BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

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

REPRESENTATION NO. 113 OF 2022

In the matter of retrospective recovery of tariff difference for RMC plant

Raju Surajmal Solanki……. …… ….. …… ……...Appellant

V/s.

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

Appearances:

Appellant : Vinay Vaze, Representative

Respondent : 1. A. S. Mirza, Addl. Executive Engineer, Vasai Road (E) S/Dn.
2. V.M. Gokhale, UDC, Vasai Road (E) S/Dn.

Coram: Vandana Krishna [IAS (Retd.)]

Date of hearing: 14th October 2022

Date of Order: 19th October 2022

ORDER

This Representation was filed on 25th July 2022 under Regulation 19.1 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2020 (CGRF & EO Regulations 2020) against the Order dated 25th May 2022 passed by the Consumer Grievance Redressal Forum, MSEDCL, Vasai (the Forum).

2. The Forum, by its Order dated 25.05.2022 has partly allowed the grievance application in Case No. 28 of 2022 with the following direction:

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

3. The Interim order dated 21.03.2022 stands vacated."

3. The Appellant filed this Representation. The hearing was held on 14th October 2022 when the Appellant and the Respondent were both heard through video conferencing. The Appellant's written submission as well as arguments are stated in brief as below:

(i) The Appellant is an Industrial consumer (No.001943865546) of the Respondent from 25.09.2017 having sanctioned load of 200 HP and contract demand of 186 KVA at Sr.No.106, Plot No.20, Manichapada, Richard Compound, Vasai Phata, Vasai (East).

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

(iii) The Flying Squad Vasai of the Respondent inspected the premises of the Appellant on 19.01.2022 and it was found that, the Appellant does not entail any manufacturing activity therefore he should have been charged at LT-II-Commercial tariff since date of supply and not Industrial LT-V B tariff.

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(iv) Assessment of plain recovery of tariff difference between Commercial and Industrial tariff category for 29256 units was carried out. Then a supplementary bill dated 2nd February 2022 of Rs.13,92,220/- was sent to the Appellant.

(v) The Appellant does agree with the Respondent that the construction sites or activities are covered under the Commercial category. Manufacturing of concrete cannot be said to be a construction activity, as it is just a 'raw material' which is used in construction. So, the categorization cannot be generalized.

(vi) The Appellant referred the tariff order of Maharashtra Electricity Regulatory Commission (the Commission) in Case No. 48 of 2016 wherein it has included "stone crushing plant" under Industrial category, being a processing unit where the finished product 'crushed stone' also gets used in construction. On the same lines, RMC is also a processing plant where finished product 'Concrete' gets used in construction, hence the activity of manufacturing concrete by processing different ingredients has to be termed as "Industrial".

(vii) In addition to the above claims of being an Industrial unit, the Appellant relies on the certificate issued by the 'Directorate of Industrial safety and health Maharashtra' where it is called a 'Karkhana'.

(viii) The Appellant has reiterated that the Respondent's citation of Hon'ble Supreme Court Judgment in C.A. No. 7235 of 2019 in Case of Prem Cottex V/s. Uttar Haryana Bijli Nigam Ltd. in the matter of retrospective recovery. The ratio of this judgement is not applicable in present case.

(ix) As per the Commission and the Appellate Tribunal for Electricity (ATE) directives, whenever there is reclassification of tariff category, in such cases the distribution licensee can change the category only prospectively from the date of inspection.

(x) The Appellant has relied on Kalyan Forum's order in Case No. 1686 of 2017 -18 in Case of Mohammad Sajid Haji Sardar V/s. MSEDCL where retrospective recovery was disallowed by the Forum. This order was challenged by MSEDCL in Bombay High Court. The Hon'ble High Court in its Judgement in W.P. No.

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7149 of 2019 has upheld the view of the Kalyan Forum and dismissed the retrospective recovery.

(xi) The Appellant approached the Forum on 21st March 2022. The Forum, by its Order dated 25.05.2022 has partly allowed the grievance application in Case No. 28 of 2022 with facility of 10 monthly installments. The Forum did not understand the basic issue that the RMC activity is a process industry.

(xii) Taking all the above points into consideration, the Appellant prays to the Electricity Ombudsman to quash the said recovery amount of Rs.13,92,220/- along with interest which is illegal and bad in law.

4. The Respondent submitted its reply dated 17th August 2022 by email. It was heard through video conferencing. Its written submission and arguments are stated in brief as below:

(i) The Appellant is a consumer (No.001943865546) of the Respondent from 25.09.2017 having sanctioned load of 200 HP and contract demand of 186 KVA at Sr.No.106, Plot No.20, Manichapada, Richard Compound, Vasai Phata, Vasai (East). The supply of the Appellant was sanctioned under Industrial tariff category by mistake.

(ii) The Flying Squad of the Respondent inspected the premises of the Appellant on 19.01.2022. During inspection, it was observed that they were wrongly billed under "Industrial" category instead of Commercial category from the date of supply.

(iii) A supplementary bill of Rs.13,92,214.46 towards tariff difference of LT-V B to LT-II for the period of April 2018 to Jan 2022 was issued on 10.02.2022.

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

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activity. The Commission in tariff order in case No.116 of 2008 and case No.111/2009 has clearly stated that the categorization of industry is applicable to such activities which entail "manufacture". Moreover, **the Commission ordered that all construction activities on infrastructure projects, buildings, etc. will be classified under 'Commercial' category.** The Appellant is engaged in the business relating to infrastructure projects and hence Commercial tariff is the proper tariff applicable to Appellant.

