TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 9th March, 2015

Appeal No.7(C) of 2014

Indian Broadcasting Foundation, New Delhi & Ors. …Appellants

Vs.

Telecom Regulatory Authority of India, New Delhi …Respondent

BEFORE:

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

For Appellants	: Mr. Amit Sibal, Sr.Advocate Mr. Abhishek Malhotra, Advocate Mr. Kunal Tandon, Advocate Mr. Angad Singh Dugal, Advocate Ms. Payal Kakra, Advocate Mr. Namit Suri, Advocate
For Respondent No.1 (TRAI)	: Mr. Mansoor Ali Shoket, Advocate
For Respondent No.2 (Federation of Hotels & Restaurant Association of India)	: Mr. Ramji Srinivasan, Sr.Advocate Mr. Sameer Parekh, Advocate Mr. Kumar Shashank, Advocate Ms. Rukmini Bobde, Advocate Ms. Nandita Bajpai, Advocate Ms. Sanjana Ramchandran, Advocate Ms. Aakanksha Nehra, Advocate for M/s Parekh & Co.

For Respondent No.3 (Hotel Association of India) : Mr. Ravi Sikri, Sr. Advocate
Mr. Gaurav Goyal, Advocate
Mr. Deepak Yadav, Advocate
Ms. Divyangana Singh, Advocate

ORDER

By AftabAlam, Chairperson –An Association of television broadcasters (appellant no. 1) and two individual broadcasters (appellants 2 and 3) have filed this appeal under section 14A (2) of the Telecom Regulatory Authority of India Act, 1997 (TRAI Act) challenging (i) the Telecommunication (Broadcasting and Cable) Services (*Second*) Tariff (*Twelfth Amendment*) Order 2014 dated 16 July 2014 and (ii) the Telecommunications (Broadcasting and Cable) Services (*Fourth*) (Addressable Systems) Tariff (*Fourth Amendment*) Order 2014 dated 18 July 2014 by which similar amendments were made in the Telecommunication (Broadcasting and Cable) Services(*Second*) Tariff Order 2004 (6 of 2004) dated 1 October 2004 (relating to non-addressable or analogue systems) and the Telecommunication (Broadcasting and Cable) Services (*Fourth*) (Addressable Systems) Tariff Order 2010 (1 of 2010) dated 21 July 2010 (relating to addressable systems) respectively. The impugned amendments introduce mainly three changes; first, the broadcaster is no longer allowed to provide its channels directly to a subscriber, be it an "ordinary subscriber" or a "commercial subscriber"; secondly the terms "commercial establishment" and "commercial subscriber" are defined elaborately

and classified separately from "ordinary subscriber" and thirdly, though defined and classified separately from "ordinary subscriber", for the purpose of charges for receiving supply of channels, the very large and highly heterogeneous body of "commercial subscriber" is *en-block* put completely at par with the "ordinary subscriber". The appellants are aggrieved by the amendments in so far as the commercial subscriber is put at par with the ordinary subscriber and contend that as a result of the impugned amendments, the tariff orders treat as equal, groups of subscribers that are inherently unequal and are also so recognized in their different definitions in the tariff orders.

The issues arising in this appeal go back to a period of about ten years over which the matter has engaged the attention of both this Tribunal and the Supreme Court and the tariff orders framed by the Telecom Regulatory Authority of India (TRAI) and (amended from time to time) have come under judicial scrutiny more than once.

In a writ petition relating to controversies arising at the time of introduction of the conditional access system regime in the four metropolises, including Delhi, the Delhi High Court by an order passed on 26 December, 2003 allowed the implementation of the regime on an experimental basis for three months, observing that it would give further directions in the matter on receipt of inputs regarding the working of the regime. At that stage the Central Government issued notification

no. 39, dated 9 January 2004 comprising S.O. nos. 44 and 45. By S.O. 44 the broadcasting services and cable services were brought within the purview of telecommunication services as defined under section 2 (k) of the TRAI Act and by S. O. 45 the Telecom Regulatory Authority of India (TRAI) was assigned additional functions in respect of broadcasting services and cable services empowering it *inter alia* "to specify standard norms for, and periodicity of, revision of rates of pay channel, including interim measures". Within six days of issuance of the notification, TRAI issued a notification on 15 January 2004 promulgating The Telecommunication (Broadcasting and Cable) Services Tariff Order 2004(the First tariff order). This tariff order was directed to cover tariffs for all broadcasting and cable services throughout the country and in clause 2 provided as under:

> "2. Charges payable by
>
> (a) Cable subscribers to cable operator;
>
> (b) Cable operators to Multi Service Operators/Broadcasters (including their authorized distribution agencies); and
>
> (c) Multi Service Operators to Broadcasters (including their authorized distribution agencies)
>
> **prevalent as on 26th December 2003 shall be the ceiling with** respect to both free-to-air and pay channels, both for CAS and non-CAS areas **until final determination** by Telecom Regulatory Authority of India on the various issues concerning these charges."

This was a very brief order that did not define broadcaster or cable operator or multi-system operator or subscriber or any other related term or expression but

simply fixed the rates prevailing on 26 December 2003 (the date of the Delhi High Court order) as ceiling at all the three tiers in the broadcasting services. It was evidently an urgent and interim measure meant to "give relief and protection to the consumers of broadcasting and cable TV services from frequent hikes in cable TV charges".

On 1 October 2004 the TRAI notified The Telecommunication (Broadcasting and Cable) Services (*Second*) Tariff Order, 2004 (the Second tariff order) repealing the First tariff order dated 15 January 2004. The Second tariff order defined the terms "broadcaster", "broadcasting services", "cable operator", "cable service", "cable television network", "charge", "free to air channel", multi system operator", and "pay channel". It did not, however, define subscriber.

It defined "charge" to mean:

> "(f) "Charge" means and includes the rates (excluding taxes) payable by one party to the other by virtue of the written/oral agreement **prevalent on 26th December 2003**. The principle applicable in the written/oral agreement prevalent on 26th December, 2003, should be applied for determining the scope of the term "rates"."
>
> (emphasis added)

The Second tariff order in clause 3, dealing with tariff, in so far as relevant for the present, provided as under:

> "3. Tariff
>
> The charges, excluding taxes, payable by

(a) Cable subscribers to cable operator;
(b) Cable operators to multi system operators/broadcasters (including their authorized distribution agencies); and
(c) Multi system operators to broadcasters (including their authorized distribution agencies)

prevalent as on 26th December 2003 shall be the ceiling with respect to both free-to-air and pay channels.

Provided that……

Provided further……..”

It is thus to be seen that the ceiling of charges as prevailing on 26 December 2003[1] that was initially meant to maintain *status quo* was made as the fixed point of reference for the purposes of cable services tariff. The Second tariff order additionally provided a window for introduction of new pay channels and conversion of Free-to-Air channels to pay channels subject to prescribed conditions but in the present case we are not concerned with that aspect of the matter.

