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Dated 21.09.2010.

To

Shri Gopal Das
Chairman cum Managing Director,
BSNL,
NEW DELHI-110001.

Sub: Effective legal actions for preventing Revenue leakage-Reg.

Respected Sir,

With reference to above subject matter, we suggest some effective legal actions for preventing revenue leakage in BSNL.

01 Various Tax issues of BSNL.

1. **One time building tax** :- This is an item of tax levied by various local bodies such as Municipal Corporations Grama Panchayats etc., on newly constructed buildings as a one-time measure based on legislations made by state governments. State/ Central Govt. is exempted from this tax.

Consequent to the formation of BSNL on 1-10-2000 local bodies started levying BSNL this one-time Tax even for those buildings constructed far before 1-10-2000. **This was challenged before the H'ble High Court of Kerala and obtained an order in our favour declaring that BSNL is not liable to pay one-time building tax for all those buildings constructed before 1-10-2010.** It was also made clear that if at all some extensions are constructed to a building constructed before 1-10-2000, **then BSNL is liable to pay one time tax only for that extended portion alone.(Judgment dt.21-07-2005 in WPC Nos. 8449,10265, 10353,17887 of 2005).**

2. **½ yearly/yearly building/property tax**:- Govt. of India is fully exempted from this tax. Hence for all the properties/ buildings now under the custody of BSNL, but the title deed still remaining in the name of President of India/ Govt. Of India, BSNL is not liable to pay this tax. It will become liable for it only from the date of conveyance of deed from the name of President of India to the name of BSNL(Till date conveyance of title deed has not taken place). On receiving demand notices/ revenue recovery notices from local bodies/ revenue authorities, BSNL Kerala challenged them before Muncif Court/ Kerala High Court . The

H'ble Court ordered government of Kerala to decide the claim for exemption in terms of sec.3(1) of building tax act (**WPC No.32930/2007**). Mean while finding large number of cases on this issue, **Local Self Govt Department issued orders exempting BSNL from the payment of such taxes for all those buildings still**

in the name of Govt. of India.(Order no. 28321/L2/06/LSGD dated 17-08-2006 of govt of Kerala, Local self govt. Department) This is an achievement gained by the Kerala Circle and avoided recurring leakage of revenue to the tune of several crores. Other circles can also stop payment of such taxes if being claimed by local bodies there, by citing the court order. Refund can be claimed in cases where payments made already.

- 3. Construction labourer's Cess:-** 1% of the total estimated cost of a building proposed for construction is to be paid as Cess which is utilized for the welfare of the construction workers. It is the liability of the employer. As far as the construction workers are concerned their employer is the contractor who undertakes the work and not BSNL. One such demand on our civil wing was challenged through WPC in which the H'ble HC has ordered to dispose the representation issuing a speaking order which was complied with.

Now the contractor has challenged the said speaking order thro' another writ petition which is still pending , but without any interim orders against BSNL. **It is pertinent to note that such clauses are to be included in Tender/agreement conditions of civil works to avoid unnecessary litigations resulting undue revenue leakage.**

- 4. One time (infra-structural) tax on Towers:-** Municipal Corporation of Kochi levied one time tax to the tune of Rs.2 Lakhs per BSNL tower. They were not issuing permit for the construction of towers pressurizing BSNL to effect the payment. Though we wrote to the Municipal Corporation that there is no statutory provision enabling them to make such demands they replied that it is the decision of the Corporation Council and they are empowered to take such decisions. Hence it was challenged through writ petition. The court's order was in favour of BSNL.

Mean while Govt. of Kerala issued orders imposing an **infra-structural fee** of Rs. 1 lakh on BSNL towers and Rs. 2 lakh on other operators towers. Certain private operators challenged this Govt. order stating it highly discriminatory. But the H'ble court directed them, through an interim order, to pay Rs.25000/-. Refund or payment of balance amount will be with respect to outcome of final judgment. Subsequently BSNL Kerala challenged this by filing a separate WPC after writing to the state government that their order has no legal support as the statute includes no provision for the same. The state Govt issued orders keeping in abeyance its own earlier order of levy of infrastructure fee. This was produced before the court by BSNL counsel. Recording this, the H'ble court closed the WPC. No 8333/2009 vide judgment dated 26-8-2009 with direction to local self government departments to refund to BSNL, the fee(Rs.25000/-) if already collected . Till date the state govt. has not reopened it.

