

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

DATED 26th May, 2011

PETITION NO.115 OF 2010

Aircel Limited, Chennai
Versus
Union of India &
Anr.

... Petitioner

... Respondents

PETITION No.116 OF 2010

(With MA Nos.132, 133 & 222 of 2010)

Aircel
Limited

...Petitioner

Versus
Union
Anr.

of India and
... Respondents

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.Meet Malhotra, Sr. Advocate with
Mr.Ravi S.S. Chauhan, Advocate

For Respondent (UOI) : Mr. Vineet Malhotra, Advocate
Mr. K. Singhal, Advocate
Mr. Siddharth Mittal, Advocate

JUDGMENT

P. K. Rastogi, Member

By way of the present Petition No.115 of 2010, the Petitioner is seeking refund/ adjustment of an excess amount of Rs.1,23,16,223/- (One Crore twenty three lakhs sixteen thousand two hundred and thirty three) paid to the respondents over and above the license fee as per the terms of the license conditions. In Petition No. 116 of 2010, the petitioner is seeking refund / adjustment of an excess amount of Rs.1,01,76,343/-. These two petitions have been heard together as the parties to both the petitions are same and issues involved are similar. While Petition No. 115 of 2010 pertains to rest of Tamil Nadu Circle, Petition No. 116 of 2010 relates to Chennai circle. We are taking up the facts and issues from Petition No. 115 of 2010 in detail.

2. The Petitioner is a Cellular Mobile Telephony Service (CMTS) provider engaged in the business of providing, inter alia, Cellular Mobile Telephone Services in Rest of Tamil Nadu Circle (ROTN) service areas of operation under the License granted to the petitioner company, by Department of Telecommunication (DoT). The Petitioner herein was granted CMTS License on 22.05.1998.

3. According to the petitioner as per the terms of the license, it regularly pays the required percentage of the said assessed AGR as the license fee in advance for every financial year. Thereafter the petitioner company submits the Audited AGR statement, Reconciliation Statements & Audited Annual Accounts with the respondent no. 1 for assessment and/or reassessment of the Adjusted Gross Revenue (AGR) for the preceding financial year. The respondent no.1 thereafter assesses the same and, if required, sets up demand note(s) for the payment of additional license fee if there is a

perceived difference in the revenue share required to be paid, as per the calculations of DoT/respondent.

4. There does not appear to be any fixed time limit for the respondent no. 1 in which the assessment and/or reassessment of the annual license fee for the preceding financial year is to be completed. The respondent no. 1 if comes to the conclusion that while assessing the documents (Audited AGR Statement, Audited Annual Accounts etc) submitted by the petitioner, may again assess (re-assessment) the same and accordingly set up an additional demand note upon the petitioner. The respondent keeps the account of the petitioner (read CMTS/UASL licensee) for the payment of the license fee, which is said to be a continuing and running one till the assessment and/or reassessment for a particular financial year is complete or till there is a full & final reconciliation of the accounts on the basis of the audited AGR statement & annual accounts. If the respondent no.1, after assessing and/or reassessing the audited AGR statement & annual accounts comes to the conclusion that the petitioner has paid an excess license fee over and above what is required under the license terms, the respondent may adjust the same against the future license fee.

5. The petitioner was also one of the petitioners in Petition 82 of 2005 wherein this Tribunal vide its judgement dated 30.08.2007 had gone into the entire gamut regarding as to what all activities of the licensees would be considered for the calculation of Adjusted Gross Revenue (AGR). The petitioner as well as the respondent has preferred an appeal against the abovesaid judgement before the Hon'ble Supreme Court of India and the matter is pending before it. The Hon'ble Supreme Court has not stayed the

judgment dated 30.08.2007 but vide interim order had stayed the adjustment of accounts if any as per the judgement dated 30.08.2007 of this Tribunal.

6. The petitioner further submits that the excess amount paid to the respondent by the petitioner is purely on account of calculation errors rather than on any differences in the definition of AGR etc. In other words AGR definition & attendant controversy is not an issue in the present case; excess amount has been paid on such issues like including roaming revenues twice over, standard deduction has not been allowed, non deduction of roaming charges passed on to others etc. Actually, the petitioner has paid excess amount as was apparent from the external audit report for the following financial years over and above the license fee legally payable in terms of the license. The year wise details regarding the excess payment made and their respective demand letters along with the relevant documents are mentioned herein below:-

(A) FINANCIAL YEAR 2002-2003

An amount of Rs.57,88,057/- alongwith interest @ SBI PLR plus 5% from April 2003 till the date of settlement has been paid in excess as the license fee as per the audited AGR for the 2002-2003 . The petitioner vide its letter dated 27-10-2009 requested the respondent for the refund of an excess payment of Rs.57,88,057/-.

