

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 20th March, 2020

AERA Appeal No.7 of 2012

Delhi International Airport Ltd.(DIAL)Appellant

Vs.

Airport Economic Regulatory Authority of India & Ors.Respondents

**AERA Appeal No.3 of 2013
(MA No.33 of 2020)**

Federation of Indian Airlines (FIA)Appellant

Vs.

Airport Economic Regulatory Authority of India & Ors.Respondents

BEFORE:

HON'BLE MR.JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

AERA Appeal No.7 of 2012

- For Appellant(DIAL) : Mr. Krishnan Venugopal, Sr. Advocate
Mr. Milanka Chaudhary, Advocate
Ms. Ashly Cherian, Advocate
Ms. Harshita Agarwal, Advocate
- For Respondent No.1(AERA) : Mr. Prashanto Chandra Sen, Sr. Advocate
Mr. Nitin Dahiya, Advocate
- For Respondent No.2(FIA) : Mr. Buddy Ranganadhan, Advocate
Ms. Divya Chaturvedi, Advocate
Ms. Srishti Rai, Advocate

AERA Appeal No.3 of 2013

- For Appellant (FIA) : Mr. Buddy Ranganadhan, Advocate
Ms. Divya Chaturvedi, Advocate
Ms. Srishti Rai, Advocate
- For Respondent No.1(AERA) : Mr. Prashanto Chandra Sen, Sr. Advocate
Mr. Nitin Dahiya, Advocate
- For Respondent No.2(DIAL) : Mr. Krishnan Venugopal, Sr. Advocate
Mr. Milanka Chaudhary, Advocate
Ms. Ashly Cherian, Advocate
Ms. Harshita Agarwal, Advocate
- For MIAL : Ms. Amrita Narayan, Advocate
Mr. Abhishek Shrivastava, Advocate
- For LGA : Ms. Neelam Rathore, Advocate
Ms. Pooja Sharma, Advocate

ORDER

By S.K. Singh, Chairperson – Both the appeals are, in practical terms, cross-appeals to each other. They are directed against two different orders issued by respondent No.1 in both the appeals, namely, the Airports Economic Regulatory Authority of India (AERA/Regulator). The earlier appeal (No.7 of 2012) preferred by Delhi International Airports Ltd. (DIAL) challenges Order No.28/2011-12 dated 08.11.2011 issued by AERA under Section 13(1)(b) of the Airports Economic Regulatory Authority of India Act, 2008(AERA Act). The order determines Allowable Project Cost for arriving at the funding gap and to meet this gap it determines the rate of levy of Development Fee(DF) for DIAL at IGI Airport, New Delhi so as to bridge the funding gap through levy of DF till February, 2014. The main grievance of the appellant DIAL is that the project cost of Rs.12,857.00 crores as submitted by it has been wrongly reduced to Rs.12,502.66 crores by arbitrarily excluding or disallowing expenses incurred on 5 specific items/areas.

2. The other appeal (No.7of 2013) has been preferred by Federation of Indian Airlines (FIA) which has challenged the legality etc. of a subsequent Order No.30/2012-13 dated 28.12.2012 issued by AERA in exercise of powers under Section 13(1)(b) of the AERA Act read with Section 22A of the Airports Authority of India Act 1994(AAI Act) to re-determine the amount of DF at IGI Airport, New

Delhi. By this order AERA reviewed the earlier DF Order dated 14.11.2011 in a small measure, reduced the rate of DF w.e.f. 01.01.2013 and extended the levy period upto April, 2016 subject to further review. The FIA, it appears, had challenged the earlier DF order dated 14.11.2011 also. Its stand is that levy of DF to bridge the funding gap for IGI Airport is contrary to law and the relevant agreements which cast a duty upon DIAL to arrange for funds for development of the Airport. It is also pleaded that the project cost has been blown-up beyond realistic proportions and AERA has failed to exercise the required level of scrutiny which would have kept the final project cost at a reasonable and permissible level.

3. As noted above, while DIAL wants project cost to be raised for various reasons which shall be discussed later, the FIA is opposed to levy of DF, wants the project cost to be brought down and reduce the burden on the public using the Airlines for travel.

4. During the course of submissions it has been submitted on behalf of DIAL that levy of DF on account of the order impugned in these appeals has already come to an end in April 2016. DIAL is not seeking orders for enhancement of the rate or for extension for period of levy that has come to an end long back. However, it wants certain findings in its favour in respect of the 5 items or areas in

which deduction has been made leading to reduction in the final project cost. This may probably give advantage to DIAL in future determination of tariff by AERA. The FIA, on the other hand, seeks total or partial reversal of the DF orders on the grounds that shall be considered hereinafter. Mumbai International Airport Ltd.(MIAL) has a similar case as DIAL which is pending hence its counsel has been permitted to address on questions of law only. Similar permission has been accorded to Lufthansa German Airlines (LGA) whose stand is same as that of FIA. Counsels for MIAL and LGA have been heard on the questions of law arising between parties to these appeals.

