TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 28th May, 2010

Petition No.92(C) of 2009

M/s Sun Direct TV(P) Ltd …Petitioner

Vs.

Union of India …Respondent

AND

Petition No.93(C) of 2009

Bharti Telemedia Ltd …Petitioner

Vs.

Union of India …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. Gopal Jain, Advocate
Mr. Kaushik Mishra, Advocate

For Respondent : Mr. Nitish Gupta, Advocate for
Mr. Ravinder Agarwal, CGSC

JUDGMENT

S.B. Sinha

Whether the petitioners, being DTH operators, are entitled to the benefit of the judgments passed by this Tribunal dated 7.7.2006, 30.8.2006 and 26.8.2008 as also the recommendations of the TRAI dated 1.10.2004, is the question involved in these petitions.

The said question arises in the following factual matrix.

The petitioners are licensees under Section 4 of the Indian Telegraph Act. Indisputably, in terms of the licenses granted to them, they were required to pay the license fee only on the basis of Adjusted Gross Revenue (AGR) which has been defined in the license as under:

"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 provides for carriage of calls;

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

We may also notice that what would be a 'Gross Revenue' has also been stated in the said license.

Clause 3.1.1 contained in the said license reads thus—

"Gross revenue for this purpose would be the gross inflow of cash, receivable or other consideration arising in the course of ordinary activities of the Direct to Home (DTH) enterprise from rendering or services and from the use by other of the enterprise resources yielding rent, interest, dividend, royalties, commissions etc. Gross Revenue shall, therefore, be calculated without deduction of taxes and agency commission, on the basis of billing rates, not of discounts to advertisers. Barter advertising contracts shall also included in the gross revenues on the basis of relevant billing rates. In the case of licensee providing or receiving goods and services from other companies that are owned or controlled by the owners of the licensee, all such transactions shall be valued at normal commercial rates and included in the profit and loss accounts of the licensee to calculate its gross revenue."

The Telecom Regulatory Authority of India (TRAI) in purported exercise of its jurisdiction under Section 11(1) (a)(ii),(iii) and (iv) of the TRAI Act, 1997 (the Act) made The Telecommunication Interconnect Regulations (The Regulations).

The petitioners have filed these petitions inter alia praying for the following reliefs :

i) "Declare and hold that the petitioner has to pay license fee on AGR basis under its DTH license;

ii) Direct the respondent to calculate the license fee only from the revenue generated from licensed activities (as per AGR);

iii) Pass any other order(s) as the Hon'ble Tribunal may deem fit in the interest of justice, equity and good conscience."

These petitions relate to five heads which according to them would not come within the purview of the term 'Adjusted Gross Revenue'.

The said heads are:-

(1) Subscription Fee charges based on the pay channel broadcast channel.

(2) Commission to dealers and distributors.

(3) Installation charges.

(4) Taxes actually paid to the Central or State Government and

(5) FDs earned on the equity shares subscribed by the shareholders.

Indisputably, the question as to whether the respondent, despite the 'Exclusive Privilege' to grant the licenses for carrying out the telegraphic activities, as envisaged under Section 4 of the Indian Telegraph Act, would be entitled to calculate the Adjusted Gross Revenue (AGR) from the income of the licensees which are not connected with the 'licensed activities' came up

for consideration before this Tribunal in Petition No. 7 of 2003, (Association of Unified Telecom Service Providers of India (AUSPI) v. Union of India) and other analogous cases.

This Tribunal by a judgment and order dated 7.7.2006 held as under:-

"In our opinion, it would be doing violence to the section if we are to accept the argument of the learned counsel for the 1st respondent that words "as it thinks fit" found in the proviso would allow the Government to demand and collect a share of revenue from all the activities of the licensee irrespective of the fact whether such revenue is traceable to the revenue realized from the activities under the license or not."

