BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

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

REPRESENTATION NO. 16 OF 2020

(Re-hearing in pursuance of the directions dated 25.08.2020 of the Bombay High Court in LD-VC-AS-SJ- WP NO. 64 OF 2020)

In the matter of change of tariff category

ESDS Software Solution Pvt. Ltd. …………………………………………….. Appellant

V/s.

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

Appearances

For Appellant : 1. Rajesh Gaikar, Sr. Manager
2. Sheshrao Pawar, Representative

For Respondent : 1. Pravin Daroli, Superintending Engineer
2. Smt. P.V. Banker, Executive Engineer
3. D. R. Mandlik, Sr. Manager (F & A)
4. Smt. Nital Varpe. Jr. Law Officer

Coram: Deepak Lad

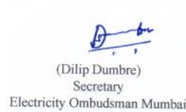
Date of hearing : 17.09.2020

Date of Order : 24.09.2020

ORDER

Preamble

Initially, the Appellant, ESDS Software Solution Pvt. Ltd. filed representation on 27th January 2020 under Regulation 17.2 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2006 (CGRF Regulations) against the Order dated 3rd January 2020 passed by the Consumer Grievance Redressal Forum, MSEDCL Nashik Zone (the Forum).



The matter was heard by the undersigned on 24.02.2020 and the order was issued on 06.03.2020. The relevant operative part of the said order is quoted below:

"(a) The Respondent to revise the tariff difference bill considering the period from July 2017 to March 2019 only, without DPC and interest.

(b) Suitable instalments may be granted if the Appellant so desires. If the instalments are granted, then the Appellant needs to pay the amount of the current bill along with the instalment within due date.

(c) The Respondent's higher officials are at liberty to inquire as to how the error occurred in non-application of appropriate tariff during the no certification period of IT/ITES in respect of the Appellant and may decide on recovery of such arrears from the erring officials."

The Appellant challenged this order in the High Court of Judicature at Bombay Civil Appellate Jurisdiction through LD-VC-AS-SJ- WP NO. 64 OF 2020. The Judgment dated 25.08.2020 of the Hon. High Court was communicated by the Appellant to this office vide its email dated 09.09.2020 at 17.51 hours. The Hon. High Court has remanded the matter to the undersigned with the following directions:

"4. In view of the fact that this limited aspect can be considered by the Ombudsman it is appropriate that the matter be remanded with a direction to consider these two aspects as well. I therefore pass the following order:

(i) The application is remanded to the Ombudsman for a decision tendered on the following two issues:

(a) Whether retrospective recovery of arrears is permissible in the facts of the present case based on re- classification of the petitioner–consumer into a different tariff category.

(b) Whether the certificate of the Directorate of Industries is mandatory for claiming benefit under the IT/ITES policy in the present case where the petitioner claims to hold certificates issued by STPI, Development Commissioner, District Industries Centre. The certificates include that issued by STPI, Director of Industries (GOM), Development Commissioner (Industries) and MIDC.

(ii) The Ombudsman shall hear the parties within a period of four weeks from today either in person or through video conference and pass a reasoned order.

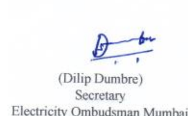
(iii) In the event the order is against the petitioners the order will not be implemented or coercive steps taken for further period of four weeks from date of the order to be passed.

(iv) It is made clear that this Court has not examined the merits of the case. The impugned order remains unaffected in its present form and the remand is restricted only to the two issues culled out above. The impugned order shall not be given effect to for a period of eight weeks.

(v) The ombudsman shall therefore decide those issues in accordance with law uninfluenced by the observations in this order.

(vi) Petition is disposed in the above terms.

(vii) All concerned to act on a copy of this order digitally signed by the Personal Assistant of this Court."



2. Accordingly, in pursuance of the above directions, the hearing was scheduled on 17.09.2020 through video conferencing with the consent of the parties and notice for the same was issued on 11.09.2020 through email. The same was telephonically informed to both the parties on the same day. The parties were directed to submit their respective written submissions / replies through email.

3. In response to the email of this office, the Appellant through its email dated 11.09.2020 (16:54 hours) informed that it has applied for modification of the impugned High Court order and attached copy of the said Misc. Application.

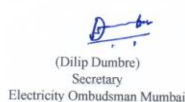
4. The Appellant's in its email dated 14.09.2020 (18:50 hours) submitted its rejoinder with supporting documents. This submission in brief is as below: -

(i) This submission is keeping its rights to file additional say and documents in case of necessity subject to order on modification application.

(ii) The Respondent MSEDCL case is based on the Commission's tariff order in Case No. 121/2014, 48/2016 and 195/2017. These tariff orders and IT Policy, 2015 of GOM require permanent registration certificate (PRC) from DIC, however, the said contention is nowhere proved by the Respondent.

It has quoted the relevant portion of the tariff orders of the Commission which are reproduced as below: -

<u>Tariff Order in Case No. 121/2014</u>
High Tension (HT) – Tariff- HT I: HT- Industry- Applicability:
This category includes consumers taking 3-phase electricity supply at High Voltage for industrial purposes of manufacturing. This Tariff shall also be applicable (but not limited to) ………………….. ………………… …………………….such facilities are situated within the same industrial premises and supplied power from the same point of supply; This Tariff shall also be applicable for use of electricity / power supply to IT/ITES units covered under IT Industry and IT enabled Services (as defined in the Policy of Government of Maharashtra as may be prevailing from time to time). Till the establishment doesn't receive permanent registration certificate as may be applicable; Tariff shall be as per HT-II Category and after receipt of permanent registration certificate HT I category shall be applicable till the validity of the Certificate.
<u>Tariff Order in Case No. 48/2016 and 195/2017</u>
LT-V (B): LT - Industry - General

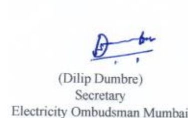


Applicability: This tariff category is applicable for ……………. ………………………. ……………………... ………………… ………………………. This tariff category shall also be applicable for use of electricity / power supply by an Information Technology (IT) or IT-enabled Services (ITeS) Unit as defined in the applicable IT/ITeS Policy of Government of Maharashtra. Where such Unit does not hold the relevant permanent registration Certificate, the tariff shall be as per the LT II category, and the LT V(B) tariff shall apply to it after receipt of such permanent registration Certificate and till it is valid.

Thus, it is amply clear that the Commission's tariff order nowhere required permanent registration certificate particularly from Directorate of Industries (DIC) only. In other words, the certificate of the DIC is not mandatory for claiming benefit under the IT/ITES policy in the present case as the petitioner undisputedly holds other certificates issued by STPI, Development Commissioner, District Industries Centre. The certificates include that issued by STPI, Director of Industries (GOM), Development Commissioner (Industries) and MIDC.

(iii) It is worthwhile to mention that the Commission's directives to exempt IT/ITES units under industrial tariff category was in consonance with IT Policy of State and Central Government which was framed with the sole intention to support, strengthen the IT revolution in the country. The Commission consciously included IT and IT enabled Services (IT & ITES) under industrial category (HT and LT as applicable) in the Tariff Order for the erstwhile MSEB in 2004.

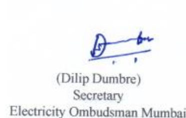
Since then, the IT & ITES category continues to be charged under industrial tariffs. The Commission gave effect to that policy for couple of years; however suddenly through its tariff in Case No. 48/2016 it inserted new criteria of relevant PRC from various authorities which was not included in previous tariff orders. This new criteria was challenged by some of the consumers before Appellate Tribunal for Electricity (ATE) on the basis that their nature of usage of electricity which was previously included in IT/ITES units and industrial tariff category cannot be changed to commercial category just because they do not have registration certificate as per IT Policy. The ATE in Appeal No. 337/2016 vide Judgment dated 12.02.2020, has ruled in favour of consumer. The said requirement of registration certificate is struck down by the ATE, by observing that nature of use of electricity is the foremost important criteria to



decide tariff and purpose of use of electricity is not affected by any registration process as nature of activity remains same. Consumer who is enjoying status of IT/ITES units & industrial tariff category for more than a decade and continuous to do so even today cannot be put to abrupt re-classification which certainly prejudices their financial loss. Considering the above aspect, it was ruled that-

"13.15 After careful consideration and analysis of the submissions of both the parties, it transpires that as per the ruling of the State Commission, in the impugned order, the telecom towers registered under the State Govt. Policy would be classified as industry and other telecom towers would be classified as commercial which is contrary to Section 62(3) of the Electricity Act, 2003. The very rationale adopted by the State Commission in granting industrial tariff to mobile/telecom towers was that these services are essential in nature and tantamount to industrial category despite having no manufacturing activities. It is noticed that vide the impugned order, it is not that all mobile / telecom towers have been put under commercial category but the only criteria for their decision is the registration under the IT/ITES Policy of Govt. of Maharashtra. Resultantly, such pre-requisite condition may put some towers under industrial category and some towers under commercial category which is contrary to the purpose of electricity classification due to the fact that use/purpose of the electricity is not affected by any registration process as the nature of the activities whether registered or not continues to be the same. Moreover, it has been presented by the Appellants during proceedings that they are registered under the IT/ITES Policy and some sample certificates were also produced before us. It is, thus clear that the discom/MSEDCL is now insisting a separate certificate for each of the thousands odd telecom towers of the Appellants to avail the industrial tariff. Further, the fact that the mobile towers and related instalments of the Appellants were treated and covered in the definition of IT/ITES under the policy of the Govt. of Maharashtra will also be evident from the registration certificate issued by the Govt. for the said instalments of the Appellants right since the year 2004. We have taken note of various judgments relied upon by the parties and the National Telecom Policy, 2012 which provide that telecom services are part / sub-set of the information technologies and hence as industrial units. It is also relevant to note that based on the nature of services, many services including telecom services have been recognised as an important infrastructure, public utility services, essential services etc. and have been considered under the incentive scheme as far as electricity tariff is concerned. For instance, airports, hospitals, cold storage, LPG/CNG bottling plants etc. have been considered under the industrial tariff which clearly do not involve manufacturing activities.

