining and marketing of petroleum products across the country.

It has a 15 million metric ton per annum (MMTPA) refinery ("Kochi Refinery') located in Ernakulam, Kerala. BPCL's Kochi Refinery (BPCL-KRL/ Kochi Refinery') plays a major part as a refiner of finished petroleum products such as petrol, diesel, kerosene, LPG, ATF etc. In order to ensure optimum utilization of space within the refinery premises, the storage facility has been constructed separately at 'Irimpanam Installation', about 4 Kms from the Kochi Refinery. At Irimpanam, BPCL has two installations/ units (collectively Irimpanam Installation), viz., A. First unit comprising storage tanks commissioned in 1992 which receives finished products from Kochi Refinery (bearing consumer no. LCN 16/1666) ('First Unit). At the First Unit, BPCL is engaged in receipt storage, blending (altering), making, and distribution of petroleum products. The storage facility is also responsible for evacuation of finished products from the crude oil processed at the Kochi Refinery, namely, petrol, diesel and kerosene. B. Second unit which pumps/ evacuates the petroleum products processed at Kochi Refinery which are stored at the first unit (bearing consumer no. LCN 15/3809) (Second Unit/ Pumping Station'). The products from Kochi Refinery are pumped at the Irimpanam installation through the Cochin - Coimbatore - Karur Pipeline (CCKPL'), as pipelines are the safest and most efficient way for transport of petroleum products inland.

The Appellant herein it is engaged in receipt, storage, blending (altering), making, and distribution of petroleum products. It receives finished products from BPCL KRL and then evacuates it through tanker loading, tank wagon loading etc. it has been the consistent stand of the Appellant that the work done at Appellant is integral part of the BPCL KRL operations and that the production at the Refinery would be severely hampered in case the storage facilities were not functioning. Indeed, operations of BPCL KRL will virtually come to standstill without the storage and evacuation activities undertaken by the Appellant. This has been acknowledged by Chief Engineer (Commercial & Tariff) in his report. The Appellant receives various petroleum products from BPCL KRL through various pipelines and then stores it in above ground tanks. This product is then dispatched mainly through 3 modes viz., pipeline, tank wagon and tank lorry filling. Out of the total dispatched product 61.17% is through pipelines and 25.04% is through tank wagons/ trains. These activities are not invoiced. Only the balance 13.49% which is dispatched through tank lorries is invoiced to end customer.

A table showing the various modes of dispatch of products by the Appellant from Apr 2023 to January 2024 is produced below:

DESPATCH SUMMARY (in KL)-2023-24					
MONTH	**ROAD**	**RAIL**	**PIPE**	**BARGE**	**TOTAL (KL)**
Apr'23	92244.000	191952.080	478012.399	1613.671	763822.150
May'23	105925.400	188478.150	417406.905	2034.226	713844.681

Jun'23	97269.000	172398.000	424152.000	1637.398	695456.398
Jul'23	87436.00	181718.380	490225.924	768.900	760149.204
Aug'23	106668.789	172422.890	383112.567	247.201	662451.447
Sep'23	98325.000	171773.250	392713.514	416.826	663228.590
Oct'23	98248.728	148991.200	410224.728	216.226	657680.882
Nov'23	95950.000	169180.060	401282.105	104.529	666516.694
Dec'23	102543.000	192806.760	503650.323	419.010	799419.093
Jan'24	103189.000	218270.840	516970.153	803.613	839233.606
Total	**987798.917**	**1807991.610**	**4417750.618**	**8261.600**	**7221802.745**
%	**13.38**	**25.04**	**61.17**	**0.11**	

Thus, it cannot be said that any commercial activities are undertaken by the Appellant herein and it is not marketing any commodity.

While so, KSEB initiated proceedings under Regulation 97 of the Kerala Electricity Supply Code 2014 (Supply Code') for suo moto reclassification of consumer category. On 25.04.2023 formal notice was issued under Regulation 97 of the Supply Code stating that no manufacturing process was being undergone at the Irimpanam Installation. Relying upon the orders of the Kerala State Electricity Regulatory Commission ('KSERC'), in OA 18/2007 filed by HPCL, the Special Officer (Revenue) noted that the tariff has to be changed to EHT 110kv Commercial with effect from 01.08.2018. The Appellant responded to this by way of letter dated 28.04.2023 clarifying and reiterating that the work done at Irimpanam Installation was integral part of the Kochi Refinery operations and that the production at the Refinery would be severely hampered in case the storage facilities were not functioning. It was further clarified that there were no similarities in the activities undertaken by BPCL at Irimpanam Installation and the LPG bottling plant that was the subject matter of the proceedings before the KSERC in OA 18/2007. Eventually, a joint inspection was then conducted on 20.07.2023 by the Distribution and Transmission wings regarding re-categorisation of tariff as has been decided in the meeting on 23.06.2023. The copy of the report was communicated along with letter dated 22.07.2023 from the Deputy Chief Engineer, KSEB.

Thereafter, by way of communication dated 04.08.2023 (incorrectly noted as 04.07.2023) by then sent by the Chief Engineer (Distribution Central), KSEB directed that both units, i.e., First Unit and the Second Unit/ Pumping Station, "may be recategorised to commercial tariff". On 26.08.2023, the Appellant submitted representation to the Special Officer (Revenue), reiterating its stand that the activities undertaken at the Irimpanam Installation are integral to the functioning of Kochi Refinery. It was also mentioned that the Irimpanam Installation is the primary hub for evacuation of finished products of the Refinery. It was also highlighted that even assuming recategorisation was justifiable, it cannot be made retrospective as sought to be done by KSEB. Reference in this regard may be

had to Regulation 97(4) of the Supply Code which states that arrears or excess charges shall be determined on the actual period of reclassification or a period of 12 months, whichever is lesser. Further, as per Section 62(4) of the Electricity Act 2003, tariff for consumers cannot be determined or modified more than once in any financial year. While the above representation/ communication was pending consideration before the KSEB, the Appellant was issued the electricity bills under commercial category which eventually included an amount of Rs. 3,43,62,195.00 as arrears.

The Appellant has been making the payment of energy charges under protest as per Regulation 130 and 131 of the Supply Code. The Appellant also specifically objected to the arrears shown as Rs. 3,43,62,195.00 on the grounds no explanation was provided nor any clarification given on how the above figure was arrived at. The Appellant also submitted letter to the Chairman, KSEB reiterating the contentions and submissions on 04.10.2023 and the Executive Director (I/C), Kochi Refinery, General Manager, HR, Kochi Refinery, General Manager (Ops.), Retail-Irimpanam Installation & (Ops.), Retail-Kerala & Head, Pipelines-South had a meeting with Chairman, KSEB on 04.10.2023 wherein he reiterated the contentions and submissions made by the Appellant following which letter was submitted. Since no action was taken by KSEB, the Appellant was constrained to file Complaint No. 72/23-24 before the Hon'ble Consumer Grievance Redressal Forum, Central Region ('CGRF'). During the pendency of the proceedings before the CGRF on 26.12.2023, the Respondent issued letter no. SOR/HTB 16/ 1666/2023 dated nil received on 27.01.2024 directing the Appellant to remit an amount to remit an amount of Rs. 7,74,63,150/- on or before 27.02.2024. It is pertinent to note that even though, admittedly, the procedure was initiated against the Complaint under Regulation 97, the demand raised by way of letter no. SOR/HTB 16/ 1666/2023 dated nil was under Regulation 134(1) of the Supply Code.

