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Court : SEBI Securities and Exchange Board of India or Securities Appellate Tribunal SAT

Decided On : May-13-2003

Reported in : (2004)2CompLJ519TelecomDSAT

Judge : D Wadhwa, R Prasad, P Dasgupta

Appellant : Sterling Cellular Ltd. and ors.

Respondent : Union of India (Uoi) and anr.

Judgement :

1. This is a petition (Petition No. 17 of 2002) filed by Sterling Cellular Ltd. and others under Section 14A(1) read with Section 14(a)(i) and other applicable provisions of the Telecom Regulatory Authority of India Act, 1997. The petitioner is challenging the incorrect levy of interest charged by the respondent, i.e., Department of Telecommunications, on a non-existent and a notional amount of licence fee for the period 1.8.1999 to 20.9.1999. Copies of the impugned demand notes dated 10.8.1999 and 6.3.2000 have been annexed with the petition.

2. The brief facts of the case are that the petitioners had submitted their bids in response to the notice inviting tender bearing No.44-24/91-MMC issued on 20.1.1992 for introducing cellular mobile telephone services in selected metres in India. The petitioners were awarded separate licences for establishing, maintaining and operating cellular mobile telephone services in their respective service areas.

Under the metro licence agreement, the cellular operators were required to pay a fixed amount of licence fee per annum for the first three years of the licence period, the year being reckoned as 12 months beginning with the date of commissioning of services or completion of 12 months from the date of signing of the licence agreement, whichever is earlier. From the 4th year onward, the metro cellular operators were required to pay the licence fee on per subscriber basis. Keeping in view the objectives of the New Telecom Policy, 1999, which were to ensure equal opportunity and level playing field for all players and to redefine the competitive nature of the industry, the Government offered the existing metro cellular operators to changeover from New Telecom Policy 1994 (NTP-1994) to New Telecom Policy, 1999 (NTP-1999) which imply in terms of Clause 3.1.1 of NTP-1999 that the metro cellular operators would pay one time entry fee and the payment of licence fee would be based on revenue sharing basis. The said offer was contained in a migration package dated 22.07.1999 which was duly accepted by the petitioners. Clause 1(ii) of the said migration package provides, inter alia, that the licensee will be required to pay one time entry fee and a licence fee as a percentage share of gross revenue under the licence.

The entry fee chargeable will be the licence fee dues payable by the existing licensee upto 30.7.1999 calculated upto this date. It was further provided in Clause 1(iii) of the migration package that the licence fee as a percentage of gross revenue under the licence shall be payable with effect from 1.8.1999. The implication of the migration package was that no licence fee on per subscriber basis would be payable after 31.7.1999. On 10.8.1999, respondent No. 3, namely, Director (LF), Licensing Finance Cell, Department of Telecommunications, raised demand notes on all the metro cellular operators in terms of the said migration package and asked them to pay the licence fee together with interest thereon as computed by the Government. This demand note stated that at least upto 35% of the total amount of licence fee plus interest should be paid by 15.8.1999 and the balance was required to be paid on or before 31.1.2000 together with interest calculated upto the actual date of payment. The petitioner No.1 informed the Government vide its letter dated 30 November, 1999, that it had already paid licence fee on revenue share basis for the quarters beginning August, 1999, and November, 1999, amounting to Rs. 13 crores and nothing was outstanding

towards quarterly licence fee. Further, the petitioner No. 1 also deposited an amount of Rs. 24,51,73,116 towards the total outstanding dues as on 31 July, 1999. However; Department of Telecommunications [DoT] issued another demand note dated 6.3.2000 to all metro cellular operators demanding additional amount which in case of petitioner No. 1 was Rs. 13,66,57,679. Even though the basis of DoT's computation was not clear to petitioner No. 1 for which DoT was requested to provide details, the petitioner No. 1 paid a sum of Rs. 17,68,12,056 on 15 March, 2000, in order to meet the deadline for the payment. The petitioner No. 1 continued to write to DoT regarding details of the computation of the amounts mentioned in DoT's demand note dated 6 March, 2000. DoT, however, clarified in its letter dated 3.4.2000 that on two occasions in the past details regarding the method of calculation were explained to the two officials of petitioner No. 1.

