**CONTEMPORARY LEGAL CHALLENGES FACED BY THE INDIAN TELECOM INDUSTRY**

**In Re: Waivers/Staggered Payment option Sought By Telecom Service Providers, namely, Airtel and Vodafone-Idea.**

**Prelude:**

In this Article we would attempt to analyse the present conundrum faced by the Indian Telecom Industry, wherein stakeholders, include both the Indian ex-chequer as well as the Indian Telecom Service Providers, who happen to be at the receiving end, namely, Airtel and Vodafone-Idea, (hereinafter referred to as TSP’s for short).

As we all are aware of the protracted litigation between the Union of India and the TSPs, which had been going on for years, earlier before the Telecom Disputes Settlement and Appellate Tribunal, (hereinafter referred to as TDSAT or Tribunal) *qua* the meaning and import of the term ‘Adjusted Gross Revenue’, and then recently, this dispute was finally settled by the ultimate arbiter of the Indian Constitution, that is, the Supreme Court of India, when on 24th October, 2019, the Court ruled in favour of the Indian Ex-chequer.

The readers of this Article will be able to appreciate the entire controversy with a better perspective, when the factual journey of this entire litigious matter would be discussed in detailed. However, at present it is fruitful to pen down the important questions, which this Article will attempt to answer. The said Questions are as follows:

1. Whether in the present scenario, the Central Government can give financial relief by waiving off already raised demands for balance license fee and SUC, interest, penalty thereupon, and interest on penalty by an executive decision/ in its capacity as licensor, against the order of the Hon’ble Supreme Court of India?
2. Whether the Central Government can give more time for making payment than what has been ordered by the Hon’ble Supreme Court of India vide order dated 24.10.2019 in the present matter?
3. Whether the Central Government can waive its legitimate dues, which have been upheld by the Hon’ble Supreme Court of India and has to be paid by a private entity under a contractual agreement, such as a license agreement?

**Detailed Facts:**

1. The Central Government, pursuant to the power granted under Section 4 of the Telegraph Act, 1885 (for brevity, ‘the Act’), granted licenses to the TSPs, by which the licensees, that is, the TSPs were required to pay a license fee on the basis of Adjusted Gross Revenue (hereinafter referred as ‘AGR’), which was clearly defined in the definition of license contained in Section 4 of the Act. AGR is defined in the license as follows:

“19. Definition of ‘Adjusted Gross Revenue’:

19.1 Gross Revenue:

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 any other miscellaneous revenue, without any set­off for related item of expense, etc. 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:

PSTN/PLMN related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India;

Roaming revenues actually passed on to other eligible/entitled telecommunication service providers and;

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.

19.3 Applicable AGR in respect of Spectrum usage charge shall be as given under Part VII of this agreement.”

[Underlining is Ours]

1. As the facts depict, in the year 2003, some of the licensees questioned the validity of the definition of AGR in the license agreement before the TDSAT. One of their contention was that the said definition can only relate to the revenue directly arising out of telecom operations licensed under Section 4 of ‘the Act’, after adjustment of expenses and write-offs and the definition of AGR cannot relate to revenues not directly attributable to the licensed telecom activities. Further the licensees also contended that miscellaneous and other items including interest income and dividend income, value of rebates, discounts, free calls and reimbursement from USO fund, etc. should not be included in the AGR for the purpose of computation of licensee fee.
2. Per contra the contention of the Central Government was that the licensees having unconditionally accepted the migration package and having taken the benefit of the same were bound by the terms and conditions of the licensee agreement and thus, cannot be permitted to assail the same.
3. TDSAT, *vide* order 07.07.2006, astonishingly rejected the contentions of the Central Government and ruled in favour of TSPs and reasoned that under Section 4 of the Act, the Central Government can take percentage of the share of gross revenue of a licensee realised from activities of the licensee under the licence and therefore revenue received by a licensee from activities beyond the licensed activities would be outside the purview of Section 4 of the Act. It was further held by the Tribunal that Section 11(1)(a) of the TRAI Act mandates the Central Government to seek recommendations from the Telecom Regulatory Authority of India (for brevity “TRAI”) on the licence fee payable by the licensees, that is the TSPs and as there had been no effective constitution made by TRAI, the matter should be remanded to TRAI so that TRAI can consider the matter and send its recommendations to the Tribunal. The Tribunal however made it clear that TRAI will bear in mind the findings of the Tribunal that revenue of the licensees derived from non-licensed activities will not be included in the AGR for the purpose of determining the licence fee payable by the TSPs.
4. Aggrieved by the aforesaid order of the TDSAT, the Central Government went in appeal before the Supreme Court. While the appeal was pending before the Apex Court, TRAI had sent its recommendations on the incorporation of the AGR which had been sought by the Tribunal by its order dated 07.07.2006. On 19.01.2007, when the said Central Government’s appeal was heard by the Apex court, the Court opined that “as TRAI had already submitted its recommendations to the Tribunal, so there was no reason to interfere and dismissed the appeal by giving liberty to the Central Government to urge all the contentions raised in the civil appeal before the Tribunal”.
5. Thereafter, when the Tribunal heard both the Central Government and the TSPs on the recommendations of TRAI, it was contended on the behalf of the Central Government that since the Supreme Court had given the liberty to urge all the contentions before the Tribunal accordingly, the Central Government was entitled to re-assail the issue as to the definition of AGR in the license agreement before the Tribunal again. Per contra, the TSPs contended before the Tribunal that as the appeal of the Central Government has been dismissed by the Supreme Court, the Central Government was not entitled to argue the matter *de novo* and accordingly the earlier order dated 07.07.2006 of the Tribunal had become final.
6. Subsequently, the Tribunal in its order-dated 30.08.2007 held that its earlier order is final and the same cannot now be re-opened after the dismissal of Appeal by the Supreme Court. The Tribunal concluded that its finding in the earlier order dated 07.07.2006 that AGR will include only revenue arising from licensed activity and inclusion of revenue from other activities outside the licence cannot be included in the ambit of AGR, as sought by the Central Government.
7. The aforesaid order dated 30.08.2007, passed by the TDSAT was challenged by the Central Government before the Supreme Court in ***Union of India & Anr. v. Association of Unified Telecom Service Providers of India & Ors.[[1]](#footnote-1)***. The Apex Court by its decision dated 30.08.2007 while setting aside the order of the TDSAT observed:

