

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

**Dated: July 17, 2012**

**Petition No.404 of 2011**

Bharti Airtel Ltd. ... Petitioner

Versus

Department of Telecommunication ... Respondent

**Petition No.412 of 2011**

(M.A.No. 278 of 2011)

Idea Cellular Ltd. ... Petitioner

Versus

Union of India ... Respondent

**Petition No.442 of 2011**

Vodafone Mobile Services Ltd. ... Petitioner

Versus

Union of India ... Respondent

**BEFORE:**

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

For Petitioners

:Mr. Maninder Singh, Sr. Advocate  
Mr. Navin Chawla, Advocate  
Mr. Kaushik Mishra, Advocate

For Respondent

:Ms. Maneesha Dhir, Advocate  
Mr. K.P.S. Kohli, Advocate  
Mr. Abhishek Kumar, Advocate for

## **Judgment**

### **Introduction**

These three petitions, involving common questions of law and fact as regards interpretation of the agreements entered into by and between the Petitioners with some agencies as to whether the terms thereof are violative of the conditions of license granted in their favour, were heard together and are being disposed of by this common judgment.

2. The relevant facts involved in each case shall be noticed separately, hereinafter but the fact of the matter involved in the case of 'Vodafone' would be considered in some details.

3. In these petitions, the Petitioners, who have been granted licenses by the Respondent herein in terms of the proviso appended to Section 4 of the Indian Telegraph Act, 1885 (The 1885 Act) have approached this Tribunal being aggrieved by and dissatisfied with the orders of the Respondent passed on diverse dates whereby and whereunder penalty for a sum of Rs.50.00 crores have been levied on each of them.

**Background Fact:**

4. Vodafone Mobile Services Ltd. (hereinafter called and referred to for the sake of brevity as `Vodafone') was granted a license on 16.3.2005.

Bharti Airtel Ltd. (hereinafter called and referred as `Bharti') was granted a license on or about 30.11.1994.

Idea Cellular Ltd. (hereinafter called and referred as `Idea') was granted a license on or about 5.10.2001.

Airtel and Idea were granted CMTS licenses but they subsequently migrated to the UAS License regime. It appears that `Vodafone' continued to possess the CMTS license.

**Re: Vodafone**

5. `Vodafone' on or about 10.7.2003 entered into a purported agreement appointing M/s Matrix Cellular Services Pvt. Ltd. (hereinafter called and referred to for the sake of brevity as `Matrix'), as its agent.

The said agreement was entered into inter alia for the purpose of acquiring new post-paid subscribers by Matrix.

It also granted bulk connections of more than 10,000 phones purported to be for their own use.

6. The Petitioner contends which has not been denied or disputed by the Respondent that on or about 27.7.2007 at the instance of

Matrix itself more than 9309 connections, the list thereof, was annexed to Matrix's letter dated 27.7.2007 were deactivated.

7. One Shri Harish Kumar of VTM Cell, Delhi sent an E-mail to one Mr. Gulshan Arora of the Petitioner seeking certain informations which were provided by it in terms of an e-mail dated 8.8.2007.

8. It however, appears that prior thereto, i.e, on 1.8.2007, the Respondent had already issued a letter to `Matrix' asking it to supply certain informations. The said informations were furnished by `Matrix' on 8.8.2007, from a perusal whereof it appears that the officers of parties had met on 3.8.2007.

We may notice the contents of said letter dated 8.8.2007.

"Dear Sir,

This is in continuation to our meeting of 3<sup>rd</sup> august 2007 on the above referred letter from your office.

As desired, the following documents are submitted herewith:

1. Copy of the agreement between Matrix Cellular Services and HEMSL under which Matrix is an agent of HEMSL to acquire postpaid subscribers and ensure 100% collection.
2. Details of the mobile connections activated by HEMSI, through Matrix Cellular Services under the said Agreement. The enclosed mobile connections are active as on date and please note that all the documents including photo, photo ID, Customer Agreement Form, Address proof are collected and given to HEMSL by us. The subscribers are of

HEMSL and the bills to the subscribers are raised. By HEMSL only.

3. The subscribers are of the HEMSL and bills to the subscribers are raised by HEMSL.
4. Details of the amount collected by us on behalf of HEMSL against the above said invoices and reimbursed to HEMSL.
5. We do not receive bill from HEMSL for the customers acquired by HEMSL.
6. Copies of tariff plan as regards to above.
7. Copy of the approved Customer Agreement Form as regards to above.

In addition, there are certain connections which are acquired by matrix Cellular Services in its name and out of these, few are given by us on temporary basis to the known persons for temporary use. We take proper measures to ensure traceability and identify of such persons. We submit that we are law abiding company adopting transparent and fair trade practices. To the best of our knowledge, our activities are as per the law of the land not engaged in establishing or maintaining the telegraph. However, without prejudice, we submit that in view of your above referred letter, we have decided to stop/suspend this activity till the matter is resolved.”

9. On or about 7.8.2007, one Mr. Anuj Jain of the Petitioner sent an E-mail to `Matrix' in response to the letter of the Respondent dated 27.7.2007, stating:

“There are many working/non-working connections activated in the name of Matrix Cellular Services. Since there are too many such connections, we request you to please look into the usage & users of these connections at your end.

In the mean time we are suspending/temporarily disconnecting such connections.”

10. The Respondent, however, did not seek for any other or further clarification from the Petitioner nor did it take any action with regard thereto.

A Show-cause notice was issued to the Petitioner only on 27.5.2009 contending that having regard to the fact that it had entered into an agreement with `Matrix`, who further had provided SIM cards to others for rental use, it should furnish the details of the amount collected by `Matrix` from the end-users.

In the said notice, the details of 10,090 connections were purported to be annexed but in fact were not.

The Petitioner replied to the said letter by its letter dated 8.6.2009 *inter-alia* contending that it had not received the list of 10,090 connections whereupon the said list was furnished upon the Respondent on 27.4.2009.

11. Another notice was issued on 27.8.2009.

We may notice some of the relevant paragraphs thereof.

“8). AND WHEREAS VTM Unit Delhi investigated the matter and on enquiry/correspondence with MCSPL found out that M/s MCSPL rented out Sim cards out of bulk connections taken from M/s VEMSL, used their own Customer Application Forms (CAF), used their own tariff, hidden subscriber detail base information to M/s VEMSL, not followed the instructions of DOT For subscriber identity verification etc.

9).AND WHEREAS M/s MCSPL was directly collecting money from the customers for post paid mobile connections as on rental basis against the invoices raised by M/s MCSPL which is more than what M/s VEMSL is getting from M/s MCSPL and the money being collected by M/s MCSPL should have been reflected in the revenue of M/s VEMSL which should be taken into consideration for Adjusted Gross Revenue (AGR ) purpose which is not happening thereby causing a loss of revenue to government of India as in the forms of License Fees.

10.)AND WHEREAS M/s was carrying out the entire activities like a like a Mobile Service Provider with fixation of their own (CAF), Bill and Tariff Plan, roaming rated, support services, bill collection, customer care, risks and Credit management, etc. all under the purported agreement with M/s VEMSL, i.e. M/s VEMSL has passed on the right to provide the telecom services to M/s MCSPL although MCSPL is not authorized by DoT to do so violating the License Agreement clause which inter-alia stated that "the LICENSEE will not assign or transfer its right in any manner whatsoever under the license to a third party or enter into any agreement for sub-license and/or partnership relation to any subject matter of the licence to any third party either in whole or in part i.e. no sub-leasing/partnership/third party interest shall be created"....

14).AND WHEREAS M//s Vodafone Essar Mobile Services Limited (VEMSL) issued 10090 bulk mobile connections in the name of company as 'M/s Matrix Cellular Services Pvt. Ltd.

And address as '7, Khullar farm, Mandi Road Mehrauli, New Delhi.' Further VTM Cell Delhi directed M/s Matrix Cellular Services Pvt. Ltd. Vide letter no. VTMD-2007-41 dated 30<sup>th</sup> august 2007 to stop renting of Domestic Sim Cards. Further it is observed from the database of M/s Vodafone Essar Mobile Service Limited (VEMSL) submitted to VTM Cell for the month of April 2008 that 380 new mobile connection were working in the name of M/s Matrix Cellular Services Pvt. Ltd. And address as '7, Khullar farm, Mandi Road Mehrauli, New Delhi'. These were used for further renting to the individuals under the

purported agreement between M/s ICL and M/s LSC. It further concluded that M/s Cellular Services Pvt. Ltd. Continued to do the business of renting of SIM Cards under the patronage of M/s VEMSL.

15). AND WHEREAS it was revealed by IB that Service Providers have change subscribers details of SIM cards provided by the rental companies even though the date of activation remained the same (i.e. as earlier). During the reinvestigation it was found that out of 129 mobile nos. one mobile was working in the name of "Mr. Ramesh Thappa", another one mobile was working in the name of "Mr. Sumit Khanna, Limco /sales" and remaining 127 mobiles were working in the name of rental company namely M/s Matrix. These 129 mobiles were further analyzed in the subscriber's database of June 2007 and March 2009 of M/s Vodafone. In the subscriber's database of June 2007, out 129 mobile nos., 4 mobile nos. were not available in database and out of 125 mobile nos., 56 mobile nos. were working in the name of rental company namely M/s Matrix and one mobile was working in the name of rental company namely M/s Limco Sales Corporation. The remaining 68 mobile nos. were working in the name of either embassy or individual/company name. In the subscriber's database of March 2009, out of 129 mobiles, 42 mobiles were not found. Out of remaining 87 mobiles, two mobile were working in the name of rental company namely M/s Matrix and one mobile was in the name of "Mr. Sumit Khanna, Limco Sales" and remaining 84 mobiles were in the name of either embassy or individuals/company name. the date of activation for these 84 mobiles was also compared in subscriber's database of June 2007 and March 2009 and it was observed that 6 mobile nos. has same date of activation though the name and address has changed in place of rental company namely M/s Matrix embassy. It was also observed that those (48) nos. were working in the name of various embassies have the date of activation same in both databases but it is somewhere in the year of 2002 or 2003. From this may be presumed that these mobiles nos. may be initially working in the name if rental companies as indicated by IB in their complaint and further shifted

in the name of various embassies and accordingly name and address has been changed in the database but the date of activation may be same as in the subscriber's database bring analyzed by IB. as the TERM Cell Delhi does not have the subscriber's database M/s Vodafone before June 2007 in which these nos. may be working in the name of rental companies and date of activation may be same as in the subscriber's database of June 2007 and March 2009.

Para 15 of the said notice, thus, contains only two names; one of Mr. Ramesh Thapa and another of Mr. Sumit Khanna of 'LIMCO Sales'.

It is stated that Mr. Sumit Khanna had been of 'LIMCO Sales' was the agent of 'Idea'. We must however, hasten to add that Ms. Dhir, on instructions, submitted that the said Mr. Khanna had indeed taken on rent a SIM Card from Matrix.

12. The said two numbers were mentioned out of 129 connections. The rest 127 were said to be working in the name of Matrix. In the said notice, it was alleged that the Petitioner violated Clauses 5.13, 5.14, 7.1, 8 and 9 of the license agreement.

13. On or about 20.8.2009, a Show-Cause Notice was also issued to 'Matrix' stating:-

"4. And whereas during the course of investigation VTM cell Delhi acquired hutch postpaid mobile no. 9873435271, sim no. 00056390876 and mobile no. 9873081876, Sim no. 00055789854 from the representatives of M/s MCSPL on the tariff plan sent by M/s. MCSPL (Annex-1).

10. And whereas as per the agreement between M/s Huchison Mobile Service Ltd and M/s Matrix Cellular Services Pvt. Ltd. , for acquiring new post paid subscribers M/s MCSPL shall cause the new postpaid subscribers to duly fill and sign a Consumer Application Form as provided by M/s HEMSL. M/s HEMSL's Consumer Application Form would state that M/s MCSPL is a specialized consumer management unit of M/s HEMSL. A copy of M/s HEMSL's Consumer Application Form (Annexure) is annexed to and forms part of the agreement. M/s MCSPL shall also obtain the subscribers photograph and other identification proofs in accordance with the directives issued by Department of Telecommunications, Government of India, from time to time. M/s HEMSL shall provide to M/s MCSPL copy for such directions enforce and shall forthwith notify to M/s MCSPL of all and any amendment In the said direction enforced and shall forthwith notify to M/s MCSPL of all and any amendment in said document. All duly completed M/s HEMSL's Consumer Application Forms and other documents shall be countersigned by M/s MCSPL authorized representative and shall be submitted to authorized person of M/s HEMSL for activation of new connection.

14. On analysis of total subscriber's database till 31<sup>st</sup> July 2007 of M/s HEMSL, by VTM it was found that 10145 (Ten Thousand One Hundred Forty Five Only) Bulk Postpaid connections are working in name of company name as 'Matrix Cellular Services Pvt. Ltd.' During the course of investigation by VTM Delhi, it was intimated by M/s MCSPL that only 27811 Prepaid connections are active and working in the network of M/s HEMSL. On the analysis of these 27811 mobile numbers with the 10145 Bulk connection issued in name/address of M/s MCSPL it was found that only 836 mobile numbers are reported by M/s MCSPL to VTM Delhi. It means that information of about 9309 mobile connections were not provided to VTM Cell Delhi. The two mobile numbers i.e. 98734345261 and 98730811876 which were taken on rental basis from M/s MCSPL by VTM Cell Delhi are among 9309 mobile connections in the figure indicated above. Therefore it concludes that 9309 mobile connections

are being used by M/s MCSPL for providing the postpaid mobile services to end users on rental basis. It is worth mentioning here that no Information was shared with VTM Cell Delhi by M/s MCSPL with respect to 9309 mobile connections or rather there was no information available to the end users of these mobile connections either with M/s MCSPL or M/s HEMSL. This again is serious threat to security of the Nation.”

14. Matrix filed its reply thereto on 3.9.2009. It is of some significance to note that the Respondent presumably with a view to explain the fact as to why it had not taken any action for a long time, in a letter dated 8.9.2009 addressed to Matrix stated as under:-

“2. The reply received from M/s. MTSPL is taken as final and it is presumed that M/S. MTPSL has nothing more to add

3. No further correspondence by the VTM cell, Delhi does not mean that the issue is satisfactory addressed and settled as referred in Para 1 of your letter

5. The Department of Telecommunication may take suitable action as deemed fit after considering all input and replies given by M/s. MCPSL.”

