TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 4th March, 2010

Petition No.325 of 2007

Vodafone Essar Mobile Services … 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. C. S. Vaidyanathan. Senior Advocate with Mr. Manjul Bajpai, Ms. Devika Bajpai, Mr. Ashish Yadav, Advocates
For Respondent	:	Mr. Vineet Malhotra, Advocate Mr. Shankar Chabra, Advocate Mr. Anurag Sharma, Advocate

JUDGMENT

S.B. Sinha

What should be the mode of accounting for the purpose of crediting and debiting revenue income and expenditure by a cellular operator is the question involved in this petition.

The petitioner is a licensee having been granted license on or about 13.11.1994 in terms of the provisions of Indian Telegraph Act, 1885 (the 1885 Act). Clause 19 of the said agreement provided for the payment of the license fee.

In the year 1999, the respondent offered a migration package and the petitioner having accepted the same, a fresh license agreement came into being on or about 12.7.1999; in terms whereof the license fee was to be paid on revenue sharing basis.

Clause 2 of the said license defines 'Adjusted Gross Revenue' (AGR). Clause 2.2 reads as under:-

> "For the purpose of arriving at the Ádjusted Gross Revenue" the following will be excluded from the Gross Revenue:-
>
> (i) PSTN related Call charges (access charges) actually paid to Bharat Sanchar Nigam Limited (BSNL) / Mahanagar Telephone Nigam Ltd (MTNL) or other telecom service providers within India.
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> (ii) Roaming revenues actually passed on to other telecom service providers, and

(iii) Service Tax on provision of service and Sales Tax actually paid to the Government; if gross revenue had included the component of Service Tax/Sales Tax."

We may also notice Clause 3.2 of the said agreement which reads as under:-

> `"License fee shall be payable in four quarterly installments during each financial year. Each Quarterly installment shall be paid in advance within 15 days of the commencement of that quarter. This Fee for each quarter shall be paid by the LICENSEE on the basis of own assessment of revenue (on actual basis) for the current quarter subject to a minimum payment equal to the actual revenue share of the previous quarter, duly certified with an affidavit (as per Proforma annexed) by a representative of the LICENSEE, authorized by the Board Resolution coupled with General Power of Attorney. However, for the first quarter of the first year, the licensee shall pay the Licence Fee on the basis of the expected revenue from the SERVICE in the first quarter."

The matter relating to adjustment and payment of difference between the advance payment made and actual amount due and payable was also to be on accrual basis as provided for in Clause 3.4.

We may also notice clause 3.8 which reads as under:-

> "In case, the total amount paid on the self assessment of the LICENSEE as quarterly License Fee for the 4 (four) quarters of the financial year, falls short by more than 10% of the payable Licence Fee, it shall attract a penalty of 150% of the entire amount of short payment. This amount of short payment along with the penalty shall be payable within 15 days of the date of signing the audit report on the annual accounts, failing which interest shall be further charged per terms of **Condition 3.5**. However, if such short payment is made good within 60 days from the last day of the financial year, no penalty shall be imposed."

Clause 5.3(b) provides for preservation of all bills and all other accounting records both electronic as well as hard copies for a period of 3 years from the date of publishing due audited and approved accounts of the petitioner. The respondent issued instructions for payment of quarterly license fee within 15 days of the completion of relevant year on or about 11.10.2002. Indisputably, the petitioner submitted a statement of accounts for Financial Years 1999-2000, 2000-01, 2001-02 in respect of its CMTS license for Delhi on 31.10.2002, as would appear from Annexure 'D'

appended to the composite response filed by the petitioner to the additional affidavit filed by the respondent. The petitioner submitted its annual accounts of auditor's report for the year ending 31.3.2006 on 31.7.2006. On or about 20.9.2006 the respondent informed the petitioner that thereafter operatorwise details would be verified and the proof of payment and the deductions claimed will have to be submitted by the licensee.

