

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

^{7k}
Dated 17 October, 2019

Telecom Petition No.439 of 2013

Vodafone Idea Ltd.

...Petitioner

Vs.

Union of India

...Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

HON'BLE MR. A.K. BHARGAVA, MEMBER

For Petitioner

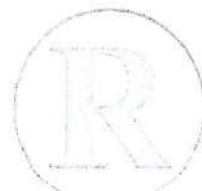
:

Dr. Abhishek Manu Singhvi, Sr. Advocate
Mr. Meet Malhotra, Sr. Advocate
Mr. Gopal Jain, Advocate
Mr. Chaitanya Safaya, Advocate
Ms. Shally Bhasin, Advocate
Mr. Prateek Gupta, Advocate
Mr. Vaibhav Niti, Advocate
Ms. Mithila Lalit, Advocate
Ms. Madhavi Agrawal, Advocate
Ms. Surabhi Limaye, Advocate

For Respondent

:

Ms. Pinky Anand, Ld. ASG
Mr. Appoorv Kurup, Advocate
Ms. Kirti Dua, Advocate
Ms. Snidha Mehra, Advocate
Mr. Baibhaw Gahalut, Advocate



Order

A. K. Bhargava - Petitioner Idea Cellular Limited (later renamed as Vodafone Idea Limited) is a Telecom Service Provider (TSP) having licenses in various service areas granted by the respondent under section 4 of the Indian Telegraph Act 1887. Telecom petition 439/2013 has been filed by Idea Cellular Ltd (hereinafter referred to as the Idea, for short) on 6-12-2013 with the following prayers:

- (i) Set aside and quash the communication dated 29.11.2013 to limited extent it denies set-off/adjustment of Rs. 484.17 crores;*
- (ii) Direct the respondent to set-off/adjust an amount of Rs. 484.17 crores to which the petitioner is legally entitled;*
- (iii) Direct the respondent to rectify the record to reflect the correct EMI of Rs. 167.27 crores and accordingly return the bank guarantees;*
- (iv) Pass any other / further order(s) as this Tribunal may deem fit in the interest of justice, equity and good conscience.*

2. Before proceeding further, we first deal with a preliminary issue raised by the parties. We are informed that the major part of the impugned order dated 29-11-2013 relates to financial penalty which is the subject matter of TP 440/2013 before us. Both the matters were at some stage tagged together, but for practical reasons TP 439/2013 has been heard first. There



was submission by the respondent that the two cases ought to have been heard together because the impugned order is common to both and the outcome in TP 439/2013 may have an implication/prejudice the adjudication of TP 440/2013. Petitioner's stand, supported by detailed submission, was that only the impugned order is common but the issues in both the petitions are different and independent of each other. We have given due consideration to views of both the sides and decided that since the issues of both facts and law pertaining to set-off/adjustment of Rs. 484.17 Cr. as prayed in this petition have fully crystallized, pendency of TP 440/2013 need not detain us.

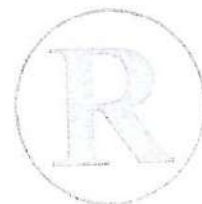
3. The prayer in this petition is limited to the extent that the impugned order dated 29.11.2013 denies set-off/adjustment of Rs. 484.17 crores. The amount of Rs. 484.17 prayed for set-off/adjustment is against the entry fee paid by erstwhile Spice Communications Ltd. for access licenses in 4 service areas, namely AP, Maharashtra, Delhi and Haryana (Rs. 103.01, 189, 170.7 and 21.46 Crore respectively). We shall therefore recount related brief background leading up to this prayer.

4. Erstwhile Spice Communications Ltd (referred to hereinafter as Spice for



short) was a public listed company and a Telecom Service Provider (TSP) having CMTS/UAS licenses in service areas AP, Maharashtra, Delhi and Haryana, Punjab and Karnataka granted by the respondent under section 4 of the Indian Telegraph Act 1887. As on 25-1-2008, Idea also had licenses in these six service areas.

5. On 25-6-2008, Board of Directors of Idea and Spice approved the proposed merger of Spice with the appellant. After this decision on merger of two companies, on 17-10-2008 the appellant acquired 41.09% equity holding in Spice w.e.f. that day. In May 2009, Idea and Spice filed "schemes" in High Courts of Gujarat and Delhi. Company Judge Delhi High Court, vide order dated 5-2-2010, sanctioned the scheme of amalgamation between Idea and Spice under section 391 and 394 of the Companies Act. DoT moved an application for recall of this order. Vide order dated 4-7-2011, learned Company Judge took a view that it would not be feasible or plausible to recall orders dated 5-2-2010 as it was not possible to "*unscramble the eggs*". Instead, the sanctioning order dated 5-2-2010 was modified to the effect that



(i) *The Six overlapping licenses of the Spice would not stand transferred or vested with the appellant till prior permission of DoT is obtained. Instead, till that time, these licenses shall stand transferred/vested with the respondent;*

(ii) *The spectrum allocated for such overlapping licences shall also forthwith revert back to DoT;*

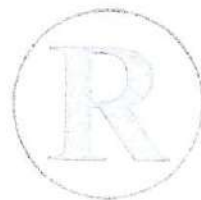
(iii) *Since the appellant had used the overlapping licenses (which belonged to the Spice) without any permission of DoT from 5.2.2010 till date, in contravention of the License and Merger Guidelines, DoT (respondent) is permitted to pass any such order for breach.*

Further legal proceedings ensued and double bench of Delhi High Court on 13-7-2012 held that

"We, thus modify the impugned orders of the learned Company Judge omitting the direction which states that overlapping licenses of Spice shall forthwith stand transferred with the licensor, i.e., DoT. Instead, we substitute this by the direction that insofar as dispute about transfer of licenses of Spice to Idea is concerned, the same shall be decided and determined by the TDSAT and the parties. It will also be open to the TDSAT to determine the arrangement in the interregnum."

