

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Reserved on: 29.04.2025

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M.A. No. 218 of 2024

IN

AERA APPEA/4/2013

Mumbai International Airport Ltd.

...Appellant

Versus

Airports Economic Regulatory Authority of India & Ors.

...Respondent(s)

WITH

M.A. No. 219 of 2024

IN

AERA APPEAL/10/2012

Delhi International Airport Ltd.

...Appellant

Versus

Airports Economic Regulatory Authority of India & Ors.

...Respondent(s)

BEFORE:

**HON'BLE MR. JUSTICE DHIRUBHAI NARANBHAI PATEL (CHAIRPERSON)
HON'BLE MR. SUBODH KUMAR GUPTA (MEMBER)**

FOR APPELLANT	FOR RESPONDENT(S)
<p><u>In AERA Appeal No.4/2013</u></p> <p>For <u>MIAL</u></p> <p>Mr. Sajan Poovayya, Sr. Adv., with; Ms. Amrita Narayan; Mr. Saurobroto Dutta; Mr. Palash Maheshwari; Mr. Madhav Sharma, Advocates.</p>	<p><u>In AERA Appeal No.4/2013</u></p> <p>For <u>AERA (R.1)</u></p> <p>Ms. Shweta Bharti; Ms. Jyoti K. Chaudhary; Ms. Yashodhara Burmon Roy; Ms. Darshita Sethia; Ms. Prakarti Srivastava; Advocates.</p> <p>Dr. Anand Kumar, Dr. Shreya Sharma.</p> <p>For <u>MoCA (R.2)</u></p> <p>Ms. Anjana Gosain, Advocate.</p> <p>For <u>FIA (R.3)</u></p> <p>Mr. Buddy Ranganadhan, Sr. Adv., Mr. Prantar Basu Choudhury; Mr. Shrom Sethi, Advocates.</p>
<p><u>In AERA Appeal No.10/2012</u></p> <p>For <u>DIAL</u></p> <p>Mr. Milanka Chaudhury; Ms. Naina Dubey; Mr. Ravneet Singh, Advocates.</p>	<p><u>In AERA Appeal No.10/2012</u></p> <p>For <u>AERA (R.1)</u></p> <p>Ms. Shweta Bharti; Ms. Jyoti K. Chaudhary; Ms. Yashodhara Burmon Roy; Ms. Darshita Sethia; Ms. Prakarti Srivastava; Advocates.</p> <p>Dr. Anand Kumar, Dr. Shreya Sharma.</p>

For **FIA (R.2)**

Mr. Buddy Ranganadhan, Sr. Adv.,

Mr. Prantar Basu Choudhury;

Mr. Shrom Sethi, Advocates.

For **MoCA (R.4)**

Ms. Anjana Gosain

For **Respondent No. 3, 6 & 9**

(i.e. Lufthansa, Austrian and Swiss Airlines) respectively:

Ms. Neelam Rathore;

Ms. Pooja Gill, Advocates.

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JUDGEMENT

Per Justice D.N. Patel, Chairperson

SUMMARIUM

Both the M.As. have been preferred because of judgment and order delivered by Hon'ble the Supreme Court of India, remanding the issue of HRAB to this Tribunal. The order was passed by Hon'ble the Supreme Court of India on 4th December, 2023 in M.A. No. 1721 of 2023 in Civil Appeal No. 8378 of 2018 in case of Delhi International Airport Limited v. Airports Economic Regulatory of India and Ors. with M.A. No. 1710 of 2023 in Civil Appeal No.5401 of 2019 in Mumbai International Airport Limited Vs. Airports Economic Regulatory of India (**Annexure A-6** to the memo of M.A. No. 218 of 2024 in AERA Appeal No. 4 of 2013 in AERA Appeal No. 4 of 2013, which is of Mumbai International Airport Limited).

Paragraphs 14 and 15 of Judgment and Order dated 04.12.2023 of Hon'ble the Supreme Court of India in M.A. No. 1721 of 2023 in Civil Appeal No. 8378 of 2018 (DIAL) with M.A. No. 1710 of 2023 in Civil Appeal No.401 of 2019 (MIAL), reads as under:

"14. On having heard learned counsel for the parties, we are of the view that the nature of jurisdiction exercised by this Court is

predicated on two specialist authorities/tribunals having applied their mind to it. It would be difficult to have a re-appreciation of evidence and facts, especially when the admitted position is that the TDSAT has not opined on it. It would thus not be appropriate to venture into this aspect. However, this letter being in the nature of an internal communication privy to the non-applicants, we believe it should have been placed before the concerned authorities. Whether it has any impact or not, it would be difficult for us to say at this stage until the opinion of the TDSAT is available.

15. *We are, thus, inclined to adopt the alternative prayer of the applicants by directing that the effect of this document ought to be examined by the TDSAT. We leave it to the TDSAT to take a view on the same, uninfluenced by the fact that the earlier opinion of the TDSAT has received our imprimatur. Thus, the TDSAT may for the limited issue qua computation of HRAB examine the effect of the letter now produced before us, i.e., the letter dated 24.05.2011 by the MoCA to the AERA, and take its own independent view on the impact of the same in computing HRAB and whether 'single till' mechanism should be the basis of the computation. Needless to say, that in either situation the effected parties would have a remedy before this Court.*

M.A. No. 218 of 2024 in AERA Appeal No.4 of 2013 in case of **MIAL Vs. AERA has been treated as the main matter** for the purpose of all references including annexures.

In view of the aforesaid judgment and order of Hon'ble the Supreme Court of India on the following issues, the matter has been remanded:

- I.** This Tribunal-TDSAT, for the limited issue, qua Computation of HRAB, shall examine the effect of the letter dated 24th May, 2011, issued by the Ministry of Civil Aviation (MoCA) to AERA (**Annexure A-4** to M.A. No.218 of 2024 in AERA Appeal No.4 of 2013 and this Tribunal-TDSAT will take its own independent view on the impact of the same in computation of HRAB.
- II.** TDSAT will also decide whether 'single till' mechanism should be the basis of the computation of HRAB. TDSAT is also directed to decide these issues uninfluenced by the effect that the earlier opinion of TDSAT has received imprimatur by Hon'ble the Supreme Court of India.

The aforesaid decision was given by Hon'ble the Supreme Court of India in Review Petition filed in Civil Appeal No. 8378 of 2018 and Civil Appeal No.5401 of 2019. Earlier, both the Civil Appeals were decided on 11th July, 2022 (**Annexure A-3** to the Memo of MA No.

218 of 2024) and thereafter, in review petition for the aforesaid limited purposes, the matter has been remanded vide order dated 4th December, 2023 (Annexure A-6 to the Memo of M.A. No. 218 of 2024).

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
AF	Annual Fee
AOC	Airlines Operators Committee
APAO	Association of Private Airport Operators
ARB	Aeronautical Revenue Base
ATC	Air Traffic Control
BAC	Base Airport Charges
BBR	Bank's Base Rate

BCAS	Bureau of Civil Aviation Security
BIAL	Bangalore International Airport Limited
CAGR	Compound Annual Growth Rate
CNS/ATM	Communication, Navigation and Surveillance and Air Traffic Management Services
CSMIA	Chhatrapati Shivaji Maharaj International Airport
CSR	Corporate Social Responsibility
CWIP	Capital Work in Progress
DF	Development Fee
DIAL	Delhi International Airport Limited
ECB	External Commercial Borrowing
FCP	First Control Period
FDR	Fixed Deposit Receipts
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
GHIAL	GMR Hyderabad International Airport Limited
HIAL	Hyderabad International Airport Limited
HRAB	Hypothetical Regulatory Asset Base
IDC	Interest During Construction
IGIA	Indira Gandhi International Airport
JVC	Joint Venture Company
MDF	Metro Development Fee
MIAL	Mumbai International Airport Limited
MoCA	Ministry of Civil Aviation
MYTP	Multi Year Tariff Proposal
NPV	Net Present Value
OMDA	Operation, Management and Development Agreement

PBT	Profit Before Tax
PV	Present Value
RAB	Regulatory Asset Base
ROI	Rate of Interest
RSA	Revenue Share Assets
RSD	Refundable Security Deposit
RTL	Rupee Term Loan
SGSA	State Government Support Agreement
SPV	Special Purpose Vehicle
SSA	State Support Agreement
TDSAT	Telecom Disputes Settlement and Appellate Tribunal
WACC	Weighted Average Cost of Capital

AERA APPEAL NO. 4 OF 2013 & AERA APPEAL NO. 10 OF 2012

FACTUAL MATRIX

- A.** The Airports Authority of India (hereinafter referred to as “AAI” for the sake of brevity) published “Invitation to Register an Expression of Interest for restructuring and modernisation of Mumbai and Delhi Airports on 17.02.2024”.
- B.** AAI issued a Request for Proposal on 01.04.2005 for restructuring and modernisation of Chhatrapati Shivaji Maharaj International Airport, Mumbai— (hereinafter referred to as “CSMIA” Mumbai for the sake of brevity). Similarly, Request for Proposal for IGIA, Delhi was issued on 01.04.2005.
- C.** An Operation, Management and Development Agreement (hereinafter referred to as “OMDA” for the sake of brevity) was executed between AAI and Mumbai International Airport Limited (**MIAL**) on 04.04.2006 (**Annexure A-4** to the memo of AERA Appeal No. 4 of 2013). Similarly, OMDA was executed between AAI and Delhi International Airport Limited (**DIAL**) on 04.04.2006 [**Annexure – E (Colly)**] to the memo of AERA Appeal No. 10 of 2012).
- D.** A State Support Agreement (hereinafter referred to as “SSA” for the sake of brevity) was executed between His Excellency the

President of India (through Ministry of Civil Aviation) and MIAL on 24.04.2006 (**Annexure A-4** to the memo of AERA Appeal No. 4 of 2013). By virtue of this SSA, the principles and procedure for tariff determination have been reduced to writing. Similarly, an SSA was executed between His Excellency the President of India (through Ministry of Civil Aviation) and DIAL on 26.04.2006 [**Annexure – E (Colly)**] to the memo of AERA Appeal No. 10 of 2012).

