

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

DATED 19th AUGUST, 2010

Petition No. 130 of 2010
(M.A. No. 136 of 2010)

...Petitioner

Tata Communications Ltd.

Vs.

Union of India & Anr

...Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

HON'BLE MR. P.K. RASTOGI, MEMBER

For Petitioner : Mr. C.S. Vaidyanathan, Advocate
Mr. U. Hazarika, Advocate
Ms. Dhanitry Phookan, Advocate

For Respondent : Mr. Vineet Malhotra, Advocate

JUDGMENT

S.B. Sinha

The petitioner herein is the successor in interest of Videsh Sanchar Nigam Limited (VSNL), a public sector undertaking.

It was granted a license by the first respondent herein purported to be under Section 4 of the Indian Telegraphs Act, 1885 pursuant thereto a license agreement was entered into by the parties.

In terms of the said license agreement as also in terms of a policy decision adopted by the first respondent, the license fee was to be realised on revenue sharing basis. The manner of computation of net revenue is known as Adjusted Gross Revenue (AGR), the definition whereof as also that of 'Gross Revenue' are set out in the license agreement.

They read as under:-

"36. Adjusted Gross Revenue for the purpose of levying LICENCE Fee as a percentage of revenue shall mean the Gross Revenue as reduced by Call Charges (access charges) actually paid to other telecom service providers for carriage of calls.

Service tax for provision of service and sales tax actual paid to the Government, if gross revenue had included the component of service tax and sales tax.

"Gross Revenue"

The Gross Revenue shall include the revenues accruing to the LICENSEE on account of goods supplied, service provided, leasing of infrastructure, use of the resources by other, application Fee, installation charges, call charges, late Fees, sale proceeds of instruments (or any terminal equipment including accessories), hand sets, band width, income from value Added Services, supplementary services, access or interconnection charges, any lease or rent charges for hiring of infrastructure etc and any other miscellaneous items including interest, dividend etc without any set off of related items of expense etc."

2. The question, as to whether various items of income included by the respondent no. 1 for the computation of AGR, include - (a) Income derived from non telecom and non licensed activities; (b)TV uplinking income; and (c) Charges passed on to other service providers, came up for consideration before this Tribunal on an application filed by Association of Unified Service Providers of India (AUSPI).

3. It was held by a judgment dated 7.7.2006 that the respondent was not entitled to include income of the licensee out of non-telecom activities in the computation of the AGR.

This Tribunal, however, referred the matter to TRAI so as to enable it to make recommendations as to which items of income shall be excluded from computation of the AGR.

Pursuant to the said judgment, the parties had appeared before the TRAI, submitted their representations, whereupon, recommendations were made by the TRAI on or about 13.9.2006.

This Tribunal, by a judgment dated 30.8.2007, held as under:-

"We would like to emphasize about a basic factor which has to be always kept in mind while undertaking this exercise. The license uses the works, revenue arising from licensed activity. Therefore, one has to always apply the test whether the revenue sought to be included in AGR arises from licensed activity. It excluded income from non-telecom activities, e.g., dividend income, interest income, capital gains from following excluding rates fluctuation, income from property and miscellaneous income

- The component of Income from TV uplinking in the computation of the AGR which related specifically to the petitioner, this Tribunal held that revenue from the service is to be excluded there, as contained in paragraph 9 of the judgment.
- In respect of Charges passed on to the other service providers, it was held, accepting the recommendation of the TRAI, that such charges are liable to be included in the computation of the AGR, holding against the petitioner in paragraph 13 of the judgment.

4. The respondent no. 1 preferred an Appeal thereagainst. The petitioner also preferred an Appeal against that part of the judgment, whereby and whereunder, it was inter alia directed that the benefit thereof would be applicable from the date of filing of application.

According to the petitioner, in terms of the aforementioned judgment, a huge amount became due from the respondent and thus, refundable to the petitioner.

By reason of an Order dated 8.1.2008, the Supreme Court of India, however, directed : 'in the mean time, no adjustment shall be made'.

5. The respondent, however, issued a communication on or about 1.7.2008 addressed to the petitioner and other operators, asking them to make payment in terms of the position as prevailing prior to the passing of the said judgment dated 30.8.2007. The petitioner, however, lodged a protest thereagainst.

6. We may furthermore notice that on similar applications having been filed, this Tribunal by Orders dated 23.10.2007 and 13.3.2009, directed the first respondent to bill the petitioners therein at least from that date on the basis of the law laid down in the judgment of the Tribunal dated 30.8.2007 without prejudice to the rights and contentions of the parties.

