

1578/Secy/10  
30/9/10



MIAL/PR/160

28<sup>th</sup> September, 2010

The Secretary,  
Airports Economic Regulatory Authority of India,  
AERA Building,  
Administrative Complex,  
Safdarjung Airport, New Delhi – 110 003.

Handwritten notes and signatures:  
- 30/9/10  
- SH (KBS)  
- R. Consolidate  
- Comments on  
- CP. No. 06/2010-11  
- 30/9/10

**Subject: Revision of Fuel Throughput Charges with effect from 1<sup>st</sup> April, 2010**

- Reference:**
1. Consultation Paper No.06/2010-11 dated 14<sup>th</sup> September 2010
  2. Letter bearing Ref. No. MIAL/PR/60 dated 02<sup>nd</sup> July 2010
  3. Letter bearing Ref. No. MIAL/PR/305 dated 19<sup>th</sup> March, 2010

Sir,

At the outset, we thank Airports Economic Regulatory Authority of India ("Authority") for bringing out the Consultation Paper No.062010-11 dated 14<sup>th</sup> September, 2010 ("Consultation Paper"), wherein, the Authority has, *inter alia*, solicited our feed-back, comments and suggestions on its proposal for the approval of the revised Fuel Throughput Charges (*as contained in para 5 therein*). The comments and suggestions of the Mumbai International Airport Pvt. Ltd's ("MIAL") to para 5 of the Consultation Paper are as under:

1. MIAL vide their letter No. MIAL/PR/60 dated 02.07.2010 (**Annexure-IV to the Consultation Paper**) enclosed a copy of the escalation mechanism as agreed with the oil companies vide agreement dated 04.09.2008 for a period of 15 years. MIAL further unequivocally stated that the change in Fuel Throughput Charges for FY 2010-11 is in line with the above agreement only. MIAL also quoted the abstract from *clause 4.11, Part IV of the Consultation Paper No. 03/2009-10* and requested the Authority to approve the increase of **Rs.26.75/KL** on **Rs.535/KL** prevailing in F.Y. 2009-10 thereby amounting to **Rs.561.75/KL**.
2. Apropos the solicitation of the Authority in *para 6* of the Consultation Paper, we hereby, without prejudice, agree with and accept the Authority's above proposal vis-à-vis MIAL (*please refer to SL No. 8 of the table in para 5 of the Consultation Paper*) for a revision of Fuel Throughput Charges to **Rs.561.75/KL** which is in line with the above referred agreement dated 4th September, 2008 entered into between MIAL and Oil PSUs and the same is also in concurrence with the stand/request of MIAL stated in its letter No. MIAL/PR/60 dated 02.07.2010.



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3. MIAL reiterates its categorical stand expressed vide its reply/letter Ref. No. MIAL/PR/305 dated March 19, 2010 to the Consultation Paper No.03/2009-10 that Cargo and Ground Handling concession have been specifically treated as non-aeronautical services under OMDA and that the Fuel Concession is neither included in aeronautical nor in non aeronautical services therein. Though Section 2(a) of the AERA Act, 2008 (the "Act") defines 'supplying fuel to the aircraft at an airport', as an aeronautical service, it does not necessarily imply that fuel throughput charges as determined between private agreements will be within the purview of aeronautical services. Fuel Throughput Charges are neither listed under Schedule 5 (Aeronautical Services) nor under Schedule 6 (Non-Aeronautical Services), however, by nature Fuel Throughput Charge is non-aeronautical. Please refer Appendix 3 of ICAO document No. 9082 (Eight Edition – 2009) wherein it is clearly mentioned that concession granted to Oil Companies to supply aviation fuel falls under revenue from non aeronautical sources.
4. Further, Authority's attention is invited to Para 4(e) of the present Consultation Paper wherein it has stated, "While there is an economic rationale for charging access fees such as throughput charges, there is no definite formula through which such charges can be determined. Therefore, conventionally such charges are negotiated between the access provider and the access seeker".

Thus, it is clearly delineated from the above that the Authority itself is admitting the fact that there is no formula or mechanism to decide optimum charges and such charges are to be decided by **negotiation** between the Airport Operator and the Oil companies on purely commercial terms.

