

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : August 17 , 2011

Petition No. 272 of 2011

Oil India Limited

...Petitioner

Vs.

Union of India & Anr.

...Respondents

BEFORE:

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON
HON'BLE MR.P.K. RASTOGI , MEMBER**

For Petitioner

: Mr.Gopal Jain & Mr. Navnit Kumar,
Advocates

For Respondent

: None.

J U D G M E N T

S.B. Sinha

The petitioner is a public sector undertaking. It applied for and was granted a license for carrying out NLD operations in terms of Section 4 of the Indian Telegraph Act, 1885 (the Act). It also was

granted ISP Registration Certificate. In terms of the said certificate only sum of Re.1.00 only was to be paid. It is not a licensee within the meaning of Section 4 of the Act. No license fee is also payable therefor. With the Registration Certificate granted to the petitioner dated 17.2.2003 a copy of the guidelines for registration of Infrastructure Provider Category-I was also annexed, clause 8 whereof reads as under:

"8.The IP-I registered company shall provide dark fibres, Right of Way, duct space, towers on lease/rent out/sale basis to the licensees of telecom services on mutually agreed terms and conditions."

The purpose of grant of such certificate, inter alia, is to establish and maintain the assets such as dark fiber, right of way, duct space and tower was to grant of lease/rent/sell basis to the licensees of the telecom services. According to the petitioner its activities under the IP-I Registration and NLD Service License are different being as under:

**ACTIVITIES CARRIED OUT BY THE PETITIONER /OIL INDIA LIMITED
UNDER ITS IP-I REGISTRATION AND NLD SERVICE LICENSE**

Serial No.	Activities Carried out under the IP-I Registration	Whether carried out under the NLD Service License	Activities carried out under the NLD Service License	Whether carried out under the IP-I Registration
1.	Dark Fibers	No	Switch bearer telecommunication services over long	No

			distance	
2.	Right of Way	No	Leased circuit (i.e. bandwidth)	No
3.	Duct Space	No		
4.	Tower	No		
5.	Co- location	No		

This petition was filed by the petitioner being aggrieved by and dissatisfied with an order dated 19.4.2011 levying a sum of Rs.74,20,037/- purported to be towards license fee being in the following terms:

"This concerns Annual Licence Fee assessment for the financial year 2007-08 and 2008-09 in respect NLD service.

2. I am directed to state that your representation dated 04-03-2011 on the above subject has been examined and it is conveyed that the Revenue from Telecom business (under IP-I) of Rs.620.17 lakhs shown in the Audited Reconciliation statement for the year 2008-09 has been CORRECTLY added back to the Gross Revenue in the four quarters and licensee fee @6% has been calculated on it.

3. The above mentioned license fee due is still outstanding. You are directed to remit the sum of Rs.74,20,037/- along with interest calculated up to the date of payment IMMEDIATELY.

4. DOT may however undertake examination of other records for these years at a later date.

5. This assessment is governed by the interim order of the Hon'ble Supreme Court of India dated 08.01.2008 and is subject to the final outcome of the AGR case."

The said amount purported to be upon determination of AGR includes revenue from dark fiber under IP-I is Rs.6,20,70,000/-.

Was the said amount payable to the respondent is the question?

It has been noticed heretofore that the impugned demand was made relying on or on the basis of a decision of this Tribunal dated 30.8.2007.

Indisputably the said matter is pending in appeal before the Supreme Court of India.

The question which arose for consideration therein was as to whether AGR could be calculated in respect of activities which are stricto sensu not licensed activities.

By a judgment and order dated 7.7.2006 passed in Petition No.7 of 2003, it was held:

“We have already noticed that under Section 4 of the Telegraph Act, Government has the power of transferring its privileges by way of licence to any person and to receive consideration of such payment as it thinks fit. According to the learned ASG the word “as it thinks fit” empowers the Government to levy such a licence fee as its thinks fit without any limitation. Therefore, if the Government incorporates a definition of AGR by which the Government is entitled to collect a percentage share from the gross revenue of the licensee irrespective of the source and nature of revenue the same is permissible. In other words, according to the learned counsel this wide power of collecting consideration “as it thinks fit” given to the Government in the proviso to Section 4 empowers the Central Government to

