TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 16th December, 2020

AERA Appeal No.8 of 2018

Bangalore International Airport Ltd.(BIAL) ….Appellant

Vs.

Airport Economic Regulatory Authority of India ….Respondent

AERA Appeal No.3 of 2014

Bangalore International Airport Ltd.(BIAL) ….Appellant

Vs.

Airport Economic Regulatory Authority of India ….Respondent

AERA Appeal No.1 of 2014

Federation of Indian Airlines (FIA) ….Appellant

Vs.

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

BEFORE:

HON'BLE MR.JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

For Appellant (BIAL) in AERA Appeal No.8/2018 and AERA Appeal No.3/2014	:	Mr. Gopal Subramanium, Sr. Advocate Mr. Sajan Poovayya, Sr. Advocate Mr. Manu Kulkarni, Advocate Mr. Sriparna Dutta, Advocate Ms. Shristi Widge, Advocate Ms. Hima Lawerence, Advocate Mr.Vishwas N., Advocate Mr.Saransh Jain, Advocate Mr.Pawan Bhushan, Advocate Ms.Shloka Narayanan, Advocate
For Appellant(FIA) in AERA Appeal No.1/2014	:	Mr. Buddy Ranganathan, Advocate Ms. Divya Chaturvedi, Advocate Ms. Srishti Rai, Advocate
For Respondent(AERA) in all Appeals	:	Ms. Shweta Bharti, Advocate Mr. Jyoti Kr. Chaudhary, Advocate Mr. Avinash Singh, Advocate Mr. Ankit Jain, Advocate
For Respondent No.2 (MOCA) in AERA Appeal No.8/2018		Ms. Anjana Gosain, Advocate Ms. Shalini Nair, Advocate

JUDGMENT

By S.K. Singh, Chairperson – All the three appeals which shall be governed by this common judgment and order have been filed under Section 18(2) of the Airports Economic Regulatory Authority of India Act, 2008 (hereinafter referred as "the Act") and heard together because they relate to and challenge

Tariff Orders passed by the Airport Economic Regulatory Authority(AERA) in respect of Kempegowda International Airport near Bangalore. AERA Appeal No.1 of 2014 preferred by Federation of Indian Airlines(FIA) and AERA Appeal No.3 of 2014 preferred by Bangalore International Airport Pvt. Ltd.(BIAL) challenge different aspects and issues arising from the Tariff Order dated 10.06.2014 relating to the First Control Period (01.04.2011 to 31.03.2016). While BIAL wants more autonomy in determining various charges except the three which have been described as regulated charges under the Concession Agreement and more finances for its operations, FIA has taken a converse stand. In practical terms, Appeals Nos.1 and 3 of 2014 are counter appeals to each other. Appeal No.8 of 2018 preferred by BIAL seeks to challenge various aspects as determined by AERA vide Tariff Order No.18/2018-19 dated 31.08.2018 for the Second Control Period (01.04.2016 to 31.03.2021), Corrigendum dated 04.09.2018 and Clarification Letter dated 13.09.2018. The main prayer of BIAL in this appeal is to direct AERA to determine the tariffs afresh in the light of issues raised in the appeal and the decision that may be rendered in respect thereof. Notably, FIA has not challenged the Tariff Order for the Second Control Period.

2. In AERA Appeal No.8 of 2018, BIAL had sought interim relief by filing MA No.444/2018. By order dated 14.03.2018 this Tribunal granted the interim

relief and as a result AERA issued orders and allowed BIAL to collect UDF at the earlier prevailing higher rates for a limited period of 4 months. The fund generated due to such interim permission was to be used only for capital expenditure of the expansion project of their Airport and in accordance with the procedure prescribed in the Concession Agreement. That order was without any prejudice to rights and contentions of the parties and was made subject to the final outcome of the appeal. Since the appeals are now being decided for final disposal, the said interim order is made absolute. It will be for AERA to take note of the extra funds generated on that account and pass suitable orders for adjustment etc., if required, in accordance with law.

3. Before proceeding with the grievances and issues raised on behalf of BIAL the Airport Operator, it will be useful to note that AERA is constituted under the statutory provisions of the Act and it exercises powers and functions enumerated in Chapter 3 of the Act which consists of Sections 13, 14, 15 and 16. The Objects and Reasons for the Introduction of the Act refer to the Airport Infrastructure Policy of 1997 which provides for the private sector participation for enhancing the quality, efficiency etc. of the airports. It was noticed that green field airports were coming up at Bangalore and at Hyderabad in public-private partnership; a private airport was in operation at Cochin and Delhi and Mumbai Airport had also been

restructured through the joint venture route. The growing competition and requirement of level playing field required the establishment of an independent expert regulator in place of Airports Authority of India which also acts as airport operator in respect of many airports. The Preamble of the Act declares that AERA was being established "to regulate tariff and other charges for the aeronautical services rendered at airport and to monitor performance standards of airports and for matter connected therewith or incidental thereto".

4. Section 2 of the Act contains definitions. This section begins with a clarification. The definitions are to mean what has been provided, "unless the context otherwise requires". Aeronautical service has been defined under Section 2(a) in following terms:

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

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

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

5. Section 2 *inter alia* defines many other terms including "airport" and "stakeholder". The main provision in the Act that governs functions of the Authority in the matter of determination of tariff for the aeronautical services in respect of major airports is Section 13(1)(a). The seven factors to be considered in the exercise of tariff determination cover vast areas relating to airport operations and yet they are only illustrative because clause(vii) under Section 13(1)(a) permits AERA to consider any other factor which may be relevant for the purposes of the Act. It is followed by a proviso to the effect that different tariff structures may be determined for different airports on account of any of the relevant considerations. AERA has also the power and function to determine the amount of development fees, passenger service fee, monitor performance standards in respect of quality, continuity and reliability of service as may be specified by the competent authority or the Central Government, to call for necessary information for tariff determination and such other functions relating to tariff as may be necessary to carry out the provisions of the Act or as may be entrusted by the Central Government. Section 13(4) makes certain provisions creating obligations upon

AERA that it shall ensure transparency while exercising its powers and discharging its functions.

6. This Tribunal earlier had an opportunity of examining the scope of functions of AERA in determination of tariff under Section 13 of the Act in the case of **Delhi International Airport Ltd. Vs. AERA & Ors.(AERA Appeal No.10 2012)**. That judgment dated 23.04.2018 was followed in respect of several relevant issues in a subsequent judgment in the case of Mumbai International Airport Ltd.(MIAL). In the present matter also BIAL has relied upon the said DIAL judgment for underlining the significance and importance of Concession Agreement and other contractual rights granted by the State or its agency even in the matter of tariff determination under Section 13 of the Act. The provisions in Section 13 refer to the concession by the Central Government in any agreement etc. There is no dispute that as per the said judgment a contractual right has to be recognized under law unless it is to be ignored as per express provisions in a statute or has to be disregarded on account of necessary implication flowing from the statute. In the case of DIAL, the Concession Agreement as well as the State support agreement to the extent they offered concession and created rights in the airport operator, were held to have legal force which could not be disregarded in exercise of powers under Section 13 of the Act. It was on the basis of provisions in the relevant

contracts/concession agreement that the definition of aeronautical service given in the Act was made inapplicable on account of the peculiar context arising from the Concession Agreement. For these purposes, the said judgment has been referred and relied upon by BIAL in these appeals. BIAL's case is that it was the first airport under private partnership and that too a green air field situated at a long distance from Bangalore city and hence, the law and equity, both require bestowing greater respect to the contractual stipulations as appearing from the Concession Agreement, the State support agreement, the Land Lease Agreement and Share Holders Agreement. Additionally, decision and order of AERA, both for the First as well as the Second Control Period in respect of several specific issues have also been challenged. Such specific issues, 16 in number have been set out along with summary of connected decisions impugned by the appellant, BIAL in its two appeals through Written Notes filed on behalf of BIAL on 14.08.2020. The summary is quite helpful in identifying the issues falling for determination. The written notes highlight the main grounds of challenge in respect of important issues through detailed notes in TAB (C) to (R). Those materials shall be considered hereinafter in course of discussion on the issues pressed and argued.

7. FIA has submitted written submissions as appellant in AERA Appeal No.1 of 2014 and separate written submissions in the capacity of respondent in Appeal

No.3 of 2014. As an appellant it has raised grievance against Tariff Order for the First Control Period on as many as 11 issues. Additionally, it has countered the objection of BIAL that the FIA is not a stakeholder and therefore, not a person aggrieved and hence, appeal by FIA should be held as not maintainable. Detailed issue-wise submissions have also been made in its written notes in AERA Appeal No.1/2014 and also in AERA Appeal No.3/2014. As a respondent in AERA Appeal No.3/2014, FIA has opposed contentions of BIAL on all the issues raised in the written notes of BIAL. In other words, as a respondent FIA has chosen to support the impugned parts of tariff orders on the same lines as argued on behalf of AERA. The arguments on behalf of AERA have been adopted by FIA in AERA Appeal No3/14.

8. On behalf of AERA, written submissions have been filed in both the appeals filed by BIAL. Separately, detailed verbal submissions have been advanced to oppose the appeal of FIA which relates only to the First Control Period. BIAL has joined AERA in opposing the appeal of FIA on the additional ground that the appeal is not maintainable and also on merits by adopting the submissions advanced on behalf of AERA.

9. Since the major issues to which many minor issues are interrelated have been raised by the Airport Operator, BIAL and the tariff determination orders directly and largely affect the airport operator, the appeals preferred by BIAL, namely, AERA Appeals Nos.3/2014 and 8/2018 are taken up first.

10. Arguments on behalf of BIAL in support of its appeals were led by Mr.Gopal Subramanium, Senior Advocate and also by Mr.Sajan Pavvayya, Senior Advocate and they both also advanced submissions later, by way of rejoinder. Mr.Buddy Ranganathan, Advocate led the arguments on behalf of FIA. Ms.Shweta Bharti, Advocate has argued in all the appeals on behalf of AERA. Ms.Anjana Gosain, Advocate has appeared and argued on behalf of Ministry of Civil Aviation(MoCA), respondent No.2 in AERA Appeal No.8/2018.

11. Mr.Gopal Subramanium highlighted the fact that the Airport under operation of the appellant near Bangalore is first Green Field Airport on a Build, Operate and Transfer(BOT) model under Public Private Participation(PPP) basis; the risk for such green airport at a long distance from Bangalore city was considerable; the airport operator was selected through open bidding and substantial private capital was infused in the project on the basis of representations made by the Central and State governments which are evident from the Concession Agreement of

05.07.2004 and other agreements executed around the same time namely, State Support Agreement(SSA), share holders agreement and land lease agreement. Government of Karnataka through Karnataka State Industrial Infrastructure Development Corporation(KSIIDC) together with AAI hold 26% equity shares and balance 74% is held by the strategic joint venture partners. The terms of the concession granted by the Central Government through the Ministry of Civil Aviation is for a period of 30 years from the Airport opening date i.e. 24.05.2008. It is extendable by a further period of 30 years at the option of the appellant. In the pleadings by BIAL, salient features of the Concession Agreement set-out are:

> "a. Article 3.1 of the Concession Agreement – Government of India granted Appellant the exclusive right and privilege to carry out the development, design, financing, construction, commissioning, maintenance, operation and management o the Airport (excluding the right to carry out the Reserved Activities and to provide CNS / ATM which are required to be provided by AAI).
>
> b. Scope of the Project – Development and Construction of the Airport on the site in accordance with the provisions of the agreement; Operation and maintenance of the airport and performance of the Airport Activities and Non-Airport Activities in accordance with the provisions of the agreement.
>
> c. Rights – Appellant may carry out any activity or business in connection with or related to the development of the Site or operation of the Airport to generate revenues including the

development of commercial ventures such as hotels, restaurants, conference venues, meeting facilities, business centres, trade fairs, real estate, theme parks, amusement arcades, golf courses and other sports and / or entertainment facilities, banks and exchanges and shopping malls. Appellant may, subject to and in accordance with the terns of this agreement, at any time, grant Service Provider Rights (including the right of the Service Provider Right Holders to grant sub-rights) to any person for the purpose of carrying out the activities.

d. Article 5.4.3 – Government of India has undertaken that it will not take any steps or action in contradiction of the Concession Agreement which results in or would result in shareholders or Lenders being deprived or substantially deprived of their investment or economic interest in the Project except in accordance with the Applicable Law.

e. Article 8.9.1 – Appellant shall, in accordance with Good Industry Practice and Applicable Law and as contemplated by the terms of this Agreement manage and operate the Airport in a competitive, efficient and economic manner and as a commercial undertaking.

f. Article 10.3 – Appellant and / or Service Provider Right Holders shall be free, without any restriction, to determine the charges to be imposed in respect of the facilities and services provided at the Airport or on the Site, other than the facilities and services in respect of which Regulated Charges are levied.

g. Schedule 6: Regulated Charges.