The respondent aggrieved by and dissatisfied therewith, preferred an appeal before the Supreme Court of India. The said appeal, however, was dismissed by it, observing:-

"Heard the parties. Pursuant to the direction of the TDSAT in the impugned order, a fresh recommendation has been made by the TRAI. In view thereof, we see no reasons to interfere. The appeal is dismissed. The appellant is, however, given liberty to urge all the conditions raised in this petition before the TDSAT."

Relying on or on the basis of the observations made therein, the respondent, sought to raise the said contentions again before this Tribunal after the recommendations were made by the TRAI in terms of the directions of this Tribunal. The said contentions were not permitted to be raised. In its judgment and order dated 30.8.2007 passed in the aforementioned case, this Tribunal while re-affirming the principle of AGR as enunciated in its judgment dated 7.7.2006, opined:-

"The Tribunal in its judgment held that in our view the contention raised on behalf of Union of India cannot be accepted… thereafter, if the licensee is able to save some amount and invest it in some securities or mutual funds that cannot be said to be income from licensed activity…..Not being in the nature of pass through charges, they need not be deducted from the gross revenue."

This Tribunal noticed :-

"Thus for DTH the license fees should be applied on the adjusted gross revenue – i.e. total revenues excluding items that are of a pass through nature. This would also be consistent with the government's policy for the Telecom Sector to apply license fee on the adjusted gross revenue and not on the total revenue….Therefore the Authority recommends:

b) The principle of application of license fee on the AGR as in the case of telecom may also be followed. The AGR in case of DTH service should mean total revenue as reflected in the audited accounts from the operation of DTH, as reduced by

i) subscription fee charges passed on to the pay channel broadcasters;

ii) sale of hardware including integrated receiver decoder required for connectivity at the consumer premise;

iii) service/entertainment tax actually paid to the central/state government, if gross revenue had included them,

c) DTH operators shall have to carry out detailed accounting separation so that revenues accrued from the DTH operations and from other services, sale of hardware could be separated. The operator should follow the Accounting Separation guidelines issued by the Authority from time to time.

d) The DTH operator shall produce, on demand, all such books of accounts and documents which have bearing on the verification of revenue for the purpose of calculating license fee and auditing by the Comptroller and Auditor General of India in accordance with provisions of Section 16 of the Comptroller and Auditor General's (Duties, Powers and Conditions of Services) Act, 1971.

e) Necessary charges should be made to the license agreements to incorporate these charges."

This Tribunal opined that the payment of taxes etc should be reckoned on accrual basis in stead and place of actual basis. This Tribunal held:-

"As a result of this most service providers end up paying licence fee even on the uncollected portion of the service tax. DoT has supported the existing practice. The Authority concluded that service tax is not a revenue for the service provider but service provider is only a collecting agency on behalf of the Government. The inclusion and exclusion on this item should be on accrual basis."

The recommendations of the TRAI, to the effect that the judgment should not be given a prospective effect was, however, rejected. It was directed to be given effect from the date of filing of the respective petitions by the petitioners thereof.

We may, however, notice a distinct feature of this case. Whereas in the case of telecom license, TRAI had the occasion to consider as to what would constitute an AGR, having regard to the directions issued by this Tribunal in the aforementioned matters, it, however, even before the licenses had been granted to the petitioners herein, in exercise of its jurisdiction under Section 11(1)(a)(ii) made recommendations in that behalf on 1.10.2004. Recommendations were also made by the TRAI on 13.9.2006. The learned counsel for the parties have taken us through the said recommendations.

We may notice Section VII of the recommendations relating to rationalisation of the license fee and taxation. Upon taking into consideration the purpose for which the licenses were granted and having regard to the comments offered by the stakeholders, it was recommended as under:-

a) A reduction of 2% in the license fee for DTH as already proposed by the Authority in its recommendations on "Accelerated growth of internet and broadband penetrations", in line with the reduction in the license fee given for other telecom operators.

b) The principle of application of license fee on the Adjusted Gross Revenue (AGR) as in the case of telecom may also be followed. The AGR in case of DTH service should mean total revenue as reflected in the audited accounts from the operation of DTH, as reduced by

i) Subscription fee charges passed on to the pay channel broadcasters;

ii) Sale of hardware including integrated Receiver Decoder required for connectivity at the consumer premises;

iii) Service/Entertainment tax actually paid to the Central/State Government if gross revenue had included them."

