

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 21st August , 2018

**Broadcasting Appeal No. 4 of 2015
(M.A. Nos.15, 120 & 121 of 2016)**

Sony Pictures Networks India Pvt. Ltd. ... Appellant
Vs.
Telecom Regulatory Authority of India & ors. ... Respondents

ALONG WITH

Broadcasting Appeal No. 5 of 2015

(M.A. Nos.14 & M.A.No.147 of 2016 & M.A.No.471 of 2017)

Indian Broadcasting Foundation & Ors. ...
Appellants
Vs.
Telecom Regulatory Authority of India & Ors. ... Respondents

BEFORE:

**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER**

For Appellants in Appeal : Mr. Aman Lekhi, Sr. Advocate
no.4 of 2015 Mr. Amit Sibal, Sr. Advocate
Mr. Kunal Tandon, Advocate
Mr. Shashank Shekher, Advocate
Mr. Prateek Jain, Advocate

For Appellants in Appeal no.5 of 2015 Mr. Meet Malhotra, Sr. Advocate
Mr Amit Sibal, Sr. Advocate
Mr. Abhishek Malhotra, Advocate
Ms. Niyati Asthana, Advocate

For Respondent : Ms. Maneesha Dhir, Advocate
No.1(TRAI) Mr. Abhishek Kumar, Advocate &
Mr. Saransh Gupta, Advocate

For Respondent No.2, 3 : Mr. Ramji Srinivasan, Sr. Advocate
Ms. Rukhmani Bobde, Advocate
Ms. Sonal Gupta, Advocate
Mr.Sarthak Gaur,Advocate

JUDGMENT

A. K. Bhargava, Member - The present two appeals are similar in nature. Hence, they were heard together and are being disposed of by this common judgment.

2. The appellant - Sony Pictures Networks India Pvt. Ltd. in Broadcasting Appeal No. 4 of 2015 and appellants - Indian Broadcasting Foundation and other parties in Broadcasting Appeal No. 5 of 2015 have approached this Tribunal seeking a direction to quash and set aside clause 2(a) of the Telecommunication

(Broadcasting and Cable Services) (Fourth) (Addressable Systems) Tariff (Fifth Amendment) Order, 2015 (No. 5 of 2015) dated 8th September 2015 and clause 2(c) of the Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Fifteenth Amendment) Order, 2015 (No. 4 of 2015) dated 8th September 2015 issued by TRAI. The impugned Clauses in the Telecommunication (Broadcasting and Cable) Services Tariff Order relate to the definitions as under:

*“**commercial subscriber**” means a subscriber who causes the signals of TV channels to be heard or seen by any person for a specific sum of money.”*

*“**ordinary subscriber**” means a subscriber who is not a commercial subscriber.*

3. Though it appears to be a simple issue of definition, it has a long chequered history. As we recount the history, we shall see how various definitions and issues surrounding them have evolved but remain unresolved.

4. TRAI issued the first Telecommunication (Broadcasting and Cable) Services Tariff Order (TTO) on 15 January 2004 which

covered tariffs for all broadcasting and cable services throughout the country. This TTO essentially provided that the prices 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 TRAI on the various issues concerning these charges. The Second tariff order dated 1-10-2004 defined the various terms like "broadcaster", "broadcasting services", "cable operator", "cable service", "cable television network", "charge", "free to air channel", "multi system operator", and "pay channel" but did not define "subscriber". The first litigation related to these TTOs came in 8-8-2005 before TDSAT when petitioners (some hotels and Association of Hotels) challenged the actions of Broadcasters requiring them to pay subscription fee beyond that which was prevalent on 26-12-2003. The practice at that time was that the hotels and restaurants were taking signals from cable operators providing service in their respective areas at a central place and were then carried through cable to rooms where TV sets were installed for viewing. The cable operators entered into agreements with respective hotels in this regard and charged them different rates which were not uniform for all the hotels/restaurants. Some big hotels also 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. According to the broadcasters, such hotels and restaurants could not be equated with domestic consumers for the provision of cable TV service. TDSAT disposed of the petition on 17-1-2006 while holding that the members of the Federation of Hotel are not subscribers / consumers and that the tariff notifications relied upon by the commercial establishments were only applicable to the domestic viewers and not to hotels etc. The TDSAT also directed TRAI to consider whether or not it is necessary to fix Tariff for commercial purposes. Pursuant to this judgment, on 7-3-2006 TRAI issued 4th Amendment to the TTO defining commercial subscribers. As per the amendment 'ordinary cable subscriber' was defined to mean any person who received broadcasting service and used it for domestic purposes and 'commercial 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. Thus, 'ordinary cable subscriber' and 'commercial cable subscriber' came to be defined separately for the first time and such classification of 'ordinary cable subscriber' and 'commercial