- Landing, Housing and Parking Charges (Domestic and International).
- Passenger Service Fee (Domestic and International)
- User Development Fee (UDF)"

12. The Concession Agreements defines the terms and conditions under which the appellant is entitled to build and run the Airport. One of the conditions precedent for the Concession Agreement was the execution of the SSA between appellant and the Government of Karnataka. The execution of the land lease agreement and handing over of vacant possession of land to appellant was similarly one of the conditions precedent for execution of the SSA. SSA was signed on 20.02.2005 and under its terms, Government of Karnataka made available Rs.350 crores as State support. The SSA stipulated for Financial Close with the lenders. For achieving this and calculating the amount of State support the appellant made available a business plan dated 03.03.2005 claiming IRR of 21.43%. The SSA was subsequently amended on 20.06.2006. A land lease deed was executed between KSIIDC and appellant on 30.04.2005. Mr. Gopal Subramanium has relied upon judgment of an English Court in the case of **Investors Compensation Scheme Ltd Vs. West Bromwich Building Society; 1998(1) WLR 896** to highlight 5 settled principles for interpretation of contracts, particularly the one which cautions that words are not always conclusive, their

meaning as understood by the parties needs to be understood because that is of significance. However, there is no occasion here to apply the said principle. The Concession Agreement does not define the forms aeronautical and non-aeronautical service at all apparently because hybrid/dual Till model was not envisaged originally. It came later, on request by BIAL which was accepted by MoCA.

13. It has also been highlighted on behalf of BIAL that the capacity of handling passengers per annum for the Airport had to be revised from 4.5 million to 11.4 million midway through the implementation of the project because of significant increase in aviation traffic. The additional cost was met by increase in debt from lenders. Certain project expansion works had to be done by raising Rs.540 crores from additional equity from the shareholders and partly by additional debt. But at the total project budget of Rs.2470 crores approximately the Airport became one of the best airports even internationally. It commenced its commercial operations on 24.05.2008.

14. Under AERA Act 2008, AERA was constituted in September 2009. Prior to that and till framing of tariffs for the First Control Period and rates (some *ad hoc*) tariffs fixed by MoCA remained operative. Before the enactment of the Act

in 2008, with a view to facilitate such enactment, the Airport Authority of India Act was suitably amended in 2003. The respondent AERA issued White Paper with regard to the Regulatory Philosophy and Approach in Economic Regulation of Airport and Air Navigation Services on 22.12.2009. The International Civil Aviation Organisation (ICAO) came out with the 8th Edition of its policies on Charges for Airports and Air Navigation Services and also Airport Economic Manual along with ICAO Policy of 2009, later amended in 2013. A Consultation Paper No.3/2009-10 was issued by AERA on 26.06.2010. The appellant filed its response.

Issues of Dual Till and Cargo, Ground Handling and Fueling(CGF)

15. From the pleadings and arguments it is clear that appellant initially pleaded for dual TILL mechanism or else light touch regulation but subsequently it submitted for a 30% shared revenue TILL (SRT) model through letter dated 30.07.2013. On the representation of the appellant and reference by AERA, MoCA vide letter dated 24.09.2013 recommended for a shared revenue TILL of 40% which was later on modified to 30% as a policy decision by MoCA uniformly applicable, and has been accepted by the appellant as well as AERA as is evident from the Tariff Order for the Second Control Period which also revised the Tariff Order for the First Control Period on the same lines. In BIAL's appeals,

admittedly now 30% of gross revenue generated by BIAL from non-aeronautical services has to be reckoned towards subsidizing the aeronautical expenses. However, FIA has opposed the above approach of AERA and has strongly pleaded and argued in its appeal for retaining the Single Till Method. BIAL, in addition to demand for SRT/Dual Till, pleaded (during the consultation process for the Tariff Order dated 10.06.2014), for treating CGF (Cargo, Ground Handling and Fueling) activities as non-aeronautical services. It also, *inter alia*, requested AERA to take into account losses incurred from the date of inception till the airport opening date, i.e. 24.05.2008. It is BIAL's case that its demands and requests were based upon rights flowing from the Concession Agreement and other supporting agreements as well as the Airport Infrastructure Policy and the Act but these materials were ignored while passing the Tariff Order dated 10.06.2014. During the pendency of the appeals of 2014, First Control Period came to an end in March 2016. Following a similar procedure of consultation, AERA issued Tariff Order for the Second Control Period on 31.08.2018 for the period between 01.04.2016 to 31.03.2021. This Tariff Order is subject matter of BIAL's AERA Appeal No.8/2018. It is obvious that both the appeals have several overlapping and common grounds of challenge because except in respect of few issues, AERA has opted to follow its earlier decisions and principles set-out in the Tariff Order dated 10.06.2014. The parties are anxious for an early decision in these matters because

consultation process for the Third Control Period beginning from April, 2021 has to be undertaken and completed without delay. One of the major issues raised on behalf of BIAL is, decision of AERA to treat the CGF services as aeronautical services for both the control periods. According to submissions advanced on behalf of BIAL, CGF services cannot be regulated by AERA because the Concession Agreement expressly provides that only the specific charges described in Schedule 6 to the Concession Agreement as "regulated charges" can be regulated and none other. Additionally, reliance has been placed on Article 10.3 of the Concession Agreement which declares that except for "regulated charges" the Airport Operator shall be free to undertake all other activities and determine charges thereof. In support of this submission reliance has been placed on the judgment of this Tribunal in the case of DIAL, noted earlier. The views of this Tribunal in DIAL's case, especially those in Paras 31, 36 and 84 have been highlighted to submit that AERA is required to respect rights/concession granted to BIAL under lawful agreements unless such rights stand annulled by the Act explicitly or by necessary implication because of an irrevocable conflict between such right and the provisions of the statute. It has also been pointed out that the definition clause in the Act provides flexibility by permitting to take a different meaning if the context so requires.

16. Without prejudice to the above contentions, it is further case of BIAL that even if CGF services are to be regulated as aeronautical services, revenue therefrom should be treated as non-aeronautical revenue because of the right granted by Article 10.3 of the Concession Agreement that the Airport Operator can determine all other charges. Parity has been claimed with DIAL and MIAL in respect of CGF services.

17. In reply, learned counsel for FIA, Mr.Buddy Ranganathan has submitted that case of DIAL was different from that of the appellant BIAL because in the former case, Operation, Management and Development Agreement (OMDA) was specific in providing that CGF services are non-aeronautical services whereas no such provision is to be found in the Concession Agreement for BIAL. He further submitted that no doubt as per Concession Agreement only the three charges mentioned in Schedule 6 require determination by AERA and other charges can be determined by the Airport Operator, BIAL, however, there is no provision in the Concession Agreement or other relevant agreements that revenue from CGF even if their rates are to be determined by BIAL, cannot be taken into account as aeronautical for determining tariff for the Airport. In other words, the right to determine the charges does not amount to a right to appropriate it by treating the same as non-aeronautical charges.

18. It is also the case of FIA that the impugned Tariff Order of 2014 does not determine CGF. Admittedly, rates of CGF have been fixed by AERA through various other orders which have not been challenged. It has further been contended that the entities or stakeholders who are associated with CGF are not parties and in their absence this issue should not be adjudicated. It has been pointed out that CGF services are rendered at the Airport by third parties/lessees and for them charges have been fixed by AERA by different orders. BIAL gets share out of the revenue earned by the third parties.

19. From the Concession Agreement it has been shown by Mr.Buddy Ranganathan that "Airport Activities" have been defined as the provision at or in relation to the Airport, of the activities set-out at Schedule 3, Part 1 as amended from time to time pursuant to ICAO Guidelines, provided that any activities that are not materially similar to those in Schedule 3, Part 1 shall require mutual agreement of the parties. The word "Airport" has been defined to clearly identify the Airport being operated by the appellant near Bangalore. "Airport Charges" have been defined as follows:

> ""**Airport Charges**" means:
>
> (i) amounts charged or imposed by BIAL in respect of the provision or use of the facilities and services which are included within Airport Activities;

(ii) amounts charged or imposed by BIAL on or in respect of passenger and cargo movement or aircraft traffic into, on, at or from the Airport; and

(iii) any other amounts deemed by this Agreement to be Airport Charges and further including any amounts to be collected by BIAL on behalf of GoI, GoK or AAI."

20. Schedule 3, Part 1 has the heading "Airport Activities" and *inter alia* it includes aircraft fueling services, cargo handling, cargo terminals, general aviation ground handling, general aviation terminals, ground handling services, ground handling equipment and hangers. The list of activities described as airport activities is extremely large whereas Schedule 3 Part 2 which has the heading "Non-Airport Activities" has very limited items detailing 13 in number. Part 2 includes *inter alia*, airport shuttle transport services(to hotels, city centre etc), business parks, hotels, industrial parks, commercial buildings and complexes, golf course, country club, independent power producing and production centres like manufacturing factories.

21. At this juncture it is useful to reproduce Articles 10.1 to 10.3 which relate to charges that can be imposed in respect of the provision at the Airport of any facility and/or services which are included within Airport:

"10.1 **Parties having right to impose charges**

Subject to Applicable Law, no Person (other than BIAL, any Service Provider Right Holder granted a relevant Service Provider Right or the AAI) may impose any charge or fee (a) in respect of the provision at the Airport of any facilities and/or services which are included within Airport Activities or (b) in respect of the movement of passenger, or vehicular traffic on the Airport or the Site.

10.2 **Airport Charges**

10.2.1 The Airport Charges specified in Schedule 6 ("Regulated Charges") shall be consistent with ICAO Policies.

10.2.2 The Regulated Charges set out in Schedule 6 shall be the indicative charges at the Airport. Prior to Airport Opening BIAL shall seek approval from the Ministry of Civil Aviation for the Regulated Charges, which shall be based on the final audited project cost. The Ministry of Civil Aviation shall, subject to the proposed Regulated Charges being in compliance with the principles set out in Article 10.2.1, grant its approval thereto within a period of sixty (60) days of the date of the application being submitted by BIAL.

10.2.3 If at any time prior to the date the IRA has the power to approve the Regulated Charges BIAL wishes to amend such charges it shall seek consent from the Ministry of Civil Aviation for such amendments. The Ministry of Civil Aviation shall, subject to the proposed charges being in compliance with the principles set out in Article 10.2.1, grant its approval of such amendments within a period of sixty (60) days of the date of the application being submitted by BIAL.

