HIGH COURT OF MADHYA PRADESH : AT JABALPUR

Writ Petition No : 3243 of 2002

M/s HEG Limited

- V/s -

MP State Electricity Board and others

Present : **Hon'ble Shri Justice Rajendra Menon**.

Shri Rohit Arya, Senior Advocate, with Shri Anubhav Jain, counsel for the petitioner.

Shri M.L. Jaiswal, Senior Advocate, with Shri K.K. Gautam, counsel for the respondents.

Whether approved for reporting: **Yes / No**.

O R D E R
30/04/2012

Challenge in this writ petition is made to the action of the respondents in levying 7% Surcharge as per Clause 5 of the Tariff Notification dated 29.6.1996, on the electrical energy wheeled out from the petitioner's Captive Power Plants. Seeking a direction for quashing the said action and a ***mandamus*** commanding the respondents to refund the entire amount collected towards 7% Surcharge without giving credit of the wheeled units, this writ petition is filed.

2- Petitioner M/s HEG Limited claims to be a Company incorporated under the Companies Act, 1956 and manufacturing Graphite Electrodes. For the said purpose, the Company has established a Factory, which is located in Mandideep, District Raisen.

3- Respondents/Electricity Board is a Body Corporate established under the provisions of the Electricity Supply Act, 1948 as it was existing prior to coming into force of the Electricity Act, 2003. It

seems that the petitioner company had certain establishment in Tawa, District Itarsi and in District Durg (now in the State of Chhattisgarh). For the purpose of meeting the power requirement of the petitioner's establishment and finding the power purchased from the respondents Board to be not adequate, petitioner/company decided to install its own Captive Power Plants in Tawa and Durg respectively. Accordingly, proceedings were initiated for seeking permission in this regard in accordance to the provisions of Section 44 of the Electricity Supply Act, 1948. Respondents issued letters – Annexures P/1 and P/2, on 13.7.1994 and 18.5.1994, granting permission on certain conditions as is stipulated in these letters. The conditions stipulated in these letters were in accordance to the Captive Power Policy formulated by the State Government. As per the conditions prescribed it was stipulated that supply from the Power Plant would be primarily used for the Units at Tawa and Borai respectively and the excess energy generated would be wheeled through the Board's transmission system to the Graphite Division located at Mandideep. It was clearly stipulated that under no circumstances should the power be sold to any other consumer or any other works of the petitioner's establishment in the State. It was further stipulated that petitioner/company shall pay to the Board wheeling and banking charges for utilizing Board's transmission system. The wheeling and banking charges were payable as per the rates, terms and conditions as may be prescribed and for which a separate agreement would be entered into. Similar conditions are stipulated in the Captive Power Policy of the State Government, which is available on record as Annexure R/2 and in the said policy the wheeling charges are contemplated under Clause 7. Petitioner having accepted the conditions, a wheeling agreement was entered into between the petitioner and the respondents/Board. The said agreement is available on record as Annexure P/3. Two separate agreements were entered into – one for Tawa Hydel Project and another for the Durg Project. The agreement was in accordance to the Captive Power Policy of the State Government and in the Agreement under Clause 1 and under Clause 3(a), certain

conditions were stipulated with regard to feeding the electricity generated at Tawa Hydel Station and Borai Station into the power system of the Board through 33 KV Double Feeders so also a provision for installing of meters to record the electricity supplied from the Tawa Hydel Station into the Board's system and also to measure the electricity purchased from the Electricity Board. Separate readings were to be maintained and the calculation was to be done in the manner contemplated under Clause 6 (a)(i) of the Agreement – Annexure P/3.

