

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique
-Chief Justice

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NOS.135-137 OF 2012 AND 443 OF 2016

WITH

CIVIL PETITION FOR LEAVE TO APPEAL NOS.1386, 1936 & 1128
OF 2012, 377 OF 2013 AND 1637 OF 2014.

(From the judgment and orders dated 13.02.2012, 13.05.2012, 14.08.2012 and 20.04.2014 passed by the High Court Division in Writ Petition Nos.8904 of 2011, 157 of 2012, 9263 of 2011 and 14864 of 2012 respectively).

Grameenphone Ltd., represented by its : **.....Appellant.**
Deputy General Manager Mr. Md. Abdul Hannan. (In C.A. No.135 of 2012)

National Board of Revenue (NBR), : **.....Appellant.**
represented by its Chairman, Revenue (In C.A. No.136 of 2012)
Building, Segunbagicha, Dhaka.

Bangladesh Telecommunication Regulatory : **.....Appellant.**
Commission (BTRC), represented by its (In C.A. No.137 of 2012)
Chairman, IEB Bhaban, Ramna, Dhaka-1000.

Government of Bangladesh, represented by : **.....Appellants.**
the Secretary, Ministry of Finance, (In C.A. No.443 of 2016)
Internal Resources Division, Bangladesh
Secretariat, Ramna, Dhaka and others.

Md. Shafiqul Karim and others. : **...Petitioners.**
(In C.P. No.1128 of 2012)

Orascom Telecom Bangladesh Limited. : **....Petitioner.**
(In C.P. No.377 of 2013)

Banglalink Digital Communications Limited. : **....Petitioner.**
(In C.P. No.1637 of 2014)

Axiata (Bangladesh) Ltd. @ Robi Axiata Ltd. : **....Petitioner.**
(In C.P. No.1936 of 2012)

Telenor Mobile Communications As, represented by : **....Petitioner.**
Per Erik Hylland, Bangladesh Country Manager. (In C.P. No.1386 of 2012)

-Versus-

Bangladesh Telecommunication Regulatory Commission, represented by its Chairman, IEB Bhaban, Ramna, Dhaka-1000 and others. : **....Respondents.**
(In C.A. No.135/12, C.P. Nos.1128/12,377/13,1386/2012)

Grameenphone Ltd., represented by its Deputy General Manager Mr. Md. Abdul Hannan and others. : **....Respondents.**
(In C.A. Nos.136-137/12)

Axiata (Bangladesh) Ltd. @ Robi Axiata Ltd. and another. : **....Respondents.**
(In C.A. No.443 of 2016, C.P. No.1936 of 2012)

Government of Bangladesh, represented by the Secretary, Ministry of Finance, Internal Resources Division, Bangladesh Secretariat, Ramna, Dhaka and others. : **....Respondents.**
(In C.P. No.1637/2014,1936/2012)

For the Appellant.
(C.A. No.135 of 2012)

: Mr. Mustafizur Rahman Khan, Advocate instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.

For the Appellant.
(C.A. No.136 of 2012)

: Mr. Sk. Md. Morshed, Additional Attorney General (with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General and Mr. Sayem Mohammad Murad, Assistant Attorney General, Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Appellant.
(C.A. No.137 of 2012)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Appellant.
(C.A. No.443 of 2016)

: Mr. A. M. Amin Uddin, Attorney General (with Mr. Sk. Md. Morshed, Additional Attorney General, with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina

Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Petitioner.

(C.P. No.1128 of 2012)

: Mr. A. F. Hassan Ariff, Senior Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the Petitioners.

(C.P. No.377 of 2013 & 1637 of 2014)

: Mr. Md. Asaduzzaman, Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the Petitioner.

(C.P. No.1936 of 2012)

: Mr. Tanjib-ul Alam, Senior Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For the Petitioner.

(C.P. No.1386 of 2012)

: Mr. Ramjan Ali Sikder, Advocate instructed by Ms. Sufia Khatun, Advocate-on-Record.

For Respondent No.1.

(C.A. No.135 of 2012)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent No.7.

(C.A. No.135 of 2012)

: Mr. Sk. Md. Morshed, Additional Attorney General (with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant

Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.8-9.

(C.A. No.135 of 2012)

: Mr. Sk. Md. Morshed, Additional Attorney General, (with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.

For Respondent Nos.2-6.

(C.A. No.135 of 2012)

: Not represented.

For Respondent No.1.

(C.A. No.136 of 2012)

: Mr. Mustafizur Rahman Khan, Advocate instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.

For Respondent No.2.

(C.A. No.136 of 2012)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.10-12.

(C.A. No.136 of 2012)

: Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For Respondent Nos.3-9.

(C.A. No.136 of 2012)

: Not represented.

For Respondent No.1.

(C.A. No.137 of 2012)

: Mr. Mustafizur Rahman Khan, Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For Respondent Nos.7-9.

(C.A. No.137 of 2012)

: Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For Respondent Nos.2-6.

(C.A. No.137 of 2012)

: Not represented.

For Respondent No.1.

(C.A. No.443 of 2016)

: Mr. Tanjib-ul Alam, Senior Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For Respondent No.2.

(C.A. No.443 of 2016)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent No.1.

(C.P. No.1386 of 2012)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.2-7.

(C.P. No.1386 of 2012)

: Not represented.

For Respondent Nos.1-4.

(C.P. No.1936 of 2012)

: Mr. A. M. Amin Uddin, Attorney General (with Mr. Sk. Md. Morshed, Additional Attorney General, with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.7-8.

(C.P. No.1936 of 2012)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.5-6.

(C.P. No.1936 of 2012)

: Not represented.

For Respondent Nos.1-2 & 4-9.

(C.P. No.1637 of 2014)

: Mr. A. M. Amin Uddin, Attorney General (with Mr. Sk. Md. Morshed,

Additional Attorney General, with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.

For Respondent No.3.

(C.P. No.1637 of 2014)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.1-6.

(C.P. No.377 of 2013)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.7-9.

(C.P. No.377 of 2013)

: Mr. A. M. Amin Uddin, Attorney General (with Mr. Sk. Md. Morshed, Additional Attorney General, with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.1-6.

(C.P. No.1128 of 2012)

: Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.7-9. : Mr. Sk. Md. Morshed, Additional
(C.P. No.1128 of 2012) Attorney General, (with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent No.10. : Not represented.
(C.P. No.1128 of 2012)

Date of Hearing. : **The 9th November, 2022 & 7th, 13th and 14th December, 2022.**

Date of Judgment. : **The 10th January, 2023.**

J U D G M E N T

Borhanuddin,J: Since questions of law involve in all the civil appeals and civil petitions are identical and based on similar facts as such all the appeals and petitions have been taken together for hearing and disposed of by this common judgment.

