

Before the  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
13<sup>th</sup> floor, Centre No.1, World Trade Centre, Cuffe Parade, Mumbai 400 005.

Tel. 22163964 / 22163965, Fax No. 22163976

E-mail [mercindia@mercindia.com](mailto:mercindia@mercindia.com)

Website: [www.mercindia.com](http://www.mercindia.com)

**CASE No. 28 of 2004**

**In the matter of passing on Tax on Sale of Electricity to industrial and commercial consumers  
by Maharashtra State Electricity Board.**

**Dr Pramod Deo, Chairman  
Shri A. Velayutham, Member**

**ORDER**

**Dated: May 24, 2005**

In their Petition dated 19<sup>th</sup> January, 2005, the Vidarbha Industries Association (VIA), through its President, has sought directions to the Maharashtra State Electricity Board (MSEB) not to charge Tax on Sale of Electricity (TOSE) to certain consumers as they were doing at present, and to refund the amount of tax already collected along with interest to such consumers. In its Petition, VIA has cited the amendment promulgated in April 2004 to the Maharashtra Tax on Sale of Electricity Act, 1963 and the subsequent Notification dated 19<sup>th</sup> May, 2004 under which, among other things, a tax on the electricity sold by MSEB to industrial and commercial consumers is to be paid by MSEB to Government of Maharashtra (GoM) at the rate of 4 paise per unit. Accordingly, MSEB have issued a Circular dated 22<sup>nd</sup> September, 2004 with regard to implementation of the GoM Notification retrospectively from 6<sup>th</sup> April, 2004, i.e. by levying an amount of 4 paise per unit consumed from industrial and commercial consumers. VIA have pointed out that, as per Section 4 of the Maharashtra Tax on Sale of Electricity Act, every bulk licensee / power utility engaged in distributing electricity, "shall pay to the State Government at the time or times and in the manner prescribed the amount of tax payable under this Act." Thus, under the Act, TOSE is to be paid, in this case by MSEB, and cannot be collected from the consumers automatically on a one-to-one basis. However if, because of the consequent increase in MSEB's cost of supplying electricity, MSEB want to recover the burden from consumers, they can only do so by approaching the Commission for review of tariff. Section 62(6) of the Electricity Act (EA), 2003 stipulates that if any Licensee recovers a price or charge exceeding the tariff determined under that Section, the excess amount shall be recoverable by the person who has paid such price or charge, along with interest.

2. Even prior to the formal Petition filed by VIA and also thereafter, the Commission has received representations from the Chamber of Marathwada Industries and Agriculture, Aurangabad and several others, essentially challenging MSEB's action in charging industrial and commercial consumers 4 paise per unit without the Commission's approval, and outside the tariff determination process. In a response dated 27<sup>th</sup> December, 2004, MSEB had stated that the levy has been imposed by GoM on industrial and commercial consumers, and that MSEB are merely recovering it from such consumers through energy bills as a recovery agency and remitting the amount to GoM. MSEB had raised the matter of retrospective recovery with GoM earlier, and are also permitting the concerned consumers to pay the amount in instalments. After some correspondence with the Commission, MSEB also submitted legal opinion on the matter. Among other things, that legal opinion stated that, since there is no express provision in the Maharashtra Tax on Sale of Electricity Act authorising the

power utility to pass on the tax to the consumers, such tax would form part of the consideration, i.e. tariff in this case. However, this statement has been qualified in the opinion given by citing various other considerations.

3. In their reply dated 22<sup>nd</sup> February, 2005 to VIA's Petition, MSEB have stated that:

- (i) *The tax on sale of electricity is demanded as per ordinance dated 19<sup>th</sup> May, 2004. As per legal opinion given by M/s Little & Co., the tariffs are exclusive of electricity duty, excise duty, taxes and other charges as levied by Government or other competent authorities and the same will be payable by the consumer in addition to the charges levied as per the tariff hereunder. Hence, demand is correct.*
- (ii) *While deciding the tariff, the impact of tax on sale of electricity is not considered hence this is additional burden. It is to be collected from the consumer as per ordinance, from commercial and industrial consumers.*
- (iii) *The amount recovered towards tax on sale of electricity is to be paid to Government. As such, MSEB is only mediator. The tax is recovered as per ordinance. Hence Section 62(6) of Electricity Act, 2003 is not applicable. The amount collected is not revenue of MSEB.*

