

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

**Dated 1<sup>st</sup> October, 2014**

**Appeal No. 2 (C) of 2013**

Dish TV India Ltd., New Delhi	... Appellant
Vs.	
Telecom Regulatory Authority of India	... Respondent

**Along with**

**Appeal No. 3 (C) of 2013**  
(With M.A.No. 103 of 2013)

Bharat Business Channel Ltd.	... Appellant
Vs.	
Telecom Regulatory Authority of India	... Respondent

**BEFORE :**

**HON'BLE MR. JUSTICE AFTAB ALAM, CHAIRPERSON**  
**HON'BLE MR. KULDIP SINGH, MEMBER**

For Appellant [in Appeal no. 2(c) of 2013]	:	Mr.Aman Lekhi,Sr. Advocate Mr.Vivek Sarin,Advocate Mr. Tejveer Singh Bhatia, Advocate Mr.Ashok Kumar Singh,Advocate Mr.Upender Singh Thakur,Advocate Mr.Yatin Grover,Advocate for Singh & Singh Law Firm LLP
For Appellant [in Appeal no. 3(c) of 2013]	:	Mr.S. Ganesh,Sr.Advocate Mr.Sandeep S. Ladda, Advocate Mr.Soumik Ghoshal, Advocate
For Respondent	:	Mr. Saket Singh, Advocate

## **ORDER**

### **Kuldip Singh:**

The present appeals have been filed challenging the Telecommunication (Broadcasting and Cable) Services (Sixth) (The Direct to Home Services) Tariff Order, 2013 (No. 2 of 2013) (hereinafter referred to as Tariff Order) dated 27.5.2013 issued by Telecom Regulatory Authority of India (TRAI).

2. The appellants are engaged in the business of providing Direct to Home (DTH) services under a license issued by Ministry of Information and Broadcasting, Government of India under Section 4 of the Indian Telegraph Act, 1885.

### **Facts of the case**

3. The Tariff Order has been issued by TRAI on 27.05.2013 in exercise of powers conferred by sub-clauses (ii), (iii), (iv) and (v) of clause (b) of sub-section (1), and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), read with notification No. 39 dated 9<sup>th</sup> January 2004 by the Government of India, Ministry of Communication and Information Technology (Department of Telecommunications).

Sub-clauses (ii), (iii), (iv) and (v) of clause (b) of sub-section (1), and sub-section (2) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) are as under :

“(ii) notwithstanding anything contained in the terms and conditions of the license granted before the commencement of the Telecom Regulatory Authority (Amendment) Act,2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers.

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication services;

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885(13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India;

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.”

4. Clause 4 of the impugned Tariff Order prescribes tariff for supply and installation of Customer Premises Equipment. The same is as under :

“4. Tariff for supply and installation of Customer Premises Equipment.--- (1) Every direct to home operator shall, without prejudice to the provisions of the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010 (No.1 of 2010), offer to every ordinary subscriber the standard tariff package, for supply and installation of the Customer Premises Equipment, conforming to the Indian Standard, if any, set by the Bureau of Indian Standard, specified in the Schedule.

(2) In addition to the option available under the Telecommunication (Broadcasting and Cable) Services (Fourth) (Addressable Systems) Tariff Order, 2010 (No.1 of 2010), the ordinary subscriber shall have option to acquire the Customer Premises Equipment at the rate and the terms and conditions specified in the Schedule and the direct to home operator shall, on receipt of request from the ordinary subscriber, supply and install the Customer Premises Equipment at the premises indicated by the subscriber.”

As per Tariff Order, the subscribers are to be given three options.

These options are as under :

“Standard Tariff Package for Supply and Installation of  
Customer Premises Equipment for DTH service  
(see clause 4)

## OPTION – I

Sl.	Particulars	Tariff
1.	Rent per month per Customer Premises Equipment for the first three years	Rs. 71.75 (exclusive of taxes)
2.	After three years from the date of installation	No rent. The Customer Premises Equipment shall become the property of the subscriber except smart card/viewing card
3.	Security Deposit (Refundable)	Rs. 500/-
4.	Deduction from Refundable Security Deposit	Nil
5.	Installation Charges	Nil
6.	Activation charges	Nil
7.	Smart Card/Viewing Card Charges	Nil
8.	Repair and Maintenance Charges for three years from the date of installation	Nil

Note :-

1. After the expiry of three years from the date of installation of Customer Premises Equipment, the entire security deposit shall be refunded to the ordinary subscriber without any deductions.

2. The full security deposit without any deduction shall be refunded to the subscriber, if he returns the Customer Premises Equipment, at any point of time, within a period of three years, provided that the Customer Premises Equipment has not been tampered with.

3. There shall be no installation charges or re-installation charges except in case of shifting of connection.

## OPTION – II

Sl.	Particulars	Tariff
1.	Rent per month per Customer Premises Equipment for the first three years	Rs. 65.50 (exclusive of taxes)
2.	After three years from the date of installation	No rent. The Customer Premises Equipment shall become the property of the subscriber except smart card/viewing card
3.	Security Deposit (Refundable)	Rs. 1000/-
4.	Deduction from Refundable Security Deposit	Nil
5.	Installation Charges	Nil
6.	Activation charges	Nil
7.	Smart Card/Viewing Card Charges	Nil
8.	Repair and Maintenance Charges for three years from the date of installation	Nil

Note :-

1. After the expiry of three years from the date of installation of Customer Premises Equipment, the entire security deposit shall be refunded to the ordinary subscriber without any deductions.

