KERALA STATE ELECTRICITY REGULATORY COMMISSION

THIRUVANANTHAPURAM

OA No. 18/2017

Present:	**Shri. Preman Dinaraj, Chairman** **Shri. S. Venugopal, Member** **Shri. K.Vikraman Nair, Member**
In the matter of	**Determination of Tariff applicable to LPG bottling plant in pursuant to the directives of the Hon'ble Supreme Court in Civil Appeal No. 11150/2016**
Petitioner :	Hindustan Petroleum Corporation Limited., Represented by the Duly Constituted Attorney, & Sr. Regional Manager, Kochi LPG Regional Office, Irumpanam P.O., Kochi – 682309
Represented by	Sri. Bipin Sankar, Deputy CE (TRAC) Sri. K G P Namboodiri, EE, TRAC Sri. Rajesh R, AEE, TRAC
Respondent :	Kerala State Electricity Board Limited Vydhyuthi Bhavanam, Pattom Thiruvananthapuram
Represented by	Sri E K Nandakumar, Advocate Sri. Jai Mohan, Advocate Sri A S Kannan, Sr. Legal Advisor, HPCL Sri. Tajeb Sait, Chief Plant Manager, HPCL

Order dated 01.08.2018

1. Hindustan Petroleum Corporation Limited (HPCL), Kochi, (herein after referred to as the petitioner or HPCL) has filed a petition before the Commission on 03.11.2017, in pursuant to the directions of the Hon'ble Supreme Court dated 09.12.2016 in Civil Appeal No. 11150/2016 with the following prayers;

a. *Allow the petition and set aside the Order dated 14.8.2014 to the extent challenged in the present Petition.*
b. *Direct that the Petitioner ought to be classified as an industrial consumer and not a commercial consumer for its LPG Plants.*
c. *Direct that the Petitioner ought to be classified as an industrial consumer and not a commercial consumer for its Petroleum Terminal and Depot.*
d. *Such other relief which are just and equitable may also be granted in favour of the Petitioner.*

2. A brief background of the case as submitted by the petitioner is as follows:

(i) The petitioner HPCL is a Government of India undertaking and is engaged in the refining and marketing of petroleum products including Liquefied Petroleum Gas (LPG) and allied products. The petitioner has two LPG bottling plants, one at Irumpanam, Ernakulam District and another one at Kanjikode, Palakkad District; a petroleum terminal and a petroleum depot, in the State of Kerala. The said LPG bottling plants carry out the operations of LPG Cylinder filling and Petroleum Oils and Lubricants terminal & Depot Carry out blending and distribution of petroleum products to retail outlets and they are registered under the Factories Act, 1948.

(ii) The petitioner entered into an agreement with the respondent KSEB Ltd in October 1991 for the purchase of electricity at its Kanjikode LPG bottling plant. As per the agreement the petitioner was categorized as 'HT Industrial' for the purpose of tariff. However, without revising the agreement, the respondent KSEB Ltd started to charge the petitioner under HT Commercial tariff after a few years without any prior authorization or consent of the petitioner and without due notice to the petitioner.

(iii) Aggrieved by the decision of the KSEB, the LPG bottlers filed a Writ Petition WP (C) No. 1866 of 2012 before the Hon'ble High Court of Kerala and the Hon'ble Court vide its order dated 03.04.2012 referred the matter to this Commission directing to take decision in the matter of fixing the tariff of the petitioner. The Commission vide the order dated 25.07.2012 maintained the categorization of the petitioner as 'commercial'. Aggrieved by the order dated 25.07.2012, the petitioner filed a Writ Petition before the Hon'ble High Court of Kerala. However the Hon'ble High Court vide its order dated 13.12.2012 dismissed the petition holding that the statutory remedy by way of appeal lies to the Appellate Tribunal for Electricity (herein after referred to as APTEL) under Section 111 of the Electricity

Act-2003. Though an appeal was filed before the APTEL, the appeal was dismissed due to delay in filing, with the liberty to take up the matter in future tariff determination process.

(iv) During the deliberations of the tariff petition OP No. 9 of 2014, filed by KSEB Ltd for determination of tariff for the FY 2014-15, the petitioner on 02.07.2014, had filed a detailed written submission before the Commission for the recategorisation of tariff of the petitioner's LPG bottling plants at Irumpanam and Palakkad, Irumpanam terminal and Elathur Depot. As directed by the Commission, the petitioner had also submitted a detailed report on the process at the LPG Cylinder Filling plants on 22.07.2014. The Commission vide the tariff order dated 14.8.2014 categorised the petitioner under the HT-IV commercial category along with other commercial establishments such as malls and multiplexes,

(v) Petitioner preferred appeal before Hon'ble APTEL, and the APTEL admitted the petition as Appeal No. 265/2014. After detailed deliberations, Hon'ble APTEL dismissed the appeal preferred by the petitioner upholding the order dated 14.08.2014 passed by this Commission,

(vi) The Petitioner preferred a statutory Civil Appeal under Section 125 of the Electricity Act, 2003, being Civil Appeal No. 11150/2016 before the Hon'ble Supreme Court. The petitioner also submitted application for placing additional facts/ documents on record before the Hon'ble Supreme Court and the Hon'ble Court took into account the additional documents filed and vide its order dated 09.12.2016 disposed off the statutory appeal in the following terms:

> *"2. In view of the aforesaid additional documents we are of the view that the matter should be reconsidered in the light of the said documents by the primary fact finding authority, i.e., Kerala State Electricity Regulatory Commission. Hence, without expressing any opinion on merits we leave the said body to go into the matter afresh on an approach being made by the appellant along with the documents and information filed before this Court."*

3. The respondent KSEB Ltd vide its affidavit dated 25.01.2018 had submitted the counter arguments on the issues raised by the petitioner and its summary is as given below.

(i) As per the tariff order dated 14.08.2014, the LPG bottling plants has been categorized under LT VII(A) and HT Commercial Tariff.

(ii) Prima facie the petition can only be seen as a request for reclassification of the existing tariff of the petitioner in the tariff order dated 14.08.2014.