E. MIAL took over the operations of CSMIA with effect from 03.05.2006 (hereinafter referred to as "the Effective Date" for the sake of brevity). Similarly, DIAL took over the operations of Indira Gandhi International Airport, Delhi (IGIA, Delhi) with effect from 03.05.2006.

F. Till 31.03.2009, the Ministry of Civil Aviation (hereinafter referred to as "MoCA" for the sake of brevity) was determining the tariff.

G. On 11.10.2011, MIAL submitted a Multi-Year Tariff Proposal (hereinafter referred to as "MYTP" for the sake of brevity) for determination of aeronautical charges for First Control Period for CSMIA (for the period 01.04.2009-31.03.2014). Similarly, on 31.07.2011, DIAL submitted an MYTP for determination of aeronautical charges for First Control Period for IGIA, Delhi (for the period 01.04.2009-31.03.2014).

- H.** AERA issued Consultation Paper on 11.10.2012 for CSMIA for the First Control Period (hereinafter referred to as the "Consultation Paper" for the sake of brevity). This Consultation Paper is at **Annexure A-3** to the memo of AERA Appeal No. 4 of 2013. In a similar way, Consultation Paper was also issued for Indira Gandhi International Airport, Delhi.
- I.** AERA after hearing all the stakeholders passed tariff order for First Control Period on 15th January, 2013 (**Annexure A-2** to the memo of M.A. No. 218 of 2024) for **MIAL** and order dated 20.04.2012 for **DIAL**. The 1st Control Period is from 1st April, 2009 to 31st March, 2014 for **MIAL** as well as for **DIAL**.
- J.** Both, DIAL as well as MIAL, preferred AERA appeals before TDSAT challenging the tariff order dated 15.01.2013 & 20.04.2012 passed by AERA for first control period [i.e. AERA Appeal No.10 of 2012 (DIAL's appeal) AERA Appeal No.4 of 2013 (MIAL's appeal)]. The Appeal of MIAL was dismissed by TDSAT vide judgment and order dated 15th November, 2018 (**Annexure A-1** to the memo of M.A. No.218 of 2024).
- K.** Review applications were also preferred by both the appellants. These review applications were also dismissed by TDSAT vide order dated 17th January, 2019 (**Annexure A-2**).

L. Thereafter, both DIAL and MIAL have preferred Civil Appeals before Hon'ble the Supreme Court of India being Civil Appeal No. 8378 of 2018 (DIAL's Appeal) and Civil Appeal No.5401 of 2019 (MIAL's Appeal). Both these appeals were disposed of by Hon'ble the Supreme Court of India on 11th July, 2022 (**Annexure A-3**).

M. Thereafter, both **DIAL** as well as **MIAL** preferred M.A. No.1721 of 2023 in Civil Appeal No. 8378 of 2018 (by **DIAL**) and M.A. No.1710 of 2023 in Civil Appeal No.5401 of 2019 (by **MIAL**).

N. These M.As. were decided by Hon'ble the Supreme Court of India vide Judgment and Order dated 4th December, 2023 and the matter has been remanded by Hon'ble the Supreme Court of India for taking a fresh decision for limited issue of computation of HRAB. TDSAT shall examine the effect of letter dated 24th May, 2011 issued by MoCA to AERA and to take independent view on the impact of the same in computation of HRAB. It has further been directed by Hon'ble the Supreme Court of India that TDSAT shall decide whether 'single till' mechanism should be the basis of computation. It has been also observed in paragraphs 14 and 15 that the decision will be taken by TDSAT without being influenced by the judgment and order delivered by Hon'ble the Supreme

Court of India dated 11th July 2022 in Civil Appeal No. 8378 of 2018 and Civil Appeal No.5401 of 2019.

- O.** Communication dated 24th May, 2021 by Ministry of Civil Aviation (MoCA) wrote to AERA in relation to computation of HRAB (**Annexure A-4**). The effect of this communication of computation of HRAB has to be examined by this Tribunal and to take independent view of the impact of this communication while computing HRAB has to be decided by this Tribunal.
- P.** Communication of AAI dated 18th June, 2018 on Tariff Determination for AAI Airports for 2005-06 (**Annexure A-5**) has also been referred by the Appellants for applicability of 'Single Till' Mechanism while computing HRAB.
- Q.** Thus, for the aforesaid limited purposes, the matter has been remanded by Hon'ble the Supreme Court of India.

ARGUMENTS CANVASSED BY THE COUNSEL FOR APPELLANTS

- 1.** Learned Senior Counsel Mr. Sajan Poovayya appearing on behalf of MIAL in the aforesaid Miscellaneous Application (M.A) submitted that the lead matter may be treated as M.A. No. 218 of 2024 in AERA Appeal No.4 of 2013 preferred by Mumbai International Airport Limited (MIAL).
- 2.** It is submitted by the learned senior counsel for MIAL that MIAL had preferred an AERA Appeal No.4 of 2013 against an order passed by Airport Economic Regulatory Authority of India (R.1-AERA) dated 15.01.2013 for First Control Period i.e., 01.04.2009 to 31.03.2014 for Chhatrapati Shivaji Maharaj International Airport (CSMIA). TDSAT passed a judgment and order on 15.11.2018 (**Annexure A-1**) and thereafter Review Application was preferred by MIAL and the same was dismissed by this Tribunal vide order dated 17.01.2019 (**Annexure A-2**). Thereafter, a Civil Appeal was preferred before Hon'ble the Supreme Court of India being Civil Appeal No. 5401 of 2019 (MIAL) and Civil Appeal No. 5738 of 2019. These Civil Appeals were decided by Hon'ble the Supreme Court of India vide judgment and order dated 11.07.2022 (**Annexure A-3**). Partly these civil appeals were allowed and for

some of the issues, the appeals were not entertained. Thereafter, Review Application was preferred by this applicant and the same was withdrawn. Meanwhile, this appellant had preferred M.A. No. 1710 of 2023 in Civil Appeal No. 5401 of 2019 seeking modification of the judgment delivered by Hon'ble the Supreme Court of India for the issue relating to **Hypothetical Regulatory Asset Base ("HRAB")**.

3. It is further submitted by learned senior counsel for the appellant that M.A. was preferred in Hon'ble the Supreme Court of India seeking modification in light of a new and important piece of evidence i.e. letter dated 24.05.2011 issued by the Ministry of Civil Aviation (MoCA) addressed to AERA providing direction regarding manner of computation of HRAB (**Annexure A-4**). This letter was written by MoCA because AERA had written Inter Department Notes (ID Notes) dated 17.02.2010 and 14.03.2011. The aforesaid letter dated 24.05.2011 issued by MoCA was not in the knowledge of the applicant and, therefore, M.A. was preferred for modification of the order. The Hon'ble Supreme Court of India remanded the matter so far as the computation of HRAB is concerned in view of the importance of letter dated 24.05.2011 issued by MoCA and also on the point that whether 'Single Till' method is applicable in

computation of HRAB. Counsel appearing for appellant had relied upon paragraphs 14 and 15 of the order passed by Hon'ble the Supreme Court of India in M.A. No.1710 of 2023 in Civil Appeal No. 5401 of 2019.

- 4.** Learned Senior Counsel for the appellant submitted that MIAL submitted Multi Year Tariff Proposal (MYTP) and so far as determination of HRAB is concerned, it was pointed out by appellant that as per Schedule-1 of SSA, Hypothetical Regulatory Asset Base (HRAB) has to be computed using the then prevailing tariff and revenue, operation and maintenance expenditure and corporate tax pertaining to aeronautical services during the financial year preceding the date of such computation.
- 5.** Thus, it is submitted by the learned senior counsel for the applicant that the First Control Period commenced from FY 2009-10 therefore, HRAB has to be computed as per tariff and revenue during the F.Y. 2008-09.
- 6.** Learned Senior Counsel for the applicants in both the aforesaid matters has taken this Tribunal to State Support Agreement dated 26.04.2006 to the definition of RB₀ for First Regulatory Period.
- 7.** Learned Senior Counsel for the applicant in both the aforesaid matters has referred to consultation paper dated 10.11.2012 for

MIAL First Control Period as well as several paragraphs of the MIAL First Control Period Order issued by AERA especially paragraphs 9.52, 9.55, 9.57 thereof and it is submitted that from the very beginning these applicants were suggesting AERA that HRAB should be computed by using back solving formula and on the basis of 'Single Till'. It was also submitted by MIAL that for FY 2008-09, AAI was operating the airport and therefore, clarifications should be sought from MoCA, but, it is observed in para 9.57 by AERA in MIAL First Control Period order that the Ministry has not given any response. This observation by AERA was patently away from truth because looking to ID Notes dated 17.02.2010 and dated 14.03.2011, AERA wrote to MoCA that AERA is seeking clarifications from MoCA in respect of HRAB and MoCA responded vide letter dated 24.05.2011 and provided guidance to AERA regarding determination of HRAB. The letter of MoCA had referred to the ABN-AMRO Report and had pointed out to AERA that accordingly, in this case, the proposed approach is to back solve the initial Aeronautical Asset Base given the aeronautical charges.

