

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 9263 of 2011

In THE MATTER OF:

An application under Article 102 (2) (a) (ii) of the
Constitution of the People's Republic of
Bangladesh.

-AND-

IN THE MATTER OF:

Orascom Telecom Bangladesh Limited
.....Petitioner

-Versus-

Bangladesh Telecommunication Regulatory
Commission, Represented by its Chairman, IEB
Bhaban, Ramna, Dhaka-1000 and others.

.....Respondents

Mr. Rokanuddin Mahmud, Advocate with

Mr. Md. Asaduzzaman, Advocate

Mr. Imtiaz Uddin Ahmad Asif, Advocate

Ms. Nazmun Nahar Choudhury, Advocate

.....For the petitioner

Mr. Imtiaz Mahmud, Advocate

Mr. Khandaker Reza-E-Raquib, Advocate

Mr. Imranul Kabir, Advocate

Mr. Mejbahur Rahman, Advocate

..... For the respondent No.1.

Mr. Murad Reza, Additional Attorney General
with

Mr. S.M. Moniruzzaman, D.A.G.

Mr. Pratikar Chakma, A.A.G.

.....For the Respondents

Heard on: 10.07.2012, 11.07.2012, 12.07.2012, 16.07.2012, 17.07.2012, 18.07.2012 and judgment on: 14.08.2012.

Present:

Mr. Justice Md. Ashfaquul Islam

And

Mr. Justice Md. Ashraful Kamal

Md. Ashraful Kamal, J:

This Rule Nisi was issued on an application under section 102 (2) (a) (ii) of the Constitution of the People's Republic of Bangladesh registered by the petitioner Orascom Telecom Bangladesh Limited calling upon the respondents to show cause as to why the decision of the Bangladesh Telecommunication Regulatory Commission issued under the signature of Deputy Director, Legal and Licensing Division (Respondent No. 4) vide Memo No. BTRC/LL/ Mobile/License Renewal (382)/2011- 688 dated 17.10.2011 (Annexure 'A') claiming Spectrum Assignment Fee based on Market Competition Factor (MCF) so far it relates to already assigned spectrum in 2008 (2.6 MHz-1800 band) and payment of license fee and spectrum fee for new assignments without any deduction, shall not be declared to have been made without lawful authority and is of no legal effect;

Brief facts, necessary for the disposal of this Rule, are as follows:

The petitioner Orascom Telecom Bangladesh Limited is a private company limited by shares and incorporated under the laws of Bangladesh. The petitioner company is a digital cellular mobile telecommunication

service provider in Bangladesh under a valid license granted by the Bangladesh Telecommunication Regulatory Commission (BTRC).

Pursuant to an advertisement dated 16.08.1995, the petitioner being the successful bidder entered into an agreement with the Ministry of Post and Telecommunications of Bangladesh (hereinafter referred to as 'MOPT') on 11.11.1996 under the provision of Section 4 of the Telegraph Act 1885 to provide cellular mobile telephone services. Subsequently, MOPT issued a Radio System Operating License to the petitioner on 28.11.1996 under the provision of Telegraph Act, 1885 and the Wireless Telegraphy Act, 1933 for installation and operation all over Bangladesh for the multi-station radio system of Digital Mobile Cellular Telephone Service in the frequency band from 900 to 905 MHz and 945 to 950 MHz with at least 12.5 KHz channel spacing at both ends of the Bands. Then, on 28.11.1996 the petitioner got a Radio Stations and Equipment License pursuant to the Telegraph Act, 1885 and the Wireless Telegraphy Act, 1933 for the specific frequency assignment of the radio base station and the equipment /mobile sets.

Thereafter, Government for the establishment of an independent commission for the purpose of development and efficient regulations of telecommunication system and telecommunications service in Bangladesh and for the transfer of the powers and functions of the Ministry of Post and telecommunication to the Commission and matters ancillary thereto enacted 'The Bangladesh Telecommunication Act, 2001 (Act No. 18 of 2001) and it came into force on 16 April, 2001. Accordingly, The BTRC assumed all regulatory and licensing functions of the MOPT, pursuant to Sections 89 and

90 of the BTA, the BTRC got the power to revalidate the License Agreement. Then, the BTRC vide letter no. BTRC/Mobile/Sheba/2002-5 dated 27.12.2004 issued a revalidation order an amended License Agreement including additional conditions, an addenda to the amended License Agreement dated 27.12.2004 under Section 89 and 90 of the BTA. Subsequently, BTRC vide letter nos. BTRC/SM/4-23/94 part -7/80-834 and BTRC/ SM/4-23/94 part -7/80-833 both dated 02.07.2005 issued to the Petitioner, allocated microwave frequency of 10915/ 11445 and 11035/11565 MHz and further allocation of frequency in the band of GSM 1800 MHz on certain terms and conditions. The terms and conditions of the Renewed Frequency Allocation inter alia provided that all charges, levies, royalties and other fees shall be payable by the petitioner for its use of such frequency and radio equipment.

Therefore, BTRC on 18.06.2006 amended the Revalidated License Agreement vide Memo No. BTRC/Mobile/ Sheba/ 2002-2143 by attaching an addenda to the Amendment Order thereby replacing the clauses relating to Levy and Charges and Allocation of Frequencies. Further, BTRC vide letter no. BTRC/SM:4-23/94 Part-1/97-2415 dated 17.07.2006 revised the spectrum charges of the petitioner, which was effective from 01.07.2006. After that, on 28.07.2008 vide memo No. BTRC/ Mobile/ Sheba (3) Part-1/2007-981, BTRC further amended the Revalidated License Agreement by attaching the Addenda 2 to the Amendment Order dated 28.07.2008, thereby inserting clauses in relation to charges for international incoming and

outgoing calls. Further, by a letter dated 17.07.2006 BTRC revised the spectrum charges of the petitioner which was effective from 01.07.2006.

