TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 23rd April, 2018

AERA Appeal No.6 of 2012

Federation of Indian Airlines ....Appellant

Versus

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

AERA Appeal No.10 of 2012
(With I.A No.5 of 2015, M.A. No.235 of 2017)

Delhi International Airport Ltd.(DIAL) ....Appellant

Versus

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

AERA Appeal No.11 of 2012

Lufthansa German Airlines & Ors. ....Appellants

Versus

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

AERA Appeal No.12 of 2012

International Air Transport Association (India Pvt.Ltd.) ....Appellant

Versus

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

BEFORE:

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

AERA Appeal No.10 of 2012

For Appellant (DIAL)	:	Mr.Gopal Jain, Sr.Advocate Mr.Atul Sharma, Advocate Mr.Milanka Chaudhury, Advocate Ms.Chinmayee Chandra, Advocate Mr. Sarojanand Jha, Advocate Ms.Ashly Cherian, Advocate Ms.Satakshi Sood, Advocate
For Respondent No. 1 (AERA)	:	Mr. Alok Dhir, Advocate Mr. K.P.S. Kohli, Advocate Mr. Abhishek Kumar, Advocate Ms. Sharmistha Ghosh, Advocate
For Respondent No. 2 (FIA)	:	Mr. Amit Kapur, Advocate Ms. Poonam Verma, Advocate Ms. Nishtha Kumar, Advocate Ms. Apoorva Saxena, Advocate
For Respondent No.3 (LGA), Respondent No.6 (Austrian Airlines and Respondent No.9 (Swiss Airlines)	:	Ms. Neelam Rathore, Advocate Ms.Pooja Sharma, Advocate Mr.Shaantanu Devansh, Advocate
For Respondent No. 4 (MoCA)	:	Ms.Anjana Gosain, Advocate Ms.Shalini Nair, Advocate
For Intervener (Air India)	:	Ms. Bhavana Duhoon, Advocate

AERA Appeal No.11 of 2012

For Appellant No.1 (LGA), Appellant No.4 (Austrian Airlines) and Appellant No.7 (Swiss Airlines)	:	Ms. Neelam Rathore, Advocate Ms. Pooja Sharma, Advocate Mr. Shaantanu Devansh, Advocate
For Respondent No. 1 (AERA)	:	Mr. Alok Dhir, Advocate Mr. K.P.S.Kohli, Advocate Mr. Abhishek Kumar, Advocate Ms. Sharmistha Ghosh, Advocate
For Respondent No. 2(DIAL)	:	Mr.Gopal Jain, Sr.Advocate Mr.Atul Sharma, Advocate Mr.Milanka Chaudhury, Advocate Ms.Chinmayee Chandra, Advocate Mr. Sarojanand Jha, Advocate Ms.Ashly Cherian, Advocate Ms.Satakshi Sood, Advocate
For Respondent No. 3 (AAI) and Respondent No. 4(MoCA)	:	Ms.Anjana Gosain, Advocate Ms.Shalini Nair, Advocate

AERA Appeal No.12 of 2012

For Appellant (IATA)	:	Mr. Nishant Menon, Advocate Ms. Kavita Sarin, Advocate Mr. Shafiq Ahmed, Advocate Mr. Abhishek Birthray, Advocate

For Respondent No. 1 (AERA)	:	Mr. Alok Dhir, Advocate Mr. K.P.S.Kohli, Advocate Mr. Abhishek Kumar, Advocate Ms. Sharmistha Ghosh, Advocate
For Respondent No. 2(DIAL)	:	Mr.Gopal Jain, Sr.Advocate Mr.Atul Sharma, Advocate Mr.Milanka Chaudhury, Advocate Ms.Chinmayee Chandra, Advocate Mr. Sarojanand Jha, Advocate Ms.Ashly Cherian, Advocate Ms.Satakshi Sood, Advocate
For Respondent No. 3 (AAI) and Respondent No. 4(MoCA)	:	Ms. Anjana Gosain, Advocate Ms. Shalini Nair, Advocate

AERA Appeal No.6 of 2012

For Appellant (FIA)	:	Mr. Amit Kapur, Advocate Ms. Poonam Verma, Advocate Mr. Nishtha Kumar, Advocate Ms. Apoorva Saxena, Advocate
For Respondent No. 1 (AERA)	:	Mr. Alok Dhir, Advocate Mr. K.P.S.Kohli, Advocate Mr. Abhishek Kumar, Advocate Ms. Sharmistha Ghosh, Advocate

For Respondent No. 2(DIAL)	:	Mr.Gopal Jain, Sr.Advocate Mr.Atul Sharma, Advocate Mr.Milanka Chaudhury, Advocate Ms.Chinmayee Chandra, Advocate Mr. Sarojanand Jha, Advocate Ms.Ashly Cherian, Advocate Ms.Satakshi Sood, Advocate
For Respondent No. 3 (AAI) and Respondent No. 4(MoCA)	:	Ms. Anjana Gosain, Advocate Ms. Shalini Nair, Advocate
For Intervenor (MIAL)	:	Mr. Krishnan Venugopal, Sr.Advocate Ms. Amrita Narayan, Advocate Mr. Akshay Gupta, Advocate Mr. Shivendra Singh, Advocate Ms. Dipanshi Ishar, Advocate

O R D E R

By S.K. Singh, Chairperson – These appeals have a chequered history. Before narrating the relevant details of the appeals that have been heard by us with some expedition in view of the directions of the Apex Court, particularly, in the order dated 03.07.2017 in Civil Appeal No.8394 of 2017 (**Air India Ltd. Vs. Delhi International Airport Pvt. Ltd. & Ors.**), it will be useful to indicate at the outset that the First Tariff Order dated 20.04.2012 relating to Delhi International Airports Ltd (DIAL) by the Airport Economic Regulatory Authority (in short "the

AERA") and the issues related thereto have alone been heard by us in these four concerned appeals preferred under section 18(2) of the Airport Economic Regulatory Authority of India 2008 (hereinafter referred to as "the Act"). The present judgment and order shall govern all the aforesaid four appeals.

2. The history of these appeals deserves the adjective "chequered" because although these were filed in the year 2012 before the Airports Economic Regulatory Authority Appellate Tribunal (AERAAT), that Tribunal, since its inception had been assigned and entrusted as an additional charge to Competition Appellate Tribunal. The competent bench of that Tribunal practically came to an end due to expiry of term of the then Chairman and also of a member sometime in August 2014. Since then no bench of AERAAT was available till 07.09.2015. Thereafter, a new bench could be constituted as per notification of the concerned Ministry dated 07.09.2015 and accordingly the Chairman and two Members of National Consumer Disputes Redressal Commission were given additional charge to function as AERAAT. This bench resumed hearing of the matter afresh but in spite of request made by the Apex Court on more than one occasion, the hearing could not conclude. Thereafter, vide a notification dated 26.05.2017 published by the Ministry of Finance, Par XIV of Chapter VI of the Finance Act, 2017 came into force. As a result, the AERAAT under the Airports Economic Regulatory

Authority Act 2008 came to mean the instant Tribunal, i.e., the Telecom Disputes Settlement & Appellate Tribunal (TDSAT). In the light of order of the Hon'ble Supreme Court dated 03.07.2017 noticed earlier, the matters were required to be heard by this Tribunal expeditiously. On request made by the parties, this Tribunal took up hearing of these appeals which relate to the First Tariff Order dated 20.04.2012. While considering the urgency for hearing, some other matters were also listed along with these appeals on 17.07.2017 but ultimately this Tribunal decided to first hear these appeals only as a practical measure so that there could be possibility of early disposal as desired by the Apex Court. Accordingly, some appeals relating to Development Fee at the Delhi airport or directed against the Second Tariff Order have been segregated for separate hearing at a later stage.

3. Chronologically, Appeal No.6 of 2012 was filed first by the Federation of Indian Airlines. The Federation was aggrieved by the impugned order of AERA dated 20.04.2012, *inter alia*, because of an increase of 345.92% in the Aeronautical Tariff of Delhi International Airport Ltd. (DIAL) in respect of IGI Airport, New Delhi. It has objected to the Shared TILL Approach of AERA because according to the appellant, the statutory framework lays down for Single TILL Approach. It also advocated for allocation of aeronautical and non-aeronautical assets in the ration of 70:30 as the appropriate allocation in the interest of Aviation industry. It

has opposed escalated project cost allowed by AERA and also the levy of User Development Fee (UDF). It is in favour of AERA directing for an independent assessment of cost and audit and ultimately wants the matter to be remanded back for re-determination of aeronautical tariff of DIAL.

4. Ordinarily, the aforesaid appeal should have been argued as the lead matter but evidently by arrangement between the counsels, the Appeal No.10 of 2012 which in some respects appears to be in the nature of a counter-appeal preferred by DIAL, has been argued as the lead matter by Mr.Gopal Jain, learned senior advocate. A perusal of Memo of this appeal along with the Synopsis discloses that the impugned Tariff Order dated 20.04.2012 has been assailed by DIAL only to a limited extent qua the claims described in detail in **Annexure 'A'** to the Memo of appeal which reads as follows:

> **"Respondent's decisions in order no.03/2012-13 in the matter of determination of aeronautical tariff in respect of IGI Airport, New Delhi for the 1st regulatory period (01.04.2009-31.03.2014) dated April 20, 2012 which are under challenge in the present appeal are set out hereunder:**
>
> **1. Decision No.19. Forecast of non aeronautical revenue**
>
> The respondent decided to retain the forecasts as proposed in the non aeronautical revenue scenario 3 as proposed in the consultation paper.

2. Decision No.21. Decision on treatment of revenue from area disallowed as per DF order

The respondent decided that though an area of 8,654 sq.mt. was disallowed in the DF order, the total non-aeronautical revenue would be reckoned towards the determination of aeronautical tariff without exclusion proposed by DIAL.

3. Decision No.10. Decision on HRAB

The respondent decided that the HRAB be taken as Rs.467 Crore.

Further the respondent decided to depreciate the HRAB at the tariff year wise average depreciation rate for aeronautical assets.

4. Decision No.20. Decision on CUTE counter charges

The respondent decided to treat the CUTE counter service as Aeronautical Service and revenues from it as aeronautical revenue.

5. Decision No.24. Decision on BME

The respondent advised BME service providers to seek approval for the tariffs as required under the AERA Act and the directions issued by the respondent.

6. Decision No.5. Decision on asset allocation mix (on account of DF disallowances)

The respondent decided not to alter the asset allocation from what was proposed in the consultation paper on account of DF disallowances and to consider the asset allocation as was proposed in the consultation paper *i.e.*, 89.25% for aeronautical assets.

7. Decision No.8. Decision on future capital expenditure and future maintenance capital.

The respondent decided not to consider, for the present, any future capital expenditure (from 2011-12 onwards) during the current control period.

As regards the future maintenance capital expenditure, the respondent decided not to consider any capex in excess of Rs.48.86 crore (for FY 2011-12) and Rs.78.92 crore (for FY 2012-13) for the present. Further the respondent also decided to reckon these figures for the determination of X factor.

Truing Up:2. Correction/Truing up for Decision No.8.

The respondent decided that it may consider the future capital expenditure and future maintenance capital expenditure incurred by DIAL during the balance control period based on the audited figures and evidence of stakeholder consultation as contemplated in the SSA, as well as the review thereof that the respondent may undertake in this behalf. This review will also include the amount of Rs.48.86 Crore (for Fy 2011-12) and Rs.78.92 Crore (for FY 2012-13) which the respondent has, for the present, reckoned for determination of X factor.

8. Decision No.29. Decision on WACC

The de-levering of the equity beta of the comparators will be in accordance with the market capitalization figures to arrive at the asset betas (as is advised by National Institute of Public Finance and Policy ("NIPFP").

The re-levering of the asset beta of DIAL will be at the notional DER of 1.5:1 (as indicated by SBI Caps).

Return on equity will be calculated based on the actual book value of debt and equity of DIAL.

The respondent decided to adopt return on equity (post tax cost of equity) as 16% in the WACC calculation.

The respondent determined the WACC at 10.33% for the control period.

The respondent also decided that WACC will not be trued up.

9. Decision No.18. Decision on Corporate Tax

The Authority decided to take into account the actual corporate tax paid by DIAL (apportioned on operations from aeronautical services) for the year 2009-10, 2010-11 and 2011-12. For the balance period i.e., 2012-13 and 2013-14 the forecast of Corporate tax payable on aeronautical services has been used for tariff determination.

Truing Up: 5. Correction/Truing up for Decision No.18

The Authority decided to review the actual corporate taxes on aeronautical services paid by DIAL, based on the audited figures as may be available and true up the difference between the actual corporate tax paid and that used by the Authority in the forecast. This truing up will be done in the next control period commencing 01.04.2014.

10. Bad Debts

The Tariff Order does not provide for adjustment/provision in respect of bad debts. No decision or determination in this behalf has been made in the Tariff Determination. The lack of decision/direction in this behalf is contrary to DIAL's interests and is being challenged in the present appeal.

11. Decision No.13. Decision on RSD

The respondent decided to consider RSD as a means of finance at zero cost.

12. Decision No.27. Decision on CPI-X

The respondent decided to follow the formulation specified in the SSA and calculate the "X" factor by solving the system of equations mentioned therein.

13. Decision No.14. Decision on manpower cost of inline baggage screeners

The respondent does not allow manpower cost of inline baggage screeners to be included as an operating cost in the tariff determination and as a result treats it as a PSF security charge. A clear direction in this regard has not been issued.

14. Decision No.32. Decision on collections charges on DF, PSF and UDF

The respondent decided not to allow any collection charges on DF to be defrayed as operating expenditure.

The respondent decided to delink the facilitation component from the existing PSF at IGI Airport, New Delhi and consider it as part of the UDF proposed by DIAL in the rate card. As the total collection charge for both PSF and UDF, the respondent decided to consider an amount of Rs.2.5 per departing passenger and Rs.3 per arriving passenger as a ceiling on the collection charges. This is in accordance with DIAL's request to keep differential collection charges for arriving and departing passengers.

15. Decision No.16. Decision on the expensing out the interest on DF loan

The respondent decided to expense out the interest on DF loan for the entire period of 01.03.2009 to 30.11.2011 as operating expenditure.

16. Decision No.28. Decision on Issue of 10% increase of the BAC

The respondent's present order is fully in consonance with the requirement of the SSA

OTHER ISSUES:

Decision No.23. Treatment of Cargo, Ground handling and Fuel Throughout Revenue

The issue regarding treatment/classification of Cargo and Ground Handling Services in the aeronautical/non-aeronautical categories is covered by Schedules V and VI of the OMDA and directive dt.09.03.2012 of the MoCA. The respondent has sought a clarification from the MoCA to confirm its inference (though the MoCA's directive is clear) and DIAL reserves its right to address this issue and raise further grounds if necessary and if so advised.

With regard to Fuel Through Put Charges, the issue is under consideration of this Hon'ble Tribunal in Appeal No.5/2010. The treatment of Fuel Through Put Charges in DIAL's case should be consistent with the final decision in the said appeal.

The present appeal is limited to the issues mentioned above. The other decisions/ issues forming part of order no.03/2012-13 in the matter of determination of aeronautical tariff in respect of IGI Airport, New Delhi for the 1st regulatory period (01.04.2009-31.03.2014) dated April 20, 2012 have not been challenged by the Appellant/DIAL at this stage."

5. Appeal No.11 of 2012 preferred by Lufthansa German Airlines is also similar in nature and content as Appeal No.6 of 2012 but has been argued separately by Ms.Neelam Rathore, Advocate whereas Appeal No.6 of 2012 has been argued at length by Mr.Amit Kapur, Advocate. Appeal No.12 of 2012 was argued by learned counsel, Mr. Nishant Menon who chose to adopt the arguments as advanced in Appeal No.6 of 2012. It may be useful to mention here that besides the counsels appearing for different parties in the four appeals noted above, we

have also heard Mr.Krishnan Venugopal, learned senior advocate, although he does not appear for any of the parties in these appeal. He sought permission to address the Tribunal on some issues which according to him could affect the interest of his client, the Mumbai International Airport Ltd. (MIAL) whose appeal remains to be heard at a later point of time. Since the Tribunal was not in a position to hear all the pending appeals together on account of urgency and observations of the Apex Court for early hearing, we decided to hear Mr.Venugopal for some length of time in order to gain further assistance on certain issues of general importance. At the outset, we may record that Mr.Venugopal has rendered invaluable assistance on general principles though we did not agree to hear the appeal by MIAL with the present appeals.

I. Brief History

6. As the introduction of the Airports Authority of India Act 1994 discloses, prior to 1971, the activities relating to construction and management of International and Domestic airport, Air Traffic Control and Air Space Management were controlled by the Director General of the Civil Aviation. On account of heavy growth in such activities, there arose a need for modernization of airports and also heavy investment for that purpose. Then existing set-up required conspicuous upgradation. Consequently, the Central Government constituted the

International Airports Authority of India (IAAI) under the International Airports Authority Act 1971. On similar lines, the National Airports Authority (NAA) under the National Airports Authority Act 1985 was constituted to manage all activities relating to domestic airports. However, NAA was not found adequate to meet the needs of development and modernization of domestic airports to the desired level. Then it was proposed to merge IAAI and NAA into one entity and constitute a single uniform Airports Authority. This was sought to be achieved by creating the Airports Authority of India under the Airports Authority of India Act 1994. However, the need for more developed airports and high investment appears to have led to formation of Government of India's new Policy on Airport Infrastructure, 2002.

7. In this Policy of 2002, it was noticed that such projects involve large elements of sunk costs, a long gestation period and highly uncertain returns on investment on account of several assumptions. Hence, for the reasons of bridging the gap in the resources and also to bring in greater efficiency in management of airports, the participation of private parties (including foreign ones) was deemed imperative. Hence, the Government decided to take all possible steps to encourage such participation.