Vide its Supplementary order dated 13-7-2012, Hon'ble High Court also mentioned that *"since we have upheld the order of the learned Company Judge except one modification, as per the order of the learned Company Judge, the DoT has to take decision regarding transfer of licenses. The said decision shall be taken by the DoT within a period of three months."*

Subsequently, after issuing show cause notices to the parties, DoT issued the impugned letter dated 29-11-2013.



6. The impugned letter dated 29-11-2013 is a 14 page detailed letter regarding imposition of financial penalty of sum of Rs. 600 Crore for violation of terms and conditions of CMTS/UASL agreement for AP, Delhi, Haryana, Karnataka, Maharashtra and Punjab service areas by both M/s Idea Cellular Limited and erstwhile M/s Spice Communications Limited and taking merger on record. The impugned order does not directly deal with the issue of set-off/adjustment of entry fee in 4 service areas. It finds indirect mention by reference to letter dated 8-2-2013 written by DoT to Idea which is reproduced below

"With reference to your letter dated 11.10.2012 regarding transfer of Licenses of M/s. Spice Communications Ltd. to M/s. Idea Cellular Ltd., this Department is in principle agreeable to consider the proposal.

Such consideration will be subject to the terms and conditions of License and also the following conditions:

(a) The transfer proposal will be considered only in respect of the following Licenses which have not been quashed by the Hon'ble Supreme Court in their Judgement dated 02.02.2012:-

S.No.	Service Area	No. and Date of the UAS Licence	Effective date of the Licence
1.	Karnataka	UAS License No. 842-714/2005-VAS dated 20/12/2005 (Old CMTS Licence No. 842-53(A)/95-VAS dated 09.09.1996	04.04.1996
2.	Punjab	UAS License No. 842-485/2004-VAS dated 19/11/2004 (Old CMTS Licence No. 842-65(B)/95-VAS dated 09.09.1996	04.04.1996



(b) The consideration would be further subject to the condition that M/s. Idea agrees to abide by the decisions taken by the Department after examination of their reply to the Show Cause Notices issued or which may be issued further in the matter and comply with the same.

(c) That M/s. Idea would clear all the dues and penalties pertaining to the Licenses held by them and also the six Licenses of M/s. Spice for which demands stand raised as on date and that may be raised in future.

(d) No benefit of set-off of entry fee paid by M/s. Spice would accrue to M/s. Idea, on account of the quashed Licenses of M/s. Spice with respect to the auction of spectrum held in accordance with the NIA dated 28.09.2012, in case, the Department finally accedes to the request of the transfer."

7. At this stage, it is pertinent to capture the relevant developments that happened in parallel. As a consequence to quashing of 122 licenses by the Hon'ble Supreme Court in WP(C) 423 of 2010 vide its order dated 2-2-2012 (known as 2G judgment), four licenses of Spice in AP, Maharashtra, Delhi and Haryana (hereinafter referred to as 4 service areas for short) and two of Idea in Punjab and Karnataka got quashed. The quashing of licenses came into effect, as per the order of Supreme Court, from 15-2-2013. Meanwhile, pursuant to the directions given by the Hon'ble Supreme court in 2G case, an NIA was issued by the respondent on 28-9-2012.

8. In a meeting on 8-10-2012, the empowered group of ministers (EGoM) took some decisions on auction of spectrum and relevant decision in this

case (titled Item 3) is reproduced below:

"The EGoM considered the note dated 06.10.2012 from the Ministry of Communication and Information Technology (Sanchar aur Soochna Praadyogiki Mantralaya), Department of Telecommunication (Doorsanchar Vibhag) and noted that :

- (i) The entry fee is non-refundable as per License terms; and*
- (ii) The Learned Attorney-General's opinion dated 08.08.2012 on entry fee and the conditions of Notice Inviting applications (NIA) on Earnest Money requirements.*

2. The EGoM, however, on the principle of equal restitution, recommended that only a set-off may be allowed against the Earnest Money and the payment due in the event of spectrum being won in this auction. The total amount of such set off shall be limited to the total entry fee paid by the entity for all its licenses which have been quashed by the Supreme Court. No interest will be due on this amount.

In another meeting of EGoM held on 18-10-2012, following was decided

"The EGoM considered the letter dated 12.10.2012 from the Minister of Information and Broadcasting regarding set-off of entry fee against earnest money and payment due in the event of spectrum being won and noted that the entry fee paid by TSPs whose licenses were quashed was for a period of 20 years. While on the one hand, the TSPs could be expected to have paid a pro-rata amount for the period of operation of the license, i.e. 2008-2012, on the other hand, there could be a claim for refund with interest for the pro-rata amount for the balance period. Therefore, the EGoM decided to allow such TSPs to adjust an amount equivalent to their full entry fee, without any interest, against the auction payments, both for participation and / or final payment on successful conclusion. It was clarified that the set-off would be permitted only to the quashed license holders participating in the auction. Such set-off would be allowed to the extent of total entry fee paid for all quashed licenses on an aggregate basis without consideration of the expired period of license, only if they succeed in the auction. The set-off will be permitted against the Earnest Money Bank Guarantee amount initially and later against the amount payable for auction price, irrespective of the number of Local



Service Areas (LSAs) in which the holder of quashed license is successful in the auction and without requiring correlation between LSAs in which licenses were held earlier and the LSAs in which the holder of the quashed licenses is successful."

