* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: November 27, 2013*
Judgment Pronounced on: January 06, 2014

\+ **WP(C) NO. 3673/2010**

ASSOCIATION OF UNIFIED TELECOM SERVICE PROVIDERS OF INDIA & ORS. .... Petitioners

Represented by: Mr.Ramji Srinivasan, Sr.Advocate with Mr.Lakshmeesh Kamath and Mr.Umang Gupta, Advocates

versus

UOI & ORS. ..... Respondents

Represented by: Ms.Maneesha Dhir, Advocate with Ms.Vanessa Singh and Ms.Neha Singh, Advocates for DOT
Mr.Aman Lekhi, Sr.Advocate with Mr.Gaurang Kanth, Advocate for CAG
Mr.Rajeeve Mehra, ASG with Mr.Neeraj Chaudhari and Ms.Ravjyot Singh, Advocates for UOI
Ms.Sangeeta Singh, Advocate with Mr.Kumar Rajan Mishra, Advocate for TRAI

WP(C) NO. 3679/2010

CELLULAR OPERATORS ASSOCIATION OF INDIA & ORS. .... Petitioners

Represented by: Mr.Abhishek Manu Singhavi, Sr.Advocate with Mr.Gopal Jain, Advocate

versus

DEPARTMENT OF TELECOMMUNICATION & ORS. ..... Respondents

Represented by: Ms.Maneesha Dhir, Advocate with Ms.Vanessa Singh and Ms.Neha Singh, Advocates for DOT
Mr.Rajeeve Mehra, ASG with Mr.Neeraj Chaudhari and Ms.Ravjyot Singh, Advocates for UOI
Ms.Sangeeta Singh, Advocate with Mr.Kumar Rajan Mishra, Advocate for TRAI

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR.JUSTICE V.KAMESWAR RAO

PRADEEP NANDRAJOG, J.

1. It is now well-recognized that post second world war, some believe that influenced by the liberal features of the economic policies of the United States of America, a new economic order and a new kind of State emerged, which promoted the values and ideals of professionalism, scientific and technical expertise, administrative competence and neutrality in governance. The shift was from rowing to steering. The era of liberalization emerged all over the globe; some countries adopted it immediately after the second world war and some slowing and grudgingly, realizing that in the global economy the municipal governance had to be in sync with the current global thinking. Many believe (wrongly in our opinion) that the regulatory regime was the consequences of the new form of governance, shifting from rowing to steering.

2. Even in the pre-liberalization era, two modes of regulation governed important enterprises for most of the twentieth century : (i) regulation of privately owned enterprises was done mainly through company law; and (ii) key industries and utilities were governed through various forms of public

ownership, of which the nationalized corporations was the most important. Privatization obviously signalled the decline of the latter.

3. What was the need to create a regulatory regime if there already existed a historic mode of regulation, in the form of company law? Accounts of every company required a mandatory audit by a Chartered Accountant who was not an employee of the company and was answerable to only the Institute of Chartered Accountants.

4. The answer must precede by understanding the problems involved in simply subjecting the privatized utilities to traditional corporate regulation. And one needs to begin by understanding the deficiency in the established role of company law in the regulation of the corporate enterprise.

5. Company law had to answer three questions : (i) What is the proper relationship between legal owners and those who do the daily job of running corporations? The question arose from the most important structural feature of the modern corporation : the separation of ownership from control which has been recognized as a central feature of business life. (ii) What claims, beyond legal ownership, give entitlement to a say in governing corporations? and (iii) What is the appropriate relationship between the corporation and the democratic State?

6. Company law was unable to satisfactorily answer the three questions and thus it was not possible to assimilate all privatized concerns in the prevailing mode of company regulation as per the existing company laws.

7. The reason why company law could not provide cogent answers to the three questions, was that the affairs of the company, as an institution, were treated as affairs concerning the shareholders and the directors (as agents of the company) answerable only to the shareholders. A company was a private entity and entitled to say that its governance was reserved for those

with property rights, signified by the legal ownership, in the form of holding in equity. No doubt, with the induction of professional managers on the board of companies there was a decisive shift in the separation of ownership and control. But, what was overlooked by the company law was that the juristic entity of a company, as a distinct personality viz-a-viz its shareholders, failed to recognize that certain privileges were conferred upon the shareholders; the most important of which – privilege of incorporation - was the limited liability, a privilege not granted to other economic actors. Whereas, an individual carrying on business or two or more persons carrying on business as partners were personally liable to the third parties and their personal assets could be seized in settlement of the dues to third parties, it could not be so done against the properties of the shareholders. Company law overlooked that these privileges granted to companies and its shareholders, was by the State, because the law was enacted by the State. It did not seek a quid pro quo, in that, the conditional entitlements i.e. privileges were on the reciprocal obligation by the corporate entity to perform its public obligations or recognizing some restraints over corporate behaviour in the wider public interest. To compound the problem, in awarding contracts, which some call largesse, the State put conditions which could be satisfied only by large corporations. The anti-monopoly laws could make no impact. The creation of a nationalized sector, dominated by public corporations, which was expected to mark a break also failed. Regretfully, the government of the nationalized sector, failed in its endeavour because of evasion of public accountability because of behind the scene intervention by Ministers to shape business plans around short-term political pressure.