8. Accordingly, amendments were made in the Airports Authority of India Act at various places to permit and enable privatization of airports. After making these

amendments effective from 1.7.2004, the Airports Economic Regulatory Authority of India Act was enacted in 2008. It came into force on 1.1.2009, except Chapter III & VI which were made effective from 1.9.2009. AERA was constituted by this Act to regulate tariff and other charges for the aeronautical services rendered at airports and to monitor the performance and standards at airports as well as for matters connected therewith or incidental thereto. The relevant provisions of this Act shall be duly noticed and adverted to in the later part of the judgment. However, it may be noted at the outset that the Act applies to all airports other than airports and fields belonging to or subject to the control of Armed Forces or Paramilitary Forces of the Union. The definitions in Section 2 include "Aeronautical Services", "Major Airports", and "Service Provider". Words used in this Act but not defined shall have the same meaning as defined in the Airports Authority of India Act, 1994.

Section 2 begins with the phraseology – "Definitions – In this Act, **unless the context otherwise requires**, ……."(emphasis supplied). Therefore, the context can be used to find out the true scope and meaning of words and phrases defined under Section 2.

Section 13 enumerates the functions of the Authority and hence requires special scrutiny under various different contexts. Since it needs to be kept in mind at all times, it is extracted hereunder below:

"**Section 13:**

"Functions of 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);

(b) to determine the amount of the development fees in respect of major airports:

(c) to determine the amount of the passengers service fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act, 1934 (22 of 1934);

(d) to monitor the set performance standards relating to quality, continuity and reliability of service as may be specified by the Central Government or any authority authorized by it in this behalf;

(e) to call for such information as may be necessary to determine the tariff under clause (a);

(f) to perform such other functions relating to tariff, as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

(2) The authority shall determine the tariff once in five years and may if so considered appropriate and in public interest, amend, from time to time during the said period of five years, the tariff so determined.

(3) While discharging its functions under sub-section (1) the authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, *inter alia*, -

(a) by holding due consultations with all stake-holders with the airport;

(b) by allowing all stake-holders to make their submissions to the authority; and

(c) by making all decisions of the authority fully documented and explained."

II. <u>Chronology of Events</u>:

9. On behalf of DIAL, a list of dates has been furnished. It points out that the Airports Infrastructure Policy of 2002 came as a replacement for the earlier Policy of 1997. Guided by this Policy, in September, 2003, the Union Government approved a proposal for redevelopment of the Delhi and Mumbai airports through

Public Private Partnership (PPP) between AAI and a Joint Venture (JV) Company for each airport. On 17.2.2004, the AAI invited Expression of Interest (EOI) for 74% equity stake for the proposed JV Companies. Statutory amendments in the AAI Act, 1994 became effective in 2004, as already noted earlier. The bid documents were issued to the bidders on 1.4.2005. Copy of the Operation Maintenance and Development Agreement (OMDA) was made available to the pre-qualified bidders in August, 2005. In January, 2006, the concession to operate, amend and develop the IGI Airport at New Delhi was awarded to GMR-FRAPORT Consortium on the basis of an international competitive bidding process. The required Joint Ventures (JV) Company DIAL was incorporated on 1.3.2006. The AAI and GMR Consortium held equity in this Company in the ratio of 26:74. The OMDA was executed between the AAI and DIAL on 4.4.2006. The relevant significant clauses of OMDA, as per submissions, relate to/comprise of:

1. Definition of aeronautical charges;
2. Chapter-XII – Tariff & Regulation, partly Clause 12.1.1 and 12.1.2;
3. Definition of aeronautical services with Schedule 5 of OMDA;
4. Definition of aeronautical assets; and
5. Definition of non-aeronautical assets.

10. A lease deed agreement was executed on 25.4.2006 between AAI and DIAL to allow use of assets by the DIAL. Inter alia, in consideration of the JVC having

entered into OMDA and to enhance the smooth functioning and viability of the JVC, in addition to the obligations of the AAI under the OMDA, the Government of India, in the name of the President of India through Secretary, Ministry of Civil Aviation, on 26.04.2006 executed a State Support Agreement (SSA) with DIAL (the JVC) to provide the required State support to the JVC. This agreement is important and shall be considered repeatedly as per context because it has been accepted even by AERA to contain concessions offered by the Central Government.

11. In the light of Airport Operator Agreement dated 01.05.2006, DIAL was handed over the management of IGI Airport, New Delhi and it commenced operations on 03.05.2006. The 'effective date' as defined under OMDA is May 2008, the date when the conditions precedent have been satisfied/waived in terms of OMDA. On 30.12.2008, the Government of India notified the AERA Act, except Chapters III and IV, which came into force on 31.08.2009. Clause 1 of Schedule 6 of the SSA contemplates a nominal increase of 10% over the Base Airport Charges on completion of Mandatory Capital Projects. This incentive was allowed by MOCA on 02.02.2009 w.e.f. 16.02.2009. DIAL claimed further 10% increase as a contractual right but AERA rejected the request by an order dated 21.05.2010. DIAL obtained various reports from experts such as KPMG Report

on Cost of Equity Estimate dated 17.05.2010, Harry Bush Report, also on Determination of Cost of Equity dated 18.01.2011, Jacobs' Consultancy Report on Allocation of Passenger Terminal Areas between Aeronautical and Non-Aeronautical Activities dated 14.06.2011, Jacobs' Consultancy Report on Allocation of Operating Expenses between Aeronautical and Non-Aeronautical Activities dated 14.06.2011 and Leigh Fisher Report on Cost of Equity for IGI Airport of June 2011; and submitted a proposal on 20.06.2011 for revision of tariff for aeronautical services at IGI Airport, claiming an X-factor of 629%. This tariff proposal by DIAL is as under:

> "1. The first five year tariff period is assumed to start from April 1st 2009 and ending on March 31st 2014.
>
> 2. Based on the assumptions discussed in this submission, the target revenues for the 5 year in the quinquennium are as under:

Figures in Rs. Crores

Building Blocks - Aeronautical	**2009-10**	**2010-11**	**2011-12**	**2012-13**	**2013-14**	**Total**
Return on Capital Employed	538	1,148	1,603	1,477	1,454	6,210
Total Expenses	321	486	710	750	822	3,088
Depreciation & Amortization	144	282	365	370	404	1,565
Taxes	-	-	172	484	522	1,179
Gross Target Revenue	**1,033**	**1,915**	**2,850**	**3,081**	**3,202**	**12,051**
Cross Subsidization	181	180	213	232	250	1,056
Net Target Aero Revenue	**822**	**1,735**	**2,628**	**2,849**	**2,952**	**10,996**

> 3. As per the SSA, the X-factor is the average equalization factor of the discounted target and projected aeronautical revenues over the regulatory period. The X-factor has been calculated as an average percentage increase as of September 1st 2011 by discounting the above target revenue with the WACC. This X-factor works out to a one-

time average increase of 629% in the aeronautical tariff as shown below:

Figures in Rs. Crores

Determination of 'X'	**2009-10**	**2010-11**	**2011-12**	**2012-13**	**2013-14**	**Total**
Net Target Aero Revenue	822	1,735	2,638	2,849	2,952	10,996
Actual/Projected Aero Revenue	502	565	2,404	4,021	4,335	11,826
Discounting Factor @ 16.15%	1.24	1.07	0.91	0.79	0.68	
Net Target Revenues (NPV)	1,018	1,852	2,410	2,242	2,000	9,523
Actual/Projected Revenues (NPV)	622	603	2,197	3,164	2,937	9,523
Increase Percentage 'X'	**629%**					

4. Inflation has not been factored in our forecast for future years. It is assumed that AERA will give a CPI based increase over and above the X factor, based on CPI data.

5. We have not considered any landing discounts in our tariff proposals. However, it is requested that published discounts available to all the eligible customers should be allowed, as cost, for healthy growth of the industry.

6. The current proposal is for the approval of an average percentage of increase 'X' in aeronautical tariff. After this approval from AERA, we shall submit a detailed pricing proposal to achieve this average increase which may be a combination of various aeronautical charges including UDF".

12. Discussions through meetings and presentations in respect of DIAL's proposal for revision of tariff continued till November 2011, mainly between AERA and DIAL. AERA raised some queries through a letter dated 07.07.2011 which was replied by DIAL on 20.07.2011. DIAL also submitted a revised tariff model in October 2011.

13. On 14.11.2011, AERA issued order No.28/2011-12 dated 08.11.2011 in respect of levy of Development Fee by the DIAL at IGI Airport. DIAL issued further letters in November 2011 addressed to AERA in respect of allowance of interest and for a change of X-factor to 874%. Ultimately, AERA issued on 03.01.2012 its Consultation Paper with respect to the Determination of Aeronautical Tariff for IGI Airport for the First Control Period (01.04.2009 – 31.03.2014). DIAL has prepared a chart comparing its proposal under different heads with the proposal made by AERA. Against the hypothetical RAB proposed by DIAL as Rs.1119 crores, AERA proposed the same as Rs.467 crores. Against claim for 24% return on equity, the proposal by AERA was for 16%. Traffic forecast on three different heads, i.e., PAX, ATM and Cargo estimated by AERA was quite high in comparison to that by DIAL. Whereas DIAL claimed 24% return on refundable security deposits amounting to Rs.1471.51 crores which was repayable by DIAL after 57 years but AERA proposed no or 0% return. In respect of X-factor, DIAL requested to determine X-factor first and then to add for inflation separately year on year. But AERA interpreted the provisions of SSA strictly to compute X-factor after considering inflationary increase along with other inputs of X-factor. AERA proposed X-factor as -693.12% (it is not in dispute that X-factor has to be in negative).

14. After obtaining reports from various agencies and experts on different issues, DIAL submitted its detailed response to the Consultation Paper on 29.02.2012. On 09.03.2012, Ministry of Civil Aviation (MoCA) issued a letter to AERA to emphasize that the tariff for aeronautical services should be fixed in accordance with the provisions set out in the OMDA and SSA. Through another letter of the same date, MoCA wrote to AERA on the issue of classification of cargo and ground handling services as non-aeronautical services and for treating the revenue from these services as non-aeronautical revenue. On 12.03.2012, MoCA issued another letter to AERA recommending to consider a rate of 18.5% - 20.5% as return on equity on the basis of a report on this issue prepared by SBI Capital Markets Ltd. The impugned First Tariff Order was passed by AERA on 20.04.2012. That Order is under challenge in all these appeals under consideration.

III. OMDA and SSA: Important Provisions and Significance

15. As already noted, the Operation Maintenance and Development Agreement (OMDA) was executed between AAI and DIAL on 04.04.2006. This agreement was soon followed by the State Support Agreement (SSA), executed between the Government of India and DIAL on 26.04.2006. These two agreements are of great

significance. Not only the parties have relied upon or referred to these but also Section 13(1)(vi) requires that while determining the tariff for the aeronautical service, the Authority shall, *inter alia*, take into consideration the concessions offered by the Central Government in any agreement or Memorandum of Understanding or otherwise. It is important to keep in mind that the concessions are relevant regardless of the fact whether the same has been offered by the Central Government through an agreement or Memorandum of Understanding or **in any other manner** (emphasis added). In Paragraph 9 of this judgment, the relevant and significant contents of OMDA have been noted only in passing. It will be useful to notice them in detail.

16. Clause 1.1 of OMDA defines "Aeronautical Services" by providing that it shall have the meaning assigned hereto in Schedule 5 of that agreement. The "Non-Aeronautical Services" have been defined to mean such services as are listed in Part I and Part II of Schedule 6 of the Agreement. These include cargo handling and ground handling services. The OMDA also defines "Aeronautical Assets" and "Non-Aeronautical Assets" in the following manner:

> ""**Aeronautical Assets"** shall mean those assets, which are necessary or required for the performance of Aeronautical Services at the Airport and such other assets as JVC procures in accordance with the provisions of the Project Agreements (or otherwise on the written directions of the GOI/

AAI) for or in relation to, provision of any Reserved Activities and shall specifically include all land (including Excluded Premises), property and structures thereon acquired or leased during the Term in relation to such Aeronautical Assets.

"Non-Aeronautical Assets" shall mean:

1. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in Part I of Schedule 6 and any other services mutually agreed to be added to the Schedule 6 hereof as located at the Airport (irrespective of whether they are owned by the JVC or any third Entity); and

2. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in Part II of Schedule 6 hereof as located at the Airport (irrespective of whether they are owned by the JVC or any third Entity), to the extent such assets (a) are located within or form part of any terminal building; (b) are conjoined to any other Aeronautical Assets, asset included in paragraph (i) above and such assets are incapable of independent access and independent existence; or (c) are predominantly servicing/ catering any terminal complex/cargo complex

and shall specifically include all additional land (other than the Demised Premises), property and structures thereon acquired or leased during the Term, in relation to such Non-Aeronautical Assets."

"Aeronautical Charges", charges for Non-Aeronautical Services, for essential services and Passenger Service Fees are defined and explained in Chapter XII containing provisions relating to tariff and regulation. This Chapter is as follows:

"CHAPTER XII

TARIFF AND REGULATION

12.1 Tariff

12.1.1 For the purpose of this Agreement, the charges to be levied at the Airport by the JVC for the provision of Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets shall be referred to as Aeronautical Charges.

12.1.2 The JVC shall at all times ensure that the Aeronautical Charges levied at the Airport shall be as determined as per the provisions of the State Support Agreement. It is hereby expressly clarified that any penalties or damages payable by the JVC under any of the Project Agreements shall not form a part of the Aeronautical Charges and not be passed on to the users of the Airport.

12.2 Charges for Non-Aeronautical Services

Subject to Applicable Law, the JVC shall be free to fix the charges for Non-Aeronautical Services, subject to the provisions of the existing contracts and other agreements.

12.3 Charges for Essential Services

12.3.1 Notwithstanding the foregoing, those Aeronautical or Non-Aeronautical Services that are also Essential Services, shall be provided free of charge to passengers.

12.4 Passenger Service Fees

12.4.1 The Passenger Service Fees shall be collected and disbursed in accordance with the provisions of the State Support Agreement."

A perusal of the above provisions reveals intimate interdependence of OMDA and SSA.

17. Chapter II of OMDA records various functions of AAI that were granted to the JVC as per these provisions. The functions include operation, maintenance, development, design, construction, upgradation, modernization, **finance** and management of the Airport (emphasis added). It is also entrusted to perform the Aeronautical Services as well as Non-Aeronautical Services at the Airport, in accordance with the terms and conditions of OMDA.

18. The significant/relevant clauses of the SSA are detailed hereinafter. But before that it would be useful to extract the two important recitals at the beginning of the agreement contained in paragraphs (D) and (E):-

"(D) AAI and JVC have entered into an Operation, Management and Development Agreement (hereinafter the OMDA) whereby they have

agreed upon the terms and conditions upon which the JVC shall operate, finance and manage etc. the Airport.

(E) In consideration of the JVC having entered into OMDA and to enhance the smooth functioning and viability of the JVC, in addition to the obligations of the AAI under the OMDA, the GOI is agreeable to provide some support to the JVC."

19. Clause 1.1 of SSA defines "Aeronautical Charges" as the charges to be levied at the Airport by the JVC for the provision of "Aeronautical Services" (and consequent recovery of costs relating to "Aeronautical Assets").

20. The word "TERM" has been defined as per its description in clause 7.1 and that makes the term of SSA co-terminus with that of OMDA. The definition clause clearly states that for SSA, unless the text otherwise requires, the interpretation rules as mentioned in clause 1.2 of the OMDA shall apply. In fact, the various provisions of OMDA and SSA clearly show that both the guidelines are intertwined and interrelated so as to complement and supplement each other.

21. Clause 3 enumerates and describes the Government of India (GOI) support to the JVC through the SSA. Creation of Airport Economic Regulatory Authority (AERA) as an independent authority responsible for certain aspects of Regulation including regulation of Aeronautical Charges, within two years from the effective

date i.e. 03.05.2006 is one of the assured support. Subject to applicable law, GOI agreed to make endeavors so that AERA shall regulate by stating/re-stating aeronautical charges in accordance with the broad principles set out in Schedule I appended to SSA. Clause 3.1.2 assures that "the aeronautical charges for any year during the TERM shall be calculated in accordance with Schedule 6 to the SSA". As an abundant caution, this clause expressly clarifies that the aeronautical charges as set-forth in Schedule 6 will not be negotiated post-bid after the selection of the Successful Bidder and will not be altered by the JVC under any circumstances. Clause 3.1.3 confirms that till AERA commences to regulate aeronautical charges, the same shall be approved by GOI in accordance with the broad principles set out in Schedule 1. Clause 3 goes on to enumerate various measures by way of GOI support, such as Passenger Service Fee, clearances required by law and other essential services by GOI such as customs control, immigration services etc. GOI also agreed to extend help in the execution of Memorandum of Understanding between the JVC and each agency/department of GOI to ensure that necessary services are provided by the concerned agencies/departments. GOI also undertook to provide guarantee as set-forth in Schedule 7.

22. As already noted, AERA has the statutory duty which is also reflected in the SSA to determine the aeronautical charges. Schedule 6 of the SSA has the status

of guidelines for calculation of aeronautical charges and hence it deserves to be noted in detail. Accordingly, it is extracted hereunder:-

"SCHEDULE 6

AERONAUTICAL CHARGES

Aeronautical Charges, for the purposes of this Agreement, shall be determined in the manner as set out hereunder:

1. The existing AAI airport charges (as set out in Schedule 8 appended hereto) ("Base Airport Charges") will continue for a period of two (2) years from the Effective Date and in the event the JVC duly completes and commissions the Mandatory Capital Projects required to be completed during the first two (2) years from the Effective Date, a nominal increase of ten (10) percent over the Base Airport Charges shall be allowed for the purposes of calculating Aeronautical Charges for the duration of the third (3rd) Year after the Effective Date ("Incentive"). It is hereby expressly clarified that in the event JVC does not complete and commission, by the end of the second (2nd) year from the Effective Date, the Mandatory Capital Projects required to be completed and commissioned, the Incentive shall not be available to the JVC for purposes of calculating Aeronautical Charges for the third (3rd) year after the Effective Date.

2. From the commencement of the fourth (4th) year after the Effective Date and for every year thereafter for the remainder of the Term, Economic Regulatory Authority / GOI (as the case may be) will set the Aeronautical Charges in accordance with Clause 3.1.1 read with Schedule 1 appended to this Agreement, subject always to the

condition that, at the least, a permitted nominal increase of ten (10) percent of the Base Airport Charges will be available to the JVC for the purposes of calculating Aeronautical Charges in any year after the commencement of the fourth year and for the remainder of the Term.

