TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 8th August, 2005

Petition No.31 of 2005
(M.A. Nos.82, 136 and 185 of 2005)

The Arvind Mills Ltd.
(Telecom Division)
Naroda Road
Ahmedabad – 380 025 …Petitioner

Versus

1. Department of Telecommunications
   Ministry of Communications & Information Technology
   Government of India
   Sanchar Bhawan
   20, Ashoka Road
   New Delhi – 110 001

2. Bank of Baroda
   Corporate Banking Branch
   57, Shamali Society
   Netaji Road
   Mithakhali Six Road
   Ahmedabad – 380 009 …Respondents

BEFORE:

HON'BLE MR. JUSTICE N. SANTOSH HEGDE, CHAIRPERSON
MR. VINOD VAISH, MEMBER
LT. GEN. D.P. SEHGAL (RETD.), MEMBER

For Petitioner : Mr. Amit Bansal, Advocate for S.K. Agarwal & Co.

For Respondent – DOT : Mr. P.P. Malhotra, Addl.Solicitor General with Mr.Rakesh Gosain and Mr.Vivek Chibb for Mr.Rajeeve Mehra, Advocate

ORDER

This petition is filed under Section 14-A(1) of the Telecom Regulatory Authority of India Act, 1997 (“the Act”). The Petitioner has sought for the following reliefs:-

(a) declare that the demand of the Respondent No.1 of penalty and interest vide letters dated 02.06.2004, 10.03.2005 and 15.03.2005 is illegal and void ab intio;

(b) pass a permanent injunction restraining the Respondent No.1 from invoking the bank guarantees bearing nos. GU/1139/03, GU/1140/03, GU/1141/03, GU/1142/03, GU/1143/03, GU/1144/03, GU/1145/03, GU/1146/03, GU/1147/03 issued by the Respondent No.2;

(c) pass a permanent injunction restraining the Respondent No.2 from releasing any funds under the bank guarantees bearing nos. GU/1139/03, GU/1140/03, GU/1141/03, GU/1142/03, GU/1143/03, GU/1144/03, GU/1145/03, GU/1146/03, GU/1147/03 issued by it;

(d) direct the Respondent No.1 to refund the excess licence fee amounting to Rs.11,87,852/- along with interest charged to the Applicant;

(e) pass such other or further orders as this Hon’ble Tribunal may deem fit in the interests of justice and the circumstances of the case”

So far as relief based on the ground of erroneous calculation made by the 1st Respondent of the Audited Gross Revenue (AGR) by including the costs for the handsets sold by the petitioner is concerned, the Petitioner has sought permission of this Tribunal to delete the said prayer with liberty to urge the same separately since many other petitions raising similar grounds are pending before this Tribunal. The said prayer of the Petitioner was granted by this Tribunal permitting the Petitioner to withdraw the said prayer with liberty to raise the said issue separately by way of fresh petition on the same cause of action. Therefore, it is not necessary for us to go

into that question and the relief prayed thereof in this petition. Therefore, only the following two issues remains to be considered by us in this petition, they are:-

(a) Was the Respondent justified in calculating shortfall in licence fee for the purpose of levy of penalty for the licensing year 2001-02 by taking into consideration the payments made by the Petitioner for a period of five months only i.e. from 01.11.2001 to 31.03.2002?

(b) Whether the Petitioner is entitled for set off for the alleged excess payment of licence fee paid for the licence year 1996-97?

Facts necessary for the disposal of the above two questions are as follows:-

The Petitioner entered into an agreement with the Respondent No.1 on 10.05.1996 for Public Mobile Radio Trunking Service (PMRTS). In respect to nine cities viz. Ahmedabad, Faridabad, Vashi, Delhi, Bangalore, Chennai, Surat, Baroda and Mumbai licence agreement was valid up to the year 2011 subject to renewal from time to time. Licence fee was to be paid in advance on a fixed basis i.e. Rs.600/- per subscriber per year. As per the terms of the said licence if there was any delay in the payment of the licence fee, petitioner was liable to pay an interest on the shortfall or delayed payment at the rate of five per cent over and above the maximum lending rate of the State Bank of India prevailing on the date. This shortfall under the terms of the licence was to be calculated on the basis of the total licence fee paid and shortfall thereof in a block period of 12 months in the relevant year.

