

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 9th January, 2018

Telecommunication Petition No.38 of 2016
(M.A. No. 268 of 2017, M.A. No. 342 of 2017)

Dishnet Wireless Ltd. & Anr.

... Petitioners

Vs.

Union of India

... Respondent

BEFORE:

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

For Petitioners : Mr. Meet Malhotra, Sr. Advocate
Mr. Ravi S.S. Chauhan, Advocate
Ms. Pallak Singh, Advocate

For Respondent : Mr. Apoorv Kurup, Advocate
Ms. Nidhi Mittal, Advocate

ORDER

By S.K. Singh, Chairperson – This petition under Section 14 read with Section 14A of the Telecom Regulatory Authority of India Act 1997 (hereinafter referred to as “the Act”) has been filed by the two petitioners who are licensees under Section 4 of the Indian Telegraph Act 1885 and are therefore, licensed to establish, maintain and operate telegraph all over India. They operate under the brand name “AIRCELL” offering 2G and 3G services.

The petitioners have also acquired 4G capability by acquiring BWA Spectrum (2300 MHz) in an auction held in 2010.

2. Petitioners have provided a table in Para 4 of the petition showing details of spectrum held by them in various frequency bands in different circles in the country. It was stated at the Bar that circle mentioned at serial no.19 shown as TN(ex CH) has been subsequently merged with the circle Chennai shown at serial no.20. The tabulated chart is as follows:

S.No.	Circles	Bands(900/1800/2100/2300 MHz)
1	AP	1800, 2100, 2300
2	Assam	900, 1800, 2100, 2300
3	Bihar	1800, 2100, 2300
4	Haryana	1800
5	HP	1800
6	J&K	900, 1800, 2100, 2300
7	Kolkata	1800, 2100
8	Kerala	1800, 2100
9	Karnataka	1800, 2100
10	MP	1800
11	North East	900, 1800, 2100, 2300
12	Punjab	1800, 2100
13	UPE	1800, 2100
14	UPW	1800
15	Delhi	1800
16	Gujarat	1800
17	Maharashtra	1800
18	Mumbai	1800
19	TN(ex CH)	900, 1800, 2100, 2300
20	Chennai	900, 1800, 2100, 2300
21	West Bengal	1800, 2100, 2300
22	Rajasthan	1800
23	Odisha	1800, 2100, 2300

3. Petitioners have annexed as Annexure P-1, a copy of guidelines dated 12.02.2015 issued by the Department of Telecommunication (DoT) for trading of Access Spectrum. There is no serious issue relating to the said guidelines which *inter alia* mention that the National Telecom Policy aims to move at the earliest in favour of liberalization of spectrum not only in respect of use in any band to provide any service in any technology but also to permit spectrum pooling, sharing and later trading to enable optimal utilization of spectrum through appropriate regulatory framework. It provides that all access spectrum bands earmarked for Access Services by the Licensor will be treated as tradable spectrum bands.

4. In order to deal with the submissions advanced by the parties it is deemed useful and accordingly Paras 11 and 12 of the guidelines are extracted hereinbelow:

“(11). The seller shall clear all its dues prior to concluding any agreement for spectrum trading. Thereafter, any dues recoverable up to the effective date of trade shall the liability of the buyer. The Government shall, at its discretion, be entitled to recover the amount, if any, found recoverable subsequent to the effective date of the trade, which was not known to the parties at the time of the effective date of trade, from the buyer or seller, jointly or severally. The demands, if any, relating to licenses of seller, stayed by the Court of Law, shall be subject to outcome of decision of such litigation.

(12). Where an issue, pertaining to the spectrum proposed to be transferred is pending adjudication before any court of law, the seller shall ensure that its rights and liabilities are transferred to the buyer as per the procedure prescribed under the law and any such transfer of spectrum will be permitted only after the interest of the Licensor has been secured.”

