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CALCULATION OF ADJUSTED GROSS REVENUE: A GAME OF TUG OF WAR?

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The Telegraph Act, 1885 empowers the Central Government to establish, operate and work telegraph i.e. conduct telecommunication services in India. This power can be transferred to private parties by entering into a licence agreement in exchange of a consideration as deemed fit by the Government. Prior to the year 1999, the telecommunication licences issued by the Government to private parties levied a fixed amount as licence fee from telecom service providers. The National Telecom Policy 1999 ushered in a change in relation to payment of licence fee, it envisaged a scheme of levy of licence fee, under different service licences, as a percentage of the adjusted gross revenue of a telecom service provider. To this effect, the Department of Telecommunications introduced a migration policy to migrate the existing service providers who were paying fixed licence fee to this new regime.On a provisional basis, the migration package calculated licence fee on the entire revenue of the service provider companies (including non-licensed revenue) with an assurance of clarification of the definition of adjusted gross revenue on receiving the recommendation from the Telecommunication Regulatory Authority of India. But the exact definition of adjusted gross revenue remains a matter of constant strife between the Department of Telecommunication and the various telecom service providers to this day with multiple petitions filed and decisions heard in different judicial forums. This essay examines the debate surrounding the definition of adjusted gross revenue especially in the context of inclusion of non-licensed activities in its ambit.

i. Introduction

India currently has the second largest telecommunication market in the world with the subscriber base reaching approximately of 1,185, 88 million (as on November 2017).[1] Over the past few years, the reports from the Comptroller and Auditor General(“**CAGReport**”) on the sharing of revenue by the telecommunication service providers indicate severe under-reporting which has caused heavy losses equivalent tothousands of crores rupees to the exchequer[1].The reluctance on the part of the telecom companies to pay the licence fee (which is calculated as a percentage of Adjusted Gross Revenue (“**AGR**”) as provided under various telecom service licences) in accordance with the CAG Report is due to the uncertainty that is prevailing over the exact definition of AGR. More particularly, the different types of revenue inflows that constitute the gross revenue of a telecom service provider.

According to Section 4 of the Telegraph Act, 1885 (“**Telegraph Act**”) the

Government of India (the "**Government**") is reserved with the exclusive privilege for establishing, maintaining and working of '*telegraphs*' in India. This provision therefore allows the Government to operate instrument, apparatus to conduct telecommunication within India[1]. This power can be given to private parties in exchange of a consideration determined by the Government.[1] For conducting wireless telecommunication, a similar provision exists in the Indian Wireless Telegraphy Act, 1935 which confers similar power to the Government to issue licences to private parties to possess wireless telegraphy apparatus[1] in exchange of payment of fee.[1] Pursuant to Article 77 of the Constitution of India, licences under the abovementioned acts are issued on behalf of the President of India, while theDepartment of Telecommunication, Ministry of Communication, Government of India ("**DoT**") as a licensor is empowered to modify, amend its terms and scope of the licences (on its own and or on the basis of recommendations of the Telecom Regulatory Authority of India ("**TRAI**" or the "**Regulator**"))[1]. After the liberalisation of the Indian economy in 1991, privatisation of the telecom sector was envisaged in the National Telecom Policy, 1994.[1] The first telecommunication licences for cellular mobile telecom services were issued in 1994, while the entry of private players in the internet services space took place in 1998.[1] These telecom service providers paid a fixed licence fee that was agreed upon with the DoT during the bidding process for issuing licences.[1]This mode of payment of licence fee was altered under the National Telecom Policy, 1999 wherein the licence fee, under various telecom licences[1] issued by the DoT,were calculated as a percentage of the adjusted gross revenue accrued by the licensed entity annually.[1]

After the National Telecom Policy, 1999 brought out the a new scheme for existing telecom service providers to migrate to the new regime as specified in the National Telecom Policy 1999 i.e. to pay licence fee as a percentage of the AGR ("**Migration Package**"). [1] This Migration Package provided assurance to the telecom service providers that fixation of quantum of licence as well as determination of final definition of AGR will only take place on obtaining recommendations from TRAI. [1] In the meantime, a temporary measure was used to fix the licence fee at 15% of the entire revenue of the licensee entity. The licensees, relying on this information signed the Migration Package. In the year 2001, the DoT incorporated a new definition of AGR and gross revenue in the telecom service licence agreements without taking into consideration the recommendations of TRAI [1]. Subsequently, the DoT issued demand notices claiming licence fee on the entire revenue of the licensee company causing a stir in the telecom sector[1].

