

**Decision 001/04/WD of the 21st April 2004
in virtue of Malta Resource Authority Act (Cap. 423) on complaints of
Denim Services Ltd. and VF Ltd. with regard to
reclassification of their operations by Water Services Corporation
for the purposes of determination of charges for second class water and a
consequent increase of such charges**

I. Determination

Whereas

- B. Denim Services Ltd. of Bulebel Industrial Estate (“Denim Services”) and VF Ltd of San Gwann Industrial Estate (VF) filed independent complaints with the Malta Resources Authority (“MRA”) on 28th May 2003 and 4th September 2003 respectively, against the decision taken by Water Services Corporation (“WSC”) whereby the classification of their activities, for tariff purposes, was changed from “industrial” to “building or other” in terms of Regulation 16 of the Water Supply Regulations LN133/48 (“Reg. 16”) and that consequently to such re-classification the companies are being charged a higher tariff rate for second class water applicable for “building or other” under the said Regulations;
- C. The Complainants asserted that the classification of their operations by WSC should revert back to the class “industrial” and be charged at the rate applicable to the class “industrial”, and requested the Authority to review the matter and pronounce its decision;
- D. WSC sustained that the complainants’ activities are “washing activities” and fall under the class “building or other” and should be charged at the rate applicable to the class “building or other”;
- E. WSC furthermore claimed that under LN133/48 it has no obligation to supply second class water and, if not allowed its own assessment with regard to classification, it could cease the supply of such water to washing activities;
- F. MRA has taken note of the complaints and has investigated the matters raised therein;
- G. MRA had afforded the parties involved an opportunity to state and explain their position on facts and issues associated with the complaint;

Now, therefore, for the reasons stated in Section II.B. of this Decision, the Malta Resources Authority hereby determines as follows:

- II.1. WSC's tariffs for the supply of second class water shall be in compliance with Reg. 16 and, accordingly, based on a distinction amongst the uses of the supplied water by the recipients of such water.
- II.2. WSC shall apply classification established under Reg. 16 to all recipients of second class water without discrimination. The assessment by WSC of water use in each particular case for the purposes of placing it under a particular class specified in the said Regulation shall be justifiable.
- II.3. The WSC shall not stop the supply of second class water to any class of recipients of such supply solely on the basis that the recipients' operations falls into a particular class in terms of Reg. 16, unless explicitly authorised by the Authority.
- II.4. The classification by WSC of the activities of Denim Services Ltd. and VF Ltd. under "building or other" in terms of Reg. 16 is incorrect and shall be reversed back to "industrial" in terms of the said Reg. 16.
- II.5. Accordingly, the charge for supply of second class water by WSC to Denim Services Ltd. and VF Ltd. shall be that applicable to "industrial" class.
- II.6. All bills for second class water consumption issued to Denim Services Ltd. and VF Ltd. shall be adjusted to reflect this latter classification ("industrial").

II. Explanatory memorandum

II.A. Facts

The facts of the case are as follows:

- II.A.1. On 28th May 2003 Denim Services Ltd. and on 4th September 2003 VF Ltd., filed independent complaints with MRA claiming that WSC has incorrectly re-classified the operations of the companies from "industrial" to "building and other" under Regulation 16 of LN133/48, which re-classification resulted in a change of tariff for second class water chargeable by WSC from of Lm0.04/m³ to Lm0.40/m³, an increase of Lm0.36/m³.
- II.A.2. The complainants asserted that their respective activities are clearly of industrial nature. Denim Services also supported its claim by the fact that the Company is a qualifying company in terms of the Business Promotion Act.
- II.A.3. The complainants stated that re-classification of their respective operations and the tariff increase by WSC is arbitrary, unjustified and without any legal foundation and requested the MRA to investigate the matter with a view of reverting back its classification to "industrial".
- II.A.4. The facilities of Denim Services, and VF Ltd. were inspected by MRA.