“59. Thus, the Tribunal in its order dated 7-7-2006 has not just decided a dispute on the interpretation of adjusted gross revenue in the licence agreement, but has decided on the validity of the definition of adjusted gross revenue in the licence agreement. As we have already held, the Tribunal had no jurisdiction to decide on the validity of the terms and conditions of the licence including the definition of adjusted gross revenue incorporated in the licence agreement. Hence, the order dated 7-7-2006 of the Tribunal insofar as it decides that revenue realised by the licensee from activities beyond the licence will be excluded from adjusted gross revenue dehors the definition of adjusted gross revenue in the licence agreement is without jurisdiction and is a nullity and the principle of res judicata will not apply.

*XXXXXXXXXX*

61. We accordingly hold that the order dated 7-7-2006 of the Tribunal was not binding on the Union of India even in those cases in which the Union of India did not file any appeal against the order dated 7-7-2006 before this Court.

63. … We, however, find from the order dated 7-7-2006 that instead of challenging any demands made on them, the licensees have questioned the validity of the definition of adjusted gross revenue in the licences given to them and the Tribunal has finally decided in its order dated 30-8-2007 as to what items of revenue would be part of adjusted gross revenue and what items of revenue would not be part of adjusted gross revenue without going into the facts and materials relating to the demand on a particular licensee.

[Emphasis Added]

1. After the pronouncement of the said decision, TSPs challenged the demands raised by the Department of Telecommunications (DoT) before the TDSAT, on the basis of the interpretation of AGR under the concerned license agreements. Vide final order and judgment dated 23.04.2015, the TDSAT held that the revenue from non-licensed activities would fall within the definition of AGR but excluded certain specified heads of revenue such as foreign exchange gains, insurance claims, etc. from the definition of AGR.
2. The said judgement dated 23.04.2015 became the subject matter of challenge before the Supreme Court in ***Union of India v. Association of Unified Telecom Service Providers of India & Ors.[[2]](#footnote-2)*** Wherein the Court, quoted with approval the decision in ***Association of Unified Telecom Service Providers of India*** (supra), wherein it was observed thus:

“34……… If the wide definition of Adjusted Gross Revenue so as to include revenue beyond the license was in any way going to affect the licensee, it was open for the licensees not to undertake activities for which they do not require license under clause (4) of the [Telegraph Act](https://indiankanoon.org/doc/357830/) and transfer these activities to any other person or firm or company.”

