

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION, BHOPAL BHOPAL

Sub: In the matter of petition under section 82 & 86 of the Electricity Act, 2003

(P.No 49/2022)

ORDER

(Hearing through Video Conferencing)

(Date of Order: 19/09/2022

M/s. Bharat Feeds and Extractions Ltd.,

Petitioner

Versus

MP Paschim Kshetra Vidyut Vitran Co. Ltd (West Discom):

Respondent

Shri Abhishek Arjaria, Advocate appeared on behalf of the Petitioner. Shri Prasanna Prasad, Advocate appeared on behalf of Respondent.

1. The subject petition is filed by the petitioner in light of the order issued by Hon'ble High Court of MP, Indore bench on 16.06.2022 in Writ petition No. 8616 of 22 filed by it, whereby Hon'ble Court dismissed aforesaid writ petition on account of available alternative efficacious remedy. The petitioner has made following prayer in petition :-

- a. Declare that the petitioner would fall under tariff category HV-5/5.2 under the retail supply tariff orders for various years
- b. Quash impugned demand notice dated 25.03.2022 issued by respondent authorities and all consequential proceedings.
- c. Revise the electricity bills raised since November 2021 under tariff schedule HV-3.1 and remaining amount would be adjusted after verification under the tariff schedule HV-5.2.

Interim Relief:

- d. The Commission, may kindly be pleased to, stay the impugned demand notice dated 25.03.22 and all consequential proceedings, during the pendency of present petition, in the larger interest of justice.

The brief facts of the case are as under :-

3. The petitioner is a HT consumer and engaged in the business of manufacturing of cattle feed and poultry feed and executed an agreement on 06.05.2002 with the Respondent. At later stage, in 2008 it is learnt by the petitioner that other manufacturing units of similar products were given connections under other agriculture usages (HV 5.2) and hence petitioner vide letter

dated 03.12 .2008 requested Respondent to change its tariff category from HV3.1 (Industrial) to HV 5.2 (other than agriculture use). The Respondent has considered request and changed the tariff category of petitioner under HV 5.2 through supplementary agreement dated 27/03/2009 .In subsequent development, Respondent Discom without issuing any show cause notice raised bill to petitioner for the month of November and December 2021 dated 29.11.2021 and 28.12.21 under HV3.1 (Industrial) rather than tariff category of HV5.2 . The petitioner, vide letter dated 12.01.22 has made representation and requested to issue correct bills under HV5.2. Subsequently, Respondent Discom has issued a demand notice of Rs 1.18 Crore retrospectively on recommendation of HT audit cell owing to the fact the consumer is engaged in manufacturing of cattle and poultry feed which is industrial in nature and therefore billing should be done under HV3.1 in place of HV5.2. Subsequently petitioner has approached Hon'ble High court Indore bench against Respondent whereby Hon'ble Court has disposed of his petition and directed to file representation before MPERC.

4. The petitioner in the subject petition has made following broad submission :
- i. *That, the petitioner is a company incorporated under the Companies Act, 1956 and for raising the dispute, filing petition or to take any legal action/ proceeding, it has authorized Mr. Anil Virang by its resolution dated 09.04.2022. Hence, the same has been filed accordingly.*
 - ii. *That, the petitioner company is in the business of manufacturing cattle feed and poultry feed and to run its business, it requires HT connection from the respondent and by applying in accordance with the provisions of prevailing rules and regulations, an agreement dated 06.05.2002 was executed for high tension supply between Madhya Pradesh Electricity Board and the petitioner, whereas it has specifically been mentioned at para 2 of the agreement that the purpose of HT connection is manufacturing of cattle and poultry feed.*
 - iii. *That, since the execution of aforesaid agreement in the year 2002, the petitioner has been using the HT connection for the same purpose, however, it has come into the knowledge of the petitioner that other manufacturing units for the same products were given HT connection on a different tariff under the category of other agricultural user, i.e., 5.3.*

Hence, petitioner has filed an application on 03.12.2008, in the office of superintending engineer, polo ground, for change of HV connection category.

