TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 14th March, 2019

AERA APPEAL NO. 8 OF 2018
(With M.A. No. 449 of 2018)

Bangalore International Airport Ltd. ... Appellant
Vs.
Airports Economics Regulatory Authority of India ... Respondent

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON
HON'BLE MR. A.K. BHARGAVA, MEMBER

For Appellant	:	Mr. Manu Kulkarni, Advocate Mr. Sriparna Dutta Choudhury, Advocate Ms. Priyanka M.P., Advocate Mr. Saaransh Jain, Advocate Mr.Meka Venkata Rama Krishna, Advocate
For Respondent	:	Ms. Shweta Bharti, Advocate Mr.J K Chaudhary, Advocate Mr. Avinash Singh, Advocate

ORDER

A K Bharagava – This appeal has been filed challenging the Airport Economic Regulatory Authority (AERA) tariff order no. 18/2018-19 dated 31-8-2018 in respect of Kempegowda International Airport for the second control period (1-4-2016 to 31-3-2021), corrigendum dated 4-9-2018 and clarification letter dated 13-9-2018. Petitioner's main prayer is to direct AERA to compute tariffs afresh to the extent enumerated in the appeal. Petitioner has also filed an MA

No. 449/2018 praying for interim relief by way of staying the impugned order and the rate card and permitting the Appellant to charge as per the rate card of first control period. It was observed that this interim relief will amount to giving final relief. However, during course of submissions, learned senior counsel for the Appellant has pressed for limited interim relief by way of the old rates for 6 months in respect of UDF charges in view of the urgency and constraints faced by Bangalore International Airport Limited (BIAL). Accordingly, we are considering interim relief restricted to the rate card for UDF and to limited extent of constraints faced in terms of capital expenditure for the expansion project.

2. BIAL is one of the fastest growing airport in the world. It recorded about 16 million flyers during the first six month period in 2018; a 33% growth over the corresponding period in the previous year. As per AERA, traffic projection during 2018-19 is 30.83 million passengers. According to BIAL, it is handling 33 million passengers against a capacity of 20 million passengers only. In view of these impressive figures, it is not in dispute that a timely expansion of the airport is required. BIAL has undertaken this exercise and is in the midst of developing a second terminal and runway along with associated works, to be completed by March 2021. This will entail a total capital outlay of Rs. 10,342 Crores. Appellant has submitted that it has exhausted all means of raising the required capital and yet it faces a shortfall of about Rs. 890 on account of various reasons. If 10% cost overrun (approx. Rs. 830 Cr) is added, the total funding gap will be to the tune of Rs. 1720 Cr. As per AERA, this shortfall will be only Rs. 178 Cr, which it maintains that BIAL should be able to manage. Grievance of the petitioner is that in taking this position, AERA has overlooked many contractual, legal, financial and practical issues, thereby affecting its cash flow position and putting the expansion project to irreparable prejudice and hardship.

3. Appellant has made many submissions in the MA 449 which will require adjudication. However, for the purpose of interim relief, relevant and main submissions made by learned senior counsel for the Appellant are summarized below

(a) Impugned order has resulted in reduction of tariff by 67% affecting its revenue generation and cash flow

(b) Even by AERA's admission, there is a shortfall of Rs 178 Cr but AERA has failed to provide for this additional revenue

(c) Appellant cannot increase the equity base and has already leveraged debt up to a prudent and permissible limit of 3:1.

(d) Appellant has also not issued any dividends and has ploughed back all surpluses into the airport development.

(e) Appellant has thus exhausted all means of finance to raise the balance capital.

(f) Suggestion to use leased land and generate revenue has limited value since appellant has to invest monies to bring land to usable condition and AERA does not permit the appellant to utilize internal accruals for development of funds.

(g) AERA has arbitrarily reduced the amount of pre-operative expenses resulting in a shortfall of Rs. 131 Cr. Non consideration of impact of GST has resulted in another shortfall of Rs. 76 Cr.

(h) Rs. 88 Cr for Eastern tunnel works were disallowed as part of capital expenditure for second control period while this work is necessary to be carried out in the second control period itself.

(i) Decision of AERA to exempt transit/transfer passengers who are transiting within 24 hours from arrival on the same ticket from paying UDF adversely affects the appellant to the tune of approximately Rs. 70 Cr.

(h) such shortfalls will have impact on the appellant's cash flow also, putting constraints on project execution

(j) Promise of true-up in future control period does not solve the cash flow problem now.

(k) Difficulties faced by BIAL are genuine as evidenced by the letter dated 22-6-2018 issued by the Government of Karnataka to AERA.

4. Learned counsel for Respondent 1 (AERA) is opposed to any interim relief on the ground that there is no genuine infirmity in the order and the urgency shown is only to suit its business profitability. Submissions made by learned counsel for the respondent in respect of interim relief sought by the appellant are summarized below

(a) AERA has commissioned a study by RITES on capital expenditure for expansion of Bangalore International Airport for the second control period resulting in downward revision of capital expenditure estimate

(b) AERA has fully looked into the fund requirement of BIAL and fund generated from the tariff order will be sufficient to meet all expenditure

(c) As per the concession agreement, it is the responsibility of the airport operator to arrange the finances. Therefore, argument of being cash strapped cannot be taken by BIAL.

(d) UDF is sanctioned to meet revenue deficit of operation and maintenance cost and return on investment, if any. It cannot be used to meet project cost or repay any loan taken for project cost.

(e) AERA has provided reasoned response to BIAL's projected shortfall and given calculations that work out the shortfall to Rs. 178 Cr, which is less than 2% of the capital expenditure.

