TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED THIS 8th DAY OF SEPTEMBER, 2003

APPEAL No.8 of 2002

C.G. Faxemail Pvt. Ltd. & Others ...
Appellants

Vs

Union of India & Others ...
Respondents

BEFORE:

HON'BLE MR. JUSTICE D.P. WADHWA,
CHAIRPERSON
MR. R.U.S. PRASAD, MEMBER
MR. P.R. DASGUPTA, MEMBER

For Appellants	:	Mr.V.R.Reddy, Senior Counsel with Ms.Meenakshi Arora, Mr.Anshul Singhal, Advocates
For Respondent No.1 – BSNL	:	Mr.Ankur Talwar for Mr.Maninder Singh, Advocate
For Respondent No.2 – MTNL	:	Mr.Arun Kathpalia, Advocate
For Respondent No.3 – VSNL	:	Mr.Vivek Yadav, Mr.Rishi Agrawala, Advocates
For Respondent No.4 – UOI	:	Mr.Navin Chawla, Advocate.

Publication- Internal Document - not gazetted - not in public domain- Reliance on a different set of Internal Circulars not used for charging purposes by DoT, cannot be relied upon before the Tribunal - adjustment - excess amount recovered from the Appellants directed to be refunded .

ORDER

The Appellants who are a group of E-mail Service Providers had approached the High Court of Delhi under Section 18 of the Telecom Regulatory Authority of India Act, 1997 on 18.11.1998 challenging an order dated 21st August 1998 of Telecom Regulatory Authority of India. While the case was pending before the High Court after notices were issued, the TRAI Act, 1997 was amended by an Act with effect from 24.01.2000 as a result of which all appeals pending before the High Court stood transferred to the newly-constituted Telecom Disputes Settlement & Appellate Tribunal.

2. The brief facts of the case are as under. The Appellants hold licences issued by the Department of Telecommunications to establish, maintain and operate Electronic mail Service and other services on the terms and conditions contained in the said licences on a non-exclusive basis. Such terms stipulate that resources of the Department of Telecommunications required by the licensees to operate their services could be provided by DoT on the basis of the prevailing rules and guidelines of the Department on the subject. The licensees requested for and obtained leased data circuits from DoT at various points of time from 1993 onwards. DoT

charged them at a rate which was prescribed under a tariff order dated 03.11.1993 for point-to-point and single party networks. While the tariff order was an internal circular, a public document in the shape of a brochure providing commercial information to the subscribers of leased circuits also indicated the same rate for point-to-point and single party networks. However, from 01.07.1998 onwards the Respondents started raising demands for the same leased circuits at double the rate on the ground that E-Mail Service was a Closed User Group (CUG) network for which the rate prescribed was double the normal rent. Even though the Appellants pointed out to the Respondents that they did not come under the category of Closed User Group the latter did not relent and continued to levy and recover from the Appellants doubt rental for the leased lines. Finally, the Appellants challenged the levy of double charges for the leased lines before the Telecom Regulatory Authority of India.

3. Before the TRAI, the Respondents argued that the Appellants were squarely covered under CUG category and hence liable to pay double the normal rent as per the existing tariff orders. The Appellants in their turn placed their own arguments as to how they did not come under that category. After the pleadings and hearings concluded, TRAI reserved its judgment and order on 1st June, 1998. Subsequently, the Appellants were informed on 10th June, 1998 by the Registry of TRAI to appear once again before the Authority and submit their reply in reply to certain internal documents of the Respondents which were brought on record by the Authority itself. The Appellants were informed by the Authority that after the conclusion of the hearing of the matter it had come across certain documents filed by the Department of Telecommunications in some other petition, which indicated inter alia that the value-added network licensees, which included E-Mail Licensees, were continued to be charged double the rental of point-to-point leased circuits. The Appellants argued before the Authority that the documents sought to be relied upon by the Authority were not a part of the pleadings of the Respondents at any stage and that the Respondents based their demand entirely on their perception that the Appellants came under the CUG category. The Appellants further pointed out that these documents were never brought to their notice earlier and the Respondents also did not inform them about any change in the basis of tariff which was being levied. TRAI, however, in its order dated 21.08.1998 held that "although E-Mail service is not a CUG network, the leased line rentals being charged at double the rate of point-to-point and a single party network mode is as per extant orders in this regard, applicable to value-added services, E-Mail admittedly being a value-added service". It was against this order of TRAI that the Appellants had approached the High Court in Delhi and which is now before this Tribunal for disposal.

