TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 28th February, 2022

R.A. No.7 of 2020
in
Telecom Petition No.56 of 2020

Netmagic Solutions Pvt. Ltd. ……Petitioner

Versus

Union of India …..Respondent

R.A. No.9 of 2020
in
Telecom Petition No.50 of 2020

Data Ingenious Global Ltd. ……Petitioner

Versus

Union of India & Anr. …..Respondent

BEFORE:
HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. SUBODH KUMAR GUPTA, MEMBER

For Petitioner (RA No.7 of 2020)	:	Mr. Tarun Gulati, Sr. Advocate Mr. Aditya Vaibhav Singh, Advocate Ms. Sakshi Chaturvedi, Advocate
For Petitioner (RA No.9 of 2020)	:	Mr. Ankit Anandraj Shah, Advocate
For Respondent(UOI)	:	Mr. Dhruv Tamta, Advocate

ORDER

By S.K. Singh, Chairperson – Both the Review Applications have been heard together because they involve similar issues of facts and law. They shall be governed by this common judgment and order.

2. Review Application No.7 of 2020 arises out of T.P. No.56 of 2020 which was heard together with T.P. No.57 of 2020 and dismissed by order dated 19.11.2020 which is under assail in the Review Application. Following the order of 19.11.2020, T.P. No.50 of 2020 was dismissed by order dated 03.12.2020 which is impugned in Review Application No.9 of 2020. For the convenience of discussion, the facts and documents are being referred from the records of RA No.7 of 2020 unless indicated otherwise.

3. T.P. No.56 of 2020 was filed on 05.10.2020 by Netmagic Solutions Pvt. Ltd. to seek quashing of 13 letters issued by DoT between 09.12.2019 and 20.03.2020 raising demand of licence fee on the basis of AGR pertaining to financial year 2005-06 onwards for Mumbai Service Area against licence agreement with the petitioner dated 08.08.2002. In the demand-cum-show cause notices (13 in number), it was indicated that provisional assessment of due licence fee, interest on

delayed/short/non-payment of licence fee and penalty and interest on penalty has been worked out to arrive at the outstanding amount with interest calculated upto 31.12.2019. Other prayers made in the petition were to restrain the respondent from demanding licence fee on AGR which included revenue from sources other than the licence based activities and for refund of certain amount paid under protest.

4. The fact that the petitioner is an Internet Service Provider (ISP) since long is not in dispute. Previously, it held ISP licences dated 10.03.2000 and 08.08.2002 which were surrendered and presently its licence is dated 19.11.2007.

5. Against earlier regime of no licence fee on such licences and a licence fee of Re.1/- per annum since 01.11.2003, a licence fee of 6% of AGR was imposed w.e.f. 01.01.2006. As per relevant clauses of the agreement, gross revenue included revenue earned through Internet Access Service, Internet Content Service, Internet Telephony Service, installation charges, late fee etc. and other miscellaneous revenue without any set-off for related items of expense etc. For the purpose of arriving at the Adjusted Gross Revenue (AGR), charges from Internet Access, Internet Content and Internet Access related installation charges as well as service tax on provision of service and sales tax actually paid to the government

were excluded from gross revenue. The Internet Service Providers Association of India and others including Netmagic Solutions challenged the increase in the licence fee from Re.1/- to 6% of AGR and in the alternative prayer (b) was for a declaration that DoT is not entitled to recover Licence Fee as Revenue Share out of any revenues arising out of non-licenced activities and sought further declaration that the Revenue Share Licence Fee is eligible only on AGR accruing directly out of the Internet Telephony activities/operations licenced under Section 4 of the Indian Telegraph Act, after adjustment of write-off and revenues not directly attributable to such licenced activities, including interest income, dividend income, rebates, discounts etc. This Tribunal by judgment dated 30.08.2007 in T.P. 119 of 2006 rejected the main prayer directed against the increase of licence fee at 6% of AGR and in respect of prayer (b) the Tribunal recorded in the judgment that the decision of the Tribunal in a batch of cases including Petition No.7 of 2003 rendered on the same date i.e. 30.08.2007 will govern prayer (b) of T.P. No.119 of 2006 and to that extent prayer (b) stood allowed.