2. The full security deposit without any deduction shall be refunded to the subscriber if he returns the Customer Premises Equipment, at any point of time, within a period of three years, provided that the Customer Premises Equipment has not been tampered with.

3. There shall be no installation charges or re-installation charges except in case of shifting of connection.

## OPTION – III

Sl.	Particulars	Tariff
1.	Rent per month per Customer Premises Equipment for the first three years	Rs. 60.66 (exclusive of taxes)
2.	After three years from the date of installation	No rent. The Customer Premises Equipment shall become the property of the subscriber except smart card/viewing card
3.	Security Deposit (Adjustable)	Rs. 500/-
4.	Amount of Security Deposit refunded on return of the Customer Premises Equipment	As per attached Table-A
5.	Installation Charges	Nil
6.	Activation charges	Nil
7.	Smart Card/Viewing Card Charges	Nil
8.	Repair and Maintenance Charges for three years from the date of installation	Nil

Note: -

1. If the ordinary subscriber returns the Customer Premises Equipment, any time before the completion of three years from the date of installation of Customer Premises Equipment, the Security Deposit shall be refunded as per the amount specified in the Table-A, provided that the Customer Premises Equipment is not tampered with.
2. In case of disconnection of direct to home service before the last day of the month, balance security deposit shown as refundable at the end of that month, in Table-A shall be refunded on return of Customer Premises Equipment.
3. There shall be no installation charges or re-installation charges except in case of shifting of connection."

5. By Notification No. 39 dated 9<sup>th</sup> January 2004 issued by Ministry of Communication and Information Technology, the Central Government notified the broadcasting services and cable services to be telecommunication service. The said notification is as under :

“S.O. 44(E).—In exercise of the powers conferred by the proviso to clause (k) of sub-section (1) of section 2 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997), the Central Government hereby notifies the broadcasting services and cable services to be telecommunication service.

[Notification No. 39 issued by Ministry of Communication and Information Technology dated 9 January 2004. S.O. No. 44(E) issued by TRAI, vide F. No. 13-1/2004]”

Further, vide S.O. 45(E), the Central Government entrusted the additional functions to the Telecom Regulatory Authority of India, as under :

#### “ORDER

S.O. 45(E).—In exercise of the powers conferred by clause (d) of sub-clause (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997) (hereinafter referred to as the Act), the Central Government hereby entrusts the following additional functions to the Telecom Regulatory Authority of India, established under Sub-section (1) of Section 3 of the Act, in respect of broadcasting services and cable services, namely:

(1) Without prejudice to the provisions contained in clause (a) of sub-section (1) of section 11 of the Act, to

make recommendation regarding —

(a) the terms and conditions on which the 'addressable systems' shall be provided to customers

Explanation—For the purposes of this clause, 'addressable system' with its grammatical variation, means an electronic device or more than one electronic devices put in an integrated system through which signals of cable television network can be sent in encrypted or unencrypted form, which can be decoded by the device or devices at the premises of the subscriber within the limits of authorisation made, on the choice and request of such subscriber, by the cable operator for that purpose to the subscriber.

(b) the parameters for regulating maximum time for advertisements in pay channels as well as other channels.

(2) Without prejudice to the provisions of sub-section (2) of section 11 of the Act, also to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures.

[Notification No. 39 issued by Ministry of Communication and Information Technology, dated 9 January 2004. S.O. No. 45(E) issued by TRAI, vide F. No. 13-1/2004]"

Section 2(k) of the TRAI Act, prescribes the definition of "telecommunication service", which is as under :

" k. "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services."

“Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.”

### **Submissions**

6. The contentions of the appellants are as under :
  - i. That the respondent-TRAI has no jurisdiction to fix the tariff for the supply of Set Top Boxes (STBs).
  - ii. No basis has been given for arriving at the price of STBs.
  - iii. The issues raised by the appellants have not been addressed.
  - iv. Even if the TRAI had such powers to fix the tariff or rental for STBs, it has not been exercised lawfully, reasonably and in a non-arbitrary manner and after considering the relevant matters which are required to be considered in price fixation.

### **Issue of Jurisdiction**

7. Mr. Aman Lekhi, learned senior counsel appearing for Dish TV, in appeal no. 2(C) of 2013, submitted that sub-clauses (ii), (iii), (iv) and (v) of clause (b) of sub-section (1) of section 11 of the Telecom Regulatory Authority of India Act, 1997 are not relevant for the purposes of present case and the relevant section is sub-section (2) of Section 11, as per which TRAI can prescribe rates for “Telecommunication Services”.

8. Mr. Lekhi submitted that any service, unlike the STBs, is by very definition intangible in nature and would have no physical characteristics. He referred to the definition of "services" as given in 'BusinessDictionary.com', which is as under :

"Services-Intangible products such as accounting, banking, cleaning, consultancy, education, insurance, expertise, medical treatment, or transportation.

Sometimes services are difficult to identify because they are closely associated with a good; such as the combination of a diagnosis with the administration of a medicine. No transfer of possession or ownership takes place when services are sold, and they (1) cannot be stored or transported, (2) are instantly perishable, and (3) come into existence at the time they are bought and consumed."