Pursuant to the said decision, proof of payment for the quarter April to June, 2006 was submitted. DoT had, from time to time, called for the audited quarterly operatorwise informations which were also supplied.

The petitioner by a letter dated 14.3.2007 stated as under:-

> "This refers to the various DoT letters requiring details of the deduction claimed by Hutch group companies on account of payment to other operators and roaming charges on actual paid basis for the year 2004-05 and 2005-06.
>
> We are in the process of compiling the same and getting them audited from our auditors. Our endeavour is to provide you these details as early as possible. We request you to bear with us till such time.
>
> The deductions claimed so far as per our existing submissions for 2004-05 and 2005-06 are of the amounts which have actually been

paid, though in some cases in the subsequent year. Therefore, it will not result in any shortfall in license fee by us. We, therefore, earnestly request you to kindly reconsider the need of this exercise."

The petitioner thereafter provided audited details of the IUC charges and roaming charges on 'actually' paid basis to other operators for the Financial Year 2004-05. Those details however were for the whole year and not on quarterly basis.

In fact, provisional assessment was made on 2.4.2007 asking the petitioner to furnish various details and clarifications; in response whereto the petitioner once again requested the respondent to reconsider the need for asking it to furnish the operatorwise information on quarterwise basis in terms of its letter dated 3.4.2007.

The audited statement including details of IUC charges and roaming charges on actual payment basis for the other periods had also been furnished. Statement of accounts for the Financial Year 2006-07 was also furnished.

By reason of a demand note dated 29.6.2007, the respondent asked the predecessor in interest of the petitioner to pay a sum of Rs. 6,84,79,739/-, wherein deductions were allowed in such a manner that in one quarter the

deductions of IUC charges and roaming charges paid to other operators was allowed on 'accrual' basis and in another quarter for the same year, the deductions were allowed on 'actual' basis. According to the petitioner, the additional demand of Rs.7,15,95,166/- had wrongly been charged by DoT towards license fee plus interest thereon and the same was arbitrary. The respondent was requested to provide the reasons therefor. A reminder was also sent on 27.8.2007.

On or about 5.9.2007, a demand note was sent for the Financial Year 2005-06 making an additional demand of Rs. 2,34,00,737/- whereto again the petitioner objected in terms of its letter dated 5.9.2007. Reminders were also sent.

It is on the aforementioned premise, the petitioner has filed this petition claiming inter alia the following reliefs:-

"(a) Direct DoT to apply and implement one system of accounting during the whole of the financial year, i.e., either on accrual basis for all four quarters of the financial year or on actual basis for all four quarters of the whole of the financial year for computation of AGR.

(b) Direct DoT to rework / re-compute the impugned Demands / Demand Notes by following only one system of accounting for

the whole of the financial year i.e., either accrual basis or actual basis.

(c) Direct DoT to refund / adjust all the excess amounts wrongfully charged by DoT together with interest wrongfully levied by DoT together with further interest thereon at the same rate as DoT charges interest from the Petitioner per annum computed from the date of the Petitioner having made the excess payment towards IUC Charges and Roaming Charges under the said impugned Demand Notes, until the date of actual refund."

The petitioner in this petition, has, inter alia, filed tables to show that claims by made in DoT in its impugned demand notes were wrongful as by reason thereof the petitioner has been overcharged.

From the Table 'A', it would appear that respondent has wrongfully applied both the accounting system, i.e., 'accrual' basis and 'paid' basis in the different quarters in the same Financial Year, as a result whereof an excess amount of Rs. 29,3810130/- in the case of 'accrual' and an excess amount of Rs. 198288650/- in case of the 'receipt' system were charged for the whole year. Similar incorrect computation by DoT has been highlighted in respect of roaming charges for the F.Y. 2004-05, from a perusal whereof, it would appear that deduction for the first two quarters have been made on 'paid' basis; whereas the deductions for the next two quarters had been made

on ‘accrual’ basis. The same methodology had been applied for the F.Y. 2005-06, which would appear from Table ‘C’, wherein the first two quarters, the ‘receipt’ system of accounting was applied but deductions had been made on ‘accrual’ basis in the next two quarters. For the year 2005-06, however, whereas ‘receipt’ system of accounting has been applied in the first quarter, deduction on ‘accrual’ basis has been made in the rest three quarters.