The DoT further asked petitioner No. 1 to get back to them in case it had any specific point of doubt. The case of the petitioner is that the licence fee for the 5th year was payable only upto 31.7.1999 since the cut-off date for entry fee was 31.7.1999 and, after 1.8.1999, the licence fee on a revenue share basis was required to be paid. However, the DoT while calculating interest for the period from 1.8.1999 to 31.1.2000 calculated the same for the whole quarter, i.e., 1.7.1999 to 30.9.1999 instead of calculating for the period, the licence fee was actually due and payable, i.e., 1.7.1999 to 31.7.1999. The petitioner have drawn attention to the order dated 9.4.2002 of this Tribunal in petition No. 10 of 2001 [Cellular Operators Association of India and Ors. v. Department of Telecommunications and Anr. (2002) 2 Comp LJ 338 (TDSAT)] wherein it was held that the consequence of notional extension of effective date in case of circle cellular operators was not only to reduce the amount of licence fee payable but also to reduce the quantum of interest payable on outstanding licence fee for that period. In other words, no interest can be levied on amounts which are not due.

The petitioner No. 1 also apprised the DoT vide its letter dated 15 July, 2002, of the position emerging from the above judgment regarding alleged incorrect calculation of interest for the quarter commencing 1.7.1999. The contention of the petitioner has been that since no licence fee on fixed basis is payable from 1.8.1999 to 31.9.1999, no interest for the said period can be charged. DoT was

again requested by the petitioner No. 1 to correctly compute the interest payable by them and also provide details of computation. The petitioner No. 1 maintains that an amount of Rs. 1.71 crores has been incorrectly calculated and charged from the petitioner as interest on an imaginary principal amount which principal amount was not payable by them for the period August, 1999, to September, 1999. The petitioner No. 1 requested to DoT to refund the said amount together with interest thereon at SBI prime lending rate + 5% calculated till the date of refund. An other point mentioned by the petitioner No. 1 in the petition relates to Clause IV of the migration package dated 22.7.1999 which provides, inter alia, that the balance dues will have to be paid on or before 31.1.2000 along with interest calculated upto the actual date of payment. In terms of this payment, it has been stated that the DoT was required to intimate on 10.8.1999 itself which could have enabled the cellular operators to make the payment on time to avoid interest liability thereon. The DoT, how ever, raised only part demand on 10.8.1999 and did not raise any other demand until the expiry of the last date of payment, i.e., 31.1.2000. It was only on 6.3.2000 that DoT raised an additional demand of licence fee pertaining to the period prior to 31.7.1999 wherein it also charged interest thereon upto 15.3.2000, i.e., the date stipulated for making the payment. The petitioner also mentions that the other petitioners had also accepted the migration package ; but they have also been charged excess interest. Copies of the impugned demand notes in case of other petitioners have also been attached with the petition.

These petitioners also wrote to DoT after this Tribunal's order dated 9.4.2002 [Cellular Operators Association of India and Ors. v. Department of Telecommunications and Anr. (2002) 2 Comp L] 338 (TDSAT)], referred to earlier, asking for refund of the excess amount charged by DoT. According to the petitioner, the details of incorrectly calculated interest in respect of some petitioners when no licence fee on the subscriber base was payable are mentioned as hereunder :

Petitioner	Amount in rupees
BPL Mobile Communications Ltd. Mumbai	1.86 crores
RPG Cellular Services Ltd. Chennai	3.07 crores
Usha Martin Telekom Ltd. Calcutta	43.7 crores
Hutchison Max Telecom Ltd. Mumbai	2.08 crores
Sterling Cellular Ltd.	1.71 crores

2.1 It has also been submitted by the petitioner that Clause 2 of the migration package which prohibits

raising of disputes for the period prior to 31.7.1999 is not applicable in the present case as neither the present dispute pertains to the period prior to 31.7.1999 nor was it an existing dispute. Hence, the petitioners have prayed that the demand notes of 10.8.1999 and 6.3.2000 issued to the respective petitioners be modified to the extent it is found to charge higher amount of interest for the period after 31.07.1999 when no licence fee was payable on per subscriber basis. It has also been prayed that the respondents be asked to refund all the excess amount charged to the respective petitioners together with interest thereon at the prevalent SBI prime lending rate + 5% per annum (compounded monthly) till the date of such refund.

