

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated : September 28, 2012

Petition No. 542 of 2012

M/s Tata Communications Ltd.

...Petitioner

Vs.

Mahanagar Telephone Nigam Limited & Ors.

...Respondent

BEFORE:

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

For Petitioner

: Mr.U. Hazarika, Sr. Advocate with
Ms. Dharitya Phookan, Advocate

For Respondent

: Mr.Chandan Kumar, Advocate

ORDER

1. The Petitioner is a licensee.

The Respondent is a public sector undertaking. It operates in the towns of Mumbai and Delhi.

2. The parties hereto entered into an interconnect agreement with regard to the aforementioned circles for its ILD services.

So far as Delhi circle is concerned, the agreement involves both basic services as also mobile services whereas in respect of Mumbai circle it was operative for mobile service.

3. The Petitioner filed Petition No.193 of 2012 M/s Tata Communication Limited vs. Mahanagar Telephone Nigam Ltd. & ors., inter alia, for recovery of a sum of about Rs.88.00 lakhs.

No interim order was prayed for nor was any passed on the premise that the said petition was in the nature of a money suit.

4. While the said petition remained pending, the Respondent herein resorted to deduction of a sum of Rs.88,00,301.00 from the dues of the Petitioner in terms of the following chart:

Unit	Date of demand notice	Amount demanded	Amount adjusted	Interest upto 7.08.12
MTNL Mumbai	16.06.2012	17,23,216	0	0
MTNL Delhi Dolphin	19.06.2012	68,11,568	56,72,190	3,21,169
MTNL Delhi Basic	21.06.2012	1,64,24,319	31,28,111	92,165
	Total	2,49,59,103	88,00,301	4,13,334

*Amount inclusive of service tax.

Calculation of interest:

Unit	Date of adjustment	Amount of adjustment	Interest calculated upto 7 August 2012
MTNL Delhi Basic	12.05.2012	11,92,162	51,149
	12.06.2012	10,94,595	30,229
	12.07.2012	8,41,354	10,788
MTNL Delhi Dolphin	13.02.2012	11,33,235	98,359
	12.03.2012	10,49,996	76,635
	12.04.2012	14,65,415	84,552
	12.05.2012	861,885	36,978
	12.06.2012	658,991	18,199
	12.07.2012	502,666	6,445

Total recovery claimed :

Rs.88,00,301(IUC Amt)+ Rs.413,334(Interest)=**Rs. 9,213,635**

5. The adjustments were purported to have been made pursuant to or in furtherance of the circular letters dated 8.4.2009, 9.2.2010, 23.2.2010 and 8.4.2010.

Demand notices have been issued by the Respondent No.4 and 3 respectively on 16.6.2012, 19.6.2012 and 21.6.2012.

6. Feeling aggrieved by and dissatisfied with the said purported adjustments, relying on or on the basis of the internal circulars issued by the Respondent itself, the present petition has been filed.

An application for stay has also been filed by the Petitioner which has been marked as MA No.475 of 2012.

7. Submissions of Mr.Hazarika, learned senior counsel appearing on behalf of the Petitioner are as under:

(i) From the impugned internal communications of the Respondent dated 8.4.2009, 9.2.2010, 23.2.2010, and 8.4.2010 it would appear that by reason thereof adjustment is sought to be made for the period January 2008 and August 2008, July, 2007 and December,2007 September, 2008 and May, 2009, May, 2005 and February, 2007 and April 2007 and June 2007 respectively and it would, thus, be evident, that the purported adjustments sought to be made are in respect of the periods which is otherwise barred under the law of limitation.

(ii) The approval for adjustment had been granted by the Respondent inter alia by reason of an e-mail dated 19.6.2012 from the invoices of the Petitioner and communicated to it by a letter dated 21.6.2012 which is malafide in nature; as it was obligatory on the part of the Respondent herein to obtain leave of this Tribunal prior thereto.

(iii) By reason of such adjustments, the right of the Petitioner to recover a huge amount from the Respondent cannot be made illusory.

8. Mr.Chandan Kumar, learned counsel appearing on behalf of the Respondent, on the other hand, urged :

- (i) Keeping in view the assurances given by the Petitioner that the ISD calls would be charged at the lowest rate offered by BSNL, the Respondent was legally entitled to adjust the amount in terms of its circular letters as on the basis of the said assurance the Respondent had given 100% traffic to it.
- (ii) Such adjustments have been made in the past, but with regard thereto the Petitioner having made no protest, it is futile to urge that the Respondent has no legal right to do so.
- (iii) Even after the adjustment of Rs.88.00 lakhs, the Respondent is entitled to a further sum of Rs.1,01,000,00/- from the Petitioner which being a public money, should not be the subject matter of an interim order.

