HIGH COURT OF MADHYA PRADESH : JABALPUR

BEFORE HON'BLE SHRI JUSTICE SANJAY YADAV

Writ Petition No.4564/1999

Shivco L.P.G. Bottling Company and another

versus

M.P. Electricity Board and others

Shri Ramsuphal Verma, learned counsel for petitioners.

Shri M.L. Jaiswal, learned Senior Counsel with Shri Pradeep Banerjee, learned counsel for respondents.

O R D E R

(7.3.2017)

Two fold grievance raised by the petitioner vide this petition under Article 226 of the Constitution of India. Firstly, that being an industrial establishment incorporated under the Indian Companies Act, 1956 with effect from 21.8.1994 and being licensed under the Factories Act, 1948 and the Rules made thereunder viz. M.P. Factories Rules, 1962 and registered as Industry with the District Industries Centre for carrying out the LPG Bottling Plant which implies a manufacturing process as defined under the Gas Cylinder Rules, 1981 which are framed under the Indian Explosives Act, 1884 and being treated as a manufacturing unit by the Commercial Tax Department of the Government of Madhya

Pradesh. The respondents are not justified in treating the petitioner as commercial establishment and charging the electricity tariff at commercial rate rather than the industrial rate.

2. Second grievance of the petitioner emanates from the contract of supply of electricity. That, though agreed upon that the uninterrupted electricity shall be supplied, but the same being not done yet, the minimum of the tariff is being charged which is more than the electricity consumed.

3. Indisputably, the petitioned is a company registered under the Companies Act, 1956 and has been issued a licence to fill compressed gas in cylinders in furtherance to the provisions of Gas Cylinder Rules, 1981 framed under the Indian Explosives Act, 1884. Licence to work as a factory was also issued under Rule 5 of the M.P. Factories Rules, 1962. It is registered as small scale industry by the District Industries Centre for LPG Bottling of twelve lacs cylinders and forty eight thousand petromax.

4. On petitioner's application for 60 HP industrial connection and after his completion of required formalities as to extension of 11 KV Line 0.5 KM with installation of 63

KVA/114 KVA transformer, an agreement was entered into between the petitioner and respondent-Electricity Board. The copy of agreement dated 14.12.1994 is brought on record as Annexure R/1. Annexure appended with agreement reflects that the purpose for which the electricity was supplying was "industrial power". Clause 3 of the agreement stipulated that the petitioner consumer will be liable to pay the minimum tariff irrespective of the use of electricity. Clause 3 is in following terms:

> ''उपभोक्ता उसको पूर्ति कि गई बिजली के लिए मण्डल द्वारा समय–समय पर निर्धारित दरों पर भुगतान करेगा । शर्त वह कि उपभोक्ता अनुबन्ध प्रभावशील होने की तिथि से भले ही वह बिजली काम में न लाये दर नियम के अनुसार निर्धारित न्यनतम राशियों का भुगतान करेगा ।

5. This leads to take up the second ground raised by the petitioner as to whether the respondents are justified in charging tariff more than the electricity supplied, which, in the considered opinion of this Court, in view of the law laid down by the Supreme Court in **M/s. Raymond Ltd. v. Madhya Pradesh Electricity Board** **AIR 2001 SC 238** relating to minimum guarantee charge, is no more *res integra*.

6. In **M/s Raymond Ltd.** (supra), their Lordships were pleased to hold:

> "16. In the light of the serious controversies raised as to the duration, quantity, manner and quality of supply of electrical energy expected to be made by the Board, it becomes inevitably necessary to decide first the question relating to the unit or standard of measurement, which invariably must have relevance, in our view, only to the billing cycle envisaged in the contract and the tariff which is only a month. The payment by the consumer is to be on the electrical energy supplied during the preceding month. The parties have also agreed that the maximum demand of the supply is to be measured with reference to the month at the point of supply of the consumer and will be determined on the basis of the supply during any consecutive thirty minutes in that month as recorded by the trivector meter. The power factor, according to the statutory conditions of supply which form part and parcel of the supply of energy to a consumer, is also to be determined with reference to the supply of energy to a consumer, and that factor is also to be determined with reference to the supply of electrical energy made during a month. The minimum consumption of energy guaranteed, as per the tariff notification, is also in terms of a monthly minimum. While that be the position, it is futile for the consumers to contend that they will not be liable to abide by the minimum guaranteed charges undertaken, unless on every day of the month/year and during the twenty four hours or round the clock the load factor and power supply agreed to be made, at one and is the same level without any shortfall, tripping or low voltage. The provisions of Section 56 of the Contract Act, 1872 sought to be relied upon have no relevance or application to the cases on hand. Countenancing of such claims would not

