

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 116 of 2006

Dated: October 4, 2007

**Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

Bharat Sanchar Nigam Limited
O/o CGM, Telecom, Punjab Circle
Sanchar Sadan, Sector 34
Chandigarh

... Appellant

Versus

(1) Punjab State Electricity Regulatory Commission
Through its Secretary,
Sector 34,
Chandigarh

(2) Punjab State Electricity Board
Patiala
Punjab

... Respondents

For the Appellant : Mr. Sharat Kapoor &
Mr. Pramod Yadav, Advs. with
Mr. I.J. Bawa, AGM

For the respondent(s) : Mr. Amit Kapur, Mr. Apoorva Misra, Advs.
with Mr. Shyam Lal, Dy. Director (TG),
PSEB for PSEB
Mr. M.G. Ramachandran and
Mr. Anand K. Ganeshan for PSERC

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

This appeal is preferred by the Bharat Sanchar Nigam Limited (for short BSNL) against the order of the Punjab State Electricity Regulatory Commission (for short Commission) dated May 10, 2006 in Petition No.1 of 2006. The challenge to the order is limited one. The Commission has placed the appellant in the Non-Residential Supply category (NRS category) for the purpose of levy of tariff for consumption of electricity for the Financial Year 2006-07. The facts giving rise to the appeal are as follows.

2. The BSNL is a company registered under Companies Act. Its establishments in the State of Punjab receive electricity from the Punjab State Electricity Board.
3. The Commission by a public notice invited objections to the ARR and application for revision of tariff filed by the Punjab State Electricity Board (for short Board) for the year 2006-07. The appellant in its objections contended that the

telephone exchanges of the appellant ought to be billed as per the industrial tariff instead of being charged on the NRS tariff. It was pleaded that the Finance Act, 2002-2003 accorded the status of an Industrial Undertaking to the BSNL by inserting sub clause (iiia) below Item No.(iii) and clause (aa) of Sub Section (7) of Section 72-A of the Income Tax Act. In the application, the appellant asserted that the business of telecommunication services, whether basic or cellular including radio paging domestic, satellite service, network of trunking, broadband network and internet services fall within the purview of the term 'Industrial undertaking'.

4. The submission of the appellant did not find favour with the Commission and the exchanges of the appellant were placed in the NRS category for the purpose of tariff. Aggrieved by the impugned order, the appellant has preferred the instant appeal.

5. The basic argument of the learned counsel for the appellant is that the exchanges of the appellant come within the purview of the word 'Industry' and, therefore, they ought not to have been placed in the NRS category. The learned counsel also submitted that in the telephone exchanges electrical energy is converted into electro-magnetic waves to provide service to its customers. As a sequitur, it was contended that a new product is manufactured. It was also canvassed that the activities of the appellant are in the nature of business & trade. It was argued that this being so, the activities squarely fall within the definition of the term 'Industry' as defined in Section 2(j) of the Industrial Disputes Act, 1947. The learned counsel for the appellant also referred to the Factories Act and submitted that the appellant also falls within the term 'factory' as defined by Section 2(m) of the Factories Act, 1948, since a manufacturing process is being carried on by it in its telephone exchanges.

6. We have considered the submission of the learned counsel for the appellant. Section 62 of the Electricity Act 2003 deals with the determination of tariff. Sub section (3) of Section 62, *Inter alia*, provides that the consumers will not be shown undue preference by the Commission while determining the tariff under the Act, but they may be differentiated according to their load factor, power factor, voltage, total consumption of electricity during any specified period or at time at which supplies are required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. In other words, categorization of consumers is possible. On the basis provided in sub section (3) of Section 62, it is for the Commission to decide, the category in which a consumer should be placed. The arguments of the learned counsel that the offices and telephone exchanges of the appellant should be treated as an industry, in view of the provisions of the Finance Act, Industrial Disputes Act, Factories Act and Employees' State Insurance Act, cannot be accepted. The categorization, as already pointed out, depends upon

the factors which are relevant to the Electricity Act, 2003 particularly, sub section (3) of Section 62. It is possible that the appellant may fall under the category of 'Industry' on applying the meaning of term 'Industry' as it is found in the other Statutes but that cannot be the basis to determine whether the appellant is to be charged tariff by treating it as an industry. The appellant has not shown any violation of the Electricity Act, 2003 or the Regulations framed thereunder in charging the tariff from it under the non-residential supply category.