demand and collect a share from the revenue of the licensee irrespective of the fact whether such revenue is derived from licensed activity or not and only option the licensee has is to accept the offer or not. And once it accepts the offer, the same cannot be challenged. Petitioners dispute this proposition. We also think that this proposition is too wide to be accepted. We will have to first analyse what is the right of the Government that could be transferred under Section 4. A plain reading of this Section and its proviso shows the Government has the exclusive privilege of establishing, maintaining and working of a Telegraph (in this case, Telecommunication). Therefore, this right conferred under Section 4 of the Telegraph Act is confined to "establishing", "maintaining" and "working of a telecommunication". The scope of the licence does not go beyond the three activities mentioned therein. Proviso to that Section empowers the Central Government to transfer that privilege of establishing, maintaining or working of a telecommunication to any person by way of licence for consideration by such payments as the Government thinks fit. A careful reading of the Section indicates that the consideration contemplated therein is only for the privilege the Government has i.e. to establishing, maintaining or working of a telegraph and not beyond that. Therefore, if the Central Government thinks it fit to transfer this privilege for a fixed sum of money and the licensee accepts that demand, there can be no further dispute but if the Government chooses to take a percentage share of the gross revenue of the licensee as its consideration then it is logical to conclude that such sharing can be only of gross revenue derived from the transferred privilege of establishing, maintaining and working of telecommunication. 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 licence or not.”

The matter was referred to the TRAI for its recommendations as to whether some of the activities would come within the purview of the licensed activities. The TRAI made its recommendations pursuant thereto and by reason of a judgment and order dated 30.8.2007 the said recommendations were accepted, inter alia, opining:

“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.”

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“7.Income from sale/lease of Passive Infrastructure like towers, dark fibre etc.

The petitioner submitted that setting up of passive infrastructure like towers is not an activity which requires license. Even under the present scheme, the tower structure is being erected by independent parties and is being offered to service providers on rent. Similar activity when carried out by a service provider should not be treated as part of licensed activity. Therefore, revenue earned from rent/leasing out passive infrastructure should not form part of AGR. Petitioners also argued that renting/leasing of dark fibre, towers etc. is carried out by IP-1 Operators. These operators do not require any license. Therefore, it is a non-licensed activity and should be out of purview of AGR. According to TRAI, service providers create assets for establishing, maintaining and carrying out

telecom activities and capabilities to provide towers and dark fibres on rent emanate from licence. The licensees have special privilege like right of way which facilitates laying down of ducts and fibre. This facility is not available to independent/non-licensed operators. Accordingly, TRAI recommended that renting and leasing of passive infrastructures by service providers is part of normal telecom activity and should, therefore, be part of AGR. We agree with the reasoning of the TRAI and affirm its recommendation that revenue from rent of towers, dark fibres etc. should be part of AGR.”

This Tribunal, therefore, was of the opinion that the activities of a licensee so far as running/leasing of dark fiber and rent of towers are concerned, would be a part of normal telecom activity.

What was accepted was the recommendations of TRAI, which related to the activities of the licensees and not the activities of IP-I Registration holder.

The petitioner has furnished the following details.

“The revenue earned from the active service under the NLD during the period as under:

Year	Gross Revenue
2007-08	Nil
2008-09	Nil
2009-10	3.04 Lakhs

The petitioner, like other telecom licenses (unified service provider etc), NLD operators have to pay revenue share as license fee to DOT/Respondent No.1 under the regime of present National Telecom Policy of Government of India. The annual license fee for NLD operators is presently 6% of the Adjusted Gross Revenue (AGR). Given the above backdrop, the revenue from telecom services under IP-I need

not be shared with DOT and hence can be deducted from the total telecom revenue in the audited AGR statement for the years 2007-08 and 2008-09 to arrive at total revenue earnings from the NLD business and the same was nil. Therefore, since AGR under the NLD License was nil, for the periods of 2007-08 and 2008-09, no license fee was paid to DOT for the aforesaid period. It is pertinent to mention here that as per Clause-2 of the Schedule-I of the NLD Service license Agreement, NLD service refers only to: - a) Switch bearer telecommunications services over long distance and b) Leased circuit (i.e. bandwidth). These services do not include the lease of any telecom infrastructure such as dark fibre, tower etc. Therefore, the revenue earned from the leasing of telecom infrastructure e.g. dark fibre, co-location etc. under IP-I registration as in the case of the petitioner herein is not a part of the NLD revenue as services of dark fibre, co-location are not included in the definition of NLD services."

The impugned order of assessment of licensed activities of petitioner as a NLD licensee reads as under:

"Subject: Assessment of Annual Licence Fee dues for the Financial year 2007-08 and 2008-09 – M/s Oil India Ltd. – NLD Licence.

This concerns Annual Licence Fee assessment for the financial year 2007-08 and 2008-09 in respect NLD service. The Audited AGR statements, Audited Annual Accounts and Reconciliation Statement submitted by you for the financial year 2007-08 and 2008-09 have been taken into consideration for the assessment.

