TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Reserved on: 5th August, 2025

Pronounced on: 11th September, 2025

AERA APPEAL/1/2023

Mangaluru International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;
2. Airports Authority of India;
3. Federation of Indian Airlines …Respondent(s)

International Air Transport Association (Intervenor)

WITH

AERA APPEAL/2/2023

Ahmedabad International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;
2. Airports Authority of India;
3. Federation of Indian Airlines …Respondent(s)

International Air Transport Association (Intervenor)

WITH

AERA APPEAL/3/2023

Lucknow International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;
2. Airports Authority of India;
3. Federation of Indian Airlines …Respondent(s)

International Air Transport Association (Intervenor)

WITH

AERA APPEAL/2/2024

Thiruvananthapuram International Airport Limited …Appellant

Versus

1. Airports Economic Regulatory Authority of India;
2. Airports Authority of India; …Respondent(s)

Federation of Indian Airlines (Intervenor)

International Air Transport Association (Intervenor)

WITH

AERA APPEAL/3/2024

Jaipur International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;
2. Airports Authority of India; …Respondent(s)

Federation of Indian Airlines (Intervenor)

International Air Transport Association (Intervenor)

WITH

AERA APPEAL/4/2024

Guwahati International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;
2. Airports Authority of India; …Respondent(s)

Federation of Indian Airlines (Intervenor)

International Air Transport Association (Intervenor)

BEFORE:

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

HON'BLE MR. SUBODH KUMAR GUPTA (MEMBER)

FOR APPELLANT	FOR RESPONDENT(S)
<u>In AERA Appeal No.1/2023,</u> **<u>In AERA Appeal No.2/2023,</u>** **<u>In AERA Appeal No.3/2023,</u>** For **<u>MIA, AIA, LIA, TIA, JIA, GIA</u>** Mr. Sajan Poovayya, Sr. Adv. with Ms. Amrita Narayan, Mr. Saurobroto Dutta, Mr. Palash Maheshwari, Mr. Madhav Sharma, Advocates.	**<u>In AERA Appeal No. 1/2023,</u>** **<u>In AERA Appeal No.2/2023,</u>** **<u>In AERA Appeal No.3/2023.</u>** For **<u>AERA (R.1)</u>** Mr. Apoorv Kurup, Sr Adv with Mr. Ritesh Kumar, Mr. Dhirender Singh Bisht, Advocates. Dr. Anand Kumar, Dr. Shreya Sharma, Mr. Neeraj Sharma, Ms. Yashasvini Chandra, Mr. Naveen Kapoor, Ms. Shalini. For **<u>FIA (R.3)</u>** Mr. Buddy Ranganadhan, Sr. Adv. with Ms. Nishtha Kumar, Mr. Prantar Basu Choudhury, Mr. Shrom Sethi, Advocates

In AERA Appeal No.2/2024, **In AERA Appeal No.3/2024,** **In AERA Appeal No.4/2024.** For **MIA, AIA, LIA, TIA, JIA, GIA** Mr. Sajan Poovayya, Sr. Adv. with Ms. Amrita Narayan, Mr. Saurobroto Dutta, Mr. Palash Maheshwari, Mr. Madhav Sharma, Advocates.	**In AERA Appeal No.2/2024,** **In AERA Appeal No.3/2024,** **In AERA Appeal No.4/2024.** For **AERA (R.1)** Mr. Apoorv Kurup, Sr Adv with Mr. Ritesh Kumar, Mr. Dhirender Singh Bisht, Advocates. Dr. Anand Kumar, Dr. Shreya Sharma, Mr. Neeraj Sharma, Ms. Yashasvini Chandra, Mr. Naveen Kapoor, Ms. Shalini. For **FIA (Intervenor)** Mr. Buddy Ranganadhan, Sr. Adv. with Ms. Nishtha Kumar, Mr. Prantar Basu Choudhury, Mr. Shrom Sethi, Advocates
	For **IATA (Intervenor)** in AERA Appeals No.1/2023, No.2/2023, No.3/2023, No.2/2024, No.3/2024, No.4/2024: Mr. Saurav Agarwal, Mr. George Pothan Poothicote, Ms. Manisha Singh, Mr. Prakash Kumar, Mr. Anurag Jain, Ms. Jyoti Singh, Mr. Kanav Khatana, Mr. Harsh Khabar, Ms. Prachi Dubey, Advocates.

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ABBREVIATIONS INVOLVED

Abbreviations	Expansion
AAI	Airports Authority of India
AAHL	Adani Airport Holdings Limited
ACI	Airports Council International
ACRP	Airport Cooperative Research Program
ADRM	Airport Development Reference Manual
AEL	Adani Enterprises Ltd.
AERA Act	Airports Economic Regulatory Authority of India Act, 2008
AERA	Airports Economic Regulatory Authority of India
AERA Guidelines	AERA (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011
AF	Annual Fee
AIA	Ahmedabad International Airport Limited
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
ATP	Annual Tariff Proposal

BAC	Base Airport Charges
BCAS	Bureau of Civil Aviation Security
BIAL	Bangalore International Airport Limited
CAGR	Compound Annual Growth Rate
CAPEX	Capital Expenditure
CAPM	Capital Asset Pricing Model
CNS/ATM	Communication, Navigation and Surveillance and Air Traffic Management Services
CoD	Cost of Debt
COD	Commercial Operation Date
COE	Cost of Equity
CP	Consultation Paper
CPWD	Central Public Works Department
CSD	City Side Development
CSR	Corporate Social Responsibility
CWIP	Capital Work in Progress
DF	Development Fee
DIAL	Delhi International Airport Limited
ECB	External Commercial Borrowing
EPF	Employee Provident Fund
ESI	Employees State Insurance
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
GIA	Guwahati International Airport Limited
GOX	Manohar International Airport, Goa
HIAL	Hyderabad International Airport Limited
IATA	International Air Transport Association
IDC	Interest During Construction
IGIA	Indira Gandhi International Airport
IIM	Indian Institute of Management
IKPL	Indo-Thai Kolkata Private Ltd.
IMG	Inter-Ministerial Group
ISP	Independent Service Provider
IXE	Mangaluru International Airport Limited
JIA	Jaipur International Airport Limited
JVC	Joint Venture Company
LIA	Lucknow International Airport Limited
LOA	Letter of Award

MCLR	Marginal Cost of funds based on Lending Rates
MIA	Mangaluru International Airport Limited
MIAL	Mumbai International Airport Limited
MoCA	Ministry of Civil Aviation
MOPA	Manohar International Airport, Goa
MSP	Master Service Provider
MYTP	Multi Year Tariff Proposal
NAR	Non-Aeronautical Revenue
NCAP	National Civil Aviation Policy, 2016
NPV	Net Present Value
O&M	Operation and Maintenance
OMDA	Operation, Management and Development Agreement
ORAT	Operational Readiness and Airport Transfer
p.a.	Per Annum
PBT	Profit Before Tax
PMC	Project Management Consultancy
PPP	Public Private Partnership
PV	Present Value
PwC	Pricewaterhouse Coopers Service Ltd.
RAB	Regulatory Asset Base
RBI	Reserve Bank of India
RFP	Request For Proposal

RoI	Return on Investment
RPT	Related Party Transaction
RSA	Revenue Share Assets
RSD	Refundable Security Deposit
R&M	Repairs and Maintenance
SCP	Second Control Period
SGSA	State Government Support Agreement
SOFR	Secured Overnight Financing Rate
SPV	Special Purpose Vehicle
SSA	State Support Agreement
TDSAT	Telecom Disputes Settlement and Appellate Tribunal
TCP	Third Control Period
TIA	TRV (Kerala) International Airport Limited
TRV/TKIAL	Thiruvananthapuram International Airport Limited
WACC	Weighted Average Cost of Capital

JUDGEMENT

Per Justice D.N. PATEL, Chairperson

SUMMARIUM

AERA APPEAL NO.1 OF 2023, AERA APPEAL NO.2 OF 2023, AERA APPEAL NO. 3 OF 2023, AERA APPEAL NO. 2 OF 2024, AERA APPEAL NO. 3 OF 2024 & AERA APPEAL NO. 4 OF 2024

1. These appeals have been preferred under **Section 18 (3) of the Airports Economic Regulatory Authority of India (AERA), Act, 2008**. These appeals have been preferred by:

- **i.** Mangaluru International Airport Limited (hereinafter referred to as **MIA** for the sake of brevity) against Order No.38/2022-23 dated 12.01.2023.
- **ii.** Ahmedabad International Airport Limited (hereinafter referred to as **AIA** for the sake of brevity) against Order No. 40/2022-23 dated 18.01.2023.
- **iii.** Lucknow International Airport Limited (hereinafter referred to as **LIA** for the sake of brevity) against Order No. 10/2022-23 dated 15.06.2023.
- **iv.** TRV (Kerala) International Airport Limited (hereinafter referred to as **TIA** for the sake of brevity) against Order No. 02/2024-25 dated 21.06.2024.

v. Jaipur International Airport Limited (hereinafter referred to as **JIA** for the sake of brevity) against Order No. 03/2024-25 dated 12.07.2024.

vi. Guwahati International Airport Limited (hereinafter referred to as **GIA** for the sake of brevity) against Order No. 07/2024-25 dated 06.09.2024.

2. The counsels appearing for appellants in all the aforesaid AERA appeal submitted that **MIA's** matter be treated as the lead matter and the counsel for the respondent has also argued accordingly. Thus, AERA Appeal No.1 of 2023 (**MIA**) is treated as lead matter for reference of annexures, dates and references.

3. Following is the airport-wise chart for the dates of the impugned orders:

AERA Appeal No.	Appellant Airport	Date of impugned order	Order No.	Control period
1/2023	Mangaluru International Airport Limited	12.01.2023	38/2022-23	FCP 01.04.2021 to 31.03.2026
2/2023	Ahmedabad International Airport Limited	18.01.2023	40/2022-23	TCP

				01.04.2021 to 31.03.2026
3/2023	Lucknow International Airport Limited	15.06.2023	10/2023-24	TCP 01.04.2021 to 31.03.2026
2/2024	TRV (Kerala) International Airport Limited	21.06.2024	02/2024-25	TCP 01.04.2022 to 31.03.2027
3/2024	Jaipur International Airport Limited	12.07.2024	03/2024-25	TCP 01.04.2022 to 31.03.2027
4/2024	Guwahati International Airport Limited	06.09.2024	07/2024-25	TCP 01.04.2022 to 31.03.2027

FACTUAL MATRIX

A. The appellant in AERA Appeal No.1 of 2023 is a company incorporated under Companies Act, 2013 and is engaged in operating, maintaining, developing, designing, upgrading,

modernizing and managing the Airport. Similar is the position of rest of the appellants for their respective airports.

B. The Government of India decided to invite the bids for operation, management, and development of certain airports of Airports Authority of India (**AAI**-Respondent No.2) on Public Private Partnership basis (**PPP**) and in furtherance of this, Respondent No. 2-Airport Authority of India (**AAI**) issued Request for Proposal on 14.12.2018. Adani Enterprises Ltd. (hereinafter referred to as **AEL**) was declared as a successful bidder and was issued a letter of award on 15.07.2019 by Respondent No. 2-AAI. AEL incorporated the appellant of AERA Appeal No.1 of 23 as a Special Purpose Vehicle under the Companies Act, 2013.

C. A Concession Agreement was entered into between the present appellant (i.e. **MIA**) and AAI (Respondent No. 2) on **<u>14.02.2020</u>** whereby the scope of the project work undertaken was narrated as under:

> **I.** design, development, financing, construction, upgradation and expansion of the Airport in a phased manner, on the Site and as per the requirements broadly set forth in Schedule A and Schedule B together with provision of respective Project Facilities

as specified in Schedule B, and in conformity with the Specifications and Standards set forth in Schedule C, and in accordance with the Applicable Laws and Applicable Permits;

II. operations, maintenance and management of the Airport in accordance with the provisions of this Agreement, Applicable Laws and Applicable Permits;

III. development, operation and maintenance of City Side, in accordance with the provisions of this Agreement, and in particular Schedule A, Schedule B and Schedule C; and

IV. performance and fulfilment of all other obligations of the Concessionaire and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement, in accordance with the provisions of this Agreement, Applicable Laws and Applicable Permits.

The Concession Agreement dated 14.02.2020 is at Annexure A-2 to the memo of AERA Appeal No.1 of 2023.

D. On 29.09.2020, "**First Interim Arrangement order was issued by AERA-R.1 for continuation of existing tariffs for period of**

6 months with effect from 01.10.2020 to 31.03.2021 or till the handing over of the airport to the appellant, whichever is earlier and the said order is order number 48/2020-21".

E. On 31.10.2020, the Commercial Operation Date (COD) was achieved by this appellant. The Respondent No.2/AAI issued on 09.11.2020 Notification No. AAI/SIU/06APTS/PPP/MANGALURU/2020/777 ("Notification to Stakeholders") to all the stakeholders of Mangaluru Airport regarding its operation, management and development through PPP mode and to extend their cooperation to the Appellant to achieve the objectives of the Project.

F. AERA further issued **Second Interim Arrangement Order** as well as **Third Interim Arrangement Order** on 24.03.2021 and on 15.09.2021 respectively for the applicability of existing tariff and they are at Annexure A-4 and Annexure A-5 to the memo of the main appeal, respectively.

G. Similarly, AERA issued **Fourth and Fifth Interim Arrangement Order** on 17.03.2021 and 20.09.2022 for extension of applicability of existing tariff. These orders are at Annexure A-6 and Annexure A-7 to the memo of the main appeal.

H. The Appellant in AERA Appeal No.1 of 2023 submitted Multi-Year-Tariff-Proposal (MYTP) on 31.05.2021, appellant further submitted revised MYTP on 10.12.2021 (Annexure A-8 and Annexure A-9 to the memo of the main appeal).

I. Consultation Paper was issued by AERA on 05.08.2022 for Mangaluru Airport for First Control Period. Representations were made by all stakeholders in pursuance of aforesaid Consultation Paper (Annexure A-10 to the memo of the main appeal). These representations were considered by AERA and the impugned order was passed by AERA on 12.01.2023 (Annexure A-1 to the memo of the main Appeal).

J. The aforesaid impugned order (Annexure A-1) has been challenged by this appellant by preferring this AERA Appeal under Section 18(3) of AERA Act, 2008 on various grounds. Miscellaneous Applications preferred by FIA & IATA are allowed and they are permitted to argue as intervenors.

<u>Issues raised in these Appeals:</u>

I. Whether the decision of AERA to determine **Cost of Equity** at 15.18% as against 17.49% proposed by the Appellant is correct, proper and justified?

II. Whether the decision of AERA to determine **Cost of Debt** at 9% as against 12% proposed by the Appellant based on actuals is correct, proper and justified?

III. Whether the decision of the AERA to not allow **Financing Allowance** for Capital Works in Progress is correct, proper and justified?

IV. Whether AERA ought to have considered the request of the appellant to allow the **Soft Cost** of 16% basis Good Industry Practices, subject to true-up on an actual incurrence basis in the next Control Period?

V. Whether the decision of AERA to **carry forward** some portion of **Aggregate Revenue Requirement** is correct, proper and justified?

VI. Whether the decision of AERA **not to allow the non-aeronautical revenues based on contracted commercial arrangement** is correct, proper and justified?

VII. Whether the decision of AERA **not to consider 30% of the Non-Aeronautical Revenue for computing Taxes** is correct, proper and justified?

VIII. Whether AERA ought to have allowed **the costs pertaining to the Pre-COD period**, as proposed by appellant?

IX. Whether the decision of AERA to disallow **O&M Expenses** qua AAI Manpower and Adani Manpower and Manpower Expenses is correct, proper and justified?

X. Whether the decision of AERA **to cap and not allow true up** of the **Repair and Maintenance Expenses** is correct, proper and justified?

XI. Whether the decision of AERA to disallow **the corporate allocation cost** for legal department employees is correct, proper and justified?

XII. Whether the decision of AERA to determine **Terminal Building Allocation Ratio** at 92:8 and average Gross

Fixed Asset Ratio at 99:20:0:80 is correct, proper and justified?

XIII. Whether the decision of AERA to **reduce 1% of the project cost from ARR** in case of delay in completion of project is correct, proper and justified?

XIV. Whether the decision of AERA to disallow **depreciation** as proposed by the Appellant based on the technical report on useful life of assets is correct, proper and justified?

Additionally, issues about "**One Time Escalation**", "**Treatment of Space Rentals**", "**Utilities Expenses**" and "**Normative Capital Cost for construction of Terminal Building**" have also been raised for some of the Airports.

Arguments canvassed by Ld. Counsel for the Appellants

1. Learned senior counsel Mr.Sajan Poovayya appearing on behalf of all the appellants in these AERA Appeals submitted that AERA Appeal No.1 of 2023 may be treated as lead matter wherein the Appellant is Mangaluru International Airport Limited(MIA). It is submitted that the impugned order passed by AERA dated 12.01.2023 (Annexure A-1 to the memo of AERA Appeal No.1 of 2023) has been passed contrary to the provisions of

Concession Agreement dated 14.02.2020 (Annexure A-2) and is also contrary to provisions of AERA Act, 2008. It is also submitted that AERA has not considered the material on record while passing the impugned order and there is inconsistency in the approach of AERA. The very same issues have been dealt with differently. There is also a violation of principles of natural justice. AERA has also not appreciated various decisions of this Tribunal whereby some of the issues were already decided by this Tribunal and the decisions of TDSAT have thus not been followed by AERA.

2. It is further submitted by the appellants that so far as Cost of Equity is concerned, AERA has failed to consider the "**Pricewaterhouse Cooper Report**" for the First Control Period. It is submitted that AERA has added the IIM-Bangalore study as the basis for determination of the Cost of Equity for the appellant. The set of airports being utilized by IIM-Bangalore for arriving at Cost of Equity for the Public Private Partnership (PPP) Airports is not operationally comparable to the Mangaluru Airport. The IIM-Bangalore study has considered 12 airports, out of which only 2 airports belong to developing countries. AERA has failed to provide any basis to disregard the data/report/independent study provided by this appellant which is the Pricewaterhouse Cooper Report. As per this PwC Report, Cost of Equity is ascertained @ 17.49% whereas AERA has

ascertained Cost of Equity @ 15.18% based upon IIM-Bangalore study and thereby AERA has committed a grave error in deciding Cost of Equity. Counsel appearing for appellant has submitted that so far as cost of debt at 9% p.a. is concerned, AERA has wrongly considered the Cost of Debt as 9% p.a. as against 12% p.a. as proposed by this appellant for computation of Fair Rate of Return (hereinafter referred to as FRoR for the sake of brevity). It was further submitted that AERA acknowledged in Para 8.5.1 of the Impugned Order that tariff determination ensures actual true-up of all building blocks. In view thereof, the actual CoD should have been considered. The omission of the actual CoD is against Clause 5.1.4 of the AERA Guidelines which categorically states that it must consider "...forecast cost of existing debt...", indicating a failure to consider available data. Further, AERA must assess the characteristics of all financial instruments employed or intended for fund mobilization. In the absence of actual debt, assumptions could have been used, but AERA failed to consider the materials placed before it while determining the CoD.

3. So far as financing allowance on Capital Work in Progress is concerned, it is submitted by counsel for the appellant that AERA has ignored the Airport Infrastructure Policy of 1997 and National Civil Aviation

Policy (NCAP), 2016 which emphasizes on the need to encourage privatization in the airport sector.

4. It was further submitted that as per the Concession Agreement, the tariffs are to be calculated as per AERA Act and AERA Guidelines which provides for Financing Allowance without any differentiation for Greenfield or Brownfield Airport and hence Financing Allowance is to be provided to all Airports. The definitions of "Fee" and "Regulatory Framework" in the Concession Agreement clarify that AERA must adhere to the AERA Guidelines, which prohibit deviations from the regulatory framework.

5. Learned senior counsel appearing on behalf of the appellant submitted that AERA has committed an error so far as Cost claimed towards technical services, Project Management Consultancy (PMC), preliminaries and pre-operatives, contingencies, statutory approvals, labour cess, site preparations, insurance, etc., this is also known as Soft Cost. AERA has failed to appreciate the Central Public Works Department (CPWD) Norms, 2022 dated 17.07.2022. As per these norms, various costs should be considered while preparing the preliminary estimates and include the following components:

I. Planning Consultancy 4% and Project Management Consultancy 5%.

II. Other Technical Services like Preliminary Sketches, Detailed Drawings, Preliminary Estimates, Structural Design, Execution, Audit & Account etc. is ranging between 7% to 24% depending upon size of the project.

III. Contingency cost is 3%.

IV. ESI & EPF ranging between 0.85% to 4.2%.

Accordingly, considering the CPWD Norms, 2022, the amount proposed towards such soft costs should range between 18 - 20%.

6. So far as Aggregate Revenue Requirement (ARR) for First Control Period is concerned, it is submitted by learned senior counsel for the appellant that AERA has committed grave error while computing ARR for the First Control Period that part of the ARR is carried forward in the next control period. AERA has carried forward 29.23% of ARR for the next control period. Thus, out of the total ARR, approximately 30% of the ARR cannot be recovered by this appellant and only out of 70% of total ARR, the airports which are in appeal have to be operated by the appellant. This decision runs counter to the decision rendered by this Tribunal vide judgment dated 14.02.2024 in AERA Appeal No.4 of 2021.

7. Learned senior Counsel for the appellant has placed reliance upon paragraph 485 of the decision rendered by this Tribunal in AERA Appeal No.4 of 2021 in case of GHIAL for the Third Control Period.

8. It is also submitted by Learned senior Counsel for the appellant that AERA's decision to carry forward some portion of ARR to the next Control Period is incorrect and untenable and is against the provisions of Concession Agreement (Annexure A-2) and is also in violation of Section 13 of AERA Act, 2008.

9. It is also submitted by learned Senior Counsel for the appellant that in Consultation Paper published by the respondent, there was a proposal for deferment of ARR but no amount was specified and, therefore, AERA's decision to defer the recovery of ARR by 29.23% of the total ARR in the next control period is in violation of principles of natural justice. <u>Hence, the order passed by AERA for deferment of ARR by 29.23% of the total ARR is arbitrary and it has a direct impact upon the efficiency of Airport Operators in managing the affairs of airports.</u>

10. So far as non-aeronautical revenues are concerned, it is submitted that AERA has failed to appreciate that the NAR projected by the appellant is true and correct.

11. It is also submitted by learned Senior Counsel for the appellant that AERA has wrongly held that NAR of FY 2019-20 (Rs.17.36 crores) can be presumed as NAR for FY 2022-23 and 5% increase in NAR per year for the remaining tariff years, in fact, there is no basis for this decision of AERA given in the impugned order. In fact, NAR depends upon the size of

the airport. Here, by competitive bidding process, Master Service Provider was selected by this appellant. The Master Concession was given by this appellant for non-aero services. It was given during COVID-19 period to secure a Minimum Guaranteed Amount and the entire risk of non-aeronautical services is passed on to the Master Service Provider. AERA has failed to appreciate that bidding process was completely fair and transparent and there are no allegations for conduct of bidding process and, therefore also, AERA cannot presume any amount on notional basis. In fact the appellant has received a fixed amount for NAR as per agreement with Master Service Provider and AERA has no power, jurisdiction or authority to rewrite the terms of the contract and hence, the impugned order deserves to be quashed and set aside.

12. So far as 30% of Non-Aeronautical Revenue (NAR) for computing taxes is concerned, it is submitted that 30% of the cross subsidization amount partakes the character of aeronautical revenue and hence, the said amount ought to be considered for computing "T". This aspect has already been decided by this Tribunal in judgment dated 06.10.2023 in case of MIAL for Second and Third Control Period in AERA Appeal No.2 of 2021 with AERA Appeal No.9 of 2016. This issue has also been decided vide judgment dated 14.02.2024 in case of GHIAL in AERA Appeal No. 4 of 2021.

13. Learned Senior Counsel for the appellant has placed reliance upon the aforesaid decisions and has submitted that the decision of AERA not to consider 30% of NAR while determining corporate taxes for Mangaluru Airport for First Control Period is incorrect and untenable.

14. So far as Pre-COD Expenditure is concerned, it is submitted that AERA has erred in allowing Rs.2.89 Crores as Pre-COD expenses as a part of O&M Expenses as against an amount of Rs.16.37 crores as part of O&M Expenses. AERA has failed to appreciate Concession Agreement Clause 5.1.1 and Clause 6.2 to be read with Clauses 19.10, 19.2, 28.4.3 to be read with other Clauses of Concession Agreement dated 14.02.2020 (Annexure A-2). AERA has failed to appreciate the requirements emanating from the Concession Agreement, which the appellant ought to perform to achieve the successful COD.

15. It is submitted by learned senior counsel that AERA has wrongly decided to consider only 6%, instead of 15% of Growth Rate towards man-power expenses for both AAI employees and employees of the appellant across all the 5 years of the tariff period.

16. Learned senior counsel for the appellant has taken this Tribunal through various Clauses of the Concession Agreement including Clause 6.5.6. AERA has given an increase of 6% towards growth rate based upon other airports in utter disregard of the fact that "**one-size fits all**"

approach cannot be allowed for determining the growth rates for the employees. AERA has erred in not allowing the Man-power Plan deployment as indicated by the appellant for safe and efficient functioning of the airport. Each airport has specific requirements and needs and, therefore, the norms of other airports cannot be made applicable to the airports in question.

17. So far as Repairs and Maintenance (R&M) expenses is concerned, it is submitted that AERA has decided to rationalize the R&M expense of the appellant for the period from COD till 31.03.2021 and has decided to limit R&M expenses to 6% of the Opening Net Block of Aeronautical Assets basis which is without providing any rational and reasonable explanation and is incorrect and untenable.

18. Learned senior Counsel for the appellant has submitted that R&M requirement for each airport differs. Moreover, AERA Guidelines do not provide capping of R&M and there is no concept of notional 6% capping. Counsel has taken this Tribunal through various clauses of AERA Guidelines including Clauses 5-4, 5-4.1 and 5-4.2 etc.

19. It is further submitted by learned senior counsel for the appellant that AERA has allowed the expenses (Rs.0.15 crores) of in-house legal team of appellant and has excluded the additional expenses towards legal department at the corporate level which is *prima facie* erroneous. For

Delhi airport, corporate cost allocation without any deduction of legal corporate cost was allowed by AERA and similar treatment is not given in the present case by AERA. This issue has also been decided by this Tribunal vide judgment dated 06.10.2023 in AERA Appeal No.2 of 2021 and AERA Appeal No.9 of 2016 in case of MIAL for Second and Third Control Period. In fact the decision of AERA for this issue is also running counter to the Consultation Paper No. 15/2020-21 and hence, the decision of AERA for this issue deserves to be quashed and set aside and AERA ought to have allowed the cost of legal employees under the Corporate Allocation Cost.

20. It is further submitted by learned senior counsel for the appellant that AERA has erred in deciding non-aeronautical area in the terminal building as 8% on the basis of IMG norms and the terminal building ratio was wrongly considered to be 92:8.

21. Learned senior counsel for the appellant has placed reliance upon AERA Guidelines, 2011 as well as the Concession Agreement especially, Clauses 5.1.5 and 5.1.7(i) thereof to be read with Annexure I to Schedule A and Schedule B of the Concession Agreement and has further submitted that IMG norms are not applicable to present appellants. It is further submitted that as per National Civil Aviation Policy, 2016, there is **<u>no mandate</u>** for bifurcating terminal building into aeronautical and non-

aeronautical areas, hence, AERA ought to have considered the terminal area ratio being 100% as aeronautical.

