TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Reserved on: 13.12.2023

Pronounced on: 14.02.2024

AERA APPEAL/4/2021

GMR Hyderabad International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;

2. Federation of Indian Airlines …Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE DHIRUBHAI NARANBHAI PATEL (CHAIRPERSON)

HON'BLE MR. SUBODH KUMAR GUPTA (MEMBER)

FOR APPELLANT	FOR RESPONDENT(S)
In AERA Appeal No. 4/2021 For **HIAL** Mr. Ramji Srinivasan, Senior Advocate Mr. Milanka Chaudhury, Ms. Naina Dubey, Ms. Swet Shikha, Mr. Ravneet Singh, Ms. Namrata Saraogi	**In AERA Appeal No. 4/2021** For **AERA (R-1)** Mr. Kunal Tandon, Mr. Shashank Shekher, Ms. Anchal Khanna, Mr. Yash Agarwal, Dr. Anand Kumar, Director Legal (AERA), Dr. Shreya Sharma, Bench Officer (AERA), Mr. Neeraj Sharma, Mr. Prabhjot Singh For **FIA (R-2)** Mr. Buddy Ranganadhan, Ms. Nishtha Kumar, Mr. Prantar Basu Choudhury, Ms. Shrom Sethi

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JUDGEMENT

Per Justice D.N. PATEL, Chairperson

SUMMARIUM

The present appeal revolves around the interpretation of Concession Agreement, Land Lease Agreement and State Support Agreement (**SSA**). These are the three major agreements entered into by this appellant with **Hon'ble the President of India**, acting through the **Ministry of Civil Aviation** (**MoCA**) and Government of Andhra Pradesh (**GoAP**) governing the functioning of Rajiv Gandhi International Airport (Hyd), Shamshabad, Hyderabad (**RGIA**). This Concession Agreement, Land Lease Agreement and SSA are at Annexure A-3, A-4 and A-5 of the memo of this AERA Appeal No.4 of 2021. The aforesaid agreements are to be interpreted in light of Airports Economic Regulatory Authority of India Act, 2008 and also in light of other supportive agreements.

In the present appeal, the Aggregate Revenue Requirement (**ARR**) for RGIA has to be determined on the basis of:

"ARR= (FRoR x RAB) + D+ O + T– NAR"

Aggregate Revenue Requirement (ARR) is an amount finalized by Respondent No. 1 – Airports Economic Regulatory Authority of India (**AERA**). Appellant is permitted to recover ARR from different stakeholders and users of Rajiv Gandhi International Airport (Hyd), Shamshabad, Hyderabad (**RGIA**) during the third

control period (01.04.2021-31.03.2026). The aforesaid formula has been given in Clause 4.3 of Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 (**Tariff Guidelines**) which is at Annexure A-21 to the memo of AERA Appeal No.4 of 2021.On every different component of the aforesaid formula, the arguments have been canvassed in these AERA Appeals.

STATUTES, REGULATIONS & LEGAL AGREEMENTS INVOLVED

ACT/REGULATION/RULE/AGREEMENT	SECTION/RULE/CLAUSE
State Support Agreement (SSA)	Recital 2, Recital 4, Recital 9
Airports Economic Regulatory Authority of India Act, 2008	Sec.13(1), Sec.18(2), Sec.31
Tariff Order No.12/2021-2022 in the matter of determination of Aeronautical Tariffs w.r.t RGIA, Hyderabad for the 3rd Control Period dated 31st August, 2021	Annexure A-1 of AERA Appeal 4 of 2021
Concession Agreement	ANNEXURE A-3 of AERA Appeal 4 of 2021
Land Lease Agreement	ANNEXURE A-4 of AERA Appeal 4 of 2021
State Support Agreement (SSA)	ANNEXURE A-5 of AERA Appeal 4 of 2021
Appellant's response to Consultation Paper 11/2021-22	ANNEXURE A-11 of AERA Appeal 4 of 2021

Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011	ANNEXURE A-21 of AERA Appeal 4 of 2021
Income Tax Act, 1961	Sec. 115JD

ABBREVIATIONS INVOLVED

Abbreviations	Expansion
AAI	Airports Authority of India
ACI	Airports Council International
ADRM	Airport Development Reference Manual
AERA Act	Airports Economic Regulatory Authority of India Act, 2008
AERA	Airports Economic Regulatory Authority of India
AERAAT	Airport Economic Regulatory Authority Appellate Tribunal
AF	Annual Fee
AIC	Aeronautical Information Circular
AO	Airport Operator
AOC	Airlines Operators Committee
APAO	Association of Private Airport Operators

ARB	Aeronautical Revenue Base
ARR	Aggregate Revenue Requirement
ATC	Air Traffic Control
AUCC	Airport Users Consultative Committee
BAC	Base Airport Charges
BCAS	Bureau of Civil Aviation Security
BIAL	Bangalore International Airport Limited
CAGR	Compound Annual Growth Rate
CAPEX	Capital Expenditure
CGF	Cargo, Ground handling and Fuel
CIDC	Construction Industry Development Council
CMP	Cash Management Process
CNS/ATM	Communication, Navigation and Surveillance and Air Traffic Management Services
CP	Control Period
CPWD	Central Public Works Department, Government of India
CSB	Cargo Satellite Building
CSR	Corporate Social Responsibility

CSMIA	Chhatrapati Shivaji Maharaj International Airport
CWIP	Capital Work in Progress
DE ratio	Debt: Equity ratio
DF	Development Fee
DGCA	Directorate General of Civil Aviation
DIAL	Delhi International Airport Limited
DIAL CP-3 Order	Judgment dated 21.07.2023 in AERA Appeal No.1 of 2021 – DIAL v. AERA
ECB	External Commercial Borrowing
FCP	First Control Period
FDR	Fixed Deposit Receipt
FIA	Federation of Indian Airlines
Forex Losses	Foreign Exchange Losses
FRoR	Fair Rate of Return
FTC	Fuel Throughput Charges
FICCI	Federation of Indian Chambers of Commerce & Industry
FY	Financial Year
GA Terminal	General Aviation Terminal

GIL	GMR Infrastructure Limited
GoAP	Government of Andhra Pradesh
GSE	Ground Services Equipment
HIAL/GHIAL	GMR Hyderabad International Airport Limited
H-RAB	Hypothetical- Regulatory Asset Base
ICAI	The Institute of Chartered Accountants of India
ICAO	International Civil Aviation Organization
IDAT	Integrated Domestic Arrival Terminal
IDC	Interest During Construction
IGIA	Indira Gandhi International Airport
IIDT	Integrated International Departure Terminal
IRR	Internal Rate of Return
IRS	Indian Register of Shipping
JVC	Joint Venture Company
MAHB	Malaysia Airports Holding Berhad (Mauritius)
MAT	Minimum Alternate Tax
MCLR	Marginal Cost of funds based Lending Rate
MIAL	Mumbai International Airport Limited

MoCA	Ministry of Civil Aviation
MPPA	Million Passengers Per Annum
MYTP	Multi Year Tariff Proposal
NAR	Revenue from Services other than Aeronautical
NCAP	National Civil Aviation Policy, 2016
OM	Operation and Maintenance Expenses
OMDA	Operation, Management and Development Agreement
PBT	Profit Before Tax
PCPE	Pre-Control Period Entitlement
PCN	Pavement Classification Number
PHP	Peak Hour Passenger
PMC	Project Management Cost
PNGRB	Petroleum and Natural Gas Regulatory Board
PPP	Public Private Partnership
PV	Present Value
R&S	Reserves and Surplus
RAB	Regulatory Asset Base
RAD	Regulatory Asset Development

RED	Real Estate Deposit
RGIA	Rajiv Gandhi International Airport, Hyderabad
RITES	Rail India Technical and Economic Service Limited
RoI	Return on Investment
RSA	Revenue Share Assets
RSD	Refundable Security Deposit
RTL	Rupee Term Loan
SCP	Second Control Period
SFIS	Served From India Scheme
SGSA	State Government Support Agreement
SPV	Special Purpose Vehicle
SSA	State Support Agreement
TAMP	Tariff Authority for Major Ports
Tariff Guidelines	Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011
TCP	Third Control Period
TDSAT	Telecom Disputes Settlement and Appellate Tribunal
UDF	User Development Fee

VTP	Variable Tariff Plan
WACC	Weighted Average Cost of Capital

ISSUES INVOLVED

The following issues are involved in the present Appeal which need due consideration of this Hon'ble Tribunal:

I. **(a)** Whether the decision of AERA to include Pre-Control Period Entitlement (PCPE) suffered by appellant only from 01.04.2008 instead of 23.03.2008 is correct, proper and justified?

(b) Is there a calculation error for Pre-Control Period for FY 2009-10 and FY 2010-11?

II. Whether the decision of AERA to treat Cargo, Ground Handling and Fuel Services as aeronautical services and the revenue generated therefrom as aeronautical revenue is correct, proper and justified?

III. Whether the decision of AERA to consider income of appellant from real estate development under its regulatory purview is correct, proper and justified?

IV. Whether the decision of AERA to bring Other Income within its regulatory purview is correct, proper and justified?

V. Whether the decision of AERA to disallow part of the capital expenditure undertaken by the appellant for phase expansion of the airport to increase its capacity to 34 MPPA is correct, proper and justified?

VI. Whether the decision of AERA not to treat Cargo Satellite Building (CSB) as a Non-Airport activity is correct, proper and justified?

VII. Whether the decision of AERA not to consider 30% Non-Aero revenue as part of Aeronautical Revenue Base for computation of Aeronautical Taxes is correct, proper and justified?

VIII. Whether the allocation of assets including reservoir, IIDT, IDAT, parking stands etc by AERA is correct proper and justified?

IX. Whether the decision of AERA not to treat depreciation as per audited financials is correct, proper and justified?

X. Whether the decision of AERA not to implement the Cost of Debt as submitted by HIAL is correct, proper and justified?

XI. Whether the decision of AERA not to consider interest charges on delayed payments as part of operational expenses is correct, proper and justified?

XII. Whether the decision of AERA to treat the benefit received by HIAL under Served From India Scheme (SFIS) as non-aeronautical income is correct, proper and justified?

XIII. Whether the decision of AERA to defer recovery of eligible ARR is correct, proper and justified?

XIV. Whether the decision of AERA to consider interest income at 6.5% for the utilised debt and reduction of IDC to that extent and not to consider amortization of Arrangement Charges of the

bond during 3rd Control Period and to consider the same during 4th Control Period is correct, proper and justified?

XV. Whether the decision of AERA to consider income earned from vehicle fuelling station on the airside as aeronautical services and vehicle fuelling station on the landside as common assets is correct, proper and justified?

XVI. Whether the decision of AERA to levy a penalty in case of delayed execution of projects is correct, proper and justified?

XVII. Whether the decision of AERA to consider year-end discounting instead of mid-year discounting is correct, proper and justified?

XVIII. Whether the decision of AERA to finalize and publish the Rate Card for aeronautical tariff after the determination of ARR is correct, proper and justified?

XIX. Whether the decision of AERA not to accept the Cost of Equity of 24.2% as proposed by HIAL is correct, proper and justified?

XX. Whether the decision of AERA to allow the appellant to recover losses due to foreign exchange fluctuations to the extent that the effective cost of borrowing in foreign currency is not higher than the cost of RTLs is correct, proper and justified?

XXI. Whether the decision of AERA to treat the notional gain on account of fair valuation of interest rate swap as non-aeronautical revenue is correct, proper and justified?

XXII. Whether the decision of AERA not to consider 30% of non-aeronautical Profit Before Tax (PBT) for determination of cross subsidy is correct, proper and justified?

AERA Appeal No. 4 of 2021

1. This appeal has been preferred under **Section 18 (2) of The Airports Economic Regulatory Authority of India Act, 2008** against the order passed by Respondent- Airports Economic Regulatory Authority of India (hereinafter referred to as AERA, for the sake of brevity) bearing **No. 12/2021-22 dated 31.08.2021 (for the 3rd Control Period)**.

2. The **3rd Control Period is from 01.04.2021 to 31.03.2026**. This order is passed by AERA under Section 13 (1) (a) of the AERA Act. This appeal is in respect of Rajiv Gandhi International Airport (Hyd), Shamshabad, Hyderabad (hereinafter referred to as **RGIA** for the sake of brevity).

FACTUAL MATRIX

A. Implementation of Finance Act 2017: Vide a notification dated 26th May, 2017 published by the Ministry of Finance, Part XIV of Chapter VI of the Finance Act, 2017 came into force. As a result, the AERAAT under the Airports Economic Regulatory Authority of India Act, 2008

came to be merged in the instant tribunal i.e. **The Telecom Disputes Settlement and Appellate Tribunal (TDSAT).**

B. First Control Period Order and Appeal: AERA passed an order for 1st Control Period (01.04.2011 to 31.03.2016) on 24.02.2014 vide Tariff Order No. 38/2013-14 which was challenged before this Tribunal in AERA Appeal No. 2 of 2014 and the same was decided by this Tribunal on 04.03.2020.

C. Second Control Period Tariff Order: Thereafter, AERA passed an order dated 27.03.2020 determining Aeronautical Tariff for 2nd Control Period (01.04.2016 to 31.03.2021) being Order No.34/2019-20.

D. Third Control Period Tariff Order and Appeal: Thereafter, AERA passed an order for 3rd Control Period (01.04.2021 to 31.03.2026) being Order No. 12/2021-22 dated 31.08.2021. This is known as 3rd Tariff Order (**Impugned Order**) which is challenged by this appellant before this Tribunal in the present AERA Appeal No. 4 of 2021.

E. Global Tender for RGIA: In 1999, the Government of Andhra Pradesh (GoAP) invited a global tender to set up a Greenfield International Airport at Shamshabad, near Hyderabad through a

Public Private Partnership model for developing, constructing, operating and maintaining the RGIA, Hyderabad.

F. **Selection of GMR-MAHB Consortium**: In December, 2000, the consortium of GMR Infrastructure Limited (GIL) – Malaysia Airports Holding Berhad (MAHB) was selected by GoAP as the private partner for designing, financing, development, operation and maintenance of the proposed Greenfield International Airport at Shamshabad, Hyderabad.

G. **Contract Award to GMR Hyderabad International Airport Ltd.**: GMR Hyderabad International Airport Ltd. (HIAL) was awarded the contract for developing, constructing, operating and maintaining the RGIA, Hyderabad.

H. **Incorporation of HIAL**: On 17.12.2002, the appellant HIAL was incorporated to design, finance, develop, operate and maintain a Greenfield International Airport at Shamshabad, Hyderabad. HIAL is a joint venture company with following shareholding pattern:

GMR Airports Limited	63%
Airports Authority of India (AAI)	13%
GoAP	13%

Malaysia Airports Holding Berhad (through associate company)	11%

I. **The Land Lease Agreement**: The Appellant executed a **Land Lease Agreement** on **30.09.2003 (Annexure A-4)** with the Transport, Road and Building (Ports) Department, GoAP, by virtue of which GoAP agreed to provide land to HIAL of about 5500 acres at Shamshabad to build, own and operate the RGIA.

J. **The State Support Agreement**: The Appellant also entered into the **State Support Agreement** (hereinafter referred to as **"SSA"** for the sake of brevity) dated **29.09.2003** with the Governor of Andhra Pradesh, exercising the executive powers of the GoAP through the Transport, Road and Building (Ports) Department.

K. **The Concession Agreement:** The Appellant also entered into a **Concession Agreement** on **20.12.2004 (Annexure A-3)** with **Hon'ble the President of India** acting through MoCA granting the ownership and rights to develop, operate and maintain the RGIA, Hyderabad to the appellant.

L. AERA's Role in Tariff Determination: As per Section 13(1)(a) of the AERA Act, 2008, AERA is required to determine the tariff for "**Aeronautical Services"** to be levied at the RGIA, Hyderabad.

M. Operational Commencement and UDF Levy: The RGIA, Hyderabad became operational on **23.03.2008** and MoCA vide its letter dated 28.02.2008 and 18.08.2008 allowed HIAL to levy a **User Development Fee (UDF)** for domestic as well as international departing passenger w.e.f. 23.04.2008 and 18.08.2008 respectively on ad-hoc basis.

N. Application for UDF Revision: The Appellant submitted an application for revision in UDF on 18.08.2010 seeking approval of AERA for revised rates for domestic passenger and international passengers. The respondent issued a Consultation Paper No. 07/2010-11 presenting its views on the UDF rates. Subsequently, on 26.10.2010, the respondent issued Order No. 06/2010-11 (Ad-Hoc UDF Order) in the matter of revision of UDF for HIAL.

O. AERA Tariff Guidelines 2011: The Respondent issued AERA (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 (**Tariff Guidelines**) on 28.02.2011 setting out the framework for determination of tariff for Airport Operators.

P. Submission of Multi-Year Tariff Proposal for First Control Period: The Appellant submitted its Multi-Year Tariff Proposal (MYTP) on 31.07.2011 for the First Control Period starting from FY 2011-12 to FY 2015-16 for tariff determination.

Q. First Tariff Order and Appeal: The Respondent passed the First Tariff Order on 24.02.2014 being Order No. 38/2013-14 for determination of Aeronautical Tariff of RGIA, Hyderabad for the First Control Period. The appellant filed an appeal challenging the First Tariff Order on 26.11.2014 being AERA Appeal No. 2 of 2014.

R. MYTP Submission for Second Control Period: During pendency of the challenge against First Tariff Order, the appellant submitted its MYTP on 25.03.2016 for the Second Control Period (01.04.2016 – 31.03.2021) on Shared Till basis.

S. Resolution of Appeal and Second Control Period Tariff Order: On 04.03.2020, TDSAT disposed of AERA Appeal No. 02 of 2014 directing AERA to consider the unresolved issues raised by HIAL and in view of this, AERA issued Order No. 34/2019-20 determining Aeronautical Tariff in respect of RGIA, Hyderabad for the Second Control Period (01.04.2016-31.03.2021).

T. Third Control Period Tariff Determination Process: The Appellant submitted its MYTP for the Third Control Period

(01.04.2021-31.03.2026) on 23.07.2021. The respondent published Consultation Paper No. 11/2021-22 on 02.07.2021 for determination of Aeronautical Tariff for RGIA, Hyderabad for the Third Control Period and invited stakeholders for a Consultation Meeting and invited their comments on the proposed tariff.

U. Appellant's Response to Consultation Paper: The Appellant filed its response to the Consultation Paper vide its letter dated 30.07.2021. Upon receiving comments of stakeholders, the appellant also submitted a response to those comments on 06.08.2021.

V. Continued Development and Expansion of RGIA: Over the years, HIAL has continued to develop and expand the facilities and infrastructure at RGIA, in line with the growing demands of air traffic and passenger convenience.

W. Future Expansion Plans and Projects: HIAL has outlined future expansion plans which involve the construction of additional runways, terminal expansion, and the development of ancillary facilities like cargo hubs and Maintenance, Repair, and Overhaul (MRO) units.

X. Contribution to Regional Economic Development: HIAL's operations and expansion plans significantly contribute to the

regional economic development, creating job opportunities and boosting the local economy, which was one of the consideration for awarding the initial contract to HIAL. [Refer recitals of the **Land Lease Agreement**].

Y. Consideration of Actual Costs: It is the stand of Respondent No. 2, AERA will consider the actual cost incurred during the true-up of the third Control Period for tariff determination of the fourth Control Period, provided the costs are reasonable and justifiable.

Z. Third Control Period Tariff Order and Appeal: The Respondent issued Order No. 12/2021-22 on 31.08.2021 determining Aeronautical Tariff in respect of RGIA, Hyderabad for the Third Control Period (01.04.2021 - 31.03.2026) ("**Impugned Order**"). This Tariff Order for Third Control Period dated 31.08.2021 is under challenge in the present AERA Appeal No. 4 of 2021.

ARGUMENTS CANVASSED BY APPELLANT- HIAL

3. It is submitted by Learned Senior Counsel Mr. Ramji Srinivasan on behalf of the appellant that the Impugned Order dated 31.08.2021 passed by AERA for 3rd Control Period (01.04.2021-31.03.2026) is patently de-hors the law and facts. The Respondent No.1 - AERA

has not maintained consistency in their approach. There is a major deviation in the decision by AERA in the 1st Control Period and 3rd Control Period. Learned Senior Counsel for the appellant has raised the following issues:

I. ***(a)*** *Whether the decision of AERA to treat Cargo, Ground Handling and Fuel Services as aeronautical services and the revenue generated therefrom as aeronautical revenue is correct, proper and justified?*

(b) *Is there a calculation error for Pre-Control Period for FY 2009-10 and FY 2010-11?*

II. *Treatment of Cargo, Ground Handling and Fuel services ('CGF')*

III. *Treatment of revenue from Real Estate Development*

IV. *Treatment of Other Income*

V. *Disallowance of part of the capital expenditure undertaken by HIAL for phase expansion of RGIA to increase the capacity to 34 MPPA*

VI. *Treatment of Cargo Satellite Building (CSB)*

VII. *Non-consideration of 30% non-aero revenue as part of aeronautical revenue base for computation of aeronautical taxes*

VIII. *Allocation of Asset.*

IX. *Failure to consider depreciation as per the audited financials.*

X. *Correction in cost of debt has not been implemented.*

XI. *Interest charges on delayed payments as part of operational expenses.*

XII. *AERA has wrongly treated the benefit received by HIAL under Served From India Scheme (SFIS) as non-aeronautical income.*

XIII. *Postponement of partial recovery of Aggregate Revenue Requirement (ARR).*

XIV. *Interest During Construction (IDC).*

XV. *Treatment of revenue from vehicle fuelling station on airside as aeronautical services and vehicle fulling station on the landside as common assets.*

XVI. *Levy penalty in case of delayed execution of projects.*

XVII. *Issue of year-end discounting instead of mid-year discounting.*

XVIII. *Unilateral finalisation and publication of rate card*

XIX. *Cost of Equity*

XX. *Treatment of foreign exchange losses ('forex losses').*

XXI. *Classification of notional gain on fair of 30% of non-aeronautical Profit Before Tax (PBT) under shared till.*

XXII. *Non-consideration of 30% of non-aeronautical Profit Before Tax (PBT) for determination of Cross-Subsidy.*

ISSUE I: Pre-Control Period Entitlement ('PCPE') from 23.03.2008

4. It is submitted by Mr. Ramji Srinivasan, Learned Senior Counsel for the appellant that this appellant commenced operations of Greenfield RGI Airport from 23.03.2008 and, therefore, this appellant is entitled to levy and collect airport charges from that date in accordance with the **Concession Agreement dated 20.12.2004.**

5. It is further submitted by Learned Senior Counsel for the appellant that date of commencement of operations by appellant and the airport opening date has already been duly accepted and notified by Central Government vide Gazette notification published in Official Gazette. Thus, the **Airport Opening Date** has significant economic/financial implications for airport developer - appellant.

6. It is further submitted by Learned Senior Counsel for the appellant that even during tariff determination exercise for the 1st Control Period (01-04-2011 to 31-03-2016), this appellant had proposed to include the entitlement during Pre-Control Period operations for 3 years i.e. 23-03-2008 to 31-03-2011.

7. However, AERA had determined the tariff for RGI Airport for the 1st Control Period, but, it did not take the period 23rd August, 2008 –

31st August, 2009 into consideration on the ground that powers of AERA under Chapter III & VI of the AERA Act, 2008 were notified only on 1st September, 2009. This approach of 1st Control Period was adopted in the 2nd Control Period.

8. Learned Senior Counsel for the appellant further submitted that since the commercial operations of RGI Airport commenced on 23rd March, 2008, Pre-Control Period Entitlement (PCPE) must be computed from 23rd March, 2008 and, therefore, it is submitted by this appellant that Rs.51.82 Crores may be trued up for 9 days.

9. It is further submitted by Learned Senior Counsel for the appellant that this appellant is entitled to PCPE of Rs.51.82 Crores for the period from 23rd March, 2008 to 31st March, 2008 and Rs.42.68 Crores towards the calculation errors for the period running from 1st September, 2009 to 31st March, 2011.

10. Learned Senior Counsel for the appellant has also pointed out that amount of Rs.39.60 Crores and surplus of Rs.3.08 Crores have been accounted twice by AERA and, therefore, they are entitled to Rs.42.68 Crores towards calculation errors for the period from 1st September, 2009 till 31st March, 2011.

ISSUE II: Treatment of Cargo, Ground Handling and Fuel services ('CGF')

11. Learned Senior Counsel for the appellant has submitted that since Cargo, Ground Handling and Fuel Services (CGF) do not form part of Regulated Charges, AERA cannot exercise its jurisdiction over CGF. It is further submitted by counsel for appellant that Concession Agreement was executed by the Govt. of India with this appellant prior to the AERA Act, 2008 was brought into force.

12. By the virtue of this Concession Agreement, specific concessions have been granted to this appellant which have not been superseded or declared void by AERA Act, 2008. Counsel for the appellant has placed reliance upon Section 13(1)(a)(vi) of AERA Act, 2008 and has submitted that the Concession Agreements are not diluted by AERA Act, 2008. Counsel for the appellant has placed reliance upon the decision rendered by Hon'ble the Supreme Court in case of Delhi International Airport Limited (DIAL) and Mumbai International Airport Limited (MIAL) that the Concession Agreement i.e. OMDA [2022 SCC OnLine SC 850] paragraph 19 and 20 thereof.

13. Learned Senior Counsel for the appellant has also placed reliance upon the decision rendered by this Tribunal dated 31.1.2023 AERA

Appeal No. 7 of 2021 especially on paragraphs numbers 14.8 and 15.2 and 15.6. By the virtue of the aforesaid decisions, AERA is statutorily obliged to give full effect to the Concession Agreement to this appellant by MoCA which is an integral and inalienable part of Tariff Determination Process.

ISSUE III: Treatment of revenue from Real Estate Development

14. Learned Senior Counsel for the appellant has also placed reliance upon **"Regulated Charges"** listed under Schedule-6 to be read with Clause 10.2.4 of Concession Agreement and it is submitted by the Learned Senior Counsel for the appellant that Schedule 6 contains an exhaustive list of charges which are subject to AERA's regulation. Thus, AERA is empowered to regulate only **"Regulated Charges"** and in guise of regulating such charges, AERA cannot assume jurisdiction over "Airport Activities". "Regulated Charges" and "Airport Charges" are **not** synonyms of each other.

15. AERA has equated both the aforesaid charges in violation of Section 13 (1) (a) (vi) of AERA Act, 2008. Concession granted by the Central Government have been duly protected under the AERA Act. Clause 10.2 (Regulated Charges) and Clause 10.3 (Other Charges) of

Concession Agreement does not start with **"Subject to applicable law".**

16. Learned Senior Counsel for the appellant has also relied upon an affidavit filed by Ministry of Civil Aviation (MoCA) in AERA Appeal No.8 of 2011 in which it has been categorically mentioned by MoCA that as per the Concession Agreement, only those charges as mentioned in Schedule-6 shall alone be regulated by AERA.

17. Learned Senior Counsel for the appellant has also pointed out that the activities of Cargo, Ground handling and Fuel Services are **Non-Regulated Activities,** even as per AERA's own Guidelines of 2011 vis-à-vis determination of Tariff for Airport Operators, the revenue received by Airport Operators from the Service providers of CGF, are Non-Aeronautical Charges. This aspect of the matter has not been properly appreciated by AERA while passing the Impugned Order dated 31.08.2021 and hence, the Impugned order deserves to be quashed and set aside.

18. It is submitted by Learned Senior Counsel for the appellant that the objective of the Concession Agreement was not just to develop a greenfield airport but to develop the 'Site' for promoting the economic and social development of the State of Telangana as is also evident from the recitals of the Land

Lease Agreement. Accordingly, to meet its stated objectives, that are in addition to establishing a greenfield airport, of the Concession Agreement, inter alia, provides the scope of the concession which includes both 'Airport Activities' and 'Non-Airport Activities' (listed in Part 2 of Schedule 3). Further, the Concession Agreement explicitly and distinctly defines 'Airport' and 'Site'. The 'Non-Airport Activities' undertaken at the 'Site', which by its very nature are unrelated to the operation of 'Airport'. Airport Activities (listed in Part 1 of Schedule 3) include both aeronautical services and non-aeronautical services. On the other hand, Non-Airport Activities are provided beyond the precincts of Airport and do not constitute either aeronautical services or non-aeronautical services but Non-Airport Activities.

19. It is submitted by the Learned Senior Counsel for the appellant that as per Master Plan, land about 3500 acres is demarcated exclusively for the development of RGI Airport and allied activities. The rest of the land i.e. about 2000 acres is meant for Non-Airport Activities, including the commercial development.

20. It is submitted by Learned Senior Counsel for the appellant that as a part of "Non-Airport Activities" HIAL has undertaken commercial development of land earmarked for "Non-Airport Activities".

21. Thus, it is submitted by Learned Senior Counsel for the appellant that AERA has wrongly treated revenue from commercial development of land as Non-Aeronautical Revenue and has wrongly used the same to cross-subsidize aeronautical tariff under the Hybrid Till.

22. It is submitted by Learned Senior Counsel for the appellant that revenue from real estate development is not generated from the rendition of non-aeronautical services that are listed in Part 1 of Schedule 3 of the Concession Agreement under the heading Airport Activities and as such, do not qualify as eligible revenue for 30% cross subsidy.

23. It is submitted by Learned Senior Counsel for the appellant that irrespective of Airport Activities in the said Part 1 of Schedule 3, the mandate given to the Respondent under the Concession Agreement is to regulate only those charges which fall under Schedule 6 i.e., Regulated Charges. Hence, the Non-Airport

Activities are clearly beyond the jurisdiction of the Respondent and shall not form part of Non-Aeronautical Services.

24. It is submitted by Learned Senior Counsel for the appellant that Any attempt by AERA to treat the Non-Airport Activities as non-aeronautical services will be fatal to the true letter and spirit of the AERA Act apart from the provisions of the Concession Agreement and amounts to enlarging its authority beyond its jurisdiction conferred on it under the AERA Act.

25. It is submitted by Learned Senior Counsel for the appellant that the Land Lease Agreement carves out a distinction for the purpose of the lease of the land i.e., (i) for development of Airport; and (ii) also for the development of hotels, resorts etc. Apart from Recitals C, D and E of the Land Lease Agreement, reliance in this regard is also placed on Clause **3.1 (a) and (b)** of the said Land Lease Agreement.

26. It is submitted by Learned Senior Counsel for the appellant that the activities permitted to be carried out in Clause **3.1(b)** of the Land Lease Agreement, include the activities listed as Non-Airport Activities under the Concession Agreement.

27. Clearly, it is pursuant to the provisions of the Land Lease Agreement that the Concession Agreement was entered into

wherein a specific carve out has been made for the Non-Airport Activities permitted to be developed by the Appellant, which have no relevance to the jurisdiction exercisable by the regulatory authority.

28. It is submitted by Learned Senior Counsel for the appellant that also, GoI has no obligation to take over the Non-Airport Activities at the end of the Concession period which clearly shows that these activities by any stretch of imagination can be treated as non-aeronautical.

29. In view of the aforesaid submissions, it is pointed out by the counsel for appellant that the decision of AERA dated 31st August, 2021 for 3rd Control Period treating revenue from commercial development of land as Non-Aeronautical Revenue and the utilisation of the same to cross-subsidize the aeronautical tariff under Hybrid Till is in violation of terms of Concession Agreement. In fact, this revenue is from Non-Airport Activities and hence, it is not within the powers of AERA to consider the same for Aeronautical Tariff determination.

ISSUE IV: Treatment of Other Income

30. It is submitted by counsel for appellant that AERA's treatment of Dividend and Interest Income and income from treasury for RGIA is squarely covered by the decision of this Tribunal in AERA Appeal No.1 of 2016 and AERA Appeal No.1 of 2021 in the case of DIAL Vs. AERA & Ors. dated 21.07.2023.

31. It is submitted by Learned Senior Counsel for the appellant that Interest Income and Income from Treasury in general accruing to HIAL is not relatable to and generated from the provision of any service being provided by HIAL. Moreover, there is no specific provision to include Other Income such as interest income while calculating ARR as per the provisions of the Concession Agreement.

32. The subsidiaries of HIAL providing these services are standalone entities and are operating at arms-length basis from HIAL. As such the classification of the nature of the services cannot constitute the basis of classification of the revenue accruing to HIAL. AERA has thus transgressed its statutory mandate by erroneously seeking to bring within its regulatory

purview, the dividend and interest income received by HIAL on the investments made by it.

33. It is submitted by Learned Senior Counsel for the appellant that Dividend Income is the only way for HIAL to recoup its investment. If AERA is permitted to consider Dividend Income as part of revenue and consequently, utilize the same for cross subsidization, the investments will become unviable.

34. It is submitted by Learned Senior Counsel for the appellant that Pertinently, the tariff for RGIA has to be determined as per the AERA Act and the provisions of the Concession Agreement and the principles entailed in the Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 ('**Tariff Guidelines'**) issued by AERA.

35. As per formula of ARR in terms of Clause **4.3** of the Tariff Guidelines, the ARR for a particular Control Period is calculated based on the determination of Regulatory Building Blocks Components as per the formula herein:

$$ARR = (FRoR \times RAB) + D + O + T - NAR$$

(NAR is Revenue from Services other than Aeronautical Services)

36. It is submitted by Learned Senior Counsel for the appellant that the revenue generated by HIAL only from Services can be taken into consideration for calculation of NAR in the formula to arrive at the ARR. In the present case, HIAL is receiving dividend from the investments made by it and not by providing any of the services. The Hon'ble TDSAT in DIAL Control Period 3 Order had the occasion to decide the issue of treatment of other income specially from dividend, interest etc. for Delhi Airport and the same has been decided against AERA.

37. While both the IGIA and RGIA have different Concession Agreements, however, HIAL relies on the findings of DIAL Control Period 3 Order in AERA Appeal No.1 of 2021 and AERA Appeal No.1 of 2016 dated 21.07.2022 especially on paragraph nos. 88 and 89 thereof, in so far as the underlying principle for treatment of 'Other Income' is concerned.

38. It is submitted by Learned Senior Counsel for the appellant that as such, the AERA's treatment of Dividend and Interest Income and Income from Treasury for RGIA is squarely covered by the DIAL Control Period 3 Order which has emphasized on the fact that Other Income are not arising from the provision of any Services and therefore AERA ought to reconsider its treatment.

Even as per the formula for calculation of ARR provided in Tariff Guidelines, only revenue from Services is to be deducted from the total of RAB + Depreciation + Taxation + Operation and Maintenance Expenditure.

39. It is submitted by Learned Senior Counsel for the appellant that moreover, AERA does not consider the investment in Joint Ventures as part of RAB boundary since such investments fall outside the regulated business of HIAL. RAB boundary is a perimeter which defines the scope for AERA to consider both aeronautical as well as non-aeronautical revenue. Since the Investment outflow is not considered as part of RAB boundary, accordingly, the return from such investment can also not be considered as part of revenue and therefore outside the regulatory purview of AERA.

40. It is submitted by Learned Senior Counsel for the appellant that in the Second Control Period, AERA deviated from its decision and took the position that income from Joint Ventures/Subsidiaries is to be treated based on the nature of activity and accordingly considered dividend income received from Hyderabad Menzies Air Cargo Pvt. Ltd as aeronautical and

dividend received from the Duty-Free subsidiary as non-aeronautical.

41. In view of the aforesaid submissions, it is highlighted by Learned Senior Counsel for the appellant that Interest from Dividend and Interest Income received by HIAL on the investments made by it and Treasury Income should be excluded from Consideration of Cross-Subsidization of Aeronautical Charges.

42. This income cannot be treated as Non-Aeronautical Revenue for cross-subsidization in Tariff Determination and to that extent, the impugned order dated 31st August, 2021 deserves to be quashed and set aside.

