

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

Dated 4th March, 2010

**Petition No.244 of 2009
(M.A. No. 150 of 2009)**

Bharti Airtel Limited & Anr.

... Petitioner

Versus

Department of Telecommunications (DoT)

... Respondent

BEFORE:

**HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. G.D. GAIHA, MEMBER**

For Petitioner : Mr.Ramji Srinivasan, Sr.Advocate
with Mr. Kaushik Mishra, Advocate

For Respondent : Mr. Vineet Malhotra, Advocate
Mr. Shankar Chabra, Advocate
Mr. Anurag Sharma, Advocate

JUDGMENT

S.B. Sinha

These two petitioners Bharti Airtel Limited and Bharti Hexacom Limited are before us questioning inter alia the legality of an order dated 17.9.2009 issued by the respondent herein and the reminders issued in relation thereto being dated 7.10.2009 and 29.10.2009.

The said Order dated 17.9.09 reads as under:-

“Sub: Re-assessment of annual License fee for the financial year 2005-06 in respect of your CMTS license for A.P., Chennai, Delhi, Gujrat, H.P., Haryana, Karnataka, Kerala, Kolkata, M.P., Maharashtra, Mumbai, Punjab, Tamil Nadu, UP (West), Rajasthan and N.E. licensed Service Areas.

Ref: This office letter of even no.dated 17.05.2008

1. This concerns re-assessment of annual License Fee for the financial year 2005-06 in respect of the CMTS License of M/s Bharti Airtel Ltd. for the license service areas of A.P., Chennai, Delhi, Gujrat, H.P., Haryana, Karnataka, Kerala, Kolkata, M.P., Maharashtra, Mumbai, Punjab, Tamil Nadu, UP(West), Rajasthan and N.E.

2. As per the extant license agreement, deductions from the Gross Revenue on account of (a) PSTN related call charges (Access charges) actually paid to other eligible/entitled telecom service providers within India and (b) Roaming charges actually paid to other operators, during the financial year are admissible.

3. You were directed to submit the duly audited quarter-wise operator-wise details of PSTN related call charges and Roaming charges actually paid to eligible/entitled telecom operators during the financial year 2005-06.

4. On submission of the requisite details by you, the re-assessment of annual License Fee for the financial year 2005-06 has been carried out after going through the Audited quarter-wise, operator-wise details of pass through charges and Roaming charges actually paid to other Telecom Services providers. The summary of the re-assessment is as under:

Service Area	AGR	Revenue Share Due	Revenue Share Paid	Difference (C-D)	Interest on delayed payment calculated up to 30.09.2009	Penalty and interest on penalty if any	Total dues
AP	6363311647	509064932	507297002	1767930	1502876	0	3270806
Chen.	4883036567	488303657	479771258	8532399	6745475	0	15277874
Delhi	16125650624	1612565062	1546071590	66493472	41953225	0	108446697
Guj	2283446076	228344608	221059736	7284872	4439101	0	11723973
Har.	1370247685	109619815	110966080	-1346365	12101	0	-1334164
HP	1223407512	61170376	61767233	-596857	61953	0	-534904
Ktka	11525415321	922033226	948598655	-26565429	240556	0	-26324873
Ker.	1680892919	134471434	134854806	-383372	48992	0	-334380
Kol.	2559415852	255941585	253172646	2768939	2072949	0	4841888
Mah.	4019336042	401933604	402526999	-593395	5547	0	-587848
MP	3034634275	243699691	230832931	12866760	7958976	0	20825735
Mum.	5169708357	516970836	525685756	-8714920	232380	0	-8482540
Punjab	6615510082	396930605	399361720	-2431115	41491	0	-2389624
T.N.	2788265428	278826543	278811395	60115148	5142610	0	11157758
UP(W)	1684662404	134772992	134739393	33599	487356	0	520955
Raj.	3280897466	196853848	196991889	-138041	737086	0	599045
N.E.	75074233	3753712	3874434	-120722	4213	0	-116509

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Total amount payable: Rs.17,66,64,731/-

(Rs.Seventeen Crores sixty six Lakhs sixty four thousand seven hundred thirty one only)

5. The above amount is due after calculating interest up to 30.09.2009. It may be noted that there is an excess of Rs.13,34,164/- 5,34,904/-, 2,63,24,873/-, 3,34,380/-, 5,87,848/- 84,82,540/-, 23,89,624/- and 1,16,509/- in respect of Haryana, H.P., Karnataka, Kerala, Mah, Mumbai, Punjab and North East licensed service areas respectively. The excess amounts so arrived at will be adjusted against the future dues in respect of the same Licensed service area, if not adjusted earlier.