22. It is submitted by learned senior counsel for the appellant that AERA has wrongly decided to re-adjust (reduce) 1% of the un-capitalised Project Cost from ARR/Target Revenue during the True-Up exercise of the Second Control Period, if any particular project is not capitalised as per the CAPEX Schedule approved in the tariff order.

23. Learned senior counsel for the appellant has placed reliance upon the decision rendered by this Tribunal dated 06.10.2023 in AERA Appeal No. 2 of 2021 and AERA Appeal No.9 of 2016 and has placed reliance upon paragraph nos. 308-310 thereof and has submitted that this issue has already been decided by this Tribunal and it has been held that decision of AERA of carrying out 1% readjustment to Project Cost and Applicable Carrying Cost in the Target Revenue at the time of determination of tariff for the next Control Period is incorrect, improper and unjustified. Similarly, counsel has also placed reliance upon the decision rendered by this Tribunal dated 14.02.2024 in AERA Appeal No. 4 of 2021 in case of GHIAL and has placed reliance upon para nos. 512 and 519 thereof. <u>There is no provision under the AERA Act or the Concession Agreement which empowers AERA to penalize the appellant, hence, AERA is acting in excess of its jurisdiction.</u> In addition to the

reasons for delay in carrying out the projects due to various uncertainties like shortage of man-power, funds, force majeure and unforeseen events, there was also an after effect of COVID-19, these aspects of the matter have not been properly appreciated by AERA while passing the impugned order and hence, the same deserves to be quashed and set aside.

24. It is submitted that AERA's decision of not adopting the methodology as encapsulated in the 'Opinion on Assessment of Technical Useful Life of the Assets at Mangaluru International Airport for Financial Reporting Purpose' dated 25.05.2021 submitted by the Appellant along with the MYTP is incorrect and untenable. The decision of Respondent No. 1/AERA of not considering the Useful Life of Assets order in its entirety is incorrect and untenable.

25. It is further submitted by learned senior counsel for the appellant that for Ahmedabad, Thiruvananthapuram, Jaipur, and Guwahati airports, AERA has erred in deciding the rentals from airlines in the terminal as aeronautical revenue looking to AERA Act, 2008 as well as AERA Guidelines, 2011 which do not recognise airline space rental as aeronautical revenue.

26. Learned senior counsel for the appellant has submitted that for Thiruvananthapuram, Jaipur and Guwahati airports, AERA has wrongly decided that power recovery of the appellant is significantly lower than

that of comparable airports. AERA has wrongly concluded that there should be a gradual increase in power recovery from the Concessionaires.

27. Learned senior counsel for the appellant has further submitted that AERA cannot decide the present issue on a notional basis. Counsel has also placed reliance on a decision rendered by this Tribunal dated 14.02.2024 in AERA Appeal No.4 of 2021 in case of GMR Hyderabad International Airport Limited.

28. It is submitted by counsel for Lucknow, Thiruvananthapuram, Jaipur and Guwahati airports that AERA has wrongly decided to consider one-time escalation of the expenses at 2/3rd of the escalation rates claimed by the appellants for the expenses such as utilities, IT, Security, and other operating expenses. Counsel has placed reliance upon table No.176 passed by interim order (Annexure A-1).

29. It is also submitted by learned senior counsel for the appellant that for Hyderabad, Chennai, and Tiruchirappalli airports, AERA has allowed an increase in Utilities, and other operating expenses (house-keeping), in proportion to an increase in terminal area for the airports. Thus, AERA cannot give different treatment to Lucknow, Thiruvananthapuram, Jaipur, and Guwahati airports. This one-time escalation for the expenses as claimed by the appellant in FY 2024-25 should be allowed in proportion to increase in terminal area for the airports.

30. It is submitted by learned senior counsel for the appellant that of all the aforesaid airports except Mangaluru airport, AERA has erred while deciding the tariff that the Normative Cost was determined vide AERA order dated 13.06.2016. The prevalent taxes of 12% were included in the Normative Cost and, therefore, AERA opined that only 6% additional provision needs to be made to account for impact of GST as against 18%. The aforesaid decision of AERA is erroneous because AERA has failed to appreciate CPWD office memorandum dated 10.08.2022 wherein multiplying factor of 1.0633 (i.e. 6.33%) is provided.

31. Learned senior counsel for the appellant has submitted that this Tribunal has recently delivered judgment that Normative Cost Order dated 13.06.2016 is null and void. Hence, Normative Cost approach cannot be applied.

32. In view of the aforesaid submissions, it is pointed out by the learned Senior Counsel for the appellant that the impugned order passed by AERA dated 12.01.2023 (Annexure A-1) for Mangaluru Airport deserves to be quashed and set aside and similarly, impugned orders in other cognate AERA Appeals also deserve to be quashed and set aside.

Arguments canvassed by Ld. Counsel for Respondent No. 1 – AERA

33. Learned Senior Counsel Mr. Apoorv Kurup appearing on behalf of AERA- Respondent No. 1, has submitted that no error has been committed by AERA while passing the impugned order dated 12th January, 2023 (Annexure A-1 to the Memo of AERA No.1 of 2023). It is submitted by learned senior counsel for AERA that while deciding Fair Rate of Return (FRoR) for the first control period for Mangaluru Airport at 15.18% as against 17.49% as demanded by the Appellant Airport Operators, for rest of the airports in the aforesaid AERA appeals, what is allowed by AERA towards the cost of equity is 15.18% as against 17.30%. AERA has relied upon IIM Bengaluru Study Report for determining cost of equity for the appellants.

34. It is further submitted by Counsel appearing on behalf of AERA that as per Clause 5.1.3 of AERA Guidelines, 2011, the Authority has to estimate cost of equity based upon Capital Asset Pricing Model (CAPM) for each Airport Operator which is subject to consideration of such factors as the Authority may deem fit.

35. Learned Senior Counsel appearing for the respondent no.1 – AERA has also taken this Tribunal to the calculation of cost of equity and mainly as revenue on the factor Beta and has submitted that no error has been committed by AERA in calculation of cost of equity.

36. Learned Senior Counsel appearing for Respondent No.1-AERA has placed reliance upon the decision rendered by Hon'ble the Supreme Court of India reported in ***(2015) 10 SCC 241*** and judgment reported in ***(1973) 2 SCC 137*** titled as "CST, Madhya Pradesh vs. H.M. Esufali, H.M. Abdulali".

37. Learned Senior Counsel appearing for AERA has further submitted that the estimate of cost of equity arrived at by AERA cannot be replaced by another estimate much less by the estimate arrived at by Pricewaterhouse Cooper (PwC).

38. It is further submitted by Counsel appearing on behalf of Respondent No.1 – AERA that no error has been committed by AERA in arriving at cost of debt at 9% p.a. as against 12% p.a. demanded by the Appellants.

39. It is further submitted by learned senior counsel for AERA that no materials have been disclosed by the appellants justifying the interest of 12% as being charged by AAHL holding company. The average bank lending rate is in the range of 8.22% to 8.74%. The cost of debt for other airports is varying from 7.8% to 10.30%. Hence, the average cost of debt comes to 8.96%, whereas AERA has mainly proposed cost of debt at 9% for computation of FRoR.

40. It is further submitted by learned senior counsel appearing for AERA that financing allowance can be given only in case of greenfield airports and not in the case of brownfield airports.

41. Learned Senior Counsel appearing on behalf of AERA has placed reliance upon AERA guidelines, 2011 especially upon Clause 4.3, 5.21, 5.2.6, 5.2.7, and has also placed reliance upon Clause 5.2.7. On the basis of these Clauses, it is submitted that Financing Allowance has been permitted to the Appellant on debt portion of the CAPEX in Capital Work in Progress (CWIP) which has been referred to Interest During Construction (IDC) and there is no separate provision of IDC in AERA Guidelines and it is the same as financing allowance on the CAPEX collected on debt portion in terms of Clause 5.2.7.

42. Learned Senior Counsel appearing on behalf of AERA submitted that the RAB includes only fully capitalized and operational aeronautical assets. CWIP has not included any RAB. Thus, only actual and real fixed assets are included in RAB and not notional values.

43. It is further submitted by learned Senior Counsel appearing on behalf of the respondent that on the issue of soft cost that no error has been committed by AERA in allowing Rs.28.06 Crores including cost for independent engineers of Rs.7.90 crores applying 8% on the allowable aeronautical new CAPEX as against the Airport Operator-Appellant

demand of Rs.75.98 Crores in case of Mangaluru International Airport being 15% of the aeronautical new CAPEX.

44. Learned Senior Counsel appearing on behalf of the respondent has placed reliance upon AERA Guidelines, 2011 and has also submitted that MYTP submitted by the appellants did not contain any proposal towards soft cost. No justification has been given by the appellant for the demand of soft cost at 15% on the proposed CAPEX. Some of the soft cost like ESI, EPF are already accounted in the labor component of the cost.

45. This aspect of the matter has been properly appreciated by AERA while determining soft cost while passing the impugned order.

46. It is further submitted by learned senior counsel appearing on behalf of AERA that no error has been committed by AERA while passing the impugned order for non-aeronautical revenues and what is projected by the appellant for post-control period is Rs.40.34 Crores towards non-aeronautical revenues whereas as per AERA the non-aeronautical revenue has been considered as Rs.85.74 Crores.

47. Learned Senior Counsel appearing on behalf of the respondent has placed reliance upon the formula for the target revenue and has relied upon Clauses 4.2 and 4.3 of AERA Guidelines. Aeronautical tariff is being decided on the hybrid till method and 30% of non-aeronautical revenues is used to cross-subsidize aeronautical charges. The contract given by the

airport operators for providing non-aeronautical services must be independent and the fees collected by them would constitute the revenues from non-aeronautical services in the hands of the Airport Operators for the purpose of cross-subsidization.

48. Learned Senior Counsel appearing on behalf of AERA has submitted that no error has been committed by AERA in deciding terminal building allocation ratio and gross fixed ratio. What is proposed by AERA is 92:8 as per AERA Guidelines, 2011 and as per IMG Norms.

49. Airport Operator has demanded allocation of Terminal Building Ratio as 100% aeronautical for the period running from FY 2016 till 31st March, 2021. This ratio has been determined by AERA as per IMG Norms.

50. It is further submitted by learned senior counsel appearing on behalf of AERA that so far as Operation and Maintenance (O&M) expenses are concerned, no error has been committed by AERA in allowing 6% growth rate towards manpower expenses for AAI employees and of the appellant's employees as against the demand of 10% to 12% increase on year-to-year basis. The increase of 10% to 12% on year-to-year basis demanded by the Airport Operator is unsustainable and unsupportive.

51. Learned senior counsel appearing on behalf of the respondent has also pointed out that there is an inconsistent submission under MYTP. The appellate has wrongly considered Compounded Annual Growth Rate

(CAGR) of 20% from FY 2017-2020. In respect of AAI employees, AERA has considered 6% growth based upon AAI airports as well as PPP airports including Bangalore Airport.

52. It is further submitted by Learned Senior Counsel on behalf of AERA that AERA has rightly reduced the manpower count to 140 personnel as against 188 personnel proposed by the appellant. Thus, the manpower expenses (headcount) has been reduced.

53. Learned Senior Counsel appearing on behalf of respondent no.1 - AERA has taken this Tribunal to detailed calculation of the manpower and it is submitted that AERA has to determine the tariff for aeronautical services taking into consideration the cost for improving efficiency, therefore, efficient manpower headcount of 140 employees was allowed.

54. It is further submitted by learned senior counsel appearing on behalf of the respondent that no error has been committed by AERA in not allowing 30% NAR while determining the corporate taxes.

55. It is further submitted by learned senior counsel for the respondent no.1 - AERA that though this issue has already been decided by this Tribunal, the appeals have been pending before Hon'ble the Supreme Court of India.

56. It is further submitted by learned senior counsel appearing on behalf of the respondent that no error has been committed by AERA in not

considering the legal department employees' cost under the corporate allocation of cost.

57. Learned Senior Counsel appearing on behalf of the respondent has placed reliance upon Clause 28.3.8 of the Concession Agreement and has submitted that the cost incurred by Concessionaires with regard to legal services shall not be considered by the Regulator for the purpose of determining the Aeronautical Charges.

58. It is further submitted by learned senior counsel appearing on behalf of the respondent no.1 – AERA that no error has been committed by AERA while passing the impugned order on the issue of depreciation. AERA has rightly and correctly not adopted the methodology "Opinion on Assessment of Technical Useful Life of the Assets at Mangalore International Airport for Financial Reporting Purpose" dated 25.05.2021.

59. It is further submitted by learned senior counsel appearing on behalf of respondent no.1 - AERA, that AERA has relied upon AERA Guidelines, 2011 and Order No.35/2017-2018 as demanded from time to time (collectively referred to as "Useful Life Order"). The appellant has relied upon private report given by some **Kanti Karamsey & Co. (Kanti & Co.).** This report has not been accepted by AERA.

60. Learned Senior Counsel appearing on behalf of AERA has taken the Tribunal to a detailed tabular format of the Useful Life as proposed by the

Appellant as per **"Useful Life Order"** and as per the Companies Act, 2013 and has submitted that no error has been committed by AERA while passing the impugned order on the point of depreciation. The appellant has proposed the depreciation of Rs. 255.53 Crore for the first control period in its MYTP and what is allowed by AERA is 130.96 Crores which is absolutely legal and proper.

61. It is further submitted by learned Senior Counsel for the respondent that no error has been committed by AERA in deciding the true-up of costs incurred by the appellant for the period prior to letter of award and, therefore, these charges have been disallowed in their entirety. Similarly, for the period after the concession agreement, **<u>but</u>**, prior to Commercial Operation Date, there is no provision for cost except for salaries in terms of Clauses 16.4 and 16.5 of the Concession Agreement and, therefore, only salary cost for the afforded period was considered. Operational Readiness and Airport Transfer (ORAT) cost is accepted only for operationalizing Greenfield Airports, but, it is not applicable for brownfield Airports.

62. It is also submitted by learned senior counsel appearing for the respondent that there is no provision in the Concession Agreement to consider the cost incurred by the Airport Operator prior to COD, except

the requirements of achieving the same within six months from the signing of the Concession Agreement.

63. Learned Senior Counsel appearing for the respondent has taken this Tribunal to various clauses of the Concession Agreement and has submitted that no error has been committed by AERA in deciding the issue of pre-COD expenses.

64. It is submitted by learned Senior Counsel appearing for AERA that no error has been committed by AERA while passing the impugned order and as per AERA Guidelines 2011, there is a capping of repair and maintenance expenses at 6%. AERA has considered various factors such as CAPEX required, efficiency, cost, relatedness, traffic, etc. and as per Clause 5.4 of AERA Guidelines 2011, AERA is required to access the repair and maintenance expense after conducting **"Prudency Check".** A study has been conducted at Mangaluru Airport for efficient operation and maintenance expenses for Mangaluru Airport, and as per Paragraph 5.6.5.5 thereof, 6% opening RAB can be allowed for repair and maintenance expenses. For the ready reference, Paragraph 5.6.5.5 of the study conducted by AERA of efficient operation and maintenance expenses for Mangaluru Airport reads as under:

*"**5.6.5.5.** After excluding the inflationary impact and the cost of construction of water drains, Repairs and maintenance expenses constitute an average of 8% of RAB value of each year, as against 6% of the RAB value approved in previous AERA tariff orders. Accordingly, it can be concluded that the Repairs and maintenance expenses are not efficient and are proposed to be rationalised."*

65. In view of the aforesaid study, the decision of AERA in allowing 6% of opening RAB as repair and maintenance expenses is absolutely just and proper.

66. It is further submitted by Learned Senior counsel for AERA-Respondent No.1 that no error has been committed by AERA in carrying forward some portion of ARR to Rs.248.91 Crores which is to be carried forward for second control period. This decision is based upon National Civil Aviation Policy, 2016.

67. Learned senior counsel appearing for respondent has also taken this Tribunal to Article 28 of the Concession Agreement. AERA has taken care of increased charges on aircraft operators and end-users, thus, a balance between interest of airport and airport users has been maintained by AERA by the deferment of ARR for the next control period.

68. It is submitted by learned senior counsel for AERA, Respondent No.1 that AERA has rightly readjusted 1% aggregate revenue requirements if any particular project is not capitalized as per the CAPEX schedule in the tariff order. Counsel appearing for Respondent No.1 has placed reliance upon Clause 23.12 of the concession agreement which permits AERA to review the performance of concessioners. The project has been delayed by the appellant and therefore 1% of ARR has been readjusted.

69. It is further submitted by learned senior counsel appearing for Respondent No. 1 - AERA that for Lucknow Airport, Thiruvananthapuram Airport, Guwahati Airport, AERA has not committed any error while passing the impugned order and that only proportionate increase pertaining to Phase-I of T-3 project for determining one-time escalation in the expenses in the current control period, thus only Phase-I of T-3 has been considered for capitalization during the current control period and Phase-II of T-3 project has been shifted to next control period. Expenses such as utilities and other operating expenses are not directly proportional to increase in area.

70. Counsel appearing for respondent no.1 – AERA has also taken this Tribunal to paragraph 10.5.3 of the impugned order for Lucknow to the effect that the Authority would examine this issue at the time of true-up while determining the tariff for the next control period for such airports.

Arguments Canvassed by Ld. Counsel on behalf of Federation of Indian Airlines (FIA)

71. Ld. Senior Counsel Mr. Buddy Ranganadhan appearing for FIA submitted that he is adopting the arguments canvassed by the Ld. Counsel for AERA. Counsel for FIA has submitted that no error has been committed by AERA while passing the impugned order especially on the point of Cost of Equity. AERA has to determine CoE in an estimate and not an exact calculation as per Clause 5.1.3 of AERA Guidelines, 2011. AERA has rightly placed reliance upon IIM Bangalore's study for arriving at Cost of Equity at 15.18%. Similarly, no error has been committed by AERA for determining Cost of Debt at 9%. AERA has benchmarked appellant's Cost of Debt against that of five comparable PPP airports including DIAL, MIAL, GHIAL, BIAL & CIAL where the Cost of Debt ranges between 7.80% to 10.30%, averaging 8.96%. It is also submitted by counsel for FIA that ECB do not justify higher CoD. So far as Financing Allowance is concerned, it is submitted by counsel for FIA that AERA has rightly rejected Financing Allowance on Equity in respect of Brownfield Airports. It is further submitted by counsel for FIA that AERA has rightly appreciated the Concession Agreement for rejection of claim of appellant for Pre-COD expenditure. The expenses sought are not comparable to ORAT costs and are not capital in nature and were incurred without legal

basis for reimbursement through tariffs. No error has been committed by AERA in bifurcation of terminal building area for aeronautical and non-aeronautical use. AERA's approach is consistent with AERA Guidelines, 2011 (Clause 5.2.1), earlier precedents and the IMG Norms, which serves as credible and technical benchmark for determining standard airport space allocation. AERA has properly appreciated the Related Party Transactions and Arms' Length Assessment for determining NAR projections. It is further submitted by the counsel for FIA that AERA has rightly rejected opinion by "Kanti Karamsey & Co." which proposes significantly shorter Useful Lives for airport assets. AERA has rightly relied upon Useful Life Order and the Companies Act, 2013 and hence AERA's approach for depreciation treatment is absolutely legal and valid. On the basis of the aforesaid submissions, it is reiterated by the counsel for FIA that there is no substance in these AERA appeals and that the same deserves to be dismissed.

Arguments canvassed by Ld. Counsel on behalf of International Air Transport Association (IATA)

72. It is submitted by Ld. Counsel Mr. Saurav Aggarwal appearing on behalf of IATA submitted that he is adopting arguments canvassed by Respondent No. 1 and supporting the Tariff Order passed by AERA

(Annexure A-1). Counsel appearing on behalf of IATA submitted that 30% of NAR goes to ARR and therefore no further reduction is permissible in NAR. The intermediatory created by this appellant who is paying lumpsum amount which is much lesser than the actual NAR. Counsel for IATA has placed reliance upon the decision reported in ***(2019) 2 SCC 104, 2019 SCC OnLine Del 8032***, ***(2021) 11 SCC 566*** and ***(2024) 8 SCC 513.*** On the basis of the aforesaid decisions, it is submitted by the Ld. Counsel appearing for IATA that no error has been committed by AERA while passing the impugned order at Annexure A-1 and hence the AERA appeals deserve to be dismissed.

REASONS AND ANALYSIS

73. These AERA Appeals have been preferred by Mangaluru Airport, Ahmedabad Airport, Lucknow Airport, Thiruvantapuram Airport, Jaipur Airport and Guwahati Airport in AERA Appeals Nos.1, 2, 3 of 2023 and AERA Appeals Nos. 2, 3, 4 of 2024 respectively. In all the aforesaid appeals, Mr. Sajan Povayya, learned senior counsel is appearing on behalf of the appellant and we have heard him at length. It is submitted by him that **the lead matter may be treated as AERA Appeal No.1 of 2023 for narration of facts, annexures numbers etc**. It is also submitted by Mr. Sajan Povayya, learned senior counsel that some of the issues to be determined in the present appeals are only limited to certain airports which shall be pointed out hereinafter separately.

74. In view of this submission, we have treated AERA Appeal No.1 of 2023 preferred by Mangaluru Airport as the lead matter for the purpose of narration of facts, annexures numbers, etc.

75. The Government of India decided to invite bids for undertaking the Operations, Management and Development of certain airports of Airport Authority of India (AAI-Respondent No.2) on Public-Private-Partnership ("**PPP**") basis to bring efficiency in service, delivery, expertise, enterprise, and professionalism apart from harnessing necessary investments.

76. On **14.12.2018**, Respondent No.22-AAI issued the "Request for Proposal" and on **14.02.2019**, Adani Enterprises Ltd. ("**AEL**") submitted the technical bid as well as financial bid for the project for Mangaluru Airport. Thereafter, on **15.07.2019**, Respondent No.2-AAI issued the Letter of Award ("**LOA**") in favour of AEL. AEL was declared as a selective bidder for the project of Mangaluru Airport.

77. AEL incorporated is a Special Purpose Vehicle ("**SPV**") i.e. the present appellant as the Concessionaire under the Companies Act, 2013.

78. Concession Agreement was entered into between Respondent No.2-AAI and the present appellant on **14.02.2020** for designing, development, financing, construction, upgradation and expansion of Mangaluru Airport. In detail, the scope of the project has been mentioned by counsel for the appellant. This Concession Agreement is at **Annexure A-2** to the memo of AERA Appeal No.1 of 2023. Thereafter, AERA issued from time to time the interim arrangement orders for application of existing aeronautical tariffs (the first interim arrangement order dated **29.09.2020**).

79. On **31.10.2020**, **Commercial Operation Date (COD)** was achieved by this appellant and Notification was issued on **09.11.2020** to all the stakeholders of Mangaluru airport regarding its operation,

management and development through PPP mode to extend the cooperation to the appellant to achieve the objectives of this project.

80. Thereafter, Second, Third, Fourth and Fifth Interim Arrangement Orders were issued on various dates and the existing tariff was made applicable.

81. Thereafter, on **31.05.2021**, the present appellant has submitted Multi-Year-Tariff Proposal (**MYTP**) (Annexure A-8 to the memo of AERA Appeal No.1 of 2023).

82. Thereafter, on **10.12.2021**, appellant submitted revised MYTP (Annexure A-9).

83. Thereafter, a Consultation Paper (**CP**) was issued for First Control Period (**FCP**) by AERA for Mangaluru Airport on **05.08.2022** and invited written comments from the stakeholders (Annexure A-10 to the memo of AERA Appeal No.1 of 2023).

84. Thereafter, on **12.08.2022**, the present appellant submitted Annual Tariff Proposal ("**ATP"**) for First Control Period for Mangaluru Airport to AERA whereby, the present appellant requested Respondent No.1-AERA to provide an opportunity to revise the tariff card prior to issuing the final tariff order and requested AERA to provide an opportunity at the end of March, 2024 to revise ATP (Annexure A-11).

85. All the stakeholders prior to comments and counter comments in respect of Concession Agreement and various issues have been raised as mentioned in their comments and counter comments. Counsel for the appellant has taken this Tribunal through various annexures annexed with this AERA Appeal from Annexure A-1 to Annexure A-15 and has submitted that those several issues were raised with necessary facts, data and documentary evidence, the same has not been properly appreciated and AERA has passed a final Order No. 38/2022-23 on **12.01.2023** titled as "In the matter of determination of aeronautical tariff for Mangaluru International Airport (MIA) for the First Control Period for 01-04-2021 to 31-03-2026 ("Impugned Order"). This order is under challenge under AERA Appeal No.1 of 2023 (**Annexure A-1**) to the memo of this AERA Appeal.

86. It is vehemently submitted by counsel for the appellant that the impugned order issued by AERA dated 12.01.2023 has been issued without appreciating the facts, data and documents on record and is also issued in violation of the AERA Act, 2008 to be read with the Concession Agreement (**Annexure A-2**) to be read with AERA Tariff Guidelines, 2011 (**Annexure A-16**).

87. Several issues have been raised in the present AERA Appeal which have been summarised as under:

I. Cost of Equity

II. Cost of Debt

III. Financing Allowance on Capital Work in Progress

IV. Soft Costs claimed towards technical services, PMC, preliminaries and pre-operatives, contingencies, statutory approvals, labour cess, site preparation, insurance etc.

V. Carry forward of Aggregate Revenue Requirement (ARR) for the First Control Period (FCP)

VI. Non-Aeronautical Revenues

VII. Taxation for First Control Period (FCP) on 30% of NAR

VIII. Expenses incurred before COD

IX. Operation & Maintenance (O&M) Expenses

- AAI Manpower & Airport Operator Manpower
- Manpower expenses (head-count)

X. Repairs & Maintenance (R&M)

XI. Treatment of Legal department employees under corporate allocation cost

XII. Terminal building allocation ratio and gross fixed asset ratio

XIII. Re-adjustment in the Aggregate Revenue Requirement (ARR)

XIV. Depreciation

I. COST OF EQUITY

88. By the Impugned Order dated **12.01.2023** (**Annexure A-1** to the memo of AERA Appeal No.1/2023), AERA has determined the "**Cost of Equity"** (**COE**) for First Control Period at 15.18% as per Capital Asset Pricing Model ("**CAPM**"). The present appellant has proposed the Cost of Equity at 17.49%. The decision of AERA has been mainly challenged as far as COE is concerned on the ground that as per clause 5.1.3 of AERA Guidelines, 2011, AERA is obliged to estimate the COE using CAPM for each airport, subject to consideration of such factors as AERA deems fit. **For the ready reference, Clause 5.1.3 of AERA Guidelines reads as under:**

> "*5.1.3 Cost of Equity*
>
> *Cost of Equity – The Authority shall estimate the cost of equity, for a Control Period, by **using the Capital Asset Pricing Model (CAPM) for each Airport Operator**, subject to the consideration of such factors as the Authority may deem fit.*"

89. Looking at the impugned order and AERA Guidelines, 2011, it appears that AERA has **not** estimated the COE using CAPM model for Mangaluru International Airport.

90. As per A5.5.2.3 of AERA Guidelines, 2011, Airport Operator-Appellant is obligated to submit its assessment of COE based upon CAPM with supporting evidence including:

I. the risk- free rate,

II. the equity market risk premium, and

III. equity beta.

This data has already been supplied by this appellant.

91. It is submitted by learned senior counsel for the appellant that AERA has wrongly submitted that Airport Operator- Appellant has failed to provide Central Point Estimate and submitted only the higher value of 17.49% without the mandated sensitivity analysis, this issue has been raised for the first time in reply to this appeal by AERA. The **PwC report**, i.e. in **Pricewaterhouse Cooper Service Limited's report** was already submitted by this appellant which provides for the range of COE from 17.32% to 23.68%.

