



Chhattisgarh State Electricity Regulatory Commission

Civil Lines, G.E. Road, Raipur – 492001

Tel: 0771-5073555, Fax-5073553

Petition No. 38/2006 (M)

In the matter of fixation of tariff for plantation of trees : review of the order of the Commission passed on the 13th September, 2006 in petition No.24 of 2006 (T)

Chhattisgarh Krishi Vaniki Samaj
Padmanabhpur, Durg

.... Petitioner

V/s

Chhattisgarh State Electricity Board
Raipur.

.... Respondent

Present: S.K.Misra, Chairman
Sarat Chandra, Member

ORDER

(Passed on 23/02/2007)

The Chhattisgarh Krishi Vaniki Samaj, a registered association of persons/establishments, has submitted an application under Sec. 94(1)(f) of the Electricity Act, 2003 (the Act) for review of the tariff order for the year 2006-07, passed by this Commission, on the 13th September, 2006 in petition No.24 of 2006(T), in so far as its relates to the tariff for tree plantation. In this order the tariff for electricity used for pump connections and other equipment etc., for tree plantation is as per 'LV-4 LT Agriculture Allied Services' category. The applicant seeks review of this order and placement of tree plantation in tariff category 'LV-3 LT Agriculture'. The main grounds on which the review petition has been preferred are the following:

- (i) The members of the applicant association are agriculturists/ farmers and are engaged in growing of tree crops like subabool, eucalyptus, jatropha etc. The Hon'ble Supreme Court, way back in 1957 in a landmark judgement in the case of CIT Vs. Raja Vinay Kumar Sahasroy (AIR 1957 SC Page 768), has clearly held that raising of tree crops is agriculture activity. The Appellate Tribunal for Electricity, in their judgement dated 16/10/2006 in appeal case No. 95 of 2006, filed by the petitioner, has also held that raising tree crops is agriculture activity and should attract agriculture tariff. In spite of that the Commission has erred in not placing tree plantation in tariff category 'LV-2 LT Agriculture' and placing it in 'LV-4 LT Agriculture Allied Services'. The classification of tree plantation as 'agriculture allied services' is an error apparent on the face of the record and hence warrants review.
- (ii) The Commission has acted against the State and National policy as higher tariff will lead to diversion of land from tree plantation to raising of other crops resulting in adverse impact on environment.
- (iii) The change in tariff for tree plantation results in a tariff shock to the members of the petitioner association since the present classification entails a tariff increase by six times.

2. The main ground of the petitioner is that tree plantation is agriculture activity and the tariff applicable to agriculture should be applicable to it. The petitioner draws strength from the judgement of the Appellate Tribunal for Electricity passed on 16/10/2006 in appeal No. 95 of 2006. This appeal was preferred against the tariff order of this Commission for the year 2005-06 (order dated 15/6/2005, passed in petition No. 5 of 2005) in which tree plantation was included under tariff category 'LV-2 Non-domestic' and the plea of the petitioner was that it should be placed in the same category as agriculture. By their judgement aforementioned, the Hon'ble Appellate Tribunal allowed the appeal and ordered that the appellant would be liable to pay electricity charges with respect to their agricultural operation of raising plantation of trees under tariff category 'LV-3 Agriculture' and not 'LV-2 Non-domestic'. This review petition relies based on this judgement. Although not pressed, the petitioner during argument even pleaded that this judgement should operate as res judicata and the Commission erred in not abiding by it in the tariff order for the next year.

3. Per contra respondent CSEB has contended that the review petition is not maintainable as there is no error apparent on the face of record in the impugned order of the Commission. The Commission has taken a deliberate decision and placed tree plantation in tariff category 'LV-4 Agriculture Allied Services'. The judgement of the Hon'ble Tribunal, on which the petition relies, is quite clear. The Hon'ble Tribunal in the absence of any explanatory statement and definition clause or any statutory provisions specifying or indicating as to what is agriculture and what is excluded from agriculture, and in consideration of the facts and circumstances of the case gave 'the benefit of vagueness of the tariff order' and 'want of specific definition or identification', to the appellant in the judgement. The impugned tariff order, on the other hand, does not leave any scope for vagueness. The objective is clearly not to provide the same level of cross subsidy to tree plantation, which is a commercial activity, as to other agricultural activities. There is no policy of the Central or the State Government for provision of subsidy in electricity tariff to tree plantation in the interest of protection of the environment. There is no policy direction of the State Government to the Commission in this regard. There is also no tariff shock to the petitioner. Tree plantation continues to attract tariff with an element of cross subsidy although the quantum of cross subsidy has been reduced. The tariff determined by the Commission is thus in conformity with Sec. 61 of the Act and is not contrary to its provisions, as contended by the applicant. The respondent CSEB has pleaded that there being no error apparent on the face of record, the review petition is not maintainable even on merits.