ISSUE V: Disallowance of part of the capital expenditure undertaken by HIAL for phase expansion of RGIA to increase the capacity to 34 MPPA

43. Learned Senior Counsel for the appellant submits that in the Second Control Period, AERA had approved the capital expenditure towards expansion of RGIA by 1,01,175 sqm. to handle passenger traffic of 20 MPPA vide Interim Measure Order dated 27.03.2020. However, owing to rapid increase in

passenger traffic during FY 2017-2019, HIAL proposed to expand the terminal building and initiated capacity expansion to 34 MPPA with an addition of 2,48,809 sqm for the combined 2nd and 3rd Control Period and invited competitive bidding wherein L&T emerged as a successful bidder. HIAL conducted an Airport User Consultative Committee ('**AUCC**') meeting to apprise AERA and other stakeholders of the overall expansion plan of RGIA.

44. It is submitted by Learned Senior Counsel for the appellant that HIAL sought in principle approval of the capital outlay plan from AERA however AERA took a stand that it would take a final view as part of the tariff determination exercise.

45. It is submitted by Learned Senior Counsel for the appellant that HIAL submitted capital expenditure of Rs.5596.23 crores towards the capacity expansion to 34 MPPA for arriving at the projected aeronautical RAB for the Third Control Period.

46. The capacity augmentation at RGIA was proposed to be completed by 01.04.2024. Since the capital expenditure was spread over FY18 - FY24, HIAL submitted the total project cost covering both Second and the Third Control Period.

47. Learned Senior Counsel for the appellant has placed reliance upon the decision rendered by this Tribunal in case of DIAL for 3rd Tariff Order in AERA Appeal No.1 of 2021 and AERA Appeal No.1 of 2016 dated 21.07.2022 especially paragraph no.165(c) and 165(f) thereof.

48. It is submitted by Learned Senior Counsel for the appellant that once the price has been arrived at through a market discovery process (through international competitive bidding), wherein L&T emerged as a successful bidder, the question of resorting to an option of estimate in determining the price does not arise and is irrelevant.

49. AERA has yet again failed to appreciate Section 13(l)(a)(i) of the AERA Act in terms of which AERA cannot rely on any notional or estimated price when the actual price is available. Thus, AERA should have allowed Rs.5596.23 Crores towards capacity expansion for the purpose of determination of RAB, as claimed by HIAL.

50. In view of the aforesaid facts and reasons, it is submitted by Learned Senior Counsel for the appellant that AERA has allowed cost of Rs.4820.05 Crores towards the expansion of capacity for

the purpose of determining RAB instead of Rs.5596.25 Crores as a part of Capital Expenditure.

51. In fact, AERA should have allowed the Actual Expenditure instead of Hypothetical Cost of Construction given by the third party. <u>This aspect of the matter has not been properly appreciated by AERA while passing the Impugned Order and hence, to that extent, the same deserves to be quashed and set aside.</u>

<u>ISSUE VI: Treatment of Cargo Satellite Building (CSB)</u>

52. It is submitted by Learned Senior Counsel for the appellant that HIAL has constructed a Cargo Satellite Building ('**CSB**') at landside at RGI Airport. The CSB has been leased out to various entities, including some freight consolidators/forwarders for their administrative office and for non-bonded warehousing purposes.

53. It is submitted by Learned Senior Counsel for the appellant that HIAL proposed AERA to treat CSB as non-aeronautical since Cargo is not part of Regulated Charges as per the Concession Agreement. However, AERA observed that CSB is being used to

undertake cargo-related operations and treated CSB as an Aeronautical Service in line with treatment of CGF.

54. It is submitted by Learned Senior Counsel for the appellant that AERA has erroneously treated CSB as aeronautical since CSB is relatable to cargo activities and as such it is beyond AERA's regulatory jurisdiction as it does not form part of Regulated Charges under Schedule 6 of the Concession Agreement.

55. It is submitted by Learned Senior Counsel for the appellant that AERA has failed to consider the provisions of Concession Agreement. AERA is bound to honour and respect the concessions awarded by the central government as per Section 13(1)(a)(vi) of the AERA Act and as also observed by this Hon'ble Tribunal in its order and judgement dated 23.04.2018 in AERA Appeal No. 10 of 2012 - *Delhi International Airport Limited v. Airports Economic Regulatory Authority of India*, order and judgment dated 13.01.2023 in AERA Appeal No. 7 of 2021 – *Delhi International Airport Limited v. Airports Economic Regulatory Authority of Indi*a and the Hon'ble Supreme Court in *Delhi International Airport Limited v. Airports Economic Regulatory Authority of India, 2022 SCC Online SC 850*.

56. In view of the aforesaid submissions, it is pointed out by the Learned Senior Counsel for the appellant that AERA has wrongly observed that Cargo Satellite Building is being used to undertake Cargo related operations and has wrongly treated Cargo Satellite Building as Aeronautical service in line with treatment of Cargo, Ground and Fuel Services and to that extent the impugned order deserves to be quashed and set aside.

ISSUE VII: Non-consideration of 30% non-aero revenue as part of aeronautical revenue base for computation of aeronautical taxes

57. Learned Senior Counsel for the appellant submits that as per Clause 4.3 of Tariff Guidelines, AERA must determine ARR for a Control Period as per the following formula:

$$ARR = (FRoR \times RAB) + D + O + T - NAR$$

Where, NAR represents the revenues from services other than aeronautical service(s) and T represents Taxation.

58. It is submitted by Learned Senior Counsel for the appellant that as per Clause 5.5 of the Tariff Guidelines, Taxation represents the payments by the Airport Operator in respect of corporate tax on income from assets/ amenities/ facilities/ services taken into consideration for determination of ARR.

59. It is submitted by Learned Senior Counsel for the appellant that HIAL had requested AERA to consider 30% of revenues from services other than aeronautical service(s), i.e., NAR as part of aeronautical revenue for computing T in view of this Hon'ble Tribunal's direction to AERA in judgment dated 15.11.2018 in AERA Appeal No. 4 of 2013 - ***Mumbai International Airport Limited v. Airports Economic Regulatory Authority of India***.

60. It is submitted by Learned Senior Counsel for the appellant that at the outset, it is imperative to point out, particularly considering AERA's contention that it has followed its decision in the Third Control Period Tariff Order No. 57/2020-21 dated 30.12.2020 issued for Delhi International Airport Limited, that this Hon'ble Tribunal has set aside AERA's decision in its order and judgement dated 21.07.2023 in AERA Appeal No. 1 of 2021 and AERA Appeal No.1 of 2016 especially on paragraph nos. 135(c) and 137 of this Judgement. This Hon'ble Tribunal has observed that tax on cross-subsidy (NAR in the case of HIAL and 'S-factor' in the case of DIAL) should be considered for determination of "T".

61. It is submitted by Learned Senior Counsel for the appellant that similarly, in the case of HIAL, the tax calculated on NAR ought to be included in T as NAR becomes part and parcel of the ARR and has a colour of Aeronautical Revenue when used for cross-subsidisation of Aeronautical Revenue.

62. It is submitted by Learned Senior Counsel for the appellant that ARR is determined based on aeronautical building blocks post cross subsidy of NAR. This clearly means that part of the aeronautical revenue has been recovered from NAR.

63. Making it amply clear that NAR is a mechanism of recovery of ARR. Clearly, NAR is a subset of aeronautical revenue. Therefore, once part of the aeronautical revenue has been recovered from NAR, the effect of NAR should also be given in 'T'.

64. It is submitted by Learned Senior Counsel for the appellant that as per the Clause 5.5 of Tariff Guidelines, AERA is mandated to compute Taxation by taking into consideration all incomes utilized for ARR. Therefore, as NAR is also used for computing the ARR, the same ought to have been taken into account while computing Taxation.

65. It is submitted by Learned Senior Counsel for the appellant that Stated differently, as computation of ARR involves reduction of

the aeronautical building blocks by NAR, AERA ought to compute T on the aggregate of aeronautical building blocks before it is reduced by NAR.

66. In view of the aforesaid facts and reasons, it is pointed out by the counsel for the appellant that AERA has not properly appreciated the aforesaid facts of the matter and, therefore, to that extent the impugned order deserves to be quashed and set aside.

ISSUE VIII: Allocation of Asset

67. It is submitted by the Learned Senior Counsel for the appellant that as part of the tariff determination process for determination of the Regulated Charges as mentioned in the Concession Agreement, one must determine the RAB, which forms the basis for calculating the ARR for a Control Period. The classification of assets within the RAB boundary is done based on the principles set out in Para 5.2.1(b) of the Tariff Guidelines.

68. It is submitted by Learned Senior Counsel for the appellant that the RAB calculated for a Control Period is also subject to true-up in the next Control Period to determine the under-recovery or over-recovery during the past Control Period.

69. It is submitted by Learned Senior Counsel for the appellant that AERA in Order No. 34/2019-20 had indicated that it would commission an independent study concerning allocation of assets between aeronautical and non-aeronautical assets for the Second Control Period for HIAL.

70. It is submitted by Learned Senior Counsel for the appellant that AERA while passing the impugned order, undertook True-Up of RAB for the First and Second Control Periods and decided if assets (i) Reservoir; (ii) Parking Stands; (iii) Integrated International Departure Terminal ('**IIDT**') and Integrated Domestic Arrival Terminal ('**IDAT**'); (iv) Township; and (v) Landscaping, fall within the RAB boundary.

71. It is submitted by Learned Senior Counsel for the appellant that HIAL had constructed reservoirs to utilize storm water for recharging ground water and avoid flooding of the Airport. It is part of critical infrastructure constructed to flood risk management and ground water recharge.

72. It is submitted by Learned Senior Counsel for the appellant that the location of the reservoir was based on the hydrological study conducted by Telangana Remote Sensing Application Centre ('TRAC'). The study location of the reservoirs was

suggested based on the natural gradient of the airport land. Accordingly, reservoir was constructed 2-3 kms from the hotel as HIAL was unable to get the natural gradient for the reservoir at the airport to cater to the entire airport and not to the hotel alone.

73. It is submitted by Learned Senior Counsel for the appellant that HIAL had converted parking stands into contact stands as part of airport expansion. Parking Stand were earlier used for aircraft parking and Contact Stand is used for boarding and deboarding of the passengers of the aircraft. Contact Stand is also critical for the fuelling the aircrafts. AERA has failed to take into consideration that the Contact Stands continue to be used for aircraft operations and the same conversion of the asset is also being reflected in Fixed Assets register of HIAL.

74. It is submitted by Learned Senior Counsel for the appellant that the parking stands satisfy the twin conditions for being classified as an asset under Accounting Standards 10, i.e., (i) Future economic benefits will flow to the enterprise; and (ii) cost of the item can be ascertained. Therefore, AERA ought not to have deleted such asset from RAB. Therefore, deletion of asset from Fixed Asset register of HIAL is of no consequence.

75. It is submitted by Learned Senior Counsel for the appellant that HIAL had constructed IIDT and IDAT as passenger processing terminal to support the main terminal building. The passenger processing activities undertaken at these terminals includes check in counter, baggage reclaim area, passenger sitting space, utilities.

76. It is submitted by Learned Senior Counsel for the appellant that IIDT has an overall area of 9000 sqm out of which Non-Aeronautical offerings occupy an area of 105 sqm area which is 1.17% of total area.

77. Similarly, IDAT has an overall area of 4000 sqm out of which non aeronautical offerings consist of round 22.60 Sqm area, i.e., 0.57%.

78. It is submitted by Learned Senior Counsel for the appellant that RGIA is the first private greenfield airport which originally was a barren piece of land situated 45 kms away from the city. Facilities were to be constructed for the operating the airport and facilitating travel of the passengers. It was envisaged to house staff for the operations of the airport and therefore there is no warrant to divide or bifurcate employees as critical or non-critical.

79. It is submitted by Learned Senior Counsel for the appellant that HIAL has constructed the township to provide accommodation to employees with the objective of ensuring quicker responses management in case of emergency or to continue to operate the airport in case of a disruption in the city.

80. It is submitted by Learned Senior Counsel for the appellant that AERA has failed to consider the intended purpose of the asset and instead assessed the utilization pattern by bifurcating the employees between those undertaking aeronautical services and non-aeronautical services and terming the former as "critical" and the latter as "non-critical". Accordingly, the township has been treated aeronautical based on critical staff ratio and the remaining as non-aeronautical.

81. It is submitted by Learned Senior Counsel for the appellant that Landscaping is an integral part of customer experience at the airport campus and is an integral part of airport operations as it enables HIAL to attract more passengers at the airport. Accordingly, HIAL had requested AERA that the landscaping expenses be treated as Aeronautical in nature in line with the treatment accorded to it in case of BIAL for the Second Control Period.

82. In view of the aforesaid submissions, it is pointed out by counsel for the appellant that the aforesaid five assets should be treated as Aeronautical Assets and may be included in RAB. This aspect of the matter has not been appreciated by AERA and, therefore, the impugned order dated 31.8.2021 deserves to be quashed and set aside.

ISSUE IX: Failure to consider depreciation as per the audited financials

83. It is submitted by the Learned Senior Counsel for the appellant that HIAL proposed AERA to consider Depreciation as per actual depreciation related to Aeronautical Assets as recorded in its Audited Financials for computing true up of depreciation in the Second Control Period.

84. It is submitted by Learned Senior Counsel for the appellant that HIAL proposed that when AERA deletes an asset from gross block, it must also delete the corresponding accumulated depreciation so that gross block less accumulated depreciation of deleted assets is reflected in the P&L Account in line with the standard accounting principles. The aforesaid aspect of the matter has not been appreciated by AERA and, therefore, the

impugned order dated 31.8.2021 deserves to be quashed and set aside.

85. AERA's decision to compute depreciation by applying depreciation rates prescribed by Order No.35/2017-2018 on the Asset Class wise Blocks is illegal. In fact, AERA should have considered depreciation as per Actual depreciation related to Aeronautical Assets as per rates provided under the Companies Act as prescribed in Tariff Guidelines (paragraph 5.3 of the Tariff Guidelines) and therefore, this aspect of the matter has not been properly appreciated by AERA while passing the impugned order and thus, to that extent, the impugned order deserves to be quashed and set aside.

ISSUE X: Correction in cost of debt has not been implemented

86. It is submitted by Learned Senior Counsel for the appellant that as per the Tariff Guidelines, AERA determines Fair Rate of Return ('FRoR') or the Weighted Average Cost of Capital taking into consideration the Cost of Debt and the Cost of Equity as per the following formula:

$$FRoR = (g \times Rd) + ((g-1) \times Re)$$

Where:

g is gearing (i.e., debt/ debt + equity)

Rd is the pre-tax cost of debt

Re is the pre-tax cost of equity

87. It is submitted by Learned Senior Counsel for the appellant that at the time of tariff determination of Second Control Period, AERA had considered cost of debt at 7.90% and proposed to true-up the same at the time of tariff determination of the Third Control Period based on the actual interest expenditure incurred by HIAL.

88. It is submitted by Learned Senior Counsel for the appellant that HIAL in its MYTP submitted actual interest expenses during the period FY2017 to FY2020 and estimated interest expenses for FY2021. Subsequently, even for FY2021, actual interest expense was submitted to AERA. Initially HIAL had considered capitalised debt and subsequently submitted cost of debt factoring in the actual draw down of the debt.

89. It is submitted by Learned Senior Counsel for the appellant that Accordingly, HIAL requested AERA to consider cost of debt for the Second Control Period as follows in Table 40.

Financial Year	FY 17	FY 18	FY 19	FY 20	FY 21
Cost of Debt	10.12%	9.28%	8.95%	9.55%	9.59%

90. It is submitted by Learned Senior Counsel for the appellant that AERA's decision to consider hypothetical cost of debt is also contrary to this Hon'ble Tribunal's observation in its judgement dated 06.10.2023 in Mumbai International Airport Limited v. Airports Economic Regulatory Authority of India wherein this Hon'ble Tribunal has observed that AERA must consider the cost of debt actually considered by the Airport Operator, especially if raised from reputed lenders.

91. In view of the aforesaid submissions, counsel for the appellant pointed out that AERA should have done correction in cost of debt and should have implemented the same. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and hence, to that extent, the impugned order deserves to be quashed and set aside.

ISSUE XI: Interest charges on delayed payments as part of operational expenses

92. It is submitted by Learned Senior Counsel for the appellant that

taxing authorities usually levy interest on the delayed payments on the difference of tax provisioned and actual tax paid for a financial year. HIAL in its MYTP for the third Control Period submitted the true up of operating and maintenance expenses for the Second Control Period based on actual expenditure from FY2017 – FY 2021 including its interest charges on delayed payments.

93. It is further submitted by counsel for the appellant that AERA should have considered interest charges on delayed payments as part of its operational expenses and thereby AERA should have allowed its true up as per actuals. This aspect of the matter has not been properly appreciated by AERA and hence, to that extent, the impugned order deserves to be quashed and set aside.

ISSUE XII: AERA has wrongly treated the benefit received by HIAL under Served From India Scheme (SFIS) as non-aeronautical income

94. It is submitted by Learned Senior Counsel for the appellant that under the Served From India Scheme ('**SFIS**') by the Government of India, HIAL was entitled to the grant of Scrips called - Custom Duty Scrips ('**SFIS Scrips**') which were in the

nature of credit notes available against the export of goods and services and could be utilized, inter-alia, for claiming exemption against payment of import duty fort import of capital goods to be used by the service provider while providing such services.

95. The SFIS Scrips were equivalent to 10% of the foreign exchange earned or deemed to be earned in the preceding financial year. HIAL received SFIS Scrips for the deemed foreign exchange earnings and it earned income from the sale of such SFIS Scrips.

96. It is submitted by the counsel for the appellant that the income generated on account of sale of SFIS Scrips is not relatable to any service provided at airport and, therefore, it cannot be allocated into aeronautical and non-aeronautical ratio. This aspect of the matter has not been properly appreciated by AERA and thus, to that extent, the impugned order deserves to be quashed and set aside.

ISSUE XIII: Postponement of partial recovery of Aggregate Revenue Requirement (ARR)

97. It is submitted by Learned Senior Counsel for the appellant that as per Clause **4.3** of Tariff Guidelines, AERA must determine ARR for a Control Period as per the following formula:

ARR = (FROR x RAB) + D + O + T – NAR

The ARR represents the entitlement of the Airport Operator for the Control Period, which is to be recovered from the Users of the Airport.

98. For determining the charges to be levied per passenger, AERA determines the Yield Per Passenger ('Y') for the Control Period. Clause 6.2 of the Tariff Guidelines provide the formula for determining Y, which is reproduced below:

$$\text{Yield per passenger (Y)} = \frac{\sum_{t=1}^{5} PV(ARR_t)}{\sum_{t=1}^{5}(VE_t)}$$

where, VE is the Estimated Volume of departing and arriving passengers in a Tariff Year.

99. Finally, AERA determines the Rate Card for Landing, Parking, UDF, etc. to be levied by Airport Operator to recover the ARR as determined in the Tariff Order.

100. AERA has exceeded its jurisdiction by allowing only a partial recovery of ARR as neither the Tariff Guidelines, the AERA Act nor the Concession Agreement permit the Respondent to delay recovery of eligible ARR for any reason whatsoever. In fact, section 13(1)(a)(i) of the AERA Act mandates AERA to

determine tariff for aeronautical services taking into consideration the "*capital expenditure incurred and timely investment in the improvement of airport facilities*".

101. HIAL has on-going capital expenditure projects, planned works and operational expenses that are recovered through levy of Regulated Charges determined by AERA. As such, the recovery of ARR in the given Control Period is necessary for economic and viable operation of major airports. Interestingly, HIAL has not been permitted to recover 100% ARR entitlement (determined by AERA itself) even though it admits that HIAL has undertaken its mandated capex at a time that, as noted by AERA, the aviation sector has been hit by the pandemic.

102. AERA has failed to appreciate the aforesaid facts and reasons and hence, the impugned order dated 31.8.2021 deserves to be quashed and set aside for the issue no. XIII.

ISSUE XIV: Interest During Construction (IDC)

103. It is submitted by Learned Senior Counsel for the appellant that as per Clause 5.2.7(a) of Tariff Guidelines, AERA must calculate Financing Allowance on Work in Progress Assets, i.e., Assets which have not been commissioned during a Tariff Year.

Financing Allowance consists of both a return on equity and return on debt, i.e., Interest During Construction **('IDC')** during the contract period.

104. HIAL had issued bonds of USD 300 million in Feb 2021 at 9.65% per annum (including hedging), payable semi-annually for undertaking capital expenditure at RGI Airport. An arrangement fee of Rs. 40.54 Crores was also incurred for the bond, which would be amortised over bond tenure (till Feb 2026).

105. HIAL as a prudent airport operator had secured project funding prior to incurring the capital expenditure to avoid risk associated with the funding of the Project. The benefits of lower borrowing costs have benefitted all stakeholders in the form of lower FRoR.

106. As AERA has not passed a reasoned order in this regard, it is unclear how AERA has calculated IDC for the Third Control Period. However, it appears AERA has calculated IDC based on utilisation of fund in capital expenditure instead of taking into consideration the costs of the entire debt facility. AERA has failed to consider that funding cannot be procured in a piecemeal manner and needs to be procured well in advance of the planned expenditure.

107. Consideration of Interest Income accruing from unutilized debt is beyond the regulatory ambit of AERA as it does not accrue from any services rendered by HIAL as set out in Para IV of the present Written Submissions pertaining to Other Income.

108. The Arrangement Fee has been borne by HIAL and accordingly being amortized in the Third Control Period as part of project cost till Mar 2023 and thereafter as part of Profit & Loss Account till Feb 2026. Accordingly, the said Fee ought to have been considered by AERA as part of Project Costs and Profit & Loss Account in the Impugned Order.

109. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and thus, to that extent, the impugned order deserves to be quashed and set aside so far as issue no. XIV is concerned.

ISSUE XV: Treatment of revenue from vehicle fuelling station on airside as aeronautical services and vehicle fulling station on the landside as common assets

110. It is submitted by Learned Senior Counsel for the appellant that Vehicle Fuelling Services are provided to the vehicles that ply in the airside to facilitate the passenger movements and for those

purposes, the Vehicle Fuelling Station on the airside have been concessioned out to BPCL at the RGIA.

111. Additionally, there is another vehicle fuelling station run by BPCL which is located on the landside/city side at the RGIA and is non-core to the airport operations as it supplies fuel to vehicles plying to and from the airport as well as customers which may not be airport users.

112. The Vehicle Fuelling Station on the airside does not supply fuel to aircraft and as such does not fall within the ambit of 'aeronautical services' as defined under the AERA Act. Since it is only used by vehicles that ply on airside to facilitate passenger movements, it should be classified as non-aeronautical.

113. The Vehicle Fuelling Station on the landside is non-core to the airport operations as it supplies fuel to vehicles plying to and from the airport as well as customers which may not be airport users. Further, the income earned by HIAL from Vehicle Fuelling Station situated on the landside is only limited to rental income for the land leased by HIAL to BPCL to operate the Vehicle Fuelling Station and, therefore, it is neither aeronautical nor non-aeronautical but purely a non-airport activity falling

beyond the regulatory purview of AERA. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and thus, to that extent, the impugned order deserves to be quashed and set aside so far as issue no. XV is concerned.

ISSUE XVI: Levy penalty in case of delayed execution of projects

114. It is submitted by Learned Senior Counsel for the appellant that HIAL has been penalised by AERA for delay in execution of the projects which is beyond its control. HIAL has requested for waiver of the penalty levied by AERA in case of delayed execution on account of COVID-19 pandemic.

115. HIAL **submitted** AERA to waive 1% penalty in case of delayed execution as HIAL is passing through extraordinary time due to COVID-19 pandemic and the Project team has faced two bouts COVID-19 waves during the execution of the Project.

116. AERA has erred in deciding to reduce 1% of the total project cost from ARR/Target Revenue for delayed execution. AERA has also erred in not considering the impact of COVID-19 pandemic on the completion schedule of the capital projects.

117. There is no provision in the AERA Act nor in the Concession Agreement which contemplates the levy of any penalty and as such the levy of 1% penalty on delayed execution is beyond the power of AERA.

118. While AERA has rejected HIAL's request for waiver of penalty on account of COVID-19 Pandemic, it has postponed the recovery of a portion of ARR for the Third Control Period to the 4th Control Period for the same reason at the request of other stakeholders. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and thus, to that extent, the impugned order deserves to be quashed and set aside so far as issue no. XVI is concerned.

ISSUE XVII: Issue of year-end discounting instead of mid-year discounting

119. It is submitted by Learned Senior Counsel for the appellant that discounting factor, in general, is used to calculate the present value of future cash flow values. The discounting rate applied by AERA in the calculation to arrive at present value of ARR and present value of true ups has been taken at year end approach.

120. Appellant represented before AERA that (a) the cash flows should be assumed to be available at the mid of the respective years; (b) the discount rate for calculation of discounting factor should correspond to the period through which discounting is performed and (c) the present value of all the cash flows to be assumed till 01.10.2021 as effective date of implementation of new tariff.

121. HIAL proposed that the cash flows should be assumed to be available at the mid of the respective years as it is closer to the reality that the cash flows of a firm are distributed evenly throughout the year. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and thus, to that extent, the impugned order deserves to be quashed and set aside so far as issue no. XVII is concerned.

ISSUE XVIII: Unilateral finalisation and publication of rate card

122. It is submitted by Learned Senior Counsel for the appellant that pursuant to the determination of ARR, the Rate Card for Aeronautical tariff is published. However, AERA without any authority, has unilaterally finalised and published the Rate Card for aeronautical tariff after the determination of ARR.

123. As per the Tariff Guidelines, HIAL has a prerogative to propose the Rate Card in consideration of its business strategy once the ARR has been determined by AERA.

124. Clause 3.4 of the Tariff Guidelines state that upon issuance of the Multi Year Tariff Order, the concerned airport operator (HIAL in the present case) shall submit its annual tariff proposal to AERA. The Annual Tariff Proposal is to be submitted at least 105 days prior to the start of the tariff year. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order dated 31.8.2021 and thus, to that extent, the impugned order deserves to be quashed and set aside so far as issue no. XVIII is concerned.

ISSUE XIX: Cost of Equity

125. It is submitted by Learned Senior Counsel for the appellant that Cost of Equity ('**CoE**') is essential in determining the Fair Rate of Return ('**FRoR**') for a Control Period. The CoE is determined on the basis of Capital Asset Pricing Model ('**CAPM**').

126. Cost of Equity is calculated using the following formula:

$$R_e = R_f + \beta \times EMRP$$

Where:

R_e is the cost of equity

R_f is the risk free rate

β is the beta

EMRP is the equity market risk premium which is equal to ($R_m - R_f$) where R_m is the return on market portfolio

127. The Cost of Equity recommended by various expert reports is as follows:

Report	**Cost of Equity**
Jacobs	24.2%
KPMG (For APAO)	20-25% based on debt equity ratio
SBI Caps (For MoCA)	18.5- 20.5%

128. Without prejudice to the claim of 24.2% for Cost of Equity based on the reports of Jacobs Consulting, AERA ought to have given credence to the reports of SBI Capital Markets Limited which was an independent study conducted at the behest of MoCA which recommended Cost of Equity of airports in the range of 18.5% to 20.5% for the purpose of determination of ideal cost of equity for airport sector/operators.

129. Instead of taking into consideration the expert's study and recommendations, AERA has merely rejected the submissions of HIAL without any plausible reasons and stuck to its stand which is without any merit.

130. In previous Control Periods, AERA has allowed an unreasonably low Cost of Equity to HIAL by relying on a report by NIPFP and in doing so, it has failed to appreciate the CAPM methodology of determination of Cost of Equity by the industry experts (Jacobs, KPMG) including the study undertaken by SBI Caps at the behest of MoCA. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and thus, to that extent, the impugned order deserves to be quashed and set aside so far as issue no. XIX is concerned.

ISSUE XX: Treatment of foreign exchange losses ('forex losses')

131. It is submitted by Learned Senior Counsel for the appellant that HIAL contracted debt in foreign currency and drew External Commercial Borrowing ('ECB') at relatively lower rate than that of Indian Rupee borrowing to reduce the cost of borrowings. This was done because during the year 2006- 07, when rupee interest cost was very expensive.

132. However, AERA has restricted the allowance of exchange rate variation suffered by HIAL to an upper cap of rupee borrowing cost on year-on-year basis. The benefit of raising funds from overseas is lower interest rates, however, at the time of

repayment of such bonds, HIAL incurs losses on account of fluctuations in the foreign exchange rate.

133. According to HIAL, AERA should consider the losses suffered by HIAL on account of foreign exchange fluctuations as part of RAB. In the absence of any clear upfront regulatory guidelines on treatment of exchange movement on account of foreign currency loan, the exchange loss suffered by HIAL should be allowed without any restriction by following the principle that when the benefit of lower cost is passed on, the loss on the same should also be allowed as pass through.

134. In this backdrop, HIAL requested AERA to allow true up of operating expenses on account of foreign exchange losses incurred by HIAL to the extent Rs.154.72 Cr as a pass-through expense while determining the tariff for aeronautical services in the Third Control Period.

135. The foreign exchange variations are beyond the control of the airport operator and can be considered as uncontrollable expenses which should be considered by AERA on actuals. AERA has capped the interest rate for CONTROL PERIOD -1 to 12.5% whereas actual interest rate paid on ECB was 7.69%.

136. Without prejudice to HIAL's rights of claim of actual forex loss even by considering the decision of the AERA, the eligible forex losses to

be recovered should be Rs.154.72 crores (HIAL incurred on account of forex fluctuations) on ECB against which AERA has allowed Rs.76.35 crores. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and thus, to that extent, the impugned order deserves to be quashed and set aside so far as issue no. XX is concerned.

ISSUE XXI: Classification of notional gain on fair of 30% of non-aeronautical Profit Before Tax (PBT) under shared till

137. It is submitted by Learned Senior Counsel for the appellant that HIAL requested AERA to exclude notional gain on account of fair value of Interest Rate Swap from Non- Aeronautical revenue.

138. The notional gain on account of fair value of Interest Rate Swap (IRS) of Rs.40.19 Crores and Rs.11.9 Crores in FY 18 and FY 19 is a mere book entry in terms of IND AS and is not realised in cash, hence notional in nature. As such, no actual income accrues to HIAL.

139. The comparison by AERA between the losses sustained on account of foreign exchange losses with the notional gain on account of IRS is untenable because in the case of losses on account of forex, actual cash loss is suffered by HIAL. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and

thus, to that extent, the impugned order deserves to be quashed and set aside so far as issue no. XXI is concerned.

ISSUE XXII: Non-consideration of 30% of non-aeronautical Profit Before Tax (PBT) for determination of Cross-Subsidy

140. It is submitted by Learned Senior Counsel for the appellant that HIAL represented AERA to consider the surplus generated by HIAL from services other than aeronautical service, i.e., 30% of non-aeronautical PBT (i.e., post deduction of associated costs) for determination of cross subsidy to the ARR based on ICAO Principles on Cost Relatedness and Order No. 14/2016-17.

141. As 'Shared-Till' or 'Hybrid-Till' Mechanism being a mix of 'Single-Till' and 'Dual Till' Mechanism, only 30% of the surpluses from services other than Aeronautical Services ought to have been considered. Clearly, AERA has erred by considering the gross NAR instead of PBT/surplus for computing the cross subsidy.

142. AERA's contention that ICAO Principles are merely guiding principles and not binding on AERA is contrary to its own submissions in Para 14 of its Reply where AERA has stated to have followed guiding principles issued by the ICAO on charges for Airports and Air Navigation Services & Airport Economic Manual. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order and thus, to that extent, the impugned order

deserves to be quashed and set aside so far as issue no. XXII is concerned.

ARGUMENTS CANVASSED BY RESPONDENT No.1- AERA

143. The Learned Counsel Mr. Kunal Tandon for Respondent No.1- AERA has vehemently opposed this present appeal and has set forth his arguments on the various issues involved in the present appeal which are delineated in the subsequent paragraphs.

ISSUE NO. I: PRE-CONTROL PERIOD ENTITLEMENT ('PCPE') FROM 23.03.2008

144. It is submitted by the learned counsel appearing for Respondent No.1- AERA that HIAL has not raised the issue of error in computation in PCPE in the previous Control Period as well as in its MYTP submission for third Control Period and hence there is no error in computation of pending entitlement for PCPE.

145. It has been raised for the first time in the response on 30.07.2021 to the Consultation Paper issued by AERA, which was the last date of stakeholder's consultation process.

146. It is submitted by the learned counsel appearing for Respondent No.1- AERA that the afterthought of the Appellant is further established from the fact that even in the TDSAT Order dated

04.03.2020 in respect of HIAL, AERA's stand has been duly noted that the issue of Pre-Control Period losses from 23.02.2008 to 01.09.2009 was never claimed or raised by the appellant.

147. It is submitted by the learned counsel appearing for Respondent No.1- AERA that Even as per Clause 10.3 and 10.4 of the Concession Agreement, AERA is supposed to grant approvals in respect of Regulated Charges, and for any date prior to the date when AERA assumes power, HIAL was required to approach MoCA for any change in the Regulated Charges. HIAL has failed to do so.

ISSUE NO. II: CARGO, GROUND HANDLING AND FUEL

148. It is submitted that the AERA Act, which is a parliamentary legislation, must have supremacy over any regulated concession given to the Appellant. Cargo, Ground Handling and Fuel (CGF) was included in the aeronautical services as defined in Section 2(a).

149. It is additionally submitted by the Ld. Counsel that, the concession agreement is, at best, a regulated contract through which a concession has been given by the Government of India,

which agreement requires consideration ('consider' is to carefully think about it and not be bound by it) by AERA. AERA is not bound by it. AERA is bound by the AERA Act.

150. The Concession Agreement does not provide for any categorization of the services into aeronautical or otherwise. AERA Act provides for the same. Hence, harmonious construction of the concession granted by the State and the enactment of the State to be made.

151. Moreover, it is submitted that, AERA is not bound by the Concession Agreement, and anything contrary contained in the Agreement stands altered and withdrawn by the AERA Act.

152. It is also noteworthy that there are many services under Schedule 3 Part I of the Concession Agreement which by their nature are purely aeronautical and admittedly have been considered aeronautical by all the stakeholders. Hence, on this count also, the argument that the Concession Agreement treats CGF as non-Aeronautical is not tenable at law.

Issue No. III: Income From Real Estate Development

153. GoAP vide letter dated 12.02.2014 recommended the treatment of income from real estate to be as non-aeronautical revenue.

154. As per para 4.60 to 4.62 of Tariff Order No. 38/2013-14, it was conclusive that land is acquired for a public purpose viz. the airport. The airport will not be feasible unless the commercial utilization of land in excess of the airport requirements is permitted. It would follow that the revenues from such commercial utilization should benefit the passengers of the airport in question.

155. AERA considered the treatment of income from real estate as non-aeronautical revenue and has used the same for cross-subsidization under the Shared Till methodology consistently as per NCAP 2016 and relevant GoI and AERA orders.

156. As per Schedule 3 Part 2 of Concession Agreement, non-airport activities include all services, facilities and equipment that may include commercial activities.

157. Thus, revenues from such sources should be considered as non-aeronautical. Concession Agreement cannot be read without taking into consideration the intent of State Support Agreement and Land lease Agreement, which is benefit of the passengers of the airport in question.

ISSUE NO. IV: TREATMENT OF OTHER INCOME

158. Dividend income from Cargo (Aeronautical) and Duty Free (non-aeronautical) are necessary for providing Aeronautical activities i.e. Cargo relates to the activities that are necessary for aircraft operation, and duty free enhances the performance, quality and efficiency of the Airport.

