

## CHAPTER – VIII

### Revenue shared by Aircel Group (Dishnet Wireless Limited, Aircel Limited and Aircel Cellular Limited)

#### 8.1 Brief Profile of Aircel Group

M/s Aircel Cellular Ltd (ACL) the erstwhile M/s RPG Cellular Ltd commenced its telecommunication services in Chennai in 1994. Subsequently, M/s Aircel Ltd (AL) promoted by Sterling group obtained CMTS Licence in Tamil Nadu service area during 1998 (erstwhile M/s Srinivasa Cellular Ltd. Coimbatore). AL has two wholly owned subsidiaries namely ACL and M/s Dishnet Wireless Ltd (DWL), which also provide telecommunication services in India. In 2006, Aircel was acquired by Maxis Communications Berhad, Malaysia (Maxis). Aircel is a joint venture with Sindya Securities and Investment Pvt Ltd and Maxis hold majority of the stake (74 per cent) in the Company. By the year 2010, the Company was having a pan India presence with licences in all 23 LSAs. Brief profile of the company is as follows:

##### 8.1.1 Licences granted to Aircel Group

ACL obtained CMTS licence in 1994 for Chennai service area. AL obtained CMTS licence in Tamil Nadu service area during 1998. Subsequently, it also got UAS licences in seven service areas during 2006<sup>1</sup>. DWL got UAS licences in 14 service areas during 2004<sup>2</sup> and 2006<sup>3</sup>.

##### 8.1.2 Spectrum allotted to Aircel group of companies

AL, ACL and DWL are GSM operators. Initial start-up spectrum for subscriber access (Main Radio Spectrum) to a GSM operator was 2×4.4 MHz. LSA wise spectrum allotted to Aircel group of companies as on 31 March 2010 is detailed below:

**Table No. 8.1**

Sl. No.	Spectrum	Licensed Service Area
1	2 × 9.8 MHz	Tamil Nadu
2	2 × 8.6 MHz	Chennai
3	2 × 6.2 MHz	Assam
4	2 × 4.4 MHz	Bihar, Himachal Pradesh, Jammu and Kashmir, North East, Orissa, West Bengal, Haryana, Kerala, MP, Punjab, UP(W), UP(E), Kolkata, AP, Delhi, Gujarat, Karnataka, Maharashtra, Mumbai and Rajasthan (20 LSAs)

1 Mumbai, Delhi, Andhra Pradesh, Karnataka, Maharashtra, Gujarat and Rajasthan.

2 Himachal Pradesh, Orissa, Jammu and Kashmir, Bihar, West Bengal, Assam and North East.

3 Kolkata, Uttar Pradesh (West), Haryana, Kerala, Madhya Pradesh, Uttar Pradesh (East) and Punjab.

### 8.1.3 Subscriber base of AL/ACL/DWL

The cellular subscribers of Aircel Group (AL, ACL and DWL) grew from 0.55 crore as on 31 March 2007 to 3.69 crore as on 31 March 2010 registering a growth of 569 *per cent*. Its market share grew from three *per cent* as on 31 March 2007 to six *per cent* as on 31 March 2010.

### 8.1.4 Gross Revenue (GR), Adjusted Gross Revenue (AGR) and Revenue share paid by the Aircel Group

As brought out in Para 1.5, Telecom Service Providers are required to pay LF and SUC at a percentage of AGR on quarterly basis on self-assessment basis. GR, deductions, AGR reported and revenue share (LF and SUC) paid by Aircel Group during the four years 2006-07 to 2009-10 are as follows:

**Table 8.2**

(₹ in crore)

Year	GR	Deductions	AGR	Percentage of AGR to GR	Revenue share (LF+SUC)
2006-07	1389.40	205.45	1183.95	85.21	144.33
2007-08	2332.21	364.82	1967.39	84.36	226.22
2008-09	3116.51	579.67	2536.84	81.40	315.47
2009-10	4703.64	1222.58	3481.06	74.01	409.60
<b>Total</b>	<b>11541.76</b>	<b>2372.52</b>	<b>9169.24</b>	<b>79.44</b>	<b>1095.62</b>

## 8.2 Under reporting of revenue by Aircel Group

As mentioned in para 1.4 (a), the GR shall be inclusive of all types of revenue stated therein without any set-off for related item of expense, etc. Further, Service Revenue (amount billable) shall be shown gross and details of discount/rebate indicated separately.