9. Subsequently, issue of set-off of entry fee was put up to EGoM again in the context of a representation by M/s Telewings Communications Services Private Limited and on 6-3-2013 the EGoM decided the following:

"2. The EGoM while considering the representation from M/s. Telewings Communications Services Private Limited on the matter of set-off of entry fee paid by M/s. Unitech Wireless (Tamil Nadu) Private Limited against the dues of M/s. Telewings Communications Services Private Limited on account of spectrum won in the November 2012 auction, recalled its decisions taken in the meetings held on 08.10.2012 and 18.10.2012 as under:

"On the principle of equal restitution, recommended that only a set-off may be allowed against the Earnest Money and the payment due in the event of spectrum being won in this auction. The total amount of such set off shall be limited to the total entry fee paid by the entity for all its licenses which have been quashed by the Supreme Court. No interest will be due on this amount."

"...the set-off would be permitted only to the quashed license holders participating in the auction. Such set-off would be allowed to the extent of total entry fee paid for all quashed licenses on an aggregate basis without consideration of the expired period of license, only if they succeed the auction."

3. The EGoM in this regard noted the following:

(i) M/s. Telenor Mobile Communications AS, Norway participated in the November 2012 auction of spectrum conducted by the Department through M/s. Telewings Communications Services Private Limited, in which wholly owned subsidiaries of M/s. Telenor Mobile Communications AS, Norway, namely, M/s. Telenor South Asia Investment Private Limited and M/s. Telenor South East Asia Investment Pvt. Limited, both



registered at Singapore, held 100% equity as Foreign Direct Investment (FDI), as permitted under Notice Inviting Application dated 28.09.2012. This was brought down to 49% before applying for UL(AS) license which is the maximum permissible FDI under the direct route for telecom services in India. Separately, Ms. Telewings Communications Services Private Limited has also sought Foreign Investment Promotion Board (FIPB) approval for raising their stake to 74% which is pending consideration of the FIPB.

(ii) M/s. Telenor Asia Investment Private Limited, another wholly owned subsidiary of M/s. Telenor Mobile Communications AS, Norway, registered at Singapore, held 67.25% equity in M/s. Unitech Wireless (Tamil Nadu) Private Limited;

(iii) UAS Licences were given in 2008 to 8 separate Unitech companies, namely Unitech Wireless (East)Private Limited, Unitech Wireless (West)Private Limited, Unitech Wireless (North Private Limited, Unitech Wireless (South))Private Limited, Unitech Wireless (Delhi)Private Limited, Unitech Wireless (Kolkata)Private Limited, Unitech Wireless (Mumbai)Private Limited, Unitech Wireless (Tamil Nadu)Private Limited, which were subsequently merged into a single entity , namely Unitech Wireless (Tamil Nadu) Private Limited by virtue of a High Court Order. Their request for merger/transfer of licences to the merged entity, namely Unitech Wireless (Tamil Nadu) Private Limited was under consideration of the Department on the date of quashing of license by Supreme Court, i.e., 02.02.2012; and

(iv) Set-off has been requested by M/s. Telewings Communication Service Pvt. Limited against the entry fee paid by the 8 companies that were merged into M/s. Unitech Wireless (Tamil Nadu) Private Limited as detailed in paragraph 3(iii) above.

4. The EGoM, keeping in view the above facts and details of ownership structure as reflected in the enclosed Annex. decided that the principle of equal restitution earlier approved would apply in this case also given the ownership details as the ultimate principal beneficial owner of both the entities is the same namely M/s. Telenor Norway."

10. Pursuant to EGoM's decision on set-off against entry fee, respondent's



response to the prospective bidder's query issued on 12-10-2012 and relevant in this case, was as follows:

Query	Response
<p>"74, i) The original entry level Pan India license fee of Rs. 1,506.82 crore (along with interest from the date of payment; of such license fee) which was paid for acquiring the licenses, which are quashed by the Hon'ble Supreme Court for no reason attributable to a licensee, should be allowed to be set off against the earnest money required to be paid for participating in the new auction and against the successful bid amount, in the event of a successful bid. In the event there would be any shortfall in the money required to be paid by xxx on successful bid and the licensee fee already paid to you in respect of the quashed 21 UASL, xxx shall obviously pay such additionally."</p>	<p>"A set-off is allowed against the Earnest Money and the payment due in the event of spectrum being won in this auction. The total amount of such set off shall be limited to the total entry fee paid by the entity for all its licenses which have been quashed by the Supreme Court. No interest will be due on this amount. "</p>

11. Another clarification to the NIA was also made on 18-10-2012. On the same day, petitioner applied to the respondent for participating in the 1800 MHz auction in which it stated that "in reference to Sr. No. 12 of the Application (refer amendment issued on 18-10-2012), we have also enclosed the details of entry fee paid in respect of quashed licenses (for set-off against EMD) and also enclosed Earnest Money Deposit (Bank Guarantee) of Rs. 601 Crore". As per the application, the number of initial eligibility points applied for and details of corresponding Bank Guarantee for EMD were as follows

"Please refer to the amendment to the NIA dated 18th October, 2012, details as under:

(1)	(2)	(3)	(4)	(5)
Amount of Entry fee Paid #	Amount of Entry fee to be set-off against EMD for	Amount of Earnest Money Bank Guarantee	Total amount of EMD (2) + (3) **	Corresponding Eligibility Points applied for

	1800 MHz band Auction	submitted (if any) ##		(corresponding to (4) **
Rs. 1,168.76 Crore	Rs. 1,168.76 Crore	Rs. 601 Crore	Rs. 1,769.76 Crore	1,594

Details of Entry Fees paid Service Area wise in respect of quashed licenses is enclosed as Annexure 18.