cable subscriber' was based on the use to which the signals received by the subscribers were put. The amendment also declared that commercial cable subscribers would pay subscription fees at rates prevailing on March 1, 2006.

5. In the meantime, an appeal was filed in the Supreme Court by Hotel and Restaurant Association and the judgment came on 24-11-2006 which remanded the matter back to the TDSAT. This judgment of the Apex court, however, answered two basic questions "(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. Regarding the first question, the court held that hotels and restaurants fully qualified as subscribers and consumers. On the second question it held that 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.

6. It appears that before the Supreme Court order was pronounced on 24 November 2006, TRAI had on 21 November 2006 issued two notifications 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 2005. By these notifications, the tariff protection was extended to all subscribers, except a small segment enumerated as “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”. The amendment also 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 could get television channels only on charges mutually agreed upon with the broadcasters. These tariff notifications dated 21-11-2006 were challenged before the Tribunal by some hoteliers in Appeals Nos.

17(C) and 18(C) of 2006. These appeals were allowed by judgement dated 28-5-2010 and the two tariff notifications of 21-11-2006 were set aside with the direction to TRAI to undertake the exercise afresh. On 21-7-2010 TRAI issued The Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order 2010 which, inter alia, defined "ordinary subscriber" as "any subscriber who receives a programming service from a service provider and uses the same for his domestic purposes" and "subscriber" as "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"

7. Against the TDSAT order dated 28-5-2010, appeals were filed by broadcasters in the Supreme Court. The Apex Court while not interfering with the distinction between commercial subscribers and ordinary subscribers as held by TDSAT, dismissed these appeals by order dated 16-4-2014 with a direction to TRAI to re-determine the tariff within three months. In pursuance of the direction by the Supreme Court, TRAI notified two tariff amendments dated 16-7-2014

and 18-7-2014 for non-CAS and CAS. These treated commercial subscribers on the same footing as ordinary subscribers.

8. The tariff amendments notified by TRAI on 16-7-14 and 18-7-2014 were promptly challenged by the Broadcasters in Appeal 7(c) of 2014. On 9-3-2015 this Tribunal set aside the Tariff orders dated 16-7-2014 and 18-7-2014 directing TRAI to undergo a fresh exercise on a completely clean slate. It was observed that TRAI must put aside earlier debates on the basis of which it has been making amendments in the three principal tariff orders, none of which has so far passed judicial scrutiny. Hotel Association and TRAI have filed separate appeals in the Supreme Court against the TDSAT order dated 9-3-2015 but no stay has been granted. Meanwhile on 14-7-2015, TRAI issued a fresh Consultation paper titled "Tariff issues related to commercial subscriber" and after the consultation process, issued two tariff amendments on 8-9-2015 which are impugned in this appeal. We have recounted the history in great detail only to bring out that the issue needs to be dealt with an appropriate approach so that the history on this issue may be given quietus.

9. On behalf of appellant - Sony Pictures Networks India Pvt. Ltd. learned senior counsel, Mr. Aman Lekhi has argued the matter at length. The thrust of his argument was that the impugned order is in violation of Article 14 of the Constitution of India. According to him, there exists no basis for clubbing bulk of the commercial subscribers with domestic subscribers which amounts to treating un-equals as equals. Such classification violates the very underlying principle of Article 14 which mandates that all persons similarly circumstanced shall be treated similarly and hence by corollary persons that are situated /circumstanced differently shall be treated differently. He further asserted that sub-classification of commercial subscribers into those who pay 'specific sum of money' and those who don't and then keeping one sub-class under regulatory protection and keeping the other out of it amounts to putting unreasonable restrictions. According to Mr. Lekhi, the restrictions thus created affect the right to do business of the broadcasters and that these provisions are in violation of Article 19(1)(g). Mr. Lekhi further submitted that the distinction/classification based on "specific" charge of extra money is arbitrary and unworkable since it provides an easy exit for most commercial establishments who will easily escape scrutiny/enquiry by suppressing/hiding the charges for their TV services. On behalf of the

respondent nos. 2 and 3, Mr. Ramji Srinivasan, learned senior counsel has appeared and argued the matter at length, while on behalf of the TRAI, Ms. Maneesha Dhir, learned counsel has appeared and defended the impugned definitions.

