MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

BHOPAL

Sub: In the matter of Petition under Section 9 and 86(1)(f) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005, challenging the levy of additional surcharge by the respondent.

ORDER

(Hearing through video conferencing)
(Date of Order: 16th Nov 2023)

Karan Kapoor,
Company Secretary,
M/s Vippy Industries Limited, 28 Industrial Area,
Dewas 455001 (M.P.)

- Petitioner

Vs.

1. **Managing Director,**
   MP Paschim Kshetra Vidyut Vitaran Company Ltd.,
   GPH, Pologround,
   Indore

2. **Managing Director,**
   MP Power Management Co. Ltd.,
   Shakti Bhavan, PO Vidyut Nagar,
   Rampur, Jabalpur, 482008

- Respondents

Shri Raunak Choukse, Advocate appeared on behalf of the petitioner.
Shri Shailendra Jain, DGM, appeared on behalf of the Respondent No. 1.
Shri Manoj Dubey, Advocate, appeared on behalf of the Respondent No. 2.

The subject petition is filed by M/s Vippy Industries Limited, Dewas, Under Section 9 and 86(1)(f) of the Electricity Act, 2003 read with Rule 3 of the Electricity Rules, 2005, challenging the levy of additional surcharge by the respondent.

2. By affidavit dated 21st June' 2023, the petitioner broadly submitted the following:

i. The Petitioner is a registered company incorporated under the provisions of the Companies Act and for raising the dispute, filing petition or to take any legal action/ proceeding, it has authorized Shri Karan Kapoor, company Secretary, through the Board resolution dated 27.04.23. Hence, the petition has been filed accordingly.

ii. Petitioner is one of the largest Soya products manufacturing company in India and it has a manufacturing unit/plant at Dewas (MP) and for the purpose of meeting its power requirements the Petitioner, in pursuance of power purchase and wheeling agreements entered into with the respondents have set up in the State of Madhya Pradesh, solar energy based captive power plants (herein after referred to as CPP) of 1 MW capacity

at Village Ranthbhawar Dist. Shajapur, 1 MW capacity plant at Village Dharakhedi Tehsil Siatamau, and another 1 MW capacity plant at Village Gaotalab Tehsil Icchawar. That all the plant are entirely owned by the petitioner only and 100% electricity generated by these plants are consumed by the petitioner only.

iii. *The petitioner further submits that the petitioner has been paying all the duties and charges levied by the respondent from time to time as per the orders and sanction of this Hon'ble Commission.*

iv. *Petitioner owns 100% of the CPP and consumes the entire power generated for its own use in manufacturing. It is submitted that the Petitioner has been a CPP in terms of Rule 3 of the Electricity Rules, 2005 and section 9 of the Electricity Act, 2003 and has not lost its status as a CPP. Petitioner's CPP has complied with the captive qualification criteria set out in Rule 3 of the Electricity Rules 2005. In the present case Petitioner is entitled to receive all benefits of captive use including no levy of additional surcharge. However, respondent no. 1 has been levying additional surcharge in the electricity bills of the petitioner since November 2017 in spite of various representations and objections of the petitioner in the said regard. The petitioner under the apprehension of adverse action by the respondent has been making payment of the disputed charge under protest till the month of April-2023. The petitioner further submits that respondent no. 1 only from the electricity bill from the month of May-2023 of the petitioner company has started to first levy the charge of additional surcharge and then deduct the same in the said bill only.*

v. *The Petitioner submits that the Respondent has levied the additional surcharge contrary to the provisions of the Act and the legislative intent of promoting captive use of electricity.*

Section 42 (4) of the Act states that:

" Section 42 (Duties of distribution licensee and open access):
Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply "

The petitioner submits that from a plain reading of the aforesaid provision, it is clear Additional Surcharge is not leviable on a captive user who is receiving power from its CPP since:

(i) There is no element of supply/ 'sale' involved in captive generation and consumption. Consumption of power under a captive arrangement (i.e. in terms of Rule 3 of the Electricity Rules)

does not amount to "supply of electricity" as contemplated under Section 42(4).

(ii) Captive user is different from a consumer receiving supply of electricity on Open Access.

(iii) Even if availing Open Access, a captive user's Open Access is right under Section 9(2) and is not subject to the Commission's discretion under Section 42(4). In other words, Section 42(4) is not applicable to captive users.

vi. That the Petitioner further submits that levying of the additional surcharge by respondent no. 1 in the electricity bills of the petitioner till the month of April-2023 is in direct violation and contempt of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 50745075 of 2019) in the above matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC 89, wherein the Hon'ble Supreme Court has held as under:

"11. Sub-section (4) of Section 42 shall be applicable only in a case where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply and only such consumer s hall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the Act, there can be two classes of consumers, (i) the ordinary consumer or class of consumers who is supplied with electricity for his own use by a distribution licensee/ licensee and; (ii) captive consumers, who are permitted to generate for their own use as per section 9 of the Act, 2003.

12. The term 'consumer' is defined in Section 2(15), which reads as under: - '(15)'consumer' means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;'

13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee

arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub than the person - distribution licensee of his area of supply. So far as captive consumers/captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers / captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003. In the case of the captive consumers/captive users, they have also to incur the expenditure and/or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.

14. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 42(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.

15. *In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.*

16. *It is reported that pursuant to the interim order passed by this Court date 01.07.2019, staying the operation and implementation of the impugned order passed by the Appellate Tribunal, the appellant - distribution licensee has recovered the additional surcharge. Therefore, as such once it is*

held that the captive consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Act, 2003, the appellant - distribution licensee has to refund the same. However, considering the fact that there shall be huge liability on the appellant - distribution license if they have to now refund the amount of additional surcharge recovered at a stretch, we direct that the additional surcharge already recovered from the captive consumers/captive users shall be adjusted in the future wheeling charges bills.

17. Present appeals are accordingly dismissed with the above observations. Appeal dismissed."

The Hon'ble Supreme Court in the aforesaid case has not only held that additional surcharge cannot be levied on captive generators like the petitioner but also has directed the distribution licensee to refund the amount collected by them by levying additional surcharge from captive generators. In light of the aforesaid judgment of the Hon'ble Supreme Court issued a letter dated 22.02.2022 to the respondent no. 1 calling upon them to take note of the aforesaid judgment and refund the additional surcharge collected by the respondent no. 1 from the petitioner, however, the petitioner did not reply to the same nor refunded the additional surcharge collected from the petitioner.

vii. The Petitioner further submits that the levying and recovery of additional surcharge by the respondent from the captive generators like the petitioner is also in contravention of this Hon'ble Commission Regulation "The First Amendment To Madhya Pradesh Electricity Regulatory Commission (Cogeneration And Generation Of Electricity From Renewable Sources Of Energy (Revision-II) Regulations 2021" which provides as under :-

"5. In 3' line of clause (d) of the Regulation 11.2 of the Principal Regulation, the words "additional surcharge" are omitted."

The petitioner submits that the additional surcharge was levied by the respondent relying on Clause 11.2(d) of the MPERC (Co-Generation & Generation of Electricity from Renewable Sources of Energy), (Revision II), Regulation, 2021 which provided as under: -

"d) The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under."

The petitioner submits that this Hon'ble Commission by the aforesaid 1st amendment dated 20.01.2023 has altogether deleted the word 'additional surcharge' from the aforesaid clause 11.2(d) and therefore the

levying of additional surcharge was completely illegal, arbitrary, and in complete violation of not only the Regulations of this Hon'ble Commission but also the subsequent orders of this Commission.