2. The summary of the assessment is as under: -

(a) Licensee fee dues pertaining to NLD service for the f.y. 2007-08 are "NIL"

- (b) The revenue from Telecom business (Under IP-1) has been taken for assessment of license fee as per TDSAT judgment dated 30-08-2007.
- (c) Since, "NIL" revenue, from NLD Business has been shown in the Audited Reconciliation statement for the year 2008-09, the Gross Revenue from Telecom business (under IP-I) of Rs.620.17 Lacs shown in the Audited Reconciliation statement for the year 2008-09 has been equally added back in the four quarters and licensee fee @6% has been calculated on it. The calculation sheet is enclosed herewith. Interest on the outstanding license fee has been calculated upto 31.01.2011.
- (d) The summary of outstanding dues on account of license fee pertaining to 2008-09 is as under

Fig. in Rs.

Interest due as on 31.1.2011	1,370,698
Principal due as on 31.01.2011	3,721,020
Total due as on 31.01.2011	5,091,718
Penalty and interest on penalty	2,328,319
Total Dues as on 31.01.2011	7,420,037

You are required to make payment of principal amount of Licence Fee, penalty and interest calculated upto 31-01-2011 amounting to Rs.74,20,037 (Rs.Seventy four lakhs twenty thousands thirty seven only) within seven (7) days of the issue of this letter.

4. DoT may however undertake examination of other records for these years at a later date.

5. The presnet assessment and demand is subject to the outcome of AGR case pending in Hon'ble Supreme Court of India."

In passing the said order of assessment the revenue from telecom business (under IP-I) had been taken into consideration. What has, however, not been taken into consideration is that grant of a registration certificate was not and could not be treated to be a grant of a license within the meaning of the Proviso appended to Section 4 of the Act.

This Tribunal was not concerned with the amount which was to be paid by the IP Registration holder. It's activities thereunder were not the activities of a licensee under the 1885 Act.

The Respondent has filed a reply wherein a contention has been raised that the communication dated 19.4.2011 has been issued on account of the outstanding license fee for the financial year 2007-2008 and 2008-2009. We may notice that the petitioner, inter alia, has raised a contention that providing services of basic telecom infrastructure like dark fiber, co-location etc. having been initiated much prior to the revenue earned therefrom, and the NLD service licenses are totally independent and distinct from each other.

It was furthermore contended:

"i. The expression Revenue as defined in Clause 31 of the NLD Service License Agreement dated December 27, 2007 clearly stipulates that it covers

revenue income accruing by way of providing NLD services under the license. The same will not include the revenue generated from the activities carried out under a IP-I registration. Therefore, the impugned decision of DOT/Respondents herein is totally erroneous and deserved to be quashed.

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n. The DOT has itself stated in its demand notice dated January 9, 2011 and the impugned decision dated April, 19, 2011 that the said demand is subject to the final outcome of the AGR case pending before the Hon'ble Supreme Court of India. Given this backdrop, it would have been appropriate for DOT not to enforce its demand till the issue is finally decided by the Hon'ble Apex Court. Furthermore, it is submitted before this Hon'ble Court that till date the Petitioner has been paying license fee@6% of the AGR earned from the services as defined in Clause 2 of Schedule-1 of the NLD License Agreement dated December 27, 2007 except for the periods of 2007-08 and 2008-09 where the revenue under the NLD Service License was nil and the same position has continued for the last three years. The status quo should not be altered till the final outcome of the AGR case. The Respondents herein should await the final decision of the Hon'ble Supreme Court."

The Respondent in its reply did not traverse the said grounds. It merely relied upon the judgment of this Tribunal.

At the time of hearing nobody appeared on behalf of the respondent.

Mr. Gopal Jain, learned counsel appearing on behalf of the petitioner would submit that the impugned demand is without any authority of law and thus must be set aside.

We, having regard to the materials brought on record, find substance in the said contention. The activities which were required to be taken into consideration for the purpose of assessing the licensee fee were the activities of a licensee. Activities in terms of a registration certificate ex facie are not the activities of a licensee; the same being distinct and separate ones.

The activities of a certificate holder of IP-I Registration being not the activities carried out by a licensee, the same would not be subject to payment of any license fee while assessing an NLD licensee. The respondent has wrongly included revenue of another concern and, thus, the same, prima facie, is contrary to the order of this Tribunal dated 7.7.2006 which we are informed at the Bar has been upheld by the Supreme Court of India.

So far as the judgment of this Tribunal dated 30.8.2007 is concerned, the same is pending decision before the Supreme Court of India. The respondent itself has issued the impugned demand relying on or on the basis of the said judgment dated 30.8.2007, but at the same time raised a contention that the impugned demand would be subject to the result of the Supreme Court judgment.

The impugned demand, therefore, to the said extent is self contradictory and inconsistent.

For the reasons aforementioned, the impugned demand subject to any decision of the Supreme Court of India is clearly unsustainable.

This petition is allowed.

In the facts and circumstances of the case, however, there shall be no order as to costs.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

August 17, 2011
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