- 5. Half yearly tax on towers:-** Certain Grama Panchayaths/ Municipalities started levying this. They pressurized BSNL to effect such payments, by not issuing use certificate(occupancy certificate) which is very much required for applying for electricity supply. This was challenged thro' 2 WPCs in two different incidents. In the 1st case the Hon'ble court has issued interim order directing the authorities

to issue use certificate without insisting for the said tax . 2nd one is partly heard. Both the petitions are pending before the H'ble High Court.

- 6. Entry Tax :- This is an item of tax imposed by various state governments on goods transported from one state to another.** It is learnt that this is one of the major issues faced by BSNL causing heavy revenue leakage in majority of BSNL circles. In Kerala, at first, certain private business parties challenged this tax levied at the various check posts by the commercial tax department.

Subsequently BSNL also challenged this. **The Hon'ble High Court was pleased to quash the Entry Tax act itself declaring it illegal.** BSNL Kerala demanded the refund of the entry tax amount paid earlier, to which state govt. turned deaf ears. Writ petition was filed demanding refund from the state which was disposed directing to settle the issue within a period of 3 months.(The vouchers produced come to about 25 crores; the total amount actually comes to about 77 crores i.e., 25 difference 77 is yet to be compiled and demanded which is being done. Similarly STR wing has also filed writ petition which was also allowed in the same lines whereby 82 lakhs paid earlier owes back from Commercial tax department for which letter has already been issued to the commercial tax department.

It is to be noted that Govt. of Kerala has filed an SLP/CA before the Supreme Court of India challenging the order of the Kerala High Court . But no stay was granted so far.

Sale Tax on SIM cards and recharge coupons:- There had been several cases before various High Courts regarding levy of sale tax on BSNL considering the service rendered by it as "doing business". To avoid contradicting decisions all these cases were taken up at the hon'ble Supreme Court. Finding that it involves no transaction of goods the hon'ble Court adjudged that BSNL is not doing any business, instead it is rendering service only. With regard to SIM cards and recharge coupons, it was directed to be considered by the concerned dept. (In supreme court **WPC No. 183/2003etc. 2006 (145) STC 91**)

In Kerala state Commercial tax dept. considered it as a commodity and levied sale Tax and the first demand was right from the year 1997 and the amount was Rs701 crores. Writ petitions were filed challenging this. H'ble court was pleased to find that SIM or Recharge Coupon is not a commodity sold out, instead it is an identity to the customer for which secrecy is to be maintained and declared that, it is not taxable (**WA No.589/2007 in WPC No.2323/07 filed by BSNL against Commercial Tax Dept**). **Thus this circle saved Rupees 701 Crores on this account.** (Recently a similar instance occurred in Karnataka Circle. There the commercial tax department levied Rs.6600 Crores as sale tax on Broad Band facility, misinterpreting it as sale of voice and data. Initially the Single Bench was not inclined to BSNL and ordered to remit Rs.560 Crores to have stay of payment But the Division Bench has stayed the said interim order of single bench based on the earlier cited Supreme Court's judgment that "**imposition of sales tax on any facilities of telecommunication services is untenable in law**".

8. **Penalty imposed by legal metrology department considering SIM cards and recharge coupons as packed commodity. :-** Writ Petition was filed before the High Court of Kerala challenging the penalty. Court granted stay order in favour of BSNL. Matter is still pending.

9. **Profession tax on BSNL Exchanges imposed by local bodies:-** Certain Grama panchayats imposed profession tax on BSNL 's Telephone exchanges stating that it is doing business. (As per the Kerala Panchayath Raj Act / Kerala municipality Act, if a person or an organization halts at a place for more than 60 days and does some business then he/it is liable to pay profession tax) In Kerala, BSNL has challenged the demand notice issued by various local bodies by filing Writ petition before Kerala High Court and has obtained stay.