(B) FINANCIAL YEAR 2003-2004

An amount of Rs. 16,14,765/- alongwith interest @ SBI PLR plus 5% from December 2005 till date of settlement has been paid in excess as the license fee as per the audited AGR for the 2003-

2004. The petitioner vide its letter dated 27-10-2009 requested the respondent for the refund of an excess payment of Rs. 16,14,765 /- .

(C) FINANCIAL YEAR 2005-2006:

An amount of Rs 49,13,411/- alongwith interest @ SBI PLR plus 5% from April 2008 till the date of settlement has been paid in excess as the license fee as per the audited AGR for the 2005-2006 . The petitioner vide its letter dated 27-10-2009 requested the respondent for the refund of an excess payment of Rs. 49,13,411 /- .

7. According to the submission of the petitioner, it was entitled to seek a refund/adjustment of the total amount mentioned herein below for the respective financial years on the basis of the demand letters by the petitioner based on the external auditor's report in respect of the statement of Revenue and Licensee fee: -

<u>YEARS</u>	<u>FINANCIAL RECOVERABLE AMOUNTS</u> (SBI PLR +5%)
(a) 2002-2003	Rs. 57,88,057/-
(b) 2003-2004	Rs. 6,14,765/-
(c) 2005-2006	Rs. 49,13,411/-
Total	Rs.1,23,16,223/-

interest was claimed till
October 2009

8. The respondent on the other hand submitted that the annual assessment of license fee for any particular year can only be carried out if all the documents/ details and clarifications are submitted by the licensee. In the present case, the licensee was directed to submit the details of amount paid

to other operators as deductions claimed through Audited statement of Revenue and License Fee for the year 2004-05. The Licensee submitted the documents for annual assessment of license fee for the F.Y 2004-05 only on 10.03.2007 and the assessment was completed on 13.03.2007 and the shortfall was communicated to the petitioner on the very same day.

The license fee has to be paid by the petitioner/licensee on a self assessment basis in terms of the license agreement. It is only when the amounts paid on self assessment by the licensees are found to be incorrect that the respondent department goes into the assessment and figures provided by the licensee and does a complete reassessment of the figures and calculations provided by the licensee.

9. According to the respondent the petitioner was not entitled to receive any refund as the amounts have been paid by the petitioner themselves on a self assessment basis and on upon a demand raised by the respondent. If a demand was incorrect or there were any calculation error the petitioner/licensee was entitled to provide the correct details and have the demand rectified.

10. The respondent did not agree with the calculation made by the petitioner about the excess payment. In turn it submitted the year-wise details as below :

Financial year 2002-03: The petitioner has paid the demanded sum of Rs. 34,41,436/- (Rs.27,57,200/- as principal outstanding and interest on short paid amount Rs. 6,84,236/-) on account of annual assessment of License

Fee for the year 2002-03. The petitioner has not paid Rs. 57,88,057/- in excess for the year 2002-03.

The licensee petitioner has mentioned the following in the 2 (I) (iii) of the statement of Revenue and License Fee for the year 2002-03:

Description	Qr.1	Qr.2	Qr.3	Qr.4	Total
Roaming Revenue from own subscriber visiting other networks including STD/ISD/pass thru charges for transmission of incoming call during roaming	72,42,588	1,02,60,064	1,08,82,536	1,39,46,653	4,25,31,841

On the deduction side, B-Deduct (2), the following has been claimed as deductions on account of Roaming Revenue:

Description	Qr.1	Qr.2	Qr.3	Qr.4	Total
Roaming Revenue actually passed on to other CMSPs and GMPCs service providers. (Operator wise)	72,42,588	1,02,60,064	1,08,82,536	1,39,46,653	4,25,31,841

In the statement, the same quarterly amount of roaming revenue from own subscribers has been actually passed on to other service providers. How could a Service provider pass on the entire amount of revenue to other service providers earned on account of the same service?