Audit examination of records/Books of accounts (Vouchers, General Ledger, Trial Balance, Profit and Loss Accounts, and Balance Sheet, etc.) of Aircel Group revealed that these companies had not adhered to the provisions of the licence agreement as brought out in the succeeding paras:

### 8.2.1 Under reporting of Prepaid/Post-paid revenue due to netting off of revenue relating to various offers given to subscribers

From the examination of data/records pertaining to prepaid services furnished by Aircel Group for the period from 2006-07 to 2009-10, it was observed that the Company offered various schemes/discounts viz. waiver, discount, Promo talk time, Free Air Time (FAT),

Promotional offers, Full talk time, etc. to subscribers without any charges. It was noticed that to accommodate such offers, the value of the same was deducted from service revenue upfront. As and when the same was used by subscriber, the revenue was credited by the said amount. Resultantly, the revenue on account of these offers to subscribers was not recognised in the GR/AGR. Since, offers made to customers were part of overall commercial strategy to enhance business, such offers/discounts amount to expenses. In terms of licence agreement, service revenue shall be shown without any set-off for related item of expense, so they are not allowed to be deducted from GR. This was also in violation of the licence agreement which clearly states that service revenue (amount billable) shall be shown gross and details of discount/rebate indicated separately.

The item wise details are furnished below-

#### **A. Waiver, Discount and Promos to customers**

Review of data/records furnished by Aircel Group for the period from 2006-07 to 2009-10 revealed that the following items of expenses were netted off from the revenue:-

- i) Waiver offered to customers (₹ 99.09 crore)
- ii) Discount offered to customers (₹ 46.77 crore)
- iii) Promo Talk Time Transfer (₹ 0.96 crore)

In addition to the above, ₹ 24.71 crore booked as Promo talk time/usage under expenses was netted off from revenue while arriving at GR. However, ₹ 30.47 crore on account of “Promo talk time given as discount/Goodwill waiver and royalty discount” was added back to revenue while arriving at GR.

Resultantly, total amount netted off from revenue on account of waiver, discount and promo was ₹ 141.06 crore (**Annexure - 8.01**). Consequently, GR/AGR was understated by ₹ 141.06 crore and LF and SUC amounting to ₹ 13.13 crore and ₹ 5.95 crore respectively was not paid by the Company (**Annexure - 8.02**).

#### **B. Full talk time scheme offered to subscribers**

The revenue from the prepaid services was netted off by ₹ 153.33 crore on account of Full talk time offer to prepaid subscribers. Resultantly, LF and SUC amounting to ₹ 9.76 crore and ₹ 4.32 crore respectively (**Annexure - 8.03**) was not paid on the said revenue by the Company.

#### **C. Free talk time offered to subscribers**

The revenue from the prepaid services was netted off by ₹ 33.36 crore on account of various offers (Free Air Time Bonus/Free talk value (FTV) accounted, FTV offered to subscribers on Recharge Coupons (RC), Additional Talk time, Extra Talk time, etc.). As a

result, the revenue was reduced by ₹ 33.36 crore. Consequently, LF and SUC amounting to ₹ 2.95 crore and ₹ 1.39 crore respectively (**Annexure - 8.04**) were not paid on the said revenue by the Company.

#### **D. Discounts**

During 2009-10, revenue from the prepaid services pertaining to AL was netted off by ₹ 2.82 crore by crediting expenditure (Discount ER). Resultantly, LF and SUC amounting to ₹ 0.28 crore and ₹ 0.06 crore respectively (**Annexure - 8.05**) were not paid on the said revenue by the company.

On being pointed out by Audit, the Management stated that-

- Waivers offered to customers which were in the nature of goodwill gesture were already added back for computing AGR in the respective years. Balance waivers which were in the nature of billing errors, were corrected by giving waivers.
- Discount/Promo Talk time transfers are in the nature of additional talk time given to subscribers based on their usage pattern to enhance subscriber experience or to retain him on Aircel network etc. For these, liabilities were booked and revenue was accounted as per usage on decrement over a period of time and revenue was included for AGR purpose.
- Full Talk time scheme offered to subscribers were in the nature of talk time given to subscribers for more value, to retain him on Aircel network etc. or to pull/instigate new subscribers to join Aircel Network.
- FAT-Bonus/Free talk value/FTV offered to subscribers on RC's/additional talk time/extra talk time offered to subscribers are in the nature of talk time given to subscribers, to retain him on Aircel network etc. or to pull/instigate new subscribers to join Aircel Network.
- The company accounts for the revenue in compliance with the Accounting Standard (AS) 9 issued by the Institute of Chartered Accountants of India.
- TDSAT also upheld the above definition and passed an order to this effect on 23 April 2015 stating that “There is no conflict between the definition of “revenue’ as provided in AS-9 and clause 19.1 and 19.2 of the licence agreement defining gross revenue and adjusted gross revenue. As is evident from section 211 (3A), (3B) and (3C) that in case of a telecom company, the licensee is legally mandated to maintain its profit and loss account and the balance sheet in compliance with the Accounting Standards. Accounting Standards are given due importance by the Supreme Court as those are the codified recommendations by the Institute of Chartered Accountants of India which is an expert body in a specialised field”.