10. The main issue pertains to classification of subscribers of the Broadcasting and Cable services for the purposes of regulating (or not regulating) the tariffs. At the outset, we agree with Mr. Lekhi's contention that such a classification should be based on intelligible differentia, should be reasonable, should not be arbitrary and should be workable. In addition, such classification should have some nexus to the objectives of the regulation. We further add that such classification also should have been done in a transparent manner. These are some weighty criteria which have evolved over a period of time from understanding of the law. We intend to examine the impugned order against these very criteria.

11. The classification as per the impugned order is as follows -

Class A : (Commercial Subscriber) - a subscriber who causes the signals of TV channels to be heard or seen by any person for a specific sum of money to be paid by such person.

Class B : (Ordinary Subscriber) – a subscriber who is not a commercial subscriber.

We have deliberately put Class A and Class B above to focus on classification and not on labels, so as not to get distracted for the purpose of test and analysis. We shall of course revert to the question of labels also later.

12. As stated above, the first test is to ascertain whether the classification as in para 11 above is based on intelligible differentia having rational relation to the object of regulation and whether such classification is reasonable. As per the regulations prevailing in Broadcasting and Cable services, the supply chain consists of Broadcasters, Multi System Operators (MSOs) and Local Cable Operators (LCOs) who supply TV signals to subscribers/consumers. Class B mentioned above represents the whole universe of subscribers/consumers who receive the TV signals from this regulated supply chain and the supply chain ends there. In case of Class A, this supply chain gets extended further to include this Class A subscriber as another link in the chain, since he “causes the signals of TV channels to be heard or seen by any person for a specific sum of money to be paid by such person.” Thus there is a

clear intelligible differentia between these two classes. The tariff regulations in great detail describe the role and responsibility of each link in the supply chain and how tariff will be regulated for each link in the chain. Therefore, a classification based on this fact is also a reasonable classification. According to TRAI, the basis of differentia here is the 'type or purpose of usage'. Mr. Lekhi, however, argues that tariff regulation should be based on 'location of use', with location being 'home' or 'commercial establishment'. As a corollary to this, he argues that the appellants should be allowed to charge commercial subscribers more as compared to domestic subscribers. In our view, Mr. Lekhi's proposition should also be subjected to the same criteria and tests. We ask ourselves, if the classification is to be based on 'location', then should it be street based, locality based, town based, city based? Within the same location having residences and shops, should there be different classification. Should we have different classifications for different star categories of hotels in the same city? We find that the more the questions are asked, the less 'intelligible' differentia becomes in such a classification. Further, does the 'location' based classification have rational relation with the object of the regulation? The undisputed object of the regulation is to promote healthy growth of the cable TV services. The classification as

propounded by the appellants which seeks higher tariffs based on 'location' can hardly be construed as conducive to growth while the one proposed by TRAI does encourage the healthier growth of TV services by extending regulatory protection to larger set of subscribers and appears to be in public interest. Mr. Lekhi of course contends that notwithstanding the public interest, reasonableness of classification is to be seen against his individual rights. We proceed to examine accordingly.

13. The appellants have all along argued that classification based on 'commercial establishment' only is reasonable because the TV services provided by them to such 'commercial establishments' like hotels and restaurants enhances the value of such establishments and therefore they are entitled to share a part of it by way of higher tariffs for their services. Any other classification would be discriminatory, putting un-equals as equals. In this regard, it is relevant to note the observation of 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 –

".....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, wherefore 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 vs. M/S. Associated Hotels Of India (1972) 1 SCC 472) on similar issue, which is reproduced below

".....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 laundry, there is a transaction which essentially involves work or service, and if the laundry man 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....”