In the said letter, it was furthermore mentioned that the principles of Natural Justice had purportedly been complied with.

15. The Petitioner in this petition has also raised a contention that instead and in place of taking any action against `Matrix`, it had been granted permission to provide international SIM card service by the Respondent.

16. Respondent in its reply submitted:

“V-Z. That the contents of Ground V to Z of this petition are wrong and denied. It is submitted that the petitioner is violated the terms and conditions of the license agreement. It is submitted that matrix was not a mere distribution channels is amply demonstrated from the fact that these companies had fixed their own CAF, Bill and Tariff Plans, Roaming Rates, Support Services Bill collection, Customer Care, Risk and Credit Management etc. and this was being done by these companies under the agreement entered by them with the petitioner. It is therefore submitted that the petitioner had violated the conditions of its license and hence the penalty has been rightly imposed by the respondent for its violation.”

17. The Petitioner moreover has placed on record two undertakings of M/s Matrix issued in its favour stating that it had not been renting out and would not in future rent out the sim-cards issued to it.

18. The Petitioner filed its reply to the Respondent’s aforementioned Notice dated 27.8.2009 in terms of its letter dated 11.9.2009.

In para 2 thereof the relevant provisions of the agreement were reproduced.

In para 3 it was contended that in terms of the said agreement, in the event it is found that any violation of the condition of license has taken place, the primary responsibility was that of the Matrix.

Mention was also made to the undertakings furnished by ‘Matrix’.

It was however, stated:-

“4. That if at all, Matrix was engaging itself in any resale activity, the same was neither in the

knowledge of Vodafone nor it had any consent/permission, either express or implied, from Vodafone.”

19. In paragraph 5 of the show-cause Notice, the Petitioner reproduced the relevant paragraphs from its notice dated 20.8.2009 addressed to `Matrix' to show that it has been accepted therein that it had not supplied the requisite informations with regard to the telephone numbers which were allegedly given on rent by it.

20. In paragraph 6 of the said cause shown by the Petitioner thereto it was inter-alia stated that the DOT acknowledged and admitted that primary obligation was that of Matrix.

It had furthermore been stated that all the informations supplied by Matrix was put on the database of the Petitioner.

According to it, the two numbers, i.e, 9873435261 and 9873081876 were procured by Matrix in its own name.

21. It was contended that `Vodafone' has not assigned or transferred its rights in favour of `Matrix'.

It was furthermore stated:-

“11. It may be noted that in about August, 2007, Vodafone had disconnected about 7850 sim cards/connections of Matrix. We have examined the list of 10145 connections as given by DoT and state that majority of such connections i.e. 9442 are already deactivated, most of them in 2007, and the remaining 691 numbers are either in name of individuals or in name of Matrix. In fact, since Vodafone is a law abiding Company, it also procured an undertaking from Matrix to the effect that Matrix confirmed and undertook that connection acquired in the name of Matrix were being used for official

purposes by employees of Matrix and to specifically confirm that such connections were not being used for any renting purposes of domestic sims. Copies of the said undertakings of Matrix dated 02.04.08 and 29.06.2009 are annexed hereto and marked as Annexure-4."

"14. In case Matrix was engaged in renting of domestic SIM cards and having its own tariff plans, as mentioned in your letter, then Matrix also need to give an explanation. The same has been done without Vodafone's permission or knowledge. There is neither any violation by Vodafone of any of the license condition nor Vodafone has caused any alleged loss to the Government. As a service provider Vodafone cannot be made liable for any use or misuse of the telephone facility by a subscriber. In fact, Vodafone's customer agreement prohibits unauthorized use of the services. The Customer Agreement Form further provides that the user of telecom shall under no circumstance be attributed to the company and the customer (Matrix in the present case) shall be solely responsible for the same. Matrix is in business of telephony related services and should be aware that such alleged rental of telephone service is not permitted by DoT. Further, under customer agreement form, Matrix has undertaken to comply with all instruction issued by DoT. Even as per Indian Telegraph Rules a subscriber shall be personally responsible for use of his telephone, including any improper use. Therefore, it is Matrix who will be responsible for any unauthorized use of telephone services. (A copy of terms and condition of a customer agreement form is annexed hereto and marked as Annexure -5)."

The Petitioner also asked for an opportunity of personal hearing.

22. On or about 18.1.2010, the Respondent herein issued another Notice to the Petitioner, the relevant paragraphs whereof read as under:-

"AND WHEREAS during the process of investigation, VTM Cell Delhi acquired two SIM Cards on Rental

basis from M/s MCSPL in the name of Harish Kumar which were among the 10145 bulk connections. The Subscriber Database of VEMSL is not having the name and address of the end user of these mobile numbers 9873435261, 9873081876 which were taken by VTM Cell Delhi in the name of Harish Kumar. These mobile numbers were actually under the name of 'Matrix Cellular Services Pvt. Ltd.' And address as '7, Khullar Farm, Mandi Road, Mehrauli, New Delhi and same has been reflected in M/s HEMSL's Database. Further findings of VTM Cell indicate that these numbers were provisioned within the ambit of said agreement because the agreed and prescribed CAF between M/s MCSPL and M/s VEMSL has been filled against the above numbers. Thus M/s MCSPL is providing the postpaid connections on rental basis i.e. transferring the SIM Cards registered in their name to the end user for monetary gain in connivance with M/s HEMSL under the purported agreement. Hence M/s HEMSL has violated clause 31.2 of CMTS License Agreement. M/s VEMSL has failed to comply the condition 5.13 of Amendment dated 12<sup>th</sup> August 2002 while executing the agreement with M/s MCSPL. It is worth mentioning here that VTM Cell Delhi directed M/s MCSPL on dated 30-aug-2007 to stop renting the domestic SIM Cards with immediate effect. VTM Cell Delhi, subsequently during investigation in May 2008 found that many mobile connections have the same date of activation but the name and address changed in subscribes database updated till 30<sup>th</sup> April, 2008. Even some of the mobile numbers are transferred in different names having address of other rental companies like M/s Limco. As these connections which were earlier being used either on renting basis by transferee are now permanently transferred to them after VTM Cell intervention. The spirit behind transfer is not correct in these cases. M/s HEMSL has not taken the due care while approving their endorses to such transfers."

23. In the said show-Cause Notice it was alleged that the Petitioner and Matrix had connived with each other by entering into the said agreement. It was furthermore alleged that the Petitioner has not

taken due care and caution and thus violated Clause 5.13 of the License Agreement.

Therein it was furthermore stated that the reply of the Petitioner dated 11.9.2009 was not 'satisfactory' having not provided for any documentary evidence except those which were already on record in defence of the alleged violations.

The operative part of the said notice reads as under:-

"Accordingly, M/s Vodafone Essar Mobile Services Limited is directed to show-cause to explain within 21 working days from issue of this notice as to why appropriate action according to condition 15.1 and 15.8 of schedule C part-III of License Agreement should not be initiated against the company for violation of terms and conditions of the License agreement. If no reply is received within the above stated time-limit it shall be presumed that M/s Vodafone Essar Mobile Services Limited has nothing to say in the matter and appropriate action may be initiated against the company as per terms and conditions of License Agreement. M/s Vodafone Essar Mobile Services Limited is also directed to take into account of the money collected by M/s MCSPL from the customers based on their invoices generate as the part of the company's AGR and intimate the details to the DoT."

24. The Petitioner filed a show cause thereto on or about 15.3.2010.

A prayer for personal hearing was again made therein.

25. In the aforementioned backdrop of events, the effect of the impugned order dated 1.11.2011 is required to be considered.

Most of the contents of the said order tally with those in the show cause notice.

We may notice only the paragraphs 22 and 23 of the said order:

“22. AND WHEREAS M/s Vodafone Essar Mobile Services Ltd. was issued show-cause notice on 18.01.2010 to explain within 21 working days from issue of this notice as to why appropriate action according to condition 15.1 and condition 15.8 of the CMTS License agreement should not be initiated against the company for the violation of terms and conditions of license agreement. And M/s VEMSL was also directed to take into account of the money collected by M/s MCSPL from customers based on their invoices generated as part of the company’s AGR and intimate the details to the DoT. The reply received from M/s Vodafone Essar Mobile service limited vide the details to the DoT. The reply received from M/s Vodafone Essar Mobile services Limited vide letter no. Ref.no.G5-B5(D)/03-10/01 dated 15/16 March 2010 against Show Cause Notice dated 18.01.2010 have been examined and the same has been found unsatisfactory as M/s Vodafone Essar Mobile services limited have not been able to establish compliance to license condition questioned in the show cause notice dated 18.01.2010

23. NOW THEREFORE as per the CMTS license agreement condition 15.8, a penalty of Rupees Fifty Crores (Rs. 50 Crores) is hereby imposed on M/s Vodafone Essar Mobile services Limited for violation of condition mentioned in above paras. M/s Vodafone Essar Mobile services Limited for violation of license is directed to deposit the penalty amount immediately and in any case within 15 days of the date of the notice by means of demand draft/ banker’s cheque drawn on any scheduled bank in favour of PAO, Department of Telecom Headquarter New Delhi 110001, in the pay and Account Office of the Department of Telecommunication at New Delhi.”

26. This petition has been filed praying inter-alia for the following reliefs:-

“(a) Set aside and quash the impugned Demand Notice bearing No.842-951/2007-AS-IV dated 1<sup>st</sup> November, 2011 issued by the Respondent;

(b) Pass an ad-interim ex-parte order staying the operation of the impugned Demand Notice bearing No.842-951/2007-AS-IV dated 1<sup>st</sup> November, 2011 issued by the Respondent;

(c) Pass such other and further orders(s) in favour of the Petitioner and against the Respondent as may be deemed fit and proper in the facts and circumstances of the case.”

27. The Respondent in its reply stated that the matter had been enquired into and/or investigated by its Vigilance Cell in 2007, on the question as to whether the Petitioners have violated the terms and conditions of the license and submitted its report on or about 6.9.2007.

We may notice the relevant part of the said purported findings of the Vigilance Cell under the heading ‘Finding and Salient Observation’ wherein it was stated:-

“2. On the base of telephonically sample check of 27811 customers it was found that the customers are getting the Bill Invoice from the M/s HEMSL with an instruction to deposit the amount of in favour of M/s MCSPL. M/s MCSPL is getting the commission for these customers as per agreement. This is as per the scope/terms and conditions of the agreement between M/s HEMSL and M/s MCSPL.”

Some of its recommendations are as under:-

1. “The notice may be issued to M/s HEMSL for the violations stated above.
2. M/s HEMSL may be instructed to withdraw these connections immediately.
3. A penalty of at least Rs. 10090000/- (Rs. One Crore Ninety Thousands Only) assuming Rs. 1000 per

connections for 10090 bulk postpaid connections may be levied on M/s HEMSL on account of giving these connections for rental use to the M/s Matrix Cellular Service Pvt. Ltd. Renting is not allowed as per terms and conditions of the License. The subscriber verification of the persons who are taking these connections on rent from the M/s Matrix without proper documentation is never being carried out.

4. A suitable penalty as per the CMTS License may be levied on to M/s HEMSL in addition to above penalty on the account of the violations stated above.”

28. The contention of the Petitioner is that it had no knowledge of the purported activities of `Matrix' so far as giving on rental the sim-cards issued to it is concerned.

29. It was furthermore stated that the principles of Natural Justice was not complied with by the Respondent prior to passing of the impugned order. It may, however, be noticed that a purported admission of `Matrix' has been referred to in a letter dated 16.11.2011.

The Petitioner has filed a rejoinder thereto.

**Re: Idea**

30. The Petitioner entered into an agreement with M/s LIMCO Service Corporation Ltd. (LIMCO) whereby and whereunder 3640 sim-cards were provided to it as a Bulk consumer over a period of 3 years.

31. An investigation was started against `LIMCO' in the year 2007 by the DOT.

According to the Petitioner, the number of sim-cards given to LIMCO came down to 390 as the rest of them were surrendered.

The Petitioner however, was not apprised of the matter relating to renting out of the SIM cards by `Limco`.

By a letter dated 27.5.2009, the Respondent called upon the Petitioner to furnish details of the amount collected by `LIMCO` from its end subscribers.

However, the said Notice referred to the purported relationship of the Petitioner with Matrix Cellular Internationals Services Pvt. Ltd. with which, it now stands admitted, the Petitioner had no contractual relationship.

It is stated by the Respondent that reference to Matrix was a typographical error.

A show cause notice was issued to the Petitioner on or about 27.8.2008 wherein inter-alia the principal clauses contained in the agreement purported to have been entered into by it with `LIMCO` were mentioned.

According to the Petitioner, it did not have a copy of the said agreement. It is also contended that the Respondent did not, despite knowledge supply a copy thereof to the Petitioner.

The Petitioner filed its show-cause on 15.9.2009. It also called upon `LIMCO` to furnish the requisite particulars in response whereto the latter by its letter dated 7.10.2009 contended that it had already complied with the requirements of the terms of the agreement.

According to the Petitioner the agreement between it and LIMCO was terminated on 2.2.2010.

32. Without determining the controversy between the parties at that stage, the Respondent again served a second Show Cause Notice on or about 18.1.2010 wherein fresh allegations were made to the following effect:-

“AND WHEREAS the above act of M/s Idea Cellular Limited is the violation of the various terms and conditions/amendments including clauses 41.13, 44.14, 9.1, 6.1, 17.1 and 31.2 of the License Agreement and other instructions issued by the Licensor and TRAI from time to time in the subject matter.”

