TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 11th February, 2010

Petition No.111 of 2007

Tata Teleservices Limited …Petitioner

Vs

Bharat Sanchar Nigam Limited …Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR.G. D. GAIHA, MEMBER

For Petitioner	:	Mr.Ramji Srinivasan,Senior Advocate with Ms.Simran Brar, Mr.Vedant Verma,Advocate
For Respondent	:	Mr.Maninder Singh,Senior Advocate with Mrs.Prathiba M. Singh, Mr.Yoginder Handoo, Mr.Tejveer Singh Bhatia,

Ms.Nitya Thakur,
Mr.Arjun Natarajan, Advocates

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JUDGMENT

S.B. Sinha

Introduction

The parties hereto are holders of licenses granted in terms of the provisions of Indian Telegraph Act, 1885 (1885 Act). The petitioners are aggrieved by and dissatisfied with demands made by the respondents herein contained in the demand notes dated 03.09.2006, 23.03.2007 and 09.04.2007 whereby and whereunder it was called upon to pay a sum of Rs.10,63,88,772/- purported to be in terms of clause 6.4.6 of the Interconnect Agreement entered into by and between the parties as amended on 01.12.2005.

Fact

The factual matrix involved herein is not much in dispute.

The parties hereto entered into a basic licence agreement for Karnataka Circle. The Telecom Regulatory Authority of India(TRAI) in exercise of its powers conferred upon it by Section 36 of the Telecom Regulatory Authority of India Act, 1997

(hereinafter called and referred to for the same brevity as 'The said Act') made Regulations on or about 29.10.2003 known as The Interconnect Usage Charge Regulations, 2003.

The respondent purported to be in terms of a prevailing practice issued an implementation circular on or about 20.01.2004, the relevant portions whereof read as under:

> "(b) In para 9 of the letter it is provided that calls without CLI if any may be rejected by the termination access provider at all POIs other than the POIs meant for termination of International calls. At the same time Para 11 of the letter says that calls received by BSNL without CLI shall be charged at the highest level as for ISD calls. TRAI has already issued a Directive on 24.11.2003 to all service providers as to not to tamper with the CLI and not to offer any call without CLI unless it involves CLIR and in case any call is received without CLI, the same may be rejected. As regards ILD calls the Direct calls on the ILDOs to insert their code and the code of the country from which the call is coming, in case call is received without CLI. BSNL decision to accept calls without CLI and charging at the higest slab rate is against TRAI direction. We are separately checking with the operators the implementation of TRAI directions." (Emphasis supplied).

TRAI issued implementation Directive regarding IUC Regulation 2003 to all Service Providers including BSNL regarding billing mechanism and dispute:

(i) Not to tamper with CLI and not to offer any calls without CLI unless it involves CLIR

(ii) If any calls received without CLI, the same be rejected.

(iii) Where ILD calls are received without CLI, ILDOs have to insert their code and the code of the country from which the call is coming.

(iv) BSNL to take urgent action for implementation of CDR based billing in their network.

(v) Till CDR based billing is introduced, BSNL would implement reciprocal arrangements.

The respondent started raising huge demands, in protest whereto the petitioner in respect its Hubli area (with which we are not concerned) made a representation to settle the issues amicably.

Respondent issued a circular on or about 13.06.2005 wherein inter alia it was laid down:

> "2. Various reasons for handover to such non-CLI or invalid/incomplete CLI calls have been reported. These reasons may be due to calls originating from mobile without SIM card, transcient faults in the switch, software version/ signaling problem, non-recognition of CLI by exchanges, lack of capability to analyse all digits by some exchanges, operator associated trunk call booking non-CLI calls originated by BSNL network and meant for private operators' network which is in turn forwarded back to BSNL network due to activation of call forwarding feature by private operators' subscribers, roaming call forwarded cases wherein non-CLI or invalid/incomplete CLI calls meant for cellular subscribers roaming in other service areas/networks were routed via BSNL TAXs etc. In all such cases where it is sufficiently established by concerned BSNL field units that the reasons for handover of non-CLI, invalid/incomplete CLI calls to BSNL network was not of deliberate misuse or routing/tampering of CLI of incoming ISD calls at PoI, and where the private operators give an undertaking that call forwarding to BSNL network has been barred from their network, in all such cases which have come to notice as well as cases which come to notice henceforth shall be settled as prescribed below.
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> 3. It has been decided for all access providers that in case for a billing cycle the number of non-CLI calls received at PoI are less than 0.5% of the total number of calls received at their PoI, then in such cases the access provider shall be charged for double the number of such non-CLI calls handed over, at the highest slab of IUC applicable i.e. incoming ISD calls as detailed below for each of the three IUC regimes.