Maximum EMD required by Idea Cellular Limited for bidding for maximum blocks in all service areas as per terms of NIA is Rs. 1,306.75 crore. Idea Cellular had earlier made EMDs of different amounts and the same cannot be revised by Oct 19 deadline, as the final clarification on EMD has come out only on 18th October 2012. In view of the same though we actually need to provide a bank guarantee of only Rs. 137.99 crore (Rs.1306.75 crore less entry fee paid of Rs. 1,168.76 crore), we are however providing a bank guarantee of higher amount. The DoT may kindly consider the possibility of replacement of bank guarantee with reduced amount at appropriate time/after the pre-qualification of bidders is completed on 28th October, 2012."

12. Details of entry fee amounting to Rs. 1168.76 Crore, as provided by the petitioner, including 9 service areas of Idea and 4 service areas of Spice, are reproduced below:

S.No.	Service Area	Name of the Company	Amount (Rs. Crore)
1.	Jammu & Kashmir	Idea Cellular Limited (Refer Note (i) below	Rs 2.00 Crore
2.	Kolkata	Idea Cellular Limited (Refer Note (i) below	Rs. 78.01 Crore
3.	North East	Idea Cellular Limited (Refer Note (i) below	Rs. 2.00 Crore
4.	Assam	Idea Cellular Limited (Refer Note (i) below	Rs. 5.00 Crore
5.	Orissa	Idea Cellular Limited (Refer Note (i) below	Rs. 5.00 Crore
6.	Tamil Nadu	Idea Cellular Limited (Refer Note (i) below	Rs. 233.00 Crore
7.	West Bengal	Idea Cellular Limited (Refer Note (i) below	Rs. 1.00 Crore
8.	Punjab	Idea Cellular Limited (Refer Note (ii) below	Rs. 151.75 Crore
9.	Karnataka	Idea Cellular Limited (Refer Note (ii) below	Rs. 206.83 Crore
10.	Andhra Pradesh (UASL held by erstwhile Spice Communications	Idea Cellular Limited (Refer Note (ii) below	Rs. 103.01 Crore

11.	Maharashtra (UASL held by erstwhile Spice Communications Ltd.)	Idea Cellular Limited (Refer Note (ii) below)	Rs. 189.00 Crore
12	Delhi (UASL held by erstwhile Spice Communications Ltd.)	Idea Cellular Limited (Refer Note (ii) below)	Rs. 170.70 Crore
13	Haryana (UASL held by erstwhile Spice Communications Ltd.)	Idea Cellular Limited (Refer Note (ii) below)	Rs. 21.46 Crore
Total			Rs. 1,168.76 Crore

Notes:

(i) These unified Access Service Licenses (UASLs) stands quashed as per the Hon'ble Supreme Court judgement dated 2nd February, 2012. However, pursuant to a further order of the Hon'ble Supreme Court dated 27th August, 2012, the licences are entitled to continue operations till 18th January, 2013. Hence these seven UASLs are currently operative as per mandate given by Hon'ble Supreme Court.

(ii) The Company held six overlapping non-operative Unified Access Service Licenses (UASLs), which include two non-operative UASLs in the name of Idea Cellular Limited for Punjab and Karnataka service areas and four non-operative UASLs in the name of erstwhile Spice Communications Limited (which has since merged with the Company) for service areas of Andhra Pradesh, Maharashtra, Delhi and Haryana. These six UASLs also stand quashed by the Hon'ble Supreme Court vide its judgement dated 2nd February, 2012.

13. DoT replied to this application on 25-10-2012 which is as follows:

"Reference : Application dated 18th October, 2012 for 1800 MHz Auction.

As per the page number 10 of your application (Clause 12.), you have mentioned eligibility points applied for as 1594, against an EMD of Rs. 1769.76 crores. Considering



your requirement for eligibility points of 1594, the auction application will display EMD amount as 1306.75 on bidding screen, even though EMD amount is 1769.76. This is because in the EAS, the initial eligibility points have to correspond with the EMD amount."

14. Petitioner responded to this communication on the same day which is as follows

"Thanks for your mail. As per DoT release "Queries and Responses to NIA dated 12th October, 2012" – refer response to query no. 74(i), the DoT has inter alia clarified that a set off is allowed against the Earnest Money and the payment due in the event of spectrum being won in this auction. The total amount of such set off shall be limited to the total entry fee paid by the entity for all its licenses which have been quashed by the Supreme Court.

In view of the above, we would be fine with display of Rs. 1306.75 crores as EMD on bidding screen, even though our actual EMD amount is Rs. 1769.76 crores (Rs. 1168.76 crores being Entry Fee for quashed licenses + Rs. 601 crores being bank guarantee submitted), subject to confirmation that this will not affect our ability to set off the total amount of Rs. 1168.76 crores paid as entry fee by us earlier, against the final winning bid amount that we are required to pay at the conclusion of the auction. Hence, based on your confirmation that we can set – off Rs. 1168.76 crores from payment against final bid amount for the spectrum won in the auction, we can confirm display of reduced EMD of 1306.75 crores on bidding screen as suggested."