Reply of the Management is not acceptable as -

- Out of total debit entry noticed in the revenue heads on account of "Waiver offered to customers" i.e. ₹ 99.09 crore, ₹ 98.62 crore (i.e. 99.53%) relates to prepaid revenue, where no bills are raised to the customers. Further, even in case of waivers to Prepaid subscribers, out of total debit entry of ₹ 98.62 crore on account of waivers, ₹ 98.43 crore was debited to GL code "Prepaid-RC Processing Income", which if, had it been due to wrong deduction (from the Subscriber accounts) on account of VAS, Talk Time, rental etc, debit on account of waiver should have been on those GL codes only. In case of billing to the post-paid customers if it is subsequently confirmed that there was a mistake in the bill, the same is reversed/adjusted in the respective revenue codes. It was noticed that there are several reversal and adjustment entries in the general ledger to this effect. Analysis of the data extracted from general ledgers pertaining to these waivers clearly indicated that these were on account of prepaid processing income, VAS, Talk Time, rental etc. It was not mentioned that these entries were due to wrong billing. Out of waivers of ₹ 99.09 crore for prepaid customers, Aircel group has itself added back ₹ 7.7 crore in the name of goodwill waiver to the customer in revenue while preparing GR.
- Discount/Promo Talk time transfers and waivers are part of overall commercial strategy to enhance business; therefore, such offers/discounts were in the nature of expenses and hence, in terms of licence agreements, were not allowed to be deducted from GR.
- In case of Full Talk Time/Free Talk Time etc. Management has itself accepted that these offers were in the nature of discounts offered to customer retention and maintaining relationship and formed part of service revenue. Therefore, such offers/discounts were in nature of expenses and hence, in terms of licence agreements, were not allowed to be deducted from GR.
- In case of FAT-Bonus /Free talk value/ FTV offered to subscribers on RC's/additional talk time/extra talk time offered to subscribers also, Management accepted that it is in the nature of talk time given to subscribers to retain them on Aircel network etc. or to pull/instigate new subscribers to join Aircel Network. Therefore, such offers/discounts were in nature of expenses and hence, in terms of licence agreements, were not allowed to be deducted from GR.
- Audit is not questioning the accounting in accordance with AS-9 but contends that since these expenses were not to be set-off against as per the licence agreement, these should be added back to GR for computation of LF and SUC.
- While the matter is sub-judice at Hon'ble Supreme Court, Audit view is that as per licence agreement, service revenue should be shown in gross without any set-off of related promotional expenses like discounts/waivers/offers given to the subscribers.

### 8.2.2 Short accounting of revenue due to upfront debit in the revenue heads

As per the procedure followed by the Company for accounting of revenue, while the revenue received in advance was accounted under liability, the FAT/FOC on this amount was debited to the current revenue. Due to this, the current revenue was short accounted to the extent of FAT/FOC resulting in deferment of LF and SUC on this amount.

On being pointed out by Audit, the Management reiterated the reply as given against our observations at para 8.2.1 above.

Reply of the Management is not tenable since the upfront debit of FAT/FOC of revenue received in advance to the current revenue results in short payment of LF and SUC on the current revenue to the extent of amount debited.

### 8.2.3 Under reporting of prepaid revenue due to set-off of revenue pertaining to commission/discount allowed to the distributors

From the examination of data/records furnished by Aircel group for the period from 2006-07 to 2009-10, it was observed that revenue booked in the accounts was net of commission/discount given to the distributors at the time of sale of electronic/paper recharge coupon. Further, the aforesaid commission/discount given to the distributors was also not added back while arriving at GR/AGR. This was in violation of the licence agreement which clearly stated that GR (amount billable) shall be shown gross and details of discount/rebate indicated separately and the GR shall be without any set-off for related item of expense.

In this connection, when Audit raised the query seeking the details of amount/percentage of commission/discount paid to the distributors at the time of sale of electronic/paper recharge coupon, relevant information was not furnished by the Management. In such circumstances, on the basis of average of the prevailing percentage (i.e. 4 *per cent*<sup>4</sup> of the pre-paid revenue), Audit calculated ₹ 272.60 crore as commission paid to the distributors during 2006-07 to 2009-10.

On being pointed out by Audit, it was stated by the Management that:-

- It is submitted that though the pre-paid vouchers carry a Maximum Retail Price (MRP), these vouchers were sold to the distributors on a lower price as per agreement between the parties. It is contended that the sale of pre-paid vouchers was a Principal to Principal transaction.
- Further, TDSAT in its judgment dated 23 April 2015 has held “In our view the definition of ‘gross revenue’ cannot be construed as to bar the licensee from fixing a wholesale price for the service which is lower than its MRP. The test is how the actual transaction takes place. If the sale and invoicing is on MRP and any discount

<sup>4</sup> Four *per cent* (average of three *per cent* to five *per cent*, the prevailing percentage of commission during 2006-07 to 2009-10)

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

Audit view on the reply of the Management is as explained in para 3.2.1 (A). While the matter is sub-judice at Hon'ble Supreme Court, Audit view is that commission/margin paid to the distributors/franchises/dealers is in the nature of marketing expenses, therefore, set-off of such expenses with revenue was against the licence condition.

