TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 15th November, 2018

AERA Appeal No. 4 of 2013

Mumbai International Airport Ltd. (MIAL) ....Appellant

Versus

Airport Economic Regulatory Authority of India & Ors. ….Respondents

AERA Appeal No.11 of 2013

Federation of India Airlines ....Appellant

Versus

Airport Economic Regulatory Authority of India & Ors. ….Respondents

AERA Appeal No.12 of 2013

Lufthansa German Airlines & Ors. ....Appellants

Versus

Airport Economic Regulatory Authority of India & Ors. ….Respondents

AERA Appeal No.14 of 2013

International Air Transport Association India Pvt. Ltd. & Ors .....Appellants

Versus

Airport Economic Regulatory Authority of India& Ors. ….Respondents

BEFORE:

HON'BLE MR. JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

HON'BLE MR. A.K. BHARGAVA, MEMBER

AERA Appeal No.4 of 2013

For Appellant (MIAL)	:	Mr. Krishnan Venugopal, Sr. Advocate Ms. Amrita Narayan, Advocate Mr.Shivendra Singh, Advocate Mr. Ishaan Duggal, Advocate Ms.Deepanshi Ishar,Advocate
For Respondent (AERA)	:	Mr Alok Dhir, Advocate Ms. Maneesha Dhir, Advocate Mr.K.P.S. Kohli, Advocate Mr.Abhishek Kumar,Advocate Ms. Sharmistha Ghosh,Advocate
For Respondent (MoCA)	:	Ms Anjana Gosain, Advocate Ms.Shalini Nair,Advocate Ms.Rabiya Thakur,Advocate
Intervenor (FIA)	:	Ms. Poonam Verma, Advocate Ms. Apoorva Saxena, Advocate

AERA Appeal No.11 of 2013

For Appellant (FIA)	:	Ms. Poonam Verma, Advocate Ms. Apoorva Saxena, Advocate
For Respondent No.1 (AERA)	:	Mr Alok Dhir, Advocate Ms.Maneesha Dhir,Advocate Mr.K.P.S.Kohli,Advocate Mr.Abhishek Kumar,Advocate Ms. Sharmistha Ghosh,Advocate
For Respondent No.2 (MIAL)	:	Mr. Krishnan Venugopal, Sr. Advocate Ms. Amrita Narayan,Advocate

		Mr.Shivendra Singh,Advocate Mr. Ishaan Duggal, Advocate Ms.Deepanshi Ishar,Advocate
For Respondent Nos.3 (AAI)& 4 (MoCA)	:	Ms Anjana Gosain, Advocate Ms.Shalini Nair,Advocate Ms.Rabiya Thakur,Advocate

AERA Appeal No.12 of 2013

For Appellants(Lufthansa, Swiss & Austrian Airlines)	:	Ms. Neelam Rathore, Advocate Mr. Shaantanu Devansh, Advocate
For Respondent No.1 (AERA)	:	Mr Alok Dhir, Advocate Ms.Maneesha Dhir,Advocate Mr.K.P.S.Kohli,Advocate Mr.Abhishek Kumar,Advocate Ms. Sharmistha Ghosh,Advocate
For Respondent No.2 (MIAL)	:	Mr. Krishnan Venugopal, Sr. Advocate Ms. Amrita Narayan,Advocate Mr.Shivendra Singh,Advocate Mr. Ishaan Duggal, Advocate Ms.Deepanshi Ishar,Advocate
For Respondent Nos.3 (AAI)& 4 (MoCA)	:	Ms Anjana Gosain, Advocate Ms.Shalini Nair,Advocate Ms.Rabiya Thakur,Advocate

AERA Appeal No.14 of 2013

For Appellants(IATA)	:	Mr. Nishant Menon,Advocate Ms. Kavita Sarin,Advocate Mr. Shafiq Ahmad, Advocate
For Respondent No.1 (AERA)	:	Mr Alok Dhir, Advocate Ms.Maneesha Dhir,Advocate Mr.K.P.S.Kohli,Advocate

		Mr.Abhishek Kumar,Advocate Ms. Sharmistha Ghosh,Advocate
For Respondent No.2 (MIAL)	:	Mr. Krishnan Venugopal, Sr. Advocate Ms. Amrita Narayan,Advocate Mr.Shivendra Singh,Advocate Mr. Ishaan Duggal, Advocate Ms.Deepanshi Ishar,Advocate
For Respondent Nos.3 (AAI)& 4 (MoCA)	:	Ms Anjana Gosain, Advocate Ms.Shalini Nair,Advocate Ms.Rabiya Thakur,Advocate

O R D E R

By A.K. Bhargava, Member – These bunch of four appeals have been preferred under section 18(2) of the Airport Economic Regulatory Authority of India 2008 (hereinafter referred to as "the Act") against the First Tariff Order No. 32/2012-13 dated 15.01.2013 issued by the Airport Economic Regulatory Authority (hereinafter referred to as "the AERA") in respect of Chhatrapati Shivaji International Airport at Mumbai. The present judgment and order shall govern all the aforesaid four appeals.

Appeal No. 4 of 2013 filed by Mumbai International Airport Limited (hereinafter referred to as "MIAL") has been argued as the lead matter by Mr. Krishnan Venugopal, learned senior advocate.

2. To begin with, it will be useful to put together a few brief facts and background relevant to the case. In 2004-2005, the Airports Authority of India (AAI) invited tenders from private participants competent to and desirous of operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the CSI Airport, Mumbai. Post selection of the private consortium, as a special purpose vehicle, MIAL was incorporated on 2.3.2006 with AAI retaining 26% of the equity stake capital and balance 74% of equity capital acquired by members of the consortia. Pursuant to this, the following agreements among others were executed -

(a) Operations, Management and Development Agreement dated 4.4.2006 between the Appellant and the AAI (OMDA)

(b) The State Support Agreement dated 26.4.2006 between the President of India acting through the respondent no. 2 and the Appellant (SSA)

AERA was established on 12.5.2009 as an Authority under the Act to *interalia* determine the tariff for the aeronautical services to be levied at a major airport. After establishment, AERA set in motion the process for determination of tariff. MIAL submitted its Multi Year Tariff Proposal on 11.10.20011 for revision of aeronautical tariffs at CSI Airport, Mumbai. AERA issued consultation paper no. 22/2012-13 for determination of aeronautical tariff and development fee in respect of CSI Airport, Mumbai for 1st regulatory period 1.4.2009 to 31.3.2014 on 11-10-2012. After receiving detailed response to the consultation paper by various

stakeholders, AERA determined the aeronautical tariff in respect of CSI Airport, Mumbai through the impugned order dated 15.01.2013. The appellant has filed the present appeal challenging the impugned order with the following prayers:

(i) Set aside the Impugned Order No. 32/2012-13 dated 15.01.2013 allow the reliefs indicated in paragraph 9.12 above and consequently direct the respondent no. 1 to carry out adjustment of the Aeronautical Tariff in respect of Chhatrapati Shivaji International Airport, Mumbai for the 1st Regulatory Period (01.04.2009-31.03.2014) after taking into consideration the financial implications of the reliefs indicated in paragraph 9.12.

(ii) Declare that demurrage charges are not aeronautical charges and hence, tariff for the same cannot be determined by respondent no. 1.

(iii) Declare that FTC charges are not aeronautical charges and hence tariff for the same cannot be determined by respondent no. 1.

(iv) Pass any such further order(s) as the Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.

