TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

DATED 29th OCTOBER, 2012

Petition No.131 of 2012

Reliance Communications Ltd. ... Petitioner

Vs.

Union of India ... Respondent

BEFORE:

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

For Petitioners : Mr. Navin Chawla, Advocate

For Respondent : Mr. K.P.S. Kohli, Advocate
Ms. Debopama Roy, Advocate for
Mr. T.S. Nanda, Advocate
Ms. Maneesha Dhir, Advocate

J U D G E M E N T

The petitioner, a licensee, is before us being aggrieved by and dissatisfied with a demand notice dated 20.8.2010 levying penalty for a sum of Rs.1,51,27,000/- for the period April 2009 and July 2009.

The said impugned order has been passed on the following factual matrix:-

(i) By reason of an UAS licence granted in its favour, the Petitioner was required to comply with the circular letters/ guidelines issued from time to time.

(ii) Clauses 41.14, 10.2 (ii) and 41.16 of the conditions of licence, which are relevant for this case, read as under :-

> *Clause 10.2 (ii)*
> *"The licensor may also impose a financial penalty not exceeding Rs.50 crores for violation of terms and conditions of license Agreement."*

> *"Clause 41.14*
> *"The licensee shall ensure adequate verification of each and every customer before enrolling him as a subscriber, instruction issued by the licensor in this regard from time to time should be scrupulously followed."*

> *Clause 41.16*
> *"The Licensor or its representative(s) will have an access to the Database relating to the subscribers of the LICENSEE. The LICENSEE shall also update the list of his subscribers and make available the same to the Licensor at such intervals as may be prescribed. The LICENSEE shall make available, at any prescribed instant, to the Licensor or its authorized representative details of the subscribers using the service."*

(iii) By a circular letter dated 10.5.2005, instructions inter-alia were issued for proper identification/verification by DoT emphasizing that sale of sim card should not be carried out, and having serious security implications and an undertaking to the effect that instructions would be followed scrupulously was also required to be submitted by the licensee.

By reason of a circular letter dated 22.11.2006, instructions were also issued for verification of subscribers, which were to be scrupulously followed by the service providers. A penalty was also to be levied thereunder, if any subscriber number was found to be operating without proper verification.

(iv) In terms of the circular letter dated 25.6.2007, the following guidelines were issued :-

> *"(i) The service Providers should be requested to provide the total subscriber data base, till last day of previous month, on CD by10th of every month.*
>
> *i(i) The samples shall be indicated to all the Service Providers immediately on receipt of the subscriber data base and not later than 15th day of the month. The sample size to be indicated shall be 0.02% of the total*

customer base subject to minimum of 100 per operator per VTM Cell.

(iii) The Service Providers shall be requested to submit the CAFs/CEFs/SEFs by 25th day of the month. However, samples should start flowing from Service Providers within 3-4 days from the date of VTM request."

Various circular letters thereafter were also issued with which we are not concerned at the moment.

2. The Petitioner allegedly failed to submit its subscriber data in a CD for the month of May 2009 by 10.5.2009 wherefor a reminder was issued to it on 15.5.2009.

Concedingly, the said subscriber data CD was filed on 19.5.2009.

3. It is also not in dispute that several reminders therefor were sent to the Petitioner on the premise that it had not been adhering to the aforementioned guidelines.

4. Concedingly again in terms of the said guidelines, the Petitioner was required to deposit its CAFs.

On 25.5.2009 it deposited 70 CAFs.

According to the Petitioners, it deposited 307 more CAFs on 26.5.2009 which the concerned officer did not accept.

A joint audit report was made on or about 28.5.2009.

An endorsement was made thereon by the representative of the Petitioner to the following effect :-

> *"The non submitted CAFs mentioned in this report were made available to D.D.G's Office on the day of verification but not taken on record on account of delay in submission. These CAFs were old (2003-04) and were lying in Bombay Warehouses and in transportation it took time."*

5. Thereafter, the impugned demand was issued on 20.8.2010.

By reason of various representations, the Petitioner requested the Respondent not to levy the penalty for delay of one day in submitting the CAFs, which were rejected both by the TERM Cell as also by the DoT.

The Petitioner by a letter dated 22.12.2011 was asked to deposit an additional sum of Rs.30,70,130/- by way of interest at the rate of 15.25 percent per annum on the penalty imposed by reason of the said notice dated 20.8.2010.