6. The calculation sheets containing computation of the AGR and interest amount are annexed to this letter. You are directed to remit the sum of Rs.17,66,64,731/-. (Rs.Seventeen Crores sixty six Lakhs sixty four thousand seven hundred thirty one only) forthwith.

7. You are also directed to submit the auditor's note stating that the deductions claimed on account of PSTN related call charges and Roaming charges include/do not include Port Charges and Leased Line charges actually paid to other operators during the year 2005-06.

If these are included, audited details of the same may also be provided.”

Along with the said demand, several sheets had been annexed directing the petitioners to make payments of the Adjusted Gross Revenue (AGR), in respect of service areas of Andhra Pradesh, Karnataka, Punjab, Chennai, Delhi, Gujarat, Haryana, Himachal Pradesh, Kerala, Calcutta, Maharashtra, Madhya Pradesh, U.P. (West), Mumbai and Tamil Nadu Service Areas and so far as the petitioner no. 2 is concerned, the service areas of Rajasthan and North East.

The petitioners herein are licensees; the licenses having been granted by the respondent in terms of the provisions of Section 4 of the Indian Telegraphs Act, 1885 (1885 Act).

Indisputably, pursuant to or in furtherance of a migration package offered to the petitioners by the respondent herein and they having accepted the same, the license fees were required to be calculated on Adjusted Gross Revenue (AGR) basis and was only payable on revenue accruing under the licenses.

The respondent included in licensing activities, while computing the amount of AGR, however, included earnings from revenue, which according to the petitioner had not accrued from the telecommunication activities. It gave rise to a

dispute by and between the petitioner No. 1 and the respondent as according to the letter it was entitled to calculate the license fees on a revenue sharing basis, “as it thinks fit”. The petitioner No. 1 filed a petition before this Tribunal marked as Petition No. 82 of 2005 challenging the mode of calculation of the license fees by the respondent under the agreement. Indisputably, the Cellular Operators Association of India (COAI) and Association of Unified Access Service Providers of India (AUSPI) and various other operators also filed similar applications.

By reason of a judgment and order dated 7.7.2006, this Tribunal held as under:-

“in our opinion, it would be doing violence to the section if we are to accept the argument of the learned counsel for the 1st respondent that words “as it thinks fit” found in the proviso would allow the government to demand and collect a share of revenue from all the activities of the licensee irrespective of the fact whether such revenue is traceable to the revenue realized from the activities under the license or not.....we are of the opinion that we do not think in the migration package the government had indicated that it would be demanding a percentage of share even in the unlicensed activity of the company. We have already noticed Section-4 of the Telegraph Act does not permit such a demand..... We think it more appropriate that

the matter should be remanded to the TRAI which is the 3rd respondent herein, before whom the government should produce the material relied by it while rejecting TRAI's recommendation so that TRAI can consider the same and send its conclusions to this Tribunal and thereafter, this Tribunal will have the benefit of a comprehensive recommendation of the TRAI after considering the materials relied upon by the government”

It is not in controversy that the said judgment has attained finality. The respondent preferred an appeal thereagainst before the Supreme Court of India which was dismissed by an order dated 19.1.2007 holding as under:-

“Heard the parties.

Pursuant to the direction of the TDSAT in the impugned order, a fresh recommendation has been made by the TRAI. In view thereof, we see no reasons to interfere. The appeal is dismissed. The appellant is, however, given liberty to urge all the contentions raised in this petition before the TDSAT.”

Pursuant to or in furtherance of the observations and directions issued by this Tribunal, in its judgment dated 7.7.2006, the Telecom Regulatory Authority of India (TRAI) made recommendations on different components of revenue

generated from it which should form part of the AGR and which should not form part thereof.

