TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Reserved on: 23rd May, 2023

Pronounced on: 21st July, 2023

AERA APPEAL/1/2021

Delhi International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;

2. Federation of Indian Airlines …Respondent(s)

WITH

AERA APPEAL/1/2016

Delhi International Airport Ltd. …Appellant

Versus

1. Union of India, Ministry of Civil Aviation (Through its Secretary);

2. Airports Economic Regulatory Authority of India;

3. Federation of Indian Airlines;

4. Lufthansa German Airlines;

5. Air India; …Respondent(s)

BEFORE:

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

HON'BLE MR. SUBODH KUMAR GUPTA (MEMBER)

FOR APPELLANT	FOR RESPONDENT(S)
In AERA Appeal No.1/2021 For **DIAL** Mr. Ramji Srinivasan, Sr. Adv. with Mr. Milanka Chaudhary, Ms. Naina Dubey, Mr. Ravneet Singh, Ms. Shruti Pandey, Ms. Namrata Saraogi, Advocates	**In AERA Appeal No. 1/2021** For **AERA (R-1)** Mr. Meet Malhotra, Sr. Adv. with Mr. Naresh Kaushik Mr. Manoj Joshi Mr. Shubham Dwiwedi, Advocates with Dr. Anand Kumar, Director-legal Dr. Shreya Sharma, Bench Officer For **FIA (R-2)** Mr. Buddy Ranganadhan Ms. Nishtha Kumar Mr. Prantar Basu Choudhury, Advocates
In AERA Appeal No.1/2016 For **DIAL**	**In AERA Appeal No.1/2016** For **UOI (R-1)**

Mr. Ramji Srinivasan, Sr. Adv. with Mr. Milanka Chaudhury, Ms. Naina Dubey, Mr. Ravneet Singh, Ms. Shruti Pandey, Advocates	Ms. Anjana Gosain, Ms. Dipika Sharma, Ms. Nippun Sharma, Ms. Heetika Vadhera, Advocates For **AERA (R-2)** Mr. K.P.S Kohli, Mr. Kartik Mittal, Advocates For **FIA (R-3)** Mr. Buddy Ranganadhan, Ms. Nishtha Kumar, Mr. Prantar Basu Choudhury, Advocates For **Lufthansa Airlines (R-4)** Mr. Sanjay Dhingra, Advocate For **Air India (R-5)** Ms. Shrinkhla Tiwari, Advocate

INDEX

JUDGEMENT

Per Justice D.N. PATEL, Chairperson

SUMMARIUM

The present appeal revolves around the interpretation of existing legal framework governing the functioning of Indira Gandhi International Airport, Delhi, especially by interpreting two major agreements which are referred to as Operation Management Development Agreement (OMDA) and State Support Agreement (SSA) hereinafter along-with other supportive agreements like Lease Deed, Escrow Account Agreement etc, in light of Airports Economic Regulatory Authority of India Act, 2008.

In the present Appeals, the methodology of calculation of Target Revenue (TR) is involved.

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

Target Revenue (TR), is an amount finalized by Respondent Number 1-AERA. Appellant is permitted to recover Target Revenue (TR) from different stakeholders and users of IGIA, Delhi, during the period of five years (known as Control Period).

The aforesaid formula has been given in Schedule 1 of State Support Agreement (SSA) which is at Annexure A-4 to the memo of AERA Appeal 1 of 2021.

On every different component of the aforesaid formula, the arguments have been canvassed in these AERA Appeals.

STATUTES, REGULATIONS & LEGAL AGREEMENTS INVOLVED

ACT/REGULATION/RULE/AGREEMENT	SECTION/RULE/CLAUSE
State Support Agreement (SSA)	Schedule 6, Schedule 8, Schedule 1, Art.3, Clause 3.1.1
Operation, Management and Development Agreement (OMDA)	Schedule 6, Schedule 5, Clause 2.1.1, Clause 2.1.2, Art.12
Airports Economic Regulatory Authority of India Act, 2008	Sec. 13(1)(a), Sec.18(2), Sec.31
Tariff Order No.40/2015-2016 in the matter of determination of Aeronautical Tariffs w.r.t	Annexure A (Cont.) in Vol. III of AERA Appeal 1 of

IGIA, Delhi for the 2nd Control Period dated 08th December, 2015	2016
Tariff Order No. 57/2020-21 in the matter of determination of Aeronautical Tariffs w.r.t IGIA, Delhi for the 3rd Control Period dated 30th December, 2020	Annexure A-1 in Vol. I of AERA Appeal 1 of 2021
Operation, Management and Development Agreement (OMDA)	Annexure A-3
State Support Agreement (SSA)	ANNEXURE A-4
Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011	Annexure A-6
Companies Act, 2013	Sec.135
Lease Deed	Annexure A-5 (Colly)

ABBREVIATIONS INVOLVED

Abbreviations	Expansion
AAI	Airports Authority of India
ACI	Airports Council International
ADRM	Airport Development Reference Manual
AERA Act	Airports Economic Regulatory Authority of India Act, 2008
AERA	Airports Economic Regulatory Authority of India
AF	Annual Fee
AOC	Airlines Operators Committee
APAO	Association of Private Airport Operators
ARB	Aeronautical Revenue Base
ATC	Air Traffic Control
BAC	Base Airport Charges
BCAS	Bureau of Civil Aviation Security

BIAL	Bangalore International Airport Limited
CAGR	Compound Annual Growth Rate
CNS/ATM	Communication, Navigation and Surveillance and Air Traffic Management Services
CSR	Corporate Social Responsibility
CWIP	Capital Work in Progress
DF	Development Fee
DIAL	Delhi International Airport Limited
ECB	External Commercial Borrowing
FDR	Fixed Deposit Receipts
FIA	Federation of Indian Airlines
Forex Losses	Foreign Exchange Losses
FRoR	Fair Rate of Return
FTC	Fuel Throughput Charges
FICCI	Federation of Indian Chambers of Commerce

GHIAL	GMR Hyderabad International Airport Limited
HIAL	Hyderabad International Airport Limited
IDC	Interest During Construction
IGIA	Indira Gandhi International Airport
JVC	Joint Venture Company
MIAL	Mumbai International Airport Limited
MoCA	Ministry of Civil Aviation
MYTP	Multi Year Tariff Proposal
OMDA	Operation, Management and Development Agreement
PBT	Profit Before Tax
PV	Present Value
RAB	Regulatory Asset Base
RoI	Return on Investment
RSA	Revenue Share Assets
RSD	Refundable Security Deposit

RTL	Rupee Term Loan
SGSA	State Government Support Agreement
SPV	Special Purpose Vehicle
SSA	State Support Agreement
TDSAT	Telecom Disputes Settlement and Appellate Tribunal
WACC	Weighted Average Cost of Capital

ISSUES INVOLVED

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

I. Whether there can be True Up of over recovered revenue on account of levy of Base Airport Charges (BAC)?

II. Whether "Other Income" is to be treated as part of revenue from Revenue Share Assets?

III. Whether Annual Fee is to be included in revenue from Revenue Share Assets in determining "S" factor?

IV. Whether "S" factor can be considered a part of aeronautical revenue base while determining aeronautical taxes (i.e. "T")?

V. Whether revenue accruing from Existing Assets/Demised Premises can be considered as part of revenue from Revenue Share Assets?

VI. Whether Capex for Phase 3A expansion project of IGIA, proposed by the Appellant to be allowed as part of RAB, can be reduced by AERA?

VII. Whether expenses towards CSR can be considered as part of operating expenses?

VIII. Whether foreign exchange losses can be considered as a part of operational expenditure?

IX. Whether, for the purpose of tariff determination, financing allowance is to be considered instead of only considering Interest During Construction (IDC)?

X. Whether Regulatory Asset Base can be determined as an average of Opening and Closing RAB?

AERA APPEAL NO.1 OF 2016 & AERA APPEAL NO. 1 OF 2021

For any reference, AERA Appeal No. 1 of 2021 shall be treated as the main matter unless expressly stated otherwise.

1. These appeals have been preferred under **Section 18(2) of the Airports Economic Regulatory Authority of India (AERA), Act, 2008** against the order passed by Respondent - AERA bearing number 40 of 2014/15 dated 08th December, 2015 (for 2nd Control Period) and against order passed by AERA bearing number 57/2020-21 dated 30th December, 2020 (for 3rd Control Period).

2. 2nd Control period is from 01st April, 2014 to 31st March, 2019 and 3rd Control Period is from 01st April, 2019 to 31st March, 2024. **These 2 orders are passed by AERA under Section 13(1)(a) of the AERA Act. These appeals are in respect of Indira Gandhi International Airport (IGIA), Delhi.**

FACTUAL MATRIX

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

of India Act, 2008 came to be merged in the instant tribunal i.e. the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).

B. Order passed by AERA for 1st Control Period (01st April, 2009 – 31st March, 2014) was passed on 20th April, 2012 vide Tariff Order No. 3/2012-13 which was challenged before this Tribunal in AERA Appeal No. 10 of 2012 and the same was decided on 23rd April, 2018. Order passed by this Tribunal dated 23rd April, 2018 was challenged by this appellant before Hon'ble the Supreme Court of India as Civil Appeal under Section 31 of the AERA Act being Civil Appeal No. 8378 of 2018. This was in respect of Indira Gandhi International Airport (IGIA), Delhi. These appeals have been decided by Hon'ble the Supreme Court on 11th July, 2022.

C. Thereafter, AERA passed order dated 08th December, 2015 for 2nd Control Period (01st April, 2014-31st March, 2019) being No. 40 of 2015-16 for IGIA, Delhi which is challenged before this Tribunal in AERA Appeal No.1 of 2016.

D. Thereafter, AERA passed order for 3rd Control Period (01st April, 2019-31st March, 2024) being No. 57 of 2020-21 dated 30th December, 2020. This is known as the 3rd Tariff Order which is challenged by this appellant before this Tribunal vide AERA Appeal No. 1 of 2021.

E. For the IGI Airport, a consortium led by the GMR Group was awarded the contract for operating, maintaining, developing, and designing, constructing, upgrading, modernizing, financing and managing the IGI Airport. Post selection of the GMR consortium based on the highest technical rating and highest revenue share offered, a Special Purpose Vehicle, namely Delhi International Airport Private Limited ("**DIAL**"), the Appellant herein, was incorporated on 01st March, 2006 with AAI holding 26% equity stake and the balance 74% of equity capital being acquired by members of the GMR consortium.

F. Pursuant to the above, DIAL/Appellant executed the Operation, Management and Development Agreement ("**OMDA**") with AAI on 04th April, 2006 and commenced operations from 03rd May, 2006. The term of the OMDA is 30 years. DIAL has a right to extend the OMDA for a further period of 30 years subject to satisfactory performance under various provisions governing the arrangement between DIAL and the AAI. In addition to the OMDA, DIAL also entered into the State Support Agreement ("**SSA**") with the Government of India on 26th April, 2006 which outlined the support from the Government of India and also laid down the principles

for tariff fixation. Copies of the OMDA and SSA have been annexed hereto and marked as **Annexure A-3** and **Annexure A-4** respectively.