33. Cause was shown thereto by the Petitioner on or about 15.2.2010.

We may notice paragraph 4 thereof:

“Please recall that the local TERM cell had raised some queries viz. customer details etc. relating to our business arrangements with M/s LIMCO in 2006/07. As desired, all required details, as available, were submitted to the satisfaction of the TERM cell at the point of time. M/s LIMCO has also informed us that they had responded to all DoT queries on the subject. Subsequently no correspondence or query or advice was received by us on this issue, until May 2009. Therefore, it was our understanding that DoT was satisfied with the responses submitted. Please note that Idea continued to show M/s LIMCO in its monthly subscriber submissions to the TERM Cell and no information was ever withheld. We reiterate that we are not aware of any specific direction issued by DoT on nature of services being provided-whether proper/improper or otherwise till its letter of May 2009. Apparently, the DoT held the

arrangement to be compliant after 2006/07, but is revising its opinion in 2009/10.”

Thereafter the impugned order dated 12.10.2011 was passed.

Recitals 8 and 10 of the said order are as under:

“8. AND WHEARES it was brought to notice of the licensor that M/s Limco Services Corporation (LSC) reported to be taking bulk mobile connections from M/s Idea Cellular Limited and further renting out these mobile connections to individuals.

10. AND WHEARES M/s Limco Sales Corporation (LSC) is post-paid SIM cards of M/s Idea Cellular Limited (ICL) on rental basis to customers in Delhi Metro Services area under purported agreement dated 11<sup>th</sup> Nov.2004 at New Delhi between M/s ICL and M/s LSC. It has been stated in the agreement that:

- i. M/s LSC has agreed to take more than 100 connections from M/s ICL and would be taking more in future.
- ii. M/s LSC would be carrying out the business of sub renting the connections of M/s ICL.
- iii. M/s LSC has agreed to sub rent the connections only after having made proper verifications of the credentials of its clients to whom the connections have been so sub- rented and in no case M/s ICL shall be held responsible for any misuse of connections.
- iv. M/s LSC shall be provided with the call details for the billing of its customers.
- v. M/s LSC has agreed to pay the monthly bills raised by M/s ICL by the end of the due date.
- vi. M/s LSC has furnished a security of Rs. One lakh only for due performance and observations of terms and conditions of this agreement.

M/s IDEA cellular Limited (ICL) has issued 3640 bulk post-paid connections in the name of Mr Sumit Khanna and his company name " Limco Sales Corporation" having address: 88, Yashwant Place, Chanakyapuri, New Delhi , on account of giving these connection for rental use. Renting of SIM cards is not permitted M/s LSC was carrying out the entire activity like a mobile service provider with fixation of their own (CAF), bill in traffic plan, roaming rates, support services bill correction, customer care, risk and credit management etc all under the purported agreement with M/s ICL i.e. M/s ICL has passed on the right to provide the telecom service to M/s LSC and created third party interest although LSC is not authorised by DoT to do so violating the licence agreement clause which inter alia states that "the LICENCEE shall not, without the prior written consent as described below, of the LICENCOR, either directly or indirectly, assigned or transfer this LICENCE in any manner whatsoever to a third party or enter into any agreement for sub licence and / or partnership relating to any subject matter of the LICENCE to any third party either in whole or in part i.e. no sub leasing / partnership /third party interest shall be created. Provided that the LICENCEE can always employ or appoint agents and employees for provision of the service".

The Petitioner however, contends that such a case as mentioned in para 8 of the said order had not been put to it.

**Re: Bharti Airtel**

34. Bharti entered into two agreements, one with M/s Galaxy Rental Tel. Pvt. Ltd. (hereinafter called and referred to as Galaxy) on or about 21.7.1999 and the other on or about 3.4.2000 with Delhi Super Trade Pvt. Ltd. the predecessor in interest of FBRPL (hereinafter called and referred to as Falcon).

35. The scope of work provided for in the said agreements reads as under:

"2. SCOPE OF WORK

- i) The First Party hereby appoints and authorizes the Second Party to provide the SIM Card and Hand Sets for being given on rent to the customers to allow them to avail the Cellular Phone Services for short periods, on non-exclusive basis, in the territory of NCT of Delhi. The First party reserves the right to appoint any other services and marketing agency in the above territory.
- ii) In addition to the above the Second Party will also do the following:
  - a) Identify the potential customers and make available to them the services of providing SIM card/handsets on rent.
  - b) Endeavour to promote the business interest of the First party.
  - c) Assist the First Party in various promotional schemes identified and launched by the First Party.
  - d) Assist in advertising the products and services of the First Party.
  - e) Supply periodical reports, returns and other information relating to the products and services, market conditions, customers taste and preferences and such other information as may be of interest to the First Party and desired by them.
  - f) To carry on marketing activity.
  - g) To train the operators of the FIRST PARTY, as and when requested."

36. The agreement of `Falcon' was renewed by the Petitioner on or about 2.7.2003 with effect from 31.3.2003.

The Respondent herein asked `Galaxy' to furnish its Article of Association, `Permission document from DoT to rent SIM Cards' and the agreements between it and the Petitioner.

37. The Respondent also directed its VRM Cell to look into the matter and submit a report.

A report was submitted by the said Cell on or about 1.10.2007, recommending:

"Recommendation

In view of the above violations the following recommendations are proposed:-

1. M/s BAL may be instructed to withdraw these bulk connections immediately.
2. A penalty of at least Rs.1000 x 2788 (721 bulk mobile connection issued in the name of M/s GRTPL and 2047 bulk mobile connection issued in the name of M/s FBRPL) may be levied on M/s BAL on account of giving the bulk connections for rental use to the M/s FBRPL and M/s GRTPL. Renting is not allowed as per terms and conditions of the License.
3. The money being collected by M/s FBRPL and M/s GRTPL should have been reflected in the revenue of M/s BAL and it should have been taken in to account for AGR purpose by M/s BAL which may not be happening in the current case. So the loss to the government, if any may be recovered from M/s BAL."

38. The Petitioner contends that the agreements with `Falcon' and `Galaxy' were terminated upon issuance of three months' notice in

terms of the said agreements, which was communicated to the Respondent by its letter dated 30.10.2007.

39. On or about 27.8.2009 a notice was issued whereby the Petitioner was asked to show cause as to why action shall not be taken against it; paragraph 13 whereof reads as under:

"13. AND WHEREAS M/s. Bharti Airtel Ltd. issued 741 and 2047 bulk mobile connections in the name of M/s GRTPL and M/s. FBRPL respectively. Further VTM Cell Delhi directed M/s. FBRPL and M/s GRTPL vide letter no. VTMD-2007-36 dated 11<sup>th</sup> September 2007 and letter no. VTMD-2007-38 dated 23<sup>rd</sup> July 2007 respectively to stop the renting of Domestic SIM Cards. Further it is observed from the database of M/s Bharti Cellular Ltd. submitted VTM Cell for the month of May 2008 that 105 & 90 new mobile connections were working in the name of FBRPL or DSTPL & GRTPL which means M/s FBRPL and GRTPL continued to do the business of renting of SIM Cards. Why M/s FBRPL did not stop renting of Domestic cards in-spite of directions from VTM Cell Delhi."

(Emphasis supplied)

40. The Petitioner submitted a reply thereto, wherein inter alia it was contended:

"We had been charging our customers as per the tariffs published and filed with TRAI from time to time and at no point of time did we charge any customer apart from the applicable tariffs. The entire amount billed to our customers, including M/s Falcon Business Resources Pvt. Ltd. (FBRPL) and M/s Galaxy Rent-a-Tel Pvt. Ltd. (GRTPL) has been included in the AGR of the respective financial years and license fee thereon has duly been paid and, therefore, no loss has been caused to the Government in any manner, whatsoever. Further, at no stage did we pass on any right to provide the telecom services to M/s FBRPL and M/s GRTPL. The services to the customers, all along, continued to be

provided by the Company and these agencies i.e. M/s FBRPL and M/s GRTPL were merely acting as a distribution channel for the issuance of SIM Cards under the agreement referred to in your letter dated 27.8.2009.

The entire amount charged and collected by the Company from M/s FBRPL and M/s GRTPL having been taken into account as a part of the AGR, it cannot be said that any loss has been caused to the Government of India.

It would be pertinent to mention that we have already terminated the agreements with M/s FBRPL and M/s GRTPL referred to your letter dated 27.8.2009 way back in the year 2007 vide letters dated 26.10.2007, copies whereof are provided at Annexure-1 for your reference.”

An additional reply was also filed by the Petitioner on 17.9.2009.

41. Yet again a second show cause notice was issued by the Respondent on or about 18.1.2010, the relevant portions whereof read thus:

“During the course of investigation by VTM Cell, Delhi, it has been informed by M/s BAL that Plan - 599 was given to M/s FBRPL and M/s GRTPL who had further rented out the SIM Cards to the individuals at tariffs different from the Plan-599. The detail of Plan-599 is as under

“Monthly fixed charges: 599	
Local (Airtel to all mobiles)	50P/Min
(Airtel to others)	Rs. 1/Min
STD (Airtel to Airtel mobiles)	Rs.2
(Airtel to others)	Rs. 2.40
ISD Group- I	Rs.6.40
Group- II	Rs.9.20
ROW	Rs.40.00
SMS Local	Rs.1
National	Rs.2
International	Rs.5

Pulse Communication and Management Services was providing web-services for promoting the rental business of M/s GRTPL. AS per the communication received from PCM, M/s GRTPL was charging the amount of Rs.150/- per day for renting of SIM Cards with STD/ISD facility and an amount of Rs.175/- per day for SIM Cards with roaming facility in the year 2000. The other call charges given in the offer letter by Galaxy are as under:

- 1.Rs. 9 per minute for local calls.
- 2.Roaming as per Airtel actual billing + DoT Tax.
3. 10% service Charges on calls +30% service charges on roaming calls.

This clearly indicates that tariff plans (filed in TRAI) conveyed by M/s. BAL were not the one the rental companies were charging from the customers. Similarly M/s FBRPL was also renting out SIM Cards to individual at tariff different from the Plan-599.

Hence, M/s BAL has violated the provision of the agreement which inter alia states that "The LICENSEE will charge the tariffs for the SERVICE as per the Tariff orders/regulations/directions issued by TRAI from time to time. The LICENSEE shall also fulfil requirements regarding publication of tariffs, notifications and provision of information as directed by TRAI through its orders/regulations/directions issued from time to time as per the provisions of TRAI Act, 1997 as amended from time to time.

AND WHEREAS as per UAS License Agreement condition 41.19(v), "Bulk users premises should be inspected by the service providers at regular intervals for satisfying themselves about bonafide use of such facilities. A record of such inspection should be maintained and preserved for minimum one year, for inspection/verification by the licensing authority or a designated officer of the authority."As the bonafide usage of these mobile connections given in the name of M/s FBRPL and M/s GRTPL were not checked by M/s BAL. Hence, this is a violation of DoT instructions as above.

As it is evident from the tariff plan given to rental company by M/s BAL. M/s FBRPL and M/s GRTPL were directly collecting, the money from the subscribers which was higher than what it comes out to be from tariff plan 599 of M/s BAL. This detail of amount on the purchase of bulk SIM Cards from M/s BAL and the revenue earned by M/s FBRPL on the renting of the SIM Cards to the individual is as under:

Year	Amount collected on Purchase of SIM Cards from M/s BAL (in Rs.)	Revenue on Sale of SIM Cards on rental to the individuals
1-04-2000 to 31-03-2001	2280697.65	4617707.98
1-04-2001 to 31-03-2002	11978196.92	20796623.58
1-04-2002 to 31-03-2004	13515638.27	28487842.16
1-04-2003 to 31-03-2005	17462888.07	27075172.37
1-04-2005 to 31-03-2006	18879840.05	32950041.58
1-04-2006 to 31-03-2007	21039839.91	27949398.75
1-04-2007 to 31-03-2008	18803273.39	32843011.34
1-04-2008 to July 2008	1917352.85	24423979.04
TOTAL	118256092.34	201143358.45

It is evident from above that the money being collected by M/s FBRPL from end users was more than the amount reimbursed to M/s BAL on the account of purchase of bulk SIM Cards. Similar is the case with M/s GRTPL. This has caused losses to the Government of India by not taking into account the money collected by M/s FBRPL and M/s GRTPL from customers as the part of their AGR which is earned by the M/s FBRPL and M/s GRTPL based on their invoice generated to the hirer.”

.....

“Accordingly, M/s Bharti Airtel Limited is directed to show cause to explain within 21 working days from issue of this notice as to why appropriate action according to condition 10.2(i) & (ii) of License Agreement should not be initiated against the company for violation of terms and conditions of the License agreement. If no reply is received within the above stated time – limit it shall be presumed that

M/s Bharti Airtel Limited has nothing to say in the matter and appropriate action may be initiated against the company as per terms and conditions of License Agreement. M/s Bharti Airtel Limited is also directed to take into account of the money collected by M/s FBRPL and M/s GRTPL from the customers based on their invoices generated as the part of the company's AGR and intimate the details to the DoT."

42. Cause was shown by the Petitioner on 9.2.2010, inter alia, contending:

"11. In response to unnumbered Para 3, it is submitted with respect that the Company has never withheld any information called for by VTM cell, Delhi at any stage, muchless as regards the present subject matter. Though no specific incidence of any deliberate delay or withholding of information has been pointed out in the notice under reply, it is humbly submitted that as a leading and a reputed Service provider it has been always our endeavor to provide the information, information data reports, etc. well within the prescribed time limits without any delay. It may kindly be appreciated that despite the data/information, called for from time to time in the present case being very old, nevertheless we have always been prompt in retrieving and providing the same to the concerned quarter. Furthermore, there was no delay in providing any information to the DoT/ TERM Cell as and when required it will be also appreciated that extracting the old data requires some time and if there was any delay, it was never deliberate or intentional.

16. With respect to unnumbered paragraph 8, it is agreed that there was an agreement which was entered into by the Company with M/s Falcon Business Resources Pvt. Ltd. (FBRPL) and M/s Galaxy Rent-a-Tel Pvt. Ltd. (GRTPL). However it is denied that the SIMs were rented to the subscribers as per the interpretation of the term "Rent" as being conceived by the DoT. In fact the SIMs were passed/supplied to the customer through M/s FBRPL and M/s GRTPL as is being done for any other

Distributor and as per the industry practice. The record of customers to whom the SIMs were being issued by M/s FBRPL and M/s GRTPL was being maintained by the said agencies as mandated under the respective agreements entered into with them they were issuing the SIMs and adding value to the services by supplying handsets as well and charging a composite amount towards, inter alia, "rent" of the handset. Thus the term "rent" has to be read and construed qua the handsets being supplied by these companies for usage by the customer and apart from this there was no other material difference between the transaction in question and the process of issuance of SIM to any other subscriber. As regards the alleged issue of bulk connection the contention and ratiocination rebutting the fact as given above in paragraph number 14 may be read with this paragraph.