Civil Appeal Nos.135-137 of 2012 by leave are directed against the judgment and order dated 13.02.2012 passed by a Division Bench of the High Court Division in Writ Petition No.8904 of 2011 making the Rule absolute-

in-part and Civil Appeal No.443 of 2016 by leave is directed against the judgment and order dated 13.05.2012 passed by another Bench of the High Court Division in Writ Petition No.157 of 2012 discharging the Rule with observation and direction.

Facts relevant for disposal of the Civil Appeal Nos.135-137 of 2012 in brief are that the petitioner Grameenphone Limited, a public limited company incorporated under the Companies Act of Bangladesh and carrying it's business as a mobile phone operator, filed Writ Petition No.8904 of 2011 invoking Article 102 of the Constitution challenging decision of the respondent no.1 Bangladesh Telecommunication Regulatory Commission (hereinafter referred as 'BTRC') issued vide Memo No.BTRC/LL/Mobile/License Renewal(382)/2011-687 dated 17.10.2011 by which BTRC claimed spectrum assignment fee based on Market Competition Factor (MCF) so far it relates to already assigned spectrum fee to the petitioner in 2008 and payment of license fee and spectrum fee for new assignment without any deduction, contending interalia, that on 11.11.1996 the petitioner

company was granted a licence by way of an agreement under Section 4 of the Telegraph Act, 1885 by the Government of Bangladesh, represented by the Director (Telecommunication), Ministry of Post and Telecommunication for a period of 15 years i.e. till 2011, for establishing, maintaining and operating of digital cellular mobile radio telephone network all over Bangladesh; Some amendments were brought to the said license agreement on 08.03.1999 and 29.03.2001; As a requirement under the Telegraph Act, 1885 the petitioner company had also obtained a radio station and equipment licence and radio system operating licence, both dated 28.11.1996; BTRC was formed under Bangladesh Telecommunication Regulatory Act, 2001; On 24.10.2004, the writ-respondent no.1 BTRC revalidated the licence of the petitioner company granted on 11.11.1996 with some modifications, amendments and editions; Some more amendments brought into the revalidated operator licence of the petitioner company on 16.04.2006 and 27.04.2006; The petitioner company obtained 5 MHz spectrum in 900 band in the year 1996 which were enhanced phase by phase;

The spectrum assigned to the petitioner company till 2008 were due to expire in 2011; On the request of the petitioner company for additional spectrum assignment a meeting was held on 29.09.2008; A Senior Assistant Director of the respondent no.1 vide letter dated 30.09.2008 informed the petitioner company that decisions were taken in the meeting dated 29.09.2008 regarding the terms and conditions of the additional spectrum assignment; Relying the terms and conditions stated in the letter dated 30.09.2008 the petitioner company paid an amount of Tk.148,00,00,000/- (One hundred and forty eight crore) as 25% down payment for 7.4 MHz spectrum in GSM 1800 MHz band to the respondent no.1; Subsequently, respondent no.5 Assistant Director of BTRC vide letter dated 30.10.2008 informed the petitioner company that the BTRC has been pleased to assign the spectrum for a period of 18 years to the petitioner company; In the letter dated 30.10.2008 it is specifically mentioned that assignment has been made for a period of 18 years from the date of assignment subject to the renewal of the license and within 18 years there will not be any

additional charge; Thereafter, the BTRC vide memo dated 11.09.2011 has issued the regulatory and licensing Guidelines for renewal of cellular mobile phone operator licence and the said guideline was amended on 22.09.2011; The petitioner company by letter dated 10.10.2011 applied to the BTRC for renewal of the operator licence and equipment licence; The respondent no.1 vide letter dated 17.10.2011 has claimed an amount of Tk.3624.03/- crores from the petitioner company as the spectrum assignment fee and an amount of Tk.10,00,00,000/- has also been claimed as license renewal fee providing 10(ten) day's time for payment without deduction and to submit certain documents; The petitioner company by letter dated 18.10.2011 has pointed out the mistakes conducted by the respondent no.1 BTRC in calculating the spectrum assignment fee with request to recalculate the fees and charges; The BTRC replied the letter on 20.10.2011; The BTRC arbitrarily introduced the concept of Market Competition Factor (MCF) in the guideline dated 11.09.2011 and also claimed the amount stipulated 10(ten) days time for making payment of the license renewal fee

and spectrum assignment fee without deduction; The National Board of Revenue (hereinafter stated as 'NBR') by its letters dated 28.02.2011 and 20.10.2011 has affirmed that payment of any money to the Government revenue should be paid after deduction of tax and thus the BTRC has acted arbitrarily and unreasonably by claiming additional spectrum fee for the 7.4 MHz in 1800 band of spectrum (based on MCF) assigned to the petitioner company in 2008 inasmuch as petitioner company has fulfilled all the conditions as stipulated in the assignment letter dated 30.10.2008 and has paid all the requisite fees; The BTRC based upon an audit report has claimed an amount of Tk.3034,11,08,581/- within 23.10.2011 for additional spectrum fee (based on MCF) assigned to the petitioner company in 2008 and such actions of respondent no.1 is without lawful authority and of no legal effect; Hence, the writ petition.

Upon hearing the petitioner, a Division Bench of the High Court Division issued a Rule Nisi upon the respondents to show cause.

The BTRC contested the Rule Nisi by filing an affidavit-in-opposition and supplementary affidavit-in-opposition. The petitioner company also submitted several supplementary affidavits.

Upon hearing the parties and perusing the relevant papers/documents, a division Bench of the High Court Division made the Rule absolute-in-part vide judgment and order dated 13.02.2012 holding that:

1. *The writ petition is maintainable;*
2. *The Rule is made absolute-in-part;*
3. *The impugned memo dated 17.10.2011 (Annexure-I), in so far as the application of MCF to the assignment of spectrum in 2008 is concerned, is without lawful authority. Accordingly, the petitioner Grameenphone is not required to pay the MCF for the 7.4 spectrum in 1800-MHz assigned in its favour in 2008;*
4. *There is no illegality in the impugned memo in so far as the issue of VAT is concerned. The Grameenphone is required to add the VAT to the demanded money (except the MCF in respect of the spectrum of 2008) and withhold it at source and then pay the same directly to the Government exchequer. However, Grameenphone will get credit for the said paid VAT from the VAT to be paid ultimately by its subscribers in accordance with law;*

5. *In view of above, the Grameenphone should immediately pay, if not paid already, the fees, charges and VAT to the concerned authorities in accordance with law.*

Being aggrieved, the petitioner Grameenphone limited filed Civil Petition for Leave to Appeal No.508 of 2012 and writ-respondent no.8 NBR preferred Civil Petition for Leave to Appeal No.772 of 2012, writ-respondent no.1 BTRC preferred Civil Petition for Leave to Appeal No.867 of 2012 invoking Article 103 of the Constitution. Though all the civil petitions were heard together but leave was granted separately vide order dated 16.07.2012.