159. The Respondent has considered these income sources as part of revenue from other income as these were revenues accruing to the airport operator through cash earned from airport operations. There is no specific provision to exclude Other Income such as interest income and income from delayed payment as per the provisions of the Concession Agreement.

160. AERA is of the view that interest income is derived by investing surplus funds from time to time and the surplus funds are primarily from aeronautical services.

161. Since CGF services are to be treated as aeronautical activity, any income incidental to this will be treated as aeronautical in nature.

162. The cash generation by HIAL originated from the airport operations, within which both aeronautical and non-aeronautical services are included.

163. In respect of treatment of dividend and interest income, it is stated that the income from treasury is earned due to investing funds earned from airport operations and hence are considered for determination of ARR.

ISSUE NO. V: DISALLOWANCE OF PART OF THE CAPITAL EXPENDITURE UNDERTAKEN BY THE APPELLANT FOR PHASE EXPANSION OF RGIA TO INCREASE CAPACITY TO 34 MPPA

164. AERA has not disallowed the capex plans but based on its own independent assessment has arrived at an efficient cost through a separate independent study conducted by RITES, a Govt. of India undertaking, exclusively for this purpose.

165. The Respondent considered the recommendation of the RITES, report for all cost heads- other than Apron & Taxiways and GSE Tunnel and, Design Development and PMC.

166. Based on the observations and findings of the RITES report, the Respondent proposed to allow the Appellant Rs.4820.05 Crores (Rs. 4785.86 as per RITES report - Table 90 and Rs.29.80 Crores & Rs.4.38 Crores already spent - Para 6.2.5) towards expansion capex for the purpose of determination of RAB instead of Rs.5596.23 Crores requested by the Appellant.).

167. As per the terms of the tariff determination process, AERA has consistently allowed only efficient costs for the determination of

tariff. The efficient costs have been arrived at through an independent study and AERA had relied on the same with necessary adjustments for inflation and statutory tax adjustments.

168. AERA shall definitely take into consideration the actual cost incurred for determining the efficient costs post incurrence of the same during the true up of third Control Period at the time of tariff determination of fourth Control Period, if the incurred costs are reasonable and justifiable.

ISSUE NO. VI: FAILURE TO TREAT CARGO SATELLITE BUILDING AS NON-AIRPORT ACTIVITY

169. Cargo Satellite Building (CSB) was being used as an administrative office for the staff of freight forwarders and some portion of the building was also being used as a storage/warehouse for cargo parcels. Thus, in light of the consideration that CSB was used for the purpose of cargo, the same is to be treated as aeronautical service in line with the treatment of cargo services as stated in earlier section.

170. As the building was being used to undertake cargo related operations and cargo handling at the airport, AERA stated it to be treated as aeronautical service in line with the treatment of

cargo services as decided by AERA in the para 3.2.50 of the Impugned Tariff Order as well as AERA's response in respect of the issue relating to CGF.

ISSUE NO. VII: NON-CONSIDERATION OF 30% NON-AERONAUTICAL REVENUE AS PART OF AERONAUTICAL REVENUE BASE FOR COMPUTATION OF AERONAUTICAL TAXES

171. Based on the views and recommendations received from the stakeholders as well as Authority's own evaluation, the 30% non-aeronautical revenue is a subsidy by nature for the airport user and not to be treated as part of aeronautical income which may overate the tax obligation. Hence, the Authority decided to not include 30% non-aero revenues for drawing of Aero P&L for computation of Aeronautical tax.

172. The Judgments dated 21.07.2023 in DIAL matter and 06.10.2023 in MIAL matter are distinguishable on specific facts pertinent to the said airport operators. While in the cases of DIAL and MIAL, the governing contract is OMDA and their SSA contemplated the calculation of Target Revenue, as

$$TR = RB^* WACC + OM + D + T - S$$

Wherein T is the corporate taxes pertaining to aeronautical services.

173. This Hon'ble Tribunal in the aforementioned judgments has clarified that benefit of "T" has to be given effect to, irrespective of the fact whether tax has been paid or not.

174. However, in the case of HIAL, the ARR is calculated on the basis of the formula contemplated in the AERA (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 dt. 28.02.2011. Clause 5.5 of the Guidelines clarify that "taxation" is the payments by the Airport Operator in respect of corporate tax on income from assets/ amenities/ facilities/ services taken into consideration for determination of Aggregate Revenue Requirement.

175. The formula contemplated in the Tariff Guideline is ARR = (FRoR*RAB) + D + O + T – NAR Wherein T has to be determined as per the principle enunciated in Clause 5.5 of the Guidelines. Thus, "payments" cannot be on notional basis and only actual taxes paid will have to be considered. Thus, the judgments of DIAL and MIAL are not applicable to the present case.

ISSUE NO. VIII: ALLOCATION OF ASSETS

176. AERA had clearly taken note of HIAL's comment regarding treatment of reservoir. Further, AERA had asked for additional details on the end use of this reservoir during the independent

study on capex allocation and HIAL had not given any further details on the same. Hence, in the absence of any details of this issue, the same has been treated as non-aero and excluded from the computation of RAB.

177. Further, in case HIAL is able to submit sufficient details regarding end use of the reservoir subject to reasonability, AERA would examine the same as part of true up while determining tariff for the Fourth Control Period.

178. AERA as per the recommendation of independent study on asset allocation, the value of decommissioned parking stands had been computed on net value of the assets and assuming normative cost as per Order no. No.07/20 16-17 dated 13.06.2016. The deletion of these assets has not been captured in the Fixed Asset Register and accordingly, the independent study by CRISIL, had suggested that deletions on account of these assets be taken into consideration and therefore an amount of ₹ 14.91 crore be reduced from the aeronautical assets to reflect the deletion of the 12 stands as per the recommendation of independent study commissioned by AERA.

179. HIAL did not provide further details on the decommissioning of stands and hence the normative approach in determining the asset value was used. Therefore, in the absence of detailed information and justification thereon, the Authority has reduced the said amount from RAB computation.

180. AERA had stated that passenger terminal buildings, including the IIDT and IDAT should be properly and optimally utilised for both the aero and non-aero operations. Further, any underutilisation of the same should not result in burdening of the user.

181. In light of the same, AERA decided that the IIDT and IDAT buildings are to be apportioned on the aeronautical:non-aeronautical percentages used by HIAL for existing passenger terminal building and the decision on terminal ratio was to be maintained.

182. Additionally, AERA revised the useful life of IIDT and IDAT to 30 years instead of 7 years as considered by HIAL on the recommendation of independent study and also since these interim structures are constructed to cater to the rising passenger traffic and hence qualify under expansion project.

183. any structure created for catering to rising traffic should be used as per its useful life as given in Order No. 35/2017-18 dated 12.01.2018 and Amendment No. 01 to Order No. 35/2017-18 dated 09.04.2018. The provisions of this order are uniformly and transparently followed for all airports.

184. AERA decided to maintain its position to apportion the township based on critical & non-critical staff ratio for the purpose of consideration into aeronautical and non-aeronautical activity respectively and in line with its past decisions.

185. The landscaping used to enhance the overall appeal of the airport and it is not just for aeronautical revenue generating customers, but it also attracts the non-aeronautical revenue generating customers and hence it has to be treated as common.

ISSUE NO. IX: FAILURE TO TREAT DEPRECIATION AS PER AUDITED FINANCIALS

186. AERA had requested HIAL to submit the basis of depreciation calculation in fixed asset registers detailing the rates prescribed by AERA as per order 35/2017-18 for various asset class. However, in light of its failure to provide the same, the

rates of the Order No.35/2017-18 were applied asset class wise to compute the deprecation for the Second Control Period, further taking into consideration the adjustments for FY17 opening asset block and for depreciation on deletion of assets. The opening block for FY17 is taken same as the closing block of FY16 as per order no. 34/2019-20 of the Second Control Period.

ISSUE NO. X: [CORRECTION IN COST OF DEBT NOT IMPLEMENTED] True-Up for Control Period

187. As per para 4.3.30 to 4.3.32 of the Order No. 12/2021-22 for Third Control Period of HIAL, AERA has clearly stated that it has scrutinized HIAL's submission of its MYTP and financial model wherein it has projected the average debt for each year for the second Control Period and noted that HIAL itself had not considered the said debt drawal in their calculations. However, AERA had modified the calculation based on its own methodology of cost of debt calculations adopted across all tariff orders for HIAL.

188. The Cost of Debt has been uniformly calculated based on closing debt position of HIAL and the same has resulted in adjustment of the cost of debt for both the Control Periods. The

difference is due to differential techniques in calculation of cost of debt. Further, based on HIAL's request AERA had examined the missed debt drawl as part of the calculation and concluded that AERA had already included the said debt drawl at the consultation stage itself and hence there was no change in the cost of Debt in the tariff order issued for third Control Period.

ISSUE NO. XI: INTEREST CHARGES ON DELAYED PAYMENTS

189. The Authority had commissioned an independent study to analyse efficient operation and maintenance costs submitted by the operator and determine the allocation and their reasonableness. The independent study had also determined the appropriate proportion of common cost centre that may be included in aeronautical activity, in order to determine the total aeronautical cost.

190. Since bank charges include finance related charges towards expansion and refinancing activities, Trust and Retention Account (TRA) operations, the amount submitted towards these expenses have been retained. Further, the bank charges were

also inclusive of one-time refinancing cost of Rs. 125.67 Crores which has been allotted basis previous direction of AERA.

191. However, the amount attributed to interest charges due to delayed payment had been deducted as these cannot be passed on to the passengers and common expenses have been classified based on revised aeronautical asset ratio.

192. End users cannot be penalized due to expense on account of lacuna in the system which necessitates payment of interest on delayed payment. Further, the advance tax mechanism is part of routine business operations and hence the end users cannot be burdened with this.

ISSUE NO. XII: BENEFITS RECEVIED BY APPELLANT UNDER SERVED FROM INDIA SCHEME ("SFIS") TREATED AS NON-AERONAUTICAL INCOME

193. AERA has proposed to allocate the realised income from SFIS common Scrips between aeronautical and non-aeronautical basis the allocation of income that resulted in earning these Scrips as HIAL has earned foreign income from certain aeronautical or non-aeronautical activities as part of the airport operations, which in turn made it eligible for earning the SFIS Scrips.

194. HIAL had earned income from FY 2010-11 to FY 2012-13 through the sale of Scrips under the Served From India Scheme (SFIS). AERA vide its query email dated 13.06.2017, sought a clarification in the form of an auditor certificate from HIAL regarding the different airport operations that led to the generation of such foreign income. In its response dated 13.07.2017, HIAL submitted that "Under the Foreign Trade Policy 2009-14, HIAL was eligible for SFIS Scrips till December 2010 only.

195. Accordingly, HIAL applied for and received SFIS Scrips for Deemed Foreign Exchange Earnings till December 2010 only. As allowed under the Scheme, calculation of SFIS Scrips had been done based on deemed foreign exchange earnings and not on the actual foreign exchange earnings. AERA had allocated the realized income from SFIS Scrips between aeronautical and non-aeronautical based on the allocation of income that resulted in earning these SFIS Scrips.

ISSUE NO. XIII POSTPONEMENT OF RECOVERY OF PARTIAL ARR

196. Only a small portion (13.84%) of ARR is carried forward while major portion (86.16%) is being allowed in the 3rd Control Period itself.

197. The pandemic had severely affected the aviation sector. Even in such challenging situation, the Respondent made their best efforts to propose reasonable resolutions while taking steps for determination of tariff for the 3rd Control Period.

198. Due to true up facility, HIAL will recover ARR in the next tariff order and in consonance with the Net Present Value ("NPV"), which shall be significantly higher than what is estimated now.

199. In view of the above, it is submitted that the Respondent as a statutory authority has acted in a fair, just, reasonable and transparent manner taking into consideration the prevailing circumstances, ensuring the Appellant's best interest while also ensuring the interest of the public at large.

ISSUE NO. XVI: INTEREST DURING CONSTRUCTION

200. AERA has considered the issue of IDC on account of the new bond issued by HIAL in FY 2021 and amortization of charges

during the Third Control Period. AERA has accordingly revised the FY21 debt figures including the IDC, and to not consider the amortization of charges related to bonds over the Third Control Period.

201. However, the same shall be considered at the time of tariff determination for the Fourth Control Period on the basis of audited financials as a one-time issuance cost.

202. It is further submitted that based on actual financials of Third Control Period this will be trued up in the next Control Period.

203. Based on the analysis of the capital expenditure plan submitted by HIAL and findings of the RITES Report, the Authority decided to allow Interest during Construction of Rs. 436.76 Crores for financing of the expansion capex based on prudent means of financing.

ISSUE NO. XV: TREATMENT OF VEHICLE FUELING STATION ON AIRSIDE AND LANDSIDE

204. AERA has decided to treat the fuelling station on landside (city side) as common in the ratio of 50:50 (aeronautical:non-aeronautical) as this service is used by both airport and other users.

205. The vehicle fuelling services on airside are essential for providing service for aircraft operations since these vehicles are necessary to support the operation of aircraft services, cargo and passenger services, emergency services, and maintenance of the airport and hence, would qualify as an aeronautical service only. Hence, AERA has decided to include vehicle fuelling service on airside as aeronautical service.

ISSUE NO. XVI: PENALTY IN CASE OF DELAYED EXECUTION

206. However, in light of the consideration that the situation is likely to improve, AERA has decided to readjust (reduce) 1% of the uncapitalised project cost from ARR/Target Revenue in True-Up exercise of the Third Control Period, if any particular project is not capitalised as per the capex schedule approved in the tariff order. As the airport operator is getting tariff based on the approved Capex as submitted by them, it is essential that they deliver and complete the work on time so that the airport users benefit from its use, since they are paying for that service.

207. AERA further clarified that in case there is a delay in completion of the project beyond the timeline given in the said tariff order, due to any reason beyond the control of HIAL or its contracting

agency and is properly justified, the same would be considered while truing up the actual cost at the time of determination of tariff for the fourth Control Period. Time and cost overrun need to be avoided and end user should not be penalised for the same.

208. Penalty is merely a means to ensure efficiency standards are maintained by the Airport Operator and would disincentivise the Appellant from allowing the project getting delayed beyond the committed timelines for implementation of the project thereby ensuring efficiency in the cost incurrence. That this is a balancing exercise to ensure the commitment of the AOs to meet the schedules.

ISSUE NO. XVII: CONSIDERATION OF DISCOUNTING FACTOR

209. The revenues as well as operating expenses are assumed to be occurring at year end hence, decide to continue with year-end discounting for all the periods under consideration. This has been a consistent approach across all airports. It may be noted that there will be no difference between the scenarios if cash flow is discounted on mid-year basis or end year basis as the PV value (current value of future sum of money or stream of cash flows,

given a specified rate of return) of both ARR and revenue will be re-calculated accordingly. For all 15 airports, this practice is followed due to good accounting practices.

ISSUE NO. XVIII: RATE CARD DETERMINATION

210. Rate card has already been given by HIAL on 09.07.2021. Rate card is arrived at in order to recover the ARR as determined in this Tariff Order. As per the Rate card, no increase in tariff has been given in FY22 which was decided in consultation with HIAL. Further, the Authority has adjusted the rate card and tariff growths over the Third Control Period as well as decided to carry forward - 13.8% of the ARR (PV) in the next Control Period to ensure that all the stakeholders including the passengers and the airlines are not unnecessarily burdened as well as keeping in mind the financial position of the airport operator in these difficult times. The Authority has taken several steps to ensure that airport operator as well as the users are protected.

211. The Authority notes IATA's comment and HIAL's counter comments on Variable Tariff Plan in order to support new route development. The Authority has decided to consider Variable

Tariff Plan (VTP) (except for key partnership Program for freighter Airlines) for the period of first 3 years of the third Control Period only as this will aid in developing new routes leading to additional revenue generation and will only help in decreasing the aeronautical revenue in the long run. It will be beneficial for the airlines in the current situation and will help revive traffic to normalcy.

ISSUE NO. XIX: COST OF EQUITY

212. That economic regulation is within the domain and purview of the GoI and no commitment in respect of IRR has been made by the Govt. of India through MoCA. Further, if any commitment (if at all) was purportedly to be given to the airport operator, it would have been given in the bid/tender document itself for appropriate representation/knowledge to the applicants. It is not guaranteed or promised in the terms of any agreement between the concerned parties, be it the Concession Agreement or the SSA.

213. As per Clause 5.1.3 of the AERA Guidelines AERA has the power to estimate cost of equity, for a Control Period, by using the CAPM for each airport operator, subject to the consideration of such factors as AERA may deemed fit.

214. As per Clause 2.11 of the AERA Direction 04/2010-11 (AERA Guidelines), 'Capital Asset Pricing Model' has been defined as the use of the following functional form to estimate the cost of equity:

$$\boldsymbol{Re} = Rf + \beta \times EMRP$$

Where: ***Re*** *= cost of equity;* ***Rf*** *= risk free rate;* ***β*** *= beta;* ***EMRP*** *= equity market risk premium which is equal to (Rm - Rf) where Rm is the return on market portfolio.*

215. The Respondent has considered the cost of equity as per the recommendations of independent study conducted by the premier institute i.e. IIM Bangalore.

ISSUE NO. XX TREATMENT OF FOREIGN EXCHANGE LOSSES

216. HIAL has not pressed this point, in view of the Judgment dt. 21.07.2023 in DIAL matter (AERA Appeal No. 01 of 2021) which has been decided against the Airport Operator. However, a note was tendered during the hearing by the Learned Senior Counsel for the Appellant and as such, without prejudice, the below responses are being given on behalf of AERA.

217. Further, Hon'ble TDSAT had also occasion to look at similar concerns raised by BIAL with regards to the tariff order for the

Second Control Period, as can be seen in Para 87 of the *BIAL* Judgement dated 16.12.2020.

218. The purpose of refinancing through bonds is to lower the cost of debt as compared to RTL and hence capping the effective cost of these loans to the extent of interest on RTL is a fair way to keep the efficiency in cost of borrowing and not to unnecessarily burden the end users due to fluctuating exchange rates.

219. Moreover, the Airport Operator should use effective mechanisms to minimise the foreign exchange risks and not pass it on to the passengers as the decision of replacing RTLs with ECB is a part of business decisions of the airport operator. Had the ECBs not been there, the consideration of RTL's into the calculation of FRoR would have been done and hence the choice of availing ECB is entirely driven by business strategy and the resultant fluctuations should be borne by the business entity itself.

220. With respect to excluding notional gain on account of foreign exchange fluctuation from non-aeronautical revenue, the same is not justified as losses incurred on account of foreign

exchange fluctuations is compensated by the AERA as a pass-through expense.

221. On the matter of true-up of forex losses based on actual loss as ascertained by HIAL, the Authority re-iterated that the Authority had specified the treatment of forex losses in Table No.8, by comparing the cost of borrowing through ECBs (foreign currency borrowings) with that of the RTLs (domestic borrowings) and allowing HIAL to recover forex losses to the extent that the effective cost of borrowing in foreign currency (net of forex gains/losses) which is not higher than the cost of RTLs.

ISSUE NO. XXI: CLASSIFICATION OF NOTIONAL GAIN ON FAIR VALUE OF INTEREST RATE SWAP AS NON-AERONAUTICAL REVENUE

222. With respect to excluding notional gain on account of foreign exchange fluctuation from non-aeronautical revenue, the same is not justified as losses incurred on account of foreign exchange fluctuations is compensated by the AERA as a pass-through expense.

223. On the matter of true-up of forex losses based on actual loss as ascertained by HIAL, the Authority re-iterated that the Authority

had specified the treatment of forex losses in Table No.8, by comparing the cost of borrowing through ECBs (foreign currency borrowings) with that of the RTLs (domestic borrowings) and allowing HIAL to recover forex losses to the extent that the effective cost of borrowing in foreign currency (net of forex gains/losses) which is not higher than the cost of RTLs.

ISSUE NO. XXII: CROSS SUBSIDISATION OF 30% OF NON-AERONAUTICAL PROFIT BEFORE TAX (PBT) UNDER SHARED TILL

224. HIAL itself in its MYTP submissions for second Control Period had considered cross subsidy based on 30% of non-aeronautical revenues and not non-aeronautical profit before taxes. Hence, HIAL's contention is baseless and not true. This treatment is uniform across all airports.

225. Only 30% of non-aeronautical revenue is used for cross subsidy under Shared Till model, while the Airport Operator gets to retain the balance 70% of non-aeronautical revenue which can service the non-aeronautical expenses. Further, the usage of 30% of the gross non-aeronautical revenues towards cross subsidization purpose is uniform across the airports under the purview of AERA.

ARGUMENTS CANVASSED BY RESPONDENT No.2- FIA

226. Learned Counsel Mr. Buddy Ranganadhan submitted that out of total of 22 issues raised by this appellant, *Respondent No.2 is arguing for the issues I, II, III, XIII, XVI and XXII only.* It is further submitted by the Learned Counsel that for remaining issues they are adopting the arguments of counsel for Respondent No.1.

227. So far as Issue No. I is concerned, counsel for the Respondent No.2 submits that: The respondent no.1 has wrongly denied the entitlement of this appellant from the date of commercial operation of the airport which is 23rd March, 2008 to 31st March, 2008 and therefore let the matter be remanded for establishment of the facts for the claim of this appellant because the factual aspect has not been established.

228. So far as Issue No. II is concerned, counsel for the Respondent No.2 submits that: The Concession agreement for this appellant and the concession agreement with regard to BIAL are similar and the issue involved in the present appeal is covered by the decision rendered by this tribunal in AERA Appeal 1 of 2014 judgment dated 16.12.2020.

229. It is further submitted by counsel for respondent no.2 that AERA can always regulate any aspect of "Airport Activities" and therefore the aforesaid three services namely cargo, ground handling and fuel

services are part of airport activities in terms of Part 1 of Schedule 3 of the Concession Agreement and therefore no error has been committed by AERA in regulating the CGF Services by the way of this impugned order.

230. So far as Issue No. III is concerned, counsel for the Respondent No.2 submits that: Airport includes development outside airport which further includes any commercial development.

231. It is submitted by Ld. counsel appearing on behalf of respondent no.2 that the key definitions in the Lease Agreement, including the Project, Airport and the Land site demonstrate that as a part of the Concession offered to the Appellant, the Appellant also has the right to commercially develop the land adjunct to the Airport/Aerodrome. That upon expiry of the Concession Agreement and Lease, all assets, including the commercially developed Non-Airport Assets would revert to the Government, and no longer remain with the Appellant.

232. It is submitted by Ld. counsel appearing on behalf of respondent no.2 that such being the nature of the Concession given to the Appellant, it would be wholly without any basis to suggest that revenue from Non-Airport Activities, which are clearly part of the Concession given to the Appellant, the same be left out of non-aeronautical revenue, i.e., out of the purview of cross-subsidisation.

233. So far as Issue No. XIII is concerned, counsel for the Respondent No.2 submits that: the Applicant's contention that the Respondent Authority does not have the power to defer a sum due to the airport operator is without any basis and lacks substance.

234. A reading of the AERA Act will show that the Regulator is empowered and required to consider various other factors for carrying out its function of tariff regulation. For example, Section 13 (1) (a) (iv) provides for the economic and viable operations of major airports.

235. It is submitted that the economic viability of the airports is not only dependent on the Airports extracting their pound of flesh by any means, but to also take into account the interest of all the stakeholders who form part of the airport's operations. This includes the difficulties being faced by the Airlines and passengers in the extraordinary circumstances which have beset the aviation industry on account of the pandemic.

236. Section 13 (2) of the Act requires the Respondent Authority to take into account "public interest" for determining and amending tariff. Section 13 (1) (f) of the Act provides that the Respondent Authority shall perform the functions related to tariff as may be entrusted to it by the Central Government and as may be necessary to carry out the provisions of the Act.

237. As a sectoral regulator, it is incumbent upon AERA to adopt a balanced approach, rather than a lopsided and biased one, favouring only the airport operator, or just the users. Economic viability of the airport must always be kept in mind, but yet not at the cost of other stakeholders, since ultimately without passengers, airlines, etc., an airport would serve no purpose.

238. So far as Issue No. XVI is concerned, counsel for the Respondent No.2 submits that: the reduction/ readjustment of project cost is well within the powers of the regulator and that Section 13(1) (a) of the AERA Act which inter alia provides that tariff is to be determined after taking into consideration the capital expenditure "incurred" and timely investments, the service provided and its quality and other relevant factors and the cost for improving efficiency.

239. Section 14 (4) of the AERA Act vests the Regulator with the power to issue such directions to monitor the performance standard of the service providers as may be necessary. Further, Section 15 of the AERA Act provides the Regulator with general powers to issue directions which relate to determining tariff.

240. Further, 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". It is submitted that monitoring of timely completion of vital projects like a terminal building has intrinsic relationship with performance of airports.

241. In view of the aforesaid submissions, no error has been committed by AERA while passing the impugned order so far as issue no.XVI is concerned for imposition of 1% penalty.

REASONS AND ANALYSIS

ISSUE No. I

Pre-Control Period Entitlement- Whether from 01.04.2008 or 23.03.2008

242. This appellant is a company incorporated under Companies Act, 1956 and it operates RGIA, Shamshabad, Hyderabad-500108 which is a major airport as per provisions of Airports Economic Regulatory Authority of India Act, 2008.

243. Global tender was published by the GoAP to set up Greenfield International Airport at Shamshabad near Hyderabad through PPP model on final evaluation, the consortium of GMR Infrastructure Limited (GIL) and Malaysia Airports Holdings Berhad was selected by GoAP in December, 2000 as the private

partner for development of the proposed Greenfield International Airport at Shamshabad, Hyderabad.

244. The appellant was incorporated to design, finance, build, operate and maintain a world class Greenfield Airport at Shamshabad, Hyderabad.

245. The present appellant is a joint venture company with following shareholding pattern:

GMR Airports Limited	63%
AAI	13%
GoAP	13%
Malaysia Airports Holding Berhad (through associate company)	11%

246. The ownership and the right to operate the Airport are pursuant to a Concession Agreement dated 20.12.2004 executed by the MoCA, Government of India with the appellant (**ANNEXURE A-3** to the memo of this appeal). As per this Concession Agreement, the appellant is entitled to design, finance, build and operate the airport.

247. As per the Concession Agreement, this appellant is entitled to recover the expenses from the date on which the commercial operations were started.

248. Counsel for the Respondent No.1 submitted that this appellant, is entitled to levy Airport Charges w.e.f. 1st April, 2008 whereas it is submitted by the counsel for the appellant that it is entitled to levy the Airport Charges w.e.f. the date from which the commercial operations were started at RGIA i.e. w.e.f. 23rd March, 2008.

249. Having heard counsels for both the sides, it appears that Central Government vide Gazette notification published in official gazette has notified the "Airport Opening Date"; which is 23rd March, 2008. The said gazette notification is dated 20th March, 2008.

250. Initially, on ad-hoc basis this airport operator was entitled to recover UDF initially at Rs.375 per departing domestic passenger and Rs.1000 per international departing passenger. This amount was reshuffled and was fixed at Rs. 340 per departing domestic passenger and Rs. 907 per departing international passenger.

251. This was approved by MoCA on ad hoc basis thereafter AERA came into existence by virtue of AERA Act, 2008 and AERA started functioning w.e.f. 1st September 2009 and the issue of determination of UDF was given to AERA by MoCA.

252. AERA initially decided that the entitlement of this appellant w.e.f. 1st September 2009 which was challenged before this tribunal and this matter was remanded by TDSAT to AERA vide order dated 04.03.2020 in AERA Appeal No 02 of 2014 for 1st Control Period which is from 01.04.2011 to 31.03.2016; Second Control Period is from 01.04.2016 to 31.03.2021, Third Control Period is from 01.04.2021 to 31.03.2026.

253. During the tariff determination exercise of 1st Control Period (01.04.2011 to 31.03.2016) this appellant proposed to include the entitlement during the Pre-Control Period Operations of 3 years i.e. 23rd March 2008 – 31st March 2011.

254. However, AERA while determining the tariff for RGIA, for 1st Control Period did not take into consideration the period running from 23rd March 2008 to 31st August 2009 because as per AERA it was notified on 1st September, 2009 by virtue of AERA Act, 2008 and the same approach has been adopted and followed in the 2nd Control Period.

255. This approach of AERA has been changed later on and entitlement was given to this appellant w.e.f. 1st April, 2008.

256. From the facts of the present case, it appears that this appellant has claimed the entitlement from the airport opening date which

means from the commencement of commercial operation which is 23rd March 2008. HIAL had made submission for 2nd CP as well as during 3rd CP that they are entitled to the expenses incurred into by them from 23rd March, 2008 which is the date of the opening of the airport and the date of commencement of commercial operation of the airport which is admittedly 23rd March, 2008. Regulatory building blocks for the period 23-March-2008 to 31-March-2008 is referred by the Counsel for the Appellant from Annexure A-11 to the memo of this appeal (page no. 1968) of the memo of the petition which is reproduced as under:

Particulars	**Rs. In Crores**
Return on Capital Employed	5.28
Operating Expense	49.86
Concession Fee	0.15
Depreciation	2.38
Taxes	0.00
Gross Target Revenue	**57.70**
Cross Subsidization	1.98
Aero Revenue Eligibility	**55.72**

Less: Actual Aero Revenue	**3.90**
Total Deficit- Absolute Value (for the Period 23-March-2008 to 31-March-2008)	**51.82**

It is not a case of AERA- Respondent no 1 that figures given in aforesaid table are inaccurate. No error has been pointed out by AERA in the impugned order about the figures stated in the aforesaid table which are based on Audited Financials.

257. This aspect of the matter has not been properly appreciated by AERA. AERA while passing the impugned order and has thus committed an error to give entitlement to this appellant to recover the expenses w.e.f. 1st April, 2008. However, it should have been from 23rd March, 2008 instead of 1st April, 2008 because the date of opening of airport and date of commencement of commercial operations of RGIA is 23rd March, 2008.

258. Counsel for AERA has submitted that the present appellant had demanded the expenses from 01st April, 2008 and thus they are not entitled to recover from 23rd March, 2008 to 31st March,

2008. This argument is not accepted by this tribunal for the following reasons:

I. This appellant has raised the demand for recovery of the expenses during 2nd CP (para 3 of Order of 2nd CP which is Order No.34/2019-20 dated 27th March, 2020, ANNEXURE A-7).

II. Order passed by AERA for 1st CP dated 24th February, 2014 was challenged before this tribunal in AERA Appeal No. 02 of 2014 and TDSAT vide order dated 04.03.2020 had remanded the matter to AERA thus the 1st CP order was to be decided again by AERA as per order of TDSAT meaning thereby to 2nd CP was in fact the first order by AERA and in the 2nd CP this appellant has already raised PCPE w.e.f. 23rd March, 2008,but, AERA had not considered the same and the same error has been continued while passing the Third Tariff Order.

III. Even if this appellant has not claimed entitlement from 23rd March, 2008, it was the duty of AERA to provide the expenses of operation of the airport from date of its opening

i.e. the date of commencement of commercial operations which is admittedly 23rd March, 2008.

259. Counsel for the appellant has taken this Tribunal in detail, about the calculation error for PCPE with the help of **Table 13 of the 1st CP order** and **Table 12 of the 2nd CP order**. Both the aforesaid tables were explained in detail along-with **Table 6 of 3rd Tariff order** which is the impugned order in the present AERA Appeal. For the ready reference, the aforesaid tables read as under:

"TABLE 13: Pre-Control Period deficit (losses) in respect of HIAL as considered by the Authority for the current Control Period"

Pre-Control Period deficit (losses) Values in crore	**FY 2009-10**	**FY 2010-11**
RAB for calculating ARR	2,172.11	2,144.58
WACC	9.45%	9.45%
RAB*WACC	205.32	202.72
Depreciation	108.78	110.32
Operating Expenses (including concession fee)	199.96	221.39
Tax	0.00	(0.84)
Revenue from services other than aeronautical services	112.17	132.04
Average Revenue Requirement	401.89	401.56
Aeronautical Revenues (including fuel farm excess set-off)	334.00	404.65
Annual deficit (losses)	67.89	(3.09)*
Pro-rated for the period to be considered	**39.60**	**(3.09)***
Future Value as on 01.04.2011 (discounted at WACC)	**43.34**	**(3.09)***
Aggregate Future Value of deficits as on 01.04.2011		**40.25**
*- denotes surplus		

"TABLE 12: Pre-Control Period deficit (tosses) in respect of HIAL as considered by the Authority for the 2nd Control Period in the tariff order."

Pre-Control Period Losses (in Rs. Crore)	FY 2009-10	FY 2010-11	Aggregate Pre-CP
As per Order No. 38 under Single Till (a)	39.6	-3.09	36.51
As per Actuals			
Return on Capital Employed (b)	197.66	192.38	390.03
Total Expenses (incl. Concession Fee) (c)	169.35	196.81	366.16
Depreciation (d)	102.67	105.00	207.67
Tax (e)	0.00	0.00	0.00
NAR Cross-Subsidization (f)	-28.67	-32.28	-60.95
Average Revenue Requirement (g) = (b)+ (c)+ (d)+(e)+(f)	441.00	461.90	902.90
Less: Actual Aero Revenue (h)	-329.89	-412.02	-741.91
Annual Deficit (Pre-Control Period Entitlement) (i)=(g)+(h)	111.12	49.88	161.00
True-Up (Considering 7 months in FY 2009-110 and FY 2010-11)	41.72	52.97	94.69
Discounting Period	-8.3	-7.3	
PV of True-Up	92.23	106.43	198.65
Total True-up as on 01-01-2018		198.65	

"Table 6: Pre-Control Period Entitlement considered by the Authority for True Up of the Pre-Control Period:"

S. No.	Particulars (In Rs. Crore)	2009	2010	2011	Total
1.	Return on Capital Employed (a)	201.15	197.66	192.38	591.19
2.	Total Expenses (incl. Concession Fee) (b)	191.52	169.24	196.76	557.52
3.	Depreciation (c)	98.66	102.67	105.00	306.33
4.	Tax (d)	0.00	0.00	0.00	0.00
5.	NAR Cross – Subsidisation (e)	-27.04	-28.61	-32.23	-87.88

6.	Aggregate Revenue Requirement (f) = (sum of a to e)	464.29	440.96	461.90	1367.15
7.	Actual Aero Revenue (g)	-289.98	-329.89	-412.02	-1031.89
8.	Annual Deficit (h) = (f) + (g)	174.30	111.07	49.88	335.25
9.	Combined true – up awarded in previous control periods (i)	0.00	81.32	49.88	131.20
10.	**True – Up (j) = (h) – (i)**	**174.30**	**29.75**	**0.00**	**204.05**
11.	Discounting factor for the PCPE (k)	1.21	1.10	1.00	
12.	PV of true up as on 31.03.2011 ((l) = (j)* (k)	210.99	32.73	0.00	243.72
13.	Discounting factor for the First Control Period (m)				1.62
14.	PV of true up as on 31.03.2016 ((n) = (l)* (m)				394.28
15.	Discounting factor for the Second Control Period (o)				1.87
16.	PV of true up as on 31.03.2022 {(p) = (n)* (o)}				736.55"

260. In the Second Control Period Tariff Order, AERA computed PCPE of Rs.161 Crores as per Actuals. While computing True-Up for 7 months, i.e., 01.09.2009 to 31.03.2010 and True-Up for 01.04.2010 to 31.03.2011, AERA adjusted the PCPE allowed in the First Control Period and arrived at PCPE of Rs.94.69 Crores. The working of the computation in Table 12 of Second Tariff Order reads as under:

Pre-Control Period Losses	FY2009-10	FY2010-11	Aggregate Pre-CP
As per Table 13 of First Control Period Order	**39.6**	**-3.09**	**36.51**
Annual Deficit as per Actuals (PCPE)	**111.12**	**49.88**	**161.00**
True Up (Considering 7 months in FY2009- 10 and FY 2010- 11)	**(111.12 39.6) x 7/12 = 41.72**	**49.88 – (3.09) = 52.97**	**94.69**

261. Thus, aggregate PCPE considered by AERA was at Rs.41.72 Crores for seven months of financial year 2009-10 and Rs. 52.97 Crores for financial year 2010-11.

