
DUES AND DELAYS: A CRITICAL ANALYSIS OF THE ADJUSTED GROSS REVENUE (AGR) RULING

Nupur Barman, NALSAR University of Law, Hyderabad

ABSTRACT

This project aims to analyse the recent judgment of the Supreme Court in *Union of India v. Association of Unified Telecom Service Providers of India* (October 24, 2019), also referred to as "AGR verdict" and intends to provide insights surrounding the Indian telecom sector and the policy implications of the verdict. This judgement has had major implications on both, the private telecom companies and the government and thus, calls for a more holistic and consolidated approach. Henceforth, the ruling has been reviewed, analysed and alternatives & appropriate reforms have been proposed.

INTRODUCTION

The AGR (Adjusted Gross Revenue) issue has been a legal battle between the telecom community and the government for more than 14 years now.¹ The center of the conflict was the dispute regarding the definition of AGR², the basis on which the Department of Telecommunications calculates payable dues of the operators. The one stipulated by the DoT has been upheld by the Supreme Court of India³ in its ruling on October 24th, 2019. It was also held that the telecom firms will be allowed 10 years (setting aside the TDSAT order)⁴ to complete their payments of AGR dues, instead of 20 as suggested by the DoT⁵ which believed that the lump sum may result in bankruptcy or unnecessary pressure on the companies. The judgment has imposed a liability of more than 1.47 lakh crores on the telecom operators.⁶ Such a move might have grievous implications on employment and competition.

The Indian Telecom Sector was liberalized in 1994⁷, but the frequent defaults by Telecom service providers (TSPs) due to the steep license fee prompted the government to come up with a revised National Telecom Policy in 1999. Under this, the option of migrating to the “revenue sharing fee” model was introduced.⁸ With that, rather than paying a fixed fee based on revenue projections, telecom licensees had to pay a percentage of actual revenue as a license fee. This method of calculation had a more direct bearing on the business of the telecom licensees than the earlier model.⁹

The concept of AGR was finalised in 2001¹⁰. Fifteen percent AGR was fixed as a license fee under "revenue sharing," which was reduced to 13 percent and lastly to 8 percent in

¹ Navadha Pandey, *Final verdict of a 14-year-old legal battle with govt may strain telcos further*, MINT (24th August 2019) <https://www.livemint.com/companies/news/final-verdict-of-14-year-old-legal-battle-with-govt-may-strain-telcos-further-1566618404350.html>.

² Jocelyn Fernandez, *SC's decision on adjusted gross revenue to lead to Rs 92,000 crore hit for telcos*, MONEY CONTROL (OCTOBER 24, 2019 / 10:59 PM IST) <https://www.moneycontrol.com/news/business/explainer-what-is-adjusted-gross-revenue-and-why-has-the-agr-dispute-reached-sc-4570091.html>.

³ Union of India v. Association of Unified Telecom Service Providers of India, 2020 SCC OnLine SC 703

⁴ Section 14(A) 1, Telecom Regulatory Authority of India Act, 1997.

⁵ PTI, *DoT's suggestion to give telcos 20 years for AGR payment to help resurrect industry*: COAI, ET TELECOM (March 16, 2020, 23:23 IST) <https://telecom.economictimes.indiatimes.com/news/dots-suggestion-to-give-telcos-20-years-for-agr-payment-to-help-resurrect-industry-coai/74662141>.

⁶ Abhisek Mohanty, *AGR Telecom Headache: A Faulty Verdict that Can Only be Remedied by Govt Intervention*, THE WIRE (22 Jan 2020) <https://thewire.in/business/agr-telecom-sc-verdict>.

⁷ National Telecom Policy, 1994.

⁸ New Telecom Policy-1999.

⁹ *Supra* note 8.

¹⁰ Telecom Regulatory Authority of India, Recommendations on components of AGR (September 13th, 2006).

2013.¹¹ Objections were raised by the **Cellular Operators Association of India** (COAI) and the companies about the inclusion of **just the revenue accrued from core services**¹² and not dividend, interest income, or profit on the sale of any investment or fixed assets in AGR measurements. The October 2019 judgment had major financial implications on both the firms and the government, having to pay huge piled-up amounts and being deprived of the extra revenue, respectively.

Recently, three telecom firms, Bharti Airtel, Vodafone Idea, and Tata Teleservices —had moved the apex court seeking correction in calculation errors in the Department of Telecommunications (DoT's) AGR demand¹³, after a conundrum of self-assessment.

The pleas were dismissed by the SC and the order was reserved¹⁴.

