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REPORTABLE

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.6328-6399 OF 2015

UNION OF INDIA ..**APPELLANT(S)**

VERSUS

ASSOCIATION OF UNIFIED TELECOM SERVICE PROVIDERS OF INDIA ETC.ETC. ..**RESPONDENT(S)**

WITH

CIVIL APPEAL NOS. 6183-6255 OF 2015

CIVIL APPEAL NOS.5832-5852 OF 2015

CIVIL APPEAL NO.5909 OF 2015

CIVIL APPEAL NO.6009 OF 2015

CIVIL APPEAL NO.5996 OF 2015

CIVIL APPEAL NO.5957 OF 2015

CIVIL APPEAL NO.5997 OF 2015

CIVIL APPEAL NO.5998 OF 2015

CIVIL APPEAL NO.6011 OF 2015

CIVIL APPEAL NO.6002 OF 2015

CIVIL APPEAL NO.6010 OF 2015

CIVIL APPEAL NO.6012 OF 2015

CIVIL APPEAL NOS.8496-8505 OF 2015

CIVIL APPEAL NOS.8493-8495 OF 2015

CIVIL APPEAL NO.5929 OF 2015

CIVIL APPEAL NO.5911 OF 2015

CIVIL APPEAL NO.5882 OF 2015

CIVIL APPEAL NO.5931 OF 2015

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CIVIL APPEAL NO.5934 OF 2015

CIVIL APPEAL NO.5930 OF 2015

CIVIL APPEAL NOS.6888-6895 OF 2015

CIVIL APPEAL NO.6003 OF 2015

CIVIL APPEAL NO.6004 OF 2015

CIVIL APPEAL NOS.8506-8530 OF 2015

CIVIL APPEAL NOS.8009-8017 OF 2015

CIVIL APPEAL NO.344 OF 2016

CIVIL APPEAL NO.498 OF 2016

CIVIL APPEAL NO.497 OF 2016

CIVIL APPEAL NO.493 OF 2016

CIVIL APPEAL NO.14624 OF 2015

CIVIL APPEAL NO.13550 OF 2015

CIVIL APPEAL NOS.13705-13711 OF 2015

CIVIL APPEAL NO.13590 OF 2015

CIVIL APPEAL NO.13587 OF 2015

CIVIL APPEAL NO.13586 OF 2015

CIVIL APPEAL NO.13585 OF 2015

CIVIL APPEAL NO.13591 OF 2015

CIVIL APPEAL NO.13538 OF 2015

CIVIL APPEAL NO.13588 OF 2015

CIVIL APPEAL NO.13593 OF 2015

CIVIL APPEAL NOS.13595-13596 OF 2015

CIVIL APPEAL NO.13584 OF 2015

CIVIL APPEAL NO.13574 OF 2015

CIVIL APPEAL NO.13681 OF 2015

CIVIL APPEAL NOS.13581-13582 OF 2015

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CIVIL APPEAL NO.13592 OF 2015

CIVIL APPEAL NO.13699 OF 2015

CIVIL APPEAL NO.13697 OF 2015

CIVIL APPEAL NO.13698 OF 2015

CIVIL APPEAL NO.13680 OF 2015

CIVIL APPEAL NOS.6022-6044 OF 2016

CIVIL APPEAL NO. 8275 OF 2019 @ SPECIAL LEAVE PETITION (C) NO.20219 OF 2016

CIVIL APPEAL NOS.8646-8648 OF 2018

J U D G M E N T

ARUN MISHRA, J.

1. In the appeals, the question involved is with respect to the definition of gross revenue as defined in clause 19.1 of the licence agreement granted by the Government of India to the Telecom Service Providers. The case has a chequered history and the scenario projected is that even after the licensees agreeing with the revenue sharing regime under the Telecom Policy of 1999 for the last two decades, definition of gross revenue has been litigated upon, though the intendment was to keep it free from the same and various disputes. Notwithstanding the fact that disputes have been raised, and despite the fact what is the meaning to be given to gross revenue, was agreed upon between the parties. The telecom sector was liberalized under the National Telecom Policy, 1994 and various licenses were issued to companies under Section 4 of the Indian Telegraph Act, 1885. The licences granted to the service providers

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stipulated a fixed licence fee, which was payable by the service providers every year.

2. However, as the said fixed license fee was very high and the telecom service providers consistently defaulted in making the payments, the telecom service providers made a representation to the Government of India for relief against the steep license fee. The said representation was considered and keeping the interest of the country, and the telecom sector in mind, a new package, known as "the National Telecom Policy, 1999 Regime" giving an option to the licensees to migrate from fixed licence fee to revenue sharing fee was made applicable in the year 1999. The National Telecom Policy, 1999 was devised after holding detailed deliberations and consultations with the telecom service providers and the telecom industry. Clause III of the migration package reads as under:

> "(iii) The Licence fee as a percentage of gross revenue under the license shall be payable w.e.f. 1.8.1999. The Government will take a final decision to charge the quantum of the revenue share as licence fee after obtaining recommendations of the Telecom Regulatory Authority of India (TRAI). Meanwhile, the Government decided to fix 15% of the gross revenue of the licensee as a provisional license fee. The gross revenue for this purpose would be the total revenue of the Licensee company excluding the PSTN related call charges paid to DOT/MTNL and service tax collected by the licensee on behalf of the Government from their subscribers. On receipt of TRAI's recommendation and Government's final decision, the final adjustment of provisional dues will be effected depending upon the percentage of revenue share and the definition of revenue for this purpose as may be finally decided."

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3. As mentioned, in the new Telecom Policy, 1999, the purpose and objects for the shift to "Revenue Sharing Regime," which, as such, was more beneficial to the telecom service providers were:

- Make available telephone on demand by the year 2002 and sustain it after that to achieve a teledensity of 7 by the year 2005 and 15 by the year 2010.
- Encourage the development of telecom in rural areas making it more affordable by suitable tariff structure and making rural communication mandatory for all fixed service providers.
- Increase rural teledensity from the current level of 0.4 to 4 by the year 2010 and provide reliable transmission media in all rural areas.
- Achieve telecom coverage of all villages in the country and provide reliable media to all exchanges by the year 2002.
- Provide Internet access to all district headquarters by the year 2000.
- Provide high-speed data and multimedia capability using technologies including ISDN to all towns with a population higher than 2 lakh by the year 2002.

4. Considering the objectives and targets of the new Telecom Policy, 1999, it appears that:

i. The Central Government gave a liberalised mode of payment by "revenue sharing" regime, which was the price for parting with the exclusive privilege the Central Government had.

ii. The Telecom Policy, 1999, was so designed that the Government becomes a partner or sharer of "gross revenue."

iii. From out of money received under the head of "Adjusted Gross Revenue," the Central Government took a conscious decision to spend money to remote and uncovered areas,

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rural areas, tribal areas, and hilly areas to ensure maximum tele-connectivity.

iv. The said objective was achieved, inter alia, by giving subsidies for the establishment of telecom infrastructure in such areas

5. Fifteen percent AGR was fixed as license fee under "revenue sharing," which was reduced to 13 percent and lastly to 8 percent in 2013. It appears that the "revenue sharing" package turned out to be very very beneficial to the telecom service providers, which is evident from the continuing rise in the gross revenue, which is as follows:

Financial Year (ending in March)	**Gross Revenue earned by TSPs (in crores)**
2004	4,855
2006	2,666
2007	89,108
2008	1,05,061
2009	1,43,044
2010	1,44,232
2011	1,60,251
2012	1,82,637
2013	2,04,221
2014	2,24,430
2015	2,37,676

6. However, the telecom service providers in spite of the financial benefits of the package started to ensure that they do not pay the licence fee to the public exchequer based on even an agreed “AGR”.

7. To arrive at the formula of "AGR," the Draft Licence Agreement was circulated to the telecom operators. It is pertinent to note that the Draft Licence Agreement provided clause 18.2, which pertains to

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an annual license fee payable as a percentage of adjusted gross revenue "AGR." Gross Revenue defined under clause 19 of the Draft Licence Agreement, reads 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/PLMN related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India;
>
> I. Roaming revenues actually passed on to other eligible/entitled telecommunication service providers and;
>
> II. 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."

8. Along with the Draft Licence Agreement, all annexures to the license, including the format of Statement of Revenue and Licence Fee (Appendix-II to Annexure-II) were circulated. As per the form of the Statement of Revenue and Licence Fee, the telecom operators were required to submit the relevant data/revenue earned by them so that the ultimate AGR/license fee can be determined.

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9. That vide communication dated 01.03.2001, the Association of Basic Telecom Operators submitted their comments on Draft License Agreement for basic service licenses. The comments on the revenue to levy the license fee were as under:

> "For ascertaining the Revenue, income is proposed to be considered on an accrual basis while deductible expenses are proposed to be considered on an actual or pass-through basis. Also, logically, the LICENSEE should be required to pay license fee only on that income which he has actually obtained. In view of this, the above mode of revenue is inequitable. Hence, both the income as well as deductible expenses should be computed on actual basis to arrive at an equitable and fair figure of revenue on which the License Fee can be levied.
>
> Income from interest, dividend, etc. are also proposed to be included while computing the Revenue. Such income is purely non-operational income as it is earned from sources other than the provision of SERVICE and is recognised to be so by all statutory authorities including the ICAI, SEBI and the Stock Exchanges. Hence, no license fee should be levied on such income, and accordingly, such income should not be included for computing the figure of REVENUE.
>
> All such deposits as are credited to the P&L Account are proposed to be covered in REVENUE. This is irrational since these .... Further, all bad debts recovered and write-back of provisions and other debits for earlier years are also proposed to be included in REVENUE. However, no deduction on account of bad debts provisions, etc. for the current year is allowed to while computing REVENUE. This is both inequitable, irrational, and against the fundamental accounting concepts. Such additions on account of write-back should be allowed only in licensees are given the corresponding benefit of the very same expenses from the current period's income for computing REVENUE.
>
> Lastly, the definition should be a comprehensive one comprising an exhaustive (and not indicative) list of items which will be included in the expression REVENUE. Any indicative list is bound to give rise to unnecessary disputes in the future, which will be detrimental to the LICENSEES in most cases."

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10. It appears that after that the licenses were issued in favour of the respective telecom operators. As observed hereinabove, the telecom operators availed the benefit of migration package. However, thereafter when the department raised the demands on the service providers, in the year 2003 the Association of Basic Telecom Operators and respective telecom operators filed a petition before the Telecom Disputes Settlement and Appellate Tribunal, New Delhi (hereinafter referred to as the 'TDSAT') under Section 14(a)(i) read with Section 14(A) (1) of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the "TRAI Act") being Petition No. 07 of 2003. It was a case of the telecom operators that the department was supposed to determine the quantum based on the recommendations of the TRAI. According to the telecom operators, the department had illegally included various elements of income in the definition of the term "AGR" which do not accrue from the operations under the license viz., dividend income, interest income on short term investment, discounts on calls, revenues from other activities separately licensed, reimbursements under the Universal Service Fund (USF) etc. The telecom operators heavily relied upon the recommendations issued by the TRAI on 31.08.2000, making detailed recommendations on the terms and conditions for issuance of licenses to new Basic Operators, more particularly the recommendations made by the TRAI with the

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revenue sharing of 12%, 10% and 8% for categories A, B and C Circles respectively ought to be levied on the Basic Operators.

11. On merits and components of the AGR, the telecom operators submitted the following grounds:

> "48) BECAUSE logically the LICENSEE should be required to pay licence fee only on that income which he has actually obtained;
>
> 50) BECAUSE income from interest, dividend, etc., which are proposed to be included while computing the Revenue are purely non-operational income as it is earned from sources other than the provision of SERVICE and is recognized to be so by all statutory authorities including the ICAI, SEBI and the Stock Exchange.
>
> 51) BECAUSE no licence fee should be levied on such income and accordingly such income should not be included for computing the figure of REVENUE;
>
> 52) BECAUSE all such deposits as are credited to the P&L Account are proposed to be covered in REVENUE which is irrational;
>
> 53) BECAUSE further, all bad debts recovered and write-back of provisions and other debits for earlier years are also proposed to be included in REVENUE;
>
> 54) BECAUSE no deduction on account of bad debts, provisions, etc. for the current year are allowed to be made while computing REVENUE;
>
> 57) BECAUSE the definition should be a comprehensive one comprising an exhaustive (and not indicative) list of items which will be included in the expression REVENUE;"

12. It appears that no other grounds were raised. The telecom operators in Petition No.7 of 2003 prayed as under:

> "a) declare that Adjusted Gross Revenues can only relate to revenues directly arising out of telecom operations licensed under Section 4 of the Indian Telegraph Act, 1885 (after adjustment of expenses and write-offs and revenues not directly attributable to the licensed telecom activities and miscellaneous and other items indicated in the DoT letter

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dated 26.7.01, including interest income and dividend income, value of rebates, discounts, free calls and reimbursement from the USO fund etc., ought not be included in the Adjusted Gross Revenues for the purposes of computation License Fee;

b) set aside the DoT letters dated 7.5.03, attempting to adjust/set off their claims relating to Adjusted Gross Revenue from out of the amounts due and refundable to the Petitioners consequent to the Judgements of this Hon'ble Tribunal and the Hon'ble Supreme Court;

c) set aside the DoT demand letters inter alia dated 21.8.02, 9.8.02, 14/21.1.03, 23.1.03, 7.3.03 and similar demands raised against the BSOs claiming Revenue Share on interest income and other miscellaneous heads which are contrary to the Recommendations of the TRAI;

d) direct the DoT to implement the recommendations of the TRAI dated 31.8.00 and 31.10.00;

e) direct the DoT to refund the BSOs all such excess amounts together with interest @ 12% per annum that may have been collected by it under its letter dated 26.7.01 or 7.5.03 or otherwise, contrary to the recommendations of the TRAI dated 31.10.00."

13. The objections described above can be said to be the first set of the grounds by the telecom operators raised at the first instance and the earliest. It appears that after TDSAT remitted the matter to the TRAI by observing that there was no adequate consultation with the TRAI before finalising the AGR and the components which form the AGR. While remitting the matter to the TRAI, the TDSAT made some observations regarding the inclusion in gross revenue of the licensee revenue derived from non-licensed activities. The TDSAT directed listing for further directions/hearing after the recommendations of the TRAI are received or in the first week of October 2006, whichever is

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earlier (Order dated 07.07.2006, Coram: Justice N. Santosh Hegde, Chairperson, and D.P. Sehgal, Member).

14. That in the order dated 07.07.2006, the Tribunal rejected the contentions of the UOI and held that under Section 4 of the Indian Telegraph Act, 1885, 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 licence activities would be outside the purview of Section 4 of the Telegraph Act. The Tribunal further held that Section 11(1)(a) of the TRAI Act mandates the Central Government to seek recommendations from the TRAI on the licence fee payable by the licensee and as the TRAI has made no effective consultation, the matter should be remitted to the TRAI and the TRAI can consider the issue and send its recommendations to the Tribunal. At this stage, it is required to be noted that the Union of India challenged the order dated 07.07.2006 of the Tribunal before this Court in Civil Appeal No. 84 of 2007 under Section 18 of the TRAI Act. During the pendency of the civil appeal, the TRAI sent its recommendations as to the AGR which have been sought by the Tribunal vide its order dated 07.07.2006. Therefore, when Civil Appeal No.84/2007 came up for hearing before this Court on 19.01.2007, this Court dismissed the said appeal with the liberty to the Union of India to urge all contentions raised in the civil appeal before the Tribunal.

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15. It appears that after that the TRAI sent its recommendations to the TDSAT. At this stage, it is required to be noted that though in view of the order passed by this Court dated 19.01.2007 passed in Civil Appeal No. 84/2007, a liberty was reserved in favour of the Union of India to urge all contentions raised in the civil appeal and accordingly the Union of India submitted that the Union of India is 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 the AGR shall also include the revenue from activities outside the license, the TDSAT in its fresh order dated 30.08.2007 did not permit the Union of India to raise the aforesaid issues, and the Tribunal held that its earlier order dated 07.07.2006 having become final, it cannot be reopened after the disposal of Civil Appeal No. 84/2007. The Tribunal held that it's finding in the earlier order dated 07.07.2006 that the adjusted gross revenue "AGR" will include only revenue arising from licence activities and not revenue from activities outside the licence cannot be re-agitated by the Union of India. Therefore, the TDSAT held that the AGR would include only the revenue from licence activities. After that the Tribunal in its fresh order dated 30.08.2007 considered the recommendations of the TRAI regarding the heads of the revenue to be included and the heads of the revenue to be excluded from the AGR and decided as follows:

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"(*i*) The Tribunal accepted the recommendation of TRAI that income from dividend even though part of the revenue does not represent revenue from licensed activity and, therefore, cannot be included in the adjusted gross revenue.

(*ii*) The Tribunal accepted the recommendation of TRAI that interest earned on investment of savings made by a licensee after meeting all liabilities including liability on account of the share of the Government in the gross revenue cannot be included in the adjusted gross revenue, but, interest on investment of funds received by a licensee by way of deposits from customers on account of security against charges and on account of concessions given in the charges payable for using the telecom services have to be included in the adjusted gross revenue as these are related to telecom service, which is part of the licensed activity.

(*iii*) The Tribunal did not fully accept the recommendation of TRAI on capital gains and held that sale of assets of a licensee such as immovable properties, securities, warrants or debt instruments are not part of the licensed activity and, therefore, capital gains earned by a licensee on such sale of assets cannot form part of the adjusted gross revenue.

(*iv*) The Tribunal accepted the recommendation of TRAI that gains from foreign exchange rate fluctuations are also not part of the licensed activity of telecom service providers and, therefore, cannot constitute part of the adjusted gross revenue.

(*v*) The Tribunal did not fully accept the recommendation of TRAI on the reversal of provisions like bad debts, taxes and vendors' credits and held that all these reversals have to be excluded from the adjusted gross revenue.

(*vi*) The Tribunal also accepted the recommendation of TRAI that rent from property owned by the licensee should be excluded from the adjusted gross revenue, provided it is established that the property is not in any way connected with establishing, maintaining and working of telecommunication.

(*vii*) The Tribunal accepted the recommendation of TRAI that income from renting and leasing of passive infrastructures like towers, dark fiber, etc. should be part of the adjusted gross revenue as they are parts of the licensed activity of the licensee.

(*viii*) The Tribunal accepted the recommendation of TRAI that revenue from sale of tenders, directories, forms, forfeiture of deposits/earnest money in relation to telecom service should form part of the adjusted gross revenue, but held that management fees, consultancy fees and training charges from telecom service should not form part of the adjusted gross revenue as these activities do not require a licence.

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(*ix*) The Tribunal held that payments received on behalf of the third party should not form part of the adjusted gross revenue and did not accept the recommendation of TRAI in this regard.

(*x*) The Tribunal did not accept the recommendation of TRAI that the revenue from TV uplinking and internet service should form part of the adjusted gross revenue as these activities are under a separate licence.

(*xi*) The Tribunal accepted the recommendation of TRAI that sale of handsets or telephone equipment bundled with telecom service should be part of the adjusted gross revenue because such sale comes within the licensed activity.

(*xii*) The Tribunal accepted the recommendation of TRAI that receipts from USO fund will not form part of the adjusted gross revenue.

(*xiii*) The Tribunal accepted the recommendation of TRAI that revenue receipts on account of ADC (access deficit charge) should form part of the adjusted gross revenue.

(*xiv*) The Tribunal accepted the recommendation of TRAI that costs on account of port charges, interconnection set-up charges, leased lines, sharing of infrastructure, roaming signalling charges and content charges should form part of the adjusted gross revenue.

(*xv*) The Tribunal did not accept the recommendation of TRAI that bad debts, waivers, and discounts should form part of the adjusted gross revenue and held that such losses incurred by a licensee should be excluded from the adjusted gross revenue.

(*xvi*) The Tribunal accepted the recommendation of TRAI that service tax payable by the licensee should be included or excluded from the adjusted gross revenue on an accrual basis and also accepted the recommendation of TRAI that interconnection usage should also be included or excluded from the adjusted gross revenue on an accrual basis.

(*xvii*) Tribunal did not accept recommendation of TRAI that its recommendations with regard to items, which are to be included or excluded from the gross revenue, should be effective from a prospective date and instead held that the findings of the Tribunal with regard to items, which are included or excluded from the adjusted gross revenue, will be effective from the date the licensee approached the Tribunal."

16. A fresh final order passed by the TDSAT dated 30.08.2007 was the subject matter of appeal before this Court in the case of *Union of*

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India and another v. Association of Unified Telecom Service Providers of India, (2011) 10 SCC 543. This Court formulated the following substantial questions of law:

> "(*i*) Whether after dismissal of Civil Appeal No. 84 of 2007 of the Union of India against the order dated 7-7-2006 of the Tribunal, by this Court by order dated 19-1-2007 [*Union of India* v. *Assn. of Unified Telecom Service Providers of India*, Civil Appeal No. 84 of 2007 decided on 19-1-2007 (SC)] , the Union of India can agitate the question decided in the order dated 7-7-2006 that the adjusted gross revenue will include only revenue arising from licensed activities and not revenue from activities outside the licence of the licensee.
>
> (*ii*) Whether TRAI and the Tribunal have the jurisdiction to decide the validity of the terms and conditions of the licence which had been finalised by the Central Government and incorporated in the licence agreement including the definition of adjusted gross revenue.
>
> (*iii*) Whether as a result of the Union of India not filing an appeal against the order dated 7-7-2006 of the Tribunal passed in favour of some of the licensees, the said order dated 7-7-2006 had not become binding on the Union of India with regard to the issue that revenue realised from activities beyond the licensed activities cannot be included in the adjusted gross revenue.
>
> (*iv*) Whether the licensee can challenge the computation of adjusted gross revenue, and if so, at what stage and on what grounds."

17. While answering issue No.1, this Court took note of the expressed language of the order dated 19.01.2007 passed in Civil Appeal No.84 of 2007 and held that it was open for the Union of India to raise all contentions which were raised in Civil Appeal No.84 of 2007 including the following grounds:

> "1. Because the judgment and order dated 7-7-2006 passed by the TDSAT are wrong, erroneous, contrary to law and deserves to be set aside.

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> 2. Because the TDSAT failed to appreciate that the migration package accepted and acted upon by the respondents herein itself provided for the definition of gross revenue and adjusted gross revenue.
>
> 3. Because the TDSAT failed to appreciate that the licensees unconditionally accepted the migration package, exploited the licence on the terms and conditions mentioned therein and after that challenged the definition of adjusted gross revenue.
>
> 4. TDSAT failed to appreciate that it had no jurisdiction or power to examine the correctness of terms of the licence which had been unconditionally accepted and acted upon by the licensees.
>
> 5. Because the TDSAT failed to appreciate that in fact, some licensees obtained a new licence which contains the definition of 'gross revenue' and 'adjusted gross revenue' which has been unconditionally accepted by the appellants (*sic* respondents).
>
> 6. Because the TDSAT failed to appreciate that under Section 4 of the Telegraph Act, 1885 it is the exclusive privilege of the Central Government to establish, maintain and work telegraph/telecom and this privilege can be given to the private parties by granting licences on such terms and conditions as the Central Government thinks fit and appropriate."