17. The contents of the unnumbered Para 9 are highly misconceived and hence denied. However the fact that the SIMs were handed over to the subscriber after documentation - customer enrolment form and supporting address and identity proof - is even accepted by DoT in this paragraph wherein it has been stated that the customer enrolment form was being got filled by these distributors. Hence it substantiates our submission that instruction of DoT for subscriber identity verification was adhered. As regards the allegation of bulk connection and subscribers details the response to paragraph number 14 may be read and referred. It is also submitted that Bharti Airtel Limited was charging the customers including M/s FBRPL and M/s GRTPL as per the tariffs published and filed with TRAI from time to time and at no point of time did Bharti Airtel Limited charged an customer more than the applicable/permissible tariffs. It is pertinent to bring to your notice that these Distributors/Agencies also provided handsets to the subscribers on hire basis and rental was charged for the same from the customers. Hence, the difference reflecting in the tariff filled with TRAI and the amount charged from the subscribers was owing to composite transaction of service as well as usage charges for handsets.

22. The contents of unnumbered paragraphs number 17 & 18 are denied being false and incorrect. The figures mentioned in unnumbered paragraph 17 of the notice under reply are denied for want of knowledge and in the absence of adequate detailing and source of the said figures. It is, however, submitted that the entire amount billed, inter alia, M/s Falcon Business Resources Pvt. Ltd. (FBRPL) AND M/S Galaxy Rent-a-Tel Pvt. Ltd. (GRTPL) has been included in the AGR of the respective financial years and license fee thereon has duly been paid. It is further submitted that by now it is well settled that the license fee is payable by an operator on the basis of actual revenue generated and any amount earned by these agencies/distributors by value addition in the services in the shape of providing handsets or otherwise would be absolutely inconsequential for the purpose of license fee. Therefore, there is not occasion of any loss having been repetition submissions made hereinabove may be read as part and parcel of this paragraph.

24. The contents of para number 20, regarding the issuance of letter dated 27<sup>th</sup> August 2009 and its reply is a matter of record. As regards the part alleging violation of License conditions, the same is false and misconceived and hence denied on the aforementioned grounds. We would also like to apprise you that we have taken all possible measures to mitigate and eliminate any kind of risk to national security. The agreements with M/s FBRPL and M/s GRTPL envisaged ensuring the traceability/verification of the customer as was mentioned in the agreement itself and has been extracted and reproduced above. Para no 14, above, may be read and referred as part and parcel of this paragraph as well. It is also reiterated that, as explained above, the business with M/s FBRPL and M/s GRTPL has in no way caused any loss to state exchequer.

43. A personal hearing was also sought for.

In the said notices, it was recorded that with a view to comply with principles of natural justice, a show cause notice had been issued and the reply filed by the Petitioner herein was not found satisfactory.

The impugned order has been passed on 19.9.2011

44. The Petitioner, however, made a further representation to the Respondent on or about 23.9.2011; wherein also an opportunity of personal hearing was sought for.

### **Submissions**

45. Mr. Maninder Singh, learned senior counsel appearing on behalf of `Vodafone' urged:-

- (i) The Respondent while passing the impugned order has failed to take into consideration the material facts and in particular, its own findings as contained in the show cause notice issued to `Matrix' that the agreement dated 10<sup>th</sup> July, 2003 was entered into by and between the parties hereto in terms of the License Agreement.
- (ii) Moreover, it having been admitted by the Respondent that `Matrix' had not divulged any information to the Petitioner that it had clandestinely been renting out the SIM cards to a few persons, the question of the Petitioner being responsible therefor does not arise.
- (iii) No allegation having been made against the Petitioner that it had not taken due care and caution or did not comply with the circular letters issued by the DoT for the purpose

of giving bulk connections to `Matrix', the impugned order cannot be sustained.

- (iv) The Respondent while passing the impugned order has failed to take into consideration the fact that out of 10,125 connections more than 9000 connections have been deactivated as far back as on July, August, 2007 and, thus, it misdirected itself in law.
- (v) The Respondent having not complied with the principles of Natural Justice in so far as no personal hearing was granted and it having based its decision on the report of the Vigilance Cell without supplying a copy thereof to the Petitioner, the impugned order is wholly unsustainable.
- (vi) The very fact that the show cause Notices were issued to `Matrix' is itself a pointer to the fact that according to the DoT itself, appropriate actions could be taken against the agent of the Petitioner and in fact as would appear from the reply filed by the Respondent itself that it had been asked not to indulge in any activity of renting out the SIM cards.
- (vii) The Respondent in its Notice dated 18.9.2010 having opined: (a) two connections were not reflected in the database of Vodafone; and (b) License Agreement is violative of Clause 5.13 of the agreement, which being

contrary to the observations made by the Respondent itself, no action could have been taken against the Petitioner.

- (viii) In its notice to Matrix dated 20.8.2009 (paras 10 and 12) DoT having concluded that it had not forwarded the details of their subscribers to `Vodafone`; the impugned order must be held to be suffering from a total non-application of mind.
- (ix) Paragraph 5 of the impugned order having clearly stated that the provisioning was as per the CAF provision of `Vodafone`, the penalty imposed must be held to be wholly illegal.
- (x) No finding having been arrived at, on the basis of any material on record that the Petitioner in any manner involved itself with regard to the acts of renting out of sim-cards by `Matrix`, the constructive liability fastened on the Petitioner, must be held to be bad in law.
- (xi) In any event had the Doctrine of Proportionality been applied, the imposition of penalty to the extent of Rs.50.00 crores for alleged renting out of two sim-cards by Matrix the same held to be wholly disproportionate.

46. Mr. Parag Tripathy, learned senior counsel appearing on behalf of the `Idea' would contend:-

- (i) From a perusal of the impugned order, it would appear that the same suffers from a total non-application of mind on the part of the concerned authorities of the Respondent, no reference at all having been made to the cause shown by the Petitioner.
- (ii) Even a copy of the VTM report, on the basis of which the Respondent has based its case having not been supplied to the Petitioner, the principles of Natural Justice must be held to have been violated.
- (iii) The Respondent had also not put to the Petitioner the allegations contained in paragraph 8 of the impugned order as a result whereof serious prejudice was caused to it.
- (iv) Paragraphs 1-26 contained in the impugned order are being mere verbatim reproduction of the recitals of the show cause notices, clearly demonstrates non-application of mind on the part of the Respondent.

Only in para 27 of the impugned order, it was stated that `The cause shown by the Petitioner was unsatisfactory and it had not been able to prove its case' and thus, the impugned order suffers from total non-application of mind;

besides containing no reason far less any cogent reason as to why penalty of Rs.50.00 crores was imposed.

- (v) From a perusal of Clause 10.9 of the agreement, it would appear that in terms thereof the licensor had a discretion to impose financial penalty not exceeding to Rs.50.00 crores for violation of the terms and conditions of the License Agreement besides liquidated damages which would clearly go to show that the Respondent itself considered the question of imposition of such measure as a financial penalty. Such fiscal liability being not a strict civil liability, the conditions precedent therefor were required to be met.
- (vi) In any event in a case of this nature, the Doctrine of Proportionality should be held to be applicable.
- (vii) From the recommendations of the TRAI dated 16.4.2012, it would appear that even the Regulator lamented that no guideline exists as regards to quantum of penalty for violation of the terms and conditions of the license.
- (viii) From the Petitioner's reply it would appear that total business carried out by and between it and LIMCO was only for a sum of Rs.5, 1817127/- and thus imposition of penalty to the extent of Rs.50.00 crores must be held to be wholly disproportionate.

47. Mr. Maninder Singh appearing on behalf of Bharti Airtel would draw our attention to paragraph 9 of the impugned order to contend that therein the Respondent conceded that both `Falcon` and `Galaxy` had hidden the details relating to the subscribers details based informations from the Petitioner and thus, it cannot be held liable.

Our attention has also been drawn to paragraph 15 of the impugned order to contend that an inference has been drawn therein purported to on the basis that the letter issued to `Galaxy` by the Respondent was undelivered with regard whereto the Petitioner had no role to play.

Our attention has furthermore been drawn to the fact that on or about 16.7.2007 a letter was sent to Galaxy by the DoT, reference whereof did not find place in the show cause notice issued to the Petitioner.

48. Ms. Manisha Dhir, learned counsel appearing on behalf of the Respondent, on the other hand, urged:

- a) The Petitioners, having been granted licenses in terms of the Indian Telegraph Act, 1885 and the security of the nation aspect of the matter being involved, were bound to comply not only with the conditions of license but also the instructions issued in this behalf from time to time.

- b) The licensees had a greater responsibility with regard to grant of bulk connections and furthermore ought to have made inspections of their premises from time to time to ascertain as to whether the bulk consumers were not misusing the facilities granted to them by way of setting up of illegal exchange etc.
- c) From the conduct of the licensees vis a vis their agents and/or the bulk consumers it would be evident that SIM Cards issued by them were being given on rental basis to the outsiders, by reason whereof not only the national security was put in jeopardy but also caused huge revenue loss to the Respondent as the actual revenue earned by the agents had not been disclosed.
- d) In these cases the principles of natural justice have been complied with before passing of the impugned orders as show cause notices were served on the Petitioner.
- e) The Vigilance Cell of the DoT as also the I.B. made a thorough investigation and found that in fact the agents of the Petitioners were renting out the SIM Cards without getting the proper subscription verification forms filled up, as a result whereof neither the identity of the customers nor their addresses could be verified, putting the national security in grave jeopardy.
- f) In view of the judgment of this Tribunal in Petition No.252(C) of 2011 (COAI vs. UOI), it would be evident that the

circulars/guidelines issued by the DoT were binding on the licensees.

- g) Failure to comply with such directions would attract the penal provisions contained in the license agreement and, thus, the Respondent had the requisite jurisdiction to impose penalty.

49. Mr. Kohli appearing on behalf of the Respondent would further contend:

- (i) Petitioner `Vodafone' having admitted in its reply that a huge number of connections were given by way of bulk connections, it is incorrect to contend that the agency agreement and bulk connection agreements are different in nature inasmuch as some of the connections have been found to have common numbers by the Vigilance and Telcom Monitoring Cell in its report dated 6.9.2007 which would also clearly go to show that at least two connections had been given by `Matrix' to outsiders with different tariff plan for which the customers had separately been billed.
- (ii) `Vodafone' also in its reply dated 31.7.2007 admitted that Matrix had taken a number of connections from it in its own name from time to time.
- (iii) Vodafone did not furnish any details as to how much amount had been realized from Matrix from its own subscribers.

- (iv) From a perusal of the report of the VTM Cell it would be evident that 836 mobiles numbers were common; whereas upon comparing the 27006 mobile numbers (which were given to the subscribers through the agency agreement with 10145 alleged bulk connections, it was found that only 55 mobile numbers were common.
- (v) It has furthermore been found that there has been a short fall of 805 mobile numbers as reported by `Matrix' which stood in its name and, thus, it may be inferred that such under-reporting had been done by `Vodafone' deliberately.
- (vi) Our attention in this behalf has been drawn to paragraph 2 of the Findings and Salient observations of the said report, which reads as under:
- "2. On the base of telephonically sample check of 27811 customers it was found that the customers are getting the Bill Invoice from the M/s HEMSL with an instruction to deposit the amount in favour of M/s MCSPL. M/s MCSPL is getting the commission for these customers as per agreement. This is as per the scope/terms and conditions of the agreement between M/s HEMSL and M/s MCSPL."
- (vii) A perusal of the show cause notices issued on 27.8.2009 and 1.1.2010, and the causes shown by `Vodafone' it would appear that it made out a new case before this Tribunal for the first time by raising new grounds.

- (viii) `Vodafone' had an opportunity to submit the details of the connections given to their agents and/or revenue earned by them and they having failed and/or neglected to do so, are estopped and precluded from raising new grounds in these petitions.
- (ix) A perusal of the CAF Forms would show that `Vodafone' has not only used the same `Forms' in respect of its agency agreement but also in respect of the so called bulk connections, which would clearly go to show that it connived with `Matrix' in renting out the SIM cards and/or subleasing the same, which is prohibited under the conditions of license.
- (x) From a perusal of the purported agency agreement it would be evident that Matrix was authorized to pass on their right to deal with the customers directly which amounts to violation of the condition of license, as categorically stated in the show cause notice.
- (xi) From a perusal of the report of the VTM Cell, it would furthermore appear that `Matrix; had given pre-activated SIM cards to its customers which is prohibited being involving transfer thereof
- (xii) From the bill issued by `Matrix' dated 1.5.2009, it would also be evident that the details of the calls had been furnished therein which could be possible only if it had a direct access to

the database of Vodafone inasmuch as for the same period Vodafone issued a bill to the Matrix only on 3.5.2009. From the said bill issued by `Matrix` it would furthermore appear that `Vodafone` has violated Clause 7.1 of the license as bill was to be raised by the licensee and not by Matrix.

(xiii) By reason of such transfer of SIM cards `Vodafone` has caused loss to the Respondent by way of loss in AGR.

(xiv) `Vodafone` having not filed any documentary evidence in support of its case either in response to the first show cause notice or the second show cause notice, it cannot be permitted to raise the said contention once over again.

(xv) From the common observations made in the show cause notices it would appear that during investigation carried out by the VTM Cell in May, 2008, it was found that many mobile connections bore the same date of activation but the name and addresses of the subscribers changed in the subscriber data base updated till 30.4.2008 and many mobile connections were transferred in different names having address of the other rental companies like `LIMCO`.

(xvi) It was obligatory on the part of the licensee to take due care while endorsing its approval for such transfers as by reason of such transfer the spirit of the bar contained in the license was violated.