G. Under OMDA, AAI granted DIAL, the exclusive right and authority during the Term to undertake some of the functions of AAI being the functions of operations, maintenance, development, design, construction, upgradation, modernizing, finance and management of the IGI Airport and to perform services and activities constituting aeronautical services and non-aeronautical services (but excluding Reserved activities) at IGI Airport.

H. Besides other rights, the Appellant/ DIAL has been granted exclusive right under Article 2.1.2 of OMDA to determine, demand, collect, retain and appropriate charges from the users of the IGI Airport subject to the provisions of Article 12 of the OMDA. Further, Article 12.1.2 under Chapter XII (dealing with Tariff and Regulation) specifically provides that the charges to be levied for the provision of Aeronautical Services (Aeronautical Charges) shall be determined as per the provisions of the SSA.

I. Under OMDA, the appellant is required to have a periodic review of the master plan of IGI Airport which was prepared by this appellant and submitted the expansion plan to the respondent AERA for its consideration. The development work at IGI Airport primarily includes expansion of

Terminal-1 and associated facilities, airfield works including 4th runway, eastern parallel cross taxiways, modification to Terminal-3 and associated facilities etc.

J. The OMDA under Article 12.2 also recognizes the exclusive liberty of the Appellant to determine the charges for Non- Aeronautical Services and accordingly the regulation thereof has been specifically kept out of the regulatory domain of AERA.

K. As per Schedule 1 of SSA, several Principles have been laid down which are to be appreciated by AERA while finalizing the Aeronautical Charges for the IGI Airport. Schedule 1 of SSA has prescribed approximately 10 principles to be kept in mind while determining the Aeronautical Charges.

L. On a reading of the aforesaid provisions including others of OMDA and the SSA, it is evident that one of the basic and fundamental tenet of OMDA and SSA is to ensure financial viability of the Appellant by ensuring adequate Return on Investment (RoI) and return of investment through appropriate fixation of the Aeronautical Charges. The SSA was executed between the Appellant and the Government of India to ensure smooth

functioning and viability of the Appellant and the same is reflected in the recital clause of SSA which provides as under:

> "(E) In consideration of the JVC having entered into OMDA and to **enhance the smooth functioning and viability of the JVC**, in addition to the obligations of the AAI under the OMDA, the GOI is agreeable to provide some support to the JVC."

M. In consideration of the JVC having entered into OMDA and to enhance the smooth functioning and viability of the JVC, in addition to the obligations of the AAI under the OMDA, the GOI is agreeable to provide some support to the JVC.

N. Besides OMDA and SSA, several other agreements were also entered into by the Appellant such as the Lease Deed Agreement dated 25th April, 2006, Shareholders' Agreement dated 04th April, 2006, State Government Support Agreement (SGSA) dated 26th April, 2006, Airport Operator Agreement dated 01st May, 2006 and CNS/ATM Facilities and Services Agreement dated 25th April, 2006, necessary for performance of the rights and obligations under the principal agreement, i.e. OMDA. These agreements along with the OMDA and SSA are collectively known/treated as Project Agreements. Copies of the other agreements entered into by the

Appellant are annexed hereto and collectively marked as Annexure A-5 (Colly.).

O. In fulfilment of its obligations under Article 3.1.1 of the SSA, the Government of India in the year 2008, notified the AERA Act and established AERA as the regulatory authority with the primary responsibility of determining tariff for aeronautical services for major airports. The underlying legislative intent of the AERA Act is to carry out the purposes of the stated policy i.e. to bring in private capital to take care of the high investment needs of the Airport sector and for that purpose to create an atmosphere where private players can safely invest in the Airport sector. Section 13(1)(a) of the AERA Act inter alia provides that while fixing tariffs for aeronautical services, the Respondent AERA shall take into consideration:-

(i) the capital expenditure incurred and timely investment in improvement of airport facilities;

(ii) the service provided, its quality and other relevant factors;

(iii) the cost for improving efficiency;

(iv) economic and viable operation of major airports;

(v) revenue received from services other than the aeronautical services;

(vi) the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise;

(vii) any other factor which may be relevant for the purposes of this Act:

Provided that different tariff structures may be determined for different airports having regard to all or any of the above considerations specified at sub-clauses (i) to (vii).

P. It is also pertinent to note that the under Section 15 of the AERA Act, the Respondent has formulated and issued guidelines setting out a framework incorporating terms, conditions, systems, procedure and information requirement thereof for the purpose of discharge of its function of tariff determination called the Airports Economic Regulatory Authority of India (Terms and Conditions for Detennination of Tariff for Airport Operators) Guidelines 2011 ("Tariff Guidelines"). It is pertinent to note that in case of the IGI Airport as the determination of tariff is principally governed by the AERA Act and the SSA, only in the event that the SSA is silent on any issue, the provisions of the Tariff Guidelines may be resorted

to. A copy of the Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines 2011 is annexed herewith as Annexure A6.

Q. In both these appeals, this appellant has relied upon the formula adopted in OMDA to be read with SSA for calculating Aeronautical Charges in the **shared till inflation - X price cap model.** The target revenue formula is:

$$\text{“}TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i\text{”}$$

R. On the basis of the aforesaid formula, the target revenue has been finalized by AERA for 2nd Control Period and 3rd Control Period and detailed methodology of calculation has been given in SSA. In much detail and at length, all the relevant factors to be kept in mind by AERA while determining the revenue target, have been pointed out to this Tribunal. AERA has passed the 2nd Tariff Order and 3rd Tariff Order after consultation process is over and after inviting objections from all stakeholders and as stated hereinabove, **2nd Tariff Order dated 08th December, 2015 and 3rd Tariff Order dated 30th December, 2020 have been challenged by this appellant on various grounds under Sec. 18(2) of the AERA Act.**

ARGUMENTS CANVASSED BY APPELLANT- DIAL

1. Learned Senior Advocate Shri Ramji Srinivasan, appearing for the appellant has submitted that AERA (which is the respondent No.1) has calculated target revenue by ignoring relevant factors which were pointed out by this appellant during consultation process before the said Authority. **Target revenue is to be arrived at by AERA in pursuance of formula:**

$$\text{“}TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i\text{”}$$

Target revenue is an amount which is permitted by AERA to be collected by appellant for running IGIA, Delhi. If this amount is not properly determined by AERA in view of the aforesaid formula which is mentioned in Schedule-1 of SSA, it will be extremely difficult for appellant to operate, manage, develop and administer the IGI Airport. This appellant has to invest thousands of Crores of rupees to efficiently implement OMDA & SSA and it's a legal obligation of the respondent No.1- AERA to accurately calculate Target Revenue as per the aforesaid formula and the guiding factors given in SSA. The powers of determination of target revenue vested in respondent - AERA is a power coupled with duty and once there is a legal

obligation vested in AERA, there is a legitimate right vested in the appellant to recover the target revenue as per OMDA & SSA in respect of IGIA, Delhi.

2. Learned Senior Advocate Shri Ramji Srinivasan, on behalf of DIAL has submitted that there were several issues raised in AERA Appeal 1 of 2016 in which 2nd Tariff Order is under challenge for the 2nd Control Period (01st April, 2014-31st March, 2019). There were total 11 major grounds for challenging 2nd Tariff Order passed by AERA dated 08th December, 2015, but, now only the following three points are left out to be adjudicated upon by this Tribunal and they are as under:

1. Foreign Exchange Fluctuations;
2. Other Income; and
3. Calculation of "S" factor as part of TR.

The aforesaid three points are now left to be adjudicated upon by this Tribunal for arriving at correct calculation of target revenue as per aforesaid formula given in Schedule - 1 of SSA for 2nd Tariff Period (i.e. F.Y. 2014-2019).

3. Counsel appearing for the Appellant Sh. Ramji Srinivasan, Ld. Sr. Adv. submitted that the Target Revenue (TR) permitted to be collected by this Appellant for the 1st Control Period was at Rs. 6849.06 Crores. Actual Aero

Revenue realized by the Appellant during 1st Control Period was at Rs. 6743.35 Crores. Thus, there was shortfall of the revenue.

4. Counsel for the appellant submitted that 1st Tariff Period Order was already challenged before this Tribunal and thereafter by this appellant before Hon'ble the Supreme Court of India in Civil Appeal No. 8378 of 2018. This Civil Appeal has already been decided by Hon'ble the Supreme Court of India vide Judgement and Order dated 11th July, 2022 and, therefore, out of the total eleven issues involved in AERA Appeal No.1 of 2016, only the aforesaid three issues are left out to be decided for 2nd Tariff Period. For rest of the points in AERA Appeal No. 1 of 2016 which is for 2nd Tariff Period, several issues have already been decided by Hon'ble the Supreme Court of India when this appellant had challenged order of AERA for 1st Tariff Period. Several creases have been ironed out by Hon'ble the Supreme Court of India and hence, only three issues as stated hereinabove are left out to be decided for 2nd Tariff Period. It is further submitted by Shri Ramji Srinivasan, Learned Senior Advocate on behalf of DIAL that in AERA Appeal No. 1 of 2021, which is for 3rd Tariff Period (F.Y 2019-2024), the major issues yet to be adjudicated by this Tribunal which

have a direct nexus in calculation of target revenue for the 3rd Tariff Period are as under:-

a. Foreign exchange fluctuations;

b. Other income;

c. Calculation of "S" factor as part of Aeronautical Revenue Base;

d. True-up of over recovery on account of levy of BAC;

e. Consideration of the part of Capex for Phase 3-A expansion project of IGIA, Delhi as part of RAB;

f. Inclusion of annual fee in determination of "S" factor;

g. Disallowance of CSR expenses as part of operating expenses;

h. Consideration of only interest during construction instead of financing allowance;

i. Calculation of average regulatory asset base;

j. Exclusion of revenue from existing assets.

5. Thus, three points of 2nd Control Period in AERA Appeal No. 1 of 2016 are also, the grounds for the 3rd Control Period in AERA Appeal No. 1 of 2021. Thus, on ten aforesaid different aspects, AERA has committed errors in calculating target revenue for 3rd Control Period and for three major

grounds as stated hereinabove, AERA has committed errors in calculations for Target Revenue in 2nd Tariff Period.

6. Counsel appearing for DIAL has taken this Tribunal to the different Clauses of OMDA, SSA and other agreements, consultation paper, the objections raised by this appellant before AERA and various impugned orders passed by AERA dated 08th December, 2015 (2nd Control Period) and order dated 30th December, 2020 (3rd Control Period). The Counsel appearing for appellant has relied upon several tables with figures in detail and calculation of several factors which are relevant in the aforesaid formula of Target Revenue.

7. Mr. Ramji Srinivasan, Learned Senior Advocate has submitted that AERA has not properly appreciated that DIAL is eligible to recover Base Airport Charges (BAC) plus 10% of BAC as per Schedule-6 of SSA, when aeronautical charges fall below the BAC plus 10% thereof. Learned Senior Counsel for DIAL submitted that this aspect of the matter has not been properly appreciated by AERA while truing up of over recovered revenue on account of levy of Base Airport Charges (BAC). Counsel for appellant has relied upon various tables along-with the figures to substantiate his arguments. These tables and figures have been mentioned in the

impugned order and it has further been submitted that true-up of over-recovered revenue is always permissible but BAC plus 10% thereof is a minimum guaranteed amount which is permissible for this appellant to recover. The target revenue for the 3rd Tariff Period has been fixed by AERA at Rs. 3869.90 Crores whereas BAC plus 10% thereof, which is a minimum guaranteed amount recoverable by this appellant for the 3rd Tariff Period (financial year 2019-2024), is Rs. 3914.15 Crores.