13.16 In view of above facts, we opine that the State Commission has not adequately considered the express provisions of the Electricity Act and various policies of the State/Central Govt. while passing the impugned order and thus violates the statutory provisions."

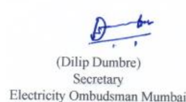


From the perusal of the ATE Judgment, it is crystal clear that every condition laid down by the Commission about requirement of registration certificate as per IT/ITES policy is struck down by ATE. Therefore, certificate of the DIC or any other certificate is not mandatory for claiming benefit under the IT/ITES policy in the present case as the petitioner undisputedly holds other certificates issued by Software Technology Parks of India (STPI), Development Commissioner, District Industries Centre.

(iv) It is important to note that, the Respondent MSEDCL has taken before this forum in earlier proceedings and before the Hon. Bombay High Court that registration certificate is mandatory for IT/ITES units for enjoying the benefits under industrial tariff slab. However, contrary stand was taken by MSEDCL before the Commission in Case no. 84/2020. MSEDCL cannot take two different stands on identical issue before two different legal forums. Respondent– MSEDCL in Case no. 84/2020, voluntarily submitted before the Commission that

"25. Issue M: Clarity on applicability of Tariff for IT and ITeS Units:
25.1. MSEDCL has listed variety of activities that can be covered under IT and ITeS policy. MSEDCL has stated that it can extend industrial tariff to IT and ITES units without any certification from the Government of Maharashtra (GOM). However, in absence of any certification the extension of subsidized tariff (industrial) will depend upon declaration from consumer and verification from MSEDCL field officers. There will be certain issues in deciding the eligibility of consumers for considering them under IT or ITeS which will lead to dispute or discrimination in implementation of tariff. Therefore. MSEDCL has requested the Commission to provide clarification in respect of methodology for deciding eligibility of consumers for IT & ITES category……"

Commission's Analysis & Rulings:
"25.4. The Commission notes that prior to the MYT Order dated 30 March 2020, registration certificate under IT&ITeS policy of the GOM was mandatory for any IT or ITeS unit claiming Industrial Tariff otherwise such unit would be categorized under Commercial category. However, in compliance of APTEL Judgment dated 12 February 2020 in Appeal No. 337 of 2016 wherein APTEL inter alia held that requirement of registration certificate is not a parameter under Section 62 (3) based on which consumer can be classified under consumer category, the Commission in the impugned MYT Order has removed the requirement of registration certificate for claiming applicability of Industrial Tariff. Now any IT or ITeS unit for which the GOM's IT&ITeS Policy is applicable can seek applicability of Industrial Tariff even



without having registration under that policy. MSEDCL in its present review Petition has also stated its readiness to extend the applicability of Industrial Tariff to such units without seeking registration certificate."

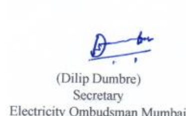
Considering the above order of the Commission and in view of the direction passed by ATE it is evident that criteria of registration under IT policy is already overruled by appellate authority being illegal and is no more in existence. Hence, the impugned demand raised by respondent MSEDCL is liable to be dismissed. In other words, certificate of the DIC is not mandatory for claiming benefit under the IT/ITES policy in the present case as the petitioner undisputedly holds other certificates issued by STPI, Development Commissioner, DIC.

(v) As per the above Judgement of ATE and the Commission tariff category of a consumer is to be decided on the basis of purpose of its use. It is not the case of MSEDCL that applicant ever changed its purpose of use. Petitioner submits that it has been carrying on only IT/ITES user activity since 2005 and had produced documents demonstrating that before Respondent authorities. Petitioners have not changed their user at any point of time since 2005 and continued paying electricity bills raised by the Respondent MSEDCL till today. The Commission in its Order in Case No 111/2009 ruled out that-

> *.....Thus, it will be seen from the elucidation given below, as to how different criteria have been used to categorize different types of consumers: …….. The criteria of purpose of supply has been used extensively to differentiate between consumer categories, with categories such as residential, nonresidential/commercial purposes, industrial purpose, agricultural purpose, street lighting purpose, etc. ……Further, it is clarified that the consumer categorization should reflect the main purpose of the consumer premises…. (Emphasis supplied)*

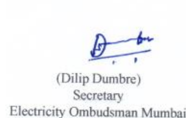
In other words, the certificate of the Directorate of Industries is not the criteria for claiming benefit under the IT/ITES policy consuming electricity for IT/ITES services.

(vi) According to the Respondent MSEDCL, an audit was done by an auditor and it was revealed that the Petitioner has not submitted the requisite permanent registration certificate, though the glaring fact of the matter is that the MSEDCL has never submitted any such audit report before any of the authorities below



and neither has provided the same to the Petitioner Company. Applicant submits that, the Respondent MSEDCL never filed its so called audit report on record on files before IGRC, CGRF and before this forum in earlier proceedings just because it contradicts their own stand. It is evident from the said report that period and amount mentioned in the said audit report is different than the disputed bill raised by respondent, MSEDCL did not filed said audit report with a view to hide important facts. Said audit report was filed by the Respondent MSEDCL before Hon. High court for the first time It is also important to consider that, the said audit report do not anywhere seeks permanent registration certificate from DIC as claimed by MSEDCL, on the contrary it only mentions absence of STPI certificate which is already provided by the Petitioner to MSEDCL long back. This further falsifies stand taken by the Respondent MSEDCL about requirement of permanent registration certificate from DIC. In other words, the certificate of the DIC for claiming benefit under the IT/ITES policy in the present case is not mandatory and was never sought by auditor as claimed by MSEDCL.

(vii) The Respondent MSEDCL relied on commercial circular no. 275. The said circular merely states that it would rely on the GOM IT/ITES policy of 2015 and is not at all applicable to present case. Petitioner's case would be governed by Circular No.212 dated 01.10.2013, which precedes the circular No.318. The guidelines for submission of the certificates of registration of IT industry for application of industrial tariff would be as per the circular No.212 for the reason being that the date of detection of error by the MSEDCL is in the purview of Circular No.212 and not Circular No.318. Another reason for this being that the Petitioner is an existing consumer of MSEDCL and the circular No.318 governs new connections. As per the above-mentioned ground, the applicable Circular being Circular No.212, there is no requirement of submission of DIC registration certificate for the application of 'HT-I Industrial' tariff to the IT/ITES units. Rather the circular stipulates six authorities whose certificates would be valid for availing such tariff. From the list of six authorities the Petitioner has four such certificates, which are submitted to the Respondent authorities which completely destroys the claims made by MSEDCL. Even if

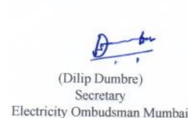


the case of the MSEDCL is considered regarding applicability of Circular No.318, the circular itself states that the LOIs obtained from DIC would also be sufficient for availing the industrial tariff. The only condition laid down in the said circular is that the industry should start its production/manufacture. The claim of MSEDCL is unsustainable even if their case is considered according to their own submissions. In other words, certificate of the DIC is not the criteria for claiming benefit under the IT/ITES policy consuming electricity for IT/ITES services.

(viii) The Appellant is a electricity consumer since 2005 and the recent circulars as claimed by MSEDCL deals only with new connection and impose new conditions. The Petitioner cannot be made to suffer on account of these new circulars as the Petitioner has been applied the industrial tariff on the basis of the conditions which were in force at the time of connection. The subsequent conditions cannot be imposed without following finite procedures of natural justice.

(ix) According to MSEDCL the Petitioner's case is covered by Circulars No.275 and 318. However, it is the consistent case of the Petitioner that the same are inapplicable to the present case. Circular No.275 arises from a tariff order and is relevant only to the extent of revision of the electricity tariff. However, the reliance by the MSEDCL on Circular No.318, which is regarding procedural guidelines regarding IT/ITES Parks and Units is misconceived, as the same is dated 26th June 2019 i.e. after the date of detection as per the case of the MSEDCL so far. The Petitioner states that the case of the Petitioner Company would be governed by Circular No.212, which precedes the Circular No.318.