S.No.	Carriage involved	IUC-I regime (Rs. Per minute)	IUC-2 regime (Rs. per minute)	IUC-3 regime (Rs. Per minute)
1	Termination SDCA	5.50	4.55	3.55
2	0-50 km	5.70	4.75	3.75

3	50-200 km	5.95	5.20	4.20
4	200-500 km	6.25	5.45	4.45
5	>500 km	6.60	5.65	4.65

Furthermore a clarificatory circular was issued on 05.07.2005 whereby it was directed that in the event any call having invalid/incomplete CLI is received in the POI with private service provider the same are to be treated as at par with non-CLI calls and to be included while calculating 0.5% of calls with no/invalid/incomplete CLI as well as while calculating the amount to be recovered from private service provider at whose POI the said calls have been received.

In terms of IUC Regulations the service providers were to raise bills on the basis of CDR based platform. In that context the respondent by a circular dated 06.08.2005 intimated all private service providers that as it had begun implementation of CDR based system, supplementary bills may be required to be raised by it to the private operators if:

(i) Any difficulty is felt in obtaining the CDR from the POI to CDR based system in time;

(ii) If errors in CDRs are not rectified on time; and

(iii) Corrupted CDRs are received or if it is unable to recover the CDRs. However it was stated that if CDRs of BSNL are lost irretrievably, the bills shall be raised on average calling patterns.

Indisputably, on the question as to whether respondent should mandatorily raise bills on the basis of CDRs, a petition was filed before this Tribunal by the Cellular Operators Association of India being Petition No.48 of 2004. By a judgment and order dated 11.11.2005, this Tribunal allowed the said petition inter alia directing as under:

"(i) BSNL to implement CDR based billing system at Level II TAX within 90 days.

(ii) BSNL to refund excess ADC on monthly basis within 3 months of collection

(iii) Parties to enter into Agreement with applicable rate of interest on reciprocal basis"

In the light of the aforementioned judgment, TRAI issued a circular letter on or about 16th November, 2005, directing:

"Now therefore, in exercise of the powers vested in it under section 13 read with section 11(1)(b)(ii), (iii) and (iv) of the Telecom Regulatory Authority of India Act 1997 and in compliance of Hon'ble TDSAT's direction to TRAI as contained in Para 47 of the order dated 11.11.2005, the Authority hereby directs BSNL, MTNL and other service provider to maintain reciprocity in the billing by way of adopting the same method for making and receiving the payments i.e. if CDR based billing is used for making payments then the same should be used for receiving payments and if MCU based billing is used for making payments then the same should be used for receiving payments.

BSNL, MTNL and other service providers are also directed to furnish compliance report latest by 22.11.2005."

It is at that stage the respondent insisted on an Addenda to be inserted in the original Interconnect Agreement dated 31.08.2001. The said Addenda was inserted in the original agreement on or about 01.12.2005. It was given effect to on and from 14.11.2003. Clause 1 of the said addenda, however, made an exception with regard to giving retrospective effect thereto in respect of interconnect usage charge including ADC, interconnection arrangements and associated bills arrangements as prescribed by BSNL corporate office during the intervening period till date of signing of the Addenda.

See sub-clauses of clause 6.4.6 which are relevant for our purpose read as under:

"(a) Unauthorised calls i.e. calls other than specified for that trunk group if detected, for which the applicable IUC (including ADC) is higher than the IUC (including ADC) applicable for calls prescribed in that trunk group, then BSNL shall charge the UASL the highest applicable IUC (including ADC), as applicable for such unauthorized calls, for all the calls recorded on this trunk group from the date of provisioning of that POI or for the preceding two months whichever is less.

(b) The CLI based barring facility shall be activated at the POIs wherever technically feasible to ensure that the traffic handed over to BSNL is in the appropriate trunk groups only. Wherever it is technically not feasible to activate CLI based barring, periodic monitoring of the incoming trunk groups shall be done by BSNL to ensure this objective. The calls received by BSNL without CLI or modified/tampered CLI from UASL shall be charged at the highest slab i.e. as for ISD Calls. In case such calls are received by BSNL on any trunk group, then all the calls recorded on this trunk group shall be charged at the rates applicable for IUC of incoming ISD Calls from the date of provisioning of that POI or for the preceding two months, whichever is less."