3. For abundant caution, it is hereby expressly clarified that in the event AAI increases the airport charges (as available on the AAI website www.airportsindia.org anytime during the first two (2) years from the Effective Date, such increase shall not be considered for revising calculating the Aeronautical Charges chargeable by the JVC."

23. There is no dispute that as per Para 1 of Schedule 6, in case the JVC duly completes and commissions the Mandatory Capital Project required to be completed during the first two years from the effective date, the JVC is entitled and has in fact been granted a nominal increase of ten (10) per cent over the Base Airport Charges for the purpose of calculating aeronautical charges for the third year, as provided. But there is a dispute whether such nominal increase of 10% of the Base Airport Charges is to be granted for subsequent years also as a matter of course or right, in any eventuality or not. It shall be answered at the appropriate place while considering the submissions on this issue. Para 2 of Schedule 6 requires AERA or GOI (as the case may be) to set the Aeronautical Charges from the commencement of the fourth year after the effective date and for every year thereafter, in accordance with clause 3.1.1 read with Schedule 1 of SSA. While

pointing out certain conditions, clause 3.1.1 also indicates clearly that the AERA shall regulate Aeronautical Charges in accordance with the broad principles in Schedule 1. Schedule 1 has a self-explanatory heading – "Principal of Tariff Fixation". Since, these principles of tariff fixation are of utmost importance in appreciating the arguments of the parties and deciding the relevant issues, it is advisable to extract this schedule *in extenso*. It provides as follows:

"**SCHEDULE 1**

PRINCIPLES OF TARIFF FIXATION

Background

If despite all reasonable efforts of the GOI, AERA is not in place by the time required to commence the first regulatory review, the Ministry of Civil Aviation will continue to undertake the role of approving aero tariff, user charges, etc.

Principles

In undertaking its role, AERA will (subject to Applicable Law) observe the following principles:

1. *Incentives Based:* The JVC will be provided with appropriate incentives to operate in an efficient manner, optimising operating cost, maximising revenue and undertaking investment in an efficient, effective and timely manner and to this end will utilise a price cap methodology as per this Agreement.

2. *Commercial:* In setting the price cap, AERA will have regard to the need for the JVC to generate sufficient revenue to cover efficient

operating costs, obtain the return of capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved.

3. *Transparency:* The approach to economic regulation will be fully documented and available to all stakeholders, with the Airports and key stakeholders able to make submissions to AERA and with all decisions fully documented and explained.

4. *Consistency:* Pricing decisions in each regulatory review period will be undertaken according to a consistent approach in terms of underlying principles.

5. *Economic Efficiency:* Price regulation should only occur in areas where monopoly power is exercised and not where a competitive or contestable market operates and so should apply only to Aeronautical Services. Further in respect to regulation of Aeronautical Services the approach to pricing regulation should encourage economic efficiency and only allow efficient costs to be recovered through pricing, subject to acceptance of imposed constraints such as the arrangements in the first three years for operations support from AAI.

6. *Independence:* The AERA will operate in an independent and autonomous manner subject to policy directives of the GOI on areas identified by GOI.

7. *Service Quality:* In undertaking its role AERA will monitor, pre-set performance in respect to service quality performance as defined in the Operations Management Development Agreement (OMDA) and revised from time to time.

8. *Master Plan and Major Development Plans:* AERA will accept the Master Plan and Major Development Plans as reviewed and commented by the GOI and will not seek to question or change the approach to development if it is consistent with these plans. However, the AERA would have the right to assess the efficiency with which capital expenditure is undertaken.

9. *Consultation:* The Joint Venture Company will be required to consult and have reasonable regard to the views of relevant major airport users with respect to planned major airport development.

10. *Pricing responsibility:* Within the overall price cap the JVC will be able to impose charges subject to those charges being consistent with these pricing principles and IATA pricing principles as revised from time to time including the following:

(i) *Cost reflectivity:* Any charges made by the JVC must be allocated across users in a manner that is fully cost reflective and relates to facilities and services that are used by Airport users;

(ii) *Non discriminatory:* Charges imposed by the JVC are to be non discriminatory as within the same class of users.;

(iii) *Safety:* Charges should not be imposed in a way as to discourage the use of facilities and services necessary for safety;

(iv) *Usage:* In general, aircraft operators, passengers and other users should not be charged for facilities and services they do not use.

Calculating the aeronautical charges in the shared till inflation – X price cap model.

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:

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

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 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."

24. The principles in Schedule 1 are to be observed by AERA in exercise of its regulatory role in respect of Aero tariff, user charges etc., of course, subject to applicable law. Applicable law has been defined in OMDA to mean, "all applicable laws and judgments of the Supreme Court as may be in force and in effect in India during the subsistence of the Agreement. The first para of Schedule

1 contemplates incentives for operating in an efficient and desired manner. AERA is also required by virtue of para 2, to have regard to commercial principles so as to generate sufficient revenue to take care of efficient operating costs and fetch the return on investment with an eye on the risk involved. The principles of transparency and consistency find separate mention and are followed by that of economic efficiency. Since paragraph 5 containing principles of economic efficiency and subsequent paragraphs upto para 9 providing for consultation as well as pricing responsibility in paragraph 10 are of special significance, the same will be discussed at appropriate places in the light of issues raised.

IV. The general submissions and issues along with findings:

25. On behalf of DIAL, Mr. Gopal Jain, learned senior advocate began his submissions by highlighting the current airport infrastructure policy as well as provisions of OMDA and SSA which according to him are binding contracts having tacit or explicit authority of GOI. According to him, the policy and the contracts/agreements are aimed at seeking investment from the private sector into the airport. The investor has been assured of adequate return on the investment. Additionally, the tariff must be determined by AERA to ensure reimbursement of legitimate expenses of DIAL along with fair/reasonable return so that economic

viability of the airport is achieved and maintained. He highlighted that the same sentiments of the policy are reflected in the Statement of Objects and Reasons of the Bill leading to 2003 amendment to Airport Authority of India Act.

26. After highlighting various important provisions of the Act as well as of OMDA and SSA, Mr.Jain submitted that AERA is required not to deviate or depart from the terms of OMDA and SSA which contain concessions that the commercial principles guiding AERA will ensure generation of sufficient revenue to cover the operating costs and shall also obtain not only the return of capital over the economic life of JVC but also provide a reasonable return on investment commensurate with the risk involved. According to him the provisions of the Act as well as powers and duties of AERA under the Act need to be interpreted in a manner so as to sub-serve the aforesaid purposes flowing from the policy of the GOI as well as relevant provisions of OMDA and SSA. AERA, as per submissions, cannot ignore the relevant provisions of the agreements/concessions offered by or at the instances of Government of India rather it is obliged under Section 13(1)(a)(vi) to determine tariff taking into consideration, *inter alia*, the concession offered by the Central Government in any Agreement or Memorandum of Understanding or otherwise. It has been submitted that such concession is reflected by both the agreements – OMDA and SSA and these must be respected also because the Act does not vest any authority in AERA to ignore or dilute any

relevant part of these agreements. This submission has been further buttressed by pointing to the powers and functions of AERA which are described in Chapter 3 of the Act and by emphasizing that the powers do not entitle AERA, a statutory authority bound to Act within the four walls of the statute, to disregard a valid contract binding the Government of India and its instrumentalities and the departments.

27. An attempt was made by learned senior counsel for DIAL to show from the impugned tariff order that AERA adopted an erroneous approach of according status of concessions (by the Central Government) only to SSA while relegating OMDA to a secondary status.

28. Before considering some judgments cited on behalf of DIAL on the aforesaid issues, the counter submissions on behalf of respondents need to be noticed.

29. Appearing for the Federation of Indian Airlines, Mr. Ramji Srinivasan made the following submissions in reply. That as an independent statutory regulator, AERA is not bound to accept all or any material relied upon by the interested parties in the exercise of fixation of tariff without testing such materials on the touchstone of relevant principles such as "Most Efficient Cost". For this AERA can commission an economic study of various aspects of costs involved in running

and maintaining an airport. According to learned senior counsel, the provisions in Chapter 3 of the Act and particularly Section 13 clothe AERA with sufficiently wide powers in discharging its functions relating to determination of tariff. According to him, while sub-section (1)(a) of Section 13 enumerates seven factors which can be taken into consideration and while *prima facie* it appears that all have same value deserving equal and collective consideration, the proviso makes it abundantly clear that different tariff structures may be determined for different airports by having regard to all or any of the considerations specified in sub-clauses (i) to (vii). Mr.Srinivasan did not, however, make any distinction between OMDA and SSA on the touchstone of whether they offer concession by the Central Government and are, therefore, covered by sub-clause (vi) of Section 13(1)(a).

30. The relative importance of OMDA and SSA is not of much significance and the issue is mainly academic because sub-clause (vii) permits AERA to take into consideration any other factor which may be relevant. Such residual provision shows the wide amplitude of power of the Authority in determining tariff. It has powers to take cognizance of all relevant materials which will include the OMDA and the SSA. Such residuary power is also meant to take care of directions by Central Government issued in exercise of power under Section 42 of the Act. For good reasons, it can rely upon all the materials and equally for good reasons it can place reliance on only some of the materials but the power to bestow regard to all

or any of the considerations does not absolve the Authority from exercising such vast powers in a judicious, fair and transparent manner. Wide powers carry with them the duty to act fairly and that is ensured by Section 13(4) of the Act. It requires that the Authority shall ensure transparency while exercising its powers and discharging its functions, *inter alia*, by due consultations with all stakeholders; by allowing such stakeholders to make their submissions; and, by making all decisions of the Authority fully documented and explained.

31. The issue, though a minor one, with respect to *inter se* precedence of OMDA and SSA, needs to be answered in a simple manner by pointing out that both the agreements are essentially parts and parcel of a composite whole aiming to secure a common purpose, viz., to attain the purpose of Policy on Airport Infrastructure and promote creation of world class infrastructure, at least at major airports of the country. Both the agreements clearly have the approval and concurrence of the Central Government either directly through the MOCA or through AAI, an instrumentality of the Government of India. Whatever concessions have been offered under these two agreements, they deserve consideration by AERA in a judicious, fair and transparent manner. It does not really matter whether the power of such consideration flows from sub-clause (vi) or sub-clause (vii) of Section 13(1)(a) of the Act. In exercise of this power, AERA is required to respect

rights/concessions flowing from lawful agreements/instruments/directives of Central Government on policy matters.

32. Before adverting to other specific issues, it is noted that Mr. Jain, learned senior counsel for DIAL referred to the 2003 amendment to Airports Authority of India Act, 1994. He relied upon the Statement of Objects and Reasons of the related Bill to draw an inference that the prime concern was to re-assure the investors so that they would feel safe and secure about their operational and managerial independence and not to protect the ultimate consumers of airport infrastructure. For the same purpose, he referred to the Preamble to the Act and submitted that it makes no reference to protection of consumers. He highlighted provisions in the Electricity Act, 2003 as well as of Petroleum and Natural Gas Regulatory Board Act, 2006. According to him, several provisions in these Acts as well as in the Securities and Exchange Board of India (SEBI) Act, 1992, Insurance Regulatory Development Authority Act, 1999 and the Competition Act, 2002 specifically mention for protection of consumer interest but that is not the case, according to him, under the Act.

33. The submission has been noted in brief only because it deserves summary rejection. The introduction to the Act clearly narrates that in 1997, Airport Infrastructure Policy was formulated to provide for the private sector participation for improving quality, efficiency and increasing competition. The quality of

services rendered at airports is one of the major concerns and it goes without saying that the quality of services and benefits of competition are meant for benefit of the ultimate consumers. The submission also ignores the various provisions by way of guidelines in the SSA for calculation of Aeronautical Charges and tariff fixation. Incentive for operating in an efficient manner, optimizing operating costs and maximizing revenue, these provisions clearly indicate concern for the consumer who has to ultimately bear the price of inefficiency or excessive operating costs. Same concern is reflected in the principle of economic efficiency which requires that pricing regulation should encourage economic efficiency and only allow efficient costs to be recovered through pricing. In such a scenario, AERA is required to monitor service quality on the basis of benchmarks in the SSA and the OMDA. The quality needs to be reviewed from time to time. The principles that are part of Pricing responsibility provided in Schedule 1 of SSA also show a deep concern for consumer interest. Such concern must pervade all public activity in a constitutional democracy like ours. No doubt, on many matters it needs to be balanced with some specific purpose like infrastructure development.

34. A general criticism has been made on behalf of DIAL that AERA has contravened the law of the land by failing to maintain a balance between rights of DIAL arising from contracts such as OMDA and SSA and power of AERA flowing from Section 13 of the Act to determine tariff from time to time. This

criticism can be appreciated only in respect of concrete facts related to decisions which are subject matter of specific criticism and challenge. However, a legal principle discernible from several judgments cited at the bar and enumerated later, clearly shows that all persons or authorities have to respect contractual rights recognizable under law. But this dictum is not absolute and cannot be stretched so as to require a statutory body to act contrary to the relevant statute under which it is constituted or to act contrary to specific provisions in an applicable statute. If there is a direct and clear conflict, a statutory authority has no option but to act in terms of the statute by holding that the contractual right claimed by a party must be deemed to have been made irrelevant by necessary implication. In cases where there is explicit provision empowering the statutory authority to ignore certain existing rights then the task becomes easier and such explicit provision has to be given full effect.

35. On the issue indicated above, it is useful to have a clear view of Section 13(1)(1) which creates an obligation upon the Authority, in the determination of tariff for the Aeronautical Services, only to take into consideration the various items enumerated in sub-clauses (i) to (vii). As explained earlier, the consideration must be a judicious and fair consideration. Upon consideration, for good reasons, the Authority is free to take its own independent decision and determine the tariff in accordance with the principles and norms as laid down in Section 13(1)(a). In

this exercise, the Authority, as per settled law, should not ignore relevant materials which require consideration, nor it should take into consideration irrelevant or extraneous materials.

36. Since special emphasis has been laid on sub-clause (vi) of clause (a) of Section 13(1), it would be proper to consider the import and effect of this provision which requires taking into consideration, the concessions offered by the Central Government in any agreement etc. Although this provision apparently stands on the same footing as other provisions in various sub-clauses but in the light of law and judgments which shall be noticed hereinafter, it would be appropriate to consider the submission advanced on behalf of DIAL by going deeper into the role of the Central Government under the Policy as well as the Act. For this purpose, all the relevant provisions in the Act need to be kept in mind. The fact that Central Government has laid down the Policy to attract private and public participation and investment to have world class airport facilities at the major airports is not in dispute. Unless there be anything contrary in the Act, the Policy needs to be viewed as a promise so that the ultimate bidders and investors may feel secure and confident of a fair treatment after they have agreed to make or made heavy investments. The concession offered through any Agreement or Memorandum of Understanding or even otherwise needs to be viewed accordingly. The role of Central Government under the Act in the matter of functions of the Authority is

indeed limited but Section 42 vests power in the Central Government to issue to the Authority, from time to time, such directions as it may think necessary in the interest of factors enumerated i.e. sovereignty and integrity of India, the security of state, friendly relations with foreign states, public order, decency or morality. Additionally, it is also provided that the Authority shall, in exercise of its powers and functions, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time. Reading the sub-clause (vi) in Section 13(1)(a) together with Section 42, it is apparent that the Authority is ultimately to be bound by directions on Policy as may be given by the Central Government in the manner indicated in Section 42. Drawing a parallel, it is also apparent that the concession offered by the Central Government, specially those relating to policy matters must receive due respect by the Authority unless it comes to the conclusion that what is being claimed as a concession is not provided as a concession at all or that the direction does not relate to any question of policy. However, if the Central Government is so inclined, it can decide whether a direction is one of policy or not and then as per Section 42(3) such decision shall be final, at least to bind the Authority in exercise of its powers or functions under the Act. In view of such discussion, the provision in sub-clause (vi) does require a relatively more serious and careful consideration by the Authority. As indicated above, the claim based on this clause and on concessions offered by the Central

Government can be disregarded only on limited counts. Since a contractual right/claim has the backing of law, it deserves clear respect. But such claim is bound to be ignored in a situation where the Authority finds that the claimed right/concession is in teeth of or contrary to any express provision in the Act or against what flows as a mandate from the provisions in the Act by necessary implications. Such finding to be lawful must be based on another finding that the conflict is irreconcilable.

37. Some of the major issues raised on behalf of DIAL relate to and arise from principles of tariff fixation enunciated in Schedule 1 of SSA. Hence its terms need to be noticed. The exercise for calculating the Aeronautical Charges in a shared TILL system begins with the target revenue (TR) which has been made dependent upon a calculation required to be made as per the given formula with several factors. The regulatory base (RB), the weighted average cost of capital(WACC), operation and maintenance costs (OM), depreciation(D) and corporate taxes(T) constitute five important factors and have been clearly defined. They add to each other as per the formula to constitute the target revenue but their added value requires to be subtracted by a particular amount shown as 'S' in the formula. 'S' represents 30% of the gross revenue generated by the JVC from the Revenue Share Assets. The target revenue is reduced by this amount with a further clarification that the costs in relation to such revenue shall not be included while calculating

Aeronautical Charges. The Revenue Share Assets have also been defined to 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 Fees etc.). The detailed definitions of all the related symbols form part of Schedule 1 which has already been extracted earlier. The calculation of Aeronautical Charges also requires working out inflation and X factor. The X factor is to be solved through an equation which uses all the factors already noticed earlier along with Aeronautical Charges. It is a suitable multiplier to serve a necessary purpose. Schedule 1 also provides a formula to calculate the maximum average Aeronautical Charge (price gap) in a particular year. It identifies CPI as the average annual inflation rate as measured by changes in the All India Consumer Price Index (Industrial Workers) over the regulatory period.

38. Before deciding specific issues in the light of rival submissions, it will be useful to keep and we have indeed kept in mind the submissions advanced on such issues on behalf of all the parties in these appeals as well as by Mr. Krishnan Venugopal, learned senior advocate, who sought intervention on behalf of Mumbai International Airport Ltd. (MIAL). Although, we did not agree to such invention because of practical reasons and requirement to decide these appeals in a time

bound manner, we granted him time to address us on general issues of law relating to various factors involved in the process of tariff formulation by TRAI.