- 8.** Learned Senior Counsel for Applicants in both miscellaneous applications has also referred to the ABN-AMRO Report, as per this report also in the present case, the proposed approach is to back

solve the initial Aeronautical Asset Base given the aeronautical charges.

9. If MoCA was not in agreement with ABN-AMRO Report, there was no occasion for MoCA to mention the same in its letter dated 24.05.2011. Thus, the letter dated 24.05.2011 issued by MoCA to AERA in pursuance of ID Notes dated 17.02.2010 and 14.03.2011, directs that HRAB should be calculated using formula which is given in SSA.

10. Learned senior counsel for DIAL as well as MIAL further submitted that prior to taking over of the airports, they were operated by Airports Authority of India (AAI) and at that relevant time i.e., for FY 2008-09 'Single Till' Method was prevailing. This aspect of the matter was further clarified by (AAI) vide their letter dated 18.06.2018 (**Annexure A-5**). Learned senior counsel for the applicant has taken this Tribunal to this communication in detail and has pointed out that by virtue of this communication with AAI it has been clarified that the tariff at the relevant time was determined on 'Single-Till' basis.

11. Learned Senior Counsel Mr. Ramji Srinivasan has also pointed out Clause 3 of SSA, especially Clauses 3.1.2 and 3.1.3 (Annexure A-4). In view of the aforesaid Clauses of SSA, it is

pointed out by the learned senior counsel for the appellants that till the aeronautical charges are regulated by AERA, the same shall be approved by the Government of India in accordance with broad principles set out in Schedule-1 appended to SSA (**Annexure A-4 (Co'ily)**). As per Schedule-1 of SSA, MoCA will continue to undertake the role of providing Aero Tariff, User Charges, etc. till the same is being decided by AERA. On the basis of the aforesaid facts and communications by MoCA as well as by AAI to be read with State Support Agreement, it is submitted by learned senior counsel Mr. Ramji Srinivasan that there was no distinction between aeronautical and non-aeronautical revenue for the FY 2008-09 because 'Single-Till' Method was applicable and, therefore, for computation of HRAB, 'Single-Till' Method should be made applicable. This aspect of the matter has not been properly appreciated by AERA while passing the order for First Control Period dated 15.01.2013 (**Annexure-A**).

- 12.** It is further submitted by learned senior counsel for both the applicants that since the very beginning these applicants were submitting that HRAB should be determined and should be calculated by back solving the target revenue formula. This is now being fortified by the letter of MoCA dated 24.05.2011 in

pursuance of ID Notes issued by AERA dated 17.02.2010 and 14.03.2011. The letter of MoCA goes to the very root of the case for computation of HRAB. AERA has not calculated HRAB in accordance with agreement between the parties (i.e. SSA) despite the guidance given by MoCA which has a cascading effect for the next Tariff Control Periods. The applicants are deprived of their rights under SSA and OMDA and this will affect in perpetuity and, therefore, this gross and fundamental error in calculation of HRAB by back solving the target revenue formula needs to be corrected.

- 13.** Learned Senior counsel Mr. Ramji Srinivasan has given explanation of HRAB calculated by AERA:

AERA in MIAL FCP Order had computed HRAB of Rs. 966 Cr. The calculation was as follows: [**Para 9.69 of the Impugned Order**]

PARTICULARS FOR FY 2008 – 09	RS. (CR.)
Aeronautical Revenue (A)	445
Non-Aeronautical Revenue (B)	---
Aeronautical Expenses (C)	335
Tax pertaining to Aeronautical Services (D)	0
WACC (E)	11.45%
HRAB (A-C-D)/E	966

14. In the aforesaid calculation given by AERA in para no. 9.69 of the impugned order, it is submitted by the counsel for the applicant that the tariff determination has to be done on 'Single Till' mechanism for FY 2008-09 because the said period was prior to AERA Regulation and it was under control of AAI and MoCA. This is clarified by AAI's letter dated 18.06.2018.

15. Learned senior counsel for the applicants submitted that if the calculation of HRAB at Rs.966 Crore is accepted as pointed out by AERA in impugned order, the target revenue for FY 2008-09 will be as under:

PARTICULARS FOR FY 2008 – 09	RS. (CR.)
HRAB	966
WACC	11.45%
Return on HRAB (RAB x WACC) (A)	111
Operation & Maintenance Expenses (B)	381
Tax (C)	20
Non-Aeronautical Revenue (D)	510
Target Revenue [(A+B+C) - D]	2

16. Thus, only in Rs.2 Crores, the airport (i.e. Mumbai airport) cannot be operated, this is an error committed by AERA.

As can be seen from the table above that if HRAB is Rs.966 Crores, target revenue arrived at is Rs. 2 Crores. This is not the actual revenue based on tariff approved in Schedule 8 of SSA, which was Rs. 445 Crores for the FY 2008-09. It is therefore evident that the HRAB as calculated by AERA is grossly inaccurate and is contrary to the intent of the SSA. Similar error has been committed by AERA while calculating HRAB for DIAL.

As per the record, Applicant had earned aeronautical revenues of Rs. 445 Crores as per the prevailing aeronautical tariffs in FY 2008-09. Therefore, the way to calculate HRAB correctly is demonstrated below:

PARTICULARS FOR FY08-09	RS. (CR.)
Aeronautical Revenue (A)	445
Non-Aeronautical Revenue (B)	510
O&M Expenses (C)	381
Corporate Tax (D)	20
Amount for HRAB Capitalization (E=A+B-C-D)	555
WACC (F)	11.45%
HRAB (E/F)	4848

17. Learned senior counsel for both the applicants have further submitted that the target revenue for any year is to be computed in the following manner:

$$\mathbf{TR = RB \times WACC + OM = D = T - S}$$

$$\mathbf{RB = \frac{TR + S - OM - D - T}{WACC}}$$

18. On the basis of aforesaid calculation and keeping in mind the definition of RB_0 given in SSA, the calculation of HRAB should have been done by AERA which comes to Rs.4848 Crores instead of Rs. 966 Crores. It is pointed out by learned senior counsel Mr. Ramji Srinivasan that as per definition of RB_0 , the Target Revenue should be computed using the prevailing tariff and revenue, operation and maintenance cost, corporate tax pertaining to aeronautical services meaning thereby to these components are to be taken into consideration and the same should be incorporated in the formula of the target revenue given in SSA. This aspect of the matter has not been properly appreciated by AERA while calculating HRAB and hence, to that extent, the impugned order dated 15.01.2013 (**Annexure A-2**) passed by AERA deserves to be quashed and set aside.

ARGUMENTS CANVASSED BY RESPONDENT No. 1- AERA

19. Ld. Counsel Ms. Shweta Bharti appearing on behalf of AERA-R-1 submitted that the letter of MoCA dated 24.05.2011 in respect of calculation of HRAB is neither a clarification nor guidance and no importance may be given to this letter. It is further submitted by counsel for AERA that SSA should be given precedence over ABN-AMRO Report. In fact, there is no mechanism for calculation of HRAB and, therefore, the definition of RB_o given in SSA has been followed by AERA. The counsel appearing for R-1 has referred several clauses of SSA and has also referred to Schedule-1 of SSA and has pointed out that only aeronautical revenue has been taken into consideration. Similarly, operation and maintenance charges for aeronautical services has been taken into consideration as per definition of RB_o given in SSA. Non- aeronautical and their revenues have not been considered by AERA as per the provisions of SSA and on the basis of aforesaid definition of RB_o , no error has been committed by AERA in calculating HRAB in paragraph no.9.69 of the impugned order passed by AERA for Mumbai First Control Period.

20. It is further submitted by the counsel for R-1 that ABN-AMRO Report is a proposed approach and the contents of this report have not even been referred in OMDA nor the same has been referred in SSA. The provisions of OMDA and SSA shall prevail instead of ABN-AMRO Report.

21. It is further submitted by the counsel of R-1 that initially Joint Venture Corporation-appellant/airport operator was made entitled to recover base airport charges irrespective of their investment and if this base airport charges has been linked with investment, expense, and revenue of these appellants, then probably in 2006-07, these appellants would not have been entitled to any tariff or maybe very less tariff as their investment for that year was very low. This fact itself establishes that the tariff charged by these appellants from the year 2006-09 was not linked to any revenue and, therefore, the tariff for FY 2008-09 was fixed as per Schedule-6 of SSA and, therefore, it was not related to any till mechanism. Till mechanism was not applied for the purposes of Regulatory Asset Base and was instead applicable only for the purpose of calculation of target revenue.

22. Counsel for R-1 has referred to the definition of RB_0 from SSA and has pointed out that RB_0 is a part of RB. RB is for

aeronautical assets only and, therefore, RB_0 is also for aeronautical assets only.

23. It is further submitted by the counsel of R-1 that the target revenue formula as envisaged in Schedule-1 of SSA is not applied till fourth year i.e., 2009-10.