(iii) As per provisions of the Electricity Act 2003 and order of APTEL dated 11.11.2011 in OP No. 1/2011, the State Commission has to determine tariff for each financial year

(iv) Tariff determination has to be done for each financial year in accordance with the procedures specified for it, which includes pre-publication of tariff proposal and public hearing. The Hon'ble APTEL and Hon'ble Supreme Court has clarified that tariff determination is a quasi-judicial process. Therefore, petitions of individual consumers after the expiry of the limits prescribed in the Regulations cannot be considered as the same can disturb the delicate balance achieved by the tariff process.

(v) The Commission had determined the tariff of all categories of consumers as per the tariff order dated 14.08.2014, after inviting objections and comments from the stakeholders, and also conducting public hearing at various places across the State. The petitioner HPCL also raised their objections regarding the tariff assigned to LPG bottling plants in the public hearings and also submitted written objections on 02.07.2014 and 22.07.2014. The Commission after considering their contentions has rightly classified the tariff of LPG bottling plants under commercial tariff.

(vi) Hon'ble APTEL vide its judgment dated 8.09.2016 in Appeal No. 265 of 2014 has upheld the decision taken by this Commission regarding the tariff assigned to LPG bottling plants.

(vii) The period of operation of the impugned tariff order dated 14.08.2014 has been completed and the prevailing tariff order dated 17.04.2017 is also nearing completion. Hence, it is not appropriate to revise the tariff retrospectively with effect from 16.08.2014 as requested by the petitioner, as the financial burden arising from any past revision will be transferred to the existing and new consumers also under other categories. Moreover the delicate balance achieved vide the tariff revision process will be disturbed by any revision made retrospectively. Further, section-62(4) of the Electricity Act-2003 stipulate that, the tariff for the consumers cannot be determined or modified more than once in any Financial Year except for fuel surcharge recovery. Moreover, any revision made in tariff at a later stage will give negative impact in the recovery of ARR for the operational year.

(viii) As far as the contention made by the Petitioner for categorizing them under Industrial tariff, it was submitted that the above contention has already been taken up with the Hon'ble Commission in many instances and the Hon'ble Commission in considering the matter in detail has

concluded that the same is to be categorized under Commercial tariff. The activity performed in the LPG bottling plants is the process of refilling of LPG cylinders and it does not involve any manufacturing process or production of any new item from raw materials or any transformation of input raw materials into a new product. No physical or chemical change of any commodity is taking place at any stage in the above process.

(ix) The Commission in disposing the petition TP No. 59 of 2008 has observed as follows;

"3.1.4 The activity performed is the process of refilling LPG cylinders and it does not involve any manufacturing process or production of any new item from raw materials or any transformation of input raw materials into a new product. It is a well known fact that no physical or chemical change of any commodity is taking place at any stage of the refilling process in the premises. Manufacture is the process of conversion of raw materials into different finished products as in the case of sugar cane to sugar, cotton to textiles, oil seeds to oil and so on. As per the standard Industrial and Occupation Classification 1962, based on United Nations International Industrial Classification (UNISIC) of Economic Activities "Manufacturing" is defined as follows:

'Manufacturing comprises units engaged in the physical or chemical transformation of materials, substance or components into new products. The materials, substances or components transformed are raw materials that are products of agriculture, forestry, fishing, mining or quarrying as well as products of other manufacturing activities.'

The units in manufacturing section are often described as plants, factories or mills and characteristically use power driven machines and materials handling equipment. However units that transform materials or substances into new products by hand or in the workers home and those engaged in selling to general public products made on the same premises from which they are sold, such as bakeries and custom tailors, are also included in the section. Manufacturing units may process materials or may contact with other units to process their material for them. Both types of units are included in manufacturing

3.1.5 It may be noted that no manufacturing activity is carried out in the premises of the respondent. There, Liquefied Petroleum Gas (LPG) from bulk containers is bottled in smaller cylinders for facilitating convenient retail distribution. The activity is similar to packing an item received in bulk quantity into marketable smaller packs to suit market conditions. This is purely a commercial activity and hence to be categorized under commercial tariff. So the contention of the respondent that industrial tariff is applicable to their bottling plants is not sustainable.

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4.3 The contention of the respondent that LPG Bottling Plants are industries by quoting definition of 'industry' from Industries Dispute Act is not maintainable as in the tariff order, it is specifically mentioned that LT IV Industry tariff is applicable for general purpose industrial loads (single or three phase). Electricity consumer classification and categorization for the purpose of electricity charges are made on the basis of the purpose of use of the electricity, and are not related to the classification made by different departments of State Government or Central Government for other purposes. Thus the classification followed either in the State Government, or in the other States is not a guiding principle for fixation of tariff for any particular class of consumers. The Commission, however recognizes the cardinal principle that any reasonable classification should have a rationale that has nexus to the objective sought to be achieved by such classification. From this point of view, **the Commission concludes that activities of LPG Bottling Plants shall be treated only as commercial activity and be classified as such."**

In view of the above findings, the Hon'ble Commission has ordered in the petition that the process of LPG bottling which is transferring the gas received from the company into cylinders of marketable size is a commercial activity which is to be classified under LT VII (A) commercial tariff.

(x) Further, the above matter has again been considered by the Commission in the tariff order dated 25.07.2012 in Petition No. O.P.23 of 2012 and has decided as under:

" SECTION 2: RECATEGORISATION OF CONSUMER CATEGORIES
102. KSEB in their petition proposed various proposals for re categorisation of certain tariff categories. The re categorization was proposed as per the direction of the Commission, orders of Ombudsman and CGRF, recommendations from field offices etc; Further, certain consumers and consumer organizations through written responses and also in their submission during the public hearing conducted at Thiruvananthapuram, Ernakulam and Kozhikode have put up various proposals for recategorisation of certain categories. Each of the proposal are dealt below:

LPG Bottling Units: According to KSEB, the Commission in its order dated 19.03.2009 had brought LPG bottling units with LT connections under LT VII(A) tariff. However, no classification is specified for HT category. KSEB requested that, the same principles may be followed for all LPG Bottling for HT connection also and thus they may be categorized under HT IV Commercial category.