1. After so quoting, the Court allowed the appeals preferred by the DoT and dismissed the appeals filed by the TSPs and held that the definition of AGR includes the revenue from activities beyond the license. The Court upheld the demands of the DoT except on certain heads of revenue such as call charges paid to other eligible TSPs, roaming revenues passed on to other TSPs, etc. Quite apart from that, the Court upheld the demand for interest on the license fees outstanding, the penalty and the interest on the penalty sought to be levied by the DoT by ruling thus:

“188…..The demand was raised for the first time in the year 2003 despite the fact that the definition of gross revenue was clear, and as is apparent from the correspondence and the agreement reached between the parties, there was no doubt what constitutes gross revenue. Licensees were aware that these items concerning which they have raised the dispute were included in the definition of gross revenue, as such, they had initially questioned inclusion on the basis of the validity of the definition of gross revenue. The challenge was found to be sans any basis by this Court. The objections raised concerning the validity of the gross revenue, were wholly unsustainable and on the face of it, were liable to be rejected, and came to be rejected finally and conclusively by this Court in the year 2011. After that, again the objections have been repeated to exclude those very revenue items which were held to be included once over an effort has been made to get rid of the definition of gross revenue. The objections which have been raised pertained to the definition of gross revenue for which the court held they are part of revenue. Now, relying upon AS­9 standards, an attempt has been made by an indirect method for excluding items, which are expressly included in the definition of gross revenue. Objections are too tenuous, and, as a matter of fact, there was no scope to raise such objections in 2003 itself. Because of the various correspondence which has been referred, it becomes apparent that all these heads are included in the definition of gross revenue, and there is no justification for the licensees to raise the objections and to keep them pending for over two decades.

189. …. Demand had been raised way­back in the year 2003, which is ultimately the subject­matter of the lis. As the objections are baseless and wholly untenable, it cannot be said that there was a bona fide dispute concerning various items. The disputes raised could not be termed to be bona fide at all. They were justified in order to delay the liability and the payment in accordance with the agreement. In this backdrop and what has been held by us, we have to consider whether the interest, penalty, and interest on penalty can be levied or not. Particularly since it is the revenue sharing regime and the Government has been deprived of the benefit of revenue which it would have earned but for granting the privilege which it has parted with in favour of the licensees.

[Emphasis Added]

1. Thereafter the Court placed reliance upon the decision in ***M/s. Everest Industrial Corporation & Ors. v. Gujarat State Financial Corporation[[3]](#footnote-3)*,** ***Punjab Financial Corporation v. Surya Auto Industries[[4]](#footnote-4)***, ***Hindustan Steel Ltd. v. State of Orissa[[5]](#footnote-5)*, *J.K. Industries Ltd. & Anr. v. Union of India & Ors.[[6]](#footnote-6)***, ***Tecumseh Products India Ltd v. Commissioner of Central Excise, Hyderabad* [[7]](#footnote-7)** and ***Central Bank of India v. Ravindra & Ors[[8]](#footnote-8).*** After relying upon the said pronouncements, the Court held:

198.…. we are of the considered opinion that interest and penalty have rightly been levied. Once an amount of shortfall has not been paid, it has to carry 50% of the penalty on defaulted amount, as agreed. Thus, we find no substance in the submission that interest, penalty, and interest on penalty cannot be realised. It is as per the agreement. In the facts and circumstances, we find no ground to reduce the same, considering the nature of untenable objections raised on behalf of the licensees, which were in fact either barred by res judicata or constructive res judicata but as this Court had remitted the matter to TDSAT to find that demand was based on proper interpretation of licence**.** Matter was remitted after giving finding on inclusion of the various heads in the definition of gross revenue. Even as per the case of licensees they were not validly included in definition, now reprobating that, stand has been taken that they did not form part of revenue which is not permissible. No litigant can be permitted to reap fruits on such inconsistent and untenable stands and litigate for decades in several rounds which is not so uncommon but is disturbing scenario projected in very many cases. We have examined the matter upon merits and then aforesaid conclusion indicates frivolous nature of objections.

199. In the result, the appeals of licensees are dismissed and filed by DOT, are accordingly allowed in view of the findings recorded.

[Emphasis Added]

1. That apart, the Supreme Court vide a separate order of the same date, gave three months’ time to the TSPs for depositing the due amount, which effectively ended on 24.01.2020.
2. Be it noted, the Cellular Operators Association of India, vide letters dated 29.10.2019 and 31.10.2019 to DoT, had communicated their concerns regarding the repercussions of the SC judgment and sought appropriate reliefs from the concerned ministry, including requests for waiver of quantum imposed in the nature of interest, penalty and interest thereof. That apart, it also sought for duration of repayment to be 10 years with a 2-year moratorium. The relevant paragraphs of the correspondence dated 29.10.2019 initiated by the Cellular Operators Association of India towards DoT are extracted hereinbelow:

“1. We draw your attention to the recent judgment of the Hon’ble Supreme Court in the over-a-decade long AGR case and the impact of this judgment on our member companies and the telecom industry as a whole.”

XXX

“5. We seek the urgent intervention of the Government to avert such an unprecedented impact on the financial health of our member companies.”