Although there have been claims by telecom service operators that the calculation of AGR on the basis of total revenue should be limited to only those telecom service operators who accepted the Migration Package in 1999 and not subsequent it was clarified that the definition of AGR remains an issue for each telecom service operator who has entered into licence agreement containing the same definition of AGR as it was first introduced in the licence agreement. [1] This is because the same clause of two standard licence agreements for provision of a telecom services entered into with the DoT cannot be interpreted differently for two licensees whereby two licensees working under the same licence cannot be made to pay the licence fee based on two completely different computations.[1]

Calculation of Adjusted Gross Revenue

Prior to the introduction of the Unified Licence Agreement by DoT in 2013, where different telecom services were combined under one umbrella licence, there were separate licences to be entered into by telecom service providers for provision of each service. The separate service licences that were prevalent at that time include Unified Access Services Licence ("**UASL**") and Cellular Mobile Telecom Service for access service, National Long Distance Licence and International Long Distance Licence for long distance services, and Internet Service Provider Licence for provision of internet services etc. These licence agreements contained similar provisions for levying of licence fee as a percentage of AGR, definition of AGR and gross revenue. In case the licensee is in possession of spectrum, the spectrum usage charges were also calculated as a percentage of AGR. Currently, the licensee fee is calculated as 8% of AGR, while as spectrum usage charge is approximately 3-8% of AGR.

For the purpose of examining the definition of AGR, we have used the definition provide in UASL as the same has been used by most courts while deciding the definition of AGR, although the definition in other telecom service licences are similar in nature. AGR is calculated by making specific deductions to the gross revenue of a telecom service provider. AGR is defined in clause 19.2 of the UASL as follows:

> *"**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.*"

While clause 19.1 of the UASL defines Gross Revenue as:

> "***19.1****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 <u>any other miscellaneous revenue</u>, without any set-off for related item of expense, etc."*

While the different inclusions in the abovedefinition provide much clarity as to the components of gross revenue, the term "*any other miscellaneous revenue*" remains ambiguous as to the nature of inflows that can be included. The DoT, giving an expansive definition to the term sent demand notices to telecom service

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providers/licensees for payment of licence fee.[1]The licensees argue that the term'*any other miscellaneous revenue*' denoted in this definition should exclude all such revenue (revenue accrued from non-licensed activities) that is not related to the telecom licence provided by the DoT. The DoT argues that that ultimately all the revenue of licensee exists due to its possession of the telecom service licence or can somehow be traced back to the telecom licence. [1]

ii. Judicial Decisions

(a) First Round of Litigation

At the first instance, in 2003, the association of telecom service providers (including Association of Unified Telecom Service Providers of India, Cellular Operators Association of India etc.)("**AUSPI**") filed a petition[1] at the Telecom Disputes Settlement and Appellate Tribunal ("**TDSAT**" or the "**Tribunal**"), a body set up to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector.[1] The AUSPI opposed the view of the DoT as expressed in the demand notices that was sent in relation to licence fee and definition of AGR. The argument by the DoT was that it hadample power to collect consideration/payments in any manner as the same has been prescribed in the proviso to Section 4 of the Telegraph Act.[1] The Tribunal decided that the power to determine the consideration/payments contemplated within the abovementioned *proviso* can only be used to the limited extent as prescribed under Section 4 of the Telegraph Act i.e. for establishing, maintaining or working of a telegraph and not beyond that. [1] The Tribunal also questioned the DoT in relation to non-consideration of the recommendation by TRAI on calculation and definition of AGR, as offered in the Migration Package. The Tribunal then went on to direct the DoT to obtain fresh recommendations[1] from TRAI before finally deciding the matter.[1]

After the submission freshrecommendation by TRAI[1], the TDSAT revisited the petition on calculation of AGR. The Tribunal considered the different heads which are to be included within the purview of gross revenue for the calculation of AGR[1]. Those heads of inflow of revenue which were determined to be not related with the licensed activities *inter-alia* include income from dividends, capital gains earned from sale of fixed assets, reversal of provisions and vendor's credits, payments received on behalf of third party, discernible or stand-alone sale of telecom equipment which is not bundled with telecom service, receipts from universal service obligation funds, bad debts, waivers, discounts from AGR etc. should be excluded from AGR[1]. At the same timerevenue accrued from sources such as rent of towers, dark fibres etc., rental income from properties utilized in establishing, maintaining and working of telecommunication, which are licensed activities, have to be included in gross revenue while calculating AGR. [1]

