

JAN 2020 SUPREME COURT RULING ON AGR IN TELECOM SECTOR – A CASE ANALYSIS*

INTRODUCTION

Supreme court in its hearing on January 17, 2020, rejected pleas by Vodafone Idea, Bharti Airtel and Tata Teleservices to review the October 24, 2019 verdict that widened the definition of Adjusted Gross Revenue (AGR), leaving the three telcos collectively facing more than Rs 1.02 lakh crore in additional licence fees, spectrum usage charges (SUC), penalties and interest.

On October 24, 2019 the Supreme Court delivered a significant judgment in relation to the licensing agreement between telecom companies and the Department of Telecom (DoT). In its judgment, the Court accepted the interpretation given to Adjusted Gross Revenue by the DoT and ruled against the telecom companies.

The appeals in question were filed by both the DoT and the telecom companies against an order of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). The case pertained to the definition of gross revenue in clause 19.1 of the licence agreement between the Government of India and the telecom service providers.

CONCEPT OF ADJUSTED GROSS REVENUE

The telecom sector was liberalized under the National Telecom Policy, 1994 and various licenses were issued to companies under Section 4 of the Indian Telegraph Act, 1885. However, as the fixed license fee was very high and the telecom service providers consistently defaulted in making the payments, the latter made a representation to the Government of India for relief against the steep license fee.

After considering this representation, the National Telecom Policy of 1999 was formulated. It gave an option to the licensees to migrate from a fixed licence fee to a revenue-sharing fee and was made applicable in the year 1999.

The 1999 Policy was so designed that the government becomes a partner or sharer of “gross revenue.” From out of money received under the head of “Adjusted Gross Revenue,” the Central Government took a conscious decision to spend money on remote and uncovered areas.

Fifteen percent AGR was fixed as the license fee under “revenue sharing,” which was first reduced to 13 per cent, and finally to 8 per cent in 2013.

Importantly, the Draft Licence Agreement provided clause 18.2, which pertains to an annual license fee payable as a percentage of Adjusted Gross Revenue (AGR).

Gross Revenue, defined under clause 19 of the Draft Licence Agreement, reads as under:

“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.

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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/PLMN related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India;
- I. Roaming revenues actually passed on to other eligible/entitled telecommunication service providers and;
- II. Service Tax on the provision of service and Sales Tax actually paid to the Government if gross revenue had included as a component of Sales Tax and Service Tax.

19.3 Applicable AGR in respect of Spectrum usage charge shall be as given under Part VII of this agreement.”

The dispute between DoT and the mobile operators was mainly on the definition of AGR. The DoT argued that AGR includes all revenues (before discounts) from both telecom and non-telecom services. The companies claimed that AGR should comprise just the revenue accrued from core services and not dividend, interest income or profit on sale of any investment or fixed assets.

In 2005, Cellular Operators Association of India (COAI) challenged the government’s definition for AGR calculation.

In 2015, the TDSAT (Telecom Disputes Settlement and Appellate Tribunal) stayed the case in favour of telecom companies and held that AGR includes all receipts except capital receipts and revenue from non-core sources such as rent, profit on the sale of fixed assets, dividend, interest and miscellaneous income.

However, setting aside TDSAT’s order, Supreme Court on October 24, 2019 upheld the definition of AGR as stipulated by the DoT.

CHRONOLOGY OF THE CONTROVERSY

1994 : With the introduction of the National Telecom Policy, a number of companies were issued telecom licences, for which they were expected to pay a fixed fee every year.

1999

- The service providers failed to pay the licence fee and had to be given a bailout package via a letter dated July 22, 1999.
- According to this letter, service providers had to pay a certain portion of their adjusted gross revenue (AGR) as licence fee with effect from August 1, 1999. The government was to decide the proportion of AGR to be charged as licence fee after receiving the recommendations of the Telecom Regulatory Authority of India (TRAI).
- After the licence agreement was amended and an AGR-based mechanism was introduced, all service providers had to pay their license fees on the basis of the AGR definition prescribed by the government.

2003 : A few members of the Association of Unified Telecom Service Providers of India (Auspi) moved the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) questioning the validity of AGR’s definition in the licence agreement.