6. On the aforementioned premise, the Petitioner alongwith others filed Petition No. 252 of 2011.

By reason of a judgment and order dated 12.4.2012, the said petition was disposed of.

7. The short question, which arises for our consideration in this petition, is as to whether the said demands were lawful?

8. Mr. Chawla, learned counsel appearing on behalf of the Petitioner would submit that keeping in view the fact that a legal fiction cannot be created by reason of a circular letter, and there was a delay for only one day in submitting the CAFs, the same would not attract the penalty clause.

9. Mr. Kohli, learned counsel appearing on behalf of the Respondent, on the other hand, would contend that keeping in view the fact that not only the Petitioner failed and/or neglected to adhere to the time frame fixed by the Respondent as it had not been complying with the circular letters by filing the requisite CD in respect of the last day of previous month by the tenth day of every month, the impugned order is sustainable. Learned counsel would

furthermore contend that it is not a case where the Petitioner has substantially complied with the direction.

10. The power of the DoT to issue such circulars and guidelines has been upheld by this Tribunal in Petition No. 252 of 2011.

In that view of the matter, the said question does not arise for consideration once over again.

We may, however, notice that therein this Tribunal opined as under :-

> *"178. In these petitions, it will bear repetition to state that this Tribunal is not concerned with individual cases. We have no doubt in our mind that in future the officers of the DoT would consider the question of enforcement of the security aspect in a holistic manner. We have also no manner of doubt that the authorities of the respondent herein shall consider the practical difficulties of the operators, if any, and ameliorate their grievances.*
>
> *179. Whereas, there cannot be any doubt or dispute that the security of the nation must be considered at the highest level, the action on the part of the officers of the respondent should be to see that the operators are not unjustly harassed. It also goes without saying that on mere technicalities, penalty should not be imposed."*

11. Keeping in view the aforementioned legal principle, we may consider its applicability in the instant case.

12. Without going into the details of the other correspondences passed between the parties hereto and/or circular letters/ guidelines issued by the Respondent, we may notice the circular letter dated 25.6.2007 :-

> *"(i) The Service Provider should be requested to provide the total subscriber data base till last day of previous month, on CD by 10th of every month.*
>
> *(ii) The samples shall be indicated to all the Service Provider immediately on receipt of the subscriber data base and not later than 15th day of the month. The sample size to be indicated shall be 0.02% of the total customer base subject to minimum of 100 per operator per VTM Cell.*
>
> *(iii) The Service Provider shall be requested to submit the CAFs/ CEFs/SEFs by 25th day of the month. However, samples should start flowing from Service Providers within 3-4 days from the date of VTM request.*
>
> *(iv) The Sample Verification shall be completed by the VTM Cell by 29th day of the month and the report shall be sent to DDG (VTM) Delhi & Coordination by 30th day of the month.*

(v) In such cases where there are more than one VTM Cells in one License Service Area, the operators should not be insisted to provide HLR data VTM wise. They can do so Licence Service Area wise. However, the data for subscriber verification should be taken VTM wise from the Service Providers and VTM wise verification report should be sent."

13. It is not in dispute that having regard to the aforementioned circular letter dated 25.6.2007, the Petitioner was required to provide the total subscriber data base till last day of previous month, on CD by 10th of every month. It failed and/or neglected to do so.

14. However despite the same, the said CD was accepted when presented before the competent authority on 19.5.2009. Ordinarily in terms of the aforementioned circular letter dated 25.6.2007, the licensees were granted ten days' time to furnish the CAFs.

In this case, the Petitioner was directed to furnish the CAFs only on 21.5.2009. Having accepted the CD on 19.5.2009 and having issued the directions on 21.5.2009, in terms of the aforementioned letter the Petitioner could furnish its CAFs within a period of ten days; it however, was asked to do so by 25.5.2009.

15. There appears to be a controversy as to whether 371 CAFs were deposited by the Petitioner after the office hours or before on 26.5.2009?

According to the Respondent, the Petitioner should have complied with its directions.