Consequently, above Civil Appeal Nos.135, 136, 137 of 2012 arose.

Civil Appeal No.443 of 2016 by leave is directed against the judgment and order dated 13.05.2012 passed by another Division Bench of the High Court Division in Writ Petition No.157 of 2012 discharging the Rule with observations and directions.

Facts, in brief, are that the petitioner Axiata (Bangladesh) Ltd, @ Robi Axiata Ltd, a company incorporated under the Laws of Bangladesh, limited by

shares and engaged in the business as Cellular Mobile Phone Operator under license is preferred Writ Petition No.157 of 2012, contending inter alia, that in course of operation, licence of the petitioner company became due for renewal in 2011; For this purpose, BTRC issued Cellular Mobile Phone Operator Regulatory and licensing Guidelines, 2011 (hereinafter stated as 'the Guidelines, 2011) in September 2011 which was amended by a memo dated 22.09.2011 imposing payment to BTRC for license renewal fee, 5.5% of the audited gross revenue as revenue sharing, 1% of the audited annual gross revenue to BTRC's Social Obligation Fund and license fee for use of spectrum; The petitioner applied for renewal of cellular mobile phone operator licence and the associated radio communications equipment licence on 10.10.2011, in response to which BTRC issued a "Notification of Awarding Renewed Cellular Mobile Phone Operator Licence" dated 17.10.2011 stipulating the petitioner shall pay License Renewal Fee of BDT.10 crores and Spectrum Allocation Fee of BDT.1925.87 crores as per the schedule given therein; The respondent no.2 vide memo dated 20.10.2011 interpret

and clarify to the effect that VAT would have to be deducted at source for aforementioned payment received or receivable by BTRC upon a reference to Rule 18(Uma) of the Rules, 1991; The petitioner has paid the required license renewal fee and spectrum allocation fee deducting the VAT amount vide letters dated 31.10.2011 and 02.11.2011, retaining the deducted VAT amount with a handwritten undertaking that the petitioner undertakes *"to pay the rest amount, if any, as determined by BTRC and also in the light of the Honourable Court's decision"* referring two applications filed by two other cellular operators; Meanwhile, vide memo dated 09.11.2011 Senior Assistant Secretary of the Ministry of Post and Telecommunication and the BTRC vide memo dated 10.11.2011 intimated the petitioner company that they can carry on their operation unhindered but the issue of renewal of license will remain suspended; The Large Tax Unit vide memo dated 15.11.2011 has sought to know from the petitioner the particulars of the deductions it has made against VAT in respect to license fee, revenue sharing and spectrum allocation fee or charge payable to BTRC;

The petitioner vide letter dated 23.11.2011 informed the LTU that the issue is sub-judice before the High Court Division; The LTU issued a memo dated 13.12.2011 demanding the amount of VAT deducted at source; The petitioner replied to the letter reiterating that the issue is sub-judice; The respondent no.5 Commissioner, LTU issued a demand note vide memo dated 27.12.2011 for payment of Tk.146,85,71,520/- (including penalty/fine) within next two working days or face consequences under Section 56 of the Act, 1991; The Central Intelligence Cell of the NBR vide memo dated 28.12.2011 sought information regarding exact amount of fees given to BTRC and VAT deducted at source therefrom; Then the petitioner invoked writ-jurisdiction under Article 102 of the Constitution.

Upon hearing the writ-petitioner, a Division Bench of the High Court Division issued a Rule Nisi calling upon the respondents to show cause.

The Rule Nisi was contested by the writ-respondent nos.2 and 7 by filing affidavit-in-opposition, contending interalia, that the petitioner company is liable to

deposit the deducted amount of VAT at source pursuant to Section 6(4KaKa) of the Act, 1991 read with Rule 18(Uma) of the Rules, 1991; The provision of Section 6(3)(Ga) provides that the VAT is payable if, any in part or full is made even before rendering the service and there is no provision to retain the deducted amount in the account of the petitioner as such the Rule is liable to be discharged.

After hearing the parties a Division Bench of the High Court Division discharged the Rule with following observations and directions vide impugned judgment and order dated 13.05.2012:

"Given further this Court's finding and observations both on the general scheme of the Act and the Rules and the Deduction at Source Scheme, the BTRC's contained non-registered status for VAT purposes appears anomalous in the facts and circumstances. This Court being of the view that such situation needs immediate attention to avoid any further confusion in the implementation of the Deduction at Source Scheme in particular. It is also noted that the BTRC itself on occasion has contributed to such confusion arising by making ill-advised assertions as to its status within the VAT regime. This Court finds in this respect

that circumstances now dictate a compulsory registration of the BTRC by application of Section 15(4) of the Act. Both the NBR and the BTRC are hereby put on notice to ensure such registration by application of Section 15(4) without undue delay. Given the findings in this judgment it is directed that such registration shall be deemed to be effective from the date the BTRC notified the petitioner of award of license and payment of License Renewal Fee and Spectrum Assignment Fees without any deduction i.e. from 17.10.2011."

Having aggrieved, the writ-respondent as petitioners moved before this Division invoking under Article 103 of the Constitution by filing Civil Petition for Leave to Appeal No.2420 of 2012.

This Division, upon hearing the parties granted leave on the following grounds:

"I. Because, the High Court Division erred in law in finding that the continued non-registered status of the BTRC appeared to be anomalous in the facts and circumstances inasmuch as the said observation is far from reality and based on mere surmise having no legal and material basis as NBR, Postal Department, Bangladesh Bank, City Corporation and Land Revenue Authority although engaged in realizing VAT through deduction at source bear no registration

under VAT Act, 1991 and the BTRC being a Government Organization has been given exemption from payment of VAT under Clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991.

II. Because, the High Court Division erred in law in making such direction inasmuch as implementation of such direction would create anomalies amongst the Government Organization, that is, NBR, Postal Department, Bangladesh Bank and City Corporation etc. by way of giving birth to some inevitable administrative problems of the VAT authorities."

Consequently, Civil Appeal No.443 of 2016 arose.

Being aggrieved by and dissatisfied with the judgment and order dated 13.02.2012 passed by the High Court Division in Writ Petition No.8904 of 2011:

- a. Writ-petitioner Grameenphone obtained leave to appeal in so far as it relates to the portion regarding VAT i.e. Civil Appeal No.135 of 2012;
- b. Writ-respondent no.8 National Board of Revenue (NBR) has obtained leave to appeal in so far as it relates to the portion regarding writ-petitioner Grameenphone being entitled to credit or rebate against the VAT Act i.e. Civil Appeal No.136 of 2012;
- c. Writ-respondent no.1 Bangladesh Telecommunication Regulatory Commission (BTRC) has obtained leave relating to declaring illegal the imposition

of Market Completion Factor (MCF) on spectrum fee assigned in 2008 i.e. Civil Appeal No.137 of 2012.