From the above observation, it is clear that provision of TV services in a commercial establishment is only incidental to the service that the commercial establishment is providing to its clients. It has also been settled by the said judgment that any service rendered to a guest by way of amenity, wherefor the guests are not charged separately, the same would not constitute as sale of the said service to the guest. The commercial establishments like hotels and restaurants are also subscribers/consumers as far as TV services are concerned. It is also not under dispute that the cost of providing such services by the appellants to such establishments is the same when compared with that of providing to homes. Hence, if the tariffs applied to them are also same, there appears to be no discrimination or unreasonableness. Regulator has an unenviable task of looking at an issue from the perspective of both service providers and subscribers. Both have rights which need to be balanced through reasonable

restrictions. In a regulated environment, suppliers alone cannot have right for differential pricing or forbearance, especially when the consumer does not have equal bargaining power. We note that hotel and restaurants are also 'subscribers/consumers' and have no special bargaining power as compared to other domestic subscribers. Therefore, clubbing them together does not imply that un-equals are being treated as equals and no case of unreasonable restrictions is made out.

14. Mr. Lekhi has also argued at length that the classification proposed by TRAI is not workable and hence arbitrary. The main reason for unworkability is attributed to difficulty in identification and possibility of easy exits from scrutiny for enhanced tariffs. According to Ms. Dhir, this contention regarding unworkability is wholly without merit. She contends that it is settled law that the possibility of abuse of a provision does not in any case take away its validity and legality. For instance, assuming that if today someone steals the signals of the appellant and earns from such stealing, the Appellant would not be remediless. The Appellant can very well take recourse to the applicable laws and seek prosecution of such offenders. She further points out that such events where 'specific charges' are levied are not

held in secrecy and are in fact extensively marketed by sending mailers, pamphlets and SMSs. Thus the broadcasters have at their command all means and resources to know in advance that a hotel, pub or restaurant etc. is organizing a special event and charging for TV services. To the charge that the respondents have not been able to produce any instance where such events have been held under some agreement, Mr. Ramji Srinivasan cites some instances but hastens to add that the volume of such transactions or convenience of one party in entering into such transactions cannot be the test of workability. Considering these submissions, we are of the opinion that the proposed regulation is capable of being implemented and workable.

15. Another grievance of the appellant is that the respondent has not been transparent. It is a matter of fact that TRAI came out with a consultation paper, took views of all stakeholders and gave its own analysis before issuing the impugned orders. Appellants contend that the analysis is not elaborate enough and is not supported by facts. Further charge is about TRAI's approach that keeps changing and is arrived at without assigning reasons. We do not think that a concise analysis can be a infirmity and no case has been made out to

establish that the analysis is bereft of reasons and facts. We are also not enamoured by the 'approach' argument since TRAI was supposed to take a 'holistic' and 'fresh look' and such 'de-novo' exercise may reasonably lead to a specific approach after evaluating other alternatives. In any case, as Ms. Dhir puts it, regulator has a right to adapt its approach as it deems fit and that the current approach has been advanced with reasons. In the facts of the case, we are not inclined to fault the impugned order on grounds of transparency.

16. Having found the classification made by TRAI in the impugned order acceptable on all counts so far, we come back to the question of labelling as stated in para 11 above. The class of "a subscriber who causes the signals of TV channels to be heard or seen by any person for a specific sum of money to be paid by such person" may be labelled as 'commercial subscriber' but there may be more accurate ways of labelling or naming such a subscriber. For example "Managed Event Subscriber" or "Special Subscriber" may be a more accurate description of the class of subscribers for which we have used the neutral label of 'Class A'. However, we do not wish to engage in a naming exercise here, though we do appreciate the

importance of the question "what is there in a name". We therefore leave it to TRAI to label or name the two classes proposed in the impugned order accurately and appropriately, in accordance with due process and in reasonable time, say six months. We also give leave and liberty to TRAI to regulate (or not regulate) these two class of subscribers in accordance with law. Till such time, current arrangement will continue.

17. For the reasons discussed above, the Appeals no. 4 and 5 of 2015 are disallowed with the direction that TRAI will take note of and act as per our observation in para 16 above.



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(S. K. Singh, J)
Chairperson



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(A.K. Bhargava)
Member