3. It is pertinent to mention here that prior to this impugned order, AERA had come out with its First Tariff Order relating to Delhi International Airport on 20-4-2012 which was challenged by DIAL and few others through different appeals. As the turn of events unfolded, this Tribunal took up the hearing of these appeals expeditiously in light of the Hon'ble Supreme Court's order dated 3-7-2017. At the time of hearing of DIAL case, Mr. Venugopal prayed for hearing the MIAL appeal as well. However, in view of the Apex court's order as noted, DIAL case was heard first. While doing so, Mr. Venugopal was given opportunity to make submissions

on common points of law which he did with great aplomb. The judgment in DIAL Appeal no. 10/2012 (hereinafter referred to as DIAL order) was delivered on 23-4-2018. Therefore, before hearing the present case in detail, vide our order dated 1-5-2018), we requested learned counsels for appellants in different appeals to submit advance notes of arguments, mainly for the purpose of informing us as to which of the issues still survive in the light of the recent judgment dated 23.4.2018 delivered by this Tribunal in respect of Ist Tariff Order relating to Delhi airport. The appellants have done this and have narrowed down their challenge to only a few issues/decisions in the impugned order. We shall thus take up the narrowed down list of grievances only.

4. While the prayer in the lead matter refers to many issues/decisions contained in the impugned order, Mr. Venugopal makes our task easier by submitting that the issues that remain and which he proposes to argue are only four. These issues are as follows

(i) Treatment of corporate taxation for purposes of the target revenue formula

(ii) Treatment of Fuel Throughput Charges for purpose of target revenue formula

(iii) Determination of the Hypothetical Regulatory Asset Base for purpose of the target revenue formula

(iv) Treatment of upfront fee (in calculating the weighted average cost of capital for purposes of the target revenue formula)

5. Mr. Alok Dhir, learned counsel for respondent AERA has advanced general arguments that in respect of the aforesaid issues also, this Tribunal has made some remarks/observations in its judgment dated 23-4-2018 which by implication ought to have settled similar issues in this case also. Ms. Poonam Verma, learned counsel for Federation of India Airlines (FIA) submits that the DIAL order, though not binding in MIAL appeal, is a precedent. She is more specific in stating that two of the four aforesaid issues, namely Corporate Tax and FTC, have been settled by the DIAL judgment and only the balance two issues of upfront payment and HRAB survive. She also emphasizes that in respect of the settled issues, review or reconsideration is not warranted in order to maintain the continuity and certainty. Ms. Verma also cites ***Keshav Mills v. Commissioner of Income Tax*** (1965) 2 SCR 908 which states that "*The principle of stare decisis, no doubt, cannot be pressed into service in cases where jurisdiction of this court to reconsider and revise its earlier decisions is invoked; but nevertheless, the normal principle that judgments pronounced by this court would be final, cannot be ignored, and unless considerations of a substantial and compelling character make it necessary to do so, this court should and would be reluctant to review and revise its earlier decisions."* Mr. Venugopal counterson the other hand submits that MIAL was not a

party in DIAL's appeal and he was heard only briefly as intervenor in that case. Therefore, the doctrine of *res judicata* or even constructive *res judicata* does not apply. He cites ***Devilal Modi v. Sales Tax officer***, (1965) 1 SCR 686 and ***State of UP v. Nawab Hussain***, (1977) 2 SCC 806 to support his argument. He further clarifies that MIAL's factual and legal contentions in the present appeal are different from those decided in the DIAL order and the doctrine of precedent also will not apply, citing ***MCD v. Gurnam Kaur***, (1989) 1 SCC 101. We have no cavil to these submissions. We have already made our approach clear in para 3 that we shall examine only the narrowed down list of issues, and while doing so, we shall also keep in mind our observations made in the DIAL order.

6. Mr. Dhir further contends that since in some cases new grounds have been taken at appellate stage, AERA ought to be given an opportunity to consider new grounds and also put the same before the stakeholders for consultation. Mr. Venugopal asserts that additional grounds and documents are permissible in appeal. The power of a statutory appellant tribunal is "co-terminus" with that of the underlying statutory authority and it "*…is competent to rehear the matter completely" (**Jute Corporation of India Ltd. V. CIT***, 1991 Supp (2) SCC 744, para 6). Further, the appellate tribunal can entertain certain additional grounds and take additional evidence where the statute does not impose a bar. The test is whether it "*is necessary in the interest of justice."* We note that in a regulatory consultative

process, affected parties may not be able to put forward all the relevant facts and or points of law before the decision is known to them. At the same time, new grounds may affect decisions which in turn require the consultation process. This circulatory process obviously cannot go on and it is for the appellate authority to bring about the balance in the interest of justice. With this observation, we put to rest this limited question and proceed further to examine the identified issues at hand.

7. Since all the aforesaid issues refer to the target revenue formula, we would like to extract for ready reference, the provision made in Schedule 1 of SSA regarding "*calculating the aeronautical charges in the shared till inflation – X price cap model*", which is as under

> ***The revenue target is defined as follows:***
>
> $TR_i = RB_i x\ WACC_i + OM_i + D_i + T_i - S_i$
>
> *where* *TR = target revenue*
>
> *RB = regulatory base pertaining to Aeronautical Assets and any investments made for the performance of Reserved Activities etc. which are owned by the JVC, after incorporating efficient capital expenditure but does not include capital work in progress to the extent not capitalised in fixed assets. It is further clarified that working capital shall not be included as part of regulatory base. It is further clarified that penalties and Liquidated Damages, if any, levied as per the provisions of the OMDA would not be allowed for capitalisation in the regulatory base. It is further clarified that the Upfront Fee and any pre-operative expenses incurred by the*

Successful Bidder towards bid preparation will not be allowed to be capitalised in the regulatory base.

WACC = nominal post-tax weighted average cost of capital, calculated using the marginal rate of corporate tax

OM = efficient operation and maintenance cost pertaining to Aeronautical Services. It is clarified that penalties and Liquidated Damages, if any, levied as per the provisions of the OMDA would not be allowed as part of operation and maintenance cost.

D = depreciation calculated in the manner as prescribed in Schedule XIV of the Indian Companies Act, 1956. In the event, the depreciation rates for certain assets are not available in the aforesaid Act, then the depreciation rates as provided in the Income Tax Act for such asset as converted to straight line method from the written down value method will be considered. In the event, such rates are not available in either of the Acts then depreciation rates as per generally accepted Indian accounting standards may be considered.

T = corporate taxes on earnings pertaining to Aeronautical Services.

S = 30% of the gross revenue generated by the JVC from the Revenue Share Assets. The costs in relation to such revenue shall not be included while calculating Aeronautical Charges.

"Revenue Share Assets" shall mean (a) Non-Aeronautical Assets; and (b) assets required for provision of aeronautical related services arising at the Airport and not considered in revenues from Non-Aeronautical Assets (e.g. Public admission fee etc.)

i = time period (year) i

$RB_i = RB_{i-1} - D_i + I_i$

where: *RB0 for the first regulatory period would be the sum total of*

(i) *the Book Value of the Aeronautical Assets in the books of the JVC and*

(ii) *the hypothetical regulatory base computed using the then prevailing tariff and the revenues, operation and maintenance cost, corporate tax pertaining to Aeronautical Services at the Airport, during the financial year preceding the date of such computation.*

I = investment undertaken in the period

The X factor is calculated by determining the X factor that equates the present value over the regulatory period of the target revenue with the present value that results from applying the forecast traffic volume with a price path based on the initial average aeronautical charge, increased by CPI minus X for each year. That is, the following equation is solved for X:

$$\sum_{i=1}^{n} \frac{RB_i \, x \, WACC_i + OM_i + D_i + T_i - S_i}{(1 + WACC_i)^i} = \sum_{i=1}^{n} \sum_{j=1}^{m} \frac{AC_{ij} \, x \, T_{ij}}{(1 + WACC_i)^i}$$

where AC_{ij} = *average aeronautical charge for the* j^{th} *category of aeronautical revenue in the* i^{th} *year*

T_{ij} = *volume of the* j^{th} *category of aeronautical traffic in the* i^{th} *year*

X = escalation factor

n = number of years considered in the regulatory period

m = number of categories of aeronautical revenue e.g. landing charges, parking charges, housing charges, Facilitation Component etc.