8. It is further submitted by Mr. Ramji Srinivasan, Learned Senior Advocate for DIAL that the issue of "**other income as part of revenue from revenue share assets"** has not been properly appreciated by AERA while passing the impugned 2nd and 3rd Tariff Orders. This issue has been pointed out to this Tribunal very elaborately and it has been submitted by counsel for the appellant that other income including dividend income from investments made by DIAL/its subsidiary companies, interest income from the surplus fund of DIAL and interest on delayed payments earned by DIAL received or receivable from the concessionaires, have to be excluded from the consideration under revenue from Revenue Share Assets. Counsel for the appellant has taken this Tribunal to the definition of Revenue Share Assets as pointed out in Schedule-1 of the SSA. It is submitted by counsel

for DIAL that "Other Income" is a part of airport's cash management process and not generated from employment of any Revenue Share Assets. Moreover, "Other Income" is not relatable to and generated from, the provision of any service by DIAL. Counsel for the appellant has submitted that AERA has travelled beyond the definition of Revenue Share Assets. Counsel for the appellant further submitted that it has been held by this Tribunal in judgment dated 23rd April, 2018 in AERA Appeal No. 06 of 2012 that AERA cannot ignore the vested contractual rights under the OMDA, SSA and other agreements and the rights or concessions flowing from the same have to be honoured by AERA. Learned Senior Counsel has also placed reliance on the decision rendered by Hon'ble the Supreme Court of India which is reported as **"2022 SCC OnLine SC 850"** wherein Hon'ble the Supreme Court of India has observed that OMDA and SSA have pre-legislative features. AERA is required to duly honour and consider the same. Counsel for appellant has further submitted that during 1st Control Period, AERA had not included dividend income, interest income and interest on delayed payments while calculating target revenue. This consistency in the approach of AERA has to be maintained by AERA even for the 2nd and 3rd Control Periods. Counsel for the appellant has also

submitted that there is a double consideration of income in Tariff. Counsel for appellant has submitted that while truing up, the surplus generated in 2nd Control Period considered the time value of surplus and accordingly considered Rs. 5721 Crores for true up, instead of Rs. 4339 Crores. Thus, AERA has already penalized DIAL to the tune of Rs. 1400 Crores as per table 71 of the impugned order. Therefore, consideration of other income again as part of cross-subsidy will mean double accounting which is an error apparent on the face of record by AERA. Counsel for the appellant also submitted that AERA has failed to appreciate that the investment of DIAL in joint ventures was not considered as part of RAB boundary for the purpose of tariff determination by AERA, such as any return (dividend) from such investment cannot be considered for cross-subsidization (calculation of "S" factor). Here also there is inconsistency by AERA, the tariff order passed by AERA has categorically stated that since the assets of its ventures were not considered as a part of RAB boundary, the dividend income accruing to DIAL from such joint ventures should not be considered towards cross subsidization. However, in the 3rd Control Period, there is a departure by AERA from its earlier tariff order and no reasons have been provided therein for such a departure. Thus, it is submitted by counsel for

appellant that AERA's decision is contrary to its own stand in its 1st and 2nd Tariff Order.

9. It is further submitted by the learned counsel for the appellant Mr. Ramji Srinivasan that the capital expenditure incurred by this appellant for Phase 3A expansion of IGI Airport, Delhi has to be accepted as it is by the AERA because for the work of expansion, prior permission has already been taken from Ministry of Civil Aviation. Thereafter, global tender was floated and the lowest No.1 has quoted the price for phase 3A expansion of IGI Airport, Delhi and, therefore, the cost of expansion project in question is a "**Market Discovered Price".** For this contract of expansion project, separate agreement has also been entered into with the lowest No.1 and therefore, this appellant had demanded Rs. 9782.15 Crores whereas AERA has permitted to recover only Rs. 9126.42 Crores. The tender process has never been called in question by AERA. There are no allegations that tender process was bad in law or any fraud has been played and, therefore, **Market Discovered Price** for Phase 3A expansion of IGI Airport, Delhi has to be accepted by AERA**.** It is further submitted by counsel for the appellant that AERA has taken an opinion from an outside agency. The outside agency has given a particular amount as an efficient

cost for Phase 3A expansion project which was much lesser than the actual cost of Phase 3A expansion and, therefore, AERA has added impact of inflation and GST credit and has arrived at a figure of Rs. 9126.42 Crores as against the demand of this appellant which is based upon **actual cost** of phase 3A expansion project which is Rs. 9782.15 Crores. In fact, the cost arrived at by AERA on the basis of report given by outside agency is an estimated cost whereas this appellant has to incur actual cost of Rs. 9782.15 Crores. This aspect of the matter has not been properly appreciated by AERA in light of Section 13(1) of AERA Act, 2008. Counsel for the appellant has taken this Tribunal to various tables from the impugned order as well as to the various provisions of the OMDA & SSA for floating the tender as well as to Section 13 of AERA Act, 2008 and has submitted that against the demand of Rs. 9782.15 Crores to be calculated in arriving at Target Revenue (TR), the AERA has wrongly reduced the said amount to Rs. 9126.42 Crores in the name of "efficient cost". Counsel appearing for the appellant has also pointed out to this Tribunal the provisions of Section 61, 62, 63 and 64 of the Electricity Act, 2003 and the method of determining the tariff under that Act.

10. It is further submitted by counsel for the appellant that the foreign exchange issue has not been properly appreciated by AERA, while passing the 2nd and 3rd Tariff Orders. It is submitted by counsel for appellant that DIAL as a part of cost optimization strategies has taken foreign currency loans in F.Y 2010 to 2014 which led to lower cost pass on to passengers in the form of tariff. However, such loans were also subjected to foreign currency fluctuations. It is submitted by counsel for appellant that losses accrued on account of foreign exchange fluctuations must be considered as operating expenses. This aspect of the matter has not been properly appreciated by AERA and AERA has disallowed foreign exchange losses as part of operational expenditure for the true-up exercise for the 1st control period. AERA has kept in mind "the refinancing cost of debt". This is outside the purview of determination of efficient foreign exchange losses. At length, this issue has been highlighted by Ld. Counsel for the appellant. AERA's decision is contrary to its own decision taken in the 2nd control period. It allowed foreign exchange losses to the extent of the cost of Rupee Term Loan (RTL) which was kept at 11.38%.

11. Ld. Senior Counsel for the appellant submitted that while determination of "S" factor, annual fee which is being paid by this appellant

to AAI which is 45.99% of gross revenue cannot be included while calculating "S" factor meaning thereby, the annual fee of 45.99% pertaining to revenue from "Revenue Share Assets" should be excluded while calculating "S" factor because this amount is never coming in the hands of this appellant. Counsel for the appellant has taken this tribunal to the definition of "S" which is equal to 30% of gross revenue generated by JVC from the revenue share assets. The cost in relation to such revenue shall not be included while calculating aeronautical charges. Counsel for the appellant has taken this Tribunal to Clause 3.1.1 of SSA wherein Annual Fee is not a cost of provision of aeronautical services and by applying the same principle, Annual Fee is not a cost of provision of Non-Aeronautical Services and aeronautical related services. Accordingly, Annual Fee has to be deducted in terms of SSA. It is submitted by learned senior counsel for appellant that AERA has admitted in the impugned order that Annual Fee is not a cost. It is also submitted by learned senior counsel for appellant that as per SSA, other capitalised terms used in SSA are not defined in SSA, but, are defined under the OMDA and it shall have the meaning ascribed to the term under the OMDA. Counsel for appellant submitted that as per SSA, if the word using capitalized term like

"Revenue", if it is not defined in SSA but it is defined in OMDA, the definition of OMDA shall be applicable in SSA meaning thereby to, if non-capitalized term (i.e. revenue) is used in SSA, then definition of "Revenue" from OMDA is not applicable for interpretation of revenue of SSA. This aspect of the matter has not been properly appreciated by AERA. What has been done by AERA is, definition of "revenue" used in SSA in the definition of "S" has been wrongly interpreted with the help of "Revenue" from OMDA. As per OMDA, "Revenue" means annual fee payable to AAI shall not be deducted from Revenue. This definition of Revenue from OMDA cannot be applied to "revenue" used in SSA. Counsel for appellant has placed heavy reliance upon the sentence used in SSA after the definitions are over in Clause 1.1 which reads as under:-

> **"Other Capitalised terms used herein (and not defined herein) but defined under the OMDA shall have the meaning ascribed to the term under the OMDA."**

It is submitted by counsel appearing for the appellant that the impact of this argument, if converted into financial figures, will make a very huge difference while calculating "S" factor in the formula of target revenue. As per appellant, in the 2nd Control Period while calculating "S" factor which is

[30% of gross revenue generated by JVC from the Revenue Share Assets], whereas, it should have been 30% of [Gross revenue generated by JVC from the Revenue Share Assets - Annual Fee paid to AAI]. "S" factor means out of total target revenue, this much amount which is equal to "S" factor is to be deducted and the remaining amount is to be collected by this appellant and, therefore, it is always an endeavour of respondent that the figure of "S" factor should be higher and higher, whereas the endeavour of this appellant is to calculate "S" factor as per SSA and not as per OMDA. Similarly, for 3rd Control Period also, "**S"** factor should have been calculated as 30% of [Gross Revenue generated by JVC from the Revenue Share Assets - Annual Fee paid to AAI].

12. It is contended by counsel for appellant that AERA has not properly appreciated while calculating "S" factor in the formula of targeted revenue, the aeronautical taxes figure. It is contended by the counsel for the appellant that issue of inclusion of "S" factor as part of aeronautical revenue base for computation of aeronautical taxes was raised before this Hon'ble Tribunal in AERA Appeal No. 4 of 2013 in the case of "MIAL Vs. AERA & Ors." wherein this Hon'ble Tribunal in its decision dated 15th November, 2018 observed that "S" is an element of revenue on aero

revenue and by the same yardstick must be added while calculating "T". The Tribunal found some merits in these arguments and, therefore, the matter was remanded to AERA for fresh consideration. Thus, it is submitted by counsel for appellant that while calculating "S" in the formula of the target revenue, out of gross revenue generated by JVC, an amount equal to tax should have been deducted from the gross revenue. This aspect of the matter has not been properly appreciated by AERA. Ld. Senior Counsel for appellant has read over the paragraphs from the impugned orders and has submitted that AERA has failed to deduct the amount equal to tax out of gross revenue from Revenue share assets.

13. Learned Senior Counsel for the appellant submitted that under Sec. 135 of the Companies Act, 2013, there is a Corporate Social Responsibility (CSR) of this appellant and the amount of expenses towards CSR should be considered as a part of the operating expenses. AERA has not included expenses towards CSR as part of operating expenses for 1st, 2nd and 3rd Control Periods. It is further submitted by Learned Senior Counsel for the appellant that this Hon'ble Tribunal in "AERA Appeal No. 8 of 2018" in the case of "Bangalore International Airports Ltd. (BIAL) Vs. AERA" has quashed and set aside the decision of AERA of not including the CSR

expenses as part of operating expenses. Thus, it is submitted by Learned Senior Counsel for the appellant that CSR expenses should be treated as operating expenses for calculating "OM" in a formula of the target revenue. "OM" has already been defined in Schedule-1 of SSA which is an operation and maintenance cost pertaining to aeronautical services.