- II.A.5. MRA had requested the WSC to present its position on the matter. Various communications have been sent to WSC and received from WSC by the Authority
- II.A.6. WSC stated, in its letter of 29th January 2004, that the reclassification of tariffs for second class water falls within a ‘broad effective and efficient water sustainable planning and management’ undertaken by WSC.
- II.A.7. WSC also claimed that under Reg. 16 WSC “may” supply non-potable water and this, in WSC’s view, means that the Corporation has a discretion as to whether to supply such water or not. WSC further stated that if the MRA ‘persists to classify washing activity within 4c per m³, the WSC would have no option but to stop the supply of non-potable water to that sphere of activity.’ This was reiterated in WSC’s letter of 3rd February 2004.
- II.A.8. MRA informed WSC on 30th January 2004 that the matter has been considered and that a decision will be communicated to WSC and requested WSC to charge the complainants, in the interim, the rates applicable under the “industrial” class.

II. B. Reasoning of the Decision

II.A.1. Applicable law – general provisions

II.A.1.1. The Corporation has been established and operates under the Water Service Corporation Act, Cap. 355, as amended, in particular by the Malta Resources Authority Act (Act XXV of 2000), Cap.423.

II.A.1.2. The tariffs for the supply of water by WSC are established under the Water Supply Regulations, LN133/48. In particular, Regulation 16 of LN133/48 regulates tariffs for non-potable water (second class water). Under Reg. 16 there are three different tariffs three broad purposes of water use by the persons to whom non-potable determines is supplied:

- “(a) *Agricultural* 4c per m³
- (b) *Industrial* 4c per m³
- (c) *Building or other* 40c per m³”

II.A.1.3. LN133/48 has been kept in force by virtue of Art. 53 of Cap. 355.

II.A.1.4. In terms of Art. 3(5) of Cap. 355, in carrying out its functions under this Act, the Corporation shall –

- (a) be in a possession of such licences, permits or other authorisations;

(b) be subject to such regulations, rules, orders, directions, standards and other regulatory provisions, as may from time to time be required by or under the Malta Resources Authority Act or any other law.

II.A.2. The operation of Denim Services and Vf Ltd and its classification

- II.A.2.1. The companies manufacture jeans.
- II.A.2.2. In the course of their jeans manufacturing operation the companies apply a particular treatment of staining and mechanical abrasion, giving the clothing a typical coloration and texture e.g. “moon-wash”, etc. The above was confirmed through an inspection of the facility by MRA on the 9th January 2004 and on the 8th April 2004
- II.A.2.3. Denim utilises treated sewage effluent from the San Antnin treatment plant and has been tapping this source of secondary water since 1992. VF are supplied with second-class water from Misrah-Lewza Borehole by the WSC.
- II.A.2.4. No explanation was given to the companies as to why their operations have been reclassified from “industrial” into “other”. The WSC asserted, however, that the tariff of Lm .04 /m³ (“industrial”) does not cover the full treatment costs incurred by the Corporation. WSC also argued that a higher charge for “washing activities” is justified.
- II.A.2.5. It must be noted that the Authority does not in any way dispute, as a matter of law, the classification provided in Reg. 16, including the fact that “washing activities” *as such* fall into the “other” category and, thus, should be charged a higher tariff.
- II.A.2.6. It must be also noted that the basis of classification of Reg.16, as it currently stands, is the purpose of water use, and not the cost of water supply.
- II.A.2.7. The issue presently under consideration is quite different and it a matter of fact: does the activity of the company fall within the scope of the “industrial” class or not?
- II.A.2.8. Once the law does not contain a definition of the “industrial activity”, in accordance with general rules of interpretation words should be given their ordinary meaning. The term “industrial” is commonly understood to mean “manufacture or production of goods” (Oxford Dictionary).
- II.A.2.9. In the Authority’s view, Denim Services and VF Ltd, in fact, produces goods - jeans. The washing activities carried out by the

companies do not constitute an independent activity or a service provided the companies, but an ancillary and integral, part of its manufacturing process.

II.A.2.10. WSC claimed that Denim Services and VF Ltd activities fall under “other” instead of “industrial” on the basis of using the same rationale as in classification of tariffs in terms of Regulation 13 of LN133/48 for potable (first class) water.