Mr. Mostafizur Rahman Khan, learned Advocate appearing for the appellant Grameenphone in Civil Appeal No.135 of 2012 and for the respondent no.1 in both Civil Appeal Nos.136-137 of 2012 submits that Sub-Section 3(Ga) of Section 3 of the VAT Act, 1991, provides that VAT will be paid by service provider and Section 5(4) of the VAT Act, 1991, provides that in case of service, VAT will be imposed on the total receivable and in the present case VAT will be charged from and on account of the receivable by the service provider namely BTRC and cannot be imposed as an additional liability on the petitioner as the recipient of service. He further submits that the High Court Division failed to appreciate that Section 6 (4KaKa) of the VAT Act, 1991 read with Rule 18(Ka) and 18(Uma) of the VAT Rules, 1991 do not impose VAT on either the provider or recipient of a service but clarifies and determines a procedure for realization of the VAT which is payable by the provider of certain services against the service rendered by it, i.e. by the

recipient of the service deducting the VAT payable at source from the amount that is receivable by the service provider from the recipient of the service and on that view of the matter, the said provisions cannot be read as imposing an obligation on the recipient of the service to calculate the VAT and add it to the amount demanded by the provider of the service and then withhold it at source and pay it to the Government.

Mr. Sk. Md. Morshed learned Additional Attorney General, appearing for the appellant NBR in Civil Appeal No.136 of 2012 and for respondent no.7 in Civil Appeal No.135 of 2012 as well as for respondent no.7 in Civil Petition for Leave to Appeal No.1128 of 2012 submits that the Parliament through Finance Act, 2011 has inserted Clause-(Uma) of Sub-Section 3 of Section 3 which clearly states that VAT will be imposed at the rate of 15% on all the imported goods or services rendered in Bangladesh under Section 5 of the VAT Act barring the imported goods mentioned in first schedule and services mentioned in second schedule of the Act and Sub-Section 3(Uma) of Section 3 of the VAT Act provides:

(৩) মূল্য সংযোজন কর প্রদান করিবেন,-

(ক) -----

(খ) -----

(গ) -----

(ঘ) -----

(ঙ) অন্যান্য ক্ষেত্রে, সরবরাহকারী ও সেবাপ্রদানকারী।

And the provisions of Rule 18(Uma) provided for deduction of VAT at source at the time of receipt of the fees royalty, charge etc., and Rules 18(Uma) authorize the Government to collect VAT at source at the rate of 15%. He also submits that Section 5 of the VAT Act provides VAT is payable upon the "total value received" from the receiver of goods or service and the same has been affirmed by this Division in Civil Petition for Leave to Appeal No.3720 of 2015 (*Grameenphone Limited vs. Government of Bangladesh and others*) and accordingly the argument placed by the Cellular Phone Companies that VAT is included with the total value, is not tenable in the eye of law. He next submits that exemption has given in Clause-7(Gha) of second schedule for "Government, Local Authority, any Organization or Institution of the local body who works for the Government" from paying any VAT but it does not preclude them or BTRC to collect VAT as

the service provider. In this regard he submits that NBR, Bangladesh Bank, City Corporation or land revenue authority although are engaged in realizing VAT through deduction at source but does not have VAT registration and just like those organizations BTRC being a Government organization is not required to be registered with the VAT authority and have been exempted from payment of VAT under Clause-7(Gha) of the second schedule of the VAT Act, 1991. He further submits that VAT paid by the cellular mobile phone operator on the spectrum fees and the license fees are not rebatable as per Section 9(Uma) of the VAT Act because spectrum provided to the cellular companies is a range of wave of radio frequencies which is uniquely distinguishable by intangible boundaries, i.e. while spectrum allotted to one cellular phone company cannot be used by others as such the same come within the purview of infrastructure and thus the argument of the appellant that the infrastructure cannot be intangible does not hold water.

Mr. Khandaker Reza-E-Raquib, learned Advocate appearing for the appellant BTRC in Civil Appeal No.137 of 2012 and for

respondent no.1 in Civil Appeal No.135 of 2012, respondent no.2 in both Civil Appeal Nos.136 of 2012 and 443 of 2016 as well as for respondent no.1 in Civil Petition for Leave to Appeal No.1386 of 2012, respondent no.7 in Civil Petition for Leave to Appeal No.1936 of 2012, respondent no.3 in Civil Petition for Leave to Appeal No.1637 of 2014 and respondent no.1 in both Civil Petition for Leave to Appeal Nos.1128 of 2012 and 377 of 2013 submits that the High Court Division has failed to appreciate that Market Competition Factor (MCF) introduced by the Guidelines, 2011 has been set by BTRC and approved by the Ministry of Post, Telecommunication and Information Technology to ensure a level playing ground for all Cellular Telephone Operators based on operators market share alongwith other relevant factors and the BTRC did not claim MCF retrospectively by the impugned memo for the period of 2008-2011 rather claimed MCF for the remaining 15 years i.e. from 2011-2026 and as such Grameenphone does not have to pay MCF for the initial 3 years starting from 2008 till the introduction of MCF in 2011 as per Clause-9.01 of the Guidelines,

2011. He further submits that the concept of MCF introduced through Guidelines, 2011 by dint of Section 55(3) of the Bangladesh Telecommunication Regulatory Act, 2001 as amended in 2010, as such it has no impact in changing the terms and conditions of the Cellular Mobile Operator Licence and thus the findings of the High Court Division that MCF incorporated in the guideline dated 11.09.2011 if applied on the spectrum allotted in 2008 would change the terms and conditions of the original licence granted in 1996 is erroneous and in essence the impugned judgment and order is liable to be set-aside.

Mr. A. M. Amin Uddin, learned Attorney General appearing for the appellants in Civil Appeal No.443 of 2016 as well as for respondent nos.1/2 in Civil Petition for Leave to Appeal No.1936 of 2012, respondent nos.1/4 in Civil Petition for Leave to Appeal No.1637 of 2014 and respondent no.8 in Civil Petition for Leave to Appeal No.377 of 2013 submits that the High Court Division erred in law in holding that the continued non-registration status of the BTRC appeared to be anomalous in the facts and circumstances inasmuch as the said observation is far

from the reality and based on mere surmise having no legal and material basis as NBR, Postal Department, Bangladesh Bank, City Corporation and Land Revenue Authority although engaged in realizing VAT through deduction at source having no registration under VAT Act, 1991 and the BTRC being a Government organization has been given exemption from payment of VAT under Clause-7 (অন্যান্য সেবা) (Ga) (Gha) of the second schedule of the VAT Act, 1991. He also submits that the High Court Division erred in law in making such direction inasmuch as implementation of such direction would create anomalous amongst the Government organization, i.e. NBR, Postal Department, Bangladesh Bank and City Corporation etc. by way of giving birth to some inimitable problems of the VAT Authorities.