We are referring to the said recommendations keeping in view the rival contentions which had been raised before us as to whether the same could be accepted or not.

We would, however, at an appropriate stage, take into consideration contentions of the parties in that behalf.

We may notice that Tata Sky Ltd., another DTH licensee, had moved this Tribunal for similar reliefs in Petition No. 129(C) of 2007.

By a judgment and order dated 12.8.2008, this Tribunal, while following the earlier judgments being dated 7.7.2006 and 30.8.2007, opined:-

"Following the judgment dated 7.7.06, TRAI made recommendations to the Government that the license fee is chargeable only on income from licensed activities but the Government has refused to follow these recommendations."

This Tribunal furthermore opined :-

"The result of the above discussion is that the legal issue as to whether the licence fee payable by the petitioner in the present case is to be calculated on the basis of total (Gross Revenue) of the petitioner or on the basis of revenue earned from licensed activities, is answered in favour of the petitioner and it is held that the concept of AGR as enunciated in the judgments of this Tribunal dated 7.7.06 and 30.8.07 in Petition No. 7 of 2003 shall apply in the present case. On the principles thus enunciated, AGR has to be calculated and the petitioner's liability to pay licence fee will be based on it. As already discussed, in the present case the revenue earned by the petitioner from sales of set top boxes and accessories is to form part of AGR besides the revenue earned under the head subscription, installation and service revenue. Dividend income has to be excluded while income from interest will depend on facts which the licensee will have to disclose to the Government. The impugned order dated 31.7.06 is set aside to the extent it directs that the petitioner is liable to pay license fee calculated on its entire gross revenue. The communication dated 12.6.07 calling upon the petitioner to pay the balance amount calculated as per order dated 31.7.06 is also accordingly set aside. The liability of the petitioner will be worked out by respondent on the basis of this judgment and the petitioner will discharge the same within time to be fixed by the respondent while intimating the liability. I hope the respondent will allow reasonable time to petitioner for making payment."

The petitioners of the said Petition filed a review application, which was marked as RA No. 5 of 2008 and an MA No. 155 of 2008. Inter alia on the ground that the said application was barred by limitation as also the same had not been properly verified, this Tribunal rejected the said Application, stating:

"From the side of petitioner a projection is being given that petitioner does not directly sell the STBs. It sells them to its distributor who in turn sells them to the new connection seekers. A spate account if maintained. To my mind, this does not make any difference. The petitioner is a DTH operator. Whether it gives connection through a distributor or directly, that will not make any difference so long as it is not disputed that without petitioner's STB, signals cannot be received i.e. STB is an integral part of the service.

The other point argued before me in support of the review application was that the petitioner claims benefit of pass through charges i.e. payment made by it to the broadcaster for obtaining the content regarding which no finding has allegedly been given in the judgment. In this behalf it is only to be pointed out that I have gone through the main petition filed by the petitioner wherein there the case now being pleaded has not been set up. During the course of hearing I had put it to the learned counsel for the petitioner about pleadings on this aspect. He was unable to point out anything except that reliance was place on a Telecom Regulatory Authority of India (TRAI) Report of 2004 which is filed as annexure to the main petition. TRAI recommendations are not binding on the Government. The point was not taken in the main petition. A review petition under Section 16 of the TRAI Act has to be decided on principles of Order 47 of CPC. It is settled law that in a review petition the party seeking review cannot bring on record fresh material or make out a fresh case nor is review a rehearing."

Aggrieved by and dissatisfied with the judgement dated 30.08.2002 the Union of India preferred an appeal before the Supreme Court of India. It is also not in dispute that the said Taka Sky Ltd has also preferred an Appeal before the Supreme Court of India.

However, we are not concerned therewith in the present petition.