An appeal was preferred against both the decisions[1] of the TDSAT in the Supreme Court of India(the "**Supreme Court**") by the DoT, Government of India. A two judge bench of the Supreme Court in *Union of India v Association of Unified Telecom Service Providers of India* [1]*("**AUSPI case**")* examined the jurisdiction of TDSAT to decide on the validity of the terms and conditions of the telecom licence including the definition of AGR incorporated in the licence agreement issued as per Section 4 of the Telegraph Act. It was decided that the order dated July 7, 2007 of the TDSAT[1] in so far as it decides that the revenue realised by the licensee from activities beyond the licence will be excluded from AGR is without jurisdiction and is a nullity.However, the Supreme Court also clarified that the Tribunal does have the jurisdiction to decide 'any' dispute between the licensor and the licensee on the interpretation of the terms and conditions of the licence. [1] Therefore, the power of the Tribunal is limited to dispute arising after the telecom service licence agreement has entered into and not the validity of the terms and conditions incorporated. [1]The Tribunal has no power to decide on the definition of AGR but to adjudicate individual disputes where a demand notice is issued by the licensor to the licensee and the licensee disputes such a demand on the basis of an error in computation etc. [1]

The Supreme Court also made an additional observation that if the wide definition of AGR includes revenue beyond the licence activities, then it is open to for <u>the licensees not to undertake the activities for which they do not require licence under Section 4 of the Telegraph Act and transfer these activities to any other person, firm or company</u>.[1] Thus, licensees having agreed to the terms regarding payment of licence fee, which had been decided by the Central Government, it is not open to the licensees to plead for an alteration of the definition of AGR in the telecom service licence agreements[1]. The Supreme Court also mandated the TRAI to reconsider the recommendations keeping in mind that all the revenue of the telecom service provider is to be included in the calculation of gross revenue and the Tribunal to examine the issue afresh. [1]

(b) Second Round of Litigation

After the decision by the Supreme Court in the AUSPI case, almost all the telecom service providers filed petitions before the Tribunal disputing the demand notice issued to them by the DoT claiming that there are errors in the computation used to calculate licence fee. The matter was taken up by the TDSAT and it gave its judgement in the year 2015. [1] In this fresh examination., TDSAT observed that in cases preceding this judgement, there was a consideration with regards to the sources from where the inflow could be reckoned as part of gross revenue, in this case what is under examination is the nature of the inflow that may be included in the definition of gross revenue. The distinction was done in a limited interpretative framework as mandated by the AUSPI case. The Tribunal ousted the different reasoning of the Government in the demand letters that the definition of Gross Revenue can be read analogous with the definition of income under Income Tax Act, 1961 [1] . The rational provided in the abovementioned demand letters are that the definition of gross revenue in the telecom service licences contain terms like '*any other miscellaneous revenue*' and '*income from supplementary revenue*' whichhave to be given the broadest meaning and thatonly the deductions as specified in the definition of AGR are permitted etc., this indicate that all the income of the licensee company (irrespective of the source) should be included in the computation. [1]The Tribunal made the following observations: (i) the

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term '*any other miscellaneousrevenue*' cannot be equated to mean '*any other miscellaneous income*'; (ii) the term gross revenue means all gross amounts, without any deductions for loss or expenditure – that is, without netting; and (iii) 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[1], but this will include will include inflow from all its business activities, whether under the licence or beyond the licence[1].

Therefore, according to the Tribunal all receipts except capital receipts and revenue from non-core sources such as rent, profit on sale of fixed assets, dividend, interest and miscellaneous income, etc will be included in AGR. It laid down some pointers to determine whether an inflow should be included in in AGR:

i. Capital receipts should be treated differently from revenue receipts; hence, capital receipts cannot be added to the definition of "gross revenue".
ii. There cannot be double charge on the same revenue.
iii. No revenue can be earned from oneself
iv. One cannot treat someone else's revenue as one's own.
v. In order to be counted as "gross revenue", the item of inflow must not be notional but real[1].