only defeat the very purpose, object and aim of providing for a minimum charges guarantee clause but would ultimately result in mutilation of the very fabric of tariff structure rendering thereby the schemes of generation and supply of power at the agreed concessional rates uneconomical and non-viable for the Board. This would also result in the re-writing of many of the clauses in the contract and rendering nugatory the tariff pattern and system itself throwing into disarray and disharmony the efficient execution of the power supply schemes.

17. The further claim asserted on behalf of the consumers that since what was agreed to between the parties was to make the supply available continuously except during situations envisaged in clause 11 of the contract, the failure to effect such supply by the Board renders the very contract relating to the payment of minimum guaranteed charges unenforceable against them, does not merit acceptance in our hands. It cannot legitimately be contended that the word continuously has one definite meaning only to convey uninterruptedness in time sequence or essence and on the other hand the very word would also mean `recurring at repeated intervals so as to be of repeated occurrence`. That apart, used as an adjective it draws colour from the context too, and in the light of the texture of clause 11 as well as clause 12 and clause 23 (b) and also Section 22B of the 1948 Act and orders passed therein which are binding with equal force upon both the consumer and the Board, the word is incapable of being construed in such absolute terms as endeavoured by the learned counsel for the consumers.

...

19. ... The contract for the supply of electrical energy cannot be treated on par with any other contacts of mutual rights and obligations, having

regard to the peculiar problems involved in the generation, transmission and supply which invariably depend upon the vagaries of monsoon as well short supply to them of the required coal and oil in time and similar other problems over which the Board cannot have any absolute control. The recurring commitments relating to constant and periodical maintenance of supply lines and other installations cannot be anytheless even during such times and such onerous liabilities cannot be left to fall exclusively upon the Board and it is only keeping in view all these aspects, payment of minimum guaranteed charges is necessarily in built in the tariff system of the Board and the reasonableness or legality of the same cannot be considered either in the abstract or in isolation of all these aspects. It is for this reason that all over and the consumer is also made to share the constraints on Boards economy even during such periods. In fact the tariff inclusive of such a provision for payment of a minimum guaranteed sum irrespective of the supply/consumption factor appears to be the consideration for the commitments undertaken by the Board as a package deal and it is not possible or permissible to allow the consumer to wriggle out of such commitments merely on the ground that the Board is not able to supply at any point of time or period the required or agreed quantum of supply or even supply up to the level of the minimum guaranteed rate of charges. Tinkering with portions of contracts for any such reasons, merely on considerations of equity or reasonableness pleaded for and vis-a-vis one party alone will amount to mutilation of the whole scheme underlying the contract and render thereby the very generation and supply of electrical energy economically unviable for the Board. Consumers, who enter into such commitments openly and knowing fully well all these hazards involved in the generation,

transmission and supply, will be estopped from going behind the solemn commitment and undertaking on their/its part under the contract. The High Court does not seem to have properly appreciated the ratio of the several decisions noticed except merely referring to them in extenso, and yet ultimately just, arrived at a conclusion merely for the reason that the court considered it to be `more equitable, just and reasonable to do so.

20. So far as the cases under consideration and the liability of the consumers relating to minimum guarantee are concerned, the relevant clause relating to minimum guarantee charges as well as the tariff notification relied upon, would go to show that what was guaranteed was not the payment of a flat sum or amount of money to be calculated with reference to a particular number or percentage of units, dehors the quantum of electrical energy distributed and supplied by the Board. In other words, the guarantee was of such minimum consumption as when calculated at the tariff.. will yield a particular monthly/annual sum to the Board. Even going by the tariff notification which prescribes also a minimum entitling the Board to collect it [vide clause 21 (b)] it merely casts liability on the consumer to guarantee a minimum monthly consumption equivalent to 40% load factor of the contract demand. Consequently, for the consumer to honour his/its commitment so undertaken to give a minimum consumption there should essentially be corresponding supply by the Board at least to that extent, without which the consumption of the agreed minimum is rendered impossible by the very lapse of the Board. The minimum guarantee, thus, appears to be not in terms of any fixed or stipulated amount but in terms of merely the energy to be consumed. The right, therefore, of the Board to demand the minimum guaranteed charges, by the very terms

> of the language in the contract as well as the one used in the tariff notification is made enforceable depending upon a corresponding duty, impliedly undertaken to supply electrical energy at least to that extent, and not otherwise. It is for this and only reason we find that the ultimate conclusion arrived at by the Full Bench of the High Court does not call for any interference in these appeals.