(xvii) The connivance between `Vodafone' and `Matrix' would also be evident from the e-mails dated 19.7.2006 at page 448 of the paper book whereby proposal had been made to make `Matrix' a national partner of `Hutch' for rental based SIM cards which must have been carried into execution as fortified by the e-mails dated 6.2.2006 exchanged between the parties, which clearly goes to show that during the visit of George G. Bush, the then President of United States of America, a large number of SIM cards were to be transferred.

It would furthermore appear from the email dated 20.5.2003 at page 451 that details of the points for entering into such an agreement had been gone into by the parties.

(xviii) Petitioner Vodafone in any event being a `principal' is equally liable for the illegal activities of its agent Matrix. The Petitioners furthermore are bound by the circular letters issued by the Respondent with regard to the bulk consumers.

50. So far as the case of Bharti Airtel is concerned, Ms. Manisha Dhir would urge:

(i) From the agreements entered into by the licensee with `Galaxy' and `Falcon', it would be evident that for short term use admittedly SIM cards had been given to third parties.

(ii) Although the licensee Bharti Airtel is said to have terminated the agreement of its agents on 26.10.2007 but despite the same, it

was found that a large number of phone connections had been given which would clearly go to show that security conditions have been violated.

(iii) From the reply of Bharti it would furthermore appear that it resorted to suppressio veri in so far as it proceeded on the basis that `Galaxy' and `Falcon' might have rented the handset and not the SIM cards which stands belied by its letters dated 10.7.2007, 30.10.2007 , 24.1.2009 and 30.9.2008.

(iv) The agreement between Bharti and its agents furthermore would clearly go to show that rental of SIM cards/handset was a part of the `Scope of Work'.

51. As regards the case of Idea Cellular, it was contended:

- (a) The Petitioner had suppressed even the agreement entered into by and between it and `Limco' although no such case has been made out in its reply to the first show cause notice.
- (b) From the letter dated 10.9.2009 it would appear that despite the direction to stop the activities of renting out SIM cards, it was categorically found by the Cell that 319 new mobile connections were given.
- (c) The Petitioner in its reply dated 15.2.2007 having referred to the agreement by way of business support, it is difficult to accept that it had no knowledge of the activities of `Limco' as

is evident from the fact that it had not made any verification as was required in terms of the circular letters.

- (d) Even assuming that the Petitioner had granted bulk connections to `Limco`, it still must be held to have violated the conditions of license and/or in any event the circular letters.

**Re: Conditions of License**

52. The licenses were issued to different Petitioners on different dates. We are however, informed that although numbers of clauses in different licenses although were issued at diverse point of time, but the conditions of license, so far as the present cases are concerned, are similar.

We may notice Clauses 6.1, 9.1, 10.2 (i), 10.2 (ii), 17.1, 30.4, 41.14, 41.19 of the UAS License:-

“6.1 The LICENSEE shall not, without the prior written consent as described below, of the LICENSOR, either directly or indirectly, assign or transfer this LICENCE in any manner whatsoever to a third party or enter into any agreement for sub-Licence and/or partnership relating to any subject matter of the LICENCE to any third party either in whole or in part i.e. no sub-leasing/partnership/third party interest shall be created. Provided that the LICENSEE can always employ or appoint agents and employees for provision of the service.

9.1 The LICENSEE shall furnish to the Licensor/TRAI, on demand in the manner and as per the time frames such documents, accounts, estimates, returns, reports or other information in accordance with the rules/orders as may be prescribed from time to time. The LICENSEE shall also submit information

to TRAI as per any rider or direction or regulation issued from time to time under the provisions of TRAI Act, 1997 or an amended or modified statute.

10.2 (i) The LICENSOR may, without prejudice to any other remedy available for the breach of any conditions of LICENCE, by a written notice of 60 Calendar days from the date of issue of such notice to the LICENCEE at its registered office, terminate this LICENCE under any of the following circumstances :

- a) fails to perform any obligation(s) under the LICENCE including timely payments of fee and other charges due to the LICENSOR;
- b) fails to rectify, within the time prescribed, any defect/deficiency/correction
- c) goes into liquidation or ordered to be wound up
- d) is recommended by TRAI for termination of LICENCE for non-compliance of the terms and conditions of the LICENCE.....

10.2(ii) The Licensor may also impose a financial penalty not exceeding Rs. 50 crores for violation of terms and conditions of licence agreement. This penalty is exclusive of Liquidated Damages as prescribed under clause 35 of this Licence Agreement.

17.1 The LICENSEE will charge the tariffs for the SERVICE as per the Tariff orders /regulations / directions issued by TRAI from time to time. The LICENSEE shall also fulfill requirements regarding publication of tariffs, notifications and provision of information as directed by TRAI through its orders / regulations / directions issued from time to time as per the provisions of TRAI Act, 1997 as amended from time to time.

30.4 It shall be the responsibility of the LICENSEE to issue or cause to be issued bills to its subscribers for use of the service. The LICENSEE shall maintain such

records so as to produce itemized billing information. The billing system of the LICENSEE shall be able to generate the billing information, in adequate details, to ensure satisfaction to the customer about the genuineness of the bill. The directions of TRAI, from time to time, in this regard shall apply.

41.14 The complete list of subscribers shall be made available by the LICENSEE on their website (having password controlled access), so that authorized Intelligence Agencies are able to obtain the subscriber list at any time, as per their convenience with the help of the password. The list should be updated on regular basis. Hard copy as and when required by security agencies shall also be furnished. The LICENSEE shall ensure adequate verification of each and every customer before enrolling him as a subscriber; instructions issued by the licensor in this regard from time to time shall be scrupulously followed. The SIM Card used in the User terminal or hand-held subscriber terminal (where SIM card is not used) shall be registered against each subscriber for his bonafide use. The LICENSEE shall make it clear to the subscriber that the SIM card used in the user terminal registered against him is non-transferable and that he alone will be responsible for proper and bonafide personal use of the service.

41.19(i) Utmost vigilance should be exercised in providing bulk telephone connections for a single user as well as for a single location. Provision of 10 or more connections may be taken as bulk connections for this purpose. Special verification of bonafide should be carried out for providing such bulk connections. Information about bulk connections shall be forwarded to VTM Cell of DoT, DDG (Security) DoT and any other officer authorized by Licensor from time to time as well as all Security Agencies on monthly basis.

(v) Bulk users premises should be inspected by the service providers at regular intervals for satisfying themselves about bonafide use of such facilities. A record of such inspection should be maintained and preserved for minimum one year, for inspection

/verification by the licensing authority or a designated officer of the authority.”

53. Clause 19.1 was introduced in the year 1999.

Clauses 6.1 and 30.4 existed in the original license. Clause 17.1 was inserted on 25.9.2011. Clauses 41.4 was inserted on 12.8.2002. Clauses 41.19(1) and (5) were inserted on 26.3.2003; whereas Clauses 10.2(1) and (2) were inserted on 25.11.2004.

### **Circular letters**

54. Pursuant to or in furtherance of the said conditions of license, instructions were issued by the Respondent from time to time. On or about 15.9.1998 the Respondent issued a circular letter directing the licensees to see that performas are filled up by the subscribers of cellular mobile telephone service, failing which the stipulated penalty would be imposed.

55. On or about 22.2.2001 instructions were issued directing the licensees to carry out verification of identities of all categories of cellular subscribers before provisioning cellular mobile telephone service.

On or about 23.6.2003 a circular letter was issued with regard to the operation of clandestine/ illegal telecommunication center/

telephone exchange. We shall deal with this circular letter at an appropriate stage.

A duty was cast thereby to inspect the premises of the bulk consumers.

56. A direction was also issued for carrying out special verification. In terms of the said circular letter connections of 10 or more to one customer was to be treated as bulk consumer.

On or about 10.5.2005 the requirements of verification of identities of the subscribers were reiterated; paras 2, 3 and 4 whereof dealt with the security implications.

On or about 22.11.2006 the need to comply with the duty of verification of subscribers was again emphasized. The said Circular letter by way of supplement to the instructions which has already been issued, the licensees were also asked to correct their data base.

### **Principles of Natural Justice**

57. In a case of this nature where penalty to the maximum amount as provided for Clause 10(2)(ii) i.e. for a sum of Rs.50 crores has been imposed, in our considered opinion, the same must be preceded by compliance of the principles of natural justice.

The Respondent does not state that the principles of natural justice were not required to be complied with.

In fact it had issued two show cause notices. It had also issued notices directing a third party namely the agents of the Petitioners.

58. It, upon obtaining requisite informations and data as also the explanations offered by the said agents, directed them that they should not rent out the SIM cards.

It is one thing to say that such directions have not been fully complied with or certain other violations were found later on, but it is another thing to say that the extent to which the principles of natural justice have been complied with were sufficient in the eyes of law.

The reasons for compliance of the principles of natural justice have recently been considered by the Apex Court, albeit in the context of a taxing statute, in *Kesar Enterprises Ltd. vs. State of Uttar Pradesh*, reported 2011 (13) SCC 733.

The learned Judges having regard to Rule 633 of the Excise Manual providing for imposition of penalty, opined as under:

**“24.** Rules of “natural justice” are not embodied rules. The phrase “natural justice” is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action.”

**30.** Having considered the issue, framed in para 16, on the touchstone of the aforementioned legal principles in regard to the applicability of the principles of natural justice, we are of the opinion that keeping in view the nature, scope and consequences of direction under sub-rule (7) of Rule 633 of the Excise Manual, the principles of natural justice demand that a show-cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order under the said Rule is made, notwithstanding the fact that the said

Rule does not contain any express provision for the affected party being given an opportunity of being heard.

**31.** Undoubtedly, action under the said Rule is a quasi-judicial function which involves due application of mind to the facts as well as to the requirements of law. Therefore, it is plain that before raising any demand and initiating any step to recover from the executant of the bond any amount by way of penalty, there has to be an adjudication as regards the breach of condition(s) of the bond or the failure to produce the discharge certificate within the time mentioned in the bond on the basis of the explanation as also the material which may be adduced by the person concerned denying the liability to pay such penalty. Moreover, the penalty amount has also to be quantified before proceedings for recovery of the amount so determined are taken.

(Emphasis supplied)

59. Recently this Tribunal in Unitech vs. UOI Petition No.1 of 2011 disposed of 13.1.2012 relying on a large number of decisions of the Apex Court including Reliance Energy Ltd. & Anr. Vs. Maharashtra State Road Development Corporation & Ors., reported in (2007) 8 SCC 1, and V.K. Ashokan Vs. Asst. Excise Commissioner & Others reported in (2009) 14 SCC 85 stated the law as under:

“Had an opportunity been granted as contended by Ms. Dhir herself, that for determination of the issue it is necessary to enter into factual aspect of each and every case. If that be so, the respective licensees could have shown that no delay was attributed on its part. The delay, if any, at least to some extent is attributable on the part of the licensor itself, which must be taken into consideration for computing the amount of liquidated damages.

In given cases, it can also be shown that roll out obligation had been met much before the expiry of 52 weeks and, thus, the licence cannot be cancelled.”

In BPL Mobile Cellular Ltd. vs. DoT., Petition No.8 of 2003 disposed on 11.2.2012, this Tribunal again emphasized the need to comply with the principles of natural justice.

The principles of natural justice are said to have been violated not only by reason of relying upon the documents copies whereof had not been supplied to the Petitioner nor any inspection thereof was given to them but also a heavy amount by way of penalty has been imposed without assigning any reason.

60. The principles of natural justice basically stand on two pillars :

1. Nobody shall be punished unheard.
2. Nobody shall be a judge of his own cause.

Apart from the aforementioned two pillars of the principles of natural justice, a third pillar namely `duty to assign reasons' has been added by the Apex Court of India in several cases.

At the outset, we may notice a recent judgment of the Supreme Court of India in Kranti Associates Pvt. Ltd. & Anr. vs. Masood Ahmed Khan & Ors. (2010) 9 SCC page 496, wherein upon relying on a large number of its earlier decisions, the principles have been summarized by the Apex Court in the following terms:

**“47.** Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-

stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in *Defence of Judicial Candor* [ (1987) 100 Harvard Law Review 731-37].)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See *Ruiz Torija v. Spain* [ (1994) 19 EHRR 553] EHRR, at 562 para 29 and *Anya v. University of Oxford* [ 2001 EWCA Civ 405 (CA)] , wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

61. It will also be apt to refer to a recent judgment of the Supreme Court of India in *Automotive Tyre Manufacturers Association vs. Designated Authority & Ors.* 2011(2) SCC 258 wherein Rule 6(vi) of Ante Dumping of Customs Tarrif (Identification) Assessment and Collection of Ante Dumping Duty on Dumped Articles and for Determination of Injury Rules 1995 came up for consideration.

Interpreting the said rule, it was opined:

**"80.** It is thus, well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of

being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a straitjacket nor is it a general rule of universal application.

.....  
**83.** The procedure prescribed in the 1995 Rules imposes a duty on the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witnesses, etc. and also clear up his doubts during the course of the arguments. Moreover, it was also observed in *Gullapalli*<sup>21</sup>, if one person hears and other decides, then personal hearing becomes an empty formality." (Emphasis supplied)

62. In *Mahmood Yunus Khan vs. State of Uttar Pradesh* 2010(10) SCC 539 the Supreme Court, while opining that in a domestic enquiry the principles contained in the Code of Civil Procedure and the Indian Evidence Act would not apply but the same should not only be conducted in compliance of the principles of natural justice but also fairly and reasonably.

It was furthermore held that the enquiry report must contain reasons for arriving at the conclusion that the charges framed against the delinquent officer proved against him, which cannot be based on the ipse dixit of the enquiry officer.

63. In Travancore Rayon Ltd. vs. Union of India 1969 (3) SCC 868

the Apex Court observed:

“11. In this case the communication from the Central Government gave no reasons in support of the order; the appellant Company is merely intimated thereby that the Government of India did not see any reasons to interfere “with the order in appeal”. The communication does not disclose the “points” which were considered, and the reasons for rejecting them. This is a totally unsatisfactory method of disposal of a case in exercise of the judicial power vested in the Central Government. Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached, in cases where a non-judicial authority exercises judicial functions, is obvious.”

64. So far as the necessity to record reasons are concerned, recently in Ravi Yashwant Bhoir vs. District Collector, Raigad & Ors. reported in 2012 (4) SCC 407, the Supreme Court stated:

“38. It is a settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order.”