[1]In the Recommendations on Issues relating to Broadcasting and Distribution of TV channels sent to the Government on the same day on which the Second Tariff Order was issued (i.e., 1 October 2004), TRAI had said that “the Ceiling shall be reviewed periodically to make adjustments of inflation”. It accordingly issued several tariff amendment orders allowing for “inflationary hikes”. Inflation linked increases of 7% (with effect from 1 January 2005) and 4% (with effect from 1 January 2006) were allowed through the Second Tariff amendment Order of 1 December 2004 and the Third Tariff Amendment Order of 29 November 2005. The Third Tariff Amendment Order could not be brought into operation as it was stayed by the Tribunal by order dated 20 December 2005in an appeal filed by a consumer organization. Later on the appeal was found to have been rendered academic and was accordingly disposed of on 22 December 2006 with liberty to TRAI “to consider if it requires to pass some orders on revision of rates for the next year”. Presently TRAI has issued Eleventh Tarff Amendment Order allowing 15% inflationary increase (with effect from 1 April 2004) and the Thirteenth Tariff Amendment Order allowing an additional 11% inflationary increase (with effect from 1 January 2015). The Eleventh and the Thirteenth Tariff Amendment Orders are under challenge before the Tribunal in a separate batch of appeals. The Tariff Amendment Orders relating to “inflationary hike” are mentioned here simply for the sake of the record, otherwise those have no bearing on the controversy arising in these appeals.

The issue of tariff for broadcasting services and cable services was in this state when two groups of hotels and restaurants came to the Tribunal in two petitions filed under section 14 A(1) of the TRAI Act. The petitioners were aggrieved by the broadcasters' demand for charges at rates much higher than those fixed under the tariff orders and sought a direction to the broadcasters (respondents in the petitions) to "charge fair, non-discriminatory, non-arbitrary and cost based rates from the petitioner".

One of the two petitions[2] was filed by Hotel Association of India (Intervener-respondent no.3 in this appeal). It was a comparatively smaller group of hotels, all of which had Five-Star ratings. The hotels in this group had set-up head-ends at their premises and took the feed directly from the different broadcasters on the basis of individual agreements entered into by the hotel and the broadcaster. The signals received at the head-end were then carried through cable to rooms were TV sets were installed for viewing.

The other petition[3] was filed by Eastern International Hotels Limited members of which comprised all categories of hotels and restaurants. Most of the hotels and restaurants in this group were taking signals from cable operators providing service in their respective areas. The signals were received from cable

[2] Petition No. 32 (C) of 2005.
[3] Petition No. 80 (C) of 2005.

operators at a central place and were then carried through cable to rooms were TV sets were installed for viewing. The cable operators entered into agreements with respective hotels in this regard and charged them different rates depending on the occupancy percentage and the location of the hotels. The charges were not uniform for all the hotels/restaurants.

The Tribunal noted that the crux of the dispute lay in the fact that, according to the broadcasters, those hotels and restaurants could not be equated with domestic consumers for the provision of cable TV service. The broadcasters maintained that since this service is used by the hotels and restaurants as public service for commercial purposes, the rates for this service must be different from those laid down for domestic users.

According to the broadcasters, the interconnect agreement that they entered into with a distributor of channels carried a prohibitory clause forbidding the distributor from providing signals to anyone for any purpose other than home viewing. For providing their signals to any commercial establishment, such as hotels or restaurants, they gave special permission to some select multi-system operators/cable operators in respect of specified hotels/restaurants at specified rates arrived at on the basis of mutual negotiations. The broadcasters alleged that a number of hotels and restaurants, members of the two petitioner associations, were getting supply of signals in a clandestine and unauthorized manner from cable

operators who were not permitted to provide signals to any commercial establishment. Such arrangements were entered into with cable operators unknown to the broadcaster, behind its back, in breach of the law and causing heavy losses to the broadcaster.

Apart from contesting the case of the hotels and restaurants on merits, the broadcasters also questioned the maintainability of the petitions. It was contended on their behalf that since the feed taken from the broadcaster at the hotels head-end is "re-transmitted" to rooms and the feed from cable-operators is also similarly carried to rooms (or to halls, in case of restaurants) for viewing by the guests and customers, the hotels/restaurants do not qualify either as subscribers or consumers and are, therefore, not competent to maintain the petitions under section 14 A of the TRAI Act.

Having regard to the contentions advanced by the two sides, the Tribunal, in its judgment and order dated 17 January 2006, identified the following three issues for consideration:

(a) Whether the hotels fall in the category of subscriber;

(b) Who is the consumer – the hotels or the occupants of the rooms;

(c) Is there a distinction between the domestic and commercial consumers and if so, whether the tariff fixed by the TRAI would apply to commercial

establishments like the members of the petitioner associations.

On the first two issues, the Tribunal accepted the case of the broadcasters and held that neither the Five-Star hotels, members of Hotel Association of India nor the hotels and restaurants, members of the other petitioner Eastern International Hotels Limited were either subscribers within the meaning of the Cable-TV Network Regulation Act or consumers. The Tribunal held that in accordance with the judicial and dictionary meanings, consumer is the ultimate user and not an intermediary between the producer and the ultimate user. Deliberating over the issues the Tribunal also noted that hotels and restaurants received the TV channels for a purpose altogether different from the domestic viewer. It observed:

> **"There is no gain saying that this use is entirely different from the domestic use of cable service. The use of cable service at a public viewing place is to attract more customers/ clients which gives it the colour of use of its service for commercial purpose**."
>
> (emphasis added)

On issue number (c) too, the Tribunal agreed with the broadcasters and in paragraphs 36 and 37 of the judgment held and found as under:

> "36. Now we come to the question whether the tariff laid down by the TRAI notification of 26th December, 2003 is applicable to the members of the petitioner associations. The said Tariff order covers the following in its ambit – the charges payable by (a) Cable subscribers to cable operator; (b) Cable operators to multi service operators/broadcasters (including their authorized distribution agencies); and (c) Multi service operators to broadcasters (including their authorized distribution

> agencies). In the petition before us we find that the commercial relationship is between the members of the petitioner associations (viz. hotels, restaurants etc.) on the one hand and either cable operators or broadcasters on the other. We have already concluded that the members of the petitioner associations cannot be regarded as subscribers or consumers. As such we are of the view that the above tariff notification of the TRAI would not be applicable. It seems that TRAI has found it necessary to fix the tariff for domestic purpose. We think the Regulator should also consider whether it is necessary or not to fix the tariff for commercial purposes in order to bring about greater degree of clarity and to avoid any conflicts and disputes arising in this regard.
>
> 37. In view of the above, we are of the opinion that the respondents are well within their rights to demand the members of the petitioner associations to enter into agreements with them or their representatives for the receipt of signals for actual use of their guests or clients on reasonable terms and conditions and in accordance with the regulations framed in this regard by the TRAI."

The matter was taken to the Supreme Court in appeal by Hotel and Restaurant Association and on 19 October 2006 the appeal[4] was admitted for hearing and the Court directed for maintaining *status quo*, as existing on that date.

At this point it is important to note that shortly after the judgment by the Tribunal and before the matter reached the Supreme Court, TRAI on 7 March 2006, notified The Telecommunication (Broadcasting and Cable) Services (*Second*) Tariff (Fourth Amendment) Order 2006, incorporating certain amendments in the Second tariff order. By virtue of the amendments, 'ordinary cable subscriber' and 'commercial cable subscriber' came to be defined separately for the first time. 'ordinary cable subscriber' was defined to mean any person who received broadcasting service and used it for domestic purposes and 'commercial

[4]Civil Appeal No. 2061 of 2006.

cable subscriber' was defined to mean any person other than a multi system operator or a cable operator who received broadcasting service and used the signals "for the benefit of his clients, customers, members or any class or group of persons" having access to the place where the signals were received.

Further, the amendment shifted the date for freezing the rates of charges in case of commercial subscriber from 26 December 2003 (relating to all other subscribers) to 1 March 2006 and provided that in case of commercial cable subscribers, charges "means the rates (excluding taxes) payable by one party to other by virtue of written/oral agreement prevalent on 1 March 2006".