6. Union of India challenged the judgment dated 30.08.2007 in favour of the petitioner before the Hon'ble Supreme Court which decided against the petitioner in AUSPI case which is reported in **Union of India & Anr. Vs. Assn. of United Telecom Service Providers of India & Ors.; (2011) 10 SCC 543**. By that

judgment the provisions relating to the AGR in the Licence Agreement were upheld and appeal against the Internet Service Providers Association of India stood completely allowed so far as definition of AGR is concerned. However, it was made clear that demands when raised on the basis of such provisions could be challenged on permissible grounds before this Tribunal. This judgment holds the field in respect of all licensees like the petitioners who are also Internet Service Providers. The subsequent Judgment dated 24.10.2019 of Hon'ble Supreme Court on AGR in respect of Telecom Service Providers having different licenses has affirmed and relied upon this judgment.

7. Post the above AUSPI judgment, in 2015 this Tribunal reconsidered the matter and gave some relief to various licensees through a judgment dated 23.04.2015. In the compilation of Judgments/Case Laws (**Vol. I**) submitted on behalf of petitioner in R.A. No.7 of 2020, a passage at page 143(internal page 19 of above judgment of 2015) notes the nature of "Petitions in the Batch" with a footnote number 9 showing the licences under consideration which included "License for Provision of Internet Services". The above passage reads as follows:

> **"Petitions in the batch**
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> The large number of petitions forming this batch are filed by different operators holding different kinds of licences[9] granted by the Government under section 4 of the Telegraph Act. However, as it

> was also noted (in the very first round) in the Tribunal's judgment dated 7 July 2006, the definition of AGR in all the licences granted under section 4 of the Telegraph Act is quite similar in all material respects. It may also be noted here that the Supreme Court in the AUSPI's case (as also the Tribunal in its earlier judgment dated 7 July 2006) have dealt with the definition of AGR as incorporated in the Unified Access Services Licence. We too, therefore, propose to refer to the relevant provisions in the UAS licence, which is the principal and the most comprehensive licence held by all the major telecom service providers in the country. In case any aspect of AGR is peculiar to some licence(s), other than the UAS licence we would indeed advert to that particular licence, stating the relevant details.
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> [9]e. g. , i. Unified Access Services Licence (UASL), ii. Licence for Provision of Internet Services (ISPIT), iii. International Long Distance Service Licence (ILDSL), iv. National Long Distance Service Licence (NLDSL), v. Very Small Aperture Terminal Licence (VSATL), vi. Passive Infra Structure Providing Licence etc."

8. The above judgment and order of this Tribunal considered the challenge to the demand notices/demand and the specific head of items to be included or excluded under the definition of "AGR". This judgment was challenged in appeal by the licensees and also by DoT. After hearing the parties in detail in respect of the issues raised through rival appeals, the Hon'ble Supreme Court by judgment dated 24.10.2019 reported in **Union of India & Anr. Vs. Assn. of United Telecom Service Providers of India & Ors.; (2020) 3 SCC 525** dismissed the appeals of licensees and that of DoT was allowed in terms of the said judgment. It is not in dispute that the Apex Court did not grant any further relief to the licensees

and all the relief granted by the said judgment is only to DoT. The entire field requiring interpretation of relevant clauses under various heads thus stands concluded by the earlier judgment of this Tribunal dated 23.04.2015 as affirmed, modified or reversed by the judgment of the Hon'ble Supreme Court dated 24.10.2019. Thus, all the issues in respect of AGR relating clause apparently acquired quietus by the 2011 and 2019 judgments of the Apex Court noticed above. But for some subsequent developments which shall be dealt with later, the two judgments now constitute *res judicata*, actual as well as constructive for the purpose of interpretation of the terms of the licence agreement including that of the petitioners.

9. It was on the basis of aforesaid view that the orders under review were passed. The Review Applications were admitted on 15.01.2021 and at that stage itself this Tribunal recorded that the order under review dated 19.11.2020 is based fully upon the judgment of the Hon'ble Supreme Court and there is no scope to exercise review, except on the issue relating to subsequent developments on account of an order passed by the Hon'ble Apex Court on 11.06.2020 recording that the licensor/Union of India has decided to withdraw demands based on interpretation of "AGR" given by the Apex Court *qua* several Public Sector Undertakings (PSUs).