8. One ill of a democratic system is partisan majoritarian politics resulting in partisan political control. Policies tend to be determined by

party strife and sectional interest. The governing elite ensured lack of transparency about institutional arrangements. There was a crisis of a governing order. The crisis had two facets : (i) content of the economic policy with the failure of the policy; and (ii) crisis of the system of rule itself. As the learned author Marquand D. in the book '*The Unprincipled Society : New Demands and Old Politics*' 1988 (pp 175 and 206) published by Jonathan Cape, London, opines this was the result of *'Club Government'*. Just like nobody can predict as to who would get the membership of a club; just like why nobody can figure out as to why some clubs allow children in the club premises and some don't and some for fixed duration of time; just like why nobody can figure out why some clubs prescribe a particular dress code and some don't; similar were the attributes of club government.

9. There were thus three striking features of club government : (i) informality; (ii) reliance on knowledge acquired by insiders by virtue of their insider status; and (iii) screening from public scrutiny and accountability.

10. The new economic order and the new kind of State which emerged had to promote the values and ideals of professionalism, scientific and technical expertise, administrative competence and neutrality in governance if the new model had to succeed.

11. It is rightly said that crisis forges the link between the shortcomings and the evils of yesterday with the horizon and the vision of tomorrow. Thus, the crisis of the governing order had to forge the link between stagnation of the past and the innovation of the future and this would require an understanding of what sense to make of the destruction of the club system and what sense to make of the policy response required to be produced. Any analysis of the regulatory State and the regulatory laws which ignores this facet would be, in our opinion, an incomplete analysis.

12. The ideology of the club government system were the result of the threats that confronted governing elites. These threats were posed by the new world of formal democracy and the empowered working classes : democratic politics. The response was persistence of oligarchic and secrecy in governing arrangements. Thus, the new kind of State had to concentrate on *'steering'* and not on '*rowing'* - making strategic decisions about the directions of the Government rather than on delivering goods and services.

13. Liberalization and privatization as also public sector reforms had to redefine the boundaries between the public and the private. The new economic order had to grow along six dimensions : (i) privatization, (ii) marketization, (iii) decentralization, (iv) output orientation, (v) quality systems, and (vi) intensity of implementation.

14. Regulatories had to fill the void.

15. The new regulatory State had not only to cope with the crisis of the economic policies and the crisis of the system of rule itself. It had to reconstruct institutions on the ruins of the club government. This involved displacing key features of club government.

16. The three features of the club governance : (i) informality; (ii) reliance on knowledge acquired by insiders by virtue of their insider status; and (iii) screening from public scrutiny and accountability, had to be replaced or displaced by : (i) standardization and formality; (ii) the provision of systematic information accessible both to insiders and outsiders; and (iii) strengthening the control mechanism and public reporting.

17. Thus, the expansion of audit into ambitious systems of surveillance are not therefore unexpected consequences of the development of the new regulatory State. They are central to its existence because they are the key response to the ruins of club governance. Indeed, oligarchies and secretive

rule cannot be defeated unless the knowledge of the insider is transformed into public knowledge, available to all.

18. Institutions typically subject to regulations - large corporations - have ample resources to devise mode of circumvention. The result is that, in critical areas of regulation, a battle of wits is constantly fought between the regulators and the regulated, intent on evading compliance all together or in producing only creative compliance; the best documented of which are in the link areas of corporate tax regimes and the regulations of financial markets.

19. One only wishes that large corporate(s) realize that the battle of wits produces perversity : a whole variety of unintended consequences which, in turn, frustrate the object of the regulation. Circumvention and perversity produce an intensification of the command and this means that one is back to square one.

20. At the same time, those who seek accountability (as regulators) must also understand that their best chance of success would be a courteous and a conciliatory demeanour towards those who are regulated; and by impressing on their minds that the object of the regulator's visit is to assist them and not to fish out grounds for complaint. The prying eyes of those who seek accountability must adopt the vision of a friendly adviser, who treats those whom he visits as gentlemen desirous of doing right and not the vision of a suspicious opponent desirous of finding evil and ready to make the most of it.

21. The doctrine of '*Res communes*' claims that some things are common to mankind – the air, the water etc. Thus, the title of these resources are vested with the State as the sovereign, in trust for the people. Res communes were excluded from private control and the trustee i.e. the State was charged with the duty of preserving the resources in a manner that made

them available for well-defined public purposes. Article 39(b) of the Constitution of India is a directive to the State that its policies, pertaining to material resources of the community, are so directed that these resources are distributed as best to sub-serve the common good. In the decision reported as (2012) 3 SCC 1 *Centre for Public Interest Litigation Vs. UOI*, in paragraphs 75 and 85 the Supreme Court observed:-

> *"75. 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. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best sub-serve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection. Of course, environment laws enacted by Parliament and State Legislatures deal with specific natural resources i.e. forest, air, water, coastal zones, etc.*
>
> *x x x*
>
> *85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects : first, it regulates the rights and obligations of the State vis-a-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-a-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent*

*and that it does not discriminate between similarly place private parties." (**Emphasis supplied**)*

22. Undisputedly, by virtue of Section 4 of the Indian Telegraph Act, 1885, the Central Government has the exclusive privilege of establishing, maintaining and working telegraphs, meaning thereby, that except for the Central Government no other person has the right to carry on telecommunication activities. By virtue of the proviso to sub-Section 1 of Section 4 of the Indian Telegraph Act, 1885 the Central Government is empowered to grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India. As defined in sub-Section 1AA of Section 3 of the Act '*Telegraph*' means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, Radio waves or Hertzian waves, Galvanic, Electric or Magnetic means.