He also referred Black's Law Dictionary (Sixth Edition), which defines "services" as under :

"services - Things purchased by consumers that do not have physical characteristics (eg. Services of doctors, lawyers, dentists, repair personnel)."

Referring to the above, he argued that for a service, no transfer of possession or ownership takes place when it is sold. The set top boxes (STBs) have physical characteristics, the ownership of which

gets transferred to the consumers on sale, and are, therefore, goods and not services.

9. Mr. Lekhi referred to the explanatory memorandum to the impugned Tariff Order, as per which CPE<sup>1</sup> forms part of the services provided by the operators. The relevant para 11 is as under:

“Jurisdiction

11. The quality of service regulations for DTH and DAS as well as tariff order applicable for all the addressable systems, clearly provides that the service providers providing broadcasting and cable TV services using an addressable system are required to give option to the subscribers for procuring the CPE/STB on outright purchase basis or hire purchase basis or rental basis as per the scheme, if any, made by the Authority in this behalf. Moreover, due to variegated technologies deployed by different operators, a consumer desiring services of a particular operator generally needs to get the CPE from that operator and so, the CPE forms an integral part of the services provided by the operator. The Authority is of the view that the standard tariff of package prescribed for CPE is part and parcel of tariff dispensation. Therefore, in accordance with the provisions already made in the regulations and tariff order, the Authority has come up with this standard tariff package for the CPEs which is to be mandatorily offered by all the DTH operators to their subscribers.”

He argued that the authority has taken a view that CPE forms an integral part of the service due to a ‘Fallacy of Division’ that occurs when one reasons logically that something true for the whole must be

---

<sup>1</sup> Customer Premises Equipment

true of all or some of its parts and the converse of which is a 'Fallacy of Composition', which arises when one fallaciously attributes a property of some part of a thing to the thing as a whole. Mr. Lekhi submitted that the system is different from the services that may be provided, based on the system.

10. Mr. Lekhi drew our attention to Article 7 of the license agreement executed by the Appellants and Ministry of I&B, Govt. of India<sup>2</sup>. Sub clause 7.1 of the said clause is as under :

"7.1 The open architecture (non-proprietary) Set Top Box, which will ensure technical compatibility and effective interoperability among different DTH service providers, shall have such specifications as laid down by the Government from time to time."

Referring to the above, Mr. Lekhi submitted that the impugned Tariff Order imposes an additional condition in the form of commercial interoperability, which is in addition to the license condition of technical interoperability as specified in clause 7.1. He submitted that as per section 11 (1) (b) of the TRAI Act, TRAI has to ensure compliance with the license conditions and under section 11 1 (a), it can make recommendations to licensor on conditions of the license, but TRAI cannot issue orders modifying or imposing additional license conditions. The impugned tariff order is doing indirectly what cannot be done directly.

---

<sup>2</sup> (page 40 of the paper book in Appeal No. 2 of 2013)

11. Mr. S. Ganesh, learned senior counsel appearing for Bharat Business Channel Ltd., in appeal no. 3(C) of 2013, also submitted that the STBs are 'goods' and do not form part of 'service'. He questioned the existence of powers of TRAI to fix the tariff or the rental for 'goods'. He argued that STBs can as well be sold by a 3<sup>rd</sup> party for which no license is required and TRAI would have no power to regulate the price of that. He further submitted that as per clause 4 of the impugned Tariff Order it becomes mandatory for a DTH service provider to supply customer premises equipment which TRAI cannot do as it cannot ask the telecom licensee to engage in an activity which is not part of the licensed activity.

Mr. Ganesh with regard to his submission relied on the Bharat Sanchar Nigam Ltd. and Anr. Vs. Union of India (UOI) and Ors. (2006) 3 SCC 1, the relevant para is as under :

"84. As we have said Article [366\(29A\)](#) has no doubt served to extend the meaning of the word 'sale' to the extent stated but no further. We cannot presume that the Constitutional Amendment was loosely drawn and must proceed on the basis that the parameters of 'sale' were carefully defined. But having said that, it is sufficient for the purposes of this judgment to find, as we do, that a telephone service is nothing but a service. There is no sales element apart from the obvious one relating to the hand set if any. That and any other accessory supplied by the service provider in our opinion remain to be taxed

under the State Sales Tax Laws. We have given the reasons earlier why we have reached this conclusion.”

He argued that the STBs being goods like the handsets do not form part of the services.

12. Mr. Saket Singh, learned counsel appearing for TRAI, however, argued that delivery of TV signals by a DTH operator is not possible without the STBs. The Customer Premises Equipment including STBs are, therefore, part of the services which is an integrated whole and cannot work as stand-alone services without STBs. With regard to his submission that STB is a part of the service, he relied on the judgment of Tribunal in *Tata Sky Limited Vs Union of India and Anr.*<sup>3</sup>

13. Mr. Saket Singh, relying on the judgment of the Tribunal in *Tamilnadu Progressive Consumer Center Vs. Ministry of Information & Broadcasting & Ors.*<sup>4</sup> , submitted that as there was no technical compatibility between STBs being used by different DTH service providers, the impugned tariff order provides for commercial interoperability and an exit route to the subscribers not satisfied with the service of a particular operator.

