

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Date: 1st July, 2015

Petition No. 320 of 2014

Tech Mahindra Business Services Ltd Mumbai

Vs.

Union of India & Anr.

... Petitioner ...

Respondents

BEFORE:

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON
HON'BLE MR. KULDIP SINGH, MEMBER**

For Petitioner

: Mr.Meet Malhotra, Sr.Advocate
Mr.Mihir Mody,Advocate Mr. Ravi S.S.
Chauhan, Advocate Mr.Tushar Gupta,
Advocate Ms.Pallak Singh,Advocate

For Respondents

: Mr.S.S.Shamshery,Advocate
Ms.Aparajita Sharma,Advocate with
Mr.Subodh Saxena(officer)

JUDGMENT

Kuldip Singh:

The petitioner is challenging a demand notice dated 14th July 2014 issued by the respondent for alleged loss of license fee, owing to the petitioner using dark fiber between two premises of the petitioner.

Briefly stated, the facts of the case are as under:

The petitioner is a company engaged in the business of offering call centre /contact centre services for various corporations based abroad.

Sometime around February 2007, the petitioner had intended to set up an international call centre in a building known as Spectrum Tower at Malad, Mumbai, along with two extended international call centres situated in buildings known as Paradigm Tower and Prism Tower (3rd and 4th Floor) also at Malad. Accordingly, on 12.2.2007, the petitioner made an application to respondent no. 1 (DOT) for grant of registration certificate to the petitioner to operate international call centre in India under Other Service Provider (OSP) category. The permission was granted on 4.4.2007. Subsequently, the petitioner proposed to set up extended international call centres at 4th Dimension Tower and Prism Tower, for which the permission was granted on 29.12.2009 and 6.3.2012 respectively.

As per the petitioner, due to paucity of space in Spectrum Tower, it had to acquire the space in other buildings in closed vicinity to the Spectrum Tower. Further, the international call centres in different buildings were connected together by dark fiber taken by the petitioner from an IP I (Infrastructure Provider) service provider namely, M/s Microscan Computers Pvt. Ltd., for which purpose it had entered into an agreement dated 1.4.2011.

On 22nd October 2012, respondent no. 2 ADG-I(Term), who is an officer of the Term Cell of respondent no. 1 (DOT), visited the petitioner's call centers and made following observations :

i. that the petitioner has established, maintained and worked end to end bandwidth of 3Gbps between OSP centre located at Spectrum Towers and Prism Towers.

ii. that the petitioner has established maintained and worked end to end bandwidth of 11 x 2 Gbps between OSP centre located at Spectrum Towers and Paradigm Towers.

iii. that the petitioner has established maintained and worked end to end

bandwidth of 2 x 3 Gbps between OSP centre located at Spectrum Towers and 4th Dimension. ”

As per respondent no. 2, since the bandwidth connectivity between the various offices in different towers, *prima facie*, appeared to be in violation of the Section 4 of the Indian Telegraph Act, 1885, a Show Cause Notice (SCN) was issued to the petitioner asking it to explain with all supporting documents as to why action should not be initiated against it for the violation of the Indian Telegraph Act, 1885. A detailed reply to the SCN was provided by the petitioner on 9.11.2012.

On 28.1.2013, another SCN was issued to the petitioner after considering various documents provided by it. This notice was restricted to the connectivity between the Spectrum Tower and the Prism Tower buildings. This was also replied by the petitioner on 18.02.2013 but the reply was not found acceptable by the respondent who asked the petitioner to disconnect the bandwidth between the Spectrum Tower and Prism Tower with immediate effect and also asked it to deposit loss occurred to DOT / Government of India (GOI) due to the use of unauthorized telecom resources within 15 days of intimation by the respondent. The respondent further stated that if the petitioner failed to comply with these directions, the operation of the petitioner from Spectrum Tower and Prism Tower would stand suspended with effect from 1800 hours of 6th March 2013. A copy of the communication dated 27.2.2013 is available at pages 149 and 150 of the paper book.

Meanwhile, the petitioner disconnected the above bandwidth on 29.1.2013. Subsequently, aggrieved by the action of the respondent in asking it to furnish an undertaking to the effect that it will deposit the loss occurred to the DoT within

15 days of as and when intimated, the petitioner approached the Hon'ble High Court of Bombay vide Writ Petition (L) No. 529 of 2013. On

15.4.2013, Hon'ble High Court of Bombay passed an order in the matter. The relevant part of the order is as under :

"3. The impugned order also requires the petitioner to furnish the following undertakings:

"furnish an undertaking within seven days from the date of issue of this notice, clearly stating that M/s Hutchison Global Services Pvt. Will deposit the loss occurred to DOT/Government of India due to the use of unauthorized telecom resources being used by M/s Hutchison Global Services Pvt. Ltd. within 15 days as and when intimated by DOT/Government of India. "

4. If the petitioner is directed to deposit the amounts determined to be the loss to the DOT / Government of India due to the unauthorized telecom resources being use, if would be bound to do so and its failure to do so so would be met with the consequences as per law. There can however, be no question of the petitioner being directed to furnish the undertaking to deposit the said amount as directed by the impugned order dated 27th February 2013 unconditionally. That would deprive the petitioner the right to challenge the orders if any this regard. The petitioner is at liberty to challenge any order passed by the respondents including an order, if any, regarding the loss on account of the circumstances mentioned above in the impugned order. The impugned order would be subject to orders, if any, of the court or Tribunal before which it is challenged.