The maximum average aeronautical charge (price cap) in a particular year 'i' for a particular category of aeronautical revenue 'j', is then calculated according to the following formula:

$$AC_i = AC_{i-1} \, x \, (1 + CPI - X)$$

where $\underline{CPI}$ = *average annual inflation rate as measured by change in the All India Consumer Price Index (Industrial Workers) over the regulatory period.*

The following is an illustrative numeric example of a price cap model showing

how the X factor is determined. The example relates to a five-year regulatory period where the X is calculated as an average factor for each of the five years.

Illustrative Numerical Example of the Price Cap Approach

The following is an indicative numerical example illustrating the methodology to calculate aeronautical charges. This is just an example and may not be followed by AERA or the GOI, as the case may be.

Assumptions

Airport Co is an airport company with the following parameters:

Existing regulated asset base = $500m

Net working capital for aeronautical services = nil

Existing aeronautical revenue = $67m

Aeronautical related revenue shared in regulated till = 30%

Existing traffic volume = 48 million passengers, aeronautical charges levied on a per passenger basis only

Post-tax nominal WACC = 7.0%

Pre-tax cost of debt = 4.0%

Debt – equity ratio for financing regulatory base = 2:1

CPI based inflation = 3.0%

Book life of existing regulated assets = 32.5 years

Book life of new regulated capital expenditure = 35 years

Rate of corporate tax = 10%, assumed to be the rate of corporate tax applicable to the earnings from Aeronautical Services as computed according to the Indian Income Tax Act

Assumption (all figures in current prices)	*2003*	*2004*	*2005*	*2006*	*2007*	*2008*
O&M Costs ($m)		*20*	*22*	*24*	*26*	*28*
Capex ($m)		*40*	*50*	*60*	*50*	*40*
Aeronautical related revenue	*30*	*32*	*34*	*37*	*39*	*42*
Traffic (passengers million)	*48*	*50*	*52*	*54*	*56*	*58*
Depreciation rate for initial regulated asset base (%)		*3.1*	*3.1*	*3.1*	*3.1*	*3.1*
Depreciation rate for new regulated capex (%)		*2.9*	*2.9*	*2.9*	*2.9*	*2.9*

Step 1: Determine Target Revenue

Target revenue is O&M plus depreciation plus WACC x RAB plus tax

Step 2: Set escalation factors

The calculations for determining the escalation factor are outlined below:

($m)	*2003*	*2004*	*2005*	*2006*	*2007*	*2008*
EBIT – Tax		*37*	*39*	*42*	*44*	*45*
less: Interest		*14*	*14*	*15*	*16*	*17*
PAT		*23*	*25*	*26*	*28*	*28*
add: Tax		*3*	*3*	*3*	*3*	*3*
add: Interest		*14*	*14*	*15*	*16*	*17*
add: Depreciation		*16*	*17*	*19*	*20*	*22*
EBITDA		*55*	*59*	*64*	*67*	*70*
add: O&M costs		*20*	*22*	*24*	*26*	*28*
less: Share of aeronautical related revenue		*10*	*10*	*11*	*12*	*13*
Target revenue requirement		*66*	*71*	*77*	*82*	*85*
Discounted target revenue requirement		*61*	*62*	*62*	*62*	*61*
Revenue based on escalation factor	*67*	*70*	*73*	*76*	*79*	*81*
Discounted revenue based on escalation factor		*65*	*64*	*62*	*60*	*58*
CPI based inflation (%)		*3.00*	*3.00*	*3.00*	*3.00*	*3.00*
Index of nominal aeronautical tariffs based on CPI – X	*1.00*	*1.00*	*1.00*	*1.00*	*1.00*	*1.00*
Post-tax nominal WACC used to calculate NPV	*7.00%*					
NPV of Target Revenue	*309*					
NPV of expected revenue based on escalation factor	*309*					
Difference in NPV	*0.00*					
X factor	*+ 2.89%*					

The X factor for this numerical example is calculated to be + 2.89% over the five year regulatory period."

Treatment of corporate taxation for purposes of the target revenue formula:

8. In respect of this issue**,** the decision of AERA in the impugned order is as under

Decision No. XV - Regarding Taxation

XV.a. The Authority decides to consider the corporate tax pertaining to earnings from aeronautical services as calculated using revenue share (Annual Fee) on these earnings as element of cost for the years 2009-10, 2010-11 and 2011-12. For the balance period i.e., 2012-13 and 2013-14 the Authority decides to make similar calculations.

XV.b. The Authority decides to review the above calculations based on the audited figures.

Truing Up: 6. Correction / Truing up for Taxation

6.a. The Authority also decides to true up the difference between its calculations of aeronautical corporate tax and that based on certifications by the auditor during the next Control Period, commencing from 01.04.2014.

9. On the issue of taxation, AERA has taken a clear stand that (i) tax paid by the company should be taken on the actuals and MIAL should not have the benefit of the difference between tax calculated on regulatory account and that actually paid by it (ii) while computing 'T', the cross-subsidy element 'S' is not to be treated as income and the Annual fee is to be treated as element of cost. Mr. Venugopal finds AERA's stand untenable on various grounds, most of which are noted in the impugned order. However, some of his submissions he suggests are new or not noted earlier or there is no specific finding in regard to them. These submissions revolve around the inherent "circularity" in the TR formula, the centrality of the example or the methodology prescribed along with the formula and the provision of 'T' becoming otiose following AERA's approach. We find it appropriate to examine each of these submissions in detail.

10. Mr. Venugopal questions the approach adopted by AERA on the basis that it makes the provision of "T" otiose and therefore must be rejected. He supports this by facts and various reasonable assumptions. We do not doubt his facts and assumptions. However, if the assumptions change (e.g. Annual fee is zero or miniscule, say 2%), the outcome may be different. Inclusion of "T" in the formula may have been superfluous, infructuous or otiose, if its value were to be "invalid" (e.g. a negative value) or a zero value under all circumstances. A zero value of tax under Income Tax Act is actually a valid value. The grievance that it will remain zero forever is more a result of choice made by the appellant in respect of annual fee percentage. Defence of Mr. Venugopal is that this choice was made on the assumption that annual fee will not be treated as element of cost. We find no evidence that bidders were led to believe this. The fact that example cited in the schedule I of SSA does not mention annual fee leads to no such inference, since it simply means that annual fee contribution is taken as zero in the example and bidders would make their own assumptions and corresponding calculations. In any case, we are reminded of Mr. Venugopal's proposition elsewhere that outcome may not be the basis of applying a provision in the statute or agreement.

11. Mr. Venugopal also relies on the centrality of the example given in the SSA and the "methodology" used therein. According to him, in order to solve the TR formula, an additional information/equation relating to 'T' is required. The

example in the SSA (as extracted above in para 5 to calculate the X factor) provides this by way of the "method" that uses an equation related to PAT (profit after tax). Though the method is not explicitly mentioned, Mr. Venugopal explains that the calculations used fit in with the equations which have also been given by MIAL in their submission to AERA. As per this "method, corporate tax is calculated after grossing up (RB*WACC – Interest cost). Specifically, (RB*WACC – Interest cost) is considered as equal to profit after tax (PAT). Mr. Dhir insists that this concept relating to PAT is outside of SSA and cannot be accepted. MIAL finds it in accordance with SSA since it is used in the example and the example is an integral part of the SSA. While explaining this "method", Mr. Venugopal fairly points out few 'typographical mistakes' in the example (otherwise the example will not be logical or consistent) while Mr. Dhir wants the example to be read as it is. Mr. Venugopal insists that the methodology given in the example be followed since the example is part of the SSA and no other methodology is prescribed. Mr. Dhir points out to the example itself which states that it is "*an indicative numerical example illustrating the methodology to calculate aeronautical charges. This is just an example and may not be followed by AERA or the GOI, as the case may be.*" Clearly the example is useful but not exhaustive in terms of facts or assumptions. The veracity of methodology may not be doubted on account of typographical mistakes, but this is not the only methodology that can be used. The example may guide wherever needed but cannot be treated as exhaustive and solitary means of

guidance so as to make it binding as the main provision itself. AERA has taken a stand independent of the example but within the provisions of the SSA. We find no bar placed on AERA in taking such a stand.