- iv. That, the aforesaid application was duly considered by the respondent and the same has been allowed by the competent authority and in pursuance to that second supplementary agreement for change in tariff was executed between petitioner and respondent on 27.03.2009 by modifying the earlier agreement executed in 2002. From a bare reading of the head note of this agreement as well as clause (B) of the same, it is very clear that the category was changed from 16.04.2008 under tariff HV-5.2.*
- v. That, thereafter with mutual consent, two additional supplementary agreements were also executed between petitioner and respondent on 10.04.2015 and 22.06.2017 for enhancement of electricity load in accordance with the demand raised by present petitioner under the same category, i.e., HV 5.2.*
- vi. That, without issuing any show-cause notice, in utter violence of terms and conditions of aforesaid agreements, respondent has raised the electricity bills to the petitioner for the months of November and December 2021 dated 29.11.2021 and 28.12.2021 under tariff category HV-3.1 (Industrial Connection) rather than the agreed tariff category HV-5.2. Petitioner was never consented/ applied/ approved for change in category of electricity connection, however, he has paid aforesaid bills under protest to avoid further technicalities.*
- vii. That, being aggrieved by aforesaid arbitrary action on account of respondent, the petitioner has filed an objection in form of the representation on 12.01.2022 raising his grievance and requested to raise the correct bills under category of HV-5.2.*
- viii. That, in spite of considering and adjudicating the aforesaid representation, respondent authorities has issued a demand notice dated 25.03.2022 relying upon the calculation done by HV audit cell and directed the petitioner to deposit an amount of Rs. 1,18,79,311/.*
- ix. That, on receipt of aforesaid demand notice, petitioner has immediately filed its objection on 30.03.2022 raising all the grounds and prayed for withdrawal of impugned demand notice and for change in category. It has specifically been objected by the petitioner that the respondent authorities cannot raise a recovery by change in category,*

retrospectively. It has also been pointed out that such impugned action is contrary to settled legal principles of law of contract and respondents are bound by Doctrine of Promissory Estoppel and that the action of respondent is not only discriminatory but also in breach of the tariff categories fixed by this commission.

- x. *That, as the petitioner has left with no other option against the illegal action of the respondent authorities, hence, he has approached Hon'ble High Court, Bench at Indore by filing the Writ Petition no. 8616/2022, which has been heard and decided finally vide order dated 15.07.2022. The Hon'ble High Court has pleased to disposed off aforesaid petition with a direction to submit its representation before this Hon'ble Commission within a period of seven days and it has been observed that without raising an objection regarding limitation, same shall be decided within a further period of six weeks.*
- xi. *The petitioner being aggrieved by the respondent has preferred the following grounds-*
 - a. *That, the impugned demand notice and the entire action of the respondent authorities in change of category from HV-5.2 to HV-3.1 is arbitrary, illegal, discriminatory, contrary to the provisions of Electricity Act, 2003 as well as Tariff Schedule issued by this Hon'ble Commission for various years.*
 - b. *From a bare reading of the retail supply tariff order for the year 2019-20, 2020-21, 2021-22 and 2022-23, it is very clear that this tariff category shall also apply to supply of power other than agriculture pump connection, connection of hatcheries, poultry farms, fisheries ponds, cattle breeding farms, grass lands, vegetables/fruits/floriculture/mushroom growing units etc. From a bare reading of aforesaid clause contained under tariff schedule HV - 5, it is very clear that the same would be applicable for a electricity connection for the purposes of poultry farms, cattle breeding farms and other unspecified items in the same series, i.e., manufacturing of cattle and poultry feed. This Hon'ble Commission while notifying the tariff schedule for various years has mentioned poultry and cattle breeding farms and also including other services in the same category by using word "etc. Word "etc." defined under Black's Law Dictionary and the meaning of the same is that, 'the term usually indicates additional, unspecified item in a series'.*
 - c. *That, it is a settled legal principle of law that while interpreting a provision or a clause, entire document has to be considered and while applying the golden rule of interpretation, it is very clear that tariff schedule HV-5 category would include poultry farms, cattle breeding farms and additional unspecified services under the same series. Hence, the action of respondent authorities is illegal and contrary to the provisions of retail supply tariff order for the relevant years.*
 - d. *That, the demand notice as well as the electricity bills which has been issued under*

industrial category are contrary to the agreement which has been executed between the parties and thus, the recovery is not legally enforceable. It is also to be noted that respondent authorities has never raised a ground of misrepresentation or suppression of facts. Hence, in absence of fraudulent act on behalf of the petitioner, respondents are bound by the agreement executed between the parties.