For the period May 2003 to September 2004, the respondent raised a supplementary demand for a sum of Rs.10,63,88,772/- being the charges for non-CLI calls, the details whereof are as under:

MONTH	**WMS OCB TAX**
May'03	21166628.23
Jun'03	23958165.03
July'03	29422638.94
Aug'03	36756238.66
Sep'03	40267399.89
Oct'03	81028.48
Nov'03	84372.64
Dec'03	128770.07
Jan'04	76045.85
Feb'04	77055.46
Mar'04	56966.26
Apr'04	63999.41
May'04	95074.40

TOTAL	**152234383.31**

Indisputably the petitioner protested thereagainst. A joint meeting for reconciliation was held, pursuant whereto a report was submitted, stating:

> "1. BSNL & TTSL CDRs are matching with reference to Date, Time, Calling No. Called No. & Duration with one second variation.
>
> 2. Majority of NO CLI calls, are pertaining to Bangalore Rural in May, Jun, Jul and Aug'2003.
>
> 3. For July, Aug & Sep'2003 many calls to CellOne are also observed where 'Calling No.is not available in BSNL data, whereas for the same calls TTSL is having Calling Numbers.
>
> The non recording of CLI at BSNL switch may be due to switch incompatibility of different technologies between BSNL & TTSL.
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> Sample data compared is enclosed in Annexures.
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> Annexure-1 - Calls to BG Rural comparison
>
> Annexure-2 - Calls to CellOne comparison
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> In view of the above, very few calls for which NO CLI is recorded both at BSNL and TTSL needs to be dealt as per the IUC agreement."

In the said meeting some datas were randomly selected and not in a chronological manner.

We say so as from Annexure-I annexed to the said report, it would appear that except two numbers, CLI was not recorded in BSNL's network although the same was available in the CDRs of the petitioner. The contention of the petitioner is that the time and date mentioned in two CDRs tallied save and except the duration of 1 second and the petitioner's CDR shows all the calling IDs. According to the respondent even the details of the called IDs would show that the CDR contained 11 digits or 10 digits which demonstrated grave inaccuracy in the details supplied by the petitioner. Discrepancies according to the respondent also exist with regard to time, duration of call etc. We must however, point out that the respondents had not made any grievance in relation thereto either in their correspondences or in their pleadings. Moreover, even the minutes of the joint reconciliation meeting do not point out the same.

The petitioner however, contends that it was reported in the joint reconciliation report at para 3 that for July, Aug & Sep'2003 many calls to CellOne are also observed where 'Calling No.is not available in BSNL data, whereas for the same calls, TTSL is having the Calling Numbers'.

The said report was also accompanied by detailed analysis of data by the petitioner which showed that the total numbers of CLI calls are merely 0.04%. Such analysis was purportedly carried out by using an appropriate software.

On the basis of said report the petitioner made a representation on or about 24.10.2006 wherein the respondent was asked:

(i) to raise demand only for the genuine non-CLI calls;

(ii) to charge the petitioner as per revised circular for treating non-CLI calls which were below 0.4% of the total traffic routed in that POI.

The respondent however, without adverting to the contentions raised in the said letter dated 24.10.2006 of the petitioner raised a supplementary bill for a sum of Rs.6,53,119/-. A reminder was also sent on 22.01.2007. The petitioner without prejudice to its rights and contentions paid the amount of Rs.6,53,116/- for the period October 2003 to June 2005 by way of full and final settlement of all the dues arising out of the said bill. It was specifically stated:

> "Please note that we are making this payment in view of your threat to withdraw the interconnect facility as per clause 7.3.2. of the Interconnect Agreement."

However, for the said period the respondent raised a revised bill for a sum of Rs.10,58,494/-. The parties thereafter held a coordination meeting for amicable solution pursuant whereto the following minutes of the meeting were recorded on 24.03.2007:

> "GM(NC) informed about with the technical nature of NO CLI observed at the BS WMS OCB TAX POI of M/s TATA (Basic Service).
>
> The technical capability of the switches was discussed in detail and it was agreed upon that the calls pertaining to the particular definition (i.e. for Bangalore rural area) NO CLI were recorded in BSNL CDRs perhaps due to the translation taken place at M/s TTSL Switch.
>
> In was also pointed out that such violated calls were charged by considering technical in nature. Accordingly bills were raised as per the interconnect agreement terms and conditions vide bill No.BSO/TATA/NOCLI dated 23.03.2007 fee an amount of Rs.105833494/-.
>
> Mr.Venugopal, GM of TTSL explained that the change of CLI is not intentional. Its further stated that the bills were for the period May 2003 to September 2003 and the period is too old. It is difficult to stimulate and decide the cases of NOCLI calls reported in BSNL Switch.
>
> He requested BSNL to consider the CDRs without CLI recorded in BSNL as well as in TTSL as violation and accordingly requested to issue revised bills for the period.

