

# Telecom Hotline

August 26, 2015

## TELECOM TRIBUNAL ORDERS UNION OF INDIA TO REFUND ENTRY FEE, AS RESTITUTION

- Licensee cannot be punished for 'sins of licensor'.
- The expression 'for any reason' in the termination clause will have to be read as 'for any reason *not attributable to licensee*' in appropriate cases.
- Orders refund of Rs. 3.376 billion (approximately USD 51.2 million) paid for spectrum and with interest at 8% on such amount from date of withdrawal of spectrum. TDSAT applies principles of restitution.

### INTRODUCTION

The Telecom Disputes Settlement & Appellate Tribunal ('TDSAT') recently passed an order<sup>1</sup> directing Union of India to refund a sum of Rs. 3.376 billion (approximately USD 51.2 million) with interest at 8% p.a. from date of withdrawal of spectrum to S. Tel Private Limited ('S Tel'). TDSAT ruled that spectrum allocation after 2008 had been quashed by the Supreme Court of India ('Supreme Court') and this was not due to any fault of S Tel and consequently, there was no justification in law or equity that would entitle Union of India to retain the entry fee of Rs. 3.376 billion. Relying on the principle of restitution, TDSAT ordered that the refund be made.

The Order is a welcome development in public contracts and has provided modest relief to a company that was already punished for reasons manifestly attributable to Union of India. The Order notes that the Supreme Court judgment in *Centre for Public Interest Litigation & Ors. v. Union of India*<sup>2</sup> ('2G Spectrum Case') quashed licences and spectrum due to 'illegalities' of the government. The Order also makes an important observation regarding consequences of termination. In this case, TDSAT held that the clause on termination would have to be read in such a manner that equitable consequences would necessarily follow when licensee has not committed any breach.

The Order sets the bar high for obligations of government and all instrumentalities of State. It is hoped that Union of India follows this Order in spirit and practice in all of its commercial contracts.

### FACTS

In July 2007 S Tel made applications for Unified Access Services ('UAS') licences in six circles and these were awarded to it by press notes issued on September 25, 2007. S Tel made another application for licences in sixteen circles (in addition to the above six) but this became subject matter of litigation.<sup>3</sup> Before the litigation was disposed off, government issued a notice inviting applications for auction of 3G and BWA spectrum. S Tel participated in the auction and succeeded in respect of 3G spectrum for six circles and paid an entry fee of Rs. 3.376 billion. In June 2010, government issued letter of intent to S Tel and on September 1, 2010, government as licensor amended the UAS licence of S Tel by incorporating clause 23.7(i). The relevant portion is set out below:

*In case the UAS licence is cancelled/terminated/revoked/surrendered for any reason, the spectrum usage rights shall stand withdrawn forthwith.*

However, in 2010 all licences issued after 2008 were challenged in Supreme Court in the 2G Spectrum Case for irregularities in the process of the grant. In its judgment of February 2, 2012, Supreme Court struck down one hundred and twenty two licences granted after January 10, 2008, which included six licences granted to S Tel. While some licensees were able to obtain temporary relief, from the date of allocation of spectrum till the date of withdrawal of spectrum, S Tel was not able to commercially operate the 3G spectrum for a single day. After making several unsuccessful representations to the government, it ultimately approached TDSAT for refund of Rs. 3.376 billion paid as entry fee.

### CONTENTION OF PARTIES

S Tel's contentions were that the licence was cancelled pursuant to the 2G Spectrum Case and it was not due to fault attributable to S Tel. S Tel relied on the principle of restitution, which is also statutorily recognized in section 141 of the Code of Civil Procedure, 1908 and section 65 of the Indian Contract Act, 1872 ('Contract Act').

