TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 13th May, 2009

Appeal No. 1 of 2008
(M.A. No. 30 of 2008)

Tata Teleservices Limited
10th Floor, Tower1, Jeevan Bharti,
124, Connaught Circus,
New Delhi – 110 001.

And

Tata Teleservices (Maharashtra) Limited
A,E & F Blocks, Voltas Premises,
T.B. Kadam Marg, Chinchpokli
Mumbai – 400 033 ……….. Petitioner

Versus

Telecom Regulatory Authority of India
Mahanagar Door Sanchar Bhawan,
Jawahar Lal Nehru Marg,
(Old Minto Road)
New Delhi – 110002. ……….. Respondent

BEFORE :

HON'BLE MR. JUSTICE ARUN KUMAR, CHAIRPERSON
HON'BLE DR. J.S. SARMA, MEMBER
HON'BLE MR. G.D. GAIHA, MEMBER

For Petitioner	:	Mr. Ramji Srinivasan, Senior Advocate with Mr. Mohit Jolly,Advocate Ms. Vartika Sahay
For Respondent	:	Mr. Saket Singh, Advocate.

O R D E R

1. The present appeal has been filed by the Appellant impugning the direction of Telecom Regulatory Authority of India (hereinafter referred to as TRAI/Authority), purported to have been issued on 18.1.2008 under Section 13 of TRAI Act, 1997

thereby directing unconditional refund of Rs.1,73,37,535/- to the subscribers within 15 days from the date of issue of such direction alleging that the said amount has been recovered in excess. Appellants are Telecom Operators licensed to operate telecom services, having specified jurisdiction in the country and are inter-related.

2. The respondent has alleged that the appellants had in Feb, 2006 unilaterally and without just cause increased the tariff payable by subscribers before the expiry of six months from the date of enrolment of such subscribers in violation of the 31st Amendment to the Telecommunication Tariff Order 2004 (hereinafter referred to as TTO 2004) which prohibits any such alteration or change within the said initial period of six month**s**.

3. The appellants' case is that no such change, as alleged was effected, but in fact it was following the judgment of this Tribunal on 9th Sept, 2005 in Petition No. 45 of 2005 as well as the decision of the Department of Telecommunication dated 26th Aug, 2005, reclassifying Fixed Wireless Telephones(FWT) as Limited Mobile Telephones and, therefore, the appellants were forced to apply the correct and relevant applicable IUC (Interconnection Usage Charges) inclusive of ADC (Access Deficit Charges hereinafter referred to as ADC). As soon as the classification of FWT as mobile phone came into force, it was incumbent upon the appellant to ensure the correct classification from the said date to reflect not only the payments made to other interconnecting operators but also in the tariffs recovered from the subscribers, that included the elements of IUC and ADC. In fact by this action, the appellant has pleaded that, it remained compliant with the applicable rules and regulations. The appellant has further pleaded that the impugned directions of 18th Jan, 2008 would result in the appellant not following the then applicable tariff regulations and IUC regulations as well as the judgment dated 9th Sept, 2005. The appellant also brought to our notice that it had challenged the order and judgment dated 9th Sept, 2005 in the Hon'ble Supreme Court of India vide Civil Appeal No. 5850 of 2005 wherein an order dated

3.10.2005 has been passed restraining Bharat Sanchar Nigam Limited (BSNL) from recovering any amounts pursuant to the said judgment, upon deposit of a sum of Rs. 10 crore by the appellant. The appellant has also intimated to the respondent, the changes as required by the applicable regulations after reclassification of service as limited mobile, following which the respondent has taken exception to these changes and called for explanation of the appellant. The appellant has explained to the respondent that these changes with little implication on the subscriber, were necessitated because of implementing the Regulation in accordance with the interpretation placed there upon by the competent authority i.e. the Department of Telecommunications vide its communication dated 26th Aug, 2005 as also the judgment of this Tribunal dated 9th September 2005. As per this communication the Department of Telecommunication has conclusively placed such services being provided by the appellant to be treated, as limited mobile service, within the scope of the license.