The said recommendations were considered by this Tribunal in its judgment dated 30.8.2007. This Tribunal accepted the recommendations made by TRAI. We would refer to the relevant portions thereof a little later.

The petitioner No. 2 thereafter filed a petition before this Tribunal which was disposed of by an order dated 31.10.2007 (marked as Petition Nos. 289 & 292 of 2007).

By Orders dated 23.10.2007 and 31.10.2007, this Tribunal upheld its earlier judgment.

By a communication dated 17.5.2007 the respondent asked the petitioner to furnish duly audited detailed account in respect of PSTN relating to payments made to the operators pursuant where to calculations were provided on actually paid basis, in the following terms:-

“Sub: Assessment of annual License fee for the financial year 2005-06 in respect of your CMTS license for A.P., Chennai, Delhi, Gujrat, H.P., Haryana, Karnataka, Kerala, Kolkata, M.P., Maharashtra, Mumbai, Punjab, Tamil Nadu, UP (West), license Service Areas.

1. This concerns re-assessment of annual License Fee for the financial year 2005-06 in respect of the CMTS License of M/s Bharti Airtel Ltd. for the license service areas of A.P., Chennai, Delhi, Gujrat, H.P., Haryana, Karnataka, Kerala, Kolkata, M.P., Maharashtra, Mumbai, Punjab, Tamil Nadu, UP(West) license service areas. The following documents – Audited Annual Accounts, Statement of Revenue and License Fee, Reconciliation statements for the financial year 2005-06 and other related documents submitted by the Licensee have been taken into consideration for the assessment.

The summary of the re-assessment is as under:

Service Area	AGR	Revenue Share Due	Revenue Share Paid	Difference (C-D)	Interest on delayed payment calculated up to 31.05.07	Penalty and interest on penalty if any	Total dues (+)/ excess (-)
AP	6266378170	501310254	507297002	-5986748	51670	0	-5935078
Chen.	4771173098	477117310	479771258	-2653948	138789	0	-2515159
Delhi	15416862657	1541686266	1546071590	-4385324	0	0	-4385324
Guj	223956695	222395670	221059736	1335934	495700	0	1831634
HP	1204128403	60206420	61767233	-1560813	12526	0	-1548287
Haryana	1344519786	107561583	110966080	-3404497	0	0	-3404497
Ktka	11410610913	912848873	948598655	-35749782	18089	0	-35731692
Ker.	1648347467	131867797	134854806	-2987009	7152	0	-2979856
Kol.	2506426758	250642676	253112000	-2469325	129007	0	-2340318
M.P.	2869803528	229584282	230832931	-1248649	27558	0	-1221090
Mah.	3948435984	394843598	402526999	-7683401	0	0	-7683401
Mum.	5207917709	520791771	525685756	-4893985	125082	0	-4768903
Punjab	6606785216	396407113	399361720	-2954607	17805	0	-2936802
T.N.	2665965152	266596515	272811395	-6214880	136386	0	-6078494
UP(W)	1669037183	133522975	134739393	-1216418	14442	0	-1201976

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3. The calculation sheets for computation of the AGR and interest amounts are annexed to this letter. It may be noted that there is an excess of Rs.5935078/-, Rs.2515159/- Rs.4385324/- Rs.1548287/-, Rs.3404497/-, Rs.35731692/-, Rs.2979856/-, Rs.2340318/-, Rs.1221090/-, Rs.7683401/-, Rs.4768903/-, Rs.2936802/-, Rs.6078494/- and Rs.1201976/- against A.P., Chennai, Delhi, H.P., Haryana, Karnataka, Kerala, Kolkata, M.P., Maharashtra, Mumbai, Punjab, T.N. and UP(West) license service areas respectively, which will be adjusted against the future License Fee dues of the concerned license service areas on receipt of the details mentioned in Para 7 below and consequent re-assessment of License Fee dues thereafter. It may also be noted that amount of Rs.1831634/- outstanding against Gujrat license service area is due after calculating interest up to 31.05.2007.