5. The Telecom Service Providers (TSPs) as well as the petitioners appear to have sought certain clarifications/queries in respect of abovementioned guidelines from the respondent/DoT. The clarifications issued on 12.05.2016 have been annexed as Annexure P-2. The relevant clarifications relate to Paras 11 and 12 and are at serial nos.1 and 2 of the clarifications. They are as follows:

S.No.	Query	Response
1.	<p>Para 11 of the guidelines states that “The Seller shall clear all its dues prior to concluding any agreement for spectrum trading. Thereafter, any dues recoverable up to the effective date of trade shall be the liability of the buyer”.</p> <p>In this regard, would the WPC/ DOT would issue a No Dues Certificate to seller prior to signing of agreement and intimation of trading to satisfy the buyer that seller has complied with this condition before entering into this agreement for spectrum trading. If not, how will the Buyer know whether the Seller has cleared all its dues?</p>	<p>As per para 11 of the Guidelines, the seller must clear all its dues pertaining to the LSA where trading is intended including OTSC dues for that band. In case where entire spectrum holding of the TSP in all LSAs is intended to be traded, the seller will have to clear all its pending dues including past dues. DOT will indicate status of Dues. However, the Buyer may perform due diligence.</p>
2.	Based on reading of para 11 and 12:	

<ul style="list-style-type: none"> • Transfer of spectrum is for specific area, all references to the dues are those relating to only the spectrum being traded in the concerned service area. • The buyer will be jointly and severally liable for only those dues if found recoverable subsequent to the effective date of trade which were not known to the seller at the time of the effective date of trade. Hence, for all liabilities, due and recoverable, which were known to the seller on the effective date of trade, seller along will be liable and buyer does not assume any obligation relating to these. <p>As regard transfer of liabilities on matter which are pending adjudication before a court of law, these liabilities will only be those relating to the spectrum proposed to be transferred. The following liabilities/litigation will not be transferred to the Buyer:</p> <ul style="list-style-type: none"> • Any liability pertaining to the license without any specific linkage to the spectrum proposed to be transferred e.g. CAF penalties, EMF penalties etc. which may be pending adjudication. • Any liability (including show cause or demands relating to OTSC) pertaining to license and spectrum earlier held by the Seller which may have been quashed, surrendered or terminated earlier. 	<p>As per para 11 of the Guidelines, the seller must clear all its dues pertaining to the LSA where trading is intended including OTSC dues for that band. In case where entire spectrum holding of the TSP in all LSAs is intended to be traded, the seller will have to clear all its pending dues including past dues. DOT will indicate status of Dues. However, the Buyer may perform due diligence.</p> <p>Further, the Government shall, at its discretion, be entitled to recover the amount, if any, found recoverable subsequent to the effective date of the trade, which was not known to the parties at the time of the effective date of trade, from the buyer or seller, jointly or severally.</p> <p>As per para 12 of the Guidelines, the seller has to comply in respect of pending OTSC and SUC dues under litigation at the time of applying for spectrum trading. Bank Guarantee equal to an amount of OTSC and SUC dues which are under litigation and stayed by the court of law shall be submitted by the buyer or seller to secure the interest of the Licensor. In the event, all spectrum held by the seller is being traded in all service areas Bank Guarantee for all dues for all services areas shall be submitted. Initially Bank Guarantee shall be for a period of 2 years and later on to be renewed on annual basis one month prior to expiry of validity of Bank Guarantee. The format of the Bank Guarantee is enclosed.</p>
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6. The petitioners applied for permission to trade its 2.3 GHz bands in the 7 circles (Assam, North East, Bihar, Jammu & Kashmir, Tamil Nadu, West Bengal and Odisha) with M/s Bharti Airtel Ltd. Joint applications for that purpose were made on or about 11/12 April, 2016. Petitioners claimed that as per their understanding based on the clarifications issued by DoT in respect of the guidelines, the dues required to be cleared for trading are limited only to the specific band in which trading is intended in a specific service area (circle). Only where the entire spectrum holding of a TSP (and not merely one band) in all service areas is intended to be traded, the seller would be required to clear all its pending dues with DoT, without any qualification.

7. The present petition was filed on 30.05.2016 against a demand notice dated 18.05.2016 (Annexure P-4). According to petitioner, the demand raised on account of alleged dues on spectrum bands other than 2.3 GHz is in teeth of and contrary to the guidelines dated 12.05.2016.

8. Petitioners filed a representation dated 20.05.2016 against the impugned demand notice. It is further case of the petitioners that the misplaced demands made by the respondent/DoT are on account of License Fee (LF) and Spectrum Usage Charges (SUC), which are based on a particular percentage of Adjusted Gross Revenue (AGR). The precise definition of AGR became a subject of decision by this Tribunal vide a judgment dated 23.04.2015 in Petition No.7 of 2003 and other connected matters, to which the petitioners were also a party. According to petitioners that judgment applies *in rem* and till it is in force, the

respondent/DoT cannot make any demand on the basis of alleged LF and SUC. According to petitioners, contrary to its undertaking given to the Hon'ble Supreme Court in an appeal preferred by the respondent against the aforesaid judgment dated 23.04.2015, the respondent is indirectly attempting to realize or enforce alleged dues only by taking advantage of the petitioners approaching the respondent for permission for trading of spectrum. According to petitioners, the demands are illegal as they are based upon perverse, flawed and impermissible interpretation of AGR.