II.A.2.11. Reg. 13 contains, comparing with Reg. 16, a more detailed classification of uses of water and has a separate class for “*Laundries, laundrettes, car washing garage, or any other premises offering a similar or other washing service*” with a higher tariff.

II.A.2.12. However, it must be noted that Reg. 13 governs tariffs for first class water *only*, and the reasoning at the basis of classification in Reg. 13 cannot be extrapolated to cover second class water for at least two reasons:

(a) The most plausible reasoning behind classification in Reg. 13 seems to be the creation of a deterrent for certain classes of activities to use the first class water so as to guide them away from the use of the more expensive first class water to second class water as a water saving measure. This reasoning, clearly, cannot be applied to Reg. 16;

(b) The very fact that Reg. 13 has 12 classes, while Reg. 16 has only 3 classes clearly indicates that the bases of Reg.13 and Reg.16 are different.

II.A.1.1. Therefore, WSC’s reasoning and decision to reclassify Denim Services Ltd. and VF Ltd. from “industrial” into “other” are not justified and, thus, the activities of the said companies should continue to be considered as “industrial”.

II.A.1.2. The Corporation must take all necessary steps to remedy the situation.

II.A.1.3. WSC shall apply classification established under Reg. 16 to all recipients of second class water without discrimination. The assessment by WSC of water use in each particular case for the purposes of placing it under a particular class specified in the said Regulation shall be justifiable.

II.A.3. The purported discretion of WSC to supply non-potable water

II.A.3.1. WSC claimed that since Reg. 16 reads “the Water Services Corporation may, on demand, supply non-potable water...”, the

supply of non-potable water is at the discretion of WSC and, accordingly, if WSC's interpretation of classification under Reg. 16 is accepted by the Authority, WSC would stop the supply of non-potable water to "that sphere of activity", presumably "washing services".

II.A.3.2. Art. 18(1) of Cap. 355 states:

"Subject to the provisions of this Act and to any requirement under any other law, the Corporation **may** –

- (a) **supply water** to such persons, in such manner and under such conditions **as may be authorised** by the Malta Resource Authority;
- (b) ensure the sufficiency, pressure and wholesomeness of water supplies;
- (c) **in so far as it is able to do so**, augment water resources and for such purpose to treat salt water by any process for removing salt or other impurities, or make use of the most appropriate technology for supplementing the natural water resources;
- (d) **to the extent that it is so authorised to do**, survey any land, to inspect any well and to cause the sinking of bores or other works for the purpose of ascertaining the nature of the subsoil or the presence, quality or quantity of underground water in it and to cause the sinking of shafts and the driving of subterranean galleries.

Art. 19 states:

"Subject to the provisions of this Act and of any other law, the Corporation **may, in so far as it is able so to do** –

- (b) provide a public sewer system to be used for the drainage of domestic sewage;
- (c) take such steps from time to time as may be necessary for ascertaining the cleanliness, safety and efficiency of such services;

II.A.3.3. In the Authority's view, the word 'may' as used in Cap. 355 should be interpreted not as discretion to do or not to do certain acts, but rather as (1) an implied authorisation to do so, subject, of course, to necessary licences and permits and/or (2) the ability to do so. Accordingly, the same interpretation should be given to the word 'may' in Reg.16.

II.A.3.4. It should also be remembered Reg. 16 was drafted at the time when WSC was both the operator and the regulation, which is not the case anymore.

II.A.3.5. Moreover, as (1) the Corporation is, at present, a national corporation with public obligation; (2) WSC is subject to the regulation by the Authority; and (3) since the Authority's duties under Art. 4(2) of Cap. 423 include the duty to secure and regulate the acquisition, production, storage, distribution or other disposal of water for domestic, commercial, industrial or other purposes; - the Authority asserts that WSC may not stop providing non-potable water to a class of recipients solely on the basis that the recipients' activities fall under a particular class in terms of Reg. 16, unless explicitly authorised to do so by the Authority.

J N Tabone
Chairman
MRA