However, GM BG reiterated that during the settlement of disputes the records made by the measurement devices located at BSNL interface point shall have precedence over the records of the UASL, as per 7.6.4 of interconnect agreement & requested M/s TTSL to pay the amount of Rs.10,58,33,494/-.

M/s TATA has agreed to look into the matter."

The petitioner by its letter dated 28.03.2007 requested the respondent not to penalize it for the technical inability of the respondent's switches. It also made a request for an appointment with the Chief General Manager of the respondent. However, the respondent by its letter dated 09.02.2007 asked the petitioner to make the payment of the demand note dated 23.02.20027 and issued a notice of disconnection by 10.05.2007 if payment is not made by 09.05.2007.

Submissions

Mr.Ramji Srinivasan, learned senior counsel appearing on behalf of the petitioner in support of this petition would urge:

(i) The impugned bill having been raised beyond the period of six months from the date of the issue of the relevant bill the same is barred by limitation in terms of clause 7.3.1(iv) of the agreement.

(ii) No material having been placed on record by the respondent to show that the petitioner has an intention to breach the conditions of the contract, the impugned demand is not substantial.

(iii) The respondent must be held to have acted illegally in comparing the case of the petitioner with that of another operator, namely, Reliance Infocomm Ltd. particularly in view of the fact that the present case does not involve any incoming ISD calls nor it is a case of tampering of CLI to pass ISD calls as local calls.

(iv) In view of the findings arrived at the joint reconciliation meeting as also the circular letter of the respondent dated 13.06.2005, the impugned bill is wholly unsustainable as the respondent itself has recognized that non-recording of

CLI could occur genuinely due to various technical reasons and the operators should not be penalized unless the amount of such non-CLI calls exceeded 0.5% of the total traffic on that POI.

(v) As the error has occurred due to the technical incompatibility at the BSNL's end in view of the fact that its CDR did not capture the CLI calling numbers, the impugned bill is liable to be set aside. Similar violations having been observed at BSNL's exchanges towards petitioner and the percentage of the same being 0.71% i.e. above 0.5% whereas petitioner's non-CLI be merely 0.07%, the impugned bills are liable to be set aside.

Mr.Maninder Singh, learned senior counsel appearing on behalf of the respondent, on the other hand, would contend:

(i) That the agreement having been given a retrospective effect from 14.11.2003 the impugned bills are within the prescribed period of limitation. The period of limitation provided for in clause 7.3.1 (iv) would apply only in case of an inadvertent omission and not in a case of fraud.

(ii) It is incorrect to say that CDRs of both the service providers had tallied and the only difference was found only in duration of call to the extent of 1 second as a perusal of the annexures appended to the said minutes of meetings would show that there were various other discrepancies.

(iii) In view of the clear and explicit provisions contained in clause 6.4.6, even a reconciliation was not necessary as in the event a non-CLI is recorded in the exchange of the BSNL and even if the subsequent circulars, namely, the circular letters dated 13.06.2005 and 05.07.2005 are given effect to, the petitioner would be bound to make payment in terms thereof.

(iv) The circular letter issued by the TRAI dated 20.01.2004 being binding on all cellular operators and as the circular letter dated 29.01.2005 having formed part of the agreement, the impugned demand is unassailable.

(v) In view of the letter of the petitioner dated 10.11.2004, an admission having been made that there existed a fault in the petitioner's equipment, no further inquiry was needed.

(vi) The petitioner having been given the benefit of the circular of 2005 by the respondent in its bill, no grievance in relation thereto can be raised.

Agreement – Effect of

The relationship of the parties is governed by the agreement. The said agreement however, would be subject to the provisions of the said 'Act' and the Regulations framed thereunder.