In terms of formula for computation of HRAB given in SSA, the elements which can be considered **for computing HRAB are only three factors and they are "the then prevailing tariff and revenue", "operation and maintenance cost" and "corporate tax"** and by using these factors, the HRAB i.e. Hypothetical Regulatory Asset Base is to be determined. Thus, while computing HRAB the figures of tariff and revenue are already available (which in normal course of tariff determination are required to be ascertained), and the RAB is to be determined (which, in normal course, are already available at the time calculation for determining the tariff) and this process itself means that while taking these factors into account it is only the reverse calculation (back solve) which is to be done, because as explained above, in ordinary and straight course it is the Revenue Requirement which is determined for Tariff determination. For this

straight calculation the figures of RAB, WACC, OM cost etc. remain available.

It is further submitted and at the sake of brevity:

- i.** The Letter of 24.05.2011 is not a new piece of evidence AND provides no mechanism for calculation of the initial Regulatory Asset Base, as was sought by AERA, and thus is a document of no relevance in the context of the present dispute.
- ii.** The letter of 24.05.2011 does not give any methodology for the computation of HRAB.
- iii.** The ABN AMRO report uses the term, 'proposed approach and is thus not conclusive.
- iv.** AERA has backsolved the equation for Regulatory Asset Base.
- v.** The backsolving of equation was not required to be done of the TR Equation as is being sought to be done by the Appellant, but instead of the RB equation, which has been done by AERA. The Applicant is attempting at "backsolving" for HRAB, by re-calculating the Target Revenue computation, which is erroneous.

24. In view of the aforesaid submissions it is pointed out by the counsel for AERA that the letter dated 24.05.2011 by MoCA (**Annexure A-4**) and letter dated 18.06.2018 by AAI (**Annexure A-5**) have no impact and bearing upon the decision of AERA for the First Control Period and AERA has scrupulously followed SSA and OMDA which are the binding agreements between the parties hence both these Misc. Applications deserve to be dismissed.

ARGUMENTS CANVASSED BY RESPONDENT No. 3- FIA

25. It is submitted by learned senior counsel Mr. Buddy Ranganadhan on behalf of Federation of Indian Airlines (FIA) that the letter of MoCA dated 24.05.2011 does not change anything. It is submitted by the counsel of FIA that the provisions of SSA and OMDA are required to be followed by AERA and the calculation of HRAB done by AERA is in accordance with State support Agreement (SSA).

26. It is further submitted by the learned senior counsel for FIA that the back solving formula method has already been followed by AERA and if the values of each component have been properly

appreciated, then no error has been committed by AERA in calculating HRAB by back solving formula.

27. Counsel for FIA has given calculation of HRAB as pointed out in paragraph no.9.38 of the First Control Period order dated 15.01.2013 and it is submitted on the basis of the order passed by AERA for First Control Period that AERA has followed back solving formula of target revenue and has computed HRAB accordingly.

28. Learned senior counsel for FIA has also placed reliance upon the definition of RB_0 given in SSA and has pointed out that revenues, operation and maintenance, cost and corporate tax all pertaining to revenue services are to be considered. No components from non-aeronautical services are to be considered as per definition of RB_0 given in SSA. Hence, both these applications may not be entertained by this Tribunal.

ARGUMENTS CANVASSED BY RESPONDENT Nos. 3, 6 & 9

(i.e. Lufthansa, Austrian and Swiss Airlines) in AERA

Appeal No. 10 of 2012

29. Ms. Neelam Rathore, learned counsel has adopted the arguments canvassed by AERA as well as on behalf of Federation of Indian Airlines (FIA) and has submitted that inclusion of non-

aeronautical services and revenues in calculation of HRAB is not permissible. RB_0 should be calculated as per SSA.

30. It is further submitted by Ms. Neelam Rathore that in SSA nowhere it has been suggested that the back solving formula for target revenue should be made applicable while calculating HRAB. Hence, the letter dated 24.05.2011 issued by MoCA has no bearing upon calculation of HRAB. It is further submitted by the counsel that the Single Till method is not applicable to calculate RB_0 hence, no error has been committed by AERA in calculating HRAB. Hence, both these M.As. filed by DIAL and MIAL may not be entertained by this Tribunal.

REASONS & ANALYSIS

- 31.** Both the Miscellaneous Applications have been preferred by MIAL (M.A. No.218 of 2024) in AERA Appeal No. 4 of 2013 and by DIAL (M.A. No.219 of 2024) in AERA Appeal No.10 of 2012. For the reference of annexures, communications between the parties to this litigation and for narration of facts lead matter has been treated as M.A. No.218 of 2024 in AERA Appeal No.4 of 2013 preferred by MIAL.
- 32.** Both these Miscellaneous Applications have been preferred in pursuance of an order passed by Hon'ble the Supreme Court of India in M.A. No. 1721 of 2023 in Civil Appeal No.8378 of 2018 (by DIAL) with M.A. No.1710 of 2023 in Civil Appeal No.5401 of 2019 (by MIAL).
- 33.** By virtue of order passed by Hon'ble the Supreme Court of India dated 4th December, 2023 on a limited issue of computation of HRAB, the matter has been remanded to TDSAT to look into the impact of letter dated 24th May, 2021, issued by Ministry of Civil Aviation (MoCA). This letter was addressed to AERA in pursuance of two communications by AERA dated 17th February, 2010 and

14th March, 2001, [**Annexure A-4 (Colly)**] to the Memo of Reply filed by Respondent No.1- AERA in M.A. No. 218 of 2024).

34. For the ready reference, paragraphs 14 and 15 of the Order passed by Hon'ble the Supreme Court of India in M.A. No.1721 of 2023 in Civil Appeal no.8378 of 2018 (by DIAL) with M.A. No.1710 of 2023 in Civil Appeal No.5401 of 2019 reads as under:

"14. On having heard learned counsel for the parties, we are of the view that the nature of jurisdiction exercised by this Court is predicated on two specialist authorities/tribunals having applied their mind to it. It would be difficult to have a re-appreciation of evidence and facts, especially when the admitted position is that the TDSAT has not opined on it. It would thus not be appropriate to venture into this aspect. However, this letter being in the nature of an internal communication privy to the non-applicants, we believe it should have been placed before the concerned authorities. Whether it has any impact or not, it would be difficult for us to say at this stage until the opinion of the TDSAT is available.

15. We are, thus, inclined to adopt the alternative prayer of the applicants by directing that the effect of this document ought to be examined by the TDSAT. We leave it to the TDSAT to take a view on the same, uninfluenced by the fact that the earlier opinion of the TDSAT has received our imprimatur. Thus, the TDSAT may for the limited issue qua computation of HRAB examine the effect of the letter now produced before us, i.e., the letter dated 24.05.2011 by the MoCA to the AERA, and take its own independent view on the impact of the same in computing HRAB and whether 'single till' mechanism should be the basis of the computation. Needless to say, that in either situation the effected parties would have a remedy before this Court."

35. In view of the aforesaid order passed by Hon'ble the Supreme Court of India, we have to evaluate the effect of letter dated 24.05.2011 issued by MoCA to AERA in the background of fact of computation of HRAB and what is the impact of this

communication on computation of HRAB is to be examined by this Tribunal. Moreover, we have to also decide whether '**Single-Till Mechanism**' should be the basis of computation of HRAB. On this limited issue, the matter has been remanded back by Hon'ble the Supreme Court of India.

36. To evaluate the effect of the letter dated 24.05.2011 issued by MoCA and its impact upon calculation of HRAB is to be examined in the background of the crucial facts which are discussed hereinafter.

37. Invitation to Register an Expression of Interest was published by the Airports Authority of India (AAI) for restructuring and modernization of Mumbai Airport and Delhi Airport on **17.02.2004**. Thereafter, Request for Proposal was issued by AAI on **01.04.2005**, for restructuring and modernization of Chhatrapati Shivaji Maharaj International Airport (CSMIA) at Mumbai.

38. Thereafter, an **Operation Management and Development Agreement** (OMDA) was executed between AAI and Mumbai International Airport Limited (MIAL) on **04.04.2006** [**Annexure A-4 (Colly)**] to the memo of AERA Appeal No.4 of 2013).

- 39. State Support Agreement** (SSA) was executed between Hon'ble the President of India (through the Ministry of Civil Aviation) and MIAL on **24.04.2006** [**Annexure A-4 (Colly)**] to the memo of AERA Appeal No. 4 of 2013). By the virtue of SSA, Principles of Tariff determination were mentioned categorically in SSA.
- 40.** MIAL took over the operations of Mumbai International Airport (CSMIA) on 03.05.2006 which is known as **Effective Date**.
- 41.** The Multi Year Tariff Proposal (MYTP) was submitted by MIAL for determination of Aeronautical Charges for the First Control Period i.e. 01.04.2009 to 31.03.2014 for CSMIA on 11.10.2011. Thereafter, **Consultation Paper** No.22/2012-13 for CSMIA was issued on **11.10.2012** for First Control Period (**Annexure A-3** to the memo of AERA Appeal No.4 of 2013).
- 42.** Thereafter, **Tariff Order** was passed by AERA for First Control Period (01.04.2009 to 31.03.2014) for CSMIA on **15.01.2013** (**Annexure A-2** to the memo of AERA Appeal No.4 of 2013).
- 43.** Thereafter, appeal was preferred by MIAL before TDSAT being AERA Appeal No.4 of 2013 challenging the First Control Period Tariff Order dated 15.01.2013, this AERA Appeal was decided on 15.11.2018 (**Annexure A-1** to the memo of M.A. No.218 of 2024).