“6. While recent judgement matter has to be urgently addressed, a moratorium of two years for spectrum payments, beyond the 1st of April 2020 till the 31st of March 2022, will ensure TSPs viability without compromising the net present value of spectrum dues to the Government.”

XXX

“9. We believe that it could not be the intent of the Government to enrich itself by charging license fee and SUC on non-licensed revenue/ income. Therefore, our request is for the Government to not press for the AGR dispute payment and grant waivers.”

“10. We, therefore, request your attention to this unprecedented crisis facing the telecom industry and seek your indulgence to consider our submissions for an urgent decision to avoid an uncontrollable chain of events for our member companies.”

[Emphasis Added]

1. The relevant paragraphs of the correspondence dated 31.10.2019 initiated by the Cellular Operators Association of India towards DoT are extracted hereinbelow:

“2. We request that the government waive off the entire disputed amount…”

“3. However, if such a step is not possible, we request that the government waive off the interest, penalty and interest on penalty given the background of this matter. Since the disputed payments go back to accumulation over past 14 years, we request that the principal repayment of past dues to be done over a period of 10 years, with a two year moratorium.”

[Emphasis Added]

1. It needs to be mentioned that in the meantime the TSPs file a review petition before the Supreme Court. The review petition was dismissed in-chambers by the Supreme Court and later when by 24.01.2020 payments were not made by the TSPs to the ex-chequer, a three-Judge Bench of the Supreme Court led by Hon’ble Mr. Justice Arun Mishra lambasted the Telecom Ministry by even going to the extent of initiating contempt proceedings against everyone involved, right up to the desk officer who was as per Court “*had the audacity to, not follow the order of the Court”.*

**ANALYSIS AND FINDINGS:**

1. Here in this Article the pivotal question, which requires consideration is; whether, the Central Government can, in its capacity as licensor, by an executive order, waive off and/or grant more time to the TSPs to honour, their liability qua balance license fee and SUC, interest, penalty thereupon, and interest on penalty, which have been crystallised consequent to the decision of the Supreme Court in ***Association of Unified Telecom Service Providers of India*** (supra).
2. In the obtaining situation it apposite to allude to a few varied aspects, beginning with:

**A. Consistent Position of DoT *qua* Definition of AGR and Its Components**

1. It is imperative to set out, the DoT’s position concerning the heads of revenue to be included in the definition of AGR has been consistent and, accordingly, DoT has consistently maintained that revenues from non-licensed activities are included within the definition of AGR, before the TDSAT in 2003. Moreover, DoT in all previous rounds of litigation, had taken a consistent position that the definition and components of AGR include revenue from non-licensed activities and that the TSPs have accepted the definition of AGR as described in the license agreement and, therefore, cannot be permitted to resile from it or seek to challenge the same.
2. DoT’s aforementioned stance has been consistent since 2003, when in a challenge to the validity of the definition of AGR by TSPs before the TDSAT, the Central Government filed an affidavit contending that:

“[…] the licensees having unconditionally accepted the migration package and having taken the benefit of the same are bound by the terms and conditions of the licence agreement and cannot be permitted to resile from the same”[[9]](#footnote-9)

1. DoT’s position before the Supreme Court in Civil Appeal No.84/2007, in its challenge to the order of the TDSAT 7.7.2006 remained the same. TRAI gave its recommendations regarding the definition of AGR, vide order dated 19.1.2007, the Supreme Court dismissed the civil appeal after giving liberty to the Central Government to urge all contentions raised in the civil appeal before the TDSAT.
2. Pursuant to the liberty granted vide order dated 19.1.2007, and consistent with its earlier stance, the Central Government reiterated before the TDSAT that it was entitled to reopen the issue whether the validity of the definition of AGR in the Licence Agreement could be questioned before the Tribunal including the submission that AGR shall also include the revenue from activities outside the license. However, the Central Government’s contentions were rejected by the TDSAT vide order dated 30.8.2007.
3. The Central Government therafter challenged the TDSAT’s order dated 30.8.2007 – which led to the decision of the Supreme Court in ***Association of Unified Telecom Service Providers of India*** (supra). Wherein the Central Government stood embedded in its stance by asserting that the TDSAT failed to appreciate that licence fee or payment made under the licence agreement is really in the nature of price or consideration for parting with the exclusive privilege of the Central Government and is binding on the Central Government and the licensee and the licensee having signed the contract and agreed to the terms and conditions therein including the payment to be made cannot question the terms of the payment before the Tribunal.
4. It was put forth by the Central Government that the definitions of gross revenue and adjusted gross revenue are part of the package comprising the terms and conditions of the licence and a licensee cannot take the licence on the one hand and dispute the definitions of gross revenue and adjusted gross revenue on the other hand.
5. It was also the Submission of the Central Government that if the licensee wants to operate the telecom licence he has to accept the definitions of gross revenue and adjusted gross revenue for the purpose of computing the fee that he will, accordingly have to pay for the licence to the Central Government. This contention of the Central government was based on the premise that a person taking advantage under an instrument which both grants a benefit as well as imposes a burden, cannot take the benefit without discharging the burden.
6. In ***Association of Unified Telecom Service Providers of India*** (supra), the Supreme Court clearly recorded that DoT had rejected the recommendations of TRAI regarding the definition and components of AGR for the purpose of determining license fees. While so opining the Court observed thus:

“[…] In our considered opinion, if the Tribunal found that there was no effective consultation with TRAI on the opinion of the expert on accountancy, the Tribunal could have at best, if it had the jurisdiction to decide the dispute, directed TRAI to consider the opinion of the expert on accountancy and send its recommendations to the Central Government and directed the Central Government to consider such fresh recommendations of TRAI as provided in the provisos to Section 11(1) of the TRAI Act. Instead the Tribunal has considered the recommendations of TRAI and passed the impugned fresh order dated 30-8-2007 contrary to the very provisions of Section 11(1)(a) of the TRAI Act and the provisos thereto. At any rate, as the Central Government has already considered the fresh recommendations of TRAI and has not accepted the same and is not agreeable to alter the definition of adjusted gross revenue, the decision of the Central Government on the point was final under the first proviso and the fifth proviso to Section 11(1) of the TRAI Act, 1997.”

[Emphasis Added]

1. After the decision of the Supreme Court in ***Association of Unified Telecom Service Providers of India*** (supra), the TSPs challenged several demand notices raised by the DoT before the TDSAT. As noted by the TDSAT in its judgment[[10]](#footnote-10) dated 23.4.2015, the stand and stance of the Central Government, with regard to the meaning and import of the term AGR remained unchanged. It was contended on behalf of the Central Government that the term “revenue” is ostensibly defined in the licence agreement in a very expansive way and, accordingly, for arriving at the AGR, only three specified items are to be deducted. It was also submitted on behalf of the Central Government that under the licence agreement “revenue” is to be calculated on accrual basis whereas the three deductions for computing the AGR are permissible on actual basis.
2. To buttress its stand regarding the expansive and wide import of AGR, it was argued on behalf of the Central Government that since the term ‘revenue’ in clause 19.1 of the licence agreement, occurs jointly with the word “gross”, it enlarges the meaning of the latter term, that is, ‘Revenue’ and, therefore, would bring into its fold inflows/entries that otherwise might not be considered as revenue.
3. It was categorically submitted on behalf of the Central Government that the stand of the DoT has been unambiguous to the effect that any entry in the profit and loss account of the company must be understood as revenue and that the total revenue of the company is understood as the sum of revenue from operations and other income and, therefore, any income of the company shown in the profit and loss account (as ‘other income’) is undoubtedly revenue. Further, it was submitted that even the license agreement draws a clear link between the profit and loss account and determination of revenue.
4. Besides, the Central Government contended that the expression ‘other income’, in Part II of Schedule VI, as understood in the ‘General Instructions for Preparation of Statement of Profit and Loss Account’ includes interest income, dividend income, gains and loss on sale of investment and non-operating income. Therefore, revenue must be understood and recognized as projected in the profit and loss account. However, since the contract provides for an exhaustive list of deductions, and also clearly states that ‘without any set-off for related items of expense’, all income, including ‘other income’ for the purposes of AGR must be reckoned as gross amounts, without any deductions for loss or expenditure.
5. That apart, the decision of the Supreme Court in ***Association of Unified Telecom Service Providers of India*** (supra) pointedly mentions regarding the consistent stand of Central Government, by clearly observing that DOT had urged that the Central Government has exclusive privilege under section 4 of the Telegraph Act; thus, it is bound to get the best price for natural resources, for parting with the exclusive privilege under the revenue sharing regime is extremely beneficial to the licensees. Thus, the State must get the price for its valuable right as mandated under Article 14.
6. Thus, it is evincible that the Central Government has a clear and consistent stand – (a) the definition of AGR in the license agreement is valid; (b) the said definition of AGR is of wide import and includes items of revenues from non-licensed activities; and (c) Save the specific deductions / exclusions mentioned in the license agreement, all other heads of revenue are to be included in the definition of AGR.
7. In view of the long-standing consistent position of the Central Government thus far (for nearly two decades), TSPs cannot – at this belated stage – be heard to contend that the Central Government should grant relief by either waiving (or providing for a moratorium) on license fee dues. Since agreeing to the migration package, the TSPs have had the opportunity to arrange their affairs in an appropriate manner (including by providing for liabilities that may arise if DoT’s views were accepted by the Hon’ble Supreme Court). Therefore, in light of the Central Government’s long-standing consistent position, after the decision of the Hon’ble Supreme Court in the SC Judgment, it would be impermissible in law for the Central Government to suddenly alter its stance and grant the waiver or any other relief sought for by COAI in its letters.