4. The appellant contended that the respondent had issued the following directions to the first appellant on 2.2.2007:

(a) To furnish the details of the number of subscribers affected by the increase in tariff.

(b) To furnish the total excess amount charged from the subscribers;

(c) deposit the said amount in a separate bank account; and

(d) Not to utilize the said amount.

In spite of the fact that the matter was already pending in appeal in Hon’ble Supreme Court and the judgment of this Tribunal dated 9th September 2005 was not considered to be final and binding on the appellant, the appellant decided to accept the decisions of the competent authority i.e. the Department of Telecommunications without prejudice to its rights and contentions and implemented the applicable IUC regulation (interconnect usage charge regulation) and introduced appropriate changes to the tariff to reflect the same.

The appellant has also stated that with effect from 10th March 2006 the interconnect usage charge regime changed altogether and the methodology of collection of ADC changed from per minute basis to a simple 1.5% of the Adjusted Gross Revenue (AGR). The appellant has further contended that the impugned demand raised by BSNL from 14-11-2003 to 26-8-2005 shall also depend on the outcome of the judgment of the Hon'ble Supreme Court to decide about the classification of the service being provided by the appellant as Fixed Wireless Telephones (FWT) or Wireless in Local Loop (Limited Mobile Telephone).

5. Appellant has stated that in response to the alleged notice, it intimated to the respondent a total number of 10,17,029 subscribers affected by increase in tariff and the corresponding total alleged excess amount worked out to Rs. 1,73,37,535/-. Following the directions dated 2nd Feb, 2007 of the respondent, the entire excess amount realized from the subscriber was kept in a separate bank account and the same was intimated to the respondent by appellant. The appellant stated that, since the direction dated 2nd Feb, 2007, nothing was heard from the respondent for about a year, and suddenly the respondent has issued another direction namely the impugned direction dated 18.1.2008 calling upon the appellant to now take urgent steps within 15 days, to unconditionally refund the said amount of Rs. 1.73 crores to over 1 million subscribers.

6. The issues which arise for determination are as follows :

(i) Whether the classification of the services as per the directions of the licensor resulting into the change of the tariff is in contravention of the TTO?

(ii) Whether there is a provision in the TTO to accommodate such changes which are to be implemented in classifying the service according to its characteristics, which results into a change of tariff?

(iii) Whether the implications of the Interconnect Usage Charges Regulation dated 29th October, 2003 which envisages the payment of ADC after classification of the service in WLL(M) category is possible to be met with without realizing the same by changing the tariff as per the classification of the service?

(iv) Whether the directions issued by the respondent are legitimate in the facts and circumstances of this particular case.

7. The learned counsel for appellant has pleaded that no change, as alleged to have been done, is without a just cause. He further argued that the appellant was following a judgment of this Tribunal on 9.9.2005 in Petition No. 45 of 2005 as well as decisions of the competent authority i.e. Deptt. Of Telecommunication vide letter dated 26th Aug, 2005 reclassifying FWT as Limited Mobile Phones, which in turn has forced them to apply correct and relevant applicable IUC (Interconnect Usage Charges) inclusive of ADC as stipulated by respondent itself. The learned counsel pleaded that by taking this action the appellant remained compliant with the applicable rules and regulations. The counsel argued that if the appellant gives effect to impugned directions dated 18.1.2008, it would be found guilty of not following the applicable Tariff Regulations and IUC Regulations as well as the judgment dated 9.9.2005 of this Tribunal. It has also been pleaded by the learned counsel of appellant that these changes in tariff were intimated to the respondent, following which the respondent took exception to these changes and, called for explanation of the appellant.

8. The counsel for appellant has pleaded that respondent should make out a case of deliberate violation and should attribute intention to breach the provisions of the Regulation in order to inflict penalty in any form including, by way of extracting refunds to customers. The counsel further argued that implementation of regulatory provisions and decisions of Licensor and/or judgment of any court

cannot amount to any voluntary breach of any Regulations. The appellant has contended that neither can it amount to attributing intent on the part of the appellant nor the breach of the Regulations and, therefore, impugned Direction is totally unjustified and cannot be sustained.