In pursuance of the meeting dated 29.09.2008 held between the Respondent No. 1 and the Petitioner along with Grameenphone Bangladesh Limited and Telecom Malaysia International Bangladesh- regarding GSM Spectrum Assignment of GSM 1800 MHz Band, one Anamika Bhakta, Senior Assistant Director, vide letter No. BTRC/SM/3- 1/97 part-32/327-2278 dated 30.09.2008 had informed the Chief Executive Officer of the petitioner that decisions were taken regarding the terms and conditions of the additional Spectrum Assignment and the conditions which runs as follows:

- i. Maximum of 7.4 Mhz, 5. 1 Mhz and 5 Mhz will be assigned respectively to the petitioner, Grameen phone and Telecom Malaysia International Bangladesh.*
- ii. Price of spectrum has been fixed to Tk.80.00 (Eighty) crore for per MHZ uplink and downlink.*
- iii. Down payment is 25% of the total price of the spectrum to be assigned to take the assignment and rest amount shall be paid by June 2009 with equal installment per month.*
- iv. The operators have to pay the Annual Spectrum Charge for this assignment as per spectrum pricing formula.*
- v. Current Spectrum Pricing Formula will be reviewed at the end of 2008.*
- vi. The assignment will be for 18 years from the date of assignment subject to the renewal of the license. Within 18 years of the license is renewed there will not be any additional charge for this particular assignment for current technology (GSM, GPRS and EDGE).*
- vii. The licensees will be to provide services with the spectrum according to the conditions of the cellular mobile license. However to utilize the frequency for 3G, LTE or equivalent technology based services the licensee will be required to take permission from the Commission. In such cases conditions and terms may be varied as deemed necessary by the Commission.*

viii. The operators shall inform the Commission in writing about their consent for additional GSM spectrum assignment under the above terms and conditions by 16th October 2008 and have to make down payment by 30th October 2008.

In compliance with the aforesaid terms and conditions of the letter dated 30.09.2008, the petitioner had paid an amount of Tk. 5,20,000,000.00 (Taka Five Corers Twenty laces) on 30.11.2008 as 25% down payment for 2.6 MHz Spectrum in GSM-1800 MHz band to the Respondent No. 1. Subsequently, on 30.11.2008, the Respondent No. 5 vide Letter N. BTRC/SM/3-1/97 Part-32/327-2278 dated 30.09.2008 had informed the Chief Executive Officer of the Petitioner's company that the Respondent No. 1 was pleased to assign 2.6 MHz Spectrum in GSM-1800MHz band for a period of 18 years to the petitioner. According to the terms and conditions No 1 of the said Letter No. BTRC/SM/4-23/94 Part-16/16-3120 dated 30.11.2008 (issued by the Respondent No.5) it was specifically mentioned that the assignment had been made for a period of 18 years, subject to the renewal of the license.

It was also mentioned that within 18 years if the license renewed then there will not add any additional charge for this particular assignment for current technology (GSM, GPRS and EDGE). Thereafter, on 11.09.2011, the Respondent No.1 vide Memo No. BTRC/LL/Mobile/License Renewal (342)/2009-563 dated 11.09.2011 had issued the Regulatory and Licensing Guidelines for Renewal of Cellular Mobile Phone Operator License for establishing, operating and maintaining cellular mobile phone systems and services in Bangladesh, which is prospective in nature. The said guideline was thereafter amended on 22.09.2011 vide the Respondent No.1's

Amendment Order No. BTRC/LL/Mobile/License Renewal 93420/2009-609 dated 22.09.2011, which is also prospective in nature. In the said guidelines it has been clearly mentioned that the spectrum assignment fees shall be applicable for all of the access frequencies assigned to the licensees except for the 7.4 MHz, 2MHz and 2.6 MHz spectrum assigned in the year 2008 in favour of the Petitioner, Grameen Phone, AXIATA respectively with a value of Tk. 80 (eighty) crore per MHz uplink and downlink for 18 (eighteen) years from the date of assignment subject to the renewal of the license.

However, other provisions of these guidelines shall be applicable for respective licensee (s). On 09.10.2011, the Petitioner vide Letter Nos. OTBL/License Renewal/Application/BTRC/01 and OTBL/License Renewal/ Application /BTRC/02 both dated 09.10.2011 had applied to the Respondent No. 1 for renewal of the Cellular Mobile Phone Operator License and Radio Communications Equipment License. Thereafter, on 17.10.2011, the Respondent No. 1 vide impugned letter No. BTRC/LL/Mobile/License Renewal (382)/2011-688 dated 17.10.2011 has claimed an amount of Tk. 2018.75 crore only from the Petitioner as the Spectrum Assignment Fee. An amount of Tk. 10,00,00,000/- has been claimed by the Respondent No. 1 as License Renewal Fee vide the said letter of the Respondent No. 1. In the said letter the Respondent No. 1 has also requested the petitioner to submit certain documents. In these regard the Respondent No.1 has provided 10 days time to the petitioner for making the payment claimed, without deduction, and to submit the required documents. Immediately, on 19.10.2011, the petitioner vide letter No. OTBL/License

Renewal/Notification Response/BTRC/19102011 sent a response to the impugned letter No. BTRC/LL/Mobile/License Renewal (382) /2011-688 dated 17.10.2011. In the said letter, the petitioner has pointed out the mistakes conducted by the Respondent No. 1 in calculating the Spectrum Assignment Fees and requested the Respondent No. 1 to re-calculate the applicable fees and charges. Subsequently, on 25.10.2011, the Respondent No. 6 vide letter No. BTRC/Finance-1373/License Renewal info/2011-145 dated 25.10.2011 sent a reply to the letter of the petitioner dated 19.10.2011 denying to re-consider the impugned decision communicated to the petitioner vide impugned letter dated 17.10.2011.