5. The FIA has not only sought reduction in the final project cost of the Airport which would automatically reduce burden of DF cast upon embarking domestic as well as international passengers but has also raised a wider issue that no DF is permissible to be levied in view of various provisions in the agreement dated 04.04.2006 (OMDA) entered into between AAI and DIAL and the agreement dated 26.04.2006(SSA) entered into between MOCA and DIAL. According to the submissions advanced on behalf of FIA, the statutory provisions contained in the AAI Act and the TRAI Act also do not support the case of DIAL seeking levy of DF for meeting the funding gap. To appreciate the arguments and submissions indicated above it is relevant to note certain statutory provisions and amendments in the AAI Act. This Act was amended on 01.07.2004 in the light of the policy of

the Government of India, particularly, the Airport Infrastructure Policies of 1997 and 2002 leading to insertions of Sections 12A and 22A. Section 12 of the AAI Act enumerates generally as well as in specific terms the functions and duties of the Authority. Section 12A enables the Authority to make a lease of the premises of an Airport to carry out some of its functions under Section 12. Such lease cannot be made without the previous approval of the Central Government. Importantly, as per Section 12A(4) “lessee who has been assigned any function of the Authority under sub-section (1) shall have all the powers of the Authority necessary for the performance of such function in terms of the lease.”

6. Section 22A was inserted to vest power in the Authority to levy DF at Airports from the embarking passengers. As per the initial amendment through Act of 2003, the DF could be collected at the rate prescribed through the rules made under this Act. But by an amendment of 2008 which came into force w.e.f. 01.01.2009, for the major Airports as defined by the AERA Act through Section 2(h), the rate is to be determined by AERA under clause (b) of sub-section(1) of Section 13 of the AERA Act.

7. Although it has been argued on behalf of FIA that the impugned order of the AERA is fundamentally erroneous in as much as it holds that DIAL can levy DF, this issue need not detain us because it has been finally settled by the Hon’ble Supreme Court in the judgment dated 26.04.2011 passed in CA No.3611/2011

reported in (2011) 5SCC 360. The appeals before the Apex Court were against the judgment and order dated 26.08.2009 of the Division Bench of Hon'ble Delhi High Court rendered in a public interest litigation upholding the validity of levy of DF by the lessees of the AAI at the major airports at New Delhi and Mumbai. The Apex Court while settling the law differently, held that levy and collection of DF by the lessees of AAI at rates fixed by the Central Government through letters issued in February 2009 was *ultra vires* of the AAI Act. It was clarified that DF was really in the nature of a tax and therefore, it could not be levied without strict compliance with the statutory provisions requiring rates to be prescribed by rules for the non-major airports and by AERA for the major airports. It further held that DF could be levied at the major airports only after an appropriate order by the AERA under Section 22A of the AAI Act as amended in 2008 and that the DF collected by the lessees will need to be accounted to AAI so that such fees could be used only for the purposes mentioned in Section 22A(a), (b) or (c) of the AAI Act. For the purpose of crediting such fees and regulation thereof the required rules were ordered to be made as early as possible in view of provision for such rules in Section 22A.

8. Even if at some places, AERA may have loosely used the expression "levy" and "collection" of DF as interchangeable, that is not material. The law settled by the Hon'ble Supreme Court was noted by AERA and there is no indication in the

impugned order that any contrary view has been taken that the lessee would independently have power to levy DF and appropriate the same. The lessee, as clarified by the Apex Court, can only be authorized to collect the DF for being deposited in the designated account of AAI. The power to levy a tax, originally vests only in the legislature. By a law it can be delegated but with some necessary safeguards. AAI as well as AERA have been given statutory roles in the levy and collection of DF but in absence of any clear provision for further sub-delegation of a taxing power, the general provisions in Section 12A can not vest such power of the delegatee AAI in a non-statutory entity such as a lessee of AAI. Hence, the above issue raised by FIA has no substance and there is no requirement to further clarify any of the relevant statutory provisions in view of law clearly enunciated by the Apex Court.