12. Mr. Venugopal has argued extensively on the 'circularity' involved in the target revenue formula. According to him, 'T' is dependent on target revenue ('TR') and 'TR' is dependent on 'T'. Mr. Venugopal further submits that AERA is to work out target revenue *ex ante* for the future based on projections while the "actual tax" paid or payable is known only when the relevant year ends. Mr. Venugopal also finds another issue of circularity in respect of annual fee which is a percentage of 'TR' which can be worked out only after computing 'T'. Thus, there is conceptual problem of circularity in going by the actual tax paid. We do not find this to be so daunting a problem as to necessarily reject AERA's approach. All that is required here is to find the value of 'T' from any method (we have already rejected specific method argument) based on logical and acceptable reasoning within the provisions of the Agreement and substitute it in the TR formula. AERA's approach is based on the definition of the term 'T' as given in the SSA viz. "*Corporate Taxes on the earnings pertaining to aeronautical services"*. For the purposes of getting the value of term 'T', AERA has proposed to (i) consider actual corporate tax paid by MIAL for the year 2009-10, 2010-11 and 2011-12 (ii) use the forecast of Corporate Tax payable on aeronautical services for tariff determination

(iii) review the actual corporate taxes on aeronautical services paid by MIAL, based on the audited figures as would need to be made available separating for aero and non-aero assets/activities (iv) true up the difference between the actual corporate tax paid (separating for aero and non-aero assets/activities) and that used by the Authority for the determination of tariff for the current control period. It must be noted that in the TR formula, 'T' is an entry for expense, just like other entries of O&M expenses. Conceptually, all these entries can be based on estimations (or actuals, if available) followed by true-up mechanism. This approach of course is an iterative process and requires separation of aero and non-aero assets/activities, which we do not think should be an impediment. In view of this, we do not find AERA's approach to be conceptually inconsistent.

13. Having dealt with the aforesaid submissions of Mr. Venugopal, we find it appropriate to reiterate our observations made in the Dial order in respect of AERA's stand that the tax paid by the company should be taken on the actuals and MIAL should not have the benefit of the difference between tax calculated on regulatory account and that actually paid by it. The observations/findings as contained in para 53 of the DIAL order are in favour of AERA and are as under "*We also find no merit in the criticism advanced against the decision of AERA in respect of taxation. The Decision No.18 by the Authority on this issue is preceded by discussion in paragraph 20 and its various sub-paragraphs. DIAL was opposed*

to taking into account the actual corporate tax paid or payable by it for the relevant years in respect of Aeronautical Services. The stakeholders' responses were opposed to treating the aeronautical segment as a standalone entity for tax computation even when there is no actual liability upon DIAL. Their stand that if the corporate tax liability is actually not there, the stakeholders should not be burdened by calculating imaginary tax liability based on theoretical calculations has been accepted. The Authority in para 20.8 has noted that tax is a statutory payment to the Government. It is to be expensed out as a cost in the Target Revenue computations and if the actual tax paid during any year in the control period is lower than the tax forecast then it would lead to a situation of unjust enrichment. Hence, the Authority decided that only the actual tax paid and which can be ascribed to Aeronautical Services will be reckoned for the purpose of determining the Target Revenue. Although lengthy arguments were advanced in support of stand of DIAL, we find no convincing reasons for reversing the views of AERA on this issue."

14. Mr. Venugopal also challenges the stand of AERA on annual fee. He contends in his defence that Article 3.1.1 of the SSA expressly provides that the Annual Fee "… ***shall not be included as part of costs*** *for provision of aero services and no pass-through will be available…."*. We note that Article 3.1.1 is clearly followed while calculating TR and annual fee is not made part of O&M or

any other cost so that it does not have a "pass-through" effect. However, this cannot mean to imply that for taxation purpose also annual fee cannot be a cost element. In fact, if it is indeed taken as cost element for the purposes of calculating tax, it will have downward bias on 'T' and thus will certainly have no "pass-through effect" on TR. His argument that the TR formula does not mention annual fee does not cut much ice since this fact has no relevance in calculating 'T' (in case of TR it is not allowed expressly due to pass through effect but that is not so in case of 'T'). The simple point to note here is that as per the provision in SSA, 'T' is the corporate tax on **earnings** pertaining to Aeronautical Services. Earnings in most simplistic terms are balance of revenue after costs and expenses are deducted. By the provision in the Agreement, Annual Fee is a cost and must be deducted. We therefore concur with AERA that annual fee should be treated as cost element in calculations for 'T'.

15. This leave us with the issue of 'S' in the calculation of 'T' to deal with. In support of his contention that 'S' should be added as aero revenue in the calculations of 'T', Mr. Venugopal uses the definition of 'T' as given in SSA. As per SSA, 'T' is defined as *corporate taxes on "**earnings** pertaining to **Aeronautical Services**"* and not on the **target revenue**. Since it is mandated in the agreement as cross-subsidy to the aero services, it is as real and actual part of the aero revenue as any other aero revenue for the purpose of calculating 'T' in respect

of earnins pertaining to aero services. Mr. Venugopal further contends that even under the Income Tax Act, a subsidy is treated as part of taxable income and also cites some judgments in support (***Sahney Steel v. CIT,*** *(1977) 7 SCC 764 and* ***CIT v. Ponni Sugars,*** *(2008) 9 SCC 337).* We have noted above that earnings in most simplistic terms are balance of revenues after costs and expenses are deducted and that by the provision in the Agreement, Annual Fee is a cost and must be deducted. Similarly, by the provision in the Agreement, 'S' is an element of revenue on aero side and by the same yardstick must be added while calculating the 'T'. We find some merit in these arguments. However, we find no discussion and examination by AERA in the impugned order on how 'S' is to be treated. The analysis presented before us indicates that inclusion of 'S' in aero revenue will have comparatively significant effect and in that sense it is not a routine or insignificant issue. It is also not a case of being so obvious or self-evident that no explanation is warranted. Therefore, we feel that pertinent questions raised by MIAL and other stakeholders on this issue should have been addressed before coming to a decision. We further notice that in the decision no. XV.a of the impugned order, there is a mention of annual fee as element of cost but there is no mention of 'S' in the decision. However, from the submissions of AERA and the calculations done, it is apparent that AERA has not taken 'S' as revenue for calculation of 'T'. It thus appears to be a case of decision by default and calculations without explanations in respect of this point. Therefore, we are of the opinion that it will be appropriate if this limited

question is remanded back to AERA for a fresh consideration through consultative process.

16. Accordingly, in the facts of the case, we find no reason to interfere with decision no. XV as such. However, in respect of decision no. XV.a, the question of 'S' as an element of revenue pertaining to aero services for the purpose of calculating 'T' is remanded back. To this limited extent only, we direct AERA to consider this issue afresh through a consultative process in the next control period that may be falling for consideration.

Treatment of Fuel Throughput Charges for purpose of the target revenue formula:

17. In respect of fuel throughput charges**,** the decision of AERA in the impugned order is as under

XVIII - Regarding treatment of revenue from Fuel Throughput Charges.

a. *The authority decides that Fuel Throughput Charges are charges in respect of provision of aeronautical service namely, supply of fuel to the aircraft hence it is an aeronautical charge and is to be determined by the Authority under Section 13(1) (a) of AERA Act.*
b. *The authority decides to consider revenue from Fuel Throughput Charges as aeronautical revenue.*
c. *The Authority decides to consider the revision in Fuel Throughput Charges in line with the agreements with the oil marketing companies and consider the escalation at CPI or 7%, whichever is less.*

18. AERA contends that the issue pertaining to FTC stands settled by the Tribunal's order dated 23-4-2018 in the DIAL case. In this order, the submissions made by MIAL are noted in paras 56, 57, 58. 59, 64 and this Tribunal has not interfered with AERA's decision to treat FTC as aeronautical revenue. Having noted that, we are certainly alive to Mr. Venugopal's contention that the tribunal did not decide on some of the submissions made and did not render a specific finding on FTC in the DIAL order.