- e. That, the sole ground which has been taken while issuing the demand notice that the HV audit cell has raised an objection and accordingly, the category was changed, and demand was raised without issuing any show cause notice and without asking for requisite changes in the agreement.*
- f. That, even for sake of arguments, if it is found that the petitioner would fall under the industrial category, though in such a situation a demand cannot be raised retrospectively, for availing electricity connection in pursuance to the legally executed agreement and hence, same deserves to be set aside.*
- g. That, the petitioner has also filed a bill generated in favor of Indore Dugdh Sangh Sahkari Maryadit which is also an institution manufacturing the cattle feed, availing the electricity connection from the respondent under tariff connection HV-5.2 till this date, however, the impugned action and demand against present petitioner in a pick and choose method is discriminatory and shows malice on account of certain officers of the respondent company.*
- h. That, even in a condition where the authorities or audit cell has found, application under wrong category even though petitioner cannot be punished for the acts of respondent authorities as there is no allegation of misrepresentation or suppression of facts or fraudulent behavior on account of petitioner and thus, in any case petitioner cannot be punished for the acts of opposite party.*

xii. *The petitioner in the subject petition has prayed the following-*

- a. Declare that the petitioner would fall under tariff category HV-5/5.2 under the retail supply tariff orders for various years*
- b. Quash impugned demand notice dated 25.03.2022 issued by respondent authorities and all consequential proceedings;*
- c. Revise the electricity bills raised since November 2021 under tariff schedule HV-3.1 and remaining amount would be adjusted after verification under the tariff schedule HV-5.2.*

- 5. At the motion hearing held on 16.08.2022, after hearing the petitioner, the Commission admitted the petition and directed to issue notice to Respondent in the matter.
- 6. During hearing held on 30.08.22, the Respondent was directed to file reply till 1st September, 2022 and thereafter rejoinder be filed by petitioner latest by 5th September, 2022. As the matter is to be heard urgently in the light of order by Hon'ble High Court, the case is listed for final arguments on 6th September, 2022 Subsequently, Respondent has filed the reply.

Thereafter rejoinder was filed by the petitioner.

7. Respondent through its reply has made following broad submission :-

- i. *The basic facts of the case are that the petitioner is a company and manufacturing cattle feeds and has been availing supply of electricity under the category HV 33 KV 5.2, and now the answering respondent has issued a communication for change of the category to HV 3.1 Industrial. It is submitted that the answering respondent company has issued the said communication based on the analysis of facts, legal position and observation of the audit wing.*
- ii. *In the text of petition, the petitioner has submitted that demand can not be raised retrospectively. It is submitted that in various similar cases demand raised by various electricity supply company against the electricity consumers have been up held and as in the present case also, on scrutiny of the record, the audit wing has found that the petitioner has been availing electricity supply under a wrong category and therefore, the demand has been raised which is perfectly within the parameters as being laid down by various judicial pronouncement, the present petition is devoid of merit and deserves to be dismissed.*
- iii. *It is therefore, prayed that the petition filed by the petitioner may kindly be dismissed with cost being devoid of merit. Any other order which this Hon'ble Commission may deem fit to protect the interest of the answering respondent may kindly be passed.*

8. The petitioner through its rejoinder has made following submission :-

- i. *That, the petitioner has filed the present petition under Section 82 and 86 of Electricity Act, 2003 for proper interpretation of tariff category HV 5.2 and its applicability upon the petitioner company along with consequential relief.*
- ii. *That, this Hon'ble Tribunal was pleased to admit present petition and issued notice to respondent on 16.08.2022 and accordingly, they have filed their reply on 01.09.2022.*
- iii. *That, in view of the reply filed by respondent, it becomes necessary to file present rejoinder for further explanation and for proper adjudication of present controversy in following paragraphs.*
- iv. *That, the respondent has filed its reply without replying to the core issue involved in the matter, in regard to interpretation of clause 5.2 of tariff schedule for the various years. It is only contended by the respondent that any agreement which was executed contrary to the terms and conditions of the tariff schedule will not be applicable considering clause 1.30 of general terms and conditions of tariff order.*
- v. *That, at the cost of repetition, it is to be noted that petitioner was availing an electricity connection under HV- 3.1 industrial category. However, on 03.12.2008, it has filed an application claiming parity with other electricity users and this application was properly considered and after approval, second supplementary agreement for change in tariff was*

executed on 27.03.2009. Thus, in any condition, recovery cannot be initiated retrospectively prior to the date of inspection of premises.