The Union of India in its reply in the present matter, inter alia, contended—

(1) As the matter relating to AGR is pending decision before the Supreme Court of India the petitioner is required to pay license fee as per the license agreement and not as per the decisions of this Tribunal.

(2) The Union of India being the licensor and having the exclusive privilege to grant license, is entitled to obtain such a share in revenue earned by the licensees which would come within the purview of the definition of 'AGR' contained in the license.

(3) As the special leave has been granted by the Supreme Court of India, the respondent is entitled to raise all the contentions and as the matter is sub judice this Tribunal should not grant any relief to the petitioners.

(4) The principles of AGR as propounded by this Tribunal in the Telecom cases have no application in the case of the DTH operators.

Reliance in this behalf has also been placed on the revised recommendations of TRAI dated 15.7.08 wherein the contentions of the respondent have been accepted.

(5) The recommendations dated 13.4.2006 could not be given weightage over the subsequent recommendations dated 15.4.2008, being specific to the DTH broadcasting services.

Before proceeding to consider the respective submissions made by the learned counsel for the parties, we may notice the provisions of the relevant statutes.

The Telegraph Act was enacted in the year 1885 wherein Telecommunication Services has been defined in Section 2(1)(k) thereof in the following terms:-

> "Telecommunication service means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic mean but shall not include broadcasting services".

By reason of a notification issued in that behalf in 2004, the Central Government included the 'Broadcasting Services' within the purview of the definition of 'Telecommunication Services'. Part of the Act contained provisions relating to powers and functions of TRAI. We are concerned with the following provisions thereof:-

> "Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new license to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations;
>
> Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall, refer the recommendation

back to the Authority for its reconsideration and the Authority may within fifteen days from the date of receipt of such reference, forward to the Central Government the recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision."

We may also notice that this Tribunal in Star India Ltd Vs BSNL (Petition No. 172 of 2009 delivereid on 17.5.2010) held that broadcasting services having been brought within the purview of the "Telecommunication Services', for all intent and purport, would also come within the purview thereof.

In view of the 'Second Proviso' appended to the Sec. 11 of the Act, the Central Government is bound to obtain the opinion of TRAI in so far as the same relates to laying down of terms and conditions of license are concerned and were required to be in conformity with the recommendations of TRAI. Clause (a) of sub-Section (l) of Sec. 11, as noticed heretobefore, clearly postulates that TRAI has the jurisdiction either to make the recommendations suo moto or on being asked by the Central Government. The second proviso appended to Sec. 11 of the Act must, thus, be read with Sec. 11(1)(a)(ii)and(v) of the Act.

Obtaining of such recommendations being imperative in character, it inter alia, does not matter whether they are made suo moto or on the asking of the Central Government. The recommendations made by TRAI, which carry great weight, should, ordinarily, be accepted. Strong reasons must be assigned before rejecting the same by the Central Government although indisputably having regard to the provisions contained in sub-Section (2) of Sec. 11 of the Act, it has the requisite jurisdiction in relation thereto. The fifth proviso appended to Sec.11 of the Act, however, makes it clear that at least before rejecting the views

of TRAI which is an expert body, the matter must be referred back to it with its comments so that the same may be considered afresh by TRAI.

The Supreme Court of India in Cellular Operators Association of India vs. Union of India [(2003)3SCC 186] held as under:-

> "Due weight has to be attached both to the recommendations of TRAI which consist of an Expert body as well as to the recommendations of GOT-IT, a committee of eminent experts from different field of life which has been constituted by the Prime Minister. It further held that the regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit…… Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected…."