15. On 28-10-2012, DoT issued a list of pre-qualified bidders list which included Idea as well, with EMD shown as 1306.75 Crore and initial eligibility points as 1594. The list of pre-qualified bidders issued by DoT is



given below

Pre – qualified bidders for the auction of spectrum in 1800 MHz band			
Sr. No.	Name of bidder	Earnest money deposit (Rs.Crores)	Initial eligibility points
1	Bharti Airtel Limited	102.75	124
2	Idea Cellular Ltd.	1306.75	1594
3	Vodafone South Limited	229	276
4	Videocon Telecommunications Limited	648	788
5	Telewings Communications Services Private Limited	1096	1332

16. Following this, petitioner wrote another letter on 2-11-2012 which is as follows

“Apropos the above referred communications, you have already acknowledged and confirmed the amount of Rs. 1168.76 crores, being the Entry Fee paid for our total 13 quashed licenses as per details in our auction application, as part our EMD. It was already confirmed by our response dated 12th October 2012 to query no. 74(i) that the EMD and winning bid prices will be set off against the entry fee paid for the quashed licensees.

Based on the above confirmation in the event our participation in the auction results in winning bids, we will be setting off the entry fee paid for our quashed licenses up to the said amount of Rs. 1168.76 crores against the cumulative final payment due from us for the spectrum won in this auction.”

17. Idea participated in the auction and was a successful bidder in some service areas. On 7-12-2012, DoT wrote to Idea regarding payment of successful bid amounts. In this letter, DoT considered entry fee of 9 circles in which Idea held quashed licenses for set-off, amounting to Rs. 684.59 Cr. This letter is also reproduced below:

“Subject : Payment of successful bid amounts for 1800 MHz Auction



Reference : Your letters dated 29.11.2012, 30.11.2012 and 3.12.2012

Kindly refer to your letter dated 29.11.2012 on the above subject wherein you have claimed the set off of the entry fee in respect of Bihar Telecom Service Area. However, set-off of entry fee in a particular Service Area is permissible only to the quashed Licensee. M/s. Idea Cellular Ltd. has won the additional spectrum in Bihar Telecom Service Area as an existing Licensee. Hence you are not eligible to set off entry fee in Bihar Telecom Service Area.

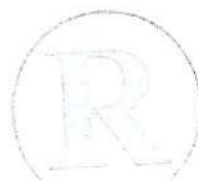
2. In view of above, you are requested to make the payment of Rs. 15,53,25,761/- (Rs. Fifteen crores, fifty three lakhs, twenty five thousand, seven hundred and sixty one only) in respect of Bihar Telecom Service Area including interest for the month of December, 2012 immediately. The calculation sheet is attached. (Annexure -1).

3. Further, the amount of entry fee which can be set off by you towards upfront payment amount is Rs. 6,84,59,00,000/- (Rs. Six hundred eighty four crores & fifty nine lakhs only.) The telecom Service Area-wise details, as well as instalment amounts are given in Annexure-II. You are requested to submit the Financial Bank Guarantee, accordingly."

18. Aggrieved by DoT's letter dated 7-12-2012, petitioner wrote to DoT explaining and requesting that a total amount of Rs. 1168.76 Cr ought to have been set off against the final winning bid amount. This letter is also reproduced below:

"We are most disturbed to receive your letter of 7th December 2012.

As you are well aware, on 19th October 2012, we had filed our application for participating in the 1800 MHz auction. Following the amendment to the NIA dated i.e. 18th October 2012 (copy enclosed as per Annexure A), our application of the application provided details (relevant pages from our application enclosed as per Annexure B) in the



required format of the amount of entry fee paid (Rs 1168.76 crores), the amount of entry fee to be set off against EMD (Rs. 1,168.76crores), the amount of earnest money bank guarantee submitted (if any) (Rs. 601 crores), total amount of EMD (amount of entry fee to set off plus amount of earnest money bank guarantee submitted (Rs. 1,769.76 crores) and the eligibility points (1594 points). As required, a break-up of the entry fee, service area-wise was also provided in Annexure 18 to our application (copy enclosed as per Annexure C).

On 25th October 2012, you advised us that (copy of DoT e-mail enclosed as per Annexure D) as the initial eligibility points have to correspond with the EMD amount, "the auction application will display EMD amount as 1306.75 on bidding screen, even though EMD amount is 1769.76. That you had accepted our set off amount of Rs. 1,168.76 crores was evident from your acknowledgement that the actual EMD amount was Rs. 1769.76 crores (which was arrived at based on the set off figure of Rs. 1,168.76 crores) and that the change in EMD amount for display purposes was only so that the EMD amount would correspond with the requisite eligibility points.

Nevertheless, by our e-mail and letter of the same date (copy enclosed as per Annexure E & F), we responded that whilst we were fine with the display of Rs. 1,306.75 crores as EMD on billing screen even though our actual EMD was 1,769.76 crores, subject to the condition that this should not affect our ability to set off the total amount of Rs. 1,168.76 crores paid as entry fee by us earlier against the final winning bid.

Once again, there was no demur or contest to this assertion by us with regard to the set off amount. Rather just a few days later on 28th October 2012, our name was put on the DoT website as a per-qualified bidder showing our EMD amount as Rs. 1,306.75 crores as per prior correspondence (copy of DoT press release enclosed as per Annexure G).