4. The matter was heard on 24<sup>th</sup> February, 2005 when, apart from the parties and authorised consumer representatives, other representationists were invited to participate if they so desired. Shri. R.B. Goenka on behalf of VIA referred to the Commission's Tariff Order in respect of MSEB which came into effect from 1<sup>st</sup> December, 2003. There was no such tax applicable at that time. GoM promulgated the Maharashtra Tax on Sale of Electricity (Amendment) Ordinance 2004, which came into force w.e.f. 5<sup>th</sup> April 2004. The salient features of this amendment are as under:

- (i) Every power utility engaged in distributing electricity to the consumers has been brought into the tax net;
- (ii) Thrust to provide infrastructure assistance to the non-conventional energy projects;
- (iii) Provision for expending the Fund for the development of non-conventional energy projects has been made;
- (iv) A provision for payment of subsidy, loans, etc., through the Maharashtra Energy Development Agency, for non-conventional energy projects has been made.

5. Shri. Goenka, submitted that, according to the notification of State Government dated 19<sup>th</sup> May 2004 (Exhibit No.2 to the Application), the bulk licensee in the State shall be charged tax on sale of electricity, and the amount of tax to be paid by the bulk licensee is as under:

Areas	Rate of Tax
1. In the distribution area of Tata Power Company, BSES Ltd. (Reliance Energy) and BEST,	
a) For sale of electricity to Industrial & commercial consumers	Rs. 0.90 Per unit
b) For sale of electricity to consumers other than industrial & commercial consumers.	Rs.0.15 Per unit
2. a) Other areas in the State for sale of electricity to industrial & commercial consumers	Rs. 0.04 Per unit
b) For sale of electricity to consumers other than industrial & commercial consumers	Rs. NIL

Shri. Goenka submitted that as far MSEB is concerned, the tax on sale of electricity is Rs. 0.04 per unit for industrial and commercial consumers. He submitted that it was not specifically mentioned that the TOSE is to be collected from the consumers. He further submitted that MSEB's Chief Engineer (Comm.) had issued a General Circular No. 400 on 22<sup>nd</sup> September 2004 for further action with respect to the Government Notification with retrospective effect from 6<sup>th</sup> April 2004. In view of this, the industrial and commercial consumers were charged TOSE on a one-to-one basis, which was reflected in the bills for the previous three months.

6. Shri Goenka submitted that the Ordinance clearly states that the distribution licensee has been brought into the tax net. He referred to Sections 3 and 4 of the Maharashtra Tax on Sale of Electricity Act, 1963. He pointed out that in Section 4, it is stipulated that every bulk licensee shall pay to the State Government at the time and in the manner prescribed, the amount of tax payable under that Act. There is no provision for this TOSE to be collected from the ultimate consumer of electricity. He submitted that, according to the Act, the liability for payment of TOSE is upon the power utility only. The total tax burden on MSEB may be added in the tariffs fixed for the different categories of consumers by due process, but it cannot be collected from the consumers directly and unilaterally.

7. The Commission observed that if this tax amount is recovered through the FOCA formula approved for MSEB, the burden would be on all the consumers as the FOCA charge applies to all of them. Therefore, MSEB should also suggest to the Commission alternatives regarding the manner in which the burden of the tax, whose incidence is on MSEB and not on consumers as per law, is to be passed on and recovered by MSEB from them.

8. Ms. Deepa Chawan, Counsel for MSEB, submitted that if the Act is silent on the issue of whether the tax burden can be passed on to the consumers, it would not necessarily mean that the tax burden cannot be passed on to them. She submitted that one alternative would be to directly recover the tax amount as a statutory due. Another alternative would be through the FOCA formula, but this method would be improper as it would burden other categories of consumers, especially because this tax on sale is payable only on the units sold by MSEB to commercial and industrial consumers.

9. The Commission inquired as to what is the exact point which should be considered to calculate the units of electricity sold. To this, Counsel for MSEB referred to a decision of Andhra Pradesh, which highlights that generation, transmission and distribution of electricity happens almost simultaneously and therefore, the same will also have to be considered in this case. Counsel further suggested that the other utilities should also be invited to join in and submit their say on this issue. She submitted that part of the electricity in the case of MSEB comes from outside the State. Therefore, this is another issue which needs to be addressed.