(f)This shortfall of Rs 178 Cr can be made up easily by adjusting the payment schedules of the Capital creditors suitably since it is quite normal for a 10 to 15% retention and a staggered payment schedule in such projects.

(g) BIAL can explore several other means of financing like Buyer's Credit arrangements for capital equipment, financing through rental models (pay as you go), top-up loans on Assets etc.

(h) BIAL has used Rs. 233 Cr. from airport's cash generation for the Hotel project for which it should have raised from other resources.

(i) In case this Tribunal permits continuation of the old UDF rates and the final decision renders the old UDF more than required, it will be difficult to return the amount to the public who will be paying excess at present.

5. Respondent has taken the stand that concession agreement puts the onus of arranging finance on the airport operator, i.e. BIAL. Relevant clause of the concession agreement is as follows

"3.1 Concession

*3.1.1 Subject to and in accordance with the provisions of this Agreement and Applicable law, GoI hereby grants BIAL the **exclusive right and privilege to carry out** the development, design, **financing**, construction, commissioning, maintenance, operation and management of the Airport (excluding the right to carry out the reserved activities and to provide communication and navigation surveillance/air traffic management services which are required to be provided by AAI)." (emphasis supplied)*

Clearly, this is an enabling provision which grants the right and privilege to carry out financing function and does not take away any right from BIAL to seek finance from all sources including UDF. Argument that UDF cannot be used for expansion project does not appear to be tenable. Concession

Agreement Schedule 6 Para (iii) on User Development Fund (UDF) (Domestic and International) states the following

"iii) User Development Fee (UDF) (Domestic and International)

BIAL will be allowed to levy UDF, w.e.f. Airport Opening Date, duly increased in the subsequent years with inflation index as set out hereunder, from embarking domestic and international passengers, for the provision of passenger amenities, services and facilities and the UDF will be used for the development, management, maintenance, operation and ***expansion of the facilities at the Airport****." (emphasis supplied)*

Apparently, UDF can be used a means of financing expansion of the airport. However, we reiterate that it should be used only as a last resort and only to the minimum extent possible since it puts burden on the passenger directly for contributing to a service that will be available only in the future. Therefore, the crucial issue for consideration in the interim is whether there exists a gap in financing the project and whether BIAL has exhausted all feasible means of finance to bridge that gap.

6. There is admittedly a shortfall of Rs 178 Cr after AERA has examined all aspects. AERA claims to have given reasons for disallowing certain items in this calculation. However, BIAL strongly disputes this on certain grounds. For example, disallowing Eastern tunnel works on the ground that it will be capitalized in the next control period does not address the question of need to carry out the work at the earliest and the need to deploy capital for this in the current control period. Similarly, AERA may be right in changing the definition of transit passengers, but it ought to have considered the effect of this decision on the cash flow and capital shortfall. Same thing can be said in respect of GST impact. Prima facie, without putting a number to it, we find that shortfall may be even in excess of the admitted figure of Rs. 178 Cr. AERA's other contention is that such shortfall is a small percentage. We observe that capital is the most critical input to any project. Cash-flow is like blood circulation which needs to be kept at required rate. Deficiency, even by small percentage may be harmful to the health of the project. However, we need to examine whether airport operator can maintain the required capital and cash flow by its own exertion, before regulator is called upon to help.

7. There is no dispute that additional finance cannot be raised by BIAL by increasing its equity base. This also limits the scope of raising the debt since BIAL has already leveraged to the extent best practices and prudence would allow. AERA's suggestion to raise the debt further in any other form may not be practical or appropriate. Suggestion like using working capital for capital expenditure will be against good corporate governance practice and may not be allowed by lenders also. Learned counsel for the appellant has shown other suggestions of AERA for meeting the shortfall as impractical or impermissible or against prevailing best industry practice. For example, appellant maintains that AERA has already considered 10% capital creditors (300 Cr) in the impugned order against industry practice of 5%. Further increase in capital creditors may not be feasible. Similarly, working capital loans may not be permissible for capital expenditure. Financing through rental models need to be seen against practicality. Finance instruments like top up loans on assets under loan financing and obtaining finance from unencumbered assets, though theoretically possible, are not practically available due to assets already pledged. Theoretical suggestions for raising finance or promise of true-up in future are not a substitute for bridging the gap in financial requirement and maintain a required cash-flow for the large project. Equity demands that if the operator has exhausted all practical means of raising the required capital, suitable means of providing such support are considered.

8. We have been informed by learned senior counsel for the appellant that UDF rate difference between first control period and second control period results in a revenue difference of Rs 50 Cr per month approximately. In facts of the case, we are of the opinion that if first control rates in respect of UDF (domestic and international) are provided for a period of 4 months, additional revenues generated will cover the admitted capital expenditure gap and also provide reasonable cushion to override cash flow problems.

9. In view of the discussion above, we direct AERA to issue suitable orders, preferably within three weeks, to effect UDF rates (domestic and international) as per the first control period for a limited period of 4 (four) months. It is clarified that the definition of transit passengers will remain as per the latest modified orders. It is further clarified that the funds generated on account of enhanced UDF rates must be used only for capital expenditure of the expansion project and in accordance with the procedure prescribed in the concession agreement. This interim arrangement is made without any prejudice to the rights and contentions of both the parties and will be subject to the final outcome of the petition. In the meantime, both parties may expedite completion of pleadings so that the matter may be heard finally at an early date. For that purpose, put up the case before learned registrar on March 19th, 2019 ~~—, 2018~~ for making the case ready for hearing. MA No. 449 of 2018 is disposed of in terms of these directions.

(S.K. Singh, J)
Chairperson

(A.K. Bhargava)
Member