7. We may notice that as against the said orders also, appeals were preferred.

By an Order dated 11.1.2010, the interim order of stay dated 7.12.2009 was modified to the extent directing the respondents to pay at the existing basis and file an undertaking that if there was any deficiency, they would make good the same.

However, an interim order of stay, in respect of the refundable amount already paid, was passed.

In spite of the same, the respondent raised a demand for a sum of Rs. 137,56,79,326 only on or about 16.6.2009. The said bill, however, was revised on 24.12.2009 reducing the demand to Rs.104 crores.

We may notice the break-up thereof :-

1.	Additional L/Fee due to mpm-telecom Income (Misc. Income & other income)	Rs. 23.36 crores
2.	Additional L/Fee due to disallowance Of cost items	Rs. 06.15 crores
3.	Credit not given for excess paid ISP VPN L/fee	Rs. 17.14 crores
4.	Credit given for excess paid L/fee In FY 2002-03 to 2004-05 (Less)	<u>Rs. 05.12 crores</u>
	Total :	<u>Rs. 42.13 crores</u>

8. We may also notice the break-up of different heads of additional license fee under revised demand notice of 24.12.2009 :-

(Rupees in crores)

Particulars	Alleged shortfall	Interest	Penalty &	Total Intt. & Penalty
-------------	-------------------	----------	-----------	-----------------------

			Interest	/Intt.
Non-Telecom Income	23.36	13.91	18.63	32.54
Due to Cost Items	6.15 <u>Less 5.12</u> <u>1.03</u>	3.59	0.82	4.41
Credit Not given for ISP-VPN	17.74	10.56	14.15	24.71
	42.13	28.06	33.6	61.66
As per Demand Notice	42.17	29.85	32.56	62.41

9. The petitioner contends that demands in respect of the said amount, being contrary to the judgment of this Tribunal and orders passed by the Supreme Court of India, are wholly illegal and without jurisdiction. We may furthermore notice that the petitioner had been granted an ISP VPN license. It paid license fees for two quarters. It however now stands admitted that no license fee was payable, having regard to the policy decision taken by the respondent itself. According to the petitioner, a sum of Rs.17.74 crores, which had been paid in excess in terms of the aforementioned policy decision, should have been directed to be adjusted and/or set-off by the Central Government itself.

The contentions of the respondent in this behalf are as under:-

- (a) The petitioner is not entitled to any relief in respect of additional license fee due to disallowance of cost items, namely, a sum of Rs.6.15 crores.
- (b) So far as item No. 1 of the table is concerned, it was urged that the same is subject to appeal and cross-appeal by the petitioner.
- (c) No credit can be given for the amount paid in excess towards ISP VPN license fee in terms of clause 29.2 of the license.

(d) There exists a distinction between the 'penal interest and penalty' and 'simple interest' and thus, the petitioner is liable to pay only simple interest on the amount due.

10. We have noticed heretofore that out of the said sum of Rs. 6.15 crores, a sum of Rs. 5.12 crores was deducted. Thus, the purported liability of the petitioner comes to Rs.1.03 crores.

11. By a letter dated 10.3.2010 addressed to the DDG(LF), DOT, the petitioner stated as under :-

"TCL under the commercial compulsion was not only forced to pay the disputed license fees of Rs.51.50 crores fee for the financial year of 2004-05, moreover, an amount of Rs.115.72 crores as penalty and interest on penalty was also paid by TCL on 9.11.08. The commercial compulsion was owing to the fact that M/s TTSL, an associate company of TCL became eligible to be granted GSM licenses for three circles for which licenses DOT agreed to grant only on its demands for additional license fees being satisfied by TTSL and its associate companies including TCL. It was acceding to this unreasonable and illegal demand that the disputed amount of license fees and more relevantly Rs. 115.72 crores as penalty and interest on penalty were realised from TCL. Even at the time of such payment, TCL had made the payment without prejudice to its rights and contentions in the various litigation including Petition No. 227 and 228 of 2007 before TDSAT, by communication of 9.11.08."

According to the petitioner, it had paid a sum of Rs.116.17 crores in excess, stating—

"The amount of Rs.115.72 crores (being penalty and interest on penalty), alongwith interest @ 15.25% (SBI PLR plus 5%), the total amount is, therefore, due is Rs.160.70 crores. You are, therefore, requested to remit the sum of Rs.160.70 crores forthwith to TCL."