The writ-petitioner i.e. Axiata (Bangladesh) Ltd. alias Robi Axiata Ltd. of Writ Petition No.157 of 2012 did not file appeal challenging judgment and order passed in the Writ Petition No.157 of 2012.

Heard the learned Attorney General, learned Additional Attorney General and learned Advocates

appearing for the parties in the respective cases. Perused the impugned judgment and order alongwith papers/ documents contained in the paper books.

As it is stated above, the High Court Division passed the impugned judgment and order in Writ Petition No.8904 of 2011 dated 13.02.2012 from which Civil Appeal Nos.135-137 of 2012 arose.

In the Writ Petition No.8904 of 2011, the Rule Nisi was issued in the following terms:

"Issue a Rule Nisi calling upon the respondents to show cause as to why the decision of the respondent no.1 (BTRC) issued vide Memo No. BTRC/LL/Mobile/License dated 17.10.2011 (Annexure-I) ("Impugned memo") under the signature of the respondent no.4 claiming Spectrum Assignment Fee based on the Market Competition Factor (MCF) in so far as it relates to the fee of already assigned spectrum (7.4 MHz-1800 band) to the petitioner in 2008 and payment of license fee and spectrum fee for new assignments without any deduction should not be declared to have been issued without lawful authority and of no legal effect."

From the facts before us it appears that in 2008 the BTRC granted the disputed spectrum of 7.4 band in 1800-

MHz vide assignment letter dated 30.10.2008. Prior to this assignment, there were correspondences between the parties, and terms and conditions of the said assignment were determined through such correspondences and negotiations. One of the Assistant Director of spectrum management of the BTRC confirmed the terms and conditions of the said assignment by letter dated 30.09.2008 and the parties having agreed, BTRC issued assignment letter dated 30.10.2008. The relevant terms and conditions mentioned in the said Assignment Letter are quoted below:

"Terms and Conditions:

1. *The assignment will be for 18 years from the date of assignment subject to the renewal of the license. Within 18 years if the license is renewed there will not be any additional charge for this particular assignment for current technology (GSM, GPRS and EDGE);*
2. *The licensees will be allowed to provide services with this 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;*
3. *The Commission reserves the rights to make any rearrangement in the assignment within*

the band if required in future and the equipment shall have the provision to readjust according to that rearrangement.

4. The operators have to pay the Annual Spectrum Charge for this assignment as per spectrum pricing formula.

5. The Commission reserves the right to make any change in the charges or levies from time to time and the Licensee shall abide by the decision of the Commission.

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The facts as gathered from the affidavit-in-opposition filed by the BTRC that the Grammenphone was assigned with an additional 7.4 MHz spectrum in GSM-1800 MHz Frequency Band vide memo dated 30.10.2008 under the signature of the writ-respondent no.5 for a period of 18 years from the date of assignment subject to the renewal of the license. Accordingly, the Grameenphone paid the requisite amount to the BTRC and obtained the said

additional 7.4 MHz Spectrum in the said Frequency Band. Clause-1 of the said assignment letter dated 30.10.2008 states that there will not be any additional charge if the licence is renewed within the said 18 years for this particular assignments for current technology. But Clause-5 of the said assignment letter also states that the BTRC reserves 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 BTRC. On 11.09.2011, BTRC with the approval of the Government has issued the Regulatory and Licensing Guidelines for Renewal of Cellular Mobile Phone Operator License **(Guidelines, 2011)**. Clause-8.01(ii) of the said Guidelines states that the Spectrum Assignment Fees for Cellular Mobile Phone Operator Licence fixed at Tk.150 crore per MHz of GSM 1800 MHz band, GSM 900 MHz band, CDMA 800 MHz band and also EGSM band access frequency. The said clause further states that in determining the Spectrum Assignment Fees, the MCF based on market share of the respective operators shall also be taken into consideration. The concept of MCF is not unique in telecommunication sector. Throughout

the world, the operators pay a significant amount of money for 2G spectrum allocation multiplied by factors such as MCF based on the respective market shares of the operators. The goal of introducing such idea of MCF is to set out a path for the current and future availability of spectrum as well as encouraging competition and growth with a level playing field for all operators and maintaining a technology neutral stance. The MCF of 1.48 allotted to the Grameenphone as determined in the said **Guidelines, 2011** has been fixed by the Ministry of Post and Telecommunication reflecting its market share which is based not only upon the spectrums assigned infavour of the Grameenphone prior to the year 2008 but also upon the 7.4 MHz spectrum of 1800 band as assigned in the year of 2008 by BTRC. As per the **Guidelines, 2011** in calculating the Spectrum Assignment fees, the aforesaid assignment fees of Tk.150 crore per MHz frequency shall be multiplied by the MCF as determined for the respective operators and the total amount shall be payable by the respective operators. As per Clause-9.01 of the **Guidelines, 2011** the spectrum assignment fees shall be

applicable for all of the access frequencies assigned to the licensees except for the 7.4 MHz Spectrum in GSM 1800 Band assigned in the year of 2008 infavour of the Grameenphone with a value of Tk.80 crore per MHz uplink and downlink for 18 years from the date of assignment subject to the renewal of the license. However, it was also stated in the said Clause-9.01 that the other provisions of the said Guidelines, 2011 shall be applicable of the respective licensees. On 10.10.2011, Grameenphone made two applications for renewal of its Mobile Phone Operator License as well as the License for Radio Communications Equipment expiring on 10.11.2011. Accordingly, by the impugned memo dated 17.11.2011 the BTRC requested the Grameenphone to make payment of Tk.10,00,00,000.00 crores only as License Renewal Fees as per Clause-7.1.3 of the Guidelines, 2011 alongwith an amount of Tk.3624.03 crores only as Spectrum Assignment Fees calculated in pursuance to Clause-8.01(ii) and 9 of the same. As per the Guidelines, 2011 the Spectrum Assignment Fees as claimed by the impugned memo was calculated in accordance with the Guidelines, 2011 i.e.

by multiplying the applicable MCF of 1.48 for the Grameenphone with spectrum fees as determined for per MHz of spectrum. It is also stated that the spectrum fees of Tk.80 crores per MHz for 7.4 MHz-GSM 1800 Frequency Band for 18 years from the date of assignment remains unchanged and by the impugned memo the writ-petitioner i.e. Grameenphone was not even asked to furnish the difference amount of BDT 70 crores (150 crores-80 crores) per MHz for remaining 15 years with regard to the assigned spectrum of 2008 in question. For better appreciation, the impugned memo is reproduced below:



Bangladesh Telecommunication Regulatory Commission
IEB Bhaban, Ramna, Dhaka-1000, Bangladesh.