19. Mr. Venugopal challenges the decision of AERA mainly on the grounds that (i) FTC is not a "service" and thus does not fall within the purview of AERA to regulate (ii) in case it is held that FTC is within the purview of AERA to regulate, it should be treated as non-aeronautical service for the purpose of calculating target revenue. We first examine the issue of jurisdiction and then, if necessary, the issue of classification as "aero" or "non-aero" can be determined.

20. Section 2 of the AERA Act provides for definitions and it is useful to extract 2 (a) which gives the definition of "aeronautical service" as under

"2. Definitions —In this Act, unless the context otherwise requires, —
(a) "aeronautical service"means ***any service*** *provided—*
(i) for navigation, surveillance and supportive communication thereto for air traffic management;
(ii) for the landing, housing or parking of an aircraft or any other ground facility offered in connection with aircraft operations at an airport;

(iii) for ground safety services at an airport;

(iv) for ground handling services relating to aircraft, passengers and cargo at an airport;

(v) for the cargo facility at an airport;

(vi) for supplying fuel to the aircraft at an airport; and

(vii) for a stake-holder at an airport, for which the charges, in the opinion of the Central Government for the reasons to be recorded in writing, may be determined by the Authority"

Section 13 of the AERA Act gives the functions of the authority and 13 (1) (a) states as under

13. Functions of Authority—

(1) The Authority shall perform the following functions in respect of major airports, namely: —

(a) to determine the tariff for the aeronautical ***services*** *taking into consideration—*

(i) the capital expenditure incurred and timely investment in improvement of airport

facilities;

(ii) the service provided, its quality and other relevant factors;

(iii) the cost for improving efficiency;

(iv) economic and viable operation of major airports;

(v) revenue received from services other than the aeronautical services;

(vi) the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise;

(vii) any other factor which may be relevant for the purposes of this Act: Provided that different tariff structures may be determined for different airports having regard to all or any of the above considerations specified at sub-clauses (i) to (vii);

According to Mr. Venugopal, AERA's jurisdiction under section 13 (1) (a) of the Act is confined to "aero **services**". If there is no "service", AERA has no jurisdiction. Mr. Venugopal contends that FTC arises out of concession and not service. To the question as to what constitutes a "service" or "concession" since these terms are not defined in the Act, he submits that as held by the Supreme Court, in the absence of any definition of a term in a statute, one must go by its ordinary meaning. He then quotes Black's Law Dictionary, 10th Ed. (2014) to state that the term "*service denotes intangible commodity in the form of human effort such as labour, skill or advice*". P. Ramanatha Aiyar's Advanced Law Lexicon, Third Edition, defines a concession as *"a grant; ordinarily applied to a grant of special privilege granted by a government, corporation or authority…..A concession is a form of privilege.*" Since MIAL is not providing any labour, skill or advice to the oil companies by granting them concessions, it is not rendering any service as far as FTC is concerned. Mr. Dhir does not agree with this interpretation and defends the jurisdiction of AERA. According to Mr. Dhir, word "facilities" is *ejusdem generis* with the word "services". He points out that under Schedule 5 of OMDA, "aeronautical services" mean the provision of "facilities" and "services". The same Schedule also provides that "A more detailed list of the above facilities and services would include the following" and under this, in Clauses 13 to 17, it provides for "Airfield", "Airfield lighting", Air Taxi Services", "Airside and

landside access roads and forecourts including writing, traffic signals, signage and monitoring" and "common hydrant infrastructure for aircraft fueling services by authorized providers", respectively. Thus, there is ample element of "facilities" that are used by fuel supplier and can be attributed to the FTC. Accordingly, FTC falls within the meaning of services and subject to AERA's jurisdiction. While Mr. Venugopal makes his own assumptions regarding FTC being concession and meaning of service restricted in terms of labour, skill, advice etc., Mr. Dhir relies on schedule 5, correlation between "facility and "service" and linkages between "facility" and FTC. We also note that FTC is a curious case in which one monopoly (airport JVC having monopoly over airport access) is granting concession to another monopoly (of oil companies having monopoly over marketing of fuel). Since both monopolies have enough market power, the fact of one monopoly agreeing to pay concession fee to another (without passing it on to the end consumer as asserted by MIAL) would mean that it is providing some extra tangible or intangible "facilities" or "services". Thus, we find little more merit in the respondent's case based on these hypotheses. Yet, it is still a question of "my definition" against "your definition" which requires further analysis and guidance. It was in this context that some suggestions were made that we look at the definition of "service" in other statutes. Mr. Venugopal had a strong objection to it and submitted that the meaning of a term cannot be derived from another statute unless the statutes are in *pari materia* with each other. He cited many case laws in

support *(**Paradeep Phosphates Ltd. V. State of Orissa***, (2018) 6 SCC 195 and ***Kotak Mahindra BankLtd. V. Hindustan National Glass and Industries Ltd***, (2013) 7 SCC 369). We are not only in agreement with this assertion but intend to rely on it and examine further the meaning of "service" within the AERA Act.

21. To begin with, we note the observation made in para 53 of DIAL order dated 23-4-2018 which is as under

"*Section 2 of the Act contains definitions and begins with the phrase – "In this Act, unless the context otherwise requires,....." . Various definitions such as Aeronautical Service, Airport, Service Provider etc. follow thereafter. To convey the exact meaning of phrase – "Unless the context otherwise requires", learned senior counsel has cited judgment of the Hon'ble Supreme Court in case of **Ashok Kapil Vs. Sana Ullah(dead) & Ors. – (1996) 6 SCC 342**. The issue in that case was definition of building in the relevant Act. Section 3 contained the definition clauses with a similar preface – "unless the context otherwise requires". In Para 10, the Apex Court held that the legislature through the definition clauses has provided sufficient play at the joints for contextual adaptations. It was further held that the Act permitted contextual variations if it was necessary to achieve the object of enactment."*

There is no doubt that in AERA Act, the definition clause has provided sufficient play at the joints for context adaptations. In the clause 2 (a), "aeronautical service" is stated to mean **any service** provided for a wide range of functions (which also include supply of fuel to aircraft at the airport) which may or may not be carried out by JVC and which may or may not be a source of revenue. Therefore, meaning of "service" should be given wide import. To get a sense of wide import of the

definition, it should be read along with the object of the Act. The preamble of the Act states that it is an Act "*to provide for the establishment of an Airports* ***Economic*** *Regulatory Authority to* ***regulate tariff and other charges for the aeronautical services rendered at airports*** *and to monitor performance standards of airports and* ***for matters connected therewith or incidental thereto"*** (emphasis supplied). The name "Airports **Economic** Regulatory Authority*"* itself suggests that the Authority deals with "economic" activities related to specified functions at the airports with the purpose to "regulate tariff and other charges for the aeronautical services" and "for matters connected therewith or incidental thereto". Thus, any economic activity connected with or incidental to specified functions and that generates revenue of significant import at the airport and matters connected therewith or incidental thereto would fall within the jurisdiction of the authority for the purpose of regulating tariff. Even Section 13 (a) of the Act, which provides for function of the Authority to determine tariff for the aeronautical services requires it to take into consideration "economic factors" like capital expenditure, timely investment, cost for improving efficiency, economic and viable operation, revenue received from services other than aeronautical services etc., besides the all-encompassing provision of "*any other factor which may be relevant for the purposes of this Act".* Therefore, while deciding jurisdiction for the purpose of regulating tariff, meaning of "service" should be read in a wide sense as economic activity pertaining to specified functions (like fuel supply) of significant

import, irrespective of label (concession, market access etc.), source (from labour, skill or advice etc), nature (aero or non-aero) or history. It is not in dispute that FTC plays a significant role in the economic activity of the airport as it generates a significant amount of revenue and is connected to (or is incidental to) the specified function of supply of fuel to aircrafts at the airport. We are therefore of the considered opinion that for the purpose of fixing tariff, FTC cannot be ousted on the ground of jurisdiction and the only question that remains to be decided is its nature i.e. it is to be treated as "aero" or "non-aero". AERA has dealt with MIAL's submissions in detail in consultation paper as well as in the impugned order regarding treatment of FTC and has concluded that it be treated as "aero".

