BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

(Appointed by the Maharashtra Electricity Regulatory Commission
under Section 42(6) of the Electricity Act, 2003)

REPRESENTATION NO. 184 OF 2022

In the matter of retrospective recovery of tariff difference

Kailash Hari Patil. …… ……..…… ….. Appellant
(Cons. No. 001880155292)

V/s.

Maharashtra State Electricity Distribution Co. Ltd., Virar (MSEDCL) …. …. Respondent

Appearances:

Appellant : Kailash Patil

Respondent : 1. Prashant Dani, Executive Engineer, Virar
2. Mukund Deshmukh, Addl. Executive Engineer, Virar (East) S/Dn.
3. Vinay Singh, Addl. Executive Engineer, Flying Squad, Vasai

Coram: Vandana Krishna [I.A.S. (Retd.)]

Date of hearing: 10th January 2023

Date of Order: 27th January 2023

ORDER

This Representation was filed on 30th November 2022 under Regulation 19.1 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2020 (CGRF & EO Regulations 2020) against the Order

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dated 10th August 2022 passed by the Consumer Grievance Redressal Forum, MSEDCL Vasai (the Forum).

2. The Forum, by its Order dated 10.08.2022 partly allowed the grievance application in Case No. 43 of 2022. with the following directions:

> *"2. Respondent shall grant 10 monthly installments for payment of supplementary bill without levying interest and DPC. If complainant defaulted in the payment of any installment along with current bill, then the facility of Installment along with concession of waiver of interest and DPC will stand cancelled forthwith."*

3. The Appellant has filed this representation against the order of the Forum. The e-hearing was held on 10.01.2023 through Video/Audio conference. Both the parties were heard at length. The Appellant's written submission and arguments during the hearing in brief are as below:

(i) The Appellant is an Industrial consumer (No. 001880155292) of the Respondent from 08.12.2011 having sanctioned load of 107 HP and contract demand of 89 KVA at S.No.29, H. No. 5&6, Virar (East).

(ii) The activity of the Appellant is processing of Ready-Mix Concrete (RMC). The Respondent has sanctioned load under Industrial tariff category for the activity of RMC plant, and was billed rightly under Industrial tariff category from the date of release of connection. Since the date of connection, the Appellant is engaged in supplying RMC to other parties at the rate agreed between the seller and purchaser. RMC is 'ready to use cement concrete', which is a predetermined mixture of cement, sand, water, and aggregates. The operational activity of RMC is organized with the help of labour and power supply, and the product of 'RMC' is supplied at different sites as per demand and requirement of the purchaser. The Appellant is not directly in construction activities, but is only the supplier of RMC. This is a process industry.

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(iii) The Addl. Executive Engineer, Flying Squad of the Respondent inspected the premises and checked the electrical installation of the Appellant on 18.01.2022. The following irregularities were noted in the inspection report,

a. Consumer is using electricity for RMC Plant.

b. Consumer has been billed as per industrial i.e., LT V (BII).

c. *RMC plant should be billed under Commercial Tariff.*

(iv) Accordingly, the Respondent issued a supplementary bill of Rs. 31,19,900/- towards retrospective recovery of tariff difference from Industrial to Commercial tariff category for the period from Jan. 2012 to Jan. 2022.

(v) The process industry is registered under Part II of Industrial Entrepreneur Memorandum (IEM) District Centre Thane, Govt. Of Maharashtra from 25.03.2011.

(vi) The process industry is following the general conditions and norms prescribed by Maharashtra Pollution Control Board and the said certificate is being renewed from time to time.

(vii) The Appellant received a disconnection notice of 24 hours for payment of the said supplementary bill dated 25.01.2022. The disconnection notice is not as per Section 56(1) of the Electricity Act, 2003 (the Act). **The supply of the Appellant was disconnected in Oct. 2022. The Appellant has been running the RMC plant on diesel Generator for the last two months.**

(viii) The Appellant prays to condone the delay for filing this representation, as the Appellant was suffering from a medical issue.