In response to the said communication, by a letter dated 16.4.2010, the petitioner was merely intimated that the Department was in process of filing an appeal in the Supreme Court of India against the said judgment dated 11.2.2010 and hence, request for any refund purportedly emanating from the said order could not be acceded.

12. The contention raised by the first respondent in respect of the additional license fee, so far as the non-telecom income is concerned, being squarely covered by the judgment of this Tribunal dated 30.8.2007, it is difficult for this Tribunal to accept the same. We, therefore, direct that no relief prayed for by the petitioner, so far as that amount is concerned, must be allowed.

13. There cannot be the doubt whatsoever that the principles of 'res judicata' shall be applicable in the instant case.

14. The first respondent, in our opinion, cannot be heard to say that the said judgment is not binding on it only on the ground that the matter is pending before the Supreme Court of India.

However, the first respondent is correct in its contention that additional license fee due to dis-allowance of cost items having been rejected by this Tribunal, the petitioner is also bound thereby and as such it was bound to pay a sum of Rs.1.03 crores to the respondent.

The different heads of additional license fees have been noticed by us heretofore. Interest on the amount due is also to be paid in terms of the agreement.

15. So far as the claim of the respondent, being penalty and penal interest for non-deposit of the license fee on the due date, is concerned, the rate of 150% on the amount due is not payable. We may notice that this Tribunal by a judgment and order dated 11.2.2010 passed in BPL Mobile Cellular Ltd V. DOT, in the case of the petitioner's predecessor's interest, upon noticing clause 6.8 of the license agreement, held the said provisions to be bad in law being penal in nature.

16. We may now notice the contention of the petitioner in regard to the excess amount paid towards ISP VPN fee. The license fees in respect of those licenses were said to be payable by both ISP and non-ISP licensees. As noticed heretofore, the petitioner paid the license fee for two quarters which were not required to be paid.

17. According to the petitioner, what was payable, would appear from a letter dated 30.8.2006 issued by VSNL to the respondent, which is in the following terms:-

“We would also like to highlight the fact that we have adjusted an amount of Rs. 177.4 million, excess paid under proposed ISP with VPN license, in line with TDSAT judgment dated 3.5.2005, amendments to ILD license dated 14.12.2005 permitting provision of VPN service under ILD license and recent amendments to ISP license dated 3.3.2006. This amount of Rs. 177.4 million may please be treated as license fee paid under the ILD license as communicated through our various communication. Kindly update your records to reflect the same appropriately. We have also adjusted an amount of Rs.2,784 Million being excess license fee paid under the erstwhile e-mail license confirmed by DoT vide letter No. 4-15/96-E. Mail/LF dated 31.7.2006. Details of the adjustment are placed at Annexure-1.”

18. The petitioner, by a letter dated 24.3.2006 asked for adjustment of a part of the said amount, stating—

“VSNL continued to follow up with the licensor for the issue of modified ISP license. In the meanwhile, in line with TDSAT judgment dated 3.5.2005, VSNL had made payments of License Fee by way of Revenue Share calculated @ 8% on its entire ISP revenue, including Layer-3 VPN, Dialup, Broadband, Internet Lease Line and other internet services, through the guidelines were issued w.r.t. VPN services only, for an amount of Rs. 20.53 crores for the first and second quarters of 2005-06 in good faith.

However, after retaining a sum of Rs. 10 Crores deposited as Entry Fee for around seven months DOT vide letter dated 9.11.05 returned the said Entry Fee on the ground that 'Entry Fee and Financial Bank Guarantee are required to be submitted as per procedure only after grant of Letter of Intent (L.O.I.) by the DOT to an Appellant Company which has so far not been issued to M/s Videsh Sanchar Nigam Limited for VPN Services.

Subsequently, the licensor vide its press note dated 10.11.05 and followed by formal amendments to the ILD/NLD licenses on 14.12.05, made certain policy announcements, doing away with requirement of a separate VPN license for rendering VPN services and

permitting provision of VPN services under NLD and ILD licenses.

The observations contained in the DOT letter dated 9.11.05 suggests very clearly that if LOI had not been issued there was no requirement of payment of Entry Fee and submission of PEGs. On this analogy, therefore, the sum of Rs.20.53 Crores paid by VSNL in good faith, under guidelines dated 16.12.2004, which has now become inapplicable in view of recent policy changes and TDSAT judgment dated 3.5.2005, in anticipation of grant of VPN license/LOI, which was never issued to VSNL, was required to be similarly refunded. We would also like to highlight the fact that during this interim period, not a single ISP has paid license fee on the entire revenue under ISP license.