9. The other wider issue raised on behalf of FIA is that neither OMDA nor SSA contains any stipulation that DIAL will be entitled to raise finances through DF. Through OMDA, the AAI (Respondent No.3 in AERA Appeal No.3/2013) has assigned some of its functions, such as, of operating, upgrading, financing the IGI Airport, New Delhi to DIAL and has also leased the Airport premises for this purpose. In terms of SSA, the Government of India has agreed to provide additional support to DIAL for the development of the IGI Airport. On behalf of

FIA certain provisions of OMDA and SSA such as clauses 7.1 and 7.2 both relating to acceptance and acknowledgements of the site and the related risks and hazards by the JVC; clauses 8.3 and 8.4 both relating to Master Plan and Major Master Development Plans and clause 13.1 of OMDA relating to financing arrangements and security have been highlighted to submit that the liability of arranging funds rests solely on the JVC i.e. DIAL. Clause 13.1 clarifies that “the JVC shall arrange for financing and/or meeting of financing requirements through suitable debt and equity contributions in order to comply with all its obligations hereunder including development of the Airport pursuant to the Master Plan and the Major Master Development Plans”.

10. The relevant provisions of SSA, pointed out as having a bearing upon the levy of DF are: (i) Clause 13.1 whereunder it is provided that “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 provisions of aeronautical services and no pass-through would be available in relation to the same”, and (ii) Clause 3.8 relating to Major Airport Development Plan, requires submission of every Major Development Plan or any development having estimated capital cost in excess of Rs.100 crores for review to Government of India. The Government of India has retained in itself the power to make comments and suggest changes in accordance

with the terms in SSA and OMDA. Schedule I of SSA explains the Regulatory Base (RAB). The Upfront Fee has been specifically kept out of RAB.

11. In view of aforesaid provisions of the OMDA, particularly, clauses 7.1.1, 7.2.1 and 13.1(a), according to the learned counsel for the FIA, DIAL cannot seek any claim over DF for meeting the financial requirements or for meeting its obligations under OMDA which include development of Airport pursuant to the Master Plan and the Major Airport Development Plans.

12. On the first flush, the above argument appears to have merit but on a deeper consideration of the entire factual and legal scenario, it cannot be accepted for some good reasons. The parties to the two agreements, OMDA and SSA include Government of India and a statutory authority AAI on the one hand and the JVC or the successful bidder on the other. In normal circumstances, the responsibility of arranging for finances through suitable debt and equity contributions is upon JVC which includes AAI as a shareholder. The shareholding proportion between AAI and other constituents of the JVC is governed by terms of the agreement and as a result the statutory authority has to show its willingness and capability to contribute whenever further finances are required for the works governed by OMDA relating to the Airport. In case it shows its unwillingness or incapacity, the

other option is to seek debt from financial institutions/banks who are free to assess the viability of the entire project for the purpose of providing additional funds as debt. In the case, as shown in the present matter, when neither funds can be arranged through equity or through debt, the option for the JVC can be only to send S.O.S. signals to AAI and to Government of India (MOCA). Of course, JVC in view of its undertaking in clause 13.1(a) cannot claim additional sources of funds like DF as a matter of right but in the given scenario as indicated above it will indeed be a prudent decision for Government of India that an important project covered by OMDA and SSA relating to a Major Airport does not suffer derailment or total annihilation because of unforeseen shortage of funds or unavoidable financial constraints. The Government of India, in such a situation has sufficient freedom both, under the Airport Infrastructure Policy, 2002 and under the statutory scheme relating to levy of DF for enumerated purposes, particularly, in view of amendments leading to Sections 12A and 22A as they stand today along with complementary provisions in Section 13 of the AERA Act vesting the power to determine the rates of DF for a Major Airport in AERA.

13. The Airport Infrastructure Policy, 2002 aimed to permit and encourage private sector participation in development of Airports for the reason of bridging the vast gap in resources and also to usher greater efficiency in management.

Government assured that it will take all possible steps to encourage such participation; to provide fiscal incentives to those involved in infrastructure projects as may be decided by Government from time to time and that such incentives should be made available not only to new investors in Airport Infrastructure but also to AAI and the existing agencies investing in upgradation of existing Airport Infrastructure. In view of the above and the statutory provisions, the plea raised on behalf of FIA that even AAI and Government of India cannot permit levy of DF to enable DIAL to meet the funding gap by way of last resort to enable the completion of the project cannot be accepted. No doubt, DIAL has itself no right to levy DF without its determination by AERA and without authorization by AAI for making the required collection. The collected amount being in the nature of a tax must go to the coffers of AAI for being spent in accordance with law, the relevant rules and for the permitted purposes only.