10. Learned counsel appearing for the review petitioners have sought to enlarge the scope of review on the basis of alleged difference between definitions of AGR in the licence for provision of internet services and those in some other telecom licenses. Arguments have also been advanced that licence of Internet Service Providers has not been discussed by the Hon'ble Supreme Court and it has not been considered that licensees like the present petitioners having licence for provision of Internet Services are rendering quite different services than the licensees who provide telecom services. Such issues cannot be raised again and again when challenge by similar licensees was considered by this Tribunal leading to the AGR issues being considered in the 2011 judgment and again in 2019 judgment by the Hon'ble Supreme Court. In the considered opinion of this Tribunal all such or similar contentions are barred by principles of *res judicata* as well as constructive *res judicata*. Therefore, submissions on behalf of petitioners that their licenses and activities are different do not deserve any consideration. Similarly, the exemption of revenue from pure Internet Services does not provide any fresh ground for reconsidering matters which have been adjudicated after contest and the judgments are clearly final, rendered by the Apex Court.

11. So far as issue of limitation is concerned, this Tribunal does not find any good reason to take a different view from what has been clearly expressed in the

order under review. So long as the AGR issue was pending in the Supreme Court, till the judgment of 2019 there was complete uncertainty as to which way the law would be settled. Not raising demands in spite of liberty available to DoT can only indicate the reasonableness of Union of India in not promoting multiplicity of litigation with large number of licensees. But what would be effect of not raising demands upon right to levy interest and penalty is a resultant issue which may require reconsideration on the facts of each case. If no demand was raised creating liability to pay upon licensees, such facts may be highlighted by them by way of representation against erroneous imposition/calculation of interest or penalty if levied contrary to terms of license agreement. Respondent shall deal with and decide such issue also along with calculation errors in demands, if raised by the petitioners, in accordance with law and the correct facts.

12. On behalf of petitioners it has been pointed out that in the order under review, Para 174 of the Supreme Court's judgment in **Anuradha Bhasin v. Union of India; (2020) 3 SCC 637** has been mistakenly mentioned because that paragraph does not refer to licence of Internet Service Providers rather the same deals with revenue under IP-1 registration under CUG licence. The aforesaid submission is correct so far as mentioning of Para 174 is concerned. However, Paras 71, 72 and 76 fully support the conclusion that this judgment makes it clear

that decision of 2011 in the case of **Union of India Vs. Association of Unified Telecom Service Providers of India** operates as *res judicata* and binds the parties. At many other places also the judgment of 2011 has been favourably noted and followed. As indicated earlier, the licence of Internet Service Providers was under consideration before this Tribunal as is evident from judgment dated 23.04.2015 which was impugned by Union of India leading to judgment dated 24.10.2019 reported in **Union of India & Anr. Vs. Assn. of United Telecom Service Providers of India & Ors.; (2020) 3 SCC 525**. Even if the alleged difference in the AGR clauses was not brought before the courts in the earlier litigations, the consequences will be adverse to the petitioners and they cannot raise same grievance again by resorting to different grounds as per their convenience.

13. The only issue which requires consideration is whether relief granted by DoT to some public sector undertakings having licences with similar or substantially similar clauses relating to AGR, deserves to be granted to petitioners also even if they are not public sector undertakings but private businesses. On the aforesaid issue based upon claim for parity with public sector undertakings, this Tribunal decided to admit the Review Applications and hear the parties at some length before coming to a final conclusion. In the Review Applications the petitioners have taken a categorical stand and pleaded that this Tribunal erred in

relying on submission made on behalf of the respondent that the Public Sector Undertakings(PSUs) though having similar licences were not rendering service to the general public and hence it would not be proper to apply the same principles for grant of relief to the petitioners. Petitioners' case is that PSUs with similar licences were exploiting their licences commercially and therefore, similar demands on the basis of AGR being made against the petitioners should also be withdrawn on the principle of level playing field as well as equality. On the basis of pleadings and various annexures to the Review Applications, petitioners have shown that Power Grid Corporation of India, a PSU was engaged in telecom business also but still demand based on AGR has already been withdrawn in its favour. Similar is stand with regard to another PSU, Software Technology Parks of India. In respect of another PSU, Railtel Corporation of India it has been shown that although it has not been exempted from the demands by any order of DoT but demands are not being enforced against this PSU and this PSU has issued document and brochures which disclose that it is rendering telecom services to the general public including retail broadband services through "Rail Wire" platform. In the draft Red Herring Prospectus dated 29.09.2020 (**Annexure A-5)** this PSU has referred to the orders of Supreme Court dated 11.06.2020 and 24.02.2019 and also stand of the DoT on the basis whereof it has not considered any contingent liability in respect of demands based on AGR.