262. In fact, the 1st Tariff order for 1st CP was remanded by the order of TDSAT dated 04th March, 2020. 2nd Tariff order was passed by AERA on 27th March, 2020 followed by an amendment order dated 26th May, 2020 as an interim measure and 3rd Tariff order (which is Impugned Order in the present appeal) was passed on 31st August, 2021. Thus, practically 2nd Control Order was an interim measure order. Thus, after 1st CP, in the process of 2nd CP determination, this appellant had already raised the demand from 23rd March, 2008 onwards and the same demand has been reiterated in the 3rd CP determination process also. This aspect

of the matter has not been properly appreciated by AERA while passing the order.

263. The claim of this appellant cannot be brushed aside on the ground that this appellant had not raised the claim at all. In fact, AERA was under the statutory duty under Sec. 13 of the AERA Act, 2008 to decide tariff from the commencement of the commercial operations of the airport which is the date of the opening of the airport which is admittedly 23rd March, 2008 as per Central Govt. Gazette notification dated 20.03.2008.

264. While computing PCPE in the impugned order (Table 6), in Sr. No.9 of Table 6 considered combined true-up awarded in the previous control periods as 81.32 Crores in FY2009-10 and 49.88 Crores in FY2010-11 respectively. However, AERA while passing the impugned order has considered the True-Up allowed in the First & Second Tariff Order i.e., by reducing the Annual Deficit for the concerned periods by the True Up allowed to be recovered in the First Tariff Order, i.e., Rs 39.60/- Crores and Second Tariff i.e., Rs 41.72 Crores.

265. In the impugned order, AERA computed the combined True-Up awarded in FY 2009-10 by adding Rs. 41.72 Crores and Rs. 39.6

Crores. **This computation is erroneous since AERA had computed PCPE of Rs. 41.72 Crores for seven months of FY2009-10**. Similarly, for FY2010-11, AERA in the Impugned Order has computed combined true-up awarded by adding Rs. 52.97 Crores and Rs.-3.09 Crores, which is erroneous. AERA has reduced the quantum of Annual Deficit by a sum of Rs.81.32 Crores for the period of 01-09-2009 to 31-03-2010 and has similarly reduced the quantum of Annual Deficit by a sum of Rs.49.88 Crores for the period of 01.04.2010 to 31.03.2011.

266. In view of the aforesaid facts, this appellant is entitled to incremental/corrective True-Up of Rs.36.52 Crores.

Table 5: Calculation of Incremental true up of Rs.36.52 crores as submitted by HIAL

Revised Entitlement (Basis CP3 assumptions) – Rs. Cr.	**2009**	**2010**	**2011**	**Total**
Return on Capital Employed	201.15	197.66	192.38	
Total Expenses (Incl. Concession Fee)	191.52	169.24	196.76	
Depreciation	98.66	102.67	105.00	
Tax	0.00	0.00	0.00	
NAR Cross-Subsidization	-27.04	-28.61	-32.23	
Average Revenue Requirement	464.3	441	461.9	

Less: Actual Aero Revenue	- 289.98	- 329.89	- 412.02	
Revenue Deficit (A)	174.3	111.1	49.89	
Authority Considered in CP2 Tariff Order & allowed separately in CP3 (B)	0.00	41.72	52.97	
Revised True-Up (A-B)	174.3	69.35	-3.08	240.6
True up as per Consultation paper	174.3	29.75	0.00	204.1
Incremental true Up	***0.00***	***39.60***	***-3.08***	***36.52***
Revised True-Up (PV as on 31.03.2011)	211.00	76.29	-3.08	284.20
True up as per Consultation paper (PV as on 31.03.2011)	211.00	32.73	0.00	243.72
Incremental true Up (PV as on 31.03.2011)		43.56	-3.08	40.48

267. The aforesaid amount of Rs. 36.52 Crores is clearly evident from the amount at Rs.39.60 Crores (PV Value) at Rs.43.34 Crores for the period running from 1st September, 2009 – 31st March, 2010 and surplus of Rs. 3.08 Crores for the period running from 01st April, 2010 to 31st March, 2011 (Rs. 39.60 Crores – Rs. 3.08 Crores = Rs. 36.52 Crores).

268. We, therefore, hold that the decision of AERA to include PCPE suffered by appellant only from 1st April, 2008 **is incorrect, improper and unjustified**. It should have been w.e.f. 23rd

March, 2008. **Hence, HIAL is entitled to PCPE of Rs.51.82 Crores as its present value for the period from 23-March-2008 to 31-March-2008 hence, this amount of Rs. 51.82 Crores shall be Trued-Up during 4th CP Tariff Determination Process.**

269. We also direct AERA to True-Up Rs. 36.52 Crores during 4th CP Tariff Determination Process because this appellant is entitled to an incremental/corrective True-Up of Rs.36.52 Crores for the reasons as stated hereinabove.

ISSUE No. II

Treatment of Cargo, Ground Handling & Fuel -Services (CGF)

270. Learned Senior Counsel Mr. Ramji Srinivasan appearing on behalf of the appellant submits that Cargo, Ground Handling and Fuel Services (CGF) do not form part of regulated charges and hence, AERA has no power, jurisdiction and authority over CGF, **whereas,** counsel for respondent no.1 submitted that CGF is aeronautical in nature and, therefore, AERA has decided that CGF being aeronautical in nature, AERA has all powers,

jurisdiction and authority to take into consideration revenue arising therefrom to be treated as Aeronautical Revenue.

271. Both the Learned Counsels have read and re-read the Concession Agreement entered into between **Hon'ble the President of India and Hyderabad International Airports Limited - Appellant** which is dated 20.12.2004, annexed here and marked as Annexure A-3 to the Memo of this appeal.

272. For the ready reference Clauses 10, 10.1, 10.2, 10.3 of the Concession Agreement (Annexure A-3) read as under:

> ***"10. CHARGES***
>
> ***10.1 Parties having right to impose charges***
>
> *Subject to Applicable Law, no Person (other than HIAL, 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 HIAL 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 forty-five (45) days of the date of the application being submitted by HIAL. Within 120 days after the Airport Opening Date, HIAL shall submit the final audited Project cost to the Ministry of Civil Aviation.

10.2.3. If at any time prior to the date the IRA has the power to approve the Regulated Charges HIAL 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 forty-five (45) days of the date of the application being submitted by HIAL.

10.2.4. *From the date the IRA has the power to approve the Regulated Charges, HIAL shall be required to obtain approval thereof from the IRA. In this regard HIAL 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 Airport Opening Date.*

10.3 Other Charges

HIAL 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."

[Emphasis Supplied]

273. For the ready reference the definitions of the "Airport Activities", "Airport Charges" and "Regulated Charges" given in Clause 1.1 of the Concession Agreement read as under:

> ***"Airport Activities"*** *means 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 contemplated in Schedule 3, Part 1 shall require the mutual agreement of the Parties;*
>
> ***"Airport Charges"*** *means:*
>
> *(i) amounts charged or imposed by HIAL in respect of the provision or use of the facilities and services which are included within Airport Activities;*
>
> *(ii) amounts charged or imposed by HIAL 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 HIAL on behalf of GoI, GoAP or AAI;*
>
> ***"Regulated Charges"*** *shall be as defined in Article 10.2.1."*

274. In view of the aforesaid Clause 10.2.4 of the **Concession Agreement**, AERA is empowered to approve the Regulated Charges set out in Schedule-6 of the Concession Agreement.

275. '**Regulated Charges'** have been mentioned unambiguously and unequivocally in the **Concession Agreement** in Schedule-6 thereof. For the ready reference, Schedule-6 of the Concession Agreement, reads as under:

"SCHEDULE 6: REGULATED CHARGES

Pursuant to and without prejudice to the principles set out in Article 10.2 of this Agreement, HIAL shall be entitled to levy and recover from airline operators, passengers and other users and in respect of both domestic and international aircraft and passenger movements, at rates consistent with ICAO Policies, the following Regulated Charges:

i. Landing, Housing and Parking charges (domestic and international):

The charges to be adopted by HIAL at the time of Airport Opening will be the higher of:

(a) The AAI tariff effective 2001 duly increased with inflation index, as set out hereunder, up to the Airport Opening Date, or

(b) The then prevailing tariff at the other AAI airports.

ii. Passenger Service Fee (domestic and international):

The charges to be adopted by HIAL at the time of Airport Opening will be the higher of:

(a) The AAI tariff effective 2001 duly increased with inflation index, as set out hereunder, up to the Airport Opening Date, or

(b) The then prevailing Passenger Service Fee at the other AAI airports.

The Passenger Service Fee chargeable by HIAL, as given above, is inclusive of the cost of security expenditure on Central Industrial Security Force (CISF). This component of the cost towards security expenditure on CISF shall be revised upwards by HIAL as and when directed by GoI, subject to the provision that such increases will also be accompanied by similar increase in the Passenger Service Fee.

iii. <u>User Development Fee (UDF)</u> (domestic and international):

HIAL will be allowed to levy UDF w.e.f. Airport Opening Date, duly increased in the subsequent years with inflation index as set out hereunder, from embarking domestic and international passengers, for the provision of passenger amenities, services and facilities and the UDF will be used for the development, management, maintenance, operation and expansion of the facilities at the Airport.

The Regulated Charges set out in Schedule 6 shall be the indicative charges at the Airport. Prior to Airport Opening HIAL shall seek approval from the Ministry of Civil Aviation for the Regulated Charges, which shall be based on the final audited Project cost.

Note: (a) Charges will be calculated on the basis of nearest MT (i.e. 1000 kg)

(b) The minimum fee per single landing will be INR 1000

(c) Peak hour surcharge on international landing between 2301 hrs (IST) to 2400 hrs (IST) will be 5%

(d) If US$ rates are to be charged the following rule for conversion, US$ into INR the rate as on the 1st day of the 1st fortnight billing period and rates as on the 16th of the month for the 2nd fortnightly billing period, will be applicable.

(e) All tariffs are net for HIAL. Any taxes such as service tax, if applicable, will be over and above the tariff proposed.

Formula for inflation index:

Base fee (multiplied by) WPI1 (divided by) WPI where,

WPI is the WPI for 'All Commodities'

WPI = is the WPI as on March 31st, 2001

WPI1 = is the WPI as on March 31st preceding the fee revision date.

For the avoidance of doubt, Route Navigation Facilities Charges and Terminal Navigational Landing Charges shall be levied and collected by AAI."

(EMPHASIS SUPPLIED)

276. In view of the aforesaid Clause 10.2.4 to be read with Schedule-6 thereof AERA can regulate the charges only for the following five major aspects:

I. *Landing Charge (Domestic & International);*

II. *Housing Charge (Domestic & International);*

III. *Parking Charge (Domestic & International);*

IV. *Passenger Service Fee (Domestic & International);*

V. *User Development Fee (UDF) (Domestic & International).*

277. The **'Regulated Charges'** have been mentioned in **Schedule-6** to the Memo of the Concession Agreement does not refer **Cargo, Ground Handling & Fuel Services** and, therefore, AERA cannot regulate these services especially for Tariff Determination purposes and therefore, AERA cannot consider the Revenue arising out of Cargo, Ground Handling & Fuel Services for the purpose of calculation of the Aggregate Revenue Requirements **(ARR)** for the control period.

278. The Concession Agreement has been executed by **Hon'ble the President of India** acting through **the Secretary, Ministry of Civil Aviation, Government of India, New Delhi** with the present appellant and the concession as mentioned hereinabove has been given by **Hon'ble the President of India** to this appellant and, therefore, **unless it is specifically taken away by the subsequent enactment of law, the concession granted by**

Hon'ble the President of India, shall continue to be operative.

279. In the facts of the present case Concession Agreement is dated 20.12.2004 (Annexure A-3 to the Memo of this Appeal). The AERA Act, 2008 is brought into force on 01.09.2009 and that too with Clause 13(1)(a)(vi). For the ready reference Section 13 of the AERA Act, 2008 reads as follows:

> ***"13. Functions of Authority. - (1) The Authority shall perform the following functions in respect of major airports, namely: -***
>
> *(a) to determine the tariff for the aeronautical services taking into consideration-*
>
> *.....*
>
> *(vi). the* ***concession offered by the Central Government in any agreement*** *or memorandum of understanding or otherwise;"*
>
> ***(Emphasis Supplied)***

280. In view of the aforesaid provision of AERA Act, 2008 especially Section 13 (1)(a)(vi) of the AERA Act, 2008, it is apparent that the AERA shall take into consideration the concession offered by the Central Government, in the determination of tariff, meaning thereby to the concession given by the Concession Agreement (Annexure A-3) **should be honoured and respected and should be accepted as it is by AERA.**

281. During the course of arguments, the Learned Senior Counsel for the petitioner has faintly alluded towards the application of Section 115 of the Indian Evidence Act & Doctrine of promissory estoppel regarding the conduct of AERA. This case has extensive dispute on various parameters which are delineated in the preceding paragraphs of this judgement and adjudicated as issues, having reference to the above and in addition to the opportunity to explain the application of the aforesaid provision of law, it is incumbent upon us to illuminate certain administrative and regulatory principles that stand at the intersection of statutory directives and contractual obligations. For ready reference Section 115 of the Indian Evidence Act, 1872 is reproduced below:

> *"**Section 115. Estoppel**. —When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."*

282. Upon examining Section 115 of the Indian Evidence Act of 1872, it is observed that the provision embodies the evidentiary principle of estoppel. This principle dictates that a party is precluded from negating the veracity of any fact which they have previously

affirmed or suggested, particularly in instances where such an affirmation has prompted a material change in stance by the reliant party, founded on the belief in said fact.

283. Thus, as per Section 115 of Indian Evidence Act, 1872, it is established that Respondent No. 1 is estopped from refuting the existence of the Concession Agreement, which is a recognized fact. Consequently, it is acknowledged that Respondent No. 1 has legitimately recognized the lawful validity of the Concession Agreement.

284. The concept of Promissory Estoppel on the other hand serves as an equitable principle rooted in fairness, designed to preclude individuals from reneging on promises that have led others to reasonably rely to their detriment. It is invoked and applied to aid the law in administration of justice.

285. The Hon'ble Supreme Court in the case of "***Union of India v. Godfrey Philips India Ltd.*, Citation: (1985) 4 SCC 369",** under Para 9, has elucidated on the concept of Promissory Estoppel and has observed as follows:

> ***"9.*** *Now the doctrine of promissory estoppel is well established in the administrative law of India. It represents a principle evolved by equity to avoid injustice and, though commonly named promissory estoppel, it is*

neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is the interposition of equity which has always, true to its form, stepped in to mitigate the rigour of strict law. This doctrine, though of ancient vintage, was rescued from obscurity by the decision of Mr Justice Denning as he then was, in his celebrated judgment in Central London Property Trust Ltd. v. High Trees House Ltd. [(1956) 1 All ER 256] The true principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties. It has often been said in England that the doctrine of promissory estoppel cannot itself be the basis of an action: it can only be a shield and not a sword: but the law in India has gone far ahead of the narrow position adopted in England and as a result of the decision of this Court in Motilal Padampat Sugar Mills v. State of U.P. [(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] it is now well settled that the doctrine of

promissory estoppel is not limited in its application only to defence but it can also found a cause of action. The decision of this Court in Motilal Sugar Mills case [(1979) 2 SCC 409: 1979 SCC (Tax) 144: (1979) 2 SCR 641] contains an exhaustive discussion of the doctrine of promissory estoppel and we find ourselves wholly in agreement with the various parameters of this doctrine outlined in that decision."

(Emphasis Supplied)

286. In the case of "***State of Bihar v. Kalyanpur Cement Ltd***", Citation: **(2010) 3 SCC 274,** under Para 35, on the Ingredients of Promissory Estoppel the Hon'ble Supreme Court has held as follows: -

"35. *In our opinion, the aforesaid statement of law covers the submissions of Dr. Dhavan and Mr Dwivedi that in order to invoke the aforesaid doctrine, it must be established that:*

(a) a party must make an unequivocal promise or representation by word or conduct to the other party;

(b) the representation was intended to create legal relations or affect the legal relationship, to arise in the future;

(c) a clear foundation has to be laid in the petition, with supporting documents;

(d) it has to be shown that the party invoking the doctrine has altered its position relying on the promise;

(e) it is possible for the Government to resile from its promise when public interest would be prejudiced if the Government were required to carry out the promise;

(f) the Court will not apply the doctrine in abstract."

(Emphasis Supplied)

287. Furthermore, in the case of "***Shrilekha Vidyarthi (Kumari) v. State of U.P***", Citation: **(1991) 1 SCC 212**, Para 24, on the point of extending the ambit of Article 14 to cover matters in contractual realm with state entities the Hon'ble Supreme Court has held as follows: -

> "**24.** The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of

function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

(Emphasis Supplied)

288. Subsequently, in the case of "***Indian Oil Corpn. Ltd. v. Shashi Prabha Shukla***", Citation: **(2018) 12 SCC 85** in Para 33 the Hon'ble Supreme Court has held as follows: -

> **"33.** Jurisprudentially thus, as could be gleaned from the above legal enunciations, a public authority in its dealings has to be fair, objective, non-arbitrary, transparent and non-discriminatory. The discretion vested in such an authority, which is a concomitant of its power is coupled with duty and can never be unregulated or unbridled. Any decision or action contrary to these functional precepts would be at the pain of invalidation thereof. The State and its instrumentalities, be it a public authority, either as an individual or a collective has to essentially abide by this inalienable and non-negotiable prescriptions

and cannot act in breach of the trust reposed by the polity and on extraneous considerations. In exercise of uncontrolled discretion and power, it cannot resort to any act to fritter, squander and emasculate any public property, be it by way of State largesse or contracts, etc. Such outrages would clearly be unconstitutional and extinctive of the rule of law which forms the bedrock of the constitutional order."

(Emphasis Supplied)

289. Moreover, in the case of '***Ram Pravesh Singh v. State of Bihar'*, Citation: (2006) 8 SCC 381,** under Paras 15-16, on the point of 'Legitimate Expectation' the Hon'ble Supreme Court has held as follows: -

> **"15.** What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term "established practice" refers to a regular, consistent, predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by the courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a "legitimate expectation" of a particular

treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above "fairness in action" but far below "promissory estoppel". It may only entitle an expectant: (*a*) to an opportunity to show cause before the expectation is dashed; or (*b*) to an explanation as to the cause for denial. In appropriate cases, the courts may grant a direction requiring the authority to follow the promised procedure or established practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bona fide reason given by the decision-maker, may be sufficient to negative the "legitimate expectation". The doctrine of legitimate expectation based on established practice (as contrasted from legitimate expectation based on a promise), can be invoked only by someone who has dealings or transactions or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognised legal relationship with the authority. A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered into any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly.

16. In *Union of India* v. *Hindustan Development Corpn.* [(1993) 3 SCC 499] this Court explained the nature and scope of the doctrine of "legitimate expectation" thus: (SCC p. 540, para 28)

> "For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. *The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense***."**
>
> **(Emphasis Supplied)**

290. We are sanguine of the well-established principle in common law jurisdictions that promissory estoppel is not tenable against statutory provisions. This differentiation is crucial to ensure that the State is not unduly hampered in exercising its governance powers. The doctrine of estoppel generally does not constrain the State in its governmental, public, or sovereign actions. Nevertheless, a notable exception arises when invoking estoppel against the State is necessary to prevent fraud or a clear

miscarriage of justice. This ensures that the doctrine is not misapplied to thwart the State's duty to the public, which remains paramount. [Refer M. Ramanatha Pillai v. State of Kerala, (1973) 2 SCC 650]

291. Now coming to the facts of the present case, Concession Agreement (Annexure A-3 to the memo of this appeal), particularly that entered into with **Hon'ble The President of India,** epitomize high-level executive assurances and carry sovereign weight. These agreements, which encapsulate extensive commitments from Airport Operators regarding the comprehensive development and management of airports, are not trivial promises but agreement of substantial public import.

292. The Airport Operators under the Agreement entered into with **Hon'ble The President of India**, being the highest executive body, discharging sovereign functions and being a fountain of justice, has undertaken all the necessary works for conception, design, planning, construction, operation, maintenance & continued development of the Airports, these steps are taken for the benefit & ease of travel of the Airport Users. While, passing Tariff Orders AERA ought to take into account concession agreements and adhere to the statutory mandate.

293. In accordance with Section 13(1)(a)(vi) of the AERA Act, which underscores the need to give effect to such agreements, AERA is mandated to recognize and integrate these pre-existing contracts in its tariff orders. This statutory provision affirms the legislative expectation that established contracts, especially those that have contributed to the public good through public-private partnerships, should be respected and given effect in regulatory decisions. Thus, the doctrine of Promissory Estoppel, in this context, finds a unique statutory recognition via Sec. 13 (1) (a) (vi), harmonizing the lex scripta with contractual fidelity and ensuring regulatory decisions are congruent with these enduring agreements.

(a) This principle has been extensively **discussed in the judgement** of **Hon'ble the Supreme Court** in **Indian Aluminium Company Vs. Kerala State Electricity Board reported in (1975) 2 SCC 414 (para 18)**.

(b) Similarly, this principle has been discussed in judgment in case of **Mahanagar Telecom Limited Vs. TRAI & Ors., given by Hon'ble**

Delhi High Court reported in 2000 SCC OnLine Del 19 (Para 32).

(c) In **DIAL Vs. AERA, (2022) SCC OnLine SC 850 in Para 20**. Hon'ble the Supreme Court has reiterated this aspect of the matter.

294. While the Hon'ble Supreme Court's pronouncements have elucidated that promissory estoppel does not impede legislative functions, particularly when legislative acts serve the public interest and are devoid of fraud, the unique circumstances of this case introduce a nuanced application of the doctrine.

295. The AERA Act, through Section 13(1)(a)(vi), implicitly endorses the expectation of estoppel by acknowledging the relevance of past agreements in the regulatory scheme of tariff decisions. This statutory recognition indicates that where the law itself provides for the consideration of such agreements, the doctrine of promissory estoppel may be invoked in harmony with legislative provisions.

296. It is conceivable that future legislative amendments could alter the landscape by specifically excluding consideration of prior agreements in tariff determinations. Should Parliament choose to amend the AERA Act to exclude Section 13(1)(a)(vi), the

doctrine of promissory estoppel would then become inapplicable to the statute, aligning with the Hon'ble Supreme Court's guidance that promissory estoppel cannot challenge or modify a statute.

297. In such a scenario, AERA's regulatory discretion would be recalibrated, potentially allowing for a **"Read and Reject"** approach concerning the Concession Agreement. However, as the law currently stands, it expressly accommodates prior agreements within its regulatory purview, reflecting a deliberate legislative choice not to render these agreements subordinate or subservient to the statutory authority.

298. This approach is particularly pertinent in commercial undertakings that serve public interest, such as those structured under public-private partnership models, where continuity, certainty, and respect for contractual obligations are paramount.

299. Thus, contracts, by their very nature, cannot be rendered nugatory by legislative fiat without explicit provisions to that effect. To annul or disregard the historical contractual considerations, there must be a direct and explicit enactment or statutory amendment to that end.

300. Counsel appearing for the respondent submitted that by the virtue of subsequent enactment namely the AERA Act, 2008, Cargo, Ground Handling and Fuel Services are Aeronautical Services as per Section 2(a) of the AERA Act, 2008 and hence, the contract i.e. Concession Agreement (Annexure A-3) is hereby modified to the aforesaid extent automatically and the aforesaid three services are now Aeronautical Services. Therefore, AERA can regulate these services especially in the process of determination of the tariff. This contention by the Counsel for Respondent No. 1 – AERA is not accepted by this Tribunal mainly for the following reasons:

I. The Concession Agreement has been entered into by the **Hon'ble the President of India** with the present Appellant on 20.12.2004 and the AERA Act, 2008 has been brought in force on 01.09.2009. Thus, by the virtue of the Concession Agreement the Appellant has already moved its position and has invested thousands of crores of rupees for the designing, financing, development, operation and maintenance of the Hyderabad International Airport Ltd.

II. It has been held by **Hon'ble the Supreme Court of India** in **DIAL Vs. AERA, (2022) SCC OnLine SC 850 in Para 20** reads as under:

> ***"20.*** *Clause (vi) of sub-section (1) of the said Act clearly stipulates that in the determination of tariff for the aeronautical services, one of the considerations, is the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise.* ***Thus, the principle that legislative intent must prevail over any prior agreement would not really apply in the present scenario as the legislative intent itself incorporates and requires the prior agreements to be taken into consideration albeit along with certain other parameters/requirements."***
>
> **[Emphasis Supplied]**

III. Thus, in view of the aforesaid decision by Hon'ble the Supreme Court of India, the Concession Agreement has to be considered by AERA, during the Tariff determination process especially looking at Section 13(1)(a)(vi) of the AERA Act, 2008.

IV. The **Hon'ble the Supreme Court** in the case of '**Indian Aluminium Company Vs. Kerala State Electricity Board Limited' reported in (1975) 2 SCC 414 especially Para 18** thereof reads as under:

> ***"18.*** *We then turn to consider the argument based on Section 59. That section provides that the Board shall not, as far as practicable and after taking credit for any subventions from the State Government under Section 63, carry on its operations under the Act at a loss, and shall adjust its charges accordingly from time to time. The contention of the Board was that since it was operating at a loss, it was bound under Section 59 to readjust its charges in order to avoid the loss and hence it was within its power to enhance the charges, notwithstanding the stipulations contained in the agreements.*
>
> *This contention, plausible though it may seem at first flush, is, on closer scrutiny, not well founded. It ignores the true object and purpose of the enactment of Section 59 and fails to give due effect to the words "as far as practicable". The marginal note to Section 59 reads "General Principles for Board's Finance". It is true that the marginal note cannot afford any legitimate aid to construction of a section, but it can certainly be relied upon as indicating the drift of the*

section, or, to use the words of Collins, M.R. in Bushell v. Hammond [(1904) 2 KB 563 : 73 LJKB 1005 : 20 TLR 413] "to show what the section was dealing with". It is apparent from the marginal note that Section 59 is intended to do no more than lay down general principles for the finance of the Board. It merely enunciates certain guidelines which the Board must follow in managing its finance. The Board is directed, as far as practicable, not to carry on its operations at a loss and to adjust its charges accordingly from time to time. The Legislature has deliberately and advisedly used the words "as far as practicable" as the Legislature was well aware that since the Board is a statutory authority charged with the general duty of promoting the coordinated development of generation, supply and distribution of electricity within the State with particular reference to such development in areas not for the time being served or adequately served by any licensee, it might run into loss in carrying on its operations and it might not always be possible for it to avoid carrying on its operations at a loss. Sometimes the Board might have to give special tariffs to consumers in undeveloped or sparsely developed areas and sometimes special tariffs might have to be given to industrial consumers with a view to accelerating the rate of industrial growth and development in the State, even though such special

tariffs might not be sufficient to meet the cost of generation, supply and distribution of electricity. The Legislature, therefore, did not issue a rigid directive to the Board that it shall on no account carry on its operations at a loss, and if there is a loss for any reason whatsoever, it shall adjust its charges so as to wipe off such loss. But it merely administered a caution to the Board that "as far as practicable" it shall not carry on its operations at a loss, that is, if it is "practicable" for it to avoid operating at a loss by adjusting its charges, it should try to do so. That is why this Court pointed out in Maharashtra State Electricity Board v. Kalyan Borough Municipality [AIR 1968 SC 991 : (1968) 3 SCR 137] that "cost ... is not the sole or only criterion for fixing the tariff". Now, obviously, where, by a stipulation validly made under sub-section (3) of Section 49, the Board is under a contractual, obligation not to charge anything more than a specified tariff, it would not be "practicable" for it to enhance its charges, even if it finds that it is incurring operational loss. To do something contrary to law — in violation of a contractual obligation — can never be regarded as "practicable". Section 59 does not give a charter to the Board to enhance its charges in breach of a contractual stipulation. The Board can adjust its charges under the section only insofar as the law permits it to do so. If there is a contractual

obligation which binds the Board not to charge anything more than a certain tariff, the Board cannot claim to override it under Section 59. It is significant to note the difference in language between Section 59 on the one hand and Section 57 read with clause (1) of the Sixth Schedule on the other. Section 57 clearly and in so many terms provides that the provisions of "any other law, agreement or instrument applicable to the licensee" shall, in relation to the licensee, be void and of no effect insofar as they are inconsistent with the provisions of the Sixth Schedule and clause (1) of the Sixth Schedule provides that the licensee shall so adjust its charges for the sale of electricity, whether by enhancing or reducing them, that its clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return. The licensee can, therefore, notwithstanding any agreement entered into with the consumer, enhance the charges for sale of electricity in order to earn the amount of reasonable return by way of clear profit. But no such language is to be found in Section 59 and, on the contrary, the words there used are "as far as practicable". We do not, therefore, think that Section 59 confers any power on the Board to enhance the charges for supply of electricity in disregard of a contractual stipulation entered into by it under sub-section (3) of Section 49."

[Emphasis Supplied]

V. It has been held by **Hon'ble the Delhi High Court** in the case of **'Mahanagar Telecom Limited Vs. TRAI & Ors., reported in 2000 SCC OnLine Delhi 19 especially Para 32** thereof which reads as under:

> ***"32.*** *In this behalf, it is very pertinent to note that even though S. 11 starts with a non obstante clause which provides that the functions are to be exercised "Notwithstanding anything contained in the Indian Telegraph Act, 1885" the section nowhere provides that the functions are to be exercised notwithstanding "any contract or any decrees or orders of Courts."* ***It is well settled law that when the legislature intends to confer on a body the power to vary contracts or existing private rights, it has to do so specifically. In the absence of any provision authorising the Authority to vary private rights under existing contracts or licenses, no such power can be presumed or assumed.*** *This is the law as laid down by the Supreme Court in the case of Indian Aluminium Company v. Kerala State Electricity Board, reported in AIR 1975 SC 1967."*
>
> **(Emphasis Supplied)**

VI. It has been held by this **Tribunal** in **DIAL Vs. AERA in AERA Appeal No.7 of 2021, judgement dated 13.01.2023** in Para No. **14.8, 15.2 and 15.6** as under, which reads as follows:

"***14.8*** *On the contrary, subsequent legislation, that is AERA Act, 2008, gives full respect and recognition to the concessions offered by Central Government through existing agreements like OMDA (Schedule 6 to be read with SSA). Therefore, we are in full agreement that arguments by the counsel of the appellant that in the fact of the present case, OMDA to be read with SSA shall be harmoniously construed with the subsequent enactment- AERA Act, 2008 because the law itself has accepted the existence and continuation of concession offered by the Central Government.*

15.2 *It ought to be kept in mind that looking to OMDA & SSA if read conjointly, it was a mature decision of Union of India to offer concession to Airport Operators. This decision was not taken overnight by the Union of India. This concession was offered by the Central Government after a long drawn consultative process and after protracted negotiations. This concession was not offered by a clerk or a head clerk of the central government, but it was by the conscious decision and a mature decision by the central government itself which is being rightly protected by the subsequently enacted law- AERA Act, 2008 through Sec. 13(1)(a)(vi) thereof.*

15.6 *By no stretch of imagination, it can be contended that few provisions of OMDA to be read with SSA have been evaporated, diluted or made redundant or have been changed or altered by AERA Act, 2008. On the contrary, if the AERA Act, 2008 is read and understood correctly, the concession offered by highest sovereign body of this country-the Central Government has been respected and recognized under Section 13(1)(a)(vi) of AERA Act, 2008. Varieties of factors must have been appreciated before offering the concession by Central Government which may include:*

A. ***Investment*** *by the airport operator.*

B. Concession has been offered for 30 years and therefore ***there is a set calculation or a definite calculation****, in the minds of airport operators on how to invest initially and how to gain subsequently by operating airports.*

C. It may happen that when concession offered by Central Government is for 30 years, initially few hundred crores of rupees may be invested by the airport operators keeping in mind the revenue to be generated from the OMDA & SSA in the subsequent years and therefore abruptly after few years or more particularly, after huge

investment is being done by the airport operators, concession cannot be withdrawn. Keeping in mind this principle, Section13 (1)(a)(vi) of AERA Act, 2008 has been enacted.

D. *If the argument of Respondent No. 1 (AERA) is accepted, then after investment of huge sum of money by airport operators on the basis of concession offered by Central Government for a particular period, the concession can be withdrawn, despite the fact that the other side has moved themselves adversely. But this is not permissible.*

A promise on the basis of which, huge investment is being attracted and after such investment, the concession granted cannot be withdrawn. The Central Government being an ideal personality and very fair personality, 89 the concession given by the way of contract shall always be respected even after the enactment of AERA Act, 2008. In this background, Section 13(1)(a)(vi) of AERA Act, 2008 has to be interpreted.

E. *In other words, the law respects the lawful agreement entered into by the Central Government through which concession has been offered. We therefore disagree with the*

contention of the Respondent No. 1 & Respondent No. 7 that by virtue of AERA Act, 2008, the concession offered by Central Government (through Schedule 6 of OMDA) has been withdrawn or given goby.

F. *In fact, the OMDA & SSA were entered into by the highest sovereign body of this country. Central Government has all power, jurisdiction and authority to give concession. Looking to section 12-A of Airport Authority Act, 1994, which empowers the central government to enter into OMDA & SSA for the ready reference Section 12-A of the Airport Authority Act, 1994 reads as under:*

"Section 12A. Lease by the Authority.— (1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit: Provided that such lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves. 1. Ins. by Act of 43 of 2003, s. 6 (w.e.f. 1-7-2004). 8 (2) No lease under sub-section (1)

shall be made without the previous approval of the Central Government. (3) Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24. (4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such function in terms of the lease."

(Emphasis Supplied)

301. Thus, in the facts of the present case the AERA Act, 2008, respects, recognizes and mandates AERA to consider the Concession offered by **Hon'ble the President of India**, which is Schedule-6 of the Concession Agreement to be read with Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 and, therefore, the Pre-existing Contract i.e. **Concession Agreement** is binding on the parties to the agreement, even after the AERA Act, 2008 has brought into force.

302. The **Airport Activities** mentioned in Schedule-3 of the Concession Agreement are different and distinct from the

Regulated Charges mentioned in Schedule-6 of the Concession Agreement.

303. AERA is empowered to regulate only the **'Regulated Charges'** and it cannot assume jurisdiction over the **'Airport Activities'.** The terms Regulated Charges and Airport Charges/Activities **are not the same, they are different and distinct.**

304. When the Specific categorization has been provided by the Concession Agreement granted by the Central Government, the due regard has to be given to such concessions and the same shall prevail upon the categorization provided by AERA Act because the Concession Agreement has been duly preserved and protected by the virtue of Section 13(1)(a) (vi) of the AERA Act, 2008.

305. AERA's reliance on 'Subject to Applicable Law' mentioned in Clause **10.1** is misplaced because Clause **10.1** does not deal with regulation of charges but only with the aspect as to which entity has the right to impose/collect such charges. However, **10.2** (Regulated Charges) & **10.3** (Other Charges) does not start with 'Subject to Applicable Law'.