23. The era of privatization and liberalization in India saw the dawn of the National Telecom Police, 1994, which amongst other things, stressed on achieving the universal service, bringing the quality of telecom services to world standard, provisions of wide range of services to meet the customer's demand at reasonable price, and participation of corporate entities in the area of basic as well as value added telecom services; private operators to be competing with government operators. The Telecom Regulatory Authority of India Act, 1997 was promulgated with a regulatory authority charged with the obligation, inter-alia, of ensuring compliance with licence conditions by the service providers.

24. The two writ petitions raise identical questions of law, concerning the power of the Comptroller and Auditor General of India, to conduct a revenue audit of telecommunication companies who have entered into licence agreements to provide cellular/unified access service, in the respective area, as per the licence agreement. As pleaded by the writ petitioner No.1 of W.P.(C) No.3673/2010, it is an association of private telecom companies, cellular licensees/unified access service licensees are members whereof. The writ petitioner No.1 of W.P.(C) No.3679/2010, also claims to be the representative of cellular licensees/unified access service licensees. As pleaded in the two writ petitions, the members of the petitioners No.1 are licensees under the Central Government. In the respective area of service they hold a right to establish, maintain and operate cellular mobile telephone services/UASL. The petitioners claim that their members have been issued licences by the Central Government under Section 4 of the Indian Telegraph Act, 1885, a fact which is not in dispute.

25. Counsel had agreed that the commercial terms of the licence held by each licensee are the same, and for facility of reference we may refer to the licence agreement dated March 03, 2008 between the Union of India and M/s.Tata Teleservices Ltd.

26. The licence agreement grants a privilege to M/s.Tata Teleservices Ltd. to provide unified access service in Jammu & Kashmir service area for a period of 20 years upon the terms contained in the licence agreement. The privilege conferred upon the licensee is as per clause 2 (and its various sub-clauses) of the agreement. The agreement envisages, apart from an entry fee, an annual fee @ 6% of Adjusted Gross Revenue excluding spectrum charges to be paid by M/s.Tata Teleservices Ltd. to the Union of India. A Radio Spectrum Charge as per clause 18.3.1 is payable additionally. The

Adjusted Gross Revenue, as per clause 19 of the licence agreement, is defined as under:-

> *" 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 set-off 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:-*
>
> *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 prodders 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."*

27. Since the consideration for the licence agreement, flowing from M/s.Tata Teleservices Ltd. to the Union of India, is the payment of the sum, being a percentage of the Adjusted Gross Revenue as also Radio Spectrum Charges, apart from the entry fee, it would be apparent that the agreement would be referring to the maintenance of accounts and we find this to be so as per clause 22 and its various sub-clauses of the licence agreement, which read as under:-

"22. ***Preparation of Accounts***

22.1 The LICENSEE will draw, keep and furnish independent accounts for the SERVICE and shall fully comply orders, directions or regulations as may be issued from time to time by the LICENSOR or TRAI as the case may be.

22.2. The LICENSEE shall be obliged to:
a) Compile and maintain accounting records, sufficient to show and explain its transactions in respect of each completed quarter of the Licence period or of such lesser periods as the LICENSOR may specify, fairly presenting the costs (including capital costs), revenue and financial position of the LICENSEE's business under the LICENCE including a reasonable assessment of the assets employed in and the liabilities attributable to the LICENSEE's business, as well as, for the quantification of Revenue or any other purpose.

b) Procure in respect of each of those accounting statements prepared in respect of a completed financial year, a report by the LICENSEE's Auditor in the formal prescribed by the LICENSOR, stating inter-alia whether in his opinion the statement is adequate for the purpose of this condition and thereafter deliver to the LICENSOR a copy of each of the accounting statements not later than three months at the end of the accounting period to which they relate.

c) Send to the LICENSOR a certified statement sworn on an affidavit, by authorized representative of the company, containing full account of Revenue as defined in condition 19 for each quarter separately along with the payment for the quarter.

22.3 (a) The LICENSOR or the TRAI, as the case may be, shall have a right to call for and the LICENSEE shall be obliged to supply and provide for examination any book of accounts that the LICENSEE may maintain in respect of the business carried on to provide the service(s) under this Licence at any time without recording any reasons thereof.

22.3(b) LICENSEE shall invariably preserve all billing and all other accounting records (electronic as well as hard copy) for a period of THREE years from the date of publishing of duly audited & approved Accounts of the company and any dereliction thereof shall be treated as a material breach independent of any other breach, sufficient to give a cause for cancellation of the LICENCE.
22.4 The records of the LICENSEE will be subject to such scrutiny as may be prescribed by the LICENSOR so as to facilitate independent verification of the amount due to the LICENSOR as its share of the revenue.