4. Attention is invited to Auditor's report on Statement of Revenue & License Fee Annexure-I, Para 3(a) and 3(c) of notes to the Statement of Revenue & License Fee for different quarters of the FY 04-05 for A.P. licensed service area:-

Para 3(a) – “The operator wise revenue share access charges and roaming revenues actually passed on to other service providers have been prepared based on management estimates as segregation of the same is not readily retrievable from the books of account of the circle.”

Para 3(c) – “Call revenue has been segregated into call revenue within the service area, national long distance call revenue and international long distance call revenue based on call traffic pattern information available with the management. Accordingly, the segregated revenue figures based on such estimation in the statement may not be accurate.”

5. Observation of similar nature has been made in the Auditor’s report on Statement of Revenue and License Fee for the FY 05-06 in respect of all the licensed service areas of M/s Bharti Airtel Ltd. (A.P., Chennai, Delhi, Gujrat, H.P., Haryana, Karnataka, Kerala, Kolkata, M.P., Maharashtra, Mumbai, Punjab, Tamil Nadu and UP(West).

6. In view of Para 4 and 5 above, a fresh auditor’s report is required to be submitted for each of the licensed Service Areas.

7. In addition to the above you are directed to furnish the following details and clarifications:

(i) Duly audited quarter-wise operator-wise details of (a) PSTN related call charges (Access charges) actually paid to other eligible/entitled telecom service providers within Indian and (b) Roaming charges actually paid to other operators, during the financial year 2005-06.

(ii) Duly audited quarter wise details of rebates, discount and waivers, other than those agreed to with customers as per Tariff Plans filed with the TRAI.

(iii) Duly audited quarter-wise details of sales tax and service tax billed/collected/paid are required to be submitted.

(iv) Profit on sale of assets on gross basis i.e. without any set off.

8. In the absence of adequate disclosures as above the present assessment of License Fee for the financial year 2005-06 is to be taken as provisional.

9. In case the above details and clarifications are not received within 30 days of the issue of this letter, the deductions already

admitted will be disallowed and License Fee and interest will be re-assessed and supplementary demand shall be issued.

10. The Auditor's report on statement of revenue and License Fee clearly stating that the statement has been prepared in accordance with norms/guidelines contained in the License Agreement is to be submitted.

11. You are directed to make the payment of principal plus interest calculated up to 31.05.2007 amounting to Rs.18,31,634/- (Rupees Eighteen lakh thirty one thousand six hundred thirty four only) in respect of Gujrat license service area forthwith."

The respondent also directed the petitioner furnish details of sales tax and service tax as well as profit on sale of assets on gross revenue basis as also the interest calculated upto 31.5.2007 amounting to almost Rs.18 lakhs.

Indisputably, the Supreme Court of India on appeals having been preferred from the orders of this Tribunal dated 30.8.2007 passed a limited order of stay i.e., "no adjustment shall be made in the mean time".

Whereas the Department of Telecommunications contends that the said order amounts to stay of the operation of the judgment of this Tribunal; according

to the petitioners, the same would amount to an order of status quo in terms whereof, the respondent was divested of its jurisdiction to reopen the assessment of AGR.

Indisputably, relying on or on the basis of the said order of the Supreme Court of India, the interim order of this Tribunal dated 23.10.2007 was prayed for being recalled in terms of an application filed by the respondent which was dismissed by an order dated 13.3.2009, stating—

“In the present case, the interim order was passed by this Tribunal on 31.10.2007 regarding which prayer for recall is being made by way of present application. The ground on which recall is sought is the order of the Supreme Court which only says no adjustments shall be made. The Supreme Court has not granted the prayer of present applicant i.e., applicant in S.L.P. for stay of order dated 7.3.2008, wherein this Tribunal has already considered effect of Supreme Court's order.

Thus, it will be seen that the interim orders passed by the Supreme Court in this matter is similar and is to the effect that no adjustments shall be made. By filing the present

application for recall of the order dated 31.10.2007, the applicant is re-agitating the same issue which has been fully considered and rejected by the Tribunal in its order dated 7.3.2008 referred to above. We see no reason to take a different view. The application is dismissed.”