---

<sup>3</sup> Petition No. 129(c) of 2007

<sup>4</sup> Petition No. 60(c) of 2010. Though a Civil Appeal No. 9035/11 is pending before the Hon'ble Supreme Court of India, Mr. Saket Singh submitted that same was challenged by TRAI limited to the issue of the Tribunal giving direction to TRAI which was stayed by the Hon'ble Supreme Court.

14. To put the case in proper perspective, we feel that it is necessary to explain briefly how TV signals are delivered to the subscribers by 'Direct To Home' (DTH) service providers.

The impugned Tariff Order defines 'Customer Premises Equipment' (CPE) and set top box (STB) as under:

"(c) "Customer Premises Equipment" means the equipment, components and accessories installed at the premises of the subscriber to enable the reception of any broadcasting service offered through an addressable system and includes ----

(i) the set top box and the remote control for set top box;  
and

(ii) the dish antenna, where such dish antenna is essential for availing such service,-----

but shall not include a television receiver set, computer or any such end equipment;

(h) "set top box" means a device, which is connected to, or is part of a television and which allows a subscriber to receive in unencrypted and descrambled form subscribed channels through an addressable system;"

Direct to home operator and direct to home service are defined as under:

"(d) "direct to home operator" means an operator licensed by the Central Government to distribute multi channel TV programmes in Ku band by using a satellite system directly to subscriber's premises without passing through

intermediary such as cable operator or any other distributor of TV channels;

(e) "direct to home service" means distribution of multi channel TV programmes by using a satellite system by providing TV signals directly to subscriber's premises without passing through an intermediary such as cable operator or any other distributor of TV channels;"

15. TV channels, comprising of content in the form of various programs, are uplinked by broadcasters of such TV channels to a satellite system [e.g. "INSAT-4B"]. The satellites in turn, send the signals back towards earth, where these are received by ground equipment that form part of the 'head-end' of distributors of these TV signals. These distributors can be MSOs as in the case of cable TV or DTH operators as in the case of the appellants<sup>5</sup>. These distributors receive and decode signals using equipment called Integrated Receiver and Decoder boxes (IRDs), which are supplied by the broadcasters. In the case of MSOs, signals are distributed to the subscribers using optical fibers and co-axial cables either directly or through another intermediary called a Local Cable Operator (LCO), who provides the last mile access and various other services to the subscriber.

In the case of DTH operators, the signals received from the broadcasters are compressed using a suitable compression algorithm

---

<sup>5</sup> There is another kind of distributor called HITS operator [Head-end in the Sky] who, like DTH operators, uplinks the signals again to the satellite. However, this is different from DTH as in this case, the signals are not received directly by the subscribers at their homes but received by LCOs who then carry it to the subscribers on physical cables.

such as MPEG2<sup>6</sup> or MPEG4, re-encrypted, and uplinked to a satellite system using 'Ku Band'.<sup>7</sup> These are then directly downloaded by subscribers at their homes using dish antennas and taken to the STBs kept near the TVs, by a physical cable<sup>8</sup>. The STBs decompress and decrypt signals of those channels that are authorized for viewing by the subscribers. TVs, which are connected to the STBs, then display such channels as are subscribed. The Set Top Boxes are centrally controlled from the head-end of the distributors.

### **Findings on the issue of jurisdiction**

16. We now consider the rival submissions with regard to the jurisdiction of TRAI to regulate the price of STBs.

17. In the case of telephone services, the telephone handset is freely available in the market. The vanilla<sup>9</sup> telephone set has a very limited role to play, which is converting the electrical signals into voice and vice versa and sending the required digits dialed by the subscriber. In such a case, the subscriber can subscribe to the services from a service provider and buy the telephone set of its choice from the market without much difficulty. Same is true for a mobile handset and

---

<sup>6</sup> MPEG is a standard defined by Motion Pictures Expert Group. MPEG4 being a later standard is more efficient in terms of bandwidth used.

<sup>7</sup> One of the frequency bands used for satellite communications

<sup>8</sup> Though rare, a STB may also be inbuilt in a TV.

<sup>9</sup> A term used in common parlance for an equipment that has bare minimum features and performs a basic function.

the mobile services. However, in the case of set top boxes there is an issue of technical compatibility between STBs of one operator vis-à-vis another due to (i) different compression techniques used, and (ii) different encrypting and encoding standards used which are largely propriety.

18. It is not in dispute that even today there is no technical compatibility between the STBs being supplied by different DTH operators. STBs cannot be freely bought in the market as the STB meant for one operator will not work with any other operator. It is nobody's case that STBs are freely available in the market. That being the case, the same has to be provided by service providers as part of its services. It has a direct nexus and is inextricably linked with the delivery of service and no delivery of service is possible without it. These are as inextricably linked as the equipment used and the medicines provided during a surgery are with the surgery. The service from the subscriber's perspective is the viewing of channels on the TV. We cannot agree with the submissions of learned Sr. Counsel for the appellants with regard to the STB being separate from service, as without a STB, all that a subscriber will get is compressed and encrypted signals that cannot be viewed and which will be no service from its point of view. To view the signals, in other words to get the service that it subscribed to, it will have to go to the same very service

provider to get a STB. The submission that TRAI could not have regulated the price of STB if it was sold separately cannot be accepted as due to lack of interoperability, sale of STBs by 3<sup>rd</sup> party is a hypothetical suggestion.