(x) Appellant further states that, the Respondent MSEDCL took a stand before Hon. High court that it is not their responsibility to take meter reading and verifying the purpose of use of electricity of consumer by actual and physical verification. It is pertinent to note that, circular no. 275 states that- it is time bound duty of MSEDCL to apply right tariff category to its consumers with the aid of computerized data base and actual-field inspection. It is also obligatory on the part of MSEDCL to regularly visit, inspect consumer premises and take meter reading on monthly basis.



(xi) It is a settled proposition of law through the various orders of the Commission, Electricity Ombudsman and the Hon. ATE. These authorities and the ATE being the highest authority have consistently followed the view that any recovery of tariff difference from a consumer, on account of the error on the part of the electricity company/licensee cannot be made retrospectively even for a single day and it always has to be prospective from the date of the detection.

(xii) The Appellant cited

(a) ATE Judgment in the matter of Vianney Enterprises V/s. KSEB, in Appeal No. 131 of 2013 dated 07.08.2014 held that-

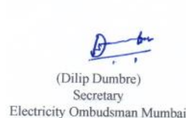
22. The State Commission has correctly held that the arrears have to be collected by the Electricity Board from the Appellant from the date of detection of error i.e. 10.03.2008. We are in full agreement with the findings of the State Commission.

(b) The Commission's order dated 11.02.2003 in Case No. 24 of 2001 has held that-

No retrospective recovery of arrear can be allowed on the basis of any abrupt reclassification of a consumer even though the same might have been pointed out by the Auditor. Any reclassification must follow a definite process of natural justice and recovery, if any, would be prospective only as the earlier classification was done with a distinct application of mind by the competent people. The same cannot be categorized as an escaped billing in the strict sense of the term to be recovered retrospectively. With the setting up of the MERC, order of the Commission will have to be sought as any reclassification of consumers directly affects the Revenue collection etc. as projected in its Tariff Order. The same could be done either at the time of the tariff revision or through a special petition by the utility or through a petition filed by the affected consumer. In all these cases, recovery, if any, would be prospective from the date of order or when the matter was raised either by the utility or consumer and not retrospective.

(c) The Commission in the matter of Seafood Exporters Association of India regarding wrongful Tariff categorization by Maharashtra State Electricity Distribution Co. Ltd. in violation of Tariff Order dated 16.8.2012 in Case No. 19 of 2012, CASE No. 42 of 2015 and M.A. No. 3 of 2015 M.A. No. 4 of 2015, Dt. 13 May, 2016 further held that-

As far as retrospective application of a different tariff category is concerned, the Commission's ruling in its Order dated 11 February, 2003 in Case No. 24 of 2001, which is relevant in this Case, was as follows: "No retrospective recovery of arrear can be allowed on the basis of any abrupt reclassification of a



consumer even though the same might have been pointed out by the Auditor. Any reclassification must follow a definite process… and the recovery, if any, would be prospective only… The same cannot be categorized as an escaped billing in the strict sense of the term to be recovered retrospectively." While that Order was passed prior to the coming into force of the EA, 2003, the same principle continues to apply: the ATE's more recent judgment dated 7 August, 2014 in Appeal No. 131 of 2013, for instance, has also been cited in these proceedings.

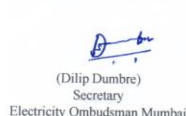
(d) The order of Electricity Ombudsman, Nagpur in Representation No. 33/2018, in the matter of- Shri Abdul Waheed Abdul Wali Vs. The Executive Engineer (Admn), O&M Urban Division, MSEDCL, Nanded Decided on: 21/09/2018, held that-

6. Since this is a case of reclassification, the order of the Maharashtra Electricity Regulatory Commission of 11th February 2003 in case No. 24/2001 will apply. This order states that "No retrospective recovery of arrear can be allowed on the basis of any abrupt reclassification of a consumer even though the same might have been pointed out by the Auditor. Any reclassification must follow a definite process of natural justice and the recovery, if any, would be prospective only as the earlier classification was done with a distinct application of mind by the competent people. The same cannot be categorized as an escaped billing in the strict sense of the terms to be recovered retrospectively."

(e) The order of Electricity Ombudsman, Mumbai in the matter of M/s. Himadri foods Vs. MSEDCL in Representation No. 12 of 2018 on 14 March 2018, held that-

9….. The respondent has not changed the tariff category pursuant to their inspection and admittedly, the purpose of use remained the same. In case no 24 of 2001, the commission in its order Dt. 11 February 2003 has held that no retrospective recovery of arrears can be allowed on the basis of any abrupt reclassification of consumer even though the same might have been pointed out by the auditor. The ApTel in appeal no 131 of 2013 has also ruled in its order Dt. 01 august 2014 that the arrears for difference in tariff could be recovered only from the date of detection of error. Similarly in representation no 124, 125 and 126 of 2014 decided on 23 December 2014, it is held that the recovery on account of reclassification can be prospective only. Even if it is held that, at the relevant time, no manufacturing activity was in operation, the supplementary bill issued by the respondent for recovery of tariff difference retrospectively for the period from August 2013 to august 2015 will not be tenable.

From the ratio laid down by above orders it is clear that retrospective recovery of arrears is not permissible in the present case based on re-classification of the petitioner-consumer into a different tariff category. Respondent MSEDCL is barred from recovering a single penny for a



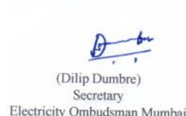
single day from its consumers in case of wrong categorization, escaped billing, wrong application of tariff etc. It is also worth to mention that, as MSEDCL itself admits the supremacy of ATE and that of the Commission and even otherwise ratio laid down by Hon. High Court in Judgment dated 12.03.2019 of the Larger Bench of Bombay High Court in W.P. No. 10764 of 2011 is not at all applicable in the present circumstances. In any case, there cannot be any recovery based on retrospective reclassification of tariff category of a consumer. Such retrospective recovery by reclassifying a consumer in different tariff category runs counter to and is ultra-vires Electricity Act, 2003 and is also manifestly unreasonable.

It is also important to mention that the Respondent – MSEDCL has admitted at Para 7 of its reply to writ petition about eligibility of different authorities and various certificates fulfils the criteria for the applicant to enjoy Industrial Tariff. The Petitioner has all the necessary certificates as admitted by the Respondent and hence no case is made out by the Respondent. Under such situation, difference in tariff by reclassifying a consumer in different tariff category is not permissible nor legal.

(f) Applicant submits that, Hon. High Court in Writ Petition No.10536 OF 2019 in the matter of MSEDCL Vs. CoEP Pune, Order dated 09.06.2020 ruled out that-

23.3. Interpreting sub-section (2), Full Bench held that by itself it is an independent provision applying only to consumers. The Full Bench clarified that the consumer cannot be vexed in the event the licensee is negligent in recovering the amount due. The licensee can recover the amount due from the consumer only for a period of two years when such sum became first due. In the event the licensee wants to recover the amount after two years, then it is the obligation and duty of the licensee to show the sum due from the consumer as continuously recoverable as arrears of charges for the electricity supplied to the consumer.

(g) While examining 56(2) the Full Bench held that a consumer cannot be vexed in the event the licensee is negligent in recovering the amount due.

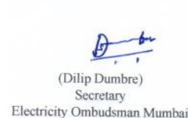


If the views of CAG are treated as correct, in that event the electricity charges on the basis of tariff category LT-I became due from September 2012. For the next two years from September 2012 there is nothing on record to show that the petitioner had raised any bill or attempted to recover electricity charges from the respondent under LT-I tariff category. Even after two years no such bills were raised. First time on the basis of LT-I tariff category bill was raised on 17.03.2018. The language used in sub-section (2) is "when such sum became first due" in contradistinction to such sum being first billed. Period of limitation will commence when such sum became first due. Admittedly, as per the petitioner such charge or sum became first due in September 2012 but billed for the first time on 17.03.2018. In such circumstances, it was not open to the petitioner to raise the bill retrospectively on 17.03.2018 for the period from September 2012 and thereafter issue disconnection notice.

That being the position, Court finds no error or infirmity in the impugned decision.

(h) For all the aforesaid reasons, Court is of the view that there is no merit in the writ petition. Accordingly, the writ petition is dismissed. However, there shall be no order as to costs.

(xiii) It is submitted that Hon. Electricity Ombudsman, Mumbai in the earlier order (Dated 06.03.2020, at Para. 09) has directed the recovery to be made prior to two years from the date of detection relying on S.56(2) of the Electricity Act, 2003 (basis the judgment of Hon'ble Bombay high Court in W.P.No.10764 OF 2011 dated 12.03.2019). It is respectfully pleaded that the said Judgment by the Larger bench of this Hon'ble Court is inapplicable. For the simple reason that said judgment by way of general rule has laid down that the recovery may be made from consumer for up to two years from the date when such bill becomes payable. Said judgment has rather laid down general rules, which cannot be interpreted to mean in the present facts and circumstances same shall be applicable verbatim.