39. Mr.Gopal Jain, learned senior advocate has supported his various submissions and criticism of the impugned tariff notification by taking a stand that the tariff proposal submitted by DIAL was based upon capital costs, operational expenses, taxes paid etc. and was supported by reports and views of experts, both international and Indian. He pointed out that the project cost was actually Rs.12,857 crores but AERA followed its order on the issue of Development Fee and reduced it to Rs.12,503 crores. He criticized the approach of AERA by asserting that the views expressed by it in its Consultation Paper was more or less adopted in the final order in an obstinate manner and hence AERA is guilty of pre-judging the matter and of determining the tariff – (i) without following the principles and methodologies set out under OMDA and SSA; (ii) without taking into account materials and documents submitted by DIAL; (iii) without following the principle of transparency mandated by Section 13(4) of the Act; and (iv) without indicating cogent reasons supported by documents to sustain its orders. After taking us through the contents of tariff proposal of DIAL, Consultation Paper issued by AERA, relevant parts of OMDA and SSA and the impugned Tariff Order, he criticized the rate of return on equity permitted by AERA while determining WACC. He also vehemently pleaded for more reasonable return on

Refundable Security Deposit(RSD) which DIAL invested for meeting the cost of project. According to him, zero percent return on such amount is highly unreasonable because this amount, according to him, required to be treated as quasi-equity or debt. He also criticized AERA for taking a wrong view of tax component and granting no benefit by taking into account the actual tax liability. According to Mr.Jain, the tax liability was required to be calculated theoretically only on the basis of aeronautical income and expenses such as interest component, O&M and depreciation related to Aeronautical Service. The profit, as per submission, should pertain to Aero Services and Aero Assets and tax should have been calculated by reducing the income from the expenses relating to Aeronautical Services. By comparing different expert reports on components of Capital Asset Price Model (CAPM), such as KPMG Report, Leigh Fisher Report and SBI Caps Report with the Report as well as revised Report of National Institute of Public Finance and Policy (NIPFP), an attempt was made to show that AERA has wrongly not placed reliance upon KPMG and Leigh Fisher reports submitted by DIAL or even upon SBI Caps Report obtained by AAI and has placed undue reliance upon reports obtained by it from NIPFP. It has been vehemently argued that the rate for the purposes of CAPM given by SBI Caps Report was 18.5% - 20.5% and at least that rate should have been preferred instead of leaning heavily on the views of NIPFP which suggested rate of 11.6% - 13.30% in its revised

Report, and ultimately fixing the rate at 16%. The plea is to raise this to at least at 18.5% as suggested by SBI Caps. The conclusions of AERA in respect of Debt-Equity Ratio and Asset Beta as well as Equity Risk Premium as components of CAPM have also been criticized on the same lines by criticizing the approach and Report of NIPFP.

40. On behalf of DIAL an issue has been raised with regard to Base Airport Charges (BAC) and a claim has been made for nominal increase by 10% of BAC every year, even after grant of 10% increase by way of incentive for the third year, on the basis of relevant provisions of the SSA. The calculation of CPI – X has been held to be erroneous on the ground that X factor had to be determined independently without taking into account the inflation index. Only thereafter, while determining the Aeronautical Charges, the inflation indexing should have been done for all the five blocks or factors including on RAB depreciation and taxes whereas AERA has done it only in respect of two regulatory blocks, viz., O&M costs and Non-Aeronautical Revenues. In other words, the DIAL's case is that CPI is to be included over and above X factor in view of the structure of the formula provided in the SSA. By placing reliance on the provisions of OMDA, an issue has been raised that AERA should not have treated Fuel Throughput Fee as one from Aeronautical Service rather it should have been accepted as a fee for a Non-Aeronautical Service and hence only a part of the revenue from such fee

could have been used for the purpose of cross-subsidization as a part of 'S' factor. Similar issue and criticism has been raised in respect of treatment of revenue from Cargo and Ground Handling. According to DIAL, in view of provisions of SSA and OMDA these should have been treated as Non-Aeronautical Services and AERA has erred in taking a different view.

41. On behalf of DIAL, almost every factor determined by AERA has been criticised, be it the component RAB, closing RAB, the return on capital taxes or total value of 'S' or determination of CPI – X. It is emphasized that originally in its proposal, DIAL had sought tariff increase of 629% which was subsequently revised to 874% but AERA has determined X factor to be 345.92% only. It has been alleged that this has led to a cumulative loss of Rs.969.86 crores to DIAL as on 31.03.2014 and hence it amounts to negative return of 8.46% on equity (for First Control Period).

42. On behalf of DIAL, a large number of case laws comprised in three volumes were filed but learned senior counsel, Mr. Jain has, in course of arguments, referred to only some of them. The case of **Harakchand Ratanchand Banthia Vs. Union of India & Ors. – (1969) 2 SCC 166** was referred to show that policy occupies an important place and the policy needs to be ascertained by finding out the object which was intended to be achieved by the particular policy. For this, few sentences at the end of paragraph 6 were relied upon in which importance of

object intended to be achieved by a statute was highlighted in the context of challenge to a law as violative of Article 14 of the Constitution. The principle read in the context noted above is beyond any cavil. **Vodafone International Holdings Ltd. Vs. Union of India – (2012) 6 SCC 613** and particularly paragraph 186 thereof was also referred to. That matter concerned a dispute under the Income Tax Act and the appellant was resisting attempt of tax authorities to tax certain gains as capital gains. The main judgment by two learned judges decided the appeal in favour of the appellant with which the third learned Judge, Radha Krishnan, J., concurred and added his own views. In the process, in paragraph 186, he observed that our regulatory laws lacked in certain aspects and that "certainty in law in dealing with such cross-border investment issues is of prime importance……". It is a general observation for the benefit of lawmakers, particularly in respect of regulatory laws. "Certainty" in the context of framing of tariffs is a tough order. Though the principles are well enumerated, various factors have been left to be worked out on the basis of a prudent exercise by adopting reasonable approach based upon available facts, figures and data. Most of the factors determined by the regulator while framing tariff for a period of 5 years (except WACC) are therefore, clearly acknowledged to be an honest attempt to reach at the best result with clear admission that in the following Control Period, truing-up shall be done to introduce necessary corrections so as to achieve the

objects of framing tariffs by repeated and sustained efforts to arrive at the best tariff which may take care of the object of such exercise.

43. Reliance has been placed upon judgement in the case of **Gherulal Parakh Vs. Mahadeodas Maiya & Ors. – AIR 1959 SC 781** to point out that in paragraph 23, the Apex Court considered views of foreign courts as well as Indian courts to uphold the principle on which a contract can be treated as void on the ground of being against public policy. The court cautioned that the doctrine of public policy is capable of being extended by interpretation but it is advisable in the interest of stability of society not to make any attempt to discover new heads under the garb of public policy. It was reiterated that "the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy;……". It is useful to note here that this proposition has not been debated, mainly because the respondents have not invoked the principle of public policy. The arguments advanced on behalf of the respondent have rested on the premise that the agreements; OMDA and SSA, wherever compulsorily required, must give way to the provisions of the Act. This aspect has already been dealt with earlier and largely the submissions advanced on behalf of the DIAL have been upheld.

44. In support of the aforesaid plea that the sanctity of contracts needs to be protected especially when one of the parties is Government or its instrumentalities, otherwise the confidence of the public and international community in the functioning of the Government will stand eroded, reliance has been placed upon Para 107.2 of judgment of the Apex Court in the case of **ITC Ltd. Vs. State of U.P. – (2011) 7 SCC 493**. For the same purpose, reliance has been placed on paragraph 42 of the judgment in **Delhi Development Authority Vs. Joint Action Committee – (2008) 2 SCC 672** and paragraph 16 of the judgment in **Markfed Vanaspati & Allied Industries Vs. Union of India – (2007) 7 SCC 679**. In the latter judgment, paragraph 16 contains an extract from the book "Russell on Arbitration", the purpose being to highlight that contract should not be contrary to public policy but it must be kept "in mind that the paramount public policy is that freedom of contract is not likely to be interfered with". This was approved by the Apex Court in the context of Indian Arbitration law.

45. In the judgment in the case of **Annakapalla Coop. Agricultural & Industrial Society Ltd. Vs. Union of India – (1973) 3 SCC 435**, the Apex Court was, *inter alia*, concerned with principles relating to price fixation of sugar under relevant Levy Sugar Supply Control Order made under Section 3 of the Essential Commodities Act 1955. In paragraph 30, which has been referred to, notice was taken of various studies on price fixation in general and relevant part of a book

were referred which, *inter alia*, read – "Generally pricing should be such as to increase production and sales and secure an adequate return on capital employed". This is too general a proposition and not of much help when all the parties express agreement with the same. For the same principle, reliance has been placed on paragraph 31 of the judgment in the case of **ONGC Vs. Association of Natural Gas Consuming Industries of Gujarat & Ors. – (1990) SUPP SCC 397**.

46. On the requirement and standards of transparency in the orders of a statutory regulator, reliance has been placed on **Cellular Operators' Association of India(COAI) & Ors. Vs. Telecom Regulatory Authority of India – (2016) 7 SCC 703**. In paragraphs 80 to 92 the issue of transparency has been discussed with great detail and care. In fact, the definition of transparency arising from the provisions of Section 13(4) of the Airports Economic Regulatory Authority of India Act (the Act) were extracted in paragraph 80 and approved in the following paragraph by holding that it provides a good working test of transparency even for the purposes of Section 11(4) of the TRAI Act. Since the provisions in the Act are very clear, we are unable to fathom the purpose of citing this judgment. On facts and also from the chronology of events noted, we do not find that any case of lack of transparency is made out against AERA in the process passing the impugned tariff order.

47. Learned senior counsel for DIAL has next highlighted the meaning and value of expert opinion. For that purpose, reliance has been placed on paragraphs 16 and 18 in the case of **Ramesh Chandra Aggarwal Vs. Regency Hospitals Ltd. & Ors. – (2009) 9 SCC 709**. That case arose out of an order passed by the National Consumer Disputes Redressal Commission rejecting the claim of the complainant for compensation on the alleged ground of medical negligence. While considering the requirements for the admissibility of expert evidence, it was spelt out that first requirement is the need of an expert evidence because of the scientific or specialized question involved. The other requirements for admissibility were that the expert must be recognized for its expertise in the field, the evidence must be based on reliance principle and the expert must be qualified in that discipline. After extracting the provisions of Section 45 of the Evidence Act dealing with opinions of experts, in paragraph 18 it was specifically highlighted that an expert must be one who has made a special study of the subject or acquired a special experience therein and thus has adequate knowledge of the subject. In the subsequent paragraphs, it has also been highlighted that a court forms its own judgment after going through the materials placed by the experts; expert is not a witness of fact and without examining the expert as a witness in court, no reliance can be placed on an opinion alone. Clearly, the said judgment dealt with the functions of a pure adjudicatory Tribunal in an adversarial litigation. The

observations and discussions in that situation cannot be appropriately imported in the present case where AERA is performing the functions of a statutory regulator and the Tribunal is exercising appellate jurisdiction over a decision which is not really adjudicatory but patently regulatory in nature. The technical requirement of an expert under the Evidence Act, therefore, will not be attracted to the present proceedings. However, the rules of transparency and fairness have to be observed by the regulator. The decision/order should show that whatever materials, including those that were brought on record as expert opinion have been taken note of adequately and discussed appropriately before coming to a final conclusion on the issue involved.

48. Paragraph 39 of **Shivashakti Sugars Ltd. Vs. Shree Renuka Sagar Ltd. & Ors. – (2017) SCC Online SC 602** was placed by learned senior counsel for showing that in this recent judgment the Apex Court has observed that now law is an inter-disciplinary subject and that interface between law and economics has become more relevant in today's times.

49. Judgment in the case of **Cellular Operators Association of India & Ors. Vs. Union of India – (2016) 7 SCC 703** was referred to for showing that it has noted and approved in paragraph 78 the judgment in the case of **Union of India & Anr. Vs. Association of Unified Telecom Service Providers of India (AUSPI) & Ors. – (2011) 10 SCC 543** for highlighting the significance of a contract

between the parties even where the relation is through a licence under a statute such as the Telegraph Act.

50. Reliance was placed on **Consumer Online Foundation & Ors. Vs. Union of India & Ors. – (2011) 5 SCC 360** to support a general submission that AERA has the power to levy Development Fee in respect of the Indira Gandhi International Airport, New Delhi and some other airports as well. This proposition is not relevant in the present proceedings and further no party has raised any rival contention.

51. It may be noticed here that this Tribunal's judgment in the case of **Zee Turner Ltd. Vs. TRAI & Ors. – (2010) TDSAT 905** has been relied upon by learned senior counsel for DIAL in course of reply. He relied upon several observations to submit that if any aspect of the Tariff Order is found unsatisfactory, the proper course would be to direct AERA to take-up the process afresh by taking the relevant factors into consideration. For same purpose, reliance was placed on judgment of TDSAT in **Indian Broadcasting Foundation, New Delhi & Ors. Vs. TRAI – (2015) SCC Online TDSAT 1328** and upon an unreported judgment dated 27.04.2012 of the Appellate Tribunal for Electricity in Appeal No.187/2011(**Ms. Champcast Sanmor Ltd. Vs. Joint Electricity Regulatory Commission & Anr.**).

52. Learned senior counsel for DIAL placed reliance on paragraph 51 of judgment of Hon'ble Supreme Court in **Nabha Power Ltd.(NPL) Vs. Punjab State Power Corporation Ltd.(PSPCL) – 2017 SCC OnLine 1239** in support of a submission that a multi-clause contract is required to be understood and interpreted in a manner so that any view, on a particular clause of the contract, should not do violence to another part of the contract. That case involved a dispute requiring pure interpretation of the terms of the contract. The principle that the entire contract should be read harmoniously is a salutary one but in the present case really there is no such dispute which requires harmonious reading of all the parts of the contract. But the principle noted above is well settled in law. No case law is required to be noticed on the submission that in a regulatory regime, the terms and conditions imposed by the regulator should be certain and unambiguous. With a view to elicit more respect to OMDA and SSA, reliance has been placed on **Nutan Kumar & Ors. Vs. IInd Additional District Judge & Ors. – (2002) 8 SCC 31**, in support of the proposition that "unless the statute specifically provides that a contract contrary to the provisions of the statute would be void, the contract would remain binding between the parties and could be enforced between the parties themselves." It may only be clarified here that the aforesaid observation was in the context of a suit for ejectment filed by a landlord on the ground of non-payment of rent. In that context, the law laid down in the case of **Nanakram Vs.**

Kundalrai – (1986) 3 SCC 83 was reiterated that in the absence of any mandatory provisions obliging eviction in case of contravention of the provisions of the Act the lease would not be void and shall be binding on the parties for observing the conditions of lease. In other words, every violation of statutory provision will not render a lease void. In the present case, it is not in dispute that the contract clearly provides that rights of the parties shall be subject to the law that may be in effect in India.

53. 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.

54. Before taking note of arguments and submissions in respect of aforesaid grievances and issues on behalf of other parties opposed to DIAL, it will be useful to notice the general submissions made by Mr.Krishnan Venugopal with a view to prevent any apprehended prejudice to MIAL whose appeal against another tariff order is pending for hearing before this Tribunal. The issues and submissions raised by him are generally on the same lines as submitted on behalf of DIAL. In particular, he compared the various principles of tariff formulation in Schedule 1 of the SSA with Section 13(1)(a) of the Act with the help of a chart. The purpose of the comparison was to point out that various elements of Section 13(1)(a) of the Act are derived largely from the principles mentioned in Schedule 1 of the SSA. The sub-clause (i) under clause (a) of Section 13(1) mentions about the capital expenditure incurred and timely investment and improvement of airport facilities. It compares well and is similar to principle (1) of the Schedule 1 of the SSA which requires that the tariff fixation should be incentive based and that JVC will be provided with appropriate incentives to operate in an efficient manner etc. Sub-clause (ii) refers to the service provided, its quality and other relevant factors. This has been compared with principle (7) indicating service quality. Sub-clause (iii) has again been shown to be similar to principle (1) noted above as well as to principle (5) which mentions and highlights economic efficiency. Sub-clause (iv) mentions economic and viable operations of major airports and has been compared

well with principle (2) of Schedule 1 which refers to commercials and profits. It stipulates that in setting the price cap, AERA will have regard to the need for the JVC to generate sufficient revenue to cover efficient operating costs, obtain the return on capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved. Sub-clause (v) refers to the revenue received from services other than the Aeronautical Services. It has been shown through a chart that in the equation provided for calculating the Aeronautical Charges and the Revenue Target, the last factor 'S' is 30% of the gross revenue generated by the JVC from Revenue Share Assets and is required to be deducted for computing the Target Revenue. In other words, the exercise noted above is aimed to convey that there is no conflict between the principles of tariff fixation provided through Schedule 1 of the SSA and those contained in relevant clause and sub-clauses of Section 13(1) of the Act and hence the principles of the SSA are equally relevant for the purpose of tariff fixation by the Authority.

55. Mr. Venugopal explained the characteristics and the definitions of various classes of assets of the JVC. The difference between Aeronautical Assets such as runway, taxi way, apron and aircraft parking area and Non-Aeronautical Assets such as airlines lounges, retail shops, restaurants etc. were pointed out. In the chart furnished on this issue, cargo handling and ground handling services have been shown as examples of Non-Aeronautical Assets but they shall be dealt with

separately while dealing with specific issues relating to these two services. Distinction between other Assets and Revenue Share Assets such as Public Admission Fee which is a Non-Aeronautical Asset but required for provision of aeronautical related services as well as non-transfer assets as a separate class such as rentals and motels have also been highlighted. On the basis of a flowchart as per allocation of assets, it has been submitted that while keeping in mind the liability of DIAL to pay the annual fee to AAI and the provision for 30% cross-subsidy out of Revenue Share Assets, if reasonable return or earning required for the JVC is actually Rs.100/-, the gross incoming should be around Rs.176/- and hence great care is required on the part of regulator in determining the Target Revenue.