That the petitioner again issued a letter/representation dated 14.03.2023 to respondent no. 1 relying upon the aforesaid notification "The First Amendment To Madhya Pradesh Electricity Regulatory Commission (Cogeneration And Generation Of Electricity From Renewable Sources Of Energy (Revision-II) Regulations 2021" and thereby called upon the respondent no. 1 to refund the additional surcharge, however, the respondent no. 1 failed to reply to the same nor has refunded the additional surcharge to the petitioner on the contrary very brazenly and in complete violation of the orders of this Commission and the Hon'ble Supreme Court continued to levy additional surcharge in the electricity bills of the petitioner till the month of April-2023.

viii. *That the petitioner along with the petition is also annexing its LTOA and power purchase and wheeling agreements it has executed with the respondents with regards to its three captive power plants.*

GROUNDS:

ix. *That, the impugned action of the respondent in levying of additional surcharge on the petitioner's electricity bills till the month of April-2023 is arbitrary, illegal, discriminatory, and contrary to the provisions of Electricity Act, 2003 and Electricity Rules, 2005.*

x. *That the respondent erroneously and falsely levied additional surcharge in the present petitioner's electricity bills till the month of April-2023 in complete violation of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC 89. That the refusal of respondent no. 1 to refund the wrongly collected additional surcharge from the petitioner for FY 2017-18 to FY 2022-23 is also in complete violation of the aforesaid judgment of the Hon'ble Supreme Court and the respondent no. 1 is liable to refund the same to the petitioner.*

xi. *That the respondent no. 1 illegal and arbitrary action of levying additional surcharge is also against the regulations and orders of this Hon'ble Commission as stated above.*

xii. *That the levy of additional surcharge on solar captive power generators is contrary to the scheme and object of the Electricity Act, 2003 and in particular Section 42, Section 61 (h) and Section 86(1)(e) of the said Act which mandates that the State Commission shall promote the renewable energy producers. The said mandate is with the objective of environmental protection and promotion of environmentally friendly generation and to ensure that such generators are provided a preference over conventional generators. One of*

the primary measure for such promotion is by way of non- levy of additional charges for the supply of electricity by renewable energy generators.

xiii. *The petitioner has invested a huge amount of Capital based on the representation made by the government (Through policy) and regulations framed by the Commission which are also in consonance with the Electricity Act, 2003. That by imposing additional surcharge mid-way upon the petitioner, the right of legitimate expectation of the petitioner is being violated as the petitioner's captive power plant project is becoming less and less profitable by imposition of such charges.*

xiv. *Other grounds would be raised at the time of argument.*

3. With the aforesaid submissions the petitioner prayed the following:

i. The Hon'ble Commission may be pleased to admit the present petition.

ii. Direct the respondent not to levy additional surcharge in future invoices of the petitioner.

iii. For order/direction to Respondent No. 1 to refund Additional Surcharge of Rs. 55,65,146/- (Rupees Fifty Five lakhs Sixty Five Thousand One Hundred and Forty Eight only) with interest @ 18% per annum from December 2021 to April 2023 recovered from the petitioner after the order of Hon'ble Apex Court cited above;

iv. For an order directing the respondent no. 1 to adjust additional surcharge of Rs. 1,28,10,108/- (Rupees One Crore Twenty Eight Lakhs Ten Thousand One Hundred and Eight Only) recovered during the period November 2017 to November 2021 in the future electricity bills of the petitioner.

v. Issue any other direction or order as may deems fit, in the larger interest of justice.

4. At the motion hearing held on 01st August' 2023, the Petitioner reiterated the prayer. After hearing the Petitioner, Petition was admitted, and the Petitioner was directed to serve a copy of Petition to the Respondents in 3 days and Respondents were directed to file their response in 15 days thereafter. Petitioner was also directed to file rejoinder, if any, within 15 days of receipt of response from Respondents.

5. At the hearing held on 05.09.2023, respondents sought time for submission of response. 2 weeks' time was allowed to respondents for submission of response. Petitioner was also directed to file rejoinder, if any, within 7 days thereafter. The case was fixed for hearing on 03.10.2023 which was rescheduled to 10.10.2023.

6. Respondent No. 1, MP Paschim Kshetra Vidyut Vitaran Company Ltd. by Affidavit dated 20th September 2023 submitted the following in its reply to the petition:

i. That, the petitioner has filed present petition on dated 22.06.2023 challenging the levy of additional surcharge being billed by the respondent and paid by petitioner since Nov 2017. Petitioner has prayed for the following two reliefs:

(i) Not to levy additional surcharge in future bills.

(ii) Refund of already billed & paid amount since Nov 2017.

ii. At the outset, the respondent denies and disputes each and every allegation, averment and contention made in the petition, which is contrary to or inconsistent with what is stated herein, as if the same has been traversed in seriatim, save and except what has been specifically and expressly admitted hereinafter in writing. Any omission on the part of the answering respondent to deal with any specific contention or averment of the petitioner should not be construed as an admission of the same by the answering respondent. Further, all the submission made herein are without prejudice to one another and are to be treated in alternate to one another in case of conflict or contradiction.

A. Re: BILLING OF ADDITIONAL SURCHARGE HAS BEEN STOPPED IN ACCORDANCE WITH THE REGULATIONS :

iii. With regard to the first kind of relief, i.e non levy of additional surcharge on the future bills, it is submitted that answering respondent has billed additional surcharge as per Provisions of Regulations as amended from time to time.

iv. It is submitted that this Hon'ble Commission has issued the MPERC (Terms and Conditions for Intra -State Open Access in Madhya Pradesh) Regulations, 2005 ('OA Regulations 2005'). The relevant provisions of the said Regulations are reproduced as under:

> *"Open Access Customer" means a person permitted under these regulations to receive supply of electricity from another person other than the distribution licensee of his area of supply, or a generating company (including captive generating plant)or a licensee, who has availed of or intends to avail of open access.*
>
> *3: ELIGIBILITY FOR OPEN ACCESS AND CONDITIONS TO BE SATISFIED*
>
> *3.1 Subject to the provisions of these regulations, open access customers shall be eligible for open access to the intra state transmission system of the State Transmission Utility (STU) or any other transmission licensee and intra state distribution system of the state distribution licensees or any other distribution licensee.*
>
> *3.2 Such open access shall be available for use by an open access customer on payment of such charges as may be determined by the Commission in accordance with the regulations framed for the purpose.*
>
> *3.3 Subject to operational constraints and other relevant factors, open access shall be allowed in the following phases:*
>
> *i. For Non-Conventional Energy Sources:*

The non-conventional energy generators and users shall be provided with open access with immediate effect and they shall be governed by the existing policy of State Government. The non-conventional energy generators shall be provided access to the transmission and sub-transmission system in the same manner as had been provided to them by the erstwhile integrated Madhya Pradesh State Electricity Board in accordance with State Government Policy in this regard on the same terms and conditions.

ii. For Captive Generating Plants of Conventional Energy:
Open access for the captive power plants shall be provided with immediate effect.

iii. For all other open access customers:

Open access to users other than at Sl. No. 3.3(i) and 3.3(ii) shall be provided as per the time table below:

Sr. No	*Phases*	*Customer with contracted power under open access for transmission and wheeling and at voltage*	*Date from which open access is to be granted*
7	*VII*	*Users requiring 1 MW and above and situated anywhere in the State*	*October 1, 2007*

13: CHARGES FOR OPEN ACCESS

13.1 The licensee providing open access shall levy only such fees or open access charges as may be specified by the Commission from time to time. The principles of determination of the charges are elaborated hereunder. The sample calculation are enclosed as annexure –I.

a. Transmission Charges –The transmission charges for use of the transmission system of the transmission licensee for intra-state transmission shall be regulated as under, namely: -

b. Wheeling Charges –. The Wheeling charges for use of the distribution system of a licensee shall be regulated as under, namely: -

f. Surcharge – The Commission shall specify the cross subsidy surcharge for individual categories of consumers separately.

g. Additional Surcharge – The Commission shall determine the additional surcharge on a yearly basis.

Similar provisions are there in the subsequent Regulations i.e MPERC (Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, 2021 (OA Regulations 2021).

v. *Petitioner has availed the open access in accordance with the aforesaid 'OA Regulations 2005' by obtaining permission to avail Long Term Open Access (LTOA) dated 06.12.2023 and by executing the Power Purchase & Wheeling Agreement (PPWA) 04.07.2016 for solar plant of 1.0 MW (Ref Annexure P/7 at page 38-100 of the Petitioner). Answering Respondent crave leave of this Hon'ble Commission to refer to and rely upon these documents at the time of hearing.*

vi. *At this juncture it would be appropriate to refer the relevant provisions of MPERC (Co-generation and Generation of electricity from Renewable Sources of Energy) (Revision -I) Regulations, 2010(Co-generation Regulations, 2010). Regulation 12.2 of Co-generation Regulations 2010 after 7th amendment and prior to 7th amendment is reproduced below:*

(a) *Prior to the 7th Amendment, the said Regulation provided as under:*
"12.2 Wheeling charges, Cross Subsidy surcharge and applicable surcharge on Wheeling charges shall be applicable as decided by the Commission from time to time. ***Captive Consumers and Open Access Consumers shall be exempted from payment of Open Access Charges in respect of energy procured from Renewable Sources of Energy."***

(b) *After 7th amendment amended Regulation 12.2 (w.e.f 17.11.2017) provides as under:*

"12.2 Wheeling charges, Cross Subsidy charge, additional surcharge on the wheeling charges and such other charges, if any, under section 42 of the Electricity Act, 2003 shall be applicable at the rate as decided by the Commission in its retail supply tariff order."
(Emphasis Supplied)

vii. *It is explicitly clear from the above mentioned seventh amendment to MPERC Co-generation Regulations, 2010 that the exemption from payment of open access charges provided to Captive and Open Access Consumers prior to the said amendment has been withdrawn and it has been provided in the seventh amendment that the open access charges shall be applicable in terms of retail supply tariff order issued by this Commission. The validity and legality of aforesaid amendment (Writ Petition No.9870/2018) was challenged before the Hon'ble High Court of MP but the same has been upheld by the Hon'ble High Court. Thus, after notification of the 7th amendment answering respondent has started the billing of additional surcharge on the consumption being done from the renewable sources.*

viii. *It is relevant to mention that subsequently, Hon'ble MPERC has notified the Madhya Pradesh Electricity Regulatory Commission (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021 (Co-generation*

Regulations 2021). The Regulation 11.2(d) of the said Co-generation Regulations 2021 is reproduced as under:

"The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, ***but it shall be liable to pay*** *wheeling charges,* ***additional surcharge,*** *as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under."*

ix. Later on this Hon'ble Commission has issued the following amendments:

(i) Vide 1st amendment (notified on dated 20.01.2023) to the Cogeneration Regulations, 2021 the words "additional surcharge" are omitted from the Regulation 11.2(d) of the Principle Regulation.