On the contrary, in the wake of law laid down by Hon. Bombay High Court in Writ Petition No.10536 of 2019 in the matter of MSEDCL Vs. CoEP Pune, Order dated 09.06.2020, which is identical to applicants case., no retrospective recovery can be levied due to the mistake of MSEDCL.

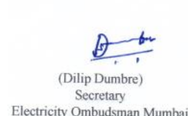
(xiv) It is further submitted that, Hon. Electricity ombudsman in this matter in earlier order (Dt. 06.03.2020 at Para. 07) held that the consumer shall hold relevant certificates as per the Commission's order in Case No. 121/2014 and 48/2016 and 195/2017. However, in view of latest order of ATE in Appeal No. 337 of 2016, and subsequent order of the Commission in Case No. 84 of 2020 dated 03.06.2020 wherein it is undisputedly laid down that certificate of registration of any kind as stipulated by the Commission is required at all and only purpose of use of electricity is required to be considered.

(xv) The Appellant therefore state and submit that, from the facts and circumstances in the present matter, it is evident that the present Petition deserves to be allowed in toto and the electricity bill raised by MSEDCL for the period 21.1.2010 to 02.01.2011 and 01.01.2016 to 02.04.2019 becomes illegal and no recoverable and the same is required to be quashed and set aside fully.

5. The Respondent submitted its reply by email dated 15.09.2020 stating as under: -

(i) It is submitted that it is an admitted fact that the Appellant was not in possession of PRC from DIC for the tenure of 21.10.2010 to 02.01.2011 and 01.01.2016 to 02.04.2019. It has not offered any reasoning or has not denied the fact that it did not possess PRC for the aforementioned tenure. Manifestly, the IT/ITES Policy 2015 of the GOM provides for the following:

a. "*iii) Electricity Tariff: Power consumed will be charged at industrial rate for the common facilities in the IT Park (such as lobbies, central air conditioning, lifts, escalators, effluent treatment plant, wash rooms etc.) which are used by the units, excluding support service areas,* ***after the registration is granted to the IT park by the Directorate of Industries*** *and Development Commissioner of the SEZ for an IT SEZ. A separate meter will have to be provided by the developer to the individual IT / ITES units in the IT parks for leased or purchased premises*". **(Emphasis supplied)**



(ii) In furtherance to the aforesaid, the Commission through its various tariff orders has incorporated the provisions regarding applicability of Industrial tariff to units possessing PRC from DIC regarding carrying on IT/ ITES Services. The relevant excerpts of the Tariff Orders are as follows:

(iii) Order dated 26.06.2015 in Case No. 121 of 2014:

"***HIGH TENSION (HT) – TARIFF***

HT I: HT- Industry

Applicability

This category includes consumers taking 3-phase electricity supply at High Voltage for industrial purposes of manufacturing. This Tariff shall also be applicable (but not limited to) for use of electricity / power supply for Administrative Office / Time Office, Canteen, Recreation Hall /Sports Club / Health Club / Gymnasium / Swimming Pool exclusively meant for employees of the industry, lifts, water pumps, firefighting pumps, premises (security) lighting, Research and Development units, etc., provided all such facilities are situated within the same industrial premises and supplied power from the same point of supply;

This Tariff shall also be applicable for use of electricity / power supply to IT/ITES units covered under IT Industry and IT enabled Services (as defined in the Policy of Government of Maharashtra as may be prevailing from time to time). Till the establishment doesn't receive permanent registration certificate as may be applicable; Tariff shall be as per HT-II Category and after receipt of permanent registration certificate HT I category shall be applicable till the validity of the Certificate."

- Order dated 03.11.2016 in Case No. 48 of 2016

"**HT I: HT – Industry**

HT I (A): Industry – General

Applicability:

This tariff category is applicable for electricity for Industrial use at High Voltage for purposes of manufacturing and processing, including electricity used within such premises for general lighting, heating/cooling, etc.

It is also applicable for use of electricity / power supply for Administrative Offices / Canteen, Recreation Hall / Sports Club or facilities / Health Club or facilities/ Gymnasium / Swimming Pool exclusively meant for employees of the industry; lifts, water pumps, firefighting pumps and equipment, street and common area lighting; Research and Development units, etc. -

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

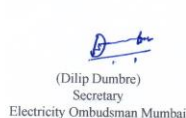
Electricity Ombudsman Mumbai M.E.R.C.

Provided that all such facilities are situated within the same industrial premises and supplied power from the same point of supply.
This tariff category shall be applicable for use of electricity / power supply by an Information Technology (IT) or IT-enabled Services (ITeS) Unit as defined in the applicable IT/ITes Policy of Government of Maharashtra. Where such Unit does not hold the relevant permanent registration Certificate, the tariff shall be as per the HT II category, and the HT I tariff shall apply to it after receipt of such permanent registration Certificate and till it is valid."

- <u>Order dated 12.09.2018 in Case No. 195 of 2017</u>

"***HT I: HT – Industry***
HT I (A): Industry – General
Applicability:
This tariff category is applicable for electricity for Industrial use at High Voltage for purposes of manufacturing and processing, including electricity used within such premises for general
lighting, heating/cooling, etc.
It is also applicable for use of electricity / power supply for Administrative Offices / Canteen, Recreation Hall / Sports Club or facilities / Health Club or facilities/ Gymnasium / Swimming Pool exclusively meant for employees of the industry; lifts, water pumps, fire-fighting pumps and equipment, street and common area lighting; Research and Development units, etc. -
Provided that all such facilities are situated within the same industrial premises and supplied power from the same point of supply.
This tariff category shall be applicable for use of electricity / power supply by an Information Technology (IT) or IT-enabled Services (ITeS) Unit as defined in the applicable IT/ITes Policy of Government of Maharashtra. Where such Unit does not hold the relevant permanent registration Certificate, the tariff shall be as per the HT II category, and the HT I tariff shall apply to it after receipt of such permanent registration Certificate and till it is valid."

(iv) It is therefore evident that under the IT Policy 2015 of the Government of Maharashtra and the Orders of the Commission, for applicability of Industrial Tariff, the PRC from DIC is mandatory, which in this case the Appellant did not have for the period mentioned above. It is in view of these guidelines, which bind the hands of the answering Respondent that the commercial tariff was applied for the duration where there was no PRC available with the Appellant. The only time period for which this certificate has been submitted by it is

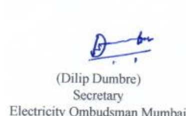


03.04.2019 to 02.04.2022 which is required to be renewed thereafter. Pertinently, prior to the certificate of 03.04.2019, it had provided the certificate dated 10.01.2011 from STPI whereby the IT approval granted earlier on 21.10.2005 for a period 5 years was extended for another 5 years from 03.01.2011, which expired on 03.01.2016. Thereafter the only certificate provided was on 03.04.2019. Needless to say, there are eligibility criterions on which these PRCs are issued and renewed. Therefore, the requirement of a valid standing PRC cannot be ignored.

(v) At the further outset, it is pertinent to mention that it is only the Regulatory Commission under the Electricity Act, 2003, that has the power to determine tariff. Once determined, it is not open to courts to interpret the same and clarification if any, in regards thereto can only be provided by the Regulatory Commission and no other courts.

(vi) It is submitted that the Appellant itself has admitted that it did not possess the PRC for two intermittent periods as cited in Paragraph No. 1. As has been stated herein above, it is mandatory under the IT Policy 2015 of the GOM and the Orders of the Commission, which bind the answering Respondent, that the PRC is mandatory for being classified as an Industrial consumer. It was on the basis of this that the Appellant was classified as a commercial consumer and not an Industrial Consumer. Due to inadvertence, the answering Respondent has not classified the Appellant in the Commercial category and on account of the auditor's Report, upon realizing the same; the amount was charged in bill of July 2019. It is submitted that the Audit report specified an approx. amount of Rs.1.85 Crores, being the loss suffered by the Respondent MSEDCL which is calculated solely considering the energy consumption of the Appellant and up to only December 2018. The other charges like the Electricity Duty, DPC, FAC, etc., for the entire relevant period was calculated by the Respondent MSEDCL vide its bill of July 2019.

(vii) It is denied that the bills issued in July 2019 is arbitrary, misconceived and illegal. The same has been issued in consonance with the Policy and the Regulations. The Industrial tariff is only applicable till the PRC is valid and the same is a mandatory requirement.