As our decision to participate in the auction was dependent on the acceptance of the set off figure of Rs. 1,168.76 crores, by our letter of 2nd November 2012 (copy enclosed as per Annexure H), we reiterated that "in the event our participation in the auction results in winning bids, we will be setting off the entry fee paid for our quashed licences up to the said amount of Rs. 1,168.76 crores against the cumulative final payment due from us for the spectrum won in this connection.



It was thus clear from the above (correspondence and conduct) that you had accepted that a total amount of Rs. 1,168.76 crores would be set off against the final winning bid amount. In any event, you had given us no cause to believe that the amount of Rs. 1,168.76 crores would not be available as set off. Were this not the case, we may have participated in the auction process differently.

In the circumstances, it would appear that your letter of 7th December 2012 has been issued erroneously, without full knowledge of the facts, and the accepted position between us with regard to the set off amount on the basis of which we participated in the auction and submitted our bid.

Accordingly, we request you to rectify the same at the earliest.

We are separately addressing your call for payment of Rs. 15,53,761/- in respect of the Bihar Telecom Service Area."

19. We have reproduced these communications in detail to capture the sequence of events and understand the context and essential facts of the case. Needless to say that few more communications followed, culminating in DoT's letter dated 8-2-2013 and impugned letter dated 29-11-2013. In between, petitioner also pointed out a new issue in its letters dated 7-3-2013 and 26-11-2013 pointing out that DoT had provided set-off even in a case where bidding entity was different from the entity whose licenses were quashed. We shall deal with this point later in detail.

20. Dr. Abhishek Manu Singhvi, learned senior advocate, appears on behalf of the petitioner. He takes us through the sequence of events, documents



and correspondences that we have noted in detail in paras above and submits that (a) respondent was bound by the EGoM decision. Further, having incorporated this into NIA by way of amendment, it acquired contractual force, since the terms of NIA and license are in the nature of a contract and binding upon the respondent (b) denial of set off is contrary to the clarification to NIA dated 12-10-2012 (c) respondent vide letter dated 25-10-2012 promised set-off/adjustment of the entry fee of Rs 1168.76 Cr. Having done so, respondent is estopped from changing its position after auction (d) Issue of transfer of licenses from erstwhile Spice to erstwhile Idea is not germane for the purposes of grant of set off which is governed by the policy decision of EGoM. (e) The payment of entry fee was for the license and not under the license. Hence the petitioner is entitled to set off the entry fee paid by a Company which subsequently merged into it (f) legally all rights and obligations of erstwhile Spice passed on to petitioner, pursuant to court approved merger including entitlement of set off of entry fee (g) Petitioner is seeking set off on the basis of principle of restitution and not on the basis of transfer of licenses (h) respondent has considered representation of M/s Telenor and given relief. Case of petitioner and Telenor stand on the same footing since in case of Telenor also, the entity



getting set off benefit is different from entity whose license was quashed. This makes it a case of discrimination and arbitrariness on part of the respondent which is the State.

21. Learned ASG Ms. Pinky Anand appears for the respondent and submits that (a) scope and intent of the respondent's policy is clearly stipulated in minutes of the EGoM. It is evident from perusal of these minutes that benefit of set-off was to be given only to those entities that participated in the bid and were the holder of squashed licenses (b) at no point of time prior to the quashing of licenses of Spice, petitioner had any right, title or interest in the said licenses (c) licenses of Spice could not have been held by the petitioner since these licenses were never transferred by DoT to the petitioner (d) DoT did not transfer the licenses held by Spice due to violation of guidelines for intra-service area merger and UMTS/UASL license agreements. (e) sanctioning of the merger scheme amounts only to the merging of company and not the licenses and therefore the appellant itself maintains that for transfer of these licenses, prior permission of DoT is required (f) since the merged entity had never actually held the licenses that were in the name of Spice, Idea /petitioner could not have been given the benefit of set-off in the EMD against entry fee that was paid by Spice for

the said quashed licenses (g) Dot is not estopped from denying the petitioner the benefit of set-off of the EMD merely because it had pre-qualified the petitioner for bidding pursuant to NIA (h) case of Telenor stands on a different footing and the minutes of EGoM dated 6-3-2013 clearly explain reasons for granting Telenor the benefit of set-off.

22. The cause of action in this petition starts from the EGoM decision, although the decision itself is not under challenge. In fact, both the parties rely on this decision to support their case and want it to be applied. EGoM decision is essentially a mechanism adopted by the respondent for taking policy decision. We therefore look at the elements of the policy first.

23. The entry fee that is under consideration is a fee paid for grant of the license. Once paid and the license is issued, it is non-refundable. When licenses were quashed, Hon'ble Supreme Court had not passed any orders regarding treatment of entry fee. Hence, respondent was in no way contractually or by law obligated to retribute or set-off entry fee for quashed licenses in any manner. However, for good reasons, respondent has taken a policy decision to set off entry fee paid by holders of quashed licenses.