14. At this stage itself, it is relevant to note certain apprehensions. A bidder who is found successful in a bid for an important project like development of a major Airport at Delhi, ordinarily must have the capacity to prepare the Master Plan and Major Development Plans within shortest time for review/approval and finalisation. Such a task should not be delayed because before the bidding process the bidder is expected to take note of all the relevant facts and figures including the

obligations which it has to meet, including the obligations to arrange for all the finances. The financial projections have to be and are closely linked to the Master Plan and the Major Development Plans for the Airport. These should be ready at the initial stage itself. Recourse to public money through DF should not be allowed in ordinary course unless disclosed in the Bid documents and in the agreements. Otherwise, if followed as a routine practice it would give a free hand to the successful bidder to have a plan beyond his capacity and then proceed to complete the unrealistic costly plans with the help of DF and use the same for larger profits disproportionate to the level of private investment. It is for this reason also that AERA has rightly stated that DF as a means of finance to the JVC should be allowed only as a matter of last resort. If DF is to be used in a regular and usual manner, sufficient and clear indication to that effect must appear in the documents inviting the bid and also in the subsequent agreements. Such a course of action would also ensure transparency and fairness in the process of bidding and subsequent selection of successful bidder for important projects and those relating to major Airports in particular. The AAI wears more than one hat when it becomes partner in the JVC hence it has to be extra careful to ensure that Plans and expenses for development of an Airport through JVC are kept in check and DF is permitted as a source of finance in rare situation, by way of last recourse only. MOCA too has a similar responsibility. Both have to ensure complete

transparency for allowing DF at a later stage. Nothing more need be stated because the above observations are meant only to make the relevant legal principles amply clear to AAI and MOCA so that past mistakes are not repeated in the matter of exercising due control and supervision/review.

15. The other major issue raised on behalf of FIA relates to the final project cost of DIAL and alleged failure of AERA to appoint an independent auditor. It is not in dispute that on the directions of AERA, made in view of provisions in the agreement, AAI appointed Engineers India Ltd.(EIL) as the Technical Auditor and KPMG Ltd. (KPMG) as the Financial Auditor to undertake an audit of the final project cost submitted by DIAL. The audit reports were made available by October, 2010. Learned counsel for FIA has hinted that AAI being a part of DIAL may not select auditors who could be fully independent. It was pointed out that EIL was already associated with DIAL in the capacity of Independent Engineer. Hence, a grievance has been raised that in view of law laid down by the Hon'ble Supreme Court in the case of **Cellular Operators' Association of India(COAI) & Ors. Vs. Union of India & Ors.; (2003) 3 SCC 186** that the regulatory bodies exercise wide jurisdiction and *inter alia*, act like an internal audit, in this case AERA was required to but failed to appoint an independent auditor of its own so as to get a better view of why the project cost kept on ballooning disproportionately

and how much of the same should be held to be unwarranted and impermissible. The relevant part of the KPMG Report relating to Financial Audit for the purpose of final project cost, relied upon by FIA is as follows:

“Project cost finalization

35. Was the right process followed for finalization of the project cost?

a. The cost estimates at different stages of the Project are indicated below:

- i. Initial Development Plan (‘IDP’) stage (May 2006) was Rs.3,287 cr.
- ii. As per the Master Plan (Dec 2006), estimated project cost was Rs.6,756 cr.
- iii. As per letter dated 18 Jan 2008 from DIAL to AAI, project cost at financial closure stage (Dec 2007) was R 8,975 cr.
- iv. Interim estimate from DIAL (letter dated 14 Jan 2009) was Rs.10,500 cr.
- v. Final project cost as per DIAL’s Project Cost Report (March 2010) is Rs 12,718 cr.
- vi. As per letter dated 20 July 2010, with the inclusion of security capex of Rs.139 cr, project cost has increased to Rs.12,857 cr

b.

c. As per DIAL's design build approach, around 40% of the packages (by value) were designed and implemented by L&T. The cost of the same was fixed after negotiations between DIAL and L&T. For the balance packages, L&T carried out the design and then the same was subcontracted to contractors on a competitive bidding basis. The negotiated price arrived at between DIAL and the sub-contractor formed part of the final project cost estimate. Under this approach, the project cost estimate would change till the last package was awarded.

d. In most public infrastructure projects in India, bidders decide their project cost at the bidding stage, with a limited period access to the data-room and project site. The same is then taken as final.

e.

f.

g. The uncapped design-build approach was approved by the DIAL Board on 7 Aug 2006. Considering the experience and skill-set of DIAL's consortium members, as well as the EPC contractor, a firm project cost could have been estimated within a reasonable period with due contingencies built in. The firm project cost should have been discussed with the DIAL Board, and frozen after incorporating modifications, if any.

CONCLUSION

44. There are certain cost elements included in DIAL's application, which do not merit inclusion in the present project cost, in the context of the present capital expenditure approval regime.....

45. Based on the above, we propose that an amount of Rs.834.5 cr be considered for exclusion from DIAL's final project cost of Rs.12,857 cr (Rs.12,718 cr plus security related expenditure of Rs.139 Cr. = Rs.12,857 Cr). The break-up of the proposed exclusion and the rationale thereof is presented in Chapter III.

