TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 23rd April, 2015

<u>Petition No.7 of 2003</u>
(M.A.No.331 of 2011)

Association of Unified Telecom
Service Providers of India & Others …Petitioners

Vs

Union of India & Anr. …Respondents

<u>Along With</u>

P No.82 of **2005**;
P. No. 57 **of 2006**;
P. Nos. 284, 289,290, 291, 292 **of 2007**;
P. Nos. 33, 34, 42, 249, 256 **of 2008**;
P. Nos. 69, 151, 201, 233, 234, 235, 244 **of 2009**;
P. No. 106 **of 2010**;
P. Nos. 388, 474, 475, 476, 477, 478, 479, 480 **of 2011**;
P. Nos. 43, 97, 98, 99, 100, 101, 102, 103,104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 150, 170, 171, 172, 173, 174, 175, 175, 176, 177, 178, 179, 180, 181, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 232, 233, 234, 235, 236, 237, 239, 434, 460, 466, 846, 849, 854, 855, 941 **of 2012;**
P. Nos.1, 2, 3, 4, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 90, 91, 96, 101, 109, 113, 140, 141,142,143,144,145,146, 147, 148, 149, 150, 396, 374 **of 2013 and**
P. No.183 **of 2014.**

<u>BEFORE</u>:

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

For Petitioners

(in P.Nos. 82/2005, 284/2007, 69/2009, & 201 of 2009) : Mr. Manjul Bajpai, Advocate
Mr. Shashwat Bajpai, Advocate

(in P.Nos.43/2012, 198-217 of 2012, 845 & 846 of 2012) : Mr. Meet Malhotra, Sr. Advocate
Ms. Shally Bhasin, Advocate
Mr. Chaitanya Safaya, Advocate

		Mr. Lakshmeesh Kamath, Advocate
(in P.Nos.96/2013, 101/2013 & 109/2013)	:	Mr. Mayank Grover, Advocate
(in P.Nos.42/08, 106/2010, 476 & 477 of 2011, 218-224 of 2012)	:	Mr. Meet Malhotra, Sr.Advocate Mr. Ravi S. S.Chauhan, Advocate Mr. Prateek Dahiya, Advocate Ms. Pallak Singh, Advocate Mr. Anant Ramdhyani, Advocate
(in P.Nos.7/2003, 108-118 of 2012, 941/2012, 854/2012, 855/2012)	:	Mr. Ramji Srinivasan, Sr. Advocate Ms. Manali Singhal, Advocate Mr. Santosh Sachin, Advocate
(in P.Nos.480/2011, 45-59/2013, 140-150/2013 & 396/2013)	:	Mr. Ramji Srinivasan, Sr. Advocate Mr. Mansoor Ali Shoket, Advocate Ms. Vibha Dhawan, Advocate Mr. Kunal Singh, Advocate
(in P.Nos.249/2008, 256/2008)	:	Mr. Meet Malhotra, Sr.Advocate Ms. Manali Singhal, Advocate Mr. Santosh Sachin, Advocate
(in P.Nos.1-4 of 2013, 69/2009, 434/2012, 460/2012,183/2014)	:	Mr. Dayan Krishnan, Sr.Advocate Ms. Gunjan Malaviya, Advocate Mr. Anand Raja, Advocate Mr. Amit Gupta, Advocate Ms. Sumati Jumrani, Advocate
(in P.No.150/2012)	:	Ms. Jyoti Dastidar, Advocate
(in P.Nos.90 & 91/2013)	:	Mr. Percival Billimoria, Advocate Ms. Abhiroop Datta, Advocate Mr. Atul N., Advocate Mr. Sumer V. Talwar, Advocate
(in P.Nos.232-239 of 2012)	:	Mr. Gopal Jain, Sr.Advocate Ms. Stephanie V. Sonawane, Advocate Mr. Gaurav Wadera, Advocate

(in P.Nos.170-181 of 2012)	:	Mr. Gopal Jain, Sr.Advocate Ms. Stephanie V. Sonawane, Advocate Mr. Gaurav Wadera, Advocate Mr. Vaibhav Choudhary, Advocate
(in P.Nos.233/2009, 234/2009, 235/2009, 232-239 of 2012, 284/2012)	:	Mr. Manjul Bajpai, Advocate Mr. Shashwat Bajpai, Advocate
(in P.Nos.475/2011, 97-107/2012, 33/2008, 34/2008)	:	Dr. A.M. Singhvi, Sr. Advocate Mr. Kavin Gulati, Sr. Advocate Mr. Manjul Bajpai, Advocate Mr. Tarun Gulati, Advocate Mr. Sparsh Bhargava, Advocate Mr. Shashwat Bajpai, Advocate
(in P.Nos.847-853 of 2012 & 151 of 2009)	:	Mr. S. Ganesh, Sr. Advocate Mr. Kavin Gulati, Sr. Advocate Mr. Manjul Bajpai, Advocate Mr. Tarun Gulati, Advocate Mr. Anupam Mishra, Advocate Mr. Sparsh Bhargava, Advocate Mr. Shashwat Bajpai, Advocate
(in P.Nos.57/2006, 474/2011)	:	Mr. Ramji Srinivasan, Sr. Advocate Mr. Manjul Bajpai, Advocate Mr. Shashwat Bajpai, Advocate
(In P.No.374 of 2013)	:	Mr. Bhadrish S. Raju, Advocate
(In P.No.455 of 2013)	:	Mr. Rajender Yadav, Advocate
(in P.No.183 of 2014)	:	Ms. Sumita Jumrani, Advocate for Mr. Amit Gupta, Advocate
For respondents – UOI(DoT)	:	Mr. P.S. Narasimha, ASG with Mr. K. Parameshwar, Advocate Mr. Abhay Prakash Sahay, Advocate Mr. Ishaan George, Advocate Mr. Vishwajith Sadananda, Advocate Ms. Somya Rathore, Advocate

ORDER

By Aftab Alam, Chairperson

Introduction

What would be the licensor's consideration, in terms of percentage share in the licensee's gross revenue for the licence granted under section 4 of the Indian Telegraph Act, 1885? That is the broad question (with a very large number of sub-heads) that arises for consideration in this batch of petitions filed by a number of telecom operators.

The past proceedings

In order to outline the limits of the controversy as it stands at present, after the litigation has already gone over for more than a decade, it will be useful to have a brief look at how the matter has proceeded since its beginning. The genesis of the dispute lies in the "migration package" offered by the Government to the licensees by its decision dated 22 July 1999 that came into effect from 1 August 1999. The offer allowed the licensee to 'share' with the Government a certain percentage of its revenue annually, in lieu of payment of a fixed amount (determined through auction), as licence fee. All the licensees, without exception,

accepted the Government offer[1]. In pursuance of the migration package that introduced the "revenue sharing regime" the licences were amended by incorporating the definition of "Adjusted Gross Revenue" (AGR), a certain percentage of which was annually payable by the licensee as the licence fee. The licensees found that the definition of AGR as inserted in the licences, and especially its application in raising demands for licence fees by the department of telecommunication (DoT), was very expansive. A bunch of petitions thus came to be filed both at the instance of individual licensees/operators and their associations assailing *the validity of the definition of AGR* and the demands of licence fees raised by the DoT on that basis. According to the licensees, AGR could only relate to the revenue directly derived from telecom operations licenced under section 4 of the Telegraph Act but it was defined in the licences in such inclusive and wide terms that it allowed the licensor/ the Government of India to have a share in the licensees' incomes from business activities that were neither covered by nor had any connection with the licence granted under the Telegraph Act; as a matter of fact for carrying on those business activities no licence of any kind was required. It was contended on their behalf that *the definition of AGR was, therefore, ultra vires section 4 of the Telegrah Act. Further, section 4 of the Telegraph Act and*

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[1]. Which was hailed by many as a decision that saved the telecom industry that was at that time almost on the brink of collapse under unbearably high licence fees resulting from some very unrealistic bidding made for obtaining the licences.

the definition of AGR given in the licences were in violation of articles 14 and 19 (1) (g) of the Constitution of India. The Tribunal upheld the licensees' contention and by judgment and order dated 7 July 2006 observed and held as under:

> "A careful reading of the Section indicates that the consideration contemplated therein is only for the privilege the Government has i.e. to establishing, maintaining or working of a telegraph and not beyond that. Therefore, if the Central Government thinks it fit to transfer this privilege for a fixed sum of money and the licensee accepts that demand, there can be no further dispute but if Government chooses to take a percentage share of the gross revenue of the licensee as its consideration then it is logical to conclude that such sharing can be only of gross revenue derived from the transferred privilege of establishing, maintaining and working of telecommunication. In our opinion, it would be doing violence to the Section if we are to accept the argument of the learned counsel for the 1st Respondent that words "as it thinks fit" found in the proviso would allow the Government to demand and collect a share of revenue from all the activities of the licensee irrespective of the fact whether such revenue is traceable to the revenue realized from the activities under the licence or not. We will shortly indicate at appropriate place that it was not the thinking of the Government itself at various stages that it wanted to demand a share in the non-licensed activities of the licensee.
>
> In our opinion the interpretation given by the learned ASG to the language of proviso to Section 4 of the Telegraph Act is neither contextually correct nor could it be logical/reasonable when considered bearing in mind the rights and obligations of the parties under the National Telecom Policies as also the Migration Package to which reference will be made hereinafter."

The Tribunal further observed that in defining what would constitute AGR there was no proper consideration of the recommendations by the Telecom Regulatory Authority of India (TRAI) as required under the provisos to section 11 (1) of the Telecom Regulatory Authority of India Act, 1997, for, the DoT had declined to

accept the TRAI recommendations on the basis of a consultation paper submitted by a private (non-statutory) consultant engaged by the Government that was not brought to the notice of TRAI. Accordingly, by its aforementioned judgment the Tribunal remanded the matter to TRAI to consider which specific heads of inflow should or should not form part of AGR and send its conclusions to the Tribunal.

The Tribunal's judgment dated 7 July 2006 was taken to the Supreme Court in appeal[2] by the Union of India. The appeal was admitted but there was no stay of the operation of the Tribunal's order. Hence, even while the appeal was pending, TRAI proceeded with the matter and submitted the report dated 13 September 2006 to the Tribunal containing the recommendations (supported by reasons) as to which of the different heads of revenue should form part of AGR for the Government to claim its percentage share in the licensee's gross revenue.

When the Supreme Court was apprised of the submission of the TRAI report to the Tribunal, it dismissed the appeal preferred by the Union of India by passing the following order on 19 January 2007.

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

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[2] Civil Appeal no.84 of 2007

On receipt of the report from TRAI, the Tribunal allowed the parties to file their responses to the recommendations made by TRAI and then proceeded to hear the matter finally. In this second round before the Tribunal, relying upon the last sentence in the Supreme Court order an attempt was made on behalf of the Union of India to reopen the principal issue in the controversy as to the legitimacy of including revenue derived from non-licenced business activities in the definition of AGR. But the Tribunal firmly rejected the Union's plea to re-agitate the issue, observing that with the dismissal of the appeal by the Supreme Court the main judgment of the Tribunal dated 7 July 2006 had attained finality and further that it is not open to any Authority to sit in appeal over an order passed by itself. It then proceeded to consider TRAI recommendations on the different specific heads of revenue (15 in all), taking into account the contending stands of the licensees and the DoT and by judgment and order dated 30 August 2007 accepted the recommendations of TRAI in regard to most of the heads while declining to accept the recommendations in regard to a few heads of revenue.

Against the judgment and order dated 30 August 2007 the Union of India once again filed appeals before the Supreme Court[3]. In the second round before the Supreme Court it was sought to be contended on behalf

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[3]The principal appeal was Civil Appeal No. 5059 of 2007: *Union of India and another Vs. Association of Unified Telecom Service Providers of India and others* which was accompanied by a large number of appeals against the same judgment and order.

of the respondents (the licensees) that the earlier appeal by the Union of India against the Tribunal's judgment dated 7 July 2006 having been dismissed it was no longer open to them to re-agitate the issue regarding inclusion of revenue from non-licenced activities and sources in computing AGR. In this connection it was also pointed out that the earlier judgment of the Tribunal dated 7 July 2006 was passed in a very large number of petitions filed on behalf of many different licensees and operators but the Union of India had omitted to file appeals in regard to some of the petitions and as a consequence, in so far as the operators in those petitions are concerned, the Tribunal's judgment had attained finality and it was, therefore, no longer open to challenge.

In view of the submissions made before it, the Supreme Court framed four substantial questions of law for its consideration, which are reproduced below.