It is significant to note that the classification of 'ordinary cable subscriber' and 'commercial cable subscriber' was based on the use to which the signals received by the subscribers were put. In the explanatory note following the two definitions it was stated as under:

> "The distinction between an ordinary cable subscriber and a commercial cable subscriber is in terms of the difference **in the use to which such signals are put**. The former would use it for his/her own use or the use of his/her family, guests etc. while the latter would over commercial and other establishments like hotels, restaurants, clubs, guest houses etc. which use the signals for the benefit of their customers, clients, members or other permitted visitors to the establishment."
>
> (emphasis added)

The tariff order dated 7 March 2006 was issued, as per the explanatory memorandum appended to the order, in pursuance of the order of the Tribunal and the representation received by TRAI from the Federation of Hotels & Restaurants of India (FHRAI). The TRAI noted that the question whether or not there was any need to fix tariff for commercial subscribers and, in case there was such need, the method and manner of fixing commercial tariff required detailed consultation and deliberation. Those issues were under consideration but in view of the observations of the Tribunal and the representation of FHRAI it was considered appropriate to issue the amendment order as an interim measure. According to the explanatory memorandum the interim order was intended as extension of "protection" of ceiling to commercial consumers as well.

It is thus clear that on the date the Supreme Court passed the *status quo* order, the charges in respect of hotels and restaurants were frozen as on 1 March 2006 as against the ordinary subscriber, in respect of whom the date of freeze of rates was 26 December 2003.

It is also clear that the hotels and restaurants were not satisfied by the "protection" given to them by the tariff order dated 7 March 2006 as they proceeded with the appeals.

The hearing of the appeals before the Supreme Court concluded on 19 October 2006 and the judgment was reserved. However, on that date the Court was informed that in view of the earlier *status quo* order, the TRAI was not proceeding with the framing of the tariff in terms of section 11 of the TRAI Act. The court was further informed that TRAI had already issued consultation papers and if it was allowed to proceed in the matter, it would complete the process of framing the tariff within one month from that date. Thereupon, even while reserving the judgment, the Court amended the earlier *status quo* order and directed the TRAI to proceed with the process for framing the tariff. TRAI was further directed that it must exercise its jurisdiction independently, without relying on any observation made by TDSAT in that connection.

The judgment came on 24 November 2006 by which the appeals were allowed. In the judgment, the Court framed two questions that arose for its consideration, as under:

> "(i) Whether the members of the appellant Associations are consumers and, thus, were entitled to invoke the jurisdiction of TDSAT in terms of Section 14 of the TRAI Act?
>
> (ii) Whether the Tariff Orders issued by TRAI on 15-1-2004 and 1-10-2004 are inapplicable to members of the appellant Associations i.e. hotels on the ground that those are commercial establishments?

On both questions, the court held that the view taken by the Tribunal was not correct and reversed its order. Regarding the first question, the court held that hotels and restaurants fully qualified as subscribers and consumers and in paragraph 28 of the judgment observed as under:

> "Similarly, if a television set is provided in all the rooms, as part of the services rendered by the management by way of an amenity, wherefor the guests are not charged separately, the same would not convert the guests staying in a hotel into consumers or subscribers. They do not have any privity of contract with broadcasters or cable operators. The identity of the guests is not known to the broadcasters or cable operators. A guest may not watch TV or in fact the room may remain unoccupied but the amount under the contract by the owners of the hotels whether with the broadcasters or cable operators remains unchanged. We, therefore, are of the opinion that the members of the appellant Associations are consumers."

On the second question too, the Court took the view contrary to the one taken by the Tribunal. It held, it would be incorrect to contend that commercial cable subscribers were outside the purview of the regulatory jurisdiction of TRAI and further held that commercial establishments, including hotels and restaurants were also covered by the Second tariff order as also the interim tariff order issued on 7 March 2006. Referring to some statement made in the explanatory memorandum to the Second tariff order that it was not possible to have uniform rates for all kinds of subscribers, the Court in paragraph 35, 36 and 54 of the judgment held and observed as under:

> 35. …….So long, TRAI does not itself make any distinction between consumers and consumers and does not fix different tariffs, the question

> that a category of users being commercial users/ subscribers being identified so as to exclude the applicability of TRAI Act does not and cannot arise. The Tariff Orders of 2004 did not define the words "cable subscribers" and, thus, no distinction was expressly provided between ordinary cable consumer and commercial cable consumer.
>
> 36. It is one thing to say that TRAI recognises the need for making such a distinction probably pursuant to or in furtherance of the observations made by TDSAT but therefor a final decision is yet to be taken. The notification dated 7.03.2006 has been issued as an interim measure. By reason of the said notification, broadcasters have been injuncted from increasing the rates. So long a final determination in the matter does not take place, not only the members of Appellants Associations but also a vast number of similar commercial subscribers would remain protected.
>
> 54. It may be true that TRAI in its Tariff Order dated 7.3.2006 sought to define ordinary cable subscribers and cable subscribers separately but the same is yet to be adopted finally. It is not conclusive. It must while laying down new tariff take into consideration all the pros and cons of the matter. It must apply its mind afresh as regards not only the justifiability thereof but also the workability thereof.

The tariff order issued on 7 March 2006 being interim in nature and the question of having a different tariff for commercial subscribers being, at that time, still under consideration by TRAI, the Court cautioned the regulator that while examining the matter it should not be influenced by any finding or observation made by the Tribunal and it must act independently in exercise of its jurisdiction under section 11 (2) of the TRAI Act. The Court observed:

> "53. We are, however, sure that TRAI while exercising its jurisdiction under Sub-section (2) of Section 11 of TRAI Act shall proceed to exercise its jurisdiction without in any way being influenced by the said observations. It must apply its mind independently."

The answer to the two questions framed by the Court having been given in the affirmative and in favour of the appellants, it necessarily followed that the petitions filed by hotels and restaurants before the Tribunal under section 14 A(1) of the TRAI Act were maintainable and accordingly, the Court remanded to the Tribunal the matter in relation to those (hotels and restaurants) that were taking their feed through cable operators. In case of hotels that had set up their own head-ends and were taking the feed directly from the broadcasters on the basis of bilateral agreements entered into between them, it was agreed, those hotels would continue to make payments at rates that was prevailing on 1 October 2004 (as per the tariff order dated 7 March 2006).

In the last two paragraphs of the judgment, while allowing the appeals, the Court took note of the modification made by it in the interim directions on 19 October 2006, when the hearing in the appeals had concluded and observed that in the event TRAI framed tariff and in case the members of the appellant Associations felt aggrieved by it, they would be entitled to prefer appeals against it. In such an event, the Court directed, all contentions available to them would remain open.

The Supreme Court order was pronounced on 24 November 2006. At that time, however, it does not seem to have been brought to the notice of the Court that

on the basis of its order dated 19 October 2006, modifying the earlier status quo order and directing TRAI to "carry out the process of framing tariff", TRAI had gone ahead, and barely three days before the Court's judgment, on 21 November 2006 had issued two tariff orders amending (i) The Telecommunication (Broadcasting and Cable) Services (*Second*) Tariff Order, 2004 and (ii) The Telecommunication (Broadcasting and Cable) Services (*Third*) (CAS Area) Tariff Order[5]. The upshot of the amendments made in the two tariff orders was that in both the areas under analogue transmission and conditional access system transmission (which means the whole of the country at that time) the tariff protection was extended to all subscribers, save and except a thin segment carved out of the commercial establishments that were kept completely out of any tariff protection. The subscribers excluded from tariff protection were enumerated as under:

> "i) Hotels with rating of three star and above
>
> ii) Heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India)
>
> iii) Any other hotel, motel, inn, and such other commercial establishment providing board and lodging and having 50 or more rooms."