5. The petitioner therefore shall not be required to furnish an unconditional undertaking as demand. The undertaking shall be subject to the orders, if any, that may be passed in proceedings that the petitioner may adopt to challenge the same.

6. Needless to clarify therefore that the show cause notice dated 20th January 2013 remains outstanding.

7. The respondents have acceded to the petitioner's request of a personal hearing in respect of the show cause notice. No coercive actin shall be taken for a period of two weeks after the service of the order pursuant to the show cause notice, if adverse to the petitioner.

8. The Writ Petition is accordingly disposed of with no order as to costs."

Pursuant to the order of the High Court, a personal hearing was granted to the petitioner. Vide the impugned demand notice dated 14.7.2014, the petitioner has been

asked to make payment of Rs. 6,11,73,460/- towards the alleged loss incurred to GOI. This includes license fee, penalty and interest charges as prescribed in UASL license for the period from April 2007 to June 2014. The relevant part of the notice is as under :

“Therefore, M/s Tech Mahindra Business Services Ltd.(erstwhile Hutchison Global Services Pvt. Ltd.) is directed to pay a sum of Rs. 6,11,73,460/- (Rupees six crore eleven lakh seventy three thousand four hundred and sixty only) towards loss incurred to Government of India. This includes license fee, penalty and interest charges as prescribed in UASL license for the period April 2007 to June 2014. Ready Reckoner ceiling tariff for STMs notified by TRAI vide notification no. 312-7/2004-Eco. dated 25th April 2005 has been considered to calculate the license fee payable. Interest (compounded monthly) has been charged @ SBI PLR as on 1st of April of the financial year concerned + 2 %. Calculation sheet is annexured. ”

The case of the petitioner is that the alleged violation is an academic, minor and insignificant violation and the Optical Fiber Cable (OFC) between Spectrum Tower and Prism Tower was never used and, therefore, the respondent did not suffer any damages, as are being claimed by it. As per the petitioner, it provided DOT with logs to show that no data, other than for testing, was exchanged over the OFC. The petitioner also provided DOT evidence to show that point to point bandwidth between these two offices was taken from an authorized service provider (Tata Communication Limited), for which Tata Communication Limited was duly paid by the petitioner.

The case of the respondent-DoT is that as per clause 1(i) of Chapter III of the terms and conditions of OSP Registration, the petitioner was required to take the end to end bandwidth from licensed telecom service providers only. As per registration certificate of IP-I(internet service provider), IP-I service providers are authorized to provide service only to telecom service providers licensed under section 4 of the Indian Telegraph Act, 1885 and therefore, the petitioner having an OSP registration could not have taken telecom

resources from an IP-I service provider.

Though, initially, a plea was raised about the jurisdiction of the Tribunal to entertain the petition, this issue was not pressed by the respondent during arguments.

As per the respondent-DOT, the two buildings namely Spectrum Towers and Prism Towers, do not feature among the buildings which are part of Mind Space Malad Complex. The distance between these two buildings is approximately 2.5 kms. Under Rule 472 of Indian Telegraph Rules, establishment of bandwidth between two buildings is illegal. The respondent further submitted that the averment of the petitioner that connectivity between the Spectrum Tower and Prism Tower was a dark fiber is not correct and during the inspection it was found that the same is for a bandwidth of 3Gbps.

Rule 472 of the Indian Telegraph Rules is as under :

“Rule 472. It provides that: Any person may without a licence establish maintain and work a telegraph (not being a wireless telegraph) within the limits of a single building compound or estate : Provided that no telegraph line pertaining to the telegraph shall pass over or under a public road. ”

As per this Rule, the end user can establish, maintain and work a telegraph (not being a wireless telegraph) within the limits of a single building, compound or estate; provided that no telegraph line pertaining to the telegraph shall pass over or under a public road.

The petitioner does not deny that there was an OFC between these two buildings.

Its case is that the respondent can claim only such damages as are actually suffered by it and not damages based on notional and inferred loss as has been done. It was submitted during hearing that such connectivity was only kept as a stand-by and was never actually used.