The case is still pending before the court. In this matter we have adopted the finding of the H'ble Supreme Court, that BSNL is not doing any business ,instead it is rendering Service, as in its transaction no purchase or sale of goods is involved.

10. **Advertisement Tax:-** Normally advertisements are outsourced and in such cases it is the responsibility of the contractor who undertakes the work, as there are sufficient clauses incorporated in the tender document for the same. But in Kerala there had been instances of demand for payment of advertisement tax when BSNL exhibited banners, signboards etc., showing various schemes/ facilities provided by it on its own telephone posts, pillars, xge buildings, trees within the premises of BSNL property . Even without filing any petitions these were turned down by suitably replying to the local bodies with supporting provisions in the relevant act which says that any advertisement on own property will not attract any such tax.

11. **Luxury Tax :-** There had been an instance of demand of luxury tax from the local bodies on BSNL inspection quarters . This was also turned down with suitable reply stating that it is not actually rented out, but is maintained for own use.

Issues with DGR / Security Agencies / Security Guards

A lot of cases are filed by security guards and security agencies against BSNL authorities along with DGR also on the respondent side. Initially there were a lot of cases filed for regularizing the security guards as permanent employees in BSNL, retaining the guards even after the termination of the agency due to expiry of agreement period etc.,. All those cases were defeated by effectively countering before the court of law wherein the hon'ble court held that no question of regularization arises as there is no employer – employee relationship between the guards and BSNL. (WPC No.3353/05 –WA No703/06, WPC No.19020/05 etc., etc.)

Similarly a lot of cases were filed either by the agency or by the guards on slashing the number of guards deployed, payment of ESI, EPF, HRA, VDA, Holiday wages etc. before Assistant Labour Commissioner, Kerala High Court etc. All these cases were decided in favour of BSNL except the one in the matter of payment of ESI

arrears only because of the fact that our agreement contained unnecessary clause allowing it.

It is noted that engaging security agencies is causing heavy financial burden to BSNL. It is also learnt that engaging “Home Guards” is a solution for it as the quantum of payment is very less when compared to that of DGR sponsored Security agencies. But the rule /order enabling BSNL to engage Home guards is not known to many circles which is required to be circulated immediately.

Issues with Kerala State Electricity board

BSNL Kerala was forced to file a number of writ petitions against Kerala state Electricity Board against penalty and interest imposed alleging the following issues:-

- 1. Contracted load more than the applied connected load on the following grounds-**
 - a) counting the number of SMPS irrespective of the factor whether all are in use or not, only because of the fact that there is no change over switch.
 - b) Counting even the vacant positions in the SMPS rack
- 2. One phase not functioning properly:-**
- 3. wrong lead connection**
- 4. alleging that the meter has gone faulty**
- 5. Though applied for additional connected load no response from the KSEB**
- 6. Arbitrary decision to change the connection to BSNL Towers given under LT VIIA (commercial) tariff to LT III tariff (for temporary/ casual) connections**

On all the above issues, consequent to the receipt of demand notices from Electricity Board, BSNL filed altogether 36 writ petitions before Kerala High Court. In all these petitions, except the one for item no.6, the H'ble Court found that they are disputes between two governmental organizations and so they are to be resolved sitting around a table. For this the H'ble Court directed the Chief Secretary of the State to constitute a High Power Committee with himself as the chairman and Chairman KSEB and Chief General Manager BSNL as members. The committee has been constituted and nominated an expert committee with experts from both organizations as members for conducting a detailed study to resolve the issue and it is under progress. In item no.6, as it was a matter already referred to Kerala State Electricity Regulatory Commission by the Electricity Board, the H'ble Court directed the commission to take a decision. **Finally the Commission decided that the tariff applicable to BSNL is only LT VII A Tariff.**