14. It would be useful to note that respondent had earlier filed a short affidavit dated 25.02.2021 and taken the following stand in respect of exemption of PSUs, in view of a direction of this Tribunal contained in order dated 15.01.2021. Paras 5 to 10 are relevant and read as follows:

> "5. The Hon'ble Supreme Court has observed that PSUs, such as those mentioned in the aforesaid order dated 11.6.2020, may not be within the ambit of the AGR judgment because *"even otherwise, the Public Sector Undertaking are not in the actual business of providing mobile services to the general public."*
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> 6. It is submitted that PSUs form a class in themselves as they substantially discharge governmental functions and represent public funds. It is submitted that a liability of more than rupees 4 lakh crores, which would fall upon the PSUs, may not be in larger public interest, more particularly when the PSUs are not providing service in the way in which commercial service providers are providing. The requirement of licence by these PSUs may be based upon some of their own internal requirements and not for commercial exploitation the way in which other telecom service providers required the service. It is brought to the notice that petitioner is providing services for commercial exploitation.
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> 7. It is respectfully submitted that in view of the very peculiar nature of the PSUs as against the private sector, the PSU may require a different treatment from such commercial service providers.

8. The Respondent herein, before the Hon'ble Supreme Court by way of an affidavit had stated that the Hon'ble Supreme Court being the highest constitutional court of the country, having inbuilt jurisdiction in the nature of equity jurisdiction, may consider giving a different treatment to all PSUs and may be pleased to differentiate PSUs from private sector so that economic health of these PSUs may not get adversely affected.

9. It was pleaded before the Hon'ble Supreme Court that the equity jurisdiction of this Hon'ble Supreme Court, is being invoked only in case of public sector undertakings as they provide important governmental services and the government has majority stake in the said PSUs. The purpose of invoking this jurisdiction is public trust and that too limited to public sector undertakings.

10. That following are the PSUs who have been granted license:

S.No.	**PSU**	**LICENSE HELD**
1	Oil India Ltd.	NLD
2	Railtel Corporation of India	ISP-IT
3	Railtel Corporation of India	UL-ISP
4	Railtel Corporation of India	NLD
5	Railtel Corporation of India	IP-II
6	Power Grid Corporation of India Ltd.	UL-ISP
7	Power Grid Corporation of India Ltd.	NLD
8	Software Technology Parks of India	UL-ISP
9	Software Technology Parks of India	Comm-VSAT
10	Noida Software Technology Parks of India	ISP-IT
11	Gail India Ltd.	IP-II
12	DMRC	IP-II
13	ERNET India	UL-ISP
14	ONGC	Wireless
15	ONGC	CUG-VSAT
16	Tamil Nadu Arasu Cable TV Corporation Ltd.	UL-ISP
17	Gujarat Narmada Valley Fertilizer	ISP-IT

18	Gujarat Narmada Valley Fertilizer	Comm-VSAT
19	MTNL	UASL
20	BSNL	UASL

It is submitted that the Respondent has not withdrawn the demand against all the PSUs mentioned above.

That till date demand against only those PSUs have been withdrawn which are at serial no.1, 6, 9, 11, 12 and 13 mentioned above.

It is stated that PSUs such as MTNL and BSNL, the demands against them have not been withdrawn and shall not be withdrawn as they have obtained the license from the Department for commercial exploitation, like the Private operators."

15. On behalf of DoT a further affidavit filed on 05.10.2021 contains as enclosures three affidavits filed by Union of India before the Hon'ble Supreme Court on 10.06.2020, 18.06.2020 and 10.08.2020. The purpose is to disclose the stand of Union of India in respect of exemption granted to some of the PSUs by not applying the judgment dated 24.10.2019 in contrast to its full application to the mobile service operators having access service licence. For the same purpose the affidavit also contains orders of Supreme Court dated 11.06.2021 and 18.06.2021 as enclosures.