[5] With the advent of transmission under Conditional Access System (CAS), TRAI had issued The Telecommunication (Broadcasting And Cable Services) (Third) (CAS Areas) Tariff order, 2006 (6 of 2006). This tariff order had fixed tariff ceiling for "basic service tier" (vide clause 4) and Ceiling on maximum retail price for pay channels in CAS areas (vide clause 6).

The amendment provided that the rates prevailing on 26 December 2003 would be the ceiling regarding charges for all subscribers, excepting those in the excluded category who, shorn of any protection, could get television channels only on charges mutually agreed upon with the broadcasters or, from their point of view, as dictated by the broadcasters.

In the explanatory memorandum to the tariff order it was candidly stated that the First tariff order (issued on 15 January 2004) as well as the Second tariff order (issued on 1 October 2004) were aimed at protecting the home viewer, that is, the ordinary subscriber and in those two tariff orders the commercial subscriber was not under contemplation. Paragraph 3 of the explanatory memorandum had the marginal heading "Issue wise analysis" and in paragraph 3.1 it was stated as under:

> **"3.1 Definition of Commercial Cable Subscriber and issues relating thereto**
>
> 3.1.1 The principal Tariff Order of 1.10.2004 did not provide for any distinction between an ordinary cable subscriber and a commercial cable subscriber. Neither did the first interim tariff order of 15.1.2004. In fact both the tariff orders did not contain the definition of the word cable subscriber. A perusal of the explanatory memorandum particularly para 4 of the first tariff order of 15.1.2004 and para 3 of the principal order of 1.10.2004 would, however, indicate that under the given situation of a non-addressable regime and reported frequent increases in cable charges, complexities involved in determining tariff based on cost, a ceiling in the form of a cap on tariff charges was considered to be feasible way of providing relief to the **cable subscriber who as an end user** had no mechanism of protection. The thrust on the need for protection of **the ordinary cable consumer** could also be noted in the

> consultation paper issued by TRAI for finalizing the recommendations on various issues relating to broadcasting and distribution of TV channels. **The commercial establishments considered to be having a mechanism and wherewithal to protect themselves were not in the realm of deliberation of tariff regulation. Thus, it could be seen that the underlying objective was the need to give relief and protection to the users of broadcasting and cable services who had no mechanism to protect themselves from the hike in cable charges. Therefore, the question for a separate dispensation or otherwise for those establishments who avail broadcasting and cable services not for their own domestic use but for the benefit of his/her clients, customers, members etc. was not an issue focused upon in the context of the circumstances leading to the issue of the said tariff orders in 2004."**
>
> (emphasis added)

The explanatory memorandum further stated that the proceedings before the Tribunal brought to fore the question of need for categorisation of different kinds of subscribers and applicability of the Second tariff order of 01.10.2004 to hotels and it was then felt that the Second tariff order needed clarity on the real intent of applicability or otherwise to establishments that do not use the broadcast and cable services for their own use. It further observed that the need and extent of protection for a commercial establishment are not the same as that for an ordinary cable subscriber. *It also noted that even at the ground level, the commercial establishments and such other similar establishments were treated differently as the prevailing business practice.* It sought to justify the classification of commercial subscriber separately from the home viewer primarily on the basis of

the end-use of the broadcast. In this regard, in paragraph 3.1.5 (v) of the explanatory memorandum it was observed as under:

> "(v) It is not denied that the product is same whether is a ordinary cable consumer or commercial establishments **but the value derived** from the product in the case of TV channels may not be the same in the situations where it is put to self use compared to a situation **where it is meant for the purpose of its clients, customers**. The television channels or programmes, even though may not be sold as a standalone service by commercial establishments particularly like hotels, etc. but as a means of entertainment do possess the potential to give an enhanced value to their packaged services. Therefore, the manner how the broadcasting services are being used becomes relevant for differentiating between an ordinary cable subscriber and a commercial cable subscriber."
>
> (emphasis supplied)

It further observed that commercial establishments particularly the hotels and other big establishments that received the broadcasting and cable services as a value addition to their own package of services *have the potential to pass on the burden to their own clients.*

The explanatory memorandum then dealt with the question of slicing off a very thin segment (namely, hotels with rating of three stars and above, heritage hotels and any other hotel, motel, inn and such other commercial establishments, providing board and lodging and having 50 or more rooms) from the very large body of commercial subscribers and putting them beyond the tariff protection. It pointed out the complexities of sub-classification of the commercial establishments and gave reasons for not clubbing clubs, hospitals, educational institutions with the

exempted categories of hotels. In support of the extremely narrow categorisation made in the tariff order for exclusion, the explanatory memorandum stated as under:

> "vi)In any case in the view of the TRAI many of these groups may not be able to negotiate their rates and may therefore may (*sic*) need protection like that of an ordinary cable consumer.
>
> vii) The hotels as a group particularly big hotels in the view of the*(sic)* do not need protection. These are large subscribers and the broadcasters too would stand to lose large sums of money if their negotiations with them are not successful."

The tariff orders issued on 21 November, 2006 came to be challenged before the Tribunal by some hoteliers in Appeals Nos. 17(C) and 18(C) of 2006. M/s Hotels Association of India and M/s Eastern International Hotels Ltd who had initiated the litigation on the issue were later impleaded in the appeals as respondents, supporting the case of the petitioners.

The appeals were allowed by judgement and order dated 28 May 2010 and the two tariff orders of 21 November, 2006 were set aside with the direction to TRAI to undertake the exercise afresh.

Having regard to the submissions made by the different parties, the Tribunal in its judgement (vide paragraph 21) framed the following questions as arising for its consideration:

(i) Whether the TRAI having regard to Section 11(2) of the Act has the requisite jurisdiction to direct forbearance in relation to a class of commercial consumers;
(ii) Whether the TRAI was justified in treating hotels having the category of three-star and above, the heritage hotels and the hotels above 50 rooms in a separate category;
(iii) Whether the classification is legal and valid.

However, the judgement does not give any express answers to the above questions and from that stage it seems to have proceeded on somewhat different lines. It noted that the hotels of the categories excluded from any protection by the Tariff orders coming under challenge were clearly dependent on the broadcasters for getting the supply of channels and the latter thus enjoyed a monopoly position with regard to the hotels and it was in that context that the justifiability and workability of the tariff orders were needed to be considered. The judgement found that the impugned tariff orders were greatly influenced by the Tribunal's order of 17 January 2006 so much so that the explanatory memorandum to the tariff orders lifted passages from the Tribunal's order. The judgement pointed out that it was in complete violation of the Supreme Court direction that had asked TRAI to frame tariff orders in exercise of its jurisdiction under section 11(ii) independently and without in any way being influenced by the Tribunal's observations in its order dated 17 January 2006. In this regard, in para 34 of the judgement, it was observed as under:

> "34. The TRAI had taken into consideration in paragraph 3.1.1 one major issue for the purpose of arriving at its conclusion in the aforementioned order that the question for a separate distinction or otherwise for those establishments who avail broadcasting and cable services not for their own domestic use but for the benefit of his / her clients. This sentence, it has not been disputed, before use has been lifted from the judgement of the TDSAT."