During the currency of the above licence, by a letter dated 19th February, 2002, the licence fee regime was changed from Fixed Regime then prevailing to Revenue Sharing Regime retrospectively w.e.f. 01.11.2001. Therefore, for the licence period between 01.04.2001 to 31.03.2002, the licence fee regime of fixed fee got reduced to a period of seven months i.e. from 01.04.2001 to 30.10.2001

while for the subsequent period between 01.11.2001 and 31.03.2002, the regime changed to revenue sharing basis.

Under the Revenue Sharing Regime, the 1st Respondent was entitled to collect the licence fee of five per cent of the Audited Gross Revenue of the Petitioner for the relevant licence year. This licence fee was payable on a self-assessment of the gross income of the licensee on quarterly basis in advance. As per the fresh licensing conditions at the end of the financial year, Petitioner was to submit its audited statement of accounts as approved by the Board of Directors for auditing by the Auditors of the 1st Respondent and on such auditing if it was found that advance payment of licence fee calculated under the new regime fell short of what was due on actual basis, the Petitioner was liable to pay interest as computed under the old terms i.e. five per cent over and above the State Bank of India's maximum lending rate which interest was to be compounded monthly and part of the month being reckoned as a full month for the purpose of said calculation.

In addition to the payment of interest under the new conditions in clause 1.10, it was provided that in case the total amount paid under self-assessment by the licensee as licence fee for a financial year fell short by more than ten per cent of the total licence fee payable then a penalty of 150% on such shortfall was liable to be paid by the licensee. Thus, for the licence years from 01.04.2002 onwards there can be no dispute in the methodology to be adopted for his calculating the shortfall for the purpose of levying penalty.

But a problem has arisen in regard to the method of calculation to be adopted to find out the levy of penalty on the shortfall in the new regime period which is only for five months of the licensing year 2001-02 i.e. the licence fee payable between 01.11.2001 to 31.3.2002 for which no specific provision was made in the new licence conditions.

The contention of the Petitioner is that since there is no specific transitory provision to calculate the shortfall, it is not open to the respondent to calculate the shortfall by taking into consideration the payments made by the petitioner for the period between 01.11.2001 to 31.03.2002 i.e. a period of 5 months only on a pro-rata basis. It is contended even though the penalty is for a period of 5 months in the licensing year 01.04.2001 to 31.03.2004 same should be calculated by taking into consideration the entire fee payable and paid for the entire 12 months between 01.04.2001 to 31.03.2002. According to the Petitioner if this methodology is followed, the shortfall for the relevant year, which include the transitory period, would not exceed eight per cent, hence, the Petitioner is not liable to pay any penalty.

Per contra, the argument on behalf of the 1st Respondent is, for the transitory period the shortfall will have to be calculated on the basis of actual licence fee paid during that period i.e. 01.11.2001 to 31.3.2002 and not by taking into consideration the amount paid between 01.04.2001 to 31.03.2002. If so calculated, the Respondent contends the shortfall for the relevant year would be nearly 18% of the total annual due for that period.

Having heard the learned counsel for the parties and perused the terms and conditions of the licences under the Fixed Fee Regime and Revenue Sharing Regime, we are unable to accept the argument addressed on behalf of the 1st Respondent.

At the outset, we must notice that what is demanded by the Respondent is a penalty for the shortfall of the payment of annual licence fee and not a compensation for belated payment which is already covered by the provisions relating to the levy of interest in the licence conditions.

A perusal of the licence conditions of the Revenue Sharing Regime does not show that any specific provision has been made for the levy of penalty for any

shortfall during the transitory period i.e. between 01.11.2001 and 31.03.2005. In the absence of any such specific provision to calculate the levy for this transitory period, it cannot be construed that a pro rata basis for this purpose was agreed upon between the parties. But the learned counsel for the respondent contended that from the other terms of the contract, it is clear that the petitioner had agreed for applying the pro rata calculation for finding out the shortfall for the transitory period and the revenue sharing regime was as a matter of fact was introduced in the middle of the licence year for the benefit of the licensee. Therefore, the petitioner cannot be permitted to contend that he was not aware of the method to be used for the purpose of calculating the shortfall and for the purpose of levy of penalty for the transitory period.