18. This Court specifically observed and held that the Union of India could urge before the Tribunal all contentions under the Grounds 1 to 6, extracted above, including the assertion that the definition of adjusted gross revenue "AGR" as given in the licence could not be challenged by the licensees before the Tribunal and will include all items of revenue mentioned in the definition of adjusted gross revenue in the licence.

19. While answering second substantial question of law, namely, whether TRAI and the Tribunal have the jurisdiction to decide the validity of the terms and conditions of the licence including the

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definition of adjusted gross revenue finalised by the Central Government and incorporated in the licence, this Court observed and held as under:

> "37. A bare perusal of sub-section (1) of Section 4 of the Telegraph Act shows that the Central Government has the exclusive privilege of establishing, maintaining, and working telegraphs. This would mean that only the Central Government, and no other person, has the right to carry on telecommunication activities.
>
> 39. The proviso to sub-section (1) of Section 4 of the Telegraph Act, however, enables the Central Government to part with this exclusive privilege in favour of any other person by granting a licence in his favour on such conditions and in consideration of such payments as it thinks fit. As the Central Government owns the exclusive privilege of carrying on telecommunication activities and as the Central Government alone has the right to part with this privilege in favour of any person by granting a licence in his favour on such conditions and in consideration of such terms as it thinks fit, a licence granted under the proviso to sub-section (1) of Section 4 of the Telegraph Act is in the nature of a contract between the Central Government and the licensee.
>
> 40. A Constitution Bench of this Court in *State of Punjab* v. *Devans Modern Breweries Ltd.* [(2004) 11 SCC 26] relying on *Har Shankar case* [(1975) 1 SCC 737] and *Panna Lal* v. *State of Rajasthan* [(1975) 2 SCC 633] has held in para 121 at p. 106 that issuance of liquor licence constitutes a contract between the parties. Thus, once a licence is issued under the proviso to sub-section (1) of Section 4 of the Telegraph Act, the licence becomes a contract between the licensor and the licensee. Consequently, the terms and conditions of the licence, including the definition of adjusted gross revenue in the licence agreement are part of a contract between the licensor and the licensee. We have to, however, consider whether the enactment of the TRAI Act in 1997 has in any way affected the exclusive privilege of the Central Government in respect of the telecommunication activities and altered the contractual nature of the licence granted to the licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act.
>
> 41. Section 2(*e*) of the TRAI Act quoted above defines "licensee" to mean any person licensed under sub-section (1) of Section 4 of the Telegraph Act for providing specified public telecommunication services and Section 2(*ea*) defines "licensor" to mean the Central Government or the telegraph authority who grants a licence under Section 4 of the

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Telegraph Act. Sub-section 2(*k*) defines "telecommunication service" very widely so as to include all kinds of telecommunication activities. These provisions under the TRAI Act do not affect the exclusive privilege of the Central Government to carry on telecommunication activities nor do they alter the contractual nature of the licence granted under the proviso to sub-section (1) of Section 4 of the Telegraph Act.

43. These provisions in the TRAI Act show that notwithstanding subsection (1) of Section 4 of the Telegraph Act vesting exclusive privilege in the Central Government in respect of telecommunication activities and notwithstanding the proviso to sub-section (1) of Section 4 of the Telegraph Act vesting in the Central Government the power to decide on the conditions of licence including the payment to be paid by the licensee for the licence, TRAI has been conferred with the statutory authority to make recommendations on the terms and conditions of the licence to a service provider and the Central Government was bound to seek the recommendations of TRAI on such terms and conditions at different stages, but the recommendations of TRAI are not binding on the Central Government, and the final decision on the terms and conditions of a licence to a service provider rested with the Central Government. The legal consequence is that if there is a difference between TRAI and the Central Government with regard to a particular term or condition of a licence, as in the present case, the recommendations of TRAI will not prevail and instead the decision of the Central Government will be final and binding.

44. In contrast to this recommendatory nature of the functions of TRAI under clause (*a*) of sub-section (1) of Section 11 of the TRAI Act, the functions of TRAI under clause (*b*) of sub-section (1) of Section 11 of the TRAI Act are not recommendatory. This will be clear from the very language of clause (*b*) of sub-section (1) of Section 11 of the TRAI Act which states that TRAI shall discharge the functions enumerated under sub-clauses (*i*), (*ii*) and (*ix*) under clause (*b*) of sub-section (1) of Section 11 of the TRAI Act. Under clause (*c*) of sub-section (1) of Section 11 of the TRAI Act, TRAI performs the function of levying fees and other charges in respect of different services and under clause (*d*) of sub-section (1) of Section 11, the Central Government can entrust to TRAI other functions. These functions of TRAI under clauses (*c*) and (*d*) of sub-section (1) of Section 11 of the TRAI Act are also not recommendatory in nature. That the functions of TRAI under clause (*a*) are recommendatory while the functions of TRAI under clauses (*b*), (*c*) and (*d*) are not recommendatory will also be clear from provisos first to fifth which refer to the recommendations of TRAI under clause (*a*) of sub-section (1) of Section 11 of the TRAI Act and not to clauses (*b*), (*c*) and (*d*) of sub-section (1) of Section 11 of the TRAI Act.

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45. The scheme of the TRAI Act therefore is that TRAI being an expert body discharges recommendatory functions under clause (*a*) of sub-section (1) of Section 11 of the TRAI Act and discharges regulatory and other functions under clauses (*b*), (*c*) and (*d*) of sub-section (1) of Section 11 of the TRAI Act. TRAI being an expert body, the recommendations of TRAI under clause (*a*) of sub-section (1) of Section 11 of the TRAI Act have to be given due weightage by the Central Government, but the recommendations of TRAI are not binding on the Central Government. On the other hand, the regulatory and other functions under clauses (*b*), (*c*) and (*d*) of sub-section (1) of Section 11 of the TRAI Act have to be performed independent of the Central Government and are binding on the licensee subject to only appeal in accordance with the provisions of the TRAI Act.

46. A reading of Section 14(*a*)(*i*) of the TRAI Act would show that the Tribunal has the power to adjudicate any dispute between a licensor and a licensee. A licensor, as we have seen, has been defined under Section 2(*ea*) of the TRAI Act to mean the Central Government or the Telegraph Authority who grants a licence under Section 4 of the Telegraph Act and a licensee has been defined in Section 2(*e*) of the TRAI Act to mean any person licensed under sub-section (1) of Section 4 of the Telegraph Act providing specified telecommunication services. The word "means" in Sections 2(*e*) and 2(*ea*) of the TRAI Act indicates that the definitions of licensee and licensor in Sections 2(*e*) and 2(*ea*) of the TRAI Act are exhaustive and therefore would not have any other meaning. As Justice G.P. Singh puts it in his book *Principles of Statutory Interpretation*, 12th Edn., at pp. 179-80:

> "… When a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive;"

47. A dispute between a licensor and a licensee referred to in Section 14(*a*)(*i*) of the TRAI Act, therefore, is a dispute after a person has been granted a licence by the Central Government or the Telegraph Authority under sub-section (1) of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a licence agreement and become a licensee and the word "any" in Section 14(*a*) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who had not become a licensee. The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the licence of a service provider, but it will have the jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the licence.

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48. Coming now to the facts of the cases before us, Clause (*iii*) of the Letter dated 22-7-1999 of the Government of India, Ministry of Communications, Department of Telecommunications, to the licensees quoted above made it clear that the licence fee was payable with effect from 1-8-1999 as a percentage of gross revenue under the licence and the gross revenue for this purpose would be total revenue of the licensee company excluding the PSTN related call charges paid to DoT/MTNL and service tax calculated by the licensee on behalf of the Government from the subscribers. It was also made clear in the aforesaid Clause (*iii*) that the Government was to take a final decision after receipt of TRAI's recommendation on not only the percentage of revenue share but also the definition of revenue. In accordance with this Clause (*iii*), the Government took the final decision on the definition of adjusted gross revenue and incorporated the same in the licence agreement. Once the licensee had accepted Clause (*iii*) of the Letter dated 22-7-1999 that the licence fee would be a percentage of the gross revenue which would be the total revenue of the licensee company and had also accepted that the Government would take a final decision not only with regard to the percentage of revenue share but also the definition of revenue for this purpose, the licensee could not have approached the Tribunal questioning the validity of the definition of adjusted gross revenue in the licence agreement on the ground that adjusted gross revenue cannot include revenue from activities beyond the licence.

49. If the wide definition of adjusted gross revenue so as to include revenue beyond the licence 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 licence under Section 4 of the Telegraph Act and transfer these activities to any other person or firm or company. The incorporation of the definition of adjusted gross revenue in the licence agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the licence and availed the exclusive privilege of the Central Government to carry on telecommunication activities, the licensees could not have approached the Tribunal for an alteration of the definition of adjusted gross revenue in the licence agreement.

50. Regarding the recommendations of TRAI under Section 11(1)(*a*)(*i*) of the TRAI Act, we find that the Tribunal in its order dated 7-7-2006 has held that the opinion of the renowned expert on Accountancy that any other definition of adjusted gross revenue would lead to reduction of licence fee liability by way of accounting jugglery was not placed before TRAI and as a result there was no proper and effective consultation with TRAI and the weightage that was due to the recommendations of TRAI was not given effect to. In our considered opinion, if

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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.

53. In *State of U.P.* v. *Devi Dayal Singh* [(2000) 3 SCC 5] a truck owner, Devi Dayal Singh, challenged the right of the State Government to recover by way of toll under Section 2 of the Tolls Act, 1851, an amount for the actual construction of the bridge. This Court held that Section 2 of the Tolls Act, 1851 which enables the State Government to levy toll at such rates "as it thinks fit" and the only restriction is latent in the word "toll" itself. This was therefore not a case of a dispute between the Government and the contractor where the contractor had challenged a stipulation of the contract. In the present case, on the other hand, the licensees had accepted the terms of the licence and after having taken the benefits of the licence are now trying to wriggle out from the terms of the licence and in particular the definition of the adjusted gross revenue.

55. On the other hand, we find from the long line of decisions in *Har Shankar* v. *Excise & Taxation Commr.* [(1975) 1 SCC 737], *Govt. of A.P.* v. *Anabeshahi Wine & Distilleries (P) Ltd.* [(1988) 2 SCC 25 : 1988 SCC (Tax) 147], *Excise Commr.* v. *Issac Peter* [(1994) 4 SCC 104], *State of Orissa* v. *Narain Prasad* [(1996) 5 SCC 740], *State of M.P.* v. *KCT Drinks Ltd.* [(2003) 4 SCC 748], *State of Punjab* v. *Devans Modern Breweries Ltd.* [(2004) 11 SCC 26], *Shyam Telelink Ltd.* v. *Union of India* [(2010) 10 SCC 165 : (2010) 4 SCC (Civ) 99] and in *Bharti Cellular Ltd.* v. *Union of India* [(2010) 10 SCC 174 : (2010) 4 SCC (Civ) 108], that this Court has consistently taken a view that once a licensee has accepted the terms and conditions of a licence, he cannot question the validity of the terms and conditions of the licence before the court. We, therefore, hold that TRAI and the Tribunal had no jurisdiction to decide on the validity of the definition of adjusted gross revenue in the licence agreement and to exclude certain items of revenue which were included in

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> the definition of adjusted gross revenue in the licence agreement between the licensor and the licensee.”

20. While considering the substantial question of law no.3, this Court observed and held in paragraph 59 as under:

> "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."

21. While answering and considering the fourth substantial question of law, namely, whether the licensee can challenge the computation of adjusted gross revenue, and if so, at what stage and on what grounds, this Court observed and held in paragraph 63 as follows:

> “63. Section 14(a)(i) of the TRAI Act, as we have seen, provides that the Tribunal can adjudicate any dispute between the licensor and the licensee. One such dispute can be that the computation of adjusted gross revenue made by the licensor and the demand raised on the basis of such computation is not in accordance with the licence agreement. This dispute, however, can be raised by the licensee, after the licence agreement has been entered into and the appropriate stage when the dispute can be raised is when a particular demand is raised on the licensee by the licensor. When such a dispute is raised against a particular demand, the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the licence agreement and in particular the definition of adjusted gross revenue in the licence agreement and can also interpret the terms and conditions of the licence agreement. We, however, find from the order dated 7-7-2006

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> 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."

22. Ultimately, this Court allowed the appeals preferred by the Union of India and set aside the order dated 30.08.2007 passed by the TDSAT. Thereafter, in paragraph 67, this Court clarified as under:

> "67. We have delivered today the judgment in these cases (supra paras 1-66) and while answering the last substantial question of law, we have held that when a particular demand is raised on a licensee, the licensee can challenge the demand before the Tribunal and the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the licence agreement and in particular the definition of adjusted gross revenue in the licence agreement and can also interpret the terms and conditions of the licence agreement."

23. After that, the respective telecom operators again approached the TDSAT challenging the demand notices/demand. The TDSAT by the impugned order has considered the specific head of items to be included or excluded under the definition of AGR. The TDSAT examined the following heads:

> "1. Gain on sale of Capital Assets and receipt from the sale of scrap.
> 2. Insurance claim in respect of Capital Assets.
> 3. Discounts and Commissions.
> Discounts allowed on international roaming.
> Commission and discount allowed to distributors on sale of pre-paid vouchers.
> 4. Waiver of Late Fee.
> 5. Amount of negative balance of the pre-paid customer.
> 6. Roaming Charges and PSTN pass-through charges

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(PSTN – Public Switch Telephone Network)
7. Reimbursement of Infrastructure operating expenses.
8. Gain from foreign exchange fluctuation.
9. Revenue from 214 FCC License, USA (in the case of Bharti BILGO)
10. Proceeds from divestment of investment in a company
(Example, case of Sistema Shyam in Hexacom)
11. The demand for License fee in a circle where the Licensee is not granted spectrum (in the case of Videocon & S. Tel)
12. Interest, Penalty, and Interest on Penalty
13. Non-refundable deposits and notional interest on interest-free loans."

24. TDSAT in the impugned order has held that the Gain on sale of Capital assets and receipt from the sale of scrap cannot be included in gross revenue for computation of licence fee. However, it is required to be noted that the said issue was raised earlier and considered by the TDSAT in its earlier order dated 30.08.2007 and held in favour of the telecom operators. However, this Court, in the case of *AUSPI (supra)* – expressly set aside the order passed by the TDSAT. Therefore, subsequently it was not open for the TDSAT to again hold contrary by the impugned order on the head as mentioned earlier and it can be said to be barred by *res judicata* because of the specific order of *AUSPI* (supra).

25. Various questions arise for consideration as under:

(i) In re: Definition of gross revenue.

(ii) In re: Discount and commissions.

(iii) In re: Gains arising out of foreign exchange fluctuations.

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(iv) In re: Monetary gains on sale of shares.

(v) In re: Insurance claim in respect of capital assets.

(vi) In re: Amount of negative balance of pre-paid customer.

(vii) In re: Reimbursement of the infrastructure operating expenses.

(viii) In re: Waiver of late fee.

(ix) In re: Gains from roaming charges & PSTN pass-through charges.

(x) In re: Non-refundable deposits.

(xi) In re: Licence fee demand where spectrum is not granted.

(xii) In re: Income from interest & dividend.

(xiii) In re: Bad-debts written off.

(xiv) In re: Liability written off.

(xv) In re: Inter-corporate loan.

(xvi) In re: Revenue under IP-1 Registration.

(xvii) In re: Income from management consultancy services.

(xviii) In re: Res Judicata.

(xix) In re: Levy of interest, penalty and interest on penalty.

In Re: Definition of Gross Revenue

26. A new package, namely "the National Telecom Policy 1999 Regime," gave an option to the licensees to migrate from fixed licence fee to revenue sharing fee, which was to the advantage of Telecom Service Providers (for short, 'the TSPs'). The objective of the

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Government was to achieve social and economic goals to provide the service to all uncovered area including rural areas, remote, hilly and tribal areas and to create an efficient infrastructure thereby propelling India into an IT superpower and to increase teledensity from 0.4 to 4 by the year 2010 and to provide internet access to all district Headquarters by the year 2000. Human resource development training, telecom equipment manufacturer, and remote area telephony were the other objectives.

27. The Central Government has given a liberalised mode of payment by revenue sharing regime, which was the price parting with the exclusive privilege which the Central Government had. The intendment was to make the Government partner or sharer of gross revenue. Out of the existing gross revenue, the Central Government decided to spend money on remote and uncovered areas, rural, tribal, and hilly areas. The Government incurred a colossal amount of Rs.49.120 crores under the Universal Service Obligation Fund (for short, 'the USOF') and incurred a committed liability of Rs.59,774 crores for ongoing projects including laying of optical fiber cables up to *Gram Panchayat* areas under "Digital India Mission." Initially, 15 percent Adjusted Gross Revenue (for short, 'the AGR') was fixed as license fee under revenue sharing, which was reduced to 13 percent and lastly to 8 percent in 2013. Out of the 8 per cent, a substantial

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portion of 5 per cent is spent by the Central Government under the USOF.

28. The Sector is benefited immensely under the Scheme as apparent from the gross revenue trend from 2004 to 2015. Clause 19.1 defines gross revenue. It came as relief against the high license fee. The gross revenue for this purpose would be the total revenue of the licensee company with certain exceptions provided in Clause 19.2 to arrive at the figure of AGR. The Policy of 1999 contained the stipulation that the conditions are to be accepted in its entirety, and no dispute concerning the license agreement shall be raised at any future date. The acceptance of the package be deemed full and final settlement, and after that amendment to the license agreement has to be signed. Following stipulations were mentioned explicitly in the Migration Package:

> "2. Migration to the NTP-99 on the conditions mentioned above will be permitted on the premise that the aforesaid conditions are accepted as a package in its entirety and simultaneously all legal proceedings in Courts, tribunals or in Arbitration instituted by the license and Associations of Cellular and Basic Service Operators (COAI) & ABTO) against DoT or UOI shall be withdrawn. Further, any dispute with regard to the license agreement for the period up to 31.07.1999 shall not be raised at any future date. The acceptance of the package will be deemed as full and final settlement of all existing disputes whatsoever irrespective of whether they are related with the present package or not.
>
> 3. After the terms and conditions of the package are accepted, amendments to the existing license agreement will be signed between the licensor and the licensee."

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29. To avoid the accounting jugglery, the Department of Telecommunications (for short, 'the DoT') sought the advice of experts in the field of accountancy to decide upon the broad definition of the gross revenue. The relevant portion of the experts' opinion is extracted hereunder:

> "1.1 The question of what should constitute 'revenue' in the context of the 'revenue sharing' policy of the government is a vexed one. Accounting principles seek to measure economic transactions and events in a dynamic and open environment and, therefore, do not always provide as definitive guidance as one would wish. While keeping these inherent limitations of accounting as a measurement discipline in view, an attempt has been made in this note to articulate a basic set of propositions that may assist in dealing with the issue on hand. Needless to add, these propositions are presented only as a starting point for discussions and further refinement.
>
> 1.2 As far as possible, our definition of 'revenue', the principles for its measurement and the procedure for establishing the authenticity of **actual figures should be simple and objective.** While it is recognised that this is a difficult proposition given the inherent nature of accounting and the diversity in the telecom scenario (which it is recognised that this is a difficult proposition given the inherent nature of accounting and the diversity in the telecom scenario (which is likely to grow at a fast pace), **our attempt should be to evolve a system of revenue sharing that does not become as arduous and litigative as some other revenue-generating activities of the government, e.g., income tax, excise duty etc.**
>
> 1.3 **Defining 'revenue in a broad, comprehensive and inclusive manner is likely to pose fewer problems of interpretation (and consequently lesser disputes and litigation) than would be the case otherwise. Further, exclusion of certain items from the definition of 'revenue' may sometimes encourage companies to design their tariff and payment schemes in such a manner that their license fee liability is reduced to the minimum.** Of course, the comprehensiveness of definition of revenue would need to be duly considered in determining the percentage of revenue to be charged as license fee, so that the amount of license fee is

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> appropriate in the context of the present stage of evolution of telecom companies.
>
> 1.4 To ensure consistency, we may lay down **uniform accounting policies** to be followed by telecom companies for presenting their annual accounts as well as periodical statements of revenue to be sent to the government supporting their payments."
>
> (emphasis supplied)

30. The definition of revenue has been taken in a broad, comprehensive, and inclusive manner to pose fewer problems of interpretation, and exclusion of certain items was avoided.

31. On 21.5.2001, the Government of India finalised the concept of gross revenue and AGR.

32. The format of the statement of revenue and license fee payable by the TSPs is appended to the license agreement, which reflected the various heads and components, including any other income/miscellaneous receipts from the wireline subscribers, which was to be included for the computation of AGR. Provision in Clause 20.2 was made for payment of license fee by the licensee on the basis of actual revenue (on accrual basis). The accrual was necessary irrespective of its realisation at a subsequent date or even its non-realisation.

33. Shri Tushar Mehta, learned Solicitor General of India, appearing on behalf of Union of India submitted that the definition of gross

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revenue has to prevail over the mode of accounting. Under Clause 20.4 of the agreement, the licensee must state in the prescribed form as Annexure-II. The format is a part of the license under the title of "Format of Statement of Revenue and Licensee Fee." It has no connection with the accounting standards prescribed under the Companies Act. The format is the basis for the calculation of the license fee in revenue sharing. The licensees provide the details as per the format Annexure-II along with the certificate of Auditors. The TSP has to provide all the details of gross revenue as per the definition. The accounting standards deal with the broad principles to be followed while maintaining accounts and can never override the definition of gross revenue. Accounting Standard (AS-9) deals with the definition of revenue, but that cannot prevail over the definition of Gross Revenue as defined in the agreement. The provisions of Section 211 (3B) of Companies Act makes it clear that accounting standards are not sacrosanct.

34. The profit and loss account and balance-sheet have to comply with the accounting standards, as provided in Section 211(3A). In case they do not comply, for any deviation, the reasons, and the economic effect have to be disclosed. In Petition No.7 of 2003 filed by AUSPI, the declaration was sought that AGRs can only be related to revenues directly arising out of the telecom operations licenced under

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Section 4 of the Indian Telegraph Act, 1885. A prayer was made to set aside the demand letter issued in 2002 and 2003, claiming revenue share on interest income and other miscellaneous heads. In Petition No.82 of 2005, a prayer was made to re-compute and modify the demands as per demand notes dated 28.3.2003 and 13.7.2004 on account of the wrongful entry of gross revenue and AGR, the DoT cannot levy license fee, which result in charge of the license fee twice on the same revenue in the hands of two or more operators/circles. DoT be directed to calculate AGR on realisation basis, not on an accrual basis, and not to include notional revenue income in AGR.

