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An unreasonable levy

Government should grant relief to telecom companies, waive interest and penalty

EVERY TELECOM COMPANY has to pay a licence fee of 8 per cent of its "adjusted gross revenue". There have been disputes as to whether certain items should be included in calculating AGR. The very wide interpretation given to this expression by the Department of Telecommunication (DoT) has been accepted by the Supreme Court and the telecom sector now faces a demand of around Rs 93,000 crore. Apart from the threat of loss of thousands of jobs, there is an even greater threat of a domino effect on banks and collateral services that are intertwined with the sector. And lurking in the shadows are even more staggering demands from public sector companies such as GAIL, Oil India and Power Grid Corporation of India.

It is necessary to understand the genesis of the AGR problem, and whether the telecom sector deserves to be in the critical situation that it now faces. As part of the process of liberalisation, the National Telecom Policy was announced in 1994 and licences were awarded to private companies on the payment of a fixed annual licence fee. This was replaced by a "revenue sharing model" in 1999 and licencees had to pay a licence fee of 8 per cent of their AGR, which was the gross revenue, reduced by certain specified charges, service tax and excise duty.

The dispute between the telecom operators and the DoT over the past 15 years was mainly on two issues: First, whether the licence fee had to be paid only on revenue

earned from telecom services and, second, what were the items that had to be excluded from gross revenue.

In July 2006, the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) had ruled that revenue from non-licensed activities could not be included to calculate gross revenue. The licence fee had to be paid only on the revenue from licensed activities. In another order passed in August 2007, the TDSAT, among others, ruled that bad debts, waivers and discounts should be excluded from AGR. In 2015, TDSAT ruled that discounts would not normally be included in AGR; however, if the invoice was for the full amount and the discount was given separately (or later), then it was not deductible.

In the Supreme Court verdict, every contention of the telecom licencees was rejected and it was held that the licence fee was to be paid on "gross revenue, without any set-off, including the discounts given". With the review petitions being dismissed, the telecom companies now have to pay a licence fee of 8 per cent on revenue they never received and a further interest and penalty on this notional revenue.

Such an interpretation is indeed unique. As a general rule, tax or duty is levied only on the consideration actually received and never on the discount that is offered to customers. The accusation that the telecom companies' conduct was unfair and that they deliberately avoided payment is also

not accurate. The figures submitted by the DoT to the Court indicate that the total licence fee that was due from the top 16 telecom companies was Rs 1,09,278 crore, of which Rs.86,089 crore or approximately 80 per cent was paid. Therefore, the disputed dues were Rs 23,188 crore. The compound interest on this was Rs 41,650 crore, the penalty was Rs 10,923 crore and the interest on penalty was another Rs 16,878 crore. Out of a staggering demand of Rs 92,641 crore, interest and penalty constitutes around Rs.70,000 crore.

As there was a genuine dispute on what constituted AGR, there is no justification to levy compound interest. As regards the penalty, it has been repeatedly held by the Supreme Court that penalty should not be levied unless a company acts in deliberate defiance of the law.

The plight of non-telecom companies is even worse. It is grossly unfair to claim that an oil and gas company, which is granted a licence and whose income from telecom services is a just a fraction of its total revenue, has to pay licence fee of 8 per cent on its entire income. It is indeed distressing that the DoT should even contemplate such an erroneous interpretation of "gross revenue". If this interpretation is upheld, GAIL would have to pay Rs 1.8 lakh crore, and Oil India and Power Grid Corporation would have to pay Rs 48,000 crore and Rs 22,000 crore (including interest and penalty) respectively.

In view of the implications not only for the telecom sector but for other sectors as well, the government should consider granting relief. As regards telecom companies, interest and penalty should be waived, because there has been a bona fide dispute about the components of gross revenue. The government has the necessary power to waive them if it is necessary to do so in public interest. These are contractual dues and there is no impediment in granting total or partial waiver. There is ample legal justification to waive interest and penalty. The government can also clarify that gross revenue does not include non-telecom revenue and licence fees will be restricted only to revenue from telecom services. This will eliminate the untenable demands that have been made against the non-telecom PSUs.

The cancellation of 2G licences by the Supreme Court led to the closure of several smaller players and dried up foreign investments in the sector. The current crisis is equally serious. While the DoT is fully justified in maximising the collection of licence fee, it must be done reasonably and equitably. If it insists that gross revenue includes every penny that is earned by a licensee, it will be devastating not just for a few companies, but for the economy as well.

The writer is a senior advocate practicing in the Supreme Court. He had appeared for a telecom company before the Supreme Court