

THE STATE ELECTRICITY OMBUDSMAN
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APPEAL PETITION NO. P/059/2016
(Present: V.V. Sathyarajan)
Dated: 29th November 2016

Appellant : Sri. Arun R Chandran,
Energy Head,
Indus Towers Ltd.,
Palarivattom,
Ernakulam

Respondent : The Assistant Executive Engineer,
Electrical Sub Division,
KSE Board Ltd, Viyyur,
Thrissur

ORDER

Background of the case:

The appellant represents M/s Indus Towers Ltd., a company providing passive infra structure service to telecommunication providers. The consumer number of the above service connection is 7669 and is under the jurisdiction of Electrical Section, Mulamkunnathukavu. At the time of availing service connection by the Cellular Mobile Towers who failed to produce required clearances, was given temporarily under LT III tariff. Challenging the applicability of LT III tariff, most of the Cellular Mobile Tower operators filed Writ Petitions before the Hon'ble High Court. In the meantime, the Hon'ble Kerala State Electricity Regulatory Commission in an order dated 07-01-2010 in TP No. 67/2009 has decided the tariff applicable to Cellular Mobile Towers shall be under LT VII A, even if the connections to the premises were effected on temporary basis due to lack of required clearances. The licensee implemented the orders of Commission and directed to revise the bills issued to Cellular Towers under LT III tariff to LT VII A tariff with effect from 07-01-2010. But the Hon'ble High Court of Kerala in W.P. (C) No. 34101/2010, directed KSEB Limited to make revision of tariff to the Mobile Towers with effect from 24-10-2002 onwards.

The appellant was given a short assessment bill amounting to Rs. 7,35,706.00 dated 08-01-2010 towards the difference in LT III and LT VII A

tariff for the period from 06/2005 to 7/2009. Against the short assessment bill the appellant approached the Honourable High Court of Kerala and filed a Writ Petition No. 5229 of 2010. The Honourable High Court of Kerala vide its Judgment dated 20-05-2015 directed the appellant to submit detailed objection to the invoices impugned and such objection if filed within one month shall be dealt within 2 months thereafter. Accordingly the Assistant Engineer revised the short assessment bill to Rs. 2,25,668.00 by applying LT III Tariff up to 01-12-2007. Aggrieved by order of the Assistant Engineer the appellant had filed a petition before the Honourable CGRF, Central Region, Ernakulam which was dismissed stating that, since the case is considered by the Honourable High Court, the Forum has no jurisdiction over the issue. Aggrieved against this decision, the appellant has submitted this appeal petition before this Authority.

Arguments of the appellant:

The appellant had given a short assessment bill amounting to Rs. 7,35,706.00 dated 08-01-2010 towards the difference in LT III and LT VII A tariff for the period from 06/2005 to 7/2009. Against the short assessment bill the appellant has filed a Writ Petition 5229 of 2010 before the Honourable High Court of Kerala. The Honourable High Court of Kerala vide its judgment dated 20-05-2015 directed to submit detailed objection to the invoice impugned and such objection if filed within one month shall be dealt within 2 months thereafter. Accordingly, a hearing was conducted by the Assistant Engineer and Senior Superintendent with the appellant. Then the Assistant Engineer revised the short assessment bill to Rs. 2,25,668.00 by applying LT III Tariff up to 01-12-2007 and after the LT VII A tariff was applied as per the Board Order (FM)(GEN)No. 2678 Comml-11/Mobile Tower/12-13/2010/TVPM Dated 05-11-2012.

Aggrieved by order of the Assistant Engineer, the appellant had filed a petition before the Honourable CGRF, Central Region, Ernakulam against the proceedings of the Assistant Engineer and the decision taken to revise the bill applying LT III Tariff up to 01-12-2007 pointing out the directions in the common Judgment dated 04-07-2013 in the very similar cases of the Writ Petition Nos. 34060, 34101, 34112, 34724, 36285 and 36331 of 2010, that the tariff of the Mobile Towers are LT VII A with effect from the date of Tariff order i.e. from 24-10-2002 onwards. But the Honourable CGRF, Central Region, dismissed the petition stating that, since the case is considered by the Honourable High Court, the Forum has no jurisdiction over the issue. But the petition was against the order of the Assistant Engineer and the revised bill applying the tariff for the Mobile Tower as LT III up to 01-12-2007.