The Appellant responded to the said letter by sending letter on 13.02.2024 stating that the proceedings initiated against the Appellant under Regulation 97 of the Kerala Supply Code 2014, which formed the basis of the demand notice, had before the CGRF. Apart from the above, letter was issued by the Respondent on 27.12.2023, being letter no. SOR/HTB 15/ 3809-2023-24/142 dated 27.12.2023 revising re-categorization of tariff category from 01.05.2013. By way of letter dated 23.01.2024, the Appellant informed the Respondent that (a) proceedings were pending before this Forum, and (b) it is completely against notices issued to BPCL under Regulation 97 of the Supply Code and is blatantly violative of the principles of natural justice.
Even though two complaints were filed separately by the First Unit and the Second Unit/ Pumping Station, because their activities, though integral to the functioning of the Kochi Refinery, were completely distinct and separate. However, the CGRF has failed to take note of this clear and obvious distinction and has proceeded to address both the complaints together. Unfortunately, after recording the Appellant's contentions that 'without the

installations at Irimpanam (i.e., the First Unit and the Second Unit/ Pumping Station), operations at their Kochi Refinery would face logistical challenges and be effectively inoperable' and further that 'the provisions of the Regulation 97, the sub-regulation 4 of the same regulation allows the licensee to charge the arrear from a consumer for a maximum period of one year only', the CGRF has summarily rejected the arguments with a simple statement that 'as per prevailing tariff orders, activities like petrol /diesel/ LPG/CNG bunks and filtering, packing, and other associated activities of oil brought from outside fall under the commercial tariff. Placed in such a situation, the Appellant has preferred this Appeal before the Hon'ble State Electricity Ombudsman on the following among other:

The CGRF has not appreciated the contentions raised by the Appellant and the judicial precedents and the law applicable to the case conscientiously. The CGRF has grossly erred in simply disregarding the contentions of the Appellant without analyzing them and without giving findings on them and without indicating any reasons why the contentions did not merit consideration. The CGRF has failed to consider that the nature of activities undertaken by the Appellant. It has also failed to consider that across the country pumping stations/ activities are undertaken as part of the refinery's activities and premises. BPCL Manmad pumping station has been categorized as industrial by Maharashtra State Electricity Distribution Co. Ltd (Consumer No. 077569023230). BPCL Washala pumping station has been categorized as industrial by Maharashtra State Electricity Distribution Co. Ltd (Consumer No. 015559020149). Unfortunately, due to the peculiar geography of Kerala, specifically the area near BPCL- KRL which has a lot of marshy land, wetlands and water bodies, there was no space to establish a pumping facility within the BPCL-KRL premises. It is for this reason that the Appellant pumping unit is situated about four kms from BPCL-KRL. The Appellant herein only pumps/ evacuates the petrol, diesel and kerosene processed at Kochi Refinery The Appellant operates HT motor driven pumps in order to ensure pumping/ evacuation of diesel, kerosene & petrol produced at Kochi Refinery to upcountry locations at Coimbatore and Karur BPCL Terminals. The CGRF has failed to consider the activities of the Pumping Station cannot be considered as "activities of oil brought from outside" inasmuch as they are integral to the activities of the Kochi Refinery. The CGRF has not at all consider the importance of the activities of the Appellant to the Kochi Refinery. The CGRF has ignored the real test, that is, whether the Appellant's activities are integral to the activities of BPCL-KRL or not. The answer can only be in the affirmative. The CGRF has not considered the that the activities undertaken at the Irimpanam Installation is essentially pumping the explosives (i.e., finished products) which entails dividing into parts or otherwise splitting up or un-marking the explosives. The CGRF has not considered the various precedents including decision of the the Bombay High Court in Laxmibai Atmaram v. Chairman and Trustees, Bombay Port Trust reported at AIR 1954 Bom 180, State of Maharashtra v. Sarva Shramik Sangh, Sangli reported at (2013) 16 SCC 16, and Qazi

Noorul, HHH Petrol Pump v. Deputy Director, ESIC, reported at (2009) 15 SCC 30, all of which hold that a process employed for the purpose of pumping water and pumping oil is a manufacturing process. The CGRF has also miserable failed to consider the fact that the judgment of the Hon'ble Supreme Court in civil appeal no. 7235 of 2009 (M/s PremCottex Vs. Uttar Haryana Bijli Nigam Limited and others) has no applicability to the present fact situation. Insofar as Prem Cottex is concerned, the said case dealt with an order of the National Consumer Disputes Redressal Commission dealing with an issue of whether there was 'deficiency in service'. The case was challenging the short assessment notice issued for wrongly recorded bills as a result of incorrect multiply factor (MF). It has nothing to do with suo moto reclassification of tariff which is the subject matter of the present case.

The CGRF has conveniently ignored the applicability of Regulation 97(4) of the Supply Code. The amended Regulation 97(4) of the Supply Code states that arrears or excess charges shall be determined on the actual period of reclassification or a period of 12 months, whichever is lesser. The CGRF has disregarded the fact that Regulation 97 of the Supply Code is a self-contained code and deals with the procedure and consequences of suo moto classification by the licensee. No reasons have been recorded by the CGRF on this point. The CGRF ought to have considered that demand under Regulation 134(1) of the Supply Code can only be made if there is 'undercharging' in the billing. This is evident from a reference to the Chapter under which the Regulation 134 has been placed. The Respondent cannot initiated proceedings for reclassification under Regulation 97 of the Supply Code and then raise a demand for undercharging under Regulation 134. Any arrears to be paid following the procedure stipulated under Regulation 97 can only be claimed under Regulation 97(4) of the Supply Code. Any other interpretation is not only incorrect, it will also render Regulations 97(4) and 97(5) irrelevant. These aspects, thought recorded as submissions of the Appellant, have not been considered at all by the CGRF.

It is prayed that this Hon'ble Ombudsman:
(a) Set aside the order of the CGRF dated 06.03.2024 in Complaint No. 72/2023-24 (b) Set aside the proceedings initiated against the Appellant under Regulation 97 of the Kerala Electricity Supply Code 2014.(c) Set aside the change of tariff of the Appellant from EHT (110 kV) Industrial to EHT Commercial (d) Set aside report of the joint inspection conducted on 20.07.2023 at the premises of the Appellant by the distribution and transmission wings regarding the re-categorisation of tariff under EHT Commercial. (e) Direct the Licensee to re-calculate the bills issued to the Appellant categorising the Appellant's tariff as EHT 110KV Industrial. (f) Direct the Licensee not to disconnect the electric connection to the Appellant till orders are issued. (g) Grants or such other reliefs as are just and proper in the circumstances of the case.