Being aggrieved by the aforesaid decision issued by the respondent No. 3 on behalf of the respondent No. 1 vide letter dated 17.10.2011 claiming spectrum assignment fee based on Market Competition Factor (MCF) so far as it relates to already assigned spectrum in 2008 (2.6 MHZ - 1800 band) and having no other alternative and efficacious remedy, the petitioner was compelled to file this instant application under Article 102 of the Constitution of the People's Republic of Bangladesh and obtained the present Rule.

Mr. Rokanuddin Mahmud, the learned Senior Advocate appearing with Mr. Md. Asaduzzaman the learned advocate for the petitioner submits that as per letter No. BTRC/SM/4-23/94 Part-16/16-3120 dated 30.11.2008 and Guideline No. 9.01 of "the Regulatory and Licensing Guidelines for Renewal of Cellular Mobile Phone Operator License for Establishing, Operating and Maintaining Cellular Mobile Phone Systems and Services in

Bangladesh” dated 11.09.2011, the assignment fees will not be applicable for the 2.6 MHz spectrum already assigned to the petitioner in the year 2008. The guideline requires for spectrum fees to be paid for future applicants and hence, it does not create any retrospective effect. Next, Mr. Rokanuddin submits that the Respondent No. 1 arbitrarily introduced Market Competition Factor (MCF) in the Guideline dated 11.09.2011 which is in violation of the Constitution as it is discriminatory and arbitrary and it is not made retrospective effect.

He also submits that the impugned letter has violated the vested right of the petitioner accrued under allocation of spectrum assignment vide letter dated 30.11.2008 issued by the Respondents inasmuch as that allocation had been made for a period of 18 years which the petitioner had been enjoying since 30.11.2008. He further submits that the issuance of the impugned letter claiming additional spectrum assignment fees is nothing but the cancellation of earlier assignment given to the petitioner vide letter dated 30.11.2008 without issuing notice upon the petitioner for such cancellation of assignment is nothing but complete denial of natural justice of the petitioner.

Moreover, he submits that the claim made by the Respondent No 1 without deduction is contradictory and is clear violation of the VAT Act, VAT Rules and the NBR clarifications. He also submits that the petitioner is entitled to carry out their business of mobile operator as per Article 40 of the Constitution of the People’s Republic of Bangladesh without interruption since there is an implied covenant that the petitioner’s right to provide mobile operating service cannot be interrupted by way of imposing

unreasonable and discriminatory fee in violation of the Telecommunication Regulation Guideline and without giving the petitioner scope defend themselves.

Mr. Mahmud also submits that the petitioner has fulfilled all the conditions of the spectrum assignment letter dated 30.11.2008 by paying all requisite fees to the Respondent No. 1 and hence, the said impugned order dated 17.10.2011, so far it relates to already assigned spectrum fee based on MCF (2.6 MHz-1800 band) to the petitioner in 2008 and payment of license fee and spectrum fee for new assignments without any deduction is liable to be declared to have been made without any lawful authority and is of no legal effect.

Mr. Rokanuddin Mahmud also argues that the license itself is not a service, but it unable and entitle its holder like the petitioner to render a service. He also submits that the license in question is not a service within the meaning of the Value Added Tax Act, 1991, therefore, not vatable. Referring to Section 2 (ख) of the VAT Act and 2nd schedule to the same, Mr. Mahmud submits that the license as provided by the BTRC comes under Article -7 (ख) of the 2nd schedule of the VAT Act and as such it is excluded from the scope of imposing VAT by the clear terms of Section 2 (ख) of the VAT Act. Accordingly, the license or any other facility as provided by the BTRC in favour of the petitioner is not vatable. He also argues that, even if it is found that the licensee provided by the BTRC is vatable, then, the Vat payable should be deducted from the amount claimed by the BTRC.

Moreover, referring to Sections 3(3)(Ga), 5, 6 and Rules 18 (ক-ঙ), argues that according to those provisions ‘deduction at source’ (উৎস কর্তন) means deduction from the total receivable but not deduction from the receivable after adding Vat. Furthermore, Mr. Mahmud submits that the granting of a license is not a service render the BTRC within the meaning of the Act. Mr. Mahmud in the course of his submission cited a case Hutchison-3G-UK Ltd. and others –V- Customs and Excise Commissioner (HC-369/04) Simons Tax cases (2008) before the court Justice of the UROPEAN communities. In the instance case the activity of issuing or renewal of license to operate Cellular Mobile system and to use Radio frequencies is not to be service within the meaning of Section 3(1) of the Act and consequently license fees and fees for allocation of spectrum are not to be deemed taxable services within the Act.