46. Our assessment of the processes followed by DIAL is as follows:

a. The key reason behind the increase in the project cost estimate is the design-build approach adopted by DIAL. A part of the increase is also due to unforeseen scope additions (Delhi Metro, ATC tower etc).

b. The risk mitigation steps undertaken by DIAL to prevent cost escalation are not entirely compliant with international best practices. At no stage was the project cost capped and the risk of escalation shared with the EPC contractor. The contract terms with the EPC contractor did not have any incentives and penalties to enable better control on cost. The Project Management Consultant did not look at the cost escalation aspect with reference to initial estimate of project costs.

c. The increase in project cost was not communicated to MoCA and AAI on a regular and proactive basis.

d. The Gross Floor Area (GFA) of T3 exceeds the one mandated by the Master Plan by nearly 84,000 sqm. No prior approval was taken from the DIAL Board for the same. The DIAL Board was apprised of the increase in GFA, and the cost variation thereof, by way of the Project Cost Report dated March 2010. The GFA per Peak Hour Passenger (PHP) of T3 is higher than most leading airports in the Asia

Pacific region. The technical reasonableness of the increased GFA could be assessed by EIL.

e. It is difficult and subjective to assess the impact of the process related issues in Rupee terms.”

16. In respect of Report of EIL relating to Technical Audit, learned counsel for the FIA has relied upon the following relevant part:

“EXECUTIVE SUMMARY

General issues which have cropped up during Audit are given below

1. Uncapped Design build approach adopted by the JVC: DIAL has adopted an uncapped design build approach for the Project, and the end result is a splendid Airport completed in a crashed time schedule of 37 months with facilities at par with International Airports. However, the cost of the Project could not be contained within their cost estimation prepared at the time of financial closure. Uncapping of the cost was due to non-availability of much of the information on design part, which has been done parallelly while execution.

2. Time was the Primary Target and no check kept for Cost overrun either by DIAL or their PMC. The Project stands on the testimony of time. Project duration was crashed remarkably and further linked with OMDA’s stringent L.D clauses. Study shows that JVC’s primary objective was shifted to Project completion and the

Project Cost could not be given top priority. Initially Project estimates were prepared by MOTT Macdonald while preparing Major Development Plans. Thereafter neither JVC nor their PMC has given enough emphasis to estimated Project cost. As per Technical Auditor's observations, the detailed cost was only worked out in March 2010 at the time of submission to AERA. PMC during execution used to generate a single page report which has been provided to the Auditors for a sample. But they never emphasized to their Clients that the Project cost trend is upwards and needs to be corrected. Projects executed in our own country as well as overseas in other sectors by many Promoters shows that there is a variation limit on cost which has to be looked upon very seriously by management and their consultant.

3. PMC have not monitored Cost adherence to Original Project Cost: Project management consultant did not look at the cost increase aspects. They were more involved in engineering review and site management, but could not give trigger for cost variation.

4. No estimation from DIAL for CWP's: DIAL has not done detailed estimation for any of the CWP. They have reviewed the estimates prepared by L&T while evaluation & recommendation of CWP. The negotiations done by DIAL were hypothetical and were not supported with back up documents.

5. No estimation either from DIAL or L&T for SCP's: For awarding works to sub-contractors, neither DIAL nor L&T had

detailed estimation. Negotiations and price reductions were done on notional basis.”

17. The comments in respect of project cost finalization in the KPMG Report are clearly critical of the DIAL’s uncapped design-build approach approved by the DIAL’s Board on 07.08.2006. The Report also rightly expresses unhappiness over the delay in projecting a well-estimated project cost. It has been rightly commented that this was possible to be done within a reasonable period. The explanation offered on behalf of DIAL is two fold. Firstly, it has been submitted that the project execution got delayed due to some litigation and therefore, very little time was left to complete the project in time before the onset of the Commonwealth Games which was given as a firm target to be accomplished. The other explanation is that the estimate given to the bidders as to the periodic increase in the number of users of the Airport was found to suffer from under-estimation and therefore, the Major Development Plans that were expected to be taken up at a future point of time got triggered much earlier necessitating increase in the very initial capacity of the Airport. This has been supported by figures of passengers availing the services at the Airport at the relevant period. It has been highlighted that AAI and MOCA have not opposed the increase in the project cost rather they have recommended in favour of DIAL.

18. On looking at the relevant facts and the reports of experts, it is evident that the best practices, as were possible by adopting a firm Master Plan with capped project cost, were clearly not opted for. However, AERA could not have done much. It could have taken effective measures only if DIAL had contravened specific provisions in the agreements and if the delay in finalizing the project cost would have attracted specific penalties/adverse consequences. No such provisions in the agreement left DIAL almost free in the matter. A time bound project for development of a major Airport will have its challenges but the successful bidder must be prepared to face these. The required amount of control and supervision for which power was available with MOCA and AAI was also lacking. The Financial Audit Report mentions the various shortcomings in the Conclusion part of the Report. Besides ticking-off the design-build approach, the Report mentions that international best practices to prevent cost escalation had not been adopted by DIAL. The project cost aspect was not shared with the EPC Contractor and the Project Management Consultant(PMC) also did not look at it. The increase in project cost was not communicated to MOCA and AAI on a regular and proactive basis. However, in practical terms, the Conclusion in the Report proposed for exclusion of an amount of Rs.834.5 crores only from DIAL's final project cost of Rs.12,857 crores.