Arguments of the Respondent

M/s Bharat Petroleum Corporation Limited (LCN-16/1666) is a live Extra High Tension Consumer under Colony Maintenance Section. At present, this consumer has a connected load of 3743.03 KW and contract demand of 850 KVA. At the time of availing EHT connection and furnishing EHT agreement, EHT-110 KV industrial tariff was fixed for the firm. But later on while inspecting the premises of the consumer by Deputy Chief Engineer, Transmission Circle, Kalamassery to ascertain the activity in the premises, it was noticed that no manufacturing/ allied activities were carried out there. Hence clarification was requested from the Chief Engineer (Commercial & Tariff) by the Deputy Chief Engineer Kalamassery regarding the tariff of EHT connection bearing LCN 16/1666. In reply, the Chief Engineer (Commercial & Tariff) reported that no manufacturing activities were undergone in the premise of BPCL Irimpanam bearing consumer number 16/1666. The premises of the consumer with this connection was storage cum dispatch unit of BPCL - KR. Hence tariff has been changed retrospectively from EHT-Industrial to EHT Commercial and the matter was informed the consumer vide letter dated 25.04.2023. Against this the consumer filed objection before the Chief Engineer (Distribution Central). Consequent on the hearing conducted on 23.06.2023 by the Chief Engineer (Distribution Central) with M/s BPCL representatives, a joint inspection was conducted in the premises of the consumer bearing Consumer No. 16/1666 by the Distribution and Transmission wing to investigate the nature of activities performing inside the premises. The Chief Engineer (Distribution Central) vide letter dated 04.08.2023 informed this office that this consumer may be re-categorized to Commercial Tariff. Then the tariff of the consumer has been changed from EHT110 KV Industrial to EHT 110 KV Commercial from 01.05.2013. Thus, the invoices issued to the consumer from 01.05.2013 to 31.07.2023 were revised accordingly. Against this, the consumer filed a petition, OP No. 72/2023-24 before the Chair Person, Consumer Grievance Redressal Forum Central Region, Ernakulam seeking direction to set aside the proceedings initiated against the consumer to change the tariff to EHT 110KV Commercial w.e.f 1/05/2013 and realize the tariff difference of Rs.7,74,63,150/-. As per order dated 06.03.2024, the Hon'ble CGRF ordered that the tariff change made by the licensee from EHT Industrial to EHT Commercial for both the premises is deemed appropriate. The forum also ordered that the petitioner is liable to pay the short assessment bill issued by the licensee. Against this order, the consumer has filed a representation, P/018/2024 before the State Electricity Ombudsman.

M/s Bharat Petroleum Corporation Limited (LCN - 16/1666) is a live Extra High Tension consumer of the Kerala State Electricity Board Limited, which comes under the jurisdiction of Transmission Circle, Kalamassery. Date of connection of the consumer is 29th December 1997. The connected load (power) of the consumer is 3398.03 KW and light load at present is 345 KW.

The present contract demand is 850 KVA. The tariff category of the consumer is EHT Commercial.

The Deputy Chief Engineer, Transmission Circle, Kalamassery sent a letter to the consumer and requested to clarify the actual nature of activity take place in the premise at Irimpanam. In reply, the consumer opined that M/s BPCL is engaged primarily in refining and marketing of petroleum products across the country. The consumer also states that pipeline and energy consumption for its operation is an integral part of Kochi Refinary and it was not used for any commercial activities and only used for evacuation of manufactured finished products of Kochi refinery. On 25.04.2023, this office sent an intimation notice as prescribed in Kerala Electricity Supply Code 2014 for hearing the consumer regarding the re-categorization of tariff under EHT 110 KV Commercial. A hearing was conducted before the Chief Engineer (Distribution Central) regarding the dispute over the change in the tariff of the consumer. Following the decision taken at the hearing, a joint inspection at the consumer premises (LCN-16/1666) by the Distribution and Transmission wing was conducted on 20.07.2023. The activities happening in the consumer premises is storing the finished products from M/s BPCL KRLviz, Petrol, Diesel, Kerosene, Aviation fuel etc. 24X7 operations are going on inside the premises. The parent industry M/s BPCL KRL and this unit is around 8 km apart. Huge pipeline connects the parent industry to this unit. As per the inspection report, two units are working in the premises of BPCL at Irimpanam. First unit (LCN-16/1666) is engaged in the process of storing the finished products from M/s BPCL KRL in 43 large floating tanks and pumping the same to wagons and tankers. Second unit is engaged in the process of pumping of crude oil derivatives stored in the storage tanks of first unit through long distance interstate pipe lines to Coimbatore and Karur. The first unit was commissioned in the year 3 1992 and the second unit was commissioned during 2002. The second connection was effected in the name of M/s Petronet CCKL. Later during 2018 M/s BPCL has taken over the same from M/s Petronet CCKL.

As per the report of the Chief Engineer (Commercial & Tariff), no manufacturing activities are undergone in the premise of BPCL Irimpanam bearing consumer number 16/1666. The tariff has been changed retrospectively from EHT-Industrial to EHT Commercial and the matter was informed to the consumer vide letter dated 25.04.2023. Against this, consumer filed objection before the Chief Engineer (Distribution Central). Then a hearing was conducted on 23.06.2023 on the issue of re-categorization of tariff of BPCL. During hearing, Deputy Chief Engineer Transmission Circle opined that activity to be categorized under industrial is not seen at both the premises of BPCL. It does not involve any manufacturing process or production of new item from raw materials or any transformation of input raw materials into a new product. Hence the activity does not come under manufacturing. Also, the Senior Manager of BPCL Irimpanam installation confirmed that sale of product is there at Irimpanam

installation (LCN-16/1666). Consequent to the hearing conducted on 23.06.2023 by the Chief Engineer (Distribution Central) with M/s BPCL representatives, a joint inspection was conducted at the premise of the consumer bearing Consumer No. 16/1666 by the Distribution and Transmission wing to investigate the nature of activities performing inside the premise. In the inspection report, it is clearly stated that evacuation of final products received from BPCL - KRL through huge pipe line, its storage, delivery and sales are the activities in the premises. As no industrial activities are seen, the inspection team recommended that both the units need to be categorized under commercial tariff. Also from the tariff order dated 14.08.2014 demands all LPG bottling plants and units carrying out filtering, packing and other associated activities of oil brought from outside are to be categorized under commercial tariff. In general "Industry" refers to any business dealing with manufacturing of goods and "Commercial" refers to any business done with the sole motive of gaining profit. Here the parent industry M/s. BPCL .KRL and these pumping units are around 8KM apart and huge pipelines connect the parent industry to these units. Evacuation of final products from M/s BPCL, its storage, delivery and sales are done in these two units and no specific industrial activities are seen. Hence both the units of BPCL were categorized to commercial tariff. Based on this, the bills from September 2023 onwards were issued to the consumer after changing the tariff to EHT 110KV commercial. Also, the bills issued to the consumer from 01.05.2013 to 15.08.2014 were revised in non-industrial tariff and the bills from 16.08.2014 to 31.07.2023 were revised in commercial tariff. The bill for the month of November 2023 and December 2023 were given to the consumer including the arrear amount due to revision. The petitioner claims that the functioning of BPCL's establishment at Irimpanam is similar to the functioning of pumping stations under the Kerala Water Authority. But the operation of pumping stations of Kerala Water Authority is related to public service. There is no profit motive in the operation of the organization similar to K.S.E.B. Limited. And the most important factor is that industrial tariff has been allowed to the pumping stations of Kerala Water Authority only after getting approval from Hon'ble KSERC.