10.2.4 From the date the IRA has the power to approve the Regulated Charges, BIAL shall be required to obtain approval thereof from the IRA. In this regard BIAL shall submit to the IRA, in accordance with any regulations framed by the IRA, details of the Regulated Charges proposed to be imposed for the next succeeding relevant period together with such information as the IRA may require for review. Unless otherwise agreed in writing between the Parties such approved Regulated Charges shall comply with the principles referred to in Article 10.2.1 until the earlier of (i) the date that outstanding Debt in respect of the Initial Phase has been repaid and (ii) fifteen (15) years from Financial

10.3 **Other Charges**

> BIAL and/or Service Provider Right Holders shall be free without any restriction to determine the charges to be imposed in respect of the facilities and services provided at the Airport or on the Site, other than the facilities and services in respect of which Regulated Charges are levied."

22. Mr. Ranganathan has laid great emphasis on Para 4 of letter of MoCA dated 24.09.2013 whereby the plea for shared Till was accepted. Through that letter the Union Government clarified that subsidy shall be only of specified percentage from non-aeronautical revenue (initially 40% and later made 30%), in Para 4 it was explicitly clarified that revenue from CGF shall be aeronautical revenue. BIAL and AERA have accepted the framework of shared Till as indicated in the above letter but now BIAL has raised a grievance against decision of AERA to accept the letter in entirety including Para 4. It has been submitted that BIAL's stand for accepting only a part of the letter beneficial to it and not to accept revenue from CGF to be aeronautical revenue is devoid of any good reason. The directions of MoCA must be accepted in full because the clarification in Para 4 has direct nexus with concept of shared Till introduced by the letter. On account of direction to adopt shared Till concept, several items of revenue which all would have been included in the single Till bucket got shifted to non-aeronautical revenue hence it was provided by clarification that revenue from CGF will be treated as aeronautical revenue.

23. On behalf of AERA the aforesaid stand of FIA, except its stand for a single Till, has been adopted. Further, Ms.Shweta Bharti, learned counsel for AERA referred to issues raised by BIAL and submitted that it was in accordance with the Airport Infrastructure Policy of MoCA and also the National Policy on Civil Aviation that for the regulated charges indicated in Schedule 6 of the Concession Agreement, it has been clearly indicated in the Concession Agreement itself that policy of ICAO shall be relied upon. She referred to Document Nos.9082 and 9562 containing relevant policy of ICAO available in Volume V of AERA Appeal No.3/2014 to highlight that the four basic principles for tariff determination spelt-out in the said policy are: (i) non-discriminatory; (ii) cost relatedness; (iii) transparency; and (iv) consultation with users. She highlighted that these principles are also evident from provisions in the AERA Act. Out of the above, the principle of cost relatedness cannot be overemphasized and Section 13 in the Act also highlights the importance of efficiency in the management of the Airport and also economic and viable operations. ICAO principles lay down clearly that the users of the Airports must be asked to pay only for what they use and not the expenses for other activities which are not available for use. The economic oversight function, as per ICAO requires the Regulator to consult the end users because usually there is monopoly in the business of management of Airports. The

guidelines of AERA for framing tariffs available in Volume VII of AERA No.3/2014 also reflect the same view. Ms.Bharti has further submitted that according to AERA the provisions in the Concession Agreement envisaged for a single Till mechanism and therefore, there was no division of services as aeronautical and non-aeronautical. The airport services which were clearly aeronautical services and included CGF were not declared as non-aeronautical by the Concession Agreement although it placed only few services in Schedule 6 as regulated charges. Such mechanism did not mean that the Concession Agreement declared patently aeronautical services to be non-aeronautical services. The division of services or charges as regulated and non-regulated does not mean that the Concession Agreement has explicitly or by necessary implication declared all non-regulated charges to be non-aeronautical charges. Hence, according to learned counsel, the parity claimed in respect of CGF with DIAL and MIAL is misplaced. The concession agreements in their cases had different provisions clearly providing for shared Till and defining aeronautical and non-aeronautical services in clear terms. For that reason alone, the statutory definition in an Act became inapplicable in the case of DIAL for the cargo and ground handling services but the Concession Agreement in case of BIAL does not have such definition. According to her, as per definitions in the Act, CGF have to be treated as aeronautical services.

24. Learned counsel for AERA referred to the definition of "Airport Activity" in the Concession Agreement and its list in Schedule 3 to submit that since CGF is in Schedule 3 and not in Schedule 6, therefore, it may be debated as to whether CGF can be regulated by the Authority or not but there can be no dispute that the airport activities such as CGF are clearly aeronautical activities/services, be it under Concession Agreement or the Act and therefore, revenue from these sources have to be treated as revenue from aeronautical services. She also submitted that policy of ICAO requires the Regulator to take note of all aeronautical revenues into account while fixing charges payable by the users and only those revenues can be kept out which are specifically excluded under the provisions of the Concession Agreement or the Act. She showed that CGF comes within the definition "aeronautical services" as given in the Act. She relied upon Para 72 of DIAL's judgment for highlighting the principles of construction of letters from the Union Government and submitted that the letter of MoCA dated 24.09.2013 along with Para 4 has rightly been treated as a directive under Section 42 of the Act and therefore, CGF revenue has been taken into account as aeronautical revenue for determining the tariff.

25. Before proceeding with other issues it will be useful to discuss the issues raised in respect of CGF charges and also the shared/dual Till methodology ultimately adopted by AERA and challenged by FIA.

26. As indicated earlier, BIAL has accepted the dual Till concept for Bangalore Airport as adopted by AERA on the directives of MoCA. The stand of FIA in its appeal that single Till approach alone is permissible under the terms of the Concession Agreement cannot be accepted in view of directives of MoCA through letter dated 24.09.2013. That letter, as a directive under Section 42 of the Act had to be accepted in whole including contents of Para 4 which require that under the dual Till regime, the revenue from CGF should be considered as aeronautical revenue. Since the response of the Union Government in that letter was to meet the request of BIAL, the directive cannot be bifurcated at the convenience of BIAL which has accepted the direction in respect of dual Till approach but is resenting and contesting the direction to include CGF revenue as aeronautical revenue. The directive is not for any fleeting one-time issue but for adopting a changed regime in respect of Bangalore Airport and therefore it clearly related to questions of policy. On policy matters, the directives are binding on the Authority as per Section 42(2) of the Act. Such directive coming at the instance of BIAL and accepted by it happily on the issue of dual Till cannot be permitted to be challenged when clear aeronautical activities of CGF have been directed to be treated as aeronautical revenue. This directive relating to CGF was required as a necessary corollary for effectively working out the dual Till regime which requires creation of two baskets, one for aeronautical revenue and the other for non-

aeronautical revenue. If revenues from clear aeronautical activities will be kept out of the basket for such revenues, the Airport users will suffer clear injustice because they will have to pay again to meet the deficit arising due to such action. Such an approach would be highly unjust and would be against the principle of cost effectiveness for charging the end users as set out in the ICAO policy.

27. The submissions advanced on behalf of respondents that there is no provision in the Concession Agreement creating vested right in BIAL that revenue from CGF must be treated as non-aeronautical revenue is found to have merit. Hence, on the basis of definition of "aeronautical services" provided in the Act, AERA is justified in treating revenue from CGF as aeronautical revenue.

28. There is clear merit in the submission advanced on behalf of BIAL that by virtue of explicit list of regulated charges given in Schedule 6 of the Concession Agreement, Clause 10.3 of the Concession Agreement vested BIAL and/or Service Provider Right Holders the freedom to determine the charges in respect of other facilities and services provided at the Airport or on the site, without any restrictions. But the right noted above is only to determine the charges and not to treat it as non-aeronautical charges. Significantly Clause 10.3 is for other charges, i.e. other than Airport Charges that are covered by Clause 10.2. Airport Charges

vide above clause are restricted to only the regulated charges specified in Schedule 6 but Clause 10.1 which grants right to impose charges only upon BIAL or any Service Provider Right Holder or the AAI for any facilities and/or services provided at the Airport which are included within Airport Activities cannot be ignored. This clause begins with the words – "subject to Applicable Law….." . The parties were aware that statutory provisions are in the offing for establishing a Regulator to look after the economic activities at the Airport and only temporarily this role was given to MoCA. Once the Act came into force, the right to impose charges in respect of Airport Activities became subject to such a law particularly as per definitions in the Act and therefore, a subordinate right of determining such charges imposable or determinable under the Concession Agreement will definitely be governed by the applicable law i.e. the Act. Section 13(1)(a) entitles the Authority to perform the function of determining the tariff for the aeronautical services taking into consideration various factors including the Concession Agreement. Hence, when the provisions in the Concession Agreement such as Clause 10.1 permit the operation of applicable law on the subject, AERA definitely got the right to determine the aeronautical services covered by CGF, moreso in view of policy directive of MoCA for a dual Till regime.

29. Any other interpretation allowing important aeronautical services of CGF to go beyond the tariff determination power of AERA will lead to diarchy in respect of determination of tariff for the aeronautical services. Such exercise must remain holistic and therefore, unified in the hand of the Regulator as per Section 13 of the Act. The policy change leading to dual Till has been held valid and binding on BIAL. As a natural corollary the CGF charges declared as aeronautical charges under such policy must come within the domain of AERA for determination of tariff in respect of such aeronautical services including the regulated charges covered by Schedule 6 of the Concession Agreement. Allowing a diarchy and leaving determination of tariff for CGF in the hands of BIAL after the creation of dual Till would also run counter to the ICAO policy noted earlier. This policy must be kept in mind by AERA for many good reasons including the provision in clause 10.2.1 of the Concession Agreement which requires that the charges in Schedule 6 shall be consistent with ICAO policy. Now, when the concept of aeronautical and non-aeronautical charges has to be imported on account of directive of MoCA along with introduction of shared/dual Till regime, the determination of charges for CGF services must also be consistent with ICAO policies. For this, as per provisions of the Act they need to be determined by AERA.

30. It is not in dispute that AERA has been determining the tariff for CGF charges by separate orders which BIAL has accepted without leveling any challenge.

31. In view of aforesaid discussion, this Tribunal finds no error or illegality in adoption of shared/dual Till methodology on the basis of letter of MoCA dated 24.09.2013. It is also found that provisions in the Concession Agreement of DIAL in respect of CGF were different and therefore, appellant BIAL cannot succeed on on the basis of judgment in the case of DIAL. For the same very reasons, the determination of tariff by the impugned order by taking into consideration CGF revenues as aeronautical revenues is also found to be in order requiring no interference.

Issues relating to treatment of Land

32. The findings or decisions on this matter in the first tariff order have not been subjected to any criticism. The appellant BIAL is aggrieved by the decision in this regard taken in the tariff order for the Second Control Period. The decision is to consider revenues from land development activities akin to non-aeronautical revenues and to use its 30% towards cross-subsidization of Airport charges. This decision is founded on the premise that such activities are non-aeronautical

activities and hence, under a shared/dual Till regime its 30% revenue only can be used for cross-subsidy.

33. The prayer of BIAL is that land development activities should be kept totally out of the ambit of tariff determination because AERA had no jurisdiction over such activities. Revenue from land development activities cannot be included in non-aeronautical basket for usurping 30% for the purpose of cross-subsidization.