The judgement also observed that "there was nothing on record to show on what material the TRAI had arrived at a conclusion that the commercial establishments had the mechanism and wherewithal to protect themselves". The judgment noted the reasons stated in the explanatory memorandum for putting the hotels with rating of three stars and above, heritage hotels and any other hotel, motel in providing board and lodging having 50 or more rooms in the excluded category and observed that the complexity of the exercise could not be a good reason for an expert body like TRAI to refrain from exercising its jurisdiction. The judgement also noted that in the explanatory memorandum there was no cogent reason assigned to change the definition of subscribers and further observed that "TRAI has also not made any serious effort to identify different establishments separately. It reiterated the old reasons for the purpose of considering the cases of the appellants. In fact, the view point of the Supreme Court of India had not been taken seriously." The judgement, however, recognised that different rates could be fixed for different consumers and in paragraph 45 of the judgement observed and held as under:

> "45. It may be true having regard to the contents of different broadcasters may be valued differently but it appears to us, with all respect to the TRAI, that no serious attempt appears to have been made in relation thereto. The TRAI in a matter like the present one, was required to apply its mind more thoroughly as to whether it was necessary to provide for a regulatory regime be it for their domestic consumers or the commercial consumers. The Act provides therefor. But the need and extend therefore was required to be considered. One cannot compare selling a piece of bread in a dhaba with the one in five star hotel. All selling the same product may have to spend differently on a large number of things including hygiene. There cannot, however, be any doubt or dispute that different rates could be fixed for the different consumers. **There cannot, however, be any doubt or dispute that different types of rates can be provided for different categories of consumers.** The consultation paper itself proceeds on the basis that even as on 17.01.2006,the TRAI noticed from the documents furnished by the Hotel Associations that rates per room charged vary from as low as from Rs.20/- to as high as Rs.1300/- per room per day. It has specifically been noted in paragraph 3.6 that the Authority had indicated that price control will be lifted once there is effective competition."

Some of the broadcasters took the matter in appeal[6] to the Supreme Court. The appeals were however, dismissed by order dated 16 April, 2014 with a direction to TRAI to re-determine the tariff within three months. The relevant extracts from the Supreme Court is as under:

> "However, we direct that for a period of three month, the impugned tariff, which is in force as on today, shall continue. Within the said period, TRAI shall look into the matter de novo, as directed in the impugned judgement, and shall re-determine the tariff after hearing the contentions of all the stake holders."

The impugned tariff orders are issued by TRAI directly in pursuance of the above direction by the Supreme Court. But before proceeding to examine the

[6]Civil Appeal No. 6040-6041 of 2010

impugned tariff orders, it would be useful to advert to two other tariff amendment orders, among the many, issued by TRAI.

On 21 July 2010 (even while the appeals challenging the tariff seventh amendment order 2006 dated 21 November 2006 were pending before the Tribunal) TRAI issued The Telecommunication (Broadcasting and Cable) Services (*Fourth*) (Addressable Systems) Tariff Order 2010 prescribing tariff for broadcasting services through conditional access system (CAS), direct-to-home (DTH) service, head-end in the sky (HITS) broadcasting service, internet protocol (IP) television service and digital addressable cable service. Clause 3 of the tariff order, *inter alia,* defined "ordinary subscriber" in sub-clause (z) and "subscriber" in sub-clause (ze) as under:

> "(z) "ordinary subscriber" means any subscriber who receives a programming service from a service provider and **uses the same for his domestic purposes.**"
>
> (ze) "subscriber" means a person who receives the signals of a service provider at a place indicated by him to the service provider, without further transmitting it to any other person **and includes ordinary subscribers and commercial subscribers unless specifically excluded**".
>
> (emphasis added)

Dealing with wholesale tariff, clause 4 (under part II) of the tariff order made it obligatory for a broadcaster to offer to the distributors of TV channels, using addressable systems, all its pay channels on *a la carte* basis and to specify

the *a la carte* rate for each channel. Apart from offering channels on *a la carte* basis, the broadcaster was free to offer its pay channels as part of a bouquet comprising only pay channels or both pay and free-to-air channels but the rate for each bouquet of channels was required to be specified. The proviso to clause 4 further provided that neither the *a la carte* rate for a pay channel nor the bouquet rate could be in excess of 35%[7] of the *a la carte* rates of the channel or the bouquet rate, as the case may be, as specified by the broadcaster for non-addressable systems.

Dealing with retail tariff, clause 6 (under part III)of the tariff order made it obligatory for all service providers to provide to its "subscribers" all pay channels on *a la carte* basis and to specify the maximum retail price payable for each pay channel **only** for "ordinary subscribers". Apart from offering on *a la carte* basis, the service provider was free to offer the pay channels in bouquets and in that event it was required to once again specify **only** for the "ordinary subscriber"**,** the maximum retail price payable for each bouquet.

[7]The ceiling of 35% of the analogue rates came to be challenged before the Tribunal in a series of appeals being Appeal Nos. 3 – 9 (C) of 2010 by a number of broad casters. The appeals were allowed by judgment and order dated 16 December 2010 and the Forth Tariff Order was set aside (in so far as the ceiling of 35% of the analogue rates is concerned). In appeal against the Tribunal's judgment, however, the Supreme Court by an interim order dated 18 February 2011 in Civil Appeal Nos. 2847 – 2854 of 2011 stayed the order of the Tribunal subject to raising the ceiling to 42% in place of 35% of the analogue rates. These facts are stated for the sake of the record though these have no bearing to the controversy arising in this case.

As more and more parts of the country came under cable transmission employing digital addressable system, there arose the need for amendment in the fourth tariff order dated 21 July 2010 and on 30 April 2012 TRAI issued The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff (First Amendment) Order 2012. In this tariff amendment order, the expression 'subscriber' was redefined as under:

> "(ze) "subscriber" means any individual, or association of individuals, or a company, or any other organization or body who receives the signals of multi-system operator or DTH operator or IPTV operator or HITS operator at a place indicated by him or it to multi-system operator or DTH operator or IPTV operator or HITS operator, without further transmitting it to any other person **and includes ordinary subscribers and commercial subscribers unless specifically excluded.**"
>
> (emphasis added)

Clause 6 of the fourth tariff order was also slightly recast but there was no change in regard to the retail price payable by the ordinary subscriber.

From a perusal of the Fourth tariff order dated 21 July 2010 along with the first amendment tariff order dated 30 April 2012 two things clearly emerge that are of some significance in the present controversy:

(i) The ceiling of rate was prescribed only for the top-most tier in the broadcasting services by mandating that the rate chargeable by the broadcaster from a distributor of TV channels must not exceed 35% of

the rate specified by the broadcaster for the non-addressable system. In the other two tiers comprising the multi-system operator, the local cable operator and the subscriber, the tariff order did not provide any ceiling. The charges for supply of signals by an MSO to an LCO could be such as determined by mutual agreement and similarly an MSO or an LCO, the distributor was free to fix its prices for supplying signals to an ordinary subscriber as long as those were specified.

(ii) Though a distinction was made between "ordinary subscriber" and "commercial subscriber" by defining ordinary subscriber and subscriber separately, the protection under the regulations, limited as it was, was only in respect of ordinary subscriber and not to subscribers in general that included commercial subscriber.

This would be clear from clauses 6.1, 6.3 and 7 of the Fourth tariff order dated 21 July 2010. The relevant clauses are as under:

> "6. **Mandatory offering of pay channels or a-la-carte basis to ordinary subscribers and charges therefor.** (1) Every service provider providing broadcasting services or cable services to its **subscribers** using an addressable system shall, from the date of coming into force of this Order, offer or cause to offer all pay channels offered by it to its **subscribers** on a-la-carte basis **and shall specify the maximum retail price for each pay channel, as payable by the ordinary subscriber.**
>
> Provided that……..