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

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

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

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

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(iv) The Appellant has referred to the Judgment dated 07.08.2014 of Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.131 of 2013 stating that retrospective recovery of arrears is contrary to the provisions of the Regulation 4 (2) of Tariff Regulations 2003. The Respondent argued that the ratio of this judgment is applicable only in cases where there is classification or reclassification of tariff by the Commission, and not applicable in cases of escaped billing due to wrong application of tariff since inception, due to a bona fide mistake. Therefore, the ratio of the said cases is not applicable to the present case.

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

> *"Coming to the second aspect, namely, the impact of Sub-Section(1) on Subsection (2) of Section 56, it is seen that the bottom line of Subsection (1) is the negligence of any person to pay any charge for electricity. Sub-section (1) starts with the words where any person neglects to pay any charge for electricity or any some other than a charge for electricity due from him."*
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> *24. Sub-section (2) uses the words "no sum due from any consumer under this Section". Therefore, the bar under Sub-section (2) is relatable to the sum due under Section 56. This naturally takes us to Sub-section (1) which deals specifically with the negligence on the part of a person to pay any charge for electricity or any sum other than a charge for electricity. What is covered by section 56, under subsection (1), is the negligence on the part of a person to pay for electricity and not anything else nor any negligence on the part of the licensee.*
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> *25. In other words, the negligence on the part of the licensee which led to short billing in the first instance and the rectification of the same after the mistake is*

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detected, is not covered by Sub-section (1) of Section 56. Consequently, any claim so made by a licensee after the detection of their mistake, may not fall within the mischief, namely, "no sum due from any consumer under this Section", appearing in Sub-section (2).

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

(vi) 'Commercial' tariff should have been applicable to the Appellant right from the date of supply, and hence the recovery towards tariff difference from LT-V to LT-II is justifiable and recoverable.

(vii) The Forum in its order dated 25.05.2022 has rightly addressed all these issues and rejected the grievances of the Appellant. In view of the above, the Respondent requested to reject the Representation of the Appellant.

Analysis and Ruling

5. Heard the parties and perused the documents on record. The Appellant is an LT industrial consumer initially. The Appellant contended that his activity is processing of Ready-Mix Concrete. The Respondent has sanctioned load under 'Industrial' tariff category for the activity of RMC plants, and was billed rightly under Industrial tariff category from the date of release of connection. An RMC plant means, ready-mix concrete plant in which concrete is manufactured in a batch plant according to a set engineered mix design. RMC is 'ready to use the cement concrete', material of predetermined mixture of cement, sand, water, and

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aggregates. This is a process industry. The product of 'RMC' is being supplied at different sites as per demand and requirement of the purchaser. The Appellant is not directly in construction activities but only the supplier of RMC product. Hence, the activity of the Appellant is industrial and not commercial.

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

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

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

Commission's Ruling

"…… …….. ……..

The Commission appreciates the concern expressed by the consumers engaged in construction activity that the nature of their connection is by no means 'temporary' and

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hence, it is inappropriate to classify construction activity under temporary. The Commission agrees with this rationale and rules that from hereon, temporary supply – HT or LT as applicable – will not include any construction activity, and will be limited to electricity used on temporary basis for any decorative lighting for exhibitions, circus, film shooting, marriages, etc., and the time period for consideration under temporary category will be one year. Further, all Construction activity, on infrastructure projects, buildings, hill station, etc., will be classified under 'Commercial Category' and be charged at HT Commercial or LT Commercial, as applicable"

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

"HT II: HT- Commercial Applicability:

…… …… …… …… …… ……

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

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

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

On careful reading of the tariff order of the Commission in Case No. 48 of 2016 and subsequent Tariff Orders, it shows that the classification under Industry / Commercial is silent on the specific activity of RMC. RMC is neither classified under Industrial nor Commercial.

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If any activity falls in the grey area between Industrial and Commercial, it is desirable that the Commission give a specific order on the classification of that activity or product. So far as RMC is concerned, it is used only in construction activities, and so we hold that **by default it is classified under Commercial, unless specified otherwise by any specific order of the Commission.**

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

9. However, at the same time, retrospective recovery on this count cannot be allowed for more than two years even if the Respondent made a bona fide mistake due to human error or due to wrong interpretation of the tariff category. Various judgments mentioned below have clearly established that retrospective recovery must be limited to two years.

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

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

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

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

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"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. (Emphasis added)
…… ……"

12. In this case, the connection was granted in the year 2017, and the supplementary bill was issued to the Appellant in the month of February 2022. Considering the provision of Section 56 (2) of the Act, and its interpretation given by the Larger Bench Judgment dated 12.03.2019 of Hon'ble Bombay High Court in W.P. No. 10764 of 2011 and other W.Ps. as well as the Judgment dated 18.02.2020 by the Hon'ble Supreme Court of India in Civil Appeal No.1672 of 2020 in case of Assistant Engineer, Ajmer Vidyut Vitran Nigam Limited & Anr. V/s. Rahamatullah Khan alias Rahamjulla, only 24 months' retrospective recovery is allowed prior to the date of issue of supplementary bill.

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

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

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

(a) To revise the supplementary bill for the period from February 2020 to January 2022 without any interest and DPC, levied if any.

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(b) To allow the Appellant to pay the revised bill in 10 equal instalments if the Appellant desires. If the Appellant fails to pay any instalment, proportionate interest will accrue, and the Respondent has the liberty to take action as per law.

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

(d) Other prayers of the Appellant are rejected.

16. The Representation is disposed of accordingly.

17. The Secretariat of this office is directed to refund the amount of Rs.25000 taken as deposit to the Appellant by adjustment in his account with the Respondent.

18. The Secretariat of this office is also directed to send a copy of this order to the Director (Commercial) MSEDCL who is advised to take up this issue of classification of RMC activity before the Commission in its Annual Revenue Requirement for the next tariff petition.

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

(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

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