The impugned demand was made thereafter. It was made on ‘actually’ paid basis. We have noticed hereinbefore that the notice of demand pertains to 17 Circles, out of which 15 Circles are in respect of the first petitioner; whereas the other two Circles being Rajasthan and North East, pertain to the licenses granted to petitioner No. 2. The demand raised as against the petitioner No. 2 was Rs. 599045 + Rs. (-) 116509 only.

Aggrieved by and dissatisfied with the said order dated 13.3.2009, the respondent filed a Special Leave Petition (SLP) wherein an order of stay was passed on 7.12.2009. An application for modification of stay was filed by the petitioner before the Supreme Court of India and by an order dated 7.12.2009, the order of stay was modified to the extent that the petitioner would pay on the existing basis.

The respondent, as the petitioners have demonstrated, had been taking inconsistent and contradictory stands in regard to the method of accounting.

It had applied two different yardsticks in the same financial year, i.e., ‘accrual’ and ‘actually paid’ basis for calculating the amount of license fee, as would be evident from the following examples :

CHART FOR KARNATAKA CIRCLE (PSTN) FOR THE YEAR 2005-06

Quarter	As per DoT Demand Notice (in Rs.)	Calculations on accrual basis by the petitioner (in Rs.)	Calculations on actual basis by the petitioner (in Rs.)	Remarks (Method adopted by DoT) (in Rs.)
Q-1	56,05,00,703	56,05,00,703	55,14,77,512	Actually paid basis
Q-2	56,91,25,540	56,91,25,540	57,58,10,766	Accrued basis
Q-3	63,41,93,036	63,41,93,036	64,74,11,370	Actually paid basis
Q-4	70,46,65,058	70,46,65,058	66,94,79,023	Actually paid basis

CHART FOR KARNATAKA CIRCLE (ROAMING) FOR THE YEAR 2005-06

Quarter	As per DoT Demand Notice (in Rs.)	Calculations on accrual basis by the petitioner (in Rs.)	Calculations on actual basis by the petitioner (in Rs.)	Remarks (Method adopted by DoT) (in Rs.)
Q-1	13,89,82,354	13,89,82,354	14,70,43,520	Actual basis
Q-2	13,65,41,938	13,65,41,938	15,07,12,608	Accrual basis
Q-3	16,60,57,520	16,60,57,520	17,28,98,863	Actual basis
Q-4	16,89,48,930	16,89,48,930	17,28,98,863	Actual basis

**CHART FOR ANDHRA PRADESH CIRCLE (PSTN) FOR THE YEAR
2005-06**

Quarter	As per DoT Demand Notice (in Rs.)	Calculations on accrual basis by the petitioner (in Rs.)	Calculations on actual basis by the petitioner (in Rs.)	Remarks (Method adopted by DoT) (in Rs.)
Q-1	26,96,63,084	26,96,63,084	24,63,89,452	Accrual basis
Q-2	25,45,50,872	25,45,50,872	26,16,41,800	Actual basis
Q-3	32,10,46,591	32,10,46,591	29,93,67,236	Accrual basis
Q-4	38,09,19,929	38,09,19,929	34,76,20,705	Accrual basis

**CHART FOR ANDHRA PRADESH CIRCLE (ROAMING) FOR THE
YEAR 2005-06**

Quarter	As per DoT Demand Notice (in Rs.)	Calculations on accrual basis by the petitioner (in Rs.)	Calculations on actual basis by the petitioner (in Rs.)	Remarks (Method adopted by DoT) (in Rs.)
Q-1	4,75,39,912	4,75,39,912	4,21,04,637	Accrual basis
Q-2	3,99,77,136	3,99,77,136	4,47,08,790	Actual basis
Q-3	4,98,73,343	4,98,73,343	5,03,35,687	Accrual basis
Q-4	5,31,25,687	5,31,25,687	5,26,45,385	Accrual basis

Mr. Ramji Srinivasan, the learned senior counsel appearing on behalf of the petitioners, would urge:-

- (i) The respondent should not have raised a demand on 'actual basis' in stead and place of 'accrual' basis upon making re-assessment of license fee or otherwise.