It is denied that the Appellant could not have been reclassified as HT-Commercial for intermittent period. The Appellant did not fulfil the criterion of the tariff category and were therefore correctly reclassified. Pertinently, only nature of the activity is not the criterion set for applicability of the Industrial Category. A valid PRC is mandatory for the same as has been elucidated here in above. It is vehemently denied that the retrospective recovery by reclassifying a consumer in different tariff category runs counter to and is ultra-vires Electricity Act, 2003 and is also manifestly unreasonable. In fact Section 56 (2) and the Judgement of the Hon'ble Bombay High Court (Full Bench) in Writ Petition No 10764 of 2011 and the Hon'ble Supreme Court in Civil Appeal No.1672 OF 2020 allows for retrospective recovery by the licensee and therefore the Order dated 06.03.2020 of the Electricity Ombudsman is correct. The Petition is therefore liable to be dismissed *in limine*.

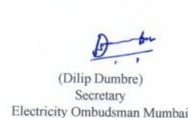
(viii) The Appellant is well aware of the PRC and the issues under it. It is pertinent to highlight that the Appellant is required to renew the PRC upon its expiry. It is not their case that there has been any delay in issuance of the certificate from the date of the application.

(ix) It must however be submitted that the bill raised in July 2019 is not unreasonable or excessive.

(x) Even without the auditor's report, the Appellant has admitted that it did not possess the PRC for the intermittent period which itself shows non-compliance.

(xi) It is submitted that the Order passed by the Forum is well reasoned and has been passed after due consideration of the case of both sides. The answering Respondent MSEDCL has not issued any notice of disconnection as on date. Furthermore, the Order of the Ld. Electricity Ombudsman is well reasoned order in consonance with the settled principles of law. There is therefore no reason for any dissatisfaction at all as alleged.

(xii) It is submitted that the reclassification of consumer is not always on the basis of change of activity. The tariffs are applied based on the criterions set by the Commission in the

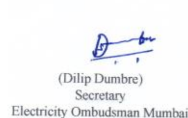


tariff orders, year after year. The only reason to classify IT/ ITES consumers under the Industrial category is on the basis of the IT policy and the subsequent Commission Orders all of which mandatorily require the company to possess a PRC from the DIC for application of the tariff. Pertinently, it is clearly specified that in the absence of the PRC, the tariff charged would be commercial and not industrial. Furthermore, the Commercial Circulars issued by the answering Respondent MSEDCL are in pursuance of the Commission Regulations/ Tariff Orders and not in supersession thereto. The Commercial Circular 212 provides for a policy in consonance with the IT Policy prevalent at the relevant time. Commercial Circular No. 275 and 318 are in consonance with the IT Policy 2015, which mandated PRC from DIC for categorization as Industrial consumer. Any consumer let alone the Appellant must be aligned with the requirements of the tariff category and cannot be tied up or governed by obsolete circulars despite substantial change in the position. Furthermore, the Commercial Circular 212 provides for submission of Registration Certificate in the absence of which commercial tariff is to be charged. However, the at that relevant point of time, the DIC certificate was not compulsory and the same could be obtained from any of the six Government Authorities mentioned there. There is no merit in the contentions of the Appellant and the same ought to be dismissed *in limine*.

(xiii) The answering Respondent MSEDCL is not delving into each and every ground raised by the Appellant in a para wise manner for the sake of brevity. The grounds of the Appellant are repetitive in nature and can be summarized as follows, amongst other scattered points:

a. Aspect of retrospective recovery
b. Reclassification of the tariff category and its basis
c. Requirement of Permanent Registration Certificate
d. Applicability of Circulars of MSEDCL
e. Other Miscellaneous grounds

The answering Respondent MSEDCL shall deal with each of the aforementioned grounds and the respective contentions taken by the Appellant under each of the heads.



a) **Retrospective Recovery**

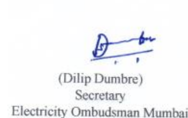
(i) The Hon'ble Supreme Court of India in the case of Civil Appeal No.1672 OF 2020, has held:

"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."

(ii) It is therefore amply clear that the Hon. Courts have time and again upheld the right of the Distribution Licensee to recover retrospectively on account of a bona fide error/ inadvertence, by means specified under Section 56 (1) of the Electricity Act, 2003 and for further periods by other available remedies. It is vehemently denied that the Judgement of the Larger Bench of this Hon. Court is inapplicable as the question therein was regarding the maximum period of supplementary bills being raised and permissibility of it. It is submitted that the Appellant wholly failed to interpret and understand the said Judgment in its true context. The said Judgment is squarely on the point of retrospective recovery and covers the contention raised by the Appellant. It is further denied that any general rules are set by the said Judgment and the same cannot be made applicable to the present case.

(iii) It is denied that it is a settled proposition of law settled by the various orders of the Commission, Electricity Ombudsman and the Hon. ATE as alleged or at all. It is further denied that finite process by following natural justice and other principles of law has not been followed by the answering Respondent.

(iv) It is vehemently denied that distribution company is taking advantage of its own wrong or setting the consumer with excessive recoveries. The answering Respondent has realized the incorrect classification upon the audit being done and has accordingly corrected the same. There is no advantage as indicated being taken, but a bona fide error which has been corrected. It is further denied that the recovery vide bill of July 2019 is an arbitrary exercise of its functions by the Respondent MSEDCL by imposing

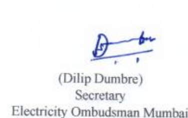


recoveries on the basis of unilateral change of tariffs as alleged or at all. At the cost of repetition, it is stated that the Appellant has failed to produce the certificate as required despite being required under the regulations and IT Policy.

b) <u>Reclassification of the tariff category and its basis</u>

(i) It is submitted that the Appellant has essentially tried to claim that it has always been into IT/ ITES Services and therefore there could not have been a reclassification of the consumer. The categorization of IT/ITES consumer under the industrial category mandatorily requires the PRC as has been elucidated hereinabove. Merely being an IT industry would not suffice. The said position has in fact been amply clarified by the IT policy and the subsequent Commission orders. It is further submitted that the Appellant's registration with the Government Authorities like STPI or MSME have no bearing upon the categorization of the Appellant under the industrial category as the mandatory requirement, as elucidated herein above is to have the PRC certificate. If the tariff orders and the IT policy intended to provide for registration with one of the authorities as the criterion for such classification, the same would have been mentioned clearly. Hence, there is no merit in the contention of the Appellant.

(ii) Furthermore, the constant harping of the Appellant on the point that the Respondent MSEDCL is contending that the Appellant, for the intermittent periods in question, were not IT users, holds no merit at all. It is the simple case of the answering Respondent MSEDCL that in view of not possessing the PRC certificate of DIC, for the intermittent periods, mandatorily required by the IT policy 2015 and the subsequent Commission orders, the Appellant has not been able to satisfy the condition to be classified as an industrial consumer and is therefore liable to be classified as a commercial consumer for such intermittent periods. The Respondent MSEDCL discovered the mistake only upon being pointed out by the audit report and is therefore entitled to correct in view of the various judgments of the Hon. Bombay High Court and the Hon. Supreme Court of India as cited here in above, on account of being a bona fide error. The Ld. Electricity Ombudsman has allowed recovery of commercial tariff for the past two years on basis of the Judgment of the Larger Bench of this Hon. High



Court in Writ Petition No. 10764 of 2011. It is a vehemently denied IT policy does not require the DIC certificate as alleged or at all. The PRC certificate has been stated to be mandatory for applicability of industrial tariff in the IT policy as well as the Commission Orders.

(iii) Furthermore, the PRC submitted by the Appellant was valid only till 2016, post which the said certificate has not been renewed by it, admittedly. As has been stated here in above the change in activity is not the only criteria under which the category of the Appellant would have to be re-classified. In the present case that the re-classification has been done on the face of no PRC certificate being submitted, for the intermittent period in question, which fact, the Appellant has not been able to refute.

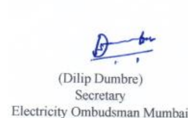
(iv) Hence, the reclassification is not incorrect and the answering Respondent MSEDCL is entitled to make recovery on commercial tariff for the intermittent periods as has been permitted by the IGRC/ the Forum.

c) **<u>Requirement of Permanent Registration Certificate</u>**

(i) It is denied that basic purpose of the demanding the PRC is to ascertain as to what is the work carried on by the concerned industry. If that were to be the case then any of the other registrations cited by the Appellant would have sufficed to show the user of the industry. PRC would have certain criterion set out by the DIC in terms of which this certificate is granted which the Appellant would also be required to satisfy. Therefore, this contention of the Appellant is whimsical and ought not be considered.

(ii) It is submitted that the non-renewal of the certificate has the same effect as that of cancellation and would disentitle the Appellant to be classified under the Industrial Category.

(iii) It is the law of the land that such certificate is compulsory for classification under the industrial category and not being aware of the same is not a valid defense. The Respondent MSEDCL has admitted its inadvertence, but that does not absolve the

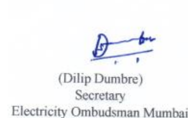


Appellant from its liabilities. In fact, the Appellant at its whims complied with the requirement as and when deemed convenient. Even without the contention of the auditor's report, the Appellant has admitted that it did not possess the PRC for the intermittent period which itself shows non-compliance.

d) <u>Applicability of Circulars of MSEDCL</u>

(i) It is required to be clarified that the Commercial Circulars of the Respondent MSEDCL are guided by the Commission Orders and are for internal regulation of procedures of the answering Respondent MSEDCL. The same do not overrule the law or supersede the Regulations.

