



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 17

No. F. 11(1072)/DERC/2013-14/

Petition No. 04/2014

In the matter of: **Petition filed pursuant to directions issued by Hon'ble Appellate Tribunal remanding the matter to Hon'ble Commission in judgment dated 28.11.2013 in Appeal No. 14/2012 proceedings in reference to seeking allowance of service tax and material cost in respect of street light maintenance services provided to MCD/PWD by Petitioner.**

Tata Power Delhi Distribution Ltd.

....Petitioner

Vs.

North Delhi Municipal Corporation & Anr.

...Respondents

Coram: Hon'ble Mr. Justice S S Chauhan, Chairperson

ORDER

(Date of Order: 04.12.2019)

1. The instant Petition has been filed by M/s Tata Power Delhi Distribution Ltd. pursuant to the directions issued by Hon'ble Appellate Tribunal remanding the matter to the Commission in judgment dated 28.11.2013 in Appeal No. 14/2012 seeking allowance of service tax and material cost in respect of street light maintenance services provided to MCD/PWD. The Petitioner has made following prayer in the petition:

- a. Allow Rs. 4.79 Cr towards material cost for policy direction period i.e. 01.07.2002 to 31.03.2007, where all the incomes and expenses were subject to true up at actual level;
- b. Allow Rs. 2.23 Cr towards material cost for FY 2007-08 as the position has not been clarified for FY 2007-08 and revised charges order has been made effective only from 01.04.2008;
- c. Allow Rs. 1.97 Cr. Additional street light material billing inadvertently offered for ARR without claiming corresponding expenses on material cost of street lighting; and
- d. Allow service tax already borne by the petitioner as statutory levy/taxes under heading operation and maintenance expenses.

2. The petitioner has further submitted that :-

- a. On Street Light material issued towards maintenance of Street Light, Petitioner in its true up petition of FY 2009-10 prayed as follows:

"NDPL provides maintenance services (including use of material, if any required) in respect of the street lights owned by MCD and PWD.

During the first control period NDPL had issued street light material to PWD/MCD, the same has not been reimbursed by the MCD, NDPL had filed a petition before the Hon'ble Commission for recovery of Rs. 4.79 Cr towards the material issued by NDPL to MCD/PWD. The Hon'ble Commission vide its order dated 22.09.2009 read with order dated 06.04.2010 has revised the rates w.e.f. 01.04.2008 (on inclusive basis) to recover the material cost as well. However, in respect of earlier periods there was no finding in the order. It shall be appreciated that all the income arising on account of Maintenance Charges during the first control period have been considered towards meeting the annual revenue requirement of respective years.

Thus it is requested that the Commission may allow Rs. 4.79 Cr in the ARR for FY 2009-10."

- b. The Petitioner in its ARR petition for FY 11-12 has prayed for allowance of additional amount which it has inadvertently missed out in its true up petition of FY 2009-10 and relevant extract is reproduced below for sake of convenience;

During the year FY 2009-10, the Commission vide its order dated 22.09.2009 read with order dated 06.04.2010 has revised the maintenance charges towards the street light w.e.f. 01.04.2008 so as to include Rs. 26/point towards material issued for street light maintenance activities and painting of polls. NDPL wishes to bring to the notice of the Commission that while all the income arising on account of Maintenance Charges during the first control period and for FY 2007-08 had been considered as Non-Tariff Income towards meeting the annual revenue requirement of respective years, NDPL has not claimed the cost incurred on street light material of Rs. 7.02 Cr during the same period as the matter was under review of the Commission which was decided on 22.09.2009. Out of Rs. 7.02 Cr. Cost

incurred on street light material, a sum of Rs. 4.79 Cr has been claimed by NDPL in its true up petition for FY 09-10 and remaining Rs. 2.23 Cr. Is being claimed in the present petition.