(ix) In view of the above, the Appellant prays that the Respondent be directed:

a. to quash the supplementary bill of Rs. 31,19,900/- and to declare the activity of RMC under Industrial tariff category.

b. to reconnect the supply immediately.

4. The Respondent by its letter dated 21.12.2022 has submitted its written reply. The written submission along with its arguments are stated in brief as below: -

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(i) The Appellant is a consumer (No. 001880155292) of the Respondent from 08.12.2011 having sanctioned load of 107 HP and contract demand of 89 KVA at S.No.29, H.No. 5&6 Virar (East). The supply of the Appellant was sanctioned under Industrial tariff category by mistake.

(ii) Various details of the Appellants, Sanctioned Load, Contract Demand, date of inspection, supplementary bill etc., are tabulated below:

Rep. No.	Appellant	Consumer No.	Address	Sanctioned load (HP)	Contract Demand (KVA)	Date of Supply	Date of Inspection	Supplementary bill (Rs.)	Date of Supplimentary Bill
184	Kailash Hari Patil	001880155292	S.No.298, H.No. 5&6 Virar (east)	107	89	08.12.2011	18.01.2022	31,19,900/-	25.01.2022

(i) The Flying Squad of the Respondent inspected the premises of the Appellant on 18.01.2022, when it was revealed that the Appellant is using supply for RMC plant, for which the applicable tariff is Commercial Tariff (LT - II C). However, the Appellant was billed as per Industrial Tariff (LT V B II) since the date of supply i.e., 08.12.2011.

(ii) Accordingly, the Respondent issued a supplementary bill of Rs. 31,19,900/- on 25.01.2022 for recovery of tariff difference i.e., Industrial to Commercial for the period from Dec. 2011 to Jan. 2022.

(iii) The mere process of crushing, pumping, mixing, and lifting do not make the process industrial. If the process does not produce an end product which is different from its raw material, it cannot be termed as an industrial process. RMC plant is a part and parcel of their own construction sites, or construction sites of their vendor/partners. Hence the activity of the Appellant is commercial activity. The Commission in tariff order in Case No.116 of 2008 and case No.111/2009 has clearly stated that the categorization of industry is applicable to such activities which entail "manufacture". Moreover, **the Commission**

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ordered that all construction activities on infrastructure projects, buildings, etc. will be classified under 'Commercial' category. The Appellant is engaged in the business of infrastructure projects and hence HT Commercial tariff is the proper tariff applicable to Appellant.

(iv) The Commission in its order dated 12.09.2010 in Case No.111 of 2009 has stated that

"In this regard, it is clarified that classification under Industry for tax purposes and other purposes by the Central or State Government shall apply to matters within their jurisdiction and have no bearing on the tariffs determined by the Commission under the EA 2003, and the import of the categorisation under Industry under other specific laws cannot be applied to seek relief under other statutes. Broadly, the categorisation of "Industry" is applicable to such activities, which entail "manufacture."

(v) The Commission, in its order dated 17.08.2009 in Case No.116 of 2008 stated that all Construction activity on infrastructure projects, buildings, hill stations etc., will be classified under "Commercial Category" and be charged at HT Commercial or LT Commercial, as applicable.

(vi) Tariff categorization is done by the Commission on the basis of nature and purpose of usage of electricity. This RMC plant was meant for supply of concrete as per requirement of construction activities. RMC is one of the components or inputs in construction projects, therefore it cannot be considered as a separate industry. The electricity used for construction purposes is to be billed as commercial; accordingly, the correct category is Commercial.

(vii) The Respondent referred Regulation 4.4.1 of Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Standards of Performance of Distribution

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Licensees including Power Quality) Regulations, 2021 (Supply Code and SOP Regulation 2021) which is reproduced below:-

> *"The Distribution Licensee is authorized to recover charges for electricity supplied in accordance with such tariff as may be fixed from time to time by the Commission."*

The Respondent is authorised to recover the charges of consumed electricity as per tariff category classified by the Commission.