9. The learned counsel for respondent has argued that the appellant had reportedly and admittedly increased the charges payable by its subscribers suddenly and without notice to its subscribers. No protection has been given for a period of six months from the date of enrolment to a tariff plan as mandated by the 31st amendment to TTO, 2004. The subscribers of the appellant had been, therefore, reportedly and admittedly made to pay higher charges in the form of increase in tariff within the protection period of six months.

10. The learned counsel for the respondent further argued that the 31st amendment to TTO, 2004 seeks to protect the interests of consumers from erratic and frequent changes by the service providers in the tariff plans chosen by the consumer. The consumers are virtually taken unaware of these changes and it creates uncertainty and avoidable confusion. Being an individual, the consumer may not be in a position to pursue his case or lodge a complaint with service provider and would perforce succumb to the increased tariff plan structure. The learned counsel for respondent extended his argument by saying that the respondent is duty bound under the Act to devise methods to protect the interest of the consumers against profit making, commercial attitude of the service provider and the 31st amendment to the TTO, 2004 is one such step in the desired direction. The protection to the consumer as per the 31st amendment to TTO, 2004 is absolute and unexceptionable. The learned counsel for respondent also argued that the said amendment is clear, unambiguous and does not have any bearing on the liability of the appellant to refund the excess amount charged by the appellant from its subscribers. Finally, the learned

counsel for the respondent argued that the Directions are lawful, in the interest of the consumers and need to be implemented without further delay by making refunds to the consumers, otherwise many of the consumers may become untraceable due to various reasons.

11. The main submission made by the counsel for respondent is that this Tribunal and the Hon'ble Supreme Court of India have decided that walky phones are WLL(M) and the clarifications issued by the respondent and the Department of Telecommunication (Licensor) were clarificatory of the license and regulatory provisions. It was further pleaded that the judgments held the clarifications to be clarificatory in nature and the services to be WLL(M). It was also pleaded by the counsel for respondent that there was no issue of change in tariff with respect to the decision on the classification, however, if there is any increase, then in what manner the same should be applied is the main issue. The counsel for respondent argued that increase in tariff cannot be made ignoring the regulatory principles, governing the increase in tariff, especially the 31st Amendment to the TTO, notwithstanding the fact that such increase is a consequence of a judgment. The following case law were cited by the learned counsel for respondent in support of its contention:

(a) **Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group,(2006) 3 SCC 434, at page 536 para 312.** A judgment, it is well settled, cannot be read as statute. Construction of a judgment, it is well settled, should be made in the light of the factual matrix involved therein. Any observation made in a judgment, it is trite, should not be read in isolation and out of context.

(b) **Mehboob Dawood Shaikh v. State of Maharashtra,(2004) 2 SCC 362, at page 369 para 12.** A decision is available as a precedent only if it decides a question of law.

(c) **Union of India v. Major Bahadur Singh,(2006) 1 SCC 368, at page 373 para 9-11.** The observations of the Court are neither to be read as Euclid's Theorems nor as the provisions of the statute and that too taken out of their context. Judges interpret statutes they do not interpret judgments. They interpret words of statute; their words are not to be interpreted as statute. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases.

12. The learned counsel for respondent argued that the content of the clarification issued by the respondent on 26th Aug, 2005 only stipulates that Walky shall be treated as a limited mobile service; it does not, by itself, authorize the service provider, including the appellant, to raise tariff ignoring the provisions of the TTO. The respondent's counsel also stated that increase in tariff may be valid but has to be effected well within the confines of the regulatory principles governing increase in tariff and the judgment or clarification automatically do not override the TTO. The learned counsel for respondent has extended the argument by saying that if the contention of the appellant is accepted, it would make the 31st Amendment to the TTO redundant, ineffective and otiose. It would amount to reading an exception against the object and purpose of the provision. It was pleaded by the learned counsel for respondent that this is a situation where the Tariff Order was not an issue before this Tribunal and Hon'ble Supreme Court and is not under challenge in any forum. Finally, the learned counsel for respondent concluded by saying that judgments may have the effect of justifying the increase in tariff, but the same is not an authority for ignoring the regulatory principles governing the actual implementation of the increase in tariff.