On examining various Tariff Revision orders it is evident that Non-industrial tariff is applicable to the petitioner's service connection with effect from 01.05.2013. Hence the monthly regular bills for the period from 05/2013 to 07/2023 were revised and accordingly bills from 01.05.2013 to 15.08.2014 were billed in EHT - Non Industrial Tariff and from 16.08.2014 to 31.07.2023 were billed in EHT 110 KV Commercial Tariff. Then a demand notice was issued to the consumer as per Regulation 134(1) of Kerala Electricity Supply Code 2014 for Rs.7,74,63,150/- and requested the petitioner to remit the arrear amount arrived after revision (Ext. R1) on or before 27.02.2024. Regulation 134 (1) of the supply code is reproduced below:
134. Under charged bills and over charged bills. - (1) If the licensee establishes either by review or otherwise, that it has undercharged the

consumer, the licensee may recover the amount so undercharged from the consumer by issuing a bill and in such cases at least thirty days time shall be given to the consumer for making payment of the bill.
As a distribution licensee, KSEB Limited has every right to claim such escape assessment as per Regulation 134 (1) of Kerala Electricity Supply Code 2014.

As per Regulation 97(1) of Kerala Electricity Supply Code 2014, "if it is found that a consumer has been wrongly classified in a particular category or the purpose of supply as mentioned in the agreement has changed, the licensee may suo moto reclassify the consumer under the appropriate category". Accordingly notice was issued to the consumer and reclassified from EHT Industrial to EHT Commercial. As per Regulation 134(1) the licensee can issue an arrear bill for undercharged bills pertaining to any period, if it can be proved. In this context, the Order in Petition No. RP 3/2021 dated 15.11.2021 (K.S.E.B. Limited V/s Bennet Coleman & Co. Ltd.) of the Hon'ble Kerala State Electricity Regulatory Commission may be perused. In this, the Hon'ble Commission had revised their order, wherein, the period of assessment which was limited to two years was revised to 66 months (full period). This was based on the orders issued by the Hon'ble Supreme Court in Civil Appeal No. 7235 of 2009 (M/s Prem Cottex V/s Uttar Haryana Bijli Vitran Nigam Ltd) in the case of short assessment due to wrongly recorded multiplication factor (MF recorded as 5 instead of 10) in the bills issued from 08.06.2006 to 08/2009 and in Civil Appeal No. 1672 of 2020 (Assistant Engineer, Ajmer Vidyut Vitran Nigam Limted V/s Rahamatullah Khan alias Rahamjulla) in the case of short assessment due to wrong tariff code (from 07/2009 to 09/2011) where in, it was clearly stated that escaped amount can be billed for the full period during which it had become due. There is no condition that, a bill can be issued only under Sec. 97. Section 97(1) is a condition for changing the tariff as per the tariff order of the Commission suo moto and inform the consumer of the proposed reclassification. Hence, here the tariff was changed by the licensee informing the consumer as per Sec. 97(1). The subsequent sections 97(4) & (5) have no relevance in this case since the period of billing in such cases has been clearly specified by the Hon'ble Supreme Court and Hon'ble KSERC in the above mentioned cases. In the light of the order of the Hon'ble Supreme Court and KSERC, the consumer is liable to pay the arrear bill amount issued by KSEB Ltd.

Here in the instant case, the licensee wrongly classified the consumer under EHT Industrial tariff at the time of connection. Later, on detailed analysis of the activities in the premise, the agreement authority had come in to a conclusion that the activities carried out in the premise is commercial in nature rather than industry and hence reclassified under EHT Commercial tariff. A close reading of sub regulation(1) of Regulation 97 of the code revealed that the regulation is mainly applicable for wrongly classified consumers and the same is also applicable to the petitioner. Also Regulation 97 of the Supply code empowers the licensee to suo-motu re-classify the

consumer category in accordance with the activities carried out in the premise and as per the tariff order in force. In the Tariff Revision Order dated 01.05.2013, two categories namely EHT Industrial and EHT Non-Industrial are included. Tariff revision orders from 16.08.2014 have included Commercial tariff instead of Non-Industrial tariff. Based on this type of classification, the consumer's tariff, which was wrongly classified as industrial is changed in to commercial with effect from 01.05.2013. This was clarified as per the order dated 01.08.2018 of the Hon'ble Kerala State Electricity Regulatory Commission in OA No. 18/2017 between Hindustan Petroleum Corporation Limited and K.S.E.B Limited.

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 the case of HPCL in OA No. 18/2017, the State Commission has differentiated between the units which use electricity for manufacturing activity and those units which are only engaged in packing of oil brought from outside which has been considered as commercial activity. Similarly, BPCL's parent unit, where petroleum is refined to produce new products, is eligible for the industrial tariff, and the two units at Irimpanam, where the units are engaged in storage and distribution of these products, are eligible for commercial tariff. 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. APTEL has already upheld that the categorization under Factories Act or any other Acts does not mandate the Commission to categorize the tariff. Further, classification made by other State / Central Govt has no relevance in tariff categorization by the Commission. Thus it is very clear that the State Commissions are empowered to categorize the consumers of the state which it deems fit considering the circumstances in each state. The State Electricity Regulatory Commission is a quasi- judicial body functioning as per the provisions of the Electricity Act -2003 (Central Act 36 of 2003). As per the Section 62 and Section 86(1)(a) of the Electricity Act 2003, the tariff determination is one of the statutory functions of the SERCS. The subsection (3) of Section 62 of the EA -2003 which is extracted hereunder provides the various factors to be considered while categorising the consumers while determining the tariff.
(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".

KSERC has already clarified the position in its order dated 18.03.2009 in TP 59/2008. The relevant portion of the order is extracted below.
Electricity consumer classification and categorization for the purpose of electricity charges are made on the basis of the purpose of use of electricity and are not related to the classification made by different departments or State Government or Central Government for other purpose. Thus, the classification followed either in the State Government or in other state 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'. Considering the settled position, the contention of the petitioner to quote the other statutes for the purpose classifying the petitioners plant as industrial cannot be acceptable. Here in this case, the end objective of supply is to deliver petroleum products in to pipelines to customers as per the contract for off-take with them, ie the marketing of petroleum products. Thus, for marketing a commodity, the most appropriate category is commercial. As a distribution licensee, KSEB Limited has every right to claim such escape assessment as per Regulation 134 (1) of Kerala Electricity Supply Code 2014. The legal right of the distribution licensee has categorically emphasized by the Hon'ble Supreme Court of India in its judgment in Civil Appeal No. 7235 of 2009 (M/s Prem Cottex Vs Uttar Haryana Bijli Nigam Limited and others), wherein the Hon'ble Apex Court has upheld the rights of the supply licensee to raise and recover the genuinely due amounts. After due consideration of the said Apex Court judgment in this regard, the Kerala State Electricity Regulatory Commission passed its order in the complaint filed by M/s Bennet & Coleman Company Ltd against the short assessment bill issued by KSEB Ltd that the bill issued to the consumer is in order and the same is to be paid by the consumer within 30 days.Moreover the Kerala State Electricity Regulatory Commission in its order dated 01.08.2018 in OA No. 18/2017 filed by M/s HPCL ordered that LPG bottling/filling plants, petroleum terminals of the petitioner and similarly placed consumers falls under 'commercial category' for the purpose of levy of electricity charges. A brief history of the case of M/s HPCL is described for favour of your reference. Aggrieved by the KSEB Ltd decision of changing the tariff to commercial category, M/s HPCL has filed a writ petition W.P.(C) No. 1866/2012 before the Hon'ble High Court of Kerala. The Hon'ble Court in its order dated 03.04.2012 referred the matter to Kerala State Electricity Regulatory Commission directing to take decision in the matter of fixing the tariff. KSERC vide order dated 25.07.2012 has maintained the categorization of tariff as commercial. Aggrieved by this order,M/s HPCL filed a writ petition before the Hon'ble High Court of Kerala. The Hon'ble Court vide order dated 13.12.2012 dismissed petition holding that the statutory remedy by way of appeal lies with the Appellate Tribunal for Electricity.