> (i) Whether after dismissal of Civil appeal No. 84 of 2007 of the Union of India against the order dated 7-7-2006 of the Tribunal, by this Court by order dated 19-1-2007, the Union of India can re-agitate the question decided in the order dated 7-7- 2006 that the adjusted gross revenue will include only revenue arising from licenced activities and not revenue from activities outside the licence of the licensee (sic?).
>
> (ii) Whether TRAI and the Tribunal have the jurisdiction to decide the validity of the terms and conditions of the licence which had been finalised by the Central Government and incorporated in the licence agreement including the definition of adjusted gross revenue (sic?).

(iii) Whether as a result of the Union of India not filing an appeal against the order dated 7-7-2006 of the Tribunal passed in favour of some of the licensees, the said order dated 7-7-2006 had not become binding on the Union of India with regard to the issue that revenue realised from activities beyond the licenced activities cannot be included in the adjusted gross revenue (sic?).

(iv) Whether the licensee can challenge the computation of adjusted gross revenue, and if so, at what stage and on what grounds (sic?).

By judgment dated 11 October 2011 (the *AUSPI*'s case)[4], the Supreme Court answered questions (i) and (iii) in favour of the Union of India. But it is the decision of the Supreme Court on questions (ii) and (iv) which is more important for our present purpose. The Court observed that the Tribunal had not just decided a dispute on *the interpretation of adjusted gross revenue* in the licence agreement but had decided *the validity of the definition of adjusted gross revenue* in the licence agreement. Dealing with question no. (ii) the Court, in paragraphs 47, 48 and 49 of the judgment observed and held as under:

"47. A dispute between a licensor and a licensee referred to in section 14(a)(i) of the TRAI Act, therefore, is a dispute after a person has been granted a licence by the Central Government or the Telegraph Authority under sub-section (1) of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub- section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a licence agreement and become a licensee and the word "any" in section 14(a) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who has not become a licensee. **The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in**

[4](2011) 10 SCC 543; *Union of India Vs. Association of Unified Telecom Services Providers of India and Others*.

the licence of a service provider, but it will have the jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the licence.

48. Coming now to the facts of the case before us, Clause (iii) of the Letter dated 22-7-1999 of the Government of India, Ministry of Communications, Department of Telecommunications, to the Licensees quoted above made it clear that the licence fee was payable with effect from 1-8-1999 as a percentage of gross revenue under the licence and the gross revenue for this purpose would be total revenue of the licensee company excluding the PSTN related call charges paid to DoT/MTNL and service tax calculated by the licensee on behalf of the government from the subscribers. It was also made clear in the aforesaid clause (iii) that the government was to take a final decision after the receipt of TRAI's recommendation on not only the percentage of revenue share but also the definition of revenue. In accordance with this Clause (iii) the government took the final decision on the definition of adjusted gross revenue and incorporated the same in the license agreement. **Once the licensee has accepted Clause (iii) of the letter dated 22-7-1999 that the licence fee would be a percentage of the gross revenue which would be the total revenue of the licensee company and has also accepted that the government would take a final decision not only with regard to the percentage of revenue share but also the definition of revenue for this purpose, the licensee could not have approached the Tribunal questioning the validity of the definition of adjusted gross revenue in the licence agreement on the ground that adjusted gross revenue cannot include revenue from activities beyond the licence.**

49. If the wide definition of adjusted gross revenue so as to include revenue beyond the licence was in any way going to affect the licensee, it was open for the licensees not to undertake activities for which they do not require licence under section 4 of the Telegraph Act and transfer these activities to any other person or firm or company. **The incorporation of the definition of adjusted gross revenue in the licence agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the licence and availed the exclusive privilege of the Central Government to carry on telecommunication activities, the licensee could not have approached the Tribunal for an alteration of the definition of adjusted gross revenue in the licence agreement.**"

(emphasis added)

It further observed in paragraph 55 as under:

> "………We, therefore, hold that TRAI and the Tribunal has no jurisdiction to decide on the validity of the definition of adjusted gross revenue in the licence agreement and to exclude certain items of revenue, which were included in the definition of adjusted gross revenue in the licence agreement between the licensor and the licensee."

Having thus answered question no. (ii), the Supreme Court dealt with question no. (iv) in paragraph 62 and 63 of the judgment which are as under.

> "62. The Last substantial question of law, which we have to decide, is whether the licensee can challenge the computation of adjusted gross revenue and if so at what stage and on what grounds.
>
> 63. Section 14 (a)(i) of the TRAI Act, as we have seen, provider that the Tribunal can adjudicate any dispute between the licensor and the licensee. **One such dispute can be that the computation of adjusted gross revenue made by the licensor and the demand raised on the basis of such computation is not in accordance with the licence agreement**. This dispute, however, can be raised by the licensee after the licence agreement has been entered into and the appropriate stage when the dispute can be raised is when a particular demand is raised on the licensee by the licensor. When such a dispute is raised against a particular demand, the Tribunal will have to go into the facts and materials on the basis if which the demand is raised and decide whether the demand is in accordance with the licence agreement and in particular the definition of adjusted gross revenue in the licence agreement **and can also interpret the terms and conditions of the licence agreement**. We, however, find from the order dated 7-7-2006 that instead of challenging any demands made on them, the licensees have questioned the validity of the definition of adjusted gross revenue in the licences given to them and the Tribunal has finally decided in its order dated 30-08-2007 as to what items of revenue would be part of adjusted gross revenue and what items of revenue would not be part of adjusted gross revenue without going into the facts and materials relating to the demand on a particular licensee."
>
> (emphasis added)

Before closing this part relating to the past proceedings one cannot help observing that though the controversy that was brought to the Tribunal and was then taken to the Supreme Court was presented as concerning the legal validity of the definition of "gross revenue", the real dispute between the parties was even then whether or not certain inflows coming to the coffers of the licensee company were to form part of its gross revenue. This would be evident from the stand taken by the DoT before the Supreme Court. It may be noted here that in the midst of hearing of the case before the Supreme Court an affidavit was filed on behalf of the Government of India which is fully incorporated in the order passed by the Court on 11 August 2011 which is reproduced below:

> "**ORDER**
>
> Civil Appeal Nos. 311-318/2008, 565/2008, 4430/2011, 10675/2010 and 10676/2010 are delinked for being listed separately.
>
> Mr. Ramji Srinivasan, learned senior counsel resumed his arguments at 10.40am and concluded at 11.15 a.m. thereafter Mr.Upmanyu Hazarika and Mr. Shyam Diwan, learned senior counsel, Mr. Gopal Jain, learned Counsel, Ms. Meenakshi Arora, learned counsel made their submission.
>
> Thereafter Mr. Soli J. Sorabjee, learned senior counsel appearing for the department of Telecommunications (for short 'DoT') started his submissions in rejoinder at 12.20 pm and proceeded till the rising of the court.
>
> During the course of hearing Mr. Soli J. Sorabjee, learned senior counsel placed on record the following stand of DoT:
>
> **"(1) The department's stand is that revenue from non telecom business which is entirely different from telecom business of the licensee is not included in the**

> **definition of GR (this is also the consequence of maintain separate accounts)**.
>
> (2) Interest and divided which were specifically included in the definition of AGR/GR and mentioned in the Appendix- II at page 349, Vol. II is to be included only to the extent the interest or dividend is attributable to that particular service area (license) at page 343, Vol II. This is necessary consequence of the licence and Appendix-II being in respect of that particular service area.
>
> (3) In order to attribute interest to a particular service area the following formula of apportionment is to be applied:-
>
> Interest x Revenue from that licence area:
> divided by Total Revenue
>
> This necessarily follows from the obligation to provide reconciliation statement as stipulated in para 20.7 (pg. 247. Vol. II)
>
> It should be noted that the interest earned by the main corporate entity can never be reconciled with the A/cs of each service area unless the interest attributable to each area and other business adds up to the total interest earned by the corporate entity.
>
> (4) At no stage the department seeks to levy the revenue share in respect of various licence held by the company on the same revenue receipt more than once.
>
> (5) All discounts mentioned in the price list filed before TRAI are excluded. However alleged ad hoc discounts which are not reflected in the price list are not excluded".
>
> (emphasis added)

In hind-sight it would thus appear that in the first round of litigation the licensees themselves invited the judgment by the Supreme Court, greatly extending the parametres of the relevant clause in the licence agreement, by raising the dispute to almost an abstract level, instead of disputing on

facts the inclusion of certain kinds of inflow as “gross revenue” as insisted upon by the DoT.

The present round

Be that as it may, the earlier controversy now stands concluded by the final judgment of the Supreme Court in the *AUSPI’s* case and any further adjudication over the dispute between the parties must take place with the clear mandate not to enter into the question of validity of the definition of AGR as given in the licence but to examine the admissibility of any specific heads of inflow that might have been included in the Government demand as part of AGR and to that end, if necessary, to also interpret the expression “gross revenue” as defined in the licence, along with any other terms and conditions of the licence.

Parallel proceeding before High Court

However, before proceeding any further it is necessary to take note of a related development. The Supreme Court said, “The incorporation of the definition of adjusted gross revenue in the licence agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the licence and availed the exclusive privilege of the Central

Government to carry on telecommunication activities, the licensee could not have approached the **Tribunal** for an alteration of the definition of adjusted gross revenue in the licence agreement". Following the Supreme Court judgment all the licensees filed petitions before the Tribunal challenging the computation of licence fee made by the Government and the demands raised against them on that basis. But at the same time all the major telecom operators, perhaps with the sole exception of Vodafone, also filed petitions before the High Courts challenging the **validity of the definition of AGR** as incorporated in the licences on exactly the same ground (amongst others) as was earlier raised before the Tribunal. The writ petitions filed by Bharti[5], Reliance[6], Idea[7] and Tata Teleservices[8] before the Kerala High Court are admitted and the writ petitioners are fully protected by interim orders passed by the High Court in their favour. In the writ petition filed by Bharti Airtel the High Court has passed the interim orders in three stages, the last of which was passed on 17 December 2012 in I. A. No. 17008 of 2012-F. The order is as under:

> "Heard the learned counsel for the petitioner and the learned Assistant Solicitor General.
>
> 2. The I.A. No. 17008/2012 is filed seeking for a stay of Ext. P17 demand dated 30/11/2012.

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[5]W. P. (C) No. 13252 of 2012: BhartiAirtel Vs. Union of India and another
[6] W. P. (C) No. 16332 of 2012: Reliance Communications Limited Vs. Union of India and Others.
[7]W. P. (C) No. 16376 of 2012
[8]W. P. (C) No. 22716 of 2012 (B): Tata Teleservices Limited Vs. Union of India and another

> 3. It is averred in the affidavit that in the light of the interim orders already passed by this Court, the same cannot be justified. it is further stated that the demand consist of various items of assessments of non telecom activities also.
>
> 4. In the interim orders dated 08/06/2012, this Court directed as follows:
>
> > "……… Pending the writ petition, the petitioner will continue to make payment as it was being done through out the period of licence to Telecom activities….."
>
> 5. The petitioner has filed I.A. No. 15749/2012 later, wherein also this Court passed an interim order dated 23/11/2012 staying the demand as evident from Ext.P.15.
>
> 6. Since the interim orders are in force, any demand as per Ext.P. 17 for non telecom activities will stand stayed subject to further orders to be passed in the writ petition. It will be subject to availing of any other legal remedies by the petitioner on any dispute regarding Ext.p.17.
>
> 7. Learned Assistant Solicitor General seeks time to get instructions
>
> Post in the third week of January, 2013 along with connected matter.
>
> Handover to both Sides."

Similar orders were passed in the cases of Reliance, Idea and Tata Teleservices.

In view of the matter relating to the validity of the definition of AGR, which is basic to the controversy between the parties, being pending before the High Court we are fully conscious that the adjudication on the petitions before the Tribunal is not likely to put an end to the dispute between the parties even at the first level. We are also aware that in case the High Court up-holds the licensees' challenge to the validity of the definition of AGR as incorporated in the licences, the

present exercise may turn out to be of little or no meaning. In view of the aforesaid it would have been quite expedient and convenient to let this very large batch of cases lie pending awaiting the disposal of the writ petitions by the Kerala High Court and the Madras High Court. As a matter of fact, Mr. Gopal Jain, Senior Advocate who appeared in some petitions by Bharti Airtel Limited and by Idea Cellular Limited suggested as much. But we are not inclined to take that course. The controversy over what constitutes AGR is one of the most basic, thorny and vexatious issue between the Government of India and the telecom licensees and it hangs fire for a decade and a half. Mr. Ramji Srinivasan, Senior Advocate, appearing for some of the licensees rightly stated that as the controversy remains unresolved, the telecom operators with annual turn over of hundreds/thousands of crores of rupees are not clear how to write their account books, the auditors do not know how to certify the accounts of the telecom companies and the Government is equally in the dark as to the revenue they may expect as licence fees for the scores of licences granted by them under section 4 of the Telegraph Act. The uncertainty prevailing for such a long time over something as basic as the finances is bound to be very harmful for the growth of the telecom industry. We are, therefore, of the view that the issue of AGR must be decided by the Tribunal without any delay, indeed within the limited interpretative framework, as directed by the Supreme Court.