35. Prayer was made to direct DoT to modify the definition of gross revenue and AGR for license fee as also WPC charges under Section 4 of the Indian Telegraph Act, 1885. Prayers were also made to direct DoT to modify the Format of Statement of Gross Revenue, Adjusted Gross Revenue, and License Fee and strike down the definition of gross revenue and AGR. This Court in *Union of India v. AUSPI* (2011) held that Tribunal has no jurisdiction to exclude certain items of revenue, which were included in the definition of AGR. The licensee could not have approached the Tribunal for the alteration of the definition of AGR in the license agreement. TRAI and Tribunal had no jurisdiction to decide on the validity of the definition AGR in the licence agreement. The licensees are not only precluded to challenge

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the definition of gross revenue/AGR, but also by the meaning the Government may choose to put to the definition. The Tribunal has travelled beyond its jurisdiction to act contrary to the specific findings and decision in *AUSPI v. Union of India.*

36. Shri Arvind Datar, Shri C.A. Sundaram, Shri Shyam Divan, Shri Gopal Jain, Shri Ramji Srinivasan, Dr. Abhishek Manu Singhvi, Shri Kavin Gulati, Shri B. Adinaraynan Rao, Shri U. Hazarika, Shri Chetan Sharma and Shri Siddhartha Dave, learned senior counsel appearing on behalf of TSPs submitted that the meaning of gross revenue has to be determined in accordance with the provisions of AS-9 which only includes gross inflow of cash, receivables that arise out of ordinary activities of the telecom companies. In the definition of gross revenue, only revenue cash inflow as revenue can be included; not all the incomes which is recorded in profit and loss account and non-revenue items cannot be included in the definition of gross revenue within the ambit of accounting standards. Clause 18.2 of the license agreement provides only license fee of 10 per cent of AGR excluding the spectrum charges. The gross revenue under Clause 19.1 is not gross income or gross inflow or gross receipts.

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37. It is further submitted on behalf of the licensees that revenue has not been defined under the license. Clauses 20.6 and 22 of the license agreement provided as to how the licensees are obliged to prepare their accounts. Section 211(3A) read with Section 211(3C) of the Companies Act, 1956, casts an obligation on companies to maintain their books of account following accounting standards recommended by the Institute of Chartered Accountants of India constituted under the Chartered Accountants Act.

38. They have insisted to adopt fair valuation method relying on decision in *J.K. Industries Limited v. Union of India,* (2007) 13 SCC 673.

39. It is further submitted that accounting standards have been made mandatory. The DoT has admitted in their counter affidavit dated 11.7.2003 in Petition No.7 of 2003 that definition of term revenue is in line with AS-9. The Government cannot resile from the stand that revenue definition is in line with AS-9 and cannot take a contradictory stand at different stages of the case. The party cannot be permitted to approbate and reprobate on the same aspect.

40. It is submitted on behalf of licensees. that in order to compute the adjusted gross revenue would constitute (a) it must be revenue; (b)

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it is gross and not net revenue; and (c) it would be adjusted revenue, but adjustment can be made only by deductions as provided under Clause 19.2. Revenue has to be interpreted in keeping with commercial and financial parlance. The contract itself recognise the applicability of the accounting standards as apparent from Clauses 20.6 and 22.7. The accounts have to be maintained as per the accounting standards. The purpose of accounting standards is to ensure that there is clarity, uniformity in dealing with the financial terms to give definitiveness and clarity to such financial expressions. Accounting standards are mandatory. Revenue had not been defined in the commercial license agreement and this being a commercial contract and the accounting standards having been incorporated by reference in the license agreement as such the basis on which the license fee has to be decided, the same would prevail.

41. It is further submitted that all receipts would not form part of AGR. The use of the word inclusive under Clause 19.2 does not make the definition of AGR expansive though the definition is not exhaustive as the provision of value-added services is different and provided in other clauses and service is to mean service in a licensed service area. Thus, license fee has to be confined in respect of business carried on to provide the services under the license. A single company may hold five licenses for five different service areas. The license fee at 10

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percent cannot be levied on the same revenue cannot be charged to license fee more than once, as apparent from Clause 20.4 of the license read with Appendix-II to Annexure-II to it, which is the prescribed format by the licensor indicating the streams of revenue required by a licensee to be disclosed. The miscellaneous receipts provided under each head are not meant to include any and every receipt received by the company.

42. It should be held that such revenue from non-licensed revenue was not part of AGR at all. *Contra proferentum* rule requires clauses 19.1 and 19.2 to be interpreted against the maker and to prefer the interpretation which is favourable to the licensees.

43. The service providers submitted that basic principles to decide what constitutes revenue have to be followed. The receipt must be having the nature of revenue, and it cannot be subjected to double charge. No one can generate revenue from oneself, and someone else's revenue cannot be treated as that of others.

44. When we consider the submissions as observed there was a paradigm shift in Telecom Policy of 1999 from the fixed licence fee to the revenue sharing basis regime, which was advantageous to the

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Telecom Service Providers. Under the new regime, the Central Government shared the privilege under section 4 of the Indian Telegraph Act with the TSPs. It came as a relief against the high licence fee, which used to be charged under the 1999 policy. The migration package contained the stipulation as to no dispute to be raised as to working out sharing of revenue. Experts were consulted in the field of accountancy, and it was their advice that the actual figures should be simple and objective to evolve a system of revenue sharing that does not become as arduous one and litigative, had been evolved. Revenue has been defined in a broad, comprehensive, and inclusive manner not to pose problems of interpretation and to protect from the accounting jugglery. Gross revenue has been defined to be inclusive of specific items mentioned in clause 19.1 and any other miscellaneous revenue, without any set-off for related items of expense, etc. All the licensees accepted the migration package and have signed the agreements. It has turned out to be a substantial financial booster in favour of the licensees as is apparent from figures of the gross revenue earned by them mentioned above. When under a contract signed by the parties, gross revenue and AGR have been given the meaning coupled with the format and the annexures which form part of the contract. Format is contained in appendix to Annexure-II which is part of the agreement in which requisite information has to be

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furnished. The meaning in clause 19 of the gross revenue and the format mentioned above have to prevail.

45. No doubt about it that the accounts have to be maintained as per the AS-9 regime prevalent at the relevant time. The definition of the contract has to prevail and not what is generally revenue, as defined in AS-9.

46. The question as to what constitute Gross Revenue has been agitated, though concluded in earlier decision in 2011, by the TSPs. again by raising the submission that we have to follow the definition of revenue as defined in AS-9, it would be the revenue as generated by activities under the licence; whereas the definition of gross revenue includes the income from non-licensing activities also as part of the gross revenue, which we have to discard.

47. The definition of 'gross revenue' in clause 19.1 is inclusive, and it includes explicitly:

(i) installation charges;
(ii) Late fees;
(iii) sale proceeds of handsets;
(iv) sale proceeds of any other terminal equipment, etc.
(v) revenue on account of interest;
(vi) revenue on account of dividend;
(vii) value-added services;
(viii) supplementary service as fixed charges;

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(ix) access or interconnection charges;
(x) roaming charges;
(xi) revenue from permissible sharing of infrastructure; and
(xii) any other miscellaneous revenue.

48. No set-off can be claimed for related items of expense etc. on any of the items mentioned above of the inclusive definition and on the miscellaneous revenue.

49. Clause 19.2 of the agreement excludes certain items from gross revenue to arrive at the figure of AGR, which are (a) PSTN/ PLMN related charges (access charges) actually paid to other eligible service providers within India; (b) roaming revenue passed on to the TSPs through service tax paid to the Government, if gross revenue had included the component of service tax and sales tax.

50. In *Union of India v. AUSPI* (2011), this Court has held that the terms and conditions of the licence, including the definition of gross revenue in the licence agreement, are part of the contract. The Central Government alone has the right to define revenue and has parted with the privilege under section 4 of the Telegraph Act. A licence granted under section 4(1) of the Telegraph Act is in the nature of the contract between the Central Government and the licensee. The provisions of the TRAI Act do not affect the specific exclusive privilege of the Central

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Government to carry on telecommunication activities, nor do they alter the contractual nature for the licence granted under the proviso to section 4(1) of the Telegraph Act. After TRAI makes the recommendation, the Central Government shall take a final decision under section 11(1)(a)(ii) of the TRAI Act. The TRAI shall have the function to make a recommendation. In case of difference between TRAI and Central Government with regard to particular terms or conditions of the licence, the recommendation of TRAI cannot prevail, and it is the decision of the Central Government, which is to be final and binding. The tribunal has no jurisdiction to decide upon the validity of terms and conditions incorporated in a licence; it has jurisdiction to decide any dispute between the licensor and the licensee on the interpretation. It has also been observed to make a final decision on the definition of the gross revenue in the licence agreement, the Government has the competence. The licence fee would be a percentage of gross revenue, which would be the total revenue of the licensee company.

51. This Court has held in *Union of India v. AUSPI* (2011) that the licensing company had accepted in the letter dated 22.7.1999 that the licence fee would be a percentage of the gross revenue, which should be the total revenue of the licensee company. The licensee agreed that the Government has to take a final decision not only concerning the

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percentage of revenue share but also the definition of revenue for this purpose. The licensee could not have approached the tribunal to question the validity of the definition of adjusted gross revenue in the licence agreement on the ground that the adjusted gross revenue cannot include revenue from activities beyond the licence.

52. It is submitted on behalf of the licensees that the term revenue has nowhere been defined under the licence. As such, it would be necessary to find out what is the meaning of revenue in AS-9. The submission that revenue has to be related to the activities of the licensee company, a reference has been made to the definition of revenue as given in clause 4.1 of AS-9, which reads as under:

> "4.1 Revenue is the gross inflow of cash, receivables, or other consideration arising in the course of the ordinary activities of an enterprise from the sale of goods, from the rendering of services, and from the use by others of enterprise resources yielding interest, royalties, and dividends. Revenue is measured by the charges made to customers or clients for goods supplied and services rendered to them and by the charges and rewards arising from the use of resources by them. In an agency relationship, the revenue is the amount of commission and not the gross inflow of cash, receivables, or other consideration."

53. The explanation contained in clause 5 of AS-9 relating to revenue recognition is extracted hereunder:

> "Explanation
> Revenue recognition is mainly concerned with the timing of recognition of revenue in the statement of profit and loss of an enterprise. The amount of revenue arising on a transaction is usually determined by agreement between the parties involved

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in the transaction. When uncertainties exist regarding the determination of the amount or its associated costs, these uncertainties may influence the timing of revenue,"

54. Clauses 20.6, 20.7, and 22 of the licence agreement have also been referred. They are extracted hereunder:

“20.6 Final adjustment of the Licence Fee for the year shall be made based on the gross revenue figures duly certified by the AUDITORS of the LICENSEE in accordance with the provision of Companies Act, 1956.

20.7 A reconciliation between the figures appearing in the quarterly statements submitted in terms of the clause 20.4 of the agreement with those appearing in annual accounts shall be submitted along with a copy of the published annual accounts audit report and duly audited quarterly statements, within 7 (seven) Calendar days of the date of signing of the audit report. The annual financial account and the statement as prescribed above shall be prepared following the norms as prescribed in Annexure.

x x x

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 format 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.

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c) Send to the LICENSOR a certified statement on an affidavit by authorised 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 books of accounts that the LICENSEE may maintain in respect of the business carried on to provide the service(s) under the 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."

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55. The clauses mentioned above provided as to how the licensees are obliged to prepare the accounts. There is a statutory obligation cast under the Companies Act. Section 211(3A) read with section 211(3C) of the Companies Act provides to maintain their books of accounts following the accounting standards and for which reliance has been placed upon *J & K Industries v. Union of India* (supra) in which the Court has emphasised upon the fair valuation principles. They have relied upon the following observations:

> "124. On the other hand, fair valuation principles are important in the context of valuing derivatives and other investments. If one were to describe one single change in accounting practice over the last few years, it would be the use of fair valuation principles. Today, the object behind the enactment of AS, which are now made mandatory under Section 211(3-A) of the Companies Act, is to shift from historical method of accounting to fair valuation. In the case of mergers and acquisitions, which is common today in the world of globalisation, fair valuation principles have important role to play. *Mergers and acquisitions are sometimes undertaken to defer revenue expenditure over future years by invoking the matching concept, which results in putting fictitious assets on the balance sheet*. This is one reason why fair valuation principles are accepted.
>
> 125. AS are established rules relating to recognition, measurement, and disclosures, thereby ensuring that all enterprises that follow them are comparable and that their financial statements are "true and fair." Measurements and disclosures based on fair value are becoming increasingly important. *Fair valuation is generally used in valuation and disclosure of financial instruments*, derivatives, conversions, auctions in a bond, business combinations, impairment of assets, retirement obligations, transactions involving exchange of assets without monetary consideration, transfer pricing, etc."

56. The accounting standards are mandatory to be followed by the companies, and DOT has admitted in the counter affidavit of

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11.7.2003 in Petition 7 of 2003 that the definition of the term revenue in the agreement is in line with AS-9 under the accounting standards. Thus, they cannot approbate and reprobate. Thus, identification of revenue would come within the purview of gross revenue, is the sole test that it should conform with the definition of revenue as provided in AS-9, and the golden thread is the phrase arising in the course of the ordinary activities of the enterprise.

57. Revenue is a 'Term of Art' as per Chapter 4.08 Kim Lewison, the Interpretation of Contract, Sweet & Maxwell, 1997, wherein it has been observed as under:

> "Where a document contains a legal term of art, the court should give it its technical meaning in law, unless there is something in the context to displace the presumption that it was intended to carry its technical meaning."
>
> (emphasis added)

58. The Technical meaning as to the gross expression revenue does not mean inflows that are not revenue and other miscellaneous revenue cannot have a broader meaning. It must qualify as revenue. It is not miscellaneous inflow and miscellaneous receipts. The items of the revenue must be interpreted as per the doctrine of *ejusdem generis*, as observed in *Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandla,* (2010) 3 SCC 786. Following observations have been made:

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> "27. The Latin expression "ejusdem generis" which means "of the same kind or nature" is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context." It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication [see Glanville Williams, *The Origins and Logical Implications of the Ejusdem Generis Rule*, 7 Conv (NS) 119]."

59. Thus, as per licensees the miscellaneous revenue has to be revenue as defined in AS-9. The miscellaneous revenue only serves the purpose of capturing such other revenue that satisfies common characteristics of the preceding word.

60. As per licensees, the revenue pertained only to the licensed activities and was specific to activities under the licensing agreement in the designated area on the services rendered to the customers. The rule of interpretation of a commercial contract is that when the provision is not exclusively defined, it is to look at how the parties would understand the same by their subsequent conduct as observed in *Godhra Electricity Co. Ltd. v. State of Gujarat*, (1975) 1 SCC 199 thus:

> "11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them.

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The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidence by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation (see *Corbin on Contracts*, Vol. 3, pp.249 & 254-56).

12. The rule that obtains in other jurisdictions is also the same:

> "In France construction of a contract is within the sole province of the judges of fact who are entirely free to use whatever material seems relevant to them... The rule is the same in Germany, where since 1888, it is established that even statements made by one of the contracting parties to a third person about the content of the contractual intentions are admissible guides to interpretation... In Italy, Article 1362(2) provides in impressively succinct language... The Vienna Convention on the law of Treaties of 1969 (which to a large extent merely codifies earlier international practice) enjoins the interpreter of a treaty to take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation': Article 31(3)(*b*) [see Notes by P.A. Mann on *L. Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.*, (1973) 2 WLR 683, Law Quarterly Review, Vol. 89, pp. 464-65].

The real reason against taking into account the subsequent conduct of the parties is the rule which excluded extrinsic evidence in the construction of a written contract.

16. We are not certain that if evidence of subsequent acting under a document is admissible, it might have the result that a contract would mean one thing on the day it is signed, but by reason of subsequent event, it would mean something a month or year later. Subsequent "interpreting" statements might not always change the meaning of a word or a phrase. A word or a phrase is not always crystal clear. When both parties subsequently say that by the word or phrase which, in the context, is ambiguous, they meant this, it only supplies a glossary as to the meaning of the word or phrase. After all, the

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inquiry is as to what the intention of the parties was from the language used. And, why is it that parties cannot clear the latent ambiguity in the language by a subsequent interpreting statement? If the meaning of the word or phrase or sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible. The parties themselves might not have been clear as to the meaning of the word or phrase when they entered into the contract. Unanticipated situation might arise or come into the contemplation of the parties subsequently which would sharpen their focus and any statement by them which would illuminate the darkness arising out of the ambiguity of the language should not be shut out. In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible.

> "The question involved is this: Is the fact that the parties to a document, and particularly to a contract, have interpreted its terms in a particular way and have been in the habit of acting on the document in accordance with that interpretation, any admissible guide to the construction of the document? In the case of an unambiguous document, the answer is 'No.' (See *Odgers' Construction of Deeds and Statutes*, 5th Edn. by G. Dworkin, pp. 118-19)."

But, as we said, in the case of an ambiguous one, the answer must be "yes." In *Lamb* v. *Goring Brick Co.*, a selling agency contract contained the words "the price shall be mutually agreed." Documents showing the mode adopted for ascertaining the price were put in evidence without objection. In the court of appeal Greer, L.J. said:

> "In my opinion, it is not necessary to consider how this contract was acted on in practice. If there had been an ambiguity, and the intention of the parties had been in question at the trial, I think it might have been held that the parties had placed their own construction on the contract and, having acted upon a certain view, had thereby agreed to accept it as the true view of its meaning.""

(emphasis supplied)

61. The submission raised for adopting fair valuation method relying on S.K. Synthetics (supra) is based upon misconception of method applicable to A.S-9. The argument is crafted to get rid of AS-9 and the definition of gross revenue in the agreement. We have to consider valuation method of accounting standards which are laid time to time

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to find an answer to the submission. The ICAI issued the AS-9 revenue recognition standard in the year 1985. In the initial years, it was recommendatory for only Level-I enterprises but was made mandatory for all enterprises from 1.4.1983. The meaning of enterprise is as defined in section 3 of the Companies Act, 1956. The IND AS-18 regime has been introduced later on. In AS-9, revenue recognition is at "nominal" value; whereas IND AS-18, the revenue recognition is at a "fair" value. The barter transactions are included in Ind AS-18, whereas this aspect is not covered in AS-9. In AS-9 revenue recognition, interest income is recognised on a time proportion basis, whereas in Ind AS-18, interest income is recognised using an effective interest rate method. AS-9 recognises revenue as per the completed service method or percentage completion method, whereas Ind AS-18 only recognises revenue as per the percentage of completion method. Thus, there is a fundamental difference. The fair value concept has no place in AS-9 as per which the accounts are to be maintained and submitted for determination of gross revenue. AS-9 revenue recognition regime states that the amount of revenue shall be measured by the gross inflow of cash, receivables, or other consideration received. There is no concept of fair valuation. Thus, the submission raised based on a fair valuation method based on the decision in *J.K. Industries v. Union of India* (supra) cannot be accepted as the decision is on consideration of different accounting standard

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which adopts fair valuation method *i.e.*, Ind AS-18 and not relevant for the AS-9 accounting standard.

62. The submission is wholly devoid of substance. It is not only barred by the principle of constructive *res judicata* but also indicates that the licensees are raising the similar objections which they have raised earlier and were not entertained by this Court and were rejected. Again precisely, the same attempt is made by submitting; revenue should be taken as defined in AS-9, not in Clause 19.1 of the agreement, submission runs contrary to the decision of the Court, as held in para 48 of the 2011 judgment, which operates as res judicata inter se parties. The meaning of revenue is apparent that it has to be gross revenue, and the licence fee would be a percentage of the same. Thus, the licensees have made a futile attempt to submit that the revenue to be considered would be derived from the activities under the licence; whereas it has been held in 2011 that the revenue from activities beyond the licence have to be included in adjusted gross revenue, is binding.

63. Even otherwise, on merit, the submission raised is baseless. The contractual definition of gross revenue is binding. This Court has observed that it was open for the licensee not to undertake activities

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for which they do not require licence under section 4 of the Telegraph Act and transfer these activities to any other firm or company. However, they cannot avoid the consequences of the contractual definition which has been accepted by the parties, and they are bound to make payment of licence fee on the basis of gross revenue, which would be the total revenue of the licensing company. As the Government has not accepted the TRAI's recommendations, the decision of the Central Government on the point of definition of adjusted gross revenue was final and binding. This Court has also held that TRAI and tribunal had no jurisdiction to decide on the validity of the definition of adjusted gross revenue under the licence agreement and to exclude certain items of revenue which were included in the definition of gross revenue in the licence agreement between the licensor and licensee. The tribunal had no jurisdiction to exclude certain items on the ground of the validity of the definition of adjusted gross revenue. The finding of the tribunal in the order dated 7.7.2006 insofar as it decided that the revenue realised by the licensee from activities beyond the licence to be excluded from adjusted gross revenue in the licence agreement is without jurisdiction and is a nullity. The matter was sent back to TDSAT for computation of adjusted gross revenue. It was also observed if a dispute is raised that computation is not following licence agreement, the tribunal has to go into facts and material on which demand is raised and to decide

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demand is following the licence agreement and in particular, the definition of adjusted gross revenue. It can also interpret the terms and conditions of the licence agreement. The tribunal did not go into the facts and material relating to the demand as to the particular licence. The tribunal can go into the question of whether the demand is under the licence agreement and in particular, the definition of adjusted gross revenue.

64. Under clause 20.6, certification of accounts by auditors appointed under the Companies Act is stipulated under the licence. The preparation of accounts under clause 22 of the licence agreement is an independent head. The definition of gross revenue given under the agreement in Clause 19.1 and that is the total revenue. In our considered opinion, when there is a contractual definition as to what would be the gross revenue that would be the revenue and also the total revenue, the revenue as mentioned in the mode of accounting AS-9 cannot govern the definition. The general definition of revenue in the mode of accounting cannot govern the contractual definition of gross revenue.

65. As per clause 20.4, a licensee must make quarterly payment in the prescribed format as Annexure-II showing the computation of revenue and licence fee payable. The Format is part of the licence and

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is independent of accounting standards and is in tune with the definition of gross revenue, and is the basis for the calculation of licence fee. It is only for uniformity that the account has to be maintained as per accounting standards AS-9 which are prescribed from time to time. Once the licensee provides the details to the Government in format Annexure-II along with accounts certified by the auditor, the reconciliation has to take place. The accounting standard AS-9 is relevant only for whether the figure given by the licensee as to gross revenue is maintained in proper manner once gross revenue is ascertained, then after certain deductions, adjusted gross revenue has to be worked out. The accounting standard provided in AS-9 cannot override the definition of gross revenue, which is the total revenue for licence and the finding in *Union of India v. AUSPI* (2011) in this regard is final, binding, and operative. The accounting standard AS-9 makes it clear that same is in the form of guidelines, it is not comprehensive and does not supersede the practice of accounting. It only lays down a system in which accounts have to be maintained. Accounting standards make it clear that it does not provide for a straight-jacket formula for accounting but merely provide for guidelines to maintain the account books in systematic manner.