The appeal filed by M/s HPCL before the Appellate Tribunal was dismissed due to delay in filing, with the liberty to take up the matter in future tariff determination process. M/s HPCL on 02.07.2014 had filed a written submission (including the proces in the plant) before the Hon'ble Kerala State Electricity Regulatory Commission. KSERC vide order dated 14.08.2014 categorized M/s HPCL under Commercial category. The consumer filed Appeal No. 265/2014 before the Appellate Tribunal. Appellate Tribunal dismissed the appeal and upholds the KSERC order dated 14.08.2014. The consumer filed a Civil Appeal No. 11150/2016 before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its order dated 09.12.2016 disposed of the appeal asking Hon'ble Kerala State Electricity Regulatory Commission to reconsider the matter. The Hon'ble KSERC vide its order 01.08.2018 has concluded that the LPG bottling /filling plants, petroleum terminals and depots of M/s HPCL and similarly placed consumers falls under commercial category for the purpose of levy of electricity charges as the activity performed in the LPG bottling plants 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 tranformation of input raw materials in to a new product and no physical or chemical change of any commodity is taking place at any stage in the above process.

As per the Tariff Revision order dated 14.08.2014 onwards, all LPG bottling plants and units carrying out filtering, packing and other associated activities using extracted oil brought from outside are categorized under LT - VII (A) commercial tariff. All classes of commercial consumers listed in LT-VII (A) and LT VII (C) categories availing supply of electricity at high tension are included in HT - IV commercial tariff and the commercial institutions availing power at EHT are included in EHT commercial tariff in the same tariff revision order. Also the Hon'ble Kerala State Electricity Regulatory Commission in its present Tariff order (w.e.f. 01.11.2023 to 30.06.2024) demands all LPG bottling plants and units carrying out filtering, packing and other associated activities of oil brought from outside are to be categorized under commercial tariff. In the above circumstances, it is necessitated to re categorize the unit LCN 16/1666 in commercial tariff i.e., EHT commercial from 01.05.2013 i.e., from the Tariff Revision order dated 01.05.2013, as per Regulation 134(1) of the Kerala Electricity Supply Code 2014. In the light of the judgment of the Hon'ble Supreme Court and the order of the Kerala State Electricity Regulatory Commission, the petitioner is liable to pay the balance arrear amount((tariff difference, Rs.7,74,63,150/-) to the Board.

Counter Arguments Filed by the Appellant

The Respondent has repeatedly conflating the activities of both the First Unit and Second Unit (as referred to in the Appeal) in an attempt to confuse

this Hon'ble Tribunal about the Appellant's actual activities. Insofar as the Appellant herein in considered, it is engaged in receipt, storage, blending (altering), making, and distribution of petroleum products. It receives finished products from BPCL Kochi Refinery (BPCL KRL') and then evacuates it through tanker loading, tank wagon loading etc. it has been the consistent stand of the Appellant that that the work done at Appellant is integral part of the BPCL KRL operations and that the production at the Refinery would be severely hampered in case the storage facilities were not functioning. Indeed, operations of BPCL KRL will virtually come to standstill without the storage and evacuation activities undertaken by the Appellant. This has been acknowledged by Chief Engineer (Commercial & Tariff) in his report.

The Respondent also repeatedly states that the distance between the Appellant's installation and BPCL KRL is 8 kms which is by road, when in fact it is less than 4 kms when through pipelines, which distance has to be reckoned in the instant case. Insofar as the allegations of the so-called 'commercial activities' are concerned, it is clarified that Appellant receives various petroleum products from BPCL KRL through various pipelines and then stores it in above ground tanks. This product is then dispatched mainly through 3 modes viz., pipeline, tank wagon and tank lorry filling. Out of the total dispatched product 61.17% is through pipelines and 25.04% is through tank wagons/ trains. These activities are not invoiced. Only the balance 13.68% which is dispatched through tank lorries is invoiced to end customer. The activities happening in the consumer premises is only product evacuation (derivatives of crude oil) through wagons, tankers and long- distance interstate pipelines is totally false. It is submitted that the premises under LCN-16/1666, is engaged in receipt, storage, blending (altering), making, and distribution of petroleum products. It receives finished products from BPCL KRL and then evacuates it through tanker loading, tank wagon loading etc. and the work done is integral part of the BPCL KRL operations and that the production at the Refinery would be severely hampered in case the storage facilities were not functioning. Indeed, operations of BPCL KRL will virtually come to stand still without the storage and evacuation activities undertaken by the Irimpanam Installation. The premises is a local hub for Southern Region of India. This has been acknowledged by Chief Engineer (Commercial & Tariff) in his report.

The pumping station of the Appellant thus is integral part of refinery at Kochi Refinery and its purpose is to ensure pumping/ evacuation of diesel, kerosene & petrol to upcountry locations at Coimbatore and Karur BPCL Terminals. It was not used for any commercial activity whatsoever, but only for pumping/ evacuation of the manufactured finished product. The Respondent has also alleged that the Appellant is "marketing a commodity" and for that commercial category would be appropriate. The said statement is not only incorrect but also reflects an incorrect understanding of the activities of the Appellant. The Appellant does not undertaking any

marketing of any commodity. The Appellant submits that the Respondent is repeatedly relying upon bald and baseless assertions without any iota of proof or substantiation and accordingly, its statements including on the nature of activities undertaken by the Appellant are liable to be rejected. The Respondent has ignored the real test, that is, whether the Appellant's activities are integral to the activities of BPCL- KRL or not. The answer can only be in the affirmative.

The Respondent has for reasons best known to it, ignored Regulation 97(4) of the Supply Code. The amended Regulation 97(4) of the Supply Code states that arrears or excess charges shall be determined on the actual period of reclassification or a period of 12 months, whichever is lesser. This part has been omitted by the Respondent. Before 2020, Regulation 97(4) of the Supply Code read as quoted by the Respondent in the Statement of Facts. However, after amendment in 2020, Regulation 97(4) saw a huge shift. The amended Regulation 97(4) is quoted herein below for ease of reference:
97. Suo motu reclassification of consumer category by the licensee.-
(1) If it is found that a consumer has been wrongly classified in a particular category or the purpose of supply as mentioned in the agreement has changed or the consumption of power has exceeded the limit of that category as per the tariff order of the Commission or the category has changed consequent to a revision of tariff order, the licensee may suo motu reclassify the consumer under appropriate category.
(2) The consumer shall be informed of the proposed reclassification through a notice with a notice period of thirty days to file objections, if any.
(3) The licensee after due consideration of the reply of the consumer, if any, may reclassify the consumer appropriately.
(4) Arrear or excess charges shall be determined based on the actual period of re classification or a period of twelve months whichever is lesser.
(5)Twelve monthly installments for the payment of the arrear charges determined under sub regulation (4) above may be allowed on the request of the consumer without interest.