No.BTRC/LL/Mobile/Lincese Renewal(382)/2011-687 Dated:17.10.2011

Subject: **Notification of awarding Renewed Cellular Mobile Phone Operator License of Grameenphone Limited (GP).**

Ref: (i) GP's application bearing No.GP/CA-LR/2011/01, dated: 10.10.2011 for renewal of Cellular Mobile Phone Operator License.

(ii) GP's application bearing No.GP/CA-LR/2011/02, dated: 10.10.2011 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 application mentioned in ref. (i) and (ii), the undersigned is directed to inform you that renewal of the Cellular Mobile Phone Operator License of GP would be considered upon fulfilment of the followings:

- (a) Under Clause-7.1.3 of the Guidelines, GP 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, GP shall pay BDT 3624.03 Crore (Taka Three Thousand Six Hundred Twenty Four point Zero Three Crore) only as the Spectrum Assignment Fee against the spectrum allocated to GP.

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 (BDT in Crore)	Market Competition Factor (MCF)	Sub Total (BDT in Crore)	Previous Payment Deduction (BDT in Crore)	Payable to BTRC (BDT in Crore)
A	B	C	D	E	F	G	$H=[(A \times B) + C \times D] + E \times F \times G$	$I=(E \times F) \times (15/18)$	$J=H-I$
7.4	150.00	7.2	150.00	7.4	80.00	1.48	4117.36	493.33	3624.03

- (c) Payment Schedule, as per provisions of Guidelines [Clause-8.01 (iii)]

Period	October 31, 2011	April 13, 2012	October 10, 2012	April 08, 2013
Percentage of Payment	49%	17%	17%	17%
Amount of Payment (BDT in Crore)	1,775.77	616.085	616.085	616.085

- (d) Documents to be submitted are listed below:

- i. Documents related to Income tax & VAT from year 1997 to 2001 and PSI from 1997 to 2004 (as per provisions of serial 7, appendix 1 of Guidelines).
- ii. Information regarding compensation paid for illegal VoIP in the history of non-compliance (as per provisions of serial 14, appendix 1 of Guidelines).
- iii. Information relating to year-wise inward and outward fund flow/transaction and year-wise income,

expenditure and profit (as per provisional 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.

Signed/-
(Tareq Hasan Siddiqui)
Deputy Director
Legal and Licensing Division
Phone: 9511127

Chief Executive Officer
Grameenphone Limited
GP house
Bashundhara, Baridhara
Dhaka-1229, Bangladesh.

Analysing the aforementioned contention of the appellant BTRC in Civil Appeal No.137 of 2012 as well as the impugned memo dated 17.10.2011, we are of the opinion that MCF based on the market shares of the operators is a worldwide system through which the mobile phone operators pay a significant amount of money for the spectrum allocated infavour of them and this system ensures a level playing field amongst the operators. And since the concept of MCF introduced by the Guidelines, 2011, BTRC by the impugned memo did not claim spectrum assignment fees based on MCF retrospectively i.e. from 2008 to 2011.

It is pertinent to mention here that Clause-5 of the Assignment Letter dated 30.10.2008 as well as Clause-12(viii) of the Guidelines, 2011 authorize the authority concern i.e. BTRC to reserves the right to make any change in the charges or levies from time to time and the mobile phone operators shall abide by such decision. Again, upon the facts and circumstances of this case, we found that BTRC did not claim any additional charge for the said spectrum of 7.4 MHz-GSM 1800 frequency band as assigned infavour of Grameenphone in 2008 rather BTRC claiming MCF for the remaining 15 years from 2011 upon a value of Tk.80 crores per MHz which is fixed in the year 2008. Thus, we find substance in the contentions of the appellant BTRC in Civil Appeal No.137 of 2012.

As such findings and observations of the High Court Division that *"The impugned memo dated 17.10.2011 (Annexure-'I'), in so far as the application of MCF to the assignment of spectrum of 2008 is concerned, is without lawful authority and accordingly, the petitioner Grameenphone is not required to payment the MCF for the 7.4 spectrum in 1800-MHz assigned to infavour in 2008"* is

based on wrong appreciation of the impugned memo and thus liable to be expunged.

It may be mentioned here that spectrum is a scarce natural resource. Article 18A of our Constitution provides that:

"The state shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forests and wild life for the present and future citizens."

(emphasis supplied)

Again, Article 7 of the Constitution states that:

"7(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution."

Above mentioned Articles of the Constitution makes it clear that the state is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the Constitutional principles including the doctrine of equality and larger public good.

It is stated in the Guidelines for the review of spectrum pricing methodologies and the preparation of spectrum fee schedules that the determination of spectrum prices and establishment of spectrum fees are closely linked to economic and market conditions, technical factors such as which technologies and services are being used or deployed, the efficiency and quality of those technologies and services, and how spectrum is assigned to spectrum users. The most important spectrum management objectives associated with spectrum prices and fees is that, the spectrum prices should promote efficient use of spectrum. When spectrum prices are determined through market mechanism, price level at a given time may be influenced by a number of factors such as geography, competition amongst potential users, advances in technology, the present value of cash flows derived from a particular service over time, the general economic climate, and particular conditions and obligations to licensees.

It is further stated that the authority concern will need to consider various issues when dealing upon the

method, the financial basis, amounts and timing for payment of fees in respect of a particular spectrum brand, type of use or type of user. The issued include:

1. *Fiscal context;*
2. *Relevant principles and objectives for certain types of spectrum fees;*
3. *Funding regulator operations;*
4. *Demand and supply for spectrum;*
5. *Technological change;*
6. *Type and duration of the spectrum authorization and renewal options.*

Furthermore, the value of spectrum fees depends upon changing technologies, international and national decisions on spectrum, allocations and harmonization, customer demand, and the commercial availability and cost of radio communications equipment. These factors may greatly affect both demand and supply.

It is most likely that a regulator will chose from several methods to establish spectrum prices and fees. Before doing so, the regulator should review legislation, policy, and regulation. The level of competition, sector health and the demand and supply of spectrum are additional important considerations. The availability of reliable data, systems, adequately experienced and

proficient staff will be necessary. Once the regulator has completed this assessment, the final decision rests with what spectrum management and spectrum pricing objectives are to be met.

Again, fairness and objectivity requires that fees are based on objective factors and all licence holders in a given frequency band should be treated on an equitable basis. This would preclude, for example, different treatment users in a given frequency band.