While doing so, respondent has set certain criteria and condition for extending the benefit. It is entirely within the powers and discretion of the respondent to set those criteria and condition while formulating the policy. Once such policy decision is made, respondent is of course bound to follow its own policy. It is also not in dispute that once this decision is incorporated in the NIA, respondent converts its discretion to confer this benefit in to a contractual obligation. The NIA requires an EMD to be deposited by prospective bidder. The amendment allows two benefits – set-off against the Earnest Money Bank Guarantee amount initially and later against the amount payable for auction price. Such benefit is given to the quashed license holder participating in the auction. According to learned ASG, it is evident from the facts narrated above that quashed licenses under discussion were those of Spice and the entity participating in the auction was not Spice. Therefore, strictly speaking, benefit of set-off was never available to the petitioner in terms of NIA conditions. Dr. Singhvi however submits that section 391 to 394 of the Companies Act, 1956 is a complete code to regulate merger/amalgamation of companies. By operation of law, all assets and liabilities of Spice stood transferred to the petitioner. Accordingly, under the scheme approved, all assets including licenses of



Spice became the property of petitioner. Since by operation of law, four quashed licenses of Spice vested with the petitioner, benefit of set-off cannot be denied to it. We note that scope of section 391 to 394 of Companies Act is specific and does not take away DoT's rights. The submission of the petitioner that the merger of companies will also vest the title of the licenses held by Spice is contrary to the law. These aspects of merger have been dealt with by the double bench of Hon'ble Delhi High Court. The licenses of Spice could not have been held by the petitioner since those were never transferred by DoT to the petitioner. We need not dwell here into the reasons for not transferring the licenses. Admitted position of the petitioner is that the four licenses held by Spice were never transferred to the petitioner by DoT. Thus, as per NIA conditions, benefit of set-off could not have been availed by the petitioner. Dr. Singhvi further submits that as a successor of the merged company, petitioner is also entitled to the benefits accruing to the merged company. He also points out that since the merger was on a 'going concern' basis, petitioner is the *de facto* holder of the quashed licenses of Spice. We find no mention in the license or any legal provision of '*de facto*' holder of the license. Moreover, since the benefit itself cannot accrue to Spice as per NIA conditions, there is



no question of getting it passed on to the acquirer company in any capacity. In view of these discussions, we are of the considered opinion that as per EGoM decision dated 8-10-2012 and 18-10-2012 and NIA conditions, petitioner was not entitled to the set-off.

24. Dr. Singhvi however submits that the expressions 'TSP' and 'holder of quashed license' should not be taken in a *stricto sensu* manner. Instead such terms and conditions should be given purposive/contextual interpretation. He further submits that such routine treatment of the issue results in triple whammy for the petitioner, which is loss of investment, loss of license and loss of entry fee, leading to an unjust outcome. Dr. Singhvi's argument may evoke sympathy. We however also note Dr. Singhvi's argument that set-off related NIA conditions have a contractual status. In the context of contractual condition, especially the qualifying conditions like EMD having significant financial implication and affecting all the prospective bidders, respondent is expected to adhere strictly to the terms and conditions of the NIA. We are therefore not inclined to fault respondent on this account.

25. Dr. Singhvi takes us through pre-auction correspondences between the parties to argue that respondent is bound by the doctrine of 'promissory estoppel' and consequently petitioner is entitled to the grant



of benefit of set-off. He submits that in its application dated 18-10-2012, petitioner discloses about the entry fee paid by Spice, in respect of which set off is being claimed. Respondent qualifies the petitioner on the basis of details mentioned in the said application. Later, respondent takes a 'U-turn' and denies the benefit of set-off. Had petitioner known, it would have participated differently or not participated at all. Once the petitioner was qualified by the respondent to participate in the auction, subsequently, no illegality can be attached since respondent is bound by the doctrine of 'promissory estoppel'. Learned ASG submits that the respondent is not estopped from denying the petitioner the benefit of set-off simply because it had pre-qualified the petitioner for bidding. In support, she cites few judgments in similar circumstances. The hon'ble Supreme Court in *Jalandhar Improvement Trust vs. Sampuran Singh (1993) 3 SCC 494* states that "the court has held that if any allotments were made wrongly that it will not create an enforceable right on the respondents to claim similar wrongful allotments in their favor. There is no estoppel against law." In *ITC Bhadrachalam Paperboards & anr. Vs. Mandal Revenue Office, AP & ors. (1996) 6 SCC 634*, the Hon'ble Supreme Court while dealing with wrong representation of government held that "the position urged by the learned



counsel for appellant falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well settled, is not applicable against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to rules of estoppel. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel.” In Monnet Ispat Energy Ltd. vs. Union of India & Ors. (2012) 11 SCC, the Hon’ble Supreme Court was faced with issue of wrongful grant of lease by the state government, it held that “...State government cannot be held to be bound by commitment or assurance or representations as the object sought to be achieved by reservation of the subject areas is likely to be defeated and thereby affecting the public interest. The overriding public interest persuades me in not invoking the doctrine of promissory estoppel and doctrine of legitimate expectation. The Act of the state government in withdrawing the recommendations made by it to the central government in the above factual and legal backdrop cannot be said to be bad in law on the



touchstone of the doctrine of promissory estoppel and doctrine of legitimate expectation". Dr. Sighvi in rejoinder submits that the legal principles laid down in the cited judgments do not apply in the different facts and contexts of this case. We therefore take a close look at the facts and the basics in the context of "promissory estoppel". For the doctrine of "promissory estoppel" to apply, promisor should make a significant promise to cause the promisee to act on it, promisee should rely on the promise and that may cause promisee to be in a position where promisee suffers significant damage for relying on the promise. A close look at the cited events suggests that none of these conditions appear to have been clearly fulfilled. As recorded in paras above, petitioner informs (in a format given by DoT) that it is submitting Rs. 601 Cr. of Earnest Money BG and amount of entry fee to be set-off against EMD is Rs 1168 Cr. Thus an EMD amount of Rs 1769.76 Cr. corresponds to eligibility points of 1594 for bidding. The application acknowledges that that the maximum EMD required in terms of NIA is only Rs. 1306.75 Cr. DoT's response dated 25-10-2012 merely acknowledges the facts as stated by the petitioner and states that only Rs 1306.75 as EMD amount will be displayed on the bidding screen. In its list of pre-qualified bidders, respondent has again reiterated Rs. 1306.75 Cr as