92. Looking to the impugned order, it appears that the report given by learned senior counsel for the appellant which is Pricewaterhouse Cooper Service Limited (PwC) report which has undertaken in depth study on evaluating the applicable COE has not been properly appreciated by AERA. PwC report is based upon Capital Asset Pricing Model (**CAPM**) which has already been submitted by this appellant along with MYTP dated

31.05.2021. As per this PwC report, other airports from developed as well as developing economies have been taken into consideration.

93. **In terms of AERA Guidelines, 2011, the appellant is obliged to provide such a report to R1-AERA for determining COE and therefore, AERA cannot ignore the PwC report submitted by this appellant on the ground that it is not an independent study.** It is a requirement under the AERA Guidelines and, therefore, PwC Ltd. was engaged, which is a reputed company and has carried out a detailed study on evaluation of COE. This report cannot be brushed aside on the ground that it is not an independent study. If such a report is to be rejected without reading, appreciating and considering there is no need of such provision in AERA Tariff Guidelines, 2011. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order dated 12.01.2023 (**Annexure A-1** to the memo of AERA Appeal No.1 of 2023).

94. AERA has used IIM-Bangalore's study dated December, 2019 as the basis for determining COE for the appellant & the said report has been submitted before this tribunal by AERA vide compilation dated 24.04.2025 titled "Compilation-IV (IIM Study Reports)".

95. Looking to the aforesaid study-report for determining COE for present appellant, it appears that airports in developing markets are

exposed to risks differently than compared to developed markets. The IIM-Bangalore study report has considered **twelve airports, out of which only two belong to developing countries**. The following is the list of the 12 airports:

Sl. No.	***Airport***
1	*Sydney*
2	*Melbourne*
3	*Amsterdam*
4	*Changi*
5	*Gatwick*
6	*Auckland*
7	*Heathrow*
8	*Johannesburg*
9	*MAHB*
10	*AoT*
11	*Dublin*
12	*Incheon*

96. None of the aforesaid listed airports has traffic of 2-3 million passengers per annum. None of the aforesaid airports are table-top airports. None of the aforesaid airports are regional airports. None of these airports are in a remote location. The set of airports which are referred to in the IIM-Bangalore's Study Report for arriving at COE are **not** operationally comparable to Mangaluru Airport. Moreover, looking to the IIM-Bangalore's study-report, it appears that it has failed to consider the airports in developing markets which are exposed to the risks, differently in comparison with developed markets.

97. The appellant, in terms of the AERA Guidelines, is obligated to provide a report on evaluation of applicable Cost of Equity and, therefore, the present appellant has engaged the services of PwC Ltd. to carry out detailed study on evaluation of the applicable Cost of Equity. The PwC study on Cost of Equity is based upon CAPM. This PwC study-report has already been submitted by this appellant along with MYTP dated 31.05.2021 in compliance with the AERA Guidelines, 2011. The PwC report has taken into consideration that the airports of developed and developing economies are different, but, AERA has brushed aside the PwC report on the ground that it is not an independent report. This is not permissible in the eyes of law because this study/report was carried out in pursuance of AERA Guidelines, 2011.

98. This appellant has submitted:

i. beta for Mangalore Airport;

ii. risk-free rate; and

iii. equity risk premium.

99. These figures have been submitted based on CAPM methodology. The Parameters submitted by this appellant as used in PwC study report are as under:

Parameter	***Value***
Risk-free rate	*7.57%*
Market return	*14.63%*

Debt-Equity ratio (leverage)	*48:52*
Equity Beta	*1.40*
Cost of Equity (rounded off)	*17.49%*

100. As per A5.5.2.3 of AERA Guidelines regarding the Cost of Equity, the Airport Operator is obliged to submit its assessment of CoE based upon the Capital Asset Pricing Model (**CAPM**). For the ready reference, Clause A5.5.2.3 of AERA Guidelines, 2011 reads as under:

*"**A 5.5.2.3 Cost of Equity***

(a) The Airport Operator(s) shall submit its assessment of cost of equity based on Capital Asset Pricing Model with supporting evidence including:

(i) The risk free rate: Source / evidence shall be provided for the nominal risk free rate estimated including any assumptions and justifications regarding inflation rates.

(ii) The equity market risk premium: Source / evidence of the equity market risk premium used, including: methodology for calculation (geometric / arithmetic), base country used, any adjustments applied for country risk, time period of data considered and the type of risk free asset used for comparison of return.

(iii) Equity beta: The approach used to estimate the equity beta, the data source, the systematic risks of the Airport Operator, the underlying asset and debt beta assumptions. Where international comparator analysis of betas is undertaken with other comparable Airport Operator(s), a detailed justification of the basis for selecting the comparators would be required, including the regulatory regime faced by such Airport Operator(s), its consistency with the Authority's regulatory approach and any differences in the commercial environment.

b) The Airport Operator(s) shall also provide a range and a central point estimate of the cost of equity, with detailed justification for the point estimate chosen.

c) Airport Operator(s) shall illustrate the sensitivity to changes in various assumptions for the most likely estimate together with a detailed sensitivity analysis in context thereto."

[**Emphasis Supplied**]

101. The AERA Guidelines, 2011 are annexed as Annexure A-16 to the memo of AERA Appeal No. 1 of 2023. Thus, the date of risk free rate, equity market risk premium, equity beta are already mentioned in the PwC report which is based upon CAPM for Mangaluru International Airport. Thus, it cannot be said that the aforesaid data has not been supplied by Airport Operator-appellant. AERA cannot ignore PwC report which was submitted by the appellant in pursuance of AERA Guidelines, 2011. The data which has been supplied for Mangaluru airport has already been supplied through PwC report for Mangaluru Airport. **One should cultivate an expert eye as to how to read the report which is submitted by the airport operator in pursuance of Clause A 5.5.2.3 of AERA Guidelines, 2011**. If this report would have been properly examined by AERA, it would have been appreciated that for all the aforesaid factors, the data has already been presented before AERA along with MYTP on 31.05.2021.

102. Moreover, it appears that without conducting airport-wise study, AERA has computed CoE for Mangaluru Airport **by averaging the CoE determined for other airports**. In fact, AERA did not determine the CoE for Mangaluru International Airport using CAPM. AERA has derived the CoE from average values of five airports namely Cochin (CIAL), Mumbai (MIAL), Bangalore (BIAL), Delhi (DIAL), Hyderabad (GHIAL).

103. AERA has tendered the IIM Bangalore Study Report to this Tribunal. The computation of Cost of Equity based upon IIM Bangalore's study report is as under:

" *Computation of Cost of Equity as per IIM Bangalore independent study reports*

(As per analysis given by appellant in Response to Consultation Paper- ***ANNEXURE A-14****)*

Date of Study	***March' 2021***	***Dec' 2019***	***June' 2020***	***Dec' 2019***	***Dec' 2020***	
Particulars	***CIAL***	***MIAL***	***BIAL***	***DIAL***	***GHIAL***	***Average***
Risk-free rate (A)	*7.56%*	*7.56%*	*7.56%*	*7.56%*	*7.56%*	*7.56%*
Equity beta (B)	*0.9427*	*0.9391*	*0.9732*	*0.9296*	*0.9442*	*0.94576*
Equity risk premium (C)	*8.06%*	*8.06%*	*8.06%*	*8.06%*	*8.06%*	*8.06%*
Cost of Equity (A+B) C	*15.16%*	*15.13%*	*15.40%*	*15.05%*	*15.17%*	***15.18%***
Average Cost of Equity						***15.18%"***

104. In view of aforesaid facts, AERA did not utilise Capital Asset Pricing Model (**CAPM**) at all, on computation of CoE for Mangaluru International Airport. AERA has wrongly applied an over-simplified averaging method based on CIAL, MIAL, BIAL, DIAL and GHIAL. This methodology adopted by AERA of "**over-simplified averaging method based upon five airports is not permissible and is in violation of AERA Guidelines especially of Clause 5.1.3 of AERA Guidelines, 2011".**

105. AERA has undertaken analysis of Cost of Equity pertaining to various dates spanning from December, 2019 to March 2021, for a period of approximately one and a half years. It is pertinent to observe that notwithstanding the temporal breath of these studies, the risk-free rate has remained unchanged throughout despite the analysis being conducted over a considerable interval.

106. Thus, reliance the on the report of IIM-Bangalore is in violation of AERA Guidelines, 2011 and the same is based upon an over-simplified averaging method based on data from the aforesaid five airports and looking to the fact that risk-free rate has remained unchanged throughout raises pertinent concerns regarding the fairness and independence of report which is relied upon by AERA and hence also, the rate of CoE relied upon by AERA deserves to be quashed and set aside and the same should have been considered at 17.49% for Mangaluru International Airport which is based upon PwC report which was submitted with MYTP on 31.05.2021 in pursuance of AERA Guidelines, 2011 especially Clause 5.1.3 of AERA Tariff Guidelines (**Annexure A-16** to the memo of AERA Appeal No.1 of 2023).

107. It is submitted by Ld. Sr. Counsel Apoorv Kurup on behalf of AERA that the Airport Operator- Appellant is required to provide a central point estimate, a range and a sensitivity analysis and the appellant has failed

to provide central point estimate and submitted only the higher value of 17.49% without the mandated sensitivity analysis and has further submitted that estimate of Cost of Equity (CoE) arrived at by AERA cannot be replaced by another estimate of Cost of Equity (CoE) arrived at by a private agency such as PwC. It is also submitted by the counsel for AERA that AERA has calculated the Cost of Equity (CoE) based upon the following formula:

*"**Cost of Equity**= Risk Free Rate + Beta x Equity Market Risk Premium*

__Cost of Equity__= 7.56% + 0.94576% x 8.06%

= 15.1828256

*= **15.18% (rounding off)**"*

Thus, it is submitted by counsel for AERA that no error has been committed by AERA while passing the Impugned Order for deciding Cost of Equity (CoE) at 15.18%.

108. <u>The aforesaid contention canvassed by Ld. Counsel for AERA are not accepted by this Tribunal for the following facts & reasons:</u>

I. As per Clause 5.1.3 of Tariff Guidelines (Annexure A-16), the Cost of Equity can be arrived at by AERA, <u>by using the Capital Asset Pricing Model (CAPM) for each Airport Operator</u>. AERA has not followed Clause 5.1.3 of AERA Tariff Guidelines (Annexure A-16);

II. As per Clause A 5.5.2.3 of Tariff Guidelines, 2011 issued by AERA, Airport Operator- Appellant is obliged to submit its assessment of Cost of Equity (CoE) based upon CAPM with supporting evidence for (i) Risk Free Rate; (ii)The equity market risk premium; (iii) Equity Beta. As per this requirement, a detailed report was submitted by this appellant namely Pricewaterhouse Cooper Service Limited Report (**PwC**) along-with MYTP on 31st May 2021. This report has been rejected by AERA for the reason that it is given by a private agency. It ought to be kept in mind by AERA that submission of such type of report is in due compliance with Tariff Guidelines, 2011 published by AERA (Annexure A-16) and therefore if such a report is to be rejected on the ground that it is a report given by a private agency, then there is no need of such a A5.5.2.3 Clause in the Tariff Guidelines, 2011.

III. The report given by the Airport Operator along-with MYTP viz.- PwC Report ought to have been considered by AERA.

IV. **No reasons have been assigned by AERA while passing the impugned order for rejecting the report of PwC. AERA should have followed fair & transparent method of determination of aeronautical tariff.**

V. AERA has not followed the Capital Asset Pricing Model (CAPM) for computation of Cost of Equity (CoE). Looking to analysis given by appellant in Response to Consultation Paper as incorporated in Paragraph No. 101 of this judgment reveals the fact that AERA has employed "a simplistic averaging method" based on the data from CIAL, MIAL, BIAL, DIAL & GHIAL. A comparative chart of DIAL, MIAL, GHIAL, BIAL & CIAL along-with Mangaluru Airport has been pointed out by the Ld. Counsel for the appellant which reads as under to point out that these five airports are not comparable with Mangaluru airport and each airport in a developing markets are exposed to risks differently, when compared to developed markets. The comparison reads as under in a tabular format:

	Delhi	***Mumbai***	***Hyderabad***	***Bangalore***	***Cochin***	***Mangaluru***
Concession Agreement	*OMDA signed with AAI*	*OMDA signed with AAI*	*Concession Agreement signed with MoCA*	*Concession Agreement signed with MoCA*	*No Agreement*	*Concession Agreement signed with AAI*
Year of establishment	*2006*	*2006*	*2004*	*2004*	*1994*	*2021*
PPP pre AERA or post AERA	*Pre-AERA*	*Pre-AERA*	*Pre-AERA*	*Pre-AERA*	*Pre- AERA*	*Post AERA*
Land Availability	*Approx 5,000 Acres*	*Approx 2,000 Acres*	*Over 5,000 Acres*	*Over 4,000 Acres*	*1261 Acres*	*Approx. 584 Acres*

Ownership	74% Private, 13% AAI and 13% MoCA	74% Private, 13% AAI and 13% MoCA	74% Private, 13% AAI and 13% State Govt	74% Private, 13% AAI and 13% State Govt	Govt of Kerala 32%, Directors and Managerial Personnel 19%, Various PSUs 22%, Various Individuals 27%	100% Private
Soft Loan by State Govt	NA	NA	Rs 315 Crs	Rs 350 Crs	No	No
Development Fee	Availed	Availed	Not availed	Not availed	Not availed	Not availed
Revenue Share/ Concession Fees	46% of revenues	38.7% of revenues	4% of revenues	4% of revenues	No revenue share	Rs 115 per domestic pax (double for international) with proportionate increase in line with CPI
Revenue share is pass through or not	No pass through allowed	No pass through allowed	Pass through allowed	Pass through allowed	Not applicable	No passthrough allowed
Geography	Metro City	Metro City	Metro City	Metro City	Regional	Regional
Land available for commercial usage	Approx 250 Acres	Approx 200 Acres	Approx 1,500 Crs			Approx 10 Acres
FY 22-23 (mppa)	65.32	43.93	20.99	31.91	8.12	1.80
Profit (Loss) as per Lok Sabha Answers FY 22-23 (Rs Crs)	-284	-1.04	32.99	528	267	-126

In view of the aforesaid comparison, it appears that Mangaluru Airport cannot be compared with DIAL, MIAL,

GHIAL, BIAL and CIAL. Moreover, looking to Clause 5.1.3 of Tariff Guidelines published by AERA in 2011, it requires that AERA shall estimate Cost of Equity (CoE) by using CAPM, **for each Airport Operator.** This aspect of the matter has not been properly appreciated by AERA while relying upon the report given by IIM Bangalore and hence also the Cost of Equity (CoE) arrived at by AERA in the impugned order deserves to be quashed and set aside.

VI. IIM Bangalore study has considered twelve airports out of which only two airports belong to developing countries. None of the listed airports have traffic of 2-3 million passengers per annum. The set of airports being utilised in IIM Bangalore study for arriving at Cost of Equity (CoE) for the Private Public Partnership (PPP) airports **is not operationally comparable** to Mangaluru Airport.

VII. AERA should have estimated Cost of Equity (CoE) using CAPM model, **for each airport operator,** whereas, in the facts of the present case, AERA has not followed the clause 5.1.3 of Tariff Guidelines, 2011.

VIII. AERA has applied an average of the five airports for arriving at a figure of all the three components of the calculation of

Cost of Equity (CoE) as stated in the aforesaid table from Annexure A-14. This is not permissible as per Tariff Guidelines. The AERA's approach of averaging components from different airports, instead of employing the CAPM for Mangaluru airport's Cost of Equity (CoE) calculation as mandated by Clause 5.1.3 of AERA Guidelines, 2011, does not comply with this requirement and hence also there is a grave error committed by AERA while arriving at a Cost of Equity (CoE).

IX. AERA has chosen to consider the report that was prepared for other airports and by applying averaging formula, the Cost of Equity (CoE) has been calculated. This is not permissible in the eyes of law looking to the provision of the Tariff Guidelines, 2011 (Annexure A-16). The new methodology employed by AERA (a simplistic averaging method based on data from five other airports) is incorrect and is in violation of the AERA Tariff Guidelines, 2011.

X. Looking to the Impugned Order, the analysis of Cost of Equity (CoE) undertaken by AERA pertains to various dates spanning from **December, 2019 to March, 2021,** a period of approximately one and a half years. The "**risk free rate**" has remained unchanged throughout, despite the analysis being

conducted over a considerable interval of approximately one and a half years. Looking to this aspect of the matter than no change in a "**risk free rate"** for such a long period affects the fairness and independence of the report, upon which reliance is placed by AERA.

XI. Counsel for AERA has also submitted that there is no "demand risk" to Indian airports as the aviation industry is booming. This argument is also not accepted by this tribunal for the reason that AERA should have appreciated the fact that the Concession Agreements for different airports are different. The "risk perspective" for each airport should be distinctly examined.

a. For e.g. Delhi and Mumbai Airport have 'minimum base charges' which protect the investors and provide guaranteed cash flow which are not present in these 6 airports (i.e. Mangaluru, Ahmedabad, Lucknow, Thiruvananthapuram, Jaipur and Guwahati).

b. In case of BIAL & GHIAL concession fee is a pass-through cost while determination of ARR, whereas in case of these 6 airports concession fee is not a pass-through cost.

c. In case of DIAL & MIAL the revenues from the non-transfer assets (City Side Development) are outside the purview of regulatory framework of AERA and are not used for the purpose of cross subsidy. Whereas in case of these 6 airports the City Side Development is considered as Non-Aero revenue and considered for cross subsidy.

In view of the aforesaid analysis, the risk adjusted return of these 6 airports should be much higher after considering the relevant risk factors including but not limited to the above points. Accordingly, the estimated Cost of Equity (**CoE**) should always be higher in case of these 6 airports as compared with the airports considered by AERA.

109. In view of the aforesaid facts and reasons, the decision of AERA on Cost of Equity which has been determined at 15.18% is hereby quashed and set aside. We hereby direct AERA to consider estimating the Cost of Equity by using CAPM method by conducting a fresh study for the concerned Airport.

II. COST OF DEBT

110. Looking to the impugned order dated 12.01.2023 (**Annexure A-1**) passed by AERA, AERA has considered CoD at 9% p.a. as against 12% p.a. proposed by the appellant for the computation of Fair Rate of Return ("**FRoR**").

111. AERA had noted that average bank lending rate of public sector banks and scheduled commercial banks is lesser than what is demanded by the appellant. AERA has also noted that CoD for other five PPP airports, namely, Delhi, Mumbai, Hyderabad, Bengaluru, and Cochin is also lesser than what is demanded by this appellant and, therefore, AERA has considered reasonable CoD at 9% p.a. as against 12% p.a. proposed by appellant for computation of FRoR.

112. It ought to be kept in mind that transition of Mangaluru Airport from Respondent No.2-AAI to the present appellant has taken place during COVID-impacted period. During this period, there was adverse impact on revenue and cash flow of the appellant and its credit worthiness.

113. It further appears from the facts and circumstances of the case that in order to attain efficiencies in terms of quantum, maturities and interest rates, borrowing from Adani Airport Holdings Limited ("**AAHL**") was availed for the CAPEX requirement. Further, AAHL had in turn availed borrowing in the form of External Commercial Borrowings which are

governed by the RBI Guidelines from global institutions like **Standard Chartered Bank** and **Barclays Bank PLC**. There is no reason, much less any justifiable reason, given by the Respondent No.1/AERA to disregard the actual borrowing rate of the CoD.

114. It has been held by this Tribunal in judgment dated **06.10.2023** in **AERA Appeal No.2 of 2021** with **AERA Appeal No.9 of 2016** in case of MIAL Vs. AERA for Second Control Period and Third Control Period in paragraph 321 as under:

> *"**321.** In view of the aforesaid provision, **AERA ought to have allowed actual cost of debt incurred by the appellant especially looking to the fact that debt availed by this appellant is from reputed lenders.** Putting a cap upon cost of debt is uncalled for, as AERA has in fact, allowed actual interest rate for First Control Period and Second Control Period and therefore the same methodology should be applied for Third Control Period as well.*
>
> ***We therefore direct AERA to consider actual cost of debt and necessary true up shall be done accordingly."***

115. It has been held by this Hon'ble Tribunal in AERA Appeal No.4 of 2021 in case of GHIAL Vs. AERA in paragraph 466 as under:

> *"**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."*

116. This Hon'ble Tribunal in AERA Appeal No. 4 of 2023 in case of GMR Hyderabad International Airport Ltd. Vs. AERA And Anr. had directed AERA to consider the Actual Rate of Interest towards DF Securitisation. For the ready reference, paragraph **Nos. 112 and 113** of this judgment reads as under:

> *"**112.** The aforesaid aspects of the matter have not been properly appreciated by AERA and, therefore, we, hereby, quash and set aside the decision of AERA in capping the rate of interest at 11.25% p.a. as the cost of loan upon securitization of DF amount. Consequently, we hereby quash and set aside the calculation of total amount to be levied as*

*DF along with interest thereupon as mentioned by AERA. We, therefore, quash and set aside the Order No.9 of 2023-2024 dated 14.06.2023 (Annexure A-1 to the memo of this appeal). We, hereby, direct AERA-Respondent No.1 that "**actual rate of interest**" upon DF securitization shall be calculated for the purpose of allowing levy of development fee by the Airport Operator.*

***113.** We, further direct AAI – Respondent No.2 to conduct an audit for arriving at the calculation of levy of development fee on the basis of actual rate of interest, charged by the lender and paid by the Airport Operator - Appellant - MIAL and AAI will also verify the initial amount of loan, because, the whole calculation as stated hereinabove is being done on the opening loan amount of Rs.2603 Crores whereas it is contended by the appellant that actual DF Loan amount availed by this appellant is Rs.2647.80 Crore. The aforesaid two figures can be verified from books of account or from lender banks by the auditor. We therefore, direct AAI to conduct an audit to verify the actual DF Loan amount availed by this appellant and thereafter, to **apply the actual rate of interest** for allowing the levy of DF by this appellant."*

[**Emphasis Supplied**]

117. It ought to be kept in mind that tariff orders for 5 airports were issued during the period of December, 2020 to August 2021 and this period was impacted by COVID. AERA has finalised the process of tariff determination for Mangaluru airport in January 2023. There were significant changes in the global economy during the period of August, 2021 to January, 2023. **The Reserve Bank of India has increased repo rate by 2.5%. Thus, from the original repo rate of 4.5%, it was increased to 6.5%**. By virtue of this increase in the repo rate, cost of domestic borrowing became dearer in India. This has a direct impact upon the increase in lending rates which are not reflected in the previous orders for other airports. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order.

118. AERA ought to have considered the latest borrowing rates while deciding COD. It is submitted by learned senior counsel for the appellant that the three-year **Marginal Cost of Funds based on Lending Rates** (**MCLR**) for both private sector as well as PSU banks has increased in the range of 100-150 bps points from December, 2021 to January, 2023. Thus, with increase in MCLR, there is an increase in overall borrowing cost which has not been appreciated by AERA.

119. Looking to the response given by this appellant to the Consultation Paper that credit rating at the Adani Airport Holdings Ltd (AAHL) level

"A+/stable". The relevant extract in paragraph 8.3.3 of the comments submitted by the appellant in response to the Consultation Paper issued by AERA reads as under:

> *"8.3.3 …*
>
> *Further AAHL combining with Airport SPVs is domestically rated "A+/stable" by India Ratings, which of MIA level will be BBB or below*
>
> *The transition of the Airport from AAI to MIA happened during the COVID impacted period. This has negatively affected the revenue and cash flow of MIA and its credit worthiness."*

120. The entire loan document was submitted to AERA and was a part of GIAL's response to Consultation Paper namely Annexure A-6 (Facility Agreement) and Annexure A-9 (Recent Term Sheet from Standard Chartered Bank). These documents categorically state that proceeds raised through External Commercial Borrowing (ECB) are meant for utilization by the "restricted companies" namely Ahmadabad, Lucknow, Mumbai, Jaipur, Thiruvananthapuram and Guwahati Airports. The loan agreement was executed prior to May, 2022 and they are based upon the requirement of aforesaid airports as envisaged under the Concession Agreement.

121. Moreover, Mangaluru Airport is comparatively a smaller airport and is therefore, less attractive to potential investments for Capital Expenditure and, therefore, to mitigate this difficulty, AAHL- the holding company of Mangaluru International Airport Limited, consolidated all six airports under its management and secured consolidated borrowing through **External Commercial Borrowing** (ECB) route. The funds raised through ECB were thereafter allocated to Mangaluru, Jaipur, Ahmadabad, Lucknow, Guwahati and Thiruvananthapuram Airports. The details of the funds received through ECB, the associated agreements were already submitted to AERA during tariff determination process for each airport and, therefore, AERA has wrongly observed their ignorance regarding utilization of ECB-raised funds.

122. Moreover, in response to the Consultation Paper, the Airport Operator has submitted all the relevant compliances with RBI which are mentioned at Annexure A-8 of the response to the Consultation Paper. Thus, it cannot be said that there is a violation of the direction for External Commercial Borrowing (ECB) issued by RBI.

123. Moreover, it has been held by AERA in case of GMR Hyderabad International Airport Limited for Second Control Period in their Order No. 34/2019-20, dated 27.03.2020 that it has considered withholding tax and cost of hedge separately while computing overall Cost of Debt. Moreover,

AERA in case of DIAL for Second Control Period in its Order No.40/2015-16 dated 08.12.2015 has considered interest rate swaps on its foreign loans while computing overall Cost of Debt.

124. Thus, even if upper limit of 10.182% p.a. is applied, there will be an additional withholding tax and upfront fee to be added which is 0.47% and 0.50% respectively and, therefore, the total COD even as per AERA's own understanding will come to minimum of 11.152% p.a. (10.182% + 0.47% + 0.50%) which is much higher than what is allowed by AERA (9%), therefore, the calculation of COD arrived at by AERA while passing the impugned order dated 12.01.2023 (Annexure A-1) deserves to be quashed and set aside.

125. While passing the impugned order, AERA has failed to appreciate that lending rate from reputed lenders ought to have been accepted as it is by AERA. The paragraph 317 of decision rendered by this Tribunal in judgment dated **06.10.2023 in AERA Appeal No.2 of 2021 with AERA Appeal No. 9 of 2016** in case of MIAL for Second Control Period and Third Control Period **paragraph 317** reads as under**:**

> *"**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."

126. It ought to be kept in mind that Mangaluru International Airport Limited has secured a loan from Consortium involving **Standard Chartered Bank and Barclays Bank** which are globally recognized lenders. This aspect of the matter has also been accepted by AERA during the consultation process and is acknowledged in paragraph no. 8.1.4 of Mangaluru Tariff Order. Paragraph 8.1.4 reads as under:

*"**8.1.4.** Subsequently, Adani Airport Holdings Limited announced on May 9, 2022 that it had raised a 3-year External Commercial Borrowing facility of $250 million from a consortium of Standard Chartered Bank and Barclays Bank PLC. The all-in borrowing cost of this facility is 12.10% p.a., the breakdown of which is provided in the table below:"*

127. Thus, the borrowing is from reputed lenders and this borrowing was done by AAHL meant for the six airports one of which is Mangaluru

International Airport and, therefore, as per the decision rendered by this Tribunal in AERA Appeal No.2 of 2021 and AERA Appeal No.9 of 2016 dated 06.10.23 in paragraph 371, the actual COD at 12% p.a. ought to have been considered by AERA. We, therefore, quash and set aside the cost of debt arrived at by AERA in impugned order dated 12.01.2023 at Annexure A-1 and we hereby direct AERA to consider actual COD at 12% p.a. for the computation of FRoR.