10. The Commission directed that, pending its final decision, MSEB should mention in their bills that the amount collected as tax is provisional or subject to the Commission's decision on this matter. However, Counsel for Ispat Industries submitted that, since the tax payable by the industrial consumers constitutes a very large amount, it should not be charged by MSEB until the outcome of this case. The Commission pointed out that, in case MSEB do not charge the tax at present but have to recover it after the Commission's decision, interest may also have to be charged. There are issues of MSEB's cash position also involved, and it would be prudent to permit the status quo to continue until a considered decision can be taken.

11. In its Notice for the next hearing, the Commission sought written submissions regarding the issues emerging during the deliberations. GoM (Energy Dept.) were also asked to participate and make submissions on these points.

12. At the hearing held on 4<sup>th</sup> April, 2005, the Commission referred to the issues on which submissions were sought, viz.

- (a) Alternative methodologies for passing on / recovery of the amount of tax from consumers, presuming that the incidence of tax is on MSEB and keeping in view the implications with regard to FOCA and tariff determination process.
- (b) The manner of determination of quantum of electricity sold for purposes of computing the amount of tax payable to GoM, and
- (c) The treatment of sale of power from outside purchases.

13. Shri. P.B. Patil, Dy. Secretary (Energy), on behalf of GoM, referred to the written submissions dated 23<sup>rd</sup> March, 2005 filed by GoM on the above issues. As regards issue (a) above, he submitted that the Maharashtra Tax on Sale of Electricity Act, 1963, as amended, empowers GoM to levy a tax on a power utility in respect of its sales of electricity to a consumer. Taxes are uncontrollable costs for a utility, and should be recovered from consumers on a monthly basis so that future consumers are not burdened with past costs. MSEB are required to pay the tax only in respect of sale to industrial and commercial consumers. Hence, GoM were of the view that whenever GoM revise the TOSE in respect of sales to a specific category of consumers, the power utility may be allowed to pass on this tax on monthly basis, with a suitable nomenclature, only to such specific category of consumers, till the tariffs are revised by the Commission. Thereafter, MSEB may be allowed to merge the tax into the tariff as an item of expenditure.

14. As regards issue (b) above, Shri. Patil submitted that the Constitution of India as well as the Maharashtra Tax on Sale of Electricity Act, 1963 prohibit GoM from levying a tax in respect of sale of electricity to Government of India and Railways. In view of this provision, the electricity sold to Government of India and Railways is required to be excluded for the purpose of computing the quantum of electricity to be taxed under this Act.

15. As regards issue (c) above, Shri. Patil submitted that the TOSE is required to be paid by the power utility in respect of its sale of electricity to consumers irrespective of whether or not the power is generated or purchased from outside, i.e. sale of power from outside purchases also attracts tax under the Maharashtra Tax on Sale of Electricity Act, 1963.

16. The representative of Kalyan-Ambarnath Manufacturer's Association pointed out that, under the VAT dispensation, the Sales Tax has to be clearly indicated on the bill. The Commission observed that the present levy had nothing to do with regular VAT or Sales Tax, but was governed by a separate enactment.

17. Referring to his written submissions, Shri R.B. Goenka of VIA submitted that, according to the Notification of GoM dated 19<sup>th</sup> May 2004, the bulk licensee in the State shall be charged TOSE and the amount of tax is to be paid by the bulk licensee. He stated that the Act and the Notification clearly stated that the tax burden was upon the licensee and not the consumer. The Commission observed out that it was agreed by all that passing on of such tax burden was a part of the tariff determination process. However, the question is whether and how this should be done in the interim period. Shri. Goenka suggested that it could be added as a surcharge in the bills of the consumer till the tariff is duly revised. The total quantum of surcharge could be calculated by the sale of electricity to industrial and commercial consumers multiplied by tax rate. This monthly total tax should be divided by total sale of units to all consumers, and the rate of surcharge per unit per month thus arrived at can be added as a surcharge in the bills. The amount of tax for a particular month may be collected from consumers in the subsequent month to avoid billing delays. MSEB will also be compensated, and ultimately it would be added to the tariff when the revision process takes place. The Commission observed that this would be tantamount to FOCA. It would be charged to all consumers, but half of them do not pay. In any case, when the revised Tariff Regulations are put in place, the existing FOCA dispensation in case of MSEB would cease to operate since variations in costs other than fuel are not envisaged under EA, 2003 for such a pass through formula. Shri. Goenka responded that eventually the same result would emerge when it is merged into tariff. Counsel for

Ispat Industries Ltd. submitted that the pass through can be effected only through the process of tariff determination and not before.