The Commission has examined the proposal. In the order dated 19.03.2009, the Commission has concluded that LT Commercial Tariff could be applied for LPG bottling plants. Hon. High Court of Kerala in its order dated 03.04.2012 (in WPC 6530/2009, WPC 13747/2009 WPC 1866/2012 Indian Oil Corporation Vs KSEB, HPCL Vs KSEB) had referred the matter to the Commission for appropriately deciding on categorization of LPG bottling plants, after affording an opportunity of hearing for the petitioners, within three months. The Commission heard the matter on 28.06.2012. The contention of the petitioner that LPG bottling is an industrial activity and it is so classified in other States could not be established. ***Considering all relevant aspects, the Commission is of the considered view that the appropriate category of LPG bottling plants for HT connections shall be HT IV commercial category****."*

(xi) In the present petition filed by the petitioner in pursuant to the direction of the Hon'ble Supreme Court, the process mentioned to be taking place in the LPG bottling plants, LPG Terminal and Depot are those already been submitted in the written submissions dated 02.07.2014 and 22.07.2014 given by the petitioner during the tariff determination process for the year 2014-15. The said contention has already been considered in the tariff determination process for the year 2014-15. No new contention has been stated in the petition filed by the petitioner regarding the process taking place in the premises. Accordingly, it was submitted that the petitioner may be treated under Commercial tariff only in tune to the earlier decision taken by the Commission and the Hon'ble APTEL as stated above.

(xii) The Commission in classifying the consumers under their purview need not go with another classification done by the Government, any other utility or any classification made by any other statutes for different purposes. The above matter has been made clear in the orders issued by the Hon'ble APTEL in appeal No 131 of 2013 filed by M/s Vianney Enterprises in a tariff re-categorization case. The relevant part of the order is extracted below;

"23. The Appellant has also raised the following issues for continuation of their classification under LT IV Industrial category:
i) Unit being recognized as industry under Factory's Act etc.
ii) Bottling and packing activity is being considered as industrial in other States for the purpose of electricity tariff.

24. In our view the above two arguments are not valid. The categorization of consumer for the purpose of electricity tariff is under the domain of the State Commission under the Electricity Act, 2003. Under Section 62(3) of the Electricity Act, the State Commission can differentiate between the tariffs based on interalia, purpose for which the supply is required. Accordingly, the State

Commission is empowered to differentiate in tariff based on a purpose for which the supply is required. In this case the State Commission has differentiated between the units which use electricity for extracting oil from seeds which is a manufacturing activity and those units which are only engaged in packing of oil brought from outside which has been considered as commercial activity. ***Secondly, each State Commission is empowered to decide the retail supply tariff and categorization of consumers for its State. It is not binding for the State Commission to follow the categorization of consumers for tariff purpose decided by the Regulatory Commissions of other States.***

APTEL has already upheld that the categorization under Factories Act or any other Acts does not mandate the Commission to categorize the tariff. Further, classification made by other State / Central Govt has no relevance in tariff categorization by the Commission. Thus it is very clear that the State Commissions are empowered to categorize the consumers of the state which it deems fit considering the circumstances in each state.

(xiii) As far as the contention made by the petitioner in para 29 of the petition regarding the Cochin International Airport being categorized under Industrial tariff, it was submitted that the Commission as per the above order has not categorized the Cochin International Airport as an Industrial consumer. The Airport has been included under EHT General Tariff in the above order. Further contention made by the petitioner that manufacturing units alone need to be categorized under industrial tariff also cannot be accepted. The tariff order issued by the Commission specifically states that the LT IV Industrial tariff is applicable for general purpose industrial loads. Categorization of consumers under the tariff revision order is based on the purpose for which electricity is being used. Under category of LT IV the establishments enlisted includes workshops using power mainly for production and or repair, pumping water for non agricultural purpose, public water works, power laundries, milk chilling, freezing plant, cold storage, stone crushing unit, diamond cutting units, electric crematoria, computer consultancy services etc. Accordingly, there is no basis for the contention raised by the petitioner that any unit which is having manufacturing process only has to be included in the category of Industry tariff. Further, the electricity consumer classification and categorization for the purpose of electricity charges are made based on the purpose of usage of electricity and are not related to the classification made by different departments of State Government or Central Government for other purposes.

(xiv) KSEB Ltd further submitted as follows;

'In the entire supply chain of manufacturing and sale of LPG by HPCL in Kerala, ***the central excise duty of 8.24% on basic value is paid by the concerned refinery at the time of despatch of products,*** *as it has to be paid at the first stage of manufacturing itself. After the receipt of bulk LPG at the LPG bottling Factory/Plant, further manufacturing process are carried out which results in the making of consumable fuel ie. LPG packed in cylinders for which VAT is duly paid by HPCL and then the final product is sold to the dealers for further sale to consumers where the sales tax is paid by the dealer.'*

From the above, it is understood that M/s HPCL, the petitioner is not paying any excise duty for the LPG bottling plants whereas sales tax is been paid by the petitioner. Accordingly, it can be concluded that no manufacturing process is taking place in the LPG bottling plants.

KSEB Ltd requested the Commission to reject the present petition filed by HPCL.

4. The Commission admitted the petition and posted for hearing on 30.01.2018, subsequently as requested by the petitioner, the hearing was rescheduled to 20.03.2018. Adv. Sri. A. K. Nandakumar who presented the matter on behalf of the petitioner clarified that, all the documents placed before the Hon'ble Supreme Court in Civil Appeal No. 11150/2016 were submitted before the Commission. The petitioner further clarified that, they are not paying any excise duty on their activities in bottling plant and at terminal.

5. Sri Bipin Sankar, Deputy Chief Engineer, KSEBL presented the arguments of KSEB Ltd in line with the earlier submissions made by it.

6. Based on the deliberations during the hearing, the Commission vide its daily order dated 28.03.2018 directed the petitioner HPCL and the respondent KSEB Ltd that, additional submission if any shall be filed latest by 09.04.2018, with supporting documents, with a copy to either side.