The telecom industry is under a debt of more than 4 lakh crores currently and is looking for a relief package from the government. This is also evident from the fact that 10 of the 15 companies with AGR dues have either closed operations or are undergoing insolvency proceedings.¹⁵

The Indian telecom sector has been a highly competitively growing agency with ever-expanding demands, since its liberalisation.¹⁶ This calls for the need for regulation to ensure fair competition. The share of private companies in this sector stands at a dominating 89.58%¹⁷, which explains the major ramifications of the ruling on the dominant players such as Vodafone Idea, Airtel, etc who own more than half of the shares of the aforementioned sector¹⁸. The operators are unwilling to bear the additional fees¹⁹, resulting in anticipation of more legal challenges. The dismissal of review petition by the SC and threats of contempt cases, pose a

¹¹ *Supra* note 3.

¹² Clause 19, License Draft Agreement.

¹³ Kritika Saxena, *AGR Verdict Today*, CNBCV18 (Sep 01, 2020, 08:12 AM IST) <https://www.cnbcv18.com/telecom/dot-approves-domestic-global-players-for-pli-scheme-for-telecom-and-networking-products-11103662.htm>.

¹⁴ Megha Manchanda BUSINESS STANDARD (July 19, 2021 22:39 IST), *AGR dues cannot be recomputed: Supreme Court reserves order*, https://www.business-standard.com/article/companies/agr-dues-cannot-be-recomputed-supreme-court-reserves-order-121071901407_1.html.

¹⁵ Yuthika Bhargava, *Why is the telecom sector under stress?*, The Hindu (NOVEMBER 18, 2019 22:04 IST), <https://www.thehindu.com/business/Industry/why-is-the-telecom-sector-under-stress/article29865316.ece>

¹⁶ Mitra PP. *Transiting from Control to Regulation: The Case of Telecommunications in India*. *Indian Journal of Public Administration*. 2018;64(4):739-748.

¹⁷ Batra S. *Case Analysis II: AGR Challenge for Bharti Airtel and Vodafone Idea*. *Vision*. 2021;25(2):258-260.

¹⁸ *Ibid*.

¹⁹ Curwen, P, Whalley, J, & Vialle, P 2019, *Disruptive Activity in a Regulated Industry: The Case of Telecommunications*, Emerald Publishing Limited, Bingley. Available from: ProQuest Ebook Central. [18 October 2021].

grim situation for the debt-laden telecoms. Unless adequate steps are taken and relief packages enforced, it is also likely to have repelling effect on future FDI investments and potentially raise the spectre of claims by foreign investors under bilateral investment treaties (BITs) given the loss of shareholder value.²⁰ The case, thus, draws attention to the need of establishing a more consolidated stable statutory regime governing critical infrastructure sectors and their fair competition discourse.

REVIEW AND ANALYSIS

UNION OF INDIA Vs. ASSOCIATION OF UNIFIED TELECOM SERVICE PROVIDERS OF INDIA ETC.²¹

Various licenses were issued under Section 4 of the Indian Telegraph Act, 1885²² to telecom companies which were frequently defaulted. In counter to this, shift to “Revenue Sharing Regime”²³ was introduced which proved out to be very beneficial as seen from the rise in the gross revenue.²⁴ The difference in interpretation of the definition by the government gave rise to levies, which, in addition to service tax and interconnection charges, ate up 17% to 45.58% over the period from 2006 to 2020.

DECISION:

The Court refused to change the definition of gross revenue as defined in clause 19.1 of the licence agreement granted by the Government of India to the Telecom Service Providers.²⁵

“The TSPs make payment in yearly installments commencing from 1.4.2021 up to 31.3.2031 payable by 31st March of every succeeding financial year.”²⁶

It was also held that giving 20 years for repayment would be “excessive”.²⁷

²⁰ Piyush Joshi, *AGR Ruling is Unfair to Telecom Players*, Mondaq (27th November 2019).

²¹ Union of India v. Association of Unified Telecom Service Providers India, 2020 SCC OnLine SC 703, decided on 01.09.2020

²² Indian Telegraph Act, 1885

²³ *Ibid.*

²⁴ *Supra* note 25.

²⁵ *Supra* note 29.

²⁶ Union of India v. Association of Unified Telecom Service Providers India, 2020 SCC OnLine SC 703 (decided on 01.09.2020)

²⁷ Anandita Singh Mankotia and Devina Sengupta, Govt mulls ways to let telcos pay AGR dues over 20 years, ET Telecom (August 24, 2021, 07:50 IST), <https://telecom.economicstimes.indiatimes.com/news/govt-mulls-ways-to-let-telcos-pay-agr-dues-over-20-years/85582066>.