**B. Violation of Articles 14 and 19(1)(g) of the Constitution**

1. Before delineating to the legal concept of waiver, it shall be fruitful here to allude to concept of level playing field as envisaged under Article 14 and Article 19(1)(g) of the Constitution of India. Article 14 of the Constitution of India embodies the fundamental right to equality. Any action of the Government must satisfy the principal requirements of Article 14, viz. treating persons similarly situated equally and grant of equal protection to them. Reasonableness and fairness are the “heart and soul” of Article 14[[11]](#footnote-11). Article 19(1)(g) confers the fundamental right to carry on business to a company. A juxtaposed reading of these two provisions embody the doctrine of “level playing field”.
2. Any kind of waiver or relaxation by the Government of India of pending dues from a few TSPs will violate the doctrine of level playing field because it will discriminate against those TSPs which have paid their dues and, in some cases, fought through financial difficulties to make such payments. The Government cannot charge the full license fees from some TSPs and waive the fees fully or partially for other TSPs. Apart from being discriminatory, any such act would also fail to satisfy the test of reasonableness and legal certainty because those TSPs who fully paid their dues did so in order to avoid foreseeable late payment penalty and interest rates. A waiver or relaxation of dues from the Government for non-paying TSPs was never foreseeable and is hence unreasonable. Thus, even dehors the SC Order, any form of waiver would be unconstitutional.
3. Adumbrating upon the doctrine of level playing field the supreme Court in ***Reliance Energy Ltd. v Maharashtra State Road Development Corpn. Ltd***.[[12]](#footnote-12), opined thus:

“The economic reforms introduced after 1992 have brought in the concept of “globalisation”. Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of “level playing field” embodied in Article 19(1)(g)... There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of “level playing field”. According to Lord Goldsmith, commitment to the “rule of law” is the heart of parliamentary democracy. One of the important elements of the “rule of law” is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of “reasonableness”, then such an act or decision would be unconstitutional.”

[Emphasis Added]

# C. Doctrine of Waiver and its inapplicability in Cases Involving Public Interest

1. Black’s Law Dictionary 8th Edition defines waiver as “The voluntary relinquishment or abandonment –express or implied- of a legal right or advantage”.
2. The concept of waiver has also been concretized by the Supreme Court in ***Krishna Bahadur v. Purna Theatre [[13]](#footnote-13),*** wherein the Court observed thus:

“9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.”

[Emphasis Added]

1. Thereafter, the supreme Court recently in ***All India Power Engineer Federation v. Sasan Power Ltd.[[14]](#footnote-14),*** after quoting with approval the aforesaid observations of the Court in ***Krishna Bahadur***(supra), held thus:

“25. It is thus clear that if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest.”

But it is clear that if a waiver is to be accepted on the facts of this case, it would clearly impact the public interest, in that consumers would have to pay substantially more for electricity consumed by them. This being the case, on facts it may not be necessary to go to the Commission as had Sasan in fact met the parameters of Schedule 5 on 30th March, then as per Schedule 11, year one would in fact have been only for one day. However, any waiver of the requirement of Schedule 5 would definitely impact the generation of electricity at the mandated percentage of contracted capacity as also the amounts payable by consumers, and would therefore affect the public interest. This being the case, this is not a case covered by the judgments cited on behalf of Sasan, in particular the judgment of this Court in Commissioner of Customs, Bombay v. Virgo Steels Bombay, (2002) 4 SCC 316, in which it has been held that even the mandatory requirement of a statute can be waived by the party concerned, provided it is intended only for his benefit. This case would fall within the parameters of the other judgments referred to above, and would therefore be governed by judgments which state that any waiver of the requirements of Article 6.3 and Schedule 5 would ultimately impact consumer interest and therefore the public interest. Such waiver therefore cannot be allowed to pass muster on the facts of the present case.”

[Emphasis Added]

1. Thus, it would be legally vulnerable for the exchequer to grant waiver in matters where public interest is involved, for it would tantamount to loss to the public exchequer and accordingly the Court may step in set aside such an attempted waiver.
2. Black’s Law Dictionary defines public interest as “1. The general welfare if the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.”
3. The Supreme Court in ***Indira Bai v Nand Kishor***[[15]](#footnote-15)***,*** while determining what constitutes Public Interestobserved thus:

“The test to determine the nature of interest, namely, private or public is whether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved.”