22.5 The LICENSOR may, on forming an opinion that the statements or accounts submitted are inaccurate or misleading, order Audit of the accounts of the LICENSEE by appointing auditor at the cost of the LICENSEE and such auditor(s) shall have the same powers which the statutory auditors of the company enjoy under Section 227 of the Companies Act, 1956. The remuneration of the Auditors, as fixed by the LICENSOR, shall be borne by the LICENSEE.

22.6 The LICENSOR may also get conducted a 'Special Audit' of the LICENSEE company's accounts/records by "Special Auditors", the payment for which at a rate as fixed by the LICENSOR, shall be borne by the LICENSEE. This will be in the nature of auditing the audit described in para 22.5 above. The Special Auditors shall also be provided the same facility and have the same powers as of the companies' auditors as envisaged in the Companies Act, 1956.

22.7 The LICENSEE shall be liable to prepare and furnish the company's annual financial accounts according to the accounting principles prescribed and the directions given by the LICENSOR or the TRAI as the case may be from time to time."

28. It is clear that a national resource, of which the Central Government is a custodian of, is permitted to be used by a private entity i.e. the licensee under the licence agreement and the consideration for the use of the national

resource is the payment of the licence fee, having major component, a percentage (6% in the case of the licence in favour of M/s.Tata Teleservices Ltd.) of the Adjusted Gross Revenue. The definition of Gross Revenue as per clause 19.1 is wide and embraces every source of revenue inflow. Per necessity, maintenance of accounts would be of utmost relevance, for therefrom would be determined as to what has to be paid by the licensee to the licensor i.e. by the telecom service provider to the Union of India.

29. Commenting upon the licence agreement, we would not be wrong to state that as per the same, the parties (M/s.Tata Teleservices Ltd. and Union of India) are allied in an enterprise for mutual gain; which enterprise is similar to a joint venture. Under the licence agreement the Central Government has reposed confidence in the integrity of the licensee, because the revenue which would be generated, and its source, are in the exclusive knowledge and control of the licensee; who would thus be duty bound to act with the utmost good faith. The Central Government has reposed trust and confidence in the licensee to maintain accounts relating to the licence agreement and in particular the revenue received by it and thus there is a contractual obligation of the licensee to account for and pay to the Central Government its share of the revenue, calculated with reference to the gross revenue receipts. Needless to state, without an accounting there is no way by which the Central Government can determine its dues.

30. Every contract contains an implied covenant of good faith and fair dealing, obligating the contracting parties to refrain from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

31. Under the terms of the licence agreement the licensee has undertaken the accounting responsibility for the Central Government as well as itself; a

responsibility arguably carrying with it a fiduciary duty to accurately and honestly report the true receipts of the gross revenue.

32. Accountants owe a fiduciary duty to their clients. Accountants also owe a duty not to supply negligently or intentionally false information to non-clients whom the accountant knows, with substantial certainty, will rely on the information in their dealings with the clients. The role of the licensee, as an accountant, under the licence agreement cannot be glossed over.

33. It may be true that the licensees are not an accounting firm but they employ accountants and book keepers, who perform the accounting function, which the licensees have contracted to carry out. In a very real sense thus, the licensees are the accountant of the Central Government with respect to the complete, accurate and honest maintenance of the books as to any transaction(s) involving revenue.

34. We venture to assert that when the history of the financial era, which preceded liberalization and privatization, would be written, and the mistakes committed would be scripted, a major fault would be the failure to apply the fiduciary principle of every contract containing an implied covenant of good faith and fair dealing because in every contract each party reposes trust and confidence in the other, that each would refrain from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

35. Thus, any interpretation of a regulatory law must keep in mind that primacy needs to be given to the fiduciary principles of good faith in dealing by the regulated especially when the regulated is the beneficiary of a natural resource and has to pay to the custodian of the natural resource money

determined as a percentage of the revenue generated from the licensed activities by the regulated.

36. The petitioners do not dispute liability to maintain the books of accounts required to be maintained as per '*The Telecom Regulatory Authority of India, Service Providers (Maintenance of Books of Accounts and other Documents) Rules, 2002*'. The petitioners also do not dispute their liability to furnish a '*Statement of Revenue and licence fee for each quarter of the year*' as per Appendix-II to Annexure-II to the licence agreement. They do not dispute that the revenue generated by the licensees are required to be shared with the Central Government on percentage basis as mentioned in the licences granted to them. They also do not dispute that for purpose of ascertaining the quantum of revenue share the Central Government would be entitled to carry out such exercise in respect whereof provisions have been made in the respective licences granted. They do not dispute that clause 22.3 of the license confers a right upon the Central Government to ask the licensee to supply and provide for examination any books of account and for said purpose the licensees are required to preserve all billing and other accounting records for a period of 3 years and that under clause 22.4 the Central Government is empowered to scrutinize the said books of accounts so as to facilitate independent verification thereof for the purpose of ascertaining the amount due to it as its share of the revenue.