Thus, netting off of commission amounting to ₹ 272.60 crore given to distributors/agents/dealers has resulted in understatement of GR/AGR and short payment of LF and SUC by ₹ 22.31 crore and ₹ 9.64 crore respectively (**Annexure - 8.06**).

#### **8.2.4 Under reporting of revenue due to set-off on account of "Impact of Market stock"**

From the examination of data/records furnished by Aircel group for the period from 2006-07 to 2009-10, it was observed that during February 2009 and March 2010, the revenue from prepaid services was netted off by ₹ 3.40 crore on account of "Impact of Market stock/Impact of service tax rate change on market stock /etc."

On being pointed out by Audit, it was stated by Management that this seems to be the difference on account of market stock impact of increase in rate of service tax. The entries for change in service tax rate are recorded at a later date, therefore while passing entry for transfer of liability from market stock to customers, the liability is transferred based on the old rate of service tax and accordingly revenue on account of such liability was recorded in excess. Hence amount equivalent to the differential of service tax rate change have been debited to revenue codes and credited to liability to rectify the excess revenue recorded. Therefore, our submission is that the above should not be added back to revenue once again in AGR for calculation of LF.

Reply of the Management is not tenable as rate of service tax was not revised during March 2010. Further, regarding cases pertaining to February 2009, it is stated that in all these cases corresponding credit entries were made to processing fee/activation charge/other provision, which is not related to service tax liability.

Thus netting off of revenue on account of "Impact of Market stock" has resulted in understatement of GR/AGR by ₹ 3.40 crore in the year 2009-10 and short payment of LF and SUC by ₹ 0.34 crore and ₹ 0.14 crore respectively (**Annexure - 8.07**).

### **8.2.5 Non consideration of revenue from infrastructure sharing from other telecom operators for GR/AGR**

As mentioned in para 1.4 (a), the GR shall be inclusive of revenue from permissible sharing of infrastructure and any other miscellaneous revenue without any set-off for related item of expense, etc.

Telecom infrastructure (towers, network equipments, etc.) owned by Aircel Group were shared with other telecom companies. They have entered into agreements with other telecom companies for infrastructure (site) sharing. In terms of the agreements entered with the other operators, charges for sharing cell site was recovered from other operators which was based on a percentage of CAPEX cost of the sites and OPEX cost incurred by Aircel group.

From the examination of data/records furnished by Aircel group pertaining to Infrastructure sharing charges for the period from 2006-07 to 2009-10, it was observed that Infrastructure/site sharing charges recoverable/recovered on account of rent, fuel (diesel), electricity, network expenses, repairs and maintenance and security amounting to ₹ 67.12 crore were netted off from their respective expense heads.

On being pointed out by Audit, it was replied that -

- There are two type of payments received for sharing of infrastructure i.e., charges levied for the usage of the facility and reimbursement of expenditure incurred such as that on repairs and maintenance, electricity, diesel etc. The charge for the usage of the facility was booked as revenue whereas the reimbursement of costs was booked as a reduction in related expenditure. It is pertinent to note here that the Company accounts for reimbursement of expenses in compliance with the AS 29.
- TDSAT vide its judgment on 23 April 2015 has held that “As is evident from section 211 (3A), (3B) and (3C) a telecom company, the licensee is legally mandated to maintain its profit and loss account and the balance sheet in compliance with the Accounting Standards. Accounting Standards are given due importance by the Supreme Court as those are the codified recommendations by the Institute of Chartered Accountants of India which is an expert body in a specialised field”. It is important to note that, TDSAT has also in its judgment dated 23 April 2015 has stated that “while any payment made towards the usage of the facility has to be taken as revenue in the hands of the recipient, a payment in the nature of reimbursement of an expense and which is clearly indicated separately in the invoice as such, may not be taken as revenue provided that it is not booked in the profit and loss account as revenue.”

Audit view on the reply of the Management is as explained in para 3.2.4. While the matter is sub-judice at Hon’ble Supreme Court, Audit view is that revenue towards diesel expenses,



security expenses, repair and maintenance expenses and electricity charges did not constitute reimbursement since they had to be incurred irrespective of whether the towers were shared or not. In fact, by sharing the expenditure the Company benefited through additional income. Thus netting of infrastructure sharing revenue received/receivable from other telecom operators from the cost relating to 2006-07 to 2009-10 resulted in understatement of GR/AGR by ₹ 67.12 crore and short payment of LF and SUC by ₹ 5.45 crore and ₹ 2.26 crore respectively (**Annexure - 8.08**).

### **8.2.6 Short/Non-consideration of revenue from forex gain in GR/AGR**

In the Profit and Loss account of Aircel Group, total net balances under the account heads operated for booking transactions related to foreign exchange gain/loss were included in the schedule of “Other Income” as Foreign Exchange Gain (net).