18. Ms. Deepa Chawan, Counsel for MSEB, circulated copies of MSEB's written submissions during the course of the hearing. Elaborating on those submissions, she submitted that the immediate issue is what is the interim measure that can be adopted until the tariff revision process takes place. Pursuant to the formal Petition filed by VIA, the Commission has powers to pass interim Orders pending tariff revision under Section 94(2) of the EA, 2003, which reads as under:

*"The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate."*

19. MSEB Counsel added that other licensees were passing on the incidence of tax, the difference being that in the case of MSEB the entire tax was only on sale to industrial and commercial consumers. She submitted that the Commission could thus consider the suggestion of GoM during the interim period, i.e. pending tariff revision under Sections 61 and 62 of the Electricity Act, 2003. The Commission pointed out that such interim Orders could not go against the tariff dispensation.

20. Counsel for MSEB submitted that, as an alternative, and in the emergent situation, the Commission can pass Orders permitting MSEB to include the component of tax within the ambit of Section 45(3)(a) which provides for charges for electricity supplied by a distribution licensee to include, besides the fixed charges, charges for the actual electricity supplied. The component of tax could be included in the latter.

21. Counsel for MSEB also referred to the Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005. Regulation 3.4.5 reads as under:

*"In addition to the charges fixed by the Commission consumers shall be required to pay all taxes, duties and other statutory charges as may be required under any law for the time being in force"*.

The Commission observed that this was in the context of only those taxes, etc. whose incidence was on the consumers.

22. Counsel for MSEB further submitted that TOSE has to be paid by MSEB, and that recovery of such tax from the consumers in one form or another was not challenged. It is the modality of passing on such tax burden which is in question before the Commission. She further submitted that after the last hearing on 28<sup>th</sup> February 2005, interim measures were undertaken by MSEB as directed by the Commission. Presently, MSEB are levying TOSE from industrial and commercial consumers under a separate head with a footnote in the bill indicating that the tax is being recovered provisionally subject to approval of the Commission. However, the question still remains as to what course of action is to be adopted by MSEB in the interim period till tariff revision. Reiterating the provisions of Section 45, she stated that the Act is silent regarding exigencies that may arise due to the sudden imposition of tax on a distribution licensee.

23. Shri. Depan Merchant, Counsel for Ispat Industries Ltd. submitted that such interim relief would unavoidably amount to final relief. Therefore, an interim Order cannot be passed at this juncture. He submitted that once the Commission revises the tariff, then the burden can be looked into and the tax can be passed on to the consumers. The Commission observed that if the Commission does not allow the pass through as a surcharge or in other form, MSEB would have to bear the entire tax burden in the meantime. Moreover, when tariff revision is eventually done, both this amount as

well as the carrying cost incurred in the intervening period would have to be passed on to consumers through tariff. In any case, MSEB had to file their ARR separately for generation, transmission and distribution, which has yet to be done. MSEB Counsel submitted that it may be retained as a provisional levy as at present, to be adjusted appropriately at the time of tariff revision.

24. Shri. Goenka pointed out that the question is one of the revenue requirement. According to him, the "fixed charges" concept is completely different, and the tax cannot be included as an element, as suggested by MSEB Counsel. The alternative is that MSEB should bear the burden until tariff revision, and take it into account in the ARR. Counsel for Ispat submitted that MSEB should have approached the Commission to sort out the issue earlier since they were aware of this since October 2004.

25. It has become clear from a plain reading of the Maharashtra Tax on Sale of Electricity Act and the various written and oral submissions made during these proceedings that the incidence of TOSE is on MSEB (as in the case, for example, of Income Tax), and not on the consumer. Thus, TOSE is different from levies like Electricity Duty, where the incidence is on consumers and MSEB collects the amount from them on a one-to-one basis on behalf of GoM. Thus, MSEB cannot automatically recover 4 paise / unit from industrial and commercial consumers merely on the ground that TOSE has been imposed on MSEB @ 4 paise / unit of electricity sold to industrial and commercial consumers.