It is beyond any controversy that clause 6.4.2 was inserted by way of an addenda in the agreement dated 01.12.2005. The said agreement, however, has been given a retrospective effect and retroactive operation w.e.f. 14.11.2003. Ex facie therefore, the bills raised prior to the said period must be held to be wholly illegal as in respect thereof no agreement was in force.

Before adverting to the other contentions raised by the learned counsel for the parties, we may furthermore notice that the purported admission on the part of the respondent in terms of its letter dated 10.11.2004 was in relation to the Hubli area and not in relation to other area. It is difficult, therefore, to accept the contention of Mr.Singh that in view of the admission made by the petitioner that its equipments were faulty in nature, no further inquiry or reconciliation was required to be made. It is not the case of respondent that the equipments of the petitioner in respect of the circle in question were defective.

We may at this juncture also deal with another contention of Mr. Singh that the annexures appended to the joint reconciliation report would show that the numbers recorded in the CDRs of the petitioner were invalid containing 11 digits or were less than 10 digits. We do not agree for more than one reason. No such contention has been raised by the respondent either in its letters to the petitioner or in the pleadings. No such observation has also been made in the minutes of the meeting.

It is now a well settled principle of law that no contention necessitating determination of factual dispute between the parties to a lis, should be permitted to be raised unless specifically pleaded.

Although this Tribunal is not bound by the procedure laid down in the Code of Civil Procedure but as it is called upon to undertake a scrutiny of various datas referred to in the annexures to the joint reconciliation meetings held on 09.10.2006 and 10.10.2006, the principles of natural justice in our opinion would be violated the petitioner is deprived of an opportunity to explain the purported discrepancies.

The joint reconciliation report dated 16.10.2006 clearly show that only sample datas have been compared. Annexure-I appended thereto refers to the comparison made in respect of calls to Bangalore Rural Area; whereas Annexure-II refers to the calls made in Cell One which is the mobile network of the respondent. It is clearly stated that in respect of some calls for which NO CLI was not recorded both at BSNL and TTSL, the same was required to be dealt with as per the IUC/agreement. The authorities of the respondents, therefore, clearly held that the CDRs of the parties were matching with reference to date, time, calling number and called number with duration with 1 second variation and the majority of non-CLI calls pertain to Bangalore rural for the months of May, June, July and August, 2003. Even for July, August and September, 2003 many calls to Cell One were also found where calling number was not available in the BSNL data but found to be available in the CDR of the petitioner. It has not been denied or disputed that the ordinarily CDRs of both the parties should match. If calling line identification of the caller is available on the CDR of the petitioner on the basis whereof the petitioner might have raised bills in terms of IUC Regulations but not shown in the CDR of the respondent, the fault lay in the system of the respondent itself for which the petitioner cannot be penalised.

The respondent in a case of this nature cannot be permitted to contend that its equipments would prevail over those of the petitioner.

If reconciliation of the datas was found to be necessary, having regard to the respondent's own circular letter dated 13.06.2005, it was, in our view, also necessary to ascertain as to whose equipment did not record the CLI calls.

The respondent in law while seeking to impose penalty on the petitioner cannot refuse to look into its contention in regard to the defect in the equipments of the parties, stating that even reconciliation was not necessary.

The respondent itself in its circular dated 20.06.2004 named as Implementation Circular of the IUC Regulations 2003 of the BSNL's network categorically mentioned that in the event any call is received without CLI the same should be rejected.

In fact the respondent itself in its circular letter dated 13.06.2005 stated that huge IUC bills have been raised which were disputed by the private service providers; the reasons wherefor might have been; due to calls originating from mobiles without sim cards, transit fault in the switch software version, signaling problems, non-recognition of CLI by exchanges, lack of compatibility to analyse all digits by some exchanges, operators' assigned trunk call booking non-CLI calls originated by BSNL network and meant for private operators' network which is in turn forwarded back to BSNL's network etc.

Interpretation of Clause 6.4.2

Clause 6.4.2 provides for imposition of penalty. The respondent itself having made a distinction between an invalid/non-CLI calls on the one hand and tampered/modified CLI on the other, it is difficult to accept the contention of the learned senior

counsel that the provisions of the penal clause would stand attracted even when a non-CLI call is received in BSNL's exchange. We are of the opinion that the said provision deserves closure scrutiny.

No penalty (unless the text of the penal clause is clear or unambiguous attracting imposition of penalty immediately on default) can be imposed without giving an opportunity of hearing.