It was inter alia held in AGR II²⁸ that the National Company Law Tribunals (NCLT) would determine the issue as to whether the spectrum licensed to telecom companies (who presently face insolvency proceedings) could be auctioned off in IBC proceedings.²⁹

LICENSE FEE³⁰

There have been two rounds of litigations³¹ before the High Courts, TDSAT etc., with the aim to reach the correct interpretation of the heads of Gross Revenue mentioned in the License.

The SC judgment held as follows:

“**The licence** fee for grant of licence to build, maintain and operate telegraphs issued under Section 4 of the Indian Telegraph Act (ITA) need not be limited to revenue from the licensed operations but would cover all revenue of the licensee even from operations and sources not licensed under Section 4 of the ITA.”³²

Bringing the grant of license under Section 4³³ of the ITA as being equivalent to a “natural resource”³⁴ as covered under the *Natural Resource Allocation* case³⁵ is problematic for both the government and potential investors. It imposes the responsibility to sub-serve the common good on the government, while it is a cause of concern for the telecom operators the same can be used to potentially argue that telecom services should be provided for free or at less than cost.

The judgment reaffirms that the license under Section 4 is a “nature of contract”³⁶ and puts the government under the obligation to unilaterally determine the extent of “gross revenue”. This brings up the need for consensus between the Government and the TSPs for the determination of extent and scope for consideration.

²⁸ *Union of India v. Association of Unified Telecom Service Providers of India & Ors.* (AGR-II).

²⁹ To sell the required assets to companies willing to set up the required infrastructure to transport these waves from one end to another, the central government through the DoT auctions airwaves from time to time.

³⁰ Department of Technology of India has the authority to grant licenses and the rights to use airwaves to telecom companies.

³¹ Harsh Walia , Shobhit Chandra and Aditya Kumar Ayachi, *India: Supreme Court's Decision On AGR: The Final Nail In The Coffin For The Telecom Industry?*, MONDAQ (06 November 2019), <https://www.mondaq.com/india/telecoms-mobile-cable-communications/861312/supreme-court39s-decision-on-agr-the-final-nail-in-the-coffin-for-the-telecom-industry>.

³² *Supra* note 26.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Natural resources allocation in re, special reference no. of (2012) 10 SCC

³⁶ Granted on basis of “consideration”

IMPLICATION ON NON-TELECOM FIRMS HOLDING LICENSES FOR INTERNAL COMMUNICATION AND SIGNALING

The Supreme Court judgment has had implications on even the non-telecom sectors and ventures, including those owned by the government. DoT has sought ₹1.72 trillion from GAIL (India) Ltd, ₹22,168 crores from Power Grid Corp of India Ltd, ₹15,019 crores from Gujarat Narmada Valley Fertilisers and Chemicals Ltd, and ₹290 crores from RailTel Corp. of India Ltd by 24 January, 2020³⁷. However, they were later detached from the said judgement after consideration of their claims, as the government decided to withdraw 96% of the 4 lakh crores owed by non-telecom PSUs.³⁸ The battle between the telcos -mainly Vi and Airtel versus DoT over AGR dues reached a flashpoint in 2019 when SC widened the scope of AGR to include non-telecom items, leaving Airtel and especially VI with huge dues.³⁹

REVIEW PLEAS

The ruling, giving a deadline extension of up to 10 years, came about as a breather for Bharti Airtel who faced 36,000 Cr of AGR Payment.⁴⁰ The situation, however, is not so pleasant for the debt-steeped Vodafone Idea with much larger outstanding dues. Both the companies have sought 15 years for AGR payments.⁴¹ VI also filed an appeal to review “arithmetic errors” in AGR dues computations as found by them after self-assessment.⁴² DoT’s AGR calculation was upheld.⁴³ The telecom firms intend to file a curative petition after the rejection.

WAY FORWARD: REFORMS AND ALTERNATIVES

The number of telecom subscribers in India stood at 1.17 billion in 2019⁴⁴, making the country

³⁷ Akanksha Gupta, JAN 2020 SUPREME COURT RULING ON AGR IN TELECOM SECTOR – A CASE ANALYSIS, https://www.icsi.edu/media/webmodules/JAN_2020_SUPREME_COURT_RULING_AGR_TELECOM_SECTOR_CASEANALYSIS.pdf.

³⁸ KrishnaDas Rajagopal, AGR demand from non-telecom PSUs withdrawn, govt tells SC, The Hindu (JUNE 18, 2020 17:56 IST), <https://www.thehindu.com/business/Industry/centre-to-withdraw-96-of-4-lakh-crore-agr-related-dues-raised-against-psus-supreme-court/article31858278.ece>.