Petitions in the batch

The large number of petitions forming this batch are filed by different operators holding different kinds of licences[9] granted by the Government under section 4 of the Telegraph Act. However, as it was also noted (in the very first round) in the Tribunal's judgment dated 7 July 2006, the definition of AGR in all the licences granted under section 4 of the Telegraph Act is quite similar in all material respects. It may also be noted here that the Supreme Court in the *AUSPI*'s case (as also the Tribunal in its earlier judgment dated 7 July 2006) have dealt with the definition of AGR as incorporated in the Unified Access Services Licence. We too, therefore, propose to refer to the relevant provisions in the UAS licence, which is the principal and the most comprehensive licence held by all the major telecom service providers in the country. In case any aspect of AGR is peculiar to some licence(s), other than the UAS licence we would indeed advert to that particular licence, stating the relevant details.

Licences granted after the Migration Package

Among the cases based on the UAS licence, there are some that were not part of the earlier round of litigation and in this group there are a

[9] e. g. , i. Unified Access Services Licence (UASL), ii. Licence for Provision of Internet Services (ISPIT), iii. International Long Distance Service Licence (ILDSL), iv. National Long Distance Service Licence (NLDSL), v. Very Small Aperture Terminal Licence (VSATL), vi. Passive Infra Structure Providing Licence etc.

few cases that warrant special mention for taking a somewhat unusual line of argument. Mr. Dayan Krishnan, senior advocate appearing on behalf of Videocon Telecom Ltd. and STel tried to completely break free from the pronouncement of the Supreme Court on the validity of clause 19, defining gross revenue and adjusted gross revenue. Learned counsel contended that the *AUSPI* decision would have no application in the case of Videocon and STel and urged that in their case, clause 19 of the licence agreement should be interpreted as it stands, unbound by the *AUSPI* decision and without taking into account the history of amendment of the licence. He submitted that unlike many other licensees in this batch of cases, Videocon was granted its UAS licence on 27 February 2008 and STel got its UAS licences between 29 February 2008 and 4 March 2008. Mr. Krishnan submitted that these two licensees had no concern with the migration package, conditionally offered by the Central Government. The letter of the Central Government dated 22 July 1999 offering migration package was not addressed to these two licensees and they did not accept the conditions attached to it. Mr. Krishnan pointed out that in paragraph (iii) of the letter, it was stipulated that the gross revenue would be the *total revenue* of the licensee company. But clause 19 of the licence agreement did not use the expression *total revenue* and it was based clearly on inclusions and exclusions. The *AUSPI* decision was in the case of licensees who, on acceptance of the migration package, were granted

the UAS licence and referring to paragraph 3 and 48 of the Supreme Court judgment, Mr. Krishnan submitted that it was for that reason that the Supreme Court held it was not open to them to question the validity of the definition of gross revenue. The case of Videocon and STel, however, is different in that they did not carry the burden of the past and in their case, therefore, clause 19 of the licence agreement should be interpreted unconcerned by the cases of the other licensees. Learned counsel tried to once again open the controversy regarding revenue from licensed activity and revenue from activities that were not covered by the licence granted under section 4 of the Indian Telegraph Act.

The submission though clever and attractive is unacceptable for the simple reason that the same clause of a licence cannot mean differently for two licensees and two licensees working under the same licence cannot be made to pay the licence fee on two completely different computations. Clause 19 of the licence has to be interpreted following the Supreme Court decision in the *AUSPI*'s case and having regard to its historical background. Whatever conclusions are thus arrived at would equally apply to all holders of the licence, including Videocon and STel and the case of these two licensees would be governed by this judgment as much as that any other holder of the UAS licence, irrespective of when it was granted.

Further, each of the major telecom operators, all holders of the UAS licence have filed[10] a number of petitions that relate to the Government's demand for licence fee for different service areas and different financial years. However, in this large batch there is a small group of cases that arise from a special audit of the accounts of some of the major telecom companies, held at the instance of the Central Government.

The DoT demand order

In May 2009 (while the appeal filed by the Union of India against the Tribunal's second order dated 30 August 2007 remained pending before the Supreme Court), the DoT, in exercise of its powers under clauses 22.05 and 22.06 of the UAS licence, ordered special audit of the telecom companies for the years 2006-07 and 2007-08. On the basis of the special audit reports, the DoT, in the early part of the year 2012 (When the Supreme Court judgment in the *AUSPI* case had already come), issued show cause notices to the licensee companies in regard to certain revenue items that were allegedly not reported or under-reported by the licensees. And after considering the replies/submissions made by the licensees in response to the show cause notice, the DoT issued demand notices asking the licensees to pay the amounts computed in

[10]Through different group companies.

regard to them as deficit licence fees for the years 2006-07 and 2007-08, inclusive of interest **and** penalty **and** interest on the penalty amount. The demand notice, apart from giving computation of the amount demanded, also encloses the order passed on the licensee's responses/objections to the show cause notice. The general discussion on AGR finds place, almost in the same terms, in all demand notices arising from the special audit. Among the special audit demand cases there is one Petition No. 851 of 2012 in which the DoT order (forming part of the impugned demand notice) deals with the largest numbers of disputed heads of inflow. Petition No.851 of 2012 is filed by M/s Vodafone Essar West Ltd. against the demand notice dated 8 November 2012 by which it is directed it pay an amount of Rs.3,16,12,334/- and Rs.15,03,93,748/- (inclusive of interest calculated up to 30 November 2012) as licence fees for the years 2006-07 and 2007-08 for the Gujarat licence service-area. In this judgment we propose to principally refer to this petition. As and when we take up for consideration any head of inflow, which is not covered by Petition No. 851 of 2012, we will indeed indicate the relevant facts pertaining to that head and the case to which it relates.

Two ancillary issues

At this stage it is necessary to put aside two points raised on behalf of the licensees/petitioners, before we proceed to examine on merits the order that forms part of the demand notice.

It is submitted on behalf of the licensees that the order for special audit of their accounts was illegal and invalid and consequently no demand can be made on that basis. It is argued on behalf of the licensees that in terms of sub-clauses 05 and 06 of clause 22 of the UAS licence the DoT must form an opinion, on the basis of cogent materials and after giving an opportunity of hearing to the licensee, that statements or accounts submitted by the licensee were inaccurate or misleading before ordering special audit. It is stated that in none of the cases the licensee was given any opportunity of hearing before its accounts were subjected to the special audit.

The DoT refutes the submission and maintains that neither sub-clause 05 nor sub-clause 06 of clause 22 provides for any oral hearing to the licensee and there were enough materials before them to ask for the special audit. It is also pointed out that clause 22.06 of the licence that provided for the special audit did not even have the qualification that is stipulated in clause 22.05.

We are of the view that for the licensees it is rather late in the day to raise any objection in regard to the special audit. The special audit was ordered in May 2009. No objection was raised at that point. The licensees fully participated in the special audit. The special audit report actually acknowledges co-operation extended by the licensees. A half-hearted objection was only raised for the first time in response to the

show cause notice. In those circumstances we are not inclined to entertain the licensees' plea against the special audit. Moreover, we believe it is important to finally decide the true meaning and scope of AGR, which is basic to the relationship between the telecom companies and the Government of India, the licensees and the licensor respectively.

It is also submitted on behalf of the licensees/petitioners that the impugned demand notices issued towards the end of 2012 in respect of financial years 2006-07 and 2007-08 are badly barred by time. On behalf of the DoT it is submitted in reply that the special audit was ordered in May 2009 at a point well within the period of limitation and hence, there is no question of the demand being barred by time.

The plea of limitation does not seem to have much force as the very basis on which licence fee is payable by the licensee remains mired in controversy till date. Hence, like the issue regarding the validity of the special audit, we are not inclined to quash the demand notices on grounds of limitation alone. We reiterate that it is necessary to settle the matter with regard to the true meaning and scope of AGR.

The DoT order examined

Thus we finally come to the order forming the basis of the impugned demand notice. This order, besides dealing with the specific heads over which the licensee and the DoT are in dispute, contains a general introductory discussion that fairly articulates the DoT's

understanding of the definition of AGR as incorporated in the UAS licence. The relevant part of the order is reproduced below:

> "On 22nd July 1999, DoT introduced migration package which came into effect from 01.08.1999. The Migration Package clearly defined AGR (Adjusted Gross Revenue) on which the operators were liable to pay the License Fee as a certain percentage of this AGR. The said definition was accepted without any kind of protest by the licensees as it was clearly defined.
>
> As per the License Agreement the definition of the AGR is:
>
> > "For the purpose of arriving at the "Adjusted Gross Revenue (AGR)" the following shall be excluded from the Gross Revenue to arrive at the AGR:
> >
> > - PSTN related call charges (Access Charges) actually paid to other eligible/ entitled telecommunication service providers within India.
> >
> > - Roaming revenues actually passed on to other eligible/entitled telecommunication service providers and;
> >
> > - Service Tax on provision of service and Sales Tax actually paid to the Government if Gross revenue had included as component of Sales Tax and Service Tax"
> >
> > The Gross Revenue shall include all revenues accruing to the licensee on account of "installation charges, late fees, sale proceeds of handsets (or any other terminal equipment etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without ant set-off related item of expense, etc".
>
> Thus the definition of gross revenue in the license agreement is an inclusive definition. **This definition is comparable to**

definition of income under Income Tax Act. Income as defined in section 2 clause 24 of the Income Tax Act, 1961 is also an inclusive definition. An analysis of the interpretation of the word 'income' given by the various courts in India would also be relevant for the analogous terms 'revenue', 'gross revenue', 'adjusted gross revenue' given in the Licence Agreement.

In the case of Kamakshya Narayan Singh Vs. CIT (1943) 11 ITR 513(PC), Lord wright observed:

> **Income…..is a word difficult and perhaps impossible to define in any precise general formula. It's a word of broadest connotation."**

Similarly in Gopal Saran Narain Singh Vs. CIT (1935) 3 ITR 237 (PC), the privy council pointed out that:

> **'Anything that can properly be described as income is taxable under the ACT unless expressly exempted'.**

The court further observed that the word income is of the widest amplitude and that it must be given its natural and grammatical meaning and it should be given its widest connotation.

It is observed that the definition of income is similar to the definition of Gross Revenue given in the Licence Agreement. The definition of Gross Revenue is an inclusive definition **and the items which are allowed to be deducted from the gross Revenue to arrive at the adjusted Gross Revenue are already defined. It is also explicitly mentioned that any set off of related items of expense are not allowed.**

In keeping with the definition of income as interpreted by the courts, the term Gross Revenue should be given the 'broadest connotation' and widest amplitude. Similarly the word 'Gross' should be given its natural and grammatical meaning and no netting should be allowed. The definition has words like "any miscellaneous income" "income from supplementary services" etc. which have the effect broadening the scope of the definition of Gross Revenue/ Adjusted Gross Revenue to include all revenue/income. On the other hand, the deductions specified in the definition are limited and exhaustive. Only

those deductions are allowed which are specifically mentioned in the definition.

Further the Supreme Court in its judgment dated 11.10.2011 has upheld the definition and discussed the scope thereof in para 34 of the judgment as below " Clause(iii) of the letter dated 22.07.1999 of the Government of India, Ministry of Communication, Department of Telecommunication, to the licensees quoted above made it clear that the licence fee is payable with effect from 01.08.1999 as a percentage of Gross Revenue under the licence and the Gross Revenue for this purpose would be total revenue of the licensee company excluding the PSTN related call charges paid to DoT/MTNL and service tax calculated by the licensee on behalf of the Government from the subscribers. It was also made clear in the aforesaid clause (iii) that the Government was to take a final decision after receipt of the TRAI's recommendations on not only the percentage of revenue share but also the definition of Revenue. In accordance with the clause (iii) the Government took the final decision on the definition of Adjusted Gross Revenue and incorporated the same in the License Agreement. Once the licensee had accepted clause (iii) of the letter dated 22.07.1999 that the licence fee would be a percentage of Gross Revenue which would be the total revenue of the Licensee company and had also accepted that the Government would take a final decision not only with regard to percentage share but also the definition of revenue for this purpose, the licensee would not have approached the Tribunal questioning the validity of the definition of Adjusted Gross Revenue in the Licence Agreement on the ground that Adjusted Gross Revenue cannot include Revenue from activities beyond the Licence. If the wide definition of Adjusted Gross Revenue so as to include revenue beyond the licence was in any way going to effect the licensee, it was open for the licensee not to undertake activities for which they do not require licence activities to any other person, or firm or company. The incorporation of the definition of Adjusted Gross Revenue in the Licence Agreement was part of the terms regarding payment which had been decided upon by the central government as a consideration for parting with its rights of exclusive privilege in respect of Telecommunication activities and having accepted the licence and availed the exclusive privilege of the central government to carry on the telecommunication activities, the licensees could not have approached the Tribunal for the alteration of the definition of the Adjusted Gross Revenue in the Licence

> Agreement." Thus the interpretation of Gross revenue/ Adjusted Gross Revenue by the Licensee does not seem to be correct."
>
> (emphasis added)

The reasoning in the DoT's order is based on the premise that the term "Revenue", used in the licence agreement, and the term "Income" as defined under the Income Tax Act, 1961 are "analogous". Hence, the order reasons, it would be legitimate and useful to refer to the decisions of the Court giving a wide meaning to the word "income" and apply the same in case of "Revenue". The order then relies upon two very old decisions of the Privy Council that gave the term "income" an expansive meaning and reasons that the same principles would apply in construing the term "Revenue".