Further, NDPL in its true up petition for FY 09-10 has inadvertently incorrectly

- c. That the Commission in MYT Order approved R&M Expenses for first MYT control period by taking actual values of base year as FY 2006-07, which does not include material cost in R&M expenses as the matter relating to whether material cost was inclusive of or not in Rs. 73/- was pending adjudication before the Commission and hence, Petitioner did not treat that said amount as expense but treated the same as being recoverable from MDC separately.
 - d. That in its true up petition filed for FY 2009-10 has inadvertently offered the income of Rs. 1.97 Cr relating to material part for street light maintenance in the ARR for the period Oct. 2009- March, 2010, which the Petitioner was entitled to or corresponding material expenses cost Rs. 4.79 Cr for the policy direction period i.e. FY 2003-07 should also be allowed.
 - e. Without prejudice to contentions above and without forging any claims as stated above and only in alternative, incase this Commission is of opinion that material cost was included in Rs. 73/- and no additional cost is to be allowed in ARR, in such a scenario the Commission should allow Rs. 4.79 Cr material cost for policy directions period (01.07.2002 to 31.03.2007) since during the policy direction period all income and expenses were subject to true up at actual level, or alternatively, if the Commission is of the opinion that additional material cost of Rs. 26/- was excluding and not included in Rs. 73/-, (the erstwhile rate of maintenance charges) the Commission should give directive to MCD/PWD so that the Petitioner can recover the same from MCD/PWD with carrying cost.
 - f. It is submitted that for the year FY 2007-08 as the petitioner has incurred Rs. 2.23 cr on material cost for FY 2007-08 and since the revised charges by this Commission have been made effective from 01.04.2008, the Petitioner could not bill any additional amount to MCD/PWD for the FY 2007-08, therefore, the Commission ought to have allow the same in ARR and/or give directive to MCD/PWD with carrying cost.
3. There are two issues involved in respect of maintenance activity of streetlight poles i.e.;

- a. Non-payment of cost for material utilized towards street light maintenance by MCD/PWD; and
 - b. Non-payment of Service tax on street light maintenance by MCD/PWD.
4. For issue no. 1 there are three claims involved as under:
- a. Rs. 4.79 Cr material used for street light not claimed however corresponding income offered in ARR during policy direction period (principle of capacity to pay period) as there was no clarity whether Rs. 73 per pole included material cost or not and this position has also not been clarified even in the order dated 22.09.2009;
 - b. Rs. 2.23 Cr material used for streetlight not claimed for FY 2007-08; however corresponding income offered in ARR during FY 2007-08 as there was no clarity whether Rs 73 per pole included material cost or not and this position has also not been clarified even in the order dated 22.09.2009;
 - c. Rs. 1.97 crore street light materials used included in street light maintenance income offered inadvertently in ARR through corresponding cost of streetlight material not claimed for the period Oct 2009 to March 2010, which need to be refunded back in ARR.
5. The petitioner has further submitted that since it provides service in regulatory environment where all legitimate cost controllable and uncontrollable are allowed as pass through in ARR, hence the Commission needs to clarify whether these costs are to be borne by consumer or direct MCD/PWD to reimburse the same by modifying/clarifying the order dtd. 22.09.2009.
6. For issue No. 2 the petitioner has submitted that the Commission may consider service tax as a statutory levy and the recovery of amount deposited by the Petitioner be allowed as expense in ARR, when the income from the same is utilized by the Commission in reducing the Revenue requirement of the Petitioner.
- a. Allow service tax already borne by the Petitioner as statutory levy/taxes under heading operation and maintenance expenses.
7. The respondent No. 1, North MCD has filed reply wherein it has stated that the petitioner has not filed any documentary evidence and has suppressed material from the Commission. Further, the petitioner has failed to comply with Section 55 of the Electricity Act, 2003, clause 35(i) and 41(ii) of the Delhi Electricity Supply Code and Performance Standards Regulations, 2007 and also failed to comply with the directions of the Commission as mentioned in the order in Petition No. 55 of 2007 and continued to bill the Respondent on the average basis without installing the meter till 2014.