It is submitted that Regulation 97 of the Supply Code is a self-contained code and deals with the procedure and consequences of suo moto classification by the licensee. The Respondent has contended that the Regulations 97(4) and 97(5) are irrelevant in view of the judgments of the Hon'ble Supreme Court which have been cited in the Statement of Facts. The said judgments have no relevance in the present case inasmuch as they do not discuss the import and scope of the Regulation 97(4) of the Supply Code post the 2020 amendment. The interpretation that the clauses can be made applicable for subsequent billing period is not only incorrect but also illogical inasmuch as the amended Regulation 97(4) does not say so. It is pertinent to note that even though, admittedly, the procedure was initiated against the Complaint under Regulation 97, the demand was under Regulation 134(1) of the Supply Code. Demand under Regulation 134(1) of the Supply Code can only be made if there is 'undercharging' in the billing.

This is evident from a reference to the Chapter under which the Regulation 134 has been placed. The Respondent cannot initiated proceedings for reclassification under Regulation 97 of the Supply Code and then raise a demand for undercharging under Regulation 134. Any arrears to be paid following the procedure stipulated under Regulation 97 can only be claimed under Regulation 97(4) of the Supply Code. Any other interpretation is not only incorrect, it will also render Regulations 97(4) and 97(5) irrelevant.

The Respondent had not made any such demand and re-classification for the last 10 years and unilaterally demanding now from the petitioner's unit, even when the same is not made applicable by other electricity board/commission itself shows that the decision of the respondent is arbitrary by nature and without sufficient reasoning. Moreover, the electricity act/supply code do not give any power or authority to the respondent to decide the same unilaterally based on any socio-economic condition. The Respondent's reference to the KSERC Order dated 01.08.2018 in OA 18/2017 has no bearing on the present case and is in no way binding on the Appellant's activities of pumping petrol, diesel and kerosene. OA 18/ 2017 dealt with LPG bottling plant and is irrelevant insofar as the Appellant is considered. And in any event, the said order is under challenge before the Appellate Tribunal for Electricity (APTEL). The Respondent has also referred to two judgments of the Hon'ble Supreme Court, being Prem Cottex v. Uttar Haryaba Bijli Nigam Ltd. & Ors., Civil Appeal No. 7235 of 209 and M/s Bennet & Coleman Company Ltd. Insofar as Prem Cottex is concerned, the said case dealt with an order of the National Consumer Disputes Redressal Commission dealing with an issue of whether there was 'deficiency in service'. The case was challenging the short assessment notice issued for wrongly recorded bills as a result of incorrect multiply factor (MF). It has nothing to do with suo moto reclassification of tariff which is the subject matter of the present case. Similarly, in Bennet, Coleman & Co. Ltd., Order dated 15.11.2021 in RP No. 3/2021, KSERC did not deal with re- classification of tariff under Regulation 97 or the implications of Regulation 97(4) on demand for arrears in respect of proceedings instituted therein. Therefore, neither of the said orders are applicable in the present case.

The claim of Respondent "the tariff order dated 14.08.2014 demands all LPG bottling plants and units carrying out filtering, packing and other associated activities using extracted oil brought from outside are to be categorized under commercial tariff." is totally misplaced. The pumping activities carried out at the premises of LCN-16/1666 is in no way connected to the tariff order against connections given to LPG Bottling plants. It is submitted that the premises under LCN-16/1666 is neither LPG bottling/ filling plant nor petroleum terminals/ depot, but it is Petroleum Installation of Public Sector Oil Industry under MOP& NG and we carry out extensive operations of petroleum product receipt, storage, blending and then dispatch through various modes viz., tank lorry, tank wagon, pipeline transfer, barge etc. to

the public of Kerala state and we are not involved in any commercial activity as it is an "essential commodity and the rates are determined by the Central and State governments." In light of the above, the submissions made by the Respondent in the Statement of Facts are liable to be rejected and the prayers sought by the Appellant has to be allowed.

Firstly, the predominant activities of the Appellant herein is receipt, storage, blending (altering), making and distribution of petroleum products. It receives finished products from BPCL KRL and then evacuates it through tanker loading, tank wagon loading etc. it has been the consistent stand of the Appellant that that the work done at Appellant is integral part of the BPCL KRL operations and that the production at the Refinery would be severely hampered in case the storage facilities were not functioning. Indeed, operations of BPCL KRL will virtually come to standstill without the storage and evacuation activities undertaken by the Appellant. This has been acknowledged by Chief Engineer (Commercial & Tariff) in his report. The Appellant receives various petroleum products from BPCL KRL through various pipelines and then stores it in above ground tanks. This product is then dispatched mainly through 3 modes viz., pipeline, tank wagon and tank lorry filling. Out of the total dispatched product 61.17% is through pipelines and 25.04% is through tank wagons/ trains. These activities are not invoiced. It is further important to note that the Hon'ble Commission recognizes the utilization of electrical energy for purposes other than domestic in the Tariff Order and stipulates that where the tariff goes over 20%, separate separate service connection shall be obtained under appropriate tariff. The Tariff Order also notes that if this is not done, 'the tariff applicable to the whole service connection shall be at the appropriate tariff applicable to the connected load used for purposes other than domestic'. Only the balance 13.49% which is dispatched through tank lorries is invoiced to end customer. Thus, the contention of Respondent KSEB that the Appellant is indulging in sale and commercial activities is liable to be rejected.

Secondly, the KSEB's stand that the Storage and Evacuation unit is situated in a different premises 8 kms away is not only factually incorrect, but is also irrelevant in decided the tariff applicable. The Storage and Evacuation is only 4 kms away. Indeed, the location of the premises is immaterial and was not considered relevant by the Hon'ble Commission in its order dated 23.11.2023 in RP No. 02/2023. In fact, this argument is contrary to KSEB's own stand before the Hon'ble Commission wherein it had demanded different tariff on the grounds that KSPPL Dispatch Terminal facility was within the premises of BPCL Kochi.

Thirdly, BPCL requires permissions under the Explosives Act 1884 for their functioning and operation. Section 4(h) of the Explosives Act 1884 defines manufacturing in relation to an explosive includes the process of process as "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, the activities undertaken at the Irimpanam Installation is essentially pumping the explosives (i.e., finished products) which entails dividing into parts or otherwise splitting up or unmarking the explosives. Furthermore, as early as 1950, the Bombay High Court in Laxmibai Atmaram v. Chairman and Trustees, Bombay Port Trust, reported at AIR 1954 Bom 180 held that a process employed for the purpose of pumping water is a manufacturing process. In the case of State of Maharashtra v. Sarva Shramik Sangh, Sangli, reported at (2013) 16 SCC 16, the Supreme Court held that "pumping water" falls within the definition of "manufacturing process" under the Factories Act 1948. The Supreme Court in Qazi Noorul, HHH Petrol Pump v. Deputy Director, ESIC, reported at (2009) 15 SCC 30, also held that "pumping oil" falls within the definition of manufacturing process under the Factories Act 1948.