(viii) The Forum in its order dated 10.08.2022 has rightly addressed all these issues and rejected the grievance of the Appellant for classification of tariff category, and allowed to pay the supplementary bill in 10 installments.

(ix) The Respondent cited the Judgement of Hon'ble Supreme Court dated 5th October 2021 in Civil Appeal No. 7235 of 2009 in the matter of Prem Cottex V/s. Uttar Haryana Bijli Vitran Nigam Ltd. and Others. It has clearly differentiated between application of Section 56 of the Act for "escaped assessment" versus "deficiency in service". The Hon'ble Supreme Court has allowed past recovery which was escaped assessment due to a bona-fide mistake of the licensee. The Court further held that limitation provided under Section 56(2) will not be applicable for "escaped billing" due to a bona-fide mistake. The relevant paras of the said Judgement are reproduced as below:

> ***"****23. Coming to the second aspect, namely, the impact of Subsection (1) on Sub-section (2) of Section 56, it is seen that the bottom line of Sub section (1) is the negligence of any person to pay any charge for electricity. Subsection (1) starts with the words "where any person neglects to pay any charge for electricity or any some other than a charge for electricity due from him".*
>
> *24. Subsection (2) uses the words "no sum due from any consumer under this Section". Therefore, the bar under Subsection (2) is relatable to the sum due under Section 56. This naturally takes us to Subsection (1) which deals specifically with the negligence on the part of a person to pay any charge for electricity or any*

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sum other than a charge for electricity. What is covered by section 56, under sub-section (1), is the negligence on the part of a person to pay for electricity and not anything else nor any negligence on the part of the licensee.

25. In other words, the negligence on the part of the licensee which led to short billing in the first instance and the rectification of the same after the mistake is detected, is not covered by Subsection (1) of Section56. Consequently, any claim so made by a licensee after the detection of their mistake, may not fall within the mischief, namely, "no sum due from any consumer under this Section", appearing in Subsection (2).

26. The matter can be examined from another angle as well. Sub section (1) of Section 56 as discussed above, deals with the disconnection of electric supply if any person "neglects to pay any charge for electricity". The question of neglect to pay would arise only after a demand is raised by the licensee. If the demand is not raised, there is no occasion for a consumer to neglect to pay any charge for electricity. Subsection (2) of Section 56 has a nonobstante clause with respect to what is contained in any other law, regarding the right to recover including the right to disconnect. Therefore, if the licensee has not raised any bill, there can be no negligence on the part of the consumer to pay the bill and consequently the period of limitation prescribed under Subsection (2) will not start running. So long as limitation has not started running, the bar for recovery and disconnection will not come into effect. Hence the decision in Rahamatullah Khan and Section 56(2) will not go to the rescue of the appellant." (Emphasis added)

In this case, the recovery is "escaped billing" of correct categorisation of Commercial tariff which should have been applied to the Appellant right from the date of supply, and hence the recovery towards tariff difference from LT-V to LT-II is justifiable and recoverable.

(x) The Appellant filed this representation on 30th November 2022 before the Electricity Ombudsman after expiry of 60 days from the date of the Order of the Forum which is 10.08.2022. The representation is one and a half months late and hence time barred as per Regulation 19.1 of the CGRF & EO Regulations 2020.

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(xi) Further, the above said case is not booked under Section135/126 of the Electricity Act 2003, as per Section No. 10 (theft and unauthorized use of electricity) under Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Standards of Performance of Distribution Licensees including Power Quality) Regulations, 2021. So the period for issuing the supplementary bill is considered from the date of supply to consumer.

(xii) In view of the above, the Respondent requested to reject the Representation of the Appellant.