Relying on various decisions of the Supreme Court of India, it was held that :

“The emphasis on recording reasons is that if the decision reveals the inscrutable face of the sphinx , it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale

is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The inscrutable face of a sphinx is ordinarily incongruous with a judicial or quasi-judicial performance.” (emphasis supplied)

65. In these cases the ultimate decision of the Respondent inter alia is based on a finding that the Petitioner’s replies were unsatisfactory.

66. A three judge bench of the Supreme Court of India in B.D. Gupta vs. State of Haryana (1973) 3 SCC 149, while considering a question of imposition of penalty on an employee on his explanation having been ‘found to be unsatisfactory’, stated the law thus:

“9. The only ground on which the Government proposed to censure the appellant is the fact that the appellant's explanation, dated December 18, 1956, in reply to the statement of charges and allegations had been found unsatisfactory by Government.”

It was held:

“The notice is vague on other grounds as well. As one reads the first paragraph of the notice, the questions that at once assail one's mind are many: In what way was the explanation of the appellant unsatisfactory? Which part of the appellant's explanation was so unsatisfactory? On what materials did the Government think that the appellant's explanation was unsatisfactory. It is to our mind essential for a “show-cause notice” to indicate the precise scope of the notice and also to indicate the points on which the officer concerned is expected to give a reply. We have no manner of doubt that the “show-cause notice” in the instant case did not give the appellant any real opportunity to defend himself against the complaint that his previous explanation of December 18, 1956, had

been unsatisfactory. The appellant did not, therefore, get any chance at all to show that he did not deserve a censure upon his conduct.”

In Commissioner of Central Excise vs. Brindavan Beverages (P) Ltd. (2007) 5 SCC 388 the Apex Court yet again opined:

“13. We find that in the show cause notice there was nothing specific as to the role of the respondents, if any. The arrangements as alleged have not been shown to be within the knowledge or at the behest or with the connivance of the respondents. Independent arrangements were entered into by the respondents with the franchise holder. On a perusal of the show cause notice the stand of the respondents clearly gets established.

“14. There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted.”

The said decision therefore, is an authority for the proposition that adequate opportunity to answer the charges levelled against the proceedee must be given to the concerned employee.

67. In the context of misconduct in service vis-à-vis inefficiency, the Supreme Court in UOI & Ors. vs. J. Ahmed 1979 (2) SCC 286, held :

“It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duties attach to public office would ipso facto constitute misconduct.”

The said principle was reiterated in Inspector Prem Chand vs. Govt. of NCT of Delhi & Ors. 2007(4) SCC 566 in the following terms:

“12. It is not in dispute that a disciplinary proceeding was initiated against the appellant in terms of the provisions of the Delhi Police (Punishment and Appeal) Rules, 1980. It was, therefore, necessary for the disciplinary authority to arrive at a finding of fact that the appellant was guilty of an unlawful behaviour in relation to discharge of his duties in service, which was wilful in character. No such finding was arrived at. An error of judgment, as noticed hereinbefore, per se is not a misconduct. A negligence simpliciter also would not be a misconduct.”

68. Reliance has been placed by learned counsel for the Petitioner on a judgment of this Tribunal in Petition No.327 of 2011, Idea Cellular Ltd. vs. Union of India. The said case also involved an order imposing penalty.

This Tribunal negated the contention of Ms. Dhir therein that whereas in the matter of determination of license the principles of

natural justice are required to be complied with, but not in a case of imposition of penalty.

69. In *Union of India vs. Millennium Mumbai Broadcast (P) Ltd.* reported in 2006(10) SCC 510 the Apex Court stated the law thus:

“24. The principles of natural justice are ordinarily required to be complied with where an action visits civil or evil consequence.

A party, against whom an action is sought to be taken resulting in imposition of penalty, is entitled to know the charges on the basis whereof the penalty is sought to be imposed.

It cannot be based on ipse dixit on the part of the Union of India.

25. The communications dated 23.6.2010, 29.6.2010 and 12.7.2010 did not even remotely mention that there are allegations of suppression/concealment on the part of the petitioner. The purported threat to the national security was also not the subject matter of any charge and, thus, in relation thereto no explanation had been sought for.

The respondent even in the said communications did not make any allegation that the petitioner has violated the conditions of licence. No opportunity, furthermore, was granted as to why the maximum penalty should be imposed. Even in that context, reference to the circular letter dated 23.3.2009, in our considered opinion, was irrelevant.”

Considering a large number of its earlier decisions the Apex Court, opined:

“(b) The conditions of licence having not excluded application of the principle of natural justice, only because another clause requiring compliance of the

principle of natural justice has specifically been provided in the licence, the same ipso-facto would not mean that the same was not attracted in a case governing clause 15.8 of the licence;”

Ms. Manisha Dhir, learned counsel for the Respondent would, however, rely upon *Grosos Pharmaceuticals (P) Ltd. & Anr. vs. State of UP & Ors.* 2001 (8) SCC 604, wherein a two judge bench of the Apex Court upheld an order of blacklisting of a contractor inter alia, on the premise that no reason was required to be assigned as the High Court upon noticing the departmental file found that elaborate reasons were recorded therein.

The said decision , therefore, was rendered in the peculiar facts obtaining therein.

In *M.J. Sivani & Ors. vs. State of Karnataka & Ors.* (1995) 6 SCC 289 whereupon again reliance has been placed by Ms. Dhir, while considering the validity of an administrative order, the Apex Court opined that no detailed reasons were necessary to be recorded.

70. In view of several decisions of the Apex Court, we are of the opinion that it is one thing to say that reasons for passing the order were available in the file but remained uncommunicated, but it is another thing to say that reasons have to be found from various communications which have been passed between the parties.

71. Reasons for an order whereby civil consequences are visited ordinarily are required to be contained in the order itself as has been noticed in various decisions of the Apex Court, that a variety of

purposes are served by assignment of reasons including the ones which would be necessary for challenging the same in appeal, in judicial review or before any other appropriate forum.

To term the explanation of the defence of the Petitioner to be 'unsatisfactory' per se is not the reason therefor. It constitutes a finding.

An adjudication on the issues was required by the appropriate authority.

72. While arriving at the said finding, the adjudicating authority authorized to pass an order imposing fine was required to take into consideration the explanations offered by the Petitioners.

### **Application of the Principles in this case**

73. Keeping in view the aforementioned principles of natural justice in mind, let us consider the effect of non compliance thereof.

In the case of Idea, informations were sought for with regard to the details of its subscribers and the amount of the gross revenue earned by it.

Idea, in its cause shown on 15.2.2010, furnished the relevant informations by annexing three annexures; Annexure A contained the details of the connections; Annexure B referred to the sum of the gross revenue earned by it from its agents. Sample copies of the bills were also furnished which are at pages 319 to 454 of the paper book.

It was furthermore stated that the agreement between the parties had been terminated.

74. The Respondent in its impugned order did not deal with any of the said contentions at all.

If according to the Respondent, the Petitioner had not furnished the details of the connections or the amount it received from its agents, it was required to say so specifically.

### **Connivance Issue**

75. In the case of Vodafone, the Petitioner was charged with a serious allegation that it connived with `Matrix,' while granting a large number of bulk connections.

`Connivance' in Bouvious Law Dictionary is stated to be "an agreement or consent, indirectly given, that something unlawful will be done by another".

Connivance differs from collusion.

A collusion may exist for a particular purpose. Connivance is an act of mind before the offence has been committed; whereas condonation is the result of a determination to forgive an injury which was not known until it was inflicted.

76. Connivance of the Petitioner with Matrix are basically sought to be proved from two facts.

Firstly on the premise that some telephone numbers which have been given to Matrix both as its agent as also bulk consumer have common numbers.

77. We have noticed heretofore that no allegation to that effect was made in the show cause notice.

Only a reference with regard thereto was made in the report of the Vigilance and Telecom Monitoring Cell.

A copy of the said report of the Telecom Monitoring Cell was not supplied to the Petitioner.

No specific allegation in the show cause notices to the said effect has also been made.

78. The second ground of the Respondent to prove connivance rests on a bill dated 1.5.2007.

The said allegation has also not been made in the show cause notice. Before us the Petitioner contended that the bill issued by Matrix must be bearing a wrong date. Ex facie it appears to be so

The said bill covers the period of Line Access for 27.04.2007 to 09.05.2007 and Airtime from 27.4.2007 to 30.4.2007 i.e. beyond the billing cycle for the period 15.3.2007 to 14.4.2007.

79. Had an opportunity of hearing being given to the Petitioner, it could have satisfied the Respondent that no connivance existed by and between it and Matrix.

80. Moreover, as has been pointed out by the Petitioner even the facts which were allegedly found in the said report and/or earlier show cause notices issued to Matrix had not been taken into consideration as to whether it had given on rent the SIM cards from its bulk connections without furnishing the requisite data from the Petitioner as also the DoT.

81. In the VRM report, reference was made to 55 common subscribers but the same has not been pressed before us as in the show cause notice it has merely been stated that the Petitioner has not furnished the details of 10090 connections.

82. It has been pointed out that the Respondent had asked for informations with regard to the connections given under the agency agreement; in response whereof, the Petitioner not only submitted the details but also contended that apart from the same there are certain other connections. The Respondent did not say that `Matrix' did not wear two hats vis a vis the Petitioner.

The Petitioner admittedly sent a letter dated 24.7.2009 giving the required details.

It, in its reply to the show cause notice dated 20.8.2009 furthermore stated:

"10. AND WHEREAS as per the agreement between M/s. Hutchison Essar Mobile Services Ltd. and M/s. Matrix Cellular Services Pvt. Ltd. for acquiring new post paid subscribers, M/s. MCSPL shall cause the new post paid subscribers to duly fill and sign a Customer Application Form, as provided by M/s.

HEMSL. M/s. HEMSL's Customer Application Form would state that M/s. MCSPL is a specialized customer management unit of M/s. HEMSL. A copy of the M/s. HEMSL's Customer Application Form ( Annexure ) is annexed to and forms part of the Agreement. M/s. MCSPL shall also obtain the subscriber's photograph and other identification proof in accordance with the verification directives issued by the Department of Telecommunications, Government of India, from time to time. M/s. HEMSL shall provide to M/s. MCSPL copy for such directions in force and shall forthwith notify to M/s. MCSPL of all and any amendment in the said directions. All duly completed M/s. HEMSL's Customer Application Forms and other documents shall be countersigned by M/s. MCSPL authorized representative and shall be submitted to the authorized person of M/s. HEMSL for activation of new connection.

11. AND WHEREAS while acquiring Hutch Postpaid Mobile number 9873435261, SIM No. 00056390876 and Mobile no. 9873081876, SIM no. 00055789854, by VTM Cell Delhi from M/s. MCSPL, it was observed that the CAF ( Customer Agreement form, Annex-4 ) provided by the M/S MCSPL is neither a standard CAF of M/s. HEMSL nor as per the prescribed CAF format of DoT though the connection provided was from M/s HEMSL. The CAF do not contain any reference to M/s. HEMSL though the service provider for these mobile connections is M/s. HEMSL. The postpaid SIM cards are provided by M/s MCSPL without the demand for the applicant's photo. M/s MCSPL did not demand the Address proof of the applicant. The CAF of M/s MCSPL is not in accordance with the instructions of the DoT given to the CMTS, CMTS licensees. The foot note of the CAF supplied by the M/s MCSPL bears the name and address of Matrix Cellular ( International ) Services Pvt. Ltd., 7, Khular Farm, Mandi Road, Mehrauli, New Delhi- 110030.

During investigation it was found that the CAFs for two numbers i.e. 9873435261 and 9873081876 were filled in the name of M/s MCSPL and were never verified. Moreover M/s MCSPL has not passed on the information about the actual end users of rental

connection to M/s HEMSL. Non verification of the customer is certainly not in the interest of National security. Such act is serious threat to the security of the Nation.

12. AND WHEREAS in the light of the agreement between the M/s. MCSPL and M/s. HEMSL where the scope of service is limited to acquire new post paid subscribers by M/s MESPL on the behalf of M/S HEMSL on such terms and conditions and tariff and tariff plans as approved M/S HEMSL in Delhi Metro Service Area.”

83. It is also evident that the Respondent itself had taken action against `Matrix' with which it had no contractual relationship by asking it to stop such activities by issuing a letter dated 30.8.2007.

The said letter was issued in the context of a notice to show cause issued to Matrix on 1.8.2007, in response where to it clearly stated that certain connections have been given for temporary use in the following terms:

“3. The Details about the Invoices sent by your company to customers on monthly basis for the consolidated postpaid customer base acquired you and handed over to the M/s HEMSL since July, 2003.

4. The details about the amount paid on monthly basis to the M/s HEMSL for the postpaid customers acquired by you and handed over to them since July, 2003.

5. The detail about the invoices received by you from M/s HEMSL on the monthly basis to the postpaid customer base acquired by them from July 2003 onwards.

6. Copy of the approved tariff plan communicated by M/s HEMSL to you from time to time.

7. Copy of the approved CAF for customers provided to you by M/s HEMSL.”

84. If on or about 30.8.2007 `Matrix' was asked to stop the purported renting out of the SIM cards, it has rightly been urged that there was no adverse finding against Vodafone at that point of time.

Notice was issued to Vodafone only on 27.8.2009.

The Petitioner in paragraph 6 of its reply thereto stated as under:

“6. As would be seen from above, DoT has itself acknowledged and admitted that under the Agreement between Matrix and Vodafone:

- a) Matrix was obliged to procure new post-paid connection for and on behalf of Vodafone.
- b) Matrix was to charge from such subscribers only such tariffs including installation charges etc. as are prescribed by Vodafone.
- c) Matrix was obliged to get only such customer agreement forms executed/signed by the subscribers as was provided by Vodafone.
- d) That Matrix has not passed on the information to Vodafone about the actual end-user of alleged rental connections. This clearly evidenced that admittedly and as acknowledged by DoT itself that Vodafone was not in the knowledge of any such rental activity by Matrix. A copy of DoT `s letter bearing No. 842-951/2007-AS-IV/674 dated 20.08.2009 is annexed hereto and marked as Annexure-3.”