Thereafter, Review Application was preferred by MIAL against the order of TDSAT dated 15.11.2018. This review application was dismissed on 17.01.2019 (**Annexure A-2** to the memo of M.A. No.218 of 2024).

44.Thereafter, Civil Appeal No.8378 of 2018 and 5401 of 2019 were preferred by DIAL and MIAL respectively and the same was disposed of by Hon'ble the Supreme Court of India vide judgment and order dated 11.07.2022 (**Annexure A-3** to the memo of M.A. No.218 of 2024). Thereafter, an M.A. was preferred bearing no.1710 of 2023 by MIAL before Hon'ble the Supreme Court of India for modification of judgment/order passed by Hon'ble the Supreme Court of India dated 11.07.2022 and Hon'ble the Supreme Court of India passed an order remanding the issue of HRAB to this Hon'ble Tribunal vide order dated 04.12.2023 (**Annexure A-6** to the memo of M.A. No.218 of 2024).

45.From the very beginning i.e. from MYTP submitted by MIAL to AERA, it was consistently contended by MIAL that:

As per the Schedule-1 of the SSA, hypothetical regulatory base has to be computed using the then prevailing tariff and revenue, operation and maintenance expenditure and corporate tax pertaining to Aeronautical Services during the financial year

preceding the date of such computation. The control period for the filing is starting from FY 2009-10, thus the hypothetical regulatory base has to be computed as closing value for the year FY 2008-09 based on the specified parameters by solving the equation of Target Revenue for Hypothetical Regulatory Base for the year 2008-09.

46. AERA had not accepted the back solving equation of target revenue for calculation of Hypothetical Revenue Asset Base (HRAB) and it is observed by AERA that as per SSA, revenues, expenses and corporate tax pertaining to aeronautical services has to be considered for the calculation of HRAB. Even in Consultation Paper, this aspect has been mentioned by AERA in paragraph no. 10.16 thereof. The Consultation Paper is at **Annexure A-3** to the memo of AERA Appeal No.4 of 2013.

47. It is observed by AERA in Tariff Order of First Control Period for CSMIA order dated 15.01.2013 (**Annexure A-2** to the memo of AERA Appeal No.4 of 2013) in paragraph no. 9.52 as under:

"The Authority notes that MIAL has raised 3 points in its comments to the Authority's position on the issue of Hypothetical RAB in the Consultation Paper – 22/2012-13 dated 11.10.2012. As regards the first point on

back solving the Target Revenue Requirement equation in order to compute the Hypothetical RAB and thereby including 30% revenue from nonaeronautical services, the Authority does not share the same view. The Authority notes MIAL's presumption that being a matter related to concession, the Authority would have obtained inputs on this issue from MoCA and if not so, there is a need of input from MoCA in this respect before finalising the issue".

48. Thus, AERA has computed HRAB using the elements mentioning the definition of RB_0 given in SSA. For the ready reference, the definition of RB_0 given in SSA reads as under:

" RB_0 , which was the sum total of:

- i. the Book Value of the Aeronautical Assets in the books of the JVC; and*
- ii. the hypothetical regulatory base computed using the then prevailing tariff and the revenues, operation and maintenance cost, corporate tax pertaining to aeronautical services at the airport, during the financial year preceding the date of such computation."*

49. This aspect of the matter has been mentioned in **para 9.55** of the order passed by AERA dated 15.01.2013 which reads as under:

"The hypothetical RAB therefore is to be computed using the elements mentioned in item (ii), during the financial year preceding the date of such computation. The Authority has computed the Regulatory Base for the first Control Period commencing 01.04.2009. Hence it has taken the preceding year namely 01.04.2008 – 31.03.2009 as the year preceding the date of such computation. It therefore does not find any reason to deviate from this straight forward and unambiguous method of calculation Hypothetical RAB by resorting to back solving of any equation as suggested by MIAL".

50. Looking to **para 9.52** of the order passed by AERA dated 15.01.2013, consistently it was insisted by MIAL that issue involved in this case is about the concession (SSA) and, therefore, input has to be obtained from MoCA for calculation of HRAB before finalizing the issue because for the FY 2008-09, HRAB is to be calculated as per SSA which is a concession agreement with the help of formula

of target revenue. Up until 31.03.2009, MoCA was determining the tariff and, therefore, for calculation of HRAB for FY 2008-09, input should have been obtained from MoCA.

51.It has been observed in **para 9.57** of the order passed by AERA dated 15.01.2013 which reads as under:

"In its submission MIAL has also made a presumption that being a matter related to concession, the Authority would have obtained inputs on this issue from MoCA and if not so, there is a need of input from MoCA in this respect before finalizing the issue. The Ministry was appraised that AERA had issued Consultation Paper on 11.10.2012 regarding Determination of Aeronautical tariffs for CSIA, Mumbai. The Ministry has not given any response on this issue."

52.In view of the aforesaid **para 9.57** of AERA's order dated 15.01.2013, it appears that AERA has taken note that MoCA has not given any response on issue of HRAB, but, this is factually incorrect.

53.On the contrary, AERA had written twice in their communications dated 17.02.2010 and 14.03.2011 (**Annexure A-4 Co'lly** to the

memo of reply filed by respondent no.1 in M.A. No.218 of 2024), to provide guidance/clarification.

54. For the ready reference, letter written by AERA to MoCA dated 17.02.2010 reads as under:

"Subject: State Support Agreements entered into with DIAL & MIAL - Computation of hypothetical regulatory base - reg.

AERA is currently undertaking an exercise to establish a body of regulatory principles and associated regulations for determination of tariff for aeronautical services for each of the regulated airports under Section 13(1)(a) of the Airports Economic Regulatory Authority of India Act, 2008. Clause (vi) of Section 13(1)(a) provides that ABRA shall determine the tariff for aeronautical services, inter-alia, taking into consideration the "concession offered by the Central Government in any agreement or memorandum of understanding or otherwise".

2. *In this regard, AERA draws attention of the Ministry to the following provisions of the State Support Agreements entered into with DIAL and MIAL:*

(i) The State Support Agreement (SSA), entered into between the Government of India and Delhi International Airport Pvt. Ltd. (DIAL) dated 26th April, 2006, in relation to the modernization and restructuring of the IGI Airport, New Delhi indicates the principles of tariff fixation in Schedule 1. A similar Schedule is incorporated in the SSA for Mumbai International Airport Pvt. Ltd. (MIAL) also.

(ii) Further, as per clause 3.1.1, the Gol intended to establish ABRA, inter-alia, for regulation of Aeronautical Charges and agreed to use reasonable efforts to have AERA established and operating within two years from the Effective Date. Gol further confirmed that, subject to Applicable Law, it shall make reasonable endeavours to procure that AERA shall regulate and set/reset Aeronautical (fit) Charges

in accordance with broad principles set out in Schedule 1.

(iii) Schedule 1 of the SSA provides guidance on calculating the aeronautical charges in the shared till 'inflation - X' price cap model wherein the revenue target is defined in terms of various parameters including the regulatory base pertaining to Aeronautical Assets and any investments made for the performance of Reserved Activities etc.

(iv) The regulatory base (RB_0). for the first regulatory period, has been LRO defined/the sum total of:

(a) the Book value of the Aeronautical Assets in the books of the JVC; and

(b) the hypothetical regulatory base computed using the then prevailing tariff and the revenues, operation maintenance cost, corporate tax pertaining to Aeronautical Services at the Airport, during the financial year preceding the date of such computation.

3. Keeping the above in view, the Ministry is kindly requested to clarify/guide AERA on the following issues:

(i) the intended objective of computation of the hypothetical regulatory base above; and

(ii) any mechanism for the computation of the hypothetical regulatory base that may have been considered/recorded at the time of drafting and approval of the above agreements by the Government of India.”

55. Thereafter, no reply was given by MoCA to AERA and, therefore, there was one more communication by AERA to MoCA dated 14.03.2011 wherein paragraph nos. 1 and 3 thereof reads as under:

1. “Ministry of Civil Aviation may kindly refer to this Authority’s ID of even no. dated 17.2.2010 on the subject above vide which clarification/guidance of the Ministry was requested in respect of the following issues pertaining to the hypothetical regulatory base

as contemplated in Schedule 1 of the SSAs entered into by the Central Government with DIAL and MIAL:

- (i) The intended objective of computation of the hypothetical regulatory base; and
- (ii) Any mechanism for the computation of the regulatory base that may have been considered/recorded at the time of drafting and approval of the above agreements by the Government of India.

3. Ministry is requested to kindly consider and favour this Authority with clarification/guidance in respect of issues mentioned at (i) and (ii) of para 1 above.

Ministry may also like to comment upon the submissions made by DiAL and MIAL in this regard. It is submitted that tariff determination process in respect of the two airport cannot be commenced, in so far as the first regulatory period is concerned, unless there is clarity regarding the hypothetical regulatory base, which is an important element of the opening RAB. In this light, the Ministry is requested to expedite its reply."

56. Thereafter, MoCA has given guidance/clarification vide communication letter dated 24.05.2011 (**Annexure A-4** to the memo of MA 218/2024). For the ready reference, the said communication reads as under:

"Subject: State Support Agreement entered into with DIAL and MIAL- computation of hypothetical regulatory base.