(ii) The Appellant, just for sake of objection is raising objections like Circular No. 275 stipulates that a PRC is to be sought but nowhere mentions that it has to be from DIC. The same is very clear in IT Policy and Commission Orders, reference of which is also found in the Commercial Circular No. 275. Further, a person carrying on business is such filed should be aware of the same. It may be stated that the Circular No. 318 showcases the position as on date. The Commercial Circular No. 212 provides for a policy in consonance with the IT Policy prevalent at the relevant time. Commercial Circular No. 275 and 318 are in consonance with the IT Policy 2015. Any consumer, let alone the Appellant is to be aligned with the requirements of the tariff category and cannot be tied up or governed by obsolete circulars despite substantial change in the position. Hence, there is no merit in the contentions of the Appellant. Furthermore, the Commercial Circular No. 212 provides for submission of Registration Certificate in the absence of which commercial tariff is to be charged. However, at that relevant point of time, the DIC certificate was not compulsory and the same could be obtained from any of the six Government Authorities mentioned therein. In any case, the Commission regulations and the IT Policy hold more value than circulars of the answering Respondent MSEDCL and the same are amply clear on the requirement of PRC and therefore, such claims of the Appellant are frivolous.



(iii) The Letter of Intent, as alleged by the Appellant is only valid for IT parks in the stage of setting up. Once production commences, the industry would be entitled to obtain registration and would then become mandatory.

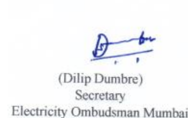
(iv) The PRC certificate requirement has been imposed by the IT Policy and is required to be followed by the industries. Furthermore, the Tariff Orders are passed by the Commission after holding public hearing and therefore would be in public knowledge of all. The Appellant cannot claim that it was not aware of the same. The Appellant was already having the PRC and hence was very much aware of the requirement of the same. The contentions to this extent are therefore frivolous and ought to be ignored.

e) <u>Other Miscellaneous grounds</u>

(i) It is denied that the Appellant holds a requisite permanent registration certificate or has submitted all the requisite registrations as per the applicable circulars of the Respondent MSEDCL. The Appellant has admittedly not produced a valid PRC for the intermittent period and is therefore required to be classified under the Commercial Category.

(ii) It is denied that recovery sought does not in any manner affect the Respondent MSEDCL financially as MSEDCL recovers the Annual Revenue Requirement periodically from its consumers across the state. It may be mentioned that where the answering Respondent MSEDCL is put to such loss, it ultimately affects he public at large as they are burdened with the amounts that were actually to be paid by the Appellant.

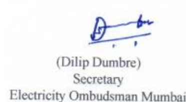
(iii) Electricity Ombudsman (Mumbai) has not properly appreciated the submission of the Respondent MSEDCL with respect to the period of recovery though it agreed with the requirement of registration certificate. Electricity Ombudsman passed the order on the basis of the Larger Bench Judgment in W.P. No.10764 of 2011 of Bombay High Court and allowed recovery only for 21 months i.e. from July 2007 to March 2017 which amounts to Rs.1,56,41,960/- which has put the Respondent to a loss of on recovered amount Rs.1,45,04,064/-.



(iv) There is no coercive action taken by the answering Respondent MSEDCL as alleged by the Appellant or at all. It is denied that there is any incorrect classification as alleged or at all and the recovery sought is of its legally recoverable dues. It is denied that the Appellant has a strong prima facie case or that the balance of convenience is in favour of the Appellant. The Appellant's case is flawed at the very root and holds no merit. It is therefore submitted that the Appellant is not entitled to any reliefs as claimed.

6. The hearing was conducted as scheduled through video conferencing, however, the same being not healthy, it was continued through audio conferencing with the consent of the parties. The Appellant argued the case at length in line with its written submission which is captured above and therefore, the same has not been reproduced here for the sake of brevity. The Respondent argued that the permanent registration certificate is mandatory for the Appellant to have its unit billed at industrial tariff. This is the requirement stipulated under the Commission's relevant tariff order for IT / ITES units. The Appellant initially did have the required PRC and was billed with appropriate tariff i.e. Industrial. However, it was not in possession of valid PRC during the periods 21.10.2010 to 02.01.2011 and 01.01.2016 to 02.04.2019. Therefore, as per the Commission's tariff order, Commercial Tariff category was applied during this period and recovery towards tariff difference was billed. The Respondent inadvertently not billed the Appellant at Commercial tariff for the above period during which the Appellant did not have valid PRC. This inadvertent act of omission on the part of the Respondent was pointed out by the Government Auditing authority during the regular audit. Hence, the Respondent raised the bill on the Appellant for this particular period towards the tariff difference between Commercial and Industrial for 41 months. The Respondent cited the Judgment dated 18.02.2020 of the Hon. Supreme Court in Civil Appeal No.1672 of 2020 in Assistant Engineer (D1), Ajmer Vidyut Vitran Nigam Ltd. & Anr. V/s. Rahamatullah Khan alias Rahamjulla. The Respondent specifically pointed and read out Para 8 and 9 of the said Judgment which is quoted below:

> *"8. Section 56(2) however, does not preclude the licensee company from raising a supplementary demand after the expiry of the limitation period of two years. It only restricts the right of the licensee to disconnect electricity supply due to non-payment of dues after the period of limitation of two years has expired, nor does it restrict other modes of recovery which may be initiated by the licensee company for recovery of a supplementary demand.*



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.

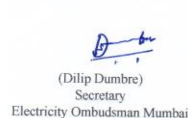
As per Section 17(1)(c) of the Limitation Act, 1963, in case of a mistake, the limitation period begins to run from the date when the mistake is discovered for the first time.

In Mahabir Kishore and Ors. v. State of Madhya Pradesh, this Court held that:–

> *"Section 17(1)(c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff had discovered the mistake or could with reasonable diligence, have discovered it. In a case where payment has been made under a mistake of law as contrasted with a mistake of fact, generally the mistake become known to the party only when a court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a court makes a pronouncement, it is seldom that a person can, even with reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law." (emphasis supplied)*

In the present case, the period of limitation would commence from the date of discovery of the mistake i.e. 18.03.2014. The licensee company may take recourse to any remedy available in law for recovery of the additional demand, but is barred from taking recourse to disconnection of supply of electricity under sub-section (2) of Section 56 of the Act."

7. The Respondent argued that the Judgment dated 12.02.2020 of the ATE in Appeal No. 337 of 2016 deals with the mobile towers and not the cases like the instant one. Hence, it is not applicable. The order dated 30.06.2020 of the Commission in Case No. 84 of 2020 is prospective in nature and therefore, cannot be applied to the instant case. The Respondent's actions are strictly in line with the Commission's order then in force and therefore, valid. The Respondent also argued that the PRC issued by the competent authority of the GOM definitely has some sanctity in absence of which the Respondent will never be able to understand the activities of the Appellant for which power is supplied by it.



Analysis and Ruling

8. Heard both the parties, perused the documents on record. Also perused the Judgment of the ATE in Appeal No. 337 of 2016 and the Order of the Commission in Case No. 84 of 2020. When this case was heard earlier, on 24.02.2020 and the order issued on 06.03.2020, the Appellant did not cite the ATE Judgment though it was issued on 12.02.2020.

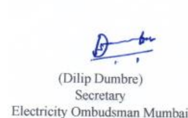
9. Aggrieved by the order dated 06.03.2020 of the undersigned in Representation No. 16 of 2020, the Appellant filed Writ Petition No. 64 of 2020 in the High Court of Judicature at Bombay. The Judgment is issued on 25.08.2020 in which the Hon. Bombay High Court remanded the matter to the undersigned and directed to decide the following issues: -

> **(a) Whether retrospective recovery of arrears is permissible in the facts of the present case based on re- classification of the petitioner–consumer into a different tariff category.**
>
> **(b) Whether the certificate of the Directorate of Industries is mandatory for claiming benefit under the IT/ITES policy in the present case where the petitioner claims to hold certificates issued by STPI, Development Commissioner, District Industries Centre. The certificates include that issued by STPI, Director of Industries (GOM), Development Commissioner (Industries) and MIDC.**

10. Firstly Issue (b) is decided as below: -

While perusing the ATE Judgment dated 12.02.2020 in Appeal No. 337 of 2016 of Bharti Airtel Ltd. with other batch of Appeals V/s. MERC and MSEDCL, I noted that the Tribunal has framed three issues. The three issues with its findings are as follows:

> *"Issue No.1: Whether the State Commission is justified in changing the categorization of the mobile towers from industrial category to commercial category for towers not falling within Govt. of Maharashtra policy on IT & ITES ?*
> *Our Findings: -*
> *12.12 We have carefully considered the submissions of learned counsel for the Appellants and learned counsel for the Respondent Commission and also taken note of the various judgments of the apex court as well as this Tribunal relied upon by the parties. It is the contention of the Appellants that till the impugned order dated 03.11.2016, the State Commission has come out with several orders such as dated 17.08.2009, dated 12.10.2010, dated 16.09.2012, dated 26.06.2015 etc. and has constantly placed the mobile / tele-communication towers under the industrial tariff category. …………………… ………….*
> *The relevant portion of the impugned order reads thus: -*
> *"…Considering the above, Telecommunication Towers shall be covered under the Commercial category, unless specifically included in the IT &ITeS Policy of the*



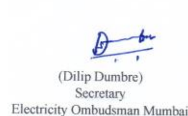
Government of Maharashtra for coverage under the Industry category." In other words, the mobile / tele-communication tower are to be considered now under commercial tariff category instead of the existing industrial tariff category unless they are covered as IT/ITES under the Policy of the Govt. of Maharashtra.