The universal system of spectrum pricing module can be formulated from a number of separate elements based on any or all of various criteria such as the amount of spectrum user, number of channels or links used degree of congestion, efficiency of radio equipment, transmitted power/coverage area, geographical location and so forth. The basic principle for this approach is to identify various technical parameters in order to measure the spectrum volume used or define the 'population area' of a radio system as a common basis for establishing spectrum fees. (from the Guidelines methodologies)

We consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non-renewable. They are thought of as the individual elements of the natural environment that provided economic and social services to human society and are considered valuable in their relatively unmodified, natural form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value. The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public

trust and ensure that no action is taken which may be detrimental to public interest.

The Supreme Court of India in the case of *Centre for Public Interest Litigation and Others vs. Union Of India & Ors.*, reported in (2012) 3 SCC 104 observed that:

"Since, spectrum is a scarce resources, it needs to be regulate separately. Spectrum should be distributed using such a mechanism that it is allocated optimally to the most efficient user. -----

we hold that the State is the legal owner of the natural resources as trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the Constitutional principles including the doctrine of equality and larger public good."

Thus, as a vital natural resource, the price of spectrum should be sufficient to ensure that it is valued and used wisely. Use of spectrum provides considerable benefits to the economy and benefits from spectrum should be maximized. In this regard we are of the view that in distributing natural resources like spectrum, rational transparent method should have been adopted so that the nation would have been enriched.

The appellant of Civil Appeal No.135 of 2012 i.e. Writ Petition No.8904 of 2011 also challenged the impugned memo for the reason that the BTRC demanded the amount without any deduction meaning without deduction of VAT therefrom. The High Court Division arrived at a conclusion that:

"There is no illegality in the impugned memo in so far as the issue of VAT is concern. The Grameenphone is required to add the VAT to the demanded money (except the MCF in respect of the spectrum of 2008) and withhold it at source and then pay the same directly to the Government exchequer. However, Grameenphone will get credit for the said VAT from the VAT to be paid ultimately by its subscribers in accordance with law.

In view of above, the Grameenphone should immediately pay, if not paid already, the fees, charges and VAT to the concerned authorities in accordance with law."

So, the question remains whether the Cellular Mobile Phone Operator can withhold the VAT collected at source and then pay the same directly to Government exchequer and VAT paid by the Cellular Mobile Phone Operator is rebatable or not. We find that the VAT as introduced in Bangladesh is an indirect tax to simplify the taxation

system. Under the VAT scheme it is provided in Sub-Section 4 of Section 6:

"৬ (৪) এই ধারায় যাহা কিছুই থাকুক না কেন, বোর্ড, বিধি দ্বারা নির্ধারিত পদ্ধতিতে, যেকোন পণ্য, পণ্যশ্রেণী বা সেবার ক্ষেত্রে মূল্য সংযোজন কর বা ক্ষেত্রমত, সম্পূরক গুণক পরিশোধের সময় ও পদ্ধতি নির্ধারণসহ, অগ্রিম পরিশোধের [বা উৎসে কর্তনে] বিধান করিতে পারিবে।"

Herein, 'Board' means 'the National Board of Revenue'. The BTRC is given responsibility to collect VAT from the Cellular Mobile Phone Operators and deposited it to the Government exchequer. As such, there is no scope to withhold the VAT collected at source by the Grameenphone.

Thus, the findings of the High Court Division "*the Grameenphone is required to add the VAT to the demanded money (except the MCF in respect of the spectrum of 2008) and withhold it at source and then pay the same directly to the Government exchequer*" is not based on provisions of the VAT Act and requires to be modified in the following manner:

"There is no illegality in the impugned memo in so far as the issue of VAT is concerned. The Ghameenphone is required to add the VAT to the demanded money and pay the same to the BTRC and BTRC shall deposit the same to the Government exchequer forthwith."

The issue whether the VAT paid by the Cellular Mobile Phone Operator is rebatable or not will be determined at the time of the addressing the issue arise in Civil Appeal No.443 of 2016.

In Civil Appeal No.443 of 2016 the High Court Division discharged the Rule directing that the LTU-VAT authority shall retain the cash payment of Tk.141,20,88,000/- and treat the same as amount deducted at source by the petitioner as VAT assessed on the licence fee and spectrum allocation charge; The petitioner consequently shall forthwith ensure a replenishment payment of the said amount of Tk.146,90,13,873/- to the BTRC; The NBR/LTU-VAT authority shall be at liberty to demand forthwith any payment due of an account of VAT assessed on the renewal of license fee, revenue sharing, annual spectrum fee with late charges, if any, from the petitioner. But direction was given for compulsory registration of the BTRC by application of Section 15(4) of the VAT Act.

From the above, it appears that both the Bench of the High Court Division in disposing both the Rule issued in

Writ Petition No.8904 of 2011 and 157 of 2012 after discussing the relevant provisions of the VAT Act arrived at a conclusion that the cellular mobile phone companies are liable to pay VAT on the renewal of license fee, revenue sharing and spectrum fee.

Now the points of law involve in all the appeals are as follows:

1. *Whether VAT if paid is rebatable;*
2. *Whether BTRC requires a compulsory registration under the VAT Act.*

Section 9 of the VAT Act provides the provisions for taking rebate by the suppliers of goods or service renderer on the output tax excepting the circumstances narrating in the Section. For better appreciation, the relevant portion of the Section 9 is reproduced below:

৯। কর রেয়াত।- (১) করযোগ্য পণ্যের সরবরাহকারী, ব্যবসায়ী বা করযোগ্য সেবা প্রদানকারী প্রতি কর মেয়াদে তৎকর্তৃক সরবরাহকৃত পণ্য বা প্রদত্ত সেবার উপর প্রদেয় উৎপাদ করের (output tax) বিপরীতে, নিম্নবর্ণিত ক্ষেত্র ব্যতীত, উপকরণ কর রেয়াত গ্রহণ করিতে পরিবেন, যথা:

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(ঙ) করযোগ্য পণ্য উৎপাদন বা করযোগ্য সেবা প্রদানের সহিত সরাসরি সম্পৃক্ত হইলেও কোনো দালান-কোঠা বা অবকাঠামো বা স্থাপনা নির্মাণ, সুস্বীকরণ, আধুনিকীকরণ, [প্রতিস্থাপন, সম্প্রসারণ,] পুনঃসংস্কারকরণ ও মেরামতকরণ, সকল প্রকার আসবাবপত্র,

স্টেশনারি দ্রব্যাদি, এয়ারকন্ডিশনার, ফ্যান, আলোক সরঞ্জাম, জেনারেটর ইত্যাদি ক্রয় বা মেরামতকরণ, স্থাপত্য পরিকল্পনা ও নকশা [যানবাহন, ইত্যাদি ভাড়া বা লিজ গ্রহণ,] ইত্যাদির সহিত সংশ্লিষ্ট পণ্য এবং সেবার ওপর পরিশোধিত মূল্য সংযোজন কর;

[(চ) করযোগ্য পণ্য উৎপাদন বা সরবরাহ বা করযোগ্য সেবা প্রদানের সহিত সম্পৃক্ত, বিধি দ্বারা নির্ধারিত, বিভিন্ন পণ্য ও সেবা এবং উহাদের ওপর পরিশোধিত মূল্য সংযোজন করের হারের অতিরিক্ত মূল্য সংযোজন কর;]

(ছ) ভ্রমণ, আপ্যায়ন, কর্মচারীর কল্যাণ ও উন্নয়নমূলক কাজের ব্যয়ের বিপরীতে পরিশোধিত মূল্য সংযোজন কর।

(emphasis supplied)

It is not specified by the writ-petitioners on which raw materials or output tax they are claiming credit/rebate.