4. In his pleading before the Tribunal, Shri V.R.Reddy, Senior Advocate and learned counsel for the Appellants, pointed out that the Appellants had approached the Respondents on the basis of the Commercial Information on Leased Circuits published by the Respondents in November 1993 which indicated the tariff to be charged to the allottees of the leased lines. The published tariff in this document did not indicate any different tariff for the leased line for the E-Mail Service Providers. The Respondents also did not produce at any stage any publicly notified decision or circular of the Department after November, 1993 fixing a different tariff. The learned counsel for the Appellants stressed that an internal circular fixing tariff which is not in public knowledge and not specifically brought to the notice of the Appellants can not be imposed upon them. Such internal circulars at best are the understanding of the statutory provisions by the Department and can never substitute statutory provisions which are officially gazetted and brought into public domain. The Department of Telecommunications itself had a different understanding about its own circular and had based its claim of double rental throughout on the understanding that the Appellants came under the CUG category. This was their understanding and plea before the TRAI also till TRAI told them that this understanding was incorrect. The learned counsel for the Appellants also argued that TRAI, while exercising its quasi-judicial jurisdiction, should not have gone beyond the pleadings of the parties and should not have based its judgment on extraneous materials and knowledge which were beyond the pleadings and the documents produced by the parties on record of the case. He also laid stress on the fact that TRAI had not appreciated the point that while under the Indian Telegraph Act, 1885 the Central Government is empowered to notify the rates for transmission of message both within the country and outside, it had failed to notify the rate relating to the imposition of double the rental of point-to-point and single party network.

5. In his response, Shri Maninder Singh, the learned counsel of the Respondents stated that the Appellants, under the terms and conditions of their licence agreements, are required to pay charges for the resources obtained from the Respondents as per the prevalent rules/guidelines of DoT and that such charges/rate are fixed by DoT (and now by the other Respondents, viz. BSNL & MTNL) from time to time through various circulars/orders. The relevant circular which lays down that double the rental should be charged for a point-to-point circuit for certain kinds of services/network (including the multi-point network configuration of the Appellants) was

issued on 12.11.1988 and continued by further circulars dated 13.07.1995 and 21.11.1996. However, by a Circular dated 10.07.1998 the requirement of payment of double rental was discontinued; hence there was a clear liability on the part of the Appellants to pay double the rental till 10.07.1998. Shri Maninder Singh argued that the reliance of the Respondents on an incorrect provision to charge double the rental did not take away in any way their inherent right to levy and collect the same at a subsequent stage as per the correct provision which permitted charging double the rental till 10.07.1998. He also did not see any impropriety in TRAI taking note of an irregularity/inaccuracy and acting suo motu as long as there was no bias and the accepted notions of fair play were adhered to. He drew attention to the fact that after TRAI discovered the relevant circular it had given due opportunity of hearing to all the parties.

6. The learned counsel for the Respondents also saw a clear distinction between the judgments delivered by the Tribunal in Petition No.13 of 2001 along with Petition No.16 of 2001 and in Petition No.12 of 2001 and the present case. He argued that in those cases the Tribunal had held that a presumption of knowledge can not be raised on the basis of internal circulars of DoT unless those are either gazetted or it can be reasonably shown that a party was aware of it. In the present case, the Appellants had a clear knowledge about their liability to pay double the rent as is evident from the minutes of a meeting held between them and DoT, issued on 02.02.1996. In addition the Appellants have themselves relied on a circular dated 03.11.1993 which was also an internal circular issued by DoT; thus the Appellants were not unaware of the circulars of the DoT as such.