66. Though the definition of revenue given in clause 4.1 of AS-9 cannot govern the contract, the contractual definition of gross revenue

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which is the gross revenue under Clause 19.1 and total revenue for the purpose of the agreement for which an independent definition has been carved out under the statutory power while parting with the privilege under section 4 by the Central Government, once the contract has been entered into, the definition of gross revenue is binding, and the licensees cannot try to wriggle out of the decision by making impermissible attempts to depart from it. The plea is barred by *res judicata*, and on merits the objection is wholly untenable. The definition of revenue in clause 4.1 of AS-9 provides that the revenue is the gross inflow of cash, receivables, or other consideration arising in the course of the ordinary activities. When the revenue in AS-9 is the gross inflow of cash and the amount which is receivable, not the amount received, which is realised or other consideration arising, can also be taken into consideration as per accounting standard AS-9. The definition of revenue in AS-9 rather than supporting the cause of the licensees defeats the same. They cannot bank upon the expression in clause 4.1 in the course of ordinary activities of an enterprise is only to be included in gross revenue as that is what has been expressly negated in *Union of India v. AUSPI* (2011). Given the definition of gross revenue, the same includes revenue from activities beyond the licence. Explanation to clause 5 of AS-9 also makes it clear that the agreement between the parties would determine the amount of revenue arising on a transaction.

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67. Section 211 of the Companies Act, 1956 deals with the obligation of the company to comply with accounting standards. In case they do not comply, it has to be disclosed in its profit and loss account, the deviation, reasons for such deviation, and financial effect. Sections 211(3A) and 211(3B) are quoted hereunder:

> "211 (3A) Every profit and loss account and balance-sheet of the company shall comply with the accounting standards.
> (3B) Whether the profit and loss account and the balance-sheet of the company do not comply with the accounting standards, such companies shall disclose in its profit and loss account and balance-sheet, the following, namely:-
> (a) the deviation from the accounting standards;
> (a) the reasons for such deviation; and
> (b) the financial effect, if any, arising due to such deviation."

68. Thus, it is apparent that accounting standard AS-9 is a method to maintain accounts and, deviation if made, has to be reflected separately.

69. Prayer made in Petition No.7/2003 filed by *AUSPI v. Union of India* was to declare that 'gross revenue' can only relate to revenue directly arising out of telecom operations licensed under section 4 of the Indian Telegraph Act, and items indicated in the DOT letter dated 26.7.2001 including interest income and the dividend income, value of rebates, discounts, free calls and reimbursement from the USO fund, etc. ought not to be excluded in the adjusted gross revenues. It was

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also prayed that revenue share on interest income and other incomes be set aside.

70. In Petition No.82/2005, demand was dated 28.3.2003 and 13.7.2004, etc. and refund on account of wrongful application and implementation of gross revenue and adjusted gross revenue was sought along with interest. Prayer was made that licence fee or WPC charges on any non-telecom revenue, *i.e.*, the revenues which are not derived from the licensed activities under the licence/revenues which do not relate to or do not have a direct nexus to the establishment, maintenance and working of Telegraph, cannot be levied. DOT cannot collect what is not revenue. Prayer was also made to direct DOT to calculate adjusted gross revenue on a realisation basis and not accrual basis, and not to include any notional revenue/income in the adjusted gross revenue. Prayer was made to direct DOT to modify the definitions of gross revenue and also adjusted gross revenue, bring them in conformity with the migration package. Prayer was also made to suitably modify the format of statement of gross revenue, adjusted gross revenue and licence fee in accordance with the correct definitions, and to strike down the definitions of gross revenue, and adjusted gross revenue contained in DOT's licence amendment dated 11.4.2001 as being unfair, unjust, unreasonable and arbitrary.

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71. Thus, it is apparent that right from the beginning, the licensees were aware of the precise terms and conditions and their obligations as contained in the letter dated 26.7.2001and purport of the definitions of gross revenue and adjusted gross revenue. Notional revenue has to be charged. The order of TDSAT excluding certain items of revenue, which were included in the definition of AGR by declaring the definition of gross revenue to be invalid, was set aside by this Court in *Union of India v. AUSPI* (supra) and this Court held that items are to be included in definition of gross revenue.

72. The rule of interpretation of *contra proferentum* has also been pressed into service. As observed in *United India Insurance Co. Ltd. v. Pushpalaya Printers*, 2004 (3) SCC 694 thus:

> **"6.** ....If the word "impact" is interpreted narrowly, the question of impact by any rail would not arise as the question of a rail forcibly coming to the contact of a building or machinery would not arise. In the absence of specific exclusion and the word "impact" having more meanings in the context, it cannot be confined to forcible contact alone when it includes the meanings "to drive close", "effective action of one thing upon another" and "the effect of such action", it is reasonable and fair to hold in the context that the word "impact" contained in clause 5 of the insurance policy covers the case of the respondent to say that damage caused to the building and machinery on account of the bulldozer moving closely on the road was on account of its "impact". It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations, one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although there is no ambiguity in the expression "impact," even otherwise applying the rule of contra preferentem, the use of the word "impact" in clause 5 in the

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instant policy must be construed against the appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This rule applies to contracts of insurance, and clause 5 of the insurance policy, even after reading the entire policy in the present case, should be construed against the insurer. A Constitution Bench of this Court in *General Assurance Society Ltd.* v. *Chandmull Jain* AIR 1966 SC 1644 has expressed that (AIR p. 1649, para 11)

> "in a contract of insurance there is requirement of uberrima fides, *i.e.*, good faith on the part of the assured and the contract is likely to be construed contra proferentem, that is, against the company in case of ambiguity or doubt."

(emphasis supplied)

73. As observed in *Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Co. Ltd.*, (2016) 15 SCC 315 thus:

> "10. We proceed to deal with the submission made by the counsel for the appellant regarding the rule of contra proferentem. The Common Law rule of construction "*verba chartarum fortius accipiuntur contra proferentem*" means that ambiguity in the wording of the policy is to be resolved against the party who prepared it. MacGillivray on Insurance Law[1] deals with the rule of contra proferentem as follows:
>
> "The contra proferentem rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. 'One must not use the rule to create the ambiguity — one must find the ambiguity first.' The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances."
>
> (footnotes omitted)
>
> 11. Colinvaux's Law of Insurance[2] propounds the contra proferentem rule as under:
>
> "Quite apart from contradictory clauses in policies, ambiguities are common in them, and it is often very uncertain what the parties to them mean. In such cases, the rule is that the policy, being drafted in language chosen

1 Legh-Jones, Longmore et al (Eds.) MacGillivray on Insurance Law (9th Edn., Sweet and Maxwell, London 1997) at p.280.

2 Robert and Merkin (Eds.), Colinvaux's Law of Insurance (6th Edn., 1990) at p.42.

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> by the insurers, must be taken most strongly against them. It is construed contra proferentes, against those who offer it. In a doubtful case, the turn of the scale ought to be given against the speaker because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it. If the insurers wish to escape liability under given circumstances, they must use words admitting of no possible doubt.
>
> But a clause is only to be contra proferentes in cases of real ambiguity. One must not use the rule to create an ambiguity. One must find the ambiguity first. Even where a clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine. So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly."
>
> (emphasis supplied)

74. In our opinion, the rule mentioned above of contra proferentem does not apply to the present case as there is no ambiguity or doubt in the definition of gross revenue in the agreement.

75. It is further submitted that for identifying the revenue, the sole test is that it should conform with the definition of revenue as provided in AS-9. For interpreting the scope of the provisions, the principle of *noscitur a sociis* has to be applied which provides that when definition includes various heads and while they may not be exhaustive as a rule of interpretation, what is being included within the definition, would be an aid to interpreting the scope of the provisions. For applying the said principle, reliance has been placed on,

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(A) ***Vania Silk Mills v. C.I.T., Ahmedabad*, 1991 (4) SCC 22**, on observation:-

"**11.** It is true that the definition of "transfer" in Section 2(47) of the Act is inclusive, and therefore, extends to events and transactions which may not otherwise be "transfer" according to its ordinary, popular and natural sense. It is this aspect of the definition which has weighed with the High Court and, therefore, the High Court has argued that if the words "extinguishment of any rights therein" are substituted for the word "transfer" in Section 45, the claim or compensation received from the insurance company would be attracted by the said section. The High Court has, however, missed the fact that the definition also mentions such transactions as sale, exchange etc. to which the word "transfer" would properly apply in its popular and natural import. Since those associated words and expressions imply the existence of the asset and of the transferee, according to the rule of *noscitur a sociis*, the expression "extinguishment of any rights therein" would take colour from the said associated words and expressions, and will have to be restricted to the sense analogous to them. If the legislature intended to extend the definition to any extinguishment of right, it would not have included the obvious instances of transfer, viz., sale, exchange etc. Hence the expression "extinguishment of any rights therein" will have to be confined to the extinguishment of rights on account of transfer and cannot be extended to mean any extinguishment of right independent of or otherwise than on account of transfer."

(B) ***Swiss Ribbons v. Union of India*, 2019 (4) SCC 17**,

"**109.** We are of the view that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24-A) show that such persons must be "connected" with the resolution applicant within the meaning of Section 29-A(*j*). This being the case, the said categories of persons who are collectively mentioned under the caption "relative" obviously need to have a connection with the business activity of the resolution applicant. In the absence of showing that such person is "connected" with the business of the activity of the resolution applicant, such person cannot possibly be disqualified under Section 29-A(*j*). All the categories in Section 29-A(*j*) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression "related party," therefore, and "relative" contained in the definition sections

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must be read noscitur a sociis with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant."

(C) ***South Gujarat Roofing Tiles Manufacturers v. State of Gujarat,* 1976 (4) SCC 601**,

3. The question turns on a true construction of the explanation to entry 22 which says that for the purpose of this entry potteries industry "includes" the manufacture of the nine "articles of pottery" specified therein. Pottery in a wide sense will take in all objects that are made from clay and hardened by fire, from crude earthen pots to delicate porcelain. Mr Patel appearing for the respondent, State of Gujarat, contends that the explanation indicates that potteries industry in Entry 22 is intended to cover all possible articles of pottery including Mangalore pattern roofing tiles. Referring to the well-known use of the word 'include' in interpretation clauses to extend the meaning of words and phrases occurring in the body of the statute, Mr. Patel submits that the explanation, when it says that potteries industry "includes" the nine named objects, what is meant is that it includes not only these objects but other articles of pottery as well. It is true that "includes" is generally used as a word of extension, but the meaning of a word or phrase is extended when it is said to include things that would not properly fall within its ordinary connotation. We may refer to the often quoted observation of Lord Watson in *Dilworth* v. *Commissioner of Stamps* that when the word "include" is used in interpretation clauses to enlarge the meaning of words or phrases in the statute

"these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include."

Thus where "includes" has an extending force, it adds to the word or phrase a meaning which does not naturally belong to it. It is difficult to agree that "includes" as used in the explanation to Entry 22 has that extending force. The explanation says that for the purpose of Entry 22, potteries industry includes the manufacture of the nine "articles of pottery" specified in the explanation. If the objects specified are also "articles of pottery", then these objects are already comprised in the expression "potteries industry". It hardly makes any sense to say that potteries industry includes the

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manufacture of articles of pottery, if the intention was to enlarge the meaning of potteries industry in any way.

4. We are also unable to agree with Mr Patel that the articles specified in the explanation may have been mentioned out of abundant caution to emphasize the comprehensive character of the entry, to indicate that all varieties of pottery are included therein. This argument, though more plausible, does not also seem acceptable. It is possible that one might have doubts whether things like refractories or electrical or textile accessories would pass under the description pottery as that word is used in common parlance, but the explanation also mentions crockery and toys regarding which there could be hardly any doubt. The inclusion in the list of objects which are well-recognised articles of pottery makes it plain that the explanation was added to the entry not by way of abundant caution.

5. The contention of Mr. Tarkunde for the appellants is that the articles mentioned in the explanation were intended to be exhaustive of the objects covered by Entry 22. According to Mr, Tarkunde if the legislature wanted to bring within the entry all possible articles of pottery then there was hardly any point in mentioning only a few of them by way of explanation. To this Mr Patel's reply is that it is well-known that where the legislature wants to exhaust the significance of the term defined, it uses the word "means" or the expression "means and includes", and that if the intention was to make the list exhaustive, the legislature would not have used the word "includes" only. We do not think there could be any inflexible rule that the word 'include' should be read always as a word of extension without reference to the context. Take for instance Entry 19 in the schedule which also has an explanation containing the word "includes". Entry 19 is as follows:

"Employment in any tobacco processing establishment, not covered under Entry 3.

Explanation.—For the purpose of this entry, the expression 'processing' includes packing or unpacking, breaking up, sieving, threshing, mixing, grading, drying, curing or otherwise treating the tobacco (including tobacco leaves and stems) in any manner."

Entry 3 to which Entry 19 refers reads:

"Employment in any tobacco (including bidi making) manufactory."

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It is clear from the explanation to Entry 19 that there could be no other way or manner of "processing" besides what is stated as included in that expression. Though "include" is generally used in interpretation clauses as a word of enlargement, in some cases the context might suggest a different intention. Pottery is an expression of very wide import, embracing all objects made of clay and hardened by heat. If it had been the legislature's intention to bring within the entry all possible articles of pottery, it was quite unnecessary to add an explanation. We have found that the explanation could not possibly have been introduced to extend the meaning of potteries industry or the articles listed therein added *ex abundanti cautela*. It seems to us therefore that the legislature did not intend everything that the potteries industry turns out to be covered by the entry. What then could be the purpose of the explanation. The explanation says that, for the purpose of Entry 22, potteries industry "includes" manufacture of the nine articles of pottery named therein. It seems to us that the word "includes" has been used here in the sense of 'means'; this is the only construction that the word can bear in the context. In that sense it is not a word of extension, but limitation; it is exhaustive of the meaning which must be given to potteries industry for the purpose of Entry 22. The use of the word "includes" in the restrictive sense is not unknown. The observation of Lord Watson in *Dilworth* v. *Commissioner of Stamps* which is usually referred to on the use of "include" as a word of extension, is followed by these lines:

"But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

It must therefore be held that the manufacture of Mangalore pattern roofing tiles is outside the purview of Entry 22."

(emphasis supplied)

76. The definition of gross revenue is crystal clear in the agreement. How the adjusted gross revenue to be arrived at is also evident. It

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cannot be submitted that the revenue has not been defined in the contract. Once the gross revenue is defined, one cannot depart from it and the very meaning is to be given to the revenue for the agreement. Overall revenue, has to be taken into account for determination of licence fees without set off, as provided in the agreement. The same was defined to simplify it to rule out the litigation, disputes, and accounting myriads. The submission raised that the term revenue has to be interpreted as the consideration payable in keeping with commercial and financial parlance is what is intended to be avoided. Raising of such submission is a futile attempt that has been made to wriggle out of the definition of gross revenue, which has been held to be binding in the previous judgment in *Union of India v. AUSPI* (2011). The submission that the contract recognises the applicability of accounting standards, in our opinion, it is only to maintain books of accounts. To a certain extent, it cannot be disputed that to have clarity, uniformity, and definitiveness; the accounting standards lay down guidelines with respect to financial terms. However, when the financial terms in the agreement are clear in the form of definition of gross revenue governed by Clause 19.1 of the agreement, the definition of Accounting Standard-9 cannot supersede it which is a general one.

77. The submission has been made that the accounting standards themselves make it clear what should be included as revenue and

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accounting standards have been incorporated in the agreement and incorporated by reference in the licence agreement. For this, reliance has been placed on *General Assurance Society Ltd. v. Chandmull Jain,* AIR 1966 SC 1644, wherein it is observed:

> "11. A contract of insurance is a species of commercial transactions, and there is a well-established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery. A cover note is a temporary and limited agreement. It may be self-contained, or it may incorporate by reference the terms and conditions of the future policy. When the cover note incorporates the policy in this manner, it does not have to recite the term and conditions, but merely to refer to a particular standard policy. If the proposal is for a standard policy and the cover note refers to it, the assured is taken to have accepted the terms of that policy. The reference to the policy and its terms and conditions may be expressed in the proposal or the cover note or even in the letter of acceptance, including the cover note. The incorporation of the terms and conditions of the policy may also arise from a combination of references in two or more documents passing between the parties. Documents like the proposal, cover note, and the policy are commercial documents, and to interpret them, commercial habits and practice cannot altogether be ignored. During the time the cover note operates, the relations of the parties are governed by its terms and conditions, if any, but more usually by the terms and conditions of the policy bargained for and to be issued. When this happens, the terms of the policy are incipient, but after the period of temporary cover, the relations are governed only by the terms and conditions of the policy unless insurance is declined in the meantime. Delay in issuing the policy makes no difference. The relations even then are governed by the future policy if the cover notes give sufficient indication that it would be so. In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of *uberrima fides* i.e. good faith on the part of the assured and the contract is likely to be construed *contra proferentem* that is against the company in case of ambiguity or doubt. A contract is formed when there is an unqualified acceptance of the proposal. Acceptance may be expressed in writing, or it may even be implied if the insurer accepts the premium and retains it. In the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it. This position was clearly recognised by the assured himself, because he wrote, close

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upon the expiry of the time of the cover notes, that either a policy should be issued to him before that period had expired or the cover note extended in time. In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties because it is not for the court to make a new contract, however reasonable if the parties have not made it themselves. Looking at the proposal, the letter of acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone etc. had come into being."

78. In *M.R. Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd.*, (2009) 7 SCC 696, the Court held:

"24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance

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> alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.
>
> (iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.
>
> (v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties."

79. Submission though attractive, but is again an attempt by taking a rigmarole to get rid of the definition of 'gross revenue'. Earlier the validity of definition was questioned to confine the meaning of gross revenue how the revenue is sought to be confined to activities under the licence by way of AS-9. The reliance has been placed on statement made by DOT in the reply filed in 2003 that the definition of gross revenue is in line with AS-9, it is by way of explaining and cannot have the effect of changing the definition of gross revenue given in the agreement. The definition in agreement is unambiguous, clear, and beyond the pale of doubt, and there is no confusion in the definition of gross revenue, which is the basis for realisation of the licence fee.

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Licensees have made a futile attempt to wriggle out of the definition in an indirect method, which was rejected directly in the decision of 2011 between the parties and it was held that these very heads form part of gross revenue.

80. The submission has been raised on the ground of approbation and reprobation relying on *Suzuki Parasrampuria Suitings Private Limited v. Official Liquidator of Mahendra Petrochemicals Limited,* (2018) 10 SCC 707. The observations made are extracted hereunder:

> "12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in *Amar Singh* v. *Union of India*, (2011) 7 SCC 69, observing as follows: (SCC p. 86, para 50)
>
> > "*50.* This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."
>
> 13. A similar view was taken in *Joint Action Committee of Air Line Pilots' Assn. of India* v. *DGCA*, (2011) 5 SCC 435, observing: (SCC p. 443, para 12)
>
> > "*12.* The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by-election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. … Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily."

81. In *Jal Mahal Resorts Private Limited v. K.P. Sharma,* (2014) 8 SCC 866, the Court observed:

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> "4. However, in spite of withdrawal of the special leave petitions, if the petitioner State is taking a diametrically opposite stand which it had taken before the High Court as also before this Court when the arguments were concluded, we surely have reservations in permitting the learned Senior Counsel to take an opposite stand now and advance arguments exactly the opposite of what was submitted in the High Court as also before this Court through the earlier counsel being the Attorney General.
>
> 5. However, the learned Senior Counsel submitted that the State is a respondent in other special leave petitions also which have been preferred by the other petitioners and, therefore, as a respondent therein, they are eligible to advance their arguments.
>
> 6. There is no doubt that the impleaded respondent may advance his arguments before the Court as he has been impleaded as a party-respondent but under the garb of advancing arguments a stand which was taken before the High Court earlier is changed at the stage of special leave petition, cannot be permitted especially when the counsel, as already stated, has withdrawn the special leave petitions preferred by the State. He may, however, advance submissions as a respondent in other matters, which he is at liberty to make within a period of two weeks, which, however, shall be subject to its acceptance."

82. In *A.P. Dairy Development Corporation Federation v. B. Narasimha Reddy*, (2011) 9 SCC 286, the following observations were made:

> "40. In the matter of the Government of a State, the succeeding Government is duty-bound to continue and carry on the unfinished job of the previous Government, for the reason that the action is that of the "State", within the meaning of Article 12 of the Constitution, which continues to subsist and therefore, it is not required that the new Government can plead contrary to the State action taken by the previous Government in respect of a particular subject. The State, being a continuing body can be stopped from changing its stand in a given case, but where after holding enquiry it came to the conclusion that action was not in conformity with law, the doctrine of estoppel would not apply. Thus, unless the act done by the previous Government is found to be contrary to the statutory provisions, unreasonable or against policy, the State should not change its stand merely

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> because the other political party has come into power. "Political agenda of an individual or a political party should not be subversive of rule of law." The Government has to rise above the nexus of vested interest and nepotism, etc. as the principles of governance have to be tested on the touchstone of justice, equity and fair play. The decision must be taken in good faith and must be legitimate. (Vide *Onkar Lal Bajaj* v. *Union of India, (2003) 2 SCC 673, State of Karnataka* v. *All India Manufacturers Organisation*, (2006) 4 SCC 683 and *State of T.N.* v. *K. Shyam Sunder*, (2011) 8 SCC 737.)"

83. In our considered opinion, it cannot be said that DOT has taken inconsistent stands at different stages of the same litigation. Their stand is apparent that the gross revenue has been clearly defined in the agreement. Parties have agreed to various inclusions in the agreement and have willingly switched over to revenue- sharing regime under the 1999 policy and same is apparent from the stand and the reliefs prayed in the petitions filed in 2003 and 2005 extracted above. The licensees were aware of items specifically included in the agreement. TSPs agreed to interpretation and accepted it as held by this Court in 2011 judgment. Licensees are taking inconsistent stands, earlier they have taken the stand that all these items concerning which disputes have been raised, had been included illegally in the definition of gross revenue, the definition may be declared ultra vires, invalid, and be struck down. They have also contended that revenue from activities under the licence cannot be included in gross revenue, which submission has been negated by this Court in 2011, it was held that the gross revenue would include the

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revenue generated from non-licensing activities. Licensees cannot be permitted to approbate and reprobate and to take inconsistent stands that they are not included in gross revenue as per AS-9. The stand taken rather than buttressing the submissions raised by them, counters and militates against their own interest and paves the way in favour of DOT.