The Regulations made by TRAI and/or the circular letters issued by DoT do not provide for generation of revenue far less providing an undue advantage to BSNL over others because of its own lapses. If the CDR of the respondent did not match with the petitioner evidently equipments were defective. Possibility of the equipments of the petitioner or other service providers being defective thus cannot be ruled out. In such a case, we have no other option but to hold that the respondent cannot seek to take advantage of its own wrong.

We have referred to hereinbefore that the percentage of violation on the part of the respondent is 0.71% compared to the percentage of the petitioner's non-CLI calls during the period May 2003 to September 2003 which is only 0.07% i.e. within the permissible limit.

CLI means Caller Line Identification and is meant to record "A" number. Mr.Maninder Singh however submitted that it was a case of CLI tampering by pointing out to discrepancies on called number ("B" number). It has never been a case of the petitioner that the respondent has indulged in tampering of CLI. It is in fact a case of "B" number transmission which might have arisen because of the wrong practice of numbering scheme being followed by BSNL. In any event the same having not been pleaded, the submission raised before us for the first time by the respondent in course of the arguments cannot be accepted.

Furthermore, it is not a case which involved any incoming calls at the wrong POIs. Had the calls been international ones the matter might have been different.

Law in a situation of this nature comprehends complete and total fairness and reasonableness on the part of the respondent in its action. We have no doubt in our mind that in a situation of this nature penalty clause deserves to be construed strictly.

Preconditions for levy of penalty

The principle of mens rea per se may not be applicable in respect of a a civil wrong. But imposition of any contractual penalty at the hands of a 'State' must be on a rational and reasonable basis.

It now stands accepted that non-CLI or invalid CLI calls may pass through the network of the another BSO for a large number of reasons some of which have been mentioned by BSNL itself in its circular dated 13.06.2005.

It is also of some significance to notice that such invalid or non-CLI calls have passed through the network of BSNL also, as a result whereof the petitioner suffered loss.

Would a default or breach immediately attract penalty may be another aspect of the matter which should receive due consideration.

If it does involve an enquiry, verification of records, exchange of datas and other information, like the present case, imposition of penalty cannot be said to wholly automatic.

The respondent being a 'State' would be bound by its own circular letter dated 13.06.2009 and, thus, obligated to ask itself the right question.

Circulars issued by DoT or TRAI were not for the purpose of generation of revenue far less by BSNL.

We are not oblivious of some decisions of the Supreme Court of India as for example in Union of India Vs. Dharmendra Textiles reported in MANU/SCC/4448/2008. It is of some significance to notice that in Union of India Vs. Rajasthan Spinning and Weaving Mills – JT 2009(7) 314 the Supreme Court of India observed that the contention that mere non-payment or short payment of duty (without there being anything else) would inevitably lead to imposition of a penalty equal to the amount for which duty was short paid is as misconceived as interpretation of Dharmendra Textiles (supra) is misconstrued by the revenue, stating, "we completely fail to see how payment of the differential duty, whether before or after the show cause notice is issued, can alter the liability for penalty, the conditions for which are clearly spelt out in Section 11AC of the Act(Central Excise Act)". Stating that in a case of non-payment, short payment or error refund of duty issues are likely to arise relating to (i) recovery; (ii) interest; and (iii) penalty, it was held:

> "From Sub-section 1 read with its proviso it is clear that in case the short payment, non payment, erroneous refund of duty is **unintended and not attributable** to fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in default within one year from the relevant date (defined in sub Section 3). In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc. of duty is **intentional and by adopting any means as indicated in the proviso** then the period of notice and a priory the period for which duty can be demanded gets extended to five years."

It was observed:

"21. From the above, we fail to see how the decision in *Dharamendra Textile* can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows:

> 5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea *as in Section* 11AC *where mens rea is prescribed statutorily.* This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned Counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here.

23. The decision in *Dharamendra Textile* must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under Sub-section (2) of Section 11A. That is what *Dharamendra Textile* decides.

> 24. It must, however, be made clear that what is stated above in regard to the decision in *Dharamendra Textile* is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision."

A distinction has been made by the Apex Court between cases where breach of a civil obligation attracts penalty immediately, irrespective of the fact whether contravention was made by the defaulter with a guilty intention or not and a case where the penalty has to be imposed on the basis of a findings of fact as to whether the violation has been made unintentionally or because of a situation which is either beyond its control or because of technical lapses.

A term in the contract, whereby a huge monetary obligation can be imposed by way of penalty; like fiscal statutes must be strictly construed.