306. Clause **10.3** which specifically deals with HIAL's power to levy charges with respect to Other Charges does not start with

"*Subject to applicable law…*". Thus, reliance on AERA Act to overrule Clause **10.2** of Concession Agreement and assume jurisdiction over all the Airport Activities, is misconceived and impermissible.

307. It has been rightly contended by the counsel for the appellant that Ministry of Civil Aviation (MoCA) had filed earlier an affidavit in AERA Appeal No.8 of 2011. Para 7 of the aforesaid affidavit filed in AERA Appeal No.8 of 2011 in case of 'M/s. Hyderabad International Airport Ltd. Vs. AERA' by MoCA reads as under:

> "***7***. *That the Answering Respondent had entered into a Concession Agreement with the M/s Bangalore International Airport Ltd. and M/s Hyderabad International Airport Ltd. for operation, maintenance, development and construction of a Greenfield airport at Devenahalli, Bangalore and Shamshabad, Hyderabad on 05.07.2004 and 20 12.2004 respectively. Article 10 of these Concession Agreements lays down the criteria for determination of the airport charges as specified in Schedule VI of the Concession Agreements. As per the provisions laid down in Article 10 and Schedule 6 of these Concession Agreements, the only regulated charges*

at these airports are Landing, Parking and Housing charges (Domestic and international): Passenger Service Fee (Domestic and International); and User Development Fee (Domestic and International) A true copy each of the Article 10 and Schedule 6 of these Concession Agreements are attached as Annexure- R2."

(Emphasis Supplied)

308. In view of the aforesaid affidavit filed by MoCA in the earlier AERA Appeal No.8 of 2011 between the very same parties, it has been categorically stated that as per the **Concession Agreement**, only those charges as mentioned in Schedule-6 shall alone be regulated by AERA.

309. MoCA had sought for the opinion by the highest law officers of this country about Cargo, Ground Handling and Fuel Services. The Counsel for the Appellant has referred to the said Opinion obtained by MoCA obtained from the highest law officers of this country. AERA in the impugned order to fortify its decision has also relied on the letter issued by MoCA on 24.09.2013 issued specifically in the case of Bangalore International Airport Limited ('BIAL') as stated in Para 3.2.7 (page no.127) of Annexure A-1 to the memo of this appeal. However, reliance on

such letter in case of HIAL is misconceived as MoCA has not issued any such letter for HIAL. On the contrary, in the case of HIAL, MoCA in its affidavit filed in AERA Appeal No. 8 of 2011 Para no. 7 (page no. 2246) of Annexure A-16 to the memo of this appeal, has categorically stated that as per the Concession Agreement only those charges as mentioned in Schedule-6, shall alone be regulated.

Further, when doubts were raised as to whether AERA could seek to rely upon the later enactment to attempt to regulate charges for certain activities like CGF, MoCA reinforced its own understanding of the binding contract and non-applicability of a later enactment, by obtaining an opinion dated 14.01.2015 from the Attorney General for India Para no. 34 (page no. 914-918) of Annexure A-9 to the memo of this appeal, which was rendered in terms of Article 76(2) of the Constitution of India. The Ld. Attorney General for India, who is a constitutional appointee, under Article 76 (1) of the Constitution of India has opined that CGF are not to be found in Schedule 6 of the Concession Agreement and, therefore, they not

Regulated Charges. The opinion of such a constitutional functionary has persuasive value for AERA.

Even the Solicitor General of India Para no. 5 to 13 (page no. 2011-2026) of Annexure A-11 to the memo of this appeal, in his opinion dated 24.12.2019, opined that CGF will have to be treated as non-regulated activity for tariff determination by AERA. This opinion is also having persuasive value for AERA. Accordingly, AERA's reliance on the letter written by MoCA in case of BIAL has no relevance at all in the present case and on the contrary based on the opinions obtained by MoCA, reinforcing its commitments in its contract with HIAL, it is clear that CGF are to be treated as non-aeronautical since the same are non-regulated as per the provisions of the Concession Agreement.

In view of the above, the judgment dated 16.12.2020 passed by the Learned Single Judge of this Hon'ble Tribunal in the case of BIAL needs reconsideration as (i) the facts as well as documents which exist in the case of HIAL were not placed before the Learned Single Judge in the case of BIAL; and (ii) as pointed out hereinabove, the reliance of the Learned Single

Judge on the phrase 'Subject to Applicable Law' occurring in Article 10.1 is erroneous. As such, AERA's reliance on the said judgment is misconceived. In any case, this Hon'ble Tribunal vide its judgement dated 04.03.2020 in AERA Appeal No. 2 of 2014 filed by the present Appellant, had directed AERA to consider the "issues afresh" and without prejudice on account of any prior litigations. Thus, AERA ought to have considered the issues raised by HIAL independently, uninfluenced by this Hon'ble Tribunal's judgement dated 16.12.2020 in AERA Appeal No. 8 of 2018 - Bangalore International Airport Ltd. v. Airport Economic Regulatory Authority of India (BIAL Order').

310. It has been contented by the Counsel for Respondent No.1 - AERA that as per Section 13(1)(a)(vi), AERA has to consider the concession agreement during the Tariff determination process and thus, AERA has read the concession agreement and has passed the impugned order for the Third Control Period (1.4.2021 to 31.3.2026) and they have held that Cargo, Ground Handling and Fuelling Services can be regulated by AERA and revenue arriving therefrom is aeronautical revenue. **This contention is not accepted by this Tribunal**.

311. The approach of the AERA of **'Read & Reject'** the Concession Agreement is hereby deprecated, especially when the Concession Agreement has been entered into by **Hon'ble the President of India with this Appellant.** In the facts of the present case, concession has been granted, in writing by the highest Sovereign body i.e. Government of India and it has to be respected and honoured especially, when the subsequently enacted AERA Act, 2008 has also mandated AERA, to consider this Concession Agreement as provided in Section 13(1)(a)(vi), the Appellant has invested sizable amount of few thousand crores for the conception, development and maintenance of the Rajiv Gandhi International Airport Ltd., Hyderabad.

312. There is always a set calculation in the mind of the Airport Operator while participating in the biding process and once the Airport Operator has been chosen by the Government of India by giving concessions, the same cannot be presumed to be brushed aside or evaporated, [Consensus Ad Idem] unless the effect of such Concession Agreement is being specifically taken away by the Statutory Provision in the enactment. In the facts of the present case it is absolutely otherwise. By the virtue of

Section 13(1)(a)(vi) of the AERA Act, 2008, **the Concession Agreement is preserved, protected and maintained.**

313. This Tribunal in the case of DIAL Vs. AERA**, AERA Appeal No. 07 of 2021**, judgement dated **13.01.2023**, has already held that the **Ground Handling Services (GHS)** and **Cargo Handling Services (CHS)** as **Non-Aeronautical activities** and the revenue arising therefrom as Non-Aeronautical Revenue.

314. In rendering the aforementioned judgment, the Tribunal undertook a comprehensive evaluation of the various elements pertinent to GHS and CHS, in conjunction with the provisions outlined in the Operation, Management and Development Agreement (OMDA) and State Support Agreement (SSA) relevant to that case. This comprehensive analysis led to a detailed exposition of the reasons and findings that underpinned the decision to categorize GHS and CHS distinctly from Aeronautical activities.

315. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order for the Third Control Period and hence, so far as Issue No. II, **we hereby quash and set aside the decision of AERA, and we hold that the**

decision of AERA to treat Cargo, Ground Handling and Fuel Services as aeronautical services and the revenue generated therefrom as aeronautical revenue is incorrect, improper & unjustified. We hereby hold that the activities of CGF in case of HIAL are non-regulated activities and the revenue received by the Airport Operator – Appellant from the service providers of CGF are non-aeronautical charges.

ISSUE No. III

Income from Real Estate Development (RED)

316. Learned Senior Counsel Mr. Ramji Srinivasan submitted that HIAL proposed to AERA that revenue generated from the commercial development of additional land cannot be treated as non-aeronautical revenue and consequently this revenue cannot be used for cross-subsidization.

317. The AERA has decided to treat the revenue from commercial development of land as non-aeronautical revenue and therefore AERA has used the same to cross-subsidize aeronautical tariff under the hybrid till regime.

318. This decision of AERA for 3rd Control Period (01.04.2021-31.03.2026) is under challenge in this Appeal. 3,500 Acres of land was demarcated exclusively for the development of the airport and allied activities.

319. Land approximately 2,000 Acres was meant for **Non-Airport Activities**, including the commercial development. These lands were given by the virtue of Land Lease Agreement executed between this appellant and Government of Andhra Pradesh.

320. This land lease agreement is dated 30.09.2003 (ANNEXURE A-4 to the memo of this appeal). By the virtue of this Land Lease Agreement, Government of Andhra Pradesh agreed to provide the State Support to HIAL-Appellant and executed a State Support Agreement (SSA) inter alia ensuring, maintaining equity internal rate of return at 18.33% per annum, granting certain support and assistance.

321. This appellant executed a State Support Agreement dated 30.9.2003 is at Annexure A-5 to the memo of this appeal.

322. Concession Agreement was entered into between **Hon'ble The President of India** and HIAL (the present appellant) on 20.12.2004 (ANNEXURE A-3) which defines certain crucial

definitions for the purpose of this issue of Revenue from Real Estate Development reads as under:

*"**Airport Activities**" means 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 contemplated in Schedule 3, Part 1 shall require the mutual agreement of the Parties.*

*"**Non-Airport Activities**" means the provision, at or in relation to the Airport, of the services set out at Schedule 3, Part 2.*

*"**Airport**" means the Greenfield international airport comprising of the Initial Phase, to be constructed and operated by HIAL at Shamshabad, near Hyderabad in the State of Andhra Pradesh and includes all its buildings, equipment, facilities and systems and including, where the circumstances so require, any Expansion thereof as per the Master Plan.*

*"**Site**" means the land in which HIAL has or shall have a leasehold interest pursuant to the Land Lease Agreement, and*

measuring approximately 5450 acres in area, on, under and over which the Airport is to be constructed.

The objective of the Concession Agreement (ANNEXURE A-3) reads as under:

> *"(B) The Parties recognise and acknowledge that in matters of airport infrastructure and civil aviation GoI has and should continue to have a major role and responsibility in determining the framework for the aviation sector."*

323. In view of the aforesaid objectives to be achieved by Concession Agreement, it appears that Concession Agreement was entered into, not just for the development of a Greenfield Airport - HIAL but also to develop the "Site" for promoting economic and social development of the Government of Andhra Pradesh (now State of Telangana) as is also evident from the recitals of the **Land Lease Agreement (Annexure A-4).** For ready reference the same is reproduced hereunder:

> *A. "The Government of India as part of its policy to encourage private sector participation in the development of airport infrastructure has granted approval and its support for the development of a Greenfield airport, with private sector participation, at Shamshabad, near Hyderabad in the State of Andhra Pradesh, India. Tire*

Government of India has to this end by its letter dated 29 May 2000 addressed to the Lessor confirmed that the existing airport at Begumpet, Hyderabad shall be closed for all civil operations. The Lessor and the Government of India through the Airports Authority of India also entered into a Memorandum of Understanding dated 23 November 2000 for the development of the Airport.

B. *The Project is of prime importance to the State of Andhra Pradesh and the Lessor as part of its policy to encourage and provide industrial development, tourism, passenger, cargo movement and the general economic and social development of the State of Andhra Pradesh has granted approval for the development of a Greenfield Airport and the provision of financial support to assist die Project. The Lessor has issued G.O. MS No. 130 dated 26 July 2003 appointing GMR-MAHB Consortium as the developer of the Project.*

C. *The Project is feasible only with State Support of the Lessor, and as part of the State Support to be made available by the Lessor to the Lessee, pursuant to die State Support Agreement, the Lessor has agreed to provide on. lease to the Lessee contiguous unobstructed, unencumbered and freehold land owned and possessed by the*

Lessor measuring about 5,000 (Five Thousand acres) at Shamshabad, near Hyderabad, as described in Schedule 1 to this Agreement and shown on the site plan attached hereto as Schedule 2 (the "Land"), and the Lessee has agreed to accept the Land on lease subject to and on the terms and conditions contained in this Agreement."

[Emphasis Supplied]

324. Thus, in view of the aforesaid objectives to be achieved which are stated in the **Concession Agreement (Annexure A-3)** to be read with Land Lease Agreement (Annexure A-4 dated 30.09.2003). Concession has been provided to the Airport Operator – HIAL – Appellant, defining **"Airport Activities"** and **"Non-Airport Activities".** These activities are mentioned in detail in Part I of Schedule 3 and Part II of Schedule 3 appended to the Concession Agreement. For ready reference, "Airport Activities" are mentioned in Part 1 of Schedule 3 reads as under:

"SCHEDULE 3: PART 1 – AIRPORT ACTIVITIES

Airport Activities include the following services, facilities and equipment:

Airside facility

- *Airfield pavements (runway, apron and taxiway system)*
- *Airfield ground lighting*
- *Airside and perimeter security including access control and patrolling.*
- *Taxiways including one emergency take off runway/parallel taxiway.*
- *Apron control and allocation of aircraft stands.*
- *Arrivals concourses*
- *Bird scaring*
- *Emergency services*
- *Crash, rescue and fire service*
- *Flight catering services.*
- *General aviation ground handling*
- *General aviation facilities*
- *Ground handling services*
- *Ground handling equipment*
- *Ground power for aircraft*
- *Cargo terminal*
- *Cargo handling and cargo terminal operations, custodial services*
- *Aircraft cleaning services*
- *Aircraft fuelling services*
- *Hangars and aircraft maintenance services*
- *Pre-conditioned air for aircraft*
- *Pavement surface water drainage*
- *Guidance systems and marshalling*

Airside / landside / terminal facilities

- *Facilities for the disabled and other special needs people*
  Check-in counters
- *Cleaning, lighting, cooling and air conditioning of public and office areas*
- *Customs and immigration halls*
- *Baggage systems including outbound and reclaim*
- *Flight information and public-address systems*
- *Information desks and staffing*
- *Bus lounge for servicing remote stands*

- *Staircases, lifts and escalators*
- *Passenger boarding bridges (aerobridges)*
- *Lost property*
- *Noise insulation and sound proofing*
- *Passenger and hand baggage search*
- *Piers and gate rooms*
- *Policing and general security*
- *Prayer rooms*
- *Scheduling committee support*
- *Signage for easy orientation of passengers*
- *Staff entries with search and security facilities*
- *Toilets and nursing mothers' rooms*
- *X-Ray service for carry on and checked-in luggage*
- *Airline lounges*
- *Banks / ATM / Bureaux de Change*
- *Business center*
- *Duty free sales in international section*
- *Hotel reservation services*
- *Restaurants, bars and other refreshment facilities*
- *Special assistance services*
- *Tourist information services*
- *Travel agency*
- *Messenger services*
- *VIP lounges*

Infrastructure and utilities for the airport complex (mainly landside)

- *Airside and landside access roads and forecourts*
- *Utilities (including electricity, telecommunications and water)*
- *Wastewater and refuse treatment and disposal*
- *Landscaping and horticulture*
- *Line maintenance services*
- *Public telephones*
- *Vehicle fuelling services*
- *Vehicle rental*
- *Foul and surface water Drainage*
- *Vehicle parking*
- *Cloak rooms*
- *Conference centre*

- *Freight forwarders/ consolidators/ agents*
- *Retail shops*
- *Lockers*
- *Observation terrace*
- *Porter services*
- *Post office*
- *Trolley services"*

325. Likewise, non-airport activities have been mentioned in Part 2 of Schedule 3 of Concession Agreement (ANNEXURE A-3) which read as under:

"SCHEDULE 3: PART 2- NON-AIRPORT ACTIVITIES

Landside Non-Airport Activities include the following services, facilities and equipment:

- *Offices for freight consolidators/ forwarders or agents at cargo complex, offices for airlines Bus terminal for local and regional buses, Airport shuttle transport services (hotels, city centre, etc.)*
- *Business parks*
- *Airport hotels, restaurants, conference venues, meeting facilities, business centres, trade fairs, real estate, theme parks, amusement arcades, golf courses, sports facilities, banks and exchanges and shopping malls*
- *Commercial buildings / complexes/ entertainment complexes/ tourist related activities.*
- *Independent power producing plants for emergency supply may be established in connection with business parks.*
- *Viewing point (at an existing hilltop) with parking, access and small food and beverage facility*

- *Any other revenue generating activity related to the development of the Site or of the Airport in relation to Non-Airport Activities"**.***

326. Looking to the definition of Non-Airport Activities along-with the definition of Airport and definition of Site, Non-Airport Activities to be undertaken by the Airport Operator – HIAL – Appellant at the site, by their very nature are unrelated to the operation of Airport.

327. Looking to the definitions of the "Airport Activities" which are enumerated in Part 1 of Schedule 3 of Concession Agreement (ANNEXURE A-3), they are consisting of both, **"Aeronautical Services & Non-Aeronautical Services"** meaning thereby to "Airport Activities" can be Aeronautical Services and can also be Non-Aeronautical Services. Looking to the Non-Aeronautical Activities which are mentioned in Part 2 of Schedule 3 of the Concession Agreement (ANNEXURE A-3) like commercial buildings, complexes, viewing point, business centres, trade fares, theme parks, golf courses, bank etc. which are provided beyond the precincts of the airport and hence they are neither aeronautical services nor Non-Aeronautical Services. Thus, in fact, the Non-Airport Activities which are referred in Part 2 of

Schedule 3 cannot be treated as aeronautical services nor they can be treated as Non-Aeronautical Services.

328. Looking to Clause 10.2.4 of the Concession Agreement, Airport Operator – HIAL – Appellant has been given the right to determine charges for all services, activities and facilities except for the regulated charges. For the ready reference, clause 10.2.4 of the Concession agreement is as follows:

> ***"10.2.4*** *From the date the IRA has the power to approve the Regulated Charges, HIAL shall be required to obtain approval thereof from the IRA. In this regard HIAL 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 Airport Opening Date."*

329. Looking to Sec. 13 (1) (a) (vi) of the AERA Act, 2008, these concessions granted by the Central Government have been

recognized and protected and they have to be considered by AERA in the tariff determination process.

330. It has been held by this Tribunal in the judgment of DIAL v. AERA in **AERA Appeal No. 07 of 2021** dated **13.01.2023** in paragraph 14.8, 15.2 and 15.6, which reads as under:

> *"**14.8** On the contrary, subsequent legislation, that is AERA Act, 2008, gives full respect and recognition to the concessions offered by Central Government through existing agreements like OMDA (Schedule 6 to be read with SSA). Therefore, we are in full agreement that arguments by the counsel of the appellant that in the fact of the present case, OMDA to be read with SSA shall be harmoniously construed with the subsequent enactment- AERA Act, 2008 because the law itself has accepted the existence and continuation of concession offered by the Central Government."*
>
> *"**15.2** It ought to be kept in mind that looking to OMDA & SSA if read conjointly, it was a mature decision of Union of India to offer concession to Airport Operators. This decision was not taken overnight by the Union of India. This concession was offered by the Central Government after a long drawn consultative process and after protracted negotiations. This concession was not offered by a clerk or a head clerk of the central government, but it was by the conscious decision and a mature decision by the central government itself which is being rightly protected by the subsequently enacted law- AERA Act, 2008 through Sec. 13(1)(a)(vi) thereof."*
>
> *"**15.6** By no stretch of imagination, it can be contended that few provisions of OMDA to be read with SSA have been evaporated, diluted or made redundant or have been changed or altered by AERA Act, 2008. On the contrary, if the AERA Act, 2008 is read and understood correctly,*

the concession offered by highest sovereign body of this country-the Central Government has been respected and recognized under Section 13(1)(a)(vi) of AERA Act, 2008. Varieties of factors must have been appreciated before offering the concession by Central Government which may include:

A. *Investment by the airport operator.*

B. *Concession has been offered for 30 years and therefore there is a set calculation in the minds of airport operators on how to 88 invest initially and how to gain subsequently by operating airports.*

C. *It may happen that when concession offered by Central Government is for 30 years, initially few hundred crores of rupees may be invested by the airport operators keeping in mind the revenue to be generated from the OMDA & SSA in the subsequent years and therefore abruptly after few years or more particularly, after huge investment is being done by the airport operators, concession cannot be withdrawn. Keeping in mind this principle, Section13 (1)(a)(vi) of AERA Act, 2008 has been enacted.*

D. *If the argument of Respondent No. 1 (AERA) is accepted, then after investment of huge sum of money by airport operators on the basis of concession offered by Central Government for a particular period, the concession can be withdrawn, despite the fact that the other side has moved themselves adversely. But this is not permissible. A promise on the basis of which, huge investment is being attracted and after such investment, the concession granted cannot be withdrawn.*

The Central Government being an ideal personality and very fair personality, 89 the concession given by the way of contract shall always be respected even after the enactment of AERA Act, 2008. In this background, Section 13(1)(a)(vi) of AERA Act, 2008 has to be interpreted.

E. In other words, the law respects the lawful agreement entered into by the Central Government through which concession has been offered. We therefore disagree with the contention of the Respondent No. 1 & Respondent No. 7 that by virtue of AERA Act, 2008, the concession offered by Central Government (through Schedule 6 of OMDA) has been withdrawn or given goby.

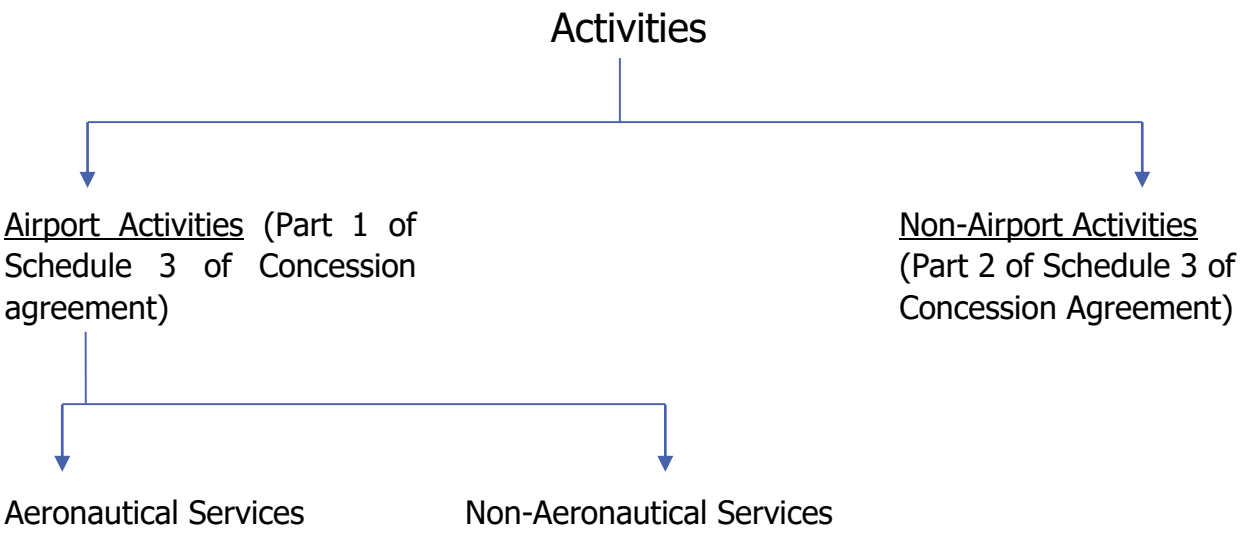
F. In fact, the OMDA & SSA were entered into by the highest sovereign body of this country. Central Government has all power, jurisdiction and authority to give concession. Looking to section 12-A of Airport Authority Act, 1994, which empowers the central government to enter into OMDA & SSA for the ready reference Section 12-A of the Airport Authority Act, 1994 reads as under:

"Section 12A. Lease by the Authority.— (1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit: Provided that such lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves. 1. Ins. by Act of 43 of 2003, s. 6 (w.e.f. 1-7-2004). 8 (2) No lease under sub-section (1) shall be made without the previous approval of the Central Government. (3) Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24. (4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such function in terms of the lease."

(Emphasis Supplied)

331. AERA vide impugned decision has treated "Non-Airport Activities" as "Non-Aeronautical Services". This is incorrect and running counter to the clauses of Concession Agreement and in violation of the AERA Act, 2008. In fact, Concession Agreement defines Airport Activities and Non-airport activities. It did not define "Aeronautical" and "Non-Aeronautical" as per Part 1 of Schedule 3 and as per Part 2 of Schedule 3 respectively.

332. Looking to the Concession Agreement, "Airport Activities" enumerated in Part 1 of Schedule 3 include, both Aeronautical Services and Non-Aeronautical Services, **whereas**, Non-Airport Activities enumerated in Part 2 of Schedule 3 which are provided in landside which is beyond the precincts of the airport, do not constitute either Aeronautical Services or Non-Aeronautical Services but they are simply and purely **"Non-Airport Activities".** For ready the scheme of the above is depicted through a chart below:



333. In view of the aforesaid provisions of Concession Agreement, "Non-Airport Activities" are clearly beyond the power, jurisdiction and authority of AERA and they do not form the part of **"Non-Aeronautical Services".**

334. Looking to Clause 7.2 and 13.5.2 of Concession Agreement, the **Government Of India** is under no obligation to take over **"Non-Airport Activities"** at the end of the term of Concession period which is 30 years in the facts of the present case which is further extendable by 30 years more. For the ready reference Clause 7.2 and Clause 13.5.2 of the Concession Agreement reads as under:

> ***"7.2 Construction and Expansion***
> *HIAL shall design, procure, construct, complete, test and commission the Initial Phase, and remedy any defects in respect thereof, in accordance with the Master Plan, Good Industry Practice and Applicable Law. HIAL shall ensure that the Works shall conform with the Specifications and Good Industry Practice.*
> *HIAL shall, taking into account and subject to increased demand, the availability of funding, the economic and*

profitable operation of the Airport at that time and the reasonable requirements of users of the Airport, develop and implement detailed proposals for the Expansion of the Airport.

To the extent that HIAL incurs any capital investments, amounts or costs in relation to the provision of Non-Airport Activities and requires such investments, amounts or costs to be included in the calculation of the Termination Amount, Debt or Settlement Amount, HIAL shall seek the prior written consent of GoI.

Notwithstanding anything contained to the contrary in the Agreement, GoI does not guarantee the obligations of the GoAP in any manner whatsoever, and it is merely responsible to the extent provided in the Agreement."

[Emphasis Supplied]

"***13.5.2*** *Notwithstanding anything contained in Article 13.5.1 prior to any transfer of the Airport, GoI shall have the right to conduct a due diligence of the contracts and agreements pertaining to Non-Airport Activities, the rights and obligations of which it is assuming and shall not be bound to assume the rights and obligations of contracts that, in the sole opinion of GoI are unreasonably onerous, and would be considered onerous at the time that the contracts were entered into. GoI shall conduct the due diligence and identify the contracts and agreements that it is prepared to assume within 45 days of the opening of a data room by HIAL for these purposes following the exercise of a right of termination by GoI or HIAL under Article 13.4. For the avoidance of doubt, to the extent GoI opts to take over Non-Airport Activities calculation of Termination Amount or Settlement Amount shall include investments amounts or costs of such Non-Airport Activities."*

335. It has been argued out by the counsel for respondent no.1 and respondent no.2 for AERA and FIA that there is a difference between "Airport" and "Site" and therefore, no error has been committed by AERA in considering revenue from Regulatory Asset Development (RAD) undertaken outside the precincts of airport. This

contention of AERA and FIA is not accepted by this tribunal mainly for the reason that there is a remarkable difference between "Airport" and "Site" as defined in the Concession Agreement. If the contention of AERA and FIA who are respondent no.1 and respondent no.2 is accepted, perhaps there was no need in the Concession Agreement to define, separately the terms "Airport" and "Site". In fact both the terms have been separately defined in the Concession Agreement (Annexure A-3) because they are different and distinct from each other. They are not synonyms of each other. **"Airport" and "Site"** are not inter-changeable terms otherwise Concession Agreement would have denied only one term and not both of them. The difference between **"Airport" and "Site"** is explicitly clear looking to –

(i) Clause 2.1.1;

(ii) Clause 3.2.1;

(iii) Clause 8.17.1;

(iv) Clause 10.1 to be read with

(v) Clause 10.3 of the Concession Agreement. Both these terms have not been used inter-changeably, but they have been used distinctly.

336. It ought to be kept in mind that revenue from Real Estate Development is not generated from the rendition from Non-Aeronautical Services, which are enlisted in Part 1 of Schedule-3 and therefore, this revenue does not qualify as eligible revenue for 30% cross-subsidy.

337. The mandate given to the respondent under the Concession Agreement is to regulate, only those charges, which fall under Schedule 6 i.e. "regulated charges". Hence, the "Non-Airport Activities" are clearly beyond the jurisdiction of AERA and it shall not form the part of Non-Aeronautical Services.

338. In fact, looking to Clause 3.1 (b) of the Land Lease agreement to be read with their Concession Agreement, the appellant and the airport operator have been granted the additional rights to develop the additional land, purely for commercial purposes i.e. Non-Airport Activities and not relating to Airport Activity.

339. Looking to ANNEXURE **A-4** to the memo of this appeal which is a "Land Lease Agreement", for different purposes the lease of the land has been given. One is for development of airport and another is for development of hotels, resorts etc. which has a direct causal connection with airport activities and non-airport activities. Looking to Clause 3(a) and Clause 3(b) of Land Lease

agreement to be read with Recital C of the Land Lease agreement, the land was acquired not only for the construction of the airport, but also to carry out "Non-Airport Activities" or commercial activities. In view of these facts, Non-Airport activities or commercial development activities carried out on land beyond the precincts of airport cannot be linked with the airport construction, operation and management.

340. It is true that the land has been given to make the airport feasible. This purpose has been achieved by giving the land at a concession. By virtue of this concession, the value of RAB is 'nil' which has resulted into a lower tariff by virtue of the following formula of ARR given in Tariff Determination Guidelines, 2011 issued by AERA.

341. AERA has relied upon the decision of Learned Single Bench dated 16.12.2020 in case of BIAL. This judgment has not appreciated the clauses of the Concession Agreement as stated hereinabove to be read with the clauses of Land Lease Agreement. The said judgment has also not appreciated the fact that "site" as defined in the Concession Agreement

includes Airport but reverse is not true meaning thereby to "airport" and not to be construed as "site". This distinction has been overlooked and we therefore do not agree with the interpretation of the Learned Single judge of this tribunal in judgment dated 16.12.2020 in case of BIAL. In fact, both the terms have been defined separately and, therefore, "Site" and "Airport" are not inter-changeable terms otherwise there would have been no need to define them separately.

AERA's reliance on National Civil Aviation Policy (NCAP) (Annexure R-1 of AERA's Reply) is misplaced as (i) no specific provision of the NCAP has been pointed out by AERA that permits it to adopt the approach that it has; (ii) assuming any provision of the NCAP provides that revenue from real estate development will be considered for the purpose of cross subsidization, no corresponding direction under Section 42 of the AERA Act, 2008 has been issued by MoCA to AERA. AERA cannot confer upon itself the jurisdiction to take into consideration revenues from Real Estate Development under the guise of NCAP where the said policy did not permit AERA to do so. Further, as stated earlier, MoCA has obtained

opinion from the Ld. Attorney General on the issue of jurisdiction of AERA with regard to the land earmarked for Non-Airport Activities to which the Ld. Attorney General has clarified to MoCA that the land meant for Non-Airport Activities should be outside the purview of AERA since AERA is related to only regulation of airports and what is outside the precincts should not be in the jurisdiction of AERA Para no. 34 (page no. 918) of Annexure A-9 to the memo of this appeal.

342. In view of the aforesaid facts and reasons, provisions of land lease agreement to be read with provisions of AERA Act, 2008, the decision of AERA to consider income of appellant from Real Estate Development under its regulatory purview is incorrect, improper and not justified. **We, hereby, hold that income from Real Estate Development (RED) is from Non-Airport Activities and it cannot be treated as Aeronautical, nor it can be treated as Non-Aeronautical but they are simply "Non-Airport Activity" revenue. AERA has no power or jurisdiction over such revenue.**

ISSUE No. IV

Treatment of Other Income

343. It is pertinent to note that Airport operator – Appellant - HIAL is receiving income from dividend and interest from the investments made by it in –

(i) Hyderabad Menzies and Cargo Private Limited (presently known as GMR Air Cargo and Aerospace Engineering Limited;

(ii) Hyderabad duty free retail Limited (Presently known as GMR Hospitality and Retail Limited). The receipt of dividend income and interest income from such entities have been treated by AERA as aeronautical revenue and as non-aeronautical revenue for the purpose of calculation of cross subsidy. This decision of AERA is under challenge under the aforesaid heading by this appellant.

344. Looking to the contentions raised by the counsels for both the sides, it appears that AERA has treated dividend and interest income from the investments made by the appellant in Hyderabad Menzies Air Cargo Private Limited (presently known as GMR Air Cargo and Aerospace Engineering Limited) as aeronautical revenue because the company in which the money

is invested is rendering cargo services and similarly AERA has considered dividend and interest income from Hyderabad duty free retail Limited (Presently known as GMR Hospitality and Retail Limited) which is performing duty free services and, therefore, income of dividend and interest arising investment made by the appellant in this company has been treated as non-aeronautical revenue.

345. We have already decided in AERA Appeal No.1 of 2016 and AERA Appeal No.1 of 2021 vide our detailed judgment and order dated 21.07.2023 in the case of DIAL Vs. AERA & Ors. (DIAL CONTROL PERIOD-3 Order) in paragraph number 88 and 90 as under:

> ***"88.*** *The contention raised for the counsel for Respondent No.1 to the effect that the income of "dividend" and "interest" are in fact from the income derived by the respondent by performing aeronautical and non-aeronautical services and, therefore, "other income" has rightly been treated as part of revenue, from "Revenue Share Assets". It is also contended by the counsels for respondents that the "dividend income" as a part of other income is a part of 3rd Control Period because dividend income is earned by DIAL through joint ventures set up with other group entities of DIAL who are carrying non-*

aeronautical related services and other non-aeronautical services provided in OMDA which if carried out by DIAL itself, would have earned surplus non-aeronautical income. These contentions are not accepted by this Tribunal mainly for the reason that "other income" is not relatable to and generated from the provision of any service by this Appellant and, therefore, it cannot be considered for cross-subsidization of aeronautical charges (i.e. as a part of revenue from Revenue Share Assets).

90. *Such type of addition by AERA of "other income" as part of revenue from revenue share assets is beyond bargain (i.e. beyond the terms of contract).* "

346. The impugned decision of AERA treating income of dividend and interest income from Cargo Subsidiary as aeronautical revenue and from duty free subsidiary as non-aeronautical revenue is not tenable in law mainly for the reason that the interest income and interest from treasury (e.g. income from fixed deposit/mutual fund etc.) in general, accruing to HIAL is not relatable to and generated from the provision of any service being provided by HIAL. This aspect of the matter has not been appreciated by AERA while passing the impugned order and hence, the same deserves to be quashed and set aside for the aforesaid point.

347. In the present case, AERA's decision to treat dividend and interest income received by HIAL from investments made in HMACPL (providing cargo service) as aeronautical revenue is based on a misconceived premise that because AERA has decided to treat cargo services as aeronautical in nature any income incidental therefrom is also to be treated as aeronautical. Similarly, for investment made by HIAL in other entity which provides duty free services, AERA has proceeded to treat such income as non-aeronautical in nature and consider it for cross subsidization. HIAL itself does not provide these services and the interest income received by HIAL does not correspond to any services rendered by HIAL and as such, it is beyond the regulatory ambit of AERA.

348. Further, there is no specific provision to include "Other Income" such as Interest income while calculating Aggregate Revenue Requirement (ARR) as per the provisions of the Concession Agreement (Annexure A-3).