4- In pursuance to the said agreement, the petitioner started using the electricity generated from its Captive Power Plants after paying the wheeling charges and the bills were being paid during the period February 1997 to February 1999. In the meanwhile, the tariff for supply of electricity underwent a change and on 29.6.1996 a Tariff Notification was issued, which is filed as Annexure R/2 and in Clause 5 of the Appendix to this Notification, it was stipulated that 7% Surcharge shall be payable by a consumer. Even though the Tariff Notification was issued on 29.6.1996, it seems that between February 1996 to February 1999, no surcharge on the units of power generated by the Captive Power Plants was imposed. In March 1999, a revised bill was issued wherein a demand was made for payment of 7% Surcharge on the electricity generated from the Captive Power Plants of the petitioner's establishment and used at the Mandideep Factory, demand was made retrospectively with effect from February 1997. Petitioner represented and protested against the said demand and submitted a representation – Annexure P/5 on 4.2.1999 and came out with a case that on the power generated from the Captive Power Plants of the petitioner's establishment no surcharge can be levied. Referring to Clause 5 of the Tariff Notification, it was stated that surcharge can be levied only on the power purchased from the Board, the matter was kept pending and after the claim was rejected, the dispute was referred to the Board level Dues Settlement Committee and the Dues Settlement Committee also rejected the claim of the petitioner vide Annexure P/11 on 27.7.2000, thereafter, this writ petition has been filed.

5- Shri Rohit Arya, learned Senior Advocate appearing for the petitioner, took me through the Captive Power Policy of the State Government; the permission granted to the petitioner for establishment of the Captive Power Plant; the wheeling agreement; and, the provisions of Clause 5 of the Tariff Notification, argued that surcharge of 7% is a charge on the electricity duty payable by the petitioner for the electricity consumed after purchase from the Board. The surcharge cannot be a charge on the electricity generated by the petitioner and pumped into the Board's system. It was argued by Shri Rohit Arya, learned Senior Advocate, after indicating the meaning of the word 'surcharge' that the energy used by the petitioner and wheeled after its generation from the Captive Power Plant through the Board's system in accordance to the wheeling agreement cannot be subjected to any surcharge. It was emphasized that the 7% additional charge or surcharge is on the total amount of the bill, which could be in the form of demand charge, energy charge and fuel charge i.e… with receipt of the units supplied by the Board, but it could not be on the electricity generated by the petitioner.

6- Shri Rohit Arya, learned Senior Advocate, referred to an example as pleaded in paragraph 5.10 of the writ petition to demonstrate his point. The pleading reads as under:

"1. Recorded monthly consumption at Mandideep = 276 Units.

	(Supplied by MPSEB say	= 100 Units
	Recd from Tawa say	= 89 Units
	Recd from Durg say	= 87 Units
		---
		276 Units

2.	Rate charged by MPSEB (say) (this includes MD charges, Energy Charges & FCA).	= Rs. 4/- per unit
3.	Amount (Serial No. 1 x 2 i.e.. 276 x 4	= Rs.1,104=00
4.	Add 7% surcharge	= Rs. 77=28

5.	Total Amount	= Rs.1,181=28

6.	Less wheeled unit - Recd from Tawa	= 89 Units

Recd from Durg	=	87 Units
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		176 Units.
@ Rs.4/- considered at Point No.2 (i.e…. 176 Units x 4 = 704	=	Rs. 704=00
Amount payable (i.e… Rs.1181=28 (–) Rs. 704=00	=	Rs. 477=28.”

and, submitted that 7% surcharge is being levied in respect of the units wheeled by the Captive Power Plant treating them to be supplied by the Board. This according to the petitioner is not permissible. Interalia contending that even a claim made by the petitioner for referring the dispute to arbitration has been rejected and by interpreting the tariff clause in a manner which is wholly unsustainable Shri Rohit Arya submits that the action of the respondents be quashed.

7- It was submitted by Shri Rohit Arya, learned Senior Advocate, that the surcharge of 7% is payable on the amount of bill for which electricity is supplied by the Board, but it would not include the electricity generated by the petitioner’s Captive Power Plant and wheeled into the Board’s system. It is stated that for the purpose of electricity generated by the petitioner from their Captive Power Plant and for the purpose of wheeling and using the Board’s system, a separate wheeling agreement is entered into and 11% charge as per the wheeling charge agreement is paid. Accordingly contending that the action of the respondents in imposing the aforesaid 7% surcharge is unsustainable, interference into the matter is sought for.