Even assuming without conceding that the re-categorization is justified, the arrears can only be claimed at most for the last one year/ 12 months. Reference in this regard may be had to Regulation 97(4) of the Supply Code which states that arrears or excess charges shall be determined on the actual period of reclassification or a period of 12 months, whichever is lesser. Regulation 97 of the Supply Code is a self-contained code and deals with the procedure and consequences of suo moto classification by the licensee. The Respondent KSEB has contended that the Regulations 97(4) and 97(5) are irrelevant in view of the judgments of the Hon'ble Supreme Court which have been cited in the Statement of Facts. The said judgments have no relevance in the present case inasmuch as they do not discuss the import and scope of the Regulation 97(4) of the Supply Code post the 2020 amendment. The interpretation that the clauses can be made applicable for subsequent billing period is not only incorrect but also illogical inasmuch as the amended Regulation 97(4) does not say so.

It is pertinent to note that even though, admittedly, the procedure was initiated against the Complaint under Regulation 97, the demand was under Regulation 134(1) of the Supply Code. Demand under Regulation 134(1) of the Supply Code can only be made if there is 'undercharging' in the billing. This is evident from a reference to the Chapter under which the Regulation 134 has been placed. The Respondent cannot initiated proceedings for reclassification under Regulation 97 of the Supply Code and then raise a demand for undercharging under Regulation 134. Any arrears to be paid following the procedure stipulated under Regulation 97 can only be claimed under Regulation 97(4) of the Supply Code. Any other interpretation is not only incorrect, it will also render Regulations 97(4) and 97(5) irrelevant. KSEB has Respondent has also referred to judgments of the Hon'ble Supreme Court, being Assistant Engineer (D1), Ajmer Vidyut Vitran Nigam Ltd. v. Rahamatullah Khan alias Rahamjulla, Civil Appeal No. 1672 OF 2020, Prem Cottex v. Uttar Haryaba Bijli Nigam Ltd. & Ors., Civil Appeal No. 7235

of 209 and decision of the Hon'ble Commission in M/s Bennet & Coleman Company Ltd. All the above cases dealt with completely different fact situations arising from an application of Section 56 of the Electricity Act 2003. They had nothing to do with suo moto reclassification of tariff which is the subject matter of the present case The Supreme Court did not completely do away with the restrictions imposed on recovery of amounts due as argued by KSEB.

Rahamatullah's case is factually completely different to the present case. In Rahamatullah's case bills were raised under the wrong Tariff Code by mistake, resulting in additional demands. That is not the case here. The Supreme Court considered three issues viz., (i) meaning of the term "first due" in Section 56(2) of the Act; (ii)when would the amount become first due in case of wrong billing tariff having been applied on account of a mistake, and (iii) whether recourse to disconnection may be taken by the licensee after the lapse of two years in the case of such a mistake. The Supreme Court held that though the liability to pay arises on the consumption of electricity, the obligation to pay would arise only when the bill is raised by the licensee and electricity charges would become "first due" only after the bill is issued, even though the liability would have arisen on consumption. The question of limitation before the Supreme Court was only regarding date on which the electricity charges became first due under Section 56(2) of the Act. Insofar as Prem Cottex is concerned, the said case dealt with an order of the National Consumer Disputes Redressal Commission dealing with an issue of whether there was 'deficiency in service' levying wrong multiply factor (MF) resulting in additional demands. It was in this context that the Supreme Court considered whether the same amounts to deficiency of service. Again, the present case is completely distinguishable factually. Similarly, in Bennet, Coleman & Co. Ltd., Order dated 15.11.2021 in RP No. 3/2021, KSERC did not deal with re-classification of tariff under Regulation 97 or the implications of Regulation 97(4) on demand for arrears in respect of proceedings instituted therein but the applicability of Section 56(2). In the circumstances it was respectfully prayed that the Appeal be allowed, the impugned order dated 06.03.2024 in Complaint No. 71 of 2024 of the Hon'ble Consumer Grievance Redressal Forum, Central Region be set-aside, set aside the change of tariff of the Complainant from EHT (110 kV) Industrial to EHT Commercial. And set aside the proceedings initiated against the Complainant under Regulation 97 of the Kerala Electricity Supply Code 2014 and direct the Respondent KSEB to refund the excess amounts billed by it under Commercial tariff pursuant to the said proceedings.

Analysis and findings

The hearing of this appeal petition was conducted on 22/05/2024 at 11:30 a.m. in the office of State Electricity Ombudsman, D.H. Road & Foreshore

Road Junction, Near Gandhi Square, Ernakulam. The appellant's representative Sr. Adv. Sri. E.K. Nandakumar, Adv. Sri. Jai Mohan, Smt. A. Srilaksli, Asst. Manager and the respondents Sri. Asokan S., Sr. Superintendent, O/o SOR, Sri. Vijayakumar V., Superintendent, O/o SOR Sri. Sudharman P.K., The Deputy Chief Engineer, Distribution Circle, Ernakulam and Sri. Boban C.P., The Deputy Chief Engineer, Transmission Circle, Kalamassery, Ernakulam were attended the hearing.

M/s Bharat Petroleum Corporation Limited is incorporated for the refining of crude oil to make various petroleum products and marketing and sale of these products. The activities of the appellant in the premises of this service connection is receipt, storage, blending(altering) making and distribution of petroleum products. The petroleum products manufactured in the Kochi Refinery which is under M/s BPCL is transferred to this Irumpanam premises and further the activities mentioned above are carried out in this premise's. The storage and distribution are to function very well for the smooth functioning of the Refinery. The products refined are to be distributed and then only further production will happen. The products stored in the above ground tanks are dispatched mainly through 4 modes. 1. Pipelines 2. Railway wagons 3. Tanker lorries 4. Barges. The statistic shows in the tabular form by the appellant shows that 61.17% is transferring through pipeline, 25.04% is through the Railway Wagons and 13.38% is filling in the tanker lorries for the retail outlets. This is the statistics of the product consumption of the storage.

The main question is whether these activities are industrial or commercial. The distribution to the retail activity is a sale activity and hence it can be termed as Commercial activity. The transfer of the product through their pipeline to their own storage facilities in other state is an industrial activity as per the definition below.
"Industrial activity means the manufacturing, production, assembling, altering, formulating, repairing, renovating, ornamenting, finishing, cleaning, washing, dismantling, transforming, processing, recycling, adapting or servicing of or the research and development of any goods, substances food, products or articles for commercial purposes and includes any storage or transportation associated with any such activity"

The break up of the connected load details noted down by the licensee during inspection is as below. Total connected load is 3743 kw with contract demand 850 kVA.