22. An additional submission advanced by Mr. Venugopal is based on "*surrounding circumstances*" at the time of entering into a contract which according to him are vital to interpreting its terms (***P. L. Bapuswami v. N. Patty Gounder*****,** AIR 1966 SC 902 and ***BSNL v. Reliance Comm. Ltd.,*** (2011) SCC 394). He points out that even before privatization, AAI had agreed with the oil companies on charging of FTC, which AAI was treating as "non-traffic" or non-aero revenue. We do not find much relevance in the assertion that FTC being "non-traffic" automatically qualifies as "non-aero". He also claims that AAI's responses to pre-bid queries led bidders to place bids for Mumbai Airport on the basis that FTC would be an important revenue stream. Perusal of the response to relevant

pre-bid queries (978 and 1092) on FTC reveals only the matter of fact that oil companies have in principle agreed to pay FTC. This cannot be said to be a promise in the RFP that FTC will be treated as "non-aero". The other query (428) is not related to FTC and we find it far fetching to conclude that it would have led the bidders to bid on the basis of FTC being non-aero. Even if it is treated as an indication, AERA has contended elsewhere that it is not bound by indicative promises in RFP and this Tribunal has held this contention. We, therefore, do not find much force in the "*surrounding circumstances*" argument advanced by Mr. Venugopal to consider FTC as non-aero revenue.

23. Another "new" ground covered by Mr. Venugopal was to address the concerns of respondents that if not regulated, MIAL would use its monopoly power to extract huge increase in FTC. He gives a few reasons as well to show that such a situation is not probable. He is also willing to submit an undertaking that MIAL will not increase FTC beyond a certain limit. He also draws our attention to the fact that treating FTC as aero revenue has an effect of increasing the HRAB and thereby mitigates the impact on target revenue. Respondents are quick to point out that this effect is pronounced only in the first control period and treating FTC as non-aero would mean increased target revenue for years to come. Sensitivity analysis presented to us bears out the fact that airport users will be adversely impacted if FTC is treated as non-aero. After having raised the point, Mr.

Venugopal further points out that in any case, it is a settled position of law that the final outcome must depend on the provisions in the contract and not on the impact, even if the impact is perceived to be adverse. (***National Highway Authority of India v. M/s Progressive****, CA No. 458 of 2018)*. To that extent we agree with him and rely on the merit of the case alone.

24. Both sides have relied as a guidance on the same document of International Civil Aviation Organization (ICAO) to advance their case. AERA's case is that ICAO guidelines specifically give the example of aviation fuel supply services as having an "aeronautical character". MIAL relies upon "Glossary of Terms" of ICAO document to treat "concessions granted to Oil companies to supply aviation fuel and lubricants…" as non-aeronautical revenue. We find it difficult to rely on such arguments which are ambivalent depending on context and situations. In any case, we have held that first reliance must be placed on the Act and the Agreements as reflected in SSA and OMDA.

25. There is some discussion in both MIAL's and AERA's submissions on inclusion or non-inclusion of FTC or related activities in schedule 5 and schedule 6 of OMDA. In Schedule 5 of OMDA, entry 17 mentions "*common hydrant infrastructure for aircraft fueling services by authorized providers",* whereas there is no mention pertaining to fuel supply in Schedule 6 defining non-aero services. According to Mr. Venugopal entry 17 of schedule 5 has the implies that (i) "aircraft

fueling services" are to be provided by "authorized providers" and (ii) on the *expression unius est exclusio alterius principle,* the mention of common hydrant infrastructure means that this is the only service an airport operator can provide. He also informs us that during the first control period (2009-10 to 2013-2014), there was no common hydrant facility and oil companies owned the infrastructure. Further, upon commissioning of common hydrant facilities, AERA did regulate the tariff for common hydrant infrastructure services. Therefore, FTC may not be treated as aero services on account of entry 17 of schedule 5 on common hydrant infrastructure. On the other hand, in addition to entry 17, AERA refers to the scope of entry 11 of schedule 5 which includes "*any other services deemed to be necessary for the safe and efficient operation of the Airport".* It is also pointed out that Schedule of OMDA that deals with non-aeronautical services has no entry that can be even remotely linked to fuel supply. AERA further explains in detail the fuel supply chain and relies on the inclusive nature of the entry 11 read with entry 17 of schedule 5 to suggest that FTC is aeronautical. In addition to these arguments, AERA contends that its decision to include FTC as relating to aeronautical charge is mainly based on the legal provisions of the AERA Act. AERA relies on the provision of Section 2(a)(vi) of the AERA Act, which provides for "*supply fuel to the aircraft at an airport"* as an aeronautical service. AERA notes that the aircraft fuel supply chain consists of various phases and links FTC to fuel supply. Being based within the confines of the Act and the Agreement and in view of the

discussions in earlier paras, we find merit in AERA's treatment of FTC as aeronautical charge.

26. In facts of the case, we find no reason to interfere with AERA's decision on treatment of fuel throughput charge for purpose of target revenue formula

Determination of the Hypothetical Regulatory Asset Base for purpose of the target revenue formula:

27. In respect of this issue**,** the decision of AERA in the impugned order is as under

Decision No. VI - Regarding Hypothetical Regulatory Asset Base

VI.a. The Authority decides, as under,

i. To compute Hypothetical RAB in accordance with the principle of Schedule 1 of SSA.

ii. Not to include non-aeronautical revenue in Hypothetical RAB.

iii. To include, for the present, Rs 23.14 crores (out of Rs 54 crores provisioned by MIAL as Extraordinary expenses in relation to AAI Operation support cost), as has been certified by the auditor to pertain to FY 2008-09, in the operating expenses in calculation of Hypothetical RAB. The Authority further decided that it would review the apportionment of the provision of Rs 54 crores, that is made by MIAL, in its Income Statement for FY 2008-09 after obtaining further documents, if any, from AAI and if necessary, make appropriate onetime adjustment to this component of Hypothetical RAB in the next Control Period. It will also make appropriate adjustment, if required, to the Target Order

No.32/2012-13 MIAL-MYTO Page 132 of 556 Revenue during this Control Period for taking into consideration while determining aeronautical tariffs for the next Control Period.

iv. To consider revenue from fuel throughput charges as part of aeronautical revenue for calculation of Hypothetical RAB

v. To consider revenue from CUTE Counter Charges as non-aeronautical revenue for calculation of Hypothetical RAB.

vi. To consider WACC, as may be calculated by the Authority, to be used for calculation of Hypothetical RAB (for the purposes of capitalization factor)

vii. To calculate corporate tax pertaining to earnings from aeronautical services as calculated using revenue share (Annual Fee) on these earnings as element of cost for the year 2008-09 and use this figure in the calculation of Hypothetical RAB

VI.b. Accordingly the Authority decides that the Hypothetical RAB be taken as Rs 966.03 Crores.

VI.c. Further the Authority also decides to depreciate the Hypothetical RAB at the tariff year wise average depreciation rate for aeronautical assets.

28. The necessity for determining HRAB arises from the need to determine RBo which is the sum of book value of the aero assets and the HRAB. The relevant provisions in the SSA are as under

i = time period (year) i

$RB_i = RB_{i-1} - D_i + I_i$

RBo for the first regulatory period would be the sum total of

(i) the Book Value of the Aeronautical Assets in the books of the JVC and

(ii) the hypothetical regulatory base computed using the then prevailing tariff and the revenues, operation and maintenance cost, corporate tax pertaining to Aeronautical Services at the Airport, during the financial year preceding the date of such computation.

Apparently, for the regulatory base of the first year (i.e. i=1) in the control period, RBo is required to be determined so as to determine the RB1. The control period in this case starts from 1-4-2009 to 31-3-2014. Thus, the HRAB is to be computed as the closing value for the year FY 2008-09.