13. The learned counsel of respondent has also brought to our notice the following case law supporting its contention that the object of TTO is beneficial and protects a certain class of consumers from any kind of increase in tariff for first six months. The provision is mandatory and an absolute bar with no exceptions.

The words being clear and unambiguous and being a tariff order, the same needs to be given a literal meaning.

(a) **Nathi Devi v. Radha Devi Gupta,(2005) 2 SCC 271, at page 277 para 13-18**; courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow for giving effect to the language used. If the words used are capable of one construction only, then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the act.

(b) **Nasiruddin v. Sita Ram Agarwal, 9 SCC page 589 para 37**; the court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is clean and unambiguous.

(c) **Easland Combines v. CCE (2003) 3 SCC 410 at page 421 para 18**. It is well settled law that merely because a law causes hardship, it cannot be interpreted in a manner so as to defeat its object.

14. **(i)** The first issue is related to the classification of service in the category of WLL(M). In our opinion the directive/communication dated 4th March, 2005 issued by TRAI only re-emphasizes the position mentioned in the IUC Regulation dated 29th Oct, 2003, namely that a fixed wireless terminal, if not confined to the premises of subscriber, will invite mobility within Short Distance Charging Area(SDCA), which in turn would attract ADC charges on such services. The definition of the WLL(M) is provided for, in the IUC Regulation of 29th Oct, 2003 in clause 2 (xxviii) which classifies the limited mobility telephone service to operate within a short distance charging area by using the wireless technology in the local loop. The implication, thereafter, is to increase the tariff. The contention of the

counsel for respondent is that the classification of subscriber as per the TTO is well within the powers of the respondent under Section 11(2) of the TRAI Act. It was argued that the classification has also been created to protect the interest of subscriber in a multi operator scenario in which the subscriber has to choose the most beneficial tariff plan, before taking services from any operator and to remain unaffected for a period of atleast six months. The change in category of a service, having consequential liability like ADC etc., should protect the subscriber as well as the operator. In the present circumstances we find that the categorization of service from WWL(F) to WWL(M) is on an immediate basis without envisaging any protection to a particular class of subscriber as per TTO who have not completed their tenure of six months period in their adopted tariff plan. We are, therefore, of the view that the action taken by the appellant is appropriate.

(ii) We have gone through the provisions of the TTO alongwith the explanatory memorandum. The objective of the 31st Amendment is to achieve transparency in publishing and implementing the tariff and in billing the subscribers, which is necessary to be ensured because of the multiplicity of the plans in a multi-operator scenario. The respondent has also not tried to regulate the number of tariff packages offered by the Access Provider, in view of the dynamic situation in the market on account of intense competition. The purpose for which, this amendment in the TTO has been issued, is laudable and, is in the interest of the subscriber, however, the instructions of the licensor and the categorization of service by the respondent in the instant case, have not kept in view a particular class of subscribers to be immune to any change of tariff. This aspect, if mentioned while issuing the change in classification of service by the licensor would have given the necessary protection to the subscriber and thereby maintaining the provisions of the TTO. In the present circumstances, we consider that there was no other option with the appellant except the action taken by it.

(iii) It is a fact that the Interconnect Usage Charges Regulation dated 29th Oct, 2003 envisages the payment of ADC after classification of the service in WLL(M)

category. The methodology of collection of ADC has also changed from per minute basis to a simple 1.5% of Adjusted Gross Revenue (AGR) of the operator in March 2006. In any case, the call charges have, therefore, to accommodate the ADC payment until and unless, the operator decides to absorb it as a business preposition. The decision about fixing tariff normally takes care of all such charges which are payable as per the prevailing regulations and, therefore, as soon as this service is classified as mobile service, the charging of ADC as a component of tariff is a normal practice adopted by all the operators. It is a fact that liability of each operator for its subscriber for payment of IUC/ADC is inevitable until and unless there is a specific provision made for the subscribers who become immune to change in tariff because of the TTO.