From the examination of data/records provided by Aircel group for the period from 2006-07 to 2009-10, it was observed that the total realized forex gain for the Aircel was ₹ 16.57 crore, out of which, forex gain amounting to ₹ 6.54 crore only was considered during 2006-07 to 2008-09 in the AGRs under UASL/CMTS licences of the Aircel Ltd and Aircel Cellular Ltd. Total realised forex gain amounting to ₹ 15.13 crore was not considered for AGR.

The above realised gain did not represent the actual gain of that particular item since the Company recasts the value of all the items included under the foreign exchange gains/losses head every year, the matured items are accounted under realised gains and the un-matured items remain under unrealised gain. Thus, the realised gain of a particular item in that year would not be the actual gain due to accounting of the gains /losses of that item during the intermediate period under unrealised. Audit could not arrive at the actual value of items accounted under realised gain every year for want of original value of each item. Further, Audit has considered the quarterly net gain, head of account-wise and LSA-wise, as it was not possible for Audit to segregate/collect the figures of gains only from the data made available. The operator should calculate the gain of each item with reference to its initial value of accounting and include the total forex gain in GR/AGR.

On being pointed out by Audit, the Management stated that:-

- The gains are of two types. First, is the reduction of liability towards payments for capital goods such as equipment and roaming charges for out-roamers. The other is increase in receipts such as roaming charges for in- roamers. In the first case, the reduction in liability on account of payment for capital goods is only a reduction of cost. Since the cost of equipment has no impact on the LF as the same is calculated on gross revenue, any gain arising on account of a decrease in such cost should also not be taken into account for LF and cannot be treated as revenue for the purpose.

As regards payment of roaming charges, since the same is allowed on actual basis and not accrual basis, the actual amount paid or set-off in case of netting, may be allowed to be deducted from gross revenue in terms of clause 19.2. On the issue of roaming revenue on account of in-roamers, since the same is to be accounted for in the revenue on accrual basis, the LF should be on the revenue that is booked in the profit and loss account as per AS-9. Subsequent changes in the book value of the receivable are only notional till the same is actually received. Further, the actual receipt may be less or more depending on the currency rate at the time of actual payment. Since no discount is given if actual receipt is less, no LF should be charged if the same is more.

- It is further submitted that the TDSAT Judgment pronounced on 23 April 2015 states that “.....any gain or loss due to foreign exchange fluctuation should have no bearing on the licence fee.”
- The Hon’ble Madras High Court by an order dated 22 June 2012 has directed as follows:  
“No coercive steps shall be taken, by the respondents, to recover the LF payable by the petitioner, in respect of the non-telecom activities of the petitioner until further orders.”

Reply of the Management is not tenable as:-

- In terms of the licence agreement GR shall be inclusive of any other miscellaneous revenue.
- While the matter is sub-judice at Hon’ble Madras High Court and Hon’ble Supreme Court, Audit view is that any gain incidental to PSPs should be considered for GR.

Thus non-inclusion of realised foreign exchange gains pertaining to period from 2006-07 to 2009-10 resulted in understatement of GR/AGR by ₹ 15.13 crore and short payment of LF and SUC amounting to ₹ 1.23 crore and ₹ 0.31 crore respectively (**Annexure - 8.09**).

### **8.2.7 Non/Short consideration of Interest Income for GR/AGR**

From the examination of data/records provided by Aircel group for the period from 2006-07 to 2009-10, it was observed that out of total Income on account of interest on bank deposits and fixed deposits of ₹ 200.20 crore, ₹ 98.89 crore was not considered as revenue during 2006-07 to 2009-10 in the GR/AGR (**Annexure - 8.10**), which was in violation of licence agreement as definition of GR in licence agreements expressly provides for inclusion of income from interest in GR/AGR.

On being pointed out by Audit, it was stated by the Management that-

- The interest earned on investment of savings made by a licensee after meeting liability on account of share of the government in the gross revenue is ought to be excluded from AGR. Investment of saving from the income which has severed all its links

with the licenced telecom activity was again an application of income, the revenue where from did not come within the purview of AGR. Similarly, revenue derived from any temporary surplus funds through use for any business other than telecom service or for maximizing the value of money through fixed deposits, securities or mutual funds cannot be termed as an income from telecom activity and hence cannot be included in AGR for the purposes of computation of LF. Such interest, therefore, cannot be treated as revenue generated from service or licensee's business under the licence or not even distantly related to the business being carried out to provide the service under the licence.

- The Hon'ble Madras High Court by an order dated 22 June 2012 has directed as follows:

“No coercive steps shall be taken, by the respondents, to recover the LF payable by the petitioner, in respect of the non-telecom activities of the petitioner, until further orders.”

Reply of the Management is not acceptable as -

- While the matter is sub-judice at Hon'ble Madras High Court, Audit view is that definition of GR in licence agreements expressly provides for inclusion of interest income for GR/AGR for computation of revenue share.

