

**RECOVERY OF MONEY PAID
AS AN AGR FOR PURE
INTERNET SERVICES FROM
DEPARTMENT OF
TELECOMMUNICATION**

INTRODUCTION:-

In order to create a business friendly environment, the fundamental principles to be ensured by the Government is level playing field and non discrimination. The doctrine of "level playing field" as set out in Article 19(1)(g) of the Indian Constitution constitutes an essential doctrine.

The doctrine requires that competitors reasonably positioned must be handled in the same way as others by ensuring that they have the "level playing field" to lead their business.

In the matter of **Reliance Energy Limited vs. Maharashtra State Road Development Corporation Limited and others (2007) 8 SCC**, the law pertaining to level playing field was clearly stated in which it has been pointed out that Article 14 applies to government policy and also to contractual matters where government decisions or acts do not follow the test of reasonableness, then in that event, such acts or decisions would be considered unconstitutional.

UNIFIED LICENSING REGIME

The Department of Telecommunications (hereinafter referred to as "DoT") introduced Unified License (UL) Regime on 19.08.2013, under which new ISP holders were required to pay license fee even on pure internet service in respect of new UL ISP License.

This decision was taken without considering recommendations from TRAI on the AGR/License Fee issue. Under new policy, ISP holders were asked to migrate to carry on their business, where 8% AGR was fixed including revenue from pure internet services.

As a matter of fact, under old regime Government of India introduced ISP Policy in the month of November, 1998 under which Licenses were issued on a Non-exclusive basis from 06.11.1998 with benefit of waiver of License fee up to 31.10.2003 and thereafter, with a token fee of Re.1/- per annum for Licenses issued prior to 01.11.2003. Also, Limited Internet Telephony Services were allowed with effect from 01.04.2002 by issuing amended ISP Licenses.

On 03.03.2006, DOT amended the License Agreement imposing 6% of AGR, excluding revenue from Internet Access (pure Internet Services) and Internet content. By 10.05.2007, TRAI made its "Review of Internet Services" recommendations wherein TRAI proposed that all ISPs, with sales originating from pure Internet services, should have a standardised annual licencing fee equal to 6% AGR.

On 24.08.2007, the Government released instructions for grant of licence for running Internet networks. Pertinently, Annual Licence fees for Category A and B service areas was set at the rate of 6% AGR. However, notably, for computing licence fees, revenues created by pure Internet services were omitted from the AGR concept by TRAI in its recommendation. The Government strongly disagreed with TRAI's recommendation on this issue. Till

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16.04.2012, definition of GR/AGR was kept unchanged by TRAI. Later on, a circular regarding uniform licence fee fixed at rate of 8% of AGR for all ISP and ISP-IT licences were issued, where license fee was included provisionally along with revenue from pure internet services for ISP-IT Category until final decision is passed. After that another petition bearing Petition No.429/2012 was filed before Hon'ble TDSAT, New Delhi, wherein Hon'ble Tribunal vide its judgment dated 12.10.2012 held that TRAI had not recommended any changes to AGR definition and therefore, Internet Service Providers can't be forced to pay provisional fee under AGR concept.

TDSAT VIEW ON REFUND OF AGR PAID FOR PURE INTERNET SERVICES

The Internet Service Providers Association filed a Petition bearing Telecom Petition No.169 of 2014 against Union of India questioning the uneven or unequal license fee imposed upon ISPs license holders in recent regime to carry on the business of pure internet services after grant of Unified Licence (UL) on 19.08.2013.

In addition to the above said Petition, several other petitions were filed challenging the action of Government for not complying with doctrine of level playing field. One other ISP association was facing migration issues who requested DOT to maintain a level play field, objecting payment of 8% license fee as other old license holders were not paying any of it under old regime. DoT permitted the said Association to continue but on payment of 8% AGR for extended period of 3 months (UL). By May, 2015 TRAI issued its recommendations changing definition of

AGR, maintaining uniform licence fee of 8% of the AGR application for all ISP and ISP-IT licences. However, the Government took no decision on above recommendations.

Thereafter, another petition bearing Telecom Petition No.94/2017 was filed before Hon'ble TDSAT in 2017 raising grievance against demand of 8% AGR on revenue from pure internet services. It was pleaded in the said Petition that the Government has deliberately created a non-level playing field between ISP operators providing alike services, as old ISP licences were not required to pay licence fee on revenue from pure internet services as earlier it was not a part of the AGR. On other hand, old ISP licence whose licence expired in 2014 and those who signed UL-ISP licence were forced to pay increase AGR in the UL regime.

The Tribunal rightly pointed out the unreasonable classification and absence of intelligible differential while exempting one class and treating unequally other class providing same services. It was found that decision of Respondent/Government was violative of the principle of level playing field as no uniformity was created as per Article 14 and 19(1)(g).

The Hon'ble TDSAT while hearing Telecom Petition No.169 of 2014 and other connected matters vide its final Judgment and Order dated 18.10.2019 observed that creating 'old regime' and 'new regime' was not rational in nature. Also, TRAI was not asked as per Section 11 proviso 5 to reconsider or provide further recommendations regarding changed definition of AGR. The Tribunal further observed that Central Government failed to

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convey its course of action to TRAI before issuing guidelines and considering recommendations of TRAI which was not fair and transparent as per Section 11(1) of TRAI Act.

The final decision was passed in favour of ISPs by the Hon'ble TDSAT, New Delhi duly upholding that all ISPs under UL regime do have a right to recovery of the money paid as an AGR for pure Internet Services from the Department of Telecommunication.

**SUPREME COURT DIRECTIONS
WITH RESPECT OF REFUND OF
MONEY PAID AS AN AGR FOR PURE
INTERNET SERVICES**

That aggrieved by the above said final Judgment and Order dated 18.10.2019, the Union of India challenged the said Order dated 18.10.2019 passed by Hon'ble TDSAT, New Delhi before the Hon'ble Supreme Court of India by way of filing one SLP bearing Diary No.14382/2020. The said SLP was listed on 05.01.2021 on which date, Hon'ble Supreme Court passed an Interim Order that the Union of India shall not be required to refund any amount in pursuance of the Order dated 18.10.2019 passed by Hon'ble TDSAT, New Delhi. The said SLP is yet to be decided finally by the Hon'ble Supreme Court.

CONCLUSION:-

The TDSAT Judgment dated 18.10.2019 has made it very clear that the DOT cannot include revenue from pure internet services in the AGR for levy of license fee on the ISPs and hence, any such demand by the DOT is illegal and is liable to be set aside.

Further, many ISPs are still filing Petitions before Hon'ble TDSAT, New Delhi seeking

refund of the excess money paid as an AGR for pure internet services and the Hon'ble TDSAT, New Delhi is admitting said Petitions but the final decisions on the said Petitions are awaited as the main issue is yet to be decided by the Hon'ble Supreme Court.

DISCLAIMER:-

The present Article intends to provide general information on the above mentioned subjects & in no manner provides exhaustive details on the same. This document shall not be construed as a legal advise & further, shall not form as a base to take any decision without seeking proper legal advise from us. We shall not be responsible for whatsoever sustained by any person relying on this material.

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