2006 : On July 7, TDSAT held that service providers needed to pay as licence fee a portion of their revenue from those activities that were related to the telecom licence, not other activities. With regard to this, it sought TRAI's recommendations on the definition of licensed and non-licensed activities. TRAI subsequently gave its recommendations defining the items to be included in the AGR for payment of licence fee.

2007

- The department of telecommunications (DoT) challenged in the Supreme Court TDSAT's jurisdiction over terms of the telecom licences that had previously been accepted unconditionally by licencees.
- In an order dated January 19, the apex court dismissed DoT's appeal, and directed it to raise its contentions before TDSAT.
- On August 30, TDSAT accepted most of TRAI's recommendations and passed an order that would be applicable to those Auspi members that had moved the TDSAT with effect from the date when they filed their petitions.
- Auspi and the Cellular Operators Association of India (COAI) filed a review petition urging that the TDSAT order be made applicable to all members of the two bodies from the date of filing of their petition.
- DoT again moved the Supreme Court against the August 30 TDSAT order.
- Even as the DoT appeal was pending before the apex court, some telcos filed petitions before TDSAT requesting to be included in the tribunal's August 30 order.

2011

- The Supreme Court on October 11 held that TDSAT's August 30, 2007, order should be set aside. It allowed licencees to challenge any demand before TDSAT, which would have to go into the merits of the claim and decide whether it was in accordance with the licence agreement and in consonance with the AGR definition.
- All telecom licencees moved TDSAT challenging the basis of DoT's licence fee demand.

2015

- On April 23, TDSAT allowed all operators' petitions and set aside DoT's demands. It also directed DoT to rework the licence fees.
- DoT moved the Supreme Court against the TDSAT order.

2019 : On October 24, the Supreme Court, having heard all arguments in the case, held that telecom operators could not be given any relief with respect to pending licence fee claims.

2020 : On January 17, the Supreme Court dismissed review petitions by various telecom companies challenging the Supreme Court judgement in the Adjusted Gross Revenue (AGR) case.

Implication on non- telecom firms holding licenses for internal communication and signaling

The Supreme Court judgment has predominantly impacted the telecom sector, it has imposed large liabilities on several other companies, including those owned by the government. The verdict has also made the non-telecom firms holding licenses for internal communications and signalling liable to pay licence fees on their entire revenue, even if they did not offer telecom services. DoT has sought Rs. 1.72 trillion from GAIL (India) Ltd, Rs. 48,000 crore from Oil India Ltd, Rs. 22,168 crore from Power Grid Corporation of India Ltd, Rs. 15,019 crore from Gujarat Narmada Valley

Fertilisers and Chemicals Ltd and Rs. 5,841 crore plus interest from Delhi Metro Rail Corp Ltd (DMRC), among others.

Recent Twists and turns- As reported*

On February 14, the Supreme Court had rejected the modification applications of Bharti and Vodafone Idea seeking relaxed payment scheme for the AGR dues. The court directed the companies to make payments immediately, prompting the DoT to issue letters to telcos last Friday that payments must be made by the same midnight. The Supreme Court made scathing observations on the conduct of the telecom companies as well as the DoT for ignoring its 24 October verdict that had directed the firm to pay DoT by January 23, over Rs.1 trillion in dues for under reporting their revenues.

Bharti Airtel and Vodafone Idea on February 17, paid Rs 10,000 crore and Rs 2,500 crore, respectively, to the Union government as a portion of their AGR dues. While Bharti has said it would make the remaining payment before March 17, Vodafone Idea has told the authorities it would pay a second tranche of Rs 1,000 crore by February 21. In all, Bharti owes the government Rs 35,500 crore and Vodafone Idea around Rs 54,000 crore in AGR dues. Tata Teleservices, which had sold its mobile business to Airtel, made a payment of Rs 2,197 crore to the government against estimated dues of around Rs 14,000 crore. However, sources close to the company said Tatas had made the full and final payment. Reliance Jio had already paid Rs 195 crore towards AGR dues.

With that, the government has so far got Rs 14,892 crore in AGR dues from telecom companies, making up for just 10 per cent of the total outstanding amount.

**As reported by Business Standard, dated February 18, 2020.*

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