Mr. Mahmud submits that there ought to be a prior finding by this court that the activity under consideration is of an economic nature. Section 3(1) comprises the activities of a service provider. A taxable person under Act is a person who provides services in Bangladesh except the services mentioned in the 2nd schedule to the Act. Therefore, to qualify as a taxable person under the Act, it has to be a person who independently carries out any economic activity for rendering services other than those mentioned in the 2nd schedule. In the instance case the petitioner does not see any addition of value occurring when the license is granted or the spectrum is allocated. Therefore the grant of license or allocation of spectrum not being activity which adds value, cannot be regarded as being subject to VAT. He further

submits that Section 3(3)(ँ) provides that VAT shall be payable in case of service by the service provider. So, even if provision of license were to be considered a service, then BTRC/GOB is service provider and the petitioner the service recipient. Thereafter, it is BTRC who has to pay VAT on the amount received by it;

Mr. Mahmud also submits that Section 6(3) specifies the time when VAT for the services becomes payable. Since no service has been provided by renewal of license, no VAT is payable. Alternatively, even if granting license were to be considered service, then the grantor of the license is service provider, who has to pay the VAT when any of the following events occur first, i.e. (i) when service is rendered, (ii) when chalan is issued relating to providing of service, (iii) when part or full payment is received. In this case, payment is received by BTRC which should, therefore, pay VAT;

He submits that Section 5(4) provides that in case of service, VAT is payable on total amount received. Total amount received has been defined in Section 2 (ः) of the Act as the amount received as VAT by a taxable service provider. First, BTRC is not a taxable service provider. Therefore, no VAT is payable by the petitioner on the license fee, etc. Alternatively, even if BTRC were to be assumed to be a chargeable or taxable service provider, then it has to pay the VAT on the account of the amount received for the license, etc.

Finally, Mr. Mahmud submits that the Rule 18ঙ (1) (ক) and (খ) provides for deduction at source (কর্তন) (i) from the amount received from “সুবিধা গ্রহণকারী” at the time of granting or renewal of license, registration and permit and (ii) from the amount received as revenue sharing, royalty, commission, charge, fee or otherwise from “সুবিধা গ্রহণকারী” in terms of the license registration and permit so granted. Rule 18 ঙ does not provide for levy/ impose (আরোপণ) VAT of itself, but it provides for deduction or “কর্তন” of VAT. VAT is imposed (আরোপিত) by Section 3 (1) of the Act. Where VAT has not been imposed/levied on a service, there is no question of deduction at source. In order for Rule 18 ঙ to be applicable for deduction there has to be an imposition of VAT. Unless there is an imposition of VAT, there cannot be any deduction.

Mr. Khandaker Reza-E-Raquib, the learned advocate appearing for the respondent No. 1 BTRC by filing affidavit in opposition at first raises the issue of maintainability of the Writ petition itself on the ground that since there is an Arbitration Clause in the revalidated license agreement of 2004 and even in the original agreement of 1996, the Writ petition is not maintainable as the petitioner has come before this court without availing of the alternative remedy as agreed by the parties and provided by the law, namely the Arbitration Act, 2001. He submits that even the ‘Arbitration Tribunal or Arbitrators may give interpretation of law if they are required to do so in disposing of the disputes between the parties. Mr. Raquib further argues that the contract between the BTRC and Orascom Telecom is an

ordinary commercial contract, and as such, Writ should be held to be not maintainable.

He also submits that the BTRC cannot claim MCF for the period from 2008 to 2011 as it will be amounting to giving retrospective effect to the Guideline which is not permitted by law. However, BTRC can claim MCF for the remaining 15 years period in respect of assignment of 2008 as the same was given for 18 years. Mr. Raquib argues that the Guideline have been issued in exercise of the statutory powers conferred on the BTRC and the Government under Sections 38 and 39 read with Section 55(3) of the Telecom Act, and as such, to change the terms and conditions of the assignment of spectrum relating to its fees and charges, no notice is required to served on the licensees under section 39 of the said Act. Referring to Clause-1 of the Assignment Letter dated 30.08.2008, learned advocate points out that the additional charges mentioned therein relate to the spectrum fee of Tk. 80 crore and it does not have any nexus with the MCF. He argues that since the spectrum fee of Tk. 80 crore for the said 2008 spectrum has not been increased, BTRC has not even violated any terms of the said Assignment Letter.

Mr. Raquib also submits that the License renewal fee as demanded by the Respondent No. 1/BTRC vide its Memo dated 17 October 2011 (annexure-A of W.P. at pg-31) are non-refundable and payable by the Petitioner-Company *without any kind of deduction*. It is further submitted that the amount as specified in the aforesaid Memo was demanded on the basis of the Guidelines, 2011 as issued in pursuance to section 38 of the BT

Act, 2001 with prior approval from the MoPT. It is also submitted the said Guidelines, 2011 the subsequent amendment of the said Guidelines, 2011 was also done in accordance with law i.e. under sections 55 (3) and 24 and also by virtue of the inherent power of the Commission of BTRC which was duly communicated to the MoPT who accordingly approved the said amendments (Annexure-2 at pg -7 of Supplementary Affidavit dated 11 July 2012 by BTRC). He also submits that the amount as requested to furnish vide the impugned Memo dated 17 October 2011 with regard to the Spectrum Assignment Fee on the basis of MCF corresponding to the Spectrums 2.6 MHz- 1800 Band as assigned in favour of the Petitioner-Company in 2008 was done in pursuance of the Guidelines, 2011 (attached to the W.P. as Annexure –E at page 39) as well as the assignment letter dated 30 October 2008 (W.P. as Annexure-D at page 37).

