

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL  
NEW DELHI

Dated / 8 March, 2016

Telecommunication Petition No.790 of 2012

Loop Telecom Limited ..... Petitioner

Versus

Union of India ..... Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON**  
**HON'BLE DR. KULDIP SINGH, MEMBER**  
**HON'BLE MR. BIPIN BIHARI SRIVASTAVA, MEMBER**

For Petitioner : Mr. Navin Chawla, Advocate  
Mr. Chaitanya Safaya, Advocate

For Respondent : Mr. Abhay Prakash Sahay, Advocate

**ORDER**

**By Aftab Alam, Chairperson** – The petitioner came to the Tribunal making the grievance that the respondent had wrongfully encashed the financial bank guarantee of Rs.5 crores given by it in respect of the Unified Access Services

(UAS) Licence earlier granted to it for the service area of Bihar. Accordingly, it sought the following two principal reliefs:

- “(a) Pass a decree/order directing the Respondent to refund the amount of Rs.5 crores along with interest @ 18% per annum;
- (b) Set aside the invocation letter dated 27.06.2012 sent by the Respondent to SBI for encashing the aforesaid Bank Guarantee;”

The facts of the case are simple and may be stated thus.

The petitioner was able to obtain from the Government, UAS licenses for the Bihar service area and for 20 other service areas in the country. All the 21 UAS licenses obtained by the petitioner (along with 101 licenses granted to other operators) were quashed by the Supreme Court by judgment and order dated 02.02.2012 in Centre of Public Interest Litigation Vs. Union of India<sup>1</sup>. The petitioner then filed Petition no.329 of 2012 seeking a number of reliefs including refund of Rs.1454.94 crores paid by it as entry fee/licence fee for the grant of those 21 licenses. In this petition, the petitioner filed an application (MA No.275 of 2012) stating that the Government had proceeded to encash the financial bank guarantee given by it against its licence for the Bihar service area for realisation of its demand of licence fee allegedly payable by the petitioner for all the 21 licenses. In the application, it sought an interim order restraining the Government from encashing the FBG<sup>2</sup> and for a direction to the Government not to invoke or encash

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<sup>1</sup>(2012) 3 SCC 1

<sup>2</sup>No.0999608BG0000125 dated 10.01.2008

any of the financial bank guarantees copies of which were attached as Annexure-7 to the application. On this application, the Tribunal on 03.07.2012 passed an interim direction restraining the Government from encashing the bank guarantees invoked by it. Notwithstanding, the order passed by the Tribunal, the bank guarantee was encashed and the proceeds were received by the Government as confirmed by the bank vide its Email dated 30.07.2012. The present petition was then filed on 01.11.2012 seeking the reliefs as indicated above.

On behalf of the Government, a reply is filed in which the encashment of bank guarantee is justified on the ground that the petitioner failed to make payment of the annual licence fee for financial years 2007-08, 2008-09, 2009-10 and 2010-11 for the UAS and NLD licenses held by it. It is stated that the licence fees payable for the licenses held by it were duly assessed and demand letters were issued to it.

The demand letters for the years 2007-08 and 2008-09 were issued on 07.05.2012. The demand letters for the years 2009-10 and 2010-11 were issued on 09.05.2012 and 23.05.2012 respectively. The demand letters show the computation of licence fees as under:

(i) For the year 2007-08

S.No	Consolidation					
	UASL/NLD	Principal L.F.	Int. on L.F.	Penalty	Int.on Penalty	Total
	Total	1,79,143	1,50,372	89,571	68,284	4,87,369

\*Interest has been calculated upto 31.05.2012.

(ii) For the year 2008-09

S.No	Consolidation					
	UASL/NLD	Principal L.F.	Int. on L.F.	Penalty	Int.on Penalty	Total
	Total	68,286	44,898	34,143	17,468	1,64,795

\*Interest has been calculated upto 31.05.2012.

(iii) For the year 2009-10

S.No	Consolidation					
	UASL/NLD	Principal L.F.	Int. on L.F.	Penalty	Int.on Penalty	Total
	Total	15,28,578	6,70,382	7,64,289	2,50,329	32,12,577

\*Interest has been calculated upto 31.05.2012.