14. Ld. Senior Counsel for the appellant further submitted that DIAL has submitted before AERA that financing allowance should be considered in RAB. AERA has appreciated financing allowance under the Tariff Guidelines as part of RAB in case of other airports (i.e. BIAL and GHIAL) and, therefore, AERA cannot deny applicability of financing allowance in case of DIAL by creating arbitrary distinction between greenfield and brownfield airports. AERA has decided to consider only Interest During Construction (IDC) instead of financing allowance incurred on account of financing expansion Capex during the 3rd Control Period based on prudent means of finance for funding the Capex, which would be true-up based on actuals for the 4th Control Period. This is an error on the part of AERA. In fact, financing allowance is a notional allowance and is different from the actual investment incurred by DIAL which could include IDC amongst other costs. In case of BIAL and GHIAL, AERA has allowed financing allowance, but, the

same has been denied to DIAL. Learned Senior Counsel for the appellant has taken this Tribunal to various paragraphs of the impugned decision and has placed reliance on several facts and figures to justify allowing financing allowance during construction.

15. It is further submitted by Ld. Senior Advocate Shri Ramji Srinivasan on behalf of DIAL that Regulatory Base (RB in the formula of target revenue) should have been determined as per SSA, i.e. $RB_i = RB_{i-I} - D_i + I_i$ where RB_i is the Regulatory Base for the period, RB_{i-I} is the opening RB, D_i is the depreciation for the period and I_i is the investment undertaken during the period. However, the Regulator has not followed the formula as per SSA. Even the Tariff Guidelines of AERA provides for:

"RAB= opening RAB (RB) + closing RAB (RB) divided by 2"

It is further submitted by Learned Counsel for DIAL that AERA has incorrectly relied upon an altogether new formula for calculation of RAB i.e. pro-rata adjustment of investments undertaken in the period, which is not contemplated either in SSA or Tariff Guidelines.

16. It is further submitted by the Learned Senior Counsel for the Appellant – DIAL that there should be exclusion of revenue generated from "existing assets" from the calculation of "S factor". It is further submitted by Shri

Ramji Srinivasan, Learned Senior Advocate that Non aeronautical revenue accruing from Existing Assets could not be considered as part of revenue from Revenue Share Assets because these assets were owned by AAI and not by DIAL or any 3rd entity and, therefore, DIAL sought for the exclusion of revenue from Existing Assets to be trued-up from the 1st Control Period. Therefore, in other words, revenue from existing assets cannot be treated as non-aeronautical revenue because the existing assets/demised premises cannot be considered as revenue from the "Revenue Share Assets" and cannot be used for cross-subsidization because these assets were owned by AAI and not by DIAL. Learned Senior Counsel for appellant has placed heavy reliance upon definition of Revenue Shared Assets and based upon this definition, non-aeronautical assets, demised premises or existing premises have been expressly excluded from the third category of non-aeronautical assets. Third category of non-aeronautical assets means all additional land **(other than demised premises),** property and structures thereon acquired or leased during the term in relation to such non-aeronautical assets. Thus, existing or demised premises are in fact not a non-aeronautical asset. This aspect of matter has not been properly assessed by AERA while calculating "S" factor in the formula of targeted

revenue. Learned Senior Counsel for appellant has also read and re-read definition of "Revenue Share Assets" and submitted that it is an exhaustive definition because it starts with the term "non-aeronautical assets shall mean…". Thus, no other assets can be further classified as non-aeronautical asset. No new words can be added to give a meaning different from what is stated in the contract merely because this contention was not raised by this appellant during the 1st and 2nd Tariff Period that does not mean that this issue cannot be raised by this appellant in the 3rd Tariff Period. On the basis of the aforesaid arguments, it is submitted by learned senior counsel for the appellant that target revenue finalized by AERA vide order dated 08th December, 2015 (2nd Control Period: 2014-2019) as well as order dated 30th December, 2020 for 3rd Control Period (FY 2019-2024) deserves to be quashed and set aside so far as IGI Airport, Delhi is concerned and the true and correct target revenue may be finalized by this Tribunal on the basis of the aforesaid arguments.

ARGUMENTS CANVASSED BY RESPONDENT NO.1 - AERA

17. Learned Senior Advocate Shri Meet Malhotra on behalf of Respondent No. 1 has submitted that no error has been committed by AERA while passing 2nd Tariff Order dated 08th December, 2015 nor any error has been committed by AERA while passing 3rd Tariff Order dated 30th December, 2020 so far as IGIA, Delhi is concerned for True-up of over recovered revenue on account of levy of Base Airport Charges (BAC). It is submitted by Learned Senior Advocate Shri Meet Malhotra on behalf of AERA that AERA vide order dated 19th November, 2018 had allowed DIAL to charge Base Airport Charges (BAC) plus 10% of BAC w.e.f. 01st December, 2018. Learned Senior Advocate Shri Meet Malhotra has relied upon Target Revenue Figures from the year 2010 and has submitted that during the period of 1st Control Period, the true-up amount was Rs. 105.71 Crores because the target revenue during the 1st Control Period was Rs. 6849.06 Crores whereas actual Aero Revenue realized was at Rs. 6743.35 Crores and, therefore, there was a deficit of Rs. 105.71 Crores. This was during the 1st Control Period (i.e. F.Y 2009-2014). For the 2nd Control Period, against the target revenue of Rs. 8002.45 Crores, there was actual aero revenue of Rs. 12,983.30 Crores. Out of this amount, earlier tariff's period

was to be trued-up. Amount to be trued-up was Rs. 105.71 Crores of the earlier tariff period was brought to its real value for the 2nd Tariff Period at Rs. 641.68 Crores. It is further submitted by learned senior counsel for appellant that the actual aero revenue realized was on a higher side for the years 2015, 2016, 2017, 2018 and 2019. The total amount to be trued-up for the 2nd Tariff Period after addition of the true-up of 1st Control Period comes to be Rs. 5721.23 Crores. These details have been given in table no. 71 of the impugned order passed by AERA dated 30th December, 2020 for the 3rd Control Period which is under challenge in AERA Appeal No. 1 of 2021 and this excess recovery of Rs. 5721.23 Crores is during the 2nd Tariff Period and true-up of this amount is to be given in the 3rd Tariff Period and, therefore, no error has been committed by AERA while passing the impugned orders. It is further submitted by Learned Senior Advocate Shri Meet Malhotra that out of the target revenue for 3rd Control Period is Rs. 9590.33 Crores out of which amount to be trued-up for 2nd Control Period at Rs. 5721.23 Crores and, therefore, adjusted target revenue comes to Rs. 3869.09 Crores. This amount is less than Base Airport Charges (BAC) which is at Rs. 3914.85 Crores. AERA has estimated on the basis of aforementioned calculation which has been given in table number 140 in

paragraph number 12.6.1 of order dated 30th December, 2020 for 3rd Tariff Period. AERA has decided that estimated eligible target revenue to be collected by this appellant during the 3rd Control Period is at Rs. 1428.47 Crores based on present value terms as on effective date of tariff implementation (i.e. 01st April, 2019) and no error has been committed by AERA in arriving at the target revenue for 2nd and 3rd Tariff Periods.

18. Learned Senior Advocate Shri Meet Malhotra appearing for AERA submitted that there was no hedging upon forex by this appellant for foreign currency swap. There was a hedge only for interest rate swap in the 1st Control Period. AERA has rightly taken a view that the cost incurred by DIAL towards hedging has already been considered under the cost of debt and losses incurred by DIAL and would not be considered as pass-through under operating expenses. It is also submitted by the Learned Senior Advocate Shri Meet Malhotra that the losses incurred by this appellant were on account of the hedging principles adopted by DIAL and losses on account of the same would not be passed onto the airport users. Counsel for the respondent has taken this Tribunal to paragraphs no. 2.4.3 onwards from the impugned order dated 30th December, 2020 which is the 3rd Control Period order. It is also submitted by counsel for Respondent

No.1 that no error was committed by AERA while passing the 2nd Tariff Order whereby it allowed Foreign Exchange (Forex) losses to the extent of the cost of rupee term loan which was capped at 11.38%.

19. It is submitted by Learned Senior Advocate - Shri Meet Malhotra on behalf of AERA that this appellant has "Other Income" including dividend income, interest income and interest on delayed payments. AERA has treated other income as non-aero and, therefore, 30% out of this "Other Income" will go in calculation of "S" factor in the formula of target revenue. Thus, 30% of "Other Income" will be deducted from the target revenue. "Other Income" is also an income of this appellant and, therefore, the same has been resulting from non-aero properties and the same has been treated as non-aero revenue so that 30% of this Other Income will be added in "S" factor which is ultimately to be deducted while arriving at target revenue as per the formula of the target revenue. Counsel for the respondent has also taken this Tribunal to various paragraphs of the impugned order and has also pointed out that there is a true-up of the "Other Income". Counsel for the respondent has placed reliance on paragraph 2.6.11 and 3.7.12 and one table no. 59 of the impugned order as well as upon paragraph Nos. 7.1.15 and 7.2.13 of the impugned order

dated 30th December, 2020. It is also submitted by learned senior counsel for respondent no. 1 that list of aero and non-aero services is not exhaustive, the lists are numeratory and not exhaustive. It is further submitted by counsel for respondent that this "Other Income" was not initially pointed out to AERA but was subsequently pointed out to AERA and, therefore, true-up has to be done for this "Other Income" earned by this appellant while calculating the target revenue.

20. It is submitted by learned senior counsel for AERA that the amount of annual fee which is payable at the rate of 45.99% of the gross revenue by DIAL to AAI cannot be included in "S" factor. Counsel for the appellant has relied upon the definition of "S" factor as given in Schedule- 1 of SSA. It is submitted by learned senior counsel for AERA that "S" is equal to 30% of gross revenue generated by JVC from the Revenue Share Assets. The cost relating to such revenue shall not be included while calculating aeronautical charges. It is submitted by counsel for the respondent that definition of "Revenue" has been already mentioned in OMDA and as per the definition of "Revenue", the annual fee payable to AAI shall not be deducted from "Revenue". Thus, as per definition of "Revenue", the annual fee cannot be deducted. **There is no difference between "revenue" and "Revenue"**

as used in OMDA to be read with definition of "S" given in SSA and, therefore, no error has been committed by AERA in excluding annual fee while calculating "S". It is submitted by counsel for the respondent that if the argument of the appellant is accepted, 30% of gross revenue generated by JVC will be approximately 16% if the annual fee is permitted to be deducted. In fact, this argument was never canvassed by this appellant during the 1st Tariff Period. It is further submitted by counsel for respondent no.1 that Annual Fee is a cost and, therefore, it cannot be deducted from the gross revenue.