7. In compliance of the direction of the Commission. KSEB Ltd submitted the additional details on 09.04.2018, which is summarized below.

   (i) Hon. APTEL in its judgment dated 7.8.2014 on Appeal No.131 of 2013 filed by Vianney Enterprises stated that each State Commission is empowered to determine tariff by its own and not required to follow the tariff of other states.

   (ii) Section 62(3) of Electricity Act 2003 provides that the commission shall not show undue preference to any category.

   (iii) As per section 62(4) Electricity Act, 2003, tariff cannot be amended more than once in a financial year.

(iv) Any relaxation made may adversely affect the financials of KSEB Ltd.

8. The petitioner HPCL, submitted additional details on 23.04.2018 and its summary is as given below.

(i) An examination of the process involved in bottling of LPG into cylinders and at the petitioner's oil installations, i.e., POL terminal & depots would clearly show that the said activities amounts to 'manufacturing process' for the purposes of determination of tariff.

(ii) The bottling of LPG into cylinders is not a simple process of transferring hydrocarbon gases produced in a refinery into a cylinder. The gases produced in a refinery cannot be delivered to the public as a kitchen fuel and it become a kitchen fuel only after it is put through various process and activities at the LPG bottling plants.

(iii) Mixing of petrol with 5% ethanol is carried out at the terminal/depot which is essentially a continuation of the manufacturing process which converts motor spirit received at the petroleum installation into petrol.

(iv) The respondent's contention that the activity performed in LPG bottling plants does not involve any manufacturing process is entirely untenable and based on incorrect perception. The term 'manufacture of gas' has been defined under rule 2 (xxxii) of the Gas Cylinder Rules, 2004 (which was promulgated to regulate filling, possession, transport and import of such gases).

(v) The Factories Act, 1948 has defined 'manufacturing process' u/s 2k to include packing with a view to its use, sale, transport, delivery or disposal. It is pertinent that LPG bottling plants, terminals and depots have been issued the license under the Factories Act, 1948. The Kerala Shops and Commercial Establishment's Act, 1960 excludes from the definition of 'commercial establishment' a factory to which provisions of the Factories Act, 1948 applies.

(vi) The LPG bottling process is classified and defined as Industry under Section 4 tabulation category 23, division 23 (Group No 232), class No 2320 and Sub Class No 23203 under the national industrial classification (All Economic Activities) 1998 by notification issued by the Central Statistical Organization, Department of Statistics, Ministry of Planning & Program Implementation , Government of India.

(vii) The Hon'ble Supreme Court in its judgment dated 3.8.2017 in Civil Appeal No. 9295 of 2017 held that LPG bottling activity is to be treated as manufacturing, relying on the Gas Cylinder Rules, 2004.

(viii) The manufacturing process at different statutes have different meanings and payment of excise cannot and does not determine whether an activity amounts to 'manufacturing' for the purposes of determination of electricity tariff.

(ix) Categorizing consumers into different tariff categories should be based on the purpose for which supply of electricity is required by the Consumer.

(x) Hon'ble APTEL in the case of Mumbai International Airport Pvt vs MERC &Anr (Appeal No. 195 of 2009 dated 31.5.2009) and subsequently in Appeal No. 110 of 2009 and batch dated 20.10.2011 has laid down the principles of tariff classification under Section 62(3) of the EA-2003.

(xi) The differentiation under Section 62(3) of the Electricity Act 2003 should specify the well settled principle contained in Article 14 of the Constitution of India, viz, (1) there must be a reasonable classification, (2) such classification should have nexus to the purpose sought to be achieved, (3) such classification should not be arbitrary and (4) unequal should not be treated equally

(xii) Electricity Regulatory Commissions/ Electricity Board in other States have held that the bottling of LPG into retail cylinders is an industry and not a commercial activity.

(xiii) The activities undertaken by the petitioner at its LPG bottling plant and oil installations, i.e., POL terminals and depot amounts to public utility services. The LPG cylinders are supplied to the consumers at the subsidized rates and hence cannot be categorized along with commercial entities.

(xiv) The present petition was instituted pursuant to the directions of the Hon'ble Supreme Court to reconsider the entire issue in light of the materials placed before the Hon'ble Supreme Court.

Analysis and Decision

9. The Commission has examined in detail the submissions and additional documents placed before it by the petitioner, the counter arguments of the respondent KSEB Ltd as per the provisions of the Electricity Act, 2003 and other Rules and Regulations in force.

10. The present petition was filed by the petitioner as per the order of the Hon'ble Supreme Court dated 09.12.2016 in Civil Appeal No. 11150/2016. The relevant portion of the order of the Hon'ble Court is extracted below.

"2. In view of the aforesaid additional documents we are of the view that the matter should be reconsidered in the light of the said documents by the primary fact finding authority, i.e., Kerala State Electricity Regulatory Commission. Hence, without expressing any opinion on merits we leave the said body to go into the matter afresh on an approach being made by the appellant along with the documents and information filed before this Court."

11. The Civil Appeal No. 11150/2016 was filed by the petitioner before the Hon'ble Supreme Court, against the judgment of the Hon'ble Appellate Tribunal for Electricity (APTEL) dated 8.09.2016 in Appeal No. 265/2014. The Appeal No. 265/2014 was filed by the petitioner before the Hon'ble APTEL against the order of the Commission dated 14.08.2014 in OP No.9 of 2014, in the matter of Aggregate Revenue Requirement & Expected Revenue from Charges of KSEB Ltd and Revision of Tariff for the year 2014-15.

12. As per the impugned order dated 14.08.2014 in OP No. 9 of 2014, the LPG bottling plants were categorised under commercial category, as was done since the year 2009. As extracted under paragraph 3(ix) above, the Commission in its order dated 18.03.2009 in petition TP No. 59 of 2008 had decided that, the activities of LPG bottling plants as commercial activity and accordingly categorized LPG bottling plants under commercial tariff.

13. As extracted under paragraph 3(x) above, the Commission again appraised the submission of the petitioner to categorise LPG bottling plants under industrial tariff instead of commercial tariff in the order dated 25.07.2012 in Petition No. O.P.23 of 2012 and ordered that, the appropriate category of LPG bottling plants is commercial category.