3. The counsel for respondents submitted that in the migration package offered to various licensees vide offer letter dated 27.7.1999 -- no concession has been granted for either on the interest dues or for the liquidated damages. In this connection the counsel referred to Clauses (ii), (iv) and (ix) of the migration package which read as follows: "(ii) The licensee will be required to pay one time entry fee and licence fee as a per centage share of gross revenue under the licence. The entry fee chargeable will be the licence fee dues payable by existing licensees upto 31.7.1999, 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.

(iv) A total of at least 35% of outstanding dues including interest payable as on 31.7.1999 and LD charges in full will have to be paid on or before 15.8.1999. The amount paid, if any, against the earlier demand sent under letter dated 25.1.1999 for paying 20% or more of the outstanding dues, may be adjusted at licensee's option. The balance dues will have to be paid on or before 31.1.2000 along with interest calculated upto the actual date of payment.

(ix) For the purpose of calculation of outstanding licence fee upto 31.7.1999, the effective date of all the licences of cellular telecom circles and basic telephone services will be notionally extended by a period of six months. This does not apply to metro cellular licences (emphasis added). This is with the further condition that where extension of effective date has been given earlier due to whatever

circumstances, further extension will be given after deducting the period of extension already given subject to the total extension period not exceeding six months. In cases where extension of period of more than six months has already been given, there will be no further change." 4. It was maintained that this package was accepted unconditionally by all the petitioners. Such being the position, demand notices were issued vide letter dated 10.8.1999 seeking payment of dues calculated on the basis of no remission of interest amount payable. This demand note was raised based on the number of subscribers intimated by the licensees. The licensees were also informed that the licence fee for the 4th and 5th year were provisional and subject to revision after receipt and confirmation of subscribers figures for each completed months of 4th and 5th year of licence upto 31.7.1999. Since on verification, vast difference was found in the figures given by the petitioner as regards the number of subscribers, the respondent subsequently raised a supplementary demand on 6.3.2000. The petitioners thereafter paid the amount without any demur or protest.

5. One of the contentions of the counsel for respondent was that the payment of licence fee for the quarter commencing from 1.7.1999 to 30.9.1999 had fallen due on 15.6.1999 and the amounts pertaining to this quarter of licence fee should have been paid by the petitioner on or before 1.7.1999. If this had happened, then any amount paid in excess would have become eligible for adjustment at a later date after the migration. Since the petitioner failed to pay the licence fee based on correct subscriber basis on time and the migration package intervened, they have no case to get unintended benefit at the cost of legitimate dues of the Government. Another point made by the counsel for respondent is that in terms of the licence agreement, the licensor is not bound to raise the bill to the licensee. As such, the payment is to be made by the licensees themselves as prescribed in the licence agreement. It was also stated that it was the petitioner who failed to furnish correct and verified subscribers figures which was behind sending a provisional claim on 10.8.1999 and a supplementary claim on 6.3.2000.

6. The licence agreement for cellular mobile telephone services makes the following stipulations with regard to payment of licence fee by the licensee :

Service area	1st year	2nd year	3rd year
Bombay	3	6	12
Delhi	2	4	8
Calcutta	1.5	3	

6Madras 1 2 4 @ Rs.5 lakhs (five lakhs) per 100 (one hundred) subscribers or part thereof; subject to the minimum shown below:Service Fourth to sixth year Seventh year onwards (for each year) (for each year)Bombay 18 24Delhi 12 16Calcutta 9 12Madras 6 8 (a) For purpose of charging the lump-sum licence fee for the first three years, the year shall be reckoned as twelve months beginning with the date of commissioning of services or completion of 12 months from date of signing of the licence agreement, whichever is earlier.