(ii) 2nd amendment (notified on dated 07.04.23) to the OA Regulations, 2021 provides that additional surcharge shall not be levied in case a person is availing power from the plant established as captive generation plant for his own use.

x. In view of above amendments, levy of additional surcharge on the consumed units has already been stopped from the monthly energy bills. The issue of effective date of applicability of Regulations came before consideration of Hon'ble Appellate Tribunal of Electricity in Appeal No. 179 of 2009 in the matter of North Eastern Electric Power Corporation Ltd. Vs Tripura State Electricity Corporation Ltd. Vide order dated 12.07.2017 Hon'ble Tribunal observed as under:

"15. The dispute which has arisen in this Appeal involves the adjudication about the date of applicability of Regulation 5A. While considering the merits of the matter it would be appropriate to refer to the principle which has been laid down by the Hon'ble Supreme Court in regard to retrospective effect. It is held in the case of State of Madhya Pradesh V/s Tikamdas (1975) 2 SCC 100 that subordinate legislation cannot be given retrospective effect unless specifically so authorized under the parent statute. The relevant observation made by the Hon'ble Supreme Court is as follows:

"There is no doubt that unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule-making power in the concerned statute expressly or by necessary implication confers power in this behalf."

16. In the light of the dictum laid by the Hon'ble Supreme Court, if we look at the Electricity Act, 2003, it is evident that this Act, under which the Regulations on the terms of conditions of tariff are notified, does not authorize the Commission to make the Regulations which may apply retrospectively. Keeping in view of the above, let us discuss the relevant facts to analyse the issue."

xi. Thus, petitioner has not entitled for any further relief nor there is any prayer in this regard.

Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY LAW OF LIMITATION:

xii. It is submitted that answering respondent has billed additional surcharge as per Provisions of Regulations as amended from time to time. Thus question of refund does not arise. Even otherwise the petitioner's Claim of refund of already paid amount is barred by Limitation. The present petition has filed before this Hon'ble Commission only on 22.06.2023 whereas the Petitioner is claiming recovery/refund of additional surcharge billed since November, 2017. It is further submitted that respondent is not able to verify the claim amount as no documentary evidence in this regard submitted.

xiii. That, as per Section 3 of the Limitation Act, 1963 any suit instituted after the prescribed period shall be dismissed. Article 113 of the Schedule of the Limitation Act, 1963 provides a limitation of 3 years from the date when right to sue accrues. In the instant case, the right to initiate legal proceedings arose at the time when the answering respondent issued the monthly energy bills incorporating the additional surcharge. Applying this test of limitation Petitioner is not entitled to claim refund and prayer of refund ought to be rejected by this Hon'ble Commission. As such, the Petitioner's claim is barred by the law of limitation for not having taken out appropriate proceedings for recovery/refund within the prescribed time period. Answering Respondent crave leave of this Hon'ble Commission to refer to and rely upon various judicial pronouncement in this regard at the time of hearing.

xiv. In view of above submission, the recovery/refund claim preferred by the Petitioner against the Respondents is time barred as per the Limitations Act, 1963 and thus refund as prayed for cannot be granted.

RE: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY PRINCIPLE OF UNJUST ENRICHMENT:

xv. It is submitted that, as far as the refund is concerned, the Principle of Unjust Enrichment is also applies to the facts of present case and petitioner consumers who have paid additional surcharge, would have passed on the same to the end users. Therefore, petitioner is not entitled to seek any refund in this regard.

xvi. In this regard kind attention is drawn towards the Judgment of Hon'ble Supreme Court in ***The State of Jharkhand & Ors V. Brahmputra Metallics Ltd, Ranchi & Anr2020 SCC OnLine SC 968*** *wherein the principle of Unjust Enrichment has been held to apply in the context of refunds:*

> *63. In Indian Council for Enviro-Legal Action vs Union of India, a two judge Bench of this Court, speaking through Justice Dalveer Bhandari, outlined the ingredients of unjust enrichment in the following terms:*
>
> *"152. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or*

property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another."

Applying this definition to the facts of the case at hand, the doctrine of unjust enrichment could have been attracted if the respondent had passed on the electricity duty to its customers and then retained the refund occasioned by the 50 per cent rebate in its own pocket*. This is not demonstrated to be the factual position and hence, the respondent cannot be denied relief on the application of the doctrine.*

xvii. Therefore, no refund can be granted as prayed by the petitioner.

xviii. It is settled principle that the law does not permit a person to both approbate & reprobate'. The petitioner cannot claim that it is not liable to pay the additional surcharge but the distribution licensee has an obligation to provide them with supply. Thus, if there is no levy of additional surcharge under Section 42(4) distribution licensee shall also not be under obligation to provide supply on demand under Section 43. As such Hon'ble Commission is requested to make a declaration in this regard.

xix. That, in view of the submissions made in the instant reply, parawise reply has not been submitted. The answering respondent crave leave of this Hon'ble Commission to submit parawise reply, additional reply as and when need arises / directed by Hon'ble Commission for proper adjudication of present petition.

xx. Therefore, this Hon'ble Commission is requested to dismiss the petition and render justice.

7. With the aforesaid submissions the Respondent No. 1 prayed the following:

i) Petition filed by the petitioner is devoid of merit; therefore, same may please be dismissed.

ii) Declare that if there is no levy of additional surcharge under Section 42(4), distribution licensee shall also not be under obligation to provide supply on demand under Section 43.

iii) Condone any inadvertent omissions/ errors/ shortcomings/ delay and permit the answering respondent to add/change/modify/alter this filing and make further submissions as may be required at later stage.

iv) Pass such other and further orders as are deemed fit and proper in the facts and circumstances of the case.

8. Respondent No. 2, MP Power Management Company Ltd. by affidavit dated: 25.09.2023 submitted that they have perused the reply submitted by Respondent No. 1 and instead of filing a separate reply to the petition, adopts the reply dated 20th September, 2023

filed by Respondent No. 1.

9. The Petitioner M/s Vippy Industries Ltd. by affidavit dated: 06.10.2023, submitted the following in its Rejoinder:

i. That at the outset, the Petitioner denies the statements and contentions in the Reply, that is contrary to and/or inconsistent with what is set out in the Petition and what is stated hereinafter in the present Rejoinder.

ii. The Petitioner adopts all the statements and submissions made in the Petition and submits that nothing in the Reply shall be deemed to be admitted by the Petitioner, unless so expressly admitted by hereinafter by the Petitioner.

iii. That the petitioner humbly submits before this Hon'ble Commission, that the respondent's reply is devoid of any merits and substance and that the respondent has not even replied to or countered the grounds raised by the petitioner in its petition specifically with regards to the judgment of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited &Ors reported in AIR 2022 SC 89 (Annexure P-3) which is squarely applicable to the facts of the present case.

iv. That with regards to para 1 of the reply, the petitioner submits that the same relates to the contents of the petition of the petitioner and are admitted.

v. That with regards to para 2 of the reply, the petitioner submits that the contents of the same are false for the reasons stated hereinafter.

vi. That with regards to Paras 3 to 11 of the reply, which are under the heading 'A. Re: BILLING OF ADDITIONAL SURCHARGE HAS BEEN STOPPED IN ACCORDANCE WITH THE REGULATIONS:', the petitioner submits, that the contents of the same are denied by the petitioner as false except the fact that the respondent has stopped levying additional surcharge completely in the bills of the petitioner from the month of June-2023. The petitioner contends that the respondent was levying additional surcharge on the electricity bills of the petitioner till April-2023 and only in the month of May-2023, the respondent first levied the amount of additional surcharge and then under the same bill deducted the same.