The summary of the aforementioned deductions, both of IUC charges and roaming charges are as under:-

Quarter	IUC Charges	Roaming Charges
FY 2004-05 Qtr 1	Paid	Paid
FY 2004-05 Qtr 2	Accrual	Paid
FY 2004-05 Qtr 3	Paid	Accrual
FY 2004-05 Qtr 4	Accrual	Accrual
FY 2005-06 Qtr 1	Paid	Paid
FY 2005-06 Qtr 2	Paid	Accrual
FY 2005-06 Qtr 3	Accrual	Accrual

FY 2005-06 Qtr 4	Accrual	Accrual

The inference which can be drawn from the aforementioned chart according to the petitioner, is:-

> "(a) In financial year2004-05 by a sum of Rs. 44,84,16,596 (i.e. sum of Rs. 29,38,10,130/- and Rs. 15,46,06,466/-) having a license fee impact of Rs. 4,48,41,660/- @ 10%; and
>
> (b) In financial year 2005-06 by a sum of Rs. 16,30,23,351/- (i.e. sum of Rs. 13,32,68,624/- and Rs. 2,97,54,727/-) having a license fee impact of Rs. 1,63,02,335/- @ 10%."

According to the petitioner, interest has been levied by the respondent on the aforementioned charges namely a sum of Rs.3,24,60,375/-. In the alternative, the petitioner contends that even if it be assumed that the principle of 'actual paid' during the years in question was to be adopted as correct principle for computing AGR, the impact in relation thereto would appear from the following:

> "(a) In financial year 2004-05 by a sum of Rs. 20,87,46,534/- (i.e. sum of Rs. 19,82,88,650/- and Rs. 1,04,57,884/-) having a license fee impact of Rs. 2,08,74,653/- @ 10%. It is reiterated that the payments actually made in 2004-05 which were pertaining to year 2003-04 and for which benefit had already been taken in 2003-04 on accrual basis have not been included in the year 2004-05; and

(b) In financial year 2005-06 by a sum of Rs. 7,30,70,970/- and Rs. 3,06,75,142/-) having a license fee impact of Rs. 1,03,74,611/- @ 10%."

On the said amount, interest also appears to have been charged.

The question as to whether the revenue receipt as also expenditure incurred in a financial year should receive application of the same system, namely, 'mercantile' or 'receipt' system of accounting came up for consideration before Telecom Regulatory Authority of India (TRAI). It opined that inclusion and exclusion of certain items should be on accrual basis.

Clause 3.2 as inserted in the license agreement dated 11.4.2002, inter alia, provides that license fee shall be paid on the basis of actual revenue (on accrual basis for the quarter). Clause 3.4 provides that the licensee shall adjust and pay the difference between the advance payment made and actual amount duly payable (on accrual basis) of the previous quarter, along with the advance payment for the current quarter.

We may notice that the matter was also considered by this Tribunal in its judgment dated 30.8.2007 passed in Petition No. 7 of 2003.

During the pendency of this petition, representations were made by the mobile operators on several occasions. We may notice that on 12.9.2008. the Tribunal recorded that the parties had been trying to resolve the dispute. On 15.9.2008, the first of such meeting was held. The petitioner provided for summary of the issues. The DoT filed its affidavit on 4.12.2008 stating that details and proof of payment would be required from the year 1999 onwards so as to enable it to verify as to whether the petitioner had acquired any double benefit on the same demand or not. This Tribunal in its order dated 12.2.2009 recorded the petitioner's plea that a uniform basis should be adopted both in terms of revenue as well as payment which was considered 'not to be unreasonably a fair request'. This Tribunal directed the petitioner to furnish the details of claim made on accrual basis as well as the payment actually made for the years 2004-05, 2005-06 and 2006-07. The petitioners were asked to hand over their respective accounts so that the parties could jointly verify the same and come to a joint conclusion as to whether on accrual basis, a 'loss has been caused to the Government'. On the request of the respondent, the petitioner submitted all the requisite details for the years 2004-05, 2005-06 and 2006-07 under cover of its letter dated 9.3.2009. Accordingly, a meeting was held by and between the parties on 23.3.2009. The respondent yet again called upon the petitioner to forward proof of