(3) Every service provider providing broadcasting services or cable services to subscribers using an addressable system may, in addition to the offering of pay channels on a-la-carte basis under sub-clause (1), also offer bouquets of channels, in which case, **it shall specify the maximum retail price for each such bouquet applicable to its ordinary subscribers**.

7. **Option to provide Customer Premises Equipment on outright purchase or hire purchase or rent.** – Every service provider, who provides broadcasting services or cable services using an addressable system to its **ordinary subscribers**, shall give an option to every **ordinary subscriber** to make available to **such subscriber**, the Customer Premises Equipment, conforming to the Indian Standard, if any, set by the Bureau of Indian Standards, on outright purchase basis or hire purchase basis or rental basis, -

(a) xxxxxxxx

(b) xxxxxxxx

Provided that……"

(emphasis added)

It was in this back ground that in pursuance of the direction by the Supreme Court, TRAI issued the impugned tariff orders. And this time, unlike the previous two occasions it was the turn of the broadcasters to assail the amendments brought about in the tariff. The present appeal was filed by Indian Broadcasting Foundation(Appellant No.1), which is a company registered under section 25 of the Companies Act and which describes itself as an association/apex body of broadcasters in India. Apart from the Foundation, two individual broadcasters are appellants 2 and 3 in this Appeal. The appeal was originally filed against TRAI but two different associations of hotels, namely (i) Federation of Hotels & Restaurants

Association of India and (ii) Hotel Association of India, were added as respondents 2 and 3 on the basis of their respective intervention applications.

All parties in the appeal have been heard in great detail. The appellants were represented by Mr.Amit Sibal, Senior Advocate, TRAI by Mr. Mansoor Ali Shoket, Advocate, Federation of Hotels & Restaurants Association of India by Mr.Ramji Srinivasan, Senior Advocate and Hotel Association of India by Mr.Ravi Sikri, Advocate.

The two impugned tariff orders, as noted at the beginning of the judgment are (i) the twelfth amendment of the Second tariff order relating to analogue transmission and (ii) the fourth amendment of the fourth tariff order relating to transmission by addressable systems. The amendments introduce in the tariff orders elaborate definitions of "commercial establishment" and "commercial subscriber". The impugned twelfth amendment in the second tariff order defines "commercial establishment" and "commercial subscriber" as under:

> "(dda) "**commercial establishment**" means any premises wherein any trade, business or any work in connection with, or incidental or ancillary thereto, is carried on and includes a society registered under the Societies Registration Act, 1860 (21 of 1860), and charitable or other trust, whether registered or not, which carries on any business, trade or work in connection with, or incidental or ancillary thereto, journalistic, printing and publishing establishments, educational, healthcare or other institutions run for private gain, theatres, cinemas, restaurants, eating houses, pubs, bars, residential hotels, malls, airport lounges, clubs or other places of public amusement or entertainment;

> (ddb) "**commercial subscriber**" means any person who receives broadcasting services or cable services at a place indicated by him to a cable operator or multi system operator or direct to home operator or head end in the sky operator or Internet Protocol television service provider, as the case may be, and uses such services for the benefit of his clients, customers, members or any other class or group of persons having access to his commercial establishment;"

It also makes certain amendments in the definition of charges and finally substitutes the third proviso to the clause by the following proviso:

> "**Provided also that in the case of the commercial subscriber, for each television connection, the charges payable by the Ordinary cable subscriber under sub-clause (a), shall be the ceiling:**
>
> Provided also that if a commercial subscriber charges his customer or any person for a programme of a broadcaster shown within his premises, he shall, before he starts providing such service, enter into agreement with the broadcaster and the broadcaster may change the commercial subscriber, for such programme, as may be agreed upon between them."
>
> (emphasis added)

The fourth amendment to the Fourth (addressable systems tariff order) similarly incorporated identical definitions for "commercial establishment" and "commercial subscriber". Further, it separately defined "ordinary subscriber" and "subscriber" and deleted the word "ordinary" wherever it appeared in clause 6 of the Fourth tariff order. Clause 3 of the amendment order reads as under:

> "3. In clause 6 of the principal Tariff Order, ----
>
> (a) the word 'ordinary', wherever appearing, shall be deleted,
>
> (b) after sub-clause (4), the following sub-clause and Explanation shall be inserted, namely:---

> "(5) If a commercial subscriber charges his customer or any person for a programme of a broadcaster shown within his premises, he shall, before he starts providing such service, enter into agreement with the broadcaster and the broadcaster may charge the commercial subscriber, for such programme, as may be agreed upon between them.
>
> Explanation: For the removal of doubt, it is clarified that any increase in the price of goods or services, being provided by the commercial subscriber during the duration of the telecast of a programme, referred to in the sub-clause (5), shall also be treated as charge for the said programme"."

The upshot of the amendments in the tariff orders is that though defined separately from ordinary subscriber, commercial subscriber too is brought under the protective ceiling of charges prescribed for ordinary subscriber. This is of course subject to the qualification that (i) in case of commercial subscribers charges would be levied for each television connection, subject of course to the ceiling applicable to an ordinary subscriber and (ii) in case a commercial subscriber separately charged for showing any programme within his premises, he would enter into an agreement with the broadcaster in which the broadcaster might charge the commercial subscriber as per the mutual agreement between them. Thus, for all intent and purposes, in the matter of tariff for broadcasting services, the very large and disparate body of commercial subscribers is put at par with the home viewer of television.

The first thing to notice here is that this is a reversal of the regulatory scheme that had prevailed from the time of the first intervention by TRAI for fixing tariff for broadcasting services in the early 2004.

The Fourth tariff order that was issued on 21 July 2010 defined "ordinary subscriber" and "subscriber" separately and the latter expression was defined to include commercial subscriber. Nonetheless, as seen in the previous paragraphs, the regulatory protections, limited as those were, vide clauses 6 & 7 of the tariff order were extended only to ordinary subscriber and not to commercial subscriber. Under the Fourth tariff order this position prevailed right up to the issuance of the impugned amendment.

Coming now to the Second tariff order issued on 1 October 2004, though like the First tariff order issued on 15 January 2004, it used the undefined expression "subscriber", there can be little doubt that it was meant to protect the home viewer and was not intended to cover the commercial subscriber of TV channels. The commercial subscriber was first brought under the purview of the Second tariff order only after the Tribunal's judgment dated 17 January 2006 and since then, at least a part of commercial subscribers, was always treated differently from ordinary subscriber and was kept out of the regulatory protection.

On behalf of respondents 2 and 3 (the two associations representing hotels and restaurants), it was strongly argued that the regulatory protection under the Second tariff order was available to commercial subscribers from its inception and the impugned tariff orders simply restore the original scheme. It was contended that the Second tariff order simply used the word 'subscriber' which naturally included all kinds of subscribers without any distinction between a domestic subscriber and a commercial subscriber. In our view the submission is fallacious and untenable. The fact of the matter is that the expression "subscriber" in the Second tariff order meant domestic subscriber and it was not *intended* to cover commercial subscriber.

The Supreme Court considered the question in its judgment dated 24 November 2006. It observed that though TRAI recognised the need for making a distinction between the home viewer and the commercial subscriber it had not, till then, made a separate tariff order especially for commercial subscribers. The Court said that till a tariff order is made especially for commercial subscriber, the Second tariff order would continue to extend to commercial subscribers. But the Supreme Court never said that the Second tariff order was made purposefully making no distinction between commercial subscribers and ordinary subscribers. Also, the explanatory memorandum to the seventh amendment to the Second tariff order that was issued on 21 November 2006 and that clearly declared that the Second tariff

order issued on 1 October was intended to protect the domestic subscriber, unfortunately, could not be brought to the notice of the Court.