We may in this connection notice the reply of the Respondent :-

> *"7. That the Respondent further vide office memorandum dated 25.06.2007 with respect to guidelines regarding Subscriber verification stated inter-alia :-*
>
> *9. That in terms of the instructions/guidelines issued by the Respondent, the Petitioner failed to submit the subscriber data CD pertaining to May, 2009 by the due date i.e. 10.5.2009. The reminder was issued by the TERM Cell on 15.05.2009 to the Nodal Officer and the Circle Head of the Petitioner by email and also over the telephone. Subsequently, the Respondent submitted the subscriber data CD on 19.05.2009 (i.e. 9 days later) instead of 10.05.2009. It is pertinent to mention that the petitioner has repeatedly and regularly submitted the subscriber database CD on the expiry of the date i.e. 10th day of every month.*
>
> *12. That a penalty of Rs.1,51,27,000/- was imposed on the Petitioner by the Respondent on the basis of correct subscriber verification percentage over the sample check for the period from April, 2009 to July, 2009. It is pertinent to mention that the Petitioner has alleged that the Petitioner had produced 301 CAFs on the day of CAF Audit for the month of May'2009. It may be noted that CAF submission date was progressive upto 25.05.2009. Petitioner did not submit 301 CAFs out of 371 samples for the month*

of May 2009 upto 25.05.2009. CAFs were brought after verification process was over on 26.05.20009. As the Report was made in office hours on 26.05.2009 and it was found that 301 CAFs were not submitted apart from deficiencies in other CAFs. Therefore the penalty has been correctly imposed."

16. A representation was made by the Petitioner on 23.8.2010, which has been rejected by an order dated 14.9.2010.

17. By reason of the aforementioned circular letters, a procedure has been laid down as to how the audit shall be conducted.

The aforementioned circular letter/guideline do not provide for imposition of penalty, which as indicated heretobefore, had been directed by reason of other guidelines.

We may, in this connection, also notice the guidelines dated 24.12.2008:-

"This has reference to CMTS/UAS Licence condition(s), which inter-alia provides that :-

".....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 ...."

And

"….The Licensor may also impose a financial penalty not exceeding Rs.50 crores for violation of terms and conditions of licence agreement……", and the instructions issued from time to time regarding subscriber verification including the provision that after 31st March 2007, if any number is found working without proper verification, a minimum penalty of Rs.1000 per violation of subscriber number verification shall be levied on the licensee apart from immediate disconnection of the subscriber number by the licensee.

2. In spite of the above provisions/instructions regarding subscriber verification, it has been observed from the report of TERM Cells that the service providers are not complying with the requirement of subscriber verification fully. Accordingly, the matter has been reviewed and it has been decided to introduce a scheme of penalty for subscriber verification failure cases at graded scales w.e.f. 1st April 2009, so that it works as a deterrent. The graded scales are based on correct subscriber verification percentage i.e. correct subscriber verification percentage of a service provider in any service area will be ascertained and based on this percentage, a financial penalty of corresponding amount for each detected case of unverified subscriber shall be levied on account of violation in respect of subscriber verification failures from the service provider in that service area. According to the said scheme, the correct subscriber verification percentage vis-à-vis financial penalty per unverified subscriber shall be as per table below :-

Correct subscriber verification percentage in a service area	*Amount of financial penalty per unverified subscriber*
Above 95%	*Rs.1000/-*
90% - 95%	*Rs.5000/-*
85% - 90%	*Rs.10000/-*
80% - 85%	*Rs.20000/-*
Below 80%	*Rs.50000/-*

3. The CMTS/UAS licensees may lighten their subscriber verification process accordingly so as to avoid imposition of financial penalty for violation of terms and conditions of License Agreement and instructions regarding subscriber verification.

4. The present provision of financial penalty @ Rs.1000/- per unverified subscriber shall continue till 31st March 2009."

18. Mr. Kohli, relying on or on the basis of a decision of the Supreme Court of India in Union of India and Ors. Vs. Alok Kumar & Ors. reported in (2010) 5 SCC 349, would contend that it is always necessary for the Executive Government to lay down by way of any statute and/or statutory rule to issue a circular.

In the said decision, the Apex Court was considering a practice whereby and whereunder an outsider could also be appointed as an Inquiry Officer. In the aforementioned context, it was held that keeping in view the fact that a practice has come into being to appoint outsiders as Inquiry Officer, the same

must be held to be a part of the rule. The said decision was, thus, rendered in a service matter in the context of Article 309 of the Constitution of India.