21. It is further submitted by learned senior counsel for AERA that so far as amount of taxes on aeronautical revenue is concerned, true-up will be given in next Tariff Period. In fact, amount towards "S" factor, though it is 30% of non-aeronautical revenue, but "S" factor amount is in fact aeronautical revenue and, therefore, amount of tax ought to be considered while calculating target revenue. In fact, this issue was also raised before this tribunal in AERA Appeal No. 4 of 2013 and in a decision of this Tribunal dated 15th November, 2018, there was observation in paragraph no. 15 of the judgment wherein this Hon'ble Tribunal found some merit that "S" factor has an element of aero revenue and the same yardstick should be

applied in calculating "T" while calculating target revenue. It is fairly submitted by learned senior counsel for AERA that this amount will be given in the next Tariff Period by truing up the same. Thus, respondent no. 1 is not contesting so far as treating "S" factor amount is on aero revenue and, therefore, while calculating "T", the amount equal to "S" factor should be considered.

22. It is further submitted by learned senior counsel for AERA that so far as Corporate Social Responsibility (CSR) expenses to be treated as operating expenses is concerned, appeal preferred by AERA is already pending before Hon'ble the Supreme Court being Civil Appeal No. 3697 of 2022. It is submitted by Ld. senior counsel for respondent no.1 that this Hon'ble Tribunal in AERA Appeal No.8 of 2018 has decided that decision of AERA of not including CSR expenses as part of operating expenses was set aside. This was in the case "Airport Economic Regulatory Authority of India (AERA) & Ors. Vs. Bangalore International Airports Ltd. (BIAL)". As the appeal is pending before Hon'ble the Supreme Court, the decision on this point will be taken later by AERA and the amount can be given as true-up as per the judgment by Hon'ble the Supreme Court of India.

23. It is further submitted by Learned Senior Advocate Shri Meet Malhotra on behalf of Respondent No. 1 that AERA has considered the cost for Phase III-A expansion at Rs. 9126.42 Crores against the demand of DIAL at Rs. 9782.15 Crores. DIAL has carried out independent study which has submitted its report and stated that the cost of Phase III-A expansion project of DIAL involves only Rs. 7968.60 Crores and, therefore, same may be treated as part of the capital expenditure of IGIA, Delhi. AERA has included amount of tax and other factors and made the figure Rs. 7968.60 Crores to Rs.9126.42 Crores and no error has been committed by AERA in allowing this amount of part of capital expenditure undertaken by DIAL for Phase III-A expansion. Counsel for AERA submitted that every shade of impact has been appreciated by AERA. It is further submitted by the learned senior counsel for AERA that if more capital is invested then it is stated by AERA that it will be trued-up in the next Tariff Period. It is submitted by learned senior counsel for Respondent No.1 that unnecessary and exaggerated amount towards expansion of IGIA cannot be a part of capital expenditure. There has to be a co-relationship with efficient management and cost-effective expenditure and, therefore, no error has

been committed by AERA while passing the impugned Tariff Order dated 30th December, 2020.

24. Learned Senior Counsel for AERA has further submitted that no error has been committed by AERA in allowing only interest during construction (IDC) instead of financing allowance incurred on account of financing Expansion Capex during the 3rd Control Period based on prudent means of finance for funding the Capex. It is submitted by learned senior counsel for AERA that there is a remarkable difference between green-field airports and brown-field airports and, therefore, same treatment cannot be given to different types of airports. Brown-field airports like Delhi and Mumbai cannot be given carrying cost for equity. It is submitted by counsel for the respondent that as per RAB calculation methodology prescribed in the SSA, DIAL should be given a return only to the extent of efficient capital expenditure that has been capitalized as Financing Allowance is a notional allowance and different from the actual investment incurred by DIAL, which could include only IDC amongst other costs, only IDC that gets capitalized can be considered as part of RAB. DIAL has not challenged the tariff order for the 1st control period on this point.

25. Learned Senior Counsel for the respondent - AERA has submitted that DIAL's submission that Regulatory Asset Base (RAB) should be determined as average of opening and closing of RAB for a particular year cannot be accepted. It is submitted by learned senior counsel for AERA that AERA has rightly decided to consider average RAB while calculating RAB for tariff determination for the 3rd Control Period. AERA has decided that it shall true-up RAB and depreciation at the time of determination of tariff for the 4th Control Period on actual additions to RAB on a pro-rata basis similar to the exercise which was done for true-up for the 1st and 2nd Control Period. This calculation of RAB is in accordance with SSA. It is further submitted by learned senior counsel for respondent that at the time of tariff determination for the 2nd Control Period, it was decided that the investment in every year shall be on a pro-rata basis and, therefore, no error has been committed by AERA while passing the impugned order dated 30th December, 2020.

26. It is submitted by learned senior counsel Mr. Meet Malhotra for AERA that there are two types of assets - aeronautical and non-aeronautical assets and, therefore, revenue obtained by this appellant from existing assets can always be considered while calculating "S" factor. Existing

assets means the assets which were already in existence prior to when this appellant was given the IGIA, Delhi for operation, management etc. Any income out of these existing assets is treated as an income from non-aeronautical assets and, therefore, 30% of the income from existing assets will be taken into consideration while calculating "S" factor. There is no 3rd type of asset like existing asset, the income out of which may be ignored by AERA. This is a consistent stand of AERA since last 10 years. Even during Tariff Period 1 and Tariff Period 2, this was the stand of AERA and for the first time in the 3rd Tariff Period this issue has been raised by DIAL and, therefore, the same may not be accepted by this Tribunal.

27. In view of the aforesaid submissions canvassed by counsel appearing for the respondent, both these appeals preferred by this appellant may not be admitted by this Hon'ble Tribunal.

ARGUMENTS CANVASSED BY RESPONDENT NO.2 – FEDERATION OF INDIAN AIRLINES (FIA)

28. Learned Counsel Mr. Buddy Ranganadhan, on behalf of the Respondent No.2 submitted that Base Airport Charges (BAC) is not a separate charge or independent charge. BAC was determined vide order dated 19th November, 2018. If there is any over-recovery by the appellant,

then the target revenue in any Tariff Period, the same can always be trued up in the next Tariff Period. It is further submitted by the counsel for the FIA-Respondent No.2 that this appellant has not challenged true up in 2nd Tariff Period. Counsel has taken this Court to Schedule-1 and Schedule-6, especially Clause-2 of the Schedule-6 appended with the SSA and has submitted that Aeronautical charges are being decided by AERA in accordance with Clause 3.1.1 to be read with Schedule-1 appended to SSA (ANNEXURE A-4) to the memo of AERA Appeal No.1 of 2021. These Aeronautical charges are basically to generate sufficient revenue to cover efficient operating cost, to obtain return on capital and to have a reasonable return on investment.

29. Counsel for FIA has taken this Tribunal to ANNEXURE A-10 which is Base Airport Charges (BAC) Order. It is further submitted by the counsel for Respondent No.2 that during 1st Tariff Period there was under-recovery and, therefore, the said amount was trued up in the 2nd Tariff Order and this was never challenged by the appellant. Counsel for the Respondent no.2 has taken this Tribunal to true up table for 2nd Tariff Period which is table No. 71 and submitted that there is a sizeable excess recovery by the appellant than that of target revenue and no error has been committed by

AERA in truing up of the excess recovery in the 3rd Tariff Order. It is also submitted by the counsel for Respondent no. 2 that nonetheless, AERA has rightly given Base Airport Charges (BAC) to the appellant subject to further true up in the 4th Tariff Order. The appellant cannot retain the benefit of excess recovery. The target revenue and Base Airport Charges (BAC) are not independent of each other. This aspect of the matter has been properly appreciated by AERA and, therefore, the true up of over recovered revenue may not be interfered by the Tribunal. It is further submitted by counsel for FIA – Respondent No. 2 that no error has been committed by AERA for considering only interest during construction instead of financing allowance in RAB. It is submitted by the counsel for the Respondent no. 2 that return can be obtained on capital only upon completion of the project. It is further submitted by the counsel that as per RAB calculation methodology prescribed under SSA, this appellant is entitled to a return only to the extent of efficient capital expenditure which has been capitalized. The cost of equity cannot be given during construction. Counsel for the Respondent no.2 - FIA has also placed reliance upon AERA's Tariff Guidelines. Counsel has further taken this Tribunal to Paragraph 5.2.7 of The Guidelines, 2011 published by AERA to be read with Clause 1.4 thereof and it is submitted

that for calculation of work in progress assets, the formula which has been given and in the said formula factor **"R_d"** is a cost of debt and not the return on investment. Counsel for Respondent No.2 has further submitted that even in case of BIAL, the return on investment was never given during construction and in case of HIAL, the AERA has followed the guidelines and no error has been committed by AERA considering only the interest during the construction instead of financing allowance hence, no benefit may be granted to this appellant on this aspect of the matter.

30. Counsel for Respondent no. 2- FIA has further submitted that no error has been committed by AERA while passing the impugned Tariff Orders dated 08th December, 2015 and 30th December, 2020 for 2nd Tariff Period and 3rd Tariff Period respectively especially for including other incomes of the appellant including interest income, interest on delayed payment, interest levied by DIAL to ensure the timely recovery of receivables from concessionaires. The word gross revenue includes all the income of the appellant while calculating "S" factor in the formula of Target Revenue. It is submitted by the counsel for Respondent no. 2- FIA that gross revenue means what is collected by the appellant and not what is retained by the appellant.

31. It is further submitted by the counsel for the respondent - FIA that the income arrived at by the appellant from any source whatsoever should be calculated for calculation of "S" factor in the formula of target revenue. In the 2nd Control Period, AERA had already decided to consider other income, apart from dividend income, as part of revenue from "Revenue Share Assets" for the 2nd Control Period and for 3rd Control Period, AERA has rightly decided to consider Non-Aeronautical portion of the "other income" including dividend income for cross subsidization of revenue from "Revenue Share Assets" at the time of truing up during tariff determination for 4th Control Period. Counsel for respondent has placed reliance on the decision rendered by **Hon'ble the Supreme Court of India reported in (2020) 3 SCC 525** and has submitted that gross revenue includes the other income as part of revenue from Revenue Share Assets for calculation of cross subsidization. Similarly, it is submitted by the counsel for the Respondent no. 2 that Annual Fee should always be included in determination of "S" factor. In fact, inclusion of annual fee was never objected by this appellant in first two control periods. The word "Revenue" has already been defined under OMDA which takes in its sweep "all pre-tax gross revenue" and it does not permit deduction of Annual Fee. The

concept of the appellant that "revenue" means an amount in hand is an incorrect approach. Counsel for Respondent no. 2 FIA has submitted that principle of constructive res judicata is applicable in facts of the case because in previous control periods the same treatment was given to "Annual Fee" for the first time this appellant is challenging inclusion of "Annual Fee" in the 3rd Tariff Order in determination of "S" factor. Counsel has also placed reliance upon decisions reported in **(1986) 1 SCC 100** and a decision reported in **(1992) 1 SCC 659** as well as on a decision rendered by Electricity Tribunal in Appeal No. 172 of 2010 dated 18th May, 2011. On the basis of the aforesaid decisions and the definitions of the word "Revenue" as defined in OMDA and "revenue" mentioned in definition of "S" factor, it is submitted by the counsel that "Annual Fee" cannot be deducted while determining "S" factor. Moreover, Annual Fee is a cost and, therefore, also as per definition, this amount of Annual Fee cannot be deducted while calculating "S" factor.