8. The Respondent No. 2, PWD has filed the reply wherein it has stated that the following:
 - a. That no liability devolves upon the answering Respondent i.e. PWD for the payment of arrears, which should prima-facie be the sole responsibility of principal agency maintaining the street light during that period.
 - b. That the Petitioner has concealed the certified copies of the agreement executed between the Petitioner and answering Respondent i.e PWD during the year 2002 onwards.
 - c. That as per the agreement clause No. 5 of the Agreement wherein it is has been clearly mentioned that any taxes, levies or other duties, presently applicable or which may be levied by the Government of any other authority after executing the agreement shall be payable by PWD and not by NDPL. It is over and above the cost of maintenance charges. Therefore, the petitioner may be directed to furnish the month wise and civic agency wise details of service tax deposited and claims made there off be provided indicating gross amount of bill and quantum service tax paid. The certified copies of the agency wise bank challans with respect to service tax paid by the petitioner may also be furnished in order to adjudication of the claim of the petition.
9. The matter was listed for hearing on 25.08.2015 wherein the Commission vide order dated 03.09.2015 directed TPDDL to furnish details about material cost to North MCD within two weeks. The petitioner on 29.12.2016 has submitted the copy of the bills for street lighting material which have already been sent to North MCD on regular basis by key consumer Group of TPDDL.
10. The Petitioner has filed an affidavit wherein it has submitted that no expenses have been claimed on account of Street light material cost of Rs. 123.73 Lac as a part of R&M expenses for base year (FY 2006-07). The said expenses have been shown as recoverable on account of streetlight from the Respondents.
11. The Respondent no. 1 North MCD has filed its counter affidavit stating the following:
 - a. That the present complaint filed before the Commission is not maintainable in its present form and is liable to be dismissed. Instead of filing the present complaint, it would have been lawful for the petitioner to have filed a suit for declaration and recovery of arrears. But instead thereof, the petitioner has preferred the present complaint which is not maintainable.

- b. That the complainant has approached the Hon'ble High Court of Delhi for same dispute which is also subject matter of the present complaint in the WP (C) No. 4586/2012 and the same is pending.
- c. That the present complaint is specifically barred by Section 511-B(4) of the DMC Act, wherein, it has been stipulated that in case of any dispute in relation to any of the matter referred to in the various clauses of sub-section (2) other than clauses (b), (d) and (i) the disputes are to be referred to the Central Government by the Corporation of the New Authority concerned (which is the present case happens to be the petitioner herein) and the decision of the Government was to be final. Since no such compliance has been made by the petitioner, before approaching this Commission, the present petition is liable to be dismissed.
- d. That the present petition is specifically barred by Section 511-A and 511-B of the DMC Act, 1957 as amended up to date. It is submitted that the respondent is not under any statutory obligation to pay service tax as has been claimed in the present petition. Accordingly, NDMC is not paying any service tax on the "transferred function" and is not liable to pay the same under any provision of law. More so, the service now transferred to the erstwhile transferees are liable to be accounted by the Transferred Agencies and if the services are being rendered by the transferee entities, then there is no question as to why the Respondent should be asked to pay the service tax in respect of services being provided by the Transferees.
- e. In pursuance to provisions of Section 511(A) and (B) of DMC Act, 1957 the petitioner was entrusted to perform transferred functions which include managing, maintenance and repairing of street lights in the area of North MCD, which the petitioner has performed during the relevant period. For which the petitioner was paid by the Respondent the charges fixed by this Commission from time to time inclusive of all taxes.
- f. The period of dispute in respect of said service Tax, is for the period 01.04.2007 to 19.06.2012.
- g. In accordance with the provisions of Finance Act, 1994, the activity of providing management and maintenance of repair road, which includes maintenance of street light installed on the roads, was never liable to Service Tax during the relevant period of dispute, as it was exempted by the Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, Government of India vide Notification 24/2009-S.T dated 27.07.2009.

- h. Retrospective amendment was brought in, in Section 97 of the Finance Act, 1994 especially for providing exemption relating to management, maintenance or repair of roads, whereby the said activity was exempted retrospectively for a period from 16.06.2005 to 26.07.2009. The retrospective amendment in Section 97 of the Finance Act, provided for refund of Service Tax which has been collected and paid by the service provider and which was not to be paid due to the effect of retrospective amendment in Section 97, *ibid*.
 - i. Due to the combined effect of Notification No. 24/2009/ST dated 27.07.2009 and retrospective amendment in Section 97 of the Finance Act, 1994, the activity of management, maintenance or repair of road including the maintenance of Street Lights, installed on the roads were exempted during 16.06.2005 to 19.06.2012, which covered the whole period of dispute and makes it clear that the services provided by the petitioner to the Respondent towards managing, maintaining and repair of Street light are exempted and the petitioner was eligible to take refund of the Service Tax in accordance with the provisions of Section 97(2) of Finance Act, 1994.
 - j. Therefore, the liability of payment of Service Tax in accordance with Section 68 of the Finance Act, 1994 is of the service provider i.e. Petitioner in the instant case.
 - k. In the light of the provisions of notification No. 24/2009-ST dated 27.07.2009 and amendment Section 97 of the Finance Act, 1994, the service provided by the petitioner to the respondent for maintenance of street lights were not chargeable to service tax during the relevant period, hence, there is no liability of service tax upon the petitioner and the petitioner was eligible for refund in accordance with provisions of Section 97 of the Finance Act, 1994.
 - l. In accordance with the provisions of Section 68 of the Finance Act, 1994, only the petitioner is liable to pay service tax, if at all, it has to be paid, being service provider, not the Respondent being receipt of service. However, in the instant case, since the services provided by the petitioner were exempted, thus, question of payment of service tax does not arise.
 - m. That since the construction maintenance of lighting in the various streets and roads of Delhi is statutory and obligatory function of the Respondent entrusted upon them under Section 42(o) of DMC Act, 1957 read with Article 213(w) of Constitution of India, is not liable for any service.
12. The Petitioner has filed rejoinder on 04.09.2018 on the counter affidavit of the respondent wherein it has submitted that:

- a. The present petition was filed pursuant to the directions of the APTEL remanding the matter to the Commission vide judgment dated 28.11.2013 in Appeal No. 14/2012 proceedings in reference to seeking allowance of service tax and material cost in respect of street light maintenance service provided by MCD/PWD by the petitioner;
 - b. The respondent is misusing the liberty granted by the Commission vide its order dated 14.06.2018, to its advantage, and instead of replying to the merits of the Affidavit has filed a Counter Affidavit placing on record additional grounds for dismissal of the main petition which would prima facie reveal that there is no response to the facts mentioned in the affidavit filed by the petitioner.
 - c. The arguments in the matter have been concluded and this Hon'ble Commission after hearing the parties vide Order dated 06.10.2017 directed the Petitioner to file a limited affidavit only mentioning if the R&M Expenses towards maintenance of the street light were part of the total R&M expenses of the petitioner or not for the corresponding period. This query of the Commission was clarified by the petitioner vide the present affidavit and the same merited no reply from the respondent.
 - d. That the liberty granted for filing the reply was limited to bring out any factual perversity in the affidavit filed by the petitioner, however, the respondent has instead filed a detailed reply.
 - e. That the disputed, issues involved and the prayers sought in the WP No. 4586/2012 is distinct from those raised in the present petition and therefore the said averment of the respondents has no legs to stand. Therefore, the present petition is maintainable and is liable to be allowed.
13. The Counsel for the Petitioner stated that the issue of Service Tax is not being pressed before this Commission as a Writ Petition (C) No. 4586/2012 has been filed by the Petitioner before the Hon'ble High Court of the Delhi and the same is pending adjudication; therefore, the present petition is now limited to the single issue of allowing the expenditure on maintenance of Street light in the ARR of the Petitioner because corresponding income on maintenance of street light has already been reflected in the ARR of the Petitioner.
14. The Counsel for the Petitioner further stated that in such a situation, the Respondent North Delhi Municipal Corporation does not have any stake remained in the present Petition. The Counsel for the Respondent stated that he wanted to

verify certain averments and claims made by the Petitioner as to whether they relate to the Respondent or not.

15. The Counsel for the Petitioner submitted that the Petitioner is not pressing on the issue of non-payment of service tax and it need not be deliberated upon. However, on the issue of non-payment of cost by MCD/PWD for material utilized towards street light maintenance, the petitioner may be allowed Rs. 8.99 crore (Rs. 4.79 Cr for policy direction period i.e. 01.07.2002 to 31.03.2007, Rs. 2.23 Cr for FY 2007-08 and Rs. 1.97 Cr. Additional street light material billing inadvertently offered for ARR) for material utilized as the corresponding income towards maintenance of street lights have been reflected in ARR whereas the expenditure has not been claimed due to the reason that position was not clear and there was an inadvertent error.