- vi. That, petitioner has specifically tried to explain and interpret HV 5.2 of Tariff Schedule in para 12 of its petition which has not been replied by respondent properly and thus, the contention of the petitioner ought to be accepted while interpreting clause 5.2 of retail supply tariff order.*
- vii. That, respondent has also failed to point out applicability of different tariff schedule for the same kind of users and thus, ground of discrimination remains unanswered in the return which shows malice in law, on account of respondent authorities.*
- viii. That, by taking shelter of clause 1.30 of tariff order, liability cannot be fastened upon present petitioner as the second supplementary agreement for change in tariff was executed with due approval of competent authorities of respondent company and thus, recovery against present petitioner is not sustainable in the eyes of law.*
- ix. That, in view of aforesaid submissions, the rejoinder needs to be taken on record and be considered as part and parcel of the present petition filed by petitioner, for proper adjudication of the matter.*

Commission's Observations and Findings:

9. The Commission observed that dispute between the petitioner and Respondent pertains to applicability of tariff category for petitioner's HT connections. The issue before the Commission is to interpret whether tariff category HV3.1 (industrial) or tariff category HV5.2 /HV5(other than agriculture use) of Retail supply tariff orders would be applicable for petitioner's HT connections. The petitioner has preferred this petition in pursuance to order of Hon'ble High Court Indore bench dated 16.06.2022 in Writ petition No. 8616 of 22 filed by it, whereby Hon'ble Court dismissed aforesaid writ petition with observations that points raised by petitioner herein can very well be answered by MPERC and further a remedy of appeal is also available to the petitioner.
10. The Commission admitted the petition in accordance with 1.32 of Retail supply tariff order FY2022-23, which provides that in case any dispute arises regarding interpretation of this tariff order and/or applicability of this tariff, the decision of the Commission shall be final and binding.
11. As per the Petitioner's submission, the dispute arose due to demand notice issued by the Respondent retrospectively on recommendation of HT audit cell of Respondents owing to the fact that consumer is engaged in manufacturing of cattle and poultry feed which is industrial in nature and therefore billing should be done under tariff category HV3.1 in place of HV5.2/HV5 of Retail supply tariff orders. The Commission has defined following applicability under "Other than Agriculture use", of tariff schedule HV5 of Retail Supply Tariff Order for FY2022-23.

Applicability of HV 5 (other than Agriculture use)

“This tariff category shall also apply to supply of power to other than agriculture pump connections i.e. the connection for hatcheries, fisheries ponds, poultry farms, cattle breeding farms, grasslands, vegetables/ fruits/ floriculture/ mushroom growing units etc. and dairy (for those dairy units where only extraction of milk and its processing such as chilling, pasteurization etc. is done). However, in units where milk is processed to produce other end products of milk, billing shall be done under HV-3.1 (Industrial) category.”

12. In its submission, the petitioner has contended that the sole ground which has been taken by the Respondent while issuing the demand notice was that the HV audit cell of Respondent has raised an objection and accordingly, the category was changed, and demand was raised without issuing any show cause notice and without asking for requisite changes in the agreement. The petitioner in its rejoinder submitted that the Respondent has filed his reply without replying to the core issue involved in the matter, in regard to interpretation of tariff category HV5.2 of tariff schedule for the various years. It is contended by the Respondent that any agreement which was executed contrary to the terms and conditions of the tariff schedule will not be applicable considering clause 1.30 of general terms and conditions of tariff order.
13. The prevailing provisions under clause 1.30 of general terms and conditions of Retail supply Tariff order for FY22-23 provides that all conditions prescribed herein shall be applicable notwithstanding if any contrary provisions, exist in the agreement entered into by the consumer with the licensee.
14. The Respondent in his submissions has rebutted the contentions of the petitioner by stating that in the text of petition, the petitioner has raised reliance on Section 56(2) of Electricity Act 2003, however, the said statutory provision has been analysed by various judicial pronouncements and the demand raised by various electricity supply company against the electricity consumers even after a stipulated period have been upheld and as in the present case also, on scrutiny of the record, the audit wing / cell has found that the petitioner has been availing electricity supply under a wrong category and therefore, the demand has been raised which is perfectly within the parameters as being laid down by various judicial pronouncement and such judicial pronouncement has been referred and relied upon in the later part of the reply and thus, the present petition is devoid of merit and deserves to be dismissed.
15. In view of the Order dated 16/06/2022, passed by the Hon’ble High Court, Indore Benchin Writ petition No. 8616 of 22, the Commission looked into the issues related to applicability of the tariff on the connection of the Petitioner and petitioner’s contention that Respondent cannot raise a recovery by change in category, retrospectively. As per the submissions made by the Petitioner and the Respondent, the Commission observed that the petitioner is in the business of manufacturing of cattle feed and poultry feed while applicability under “Other than