32. Counsel for Respondent no. 2- FIA further submitted that no error has been committed by AERA in dis-allowing Capex for Phase III-A expansion of IGIA, Delhi. For Phase III-A expansion project, DIAL in its tariff proposal requested AERA to allow Rs.9782.15 Crores towards capital expenditure

(Capex) as part of RAB. AERA has appointed independent auditor or assessor to arrive at correct project cost and for the cost incurred. In fact, after taking auditor's report which permits lesser amount of capital expenditure, for that AERA has added a certain amount towards the capital expenditure but has rightly reduced the demand of the appellant of Rs. 9782.15 Crores. AERA has all power of scrutiny to avoid gold-plated cost. Whatever is demanded by the appellant and whatever is permitted by Ministry of Civil Aviation (MoCA) may not be allowed by AERA and AERA has all the powers to appoint auditor or assessor for correct project cost and the cost incurred by the Appellant.

33. It is submitted by the counsel for the respondent No.2 – FIA that predominant role of AERA with respect to allowance/disallowance of the Capital Expenditure undertaken by DIAL for Phase 3A expansion of IGIA is to verify whether the cost of project e.g. approved by the Centre Government is of Rs.10,000 Crores then it is the duty vested in AERA to verify whether the actual work of Rs.10,000 Crores is done or not.

34. If the actual work is done of Rs.8,000 Crores as per the opinion of AERA, to that extent (Rs.2,000 Crores) will be deducted from the Capital Expenditure.

35. Nonetheless, if more cost is incurred then what is allowed by AERA, the same can be trued up in the 4th Tariff Order. Counsel for the appellant has placed reliance upon the decision of this Tribunal dated 24th April, 2018 in AERA Appeal No. 6 of 2012 and in other batch cases and has also placed reliance upon the decision rendered by Hon'ble the Supreme Court of India reported in **(2022) SCC OnLine SC 850.** It is submitted by the counsel for the Respondent No. 2 that this scrutiny by AERA is for both private airports and other airports and hence, no error has been committed by AERA in dis-allowing part of the Capex undertaken by DIAL for Phase III-A expansion of IGIA, Delhi.

36. Counsel appearing for Respondent No. 2-FIA further submitted that no error has been committed by AERA to consider average RAB while calculating RAB for tariff determination for the 3rd Control Period. If the argument of the appellant is permitted to be allowed then even if investment is done just before five days of end of financial year, the benefit will be given for the whole of financial year, which is not permissible. AERA has already given advantage on *pro rata* basis. Counsel for Respondent no. 2 - FIA has taken this Tribunal to the formula of target revenue and the formula of "RB" and has pointed out that if the investment

is being done in the month of July, August, September, October etc, no advantage can be given to the appellant for the whole financial year but it can be given for the remaining months up-to the end of the financial year. This aspect of the matter has been properly appreciated by AERA. It is also submitted by counsel for the Respondent No. 2 - FIA that if SSA and Guidelines published by AERA are silent, then as per normal prudent commercial man, on *pro rata* basis, the benefit of investment can be given while calculating RAB.

37. It is also submitted by counsel for Respondent No. 2 - FIA that "Revenue" obtained from existing assets can always be considered for calculation of cross-subsidization (i.e. "S" factor). Counsel has taken to the definition of non-aeronautical assets and has submitted that existing assets are included in the definition of non-aeronautical assets and, therefore, "Revenue" is derived from the existing assets or from the demised premises can always be taken into consideration while calculating "S" factor. The definition of third entity in non-aeronautical assets does not expressly exclude AAI. In fact, the issue which is raised in 3rd Control Period was never raised in the earlier two control periods by this appellant. It is submitted by counsel for the Respondent No. 2 - FIA that use of the

property is to be seen and not the ownership of the assets and, therefore, the revenue derived from the existing assets has rightly been taken into consideration for calculating "S" factor in the formula of target revenue. Counsel for the Respondent No. 2 - FIA has supported for this contention, the arguments canvassed by learned senior counsel for AERA and it is submitted that on these grounds, the appeals preferred by the appellants may not be entertained by this Tribunal.

ARGUMENTS CANVASSED BY RESPONDENT NO.4 - LUFTHANSA GERMAN AIRLINES IN AERA APPEAL NO. 1 OF 2016.

38. Counsel appearing for Respondent No. 4- Lufthansa German Airlines in AERA Appeal No. 1 of 2016 has restricted their arguments to Foreign Exchange Issue, on other income issue and on the issue of taxes on 30% on the amount equal to revenue collected by the appellant from Non-Aeronautical Assets in the calculation of "S" – Factor.

So far as arguments on foreign exchange issue is concerned, it is submitted by the counsel for Respondent No. 4 in AERA Appeal No. 1 of 2016 that they are adopting the arguments canvased by AERA and no further comments are required to be offered.

So far as inclusion of other income like interest income, dividend income, interest on delayed payments etc. is concerned, which is obtained by DIAL, the same ought to be considered by AERA while arriving at Target Revenue and other income will be a part of Revenue from Revenue Share Assets. It is submitted by the counsel for Lufthansa German Airlines that no error has been committed by AERA while considering other income of the appellants as a part of revenue looking to the definition of Revenue for cross subsidization. Counsel for the Lufthansa German Airlines has taken this Tribunal to the definition of Revenue Share Assets and has submitted that the same is an exhaustive definition. The definition of "Revenue" given in OMDA has a very wide amplitude. Counsel has also pointed out the judgment of this Tribunal dated 23rd April, 2018 in AERA Appeal 10 of 2012 and has submitted that consumer's interest should be kept in mind and the income arrived at from interest from investment, dividend income etc. should always be calculated as a part of income from Revenue Share Assets and, therefore, no error has been committed by AERA while deciding this issue of Other Income while calculating Revenue from Revenue Share Assets for calculating "S" factor in a target revenue formula.

39. Counsel appearing for the Lufthansa German Airlines - Respondent 4 in AERA Appeal 1 of 2016 has also given an answer which is not involved in AERA Appeal 1 of 2016 and this issue is calculation of tax on the amount which is equal to 30% of revenue generated by this appellant from Non-Aeronautical Services and it is submitted by the counsel for the Lufthansa German Airlines that the amount of tax on amount equal to revenue generated from Non-aeronautical services cannot be added as factor – "T" in the target revenue formula.

40. Counsel for the appellant has objected to this argument because this argument is not involved in AERA Appeal No. 1 of 2016.

ARGUMENTS CANVASSED BY RESPONDENT NO.5 - AIR INDIA

41. Counsel appearing for Air India who is Respondent no. 5 in AERA Appeal No. 1 of 2016 submitted that they are adopting the arguments of Federation of Indian Airlines (FIA) who is respondent no. 3 and they have nothing more to submit than what is already argued by learned senior counsel Mr. Buddy Ranganadhan on behalf of FIA.

REASONS AND ANALYSIS

ISSUE No. I

TRUE UP OF OVER RECOVERED REVENUE ON ACCOUNT OF LEVY OF BASE AIRPORT CHARGES (BAC)

42. This appellant is a Joint Venture Company (JVC) and has been awarded the contract for operating, maintaining, developing and designing, constructing, upgrading, modernising and managing the IGI Airport, Delhi and to perform the services and activities constituting aeronautical services and non-aeronautical services at IGI Airport, Delhi for which this appellant has executed the Operation, Management, Development Agreement (**OMDA**) with Airport Authority of India (AAI) on 04th April, 2006. The terms of OMDA is 30 years which can be further extended for further period of 30 years. In addition to OMDA, DIAL has also entered into State Support Agreement (**SSA**) with the Govt. of India on 26th April, 2006 which outlined the support from Government of India and also laid down the principles for tariff fixation. They are at ANNEXURE A-3 & ANNEXURE A-4 to AERA Appeal 1 of 2021.

43. As per Article 2.1.2 of OMDA, DIAL has been granted exclusive right to demand, collect, retain and appropriate charges from the users of IGI Airport, Delhi subject to the provisions of Article 12 of OMDA and as per Article 12.1.2 of Chapter-XII (dealing with tariff and regulation) specifically provides that charges to be levied for the provision of aeronautical services (aeronautical charges) shall be determined as per provisions of SSA. For the ready reference, Clause 3.1.1 and 3.1.2 of **SSA** (ANNEXURE A-4) to the memo of AERA Appeal No. 1 of 2021 reads as under:

"CLAUSE 3

GOI SUPPORT

In consideration for the JVC entering into the OMDA and the covenants and obligations set out therein, GOl hereby undertakes to provide to the JVC the following support ("GOl Support"):

3.1 Airport Economic Regulatory Authority

3.1.1 GOl's intention is to establish an independent airport economic regulatory authority (the "Economic Regulatory Authority"), which will be responsible for certain aspects of

regulation (including regulation of Aeronautical Charges) of certain airports in India. GOl agrees to use reasonable efforts to have the Economic Regulatory Authority established and operating within two (2) years from the Effective Date. GOl further confirms that, subject to Applicable Law, it shall make reasonable endeavours to procure that the Economic Regulatory Authority shall regulate and set/re-set Aeronautical Charges, in accordance with the broad principles set out in Schedule 1 appended hereto. *Provided however,* the Up-front Fee and the Annual Fee paid/payable by the JVC to AAI under the OMDA shall not be included as part of costs for provision of Aeronautical Services and no pass-through would be available in relation to the same.

3.1.2 The Aeronautical Charges for any year during the Term shall be calculated in accordance with Schedule 6 appended hereto. For abundant caution, it is expressly clarified that the Aeronautical Charges as set forth in Schedule 6 will not be negotiated post bid after the selection of the Successful Bidder and will not be altered by the JVC under any circumstances."

(Emphasis Supplied)

44. To run, to manage and to operate IGI Airport, Delhi, Appellant-Special Purpose Vehicle which is a Joint Venture Company, has been created which requires revenue to be collected by the appellant.

45. There is a set formula for the revenue to be recovered by **DIAL** from various stakeholders including consumers of IGI Airport, Delhi. This formula has been given in Schedule-1 appended to the SSA which is as under:

> "Calculating the aeronautical charges in the shared till inflation-X price cap model
>
> The revenue target is defined as follows:
>
> $$\mathbf{TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i}$$"

Where "**TR**" = target revenue,

RB = Regulatory Base pertaining to Aeronautical Assets and any investments made for the performance of reserved activities etc….

WACC = nominal post-tax weighted average cost of capital….

OM = efficient operation and maintenance cost pertaining to aeronautical services…

D = depreciation…

T = corporate taxes on earnings pertaining to aeronautical services…

S = 30% of gross revenue generated by the JVC- DIAL from the Revenue Share Assets. The costs in relation to such revenue shall not be included while calculating aeronautical charges.

"Revenue Share Assets" shall mean:

a. Non aeronautical assets;

b. assets required for provision of aeronautical related services arising at Airport…

46. Thus, in view of the aforesaid formula of target revenue, AERA is fixing the target revenue for 5 years period as per Section 13(2) of The AERA Act.

47. AERA has decided the target revenue which is to be collected by this appellant for the first Control Period i.e. from F.Y 2009-2014. Similarly, the AERA has passed a 2nd Tariff Order dated 8th December, 2015 for 2nd Control Period that is from the F.Y 2014-2019. AERA has also passed 3rd Tariff Order dated 30th December, 2020 for 3rd Control Period that is from F.Y 2019-2024.