8- Apart from referring to various judgments with regard to the meaning of the word ‘surcharge’, Shri Rohit Arya submitted that initially when the dispute in question took place the establishment of Captive Power Plant and wheeling of the same through Board’s system was governed by the policies of the State Government and the agreement in question, but now after the Indian Electricity Act of 2003 has come into force, the same is governed by the statutory provisions. Wheeling is defined in section 2(76) of the Electricity Act of 2003 and for the

purpose of payment of charges with regard to wheeling, the determination of tariff is made under section 62. It is pointed out by referring to section 62 that tariff for various items as indicated in section 62, which includes transmission of electricity, wheeling of electricity and retail sale of electricity. Referring to these provisions, learned Senior Advocate tried to emphasize that once for the use of the Board's system petitioner is paying wheeling charge as per the wheeling agreement merely on the ground that the petitioner is not utilizing the contract demand to the extent of 8000 KVA that also at 33 KV instead of at 132 KV, on the ground of usage being less than the prescribed under the HT Agreement, surcharge cannot be imposed. Shri Rohit Arya, learned Senior Advocate, referring to the contention of the respondents to the effect that the surcharge is imposed because the contract demand of the petitioner is more than 8 MVA and the petitioner is availing power at 33 KV in place of 132 KV, invites my attention to Clause 3(a) of the wheeling agreement and points out that the agreement itself is to feed the power generated by the Captive Power Plant into the 33 KV Double Feeder of the Board's sub-station. Accordingly, contending that on the ground of allowing the petitioner to have power supplied at a lower voltage of 33 KV than the prescribed voltage of 132 KV, levy of 7% surcharge cannot be made on the electricity generated by the petitioner's Captive Power Plant, but it can be only on the electricity purchased from the Board, Shri Arya seeks for interference into the matter. It is argued by learned Senior Advocate that when wheeling charges are paid as per the agreement and when the Board is not charging any duty on the electricity generated by the petitioner from its Captive Power Plant, the said power consumed by the petitioner cannot be added into the total bill for imposition of 7% surcharge. Accordingly, Shri Arya prays for interference into the matter.

9- Shri M.L. Jaiswal, learned Senior Advocate appearing for the respondents, took me through the documents available on record; the meaning of the word 'surcharge' as explained by the Andhra Pradesh High Court in the case of **The Associated Cement Companies Limited**

Vs. Andhra Pradesh State Electricity Board, AIR 1997 AP 142; and, certain principle laid down by the Supreme Court in the case of **M/s Bisra Stone Lime Co. Limited and others Vs. Orissa State Electricity Board and another, AIR 1976 SC 127**; and, **Tata Power Company Limited Vs. Reliance Energy Limited and others, (2008) 10 SCC 321**, to argue that the surcharge of 7% is being imposed strictly in accordance to the Tariff Notification – Annexure R/2 and the conditions stipulated in Clause 5 thereof, and as the petitioner is required to pay the surcharge in accordance to the aforesaid provision, he submits that there is no illegality in the matter. It is pointed out by him that a Three Member Dues Settlement Committee consisting of Experts having assessed the claim of the petitioner and have rejected it, now, no case is made out for interference.

10- According to Shri M.L. Jaiswal, learned Senior Advocate, 7% surcharge according to the Supplementary Agreement dated 5.7.1997 – Annexure R/1 and the Tariff Notification – Annexure R/2 is imposed as the contract demand of the petitioner is more than 8 MVA and the petitioner is availing power at 33 KV in place of 132 KV. According to Shri Jaiswal, learned Senior Advocate, the prescribed voltage for contract demand above 8 MVA is 132 KV, therefore, imposition of 7% surcharge is made on the total amount of the bill. It is stated that the 7% surcharge is billed only to such of the consumers who are not able to avail the supply with contract demand of more than 8 MVA at 132 KV. It is stated that 7% surcharge is payable on the total amount of the bill, including the demand charge, energy charge, FCA etc, it is not payable on the net amount of the bill after deducting the energy wheeled out from Tawa and Borai Plants. It is indicated that the intention and purpose for imposing this 7% surcharge is for allowing the petitioner to use the lower voltage of 33 KV instead of the prescribed voltage of 132 KV, which has the result of blocking the Board's 33 KV transmission and for using the infrastructure and system of the Board. It is stated that 7% surcharge levied is not a surcharge in its real sense, it is basically a users charge for availing the facility of getting power at a