128. It is contended by the Ld. Counsel Mr. Apoorv Kurup appearing on behalf of AERA that neither Mangaluru airport nor its current group lending shareholder, AAHL, had obtained credit rating from any external rating agency and the appellant herein had already availed debt from AAHL (during 1-4-2020 to 31-3-2021) at the rate of 12% much prior to AAHL availing the **External Commercial Borrowing** (**ECB**) from the Consortium of Standard Chartered Bank and Barclays Bank PLC in May, 2022. Moreover, only the portion of the funds raised by ECB was intended for lending to Mangaluru airport and therefore the rate of interest of ECB (12%) should not apply to Mangaluru airport. Moreover, ECB is governed by Master Direction issued by RBI. Moreover, upper limit of interest payable fixed by RBI works out to be 10.182% p.a. and therefore no error has been committed by AERA in determining Cost of Debt at 9% instead of 12% as demanded by this Appellant. It is further contended by the

learned counsel for AERA that the Raising of Debt is ECB is governed by the Master Direction-External Commercial Borrowings issued by RBI (FED Master Direction Number 5/2018-19 dated 26.03.2019 as amended from time to time). Under this direction, eligible borrowers can raise ECB up to USD 750 million or its equivalent as per FY under automatic route, i.e. no prior permission from RBI is required. The borrower only has to report the transaction to the RBI.

129. The aforesaid contentions canvassed by the counsel for AERA <u>are not accepted by this Tribunal</u> for the following facts and reasons:

I. Looking to Paragraph 8.3.3 of the impugned tariff order (which has been already quoted hereinabove). The credit rating at the AAHL level is "A+ stable". Thus, it cannot be said that no credit rating was obtained by AAHL who has borrowed money through External Commercial Borrowing (ECB) for 6 airports who are appellants.

II. It has already been pointed out that the entire loan document submitted to AERA and form part of Guwahati Airport's response to the Consultation Paper especially Annexure- 6 (Facility Agreement) and Annexure- 9 (Recent Term Sheet from Standard Chartered Bank).

III. By virtue of the aforesaid two documents, it was categorically pointed out that proceeds raised through ECB are meant for utilisation by the "Restricted Companies" who are the present appellants- six airports.

IV. The loan agreements were executed prior to May, 2022 were based upon requirements of the present airports as envisaged under the Concession Agreement.

V. The fund raised via ECB were meant for six appellant airports and in fact they were allocated to the six appellant airports.

VI. Mangaluru airport is comparatively a smaller airport and therefore is less attractive to potential investors, for Capital Expenditure Borrowing and therefore AAHL- Holding Company, consolidated all six appellant airports under its management and secured consolidated borrowing through the External Commercial Borrowing (ECB) route. Therefore, each of the six appellant airports got part of 'secured consolidated borrowing through the External Commercial Borrowing (ECB)'.

VII. In view of the aforesaid facts, AERA has observed in the impugned order in paragraph number 8.3.3 that <u>to have efficiencies in the terms of quantum, maturities & interest rates, borrowing at AAHL was availed in the form of External Commercial Borrowings (ECB)</u>

for Capex requirement of various airports. Thus, consolidated borrowing through ECB by AAHL for the present six appellant airports is a mature decision which always brings down the cost of debt and will have better terms of borrowings. This aspect of the matter has not been properly appreciated by AERA.

VIII. AERA in the case of GHIAL for Second Control Period (SCP) in order dated 27.03.2020 has considered withholding tax and cost of hedge separately while computing overall Cost of Debt (CoD).

IX. Similarly, AERA in case of DIAL for SCP vide order dated 08.12.2015 has considered interest rate swaps on its foreign loans, while computing overall Cost of Debts.

X. Thus, even considering upper limit of 10.82% p.a., AERA has ignored **withholding tax** and **up-front fee.** Considering withholding tax (0.47%) and up-front fee (0.50%), the total lended Cost of Debt will come to 11.152% (10.182% + 0.47% + 0.50%) p.a.

XI. Looking to Part 1 of RBI Master Direction, the all-in-cost celling per annum is Benchmark rate + 450 basis point. **Table 82** of **paragraph no 8.4.1** of the Impugned Order (**Annexure A-1**) provides for breakdown of all-in External Commercial Borrowing Cost which is reproduced as under:

Particulars	Value
Secured Overnight Financing Rate (SOFR) reference	**2.28%**
Spread over SOFR	**4.25%**
Withholding tax gross up (at 5% of SOFR + spread)	**0.33%**
One-year forward Dollar-Rupee hedge cost (mandatory as per RBI guidelines)	**4.51%**
Upfront fees (summarized)	**0.73%**
All-in Cost of External Commercial Borrowing	**12.10%**

In view of the aforesaid facts, it is clear that the borrowing was availed at SOFR Reference and sprayed (which is permissible in addition to SOFR up to 450 basis point). There cannot be any dispute about the mandatory requirements of hedging the instrument and also withholding tax are required to be complied with by the borrower. Therefore, AERA has grossly misunderstood the aforementioned details provided by the appellant in claiming CoD at 12%. <u>We therefore, hold that the borrowing of funds by Adani Airport Holdings Limited is well within the regulatory framework stipulated by the RBI and AERA has failed to appreciate the concerned regulatory framework and has wrongly kept the Interest Rate for the Cost of Debt</u>.

XII. It has been held by this Hon'ble tribunal in its judgment in AERA Appeal No. 1 of 2021 and AERA Appeal No. 9 of 2016 dated 06.10.2023 in case of MIAL (SCP & TCP) in para 317 as under:

> *"**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**."*

XIII. In the facts of the present case, loan has been secured by a Consortium involving Standard Chartered Bank & Barclays Bank PLC which are globally recognised lenders and therefore it cannot be said that the appellants have not acquired the loans from reputed lenders. In fact, the loans obtained by these appellants through AAHL- Holding Company which has consolidated all six appellant airports under its management and secured Consolidated borrowing through ECB route and thereby the bargaining power has been increased of these six appellant airports for

consolidated borrowing for availing borrowing with optimum bargaining. This aspect of the matter has not been properly appreciated by AERA.

130. **<u>In view of the aforesaid facts, reasons and judicial pronouncements, we hereby quash and set aside the decision of AERA whereby AERA has considered CoD at 9% p.a. for computation of Fair Rate of Return (FroR). We hereby hold that, looking to the facts of the present case, simply because the appellant has availed debt from its one of the shareholders, the same cannot by itself disallow the appellant to claim actual Cost of Debt. This is more so when the entity from which the appellant has availed debt has in turn, availed debt from reputed lenders. Thus, AERA ought to have allowed actual Cost of Debt incurred by the appellant. Putting a cap upon Cost of Debt is uncalled for and unwarranted. We therefore direct AERA to allow actual Cost of Debt incurred by the appellant and necessary True Up shall be given for previous Control Periods accordingly.</u>**

<u>III. FINANCING ALLOWANCE FOR WORK IN PROGRESS (FWIP)</u>

131. Financing allowance was **<u>not</u>** proposed in the Consultation Paper published by AERA dated 5th August, 2022 (Annexure A-10 to the memo

of AERA Appeal No.1 of 2023) and later on the same was disallowed as per the impugned order dated 12th January, 2023 (Annexure A-1 of AERA Appeal No. 1 of 2023). The reason given in the impugned order by AERA for the financing allowance is that it has not been provided for any Brownfield Airport except in the initial stages of their development.

132. Looking to the provisions of AERA Act, 2008 especially Section 13(1), thereof AERA should have taken into consideration the capital expenditure incurred and the timely investments made for the improvement of the airports and facilities and the economic and viable operation for major airports. For the ready reference, the relevant part of **Section 13(1) reads as under:**

> *"**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:*
>
> *(i) the capital expenditure incurred and timely investments made for improvement of airport and facilities;*
>
> *(ii) …*
>
> *(iii)...*

(iv) economic and viable operation of major airports;"

133. In view of the aforesaid provisions, AERA ought to have provided for financing allowance to the appellant for all such airports undertaken by the Airport Operator.

134. Moreover, as per AERA Guidelines, 2011, Clause 5 thereof provides for methodology of tariff determination for aeronautical services and it allows the airport operator to be eligible for Financing Allowance as a return on the value invested in the construction phase of an asset before the asset is put to use.

135. Thus, in view of the AERA Guidelines, 2011, formula to calculate Work In Progress Assets (WIPA) has been given and the methodology of Financing Allowance has also been given.

136. As per AERA Guidelines, **Clause 5.2.7** reads as under:

"5.2.7 Work In Progress Assets

(a) Work in Progress Assets (WIPA) are such assets as have been commissioned during a Tariff Year or Control Period, as the case may be. Work in Progress shall be accounted for as:

WIPAt = WIPAt-1

+ Capital Expenditure (Capex)

+ Financing Allowance

- Capital Receipts of the nature of contributions from stakeholders (SC)

- Commissioned Assets (CA)

....

The Financing Allowance shall be calculated as follows:

<u>Financing Allowance</u> *= Rd x [WIPAt-1 + (Capex – SC – CA)/2]"*

[Emphasis Supplied]

137. <u>In view of the AERA Guidelines, 2011, there is no restriction of allowing the Financing Allowance only for green field airport. There is no distinction between green field and brown field airports for financing allowance because Financing Allowance is based upon the capital expenditure incurred for the Work In Progress Assets (WIPA) and this is covered in Section 13(1)(a)(i) and (iv) of the AERA Act, 2008.</u>

138. The principles under AERA Guidelines, 2011 have been laid down to bring about regulatory certainty and stability, the basis on which the stakeholders invest in a particular project. **<u>The AERA Guidelines are the regulatory principles laid down by Respondent No.1-AERA. It</u>**

provides methodology for tariff determination. AERA Guidelines, 2011 is the guiding factor for determination of tariffs for aeronautical services so that there may not be inconsistent approach on the part of AERA. Such types of guidelines have been enacted to avoid arbitrariness and discrimination and therefore AERA's Guidelines, 2011 ought to have been followed by AERA at the time of determination of tariffs for aeronautical services.

139. Further, looking to AERA Guidelines, Form F10(B) thereof, Airport Operator-appellant has to submit a project-wise Financing Allowance. The value of the "commissioned asset" which includes "Financing Allowance" shall be used for determination of the "Forecasted RAB Valuation".

140. AERA did not adhere to these AERA Guidelines, 2011 and Financing Allowance has not been allowed while determining Forecasted RAB. Even at the cost of repetition we are mentioning that AERA Guidelines do not limit Financing Allowance solely to the Green Field Airports. The concept of WIPA as pointed out in Clause 5.2.7 of AERA Guidelines, 2011 is based upon regulatory principles with no provisions to introduce additional impediments by Respondent No.1-AERA. Thus, no further restrictions can be imposed by AERA for allowing Financing Allowance for the capital expenditure incurred for the Work In Progress Assets (WIPA). This aspect of the matter has not been properly appreciated by AERA while passing

the impugned order and hence, we hereby quash and set aside the decision in impugned order dated 12.01.2023 (Annexure A-1) so far as it relates to Financing Allowance on Capital Work in Progress (CWIP) and we hereby direct AERA to allow Financing Allowance to these appellants on CWIP based upon calculation given in Clause 5.2.7 of AERA Guidelines, 2011.

141. Moreover, looking to AERA Guidelines, illustrations have been given for RAB as well as for Financing Allowances. Looking to these illustrations, even in the AERA Guidelines, Financing Allowance has to be added in the RAB. These illustrations have been given as Illustration No. 4 and Illustration No. 7 of the AERA Guidelines 2011. For the Ready Reference, Illustration No. 4 and No. 7 as mentioned in the AERA Guidelines 2011, for Forecast RAB and for Forecast Work in Progress reads as under:

*"**Illustration 7**: The following example illustrates this approach for calculation*
of Work in progress assets, financing allowance and commissioned assets.
The numbers in the illustration have been rounded to the nearest integers.

Forecast Work in Progress Assets

		2010 -11	Tariff Year-1	Tariff Year-2	Tarif Year-3	Tariff Year-4	Tariff Year-5
Opening WIP: WIPA	**OW**	**-**	**-**	**-**	**558**	**638**	**-**
Capital Expenditure	**CE**	**-**	**833**	**521**	**-**	**-**	**-**

Financing Allowance	FA=Rd x (OW+(CE-CA-SC)/2)	-	-	37	80	43	-
Capital Receipts	SC	-	200	-	-	-	-
Commissioned Assets	CA	-	633	-	-	681	-
Closing WIP: WIPA	CW = OW +CE+ FA - SC - CA	-	-	558	638	-	-

** The cost of debt, Rd, used for calculation of financing allowance, is the cost of debt determined by the Authority under Clause 5.1.4.*

** The example illustrates that those assets, which have been acquired or commissioned within the same Tariff Year (i.e. Tariff Year 1), have been included both in Capital Expenditure and Commissioned Assets.*

** The value of commissioned assets, as calculated, shall be used for forecasting RAB for the Control Period.*

Illustration 4: *The following example illustrates the approach for forecasting RAB for the Control period. The numbers in the illustration have been rounded to the nearest integers.*

Forecast RAB

		2010-11	Tariff Year 1	Tariff Year 2	Tariff Year 3	Tariff Year 4	Tariff Year 5
Opening RAB	(OR)	22,750	20,500	18,826	16,462	13,998	12,277
Commissioned Assets	(CA)	-	633	-	-	681	-
Depreciation	(DR)	2,250	2,307	2,364	2,364	2,402	731
Disposals	(DI)	-	-	-	100	-	-
Incentive Adjustments	(IA)	-	-	-	-	-	-
Closing RAB	(CR = OR + CA – DR – DI ± IA)	20,500	18,826	16,462	13,998	12,277	11,547
RAB for calculating ARR	(RA = (OR + CR)/2)		19,663	17,644	15,230	13,138	11,912

** The example illustrates that RAB -1 for the first Tariff Year of the first Control Period is equal to the forecasted RAB at the end of the financial year 2010-11 and the Initial RAB, as calculated in Clause 5.2.4, is used as the opening RAB for 2010-11.*

** The example also illustrates that the RAB value, to be considered for the calculation of ARR for a Tariff Year t, shall be the average of the RAB value at the end of Tariff Year t and the RAB value at the end of the preceding Tariff Year t-1, as explained in the Clause 5.2.3."*

It is clear from the aforesaid illustrations that Commissioned Assets are identical numbers in (1) Addition during the year and (2) Calculation of financing allowance.

142. For the Cochin Airport, Respondent No. 1, AERA previously granted Financing Allowance though it was Brownfield Airport. This is evident from **AERA Order No. 7 of 2017-18** dated **13th July, 2017**. This Financing Allowance was allowed by AERA for Cochin Airport despite it being **operational and generating revenue**. Cochin Airport did the first significant investment during second control period when the financing allowance was provided by Respondent No.1 - AERA. Therefore, the reasons provided by AERA in the impugned order that it has never provided financing allowance to revenue-generating airports is absolutely incorrect. In fact, AERA should have consistency in their approach. AERA

should not take a contrary decision being a statutory regulator. The zigzag approach of AERA creates uncertainty and ambiguity which leads to discrimination and discrimination leads to arbitrariness, especially when there are clear guidelines known as AERA Guidelines, 2011 and moreover, there is no distinction in AERA's framework for Greenfield and Brownfield airports regarding Financing Allowance. This artificial differentiation or characterization evolved by AERA is not permissible in view of AERA Act, 2008 read with AERA Guidelines, 2011 and also relevant order passed for Cochin by AERA itself being Order No.07/2017-18 dated 13th July, 2017.

143. As per Airport Infrastructure Policy of 1997 and as per National Civil Aviation Policy, 2016 (NCAP) which emphasizes the need to encourage privatization in the airport sector. Airport operator has to invest hundreds of crores in the running construction projects and not granting the Financing Allowance even though it is provided in AERA Act as well as in Clause 5.2.7 of AERA Guidelines, to be read with Illustration No. 4 and Illustration No. 7, thereof, creates hinderance in the development of the airport which is otherwise required to be carried out in terms of the Concession Agreement.

144. The concession agreement has to be read with the provisions of AERA Act, 2008 and AERA Guidelines, 2011. As per AERA Guidelines, 2011, there is no differentiation in the Greenfield Airport and Brownfield

Airport for the financing allowance to be provided to the airport operators. The definition of "Fee", and "Regulatory Framework" in the Concession Agreement (Annexure A-2) clarifies that AERA must adhere to AERA Guidelines and deviation from AERA guidelines is prohibited.

145. Learned Senior Counsel for the Appellants Mr. Sajan Poovayya, has rightly pointed out that GHIAL, BIAL and CIAL which are Greenfield Airports, and in order to calculate the cost of equity, average cost of equity has been considered for DIAL at 15.41%, MIAL at 15.30%, GHIAL at 15.17%, BIAL at 15.03%, and CIAL at 15.16%. The average of this has been considered for airports (brownfield airports and greenfield airports) for arriving at cost of equity. Thus, AERA should have treated both sides of airports as equal and could not have denied Financing Allowance to the Appellant.

146. The Concession Agreement has to be appreciated by AERA as per the provisions of Section 13(1)(a)(vi) of AERA Act, 2008, as has been held by this Tribunal in its judgment dated **13th January, 2023** in AERA Appeal No. 7 of 2021 in case of DIAL Vs. AERA. For the ready reference, Paragraph No. 14.4 and 14.5 of the said judgment is as follows:

> *"**14.5** The words used in Clause 12.2 of OMDA "subject to applicable law" may refer AERA Act, 2008, but, AERA Act,*

2008 mandates R-1 to give due consideration to the Concession Agreement "as per Section 13 (1)(a)(vi) of AERA Act, 2008.

***14.6** Thus, looking to OMDA, SSA & Section 13 (1)(a)(vi) of AERA Act, 2008 even if AERA Act, 2008 came into force, the existence of OMDA and the concession offered by Central Government through OMDA & SSA has been recognized."*

147. It has been held by this Tribunal in the judgment dated 6th October, 2023 in case of MIAL in AERA Appeal 9 of 2016 and AERA Appeal 2 of 2021 for 2nd Control Period and 3rd Control Period in paragraph 214 which reads as under:

*"**214.** AERA is required 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 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 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."

148. In view of the aforesaid facts, reasons, and judicial pronouncements to be read with the Provisions of AERA Act, 2008 and Provisions of AERA Guidelines, 2011, to be read with Airport Infrastructure Policy of 1997, to be read with National Civil Aviation Policy, 2016, to be read with Cochin Airport's AERA Order No.7/2017-18 dated 13th July, 2017, **the decision of AERA in the Impugned Order dated 12th January, 2023, Annexure A-1 for Financing Allowance on Capital Work in Progress, is hereby quashed and set aside, and we hereby direct**

AERA to allow the Financing Allowance on Capital Work in Progress (CWIP) as per Clause 5 of AERA Guidelines, 2011 as has been clarified in Illustration Nos. 4 and 7 of AERA Guidelines, 2011, without any discrimination between Greenfield and Brownfield Airports. Clause 5 of AERA Guidelines, 2011 provides the methodology for tariff determination for aeronautical services by allowing "Financing Allowance" as a return on the value invested, in construction phase of an asset, before the asset is put to use.

IV. SOFT COST

149. Cost Claim towards Technical Services, Project Management Consultancy (PMC), Preliminaries and Pre-operatives Contingencies, Statutory Provisions, Labor Cess, Site Preparation, Insurance etc. which is also conjointly known as soft costs.

150. AERA has decided an amount of Rs.28.06 crores including Cost of Independent Engineers at Rs.7.09 crores as against the cost submitted by the appellant of Rs.75.98 crores, AERA has applied 8% on the "allowable" Aeronautical New Capex as against 15% of Aeronautical New Capex as claimed by the appellant.

151. Soft costs like project management consultancy, technical services, pre-operatives, etc. are inelastic for smaller projects and, therefore

substantial portion of the cost tends to be fixed. Moreover, Mangalore International Airport cannot be compared to much bigger airports like Bengaluru, Delhi and Mumbai because these big Public Private Partnership (PPP) Projects do not face such impediments and also because they are equipped with passenger handling capacity of 30-70 million. They are the big projects ranging from Rs.5,000 Crores to Rs.10,000 Crores, **whereas**, Mangalore Airport has the passenger handling capacity of only 2 to 3 million and capital expenditure is only to the tune of Rs.800 Crores. There are several other major distinguishing features. Therefore, Mangalore Airport cannot be compared with the bigger PPP projects like Bangalore, Delhi and Mumbai. The comparison by AERA in the impugned order of Mangalore Airport with bigger PPP projects like Bengaluru, Delhi and Mumbai for determination of Soft Cost is uncalled for and unwarranted and AERA is comparing the incomparable.

152. As per the Tariff Order No.8-2021-2022 for Cochin Airport (for 3rd Control Period) which has been passed by AERA, it has been acknowledged that new airport operators cannot be compared with old airport operators and it is reasonable to presume that newer companies would have greater risk. Relevant part of the **Tariff Order No.8-2021-2022** for **Cochin Airport (3rd Control Period),** the order passed by AERA reads in paragraph 4.6.20 as under:

*"**4.6.20***

The Authority has noted CIAL's comments regarding cost of equity for the Second Control Period. However, it would not be prudent to compare CIAL with other private airport operators like DIAL and HIAL which have started operations more recently as compared to CIAL. ***The Authority had noted at the time of determining tariffs for the Second Control Period that it is reasonable to presume that newer companies would have a greater risk when compared to a well-established, investment-light and dividend paying airport like Cochin International Airport****. This is also evident from the high contribution of equity (around 63% in Second Control Period) in capital investments at Cochin Airport."*

153. Sometimes the geographical position and the topography of the airport like tabletop airports, land-constrained contract airport having steep variations in the topography on the airport site makes the execution of various capital works at such an airport more challenging and requires more man-hours for finalization of various designs etc. These factors increased the soft cost. AERA has failed to appreciate that such airports

have an exclusive team for Planning, Designing, Construction, Quality Control, Procurement, Contract Administration and Project Control besides support services like Human Resources, Legal and Finance etc. These types of airports cannot be compared with bigger PPP projects like Bengaluru, Delhi and Mumbai. "One-size fits all" approach is not a correct parameter to be applied by AERA.

154. It is rightly pointed out by Learned Senior Counsel for the Appellant that in the Consultation Paper No.11-2023-24 dated 31st August, 2023 issued for Goa Airport in the determination of aeronautical tariff for Manoharlal International Airport MOPA, Goa (GOX) for the first control period has proposed soft cost for designing consultancy PMC expenses, pre-tariff expenses and contingencies etc. at approximately 16% after removing the project cost pertaining to site preparation and earth work. Soft cost comes to Rs.405.33 Crores over the project cost of Rs. 2540.56 Crores. AERA approved soft costs of approximately 13% in the case of MOPA, Goa, whereas, cap of 8% is applied in the case of Mangalore airport.

155. Thus, in view of the aforesaid order, 16% was a reasonable measure to relate so far as soft cost is concerned which has been demanded by Airport Operator-Appellant. Only 8% was allowed by AERA vide the impugned order and hence, in light of the aforesaid provisions and order

passed by AERA itself, we hereby quash and set aside the order of AERA dated 12th January, 2023 (Annexure A-1) in so far as it relates to soft cost.

156. Moreover, AERA, which allowed the soft cost vide the impugned order to the appellant at 8% is without any basis and is discriminatory and is based upon irrational assumption.

157. Looking to the Central Public Works Department Norms, 2022 (Annexure A-17), which are dated 13th July 2022, these are various costs which should be considered while preparing the preliminary estimates and include the following components:

- **I.** Planning Consultancy 4% and Project Management Consultancy 5%"
- **II.** Other Technical Services like Preliminary Sketches, Detailed Drawings, Preliminary Estimates, Structural Design, Execution, Audit & Account etc. is ranging between 7% to 24% depending upon size of the project.
- **III.** Contingency cost is 3%.
- **IV.** ESI & EPF ranging between 0.85% to 4.2%.

Accordingly, considering the CPWD Norms, 2022, the amount proposed towards such soft costs should range between 18% - 20%.

It was highlighted by the Ld. Counsel Mr. Sajan Poovayya, Sr. Adv. on behalf of appellants that the Airport's Comparative Research Program, a study which is conducted by the Transport Research Board (sponsored by U.S. Government Federal Aviation Administration), the soft cost is ranging between 10% to 30% even in the developed countries.

158. It has been observed by AERA that "contingencies do not become a separate cost and are subsumed in the project cost" and it has also been further observed by AERA that "these costs shall be trued up based on cost efficiency and reasonableness at the time of determination of tariff for the next control period".

Therefore, AERA ought to provide for true-up of all the soft costs based on actual incurrence, as per **Sec. 13(1)(a)(i) of the AERA Act, 2008**.

159. Appellant has submitted 16% as Rational Soft Cost keeping in mind **latest tariff order passed by AERA for MOPA, Goa Airport** and also keeping in mind **CPWD Norms** and also keeping in mind **Airport Cooperative Research Program (ACRP) approach**. In view of the aforesaid facts, reasons and AERA's own orders and looking to Sec. 13(1)(a)(i) of AERA Act, 2008, we hereby direct AERA to allow the soft cost proposed by Airport Operator based on Good Industry Practice, while

estimating capital expenditure, which is subject to true-up on actual incurrence basis in the next control period without any notional capping.

160. It has been contended by Ld. Sr. Counsel Apoorv Kurup, Sr. Adv. on behalf of AERA that no details were supplied by the appellant along-with MYTP, justifying soft cost at 15% of the revised Capex schedule. It is also submitted by counsel for AERA that most of the functions claimed under the soft cost can always be done by an Independent Engineer appointed under the Concession agreement and it was pointed out that CPWD Norms are not relevant over here and therefore no error has been committed by AERA in deciding the claim of soft cost at Rs. 28.06 Crores (which includes the cost of Independent Engineer at Rs. 7.90 Crores).

161. The aforesaid contentions raised by the counsel for the Respondent No. 1- AERA are not accepted by this tribunal mainly for the following facts and reasons:

I. AERA has never raised an issue that no details were submitted along-with MYTP by the appellant in the Consultation Paper published by AERA nor this issue has been addressed in the impugned order.

II. As per Paragraph No. 7.3.10 of the impugned Order (Annexure A-1), the detailed description of revised Capex schedule reads as under:

"***7.3.10.*** *Cost claimed towards technical services, PMC, Preliminaries and Pre-operatives, Contingencies, Statutory approvals, Labour cess. Site-preparation, Insurance etc.,*

The Authority observed that the Airport Operator had claimed Rs. 75.98 Crores towards Technical services. PMC, Pre-operatives, Contingencies etc., distributed across all the CAPEX items submitted in the revised CAPEX schedule. Broadly, this cost had been claimed under the following sub-heads such as:

a) Consultancy charges of Rs. 4,02 Crores towards Concept Land use planning and Master planning

b) Cost of Independent Engineer appointed by AAI for three (3) years and projected by Airport Operator for five (5) years amounting to Rs. 7.89 Crores and

c) Cost of technical services. PMC, Pre-operatives, Contingencies, Statutory approvals, Insurance etc.

computed @ 15% of the revised Aero CAPEX for new projects submitted by the Airport Operator amounting to Rs. 64.07 Crores.

………………………………………………….."

[**Emphasis Supplied**]

Thus, it cannot be said that no detailed description was given by appellant for the claim of soft cost.