349. HIAL-Appellant-Airport operator has received Interest income and treasury income from investing surplus fund from time to time. Income interest in general and treasury income accruing to HIAL is not relatable to any services rendered by HIAL.

350. Interest Income and Income from Treasury in general accruing to HIAL is not relatable to and generated from the provision of any service being provided by HIAL. Moreover, there is no specific provision to include Other Income such as interest income while calculating ARR as per the provisions of the Concession Agreement. The subsidiaries of HIAL providing these services are standalone entities and operate independently from HIAL. As such the classification of the nature of the services cannot constitute the basis of classification of the revenue accruing to HIAL. AERA has thus transgressed its statutory mandate by erroneously seeking to bring within its regulatory purview, the dividend and interest income received by HIAL on the investments made by it. The revenue generated by HIAL from Services only can be taken into consideration in the formula of ARR which is as under:

"ARR= (FRoR x RAB) + D + O + T – NAR"

351. AERA itself does not consider the investment in Joint ventures as part of RAB boundary since such investments fall outside the regulated business of HIAL. RAB boundary is a perimeter which defines the scope for AERA to consider both aeronautical as well as non-aeronautical revenue. Since the Investment outflow is not considered as part of RAB boundary, accordingly, the return from

such investment can also not be considered as part of revenue and therefore outside the regulatory purview of AERA.

352. AERA in the first tariff order, while determining the treatment of Dividend Income in the hands of HIAL stated that since the assets pertaining to the subsidiaries are not being reckoned for the purpose of determination of RAB, dividend and interest income accruing to the appellant are kept outside the regulatory considerations which is reproduced herein below:

> ***"****For the purposes of calculation of ARR, the Authority has taken into consideration only the RAB in the books of accounts of HIAL and has accordingly not reckoned the assets of Hyderabad Menzies Air Cargo Private Ltd. in RAB for the purposes of tariff determination. The dividend received by HIAL from HMACPL is likewise not included in the ARR calculations for HIAL****."***

[Emphasis Supplied]

353. In view of the aforesaid tariff order passed by AERA for 1st Control Period, AERA has recognised that HIAL – Appellant and **"Hyderabad Menzies Air Cargo Private Limited.**" are separate legal entities and services of "Hyderabad Menzies Air Cargo Private Ltd." cannot be attributed to HIAL. Now, while passing the Impugned Order for 3rd Control Period (01.04.2021 to 31.03.2026) without assigning any reason, there is a total

deviation by AERA from the aforesaid decision for 1st Control Period (01.04.2011 to 31.03.2016).

354. It has been held by this Tribunal in AERA Appeal No.1 of 2016 and AERA Appeal No.1 of 2021 in the case of DIAL Vs. AERA & Ors. (DIAL CONTROL PERIOD 3 Order) judgment dated 21.07.2023 in **paragraph number 93 as under:**

> ***"93.*** *In fact, AERA has to maintain consistency in their approach. During First Control Period "other income" of the appellant was not treated as part of revenue, from "Revenue Share Assets" and no reasons have been given by AERA for departure from the principles adopted in First Control Period and thus, there is a violation of Section 13(4) of AERA Act, 2008. Unjustifiably inconsistent interpretations of the rules of the game are more problematic, in so far as they create severe uncertainty and unpredictability in the making of investments and for national regulatory choice.* ***AERA cannot take different view in different Control Periods. Certainty of regulatory philosophy is a key to create a predictable environment for clarity to all the stakeholders. If different approaches are adopted for different Control Periods, it will lead to uncertainty which will ultimately lead to unwarranted increase in the litigation. As a result, it will be the end consumer who would be at sufferance. We are of the opinion that such unnecessary and unwarranted litigation needs to be curbed which can only happen when the regulator (AERA) strictly maintains consistency in its approach."***

355. The treatment by AERA to interest income and dividend income, in impugned order is liable to be set aside as AERA has not given any reasons for deviation from the stance taken in the First Tariff Order nor is there any change in circumstance which merits deviation. Recently, this Tribunal in DIAL CP 3 Order have a finding on the principles of legal certainty.

356. AERA while truing up the under/over recovery in following control period considers the over/under collection with time value or carrying cost at the value of WACC arrived. This inter-alia means that the authority has considered any potential interest on the surplus during the control period at the rate of WACC. Such interest relates to the investment which can be made from the surplus amount at much higher rate as compared to the actual and also is considered 100% aeronautical in nature. This may be seen from the consideration of AERA in the calculation of surplus of the Second Control Period at Table 80 where the surplus amount of Rs.1301 Crores has been considered with WACC value to be at Rs.1976 Crores which means an additional Rs.675 Crores of income has already been considered by AERA. Thus, considering the actual treasury income over and above the present value of the surplus would therefore lead to double accounting of the same income which is impermissible. This is evident from Table No. 80, for the

calculation of surplus for 2nd Control Period. For ready reference, table number 80 of the order passed in 2nd Control Period (01.04.2016 to 31.03.2021) passed by AERA dated 17-12-2017 is reproduced herein below:

"Table 80: Aggregate Revenue Requirement proposed to be considered by the Authority for the True up of the Second Control Period"

Particulars (In Rs. Crores)	**2017**	**2018**	**2019**	**2020**	**2021**	**Total**
Average Regulatory Asset Base (a) (Refer Table 35)	1413.48	1350.87	1533.44	1854.92	1916.46	
FROR/WACC (b) (Refer Table 39)	10.84%	10.84%	10.84%	10.84%	10.84%	
Return on RAB (c) = (a* b)	153.20	146.41	166.20	201.04	207.71	874.57
Operating Expense (Aero) (d) (Refer Table 54)	231.75	384.90	316.00	417.98	324.71	1675.33
Aeronautical Concession fees (e) (Refer Table 58)	33.70	38.03	44.17	45.01	10.52	171.44
Depreciation on RAB (f) (Refer Table 45]	108.82	112.04	140.99	176.53	184.38	722.77
Aeronautical Tax (g) (Refer Table 62)	75.05	10.87	19.39	19.47	0.00	124.78
Cross-subsidy (30% of non-aeronautical revenue) (h) (Refer Table 67)	105.99	114.25	133.65	145.72	84.84	584.44
Net Aggregate Revenue Requirement (i) = (sum of c to g) - (h)	**496.54**	**578.00**	**553.10**	**714.31**	**642.49**	**2984.44**

Actual Aero Revenues (j) (refer Table 71)	842.59	950.69	1104.34	1125.32	262.98	4285.91
Difference (k) = (i) - (j)	-346.04	-372.69	-551.24	-411.00	379.51	-1301.47
Fair Rate of Return/ WACC (Refer Table 39)	10.84%	10.84%	10.84%	10.84%	10.84%	
Discounting Factor (l)	1.67	1.51	1.36	1.23	1.11	
True up of the Second Control Period (as on 31.03.2022) (m) = (k) * (l)	(578.87)	(562.48)	(750.60)	(504.92)	420.64	(1.976.24)
True up of PCPE (as on 31.03.2022) (n) (refer Table 4)						731.05
True up the First Control Period (o) (as on 31.03.2022) (refer Table 18)						0.54
Under recovery of Pre-Control Period and First Control Period as on 01.01.2018 (refer Table 13 of Second Control Period Tariff Order) (p)						481.85
Discounting Factor (q)						1.55
Under recovery of Pre-Control Period and First Control Period as on 31.03.2022 (r) = (p) * (q)						746.18
Total True up to be carried forward to the Third Control Period (s) = (m) +(n) + (o) +(r)						(498.47)

357. In view of the above, it appears that surplus amount of Rs.1301 Crores has been considered with Weighted Average Cost of

Capital (WACC) value to be at Rs.1976 Crores. The approach of AERA in giving treatment of Dividend and Interest Income and Income from Treasury for RGIA is squarely covered by the DIAL CP3 Order which has emphasised on the fact that "Other Income" are not arising from the provision of any Services.

358. Counsel for the AERA submitted that there is a consistent approach by AERA and there is a uniform treatment given by AERA to all airports to the treatment of Income and Dividend. This contention is losing its significance in light of the judgment and order delivered by this Tribunal in AERA Appeal No.1 of 2016 and AERA Appeal No.1 of 2021 in case of DIAL Vs. AERA & Ors. (DIAL CONTROL PERIOD 3 Order) judgment dated 21.07.2023 as well as judgment and order passed by this Tribunal in case of MIAL Vs. AERA, judgment dated 06.10.2023 in AERA Appeal No. 2 of 2021 and AERA Appeal No.9 of 2016. By the virtue of the aforesaid two decisions delivered by this Tribunal, it has been recognized that there is a distinction between services undertaken by Airport Operator and a subsidiary. In view of this distinction, it has been held that Dividend Income and Interest Income of the Airport Operator -

Appellant cannot be considered for the purpose of calculating the cross-subsidy. The same principle is applicable in the present case also and, therefore, no reliance can be placed by AERA on the judgment dated 16.12.2020 passed by learned single judge in case of BIAL.

359. In view of the aforesaid facts and reasons, the decision of AERA to bring "Other Income" within its regulatory purview is incorrect, improper and unjustified. We hereby hold that Income from interest and dividend earned by this appellant is because of Cash Management Process (CMP). In fact, there is no legal base, to treat "Other Income" as a part of revenue for calculation of cross-subsidization.

ISSUE V

Capital expenditure for phase expansion of Rajiv Gandhi International Airport (RGIA) to increase capacity from 20 million Passengers Per Annum (MPPA) to 34 MPPA

360. Rajiv Gandhi International Airport is a green field airport. During the earlier Control Periods (1.4.2011 to 31.03.2016 and 1.04.2016-31.3.2021) there was already construction on RGIA,

now there is a need for expansion of RGIA looking to the increase in number of passengers.

361. In a second Control Period, AERA had approved the capital expenditure towards the expansion of RGIA by 101175 sq. mtrs. to handle the passenger traffic of 20 million Passengers Per Annum (MPPA) vide Interim Measure Order dated 27.03.2020.

362. The expansion of the airport is a regular phenomenon looking to the increase in footfall of the passengers and, therefore, time and again the **concerned committee** i.e. **(Airport Users Consultative Committee 'AUCC')** has gone through the proposal and has approved the expansion, which cannot be upset by AERA.

363. Looking to the rapid increase in passenger traffic during FY 2017-2019, this appellant proposed to expand the terminal building as well as this appellant has initiated capacity expansion of the Airport building. Earlier, the construction was suitable to handle the passenger traffic of 20 MPPA and now, the committee has approved the proposal of this appellant for the capacity expansion of the terminal building from 20 MPPA to 34 MPPA with an addition of 2,48,809 sq. mtrs. for the combined Second and Third Control Periods.

364. In pursuance of this approval of the Committee, this appellant invited global tenders and through a competing bidding process L&T emerged as a successful bidder.

365. It was proposed by HIAL that capital expenditure for capacity expansion to 34 MPPA for arriving at the projected aeronautical RAB for the third Control Period will be at Rs.5596.23 Crore.

366. The following is the summary of the capital expenditure towards capacity expansion to 34 MPPA submitted by HIAL as per MYTP, table no.92 of the impugned tariff order for third Control Period (01.04.2021- 31.03.2026) reads as under:

"Table 92: Capital expenditure (FY18-FY24) towards capacity expansion to 34 MPPA submitted by HIAL as per MYTP:"

Projects	Allocation	Total amount (in Rs. Crores)
Expansion of Terminal Buildings including Piers (1)	Common	2485.16
ICT Cost (2)	Aero	69.43
Miscellaneous Direct Capex and Election Items (3)	Aero	57.00
Enabling Works (4)	Aero	46.73
Total Terminal Building Cost (a) = (sum of 1 to 4)	Aero	2658.32
Airport Systems (b)	Aero	1070.00
Expansion of Apron & Taxiway (S)	Aero	907.47
GSE Tunnel (6)	Aero	71.00

Apron & Taxiway and GSE Tunnel Cost (c) = (5) + (6)	Aero	978.47
Expansion of the Kerb and Approach Ramp (d)	Aero	156.40
Road Infrastructure (e)	Aero	167.00
Total Hard Cost (sum of a to e)		5030.18
Preliminaries (7)		47.20
Insurance & Permits (8)		72.90
Design Development and PMC (9)		202.94
Contingencies (10)		243.01
Total Soft costs (f) = (sum of 7 to 10)		566.05
Total Capital Expenditure (g) = (sum of a to f)		5596.23
Interest During Construction (IDC) (h)		691.54
Total Project Cost (i) = (g) + (h)		6287.77

367. The capacity augmentation at RGIA was proposed to be completed by 01.04.2024. Since the capital expenditure was spread over FY 2018- FY 2024, this appellant - airport operator submitted the total project cost covering both, second Control Period (01.04.2016 - 31.03.2021) and third Control Period (01.04.2021 - 31.03.2026) as per table no. 93 of the impugned order which for ready reference reads as under:

"Table 93. Phasing of capital expenditure and capitalization for capacity expansion submitted by HIAL as per MYTP:"

Particulars (in Rs. Crores)	2018	2019	2020	2021	2022	2023	2024	Total

Capital Expenditure (excluding IDC)	166.87	778.97	1044.45	674.35	919.57	1353.41	658.62	5596.23
Capital Expenditure (including IDC)	164.05	802.41	1192.64	861.90	1106.41	1469.44	690.93	6287.77
Capitalisation	0.00	328.87	416.55	62.56	1172.85	2736.95	1569.99	6287.77

368. AERA has allowed the cost of **Rs.4820.05 Crores** towards expansion of capacity for the purpose of determining RAB instead of **Rs.5596.23** Crores as claimed by the airport operator - appellant.

369. The reduction of aforesaid sizeable amount (which is difference between Rs.5596.23 Crores and Rs.4820.05 Crores) is mainly because of the fact that AERA has given the verification of the need of construction and nature of construction to be done by RITES - a Government of India undertaking appointed by AERA for examining the overall expansion project cost submitted by HIAL.

370. Much has been argued out by learned counsel for the respondent that AERA has to find out efficient cost expenditure and if there

is any exaggerated expenditure by the airport operator the same cannot be allowed by AERA.

371. It ought to be kept in mind that whenever there is an expansion of construction at the airport, the need and nature of construction has to be proposed and later on after protracted discussions and deliberations, the same is being approved by the **AUCC,** which is constitution of a multi member committee including experts of the subject. This committee of experts, after due deliberations are allowing the need and nature of constructions along with proposed cost.

372. Thereafter, global tenders are being invited. Then the lowest no.1 will be chosen, and this is how the **"Market Discovered Price"** is being found out by the competitive bidding process and this **"Market Discovered Price"** for the construction in question cannot be so easily brushed aside or given go by on just an opinion given by or just an estimated price of construction is given by another body/committee.

As per Section 13 (1) (a) (i) of AERA Act,2008, AERA has to keep in mind capital expenditure incurred. For ready reference Section 13 (1) (a) (i) reads as under:

"Chapter III

Powers & Functions of the Authority

13. (1) *The Authority Shall perform the following functions in respect of major airports namely: -*

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

(i) <u>the capital expenditure incurred</u> *and timely investment in improvement of airport facilities;"*

(Emphasis Supplied)

373. In view of the aforesaid provision of Section 13(1), AERA has to appreciate **<u>actual capital expenditure incurred</u>** by the appellant. As per Respondent No.1, the cost which is arrived at by the global bidding process is not an efficient cost and, therefore, AERA had arrived at its <u>own</u> efficient cost seeking consultant's report from RITES.

374. Thereafter, AERA considered GST credit and impact of inflation amount and has arrived at a new figure which is at Rs.4820.25 Crores which is allowed at capital expenditure as a part of RAB. The contention of respondent no.1 as well as respondent no.2 that on the basis of efficient cost, arrived at by AERA, they have reduced the amount of capital expenditure which was proposed

by HIAL. This contention is not accepted by this Tribunal mainly for the reason that project of capacity expansion to 34 MPPA has been principally and technically allowed by multi-member committee**.**

375. AERA cannot sit in appeal against the decision of the construction approving committee which evaluates the need of expansion, nature of expansion, and the probable cost of expansion.

376. The global bidding process was followed by this appellant in which the lowest no.1 has quoted in the minimum amount for the project of increasing capacity of RGIA to 34 MPPA. For such a huge amount of contract, for construction, the agreement is always in writing narrating the details of the construction and the consideration to be paid.

377. This amount has to be paid by cheque or through bank transactions, there are no allegations by Respondent No.1 and much less by Respondent No.2 that the global bidding process which was followed was malafide or capricious or was bearing loan or there was any fraud. Thus, in absence of such allegations by respondents, the global bidding process followed by this appellant was transparent bidding process.

378. Moreover, looking to the global bidding process, followed by this appellant and the price offered by L&T is in fact **"Market Discovered Price"** arrived at through competitive bidding process.

379. Furthermore, a legally binding contract has been executed by the Joint Venture Company-Appellant HIAL with the lowest bidder, who emerged as the successful party in the competitive bidding process. This agreement pertains to the project aimed at increasing the capacity of RGIA, Hyderabad to 34 MPPA.

380. In the absence of any claims of procedural irregularities, fraudulent conduct, or malicious intent, AERA lacks the jurisdiction to intervene in the capital expenditure decisions made for this significant expansion project. It is beyond AERA's scope to revise or override a legally sound and valid contract between HIAL and the foremost successful bidder. Consequently, this Tribunal does not uphold the arguments presented by the counsels for respondent no.1 and respondent no.2 seeking the disallowance of a portion of the capital expenditure incurred by HIAL for the enhancement project designed to expand the capacity of RGIA, Hyderabad to 34 MPPA.

381. Looking to the Section 13(1)(a)(i) of AERA Act, 2008, AERA cannot rely on any notional or estimated price when the actual price is available for the expansion project in question. AERA has relied upon estimated cost for the project in question given by the consultant – RITES - appointed by AERA, ignoring the actual "**Market Discovered Price" (MDP)** arrived at through competitive bidding process.

382. This is an error committed by AERA and hence, impugned order dated 31.08.2021, of disallowing part of capital expenditure undertaken by this appellant for phase expansion of RGIA, to increase capacity to 34 MPPA is hereby quashed and set aside.

383. Similarly, it appears that AERA has considered Airport Users Consultative Committee (AUCC) document wherein there was a proposal for 2,48,809 sq. mtrs. construction, whereas the actual design comes to 2,58,089 sq. mtrs. for the expansion project in question, therefore, AERA has allowed only 2,48,089 sq. mtrs. construction.

384. This decision of AERA is far away from the facts that the actual construction is 2,58,089 sq. mtrs. AUCC document is nothing but merely a statement of intent instead of the actual final design of the expansion in question. AERA ought to appreciate

that it is within the power, jurisdiction and authority of airport operator to propose the need and nature of construction and the same has to be approved by the committee which is a multi-member committee including the members of Government and other experts.

385. Once, this committee is approving the need, nature, and expenditures of construction that perhaps there is little or practically no scope of interference by AERA and that too with the help of some consultant's report under the guise of **"efficient cost".** If this type of interference by AERA is permitted by this Tribunal, then it tantamount to sitting in appeal against the decision of the committee which is a multi-member committee.

386. The AERA has allowed the following costs for the project of phase expansion of RGIA to increase its capacity from 20 MPPA to 34 MPPA. For ready reference, table no. 111 reads as under:

"Table 111: RITES recommendations on revision of capital expenditure towards capital expansion to 34 MPPA:"

Particulars (In Rs. Crores)	As per HIAL	As per RITES
Total Terminal Building Cost with Airport Systems (a)	3728.32	3347.39
Apron & Taxiway and GSE Tinnel Cost (b)	978.47	814.11

Expansion of the Kerb and Approach Ramp (c)	156.40	156.40
Road Infrastructure (d)	167.00	104.28
Total Hard Cost (1) = (sum of a to d)	5030.18	4422.18
Preliminaries, Insurance & permits (e)	120.20	98.35
Design Development and PMC (f)	202.94	132.67
Contingencies (g)	243.01	132.67
Total Soft Costs (2) – (sum of e to g)	566.05	373.69
Total Capital Expenditure (1) + (2)	5596.23	4785.86

387. Thus, as per consultant's report obtained by AERA, the total capital expenditure which is allowable as per AERA was Rs.4785.86 Crores in which there is further addition of the amount by AERA, and the actual allowable expenditure comes to Rs.4820.05 Crores (Rs.4785.86 Cr + Rs.29.80 Cr + Rs.4.38 Cr).

388. The actual construction as per the design approved by the committee comes to 2,58,089 sq. mtrs. Whereas; AERA appreciated 2,48,089 sq. mtrs. of construction mainly for the reason that as per IMG norms of integrated terminal building for Indian airports which provides for 25 sq. mtrs./Peak Hour Passengers (PHP) and, therefore, also the excess area constructed by this appellant has not been considered. This decision of AERA is not tenable at law mainly for reasons

as per Section 13 (1)(a)(i) of AERA Act, AERA has to consider the **"actual expenditure incurred"** by the appellant.

389. As stated hereinabove, the need, nature, length & width of the construction is not as per the whims and caprice of this appellant, but, this need of construction and nature, length and width of the same is being approved by multi member committee of experts including members appointed by Governmental Institutions. Once, the expert committee is allowing the expansion project proposed by appellant along with probable cost (which will be finalized at the time of completion of bidding process with lowest no. 1 in a global competitive bidding process) cannot be easily brushed aside by AERA under the guise of **efficient cost** that too with the help of consultant appointed by AERA. A consultant is a general consultant whereas the committee approving the expansion is specialized consultant, meant only for a particular airport; this remarkable difference between two expert committees cannot be ignored by AERA.

390. AERA's contention that the HIAL revised the area of the Passenger Terminal Building to 2,58,089 sqm from 2,48,809 sqms submitted at MYTP stage ignores HIAL's submission of

2,48,809 sqms was made based on the concept design stage where the exact areas were not available and could not have been determined in absolute figures at that stage.

391. Subsequently, at the detailing stage minor revisions had to be made in the area considering the challenges of a brownfield expansion and the exact area of 2,58,089 sqm for the terminal building was arrived at, which was a mere 3.79% increase from the concept design stage and the entire space is meant for provision of services at the Airport and not for any other purpose. Hence, AERA's contention is liable to be rejected as baseless and without jurisdiction.

392. Before AUCC Airport Users Consultative Committee at length the need of construction and nature of construction is being discussed and the said committee has approved the total construction at 2,58,089 sq. mtrs. and this cannot be reduced by AERA thereafter for calculation of RAB, the cost at construction of 2,48,089 sq. mtrs. because the actual design and airport requirement has been approved by AUCC committee in pursuance of Annexure-1 of the AERA (Terms and Conditions for determination of tariff for Airport

Operators) Guidelines, 2011 dated 28.02.2011 in Appendix-1 of Guidelines, 2011, the detailed construction protocol has been mentioned including the composition of AUCC, the scope of consultation, consultation process with AUCC.

393. As per Clause A1.6 of Appendix-1, appended to the Tariff Guidelines, 2011, the monitoring and compliance of the consultation process, read as under:

> *"A.1.6. The Authority expects its role in the consultation process to be limited to a review of the proceedings of the process. However, where there is sufficient evidence of disagreement between Users and Airport Operator either in terms of process of consultation, information requirements from Airport Operators or investment decisions and the Authority is satisfied that the disagreements prevent the Airport Operator in making informed decisions, the Authority will intervene to facilitate the consultation process. Any outstanding differences between Airport Operators and AUCC about the scope and depth of information provided as part of the consultation may be referred to the Authority.*

A.1.6.2. The Authority will consider intervention on evidence-based request from Airport Operator or Users. In any case, the Authority expects to be informed on the on-going consultation between Airport Operators and Users through monthly updates. The Airport Operator shall, in parallel, provide to the Authority a copy of all information furnished to AUCC.

A1.6.3. The Authority shall receive the final project investment file on the AUCC and Airport Operator consultation process at the end of the satisfied consultation period for all projects.

A1.6.4. As far as possible, project investment files should be agreed to as between the Airport Operator and the AUCC. In the final project investment file submitted to the Authority, the Airport Operator should clearly specify the process of consultation undertaken and highlight suggestions, areas of concerns and decisions made by the AUCC. The project investment file shall also highlight the rationale for the final position and the next steps in project development.

A.1.6.4. At the time of a tariff review, project investment files and consultation information, minutes of meeting etc. In respect of projects for which consultation is not complete, would provide

relevant information to the Authority to inform its assessment of the capital expenditure that may be included in the RAB. However, the Authority may specify further information that it will require to be considered by the Airport Operator and AUCC.

A1.6.6. The Authority may, in its discretion, intervene in the consultation process at any stage to facilitate the same."

[Emphasis Supplied]

394. AERA was bound to give due weightage to factor in the intangibles in a bidding process that have a significant bearing on the outcome of a bid - like spike in prices of commodities which are not rare and not one-off. Even in case of similarly placed airports, AERA has allowed a margin of 10% over and above the indicative cost as per the independent study. Thus, similar treatment should have also been accorded to HIAL Moreover, AERA based on the RITES Independent Study has applied inflation based on CIDC Index. CIDC index in any case is not a true reflection of inflationary effect on airport construction and AERA having considered CPWD rate of inflation in the case of Delhi Airport, cannot be allowed to adopt shifting stance in case of HIAL.

395. AERA has also failed to consider that HIAL's current soft cost provision was already in line with the RITES, approved soft cost provisions for 20MPPA. AERA has failed to explain the reduction in soft cost for 34 MPPA and the percentage taken by AERA is arbitrary and without any basis, this can be illustrated by alluding to following factors:

I. **Preliminary:** Earlier, RITES considered preliminary @ 3.4% of project cost while giving a perspective that it ranges between 1% to 5% depending on the scale of the project. As part of information submitted to RITES, HIAL had provided the detailed list of preliminary works and since HIAL's current preliminary cost estimates is at 2.38%, (which is much lesser than earlier approved 3.4% of project cost) AERA should have considered the same as part of capex.

II. **Design PMC**: The Design and PMC cost for the project is in line with earlier evaluated cost of RITES for the 20 MPPA expansion proposal wherein RITES provisioned 5% of capital cost towards design development and PMC. RITES have contended that there could have been better price discovery had PMC contract been bid out. However,

RITES while estimating capital cost of terminal and airside defy the said principles of market discovered price. Even though the PMC is awarded to a group company, however, the award is purely on arm's length basis. Considering the project implementation period and the magnitude and size of the project, the PMC cost is comparable which is 3% of the hard cost of the project.

III. **Contingency**: HIAL made lumpsum provisions of contingency at 4.8% of the hard cost of the project considering the mammoth brownfield expansion. HIAL stated that the impact of increase in capacity to 34 MPPA could not be assessed/exact scoping was not feasible at the beginning of the project. As such, HIAL was of the view that 5% of the hard cost of the project incurred by HIAL, towards contingencies cannot be treated as exaggerated or inflated cost.

396. AERA's disallowance of part of capital expenditure for capacity expansion for RGIA is squarely covered by decision of the Hon'ble TDSAT in DIAL CP3 Order. AERA had raised exactly similar arguments as raised in the present matter in response to DIAL's contention which were rejected by this Hon'ble

Tribunal and the observation in DIAL CP3 Order (Para 165(c) and Para 165(f) of the Judgement dated 21.07.2022) for setting aside AERA's decision is reproduced as under:

> *"…The cost which is arrived at for Phase 3A expansion for IGIA, Delhi through global bids invited is giving real and efficient cost. It is a market discovered price through competitive and transparent bidding process.*
>
> *As per Section 13 (1)(a) (i) of the AERA Act, 2008, it was a power coupled with a duty vested in AERA to determine the tariff for the aeronautical services taking into consideration, "the capital expenditure incurred and timely investment in the improvement of airport facilities" which is on "actual basis" meaning thereby, if the actual capital expenditure is incurred by the appellant, the same has to be considered by AERA as per aforesaid provision of AERA Act and it cannot be so easily brushed and set aside by AERA under the guise of "the efficient cost".*
>
> **[Emphasis Supplied]**

AERA has recognised that splitting of bids for civil and supply contracts by HIAL has resulted in saving of Rs. 50.02 crores but instead of accepting the price arrived following the global bidding process, AERA tried to find a fault in the bidding process by speculating that if splitting was done prior to bidding process, it could have led to even more cost savings. The fact remains that HIAL followed an international competitive bidding and undertaking the exercise of splitting rendered in lower price

than what was arrived at during the bidding process and admittedly resulted in a saving of Rs.50.02 Crores which in-turn benefitted the stakeholders.

The aforesaid aspects of matter have not been appreciated by AERA while passing the impugned order for phase expansion of RGIA to increase the capacity of the airport from 20 MPPA to 34 MPPA, we, therefore, quash and set aside the decision of AERA for the aforesaid aspect of the matter.

397. We, hereby, direct AERA to allow the <u>actual</u> expenditure incurred by appellant for phase expansion of RGIA to increase the capacity to 34 MPPA. Thus, on the basis of proof of <u>actual</u> expenditure incurred by appellant for increasing the capacity of the airport 20 MPPA to 34 MPPA, True-Up shall be allowed in next Control Period.

-<u>ISSUE No. VI</u> -

<u>Treatment of Cargo Satellite Building (CSB)</u>

398. Airport Operator-Appellant has constructed **Cargo Satellite Building (CSB)** at landside of RGI Airport. The same has been leased out to various entities including some freight consolidators/forwarders for their administrative office and for

non-bonded warehousing purposes. Respondent No.1 has considered CSB being used to undertake cargo related operations and, therefore, has treated CSB as an aeronautical service which is in line with treatment of Cargo, Ground Handling and Fuel services. (Issue No. II in this Appeal).

399. It is a major contention of the appellant who is airport operator that CSB should be treated as non-aeronautical because cargo is not a part of **"Regulated Charges"** as per the Concession Agreement.

400. As stated hereinabove in Issue No. II, AERA can regulate the charges only for the subjects which are mentioned in Schedule 6 of Concession Agreement which are referred as **"Regulated Charges".**

401. We have already incorporated in the earlier paragraphs Schedule-6 of Concession Agreement (ANNEXURE A-3 in the memo of this appeal) and in Schedule 6 Cargo related operations have not been mentioned at all and hence, in Issue No. II we have already decided that Cargo, Ground Handling and Fuel Services are non-aeronautical.

402. For the very same reasons, especially based upon the Concession Agreement, the decision of AERA to treat CSB as

aeronautical is hereby quashed and set aside mainly for the reason that CSB is a non-aeronautical and it is beyond the regulatory jurisdiction of AERA as it does not form part of regulated charges under Schedule 6 of the Concession Agreement.

403. As stated hereinabove in Issue No. II, it has been decided by **Hon'ble the Supreme court vide judgment date 11.07.2022 in DIAL Vs. AERA reported in 2022 SCC OnLine SC 850 in paragraph number 19 and 20** as follows:

> ***"19****. We may, however, add that in the given factual scenario in the dispute before us there is something more which is required to be addressed. Before the complete legislative structure was set in place, operations were proceeded on the understanding of the agreement between the parties and the legislative intent is also apparent. This provides for due honour and consideration being given to the aforesaid intent as per the provisions of Section 13 of the said Act. The objective is that all parties who have operated in what may be called a pioneering effort in the field of civil aviation in India should not be taken by surprise affecting their commercial viability as it would discourage private participation in such economic activities which have been perceived to be essential by the Government. To that extent, we are inclined to*

consider that some aspects of the agreements have pre-legislative features and, thus, there is a requirement to look into them. Section 13 of the said Act forming part of Chapter III deals with "Powers and Functions of the Authority" and reads as under:

"CHAPTER III

POWERS AND FUNCTIONS OF THE AUTHORITY

(1) The Authority shall perform the following functions in respect of Major Airports, namely-

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

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

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

(iii) the cost for improving efficiency;

(iv) economic and viable operation of major airports;

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

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

(vii) any other factor which may be relevant for the purposes of this Act:

Provided that different tariff structures may be determined for different airports having regard to

all or any of the above considerations specified at sub-clauses (i) to (vii);

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

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

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

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

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

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

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

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

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

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

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

20. *Clause (vi) of sub-section (1) of the said Act clearly stipulates that in the determination of tariff for the aeronautical services, one of the considerations, is the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise. Thus, the principle that legislative intent must prevail over any prior agreement would not really apply in the present scenario as the legislative intent itself incorporates and requires the prior agreements to be taken into consideration albeit along with certain other parameters/ requirements."*

(Emphasis Supplied)

404. In view of the aforesaid decision, and as per various clauses of the concession agreement that has been entered into between **Hon'ble the President of India** and this appellant and as per the clauses of the concession agreement as stated in detail in our reasoning in Issue No. II, AERA has no power, jurisdiction, power or authority to regulate the charges for the items which are not mentioned in schedule 6 of the Concession Agreement. Cargo Handling is not a subject

mentioned in Schedule 6 of the Concession Agreement and, therefore, looking to the provisions of Clauses 10.2 and 10.3 of the Concession Agreement (which are already reproduced in paragraph No. 274 of this judgment to be read with Schedule 6 of the Concession Agreement, which is already reproduced in the earlier paragraph No. 277 of this judgment, AERA has wrongly treated Cargo Handling as aeronautical.

405. In line with the decision given by this Tribunal in the earlier paragraphs under Issue No. II, we hereby hold that the decision of AERA to treat CSB as Aeronautical Service is hereby quashed and set aside.

406. It has been held by this Tribunal vide judgment dated 13.01.2023 in DIAL Vs. AERA in AERA Appeal No. 07 of 2021 in paragraph number 14.8, 15.2 and 15.6 which have already been reproduced in paragraph numbers 300(VI) & 331 of this judgment. In previous paragraphs of this Judgement, we have held that the provisions of the Concession Agreement must be considered and given effect to by AERA. By this agreement an important contractual right has been vested in

this appellant for the development of RGIA, Hyderabad, before coming into force of AERA Act, 2008.

407. The Concession Agreement is dated 20.12.2004 (ANNEXURE A-3), Land Lease Agreement is dated 30.09.2003 (ANNEXURE A-4). Whereas AERA Act, 2008 came in force on 01.01.2009. As per Section 13(1)(a)(vi) of the AERA Act, the concessions granted by the Government of India should be considered by AERA.

408. Meaning thereby to, the Concession Agreement in the facts of the present case which has been entered into between **Hon'ble the President of India** and this appellant has to be accepted and honored as it is. "**Read and Reject approach of AERA is again deprecated especially for not giving effect to the concession agreement" (Annexure A-3)**, though there is unambiguous and unequivocal provision of AERA Act i.e. Section 13(1)(a)(vi).