14. Subsequently, during the deliberations of the petition OP No.9 of 2014, in the matter of ARR&ERC of KSEB Ltd and Revision of Tariff for 2014-15, the petitioner had raised the same issues again, and the Commission in the order dated 14.08.2014 in OP No. 9 of 2014, recorded the submission of petitioner and similarly placed consumers as under:

> *8.14 Sri. S.Sivakumar, Senior Plant Manager, Indian Oil Corporation, Thenhipalam, Malappuram brought to the attention of the Commission that the tariff for their unit LPG Cylinder Filling Plant, shall be re-categorized from HT IV Commercial category to HT I Industrial category considering the process undergone in their plant. Sri R. Balasubramoniam, Chief Plant Manager, Indian Oil Corporation Ltd., Parippally also raised the same issue and requested for re-categorization of their LPG Cylinder Filling Plants under HT I industrial category. Sri. Renjith Mathew, Senior Law Officer,*

Hindustan Petroleum Corporation requested that LPG Bottling Plants of HPCL shall be re-categorized from HT IV Commercial to HT I Industrial considering the process in the LPG Bottling Plants."

As above, the Commission had duly considered the issues raised by the petitioner and others, regarding the re-categorisation of the tariff applicable to LPG bottling plants and finally decided to continue to categorise them under commercial category vide the order dated 14.08.2014 in OP No. 9/2014.

15. The petitioner had preferred an appeal under Section-111 of the Electricity Act 2003 before the Hon'ble Appellate Tribunal for Electricity (herein after referred as APTEL) against the order dated 14.08.2014, and the APTEL admitted the petition as Appeal No. 265 of 2014. The main issue raised by the petitioner is regarding the categorization of LPG bottling and filling plants under commercial category instead of industrial category. In support of their claim, the petitioner had produced the following documents before the Hon'ble APTEL;

(1) Provisions under Explosives Act, 1984.
(2) Provisions in the Gas Cylinder Rules, 2004.
(3) Provisions in the Factories Act, 1948
(4) Tariff Orders issued by other State Commissions.

16. Based on the arguments of the petitioner and documents placed before it, Hon'ble APTEL in the judgment dated 08.09.2016 in Appeal No. 265 of 2014 has appraised in detail the following issues;

(1) Whether the State Commission is justified in categorizing the Appellant's LPG bottling/ filling plants under the commercial category as against the Industrial category?

(2) Whether the State Commission is justified in neglecting the submissions made by the Appellant with regard to the Tariff re-categorization of its Petroleum Terminal at Irumpanam, Ernakulam District and Petroleum Depot at Elathur, Kozhikode District?

(3) Whether the considerations applicable for high tariff in case of HT-IV commercial category would be applicable to the nature of operations carried out by the appellant?

(4) Whether in the facts and circumstances of the present case and in view of Section 62(3) of the Act, the appellant may be treated at par with the

establishments like shopping malls and multiplexes falling under the HT-IV commercial category?

(5) Whether the facts and circumstances of the present case, the Appellant is entitled to be re-categorised into a separate category other than HT-IV Commercial or be continued in the HT-Industrial category, as has been done in the past having regard to the nature of service provided and also the nature and purpose of consumption of electricity by the Appellant and in view of the significant increase in tariff and cross subsidy resulting in tariff shock to them?.

(6) Whether the State Commission while classifying consumers ought to be guided by the orders passed and views taken by the other Electricity Regulatory Commissions/ CGRF/Ombudsman?

17. Hon'ble APTEL after deeply appraising the issues raised by the petitioner including the supporting documents and other materials placed before it, had ordered that, there is no merit in the issues raised by them and hence the appeal petition No. 265/2014 was dismissed vide the judgment dated 08.09.2016 and upheld the order of this Commission dated 14.08.2014.

18. As discussed under paragraph-10 of this order, the petitioner had preferred civil appeal against the judgment of the APTEL before the Hon'ble Supreme Court as Civil Appeal No. 11150/2016 and the Hon'ble Court remanded back the issue to the Commission to go to the matter afresh in the light of the additional documents placed before the Hon'ble Court. Hon'ble Supreme Court categorically stated in the order that, they had not expressed any opinion on merit of the issue.

19. In compliance of the direction of the Hon'ble Supreme Court, the petitioner had filed the present petition with supporting documents on 03.11.2017. At the convenience of the petitioner, the hearing on the petition was held on 20.03.2018. During the proceedings of the hearing, the petitioner submitted that, all the documents placed before the Hon'ble Supreme Court in Civil Appeal No. 11150/2016 are placed before the Commission as Annexure to the petition.

20. The Commission has examined all the documents placed before it along with the petition, and its findings are given below.

(i) As Annexure-16 to the petition dated 03.11.2017, the petitioner had produced a copy of the Gas Cylinder Rules-2004. On appraisal of the records, it is noticed that, this document was considered by the Commission during the deliberations of the subject matter, before this

Commission in OP No. 09/2014 and Hon'ble APTEL in Appeal No. 265 of 2014.

(ii) As Annexure-17 to the petition, the petitioner had produced relevant pages of the National Industrial Classification, 2008 published by the Central Statistical Organization, Ministry of Statistics and Programme Implementation, GoI, New Delhi, classifying that, 'Bottling of LPG/CNG' under the 'manufacture of coke and refined petroleum products'.

The Central Statistical Organisation (CSO) which is responsible for coordination of statistical activities in the country as well as for evolving and maintaining statistical standards took up the task of evolving a standard industrial classification. As part of the said task, the CSO published said classification. However, such classifications are not binding on the Commission for categorizing the consumers under Section 62(3) of the Electricity Act, 2003. The Commission has already clarified this position in its order dated 18.03.2009 in TP 59/2008. The relevant portion of the order is extracted below.