Thus non-inclusion of interest income pertaining to period from 2006-07 to 2009-10 has resulted in understatement of GR/AGR by ₹ 98.89 crore and short payment of LF and SUC amounting to ₹ 6.74 crore and ₹ 2.66 crore respectively (**Annexure - 8.10**).

### **8.2.8 Non consideration of income from investment for GR/AGR for payment of revenue share**

From the examination of data/records provided by Aircel group for the period from 2006-07 to 2009-10 it was observed that income from investments amounting to ₹ 9.01 crore was not considered as revenue during 2006-07 to 2009-10 for GR/AGR.

To an Audit query, the Management stated that -

- The nature of the income, being dividend, was not attributable to any licenced activity. Hence, any dividend earned on account of investments of any nature whatsoever, was not part of income accrued from the licenced activity.
- The Hon'ble Madras High Court by an order dated 22 June 2012 has directed as follows:

“No coercive steps shall be taken, by the respondents, to recover the LF payable by the petitioner, in respect of the non-telecom activities of the petitioner, until further orders.”

Reply of the Management is not tenable as while the matter was *sub-judice* at Hon'ble Madras High Court, Audit view is that definition of GR in licence agreements expressly provides for inclusion of income from dividend in GR/AGR for computation of revenue share.

Thus non-inclusion of Income on investment pertaining to period from 2008-09 to 2009-10 has resulted in understatement of GR/AGR by ₹ 9.01 crore and short payment of LF and SUC amounting to ₹ 0.90 crore and ₹ 0.37 crore respectively (**Annexure - 8.11**).

### **8.2.9 Non consideration of miscellaneous income for GR/AGR**

From the examination of data/records provided by Aircel group for the period from 2006-07 to 2009-10, it was observed that certain items of miscellaneous income like income from composite contract, income from software services, income from project Management, notice pay (barring a few cases in some LSAs), income on account of sale of scraps, reimbursement of cost etc. were not considered while computing AGR for the purpose of revenue share:

- (i) Corporate Income amounting to ₹ 93.63 crore was not considered for AGR in DWL during 2006-07 and 2008-09. The short payment of LF and SUC on this amount worked out to ₹ 5.70 crore and ₹ 2.16 crore respectively (**Annexure - 8.12**).
- (ii) Recovery of Notice pay from the employees was not treated as revenue for the purpose of GR/AGR (except for a few cases in DWL in 2009-10). During 2009-10 in some LSAs of DWL (viz. UP (West), Bihar and Jharkhand, Assam, North East and NLD) notice pay was included in AGR and LF paid on it. The total amount of recovery of notice pay was ₹ 5.56 crore, out of which ₹ 0.58 crore was considered for AGR during 2009-10 and the total amount on which LF/SUC remains to be paid was ₹ 4.98 crore. LF and SUC short paid works out to ₹ 0.40 crore and ₹ 0.13 crore respectively (**Annexure - 8.13**).
- (iii) Miscellaneous income/other income on account of sale of scraps, reimbursement of cost etc. (excluding insurance claims) amounting to ₹ 1.59 crore had not been considered as revenue while computing GR/AGR for the purpose of LF/SUC. LF and SUC short paid works out to ₹ 0.11 crore and ₹ 0.03 crore respectively (**Annexure - 8.14**).

To an Audit query, the Management stated that-

- Corporate incomes do not arise from the licenced activity and for doing this, no licence was required. Further, separate divisional books of account were maintained for the non-telecom businesses which had no nexus with the licenced activities of any telecom circles.

“Notice Pay Recovery” consists of income received from employees on termination of services which do not accrue either from subscribers or from other telecom service providers for provisioning of telecom service, and therefore, should not be part of AGR.

“Miscellaneous income/other income” includes income from sale of scraps, insurance claim, reimbursement of cost etc. which do not accrue either from subscribers or from other telecom service providers for provision of telecom service, and therefore, should not be part of AGR.

Furthermore, these incomes do not require even a telecom licence.

- The Hon’ble Madras High Court by an order dated 22 June 2012 has directed as follows:

“No coercive steps shall be taken, by the respondents, to recover the LF payable by the petitioner, in respect of the non-telecom activities of the petitioner, until further orders.”

Reply of the Management is not tenable as -

- Definition of GR in licence agreement expressly provides for inclusion of miscellaneous income in GR/AGR for computation of revenue share. As mentioned earlier, the insurance claims have been excluded from AGR.
- While the matter is *sub-judice* at Hon’ble Madras High Court, Audit view is that miscellaneous income should be included in GR/AGR for computation of revenue share, as per licence conditions.