34. The aforesaid stand of BIAL is on a presumption that Airport has a limited meaning as per definition in Section 2(b) of the Act; it means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes Aerodrome as defined in clause(2) of Section 2 of the Aircraft Act, 1934. This definition has been lifted from Section 2(b) of the Airports Authority of India Act. As per clause(2) of Section 2 of the Aircraft Act, 1934 "Aerodrome means any defined or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and other structures thereon or appertaining thereto." By including the latter definition of Aerodrome, Airport has been given a much wider meaning. As a result Airport would extend upto any defined or limited ground or water area, if that area is intended to be used even in

part for the landing or departure of aircrafts. Further all buildings, sheds etc. on such defined area get covered under the definition of aircraft.

35. The stand of the BIAL is that land development activities are carried on not at the land of the airport but on additional land and hence the land development activities not being at the airport, cannot be subject matter of regulation by AERA and it cannot do so through tariff determination under Section 13 of the Act.

36. The stand of BIAL noted above will have merits if AERA attempts to regulate non-airport activities outside the precincts of an Airport or clearly outside the defined area of an Aerodrome. The task of finding out whether in the present case there is any defined area, covering ground or water which alone is intended to be used as an Aerodrome or Airport is not very difficult.

37. BIAL cannot take advantage of observations of AERA in the tariff order for the First Control Period. At that time, the Authority had taken only an *ad hoc* view favouring the single Till mechanism on the basis of provisions in the Concession Agreement.

38. It has been pointed out that the word "site" as defined in the Concession Agreement means the land in which BIAL has or shall have a leasehold interest pursuant to the land lease agreement, whereas 'Airport' as defined in the Concession Agreement means the Greenfield Airport at Devanahalli near Bangalore comprising of the initial phases to be constructed and operated by BIAL and includes any expansion thereof as per the Master Plan. However, it does not refer to any defined piece of area or limited site so as to exclude any additional land which may be described as beyond the precincts of the Airport or the Aerodrome. Learned counsel for FIA and AERA have pointed out that the Concession Agreement visualized a land lease agreement through which BIAL will get leasehold rights and interests in the "site" from KSIIDC. The definition of "site" on the other hand clarifies that it means the land in which BIAL shall have a leasehold interest pursuant to the land lease agreement, measuring approximately 4300 acres in area on, under and over which the Airport is to be constructed. Clearly, the entire "site" has been made available for construction of the Airport and not any limited or defined part thereof. It is not in doubt that clause 3.2.1(iii) of the Concession Agreement recognizes the right of BIAL to undertake any activity or business in connection with or related to the development of site or operation of Airport to generate revenues including the development of commercial ventures such as real estate, hotels, restaurants, conference venues,

meeting facilities, business centres, trade fairs etc. which are clearly non-aeronautical activities and therefore, cannot fall under aeronautical activities. But the claim that revenue from such ventures will belong exclusively to BIAL cannot be found anywhere. Under the single Till mechanism, such revenues would have to be accounted for and taken into the single basket but once shared/dual Till regime has been accepted, the division of all the revenues of the Airport has to be on the lines of aeronautical and non-aeronautical revenues.

39. On behalf of respondents, recitals "F" and "H" of the Land Lease Deed dated 30.04.2005 have been highlighted in support of their stand that the entire state support as well as providing the Site on lease to BIAL was accepted by the Government of Karnataka (GoK) for the express purpose – "to provide funding support, to improve the viability of the project and enhance the bankability". The definition of the term "project" in the deed embraces almost all activities relating to the Airport including its development. Clause 2.1 of the deed defines the Site by referring to 3884 acres approximately in the first instance and as per clause 2.4 it shall mean and include the additional land also. The actual land comprising the Site is said to be 4008 acres which is the total land made available to BIAL on lease by the KSIIDC. From the tariff order for the First Control Period, it has been shown that in Para 11.59, AERA considered the stand of Government of Karnataka

expressed in a letter of 06.03.2014. The stand is in categorical terms that GoK has provided around 4008 acres of land to BIAL on lease basis to cater to the ultimate capacity of about 50 million passengers through two parallel simultaneously operable runways and the correspondent area Site and landside facilities. The letter clarified that no land has been provided exclusively or specifically for commercial or non-airport activities and that the guiding principles for utilization of land are contained in the Land Lease Deed, Concession Agreement and State Support Agreement. The understanding of GoK favours the view that revenue generated from commercial exploitation of any excess land should entirely be ploughed back into the airport project and that passengers' interest is paramount; they should enjoy world class facilities. It was shown that definition of 'Site' is same in the SSA also. Learned counsel for AERA has placed reliance upon clause 3.2.1(iii) to support the stand of the Authority. That clause while recognizing certain right of BIAL clearly pronounces that such right includes any activity or business "in connection with or related to the development of the Site or operation of the Airport to generate revenues including the development of commercial ventures such as hotels……..". Ms.Bharti has also referred to clause 13.5.2 of the SSA in support of the contention that there is no right in BIAL to hold any property or part of the Site on termination of the lease except in respect of such enterprise which Government of India may decide to refuse to take over.

40. From the definition of "Airport" and "Aerodrome", BIAL cannot take any advantage because the Concession Agreement, the State Support Agreement and the land lease agreement do not show that land comprising the site was divided into two or more parts so as to confine the area of Airport to a limited extent. Since no such arrangement was made under any of the agreements, the claim of BIAL that there is additional land beyond the airport precincts over which AERA will have no legal Authority of regulation for tariff determination cannot be accepted. The impugned decision suffers from no infirmity.

Issues relating to Pre-Control Period Losses

41. BIAL wanted the Authority(AERA) to take into consideration and provide to it the pre-control period losses with interest, approximately Rs.269 crores. The Authority noted that its powers were notified under the Act w.e.f. 01.09.2009 and since BIAL has not posted any losses in its Profit & Loss Statement for the period 2009-10 or 2010-11, hence there was no question of considering any pre-control period shortfall or loss for the purpose of determination of aeronautical tariffs for the First Control Period. In the tariff order for Second Control Period also, AERA has followed its earlier view and has declined to consider any pre-control period shortfall/over-recovery for truing-up process for the First Control Period. Same

view has been adopted also in computing Annual Revenue Requirement(ARR) for the Second Control Period.

42. On behalf of BIAL reliance has been placed on the judgment of this Tribunal in the case of DIAL to support its plea that the exercise of tariff determination under Section 13 need not be limited to looking at accounts or figures of only the control period; it may include facts and figures of anterior period also. It has been pointed out that clause 10.2.2 of Concession Agreement required seeking approval of regulated charges from MoCA and such regulated charges were required to be based on the final audited project cost. BIAL claims that it suffered a loss of Rs.53 crores which is reflected in its Profit & Loss Accounts for the year ending 31.03.2008. It has also claimed additional losses of Rs.97 crores approximately during the first year of operation (FY 2008-2009). The blame has been put-up on MoCA that the UDF charges claimed by BIAL were reduced and approved on *ad hoc* basis and therefore, the losses continued and required to be trued-up. According to learned counsel for the appellant BIAL, AERA erred in not considering this claim on the technical ground that it was constituted and vested with powers only on 01.09.2009. As a successor of MoCA it was required to finalise the *ad hoc* charges for the earlier period so that BIAL could recover the losses; AERA has further erred in holding that it could not re-decide the *ad hoc*

charges in absence of any directive from MoCA; directive from MoCA for such purpose is not contemplated under the Act.

43. Learned counsel for FIA has taken a simple stand in reply that since earlier fixation of charges was not by AERA it rightly refused to get into the past history for the claimed pre-control period losses.

44. Learned counsel for AERA has referred to Para 10.2.4 of the Concession Agreement which provides that from the date the independent regulatory authority (in this case AERA) has the power to approve the regulated charges, BIAL shall be required to obtain approval thereof from the IRA. Hence, the period for which approval has to be obtained is not in doubt, it is the next succeeding relevant period.

45. The losses for the pre-control period have been considered by the Authority in Para 5 of the order for the First Control Period. It notes that BIAL has claimed – (a) shortfall of Rs.53.30 crores from the date of inception of BIAL viz. 2001-02 till the Airport Opening dated i.e. 24.05.2008; and (b) shortfall of Rs.188.30 crores from the date of opening of Airport till the commencement of the First Control Period viz. 31.03.2011. This claim has been pressed as a shortfall under single

Till, as noted in Para 5.2 of the order. Learned counsel for the AERA has referred to similar view of the Authority in the second tariff order and to ICAO principles in support of the decision taken by AERA.

46. The contention advanced on behalf of BIAL appears to have merit, especially in view of decision of this Tribunal in the case of DIAL wherein facts and figures of earlier period were considered by the AERA for tariff determination and the same was approved by taking a pragmatic view that even if the matter was to be remitted back to MoCA, the exercise of tariff determination by an expert body like AERA would be more reliable and useful. On a careful perusal of discussions made in various sub-paragraphs of Para 5 of the tariff order for the First Control Period, it is evident that the Authority was aware that MoCA had granted only *ad hoc* UDF charges but has further noted that since it was fixing tariff for the period from 01.04.2011, it would consider the loss, if any, only from 01.09.2009 to March 2011 when factually there was no loss. In Paras 5.29 and 5.30 it decided against the claim for a review of financial results of BIAL for the period since commencement of operations to 31.03.2011. It has declined to consider the claim for the pre-control period mainly for the two reasons which have been highlighted and challenged on behalf of BIAL.

47. In the considered opinion of this Tribunal, it will not be proper to hold that in the exercise of its statutory powers to provide for a purposeful and good tariff order, the AERA should depend upon a direction from MoCA to look into facts relating to *ad hoc* rates and resultant loss, if any. Similarly, for the lapses of MoCA, if any, it will not be proper now to refer the task of looking into deficiencies in tariff formulation for the period prior to First Control Period to MoCA. The relevant facts, figures and accounts for the earlier period should have been gone into by AERA to find out whether there was any merit in the claim of BIAL. Since that has not been done, the claim for per-control period losses as determined in various parts of Para 5 of the tariff order for the First Control Period and virtually reiterated in the next tariff order are set aside for the purpose of remitting the claim back to AERA for fresh consideration on its own merits and in accordance with law and this order.

On the cost of Equity

48. The cost of equity, in the first tariff order of 2014 was fixed at 16% for working out the aggregate cost of capital (WACC) –under single Till and also in alternative for shared revenue Till. In the second tariff order, the Authority fixed it at the same rate of 16% for computation of a fair rate of return. It also recorded

a decision to commission a study on cost of equity and to consider the result of such a study at the time of truing-up the Second Control Period revenues. The stand of BIAL is that the cost of equity should be on the basis of assured IRR at 21.66% provided in the Concession Agreement. The finding on this issue for the second tariff order is based upon Authority's opinion and observations. It has noted in clause 14.2.4 that there were no adverse scenarios affecting the risk assessment of BIAL Airport, rather it had witnessed very favourable traffic and profitability over the last 3 years and considering all these the Authority proposed to treat return on equity at 16% for the Second Control Period also.

49. The only material worth consideration to support the claim of BIAL is the Project IRR indicated as 14.58% in Annexure-3 of the Amendment Agreement to the SSA dated 20.01.2005 and supplemental SSA executed on 20.06.2006. It is BIAL's case that on the basis of above Project IRR, the funding model discloses the corresponding equity IRR (post-tax) as 21.66% for the investment made in the project, for 30 years. According to BIAL, if the cost of equity had been 16%, the amount of state support required for the project would have been far in excess of Rs.350 crores.