37. We may note at this stage that the dispute pertaining to the power of the Central Government under Clause 22.5 to appoint special auditors to conduct a special audit as per clause 22.6 has been settled in favour of the licensees by the Telecom Disputes Settlement & Appellate Tribunal as per its decision dated February 10, 2011 in Petition No.139/2010 *Cellular Operators Association of India & Ors. Vs. Department of*

Telecommunication and Petition No.141/2010 *Association of Unified Telecom Services Providers of India (AUSPI) & Ors. Vs. Department of Telecommunication & Anr*. and the matter currently awaits a final adjudication before the Supreme Court on the subject.

38. It is the case of the petitioners that under Article 149 of the Constitution of India, the Comptroller and Auditor General in India is empowered only to audit the accounts of the Union and of the States as also of such authorities or bodies as may be prescribed by or under any law made by Parliament. They urge that the phrase '*any other authority or body*' must be read in conjunction with the earlier part i.e. '*the Union and the States*', meaning thereby, statutory authorities, government companies or entities financed by the Union or by the State. They plead that the Constituent Assembly debates would reveal so. Petitioners state that private companies are outside the purview of Article 149 of the Constitution of India. Petitioners rely upon the decisions reported as ILR (1996) 2 Del. 34 *K.Satyanarayanan Vs. Union of India* and AIR 1991 Madras 61 *R.R.Delavai Vs. Indian Overseas Bank* to make good the point. As per the petitioners, each clause, each phrase and each word in a statute has to be construed, not in isolation, but in the context and the scheme of the statute as held by the Supreme Court in the decision reported as (1987) 1 SCC 424 *RBI Vs. UOI*. The petitioners challenge the vires of Rule 5 of the Telecom Regulatory Authority of India, Service Providers (Maintenance of Books of Accounts and other Documents) Rules, 2002 alleging the same to be ultra vires Section 16 of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971 read with Article 149 of the Constitution of India. We may note that during arguments it was urged by learned senior counsel for the petitioners that if Section 16 of the Comptroller and Auditor

General (Duties, Powers and Conditions of Service) Act, 1971 is read as suggested by the respondents, the same be declared ultra vires Article 149 of the Constitution of India. Relying upon the law declared by the Supreme Court in the decision reported as (1997) 5 SCC 516 *Agricultural Marketing Committee Vs. Shalimar Chemical Works Ltd.* it is urged that if a constitutional provision (Article 149) imposes restrictions on the power of a constitutional authority, no law made by Parliament can widen the said power.

39. The factual basis for the writ petitions to be filed are three letters dated January 28, 2010, May 10, 2010 and May 21, 2010; the first written by the Telecom Regulatory Authority of India and the other two written by the Director General of Audit, Post & Telecommunications to all Telecom Service Providers requiring them to produce their books of accounts and other documents having a bearing on the verification of the revenue to the Comptroller and Auditor General of India for three years commencing from 2006-07 onwards. The three letters read as under:-

*"**TELECOM REGULATORY AUTHORITY OF INDIA***
MAHANAGAR DOORSANCHAR BHAVAN, JAWAHAR LAL NEHRU MARG,
OLD MINTO ROAD, NEW DELHI – 110002

F.NO.14.21/2009-FA *Dated 28th January, 2010*

To,

Mr.Devinder Singh/Sunil Gupta
M/s Reliance Group of Companies
15th Floor, Vijaya Building,
17, Barakhamba Road,
New Delhi 110001

Subject: Furnishing of Books of Accounts to the Brach Audit Offices of the Director General of Audit, Post & Telecommunications.

Dear Sir,

In terms of rule 5 of the Telecom Regulatory Authority of India, Service Providers (Maintenance of Books of Accounts and other Documents) Rules, 2002, every service provider shall produce all such books of accounts and documents referred to in sub rule (1) of rule 3 thereof that has a bearing on the verification of the Revenue, to Telecom Regulatory Authority of India (the Authority)

"(ii) to furnish the Comptroller and Auditor General of India the statement or Information, relating thereto, which the Comptroller and Auditor General of India may require to be produced before him and the Comptroller and Auditor General of India may audit the same in accordance with the provisions of section 16 of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 (56 of 1971)".

2. The Comptroller and Auditor General of India (through Director General of Audit, Post & Telecommunications) has decided to audit the books of accounts of your company for the period of three years commencing from 2006-2007 onwards to assess the Government share out of the revenues carried by your company, in terms of the license agreements with DoT.

3. Therefore in terms of the rule 5 of the TRAI, Service Providers (Maintenance of Books of Accounts and other Documents) Rules, 2002. It is requested that all necessary records/books of accounts circle/area-wise, on the Maintenance of Books of Accounts and other relevant matters during the last week of January 2010 in the office of DO Audit, P&T, New Delhi, which would facilitate the audit work.

4. It is therefore requested that all necessary co-operation may be extended to the Branch Audit offices and Delhi office of DG Audit P&T for completion of the above audit work besides providing all necessary records/information/documents required in connection with this audit work.

This issues with the approval of the Authority.

Yours faithfully

Sd/
(Manoj Kr. Misra)"

x x x

*"**Director General of Audit, Post & Telecommunications***
Sham Nath Marg, (Near Old Secretariat), Delhi – 110402

R.P.Singh
Director General *Date – 10-5-2010*

Sub: Audit or Telecom Service Providers by C&AG-Reg
Ref: 1) DoT letter No.842-1086/2010-AS-IV dt.16.03.2010.
2) Your office letter No.RTL/09-10/4433 dt.31-03-2010.