Analysis and Ruling

5. Heard the parties and perused the documents on record. The delay in filing this representation by the Appellant is condoned. The Appellant contended that he is a LT industrial consumer from the date of supply. Their activity is processing of Ready-Mix Concrete. The Respondent sanctioned load under 'Industrial' tariff category for the RMC plant, and it was rightly billed under Industrial tariff category from the date of release of connection. RMC is 'ready to use cement concrete,' a predetermined mixture of cement, sand, water, and aggregates. This is a process industry. The product of 'RMC' is being supplied at different sites as per demand and requirement of the purchaser. The Appellant is not directly in construction activities but only the supplier of RMC product. Hence, the activity of the Appellant is industrial and not commercial.

6. The Respondent contended that the mere process of crushing, pumping, mixing, and lifting do not make the process industrial. If the process does not produce an end product different from its raw material, it cannot be termed as an industrial process. RMC plant is a part and parcel of its own construction sites, or construction sites of its vendor/partners, and hence the activity of the Appellant is commercial activity.

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7. The main point of disagreement between the parties relates to whether the activity of production of RMC is covered under "Industrial" activity or "Commercial" activity. The parties have partly based their argument on the issue as to whether the said activity is an internal activity (whereby the product is used by the producers themselves) or an external activity which supplies the product to other parties. The Appellant has argued that they are producing the product (RMC) for other parties with whom they have entered into an agreement, and therefore the process is external and should be categorized under "Industrial". On the other hand, the Respondent has argued that this activity is an internal activity, as the product is used for its own business, whether it is for supplying to other parties or not.

8. As per the Order dated 17.08.2009 in Case No. 116 of 2008, the Commission states as follows:

> *Commission's Ruling*
>
> *"……..*
> *……..*
>
> *The Commission appreciates the concern expressed by the consumers engaged in construction activity that the nature of their connection is by no means 'temporary' and hence, it is inappropriate to classify construction activity under temporary. The Commission agrees with this rationale and rules that from hereon, temporary supply – HT or LT as applicable – will not include any construction activity, and will be limited to electricity used on temporary basis for any decorative lighting for exhibitions, circus, film shooting, marriages, etc., and the time period for consideration under temporary category will be one year. Further, all Construction activity, on infrastructure projects, buildings, hill station, etc., will be classified under 'Commercial Category' and be charged at HT Commercial or LT Commercial, as applicable."*

In the present case, the applicable Tariff Orders of the Commission in Case No. 48 of 2016 (dt.03.11.2016), Case No. 195 of 2017 (dt. 12.09.2018) and Case No. 322 of 2019 (dt.30.03.2020) states as under:

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"HT II: HT- Commercial Applicability:

…… …… …… …… …… ……

k) Construction of all types of structures/ infrastructures such as buildings, bridges, flyovers, dams, Power Stations, roads, Aerodromes, tunnels for laying of pipelines for all purposes, and which is not covered under the HT - Temporary category;"

RMC material is used for construction activity. Construction activity is defined broadly under Commercial tariff category.

The Commission is empowered as per Sections 61, 62 and 86 of the Electricity Act, 2003, to determine the tariff category. The Commission has not made any distinction based on the location of construction activities or infrastructure, or whether it is meant for own business or supply to other parties. **In all cases, construction activity or infrastructure projects is to be classified as "Commercial".** In other words, the tariff categorisation is based on the purpose or type of activity, and not on the location of the activity, or whether it is meant for the concerned party's own business or for sale of the product to other parties.

On careful reading of the tariff order of the Commission in Case No. 48 of 2016 and subsequent Tariff Orders, it shows that the classification under Industry / Commercial is silent on the specific activity of RMC. RMC is neither classified under Industrial nor Commercial. If any activity falls in the grey area between Industrial and Commercial, it is desirable that the Commission give a specific order on the classification of that activity or product. So far as RMC is concerned, it is used only in construction activities, and so we hold that **by default it is classified under Commercial, unless specified otherwise by any specific order of the Commission.**

It is, therefore, held that the correct categorisation for the Appellant's business would be "Commercial" and not "Industrial".