#### 8.2.10 Non consideration of income from profit on sale of fixed assets for payment of revenue share

From the examination of data/records provided by Aircel group for the period from 2006-07 to 2009-10, it was observed that income from profit on sale of fixed assets was not included in GR/AGR for computation of revenue share, as detailed below:

**Table 8.3**

Name of the company	Year	Amount not considered for GR/ AGR (₹ in crore)	Annexure reference
Dishnet Wireless Ltd	2007-08	10.04	<b>8.15</b>
Aircel Ltd	2009-10	23.88	<b>8.16</b>
Aircel Cellular Ltd	2007-08	0.01	<b>8.17</b>
	2009-10	7.24	
<b>Total</b>		<b>41.17</b>	

To an Audit query, the Management stated that -

- Sale of fixed assets on which capital gains were made cannot be said to be part of licenced activity. The stage at which the funds were utilized for purchase of fixed assets was after they had severed their connection with AGR. Hence, capital gains made on account of sale of fixed assets etc. should not form part of AGR. The capital gain made out of sale of asset was well within the purview of income tax and are charged separately from the operator during its assessment by the tax authorities and it was a common principle of law that the same cannot be charged twice by the State. If the licensor also extends its right to claim a part of this capital gain as a percentage of AGR from the licensee, then the State is indulging in double taxation, which was legally impermissible.
- The Hon'ble Madras High Court by an order dated 22 June 2012 has directed as follows:

“No coercive steps shall be taken, by the respondents, to recover the LF payable by the petitioner, in respect of the non-telecom activities of the petitioner, until further orders.”
- Further, TDSAT in its recent judgment dated 23 April 2015 has held that “In light of the discussions made above and especially in view of the recognition of revenue as per AS-9 “gain on sale of capital assets and receipt from sale of scrap” cannot be included in “gross revenue” for computation of LF. As seen above, clause 19.1 of the licence agreement mentions specific inflows as forming part of “gross revenue”. The item under consideration evidently does not come under any of the inflows enumerated in clause 19.1. Capital receipts are different from revenue receipts; hence, receipts of capital nature cannot be added to the “gross revenue” (para 19.2).

Reply of the Management is not tenable as:

- Definition of GR in licence agreements expressly provides for inclusion of miscellaneous income in GR/AGR for computation of revenue share.
- While the matter is *sub-judice* at Hon'ble Madras High Court and Hon'ble Supreme Court, Audit view is that any gain incidental to PSPs should be considered for GR.

Thus, income of ₹ 41.17 crore on account of profit on sale of fixed asset accounted in the books of accounts of the company should be included in GR/AGR for computation of revenue share payable by the company to DoT. Resultantly, LF and SUC amounting to ₹ 3.72 crore and ₹ 1.34 crore respectively (**Annexure - 8.18**) were not paid on the said revenue by the Company.

### **8.2.11 Non Inclusion of profit on revaluation of assets in GR**

As per the Scheme of Arrangements (SoA) approved by the Hon'ble Madras High Court in June 2010, the passive infrastructure assets of the three companies in the Aircel group-Aircel Ltd (AL), Aircel Cellular Ltd (ACL) and Dishnet Wireless Ltd (DWL) were to be transferred to Chennai Network Infrastructure Limited (CNIL) for a lump sum consideration. The appointed date of the Scheme was 1 January 2010. Accordingly, the assets of all three companies were revalued as on 1 January 2010 and the profit on revaluation of ₹ 3612.04 crore was accounted in 2009-10 under General Reserve which has been treated as a free reserve for all purposes as per the SoA. The above profit included profit from revaluation of the Company's passive infrastructure assets and other assets. As per the directions of the Hon'ble High Court, the SoA was to be effective from the date of filing of the order with the Registrar of Companies. Accordingly the transfer of assets as per the SoA became effective in July 2010.

Audit observed that the profit of ₹ 3390 crore earned on revaluation of the passive infrastructure assets, transferred to CNIL was not considered for revenue share in the year 2009-10. The Management informed that recording of the transaction of sale/transfer of asset prior to July 2010 i.e. before filing the order with the Registrar of Companies would have amounted to contempt of court.

As the effective date of SoA was beyond the period covered in the present Audit, it could not be ascertained whether the profit earned from the passive infrastructure assets transferred to CNIL was offered for payment of LF and SUC in subsequent years.

### **8.3 Short/non-payment of revenue share due to irregular/excess deductions claimed in the AGR statements**

#### **8.3.1 Irregular deduction of bad debts written off from GR to arrive at AGR**

In terms of clause 19.2 of the licence agreement, only following three items are allowed to be excluded from the GR for arriving at AGR-

- PSTN related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India:
- Roaming revenues actually passed on to other eligible/entitled telecommunication service providers and;
- Service tax on provision of service and sales tax actually paid to the government if gross revenue had included as component of sales tax and service tax.

Review of data/records furnished by Aircel Group for the period from 2006-07 to 2009-10 revealed that during 2009-10, while arriving at GR for Aircel Cellular Ltd, Bad debt written off amounting to ₹ 24.70 crore in Tamil Nadu LSA was deducted from the revenue resulting in reduction of GR/AGR for 2009-10 by ₹ 24.70 crore.