Dear Sir,

Kindly refer to your office letter cited on the above subject extending cooperation in conduct of the audit of revenue share by C&AG. Certain difficulty has been expressed by your Company in providing the books of account in physical form as they are being maintained in electronic form in SAP R3. Further, it has been stated that the same could be viewed in the concerned IT Systems which would be made available at your headquarters at DAKC, Navi Mumbai. In this connection it is requested that on 20th May 2010 a presentation may be given covering your business activities, accounting policies, Accounting, billing and financial systems and all other issues relating to revenue share, followed by brief interface meeting with my Audit team which would start the process of audit. The time and venue of the presentation is given in Annexure-I. Shri Subu R.Director (Report) of my office has been nominated as Nodal Officer who would be overseeing and coordinating the Audit.

Yours sincerely,

Sd/-
(R.P.SINGH)"

x x x

*"**F.No.14-21/209-FA** **Dated 21st May, 2010***

To,

Mr.Anand Dalal
Addl.Vice President (Regulatory Affairs)
M/s. Tata Group of Companies
Indicom Building
2A, Old Ishwar Nagar
Main Mathura Road
New Delhi – 110065

Subject: Furnishing of Books of Accounts to the Branch Audit Offices of the Director General of Audit, Post & Telecommunications.

Kindly refer to TRAI's letter No.14-21/2009-FA dated 28th January 2010, in which your company has been asked to make available for audit all necessary records/books of accounts circle/area-wise, to the corresponding Branch Audit Offices (as indicated in the list) and to submit consolidated accounts to the Delhi office of the DG Audit, P&T. Your company was also requested to make a presentation on the 'maintenance of books of accounts and other relevant matters' in the office of DG Audit P&T, New Delhi.

2. We have been informed by the C&AG that your company has not responded to these instructions so far.

3. In this connection, TRAI had received representations from the industry associations indicating that the scope of the C&AG's audit is similar to the scope of the exercise that is being done by the special auditor appointed by the DoT and that this exercise would be a duplication of work. The concerns expressed by the industry associations were brought to the notice of the C&AG. However, the C&AG (through Director General Audit (P&T) has informed us that the audit by the C&AG of India under Section 16 of the C&AG (DPC) Act is in exercise of the provisions of TRAI Rules 2002 and has no

relation with the special audit undertaken by the CAs appointed by DoT.

4. In view of above, you are requested to make available all necessary records/books of accounts circle/area-wise, to the corresponding Branch Audit Offices (as indicated in the letter dated 28th January 2010) and to submit consolidated accounts to the Delhi office of the DG Audit, P&T within 15 days of the receipt of this letter. You are also informed that non-compliance of this letter may attract appropriate action under the TRAI Act.

This issues with the approval of the Authority.

Yours faithfully,

Sd/
(Anuradha Mitra)
Pr.Advisor (FA)"

40. Our journey must therefore begin by noting Article 149 of the Constitution of India. It reads as under:-

> ***"149. Duties and powers of the Comptroller and Auditor General*** *- The Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively."*

41. Section 10, Section 13, Section 14 and Section 16 of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971 read as under:-

"10. ***Comptroller and Auditor-General to compile accounts of Union and States-***

(1) The Comptroller and Auditor-General shall be responsible-

(a) for compiling the accounts of the Union and of each State from the initial and subsidiary accounts rendered to the audit and accounts offices under the control by treasuries, offices or departments responsible for the keeping of such accounts; and

(b) for keeping such accounts in relation to any of the matters specified in clause(a) as may be necessary:

Provided that the President may, after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for compiling-

(i) the said accounts of the Union (either at once or gradually by the issue of several orders); or

(ii) the accounts of any particular services or departments of the Union:

Provided further that the Governor of a State may, with the previous approval of the President and after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for compiling-

(i) the said accounts of the State (either at once or gradually by the issue of several orders), or

(ii) the accounts of any particular services or departments of the State:

Provided also that the President may, after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for keeping the accounts of any particular class or character.

(2) Where, under any arrangement, a person other than the Comptroller and Auditor-General has, before the commencement of this Act, been responsible-

(i) for compiling the accounts of any particular service or department of the Union or of a State, or

(ii) for keeping the accounts of any particular class or character.

Such arrangement shall, notwithstanding anything contained in sub-section (1) continue to be in force, unless, after consultation with the Comptroller and Auditor-General, it is revoked in the case referred to in clause(i), by an order of the President of the Governor of the State, as the case may be, and in the case referred to in clause(ii), by an order of the President.

x x x

13. ***General provisions relating to audit.-***

It shall be the duty of the Comptroller and Auditor-General-

(a) to audit all expenditure from the Consolidated Fund of India and of each State and of each Union territory having a Legislative Assembly and to ascertain whether the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have been applied or charged and whether the expenditure conforms to the authority which governs it:

(b) to audit all transactions of the Union and of the States relating to Contingency Funds and Public Accounts,

(c) to audit all trading, manufacturing, profit and loss accounts and balance sheet and other subsidiary accounts kept in any department of the Union or of a State;

and in each case to report on the expenditure, transactions or accounts so audited by him.

x x x

14. ***Audit of receipts and expenditure of bodies or authorities substantially financed from Union or State Revenues****.-*

(1) Where any body or authority is substantially financed by grants or loans from the Consolidated Fund of India or of any State or any Union territory having a Legislative Assembly, the Comptroller and Auditor-General shall, subject to the provisions of any law for the time being in force applicable to the body or authority, as the case may be, audit all receipts and expenditure of that body or authority and to report on the receipts and expenditure audited by him.