III. Moreover, looking to Paragraph No. 7.4.15 of the Impugned Order passed by AERA (Annexure A-1), confirms the fact that Mangaluru Airport has made detailed submissions about the soft cost. For ready reference, Paragraph No. 7.4.15 of the impugned order reads as under:

*"**7.4.15.** AO has commented the following with respect to AERA's views on cost claimed towards technical services, PMC, Preliminaries and Pre-operatives, Contingencies, Statutory approval, Labour cess, Site-preparation, Insurance etc. as stated in para 7.3.10 in this Tariff Order:*

- *It is to be noted that Mangaluru airport is a tabletop. Land constrained Airport with only 236.35 hectares of land available for airport development. Apart from the*

limited quantum of total land area of airport, due to non-contiguous nature of airport land and steep variations in topography of the airport site, execution of various capital works is more challenging and requires more manhours for finalization of various designs and estimates.

- *Further it is not correct to compare costs of Mangaluru airport having passenger handling capacity of 2-3 million where capital expenditure planned is only to the tune of Rs. 800 Crs. with much bigger PPP projects like DIAL, BIAL with passenger handling capacity of 30 mn to 70 mn as quantum of works in those projects are much larger ranging from Rs. 5,000 Crs to Rs 10,000 Crs. Large Airports enjoy economy of scale and their soft cost in terms of percentage tends to decrease as compared to airports of lower size.*

Soft costs like PMC, Technical Services, Consultancies pre-operative, contingency etc. are inelastic in nature for smaller projects. Substantial portion of cost tends to be

fixed in nature. Some of the fixed cost which are committed or shall be incurred by MIA are below:

Details	***Nature of Service***	***Rs. Cr.***
Technical Consultancies	*Master Planning, Consultancy services for Traffic Planning, Design, Consultancy for Landside Facilities i.e. Drainage, Utility and Transport Infrastructure, Quantity Survey and Cost Consultancy Services, Design Management Consultancy Services, Design Consultancy Services for Airside Improvement Works, Engineering Consultancy Service for ATF Fuel storage Farm and Hydrant Fuel System. Consultancy for Airport Signage and Wayfinding. Reconfiguration, Modification & Refurbishment of the Existing Terminal & Fore Court.* ***(PO copies for - ₹ 11.5 Cr are attached as Annexure 8.1 to 8.9)***	*13.53*
Salaries for Project Team to be capitalized	*Salaries of project team on rolls of Company. The avg cost per month is ₹ 18 lacs (annual cost of ₹ 2.16 Crs). Cost for 5 years with annual escalation of 10% is projected. Manpower composition*	*14.50*

	includes Lead Projects, Lead Architects, Lead Interior. Lead Master Planner. Procurement & Contract Admin, Operational Health & Safety, and support staff *Also, there is support from head office construction team which has allocation cost of approx. ₹ 10 lacs per quarter.*	
	Total (A)	***28.03***

In view of the aforesaid observations in the impugned Order it cannot be said that no details were supplied by the appellant for Soft Costs.

IV. AERA while determining tariff is of the opinion that required details have not been supplied by the Airport Operator, being a first authority, it could have ordered demanding the supporting material for the claim made by the Airport Operator. The first authority should always endeavor to get as many details as are required to decide the claim of Airport Operator as pointed out in MYTP or to decide the claim of Airport Operator as pointed out in comments made in response to the Consultation Paper.

V. Independent Engineer in the case of Mangaluru Airport, is appointed by Airport Authority of India (AAI). Payment of Independent Engineer is initially to be made by AAI which is thereafter reimbursed by the appellant as per Concession Agreement (Annexure A-2) especially as per 2.2 of Schedule K thereof. Independent Engineer is appointed under Clause 24.1 of the Concession agreement and the duties of the Independent Engineer have been mentioned in Clause 24.2. Looking to these clauses of the Concession agreement, Independent Engineer has to review designs, drawings and documents submitted by AO. The Independent Engineer is appointed by AAI and acts in the capacity of an agent of AAI and is responsible to review and comment upon designs, drawings and specifications. All the works as pointed out under the heading of soft costs cannot be performed by Independent Engineer only. Team work is required for such a complex work and supervision is also required by expert- Independent Engineer. This aspect of the matter has been properly appreciated by AERA in **Paragraph No. 7.3.11 (iii) of Lucknow Order** and it has been elaborated in this paragraph by AERA, role of Independent Engineer to the effect that it is

limited to review. Independent Engineer has nothing to do in day to day preparation of drawings. These are the observations by AERA for the role of Independent Engineer while passing the impugned order for the Lucknow Airport. For ready reference, **Paragraph 7.3.11 (iii) of the Impugned Order** dated 15.06.2023 for **Lucknow Airport** in AERA Appeal No. 3/2023 as under:

> *"**iii.** … The Authority noted that AAI had appointed Engineering Projects India Limited as the Independent Engineer from date of COD with the **responsibility of reviewing the projects being carried out by the Airport Operator** on site and submitting necessary reports to the Airport Operator. The Authority had convened a meeting with the Independent Engineer to review the work performed by them.*
>
> *……………………………."*

[Emphasis Supplied]

VI. In view of the aforesaid interpretation of Concession Agreement by AERA itself, predominant role and responsibility of Independent Engineer is to review the work like designs, drawings and

documents submitted by Airport Operator. Thus, for several preliminary work of like designing, drawing etc., the persons have to be engaged by AO and for hiring their services, their payments are to be made by AO which leads to soft cost. Thus, soft cost has to be incurred by AO even though there is an Independent Engineer whose appointment is a must as per the Concession Agreement. This aspect of the matter has not been appreciated by AERA and therefore we are unable to agree with AERA that because of availability of Independent Engineer, it will obviate, major portions of proposed activities towards which the soft costs have been claimed by the appellant.

VII. The role of Independent Engineer under the MOPA, Goa Airport Concession Agreement is similar to the appellant's Concession Agreement. Here in the case of MOPA, Goa airport, AERA had never insisted that the Independent Engineer's role supplants functions claimed under soft costs and AERA approved soft costs of approximately 13% in MOPA, Goa Airport case in which only 0.48% cost was towards Independent Engineer and therefore even if this 0.48% is excluded AERA effectively approved soft cost margin of 12.50% for MOPA, Goa airport whereas in the present case, AERA has capped 8% of hard costs and therefore also we are not agreeing with the contentions raised by AERA for soft costs.

VIII. CPWD Norms, 2022 (**Annexure A-17**) reflects that there are various costs which should be considered while preparing the preliminary estimates and include the components like:

- Planning Consultancy cost;
- Project management Consultancy cost;
- Other technical services like Preliminary Sketches, Detailed Drawings, Preliminary Estimates, Structural Design, Execution, Audit & Account etc. depending upon the size of the project; etc.

After considering all the aforesaid types of costs, it has been observed in CPWD Norms, 2022 the amount proposed towards such soft costs should range between 18-20%.

IX. CPWD Norms, 2022 which are prepared by the Central Govt. provides enough guidelines for determining reasonable soft cost as done by the Appellant.

X. Looking to the Tariff Order passed by AERA for MOPA, Goa Airport, it appears that consistency should have been maintained by AERA in their approach. What is allowed for one airport cannot be rejected for another airport, for trifle reasons.

162. In view of the aforesaid facts and reasons, we hereby quash and

set aside the decision of AERA in the impugned order (Annexure A-1) so far as it relates to Soft Cost and we hereby direct AERA to allow actual Soft Cost incurred by the Appellant. Putting an artificial cap upon Soft Cost is not contemplated under the applicable laws. Therefore, AERA shall allow actual Soft Cost incurred by the appellant and necessary true up shall be given for the previous control periods accordingly.

V. AGGREGATE REVENUE REQUIREMENT – ARR FOR FIRST CONTROL PERIOD

CARRY FORWARD OF SOME PORTION OF ARR

163. AERA, while computing the aggregate revenue requirement for first control period, decided to carry forward Rs. 248.91 Crores in the next control period, thus approximately **29.23%** of the ARR has been carried forward in the next control period. Though AERA has decided that a particular sum of revenue is required for operating the airports, but, the same is not required to be recovered during first control period of 5 years but it is allowed to be recovered in the next control period of 5 years.

164. It must have been kept in mind by AERA that there are several legal obligations to be followed by Concession Agreement, more particularly, the Concession Fee payment to the Respondent No.2 - Airport Authority of India (AAI).

165. AERA has failed to appreciate that there are various legal obligations to be fulfilled by the Airport Operator under the concession agreement like:

(i) Concession Fee to be paid by the airport operator to the Respondent No.2/Airport Authority of India;

(ii) Monthly reimbursement of the Respondent No. 2 - Airport Authority of India Manpower etc. are some of the most important legal obligations and, therefore, AERA ought not to have been reduced ARR in the first control period and there was no need of carried forward of portion of ARR in the second control period. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order dated 16th January, 2023 (Annexure A-1 to the Memo of AERA Appeal No.1 of 2023).

(iii) The default in the mandatory payment will have irreplaceable repercussions. The carried forward of part of ARR will cause impediments in fulfilling the legal obligations by the airport operator which will erode the credit worthiness of the appellant and will lead to Cost of Debt because the airport operator will have to incur more debt and will have to pay more interest for the deficit which is equal to a part of ARR which is ordered to be

carried forward in the next control period and the increase in the CoD – Cost of Debt will lead to increase in FRoR. Out of the total project cost for the first control period, ARR was decided and out of which Rs.248.91 Crores has been ordered to be carried forward in the next control period which is approximately **29.23%** of the ARR which is unreasonably excessive percentage of ARR.

166. Moreover, whenever such type of ARR is carried forward, it will lead to a situation that future passengers and other stakeholders will have to bear more burden which is carried forward from the earlier control periods.

167. Such type of carry forward of ARR will lead to a situation that significant funds for justified projects and operational expenses which are proposed (which are based on the actual cost), and which are considered in the current ARR and if the part of ARR is to be carried forward, it will have a direct impact upon the completion of justified projects and it will have a bearing upon operation and management of the airports. Once the ARR is decided by AERA, it has to be allowed to be recovered from the stakeholders. Such type of ARR or part thereof cannot be postponed to

be recovered in the next control period. It ought to be kept in mind that ARR is to be arrived at by applying the following calculation methodology:

ARR = (FRoR *x* RAB) + D + O + T – NAR

168. Thus, the aforesaid calculation of ARR is for 1st control period i.e. 1st April, 2021 to 31st March, 2026. All the parameters of the aforesaid formula are of the aforesaid period of 5 years. The airport operator has to purchase the services and the payments are to be made to various bodies by the airport operator. These payments etc. cannot be hampered by postponing recovery of part of ARR in the next control period, there are cascading effects of such type of orders by AERA.

169. It ought to be kept in mind by AERA that the airport operators - appellants have presented all the calculations for determination of ARR based upon, actual cost to be incurred, by the airport operator in 5 years. After accepting the figures based upon actual cost, AERA has been determining ARR and thereafter it is highly unreasonable for AERA to postpone the recovery of ARR which is known as carry forward of part of ARR in the next control period. Because of postponement of ARR, the cost to be incurred by the airport operator cannot be postponed. The gap between the two, will lead to further debt to be incurred by the airport

operator and more the debt, more will be the cost of debt and more the cost of debt will result into more FRoR.

170. As per Section 13 of the AERA Act, 2008, AERA has to take into consideration several factors for determination of the tariff. After determining the tariff, AERA cannot defer ARR. AERA is acting beyond its jurisdiction because AERA Act, 2008 does not prescribe deferring the ARR.

171. The deferment of ARR in the next control period will tantamount to double jeopardy to the appellant because on one hand to fulfill the legal obligations under the Concession Agreement, airport operator has to make payment within a time bound schedule whereas on the other hand, the part of its ARR is getting deferred or carried forward in the next control period of 5 years, meaning thereby to, the cash flow of the airport operator will get impacted which has direct bearing and nexus with the Operation, Management and Development Agreement of the airport. There is already a delay in passing the impugned order by 2 years and, therefore, the airport operator is recovering tariffs at the old rates and now a part of approximately 30% of ARR is being postponed or carried out in the next control period of 5 years. That is not permissible in the eyes of law, especially as per Section 13 of AERA Act, 2008.

172. If this cash flow is obstructed by the impugned order by postponing or by deferring a part of ARR in the next control period, which has direct

bearing upon airport operations and potential of worsening credit profile of the appellant and will escalate the current Cost of Debt beyond 12%. No justifiable reasons are provided by AERA in the impugned order in support of decision of deferment of ARR in the next control period.

173. AERA should have appreciated that the Payment to Airport Authority of India is never postponed. Thus, 30% of ARR is postponed and out of the 70% of total ARR, all legal obligations including payments to Airport Authority of India has to be done, as if 100% ARR has been recovered, by the airport operator. A statutory regulator, respondent No.1 – AERA, is not only obligated, to create a balance, between the consumers and the stakeholders, but, also to balance the interest of airport operators.

174. AERA has not properly appreciated the National Civil Aviation Policy 2016, which emphasizes the need to encourage privatization and regulatory certainty in the airport sector. Under NCAP, 2016, there is no definition of the term **"excess amount"**. The term **"excess amount"** is a subjective term and has been used at a disadvantage of the appellant. AERA has failed to consider in the impugned order that there are two airport operators, namely Airport Authority of India and the appellant. ARR includes true-up for Airport Authority of India for the previous control period which is one of the key components in determination of ARR and the resultant tariff. True-up to the Respondent No. 2 - Airport Authority

of India is to be made upfront **whereas**, appellant recovers the same over the control period of 5 years. Without appreciating these aspects of the matter, the Respondent No. 1- AERA has decided to carry forward approximately 30% of ARR to the next control period arbitrarily.

175. ARR cannot be recovered in a piecemeal manner, because the legal obligations to be carried out and the concession agreement have to be fulfilled at the same time and not in a piecemeal manner and therefore, it will create an imbalance between the payment schedule and "the income" which is determined in the form of ARR for operating the airport. ARR is a justified claim of the airport operator determined by AERA. Now this justified claim of ARR cannot be postponed under the AERA Act, 2008.

176. Moreover, it also appears from the facts of the case that Principles of Natural Justice have also been violated because AERA has never pointed out in the consultation paper that how much amount of ARR will be postponed or will be carried forward in the next control period of 5 years. Thus, without giving opportunity of being heard to the appellant, unilaterally AERA has decided to defer the part of collection of ARR which is approximately 30% to be recovered in the next control period. Therefore also, the decision of AERA to postpone the recovery of ARR or to carry forward some portion of ARR in the next control period is arbitrary

and in violation of AERA Act, 2008 and the same is hereby quashed and set aside.

177. Moreover, as per Clause A5.3.4 of AERA Guidelines, 2011, projected cost is critical in tariff proposal that cannot be ignored by AERA. The impugned decision by AERA is dereliction in the duties by AERA as it failed to take such cash flow issue into consideration while determining the aeronautical tariff.

178. It has been observed by this Hon'ble Tribunal in **Para No. 485, 491 & 492** in its judgment in the case of GHIAL v. AERA dated **14.02.2024** in **AERA Appeal No. 4 of 2021** as under:

> *"**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.*

*"**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."

The facts of the present case are similar to the aforesaid decided case so far as deferment/postponement of ARR is concerned. Hence, in the facts of the present case also, for the aforesaid reasons, the decision of deferment/postponement of ARR deserves to be quashed and set aside.

179. We, therefore, quash and set aside the decision of AERA dated 12th January, 2023 (Annexure A1) so far as it is about the carry forward of portion of the ARR which is Rs.248.91 Crores which is 29.23% of the ARR in Net Present Value (NPV) terms as

on 31st March, 2022 which is made subject to true-up in the next control period.

VI. NON-AERONAUTICAL REVENUES

180. It is further submitted by learned senior counsel for the appellant that AERA has decided that Non-Aeronautical Revenues projected by the appellant is significantly lower than the actual non-aeronautical revenues earned by Respondent No.2-Airport Authority of India (AAI) in Pre-COD period (Pre-Commercial Operation Date) i.e. the period running from FY 2016-17 till COD. AERA has further held that non-aeronautical revenue for FY 2019-20 is Rs.17.36 Crores, will be presumed to be non-aeronautical revenue for FY 2022-23, because the traffic is expected to reach at the level of the pre-COVID period. It has been further observed in impugned order that there shall be an increase in non-aeronautical revenue by 5% every year for the remaining years of tariff period which is the First Control Period and an additional increase of 5% to non-aeronautical revenue for FY 2023-24 on account of expansion of the existing Terminal Building Area. These observations in impugned order have been challenged in the present Appeal by learned senior counsel for the appellant.

181. Looking to facts and circumstances of the case, it appears that these reasons given by AERA are not tenable at law and presumption of non-

aeronautical revenues without any basis, logic, calculation and figures, *ipse dixit* cannot be arrived at by AERA that non-aeronautical revenue shall be Rs.17.36 Crores for FY 2022-23 and there shall be an increase in NAR by 5% every year.

182. Looking at the facts of the case, it appears that non-aeronautical revenue of Mangaluru Airport was severely impacted during COVID-19 and subsequent periods. In order to mitigate the losses and to protect the business interest from such other eventualities in future, the appellant has given a Master Concession for non-aeronautical services. By virtue of this arrangement, interest of the appellant is secured by way of a minimum guaranteed amount or an amount arrived at by multiplying the Revenue Share Percentage (of 10%) with Gross Revenue in that year, whichever is higher. The entire risk of non-aeronautical services is passed on to the Master Service Provider.

183. The Master Service Provider was selected through Open Competitive Bidding Process. The said bidding process had commenced with an advertisement in the newspaper, followed by e-Tendering on the Government recognized procurement portal. The entire bidding process was undertaken under the supervision of External – Consultant i.e. PwC. AERA has not challenged the bidding process and has observed in paragraph no. 11.2.2 of the impugned order as under:

*"**11.2.2***

*The Authority noted that the AO undertook two-stage tendering process through e-tender mode vide Request for Proposal ("**RFP**") dated March 1, 2021"*

Under the said arrangement, the Master Service Provider shall pay to the Airport Operator/appellant an amount of Rs.6 Crores per annum as a minimum guarantee or an amount arrived at by multiplying the Revenue Share Percentage (10%) with gross revenue in that year, whichever may be higher.

184. It appears that the bid process was completely fair and transparent and there are no allegations regarding the conduct of the bid process. It ought to be kept in mind that no interference is required with the outcome of the open competitive bidding process as long as the process is not vitiated by arbitrariness, illegality and unfairness and, therefore, it was not justified for AERA to interfere with the price discovered through open competitive bidding process and assuming the non-aeronautical amount on a notional basis. In absence of allegations about arbitrariness, illegality or unfairness in the bidding process, AERA should have maintained the sanctity of open competitive bidding process.

185. Moreover, AERA ought not to have compared non-aeronautical revenue discovered through open competitive bidding process with non-aeronautical revenue recovered by Respondent No.2-AAI during pre-COD period because, they are not comparable and AERA is not justified in comparing two revenues which are non-comparable.

186. AERA cannot presume that the Airport Operator must earn a particular amount of non-aeronautical revenue. On the contrary, once the bidding process is just, proper and equitable and there are no allegation of arbitrariness, illegality and unfairness, non-aeronautical revenue received by airport operator neither can be increased nor can be decreased by AERA. In the present case, AERA has presumed non-aeronautical revenue at Rs.17.36 Crores for FY 2022-23. AERA has further presumed that there must be a 5% increase in non-aeronautical revenue every year. Instead of these presumptions, AERA should have looked at the actual non-aeronautical revenue received by the Airport Operator through a Master Service Provider.

187. It has been held by this Tribunal in judgment dated **21.05.2023** in **AERA Appeal No.1 of 2021** and **AERA Appeal No.1 of 2016**, in paragraphs 164,165,166 as under:

> ***"164.*** *Looking to the Agreement Clauses of OMDA especially* ***Clause No.8.5.7 (i) (c)****, it appears that appellant which is*

*a JVC has to follow a competitive bidding procedure when the value of the contract exceeds Rs.50,00,00,000/-. For the ready reference, the relevant part of **Clause 8.5.7** reads as under:*

"8.5.7 Contracts, Leases and Licenses

(i) Sub-Contracting, Sub-leasing and Licensing

(a)......................................

(b)......................................

(c) Before entering into contracts or granting any sub-lease or license, the JVC will:

(aa) comply with Applicable Laws including without limitation (where applicable) the procedures for competitive bidding in the field of public works concessions and in any case for every contract whose value exceeds Rs. 50,00,00,000/- (Rupees Fifty Crores Only) the JVC shall ensure that the selection of the counter party is by way of a competitive bidding procedure; and

(bb) inform AAI of the counter-party or parties to every contract, sub-lessee or licensee (as the case may be) and their shareholding pattern.

(d) Without prejudice to the foregoing,................"

(Emphasis Supplied)

*In view of the aforesaid provisions of OMDA, the competitive bidding process was followed by JVC (i.e. Appellant) and the bidding process is not questioned by AERA. Lowest no.1 is given the contract for Rs.9782.15 Crores for phase 3A expansion project of IGI Airport, Delhi. The aforesaid amount has to be paid by the appellant for phase 3A expansion project of IGIA and there is a separate contract between JVC and lowest no.1. This contract has to be respected by AERA. No terms of the contract between JVC and lowest no. 1 can be altered by AERA, much less the competitive bidding price or **"market discovered price"** arrived at during the transparent bidding process. This amount cannot be reduced by AERA under the guise of "the efficient cost".*

165. *Much has been argued by respondent no. 1 and respondent no. 2 that that AERA had also appointed a consultant and as per his repo Rs.7968 Crores should have been a cost. Thereafter, AERA has added Rs.7968 Crores (consultant's figure), the amount of GST credit and the impact of inflation and has arrived at a new figure as an*

efficient cost at Rs.9126.42 Crores and, therefore, instead of Rs.9782.15 Crores, partially out of this amount, Rs.9126.42 Crores was considered of capital expenditure as part of RAB. This contention of the counsels of respondent no.1 and respondent no.2 (i.e. AERA & FIA) is not accepted by this Tribunal mainly for the reasons that:

***(a)** The global competitive bidding process was never called in question by AERA meaning thereby to there was no allegation of fraud or procedural lapse or any illegality in the bidding process. Thus, bidding process followed by this appellant was transparent;*

***(b)** As per OMDA, especially as per Clause 8.5.7 (i) (c) of **OMDA**, if the sub-contract value is more than Rs.50,00,00,000/- (Rs.50 Crores), the JVC has to follow a competitive bidding procedure;*

***(c)** 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;*

***(d)** A separate contract has been entered into between JVC and lowest No.1 for Phase 3A expansion of IGIA. The cost*

which is to be paid by this appellant to the successful bidder has been reduced in writing, in the contract and, therefore, AERA has no power, jurisdiction and authority to reduce the same nor the AERA has the power to make changes in any of the Clauses of the agreement, much less by giving a vague and arbitrary reason that as per opinion of AERA, efficient cost is Rs.9126.42 Crores instead of contractual amount of capital expenditure, which is arrived at through transparent and legally valid bidding process at Rs.9782.15 Crores;

(e) *The figure of Rs.9126.42 Crores arrived at by AERA is nothing but an estimated cost or a probable cost whereas, Rs.9782.15 Crores is a cost of capital expenditure for Phase 3A capital expansion of IGIA, Delhi is based upon a contract which is crystallized or reduced in writing, after global bidding process. If this figure is allowed to be altered by AERA in the name of "efficient cost", terms of contract will be altered which is not permissible, in the facts of the present case, especially when the bidding process is not challenged by AERA nor there is any allegation that there is a procedural lapse or fraud played by this appellant;*

(f) *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"****;*

(g) *The figure given by the consultant's report and the final figure arrived at by AERA by addition of impact of inflation and GST credit, per se is not sufficient for reduction of or for disallowance of part of the capital expenditure undertaken by DIAL for Phase 3A expansion of IGIA, Delhi;*

(h) *AERA cannot differ the Consideration of price incurred to a subsequent control period when the actual price is available during the relevant control period;*

(i) *The cost of expansion works, given by the consultant is only an* ***estimated cost*** *and AERA has treated the same as*

the efficient cost by adding impact, inflation and GST, which is in fact a violation of-

i. Sec. 13(1)(a)(i) of AERA Act, 2008; and

ii. Violation of agreement between JVC and lowest no.1 because AERA has in fact altered the terms of the contract.

For the aforesaid reasons, the contentions of counsel for respondent nos. 1 and 2 for disallowance of part of Capital Expenditure undertaken by DIAL for Phase 3A expansion of IGIA, Delhi is not accepted by this Tribunal. Looking to the facts of the present case, AERA cannot reduce the Capital Expenditure for Phase 3A expansion from Rs.9782.15 Crores to Rs.9126.42 Crores. ***We hereby quash and set aside the decision of AERA*** *dated 30th December, 2020 for 3rd Control Period (2019-2024) to the extent it disallows the part of the capital expenditure undertaken by DIAL for Phase 3A expansion of IGI Airport, Delhi. The reasons given by AERA in order dated 30th December, 2020 for 3rd Control Period at paragraphs 4.5.5 and 4.6.1, so far as they relate to the cost for Phase 3A expansion is concerned, are hereby quashed and set aside.*

166. *Determination of tariff by the regulatory authority and challenge of the same in the Court or Tribunals is not so unknown in The Electricity Act, 2003. There is a provision to determine tariff in Part VII of the Act, 2003 under Section 61, 62, 63, 64. For the ready reference,* ***Section 63 of The Electricity Act, 2003*** *reads as under:*

> *"**Section 63. Determination of Tariff by Bidding Process***
>
> *Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such **tariff has been determined through transparent process of bidding** in accordance with the guidelines issued by the Central Government."*
>
> (***Emphasis Supplied***)

Under the Electricity Act, 2003 while determining the tariff for the Electricity the appropriate commission has to give due weightage to competitive bidding price. Though there is no such provision in AERA Act, 2008 but The Electricity Act, 2003 provides sound and transparent policy, as to determination of the tariff. Though this provision is not available in the AERA

Act, 2008, it ought to be kept in mind that competitive bidding price arrived at through legal, valid and transparent bidding process cannot be brushed aside or cannot be given go-bye by AERA under the guise of efficient cost, just by taking consultant's report and by ignoring OMDA, AERA Act, 2008 and by re-writing the terms of the contract. The judgments upon which the counsels for the respondents are relying upon for the aforesaid point are not applicable to the facts of the present case especially that bidding process followed by the appellant is never called in question by the respondents nor there is any allegation that bidding process was tainted by fraud or by procedural lapse and, therefore, the bidding process followed by this appellant in pursuance of clause 8.5.7(i)(c) of OMDA is by transparent bidding process and the competitive price arrived at after negotiations with the lowest bidder is "real and efficient cost". Such cost is a ***"market discovered price"*** *through competitive global bidding process. In this set of circumstances of the present case makes the present case different from the facts of the cases upon which reliance is placed by counsels for the respondents and, therefore, the judgments are not applicable in the*

*present AERA Appeal No. 1 of 2021. In fact, as per Section 13(1)(a)(i) of AERA Act, 2008, the expenditure incurred ought to be considered by AERA. Thus, in the facts of the present case without any justifiable reasons, arbitrarily, AERA has partly rejected the capital expenditure undertaken by DIAL for Phase 3A expansion of IGIA, Delhi under the guise of "**the efficient cost**" which is not permissible. Consultant's report gives probable cost whereas the figure arrived at for capital expenditure for Phase 3A expansion of IGIA through competitive bidding process is a "real cost" which is also reduced in writing by the way of a separate contract between the JVC and the **lowest-1 (L-1)**.*

Thus, in view of the aforesaid facts and reasons, Issue No. VI is answered in negative. AERA cannot reduce an amount of Capex for Phase 3A expansion project of IGIA, Delhi proposed by appellant which is a bidding price of L-1 for which separate contract has also been entered into between appellant and L-1."