' Electricity consumer classification and categorization for the purpose of electricity charges are made on the basis of the purpose of use of the electricity, and are not related to the classification made by different departments of State Government or Central Government for other purposes. Thus the classification followed either in the State Government, or in the other States is not a guiding principle for fixation of tariff for any particular class of consumers. The Commission, however recognizes the cardinal principle that any reasonable classification should have a rationale that has nexus to the objective sought to be achieved by such classification.'

21. Subsequently, during the hearing held on 20.03.2018, the petitioner has produced the following documents.

(i) Copies of the electricity bill issued by the DISCOMS in other States to HPCL.

It is a well settled position, that the tariff classification and orders issued by the State Commissions of other States are not binding on the State Commission. Hon'ble APTEL in its judgment dated 08.09.2016 in Appeal No. 265 of 2014 has already appraised this issue as 'issue No.6' and ordered as follows.

' The State Commission may take reference from the orders passed by other State Regulatory Commissions while considering the categorization of various class of consumers for tariff applicability but it is not mandatory for compliance,

however, the State Commissions have to comply with the principles set out in Sec 62 (3) of the Electricity Act, 2003.'.

(ii) A copy of the order of the Income Tax Appellate Tribunal (ITAT) Mumbai dated 31st July 2012 (IT Appeal Nos. 2124, 5856 to 5858 (Mum) 1999), wherein the ITAT Mumbai, concluded that, the activity of filling of cylinder with compressed gas amounts to 'production' or 'manufacture' for the purposes of Sections 80HH, 80-I and 80-IA of the Act as well.

It is noted from the records that, the petitioner has already brought the order dated 31.07.2012 of the ITAT Mumbai before this Commission during the deliberations of the petition OP 9/2014. The issue addressed in the said petition is the specific issue related to deductions on profits and gains derived from an industrial activity as per Section 80-1 of the Income Tax Act 1961. The Commission is not bound to follow the analysis and decision of the ITAT, Mumbai, while deciding on the tariff classification as per Section 62(3) of the EA-2003.

22. As discussed under paragraph 20 and 21 above, the Commission has examined in detail, the additional documents placed before it by the petitioner, which was earlier filed before the Hon'ble Supreme Court in Civil Appeal Nos. 11150/2016. However, the petitioner could not produce sufficient reasons to take a different decision from the findings of the Hon'ble APTEL in its judgment dated 08.09.2016 in Appeal No. 265 of 2014.

23. During the deliberations of the hearing on 20.03.2018, the petitioner has also placed a copy of the judgment of the Hon'ble Supreme Court dated 03.08.2017 in Civil Appeal No. 9295 of 2017 (Commissioner of Income Tax-1, Mumbai vs M/s HPCL). Though the said judgment was pronounced after the Hon'ble Supreme Court remanded the present matter before this Commission, the issues discussed in the judgment dated 03.08.2017 has been examined in detail, and the observation is given below.

(i) The paragraph 3 and 4 of the judgment dated 03.08.2017 discusses the basic issues addressed therein, which is extracted below.

3) *"Before discussing the aforesaid central issue which has arisen for consideration, it may be noted that Section 80-I of the Act provides for certain amount of deductions in respect of profits and gains derived from an industrial undertaking or a ship or the business of a hotel or the business of repairs to ocean-going vessels or other powered craft to which the said section applies. Section 80-IA gives similar benefits to those industrial undertakings or enterprises which are engaged in*

infrastructure development. Section 80HH, on the other hand, entitles deduction in respect of profits and gains from a newly established undertaking or a hotel business in backward areas.

4) As mentioned above, all the assessees are in the business of bottling LPG cylinder and according to them they are industrial undertakings and the aforesaid process amounts to production or manufacture. Since, manufacture or production of articles is sine qua non for treating these assessees as industrial undertakings and for the applicability of the aforesaid provisions, it is essential to establish that the assessees are industrial undertakings. It is in this context the question mooted above has arisen for consideration".

(ii) Further, paragraph 14 of the said judgment mooted the question of law arose in the subject matter, which is extracted below.

"14) We have given adequate consideration to the respective submissions of both the parties, which they deserve. As is clear from the facts and arguments noted above, the question of law which is involved (already mentioned) is:

Whether bottling of LPG, as undertaken by the assessee, is a process which amounts to 'production' or 'manufacture' for the purposes of Sections 80HH, 80-I and 80-IA of the Act?; and if so, whether the respondents/assessees are entitled to claim the benefit of deduction under the aforesaid provisions while computing their taxable income?"

(iii) In paragraph 15 of the said judgment, Hon'ble Supreme Court, discussed in detail the term 'manufacture' used by different statutes; the Central Excise Act and Income Tax Act, which is extracted below.

"15) At the outset, it needs to be emphasised that the aforesaid provisions of the Act use both the expressions, namely, 'manufacture' as well as 'production'. It also becomes clear after reading these provisions that an assessee whose process amounts to either 'manufacture' or 'production' (i.e. one of these two and not both) would become entitled to the benefits enshrined therein. It is held by this Court in ***Arihant Tiles and Marbles P. Ltd.*** *case that the word 'production' is wider than the word 'manufacture'. The two expressions, thus, have different connotation. Significantly,* ***Arihant Tiles*** *judgment decides that cutting of marble blocks into marble slabs does not amount to manufacture. At the same time, it clarifies that it would be relevant for the purpose of the Central Excise Act. When it comes to interpreting Section 80-IA of the Act (which was involved in the said case), the Court was categorical in pointing out that the aforesaid interpretation of 'manufacture' in the context of Central Excise Act would not apply while interpreting Section 80-IA of the Act as this provision not*

only covers those assessees which are involved in the process of manufacture but also those who are undertaking 'production' of the goods. Taking note of the judgment in ***Commissioner of Income Tax, Goa*** *v.* ***Sesa Goa Ltd.***[7] *which was rendered in the context of Section 32A of the Act and which provision also applies in respect of 'production', the Court reiterated the ratio in* ***Sesa Goa Ltd.*** *to hold that the word 'production' was wider than the word 'manufacture'. On that basis, finding arrived at by the Court was that though cutting of marble blocks into marble slabs did not amount to 'manufacture', if there are various stages through which marble blocks are subjected to before they become polished slabs and tiles, such activity would certainly be treated as 'production' for the purpose of Section 80-IA of the Act."*

In the Judgment Hon'ble Supreme Court concluded that, LPG bottling is an activity which fall within the definition of production and is eligible to get income tax benefits under Section 80HH, 80-I and 80-IA of the Income Tax Act 1961.