84. A submission has been raised that the definition of gross revenue is not exhaustive. It only includes those streams which are specifically included in the definition of AGR. If it is an inclusive definition of AGR, and all receipts were ipso facto part of AGR, then there was no occasion to further provide in clause 2.2 (b)(ii) that the revenue from value-added services was to be treated as part of AGR. Further, the licensee was obliged to maintain separate account for service defined in Annexure 1 to the licence in clause 55 to mean service in a licensed service area. By the fact that separate provision is made for value-added services, a separate account has to be maintained as per clauses 22.1, 22.2 and 22.3 that is for arriving at the figure of revenue and step in aid, to clarify how the licensee has to operate, that would not change the definition of gross revenue which is the meaning of revenue itself is apparent, same is gross inflow of the cash, and the amount which is receivable as provided in AS-9 also. Thus, the submission raised that the definition is not wide, cannot be

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accepted, and stands repelled. Clauses 22.1, 22.2 and 22.3 cast obligation upon the licensee to draw, keep and furnish independent accounts for the service. Under clauses 22.1 and 22.2, the licensee has to maintain records quarterly. Accounts have to be audited and can be called for by the licensor or the TRAI, as provided in Clause 22.3. The format of gross revenue is supportive of definition of gross revenue as defined in the agreement. Clause 22 is a rider upon the licensee to maintain the records of activities and other matters such as financial position as enumerated therein.

85. Clause 18.1 of the agreement has also been pressed into service. The submission raised that a single company may hold 5 licences for 5 different service areas; the AGR as suggested by the DOT, cannot be followed as it may end up in paying the licence fee at the rate of 5 times. As the licence fee cannot be charged more than once, there is no room to entertain the submission. It is not what is contemplated in the definition. While computing the licence fee, the gross revenue has to be taken into consideration under a particular licence for which it is being determined. The argument had been raised on a hypothetical basis without foundational facts to raise the same is thus, liable to be and is rejected at the threshold.

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86. DOT has 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. To part 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. In our opinion, there is no doubt that the State is a trustee of the natural resources and is obliged to hold it for the benefit of the citizens but also to ensure equal distribution to sub-serve the common good as observed under Article 39 of the Constitution of India *in Re : Natural Resources Allocation, 2012* (10) SCC 1. The Government being the sole repository of all the resources in the country, also has the exclusive power to determine the licence conditions at which it parts with the exclusive right to the resources. Government has to make an effort to get the best price for its valuable rights and cannot throw them away, and there would be no arbitrariness in the same as observed in *State of Orissa & Ors. v. Harinarayan Jaiswal & Ors.*, (1972) 2 SCC 36, thus:

> "**13**. Even apart from the power conferred on the Government under Sections 22 and 29, we fail to see how the power retained by the Government under clause (6) of its order, dated January 6, 1971, can be considered as unconstitutional. As held by this Court in *Cooverjee B. Bharucha case*, one of the important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of every State's revenue. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the Legislature has empowered the Government to see that there

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is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(*g*) or Article 14 can arise in these cases. The Government's power to sell the exclusive privileges set out in Section 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids — see *Union of India* v. *Bhimsen Walaiti Ram*, (1970) 2 SCR 594. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(*g*) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government—nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights. ...."

(emphasis supplied)

87. Similar is the case law laid down in *Har Shankar v. Excise & Taxation Commissioner*, 1975 (1) SCC 737; *Government of A.P. v. Anabeshahi Wine & Distilleries (P) Ltd.*, (1988) 2 SCC 25; *Excise Commissioner v. Issac Peter*, (1994) 4 SCC 104; *State of Orissa v. Narain Prasad* (1996) 5 SCC 740, *State of M.P. v. KCT Drinks Ltd.*, (2003) 4 SCC 748 and *State of Punjab v. Devans Modern Breweries Ltd.*, (2004) 11 SCC 26.

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88. A licence granted under section 4(1) is in the nature of a contract. DOT has relied upon *Khardah Company Ltd. v. Raymond & Co. (India) Pvt. Ltd.*, 1963 (3) SCR 183 in which it has been observed that once a contract has been reduced to writing, terms have to be ascertained from the agreement. It may be relevant to look into the circumstances in case need arises, which resulted in the inclusion of the definition of AGR in the licence agreement. The deliberations were held with the licensees, experts, and then finally migration package, revenue sharing regime is being consented to, was worked out in which the definition of adjusted gross revenue as a part of the financial condition of the licence is mentioned. As to the provisions of gross revenue there had been consensus ad idem between the parties. The licensees are bound by it as they have executed the licence agreement. A party is free to enter into a contract with a State, there is no compulsion, it is voluntary on both sides and binding and cannot be termed to be unfair as observed in *Assistant Excise Commissioner & Ors. v. Issac Peters & Ors.* (1994) 4 SCC 104, thus:

> "**26.** .....We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by

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negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make a profit or incur a loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

89. The licensees who have taken the advantage under the licence, carry certain obligations. The licensee is bound to discharge the obligation while taking benefit under the licence of migration package, for this purpose as held in *Shyam Telelink Ltd. v. Union of India*, 2010 (10) SCC 165, thus:

"**21.** The unconditional acceptance of the terms of the package and the benefit which the appellant derived under the same will estop the appellant from challenging the recovery of the dues under the package or the process of its determination. No dispute has been raised by the appellant and rightly so in regard to the payment of outstanding licence fee or the interest due thereon. The controversy is limited to the computation of liquidated damages of Rs. 8 crores out of which Rs. 7.3 crores was paid by the appellant in the beginning without any objection followed by a payment of Rs. 70 lakhs made on 29-5-2001.

22. Although the appellant had sought waiver of the liquidated damages yet upon rejection of that request it had made the payment of the amount demanded which signified a clear acceptance on its part of the obligation to pay. If the appellant proposed to continue with its challenge to demand, nothing prevented it from taking recourse to appropriate proceedings and taking the adjudication process to its logical conclusion

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before exercising its option. Far from doing so, the appellant gave up the plea of waiver and deposited the amount which clearly indicates acceptance on its part of its liability to pay especially when it was only upon such payment that it could be permitted to avail of the migration package. Allowing the appellant at this stage to question the demand raised under the migration package would amount to permitting the appellant to accept what was favourable to it and reject what was not. The appellant cannot approbate and reprobate.

23. The maxim *qui approbat non reprobat* (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.

28. For the reasons set out by us hereinabove, we have no hesitation in holding that the appellant was not entitled to question the terms of the migration package after unconditionally accepting and acting upon the same."

90. After the introduction of the migration package policy, 1999, there is an exponential growth of the telecom sector. In *Bharti Cellular Ltd. v. Union of India*, 2010 (10) SCC 174, this Court held that acceptance of benefits under the package precluded them from questioning the terms of the same. The Court observed:

"**8.** There is, in our opinion, no legal infirmity in the view taken by the Tribunal. Once the appellant-petitioner had specifically and unconditionally agreed to accept the migration package and given up all disputes relating to licence agreement for the period up to 31-7-1999, it was not open to it to turn around and agitate any such dispute after availing of the migration package. <u>A party which has unconditionally accepted the package cannot after such acceptance reject the conditions subject to which the benefits were extended to it under the package. It cannot reject what is inconvenient and onerous while accepting what is beneficial to its interests</u>. The package having been offered subject to the conditions that all disputes relating to the

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> licence agreement for the period ending 31-7-1999 shall stand abandoned by the operators, there was no room for going back on that representation."
>
> (emphasis supplied)

91. The terms and conditions cannot be said to be oppressive as submitted on behalf of the licensees on the strength of *Central Inland Water Transport Corporation v. Brojo Nath Ganguly*, 1986 (3) SCC 156, it cannot be said that DOT was in a dominant position, or possessed wholly disproportionate and unequal bargaining power. In the matter of commercial contracts, the doctrine of unconscionable bargaining is not applicable as held with respect to migration package in *S.K. Jain v. State of Haryana*, 2009 (4) SCC 35, thus:

> "**8.** There is, in our opinion, no legal infirmity in the view taken by the Tribunal. Once the appellant-petitioner had specifically and unconditionally agreed to accept the migration package and given up all disputes relating to licence agreement for the period up to 31-7-1999, it was not open to it to turn around and agitate any such dispute after availing of the migration package. A party which has unconditionally accepted the package cannot after such acceptance reject the conditions subject to which the benefits were extended to it under the package. It cannot reject what is inconvenient and onerous while accepting what is beneficial to its interests. The package having been offered subject to the conditions that all disputes relating to the licence agreement for the period ending 31-7-1999 shall stand abandoned by the operators, there was no room for going back on that representation."
>
> (emphasis supplied)

92. Once benefit has been drawn, the licensees cannot deny validity or binding effect of contract. In *Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Co. Ltd.*, (2011) 10 SCC 420) it was observed:

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> "A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience."

93. In *R.N. Gosain v. Yashpal Dhir*, AIR 1993 SC 352, it was held:

> "10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'."

94. Submissions have been raised in respect of various revenue heads not being revenue cannot be included within the purview of gross revenue. We propose to deal with each of them under separate heads.

In re: Discount and Commissions:

95. The Tribunal has dealt with discounts, and commissions under 3 heads : (i) discounts allowed on international roaming; (ii) commission and discount allowed to distributors on sale of pre-paid vouchers; (iii) goodwill waiver, discount and rebates.

96. The Tribunal held with respect to discounts allowed on international roaming that if the discounts are in the form of reduced billing and the amount booked in the profit and loss account is on the

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basis of the invoices raised and no deduction was shown on account of discount, no addition may be made in the same on the ground that the billing was on a discounted price. The tribunal has further held that if the amount billed is for a higher amount and the discount is in the form of volume discount given separately, the billed amount should be taken as revenue, and the discount may be treated as an expense which is not open to deduction under clause 19.1. A credit note given after the billing may also be treated as an expense. If the revenue booked in the profit and loss account shows netting off on account of any discount, the amount netted off may also be added up for computation of gross revenue.

97. The tribunal has adopted two different criteria concerning discounts on international roaming. With respect to commission and discount allowed to distributors on sale of pre-paid vouchers, the tribunal has held that if the sale and invoicing is on Maximum Retail Price (MRP) and if any discount is given separately then in terms of clause 19.1, such discount is not deductible even if the revenue booked in the profit and loss account is after netting off the discount. On the other hand, if the sale is on a stated/agreed price, invoiced at that agreed price and booked under the revenue in the profit and loss account accordingly, without netting off any discount, then the actual

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selling price would be the revenue and the difference between the MRP and this selling price cannot be added to gross revenue.

98. Concerning goodwill waiver, discount, and rebates, the tribunal has held that under clause 19.1, the items shall form part of gross revenue without netting off any expenses. The case of licensees on this score has not been accepted. In the case of wrong billing and its revision, the correct differential amount cannot be taken as part of gross revenue.

99. It has been urged on behalf of licensees that the discounts are not like expenses. The treatment of discount as expenditure is contrary to the fundamental principle of accounting. Expenses are always in the form of outflow of cash. In the telecom sector, discounts are given to the customers to get the advantage of the much lesser amount. The same induce gross inflow of cash to a telecom company. Therefore, discounts can never be treated as an expenditure.

100. It is further submitted on behalf of the licensees that as per binding and mandatory principle of AS-9, the ICAI has declared discounts, rebates, deductions, lesser realisation of cost price are not to be treated as an expenditure. It is further submitted that an agreement between the parties determines the revenue arising on a

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transaction. It is measured at the fair value of the consideration received or receivable considering the amount of consideration. The amount of any discount or volume-based discount and volume rebates are not considered as revenue.

101. It is further submitted that the licensees have been given the discount that is transparently reflected in its invoice. The appellant only receives the discounted amount, which is the realised revenue or the cash inflow in their hands. The licence fee is paid on this realised amount.

102. It is further submitted that the licensees gives "trade discounts" and "subscriber's discount," and both are exempted from recognition as revenue for the reason that firstly as per AS-9, trade discounts are not included within the definition of revenue since they represent a reduction of cost. Guidance Note 5 on terms used in financial statements verifies that the trade discount is a reduction granted by a supplier from the list price of goods or services and the DOT in para 47 of the affidavit dated 11.7.2003 has mentioned that trade discounts shown in the invoice should not be included in gross revenue. These discounts are transparently reflected in the invoice raised on the distributor.

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103. Concerning the "subscriber's discount," it is submitted on behalf of the licensees that these discounts offered to the customers or subscribers are part of the tariff plan. Subscriber has a choice of different rental plans offered by the appellants, where certain discounts are offered by way of some free minutes/calls/SMS/VAS/value. Once a subscriber selects a plan, he is entering into a contract with the operator, is entitled to services and discounts, as indicated in the plan. Usually, these are in the form of free calls or additional data, and no revenue is collectible. Hence it cannot be taken into account for determining licence fee. DOT is asking for licence fee on the notional revenue for these free calls/SMS/VAS minutes/data when the appellants collect no amount on this account. These amounts of discounts are transparently reflected in the invoice raised on the subscriber as memorandum.

104. It is further submitted on behalf of the licensees that services are offered by the licensees and not goods. For payment of service tax, the licensees consider the gross amount charged as derived and mandated under section 67 of the Service Tax Act, 1994, which includes only the amount realised by the licensees and not the notional amount. Circular No.23/3/97/-S.T. dated 13.10.1997, mandates that the service tax liability is only concerning the discounted price so received

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by the Cellular companies. The licensees frequently offer discounts as they are used as competitive tools to increase business in the long run. Those were inevitable as there were 8 to 10 operators operating in the same geography, and the licensees had to match highly competitive prices offered, especially by new entrants. Discounts help to survive and grow business and increase revenue, which is to the advantage of DOT.

105. On behalf of the DOT, it has been submitted that discounts over and above the agreed charges are part of the overall commercial strategy to enhance business. Hence, these discounts are like expenses. As per definition of "gross revenue" in clause 19.1 of the agreement, it is not permissible to set off these volume-based discounts against the revenue as expenses are not permitted to be netted off, such amounts form part of revenue; otherwise, it would lead to accounting jugglery, which is very consciously avoided by purposefully drafting the AGR definition in "inclusive" terms. Otherwise, the discounts may be used by the company to reduce its costs, and the profitability of the company may remain unaffected, but the gross revenue for the computation of AGR may be reduced. As the company may make contracts with distributors and provide them with huge discounts in the form of reduced billing. To say this (i), the company may make contracts with the distributors to sell pre-paid

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vouchers of Rs.100 for Rs.70. Against the discount, the company may make with the distributors further agreement reducing the company's cost, such as the supply of contractual workforce, the printing of paper vouchers, etc. Thus, it would cause evade of the licence fee without affecting the profitability of the company. The commissions thus form part of the income. The commission is nothing but "expenses" for growth in the business of the licensees, it cannot be netted off while computing the gross revenue. The finding, to the extent it is contrary, recorded by TDSAT is derogatory to the contractual definition of gross revenue. DOT also submits that the question of discount was raised earlier in the order dated 30.8.2007 by TDSAT. This Court did not accept it; as such, it is barred by res judicata and the question as to discount on international roaming, and questions as to other discounts, were not raised before TDSAT. As such, these objections concerning discounts allowed to distributors on sale of pre-paid vouchers are barred by the principle of constructive *res judicata.*

106. When we consider the rival submissions it has been mentioned in the communication dated 26.7.2001 that the interest income, dividend income, value of rebates, discounts, free calls, and reimbursement from the USO funds have to be included in the adjusted gross revenue. Consequently, a prayer was made to set aside

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the communication dated 26.7.2001 in Petition No.7 of 2003. Prayer has not been granted on the ground that the Government has not accepted the recommendations of TRAI and the decision of the Government is final, binding and conclusive as has been held by this Court in AUSPI (2011). Finding has been recorded that parties have agreed to aforesaid position as reflected in communication dated 26.7.2001.

107. When we ponder on the definition of "gross revenue" in clause 19.1 of the licence agreement, it is apparent that the gross revenue has to be taken into consideration without any set-off for related items of expense. Thus, the gross amount, as per the definition, is the gross revenue, without set-off, is to be taken into consideration including the discounts given. Parties understood right from the beginning that the gross revenue does not exclude discounts, commissions, rebate etc. and specific challenge made to the same had not been accepted in 2011. Now once again by the circuitous method, impermissible attempt has been made to re-write the definition of gross revenue. The definition of 'gross revenue' is independent of AS-9 as the definition of revenue in AS-9 cannot govern the definition in Clause 19.1 of the licence agreement. What has been defined in AS-9 is revenue, whereas, for a licence fee, gross revenue is the revenue. It would be greatest fallacy to say that while gross revenue has been defined in

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Clause 19.1 of agreement, revenue has not been defined in the licence agreement. What has been defined as gross revenue is in fact broader definition of revenue and has to be taken as definition of revenue for licence agreement. An attempt has made to wriggle out of the rigour of the definition of gross revenue by banking upon the definition of revenue in AS-9 is to scuttle the effect of the previous decision in *Union of India v. AUSPI* (2011). Gross revenue as defined in agreement cannot be diluted in any manner whatsoever based on the submission mentioned above, as AS-9 is only for method of accounting and specific definition of revenue *i.e.*, gross revenue under the licence agreement has to prevail. In our considered opinion, 'gross revenue' is the revenue has been held in 2011 judgment finding is binding on parties for determination of license fees under the licence agreement and the definition of revenue in AS-9 cannot govern. Reliance upon the affidavit filed on behalf of DOT is wholly misconceived. What is the meaning of the definition of gross revenue has been finally settled inter parties vide 2011 judgment. Thus, there is no scope to entertain the misconceived submission. Though artistically designed with ingenuity, however, the same is misconceived one on in-depth scrutiny.

108. The submission was raised on behalf of the licensees relying upon J.K. Industries (supra) that fair value has to be taken into consideration to reduce discounts etc. The concept of fair value is not

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the basis of Accounting Standard-9. Fair value is the operating concept of IND AS-18. In AS-9, revenue recognition is at nominal value and that the fundamental difference between the two accounting standards. Thus, the nominal value has to be taken as the one which is relevant for AS-9. Under the AS-9 regime, the revenue recognition shall be measured as the gross inflow of cash, receivables, or other consideration received. There is no concept of fair valuation under AS-9.

109. With the advent of modern technology, the mode of business transactions has changed. The number of online purchases and sales has been continually growing, and the techniques to retain clients online are being utilised. Unlike sales promotion schemes in the case of off-line transactions, the online transactions of sales carry cash back rewards, discount coupons, and reward points. The incentives may include cash coupons, discount coupons, cash discounts, cash-back and credit points, etc. The various incentives affect the amount of revenue to be recognised. Under IND AS-18 Revenue or IND AS-115, Revenue from Contracts with Customers states that revenue shall be measured at the fair value of the consideration received or receivable after taking into account the number of various incentives provided to the customers.

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110. Reliance has been placed on *Union of India v. Bombay Tyres International Pvt. Ltd.*, (2005) 3 SCC 787, wherein this Court has observed that trade discount should be allowed to be deducted from the sale price. The decision is in the context of the Central Excise & Salt Act, 1944. The decision has no relevance to consider the concept of gross revenue under the licence agreement. Reliance has also been placed on the decision of this Court in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Advani Oorlikon (P) Ltd.*, (1980) 1 SCC 360, in which this Court considered the question of taxable turnover and the concept of sale price under the Sales Tax Act. It was held that the trade discount on catalogue price allowed by the wholesaler to the retailer is not includible in the taxable turnover. Trade discount is distinct from cash discount. A cash discount is a discount granted in consideration of prompt payment. A trade discount is a deduction from the catalogue price of goods allowed by wholesalers to retailers engaged in the trade. Reliance has also been placed on the decision of Delhi High Court in *M/s. United Exports v. Commissioner of Income Tax, Delhi* (2009) SCC Online Del 2566 rendered in the context of the provisions of section 40-A(2)(b) of the Income-tax Act, 1961. Certain trade discount was given. The High Court held that the provision pertained to disallowance to an expenditure, an amount spent by the assessee as an expenditure. For

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that, actual payment must be made. There has to be an expenditure incurred before the provision can be said to be applicable. Trade discount was held not to be an expenditure as it is incurred for which allowance could have been claimed under section 40(A)(2). Above mentioned decisions are wholly inapplicable, given the definition of gross revenue and have been rendered in context of concerning provisions of different statutes.

111. Reliance has also been placed on *IFB Industries Ltd. v. State of Kerala*, (2012) 4 SCC 618. The question coming up for consideration was the discount on qualifying for deduction under Rule 9(a) of 1963 Rules. The trade discount was given for dealers on achieving a pre-set sales target. It was held that for the discount on qualifying for deduction under Rule 9(a) of the said Rules must be shown in invoice, itself and that it would not be good enough to show it employing a credit note issued after the sale. The decision is on the method of computation when discount can be allowed on sales-tax and VAT under the Kerala General Sales Tax Rules, 1963, and has no relevance. In *Commissioner of Central Excise, Madras v. Addison & Co. Ltd.*, (2016) 10 SCC 56, the question of turnover discount came up for consideration under section 11-B of the Central Excise Act, 1944. It was held that trade discounts should not be disallowed because they are not payable at the time of each invoice or deducted from the

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invoice price. In *Southern Motors v. State of Karnataka & Ors.*, (2017) 3 SCC 467, a question arose of trade discount given post-issuance of tax/sale invoice, a deduction from the sale price for computing taxable turnover when the discount was not reflected in the tax invoice or bill of sale. It was held that it has to be proved that such discounts were given. The decision was in the context of Karnataka Value Added Tax Rules, 2005. Yet in *Maya Appliances Pvt. Ltd. v. Additional Commissioner of Commercial Taxes & Ors.*, (2018) 2 SCC 756 has also been relied upon where the question of computation of taxable turnover came up for consideration in the context of Karnataka Value Added Tax Act, 2003, with respect to all regular trade discounts and they are allowable as permissible deductions, if proper proof is shown.

112. The decisions have no relevance having been rendered under the provisions of different statutes and for construing the definition of gross revenue under the licence agreement, which has to prevail.

113. Reliance has been placed on service tax Circular dated 13.10.1997, which provides that service tax liability is only in respect of the discounted price so received by the Cellular companies. The question of service tax liability has no relevance for determination of licence fee for which definition has been worked out by the

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Government of India, which has been agreed to by the licensees also as that was beneficial to them as compared to the fixed fee regime which prevailed earlier. They have switched over to the new regime of sharing the revenue earned by them on a percentage basis. The definition of gross revenue has the purpose behind it and was the outcome of prolonged exercise and has already been upheld, and the question cannot be reopened once over again by an indirect method.

114. The trade discounts cannot be deducted from the gross revenue merely on the ground that they represent a reduction of cost. The reliance by the licensees on the Guidance Note filed that discounts are reduction granted by a supplier from the list price of goods or services is of no avail owing to the definition of the gross revenue. Set off of trade discounts is not permissible under Clause 19.1 of agreement against revenue as expenses are not permitted to be netted up.