The petitioner further submits that the respondent in its reply dated 20.09.23, for the reasons best known to the respondent only, has not mentioned about this Hon'ble Commission's order dated 31.07.2023 passed in petition no. 05 of 2023 (Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd.), wherein this Hon'ble Commission in a similar case involving levy of additional surcharge has held as under:-

"16. Commission in light of the binding judgement of Hon'ble Supreme Court dated 10.12.2021 mentioned in Para 15 above holds that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its onsite 2250 kVA Steam Turbine Captive Power Plant. Respondent shall refund the amount deposited by Petitioner along with

consequential surcharge and withdraw the demand of balance amount if any on account of additional surcharge on captive use of electricity within a period of 1 month from the date of this order. With the aforesaid observations and findings, the subject petition stands disposed of."

Thus the petitioner submits that the petition of the petitioner is covered by the aforesaid matter wherein the Hon'ble Commission has held that the additional surcharge is not leviable on captive consumers and also has directed the respondent to refund the amount deposited towards additional surcharge and further withdraw any demand within one month from the order of the Hon'ble Commission. The petitioner further submits that all the contentions raised by the respondent in this rejoinder were also raised in the aforesaid case of Re Rama Phosphates and the same have been dealt with by this Hon'ble Commission in the said order.

vii. *That with regards to Paras 12 to 14 of the reply, which are under the heading 'B. Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY LAW OF LIMITATION:', the petitioner submits, that the contents of the same are denied by the petitioner as false and baseless. The petitioner submits that in the present case, there is a continuous cause of action as the additional surcharge was wrongly collected by the respondent from November 2017 to April 2023 and the petitioner made the payment under protest to the respondent. Furthermore, the issue of levy of additional surcharge on captive consumers was pending before the Hon'ble High Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited &Ors and was decided only on 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019). The petitioner further submits that this Hon'ble Commission in the case of Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd.(Petition no. 5 of 2023) vide order dated 31.07.2023 and in other matters of captive consumers following the judgment of the Hon'ble Supreme Court in Re JSW Steel Case and has directed the respondent to refund the amount so collected towards additional surcharge and therefore, on the ground of parity also, the petitioner deserves the same relief. The petitioner also submits that the Hon'ble Apex Court in Various rulings has held that public authorities/entities like the present respondent ought not to take technical plea of Limitation to defeat the legitimate claims of the citizens.*

viii. *That with regards to Paras 15 to 17 of the reply, which are under the heading 'C. Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY PRINCIPLE OF UNJUST ENRICHMENT:', the petitioner submits, that the contents of the same are denied by the petitioner in toto as false and completely baseless. The petitioner submits that the respondent before raising the aforesaid false ground has completely ignored and lost sight of the admitted fact that the solar plant is entirely owned by the petitioner only and 100% of electricity generated by the captive solar power plant is also consumed by the petitioner only, therefore, there can be no question of any unjust enrichment and in the present case the generator and end use are one and the same entity who has paid the additional surcharge to the respondent.*

That with regards to para 18 to 20 of the reply, the petitioner submits that the contents of the same are false and are therefore denied by the petitioner. The petitioner submits that the controversy involved in the present matter has already

been decided by this Hon'ble Commission in the case of Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd.(Petition no. 5 of 2023) vide order dated 31.07.2023 and in other matters of captive consumers following the judgment of the Hon'ble Supreme Court in Re JSW Steel Case and has already directed the respondent to refund the amount so collected towards additional surcharge from captive power plant owners. The petitioner craves leave of this Hon'ble Commission and also reserves its right to submit a detailed rejoinder as and when the need arises or as directed by the Hon'ble Commission for proper adjudication of the present petition.

10. With the aforesaid submissions the Petitioner prayed that the reply of the respondent being devoid of merits should not be taken into consideration and the petitioner's petition should be allowed.

11. Respondent No. 1, MP Paschim Kshetra Vidyut Vitaran Company Ltd. by Letter dated 13th October 2023 submitted the following in its Written Arguments:

i. That, the petitioner has filed present petition on dated 22.06.2023 challenging the levy of additional surcharge being billed by the respondent and paid by petitioner since Nov 2017. Petitioner has prayed for the following two reliefs:

(iii) Not to levy additional surcharge in future bills.

(iv) Refund of already paid amount till the month of April 2023.

Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY LAW OF LIMITATION:

10. It is submitted that the petitioner's Claim of refund of already paid amount is barred by law of Limitation. The present petition has filed before this Hon'ble Commission only on 22.06.2013 whereas the Petitioner is claiming recovery/refund of additional surcharge billed during the period between November, 2017 to April, 2023.

11. As per Section 3 of the Limitation Act, 1963 any suit instituted after the prescribed period shall be dismissed. Article 113 of the Schedule of the Limitation Act, 1963 provides a limitation of 3 years from the date when right to sue accrues. As such, the Petitioner's claim is barred by the law of limitation for not having taken out appropriate proceedings for recovery/refund within the prescribed time period.

12. In this regard, the Hon'ble Supreme Court in A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd., (Civil Appeal No. 6036 Of 2012 Order dated October 16, 2015) in the context of Electricity Act, 2003, held as under:

> *"**29.** .....In our considered view a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Sections 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the*

Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. ***In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.***

*30…….**Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court…..”***

(Emphasis supplied)

13. ***This Hon’ble Commission vide order dated 30.11.2018 in the matter MP Paschim KVVCL,Indore. (West Discom) V/s M/s Sunil Oil Mills (Petition No. 26/2017)*** *held that as per the provisions of “The Limitation Act, 1963”, a claim for money must be brought within a period of three years and upon expiry of three years, the right to sue for recovery is lost. The relevant part of the said judgment is reproduced as under:*

Commission’s Ruling –

12……..With regard to the applicability of tariff the Commission has following observations:

“vi.** ……..The Discom was billing urban tariff since 2007-08, and the respondent has been paying such bills without raising any dispute. The respondent disputed on the billing for the first time in August, 2014, after a period of about more than 7 years and asked for refund of Rs. 7.05 lakhs for the period from 2006-07 to 2013-14 and Rs. 27,500/- from 1st April, 2014 to August, 2014.* ***As per the provisions of “The Limitation Act, 1963”, a claim for money must be brought within a period of three years. Upon expiry of three years, the right to sue for recovery is lost, Hon’ble Allahabad High Court in Writ (No. 13590 of 2016 order dated 6.4.2016) upheld the above limitation for claiming the money…….”

(Emphasis supplied)

14. *In view of the above discussions, it is submitted that the Limitation Act, 1963 is squarely applicable in the instant case, which is three years. Accordingly, the recovery/refund claim preferred by the Petitioner against the Respondent is time barred as per the Limitations Act, 1963.*

Re: SUBMISSION OF PETITIONER IN THE REJOINDER:

A. PUBLIC AUTHORITY SHOULD NOT TAKE PLEA OF LIMITATION:

15. This submission of the petitioner is devoid of merit. In fact the law goes so far as to say that it is the duty of the Court to consider limitation even if not set up as a defence as held in Noharlal Verma v. Distt. Coop. Central Bank Ltd.[2008 (14) SCC 445]:

> ***"27. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.***
>
> ***28. Sub-section (1) of Section 3 of the Limitation Act, 1963 reads as under:***
> ***"3. Bar of limitation. —(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence."***
>
> ***(emphasis supplied)***
>
> ***29. Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."...***

B. Hon'ble Supreme Court dated 10.12.2021 in "Maharashtra State Electricity Distribution Company Limited Vs. JSW Steel Limited and Others" (2022) 2 SCC 742 held that additional surcharge is not applicable on captive consumption hence petitioner is entitled for the refund:

16. This submission is devoid of merit. Additional surcharge is being billed to the petitioner since Nov 2017 (Additional surcharge for the month of Nov 2017 w.e.f 17.11.2017 included in the energy bill of Dec 17 dated 28.12.2017) and petitioner has filed instant petition only on 22.06.2023. Thus, the petitioner has not approached this Hon'ble Commission within the prescribed period of time. Therefore, no relief of refund with regard to time bar claim granted on the basis of judgment of the Hon'ble Supreme Court in any other petitioner's case. It is settled position of limitation law (Ref. Section 9 of the Limitation Act 1963) that once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.