7. In view whereof, the relief sought by the petitioner for a direction to respondents to raise the bills on the basis of the actual electricity consumed by him and not at the minimum tariff and refund the amount which they charged on the basis of minimum tariff, cannot be acceded.

8. Now coming to the issue as to whether the respondents are justified in charging the tariff at commercial rate, instead the industrial rate as claimed by the petitioner.

9. The agreement dated 14.12.1994 records the purpose for which the electricity is supplied is industrial. Petitioner has relied on the correspondence dated 23.11.1994 (Annexure P/6) between Superintending Engineer (O&M), MPEB Sehore and the Executive Engineer (O&M), MPEB Sehore to bring home the submissions that the power supply was for industrial purpose on LT side.

10. The dispute as to liability of the petitioner to pay at commercial rate emanates from an inspection carried out by the Executive Engineer (Vigilance) on 24.9.1998 where on inspection after taking note of the fact that no manufacturing process is being undertaken in LPG bottling and filling of Petromax which he adjudged being a commercial activities, demands were raised for payment at commercial rate. Non-consideration of the representation, has led the petitioner file this petition questioning the decision to charge at commercial rate on the anvil of the contentions taken note of *supra.*

11. Petitioner places reliance on the definition of the expression "manufacture of gas" as contained in Rule 2(xxv) of the Gas Cylinder Rules, 1981, which envisages :

> "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;

12. Furthermore, it is urged that LPG bottling is a manufacturing process would be borne out from the certificate issued by the Deputy Controller, Explosives, Bhopal (Annexure

P/30) for storage of compressed gas in pressure vessels. It is urged that the dealers in LPG have no facilities for filling the cylinders, they are allowed to store the gas in cylinder which can be termed to be commercial; however, the activities carried out by the petitioner being essentially in the nature of manufacturing cannot be put at par with the dealers. In order to establish that LPG bottling is a manufacturing process, the petitioner has adverted to the entire process in paragraph 5.14 of the petition stating that LPG is stored at a temperature of 23 centigrade. Vapour compressor is used which sucks the gaseous refrigerant. Thus, it is the industrial activities which are carried on in the establishment which, as per the petitioner, cannot be treated as commercial activities. Petitioner also relies upon the decision by Gujarat High Court in **Bharat Petroleum Corporation Ltd. vs State of Gujarat** : Special Civil Application Nos.373 and 6220 of 2001 decided on 6.5.2010 : Manupatra : Manu/GJ/0203/2010, wherein learned Single Judge has held :

> "16. Having heard the learned advocates appearing for the parties and having considered

their rival submissions in light of the statutory provisions and decided case law on the subject and having judiciously examined the decisions/orders under challenge, the Court is of the view that the respondent authorities are not justified in collecting/adjusting and/or enforcing the recovery of electricity duty at the rate of 60% by reclassifying the electrical energy consumed by the petitioners for their activities. The Court has at length discussed this issue in Special Civil Application No.5400 of 2001 decided today and for the reasons stated and findings recorded therein, the petitions deserve to be allowed and are accordingly allowed.

17. Apart from the said reasoning, one more point which is in favour of the petitioners is that as per the definition of industrial undertaking given in Section 2(bb)of the Act, the petitioners' activities fall within the ambit of this definition. The Government of India in exercise of power conferred by Sections 5 and 7 of the Indian Explosives Act, 1884 has made Rules known as Gas Cylinder Rules, 1981. The Rule-2, Sub-clause-xxv defines the expression 'manufacturing of gas' which means filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder. Thus, filling of LPG Gas Cylinder is evidently a process of manufacture and, therefore, the petitioners are Industrial Undertakings consuming high tension energy as provided by Section-3(1) and Clause 5(a) of the Schedule to the Act and as such the respondents had initially correctly levied duty at 20% of the consumption charges.