115. Concerning cash discount, it is apparent that cash discount may be used in various methods. It is an incentive for customers. The customer makes payment after deducting amount of cash discount, if eligible for availing of the same as per the agreement between the entity and the customer. Under AS-9, revenue is recognised at the gross amount and cash discount is regarded as an expense when the

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seller receives the payment net off discount is not permissible. For example, if A has sold goods to Z for Rs.1000 on 90 days' credit period, but if Z pays within 50 days, a cash discount of 10% shall be provided by A. It is reasonably sure that Z to pay the amount within 15 days. In the AS regime, the revenue has to be recorded at Rs.1000, and when Z pays Rs.900, the amount of cash discount of Rs.100 will be recognised as an expense. That is the effect of the revenue to be recognised as a gross amount under AS-9. Concerning the volume-based discount, under the AS-9 regime, revenue is recognised at the gross amount received or receivable from the customers. However, the value of trade discounts and volume rebates received cannot be deducted from the gross revenue owing to the definition in clause 19.1. The subscriber's discount can also be in the form of free calls, some free minutes SMS value.

116. DOT has rightly asked for the licence fee on the notional revenue of free calls, SMS, VAS minutes/data. When these amounts admittedly are reflected in the invoice raised on the subscriber as memorandum, it is the gross revenue. It forms part of the gross revenue and cannot be deducted. That is what was intended by carving out the definition to make it free from litigation and accounting jugglery and to free determination of licence fee from the clutches of accounting jugglery.

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117. The discounts allowed on international roaming, commission, and discount allowed to distributors on sale of pre-paid vouchers form part of the gross revenue and cannot be deducted by placing reliance on the definition of revenue and certain notes of AS-9 standards; whereas they are explicitly included in the definition of gross revenue.

118. As to pre-paid options, the format of statement of revenue and licence fee contained in Appendix II to Annexure-II provides in the case of pre-paid options, sale of pre-paid SIM cards including full value of components charged therein. Revenue from mobile community phone service including full value of all components charged therein has to be considered, revenue from franchisees/re-sellers including all commissions and discounts, etc. have to form part of the gross revenue. How the parties have understood and agreed to pay the gross revenue is apparent from the correspondence and letter dated 22.7.2001 and the ultimate definition mentioned in the licence agreement Clause 19.1 and rejection of TRAI's recommendations by the Government.

119. The TDSAT has erred in holding that if the discounts are in the form of reduced billing, no addition to be made in the gross revenue. It would mean violating the definition of gross revenue where no set-off is

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permitted. It is rightly submitted by DOT that discounts over and above the agreed charges are part of overall commercial strategy to enhance the business, and hence, these discounts are like expenses. Expenses are not permitted to be net off under clause 19.1 from the gross revenue under the licence agreement. Similarly, the TDSAT has erred in holding and giving a finding concerning commission and discounts if the invoice is at a discounted price, which is at Rs.90 instead of Rs.100. For the same reason, the finding of TDSAT is not sustainable.

120. The TDSAT has rejected the case of the licensees. Where the bill is for a higher amount and the discount is in the form of volume discount given separately, the billed amount should be taken as the revenue, and the discount may be treated as an expense. That part of the finding is not disturbed. However, for all discounts and commissions allowed on international roaming, and to distributors on sale of pre-paid vouchers, trade discounts, subscribers' discounts, and volume rebates form part of gross revenue.

121. It has also been submitted on behalf of the licensees that offering discounts is frequently used to increase business in the long run/term. These are inevitable as there were 8 to 10 operators

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operating in the same geography at highly competitive prices. Discounts help to survive and grow business and augment revenue. Thus it is in the nature of expense for earning the profit and by this method it is admitted that business has grown and there is an increase in revenue, hence the same being part of the commercial strategy to enhance the business, it has to be treated in the nature of expense and cannot be deducted from gross revenue.

122. Thus, we have no hesitation to reject the claim for various forms of discounts, commissions, pre-paid vouchers, goodwill waiver etc., raised on behalf of the licensees and set aside the finding of the TDSAT to the extent it is contrary to the stand taken by DOT, and we hold that all discounts and commission etc. as discussed form part of the gross revenue for the purpose of payment of licence fee.

In re: Gains arising out of Foreign Exchange Fluctuations:

123. The telecom service providers have transactions of purchasing equipments or settling roaming charges etc. in foreign currency. The change in exchange rate vis-à-vis a foreign currency from the date of transaction to the time of settlement may cause gain or loss based upon the fluctuations in the exchange rate of rupee. TDSAT in the 2007 judgment held that the fluctuations in the foreign exchange rate have nothing to do with the licensed activities of the telecom service

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providers. The TDSAT in the impugned judgment and order in 2015 has held that foreign exchange gains are of two types. The reduction in liability towards payment for purchase of capital goods from pre-paid and payment of charges or outroamers and secondly in receipt from inroamer. In the first case, there is a decrease in cost, which cannot be taken as revenue for the purpose of determining AGR. In case of reduction, payment of charges for outroaming the reduction is allowed only on payment basis. Therefore, the difference between accrual and paid basis cannot be taken as revenue for AGR calculation, and in the second case, revenue is recorded on accrual basis. Any charges till payment is made, are notional income, which cannot be taken as revenue for AGR basis. On actual payment since no discount is given and the actual receipt is less, no licence fee should be charged if the same is more. Thus, any gain or loss due to foreign exchange fluctuations will have no bearing on the licence fee.

124. The DOT submits that the mandate of the definition of gross revenue has been ignored. The gain from foreign exchange fluctuation is to be taken into the calculation of adjusted gross revenue, the income is understood as an increase in economic benefits in the form of inflows from the enhancement of assets or decreases in liability that result in increase in equity. The definition of income covers both revenue and gains. The gains from foreign exchange fluctuations

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should be added without any net off against the losses, and these should be on accrual basis.

125. It is submitted on behalf of licensees that DOT is trying to confuse the revenue with income. The foreign exchange fluctuation gain is unrealised gain and is purely notional, and no flow of revenue takes place. AS-11 mandates the reporting of foreign currency in the balance-sheet at the prevailing foreign exchange rate. The difference in exchange variation between the transaction date and the year-end rates is booked as an unrealised exchange of gain or loss. The transactions denominated in foreign currency are recorded at the exchange rate prevailing at the time of transaction and realised. As such, gain or loss results when there is a change in the exchange rate between the transaction date and date of settlement of items.

126. It is further submitted on behalf of the licensees that notional gains are not inflows of cash and do not represent revenue. When there is neither accrual nor receipt of income, no revenue can be said to have resulted. A higher cost of an asset shown in the books on account of a higher foreign exchange rate may be reduced to reflect the current foreign exchange rate and does not result in any revenue received or receivable by the appellant. If forex gain is on any item of

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expenditure, then it should not enter calculation of gross revenue as expenses are not deductible while calculating gross revenue. It is further submitted that Para 3(iii) of AS-9 expressly excludes the realised or unrealised gains resulting from changes in foreign exchange rates and adjustment arising on the transaction of foreign currency financial statements.

127. When we consider the rival submissions, it is apparent that there can be realised as well as unrealised foreign exchange gains/losses which may differ depending on whether or not the transaction has been completed by the end of the accounting period. The realised gains or losses are the gains or losses that have been achieved. It means that the customer has already settled the invoice before the close of the accounting period. For example, to say a customer purchased items worth $1000 from a foreign seller based abroad, and the invoice is valued at $1100 at the invoice rate. When customer settles the invoice after a few days, say four weeks, after the date invoice was sent, and the invoice is valued at $1200 when converted to US dollars at the current exchange rate. It means that the seller will have a realised gain of $100. The foreign currency gain is recorded in the income section of the income statement. Unrealised gain or loss results when the invoice is settled, but in case the customer fails to pay the invoice by the close of the accounting period. The seller

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calculates the gains or losses that would be earned if the customer paid the invoice at the end of the accounting period. While preparing a financial statement, a transaction will be recorded as an unrealised loss of $100 in case the value of the invoice was $200. On the last date of the accounting period, the invoice is valued at $100. Thus, the unrealised loss will be of $100. The unrealised gain or loss is recorded in the balance-sheet. When preparing the actual financial statement, companies are required to report the transaction in the home currency to make it easy to understand all the financial reports. It means that all transactions carried out in foreign currency must be converted to the home currency at the current exchange rate when the business recognises the transaction. The exchange difference which arises on reporting the mandatory items at the rate different from the ones at which they are recorded initially, must be recognised rate as an income or an expense. Thus, gain from foreign exchange fluctuation is to be taken in the calculation of AGR, and that is the actual revenue and cannot be ignored.

128. Similarly, gain from foreign exchange fluctuation should be added on accrual basis. If later on, the amount has to be spent on the purchase of equipment or settling roaming charges in foreign currency, that is also a gain and results in economic benefit and has to be accounted for while working out the gross revenue as a decrease

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in liability would be gain. Whatever may be the expenditure, whether it has increased or decreased, must be accounted for as it forms part of the gross revenue.

129. In the definition of gross revenue, any other miscellaneous revenue is included, and when once the item has to be shown in the balance-sheet or profit and loss account, obviously, it has to be accounted for gross revenue, even as a notional figure. Once the amount is receivable, it has to be taken as part of gross revenue. The finding to the contrary recorded by the TDSAT is thus liable to be set aside. Whether the amount is paid for the purchase of equipment, it has to be accounted for and must be accounted for as per the value spent on the date of the banking transaction, which cannot be ignored. Thus, the gains from foreign exchange fluctuations have to be added in the computation of gross revenue, otherwise, the benefit which is accruing will be ignored. Where profit or loss arises on account of appreciation of foreign currency, such gain or loss has to form part of profit from the business or loss. Whether it is profit or loss on account of trading or on account of asset, it has to form part of profit and loss account, thus, it has to account for gross revenue. The fluctuation in the foreign currency has to be accounted for in the account at the time when the amount is received or at the end of the accounting year. Thus, there is no escape from the conclusion that

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forex gain has to be accounted for as part of gross revenue. When loss can be claimed as an expenditure, profit or gain due to fluctuations in the rate of foreign exchange has also to be accounted for towards gross receipt, which is gross revenue.

In re: Monetary Gains on Sale of Shares:

130. It is submitted on behalf of the Tata Teleservices Ltd. and other licensees that gains from sale of shares should not be included in the inclusive definition of gross revenue. The gains on the sale of capital assets and receipt from the sale of scrap. The issue has arisen when an asset/scrap is sold for more than its book value, then the difference between net sale proceeds and book value is the amount of gain on sale of capital assets. Whether it has to form part of the gross revenue? The tribunal has held that capital gains are of two types. (i) Gain over and over the gross book value (cost) of the assets, that is when sale proceeds are more than the original purchase cost of the assets; and (ii) gain over and above the net book value, i.e. when the sale proceeds are less than the initial purchase cost but more than the net worth of the asset. The tribunal has held that the gain on sale of capital assets as per the first case, *i.e.*, when the increase is over and above the book value of the asset, it will form part of calculation of gross revenue.

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131. Given the definition of gross revenue in the licence agreement, every amount which is more than the book value of the current asset and comes to licensee company, has to be considered for calculation of gross revenue without netting off. Thus, the reasons given by the tribunal that any gain over and above the net book value, that is, when the sale proceeds are less than the original purchase cost but more than the net worth of the assets, has to be excluded from the gross revenue, cannot be accepted. The gross revenue for the current year has to be worked out based on the value of the capital assets. Gross revenue for any year is considered in light of the opening statement and also closing statement at the end of the year. What is gain over and above the book value in the year in question, has to be taken into consideration towards gross revenue received. Submission to the contrary raised on behalf of the licensees cannot be accepted. We are not able to accept the submission that the money collected on the sale of shares etc. is not like revenue receipt but is a capital receipt. The gain from the sale of capital asset including increase over and above net book value and scrap and not the entire proceeds are to be taken as revenue in calculation of the gross revenue without netting off and should be on accrual basis, is unobjectionably within the ken of definition of gross revenue. To say in case e.g., gain for AGR will accrue when the sale proceeds or the current disposition value of the goods is Rs.60, and if it is sold at Rs.70, in that case, there will be a

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gain of Rs.10. That shall be taken as a gain for AGR calculation. The result would be the same in case the value of an asset worth Rs.100 has depreciated to book value worth Rs.60 and is sold at Rs.70, as urged on behalf of DOT, Rs. 10 will form part of gross revenue. For what purpose and head the income tax would be leviable, is not the question for our consideration.

132. The submission raised that the sale of shares is not an ordinary business activity, as provided in Para 4.1 of AS-9. Even Para 3(i) of AS-9 which excludes from the ambit of 'revenue' any realised or unrealised gains resulting from disposal of non-current assets, *i.e.* appreciation in the value of fixed assets. Again, a futile attempt has been made to get rid of the definition of gross revenue, and confusion is sought to be created by ordinary business activity, which is the expression used in Para 4.1 of AS-9. In contrast, the definition of gross revenue in clause 19.1 includes gross revenue from non-licensed activities also. Thus, the submission is wholly sans substance and stands repelled. Finding to the contrary recorded by TDSAT considering the initial cost is set aside. It has to be seen as book value as on date of sale. The stand of TDSAT is approved in this regard in regard to assets/scrap, shares etc.

In re: Insurance claim in respect of capital assets:

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133. Where an asset is destroyed, and the insurance claim is received for more than its book value. The difference between the insurance claim received and the book value is treated as revenue by the DOT for computing AGR. The dispute was not raised initially by the licensees, while the order in the year 2007 came to be passed. It has been raised after this Court has remitted the case to the TDSAT in the year 2011. The TDSAT has held that if the asset destroyed is replaced immediately and the claim received is more than the actual cost of replacing the equipment, the difference would be taken as income; and in a case where the asset destroyed is not replaced immediately, the gain to the extent more than the gross book value is considered as income. The asset has appreciated over time, then insurance claim received more than the total cost, though being real gain, is not treated as revenue for clause 19.1 of the licence agreement.

134. On behalf of DOT, it is submitted that the tribunal has erred in making the classification of the revenue. In case the insurance claim received is more than the book value, it is to be treated as revenue. According to the definition in clause 19.1, the gross inflow of cash for the current year, over and above the book value, is to be treated gross revenue. There is no need to make any classification as to when an asset is destroyed and replaced later on. The insurance claim received more than depreciated book value has to be recorded in the profit and

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loss account under any other income, that too constitutes a gain, therefore, it will form part of the gross revenue in the calculation without netting off and on accrual basis. To say if the revenue to form part of gross revenue will be treated only when the insurance claim received is more than the book value. Therefore, the excess amount received over and above the book value shall be taken as revenue for calculation of gross revenue. For the use of accounting, the gain from the insurance claim, the bifurcation made by the contingencies, was uncalled for and cannot be culled out from the definition of gross revenue, which was to simplify the procedure of assessment of licence fee. What is the meaning to be given to the word 'immediately' would differ from case to case and determination of licence fee. The cost of replacement also depends upon various factors. An old asset may be replaced by a brand new one of the higher prices. For an accounting of gain from the insurance claim, the methodology classification adopted by DOT is not found to be proper and is not in tune with the definition of gross revenue.

135. It is submitted on behalf of the licensees that the amount received towards insurance claim is for indemnification towards loss of capital asset to compensate for the loss. The decision in *Vania Silk Mills v. C.I.T. Ahmedabad*, (supra) has been pressed into service wherein it has been held that while paying for the loss, the insurance

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company compensates for the loss. The insurance claim is not the value of the damage to property but only takes into consideration the amount required to restore it to its original condition. Insurance contracts are for indemnification. Therefore, it is submitted that the claims are not as revenue.

136. The submission raised on behalf of the licensees cannot be accepted as the insurance claim over and above the book value is considered as revenue and not the value of the capital asset as there is an inflow of cash received. It is accounted for in the profit and loss account. It has to form part of the gross revenue as defined in clause 19.1. The artificial bifurcation of insurance claim made by the TDSAT cannot be accepted and is contrary to contractual definition of gross revenue. The finding of TDSAT to the extent it is contrary to revenue is set aside.

In re: Amount of negative balance of pre-paid customer:

137. The negative balance occurs when a pre-paid customer exhausts the available talk-time. TSPs as a matter of policy, sometimes provides the customer with a small amount of loan talk-time as it may deem fit, say of the value of Rs.10 or Rs.20. The utilisation of this talk-time results in negative balance in the account of the pre-paid customer. The balance is recovered from the subsequent re-charge made by the

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customer. In case where the customer fails to re-charge the fresh top-up amount, the balance remains negative in the pre-paid account of the customer. The pre-paid vouchers are sold for a price for which the customer gets a fixed duration of talk-time/usage of the service. When it is exhausted, and long talk-time is used, it results in a negative balance. The TDSAT has held that the negative balance cannot be taken into account for computation of gross revenue as it is notional revenue, which is neither billed nor received. It is not due to the fault of the licensee, and the licensee does not gain anything from such usage beyond the permitted duration for the amount received by it.

138. The case set up by DOT is that the negative balance is communicated to the customer and also shown in the account. It is billed on accrual basis and becomes part of gross revenue. In case it is not realised, the same has the effect of bad debt, which is not allowed as a deduction as per the definition of gross revenue. In case it is not counted towards the gross revenue, it may encourage the licensee to give discounts increasing their gross revenue by such incentive and not paying the licence fee to the public exchequer.

139. It is apparent that the amount of negative balance is a business strategy, and the amount is adjusted in case re-charge is opted. Otherwise also, it is billed and reflected on accrual basis in the

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account of the customer. Though it has to form part of gross revenue for determination of licence fee under clause 19.1, the number of calls at the full value have to be measured without any discounts or incentive of such business strategy. It is a part of revenue. It cannot be deducted from the gross revenue to be worked out as per the definition of gross revenue under AS-9. Thus, the finding of the TDSAT cannot be said to align with the meaning of gross revenue in factual aspects of the case and is set aside.

In re: Reimbursement of the infrastructure operating expenses

140. The telecom service provider needs infrastructure like towers to operate. To achieve economies of scale, two or more companies may share one such passive infrastructure.

141. The licensees have submitted that setting up of passive infrastructure like towers is not an activity which requires licence. The tower structure is sometimes erected by independent parties and is offered to service providers on rent. Similar activity, when carried out by a service provider, should not be treated as part of licensed activity. Therefore, the revenue earned by licensee from rent/leasing out passive infrastructure should not form part of adjusted gross revenue. It is also submitted that renting/leasing of dark fibre towers etc. is carried out by IP-1 operators. These operators do not require any

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licence. It is a non-licensed activity and should be out of the purview of adjusted gross revenue.

142. The TRAI recommended that renting and leasing of the passive infrastructures by service providers is a regular telecom activity and should, therefore, be part of AGR.

143. The TDSAT has observed that in case A has one tower at a particular building, the same tower can be permitted to be used by B. B would pay rent to A for the use of this tower. In case B pays Rs.100 as rent to A, A will have to incur operating expenses for keeping the equipment in the tower, functional, which may inter alia, require diesel generator. If monthly expenses for such operating expenses is Rs.10, then A and B would divide it in equal proportions. Thus, Rs.5 paid by B to A would be a revenue for A (Airtel). The TDSAT has deducted Rs.5 from the gross revenue on a notional logic that the rent of Rs.100 should be treated as rent of Rs.95 plus Rs.5 towards reimbursement of expenditure. Thus, according to TDSAT, usage of facility like rent has to be included in the gross revenue, and reimbursement of spending should not be included in the gross revenue provided it is shown separately in the invoice and not shown in the profit and loss account as revenue.

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144. The stand of DOT is that the interpretation is expressly contrary to clause 19.1, which categorically includes "revenue from permissible sharing infrastructure". The definition of gross revenue does not permit differentiation between the reimbursement of expenses and rent for the usage of the facility. By the interpretation of TDSAT, accounting jugglery would take place, and the licensee will try to derive maximum reimbursement of infrastructure operating expenses under the category of "reimbursement of expenditure" rather than under the "rent category". The company may form cartel and put up a common expenditure in the type of reimbursement of the cost it would give a chance for netting off the expenditure against revenue, which is prohibited in clause 19.1.

145. In the definition of gross revenue, the item sharing of infrastructure facility is explicitly mentioned. In the format in Appendix 2 to Annexure-II also, the entire amount is required to be shown. It has been specifically mentioned that there cannot be any setting off of the amount of gross revenue, and the entire money received has to be treated as the gross revenue for the determination of licence fee. It is not the determination of profit. The gross revenue carries a different definition, and the intendment is clear to prevent disputes. Thus the entire amount received by the licensee on account

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of sharing of passive infrastructure has to be counted in the gross revenue while working out AGR. Thus, the finding to the contrary recorded by the TDSAT is set aside.

In re: Waiver of late fee

146. Late fee is a penalty charged by the licensee in case customer fails to pay the bill within the due date. Sometime late fee is waived off by the licensee as a goodwill gesture at the time of payment. The submission raised on behalf of the licensee is that the licence fee should be payable on the realised revenue. What has not been realised, cannot form part of revenue.

147. The TDSAT in the order passed in 2007 held that the amount of waiver of late fee has to be excluded from the gross revenue. The recommendation to the contrary made to the TRAI was set aside. The TDSAT in the impugned order passed in 2015 has held that the late fee is a penalty and the penalty that has been waived off, cannot be added to the revenue. In the first place, penalty cannot be said to be revenue, and if the penalty which is waived off, is added to revenue, it would be a case of notional income being subjected to charge.

148. DOT submits that if the operator bills the late fee, it would be taken as part of gross revenue, whether it is realised or not.

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149. In case the late fee is attracted, it has to be counted towards gross revenue without setting off, and if the operator waives it off, it has the same effect of discount being given to the customer which cannot be allowed as no deduction (net off) is allowed under clause 19.1. When once the late fee amount is billed and the amount is not paid within the due date, and the late fee is attracted, merely non-realisation of the same for any reason, cannot be excluded from the part of gross revenue as per its definition. Gross revenue has to be taken whether it is received or not, and netting off is not allowed under clause 19.1. Once the amount has been billed, it is for the licensee to realise it. There cannot be any justification for excluding late fee from the gross revenue. In case money is lost by the service provider, the same losses cannot be excluded from the AGR for the determination of licence fee.

150. Late free is included explicitly in the definition of gross revenue. As such, it has to be computed as part of gross revenue. Merely by waiver, it cannot be ousted from the purview of gross revenue once it becomes leviable. Thus, the finding of the TDSAT is not sustainable and is set aside.

<u>In re: Gains from roaming charges and PSTN pass-through charges</u>

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151. Roaming charges apply when the customer leaves the home network area and roams into the network or coverage area of another service area. Pass-through charges are charges paid by the licensee to the licensor for allowing their subscribers' calls to be carried on their networks. Clause 19.2 of the licence agreement provides for certain deductions of roaming charges and PSTN pass-through charges from gross revenue on actually paid basis. The TDSAT considered grievance on behalf of the licensees that many a time it happens that the licensee to whom such charges to be paid, happens to be the same company. It is stated officers of the respondent do not allow deduction of such charges on the ground that there is no such actual payment as the company making as well as receiving the payment is the same. But the revenue is counted under both the licences to compute the gross revenue, and the tribunal has observed that irrespective of the company being the same, pass-through charges shall be allowed to be deducted as soon as the same are accounted as revenue under the different licence held by the company.