7. After going through the pleadings and the documents produced we have no doubts in our mind that the Respondents do not have much of a case. Admittedly under the terms and conditions of the licences held by them the Appellants are under an obligation to pay for the resources admitted as per the rates fixed by the Respondents. However, in the absence of a specific contract drawn up between both the parties to lay down specifically the resources to be obtained and the precise charges to be paid by them, one has to rely upon knowledge as may be available in public domain and on documents exchanged between the parties, viz., requests for making available certain resources and the demand notes subsequently raised by the provider of resources. It is an admitted fact, and it has not been contested by the Respondents, that the documents relied upon for charging double the rental were internal circulars which were not gazetted and hence not in public domain. The Commercial Information on Leased Circuits, which was a published document of DoT made available to all the allottees of leased circuits and hence very much in public domain, did not contain any provision under which E-Mail Service Providers were to be charged double the normal rent. Even if it is assumed that the Appellants were aware of a particular circular issued in 1993 it can not be stretched to argue that they were aware of all the internal circulars of DoT on this subject. We have verified from copies of the demand notes raised by the Respondents in response to the requests received from the Appellants that the initial demands were in conformity with the rates and tariff as indicated in the brochure "Commercial Information on Leased Circuits".

8. We have also perused the minutes of the meeting issued on 02.02.1996 which has been relied upon by the learned counsel of the Respondents. The minutes indicate that a meeting was held by the E-Mail Service Providers with the Chairman of Telecom Commission on 29th January, 1996 to discuss various issues relating to E-Mail Services. The minutes relating to the relevant item reads as under:-

"**Item No.1**

E-Mail service providers are charged two times the rental of the point-to-point circuit which is exorbitant. It is not economically viable to provide the services at such high tariff of the leased circuits.

Decision

It was informed that a Committee headed by Sr.DDG(CS) is deliberating the tariff structure for CUG networks. The Committee has been asked to take care of the issue and give an early recommendation.

Action: Sr.DDG(CS)"

The minutes establish three basic things:

(a) E-Mail Service Providers, at that point of time, were being charged two times the normal rent;
(b) The Department considered the request of the E-Mail Service Providers to be pertaining to the domain of Closed Users Group (CUG) networks and hence referred the issue to a Committee set up to consider the tariff structure of such networks;
(c) The Department knew that there was a problem and hence wanted early recommendations from the Committee.

However, the minutes do not disprove in any way the points urged by the Appellants that:-

(i) the initial demand notes issued by the Respondents to the Appellants charged only the normal rent as indicated in the published document "Commercial Information on Leased Circuits" and without any reference to any internal circular under which the rents were to be doubled;
(ii) the subsequent additional demands raised were on the ground that E-Mail Service Providers came under the category of CUG, and not on the basis of the circular of 1988 or any other circular under which valued-added services were to be charged at a different rate;
(iii) the department itself had rested its case before the TRAI on the basis of rates chargeable for CUG; and
(iv) TRAI gave an unambiguous opinion that E-Mail Service Providers do not come under "CUG" category.

TRAI was in obvious error when, after giving a clear and unambiguous opinion that the E-Mail Service Providers did not belong to the category of CUG, it upheld the decision of the Respondents to charge double the rent on the ground that it was permissible under another internal circular which was not relied upon by the Respondents themselves either for charging the Appellants or in its pleadings before TRAI.

9. We are therefore, of the opinion that there is considerable merit in the appeal preferred by the Appellants against the Judgment and Order dated 21.08.1998 passed by the Telecom Regulatory Authority of India in Petition no.1 of 1998. The Appeal is allowed accordingly and the impugned order is set aside. The excess amount recovered from the Appellants may be adjusted against rentals and other dues payable to the Respondents or refunded in case no amount is due to the Respondents, as the case may be. Appellants are entitled to costs. Counsel fee Rs.10,000/-.

.....Sd/-.....J
(D.P.Wadhwa)
Chairperson

.....Sd/-.....
(R.U.S. Prasad)
Member

.....Sd/-.....
(P.R.Dasgupta)
Member