Besides, there are several other positive materials and circumstances for taking the view that the First and the Second tariff orders issued in January and October 2004 were actually aimed at protecting the ordinary cable consumer, the end user and those tariff orders, as originally issued, were not meant for the commercial subscribers. First, the circumstances under which the First tariff order was issued on 15 January 2004 and was replaced by the Second tariff order (as discussed in the initial part of this judgment) clearly suggest that TRAI had moved in swiftly to protect the home viewer from any arbitrary and frequent increases of television charges. At that time TRAI was not contemplating the larger and highly complicated issues like classification of subscribers for fixing the tariff.

Secondly, this position was made explicit by TRAI itself. In the explanatory memorandum to the seventh amendment to the Second tariff order dated 21 November 2006, by which a very small segment of commercial subscribers [namely, (i) hotels with rating of three stars and above, (ii) heritage hotels and (iii) any other hotel/motel, inn and such other commercial establishment providing board and lodging having 50 or more rooms] were expressly put beyond the regulatory protection, it was clearly stated that the First and the Second tariff

orders issued in January and October 2004 were actually aimed at protecting the ordinary cable consumer, the end user and the commercial establishments were not in the realm of deliberation of tariff regulation.

On behalf of the respondents, it was strongly argued that the seventh amendment dated 21 November 2006 was set aside by the judgment of the Tribunal which was also affirmed by the Supreme Court and hence, no reliance can be placed on the explanatory memorandum to the seventh amendment order. We are unable to accept the submission. The outcome of the tariff making exercise might have been found to be unsustainable and set aside for various reasons. But on that account, the reasons given for undertaking the exercise will not disappear. Also, the judgment setting aside the seventh amendment will not in any way affect the scope and ambit of the first and the second tariff orders as understood by TRAI, the maker itself of the tariff orders.

Thirdly, in the consultation paper leading to the issuance of the impugned tariff orders, in chapter 1 under the heading "Issues Related to Tariff of Commercial Subscribers", in paragraph 1.1 it is stated as under:

> "***Background to Evolution of Category of and Tariff for Commercial Subscribers.***
>
> 1.1 As discussed, the question of making a separate dispensation for commercial establishments which availed broadcasting and cable TV services, notfor their own domestic use but for the benefit of clients,

> customers, members, etc. **was not in the realm of deliberation in the context of both the Tariff Orders issued in 2004.**"
>
> (emphasis added).

Fourthly, TRAI recognised that at the ground level ordinary subscribers and commercial subscribers were treated differently in regard to charges payable by them for receiving television signals and that it was a well-established business practice. It is so stated in the explanatory memorandum to the seventh amendment of the Second tariff order. Further, on behalf of the appellant a fat compilation is filed enclosing the rate cards and reference interconnect offers submitted by the broadcasters before TRAI under the reporting requirement in the tariff orders. The rate cards and the reference interconnect offers relate to domestic viewers and expressly exclude hotels (three star plus heritage plus inns with 50 rooms etc.). TRAI never took any objection to the exclusion of the commercial establishments from the rate cards and RIOs submitted by the broadcasters nor any objection was taken in this regard by any MSO or any other commercial establishment.

On behalf of the intervener respondents strong reliance was placed on paragraph 2 of the explanatory memorandum to the impugned amendments where it is stated that the Authority (TRAI) did not differentiate between ordinary and commercial subscriber. In our view, the statement is in teeth of a host of circumstances and earlier statements and declarations made by TRAI itself and we

are not willing to accept that prior to amendment no distinction was made between ordinary and commercial subscribers.

We accordingly find and hold that the impugned tariff orders, breaking away from the past reversed the regulatory scheme in treating the entire body of commercial subscribers at par with the home viewer.

Let us now see the reason given by TRAI for breaking away from the past in such a radical manner. The two reasons assigned by it are one, that the end consumer whether (s)he is watching the TV programme at home or at some commercial establishment gets to view the same content with the same quality of signals and the other, that in both cases the cost to the broadcaster and the distributor remains the same. In paragraphs 19 and 20 of the explanatory memorandum it is stated as under:

> "19. **The end consumer, whether at his domestic premises or at any commercial establishment, gets to view the same content with same quality of signals. In both the cases, the cost to the content owner (broadcaster) and the DPO, for supplying the signals, per se, does not vary on account of where the signals are supplied - at the domestic premises or the commercial establishment.** Moreover, The Hon'ble Supreme Court in its judgment dated 24.11.2006 in appeal (Civil) 2061 of 2006 Hotel and Restaurants Association and Anr Vs Star India Pvt Ltd. and Ors has, amongst others, observed as under:
>
> > *"....The owners of the hotels take TV signals for their customers/ guests. While doing so, they inter alia provide services to their customers. An owner of a hotel provides various amenities to its customers such as beds, meals, fans,*

television, etc. Making a provision for extending such facilities or amenities to the boarders would not constitute a sale by an owner to a guest. The owners of the hotels take TV signals from the broadcasters in the same manner as they take supply of electrical energy from the licensees. A guest may use an electrical appliance. The same would not constitute the sale of electricity by the hotel to him. For the said purpose, the 'consumer' and 'subscriber' would continue to be the hotel and its management. Similarly, if a television set is provided in all the rooms, as part of the services rendered by the management by way of an amenity, wherefor the guests are not charged separately, the same would not convert the guests staying in a hotel into consumers or subscribers….."

The said judgment further quotes another judgment of the Hon'ble Supreme Court (in The State of Punjab v. M/s. Associated Hotels of India Ltd. [(1972) 1 SCC 472)]) on similar issue, which is reproduced as under:

"…. When a traveller, by plane or by steam-ship, purchases his passage-ticket, the transaction is one for his passage from one place to another. If, in the course of carrying out that transaction, the traveller is supplied with drinks or meals or cigarettes, no one would think that the transaction involves separate sales each time any of those things is supplied. The transaction is essentially one of carrying the passenger to his destination and if in performance of the contract of carriage something is supplied to him, such supply is only incidental to that services, not changing either the pattern or the nature of the contract. Similarly, when clothes are given for washing to a laundery, there is a transaction which essentially involves work or service, and if the launderyman stitches a button to a garment which has fallen off, there is no sale of the button or the thread. A number of such cases involving incidental uses of materials can be cited, none of which can be said to involve a sale as part of the main transaction. …."

20. From the observations of the Hon'ble Supreme Court, cited above, it is clear that provision of TV services in a commercial establishment in only incidental to the service that the commercial establishment is providing to its clients. It cannot be construed as re-distribution or re-sale of TV services. In any case, there is no re-transmission. In sum, the question as to who is the subscriber has been settled through this judgment. It has also

> been settled by the said judgment that any service rendered to a guest by way of an amenity, wherefor the guests are not charged separately, the same would not constitute as sale of the said service to the guest. Further, this judgment specifically refers to the subject in hand. **Accordingly, the Authority was of the view that in the rates of TV services, there should be no differentiation between an ordinary subscriber and a commercial subscriber i.e. in both the cases, the charges should be the same and on per TV set basis."**

It is to be seen that apart from the two factors namely, the content being the same and the cost to the broadcaster and the distributor being the same, the element of the use of the broadcast is completely divorced from consideration. The use of the broadcast, to our mind, is of considerable importance for fixing tariff for broadcasting services. It was a recurrent theme in the earlier exercises undertaken by TRAI for framing tariff. In our view, any exercise of fixing tariff for broadcasting services that completely disregards the user of the broadcast is bound to lead to unreasonable and inequitable results and so have the impugned amendments in the tariff orders.