It is clear from Section 9(1) (Uma) of the VAT Act, 1991 that 'spectrum' comes within the definition of infrastructure (অবকাঠামো) and thus VAT paid by the cellular mobile companies on the spectrum fees and the license fees are not rebatable. Said provisions of Section 9 does not require the infrastructure to be tangible as such the argument placed by the learned Advocate for the cellular phone companies that infrastructure cannot intangible is not correct inasmuch as spectrum provided to the cellular mobile phone companies are a range of wave of radio frequencies which is uniquely distinguishable by intangible boundaries that is why spectrum allotted to

one cellular phone company cannot be used by others. The cellular phone companies cannot provide service without allocation of spectrum.

The High Court Division in Writ Petition No.157 of 2012 directed a compulsory registration of the BTRC by application of Section 15(4) of the VAT Act and directed both the NBR and the BTRC to ensure such registration under the Section. We have perused Section 15(4) of the VAT Act which runs as follows:

“১৫। নিবন্ধন।- (১) করযোগ্য পণ্যের সরবরাহকারী বা করযোগ্য সেবা প্রদানকারী বা যেকোনো পণ্যের আমদানিকারক বা যেকোনো পণ্য বা সেবার রপ্তানিকারককে বিধি দ্বারা নির্ধারিত পদ্ধতিতে সংশ্লিষ্ট কর্মকর্তার নিকট নিবন্ধিত হইতে হইবে;

(২) -----

(৩) -----

(৩ক)-----

(৪) যদি নিবন্ধনযোগ্য কোনো ব্যক্তি নিবন্ধনের জন্য আবেদনপত্র পেশ না করেন এবং সংশ্লিষ্ট কর্মকর্তা যথাযথ অনুসন্ধানের পর সন্তুষ্ট হন যে উক্ত ব্যক্তির এই ধারার অধীন নিবন্ধিত হওয়ার বাধ্যবাধকতা রহিয়াছে, তাহা হইলে তিনি উক্ত ব্যক্তিকে [নিবন্ধিত করিয়া তাহাকে অবহিত করিবেন] এবং যেদিন হইতে উক্ত বাধ্যবাধকতার উদ্ভব হইয়াছে সেই দিন হইতেই উক্ত ব্যক্তি নিবন্ধিত বলিয়া গণ্য হইবেন।”

(৫) -----

Second Schedule of the VAT Act described the services exempted from payment of VAT. The relevant portion is quoted hereinunder:

দ্বিতীয় তফসিল

মূল্য সংযোজন কর হইতে অব্যাহতিপ্রাপ্ত সেবাসমূহ

১।	-----
২।	-----
৩।	-----
৪।	-----
৫।	-----
৬।	-----
৭।	অন্যান্য সেবা;
	(ক) -----
	(খ) -----
	(গ) -----
	(ঘ) সরকার, স্থানীয় কর্তৃপক্ষ, স্থানীয় কর্তৃপক্ষের সংঘ অথবা প্রতিষ্ঠান যাহারা সরকারের জন্য কাজ করে এইরূপ সেবা প্রদানকারী প্রতিষ্ঠান (ওয়াসা, বিদ্যুৎ বিতরণকারী, নির্মাণ সংস্থা, ভূমি উন্নয়ন ও ভবন নির্মাণ, ভূমি বিক্রয়কারী, ব্যাংক ও বীমা প্রতিষ্ঠান ব্যতীত);

From the above it appears that Government, local authorities, the organization of local authority or organization those who are working for the Government are exempted from payment of VAT. The NBR, postal department, Bangladesh Bank, City Corporation and land revenue authority although engaged in realization of VAT through deduction at source bearing no registration under VAT Act, 1991 and thus the BTRC being Government organization is also exempted from payment of VAT under Clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991 and compulsory VAT registration is not necessary for BTRC.

For the reasons as stated above the operative portion of the judgement and order dated 13.02.2012 passed in

Writ Petition No.8904 of 2011 (from which Civil Appeal Nos.135-137 of 2012 arose) are modified in the following manner:

1. *The writ petition is maintainable;*
2. *There is no illegality in the impugned memo in so far as the issue of VAT is concerned. The Grameenphone is required to add the VAT to the demanded money and pay the same to the BTRC and BTRC shall deposit the same to the Government exchequer forthwith;*
3. *In view of the above, the Grameenphone should immediately pay, if not paid already, the fees, charges and VAT to the concerned authorities in accordance with law.*

And

In view of the discussions made above, observation and direction passed by the High Court Division in Writ Petition No.157 of 2012 dated 13.05.2012 (from which Civil Appeal No.443 of 2016 arose) that:

"the BTRC's contained non-registered status for VAT purposes appears anomalous in the facts and circumstances. This Court being of the view that such situation needs immediate attention to avoid any further confusion in the implementation of the Deduction at Source Scheme in particular. It is also noted that the BTRC itself on occasion has contributed to such confusion arising by making ill-advised assertions as to its status within the VAT regime. This Court finds in this respect that circumstances now dictate a compulsory registration of the

BTRC by application of Section 15(4) of the Act. Both the NBR and the BTRC are hereby put on notice to ensure such registration by application of Section 15(4) without undue delay. Given the findings in this judgment it is directed that such registration shall be deemed to be effective from the date the BTRC notified the petitioner of award of license and payment of License Renewal Fee and Spectrum Assignment Fees without any deduction i.e. from 17.10.2011."

-are hereby expunged.

With the above modification, observations and findings, Civil Appeal No.135 of 2012 is dismissed, Civil Appeal Nos 136 of 2012 & 443 of 2016 are allowed and Civil Appeal No.137 of 2012 is disposed of and Civil Petition Nos.1386, 1936 of 2012, 1637 of 2014, 377 of 2013 & 1128 of 2012 are disposed of in the light of the judgment and order delivered in Civil Appeal Nos.135-137 of 2012 & 443 of 2016.

No order as to costs.

C.J.

J.

J.

J.

J.