payments, to which it was pointed out that all the details had been furnished and prior to the filing of this petition no proof of payment had been asked for. However, copies of the bank statement and ledger accounts of the operators as proof of payments was furnished, stating that actual payment made to the operators could be verified from the bank statement and ledgers. Meetings were again held on 23.6.2009, 24.6.2009, 25.6.2009, 27.6.2009 and 29.6.2009. A joint statement was also signed which has been appended as 'Annexure K' to the composite affidavit. A copy of the said joint statement had been produced before us, from a perusal whereof it appears that upon verification, it was found that the petitioner had paid all the amount including the service tax and, thus, there was no question of any double payment by the respondent.

Mr. Vaidyanathan, the learned senior counsel appearing on behalf of the petitioner would contend that the stand of the respondent is clearly illegal as it would appear that although from 1999 onwards, the respondent had been applying the 'accrual' basis and furthermore despite the fact that all details the petitioner maintains its accounts on accrual basis and in that behalf have been submitted, it has been asked to shift to 'actual basis' as a result whereof it lost a substantial amount.

Mr. Malhotra, the learned counsel appearing on behalf of the respondent, on the other hand, would contend that the petitioner should have supplied the requisite informations in time prior to filing its rejoinder to the affidavit. The learned counsel urged that as the petitioner did not raise any objection to the application of 'actual' system of accounting is applied both for expenditure as also revenue, it cannot now be permitted to contend that expenditure should be considered only on 'accrual' basis.

The learned counsel submitted that in view of the fact that this Tribunal, in the AGR matter did not grant any relief of refund of any amount, the petitioner would not be entitled to any relief for all practical purposes.

The core question which arises for consideration is as to whether the respondent should be directed to take into account the 'accrual' basis of accounting for the purpose of reckoning the expenditure.

The petitioner is a licensee. It has been granted license in terms of the provisions of Section 4 of the Indian Telegraph Act. The terms and conditions of license indisputably would be governed thereby.

Clause 3.2 of the license agreement lays down the mode and manner in which the licensees were required to pay the stipulated amount of license fee on revenue sharing basis.

Indisputably, the mercantile basis of accounting is different from that of the ‘receipt’ basis.

In terms of the provisions of the agreement, whereas the revenue is to be received on ‘accrual’ basis; so far as the expenditure part is concerned, the same is to be given effect to on a ‘receipt’ basis.

The conditions of the license which we have noticed heretobefore, provide therefor, but whether the same is reasonable or workable, is the question.

The concept of exclusive privilege contained in Sec. 4 of the Indian Telegraph Act, in our considered opinion, does not carry with it a power on to the Government of India to act unfairly or unreasonably. Any power, conferred on any statutory body must be fair and reasonable. The authority of a statutory body must be exercised rationally. The conditions of license in view of the aforementioned propositions of law, must be such which should be found to be workable and reasonable.