Also in P. No. 5 of 2002, in terms of its judgment dated 27.9.2003, this Tribunal made the following observations:-

> "Could it be said the Government can treat that recommendation as a scrap of paper and consign it to the waste paper basket? Certainly not. Otherwise also the Government will have to give reasons for not accepting the recommendations of the Authority, even if we accept the argument of Mr. Salve. Otherwise, the Authority will look absolutely ineffective and its functions can as well be performed by any of the Departments of the Central Government….. To us it appears that we have to adopt a constructive and purposeful approach in interpreting the provisions of Section 11 and we cannot accept

an argument which strikes at the bottom of very existence of the Authority. It is undeniable that Authority is an expert body constituted under the Act and it has been held to be so by the judgment of the Supreme Court in the case of Cellular Operators Association of India & Ors Vs. Union of India & Ors – (2003)3 SCC 186."

In regard to the question of jurisdiction of TRAI having regard to Second proviso, vis-à-vis the Fifth proviso, this Tribunal held—

The recommendations of the TRAI therefore were required to be given due weight.

We may also notice that the respondent has not brought any document to show that at any point of time, the recommendations offered by TRAI have been rejected.

In view of the decisions of the Supreme Court of India in COAI (supra) as also the decision of this Tribunal in Petition No. 5 of 2002 in COAI & Ors v. Union of India & Ors, there cannot be any doubt whatsoever that before the Central Government exercises its jurisdiction under sub Sec. (2) of Sec. 11 of the Act rejecting the recommendations of the TRAI, it is obligatory on its part to refer the matter back to the Authority at least once.

It is of some significance to note that the Central Government by a letter dated 17.3.2008, during pendency of the aforementioned petition of Tata Sky (supra) stated as under:-

"This is with reference to recommendations of TRAI dated the 1st October, 2004 on the issues relating to broadcasting and distribution of TV channels.

2. The recommendation No. 7.9 was regarding rationalization of license fee and taxation. After due consideration, it has been decided not to adopt the concept of AGR after allowing tax and other deductions as recommended by TRAI as allowing such deductions is likely to enable the companies to conceal their actual shareable revenue rather than making the system transparent. It has also been noted that TRAI has itself been proposing a percentage of gross revenue in the recommendations for other broadcasting services such as Mobile TV.

3. In view of the above, the Government has decided to reduce the license fee calculated as percentage of GR for DTH service providers to bring them at par with most of the other sectors. TRAI has recommended a license fee of 8% on AGR. Since it has been decided to impose fee on GR instead of AGR, it is therefore proposed to prescribe annual license fee as 6% of gross revenue instead of 10% of gross revenue as charged presently. It is frelt that this will be broadly in line with the proposal of TRAI (8% on AGR) in terms of actual revenue accruals to the Government. At the same time there will be ease in calculation and less scope for manipulating revenue figures.

4. TRAI is requested to furnish its comments on the above proposal of the Government at the earliest."

The said action on the part of the respondent was brought to the notice of this Tribunal. However, the respondent withdrew the same. It, therefore, is evident that at no point of time, the recommendations of TRAI were rejected.

If the principle of law, which is by now well settled, is that without giving due weight to the recommendations of an extra expert body, like TRAI, the Central Government cannot reject its recommendations, they must be held to be still operative. In that view of the matter, the licenses having been granted after the said recommendations were made, the respondent must be held to have complied with the principles laid down therein.

When a Statutory Authority performs its statutory functions, it is expected to know the law. It is bound to act in terms of the statute. At that point of time, thus, when licenses had been granted to the petitioners herein, as the said recommendations were in force having not been expressly rejected, the term AGR must be assigned the same meaning as has been recommended by TRAI. Moreover, we have noticed heretobefore that this Tribunal in terms of its judgment dated 7.7.2006 has already laid down the principles in respect thereof. It is also borne out from the records that the case of telecom operators had been extended to the cases by the DTH operators like the petitioner. If the respondent intends to take a different stand, it must do so before an appropriate forum, namely, before the Supreme Court of India.

It may be true that the principle of res judicata may not be held to be applicable as no finality has been reached in the matter of definition of AGR and/or the principles laid down by this Tribunal in the aforementioned cases. But it is also well settled that the principle of res judicata would apply to different stages of the same proceedings. (See Satyadhyan Ghosal & Ors v. Deorajin Debi (Smt) & Anr [AIR(1960)SC 941].