These matters of LT III billing of Mobile Towers were settled by KSEB itself by releasing B.O.D(F) No. 1167/2016 (LA1/2662/2010) dated Thiruvananthapuram 16-04-2016 and given direction to settle the similar cases in the Lok Adalath conducted in the Honourable High Court of Kerala on

11-06-2016 by the Lok Adalath by fixing the tariff of the Mobile towers as LT VII A with effect from 24-10-2002 that is the date of order of the Tariff revision. 19 similar cases of their company consisting of around 70 service connections and an involvement of amounting to Rs. 3.2 Crores approximately were settled according to the above Board Order and fixing the tariff as LT VII A with effect from 24-10-2002 for the Mobile Towers.

The Honourable CGRF, Northern Region, has noted the following points in a similar case referring the judgment dated 04-07-2013 of the Honourable High Court of Kerala in the W.P(C) No. 34724 of 2010,

- a) As per the order passed by the KSERC on 07-01-2010 it was declared that the tariff applicable to Cellular Mobile Towers would be LT VII A.
- b) The above said order of KSERC was the clarification that the rate applicable to the cellular mobile towers as per the tariff order which came into effect in the year 2002 is under LT VII and that temporary connection provided are also liable to be charged only under the said tariff.
- c) The Regulatory Commission is the competent Authority to consider the issue of tariffs.
- d) Therefore KSEB Limited is not justified in restricting the revision only from the date of the said order. On the other hand the order has got the effect of a declaration of the tariff applicable made by a competent authority having applicability in the case of all connection provided even before the date of the said order.

The Assistant Engineer, Electrical Section, Mulamkunnathukavu has not considered any of the above facts while preparing the revised bill as per the order of the Honourable High Court of Kerala in the judgment dated 20-05-2015 in WP (C) No. 5229 of 2010.

The appellant pray to consider all the above facts and quash the order of the Assistant Engineer dated 27-10-2015 and the bill issued illegally for Rs. 2,25,668.00.

Arguments of the respondent:

1. It is submitted that the above appeal filed by suppressing and partially disclosing the real facts of the case, was dismissed by the Hon'ble CGRF vide order dated 17-08-2016 as not maintainable since the subject matter of this complaint has already been decided by the Hon'ble High Court of Kerala in Writ Petition WP(C) 5229 of 2010 which was disposed by the Hon'ble Court vide judgment dated 20-05-2015.
2. The Writ Petition No. 5229 of 2010 was filed before the Hon'ble High Court by M/s Indus Towers, duly Authorised Head (Legal), Sri.

Premakrishnan Nair M.N., 8th Floor Vankarath Towers NH Bypass, Padivattom, Kochi-24 aggrieved by the short assessment bill for Rs. 7,35,706.00 issued on 08-01-2010 to consumer No. 7669 for mobile tower under Electrical Section, Mulamkunnathukavu.

3. The service connection with consumer No. 7669 for mobile communication Tower at Athani, Thrissur registered in the name of Sri. Mohammed Saleem K.A., B.P.L. Mobile Service was effected on 1-12-2007 in LT VII A tariff with the condition that the connection will be treated as temporary connection and will be billed accordingly if he failed to produce necessary clearances within the stipulated time. Though the appellant failed to produce the necessary clearances in time, the connection has been continued as billed under LT VII A. This was noticed during the audit conducted by the Accountant General of Kerala and a short assessment bill being the difference in demand in LT III tariff and LT VII A tariff for the period 6/2005 to 9/2009 was issued to the appellant as per the audit.
4. The statement in the complaint that the order and the invoice dated 27-10-2015 challenged in this appeal was issued as per the petition filed before the Assistant Engineer, Electrical Section Mulamkunnathukavu for cancelling the short assessment bill is not true. The order and the revised invoice was issued after hearing the appellant as per direction in the above judgment of the Hon'ble High court of Kerala in WP(C) 5229 of 2010.
5. The revised short assessment bill issued is as per Board Order dated 15-11-2012 as stated in the complaint is not true. But it is issued as per the B.O. (FM)(Gen)No.2678 Comml-11 Mobile Tower/12-13/2010 TVPM Dated 05-11-2012 limiting the application of LT III tariff up to 01-12-2007.
6. The Board Orders challenged and set aside by the Hon'ble High Court of Kerala vide judgment in WP (C) 8245 of 2008 are the Board Orders prior to the B.O. dated 05-11-2012 and this B.O. has not been challenged or set aside in the judgments submitted along with the complaint by the appellant.
7. Since the impugned bill was issued to the appellant after hearing as per the direction of the Hon'ble High court in the judgment dated 20-05-2015 in the Writ Petition No. 5229 of 2010 filed by the appellant against this particular short assessment bill disputed in this appeal, the common judgment of the Hon'ble High Court of Kerala in WP Nos. 34060, 34101, 34112, 34724, 36285 and 36331 of 2010 referred by the appellant was dated on 04-07-2013 is not relevant in this case and hence cannot be relied.