It is also of some relevance to notice that in Guljag Industries Vs. Commercial Taxes Officer – 2007(7) SCC 269, the Supreme court distinguished its earlier decision in State of Rajasthan & Anr. Vs. D.P. Metals – AIR(2001) SC 3076: 2002(1) SCC 279, stating:

> 24. That, once the ingredient of Section 78(5) stood established after giving a hearing, there was no discretion with the officer to reduce the amount of penalty or to waive the penalty. If by mistake some of the documents were not readily available at the time of checking, principles of natural justice might require opportunity being given to produce the same. It was further held that under Section 78(5) the legislature has fixed the rate of penalty and, therefore, the quantum of penalty could not be waived or reduced.
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> 25. In our view, the aforestated judgment in the case of **D.P. Metals** (supra) has no application to the present case. We are not concerned in the present case with false or forged documents/declaration. In the present case the goods in movement were carried with the blank declaration Form 18A/18C which was duly signed by the assessee.

> Therefore, as stated above, we hold that the goods in movement were carried without the declaration Form 18A/18C. Therefore, Section 78(2)(a) stood attracted. Moreover, in the present case, there were no special circumstances indicated by the assessee as to why the forms which were duly signed were not filled in. Therefore, in our view the above judgment in the case of **D.P. Metals** (supra) has no application to the facts of the present case.

The decision of Aftab Alam J in Rajasthan Spinning and Weaving Mills (supra) has also been considered by the Apex Court in C.I.T. Delhi vs. Atul Mohan Bindal – 2009(11) SCALE 592.

In a case of this nature penalty is not immediately attracted. The circular letters issued by the respondent itself in 2005 provides for application of mind. Cases even on the basis thereof must be divided in two categories. Even percentage of non-CLI calls received in the network of the BSNL is less than 0.5% only twice the charges are to be levied whereas in the case, where it exceeds 0.5%, charges on all calls received for the last two months at the maximum slab may have to be levied.

It, therefore, involves inquiry, verification of records, exchange of datas and other informations and thus, in the instant case it cannot be said that levy of penalty is automatic and immediate.

Failure to ask a right question would amount to ‘misdirection in law’. If the respondent has laid down a procedure it was bound to follow the same. It is now well accepted in the Indian jurisprudence the dicta of Frankfurter J that ‘he who carries a procedural sword, shall perish with it’. See Ramana Dayaram Shetty Vs. International Airport Authority of India and Ors.– AIR1979SC1628: (1979)3SCC489.

In this case not only the respondent but also Government of India accepts that there exists a 'grey market' which is operated by some miscreants or unscrupulous persons as a result whereof not only the security of the State is at threat, but loss of revenue is also suffered by all private operators including the respondent. The DoT was thus, grappling with a problem of both security of State as also loss of revenue. If a private operator looses revenue, the Government of India also suffers loss. Furthermore, as noticed hereinbefore in the event of non-CLI calls, having regard to the statutory requirements made by TRAI, all parties were to reject the same, there was absolutely no reason as to why the respondent shall stand alone in the matter of implementation thereof. Its request for exemption has met with an order of rejection by TRAI as noticed in the respondent's circular letter dated 20.01.2004.

Moreover the amount of penalty is not commensurate with the actual damages suffered by the respondent. For the said purpose, we would assume that clause 6.4.6 provides for the machinery to arrive at a pre-estimated damage but it is well known that even damages in terms of Section 74 of the Indian Contract Act must be a reasonable one. It is not necessary to further dilate in this matter as this aspect has been considered by us in the connected matters at some details.

Limitation

We are, however, unable to accept the contention of Mr.Srinivasan that the period of limitation would only be six months in terms of clause 7.3.1(iv) of the agreement.

It is now well settled that period of limitation provided for in the Limitation Act, 1963 cannot be curtailed by agreement in view of Section 28 of the Indian Contract Act.

Furthermore, the said clause would apply only in case of a mistake and not in case of this nature.

For the reasons aforementioned this petition is allowed. However, the respondent may give an opportunity of hearing to the petitioner to demonstrate as to what would be the reasonable quantum of the loss, if any, only in respect of the period which will be covered by the agreement i.e. from 14.11.2003 to May 2004. In the facts and circumstances of the case, the parties shall pay and bear their own costs.

……..... J
(S.B. Sinha)
Chairperson

…….....
(G. D. Gaiha)
Member