19. The Technical Audit Report by EIL who was also the Independent Engineer for the project, also criticizes the uncapped design-build approach as a general issue along with the fact that no check was kept for the cost overrun either by DIAL or their PMC. The negotiations between DIAL and its sub-contractor, L&T have been described as hypothetical not supported with back-up documents. EIL proposed an exclusion of Rs.1006.32 crores. The proposed exclusion in both the Reports has been noted by AERA in Para 6 of the impugned order dated 08.11.2011. Rs.647 crores has been marked for exclusion in both the Reports because these costs had not been incurred as on 28.02.2010. The Reports also propose to exclude Rs.150 crores paid by DIAL as Upfront Fee. On the remaining items for which cost reduction has been proposed by EIL adds to approximately Rs.209.32 crores. As already noted earlier, the total exclusion accepted by AERA includes Rs.150 crores paid as Upfront Fee and further different amounts against four other items/works i.e. Apron, Escalation for reinforcement, Rehabilitation of runway 10-28 and Exclusion of 8652 sq.mtrs. from the floor area. DIAL has opposed such exclusions. Submissions with respect to each of the 5 items will be considered hereinafter.

20. So far as the case of the FIA that the exclusion ought to have been much more on account of unreasonable increase in the final project cost submitted by

DIAL is concerned, it has been seriously opposed by the learned Senior Counsel for DIAL by pointing out that the necessity to complete the project within a very short timeframe on account of Common Wealth Games has not been denied by MOCA or AAI or by any other stakeholder. Since uncapped design-build approach was adopted due to such necessity the increase could be ascertained and finalized only after the costs had been incurred and the project was almost complete. He has also submitted that the total cost has been found to be within reasonable range as compared to similar projects in different countries. M/s Jacob's Consultancy was engaged by DIAL and on the basis of figures of international standards it has found that the cost of the project is well within the cost benchmark. It has also been highlighted that in general the costs, for some reasons connected with the Common Wealth Games, suddenly rose very high for all construction activities including building materials and this was an unforeseen situation. He has also pointed out provisions in OMDA which provide substantial penalty for delay in execution of the project. Hence, it is the stand of DIAL that the Airport project at Delhi was constructed in record time to deliver a quality product of international standards and so long as the cost of the project is reasonable compared to other similar projects, there can be no question of reducing the project cost only because it had to be revised from time to time. According to learned counsel, even the exclusions made by AERA are arbitrary and for wrong

reasons and the entire project cost submitted by DIAL needs to be accepted, if not entirely for the purpose of DF, for getting due return on the assets created with such cost, through appropriate tariffs.

21. Learned Senior Counsel for DIAL has highlighted that even if the views of experts who have conducted Financial and Technical Audit are to be accepted, since AERA has already made exclusions on the basis of their Reports, the plea of FIA for further exclusion deserves to be rejected. According to him, it will make no difference even if experts had been appointed for similar audit by AERA because the available experts' views deserve full consideration and respect.

22. In respect of general issues noted above and flagged by the audit reports, financial and technical, the stand of FIA that there could have been better cost control deserves to be accepted. The OMDA and SSA, by accident or by design have permitted high degree of latitude to the JVC. As a result, the exact project cost came to light much later like a fate accompli. AERA had little or no scope to examine these aspects in exercise of its limited statutory role to determine the amount of DF in respect of major Airports as per Section 13 of the AERA Act. The capital expenditure incurred in the project is one of the factors in determination of the tariff for the aeronautical services and this exercise of

determining the tariff for the First Control Period had been done by AERA in respect of the Airport. For some good reasons the appeals against the tariff order for the First Control Period have been already heard and decided by this Tribunal. During the hearing of those appeals, some of the Airlines and FIA had objected to the capital expenditure reflected by the final project cost as accepted by AERA for determining the tariff. Such objections were considered and ultimately the stand of AERA that the capital expenditure found to have been “incurred” in an authorized manner for the permissible purpose relating to the project of developing the Airport at Delhi should be allowed towards the project cost. This was accepted by this Tribunal in the judgment dated 23.04.2018.