4. The main issues for consideration are –

- (i) Is the review petition maintainable on the ground adduced? Has there been any error apparent on the face of record in the impugned order as alleged in this review petition?
- (ii) Secondly, are there other sufficient reasons for review of the impugned order and for placing tree plantation in tariff category LV-2 Agriculture and not in LV-3 Agriculture Allied Services?

5. Before we discuss the merits of the case, it would be necessary to consider the provisions regarding review of orders of the Commission. As per the provision of Regulation 33 of the CSERC (Details to be furnished by the licensee or generating

company for determination of tariff and manner of making application) Regulation, 2004, a review of the tariff order may be entertained by the Commission only on the ground of "an error apparent on the face of record". A plea for review is not to be entertained on any other ground. The provision for review in order 47, Rule 1 of the Code of Civil Procedure is that a review of an order may be sought by a person on the basis of (i) 'discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of applicant or could not be produced by him at the time' the order was passed, or (ii) 'on account of some mistake or error apparent on the face of the record', or (iii) for any other sufficient reasons. Even if we go by the grounds of review in the CPC and not our Regulations, the first ground is not applicable in this case, nor has it been pleaded. Thus this application has to be tested by the two other grounds for review. The main ground is the apparent error. The contention of the petitioner is that there has been an apparent error in the classification of tree plantation in LV-4, in place of LV-2 which is applicable to agriculture. The applicant's contention is that tree plantation is an agricultural operation and this has been settled by the order of the Hon'ble Supreme Court aforementioned and several judgements of the High Courts and the judgement of Appellate Tribunal against the tariff order passed by this Commission for the year 2005-06, on the very same issue. The line of reasoning is that if an activity is agriculture it is an error to classify it agriculture-allied services. We do not consider it necessary to enter into any discussion as to whether tree plantation is agricultural activity or not. The matter is well settled. The question is whether there has been an error in not making electricity tariff for agriculture applicable to tree plantation. For consideration of this issue in its right perspective, it would be necessary to go back to the judgement dated 16/10/2006 of the Hon'ble Appellate Tribunal aforementioned. The Hon'ble Tribunal has clearly taken into consideration the facts and circumstances of the case in ruling that tree plantation should attract tariff for agriculture and not non-domestic tariff. In para 19 of their judgement the Tribunal has observed: "The view that raising of tree is not an agricultural operation, cannot be sustained. *Had there been exclusion of such an activity at least by implication in the tariff notification, this difficulty might not have arisen, but in this case when such a difficulty has arisen the benefit of vagueness of tariff and want of specific definition or identification, benefit has to be given to the appellants*" (Emphasis added). The Hon'ble Tribunal has clarified in para 22 that the appeal has been allowed "with respect to the tariff year in question". In the impugned tariff order for 2006-07, apart from the tariff category LV-3 LT Agriculture a separate agriculture allied services tariff category i.e. LV-4 has been created. The latter tariff has been made applicable to tree plantation, fisheries, aquaculture, sericulture, dairy, hatcheries and poultry farms etc. It may be noted that this tariff is applicable apart from tree plantation, to sericulture which by the nature of the activity would also be classified as agriculture. Sericulture involves irrigation for raising saja or sehtut trees. A clear classification has been made by the Commission differentiating between the tariff for raising of traditional agriculture crops, and tree plantation and sericulture which are commercial in nature. It maybe argued that jatropha cultivation should also be classified as commercial. This has, however, been included in LV-3 Agriculture because of the importance of bio-fuel which jatropha crop yields and the policy of the State Government to give a thrust to growing of jatropha in the State. Secondly, in view of the purpose of use of electricity to which it applies, this category of tariff has also been kept below the average cost of supply which is Rs.3.20 \unit for this year.