To an Audit query, the Management stated that-

- The bad debts written-off in the year 2009-10 were reduced from the AGR pursuant to the TDSAT judgment dated 30 August 2007 which stated that “Bad debts are actual monies lost by the service provider. Therefore, such losses have to be excluded from AGR. Allowing amounts on account of such losses to be included in AGR would mean that while the party incurs loss it has to pay LF on the loss also”. The above judgment still holds good since the new judgment of TDSAT dated 23 April 2015 has yet not attained the finality as the same is challenged by DoT before Supreme Court.
- In our view, bad debts represent failure of the service provider to realize the amounts. To impose LF on these items would mean subjecting the operators to double jeopardy – by failing to realize the amounts they lose the revenue.

The contention of the Management is not tenable, as:

- TDSAT judgment dated 30 August 2007 referred in the reply was set aside by the Hon'ble Supreme Court vide judgement dated 11 October 2011.
- The licence agreement does not provide deduction of bad debt from GR to arrive at AGR.
- While the matter is sub-judice at Hon'ble Supreme Court, Audit view is that bad debt should not be deducted from GR, as per licence conditions.

This has resulted in understatement of AGR by ₹ 24.70 crore and short payment of LF and SUC by ₹ 2.47 crore and ₹ 1.05 crore respectively.

### **8.3.2. Excess Deductions claimed in ISP (IT) AGR**

In terms of the amendment to “Terms and conditions of licence agreement for provision of internet services (including Internet Telephony)” issued by DoT vide its letter dated 3 March 2006, “For the purpose of arriving at the AGR, the following shall be excluded from the GR:

- Charges from internet access, internet content and internet access related installation charges.
- 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.”

During review of Audited AGR in respect of ISP (IT) Licence of DWL for the year from 2006-07 to 2009-10, it was noticed that the total deduction claimed by DWL was ₹ 96.52 crore out of which, deduction amounting to ₹ 7.50 crore pertains to customer premises equipment rental, mailbox solution to corporate, server co-location charges, etc.



which do not fall under any of the category of deductions allowed in the licence agreement for ISP(IT), consequently the AGR was understated by the same amount.

On being pointed out by Audit it was replied that-

**Table-8.4**

GL Description	Remarks
Income from Inter divisional Services	The company is charging for the lease line (E1s) used by the clients. The invoices raised by the Company and charges recovered are in the nature of lease line though the same are billed as Port charges on account of lease lines. These lease line charges are against the internet access charges and is grouped under the same. Port is a technical arrangement of the company for the provision of connectivity of the services for which the customers are not billed by any of the private operators. Charges billed to customers are in the nature of lease line only though billed with the nomenclature of port charges. Even the invoices raised in the current periods also have the same nomenclature.
Income from CPE rental - Inter Company	The Company is installing equipment at the customer premises to provide the internet services, for which the Company recovers installation charges from the group company. The Company is charging installation charges which are described as CPE rental charges in the invoices. The invoice does not contain installation charges separately in the invoices, since it is charged under this head. The same practice of invoicing is followed by the company during the current years too.
Income from CPE Rental	

Therefore, from the above, it is evident that deductions claimed are as per the licensing agreement and eligible for deduction from the calculation of AGR.

Audit view on the Management reply is as follows:

- Management contention that income from Inter divisional services includes income from port charges, which was of the nature of internet lease line, was considered. During 2006-07 to 2009-10 total income from such port charges was ₹ 2.37 crore. Hence the amount of excess deduction claimed during 2006-07 to 2009-10 was revised from ₹ 7.50 crore to ₹ 5.13 crore.
- Regarding Income from Inter divisional Services, the revenues relating to Mailbox solution to corporate, server co-location charges, etc. amounting to ₹ 0.83 crore was not at all eligible for deduction, as it did not fall under any of the category of deductions allowed in the licence agreement for ISP (IT).
- Further, as per invoice shown to Audit, installation charges and CPE rental charges were separately shown in the invoice and also they do not fall under any of the

category of deductions allowed in the licence agreement for ISP (IT) and hence did not qualify for deduction.

In view of above, deduction amounting to ₹ 5.13 crore was claimed in excess by DWL and consequently the AGR was understated by the same amount. Resultantly, LF amounting to ₹ 0.31 crore (**Annexure - 8.19**) was not paid by the Company.

#### **8.4 Interest on short/non-payment of LF and SUC**

On issues raised above (para 8.2 to 8.3) short/non-payment of LF and SUC worked out to be ₹ 75.80 crore and ₹ 31.81 crore respectively. The interest on this short/non-payment of LF and SUC is ₹ 155.22 crore (**Annexure - 8.20**). The calculation of interest was based on the rate prescribed in the Licence agreement i.e. two *per cent* above the Prime Lending Rate of State Bank of India existing as on the beginning of the financial year and the period considered for the calculation was from the end of the concerned financial year up to March 2015. The interest has been compounded monthly as prescribed in the licence agreement.

#### **8.5 DoT's response to the Audit observations**

Audit observations on the revenue shared by Aircel Group were communicated to DoT in October 2015. Reply of DoT is awaited (January 2016).