We humbly submit that without issuance of a LOI or a Licence, DOT had no right to collect Licence Fee as any attempt to collect or retain amounts paid in good faith amounted to collection of License Fee without authority of law.”

19. It was stated –

“In the light of above, we have adjusted only Rs. 17.74 Crores out of total amount of Rs. 20.53 Crores plus applicable interest to be paid by DOT as per TDSAT judgment, and still leaving Rs.2.79 crores plus applicable interest to be paid by DOT, should DOT decided to levy any license fee on VPN and make applicable the same to all the service providers. This is being done as matter of abundant caution to remain fully compliant of license obligations. We would claim the balance money with interest on final determination by DOT on the matter relating to applicability of license fee on VPN services.

Since license fee under the ISP license fee is not sufficient for adjustment, we are adjusting the same from the license fee due under ILD license fee and such adjusted amount be treated as paid under ILD license.”

20. By another letter dated 24.3.08 addressed to the respondent, the petitioner stated –

“Issue for resolution :

Out of revenue share paid under the proposed IP-VPN license of Rs. 20.58 crores, license fee due for VPN services is Rs. 2.29 Crores and Rs. 17.74 Crores has been offered / adjusted under the ILD license as per TDSAT judgment of 3.5.2005, balance Rs. 0.5

Crores being refundable with appropriate interest as per our letter dated 5.7.2006.

In view of the facts presented above, we request you to kindly issue appropriate communication to LF section (ILD) for adjustment of Rs. 17.74 Crores (Rs. 7.86 Crores in Q1 of 2005-06 and Rs.9.88 Crores in Q2 of 2005-06) from license fee due under ILD license, at the earliest and oblige.”

21. The only communication received by the petitioner from the respondent no. 1, by a letter dated 3.3.2006, is to the following effect:-

“I am directed to inform you that the subject matter has been referred to LR Branch of Department of Telecom. You are requested to follow up the matter with L.R. Branch, in future.”

22. It is not denied or disputed that the question with regard to the payment of the license fee now stands covered by a decision of this Tribunal dated 3.5.2007 in Petition No. 7 of 2005- Internet Service Providers Association of India (ISPAI) v. Union of India, it was inter alia held thereunder:-

“37. Thus we observe that though VPN is being defined and discussed by both the parties, including the diagrammatic presentation, on access through internet as well as on direct leased line. The Respondent mentioned that the VPN provided on direct leased line by ISPs is not allowed. This stand of the DOT we accept because by basic definition of ISP it has to be only internet based activity. License of ISP permits them the activity concerned with access of internet and use of its content for IT enabled services. As rightly contended by DOT, VPN was not allowed as a part of ISP licence, it is fair for us, therhefore, to hold that it becomes a separate service. The quantum of entry fee and revenue share to be charged for a separate service from the service provider would require the recommendations of TRAI as per Section 11(a)(a)(i)(ii) of TRAI Act.

39. Since we have held the VPN Service as provided by the petitioners is not included in the ISP Licence it, therefore, cannot be said that guidelines of the Cabinet have been contravened in any way. Once having held that VPN is a distinct service outside their ISP Licence, in our view, recommendations of the TRAI are mandatory as provided under Section 11(1)(a)(i)(ii) of the TRAI Act.

41. The question arises now as to how to mould the relief in the present petition till the Government comes up with its order on fixation of entry fee and licence fee. Keeping in view the observations made in the judgment, we order as under:-

ISP Licensees who wish to provide VPN Services may do so in terms of the guidelines only after paying the requisite entry fee and would pay the annual licence fee as enjoined in the guidelines; subject to adjustment later on in accordance with the final determination of entry fee and licence fee by the government after receipt of recommendations from TRAI. In case after final determination, petitioners are entitled to refund of excess of the entry fee and license fee paid, if any, it would be refunded along with interest at prevalent bank rates, for such of the ISPs who do not wish to continue with VPN service, the excess amount so worked out along with interest will be adjusted against the future dues.”

23. The question which, therefore, survives for our consideration is as to whether the said amount could have been adjusted by the petitioner unilaterally. The license agreement dated 5.2.2004, we may notice, contained a clause to the following terms:-

“In the event any sum of money or claim becomes recoverable from or payable by LICENSEE to the LICENSOR either against the LICENCE AGREEMENT or otherwise in any manner, such money or claim can be (without restricting any right of set off for counter claim given or employed by law) deducted or adjusted against any amount or sum of money then due or which at any time thereafter may become due to the LICNSEE under this LICENCE AGREEMENT or any other AGREEMENT or contract between the LICENSOR and the LICENSEE.”