9. We may at the outset notice the statements made by the Petitioner in paragraphs 6 and 7 of the petition.

"6. That by impugned demand notice dated 19 June 2012 the respondent No. 4 has sought to give effect to internal letters/circulars of the respondent No. 1 dated 8 April 2009, 9 February 2010, 23 February 2010 and 8 April 2010 and make deduction / adjustment of an amount of Rs. 68,11,568 constituting IUC dues allegedly paid in excess to the petitioner. Such adjustments were proposed to be done for the months of May 2005 to May 2009 and MTNL Delhi Dolphin has already made adjustments of an amount of Rs. 56,72,190/- till July 2012. The petitioner is seeking recovery of such adjustments

made in the accompanying petition and stay of further recovery of Rs. 11,39,378/-.

7. That by the impugned demand notice dated 16 June 2012 the respondent No.2 conveyed to the petitioner that it will make further adjustments to the tune of Rs. 17, 23, 216 for the period of May 2005 to June 2005 in terms of the circular dated 8 April 2010. The respondent No. 2 is yet to make any adjustment in terms of the impugned demand notice dated 16 June 2012, 19 June 2012 and 21 June 2012."

10. The said contentions have been traversed by the Respondent in paragraph 6 & 7 of its reply in the following terms:

"6&7. Save and except to reiterate that no amount as alleged or at all is recoverable against the Respondent, contents of rest of paragraph nos. 6 and 7 of the Petition are not denied. In respect of row no. 2, 3 and 4 of Table 1, Respondent's MTNL Mumbai under intimation to the petitioner vide letter dated 20.06.2012, is Annexed at Annexure R/5, adjusted Rs. 15,92,984/- out of Rs.17,23/216/- related to excess payment meant for billing month of May,2005 & June,2005, Respondent's Delhi Dolphin adjusted Rs.64,49,54i/- out of Rs.68,11,568/- related to excess payment made and Respondent Delhi Basic has withheld Rs.31,28,111/- dues, related to revision of rates for the month of May 2005, out of total excess payment of Rs. 1,64,24,319/- due to revision of rates for the period from May'2005 to June'2007 as per the said circulars, from billing period pertaining to April'2012 to June'2012 Respectively which were not recovered/ adjusted in the past. It is however stated that amount so set out in the said two charts are under verification."

We may furthermore notice that the Respondent has filed a chart in Petition No.193 of 2012 which reads as follow:

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 10/10/2008-27

Revised Chart

Date of Circular	Period for which circular issued	Circle	Amt Billed to MTNL		Amt Paid by MTNL		Amt Adjusted		2/29/2012 Interest	Date of Adjustment	No. of Days	Type
			IUC	IUC + Service tax	IUC	IUC + Service tax	IUC	IUC + Service tax				
08-Apr-09	Jan08 to Aug08	MTNL Mumbai	167,581,397	188,294,458	163,396,388	183,592,182	4,185,009	4,702,276	2,575,672	9/29/2008	1248	10%
		MTNL Delhi Basic	78,575,846	86,669,158	57,333,945	63,239,341	21,241,901	23,867,400	8,600,351	11/30/2009	821	Others
		MTNL Mumbai	58,871,129	66,147,601	52,902,757	59,441,538	5,968,372	6,706,063	3,564,344	11/5/2008	1211	10%
09.02.10	Jul07 to Dec07	MTNL Mumbai	16,788,231	18,517,419	12,878,638	14,205,138	2,483,650	2,790,629	967,603	12/31/2009	790	Others
		MTNL Delhi Basic	42,439,430	46,810,691	30,574,629	34,165,016	11,464,801	12,881,850	4,138,336	2/27/2010	732	Others
		MTNL Delhi Basic	48,209,255	53,174,808	42,428,515	46,798,652	3,683,307	4,139,126	1,002,803	8/26/2010	552	Others
23.02.10	Sep08 to May09	MTNL Mumbai	44,171,929	49,631,579	39,754,736	44,668,421	1,425,943	1,602,190	555,332	12/31/2009	790	Others
		MTNL Delhi Basic	71,840,903	79,240,516	62,943,536	69,426,720	4,417,193	4,963,158	2,587,870	11/28/2008	1188	10%
		MTNL Delhi Basic	16,521,551	18,563,615	15,678,508	17,616,372	4,414,150	4,959,739	1,001,347	11/26/2010	460	Others
08.04.10	May05 to Jun07	MTNL Mumbai	-	-	-	-	843,043	947,243	483,098	12/24/2008	1162	10%
		MTNL Mumbai	-	-	-	-	2,096,933	2,356,114	570,825	8/26/2010	552	Others
		MTNL Delhi Basic	-	-	-	-	4,483,217	4,483,217	1,017,015	11/26/2010	460	Others
			544,999,671	607,049,845	478,291,652	533,153,379	66,708,019	74,399,005	27,065,097			Others