The Petitioner therein pointed out certain purported admissions on the part of the Respondent.

It was furthermore stated:

“11. It may be noted that in about August, 2007, Vodafone had disconnected about 7850 sim

cards/connections of Matrix. We have examined the list of 10145 connections as given by DoT and state that majority of such connections i.e. 9442 are already deactivated, most of them in 2007, and the remaining 691 numbers are either in name of individuals or in name of Matrix. In fact, since Vodafone is a law abiding Company, it also procured an undertaking from Matrix to the effect that Matrix confirmed and undertook that connection acquired in the name of Matrix were being used for official purposes by employees of Matrix and to specifically confirm that such connections were not being used for any renting purposes of domestic sims. Copies of the said undertakings of Matrix dated 02.04.08 and 29.06.2009 are annexed hereto and marked as Annexure-4.

12. It is submitted that bulk connections were duly verified by Vodafone as per DoT's letter dated 23.06.2003. Also that no discrepancy was found by Vodafone in the calling pattern of these telephone connections. Moreover, it is a fact that these bulk connections were held by Matrix in its own name and it was not a case of connections being held in wrong names due to any wrong identities. Thus, though there were multiple connections but they were genuinely subscribed by Matrix and the call pattern was not as contemplated in Dot's letter of 23.06.2003."

.....  
"14. In case Matrix was engaged in renting of domestic SIM cards and having its own tariff plans, as mentioned in your letter, then Matrix also need to give an explanation. The same has been done without Vodafone's permission or knowledge. There is neither any violation by Vodafone of any of the license condition nor Vodafone has caused any alleged loss to the Government. As a service provider Vodafone cannot be made liable for any use or misuse of the telephone facility by a subscriber. In fact, Vodafone's customer agreement prohibits unauthorized use of the services. The Customer Agreement Form further provides that the user of telecom shall under no circumstance be attributed to the company and the customer (Matrix in the present case) shall be solely responsible for the

same. Matrix is in business of telephony related services and should be aware that such alleged rental of telephone service is not permitted by DoT. Further, under customer agreement from, Matrix has undertaken to comply with all instruction issued by DoT. Even as per Indian Telegraph Rules a subscriber shall be personally responsible for use of his telephone, including any improper use. Therefore, it is Matrix who will be responsible for any unauthorized use of telephone services. (A copy of terms and condition of a customer agreement form is annexed hereto and marked as Annexure -5)."

Yet again, in response to the second show cause notice, the Petitioner in its reply dated 3.9.2009 stated as under :

"2. In your said letter, it has been stated that 10145 numbers are working in the name of Matrix Cellular Services Pvt. Ltd. and are being used on rental basis. Please note that as per our records, no such numbers exists. 9351 connections were disconnected during the year 2007, 461 are in individual subscribers' names and the balance 331 are being used by our staff for official purposes. Sir, after reviewing this information you will appreciate that, there is no violation to any regulation or threat to national security."

It, in its reply dated 26.8.2009 furthermore pointed out that 'Matrix' was admittedly authorized by DoT to supply international SIM cards.

The said contentions of 'Vodafone' should have been considered by the Respondent while passing its order imposing penalty.

### **Allegations against Bharti**

85. So far as 'Bharti Airtel' is concerned, no copy of the report dated 1.10.2007 was supplied.

Learned counsel urged that the Respondent has not supplied a copy of the reply of `Falcon' and had merely filed letters being dated 22.8.2009 wrongly stated in paragraph 15 as dated 21.8.2009.

One of the said letters read as under:

**"Subject: Renting of domestic SIM Cards in Indian Territory by M/s Galaxy Rent-a- Tel Private Limited.**

In continuation to the vide letter No. VTMD-2007-38 dated 23-07-2007 regarding renting of SIM Cards in Indian Territory. You are requested to provide the following information:

- 1.) Details of all the mobile connection numbers acquired by you from M/s Bharti Cellular Limited.
- 2.) The details about the invoice sent by your company to customers acquired by you for this year.
- 3.) The details of invoices and amount paid on monthly basis to M/s Bharti Cellular Limited for usage of their SIM Cards which has been rented by you for this year.
- 4.) Copy of the approved tariff plan communicated by M/s Bharti Cellular Limited to you from time to time.
- 5.) Copy of tariff plan offered by you to your customers.
- 6.) A sample copy of the CAFs filled by the customers during renting the SIM cards.

You are requested to submit the above information to this office latest by 27<sup>th</sup> August, 2007."

86. It may furthermore be noticed that DoT yet again issued a letter to `Falcon' on or about 11.9.2007, stating as under:

"Kindly refer to the subject as mentioned above. This office has not received the reply along with data from you till now. This office is giving you the last opportunity to provide the data being asked in above reference letter to VTM Office within one week otherwise action may be initiated against you as per the Indian Telegraph Act and other regulations.

The renting of domestic SIM cards in Indian Territory is illegal/unauthorized telecom services. In this regard, you are hereby directed to stop the renting of domestic SIM cards with immediate effect. It is to inform you that call by unscrupulous elements using these rented domestic SIM cards may pose a threat to the national security.

Further, it is also to inform your office premises may be inspected without any prior notice. If it is detected that you are continuing the above mentioned illegal/unauthorized telecom services, then VTM Cell shall be forced to take action under Indian Telegraph Act, 1885."

In this case also notices were issued to 'Falcon' and 'Galaxy'.

87. Both the said companies sent their replies on or about 16.7.2007.

It was stated :

"It has come to the notice of VTM Cell Delhi that M/s Galaxy Rent-a-Tel. Pvt. Ltd. is renting the SIM cards of M/s Bharti Airtel Ltd. in India. The website of M/s Galaxy Rent-a-Tel. Pvt. Ltd. is also indicting the same. In this regard, you are requested to furnish the following documents to the office of the undersigned:

1. The Article of Association and Memorandum of the company.
2. Permission documents for the renting of SIM cards in India from DoT.
3. Agreement documents with M/s Bharti Airtel Ltd. to rent the SIM cards in India."

In the show cause notice dated 18.1.2010 it was also stated:

“AND WHEREAS to meet the requirement of natural justice, M/s GRTPL and M/s FBRPL were requested to offer comments on the alleged violations communicated vide letter no. No.842-961/2008-AS-IV/ both dated 21<sup>st</sup> August, 2009. The reply from M/s M/s FBRPL dated 30<sup>th</sup> September 2009 received in DoT in defence of their unauthorized/illegal business is not satisfactory. The letter to M/s GRTPL received back in DoT undelivered. There has been a loss to the Government and had been threat to the security of the National besides violation of the License Agreement due to the business arrangement on the basis of purported agreement.”

According to `Airtel`, copies of the report/letters had not been furnished.

On an analysis of the subscriber data by the Vigilance Wing, it is evident, that Bharti had been supplying the same on a monthly basis.

It was concluded that `Falcon` and `Galaxy` “hidden subscriber base” from M/s Bharti.

The report also proceeded on the basis that the same was virtually based on suspicion. From a perusal of a notice dated 18.1.2010 and the impugned order 19.9.2011, it would appear that a table only had been given but no details thereof had been supplied to the Petitioner.

It was furthermore stated that the reply of `Falcon` had been found to be unsatisfactory but still reliance has been placed on it.

88. So far as the alleged violation of the circular letter dated 23.6.2008 is concerned, the Petitioners have made two fold submissions:

1. They had been supplying all the relevant data which were in their power and possession.
2. They had complied with the requisite directives.

It has furthermore been contended that even in the show cause notices the allegations made against the Petitioners are general and bald in nature.

According to them, the Respondent did not deal with the question as to which part of the requirements of the said circular had been complied with.

### **Transfer of SIM cards**

89. One of the contentions in the case of 'Vodafone' was that the spirit of transfer prohibited the licensees from granting their approval. It has, thus, not been denied that transfers in fact had been approved. If such transfers have been made how far they are illegal and contrary to the conditions of license could have been put to the Petitioners and they could have replied thereto.

Mr. Naveen Chawla has also placed reliance on a circular letter dated 23.11.2004 in Idea's case to contend that even in respect of the prepaid customer, sub-letting has been permitted.

**Violation of Agreement - Issue**

90. On this issue the case of `Vodafone' stands on a bit different footing.

So far as the agency agreement granted by it to Matrix is concerned, no deficiency had been found in the agreement itself. We have noticed heretobefore that the allegation of connivance has not prima facie, been established. We would, however, deal with the question with regard to grant of bulk connections separately.

All the Petitioners have granted bulk connections. The matter relating to grant of bulk connections to one entity required taking of some steps as has been provided for in the circular letter dated 23.6.2003.

We may notice some of the relevant provisions thereof:

“Subject:- Operation of Clandestine/illegal Telecommunications Centers/Telephone Exchanges.

From time to time, Vigilance Units of DoT/BSNL/MTNL/VSNL with the help & assistance of intelligence Agencies/ Law Enforcement Agency have unearthed operations of clandestine/illegal Telecommunications facilities/exchanges. The number of cases detected/unearthed in the recent past substantiality increased. Mostly clandestine/illegal Exchange for receiving international calls and distribution to PSTN in India has been found. In the cases detected, it was observed that the miscreants had obtained following types of telecommunications facilities from the authorized service providers:

.....

ii For connecting to the domestic end, bulk telephone lines (landlines or Cellular Mobile Telephone Connections), ISDN-BRA/PRI, bulk extension lines of EPABX, DOD junctions/E-IR2 etc. were used.

2. Operation of such clandestine/illegal telecommunications facilities has serious implications from National security point of view besides revenue loss to the Government as well as telecom operators. This is a matter of serious concern and all possible steps need to be taken by all concerned to curb such activities. This issue was also discussed in the meeting chaired by Secretary, Telecom on 26.4.2003, held jointly with Intelligence Agencies and all Cellular Operators.

3. With a view to ensure that such activities are stopped forthwith, all the Cellular Operators hereby advised to implement the following with immediate effect.

(i) Utmost vigilance should be exercised in providing bulk telephone connections for a single user as well as for a single location. Provision of 10 or more connections may be taken as bulk connections for this purpose. Special verification of bonafide should be carried out for providing such bulk connections. Information about bulk connections will be forwarded to Sr. DDG (Vigilance), DoT as well as all Security Agency on monthly basis.

(ii) The call detail records for outgoing call made by mobile customers should be analyzed for subscribers making large number of outgoing calls day and night and to the various telephone numbers. Normally no incoming call is observed in such cases. This can be done by running special program for this purpose. This service provider should devise appropriate fraud management and prevention programme and fix threshold levels of average per day usage in minutes of the telephone connection; all telephone connections crossing the threshold of usage should be checked for bonafide use. A record of check must be maintained which may be verified by Licensor, any time The list/details of suspected

subscribers should be informed to the Sr. DDG(Vigilance), DoT, West Block-I Wing -2 R.K.Puram, New Delhi-66, immediately.

.....

(v) Bulk user premises should be inspected by the service providers at regular intervals for satisfying themselves about bonafide use of such facilities. A record of such inspection should be maintained and preserved for minimum one year, for inspection/verification by the licensing authority or a designated officer of the authority.

(vi) Leased circuits should also be checked for their bonafide use and to detect any misuse

(S C Chaudhary)  
Asstt Director General (VAS-I)

Copy to:

- (i) Sr. DDG (TEC)
- (ii) Secretary, TRAI"

91. It is now almost admitted that all the agencies of the Petitioners had granted connections and/or pre activated SIMs to various subscribers. The Respondent while directing the agents of the Petitioners to disconnect the same, however, asked them not to disconnect the phones of the officials of the Embassies.

The said directions according to the agents of the Petitioner had been complied with.

92. The Petitioners, however, contend that they have not violated the provisions of said circular as all relevant informations have been furnished.

Before us, Ms. Manisha Dhir urged that the Petitioners ought not to have granted so many connections to one single entity and it would

be preposterous to conceive as to how a single entity could utilize so many connections.

Apart from the fact that suspicion by itself would not be a substitute for proof, our attention as noticed heretofore has been drawn to a circular letter dated 23.11.2009 whereby transfer of even prepaid connections is permissible in law.

Relying on or on the basis of paragraph 2 of the said circular it has been contended that transfer of a SIM card, if permissible in respect of pre paid connection, there is absolutely no reason as to why the said principle would not be applicable to a post paid connections.

Having heard the learned counsel for the parties we are of the opinion that this question may be considered afresh by the DoT. It may be true that prima facie grant of so many connections to one single identity; within a span of a few years seem to be very suspicious as also violative of several circular letters issued by the Respondent and upon which reliance has been placed in this behalf, but the Petitioners were at least entitled to be heard on the said issue.

### **Quantum Issue**

93. The Respondent also did not pose unto itself the right question namely assuming that the Petitioner is guilty of violation of certain conditions of license, whether a case has been made out for imposition of maximum amount of penalty.

The quantum of penalty imposed on a licensee plays an important role in his further transaction.

A sum of Rs.50.00 crores is not a trifling amount.

In *Global Energy Limited & Anr. vs. Central Electricity Regulatory Commission* (2009) 15 SCC 570 even in the context of a 'law' the Supreme Court opined:

"71. The law sometimes can be written in such subjective manner that it affects efficiency and transparent function of the Government. If the statute provides for pointless discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an objective norm, which can enforce accountability in decision-making process. All law-making, be it in the context of delegated legislation or primary legislation, have to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from due process requirement under Article 21, equal protection clause embodied in Article 14 and fundamental freedoms clause ingrained under Article 19. A modern deliberative democracy cannot function without these attributes.

72. The constitutive understanding of the aforementioned guarantees under the Fundamental Rights Chapter in the Constitution does not give rise to a mere rhetoric and symbolic value inured by the polity but has to be reflected in minute functioning of all the three wings of State—executive, legislature and judiciary. When we talk of State action, the devil lies in the detail. The approach to writing of laws, rules, notifications, etc. has to showcase these concerns.

73. The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic

level of “legal security” by assuring that law is knowable, dependable and shielded from excessive manipulation. In the context of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters.”