29. Beginning from the pre-consultation stage, MIAL has come out with various figures of HRAB (ranging from Rs. 1587 to 1991 Cr and later upto Rs. 4310 Cr) based on various facts and arguments. After noting MIAL's submissions, AERA has decided on a figure of Rs. 966.03 in the impugned order which is significantly different (lower) than the various figures proposed by MIAL. We also note here for the record that during course of the hearing, MIAL filed an application seeking permission to raise additional grounds and an additional prayer on the basis of additional documents that for the purpose of calculating HRAB, entire non-aero revenue should be taken into account. However, Mr. Venugopal later changed the stand slightly by stating that although he is arguing for the entire non-aero revenue to be taken as cross-subsidy, he would settle for only 30% to be considered for the calculation of HRAB.

30. While many factors go into the calculation of HRAB, major difference remains on account of the basic approach as adopted by MIAL and AERA. Mr. Venugopal has basically pressed for the twin contentions (on which AERA does not share the same view) that HRAB in Schedule I of the SSA be back-solved by using the TR formula and that the cross-subsidy element be taken into account for the calculation.

31. While dealing with his main contentions, Mr. Venugopal has raised an interesting point of law as to how placement of comma in the definition of HRAB should be interpreted. For the convenience, we first note the definition – "*the hypothetical regulatory base computed using the then prevailing tariff and the revenues, operation and maintenance cost,* ***corporate tax pertaining to Aeronautical Services at the Airport,*** *during the financial year preceding the date of such computation*" (emphasis added). According to Mr. Venugopal, the absence of a comma after the term "corporate tax" in the definition means that it is only the corporate tax that pertains to aero services and not the other elements. Lest we take it lightly, Mr. Venugopal cites number of judgments to emphasize the importance of punctuation in the interpretation of statutes and contracts (***State v. R.MD. Chamarbaugwala,*** 1957 SCR 874 para 18, ***Mohd. Shabir v. State of Maharashtra,*** (1979) 1 SCC 568, para 4, ***Sree Durga v. State of Karnataka,*** (2007) 4 SCC 476, para 5 etc). Mr. Dhir gives a little different perspective to this

proposition by pointing out that in the realm of interpretation of provisions, words control the punctuation marks, not the punctuation marks the words. While punctuation may assist in arriving at the correct construction, yet it cannot control the clear meaning of a statutory provision. It is but a minor element in construction (as noted in ***Director of Income Tax v. New Skies Satellite BV*** (2016) 382 ITR 114, para 63). In order to drive home his point further, Mr. Venugopal submits that it is only if "*each"* or "*all"* is added after the comma that the phrase "*pertaining to aero services"* would qualify the preceding elements, namely, prevailing tariffs and revenues and O&M costs and not be limited to qualifying only corporate tax. This cannot be since it is settled law that words cannot be added or subtracted into or from a contractual provision while interpreting it (***General Assurance v. Chandrdumall Jain,*** (1966) 3 SCR 500, para 11 and ***United India Insurance Co. Ltd. V. Harchand Rai Chandan Lal,*** (2004) 8 SCC 644, para 6). According to Mr. Dhir, no change in the punctuation is required to read the formula of HRAB. Comma as a punctuation is sufficient in itself to show that all the elements pertain to aeronautical services. In support, he cites the judgment of ***Naresh Kumar Sachdeva v. State of Maharashtra*** 2010 SCC OnLine Bom 1336, wherein it was held at para 9 that *"...it ought to have used the conjunctive expression 'and' or could have used punctuation* ***'comma' to mean that the proposed action against the petitioner was for all the activities*** *in respect of which material was made available before*". We thus recognize that arguments on grammar can be quite

exhausting. We also recognize that grammatically both sides may be right in their own interpretation. We also recognize that the SSA (of which this definition is only a small part) is a very well drafted document and a lot of effort and diligence on part of the concerned parties must have gone into it. Therefore, the punctuations must have been placed correctly and intentionally where they are, to convey the meaning which would have been consistent and logical. Keeping this in mind, it would be useful to test both the interpretations on the ground of consistency and logical meaning. There are three commas and three elements in the sentence, namely, "prevailing tariff and the revenues", "operation and maintenance costs" and "corporate tax". As per AERA, all the terms pertain to "aeronautical services at the airport". In terms of consistency and logical meaning we find no problem with this treatment since all three terms pertain to aeronautical services and the resultant computation would also give the figure of HRAB for aeronautical services. If we go by Mr. Venugopal's submissions, only corporate tax is qualified as pertaining to aeronautical srvices. This means that the other two elements can be pertaining to either aeronautical services or non-aeronautical services or both. Admittedly, "operation and maintenance costs" are meant to be those pertaining to aeronautical services which is evident from the calculations submitted by both the parties. Thus, there is no doubt or dispute that the latter two terms pertain to aeronautical services and are separated from the first term by a comma. According to Mr. Venugopal, the remaining first element "prevailing tariff and revenues" should be treated as

'aeronautical plus partial non-aeronautical or as "aero plus non-aero". It is obvious that this would be inconsistent and illogical to read from the construction of the sentence. Thus, despite the vagaries of punctuations, we realize the beauty of the language which enables us, by way deduction, to realize that the only consistent and logical way to read this sentence is to treat all the three elements as pertaining to aeronautical services. Having settled this question of law in favour of AERA, we now look at the other submissions.

32. AERA has taken the stand that as per the SSA, calculation of HRAB should be done as stated in clause (ii) of RBo definition and not by back solving the equation of Target revenue. As per the SSA, revenues, expenses and corporate tax pertaining to aeronautical services only have to be considered for the calculation of HRAB. Therefore, AERA has proposed not to consider 30% of non-aero revenue for the calculation of HRAB. Clause (ii) of RBo definition is an independent and express provision and must be treated as such. Besides, we are dealing with pre-control period of FY 2008-09 when provisions of fixing tariff were different than the approach during the control period where 'S' is treated as cross subsidy for aero revenue. The beginning of control period is thus the boundary, prior to which criterion of "prevailing tariff and revenues" will prevail. Mr. Venugopal argues that prevailing tariffs by legacy were based on single till approach and therefore entire revenue (i.e. aero plus 100% of non-aero) must be counted in HRAB calculation.

We have not found this argument logical or consistent in para 29 above. We have already clarified that HRAB is to be calculated based on revenues (and costs and corporate tax) pertaining to aeronautical services only and the aero revenue cannot be equated with total revenue (or with aero plus 'S' since there is no such provision in pre-control period). It can of course be argued that AERA's approach of fixing HRAB amounts to dual till approach, which is not envisaged at all. Here, we need to keep in mind the distinction between approach for calculating the tariff and the method for calculating the asset base. We have already noted that during pre-control period AERA is not to apply its own prescribed approach for fixing tariff and only the SSA prescribes how to deal with the tariff during the pre-control period. Based on the prevailing tariff, irrespective of the colour of the 'Till', AERA has to simply go by the provisions of the clause (ii) of the RBo definition in calculating the HRAB. We do not find that AERA has erred in doing that.

33. One more argument advanced by Mr. Venugopal is to suggest that the drafters could not have intended to limit the valuation of a huge airport like Mumbai supporting 22.25 million passengers in 2006-7 to a paltry Rs 966 (in comparison to his estimated valuation of Rs 9000 Cr). As indicated earlier also, we have full faith in sagacity of the drafters. Drafters have made no mention of valuations. If HRAB was to be equated with valuation, they of course may not have intended a perpetual fixed return (above the interest rate) on such huge

valuations. The drafters have in fact considered hundreds of factors like liabilities, investments, debts, book value, land leases, costs and obligations etc. to arrive at a comprehensive and integrated document. In this background, the provision that RBo would be book value plus HRAB as provided appears to be a reasonable provision. Mr. Dhir in fact submits that the provision of HRAB on top of the book value is actually quite generous since initial asset base should have been taken as book value only. Therefore, argument of Rs 966 Cr HRAB being 'paltry' appears to be based on subjective perception. This may appeal to optics but not to objective reasoning.