It is further submitted that the Spectrum Fees of Tk. 80 Crore per MHz for 2.6 MHz- GSM 1800 Frequency Band for 18 years from the date of assignment, remains unchanged. However, clause 9.01 of the Guidelines, 2011 states inter alia that other provisions of the said Guidelines shall be applicable to the respective licensee(s). Accordingly, all the other provisions of the Guidelines, 2011 including MCF as fixed by the Government in the Guidelines, 2011 at clause 8.01 (ii) thereof becomes applicable to all operators including the Petitioner-Company for renewal of the license. Further or alternatively, as per clause 5 (under the head of terms & conditions) of the assignment letter dated 30 October 2011 (Writ Petition as Annexure –D at page 37), the Respondent No. 1/BTRC reserves the right to

make any change in the charges or levies from time to time and that the Licensee i.e. the Petitioner-Company shall abide by such decision of the Respondent No. 1/BTRC. Moreover, prior to the enactment of the Bangladesh Telecommunication Regulatory Act 2001 (hereinafter referred to as BT Act, 2001), the Government i.e. MoPT was empowered and solely responsible under the Telegraph Act, 1885 to deal with all sorts of issues relating to Telecommunication system, its control, management, operations and service in Bangladesh. Later on, in the year of 2001, upon enactment of the BT Act 2001, the Writ Respondent No. 1/Petitioner/ BTRC was formed under the said Act and all the aforesaid power of the MoPT was vested with BTRC.

As a result, the Respondent No. 1/ BTRC became the exclusive authority to control and regulate the entire telecommunication system and service of Bangladesh including all ancillary matters related to the same i.e. issues relating to issuance of required license to operate telecommunication system and/or provide telecommunication service, tariff, charge rage, radio communications, spectrum managements, issuance of spectrum assignment license etc. However, in the year of 2010, the aforesaid BT Act, 2001 has undergone major changes through the amendments vide Act 41 of 2010 as published in Bangladesh Gazette dated 01 August 2010 and in consequence to which, the power of the Commissioner relating to certain matters have been vested with the Government i.e. MoPT. As a result, the MoPT becomes the concerned authority to deal with certain issues under the BT Act 2001 i.e. to give approval in relation to the issuance of Operators' license and ll

the matters related to the same to establish maintain and operate telecommunication system and also to provide telecommunication service in Bangladesh, Licensing procedure, issuance of Guidelines where requires and to take necessary decisions etc. in these regard. On the other hand, the power of the Commission/BTRC relating to other matters, i.e. issues relating to spectrum allocation, determination of allocation fees, its management, issuance of required license i.e. Spectrum Assignment License, determination of fees and charges and inclusive other affairs etc. remains unchanged by virtue of section 55 and section 24 of the BT Act, 2001. As a result, even after the said amendment in the year 2010, the Respondent No. 1/BTRC still reserves the exclusive authority to deal with all sorts of issues in relation to radio communications, spectrum allocation, spectrum Assignment fees, issuance of Spectrum Assignment License and its management etc. as mentioned above.

Mr. Raquib submits that by exercising the aforesaid power of the Commission as conferred by sections 55(3) and 24 of the BT Act 2001, the Respondent No.1/BTRC has lawfully introduced the aforesaid concept of the MCF and multiplied the same while calculating the Spectrum Assignment fee for the respective spectrum allocation assigned in favour of the respective spectrum allocations assigned in favour of the Writ Petitioner-Company on different occasions. Moreover, disputed spectrum allocation of 2.6 MHz in 1800 Frequency Band in favour of the Writ Petitioner-Company in 2008 itself is a separate permit/license i.e. Spectrum Assignment License

[attached to the W.P. as Annexure-D at page 37] having no impact upon the terms and conditions of the Writ Petitioner's Operator License of 1996.

He also submits that the amount as requested to furnish vide the impugned Memo dated 17 October 2011 (attached to the Writ petition as Annexure-A at page 31) in respect of the Spectrum assignment Fee on the basis of MCF corresponding to the Spectrums 2.6 MHz- 1800 Band as assigned in favour of the Writ Petitioner/ Respondent in 2008 was done in pursuance of the Guidelines, 2011 as well as the Spectrum Assignment License dated 30 October 2008 (attached to the Writ petition as Annexure-D at page 37) and the Spectrum Fees of Tk. 80 Crore per MHz for the assignment of 2.6 MHz –GSM 1800 Frequency Band spectrum in 2008 for 18 years from the date of assignment, remains unchanged.

Mr. Raquib submits that Clause 9.01 of the Guidelines, 2011 states inter alia that other provisions of the said Guidelines shall be applicable to the respective licensee (s). Accordingly, all the other provisions of the Guidelines, 2011 including MCF as fixed by the Government and BTRC in the Guidelines at Clause 8.01 (ii) thereof becomes applicable to all operators including the Writ Petitioner/Respondent for renewal of the license. Further or alternatively, as per Clause 5 (under the head of terms & conditions) of the Spectrum Assignment License dated 30 October 2011 (attached to the Writ Petition as Annexure –D at page 37), the Respondent No. 1 reserves the right to make any change in the charges or levies from time to time and that the Licensee i.e. the Writ Petitioner-Company shall abide by such decision of the Respondent No. 1. Accordingly, it is submitted that by virtue of

section 55(3) and 24 of the BT Act 2001, the Respondent No. 1 is legally entitled to take into consideration of the MCF in calculating the Spectrum Assignment Fee with regard to the Spectrums in question assigned in 2008 in favour of the Petitioner /Orascom for the remaining 15 years. And the Respondent No. No.1/BTRC has lawful authority and also legally entitled to impose MCF while calculating the Spectrum Assignment Fee corresponding to the 2008 Spectrum Allocation but failed to recognize that introducing MCF in such case does not call for compliance with the provisions of notice as mandated by Section 39 (2) of the BT Act, 2001.