56. Mr.Venugopal submitted with emphasis that revenue from Aeronautical Services like cargo, ground handling and fuel throughput charges must always be treated as Non-Aeronautical revenue. As per submissions, the concessionaire as the Airport Operator provides the services and if it receives any revenue and charges for parting with any of the services, such revenue on account of parting cannot be treated as charge for rendering that service. He referred to paragraph 21.6.20 for pointing out the fact that from April 2009 to middle-November 2009, the cargo services were provided by the airport operator and thereafter it was concessioned out to another entity. Other judgments cited on this issue will be

considered hereinafter but the issue itself is interesting. The submission is that fee for services rendered and fee for other purposes such as for parting with a privilege need to be treated differently. While parting with the privilege, the fee is in the nature of a fixed fee or licence fee and not on the basis of *quid pro quo*. If service provider is DIAL, the revenue will be fee for service but once it outsources an Aeronautical Service, the fee for such outsourcing should be treated as Non-Aeronautical Revenue because in such a case, DIAL is not rendering any service.

57. On this issue, it is relevant to notice the definition of service provider in Section 2(n) of the Act – "unless the context otherwise requires, 'Service Provider' means any person who provides Aeronautical Service and is eligible to levy and charge User Development Fees from the embarking passengers at any airport and includes the Authority which manages the airport". The definition is clearly not exclusive and does not rule out an entity authorized by the Authority or a Concessionaire having a right to manage the Airport, to act as service provider. The submission noted above is not acceptable in view of the definition noted above and also on the touchstone of a basic principle that revenue from an Aeronautical Service has a definite connotation and purpose affecting the rights and interests of all the stakeholders. It cannot be permitted to be changed by a unilateral act of DIAL. Even if DIAL engages in providing an Aeronautical Service through its servants or agents, in essence the service must be deemed to be one provided by

DIAL. In view of definition noted above, the colour of revenue from Aeronautical Service cannot get changed to that of revenue from Non-Aeronautical Service, by an act of delegation or leasing out by the Concessionaire.

58. Judgment of the Supreme Court in **Commr. Hindu Religious Endowments Ltd. Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt – 1954 SCR 1005** has been cited for the purpose of showing that Government can realize two types of fees, one for granting a permission or privilege to a person to do something and the other when the Government takes fee in return for some positive work done or services rendered for the benefit of concerned persons. It has been pointed out that in the first type of cases, the fee for grant of permission or privilege predominantly has elements of tax. In the other case, there is an element of *quid pro quo* and such charge is predominantly a fee in the classical sense of the term. Case of **Har Shankar & Ors. Vs. Dy. Excise and Taxation Commr. & Ors. – (1975) 1 SCC 737** is referred only to explain the difference between a tax and a fee, as explained in paragraph 56 of the judgment. Case of **Nashirwar & Ors. Vs. State of Madhya Pradesh & Ors. – (1975) 1 SCC 29** has been cited because in paragraph 20, the court clarified that in the auction of the privilege of selling liquor, the licensee pays for the exclusive privilege of selling liquor or toddy from certain shops. It was highlighted that the licensee pays what he considers to be equivalent to the value of the right and such payment has no

relation to the production or manufacture of toddy but is related only to the right to sell as per the licence.

59. The aforesaid case laws have no application to a situation where an Aeronautical Service is outsourced to be performed by an agent or employee for a determined value or price. Whether the earning is by DIAL as a service provider or it comes to DIAL through its agent would make no difference as indicated earlier.

60. It is noted here that two judgments of foreign courts, one by Colorado Court of Appeals in the case of **Cantina Grill, JV Vs. City & County of Denver Country Board of Equalization – 292 P. 3d 1144 (Colo. App. 2012)** and the other of Supreme Court of Pennsylvania in the case of **Fidelman-Danziger Inc. Vs. Statler Management – 136 A. 2d 119** were also cited with the purpose of enlarging the proposition noted above so as to cover not only the case of a State but also of a private person parting with its privilege as a concessionaire. On going through the relevant parts of the first judgment, particularly paragraph 32 which was relied upon, it is found that the issue involved was different and related to ability of the concessionaire to generate independent revenue. In the other case, the last few paragraphs relied upon related to the question whether a liability for negligence or torts would be confined to the concessionaire or would cover others also who could be agents and in possession. The issue was not finally determined

but was left for another trial. The view taken earlier does not get affected by these two judgments.

61. Mr.Venugopal referred to the formula for Target Revenue with a view to highlight the symbol 'T' signifying taxes. As per definition of 'T' in the SSA, it is a corporate tax on earnings pertaining to Aeronautical Services in the illustration following the definition and formula for 'X' factor. As an assumption, the rate of corporate tax has been taken as "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". This was highlighted with a view to show that in the illustration the value of tax in all the years has been taken as a positive value. On that basis it has been submitted that intention of the makers of the SSA contract to reduce the aeronautical earnings by a positive value of corporate tax should not have been rendered otiose or redundant by the view taken by AERA in respect of taxation in various sub-paragraphs of paragraph 20. The AERA has taken a view that corporate taxes on earnings pertaining to Aeronautical Services can be taken to be positive only if taxes are actually paid and not when they are zero. In other words, the submission is that the tax liability should have been worked out in theory only in respect of earnings from Aeronautical Services instead of treating corporate taxes to be zero on the basis of actual/forecast tax liability of DIAL.

62. To further support his submissions that the provisions of SSA need to be interpreted in a manner so that 'T' should not invariably become zero or even less, he has relied upon **M. Arul Jothi and Anr. Vs. Lajja Bal (deceased) and Anr.- (2000) 3 SCC 723**. In paragraph 10 of that judgment the Hon'ble Supreme Court rejected a contention for giving a broader interpretation to a relevant statutory provision on the ground that if such interpretation is given, it would make specific terms of a valid agreement redundant. Once parties enter into a contract then every word stated therein has to be given its true meaning to find out rights and obligations of the parties. So long as law permits a contract and does not impose any statutory restrictions, the words of the agreement need to be respected fully. Same principle flows from the judgment of the Apex Court in the case of **Nabha Power Ltd. (supra.)**. In paragraph 30 of that judgment, this principle has been reiterated by referring to an earlier judgment. There can be no cavil with the proposition pointed out earlier even on the basis of paragraph 7 of the judgment in the case of **Amireddi Rajagopala Rao & Ors. Vs. Amireddi Sitharamamma & Ors. – AIR 1965 SC 1970**. The court pointed out that "It is a well-recognized rule that a statute should be interpreted, if possible, so as to respect vested rights, and such a construction should never be adopted if the words are open to another construction." Such view has already been discussed and accepted.

63. Mr. Venugopal reiterated the submissions that were advanced on behalf of DIAL in respect of Refundable Security Deposit (RSD). On the issue of directives by the Central Government, he submitted that as per settled principles of law, the nomenclature or label is immaterial. The letters or communications from Central Government need to be carefully examined by going into their substance and on such analysis, according to him, the communications relied upon by the DIAL will amount to be a directive from the Central Government and, therefore, binding on AERA. To support the aforesaid, reliance has been placed upon case of **Paschimanchal Vidyut Vitran Nigam Ltd. Vs. Adarsh Textile & Ors. – (2014) 16 SCC 212** and on the case of **Coal India Ltd. & Anr. Vs. Continental Transport & Construction Corpn. & Ors. – (1997) 9 SCC 258**. The case of **Paschimanchal Vidyut Vitran Nigam Ltd.(supra)** relates to fixation of tariff and grant of subsidy under the Electricity Act 2003. Under Section 108 of the aforesaid Act, it is stipulated that the competent authority, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing and on the issue whether such directions relates to a matter of policy involving public interest, the decision of the State Government shall be final. There is some similarity in the said provision with Section 42 of the Act but there is nothing in the said judgment to throw light on the issue whether the communications in the present case are by way of

directives under Section 42. In the case of **Coal India Ltd. (supra.)**, several contentions were raised to assail the judgment of the High Court but they all were negatived for different reasons. As appears from paragraph 21, an attempt was made to submit that since the letter from the Coal Controller to the Chairman-cum-Managing Director of CCL used the word "advice", it should not be treated as a direction for giving effect to transfer of allotments. The plea was turned down by holding that in substance the letter was a direction and binding upon CCL in view of clause 17 of the Colliery Control Order. In principle, there is no difficulty in accepting that mere nomenclature or label is not conclusive. Whether the Central Government has exercised its statutory powers to issue directions under Section 42 of the Act on questions of policy or not should be decided by taking into consideration the entire contents of the communications. If it relates to questions of policy and suggests a particular course of action, whether the word used is "advice" or "direction" will not make much of a difference. To that extent, the submission made by Mr. Venugopal on this issue is found to have substance.

64. Mr.Venugopal advanced submissions to support the case of DIAL in support of Fuel Throughput Charge from another perspective. He pointed out that Schedule 5 of OMDA enumerates various Aeronautical Services including the facility and service of "common hydrant infrastructure for aircraft fueling services by authorized providers". According to submissions, since such service existed

from before, therefore, there is actually no service by the airport operator. Lastly, he emphasized that the Authority while fixing tariff is required to keep the Preamble of SSA in mind wherein in "(E)", the smooth functioning and viability of the JVC and its enhancement has been recognized as one of the purposes under the OMDA and for that very purpose the Government of India agreed to provide some support to JVC. This aspect, however, need not detain us any further because the issue of OMDA and SSA vis-à-vis each other and also in the context of statutory provisions in the Acts has already been discussed earlier. The preamble is a valuable aid in interpreting the agreement, if need arises for interpretation.

65. The submissions advanced by Mr. Alok Dhir, learned counsel appearing on behalf of the Regulator, AERA, have been carefully gone through. It would be practical and save repetition and time if these are considered along with the submissions of all the parties who are opposed to the demands of DIAL and are either respondent in Appeal No.10 of 2012 or are appellants in the other appeals which are almost like cross-appeals. Those submissions are under consideration henceforth.

V. <u>Submissions and findings on specific issues:</u>

66. Mr.Ramji Srinivasan, learned senior counsel, appearing on behalf of respondent No.2 in Appeal No.10 of 2012 opposed the case of DIAL by submitting

that DIAL had made an exaggerated demand for 800% increase in the tariff and that put pressure on the Regulator who has allowed approximately 345% increase which itself is high and will put undue burden on the airlines and other stakeholders. He pointed out that Tariff Order is dated 12.05.2012 and since it is for the entire 5 years' period from 01.04.2009 to 31.03.2014, the rates for collecting the Targeted Revenue had to be unusually high to enable collection within a short period of 22 months. This heavy burden was unreasonable and unnecessarily placed upon the stakeholders. He also raised a technical issue that source of power for the Regulator is located in Section 13 of the Act which came into effect only on 01.09.2009 and hence the Regulator had no power or jurisdiction to determine tariff from an earlier date of 01.04.2009. As per this submission the tariff prior to 01.09.2009 could have been determined only by the Central Government because AERA was not constituted by then.

67. The aforesaid technical plea has been raised by learned counsels appearing for different respondents as well. In view of a clear and categorical reply that it has no direct bearing with the substance of a tariff formulation exercise, this plea is rejected outrightly for the simple reason that none of the parties are adversely affected on this account. Even if the rightful authority, the Central Government had initiated the exercise of tariff formulation for the period of 5 years beginning from 01.04.2009, it would have remained inclusive and liable to be criticized as an

action by an interested party and not an independent statutory authority. Once AERA was legally constituted from September 2009, the unfinished exercise could have been finished only by AERA. Clearly, the Central Government had the authority to consult independent expert body for the period between 01.04.2009 and 01.09.2009 when AERA came into existence. The exercise by AERA for that period has been within the knowledge of Central Government which has issued communications relating to tariff formulation. In absence of any objection from any quarters including Central Government, it would be futile to direct the Central Government to go through the formality of fixing tariffs for the 5 months between April 2009 and August 2009 when Central Government cannot complete that exercise in a meaningful and proper manner so as to avoid retrospectivity and delay. Further, the Central Government can always adopt and approve the studied view of AERA which it appears to have done by not raising any objections at any stage. Nothing has been pointed out in the OMDA and SSA against such action and Section 13 of the Act gives sufficient latitude in selecting an appropriate beginning of the first regulatory term of 5 years subject to rules of transparency and fairness.

68. Even the criticism that Tariff Order published in May 2012 is bad for acting retrospectively for the earlier period, in our view deserves to be rejected outrightly. Such objection raised by many of the counsels ignores the entire scheme of tariff

formulation which requires adequate consultation with all stakeholders and transparency. The stakeholders are aware of the need as well as principles relating to determination of tariff. Allowing a significant period to escape from the effect of periodic tariff revision, is bound to lead to accumulation of financial burden for all the stakeholders and shall cause difficulty to all, in addition to defeating the very object and purpose for which the entire exercise has to be undertaken. The purpose of OMDA and SSA as well as object of the Act leave no manner of doubt that same delay in finalizing the tariff for a specified period which has started to run will not require aborting the entire process. There is no adverse effect on any party and no vested rights are taken away if a holistic and broad view of the exercise is kept in mind. Rule against retrospective action by the executive is only to protect the vested rights getting affected from a back date. Benefits can always be granted even from an earlier date. The exercise of periodic formulation of tariff to serve the purposes of OMDA, SSA and the Act is to the benefit of all the stakeholders in the ultimate analysis and hence mere delay in finalizing the tariff order neither requires re-initiation of the entire process nor to apply the revised tariff only for a period which has yet not begun. Such a view is impractical, unwarranted by the provisions of the Act read in conjunction with OMDA and SSA and shall not help any of the stakeholders. Such objection is, therefore, also found to be without any substance.

69. The capital cost of the project determined by AERA in the context of Development Fee (DF) has been taken by the Regulator as the capital cost for tariff fixation also. Learned counsel for the respondents and appellants in appeals directed against DIAL have taken the stand that the project cost ought to have been determined separately. According to them, only efficient capital expenditure could have been taken into account for computing RAB. Hence, the Regulator had huge responsibility to ensure that the airport operator does not take advantage of its monopolistic existence. The Regulator, according to Mr.Srinivasan, had to act like an internal auditor and data supplied by DIAL should have been verified by AERA itself or through any independent agency selected by it. His stand is that there is no guarantee in the agreement as to any particular percentage of return on equity and, therefore, the Regulator had to first lay-down firm benchmarks so as to iron out the differences between various opinions of so called expert agencies, the range of variation being 14% to 24%. It was highlighted that 24% return is unjustified and 14% may not be arbitrary but if it is accepted, there should be clear reasons indicating why such return has been found adequate and/or proper. Since special emphasis was placed upon report of SBI CAPS on behalf of DIAL, Mr.Ramji Srinivasan submitted that this report fails to adequately factor in various risk mitigation measures such as (i) provision for independent Regulator and (ii) concessions offered by the Central Government.

70. To highlight the role of a statutory Regulator, Mr.Srinivasan placed reliance upon the case of **Cellular Operators Association of India & Ors. Vs. Union of India & Ors. - (2003) 3 SCC 186.** In that case although the main issue as to the legality of impugned judgment of TDSAT was answered in favour of the appellants with a finding that many relevant materials on the issue relating to level playing field had not been considered, the third Hon'ble Judge (S.B. Sinha, J) while concurring with the views of the Hon'ble Judges that the matter should be remitted back to the Tribunal, assigned various additional reasons in paragraph 14 onwards. Reliance has been placed on paragraph 33 which cannot be said to be the ratio of the judgment but definitely has persuasive force. Paragraphs 31, 32 and 33 enumerate the distinctive features and attributes of – an expert Tribunal like TDSAT, a judicial power in contrast to the reviewing powers of a writ court, and the width of jurisdiction exercised by the regulatory bodies, respectively. They may usefully be extracted hereunder:

> "31. The rule as regard deference to expert bodies applies only in respect of a reviewing court and not to an expert tribunal. It may not be the function of a court exercising power of judicial review to act as a super-model as has been stated in *Administrative Law* by Bernard Schwartz, 3rd edition in para 10.1 at page 625; but the same would not be a case where an expert tribunal has been constituted only with a view to determine the correctness of an order passed by another expert body. The remedy under Section 14 of the Act is not a supervisory one. TDSAT's jurisdiction is not akin to a court issuing a writ of certiorari. The tribunal although is not a court, it has all the trappings of a Court. Its functions are judicial.

> 32. In *Jurisdiction and Illegality* by Amnon Rubinstein a judicial power in contrast to the reviewing power is stated thus:
>
> > "A judicial power, on the other hand, denotes a process in which ascertainable legal rules are applied and which, therefore, is subject to an objectively correct solution. But that, as will be seen, does not mean that the repository of such a power is under an enforceable duty to arrive at that solution. The legal rules applied are capable of various interpretations and the repository of power, using his own reasoning faculties, may deviate from that solution which the law regards as the objectively correct one."
>
> 33. The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees."

71. For highlighting the role of an independent Telecom Regulatory Authority reliance has also been placed upon paragraph 31 of Supreme Court judgement in the case of **Delhi Science Forum Vs. Union of India – (1996) 2 SCC 405**. That case dealt with the National Telecom Policy of 1994 which professed to encourage private sector involvement and participation in Telecom to supplement the efforts of Department of Telecommunication, particularly in creation of a competitive industry of international standards. The grant of licences to various non-government companies to establish and maintain telecommunications system in the country was challenged through writ petitions before the Apex Court. The writ petitions were dismissed. The court noticed the practice of constituting regulatory authorities in almost all the countries of the world and also the Telecom Regulatory

Authority of India Ordinance 1996 along with the powers and roles assigned to TRAI under the Ordinance. The relevant part of paragraph 31 is almost prophetic in recording the views of the court thus:

> "……..The National Telecom Policy is a historic departure from the practice followed during the past century. Since the private sector will have to contribute more to the development of the telecom network than DOT/MTNL in the next few years, the role of an independent Telecom Regulatory Authority with appropriate powers need not be impressed, which can harness the individual appetite for private gains, for social ends. The Central Government and the Telecom Regulatory Authority have not to behave like sleeping trustees, but have to function as active trustees for the public good."