Explanation.-

Where the grant or loan to a body or authority from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly in a financial year is not less than rupees twenty-five lakhs and the amount of such grant or loan is not less than seventy-five per cent of the total expenditure of that body or authority, such body or authority shall be deemed, for the purposes of this sub-section, to be substantially financed by such grants or loans, as the case may be.

(2) Notwithstanding anything contained in sub-section (1), the Comptroller and Auditor-General may, with the previous approval of the President of the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, audit all receipts and expenditure of any body or authority where the grant to such body or authority from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly, as the case may be, in a financial year is not less than rupees one crore.

(3) Where the receipts and expenditure of any body or authority are, by virtue of the fulfilment of the conditions specified in sub-section (1) or sub-section (2), audited by the Comptroller and

Auditor-General in a financial year, he shall continue to audit the receipts and expenditure of that body or authority for a further period of two years notwithstanding that the conditions specified in sub-section (1) or sub-section (2) are not fulfilled during any of the two subsequent years.

x x x

16. ***Audit of receipts of Union or of States.-***

It shall be the duty of the Comptroller and Auditor-General to audit all receipts which are payable into the Consolidated Fund of India and of each State and of each Union territory having a Legislative Assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, affection and proper allocation of revenue and are being duly observed and to make for this purpose such examination of the accounts as he thinks fit and report thereon."

42. Rule 5 of the Telecom Regulatory Authority of India, Service Providers (Maintenance of Books of Accounts and other Documents) Rules, 2002 reads as under:-

"5. Audit.- *Every service provider shall produce all such books of accounts and documents, referred to in sub-rule (1) of rule 3, that has a bearing on the verification of the Revenue, to the Authority –*

(i) for the purpose of calculating license fee, and

(ii) to furnish to the Comptroller and Auditor General of India the statement or information, relating thereto, which the Comptroller and Auditor General of India may require to be produced before him and the Comptroller and Auditor General of India may audit the same in accordance with the provisions of section 16 of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 (56 of 1971)."

43. A plain reading of Article 149 of the Constitution of India would reveal that it is the constitutional duty of the Comptroller and Auditor General of India to perform such duties and exercise such powers in relation to the accounts of the Union and the States and of any other authority or body as may be prescribed by or under any law made by Parliament. In other words Parliament would be competent to frame a law on two subjects : (i) the manner and scope of the audit pertaining to the accounts of the Union and the State; and (ii) such other bodies or authorities accounts whereof would be subject to an audit by the Comptroller and Auditor General of India including the manner and scope of the audit.

44. For the purposes of our decision we would be proceeding on the basis that the bodies or authorities accounts whereof would be subject to an audit by the Comptroller and Auditor General of India would be the ones as suggested by the petitioners and that the private telecom companies would not be the bodies or authorities conceived of by Article 149 of the Constitution of India, leaving the question open but noting that in the decision reported as AIR 1982 SC 149 *S.P.Gupta Vs. Union of India*, in paragraph 62 the Supreme Court observed:-

> *"The interpretation of every statutory provision must keep pace with changing concepts and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to accord with the requirement of the fast changing society which is undergoing rapid social and economic transformation.... It is elementary that law does not operate in a vacuum. It is, therefore, intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest it with a meaning which will harmonise*

the law with the prevailing concepts and values and make it an effective instrument for delivery of justice."

And in the decision reported as AIR 1987 SC 222 *S.P.Jain Vs. Krishan Mohan Gupta & Ors.* it was observed in paragraph 18 as under-

> *"We are of the opinion that law should take pragmatic view of the matter and respond to the purpose for which it was made and also take cognizance of the current capabilities of technology and life style of community."*

45. We therefore do not note the quotes from the Constituent Assembly debates which were copiously read to us, but would be failing not to observe that no debate on a point of law can be construed so as to render the law anachronistic. Indeed, law has to be interpreted meaningfully, in pace with the development in society. In a modern progressive society it would be unreasonable to confine the intention of the legislature to the meaning attributed to the words used at the time when the law was made unless a contrary intention appears. Law has to be interpreted in the given new facts and situations and the existing words of the law have to be read as capable of comprehending new facts and situations.

46. Article 266 of the Constitution of India reads as under:-

> *"266.* ***Consolidated Funds and public accounts of India and of the States. –***
>
> (1) *Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India", and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury*

bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State".

(2) *All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.*

(3) *No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution."*

47. We highlight the expression '*all revenues received by the Government of India*' and '*shall form one consolidated fund to be entitled the Consolidated Fund of India'* in Article 266.

