

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

Dated 30th May, 2018

Telecom Petition No. 418 of 2014

M/s World Phone Internet Services Pvt. Ltd., New DelhiPetitioner
Vs.
Union of India, New DelhiRespondent

BEFORE:

**HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER**

For Petitioner : Mr. Harish V. Shankar, Advocate
Ms.Nisha Mohan Das, Advocate
Ms.Rati Varma, Advocate

For Respondent : Mr. Apoorv Kurup, Advocate
Mr.Avinash Rathi, Advocate
Ms.Nidhi Mittal, Advocate

ORDER

1. **By A. K. Bhargava, Member:** Petitioner holds a license for providing internet service (including internet telephony) since 8-4-2002. Initially under the license agreement no license fee was payable (License fee was waived) till 31.10.2003, subsequent to which the Petitioner was liable to pay a nominal license fee of Rs. 1 (Rupees One Only) per annum. At the time of the

Agreement, the Petitioner was required to provide a Bank Guarantee for a sum of Rs. Two Crores Only, which was later reduced to Rs. One Crore. At the time when the License fee at the rate of 6% was imposed by the Respondent, the Petitioner was asked to furnish a Bank Guarantee for Rs. 20 Lakhs which was, under protest, furnished by the Petitioner.

2. The Respondent, vide notification dated 3.3.2006 amended the conditions of the License by which a license fee of 6% was imposed as a percentage of the AGR. The Petitioner made payments at separate times under protest. By notification dated 29.6.2012, the Respondent further intimated about increasing the license fee to first 7% of the AGR for the period 1.7.2012 to 31.03.2013 and thereupon from 2013-14 to 8% of the AGR.
3. The Respondent has made demands of Rs 42,44,123 for FY 2005-06 and 2006-07 and Rs. 6,70,804 for FY 2007-08 against which the petitioner made various representations and the respondent issued various reminders. Subsequently, vide letter dated 18-9-2014 the respondent encashed the FBG amounting to Rs 20,00,000. Aggrieved by the actions of the respondent, the

petitioner has filed this petition on 23-9-2014 with a number of prayers as listed below

- a) Quash the letters dated 05.08.2014 & 04.09.2014.
- b) Restrain the Respondent from encashing the Bank Guarantee being BG No. 6005IBGI5070135 dated 01.10.2007.
- c) Restrain the Respondent from cancelling the License being Agreement No. 820-511/2002-LR, dt. 8.4.2002.
- d) Restrain the Respondent from taking any action including encashment of Bank Guarantee and Cancellation of the License being Agreement No. 820-511/2002-LR, dt. 8.4.2002 for non-payment of license fees.
- e) Set aside and quash the notification dt. 29.6.2012 whereby the Respondent has unilaterally imposed a license fee of 7% from 1.7.2012-31.03.2012 and from 2013-14, 8% of AGR.
- f) Pass an ad-interim ex-parte order staying the operation of the impugned notification dt. 29.6.2012;
- g) Pass an ad-interim ex-parte order staying the operation of letter dt. 5.8.2014 whereby the Petitioner has been asked to

submit interest, penalty and interest on penalty on alleged delayed payment for the period from FY 2005-2006 to 2007-08 calculated on a self-assessment basis upto date of payment as well as pay quarterly License Fee for the period FY 2008-09 to FY 2013-14 with interest, penalty and interest on penalty failing which the Petitioner has been threatened with termination of license and encashment of Bank Guarantee provided by it to the Respondent.

4. Subsequently, on 13-5-2015, following issues were framed after hearing both the parties
 - a) Whether Over the Top (OTT) Services offered by Google, Viber, Yahoo and Tango are not services that are similar or in fact exactly in the nature of the services being provided by the Petitioner?
 - b) Whether the said OTT Services provided have been subjected to any fee or is any revenue being generated from them that enures to the benefit of the Licensor (Respondent)?

- c) Whether the provisions of the OTT services have caused any losses to the Petitioner and/or the Respondent herein?
 - d) Whether in view of the non-regulation of such OTT services, the Respondent is entitled to claim License Fee from the Petitioner?
 - e) Whether the Petitioner is liable to pay interest, penalty and interest on penalty on alleged delayed payment for period FY 2005-2006 to 2007-2008?
 - f) Whether the Petitioner is liable to pay quarterly license fee for period 2007-09 to 2013-14 with interest, penalty and interest on penalty?
 - g) Whether the impugned letters dated 05.08.2014 and 04.09.2014 are lawful and valid?
 - h) Whether the present petition is infructuous or not?
5. Learned counsel for petitioner Mr. Harish Vaidyanathan's case is that no license fee is leviable at all on the petitioner by the respondent. In support of his case, his first argument is that OTT players who provide same or similar services do not pay any license fee and are not bound by many other constraints that an

ISP-IT licensee is saddled with. Hence imposition of license fee vitiates the level playing field and is discriminatory. His second argument is that imposition of license fee at 6% of AGR and later at 7/8% is bad in law on various counts but mainly on account of there being no proper consultation as per the provisions of law. We examine both these propositions in detail.

5. The petitioner provides internet services as well as Internet Telephony services. Internet Telephony is a service to process and carry voice signals offered through public Internet by the use of Personal Computers (PC) or IP based Customer Premises Equipment (CPE) connecting the following:-

(a) PC to PC; Within or outside India

(b) PC in India to Telephone outside India

(c) IP based H. 323/ SIP Terminals connected directly to ISP nodes to similar terminals; within or outside India."