23. Now when the project cost has been examined and decided by AERA on the basis of reports of two experts and after holding due consultations with all stakeholders who were given opportunity to make their submissions is it prudent and just to take a different view is the issue. The impugned decision of AERA refers to various documents, reports of the two experts and contains sufficient explanation, thus meeting the requirements of Section 13(4) of the AERA Act. Learned Senior Counsel for DIAL has referred to judgment of Hon’ble Supreme Court report in **(2007) 5 SCC 133 (G.L. Sultania & Anr. Vs. SEBI & Ors.)**. It supports the principle that an expert’s opinion should not be interfered with unless

there are very good reasons such as if the approach adopted is patently erroneous or some relevant factors were not considered.

24. In view of aforesaid discussions on the general issues noted above, the submissions and stand of DIAL deserve to be accepted, but save and except their stand and submission that there should be no exclusion of any amount from the final project cost inspite of reports of the two experts holding otherwise. The exclusions allowed by AERA are based upon reports and recommendations of the two experts who held Financial and Technical Audit. Those exclusions deserve to be respected unless, on considering the submissions it is found that those exclusions are clearly against law or arbitrary. FIA has not argued against experts' reports or against exclusions.

25. During the course of determining tariff for the First Control Period vide order dated 20.04.2012, AERA relied upon the DF orders which are subject matter of present appeals. It decided to treat the project cost of Rs.12,502.86 crores as the basis for determination of RAB. It also decided not to include in RAB the amounts collected or to be collected as DF. FIA in its AERA Appeal No.6/2012 preferred against the first Tariff Order had raised similar objections against ballooning of the project cost and objected to AERA accepting alleged huge escalation in the project

cost. DIAL had also preferred AERA Appeal No.10/2012 before this Tribunal to challenge the determination made by AERA in respect of some issues having a bearing on the tariff for aeronautical services. This Tribunal did not interfere with the project cost as decided by AERA for the purpose of Tariff. Admittedly FIA and DIAL have challenged the findings of this Tribunal with respect to the issue of project cost as well as some other issues and their appeals are pending before the Supreme Court. It will not be just and proper to hold that the parties or either of them are now incompetent or barred in law from challenging the various issues arising from determination of final project cost by AERA for the purpose of determination of DF. Such issues arising from the impugned orders did not arise from the first Tariff Order because the subject matter before AERA was not the determination of the project cost but that of RAB in which the project cost already determined was used simply as a factor. The present issues were not directly and substantially in issue while hearing the appeal against first Tariff Order dated 20.04.2012 and therefore, the findings in that appeal or pendency of further appeal before the Supreme Court will not *stricto sensu* constitute *res judicata*.

26. The specific heads under which and the amounts of exclusions have been allowed by AERA are:

- (i) Apron - Rs.23.82 crores

(ii)	Escalation of Reinforcements	-	Rs.35.67 crores
(iii)	Rehabilitation of runway 10-28	-	Rs.37.50 crores
(iv)	Upfront Fee paid by DIAL to AAI	-	Rs.150 crores
(v)	Gross Floor Area (8652 sq.mtrs.)	-	Rs.107.15 crores
	Total exclusion	-	Rs.354.14 crores

26. So far as exclusion in respect of additional Apron area is concerned, the grievance of DIAL is mainly against the stand of EIL in its Report which came to be accepted by AERA. Learned Senior Counsel for DIAL has submitted that the reduction or exclusion suggested by EIL is because of wrong reliance by EIL upon costs that were benchmarked for the Ministry of Road Transport & Highways (MORTH). According to learned counsel, EIL should have taken into consideration benchmarked costs specific to the project of Airport and not doing so has led to wrong conclusions. According to DIAL the usual works falling under the domain of MORTH are roads etc. and it is unlikely that the costs applicable for the works of Apron area can be covered by benchmarks used by EIL.

27. The arguments noted above do not merit acceptance for the reasons that EIL was earlier also associated with the project works in the capacity of Independent Engineer. It was fully aware of factors specific to the project and its capacity as an

expert has not been doubted. There was no material placed before AERA or before this Tribunal in support of the assertion that MORTH Guidelines on cost lack particular necessary details and therefore, cannot be applied to additional Apron area. There is absolutely no material for not relying upon EIL as an expert when it has been appointed as such by AAI itself and earlier also it was selected to be the Independent Engineer for the project. On a careful consideration of all the submissions advanced on behalf of DIAL either before the AERA or before this Tribunal, there appears no good reason for not accepting the calculations of EIL in respect of reduction or exclusion of cost for the additional Apron area.

28. So far as exclusion of Rs.35.67 crores from Escalation of Reinforcements is concerned, the same is also founded upon Report of EIL which has based its calculation by determining a fair price increase for steel on the basis of average cost of reinforced steel at the relevant time. There is nothing to discredit the stand of EIL nor there is any good ground available with DIAL to assail the determination made by EIL which has been accepted by AERA.