9. However, at the same time, retrospective recovery on this count cannot be allowed for more than two years even if the Respondent made a bona fide mistake due to human error or due

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to wrong interpretation of the tariff category. Various judgments mentioned below have clearly established that retrospective recovery must be limited to two years.

10. The Section 56 (2) of the Electricity Act, 2003 is reproduced below:

> *"(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."*

This Section 56 (2) of the Act has been interpreted by the Larger Bench Judgment dated 12.03.2019 of Hon'ble Bombay High Court in W.P. No. 10764 of 2011 with Other Writ Petitions. In accordance with this Judgment, the Distribution Licensee cannot demand charges for consumption of electricity for a period of more than two years preceding the date of the first demand of such charges.

11. The Hon'ble Supreme Court of India in its Judgment dated 18.02.2020 in Civil Appeal No.1672 of 2020 in case of Assistant Engineer, Ajmer Vidyut Vitran Nigam Limited & Anr. V/s. Rahamatullah Khan alias Rahamjulla has held that:

> *"9. Applying the aforesaid ratio to the facts of the present case, the licensee company raised an additional demand on 18.03.2014 for the period July, 2009 to September, 2011. The licensee company discovered the mistake of billing under the wrong Tariff Code on 18.03.2014. The limitation period of two years under Section 56(2) had by then already expired. Section 56(2) did not preclude the licensee company from raising an additional or supplementary demand after the expiry of the limitation period under Section 56(2) in the case of a mistake or bona fide error. It did not however, empower the licensee company to take recourse to the coercive measure of disconnection of electricity supply, for recovery of the additional demand. ……."*

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12. In this case, the connection was granted on 08.12.2011 and the supplementary bill was issued to the Appellant on 25.01.2022. Considering the provision of Section 56 (2) of the Act, and its interpretation given by the Larger Bench Judgment dated 12.03.2019 of Hon'ble Bombay High Court in W.P. No. 10764 of 2011 and other W.Ps. as well as the Judgment dated 18.02.2020 by the Hon'ble Supreme Court of India in Civil Appeal No.1672 of 2020 in case of Assistant Engineer, Ajmer Vidyut Vitran Nigam Limited & Anr. V/s. Rahamatullah Khan alias Rahamjulla, only 24 months' retrospective recovery is allowed prior to the date of issue of supplementary bill.

13. The ratio of the Judgment dated 5th October 2021 in Civil Appeal No. 7235 of 2009 in the matter of Prem Cottex V/s. Uttar Haryana Bijli Vitran Nigam Ltd. passed by Hon'ble Supreme Court of India is not applicable in the instant case.

14. In view of the above Judgments of the Hon'ble Supreme Court of India in Civil Appeal No.1672 of 2020 and Hon'ble Bombay High Court in W.P. No. 10764 of 2011, we hold that the Respondent can recover only for 24 months retrospectively for tariff difference i.e., from Feb. 2020 to Jan. 2022, as the supplementary bill was issued in Jan. 2022.

15. In view of the above, the Respondent is directed as under: -

(a) To revise the supplementary bills of the Appellants for the period from Feb. 2020 to Jan. 2022 without interest and DPC, levied if any.

(b) To allow the Appellants to pay the revised bill in 10 equal instalments without any interest and DPC. If the Appellants fail to pay any instalment, proportionate interest will accrue, and the Respondent has the liberty to take action as per law.

(c) Compliance to be submitted within two months from the date of issue of this order.

(d) Other prayers of the Appellant are rejected.

16. The order of the Forum is modified to the extent above. The instant Representation is disposed of accordingly.

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17. The Secretariat of this office is directed to refund the amount of Rs.25000/- taken as deposit to the Respondent for adjustment in ensuing bill of the Appellant.

Sd/-
(Vandana Krishna)
Electricity Ombudsman (Mumbai)

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Secretary
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