He submits that claiming MCF, as incorporated in the Guidelines 2011, on the assignment of 2.6 MHz Spectrum in 2008 does not amount to change the terms and conditions of the Operator License of the Writ Petitioner-Company. It is submitted that the imposition of MCF while calculating the Spectrum Assignment fee is completely a separate issue done in pursuance to the section 55 (3) of the Act 2001-having no relevance with regard to the Cellular Mobile Phone Operator License of the Writ Petitioner-company and as such has no impact in changing the terms and conditions of the Operator License. And the aforesaid Operator License as issued in favour of the Writ Petitioner Company was issued under section 35 of the BT Act, 2001 whereas the Spectrum Assignment License in question of the Writ Petitioner-Company was issued under section 55 of the BT Act, 2001. The concept of MCF was also introduced in the aforesaid Guidelines, 2011 by the Respondent No. 1/ BTRC by virtue of its power under section 55(3) of the Act, 2011. The issue of MCF is entirely related to the issue of

spectrum/ frequency as dealt in section 55 of the BT Act, 2001. As such, it has no impact in changing the terms and conditions of the Cellular Mobile Phone Operators License issued under section 35 of the Writ Petitioner-Company.

Mr. Murad Reza, the learned Additional Attorney General and Mr. S.M. Moniruzzaman, the learned Deputy Attorney General by filing affidavit –in-opposition on behalf of the respondent No. 8 opposes the Rule and submits that the Vat scheme under the VAT Act made different persons liable for collection and deposit of VAT at different stages of transactions. Therefore, liability to pay VAT and responsibility to collect and deposit the same may be required to be done by different reasons. Referring to the definition of ‘করযোগ্য সেবা’ (taxable service) and কর (tax) as defined by Sections 2 (Chhaa) and 2 (Gha Gha Gha) respectively, he submits that there is no scope to hold otherwise than that the service (সেবা) or facility (সুবিধা) as provided by the BTRC through license in exchange for license fees and other charges is not included in the 2nd Schedule to the VAT Act. Therefore, the service or সুবিধা as provided by the BTRC through license or permit are vat-able. Drawing our attention to the provisions of Section 3(5) and definition of ‘পণ’ (consideration) as given by Section 2 (গ গ), Mr. Reza submits that the basic scheme of the VAT Act is that the VAT is calculated at the rate of 15% on the total value receivable. Therefore, according to him, Vat is always added to the total value receivable, and under no circumstances, it can be deducted or subtracted from the total value as suggested by the learned advocates for the petitioner. Therefore, he argues,

to comply with the basic scheme of the VAT Act and VAT Rules made thereunder, BTRC lawfully motioned the words ‘without any deduction’ in the impugned memo, which means the demanded money has to be paid as it is, and while calculating VAT to pay the same at source, the petitioner will have to add to it 15% of the total demanded amount as VAT, withhold the same and deposit in the exchequer directly, otherwise it will go against the basic concept of Vat.

Mr. Reza submits that the petitioner company has not challenged any illegality of the VAT authority or any action of the VAT authority in the instant writ petition in respect of imposition of VAT on the renewal fees and other fees. But, the petitioner deducted VAT from the license renewal fees and kept illegally the same in their custody and as such the petitioner is liable to deposit the amount of VAT at source pursuant to section 6 (4) (kaka) of the VAT Act 1991. Section 3 of the said Act has provided the details of the persons who would be liable to pay the VAT. The provision laid down in section 6 (3) (ga) of the VAT Act 1991 provides that VAT would be payable when the ‘pon’ either partially or fully is paid up even if the service remain undelivered. So under the situation although the license has not been renewed, the fees in connection with the renewal have already been paid and the due VAT has been deducted by the petitioner, there is no lawful reason to retain the sum in the account of the petitioner. As per provision of section 5 (4) of VAT Act 1991, Value Added Tax (VAT) will be calculated and realized on total payment of service. Moreover, the demand has been quite lawful since no VAT has been charged upon the

BTRC which is a Government body and that the renewal of license of Cellular Mobile Phone Operators is a 'service. Moreover, this is clearly a VAT payable service under the VAT Act and as such the petitioner is not only liable to pay 15% VAT but also to pay the amount as demanded by BTRC as license renewal fee as well as spectrum assignment fee and there is no relation whatsoever to the applicability of VAT with regard to the payment of license renewal fee and spectrum assignment fee in favour of BTRC.

Mr. Reza finally submits that Section 5(4) of the VAT Act clearly provides that VAT will be calculated and realized on total payment of service that means if total receipt against service is Tk 100/- then value added tax will be (15% of 100/-) that means 15/- Tk and the petitioner company being the service availing entity is under an obligation to pay the demanded amount along with 15% applicable VAT.

In support of his aforesaid submissions Mr. Reza has cited two unreported cases on the self same issue, which are Grameen Phone Ltd. –V- BTRC & others in Writ Petition No. 8904 of 2011 and Robi Axiata Ltd. –V- BTRC & others in Writ Petition No. 157 of 2012. He also cited Hefzur Rahman –V-Shamsun Nahar Begum reported in 51 DLR(AD)-172 (para-6), Govt. of Bangladesh –V- Sheikh Hasina reported in 60 DLR (AD) 90 (para 46-48), 49 DLR(AD)164(para-36), PTR Exports (Madras) (P.) Ltd. –Vs- Union of India AIR 1996 SC 3461(para 5 and Head note), Asif Hameed – Vs- State of J & K AIR 1989 SC (para 19 & Head note, 2 SCC 3431(para 39,36 &31), Bangladesh and others –Vs- Mohammad Azizur Rahman and

others reported in 46 DLR(AD)1994 (para-22), Sheikh Abdus Sabur –Vs- Returning Officer and others reported in 41 DLR(1989)30 (para-29), New Ideal Engineering and Works –Vs- Bangladesh Shilpo Bank and others reported in 42 DLR(AD) page-221 (para-8A), Sheikh Abdus Sabur –Vs- Returning Officer & Others reported in 41 DLR (1989)30 (para-76), Sheikh Abdus Sabur –Vs- Returning Officer & Others reported in 41 DLR(AD)1989 30 (para-38), Sheikh Abdus Sabur –Vs- Returning Officer & Others 41 DLR(AD)1989, 30 (para-43), Solicitor –Vs- Syed Sanwar Ali reported in 27 DLR(AD)16 (para-14), Tabarak Ali Sikder-Vs-The Administration of Waqfs reported in 45 DLR(1993)70 (para-10), Ali Ekabbar –Vs- Govt. of Bangladesh reported in 47 DLR(AD) 1995,394, PLD,1958, page73(FB), PLD1975(A,J &K)69,