We have gone through the two decisions of the Privy Council and in our view those decisions have no application to the present exercise and are of no help in interpreting the licence provisions dealing with "Gross Revenue" and "Adjusted Gross Revenue".

In Gopal Saran Narain Singh[11] the Privy Council held that the sum of Rs.2,40,000/- payable annually to the assessee during his life-time in terms of the covenant under the indenture for absolute sale of his estate as part of the considerations was a life annuity which was income in the assessee's hands. It was not a case in which he had exchanged his estate

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[11](1935) 3 ITR 237 (PC)

for a capital sum payable in installments. In that context the judgment said that anything which can properly be described as income is taxable under the Indian Income Tax Act unless expressly exempted, and the tern “income” in section 12 (1) of the Act was not limited by the words “profits” and “gains”.

In Kamakshya Narain Singh[12] the Privy Council examined certain mining leases executed by the assessee that provided for the payment of royalties at a fixed rate per ton of coal extracted, and also for payment of a minimum royalty at the end of the year in which royalties on coal raised should be less than the sum fixed as the minimum royalty. The Privy Council held that the royalties per ton were “income” under the Indian Income Tax, 1922 and were accordingly assessable to income tax. It also held that the minimum royalty was “income” and in no sense a payment on capital account. It was a species of annual guarantee which did not correspond to any coal in fact extracted, and was simply “income flowing from the covenants in the lease contingently on the lessees’ failure to take the minimum quantity of coal. In that context the Privy Council observed that “Income” is a word of broadest connotation, and similes likening it to the fruit of a tree or crop of a field cannot be used to limit the true nature of income in general, and particularly when it is constituted by mining rent or royalties, which are periodical payments to be made by the lessee

[12](1943) 11 ITR 513(PC)

under his covenants in consideration of the benefits which he is granted by the lessor. If the receipts are income it is immaterial for the tax purposes that for which they are paid comes from a wasting property.

Both the decisions are on the facts of the respective cases and are based on the interpretation of the indenture in the Gopal Saran Narain's case and the leases in the Kamakshya Narain Singh's case. Moreover, though both the decisions give very broad meaning to the word "income", neither decision tends to do away with the well-recognized basic distinction between "income" and capital. As a matter of fact the salami or premium paid under the lease was taken to be a capital receipt, not assessable to income tax.

In our view the fallacy in the DoT's order lies not in observing that the term "Revenue" is given a wide and inclusive definition in the licence agreement; without doubt that is so as we would see when we presently refer to relevant clauses in the agreement. The fallacy lies in assuming that the terms "Revenue" and "income" are equivalent, they carry the same meaning and the two terms can be used interchangeably. The order over-looks that the term "Income" is of much wider import than "Revenue"; income may include revenue as one of its sub-heads but all of income may not come within the scope of revenue.

Apart from relying upon the two Privy Council decisions, the DoT's order seems to take the position that the Supreme Court decision

in *AUSPI*'s case is conclusive of all disputes in regard to AGR. In view of that decision (especially paragraph 34 of the judgment) there remains nothing for the licensees to contend in regard to AGR and they must submit to the demands raised by the DoT.

We find that the position taken in the order on the basis of the *AUSPI*'s decision is quite unfounded and untenable. In *AUSPI* the Supreme Court was hearing an appeal from the judgment of this Tribunal that held that the definition of AGR, in so far as it included revenue from sources other than the business activities covered by the licence was *ultra vires* section 4 of the Telegraph Act. The Supreme Court set aside the Tribunal's judgment and rejected the licensees' contention. It pointed out that in terms of section 4 it was open to the Government to part with its privilege on such terms and conditions as it might think fit. Hence, if the Government deemed fit to part with its privilege on condition of having a percentage share in the gross revenue of the licensee, it would be misconceived to question the validity of the condition/definition of gross revenue on grounds of section 4 of the Telegraph Act. Further, the Court said, having accepted condition no. 3 of the migration package offered by the Government vide letter dated 22 July 1999, it was no longer open to the licensee to challenge the validity of the definition of gross revenue incorporated in the licence to give effect to the revenue sharing regime and to approach the Tribunal to alter the terms of the licence. In any

event, the Court said, it was not within the Tribunal's jurisdiction to examine the validity of a term of the licence or to strike it down, either in part or in whole, and thus to effectively alter the terms on which the Government had parted with its exclusive privilege in favour of the licensee. Though, thus circumscribing the Tribunal's jurisdiction, the Court left it open for the Tribunal to construe the true meaning of the terms of the licence by the process of interpretation. The Court said if "a dispute is raised against a particular demand, the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the licence agreement and in particular the definition of adjusted gross revenue in the licence agreement **and can also interpret the terms and conditions of the licence agreement"**.

One may say that in the previous rounds of litigation and in the *AUSPI's* case the dispute was in regard to the *sources* from where the inflow could be reckoned as part of gross revenue. And in the present round what is under consideration is *not the sources but the nature* of inflow that may come taken as gross revenue as defined in the licence. This is exactly the exercise undertaken here. It is thus quite incorrect to assume that as a result of the Supreme Court decision in *AUSPI*'s case the licensees are not only precluded from questioning the validity of the

definition of gross revenue/AGR but they are also bound by whatever meaning the Government may choose to put to the definition.

The relevant materials for consideration

In order to understand the true meaning of the terms "gross revenue" and "adjusted gross revenue" occurring in the licence agreement it is necessary to once again start from the migration package. On 22 July 1999 the Government of India sent a letter to all cellular operators and their association offering the "Package for Migration of Cellular (Metros and Telecom Circles) and Basic Telecom Services to New Telecom Policy – 1999 regime". Paragraphs 1(i) to 1(ii) and 3 of this letter, which are relevant for us, are as under:

> "(i) The cut off date for change over to NTP-99 regime will be 1.8.1999.
>
> (ii) The licensee will be required to pay one time Entry Fee and License Fee as a percentage share of gross revenue under the licence. The Entry Fee chargeable will be the licence fee dues payable by existing licensees upto 31.07.1999, calculated upto this date duly adjusted consequent upon notional extension of effective date as in para (ix) below, as per the Conditions of existing licence.
>
> 3. After the terms and conditions of the package are accepted, amendments to the existing licence agreement will be signed between the licensor and the licensee."

Needless to say, that all telecom operators, holders of licences granted under the Telegraph Act, without exception, opted to switch over to the new revenue sharing regime offered by the Government.

Following the introduction of the migration package the Telecom Commission of the Government of India on 6 October 1999 appointed a consultant to evolve a procedure for verification of revenues of licensee companies under the revenue sharing regime. In the letter issued by the Commission it was stated that the appointment of the consultant was "in connection with evolving a system to verify the account of licensee companies".

After taking into consideration the consultant's report (as also the recommendations by TRAI, the Government of India vide letter dated 11 April 2002[13] spelled out the changes in the licence that would be effective from 1 August 1999, the date of introduction of the migration package. The amendments comprised, apart from introduction of the definition of AGR, "Schedule of Payment of Annual Licence Fee and other dues" and more importantly provisions regarding "Preparation of Accounts" by the licensee and a prescribed form for the report of the Auditor. The amendments were finally incorporated in the UAS licence as clauses 18, 19, 20 and 22. The definition of Gross Revenue is given in clause 19 but in order to understand the true scope and ambit of AGR it would be

[13] In Petition No. 851 of 2012

helpful to take a look at some ancillary provisions, which are reproduced below:

"18. <u>FEES PAYABLE:</u>

18.1 <u>Entry Fee:</u>

No additional entry fee shall be charged from CMSPs for migration to UASL.

18.2 <u>License Fees:</u>

The Licensee shall pay Licence fee annually @ **10**% of **Adjusted Gross Revenue (AGR)**, excluding spectrum charges. Separate spectrum charges would be required to be paid by the licensee.

The Licensor reserves the right to modify the above mentioned Licence Fee at any time during the currency of this Agreement.

18.3 <u>Radio Spectrum Charges:</u>

18.3.1 In addition to the licence fee as clause 18.2, the Licensee shall pay spectrum charges on revenue share basis of 2% of AGR towards WPC Charges covering royalty payment for the use of cellular spectrum upto 4.4 MHz + 4.4 MHz and Licence fee for Cellular Mobile handsets & Cellular Mobile Base Stations and also for possession of Wireless Planning & Coordination Wing (WPC). Any additional band width, if allotted subject to availability and justification shall attract additional Licence fee as revenue share (typically 1% additional revenue share if Bandwidth allocated is upto 6.2 MHz + 6.2 MHz in place of 4.4 MHz + 4.4 MHz).

18.3.2 Further, royalty for the use of spectrum for point to point links and access links (other than Cellular Service Spectrum) shall be separately payable as per the details and prescription of Wireless Planning & Coordination Wing. The fee/royalty for the use of spectrum/possession of wireless telegraphy equipment depends upon various factors such as frequency, hop and link length, area of operation etc. Authorisation of frequencies for setting up Microwave links by Cellular Operators and issue of Licences shall be separately dealt with WPC Wing as per existing rules.

18.3.3 The above spectrum charge is subject to unilateral review by WPC Wing from time to time which shall be binding on the licensee.

19. Definition of 'Adjusted Gross Revenue':

19.1 Gross Revenue

The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets (or any other terminal equipment etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense, etc.

19.2 For the purpose of arriving at the "Adjusted Gross Revenue (AGR)" the following shall be excluded from the Gross Revenue to arrive at the AGR:

I. PSTN related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India;

II. Roaming revenues actually passed on to other eligible/entitled telecommunication service providers and;

III. Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax.

Clause 20 of the licence agreement deals with payment of annual licence fee and other dues. Sub-clause 4 of clause 20 directs that the quarterly payment should be made together with a statement in the prescribed form as Annexure-II to the licence. Clause 20.4 is as under:

"20.4 The quarterly payment shall be made together with a STATEMENT in the prescribed form as **Annexure-II,** showing the computation of revenue and Licence fee payable. The aforesaid quarterly STATEMENTS of each year shall be required to be audited by the Auditors (hereinafter called LICENSEE'S Auditors) of the LICENSEE appointed under section 224 of the Companies' Act, 1956. The report of the Auditor should be in prescribed form as **Annexure-II.**"

Appendix-II to Annexure-II referred to in clause 20.4 prescribes the “Format of Statement of Revenue and Licence Fee”. Arguments on both sides were made with reference to Appendix-II and hence, for ready reference it is put as *Annexure* at the end of this judgment.

The issues

A bare glance at clause 19 is sufficient to tell that the expression Gross Revenue (from which certain clearly identified elements are excluded to arrive at the AGR) is given an inclusive and very wide definition. But the question is, how wide? Does the definition, for instance, intend also to cover income that is not real but only notional or heads of inflow that in their very nature do not comprise revenue but are classified as capital?

Does it intend to disregard the Accounting Standards, which the licensee companies are mandated, by law, to follow for keeping the accounts? Does it intend that the provisions regarding exclusions as contained in clause 19(2) should operate differently for the licensor and the license? These are only some of the questions that arise in the interpretation of the expression AGR as defined in the licence.

The case of DoT

Mr. P.S. Narasimha, learned ASG, appearing for the Union of India submitted that the term “revenue” is defined in the licence agreement in a very expansive way and from “revenue”, thus defined,

only three specified items are to be deducted for arriving at the "adjusted gross revenue" (AGR). He pointed out that under the licence agreement "revenue" is to be calculated on *accrual* basis whereas the three deductions for computing the AGR are permissible on *actual* basis. Clause 19.2 of the licence, dealing with deductions clearly stated that only (i) PSTN related call charges *actually paid* (ii) roaming revenue *actually passed* on and (iii) service tax and sales tax *actually paid* shall be deductible to arrive at the AGR. On the other hand 20.2 stated that the licence fee shall be paid on revenue on *accrual* basis. Clause 20.3 also stated that the licence fee payable for the last quarter will be calculated on *accrual* basis. Further, the deductions mentioned under head 'B' in Appendix II to Annexure II to the licence indicated that only what is *actually* paid is deductible. Annexure III to the licence also stated that that revenue would be calculated on *accrual* basis and sales tax as well as service tax, as *actually* remitted should be shown separately.