72. The views extracted above in two judgments of the Apex Court in respect of role of a regulatory authority like TRAI and the powers of an expert Tribunal like TDSAT deserve all the respect. One cannot help but agree that the Regulator has to harness the appetite for private gains so as to achieve social needs embodied in the policy. In the present case, the policy stands supplemented by relevant provisions of the two agreements, OMDA and SSA, and also of the Act. It is easier said than done that a Regulator like AERA should be an active and not a sleeping trustee. It shall always be a difficult task even for an active trustee to achieve the social ends for the public good on the one hand and to ensure required development by encouraging private sector involvement and participation for creating requisite infrastructure of international quality. The role of Regulator lies in carefully balancing of financial interests of the investors and at the same time

encouraging all the stakeholders to contribute their own share of services and finances so that end users are served well for reasonable fees and none is compelled to withdraw on account of impractical/excessive hike in fees and tariffs. Fortunately, the impugned Tariff Order of AERA dated 24.04.2012 even without the Index or tables etc. is an exhaustive and detailed order running into more than 350 pages, covering the whole of one of the Convenience Volumes (**Vol. – VII**). It has rendered decisions on 33 issues. Sufficient length of discussions and reasons are available in respect of all the 33 decisions at least to show application of mind to the core issues. Learned counsel for the parties have taken us through the discussions and reasons in respect of the contentious issues having bearing on the formulation of tariff. The same shall be dealt separately later as and when required.

73. According to Mr.Srinivasan, the letter of MOCA addressed to AERA in respect of report of SBI CAPS, should not be accepted as a statutory direction by MOCA. His submission is that the reports of various experts have been obtained by vested interests and therefore, should not be accepted on their face value as reports of independent experts. According to him, the report of NIPFP is more balanced and has rightly been appreciated by AERA. The letter of MOCA dated 12.03.2012 only refers to the report of SBI CAPS in which the desired Return on Equity is indicated in the range of 18.5% to 20.5% but the Government has

indicated nothing further to show that the issue was one relating to policy and therefore, as per Mr.Srinivasan the direction of the Government in paragraph 3 of the letter was only to consider the report in taking decision. This desire of Government that the report be "considered in taking decision", as per submission should not be treated as a binding direction of the Central Government in terms of Section 42 of the Act. It was pointed out that in paragraph 26.2.3 of the Tariff Order, the Federation of Indian Airlines' objection to the suggestion of SBI CAPS is recorded with a counter suggestion that the Return on Equity should abide by the return applicable to nationalised banks which would be in the interest of stakeholders and the consumers. A clear stand has been taken on behalf of FIA that on Issue No.26 i.e. Cost of Equity/Return on Equity (ROE), lengthy consideration by AERA is of no avail for coming to conclusion in paragraph 26.8.4 that since tariff is being determined for the first regulatory cycle and it will be an indicator to the prospective investors hence a value of 16% for Return on Equity would represent a sufficiently generous allowance, keeping in view the various uncertainties. The case of FIA is that DIAL has failed to supply any good materials to show that return applicable to nationalised bank is less or unviable. The view of the Authority (AERA) in paragraph 26.5.5 of the Tariff Order has been highlighted. In that paragraph, the Authority has extracted for its guidance the observations of the Supreme Court in **Union of India & Anr. Vs. Cynamide**

India Ltd. & Anr. – (1987) 2 SCC 720. In that case, it was observed that tariff fixation under a statute is quasi-legislative function and that "the ups and downs of commercials are inevitable and it is not possible to devise a fool proof system to take care of every possible defect and objection" (Paragraph 35 of the judgment). Paragraph 33 of the above judgment has also been relied upon by extracting 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." No criticism has been levelled to aforesaid understanding of the Authority and in that light it has been submitted that the decisions on the issues i.e. no return on Refundable Security Deposit (RSD), tax as per actuals, and determination of hypothetical asset base are be sound from all perspective. Same stand has been taken in respect of Base Airport Charges and the treatment of Fuel Throughput Charges as an Aeronautical Charge in the light of relevant factors as well as definitions in Section 2(a)(vi) of the Act.

74. Ms. Neelam Rathore, learned counsel appearing for respondents Nos.3, 6 and 9 in DIAL's Appeal No.10 of 2012 at the outset made it clear that she is in favour of adopting the arguments of Mr. Ramji Srinivasan, learned senior counsel for FIA but she also proceeded to elaborate her further submissions and pointed out various materials in quite some detail. She has also advanced similar arguments while appearing for Appellants Nos.1, 4 and 7 in Appeal No.11 of 2012.

75. To counter a criticism made by learned senior counsel for DIAL in respect of author's precautionary disclaimer in the Report of NIPFP, she drew our attention to similar disclaimers made at the very beginning of Leigh Fisher Report as well as the Report by SBI CAPS. Next, our attention was drawn to recital (B) of the OMDA agreement to highlight that AAI had decided to grant some of its important functions of operating, maintaining, developing etc. in respect of the Airport to the JVC in the interest of better management of the airport and/or overall public interest. This aspect has already been dealt with earlier and we have accepted that public interest cannot be ignored or lost sight of by AERA in its statutory functions including fixation of tariffs. Like all other counsels who opposed the prayer of DIAL, Ms.Rathore also highlighted the various provisions of OMDA including the scope of grant whereunder various tasks including finance have been entrusted exclusively to the JVC. It was also highlighted that Chapter XII of OMDA requires that the Aeronautical Charges levied at the airport shall be as per relevant provisions of the SSA. Schedule 1 of SSA containing principles of tariff fixation which have already been extracted earlier, were again highlighted in the context of provisions relating to commercials which permit the JVC to generate sufficient revenue to cover efficient operating costs. It has been highlighted that fanciful and imaginary operating cost cannot be permitted to be recovered. It was shown that AERA has dealt with this aspect and has also discussed the Reports on

the issue of cost of equity and fair rate of return/weighted average cost of capital (WACC). Various sub-paragraphs of Paragraph 26 of the impugned Tariff Order were referred to support the submission that AERA has considered all relevant factors before coming to important conclusions. It was pointed out that a mere look at the discussions in respect of Risk Mitigating Measures by Government of India and the Authority shows independent application of mind by the Authority. Paragraph 26.84 was highlighted to allege that the Authority has purposefully allowed a higher return on equity by giving somewhat dubious explanation that "a clear indication needs to be given to the prospective investors". The submission is that DIAL should be more than happy at 16% return on equity but instead it has preferred to come in appeal against even such generous determination in its favour. It was further submitted that a wrong impression has been sought to be created on behalf of DIAL and in fact the summary in Decision No.29 would reveal that in most of the items the Authority has not based its conclusions on the recommendations of NIPFP.

76. On the issue of Refundable Security Deposit belonging to the JVC which has been invested in the project to meet the shortcoming of finances, the claim of DIAL for return like that on equity was strongly opposed by Ms. Rathore. By referring to the definition of "equity" in OMDA, it was submitted that the interest free Refundable Security Deposit (RSD) does not meet the requirements of equity.

It was also pointed out that AERA has taken a reasonable stand that since RSD is not of any shareholder but is money of JVC itself, the same cannot be treated as equity. It was pointed out that under Chapter XIX of OMDA, the transfer assets which have yielded RSD shall, upon termination of the agreement again vest in AAI, free of all encumbrances. Therefore, RSD will have to be refunded back to the entities who have made this deposit, once the term of the agreement expires. Clause 2.3 of OMDA was pointed out for emphasizing that without the written consent of AAI, the JVC cannot hold any shares, ownership participation or any other ownership interest in any undertaking other than the Airport. However, the proviso to clause 2.3 permits certain kinds of investment for various activities as contemplated under OMDA or for developing a second Airport as per rights available under the SSA. At this juncture, it is relevant to notice that as per ESCROW Account Agreement, the amounts to the credit of the ESCROW Account can be invested in authorised investments which include fixed deposits in banks, subject to certain conditions. On the issue of Base Airport Charges as provided in Schedule 6 of SSA, learned counsel supported the decision of Authority.

77. The learned counsel, Ms. Rathore made more detailed submissions while appearing for the appellant in Appeal No.11 of 2012. She placed reliance on a Report of the Parliamentary Standing Committee on Airport Economic Regulatory

Authority Bill 2007 to point out that the Committee, *inter alia*, had recommended to the Government that the non-Aeronautical Services be also brought under the ambit of proposed Regulator and that the fuel supply infrastructure should be added and brought within the powers and functions of the Authority. A criticism was made that the project cost for the Airport in October 2009 was only Rs.8,975 crores but by March 2010, it was revised and enhanced to Rs.12,857 crores. The submission is that the Regulator should have examined this aspect carefully. The other important issue highlighted by learned counsel relates to the methodology adopted for determination of Aeronautical Tariff. As per submission, it was not done as per Section 13(1)(v) of the Act. The decision to have shared TILL and not a single TILL for tariff determination was also challenged as against the provisions of the Act. The ratio of 89.2% and 10.75% in allocation of Aero and non-Aero assets has been criticised, as also the calculation of the project cost. According to learned counsel, there was no adequate consultation with any of the stakeholders other than DIAL and AERA did not act in a transparent and independent manner. On the first two issues indicated above, learned counsel elaborated that AERA had placed reliance mainly on Section 13(1)(a)(vi) in place of sub-clause(v) while determining the tariff. It was also submitted that due to opting for shared TILL, the value of 'S' in the formula for determining Target Revenue stands limited only to 30% of revenue from Non-Aeronautical Assets. According to learned counsel,

this amounts to disregard of revenue received from services other than the Aeronautical Services although that should also merit full consideration under sub-clause(v) of Section 13(1)(a).

78. On the issue of calculation of project cost, another criticism has been levelled that only because order of AERA dated 08.11.2011 on Development Fee is under challenge, the Authority persisted in not excluding Rs.350 crores for another ATC Tower. On allocation of assets, the procedure was described as erroneous. The Decision No.3, particularly, paragraph 6.9 in the impugned Tariff Order was severely criticised on the ground of being ad-hoc in nature. It has been submitted that only for paucity of time, the commissioning of an independent study regarding allocation of assets should not have been deferred to the next Regulatory Control Period.

79. Learned counsel also criticised formula for determination of Target Revenue as given in SSA on the ground that as per the Act the cargo and ground handling services are required to be treated as Aeronautical Services and hence, the formula has become unworkable. Consultation between AERA and stakeholders other than DIAL was alleged to be ineffective and inadequate on the ground that such consultation began only after issue of Consultation Paper dated 03.01.2012 and in the earlier meetings only DIAL was included in the consultation procedure. The

criticism earlier levied by DIAL that tariff for the period of about 5 months between 01.04.2009 to 01.09.2009 was framed by AERA without jurisdiction, was reiterated. By referring to Rule 89 of the Aircraft Rule 1937, learned counsel submitted that determination of User Development Fee(UDF) under the impugned Tariff Determination Order was an exercise without jurisdiction.

80. Learned counsel placed reliance on judgment of Supreme Court in **West Bengal Electricity Regulatory Commission. Vs CESC Ltd. – (2002) 8 SCC 715** to highlight the importance of transparency and right of the consumer to be heard. Highlighting the ambit of this Tribunal's role as an appellate body, reference was made to various paragraphs in the judgment of Supreme Court in the case of **COAI (supra).**

81. Learned counsel sought to counter the submission made on behalf of DIAL that existing rights of a private party under a contract cannot be interfered with; by highlighting paragraphs 66 and 67 in the judgment of the Apex Court in **Mardia Chemicals Ltd. Vs. Union of India – (2004) 4 SCC 311**. In these paragraphs the court, in the given facts held that through legislative measures the existing rights of individuals may be adversely affected in larger public interest when it becomes necessary to achieve such an object. There can be no two opinions that by law, legislature can adversely affect vested rights of individuals. The issue in that case

was whether such an effect would invalidate an otherwise valid Act enacted by the legislature. Obviously, the answer was 'No'. Some other judgments were also cited on general principles such as: post-decisional hearing is not always good; and that for want of application of mind, act of a statutory authority may be held to be vitiated; and also the principle that a statute should be read in its context. These are well-established principles of law and hence it would not serve any good purpose to refer to all the judgments on these. Paragraph 21 in the case of **State of Jharkhand Vs. Govind Singh – (2005) 10 SCC 437** lays down that two principles of construction or interpretation of statute are well-established – one relating to *casus omissus* and the other that the statute should be read as a whole. It was pointed out further that a *casus omissus* cannot be supplied by the court except in the case of clear necessity and when reason for it is found within the statute itself.

82. Mr. Amit Kapur, learned counsel appearing of the appellant, Federation of Indian airlines (domestic airlines of India) in Appeal No.6 of 2012 has also argued quite at length with a view to criticise the impugned Tariff Determination Order on various grounds including the ground that it is leaning too much in favour of DIAL.

83. The stand of domestic airlines of India is not different from that of foreign airlines (the appellants in Appeal No.11 of 2012 and respondents in Appeal No.10

of 2012) and on whose behalf detailed submissions advanced by Ms.Neelam Rathore have already been noticed.

84. Mr. Kapur also referred to some relevant provisions of SSA and OMDA. He has filed written notes on retrospectivity citing various judgements such as **Delta Engineers Vs. State of Goa - (2009) 12 SCC 110** and **Securities Exchange Board of India Vs. Alliance Finstock & Ors. - (2015) 16 SCC 731**. These judgments follow the earlier precedents and do not warrant a different view on the issue of alleged impermissible retrospectivity of the Tariff Order. In paragraph 19 of the latter judgment, it was rightly highlighted that "the rationale in not permitting retrospective operation of laws is only to ensure that subjects are not adversely affected by creation of legal liabilities and obligations for a period already bygone." We have already held that the statutory provisions as well as the agreements required re-fixation of tariff and permitted the regulatory period to start from 01.04.2009. The discussions made earlier on this issue are reiterated. On the basis of various factors enumerated in Section 13(1)(a) and certain observations of a Parliamentary Standing Committee, it was argued that AERA should have opted for single TILL in place of shared TILL and ought to have treated the entire revenue whether received from Aero or Non-Aero services as one for determination of tariff. The argument is that provisions to the contrary in the SSA and OMDA deserved no respect in view of observations of the Parliamentary

Standing Committee and Section 13(1)(a)(v) which spells out – "revenue received from services other than the Aeronautical Services" – to be one of the factors requiring consideration in the task of tariff formulation. On the other hand, it has been argued at length by Mr.Venugopal and also by others supporting the impugned tariff that unless there be explicit provision in a statute for taking away a vested contractual right or at least there be such provisions which necessarily require such rights to be voided, the vested contractual rights cannot be ignored. Hence, it has been submitted in reply that the adoption of shared TILL by AERA is fully in accordance with law and permitted by clause (vi) of Section 13(1)(a). It was submitted that for Delhi International Airport only 30% of Non-Aero revenue could be taken into consideration as per the formula in the contract and the said view has rightly been followed because it creates a harmony between the contract and the statute. We find ourselves in agreement with this view. Hence, as per provisions in OMDA and SSA, particularly the formulae for Target Revenue etc., Cargo and Ground Handling charges have to be treated as Non-Aero Revenue. There is enough flexibility in the definition clause of the Act contained in Section 2 as noted earlier in paragraph 8, to permit this view in the light of context and the need to honour the rights/concessions under OMDA and SSA.

85. Written notes have also been submitted by Mr.Kapur in support of his submission that Aero assets have wrongly been raised to 89.25% of the total assets

when even as per Jacob's Report it should have been 84.10%. Correspondingly, the Non-Aero assets should have been 15.90% and not 10.75% as accepted by AERA without any clarification.

86. No doubt allocation of assets into Aero and Non-Aero category has high significance when the methodology adopted is of shared TILL. However, to be fair to the Authority, AERA in the impugned order has recorded in para 6.9 that it accepted the allocation suggested by DIAL only because of paucity of time to commission an independent study regarding allocation of assets. It has noted that if on proper analysis/examination pursuant to such study, the allocation made and costs adopted for the time being needed to be changed, the same would be done and the exercise of truing-up the allocation made and costs would be taken-up at the beginning of the next regulatory control period. This course was justified by AERA on the ground that any delay in the tariff determination would not be in the interest of the stakeholders because it would widen the gap between revenue requirement and actual revenue earned and would push the hike further for bridging the widening gap. The tariff determination exercise was thus not deferred further and for sake of convenience, an *ad hoc* view was taken as per suggestion by DIAL. The view taken by AERA on this issue is a possible and practical view. Considering the correction proposed in the future, it does not require any

interference. We direct AERA to undertake such an exercise for assets allocation at the earliest possible, if not already redone.

87. On the issue of project cost, the decision of AERA has been severely criticised on the same grounds noted earlier that even if the project cost at Rs.8,975 crores is accepted as proper and final in the light of MOCA's letter dated 09.02.2009, its further increase to Rs.12,503 crores should have been discarded by AERA. The increase has been criticised on the ground that it is a 43% increase claimed by DIAL in the 4th year of operation of the Airport. Reliance was placed on the principal Development Fee(DF) Order dated 08.11.2011 to comment that while the project cost in that order had been accepted as Rs.12502.86 crores only as a tentative estimate, the same figure has been accepted almost as final in the impugned Tariff Order.

88. On the other hand, on behalf of AERA, Mr.Dhir has taken a firm stand that in the task of tariff determination, the project cost can be looked at from a narrow hole, only to examine the incurred cost as per available records and see that it relates to the approved and essential parts of the Airport. According to him, this had to be done on the basis of accounts bearing certificates granted or approved by the Chartered Accountant. His clear stand is that such cost cannot be re-examined on the yardstick of efficient cost but has to be taken as the incurred cost only, as

appearing in the duly certified books of accounts. This submission appears to be weighty and deserves acceptance.

89. On considering the implications as well as the facts placed before us, we find no error in the approach of AERA noted above. It was also pointed out on behalf of AERA that issue of depreciation has been unnecessarily highlighted when the same was required to be dealt with as per provisions in the Companies Act and the same has been followed scrupulously. It would be relevant to mention here that while consideration the submissions advanced on behalf of appellant in Appeal No.6 of 2012 and recording our findings in the few proceedings paragraphs, we have taken note of submissions on all those issues also, as advanced by Mr.Alok Dhir, learned senior counsel representing AERA.