(iv) For the year 2010-11

S.No	Consolidation					
	UASL/NLD	Principal L.F.	Int. on L.F.	Penalty	Int.on Penalty	Total
	Total	95,80,367	22,53,256	45,19,948	4,88,065	1,68,41,635

\*Interest has been calculated upto 31.05.2012.

The above computations are in respect of all the service areas where the petitioner held the licenses and the total demand for the four years adds upto Rs.2,07,07,376/-.

According to the petitioner, the licence fee payable by it on the licence for the Bihar service area, according to the Government's own computation, was as under:

(i)	2007-08	-	Rs.14,365/-
(ii)	2008-09	-	Rs.5,618/-
(iii)	2009-10	-	Rs.1,09,554/-
(iv)	2010-11	-	Rs.1,68,41,635/-

It is further stated on behalf of the petitioner that for the year 2011-12, the total licence fee demanded from it was Rs.1,66,16,198/- out of which licence fee payable on the licence for Bihar service area was Rs.5,69,953/-.

Thus, the total licence fee payable by the petitioner for financial years 2007-08 to 2011-12(as per the Government's computation) was Rs.3,73,23,574/- and only for the service area of Bihar, Rs.12,80,083/-.

The case of the petitioner is that the financial bank guarantee given against the licence for the Bihar service area could be invoked only in respect of any dues for that area and not for the dues of the other areas. In any event, for realisation of dues of Rs.12,80,083/- (or even Rs.3,73,23,574/-), the action of the respondent to encash the bank guarantee for Rs.5 crore and keep the entire proceeds to itself was wholly unreasonable, unfair and unjust.

At this stage, it needs to be noted that Petition no, 329 of 2012 in which the petitioner sought refund of entry fees/ licence fees for the 21 licences on the plea that those were eventually quashed by the Supreme Court, was finally heard and dismissed with certain observations by the Tribunal by judgment and order dated 16 September 2015. Extending the ratio of the judgement it must be held that the petitioner is liable to pay the licence fee for the licences till 1 June 2012 when it shut down its operations under those licences as directed by the Supreme Court.

The petitioner being held liable to pay licence fee for all the 21 licenses, the question is whether the FBG given for one licence can be invoked for realisation of the aggregate of the licence fees payable by the petitioner for all the licences. Applying the principle of expediency, we see no reason why the bank guarantee for one service area may not be invoked for recovery of the dues of all the service areas; moreso, as the aggregate of all the dues is covered by one single FBG and hence, realisation of all the dues of all the service areas by invoking a single FBG would be more convenient than invoking all the 21 FBGs for realisation of smaller amounts as dues in each of the 21 service areas. Needless to say, that on recovery of the entire dues of all the circles by invocation of a single bank guarantee in any one service area, the bank guarantees in other service areas cannot be invoked for realisation of the same dues twice over.

The next question is about the propriety and correctness of invoking the FBG for Rs.5 cr. for realisation of the demand of Rs.3,73,23,574/- and retaining the balance money. On behalf of the Union of India it is contended that the department was obliged to demand full payment of Rs.5 cr. under the FBG as it was not possible to invoke the guarantee partially. The submission is untenable both on the terms of the FBG and in view of the settled legal position. In the FBG the bank undertook to pay an amount **not exceeding** Rs.5 cr. It could therefore be invoked without any difficulty for a sum under Rs.5 cr. The stand taken by the

Union of India is also contrary to the decisions of the court<sup>3</sup> on the issue. In any event, having received the full amount under the FBG, the Union of India had no right to retain the money in excess of its demand of licence fees and the balance amount should have been refunded to the petitioner.

This takes us to the main question arising in the case. It is held above that the petitioner is liable to pay licence fees for all the 21 licenses till 01.06.2012. It needs, however, to be clarified that the liability of the petitioner is to pay licence fee *as lawfully determined* and not any amount that the licensor may demand in the name of licence fee without any sanction of law.