The Tribunal gave an indicative list of revenues inflows that are to be included in the calculation of AGR as follows:

Inflowof Revenue liable to be Included in the Calculation of AGR	Inflow of Revenue liable to be excluded in the Calculation of AGR
• Commissions and discounts are allowed to be given to distributors (sale of pre-paid vouchers) so long as the sale and invoicing are on MRP and any discount is provided separately. • Discounts on international roaming are allowedonly if the discounts are in the form of volume discount provided separately. The billed amount is always taken as revenue.	• Gain on sale of capital asset and receipts from sale of scrap. • Insurance claims in relation to capital assets. • Commission and discount allowed to distributors on sale of pre-paid vouchers, if the sale is on a stated/agreed price, invoiced at that agreed price. • Discounts on international roaming are permitted if the discounts are in the form of reduced billing. • Any amount due to the liability of the telecom

• Goodwill waiver, discount and rebates. • 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. • Any payment made towards the usage of the facility (usage of infrastructure) has to be taken as revenue in the hands of the	service provider being written off. • Waived off penalty. • Amount of negative balance of pre-paid customers. • Non-refundable deposits. • Notional interest. • Refund of excess interest and excess licence fee. • Interest Income on promoters' equity and funds received. • Pass-through charges shall be allowed to be deducted as soon as the same are accounted as revenue under

recipient. • Income from management support and consultancy support services. • Trading income from VSAT equipment, sale proceeds of handsets (or any other terminal equipment etc.) • Revenue from IP1 • Revenue from cable landing station • Revenue from dividend and interest.	the different licence held by the company. • Reimbursement of infrastructure operating expensesa payment in the nature of reimbursement of an expense and which is clearly indicated separately in the invoice. • Gains from foreign exchange fluctuations. • Revenue from 214 FCC licence, USA • Proceeds of disinvestment in a company, unless it is proved that the stake was the company's stock-in-trade. • Demand of

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	licence fee in circle where the licensee was not granted spectrum (only in case where spectrum is required)

Simultaneously, in addition to filing petitions in the TDSAT, the telecom service providers also challenged the definition of AGR in different High Courts[1] across the country.[1]These petitions were based on the argument that the Supreme Court did not address the following questions: (i) what are inflows that constitute AGR; (ii) are the inflows restricted to activities under Section 4 of the Telegraph Act; and (iii) whether the definition of AGR which comprise of revenue from non licensed activities is in violation of Article 14 and Article 19 (g) of the Constitution.

In 2016,the Madras High Court heard the petition filed by Aircel Cellular Limited ("**Aircel case**").[1]The Petitioners advanced the argument that the first proviso to Section 4 of the Telegraph Act is violative of Article 14 and Article 19 (1) (g) of the Constitution of India. The Court decided following:

(i) The licensee having accepted the terms of the agreement and taken advantage of the benefits under the licence cannot now claim that the revenue generated from other activities, which are not part of the licence agreement, does not fall within the definition of AGR; and

(ii) Since the government is trying to get the best available price for the valuable rights that is vested on it from Section 4(1) of the Telegraph Act, the claim of violation of Articles 14 and 19(1)(g) of the Constitution does not stand[1].

The Tripura High Court, in 2017, while disposing off the petition by Bharati Hexacom Limited ("**Bharti case**")[1]took the exact opposite stance to the one taken by the Madras High Court in the Aircel case. The High Court laid emphasis onthe intent of formation of contract for interpreting when a provision is in contention. The Court relied on the understanding in the Migration Policy to the extent that there was confusion in relation to the calculation of AGR, the understanding in the Migration Policy cannot be foregone[1]. It also pointed out that the provisions of a statute cannot be expanded contractually, therefore, according to Section 4 of the Telegraph Act, consideration for establishing, maintaining and working a telegraph should be related to activities for which the licence was granted.[1]

iii. Should Non-Licensed Activities of the Company be Included in the Definition of AGR

While the final decision on the definition of AGR is awaited, we have examined some legal and economic reasons for the Government to loosen the liability of the telecom service operators.

(a) Levy of Excessive Licence Fee in India

In the recommendations released by TRAI in relation of definition of AGR for internet service provider licences [1], the telecom Regulator observed that both the licence fee as well as spectrum usage charges levied by the DoT in India from the telecom operators are exorbitant in comparison to the same levied in different jurisdictions around the world.[1] The Economic Survey 2018 reveals that the telecom sector is crippling with losses and debts due contributed by increasing competition in the market coupled with excessive fee payments to the government. [1] The last year saw many telecom service providers like Vodafone Limited and Idea Limited, Reliance Communications Limited and Aircel Limited entering into consolidation to benefit from the economies of scale while the rising debt in the industry mounts. [1]Further, in this year itself a major player in the market, Aircel Limited is set to file bankruptcy.[1]

Considering the state in which the telecom industry finds itself, the Government should provide adequate relief for its continued sustenance. Much of the Government's programmes to digitalise the Indian economy are dependent on the participation of a host of private players in the market.