5. The provisions of Section 13 of the Act sets out various functions of the Authority and Section 13(1)(a), *inter alia*, stipulates that the Authority shall determine tariff for the aeronautical services taking into consideration the factors mentioned in sub-clauses (i) to (vii). Proviso to Section 13 (1)(a) further clearly states 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).
6. For the purpose of formulating/ determining a rational tariff philosophy, the Authority has to bear in mind the provisions of Section 13 in its entirety and not pick and choose a particular provision and apply thereto. Each and every provision has to be considered and weighed vis-à-vis the different facts and circumstances existing in each case. The Authority unfortunately, has ignored this essential feature and proposes to treat all airports at par. The proposal made by the Authority so far has evinced a clear variance with its intended and avowed objective of formulating regulatory philosophy as enunciated in its Consultation Paper No. 03/2009-10 dated 26th February 2010. The proposals made by the Authority, more particularly, with regard to fuel, cargo and ground handling concessions are in total disregard of the existing Concession Agreements which **covenant the guaranteed rights of the contracting parties** (more particularly, the beneficiary). In the Consultation Paper No. 03/2009-10, the Authority clearly states that it will consider the provisions and consequently the effect of concession agreements for the concerned airports while / at the time

of determining tariffs for the first tariff cycle (though it is our contention that it cannot be limited to first tariff cycle only).

7. It is further pertinent to note that vide sub-clause (vi) of Section 13(1)(a) of the Act, any concession offered by Central Government in any agreement or memorandum of understanding has to be considered. The above provision of the Act has to be read alongwith the above stipulation contained in the Consultation Paper No. 03/2009-10.
8. It is beyond doubt that sub-clause (vi) supersedes sub clause (v) of Section 13(1)(a) of the Act. However, if Concession Agreement stipulates cross-subsidisation, that itself satisfies provision of sub clause (v). Gist of the matter is that airports under Concession Agreement should not be economically worse off than as provided under Concession Agreement. This might be the view of the Authority also but it has not been brought out adequately in the *Consultation Paper No.062010-11 dated 14<sup>th</sup> September 2010*.
9. Nowhere, the Act stipulates Fuel Throughput Charges as aeronautical services because airport as such is not providing any service to airlines. It is only allowing oil companies to conduct business at the airport against a concession fee. ICAO has stated that concession fee may relate to service that is an aeronautical service but such concession fee remains a non-aeronautical revenue. *Appendix-3 to Doc No. 9082 (ICAO's Policies on Charges for Airports and Air Navigation Services)* defines revenues from non-aeronautical sources as "*Any revenues received by an airport in consideration for the various commercial arrangements it makes in relation to the granting of concessions, the rental or leasing of premises and land, and free-zone operations, even though such arrangements may in fact apply to activities which may themselves be considered to be of an aeronautical character (for example, concessions granted to oil companies to supply aviation fuel and lubricants and the rental of terminal building space or premises to air carriers). Also intended to be included are the gross revenues, less any sales tax or other taxes, earned by shops or services operated by the airport itself*".
10. The Authority, moreover, on its own has extended the interpretation against airports under concession agreements by mentioning about access charges at various places in various Consultation papers while no such charges are mentioned in the Act.
11. In view of the above, MIAL opposes the Authority's proposal to treat entire concession fee as part of the passenger yield cap calculation, i.e. beyond 30% as per concession agreements for MIAL. The Authority itself mentioned in Consultation paper no. 03/2009-10 dated 26th February 2010 that existing contract will be considered. MIAL's preceding contract which is valid for a period of 15 years, was finalised before the Authority was formed.



12. The Authority has asked MIAL vide its direction under Section 15 of the Act to stop charging revised fuel throughput fees. We oppose the direction as the revision is strictly as per contract. MIAL agrees to approval for increase in fuel throughput charges but strongly opposes considering entire amount as part of the passenger yield cap calculation which is in violation of concession agreements.

Thanking you,

Yours sincerely,

For Mumbai International Airport Pvt. Ltd.

  
(R. K. Jain)  
President