8. The bill has been issued as per the terms agreed by the consumer at the time of providing connection that the connection will be treated as temporary connection and will be billed accordingly if he failed to produce necessary clearances within the stipulated time. Hence the appellant is liable to remit the bill in all respects.

These being the real facts of the case, it is humbly submitted that there is no deficiency on the part of these respondents and the appellant is not eligible for any relief sought for. For the reasons stated above it is respectfully submitted that the appeal is not maintainable before this Hon'ble Ombudsman and is liable to be dismissed.

Analysis and findings:

The hearing of the case was conducted on 09-11-2016 in my chamber at Edappally and Sri. M.Y. George represented for the appellant's side and Sri V.A. Manoj, Assistant Executive Engineer, Electrical Sub Division, Viyyur and Sri James T. Paul, Nodal Officer, Electrical Circle, Thrissur appeared for the respondent's side. On examining the petition and the arguments filed by the appellant, the statement of facts of the respondent, perusing the documents attached and considering all the facts and circumstances of the case, this Authority comes to the following conclusions leading to the decision.

The appellant in this appeal petition had challenged the short assessment bill amounting to Rs. 7,35,706.00 dated 08-01-2010 towards the difference in LT III and LT VII A tariff for the period from 06/2005 to 10/09 which subsequently revised bill to Rs. 2,25,668.00 by applying LT III tariff up to 01-12-2007. Moreover, the petition filed by the appellant before the CGRF, Ernakulam was also dismissed on the ground that the Forum has no jurisdiction over the issue since the Hon'ble High Court had considered the case and disposed accordingly.

But, the respondent has argued that the revised short assessment bill issued is as per the B.O. (FM)(Gen) No.2678 Comml-11/Mobile Tower/12-13/2010 Dated 05-11-2012 limiting the application of LT III tariff up to 01-12-2007. Moreover, the respondent has challenged maintainability of this petition by contending that the common judgment of the Hon'ble High Court of Kerala in WP Nos. 34060, 34101, 34112, 34724, 36285 and 36331 of 2010 referred by the appellant was dated 04-07-2013 is not relevant in this case and hence cannot be relied. Further, the impugned bill was issued to the appellant after conducting hearing as directed by the Hon'ble High court in its judgment dated 20-05-2015 in the Writ Petition 5229 of 2010 filed by the appellant.

The point to be decided in this case is whether the appellant is entitled to get LT VII A tariff with effect from date of tariff order i.e. 24-10-2002 onwards.

The facts disclosed before this Authority reveals that service connection to Cellular Mobile Towers, was given on temporary basis under LT III tariff to those who had not produced required clearances at the time of availing connection. Challenging the applicability of LT III tariff, the mobile tower operators filed petitions before the Hon'ble High Court of Kerala. In the meantime, the Hon'ble Regulatory Commission has issued an order dated 07-01-2010 in TP No. 67/2009 deciding the tariff to these connections shall be under LT VII A commercial and not LT III. Accordingly, the licensee implemented the above order and revised the bills issued to Cellular Towers under LT III to LT VII A tariff with effect from 07-01-2010.

The mobile operators challenged the order of the licensee implementing the tariff of mobile towers as LT VII A with effect from 07-01-2010. In most of the cases the Hon'ble High Court disposed of the petitions directing that the demand of the past period shall be regularised as LT VII A with effect from 01-12-2007. Accordingly, the licensee issued vide order No. BO(FM)(Genl) No.2087(Comml-II/Mobile tower/12-13, Thiruvananthapuram dated 5-11-2012 to review the demand raised under LT III as LT VII A in respect of mobile tower connections as LT VII A with effect from 01-12-2007. Subsequently in a common judgment dated 04-07-2013 in W.P (C) No. 34101/2010 and others, the Hon'ble High Court of Kerala directed the licensee to revise the tariff of cellular mobile towers with effect from 24-10-2002 onwards (i.e. date of tariff order) and the Board complied with the judgment as per order B.O. (FTD) No.1255/2014 (LA I)/12088/2010) dated 28-04-2014.

The appellant approached the Hon'ble High Court of Kerala by filing Writ Petition No.5229 of 2010 being aggrieved against the short assessment bill amounting to Rs. 7,35,706.00 dated 08-01-2010. The Hon'ble High Court disposed of the petition with a direction to submit detailed objection to the invoices impugned, vide judgment dated 20-05-2015. Based on this direction, the Assistant Engineer revised the short assessment to Rs. 2,25,668.00 by applying LT III tariff up to 01-12-2007 as per his proceedings No. ES/8/MGR/15-16 dated 27-10-2015. Even though the appellant filed petition against the order of the Assistant Engineer, the CGRF has not admitted the petition by holding the view that the Forum has no jurisdiction and hence this appeal petition.