It is correct that under the licence the computation of revenue is to be done on accrual basis and the deductions are permitted only on actual basis. It is equally correct that in case a licensee, apart from providing telecom services under the licence, also carries on other kinds of trade or business, revenues generated from other business activities even though unconnected with the telecom licence would be taken in for computation of revenue under the licence.

The stand of the learned ASG on these two issues is unexceptionable but it is not of much help in construing the true meaning and scope of the term "gross revenue" under the licence agreement.

On the question, how the term "gross revenue" as defined in the licence agreement is to be interpreted, the learned ASG maintained that it has the same meaning as gross receipts or gross income and in legal parlance 'revenue' is "synonymous with receipts, all amounts received, regardless of source or purpose". It is thus to be seen that on the question how inclusive is the term 'revenue' under the licence agreement, the ASG adopts the same approach as in the order of the DoT, that is noticed earlier. But while the DoT order relied upon two old Privy Council decisions, the ASG sought to rely on the meaning of the term 'revenue' as given in Black's Law Dictionary and the *Corpus Juris Secundum.*

The ASG referred to Black's Law Dictionary and submitted that it defined 'revenue' as "income from any and all sources; gross income or gross receipts". He further submitted that the word 'gross' is further defined in Black as 'undiminished by deduction; entire'. "Gross Revenues" is defined by Black as "receipts of a business before deduction for any purpose except those items specifically exempted". He submitted that according to the dictionary meaning, the words "gross revenue", taken together or separately, indicates that **any and all inflow,** without deductions, would form part of gross revenue.

He then referred to the *Corpus Juris Secundum* according to which "the word 'revenue' is broad, general and is used in many senses". The term 'revenue' in both singular and plural forms is defined generally as meaning return; yield, as of land; profit; rent; that which returns or comes back, from an investment; income; income or annual profit received from lands or other property; the annual or periodic rents; profits, interests, or issues, of any species of property, real or personal; reward.

Submissions of ASG discussed

In our view, the meanings of revenue given in Black's Law Dictionary and the *Corpus Juris Secundum* do not support the stand of the DoT. Black's Law Dictionary undoubtedly gives a general and broad meaning of the term. Nonetheless, the distinction between 'revenue' and 'capital' is never obliterated. It is nowhere suggested that revenue includes assets or the proceeds from the sale of assets. On the contrary, the distinction between 'revenue' that is income and 'asset' that is the source to generate income is fully maintained. Black's Law Dictionary defines 'revenue' as "gross income or receipts". It defines 'receipt' as "1. the act of receiving something, 2. a written acknowledgement that something has been received". It defines 'income' as "the money or other form of payment that one receives, usually periodically, **from** employment, business, investments, royalties, gifts, and the like".

It is significant to note that besides revenue, receipt and income, Black's Law Dictionary also defines 'capital', 'capital gain' and 'capital loss' separately as under:

> "Capital. 1. Money or assets invested, or available for investment, in a business.
>
> Capital gain – The profit realised when a capital asset is sold or exchanged. [Cases: Internal Revenue]
>
> > "Throughout most of the history of income taxation in the U.S., a distinction has been drawn between the rate of taxation on 'ordinary income' (or ordinary loss) and 'capital gain' (or capital loss). 'Capital gain' refers to the income from certain transactions in some assets, called capital assets, or from other transactions that Congress has said should be taxed as capital gain……The most common form of capital gain or loss transaction is a sale of an asset such as a share of stock or a parcel of land, for cash." John K. McNulty, *Federal Income Taxation of Individuals in a Nutshell 420(5th ed. 1995).*
>
> Capital loss -The loss realised upon selling or exchanging a capital asset."

The *Corpus Juris Secundum* maintains the distinction between 'revenue' and the 'source of revenue' even more starkly. It defines 'revenue' to mean return; yield, **as of land**; profit; rent; that which returns or comes back, **from an investment**; income; income or annual profit **received from lands or other property**……

In support of the submission, the learned ASG also relied upon two US decisions in *Public Service Co. of Colorado v. City and County of Denver 387 P.2d 33 (1963) and City of Dallas, Texas v. Federal Communications Commission 165 F.3d 341*. The learned ASG put emphasis on the words “all amounts” occurring in the judgments. But to our mind, the real emphasis lies on the words “received from operation of a business” which is the real meaning of the term ‘revenue’.

The learned ASG laid some stress that the term ‘revenue’ occurs in clause 19.1 of the licence agreement jointly with the word “gross”. He implied that the combination of the two words meant all kinds of income and gains etc. and seemed to suggest that the word “gross”, preceding the term ‘revenue’, would somehow change and enlarge the meaning of the latter term and would bring into its fold inflows/entries that otherwise might not be considered as revenue. In our view, the submission is quite misconceived. “Gross” and “revenue” are two different words with different meanings. “Revenue” is a noun, meaning income that an entity/organisation receives from its normal business activities. The word “gross” is used as an adjective, qualifying the noun “revenue”. “Gross”, as opposed to “net”, means entire, total, whole of an amount, value, weight or number before any deductions are made. In accounting parlance, ‘gross’ generally means “without netting off”. For example, gross sales means amount of sales without deduction of the cost of sales

and net sales, the amount of sales minus the cost of sales. Similarly, gross book value of a fixed asset is its historical cost but when this amount is shown net of accumulated depreciation, it is termed as net book value. The meaning of the word "gross" is made clear in clause 19.1 itself that concludes by saying "…. without any set-off for related item of expenses etc."

Learned ASG next submitted that the stand of the DoT is unambiguous and it is that any entry in the profit and loss account of the company must be understood as revenue. He submitted that section 211 of the Companies Act 1956 prescribes the form and content of the balance sheet and the profit and loss account of a company as set out in Schedule VI. Part II of Schedule VI, which is the form of statement of the profit and loss account, gives an indication of the expansiveness of the term 'revenue'. Similar provisions exist in the Companies Act 2013 – section 129 and Schedule III. He further submitted that the total revenue of the company is understood as the sum of revenue from operations and other income. He contended, therefore, any income of the company shown in the profit and loss account (as 'other income') is undoubtedly revenue. The treatment of heads of income or gain by the licensee in its profit and loss account demonstrates how the licensee understood the term 'revenue', in tune with the statutory prescription. Even the license agreement draws a clear link between the profit and loss account and

determination of revenue. Annexure III of the licence agreement clearly refers to the profit and loss account in the context of accrued revenue. Therefore, it is not legally permissible to say that the manner in which the company/licensee treats the gain or income in the profit and loss account of the company is not relevant; in fact it is most relevant.

He further submitted that the expression ‘other income’, in Part II of Schedule VI, as understood in the ‘General Instructions for Preparation of Statement of Profit and Loss Account’ includes interest income, dividend income, gains and loss on sale of investment and non-operating income. Undoubtedly therefore, revenue must be understood and recognized as projected in the profit and loss account. However, since the contract provides for an exhaustive list of deductions, and also clearly states that ‘without any set-off for related items of expense’, all income, including ‘other income’ for the purposes of AGR must be reckoned as gross amounts, without any deductions for loss or expenditure – that is, without netting.

We do not find any force in the submission. The words “and any other miscellaneous revenue” occurring in definition of “revenue” in clause 19.1 of the licence agreement, on which the learned ASG put a lot of emphasis, must be understood in the context of the definition. Those words are not meant to change or enlarge the well-established meaning of the term “revenue”. “Any other miscellaneous **revenue**” does not mean

"any other miscellaneous **income**" and in order to form part of gross revenue, the miscellaneous inflow/entry must first qualify as "revenue".

Further, section 211 of the Companies Act, 1956 to which reference is made by the learned ASG, in subsections (3A), (3B) and (3C) provides as under:

> "[(3A) Every profit and loss account and balance sheet of the company shall comply with the accounting standards.
>
> (3B) Where the profit and loss account and the balance sheet of the company do not comply with the accounting standards, such companies shall disclose in its profit and loss account and balance sheet, the following, namely:-
>
> (a) the deviation from the accounting standards;
> (b) the reasons for such deviation; and
> (c) the financial effect, if any, arising due to such deviation.
>
> (3C) For the purposes of this section, the expression "accounting standards" means the standards of accounting recommended by the Institute of Chartered Accountants of India constituted under the Chartered Accountants Act, Page 111 of 332 1949 (38 of 1949), as may be prescribed by the Central Government in consultation with the National Advisory Committee on Accounting Standards established under sub-section (1) of section 210A:"

Accounting Standard (AS) 9 issued by the Institute of Chartered Accountants of India dealing with Revenue Recognition, in clause 4.1 provides as under:

> "4.1 Revenue is the gross inflow of cash, receivables, or other consideration arising in the course of the ordinary activities of an enterprise from the sale

> of goods, from the rendering of services, and from the use by others of enterprise resources yielding interest, royalties and dividends. Revenue is measured by the charges made to customers or clients for goods supplied and services rendered to them and by the charges and rewards arising from the use of resources by them. In an agency relationship, the revenue is the amount of commission and not the gross inflow of cash, receivables and other considerations."

In order to overcome the definition of revenue in AS-9, the learned ASG contended that the Accounting Standards could be applied only in so far those are consistent with the term "revenue" as it is understood in law and in the context of the contract terms. He submitted that for the purposes of licence fee and AGR, the terms of the contract will dictate the definition of revenue, the recognition of revenue and the manner in which accounts are to be maintained. In other words, learned ASG argued, the Accounting Standards or the contextual understanding of certain terms under taxing statutes will have no bearing, if they are inconsistent with express terms or the intent of the licence agreement.

We are totally unable to accept the submissions advanced by the learned ASG for eluding AS-9. First, we see absolutely no conflict between the definition of "revenue' as provided in AS-9 and clause 19.1 and 19.2 of the licence agreement defining gross revenue and adjusted gross revenue. Secondly, as is evident from section 211 (3A), (3B) and (3C) a telecom company, the licensee is legally mandated to maintain its profit and loss account and the balance sheet in compliance with the

Accounting Standards. Thirdly, Accounting Standards are given due importance by the Supreme Court as those are the codified recommendations by the Institute of Chartered Accountants of India which is an expert body in a specialised field[14].

The submissions of the learned ASG, especially in respect of AS-9, are further unacceptable as they take a position which is in complete reversal of the stand of the DoT in the first round of this litigation. When the dispute first came to the Tribunal, the DoT interpreted the term "revenue" firmly on the basis of AS-9 and explained that the specific inclusions in "gross revenue" under clause 19.1 of the licence agreement, that were in deviation from the standard definition of revenue, were made for a specific object and purpose. In paragraph 26-27 of the counter affidavit filed on behalf of the Union of India on 14.07.2003, it was stated as under:

> "……..The AGR has a direct bearing on the monies received by way of license fee to the Consolidated Fund of India. It was for these reasons that another independent consultation with a National renowned expert in matters of accounting was undertaken by the Government in the interest of Public Money. The consultant has based his recommendations on several authoritative statements on accounting related to revenue which included amongst others Accounting Standard 9 (AS-9) of the Institute of Chartered Accountants of India and International Accounting Standard issued by the International Accounting Standard Committee. **It is submitted that AS-9 issued by the Institute of Chartered**

[14] See the decisions in Reliance Energy Ltd. & Anr.Vs. Maharashtra State Road Development Corpn. Ltd. & Ors.– (2007) 8 SCC 1, J.K. Industries Ltd. Vs. Union of India – (2007) 13 SCC 673, Commissioner of Income Tax, Delhi Vs. Woodward Governor India Pvt. Ltd. – (2009) 13 SCC 1, India Bank Vs. Blue Jaggers Estates Ltd. & Ors. – (2010) 8 SCC 129 and Catholic Syrian Bank Ltd. Vs. CIT – (2012) 3 SCC 784

Accountants of India is a mandatory accounting standard under the Companies Act, 1956. The term revenue has been defined in AS-9 of the Institute of Chartered Accountants of India as

> "4.1 The gross inflow of cash, receivables or other consideration arising in the course of the ordinary activities of an enterprise from the sale of goods, from the rendering of services, and from the use by others of enterprise resources yielding interest, royalties and dividends. Revenue is measured by the charges made to customers or clients for goods supplied and services rendered to them and by the charges and rewards arising from the use of resources by them. In an agency relationship, the revenue is the amount of commission and not the gross inflow of cash, receivable or other consideration."

The basic rationale propounded by the consultant by giving his recommendations and the finalisation of the definition of Revenue by the Government were (i) easy to interpret – so as to pose fewer problem in application and consequently less disputes and litigations, and less prone to reduction in license fee liability by ways of accounting jugglery, (ii) easy to verify – desirability to keep definition of revenue uniform to enable a uniform and simple procedure for verification of revenue, (iii) comprehensive enough – to discourage designing of tariffs and schemes for the prime purpose of reducing the license fee liability to a minimum. Therefore, the Government while taking a decision on the definition of Revenue for the purpose of license fee as revenue share considered to evolve a system of revenue sharing that does not become arduous, complicated and litigative."