During the meeting between the representative of the Licensee petitioner Shri DVS Rajan and the Director (LF), the former was asked to clarify its stand as to how the entire quarterly amount of roaming revenue earned could be passed on to other service providers. It never turned up to

explain. In the meeting, it was agreed to make the payment of dues and interest on delayed payment and the licensee petitioner made the payment with interest comprising of dues of Rs. 27,57,200/- and interest of Rs. 6,84,236/- for the period April 2003 to August 2004.

Financial year 2003-04: The respondent has not agreed that there was an excess of Rs. 23,46,621/- paid during the year 2002-03 by the petitioner.

There was no excess available with the Department for the year 2002-03 to be set off against the dues for the year 2003-04. The annual assessment of License Fee was carried with a shortfall of Rs. 39,61,386/- which was later paid by the Licensee petitioner.

Financial year 2005-06: The Telecom licensees are required to furnish operator wise details of PSTN/roaming charges paid to other telecom operators. Such amount paid by the Licensee is claimed by them as deductions from the Gross Revenue. These claimed deductions are made through Audited statement of Revenue and License Fee. While making the annual assessment of License Fee for the financial year 2004-05, the amounts claimed as deductions were provisionally allowed with the directions to submit the duly audited quarter wise operator wise details of deductions claimed within a stipulated period. The quarter-wise operator-wise audited details were sought so as to back up the claimed deductions and the same was as per the provisions of the extant License Agreements.

It may be noted that in accordance with the provisions of the License Agreement, every License Fee assessment order for the financial years 1999-00 to 2003-04, the Licensee has been directed to submit the duly audited, quarter-wise, operator-wise details of PSTN/ Roaming revenue paid to other operators during the concerned financial years. However, the requisite details as above, so as to back up the claimed deductions (made through Audited statement of Revenue and License Fee for the respective years) have not been submitted yet.

On the basis of assessment made after receipt of duly audited, quarter-wise, operator-wise details of PSTN/ Roaming revenue paid to other operators during the concerned financial years, It was found that there has been a shortfall of License Fee for the year 2004-05 and 2005-06 calculated on the basis of AGR arrived at by DoT.

The alleged excess paid as license fee of Rs. 49,13,411/- as per the Audited AGR for the year 2005-06 comprises of the following:

Description	Amounts Disallowed
Disallowance of PSTN related call charges	38,86,739
Disallowance of Roaming Revenue	2,36,06,010
Wrong addition of certain items of revenue (considered twice)	3,27,59,326
Total	6,02,52,075
License Fee @ 8% of the above	49,13,411

If a demand was incorrect or there were any calculation errors, the petitioner/licensee was entitled to provide the correct details and have the demand rectified.

11. However, the petitioner explained that prior to the year 2004-2005, the IUC and Roaming expenses were deducted on accrual basis. From the year 2004-2005, as per DoT requirements the methodology of claiming IUC and Roaming deduction was changed from accrual to actual payment basis. As per the fixed calendar of licence fee payment, Aircel had for the year 2004-2005 and 2005-2006 computed the AGR after deducting IUC and Roaming payments on accrual basis and discharged the liability in full. Later DoT communicated that IUC and Roaming deduction is to be done on actual payments basis. Hence, based on DOT requirements, Aircel had submitted to DoT the audited statement of actual payment made to IUC and Roaming partners. Thereafter DoT had reassessed the AGR for year 2004-2005 and 2005-2006 on the basis of actual payment and where the difference between accrual and payment is beneficial to DoT that has been considered and where it is beneficial to petitioner the same was ignored by DoT.

In the case of the petitioner since the revised claim is higher than the original claim payment made, DoT has considered only the original claim, thus DoT is liable to refund the license fee on the differential amount for which petitioner is legally entitled and which DoT has illegally not accounted for.

The petitioner company was always ready and willing to reconcile its statement of accounts with the respondent for the financial years in which an excess payment has been made.

12. The petitioner company is seeking refund/recovery of the excess amount paid on account of issues like inclusion of roaming revenue twice

over, standard deduction not been allowed, non-deduction of roaming charges passed onto others etc. and not on account of any difference in the definition of AGR which is the subject matter in Petition no. 82 of 2005.