16. The affidavit dated 10.06.2020 filed on behalf of Union of India before the Apex Court discloses that after describing five different types of licences granted

by DoT it was indicated in Para 5 that on comparison of clauses defining Revenue and AGR, the NLD and IP-II licences were found differently worded than UAS and ISP licences. It was then submitted that the PSUs can be distinguished from most of the private telecom service providers because except BSNL and MTNL, the PSUs do not hold access service licence. It was also submitted that the Court had no occasion to express the legal or the factual issues arising in case of various PSUs. The history of AGR dispute since July/August, 1999 along with relevant clauses relating to gross revenue and AGR were explained and extracted. The details of 21 PSUs who acquired telecom licences over the years were also provided. The list shows that Powergrid Corporation of India Ltd., Railtel Corporation of India and Noida Software Technology Park Ltd. held licences for providing internet services. The estimated outstanding against them as on October, 2019 was disclosed with a submission that some of the PSUs were parties to the proceedings before the Hon'ble Supreme Court.

17. The main submission to distinguish PSUs in Para 8 of affidavit dated 10.06.2020 is as follows:

> "**8**. It is submitted that Public Sector Undertakings form a class in themselves as they substantially discharge governmental functions and represent public funds. It is submitted that a liability of more than Rs.4

> lakh crores, which would fall upon the PSUs, may not be in larger public interest, more particularly when these PSUs are not providing mobile services the way in which these PSUs are not providing mobile services the way in which commercial service providers are providing. The requirement of license by these PSUs may be based upon some of their own internal requirements and not for commercial exploitation the way in which other telecom service providers require the services except the two PSUs not mentioned in the list stated above."

18. The Hon'ble Apex Court posed a query to learned Solicitor General of India as to how the demand was raised with respect to PSUs when the licences were different and the AGR judgment never dealt with the issue of PSUs and their agreements were different. Paras 5 to 8 of the affidavit dated 10.06.2020 were extracted. Thereafter the Court recorded that the licences are different and hence the judgment in the AGR case could not have been made the basis for raising the demands against PSUs. It is also observed that "even otherwise, the public sector undertakings are not in the actual business of providing mobile service to the general public." The Court directed DoT to reconsider the demand against PSUs. In the affidavit dated 18.06.2020 the stand taken by the PSUs was noted in Para 5. They pleaded that the demand against them required reconsideration and also because according to them the Hon'ble Supreme Court had clarified that AGR judgment dated 24.02.2019 is not applicable to them. Paras 6 and 7 of this

affidavit disclosed the reasons for and the decision leading to withdrawal of the demand of licence fee by inclusion of non-telecom revenue, in respect of the non-telecom PSUs, M/s Power Grid, GAIL, Oil India Ltd. and DMRC. With respect of others DoT prayed for further time. Paras 6 and 7 of the affidavit are extracted hereinbelow:

> "**6**. The Department of Telecommunication has examined the facts and circumstances arising in case of each of the said individual non-telecom Public Sector Undertakings separately and in light of the above quoted observations and directions made by the Hon'ble Court in its order dated 11.6.2020 and it is found that–
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> (a) These non-telecom Public Sector Undertakings are non-telecom entities involved in providing services such as power transmission, oil and gas exploration and refining, Metrorail services etc. and that they are not into the business of providing mobile services to general public
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> (b) These non-telecom public sector undertakings which have substantial governmental interest in terms of finance and management including ownership have taken licenses essentially for their captive uses
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> (c) None of these non-telecom public sector undertakings are holding Access Service License [ASL] which clearly distinguishes them from other private telecom service providers who are into the actual business of providing mobile services to the general public

(d) The revenue received by such non-telecom public sector undertakings under the head of telecom services forms a very negligible and a small part of their total revenue [eg. 0.0002% for GAIL, 0.00028% for DMRC and 0.001% for Oil India etc.].

7. Having reconsidered the matter of issuing demand notices for license fee on both telecom and non-telecom revenue to these non-telecom Public Sector Undertakings, taking the above referred special distinguishing features into consideration and after carefully considering the said demands in light of the order dated 11.6.2020 passed by this Hon'ble Court, the Department of Telecommunications has decided to withdraw the demands raised for License Fee on account of non-telecom revenue from the non-telecom Public Sector Undertakings [M/s Powergrid, GAIL, Oil India Limited, DMRC which constitute about 96% of the demand in respect of non-telecom PSUs] based upon each individual case and depending upon the distinguishing features in their case which are classified hereinabove. The formal orders of withdrawal are in the process of being issued after following the administrative procedure. It is submitted that decisions regarding other substantially Government owned non-telecom entities is in the process and could not be decided during the period of 3 days which shall be decided at the earliest and shall be placed before this Hon'ble Court."