It should ensure a level-playing field. It is beyond any doubt or dispute that whatever expenditure had been shown in the audited statement of account on the basis of mercantile system of accounting was found to have been actually paid by the petitioner. It may be noticed that the parties had

carried out such an exercise in terms of order of this Tribunal. We have also noticed hereinbefore, that in fact, a signed statement has been produced in respect of all the four quarters of F.Ys. 2004-05, 2005-06 and 2006-07 to show that the total amount claimed including IUC and the roaming charges and the amounts paid for all the aforementioned years were the same. It has furthermore been brought on record of this case by the petitioner on the basis of different tables to show wrongful computations made by the respondent in its demand notes wherefrom the impact of over-charging on it both in respect of IUC as also roaming charges became evident. Table 1 reflects wrongful computation in respect of IUC charges for the F.Y. 2004-05. Table 2 represents incorrect computation in respect of the roaming charges for the same year. Similarly, Table-3 and Table-4 show the incorrect computation in respect of IUC charges and roaming charges; whereas Table-5 shows the comparison of the basis adopted by the respondent on 'accrual' and 'paid' in the same quarter. We may also notice that in the petition, the petitioner has furthermore made categorical statements as regards the financial impact as a result of such wrongful accounting.

There is furthermore no doubt or dispute that even TRAI has in its advice categorically stated that the respondent should adopt an uniform system of accounting. Had such a system been introduced, the inclusion and

exclusion of a particular item i.e. either in respect of 'revenue' or 'expenditure' could have been taken into consideration by applying the same system which would have been more workable and would not have occasioned any loss to the petitioner.

This Tribunal in its order dated 30.8.2007 passed in Petition No. 7/2003 opined 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."

Correctness of the said decision is not under challenge. It is also of some significance to notice that if 'accrual' system is made the basis for accounting both for revenue as also expenditure, clause 6.4.8 would be applicable. The respondent in applying the accrual system for the purpose of revenue, in the case of shortfall, in the matter of payment of AGR for any quarter, would be entitled to levy penalty.

The petitioner, or other operators, in a situation of this nature, would not be able to say that in fact, it had not earned a part of the revenue and, thus, no shortfall has occurred.

So far as the submission of Mr. Malhotra, that this Tribunal had issued directions with prospective effect, is concerned, the same was in relation to interpretation of the word AGR. The question before the Tribunal was as to

whether income on certain heads earned by a licensee would come within the purview of the term Adjusted Gross Revenue. It was held several items would not be. In arriving at the said conclusion, this Tribunal had also taken into consideration the recommendations of TRAI. In the aforementioned petition, in fact, this Tribunal was neither called upon, nor rendered any decision in regard to the correctness or otherwise of the accounting system which is required to be followed by the respondent. No direction in this behalf was issued, nor in fact, was necessary to be issued.

A court of law may in its discretion, give prospective effect to its judgment. It is not necessary to consider as to whether a Tribunal can exercise its power in that behalf or not. Ordinarily, however, a person aggrieved by an action on the part of the State, may approach this Tribunal for ventilation of its grievances. In our opinion, that when the grievance is found to be genuine, relief to him should be granted. Giving prospective effect to a judgment is not only an exceptional measure by a court of law, but therefor, ordinarily, reasons have to be assigned and the facts and circumstances of the matter are required to be considered.

It is not in dispute that adoption of different types of accounting may lead to different results. As noticed heretobefore, the same may create new fiscal obligations/liability. It, in a given situation, may also, attract a penal provision.

For the years 1999-2000 and 2002-03 the respondent itself was operating its accounts on 'accrual' basis both in respect of expenditure and revenue. It is also pertinent to notice the observations made by this Tribunal made in its orders. Upon taking into consideration the judgment of this Tribunal dated 30.8.2007 in Petition No. 7 of 2003, it was observed:

> "Keeping in view the aforesaid judgment, as well as the concerns of both the parties, we direct that the petitioner may furnish, if not already furnished, the details of claims made on accrual basis as well as the payments actually made for the years 2004-05, 2005-06 and 2006-07. We also direct Mr. Mr.Sundeep Kathuria,Vice President,Vodafone Essar Mobile Services Ltd., New Delhi and Mr..Amit Katoch,Director (LF), DoT, both present in court, to jointly go over the accounts so given, verify the same and come to a joint conclusion whether on accrual basis there is any loss to the Government. We are so directing because we are concerned that while on the one hand there

should be no loss to the government, there should simultaneously be no inconvenience caused to the petitioner.