- (ii) Various components of calculation of license fee which had been excluded in terms of the judgment of this Tribunal dated 30.8.2007 could not have been the subject matter of assessment of the license fee.
- (iii) Adoption of two different yardsticks for revenue and expenditure is arbitrary in nature.
- (iv) The respondent is bound by the judgment of this Tribunal.

Mr.Vineet Malhotra, the learned counsel appearing on behalf of the respondent, on the other hand, submitted:-

- (i) The order of stay passed by the Supreme Court of India must be held to mean that the judgment of this Tribunal was not in force.
- (ii) Re-assessment of AGR had been made in terms of the terms and conditions of the license.
- (iii) The judgment of this Tribunal having been rendered on 30.8.2007, the petitioners are not entitled to any relief as the re-assessment of AGR relates to the F.Y. 2005-06.

This Tribunal, in its judgment dated 30.8.2007 passed in Petition No. 7 of 2003 including Petition No. 82 of 2005, inter alia, held as under:-

15. Inclusion of items of revenue on accrual basis but exclusion of items of cost on actual payment basis.

The petitioners are at pains to point out inconsistency and unfairness in following the practice of taking into consideration revenue on accrual basis while costs are allowed to be deducted on actual payment basis. To demonstrate this it was contended that service tax is included in the revenue on accrual basis but deduction is allowed only on actual payment. This results in difference between revenue booked and deductions made. As a result of this most service providers end up paying licence fee even on the uncollected portion of the service tax. DoT has supported the existing practice. The Authority concluded that service tax is not a revenue for the service provider but service provider is only a collecting agency on behalf of the Government. The inclusion and exclusion on this item should be on accrual basis. The Authority recommended that service tax should be shown on accrual basis both for inclusion and exclusion for the purpose of AGR. It also recommended that interconnection usage are also to be shown on accrual basis both for inclusion and exclusion from the gross revenue for purpose of AGR. We find no reason to differ with the view of the Authority on this point. The recommendation of the Authority is, therefore, affirmed.”

Indisputably, some of the items for the purpose of re-assessment of annual license fee considered by the respondent include the items which, according to this Tribunal could not have been taken in to consideration being outside the scope of telecommunication activities.

From the following chart, it would furthermore appear that the impugned demand is contrary to the order of this Tribunal dated 30.8.2007:-

“Comparative Chart Showing Impugned Demand is Contrary to the TDSAT Judgment dated 30.8.2007

Component of Demand	Covered by TDSAT Judgement dated 30.8.2007
Revenue earned from interconnect usage charge	It also recommended that interconnection usage are also to be shown on accrual basis both for inclusion and exclusion from the gross revenue for purpose of AGR. We find no reason to differ with the view of the Authority on this point. The recommendation of the Authority is, therefore, affirmed.

<p>Revenue from Foreign exchange fluctuations, disincentives and waivers.</p>	<p>According to the TRAI impact of foreign exchange fluctuations, whether upward or downward, on AGR must be ignored. Foreign exchange fluctuation is a contingency which has impact on every business which may have something to do with foreign exchange. Fluctuations in foreign exchange rates have nothing to do with licensed activity of telecom service providers.</p> <p>Union of India, however, submits that incomes accruing on account of foreign exchange fluctuations and which are accounted for in the income statements of the licensee form part of the revenues and hence are subject to levy of license fee by treating it part of AGR. We are unable to accept this.</p> <p><u>Foreign exchange fluctuations do not arise from licensed activity and,</u></p>
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	<p><u>therefore, need not be included in AGR. Secondly, the Union of India does not say anything whether they will permit deduction from AGR if loss occurs on account of such fluctuations.</u></p> <p><u>We affirm the recommendation of TRAI on this point.</u></p>
Bad debts, waivers, discounts	<p><u>Bad debts, waivers or discounts are actual monies lost by the service provider. Therefore, such losses have to be excluded from AGR.</u> Allowing amounts on account of such losses to be included in AGR would mean that while the party incurs loss it has to pay licence fee on the loss also. The recommendation of TRAI in this behalf is, therefore, set aside and we recommend that <u>items under this head have to be excluded from AGR.</u></p>