Even otherwise, this Tribunal in its judgment dated 30.8.2007 had rejected the contention viz., the question can be re-agitated again. Despite observations made by the Supreme Court of India, this Tribunal had not allowed the respondent to raise the said contentions once over again.

So far as that decision of this Tribunal is concerned, we are bound thereby.

The contention of the learned counsel for the respondent that this Tribunal has no jurisdiction as neither any demand had been raised nor any show cause notice has been issued, nor any objection on its part had been communicated and in any event no punitive action having been threatened, this petition is not maintainable in terms of Section 14 of the Act cannot be accepted. Section14 of the Act is required to be widely construed. The word 'any dispute' means all disputes.

The respondent, despite three judgments of the Tribunal have refused to extend the benefit thereof to the DTH operators, who, having regard to the fact that licenses had also been granted to them in terms of Sec. 4 of the Indian Telegraph Act, 1885, they, mutatis mutandis, would be deemed to be rendering the telecommunication services.

If the principle laid down in Tata Sky has not been given effect to and licensees even are being charged on the basis of the gross revenue earned by them, in our opinion, a dispute has arisen for determination thereof by this Tribunal in terms of Sec. 14

of the Act.

In COAI v. Union of India (Appeal No. 3 of 2006), this Tribunal has held that the jurisdiction of this Tribunal is wide in nature although a mere show cause notice by itself may not be stated to be a dispute.

(See also Star v. BSNL and U.O.I vs. Tata Teleservices [2007(7)SCC517]

The learned counsel would contend that an arbitration agreement having been entered into by and between the parties, this petition is not maintainable. This contention has also no merit in view of the decision of this Tribunal in Aircel Digilink Vs. Union of India (Disposed of on 6.1.05).

Submission of Mr.Gupta appearing on behalf of the respondent that we should invoke the concept of Gross Revenue cannot be accepted for more than one reasons. Firstly because the terms Gross Revenue and Adjusted Gross Revenue are separately defined. They are two different concepts. AGR relates to the activities which are confined to those related to telecommunication services.

Moreover, in Tata Sky (supra), this argument has clearly been rejected. The Supreme Court of India, admittedly, had not passed any order of stay. We, therefore, must proceed on the premise that the principles laid down therein should be applied.

We may, at the outset, notice that the learned counsel for the respondent was unable to raise any contention as to how the taxes and FDs earned on equity share would attract the principle of AGR, namely, activity which is necessary for rendering

telecommunication service.

The learned counsel would, however, contend that even if the principles laid down in Tata Sky case is to be applied this petition has no substance. The principles laid down therein, according to the learned counsel, are as under:-

(1) License fee to be determined on AGR.

(2) AGR would include only those activities for which license had been granted and

(3) What is necessary for rendering of service must form part of the licensed activities.

According to the learned counsel, in view of the third principle the contentions of the petitioner that the five items mentioned therein would not come within the purview of AGR must be decided.

The questions which now arise for consideration are as to whether in respect of the heads in question, the principles of AGR shall apply. The matter may be held to be not in controversy not only from the point of view of recommendations of the TRAI but also the decisions of this Tribunal.

We have noticed heretobefore that the recommendations postulate that the subscription charges should not form the basis for determining the revenue, an investment made or any tax admittedly paid by it, whether service or entertainment tax to the Central / State Government, should not be considered for determination of AGR. So far the principle laid down in respect of the commission is concerned, a question arises as to whether the expenses incurred on the aforementioned heads by a licensee should be treated to be business income. It may be so for the purpose of other statutes but the principle enunciated by this Tribunal in the aforementioned cases as also the recommendations made by TRAI, in our opinion, would lead to the conclusion that what is necessary, is that the licensees must earn revenue. What is meant by generation of revenue is not only receiving and spending the same. It would not come within the definition of AGR in terms of the conditions of licence. Furthermore, Gross Revenue is not Adjusted Gross Revenue. The distinction between the two terms is apparent, having been defined differently.