Sir,

I am directed to refer to AERA's ID note dated 17.02.2010 and 14.03.2011 on the above subject and to say that at two places reference has been made to hypothetical/initial Regulatory Asset Base as under:

(i) in the report on 'Approach to Economic Regulation at Mumbai and Delhi International Airports' prepared by ABN-AMRO (at pages 19-20), it has been mentioned that in the particular case of Delhi and Mumbai the Ministry of Civil Aviation has informed that the existing aeronautical charges will be, set as the initial regulated aeronautical charges. Accordingly, issue the proposed approach is to back solve the initial

aeronautical Asset Base given the aeronautical charges.

(ii) In the State Support Agreement, in Schedule-I, the method for calculating Asset Base for the first regulatory period has been defined.

There is no record of any mechanism for calculation of regulatory base.”

57.The aforesaid letter affects the very root of the case of calculation of Hypothetical Revenue Asset Base (HRAB). It has been mentioned categorically in the letter dated 24.05.2011 of MoCA that HRAB should be calculated by back solving method which is given in Schedule-1 of State Support Agreement (SSA).

58.The formula of target revenue as per Schedule-1 of State Support Agreement (SSA) reads as under:

$$TR = RB \times WACC + OM + D + T - SI$$

Where, TR= Target Revenue

RB= Regulatory Base

WACC = Weighted Average Cost of Capital

OM= Operation and Maintenance Cost

D= Depreciation

T= Corporate Taxes

S= 30% of Gross Revenue from Revenue Share Assets

$RB_i = RB_{i-1} - D_i + I_i$

59. Thus, this Tribunal has to consider two letters of AERA to MoCA dated 17.02.2010 & 14.03.2011 (Annexure A-4 Co'lly to the memo of reply filed by Respondent No. 1 in MA No. 218 of 2024) & most importantly, the letter dated 24.05.2011 of MoCA, keeping in mind the fact that for FY 2008-09, it was MoCA which was finalizing tariff. Therefore, the letter dated 24.05.2011 of MoCA is of vital importance in calculation of HRAB & cannot be ignored at all by the respondents. Moreover, the communication of MoCA dated 24.05.2011 has also mentioned ABN-AMRO report.

60. Looking to paragraph 9.57 of the First Control Period Tariff order dated 15.01.2013, it has been observed by AERA that MoCA has not given any response on the issue of HRAB whereas MoCA has mentioned about calculation of HRAB categorically in their letter dated 24.05.2011 which is prior to the tariff order passed by AERA. Thus, looking to the aforesaid background and two communications by AERA to MoCA dated 17.02.2010 and 14.03.2011 [**Annexure A-4 (Co'lly)**] to the memo of reply filed by respondent no.1 in M.A. No.218 of 2024 and looking to the

contents of letter dated 24.05.2011 by MoCA and also looking to the fact that for FY 2008-09, it was MoCA which was finalizing tariff and, therefore, the letter of MoCA is of vital importance in calculation of HRAB. Moreover, the letter of MoCA dated 24.05.2011 has also mentioned ABN-AMRO Report.

61. The ABN-AMRO Report has been produced by AERA and it has been stated therein:

"In the particular case of Delhi and Mumbai the Ministry of Civil Aviation has informed that the existing aeronautical charges will be set as the initial regulated aeronautical charges". Thus, MoCA had informed to ABN Amro that the existing aeronautical charges will be set as the initial regulated aeronautical charges. Basis the same, ABN Amro recommended that accordingly, in this case the proposed approach is to back solve the initial aeronautical Asset Base given the aeronautical charges."

62. It further appears from the facts of the case that if MoCA was not in agreement with ABN-AMRO Report, there was no occasion for MoCA to mention the same in its letter dated 24.05.2011

addressed to AERA. The very fact that MoCA has quoted from ABN-AMRO Report, it fortifies that this was the understanding of MoCA on the approach to calculate HRAB which was provided in the form of direction to AERA. After a lapse of approximately 13 years from communication of MoCA dated 24.05.2011, now the respondents cannot deny the contents of the letter which was given in the form of direction to AERA. In fact, the reference of ABN-AMRO report in MoCA letter dated 24.05.2011 makes it clear that the approach for determining the HRAB was to back solve the initial aeronautical asset base given the aeronautical charges, which according to us will mean that it must consider actual revenue including aeronautical & non-aeronautical revenues for FY 2008-09.

63. Thus, in our view, MoCA letter dated 24.05.2011 must be read with AERA's two letters dated 10.02.2010 & 14.03.2011 which clearly demonstrates that HRAB must be calculated by using the actual revenue of FY 2008-09. This is also supported by Schedule-1 of SSA which provides for the Target Revenue formula and HRAB must be calculated as per the definition of RB_0 .

64. The factors to be taken into consideration for RB_0 are:

- The then prevailing tariff and the revenues;
- Operation and Maintenance cost

- Corporate Tax pertaining to aeronautical services.

These three factors are to be considered and the formula of Target Revenue should be used for calculating HRAB and there is no other formula that can be considered by AERA. We must note that the determination of HRAB by AERA was not based on MoCA letter dated 24.05.2011, as the same was not considered by AERA which determined the Target Revenue. MoCA is a part of Central Government & is an expert authority which was determining the tariff till 31.03.2009 for Mumbai & Delhi Airports. The letter dated 24.05.2011 of MoCA providing directions to AERA about the methodology for computation of HRAB is nothing but a view of MoCA and its directives given to AERA. The respondents cannot ignore these directives and get away now saying that it was mere communication.

When the expert in determining the issue in the field has opined in a particular way, this Tribunal cannot ignore it and must accept the same, unless it is proved that the decision is arbitrary and taken for extraneous consideration. The Hon'ble Supreme Court in the case of ***MSEDCL v. APML & Ors.*** (Supra) reported in ***(2023) 7 SCC 401***, after considering the relevant provisions under the Electricity Act, 2003 with regard to constitution of various expert

bodies like the CEA, CERC & the Ld. APTEL, has held that these bodies are consisting of experts in the field. After considering the various judgements on the issue, the court observed in Para 123 as under:

“**123.** Recently, the Constitution Bench of this Court in the case of Vivek Narayan Sharma v. Union of India has held that the Courts should be slow in interfering with the decisions taken by experts in the field and unless it is found that the expert bodies have failed to take into consideration the mandatory statutory provisions or the decisions taken are based on extraneous considerations or they are *ex facie* arbitrary and illegal, it will not be appropriate for this Court to substitute its views with that of the expert bodies”.

[Emphasis Supplied]

Therefore, MoCA has acted within its powers read with Art. 3.1.1 of the SSA and hence the directions issued by MoCA vide its letter dated 24.05.2011 for determination of HRAB must be followed.

65. Now the question arises whether all the aforesaid factors are to be taken into consideration only for aeronautical services or for

non-aeronautical services also, meaning thereby to, whether the revenues are from aeronautical services or non-aeronautical services are to be considered. Similarly, operation and maintenance cost is only for aeronautical services or for both, aeronautical and non- aeronautical services. This issue can be decided keeping in mind what practice AAI has followed in the year 2008-09. Whether it was a Single-Till mechanism or Hybrid Till mechanism.

66. Looking to the communication of AAI dated 18.06.2018, it was a Single Till mechanism. There was no distinction between aeronautical and non-aeronautical revenues at the relevant time, for the entire FY 2008-09 & the entire revenue of FY 2008-09 must be considered for the purpose of computation of HRAB. The relevant part of the letter dated **18.06.2018** by AAI reads as under:

"The components of Traffic Revenue and Non Traffic Revenue in the, financial year 2007-08 as per records- are as under:

***2.** The Airport charges were fixed on cost recovery principle as per ICAO documents 9082 and in*

consultation with IATA. The said documents states that while determining the cost basis for airport charges, the cost to be shared is the full cost of providing the airport and its essential ancillary services, including appropriate amounts for cost of capital and depreciation of assets, as well as the costs of maintenance, operation, management and administration, but allowing, for all aeronautical revenue plus contribution from non-aeronautical revenues accruing from the operations of the airports to its operators".

67. Vide letter dated 18.06.2018, AAI has clarified that The Airport Charges were fixed on Cost Recovery Principle as per ICAO documents 9082 and in consultation with IATA. The said documents state that while determining the cost basis for Airport Charge, the cost to be shared is the full cost of providing the airport and its essential ancillary services including appropriate amounts for cost of capital and depreciation of assets as well as the costs of maintenance/operation management & administration but allowing, for Aeronautical Revenue plus contribution from Non-

Aeronautical revenues accruing from the operations of the airports to its operators. Meaning thereby, while determining the Airport Charges, the contribution from Non-Aeronautical revenues accruing from the operations were also considered. Thus, the charges fixed by MoCA, as mentioned in Schedule 6 and Schedule 8 to the SSA were based on all revenues (Aeronautical & Non-Aeronautical) earned by the Airport Operator. Therefore, there was no distinction between the Aeronautical and Non-Aeronautical revenue for the purposes of determination of Airport Charges for the period from 1st April, 2008 to 31st March, 2009 which is the relevant period for the purpose of determination of HRAB. Such a mechanism of considering all revenues, namely viz.- Aeronautical and Non-Aeronautical Revenues, is referred to as 'Single Till' for convenience purposes only and reference to the term 'Single Till' in this letter shall have this meaning to it. It is clarified to avoid any confusion between the phrases 'Single Till' & 'Hybrid Till' for the purpose of determining HRAB, which has an altogether different meaning & application for determination of tariff. This Tribunal is not much concerned with the phrases 'Single Till' or 'Hybrid Till', as this Tribunal is only concerned with the prevalent Airport Charges for the period during FY 2008-09.