Internet Telephony is a different service in its scope, nature and kind from real time voice services as offered by other licensed operators like BSO, CMSO, NLDO, ILDO. Accordingly, a certain regulatory framework has evolved over a period of time. In parallel, with the advent of technology and innovations, number of OTT services have emerged that occupy important place in digital space. The term over-the-top (OTT) refers to applications and services which are accessible over the internet and ride on operators' networks offering internet access services e.g. social networks, search engines, amateur video aggregation sites etc. OTT service providers neither operate a network nor lease network capacity for service provision. They simply use a licensed network and they themselves are not regulated. Scope of OTT services is pretty wide but some of them do provide services that are similar to the telecommunication services provided by the licensed telecom service providers, only difference being that such OTT services are provided to the users as applications carried over the internet using the network infrastructure of licensed TSP. Impact of these OTT services on the licensed operators has been both ways; on one hand usage

of network has gone up, on the other hand many services provided by licensed operator have been substituted by OTT players. OTT players also deny that any issue of discrimination is involved that requires hard regulations. They rely on innovation and consumer interest as reasons to justify that they be not subjected to hard regulations. Apparently, there are complex and multiple policy issues involved in determining whether to regulate, what to regulate and how to regulate such OTT services. The policy formulation and development of appropriate regulatory framework to support the policy is the privilege and domain of the state or the licensor and the regulator. Litigation cannot be a tool or substitute for such an exercise. We are given to understand that both licensor and regulator have undertaken such an exercise in respect of OTT services and the petitioner if so advised may espouse its viewpoint there. What petitioner wants is to negate one regulatory framework (to which he is a party by agreement) because another regulatory framework or policy is not in place. This will actually amount to re-writing existing regulation and or pre-empting the exercise of developing new regulatory framework. We are not persuaded to tread such

a path. Accordingly issues (i) to (iv) are disposed of with the comment that they require no intervention from this tribunal.

6. Learned counsel for the petitioner has also argued against imposition of any license fee, beginning with the notification dated 3-3-2006 vide which respondent amended the license condition regarding license fee to be imposed at 6% instead of zero. His main challenge is on the ground that (a) the Agreement provides for a "Review" of the condition and "impose license fee". Review of an Agreement clearly entails a process of consultations (b) TRAI recommendations came only in 2007 and recommendations of the TRAI cannot be sought ex post facto. (c) Moreover giving effect to the amendment dated 3-3-2006 retrospectively from 1-1-2006 is not just and correct. In all fairness he submitted that this notification dated 3-3-2006 was challenged by ISPAI in petition 119 of 2006 and was decided by Judgment dated 30-8-2007. Issue of consultation has been dealt with in that judgment and the petitioner's challenge was rejected. This judgment has attained finality and even if there are new

points to be agitated, the status cannot be changed. In view of the facts, we find that no useful purpose will be served to discuss the issue of imposition of license fee at the rate of 6% of AGR any further.

7. Petitioner's challenge to respondent's letter dated 29-6-2012 increasing license fee to 7/8% is also based on lack of proper consultation and that issues related to non-level playing were not considered. This order was challenged by petition no. 429 of 2012 and this Tribunal in judgment dated 12-1-2012 held that para 2 of the impugned order is not sustainable. Learned counsel for the petitioner contended that based on discussions in the said judgment the whole impugned order is not sustainable. Stand of the learned counsel for respondent has been that as per the AUSPI judgment (2011) 10 SCC 543, once a licensee has accepted the terms and conditions of a license, he cannot question the validity of the terms and conditions of the license before the Court. Be that as it may, we note the para 3 of the order dated 29-6-2012 which states that "**Necessary amendment(s) to the License Agreement(s) to above effect**

will be issued in due course of time". No amendment to this effect has been shown to have been issued to the petitioner. Hence, the rate of 7/8% is not applicable in respect of the license fee payable by the petitioner in absence of any amendment in relevant terms and condition of the license. We however hasten to add that the petitioner is liable to continue to pay license fee at 6% in accordance with terms and condition of the license and the amendment dated 3-3-2006 to the license.

8. The other part of the matter relates to the interest, penalty and interest on penalty. Petitioner's submission that no interest or penalty is payable because no principal in terms of license fee is justified stands rejected anyway in view of the discussions above. The respondent has raised a demand of Rs. 42,44,123 for FY 2005-06 and 2006-07 and Rs. 6,70,804 for FY 2007-08. These demands arise out of the late payment made by the petitioner. Learned counsel for the petitioner argued that the interest imposed is to be seen as "penal" and should be dealt with under the provision for penalty in the Telegraph Act, Section 20A. Learned counsel for the respondent contends that in view

of the TDSAT judgment dated 30-8-2007 having attained finality. whole of the amendment dated 3-3-2006 has to be implemented as such. He further submits that the interest and penalty has been imposed in accordance with the amended clause 13.5.7 and 13.4 (A) (e) and (h) of the notification dated 3-3-2006. Since express provision has been made in the amended license terms and conditions for charging interest for delayed payment, penalty and interest on penalty and the demands have been raised in terms of these provisions, we are unable to hold them illegal and invalid as prayed for by the petitioner.

9. In view of the above, we summarize our directions in respect of the issues framed (as in para 3) as follows
 - (a) Issues (i) to (iv) are disposed of with the comment that they require no intervention from this tribunal.
 - (b) Issues (v) to (viii) are decided in favor of the Respondent with the observation that the rate of 7/8% is not applicable in respect of the license fee payable by the petitioner in