19. With regard to the submissions that a service can have no physical characteristics and a STB can be sold separately as a good, we may note that in case of *BSNL Vs UOI (Supra)*, in the case of a SIM<sup>10</sup> card, though it has physical characteristics, Hon'ble Supreme Court had remanded the matter to the Sales Tax Department for determination on issue regarding SIM Cards in the light of observations contained in the judgment. In para 87 of the judgment, it observed as under:

"In determining the issue, however the Assessing Authorities will have to keep in mind the following principles: If the SIM Card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon."

In case of *Vodafone Essar Cellular Ltd. Vs. Asstt. CIT*,<sup>11</sup> it was held that a transaction by which a mobile service operator provides SIM cards

---

<sup>10</sup> Subscriber Identity Module. The card is inserted in the mobile handset to get mobile service.

<sup>11</sup> (2010) Tax LR 618 (Ker)

to distributors (who in turn supply them to customers) is not one of sale of goods. A SIM card merely enables the customer to obtain access to the mobile phone service provided by the operator and apart from that is of no value to the subscriber.

We note that in case of *Tata Sky Limited Vs Union of India and Anr. (supra)*, the Tribunal, while holding that license fees can be recovered based on income arising only from licensed activities and cannot include other income of the licensee within the sweep of licensed activities for calculation of license fees, still held that the STB necessarily forms part of the petitioner's telecommunication services. The Tribunal held that the STBs are must for the de-encryption of the signals received by consumers and without this box, the signals cannot be enjoyed by the consumers. The relevant parts of the judgment are as under:

“Admittedly the license in the present case has been granted to the petitioner under this provision. The provision applies only to establishing, maintaining and working telegraphs and the license envisaged under this provision to be granted in favour of any person has to be in relation to such activity only. When the license has to be in relation to such activity only, it follows that the license fee can be recovered based on income arising from such activities. The proviso under which the license has been granted in the present case has to relate to the activities of establishing, maintaining and working

telegraphs and income from such activities alone can be subjected to license fee. **In other words Government's privilege to issue license and right to charge license fee arises only from Section 4 referred to above, other services, if they are being rendered by the petitioner, are outside the license for which no license is required by the petitioner. Under law the government has power/privilege to grant license only for the activities mentioned in the said provision. It follows that it will have power to charge license fee only from income derived from such activities and it cannot include other incomes of the licensee within the sweep of the licensed activities for calculation of license fee.** In the judgment of this Tribunal to which reference has been made already, this Tribunal had occasion to elaborately deal with this question. It was observed that the power of the Government in issuing license is controlled by provisions of the National Telecom Policies and the Telegraph Act. Following observations contained in the said judgment bear reproduction:"

**"GROSS REVENUE"**

"The Gross Revenue shall include all revenues accruing to the LICENSEE on the account of goods supplied, services provided, leasing of infrastructure, use of its resources by others, application fee, installation charges, call charges, late fees, sale process of instruments (or any terminal equipment including accessories), hand sets, band width, income from Value Added Services, supplementary services, access of interconnection charges, any lease or rent charges for hiring of infrastructure etc. and any other miscellaneous items including interest, dividend etc. without any set off of related items of expense etc."

The definition of Gross Revenue in the Broadcasting License issued to the Petitioner reads as follows:-

“3.1.1 Gross revenue for this purpose would be gross inflow of cash, receivable or other consideration arising in the course of ordinary activities of the Direct to Home (DTH) enterprise from rendering or services and from the use by others of the enterprise resources yielding rent, interest, dividend, royalties, commissions etc. Gross revenue shall, therefore, be calculated without deduction of taxes and agency commission, on the basis of billing rates, net of discounts to advertisers. Barter advertising contracts shall also be included in the gross revenues on the basis of relevant billing rates. In the case of licensee providing or receiving goods and services from other companies that are owned or controlled by the owners of the licensee, all such transactions shall be valued at normal commercial rates and included in the profit and loss accounts of the licensee to calculate its gross revenue.”

“This item regarding sales of set top boxes and accessories is mentioned in the said Form D. According to the petitioner income from this item needs to be excluded for purposes of calculation of license fee while according to the respondent the income derived from sale of these items must be included in the gross revenue for purpose of calculation of license fee. **After hearing counsel for parties I am of the view that looking at the nature of the item in question it has to be held that it is a part of the service being rendered by the petitioner. Whenever the petitioner has to provide a DTH connection in any household i.e. to any consumer, the consumer has to buy the set top box and a dish from the petitioner. Without these two items the consumer cannot receive signals. Set top box is a must for de encrypting the signals which are received by a consumer. Without this box the signals cannot be enjoyed by the consumer. Similarly, a dish is necessary for receiving the encrypted signals. So these two items are part and parcel of the DTH service which the petitioner renders. Without them the service cannot be rendered.** Clause 3.1.1 of license uses the words “for rendering of service”. Thus what is necessary for rendering service must form part of licensed activity and income from it

will be liable to be included in gross revenue. **Looking at this from another angle a set top box has no independent use. It has to necessarily form part of the petitioner's DTH service.** What is part of the service becomes part of the licensed activity. The petitioner cannot render the licensed activity without providing a dish and set top box to consumers. Therefore, income derived from sale of these items has to form part of total income on which license fee is payable." (emphasis supplied)