13. There are two issues to be considered before us in these petitions:

(a) Whether the petitioner has made excess payment of licence fee for the year 2002-03, 2003-04, and 2005-06 and is eligible for refund of the said amount alongwith interest.

(b) Whether the request for refund of the excess payment made is covered by limitation period.

14. Regarding limitation period, Shri Meet Malhotra, learned senior counsel for the petitioner agreed that the demand of refund for excess amount for the year 2002-03 and 2003-04 is covered by limitation, if the period of 3 years from the date of payment and the date of this petition is calculated. However, he submitted that the limitation period will not be applicable in these cases as the life of licence is 20 years and the Government has the right of making adjustment of short or excess payment any time. Therefore, the licensee also has a right to claim the refund of the fee anytime, if paid in excess.

15. We are not in agreement with the contention of the learned counsel of the petitioner. If the petitioner paid the excess payment even under protest and forgot about it for more than 3 years, we are of the opinion that it did not have any right to raise the issue in the Court. For the year 2002-03, the

respondent finalized the AGR in respect of the petitioner's licence for Tamil Nadu service area on 02.08.2004 and requested the petitioner to make the payment of Rs. 27,27,200/- alongwith further interest upto the actual date of payment. The said letter reads as under :

“Based on the information received from your end regarding calculation of Adjusted Gross Revenue for the financial year 2002-03, the following figures are provisionally arrived at :

Period	AGR	Revenue share due	Revenue share paid	Difference	Interest on delayed payments calculated upto 15.4.03	Penalty, if any alongwith interest calculated upto 31.3.04
A	B	C	D	E	F	
2002-03	1,97,17,75,933	23,66,13,112	23,38,55,912	27,57,200	0	0
TOTAL	1,97,17,75,933	23,66,13,112	23,38,55,912	27,57,200	0	0

(Rs. 27,57,200)

Total principal + interest due as on 15.4.2003 is Rs. 27,57,200 (Total of Column E+F). It may please be noted that the above amount is due after including interest calculated only upto 15.4.2003 and further interest is payable till the date of actual payment.

A. Roaming revenue actually passed on to other CMSPs and GMPCS service providers have been added back to arrive at the AGR since the same has been reduced twice.

The following information is required to be furnished for finalizing your licence fee as revenue share for the FY 2002-03.

1. It may be clarified as to whether Sales Tax and Service Tax bill has been included in the income as reflected in the P&L account of the company. This may be submitted duly certified by the statutory auditors.
2. Quarter wise details of PSTN call related charges actually passed on to the service providers and roaming charges actually passed on to other service providers. In the financial year 2002-03 is required to be submitted, duly audited by the statutory auditors.
3. Quarter wise details of rebates, discount and waivers, other than those agreed to with customers as per contracted bill plans filed with the TRAI may be furnished, duly audited by the statutory auditors. The discounts, rebates etc. (Quarter wise) given to franchisees/agents etc. may also be provided duly audited by statutory auditors.
4. The quarter wise amounts of service tax /sales tax billed and the quarter wise amounts of service tax actually deposited with the Government may be submitted, duly certified by the statutory auditors.

You are requested to make the payment of Rs. 27,57,200/- alongwith further interest upto the actual date of payment within 10 days of the issue of this letter, which action in terms of the licence agreement shall be initiated without any further notice.”

The petitioner paid the said amount by pay order on 27.09.2004. It, however, raised an issue that the respondent has calculated the amount wrongly. After this, the petitioner kept quiet for about 5 years. It is only on 27th October 2009, it requested the respondent to refund the excess amount of Rs. 57,88,057/- made by the petitioner to the respondent.

16. For the year 2003-04, the Department of Telecommunications assessed the license fee in the year 2005 and communicated to the petitioner by their letter dated 18.11.2005. The petitioner was directed to remit the amount of Rs. 29,61,386/- for the year 2003-04. The petitioner paid the same

amount on 08.12.2005 under protest. The petitioner's letter dated 8.12.2005 reads as under:

"We have paid today Rs. 39,61,386/- being the amount claimed vide your letter dated 18th Nov 2005 and acknowledgment obtained from Department of Telecommunications is enclosed for your immediate reference. This amount is being paid under protest without admitting any liability, since we have discharged the revenue share liability for the year 2003-04 in full."