188. It has been held by this tribunal in judgment dated **14.02.2024** in **AERA Appeal No. 4/2021** in case of **GHIAL** for TCP in para **380, 381**, and **382** which read as under:

*"**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."*

189. It further appears from the facts of the case that open competitive bidding process was fairly conducted by the appellant and the Master Service Providers (MSPs) who were offering the highest amount was given the contract for non-aeronautical services, a separate contract was entered into between the present appellant and Master Service Provider and as stated hereinabove, the minimum guaranteed amount was Rs.6 Crores to be paid by the Master Service Provider or an amount arrived at by multiplying the revenue share percentage (10%) with Gross Revenue in that year whichever may be higher. Thus, this contract ought to have been considered by AERA as per provisions of section 13(1) of AERA Act, 2008 to be read with AERA Guidelines, 2011. AERA cannot alter the terms of the agreement nor the amount of the agreement. No potential bidder has raised any issue or that they were denied equal participation in the entire bidding process.

190. It ought to be kept in mind that financial criteria in the bid process is necessary for Quality and Sustainability. Looking to the facts of the case, it appears that the bid criteria was designed to achieve the highest standards of service and fiscal responsibility. Adani Holdings Airports Limited was selected as the Master Service Provider on transparent evaluation criteria as per the conditions of the bid through open competitive bidding process. Neither any authority nor any potential bidder had raised any issue concerning the interest of the bidder being jeopardized nor there is any denial of equal participation in the entire bidding process. The Master Service Provider has to pay a minimum guarantee of Rs.6 Crores as non-aeronautical revenue or an amount arrived at by multiplying the revenue share percentage (10%) with Gross Revenue in that year, whichever may be higher. This amount received from Master Service Provider should have been treated as non-aeronautical revenue by AERA.

191. Moreover, as per Clause 5.1.7 (i) of the Concession Agreement, a contract can always be given by the Airport Operator. For the ready reference, Clause 5.1.7 (i) of the Concession Agreement (Annexure A-2) is as under:

> "***5.1.7*** *The Concessionaire shall, at its own cost and expense, in addition to and not in derogation of its*

obligations elsewhere set out in this Agreement:

(i) *provide, or* ***cause to be provided****, Aeronautical Services and Non-Aeronautical Services at the Airport in accordance with the provisions of this Agreement, Applicable Laws and Applicable Permits;"*

The words used are "**cause to be provided**", this clause expressly permits the concessionaire (Appellant) to discharge its obligation for providing non-aeronautical services not only directly, but, also through third-party agencies or sublicenses.

192. In cases of MIAL and DIAL, several non-aeronautical services such as **Cargo Handling** and **Ground Handling** are concessioned out to third-party service providers under the Master Concession Agreement. These concessionaires provide these non-aeronautical services and charges to users. The concessionaires provide a revenue share of total fees charged from the users to the Airport Operator. In that case, only 30% of those revenue share values are considered for cross subsidization and not the Gross Revenue earned by the concessionaire. The very same logic is applicable to the present six airports which are appellants thus, it cannot be said that non-aeronautical services cannot be rendered by a third-party.

193. Thus, in the facts of the present case also, the Master Service Provider (**MSP**) has been given a contract of providing non-aeronautical services, including City Side Development which is comparable with non-aeronautical services contracts like Cargo Handling and Ground Handling contracts for DIAL and MIAL. The Master Service Provider is also providing consideration which must be treated as non-aeronautical revenue without any addition or subtraction by AERA.

194. As per section 13 (1)(a)(v) of the AERA Act, 2008, while determining the tariff for aeronautical services, AERA will take into consideration the "revenue received" from services other than aeronautical services, thus, the "revenue received" by the Airport Operator should be taken into consideration and no imaginary figure should be kept in mind by AERA as non-aeronautical revenue. AERA must give due weightage to a legally valid contract. AERA can neither replace the terms of such a contract nor can it alter any amount receivable by the Airport Operator.

195. Appellant has entered into Master Service Agreement for non-aeronautical services including for City-Side Development and as per **Clause 28.3.7** of the Concession Agreement, non-aeronautical revenue at airports includes revenue from City-Side Development. For the ready reference, Clause 28.3.7 of the Concession Agreement reads as under:

*"**28.3.7** Notwithstanding anything to the contrary contained elsewhere in this Agreement, it is expressly noted and agreed that all revenues/ monies that the Concessionaire is entitled to receiving in respect of any sub-leases, **assignments or other Encumbrances with respect to the City Side Development**, either in terms of the monthly fees, charges, rents or revenue shares, as the case may be, would be considered as revenues from Non-Aeronautical Services for the purposes of determining the Aeronautical Charges pursuant to Clause 28.3.2 above."*

196. In **Order No. 39/2023-24** dated **07.03.2024** in the matter of determination of Tariff in respect of the Ground Handling Services for M/s IndoThai Kolkata Private Limited (IKPL) at Netaji Subhash Chandra Bose International Airport, Kolkata for the First Control Period (FY 2023-24 to FY 2027-28), when the stakeholders sought intervention of Respondent No.1 / AERA to review the tendering process of License Agreement between the ISP and the Airport Operator, Respondent No.1/ AERA responded stating that the bidding process for awarding such contracts is a non-regulatory issue and should be addressed between the stakeholders. For ease of reference the relevant extract of the same has been reproduced herein below:

*"**1.13** As regard to the aspect of awarding Concessions by the Airport Operator on Revenue Share basis, the Authority observes that Concession Fee/ Revenue Share paid by the ISP to the Airport Operator is in accordance with the Concession Agreement executed between the Service Provider and the Airport Operator. Further, as per regulatory approach of AERA, the royalty paid by the ISPs to the Airport Operators is treated as aeronautical revenues in the hands of Airport Operators; hence, such revenues directly help in subsidizing the Aeronautical Tariffs, levied by the Airport Operators to the Airlines.*

Further, as per the Authority, bidding process to award such contracts, based on which ISPs pays Revenue Share to Airport Operators, is a non- regulatory issue and such matters may be dealt between the stakeholders at an appropriate forum."

197. Further, in Order No. 16/2024-25 dated **01.03.2025** in the matter of Determination of aeronautical tariff for **Lal Bahadur Shastri International Airport, Varanasi (VNS)** for the Second Control Period (01.04.2024 -31.03.2029), Respondent No.1/AERA has acknowledged that there is no relationship between the O&M Expenditure of the airport and

non-aeronautical revenue. For ease of reference, the relevant extract of the same has been reproduced herein below:

> *"10.5.1 The Authority has noted FIA's comments on NAR projected by AAI for the Second Control Period and AAI's response on the same. AAI has aptly explained the generation of non-aero revenue in context of consumer behaviour and spending pattern at the airports. Further, there is no direct relationship between the O&M Expenditure of the airport and generation of the non-aeronautical revenue ..."*

198. Further, in paragraph 11.2.7 at page 252 of the impugned order **(Annexure A-1**), AERA has observed that the proportion of NAR revenue projected by the Appellant should be equal or comparable to the quantum of O&M Expenses. Whereas, in case of the Appellant, the situation is peculiar wherein the projection of NAR is substantially lesser than O&M Expenses.

199. There cannot be any doubt that there is appellant inconsistency in the approach adopted by AERA concerning two different airports. We deprecate such a contradictory stance of AERA and are compelled to observe that such an approach underscores a lack of due consideration and careful analysis on the part of AERA while issuing the impugned order.

200. There is no concept of notional non-aeronautical revenue under the AERA Guidelines, 2011, moreover, Section 13(1)(a)(v) of the AERA Act, 2008, categorically states the word "**revenue**" meaning thereby to that revenue must be actual revenue and not notional revenue. Thus, neither under the AERA Act, 2008 nor under the AERA Guidelines, 2011, there is a concept of notional revenue. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order dated 12.01.2023 (Annexure A-1).

201. Further, AERA has completely ignored the vital fact that the Master Service Provider is also obliged to undertake City Side Development at the airport. Meaning thereby, the entire capital and operational expenses are to be borne by the Master Service Provider for the City Side Development as well. As and when such development takes place, it will also add to the non-aeronautical revenue of the appellant and therefore, AERA is not right in its approach to reach the conclusion that the appellant has not taken any steps to increase its non-aeronautical revenue.

202. AERA cannot sit over with wisdom of the interested bidders and dictate with the Appellant that the Appellant ought not to have accepted the bid of the highest bidder. In absence of any allegation of bias, arbitrariness or unfair treatment to the bidders, even the courts cannot

sit in appeal over the commercial wisdom of the parties and question the outcome of the fair and transparent bidding process.

203. Several arguments have been canvassed by learned senior counsel for AERA about the bidding process etc. but these reasons are not mentioned in the impugned order. Thus, by virtue of affidavit in reply filed by AERA, additional reasons cannot be supplied to the impugned order. As per the judgment of Mohinder Singh Gill v. Chief Election Commissioner reported in **(*1978) 1 SCC 405***, no reasons can be supplied to justify the impugned order in the counter affidavit. The reasons must have been given in the impugned order itself. For ready reference, the relevant portion of **Paragraph 8** of the said judgment reads as under:

> ***"8.*** *The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out…*
>
> ***Orders are not like old wine becoming better as they grow older****."*

[Emphasis Supplied]

204. Thus, in view of the aforesaid facts, reasons and judicial pronouncements, **we hereby quash and set aside the decision of AERA that non-aeronautical revenue projected by the appellant is lower than actual NAR earned by Respondent No.2-AAI in Pre-COD period i.e. the period running from FY 2016-21 till COD i.e. 31.10.2020**. We also hereby quash and set aside the decision of AERA at Annexure A-1 for non-aeronautical revenue wherein AERA has held that non-aeronautical revenue of FY 2019-20 will be assumed also for FY 2022-23 as traffic is expected to reach Pre-COVID period. **We also hereby quash and set aside AERA's decision to increase non-aeronautical revenue by 5% Year-on-Year basis for remaining tariff for First Control Period. We also quash and set aside the decision of AERA of additional increase of 5% to non-aeronautical revenue for FY 2023-24 on account of expansion of existing terminal building area in FY 2022-23 and we hereby direct AERA to take into consideration the actual non-aeronautical revenue received by airport operator from Master Service Provider in pursuance of a contract between airport operator and Master Service Provider which is Adani Airport Holding Limited (AAHL), and necessary true up shall be carried out by AERA.**

VII. TAXATION FOR FIRST CONTROL PERIOD

30% FOR THE NON-AERONAUTICAL REVENUE FOR COMPUTING TAXES

205. As per Tariff Guidelines, 2011 (Annexure A-16), the formula for arriving at Aggregate Revenue Requirement (ARR):

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

In this formula, 30% of Non-Aeronautical Revenue is to be utilized for cross-subsidization and to that extent the value of ARR will be reduced. Thus, 30% of the NAR partakes character of aeronautical revenue. 30% of NAR will be treated as aeronautical revenue for the purpose of calculation of ARR and therefore the same is deducted from the total value of ARR. This is also known as Hybrid Till mechanism and therefore while computing factor 'T' in the aforesaid formula tax on 30% of NAR has to be included because 'T' is equal to amount equal to tax upon aeronautical revenue. As 30% of NAR is to be treated as aeronautical revenue (as per Hybrid Till mechanism) tax on 30% of NAR is to be added in the value of 'T'. This aspect of the matter has already been argued out in more than one AERA appeals and repeatedly it has been decided that tax on 30% of

NAR has to be calculated while computing factor 'T' in the aforesaid formula for arriving at ARR.

206. Paragraph No. **390** & **398** of the judgment of this Tribunal dated **06.10.2023** in AERA Appeal **No. 9 of 2016** & AERA Appeal **No. 2 of 2021** is relevant in deciding the present issue:

> ***"390.*** *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).

398. *It is highly appurtenant to keep in mind that in the formula of Target Revenue (TRi = RBi x WACCi + OMi + Di + Ti – Si), T is to be calculated as an amount equal to corporate taxes on earnings pertaining to aeronautical services as defined in SSA meaning thereby to irrespective of the fact that tax is actually paid or not**, but,** amount equal to corporate taxes on the earnings pertaining to aeronautical services (including upon the amount of S-factor should be added as T in the formula of Target Revenue) and, therefore, one of the reason given by AERA for the aforesaid issue that MIAL is not likely to pay income tax on the revenue earned during the 3rd Control Period is devoid of any merit. It has been further observed by AERA in the impugned order that as and when MIAL will pay the Income Tax for the 3rd Control Period in the true up process in the next control period, the said amount of tax will be taken into consideration. This observation is also devoid of any merit for the reason that in the formula of target revenue as stated*

*hereinabove, the component of an amount equal to **"T"** has to be added and the methodology to calculate **"T"** is an amount equal to corporate taxes on earnings pertaining to aeronautical services (including the amount upon "S" factor), irrespective of the fact that whether actually the taxes are paid or not. The payment of tax to income tax authority and calculation of target revenue are two different things. The formula of a target revenue is an agreed formula as per the agreements between the appellant and the Government of India. Thus, the T factor is equal to an amount of corporate taxes. AERA has presumed that T is equal to amount of corporate taxes paid by the appellant. This definition cannot be amended nor the formula can be amended by AERA. AERA has presumed that T=corporate taxes paid by appellant. This addition of the words, neither in the definition nor the formula is permissible because it is an agreement between the appellant and the Government of India. **We, therefore, quash and set aside observations of AERA, so far as they are related to exclusion of "S" factor as part of aeronautical base, while determining aeronautical taxes (i.e. T). We,***

hereby hold to include "S"-factor as part of aeronautical revenue base while determining aeronautical taxes (i.e. T)."

207. Paragraph **No. 421** to **424** of the judgment of this Tribunal dated **14.02.2024** in AERA Appeal **No. 4 of 2021** is relevant in deciding the present issue:

> ***"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."

208. Similarly, in paragraph **No. 145** of the judgment of this Tribunal dated **21st July 2023** in **AERA Appeal No.1 of 2021** in the case of **DIAL Vs. AERA** has been held as under:

> *"**145.** …This definition cannot be amended nor the formula can be amended by AERA. AERA has presumed that T is equal to amount of corporate taxes paid by the appellant. This definition cannot be amended nor the formula can be amended by AERA. AERA has presumed that T=corporate taxes paid by the Appellant. This addition of the words, neither in the definition nor the formula is permissible because it is an agreement between the appellant and the Government of India. **We, therefore, quash and set aside observations of AERA for 2nd Control Period as well as for 3rd Control Period, so far as they are related to exclusion of "S" factor as part of aeronautical base, while determining aeronautical taxes (i.e. T). We, hereby hold to include "S"-factor as part of aeronautical revenue base while determining aeronautical taxes (i.e. T), for 2nd as well as 3rd Control Period**.*

Thus, in view of the aforesaid facts and reasons, Issue No. IV is answered in affirmative. "S-factor" should be considered as a part of Aeronautical Revenue Base while determining Aeronautical taxes (i.e. T), and consequently true up has to be given for the earlier control periods also."

209. AERA should have followed the earlier decisions pronounced by this Hon'ble Tribunal in more than one AERA Appeals especially when no stay has been granted by Hon'ble the Supreme Court of India. Merely because Appeal is pending, no stay could have been presumed by AERA otherwise it will tantamount to a situation that '**though stay has not been granted by Hon'ble the Supreme Court of India, AERA has granted stay on their own upon the decision of TDSAT'**. This approach of AERA is against several decisions rendered by Hon'ble the Supreme Court of India in which it has been held that trial courts/tribunals/authorities cannot presume stay when the same has not been granted by Hon'ble the Supreme Court of India.

210. In view of the aforesaid facts, reasons and judicial pronouncements, we hereby quash and set aside the decision of AERA not to consider 30% of NAR while determining the Corporate Taxes. The observations of AERA in the impugned

order (Annexure A-1), so far as they are related to exclusion of "NAR" factor as part of the Aeronautical Base, while determining aeronautical taxes ("T") is hereby quashed and set aside. We hereby direct AERA to consider 30% NAR while determining the Corporate Taxes. We hereby hold to include "NAR" factor as a part of aeronautical revenue base while determining aeronautical taxes ("T").

VIII. PRE-COMMERCIAL OPERATION DATE EXPENDITURE (PRE-COD EXPENDITURE)

211. Looking to the impugned order, AERA has decided to allow Rs.2.89 Crores towards Pre-COD expenses as a part of the O&M expenses as against an amount of Rs.16.37 Crores as a part of O&M expenses for Frist Control Period. Rs.2.89 Crores includes certain costs pertaining to salary expenses incurred by Adani Group and the appellant. This decision of AERA in impugned order is challenged by the appellants.

212. There are several types of expenditures which are to be incurred by the Airport Operator prior to COD. In the case of Mangaluru airport, COD is 31.10.2020. As per Clause 5.1.1 of the Concession Agreement, there are certain mandates for Concessionaires. This appellant has to perform all the obligations stipulated under the agreement. In furtherance of this

appellant incurred, necessary pre-COD expenses including salaries, professional consultancies, the admin costs, all of which were essential for ensuring operational readiness and seamless transition from Respondent No.2-AAI to the Airport Operator.

213. Clause 5.1.1 of the Concession Agreement (Annexure A-2) does not restrict the allowability of such expenditure as the meaning of the term "**The Concessionaires shall, at its own cost an expense...**" is to provide clarity between Appellant and Respondent No.2, as to who will pay, the cost of such expenses. **Clause 19.10 and 19.2** of the Concession Agreement reads as under:

> *"**19.10** Check-in Services*
>
> *19.10.1 **The Concessionaire** shall provide or cause to be provided, **at its own cost and expense**, the infrastructure required for operation of check-in services at the Airport for and in respect of departing Users ("Check-in Services")."*
>
> *"**19.2** Ground Handling Services*
>
> ***The Concessionaire shall** provide or cause to be provided as per Applicable Laws and Good Industry Practice, **at its own cost and expense**, the infrastructure required for operation of the ground handling services required at the Airport for and in respect of the Users, like aircrafts,*

passengers and cargo, which shall include ramp handling, traffic handling, aircraft handling, aircraft cleaning, loading and unloading ("Ground Handling Services")."

[Emphasis Supplied]

214. There is no dispute that as per clause 15.1.1 of the Concession Agreement, the Commercial Operation Date (**COD**) of the Concession for Mangaluru Airport shall be the date on which all Conditions Precedent have ben satisfied in accordance with clause 4 and the Appellant has achieved Financial Close.

215. Clause 15.1 provides that the Appellant shall achieve COD within 180 days from the date of the Concession Agreement and in the event of delay, it shall be entitled to a further period not exceeding 90 days and that it shall from COD, be entitled to commence the operation and management of the airport. There are several other obligations of the Appellant which it was required to fulfil after COD. These aspects of the matter have not been properly appreciated by AERA while passing the impugned order especially for the present issue of pre-COD expenditure.

216. The Appellant has submitted that it was obliged to take over the operations, management, and development of Mangaluru Airport from COD and therefore, there was no other way for the Appellant to fulfil this obligation, except hiring the required manpower and engaging the

consultancy agencies. The Appellant has further submitted that as a part of preparation for the satisfaction of Conditions Precedent, support of manpower and consultants was required. The Appellant submitted that thus, they required to be onboarded in advance to make them acquainted with the existing operations and management of the airport.

217. The provisions of the Concession Agreement including the Clauses which are pointed out hereinabove categorically clarifies as to who has to incur Pre-COD Expenditure. No clause thereof restrict the parties to consider the expenses as pass through. Moreover, looking to clause 28.4.3 of the Concession Agreement which provides that "the Parties agree and acknowledge that the Concessionaire expressly waives its right to seek as pass- through in the Aeronautical Charges, such costs and/or expenses which the Concessionaire is restrained under this Agreement from seeking to be passed- through thereunder". Concession Agreement has provided specific expenses which are not to be considered pass-through, such as Clause 27.1.2 of the Concession Agreement wherein it is specifically mentioned that Monthly Concession Fee will not be considered for pass-through. Accordingly, the Concession Agreement does not restrict the allowability of the Pre-COD Expenses and, therefore, AERA ought to have allowed the amount of Pre-COD Expenses, including salaries,

consultancies and admin costs to be recognized in True-Up, in line with regulatory and contractual principles.

218. AERA ought to have appreciated the fact that the "the process of operationalizing the airport is akin to Operational Readiness and Airport Transfer **("ORAT")** activity which is done when a new facility is commissioned."

219. Looking to the Concession Agreement, there are various Clauses which mandates certain services performed by appellant prior to COD. The cost incurred by the appellant covers maintaining a smooth transition which cannot be lost sight of and it cannot be disallowed by Respondent No.1-AERA. Moreover, the activities performed prior to COD are critical for timely achievement of COD and expenditure incurred towards the same ought to have been considered by AERA**.** The services performed prior COD can be performed by this appellant only through its own employees and services of various professional experts and not by only senior personnel of Respondent No.2- AAI.

220. To ensure a seamless transition from Respondent No. 2-AAI to the appellant, several activities were to be performed as Concession Agreement prior to COD like:

i. Operational Readiness familiarisation;

ii. training;

iii. Trial programs;

iv. Airport facility assessment;

v. Capacity building and human resource management;

vi. Observation period;

vii. financial closure, etc.

221. To perform these duties, expenditure has to be incurred by Airport Operator for pre COD period and the same ought to have been considered by AERA as per Section 13(1)(a) of AERA Act, 2008.

222. There is no Clause in the Concession Agreement that the appellant cannot claim pre COD expenses.

223. In fact, there is no benchmarking in the Consultation Paper and consequently, there is no basis with Respondent No.1-AERA for their observation of "**high pre-operative expenses**".

224. It ought to be kept in mind that activities such as operational readiness, familiarization & training, trial programs, airport facility assessment, capability building and human resource management, observation period, financial closure etc. are integral part of project's success. In fact, AERA ought not to have raised an issue with regard to the reasonableness of expenses to be incurred by appellant prior to CoD. Once the Letter of Award is granted in favour of the appellant, it is incumbent upon the appellant to be prepared and ready in order to

achieve COD within the stipulated time and commence operations accordingly. To achieve this result within a time-bound schedule prior to commencement of COD, expenditure has to be incurred and hence, in fact, pre-COD expenditure incurred by this appellant should have been allowed on actual basis by AERA. The aforesaid aspects of the matter have not been appreciated by AERA while passing the Impugned Order (Annexure A-1).

225. We have no hesitation to observe that there is a cost of hiring the manpower and engaging the consultants which was incurred by the Appellant. The Appellant is thus seeking reimbursement of such cost and expenses which were imperative to achieve COD and fulfil its obligations under the Concession Agreement, post-COD.

226. Covid-19 had occurred in our country after execution of the Concession Agreement dated 14.02.2020 (**Annexure A-2**). There cannot be any dispute that due to occurrence of Covid-19, the period to achieve COD was extended by Respondent No.2/AAI, by period of 90 days. It is not a case of Respondents that the Appellant was not required to fulfil its obligations to achieve COD as well as its post-COD obligations. The Respondents could not have expected that the manpower should have been laid off during Covid-19 to reduce the pre-COD expenses.

227. **We, therefore, quash and set aside the decision of AERA in the impugned order so far as it relates to the pre-COD expenditure. AERA has allowed part of pre-COD expenditure. We are of the considered view that the Appellant is entitled for passthrough of costs and expenses incurred, prior to COD and the same should form part of O&M expenses in its entirety. We therefore direct AERA to allow INR 16.37 Crore, incurred by the appellant as pre-COD expenses, as a part of O&M expenses for the FCP.**

IX. OPERATION AND MAINTENANCE (O&M) EXPENSES AIRPORT AUTHORITY OF INDIA MANPOWER AND AIRPORT OPERATOR MANPOWER

228. Looking to the impugned order passed by AERA dated 12.01.2023 (Annexure A-1), AERA has decided to consider only 6% instead of 15% growth rate towards man-power expenses for both AAI employees and the employees of the appellant across all the five tariff years of the First Control Period.

229. As per the Appellant, it had to offer select AAI employees with a significant increase in the existing remuneration structure, as they were not inclined to leave public sector and join the Appellant. None of the

select AAI employees accepted the offer and therefore, the Airport Operator has to hire new employees with necessary skill in the sector with a substantial premium. AERA has considered increase of 6% towards growth rate, keeping in mind other airport. The "**One-size fits all**" approach cannot be applied for determining the growth rate of employees.

230. Moreover, in paragraph No. 10.6.2 of the Tariff Order which is under challenge, it has been observed by AERA that it has decided to consider O&M Expenses incurred by the appellant during First Control Period at the time of True-Up in Second Control Period subject to reasonableness and efficiency.

231. Looking to the aforesaid observation of AERA, AERA should have considered Truing-Up all the O&M Expenses actually incurred by the Airport Operator. Looking to the proposition of the Airport Operator demanding 15% growth rate, man-power expenses for both AAI employees and the appellant across all the five tariff years for the First Control Period and also looking to the overall growth in normal circumstances, AERA ought to have allowed at least 12% of growth rate towards the manpower expenses which is reasonable, just and equitable. We, therefore, quash and set aside the decision of AERA to consider only 6% growth rate towards the manpower expenses. **We, therefore, set**

aside the decision of AERA to allow only 6% increase in the manpower cost and direct AERA to consider actual increase on a Year-on-Year basis in the average cost of salaries for all employees including AAI manpower and Airport Operator manpower as the same shall not be artificially capped at 6%.

232. AERA has rationalised the Manpower headcount for the First Control Period at 140 employees whereas the AO-appellant has placed a manpower plant deployment for more number of employees.

233. Initially, Mangaluru Airport had made a representation that they are in need of 249 employees, but, thereafter, upon due deliberations and after several adjustments in the duties of manpower, the appellant rationalised its requirement and sought approval for 188 employees which has been further reduced by AERA to 140 personnel by AERA vide the impugned order.

234. Several factors have been pointed out by learned senior counsel for the appellant and it has been highlighted that Mangaluru Airport is undergoing terminal expansion from 37000 sq. m. to 47000 sq. m. and Parallel Taxi Track work has also been started by Respondent No. 2-AAI in the year 2018 and 2017 respectively, but, will be commissioned in FY 2023. Thus, the terminal area will be increased by 27% and it requires additional manpower.

235. Moreover, as per Concession Agreement, appellant is obligated to perform certain additional functions because several functions were not carried when the airport was under the control of AAI and this requires appellant to hire/engage additional manpower.

236. Moreover, as per mandate issued by **Director General of Civil Aviation (DGCA)**, "**Airport Rescue Fire Fighting**" (ARFF) people are required to be engaged and Airport Operator has submitted to DGCA a **Task Resource Analysis Report**. This is very much required for safety and security of airport operator as a priority. This also requires manpower and its training etc.

237. Moreover, AERA has decided to disallow the manpower cost of 4 employees merely on the basis that the number of employees proposed by appellant **(seems to be on the higher side)**. Thus, merely on apprehension, AERA has disallowed the cost of 4 employees without any explanation, data, and reasoning of how it is on the higher side.

238. Looking to the aforesaid aspects of the matter and looking to the obligations to be performed by the Airport Operator under Concession Agreement and also under the further requirement of DGCA for safety and security of airport operation as a priority and also looking to the size of Mangaluru Airport and also the number of footfall per annum at the airport, AERA ought to have allowed 188 personnel to be employees as

the Manpower headcount expenses for First Control Period. We, therefore, quash and set aside the decision of AERA of allowing only 140 employees for the Manpower headcount expenses for the First Control Period. **We hereby direct AERA to allow actual manpower deployed by the Appellant as employees for the purpose of the Manpower Headcount Expenses for the FCP, as the same shall not be artificially capped at any notional number. The AERA's decision of rationalization of cost and number of employees, both AAI employees and the employees of the Appellants, is unjustified and unreasonable. AERA shall consider the actual expenses incurred by the Appellant towards AAI employees and towards the employees of the appellant.**

X. REPAIRS AND MAINTENANCE

239. It is submitted by learned senior counsel for the appellant that AERA has decided to rationalize the repairs and maintenance expenses for the appellant for the period from COD i.e. 31.10.2020 to 31.03.2021 & for the FCP and has decided to limit the repair and maintenance expenses to 6% of the Opening Net Block of Aeronautical Asset base.