We cannot accept this argument of the 1st Respondent for more than one reason. After perusing the conditions of licence, we do not see that the licensee, in this case the petitioner, has agreed for adopting the pro rata calculation for the purpose of levy of penalty for the transitory period. Then again we notice when it comes to the calculation of shortfall for the succeeding licensing years the terms show that the licence fee paid in total and payable in total for the entire period of 12 months of that licensing year will have to be taken into account. Thereby, it is seen that the licensee is given an elbow room to adjust the payment of licence fee to avoid the levy of penalty. In that background we find it difficult to accept the argument of the 1st Respondent.

Be that as it may, it should be seen that the object of calculation is to levy penalty. If that be so, the terms of the licence pertaining to the levy of penalty will have to be construed strictly and if two reasonable constructions are possible the one that is more lenient, should be preferred. While construing penal provision the Tribunal must lean towards construction which exempts the party from penalty rather than the one which imposes penalty. This is based on the principle that a person cannot be deprived of his right to property unless such deprival is authorized

by unambiguous law or terms of contract and parties concerned must have advance notice of the same.

In the present case, we have noticed that though, a penalty provision is made in the contract providing for calculation of shortfall in a licence year by taking into consideration, the difference between the licence fee paid and payable in a block period of 12 months, it does not provide anywhere that in the event of the term of licence is less than one year, a pro rata calculation will be adopted for levying the licence fee. If there was any apprehension that the licence would be terminated or would come to an end in a licence year before the block period of 12 months came to an end and during that limited period the licensor was entitled to levy penalty a specific provision should have been made for such shorter period of licences. In the absence of the same, the respondent No.1 cannot be permitted to adopt a pro rata methodology for calculating the shortfall.

That apart, even the language of Condition 1.10 of the new licence regime indicates that it is a block period of 12 months of the licence year which will have to be taken into consideration for calculating the shortfall. The relevant part of that Clause reads thus:-

> "1.10 In case, the total amount paid on the self-assessment of the LICENSEE as quarterly Licence Fee for the 4 (four) quarters of the financial year, falls short by more than 10% of the payable licence fee, it shall attract a penalty of 150% of the entire amount of short payment………" (emphasis supplied)

This clearly shows that for the purpose of finding out whether there is a shortfall in the payment of licence fee, the total amount paid on self-assessment basis for the four quarters of the financial year will have to be taken into account and not a part of the year, which in our opinion also indicates that for levying penalty the calculation will have to be on the basis of the total amount paid by the licensee for the whole licence year and not on a pro rata basis.

It is not disputed that if the methodology suggested by the Petitioner for calculating the penalty for the year 2001-02 is accepted, the shortfall would be less than ten per cent. Per contra, if the calculation is based on pro rata system as sought to be done by the Respondent No.1 is accepted, the shortfall comes to 18.9 per cent with which calculation we are not in agreement. Therefore, we are of the considered opinion that the demand for penalty for the licence year 2001-02 by taking into consideration the payments made from 01.11.2001 to 31.03.2005 alone cannot be sustained. Therefore, the demand notice for payment of penalty for this period has to be set aside.

The Petitioner has made certain averments in the Petition that it has paid certain excess licence fee for the licensing year 1996-97 and has sought adjustment of the same for the future period. The particulars given by the Petitioner in this petition, in our opinion, do not establish the above fact. Hence, we are not inclined to go into that question. Therefore, that prayer of the Petitioner is rejected. Accordingly, the petition succeeds partly to the extent that the demand made by the 1st Respondent for payment of penalty for the licence year 2001-02 is set aside.

……………………….J
(N. Santosh Hegde)
Chairperson

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(Vinod Vaish)
Member

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(D.P. Sehgal)
Member