Sl.no.	Item	Connected load	Percentage
1	Pumps for tanker lorry filling operation	1055 HP (787.03kW)	21.02%
2	Pumps for Wagon filling operations	2349.6 HP (1752.51 kW)	46.82%
3	Pumps for Barge filling operations	240 HP (179.04kW)	4.78%
	Total	2718.58 kW	72.62%

The 72.62% of the connected load is for the above three operations. The tanker lorry filling is for the distributions of the petroleum products to the dealer and distributors for the retail sale. The railway wagor filling also the transfer of products to the petroleum depots of other stations for the sale to the return outlets which also a sale activity and also to the bulk supplies. The filling operations in the barge is for the supply of these products to the local industries mainly to the Udyogamandal area. The KSERC order dated 19/10/2015 in OP No. 30/2015 states that load for other purposes in industrial units shall not exceed 10% of the total connected load. This also as per the sub regulation 4 (D) of regulation 153 of Kerala Electricity Supply Code 2014. then the total load is to be considered as commercial load.

This is also almost similar that the order of Commission dated 01/08/2018 in OA No. 18/2017 filed by M/s HPCL for their LPG bottling/filling plants, petroleum terminals of the petitioner and similar placed consumers falls under “commercial category” for the purpose of levy of electricity charges. The HPCL had filed the petition of Hon’ble High Court of Kerala and the Appellate Tribunal of electricity. Both the forum dismissed the petition and finally KSERC had concluded that the tariff applicable is commercial tariff.

The second issue is about the period for which the short assessment could be done. The respondent have made a short assessment as per regulation 134.

134(1) *“If the licensee establishes either by review or otherwise, that it has undercharged the consumer, the licensee may recover the amount so undercharged from the consumer by issuing a bill and in such cases at least thirty days shall be given to the consumer for making payment of the bill”.*

Then the regulation 136 describes about the recovery of arrears and its limitation.

136(1) *“The licensee shall be entitled to recover arrears of charges or any other amount due from the consumer along with interest at the rates applicable for belated payments from the date on which such payments became due”.*

136(2) *“The licensee may prefer a claim for such arrears by issuance of a demand notice and the consumer shall remit the arrear amount within the due date indicated in the demand notice”.*

136(3) *“No such sum due from any customer, on account of default in payment shall be recoverable after a period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable arrear of charges for electricity supplied”.*

The limitation of two years is applicable from the date when such sum became first due. The first due is defined in the order of Hon’ble Supreme Court in the Civil Appeal No. 7235 of 2009 which is M/s Prem Cottex Vs

Uttar Haryana Bijili Nigam Ltd and others, that the amount is first due when the mistake is found out. The order of Hon'ble supreme court in civil appeal 7235 of 2009 states as follows.

Para 11 *"In Rahamathullah Khan (supra), three issues arose for the consideration of this court. They were (i) what is the meaning to be ascribed to the term first due in section 56(2) of the Act; (ii) in the case of a wrong billing tariff having been applied on account of a mistake, when would the amount become first due; and (iii) whether recourse to disconnection may be taken by the licensee after the lapse of two years in the case of the mistake."*

Para 12 *"On the first two issues, this court held that though the liability to pay arises on the consumption of electricity, the obligation to pay would arise only when the bill is raised by the licensee and that, therefore, electricity charges would become "first due" only after the bill is issued, even though the liability would have arisen on consumption. On the third issue, this court held in Rahamathullah Khan (Supra), that the period of limitation of two years would commence from the date on which the electricity charges became first due under section 52(2) does not preclude the licensee from raising an additional or supplementary demand after the expiry of the period of limitation in the case of a mistake or bonafides error. To come to such a conclusion, this court also referred to section 17(1)(c) of the Limitation Act, 1963 and the decision of this court in Mahabir Kishore & Ors. Vs State of Madhya Pradesh 2."*

Para 13 *"Despite holding that electricity charges would become first due only after the bill is issued to the consumer (para 6.9 of the SCC Report) and despite holding that Section 56(2) does not preclude the licensee from raising an additional or supplementary demand after the expiry of the period of limitation prescribed therein in the case of a mistake or bonafide error (Para 9.1 of the SCC Report), this Court came to the conclusion that what is barred under Section 56(2) is only the disconnection of supply of electricity. In other words, it was held by this Court in the penultimate paragraph that the licensee may take recourse to any remedy available in law for the recovery of the additional demand, but is barred from taking recourse to disconnection of supply under Section 56(2)."*

It is very clear that the amount become first due only from the date of discovery of mistake and the limitation period of two years is applied from that date.

It is very important to consider the order dated 15/11/2021 of Kerala State Electricity Regulatory Commission in RP/03/2021 in the petition between M/s KSEBL & M/s Bennett Coleman & Co Ltd. The original petition OP No. 21/2021, the KSERC has ordered to limit the short assessment for two years. Then the licensee has filed Review petition (RP/03/2021) which was heard and review by the Commission. Commission viewed as *"On reviewing the judgment's of the Hon'ble Supreme Court, it is seen that the restriction of 2 years imposed under section 56(2) of the Electricity Act 2003, does not prelude the licensee from raising and recovering an amount genuinely due, even for*

period prior to 2 years. As such the order of the Commission dated 08/07/2021 in OP No. 21/2021, under clause 3 & 4 para 34, issued in compliance of the provisions of Electricity Act, 2003 and the Kerala Electricity Supply Code 2014 need to be reviewed. Accordingly the arrear bill dated 29/04/2020 issued by KSEB Ltd. for a prior period of 66 month need to be treated as in order and the consumer is liable to remit the same".

The case of M/s Bennett Coleman with the licensee (M/s KSEBL) was also very similar which is tariff re-clarification. They were liable to pay the short assessment raised by the KSEBL beyond two years.

Considering the discussions above it is to conclude that the tariff applicable for M/s BPCL on this consumer number is commercial tariff. The appellant is also have to pay arrears with effect from 01/05/2013 to 31/07/2023.

Decision

On verifying the documents submitted and hearing both the petitioner and respondent and also from the analysis as mentioned above, the following decision are hereby taken.

1. The tariff applicable to the appellant is commercial tariff.

2. The appellant is liable to pay the short assessment bill raised by the licensee.

3. The licensee shall not charge any interest/surcharge on this payment.

4. No order on cost.

ELECTRICITY OMBUDSMAN

No. P/018/2024/ dated: 19/06/2024.

Delivered to:

1. M/s Bharat Petroleum Corporation Ltd, Cochin- Coimbatore- Karur-Pipeline- Irimpanam installation, Ernakulam Dist., Pin-682309.

2. Special Officer Revenue, Vydyuthi Bhavanam, Pattom, Thiruvananthapuram.

3. The Chief Engineer, Distribution Circle, KSE Board Limited, Ernakulam, Ernakulam District.

4. The Deputy Chief Engineer, Transmission Circle, KSE Board Limited, Kalamassery, Ernakulam.

Copy to:

1. The Secretary, Kerala State Electricity Regulatory Commission, KPFC Bhavanam, Vellayambalam, Thiruvananthapuram-10.

2. The Secretary, KSE Board Limited, Vydhyuthi bhavanam, Pattom, Thiruvananthapuram-4.

3. The Chairperson, Consumer Grievance Redressal Forum, 220 kV Substation Compound, HMT Colony P.O., Kalamassery, Pin- 683503.