26. Being a tax with primary incidence on MSEB and not the consumer, the TOSE payable by MSEB to GoM would have to be considered in MSEB's ARR and in future tariff determination. Pending a fresh tariff determination process, which has yet to be initiated and will take considerable time, the issue is how TOSE is to be recovered by MSEB from the consumers in the meantime, since it is a substantial amount which has to be paid to GoM and may place a significant burden on MSEB. Moreover, postponing such recovery from consumers while having to pay to GoM will result in consumers eventually having to pay MSEB both the past burden of TOSE as well as the carrying cost in the future tariff. The following options are available, since GoM's suggestion of a surcharge on industrial and commercial consumers, while expedient, is not tenable in view of the nature of TOSE explained above and in the absence of a tariff determination process.

- (a) In its Order dated 31<sup>st</sup> July, 2001 in Case No. 15 of 2000, which was passed after due public process and public hearing, the Commission had set out a formula for computation of Fuel and Other Cost Adjustment (FOCA) charges in respect of MSEB. Although it is true that Section 62(4) of EA, 2003 envisages only a fuel surcharge formula (not including other costs), such formula has yet to be specified (i.e. by Regulations) by the Commission, as required. Moreover, although MSEB's last tariff Order was issued under the provisions of the erstwhile Electricity Regulatory Commissions Act since the Petition was filed while it was in force, the Order itself was applicable from 1<sup>st</sup> December, 2003. EA, 2003 had come into force, but at that time the FOCA formula already in operation was not disturbed by the Commission. The existing Regulations governing the Terms and Conditions of Tariff, notified on 10<sup>th</sup> June, 2004, also do not specify any formula for Fuel Adjustment Cost (FAC) charges (as distinct from FOCA). The Commission has since revisited those Regulations, and a fresh draft which was put to the public for comments is under finalisation. The revisited draft Tariff Regulations seek to apply a FAC formula in line with the provisions of Section 62(4) of EA, 2003 prospectively. Thus, MSEB can recover the burden of TOSE from the consumers through the prevailing FOCA formula until such time as the new Tariff Regulations are notified, and in respect of the period prior to such notification. The burden of TOSE paid by MSEB to GoM would be spread across all consumers as per that formula, and not be restricted to industrial and commercial consumers as MSEB are doing at present. This would mean that, because of poor recovery from certain categories of consumers, the entire amount of TOSE may not actually be recovered by MSEB initially. This cannot be helped, and would

have to be considered at the time of tariff revision. Moreover, refunds would have to be made by MSEB to industrial and commercial consumers to the required extent (without interest considering the circumstances of the case), and arrears arising as a result of application of the FOCA formula recovered from other consumers (without interest and DPC). The Commission notes that, for pass through to the extent of the TOSE amount actually paid by MSEB to GoM, no specific approval of the Commission is necessary since it is covered under the component 'A<sub>oth</sub>' of the FOCA formula. Para 17.0.V(b) of the Order dated 31<sup>st</sup> July, 2001 reads as follows:

*"Under the head 'A<sub>oth</sub>', the following charges only shall be permitted by the Commission for recovery.....*

*b. Actual statutory payment such as income tax paid during the year under consideration but not considered in tariff filing. The provision made shall not be allowed except during the tariff revision....*

*Any other statutory payment except for the above shall require the Commission's approval before passing through in the FOCA formula."*

Any shortfall in actual recovery may be taken into account at the time of ARR / tariff determination. Once the new FAC formula (excluding other costs) is applied upon notification of the revised Tariff Regulations, MSEB would not be able to recover the burden of TOSE until the revised tariff is determined after due process.

- (b) Alternatively, MSEB should bear the entire burden of TOSE payments until the tariff is revised following due process, and refund the amounts recovered from industrial and commercial consumers on this account.

The Commission leaves the matter of which of the above alternatives (a) or (b) to avail of for MSEB to decide, although we favour alternative (b), since it would be simpler and MSEB would also be able to claim the carrying costs later through their ARR and revised tariff. In either case, refunds or raising of claims may be completed by 31<sup>st</sup> August, 2005, by adjustment through energy bills or otherwise.

Sd/-  
(A. Velayutham)  
Member

Sd/-  
(Dr Pramod Deo)  
Chairman, MERC

Sd/-  
(A.M. Khan)  
Secretary, MERC