Both the parties state that it would take about 4-6 weeks to complete this exercise. We direct both the gentlemen to look into this personally without leaving it to any other representatives/subordinates."

Yet again on 7.7.2009, it was observed:-

"It is agreed by learned counsel for parties that the verification of accounts has been completed in terms of the order dated 12.2.2009. The grievance of the petitioner is that the respondent is not adopting a uniform basis for calculation of AGR for the years 2004-05, 2005-06.

We have already expressed in our order dated 12.2.2009 that asking for a uniform basis is a fair request. The Government should be prepared to accept either accrual basis or actual basis. Counsel for respondent requests for time to seek instructions on this aspect. Accordingly, as per his request adjourned to 21.7.2009 for directions."

The respondent's counsel sought for time twice to seek instructions in the matter. It, then filed affidavit accepting that it would proceed on actual basis. At that juncture, a prayer was made that even on actual basis, the extra amount may either be refunded or adjusted and in that context. It was observed:-

> "Petitioner has made a further prayer that the excess amount paid by it should be either refunded or adjusted together with interest. On this issue, the account have to be gone into and vide our order dated 12.2.2009, we had directed the petitioner to furnish the details of claims made on accrual basis as well as payments actually made for the years 2004-05, 2005-06 and 2006-07.
>
> Mr.Amit Katoch, Director (LF), Department of Telecommunications who is present in the Court, submits that the petitioner is required to furnish accounts for periods prior to 2004-05 also. We have put it to him that in these circumstances, this need not be done and the Government should take a uniform decision regarding all operators. He requests for time to seek instructions in the meanwhile.
>
> It is pointed out that an appeal against this Tribunal's judgement dated 30.8.2007 is pending in the Supreme Court. The above will be subject

to the decision of the Supreme Court in the said appeal."

The respondents, therefore, were dilly-dallying the matter. They had even gone to the extent of applying two different systems of accounting in the same year. It will bear repetition to state that no manipulation was found on the part of the petitioner. The accounts were gone into and examined with reference to 'payable' and 'paid' basis but no discrepancy was found. With its rejoinder, the petitioner has furnished the details of statements again from the year 1999-2000. But before us, the same prayer was repeated once over again by the respondents.

This trend shows that the respondent itself was not very sure as to which system should be followed. It is in the aforementioned context that in our opinion, the advice of the TRAI must be held to be acceptable.

For the reasons aforementioned, this petition is allowed, and the respondent is directed to adjust accounts on 'accrual' basis.

The question however which arises further for consideration is whether we should direct payment of interest. Mr. Vaidyanathan has referred to two

decisions of this Tribunal to contend that even in the matter of interest, the reciprocity should be maintained.

In this Tribunal's Order dated 11.11.2005 in Petition No. 48 of 2004, this Tribunal have accepted the argument of reciprocity in the matter of payment of interest, and "in line with our general approach in all such matters, we would not like old cases to be reopened as the benefit of refund/payments on this account will not be passed on to the consumers, nor can the tariffs which have taken into account all these payments be altered retrospectively. The petitioners have pointed out that large amounts of bills are not paid in time by the respondents and when paid after considerable delay there is no payment of interest whereas an interest of 24% per annum compounded quarterly is charged from them on their dues. We direct that this should be on reciprocal basis. Both parties are directed to enter into agreement regarding the rate of interest which will be applicable for both the parties on reciprocal basis."

We are, however, of the opinion that in the facts and circumstances of this case, interest of justice would be subserved if the amount required to be refunded by the respondent be directed to be paid with interest @ 12% p.a. from the date of filing of this petitioner till realization. We say so as the

petitioner has filed this application only in 2007. We may also notice that except this petitioner and another, no other operator has accepted the basis of accounting. Furthermore, the issue was a contentious one.

This petition is allowed to the aforementioned extent. In the peculiar fact and circumstances of this case, there shall be no order as to costs.

……....., J
(S.B. Sinha)
Chairperson

…….....
(G. D. Gaiha)
Member