9. The stand of the respondent is that Para 11 of the guidelines requires the seller to clear all its dues prior to concluding any agreement for spectrum trading. Hence, this provision entitles the respondent to demand payment of entire dues of LF and SUC in respect of the entire spectrum held by the petitioners. It is further stand of the respondent that clarifications/queries in respect of Paras 11 and 12 should not be given the same value or status as the guidelines and in case of apparent conflict, the latter must be followed as a policy.

10. On a plain reading of Para 11 and 12, it appears that the vagueness and all pervasive generality in Para 11 has been saved from the vice of absurdity by a clarification issued by the competent authority that the seller must clear all its dues pertaining to the LSA(circle) where trading is intended including OTSC dues for that band. It has been further explained that only where entire

spectrum holding is proposed to be traded by a TSP, the seller will have to clear all its pending dues which would, *inter alia*, include past dues.

11. The stand of the respondent that guidelines be treated like law and the response or clarification only as an instruction, is difficult to be accepted in this particular case and situation. The dues may include personal dues payable to a bank, to a third party or to a friend. The guidelines must, therefore, be read in the light of clarification which saves the guidelines, particularly Para 11 from the vice of vagueness bordering to absurdity. Neither of the two are statutory provisions and hence, there is no merit that one should be treated as superior to the other.

12. Under Para 11, when some dues are subject matter of litigation, then such dues must be catered for by providing security so as to protect the interest of the licensor. It has rightly been clarified that bank guarantee equal to an amount of OTSC and SUC dues which are under litigation and stayed by the court of law shall be submitted by the buyer or seller to secure the interest of the licensor.

13. In the present case, the demands of LF and SUC based on AGR have not been stayed but set aside by this Tribunal and that judgment has not been stayed by the Apex Court although appeal by respondent is pending. In such a situation, learned counsel for the petitioner has rightly placed reliance upon an order of this Tribunal dated 17.05.2017 in T.P. No.26 of 2017 (Reliance Communications Ltd. & Anr. Vs. Union of India). It will not serve any useful purpose to revisit the facts of that case but relevant extract including the interim

order passed by the Apex Court dated 29.02.2016 as well as the relevant submissions and the final view taken by this Tribunal are evident from the following extract:

“Coming to the demand for bank guarantees under clause (a) & (b) of para 2(i), it is recorded that learned counsel for the respondent has tried to justify such demand for bank guarantees on the plea that in case respondent succeeds in its appeal before the Supreme Court, it may face difficulties in realizing the amount from the petitioner no.2 M/s. SSTL. In order to appreciate this stand of the respondent, we have looked to the interim order passed by the Apex Court dated 29.2.2016 vide Civil Appeal No.5882 of 2015 [**M/s Vodafone (West) Ltd Vs. UOI – Deptt of Telecommunications**] and other connected appeals. The main order is in following terms:

“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.

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

List for hearing after eight weeks, on a non-miscellaneous day.

Liberty is granted to the Union of India to file response to the applications for impleadment filed by Reliance Gio.

Needful be done within four weeks.”

It is evident from the order extracted above that Hon’ble Supreme Court is yet to hear the matter wherein the respondent has challenged the final order of this Tribunal setting aside the demands of

licence fee etc. which is indicated in clause (a) & (b) but the Judgment and Order of this Tribunal has not been stayed and, therefore, there is no difficulty in accepting the submission on behalf of the petitioners that in the eyes of law there are no actionable or surviving action for which the bank guarantees can be asked for. Learned Additional Solicitor General informed the Apex Court that the respondent will continue to raise demands as per its understanding but the demand so raised will not be enforced till the final decision of the controversy by the Supreme Court. At this stage, as facts stand, the demand quashed by this Tribunal have not been revived by any order of the Apex Court and not is the stand of the respondent before the Court that it will not enforce further demands which it may raise as per its understanding.