19. On 18.06.2020 the Hon'ble Supreme Court considered the affidavit mentioned above which was filed by DoT, recorded the decision of DoT to withdraw the demands with respect to some PSUs and also recorded the

undertaking that DoT shall take decision in respect of remaining PSUs before the next date of hearing and place it on record.

20. In the affidavit dated 10.08.2020, DoT reiterated its earlier decision disclosed on the affidavit of 18.06.2020 and in Para 9 further information was given to the Court that demand notices were also withdrawn in respect of ERNET, NICSI, Software Technology Parks of India and Gujarat Info Petro Ltd. Representations of two other PSUs, namely, Gujarat Narmada Valley Fertilisers and M/s Railtel Corporation were reported to be under examination.

21. On carefully going through the stand of Union of India in the affidavits dated 10.06.2020, 18.06.2020 and 10.08.2020 filed before the Supreme Court it is clear that –

(i) Union of India in general terms made a submission that most of the PSUs held licences under which the relevant terms and clauses may not be similar to the Access Service licence analysed and interpreted in the judgment dated 24.10.2019;

(ii) Impliedly the stand and the submission was that in the judgment of 24.10.2019 the Hon'ble Supreme Court had analysed and interpreted terms and clauses of the Access Service licences only and a distinction was drawn between non-telecom PSUs, 21 in numbers and telecom PSUs, BSNL and MTNL;

(iii) The Union of India took the stand and made submissions that PSUs are a class in themselves and putting them to huge liability as per AGR clause would not be in larger public interest, especially when these are not providing mobile services the way in which the commercial service providers are doing. Their requirement of licence may be due to internal requirement and not for commercial exploitation the way in which it is done by other telecom service providers; and

(iv) In view of peculiar nature of the PSUs, the Apex Court should exercise its inherent power and may consider to give a different treatment to all PSUs to differentiate them from private sector telecom service providers by appropriate and suitable modification of the judgment to safeguard the economic health of PSUs.

22. The Hon'ble Supreme Court in the order dated 11.06.2020 referred to its queries to learned Solicitor General of India for enquiring the basis of demands raised with respect to PSUs **when the licences were different** and **the judgment never dealt with the issue of PSUs (emphasis supplied)**. Then the Court extracted Paras 5 and 6 of the affidavit dated 10.06.2020 to record that –

(i) On the basis of the stand of Union of India and recording the findings noted above, the Court did not itself go into the exercise but permitted DoT to reconsider the demands made upon the PSUs within a fixed time; and

(ii) It is apparent that the licences are different and the judgment (dated 24.10.2019) could not have been made the basis for raising demands against PSUs. In view of the submissions in the affidavit, the Court held that "even otherwise, the PSUs are not in the actual business of providing Mobile Services to the general public".

23. The compliance affidavit dated 18.06.2020 discloses that after the order of 11.06.2020 DoT received detailed representations from various PSUs like M/s Powergrid, GAIL, Oil India Ltd., DMRC etc. to withdraw the demands raised against them and they raised four issues/grounds which were considered by DoT to

come to the findings in Paras 6 and 7 of the affidavit which have been extracted earlier. The findings which need to be highlighted are as follows:

(i) The non-telecom PSUs are not into the business of providing mobile services to general public and they have taken telecom licences essentially for their captive users;

(ii) They form a class because they do not hold Access Service licence like the private telecom service providers who are in the actual business of providing Mobile Services to the general public;

(iii) The revenue of the non-telecom PSUs under the head of telecom services forms a very small part of their total revenue as apparent in the case of GAIL – 0.0002%, DMRC – 0.00028% and Oil India Ltd. – 0.001%. On the basis of aforesaid stand, DoT decided to withdraw the demands raised for licence fee on account of non-telecom revenue from the non-telecom PSUs like Powergrid, GAIL, Oil India Ltd., DMRC and subsequently decision was taken in favour of some other PSUs. This decision was noted by the Apex Court in its order of 18.06.2020 and that order was followed by further information with regard to other PSUs through affidavit of 10.08.2020.