68. According to counsels for appellant as well as respondents as per Clauses 3.1.2 and 3.1.3 of the State Support Agreement (SSA), till Economic Regulatory Authority commences with regulating Aeronautical Charges, the same shall be approved by Government of India in accordance with the broad principles set out in Schedule-1 of SSA, looking to Schedule-1 of SSA, it provides Principles of Tariff Fixation. This Schedule provides that if AERA is not in place by the time required to commence the First Regulatory Review, the Ministry of Civil Aviation will continue to undertake the role of approving aeronautical tariff, user charges, etc.

"Schedule 6 of SSA provides for Aeronautical Charges, as under:

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

1. *The existing AA1 airport charges (as set out in Schedule 8 appended hereto) ("Base Airport Charges") will continue for a period of two (2) years from the Effective Date and in the event the JVC duly*

completes and commissions the Mandatory Capital Projects required to be completed during the first two (2) years from the Effective Date, a nominal increase of ten (10) percent over the Base Airport Charges shall be allowed for the purposes of calculating Aeronautical Charges for the duration of .the third (3rd) Year after the Effective Date ("Incentive")..."

69. Thus, MoCA was deciding tariff for FY 2008-09 and as per letter of AAI dated 18.06.2018 it has been clarified that at the relevant time, **the tariff was determined on Single Till basis thus, there was no distinction between aeronautical and non-aeronautical revenue, therefore, the entire revenue of FY 2008-09 must be considered for the purposes of computing HRAB.**

70. The concept of 'Hybrid Till' attained its finality on 11.07.2022 when the Hon'ble Supreme Court of India rejected the contentions of FIA/Airlines, to apply 'Single Till'. Therefore, only 'Single Till' mechanism was applicable, meaning thereby, value of RB_0 can be determined on the basis of the then prevailing Airport Charges.

71. Thus, the letter of MoCA dated 24.05.2011 affects the very root of the case for computation of HRAB and it has a cascading effect

upon next tariff orders and, therefore, the error in calculation of HRAB has to be corrected at the earliest.

72. Para 9.69 of the order passed by AERA in MIAL First Control Period Tariff Order, HRAB has been calculated as under:

"AERA in MIAL FCP Order had computed HRAB of Rs. 966 Cr. The calculation was as follows of the impugned order:

<i>PARTICULARS FOR FY 2008 – 09</i>	<i>RS. (CR.)</i>
<i>Aeronautical Revenue (A)</i>	<i>445</i>
<i>Non-Aeronautical Revenue (B)</i>	<i>---</i>
<i>Aeronautical Expenses (C)</i>	<i>335</i>
<i>Tax pertaining to Aeronautical Services (D)</i>	<i>0</i>
<i>WACC (E)</i>	<i>11.45%</i>
<i>HRAB (A-C-D)/E</i>	<i>966"</i>

73. Prior to AERA being notified, tariffs were determined by MoCA on a 'Single Till' mechanism. Looking to the letter of AAI dated 18.06.2018 (**Annexure A-5** to the memo of M.A. No.218 of 2024)

it appears that the tariff was determined on a Single Till basis and it continued to be applicable for FY 2008-09. AERA determined tariff on and from 01.04.2009 till 31.03.2014 for the First Control Period. In fact, there was no distinction between aeronautical and non-aeronautical revenues at the relevant time and, therefore, the entire revenue of FY 2008-09 must be considered for calculation of HRAB.

74. In view of this, HRAB of Rs. 966 Crores calculated by AERA, target revenue for FY 2008-09 will be reflected as under:

PARTICULARS FOR FY 2008 – 09	RS. (CR.)
HRAB	966
WACC	11.45%
Return on HRAB (RAB x WACC) (A)	111
Operation & Maintenance Expenses (B)	381
Tax (C)	20
Non-Aeronautical Revenue (D)	510
Target Revenue [(A+B+C) - D]	2

75. The target revenue cannot be Rs.2 Crores for FY 2008-09 and, therefore, there was an error in calculation of HRAB by AERA. HRAB should have been calculated on the basis of 'Single Till' mechanism and by applying the parameters of RB_o:

- I. The then prevailing tariff and revenue (based on Single Till mechanism);
- II. Operation and Maintenance expenditure (for aeronautical and non-aeronautical services and assets); and
- III. Corporate Tax pertaining to aero services only at the airport.

The values of the aforesaid parameters based upon Single Till mechanism especially for Revenue as well as Operation & Maintenance expenditure must be included into Target Revenue formula & HRAB must be calculated by AERA. For clarity, the equation of HRAB is as under:

Target Revenue for any year is to computed in the following manner:

$$\mathbf{TR = RB \times WACC + OM + D + T - S}$$

If we rearrange the equation to calculate RB given all other parameters of above equation are known

$$TR = RB \times WACC + OM + D + T - S$$

$$RB \times WACC = TR + S - OM - D - T$$

$$\underline{RB = (TR + S - OM - D - T) / WACC}$$

76. Applying the aforesaid formula for calculation of HRAB for FY 2008-09, the calculation demonstrated by MIAL is as under:

PARTICULARS FOR FY08-09	RS. (CR.)
Aeronautical Revenue (A)	445
Non-Aeronautical Revenue (B)	510
O&M Expenses (C)	381
Corporate Tax (D)	20
Amount for HRAB Capitalization (E=A+B-C-D)	555
WACC (F)	11.45%
HRAB (E/F)	4848

77.In view of the aforesaid tables, it is clear that if AERA's calculation of HRAB is accepted, the Target Revenue for FY 2008-09 comes to

Rs.2 Crores. This is an incorrect calculation because the Target Revenue of Rs.2 Crores for FY 2008-09 was not the actual revenue based on tariff approved in Schedule-8 of SSA. Thus, calculation of HRAB by AERA is wrong and contrary to SSA.

78. Thus, as per letter by MoCA dated 24.05.2011 (**Annexure A-4** to the memo of M.A. No. 218 of 2024) and letter by AAI dated 18.06.2018 (**Annexure A-5** to the memo of M.A. No.218 of 2024), read with provisions of SSA and definition of RB_o, AERA ought to have calculated HRAB by applying Single Till mechanism for the parameters of RB_o illustrated hereinabove and by applying target revenue formula given in SSA.

79. On the basis of the above and in particular MoCA letter dated 24.05.2011, AAI letter dated 18.06.2018 and Paragraph No. 67 hereinabove, **we hereby direct** AERA to calculate the value HRAB afresh keeping in mind 'Single Till' mechanism and formula of Target Revenue for calculation of HRAB. AERA has followed non-existent methodology for calculating HRAB. Back solving approach for arriving at HRAB is the most plausible approach to be adopted which is also given by MoCA vide their letter dated 24.05.2011 as a direction for calculation of HRAB. SSA also provides the definition of RB_o and Target Revenue formula must be used to back solve the

HRAB using the actual figures for each component as stated hereinabove based on 'Single Till' mechanism.

80. These aspects of the matter have not been appreciated by AERA while calculating HRAB in para no 9.69 of the impugned order passed by AERA for Mumbai First Control Period dated 15.01.2013 (**Annexure A-2** to the memo of M.A. 218 of 2024 in AERA Appeal No.4 of 2024).

81. It is contended by learned senior counsels for the respondents that letter dated 24.5.2011 of MoCA is not a piece of evidence and it does not provide mechanism for calculation of the initial regulatory asset base. AERA has back solved equation for regulatory asset base and ABN-AMRO report is not conclusive. It is further contended by the learned counsels appearing for respondents that the tariff for FY 2008-09 was fixed as per Schedule 6 of SSA and, therefore, it was not related to any 'Till mechanism'. 'Till mechanism' was not applied for the purposes of Regulatory Asset Base and was instead applicable only for the purposes of Target Revenue (TR) hence, HRAB can only be about aeronautical assets and it does not include non-aeronautical revenue.

82. These contentions of the respondents are **not** accepted by this Tribunal mainly for the following facts and reasons:

- I.** AERA's regulatory mechanism for determination of tariff under the Airport's Economic Regulatory Authority Act, 2008 (AERA Act, 2008) started from 01.04.2009. For the First Control Period i.e. 01.04.2009 to 31.03.2014, AERA passed the Tariff Order. Here we are concerned with HRAB for the year 2008-09 which is the previous year of the First Control period.
- II.** In previous year i.e. FY 2008-09 it was Ministry of Civil Aviation (MoCA) determining the tariff.
- III.** When the process of First Control Period's tariff determination was going on, it was consistently pointed out by MIAL to AERA that as there is no mechanism for calculation of HRAB pointed out in SSA and as MoCA was determining the tariff for the previous year i.e. FY 2008-09, clarification/guidance may be sought from MoCA. As stated hereinabove, AERA observed in the tariff order for First Control Period in paragraph 9.52, 9.55, and 9.57 that though MoCA was appraised, the Ministry has not given any response to the issue of calculation of HRAB. This observation of AERA in paragraph 9.57 of MIAL's First Control Period Tariff Order was factually incorrect because a letter dated

24.05.2011 was already written by MoCA clarifying that HRAB may be calculated by back solving the Target Revenue formula.