Clearly, till the respondent succeeds in its appeal before the Apex Court, it cannot lawfully claim that there are any dues against the petitioners as claimed in conditions no.(a) & (b) of clause (i). Only on getting success in the matter before the Apex Court it will be entitled to take action as per law for realization of its lawful dues towards petitioners.

In view of above said discussions, we have no difficulty in accepting the submissions on behalf of the petitioners that the condition indicated in para 2 of the letter dated 22.3.2017 as contained in clause (i) (a) & (b) do not relate to any lawful dues which the respondent is entitled to recover from the petitioners unless and until the matter is ultimately decided in favour of the respondent. In absence of a valid and lawful reasonable dues demand of bank guarantee, according to the petitioners, would amount to depriving the petitioners the benefit of the judgment by this Tribunal in their favour when the respondent has not been able to get a stay from the Apex Court. Hence, the conditions (a) and (b), as noted above, are set aside.”

14. It may be useful to recapitulate that in this petition, an interim order was passed on 03.01.2016. Although that is a long order but its relevant part needs to be noticed because under that interim order of this Tribunal, the petitioner was directed to pay a sum of Rs.172 crores on account of dues of licence fee calculated without adding up interest, penalties and interest on penalties. Further, the petitioner was asked to submit bank guarantees of Rs.312 crores to cover the balance of the demand by DoT as per its letter dated 30.05.2016.

Relevant part of the interim order is as follows:

“In light of the view taken above, the Tribunal might have set aside the demand and asked the DoT to grant permission to the petitioner for trading the spectrum as applied for on its behalf. However, alive to the financial interests of the State, we do not propose to do so.

We may note here that in course of the submissions, Mr. Malhotra stated that the dues of licence fees in the six service areas in question, if determined without adding up any interest on delayed payment, penalties and interest on penalties would not exceed the amount of Rs.172 crores. Mr.Malhotra however, submitted that as against the possible licence fee dues of Rs.172 crores, bank guarantees worth Rs.1100 crores submitted by the petitioner is already in possession of the Government. He further submitted that immediately on grant of permission for trading spectrum, the petitioner will be obliged to pay to the DoT (service tax Rs.525 cr + License fee Rs.280 crores + Spectrum charges Rs.35 crores) in aggregate the sum of Rs.840 crores. Hence, the petitioner need not be saddled with any further liability for grant of permission for trading spectrum.

We are unable to accept the submissions made by Mr. Malhotra. In order to safeguard the financial interests of the Government, it is directed that the petitioner must pay the sum of Rs.172 crores as dues of licence fee calculated without adding up interest, penalties and interest on penalties. Besides this payment, the petitioner must also submit bank guarantees of Rs.312 crores to cover the balance of the DoT demand as per the letter dated 30 May 2016.

On complying with the aforesaid directions, the DoT is directed to issue permission in accordance with other terms of the Government policy. The aforesaid payment and the submission of the bank guarantee will be without prejudice to the respective cases of the parties before the Supreme Court in the AGR matter.”

15. Learned counsel for the respondent has placed reliance upon the judgment of the Supreme Court in case of **Novopan India Ltd., Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad – (1994) Supp(3) SCC 606** to highlight that in Para 16, the Apex Court has cautioned that although a taxing statute requires to be construed in favour of the assessee, when reliance is placed upon an exception, the same must be construed strictly. Although, the proposition is sound but is not relevant for the purpose of the present dispute.

16. In our considered view, the respondent is not justified in making the impugned demand covering the alleged “entire dues” payable by the petitioner for grant of permission to trade a particular spectrum in some of the circles. The order deserves to be set aside for reworking the demand. However, instead of quashing the entire demand and asking the respondent to recalculate the dues,

which would be almost an impossibility in view of judgment of TDSAT against which appeal is pending in the Apex Court relating to issue of AGR, we grant a modified relief to the petitioner by directing that the respondent need not refund the sum of Rs.172 crores immediately, till the issue relating to AGR is finalized in terms of judgment which may be rendered by the Apex Court. However, the petitioner can not be put to recurring loss by maintaining and keeping alive the bank guarantees furnished by it pursuant to the interim order dated 03.06.2016. The said bank guarantees shall be returned to the petitioner forthwith and in any case within four weeks from today but without prejudice to the right of the parties to claim final adjustment as per judgment of the Supreme Court in the AGR matter.

17. This petition is allowed to the aforesaid extent but there shall be no order as to costs.

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(S.K. Singh, J)
Chairperson

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(B.B. Srivastava)
Member

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(A.K. Bhargava)
Member