Here it needs to be noted that the question of AGR, on remand by the Supreme Court, is finally decided by the Tribunal by its judgement and order dated 23.04.2015. Appeals<sup>4</sup> against the Tribunal's judgement are preferred before the Supreme Court both by the Union of India and the telecom operators. In the pending appeals, on an application for stay made by the Union of India, the Supreme Court on 29.02.2016 passed the following order which in so far as relevant for the present is as under:

“Mr. P.S. Narasimha, learned Additional Solicitor General of India appearing for the Union of India states, that the Union of India will continue to raise demands as per its understanding, however, the same will not be enforced till the final decision of the controversy by this Court.

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<sup>3</sup> (2010) 175 DLT 585(Emaar MGF Construction Pvt. Ltd. Vs. Delhi Development Authority &Ors.) and 2012(132) DRJ 424 (Videsh Sanchar Nigam Ltd. Vs. U.T.I. Bank Ltd. &Anr)

<sup>4</sup>Civil Appeal No(s).5882/2015 (M/s Vodafone West Ltd, through its AVP, GauravMalhotra Vs. UOI)

The statement of the learned Additional Solicitor General of India is placed on record.”

Thus, the judgement and order passed by the Tribunal is not stayed. It is, however, open to the Union of India to continue to raise demands as per its understanding. However, the demands would not be enforced till the final decision by the Supreme Court. It follows that the liability of the licensee is to pay licence fee in terms of the Tribunal’s judgement until the matter is decided by the Supreme Court the decision of the Supreme Court gives rise to any further liabilities for payments.

Keeping this in mind, we advert back to the demands as quoted above. From the demands, it is evident that the total amount payable by the petitioner is arrived at by adding on the principal licence fee, the components of (i) interest on licence fee, (ii) penalty and (iii) interest on penalty. On the issue of interest, penalty and interest on penalty, the Tribunal in its judgement dated 23.04.2015 has held as under:

“In our opinion, in the attending facts and circumstances, the imposition of interest and maximum penalty and then to further compound it with interest on the amount of penalty is wholly unjustified. As is evident from the history of the dispute, the question of computation of “gross revenue” and “adjusted gross revenue” has been mired in controversy from the beginning. The parties are in dispute for more than ten years over the elements that go into the computation of “gross revenue” and “adjusted gross revenue” and the whole matter has been in a flux for all this time. In those circumstances, there seems to be no reason for charging interest and penalty and then interest on penalty. Even in case some penalty must be imposed in the facts of any particular case, it can never be the maximum prescribed under the licence. At the most, some nominal amount may be imposed as token penalty with interest, if permissible, at the lowest rates. Further, there should be no question of any penalty in case the delay in raising the demand is attributable to the DoT or if it is caused due to court cases.”

Further, it may be noted that for determining the licence fee for the 2010-11 forex gain of Rs.7,39,430/- was also taken as part of the gross revenue. The inclusion of any gains resulting from foreign exchange fluctuations for determining the gross revenue is also impermissible in terms of the Tribunal's judgement. There are some other instances also that show that the computation of licence fee is not fully in accordance with the TDSAT judgement.

Under the interim order passed by the Supreme Court, the Union of India is indeed entitled to make computations and raise demands as per its understanding. It is, therefore, open to the Union of India to raise the demands and serve it on the petitioner but at the same time it cannot enforce those demands by invocation of the FBGs till the matter is finally adjudicated by the Supreme Court. Until then, the Union of India is directed to make computation of the licence fees payable by the petitioner in all the 21 service areas on the basis of the TDSAT judgement and order dated 23.04.2015. It may then adjust the licence fee payable by the petitioner so determined against Rs.5 cr. received by it from the FBG and must refund the balance amount of the bank guarantee to the petitioner subject to the undertaking given by the petitioner that it would make any additional payments forthwith and without objection if found so liable in terms of the Supreme Court judgement in the AGR matter. The refund, as directed should be made within three months from the date of this judgement, failing which the amount will attract interest @ 14%

per annum for the period commencing from the date three months beyond the date of this judgement to the date of payment.



/ (Aftab Alam)  
Chairperson



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(Kuldip Singh)  
Member



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(B.B. Srivastava)  
Member

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