50. On the other hand, learned counsel for the Authority(AERA) has pointed out that 16% return on equity has been considered as a fair return even in the case of

Delhi International Airport as is evident from judgment in DIAL's case. She has pointed out that the said judgment required the Authority to study the issue further and hence an independent study has been commissioned. It is underway and the report shall be considered whenever it is made available. It is pointed out that amended agreement to the SSA and the supplemental SSA of June, 2006 is only between the State of Karnataka and BIAL. ***Clause 2.1.8 amended the definition of "funding model" and permitted revision of the earlier document so as to conform to the key financial parameters in Annexure-3.*** For revising the funding model, in the chart at Annexure-3(Pg.648, Vol.IV in AERA Appeal No.8/2018), the Project IRR(25 years post-tax) for the initial phase was 14.16% and in another column depicting – "including redesigning" as 14.58%. On that basis BIAL submitted before the Authority for considering cost of equity. In Para 14.53 of the first tariff order, the Zurich Airport Report is extracted and it shows that various financing agreements entered into by BIAL were based on the premise that the project would generate 21.66% internal revenue return (IRR).

51. On a careful perusal of the chart depicting Project IRR for claiming state support through SSA, it is found that there was no agreement or contract between the parties to which MoCA would have been necessary, to guarantee equity return of 21.66% or any fixed return on equity. The charts were to work as models for

understanding the need/quantum of state support claimed by BIAL. The model and the figures for its formulation do reflect the understanding of BIAL on Project IRR but that cannot amount to an agreement between the concerned parties, particularly MoCA on the fair return on equity. It is not guaranteed or promised in the terms of any agreement between the concerned parties, be it the Concession Agreement or the SSA. This claim of BIAL is not found acceptable. In Para 13.4.9 of the tariff order the Authority has correctly concluded that the equity IRR of 21.66% is not specified either in the Concession Agreement or in the SSA. The decision of AERA on this issue requires no interference.

Issues relating to Capital Expenditure

52. The main issue raised under this head by learned counsel for BIAL is whether the Authority has the jurisdiction and legal competence to decide as per Decision No.9.a.(v): to impose a penalty of 1% of the cost of Terminal II-Phase1 if BIAL fails to commission the said work by March 2021 and to not consider any additional interest during construction (IOC)/Financing Allowance if the project is delayed beyond 31.03.2021. Admittedly, in response to a letter of BIAL the Authority has modified its stand as indicated in reply dated 13.09.2018. It was clarified that if there is delay in completion of the said project due to any reason

beyond the control of BIAL or its agency and is found justified, the same would be considered by the Authority at the time of truing-up the actual cost in respect of IDC and EMC. But there will be no waiver of penalty in case Phase 1 of Terminal II project is delayed beyond 31.03.2021 under any circumstances. The simple argument on behalf of BIAL is that power to determine tariff granted under Section 13 of the Act does not confer power to impose penalty for non-completion of the project or a part thereof within a specified time. Additionally, it has been urged that if the delay is for reasons like pandemic, beyond the control of BIAL it would be wholly wrong to impose penalty. Further, BIAL has assailed the approach of the Authority to pre-approve the project cost estimates and then proceed to impose the burden of submitting a detailed explanation and justification should the cost incurred exceed 10% over the cost approved by the consultant. This objection is claimed to be based upon judgment of this Tribunal in the case of DIAL where the Tribunal approved the tariff exercise by the Authority on the basis of incurred cost instead of redoing the entire cost and accounts on the principle of efficient cost. BIAL has also assailed the decision to allow 10% Tax cost towards computation of permitted Capital Expenditure estimate. The estimate is for all line items. According to BIAL, since the introduction of Goods & Services Tax, 13% tax cost was required to be allowed instead of resorting to 10% by way of estimate. Lastly, under this head, BIAL is dissatisfied with decision of the Authority to not consider

part works done for completing the project of Eastern Tunnel as a capital expenditure during the Second Control Period. The submission is that although the Eastern Tunnel is expected to be completed and ready for serving the users only during the Third Control Period, the expense incurred during the Second Control Period should have been taken into account otherwise the cash flow with BIAL shall be affected adversely.

53. So far as issue of 1% penalty by way of reduction of the value from ARR is concerned, learned counsel for AERA has referred to discussions in Para 9.6.5 of the second tariff order. The discussion discloses that on the basis of claim that the Terminal II Building would be completed by March 2021 as estimated by BIAL, the Authority agreed to treat the capitalization year for Terminal II-Phase 1 as 2020-21. This advantage to BIAL would be totally undeserved if the claim of BIAL that it will complete Terminal II-Phase 1 by end of March 2021 is not found correct. Hence, as a balancing exercise for allowing capitalization on the assurance of BIAL such a penalty which is nothing but reduction of ARR has been provided to ensure that such promise does not cause loss to the users and undue advantage to BIAL if the claim as to the time of completion is ultimately found incorrect. In other words, the stand of AERA is that the word 'penalty' has been

used in a different sense only to keep the equities in balance and to promote the efficiency of BIAL.

54. Learned counsel for AERA has further submitted that in spite of the clarification that this penalty will not be relaxed in any situation, if a convincing case is made out for any reasonable delay, the Authority agrees to examine the same on its own merits and may vary or waive the penalty proposed but only for good reasons. This stand of the Authority appears just and proper and does not require further scrutiny except to point out that the stand of BIAL as to the jurisdiction of the Authority is not justified in view of provisions in Section 13(1)(f) read in conjunction with the obligation to determine the tariff under Section 13(1)(a) by taking into consideration the capital expenditure incurred and timely investment in improvement of airport facilities; the service provided, its quality and other relevant factors and the cost for improving efficiency. Section 14(4) of the Act vests the Authority with the power to issue such directions to monitor the performance of the service providers as it may consider necessary for proper functioning. Section 15 also grants power to issue certain directions. Clause 9.2.9 of the Concession Agreement also vests the independent regulator with the power to frame regulations for monitoring of performance standards which could earlier be done by the Government of India as per various sub-clauses

of Article 9.2 of the Concession Agreement. Hence, the agreement also respects the power of the regulator to review, monitor and set standards and penalties and regulate such related activities at the Airport with corresponding duties upon the BIAL to comply with all such regulations of the Authority. In any case, the facts justify the limitation set by the Authority through penalty upon the gains of BIAL due to acceptance of its assurance and plea for capitalization of Terminal II-Phase 1 during Second Control Period itself. The Preamble of the Act discloses that besides regulating tariff and other charges, the Authority is "to monitor performance standards of airports and for matters connected therewith or incidental thereto". Monitoring of timely completion of vital projects like a terminal building has intrinsic relationship with performance of airports.

55. So far as seeking explanation from BIAL if the cost incurred exceeds 10% of the cost approved by the consultant – RITES is concerned, this grievance is based upon a wrong understanding of judgment in the case of DIAL. In that case, based upon statutory role of the Regulator, observations were made explicitly that the Authority should use experts and keep constant watch over the activities, particularly, aeronautical activities at the Airport. For the past closed accounts, it was not deemed proper to reopen the same for deciding tariff for the future but the emphasis was that the Authority should act as a custodian of the interests of the

users of Airport and that if a case of gold-plating of the costs is suspected, adequate precaution should be exercised through experts and through necessary queries from the airport operator to rule out possibility of wrong or reckless costs. It will be wrong to expect the Regulator not to use its powers under Section 14 to call for information and conduct investigations including power to issue directions under Section 14(4) and also the power of seizure under Section 16 of the Act. This role is envisaged in the Preamble of the Act also. If such power and role is denied, the obligation to determine tariff with due regard to the economic and viable operation of the airports will lose all its significance. The importance of public interest in course of exercise of the power to determine tariff is explicit from Section 13(2) of the Act as well. No doubt, such powers have to be exercised within the four walls of the Act with a view to ensure fairness and just pricing for all the stakeholders which will always include the ultimate user and payer, the public.

56. So far as grievance is concerned against only 10% as Tax cost by way of estimate for working out the capitalization values, on all the line items of the approved capital expenditure, it is only an estimate. The rates can vary and different slabs may apply to different items. Hence, an estimate at the rate of 10% when there is inbuilt provision for truing-up of the expense towards tax actually

paid, does not merit any interference. If BIAL spends more than the estimated amount as Tax cost, it is bound to get it back on truing-up. However, the tax regimes are becoming more and more stable and consistent for a longer period of time hence, the Authority is requested to show more attention and care in working out the estimated Tax cost for the next control period keeping in view the required cash flow. The last grievance under this head that the part works done during the Second Control Period to facilitate the completion of Eastern Tunnel has wrongly been excluded from capitalization during the Second Control Period has no sound basis. The arrangement of funds for timely investment for such projects is primarily the responsibility of Airport operator and as soon as the project is satisfactorily completed and made available for use as a part of the airport facilities, its value has to be capitalized. But to do so selectively even for incomplete works will go against the sound policy of AERA to wait for the projects to be completed and to capitalize it only during the relevant control period when the facility is complete and made available for use. The plea that it will affect cash flow unfairly cannot be a good reason to deviate from the otherwise sound policy. Availability of adequate cash flow is a separate issue and it cannot be linked to sundry items and services for claiming money before it is available for use.

57. In view of revised stand of AERA noted earlier in respect of the proposed penalty for non-completion, no case is made out for interfering with the related decisions of the Authority in respect of issues relating to capital expenditure noted above.

Issues of exclusion from RAB

58. The grievance of BIAL is that the Authority erred in disallowing Rs.69.45 crores from the value of assets involving capital expenditure only on the basis of report of EIL. According to BIAL the corresponding depreciated value of Rs.57.50 crores should not have been reduced from the Opening RAB of the First Control Period. The same view was reiterated in the second tariff order also. The prayer is that the value of the capital expenditure incurred be restored as per accounts maintained and the illegal deduction be set aside. The ground urged is that findings in EIL's report should not have been accepted in view of objections by BIAL. The approval of the report or the absence of the protest against the same by AAI is not a good ground to justify the impugned decision. Reliance has also been placed upon the judgment of this Tribunal in the case of DIAL that incurred cost deserves to be accepted.

59. Learned counsel for the Authority has placed reliance upon subsequent judgment of this Tribunal in case of DIAL dated 20.02.2020. She has supported the impugned decision with the help of discussions made by the Authority in Paras 11.2 to 11.6 leading to Decision No.8 regarding RAB. She has highlighted that EIL was appointed by the AAI which is a 13% shareholder in BIAL and hence the Authority did not commit any error in accepting the report of EIL after sending the same to AAI which offered no objection to that report.

60. Learned counsel for FIA has taken the same stand and has further submitted that order of the Authority is in accordance with Guidelines 5.2.4 framed by AERA. It provides that for inclusion of an asset into initial RAB, the Authority can also assess the cost by considering evidence on three relevant aspects relating to the investment, such as, when it is over and above the approved investment.

61. The judgment of this Tribunal dated 20.03.2020 in the subsequent case of DIAL, in similar circumstances permitted reduction of cost of assets on the basis of expert report of EIL. There is no good ground to doubt the correctness and reasonableness of the report. Hence, no error is found in the approach of the Authority in respect of this issue.

Exclusion from liability to pay UDF by transit passenger

62. There is no dispute that earlier to the tariff order for the Second Control Period also transit/transfer passengers were granted exemption from levy of User Development Fee(UDF) at the Airport in question but earlier the qualifying time-limit for exemption was 6 hours. The impugned decision has enlarged the time limit to 24 hours. Aggrieved by fear of loss of UDF, BIAL seeks setting aside of the decision granting exemption to all transit/transfer passengers who are transiting within 24 hours. It has prayed for restoring the earlier criteria of 6 hours. Ultimate financial implication of this decision is not know and in any case it will not be adverse to BIAL because the Authority has allowed truing-up of revenue on this count. BIAL apprehends that it will affect the availability of cash flow. But this aspect alone is not sufficient to warrant interference when it is bound to receive due attention of the Authority in a holistic manner.