(iv) However, it is seen that, as extracted under paragraph 23(ii) above, the question of law considered by the Hon'ble Supreme Court is limited to the issue that,

' Whether bottling of LPG, as undertaken by the assessee, is a process which amounts to 'production' or 'manufacture' for the purposes of Sections 80HH, 80-I and 80-IA of the Act?; and if so, whether the respondents/assessees are entitled to claim the benefit of deduction under the aforesaid provisions while computing their taxable income?"

24. As extracted above, the judgment of the Hon'ble Supreme Court dated 03.08.2017 appraised the activity of the LPG bottling plants for the limited purpose whether they are eligible to tax deductions under Sections 80HH, 80-I and 80-IA of the Income Tax-Act 1961, which cannot be directly made applicable for categorizing the consumers for the purpose of determination of electricity tariff under Section 62(3) of the EA-2003 by the State Electricity Regulatory Commissions.

25. The State Electricity Regulatory Commission is a quasi-judicial body functioning as per the provisions of the Electricity Act-2003 (Central Act 36 of 2003). As per the Section 62 and Section 86 (1)(a) of the Electricity Act, 2003, the tariff determination is one of the statutory functions of the SERCs. The subsection (3) of Section 62 of the EA-2003 which is extracted hereunder provides the various factors to be considered while categorizing the consumers while determining the tariff.

(3) "The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required".

26. Therefore the Commission has to consider the purpose for which electricity is used, while determining tariff for various categories of consumers. The Commission has been authorized by the provisions of Electricity Act, 2003, to formulate consumer categories and to determine tariff according to the role each consumer category plays in the socio economic development of the society. The categorization of consumer for the purpose of electricity tariff is under the domain of the State Commission under the Electricity Act-2003. Under Section 62(3) of the Electricity Act, 2003, the Commission is empowered to differentiate between consumers based on the purpose for which electricity is required. Hon'ble APTEL in judgment dated 20th October 2011 (in Appeal No. 110 of 2009 & Ors), has expressed the view that,

"30. The real meaning of expression 'purpose for which the supply is required' as used in Section 62 (3) of the Act does not merely relate to the nature of the activity carried out by a consumer but has to be necessarily determined from the objects sought to be achieved through such activity. The purpose is the design of effecting something to be achieved or accomplished. The overt act of the person must be looked at so as to find out the effect of the transaction.

31. Webster's New International Dictionary defines the work 'purpose' as that which one sets before him as an object to be attained; the end or aim has to be kept in view of any plan, measure, exertion or operation. Therefore, it is beyond doubt that 'purpose' has to be determined with regard to the ultimate object of the consumer for the use of electricity. While determining the purpose for which supply is required by a consumer, it is ultimately the end objective of the user that has to be ascertained."

27. The request of the petitioner is to classify the LPG bottling plants and their terminal at Industrial tariff for determination of electricity tariff. Such reclassification would amount to re-determination and reduction of tariff. Determination of tariff for electricity has to be done by the Commission in accordance with Sections 61, 62 and 64 of the Electricity Act, 2003, read with the provisions of the KSERC (Terms and Conditions for Determination of Tariff)

Regulations, 2014. It has been clarified by the Hon'ble Supreme Court and the Hon'ble APTEL that the tariff determination is a quasi-legislative process. As per the procedures specified by the Tariff Regulations, the tariff can be determined only after notifying the proposal for the information of the public and after conducting public hearing thereon. The issues raised by the petitioner had duly considered while determining the tariff as per the impugned order dated 14.08.2014. Further, Section 62 (4) of the Electricity Act 2003 provides that,

(4) "No tariff or part of any tariff may ordinarily be amended more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified".

28. Electricity is a merchantable commodity. In the usual course, the same quantity of electricity with same quality, should be priced equally irrespective of the purpose for which it is used. But this is not the case with the tariff of electricity. Electricity supplied for irrigation, domestic activities, industrial activities, commercial activities, publicity and advertisement activities, entertainment activities etc., are priced differentially depending upon the socio economic importance of such activity for which electricity is used. This is because electricity is a versatile form of energy and it is the lifeline of all developmental activities in the society. While it is inevitable for improving the standard of living and health care of the people, it is also inevitable for the economic development of the Nation. Electricity is instrumental in engineering the socio economic development in society. As per Section 6 of the Electricity Act, 2003, it is the duty of the Central and the State Governments to provide access to electricity to all areas including villages and hamlets through rural electricity infrastructure and electrification of households. As per Section 43 of the Act every distribution licensee shall, on application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply. Thus it can be seen that electricity has become a statutory right of every citizen of our Nation. The Central and the State Governments have been given the duty to provide access to electricity in all areas and to all households. Thus electrification of rural areas and households therein is one of the statutory duties of the Governments. The National Electricity Policy and the Tariff Policy notified by the Government of India do also stipulate that the citizen should be given 24 x 7 supply of electricity. The Central and State Governments have also launched projects for 100% electrification of households.

29. The cross subsidy is a practice recognized by the provisions of Electricity Act, 2003, though it has been stipulated in clause (g) of Section 61 that the cross subsidy should be reduced. In the process of cross subsidy, the sectors such as

agriculture and domestic are given electricity at subsidized rates and subsidy is provided by consumers in the categories such as commercial, industrial and general. The Commission has to carefully consider the competing claims of various categories of consumers and work out a delicate balance while determining tariff, in such a way that the legitimate and reasonable expenses of the licensees are met with. Therefore tariff for electricity supplied to various categories of consumers can only be determined in an integrated manner after considering the claims and counter claims of all stakeholders.