1. In ***Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi[[16]](#footnote-16)***, the Supreme Court, speaking in the same tone tenor opined thus:

“The expression ‘public interest’ has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. The expression ‘public interest’ must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. In its common parlance, the expression ‘public interest’, like ‘public purpose’, is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs. [State of Bihar v. Kameshwar Singh (AIR 1952 SC 252)]. It also means the general welfare of the public that warrants recommendation and protection; something in which the public as a whole has a stake [Black’s Law Dictionary (Eighth Edition)].”

1. Analysing auction of natural resources, such as Spectrum in the backdrop of Public Interest doctrine, it is axiomatic that the levy of duty/fee as a consideration to part with, the exclusive privilege of Union Government, is a statutory right under Section 4 of the Telegraph Act. However, such allocation of the exclusive privilege can only be done in consonance with the underlying public interest especially considering the vital character of natural resources such as spectrum which the government had assigned to the TSPs for its best utilization/exploitation, expecting the maximum return on apportionment as a public trustee of the resources.
2. Observing in a similar manner the Supreme Court in ***Secretary,*** ***Ministry of Information & Broadcasting, Govt. of India v Cricket Association of Bengal***,[[17]](#footnote-17), held that Airwaves / frequencies, being part and parcel of public property have to be used in the best interest of the society which can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies.
3. Thereafter, in ***Reliance Natural Resources Limited v Reliance Industries Limited[[18]](#footnote-18)***, the Supreme Court while extending the public trust doctrine in respect of natural resources, stated that the constitutional mandates that natural resources belong to the people of this country. The nature of the word “vest” must be seen in the context of the public trust doctrine (PTD), which has a broader application.
4. In ***Centre for*** ***Public Interest Litigation v Union of India[[19]](#footnote-19)***, the Supreme Court while dealing with allocation spectrum has observed thus:

“… Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value. Constitutionalism must be reflected at every stage of the distribution of natural resources.”

The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources..”

[Emphasis Added]

1. Therefore, the dues which have been adjudicated in favour of the government by the Supreme Court in ***Association of Unified Telecom Service Providers of India*** (supra) are not simpliciter private contractual dues of the Central Government but in essence, public money and thereby, irrefragably involves substantial public interest.

# D. Doctrine of Separation of Powers and Duty of the Executive qua Judicial Pronouncements

1. In the obtaining situation it is seemly to refer to the concretized concept of Doctrine of Separation of Powers and the consequent obligation of the Executive to ensure compliance of the decision of the court of Law. In this regard, it is profitable to refer to the decision of the Supreme Court in ***Union of India v. K.M. Shankarappa*[[20]](#footnote-20),** wherein the Court observed thus:

7. [….] To permit the executive to review and/or revise that decision would amount to interference with the exercise of judicial functions by a quasi-judicial Board. It would amount to subjecting the decision of a quasi-judicial body to the scrutiny of the executive. Under our Constitution the position is reverse. The executive has to obey judicial orders. Thus, Section 6(1) is a travesty of the rule of law which is one of the basic structures of the Constitution. The legislature may, in certain cases, overrule or nullify a judicial or executive decision by enacting an appropriate legislation. However, without enacting an appropriate legislation, the executive or the legislature cannot set at naught a judicial order. The executive cannot sit in an appeal or review or revise a judicial order. The Appellate Tribunal consisting of experts decides matters quasi-judicially. A Secretary and/or Minister cannot sit in appeal or revision over those decisions. At the highest, the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal.

[Emphasis added]

1. Thus, in the light of the aforesaid decision of the Supreme Court, it is crystal clear that the executive has no right to review and / or revise a final and binding decision of the court, for such an action on the part of the executive would tantamount to subjecting the decision of the court to scrutiny by the executive which would, invariably, be a violation of the doctrine of separation of powers.
2. Any attempt by the executive to scrutinize the order of the court and pass an order in contravention of the directions given in the judicial order has been held to be a case of legal malice[[21]](#footnote-21). The aspect of legal malice was considered by this Court in ***Kalabharati Advertising v. Hemant Vimalnath Narichania[[22]](#footnote-22),*** in the following manner:

“25. The State is under obligation to act fairly without ill will or malice—in fact or in law. ‘Legal malice’ or ‘malice in law’ means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for ‘purposes foreign to those for which it is in law intended’. It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. …”

26. Passing an order for an unauthorised purpose constitutes malice in law.”

[Emphasis added]

1. In this regard, it shall be fruitful to refer to the decision of the supreme Court in ***State of Bihar v. Sonabati Kumari*[[23]](#footnote-23)**, wherein the Court observed thus:

“It is of the essence of the rule of law that every authority within the State including the Executive Government should consider itself bound by and obey the Law.”