24. Mr. Vaidyanathan, would contend that the respnodent should have applied the said principle to the case of the petitioner also.

According to the learned counsel, for the said purpose, the doctrine of 'level-playing field' would apply and in any event, if they have a power, they have also a duty in respect thereof.

The stand of the respondent in its reply, however, is as under:-

"Regarding credit of Rs.17.74 crores for excess license fee paid for ISP VPN license, it is submitted that the company was not given permission by the DOT to provide VPN services. In the absence of any License Agreement, the VPN services provided by M/s VSNL are irregular. The petitioner required a special permission for providing VPN service vide guidelines dated 16.12.2004 amended vide guidelines dated 21.6.2006. The petitioner has failed to get amended its declaration in the statement of revenue and license fee vide Audited Statement as prescribed in the License."

25. The petitioner has not questioned the validity of the said clause. It has not been stated that although the same is one-sided, it is arbitrary or otherwise illegal. The language employed in the said provision, in our opinion, is absolutely clear and unambiguous. By reason of the aforementioned provision, it was the licensor alone, who could deduct or adjust against any amount or sum of money, than due from the licensee. No such covenant exists in favour of the licensee. It is now well settled that in absence of any agreement, a party to a contract cannot adjust any amount from the dues of the other party from another contract or from a third party.

26. Mr. Vaidyanathan has however placed strong reliance upon a decision of the Supreme Court of India in **Jasraj Inder Singh. vs. Hemraj Multanchand, [1977(2)SCC155]**.

In that case, the defendant had transactions with two shops owned by the plaintiff therein. The suit was filed by the plaintiff in respect of the amounts due of one shop. The question was whether any amount due in respect of the other shop could be directed to be set-off. The action was one for accounts and various entries in both the shops involved transfusion of funds and goods and in that view of the matter, the opinion of the learned High Court that the entirety of the accounts in the two shops should be viewed as a composite one, was upheld, stating—

“The suit is for a sum due on accounts. The parties are the same. There are two shops belonging to the same owner. The return of the income from the two shops, for income tax purposes, is a consolidated one. In short, there was only one person who owned two shops and it is wrong to construe the situation as if there were two juristic entities or personae. Secondly, the defendant, who dealt with the plaintiff in the two shops, was the same person. He had no dual characters to play. The dealings were either in one or in the other shop. They were business dealings between two businessmen, during the same period, and even inter-related, to such an extent that sometimes advances were made from one shop and realisations were made in the other shop. In short an artificial dissection of these transactions could not square up with the reality of the situation. Shri Phadke urged that one contract was one transaction and a set of contracts need not be necessarily brought up in the same action between the same parties. We consider that the true nature of the action here is a suit on accounts for the sum due on striking a balance. That itself is the cause of action. Such a suit is not unfamiliar and such a cause of action may be made up of various minor transactions. Viewed at the micro level each may be a single contract. But viewed at the micro level as a suit on accounts, it is a single cause of action.”

27. The instant suit is not a suit for accounts. The provisions of Order VIII Rule 6 of the Code of Civil Procedure has not been resorted to. The respondent herein, has not laid any claim before this Tribunal. The petitioner unilaterally seeks to make an adjustment which in terms of clause 29.2 of the license agreement and even otherwise, is not legally permissible.

28. In that view of the matter, we hold:-

- (i) The demand of the respondent to the extent of a sum of Rs. 23.36 crores and the interest and penalty levied thereupon must be set aside.
- (ii) The claim of the petitioner in respect of Rs.1.03 crores towards additional license fee due to the disallowance of cost items is rejected.
- (iii) The petitioner is not entitled to get any credit for excess amounts paid towards ISP VPN license fees.

- (iv) The petitioner is liable to pay interest on Rs.1.03 crores and/or any other sum due from it, in terms of the judgment of this Tribunal dated 30.8.2007.
- (v) Clause 6.8, in terms whereof, the penal interest is levied at 150%, being covered by the judgment of this Tribunal dated 11.2.2010, is set aside.

The petitioner, it is made clear, shall be entitled to bring separate action as against the respondent for refund of the excess amount paid to the respondent in relation to the ISP VPN license fee or otherwise.

29. In the facts and circumstances of this case, there shall be no orders as to costs.

.....J
(S.B. Sinha)
Chairperson

.....
(G.D. Gaiha)
Member

.....
(P.K. Rastogi)
Member