In the case of Essel Shyam Communication Ltd. Vs. Commissioner of Income Tax and Commissioner of Income Tax Vs Essel Shyam Communication Ltd.<sup>12</sup> , Hon'ble High Court of Delhi, while examining the issue of what would form "telecommunication services" for the purpose of exemption under Section 80 IA of the Income Tax Act, 1961 observed :

"Sale of TV Camera, Air Conditioner, generator sets per se or on standalone basis would not qualify for deduction 80IA read with sub-section (4) clause (ii). On the other hand, in case the assessee has been awarded a contract for providing telecommunication service, network of trunking and broadband/internet services and while and for executing the said contract, generator sets, air conditioner etc. were sold as a part of a complete package, then the income earned may qualify for deduction under Section [80IA](#). Therefore, each contract and nature thereof has to be examined. **It has to be ascertained whether it was a case of supply of goods or it was a case where the assessee was providing qualifying services which mandated and required inextricably or as an necessary requirement, (under the same**

---

<sup>12</sup> (2012) ILR 5 Delhi 306

**contract or under a different contract), sale/supply goods to operationalize and use/provide the telecommunication services. In case, the sale of goods was inextricably linked, had nexus and was connected with the primary purpose of providing or starting telecommunication services, the assessee will be entitled to benefit under Section 80IA. Otherwise, the assessee will not be entitled to exemption under Section 80IA on the transaction. Whether the commodities/goods could have been also purchased from a third party may not be relevant and the determinative factor in many a case. It is the predominant or primary reason or purpose why the contract was entered into, and whether it has direct nexus and is inextricably linked with providing the qualifying activities, is and would be the determinative factor.** The substantial question of law is accordingly answered. An order of remit is passed, with a direction to the tribunal to decide the issue/question afresh in the light of the above observation/ratio."

(Emphasis supplied)

Mr. Lekhi and Mr. Ganesh both argued that in the case of Tata Sky, the issue under examination was computation of AGR for the purpose of license fees, which was calculated as percentage of AGR and the issue was not that of jurisdiction as in the present case. Mr. Ganesh with regard to his submission relied on Haryana Financial Corporation and Anr. Vs. Jagdamba Oil Mills and Anr.<sup>13</sup>

20. We are unable to agree with the submission of Mr. Ganesh that as per clause 4 of the impugned Tariff Order it becomes mandatory for a DTH service provider to supply customer premises equipment which

---

<sup>13</sup> (2002) 3 SCC 496

TRAI cannot do as it cannot ask the telecom licensee to engage in an activity which is not part of the licensed activity. We note that the Tribunal, while examining the issue of technical interoperability and commercial interoperability of the equipment supplied by the DTH operators in case of *Tamilnadu Progressive Consumer Center Vs. Ministry of Information & Broadcasting & Ors.(supra)*, found that DTH operator (as respondent no.8 was in that case) was bound to supply the same. The relevant para is as under:

“145. It is, however, difficult to agree with the submission of the Learned Counsel for respondent No. 8 that the supply of STB is not a statutory condition. If that be so, it was not necessary for it to supply. It could have asked the consumers to purchase it from the market. But once the conditions of license provided for end to end service and it’s job is not only to decoding the signal and not only uplinking and downlinking but also render services so as to comply with the compatibility clause. It was bound to do so.”

21. To summarize, we find that the STB has a direct nexus and is inextricably linked with the delivery of service and no delivery of service is possible without it. A vanilla STB can only be used to decompress and decode the signals for viewing on a TV and has no other standalone value in the hands of the subscriber. There being no technical interoperability between the STBs provided by different service providers, the same has to be compulsorily taken from the DTH operator as part of the DTH service and is, therefore, a part and parcel

of the service provided by the DTH operators. That being the case, the respondent-TRAI has jurisdiction under section 11 of the TRAI Act to regulate the tariff of the same along with other elements of CPE.

### **Submissions on merit of the tariff order**

22. Mr. Lekhi submitted that the costing of STB is without basis, and relevant material and circumstances have not been taken into consideration; no open house was held to consider the issues raised by the appellants and the impugned Tariff Order was passed in undue haste and hurry.

23. Referring to the definition of 'Customer Premises Equipment', Mr. Lekhi submitted that this definition of CPE is different from the way TRAI has used it in the impugned Tariff Order and when TRAI speaks of CPE what they mean is STB. He argued that this in itself shows that there was no application of mind while framing the impugned Tariff Order.

24. He further submitted that as per explanatory memorandum with the impugned Tariff Order, total cost of CPE has been taken as Rs. 2250/-. He referred to the response provided by Dish TV India Ltd. to the

respondent's draft tariff order<sup>14</sup> and submitted that the cost of STB as per customs department is in the range of Rs.2000-2500 for a plain vanilla box on which an additional duty (CVD) based on this retail price is asked. As per cost sheet submitted on 21.6.2013 to TRAI, the price per CPE (inclusive of taxes) works out to Rs. 4654/-. He submitted that important elements of cost that include cost of antenna, cable, LNBF, viewing card and connectors etc., have been totally ignored; these items being imported, price is also subject to the fluctuation of dollar rate; custom duties have not been taken into consideration.