240. It is submitted by learned senior counsel for the appellant that Mangaluru airport was created by Respondent No.2-Airport Authority of

India during the years 2001-2010 (approx. Rs.270 Crores) out of total Gross Fixed Assets of around Rs.400 Crores and balance between the years 2011-2020.

241. It is submitted by learned senior counsel for the appellant that this indicates that fixed assets of the Mangaluru airport are very old and require higher repair and maintenance cost to achieve efficiency.

242. In view of these facts, it appears that opening RAB will be reduced every year and 6% thereof will be a reducing figure every year whereas older the premises and the properties, *prima facie* more will be the repair and maintenance cost, if the efficiency is to be maintained as it is.

243. Each airport is different and therefore "one-size fits all" cannot be adopted at other airports. What is allowed as repair and maintenance cost for other airports, may not be the repair and maintenance cost at Mangaluru airport. Repair and maintenance cost depends upon a variety of factors like age of existing assets, frequency of use of assets, and local geographic and weather conditions, etc.

244. As stated hereinabove, most of the properties at Mangaluru airport are quite old and, therefore, more cost will have to be incurred by the airport operator towards repair and maintenance cost to maintain same level of efficiency and hence, there cannot be a capping upon the repair and maintenance cost at 6% of Opening Net Block of Aero Assets. This

aspect of the matter has not been appreciated by AERA while deciding the repair and maintenance cost in the impugned order which is at Annexure A-1, hence, the same deserves to be quashed and set aside.

245. AERA Guidelines, 2011 have been published to minimise the discretion of the Authority and thereby to minimise the discrimination or the arbitrariness in the decision by the Authority. As per AERA Guidelines, 2011 there is no provision for capping of repair and maintenance expenses at 6%.

246. As per AERA Guidelines, 2011, AERA ought to have considered **the actual cost** incurred by the airport operator. The relevant clauses of AERA Guidelines are reproduced herein below:

> *"**5-4. Operation and Maintenance Expenditure** (0)*
>
> *5-4.1. The operation and maintenance expenditure shall include **all expenditures incurred** by the Airport Operator(s) including expenditure incurred on statutory operating costs and other mandated operating costs as defined in Clause 5-4.2.*
>
> *5-4.2. The assessment of operation and maintenance expenditure by the Authority shall include a review of the forecast of such expenditure as submitted by the Airport Operator based on the following principles:*

*(a) Assessment of baseline operation and maintenance expenditure based on review of **actual expenditure** indicated in last audited accounts, and prudency check inter alia with respect to underlying factors impacting variance over the preceding year(s) including treatment for one-time costs or atypical costs."*

247. In view of the aforesaid provisions of AERA Guidelines, 2011 published by AERA itself, there is no provision of capping of 6% for repair and maintenance cost, **on the contrary**, the actual expenditure has to be appreciated by AERA. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order especially regarding repair and maintenance cost and hence, the same deserves to be quashed and set aside.

248. It is not open for AERA to rule on the efficiency of the management of airports and on that basis disallow a portion of actual expenditure to be incurred on repair and maintenance.

249. RAB is a depreciating Building Block. RAB amount depreciates every year and based on the depreciating rate that is applied, repair and maintenance cost is to be computed as sum of percentage of RAB, then there will always be a reduction of repair and maintenance amount as well, **whereas**, older property requires more repairs and maintenance to

maintain efficiency of the operations. There will be an increasing gap between Projected repair and maintenance Vs. Notional repair and maintenance based on 6% of Opening RAB. This has been explained in tabular format in a way of illustration herein under:

Particulars	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
Opening Net Block	100	95	90	85	80	75	70	65	60	55
Dep Rate	5%	5%	5%	5%	5%	5%	5%	5%	5%	5%
Dep on Gross Block	5	5	5	5	5	5	5	5	5	5
Closing Net Block	95	90	85	80	75	70	65	60	55	50
6% of R&M Exp on Opening Net RAB (as approved by AERA) (A)	6.00	5.70	5.40	5.10	4.80	4.50	4.20	3.90	3.60	3.30
Projected R&M Cost based on age of asset (B)	6.00	6.00	7.00	7.00	8.00	8.00	9.00	9.00	10.00	10.00
Difference (A - B)	-	(0.30)	(1.60)	(1.90)	(3.20)	(3.50)	(4.80)	(5.10)	(6.40)	(6.70)

250. From the aforesaid table, it is clear that there will be an ever-increasing gap between the Actual repair and maintenance cost Vs. Notional repair and maintenance cost. It has been pointed out by counsel for appellant that AERA in tariff Order No.6/2024-25 dated 27.08.2024 for **Shirdi International Airport Limited** has recognised the fact that due to normal wear and tear and aging of the assets, repair and maintenance expenses tend to increase over a period of time and it has been observed by AERA that repair and maintenance expenses at 6% of the Opening RAB may be reviewed by it as the said capping adversely impacts the airports. Paragraph nos. **3.8.36** and **3.8.46** of the order dated

27.08.2024 passed by AERA for **Shirdi International Airport Limited** reads as under:

*"**3.8.36** The Authority, on the aspect of capping of R&M Expenses of the airport at 6% of Opening RAB (Net Block) of the related tariff year, notes the submission of some of the airport operators, wherein they have submitted that capping of R&M Expenses to 6% of Opening RAB (Net Block) needs review. As per the stakeholders, considering that the RAB (Net Block) of the airports, particularly smaller airports, with no major CAPEX additions, gradually decrease due to depreciation; whereas, due to normal wear & tear and aging of Assets, R&M Expenses tend to increase over a period of time. Hence, capping of R&M Expenses at 6% of Opening RAB (Net Block) may be reviewed by the Authority appropriately, as capping of R&M Expenses as per present mechanism impacts adversely the airports (smaller airports) with low Regulatory Asset Base.*

The Authority, taking note of above submission of stakeholders, proposes to revisit the issue relating to capping of R&M Expenses at the ceiling of 6% of Opening RAB (Net Block).

The Authority seeks the specific views of the stakeholders on the capping of R&M Expenses at 6% of opening RAB (Net Block). The Authority will take a final view in the matter considering the views/ inputs from the stakeholders."

....

3.8.46 *The Authority notes the comments from stakeholders on the need for re- evaluation of the capping being applied by AERA on R&M Expenses, as per its current approach. It has been mentioned that there are many airports where there is no substantial new Capex and hence applying the cap of 6% of opening RAB by factoring in depreciation does not give sufficient provision for R&M expenses, since the old assets would require more R&M expenses with passage of time. The Authority, therefore, is of the view to review the existing approach across all airports towards capping of R&M Expenses to 6% of Opening RAB (Net Block) of respective tariff years and would look into alternative methodology/ benchmarks for evaluation of reasonableness of R&M expenses proposed by the AOs. The Authority, considering that review of current approach*

towards capping of R&M Expenses and arriving at final decision in the matter will take some time, in the interim period, decides to continue with the present approach of capping of R&M Expenses to 6% of opening RAB (net block) and consider the R&M expenses accordingly."

251. Ld. Counsel appearing for the appellant has submitted that a cap of 6% towards O&M Expenses for smaller airports where the amount of Regulatory Asset Base is smaller in comparison to large airports, will not be sufficient to cover the actual O&M Expenses.

252. Looking to the impugned order (Annexure A-1) at page 249 thereof, it has been observed by AERA that "to consider the O&M Expenses incurred by the Airport Operator during FCP subject to reasonableness and efficiency, at the time of True-up in a Second Control Period".

253. AERA itself has recognised in a recent Tariff Order of Amritsar airport at para 9.2.17 of Order No. 17/2024-25 dated 21.03.2025 and in a Tariff Order for Varanasi airport, Order No. 16/2024-25 dated 01.03.2025 that the mechanism of capping R&M at 6% requires reconsideration.

254. It has also been pointed out before this Tribunal that in case of Ahmedabad, Lucknow, Jaipur, Guwahati, and Trivandrum airports, no

such cap is imposed by AERA in the Tariff Orders for the previous Control Periods.

255. Thus, this is for the first time, AERA has imposed an artificial cap of 6% on R&M Expenses. No justification much less any valid reasons have been granted by AERA to deviate from the past practices for the same airports.

256. AERA has submitted arguments Note-V dated 22.05.2025 wherein at page 23, in paragraph 19, a comparative table is provided. On perusal of the same, it is evident that smaller airports with lower Regulatory Asset Base have incurred a higher percentage of R&M Expenditure, viz. -namely Bhubaneshwar Airport recorded R&M Expenses of about 9% and Trichy Airport recorded figures up to 43%.

257. In view of the aforesaid order passed by AERA itself, capping of 6% of Opening RAB upon repair and maintenance expenditure adversely affects the efficiency of the airports.

258. Similarly, for **Patna International Airport Limited**, AERA has approved repair and maintenance expenditure without applying any capping of 6% of Opening RAB during True Up of First Control Period in the Tariff Order for Second Control Period.

259. Further, it is observed that AERA has approved Repair and Maintenance Cost varying from 6% to 43% in various airports like

Bhubaneshwar, Trichy, etc. Hence, applying 6% as cap for appellants is arbitrary and needs to be quashed.

260. Looking to the provision of Section 13(1)(a) of AERA Act, 2008, while deciding tariff, AERA has to appreciate "**expenditure incurred**". Whenever actual expenditure incurred is available from audited books of accounts of airport, AERA cannot rely upon notional expenditure. Hence, the impugned order at Annexure A-1 for repair and maintenance expenses whereby the cap of 6% of Opening RAB has been applied deserves to be quashed and set aside.

261. Thus, impugned order of repair and maintenance order is in violation of AERA Act, 2008 and AERA Guidelines, 2011 and is also in violation of AERA's own orders as stated hereinabove. AERA's decision to cap Repairs and Maintenance expenses to 6% of the opening RAB, is legally untenable, unjustified and unreasonable. Hence, we hereby quash and set aside the decision of AERA in impugned order so far as it relates to repair and maintenance expenses. **We, hereby direct AERA to allow the repair and maintenance expenses actually incurred by the appellant and necessary True-Up of repair and maintenance expenses** for the period running from COD till 31.03.2021 and for FCP shall be done in the next Control Period.

XI. TREATMENT OF LEGAL DEPARTMENT'S EMPLOYEES UNDER CORPORATE ALLOCATION COST

262. It is submitted by learned senior counsel for the appellant that AERA has allowed expenses (Rs.0.15 Crores) towards the in-house legal team of the appellant and, therefore, AERA is of the view that providing additional expenses to cover the legal department at the corporate level would result in redundancy. Thus, AERA has decided to exclude the same from aeronautical office and maintenance expenses.

263. Learned senior counsel for the appellant has highlighted the role and responsibilities of the legal department and has argued out this issue in detail which is being opposed by counsel for the respondent. Looking to the facts and circumstances of the case, it appears that the role and responsibilities of the legal department are classified under two sub heads:

A. Corporate level;

B. Airport level.

264. The fundamental roles and responsibilities at corporate level are as under:

i. Providing business and legal perspective and advice on a wide range of strategic, tactical, and operational issues to all Airports teams

ii. Determination of legal interests and options and counsel to top leadership on legal matters

iii. Coordinating and giving directions with external counsels

iv. Participating in the formulation of general management policy as a member of the executive management team

v. Developing and leading internal audit and corporate compliance programs.

265. Moreover, in a **Consultation Paper No.15/2020-21**, for DIAL, corporate cost allocation without any deduction of legal corporate cost was allowed by R1-AERA. The consistency ought to have been maintained by AERA in their decisions, in fact, consistency is a virtue which ought to have been followed by the Authority so that that there is certainty among the stakeholders about the fact that what type of expenditure will be allowed and what type of experience will not be allowed. The zig zag approach of AERA is hereby deprecated.

266. It has been held by this Tribunal in judgment dated **06.10.2023** in **AERA Appeal No.9 of 2016** and **AERA Appeal No. 2 of 2021** in MIAL for Second Control Period and Third Control Period respectively whereby AERA was directed to include Corporate Cost Allocation under the

Operating Expenses on actual basis and further it was provided that necessary True-Up in subsequent Control Periods should be given.

267. It has been held in **Paragraphs No. 286-287** in the aforesaid order in **judgment dated 06.10.2020 in AERA Appeal No.9 of 2016** and **AERA Appeal No.2 of 2021:**

> *"**286.** AERA has considered corporate cost allocation methodology for Mangaluru International Airport Ltd. and also for Ahmedabad International Airport Ltd. during the tariff determination process. AERA should have a consistent approach to allow the corporate cost for the appellant for the reasons stated hereinabove. We, therefore, quash and set aside the decision of AERA not to include the corporate cost under the operating expenses. We, therefore, direct AERA that it shall include corporate cost under operating expenses, on an actual basis for 3rd Control Period (2019-2024) and necessary true up shall be given in 4th Control Period.*
>
> ***287.** Thus, Issue No. XIV is answered in negative i.e. the decision of AERA not to include the Corporate Cost Allocation under the Operating Expense is incorrect, improper and not justified.*
>
> *……"*

268. AERA has relied upon clause 28.3.8 of the Concession Agreement to argue that legal services should not be allowed and has accordingly

disallowed reimbursement of the corporate allocation of legal cost claimed by the appellant.

The appellant has contended that AERA has failed to consider that the Corporate Legal Department also performs the duties as that of direct employees of the appellant. This helps the appellant to keep its legal department lean and rely upon Corporate Legal Department for majority of legal related assignments.

269. In view of the facts of the present case, if appellant is not allowed reimbursement of Cost of Corporate Legal Department, the appellant will have to recruit more employees in its legal department which will unnecessarily increase the cost of appellant, whereas, the Cost of Corporate Legal Department is apportioned amongst other sister concerns of the appellant. Thus, there is rationalisation of cost of Corporate Legal Department and there is no duplication of resources amongst several sister concern airports.

270. Ld. Counsel Mr. Sajan Poovayya, Sr. Adv on behalf of appellant has pointed out in detail, functions to be performed by legal personnel both, at the Appellate level and at the Corporate level, demonstrating that the responsibilities and duties are distinct in nature. Looking to this aspect of the matter, it appears that AERA has failed to provide any substantive

reasoning on this issue and has instead disallowed the expenses, based on mere assumptions of redundancy.

271. It ought to be kept in mind by AERA that the Cost of legal department employees cannot be treated as Legal Services, as there is a restriction on advocates from taking up other employments. Meaning thereby to, an advocate can either be a counsel or an employee. In-House legal department employees cannot provide legal services of arguing a case in court of law. They can merely check the legal side of the documents for better understanding of the management who are not qualified in law.

272. In view of the aforesaid facts, reasons and judicial pronouncement, we hereby quash and set aside the decision of AERA of partly allowing expenses towards the in-house legal team of the appellant. We, hereby direct AERA to include Corporate Cost under the Operating Expenses on actual basis. Necessary True-up shall also be given in next Control Period. Hence, AERA is directed to allow the cost of legal employees under the Corporate Allocation Cost.

XII. TERMINAL BUILDING ALLOCATION RATIO AND GROSS FIXED RATIO

273. It is submitted by learned senior counsel for the appellant that AERA has decided non-aeronautical area in the terminal building as 8% on the basis of IMG norms and the terminal building ratio was considered to be 92:8. AERA has relied upon para 4.5.1 of the "**Study on Efficient Operation and Maintenance Expenses for Mangaluru IAL"**, to arrive at allocation ratio. It has also been observed by AERA that the allocation ratio is in line with other similar airports such as Amritsar, Varanasi, Trichy and Raipur in past tariff orders and as per the aforesaid study-report, the terminal building ratio is 92:8 for its re-classification of the Common Assets within the terminal building. It has also been observed by AERA that this terminal building ratio of 92:8 is in line with Asset Allocation Report and IMG norms. This decision of AERA is under challenge in this AERA Appeal.

274. Looking to the IMG norms, it appears that the same is not applicable to PPP airports. Hence, the norms which are fixed by the aforesaid report are not applicable to PPP airports. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order (Annexure A-1).

275. As per Section 13 (4) of the AERA Act, in Consultation Paper there was a reference of adoption of IMG Norms so that the stakeholders can file their comments. In the facts of the present case, in the Consultation Paper, AERA has pointed out that there is a proposal of adoption of IMG norms for Terminal Building Allocation Ratio.

276. Further, looking to clause "G" of the IMG norms, the terminal building allocation ratio narrated in IMG norms is not applicable to PPP airports. For the ready reference, clause "G" of the IMG norms reads as under:

> *"…..*
> ***G.*** *In the case of airports developed through Public Private Partnerships the project authorities may adopt a case-by-case approach with respect to norms relating to unit area and unit costs. Based on the judicious consideration of international best practices and financial viability, the norms may be specified in each case prior to inviting bids for private participation."*

277. Moreover, further looking to the AERA Guidelines, 2011, there is no provision for applying fixed allocation ratio. Under the Shared-Till model, 30% of the Non-Aeronautical Revenue is accounted for Cross Subsidizing the ARR, therefore, there is no need for allocation ratio whereby capital and operating expenditure is reduced.

278. Moreover, looking to the AERA Guidelines, the terminal building as a whole should be considered as RAB/Aero Asset and there is no ratio whatsoever provided for allocation between aero and non-aeronautical in AERA Guidelines. The relevant clause of the AERA Guidelines is reproduced herein below**:**

"Regulatory Asset Base (RAB)

5.2.1. Scope of the RAB

(a) In normal course, all airport fixed assets will come under the scope of the RAB. However, the Authority may, based on due consideration of relevant factors, include or exclude certain fixed assets from the scope of 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) may be 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 RAE. The principles governing the ring fencing are mentioned in the paragraph 7.5 of Order Number 13/2010-11 of the Authority issued on 12-Jan-2011.

(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****"*

279. It has been held by this Hon'ble Tribunal in AERA Appeal **No. 4 of 2016**, AERA Appeal **No. 5 of 2016,** AERA Appeal **No. 6 of 2016,** AERA Appeal **No. 7 of 2016** in judgment dated **16.04.2025** in the matters of DIAL, GHIAL, MIAL & BIAL respectively in **Para No. 71, 75 & 82** as under:

> *"**71.** In view of the aforesaid paragraph–G of IMG Norms recommendations, it is not applicable to PPP Airports which are governed by their own specifications and standards as mentioned in OMDA (Annexure A-3) to be read with SSA (Annexure A-4). The Report recognizes that cost of construction is dependent on various variables including the location. Therefore, cost of construction must be benchmarked across projects being implemented with similar planning horizon for AAI Airports. The IMG Norms recommend that unit cost of construction for PPP Airports should be decided on a case-to-case basis and there cannot be a benchmarking exercise for new developments and that the benchmarking should be set prior to inviting bids for the airport. The Impugned Order subjects DIAL to IMG Norms even though the IMG Norms itself acknowledge that the same*

are wholly inapplicable to PPP Airports and the bidding process of IGI Airport did not propose any Unit Costs for assets.

…

75. *Learned Senior Counsel appearing for the appellants have pointed out that AERA has done exactly opposite to what is prescribed in IMG Norms for Airports operated by AAI. These IMG Norms should not be made applicable to PPP Airports and the norms should be mentioned in the notice inviting tenders for private participation, but, AERA has done exactly opposite to these recommendations meaning thereby to that these norms are not applied to AAI Airports and is made applicable to Airports developed through Public Private Partnership.*

…

82. *Thus, in view of the aforesaid facts and reasons and looking to the recommendations of the IMG report/norms (Annexure A-5) especially as per "**Clause – G**" thereof, the IMG Norms are not applicable to these appellants and AERA has to consider capital expenditure incurred while determining tariff for the aeronautical services as per Section 13(1)(a) of the AERA Act, 2008."*

280. In view of the aforesaid decision, IMG Norms are not applicable to PPP airports. Clause 'G' of the IMG Norms is explicitly clear which has been referred hereinabove.

281. In view of the aforesaid provisions of AERA Guidelines, 2011, the whole terminal building should have been considered as RAB/aeronautical asset.

282. In view of these facts, reasons and judicial pronouncements, the terminal building allocation ratio cannot be a notional number. The terminal building should not be different than actual. We, therefore, quash and set aside the decision of AERA in impugned order dated 12.01.2023 (Annexure A-1) as far as Terminal Building Allocation Ratio and Gross Fixed Allocation Ratio is concerned and we, hereby direct AERA to consider the actual area measurement submitted by appellant and on that basis, the Terminal Building Allocation Ratio shall be finalised.

XIII. READJUSTMENT WITH AGGREGATE REVENUE REQUIREMENT

283. Under this heading, AERA has decided to readjust/reduce 1% of un-capitalised project cost from ARR/target revenue during the true-up exercise of Second Control Period, if any particular project, is not

capitalised as per CAPEX schedule approved in the tariff order. Looking to AERA Act, 2008, there is no provision for imposition of penalty upon Airport Operator neither there is any provision for deduction of ARR/Target revenue during True-up exercise during Second Control Period. Thus, this decision of AERA is beyond the power and is in violation of AERA Act, 2008.

284. Moreover, there is no provision under AERA Guidelines for re-adjustment/reduction in the un-capitalised project cost from ARR/target revenue and, therefore, impugned decision of AERA of readjustment in ARR is in violation of AERA Guidelines, and hence, the same deserves to be quashed and set aside.

285. The decision of AERA to de-incentivise the appellant by reducing 1% of project cost in case of delay in implementation of the project is incorrect and against the principles of tariff fixation. There are variety of reasons for delay, when such delay is beyond the control of appellant, keeping in mind the dynamic environment post COVID-19 period. If 1% penalty is imposed, the Airport Operator will have to suffer from double jeopardy because due to delay in completion of project, the return on asset will be denied and 1% penalty would be imposed and both cannot go together. The power to impose penalty must come from the AERA Act, 2008. In absence of such power in AERA Act, 2008, penalty cannot be imposed by

AERA. This de-incentivise by 1% is in the nature of a penalty. A thing which cannot be done directly, can never be done indirectly. There is no provision under the AERA Act, 2008, AERA Guidelines, 2011 and Concession Agreement which empowers AERA to penalise the appellant hence, the order passed by AERA of re-adjustment in the ARR is beyond the power, jurisdiction and authority of AERA hence, the same is hereby quashed and set aside.

286. It has been held by this Tribunal in case of MIAL in Second Control Period and Third Control Period in judgment dated 06.10.2023 in **AERA Appeal No.2 of 2021 and AERA Appeal No.9 of 2016 in paragraphs 308, 309, 310** as under:

> *"**308. Moreover, in the 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 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.

309. *Here in the facts of the present case, AERA has failed to appreciate the prevailing pandemic situation of COVID-19 and its aftermath. Curfew type situation or lockdown type situation was prevailing. Labourers were not available and hence, there is bound to be delay in execution of the project work. Such a big factor ought to have been appreciated by AERA. The genuine difficulty of airport operator ought to have been appreciated.*

310. *Thus, Issue No. XVII is answered in negative i.e. the decision of AERA of carrying out 1% re-adjustment to Project Cost and applicable carrying cost in the Target Revenue at the time of determination of Tariff for 4th Control Period is incorrect, improper and not justified."*

287. It has also been held by this Tribunal in judgment dated 14.02.2024 in **AERA Appeal No.4 of 2021** in case of GHIAL in **paragraphs 512** and **519** as under:

*"**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.*

***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."*

288. <u>In view of the aforesaid facts, reasons and judicial pronouncements, AERA has no power, jurisdiction and authority to readjust in the ARR of the Airport Operator or readjust/reduce 1% of un-capitalised project cost from ARR/Target Revenue during True-Up exercise of next Control Period, if any particular project is not capitalised as per CAPEX schedule, approved in the tariff order. We, therefore, quash and set aside this decision of AERA in the impugned order.</u>

XIV. DEPRECIATION

289. AERA has decided to make an adjustment in depreciation on account of change in Useful Life and revision in asset addition whereby AERA had considered depreciation for Mangaluru Airport for First Control Period at Rs.130.96 Crores as against Rs.239.51 Crores as proposed by the appellant. The Respondent No.1-AERA has relied upon Order No.35/2017-18 dated 12.01.2018 as amended by AERA regarding determination of Useful Life of the Airports (Useful Life of Asset Order).

290. Looking to the Useful Life of Asset Order, it is mentioned, if the period of Useful Life of Asset is considered differently, the Airport Operator shall document the same and provide the reasons/justifications and basis for period considered in determination of Useful Life of Asset for purpose of tariff determination which shall be examined and considered by the Authority.

291. The aforesaid aspect of the matter which is mentioned in "**useful life of assets order**" has not been properly appreciated by AERA.

292. The appellant has provided a detailed report, document, justification and reasons by way of an independent expert report. "**Technical report of Useful Life of Assets has already been submitted by the Airport Operator**" which is a technical report with reasons and justifications as to why the shorter life-span should not be considered. This report

provided by airport operator is absolutely in consonance with "**useful life of assets order passed by AERA**" and as stated hereinabove, if the Airport Operator canvassing the shorter life of the assets for the purpose of tariff determination, the same should have been documented and reasons and justifications should have been given and in that eventuality, AERA shall examine the same while considering the same. In the facts of the present case, when Airport Operator has presented a detailed technical study and has given detailed reasons and justifications for shorter useful life of assets, the purpose of justification has neither been considered nor has been examined by AERA.

293. Thus, AERA has committed violation of "**useful life of assets order**".

294. It ought to be kept in mind that the Useful Life of Assets Order prescribes the life of assets as guidelines only. In case, if the Airport Operator gives any document or provides reasons for justification and basis for shorter useful life of assets then what is mentioned in the **"Useful Life of Asset Order",** in that eventuality, AERA is bound to examine and consider the same. The life span of the assets mentioned in "**useful life of assets order**" is not conclusive or a gospel truth, it is just an indication and nothing beyond it. If the Airport Operator is not treating shorter life-span of their assets as what is mentioned in the "**useful life**

of assets order”, then in that eventuality, the life span of the assets mentioned in “**useful life of assets order**” shall be accepted as it is. Thus, whenever any Airport Operator is claiming shorter life span than what is mentioned in “**useful life of assets order**” then in that eventuality the Airport Operator shall submit the documents and provide reasons, justification and basis for shorter life span and AERA is bound to examine and consider the same and without any analysis of the report submitted by Airport Operator, it cannot be brushed aside or overlooked nor can it be rejected without any reasoning. Meaning thereby to, such justifications/reasons and the basis supplied by Airport Operator ought to be examined and considered by AERA and if the same is to be rejected, AERA should give reasons for rejecting and not accepting the justification/basis supplied by Airport Operator.

295. AERA has failed to acknowledge that increase in depreciation will result in decrease of RAB and accordingly the return on RAB as sought by the appellant is adjusted to the said extent. Thus, the statement made by AERA with respect to “*shorter useful life of the asset would increase the per year rate of depreciation of the airport assets and would result in higher amount of Depreciation (D) to be added in ARR formula*” is incorrect as on one hand, there will be increase in depreciation and on the other hand, there will be decrease in return on RAB.

296. In the facts of the present case, the reasons, justifications and with basis for claiming shorter life span than what is mentioned in "**useful life of assets order**" have been given by AO in the form of Report. This report is not appreciated at all by AERA. No reasons have been given by AERA for rejecting the said report. The report was given by "**Kanti Karamsey and Co. (Govt. registered valuers)**". This report cannot be brushed aside by AERA without any reason. We therefore quash and set aside decision of AERA for mechanically following "**useful life of assets order**" No.35/2017-18 dated 12.01.2018 amended from time to time for determination of depreciation.