48. The expression '*revenues*' as observed by the Division Bench of the Punjab High Court in the decision reported as AIR 1957 Punjab 45 *Gopi Parshad Vs. State of Punjab* appearing in Article 266 has not been defined but there can be no manner of doubt that it means the income of the nation derived from taxes, duties or other sources for the payment of the nation's expenses. It is a term generally used in referring to income of a Government, and so used, means all the public money which the State collects and receives from whatever source and in whatever manner. If all the income of the State, must, in view of the constitutional requirements, be credited to and form part of the Consolidated Fund of the State, it is obvious that the income derived by the State from any contract, cannot be kept out of the general revenues.

49. Thus, it is the constitutional obligation of the Comptroller and Auditor General to perform such duties in relation to the accounts of the Union as

may be prescribed under any law made by Parliament, and the law made by Parliament is the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971. As per Section 10 thereof, the Comptroller and Auditor General is responsible for compiling the accounts of the Union from the initial and subsidiary accounts. As per Section 13 thereof, the Comptroller and Auditor General is charged with the duty to audit all expenditure from the Consolidated Fund of India. As per Section 14 thereof, bodies or authorities substantially financed from the Union or State revenues are subject to the audit by the Comptroller and Auditor General and as per Section 16 thereof, the Comptroller and Auditor General has to audit all receipts which are payable into the Consolidated Fund of India and Article 266 of the Constitution of India, to which we have adverted to hereinbefore and in respect whereof we have already explained what would the expression '*revenues*' mean to be kept in mind. And needless to state, would include any income of the nation derived from any source, to be credited into the Consolidated Fund of India.

50. The legal position could be stated in simple language as follows : The Constitution (Article 149) mandates the Comptroller and Auditor General to perform such duties and exercise such powers in relation to the accounts of the Union. Accounts would include a record of money received and spent by the Union. Power in relation to the account envisaged under Article 149 would be as prescribed by or under any law made by Parliament which would mean that Parliament can make a law with respect to compiling accounts and auditing the same. While enacting the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971, vide Section 10, the Parliament has prescribed the manner in which power contemplated by Article 149 shall be exercised by the Comptroller and

Auditor General in relation to compiling and keeping accounts and vide Section 13 has prescribed the manner in which the expenditure shall be audited and vide Section 16 has prescribed the manner in which the receipts have to be audited.

51. We see no scope for any argument of there being any conflict between Section 16 of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971 and Article 149 of the Constitution of India. We see no scope for an argument to urge any conflict between Rule 5 of the Telecom Regulatory Authority of India, Service Providers (Maintenance of Books of Accounts and other Documents) Rules, 2002 and Section 16 of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971 for the reason, interpreting the contract, we have already held hereinabove that in a very real sense the licensees are the accountant of the Central Government with respect to the complete, accurate and honest maintenance of the books as to any transaction(s) involving revenue. (See para 33 above). We have already held in paragraph 31 above that under the terms of the licence agreement the licensee has undertaken the accounting responsibility for the Central Government as well as itself. Thus, the accounts of the licensees, in relation to the revenue receipts can be said to be the accounts of the Central Government and thus subject to a revenue audit as per Section 16 of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971.

52. We note that the power of the Comptroller and Auditor General to conduct a revenue audit of the accounts drawn up by the licensees does not flow from Rule 5 of the Telecom Regulatory Authority of India, Service Providers (Maintenance of Books of Accounts and other Documents) Rules, 2002 but flows from Article 149 of the Constitution of India and with the

concept of revenue as explained by us hereinabove with reference to Article 266 of the Constitution of India, finding flesh and blood from Section 16 of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971.

53. We conclude by holding that neither Rule 5 of the Telecom Regulatory Authority of India, Service Providers (Maintenance of Books of Accounts and other Documents) Rules, 2002 is ultra vires Section 16 of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971 nor is Section 16 ultra vires Article 149 of the Constitution of India. The Rule and the Section fits perfectly into the constitutional scheme of every rupee flowing into the Consolidated Fund of India, by way of revenue, to be audited by the Comptroller and Auditor General of India. The Rule, the Section and the constitutional provisions as interpreted by us perfectly fit the critical features of the new emerging regulatory State which has to reconstruct institution on the ruins of the club government requiring displacing the key feature of the club with standardization and formality; the provision of systematic information accessible both to insiders and outsiders and strengthening the control mechanism and public reporting.

54. A small caveat by way of reminder to the Comptroller and Auditor General. In relation to the accounts of the Telecom Service Providers, the audit has to be only an audit pertaining to the receipts and no more. The Comptroller and Auditor General would not confuse himself with his wide all embracing power under Section 14(2) of the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971 which includes inquiries into aspects like faithfulness, wisdom and economy in expenditures. The Telecom Service Providers would be reminded by us of

what we have written in paragraphs 18 and 19 above and the Comptroller and Auditor General of India would be reminded by us of what we have written in paragraph 20 above. A synergy between the two would be not only for the benefit of the industry, the economy of the country, the society at large but would go a long way in establishing public confidence in good corporate governance.

55. The writ petitions are dismissed but without any order as to costs.

56. Interim orders are vacated.

(PRADEEP NANDRAJOG)
JUDGE

(V.KAMESWAR RAO)
JUDGE

JANUARY 06, 2014
mamta/skb