30. It is also noted that, all the industries as defined in different statues are not included under industrial tariff for electricity tariff determination. The industries have been broadly classified into manufacturing industry and service industry. In the recent years, a new category namely IT and IT related industries has also come into existence. It should be noted that the word 'industry' has very wide meaning to bring to its fold various categories of industries such as manufacturing industry, IT and IT enabled industry, hotel industry, hospitality industry, tourism industry, transport industry, plantation industry, construction industry and such many other industries. For the purpose of tariff determination all such industries are not treated alike.

31. The Commission had considered the issues raised by the petitioner and appraised all the documents before and concluded that, the appropriate tariff category for LPG bottling plants, and also the terminals and depots of the petitioner shall be under commercial category for electricity tariff.

32. As per the impugned tariff order OP No.09/2014 dated 14.08.2014, the Commission has included the following categories of consumers under commercial category for the purpose of levying electricity charges.

(i) shops**,** showrooms, display outlets, business houses,
(ii) hotels and restaurants (having connected load exceeding 1000 W), house boats,
(iii) private lodges, private hostels, private guest houses, private rest houses, private travelers bungalows,
(iv) freezing plants, cold storages, milk chilling plants,
(v) bakeries (without manufacturing process),
(vi) petrol/diesel/ LPG /CNG bunks, LPG bottling plants,
(vii) automobile service stations, computerized wheel alignment centres,
(viii) marble and granite cutting units,
(ix) units carrying out filtering, packing and other associated activities of oil brought from outside,
(x) share broking firms, stock broking firms, marketing firms.

As above, the units carrying out oil filtering, packing and other associated activities of oil brought from outside is included under commercial category.

33. Regarding the electricity tariff applicable to the LPG bottling plants, the Commission has also seen the recent judgment dated 26.03.2018 of the division bench of the Hon'ble High Court of Madhya Pradesh in Writ Appeal No.550/2017, wherein the Hon'ble High Court has endorsed the judgment of the learned single bench of the Hon'ble High Court of Madhya Pradesh dated 07.03.2017 that, 'LPG bottling and filling of Petro Max is not a manufacturing nor industrial activities but is purely commercial activity. The relevant paragraphs of the judgment dated 26.03.2018 of the Hon'ble High Court is extracted below.

" 11. We have heard Attorney of the appellate and find no merit in the present appeal.
12. The registration of the Appellant under the Gas Cylinder Rules or the Explosive Act or the Factories Act is to satisfy the specific requirement of each of the said Act or the Rules framed there-under. Each of the Act has a different object to be achieved, and has different requirement for the purposes of manufacturing activity. The definition in one statute cannot be used for interpreting the same expression used in another statute. The purpose and meaning of the expression "manufacturing activities" has to be arrived at in view of the language of statute or the rules framed there under and the object of such provision. Meaning assigned to certain words in one statute cannot be imported to define the meaning of the same word in a different statute.

13. The judgment in Servo-Med Industries (supra) deals with the provisions of Central Excise Act, 1944, wherein the question was levy of excise on manufacture of excisable goods. The said judgment is for the purpose of levy of excise duty. The said judgment has been considered by the Appellate Tribunal considering the same question as is raised in the present appeal as to whether the bottling of liquefied petroleum gas form the bulk containers to the marketable small containers is a manufacturing activity. It was held that it is not a manufacturing activity.
14. We find that the reasoning given by the Appellate Tribunal is a plausible meaning and with which we respectfully agree. We find that the reasoning recorded by the learned Single Judge of Gujarat High Court is in respect of the definition of Industrial undertaking given in Section 2 (bb) of Bombay Electricity Duty Act, 1958. The said judgment is not applicable to the facts of the present case as the Bombay Electricity Duty Act, 1958 defines the expression "Industrial Undertaking" and the petitioner unit was found to be in such Industrial Undertaking as per the definition under the Act. But admittedly, the expression "Industrial Undertaking" has not been defined under the Electricity Act. The only definition of Industry available is under the tariff order of 2001 which means that the units where conversion from raw material to finished goods takes place is covered by the expression manufacturing.

15. However, in the present case admittedly, the liquefied petroleum gas is bottled into small containers from the bulk containers, therefore, there is no manufacturing process is undertaken though elaborate bottling activities in undertaking so as to facilitate

liquefied petroleum gas under high pressure from the bulk containers to the small cylinders. Therefore, activity undertaken by the appellant is not a manufacturing activity for the purpose of electricity charges as the definition of such expression has to be found out either from the provisions of agreement prior to the tariff order or in terms of the tariff order. The end product in the cylinders is the same as in the bulk containers. There is no change in any of the properties of the product. Therefore, it cannot be said that the Appellant is engaged in the manufacturing activity.

16. The order passed by the Income Tax Appellate Tribunal in ITA.No.2124/MUM/1999 decided on 31.07.2012 (Hindustan Petroleum Corporation Ltd. Vs. Deputy Commissioner of Income Tax) is again dealing with the Section 80 (IA) or Section 80 HH of Income Tax Act, 1961. The definition of manufacturing activity under the Income Tax Act or for considering that when the new industrial units comes in to existence as considered by the Hon'ble Supreme Court in Vadilal Chemicals Ltd. (supra) would not be helpful to examine the expression manufacturing activities for the purpose of levy of electricity duty.

17. Thus, We do not find any merit in the present appeal. Accordingly, the same is dismissed.".

(xi) In the circumstances explained above we do not find any reason to alter the stand already taken by the Commission in this matter.

Order of the Commission

The Commission, in view of the direction of the Hon'ble Supreme Court dated 09.12.2016 in Civil Appeal No. 11150/2016, has carefully examined the entire documents and other materials placed before it by the petitioner, the counter argument of the respondent, and other relevant facts and documents submitted as per the provisions of the Electricity Act, 2003 in the matter of electricity tariff determination and concluded that, the LPG bottling/ filling plants, Petroleum Terminals and Depots of the petitioner and the similarly placed consumers falls under 'commercial category' for the purposes of levy of electricity charges.

Petition disposed off accordingly.

Sd/-	Sd/-	Sd/-
K.Vikraman Nair	**S.Venugopal**	**Preman Dinaraj**
Member	**Member**	**Chairman**

Approved for Issue

Sd/-

Santhosh Kumar. K.B
Secretary