63. The reasons for introducing the impugned decision, as disclosed by AERA through letter dated 31.10.2018 is the intention and decision of the Authority to uniformly apply the period of 24 hours to all airports. The basis for such decision by the Authority is a circular dated 31.08.2012 issued by the Director General of Civil Aviation. BIAL has taken the stand that the said circular is not applicable to

airport operator like BIAL because it has been issued under Section 40 of the Airports Authority of India 1994 and is applicable only to AAI and its lessees.

64. On behalf of FIA, it has been submitted that the issue of applicability of the circular dated 31.08.2012 to all the airports including BIAL is pending before the Hon'ble Delhi High Court in Writ Petition(C) No.9318 of 2019(**Federation of Indian Airlines & Anr. Vs. UOI & Ors.**). BIAL is respondent No.5 in that writ petition. From the submissions advanced by learned counsel for FIA it appears that subsequently MoCA considered the issue of uniform applicability of circular dated 31.08.2012 and issued a letter dated 14.05.2019 to grant uniform exemption to all transit/transfer passengers transiting within 24 hours, from the payment of UDF. Since the applicability of this decision was made prospective, the above writ petition was filed by FIA in August 2019 seeking directions for uniform applicability of a letter of MoCA dated 30.11.2011 said to be the genesis of circular dated 31.08.2012. It appears that FIA is seeking uniformity across all the airports from the date of circular of 31.08.2012 itself.

65. The validity of the impugned decision of the Authority has to be examined in these proceedings in accordance with the provisions of the Act and constitutional obligations, if attracted. The pendency of the writ petition is not of

much relevance so far as this task is concerned. The impugned decision relates to the exercise of tariff formulation. Within its jurisdiction the Authority has decided to opt for uniformity at all airports so as to ensure equal treatment at all the airports in India. This will promote a healthy practice of standardizing the meaning of transit/transfer passengers exempted from payment of UDF/DF/Passengers Service Fee(PSF). Subsequent clarification of MoCA in favour of such uniformity shows that the Authority has moved ahead of MoCA in the right direction. There is no loss of revenue because the same will have to be verified and ultimately trued-up. Hence, the prayer of BIAL in respect of this issue does not merit acceptance.

Issues relating to allocation of assets as well as of expenses as aeronautical and non-aeronautical

66. The issues relating to the allocation of assets between one head or the other and also the expenses, have not been pressed for any particular item(s) but a general criticism has been made that although AERA has the power of allocation for working out the dual or hybrid Till but the power should have been exercised only after holding a study and in the meantime the proposal of BIAL for asset allocation as well as expense allocation should have been accepted.

67. At the outset in the written note under the Tab "J", BIAL has taken the stand that it is no longer pressing the allocation of cargo village as non-aeronautical services and hence its 30% revenue alone should be used for subsidizing aeronautical expenses.

68. On the other side, in its appeal against the first tariff order, FIA has leveled counter allegations that Paras 8.70.1 and 8.70.2 show that AERA failed to ask for auditor's certificate for the initial three years for asset allocation and operational expenditure and did not conduct prudence check before accepting the submissions of BIAL. It has also taken objection and highlighted that in the consultation paper for Opening RAB, the proposed allocation ratio was approximately 82%:18% but it was ultimately revised to approximately 89%:11%. The Authority has allotted a similar higher revision in case of expansion of Terminal I. FIA's grievance is that the Authority did not conduct independent valuation and as a result there has been overall increase in the asset allocation towards aeronautical.

69. On behalf of AERA, learned counsel has stated at the outset that in respect of allocation of assets as well as expenses under the heads 'aeronautical' and 'non-aeronautical' a study has been commissioned which has already begun. The Authority is hopeful that the findings of such a study would be available in time for

implementation during the Third Control Period which is to begin from 01.04.2021. She pointed out that even as per submissions of BIAL, the Authority could refuse to accept the ratio given by BIAL but only if a study was made and for justifiable reasons for deviation. Since a grievance was raised that no study has been conducted by AERA, hence now the study has been undertaken.

70. At this stage, it would not be proper to interfere with the allocation made by the Authority when admittedly a study has already commenced. AERA has taken the stand that allocation as per the outcome of study will hopefully be implemented in the Third Control Period. Hence, AERA is directed to take suitable and required steps to ensure that the study is completed at the earliest and put to use as indicated.

Issues of Interest Income

71. In the first tariff order AERA decided to consider interest income, except that from deposit received for hotel, as non-aeronautical revenues. For the Second Control Period also the Authority has decided to consider interest income as non-aeronautical revenues. It has further been decided in the second tariff order that any income from hotel project, including interest on deposit would be non-

aeronautical revenue and shall be considered for deduction of 30% of such income for cross-subsidizing, from the computed value of ARR.

72. The submission made on behalf of BIAL is that interest income is derived from the surplus cash emerging in the hands of the airport operator after the application of the regulatory regime. The money lawfully coming into the hands of the operator can be invested for earning interest for itself and hence, it should not be treated as a revenue receipt, either aeronautical or non-aeronautical. According to learned counsel the investments of surplus have no relationship with any kind of service at the Airport provided by BIAL.

73. In reply learned counsel for AERA has placed reliance on Paras 13.6 to 13.68 of the Authority's second tariff order of 2018 to support the submission that the Authority has considered the relevant facts and given good reasons in support of its decision. The Authority has noted that BIAL in its MYTP submissions for the First Control Period and Second Control Period showed interest income as non-aeronautical revenue and the issue now being raised is only an afterthought. The Authority has noted that the cash surplus generated by the Airport generally arises out of the airport operations, aeronautical and non-aeronautical activities being part of it. The surplus is generated on collection of determined ARR as charges and

also when the collected aeronautical charges are beyond the estimated or eligible ARR due to increase in traffic volumes and other reasons. On a consideration of the discussion made by the Authority in the relevant paragraphs noted above, no good reasons are found to interfere with the views of the Authority on this issue.

Issue in respect of Quality of Service

74. The Authority has issued directions in both the tariff orders to the effect that BIAL shall ensure that service quality at the Airport conforms to the performance standards as indicated in the Concession Agreement. In the second tariff order the Authority has also decided not to levy penalties against BIAL for the First Control Period because it has managed to ensure prescribed levels of service quality during the review period.

75. BIAL has objected to the orders indicated above mainly on the ground that AERA cannot monitor performance standards while passing a tariff order under Section 13(1)(a) of the Act and that in any case AERA has no jurisdiction to prescribe service quality parameters and it cannot even monitor the quality of service when after coming into the force of the Act, neither the Central Government nor any authorized authority has specified performance standards. In

reply, learned counsel for AERA has relied upon provisions in Section 13(1)(a) and particularly, sub-clauses (ii) and (iii) and has submitted that the phrase "taking into consideration" in clause (a) requires the Authority to look into the quality of service provided and also to take steps for determining the cost for improving efficiency. These read with Section 13(1)(d), as per case of AERA, vests statutory power in the Authority to keep a watch over quality of service. Reliance has also been placed upon provisions in Article 9 of the Concession Agreement particularly Article 9.2.9 to show that such power is available even under the contract.

76. The objection of BIAL that the Authority does not have power under the Act is not acceptable. An impression is created by isolated reading of Section 13(1)(d) that the Authority can only monitor such performance standards relating to quality as have been set specifically by the Central Government or its authorized authority. But full reading of the provisions in the Act and the binding effect of the Concession Agreement easily lead to the conclusion that power under Section 13(1)(d) is an additional power and it does not take away powers and duties of the Authority to monitor quality of the services on the basis of current prevailing national and international practices and the standards. Such objections in respect of role of the Authority should not be leveled in a casual manner because as a Regulator under the Act the Authority has heavy responsibility to keep an eye on

the overall functioning and performance of the Airport for which adequate funds have to be provided through tariff formulation. The role of the Regulator is not to interfere with day-to-day working of the airport operator or in the fields totally left for the operator but the Regulator has to discharge all necessary functions to achieve the purpose of the Act as apparent from the Preamble also. Its role includes that of an internal auditor in respect of quality of service as well. Hence, the prayer of BIAL on this issue that the decisions mentioned earlier be set aside for lack of power is found to be without merit.

Issue of expenditure on Corporate Social Responsibilty(CSR)

77. BIAL has challenged the decision of the Authority as appearing in clause 12.7.2 of the second tariff order which in effect disallows the claim of BIAL and certain stakeholders that CSR expenditure should be allowed because it is a mandatory cost to be borne by the operator in view of statutory requirements.

78. The reasons assigned by the Authority for not allowing CSR expenditure as a cost of the operator are two-fold; firstly the Authority has noted that it reviews and evaluates only the costs relating to the aeronautical operations of the airport operator for taking the same into account in computation of ARR. The Authority has expressed helplessness in considering costs which are outside the purview of

the aeronautical operations carried out by the airport operator. Secondly, the Authority has noted that these expenditures are not to be considered as part of Business Expenditure in the computation of Business Income for the purpose of income tax.

79. The prayer on behalf of BIAL is to set aside the aforesaid decision and allow expenditure on CSR as a cost pass-through.

80. Learned counsel for BIAL has submitted that but for *nomenclature,* there is no difference between expenditure towards CSR and an expense in the nature of income tax payable by BIAL. When income tax with respect to aeronautical services is allowed as a cost pass-through, for similar reasons the expenditure on CSR should also be allowed. Secondly, learned counsel has submitted that provisions in the Companies Act bind all the companies in general but they cannot take away from the powers and responsibility of AERA while dealing with an airport operating in a regulated environment. When the airport operator, under mandate of law has to incur expenditure towards CSR, it is bound to adversely affect the regulated and determined fair return on equity. Such issue does not arise in the case of general corporate entities who do not operate in a regulated regime.

81. Learned counsel for AERA has, on the other hand placed reliance upon Section 37(1) of the Income Tax Act which has already been noted by the Authority because this provision clarifies that expenditure on CSR will not be accepted as an expenditure for business. However, the other argument that in a regulated environment the fair return of equity determined and allowed must be real as determined by the Regulator, has not been answered effectively. There is no difference between expenditure towards CSR once it is mandated by law vis-à-vis an expenditure in the nature of income tax which is allowed as a cost pass-through. Not allowing such cost amounts to indirectly lowering the percentage fixed as a fair return on equity, because if the impugned decision of the Authority is accepted, the expenditure towards CSR has to come out from such return allowed for the equity holders. In view of the above discussions, the grievance of BIAL in respect of expenditure on CSR is found to have merits. The impugned decision on this issue is, therefore, set aside. The Authority shall pass consequential orders so that no loss due to reduction in determined fair return is caused to the equity holders on account of expenditure on CSR. Necessary truing-up exercise shall be done by the Authority accordingly.

Issue relating to Lease Rentals and Infrastructure Recovery

82. The dispute raised under this head relates to treatment of rental received by BIAL only for those spaces which have been leased for core aviation services i.e.

Cargo, Ground Handling and Fuel Farm services. The Authority has decided to treat rentals from leasing of space to these agencies for providing core aeronautical services as aeronautical revenues.