The present writ petition has been hotly contested and the learned Advocates on both the sides have debated the points raised therein at sufficient length.

It appears from the rule issuing order as well as the prayer of the writ petition that the petitioner company did not challenge any action of the respondent No. 8 (NBR). Despite the fact, petitioner made party the NBR as respondent No. 8 for reason best known to them.

There is provision to issue Cellular Mobile Phone Operator license under section 35 of the Bangladesh Telecommunication Act, 2001. On the other hand Spectrum Assignment License issue under section 55 of the BT Act, 2001.

The imposition of MCF while calculating the spectrum assignment fee is completely a separate issue done in pursuance to the section 55(3) of the Bangladesh Telecommunication Act, 2001-having no relevance with regard to the Cellular Mobile Phone Operator license of the petitioner company.

The concept of MCF was introduced in the guidelines, 2011 by the BTRC by virtue of its power under section 55(3) of the Act, 2001. The issue of MCF is entirely related to the issue of spectrum/ frequency as dealt in section 55 of the BT Act, 2001. As such, it has no nexus in respect of the cellular mobile phone operators.

The issue of applicability of VAT and/or liability of the petitioner company to pay the VAT has no relation whatsoever with regard to the payment of license renewal fee and spectrum assignment fee. The petitioner company is bound to pay the net amount of the license renewal fee fixed by BTRC, without any kind of deduction.

From the record it appears that after issuance of SRO dated 30 June 2010, the petitioner company has made all sorts of payment whatsoever including the payment of annual license fee, revenue sharing and annual spectrum fee after deduction of 15% . The petitioner has deducted the said 15% amount from the total license fee, revenue sharing and annual spectrum fee on the basis of their self interpretation of the Rule 18 (Uma) of the SRO dated 30 June 2010.

That the VAT Act requires the service recipient to pay an amount of 15% VAT on all services received in Bangladesh on the basis of the value

mentioned in section 5. As per section 3 (গ) of the VAT Act 1991, in case of providing service, the service providing entity was required to deposit the said applicable amount of 15% VAT to the government exchequer. Section 5(4) of the said Act provides that in case of providing service, the VAT will be charged on the total receivable amount (‘সর্বমোট প্রাপ্তির উপর’). As such, a conclusion may be drawn if section 3 (গ) is read along with section 5 (4) together with the definition of পণ (consideration) as given in section 2 (গ গ) of the VAT Act that VAT is always assessed or calculated on the basis of the total value receivable or received.

In view of sections 3 & 5 of the VAT Act 1991, the basic scheme of the VAT Act is that the VAT is calculated at the rate of 15% on the total value receivable and is always added to the total consideration value instead of deduction. Under no circumstances; it cannot be deducted or subtracted from the total value. In order to comply with the basic scheme of VAT Act and VAT Rules made thereunder, the BTRC lawfully mentioned the words ‘without any deduction’ in its memo dated 17 October 2011 – which means that the demanded money has to be paid by the petitioner to BTRC as it is, and, while calculating the VAT to be paid at source, the petitioner will have to add an amount calculating at the rate of 15% of the total demanded amount as VAT, withhold the same and deposit it in the exchequer directly within the stipulated time period.

In the present case, petitioner's core contention is that as per memo dated 30.11.2008 respondent No.1 has been assigned 2.6 MHz Spectrum in favour of the petitioner with a value of Tk. 80(eighty) crore per MHz uplink and downlink for 18 years from the date of assignment subject to the renewal of the license; but respondent No. 1 by Memo dated 17.10.2011 again demanded Spectrum fees in respect of aforesaid 2.6 MHz.

In this regard it is worthwhile to quote clause 9.01 of the 'Cellular Mobile Phone Operator Regulatory And Licensing Guidelines , 2011' which runs as follows;

"9. SPECTRUM, 9.01 The spectrum assignment Fees shall be applicable for all of the access frequencies assigned to the licensees except for the 7.4 MHz, 2 MHz and 2.6 MHz spectrum assigned in the year 2008 in favour of Grameenphone, AXIATA and Orascom respectively with a value of Tk. 80 (eighty) crore per MHz uplink and downlink for 18 (eighteen) years from the date of assignment subject to the renewal of the license. However, other provisions of these guidelines shall be applicable for respective licensee (s)."(underlined by us).

On a plain reading of the aforesaid clause 9.01 of the 'Cellular Mobile Phone Operator Regulatory And Licensing Guidelines , 2011' it is crystal clear that the Spectrum assignment Fees shall be applicable for all of the access frequencies assigned to the licensees, except Spectrum assigned in the year 2008 (30.11.2008) for the 2.6 MHz in favour Orascom Telecom Bangladesh Ltd.

Therefore, by Guideline 2011, NBR did not charge or impose any additional fees on the petitioner company for the aforesaid 2 MHz spectrum.