25. Mr. Lekhi referred to a letter dated 21.06.2013 written by appellants to the respondent enclosing costing of CPE along with relevant invoices and bill of entries of the same. This letter is in response to letter of the respondent dated 18.06.2013. He submitted that when the respondent passed the Tariff Order on 27.05.2013, it did not have the details of costing of appellant and therefore, it had no basis for passing the order.

26. Both Mr. Lekhi and Mr. Ganesh submitted that the price of STB is subsidized by the service providers. This is recovered from the subscriber

---

<sup>14</sup> Appeal No. 2(c) of 2013 (page 254)

in the form of subscription fees. TRAI has wrongly fixed the tariff of STB on the basis of such subsidized price of one DTH operator. Referring to the explanatory memorandum with the impugned Tariff Order, Mr. Ganesh submitted that TRAI has itself recorded the factum of subsidy.

27. Mr. Lekhi submitted that by ignoring the issues raised by the appellants in its response to the draft Tariff Order, the respondent has acted arbitrarily and in violation of the Article 19(1)(g) of the Constitution that guarantees a 'modicum of profit' to the appellant. With regard to his submission, he relied on the judgment of Supreme Court in *Shree Meenakshi Mills Ltd. Vs Union of India and Bihar Cotton Mills Ltd. Vs. Union of India*,<sup>15</sup> and *Shri Malaprabha Co-op. Sugar Factory Ltd. Vs. Union of India and Another*.<sup>16</sup>

28. It was further submitted by Mr. Lekhi that even if the respondent's version of STB's cost were assumed, the authority is forcing the DTH companies to bear the subsidy burden of Rs. 1250 to Rs. 1750 upfront. Financing of these subsidies has not been taken into consideration. There is no protection to the appellant in the event customer defaults before paying off all the installments and items of CPE even if recovered will only have a scrap value as no customer will

---

<sup>15</sup> (1974) 1 SCC 468

<sup>16</sup> (1994) 1 SCC 648

accept a second hand box for the service. As the objective of the Tariff Order is commercial interoperability, the respondent is encouraging the customer to switch services without paying the full cost of the box, which would inflict heavy losses on appellant.

Appellant is also required to provide repair and service free of cost in addition to the above. The issue of free repair and service is totally unacceptable to the appellant and though it raised this issue emphatically and unequivocally, there is no mention of the same in the explanatory memorandum with the Tariff Order. The regulation of pricing is required in case of a market failure which is not the case for DTH services. Mr. Lekhi argued that the issue is not addressed except for a vague reliance on protecting the interest of the consumer.

29. Arguing on the same lines, Mr. Ganesh submitted that the cost of CPE for Bharat Business Channel Ltd. is Rs. 3917.99 [page – 22 of the paper-book in appeal No.3(C)/2013]. This cost is based on the rate of 1 US \$ being between Rs. 55/- and Rs. 56/- and is subject to the fluctuations of this rate. There are various fees and taxes paid to the government [details at page 23 of the paper book]. He referred to the comments / suggestions on the draft Tariff Order submitted by the appellant on 2.5.2013 [from pages 133 to 139 of the paper book] and letter dated 20.06.2013 in response to TRAI letter dated 18.6.2013

vide which the information regarding value of CPE was provided. He referred to the counter affidavit filed by the respondent as per which the stand of the respondent is that since appellant is offering the services in a bundled form, it can spread its costs on the bundled services.

30. Mr. Ganesh drew our attention to the Direct to Home Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulations, 2007, Clause 4 which is as under :

“4. Option to provide Direct To Home Customer Premises Equipment on outright purchase or hire purchase or rent.--  
----- (1) Every direct to home operator shall give an option to every person making request under regulation 5 to make available to him, the Direct To Home Customer Premises Equipment conforming to the Indian Standard set by the Bureau of Indian Standards as applicable, on outright purchase basis or hire purchase basis or rental basis, ---”

Referring to the above clause, Mr. Ganesh submitted that as per this clause, CPE is to be supplied on outright purchase or hire purchase basis or rent basis but the impugned Tariff Order runs contrary to this regulation because the rental arrangement is tantamount to higher purchase agreement.

31. Mr. Ganesh additionally submitted that the equipment of the

appellant- Bharat Business Channel Ltd. is fully technically compliant and interoperable and therefore, this price control should not be made applicable to the appellant. However, in our view, for an equipment to be interoperable, it has to work seamlessly with the equipment of others, which is obviously not the case.

32. Mr. Saket Singh, learned counsel appearing for the respondent- TRAI submitted that the concept of commercial interoperability is part of DTH Broadcasting Services (Standards of Quality of Service and Redressal of Grievances) Regulations, 2007. He submitted that the impugned Tariff Order provides standard tariff package, which is to be mandatorily provided to the subscribers. As per him, this tariff package is without prejudice to the provisions of the Tariff Order of 2010 as this standard tariff package is in addition to all the other schemes given by the DTH operators.

33. He further submitted that the Tariff Order under challenge is for a vanilla STB and the appellants are free to fix the tariff for premium STBs. He submitted that basis on which standard tariff package has been worked out is given in para 22 of explanatory memorandum [page 66 of the paper book in appeal No. 2(C) of 2013]. He submitted that all the comments of the stakeholders have been addressed in paras 5 to 10 of the explanatory memorandum. He

argued that a similar tariff order in case of MSOs in DAS areas, in which price of STB was taken as Rs. 1750/- , is in force and in even in present case only two out of the six DTH operators have challenged the same.