We may note that as per the calculation annexed with the impugned demand notice, the respondent has taken the rates for bandwidth as notified by TRAI vide notification no. 312-7/2004-Eco. dated 25th April 2005 for calculating the license fee payable. The rate for 1 Gbps connectivity is taken as Rs. 29,52,304/- per quarter and multiplied by 3 for arriving at a revenue for 3 Gbps bandwidth of Rs. 88,56,913/- per quarter. This rate is taken for 23 quarters starting from 1.4.2007 to 31.12.2012 and for the 24th quarter (1st January 2013 to 28th February 2013), the rate has been taken for 2 Gbps connectivity as Rs. 59,04,609/-. Further, for the 21 quarters, the license fee rate has been estimated as 10% and for the remaining 3 quarters as 9%. The license fee, as estimated, comes to Rs. 2,07,25,176/-. An interest of Rs. 2,00,57,130/- on this License fee ,penalty of Rs. 1,03,62,588/- and interest on penalty amounting to Rs. 1,00,28,565/- has also been charged.

As per DOT, for delayed/under payment of license fee, a service provider holding a UASL license would have to pay interest and penalty under the UASL license. The same interest and penalty, as prescribed under the UASL license, has been used for calculating loss incurred by the respondent.

From the calculations above, we may note the following:

1. The amount to be paid for the bandwidth has been calculated based on

the ceiling provided in the rate card notified by the TRAI. However, the actual amounts paid for the bandwidth can be negotiated and in practice may be much lower than the ceilings provided.

2. The rate of license fee has been taken as 10% which was the highest and pertains to an access provider license. However, as per the respondent itself, the petitioner could have taken the connectivity from any of the licensees such as a National Long Distance Provider who pay a lesser percentage as license fee.
3. The interest, penalty, and interest on penalty has been calculated which is payable by a UASL (Universal Access Service Provider License) licensee for delayed/under declared license fee. There is no such provision in the OSP registration of the petitioner.

We may note here that as per explanatory memorandum with the TRAI notification dated 21.4.2005 in the Telecom Tariff (36th Amendment) order 2005 (3 of 2005), the transmission circuit prices had fallen to 95% since 1999. Para 1.3 of the TRAI notification is as under :

“1.3 Price stability even in the presence of new entrants in the market gave support to the hypothesis that competition was not effective in the provision of DLCs. Further, rapid technological advances have sharply reduced the unit cost of long-haul bandwidth. There is a significant decline in the cost of transmission equipment including Optical Fibre cable coupled with a sharp increase in capacity that can be carried over these same cables. Reflecting these realities, worldwide, the transmission circuit prices have fallen by about 90% since 1999 (Primetrica, Inc. 2004, Terrestrial Networks). While tariff for leased circuits in India have generally come down during the last five years, the reduction is not commensurate with the reduction witnessed in the cost of providing the services. The reduction in tariff for leased circuits is limited to E-1 capacities, in trunk routes, and varies by service provider. The reported discount offered is about 60% less than the prevailing ceiling tariff specified by TRAI in 1999. In addition, the extent of reduction even in these routes and capacities is not commensurate with the decline in the leased circuit prices witnessed elsewhere in the world.”

In our view, the respondent has erred in calculating the loss using the ceiling rate provided in an order issued in 2005 in a regime where the rates have been continuously falling. Further, it is not fair to use the highest percentage prescribed under the UASL license to calculate the licensee fee as well as the interest and penalty provided in a UASL license to calculate the total loss. We may note here that if an ordinary subscriber had made a similar mistake, the respondent-DoT could only have imposed fine as provided in the Telegraph Rules. Just because the petitioner happens to have an OSP registration, we do not see how interest and penalties as provided in a UASL license can be imposed on it.

We may also note that as per Annexure A of the rejoinder filed by the petitioner, it has been paying the following amounts to M/s Tata Communications Ltd. for the years 2010 to November 2014 for similar connectivity.

<i>Year</i>	<i>Amount paid (Rs.)</i>
<i>2010</i>	<i>7,44,527</i>
<i>2011</i>	<i>12,00,662</i>
<i>2012</i>	<i>12,96,056</i>
<i>2013</i>	<i>10,67,424</i>
<i>Jan 2014 to Nov 2014</i>	<i>9,49,441</i>
<i>Total</i>	<i>52,58,110</i>

Though the petitioner claims that the bandwidth in question was never used by it, even if the petitioner had taken the same for redundancy purpose from the same service provider that is M/s Tata Communications Ltd., it would have, at the most, paid the same amounts as paid for the actual bandwidth used by it. Therefore, in our view the interest of justice will be sub-served if the respondent was to calculate the loss assuming the same

payments as made by the petitioner to M/s Tata Communications Ltd for the same bandwidth. For the period prior to the year 2010, the highest payment made for any year (Rs. 12,96,056/- for the year 2012) may be used for all the years. The license fee that M/s Tata Communications Ltd. would have paid on this amount may be taken as the loss of licensee fee. The respondent may charge an interest of 10% from the date such license fee would have become due.

We, therefore, direct the respondent to recalculate the demand in above terms and issue a fresh demand notice to the petitioner. The petitioner shall pay the same within fifteen days of its receipt.

The petition is disposed of in above terms with no order as to costs.

(Aftab Alam)
Chairperson

(Kuldip Singh)
Member

/NC/