On going through the facts of the case, this Authority is of the opinion that the case is worthy to be admitted by the CGRF since it is a petition against the order of licensee, the Assistant Engineer. In the judgment issued by the Hon'ble High Court of Kerala in W.P. (C) No. 5229/2010, it is directed that the competent among the respondents shall consider the objection with notice to

the petitioner and issue revised invoices. The Hon'ble High Court has not passed any order in the subject matter while disposing the Writ Petition. If the consumer has not satisfied with the decision of the Assistant Engineer, the consumer has the right to approach the CGRF and the Ombudsman as per rules. Any decision of the lower authority, if aggrieved, can be challenged at a higher level, which is the natural course of action as envisaged in law.

The appellant submitted that these matters regarding LT III billing of Mobile Towers were settled by the licensee after issuing vide order B.O.D (F) No. 1167/2016 (LA1/2662/2010) dated 16/04/2016) and given direction to settle similar cases in the Adalath conducted in the Honourable High Court of Kerala on 11-06-2016 by the Lok Adalath after fixing the tariff of the Mobile towers as LT VII A with effect from 24-10-2002 i.e. the date of order of the tariff revision. It is further contended that 19 similar cases of the appellant consisting of around 70 service connections and an involvement amounting to Rs. 3.2 Crores approximately were settled according to the above Board Order and fixing the tariff as LT VII A with effect from 24-10-2002 for the Mobile Towers.

On a detailed analysis of the pleadings and the documents produced by both sides it can be seen that the licensee issued order vide B.O.D (F) No. 1167/2016 (LA1/2662/2010) dated Thiruvananthapuram 16-04-2016, to implement the directions issued by the Hon'ble High Court in compliance with the judgment in W.P. (C) No. 34101/2010 which is detailed as follows.

“in cases where the tariff of the connection is only disputed then the same be settled in tune to the decision taken by the Board in W.P. (C) No. 34101/2010 as Board Order dated 28-4-2014, i.e., the tariff of the Cellular Mobile Tower connection is LT VII A with effect from 24-10-2002 (date of tariff order).” Moreover, a common award passed by the Lok Adalath on 11-06-2016, it is held that **“In view of what is stated above, revised demand will be issued by the Board and the tariff will be refixed in the respective cases under LT VII A with effect from 24-10-2002, within a period of three months from the date of receipt of a copy of the award. The excess amount, if any, already collected will be adjusted in the future bills which will be issued by the Board.”**

Accordingly, all cases of similar nature of the Cellular Mobile operators have been found settled and the tariff has been refixed in the respective cases under LT VII A with effect from 24-10-2002, as per Board Orders dated 28-04-2014 and 16-04-2016 (and by a common award issued by the Lok Adalath). This proposition was accepted and acted upon while settling similar issues before the Lok Adalath. In this circumstance this Authority is of the opinion that the appellant herein is also entitled for the same treatment given to similarly placed other consumers. There is no justification for a different stand

adopted by the respondent in granting the same relief awarded to similarly placed other consumers while settling the issue before the Lok Adalath.

Decision

In view of the above findings, the respondent is hereby directed to fix the tariff of the appellant under LT VII A with effect from 24-10-2002 onwards or the actual date on which the service connection effected to the appellant after 24-10-2002 as ordered by the Board dated 28-04-14 and 16-04-2016 and as per the common award passed by the Lok Adalath. Having concluded and decided as above, it is ordered accordingly. The appeal petition No. P/059/2016, filed by the appellant is disposed of as above. The order of CGRF-CR/Comp/30/2016-17/232 dated 17-08-2016 is set aside. No order as to costs.

ELECTRICITY OMBUDSMAN

P/059/2016/ _____ /Dated: _____

Delivered to:

1. Sri Arun R Chandran, Energy Head, Indus Towers Ltd., Palarivattom, Ernakulam
2. The Assistant Executive Engineer, Electrical Sub Division, KSE Board Ltd, Viyyur, Thrissur

Copy to:

1. The Secretary, Kerala State Electricity Regulatory Commission, KPFC Bhavanam, Vellayambalam, Thiruvananthapuram-10.
2. The Secretary, KSE Board Limited, Vydhyuthibhavanam, Pattom, Thiruvananthapuram-4.
3. The Chairperson, CGRF-CR, 220 kV, KSE Board Limited, Substation Compound, HMT Colony P.O., Kalamassery, PIN: 683 503.