24. Coming back to the claim of the petitioners for parity with PSUs, on the basis of materials noted and discussed in Para 14 onwards which are all subsequent to judgment of the Hon'ble Supreme Court dated 24.10.2019, it is found that the said judgment, as per stand of the respondent which were accepted by the Apex Court in the orders dated 11.06.2020 and 18.06.2020, will not govern the PSUs for two reasons. Firstly, because the PSUs are not in the actual business of providing Mobile Services to the general public because they do not hold Access Service licences; secondly, because their requirement of licence may be due to internal requirements and not for commercial exploitation the way in which it is done by other telecom service providers. On account of pointed and specific stand of the respondent that the nature of PSUs having telecom licences is peculiar and the Court should give a different treatment to all such PSUs *qua* private sector telecom service providers, the Court allowed the respondents to undertake the exercise of enquiring into the basis of demands raised with respect to PSUs because their licences were different and the judgment never dealt with issues of PSUs. In the order dated 10.06.2020 the Court accepted the stand of the respondent that the licences of PSUs are different and the judgment of 24.10.2019 could not be made the basis for raising demands against PSUs as they are not in the actual business of providing Mobile Services to the general public.

25. As noted, the respondent withdrew demands of license fee, interest and penalty from PSUs who held licence for providing Internet Services. The underlying reason was that since their main or bulk revenue is from non-telecom services, on account of very small revenue from telecom services they should not be burdened by including revenue from non-telecom services for the purpose of AGR. In other words, in respect of exempted PSUs the respondents have decided to levy licence fee only on the basis of revenue from telecom services/licenced activities.

26. The decision in favour of PSUs taken by the respondent has the approval of the Apex Court and hence though some of them were parties before the Supreme Court in the AGR matter leading to judgment dated 24.10.2019, they all have been treated as not covered by the said judgment because their peculiar licence and situation was not discussed separately in the said judgment. The petitioners' case is covered by the aforesaid reasons and situations. The only ground to deny them parity and level playing field with some of the exempted PSUs having licence to provide Internet Services is the fact pleaded by the respondent that PSUs are substantially government owned entities and the government has substantial interest in their financial health and management. The difference in ratio of

revenue from licensed *qua* non-licensed activities can not be a germane and relevant basis for change of AGR terms for some licensees (PSUs) and thus create two classes amongst licensees holding same licence.

27. On a careful consideration of provisions of Indian Telegraph Act, 1885 under which licence for telecom services have been issued to the petitioners as well as the concerned PSUs and also the terms of the licence, it is found that there is no scope to differentiate between two sets of licensees having same or similar licences only on the basis of their ownership, private or public. The statutory rights and liabilities must remain the same for both the classes in so far as they arise from the licences/agreements under consideration. The same conclusion would flow from the requirements of equality, fairness and level playing field.

28. In one of the affidavits before the Apex Court, the respondent DoT/Union of India made a general claim that the concerned PSUs have taken licenses essentially for their captive uses. It was not their case that the licences are exclusively for their captive use. Subsequently however, this was not pursued too vigorously in the proceedings before the Supreme Court as is clear from the order dated 11.06.2020. A ground has been taken that the PSUs are not rendering service under their licence to the general public and therefore, could not be treated as

equally placed. But that impression is found to be erroneous as found earlier in Para 13.

29. The observations of the Hon'ble Supreme Court in the order dated 11.06.2020 that "even otherwise, the public sector undertakings are not in the actual business of providing Mobile Services to the general public" was placed differently in course of oral submissions before this Tribunal and accepted mistakenly as a finding of the Apex Court that PSUs are not providing **licenced services** to the general public. Such error in the order under review deserves to be corrected by reviewing that order on the basis of parity, equality and level playing field for all licenses, regardless of their ownership.

30. In view of aforesaid facts and discussions, the issue relating to prayer of the petitioners that the order dated 19.11.2020 be reviewed and they be given parity of treatment in respect of concept of AGR by excluding revenue from non-telecom activities and services is found fit to be accepted in view of stand and action of respondent *qua* some of the PSUs having the same licence for providing Internet Services. As a result, the impugned demands of licence fee etc. raised upon the petitioners by the DoT by including revenue from non-licenced activities in AGR

on the basis of judgment dated 19.11.2020, are set aside. The respondents will have the liberty to raise revised demands by treating the petitioners at par with the exempted PSUs having licence to provide Internet Services.

31. The Review Applications succeed to the aforesaid extent and are allowed accordingly. In the facts of the case, there shall be no order as to costs.

Sd/-

……..J
(Shiva Kirti Singh)
Chairperson

Sd/-
…….
(Subodh Kumar Gupta)
Member

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