EMD. Nowhere, we find clear promise of the respondent that this amount of Rs. 1306.75 Cr is inclusive of the entry fee of 4 circles of Spice. BG of Rs. 601 Cr is sufficient to cover the requirement of Rs 1306.75 Cr even when entry fee of 4 circles is excluded. Thus, pre-qualification of the petitioner is consistent in facts and by no means constitutes a clear promise for set-off. It is only an assertion by the petitioner that DoT should first account for all the entry fee as claimed by it and then add the balance amount (i.e. 601 – 484.17 Cr) from the BG that it knowingly submitted. To these assertions, there is no clear and direct admission by the respondent that set-off will be provided. Facts of pre-qualification in no way indicate that without considering Rs. 484.17 Cr for 4 circles, petitioner could not have been pre-qualified. Under these circumstances, coupled with the submissions and judgments cited by learned ASG, we are of the considered opinion that the respondent is not estopped from denying the set-off of entry fee to the petitioner.

26. Dr Singhvi brings to our attention that the respondent has given benefit of set-off to Telenor in relaxation of NIA condition, pursuant to the EGoM decision dated 6-3-2013. He does not challenge the EGoM decision itself, but submits that denial of similar benefit amounts to a discriminatory



practice adopted by the respondent. He submits that in Telenor's case, bidding entity was different from the entity to which benefit of set-off could have been given. Originally, eight licenses were given to 8 separate Unitech Wireless companies. Subsequently these 8 companies merged into single entity namely, Unitech Wireless (Tamil Nadu) Pvt. Ltd. by virtue of court orders. However, their request for transfer/merger of license was pending with DoT when by virtue of the judgment in 2G case, all 8 licenses were quashed. Despite this, benefit of set-off against entry fees paid by 8 different companies (that merged without DoT's approval of transfer into Unitech wireless (Tamil Nadu)) was given to another company Telewings Communications Services, solely on the ground that beneficial owner of both entities was Telenor Norway. Dr. Singhvi submits that petitioner's case in substance is similar to that of Telenor. As compared to the case of Telenor, petitioner's case has even more merit to deserve a similar consideration. However, respondent chose not to put up its case before the EGoM. Even afterwards, respondent ignored its representations that similar considerations may be granted to it for set-off. In its reply, respondent has merely stated that Telenor's case is different than the petitioner's without explaining how in substance it is so. The impugned orders, or none of the



correspondence for that matter, explain why respondent has denied the benefit to the petitioner while granting the same to Telenor. We find some merit in these submissions.

27. The EGoM decision dated 6-3-2013 is a post-NIA and post-auction decision. Therefore it does not have the binding obligation of a contract. However, it certainly is in the nature of a departure from the earlier decisions of the EGoM. As EGoM minutes suggest, EGoM "*recalled the decisions taken in the meetings held on 8-10-2012 and 18-10-2012*". After recalling its earlier decision, EGoM goes through the complex structure of the companies involved, their shareholding pattern and their inter-relationship. Considering these facts, EGoM concludes that "*principle of equal restitution earlier approved would apply in this case of given the ownership details as the ultimate beneficial owner of both the entities is the same, namely M/s Telenor Norway*". Not much light is shed on the 'principles of equal restitution'. However, despite the decision being specific to Telenor, it does set a new criteria or condition that benefit of set-off can also be given on the basis of shareholding and ownership structure even if the entity bidding in the auction and the entity holding the quashed licenses are different. Such a criteria was not available earlier, and



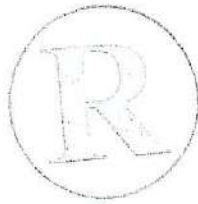
carves out an exception or relaxation to the earlier criteria. Since the decision brings in a new criteria of ownership structure for qualification of set-off benefit on the principle of equal restitution, applicability in each case should have been examined and considered accordingly. It is not enough to say that Telenor's case is different than that of the petitioner since all the cases will be different on facts in terms of shareholding or ownership structure. EGoM decision being a policy decision at the highest level, respondent was bound to consider other similarly placed cases as well in the light of principle or policy set by a fresh decision.

28. Principles of natural justice therefore require that the respondent considers the case of petitioner afresh in the light of EGoM decision dated 6-3-2013. It is of course entirely up to the respondent to examine, given the particular shareholding and ownership structure in the case of petitioner, whether it is entitled to a similar relaxation or not. For this reason, we remit the matter to the respondent, limited to the issue of considering the petitioner's request for set-off in the light of EGoM decision dated 6-3-2013. Petitioner is also granted liberty to make a representation to the respondent, within 3 weeks from today, limiting it to the points dealt with in EGoM decision dated 6-3-2013. If such a representation is made,



respondent will consider it suitably and pass a reasoned order, preferably within 10 weeks thereafter.

29. TP 439 of 2013 is disposed of in above terms. No order as to costs.



.....
(S. K. Singh, J)
Chairperson

.....
(A.K. Bhargava)
Member