It is also remunerative to quote the letter dated 17.10.2011 (by which this petitioner aggrieves) which runs as follows:-

Bangladesh Telecommunication Regulatory Commission

IEB Bhaban, Ramna, Dhaka-1000, Bangladesh.

No. BTRC/LL/Mobile/ License Renewal (382)/2011-688

Date: 17.10.2011

Subject: Notification of awarding Renewed Cellular Mobile Phone Operator License of

Orascom Telecom Bangladesh Limited (Banglalink).

Ref: (i) Banglalink's application bearing No. OTBL/License Renewal /Application/

BTRC/ 01, dated: 09-10-2011 for renewal of Cellular Mobile Phone Operator

License.

(ii) Banglalink's application bearing No. OTBL/ License Renewal/ Application/

BTRC/02, dated: 09-10-2011 for renewal of Radio Communications Equipment

License.

(iii) Regulatory and Licensing guidelines for Renewal of Cellular Mobile Phone

Operator License bearing No. BTRC/LL/Mobile/ License Renewal (342)/2009

- 563, dated: 11-09-2011 (guidelines).

With reference to the applications mentioned in ref. (i) and (ii), the undersigned is directed to inform you that renewal of the Cellular Mobile Phone Operator License of Banglalink would be considered upon fulfillment of the followings:

(a) Under clause 7.1.3. of the guidelines, Banglalink shall pay BDT 10,00,000,00 (Taka Ten Crore) only as the License Renewal Fee.

(b) Under clause 8.01 (ii) and clause 9, of the guidelines, Banglalink shall pay BDT 2018.75 Crore (Taka Two Thousand Eighteen point Seven Five Crore) only as the Spectrum Assignment Fee against the spectrum allocated to Banglalink.

Spectrum Fee Calculation:

New Assignment in 900 MHz band	Fee for New Assignment per MHz (BDT in Crore)	New Assignment in 1800 MHz band	Fee for new Assignment per MHz (BDT in Crore)	Previous Assignment in 1800 MHz band	Fee for previous Assignment per MHz band	Market Competition Factor (MCF)	Sub Total (BDT in crore)	Previous Payment Deducted (BDT in Crore)	Payable to BTRC (BDT in Crore)
A	B	C	D	E	F	G	H= [(AXB) + (CXD)+(EXF)] X G	I- (EXF) X (15/18)	J= H-I
5	150.00	7.4	150.00	2.6	80.00	1.06	2192.08	173.33	2018.75

(C) Payment Schedule, as per provisions of guidelines [clause 8.01 (iii)]

Period	October 31, 2011	April 13, 2012	October 10, 2012	April 8, 2013
Percentage of payment	49%	17%	17%	17%
Amount of payment (BDT in Crore)	989.19	343.19	343.19	343.19

(d) Documents to be submitted are listed below:

- i. Latest shareholding structure in MoA and AoA (as per provisions of serial 4, appendix 1 of guidelines).
- ii. Annual Reports for the years from 1996 to 2007 (as per provisions of serial 8, appendix 1 of guidelines).
- iii. Percentage of geographical coverage and population coverage (as per provisions of serial 13, appendix 1 guidelines).
- iv. Information regarding compensation paid for illegal VoIP in the history of non-compliance (as per provisions of serial 14, appendix 1 of guidelines).
- v. Detailed RF plan (as per provisions of serial 18, appendix 1 of guidelines)
- vi. Information relating to year –wise inward and outward fund flow/transaction and year-wise income, expenditure and profit (as provisions of serial 5, appendix 1 of guidelines).

You are requested to pay the above mentioned amount without any deduction as per provisions of guidelines and submit the documents as stated above in clause (d) to the Commission within 10 (ten) days from the date of issuance of this notification.

Thanking You.

(Tareq Hasan Siddiqui)

Deputy Director

Legal and Licensing Division

Phone: 9511127

Chief Executive Officer

Orascom Telecom Bangladesh Limited

Tiger's Den

House#4, Gulshan Avenue SW

Gulshan-1. Dhaka-1212.

From the aforesaid letter dated 17.10.2011 it is also clear that NBR did not claim any additional fees for the 2.6 MHz spectrum.

By the said letter they only notified the petitioner, the mandatory requirement for consideration of their Cellular Mobile Phone Operator License as per guidelines dated 11.09.2011.

Further or alternatively, as per clause 5 (under the head of terms & conditions) of the assignment letter dated 30.11.2008 (attached to the Writ Petition as Annexure-‘D’ at page 37), the respondent No.1/BTRC reserve the right to make any change in the charges or levies from time to time and that the licensee shall abide by such decision of the respondent No.1/BTRC.

Despite the fact, BTRC by its letter dated 17.10.2001 did not demand any additional charge for the 2.6 MHz spectrum which was assigned in favour of the petitioner in 2008 with a value of Tk. 80 crore per MHz.

So, BTRC neither did impose any Spectrum Assignment Fee according to the Guide Line 2011 for 2.6 MHz-GSM 1800 frequency Band, which was assigned in favour of the petitioner on 30.11.2008 nor by memo dated 17.10.2011 did not claim any additional Spectrum Assignment Fee for the same.

In the light of the above facts and circumstances, we find no substances in this writ petition. All the allegations made by the petitioner in its petition are amorphous, fallacious and absolutely based on erroneous notion. Respondent No. 1 BTRC upon issuing the memo dated 17.10.2011

did not violate any right of the petitioner as enshrined in the constitution or in the law or in any clause of the guidelines 2011 whatsoever.

In the result, the Rule is discharged without any order as to costs.

Md. Ashfaul Islam, J:

I agree.