*17. **The 9 Judge Constitution bench of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India [1997 (89) E.L.T. 247 (S.C.)] while dealing with almost identical aspect held and observed by Majority [Judgment***

per: B.P. Jeevan Reddy, J. for himself and on behalf of J.S. Verma, S.C. Agrawal, A.S. Anand and B.N. Kirpal, JJ.] as under:—

18. Second situation is where the tax is collected by the authorities under the Act by mis-construction or wrong interpretation of the provisions of the Act, Rules and Notifications or by an erroneous determination of the relevant facts, i.e., an erroneous finding of fact. ***This class of cases may be called, for the sake of convenience, as illegal levy. ……..***

70. Re: (II) : We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. ***(****We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation.* ***In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.)*** *Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the ease may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law.* ***One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law.***

So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. *But what is happening now is that the duty which has been paid under a proceeding which has become final long ago -*

*may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law: The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him**. **What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturers/Assessees all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts.** it is un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case.*

An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. ***The explanation offered is untenable as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world.*** *Article 265 surely could not have been meant to provide for this.* ***We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assesses taking advantage of the decision in another assessee's case.*** *.....* ***An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assesses.*** *(See the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith.*
"

99 (iv) - It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of another person. He cannot also claim that the decision of the court/tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he

claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to pubic interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, ***or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund."***

18. *Accordingly, even taking into account (assuming but not admitting for the reason mentioned in the reply) the petitioner's pleadings in the instant petition (ref Para 5, 10, 12 etc. in which levy is termed as 'illegal') petitioner cannot claim relief of refund on the ground of a decision in another person's case as per aforesaid law laid down in the Constitution Bench Judgement of the Hon'ble Supreme Court. Hence, claim of refund is liable to be rejected. Further, as already submitted that billing of additional surcharge in the future bills has been stopped.*

C. NO BAR OF LIMITATION AS CONTINUOUS CAUSE OF ACTION.

19. *This submission of the petitioner is devoid of merit. It settled law that law of limitation is applicable even in case of continuous breaches. Hon'ble APTEL in Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Limited (Appeal No. 77 of 2009 order 22.02.2010) held as under:*

6. After hearing the parties, the State Commission ultimately allowed the Application filed by the Electricity Board by the order dated 18.02.2009, and granted the reliefs in respect of both the prayers, sought for by the Electricity Board. However, the claim in respect of the compensation ***and return of the deemed generation incentive in respect of the period prior to 3 years from the date of filing of the application was rejected on the ground of limitation.*** *But, it allowed the said claim for 3 years for the subsequent periods i.e. 3 years period i.e. prior to the date of filing of the petition before the State Commission.*

21. It cannot be disputed that the provisions of Limitation Act 1963 applies to the present case. Article 55 of the Limitation Act is relevant. Article 55 provides for filing of the suit for compensation for the breach of any contract, express or implied. According to this Article the period of limitation is 3 years. This Article further says that when the contract is broken or where there are successive breaches, then the breach in respect of which suit is instituted occurs. Under these circumstances, the above Article applies to the present case and as per the same, the period of limitation for compensation for breach of contract is 3 years from the date when the contract is broken or where there are successive breaches. ***It is a settled law that once a period of limitation prescribed for suit begins to run, it is not stopped.***

22. …….. ***Under those circumstances, the State Commission in our view rightly held that the claims of the Appellant for the said compensation and for the refund of the said deemed generation incentive pertaining to any period prior to 3 years from the date of the filing of the petition before the State Commission i.e. on 14.09.2005 are clearly barred by limitation.***

20. Petitioner has placed reliance upon the representation submitted to the Discom. Hon'ble Supreme Court in the Judgment dated 28.02.2022 in the matter of Surjeet Singh Sahni Vs State of U.P. and Ors. (SLP (C) NO. 3008 OF 2022), has held that ***mere submission of representations does not extend the period of limitation.*** *The relevant part of the said judgment is reproduced as under:*

5. As observed by this Court in catena of decisions, mere representation does not extend the period of limitation and the aggrieved person has to approach the Court expeditiously and within reasonable time…..

D. RELIEF OF REFUND HAS BEEN GRANTED TO M/S RAMA PHOSPHATE LTD IN PETITION NO. 05/2023 HENCE THE INSTANT PETITIONER IS ALSO ENTITLED FOR THE SAME:

21. In this regard it is humbly submitted that the first principle to consider with regard to limitation is that ***there is no equity when it comes to limitation.*** *If an action is barred it is so and one has to face the consequences.* ***It is not open to a Court or authority to carve out any fresh period or exclusion otherwise than as provided in the Act.*** *This has been the settled proposition in the judgements cited hereafter.*

22. ***In M/s. Rup Diamonds and others Petitioners v. Union of India & Ors (AIR 1989 SUPREME COURT 674) Hon'ble Supreme Court observed as under:***

*7. The present writ petition challenge these orders. The petitioners allege that their claims are similar to those made by M/s. Ripal Kumar and Co., and M/s. H. Patel and Co. who had filed writ petitions No. 2477 of 1984*and No. 1465 of 1984 respectively in the High Court of Judicature at Bombay for the issue of appropriate writs to the authorities, to revalidate the Imprest- Licences; that those writ petitions were allowed by the learned Single Judges of the High Court. whose decisions came to be affirmed in appeal by the Division Bench; that Special Leave Petitions 4670 of 1986 and 7389 of 1985, respectively, preferred by the Union of India, against the said two judgments of the Bombay High Court were dismissed by this Court and that, therefore, the rejection by the authorities, of the petitioners claim for similar revalidation of the six Imprest- Licences and endorsement for OGL items would, in view of grant of revaliation and endorsement in those cases, be discriminatory and violative of Article 14. It is contended for the petitioners that the grounds for refusal put-forward by the authorities in the case of M/s. Ripal Kumar and Co., and M/s. H. Patel and Co., were exactly similar to those preferred in the case of petitioners also and that those grounds had been found by the courts to be insufficient in law to support the refusal.* ***Petitioners say that they made the demand for revalidation immediately after the decision of the Bombay High Court in M/s. Ripal Kumar and Co.s case and that the rejection of the petitioners' claim is wholly***

discriminatory as there was no basis for any distinction to be made in petitioners' case.
** Reported in (1988) 37 ELT 517 (Bom)*

*8. ..... **Petitioners are reagitating claims which they had not pursued for several years. Petitioners were not vigilant but were content to be dormant and chose to sit on the fence till somebody else's case came to be decided.....** There is also an unexplained. inordinate delay in preferring this writ petition which is brought after almost an year after the first rejection. From the orders in M/s. . Ripal Kumar and Co's case and M/s H. Patel and Co.'s case it is seen that in the former case the application, for revalidation and endorsement was made on 12-3-1984 within four months of the date of the redemption certificate dated 16-11-1983 and in the latter case the application for revalidation was filed on 20-6-1984 in about three months from the Redemption Certificate dated 9-3-1984.*

9. On a consideration of the matter we think that, apart altogether from the merits of the other grounds for rejection the inordinate delay in preferring the claim before the authorities as also the delay in filing the writ petition before this Court should by themselves persuade us to decline interfere.

23. *It is submitted in the instant case also there is a delay on the part of the petitioner. Thus, petitioner is not entitled for relief based on the Judgment of this Hon'ble Commission in the matter of M/s Rama Phosphate Ltd.*

24. ***In Siraj-Ul-Haq Khan. v. The Sunni Central Board of Waqf, U.P. [AIR 1959 SC 198] it was held that equitable considerations are not material:***
*"19. The next question which calls for our decision is whether the Appellant's Suit is saved by virtue of the provisions of Section 15 of the Limitation Act. That is the only provision ... **it is true that rules of limitation are to some extent arbitrary and may frequently lead to hardship; but there can be no doubt, in construing provision of limitation, equitable consideration are immaterial and irrelevant** and in applying them effect must be given to the strict grammatical meanings of the words used by them....."*

25. *It may be seen that Hon'ble Supreme Court in the aforesaid judgment clearly held that equitable consideration are immaterial in apply the provision of the limitation act.*

26. *Accordingly, no relief of refund can be granted to the petitioner based on the judgment of this Hon'ble Commission in the petition No. 05/2023.*

27. *In view of above submission and judicial pronouncement the recovery/refund claim preferred by the Petitioner against the Respondent is time barred as per the Limitations Act, 1963 and thus refund as prayed for cannot be granted.*

28. *The detailed reply has already been filed before Hon'ble Commission. The content of the same is not being reproduced herein for the sake of brevity. Same may please be considered as part and parcel of this submission.*

12. With the aforesaid submissions the Respondent No. 1 prayed the Commission to dismiss the petition and grant relief prayed by the respondent in the reply dated 20.09.2023.