lower voltage than the prescribed one. It is stated that once the petitioner switches over to the 132 KV power, imposition of the surcharge has been done away with. Accordingly, contending that the total amount of the bill includes the wheeled units of the consumer from its Captive Power Plant, Shri M.L. Jaiswal submits that the 7% surcharge is on the total bill amount of the recorded consumption of petitioner's plant at Mandideep and from this no credit for the wheeled units can be given. Accordingly, emphasizing that the entire matter has been considered by the Dues Settlement Committee and decided in accordance with law, Shri Jaiswal prays for dismissal of the writ petition.

11- Having heard learned counsel for the parties and on a perusal of the records, it is clear that the only question warranting consideration now in this writ petition is as to whether the 7% surcharge payable in accordance to Clause 5 of the Tariff Notification – Annexure R/2, is to be paid after including the consumption of electricity by the petitioner at their Mandideep Unit, which is generated from their Captive Power Plants.

12- For deciding the said question, it would be appropriate to take note of the provisions of the Tariff Notification and the agreement between the parties. Clause 5 of the Tariff Notification in Hindi reads as under:

> " 5. ये विद्युत दरें उपभोक्ताओं को जबकि उनकी संविदा मांग 8000 के.व्ही.ए. में अधिक न हो, विद्युत प्रदाय हेतु लागू होंगी। तथापि, वर्तमान उपभोक्ताओं को जिनकी संविदा मांग 8000 के.व्ही.ए. से अधिक है और जिन्हें 33 के.व्ही पर विद्युत प्राप्त करते रहने की अनुमति दी गई है, को 33 के.व्ही. पर अपने विद्युत देयक की कुल राशि का 7 प्रतिशत अधिभार के रूप में देते रहना होगा। पूर्वोक्त 7 प्रतिशत का अधिभार बिल की कुल राशि जो कि मांग प्रभार, ऊर्जा प्रभार तथा ईधन शुल्क समायोजन प्रभार के रूप में होगी, पर लगाया जावेगा। पुनश्च यदि पूर्वोक्त 8000 के.वही.ए. से कम संविदा मांग वाले वर्तमान उपभोक्ताओं को अतिरिक्त विद्युत प्रदाय की आवश्यकता होती है जिससे कि उनकी संविदा मांग 8000 के.व्हीए. से अधिक होती हो तो उन्हें सम्पूर्ण विद्युत प्रदाय 132 के.व्ही पर तथा 132 के. व्ही. पर प्रदाय हेतु प्रयोजय विद्युत दरों पर बढ़ी हुई संविदा मांग (अतिरिक्त विद्युत प्रदाय को मिलाकर) के लागू होने की दिनांक से लेना होगा।"

(***Emphasis supplied***)

13- The aforesaid clause shows that 7% surcharge shall be payable on the total amount of bill, which includes demand charge, energy charge and FCA. The moot question, therefore, would be as to whether the total amount of bill would mean the total consumption recorded in the bill or the charge payable by the petitioner on such of the consumption for which electricity duty is to be paid as per the Tariff Notification or HT Agreement.

14- Admittedly, petitioner has been granted permission to install two Captive Power Plants – one in Tawa, District Itarsi and another in Borai, District Durg. For transmitting the electrical energy generated at the Captive Power Plants, petitioner has been granted permission to use the transmission system of the respondent Board and for this purpose two wheeling agreements – Annexure P/2 have been entered into. Charge at the rate of 11% of the quantum of electricity supplied is paid as wheeling charges in accordance to the wheeling agreement. From the formula indicated by the petitioner in paragraph 5.10, reproduced hereinabove, it is clear that electricity duty is calculated by deducting the electricity generated by the Captive Power Plants from the total units received and consumed at Mandideep, units generated from Tawa and Borai and pumped into the Board's system are deducted and the energy charges are levied only on consumption of units purchased from the Board. This position is not disputed by the respondents. With regard to the power generated by the Captive Power Plants, only wheeling charges are payable. That being so, the question would be as to whether claiming 7% surcharge on the total consumption treating it to be the total amount of the bill is correct or not?