(iv) The directions issued by the respondent in the present circumstances are in conflict with its own instructions of classifying the service in WLL(M) category without making any exception to the class of subscriber created in the TTO for providing protection against change in tariff plan before the expiry of six months and, therefore, in the instant case the direction issued by respondent is not tenable.

15. We uphol We uphold that the classification of service as WLL(M) (Wireless Local Loop Limited Mobile Service) according to the direction of licensor resulting into the application of pulse rate is as per the prevailing orders of the licensor as well as the respondent. As per the TTO the respondent has created a class of subscribers, who have not completed the six months duration in a particular tariff plan. This classification is well within the powers of the respondent under section 11(2) of the TRAI Act. The intention of making such classification is to protect the interest of the subscriber in a multi-operator scenario, offering several options, which requires a concerted effort on the part of the subscriber to choose the most beneficial plan, before taking services under a particular tariff plan. The subscriber does not expect to be hurt atleast for a period of six

months after adopting a particular tariff plan. This implies that, the subscriber belonging to this class should be protected by change in tariff on account of the instructions of the respondent as well as the licensor, and, therefore, while issuing the orders for effecting a change in the category of service, having consequential liability like ADC etc., there should be a specific mention that, as per the TTO, the class of subscriber which is within the period of six months time, after adopting a particular tariff plan, is insulated from these changes. In the present circumstances, however, we find that the instructions of the licensor and the respondent are to implement its decision immediately. There is no specific reference to exempt a class of subscribers who have not completed the period of 6 months.

16. We find that the Appellant has changed the tariff and it had done so to accommodate the ADC Charges as stipulated in the Interconnect Usage Regulation issued by the Respondent. This exercise has been carried out by the Appellant as per the direction of the licensor. The instructions of the Respondent which inter-alia required the licensee of the Fixed Wireless Service Provider to strictly confine to the premises of the subscriber and not to give any misleading advertisement in the electronic and print media to publicise their service as mobile or limited mobile service has also not been followed. In the present case, the Appellant has advertised its service to be limited mobile service in the Short Distance Charging Area by using the wireless access and has, therefore, attracted the classification of being a limited mobile service operator as per the judgment of the Tribunal as well as the respondent. Had it not changed the tariff to accommodate the payment of ADC, the Appellant would have attracted the charge of not levying the proper tariff and, thereby depriving the Government of license fee/taxes on Adjusted Gross Revenue (AGR) as well as defaulting on ADC payments. We, therefore, hold that this is a peculiar case where the Appellant was obliged to change over to the tariff plan to accommodate to pay

the ADC charges and any other payment as per the license conditions. It could have not done anything otherwise in these circumstances, than what it did. The Appellant has also informed to its consumers the revised tariff plan which were to be implemented in view of the changed regulatory conditions whereby the services of TTSL were reclassified WLL(M). The Appellant in this case has also sought directions to allow the modification of the tariff plan from the Respondent on the ground that the services of the appellant has been reclassified from fixed category to WLL(M) category and the change in tariff is inevitable and thus, involuntary due to change in regulatory/license conditions. But, it would have not been possible for the Appellant to wait for six months, even in respect of a restricted number of subscribers, which fell in the category to enjoy the immunity of any change in the tariff as per the TTO. It would have only resulted in avoidable confusion. We, therefore, direct that no further action is necessary in pursuance of the Respondent's Direction dated 18.1.2008.

17. The qu The question remains whether the Direction itself was valid. In normal circumstance, such a Direction would be valid, since, as maintained by the counsel for Respondent, the Tariff Order is the only protection for the consumer. But this is an extraordinary situation and we, therefore, feel that, in this case, further action is not called for. In this case the Appellant has already deposited Rs. 1,73,37,535/- in a separate account as per the directions of the Respondent. We direct that the Appellant need not disburse this money to the subscribers, however, it must meet the obligation as per Regulations in regard to Interconnect Usage Charges i.e. the payment of ADC etc.

The The appeal is disposed of accordingly with no costs. M.A. is also disposed of.

……………………..J
(Arun Kumar)
Chairperson

………………….
(J.S. Sarma)
Member

………………….
(G.D. Gaiha)
Member