³⁹ Samanwaya Rautray, Non-telcos to file a review against AGR ruling: Solicitor General, The Economic Times (Jan 16, 2020, 11:25 PM IST), <https://economictimes.indiatimes.com/industry/telecom/non-telcos-to-file-review-against-agr-ruling-solicitor-general/articleshow/73309354.cms?from=mdr>.

⁴⁰ ET Bureau, Huge blow to telecom cos: SC hangs up on telcos’ AGR review petitions, The Economic Times (Jan 17, 2020, 08:51 AM IST), <https://economictimes.indiatimes.com/industry/telecom/telecom-news/sc-dismisses-telcos-agr-review-pleas/articleshow/73299605.cms?from=mdr>.

⁴¹ *Ibid.*

⁴² Batra S, *Case Analysis II: AGR Challenge for Bharti Airtel and Vodafone Idea*, VISION. 2021;25(2):258-260.

⁴³ Piyush Joshi, AGR ruling is unfair to telecom players, Business Line (22 Nov., 2019)

⁴⁴ INDIAN TELECOMMUNICATIONS INDUSTRY REPORT (AUGUST, 2021)

the second largest telecom market worldwide.⁴⁵ The future course of action would need to include the analysis and utilization of the strengths of this sector while keeping in mind and navigating through the potholes of the regulation system, and the dynamics of consumer behavior, technology, and pricing.

There is an imminent need for a new infrastructural policy for the enhancement of the sector. The government also needs to include provisions to provide an enabling environment as well as **enhanced accessibility of the broadband services** in the long-term discourse.

The government can direct the telecom companies to make a minimum payment to establish bonafide intent instead of burdening them with the excessive dues all at once. The fees could have also been scrapped as was implicated in 2010, making it easier for telcos to pay the AGR dues since they would save on the annual license fee/spectrum charges. It would also have resulted in larger pay-outs today.

This however raises the following two questions:

- i. The issue of security and guarantee of payment by the operators- personal guarantees or “spectrum” as security?
This issue needs to be adjudicated on, rather than leaving it to the wisdom of NCLT.
- ii. What constitutes as “reasonable time”?

The government also has the option of over-ruling the SC Judgement as was done in the Vodafone taxation⁴⁶ case through retrospective tax amendment. This, however, is likely to prove harmful to the country’s investment climate.

RELIEF PACKAGE:

A 4-year moratorium has been proposed to relieve the telcos of the excessive dues and is certainly a step in the right direction. Both banks and telcos will benefit from de-stressed balance sheets thanks to this relief measure. The monthly compounding of interest on spectrum

⁴⁵ *Ibid.*

⁴⁶ Vodafone International Holdings B.V., a company incorporated under the provisions of the Companies Act Vs. Union of India (UOI), Ministry of Finance and Asstt. Director of Income Tax (International Taxation) 2009(4)BomCR258, (2008)220CTR(Bom)649,

usage charges will be replaced by annual compounding and the interest rate will come down, based on the formula $MCLR + 2\%$.⁴⁷

Apart from this, free spectrum sharing between firms should be allowed and FDI caps should be increased in the sector, in order to provide flexibility to hefty dues-laden firms.

SUMMARY AND CONCLUSION

The AGR issue casts a significant degree of uncertainty on the telecom sector and is expected to have a long-term bearing on the structure and recovery of the sector. The ruling rendered an all-encompassing interpretation as to what would constitute revenue for the purposes of calculating the outstanding AGR dues payable by the Telecom Service Providers (TSPs) to the Central government.

The jeopardising effect of the recent judgement is likely to threaten the very existence of telecom in India, evident from the increased number of telecoms undergoing bankruptcy proceedings under the *Insolvency & Bankruptcy Code, 2016 (IBC)*⁴⁸.

Instead of playing the role of a silent spectator, the government needs to spell out implications and suggest alternatives. The judiciary also needs holistically approach policy matters which tend to have such reverberating impact on the economy, ideally not being interfered judicially at all (In *Delhi Science Forum v. Union of India*⁴⁹, it was held that courts would not interfere in matters of policy). Additionally, due regard should be given to other stakeholders such as banks and other lending institutions.

⁴⁷ Marginal Cost of Funds based Lending Rate (MCLR) is the minimum lending rate below which a bank is not permitted to lend.

⁴⁸ Aims to resolve corporate insolvencies in a time-bound manner to boost the confidence of creditors and increase the availability of credit.

⁴⁹ *Delhi Science Forum v. Union of India*, (1996) 2 SCC 405 : AIR 1996 SC 1356.