409. In view of the aforesaid facts and reasons, the activity of CSB is a Non-Airport Activity. Non-Airport Activity has already been reproduced in paragraph numbers 322 & 326 of this judgment. In the Concession Agreement, "Non-Airport

Activity" has been defined in Schedule 3, Part 2 of Concession Agreement and in this list of activities, **"office for freight consolidators/ forwarders or agents at cargo complex"** and the CSB is used for these purposes, hence, it is a non-airport activity and, **therefore, the decision of AERA to treat CSB as aeronautical service is hereby quashed and set aside. We, hereby direct AERA to treat CSB as Non-Airport Activity since Cargo is not a part of Regulated Charges as per Schedule -6 of the Concession Agreement.**

Issue No. VII

Non-Consideration of 30% Non-aeronautical Revenue as part of Aeronautical Revenue Base for computation of Aeronautical Taxes

410. The Aggregate Revenue Requirement for the Control Period (ARR) is the revenue to be recovered by the Airport Operator from the concerned stakeholders for the designing, financing, development, operation and maintenance of the RGI Airport. This ARR is being finalized by AERA- Respondent No.1. The calculation of ARR is to be understood, in the facts of the present case as per **(AERA Terms and Conditions for**

Determination of Tariff for Airport Operators) Guidelines, 2011 dated 28th February, 2011. For ready reference Clause 4.3 of Chapter II of the Guidelines, 2011 reads as under:

> ***"4.3.*** *The Aggregate Revenue Requirement for the Control Period (ARR) shall be expressed as under:*
>
> $ARR = \sum^{5}_{t=1} (ARR_t)$ *and*
> $ARR_t = (FRoR \times RAB_t) + D_t + O_t + T_t - NAR_t$
>
> *Where t is the Tariff Year in the Control Period and* ARR_t *is the Aggregate Revenue Requirement for year t.*
>
> - *The numbers in this illustration are on nominal basis.*
> - *RAB for calculating ARR shall be determined as per Clause 5.2.*
> - *FRoR for calculating ARR shall be determined as per Clause 5.1.*
> - *Depreciation for calculating ARR shall be determined as per Clause 5.3.*
> - *Tax for calculating ARR shall be determined as per Clause 5.5*
> - *Revenues from services other than aeronautical service for calculating ARR shall be determined as per Clause 5.6."*

411. Furthermore, to understand the tax related consideration of the Clause 4.3, it is pertinent to refer to Clause 5.5 of the Tariff Guidelines, 2011. For the ready reference, Clause 5.5 & 5.5.1 of the Guidelines, 2011 reads as under:

> *"5.5. Taxation (T)*
>
> *5.5.1. Taxation represents payments by the Airport Operator in respect of corporate tax on income from assets/ amenities/ facilities/ services taken into consideration for determination of Aggregate Revenue Requirement."*

412. From the conspectus of the facts & circumstance underlying the present dispute it appears that AERA computed T by allocating the taxes paid by HIAL (as per the aggregate profit & loss account) between aeronautical and non-aeronautical components based on the ratio of taxes as per both aeronautical and non-aeronautical profit & loss accounts. AERA computed T without considering the revenues from services other than aeronautical services (i.e., non-aeronautical services).

413. AERA decided to compute Tax on the basis of Minimum Alternate Tax paid by HIAL pursuant to the benefit of Section 80IA of the Income Tax Act, 1961, instead of normal provisions of Income Tax Act, 1961. The aforesaid decision of AERA in the impugned order dated 31.08.2021 is under challenge in the present Appeal preferred by the Airport Operator.

414. It has been vehemently argued at length that by virtue of ANNEXURE A-18 to the memo of this Appeal which is an **Order No. 14/2016-17 dated 12.1.2017, Ministry of Civil Aviation (MoCA)** has taken a policy decision on Till. As per this, ANNEXURE A-18, it states that the tariff determination at all the airports will be done on the basis of: **a. "Hybrid Till"**

415. As per **Hybrid Till Mechanism** adopted by AERA, **30% of Non-Aeronautical revenue will be used to cross-subsidize aeronautical charges. Thus, in the aforesaid formula for calculating Aggregate Revenue Requirement, NAR means 30% of Non-Aeronautical Revenue.**

416. Looking to the Concession agreement to be read with Tariff Guidelines, 2011 to be read with State Support Agreement, 30% of Non-Aeronautical Revenue which is used for cross-

subsidization as per **"Hybrid Till"** mechanism. As per this Tribunal's decision dated 21.07.2023 in AERA Appeal No.1 of 2021, in case of DIAL Vs. AERA & Anr., it has been observed in paragraph 135 (c) and paragraph 137 of this judgment as under:

> *"135. (c) Once the amount of "S-factor" which is 30% of the gross revenue generated from Revenue Share Asset becomes part and parcel of the target revenue, it also having a color of aeronautical revenue and, therefore, tax-T ought to be calculated even upon amount equal to "S" factor.*
>
> *137. We do not agree with the aforesaid reasons by AERA mainly for the reason that because the target revenue as per the aforesaid formula is determined, based on aeronautical building block post cross subsidy of 30% revenue from Revenue Share Assets and, therefore, out of total target revenue, 30% has been recovered from the revenue generated by JVC from Revenue Share Assets. In view of this formula of Target Revenue, it is abundantly clear that in a recovery of Target Revenue for aeronautical services, "S-factor" is one of the mechanism of calculation in the formula of TR thus, the amount of "S-factor" partakes the character of aeronautical revenue and, therefore, once the part of aeronautical revenue has been recovered from 30% of revenue from Revenue Share Assets, the effect of "S-factor" should also be given in "T" (i.e. corporate tax pertaining to aeronautical services)."*

417. This Hon'ble Tribunal while setting aside AERA's decision in its order and judgement dated 21.07.2023, observed that tax on

cross-subsidy (NAR in the case of HIAL and 'S-factor' in the case of DIAL) should considered for determination of T.

418. In view of the aforesaid decision, the amount of 30% of Non-Aeronautical Revenue (NAR) partakes in the character of Aeronautical Revenue and, therefore, in case of HIAL, the tax calculated on NAR ought to be included in "T". NAR becomes part and parcel of ARR and has a colour of aeronautical revenue when used for cross-subsidization of Aeronautical Revenue. For ready reference it is pertinent to peruse the formula for the same which reads as under:

"ARR= (FRoR x RAB) + D + O+ T – NAR"

419. Thus, ARR is determined, based on aeronautical building blocks, post cross-subsidy of NAR, meaning thereby to part of aeronautical revenue has been recovered from non-aeronautical revenue (NAR). In view of this formula for arriving at ARR, it is amply clear that NAR is a mechanism of recovery of ARR. In view of these facts, NAR is a subset of Aeronautical Revenue. Thus, once the part of Aeronautical

Revenue has been recovered from NAR, the effect of NAR should always be given in "T".

420. Looking to Clause 5.5 of the Tariff Guidelines, (which has been incorporated in para 395 of this judgment), AERA has to compute taxation by taking into consideration all incomes utilized in ARR. Therefore, as NAR is also used for computing the ARR, the same ought to have been taken into account while computing taxation.

421. Computation of ARR involves reduction of aeronautical building blocks, therefore, taxation should be computed on aggregate of aero building blocks before it is reduced by NAR. Much has been argued out by the Respondent No.1 that consideration of 30% Non-Aeronautical profit before tax (PBT) will result in artificial tax benefit or reduction in cross-subsidy. This contention is misconceived and not tenable at law. This Tribunal has considered this contention and rejected the same in our judgment and order dated 21st July 2023 in AERA Appeal No.1 of 2021 in the case of DIAL Vs. AERA in paragraph number 140 and 141 as follows:

"140. AERA's contention that including S- Factor in calculation of Tax will result in an artificial tax benefit and overstate aeronautical tax is also misconceived and misleading. S factor has been considered in aeronautical Profit & Loss to arrive at Aeronautical Profit Before Tax (PBT) and the allocation of actual tax paid by DIAL is in the ratio of Aeronautical and Non-Aeronautical PBT and thus will not result in creation of artificial tax. Further, inclusion of S Factor in Tax and consequent consideration of S Factor as aeronautical revenue will provide true aeronautical profit and accurate base to calculate 'T'.

141. AERA's observation regarding reduction in the level of cross subsidy is also misconceived in as much as the non-aeronautical revenue cross subsidizes aeronautical revenue and the tax is only resultant on the profit earned and thus, the cross subsidy is nothing but a part of recovery of eligible aeronautical revenue only and thus has to be considered while drawing aeronautical Profit & Loss."

422. AERA ought to have calculated **"T"** based on normal provisions of Income Tax Act because computing "**T**" based on **Minimum Alternate Tax (MAT)** nullifies and takes away the statutory benefits which were made available to HIAL under **Section 80 IA of Income Tax Act, 1961**. The calculation of **"T"** ought to be on normal provisions of Income Tax Act.

423. The aforesaid facts of the matter have not been properly appreciated by AERA, and therefore, the decision of AERA not to consider 30% of **Non-Aeronautical Revenue (NAR) as part of Aeronautical Revenue Base** for **computation of aeronautical taxes is incorrect, improper and unjustified.**

424. We, hereby direct AERA to consider (i) the calculation of "T" on 30% of Non-Aeronautical Revenue because it partakes the character of Aeronautical Revenue in calculation of ARR as per the aforesaid formula, (ii) the aeronautical taxable income computed as per the normal provisions of the Income Tax Act, 1961.

-Issue No. VIII-

Allocation of Assets

425. For determination of **Aggregate Revenue Requirement (ARR)** for the Control Period, the formula is given under the AERA Guidelines, 2011 in Clause 4.3 as under:

"ARR= (FRoR x RAB) + D + O + T – NAR"

426. In the aforesaid formula, RAB is to be calculated as per para 5.2 of the AERA Guidelines, 2011. The classification of assets within the RAB boundary is done, based upon the principles set out in paragraph 5.2.1 (b). For the ready reference, Clause 5.2.1(b) reads of the AERA Guidelines reads as under:

"5.2. Regulatory Asset Base (RAB)

1. *Scope of the RAB*

(b) *The relevant RAB assets shall be all the fixed assets proposed by the Airport Operator(s), after providing for such exclusions therefrom or such inclusions therein, as may be determined by the Authority in respect of specific assets based on following principles:*

i. *The assets that substantially provide amenities/ facilities/ services that are not related to, or not normally provided at an airport, may be excluded from the scope of RAB;*

ii. *The assets that in the opinion of the Authority do not derive any material commercial advantage from the airport (for example from being located close to the airport) maybe excluded from the scope of RAB;*

iii. *Responses by stakeholders in relation to their inclusion or exclusion during consultations.*

iv. *Specification of, to the Authority's satisfaction, sufficient accounting separation to ensure that the costs and revenues associated with the assets shall*

be clearly identified for the preparation and audit of regulated airport accounts;

v. *Specification of, to the Authority's satisfaction wherever appropriate (where the Authority considers there may be substantial financial risks associated with any asset), sufficient legal separation to protect the Airport Operators, and thus airport Users, in the event of any substantial financial risks materialising. The Authority shall require the Airport Operator(s) to insulate the Users by suitably ring fencing the assets excluded from the scope of RAB. The principles governing ring fencing are mentioned in the paragraph 7.5 of Order Number 13/2010-11 of the Authority issued on 12-Jan-2O11.*

vi. *Notwithstanding the principles mentioned under points i to v above, assets with fixed locations inside terminal buildings shall be considered within the scope of RAB."*

427. The RAB calculated for the Control Period is also subject to True-Up in the next Control Period to determine the under-recovery or over-recovery during the past Control Periods. For the following assets an impugned order has been passed by AERA, which reads as under: -

i. ***Reservoir***

ii. ***Parking Stands***

iii. Integrated International Departure Terminal ***(IIDT)*** *& Integrated Domestic Arrival Terminal* ***(IDAT)***

iv. ***Township****; &*

v. ***Landscaping****.*

428. AERA while passing the impugned order, undertook the true up of RAB for First Control Period and Second Control Period for the aforesaid assets and has decided whether they are RAB or not.

429. AERA has decided to treat **Reservoir** to be a non-aero and, therefore, it is excluded from RAB. So far as **Parking Stand** is concerned, it has been deleted from RAB. So far as **IIDT** and **IDAT** is concerned, on the basis of ratio of Aero and Non-Aero, these 2 assets have been treated and considered in RAB as per the ratio of Aero : Non-Aero. Moreover, AERA has treated useful life of IIDT and IDAT for 30 years.

430. So far as **Township** is concerned, it is also apportioned into aero and non-aero percentages. On the basis of critical and non-critical staff ratio and for **Landscaping**, it has been treated as a common asset. This decision of AERA vide impugned order dated 31.08.2021 is under challenge in the present appeal. Having heard the counsels for both the sides at length and looking to the facts

and circumstances of the case, it appears that this appellant – HIAL – Airport Operator has constructed reservoirs to utilize stored water for recharging groundwater and avoid flooding of airport.

431. Thus, it appears that Reservoir is a part of critical infrastructure constructed to prevent the probable risk of flood and for ground water recharge. Moreover, the location of the reservoir is based upon Hydrological study conducted by Telangana Remote Sensing Application Centre **(TRAC).** The location of the reservoir is based upon natural gradient of the airport land and as per suggestion of the study by **TRAC.**

432. Therefore, a reservoir was constructed 2 to 3 kilometers away by HIAL, to cater the need of entire airport and not for the hotel alone. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order. The decision of AERA to exclude the asset of reservoir from RAB based on its proximity to the hotel has no basis. We, therefore, quash and set aside the decision of AERA to exclude the asset of reservoir from RAB. We, hereby direct AERA to include asset of reservoir into the calculation of RAB in the formula-

"ARR= (FRoR x RAB) + D + O + T – NAR"

433. As far as parking stands are concerned, AERA has deleted the same from RAB on the ground that Parking Stands were not reflected in the asset register of this appellant. It is vehemently contended by the counsel for appellant that HIAL has converted parking stands into Contact Stands as part of airport expansion.

434. The parking stands were earlier used for the parking of aircraft and Contact Stand is used for boarding and de-boarding of the passengers of the aircraft. It also appears that a Contact Stand is also used for fuelling the aircrafts. Thus, parking stands which are converted into Contact Stands have been continuously used for aircraft operations.

435. This conversion of asset has been reflected in the Fixed Assets Register of this appellant. Parking Stands are useful as future economic benefits will flow to the enterprise. The cost of this parking stand can also be ascertained and, therefore, AERA ought not to have deleted these assets of Parking Stands which are converted into contact stands from computing RAB. We, therefore, quash and set aside the decision of AERA of deleting parking stands from computation of RAB.

436. **We, hereby direct AERA to include asset of Parking Stands into the calculation of RAB as per the aforesaid mentioned formula for the ARR.**

437. It is rightly submitted by the counsel for the appellant that if the asset is deleted from the Balance Sheet, a corresponding entry in the Profit and Loss account is made under the double entry system of book keeping. The contention on behalf of the counsel for AERA that an adjustment in the Profit and Loss account was not required because deduction was made from the net value of asset. This contention by AERA is contrary to the settled principles of accounting.

438. The construction of **IIDT** and **IDAT** was done by this Airport Operator – HIAL, as **"passenger processing terminal"** to support the main terminal building. Several passenger processing activities undertaken at these IIDT and IDAT terminals like check-in-counter, baggage reclaim area, passenger sitting space, utilities etc.

439. IIDT has an overall constructed area of 9,000 Square Metres and it is submitted by the counsel for the appellant that only 105 square metre area of this IIDT for non-aeronautical use. Thus, only 1.17% of the total area is used for non-aeronautical.

Otherwise, 98.83% of the total area of IIDT is used for aeronautical purposes only. Similarly, for IDAT out of total 4000 square metre constructed area, only 22.60 square metre area is used for non-aeronautical purpose which is 0.57% otherwise 99.43% of the total area of IDAT is used for aeronautical operations. This aspect of the matter has not been properly appreciated by AERA.

440. AERA has no jurisdiction to dictate, how the assets are to be utilised by HIAL. Merely because HIAL has not utilised an asset as desired by AERA, cannot be the basis to arbitrarily reduce RAB. Both the aforesaid buildings, IIDT and IDAT have been used for the purposes of passengers and other stakeholders and, therefore, the segregation in Aero and Non-Aero cannot be done by AERA for the aforesaid two buildings.

441. Moreover, it appears that IIDT and IDAT are interim terminals which serve for a limited period. In the books of accounts of HIAL, these two assets have been depreciated for over 7 years. However, AERA has depreciated these assets over 30 years. Though IIDT and IDAT are the assets not made for operational use for 30 years. **We, therefore, direct AERA to depreciate**

IIDT and IDAT as per books of accounts of HIAL over 7 years only.

442. So far as Township is concerned, it has been contended by Learned Senior Counsel Mr. Ramji Srinivasan for appellant that RGIA, Hyderabad is the First Private Greenfield Airport of this country. Initially, there was a barren piece of land situated 45 Kms. away from the city of Hyderabad. Facilities were to be constructed for the operation of airport and for facilitating travel of the passengers.

443. It was also envisaged by the Airport Operator – HIAL to house the staff, for the operation of the airport and, therefore, irrespective of the fact whether employees are critical or non-critical, the township should be treated as aeronautical for the calculation of RAB. We are in full agreement with the contention of the counsel for the appellant because the township has been constructed to provide accommodation to the employees with the objective of ensuring quicker responses management in case of need or to continue to operate the airport in case of disruption in the city.

444. Thus, intention of construction of the asset has to be appreciated by AERA instead of viewing the utilisation pattern of the township and that too bifurcating the employees between

those undertaking aeronautical services and non-aeronautical services by treating the former as **"critical"** and later as **"non-critical"**. This reasoning of AERA is not tenable at law for bifurcating the township for calculation of RAB for determination of ARR.

445. There is no basis underlying AERA's decision to bracket what is critical and what is non-critical. It ought to be kept in mind that the township has been constructed by HIAL for the employees and staff of HIAL for smooth functioning, management and operation of the airport and, therefore, the approach of AERA to bifurcate asset of township into aeronautical and non-aeronautical based upon ratio of employees engaged in critical operations and employees engaged for non-critical operations is baseless. We, therefore, quash and set aside this decision of AERA to bifurcate township into aero and non-aero on the basis of critical and non-critical.

446. **We, therefore, direct AERA to treat whole of the asset of township (without any bifurcation into aero and non-aero) for the calculation of RAB for determination of ARR into the formula-**

"ARR= (FRoR x RAB) + D + O + T – NAR"

447. From the conspectus of the above it is amply clear that for operation, management and development of the RGI Airport. The township has been constructed and this intention of the construction of the asset and the use thereof requires to treat the whole of the building of township without any bifurcation for the calculation of RAB.

448. AERA has also gone into the actual occupancy or the vacancy of the flats of the township. This is also not required to be done by AERA because vacancy and recruitment of employees is a routine - phenomena in such a huge activity of operation of airport. The recruitment of manpower depends upon several factors like urgency for the requirement for the staff, future expansion of the airport etc. and, therefore, township has to be kept ready in advance. Few vacancies here and there cannot be gone into, therefore, the whole township should be treated as aeronautical asset for the calculation of RAB.

449. Landscaping is an integral part of customer experience at the airport campus, as submitted by the counsel for the appellant and it is an integral part of airport operations as it enables the airport operator to attract more passengers at the airport. Looking to the facts of the case and keeping in mind the

purpose of landscaping at the airport, it is meant for the passengers at the airport. The landscaping at the airport is always facilitating to attract more passengers at the airport. Landscaping is an integral part of the airport. This aspect of the matter has not been properly appreciated by AERA and has therefore wrongly treated landscaping as common i.e. aeronautical and non-aeronautical.

450. In the case of BIAL, AERA has treated landscaping at Real Estate Development Area as non-aeronautical expense, **but**, so far as within the terminal area is concerned, AERA has treated landscaping as aeronautical expense in the case of BIAL. Therefore, in the case of RGIA, Hyderabad, the landscaping at the airport campus should be treated as an integral part of the airport operations and the whole of the landscaping expense should be treated as aeronautical in nature. **We, therefore, quash and set aside the decision of AERA treating landscaping expense as a common one.**

-ISSUE No. IX -

Failure to consider depreciation as per the audited financials

451. The respondent no.1 decided to compute the true up of depreciation by applying depreciation rates prescribed by order No.35/2017-18 on the asset class-wise blocks. This calculation has been done by AERA in the impugned order at table number 48 which reads as under:

Table 48: Aeronautical Depreciation decided to be considered by the Authority for True up of the Second Control Period

Particulars (In Rs. Crores)	2017	2018	2019	2020	2021	Total
Depreciation as proposed to be considered by the Authority (post adjustment towards ADFG assets) {refer table 37}	131.17	122.47	138.69	179.41	192.88	764.63

452. The aforesaid decision of AERA is under challenge in this appeal by the appellant mainly on the point that AERA ought to have considered Depreciation as per actual depreciation related to Aeronautical Assets as recorded in its Audited Financials for computing true-up of depreciation in the 2nd Control Period. Moreover, it has been further argued by the counsel for the appellant that the assets which have been deleted from gross

block, it must also delete the corresponding accumulated depreciation so that gross block less accumulated depreciation of deleted assets is reflected in the Profit & Loss account, in line with the standard accounting principles.

453. Having heard the counsels for both sides and looking to the facts of the case and circumstances of the case, it appears that AERA had requested HIAL to submit the basis of depreciation calculation in the fixed assets register detailing the rates prescribed by AERA as per Order No. 35/2017-18 for various asset class but the same was not provided by this appellant.

454. In view of these facts, as no details as stated hereinabove which was asked for by AERA was supplied by this appellant, we hereby allow this appellant and liberty is reserved in this appellant to approach AERA with requisite data, in a format requested by AERA. Consequently, we direct AERA to consider the same and provide true up in fourth Control Period, on the basis of the figures supplied by this appellant and the facts established before AERA.

455. We make it explicitly clear that whenever AERA deletes an asset from gross block, it must also delete the corresponding accumulated depreciation so that gross block less accumulated

depreciation of deleted assets is reflected in the Profit and Loss account. In view of the facts that this appellant has failed to supply the details as demanded by AERA, the issue of depreciation has been decided by AERA. We, therefore, reserve liberty with this appellant to supply data in proper format and we direct AERA to consider the same during determination of tariff for 4th Control Period. Thus, Issue no IX which is about deprecation is answered accordingly.

456. In view of the facts that this appellant has failed to supply the details as demanded by the AERA, the issue of depreciation has been decided by AERA**. We, therefore, reserve liberty with this appellant to supply data in a proper format to AERA and we direct AERA to consider the same during determination of tariff for 4th Control Period. Thus, Issue No. IX which is about depreciation is answered accordingly.**

-Issue No. X-

Correction in Cost of Debt

457. As per Tariff Guidelines, 2011, AERA determines Fair Rate of Return (FRoR) taking into consideration the Cost of Debt and the cost of equity as per the following formula:

"FRoR = (g x Rd) + ((g-1) x Re)

Where:

g is gearing (i.e., debt/ debt + equity)

Rd is the pre-tax cost of debt

Re is the pre-tax cost of equity"

458. At the time of determination of tariff for 2nd Control Period (01.04.2016 to 31.03.2021), AERA had considered Cost of Debt at 7.9% and had proposed to true up the same at the time of determination of tariff for the 3rd Control Period, based on Actual Interest expenditure incurred by this appellant. For ready reference, para 4.3.6 reads as under-

> ***"4.3.6*** *The Authority at the time of tariff determination for the Second Control Period had considered weighted average cost of debt towards determination of WACC for the Second Control Period at 7.90% which shall be trued up at the lime of determination of aeronautical tariff for the Third Control Period as per the actual interest expenditure incurred by HAL subject to a ceiling which is no more than 50 basis points from the projected cost of debt."*

[Emphasis Supplied]

459. In view of the aforesaid order passed by AERA, the Cost of Debt which was appreciated was 7.9% during 2nd Control Period, but, the same has to be trued up in the 3rd Control Period on the basis of actual interest expenditure incurred by this appellant.

460. It further appears from the facts of the case that this appellant had pointed out to AERA in its Multi Year Tariff Proposal (MYTP) the Cost of Debt for the 2nd Control Period as under which is at Table No. 40 of the impugned order, the same reads as under-

"Table 40: Basis of calculating the cost of debt submitted by HIAL:"

Particulars	**FY17**	**FY18**	**FY19**	**FY20**	**FY21**
Opening Debt	1523.3	1525.0	2147.3	2147.3	4214.3
Additions	50.0	2147.3	0.0	2067.0#	2188.0*
Less: Repayment	48.3	1525.0	0.0	0.0	0.0
Closing Balance	1524.0	2147.3	2147.3	4124.3	6402.3
Average Debt	1524.2	1836.1	2147.3	4213.3	6402.3
Interest Paid	154.3	170.4	192.3	402.4	437.0
Cost of Debt	**10.12%**	**9.28%**	**8.95%**	**9.55%**	**9.59%**

Drawn on April 10, 2020 ***** Drawn on Feb 2nd 2021

461. Thus, in view of the aforesaid Table Number 40 for FY 2018, this appellant has incurred interest expenditure at 9.28%. AERA has considered the same at the rate of 7.94% instead of 9.28%. AERA's consideration has been reflected in the Table No.41 which reads as under-

"Table 41: WACC details decided to be considered by the Authority for True Up of the Second Control Period:"

Particulars (In Rs. Crores)	**2017**	**2018**	**2019**	**2020**	**2021**	**Total**
Average Debt (a)	1524.15	1582.80	1640.58	2674.08	4801.73	12223.35
Interest Free Loan (b)	315.05	315.05	315.05	315.05	315.05	1575.25
Shareholders' Contribution (c)	378.00	378.00	378.00	378.00	378.00	1890.00

Reserved & Surplus (d)	179.24	559.17	1101.59	1629.99	1477.93	4947.92
Debt + Equity (sum of a to d)	**2396.44**	**2835.02**	**3435.22**	**4997.12**	**6972.71**	**20636.52**
Cost of Debt	10.12.%	7.94%	8.95%	9.55%	9.14%	
Cost of IFL	0.00%	0.00%	0.00%	0.00%	0.00%	
Cost of Equity	16.00%	16.00%	16.00%	16.00%	16.00%	
Individual Year Gearing	76.75%	66.94%	56.93%	59.82%	73.38%	
FRoR Calculation						
Weighted Average Gearing						66.86%
Weighted Average Cost of Debt						8.12%
Cost of Equity						16.00%
FRoR (WACC)						10.73%

462. In view of the aforesaid facts, it appears that the actual interest expenditure incurred by HIAL for the FY 2018 is 9.28% and AERA has reduced the same at 7.94%. This is not permissible mainly for the reason that while passing the tariff order for the 2nd Control Period, it has already been decided by AERA as per paragraph number 4.3.6 of the impugned order that tentatively the Cost of Debt has been considered at 7.90% but the true up shall be given in 3rd Control Period based on actual interest expenditure incurred by HIAL.

463. HIAL has already pointed out in its MYTP that during FY 2018, this appellant has incurred actual interest expenditure at 9.28% and hence, this aspect of the matter has not been appreciated

by AERA and hence, the Impugned decision of AERA of not to give correction in Cost of Debt is hereby quashed and set aside.

464. Looking to paragraph number 4.3.30 of the impugned order, the Cost of Debt which was proposed in table number 39 had to be revised in view of the revised Cost of Debt as submitted by this appellant, considering Debt drawl. But AERA has failed to revise the Cost of Debt for FY 2018 and has continued with FRoR at 7.94% instead of 9.28%.

465. It has been decided by this Tribunal vide judgment and order dated **06.10.2023** in case of MIAL Vs. AERA, in AERA Appeal No. 2 of 2021 & AERA Appeal No. 9 of 2016, paragraph number 313, 316 and 317 as under:

> ***"313.*** *This contention of respondent no.1 is not accepted by this Tribunal mainly for the reason that there cannot be a fixed cost of debt for the entire 3rd Control Period of five years which is from 2019-2024. The cost of debt which is actually incurred by the appellant should have been considered by AERA. The cost of debt depends upon marginal cost of funds based lending rate and the time period within which the loan is to be repaid. Inflation is one of the most important factor for determination of market forces for further*

determination of MCLR rates. Moreover, the spread for the time within which loan is to be repaid depends upon the credit profile of the entity.

316. *Much has been argued out by learned senior counsel appearing for respondent no.1 that wherever airport operator is incurring debt, it must be efficient in nature and, therefore, if any debt is incurred with a higher cost of debt than 10.30%, in a target revenue, only 10.30% cost of debt will be appreciated. This contention is not accepted by this Tribunal mainly for the reason that the debt which has been incurred by this appellant has been pointed out by learned senior counsel appearing for the appellant as under:*

Project Term Loan Sanctioned Limit (Rs Cr)

Name of the Bank	***Proportion***
SBI	*51%*
Union Bank	*6%*
Indian Bank	*3%*
Exim Bank	*4%*
PNB	*12%*
Canara Bank	*5%*
Central Bank	*5%*
Vijaya Bank	*8%*
Bank of India	*7%*

317. In view of the aforesaid borrowings by the airport operator - MIAL – appellant, it appears that the debt of

Rs. 6141 Crores was availed from the reputed lenders and therefore, the rate of interest which has been prevailing, is being demanded by this appellant instead of a cap of 10.30% as cost of debt. Meaning thereby to that AERA ought to have allowed actual cost of debt incurred by this appellant for 3rd Control Period because all the debt has been taken from reputed lenders".

(Emphasis Supplied)

466. In view of this judgment, AERA must consider Cost of Debt actually incurred by the airport operator. These aspects of the matter have not been properly appreciated by AERA while passing the impugned order especially in the correction of Cost of Debt especially in FY 2018 and has wrongly considered the cost of Debt at 7.94% instead of 9.28%. **We, therefore, direct AERA to consider 9.28% for Cost of Debt for FY 2018 as stated in table number 40 of the impugned order.**

Issue No. XI

Interest Charges on Delayed Payments of Advanced Tax

467. While paying the income tax, if there is any delay then in that eventuality, taxing authorities are usually levying interest upon the delayed payments. In the facts of the present case, HIAL–Appellant had suggested in MYTP for 3rd Control Period to have true up of operating and maintenance expenses for the 2nd

Control Period based on Actual expenditure from FY 2017 – FY 2021 including its interest charges on delayed payments. AERA has not allowed interest charges on delayed payments towards operational and maintenance expenditure and, therefore, this Appeal has been preferred.

468. Having heard counsels for both the sides and looking to the facts and circumstances of the case, it appears that advance tax is being paid by this appellant based on the estimates of profitability for each quarter in a year, but, the actual performance and incidents of tax varies because of variety of factors including the number of passengers at the airport. It happens that sometimes the rush of passengers is much more than what is estimated especially after COVID and, therefore, the advance tax calculated on estimate basis is slightly lower than the actual amount of tax which is based upon variety of factors including the footfall of passengers and, therefore, this appellant has to pay the interest on the amount equal to difference between actual tax and the advance tax. **There is no intentional evasion of tax by this appellant.**

469. Moreover, there is always a difference in the estimated tax and the actual tax especially when taxpayer is an Airport Operator

and when actual tax depends upon several factors including the footfall of passengers especially after COVID situation prevailing in this country. As the action of this appellant is without any intention of evasion of tax the payment by the Airport Operator upon delayed payment of advanced tax ought to have been allowed as Operational Expenditure in the formula of calculation of ARR-

"ARR= (FRoR x RAB) + D + O + T – NAR"

470. It is submitted by counsel for R1 that as per clause 5.5 of AERA Guidelines, 2011, interest payments and penalties cannot be considered by AERA for calculation of taxation. This contention is of no help to the R1 because interest on delayed payment may not be a part of "**T**", but, as stated hereinabove, this amount can always be considered by AERA as an Operation and Maintenance Expenditure i.e. as "**O**" in the formula of **ARR= (FRoR x RAB) + D + O + T – NAR**.

471. It is also contended by AERA that this appellant has not followed prudent tax procedures and has paid penal interest at the end of the fiscal year and, therefore, AERA cannot consider interest charges while calculating ARR. This contention is not accepted by this Tribunal because this appellant has paid the differential

tax payments along with interest on quarterly basis as per the provisions of the Income Tax Act, 1961.

472. Thus, the payment of interest upon delayed payment of advance tax, in the facts of the present case is an operational expenditure. This aspect of the matter has not been properly appreciated by AERA and we, therefore, quash and set aside the decision of AERA of not to allow the interest charges on delayed payment of advanced tax as operational expenditure. **We, therefore, direct AERA to allow interest charges on delayed payment of advanced taxes as operational expenditure.**

ISSUE NO. XII

Benefit received by Airport Operator from "Served From India Scheme (SFIS)" whether is aeronautical or non-aeronautical income?

473. The Learned Senior Counsel for the appellant has explained the scheme floated by Union of India viz.- **"Served From India Scheme (SFIS)"** whereby credit notes will be made available against the export of goods and services. This credit notes issued by UOI is by the way of reward and it can be utilised for several purposes including for claiming exemption against payment of import duty for import of capital goods to be used by service provider

while providing such services. Normally, SFIS Scrips were equivalent to 10% of foreign exchange earned or deemed to be earned in the preceding financial year.

474. In the facts of the present case, this appellant has got SFIS Scrips because of export of goods and AERA has treated this income from sale of SFIS Scrips as aeronautical and non-aeronautical looking to those SFIS Scrips. This decision of AERA is under challenge in the present appeal mainly for the reason that SFIS Scrips earned by this appellant is not based upon the services rendered by this appellant and, therefore, it can neither be aeronautical nor non-aeronautical because the income arising out of sale of SFIS Scrips is because of the scheme announced by the Central Government.

475. It ought to be kept in mind that income generated on account of sale of SFIS Scrips is not relatable to any service provided at the airport and, therefore, this type of income is neither aeronautical nor non-aeronautical.

476. It has been held by this Tribunal in judgment and order dated **21.07.2022** in **Appeal No.1 of 2016** and **AERA Appeal No.1 of 2021** in the case of DIAL for 3rd Control Period in relevant portion of paragraph number 88 and 90 are as under-

> "88*…These contentions are not accepted by this Tribunal mainly for the reason that "other income" is not relatable to and generated from the provision of any service by this*

Appellant and, therefore, it cannot be considered for cross subsidization of aeronautical charges."

90...Such type of addition by AERA of "other income" as part of revenue from revenue share assets is beyond bargain (i.e. beyond the terms of contract)"

[Emphasis Supplied]

477. Thus, looking at the above findings of this Tribunal, AERA's treatment of classifying income from SFIS Scrips for RGIA is squarely covered by decision of the Hon'ble TDSAT in AERA Appeal No. 1/2016 and AERA Appeal No. 1/2021 titled DIAL CP3 Order. AERA had raised exactly similar arguments as raised in the present matter in response to DIAL's contention to not consider Other Income for cross subsidization, which were rejected by this Hon'ble Tribunal.

478. In view of the above decision under the heading "Other Income", SFIS being an incentivising scheme, the income generated there from ought to have been kept beyond the regulatory purview of AERA for the purpose of determination of tariff. AERA has exceeded in its jurisdiction and has transgressed its statutory mandate by erroneously seeking to bring within its regulatory purview, the income generated from a derivative activity such as sale of SFIS Scrips received by HIAL.