12.13 Learned counsel for the Appellants placed reliance on the judgment of Hon'ble Supreme Court in case of Indian Metal and Ferro Alloys under the Collector of Central Excise to contend that it is not open to the licensee or the State Commission to now change the tariff category of mobile / broadcasting towers in utter contravention of the conscious decisions of the State Commission having consistently categorised the mobile/broadcasting towers under industrial category for the purpose of retail supply tariff. Moreover, it is relevant to note that the classification under the Electricity Act is not governed by the classification adopted by the State Govt. for providing incentives to specific industry. Learned counsel for the Appellants placed reliance on a host of judgments of the Apex Court which has held that a long standing view taken by an authority ordinarily be adhered to and not disturbed so as to maintain consistency and to avoid uncertainty.

12.14 Learned counsel for the Appellants have accordingly highlighted that in terms of the various judgments of the Supreme Court when the State Commission since long taken a consistent view that mobile/broadcasting towers would be placed under the industrial whether they fall under the Govt. policy of IT/ITES or not, the said position has been held well forth for quite a long time more than 10-12 years and admittedly, there has been no change whatsoever in the factual or legal position, as such the principle of law laid down by the Hon'ble Supreme Court applies squarely in the present case.

12.15 On the other hand, learned counsel for the Respondent Commission contended that the principal argument of the Appellants is that the State Commission has in the impugned order taken a complete U-turn and treated mobile/telecom towers under commercial category when they were hitherto being treated under the industrial category. …………………………..In fact, the State Commission has not gone into the issues as to what activities are covered by the IT/ITES policy of the Govt. Learned counsel reiterated that if the telecom towers were covered by the IT/ITES policy, they would be charged industrial tariff and all that they have to do is to show the very same dispensation which was brought in the year on year was continued from 2004 till the impugned order as well and the Commission has not made any change at all. Referring to the judgment dated 07.11.2012 of this Tribunal, learned counsel for the Respondent Commission submitted that in the above judgment, this Tribunal had set aside Commission's order only on account of denial of principle of natural justice and the Tribunal had not given any opinion on the merits of the matter. Further, learned counsel emphasised that while continuing the practice of categorising activities under the Government's IT/ITES policy in the industrial category vide its various orders, the Commission has reiterated that the benefit of industrial category vide its various orders, can be availed by mobile towers only if they are covered by the Govt. of Maharashtra policy.

12.16 It is pertinent to note that the above ruling of the Respondent Commission has not been challenged before this Tribunal and hence has attained finality. In fact, the impugned order dated 03.11.2016 is nothing more than repeated and reiterated the said order of 2015. Learned counsel for the Respondent Commission further contended that the



Commission has not gone into the question of coverage of IT/ITES policy and in terms of Clause 13 of Maharashtra Supply Code, 2005, it is the obligation of the distribution licensee to verify whether a particular consumer is covered by Government of Maharashtra's IT/ITES policy for categorising in the Industrial Tariff Category or not.

12.17 After critical analysis of the rival contentions of the Appellants and the Respondents Commission, it is relevant to note that after a continuation of more than 10-12 years of considering mobile/telecom powers under Industrial Tariff Category, the State Commission has abruptly changed the said category under the commercial category unless otherwise these towers are established to be under the IT/ITES policy of the Govt. of Maharashtra. The question, thus emerges that under what changed scenario, …………………………………… ……… These contentions are contrary to each other and also erroneous in consideration of the facts and circumstances prevailing since announcement of the GOM IT/ITES Policy, 2003 and various orders of the State Commission. …………………………….. ….. The Appellants, herein who are operators of the mobile/broadcasting towers have enjoyed the status of industrial tariff category since last 10-12 years and obviously pre-judiced of financial loss without any established reasons and grounds necessitating such change in classification of the telecom towers.

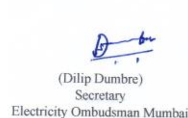
12.18 ***In view of the facts and submissions placed before us during the proceedings, we opine that the classification under the Electricity Act is not governed by the classification adopted by the State Govt. under any policy brought out by the State Govt. for providing incentives to specific industry.*** *It would thus appear that the State Commission has consciously with full application of mind categorised the mobile/broadcasting towers under HT-I industrial category for the purpose of retail supply tariff to be charged from the Appellants herein under the tariff orders issued by it from time to time. We have perused the rulings under the various judgments of the Apex Court and note that in a host of judgments, Hon'ble Supreme Court has held that a long standing view taken by an authority ordinarily be adhered to and not disturbed so as to maintain consistency and to avoid uncertainty.* ***In terms of the above, the State Commission has since the year 2008 taken a consistent view to put mobile / telecom towers under industrial category without going into the details where they fall under the GOM policy or not.*** *Besides, the said position has been held for quite a long time and also there is no change whatsoever in the factual or legal position, the above principles of law settled by the Apex Court applies squarely in the instant case in hand.*

12.19 In view of the above, we are of the considered opinion that the impugned order passed by the State Commission dated 03.11.2016 is not justified in the eyes of law settled by various courts as far as the change of tariff category of mobile towers from industrial category to commercial category is concerned. ***(Emphasis added)***

Issue No.2: Whether the impugned order has been passed by State Commission in accordance with law provided under Electricity Act, 2003 and other policies of Govt. of India?

Our Findings: -

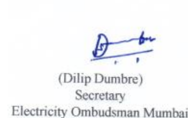
13.10 It is the contention of the Appellants that the broad classification of the electricity consumers has been provided under Section 62(3) of the Act which is unlike Section 49 of



the Electricity (Supply) Act, 1948 which provided for a residuary criteria of classification on factors as deemed fit by the State Commission but the classification can only be based on the specified criteria. Accordingly, the criteria laid in the impugned order that the telecom towers registered under the State Government policy would be classified as Industry and other telecom towers would be classified as commercial is contrary to Section 62(3) of the Electricity Act and hence bad in law. ………………………………………….. In fact, such pre-requisite condition is misconceived for the purpose of electricity classification due to the fact that the purposes for use of electricity is not affected by the registration process as the nature of the activities whether registered under policy or not continued to be same.

13.13 On the other hand, learned counsel for the Respondent Commission submitted that tariff for electricity is to be fixed by the appropriate State Commission on the basis of various factors including the purpose for which the supply is required under Section 62 (3) of the Electricity Act. In this regard, learned counsel placed reliance upon the judgment of this Tribunal in BSNL vs PSERC (Appeal No. 116 of 2006) where the Tribunal has held that it is for the State Commission to decide which category a consumer should fall under. Further, in the case of BSNL vs. UOI, the Apex Court precisely held that mobile towers or devices are used for transmitting telecommunication signals, and there is no manufacturing or industrial activity". Accordingly, learned counsel for the Respondent Commission contended that in view of the above mentioned decision of Hon'ble Supreme Court, BSNL was not classified as industry. Further, in Appeal 88 of 2012(Tata Teleservices vs RERC) this Tribunal in its judgment dated 20.5.2013 held that: "43.IT Policy and other policies issued by the State Government and classification made by the State Government for providing incentives under various programmes etc., do not have any role in tariff determination process. It cannot be denied that the jurisdiction for change of categorization is of the State Commission and not of the State Government. That apart, for the purpose of tariff determination by the State Commission, telecom services does not fall under the category of IT industry..."