TRAI makes it appear as if in putting commercial subscriber at par with ordinary subscriber, it has followed and given effect to the judgment of the Supreme Court. But the Supreme Court judgment does not even remotely suggest that for the purpose of tariff, commercial subscriber should be meted out the same treatment as ordinary subscriber. On the contrary, the Supreme Court repeatedly observed that TRAI must act independently in framing tariff for broadcasting

service in exercise of its authority under section 11 of the TRAI Act. TRAI has completely misread the judgment of the Supreme Court and has selectively quoted from it to rationalise its conclusion. As noted earlier, the Supreme Court repeatedly said that it was for TRAI to deliberate whether the two kinds of subscribers need the same treatment and it must exercise its jurisdiction independently and without being influenced by any observations. TRAI has plainly failed to take an independent and objective view of the matter and as a result the tariff orders have come to a state where no distinction is made between a home viewer and someone who uses the television programme not for personal viewing but for deriving benefit from it in its trade or business.

On a careful consideration of the materials on record and the submissions made on behalf of the contending parties we find the reasons assigned by TRAI for putting the entire body of commercial subscriber at par with ordinary subscriber completely unacceptable.

Further, the provision introduced (vide the second proviso to clause 3) for protection and enforcement of copyrights that requires a commercial subscriber who might charge the viewers separately for showing any television programme within his premises to enter into an agreement with the broadcaster at mutually agreed charges, completely fails the test of workability. The provision can be, and

is being circumvented in a dozen ways by social/sports clubs, restaurants and similar other subscribers.

Further, in the DAS regime (that is scheduled to cover the entire country by the end of this year), the regulatory constraint on tariff, as noted above, is only in respect of the broadcaster and the relationship between the MSO and the LCO and the MSO or the LCO and the subscriber is left completely unregulated. There is no reason assigned for subjecting the broadcaster alone to tariff restrictions while leaving free the other players on the lower tiers. On behalf of respondents 2 and 3, it was argued that at the two lower tiers there is sufficient competition in the market and that justifies forbearance by the regulatory authority. But at the top tier of the broadcasting service, comprising the broadcaster and the MSO, there is no sufficient competition and the broadcaster is in the position of monopoly and hence, the need of regulatory restrictions in the case of broadcasters.

There is no such statement in the explanatory memoranda to any of the tariff orders and we do not find any material in support of the contention. On the contrary, TRAI had earlier observed that large hotels (or large commercial establishments) have sufficient wherewithal and the bargaining power to protect themselves. No distributor of TV channels would like to lose certain kinds of commercial subscribers that, to the former, would be like a flock of ordinary

subscribers. Moreover, as observed by TRAI itself, commercial establishments have the means to pass-on the charges to their customers and clients.

In light of the discussion made above, we find the two amendments quite unsustainable and we are thus constrained to set aside the impugned amendment orders.

At this stage it may be noted that even while the hearing of the present appeal before the Tribunal was underway, on 6 January 2015 TRAI issued the Telecommunication (Broadcasting & Cable) Services (Second) Tariff (Fourteenth Amendment) Order 2015 (1 of 2015) that *inter alia* restates the impugned amendments in the Second and Fourth tariff order. Consequently the appellants have filed an application[8] for amending the appeal with a view to challenge the restatement of the impugned amendments in the fourteenth amendment of the Second tariff order.

In the facts and circumstances of the case, this petition is allowed and for the same reasons as discussed above, proviso 6 and 7 to clause 3 of the fourteenth amendment along with the explanation appended to proviso 7 are also set aside.

TRAI must now undertake a fresh exercise on a completely clean slate. It must put aside the earlier debates on the basis of which it has been making

[8]MA No.20 of 2015

amendments in the three principal tariff orders none of which has so far passed judicial scrutiny. It must consider afresh the question whether commercial subscribers should be treated equally as home viewers for the purpose of broadcasting services tariff or there needs to be a different and separate tariff system for commercial subscribers or some parts of that larger body. It is hoped and expected that TRAI will issue fresh tariff orders within six months from to-day.

Now that the impugned tariff orders are quashed, the question arises at what rates commercial establishments are to be charged, especially those that were excluded from the tariff protection by the seventh amendment of the Second tariff order until TRAI comes out with the fresh tariff order. The seventh amendment to the Second tariff order and the first amendment to the Third (CAS Area) tariff order were quashed by the judgment of the Tribunal dated 28 May 2010 but those were kept alive by the Supreme Court for a period of three months from 16 April 2014, the date of the order by which the Court confirmed the Tribunal's judgment. That period is long over and, therefore, it would not be proper to revive the tariff amendment orders dated 21 November 2006. As a consequence of the tariff amendment orders dated 21 November being taken out, the un-amended Second, Third and Fourth tariff orders will come into play and commercial subscriber would, *by default*, get bracketed with ordinary subscriber. In other words though

the impugned amendments in the tariff orders are quashed by this judgment, nonetheless, for practical purposes the situation will continue to remain the same. And this is because despite two orders by the Supreme Court to consider the question of tariff in respect of commercial subscribers, within specified times periods, TRAI has not been able to produce the tariff that would satisfy judicial scrutiny. This is evidently a highly anomalous situation and to remedy it TRAI must consider whether to issue an interim tariff order dealing with the matter until it takes a final call on the subject. TRAI should take a decision in regard to any interim arrangement within one month from today.

We are fully mindful that TRAI has been painstakingly grappling with this matter for a long time. We also recognise that the issue is highly complex and no easy answers are available. We feel that a good deal of confusion and misunderstanding has resulted from the fact that the seventh amendment of the Second tariff order came to be issued just three days before the pronouncement of the judgment by the Supreme Court in the first round of litigation. TRAI can hardly be blamed for this as it had acted in pursuance of the direction of the Supreme Court by which the Court had modified the *status quo* order passed at the time of the admission of the appeal. But the result was that in framing the seventh amendment to the Second tariff order, TRAI did not have the benefit of the pronouncement of the Supreme Court in the matter. At the same time the Supreme

Court could not get to know how the First and the Second tariff orders were perceived by their maker, the regulator and to what object and purpose those tariff orders were made according to the regulator.

The seventh amendment to the Second tariff order and the amendment to the Third CAS areas tariff order were eventually quashed by the Tribunal and in the judgment TRAI came in for some strong criticism. As a result, it appears, TRAI went to the other extreme in coming up with the impugned tariff orders. All the different kinds of commercial subscribers being put *en block* at par with the ordinary subscriber appears to be as arbitrary and unreasonable as the carving out of a very small segment of hotels [namely, (i) hotels with rating of three stars and above, (ii) heritage hotels and (iii) any other hotel/motel, inn and such other commercial establishment providing board and lodging having 50 or more rooms] for exclusion from the tariff protection. We are strongly of the view that what is required in the matter is a far more nuanced approach. We rather feel it is high time that TRAI should stop making any further amendments in the different tariff orders and take a completely fresh and holistic view on the question of tariff in broadcasting services. As a result of repeated amendments, the Second, Third and Fourth tariff orders have become so complicated that it has become difficult even to follow the exact import of a provision without examining all the amendments made earlier in the Principal tariff order. How much the tariff orders have become

clumsy and unwieldy is evident from their very names as is sought be demonstrated in the opening lines of this judgment. We, accordingly, expect that as the whole country is now to come under the DAS regime, TRAI will undertake a fresh exercise and come out with a single consolidated instrument covering broadcasting services.

The appeal is allowed but with no order as to costs.

…….
(AftabAlam)
Chairperson

…….
(Kuldip Singh)
Member