83. The foremost argument advanced on behalf of BIAL that AERA has no power to treat the aforesaid services as aeronautical has already been decided earlier against BIAL. Hence, the rental coming from these services must also come within the fold of regulation and count towards aeronautical revenues. If left unregulated as non-aeronautical revenue, it will affect the price payable by the public and other users for the core aeronautical services. Hence, the impugned decision in respect of lease rentals noted above cannot be faulted. During the First Control Period, the utility charges recovered from concessionaires were shown by BIAL as non-aeronautical revenue but with full reduction of utility expenditure from the same. In the second tariff order the deduction of utility costs has been permitted from the utility charges recovered but the Authority has then decided to treat the net utility charges remaining after deduction as aeronautical revenue. The main objection of BIAL appears to be that even if the utility charges and infrastructure recovery is being made only from the concessionaires providing aeronautical services, it is not proper and permissible for the Authority to create such a distinction when lease rentals and infrastructure recoveries from non-

aeronautical service providers are being treated as non-aeronautical revenue. The grievance is without any merits. Aeronautical service as defined in the Act gives power to the Regulator to regulate such services through tariff. Section 2(a)(ii) includes as aeronautical service – any service provided…….“or any other ground facility offered in connection with aircrafts operations at an airport”. When infrastructure facilities and provision of utilities for which recoveries are being made from the concessionaires who provide aeronautical services, it will get covered by the aforesaid definition and the revenue can be netted-off and treated as aeronautical revenue. The distinction between aeronautical and non-aeronautical service providers has direct co-relation with the appropriate cost realizable from the users through tariff as per ICAO Policies. Hence, the claim of BIAL to treat infrastructure recoveries from net cost of utilities realized from concessionaries providing aeronautical services as non-aeronautical revenue cannot be accepted.

Issues relating to cost of debt

84. BIAL is aggrieved by the tariff order for the first control period because the Authority has maintained a ceiling in respect of cost of debt for Rupee Term loan at 12.5% and for ECB loan at 10.15%. However, the Authority also decided to review the ceiling of 12.50% upon reasonable evidence that BIAL may present to

the Authority but no such review was contemplated in respect of ceiling for the ECB loan. This could be trued up only if the actual cost was found to be lower.

85. It is interesting to note that during the second control period the Authority held that it will review reasonableness of the cost of debt contracted by BIAL and based on the evaluation, true-up the same. Further discussions and decisions in the second tariff order disclose that no claim was made by BIAL for any rate above the ceiling limit indicated in the first tariff order. Hence, the objection to the decision is not on account of any actual loss or injury. The prayer of BIAL is to set aside the above findings of AERA on the ground that it cannot look at the reasonableness of the cost of debt and is permitted only to look at the actual cost.

86. In reply, the stand of the Authority is that in the first control period the existing debt of BIAL for the financial year 2012-13 was approx. Rs.1816 crores. Since the cost of debt was proposed to be given a pass-through, hence AERA wanted to assure that all reasonable efforts should be made to contain the cost of debt. The decision to provide ceiling has been justified by AERA in public interest, only with a view to avoid excessive cost of debt and that it is an usual regulatory practice.

87. This Tribunal finds merit in the stand of AERA. When the cost of debt is to be given a pass-through then it has to be an efficient cost, commensurate with the prevailing reasonable cost. It is justified by just concern of the Authority to avoid placing unreasonable burden upon the users of the service. This has to be accepted as a genuine and permissible concern for the Regulator. The prayer sought by BIAL on this issue is therefore found to be unacceptable.

Plea for light touch Regulation

88. During the first control period BIAL pleaded for grant of freedom to determine tariff for different aeronautical services subject to an overall price cap determined by the Authority. In support of such a plea BIAL cited operation of such light touch Regulatory regime in Australia and New Zealand. The prayer on this issue is that "going forward, tariff determination should be preceded by an examination of the relevant facts and consequently by a decision that tariff determination is necessary."

89. The above plea of BIAL has been considered in detail in paragraph 4.6 to 4.19 of the first tariff order. After discussing the light touch Regulation as contemplated by some Experts like Professor David Gillen, the Authority came to

the conclusion that such Regulation is not within the framework and the provisions of the Act.

90. It is the stand of AERA that for adopting light touch Regulation the relevant criteria are – (a) Materiality test; (b) Competitiveness test; and (c) Reasonableness test. Only on successful clearance of all the three tests, a Regulator, if permitted by the relevant statutes may adopt the light touch approach. So far as Airport business as a whole is concerned, according to AERA, the light touch approach would fail at least the competitiveness test. This is obvious because of obvious monopoly of the Airport operator BIAL for long number of years.

91. Preamble and provisions of the Act must remain the guiding principle for AERA in Regulating tariff and other charges for the aeronautical services rendered at major Airports in India and in discharging its duty to maintain performance standards of Airports and also in respect of matters connected therewith or incidental thereto. Section 13 requires that the Authority shall determine tariff for the aeronautical services in the light of various factors indicated in Section 13(1)(a). Similarly, the Authority has to determine the amount of development fees, passenger service fees etc. Such statutory requirements leave no room for the Authority to adopt light touch approach in framing periodical tariffs for an

Airport. It must be a holistic exercise by the Authority to protect the interest of all the stakeholders including general public as well as the Airport operator. Asking the Authority to leave such task in the hands of the Airport operator would amount to directing AERA to abdicate its statutory duties and functions. Hence, this plea has been rightly rejected by the impugned decision requiring no interference.

92. The discussions made so far and the findings given are after considering not only the submissions made on behalf of BIAL and AERA but also those advanced on behalf of FIA. In fact, the submissions on most of the issues noted as that on behalf of AERA were also advanced in detail by learned counsel for FIA, Mr.Ranganathan. However, it would be necessary to deal with some of his submissions for FIA as an Appellant separately because FIA has claimed some reliefs as an Appellant in Appeal No.1/1014. It is found just and proper to deal with some features and pleas peculiar to Appeal of FIA separately.

Appeal No.01/2014 by FIA

93. As already noticed earlier FIA has preferred an Appeal only against the first tariff order dated 10.6.2014 and not against the second tariff order of 2018. The stand of learned counsel is that FIA will be satisfied if the claims made in its

Appeal are allowed, and if the effect of such decision on the second and subsequent control period is left open for consideration by the Authority.

94. So far as this Appeal by FIA is concerned, learned counsel for the respondent AERA and for respondent BIAL have adopted the same defense against all the reliefs sought by FIA but learned senior counsel Mr Sajan Poovayya has raised a preliminary objection that FIA cannot maintain an Appeal before this Tribunal because it is an Association or Federation of Airlines and not an Airlines by itself. According to Mr. Poovayya the term 'stakeholder' as defined under section 2(o) includes licensee of an Airport, Airlines operating thereat, a person who provides aeronautical services and an association of individuals, which in the opinion of the Authority, represents the passenger or cargo facility users. He has submitted that when the definition includes any association of individuals and does not refer to any association of airlines operating thereat, it clearly means that a body like FIA being an association is not a stakeholder and therefore an Appeal against tariff order of AERA should not be permitted to be challenged by this Appellant. On the other hand, Mr. Ranganathan has argued that the definition of stakeholder is not an exhaustive definition but only illustrative one and therefore the Airlines operating thereat, for the convenience of hearing etc. can opt to be represented by Federation like the Appellant which was issued notices and heard

by the Authority as a stakeholder. The definition does not prohibit inclusion of the Appellant also as a stakeholder. It is pointed out that even in case of association of individuals, the Authority has been empowered to decide as to who in its opinion represents the passenger or cargo facility users hence in view of the authority having recognized the Appellant since last several years as the authorized representative of Airlines, the capacity of the Appellant as a stakeholder stands fully recognized under law as well as on facts. It was pointed out that even in respect of Delhi and other Airports, FIA had preferred Appeals and some were considered by this Tribunal on merits.

95. The fact that FIA was given notice and heard as a stakeholder by the Authority in the process of determination of tariffs is not under dispute. Its views have been noted and discussed by AERA and if the same have not been accepted for reasons which FIA wants to challenge, this Tribunal cannot dismiss the Appeal on the aforesaid technical ground. The definition of stakeholder is clearly illustrative and not exhaustive. There is nothing in the Act to prohibit the Airlines from forming an association / Federation and authorizing the same to participate in the formulation of tariffs by AERA. Section-17 of the Act provides for the Appellate Tribunal and prescribes the jurisdiction and powers and Authority conferred thereupon. In the matter of adjudication of any dispute under original

jurisdiction, it has been indicated that the dispute can be between two or more service providers or between a service provider and a group of consumer. A group of consumer is a term which can easily include group of Airlines who are also consumer of services provided at an Airport. So far as the Appellate jurisdiction is concerned, section 17(b) provides that the Tribunal has the power to hear and dispose of an Appeal against any direction, decision or order of the Authority under this Act. There is no requirement that the Appeal must be by an individual Airlines and not by a group as represented by the Federation. In the regulatory scheme of the Act, the Federation represents a group of consumer i.e. Airlines and hence it can maintain a dispute under the original jurisdiction of this Tribunal in clear terms. Applying the same logic, if the AERA invites such a group of consumer during the consultation process, there is no prohibition under the Act that such group of consumer cannot prefer an Appeal against any direction / decision or order of the Authority under the Act. Hence the preliminary objection raised on behalf of BIAL is found to be meritless.

Issues relating to Single Till

96. The issue of Single Till Vs. Dual / Hybrid Till has already been considered in detail and the order of the Authority on this issue has been upheld. No doubt,

FIA pleaded before the Authority for accepting the Single Till methodology and the Authority was also in favour of the same while determining tariff for the first control period, but ultimately the Authority decided to accept the views of the Government of India in letter of MOCA dated 24.9.2013. On behalf of FIA learned counsel has submitted that AERA has committed a mistake in treating the contents of the aforesaid letter of MOCA as a policy directive. It should not have accepted the views of that letter because it is against the provisions in the CA. It was pointed out that section 13(1)(a)(v) permits the Authority to take into consideration in the matter of determination of tariffs and revenue received from services other than the aeronautical services also and therefore there was no difficulty in law or on facts in accepting the Single Till mechanism on the basis of Concession Agreement.

97. Sufficient discussion has already been made in respect of MOCA's letter dated 24.9.2013 and the same has been accepted as a policy directive of the Central Government. Hence, no relief can be granted to FIA on this issue.

Recovery period has been wrongly shrunk to 21 months

98. No doubt, the first control period of 60 months should have been placed under appropriate tariff right from the beginning of first month i.e. April, 2011 so

that the targeted amount as per tariff determination could be recovered from the users in the long span of 60 months. Since the tariff order has come belatedly in June, 2014, it has been rightly complained by FIA that the recovery period has shrunk to 21 months and thereby increased the burden upon the users of aeronautical services. Mr. Ranganathan argued that delay in determining the tariff was largely because of delayed submission of proposal and papers by BIAL and therefore the Authority should have avoided to put the users to disadvantage and should have devised ways to put the burden on BIAL.

99. Learned counsel for AERA has highlighted various dates to show that delay was on account of BIAL and a litigation and not on account of the Authority. Hence, it has been pleaded that the order should not be interfered with on this count.

100. The exercise of tariff determination for the first control period should have begun well in time considering that the order was required to be in place effective from 1.4.2011. But as it was the first control period, several issues which normally do not arise later on, had to be resolved and there was a challenge to an interim direction of the Authority leading to delay. In such circumstances, the impugned tariff order does not require any interference. However, there is substance in this

grievance and AERA will do well to ensure that if delay is caused by the Airport operator, its consequences should not fall upon the users. Tariff orders should be prepared well in time so that the burden of recovery is spread over the entire period for which the order is passed. If AERA feels the necessity of binding directions for compliance with the time-bound schedule for deliberations, it may do so or approach MoCA for the same.