7. It will not be correct to borrow the definition of 'Industry' from 'other statutes' for the purpose of holding that the appellant ought to be billed as per Industrial Tariff. In Union of India Vs. Sh. R.C. Jain (AIR 1981 SC 951), the Supreme Court refused to borrow the meaning of the words 'local fund' as defined in the General Clauses Act on the ground that it is not a sound rule of interpretation to seek the meaning of the words used in an Act, in the definition clause of 'other statutes'. In this regard it was held that

definition of an expression in one Statute must not be imported into another.

8. In Loreburn L.C. in Macbeth vs. Chislett (1910) AC 220, it was observed to the effect that it would be a new kind of terror in the construction of Acts of Parliament if the courts were required to limit a word to a particular sense of a Statute, which is not incorporated or referred to in the legislation that requires interpretation.

9. The question whether the appellant is carrying out any process of manufacturing of goods or supply of any goods is no longer *res-integra*. In Bharat Sanchar Nigam Ltd. & Anr. Vs. Union of India & Ors., (2006) 3 SCC 1, the principal question to be decided was the nature of the transaction by which mobile phone connection is made available by the telecom company to the consumers, namely, is it sale or is it a service or is it both. The Supreme Court held that the appellant was not carrying out any process of manufacturing of goods or supply of any goods, it was

simply rendering service to customers. In this connection, it was held as follows:-

“61. We will proceed on the basis that incorporeal rights may be goods for the purposes of levying sales tax. Assuming it to be so, the question is whether these electromagnetic waves can fulfil the criteria laid down in Tata Consultancy for goods. In our opinion the question must be answered in the negative. Electromagnetic waves have been described in David Gilles & Roger Marshal: Telecommunications Law: Butterworths:

“1.14. Electromagnetic waves travel through free space from one point to another but can be channeled through waveguides which may be metallic cables, optical fibres or even simple tubes. All electromagnetic waves are susceptible to interference from one another and unrelated electrical energy can distort or destroy the information they carry. To reduce these problems they have been organized within the spectrum into bands of frequencies or wavelengths for the transmission of particular types of services and information.”

62. The process of sending a signal is as follows:

“Data is superimposed on a carrier current or wave by means of a process called modulation. Signal modulation can be done in either of two main ways: analog and digital. In recent years, digital modulation has been getting more common, while analog modulation methods have been used less and less. There are still plenty of analog signals around, however, and they will probably never become totally extinct. Except for DC signals

such as telegraph and baseband, all signal carriers have a definable frequency or frequencies. Signals also have a property called wavelength, which is inversely proportional to the frequency". (Encyclopedia of Technology Terms of Techmedia)

63. *It is clear, electromagnetic waves are neither abstracted nor are they consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are merely the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscribers.*

64. *The second reason is more basic. A subscriber to a telephone service could not reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most the concept of the sale in a subscriber's mind would be limited to the handset that may have been purchased for the purposes of getting a telephone connection. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection.*

65. *We cannot anticipate what may be achieved by scientific and technological advances in future. No one has argued that at present electromagnetic waves are abstractable or are*

capable of delivery. It would, therefore, appear that an electromagnetic wave (or radio frequency as contended by one of the counsel for the respondents), does not fulfil the parameters applied by the Supreme Court in Tata, Consultancy for determining whether they are goods, right to use of which would be a sale for the purpose of Article 366(29-A)(d).”

10. Thus, it needs to be noted that there is no consumption of electro-magnetic waves by the customer. The mere fact that electrical energy is converted into electro-magnetic waves does not detract from the fact that the appellant is providing only service to its customers and nothing more. In the process, no goods are being manufactured. Unlike goods the electro-magnetic waves are neither delivered to the customers nor consumed by them.
11. In view of the above mentioned decision of the Supreme Court, we cannot accept the argument that the appellant is an industry and ought not to be placed in the category of NRS category.

12. In this view of the matter, we do not find any force in the appeal. Accordingly, the appeal is dismissed.

(Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member

Dated: October 4, 2007