19. Such is not the case here. The practice as was contended by Mr. Kohli itself provided that even after the expiry of the time frame granted by the Respondent, as contained in the guidelines could be accepted.

In that view of the matter, keeping in view the fact that the Respondent had all along been extending the time to comply with the time frame specified in these circular letters, it cannot be said that time frame issued by the Respondent must be held to have been accepted as a practice.

20. It is now a well settled principle of law that where a provision for imposition of penalty has been laid down, the same would not be treated to be imperative in character. It would be held to be directory in nature.

21. Even in some cases, the mandatory provisions may also be considered to be a directory one.

This has been so held by the Supreme Court in Pandiyan Roadways Corporation Ltd. Vs. N. Balakrishnan reported in (2007) 9 SCC 755, in the following terms :-

"14. There cannot also be any doubt that ordinarily consequences flowing from contravention of an imperative character of a statute have to be given effect to. A statutory provision may be substantive or procedural. If it is substantive, the requirements laid down in the statute should ordinarily be complied with. However, when the provisions contain a procedural matter, substantial compliance thereof would serve the purpose.

18. Ordinarily, although sub-clause (5) of Clause (17) of the Certified Standing Orders is required to be complied with, the same, in our opinion, would not mean that in a given situation, there cannot be any deviation therefrom. In a case where dismissal or removal from service is to be ordinarily followed e.g. in a case of grave misconduct like misappropriation, strict enforcement of the rule may not be insisted upon. When, we say so, we are not oblivious of the law that an executive agency is ordinarily bound by the standard by which it professes its actions to be judged. (See Harjit Singh v. State of Punjab). But where a procedural provision merely embodied the principles of natural justice, in view of the decision of this Court in State Bank of Patiala the question as to whether the principle has been followed or not, will depend upon the fact situation obtaining in each case. (See Ashok Kumar Sonkar v. Union of India)."

22. Moreover, it is also well settled that the discretion rested in an authority should be exercised in an objective manner.

In Montreal Street Railway Co. Vs. Normandin 1917 Appeal Cases 170 at 175, the following principle was enunciated :-

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

23. In Pratap Singh Vs. Shri Krishna Gupta & Ors. reported in AIR 1956 SC 140, it has again been held by the Supreme Court of India that a substantial compliance of the legal provision would serve the statutory purposes, stating :-

"(3). We do not think that is right and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which is which judges must determine the matter and, exercising a nice discrimination, sort out one class from the other along broad based, commonsense lines. This principle was enunciated by Viscount Maugham in Punjab Co-operative Bank Ltd., Amritsar v. Income Tax Officer, Lahore(2) and was quoted by the learned High Court judges-'

"It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

24. In this case, there are several documents to show that the delay of the Petitioner was only for a day.

It has furthermore not been granted ten days time to file CAFs, which in terms of the guidelines itself it was entitled to.

The Petitioner's representative categorically made an endorsement in the joint audit report, the contents whereof were also reiterated in various representations made by the Petitioner and in particular, in its representation dated 23.8.2010. It would, therefore, not be correct to contend, as has been done by Mr. Kohli, that the onus was on the Petitioner to prove that it had supplied the CAFs within the office hours of 26.5.2009.

If such was the contention of the Respondent, the concerned officer of the TERM Cell in his turn also could make an endorsement in the Joint Audit Report to that effect. Moreover, the joint audit report was prepared only on 28.05.2009. We, therefore, do not see any reason as to why the endorsement made by the Petitioner's representative shall not be relied upon.

25. Keeping in view the facts and circumstances of the present case, we are of the opinion that the Petitioner has wrongly been imposed with the demand of penalty and/or the interest accruing thereupon.

The impugned demand notices dated 22.8.2010, 20.9.2011, 22.12.2011 and other orders rejecting the representations of the Petitioner including those contained in the e. mail dated 08.02.2012 and the letter dated 24.02.2012 are hereby set aside.

The Respondent may, however, scrutinize the said 301 CAFs and take action against the Petitioner in accordance with the circular letter/guidelines.

26. The Respondent is directed to refund the amount deposited by the Petitioner within four weeks from date and on its failure to do so, the Respondent will have to pay the amount alongwith interest at the rate of nine percent per annum.

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

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(S.B. Sinha)
Chairperson

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(P.K. Rastogi)
Member

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