Issues relating to allocation of assets, acceptance of projections for future capital expenditure and determination of RAB

101. A grievance has been raised that even if AERA was correct in adopting Hybrid / Dual Till, it erred in accepting the suggestions of BIAL for allocation of assets and operating expenditure (except for opening RAB and Terminal 1 expansion) into aeronautical and non-aeronautical. The approach should have been to conduct prudence check and its own independent analysis as per section 13, 14 and 15 of the Act. FIA has also raised objection that independent study to assess the reasonableness of the approach of BIAL should have been conducted in the first control period itself and not left for the next control period.

102. An independent study to assess the reasonableness for allocation of assets or in respect of BIAL's projections for the year 2014-15 and 2015-16, if required,

should have been done prior to determination of tariff but in such matters there are always practical difficulties and hence to avoid further delay, such activities are at times necessary to be done in future. That ensures that if the approach or the projection was erroneous, it will be corrected for the future and if possible, trued-up for the past. For such issues, it will not be proper to interfere with the tariff order. It is necessary to clarify that AERA itself is an expert body. Appointment of independent study to obtain expert opinion is not necessary as a routine but only where AERA finds necessity for such study on account of complex facts or issues involved.

103. In respect of determination of initial RAB, the main criticism advanced on behalf of FIA is that it has been done without an independent study, without showing due compliance with the methodology prescribed in the guidelines of AERA itself and without ascertaining fair costs of all the assets. The grievance, in other words, is that the costs reflected by the accounts (historical costs) should not have been accepted rather only economical/fair costs emerging from independent assessment should have been included for the purpose of initial RAB.

104. Computation of RAB has also been criticized on some other grounds as well, such as not taking into account the monetization of land provided to BIAL on

lease. But this line of criticism is based on the presumption of a Single Till mechanism and therefore cannot hold good.

105. So far as consideration of Net Block as on 31.3.2011 as initial RAB is concerned, value of some assets have been re-determined on the basis of Report of EIL but as already held in the first judgment in the case of DIAL, the value of assets as reflected in the audited book of accounts need not be re-determined on mere plea for fair cost or economical cost. Hence, the grievances raised by FIA against the decisions in respect of initial RAB have no merits.

Issues in respect of depreciation upto 100%

106. Learned counsel for FIA has relied heavily upon guideline 5.3.3 of AERA Guidelines which is as follows:

> "5.3.3 The minimum residual value of the asset shall be considered as 10% and depreciation shall be allowed upto maximum of 90% of the original cost of the asset."

107. It has been pointed out that from the guideline noted above it is clear that depreciation was to be calculated to the extent of 90% of the assets.

108. AERA has ultimately considered to allow depreciation upto 100% of the value of the assets on the basis of a finding that no compensation will be received towards the value of the Net Block of assets upon the transfer of Airport on completion of the full term under the CA. This is based upon a careful reading of the relevant provisions of contract and no error has been pointed out in such reading. Hence, the impugned decision of AERA is found to suffer from no error.

Issues relating to writing off bad debts as operating expenditure

109. The stand of FIA is that AERA has erred in including Rs.47.51 crores in FY 2012-13 (dues from Kingfisher Airlines Ltd.) as bad debts to be written off as a part of the operating and maintenance expenditure. From the Consultation Paper No.14/2013-14 dated 26.06.2013 as well as from the Decision No.14 in the impugned first tariff order it was shown that generally bad debts are not allowed as expenditure but still AERA proceeded to treat the dues from Kingfisher Airlines as bad debts of an exceptional nature and allowed the same as operating and maintenance expenditure.

110. Mr.Ranganathan has submitted that allowing Rs.47.5 crores as a part of the operating and maintenance expenditure is in violation of the settled principle of law that bad debts are to be written off as irrecoverable in the accounts of the company. Reference has been made in this regard to the case of Catholic Syrian Bank Ltd. Vs. Commissioner of Income Tax, Thrichur; (2012 3 SCC 784. He further submits that decision of AERA to allow the bad debts of the company, BIAL to be recovered from the users of Airport by treating it as a part of expenditure sets a wrong precedent and is not justified in law.

111. Mr. Ranganathan elaborated the issue that bad debts at times may have adverse effect on the availability of working capital and if that is permitted to be raised by arrangement of additional funds, BIAL could have allowed only payment of interest on such additional funds as part of expenditure to be borne by the users. The whole bad debts should not have been treated as an operational expenditure.

112. The reply on behalf of respondents does not meet the aforesaid criticism. In reply it has been submitted that a prudence test by AERA showed that such a bad debt be written off as a part of operating and maintenance expenditure as a one-time measure. This explanation from AERA and BIAL is not at all convincing. There is no rationale or justification in treating such a bad debt as an expenditure.

The users of aeronautical services should not have been burdened with such bad debts. It will indeed be a bad precedent and hence the decision is declared to be bad in law. But since it relates to the First Control Period, it is not set aside only on account of practical and pragmatic reasons. AERA should be careful that bad debts may not be claimed as expenses. If the bad debts in the books of accounts need to be written off and the impact of the same on tariff formulation is significant, AERA should advise ways and means to address this issue but with all precautions that the users are not put to penalty for no fault of theirs. Equitable sharing of the burden may also be examined as an option, as is evident from the illustration of more funds for working capital on cost, as noted above.

Issues relating to levy of UDF

113. On behalf of FIA, more than once a general grievance has been raised that AERA has not followed its own guidelines. On this issue, Guideline 6.8.5 has been referred which provides that UDF is a revenue enhancing measure to allow Fair Rate of Return to the Airport Operator while working out the rate of UDF, but according to FIA there is lack of transparency and the basis for the rates allowed and levied have not been made clear. During arguments greater emphasis was laid on Landing and Parking Charges to point out that instead of usual practice of

fixing such charges as per weight of the aircrafts as is the usual practice, BIAL has been allowed undue gain by providing lower charges for Home Carriers and almost double charge for other aircrafts which are not included in the category of Home Carriers.

114. A perusal of the first tariff order (Para 25.79) and the tariff card supports the aforesaid contention. So far as disparity in charges is concerned, there does not appear any good basis or justification for treating some of the aircrafts differently as Home Carriers only because they may avail parking at the Airport during the night hours. The grievance is that other airlines, for no good reason were forced to bear higher charges whose impact would be around Rs.17-18 crores extra per annum because of the higher Landing and Parking Charges. This practice approved by AERA, according to learned counsel for FIA denied equality of treatment to different airlines and thus violated guarantee of Article 14 of the Constitution of India.

115. After hearing learned counsel for AERA and also learned counsel for BIAL, there appears no good justification for permitting such different treatment to airlines, particularly in respect of landing and taking-off charges. This charge should be on the basis of size and weight of the aircraft and not on artificial notion

of Home Carriers and non-Home Carriers. But it is satisfying to note that such distinction has not been carried on during the Second Control Period. On this issue also the Tribunal accepts the plea of FIA that such discriminatory charges are impermissible and bad in law. However, again for practical reasons alone, the decision is not being reversed. But, AERA is requested to be more cautious in evaluating and permitting such discriminatory proposals in future.

116. No other issue of any significance or substance remains to be addressed in this appeal because only the aforesaid issues were argued and pressed.

117. For the sake of convenience it is deemed useful to summarise the findings in both sets of appeals to highlight those issues where the appellant has been found entitled to some relief either by way of declaration or by actual interference with the impugned decision.

AERA Appeals Nos.3/2014 and 8/2018

(i) The dual/hybrid Till model for Bangalore Airport is as per request made by BIAL and accepted by AERA on the basis of

directives of MoCA. Demand of FIA for single Till cannot be accepted because the directives are under Section 42 of the Act. **(Paras 26 to 31).**

(ii) The claim of BIAL that there is additional land beyond the airport precincts and therefore, beyond the tariff determination power of the Authority cannot be accepted. Income from such land has been correctly treated as non-aeronautical revenue. (**Para 40).**

(iii) The claim for pre-Control Period losses as determined in various parts of Para 5 of the first tariff order and virtually reiterated in the next tariff order are set aside and the claim is remitted back to AERA for fresh consideration on its own merits and in accordance with law. (**Para 47).**

(iv) The claim of BIAL for 21.66% equity IRR is not found acceptable as it is not promised or guaranteed in terms of any agreement between the concerned parties.**(Para 51).**

(v) The decision to impose 1% penalty by way of reduction of the value of the Terminal II Building from ARR is just, proper and

within the jurisdiction of the Authority because the word 'penalty' has been used differently in a peculiar context. (**Paras 53 and 54).**

The order that BIAL should offer explanation if the cost incurred exceeds 10% of the cost approved by the Consultant suffers from no error and is within the powers of the Regulator. (**Para 55).**

Grant of 10% as tax cost by way of estimate made subject to truing up does not require interference but the Authority has to be cautious that the availability of adequate cash flow also has to be kept in mind in a holistic manner. (**Para 56**).

(vi) Decision of the Authority in excluding Rs.69.45 crores from the opening RAB of the First Control Period suffers from no error. (**Para 58).**

(vii) Challenge by BIAL to the decision of AERA to grant uniform exemption to all transit/transfer passengers transiting within 24 hours, from the payment of UDF does not merit acceptance. (**Para 65**).

(viii) The decisions of AERA in respect of allocation of assets as well as of expenses as aeronautical and non-aeronautical needs no interference. (**Para 70**).

(ix) The decision of the Authority to consider interest income as non-aeronautical revenue is correct and BIAL's claim to exclude such income altogether is not found acceptable. (**Para 73**).

(x) The direction of the Authority in both the tariff orders requiring BIAL to ensure service quality at the Airport in conformity with the performance standards as indicated in the Concession Agreement is within the jurisdiction of the Authority and requires no interference. (**Para 76).**

(xi) The decision of the Authority to not allow CSR expenditure as a cost of the Airport Operator is not proper and is set aside. The Authority shall pass consequential orders so as to prevent loss of or reduction in the determined fair return to the equity holders. Necessary truing-up exercise shall be done accordingly. (**Para 81**).

(xii) The treatment by the Authority in respect of Lease Rentals and Infrastructure Recovery is proper and requires no interference. (**Para 83**).

(xiii) Issues raised by BIAL in respect of cost of debt do not require any interference with the impugned tariff orders. (**Para 87**).

(xiv) The plea for light touch regulation has rightly not been accepted by AERA. (**Para 91**).

AERA Appeal No.1/2014

(i) A preliminary issue raised by BIAL as to maintainability of appeal by FIA is found to be without merits. (**Para 95**).

(ii) As held earlier, the plea of FIA for single Till approach cannot be accepted. (**Para 97**).

(iii) Due to delay in the first tariff order the recovery period got shrunk to 21 months causing unnecessary burden on the users.

This needs to be avoided by AERA but for this reason the tariff order does not require any interference. (**Para 100**).

(iv) The grievances raised by FIA against the decisions in respect of initial RAB have no merits. (**Para 105**).

(v) The decision of AERA to allow in the peculiar facts depreciation upto 100% of the value of the assets suffers from no error. (**Para 108**).

(vi) Allowing bad debts to be recovered as operating expenses is a bad precedent and should not be followed in future because users should not be put to penalty for no fault of theirs. However, for pragmatic reasons such decision for the First Control Period is not set aside. (**Para 112**).

(vii) The practice approved by AERA permitting different treatment to Airlines in respect of landing and taking-off charges and parking charges is discriminatory and impermissible. However, since it has not been carried on during the Second Control Period, hence again for practical reasons alone, the decision is

not being reversed. But AERA is requested to be more cautious in such matters in the future. (**Para 115**).

118. All the appeals are disposed of in terms of the reliefs granted or declarations made as per discussions made earlier. Wherever relief has been granted, the appeals will stand allowed to that extent. There shall be no order as to costs.

……..J
(S.K. Singh)
Chairperson

sks