6. It is also relevant to note here that in their tariff application for 2006-07 the CSEB had proposed a separate tariff category as 'agriculture allied services' for tree plantation, hitech agriculture, dairy, hatcheries, sericulture, poultry farms etc., with energy charges at Rs.3.00\KWh and fixed charges at Rs.80.00\KW. The petitioner association had submitted an objection (listed at No.44 of list of objectors at annexure to the impugned order), which was duly taken into account. This issue has been dealt with as issue No.19 of chapter 3 of the order. The CSEB had then submitted that tree plantation is a commercial activity and hence the highly subsidized rate of agriculture tariff should not be made applicable to them. They had also submitted that in any case keeping in view the nature of activities sought to be covered, the rates proposed for them were lower than that for non-domestic (commercial) category. The Commission held public hearing on the objections received, at Raipur on three days. The petitioner association did not appear in the public hearing to plead his case. There is thus no error. The reasons why tree plantation has been placed in a category other than agriculture is that agriculture is a highly subsidized tariff category for socio-economic and historical reasons which are well known. This category is being cross subsidized by the other consumers, mainly the industries and commercial consumers who have to bear the subsidy burden. The Act mandates that the tariff should progressively reflect the cost of supply of electricity and that cross subsidy should be reduced and eliminated [Sec.61(g) of the Act]. The Commission has, therefore, taken out such of the activities from agriculture which are commercial in nature and do not merit a highly subsidized tariff and placed them in a tariff category to reduce the element of subsidy presently available to agriculture. The Commission has, however, reduced the tariff proposed by CSEB and has approved energy charges of Rs.2.50\KWh and fixed charge of Rs.54\KW\month (Rs.40\HP) for them. This is a reasonable classification which cannot be treated as an error apparent on record. The petitioner has emphasized on the nomenclature of the tariff category i.e. 'agriculture allied services' to buttress his contention that an error has been made. It has been argued that calling an agricultural activity 'agriculture allied services' is prima facie an error. We do not accept the contention that nomenclature itself is classification. The applicability clause under each tariff category determines the classification of that tariff category. The nomenclature is only a manner of differentiation. There is no vagueness about the order of the Commission which is a deliberate decision. There is thus no error apparent on the face of the record in the impugned order. Hence the main ground on which this review application has been submitted is without basis. The petition therefore cannot be said to fall within the scope of the provision for review of tariff order in the Regulations made by the Commission aforementioned.

7. There are also no other sufficient reasons to warrant review of the impugned order. The order in no way violates the State/National policy. While protection of the environment and tree plantation is definitely a laudable objective, there is no national or State Government policy which mandates that electricity should be supplied to such activities at a subsidized rate. The Commission's order is in compliance with the provisions of the Electricity Act, 2003. Tree plantation is a commercial activity and a major part of the electricity charges payable by this sector should not be shifted to other consumers. As the Hon'ble Appellate Tribunal has observed in their judgement of 21/11/2006 in appeal No.83 of 2006, albeit in another context, "In case the burden of tariff on well to do sector is shifted to other consumers, it would surely not be in public interest and will amount to travesty of justice." The contention that this tariff has resulted in a tariff shock to the petitioner is also not borne out by facts.

There is no doubt that as compared to agriculture, the tariff for consumers in agriculture allied services category is higher, to the extent of slightly more than two times. But that does not amount to a tariff shock particularly when the objective of a separate classification is in keeping of the mandate of the Act.

8. In the light of the above discussion the Commission is convinced that there is no error apparent on record in the impugned order and there is also no sufficient ground for review of the order. It has to be noted that the scope of review is very limited and it cannot be allowed to be “an appeal in a disguise”. In this context it would be relevant to note the observations of the Madhya Pradesh High Court, in the case of State of Madhya Pradesh and another v/s Jaswantpuri and others AIR 1989 Madhya Pradesh 115:

*“4. Review is a strict legal remedy and not an equitable proceeding. Often it is regulated and controlled by Statute and is limited and confined to such case as the Statute enumerates..... The Supreme Court in Aribam Tuleshwar Sharma vs. Aribam Pishak Sharma, AIR 1979 SC 1047 pointed out that the power of review inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it**It cautioned that review is not permissible on the ground that the decision was erroneous on merits. The certainly is province of a Court of appeal.....**”* (emphasis added)

The Hon’ble Supreme Court has held in the M/s Thungrabhadra Industries Ltd Vs. Govt. of Andhra Pradesh (AIR 1964 SC 1372) case that “a review is no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.” As we have already noted above, not only is there no error apparent in the impugned order to justify a review, but even on merits there are no sufficient grounds.

9. In view of the above discussion the review application is not maintainable and is accordingly rejected.

**Sd/-
Member**

**Sd/-
Chairman**

True Copy

**(N.K. Rupwani)
Secretary**