> 18. The petitioners' claim is further supported by the decision of this Court in the case of Vadilal Gas Pvt. Ltd. Vs. State of Gujarat (Special Civil Application No.9691 of 2000 decided on 25.11.2009) wherein the Court after considering the nature of the process undertaken by the petitioner took the view that the petitioner unit is a manufacturing unit within the definition of the Act and hence the petitioners require to pay only 10% duty charges and not 60% charges as demanded by the respondent."

13. On these contentions, petitioner seeks quashment of demand of tariff at commercial rate in place of industrial rate.

14. Respondents, on their turn, have refuted all the contentions raised on behalf of the petitioner. It is contended that the Executive Engineer on his inspection of the premises on 24.9.1998 found the actual purpose of the factory in which electricity is being used is purely for commercial use as it was for refilling the gas cylinders. The process it is urged, is not at all industrial nor any manufacturing process was involved. Commenting on the documents served by the petitioner, it is urged on behalf of the respondents that the certificate issued by the District Industrial Centre that the petitioner is a small scale industry only indicates the purpose for LPG Bottling and not the manufacturing of Gas/LPG or the cylinders. It is urged that being not engaged in industrial/manufacturing activities,

the petitioner is rightly held not entitled for the industrial tariff rate. It is further contended that even the certificate issued under the Gas cylinder Rules, 1981 is not for manufacturing of gas cylinders or LPG but for bottling. The respondents have relied upon the decision by the Appellate Tribunal for Electricity (Appellate Jurisdiction) to bring home the submissions that the LPG bottling/filling plants is not an industrial activity but fall under commercial category.

15. Considered the rival submissions.

16. It being not in dispute that the petitioner is engaged in LPG Bottling and filling of Petromax, the question is whether it can be said to be a manufacturing or industrial activity as would justify the challenge that the respondent cannot charge tariff at commercial rate.

17. This very issue came up for consideration before the Appellate Tribunal for Electricity constituted under the provisions of the Electricity Act, 2003 in **Hindustan Petroleum Corporation Ltd. Kochi vs Kerala State Electricity Regulatory Commission, Kerala** reported in **2016 ELR (APTEL) 1191**. The Tribunal was in seisin with an appeal under Section 111 of 2003 Act. And, was dwelling on the question of law, viz, :

> 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?

18. In the case at hand, we are concerned with Question No.(a). The Tribunal exhaustively dwelt on the issue, which is reproduced in its entirety:

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 Appeal No 265 of 2014 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 Appeal No 265 of 2014 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 0 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 filed 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.

Appeal No 265 of 2014 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 Appeal No 265 of 2014 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 Appeal No 265 of 2014 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 Appeal No 265 of 2014 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."

19. Be it noted that the Appellate Tribunal besides being chaired by a retired Supreme Court Judge comprises of an expert and as has been observed by the Supreme Court in **W.B. Electricity Regulatory Commission vs. C.E.S.C. Ltd. (2002) 8 SCC 715** :

> 102. We notice that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff which has to be made by the Commission involves a very

> highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. A perusal of the report of the ASCI as well as that of the Commission abundantly proves this fact. Therefore, we think it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that the various questions which are factual and technical that arise in such an appeal, get appropriate consideration in the first appellate stage also. From Section 4 of the 1998 Act, we notice that the Central Electricity Regulatory Commission which has a Judicial Member as also a number of other Members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission. Without meaning any disrespect of the Judges of the High Court, we think neither the High Court nor the Supreme Court would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. Therefore, we recommend that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. We notice that under the Telecom Regulatory Authority of India Act, 1997 in Chapter IV, a similar provision is made for an appeal to a special Appellate Tribunal and thereafter a further appeal to the Supreme Court on questions of law only. We think a similar appellate provision may be considered to make the relief of appeal more effective.

- the decision rendered by the Appellate Tribunal will have the effect of being a precedent on the issue under consideration. It being not shown by the petitioner that the

view taken by the Appellate Tribunal having been varied in the higher forum, this Court is of the considered opinion that the findings arrived at by the Appellate Tribunal clinches the issue.

20. In view whereof, it is held that the activities carried out by the petitioner i.e. of LPG bottling and filling of Petromax is not a manufacturing nor industrial activities but is purely a commercial activity. The respondents are justified in charging the tariff at commercial rate.

21. For these reasons, this Court respectfully disagree with the view taken by learned Single Judge of Gujarat High Court in **Bharat Petroleum Corporation** (supra).

22. Consequently, petition fails and is **dismissed**. No costs.

(SANJAY YADAV)
JUDGE

vinod