(emphasis added)

Again in paragraph 47 of the counter affidavit, it was stated as under:

"…….It is submitted that free calls are a nature of Trade discount and no valuation of Trade discounts has been carried for its inclusion in AGR and the charge of the petitioners is denied. However, after billing, cash rebates and discounts are resorted to and is claimed by the petitioners as not to be part of the AGR. It is submitted that the term "revenue" includes all amounts billed and any discounts or rebates granted after billing cannot be set off against the billed amount. It the cash rebates/discounts are excluded from the AGR then the licensees shall be encouraged to treat all bad debts i.e. bills which they are not able to recover, as rebate or discount thereby reducing the liability of licence fee. Such non-recovery of billed

amount is a business risk and therefore, cash discounts and rebates are in the nature of costs to the licensee and cannot be considered for exclusion from the AGR. As per the definition of AGR no set-off related item of expense is allowed for the computation of AGR. **As already explained above, the definition of revenue is in line with AS-9 of the Institute of Chartered Accountants of India which is a mandatory accounting standard as per the Companies Act, 1956 extract of which is annexed herein as ANNEXURE-R3. Income from interest and dividend has been included in the AGR and is in line with AS-9 of the Institute of Chartered Accountants of India.** There may be a contrary view that income in nature of interest/dividend from investments has no nexus with the rendering of Telecom Services – it is in the nature of income from financing activities and should therefore, be excluded from Revenue as claimed by the petitioners. It is however, submitted that exclusion of interest/dividend income from revenue may encourage Telecom Companies to introduce schemes whereby the customers are allowed monthly tariff/Airtime at very low or even nil charges in return for making substantial security deposits that may then be invested to earn interest/dividend income. Therefore, the Telecom Licensees for the prime purpose of ensuring minimum licence fee liability can do so by way of such innovative tariff plans and are therefore arguing in the present petition for exclusion of incomes from interest/dividend from the AGR."

(emphasis added)

In our view, the stand taken by the DoT as regards the meaning of "revenue" in the affidavit filed on its behalf in the year 2003 in this very litigation was clearly right and its present stand is plainly wrong.

In the averments made by the DoT in the above quoted passages from its earlier counter affidavit, there is a reference to the consultant's recommendations. Here it may be recalled that following the introduction of the migration package, the Telecom Commission of the Government of India had appointed a consultant to evolve a procedure for verification of revenues of licensee companies under the revenue sharing regime. The issues referred to the consultant and his report on

those issues give a very good idea how the definition of "gross revenue" was framed in the licence agreement and why certain items of inflow were expressly included as part of "gross revenue". In the letter issued by the Telecom Commission on 6 October 1999 it was stated that the appointment of the consultant was "in connection with evolving a system to verify the account of licensee companies" and the terms of the reference to the consultant were as under:

> "1. What constitutes revenue for different services, i.e., Cellular, Basic, Paging etc.?
>
> 2. Whether revenue of a subsidiary dealing in goods and services connected to the licensed service can be treated as a revenue of the licensee?
>
> 3. What should be the system for recognition of revenue of the licensees?
>
> 4. What can be the effect of different accounting practices on revenue and the need for uniform accounting practice for all licensees?
>
> 5. What should be the mechanism to verify the correctness of revenue of the licensees and detect under-representation of revenue, if any?
>
> 6. How should the licensee reflect revenues for different services and different service area in the consolidated account for the purpose of identifying revenue against each license and service area?"

As may be seen, the first item in the terms of reference is what constitutes revenue for different services namely, cellular, basic, paging etc. It is thus apparent that the determination of the term 'revenue' is in relation to those services. The second term relates to the revenue of a

subsidiary company and the question is whether it can be treated as revenue of the licensee. Again, the reference is in regard to the subsidiary company dealing in goods and services connected to the licensee's service.

The consultant's report, in paragraph 2 deals with Revenue and its Measurement and in paragraph 2.1 states as under:

> "2.1 The term 'revenue' has been discussed at various places in authoritative accounting literature. (Refer to Appendix I of this note for relevant excerpts). From a perusal of this literature, **it is clear that under accrual accounting, revenue of an enterprise is measured by the charges to customers or clients for goods supplied and services rendered to them and by the charges for use of enterprise resources by them.** Some specific issues in determination of revenue are discussed in the succeeding paragraphs."
>
> (emphasis added)

Having thus fully acknowledged the true nature of revenue, the report proceeded to deal with certain specific items of inflow and recommended their inclusion in gross revenue, assigning very good reasons for the recommendation. Some illustrative cases are provided under paragraphs 2.3, 2.4 and 2.5 of the report:

> "**Security Deposits from Customers**
>
> 2.3 As far as security deposits received from customers and similar items are concerned, they should be excluded from revenue **only if they are strictly refundable** and have not been credited to the profit & loss account but shown as a liability in the balance sheet.
>
> **Sale of Handsets/Accessories**

> 2.4 Amounts billed to customers in respect of handsets and accessories sold is covered by the definition of term ‘revenue’. It could possibly be argued that sale of handsets that sale of handsets and accessories represents a trading activity which can be carried on without a license; it does not have a direct nexus with the revenue of an operator from service activity and therefore, it should not be included in the revenue. For our purpose, however, this argument does not hold good. Sale of handsets and accessories is an integral part of the telecom business and has been always so recognized. Sale of handsets and accessories and rendering of services are not independent activities. **Many of the schemes offered by the operators price the handsets and services as a package. Exclusion of sale proceeds of handsets/accessories from revenue may also trigger schemes whereby airtime is charged at a low price or even provided free of charge while the price of handset also covers the element of airtime.**
>
> **Income from Interest/Dividends/etc.**
>
> 2.5. Income from Interest and Dividends should be included in revenue. There may be a contrary view that income in the nature of interest/dividend from investments has no nexus with the rendering of telecom services – it is in the nature of income from financing activities and should therefore, be excluded from revenue. **But exclusion of interest/dividend from revenue may encourage telecom companies to introduce schemes whereby the customers are allowed monthly tariff/airtime at very low (or even nil) charges in return for making substantial deposits that may then be invested to earn interest/dividend income**.”
>
> (emphasis added)

Thus even while conceding that the inclusion of certain kinds of inflow as “revenue” may be debatable from a purely accounting point of view, the report recommended their inclusion for the reason that the exclusion of those items might encourage the licensee companies to make

good earnings, even while keeping the tariff very low, by offering to the subscribers different kinds of schemes avoiding any significant inflow of "revenue" as call charges and thus defeating the very object of the revenue sharing regime introduced by the government. The intention here was clearly not to include each and every income in the definition of gross revenue.

The statements made in the counter affidavit filed by the DoT in the year 2003, along with the consultant's report leave no room for doubt that the definition of "gross revenue" in clause 19.1 of the licence agreement is derived from AS-9 and the term "revenue" in the licence agreement carries the same meaning as recognized by AS-9. It needs to be noted here that the earlier affidavit was filed in the year 2003 when the migration package and the changes in the licence, incorporating the provisions for revenue sharing, were quite fresh and the affidavit thus reveals how the term was understood by the DoT contemporaneously. The present stand, which is a reversal of the earlier stand, is being taken after a passage of about 14 years.

In any case, there is no reason for the DoT to change its stand on the same issue and in the same proceeding. It may be added here that it would be pointless for it to defend the change of its stand as regards the meaning of "revenue" on the basis of the *AUSPI* decision. As explained earlier, in the *AUSPI* decision the Supreme Court rejected the licensee's

plea that the total revenue should mean only revenue derived from the licence activities and must exclude revenue coming from activities beyond the licence. So far as the meaning of the term "revenue" used in the licence, it expressly left the question open for interpretation by the Tribunal.

Finding

In light of the discussion made above we are of the view that under the licence agreement "revenue" is no different from the way it is defined in Accounting Standard 9, that is, "the gross inflow of cash, receivables, or other consideration arising in the course of the ordinary activities of an enterprise from the sale of goods, from the rendering of services, and from the use by others of enterprise resources yielding interest, royalties and dividends". However, by virtue of the *AUSPI* decision of the Supreme Court, in case the licensee carries on other kinds of business, apart from providing telecom services, "gross revenue", for the purpose of determining the licence fee, will include inflow from all its business activities, whether under the licence or beyond the licence. Further, "gross revenue" will also include all the items expressly specified in clause 19.1 of the licence agreement whether or not in accounting systems and in ordinary commercial parlance, any of those items are viewed as 'revenue'. From the "gross revenue", thus arrived at, only those deductions are permissible which are expressly specified in clause

19.2 of the licence agreement. Further, unlike the computation of "gross revenue" deductions are permissible only on actual basis.

Having seen what comprises "revenue", it will be useful, having regard to the 'heads' over which the parties are in dispute, to state here certain basic principles and on that basis enumerate what cannot be taken into reckoning for computation of "gross revenue".

i. Capital receipts are different from revenue receipts; hence, receipts of capital nature cannot be added to the "gross revenue".
ii. The same revenue cannot be subjected to double charge. It follows that the same item of inflow cannot be added up more than once for computation of gross revenue
iii.
   a. No one can earn revenue from oneself.
   b. One cannot treat someone else's revenue as one's own.

This means that in order to be counted as "gross revenue", the item of inflow must not be notional but real.

Discussion on specific heads

1. Gain on sale of capital asset and receipts from sale of scrap

In light of the discussions made above and especially in view of the recognition of revenue as per AS-9 "gain on sale of capital assets and receipt from sale of scrap" cannot be included in "gross revenue" for computation of licence fee. As seen above, clause 19.1 of the licence agreement mentions specific inflows as forming part of "gross revenue".

The item under consideration evidently does not come under any of the inflows enumerated in clause 19.1.

The learned ASG, however, argued that the expression “any other miscellaneous revenue” would include not only this item but all and every income that may come to the licensee company. However, a perusal of clause 19.1 would show that all heads of inflow mentioned there, with the exception of interest and dividend, relate to the services being provided under the license. Even for interest and dividend, it was argued on behalf of the licensees that those inflows too must relate to the service under the license. In any case the terms used are “miscellaneous revenue” and not “miscellaneous income”. The submission that revenue and income are synonymous terms and are used interchangeably is not acceptable in view of the definition of revenue under AS-9 and the submission is already rejected in the earlier part of the judgment.

Leaned ASG submitted that it is only the *gain* from sale of fixed assets and scrap that is to be considered as revenue. He clarified that it is not the entire sale proceeds but the *gain* from sale of the capital assets and scrap that is to be taken into account for computation of revenue since *gains* are reflected in the profit and loss account under the head ‘other income’. He argued that as per the *Framework for the preparation and Presentation of Financial Statements* (July, 2000), income is also understood as increase in economic benefits, enhancement of assets,

decrease in liability, etc. The clauses referred to by the ASG in this regard are as under:

> "73. The definition of income encompasses both revenue and gains. Revenue arises in the course of the ordinary activities of an enterprise and is referred to by a variety of different names including sales, fees, interest, dividends, royalties and rent.
>
> 74. Gains represent other items that meet the definition of income and may, or may not, arise in the course of the ordinary activities of an enterprise. Gains represent increases in economic benefits and as such are no different in nature from revenue. Hence, they are not regarded as a separate element in this Framework.
>
> 75. The definition of income includes unrealized gains. Gains also include, for example, those arising on the disposal of fixed assets. When gains are recognized in the statement of profit and loss, they are usually displayed separately because knowledge of them is useful for the purpose of making economic decisions."

Accounting Standard (AS) 10 deals with the accounting for fixed assets. And it gives the meanings of the certain terms used in it as under:

> "6. The following terms are used in this standard with the meanings specified:
>
> 6.1 Fixed asset is an asset held with the intention of being used for the purpose of producing or providing goods or services and is not held for sale in the normal course of business.
>
> 6.2 Fair market value is the price that would be agreed to in an open and unrestricted market between knowledgeable and willing parties dealing at arm's length who are fully informed and are not under any compulsion to transact.
>
> 6.3. Gross book value of a fixed asset is its historical cost or other amount substituted for historical cost in the books of account or financial statements. When this

> amount is shown net of accumulated depreciation, it is termed as net book value."

As per the Main Principles, gains or losses arising from disposal of fixed asset, which is carried at cost, should be recognised in the profit and loss statement. Further, on disposal of a previously re-valued item of fixed asset, the difference between net disposal proceeds and the net book value should be charged or credited to the profit and loss statement. Principles 26 and 32 in this regard are as under:

> "26. Losses arising from the retirement or gains or losses arising from disposal of fixed asset which is carried at cost should be recognized in the profit and loss statement.
>
> 32. On disposal of a previously revalue item of fixed asset, the difference between net disposal proceeds and the net book value should be charged or credited to the profit and loss statement except that to the extent that such a loss is related to an increase which was previously recorded as a credit to revaluation reserve and which has not been subsequently reversed or utilized, it may be charged directly to that account."