13. By letter dt. 19.10.2023, petitioner submitted the following in its written submission:

i. That the Petitioner has filed the present petition before this Hon'ble Commission on 22.06.2023 challenging the illegal levy of additional surcharge by respondent no.1 in the monthly electricity bills of the petitioner who is a captive power plant owner and the petitioner itself consumes the entire electricity produced by the said captive power plant. The petitioner has prayed before this Hon'ble Commission to direct respondent no.1 to not levy additional surcharge in the future bills of the petitioner and to adjust the amount of additional surcharge collected by respondent no.1 from the petitioner during the period November 2017 to November 2021 in the future bills of the petitioner and also to refund the amount collected towards additional surcharge during the period from December 2021 to April 2023 to the petitioner with interest in the light of the judgment of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC 89 (Annexure P-3) which is squarely applicable to the facts of the present case whrein the Hon'ble Supreme Court has held that the additional surcharge is not leviable on captive power plant consumers like the present petitioner and also has directed the respondent to adjust the amount deposited towards additional surcharge in the future electricity bills of the captive consumer.

ii. The respondent no.1 filed reply dated 20.09.2023 before the Hon'ble Commission raising various issues challenging the petition including the claim of the petitioner being barred by limitation and also the issue of unjust enrichment. The petitioner in rebuttal of the said reply filed a rejoinder dated 06.10.23 before the Hon'ble Commission. However, during the final arguments before the Hon'ble Commission on 10.10.23 and in the written submission dated 13.10.2023 filed by respondent no.1, the respondent no.1has argued and only took the ground that the claim of the petitioner is time-barred as per Section 3 of the Limitation Act, 1963 and it seems respondent no.1 has given up the other grounds to challenge the petition raised by it in its reply dated 20.09.23 and therefore, the petitioner in this written submission is only addressing the false ground taken by the respondent no.1 that the claim of the petitioner is time-barred and prays before the Hon'ble Commission to consider the petition and rejoinder of the petitioner for the other grounds raised by respondent no.1 in its reply dated 20.09.2023.

iii. *The petitioner submits that the respondent in its reply and written submission has contended that 'Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY LAW OF LIMITATION'. The respondent no.1 has further submitted that as per Section 3 of the Limitation Act, 1963 any suit instituted after the prescribed period shall be dismissed. Furthermore, respondent no.1 contended that in the present case Article 113 of the Schedule of the Limitation Act, 1963 is applicable which provides a Limitation of (3) three years from the date when the right to sue accrues in cases for any suit where limitation is not provided under any other schedule.* ***Thus, it is evident that respondent no.1 is only challenging the refund***

of the additional surcharge that was collected by respondent no.1 from the petitioner before 22.06.2020 which is three years from the date of filing of the present petition by the petitioner on 22.06.2023 as allegedly time-barred and therefore, the claim of the refund with interest of additional surcharge by the petitioner collected by respondent no.1 after 22.06.2020 till April 2023 is not disputed by respondent no.1

However, the petitioner without prejudice to its other submissions submits that in the present case, the limitation will start running from the date of the judgment of the Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited i.e. 10.12.2021 as on the said date only, the law was laid down by the Supreme Court that Captive Consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003. The petitioner contends that in the present case Section 17 (1)(c) of the Limitation Act is applicable which provides as under :-

17. Effect of fraud or mistake.—(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—
……..
(c) the suit or application is for relief from the consequences of a mistake; or
……..
the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it;

The Petitioner submits that the Hon'ble Supreme Court in the case of ***Mahabir Kishore Vs State of MP reported in AIR 1990 SC 313*** *has held as under:-*

"27. It is thus a settled law that in a suit for refund of money paid by mistake of law, S.72 of the Contract Act is applicable and the period of limitation is three years as prescribed by Article 113 of the Schedule to the Indian Limitation Act, 1963 and the provisions of S. 17(1)(c) of that Act will be applicable so that the period will begin to run from the date of knowledge of the particular law, whereunder the money was paid, being declared void; and this could be the date of the judgment of a competent Court declaring that law void."

iv. Furthermore, the Hon'ble Supreme Court in the case of ***Union of India Vs West Cost Paper Mills Ltd. reported in AIR 2004 SC 1596*** *has held as under:-*

20. A distinction furthermore, which is required to be noticed is that whereas in terms of Article 58 the period of three years is to be counted from the date when 'the right to sue first accrues'; in terms of Article 113 thereof, the period of limitation would be counted from the date 'when the right to sue accrues'. The distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the case of action arose first whereas, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefore arose.

21. The fact that the suit was not filed by plaintiff-respondent claiming existence of any legal right in Itself is not disputed. The suit for recovery of money was based on the declaration made by 'The Tribunal' to the effect that the amount of freight charged by the appellant was unreasonable. It will bear repetition to state that a plaintiff filed a suit for refund and a cause of action therefore arose only when its right was finally determined by this Court and not prior thereto. This Court not only granted special leave but also considered the decision of the Tribunal on merit.

The Hon'ble Supreme Court has recently only reiterated the aforesaid proposition in case of Shakti Bhog Foods Vs Central Bank of India reported in AIR 2020 SC 2721. The petitioner thus submits that in the case of the petitioner also as per Article 113 of the Limitation Act, the right to sue accrue on the date of the judgment of the Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited i.e. 10.12.2021 as on the said date only, the law was laid down by the Supreme Court that Captive Consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003 and the petition has been filed within three years from the said date on 22.06.2023 and is thus within limitation.

v. *The petitioner without prejudice to its other submissions and without admitting or conceding anything and only for argument's sake submits that if the contention of respondent no.1 (para 16 of the written submission filed by respondent no.1) is to be accepted that the limitation would start running from the date of electricity bill of the petitioner dated 28.12.2017 when respondent no.1 first levied the additional surcharge even then also the entire claim of the petitioner for the period from 28.12.2017 to 22.06.2020 will not be time-barred in light of the order of the Hon'ble* ***Supreme Court dated 10.01.2022*** *reported in* ***AIRONLINE 2022 SC 55 (In RE.:- Cognizance for Extension of Limitation)*** *wherein the Hon'ble Supreme Court has held that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings and consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.*

vi. *The Petitioner submits that a public authority or state instrumentality like respondent no.1 ought not to take the technical plea of Limitation to defeat the legitimate claims of the citizens. The petitioner submits that the Hon'ble Supreme Court in the case of* ***Madras Port Vs Hymanshu International reported in AIR 1979 SC 1144*** *has held as under:-*

" The plea of limitation based on this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens."

The petitioner further submits that the Hon'ble Supreme Court in the case of ***Dilbagh Rai Vs UOI reported in 1974 SC 130*** *has held as under:-*

"The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for, the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court."

vii. *That the petitioner on the ground of parity and also the principle that a state instrumentality like respondent no.1 or this Hon'ble Commission cannot treat equal person unequally which is in violation of the Constitution of India submits that claim of the petitioner should be allowed in to as this Hon'ble Commission vide order dated 31.07.2023 passed in petition no. 05 of 2023 (Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd.), has held as under:-*

"16. Commission in light of the binding judgement of Hon'ble Supreme Court dated 10.12.2021 mentioned in Para 15 above holds that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its onsite 2250 kVA Steam Turbine Captive Power Plant. Respondent shall refund the amount deposited by Petitioner along with consequential surcharge and withdraw the demand of balance amount if any on account of additional surcharge on captive use of electricity within a period of 1 month from the date of this order. With the aforesaid observations and findings, the subject petition stands disposed of."

Thus, the petitioner submits that the petition of the petitioner is covered by the aforesaid matter wherein the Hon'ble Commission has held that the additional surcharge is not leviable on captive consumers and also has directed the respondent to refund the amount deposited towards additional surcharge and further withdraw any demand within one month from the order of the Hon'ble Commission. The petitioner submits that in addition to the aforesaid petition, this Hon'ble Commission in the case of Tirupati Starch and Chemicals Ltd Vs M.P.P.K.V.V.Co Ltd vide order dated 11.09.2023 also has allowed the petition of captive users and directed respondent no.1 to refund the amount collected towards additional surcharge. Thus, the petitioner also on the ground of parity deserves the same relief from this Hon'ble Commission.

viii. *The petitioner further submits that the judgment of the Hon'ble Supreme Court's judgment dated 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019) in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors reported in AIR 2022 SC 89 is binding on respondent no.1 and this Hon'ble Commission and respondent no.1 after the receipt of letters dated 22.02.2022 (Annexure P-4) and letter dated 14.03.2023(Annexure P-6) from the petitioner should have on its own stopped levying additional surcharge and refunded the amount of additional surcharge so collected, However, respondent inspite of knowledge of the*

Supreme Court judgment did not do so and on the contrary continued to levy additional surcharge on the petitioner.

The petitioner submits that the Hon'ble Supreme Court in the case of ***Shenoy and Co. v. Commercial Tax Officer, Circle II, Bangalore and Ors. reported in AIR 1985 SC 621****,it has been held that when the Supreme Court declares a law and holds either a particular levy as valid or invalid it is idle to contend that the law laid down by this Court in that judgment would bind only those parties who are before the Court and not others in respect of whom appeal had not been filed. To do so is to ignore the binding nature of a judgment of this Court under Article 141 of the Constitution.*

ix. That with regards to ground of unjust enrichment taken by respondent no.1 in its reply ' Re: REFUND OF ALREADY PAID AMOUNT OF ADDITIONAL SURCHARGE IS BARRED BY PRINCIPLE OF UNJUST ENRICHMENT:', the petitioner submits, that the contents of the same are denied by the petitioner in toto as false and completely baseless. The petitioner submits that the respondent before raising the aforesaid false ground has completely ignored and lost sight of the admitted fact that the solar plant is entirely owned by the petitioner only and 100% of electricity generated by the captive solar power plant is also consumed by the petitioner only, therefore, there can be no question of any unjust enrichment and in the present case the generator and end use are one and the same entity who has paid the additional surcharge to the respondent. Therefore, the judgement relied upon by respondent no.1 passed in the case of Mafatlal Industries Vs Union of India has no application in the present case.