15- Admittedly, for the power generated by the petitioner and transmitted to Mandideep, no electricity duty is payable. As per the provisions of Clause 5 of the Tariff Notification, 7% surcharge is to be paid on the total amount of the bill, which has to be calculated by adding only such of the components for which the petitioner is liable to make payment to the Board. For the electricity generated by the Captive Power Plants under the wheeling agreement and for the power supplied by the

Board, two different criteria for payment are laid down. As per the agreement, under the HT agreement for the power consumed by the petitioner, which is purchased from the Board, duty as per the Tariff Notification are to be made and for the energy generated at the Captive Power Plants and pumped into the Board's system only wheeling charges are to be paid. If that be so, then the surcharge of 7% would be payable only on the charge for which provision is made in the Tariff Notification.

16- To clarify the position more, it would be appropriate to take note of the meaning of the word 'surcharge'. According to common parlance and the Oxford English Dictionary, 'surcharge' means 'a charge in excess of the usual normal amount; an additional tax or cost imposed; an additional rate added to the usual charge'. It is infact an additional charge or payment on an existing charge.

17- In the case of **M/s Bisra Stone Lime Co. Limited** (supra) relied upon by Shri M.L. Jaiswal, learned Senior Advocate, import of the word 'surcharge' is considered and it is held that the word 'charge' is not defined in the Electricity Act or the statutory provision, but the word stands and means 'an additional or extra charge or payment'. It is held by the Supreme Court in the aforesaid case that 'surcharge' is a 'super-added charge or a charge over and above the usual or current dues'. That being so, the 7% surcharge being a charge over and above the usual or current dues, the question would be as to what is the usual or current dues or charge payable by the petitioner as per the HT Agreement and the Tariff Notification. Admittedly, the charge or the dues payable by the petitioner are for the energy consumed after purchase from the Board. It is only for this consumption that charge is made in normal course and if surcharge is an additional charge on this charge, then for the consumption made, which is generated by the Captive Power Plants, as no charge is payable to the Board, there is no question of paying any additional charge or surcharge on this energy.

18- Infact the petitioner only pays the cost for the energy consumed and which is purchased from the Board and for the energy

consumed on the basis of the generation made in the Captive Power Plants, no duty or electricity charge is payable. If on such consumption no electricity duty or charge is payable then it is not known as to how the respondents can contend that the total consumption would become the total amount of the bill. The total amount of the bill referred to in Clause 5 of the Tariff Notification is such charge or amount for which payment is to be made by the petitioner as basic energy charge, demand charge or fuel charge. Charging 7% surcharge on the notional cost worked out on the energy wheeled out from the petitioner's Captive Power Plants is not contemplated under Clause 5 of the Tariff Notification. The total amount of the bill is in the form of demand charge, energy charge and FCA, these are the only factors which are relevant for payment of electricity duty or charge and if the example set forth by the petitioner, as indicated hereinabove, is taken note of then the act of the respondents in imposing 7% surcharge on the units wheeled out from the petitioner's Captive Power Plants seems to be unreasonable and an arbitrary decision, particularly when no recovery of duty or charge is to be made from the power generated from petitioner's Captive Power Plants. For this generation of power, petitioner is only required to pay the wheeling charges as per the wheeling agreement, therefore, petitioner is right in contending that by no stretch of imagination can Clause 5 of the Tariff Notification be interpreted to include the power used through petitioner's own Captive Power Plants and for which no payment is to be made by the petitioner.

19- If the respondents' contentions are accepted and if the petitioner is made to pay 7% surcharge on the power generated from its Captive Power Plants, it would mean that 7% surcharge or additional charge is being made on certain units or energy for which no charge is payable as per the Tariff Notification. This could never be the purpose for which the surcharge is imposed. Accordingly, this Court finds much force in the contentions advanced by the petitioner.