34. We have considered the submissions of the rival parties. Para 22 of the explanatory memorandum to tariff order gives the parameters used to formulate the standard tariff package as under:

“

- i. The total cost of CPE has been taken as Rs. 2250/-
- ii. Life span of CPE has been taken as 3 years.
- iii. The residual value has been taken as nil.
- iv. Rental per month is based on cost of CPE on Equated Monthly Instalment (EMI) Basis @ 15% per annum(@1.25% per month) for a period of 36 months.
- v. In options where the security deposit is to be refunded, the interest on security deposit has been adjusted in the rental.
- vi. In options where the security deposit is to be adjusted, the interest per month on balance security deposit has been adjusted in the rental.”
- vii.

The rationale for taking the cost of CPE as Rs. 2250/- is explained in para 19 of the E.M. (explanatory memorandum). However, the heading of para 19 is “**Cost of STB considered for prescribing the standard tariff package**” (emphasis supplied). In the same para words “MPEG4 and DVBS2”, which are standards used in

case of STBs, are used with CPE. As per the tariff order, the definition of CPE is as under:

(c) "Customer Premises Equipment" means the equipment, components and accessories installed at the premises of the subscriber to enable the reception of any broadcasting service offered through an addressable system and includes ----

(i) the set top box and the remote control for set top box;  
and

(ii) the dish antenna, where such dish antenna is essential for availing such service,--  
but shall not include a television receiver set, computer or any such end equipment;

As is apparent from the definition, CPE has certain elements in addition to the STB. It is not clear whether the cost of such elements, which are the dish antenna, LNBF, Cable, connectors, viewing card etc., have been considered by the TRAI in the tariff order. It appears otherwise as CPE seems to be equated with STB in the E.M. In para 19, while justifying the figure of Rs. 2250/-, it is stated that the cost of electronic items is falling but there is no mention of the fluctuation in foreign exchange rates which has been on the upside lately. Bharat Business Channel, appellant in appeal 3/2013, has also raised the issue of activation and installation costs, distribution cost and trade margin (page 133 of paper book at para 3.5 page 137).

35. We note from the para 7 of the E.M. that the respondent has recorded the factum of subsidiary but there is no mention how the cost of this subsidy will be financed. Para 7 is as under:

“7. On the aspect of cost of CPE, the operators have stated that the cost of CPE considered in the draft tariff order is lesser than the actual cost in procuring, activating and installing of CPE at the subscriber’s premises and also there is wide variation in the prices. It has been mentioned that DTH operators are offering CPEs between Rs.1600 to Rs.2200 and the subsidy on CPE is in the range of Rs.2200 to Rs.2700. It has also been stated that the hardware cost of CPE works out to be Rs. 2250 and installation cost, dealer margin and cost of smart card should be taken as Rs. 1250.”

36. The stand of the respondent, as can be seen from the counter filed by it<sup>17</sup>, is that appellant is offering the services in a bundled form and can spread its costs on the bundled services which include the programming service. The relevant para is as under:

“25.....since the appellant is offering its services in a bundled form, the bundle containing both the programming content and hardware such as CPE to receive the content, the forbearance at retail level enables the appellant to spread over its various costs on to the bundled services. In view of this fact, the expenditure side of the hardware (CPE) cannot be seen in isolation of the pricing of the bundled service which includes programming service.....”

---

<sup>17</sup> Page 146 of paper book in appeal 3(C) of 2013, para 25.

37. There is an apparent contradiction in the above stand and the main objective of the tariff order which is commercial interoperability. In other words, if a subscriber is not satisfied with the service of an operator or wants to change the operator due to any reason, it is not stuck with the cost of the CPE, it can return the CPE and get its security back at any time. Let us test the proposition of spreading the cost of CPE over bundled service by taking an example where the subscriber surrenders the service say after 3 months. The rent that the operator will get for CPE under option 1 would be Rs. 215.25 (@ Rs. 71.75 per month). Though, a subscriber can opt for only free to air channels for a subscription of maximum Rs. 100/- p.m., assuming that it takes some paid content also and pays a monthly subscription of Rs. 200/- for channels. Even then, the operator would get a total of Rs. 815.25 from which it has to meet its operational expenditure including cost of content as well as the installation charges and distributor commissions. Assuming that it is able to recover the CPE, will it be able to use a second hand CPE again and will a customer accept a second hand CPE? In our opinion, one way to address this issue can be to permit the DTH operators to supply recovered/refurbished CPE under the standard tariff order and the subscribers may not insist on new CPE if they want this tariff. However, we may clarify that this is just one example and the respondent is free to address the various issues as it may deem fit. Though all these issues have been raised by

the appellants, in our view the same have not been satisfactorily addressed by the respondent.

38. In view of the above, we find that some elements of cost have not been taken into account and issues raised by the appellants have not been fully addressed by the respondent while passing the impugned tariff order and the same is ,therefore, not tenable. The impugned tariff order is accordingly set aside. However, we make it clear that it will be open to the respondent-TRAI to issue a fresh tariff order after taking into consideration the inputs provided by the appellants and addressing the issues raised by them.

Parties to bear their own costs.

.....  
**(Aftab Alam)**  
**Chairperson**

.....  
**(Kuldip Singh)**  
**Member**

/NC/