152. DOT submits that merely because one company has a licence of more than one circle, there will not be common accounts of that company. The licence fee is realised as per the separate account. In case both the licences are different, accounts are different, and payment of licence fee for each circle is different, Idea (Delhi Circle

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would pay to Idea (Bombay Circle) on actual basis as against on accrual basis, becomes revenue in the accounts of Idea (Bombay Circle).

153. In this regard, the definition is apparent as to what deduction has to be made from gross revenue. Thus, it is more or less a problem of particular calculation. How calculation is to be made?

154. Clause 19.2 makes it clear that detailed call charges paid to other eligible telecommunication service providers within India shall be excluded from gross revenue. Similarly, roaming revenues passed on to other eligible/ineligible service providers are also excluded. In that case, they must be actually passed over to the licensees in different service areas. Only then it can be excluded from gross revenue and not otherwise.

155. Revenue from operating FCC 214 licence, USA, the problem arises in the case of Bharti BILGO which is an isolated case where it has a branch of Bharti Airtel in U.S. The submission of Bharti Airtel is that since the income generated by the branch is a separate income, it cannot be included in the income of Bharti Airtel in India. In the year 2007, the TDSAT has observed that the VSNL had the monopoly for ILD service before 1.4.2002. VSNL ceased to be a Government-owned

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company. The old ILD licence permitted VSNL to carry both the activities, i.e., ILD service as well as TV uplinking. Under the new regime, a separate licence had to be obtained. Licence for TV uplinking service was obtained from the Ministry of Information and Broadcasting Ltd. while DOT issued the ILD licence. TV uplinking service cannot be rendered in the ILD licence due to the definition of the word service in that licence. Since for TV uplinking facility, a separate licence is required, such service could not be rendered under an ILD licence. The ILD licence issued by DOT carries a revenue-sharing scheme out of the gross revenue, which is not there in case of TV uplinking licence issued by the Ministry of Information & Broadcasting. The said licence is practically free. Therefore, other service providers of TV uplinking service do not have to pay almost any licence fee. The TDSAT had rejected the recommendation of TRAI according to which revenue from TV uplinking and Internet service is to form part of AGR as it was held to be a form of AGR. It was held by TDSAT that revenue from these services is to be excluded from AGR.

156. In the impugned order, the tribunal has held that the revenue from operating FCC 214 licence arises not from the licence granted by DOT but by FCC. Hence, this inflow cannot be taken as part of AGR unless the DOT can establish that there is technical, managerial and financial interconnection interlacing and synergy between company's

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operations in the USA and India the gross revenue from the services of 214 FCC licence is reflected in the company's accounts.

157. The stand of the DOT is that if this is permitted, every TSP/licensee in India would have branch offices in other parts of the world and would treat majority of the international income of the licensee as having been generated in the branch office outside the country and would not take it into account from calculation of gross revenue for payment of licence fee. It could not be said that the situation would not affect the profitability of the company since the revenue is generated in the branch office of the company but will affect the calculation of gross revenue as only a repatriated amount would be taken for calculation. Relying on the observations made by this Court in *Union of India v. AUSPI* (2011) at Para 49 in which this Court has held that in such a scenario, the business can be transferred to a separate legal entity to avoid the branch office's revenue to be clubbed with the main office. The income of the subsidiaries has to be included in the case of Bharti Airtel, it has separate subsidiaries, which are separate legal entities in and outside India, and the income generated from such subsidiaries are not considered or included while computing the adjusted gross revenue of Bharti Airtel. Since BILGO is a branch of Bharti Airtel and not a separate legal entity, because of the previous decision of 2011, the business for which no licence is

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required, should be transferred to a separate legal entity to avoid computation of gross revenue, if not due it has to be part of gross revenue.

158. In our opinion, para 49 of the judgment of 2011 takes care of the submission. Once there is a branch, maybe based abroad, its income and the activity of the branch may not require any licence since licensee is undertaking the activity, and the definition of adjusted gross revenue activities includes revenue beyond the licence. The same has to be included in the gross revenue. The submission stands concluded by the previous decision, and we find no merit in the submission.

159. The finding recorded by the TDSAT, to the extent it is contrary to the DOT, based upon certain conditions, is set aside.

In re: Non-refundable Deposits

160. It is permissible for the licensee to accept deposits from its customers, which at times are non-refundable but are used to provide discounts on the bills raised. Concerning non-refundable deposits, the claim was not pressed by the learned counsel appearing on behalf of DOT before the tribunal. However, we find that the concession given

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by the learned counsel on behalf of DOT concerning non-refundable deposits is palpably incorrect.

161. We had put learned counsel for the parties at notice during the hearing as to the correctness of the finding recorded by the tribunal based on the concession, which was prima facie incorrect. We have heard learned counsel for the parties on the issue whether non-refundable deposit forms part of the revenue of the licensee.

162. Appendix II to Annexure-II of the licence agreement: Item No.5, in Section D of the format, is an entry concerning non-refundable deposits from subscribers. It has to be included as per the format in the statement of the gross revenue. The definition of gross revenue is wide enough to cover non-refundable deposits as non-refundable deposits are revenue earned from licensed activities. Non-refundable deposits are to be treated as accrued in the profit and loss account as per Annexure III of the licence agreement. It is apparent that non-refundable deposits are in fact revenue received in advance from the subscribers. Even if they are used for discount etc. in the bills, they form part of revenue. Licensees themselves treat non-refundable deposits as income under section 80 IA (2a) of the Income-tax Act. Be that as it may. The finding recorded by the TDSAT concerning non-refundable deposits not being part of the revenue based upon wrong

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concession made by the learned counsel appearing for the DOT, is as a result of this is liable to be set-aside. It was expected of the TDSAT to consider the concession following law, as such cases cannot be decided and ought not to be decided on the basis of prima facie incorrect concession of the counsel, it has to be legally tested. In case any admission is made, its correctness has to be examined.

In re: Licence fee demand where spectrum is not granted

163. Concerning demand of licence fee in the circle where the licensee was not granted spectrum: When the spectrum itself has not been issued, licence activity has not come into play, no revenue is generated. TDSAT has held that the demands of licence fee based on other activities, are bad, unreasonable, invalid, and unsustainable. During the period in question, the UAS licence came bundled with the spectrum, and it is evident that without a spectrum, the licensee could not work out the licence. The finding recorded by the TDSAT is appropriate. Once there is no activity under a licence, merely on the basis that the licence has been issued, no revenue earned, it cannot be shared. Still, there is no activity under the licence, *i.e.*, based on non-licensed activities, the revenue sharing could not have been asked. It would be an unreasonable and unconscionable bargain to pass on such a liability. We agree with finding recorded by TDSAT in the case of Videocon & S. Tel.

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In re: Income from interest and dividend

164. Argument has also been raised concerning interest income and dividend income. Since these items are expressly included in the definition of gross revenue in clause 19.1. There is no scope to entertain the submission concerning the exclusion of interest and dividend from gross revenue. Whatever, interest and dividend earned from the licensing and non-licensing activities, have to form part of gross revenue for determination of licence fee.

In re: Bad-debts written off

165. The bad debts written off are not allowed as a deduction by the DOT while computing adjusted gross revenue, bad debt is written off when recovered subsequently, it cannot be added to the gross revenue. The TDSAT in the impugned order, has observed as under:

> "Licensees submit that if a bad debt, that is written off is later on recovered, it is required to be reported to the DoT, this, according to the licensees, that bad debts written off may be allowed as deductions from revenue but as and when those are recovered subsequently those should be added on to revenue. The submission is not acceptable but it needs to be clarified that when any bad debt written of is recovered finally, it may not be charged to license fee again as that would result in double charging of license fee on the same revenue."

166. TDSAT has not accepted the submission of the licensees. However, at the same time, it has safeguarded the interest of the licensees. In case it is realised later on, it may not be charged again. It should be charged only once. We find the finding to be appropriate. No

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case for interference in the findings recorded by the TDSAT is made out.

In re: Liability written off

167. The TDSAT has observed as under:

> "Take the example of a company that makes a provision for retirement benefits for the amount. For income tax, it will be considered as an expense, but no discount from income will be allowed for the sum for determining the license fee. If such a liability is written off on a future date and shown accordingly in the profit and loss statement it surely cannot be brought to charge for a second time for computing licence fee."

No objection has been raised on behalf of DOT to the said findings.

168. DOT submits that the reasoning is correct. However, TDSAT could not have undertaken this exercise head-wise. It is presented on behalf of the licensees that notional revenue cannot be included in the revenue of the company based on provisional liability being finalised by actual liability. The amount kept as provisional liability cannot be treated as income. In our opinion, TDSAT has rightly held that if it is to be considered as an expenditure, liability has to be treated as an expense, and no discount on the income will be allowed for the sum for determining the licence fee. It cannot be charged for the second time for computation of licence fee.

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169. In *Rajputana Trading Co. Ltd. v. Commissioner of Income Tax, West Bengal-I*, (1982) 2 SCC 775, it has been observed that once liability is written off, it has to be added as income from the business under section 10(2A) and such income should be given some local habitation or name.

170. Hence, we hold that it is to be treated as an expense, and discount cannot be allowed for determining the licence fee.

In re: Inter-corporate loan

171. Certain licensees have raised the loan being holding companies for the subsidiaries from various banks and financial institutions. In turn, this amount is given to the subsidiaries for their day-to-day operations. On this amount, the subsidiaries pay interest at the SBI Prime Lending Rates (PLR) every quarter, which in turn is paid by the holding company to the banks/financial institutions. DOT seeks to include the interest received from the subsidiaries companies in the revenue of the holding company. The TDSAT has included the income from interest on inter-corporate loan as part of gross revenue. It is submitted on behalf of licensees that as the holding company only performs the function for the subsidiary company and the interest amount is only reimbursement of the amount paid to the bank, it

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cannot be included in the gross revenue. As such, it does not form part of gross revenue.

172. The submission has no legs to stand, and it is apparent from the definition of gross revenue in clause 19.1 that income from interest is to be included in the gross revenue. Thus, the submission is baseless. By the fact that the holding company gives loan to the subsidiary company and recovers interest from subsidiaries, is good enough to make it a part of gross revenue.

173. Thus, interest income from inter-corporate loan has to be included in the gross revenue for working out the licence fee.

In re: Revenue under IP-1 Registration

174. Whether it can be claimed/clubbed under revenue under CUG licence? It is apparent from the definition of gross revenue that income from licensed activities and even from non-licensing activities and any other miscellaneous revenue of the licensee has to be included. Thus, DOT has rightly included the income of the licensee from IP registration under the CUG licence.

In re: Income from management consultancy services:

175. When we consider the definition of gross revenue, it has to be included in the adjusted gross revenue to work out the licence fee. The

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income from management support and consultancy of the licensee cannot be excluded. Submission to the contrary cannot be accepted and is as a result of this rejected.

176. The TDSAT has also rightly held in the case of Bharti Airtel that the revenue from Cable Landing Station has to be included in the gross revenue.

In re: Res Judicata

177. Coming to the submission raised on behalf of DOT that the findings in *Union of India v. AUSPI* (2011) (supra) operate as res judicata with respect to items dealt with and act as constructive res judicata with respect to the questions that were not raised in the petition which were filed in Petition No.7/2003 and Petition No.82/2005. The challenge was made to most items on the ground; they could not be included in the definition of gross revenue; same did not form part of the licensed activity. However, this Court has repelled this submission and has included the such items in the definition of gross revenue. It is clear that once this Court has held that the income which covered under the definition of gross revenue and were claimed to be excluded earlier on the ground that they could not form part of gross revenue, the definition so including them was *ultra vires* and illegal/invalid. The same heads are now sought to be excluded by taking the shelter that they do not form part of revenue under AS-9.

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Though they form part of gross revenue under Clause 19.1. There is no scope left for this exercise. Though, we have examined every question raised on merit again as it was submitted that this Court had left the question open as to proper interpretation. This Court has held that TRAI and the TDSAT had no jurisdiction to decide on the validity of the definition of gross revenue and adjusted gross revenue in the licence agreement and to exclude items of revenue, which were included in the definition of gross revenue in the licence agreement, whether they are from non-licencing activities.

178. Considering whether the licensee can challenge the computation of adjusted gross revenue and if so, at what stage and on what ground, this Court has observed that one such dispute can be that computation of adjusted gross revenue made by the licensor and the demand raised based on such computation is not following the licence agreement. The dispute can be raised after the licence agreement has been entered into at the appropriate stage, when the demand is raised by the licensor/licensee. This Court observed if the dispute is raised, TDSAT will have to go into the facts and material to decide demand is as per licence, in particular, the definition of adjusted gross revenue in the licence agreement. It can also interpret the terms and conditions of the licence agreement, as the tribunal has not gone into the facts and material relating to the demand of a particular licensee. It was further

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observed that the tribunal may go into the facts and material based on which demand is raised to make the computation. Thus, the scope of the latter observations is not so wide to take out certain items, though included explicitly in the definition of gross revenue and to hold that they do not to form part of it. Income from licensing and non-licensing activities are in the ambit of gross revenue had been determined conclusively in 2011 judgment. Only facts and material can be seen for computation.

179. It was submitted that the computation involves the process of that of computing, numbering, reckoning, and distributing. The account of estimation by rule of law is distinguished from the arbitrary construction of the parties. *The reliance has been placed on the decision in Hindustan Machines Ltd. v. Union of India*, 1985 (2) SCC 197.

180. Reliance has also been placed on *Lohia Machines Ltd. & Anr. v. Union of India & Ors.*, (1985) 2 SCC 197 in which for income tax, the term computation has been considered. Wharton Law Dictionary reference has also made as to the definition of computation based upon *Lohia Machines Ltd.* (supra). It is a legal process of computing inclusion and exclusion of items, which may otherwise be regarded as

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forming part of the capital employed, as interpreted by this Court in *Lohia Machines Ltd.* (supra) in which following observations have been made:

> "**18.** It is because the expression "capital employed" has a variable meaning that it has been enacted by the legislature that, to calculate the relief allowable under Section 80-J sub-section (1), the statutory percentage must be applied to the "capital employed" *as computed in the prescribed manner*. How the "capital employed" shall be computed is left to be prescribed by the Central Board of Revenue by making Rule or Rules under Section 295 of the Income Tax Act, 1961. The process of computation would involve both inclusion and exclusion of items, which may possibly be regarded as falling within the expression "capital employed". The Central Board of Revenue may include some items and exclude some others while prescribing the manner of computation of the "capital employed". This is the sense in which the word "computed" has been consistently used by the legislature while enacting legislation of this kind. Turning to the earliest legislation where the word "computed" has been used in relation to the "capital employed", we find that in the Excess Profits Tax Act, 1940 for determining the standard profits, the statutory percentage was required to be applied to the average amount of capital employed as *computed* in accordance with the Second Schedule and the Second Schedule provided for inclusion of certain items and exclusion of certain others including borrowed moneys and debts. The legislature clearly, in this statute, regarded exclusion of borrowed moneys and debts as implicit in the process of computation of the "capital employed" or to put it differently, according to legislative usage, computation of the "capital employed" could legitimately involve as part of the process, exclusion of items such as borrowed moneys and debts. So also in the Business Profits Tax Act, 1941 and the Super Tax Profits Tax Act, 1953, the word "computed" was used in the same sense as involving in the process of computation of the "capital employed", exclusion of borrowed moneys and debts. Similarly, in the Companies (Profits) Surtax Act, 1964 also, the word "computed" has been used in the same sense. Of course it may be pointed out that in this statute the word "computed" has been used in relation to the "capital of the company" and not in relation to the "capital employed" but that would make no difference, because what we are concerned with here is the sense in which the word "computed" has been used and whether it involves the process of exclusion as well as

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inclusion and on that point, the Act analogically throws considerable light. The statutory deduction which must be made from the chargeable profits for the purpose of determining the charge of Surtax under this statute is defined to mean "an amount equivalent to ten percent of the capital of the company as computed in accordance with the provisions of the Second Schedule" and the Second Schedule after its amendment by Finance Act 66 of 1976 does not provide for inclusion of borrowed moneys and debts in computation of the capital of the company though it provides for inclusion of the paid-up share capital and reserves. It will thus be seen that there is legislative history behind the use of the word "computed" in relation to the "capital employed" and it has been legislatively recognised as involving, as part of the process of computation, both inclusion as well as exclusion of items which may otherwise be regarded as forming part of the "capital employed." It is in the context of this background and not by way of a virgin attempt that the word "computed" has been used by the legislature in relation to the "capital employed" in Section 80-J sub-section (1).

19. It may be noted that even in the Income Tax Act, 1961 the word "computed" has been consistently used in relation to "income" in the sense of involving both inclusion and exclusion of items of income. Section 2 clause (45) defines "total income" to mean the total amount of income referred to in Section 5 "computed in the manner laid down in this Act". Now, if we look at the provisions in the Income Tax Act, 1961, which lay down the manner of computation of the total income, it would be clear that the process of computation of total income involves both inclusion and exclusion of various items of income. Section 10 provides that in computing the total income of a previous year of any person, any income falling within any of the clauses of that section shall not be included in the total income, though such income which is required to be excluded is undoubtedly income and therefore part of total income according to the plain natural connotation of that expression. But it is required to be excluded in determining the charge of tax because "total income" is defined as total amount of income, "*computed* in the manner laid down in the Act". The same position obtains also in regard to Section 11 and it excludes certain categories of income in computation of the total income. Then, we may refer to Section 29 which provides that the income from profits and gains of business and profession shall be computed in accordance with the provisions contained in Sections 30 to 43-A. These sections provide for inclusion and exclusion of various items in computing the total income. Sections 80-A to 80-VV also provide for deductions to be made in computing the total

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income and under sections such as 80-HH, 80-JJ and 80-O, even an item which indisputably forms part of income of an assessee, is required to be excluded in computing the total income chargeable to tax. No one has ever argued and indeed it is impossible even to conceive of such an argument, that when Section 2 clause (45) defines total income as the total amount of income computed in accordance with the provisions of the Act, what is indubitably part of income cannot be excluded in the computation. However, the argument of Mr. Palkhivala was that in the case of definition of "total income" the exclusion of items of income in the process of computation is provided for by the legislature itself and is not purported to be done by any rule-making authority. The legislature, stated Mr. Palkhivala, can cut down the width and amplitude of the expression "total amount of income" by expressly providing that particular item or items shall be excluded in the computation of the total amount of income, but the Rule-making authority cannot do so, because by doing so, it would be derogating from the provisions of the statute. Now we have already pointed out that since the expression “capital employed” has a variable meaning which in a given case may or may not include borrowed moneys, the Central Board of Revenue, could, in exercise of its rule-making power, exclude borrowed moneys in computation of the “capital employed” and in doing so, it would not in any way be acting contrary to the mandate of the statute. But the point which we wish to emphasise here, while referring to the definition of “total income” in Section 2 clause (45), is that the word “computed” have been used by the legislature as comprehending within its scope not only inclusion but also exclusion of certain items of income which are admittedly and without doubt, part of the income of the assessee. We find that even in some of the sub-sections of Section 80-J the word “computed” has been used in the same sense as involving both inclusion and exclusion. The second proviso to sub-section (4) of Section 80-J provides that “where any building or any part thereof previously used for any purpose is transferred to the business of the industrial undertaking, the value of the building or part so transferred shall not be taken into account in computing the ‘capital employed’ in the industrial undertaking”. So also Explanation 2 to the same sub-section enacts in so many terms that in a case falling within its scope and ambit, “the total value of the machinery or plant or part so transferred shall not be taken into account in computing the ‘capital employed’ in the industrial undertaking”. Then again, the Explanation to sub-section (6) of Section 80-J makes a similar provision for exclusion of “total value of the building machinery or plant or part so transferred” in computing the “capital employed” in the case of business of a hotel. It will thus be seen that, even

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> according to these provisions in Section 80-J, the process of computation of the "capital employed" can legitimately exclude item or items which are plainly and indubitably part of the "capital employed". Of course the exclusion enacted by these provisions is made by the legislature and not by the Rule-making authority, but again, if we may emphasise, the point is not whether an exclusion is made by the legislature or by the Rule-making authority but whether such exclusion is implicit in the process of computation so as to be comprised in it. And on this point not only the provisions of the Excess Profits Tax Act, 1940, the Business Profits Tax Act, 1947, the Super Profits Tax Act, 1963 and the Companies (Profits) Surtax Act, 1964 but also the various provisions of the Income Tax Act, 1961 referred to by us, clearly indicate that the word "computed" has been used by the legislature in sub-section (1) of Section 80-J as involving not only inclusion but also exclusion of items which may otherwise be regarded as falling within the expression "capital employed". It is left by the legislature to the Central Board of Revenue as rule-making authority to prescribe the manner in which the "capital employed" shall be computed and in so prescribing, the Central Board of Revenue may include or exclude items which may be regarded as forming part of the "capital employed"."

181. This Court has considered the matter given the provisions contained in section 80J of the Income Tax Act and has observed that capital employed has variable meanings. It has been legislatively recognised both inclusion as well as exclusion of the items, which may otherwise be regarded as forming part of the capital employed. Thus, the expression computation has not been used in the 2011 decision to include those very items from the purview of the definition of gross revenue, which have been held to be covered by this Court to be part of gross revenue. According to the 2011 judgment, whether the demand is in terms and conditions of the licence agreement and, in particular, the definition of adjusted gross revenue, could have been

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seen. The TDSAT could also view the facts and material based on which demand has been raised, but it was not permissible to exclude the items which are included in the definition of gross revenue, as is sought to be done. Be that as it may. We have examined all the submissions which have been raised on merits again, uninfluenced by the plea of res judicata/constructive res judicata, and we have found no merit in the submissions which have been raised. Thus, we refrain from burdening the judgment with the decisions cited at the Bar concerning *res judicata* and *constructive res judicata.*

In re: Levy of interest, penalty, and interest on penalty:

182. Levy of licence fee is provided in clause 20.2. In case of any delay in payment of licence fee beyond the stipulated period would attract penalty at the rate, which would be 2% above the Prime Lending Rate (PLR) of the State Bank of India. As per clauses 20.5 and 20.8, if the licensee does not pay the demand, consequences would follow. The clauses are extracted hereunder:

> "20.5 Any delay in payment of Licence Fee payable or any other dues payable under the LICENCE beyond the stipulated period will attract interest at a rate which will be 2% above the Prime Lending Rate (PLR) of State Bank of India existing as on the beginning of the Financial Year (namely 1st April) in respect of the licence fees pertaining to the said Financial Year. The interest shall be compounded monthly and a part of the month shall be reckoned as a full month for the purposes of calculation of interest. A month shall be reckoned as an English calendar month.
>
> 20.8 In case, the total amount paid as quarterly Licence Fee for the 4 (four) quarters of the financial year, falls short by

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> more than 10% of the payable Licence Fee, it shall attract a penalty of 50% of the entire amount of short payment. However, if such short payment is made good within 60 days from the last day of the financial year, no penalty shall be imposed. The amount of penalty shall be payable within 15 days of the date of signing the audit report on the annual accounts, failing which interest shall be further charged per terms of Condition 20.5."