Counsel for Union of India submitted that any relief could be granted only by the Supreme Court in reference to its judgment in the 2G Spectrum Case and the present petition before TDSAT was therefore not maintainable. Relying on the relevant clauses under the licence agreement, it was further argued that since the licence stood terminated, no relief could be granted in respect of the same. The relevant clauses relied by Union of India are:

### 3.6 Duration

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3G Spectrum - The right to use the 3G Spectrum shall be valid for 20 years from the Effective Date unless revoked or surrendered earlier, subject to the operator continuing to have a UAS/ CMTS licence. In case the UAS/ CMTS licence is cancelled/ terminated **for any reason**, the spectrum usage rights shall stand withdrawn forthwith. (**emphasis added**)

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### 3.7 Breach, revocation and surrender

The spectrum assignment may be revoked, withdrawn, varied or surrendered in accordance with applicable licence conditions or any other applicable laws, rules, regulations or other statutory provisions.

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If at any stage, the **spectrum allocation is revoked**, withdrawn, varied or surrendered, **no refund will be made**. (**emphasis added**)

It was submitted by Counsel for Union of India that government had absolute discretion in termination and that Supreme Court judgment in the 2G Spectrum Case operated as termination of the licence within the meaning of clause 3.7 above. In view of the last part of clause 3.7, refund to S Tel was not permissible.

### ORDER

Addressing the first argument of Union of India, TDSAT held that the Supreme Court judgment in 2G Spectrum Case did not preclude any form of restitution. TDSAT noted that S Tel only sought refund of the entry fee of Rs. 3.376 billion for spectrum and not licence fee itself. Analysing the key provisions of the UAS licence, TDSAT held that the Supreme Court judgement in 2G Spectrum Case made the licence impossible to perform. Thus, there was a frustration of contract in the manner envisaged under section 56 of the Contract Act.

TDSAT held that termination of the licence in the present case was not due to the fault of the licensee (i.e., S Tel) and that to hold S Tel liable for the termination would be to punish it twice. Importantly, TDSAT held that the expression 'for any reason' would have to be read 'for any reason attributable to licensee' and it would not be possible to 'stretch' the meaning of the expression 'for any reason' in the manner sought to be done by Union of India. TDSAT relied on judicial precedents to distinguish between scenarios where licence was terminated due to fault of licensee and other scenarios where licence was terminated due to fault of licensor.<sup>4</sup>

### ANALYSIS

The judgment of the Supreme Court in the 2G Spectrum Case was quite unprecedented with tremendous commercial and economic implications for companies that had invested in telecom in India. Refund of entry fee was a legitimate right of S Tel (and any applicant for that matter). Principles of restitution are well settled and it is an equally well settled principle of law that '*an act of court shall prejudice no man*'.<sup>5</sup> The Supreme Court also held that a party entitled to refund, will also be entitled to interest.<sup>6</sup>

Companies contracting with government would do well to remember their rights in cases such as the present – where due to an order of a court, prejudice has been caused. While TDSAT has made some hard-hitting comments on Union of India, it cannot be denied that the reasoning and the conclusion of TDSAT was sound in both law and equity.

Government and State instrumentalities would do well to keep in mind the cost of licence cancellations and resulting litigation. Union of India has the right to appeal under the Telecom Regulatory Authority of India Act, 1997. Supreme Court having already upheld principles of restitution and having heard the case of S Tel earlier, it can be reasonably expected that this Order will be upheld even if it is challenged.

– **M.S. Ananth & Vivek Kathpalia**

You can direct your queries or comments to the authors

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<sup>1</sup> Order dated July 6, 2015 in Petition No. 438 of 2014.

<sup>2</sup> (2012) 3 SCC 1.

<sup>3</sup> S Tel made another application on September 27, 2007, which was not considered on the ground that the same was submitted after the deadline of September 25, 2007. S Tel challenged this rejection on the ground that the deadline was retrospectively changed on January 10, 2008. S Tel succeeded in Delhi High Court and in the appeal filed by Union of India before the Supreme Court, Supreme Court disposed off the appeal without examining the merits of the contentions as Union of India made a statement that all pending applications, including S Tel's, would be considered on a 'first-come-first-served basis'.

<sup>4</sup> Unitech Wireless (TN) Pvt. Ltd. v. Bharat Sanchar Nigam Limited & Ors., Petition No. 436 of 2014, Order dated August 21, 2014.

<sup>5</sup> *Actus curiae neminem gravabit*

<sup>6</sup> ONGC v. Association of Natural Gas Consuming Industries AIR 2001 SC 2796.

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