And again:

“When the State Government obeys a law, or gives effect to an order of a Court passed against it, it is not doing anything which detracts from its dignity, but rather, invests the law and the Courts with the dignity which are their due, which enhances the prestige of the executive Government itself, in a democratic set-up.”

1. In light of the judgments and law-discussed hereinabove, it is limpid that the Government of India has a positive duty to obey and take steps to ensure compliance of the decision of the Supreme Court in ***Association of Unified Telecom Service Providers of India*** (supra). As it is ostensible that waiver and/or moratorium, as sought by the Cellular Operators Association of India would tantamount to overruling the Judgment and order of the Supreme Court. It is for this reason, that it would legally vulnerable for the Government of India to impose a moratorium of any duration, for it would directly contravene the specific direction of the Supreme Court.
2. As stated above, the Government has no power to modify the specific direction of the Court to the TSPs to pay the interest, penalty and interest on penalty. Moreover, given the background of this matter, the TSPs had 14 years to arrange their affairs and prepare themselves for the consequences if this litigation, which fatefully turned out against their interest. Any request for a two-year moratorium is also outside the power of the Government to entertain because the Supreme Court has specifically given a period of three months to the TSPs to pay their long-held dues.
3. From the aforesaid analysis certain aspect which constitute the fulcrum of respect for Rule of Law, obeisance to Court’s order, obligation to follow the mandate of law, absence of power to waive the dues and lack of authority to extend the period for payment are absolutely clear as crystal.
4. In addition, it is worthy to state that, a state defending the fiscal interest of the collective after attaining the success in a Court of law cannot give it away for the benefit of a few individual companies. It will tantamount to creating an unacceptable dent to the exchequer. Under our constitutional framework, the State is obligated to manage its revenue in an apposite manner so that it can expend on citizens for sustenance of fundamental rights and also to see how far it can realize the dreams of the citizens. Waiver of huge sum to the litigating parties who have already availed of the benefits is conferment of premium on defaulter.

**Conclusion:**

1. In view of the foregoing analysis, the findings emerge as follows:
2. The Central Government cannot give financial relief by waiving off already raised demands for balance license fee and SUC, interest, penalty thereupon, and interest on penalty by an executive decision/ in its capacity as licensor, against the order of the Supreme Court of India.
3. Central Government cannot grant more time, than three months from the date of order, for making payment as directed by the Supreme Court vide order-dated 24.10.2019.
4. Central Government cannot waive its legitimate dues, which have been upheld by the Supreme Court and are to be paid by a private entity under a license agreement.

1. (2011) 10 SCC 543 [↑](#footnote-ref-1)
2. C.A. Nos. 6328-6399/2015, decision dated 24.10.2019. [↑](#footnote-ref-2)
3. (1987) 3 SCC 597 [↑](#footnote-ref-3)
4. (2010) 1 SCC 297 [↑](#footnote-ref-4)
5. 1969 (2) SCC 627 [↑](#footnote-ref-5)
6. (2007) 13 SCC 673 [↑](#footnote-ref-6)
7. 2004 (6) SCC 30 [↑](#footnote-ref-7)
8. (2002) 1 SCC 367 [↑](#footnote-ref-8)
9. (2011) 10 SCC 543 (“AUSPI”), Paragraph 6 [↑](#footnote-ref-9)
10. Association of Unified Telecom Service Providers of India v Union of India and Connected Petitions being T.P. No. 7 of 2003 [↑](#footnote-ref-10)
11. Delhi Development Authority & Anr. v Joint Action Committee, Allottee of SFS Flats & Ors. (2008) 2 SCC 672 [↑](#footnote-ref-11)
12. (2007) 8 SCC 1 [↑](#footnote-ref-12)
13. (2004) 8 SCC 229 [↑](#footnote-ref-13)
14. (2017) 1 SCC 487 [↑](#footnote-ref-14)
15. (1990) 4 SCC 668 [↑](#footnote-ref-15)
16. (2012) 13 SCC 61 [↑](#footnote-ref-16)
17. (1995) 2 SCC 161 [↑](#footnote-ref-17)
18. (2010) 7 SCC 1 [↑](#footnote-ref-18)
19. (2012) 3 SCC 1 [↑](#footnote-ref-19)
20. (2001) 1 SCC 582  [↑](#footnote-ref-20)
21. Union of India v. Ashok Kumar Aggarwal (2013) 16 SCC 147 [↑](#footnote-ref-21)
22. (2010) 9 SCC 437 [↑](#footnote-ref-22)
23. (1961) 1 SCR 728 [↑](#footnote-ref-23)