90. With a view to avoid any confusion, it is made clear that on the issue of alleged illegality in making the tariff effective from 01.04.2009, Mr.Dhir pointed out that this issue is mentioned only as a ground in Appeal No.6 of 2012 but no prayer has been made or relief sought on this ground. He pointed out the reasons for the view taken as mentioned in paragraphs 63 to 72 of the Consultation Paper (Vol. VIII). He also pointed out from the impugned order (Para 3.2) that no objection had been taken to such date. It was also submitted, as already noted and accepted that it is a procedural matter which does not affect any rights in the long

run and since nobody would gain, public interest also does not require changing the dates. He also justified adoption of shared TILL principle and asset allocation for the purpose of tariff determination by referring to relevant discussions. All these submissions were kept in mind while expressing our views in the preceding paragraphs.

91. It has also been urged on behalf of appellant FIA that AERA did not ensure compliance with principles of natural justice and transparency and thus acted in violation of provisions in the Act passing the impugned order. In his written submissions, Mr.Kapur has pointed out that while there were at least four meetings between AERA and DIAL leading to issuance of the Consultation Paper but thereafter the stakeholders were afforded only one meeting for airing their views and objections etc. He tried to make out a case of disparity in affording opportunity of hearing. He also raised a grievance that the Federation of Indian Airlines (FIA) vide letter dated 08.02.2012 had requested AERA to provide some missing documents mentioned in the Consultation Paper but that request was declined by AERA through a letter dated 14.02.2012. A perusal of AERA's reply shows that the subject of the letter was "extension of time along with providing copies of various documents/correspondences." By that letter, the request for extension of time was declined after providing through a chart the comments of the Authority with respect of documents sought. Most of the documents were shown

to be supplied and few as irrelevant. The explanation with respect to documents has not been separately challenged and hence, the explanations or reasons in respect of various documents deserve to be taken as sufficient explanation. This issue need not be discussed any further. But it is made clear that request for supply of relevant documents by a stakeholder should ordinarily be accepted. The stakeholder should also ensure that the request is made at the earliest without requiring extension of time schedule.

92. So far as disparity in the number of meetings held between AERA with DIAL as against that held with stakeholders is concerned, the principle of fairness, natural justice and transparency do not require mathematical calculations and equations. They are need based. Since DIAL had to submit with all details its final proposal for tariff revision for purposes of consultation with stakeholders and for eliciting their comments, the nature of task required several preliminary meetings between DIAL and AERA. At that stage, when the Consultation Paper was not final, inclusion of other stakeholders in the meetings would not have served any meaningful purpose. What is more important is quality of consultation and opportunity and not mere quantity as reflected through number of preliminary meetings. There is no doubt that the principles of fairness and transparency are very valuable and must be scrupulously observed by the Regulator in the exercise of fixation of tariffs. In the present case however, the materials do not warrant

any adverse comment on these scores. Opportunity of hearing was provided in more than one ways to all the stakeholders by initiating the process with issuance of Consultation Paper. Thereafter, in order to derive any advantage on the ground of non-compliance with principles of natural justice, the appellants must plead and prove that they have suffered prejudice in their defence in offering comments. No such case of prejudice has been made out. The impugned order itself is a bulky document incorporating all the relevant facts and different views as well as the reasons for adopting or approving a particular view. Thus, on the whole the tariff fixation exercise by AERA cannot be criticised on the ground of violation of natural justice or lack of transparency.

93. On behalf of Federation of Indian Airlines (FIA) as well as some other appellants, our attention has been drawn to the last part of the impugned order wherein a request of DIAL for determination of User Development Fee (UDF) has been accepted without much discussion. Such determination has been severely criticized by the appellants (Airlines) as an exercise without jurisdiction. This fee is levied on embarking as well as disembarking passengers. The criticism is that there is no legal justification for such a levy and the purpose appears to be to bridge the revenue shortfall which is not provided for or authorised by OMDA, SSA or the Act. DIAL has placed reliance on Rule 89 of Aircraft Rules 1937 and the provisions in the Aircrafts Act 1934 to justify levy of such fee. The main

submission against such levy is to the effect that since the levied amount is now placed or entrusted with the airport operator which is a private concessionaire, it could be permitted only by suitable provisions in the agreements or the Act. It has also been submitted that the financial model under which the bids were invited and submitted stands modified and changed in favour of the concessionaire and such favour is not warranted either by the agreements or the statutory provisions in the Act.

94. On facts there is no disagreement that a levy known as Development Fee (DF) is authorized by Section 22A of the Airports Authority of India Act 1994 (AAI Act). The Authority has its own fund and all receipts of the Authority are required to be credited to such fund. Section 22A was inserted by Act 43 of 2003. This Section permits levy of the Development Fee at the rate as may be determined under clause (b) of sub-section (1) of Section 13 of the Act. The purpose for which this fund can be utilized is also mentioned in the said provision. The major purpose is to fund or finance the costs of upgradation, expansion etc. of the Airport at which the fee is collected or even for establishment or development of a new Airport in lieu of the Airport at which it is collected or for investment in the equity shares of companies engaged in establishing, developing etc. of a private Airport in lieu of the Airport referred earlier. There is no dispute with respect to jurisdiction, power and purpose of such Development Fee(DF), however, as noted above, there

is serious challenge to determination of User Development Fee (UDF) for the purpose of collection, realisation and utilisation by DIAL. Section 13(1)(b) provides that AERA shall discharge the function of determining the amount of the Development Fee in respect of major Airports. In exercise of that power, it has passed orders separately determining the Development Fee for the Delhi Airport which is a major Airport. Interestingly, UDF is provided under Rule 89 of the Aircraft Rules 1937, framed under the Aircraft Act, 1934. Rule 89 was amended in October 2009 and reads as under:

> "**89. User Development Fee** — The licensee may, -
>
> (i) levy and collect at a major airport the User Development Fee at such rate as may be determined under clause (b) of sub-section (1) of section 13 of the Airports Economic Regulatory Authority of India Act, 2008;
>
> (ii) levy and collect at any other airport the User Development Fees at such rate as the Central Government may specify."

95. Before amendment the licensee was entitled to collect UDF at such rates as the Central Government may specify. But now the determination is required to be done by AERA under clause (b) of sub-section (1) of Section 13 of the Act itself. A close scrutiny of Aircraft Rules shows that a number of amendments were made recently between November 2004 and December 2016, particularly in Part XI of the Rules which governs Aerodromes and their licensing. A provision in Rule 78 contains a prohibition by providing that no person shall operate or cause to be

operated any flight from a temporary Aerodrome or an Aerodrome which has not been licensed or approved etc. The conditions governing the grant of licence prescribed by Rule 83 makes a licensee empowered to manage and operate the Airport subject to conditions. The Rules do not define UDF nor mechanism for its regulation. Who shall retain UDF and for what purpose, is not clear but since the licensee is empowered to levy and collect it, it can perhaps be presumed that the licensee is entitled to use it also. In the present case, DIAL is levying and collecting UDF under the provisions of aforesaid Rules. There is no mention of UDF in the Aircraft Act 1934. It is provided only through the Rules.

96. There appears no merit in the case of Airlines that UDF is being levied by DIAL and determined by AERA without any jurisdiction or authority of law. However, there is enough substance in the submission that the financial arrangement created under the two major agreements, OMDA and SSA take note of only the Development Fee(DF) and not the User Development Fee (UDF). There is no discussion or even disclosure during arguments as to how the income accruing to the concessionaire, DIAL from UDF is being used in the formula and in the mechanism for determination of Aeronautical Tariff of DIAL. This income, if not transferred in favour of any governmental agency discharging functions under the Aircraft Act 1934, and if retained by DIAL in accordance with law, must be taken into account for the purpose of reducing/balancing the Targeted Revenue

suitably. AERA is directed to take it under consideration and act accordingly in future when the next exercise under Section 13 of the Act for determination of Aeronautical Tariff is undertaken. Mr.Kapur placed reliance on paragraph 18 in **M. Chandru Vs. Member-Secretary, Chennai Metropolitan Development Authority & Anr. – (2009) 4 SCC 72** to highlight a well-established principle of delegation that a creature of statute can make a valid delegation only if there exists a provision for that in the statute. In view of statutory provisions noted above, the aforesaid principle of delegation is not found relevant in the context of issues under consideration relating to UDF.

97. It may be useful to note that on behalf of MOCA, Ms. Anjana Gosain has taken a clear stance that the impugned Tariff Order has been accepted by the Government and the Government has no other role. In the course of hearing of different appeals, she took a further stand that although the Central Government has powers under Section 42 of the Act to issue directions to the Authority but as per stand of the Government, the letters of MOCA dated 30.05.2011, 09.03.2012 and 12.03.2012 contain simple exchange of views and are not a directive so as to be binding under Section 42 of the Act.

98. All the above mentioned three letters are annexures to the counter affidavit of Union of India (MOCA) in Appeal No.6 of 2012. The letter of 30.05.2011 contains the opinion of Central Government as to whether various agreements such

as OMDA, SSA etc. entered between concerned state organisations and the JVCs for restructuring and modernization of Delhi and Mumbai Airports should be considered as the "concession offered" by the Central Government and the answer in the letter is in the affirmative; those agreements have been approved by the Empowered Group of Ministers i.e. the Central Government and therefore, need to be considered as concession offered in terms of Section 13(1)(a)(vi) of the Act. This letter meets the attributes of a directive under Section 42 of the Act. The letter dated 09.03.2012 refers to the Consultation Paper in respect of determination of Aeronautical Tariff for IGI Airport, Delhi. It seeks to clarify the stand of the Central Government that although Cargo and Ground Handling Services are being treated as Aeronautical Services as per Section 2(a) of the Act but under the provisions of OMDA and SSA these are categorized as Non-Aeronautical and therefore, in view of Section 13(1)(a)(vi) of the Act due consideration needs to be given to the Concession Agreement and hence, the revenue from these services may be treated as Non-Aeronautical revenue. In Para 6 of that letter there is a clear direction that AERA should adhere to the relevant provisions of the contractual agreements in the process of determination of tariffs. This letter, although at some places appears to be clarificatory, but in its entirety and on complete reading appears to contain directions. Though it is signed by Under Secretary to the Government of India, in Para 7, it is mentioned that it has been issued with the

approval of Hon'ble Minister of Civil Aviation. The construction of such a letter cannot depend on use of a word here or there. Even if the word selected is "request", a consideration of the document in its entirety discloses it to be really a direction and issued with that purpose in mind. The Central Government may have to disclose or assert that it is exercising its statutory powers to issue directives through such a letter, only if the Authority chooses to take a different view. It is always the contents and not the label which will determine the purpose and nature of such a communication between two statutory authorities. The last letter dated 12.03.2012 relates to advice of M/s SBI CAPS on fair rate of return on equity. The MOCA has noted the relevant part of the report disclosing the range of 18.5% to 20.5% as reasonable for airport section in India and also the return recommended for quasi-equity that it should be above that of debt and below that of equity. However, in substance, as mentioned in paragraph 3, it only observes that the report may be considered in taking decision. The Act itself requires AERA to consider so many relevant materials and hence this letter, considered in its entirety, is clearly not a directive.

99. While considering various issues, in the earlier part of this judgment, the submissions advanced by Mr.Dhir appearing for AERA have been kept in mind but before taking up issues having commercial significance that relate to the formula for determination of Targeted Revenue and other relevant factors for determination

of Aeronautical Tariff, it is proper to have a relook at the stand of AERA as flowing from the submissions made by learned counsel. As per White Paper, AERA described only the SSA as a Concession Agreement. This was supported by referring to Section 13(1)(a)(vi) of the Act. No doubt it begins by describing the concession as one offered by the Central Government in any agreement or Memorandum of Understanding but at the end it also permits the concession offered by the Central Government to be expressed otherwise than in agreement or memorandum. The letter of MOCA noticed earlier clearly show that the Central Government had approved the agreements executed through other agencies and accepted the concessions to be one by the Central Government. Thus all the agreements wherever they contain concessions relevant for determination of tariff for the Aeronautical Services, have to be treated as concession offered by the Central Government deserving due consideration under Section 13 of the Act.

100. According to AERA, it has kept in mind public interest and has determined the tariff as per provisions in the SSA. Chronological events beginning from White Paper dated 22.12.2009, issuance of Consultation Paper No.3 of 2009-10 on 26.02.2010 and of Guidelines on 20.02.2011 leading to proposal from DIAL on 20.06.2011, issuance of a Consultation Paper No.32 on 03.01.2012 and then consultation with all stakeholders before passing of the Tariff Order on 20.04.2012 have been highlighted to show that there was complete transparency and effective

consultation in the process of tariff determination. In the context of HRAB, it was pointed out that although DIAL had asked for WACC of 11.6 but AERA approved it as 10.3 after giving good reasons in the impugned order.

101. On the issue of return on Refundable Security Deposit (RSD) the stand of AERA to treat it as a debt at zero cost was sought to be justified on the ground that it was a duty cast upon JVC(DIAL) to arrange for finance hence for discharging such duty it could not be given any return. There is no dispute that this investment amounting to Rs.1471 crores belongs to DIAL. RSD is due to be returned after long interval of 60 years. It was pointed out that on account of permitted depreciation the money would come back in the hands of DIAL for its return. Since it was not money of the shareholders but of DIAL, therefore, it could not be treated as equity cost is understandable.

102. As to what treatment the interest free RSD should get is discussed in paragraph 15 of the impugned Tariff Order and its various sub-paragraphs and ultimately by Decision No.13, AERA decided to consider it as a means of finance at zero cost. After noticing the comments of stakeholders including that of Fraport and ASSOCHAM, AERA has dealt with the submissions of DIAL. It has no doubt noted extracts from the Report of KPMG on the Return on Deposits in other infrastructure sectors and from opinion of CARE (Credit Analysis and Research Limited) but has totally omitted to consider them even in brief. AERA has taken

note of SBI CAPS Report and definition of "equity" in OMDA for coming to the conclusion that other modes of funding the project cannot be included in the list of items mentioned in the definition of equity. But no reason has been given for rejecting the concept of quasi-equity. For coming to the opinion that DIAL's money available as security deposit and invested by the decision of the DIAL for funding the airport project does not merit any interest, it has simply relied upon the liability of DIAL to take care of funding and that RSD has been obtained on account of commercial exploitation of a part of 245 acres of land made available to DIAL as non-transfer assets for no cost. It fails to take into consideration the actual facts emerging from the provisions of OMDA and the ESCROW Agreement which not only permit but expect such fund to be used but not at zero interest. The investment opportunities are limited but DIAL definitely has discretion as to how funds shall be used. There is no provision creating a compulsion for using such money at zero interest or no return. Schedule I of SSA begins with principles to be observed by AERA. The second principle relates to commercial. It requires that the JVC (DIAL) shall achieve a reasonable return on investment commensurate with the risk involved. AERA has acted contrary to this mandate in fixing zero return. But for decision by the Board of Directors of DIAL, this fund of RSD could not have been invested to finance the project.

103. In paragraphs 15.17 of Tariff Order AERA has taken note of twin issues raised by DIAL – (i) The RSD having been raised from Non-Transfer Assets, it was open to DIAL to use the same at its will and (ii) The money raised from RSD having been invested in the project DIAL needs to be compensated at least to the extent of opportunity cost. On carefully evaluating the reasons given by AERA in sub-paragraphs 15.17.1 to 15.17.14, it is found that fallacious presumptions have led to incorrect basic premises and hence the conclusions reached are seriously flawed and unjust. The very opening lines for considering the twin issues wrongly mention that land made available to DIAL under the Concessionaire Agreement was at no cost and can be treated as subsidy. It ignores the liabilities which DIAL undertook by bidding for the project in view of clear stipulations as to rights in respect of such land as part of Non-Transfer Assets. The liability to keep on paying huge percentage of revenue every year to AAI has also wrongly been ignored while drawing wrong presumption noted above. The lease deed in favour of DIAL clearly mentions the considerations including Lease Rent.

104. AERA has wrongly taken help of the larger purpose of Concessionaire Agreement to defeat and ignore the specific provisions creating rights in DIAL for commercial exploitation of the land to a defined extent and to have the revenue as its own money after paying a huge share of 46% to AAI and 30% as cross-subsidy

for Aeronautical Tariff for the Airport. How the larger purpose of project will deprive DIAL of assured contractual benefits is something AERA has failed to explain when Clause 2.1.1 of the Lease Deed mentions that the demised premises shall be held for the sole purpose of the Project and **for such other purposes as are permitted under the Lease Deed (emphasis supplied)**. The findings that DIAL had no option in respect of right to use the RSD amount and that "opportunity cost cannot be considered because RSD has been at zero cost are not supported by any explicit or implicit provisions in SSA/OMDA and ignore the relevant facts such as Clause 2.3 of OMDA and clauses 1.1, 3.2, 3.5 and 4 to the ESCROW Account Agreement which is also a part of OMDA.

105. In the SSA the meaning of WACC requires taking in account weighted average cost of capital. But the presumption that cost of capital for any monetary investment other than by way of equity must be judged only on the basis of interest liability is unwarranted and unjust. Whether voluntarily or mandatorily, there is no doubt that the RSD amount has been used as an investment in the project and that SSA allows a fair return on the investment which is to be proportionate to the cost of investment. Conceptually, the cost of investment can never be zero since that would imply an infinite return {by general definition, return on investment = (gains from investment – cost of investment)/cost of investment)}. Thus it is

obvious that if this fund has been used as an investment, there is a cost attached to it which cannot be obviated by saying that it is a zero cost debt.

106. On a careful consideration of all the relevant factors and keeping in mind the provisions in the OMDA agreement including ESCROW Agreement which authorizes investment of such money of JVC(ESCROW Account) to be invested in some specified funds having required rating by CRISIL, it is found unacceptable that the amount of RSD would not have earned anything for DIAL if it was not invested in the project, irrespective of the fact that it was available at zero cost from the providers of the deposit. At the least, the cost would be the rate of return made available by the approved funds having required ratings of CRISIL. That return cannot be less than the cost which DIAL has to bear or it has borne by making available the amount of RSD (Rs.1471 crores) for investment in the airport project. Clearly, in our opinion, this money has wrongly been treated as debt at zero cost. The well accepted commercial practices and norms need to be respected by the Authority and therefore, return on RSD amount should be re-determined by it for the reasons indicated above. Instead of interfering with the impugned tariff determination we direct that the amount due to DIAL under this head should be worked out and made available to DIAL through appropriate fiscal exercises which should be undertaken when the exercise of redetermination of tariff for IGI Airport, Delhi is next undertaken in due course.