<p>Inclusion of items of revenue on accrual basis but exclusion of items of cost on actual payment basis</p>	<p>The petitioners are at pains to point out inconsistency and unfairness in following the practice of taking into consideration revenue on accrual basis while costs are allowed to be deducted on actual payment basis. To demonstrate this it was contended that service tax is included in the revenue on accrual basis but deduction is allowed only on actual payment. This results in difference between revenue booked and deductions made. As a result of this most service providers end up paying licence fee even on the uncollected portion of the service tax.....<u>It also recommended that interconnection usage are also to be shown on accrual basis both for inclusion and exclusion from the gross revenue for purpose of AGR. We find no reason to differ</u></p>
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	<p><u>with the view of the Authority on this point. The recommendation of the Authority is, therefore, affirmed.</u></p>
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It would furthermore be of some significance to notice that by reason of one communication, demand had been raised in respect of so many circles on both petitioner Nos. 1 and 2 for a sum of Rs. 17,66,64,731/-.

It is not in dispute that the petitioners had supplied details of the receipts and expenditures as demanded by the respondent on 'actual' basis also.

The respondent in its reply, however, contended that the principles laid down by this Tribunal in its judgment have not assumed finality as appeals have been preferred before the Supreme Court of India.

The Supreme Court of India, as noticed hereinbefore, merely directed that no adjustment should be made in the mean time. The said order, in our considered opinion, does not amount to stay of the operation of the judgment of this Tribunal. If the Supreme Court of India intended to stay the operation of the judgment, it could have said so explicitly. It consciously passed a limited order of stay. It is not within the province of the respondent to expand the scope thereof. If the

respondent intended to obtain any clarification of the said order, it should have approached the Supreme Court of India therefor.

Furthermore, the Supreme Court of India itself in its order dated 11.1.2010, directed that payment should be made on existing basis. The operation of order of this Tribunal having, thus, not been stayed, the same would mean that the directions issued by it were required to be followed in making computation of the license fee.

We may notice that this Tribunal even in its order dated 31.10.2007 directed as under:-

“The petitioner has raised various pleas in this petition. It is submitted that as of today the judgement of this Tribunal dated 30.8.07 holds the field and without prejudice to the various other contentions of the petitioner in this petition at least from today onwards the Respondent No.1 should bill the petitioner on the basis of the law laid down in the said judgement. The learned counsel appearing for respondent is unable to controvert the fact that the judgement of this Tribunal holds the field. Accordingly, I direct that respondent will bill the petitioner at least from today onwards on the

basis of law laid down in the said judgement of this Tribunal dated 30.8.07. This will be without prejudice to the rights and contentions of the parties.”

Yet again, in Petition No. 284 of 2007, by an order dated 23.10.2007, similar observations were made.

The respondent was even bound by the observations made in the said interim orders. An order passed by this Tribunal against the respondent was meant to be followed. It could not have been circumvented, being binding on it.

We have, furthermore, noticed that the method of accounting adopted by the respondent was not in consonance with any known method of accounting. By reason of such amalgam of accounting method, the petitioners have been put to financial loss.

We may furthermore notice that for the period 1.4.2005 to 31.3.2006, the PSTN related call charges passed on to the other operators were Rs.1,226,180,477/-.

We have dealt with this aspect of the matter in Vodafone v. BSNL (P. No. 325 of 2007). In that view of the matter it is not necessary to reiterate the reasonings stated therein.

We, therefore, are of the opinion that the petition should be allowed and the respondent should be directed to adjust accounts on accrual basis so far as the petitioner No. 1 is concerned. The amount which is lying in the hands of the respondent should be refunded with interest @ 12% per annum.

Mr. Malhotra, however, appears to be correct that so far as the petitioner No. 2 is concerned, that it having obtained an order of stay only on 30.8.2007, would not be entitled to any relief, the demand having been made for the assessment year 2005-06. However, petitioner No. 1 having approached this Tribunal in 2003, the petition must be allowed so far as it is concerned.

In the peculiar facts and circumstances of the case, there shall be no order as to costs.

..... J
(S.B. Sinha)
Chairperson

.....
(G. D. Gaiha)
Member