14. With the aforesaid submissions the Petitioner prayed that the petition should be allowed and the reliefs sought therein be granted in favor of the petitioner.

15. Last hearing in the subject matter was held on 10th October' 2023, the arguments were heard and the case was reserved for Order.

Commission's observations and findings:

16. The Commission mainly noted the following from the submission made by petitioner in this matter:

(i) Respondent No. 1 was levying additional surcharge on the captive power consumption of the petitioner from Nov 2017 till April 23. Respondent No.1 stopped levying additional surcharge on captive consumption since May 2023 onwards.

(ii) Petitioner has submitted that Hon'ble Supreme Court in its order dated 10.12.2021 passed in Civil Appeal Nos. 5074-5075 of 2019 in the matter of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited & Ors has held that captive consumers/captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003. The Respondent No. 1 has however, continued to bill additional surcharge on petitioners' captive consumption beyond Dec 21 till April 23.

(iii) The Petitioner further submitted that additional surcharge was being levied by the respondent relying on the said clause 11.2(d) of MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy (Revision-II) Regulations 2021 which provided as under:

"d) The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under."

Since the Commission through 1st amendment dated 20.01.2023 in aforesaid regulations has altogether deleted the word 'additional surcharge' from the aforesaid clause 11.2(d), therefore the levying of additional surcharge was completely illegal, arbitrary, and in complete violation of not only the Regulations of this Commission but also the subsequent orders of this Commission.

(iv) The petitioner further submitted that this Commission in a similar petition no. 05 of 2023(Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd.), vide order dated 31.07.2023 has held as under: -

"16. Commission in light of the binding judgement of Hon'ble Supreme Court dated 10.12.2021 mentioned in Para 15 above holds that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its onsite 2250 kVA Steam Turbine Captive Power Plant. Respondent shall refund the amount deposited by Petitioner along with consequential surcharge and withdraw the demand of balance amount if any on account of additional surcharge on captive use of electricity within a period of 1 month from the date of this order. With the aforesaid observations and findings, the subject petition stands disposed of."

Petitioner submitted that their case is covered by the aforesaid matter wherein the Commission has held that the additional surcharge is not leviable on captive consumers and also has directed the respondent to refund the amount deposited towards additional surcharge and further withdraw any demand within one month from the order of the Hon'ble Commission.

(v) On the limitation issue of claiming refund of already paid amount of additional surcharge, petitioner has submitted that in the present case, there is a continuous cause of action as the additional surcharge was wrongly collected by the respondent from November 2017 and the petitioner made the payment under protest to the respondent till April 2023. Furthermore, the issue of levy of additional surcharge on captive consumers was pending before the Hon'ble Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited &Ors and was decided only on 10th December' 2021 (Civil Appeal Nos. 5074-5075 of 2019). On this issue, petitioner further submitted that this Commission in the case of Rama Phosphates Ltd. Vs M.P.P.K.V.V.Co. Ltd.

(Petition no. 5 of 2023) vide order dated 31.07.2023 has directed the respondent to refund the amount so collected towards additional surcharge and therefore, on the ground of parity also, the petitioner deserves the same relief.

(vi) Petitioner further submitted that in the present case, the limitation will start running from the date of the judgment of the Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. Vs. M/s. JSW Steel Limited i.e. 10.12.2021 as on the said date only, the law was laid down by the Supreme Court that Captive Consumers/captive users are not liable to pay the additional surcharge leviable under Section 42(4) of the Electricity Act, 2003. The petitioner contends that in the present case, Section 17 (1)(c) of the Limitation Act is applicable which provides as under: -

17. Effect of fraud or mistake. — (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act, —

……..

(c) the suit or application is for relief from the consequences of a mistake; or

……..

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it;

(vii) Petitioner also submitted that if the contention of respondent no.1 is to be accepted that the limitation would start running from the date of electricity bill of the petitioner dated 28.12.2017 when respondent no.1 first levied the additional surcharge even then also the entire claim of the petitioner for the period from 28.12.2017 to 22.06.2020 will not be time-barred in light of the order of the Hon'ble Supreme Court dated 10.01.2022 reported in AIRONLINE 2022 SC 55 (In RE.:- Cognizance for Extension of Limitation)wherein the Hon'ble Supreme Court has held that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings and consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

(viii) Petitioner further submitted that a public authority or state instrumentality like respondent no.1 ought not to take the technical plea of Limitation to defeat the legitimate claims of the citizens. Hon'ble Supreme Court in the case of Madras Port Vs Hymanshu International reported in AIR 1979 SC 1144 has held as under: -

" The plea of limitation based on this section is one which the court always looks upon with disfavor and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens."

Hon'ble Supreme Court in the case of Dilbagh Rai Vs UOI reported in 1974 SC 130 has held as under: -

"The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for, the State's interest is to meet honest claims, vindicate a substantial defense and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court."

17. The Commission mainly noted the following from the submission made by respondent no. 1 in this matter:

(i) Respondent no. 1 has submitted that additional surcharge on captive power consumption was being levied only after the 7th amendment in MPERC Co-generation and Generation of electricity from renewable sources of energy) Regulations 2010 was notified by the Commission 17.11.2017 which provides as under: -

"12.2 Wheeling charges, Cross Subsidy charge, additional surcharge on the wheeling charges and such other charges, if any, under section 42 of the Electricity Act,2003 shall be applicable at the rate as decided by the Commission in its retail supply tariff order."

(ii) As submitted by the respondent, Commission subsequently notified MPERC (Co-generation and Generation of electricity from renewable sources of energy) Regulations 2021. The Regulation 11.2(d) of the said Co-generation Regulations 2021 is reproduced as under:

"The captive consumer of the Renewable Energy based Captive Generating plant shall not be liable to pay cross subsidy surcharge, but it shall be liable to pay wheeling charges, additional surcharge, as applicable under Section 42 of the Electricity Act, 2003 and shall also be liable to bear the losses for carrying the generated electricity from its plant to the destination for its use or for the use of its captive user as defined by the Act or the rules made there under."

(iii) Respondent further submitted that later on, this Hon'ble Commission has issued the following amendments:

(a) Vide 1st amendment (notified on dated 20.01.2023) to the Cogeneration Regulations, 2021 the words "additional surcharge" is omitted from Regulation 11.2(d) of the Principle Regulation.

(b) 2nd amendment (notified on dated 07.04.23) to the OA Regulations, 2021 provides that additional surcharge shall not be levied in case a person is availing power from the plant established as captive generation plant for his own use.

(iv) In view of above amendments, levy of additional surcharge on the consumed units has already been stopped from the monthly energy bills.

(v) Respondent No. 1 has disputed refund of already paid amount of additional surcharge. It is submitted by Respondent No. 1 that answering respondent has billed additional surcharge as per Provisions of Regulations as amended from time to time. Thus, question of refund does not arise. Even otherwise the petitioner's claim of refund of already paid amount is barred by limitation. The present petition was filed before this Hon'ble Commission only on 22.06.2023 whereas the petitioner is claiming recovery/refund of additional surcharge billed since November 2017. It is further submitted that respondent is not able to verify the claim amount as no documentary evidence in this regard submitted.

(vi) Respondent no. 1 further submitted that, as per Section 3 of the Limitation Act, 1963, any suit instituted after the prescribed period shall be dismissed. Article 113 of the Schedule of the Limitation Act, 1963 provides a limitation of 3 years from the date when right to sue accrues. In the instant case, the right to initiate legal proceedings arose at the time when the answering respondent issued the monthly energy bills incorporating the additional surcharge. Applying this test of limitation Petitioner is not entitled to claim refund and prayer of refund ought to be rejected by this Hon'ble Commission. As such, the Petitioner's claim is barred by the law of limitation for not having taken out appropriate proceedings for recovery/refund within the prescribed time period. Answering Respondent crave leave of this Hon'ble Commission to refer to and rely upon various judicial pronouncement in this regard at the time of hearing. In view of above submission, the recovery/refund claim preferred by the Petitioner against the Respondents is time barred as per the Limitations Act, 1963 and thus refund as prayed for cannot be granted.

18. From the submissions of the parties, Commission has noted that there is no dispute on the fact that respondent No. 1 has stopped levying additional surcharge on captive power consumption of petitioner with effect from May 2023. There is dispute on levying additional surcharge on captive consumption prior to May 2023 and also in respect of refund/ adjustment of amount being claimed by petitioner from Nov 2017 onwards.