Revenue recovery in case of bill default by its customers

Consequent to the formation of BSNL in 1-10- 2000, revenue recovery against the defaulters utilizing State machinery became impossible for BSNL as it became a PSU and lost government status. At the instance of legal wing, CGM BSNL Kerala circle took up the matter with the state government for amending Kerala Revenue Recovery Act 1968 (Act 15 of 1968) and succeeded in the venture. Notification was published in the Kerala Gazette dated 5th July 2001 vide G.O(MS) No.175/2001/RD dated 29th June 2001. A huge number of defaulter subscribers of BSNL Kerala Circle filed petitions challenging the authority to conduct RR. All these petitions could be taken in favour of BSNL due to the above mentioned notification. (judgment dt. 07/08/2003 in WA No. 1618/03 judgment dt. 16-09-2003 in WPC No.28784/2003). So now-a-days, such type of

petitions against BSNL from its customers are very rare. **A similar exercise can be done by Circle heads in other circles also to make available the facility of RR using state government machinery if not done so far.**

BSNL Kannur SSA of Kerala Circle was even able to recover its dues from a defaulter, who sold out her property after the receipt of demand notice, by attaching the said sold out property. (judgment dt.15-06-2004 in OP.No.11542/02, judgment dt.13-07-2004 in WA no.1282/04)

Arbitration under section 7b of Indian Telegraph Act 1885

In the year 2000, there had been a huge number of petitions pending before the High Court of Kerala filed by the defaulted subscribers requesting for arbitration under sec.7b of Indian Telegraph Act only with a malafide intention to avoid Revenue Recovery initiated by BSNL. By the provisions of the said act, when a subscriber disputes a bill, the matter has to be referred to an arbitrator appointed by Government of India. Normally it is seen that this provision is not properly taken care of and defaulters approaches the court with such prayers which are immediately allowed along with orders of stay of disconnection or reconnection if disconnected already till the arbitrator passes

an award on it. Here, again, the defaulters are wise enough to challenge the arbitration award utilizing the loop-holes in the award and succeed in getting either the entire bill quashed or a good percentage as rebate.(A full fledged, speaking award could not be challenged, and if at all challenged the court will not interfere at all – here it is to be noted that the arbitrators, even though they are BSNL executives, fail to draft such fully plugged awards in majority of cases.)

In Kerala, H'ble court was pleased to allow BSNL to collect interest on such blocked revenue with effect from the date of default. (Judgment dt.17-11-2006 in WPC No.30360/06). There are judgments in many WPCs filed by defaulter subscribers requesting arbitration under sec.7b of IT Act, allowing the arbitrators to decide the cost of arbitration which can be collected from the petitioners in full or part as the case may be.

Now by virtue of the H'ble Supreme Court Judgment , Consumer Dispute Redressal forums lost their jurisdiction to adjudicate those issues of BSNL coming under the purview of Sec.7b.

Arbitration under arbitration and conciliation Act

Points to be taken care of while handling disputes in respect of Tenders/ agreements/ bills of contractors.

1. Tenders/ agreements are incorporated with arbitration clause which comes under the provision of arbitration and conciliation act.
2. When either of the party to the agreement raises any dispute the matter has to be referred to the arbitrator as referred to in the said agreement, failing which the party is free to approach the Court with AR Petition (Arbitration Request Petition).
3. Normally as per the Tender clause the arbitrator can be any Officers of BSNL. But on filing AR petition, the Court can appoint arbitrator from outside ie., any retired judges from Supreme Court, High Court, District Court, Advocates Panel etc.
4. Such arbitrators are free to fix their cost for their own for each sitting. Same is the case with number of sittings.

5. Initially such cost has to be remitted by both the parties (There is provision to avoid also, but it will surely invite problems) and finally the burden can be shifted to the failing party.

It is recommended to take all measures to avoid external arbitrators as far as possible for obvious reasons. KELTRON case and MOTOROA case are examples in Kerala for loss incurred in this regard.

We, therefore, request you to kindly look into the matter.

With kind regards,

Yours faithfully

-sd-

(Pralhad Rai)

General Secretary

Copy to : The ED(Fin), BSNL, New Delhi.