29. The deduction made for Rehabilitation of runway 10-28 is on the basis of Technical Report of EIL recommending for an exclusion of Rs.20 crores and also the Report of KPMG recommending an additional deduction of Rs.17.5 crores towards O&M expenditure. The views of both the experts have rightly been

accepted leading to deduction of Rs.35.50 crores because nothing could be pointed out on behalf of DIAL which could discredit the views of experts on this matter as well.

30. So far as Upfront Fee of Rs.150 crores is concerned, it merits a closure scrutiny. This issue has been considered in the impugned order and decided only on the basis of a provision in the SSA (Article 3.1.1) which prohibits inclusion of the upfront fee paid by the JVC to AAI as per OMDA, as a part of the costs for Aeronautical Services and also prohibits grant of pass through in relation to the upfront fee. After considering such limited bar which can only justify the exclusion of upfront fee from being a part of RAB, AERA has concluded that it should not be included even as a part of the Project cost because then DIAL will be recovering the same through DF which should not be allowed. This conclusion is flawed and is clearly unreasonable. MOCA had informed AERA that it was in favour of inclusion of upfront fee in the Project cost. There is no dispute that the upfront fee was actually a cost incurred by the JVC for the purpose of acquiring the right to proceed with the Project. This cost, in view of provisions in the SSA could not be permitted as a cost towards Aeronautical Services. But in the absence of any bar in the agreements or any law, the actual cost incurred requires to be acknowledged and included in the Project cost.

31. Learned counsel for the DIAL has rightly pointed out that in the case of MIAL (Appeal No.4/2013) this Tribunal directed AERA not to exclude the amount of upfront fee from the equity share capital of MIAL while determining WACC.

32. For the aforesaid reasons, the impugned order of AERA for excluding the upfront fee of Rs.150 crores from the Project cost is found to be not sustainable either on facts or in law. Hence, exclusion of the aforesaid amount of Rs.150 crores of upfront fee from the Project cost is set aside. However, it is clarified that this amount shall not be a part of the RAB but will be treated as equity share capital of DIAL while determining WACC.

33. On behalf of DIAL, exclusion of Rs.107.15 crores on account of 8652 sq. meters of Gross Floor Area has been strongly objected to on the ground that EIL erred in concluding that such area need not have been built and, therefore, its cost should be kept out of admissible Project cost. According to the learned counsel for DIAL, AERA should not have accepted such report of EIL rather the explanation of DIAL that this expanded floor area of T-3 was useful for Food Court and Retail to be used directly by the airport users, ought to have been accepted.

34. On the other hand, FIA has supported the views of AERA. According to learned counsel for FIA, since the area of 8652 sq.mtrs. was not a part of DIAL's Master Plan, EIL had to examine the validity and rationale for construction of such additional floor area. As an expert it came to the conclusion that sufficient area for the claimed purposes is already available on departure and arrival levels and the additional area at CIP, Office and Hotel levels will not be used by passengers. Some of the stakeholders also supported the views of EIL. In these circumstances, simply because AAI having 26% share in the JVC wanted the costs of such additional area to be included in the project cost does not render the decision of AERA erroneous. AERA has noted that there had been a large increase in the floor area of T-3 after the Master Development Plan, to the extent of about 84000 sq.mtrs. and out of this only 8652 sq.mtrs. was not required to be built deserved to be accepted. AERA has relied upon the fact that none of the Airport users supported the inclusion of this area. In above circumstances, the order of AERA on this issue also does not require any interference. The exclusion of an amount of Rs.107.15 crores as per calculations on proportionate basis, recommended by EIL is therefore, upheld.

35. From the discussions made above and the findings recorded it is clear that DIAL in its AERA Appeal No.7/2012 has succeeded partially only in respect of an

amount of Rs.150 crores paid by JVC to AAI as Upfront Fee. For the purpose of DF, this amount should not have been excluded from the project cost. As clarified, this amount shall not form part of RAB for the purpose of WACC for determining the tariff for aeronautical services. DIAL's AERA Appeal No.7 of 2012 is disposed of accordingly. AERA shall take note of this relief and take necessary consequential steps in future at the earliest opportunity.

36. So far as the other appeal bearing AERA Appeal No.3 of 2013 preferred by FIA is concerned, it fails on the major issues relating to legality and permissibility of use of DF for bridging the funding gap. If the facts require, as held by the Hon'ble Supreme Court DF can be levied as per determination by AERA. So far as the prayer to reduce the project cost and the amount of DF to be realized is concerned, in view of the discussions and findings this relief also cannot be granted. Hence, appeal (AERA Appeal No.3 of 2013) of FIA fails and is disposed of accordingly.

37. In the facts of the case, there shall be no order as to costs.

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(S.K. Singh)
Chairperson