(b) A clear case of unconscionable bargain/ understanding things in the same sense

The principle of unconscionable bargain is a common law principle which recognises that certain contracts or clauses in a contract are entered into in circumstances where there is an in-equal bargaining power between the parties involved [1] . In case of contracts entered into with the State, the court has recognised that there are myriad of instances where the State can thrust upon the parties, terms and conditions which are unreasonable as well as unconscionable. [1] The apex court in *Hindustan Times vs. State of U.P* [1] observed that in circumstances where unjust condition are imposed upon parties by the State, the same will have to be examined in the light of Article 14 of the Constitution of India and Section 23 of the Indian Contract Act 1972 ("**Indian Contract Act**"). Thus, it is established that where the parties have no effective choice to enter into the contract or assent to a term of the contract, such action by the party with higher bargaining power will be considered as unconscionable. [1]

In the Migration Package only one option was offered [1] to the telecom service providers, either accept the offer to migrate or stop conducting telecom services. The telecom service providers agreed to migrate to the National Telecom Policy 1999 regime relying on the assurance of the Government that the quantum and definition of AGR will be revised later. They had entered into the licence agreement and subsequently, the definition of AGR and gross revenues introduced by the Government.[1] Here, the Government has time and again claimed that since the licensees signed the licence agreement (with the provisional clause on licence fee) they are bound to accept the fresh clause introduced subsequently. It is apparent that since the Government held the upper hand in the distribution of licences, the licensees were not in a position to negotiate the terms of the licence agreement at any point. The clause introduced subsequently can be considered as unconscionable and is deprived of the acquiescence of the licensees.

(c) Violation of Fundamental Rights

The Government has emphatically emphasised that the licence agreements entered into with the telecom service providers are purely commercial in nature and therefore interference from either the Regulator or the judicial bodies are the not warranted.[1]In the case it was held that like any other contract, contracts entered into with the Government are governed by the Indian Contract Act, but in case of such contracts, the onus is on the Government to ensure that it conforms to the test of equality under Article 14 of the Indian Constitution[1]. This is due to the fact that the Government is entering into a contract on behalf of the general public this casts a duty upon State to exercise greater caution to avoid loss to the public. Additionally, in the case of contracts entered into with the State, the State has an upper hand in negotiating the terms and conditions.

In the case *Bharati Airtel Ltd. and Ors. vs. Union of India*[1],the apex court observed that the licences granted under the Telegraph Act are in the nature of largesse from the State and the State has to distribute the licences is subject to the conditions of Article 14 of the Constitution i.e. the distribution must be on the basis of some rational policy. In a similar decision the Supreme Court decided that "*even the language of the proviso to Section 4 of the Telegraph Act, which stipulates that the grant of licence should be "on such conditions and in consideration of such payments as it thinks fit", must necessarily be understood that the conditions must be rational and the payments forming the consideration for the grant of licence must be non-discriminatory*[1]*.*"

While deciding upon the judicial interference in the realm of contracts, the Supreme Court observed that the Government must be allowed to autonomy to ensure fair play in administrative functioning. At the same time, the decisions of the Government must be scrutinised by applying Wednesbury principle of reasonableness but must also be free from arbitrariness and must not be affected by bias or actuated by mala fides and while quashing decisions, heavy administrative burden on the administration and increase on expenditure have to be kept in view.[1]

In the case *Kerala Samsthana Chethu Thozhilali Union vs. State of Kerala*[1], it was laid down that when conditions are imposed on parting with natural resources of the state by virtue of a statute, the same cannotbe deviated from. The licence conditions cannot be framed to include matters that have not been contemplated under the Act. The power to impose terms and conditions therefore are subject to the provisions of the Indian Telegraph Act, 1885 and must conform to the legislative policy. The same must not be framed in contravention of the constitutional or statutory scheme. The conditions of the licence agreement must be such which would promote the policy or secure the object of the Act. The State has no power and/or jurisdiction to realise licence fee from the licensees by including revenue generated from their non-licensed activities in AGR in exercise of its monopoly powers. Such an action will clearly be violative of Section 4 of the Indian Telegraph Act, 1885.