- IV.** Twice AERA had communicated to MoCA by communications dated 17.02.2010 and 14.03.2011 [(**Annexure A-4 Co'llly** to the memo of reply filed by R1-AERA in M.A. No.219 of 2024)]. The contents of these letters have already been incorporated hereinabove. By the virtue of these communications, very categorically, unambiguously and unequivocally guidance was sought for by AERA and though there was a direction from MoCA to AERA vide letter dated 24.05.2011 (**Annexure A-4** to the memo of M.A. No.218 of 2024). AERA had suppressed this fact, which is evident from paragraph 9.57 of MIAL's First Control Period tariff order passed by AERA which is dated 15.01.2013 (**Annexure A-2** to the memo of AERA Appeal No.4 of 2013).
- V.** Looking to the aforesaid background of the matter, the letter of MoCA is of vital importance and it affects the very root of the case. The letter of MoCA is also important because for FY 2008-09, AERA's regime of deciding tariff was not in existence under the AERA Act, 2008. During the prior period of 01.04.2009, the tariff was being determined by MoCA and, therefore, the clarification was given by MoCA vide letter dated 24.05.2011.

Hence, it is of vital importance for calculation of initial Hypothetical Regulatory Asset Base (HRAB).

VI. Moreover, the concession agreement which is known as State Support Agreement was entered into between Hon'ble the President of India (through MoCA) and MIAL. The calculation of tariff is to be done as per the provisions of SSA. The formula of Target Revenue:

$$\mathbf{TR = RB \times WACC + OM + D + T - S}$$

is given in SSA. The components of RB_0 have also been given in SSA and, therefore, MoCA being one of the parties to the SSA has written a letter dated 24.05.2011 which is of vital importance because they were determining the tariff for the period prior to 01.04.2009. Thus, MoCA was a party to SSA, moreover, they were deciding tariff for the prior period of 01.04.2009 and initial Hypothetical Regulatory Asset Base (HRAB) is to be calculated as per SSA, the guidance given by MoCA vide letter dated 24.05.2011 is of vital importance and it affects the very root of the case. This letter could **not** be ignored by AERA. AERA cannot also discard the letter dated 24.05.2011 and AAI letter dated 18th June, 2018 which were not considered by this Tribunal in its order dated 15th November, 2018.

VII. Tariff determination is being done as per SSA, as per the aforesaid formula:

$$\mathbf{TR = RB \times WACC + OM + D + T - S}$$

There is also a definition of RB_0 given in SSA:

" RB_0 , which was the sum total of:

i. the Book Value of the Aeronautical Assets in the books of the JVC; and

ii. the hypothetical regulatory base computed using the then prevailing tariff and the revenues, operation and maintenance cost, corporate tax pertaining to aeronautical services at the airport, during the financial year preceding the date of such computation."

The components for Hypothetical Regulatory Asset Base (HRAB) are:

- The prevailing tariff and the revenues;
- Operation and Maintenance cost;
- Corporate tax pertaining to aero services at the airport.

- VIII.** Prior to the first year of the First Control Period i.e. 01.04.2009, the tariff determination was based upon Single Till mechanism. Airports Authority of India (AAI) vide letter dated 18.06.2018 (**Annexure A-5** to the memo of M.A. No.218 of 2024) has clarified that the then existing AAI airport charges were determined on Single Till basis. There is no distinction between aeronautical & non-aeronautical revenue at the relevant time for the purpose of arriving at the Airport Charges, therefore, the entire revenue of FY 2008-09 must be considered for the purposes of computing HRAB. The reference to the word 'Single Till' should not be used otherwise & is only referred to give purposive meaning to the mechanism of tariff determination prevalent at the relevant time i.e. FY 2008-09.
- IX.** Thus, the values of different components of Hypothetical Regulatory Asset Base (RB₀) viz., **the prevailing tariff**, includes aeronautical and non-aeronautical revenues. The second component of HRAB is "**operation and maintenance cost**". This component also includes the operation and maintenance cost for aeronautical services/assets as well as non- aeronautical services/assets. As far as the third component is concerned, it is **corporate tax**. As per definition of RB₀, corporate tax pertaining

to aeronautical services at the airport shall be taken into consideration. Thus, the components viz., prevailing tariff and revenues and second component being operation and maintenance cost, because of the fact that in FY 2008–09, the tariff determination was done on the basis of Single Till mechanism (aeronautical and non-aeronautical revenue should be combined) of both aeronautical and non-aeronautical services/assets are to be taken into consideration. Similarly, because of the Single Till mechanism, the word "**the revenues**" as used in definition of RB₀ includes aeronautical as well as non-aeronautical revenues whereas corporate tax as per definition of RB₀ given in SSA pertaining to aeronautical services at airports is to be taken into consideration. This aspect of the matter has not been properly appreciated by AERA while passing the tariff order for First Control Period dated 15.01.2013 (**Annexure A-2** to the memo of AERA Appeal No.4 of 2013) especially, looking to **paragraph 9.69 thereof** which reads as under:

PARTICULARS FOR FY 2008 – 09	RS. (CR.)
Aeronautical Revenue (A)	445

Non-Aeronautical Revenue (B)	---
Aeronautical Expenses (C)	335
Tax pertaining to Aeronautical Services (D)	0
WACC (E)	11.45%
HRAB (A-C-D)/E	966

X. In view of the aforesaid calculation of HRAB by AERA, if the Target Revenue for FY 2008-09 is calculated, it will be as under:

PARTICULARS FOR FY 2008 – 09	RS. (CR.)
HRAB	966
WACC	11.45%
Return on HRAB (RAB x WACC) (A)	111
Operation & Maintenance Expenses (B)	381
Tax (C)	20
Non-Aeronautical Revenue (D)	510
Target Revenue [(A+B+C) - D]	2

XI. In view of the aforesaid calculation of Target Revenue, which comes to Rs.2 Crores is absolutely erroneous. The Target Revenue for FY 2008-09 was never Rs.2 Crores, the aeronautical revenue for FY 2008-09 was Rs.445 Crores and, therefore, *prima facie* the calculation of HRAB understood by AERA in paragraph 9.69 of First Control Period Tariff Order passed by AERA dated 15.01.2013 is erroneous and against the provisions of SSA. Similar error is committed by AERA for calculation of HRAB for **DIAL** while passing First Control Period Tariff Order dated 20.04.2012 especially in Para No. 12.35 thereof.

XII. If Single Till mechanism is correctly applied to the different components of RB_0 , viz., "**the then prevailing tariff and the revenues**" and to the "**Operation and Maintenance Cost**", the figures for revenues and Operation and Maintenance cost shall include aeronautical as well as non- aeronautical revenues and similarly, for aeronautical and non-aeronautical services/assets. Applying the Single Till mechanism for the components of RB_0 and putting them into the formula of Target Revenue which is:

$$\mathbf{TR = RB \times WACC + OM + D + T - S}$$

XIII. The calculation of HRAB will be as under:

PARTICULARS FOR FY08-09	Rs. (Cr.)
Aeronautical Revenue (A)	445
Non-Aeronautical Revenue (B)	510
O&M Expenses (C)	381
Corporate Tax (D)	20
Amount for HRAB Capitalization (E=A+B-C-D)	555
WACC (F)	11.45%
HRAB (E/F)	4848

It goes without saying that the aforesaid numbers provided by MIAL are subject to verification by AERA on the basis of the audited financial statements of MIAL.

XIV. This is known as application of the back-solving formula in the background of Single Till mechanism approach and, therefore, also the letter written by MoCA dated 24.05.2011 is of vital importance and it effects the very root of the case because by virtue of this letter, HRAB can be calculated by back solving the Target Revenue formula by the communication of AAI dated 18.6.20218 (**Annexure A-5** to the memo of AERA Appeal No.218

of 2024). It was clarified by AAI at the relevant time that tariff was determined on Single Till basis. Even otherwise also, hybrid till came into existence much later, thus, back solving the target revenue formula for the calculation of HRAB in the background of the Single Till mechanism is a true and correct approach as per provisions of SSA which is binding to both the parties in this litigation.

83. As a cumulative effect of aforesaid facts, reasons and provisions of SSA, both these Miscellanies Applications are hereby allowed and disposed of with a direction to AERA that HRAB shall be calculated for **MIAL** and **DIAL**, keeping in mind the values of the components of RB₀ viz.- **the revenues** shall include both, aeronautical as well as non-aeronautical revenues for FY 2008-09 and "**Operation and Maintenance Cost**" shall include the aeronautical as well as non-aeronautical services/assets and the value of **Corporate Tax** pertaining to aeronautical services at the airport shall be arrived at on the basis of audited balance sheets and on the basis of books of accounts and these values shall be incorporated in the formula of Target Revenue namely:

$$\mathbf{TR = RB \times WACC + OM + D + T - S}$$

$$\text{Therefore, } \mathbf{RB = (TR + S - OM - D - T) / WACC}$$

Here, looking at the definition of RB_0 , the value of $D=0$ and value of $S=0$ because they are neither referred to in the definition of RB_0 nor these components have been considered by AERA for calculation of HRAB as mentioned in paragraph 9.69 of the impugned order. **We, therefore, quash and set aside the calculation of HRAB by AERA for MIAL and DIAL and the exercise of calculation of HRAB shall be completed by AERA afresh as per aforesaid directions within a period of 12 weeks from the date of pronouncement of this judgment.**

(JUSTICE D.N. PATEL)
CHAIRPERSON

(SUBODH KUMAR GUPTA)
MEMBER

/NS/