This gain can be of two types, a gain over and above the gross book value and a gain over the net book value. A gain over and above the net book value may also be shown as income in the profit and loss account. Nonetheless, it cannot not be considered for computation of gross revenue even if the stand of the respondent is to be accepted. The gain over the gross value is in real terms but the gain over net book value can only be for profit and loss account and income tax purposes, as depreciation is shown as an expense as far as profit and loss statement

and income tax are concerned. However, as the license fee is charged on gross revenue without allowing for expenses, no deduction will be permissible for depreciation of the asset. An asset carried at the depreciated value when sold above this value will be gain only as in that case actual depreciation would be lower than what was claimed. As long as the sale value does not exceed the gross book value (actual or historical cost price), the sale proceeds though liable to income tax, cannot be taken into reckoning for computation of gross value because license fee has already been paid on this amount. It is noted above that the same revenue cannot be subjected to charge twice over. We may here note that the learned ASG fairly accepted that income may mean differently for coming under the charge of income tax and for determination of gross revenue under the licence. He also accepted that the same revenue cannot be subjected to license fee twice.

For illustration, a company earns Rs.100 in a year. It spends Rs.50 on buying equipment. The equipment depreciates by Rs.20 so that its gross book value is Rs.50 and net book value Rs.30. The company pays license fee on the full income of Rs.100 but its income for the purpose of income tax is Rs.80 as depreciation is allowed as an expense for the purpose of income tax. The Company sells the equipment for Rs.40 in the next year. Though the gain of Rs.10 on the depreciated value will be chargeable to Income Tax, it would not come under charge for payment

of licence fee as licence fee was already paid on Rs.100 of which this Rs.10 is only a part.

2. Insurance claims in respect of capital assets

An insurance claim does not form part of the normal business activities of the licensee (unless the claim is in respect of loss of business) and it is also not covered by any of the inflows mentioned in clause 19.1.

The ASG once again sought to clarify that as in case of fixed assets, it is only the gain arising from the insurance claim that is to be included in the gross revenue. He submitted that the amount of insurance claim in excess of the depreciated book value and which is booked in the profit and loss account under the head 'other income' would constitute gain and it should, therefore, form part of "gross revenue". He once again placed reliance on the framework for the preparation of accounting standards. He also placed reliance on section 41(2) of the IT Act, according to which gains made from destruction of assets are also to be treated as income.

Under this head two types of cases may arise, as may be seen from the following illustrations:

(i) An equipment destroyed due to any calamity is replaced by a new equipment. In such a case, even if the claim received is more than the depreciated book value of the equipment, the

same cannot be considered as revenue as long as the cost of replacement of equipment is equal to or more than the claim received. However, in the unlikely event, that the claim received is more than the actual cost of replacing the equipment, the difference may be taken as income.

(ii) The equipment or the asset is not immediately replaced. In that case, by the same logic as for the sale of fixed assets, the gain to the extent it is more than the gross book value and not the net book value (depreciated value) can be considered as income.

For example, a building the cost of which was Rs.x is destroyed due to fire. If the claim received is more than the net value of the asset (depreciated value) but less than the cost paid for it or its gross value, such a gain cannot be included in income for the purpose of clause 19.1 as no rebate was given when the asset was purchased or for its depreciation over the period of time. However, in reality the building might have appreciated in value and at the time of

destruction, its value might be more than its cost. For example, if it was insured for Rs.x+y and it is this amount that is received from the insurance company. In that case, Rs.y, which is in excess of the gross value (cost of asset), would indeed be a gain in real terms but that too cannot be reckoned under clause 19.1 because the gain in its nature does not pertain to "revenue".

3. Discounts and Commissions

There are three types of cases that may be clubbed under this head:

a. Discounts allowed on international roaming
b. Commission and discount allowed to distributors on sale of pre-paid vouchers
c. Goodwill waiver, discount and rebates

It is the contention of the respondent that all such discounts relate to business promotion activities of the licensee and they cannot be treated as diminished revenue. Even under normal accounting practice, discounts are treated as expenditure and netted off before showing income. Since the licence agreement does not permit any netting off, such expenditure cannot be deducted and will, therefore, have to be included in the gross revenue. It was further submitted that if one understands revenue as synonymous with increase in economic benefits, and the revenue sharing

exercise as sharing of benefits or real worth of the natural resource, these discounts and commissions cannot be allowed to be deducted.

The argument regarding sharing of benefits of natural resource would have been well founded if it was a case of an administered price of services as in the case of petrol and diesel. If the licensor had prescribed a price for a particular service and the licensee had given a discount on the same in the interest of business, no doubt such a discount would not be open to exclusion under clause 19.1. But in the absence of any price fixed by the licensor, the licensee is free to fix the price as long as it is not in violation of any regulation. The argument of natural resource and its worth, therefore, does not hold scrutiny.

The profit and loss account of the licensee company is audited by the statutory auditors and passes the scrutiny of the Board of Directors. Any additions or deletions from the revenue stated therein may be made only if there is a sound basis for it either in clause 19.1 or in the accounting standards.

(a) Discounts allowed on international roaming.

i. If the discounts are in the form of reduced billing and the amount booked in the profit and loss account is on the basis of the invoices raised and no deduction is shown on account of discount, no addition may also

be made in the same on the ground that the billing was on a discounted price.

ii. If the amount billed is for a higher amount and the discount is in the form of volume discount given separately, the billed amount should be taken as revenue and the discount may be treated as an expense which is not open to deduction under clause 19.1. A credit note given subsequent to the billing may also be treated as an expense. If the revenue booked in the profit and loss account shows netting off on account of any discount, the amount netted off may also be added up for computation of gross revenue.

(b) Commission and discount allowed to distributors on sale of pre-paid vouchers

It is submitted on behalf of the licensees that though the pre-paid vouchers carry a Maximum Retail Price (MRP), these vouchers are sold to the distributors on a lower price as per agreement between the parties. It is contended that the sale of pre-paid vouchers is a principal to principal transaction. The sale transaction is complete with the realisation of the consideration and from that moment the ownership of the cards,

their custody as well as all the attending risks arising from their loss, destruction etc. passes on to the distributors, regardless of when the distributors sell the cards to the retailers or the end users. It is stated that the distributors are invoiced at this sale price and the revenue is booked in the profit and loss account without any netting off as no discount is given on the price. In support of the submission illustrations are given of sale of fast moving consumer goods such as vegetable oil, cosmetics etc. to the wholesalers and it is argued that sale of the pre-paid cards is akin to that.

The learned ASG, on the other hand submitted that no netting off is permissible under clause 19.1 and in terms of that clause gross revenue is to be taken without netting off.

In our view the definition of "gross revenue" cannot be construed as to bar the licensee from fixing a wholesale price for the service which is lower than its MRP. The test is how the actual transaction takes place. If the sale and invoicing is on MRP and any discount is given separately, then in terms of clause 19.1 such discount is not deductible even if the revenue booked in the profit and loss account is after netting off the discount. On the other hand, if the sale is on a stated/agreed price, invoiced at that agreed price and booked under the revenue in the profit and loss account accordingly, without netting off any discount, the actual selling price would be the revenue and the difference between the MRP and this selling price cannot be added to "gross revenue".

(c) Goodwill waiver, discount and rebates

It is argued on behalf of the licensees that discounts, other than cash discounts, amount to a reduction in billing and are not items of expense. Further, as they lead to reduced revenue, they should not be added in the gross revenue for determining the license fee. It is argued that only a cash discount given for early payment is in the form of a finance charge and an item of expense that may not qualify for deduction according to the definition of "gross revenue". It is argued that other discounts such as goodwill waiver are allowed to be deducted from revenue in terms of the accounting standards and, therefore, should not form part of "gross revenue".

Though, the accounting practice may allow for deduction of goodwill waiver and discounts other than cash discounts, clause 19.1 is very clear that the items mentioned therein shall form part of "gross revenue", without netting off any expenses. The case of the licensees on this score is, therefore, not acceptable.

However, a wrong billing is a different case. In case a customer is billed wrongly and subsequently it is confirmed that there was a mistake in the bill, the discount for such wrong billing given immediately or in a subsequent bill is not an item of expense but amounts to a revision in the billing itself and, therefore, cannot be taken as part of gross revenue. The test for this is that such wrong billing is confirmed on

verification/investigation and the discount/reversal is not given merely on the word of the customer as a goodwill gesture. Further, in case of any doubt, the onus to prove that the discount/rebate was on account of wrong billing will be on the licensee.

4. Bad Debts written off

It is the contention of the licensees that since the charging from the customers is on accrual basis, the amounts considered on accrual basis remain gross amounts and reduction due to bad debts does not amount to netting off of gross revenue but simply results in reduction in the quantum of gross revenue.

According to the ASG, however, this cannot be called an effacement of revenue but it is expenditure in the normal course of business. It is pointed out that even in the clarifications issued following the tender documents, on a specific query about bad debts, sales returns etc., the department clarified that there is no provisions for their deduction from gross revenue.

It is true that the writing off the bad debts does not result in effacement of revenue. In the accounts, revenue is shown on accrual basis as billed and provisions are made for bad debts. If the writing off the bad debts takes place in the financial year subsequent to the one in which the corresponding revenues were booked, it becomes expenditure for that year and does not result in effacement of revenue originally booked.

Since the definition of gross revenue does not permit deduction of expenses from the revenue, bad debts written off may not be allowed to be deducted from the computation of "gross revenue" for fixing the licence fee.

It is submitted on behalf of the licensees that if a bad debt, that is written off is later on recovered, it is required to be reported to the DoT. This implies, according to the licensees, that bad debts written off may be allowed as deductions from revenue but as and when those are recovered subsequently those should be added on to revenue. The submission is not acceptable but it needs to be clarified that when any bad debt written off is recovered subsequently, it may not be charged to license fee again as that would result in double charging of license fee on the same revenue.

5. Liability written off

The learned ASG contended that even a liability written off would be a gain and therefore, included in gross revenue. That may be true for the purpose of Income Tax because when the liability had incurred, it might have been shown as an expense. However, if deduction was not allowed for determining the license fee when the liability incurred, it cannot also be included in income for the purpose of license fee, for that would mean subjecting the same amount to the charge of licence fee twice over.

Take the example of a company that makes a provision for retirement benefits for the amount x. For the purpose of income tax, it will be considered as an expense, but no discount from income will be allowed for the sum for determining the license fee. If such a liability is written off on a future date and shown accordingly in the profit and loss statement it surely cannot be brought to charge for a second time for computing licence fee.

6. Waiver of Late Fee

According to the ASG, waiver of late fee should be treated on the same footing as writing off bad debts. We are unable to agree. Late fee is a penalty and a penalty that is waived off cannot be added to revenue. In the first place penalty cannot be said to be revenue and if a penalty which is waived off is added to revenue, it would be clearly a case of a notional income being subjected to charge.

7. Amount of negative balance of pre-paid customer

Pre-paid vouchers are sold for a price for which the customer gets a fixed duration of talk time/usage of telecom service. However, when the talk time/usage is exhausted, it may so happen that some usage/call is in progress due to which, the charge may exceed the amount received for the voucher, resulting in a negative balance. Generally these amounts should be nominal. When the customer recharges the account, this

negative balance is adjusted. However, in case the customer does not recharge, and consequently the service provider does not receive this amount, the same is added to its gross revenue for determining its licence fee. In our view this negative balance cannot be taken into account for computation of gross revenue as it is notional revenue which is neither billed nor received. Moreover, the extra usage is not on account of any fault on the part of the service provider and the service provider does not gain anything from such usage beyond the permitted duration for the amount received by it.

8. Non-refundable deposits and notional interest on interest free loans

With regard to non-refundable deposits, the ASG submitted that the respondent no longer wishes to press for it to be included in "gross revenue". Regarding notional interest also, it is stated that since this demand is under suspension, adjudication on it may be kept in abeyance.

9. Refund of excess interest and excess licence fee:

The ASG in his written submissions-II has stated that refund of excess interest and excess licence fee will be excluded from computation for determination of AGR.

10. Interest Income on promoters' equity and funds received:

It is strongly argued on behalf of the licensees that only such interest income that has a direct nexus with the provision of services can

be included in "gross revenue". It was argued that this income was recommended to be included in "gross revenue" only to check the service providers from devising schemes providing for large deposits from the subscribers on which handsome interest may be earned while keeping the tariff for actual usage quite low. It was further argued that any item included in the definition of gross revenue has to be read *ejusdem generis*, in the context of the other items that precede or succeed it.