183. It is apparent that in case licence fee is not paid as per clause 20.2, the agreement is that the outstanding will attract interest at the rate of 2% above the Prime Lending Rate of the State Bank of India existing as on the date of the beginning of the financial year, that is first of April. The interest shall be compounded monthly. Under clause 20.8, the penalty is to be paid in case the total amount paid as quarterly licence fee falls short by more than 10% of the payable licence fee, it shall attract a penalty of 50% of the entire amount of short-payment. A grace period of 60 days is granted, otherwise, it will carry the interest. The amount of penalty shall be payable within 15 days of the date of signing the audit report, failing which interest shall be charged as per terms of clause 20.5.

184. Whether interest and penalty have to be levied or not is to be gone into on the facts and circumstances of the case.

185. The TDSAT has held that it would not be appropriate to levy interest as well as the penalty. In case interest has to be levied, it has

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to be collected at a nominal amount. The TDSAT has not specified the same.

186. DOT submits that as per the terms and conditions of the agreement, interest has to be paid for delayed payment. The contract has been entered into, and the rate of interest has been fixed therein. It is not for the court to modify the same and penalty clause is also attracted considering the nature of the objections raised as to the very definition of gross revenue whereas parties have fully understood the meaning of gross revenue and the regime of revenue sharing was highly beneficial, and they have earned revenue and failed to share the same as compared to the fixed fee regime. Thus, it was incumbent upon the licensees to make payment of interest and penalty as agreed.

187. The licensees submit that when once this Court passes an order in the present appeals, it will have to be given effect to as to which items can be included or excluded in the gross revenue. It is only if the demand is not then paid within the stipulated period; the question of payment of interest would arise. It is further submitted that the penalty is for failure to pay the demand within the specified period. Penalty requires *mens rea*, contumacious conduct, or deliberate disregard of the person's statutory liability. Parties are in litigation

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since 2003. TDSAT decided on the validity of definition in the year 2007. After that, this Court passed judgment in 2011 and remitted the case to TDSAT. TDSAT has again decided concerning certain items in favour of the licensees, and throughout litigation, demands were stayed by this Court/TDSAT. Disputes are bona fide disputes. The licensees have paid about 80% of the demand raised by DOT, and the instant dispute pertains only to 20% of the demand on which stay was in operation. Under section 74 of the Indian Contract Act, compensation must be only reasonable compensation. DOT has also levied penalty and interest on penalty. In the absence of deliberate refusal to pay, no penal consequences like penalty can be imposed. It is also submitted that a fiscal contract/agreement is to be construed strictly, and if there is a doubt, the same needs to be interpreted in favour of the assessee. Non-payment was neither deliberate nor under defiance of any law. The licensees have placed reliance on:

A. *Hindustan Steel Ltd. v. State of Orissa*, 1969 (2) SCC 627, in which following observations are made:

> "8. Under the Act penalty may be imposed for failure to register as a dealer — Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for

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> failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

B. *Akbar Badrudin Giwani v. Collector of Customs*, 1990 (2) SCC 203,

> "**60.** In the present case, the Tribunal has itself specifically stated that the appellant has acted on the basis of bona fide belief that the goods were importable under OGL and that, therefore, the appellant deserves lenient treatment. It is, therefore, to be considered whether in the light of this specific finding of the Customs, Excise & Gold (Control) Appellate Tribunal, the penalty and fine in lieu of confiscation require to be set aside and quashed. Moreover, the quantum of penalty and fine in lieu of confiscation are extremely harsh, excessive and unreasonable bearing in mind the bona fides of the appellant, as specifically found by the Appellate Tribunal.
>
> **61.** We refer in this connection to the decision in *Merck Spares* v. *Collector of Central Excise & Customs, New Delhi*, (1983) 13 ELT 1261 (CEGAT), *Shama Engine Valves Ltd.* v. *Collector of Customs*, (1984) 13 ELT 533 (CEGAT), *Bombay* and *Madhusudan Gordhandas & Co.* v. *Collector of Customs, Bombay* (1987) 29 ELT 904, wherein it has been held that in imposing penalty the requisite mens rea has to be established. It has also been observed in *Hindustan Steel Ltd.* v. *State of Orissa*, (1969) 2 SCC 627, by this Court that: (SCR HN p. 753)
>
>> "The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

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> **62.** In the instant case, even if it is assumed for argument's sake that the stone slabs imported for home consumption are marble still in view of the finding arrived at by the Appellate Tribunal that the said product was imported on a bona fide belief that it was not marble, the imposition of such a heavy fine is not at all warranted and justifiable."
>
> (emphasis supplied)

C. *Jaiprakash Industries Ltd. v. Commissioner of Central Excise, Chandigarh*, 2003 (1) SCC 67, para 8.

> "**8.** In this case, there was a divergent view of the various High Courts whether crushing of bigger stones or boulders into smaller pieces amounts to manufacture. In view of the divergent views of the various High Courts, there was a bona fide doubt as to whether or not such an activity amounted to manufacture. This being the position, it cannot be said that merely because the appellants did not take out a licence and did not pay the duty the provisions of Section 11-A got attracted. There is no evidence or proof that the licence was not taken out and/or duty not paid on account of any fraud, collusion, wilful misstatement or suppression of fact. We, therefore, set aside the demand under the show-cause notice dated 3-5-1993."
>
> (emphasis supplied)

D. In *Tecumseh Products India Ltd. v. Commissioner of Central Excise, Hyderabad*, 2004 (6) SCC 30, it was held as under:

> "**7.** But, insofar as the application of extended period of limitation provided under Section 11-A is concerned, we do not think that the Tribunal is justified because it was not clear as to whether if any part is used for the purpose of repairing a machinery would amount to manufacture. In fact, the Tribunal on a detailed analysis and after going into several processes carried out by the appellant, came to the conclusion that the stators which were used in the repairing of the compressors involved manufacturing activity. This circumstance itself shows that there was bona fide dispute between the parties in regard to the question whether stators made ready for the purpose of use of compressors involved any manufacturing activity or not. Therefore, to the extent the authorities invoked Section 11-A of the Act and imposed penal interest and other

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> penalties shall stand set aside and the order made by the Tribunal stands modified to that extent."
>
> (emphasis supplied)

E. In *J. K. Synthetics Ltd. v. Commercial Taxes Officer*, 1994 (4) SCC 276, following observation has been made:

> "**17.** Let us look at the question from a slightly different angle. Section 7(1) enjoins on every dealer that he shall furnish prescribed returns for the prescribed period within the prescribed time to the assessing authority. By the proviso the time can be extended by not more than 15 days. The requirement of Section 7(1) is undoubtedly a statutory requirement. The prescribed return must be accompanied by a receipt evidencing the deposit of full amount of 'tax due' in the State Government on the basis of the return. That is the requirement of Section 7(2). Section 7(2-A), no doubt, permits payment of tax at shorter intervals but the ultimate requirement is deposit of the full amount of 'tax due' shown in the return. When Section 11-B(*a*) uses the expression "tax payable under sub-sections (2) and (2-A) of Section 7", that must be understood in the context of the aforesaid expressions employed in the two sub-sections. Therefore, the expression 'tax payable' under the said two sub-sections is the full amount of tax due and 'tax due' is that amount which becomes due ex hypothesi on the turnover and taxable turnover "shown in or based on the return". The word 'payable' is a descriptive word, which ordinarily means "that which must be paid or is due, or maybe paid" but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'. Therefore, the conjoint reading of Sections 7(1), (2) and (2-A) and 11-B of the Act leaves no room for doubt that the expression 'tax payable' in Section 11-B can only mean the full amount of tax which becomes due under sub-sections (2) and (2-A) of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under Section 7 of the Act and, therefore, it would be difficult to hold that the 'tax payable' by him 'is not paid' to visit him with the liability to pay interest under clause (*a*) of Section 11-B. It would be a different matter if the return is not approved by the authority,

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but that is not the case here. It is difficult on the plain language of the section to hold that the law envisages the assessee to predicate the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible."

(emphasis supplied)

F. *Kailash Nath Associates v. Delhi Development Authority & Anr.*, 2015 (4) SCC 136, paras 40 & 43

"**40.** From the above, it is clear that this Court held that *Maula Bux v. Union of India*, (1969) 2 SCC 554, was not, on facts, a case that related to earnest money. Consequently, the observation in *Maula Bux* that forfeiture of earnest money under a contract if reasonable does not fall within Section 74, and would fall within Section 74 only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case. The law laid down by a Bench of five Judges in *Fateh Chand v. Balkishan Dass*, (1964) 1 SCR 515, is that *all stipulations* naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English common law by enacting a *uniform principle* that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in *Fateh Chand case* was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74."

(emphasis supplied)

G. *Central Bank of India v. Ravindra & Ors.*, (2002) 1 SCC 367, paras 38, 55

"**38.** However "penal interest" has to be distinguished from "interest". Penal interest is an extraordinary liability incurred by a debtor on account of his being a wrongdoer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. Thus, while liability to pay interest is founded on the doctrine of compensation, penal interest is a penalty founded on the

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doctrine of penal action. Penal interest can be charged only once for one period of default and therefore cannot be permitted to be capitalised.

55. During the course of hearing it was brought to our notice that in view of several usury laws and debt relief laws in force in several States private moneylending has almost come to an end and needy borrowers by and large depend on banking institutions for financial facilities. Several unhealthy practices having slowly penetrated into prevalence were pointed out. Banking is an organised institution and most of the banks press into service long-running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein, and bind themselves by the stipulations articulated by the best of legal brains. Borrowers other than those belonging to the corporate sector, find themselves having unwittingly fallen into a trap and rendered themselves liable and obliged to pay interest the quantum whereof may at the end prove to be ruinous. At times the interest charged and capitalised is manifold than the amount actually advanced. Rule of damdupat does not apply. Penal interest, service charges and other overheads are debited in the account of the borrower and capitalised of which debits the borrower may not even be aware. If the practice of charging interest on quarterly rests is upheld and given a judicial recognition, unscrupulous banks may resort to charging interest even on monthly rests and capitalising the same. Statements of accounts supplied by banks to borrowers many a times do not contain particulars or details of debit entries and when written in hand are worse than medical prescriptions putting to test the eyes and wits of the borrowers. Instances of unscrupulous, unfair and unhealthy dealings can be multiplied though they cannot be generalised. Suffice it to observe that such issues shall have to be left open to be adjudicated upon in appropriate cases as and when actually arising for decision and we cannot venture into laying down law on such issues as do not arise for determination before us. However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under:

(*1*) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy.

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(*2*) Novation, that is, a debtor entering into a fresh agreement with a creditor undertaking payment of previously borrowed principal amount coupled with interest by treating the sum total as principal, any contract express or implied and an express acknowledgement of accounts, are the best evidence of capitalisation. Acquiescence in the method of accounting adopted by the creditor and brought to the knowledge of the debtor may also enable interest being converted into principal. A mere failure to protest is not acquiescence.

(*3*) The prevalence of banking practice legitimatises stipulations as to interest on periodical rests and their capitalisation being incorporated in contracts. Such stipulations incorporated in contracts voluntarily entered into and binding on the parties shall govern the substantive rights and obligations of the parties as to recovery and payment of interest.

(*4*) Capitalisation method is founded on the principle that the borrower failed to make payment though he could have made and thereby rendered himself a defaulter. To hold an amount debited to the account of the borrower capitalised it should appear that the borrower had an opportunity of making the payment on the date of entry or within a reasonable time or period of grace from the date of debit entry or the amount falling due and thereby avoiding capitalisation. Any debit entry in the account of the borrower and claimed to have been capitalised so as to form an amalgam of the principal sum may be excluded on being shown to the satisfaction of the court that such debit entry was not brought to the notice of the borrower and/or he did not have the opportunity of making payment before capitalisation and thereby excluding its capitalisation.

(*5*) The power conferred by Sections 21 and 35-A of the Banking Regulation Act, 1949 is coupled with duty to act. The Reserve Bank of India is the prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of the public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. The Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with the rate of interest which can be charged and

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> the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy.
>
> (*6*) Agricultural borrowings are to be treated on a pedestal different from others. Charging and capitalisation of interest on agricultural loans cannot be permitted in India except on annual or six-monthly rests depending on the rotation of crops in the area to which the agriculturist borrowers belong.
>
> (*7*) Any interest charged and/or capitalised in violation of RBI directives, as to rate of interest, or as to periods at which rests can be arrived at, shall be disallowed and/or excluded from capital sum and be treated only as interest and dealt with accordingly.
>
> (*8*) <u>Award of interest pendente lite and post-decree is discretionary with the court as it is essentially governed by Section 34 CPC dehors the contract between the parties.</u> In a given case if the court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner."

188. Before considering the applicability of the decisions above, the factual gamut of the case has to be considered. 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

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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 AS-9 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. Further, the conduct of the licensees has also to be considered in the backdrop of the fact that the regime of revenue sharing was

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extremely beneficial than the previous regime of the fixed licence fee, and they have tremendously benefited by it as is apparent from the statistics of the revenue earned by the licensees under the revenue sharing regime. When Government has parted with the privilege as to revenue on sharing basis under the license, and an agreement entered into, it ought to have been precisely followed. The conduct of the licensees was highly unfair, and anyhow and somehow, they had attempted to delay the payment. It passes comprehension how they have contended that the demand has to be worked out after this Court renders the decision. Demand had been raised way-back in the year 2003, which is ultimately the subject-matter 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.

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190. In *M/s. Everest Industrial Corporation & Ors. v. Gujarat State Financial Corporation*, (1987) 3 SCC 597, this Court held that the rate of interest payable on the principal amount due under the court's order passed under section 32 of the State Financial Corporations Act, 1951 would be as stipulated in the contract as the provisions of section 34 CPC are not attracted, order under section 32 being not a decree, liability to pay contractual rate of interest cannot be disowned, merely because of absence of direction for payment of interest in order under section 32. This Court has held:

> "**6.** If as held by this Court the proceeding instituted under Section 31(1) of the Act is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree no question of passing any order under Section 34 of the Code would arise since Section 34 of the Code would be applicable only at the stage of the passing of the decree and not to any stage posterior to the decree. It may also be mentioned here that even under the Code the question of interest payable in mortgage suits filed in civil courts is governed by Order 34 Rule 11 of the Code and not by Section 34 of the Code which may be applicable only to cases of personal decrees passed under Order 34 Rule 6 of the Code. The High Court was right in holding that interest would be payable on the principal amount due in accordance with the terms of the agreement between the parties till the entire amount due was paid as per the order passed under Section 32 of the Act. We hold that the decision of the Karnataka High Court, referred to above, which has applied Section 34 of the Code to a proceeding instituted under Section 31(1) of the Act is not correctly decided."
>
> (emphasis supplied)

191. In *Punjab Financial Corporation v. Surya Auto Industries*, (2010) 1 SCC 297, the Court held that when the terms of the agreement have

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not been questioned, contractual rate of interest cannot be altered. The Court has observed thus:

> "**25.** The High Court also committed serious error in declaring that the appellant Corporation will be entitled to charge simple interest at the rate of 10% w.e.f. 1-4-2003 i.e. after the expiry of six months from the date of taking over of the unit. Undisputedly, the respondent had not challenged the terms of loan agreement. Therefore, the High Court could not have suo motu altered the terms of agreement and directed the appellant to make fresh calculation of the outstanding dues and allowed the respondent to pay the amount as per fresh demand by selling the mortgaged property. This approach of the High Court is ex facie contrary to the law laid down in *U.P. Financial Corpn.* v. *Gem Cap (India) (P) Ltd.*, (1993) 2 SCC 299 and *Haryana Financial Corpn.* v. *Jagdamba Oil* Mills (2002) 3 SCC 496."
>
> (emphasis supplied)

192. In *Hindustan Steel Ltd. v. State of Orissa* (supra), relied on by licensees the matter was of imposition of penalty in a quasi-criminal proceeding that penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct – contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty to be imposed is exercised by judicial discretion. The ratio of the case, it is not attracted for the reason that in the instant matter, it is the contractual rate of interest and penalty agreed to which cannot be said to be arduous in any manner. The rate of interest has been agreed to and particularly since it is a revenue-sharing regime, and the licensees have acted in conscious disregard of their obligation. Thus, on the anvil of the decision above also, they are liable to pay the dues with interest and penalty. There is no discretion

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to vary the penalty. It is 50% of the amount which is in short-fall which cannot be said to be unreasonable and that too, two grace periods have been given in clause 20.8 to make payment of the same. As it is the agreed term and cannot be said to be arbitrary, the ratio of the decision is not attracted. Reliance has also been placed on *Akbar Badrudin Giwani v. Collector of Customs* (supra), wherein the dispute was bona fide. It was a case of exercise of power by the tribunal while imposing a penalty and fine instead of confiscation. There is no such discretion available when the parties have agreed in default what amount is to be paid. It automatically follows that it is not to be determined by licensor once over again. Parties (licensor and licensees) are bound by the terms and conditions of the contract. There is no enabling clause to vary either the rate of interest or the penalty provided therein and even if permissible it is not called for to vary interest or penalty fixed under the agreement in the facts and circumstances of the case. The decision mentioned above was concerning discretion to impose the penalty. Here, there is no such discretion, and considering the conduct of conscious disregard, the decision rather negates the submission than espousing the same.

193. Reliance has been placed on *J.K. Industries Ltd. & Anr. v. Union of India & Ors.*, (supra) and *Tecumseh Products India Ltd.* (supra). In both the cases, duty was not paid under the provisions of section 11-

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A. There were divergent views of the High Courts. It was not found to be a case of fraud, collusion, wilful misstatement, or suppression of facts. Thus, the action of the imposing penal interest under section 11A and other penalties were set aside as there was a bona fide dispute. In the present case, there is no bona fide dispute, and it is not appropriate to vary the interest or the penalty. That has to be worked out from 2003 and not after the decision to be passed by this Court. Facts in *J K Synthetics Ltd.* (supra) were different. In that case, the assessee had paid the tax based on information supplied by him in the return. Thus, it was held that it would not be proper to levy interest under clause (a) of section 11B. In the instant case, the demand had been raised by the licensor, and after that, untenable objections have been raised which had no foundational basis, and the licensees have taken inconsistent stands. Earlier they had questioned on the ground that these items were wrongly included in the definition, now they are contending that the same are not part of the definition in agreement.

194. Reference has also been made to the decision in *Kailash Nath Associates* (supra). In that case, there was forfeiture of earnest money. The factual matrix of the instant case is different. The case was dealing with the court's power to grant reasonable compensation when the amount fixed in the contract is like a penalty; only reasonable compensation can be awarded. Whether or not actual damage or loss

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is proved, has to be considered. It is only in cases where it is possible to prove actual damage or loss, such proof is not to be dispensed. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract can be awarded. In the instant case, it is quite reasonable amount of the penalty in case of default in payment of the amount. The term cannot be said to be unconscionable. As the Government has been deprived of the revenue and the licensees have been benefited by revenue sharing regime, in spite of that, they have not shared the revenue. They are bound by the stipulation, which is found to be quite reasonable in the facts and circumstances of the case.

195. In *Central Bank of India v. Ravindra*, (supra), this Court considered the question of award of payment of interest and has held that there is nothing wrong with the party voluntarily entering into the transaction as to stipulation, for payment of compound interest ,at reasonable rates and authorising the creditors to capitalise the amount on the amount remaining unpaid so as to enable interest to be charged on the accrued rate on the interest component of the capitalised sum for the succeeding period. Interest, once capitalised, sheds its colour of interest and becomes a part of the principal to become a debt as has been observed thus:

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“**36.** The English decisions and the decisions of this Court and almost all the High Courts of the country have noticed and approved long-established banking practice of charging interest at reasonable rates on periodical rests and capitalising the same on remaining unpaid. Such a practice is prevalent and also recognised in non-banking moneylending transactions. The legislature has stepped in from time to time to relieve the debtors from hardship whenever it has found the practice of charging compound interest and its capitalisation to be oppressive and hence needing to be curbed. The practice is permissible, legal and judicially upheld excepting when superseded by legislation. There is nothing wrong in the parties voluntarily entering into transactions, evidenced by deeds incorporating covenant or stipulation for payment of compound interest at reasonable rates, and authorising the creditor to capitalise the interest on remaining unpaid so as to enable interest being charged at the agreed rate on the interest component of the capitalised sum for the succeeding period. Interest once capitalised, sheds its colour of being interest and becomes a part of the principal to bind the debtor/borrower.

44. We are of the opinion that the meaning assigned to the expression “the principal sum adjudged” should continue to be assigned to “principal sum” at such other places in Section 34(1) where the expression has been used qualified by the adjective “such”, that is to say, as “such principal sum”. Recognition of the method of capitalisation of interest to make it a part of the principal consistently with the contract between the parties or established banking practice does not offend the sense of reason, justice and equity. As we have noticed, such a system has a long-established practice and a series of judicial precedents upholding the same. Secondly, the underlying principle as noticed in several decided cases is that when interest is debited to the account of the borrower on periodical rests, it is debited because of it having fallen due on that day. Nothing prevents the borrower from paying the amount of interest on the date it falls due. If the amount of interest is paid there will be no occasion for capitalising the amount of interest and converting it into principal. If the interest is not paid on the date due, from that date the creditor is deprived of the use of the money, and which it would have made if the debtor had paid the amount of interest on the date due, the creditor needs to be compensated for deprivation. As held in *Pazhaniappa Mudaliar* v. *Narayana Ayyar*, AIR 143 Mad 157, the fact situation is analogous to one as if the creditor has advanced money to the borrower equivalent to the amount of interest debited. We are, therefore, of the opinion that the expression “the principal sum adjudged” may include the amount of interest, charged on periodical rests, and capitalised with the principal sum actually advanced, so as to

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> become an amalgam of principal in such cases where it is permissible or obligatory for the court to hold so. Where the principal sum (on the date of suit) has been so adjudged, the same shall be treated as "principal sum" for the purpose of "such principal sum" — the expression employed later in Section 34 CPC. The expression "principal sum" cannot be given different meanings at different places in the language of same section, i.e. Section 34 CPC.
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> (emphasis supplied)"

196. Concerning penal interest, this Court in *Central Bank of India v. Ravindra* (supra) has observed that the penalty is founded on the doctrine of penal action. Penal interest can be charged only once for one period of default, and therefore cannot be permitted to be capitalised.

> "*55. (1*) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy."

197. It is not levy of penal interest, which is involved in the instant case. Thus, based on the decision mentioned above, we find that when there is contractual stipulation, the interest can be levied and compounded.

198. Resultantly, we are of the considered opinion that interest and penalty have rightly been levied. Once an amount of shortfall has not

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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.

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200. No order as to costs.

.... J.
(ARUN MISHRA)

.... J.
(S. ABDUL NAZEER)

.... J.
(M.R. SHAH)

NEW DELHI;
OCTOBER 24, 2019.