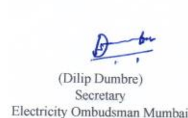
13.15 After careful consideration and analysis of the submissions of both the parties, it transpires that as per the ruling of the State Commission, in the impugned order, the telecom towers registered under the State Govt. Policy would be classified as industry and other telecom towers would be classified as commercial which is contrary to Section 62(3) of the Electricity Act, 2003. The very rationale adopted by the State Commission in granting industrial tariff to mobile/telecom towers was that these services are essential in nature and tantamount to industrial category despite having no manufacturing activities. ***It is noticed that vide the impugned order, it is not that all mobile / telecom towers have been put under commercial category but the only criteria for their decision is the registration under the IT/ITES Policy of Govt. of Maharashtra. Resultantly, such pre-requisite condition may put some towers under industrial category and some towers under commercial category which is contrary to the purpose of electricity classification due to the fact that use/purpose of the electricity is not affected by any registration process as the nature of the activities whether registered or not continues to be the same.*** *Moreover, it has been presented by the Appellants during proceedings that they are registered under the IT/ITES Policy and some sample certificates were also produced before us. It is, thus clear that the discom/MSEDCL is now insisting a separate certificate*



for each of the thousands odd telecom towers of the Appellants to avail the industrial tariff. Further, the fact that the mobile towers and related instalments of the Appellants were treated and covered in the definition of IT/ITES under the policy of the Govt. of Maharashtra will also be evident from the registration certificate issued by the Govt. for the said instalments of the Appellants right since the year 2004. We have taken note of various judgments relied upon by the parties and the National Telecom Policy, 2012 which provide that telecom services are part / sub-set of the information technologies and hence as industrial units. It is also relevant to note that based on the nature of services, many services including telecom services have been recognised as an important infrastructure, public utility services, essential services etc. and have been considered under the incentive scheme as far as electricity tariff is concerned. For instance, airports, hospitals, cold storage, LPG/CNG bottling plants etc. have been considered under the industrial tariff which clearly do not involve manufacturing activities. ***(Emphasis added)***
13.16 In view of above facts, we opine that the State Commission has not adequately considered the express provisions of the Electricity Act and various policies of the State/Central Govt. while passing the impugned order and thus violates the statutory provisions.

Issue No.3: Whether in the facts and circumstances of the case, the impugned order passed by the State Commission is violative of the principle of natural justice?
Our Findings: -
14.8 We have carefully perused all the materials placed before us during the pleadings and note that petition filed by MSEDCL before the State Commission was for final true up for FY 2014-15, provisionally true up for FY 2015-16, MYT of 2016-17 to 2019-20 in case of 48 of 2016 and it did not categorically include tariff restructuring of mobile/telecom towers which is a matter for consideration in these Appeals. It is also worth considering that when a matter pertaining to several service providers and numerous mobile towers are being undertaken for tariff determination/classification, the concerned Appellants ought to have been given adequate notice/time to present their case and file comments / objections. We do not find force in the arguments of the learned counsel for the State Commission that one of the Appellants namely Bharti Airtel had submitted its comments/suggestions and hence, it may be concluded that restructuring of tariff for Mobile Towers was an element in the petition. Accordingly, we hold that the Appellants were not given requisite notices by the State Commission before passing the impugned order. As such, a case of violation of principles of natural justice has been established.

In view of the above, I come to the conclusion that the ratio of the above ATE Judgment is that the classification under the Electricity Act 2003 is not governed by the classification adopted by the State Government under any policy brought out by the State Government for providing incentives to specific industry. Inter alia, it means that pre-requisite condition of registration may put some towers under industrial category and some towers under commercial category which is contrary to the purpose of electricity classification due to the fact that use/purpose of the electricity is not affected by any registration process as the nature of the activities whether



registered or not continues to be the same. Moreover, this is substantiated by Section 62 (3) of the Electricity Act, 2003 which is reproduced below: -

> "(*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."*

11. In short, ATE Judgment in sum and substance, stipulates that same class of consumers cannot be differentiated as far as tariff category is concerned on the strength of registration of some of them by the Government Authority. In nutshell, a consumer having registration under IT/ ITES Policy of the Government cannot be differentiated from the other IT / ITES consumers having no registration as the purpose of use of power is same. Such discrimination is violative of provision of Section 62 (3) of the Electricity Act, 2003.

12. The Appellant also cited the Commission's order dated 30.06.2020 in Case No. 84 of 2020 on the petition filed by MSEDCL. In this petition, MSEDCL has made various prayers. The relevant one is as below:

"o. To provide clarification for deciding eligibility of Consumers for IT and ITES category;"

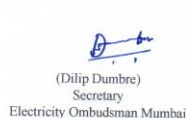
In this petition, MSEDCL has made following submissions:

"25.1. MSEDCL has listed variety of activities that can be covered under IT and ITeS policy. MSEDCL has stated that it can extend industrial tariff to IT and ITES units without any certification from the Government of Maharashtra (GOM). However, in absence of any certification the extension of subsidized tariff (industrial) will depend upon declaration from consumer and verification from MSEDCL field officers. There will be certain issues in deciding the eligibility of consumers for considering them under IT or ITeS which will lead to dispute or discrimination in implementation of tariff. Therefore. MSEDCL has requested the Commission to provide clarification in respect of methodology for deciding eligibility of consumers for IT & ITES category.

This has been analyzed and ruled by the Commission as below:

Commission's Analysis & Rulings:

25.4. The Commission notes that prior to the MYT Order dated 30 March 2020, registration certificate under IT&ITeS policy of the GOM was mandatory for any IT or ITeS unit claiming Industrial Tariff otherwise such unit would be categorized under Commercial category. ***However, in compliance of APTEL Judgment dated 12 February 2020 in Appeal No. 337 of 2016 wherein APTEL inter alia held that requirement of registration certificate is not a parameter under Section 62 (3) based on which consumer can be classified under consumer***



category, the Commission in the impugned MYT Order has removed the requirement of registration certificate for claiming applicability of Industrial Tariff. Now any IT or ITeS unit for which the GOM's IT&ITeS Policy is applicable can seek applicability of Industrial Tariff even without having registration under that policy. MSEDCL in its present review Petition has also stated its readiness to extend the applicability of Industrial Tariff to such units without seeking registration certificate. ***(Emphasis added)***

25.5. However, through this review Petition, MSEDCL has requested for clarification on activities which can be considered as IT or ITeS activities and provided benefit of Industrial Category. In this regard, the Commission is of the opinion that for providing such clarification, one needs to interpret provisions of IT&ITeS Policy. The Industrial Department of the GoM which is administrative department dealing with IT&ITeS Policy would be best suited to do that. Hence, the Commission suggests that MSEDCL could approach Industries Department/ Information Technology Department of the GoM to seek guidance on the matter. Based on such discussion, MSEDCL may issue uniform guidelines for its field staff to identify IT or ITeS units for which benefit of Industrial Tariff can be allowed. Such uniform guidelines prepared based on consultation with Industrial Department/Information Technology Department of the GoM would be certainly helpful in a uniform and transparent implementation of tariff Order.

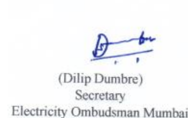
The operative part of the order is as below:

"n. On the prayer seeking clarification for deciding eligibility of consumer for IT and ITES category, it is suggested that MSEDCL should approach Industries Department/ Information Technology Department of the Government of Maharashtra for seeking guidance in this regard. (para no. 25.5)"

13. The Respondent argued that this order of the Commission will not have retrospective effect. However, the ATE in its Judgment dated 12.02.2020 in Appeal No. 337 of 2016 has decided the batch of petitions filed in 2016.

14. I also noted that registration of IT / ITES activity with the Government has direct linkage with the benefits / incentives that are being dolled out under IT / ITES Policy of the Government. However, as per ATE above Judgment, it has no bearing on the determination of tariff by the Commission.

15. It is noted that the Appellant was having registration certificate for the periods (a) 21.10.2005 to 20.10.2010, (b) 03.01.2011 to 02.01.2016 and (c) 03.04.2019 to 02.04.2022. For the intervening period from 21.10.2010 to 02.01.2011 and 03.01.2016 to 02.04.2019, it did not have registration. It is not understood why it did have registration for some period and did not have it for other period.



16. The Respondent billed the Appellant at Commercial tariff for a period during which the Appellant did not have registration strictly in accordance with the Order of the Commission. They simply acted mechanically in applying Commercial tariff for not having registration during that period. It is not the case of the Respondent that the Appellant's activity is not IT / ITES.

17. Harmonious reading of the ATE Judgment in Appeal No. 337 of 2016 and the Commission's order in Case No. 84 of 2020, culminates into a conclusion that appropriate Industrial tariff needs to be applied to IT / ITES activities of a consumer irrespective of whether it is registered with the Government or otherwise. The condition of registration has been held invalid.

18. Issue (b) has been decided accordingly and therefore there is need to decide Issue (a).

19. Therefore, the Representation has been decided accordingly with directions to the Respondent to withdraw the tariff difference applied to the Appellant for the period during which it did not have valid registration certificate and report compliance within

20. This order is issued in pursuance of the directions of the Hon. Bombay High Court in its Judgment dated 25.08.2020 in W.P. 64 of 2020. As a result, the earlier order dated 06.03.2020 in Representation No. 16 of 2020 issued by the undersigned stands modified accordingly.

Sd/
(Deepak Lad)
Electricity Ombudsman (Mumbai)