297. During the course of arguments, it was fairly contended by the appellants that the issue affects the cash flow of the appellants and there is no impact on the end result by applying different percentages of depreciation, as the asset will be allowed to be depreciated until it has a value attached to it.

Therefore, AERA is directed to ensure that appropriate depreciation rate as per usual practice is applied to the assets of the Appellant while doing the True-Up exercise of First Control Period Tariff and no unjust loss is made to the Appellant.

<u>We feel that no decision is required on this issue by this Tribunal and the same is kept open to be decided in future, if and when raised by the concerned party/parties.</u>

<u>ONE TIME ESCALATION</u>

298. This issue is common to the following appeals:

i. <u>Lucknow International Airport</u> Ltd. (LIAL) in AERA Appeal No.3 of 2023;

ii. <u>Thiruvananthapuram International Airport</u> Ltd. (TKIAL) in AERA Appeal No.2 of 2024;

iii. <u>Jaipur International Airport</u> Ltd (JIAL) in AERA Appeal No.3 of 2024;

iv. <u>Guwahati International Airport</u> Ltd (GIAL) in AERA Appeal No.4 of 2024.

AERA has decided to consider a one-time escalation of the expenses which is 183.29% out of 274.94% (for Lucknow airport) of escalation rates claimed by the appellant in FY 2024-25. Thus, AERA has decided to consider two-thirds of the total escalation rates claimed by the appellant and remaining one-third escalation rate has been denied by AERA. The appellant has considered that expansion of Terminal Building area which has resulted into proportionate increase in various expenses such as:

a) utilities;

b) IT expenses;

c) rates and taxes;

d) security and other operating expenses for the last two years i.e. FY 2023-24 and FY 2024-25.

299. Respondent No.1-AERA has allowed an increase in utilities and other operating expenses (House-keeping) in proportion to the increase in Terminal Area for the airport which enjoys economies of scale and are future tech ready. The counsel for appellant has taken this tribunal to various orders passed by AERA for Hyderabad airport under TCP with AERA Order No. 12/2021-22 dated 31.08.2021. The Utilities and House-keeping expenses increased in proportion to increase in the Terminal Area. The Terminal Area increased from 1,17,000 sq. mtr. to 3,65,809 sq. mtr. i.e. **213%**. The authority approved expansion of Terminal as a driver for the House-keeping cost and, therefore, accepted HIAL's submission that increase in House-keeping cost due to expansion has to be factored for operational months for expanded Terminal.

300. For Chennai Airport (Third Control Period), vide AERA Order No.38/2020-21 dated 04.02.2022, the Utilities expenses increased in proportion to increase in the Terminal Area by **33%**.

301. Similar is the case with Trichy Airport under First Control Period with AERA Order No. 55/2020-21 dated 22.10.2020 wherein the House-keeping expenses increased in proportion to the increase in Terminal Area. The Terminal Area has increased by **410%.**

302. In view of the aforesaid orders and looking to the facts of the case, it appears that AERA should have considered one-time escalation in proportion to increase in Terminal Building Area. "True-Up" of this amount at the time of determining tariff for next Control Period has adverse financial implications upon the appellant in the present Control Period.

303. It has been held by this Tribunal in case of MIAL Second Control Period and Third Control Period judgment dated **06.10.2023** in AERA **Appeal No.9/2016** and **AERA Appeal No.2/2021** that AERA is required to maintain consistent approach. In this regard, paragraph 214 of the said judgment is as under:

> *"**214. AERA is required 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 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 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."

304. In circumstances where aspects favourable to the Airport Operator, such as one time cost escalation are identified, in that case, it has been stated by AERA that such matter shall be reviewed during True-Up process, this raises a pertinent question regarding the purpose and significance of submission of MYTP and the consultation process

undertaken by the Airport Operator. We are unable to understand why AERA is deferring decisions on such undisputed positions without reviewing at this stage. In view of these facts and the orders passed by AERA for different airports, AERA ought to have maintained consistency and one-time escalation of the expenses should have been in proportion with expansion of Terminal Building Area. As we are deciding these AERA Appeals commonly, we are not going into the facts of each case, but, the issues have been principally decided by this Tribunal.

305. In view of the aforesaid facts, reasons and judicial pronouncement, we hereby quash and set aside treatment of allowing increase of only 2/3rd cost in case of the Appellant and we hereby direct AERA-

(i) To maintain consistency in future while estimating additional cost for Utilities, IT Expenses, Rates and Taxes, Security and other operating expenses in proportion to the increase in terminal area/ facilities and

(ii) To True-Up expenses such as Utilities, IT Expenses, Rates and Taxes, Security and other operating expenses on actual basis.

TREATMENT OF SPACE RENTALS

306. This issue is common to the appeals mentioned herein below:

I. Ahmedabad International Airport Limited ("**AIAL**") in AERA Appeal No. 02 of 2023,

II. TRV Kerala International Airport Limited ("**TKIAL**") in AERA Appeal No. 2 of 2024,

III. Jaipur International Airport Limited ("**JIAL**") in AERA Appeal No. 3 of 2024, and

IV. Guwahati International Airport Ltd ("**GIAL**") in AERA Appeal No. 4 of 2024.

307. AERA has decided to consider space rentals from airlines such as SpiceJet, Indigo, Tata Singapore Airlines, Emirates, Qatar airways, Go Airways, Air Arabia, Air Asia and Singapore Airlines in the terminal building area as aeronautical revenue. This decision of AERA is under challenge in the aforesaid AERA Appeals.

308. It is submitted by counsel for appellant that the rental income from the space given to the airline is not Aeronautical Revenue. Counsel for appellant has taken this Tribunal through AERA Act, 2008 and AERA Guidelines, 2011 as well as the International Civil Aviation Organisation (ICAO) document.

309. Looking at provisions of the AERA Act, 2008, Airline Space Rental is not an Aeronautical Revenue and similarly as per AERA Guidelines, 2011, Airline Space Rental cannot be categorised as Aeronautical Revenue, hence, AERA does not regulate the Airline Space Rental for the appellants. As per **Clause 4.23** of **ICAO document 9562**, the Space Rentals from airlines are classified as Non-Aeronautical Revenue which Respondent No.1-AERA has failed to consider.

310. The International Civil Aviation Organisation (ICAO) Guidelines are international guidelines and have been relied upon by AERA time and again especially while dealing with the issue of deferment of the ARR/Target Revenue.

311. The lease rentals earned from cargo, ground handling and fuel services have no relation with respect to Space Rentals for airlines.

312. Looking to the counter affidavit filed by AERA in Guwahati International Airport Limited (GIAL), **AERA Appeal No.4/2024** in **paragraph Nos.10, 14-16**, and **34** are as under:

> *"**10.** It is submitted that the Tariff Order in the present case has been issued under the provisions of the AERA Act, 2008 and the respondent has adopted and followed the prescribed methodology/ guidelines/ principles issued by*

International Civil Aviation Organization (ICAO) and AERA Guidelines issued from time to time, in letter and spirit, in the backdrop of position encapsulated in preceding paragraphs.

...

14. *That as submitted hereinabove, the answering respondent also follows the guiding principles as laid down by the International Civil Aviation Organization ('ICAO')As per the ICAO's Policies on Charges for Airports and Air Navigation Services ('ICAO Doc 9082'), the main purpose of economic oversight is to achieve a balance between the interest of Airport Operators and the Airport Users ensuring non-discrimination and transparency on the applicability of charges, ascertaining those investments in capacity meets the current and future demand in a cost-effective manner and also ensuring the protection of the interest of the passengers and other end users. In respect of balancing the shortfall or revenues, the ICAO Doc 9082 categorically specifies that "caution be exercised when attempting to compensate for shortfalls in revenue and that account be taken of the effects of increased charges on aircraft*

operators and end users.

15. *The ICAO Doc 9082 also emphasizes* "There should be balance between the respective interests of airports and ANSPs on the one hand and of aircraft operators and end users on the other, in view of the importance of the transport system to States." *This should be applied particularly during periods of economic difficulty. Therefore, ICAO Doc 9082 recommends that States encourage increased cooperation between airports and aircraft operators to ensure that the economic difficulties facing them all are shared in a reasonable manner. This may also be read in conjunction with the objectives of the NCAP, which intends to provide affordable and sustainable air travel for passengers/masses. As per para 12 (c) of the NCAP,* "In case the tariff in one particular year or contractual period turns out to be excessive, the Airport Operator and the Regulator will explore ways to keep the tariff reasonable and spread the excess amount over the future*". The above consideration has also been conveyed by the answering Respondent in the Tariff Order impugned herein.*

__16.__ That in consonance with the principles laid down by ICAO, the Answering Respondent has to adhere to the key principles of fixing charges for airports while exercising the function of Tariff Determination, that is:

a. Non-discrimination;

b. Cost-relatedness;

c. Transparency; and

d. Consultation with users.

...

__34.__ The contents of paragraph 7 are denied for being incorrect and misconceived. It is submitted that the Impugned Order passed by the Respondent No.1 is based on the provisions of the Act and the 2011 Guidelines, the ICAO principles, the NCAP and the independent studies."

313. In view of the aforesaid affidavit filed by AERA in GIAL appeal (AERA Appeal No.4 of 2024), AERA has placed reliance upon ICAO document 9082 in tariff determination for Mangaluru, Lucknow, Ahmedabad, Jaipur, Thiruvananthapuram, and Guwahati airports. On one hand, in the present case, AERA submits that the ICAO document is advisory and on the other hand, these ICAO documents are a basis for substantial decisions impacting tariff orders.

314. In view of the ICAO document 9082, the Space Rentals from airlines is non-aeronautical revenue. This aspect of the matter has not been appreciated by AERA. Moreover, like other shop owners, the space is taken on rent from the Airport Operator. The income from rent of the shops is non-aeronautical revenue. Similarly, the Space Rental given by different airlines is also non-aeronautical revenue.

315. Moreover, the rent is received from allotment of space from various shops, etc. The rent which they are paying in view of the space allotted by Airport Operator is non-aeronautical revenue because in allotment of space and receiving rent and in receiving the rent, no aeronautical services are being rendered. If these airlines would have taken premises on rent outside of Terminal Building then certainly it is non-aeronautical revenue. Similarly, the aforesaid airlines have taken space on rent, the rental income out of allotment of the space on airport is also non-aeronautical revenue. This aspect of the matter has not been properly appreciated by AERA while passing the impugned order. For ready reference, Clause 4.23 of International Civil Aviation Organisation (ICAO) document 9562 reads as under:

> ***"4.23*** *Rentals. Rentals payable by commercial enterprises and other entities for the use of airport-owned building space, land or equipment. Such rentals should include those*

payable by aircraft operators for airport-owned premises and facilities (e.g. check-in counters, sales counters and administrative offices) other than those already covered under "air traffic operations".

316. **The aforesaid Airport Operators have not rendered any aeronautical services for getting Space Rentals and, therefore also, Space Rental income is non-aeronautical revenue. Hence, in view of the aforesaid facts and reasons and looking to the fact that neither under the AERA Act, 2008 nor AERA Guidelines, 2011 nor under the Concession Agreement, Space Rentals by the airlines can be treated as Aeronautical Revenue. We therefore, quash and set aside the decision of AERA treating Space Rentals income as aeronautical revenue. We, hereby direct AERA to treat Space Rental income received by Appellants as non-aeronautical revenues.**

UTILITIES EXPENSES

317. The aforementioned issue is common to the Appeals mentioned hereinunder:

I. TRV International Airport Limited ("**TKIAL**") in AERA Appeal No. 2 of 2024,

II. Jaipur International Airport Limited ("**JIAL**") in AERA Appeal No. 3 of 2024 and

III. Guwahati International Airport Ltd ("**GIAL**") in AERA Appeal No. 4 of 2024.

318. AERA has decided that in case the efforts are not taken by appellant-Thiruvanthapuram, Jaipur and Guwahati Airports to substantially increase the power recovery for the Third Control Period, AERA will consider power recoveries at a notional rate as deemed appropriate while Truing Up for the Third Control Period. AERA is of the view that with gradual increase in non-aeronautical operations, the Airport Operator should increase the power recovery from Concessionaires. This decision of AERA is under challenge by Thiruvananthapuram, Jaipur, and Guwahati Airports in AERA Appeal No. 2, 3, and 4 of 2024.

319. AERA's proposal that if the power recoveries are not enhanced, AERA may consider it on a notional rate as deemed appropriate for Truing-Up for Third Control Period is *prima facie* running counter to provisions of AERA Act especially Section 13(1). AERA cannot rely upon notional or estimated price when actual price is available.

320. It appears that AERA has examined the comments of the appellant regarding the utility expenses and is of the view that the power recovery of the appellant is significantly lower than that of comparable airports.

321. It has been decided by AERA that in case efforts are not taken by the appellant to substantially increase the power recovery for the Third Control Period, AERA may consider power recoveries at a notional rate as deemed appropriate while truing up for the Third Control Period.

322. It is rightly contended by the appellant that the tariff determination mechanism ensures the True-Up of all building blocks on actual basis subject to efficiency and reasonableness in the tariff determination process. In view of these facts, there is an error on the part of AERA to consider power recoveries at a notional rate. AERA being a statutory body cannot be allowed to prescribe a notional rate while Truing-Up for the Third Control Period.

323. AERA had made no proposal to consider the notional recoveries/adjustments at the stage of Consultation Paper and that a significant change was introduced only in the impugned order, without providing the appellant an opportunity to comment or respond to the said alteration. The lack of prior notice and opportunity for the appellant to present its submissions on this crucial change undermines the principles of natural justice and procedural fairness.

324. It ought to be kept in mind by AERA that the comparison with other airports does not fully account for the operational and geographical differences that affect power consumption and recovery rates. Each

airport has distinct operational challenges and cost structures which should be considered. Thus, setting notional rates for power recoveries without taking into consideration the unique circumstances and operational challenges specific to the appellant will lead to an unfair and non-reflective tariff structure.

325. It has been decided by this Tribunal in a judgment dated 14.02.2024 in AERA Appeal No. 4/2021 passed in case of Hyderabad Airport wherein it is held that in terms of "*Section 13(1)(a)(i) of the AERA Act, 2008, AERA cannot rely on any notional or estimated price when the actual price is available*". Therefore, in view of the same, AERA ought to have allowed the power recoveries of the appellant on actuals.

326. Further, in case of Jaipur Airport in present set of appeals, a committee was constituted on 15.03.2024 with the members of the appellant and the respondent No. 2/AAI (select employees) to review the electricity charges billed to the concessioner based on units' consumption thereof. The "Committee's Report on Recovery of Electricity" (Annexure 6) of the Response to the Consultation Paper. The Committee has verified that the separate meters are installed for each Concessionaire/user, the meter readings are done on monthly basis and necessary records are maintained, the appellant raises the invoice for the electricity usage charges to Concessionaire/user on monthly basis, the appellant charges

to Concessionaire/user on cost-to-cost basis (without any mark-up) based on actual meter reading and units consumed by each Concessionaire/user, based on review of electricity invoices raised on Concessionaire/users for the period from April 2023 to February 2024, the average power supply utilized by Concessionaire/user is 12% of the total utilization of the Airport.

327. We have carefully examined the aforesaid submissions made by the parties. No material was placed before AERA to counter the report of the Committee constituted at Jaipur Airport (and other airports) which has categorically recorded that separate meters are installed for each Concessionaire/user, meter readings are done on monthly basis and invoices are raised by the appellant for the electricity charges to the concerned Concessionaire/user on cost-to-case basis.

328. The Consultation Paper proposed by AERA was silent on consideration of the notional recoveries/adjustments. Thus, there was no proposal from AERA to consider the notional recoveries/adjustment at the stage of Consultation Paper. This significant change has been introduced directly in the impugned order without providing appellants any opportunity to comment or respond to the said alterations. The lack of notice and opportunity to present its case on this critical change undermines the principles of natural justice and procedural fairness. AERA

cannot consider the notional rates for power recoveries based upon other airports or in comparison with other airports. Each airport has its own circumstances and operational challenges specific to each Airport's Infrastructure, Passenger Profile and Concessionaire's Agreements which significantly influence its capability to recover utility expenses. Separate meters have been installed for each concessionaire/user. The meter reading is done on a monthly basis:

- The separate meters are installed for each concessionaire/user.
- The meter readings are done on monthly basis and necessary records are maintained
- The Appellant raises the invoice for the electricity usage charges to concessionaire/ user on monthly basis.
- The Appellant charges to concessionaire/ user on cost-to-cost basis (without any mark-up) based on actual meter reading and units consumed by each concessionaire/ user.
- Based on review of electricity invoices raised on concessionaire/ users for the period from April 2023 to February 2024, the average power supply utilized by concessionaire/ user is 12% of the total utilization of the Airport.

329. The power recovery is being made and, therefore, it cannot be said that there is higher or lower recovery because the same is on no profit no loss basis and the power recovery is based upon monthly meter reading separately installed for each user at the airport and hence, whenever actual figures are available, AERA cannot rely upon notional figures for deciding tariff under Section 13 of the AERA Act, 2008.

330. The appellant has also submitted "Committees' report on recovery of electricity" as Annexure-6 of the response to Consultation Process and the Committee includes **AAI's employees**. This aspect of the matter has not been appreciated by AERA. Looking to the aforesaid steps taken by the Airport Operator There is **no** lackadaisical approach on the part of the Airport Operator in power recovery from each concessionaire/Airport Operator/user and hence, the decision of AERA that in the next Control Period while Truing-Up, notional figure of power recovery may be considered is hereby **quashed and set aside**.

331. It has been held by this Tribunal in judgment dated 14.02.2024 in **AERA Appeal No. 4 of 2021** in case of GHIAL in **paragraph 381** as under:

> *"**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."

332. Moreover, it ought to be kept in mind by AERA that <u>whenever actual figures are available</u>, <u>notional figures cannot be used for tariff determination.</u> AERA has failed to appreciate that power recovery at 'notional rate' might result in over-recovery or under-recovery. Therefore, actual cost recovery is fairer to consumers, as it is based on the actual usage. Actual bill price for power consumption is available in the present case because there are meters separately installed for each user. Therefore, we are of the considered view that AERA is not entitled to consider power recoveries at a notional rate. We hereby direct AERA to consider recovery by the Appellant of actual amount, for electricity consumption and the same be trued up on actual receipt basis.

NORMATIVE COST FOR CONSTRUCTION OF TERMINAL BUILDING

333. The aforesaid issue is common to the following appeals:

(i) Ahmedabad International Airport Limited ("**AIAL**") in AERA Appeal No. 02 of 2023,

(ii) Lucknow International Airport Limited ("**LIAL**") in AERA Appeal No. 3 of 2023,

(iii) TRV Kerala International Airport Limited ("**TKIAL**") in AERA Appeal No. 2 of 2024,

(iv) Jaipur International Airport Limited ("**JIAL**") in AERA Appeal No. 3 of 2024, and

(v) Guwahati International Airport Ltd ("**GIAL**") in AERA Appeal No. 4 of 2024.

334. AERA has noted "**Wholesale Price Index**" (WPI) inflation rate for FY 2022 (12.97%) and, therefore, AERA has revised the inflation rate and adjusted normative costs for the construction of Terminal Building in FY 2022 at the rate of 7.14% (average of WPI in FY 2021 and FY 2022). **AERA has noted that the "Wholesale Price Index" (WPI) inflation rate for FY 2022 was abnormally high (12.97%), and therefore, AERA has revised the inflation rate and adjusted normative costs for the construction of terminal building in FY 2022 at the rate of**

7.14% (average of WPI in FY 2021 and FY 2022). AERA notes that normative costs were determined vide AERA Order No. No.7/2016-17 dated 13.06.2016, the prevalent taxes were at the rate of 12% and they were included in normative cost and therefore, AERA is of the view that only 6% additional provision needs to be made to the account of impact of GST as against 18% considered during consultation stage.

335. After adjusting the impact of GST, normative cost for terminal building works out to be Rs.113568/- per sq. mtr. in FY 2022.

336. AERA while passing the impugned order has failed to consider the fact that normative cost for Terminal Building and pavements was calculated on WPI inflation rate of 12.97%, **whereas**, it has applied an average of WPI inflation rate of 7.14%. This change in WPI inflation from 12.97% to 7.14% was not contemplated at the consultation stage. This is against the principles of natural justice and procedural fairness. Similarly, at the consultation stage, GST rate was considered to be 18%, however, under the impugned order, AERA has adjusted the impact of GST at the rate of 6% based on prevalent tax of 12% as determined under Order No.7/2016-17 dated 13.06.2016.

337. Thus, the aforesaid changes in the rates of WPI inflation as well as the revised GST rate are without providing an opportunity to raise its objections against such arbitrary deductions.

338. AERA ought to have adopted a consistent approach and should have granted an opportunity to the Appellant to respond to the same before taking such a decision. Thus, the approach adopted by the AERA demonstrates its arbitrariness and high-handed approach. Such an approach is also in teeth of the principle of natural justice. It is also the tenet of the AERA Act that the AERA ought not to take a unilateral decision.

339. AERA Act under Section 13 (4) provides that AERA while discharging its functions shall ensure transparency and ought not to take a unilateral decision. AERA in its reply mentioned that the Terminal Building has been allowed to the Appellant only on an incurrence basis and hence, Normative Cost has no real impact on the ARR calculation. This clearly shows that AERA has failed to understand its own tariff order, since it has applied the Normative Cost for refurbishment of the existing terminal and airside works too, which has a real calculation impact on the ARR. AERA has in fact referred to the "New terminal building" which is provided on an incurrence basis. This clearly shows a lack of detailing and non-application of mind by AERA. Further, as indicated in the Impugned Order, the

inflation value for FY 2022 is considered as 7.14% (*i.e.*, Average of 1.29% (FY 2021) and 12.97% (FY 2022) in view of extraordinarily high inflation of FY 2022. However, AERA Guidelines on Normative Costing do not provide for averaging of inflation.

340. With respect to AERA's contention of considering only 6% as additional GST portion, it is important to note that in the AERA Order No. 43/2021-22 dated 15.03.2022 for Kolkata Airport, the Respondent No.2/AAI submitted the Normative Cost benchmarking whereby GST had been excluded in the calculation. The same was duly noted and acknowledged by AERA. Similarly, it would also be relevant to note that the RITES report of January 2018 for Analysis of Capital Expenditure on Expansion of Bangalore International Airport (Terminal Building, Taxiway and Apron) for the second control period whereby it was mentioned that in order to compare project cost against normative costing, the project cost without Service tax is analysed.

341. The issue of Normative Capital Cost involved in present appeal is covered by judgment of this Tribunal in **AERA Appeal No. 4 of 2016** dated **16.04.2025** in case of **DIAL Vs. UOI and Ors**. It has been held in paragraph no. **123** as under:

> "123. It is also stated by Learned Senior Counsel for AERA that the impugned order (Annexure A-1) enhances the

transparency and it also encourages the economic efficiency and it ensures that only efficient capital cost would be considered for determination of the aeronautical tariff. Hence, the impugned order is legal and valid. This contention of AERA is not accepted by this Tribunal for the following facts and reasons:

(i) By virtue of the impugned order, benchmarking is being done by AERA without considering "airport-specific factors" such as construction obligation under concession agreement like OMDA and SSA, cost structures, traffic projections, financing models, service quality expectation etc.

(ii) Without proper evaluation of airport's operational and financial realities, the impugned order has been passed which tantamount to arbitrary standardization and thereby has failed to account for unique characteristics of individual airports, particularly those developed under PPP Model.

(iii) By virtue of the impugned order, there is an imposition of generic benchmarks without appreciating the fact that PPP airports like DIAL, MIAL, HIAL and BIAL, which operate in a commercially structured framework distinct from other airports, including those operated by AAI.

(iv) The transparency envisioned under the AERA Act necessitates that all regulatory decisions, including cost assessments be based on a reasoned analysis rather than arbitrary comparisons with other airports that operate under different financial, contractual, and infrastructural conditions.

(v) By virtue of impugned order (Annexure A-1), "a rigid benchmarking approach" has been followed by AERA disregarding airport specific realities.

(vi) There can be no greater transparency than acceptance of capital expenditure incurred as mandated by Section 13(1)(a)(i) of the AERA Act that can be scrutinized based on audited accounts of DIAL and certificates provided by Chartered Accountants.

(vii) AERA cannot assume more power than what is granted under the AERA Act, 2008 to be read with OMDA and SSA, which are at Annexure A-3 and Annexure A-4 respectively by contending that AERA can adjudge "if excessive investment is made without requirements of asset.

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(ix) AERA cannot sit in appeal to determine the veracity or requirement of the particular development of the Aeronautical Asset in a particular manner and in a particular form and quality. The impugned order (Annexure A-1) tantamount to encroachment upon such functions which are solely made available to DIAL, MIAL, HIAL, and BIAL- these appellants under the contract (OMDA and SSA) which are at Annexure A-3 and Annexure A-4 respectively.

(x) The impugned order pre-supposes the cost to be incurred. AERA ought to have appreciated that when appellants – Airport Operators undertakes a development project, the cost of such project will be as per the requirements of the development project which is approved by following the procedure as laid down in OMDA and SSA and is further finalized at the touchstone of competitive bidding process because competitive bidding process brings on surface a price driven by market forces which is also known as "market driven prices" and once the process of giving contract is followed as per OMDA and SSA and through competitive bidding process once market driven price is arrived at for a particular development project,

a separate contract is always entered into by the Airport Operator with a successful bidder. This contract is binding and AERA cannot alter this binding contract between Airport Operator and a successful bidder. The cost of project is being paid by the Airport Operator to the successful bidder by way of bank entries and, therefore, also AERA cannot reduce the cost of project otherwise it will tantamount to change in terms of contract between Airport Operator and a successful bidder by AERA. This change in a contract is prohibited by SSA. If the impugned order is allowed, AERA will be empowered to alter the terms of contract between the Airport Operator and a successful bidder. Thus, a thing which cannot be done directly, can never be done indirectly meaning thereby to AERA cannot alter the terms of contract especially of cost/consideration for a particular project which is arrived at through "market discovered price" (bidding process). This impermissible thing will be permitted if the impugned order is held as a valid one. In that eventuality, AERA cannot alter the price or cost of the project under the guise of efficient cost or in the guise of "economic efficiency" or in the guise of "maintaining more transparency".

AERA cannot make or alter the contract under a hopeless reasoning that AERA is drafting a more efficient contract.

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(xiii) AERA by way of Impugned Order seeks to pre-emptively 'estimate' the costs that may be incurred based on estimated prices and disregards the actual cost arrived at through market discovery which is contrary to its mandate under Section 13(1)(a)(i) to determine tariff for the Aeronautical services taking into consideration the capital expenditure 'incurred' i.e. actually spent."

[Emphasis Supplied]

342. The contention of AERA that Normative cost includes the erstwhile Service Tax is not correct. Thus, it would be logical for AERA to have added GST of 18% instead of adding 6% differential between GST and Service Tax while calculating the Normative Cost benchmark as per the normal practice followed by it for other airports.

343. In view of the aforesaid facts, reasons and judicial pronouncement and since the order on Normative Cost is already quashed by this Tribunal, it cannot be applied by AERA anymore and has to be ignored. We therefore quash and set aside the

decision of AERA in the impugned order so far as it relates to normative cost of construction of terminal building and we hereby direct AERA to consider the cost proposed by Airport Operator while examining the estimates which will be in any case Trued-Up on actual basis as and when actual cost is incurred.

344. In view of the aforesaid facts, reasons and judicial pronouncements, these appeals are allowed and accordingly disposed of.

(JUSTICE D.N. PATEL)

CHAIRPERSON

(SUBODH KUMAR GUPTA)

MEMBER

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