20- According to the respondents, the 7% surcharge is being demanded on the total amount of the bill because the contract demand of

the petitioner's establishment is more than 8000 KV and the petitioner is unable to use the facility of 132 KV. Therefore, the surcharge is being imposed as a user charge on the petitioner for availing power at 33 KVA in place of 132 KVA. Even if the intention and purpose of levying 7% surcharge is what is canvassed by the respondents, then also the 7% surcharge is on the total amount of the bill payable by the petitioner which would include the demand charge, energy charge and FCA as per the HT Agreement, and as already indicated hereinabove when for the power generated from the Captive Power Plants no such charge is payable, then on the ground of user charge for getting power at a lower voltage than the prescribed, no further surcharge can be levied upon the petitioner.

21- Levying surcharge as a user charge for availing the facility of getting power at a lower voltage than the prescribed as per the HT Agreement and the Tariff Notification is entirely different from the wheeling agreement. For using the system of the Board, for transmission of electricity generated from the Captive Power Plants, wheeling charges are being paid and this charge is for use of Board's system and for the loss caused i.e…. wear and tear of such a system, and for not availing of the facility of getting power at the prescribed voltage, petitioner is required to pay surcharge @ 7% only on such of the consumption which is supplied by the Board and for which electricity duty or charge is payable by the petitioner. The respondents are misinterpreting the provisions of the Tariff Notification – Annexure R/2, Clause 5. The concept of wheeling of power and availing supply at a particular voltage as per the HT Agreement are quite different and the concept governing both have to be appreciated in its right perspective.

22- The contention of Shri M.L. Jaiswal that 7% surcharge is on the total amount of the monthly energy bill, cannot be accepted to mean to include the energy generated from the Captive Power Plants. 7% surcharge is payable as per the HT agreement and the Tariff Agreement only on such of the components or factors for which duty or charge can be levied by the Board and not on such components or factors on which

the consumer is not required to pay any charge or duty to the Board, and on such component for which petitioner is not required to pay anything to the Board i.e… for the electricity energy generated from its Captive Power Plants, no surcharge is payable.

23- Respondents in the garb of imposing 7% surcharge on the total bill amount are infact imposing 7% surcharge on the total recorded consumption of electricity duty, when the recorded total consumption of electricity dues include both the electricity generated from the Captive Power Plants of the petitioner and that which is purchased by the petitioner from the Board. Surcharge on the consumption which is generated by the petitioner cannot be made because for this consumption no charge is payable as per the Tariff Agreement. The very fact of installing two meters for recording consumptions and deducting the consumption generated by the petitioner while making payment of electricity duty clearly shows that the respondents are not charging any duty on the consumption made by the petitioner which is generated at their Captive Power Plants and if no duty is payable on this consumption or electricity generated at the Captive Power Plants then the surcharge which is an addition on the charge or which is an additional payment on energy duty, cannot be made because for the units generated by the petitioner from its Captive Power Plants, no electricity duty or charge is payable.

24- Taking note of the totality of the facts and circumstances of the case and for the reasons indicated hereinabove, I am of the considered view that 7% surcharge as per Clause 5 of the Tariff Notification – Annexure P/2, is to be billed on such consumers, who are not availing supply of the contract demand of more than 8 MVA at 132 KVA or above and who are availing of power supply at a lower voltage only with regard to the consumption made for which supply is made by the Board and for which electricity duty is chargeable. Such consumption for which no duty or charge is payable, the surcharge of 7% cannot be imposed.

25- While considering the objection of the petitioner, the Dues Settlement Committee has also mis-directed itself. It has held that the 7% surcharge is payable even on the generation of electricity made by the petitioner. To that extent, the finding recorded by the Dues Settlement Committee is illegal.

26- Accordingly, finding the recovery of 7% surcharge made from the petitioner to be unsustainable, for the grounds and reasons indicated hereinabove, the petition is allowed. The findings recorded by the Dues Settlement Committee as contained in Annexure P/11 dated 29.9.2000 and the recovery made from the petitioner by imposing 7% surcharge, to the extent indicated hereinabove, is quashed. The above amount be refunded back to the petitioner.

27- Accordingly, the petition stands allowed and disposed of.

(RAJENDRA MENON)
J U D G E

Aks/-