While it is true that the consultant appointed by the DoT had recommended including interest as part of revenue for the above reasons, no such limitation is placed either in clause 19.1 or elsewhere. Even in terms of AS-9, revenue arising from the use of other resources by the enterprise, yielding interest, royalties and dividend income is to be recognised as revenue when there is no significant uncertainty as to its measurability of collectability (paragraph 13). Interest/dividend earned is reflected in the profit and loss account of the company. Since no limitation is placed on the type of interest or dividend, no exception would be available for any interest/dividend and all interest/dividend may be added up for calculation of gross revenue. Further, as no related item of expense is to be deducted from the revenue in terms of clause 19.1, interest paid by the licensee for any borrowing etc. may not be netted off from the interest earned.

It is argued on behalf of the licensees that if interest and dividends that are corporate income are added to "gross revenue" and if the company has more than one license, the income would get added up for each of its licences, leading to an anomalous situation which cannot be the intent of the license. It was clarified by the ASG that such corporate income will be *apportioned* to the different licenses held by the company and will not be added up over and over again for the different licences held by the company. In view of the statement made by the ASG and the discussion made above it is held that the interest income of the company earned on any of its resources has to be taken into account for computation of "gross revenue" but it is also made clear that for a company holding more than one license, the interest/dividends income will not be added as a whole to each of its licences but *apportioned* to the different licenses so that the same income does not come under the charge of licence fee more than once.

11. Roaming charges and PSTN pass-through charges not allowed in subsequent years

Under clause 19.2 of the licence agreement, roaming charges and PSTN (Public Switched Telephone Network) charges are allowed to be deducted from "gross revenue" for arriving at the AGR. The charges are allowed to be deducted on actual payment and not on accrual basis. It is the grievance of the licensees that many times the bills are raised late

and such charges are paid in the financial year succeeding the one in which those are incurred. However, the charges are not allowed deduction by the respondent on the ground that those were not incurred in the same financial year.

The ASG stated that deductions will be allowed on payment even though the actual payment may take place in the financial year following the financial year in which the charges were incurred.

On behalf of the licensees, in this regard a further grievance is made that many times it so happens that the licensee to whom such charges are to be paid also happens to be the same company. It is stated that some officers of the respondent do not allow deduction of such charges on the ground that there is no actual payment as the company making as well as receiving the payment is the same. But the revenue is counted under both the licences for the purpose of computing the "gross revenue".

We may clarify that irrespective of the company being the same, pass-through charges shall be allowed to be deducted as soon as the same are accounted as revenue under the different licence held by the company.

12. Reimbursement of infrastructure operating expenses

Under clause 19.1, no rebate is to be given for any expense except those specified in clause 19.2. The issue is with regard to sharing of

towers and infra-structure. According to the ASG, any payments received for such sharing must form part of the revenue of the company for the purpose of license fee.

According to the licensees, however, there are two types of payments received for sharing of infrastructure; one, a charge levied for the usage of the facility and the other, reimbursement of expenditure incurred such as that on electricity, diesel etc. It is the contention of the licensees that while charges levied for usage of infrastructure form part of "gross revenue" for the purpose of license fee, the reimbursement of costs of sharing only goes towards reducing their costs and should not be construed as revenue.

In our view while any payment made towards the usage of the facility has to be taken as revenue in the hands of the recipient, a payment in the nature of reimbursement of an expense and which is clearly indicated separately in the invoice as such, may not be taken as revenue provided that it is not booked in the profit and loss account as revenue. Further, the onus to differentiate between the two kinds of payment lies fully on the licensee, the recipient of the payment.

13. Gains from foreign exchange fluctuation

These gains are of two types. First, is the reduction of liability towards payments for capital goods such as equipment, and roaming

charges for out-roamers. The other is increase in receipts such as roaming charges for in- roamers.

In the first case the reduction in liability on account of payment for capital goods is only a reduction of cost. Since the cost of equipment has no impact on the licence fee as the same is calculated on gross revenue, any gain arising on account of a decrease in such cost should also not be taken into account for licence fee and cannot be treated as revenue for the purpose.

As regards payment of roaming charges, since the same is allowed on actual basis and not accrual basis, the actual amount paid or set off in case of netting, may be allowed to be deducted from gross revenue in terms of clause 19.2.

On the issue of roaming revenue on account of in-roamers, since the same is to be accounted for in the revenue on accrual basis, the licence fee should be on the revenue that is booked in the profit and loss account as per AS-9. Subsequent changes in the book value of the receivable are only notional till the same is actually received. Further, the actual receipt may be less or more depending on the currency rate at the time of actual payment. Since no discount is given if actual receipt is less, no license fee should be charged if the same is more.

In view of the above, any gain or loss due to foreign exchange fluctuation should have no bearing on the license fee.

14. Income from Management Support and Consultancy Service:

Under the Companies Act, revenue from operations is to be disclosed under sale of products, sale of services and other operating revenues. Income from Management Support and Consultancy Services in most cases arises on application of the company's experience, expertise and domain knowledge of the sector in which the company operates. Whether or not there is other operating revenue or other income under the Companies Act, it is income rendered in connection with the business of the company and taxable under section 28 of the Income Tax Act.

There is full justification to include Income from Management Support and Consultancy Services as part of AGR.

15. Trading income from VSAT equipment:

VSAT is the abbreviation for Very Small Aperture Terminal. The heads of inflow specifically made part of "gross revenue" under clause 19.1 of the licence agreement include **"…….**sale proceeds of handsets (**or any other terminal equipment etc.**)". The receipts under this head, therefore, clearly form part of gross revenue.

16. Revenue from IP1 (arising in the case of Bharti)

According to the licensees, revenue from passive infrastructure the provision of which does not require a licence should not be included in

the revenue of the licensees. This cannot be accepted because this is revenue generated from normal operations of the business and booked in the profit and loss account as such under AS-9.

17. Revenue from cable landing station ("Bharti Aquanet Ltd." in the case of Bharti):

Bharti Aquanet Ltd.'s cable handling system caters to the collocation requirements of international carriers. Bharti Aquanet has entered into licence agreement with DoT to provide ISP services in India. Its income sources are from rent and rendering of services. Revenue from operations on account of provisioning of inter-connection through facilities created either through cable landing station or any other is "revenue from operations" for the purposes of Companies Act. There is ample basis to include revenue from cable landing station as part of AGR.

18. Revenue from 214 FCC Licence, USA (in the case of Bharti – "BILGO"):

Federal Communication Commission (FCC) 214 licence regulates the provider as a service carrier under the Communication Act of 1996, where it is provided that all providers of telecom services (domestic or international) that provide services to the general public for profit must have the prior approval of the FCC before offering or providing such services. All facility bases providers, re-sellers, wireless service providers, mobile virtual network operators and retail service providers

are required to obtain authority from FCC before they start rendering services.

It is clear that the revenue from operating FCC 214 licence in the USA arises not from the licence granted by DoT but by FCC. Hence, this inflow cannot be taken as part of AGR unless the DoT is able to establish that there is technical, managerial and financial interconnection, interlacing and synergy between company's operations in the USA and in India and the gross revenue from operation of FCC 214 licence is otherwise reflected in the company's accounts.

19. Proceeds of disinvestment of investment in a company (in case of Sistema Shyam in Hexacom):

Net gain/loss on sale of investment is Company's "other income" under the Companies Act (General Instructions for preparation of Statement of Profit and Loss – Part II Schedule IV of the Companies Act). Sale proceeds of assets held as investments are also not included as part of "gross receipts in business" under section 44AB of the Income Tax Act (Guidance Note on Tax Audit under section 44 AB of the Income Tax Act 1961 of ICAI). [However, if shares/securities in Hexacom are held by Sistema Shyam as stock-in-trade, the sale proceeds need to be recognized as part of gross receipts in business].

Proceeds of disinvestment in a company, therefore, should not form part of AGR unless it is proved that the stake was the company's stock-in-trade.

20. Treasury Income (Interest, Dividend, Profit from redemption of mutual funds on loan/equity funds temporarily invested pending deployment) (in the case of TTSL):

Treasury income of the nature above is part of 'other income' under the classification recommended by ICAI in its Guidance Note. TRAI however held that income from dividend should not form part of AGR in its recommendations of 2006. The view was confirmed by TDSAT in its order dated 30 August 2007 in Petition no.7 of 2003. With regard to interest, TRAI recommended that interest on refundable deposits alone needs to be counted as AGR. TDSAT in its order dated 30 August 2007 enlarged the scope as defined by TRAI and *inter alia* held that interest on deposit held as security from customers using long distance calls or for allowing them concessions in the charges for using the telecom services are also to be included as part of AGR.

On the issue of considering interest and dividend as part of AGR, definition of gross revenue under clause 19.1 specifically includes "revenue on account of interest, dividend". The format of Auditor's Report on Statement of Revenue and Licence Fee clearly includes interest and dividend.

TDSAT in its order dated 30 August 2007 went with the argument that gross revenue has already suffered levy of licence fees and hence the surplus of gross revenue after discounting expenditure if invested in dividend yielding assets need not again be subject to levy of licence fees. We beg to respectfully differ. Surplus of gross revenue if invested in the core operations of the company would have yielded a larger gross revenue in subsequent years and the larger gross revenue would have been subject to levy of licence fees without any distinction. Use of enterprise resources for the purposes of business whether as working capital or in dividend/interest yielding assets is primarily a business decision. Interest is assessed to income tax as profit and gain from business and profession and not an income from other sources if there is evidence to support a view that use of enterprise resources by way of a business decision has yielded the interest income.

Definition of AGR provides for dividend and interest to be considered as part of AGR, there may be no basis to exclude those for levy of licence fees.

21. Credit of expenses (in the case of TTSL)

Only if it is an incidence of “other non-operating income” that net of expenses directly attributable to such income can be disclosed under the Companies Act (ICAI’s Guidance Note). But if the expenses pertain to company’s revenue from operations (whether as sale of products, sale

of services or other operating revenue) then gross figure, both of receipts and expenses are to be disclosed.

There would be no basis to allow credit in expenses, if the transaction *per se* pertains to company's revenue from operations.

22. Demand of Licence Fee in circle where the Licensee was not granted spectrum (in the case of Videocon & STel):

Videocon though granted a UAS licence for the Delhi service area was not allocated any spectrum there. Similarly, STel was granted a UAS licence for the service area of J & K but it was not given any spectrum in that service area. Nonetheless, both Videocon and STel are faced with demands of licence fee for the service areas of Delhi and J & K respectively.

In our opinion, the demands are bad, unreasonable, invalid and unsustainable. During the period in question, the UAS licence came bundled with spectrum and it is evident that without any spectrum, the licensee could not work out the licence.

It may also be noted that in petition no.1 of 2011 filed by STel, it was held that in the absence of allocation of any spectrum, it did not have the roll out obligation under the licence.

In our considered view, the demand of licence fee from Videocon for the Delhi circle and from STel for the J & K circle is fit to be set aside.

23. Interest, Penalty and Interest on Penalty:

On behalf of the licensees an almost unanimous grievance is made in regard to the impositions of interest, penalty and interest on the amount of penalty.

It appears that the DoT has imposed, as a matter of course, interest besides imposing the maximum amount of penalty prescribed under the licence agreement for delayed payment or short payment of the licence fee and has then further added interest on the penalty amount. The payment of licence fee by the licensee is treated as delayed or short payment in case it is not in accordance with the computation of gross revenue and adjusted gross revenue by the DoT. In many cases, the amount of penalty along with the interest, shown to have accrued on it, exceeds the amount of licence fee.

In our opinion, in the attending facts and circumstances, the imposition of interest and maximum penalty and then to further compound it with interest on the amount of penalty is wholly unjustified. As is evident from the history of the dispute, the question of computation of "gross revenue" and "adjusted gross revenue" has been mired in controversy from the beginning. The parties are in dispute for more than ten years over the elements that go into the computation of "gross revenue" and "adjusted gross revenue" and the whole matter has been in a flux for all this time. In those circumstances, there seems to be no reason

for charging interest and penalty and then interest on penalty. Even in case some penalty must be imposed in the facts of any particular case, it can never be the maximum prescribed under the licence. At the most, some nominal amount may be imposed as token penalty with interest, if permissible, at the lowest rates. Further, there should be no question of any penalty in case the delay in raising the demand is attributable to the DoT or if it is caused due to court cases.

These are broadly all the heads of inflow over which the parties are in dispute. In case, any disputed head of inflow is left out, that will be governed in light of the general discussions and discussions concerning the individual heads.

All the petitions are disposed in the above terms. The impugned demands are set aside and the DoT is directed to rework the licence fees payable by the petitioners for the years in question, in light of the findings, observations and directions made in the judgment and to issue fresh demands which the licensees will pay within the time prescribed under the law.

……………....
(AftabAlam)
Chairperson

………………....
(Kuldip Singh)
Member

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