We have also noticed the relevant heads. So far as subscription fee which is paid by the DTH operators to the Broadcasters is concerned, the same does not add to the revenue it generates. It, in view of the decision of this Tribunal, does not come within the purview of licensed activities.

Subscription fee payable to the broadcasters in respect of pay channel may be a necessity, as has been contended by the learned counsel but the same, in our opinion, having regard to the provisions of the Section 4 of Indian Telegraph Act, would not be licensed activities nor would it come within the purview of the term ‘revenue realized.’

It is, as noticed heretobefore, covered by Sec. 7.9(b) of the TRAI recommendations.

So far as the commission paid to the dealers and distributors is concerned, it has been held to be a legitimate expenditure incurred by the service provider for the said purpose, which would not come within the purview of AGR. Such expenditure is not rendered as a necessary component of rendering service within the meaning of clause 3.1.1 of the license.

We may notice heretobelow the said principle, at the outset:-

> "In this context a particular mention needs to be made of income derived by petitioner from sale of set top boxes and accessories. In an application filed by the petitioner on 21st September, 2007 in this case, it had filed a copy of Form D which contains a statement of gross revenue of the petitioner under different heads for the year ending 31st March, 2007. This item regarding sales of set top boxes and accessories is mentioned in the said Form D. According to the petitioner income from this item needs to be excluded for purposes of calculation of license fee while according to the respondent the income derived from sale of these items must be included in the gross revenue for purpose of calculation of license fee.

We may, however, notice that according to the learned counsel for the respondent himself, the said principle was applied in respect of the Set Top Boxes. The principles laid down by the larger Bench of this Tribunal squarely rejected the contention

of the respondent that the activities of the licensee should be service based ones. It was categorically held :–

> "Similarly, payments received on behalf of third party should not form part of AGR. Such payments are meant to be passed on to the concerned party. It is a service being rendered to the customer whether on a small commission or otherwise. Such receipts do not form part of the revenue of the collecting service provider and, therefore, should not be included in AGR."

If, in the judgment of Tata Sky and the earlier judgments rendered by a larger Bench had not been considered, the same would not be binding on us.

It is in the aforementioned context that the recommendations of TRAI which were operative, had been taken into consideration by this Tribunal. In its judgment dated 26.8.2008. It may be pointed out that before this Tribunal, thus, only the recommendations of the TRAI dated 1.10.2004 were required to be taken into consideration and not the other one.

So far as installation charges are concerned, the amount received by the service provider is given back to the person who had installed it. It would not come within the purview of the licensed activity being no revenue having been realized thereby.

Commission and installation charges, thus, are squarely covered by the said licensees. The submissions of the learned counsel that if such a legitimate expenditure is excluded, it would give rise to the principle of Adjusted Net Revenue, may not be correct.

What would come within the purview of AGR had clearly been laid down in the three judgments of this Tribunal in term whereof, the expenditure incurred must not only be necessary for carrying out business by the licensee directly or indirectly but also must be intimately connected with the licensed activities. Some small expenditures, which may be incidental to carrying out the licensed activities may not strict sensu, fall within the purview thereof.

The installation charges, in view of the judgment of this Tribunal would also not form part of the revenue as the same are passed to the other parties responsible for installation.

The test which is to be applied is as to whether the DTH operators remain the payments received from the customers for those services or passed on to some other party.

If the DTH operator cannot retain that part of the AGR, which it is not obliged to include while computing AGR.

So far as the taxes which have been actually paid is concerned, TRAI in its recommendations has clearly stated that taxes whether paid to the Central or the State Government shall be excluded from the purview of AGR of the licence. This point is concluded by the judgement of the Tribunal and recommendations of TRAI dated 1.10.2004.

For the reasons aforementioned, these petitions are allowed with costs. Advocate's fees assessed at Rs. 50,000/- in each case.

……J

(S.B. Sinha)
Chairperson

……..
(G.D. Gaiha)
Member

……
(P.K. Rastogi)
Member