479. If the contention of AERA is accepted, the same would tantamount to the fact that the benefit given by the central government under the SFIS scheme is being taken back by AERA which is not permissible because the income derived by appellant from SFIS Scrips is not relatable to any service provided at the airport. We, therefore, quash and set aside the decision of AERA of treating the income of SFIS Scrips as aeronautical and non-aeronautical based on allocation of income that resulted in earning of those SFIS Scrips. **We, therefore, direct AERA not to consider income from sale of SFIS Scrips in tariff determination process.**

ISSUE NO. XIII

Postponement of partial recovery of Aggregate Revenue Requirement (ARR)

480. The calculation of ARR is based upon the Tariff Guidelines, 2011 published by AERA especially in para 4.3 thereof, the said formula reads as under-

"ARR= (FRoR x RAB) + D + O + T – NAR"

481. AERA has to determine ARR for the Control Period which is of 5 years as per Sec. 13 (2) of AERA Act, 2008. The ARR is an amount which is to be recovered by the Airport Operator – Appellant during the Control Period of 5 years from different stakeholders who are using

the airport. There is also a separate calculation for determining the charges to be levied per passenger. AERA determines the **Yield Per Passenger ("Y")** for the Control Period. Clause 6.2 of the AERA Tariff Guidelines, 2011 prescribes the following formula to determine "Y" which reads as under –

> *6.2. For determining the charges to be levied per passenger, AERA determines the Yield Per Passenger ('Y') for the Control Period. Clause 6.2 of the Tariff Guidelines provide the formula for determining Y, which is reproduced below:*
>
> $$\text{Yield per passenger (Y)} = \frac{\sum_{t=1}^{5} PV(ARR_t)}{\sum_{t=1}^{5}(VE_t)}$$
>
> *where, VE is the Estimated Volume of departing and arriving passengers in a Tariff Year.*

482. AERA also determines the rate card for landing, parking, User Development Fee (UDF) to be levied by the Airport Operator to recover ARR as determined in the tariff order. It is vehemently submitted by counsel for appellant that AERA has determined ARR for 3rd Control Period (FY 2021 – FY 2026) at Rs.6364.73 Crores having present value of Rs.4835.99 Crores. These figures are being reflected in table number 167 of the impugned order. For ready reference table number 167 reads as under-

"Table 167: Aggregate Revenue Requirement decided by the Authority for the Third Control Period:"

Particulars (In Rs. Crores)	**2022**	**2023**	**2024**	**2025**	**2026**	**Total**
Average RAB (1) {refer table 138}	2550.23	4264.90	5678.55	5957.61	5609.15	
WACC (2) {para 9.5.23}	12.20%	12.20%	12.20%	12.20%	12.20%	
Return on RAB (i) = (1) * (2)	311.18	520.40	692.90	726.95	684.43	2,935.86
Depreciation (ii) {refer table 137}	222.09	344.12	434.67	475.30	484.11	1,960.29
Operating Expense (iii) {refer table 146}	361.83	451.30	534.80	575.36	605.40	2,528.70
Concession Fee (i) {refer table 146}	14.33	32.59	50.25	59.59	65.28	222.04
Taxes (v) {refer table 162}	0.00	0.00	0.00	1.26	11.30	12.56
Less: 30% Cross-subsidisation of NAR (vi) {refer table 152}	109.25	156.37	177.01	193.39	217.09	853.12
Gross Aggregate Revenue Requirement (a) = {(i) + (ii) + (iii) + (iv) + (v) – (vi)}	800.18	1,192.04	1,535,60	1,645.08	1,633.44	6,806.33
Over/ under recovery of previous control periods as on 31.03.2022 (vii) {refer table 81}	(441.60)					(441.60)
Net Aggregate Revenue Requirement (b) = {a + (vii)}	358.59	1,192.04	1,535.60	1,645.08	1,633.44	6,364.73
PV Value factor (c)	1.00	0.89	0.79	0.71	0.63	
PV of Net Aggregate Revenue Requirement (including True up) {(d) = (b) * (c)}	358.58	1,062.41	1,219.77	1,164.62	1,030.62	4,835.99
Total Pax Traffic (Million passengers) (e) {refer table 90}	12.94	21.51	23.36	25.44	29.29	112.53
Yield Per Passenger = {(d)*10}/(e)						429.74

483. In the facts of the present case, it appears that AERA has adjusted the rate card in such a manner that this appellant's aero revenue falls short of its ARR. The said shortfall decided by AERA to be carried forward to the next Control Period. The calculation of shortfall given in table number 168 of the impugned order reads as under-

"Table 168: Shortfall decided by the Authority to be carried forward to next control period:"

Particulars (In Rs. Crores)	**2022**	**2023**	**2024**	**2025**	**2026**	**Total**
Landing revenues	71.8	158.3	232.3	302.2	372.4	1,136.95
Parking Revenues	2.4	5.9	8.6	11.3	13.5	41.77
Revenues from User Development Fee	163.8	482.2	834.4	980.6	1,025.9	3,487.04
Subtotal – L&P, UDF	238.11	646.44	1,075.33	1,294.08	1,411.79	4,665.76
Fuel Farm	58.22	95.03	102.34	111.51	128.79	495.90
Cute, Cuss, BRS	0.93	1.12	1.29	1.29	1.37	6.00
Cargo	28.62	29.88	32.50	34.92	36.87	162.78
GH	13.52	22.07	23.77	25.90	29.91	115.18
GPU	0.95	1.55	1.67	1.82	2.10	8.09
Subtotal – CGF revenues	102.2	149.7	161.6	175.4	199.0	787.95
Other Aero Revenues						
CSB Rentals*	13.54	14.21	14.93	15.67	16.46	74.81
Income from vehicle fueling services - landside	0.47	0.49	0.52	0.54	0.57	2.59
Income from vehicle fueling services - airside	0.32	0.34	0.36	0.37	0.39	1.78
ATC Tower Rentals	2.85	2.85	2.85	2.85	2.85	14.25
Incidental Income – Township rentals	0.72	0.76	0.79	0.83	0.88	3.98
Subtotal – Other Aero revenue streams	17.9	18.7	19.4	20.3	21.1	97.41
Total Projected Aero Revenues	358.25	814.75	1,256.35	1,489.79	1,631.98	5,551.12
Discounting Factor	1.00	0.89	0.79	0.71	0.63	
PV of Projected Aero Revenues (A)	358.25	726.14	997.95	1,054.69	1,029.70	4,166.74
Target ARR	358.58	1,192.04	1,535.60	1,645.08	1,633.44	6,364.73
PV of ARR	358.58	1,062.41	1,219.77	1,164.62	1,030.62	4,935.99
Difference of PV for the control period (A-B)						(669.26)

484. Thus, the shortfall of Rs.669.26 Crores is to be recovered by this appellant in 4th Control Period (FY 2026 – FY 2031). Meaning thereby to, part of the ARR of 3rd Control Period (FY 2021 – FY 2026) is allowed to be recovered in 4th Control Period. Looking to the provisions of Section 13 of AERA Act, 2008 to be read with AERA Tariff Guidelines, 2011 and to be read with Concession Agreement entered into between the **Hon'ble the President of India** and this appellant. The True-Up mechanism has been envisaged only to adjust the over-recovery and under-recovery of aeronautical revenues.

485. AERA has no power, jurisdiction or authority to apply the "True Up Mechanism" by reducing the determined ARR to make it recoverable in the next Control Period. It ought to be kept in mind that ARR is determined in a particular Control Period which entitles the Airport Operator to recover the said amount during the period of 5 years of that Control Period and if there is any over-recovery or under-recovery by the Airport Operator, then "True Up Mechanism" can be applied during next Control Period, but, there is no power vested in AERA, not to allow the Airport Operator to recover part of ARR of one Control Period and thereafter to allow to recover that postponed part of ARR to be recovered in the next Control Period.

486. If this mechanism is allowed, which is followed by AERA then in the next Control Period, there will be ARR for the next Control Period which is recoverable during 5 years and there will be additional recovery of part of ARR of the earlier Control Period during the next Control Period thus, the passengers of the next Control Period will be overburdened by the ARR of the current Control Period with an additional burden of carried forward ARR of earlier Control Period.

487. Counsel appearing for R1- AERA has placed reliance on para 12 (b) of National Civil Aviation Policy, 2016 (NCAP). For the reading reference, para 12 (c) of NCAP, 2016 (**Annexure R-1** to the memo of this appeal) reads as under:

> *"**12. Airports developed by State Government, Private Sector or in PPP mode***
>
> *MoCA will continue to encourage development of Airports by the State Government/Private Sector in PPP mode. MoCA will also encourage the State Governments to develop new airports in their State by forming SPV with Airport Authority of India or with other interested Public Sectors Undertaking/ Industry in order to create stake and ownership. Wherever so required, MoCA will endeavour to provide regulatory certainly with the following framework;*
>
> *a)……..*
>
> *b)……..*

c) To ensure uniformity and level playing field across various operators, future tariffs at all airports will be calculated on the 'hybrid till' basis, unless otherwise specified for any project being bid out in future. 30% of non-aeronautical revenue will be used to cross-subsidize aeronautical charges. In case the tariff in one particular year or contractual period turns out to be excessive, the airport operator and regulator will explore ways to keep the tariff reasonable, and spread the excess amount over the future.

d)…….

e)……..

f) …… facility at the airport."

(Emphasis Supplied)

488. The aforesaid contention is not accepted by this Tribunal for postponement of partial recovery of ARR, mainly for the reason that the Ministry of Civil Aviation Policy has not been culminated into issuance of any directions to AERA which would empower AERA to postpone recovery of eligible ARR. The direction could have been issued by Central Government to AERA under Section 42 of the Airport Economic Regulatory Authority of India, 2008. For the ready reference Section 42 of AERA Act, 2008 reads as under:

*"**Section 42: Directions by Central Government. -***

(1) The Central Government may, from time to time, issue to the Authority such directions as it may think necessary in the interest of the sovereignty and

integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(2) Without prejudice to the foregoing provisions, the Authority shall, in exercise of its powers or the performance of its functions, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time:

Provided that the Authority shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

(3) The decision of the Central Government whether a question is one of policy or not shall be final."

(Emphasis Supplied)

489. No such direction has been issued by Central Government under Section 42 of the AERA Act, 2008, in consonance with NCAP, 2016. Moreover, eligible ARR has been determined by AERA itself in accordance with AERA Guidelines, 2011, and, therefore, it cannot be said to be "excessive". Thus, para 12(c) of NCAP, 2016, does not permit AERA to postpone the partial recovery of Aggregate Revenue Requirement (ARR) for the next Control Period.

490. It is also to be kept in mind that ARR is to be utilised on capital expenditure projects undertaken by the Airport Operator. There is a systematic operation of work and operational expenditures which can be recovered through the levy of regulated charges determined by AERA and, therefore, the recovery of ARR in a given Control Period is necessary for economic and viable operation of major airports.

491. 'Moreover, looking to Section 13(1)(a)(i) of the AERA Act, 2008 mandates AERA to determine tariff for aeronautical services taking into consideration the "Capital Expenditure incurred and timely investment in the improvement of the airport facilities". There is also violation of Tariff Guidelines Clause 6.2 by AERA if postponement of recovery of ARR is allowed because "Y, Yield per Passenger, calculated by AERA must be equal to ARR divided by Volume estimated in the tariff year.

492. Meaning thereby to if the recovery of part of ARR is to be postponed, there will be mismatch of **ARR** and "**Y**". **We, therefore, quash and set aside the decision of AERA to postpone the part of recovery of ARR in the next**

Control Period and direct AERA to allow Airport Operator to recover ARR during the Control Period.

ISSUE NO. XIV

Interest during Construction (IDC)

493. As per Concession Agreement between **Hon'ble the President of India** and this appellant dated 20.12.2004 (ANNEXURE A-3), the tariff calculation will be as per AERA Tariff Guidelines, 2011 and as per Clause 5.2.7(a) the financing allowance is to be calculated. For ready reference, Clause 5.2.7(a) of AERA Tariff Guidelines, 2011 reads as under-

> *"**5.2.7.** Work In Progress assets*
>
> *a. Work in Progress Assets (WIPA) are such assets as have not been commissioned during a Tariff Year or Control Period, as the case may be. Work in Progress assets shall be accounted for as:*
>
> *$WIPA_t = WIPA_{t-1}$*
>
> *+ Capital Expenditure (Capex)*
>
> *+ Financing Allowance*
>
> - *Capital Receipts of the nature of contributions from stakeholders (SC)*
>
> *Where:*
>
> *$WIPA_t$: Work in Progress Assets at the end of Tariff Year t*
>
> *$WIPA_{t-1}$: Work in Progress Assets at the end of Tariff Year t-1*

<u>Captial Expenditure:</u> Expenditure on capital projects and capital items made during Tariff Year t."

494. It may happen that construction work at the airport takes few months' time. Sizeable amount is to be invested in the construction activities by the Airport Operator. Once the construction work is over, the value of the said property will be calculated in RAB in the formula as stated hereinabove for arriving at Aggregate Revenue Requirement (ARR) but during construction also, huge amount is to be invested by the Airport Operator and, therefore, financing allowance which is consisting of both, a return on equity and return on debt i.e. interest during construction during the contract period is also to be calculated while arriving at ARR.

495. Looking to the facts of the present case, this appellant – Airport Operator had issued bonds of USD 300 Million in February, 2021 at 9.65% per annum (including hedging), payable semi-annually for undertaking, the capital expenditure at RGIA. Moreover, an arrangement fee of Rs.40.54 Crores was also incurred for the bond and that would be amortized over bond tenure (till February, 2026). Therefore, it is submitted by

Learned Senior Counsel Mr. Ramji Srinivasan that AERA should have considered the New Debt Facility and its arrangement fee while computing interest during construction (IDC) for the 3rd Control Period.

496. AERA has decided to consider the new bond issued by this appellant, while computing the Interest During Construction (IDC), but, AERA considered interest income at 6.5% for the unutilised debt and reduced IDC to that extent. Moreover, AERA has decided not to consider the amortization of Arrangement Charges for the bond during the 3rd Control Period and decided to consider the same during the tariff determination for the 4th Control Period.

497. There is an inbuilt fallacy in the decision of AERA because project funding should be secured at a time. Project funding cannot be secured in a piecemeal manner. Moreover, if the project funding is secured in small denomination, then the cost of debt will be a higher one and there is also a risk in getting the funds. It may happen that after half the project is over, the borrower – Airport Operator – Present Appellant may not get the loan because of these inbuilt difficulties especially when 300 million USD is required. On the contrary, if the project funding

is secured at a time, the benefit of lower borrowing cost will be attracted and to that extent the stakeholders will be benefitted in the form of lower value of FRoR. The ARR is to be calculated as under-

"ARR= (FRoR x RAB) + D + O + T – NAR"

498. In view of the aforesaid formula, lower FRoR is highly appreciable because it is to be multiplied by RAB for the calculation of ARR and, therefore, IDC should be calculated on the total project funding. AERA has to calculate IDC taking into consideration the costs of the entire debt facility. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order dated 31.08.2021 mainly for the reason that project funding cannot be procured intermittently or in a piecemeal manner. On the contrary, it should be procured well in advance for the planned expenditure.

499. AERA has deducted interest at the rate of 6.5% per annum for the unutilised debt and has reduced IDC to that extent. This is not permissible in the eyes of law and this deduction is beyond the regulatory ambit of AERA because interest does not accrue from any services rendered by the Airport Operator. Much has been argued out by the counsel for AERA that interest earned

upon the unutilised debt has to be deducted from the calculation of IDC. This contention of the counsel for Respondent No.1 - AERA is not accepted by this Tribunal mainly for the reason that –

a. The earning of interest is not arising out of aeronautical services;
b. Consideration of interest income is beyond the regulatory ambit of AERA because it does not accrue from any services rendered by the Airport Operator;
c. The formula for calculation of Financing Allowance which is set out in paragraph number 5.2.7(a) of the Tariff Guidelines, 2011 is unequivocal and unambiguous. Thus, it is explicitly clear that calculation of financing allowance given in para 5.2.7(a) does not require netting-off interest;
d. The rate of interest fixed by AERA at 6.5% is without any basis and no reasons have been given by AERA for the same and, therefore, it is arbitrary in nature and excessive.

500. The aforesaid aspects of the matter have not been properly appreciated by AERA while calculating IDC and, therefore, the

decision of calculation of IDC by AERA in the impugned order is hereby quashed and set aside. Moreover, AERA has not considered the amortization of charges related to bonds over the 3rd Control Period.

501. Arrangement Fee has been borne by the Airport Operator – Appellant and accordingly being amortized in the 3rd Control Period as part of the project cost till March, 2023 and thereafter this Arrangement Fee has become a part of Profit & Loss account of this appellant till February, 2026 and, therefore, the Arrangement Fee which is Rs.40.54 Crores should have been considered by AERA as part of Project Costs.

502. Nowadays, no loan can be obtained and that too of such a huge magnitude without Arrangement Charges and, therefore, it has to be amortized during the 3rd Control Period and, therefore, it has to be considered by AERA as part of the project cost. **We, therefore, direct AERA to consider (i) the amortization of Arrangement Charges during 3rd Control Period, and (ii) Arrangement Fee of Rs.40.54**

crores (as per HIAL's audited financial statements), at the time of True-Up for the Fourth Control Period.

ISSUE NO. XV

Treatment to revenue from vehicle fuelling station from airside and landside

503. Vehicle fuelling services are provided to the vehicles that ply in the airside to facilitate the passenger movements and for those purposes the vehicle fuelling station on the airside (airport area) have been concessioned out to Bharat Petroleum Corporation Limited (BPCL) at RGI Airport.

504. There is also another vehicle fuelling station which is run and operated by BPCL that is located at the landside (city-side) at RGIA. AERA has therefore, decided to treat the revenue arising out of rental income earned by HIAL from the vehicle fuelling station situated on airside of RGIA which is meant for fuelling the vehicles and not aircraft as aeronautical services and the vehicle fuelling station situated on the landside of the RGIA is treated as a common asset, apportioning the revenue in the ratio of 50:50.

505. No error has been committed by AERA in deciding this issue because Vehicle Fuelling Station (VFS) on airside (airport area) which is operated by BPCL is providing services which is incidental to aircraft operations mainly for the reason that these vehicles are necessary to support the operation of aircraft services, cargo and passenger services, emergency services and maintenance at the airport.

506. These all services are directly related to aircraft operations and, therefore, no error has been committed by AERA in deciding revenue earned from the Vehicle Fuelling Station (VFS) as aeronautical. We are in full agreement with the arguments canvassed by counsel for respondent no.1 – AERA for the aforesaid issue involved in the present appeal.

507. Similarly, the VFS at the landside (city side) is used by both, airport users and other users. Moreover, it cannot ascertain the actual fuel uptake by various users and revenue collected at this stage, and, therefore, the VFS on landside (city side) has been treated as common in the ratio of 50:50 for aeronautical: non-aeronautical. **We are in full agreement with the decision of AERA on this point and the reasons given by AERA.**

Hence, we see no reason to interfere with the decision taken by AERA.

ISSUE NO. XVI

Penalty in case of delayed execution of projects

508. AERA has penalized for delay in execution of projects, the airport operator – Appellant which is equal to reduction of 1% of the total cost of project from ARR.

509. Much has been argued out by the counsels for both the sides on this issue, it has also been submitted by Learned Senior Counsel for the Appellant that the issue of imposition of penalty has already been decided by this Tribunal by a detailed judgment and order dated 06.10.2023 in AERA Appeal No.2 of 2021 and AERA Appeal No.9 of 2016, in a discussion in Issue No. XVII of that Judgement.

510. Looking to the facts and circumstances of the present case and also keeping in mind the AERA Act, 2008 and Concession Agreement under dated 20.12.2024 (Annexure-A3 to the memo of this appeal) there is no provision under the AERA Act, 2008 nor in there is any provision in the Concession Agreement which contemplates the levy of penalty much less levy of penalty 1%

on delayed execution and hence, deduction of 1% of the total value of the project cost from ARR is beyond the power, jurisdiction and authority of AERA.

511. Moreover, it ought to be kept in mind that during Covid Pandemic situation prevailing in this country, the construction work has suffered a lot, airport projects are no exception to it. The delay in completion of the project at the airport was thus beyond the control of this appellant. This aspect of the matter has not been properly appreciated by AERA.

512. Imposition of the penalty by 1% is absolutely arbitrary in nature because today AERA has imposed 1% and tomorrow it could be 1.5% and thereafter it can be 2%, so on and so forth. The penalty has to be prescribed under law. Penalty cannot be imposed at the whims and caprice of the authority.

513. As stated hereinabove, neither under the AERA act nor under the Concession Agreement, entered into between **Hon'ble the President of India** and present appellant dated 20.12.2004 (Annexure A-3 to the memo of this appeal) there is any provision for the imposition of the penalty for delayed execution of the project and therefore, we hereby quash and set aside the

decision of AERA of deduction of 1% of the total project cost from ARR.

514. Looking to the formula of ARR which reads as under:

"ARR= (FRoR x RAB) + D + O + T – NAR"

In the aforesaid formula, the only deduction permissible is **"NAR"** which is a revenue arising out of non-aeronautical activities. This formula cannot be amended unilaterally by AERA.

515. By the virtue of the impugned order, AERA has amended the formula of calculation of ARR and has put one more figure for deduction from ARR, over and above "**NAR**" which is not permissible in the eye of law. Hence, we quash and set aside the decision of AERA in the impugned order in deduction of 1% of total project cost from ARR.

516. This Tribunal in its Judgement & Order of MIAL dated 06-10-2023 in Aera Appeal No. 2 of 2021 & Aera Appeal No. 9 of 2016, while deliberating on similar contentions, under Paras 301, 302 & 308 has held as follows:

> "***301.*** *Thus, it is submitted by learned senior advocate for the appellant that the value of RB will be reduced, moreover, the amount which is not Page 185 of 253*

spent for construction can always be trued up in the next control period along with carrying cost. The counsel for the appellant has taken this Tribunal to a table by giving details as to how the amount recovered, but, not utilised for the project can be adjusted as a true up in the next control period. It is submitted by counsel for the appellant that in case of Bangalore International Airport Ltd., there is a provision in Concession Agreement dated 05.07.2004 for the Bangalore International Airport Limited (BIAL) which at Clause 9.2.9, categorically states that "From the date the IRA has power to review, monitor and set standards and penalties and regulate any such related activities at the Airport, BIAL shall be required, instead of the provisions of Articles 9.2.1 to 9.2.7, to comply with all such regulations framed by IRA", but, in the case of Chhatrapati Shivaji Maharaj International Airport, Mumbai, there is no provision of penalty under OMDA, therefore, the judgement upon which the respondent is relying upon is not applicable.

302. *Learned Senior Advocate for the respondent submitted that in the decision of this Tribunal in AERA Appeal No.8 of 2018 judgment dated 16.12.2020 in case of Bangalore International Airport Ltd. Vs. AERA, it has been observed in para 14 that AERA has all power to impose penalty. In*

view of this decision, no error has been committed by AERA Page 186 of 253 in imposing 1% penalty of the project cost because the appellant though has recovered the amount, but has not started the project and completed the same within time bound schedule. Having heard the counsels for both the sides and looking to the facts and circumstances of the case, it appears that because of outbreak of COVID -19 prevailing situations and its aftermath, the project has been delayed. This aspect of the matter has not been appreciated by AERA. Time and again lock down type of situation was prevailing. No labourers were available and no work could progress because of administrative orders by the State Govt., moreover, there is no provision under OMDA nor SSA nor under the AERA Act, 2008 stating that the respondent can impose penalty of 1% of the project cost in the next control period.

***"308**. Moreover, in absence of any provision for penalty under OMDA or SSA or AERA Act, 2008, no such penalty can be imposed, otherwise highly discriminatory position will prevail because today 1% of project cost penalty is imposed and subsequently it may be increased to 1.5%. If 1% penalty is allowed then 1.5% penalty would also have to be allowed then in forth coming years, as there are unguided powers, the Page 189 of 253 penalty might be 3% also and, thereafter it can be 5% or more also. There will be no*

end to penalty in absence of any provision under OMDA, SSA and AERA Act, 2008. It ought to be kept in mind that unguided and uncontrolled power always leads to discrimination. In case of one airport operator penalty imposed will be 1% and in case of another airport operator it can be 2% because there is no law, there is no contract, there is no provision and there are no guidelines. The balance has already been created under OMDA and SSA in the methodology of true up in next control period and as stated hereinabove, as per the said methodology, excess amount recovered shall be trued up with carrying cost in next control period. Therefore, in the aforesaid example, if Rs.83 Crores has been recovered, the true up amount in the next control period, if the project is not commenced or completed within the time bound schedule, would be at Rs.121 Crores which is in fact more than sufficient revenue clawed back from the airport operator and perhaps for this very reason no powers have been given to AERA for imposing penalty. Hence, we hereby quash and set aside the decision of AERA of carrying out 1% of readjustment to project cost and applicable carrying cost in the target revenue at the time of determination of tariff for next control period".

[Emphasis Supplied]

517. Respondent No. 1- AERA and Respondent No. 2-FIA have relied upon judgment in case of BIAL for the present issue. Looking

to the facts of the present case, the contentions of Respondent no. 1 and Respondent no. 2 of reliance upon BIAL's judgment is of no help in the present case especially, of Clause 9.2.9 of Concession Agreement to assume the jurisdiction to levy the penalty is wrong. On the contrary, looking to Clause 9.2.9 of the Concession Agreement it relates to performance standards for the provisions of services, as mentioned in Schedule 9 Part 2 of the Concession Agreement and not for issues related to construction.

518. In view of the aforesaid reason given by this Tribunal, it appears that in facts of the present case also, the same reasoning is applicable. If any amount has been recovered by the way of ARR which includes the project cost and if the project is incomplete to that extent, in the next Control Period, the true up is to be given with an illustration, this aspect of the matter has been narrated in paragraph 308 of our previous judgment dated 06-10-2023 in AERA Appeal No. 2 of 2021 and AERA Appeal No. 9 of 2016.

519. Therefore, by trueing up the cost of incomplete project, much higher amount is going to be deducted, therefore, again second time penalty cannot be imposed by 1%. **Hence, we hereby**

quash and set aside of carrying out 1% of readjustment to project cost and applicable carrying cost in ARR.

ISSUE NO. XVII

Consideration of Discounting Factor

520. Discounting factor in general is used to calculate the Present Value of future cash flow values. Discounting Rate applied by AERA in calculation to arrive at the present value of ARR and the present value of true ups have been taken at **"year-end approach".**

521. This approach of AERA namely viz.- year-end approach is under challenge by appellant in this appeal. Having heard counsels for both the sides and looking to the facts and circumstances of the case, it appears that AERA has decided to continue with "year-end discounting approach" for all the period under consideration and computed present value as on 31.03.2022. AERA has made revision in the calculation of the true-ups considering the appellant's proposal regarding discounting factor to correspond to the period through which it is performed.

522. It further appears that "year-end approach" has been consistently followed by AERA across all major airports. In fact, there will be no material difference between the scenarios if cash flows are discounted on mid-year basis or end-year basis as the present value of both ARR and revenue will be re-calculated accordingly. To maintain consistency and uniformity, AERA has decided to consider "year-end discounting" and has computed the present value as on 31.03.2022.

523. **We are in full agreement with the reasons given by AERA and with the decision given by AERA because the revenue as well as operating expenses are assumed to be occurring at year-end. Hence, AERA decided to continue with "year-end discounting" for all the periods under consideration and this has been a consistent approach for all the airports. Hence, we see no reason to interfere with the decision of AERA on the aforesaid issue.**

ISSUE NO. XVIII

Finalisation and publication of rate card

524. As per Tariff Guidelines, 2011, the appellant has prerogative power to propose the rate card in consideration of its business strategy after the ARR has been determined by the respondent.

525. In the facts of the present case, it appears that rate card was given by HIAL on 09.07.2021 and AERA has published its Public Notice on its website inviting comments from its different stakeholders.

526. The Authority notes IATA's comment and HIAL's counter comments on Variable Tariff Plan in order to support new route development. The Authority has decided to consider VTP (except for key partnership Program for freighter Airlines) for the period of first 3 years of the 3rd Control Period only as this will aid in developing new routes leading to additional revenue generation and will only help in decreasing the aeronautical revenue in the long run. It will be beneficial for the airlines in the current situation and will help revive traffic to normalcy.

527. In view of the aforesaid facts, no error has been committed by AERA in deciding in finalization of rate card. **We are in full**

agreement with AERA on the aforesaid issue and we see no reason to interfere with the same.

ISSUE NO. XIX

Cost of Equity

528. Counsel for the appellant has submitted that this appellant had proposed for a revision in the value of the Cost of Equity for the previous Control Period as well as 3rd Control Period. Appellant proposed cost of equity of 24.2% based upon the report given by expert namely viz. M/s. Jacobs Consulting. It is also submitted by Learned Senior Counsel for appellant that cost of equity is essential in determining FRoR for the Control Period. The cost of equity is determined on the basis of Capital Asset Pricing Model (CAPM).

529. AERA has considered the cost of equity as per the recommendations of independent study conducted by the premier institute namely viz.- **IIM, Bangalore** and the cost of equity finalized by AERA is 15.17%. This decision of AERA fixing the cost of equity at 15.17% instead of 24.2% is under challenge by this appellant. The cost of equity is essential for

determining the FRoR. Formula for calculation of Cost of Equity has been pointed out by the counsels for both the sides.

530. Having heard the counsels for both the sided and looking to the facts and circumstances of the case, it appears that AERA has considered the cost of equity as per recommendations of independent study conducted by IIM, Bangalore. It ought to be kept in mind that economic regulation is within the domain and purview of Government of India and there is no commitment in respect of **Internal Rate of Return (IRR)** through **Ministry of Civil Aviation (MoCA)**. Moreover, there was no such condition in the bid or tender document for appropriate representation/knowledge to the applicants about any commitment in respect of IRR.

531. The report upon which this appellant is relying is **Jacob's Consultancy Report.** Whenever the party interested is getting the report, there is always an element of conflict of interest and, therefore, AERA has not accepted the report and has relied upon independent report given by **IIM, Bangalore** for arriving at the Cost of Equity.

532. It is not guaranteed or promised in terms of any agreement whether it is concession agreement or SSA whereby the cost of

equity is fixed. On the contrary, the cost of equity is to be determined by AERA and AERA has therefore committed no error in relying upon the report of IIM Bangalore.

533. As per **Clause 5.1.3** of **AERA Guidelines, 2011,** AERA has power to estimate cost of equity for a particular CP by using "**Capital Asset Pricing Model" (CAPM)** for each Airport Operator and as per Clause 2.11 of AERA Direction No.04/2010-11 "Capital Asset Pricing Model" has been defined by using specific formula.

534. **Looking to these aspects of the matter, no error has been committed by AERA while deciding Cost of Equity in the impugned order.**

ISSUE NO. XX

Foreign Exchange Losses (Forex Losses)

535. Counsel for the appellant has submitted that the debt in foreign currency is relatively at a lower rate than that of **Indian Rupee borrowing** and because of the fluctuation of foreign exchange, this appellant has to suffer a loss which should have been treated as Operation and Management cost and should be allowed as pass-through.

536. AERA has allowed to recover Forex to the extent that the effective cost of borrowing in foreign currency is not higher than the cost of **Rupee Term Loan (RTL)** subject to the ceiling of interest rates however, such losses are proposed to be allowed partially as part of one-time adjustment to operating expenses subject to a cap of 12.5%.

537. Looking to the facts and circumstances of the case this Tribunal had an occasion to look at similar concerns raised by BIAL with regards to the tariff order for the Second Control Period, as can be seen in para 87 of the BIAL Judgment dated 16.12.2020.

538. The principal objective behind the strategy of refinancing through bond issuance is to achieve a reduction in the overall cost of debt, compared to the Rupee Term Loan (RTL). Consequently, capping the effective cost of these loans at the level of interest applicable to RTL emerges as a reasonable approach. This method ensures efficiency in borrowing costs and safeguards end-users from bearing the extra financial burden that could arise from volatile exchange rates. Such a cap is a balanced solution that aligns the interests of all stakeholders.

539. Furthermore, it is incumbent upon the Airport Operator to employ effective mechanisms for mitigating foreign exchange risks, ensuring that such financial burdens are not transferred to passengers. The

decision to replace RTLs with External Commercial Borrowings (ECBs) stems from the strategic business considerations of the airport operator.

540. Moreover, the Airport Operator should use effective mechanisms to minimise the foreign exchange risks and not pass it on to the passengers as the decision of replacing RTLs with ECB is a part of business decisions of the airport operator. Had the ECBs not been there, the consideration of RTLs into the calculation of FRoR would have been done and hence the choice of availing ECB is entirely driven by business strategy and the resultant fluctuations should be borne by the business entity itself.

541. In view of the aforesaid facts and reasons, no error has been committed by AERA in giving treatment to the foreign exchange losses to this appellant.

ISSUE NO. XXI

Classification of Notional Gain on Fair Value of Interest Rate Swap (IRS) as Non-Aeronautical Income

542. It is submitted by the counsel for appellant that AERA should have excluded notional gain on account of fair value of **Interest Rate Swap (IRS)** from Non-Aeronautical Revenue whereas AERA has decided to treat notional gain on account of fair value of IRS as non-aeronautical revenue.

543. Having heard counsels for both the sides and looking to the facts and circumstances, it appears that the losses incurred on account of Foreign Exchange Fluctuation is compensated as pass-through expenses and, therefore, whenever there is a notional gain on account of foreign exchange fluctuations, the same cannot be excluded from non-aeronautical revenue. On the contrary, it will be calculated towards Non-Aeronautical Revenue and it will be utilised in the formula of ARR-

"ARR= (FRoR x RAB) + D + O + T– NAR"

544. In relation to the exclusion of notional gains attributed to foreign exchange fluctuations from non-aeronautical revenue, such exclusion appears unjustified, particularly considering that losses incurred due to these fluctuations are compensated by the AERA as a pass-through expense. This arrangement implies that while losses from forex movements are acknowledged and accounted for in the financial assessments, notional gains are not treated similarly, leading to an imbalance in the financial reckoning.

545. In addressing the true-up of forex losses as verified by HIAL, the Authority has reiterated its stance. The methodology adopted, outlined in Table No. 8, encompasses a comparative analysis. This analysis juxtaposes the financial implications of External Commercial Borrowings (ECBs) – denoting foreign currency borrowings – against those of Rupee Term Loans (RTLs), classified as domestic borrowings.

546. This evaluative approach permits HIAL to recoup forex losses to the extent that the net effective cost of foreign currency borrowing, inclusive of forex gains and losses, does not exceed the cost incurred through RTLs. Such a mechanism ensures a balanced and equitable treatment of the financial effects stemming from currency exchange rate fluctuations, aligning the actual costs between foreign and domestic borrowings within a consistent fiscal framework.

547. **We are in full agreement with the reasons given by AERA treating notional gain on fair value of Interest Rate Swap (IRS) as Non-Aeronautical Income and hence, we see no reason to interfere with the decision of AERA on the aforesaid issue.**

ISSUE NO. XXII

Cross-Subsidization of 30% of Non-Aeronautical Profit Before Tax (PBT) under Shared Till

548. It is submitted by Learned Senior Counsel for the appellant that while calculating 30% of non-aeronautical revenue, the cost incurred should have been deducted. This is not accepted by AERA in the impugned order and hence, this appeal has been preferred in the aforesaid issue. Having heard the counsels for both the sides and looking to the facts and circumstances of the case, as per AERA Guidelines, 2011, ARR is to be calculated as per Clause 4.3 of Tariff Guidelines, 2011 as under:

"ARR= (FRoR x RAB) + D + O + T– NAR"

549. Originally, as per aforesaid formula, single-till method was made applicable but later on by the virtue of the policy decision taken by Union of India and by the virtue of specific order issued by the Government, Hybrid Till method was adopted and, therefore, out of Non-Aeronautical Revenue received by Airport Operator, only 30% is to be taken into consideration. This is known as hybrid-till method.

550. This order has been issued by the **Government vide Order No.14/2016-17 dated 12.01.2017** which was issued on **23.01.2017** on a shared-till. The principle of cross-subsidy where 30% of the non-aeronautical revenues have been ordered to be used to cross-subsidize aeronautical charges.

551. In view of the aforesaid formula of ARR to be read with Order no. 14/2016-17 dated 12.01.2017, 30% of NAR is to be calculated on the basis of Gross-NAR meaning thereby to no cost can be deducted from NAR for calculating ARR on "shared-till basis".

552. Moreover, HIAL itself had suggested in its Multi Year Tariff Proposal (MYTP) similar to 2nd Control Period, especially cross-subsidy based on 30% of Non-Aeronautical Revenue which was Profit Before Taxes (PBT). Moreover, uniform practise has been

adopted by AERA for all the airports. **Hence, we see no reason to interfere with the decision of AERA so far as cross-subsidization of 30% of NAR on the basis of PBT under Shared-Till.**

553. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, this appeal is partly allowed to the aforesaid extent and disposed of.

(JUSTICE D. N. PATEL)
CHAIRPERSON

(SUBODH KUMAR GUPTA)
MEMBER

/NS/