Again the petitioner kept quiet for almost 4 long years and requested for refund only on 27.10.2009. The relevant portion of the letter reads as under :

"Kindly refer to our letter dated December 8th 2005 and your letter dated 18th Nov 2005, wherein you disallowed an excess payment of Rs. 2,346,621/- for the financial year 2002-03 and disallowed the same for set off against the dues for the year 2003-04. We have paid the same alongwith interest of Rs. 1,614,765/- under protest on December 8th, 2005.

We are enclosing herewith the copy of our letter dated December 8th, 2005 duly acknowledged by DOT, copy of demand draft no. 120019 dtd. Dec 08th 2005 and copy of letter dtd. Nov 18th 2005.

We are now request you to finalise the assessment for the year 2003-04 and refund the excess payments of Rs. 1,614,765/- made by us alongwith interest payable as per licence agreement (SBI PLR +5%) from Dec 2005 till the date of settlement."

17. This petition has been filed on 27th September 2010. We are of the opinion that the petitioner's claim for excess amount of AGR for the year 2002-03 and 2003-04 is barred by limitation period and cannot be allowed. In view of aforementioned findings, we have not dealt the issue on merit.

18. For the year 2005-2006, the respondent communicated to the petitioner the reassessment of licence fee vide their letter dated 13.03.2007 and reminded it on 20.04.2007. According to the assessment, the petitioner was to pay an amount of Rs. 38,07,056/- as licence fee alongwith interest calculated upto 31.03.2007. According to the petitioner, excess licence fee was paid to the extent of Rs. 49,13,411/- for the year 2005-06. The petitioner wrote a letter to the respondent on 27.10.2009 for refund of the excess amount alongwith interest as per licence agreement. The petitioner has claimed excess amount which was paid due to following :

Description	Amounts Disallowed
Disallowance of PSTN related call charges	38,86,739
Disallowance of Roaming Revenue	2,36,06,010
Wrong addition of certain items of revenue (considered twice)	3,27,59,326
Total	6,02,52,075
License Fee @ 8% of the above	49,13,411

According to the respondent, if a demand was incorrect or there were any calculation error, the petitioner licence was entitled to provide the correct details and have the demand rectified.

19. We find that the respondent is ready to reconcile the accounts for the period 2005-06 with the petitioner. In our view it is necessary to reconcile the accounts of the petitioner and the respondent in the light of the decision of this Tribunal. The Respondent may ask for the requisite details and informations from the petitioner within four weeks. Such informations may be furnished within two weeks thereafter. The petitioner may provide all informations and particulars, if required by the respondent, in accordance with the license

conditions. The respondent will consider all the aspects and take decision in accordance with the TDSAT Judgment dated 30.08.2007 in Petition No. 82 of 2005 and determine the excess amount, if any, upon reconciliation of the accounts within six weeks thereafter. For the said purpose the authorized representatives of the parties may also meet. Further action should be in accordance with the interim directions of the Hon'ble Supreme Court of India wherein it was directed that "no adjustment shall be made in the meanwhile."

20. This order shall however, be subject to any order which may be passed by the Hon'ble Supreme Court of India in the pending appeal.

Petition No. 116 of 2010

21. In the Petition No. 116 of 2010, the Petitioner has sought a refund/adjustment of the total amount mentioned below for the respective financial years for Chennai Metro Service areas of operations :

<u>"FINANCIAL YEARS</u>		<u>RECOVERABLE AMOUNTS</u>	
		(SBI PLR +5%)	
(a)	2002-2003		Rs. 35,81,934/-
(b)	2003-2004		Rs. 3,84,132/-
(c)	2004-2005		Rs. 31,96,130/-
(d)	2005-2006		Rs. 28,11,339/-
			(Rs.1,94,473/-+ Rs. 26,16,866/-)
(e)	2007-2008		Rs. 28,19,674/-
	Total	Rs.	1,27,93,209/-

interest is claimed till October 2009"

22. We have perused the records and find that the claim of refund for the year 2002-2003, 2003-04 and 2004-05 is barred by limitation. For the year 2005-06, we direct to follow the principle enunciated at paras 19 and 20 above. For the Financial year 2007-2008, the claim is premature as according to the respondent, the assessment of that year is yet to be finalized.

23. These petitions are disposed of with aforementioned observations. In the facts and circumstances of the cases, there shall be no order for the cost.

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

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

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

/NC/