COMMISSION'S ANALYSIS

16. In view of the foregoings, and the submission of the Petitioner that it is not pressing on the issue of non-payment of service tax and it need not be deliberated upon, following three issues have to be adjudicated:
 - i. Rs. 4.79 Cr towards material cost for policy direction period i.e. 01.07.2002 to 31.03.2007, where all the incomes and expenses were subject to true up at actual level;
 - ii. Rs. 2.23 Cr towards material cost for FY 2007-08 as the position has not been clarified for FY 2007-08 and revised charges order has been made effective only from 01.04.2008;
 - iii. Rs. 1.97 Cr. Additional street light material billing inadvertently offered for ARR without claiming corresponding expenses on material cost of street lighting.
17. It is to be noted that the cost of material towards the maintenance of street light cannot be made a part of ARR so as to burden the consumers of Delhi towards maintenance of street lights which is the duty of the civic bodies and there has been an agreement between the civic bodies and the DISCOMs for maintenance of the street lights. This is a bilateral issue and the Hon'ble APTEL has also concluded in its Order dated 28.11.2013 in Appeal no. 14/2012 in reference to non-allowance of service tax and material cost in respect of street light maintenance services provided to MCD/PWD by TPDDL that "it is clear the issue involved is bilateral issue between the Appellant (TPDDL) and MCD and the burden cannot be passed on to the consumers. However, Delhi Commission is required to clarify the points raised by the Appellant so that it could take up the matter with the MCD."

ISSUE NO.1 :

Rs. 4.79 Cr towards material cost for policy direction period i.e. 01.07.2002 to 31.03.2007, where all the incomes and expenses were subject to true up at actual level

18. From the submissions and contentions of the parties, it is evident that the material cost towards maintenance of street light is to be recovered from the civic bodies irrespective of true up of income & expenses towards street light maintenance; and may be treated as an arrear in the hands of civic bodies. Even the Petitioner in its affidavit has stated that such expenditure has been shown as recoverable on account of street light from the Respondent. Vide Order dated 22.09.2009 the Commission had observed that all the three DISCOMs including NDPL and the Civic Agencies had agreed in the meeting on 27.10.2006 that the details of bills for maintenance charges and the cost of material utilized in the maintenance of street lights raised by the DISCOM and the payment thereof by the Civic Agencies should be reconciled between all the three DISCOMs and the concerned Civic Agencies.
19. Accordingly, the Petitioner may take up the issue of material cost for policy direction period i.e. 01.07.2002 to 31.03.2007 with the concerned civic bodies.

ISSUE NO.2 :

Rs. 2.23 Cr towards material cost for FY 2007-08 as the position has not been clarified for FY 2007-08 and revised charges order has been made effective only from 01.04.2008.

20. It is to be noted that the Commission vide its order dated 16.03.2004 had decided the maintenance charges of Rs. 73 per point per month which included replacement of incandescent bulbs of 40 to 100 Watts. Subsequently, vide order dated 22.09.2009, the maintenance charge was revised to Rs.77/- per point per month. In addition to Rs.19/- per point per month net of salvage value towards material cost and Rs.7/- per point per month towards painting and numbering of poles have also been allowed.
21. The Commission vide Order dated 06.04.2010 has clarified that the revision of single maintenance charge of Rs.77/- per point per month is based on the cost for the financial year 2007-08 ending on 31.03.2008 and therefore, the Commission is inclined to give effect the impugned order dated 22.09.2009 w.e.f. 01.04.2008.
22. Whereas, from this Commission's Order 22.09.2009, it is evident that the material cost of Rs.19 per pole was determined on the basis of expenditure of previous years. On the issue whether the maintenance cost for street lights includes the

material cost, it is clarified that the material cost was not considered as a part of the maintenance charge provided to the DISCOMs.

23. As already held that the material cost of maintenance of Street light is to be realized by the DISCOMs from the civic agencies and this Commission may not intervene in such bilateral issue. After clarifying the position about non-inclusion of material cost in the maintenance charge towards street lights, this Commission has no further role in the matter. Therefore, for the period prior to 01.04.2008, the material cost towards maintenance of street lights has to be realized by the petitioner DISCOM from the civic agencies on actual basis.

ISSUE NO.3 :

Rs. 1.97 Cr. Additional street light material billing inadvertently offered for ARR without claiming corresponding expenses on material cost of street lighting.

24. As much it is related to the claim of the petitioner that Rs.1.97 crore towards additional street light material inadvertently included for ARR without claiming corresponding expenses on material cost of street light, the same was not allowed as the audited account submitted by the Petitioner has entries grouping various expenses and as such Rs.1.97 crore towards additional street light material could not be verified. If the Petitioner has made an inadvertent error as claimed, it may be allowed to be rectified subject to prudence check. The Petitioner is directed to get the entry regarding Rs.1.97 Cr. reconciled and verified within one month from the issue of this Order. The impact of the claim of the Petitioner on being admissible may be considered in the subsequent Tariff Order.

25. The Petition is dismissed with the above observations.

**Sd/-
(Justice S S Chauhan)
Chairperson**