In *Presidential Reference on the issue of Alienation of Natural Resources*[1] the court identified the different treatment required to be given to different natural resources, it took the example of bundling of exploration and exploitation contracts where there is requirement of heavy capital in the discovery of natural resources. The bundling of the two contracts are legally sound and economically justified to ensure that the

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exploration natural resources are exploited[1]. This will spur growth in a specific industry. In case the State plans to promote development in an industry, then the norm of maximisation of revenue from a certain resource can be deviated from.[1]

The Telecommunication sector can be equated to the exploration sector since the amount of capital required by the industries. The telecommunication sector is capital intensive and therefore, from the above decision proves that deviation can be made from the norm that is to reduce the licence fee and other fee to foster growth in the telecommunication sector.

(d) Absence of the term '*any othermiscellaneous revenue*' in Unified Licence

The DoT came out with a new regime under latest National Telecom Policy brought out in 2012, the policy unifies the various telecom services under one umbrella licence and there are separate services within the licence. The Unified Licence was released by the DoT on August 2, 2013. Although the DoT has vehemently argued that all even the non licensed revenue of the telecom company would fall within the definition of gross revenue while calculating AGR, in the Unified Licence, the definition of Gross Revenue for different services are devoid of the term '*any other miscellaneous charges*'. Take for examine the definition of Gross Revenue under the internet service chapter (Chapter IX) of the Unified Licence:

> *"The Gross Revenue shall be inclusive of all types of revenuefrom Internet services, revenue from Internet access service, revenue from internetcontents, revenue from Internet Telephony service, revenue from activation charges,revenue from sale, lease or renting of bandwidth, links, R&G cases, Turnkey projects,revenue from IPTV service, late fees, sale proceeds of terminal equipments, revenueon account of interest, dividend, value added services, supplementary services,interconnection charges, roaming charges, revenue from permissible sharing ofinfrastructure etc. allowing only those deductions available for pass through chargesand taxes/levies as in the case of access services, without any set-off for related item ofexpense etc."*

The absence of the term '*any other miscellaneous revenue*' from the definition of Gross Revenue renders the definition to be exhaustive with no scope of broadening the interpretation. Thus, it amply clear that the DoT itself feels that the inclusion of the total revenue of a telecom operator in the calculation of AGR is unjustifiable.

In the AUSPI case, the Supreme Court had observed that the Government was open to the option of transferring non-licensed activities of the licensee company to any other person or entity (that doesn't hold the licence) to avoid inclusion in the calculation of AGR[1]. The DoT therefore never had the intention to include the revenue from non-licensed activities in the ambit of AGR.

(e) Non-consideration of the recommendations of the regulator

In the Migration Policy, the Government had assured that the Government will base on final decision on the percentage of revenue share to be considered as AGR and definition of revenue on consultation with TRAI.

According to Section 11(1) (a) (ii) of the Telecom Regulatory Authority of India Act ("**TRAI Act**") the power is given to the TRAI to make recommendations in regard to terms and conditions of licence to be given to the service provider. The Government is also vested with the responsibility of seeking the recommendations of the Regulator with respect to issuance of new licences to the telecom service provider. [1] Although recommendation provided under this provision is not binding on the Government [1], due weightage should be given to the recommendations of TRAI. In the absence of such a consideration, the entire consultation process is futile. In a series of recommendations by the TRAI, from the year 2000 to present, the Government has refused to give due importance to the view of the Regulator.

Even in 2015, the TRAI released a new set of recommendations for definition of AGR for all licences (other than internet service provider licence) [1]. Through this recommendation, TRAI introduced the concept of Applicable Gross Revenue ("**ApGR**") which can be arrived at by deducing (i) revenue from other activities other than telecom activities (ii) receipts from Universal Service Obligation funds; and (iii) items specifically given by the TRAI such as income from dividend, income from interest, capital gains, income from property rent etc. Then AGR can be arrived at by making deductions for pass through charges. [1]

iv. Conclusion

The Government is planning to introduce the National Telecom Policy 2018, conduct the auction for 5G spectrum with the objective to attract investments to the sector and to provide telecom services to the entire population of the country. [1] In a recent statement, the Government had expressed the fact that revenue for the coffers is a secondary concern in comparison to the overall objective increasing the digital penetration in India.[1] Recently, the TRAI in its inputs for National Telecom Policy 2018 has again suggested that the DoT considers revising the levies and rates to be paid by the telecom service provider. Several policies on the incumbent government, including digital India, introduction of virtual network operators were brought in with the participation of private players in the forefront. However, these programmes cannot take shape without resolving the issue in relation to the definition of AGR and lowering the burden on the telecom service providers.

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