(b) The fourth year for purposes of charging the licence fee shall be the period from the completion of the third year as defined above to the 31 March succeeding. The annual licence fee for the fourth year will, therefore, be computed pro rata with reference to the actual number of days. Thereafter, the year for purpose of levy of licence fee shall be the financial year, i.e., 1 April to 31 March and part of the year as balance period, if any.

(c) For the purpose of calculation of licence fee from the fourth year onwards as indicated in para 19.1 above, the number of subscribers at the end of each month shall be added for all the months of the year and divided by the number of completed months.

(d) (i) Subject to what is stated in para 19.1(d) --II, within one month of commissioning/provision of services, the licensee shall establish a separate bank account with a scheduled bank in India, to which all revenues accruing from the licence shall be credited. The Authority shall have lien of 30% on the amount of funds credited to this account limited to one quarter, as intimated by the Authority, which shall be adjusted towards the cellular licence fee and all other dues shall be carried out between the Authority and the licensee on a quarterly basis in advance.

DoT may specify the estimated quarterly amounts) in the beginning of the year and any balance adjustment may be made in the last week of the quarter. If the amount of balance adjustment at the end of the quarter exceeds Rs. 2 lakhs suitably revised amount may be specified for the ensuing quarter(s).

(e) Schedule of payments of cellular levy/licence fee will be as follows: (i) 10% before the signing of the agreement in the form of a bank draft drawn on scheduled bank in India, in favour of Pay and Account Officer (Hqrs), DoT, New Delhi.

(iv) Necessary adjustments will be made after payment has been received for 12 quarters (for first three years) in accordance with Clause 19.1(c).

(v) Thereafter, quarterly payments shall be paid ten days in advance for quarters starting with effect from 1st April, 1st July, 1st October and 1st January. Thereafter, pro rata licence fee for balance period will be collected in advance.

(f) The rate of Rs. five lakhs per hundred subscribers or part thereof is based on the unit call rate of Rs. 1.10. Fourth year onwards, as defined in the Clause 19.1(d), the rate of Rs. five lakhs will be revised based on the prevalent unit call rate. The revision will be limited to 75% of the overall increase in the unit rate during the period preceding such revision.

7. We have heard the counsel for the parties in dispute at great length and facts which emerge are as follows: 8. That the licence fee for the quarter 1.7.1999 to 30.9.1999 had fallen due for payment on 15.6.1999 which should have been paid on or before 1.7.1999 by the petitioner.

8.1 The migration package had become effective from 1.8.1999, which had entailed a change in terms and conditions for payment of licence fee.

8.2 The licensee did not pay the licence fee for the quarter 1.7.1999 to 15.9.1999 which had fallen due on 15.6.1999. This was required to be paid before 1.7.1999 which has not been done.

8.3 The second demand note dated 6 March, 2000, was not issued by the respondent on time which should actually have been issued on 31.1.2000.

The demand note issued by the respondent should have taken into account the changed terms and conditions stipulated in the migration package.

8.4 In this scenario, had the petitioner paid on time any excess amount for the quarter 1.7.1999 to 30.9.1999, he would have been entitled for refund or adjustment for the excess amount paid at a later date in terms of the migration package prescribing the cut off date as 1.8.1999.

9. While no premium can be placed on the action of the petitioner for not adhering to the schedule of payment of licence fee as discussed above, the factor of migration package and its implication on quantum of payment which has to be effected cannot be ignored. Hence, the petitioner should pay the licence fee as well as interest on account of delay in terms of conditions stipulated in the licence agreement upto 31.7.1999. However, after 31.7.1999, the payment of licence fee etc., are to be regulated in accordance with the terms and conditions of the migration package. The same position would obtain in regard to the similarly placed other petitioners.

10. We, accordingly, direct the respondents to modify the demand notes in the light of what has been indicated above. There will be no order as to costs.

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