34. In facts of the case, we find no reason to interfere with AERA's decision on hypothetical regulatory asset base.

Treatment of upfront fee (in calculating the weighted average cost of capital for purposes of the target revenue formula) :

35. In respect of this issue**,** the decision of AERA in the impugned order is as under

XI - Regarding treatment of the Upfront Fee paid by MIAL to AAI as part of equity

The authority decids not to consider Upfront Fee paid by MIAL towards equity share capital of MIAL.

36. It appears that MIAL had a paid-up capital of Rs. 1200 Cr, out of which 153.85 Cr. was paid to AAI as upfront fee. MIAL's grievance is that while determining its weighted average cost of capital ('WACC'), this amount of upfront fee paid by MIAL to AAI has been excluded from its share capital while calculating the ratio of debt to equity ('D/E').

37. AERA's examination on this issue is in para 14.16 of the impugned order which is as follows

"*As regards the issues pertaining to AAI Upfront fee not being considered as part of Equity share capital of MIAL, the Authority has examined the comments made by the Stakeholders and the response by MIAL to these comments. The Authority has provided detailed reasoning for not considering the AAI Upfront Fee as part of equity of MIAL. Having considered the comments and responses, the Authority does not find any reason to review its earlier position and decides not to consider Upfront fee paid by MIAL to AAI towards equity share capital of MIAL."*

We find no "detailed reasoning" in this examination or analysis, to say the least. The only "detailed reasoning" is stated in para 14a. of the impugned order. Here, Authority observes that as per Article 3.1.1 of the SSA "*...the Upfront Fee and the Annual Fee paid / payable by the JVC to AAI under the OMDA shall not be included as part of costs for provision of aero services and no pass-through will be available in relation to the same."* The SSA further defines the regulatory base on which returns are admissible at the rate of WACC and states that "*it is further*

clarified that the Upfront Fee and any pre-operative expenses incurred by the Successful Bidder towards bid preparation will not be allowed to be capitalised in the regulatory base." AERA merely states these two provisions in para 14.4 to conclude in para 14.5 that "*in view of the above, the Upfront fees incurred by MIAL appeared to be inadmissible as equity and therefore should not be included as part of Equity for the purpose of WACC determination".* We find such stand bereft of any reasoning. It is a matter of fact that the upfront fee has not been included as part of costs for provision of aero services and no pass-through is available in relation to the same. It is also a matter of fact that upfront fee has not been allowed to be capitalized in the regulatory base. Compliance or non-compliance of these provisions is not dependent on exclusion or inclusion of upfront fee from equity for the purpose of WACC. Mr. Dhir, in his oral submissions, however valiantly argues that such an inclusion would mean giving additional returns where it was not intended. Since the return on equity is higher than the rate of interest, it would appear that the net returns would be higher, though only by a very small fraction, if upfront fee is not excluded from equity in WACC. We find no mention anywhere in the Agreement that such a return be denied or that the definition of equity would mean paid up capital minus the upfront fee. We have also agreed elsewhere that on the basis of impact, howsoever small or big, one cannot add or delete a provision in the contract. Mr. Venugopal also chips in further to contend through case laws that new obligations and disabilities cannot be implied into a contract (***Rajasthan State***

Ind. Dev. V. Diamond and Gem Dev. Corpn. Ltd. *(2013) 5 SCC 470,* ***Chief Conservator of Forests v. Yanthong Hookip*** *(2008) 17 SCC 645)*. We thus find no good reason in support of AERA's decision no. XI on treatment of upfront fee.

38. In the facts of the case, we allow MIAL's prayer regarding treatment of Upfront Fee and direct AERA not to exclude the amount of Upfront Fee from the equity share capital of MIAL while determining WACC.

Tariff Structure/Rate card

39. International Air Transport Association (IATA), Appellant in Appeal No. 14 of 2013, has raised a specific grievance in respect of Tariff structure/Rate card that the landing rates for domestic and international flights are different. IATA has submitted that "*Principle 10 in Schedule 1 of SSA requires charges to be set in accordance with IATA pricing principles. Consultation with users is a cornerstone of IATA pricing principles which are aligned with that of ICAO. Users' inputs on the rate card should be fairly considered before it is finalized.*" For a tariff structure to be in line with IATA principles, the landing rates for international flights and domestic flights must be exactly the same to be cost-reflective and there should be no cross subsidy of cost. AERA has taken note of these submissions and has made the following observations in the impugned order

"*While performing the function of tariff determination the Authority had also taken into account the ICAO Guidelines. One of the main points of the comments of the*

stakeholders is that no difference be made in respective charges for international and domestic passengers. In this regard, the Authority has noted that IATA had, in the Stakeholder Consultation (on 29.10.2012) as well as its comments on the issue of level of DF, accepted the position of having a differential between charges for domestic passengers and international passengers. It had felt that a ratio of 2:1 would be acceptable. The rate card has this differential with respect to UDF charges for domestic and international passengers. The Authority therefore feels that on balance the rate cards at Annexure III-A & Annexure III-B take into account reasonable interest of all the stakeholders and therefore it has decided to determine the aeronautical charges accordingly."

Mr. Nishant Menon, learned counsel appearing on behalf of IATA submits that the ratio 2:1 being acceptable is only partially true and points out some charges that are steeper than this ratio. We are given to understand that this differential in rates has been in practice since long as a matter of policy. Keeping in view the submissions by AERA and this being a matter of policy legitimized by past and practice, we are not inclined to interfere in this matter. However, as a matter of precaution, we observe that if in future the ratio (between domestic and international airlines) in the tariff structure/rate card is proposed to be changed to the disadvantage of the appellants, AERA may do so only through a process of detailed consultation and in accordance with the AERA Act 2008.

40. Before concluding, we are tempted to reiterate a para from the DIAL order. That para 116 from the DIAL order dated 23-4-2018 passed by this Tribunal is as

under -

"The task of keeping all the stakeholders happy is always a heavy burden for any Regulator and more so when the exercise of tariff formulation is for the first control period and a maiden exercise. We find ourselves largely satisfied with the manner in which this task has been undertaken and performed by AERA. The Authority has rightly noted in paragraph 26.55 the observations of the Supreme Court of India made in ***Union of India & Anr. Vs. Cynamide India Ltd. & Anr. (Supra.)****. In this case, as already noted earlier on paragraph 68, it was observed that tariff fixation under a statute is in its nature a quasi-legislative function and that – "The ups and downs of commercials are inevitable and it is not possible to devise a foolproof system to take care of every possible defect and objection". Besides the aforesaid, the court also observed that "it is open to the subordinate legislating authority to adopt a rough and ready but otherwise not unreasonable formula rather than a needlessly intricate so-called scientific formula". But it is important to keep in mind that the statute, like the Act, may subject these functions to a wide appellate jurisdiction."*

The task we have set out for examination in the paras above must be seen in juxtaposition with the observations in the extract above.

41. To conclude, we find no good reason to interfere with the impugned tariff order, except to the extent indicated below –

(i) In respect of decision XV.a, the question of 'S' as an element of revenue pertaining to aero services for the purpose of calculating 'T' is remanded back. Only to this limited extent, we direct AERA to consider the issue afresh through a consultative process in the next control period that may be falling for

consideration.

(ii) We direct AERA not to exclude the amount of Upfront Fee from the equity share capital of MIAL while determining WACC.

(iii) We observe that, if in future the ratio (between domestic and international airlines) in respect of tariff structure/rate card is proposed to be changed to the disadvantage of the appellants, AERA may do so only through a process of detailed consultation and in accordance with the AERA Act 2008.

(iv) In view of facts and stand of the appellants noted in paragraphs 3 and 4 of this order, it is clarified that in respect of relevant issues not pressed in these appeals but decided in DIAL's appeal No. 10/2012, that judgment dated 23-4-2018 shall govern the parties herein.

The appeals are disposed of accordingly. No costs.

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(S.K.Singh, J)
Chairperson

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(A.K. Bhargava)
Member