11. Our attention has also been drawn to a letter dated 8.5.2009 filed in the aforementioned petition which is in the following terms:

“Dear Sir,

This is in reference to your letter No.MTNL/CO/ILDRates/(VSNL-BSNL)/ Final payment/ 08 dated 8.4.2009 regarding final payment settlement of ILD rates to Tata Communications Ltd. (erstwhile VSNL) for the period January 08 to August, 08.

We would like to inform you that the rates offered by Tata Communications for the period January 08 to August, 08 are competitive & best in the market. Further these rates have been accepted by MTNL Corporate Office. Hence we request you to release ILD IUC payments as per the invoices raised by Tata Communications Ltd. for the period January, 08 to August, 08.

We are also enclosing the rates offered by Tata Comm to MTNL for the period Jan 08 to Aug, 08 for your ready reference.

12. In this petition, the core question which would arise for consideration is as to whether the Respondent could exercise its purported right of set off from the pending bills without any intimation to the Petitioner and by reason of internal circulars and internal letters?

13. The Petitioner has raised an issue with regard to the legality or otherwise of the said circulars.

Prima facie, as noticed heretobefore, bills with retrospective effect are sought to be enforced which are apparently barred under the law of limitation.

14. The Respondent even in these cases ought to have filed a counter claim, if it was entitled to any other or further amount apart from the sum of Rs.88.00 lakhs which has already been deducted.

15. Strangely enough, from one of the internal letters issued by the Respondent being dated 21.6.2012, it would appear that the reference

has been made to "No. CAO (IUC) TDSAT-TCL/2012-13/21. The Respondent was, thus, aware of pendency of the petition for recovery filed by the Petitioner.

16. There cannot, therefore, be any doubt or dispute that prima facie such deductions were started to be made malafide only after the Petition No.193 of 2012 was filed.

17. It was expected of a public sector undertaking which is a 'State' within the meaning of Article 12 of the Constitution of India to seek leave of this Tribunal before any such deduction was made.

The question as to whether the internal circulars can be upheld or not appears to us to be a triable issue.

18. In one of the recent judgments this Tribunal, being Petition No.324 of 2010 Reliance Communications Ltd. vs. Bharat Sanchar Nigam Ltd. disposed of on 19.4.2012, it has been held that a disconnection notice issued by BSNL in respect of a period which was barred by limitation cannot be enforced. The said decision has recently been considered again by this Tribunal in Sistema Shyam Teleservices Ltd. vs. BSNL being Petition No.417 of 2011 disposed of on 17.7.2012.

19. The dispute between the parties essentially is of a monetary claim. But the right to adjust any amount in respect of purported dues which is five years or seven years old must receive serious consideration at the hands of this Tribunal.

20. Contention of the Respondent to the effect that it came to know of the lowest rates of BSNL only recently cannot be prima facie accepted. The same being a disputed question would have to be decided in the main petition itself.

21. It is furthermore not a case where a money claim only is involved. The Respondent is claiming a right of adjustment on the

basis of certain internal circulars and not on the basis of any provisions of law or a contract.

Submission of Mr. Chandan Kumar that there should not be a stay of recovery of public money by way of adjustments of the bills, in our opinion, cannot prima facie be accepted. If the Respondent was so much concerned about the public money it ought to have taken steps to recover the same at an early date.

22. It may be true that deductions have been made even earlier, but the details thereof have not been disclosed except by way of a chart.

Moreover, the balance of convenience between the parties must be judged, keeping in view the entirety of their respective contentions.

23. The Respondent as indicated heretofore, could have filed a counter claim wherefor it was also not required to pay any huge amount by way of court fee. It can still maintain a petition.

24. However, we are of the opinion that in the event a direction is issued that if these petitions are dismissed and the internal circular of the Petitioner as also the impugned demand are upheld the Petitioner should be bound pay the demanded amount in question with interest at the rate of 18% per annum.

However, we do not intend to pass any interim order with regard to the amount which has already been deducted.

25. The interim order passed by this Tribunal, therefore, is made absolute subject to the aforementioned observations and directions.

(S.B. Sinha)
Chairperson

(P.K. Rastogi)
Member

September 28, 2012
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