Agriculture use”, of tariff schedule HV-5 of Retail Supply Tariff Order for FY2022-23, is limited to farming activities and not intended for producing or manufacturing end products as stipulated below :

Applicability of HV 5 (other than Agriculture use)

“This tariff category shall also apply to supply of power to other than agriculture pump connections i.e. the connection for hatcheries, fisheries ponds, poultry farms, cattle breeding farms, grasslands, vegetables/ fruits/ floriculture/ mushroom growing units etc. and dairy (for those dairy units where only extraction of milk and its processing such as chilling, pasteurization etc. is done). However, in units where milk is processed to produce other end products of milk, billing shall be done under HV-3.1 (Industrial) category.”

As regard manufacturing or producing end product, the Commission has specified industrial tariff category under LV and HV namely LV4 and HV 3.1. The applicability under HV3.1 is reproduced below :

“The tariff HV-3.1(Industrial) shall apply to all HT industrial consumers including mines (other than coal mines) for power, light and fan etc. which shall mean and include all energy consumed for factory and lighting in the offices, main factory building, stores, canteen, residential colonies of industries, compound lighting, common and ancillary facilities such as Telecom tower, Banks, General purpose shops, Water supply, Sewage pumps, Police Stations, etc. located within the premises of the industrial units and Dairy units where milk is processed (other than chilling, pasteurization etc.) to produce other end products of milk. This tariff shall also apply to cold storages.”

16. For illustration purpose, as may be observed from above, Tariff HV3.1 (industrial) shall apply to Dairy units where milk is processed (other than chilling, pasteurization etc.) to produce other end products of milk while applicability of HV 5 (other than Agriculture use) is limited to for those dairy units where only extraction of milk and its processing such as chilling, pasteurization etc. is done).
17. Further, in order to draw a parity with the petitioner’s business of manufacturing of cattle feed and poultry feed, the definition of “manufacturing process” is further referred from the “Factory Act 1948” which is as under :-

(k) “manufacturing process” means any process for –

- i. *making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or;*
- ii. *pumping oil, water, sewage or any other substance, or*
- iii. *generating, transforming or transmitting power; or*

iv. *composing* types for printing, printing by letter press, lithography, photogravure or other similar process or book binding;][or]

v. *constructing*, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; [or]

vi. *preserving* or storing any article in cold storage;]

18. In similar manner, in reference to petitioner's case, tariff category HV5 (other than agriculture) is limited to poultry farms, cattle breeding farms only while activities pertaining to manufacturing of cattle feed and poultry feed are tantamount to industrial activities and fall under HV3.1 (industrial) of Retail supply Tariff Orders.

19. Further, in regard to petitioner's contention that that Respondent cannot raise a recovery by change in category, retrospectively, the Commission has examined the statutory provisions provided under Section 56 (2) of the Electricity Act 2003 and observed that demand raised is well founded and not hit by section 56(2) of the Electricity Act 2003 in light of the following landmark judgement of Hon'ble Supreme Court of India.

Assistant Engineer, Ajmer Vidyut Vitran Co. Ltd. V/s. Rahmatulla Khan (2020) 4 SCC 650 the relevant portion is at paragraph no. 9.1-9.2 and the same is reproduced as under:-

9.1. Section 56(2) did not preclude the licensee company from raising an additional or supplementary demand after the expiry of the limitation period under Section 56(2) in the case of a mistake or bona fide error. It did not, however, empower the licensee company to take recourse to the coercive measure of disconnection of electricity supply, for recovery of the additional demand.

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

In Mahabir Kishore and Ors v. State of Madhya Pradesh. [(1989) 4 SCC 1], this Court held that:

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

court makes a pronouncement, it is seldom that a person can, even with reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law.”

20. In light of above, the Commission observed that the tariff category HV 5 (other than agriculture) shall not be applicable in this case and billing should be done under HV 3.1 (industrial) category as per the demand raised by the Respondent. With these findings the Petition is dismissed and stands disposed of.

(Gopal Srivastava)
Member (Law)

(Mukul Dhariwal)
Member

(S. P. S. Parihar)
Chairman