48. The 1st Tariff Order was already challenged before this Tribunal in AERA appeal No. 10 of 2012 decided on 23rd April, 2018 and the same was challenged before Hon'ble The Supreme Court of India by way of Civil Appeal No. 8378 of 2018 and the same has been decided on 11th July, 2022.

2nd Tariff Order and 3rd Tariff Order are under challenge in present AERA Appeal No. 1 of 2016 and AERA Appeal No. 1 of 2021 respectively.

The target revenue as per Scheule-1 of SSA shall have to be fixed by AERA under Section 13 of The AERA Act,2008 and this amount is to be recovered by the appellant as per OMDA for running, operating, managing the IGIA, Delhi.

49. Looking to the Clause 3.1.2 of SSA as stated hereinabove, the aeronautical charges for any year during the term shall be calculated in accordance with Schedule - 6 appended to the SSA.

50. Therefore, question arises, what is aeronautical charges as per Schedule-6, for the ready reference, **Schedule-6 of SSA** reads as under:

"SCHEDULE 6

AERONAUTICAL CHARGES

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

1. The existing AAI airport charges (as set out in Schedule 8 appended hereto) ("**Base Airport Charges**") will continue for a period of two (2) years from the Effective Date and in the event the JVC duly completes and commissions the Mandatory Capital Projects required to be completed during the first two (2) years from the Effective Date, a nominal increase of ten (10) percent over the Base Airport Charges shall be allowed for the purposes of calculating Aeronautical Charges for the duration of the third (3rd) Year after the Effective Date ("Incentive"). It is hereby expressly clarified that in the event JVC does not complete and commission, by the end of the second (2nd) year from the Effective Date, the Mandatory Capital Projects required to be completed and commissioned, the Incentive shall not be available to the JVC for purposes of calculating Aeronautical Charges for the third 3rd year after the Effective Date.

2. From the commencement of the fourth (4th) year after the Effective Date and for every year thereafter for the remainder of the Term, Economic Regulatory Authority/GOI (as the case may be) will set the Aeronautical Charges in accordance with Clause 3.1.1 read with Schedule 1 appended to this Agreement, **subject** always **to the condition that, at the least,** a permitted nominal increase of ten (10) percent of the Base Airport Charges **will be available to the JVC** for the purposes of calculating Aeronautical Charges in any year after the commencement of the fourth year and for the remainder of the Term.

3. For abundant caution, it is hereby expressly clarified that in the event AAI increases the airport charges (as available on the AAI website www.aimottSindia.org anytime during the first two (2) years from the Effective Date, such increase shall not be considered for revising calculating the Aeronautical Charges chargeable by the JVC.″

(Emphasis Supplied)

51. The definition of **"Aeronautical Charges"** given in **Clause 1.1 of SSA** reads as under: -

> "**Aeronautical Charges**" shall be the charges to be levied at the Airport by the JVC for the provision of Aeronautical Services (and consequent recovery of costs relating to Aeronautical Assets)."
>
> **(Emphasis Supplied)**

52. In view of the aforesaid provisions of Schedule-6, especially as per para 2 thereof, there is a Base Airport Charges (BAC) which shall be available to this appellant for the purposes of calculating aeronautical charges. Thus, the Base Airport Charges is a minimum guarantee from Government of India to DIAL. In no circumstances, this amount can be reduced as per agreement between JVC- DIAL and Government of India. BAC is an aggregation of or summation of varieties of charges as mentioned in **Schedule-8 to the SSA**. BAC means-

Landing Charges

Housing Charges

Parking Charges for the aircraft

X- Ray baggage charges

Passenger service fees

The details about the aforesaid charges and **its calculation** has been mentioned in **Schedule-8 of SSA**. Thus, under Schedule 8 of SSA, the components of BAC and their calculation has been given which is different from that of Schedule 1 of SSA.

53. Thus, looking to Schedule-1 and Schedule-6 of SSA to be read with Clause 3.1.1 and 3.1.2 of SSA, there are two methods of arriving at leviable Aeronautical Charges: One is under Schedule -1 of SSA & another method is as per Schedule-6 of SSA which is a BAC (From third year onwards of the agreement, it will be BAC+10% thereof. This increase of 10% is only once in 30 years).

54. As per Schedule-1, the formula is:

$$\text{“}TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i\text{”}$$

The details of this calculation and the meaning of the abbreviations have been given in Schedule-1 to the SSA which are the principles of tariff fixation. Under this methodology given in Schedule-1, the target revenue

has to be arrived at by AERA for which AERA is publishing consultation paper thereafter inviting comments, suggestions/objections from all the stakeholders including appellant, FIA and from other airlines etc. and AERA is passing the order which is more of a nature of Regulatory which is known as Tariff Order for the period of 5 years as per provisions of **Section 13(1) to be read with Section 13(2) of Airport Economic Regulatory Authority of India (AERA) Act, 2008.**

55. While arriving at the target revenue for the current tariff period of any block of 5 years, if there is any excess recovery by the present appellant for the earlier tariff period (block of 5 years), the same can always be adjusted for arriving at a target revenue as per Schedule-1 of SSA.

56. But the question in the present appeals is whether appellant is entitled to BAC as per Schedule-6 of SSA or not. Looking to Clause 3.1.1 and Clause 3.1.2 of SSA, **the second methodology of calculation of aeronautical charges** is given in Schedule- 6 which is the **BAC**. The details of various components of BAC and their calculation have been mentioned in Schedule-8 to the SSA. Thus, as per para 2 of Schedule 6, BAC is a minimum guaranteed amount which is allowed to be recovered by the Special Purpose Vehicle-JVC-DIAL-Appellant. Looking to Schedule-6 of

SSA, BAC ought to be allowed to be recovered by the appellant whenever Target Revenue determined by the AERA is lesser than the BAC. Under Schedule-1, formula for Target Revenue is $TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i$. True up is permissible for arriving at Target Revenue if there is any over recovery or under recovery under the earlier tariff period, "but", under Schedule-6 of SSA, while arriving at BAC, no true up is permissible.

57. Thus, looking to **Clause 3.1.2 of SSA** which is an agreement between appellant and Union of India (ANNEXURE A-4) to be read with Schedule-1 and Schedule-6 thereof, both the methodology of calculation for arriving at aeronautical charges are independent of each other. Their components and calculations are different. Once the BAC is more than target revenue (after true up), the appellant is entitled for BAC, and in case target revenue is higher than BAC, in that eventuality, DIAL is entitled to recover the target revenue in a block of 5 years period. Meaning thereby to, out of **target revenue** and **BAC**, whichever is higher is permitted to be recovered by DIAL.

58. In view of the aforesaid provisions of SSA, once the BAC formula is to be followed under Schedule-6 of SSA (when target revenue is less than BAC) there cannot be any true up in BAC. BAC cannot be reduced because

it is a minimum guaranteed amount to be recovered by DIAL for operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the IGI Airport, Delhi.

59. Under Schedule-6, for calculating BAC, there cannot be any true up or there cannot be any deduction, from the minimum guaranteed amount **otherwise "minimum" amount will become "the least"** amount. It ought to be kept in mind that minimum guaranteed amount is an assurance or promise given by **the highest sovereign body** of this country (i.e. **the Government of India**). This promise of Union of India has a very high value and thus it cannot be diluted, directly or indirectly, by any authority. Moreover, this is a term of an agreement which cannot be altered by this Tribunal. The contractual obligations have been finalized by the parties to the contract and, therefore, the terms of the contract **neither** can be modified **nor** can be altered by this Tribunal and not by any other party.

60. If the minimum guaranteed amount which is BAC as per Schedule-6 appended to SSA is allowed to be reduced by truing up, it will have a direct effect on operation, maintenance, development, construction, upgrading, modernizing and management of IGI Airport, Delhi.

61. The leviable aeronautical charges as per Schedule-1 of SSA and as per Schedule- 6 of SSA which is BAC+10% thereof are **mutually exclusive** and **independent** of each other. Even their **components** and methods of calculation are different. True up, which is permissible, under Schedule-1 in a target revenue formula, is not provided under Schedule-6 of SSA for arriving at **BAC**. AERA cannot presume such provision of truing up in BAC. This is an error on part of AERA that it has allowed truing up even after concluding that target revenue for 3rd Control Period after truing up is lesser than BAC.

62. For the ready reference, **Table No. 71** from the impugned order of 3rd Tariff Control Period reads as under:-

"FY ending March 31 (Rs. Cr)	**2015**	**2016**	**2017**	**2018**	**2019**	**Total**
Regulatory Asset Base (RAB)	6,767.53	6,281.63	5,848.87	5,391.11	5,004.30	29,293.43
WACC	11.10%	11.10%	11.10%	11.10%	11.10%	
Return on RAB (A= RAB X WACC)	751.33	697.39	649.34	598.52	555.58	3,252.17

Expense (E)	1,094.67	743.41	902.16	916.11	896.24	4,552.59
Depreciation (D)	532.22	533.26	541.20	546.73	553.93	2,707.32
Taxes (T)	-	50.64	97.01	-	-	147.65
Target Revenue prior to cross-subsidy from Revenue Share Assets (GTR=A+E+D+T)	2,378.22	2,024.70	2,189.71	2,061.35	2,005.75	10,659.73
Less: Cross Subsidy from Revenue Share Assets (NAR)	363.44	443.63	492.35	588.94	768.92	2,657.28
Target Revenue (TR = GTR - NAR)	2,014.78	1,581.07	1,697.36	1,472.41	1,236.83	8,002.45
Revenues calculated based on actual traffic at BAC plus 10% (BAC)	689.33	739.35	836.06	930.79	993.28	4,188.80
Actual Aero Revenue Realised (including Fuel	2,950.92	3,407.58	3,931.53	1,705.47	987.79	12,983.30

Farm)(AR)						
True Up (Higher of (TR or BAC) less AR)	(936.14)	(1,826.52)	(2,234.17)	(233.06)	249.04	(4,980.85)
Add True up for FCP	641.68					641.68
True up for Second Control Period	(294.46)	(1,826.52)	(2,234.17)	(233.06)	249.04	(4,339.17)
WACC for CP2	11.10%					
PV Factor as on 1st April'2019	1.52	1.37	1.23	1.11	1.00	
True up on a Present Value Basis as on 1st April'2019	(448.66)	(2,504.90)	(2,757.79)	(258.93)	249.04	(5,721.23)
Actual True up for CP2						**(5,721.23)**

Table 71: True up decided to be considered by Authority for Second Control Period"

(Emphasis Supplied)

63. Thus, the aforesaid table given in the impugned order is a true up, decided by AERA for 2nd Control Period meaning thereby to Rs.5721.23

Crores are to be deducted as true up in the 3rd Control Period's target revenue.