19. Let us first discuss the validity of levying additional surcharge on captive power consumption by respondent no. 1 prior to May 2023. The specific issue regarding applicability of additional surcharge on captive use of power has been dealt with by Hon'ble APTEL in its Judgment dated 27.03.2019 passed in Appeal No. 311 & 315 of 2018 in the matter of M/s JSW Steel Ltd. & Ors. v. MERC & Anr. This order was stayed by Hon'ble Supreme Court initially on 01.07.2019. Subsequently, Hon'ble Supreme Court vide Order dt. 10.12.2021 in Civil Appeal No. 5074-5075/ 2019 upheld the order dated 27.03.2019 of

Hon'ble APTEL. As such the matter of applicability of additional surcharge on captive power consumption attained finality on 10.12.2021. We have already decided similar petitions of levying additional surcharge on captive consumption of power based on aforesaid Judgment whereby it was held that additional surcharge is not applicable in case of captive consumption by a consumer from its captive generating plant. The operating paras of order dated 10.12.2021 of Hon'ble Supreme Court passed in Civil Appeal No. 5074-5075/ 2019 are reproduced as under: -

"*11. Sub-section (4) of Section 42 shall be applicable only in a case where the* State Commission permits a consumer or class of consumers to receive supply of electivity from a person other than the distribution licensee of his area of supply and only such consumer shall be liable to pay additional surcharge on the charges of wheeling, as may be specified by the State Commission. Captive user requires no such permission, as he has statutory right. At this stage, it is required to be noted that as per the Scheme of the *Act, there can be two classes of consumers, (i) the ordinary consumer* or class of consumers who is supplied with electricity for his own use by a distribution licensee/ licensee and; (ii) captive consumers, who are permitted to generate for their own use as per Section 9 of the Act, 2003.

12. The term "consumer" is defined in Section 2(15), which reads as under:

> *"(15) "consumer" means any person who is supplied with electricity for his* own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of licensee, the Government or such other person, as the case may be;"

13. Ordinarily, a consumer or class of consumers has to receive supply of electricity from the distribution licensee of his area of supply. However, with the permission of the State Commission such a consumer or class of consumers may receive supply of electricity from the person other than the distribution licensee of his area of supply, however, subject to payment of additional surcharge on the charges of wheeling as may be specified by the State Commission to meet the fixed cost of such distribution licensee arising out of his obligation to supply. There is a logic behind the levy of additional surcharge on the charges of wheeling in such a situation and/ or eventuality, because the distribution licensee has already incurred the expenditure, entered into purchase agreements and has invested the money for supply of electricity to the consumers or class of consumers of the area of his supply for which the distribution license is issued. Therefore, if a consumer or class of consumers want to receive the supply of electricity from a person other than the distribution licensee of his area of supply, he has to compensate for the fixed cost and expenses of such distribution licensee arising out of his obligation to supply. Therefore, the levy of additional surcharge under sub-section (4) of Section 42 can be said to be justified and can be imposed and also can be said to be compensatory in nature. However, as observed hereinabove, sub-section (4) of Section 42 shall be applicable only in a case

where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the person – distribution licensee of his area of supply. ***So far as captive consumers/ captive users are concerned, no such permission of the State Commission is required and by operation of law namely Section 9 captive generation and distribution to captive users is permitted. Therefore, so far as the captive consumers/ captive users are concerned, they are not liable to pay the additional surcharge under Section 42(4) of the Act, 2003.*** *In the case of the captive consumers, captive users, they have also to incur the expenditure and/ or invest the money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/ captive user, they have also to incur the expenditure and/ or invest the* money for constructing, maintaining or operating a captive generating plant and dedicated transmission lines. Therefore, as such the Appellate Tribunal has rightly held that so far as the captive consumers/ captive users are concerned, the additional surcharge under sub-section (4) of Section 42 of the Act, 2003 shall not be leviable.

14. Even otherwise, it is required to be noted that the consumers defined under Section 2(15) and the captive consumers are different and distinct and they form a separate class by themselves. So far as captive consumers are concerned, they incur a huge expenditure/ invest a huge amount for the purpose of construction, maintenance or operation of a captive generating plant and dedicated transmission lines. However, so far as the consumers defined under Section 2(15) are concerned, they as such are not to incur any expenditure and/ or invest any amount at all. Therefore, if the appellant is held to be right in submitting that even the captive consumers, who are a separate class by themselves are subjected to levy of additional surcharge under Section 41(4), in that case, it will be discriminatory and it can be said that unequals are treated equally. Therefore, it is to be held that such captive consumers/ captive users, who form a separate class other than the consumers defined under Section 2(15) of the Act, 2003, shall not be subjected to and/ or liable to pay additional surcharge leviable under Section 42(4) of the Act, 2003.

15. In view of the above and for the reasons stated above, the present appeals fail and deserve to be dismissed and are accordingly dismissed……."

(Emphasis Supplied)"

20. **Conclusion**

i) Commission through 1st amendment in Madhya Pradesh Electricity Regulatory Commission (Co Generation and Generation of Electricity from Renewable Sources of Energy (Revision-II) Regulations 2021 notified on 20th Jan 2023 has omitted applicability of additional surcharge in respect of renewable energy-based captive generating plants from clause (d) of the Regulation 11.2 of the Principal Regulations. Commission has also specified in Madhya Pradesh Electricity Regulatory Commission

(Terms and Conditions for Intra-State Open Access in Madhya Pradesh) Regulations, (Revision-I) 2021 (Second Amendment) {ARG-24(I)(ii) of 2023} notified on 05.04.2023 that additional surcharge shall not be leviable in case a person is availing supply from the plant established as captive generation plant for his own use. As such, additional surcharge is not applicable in respect of captive generating plants. Therefore, as per the provisions of MPERC (Co Generation and Generation of Electricity from Renewable Sources of Energy (Revision-II) Regulations 2021 notified on 20th Jan 2023 additional surcharge on the captive consumption from renewable source captive generating plant was not leviable since 20th Jan 2023.

ii) However, in light of the final verdict of Hon'ble Supreme Court in the matter and in view of the foregoing observations, it is held that the additional surcharge under Section 42(4) of the Electricity Act 2003 is not leviable on the quantum of power consumed by Petitioner from its captive power plant.

21. Once it is decided that the additional surcharge under section 42(4) is not leviable on the quantum of power consumed by petitioner from its captive power plant, the issue of refund of additional surcharge collected needs to be decided. Commission is of the considered view that the direction for refund of additional surcharge in the case of M/s JSW Steels is applicable only for the parties to the civil appeals no. 5074-5075/2019 and cannot be made applicable universally. In this connection, Commission would rely on the order passed by the 9 Judge Constitution Bench of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India [1997 (89) E.L.T. 247 (S.C.)] in which following almost identical aspect have been dealt by majority [Judgment per: B.P. Jeevan Reddy, J. for himself and on behalf of J.S. Verma, S.C. Agrawal, A.S. Anand and B.N. Kirpal, JJ.]: -

"Para 99-

ii. Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it. Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation

cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

iii. *A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition. The doctrine of unjust enrichment is a just and salutory doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.*

iv. *It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment of levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any*

proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund."

22. In light of judgement of Hon'ble Supreme Court (9 Judge Constitution Bench of Hon'ble Supreme Court) in Mafatlal case as discussed in Para 21 above, Commission noted that petitioner cannot claim refund on the basis of order dated 10.12.2021 of Hon'ble Supreme Court in Civil Appeal No. 5074-5075/2019 as it relates to the parties to Civil Appeals No. 5074-5075/2019 only. Further, In light of the same judgement of Hon'ble Supreme Court in Mafatlal case, Commission also noted that petitioner has not established that burden of additional surcharge recovered from them has not been passed on and whether petitioner actually suffered a real loss which could not be recovered from the end users.

23. In the light of judgement dated 10.12.2021 of Hon'ble Supreme Court in Civil Appeals no. 5074-5075/2019 in the matter of levy of additional surcharge on captive power consumption, Commission allows the petition partially and direct the respondent no. 1 not to levy additional surcharge from 10.12.2021 onwards. In view of the judgement dated 19.12.1996 of constitutional bench of Hon'ble Supreme Court in Civil Appeal 3255 of 1984 regarding refund of excess amount recovered on account of interpretation of law, Commission directs the Respondent no. 1 to refund the amount deposited by petitioner on account of additional surcharge on captive power consumption with effect from the date of order of Hon'ble Supreme Court in CA no. 5074-5075/ 2019 i.e., from 10.12.2021 onwards by way of monthly adjustments in electricity bills of the petitioner starting from the ensuing bill.

With the aforesaid observations and findings, the subject petition stands disposed of.

(Prashant Chaturvedi)	**(Gopal Srivastava)**	**(S.P.S. Parihar)**
Member	**Member(Law)**	**Chairman**