### **TRAI Recommendations Re:Quantum of Penalty**

94. The TRAI on or about 16.4.2012 has issued guidelines for Unified Licensing Regime.

In Clause 2.39 of its recommendations, TRAI sought to issue draft guidelines with regard to proposed imposition of penalty based on the type of violation – ‘minor’ and ‘major’ and the type of licence i.e. at the ‘National level’, ‘Service area level and District level’.

104. In para 2.40 of the said guidelines it has been noticed that the opinion of the majority of the stakeholders was that the quantum of penalty should be commensurate with injury/damage suffered by the licensor/Central government and the penal provisions in the license agreement should only be applied in case of a wilful breach and not in a case of inadvertent lapses /impossibility.

95. Para 2.43 of the said recommendations reads as under:-

“2.43. The Authority, after examining the suggestions given by the stakeholders, agrees with the contention that it is not the type of licence but the nature of violation that should determine the level of penalty. The Authority is also of the opinion

that the quantum of penalty should also depend upon the number of time a service provider has violated the licence conditions. Accordingly, the Authority has modified the relevant clause by linking the amount of penalty with the number of occurrences of the violation. The maximum penalty amount is brought down from Rs. 50 crore to Rs. 10 crore. Additionally, based on the suggestions given by the stakeholders, the Authority has also laid down broad guidelines for categorising major and minor violations.”

96. In the guidelines, it was suggested:-

**“10. Penalty**

10.1. TRAI may impose financial penalty (as detailed below) based, for each violation of the terms and conditions of licence agreement:

No. of times	Minor violation	Major violation
1 <sup>st</sup>	1 lakh	10 lakh
2 <sup>nd</sup>	5 lakh	50 lakh
3 <sup>rd</sup>	25 lakh	2.5 crore
4 <sup>th</sup>	25 lakh	5 crore
5 <sup>th</sup> and subsequent violations	25 lakh	10 crore

10.2. Before deciding the imposition any penalty, proper opportunity will be given to Licensee to present its case.

10.3. For categorising a violation as minor or major, the guiding principles shall be

- Whether the violation is committed deliberately or inadvertently;
- Whether the violation is committed repeated violations;
- Whether the licensee is prompt in taking corrective action;

- The amount of loss to the exchequer;
- What kind of benefits were derived by licensee due to the violation;
- Whether the violation was restricted in a service area or was across a number of service areas;
- Whether the violation / breach carried out in its network by a third party beyond the control of the operator;
- Whether the violation has an impact on the end-user(s) and /or other licensee(s) business.

10.4. Notwithstanding the above, the following violations be always be categorised as major violations;

- i Violation resulting in threat to the security of nation,
- ii Violation resulting in heavy revenue losses to the Government.
- iii Wilful and illegal conduct of the Licensee outside the framework of terms and Conditions of the Licence.”

97. Any violation affecting the security of the nation and violation of the conditions of license for a long time, however, was recommended to be `major violation.’

It, therefore, appears that the TRAI also opined that conduct of the licensees play an important role in the matter of imposition of penalty.

98. Moreover, Clause 10.2(iii) of the conditions of license does not prescribed a minimum or maximum penalty. It is also not a case where the licensor has no discretion in the matter. Licensor in fact has

a wide discretion. The quantum of penalty, therefore, must be fixed depending on the gravity of the charges against each of the operators. Application of mind, therefore, would also be necessary having regard to the facts and circumstances of each case. Discretion as it is well known cannot be exercised either on whims or caprice. For the aforementioned reasons also it is necessary that the licensor must apply its mind with regard to the quantum of penalty in each case separately. It is expected that the licensor shall not apply the principle mechanically. We have noticed heretobefore the recommendations of the TRAI also in this behalf which also shows that quantum of penalty received some consideration at the hands of the TRAI. It is of course not binding on the Respondent but we have referred thereto inter alia to show that quantum of maximum penalty in each and every case by DoT is of some concern to all concerned authorities.

**Delay**

99. It had been submitted before us by learned senior counsel appearing on behalf of the Petitioners that the Respondent in effect and substance was not concerned with the security aspect of the matter as otherwise there is absolutely no reason as to why so much delay could be caused in dealing with the matter.

We are prima facie of the opinion that the said contention has some substance.

The Petitioners have been issued notices by the Respondent in the year 2009.

According to the learned counsel appearing for the Petitioners, the Respondent must be held to have satisfied itself upon issuance of directions upon the agents of the operators and its purpose would be served if the Respondents the purpose and object for which the license conditions have been laid down and the circular letters have been issued in view of the fact that the agent of the Respondent had already been asked to stop renting of SIM cards to third parties.

We think that this aspect of the matter should also be considered by the appropriate authority of the Respondent.

**Re: Agency Issue**

100. Submission of Ms. Manisha Dhir to the effect that the Petitioners are bound by the acts of their agents may now be considered.

In the case of Vodafone, Matrix, as noticed heretobefore, had two roles to play; one as an agent and the other as a bulk customer. So far as its action as a bulk customer is concerned, the same will have nothing to do with the contract of agency.

We may notice Sections 237 and 238 of the Indian Contract Act whereupon reliance has been placed by Ms. Dhir:

237. Liability of principal inducing belief that agent's  
– unauthorized acts were authorized

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When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his

principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such act and obligations were within the scope of the agent's authority.

#### Illustrations

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

#### *238. Effect, on agreement, of misrepresentation or fraud by agent -*

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Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed, by the principals; but misrepresentations made, or frauds, committed, by agents, in matters which do not fall within their authority, do not affect their principals.

#### Illustrations

(a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

101. It may not be correct to contend that the terms of agency are proved by the CAF Forms. Such a charge, as indicated heretobefore, so far as 'Vodafone' is concerned has not been put to it. If in law

Matrix was not an agent of Vodafone in its capacity as a bulk customer, the question of applicability of the aforementioned provisions of the Indian Contract Act would not arise.

102. Our attention has been drawn to a decision of the Supreme Court of India in *Chairman, Life Insurance Corporation & Ors. vs. Rajiv Kumar Bhaskar* (2005) 6 SCC 188, wherein the question which fell for consideration was as to whether an employer having entered into a contract of insurance on behalf of its employees and were to deduct the amount of premium from their salaries, the effect of the failure on the part of the former to do so which was detected when a claim was lodged by the heirs and legal representatives of a deceased employee.

It was in that context only it was opined:

**“22.** An agency can be created expressly or by necessary implication. It may be true that the employers in response to the proposal made by the Corporation stated that they would act as agents of their employees and not that of the Corporation. But, the expression “agent” in such circumstances may not mean to be one within the meaning of the Life Insurance Corporation of India (Agents) Regulations, 1972 made in terms of Section 49 of the Act; but would mean an agent in the ordinary sense of the term. An employer would not be an agent in terms of the said Regulations on the premise that it was not appointed by the Corporation to solicit or procure life insurance business. The employers had no duty to discharge to the Corporation either under the Act or the Rules and Regulations framed thereunder but keeping in view the fact that the Corporation did not make any offer to the employees nor would directly make any communication with them regarding

payment or non-payment of the premium or any other matter in relation thereto or connected therewith including the lapse of the policy, if any, it cannot be said that the employer had no role to play on behalf of the Corporation.”

“**23.** In a plain and simple contract of insurance either the Corporation or the agent, on the one hand, and the insured, on the other, is liable to comply with their respective obligations thereunder. In other words, when a contract of insurance is entered into by and between the insurer and the insured no third party would have any role to play, but the said principle would not apply in a case of this nature. In a scheme of this nature, the employers were to make all endeavours to improve the service conditions of the employees and discharge its social obligations towards them. So far as the employees are concerned, they could not approach the insurer directly, and, thus, for all intent and purport they were to treat their employers as “agents” of the Corporation. The Scheme clearly and unequivocally demonstrates that not only was the contract of insurance entered into by and between the employee and the insurer through the employer but even the terms and conditions of the policy were to be performed only through the employer.”

There cannot be any quarrel with the aforementioned principle of law. The said decision, however, has no application to the fact of the present case.

103. Reliance has also been placed on *Dilawari Exporters vs. Alitalia Cargo & Ors.* (2010) 5 SCC 754, wherein D.K. Jain, J. speaking for a Division Bench of the Apex Court stated the law thus:

“20. There is no gainsaying that onus to show that the act done by an agent was within the scope of his authority or ostensible authority held or exercised by him is on the person claiming against the principal. This, of course, can be shown by practice as well as by a written instrument. Thus, the question for

consideration is whether on the evidence obtaining in the instant case, can it be said that respondent No.3 had an express or implied authority to act on behalf of respondent No.1 as their agent? If respondent No.3 had such an authority, then obviously respondent No.1 was bound by the commitment respondent No.3 had made to the appellant."

"22. The other relevant particulars like, the name of the consignee, the number of the House Air Waybill (0841), etc. tally with the House Air Waybill issued by respondent No.3 to the appellant clearly showing the name of the consignor as that of the appellant. From the said documents, it would, appear that respondent No.3 was, in fact, acting in dual capacity - one as a Shipper on behalf of the appellant and the other as an agent of respondent No.1. That being so, respondent No.1 was bound by the acts of their agent, viz. respondent No.3, with all its results. We are of the opinion that while holding that there was no privity of contract between the appellant and respondent No.1 this vital aspect of the matter escaped the attention of the Commission thus, vitiating its order."

The aforementioned authority relied on by Ms. Dhir herself is clear and unambiguous to the effect that the action on the part of a person working in dual capacity must be carried out in its capacity as an agent so as to bind the consumer and not those which are not carried out by him as an agent.

Section 182 of the Indian Contract Act defines the term 'Agent'.

What would be the agent's authority is stated in Section 188 thereof.

104. Thus, before a 'Principal' is found to be bound by the acts of his agent; the Court must be satisfied that there exists an agreement in

that behalf. The Principal would not be liable when the concerned person does not act in its capacity as an Agent.

As Bowstead & Reynolds on Agency states that concept of agency has remained "peculiarly troublesome."

105. If a finding of fact could be arrived at that Matrix was the Agent of Vodafone even as a bulk consumer the matter would have been different.

106. A fortiori clear evidence should have been brought on record to show that `Matrix' transferred the SIM cards which were meant to be distributed in its capacity as an agent.

In fact to that effect it was entitled to perform its activities as an agent. [See Morarji Premji Gokuladas v. Mulji Ranchhod Ved & Co. AIR 1924 Bombay 232, Pullock & Mulla, Indian Contract and Specific Relief Acts, Twelfth Edition, page 2349 and Venkoba Rao's Law of Agency page 660 and 665].

In Bowstead & Reynolds on `Agency' at para 8-064 it is stated:

"But for the principal to be responsible under agency principles the agent must normally have been acting within the scope of his actual or apparent authority. It is a well-known proposition that the mere fact that the principal by appointing an agent gives that agent the opportunity to steal or otherwise to behave fraudulently does not without more make him liable. Furthermore, the fact that an agent is acting in furtherance of his own interest may negative actual authority and, may if known to him or such that he ought to know it, put the third party on notice as regards apparent authority."

107. We have noticed heretobefore that the Respondent prima facie has not been able to establish the allegation of connivance.

We may, however, hasten to add that the conclusion of ours is confined to the case in hand and materials placed on record, as on principle there cannot be any doubt or dispute that the Petitioners in their capacity as licensees, would be bound by the acts of their 'Agents', if one way or the other the conditions of licenses are found to be violated. It is for that reason only, we have emphasized the requirement to comply with the principles of natural justice and fair and/or reasonable action on the part of the Respondent.

**Re: The question of the Petitioners having not provided any documentary evidence.**

108. We have noticed heretobefore that the Petitioners filed a large number of documents. Some documents had also been furnished by their agents. It is not the case of the Respondent that the said documents were not to be taken into consideration or otherwise wholly irrelevant. In fact the documents filed by the agents of the Petitioners in terms of the agreements have been acted upon and they had been injuncted from carrying out their activities of renting out the SIM cards.

The Petitioners have merely complained that while passing the impugned orders some documents which were vital for determination of the issue had not been supplied to them.

## **Conclusion**

109. In view of our findings aforementioned the matters must be directed to be remitted to the Respondent herein for fresh consideration. But we cannot shut our eyes to one aspect of the matter.

The Petitioners `Idea' and `Bharti' were bound to explain to the Respondent the terms of the Agreement entered into with its agent.

110. It is also difficult for us to agree with the contention of Mr. Tripathi that `Idea' did not have with it a copy of the agreement entered into by and between itself and M/s LIMCO. Had the said fact been correct, it could have raised the said contention in its cause shown to the first show cause notice.

It is also difficult for us to agree to the contention of Mr. Tripathi that the first show cause notice and its reply should be totally ignored. The Tribunal is required to arrive at a conclusion on the basis of the materials on record. The materials on record placed by the parties must be considered in their entirety. If the conduct of the parties can be ascertained from very important materials brought on record, it is difficult to ignore the same particularly keeping in view the fact that the reply to the said show cause notice was a consensus act on the part of the Petitioner.

It is really a matter of great surprise that the Petitioner-`Idea` has raised the question of misplacement and/or loss of agreement entered into by and between it and Limco.

Only in answer to the second show cause notice it did so. Even from the tenor of the first show cause it appeared to be aware that the Respondent has obtained a copy thereof either from `Limco` or the Petitioner itself.

The Respondent had also disclosed those parts of the agreement which were found to be relevant for the purpose of issuance of show causes.

111. Similarly it is difficult for this Tribunal to hold as has been submitted by Mr. Tripathi that only because in the notice of termination of the agreement with `Limco` the said agreement had not been referred to, an inference should be drawn that `Idea` was not in possession thereof.

We, therefore, are of the opinion that Idea has taken recourse to suppression of the said agreement.

In any event, hearing of the Petitioners on the quantum of sentence was also necessary.

Petitioners may be served again with a show cause notice. They on receipt thereof must file their respective show causes within two weeks from the date of receipt thereof.

On consideration of the causes shown by the Petitioners fresh orders may be passed.

The Respondent shall refund the amount deposited by the Petitioners with interest @9% p.a. within two weeks.

The petitions are allowed with the aforementioned directions.

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

**(S.B. Sinha)**  
**Chairperson**

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

**July 17, 2012**  
**`anu'**