107. The formula for determining the Target Revenue provided in Schedule I of SSA has already been noticed and extracted earlier. The formula for calculating the Aeronautical Charges requires to first determine the Target Revenue. It is based on shared TILL Inflation – X Price Cap model. The model is chosen and provided for and is beyond any debate or dispute for the purpose at hand. The concepts of "shared TILL" and "Price Cap" are inherent in this model. The task is to calculate X factor which can be applied on base charges to determine the Aeronautical Charges applicable during the control period. The X factor is calculated as a factor that equates the value of the Target Revenue over the regulatory period 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 – X for each year. The equation for solving X has been noticed and extracted earlier. While the formula is not under dispute, almost every variable in the formula has been subjected to some controversy or dispute in these appeals. The disputes are directed against most of the assumptions and interpretations whether of facts or law. Therefore, a need has arisen to see whether the points of disputes in respect of the concerned variables have been properly and/or reasonably settled by AERA or not.

108. Calculation of CPI – X

Authority's decision No.27 on CPI – X is as follows:

> "27.a The Authority decided to follow the formulation specified in the SSA and calculate the "X" factor by solving the system of equations mentioned therein."

DIAL has challenged this decision of the following grounds:

> "In a CPI-X methodology of tariff determination, as envisaged in the SSA, the CPI is tariff add-on to cover inflation. In this methodology the efficient way is to determine X factor without considering inflationary increases and only considering real increases in costs. This provides an unadulterated X factor bereft of inflation. Thereafter, the CPI inflation coverage on actual year on year basis in rate care is provided which ensures transparency and each of computation. The X factor has been computed in the model accordingly and the request is that this may be continued."

AERA has shown that this contention effectively leads to following equation:

$$AC_i = AC_i\text{-}1 \times (1+CPI-X) – AC_i\text{-}1 \times CPI \times X$$

This equation is obviously different than what is provided in the SSA and hence unacceptable. In our view, such an anomaly arises when an interpretation is sought

where none is warranted in the SSA. SSA clearly states in Schedule 1 that the following equation is solved for X:

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

It can be seen that 'X' does not figure in the Equation. However, it figures in the following equation as given in the SSA:

$$ACi = ACi\text{-}1 \times (1+CPI-X)$$

Substitution of AC_i leads to the following equation which can be solved for 'X'

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

This is the approach adopted by AERA, which is in accordance with the provisions of SSA. We accordingly agree with AERA Decision No.27 on CPI – X calculation.

109. Weighted Average Cost of Capital (WACC)

WACC is described in the SSA as nominal post-tax weighted average cost of capital, calculated using marginal rate of corporate tax. Besides incorporating

WACC in the formula for X, the SSA is silent on how WACC would be computed. The Authority in its "Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011" has stated that the WACC for an Airport Operator will be estimated as follows:

WACC = Rd x g + Re x (1-g) where g is defined as

g = D / (D + E) where D and E represent the debt and equity proportions.

To arrive at the value of WACC, we need to look at the building blocks of the cost of capital. Since the investments made are broadly composed of investor's equity and debt, the fair rate of return on investment involves calculation of fair rate of return on equity consistent with the risk profile as well as the cost of debt. Many issues have been raised in respect of the building blocks above i.e. in respect of Rd, Re, g, D and E. After detailed examination of these issues, AERA has made the following decisions:

> "29 a. The de-levering of the equity beta of the comparators will be in accordance with the market capitalization figures to arrive at the asset betas (as is advised by NIPFP)
>
> 29 b. The re-levering of asset beta of DIAL will be at the notional DER of 1.5:1 (as indicated by SBI Caps)
>
> 29 c. RoE will be calculated based on the actual book value of debt and equity of DIAL.

29 d. The Authority decided to adopt Return on Equity (post tax Cost of Equity) as 16% in the WACC calculations.

29 e. The Authority determined the WACC at 10.33% for the control period.

29 f. The Authority decided that WACC will not be trued up."

After taking into consideration the submissions of both the parties in respect of these, we find that the above decisions need some detailed examination and adjudication, especially in respect of return on equity and RSD. Accordingly, these issues have been dealt with in subsequent para.

110. The only question not connected with the formula itself is that why use the formula at all when in the RFP itself, WACC has been indicated as 11.6%. This contention has been discussed and rejected by AERA in its Consultation Paper dated 03.01.2012 on the ground that WACC of 11.6% was only indicative for comparison purposes and cannot be construed as assured return by any stretch of imagination. In the facts of the case, we accept AERA's view with the observation that a value being indicative for comparison purposes" also serves the purpose as a rough benchmark or reference in the sense that any estimation may not be in violent deviation from the indicative value.

111. Cost of Equity

For estimating the cost of equity, the most commonly used method is the Capital Asset Pricing Model (CAPM). The CAPM formula is as under:

$Re = Rf + \beta e \times (Rm - Rf)$; where

Re : Cost of Equity

Rf : Risk free rate

Rm : Expected return of the market

(Rm – Rf) is typically referred to as equity risk premium (ERP).

βe : A measure of systematic risk for a stock. βe is the equity β which is a measure of risk of the asset with respect to the market and is given by $\beta e = Cov (Re, Rm)/ Var(Rm)$

In order to work out the cost of equity using above method, AERA has fairly stated difficulties like non-availability of enough data, such an exercise being carried out for the first time and DIAL not being a listed company etc. Admittedly, determination of these factors is complex and requires a detailed study. DIAL had commissioned a study by Leigh Fischer, AERA commissioned a study from NIPFP while MOCA commissioned SBI CAPS. AERA further commissioned NIPFP study which also takes into account DIAL's response to AERA Consultation Paper No.32 and the report by SBI CAPS. All the studies have produced different results on account of assumptions made around the different

components of CAPM. Following is a summary comparison chart in respect of these components of CAPM:

	Leigh Fischer	NIPFP dated 13.12.2011	SBI CAPS	NIPFP dated 19.04.2012
Risk Free Rate	10 year government gilt edged securities Varma and Baruha Report – Range 2.6% to 3.9% Proposed value – 2.2% = nominal value 8.3%	10 year Government Gilt Bonds over 01.01.2001 to 31.12.2010 Nominal value – 7.35%	10 year Government of India Bonds Range 7.19% to 8.02%	7.23%
Market risk premium	Arithmetic average Relied upon Varun and Barua, Damodaran, KPMG Recommended – 9%	Geometric average USA+ Indian Risk Recommended – 6.71%	Implied Premium Relied Upon Prof. Damodaran Recommended – 9%	Recommended – 6.10%
Debt Equity Ratio	0.57	0.50	0.47	0.55
Beta	Approach 1 – Listed emerging market airports – 0.70 – 0.90 Approach 2 – Evidence from other Regulators – NZ CC 0.74-0.71 Risk highlighted Accepted Beta – 0.80	27 Foreign airports NZ CC Mitigating Factors Accepted Beta 0.4	24 Global listed Airports – 0.61 (including emerging markets 0.71) Infrastructure companies – 0.6 Accepted Beta of emerging markets 0.71	Accepted Beta 0.55
Recommended RoE	Determined 25.1% Recommended – 24%	Determined 12.7% - 14.06%	Recommended 18.5% - 20.5%	Determined 11.6% - 13.3% Recommended 11% - 14%

From the above chart, it appears that while there is little variation in respect of 'risk free return', there is considerable difference in respect of the other parameters, resulting into a significant difference in the final outcome. This is on account of difference in comparator sets, approaches, assumptions, risk perception and many other factors. AERA has done detailed examination and finally relies on the NIPFP study dated 19.04.2012. Conclusion of NIPFP study dated 19.04.2012 in respect of cost of equity is as follows:

"Based on the two approaches for estimating DER we discussed earlier, the equity beta values for DIAL are computed below.

$B_e = ß_a$ X (1+(1-tax rate) X DER)

B_e for DIAL (using the normative DER) = 0.55 * (1+(1-0.33) * 1.2) = 0.99

B_e for DIAL (suing the DER based on market value of equity) = 0.55 * (1+(1-0.33) * 0.47) = 0.72

So, these two values of equity beta, give the following estimates of cost of equity:

1. DER based on normative approach (1.2). This would provide the cost of equity = 7.23 + 6.1*0.99 = 13.30%

2. DER based on estimate of market value of equity (0.47). This would provide the cost of equity = 7.23 + 6.1*0.72 = 11.6%

So, the range of cost of equity, based on these combinations of scenarios is 11.6% to 13.30%. Considering possibility of errors in some of the estimates, we can consider this range to be from 11% to 14%. AERA can consider a value within this range. A key decision AERA whether it wants to consider the estimation of market value of equity provided by NIPFP in this report, or consider a normative approach for estimating DER."

112. In its examination, AERA accepts NIPFP recommended value of 7.23% as the risk-free rate and 6.1% as ERP in its calculations. It also accepts NIPFP estimation of 0.55 as asset beta. In respect of DER used for calculating equity beta, AERA finds both the approaches of NIPFP as reasonable but leans on the normative approach. After having done so, it then makes the following abrupt conclusion:

"26.84 The return on equity R_e is to be calculated by application of CAPM equation given above. With the parameters estimated by NIPFP(risk fee rate of 7.23%, ERP of 6.1%, asset beta of 0.55 by qualitatively taking into account de-risking measure, debt to equity ratio of 0.47 based on the market valuation of DIAL made by NIPFP giving an equity beta of 0.72) the return on equity is

calculated as 11.6%. NIPFP has also given other scenarios based on different combinations of parameters that go into the calculation of the rate of return on equity. The range of RoE based on these combinations of scenarios is 11.6% (DER at 0.47 based on estimate of market value of equity) to 13.3% (DER based on normative approach, at 1.2). NIPFP has approximated this to 11% to 14% considering the possibility of errors in some of the estimates. It is seen that the estimate of R_e is sensitive to the DER and ERP and different combination of these two numbers will give different values for R_e. For example, keeping DER at 1.5 (as suggested by SBI CAPS) and taking DIAL's asset beta at 0.61 (i.e. without giving any consideration to the risk mitigating measures), return on equity works out to 15.83% for ERP value of 7%. If, however, DER was to be taken as 1:1 (notional DER for Stansted), then return on equity would be 15.92% for ERP of 8.5%. The Authority has noted the comments of Dr. Harry Bush that "users' interest might well be better served by a higher allowed cost of equity than its short-term price impact would suggest. Put simply, it is in users' interest that the cost of equity should not be excessive, but it is in all parties' interest that it should be enough". **The Authority is also conscious that it is determining tariffs for the first regulatory cycle and a clear indication needs to be given to be prospective investors. Keeping these considerations in view, the Authority has concluded that a value of 16% for R_e represents a sufficiently generous allowance for the various uncertainties involved in the estimation of this number as well as it represents a reasonable incentive for prospective**

investors. Therefore, the Authority has decided to adopt this value (i.e. 16%) for calculation of WACC in respect of DIAL for this control period." **(emphasis supplied)**

113. We thus have a situation where AERA does a great deal of discussion, examination and analysis to be able to arrive at a calculated value and then backtrack on it on the ground that it wants to give 'clear indication to the prospective investors'. If that be the case, it may have considered the WACC value 'indicated' in the RFP to the prospective investors. This proposition has been rejected by the Authority in its Consultation Paper itself. If it wants to use fixation of tariff for DIAL as a tool for sending 'indication' to prospective investors of other airports, it has not said so in its policy or Consultation Paper. Even if we concede that AERA has mandate or power or duty or objective to do so, we find no reason in support that 16% of Re will achieve this goal. There remains a lingering doubt whether a value of 14% would not be enough or should it be 15% or at least 18%? Is there any benchmark in this regard? Should investor interest depend on regulatory discretion? Would it not send a negative signal by highlighting regulatory risk since "discretion" signifies uncertainty and risk. We agree with the quote that "the cost of equity should not be excessive, but it is in all parties' interest that it should be enough". It is the duty of regulator to

scientifically and objectively ascertain how much is enough. Sadly, we find this answer missing from the Authority's analysis. To be fair, AERA has given two scenario using different values of DER, Asset Beta or ERP which yield a result approximating 16% for Re. However, AERA itself does not agree with such scenario in their earlier analysis. In any case, a different combination of values of these variables from the four studies would have yielded a result in a range from about 12% to 22%. We asked AERA whether any statistical tool like averaging or regression analysis would have been appropriate to arrive at a fair value. Response of AERA was that different assumptions produce different results and therefore averaging or any other statistical tool may produce absurd results. In view of this position, it appears to us that fixation of 16% is based on hunch and not on scientific and objective calculation or analysis. We, therefore, direct the Authority to improve upon their estimation through a scientific and objective approach in a transparent manner. Since the opportunity for such improvement is available now in the third control period, Authority may do so in the third control period. We make it clear that we are not commenting on the correctness or otherwise of the 16% value fixed in the first control period and therefore feel no need to make any changes on this account in the first control period. We also clarify that AERA may undertake this directed exercise independently of any observations made by us here.

114. The most crucial issues relating to variables, numbers and figures relating to formulas involved in determination of aeronautical tariff have been considered and dealt above. We are aware that a number of issues such as what are the requirements of an expert and whether NIPFP is an expert in the concerned field or not, have not been dealt above. If all such issues are to be dealt elaborately, the judgment would run in several volumes and we would be failing in our duty to dispose of the appeal within a reasonable time in the light of orders of the Supreme Court for expeditious disposal. We have given anxious consideration to the charges leveled on behalf of DIAL that AERA erred in engaging NIPFP because allegedly it does not have special knowledge or experience in various branches of knowledge mentioned in Section 9(4) of the Act. We do not find the criticism to be valid. On going through the credentials of NIPFP made available to us and its Report, it is not possible to accept the aforesaid criticism. 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. Similarly, the reasons for not accepting the request for yearly 10% increase on Air Base Charges do not suffer from any error so as to require interference. The provisions in the SSA have been carefully kept under consideration for turning down such demand after elaborate discussion in paragraph 25 and its various sub-paragraphs leading to Decision No.28. The plea of DIAL to exclude the cost of an alleged extra set of employees (of AAI, working from before the handing over of Airport to DIAL) for the initial year, for calculating HRAB has been rightly negatived in the light of provisions in OMDA

and other relevant facts. There is no good ground made out to overlook the costs actually incurred.

115. On merits the entire matter must be left to rest with the aforesaid discussion. It is, however, worth noting that none of the parties has leveled any criticism with respect to performance of DIAL in managing the IGI Airport at New Delhi. The facts and figures show that the airport has been making remarkable progress and it must be on account of satisfactory services. Efforts must be made to keep it on these lines. Whatever permissible incentives are required we are sure the Regulator will ensure their availability to DIAL. The Regulator has to perform a delicate balancing task by ensuring that the airport operator is able to maintain the quality of services without suffering operational loss and at the same time ensure that the cost of operating the airport is informed with principles of economic but viable operation and the greed to have maximum return is kept under reasonable checks. It is not necessary for the Regulator to accept all the opinions rendered by experts. The requirement of law is that such views should be kept under consideration and decision to opt for one or the other views must be informed by reasons which constitute a part of rule of transparency.

116. 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.

117. A legislative or quasi-legislative function by a subordinate legislating authority can be successfully assailed under extra-ordinary review, like in writ jurisdiction only if it is shown that the subordinate authority has transgressed the provisions of the statute, and/or the limits of delegation or has transgressed more

fundamental principles similar to constitutional limitations over a legislative action. Keeping these as well as the principles governing our appellate jurisdiction in mind, we have examined the submissions advanced to assail the impugned order of AERA and have given our responses noted earlier. It will be necessary to remind AERA that Section 13 of the Act empowers it to frame tariffs as per law and that means not to ignore the salient features of agreements providing concessions, like OMDA and SSA. The regulator, at the same time, as an active trustee must not be lax in commissioning enquiries/studies to ensure that the Airport is being maintained and run as per best standards and practices to serve the interest of all the stakeholders including the end consumers.

118. We expect the Authority to take up the exercise of truing-up wherever required in right earnest in all subsequent exercises so that the delicate task of balancing the rights and duties of the different stakeholders is harmoniously maintained while ensuring proper maintenance and growth of the airports to meet the future needs of the country. The tariff formulation exercise should ideally be completed in advance, before the next control period begins.

119. Some of the salient observations and directions on material issues are summarized hereinbelow for the purpose of easy reference so that these directions

and observations are carried out and/or kept in mind by AERA at the time of tariff formulation for Aeronautical Services for the next control period that may be falling for consideration:

(i) In exercise of powers under Section 13 of the Act, AERA is required to respect rights/concessions etc. (See Para 31).

(ii) Contractual rights can be voided only on the basis of explicit statutory provisions or implications from statutory provisions permitting no other option (See Paras 34 and 36)

(iii) Even when the Airport Operator engages in providing an Aeronautical Service through its servants or agents, the service must be deemed to be one provided by the Airport operator. The colour of revenue from Aeronautical Service cannot get changed to that of revenue from Non-Aeronautical Service, by an act of delegation or leasing out by the Concessionaire. (See Paras 57 and 59)

(iv) Revenue from Cargo and Ground Handling charges are required to be treated as non-Aero revenue (See Para 84)

(v) For future, the exercise for Assets allocation has to be redone, if not redone already (See Para 86).

(vi) Levy and determination of User Development Fee (UDF) is lawful but its use and appropriation must also be transparent lawful and accounted for in the future exercise for tariff determination (See Para 96).

(vii) RSD of Rs.1471 crores cannot be a zero cost debt. Its cost needs to be ascertained and made available to DIAL through appropriate fiscal exercise at the time of next tariff redetermination (See Para 106)

(viii) Although rate of 16% as return on Equity not interfered with, AERA may redo the exercise through a scientific and objective approach, independently of any observations in the Third Control Period. (See Para 113).

120. Except to the extent indicated, we find no good reason to interfere with the impugned tariff order. The appeals are disposed of accordingly. No costs.

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(S.K. Singh, J)
Chairperson

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(B.B. Srivastava)
Member

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(A.K. Bhargava)
Member

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