64. For ready reference, the target revenue decided to be considered by AERA for the 3rd Control Period is given in **Table no. 140** in the impugned order, the same reads as under:-

"FY ending March 31 (Rs. Cr)	**2020**	**2021**	**2022**	**2023**	**2024**	**Total**
Control Period Year	1	2	3	4	5	
RAB (A) (Refer Table 96)	4,912.93	4,729.96	5,342.99	7,840.41	11,237.05	34,063.33
WACC (B)	12.75%	12.75%	12.75%	12.75%	12.75%	
Return on RAB (C= A X B)	626.46	603.13	681.30	999.75	1,432.86	**4,343.48**
Depreciation (D) (Refer Table 95)	521.31	470.93	462.21	583.48	747.98	2,785.91
Expense (E) (Refer Table 115)	875.96	830.67	924.55	1,067.95	1,245.96	4,945.09
Taxes (T) (Refer Table 126)	-	-	-	-	-	-

Target Revenue prior to cross subsidy from Revenue Share Assets (GTR= C+D+E+T)	2,023.73	1,904.73	2,068.06	2,651.17	3,426.80	**12,074.49**
Less: Cross Subsidy from Revenue Share Assets (NAR) (Refer Table 122)	693.62	246.88	400.90	535.79	606.96	2,484.16
Target Revenue for CP3 (TR=GTR - NAR)	**1,330.11**	**1,657.84**	**1,667.15**	**2,115.38**	**2,819.84**	**9,590.33**
BAC True Up	-					-
True up for 2nd Control Period (STR) (Refer	(5,721.23)					(5,721.23)

Table 71)						
Adjusted TR (ATR= TR+STR)	**(4,391.13)**	**1,657.84**	**1,667.15**	**2,115.38**	**2,819.84**	**3,869.09**
PV Factor as on 01.04.2019 (PV)	0.89	0.79	0.70	0.62	0.55	
Present value of ATR as on 01.04.2019 at 12.75% (X=ATR*PV)	(3,894.53)	1,304.07	1,163.09	1,308.89	1,546.95	1,428.47
Projected Aero Revenue based on Base Airport Charges including compensation towards discontinuation of Fuel Throughput Charges (PAR)	**949.16**	**278.21**	**610.83**	**994.47**	**1,082.18**	**3,914.85**

Present Value of Projected Aeronautical Revenue as on 01.04.2019 at 12.75% (Y=PAR*PV)	841.81	218.84	426.15	615.33	593.68	2,695.81
Over Recovery on PV terms as on 01.04.2019 (Z= Y-X)	4,736.34	(1,085.23)	(736.94)	(693.56)	(953.27)	1,267.34
Projected Over Recovery pending to be trued up as on 01.04.2019						**1,267.34**

Table 140: Target Revenue decided to be considered by Authority for Third Control Period."

(Emphasis Supplied)

65. AERA's decision regarding the target revenue for 3rd Control Period has been given in paragraph 12.9 and the relevant part of paragraphs 12.9.1 and 12.9.2 reads as under:-

"12.9 Authority's Decisions regarding Target Revenue for the Third Control Period.

Based on the material before it and based on its analysis, Authority has decided the following regarding Target Revenue for the Third Control Period;

12.9.1 Authority decides to continue with the existing base Airport Charges plus 10% for the airport operator **as per the terms of the Schedule 6 of the SSA.**

12.9.2. Authority shall consider the aspect of projected over recovery **pending to be trued up (determined currently as Rs.1267 Cr.) along with carrying cost at the time of tariff determination for the Fourth Control Period, during which the actual over recovery shall have to be re-assessed based on actuals."**

(Emphasis Supplied)

66. Thus, it appears that AERA, even after concluding the fact, that **target revenue (TR)** for the 3rd Control Period (as per table 140) is Rs.3869.09 Crores which is lesser than the **BAC** (Rs.3914.85 Crores) and though AERA

has permitted recovery by this appellant- DIAL for the period of F.Y 2019-2024, the BAC which is at Rs.3914.84 Crores, it has been mentioned in paragraph 12.9.2 of the impugned order that Rs.1267 Crores will be trued-up in the 4th Control Period thus, the true up is still hanging over in the mind of AERA as per Schedule-1 target revenue formula given in SSA though Schedule-6 has been followed by AERA for BAC. This is an error on the part of AERA.

67. Once, AERA has concluded that target revenue (**TR**) for 3rd Control Period (Rs.3869.09 Crores from table 140) is lesser than the **BAC** (Rs. 3914.85 Crores as per table 140) and when AERA has permitted to recover the BAC, then in that eventuality, Schedule-6 has been followed by AERA of SSA where there is no true up methodology to be followed because it is a bare minimum amount to be recovered by DIAL as permitted by Government of India and, therefore, there is no question whatsoever arising for truing up of any amount of 3rd Control Period while calculating aeronautical charges in 4th Control Period. **We, therefore, quash and set aside the decision of AERA as mentioned in paragraph 12.9.2 in the impugned order dated 30th December, 2020 which is at ANNEXURE A-1 to the memo of AERA Appeal No.1 of 2021.** There

cannot be any true up of Rs.1267 Crores in 4th Control Period because in the 3rd control period, Schedule-6 of SSA has been followed by AERA itself. Learned senior counsel for the appellant Mr. Ramji Srinivasan, has rightly relied upon the decision of Order No. 30/2018-19 (ANNEXURE A-10) for 2nd Control Period (F.Y 2014-2019) with respect to IGI Airport, Delhi for BAC. As per aforesaid order of AERA, paragraphs 5, 5.1, 5.2, 5.2.1 and 5.2.2 read as under:-

> **"5. Order**
>
> **5.1** The Authority has scrutinized the stakeholder's comments and has taken note of the responses provided by DIAL. In terms of Concession granted to DIAL in reference specifically to Schedule 6 of the SSA, DIAL has a contractual right and is entitled to Base Airport Charges (BAC) provided under Schedule 8 of OMDA +10% of SAC in any year of the concession term. Accordingly in terms of Section 13(l)(a) of the AERA Act the Authority decides to consider the concession offered in determination of tariff.

5.2 Upon careful consideration of the Material available on records, the Authority, in exercise of powers conferred upon it by Section 13(l)(a) of the AERA Act, 2008, hereby orders that:

5.2.1 DIAL is entitled to maintain minimum aeronautical charges equivalent to BAC+l0% of SAC in any year during the term of the concession in terms of the SSA awarded by the Government.

5.2.2 Accordingly, the authority decides to allow DIAL to charge the rates equivalent to BAC+l0% of BAC effective from 1st December 2018. The applicable aeronautical charges effective from 1st December 2018 are therefore mentioned at Annexure I."

(Emphasis Supplied)

68. Thus, true up of revenue collected in the earlier Tariff Period by terming such levy as "over-recovered" would render the provisions which is in fact a promise, given in SSA in Schedule-6, nugatory. When the BAC+10% thereof is permitted to be recovered as per Schedule-6 of SSA, then no true up can ever be done under that Schedule which is, a bare minimum tariff and a safety net, provided to DIAL under SSA. Once the

Schedule-6 formula (BAC+10% charges) is allowed by AERA, there cannot be any carry forward of the true up amount in the 4th Control Period.

69. If the submissions of the respondents are allowed for truing up of the amount even after following Schedule-6 of SSA then the net effect will be "as if there is nothing like Schedule-6 to be read with Schedule-8 in the SSA".

70. Thus, true up is permissible for calculation of target revenue in the formula "$TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i$" as per Schedule-1 of the SSA. Here, true up can be done and the target revenue can be arrived at by AERA. Once the **Target Revenue (TR)** after truing up is found lesser than the **BAC**, then BAC as per Schedule-6 of SSA which is a bare minimum tariff can always be recovered by DIAL. Further true up from BAC like in target revenue-TR-is not permissible nor the true up can be carried forward in the 4th Control Period as concluded by AERA in paragraph 12.9 in the impugned order for 3rd Control Period. It is also not the case that BAC + 10% over the calculated Target Revenue is cash advance that requires to be trued-up. **We, therefore, quash and set aside the AERA's decision for truing up of an amount with carrying cost at**

the time of tariff determination for the 4th Control Period as stated in paragraph 12.9.2 of the impugned order.

Thus, in view of the aforesaid facts and reasons, Issue No. I is answered in negative that there cannot be true up of revenue for the 4th Control Period once the Schedule-6 formula of BAC + 10% charges is allowed by AERA.

ISSUE No. II

"OTHER INCOME AS PART OF REVENUE FROM "REVENUE SHARE ASSETS FOR 2ND AND 3RD CONTROL PERIOD"

71. For calculating the target revenue which is permitted to be recovered by the appellant has been specified in Schedule-1 of SSA (ANNEXURE A-4) is as under:-

$$TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i$$

where S is equal to 30% of the gross revenue generated by the JVC (Appellant - DIAL) from the **"REVENUE SHARE ASSETS".**

72. Revenue Share Assets shall mean-

a. Non-Aeronautical Assets; &

b. Assets required for provision of aeronautical related services arising at the airport and not considered in revenues from Non-Aeronautical Assets (e.g.- Public Admission fee).

73. Thus, the revenue generated by the appellant from the "**Revenue Share Assets"** can only be taken into consideration for calculation of "S" factor in the formula of the Target Revenue.

74. AERA during the 1st Control Period (F.Y 2009-2014) had **not** calculated other income especially from dividend, interest income, interest on delayed payments obtained by the Appellant as revenue generated from the Revenue Share Assets. In the 2nd Control Period (F.Y 2014-2019), AERA has treated other income as a part of the revenue from Revenue Share Assets, except dividend income and in the 3rd Control Period (F.Y 2019-2024) even dividend is also included in other income as a part of revenue from the Revenue Share Assets.

75. This appellant has challenged inclusion of "Other Income" of this appellant as part of the revenue share assets for 2nd Control Period as well as for 3rd Control Period in AERA Appeal No. 1 of 2016 and AERA Appeal

No. 1 of 2021. Thus, the inclusion of "other income" as part of the Revenue from Revenue Share Assets is under challenge in both the aforesaid appeals for 2nd Control Period for (F.Y 2014-2019) and for 3rd Control Period (F.Y 2019-2024).

76. "**Other Income**" includes:

a. Dividend income (dividend earned by DIAL from investments made by it in a joint ventures or in subsidiary companies providing services at IGI Airport, Delhi).

b. Interest income (income earned by DIAL by investing surplus funds in treasury instruments) and;

c. Interest on delayed payments (interest levied by DIAL to ensure timely recovery of receivables from concessionaires) etc.

77. It is contended by the counsel for the Appellant that initially the stand taken by AERA, for the 1st Control Period (F.Y 2009-2014) was absolutely correct because as per terms of contract, "S" is equal to 30% of gross revenue generated by DIAL from the Revenue Share Assets. During 1st Control Period, other income **was not** part and parcel of revenue from

"Revenue Share Assets" because Revenue Share Assets has also been defined hereinabove in Schedule-1 of SSA.

78. The stand has been altered by the other stakeholders who are respondents and consequently AERA has treated other income as part of revenue from Revenue Share Assets. Thus, there is no consistency by AERA on this point. In the 2nd Control Period, dividend income was not treated as a revenue from Revenue Share Assets and in the 3rd Control Period, even dividend income, has also been added as part of revenue from Revenue Share Assets.

79. Therefore, the question arises that what is revenue from Revenue Share Assets because as per appellant, "other income" cannot be treated as revenue from Revenue Share Assets, **whereas**, as per respondents (i.e. by AERA, FIA), as well as by other stakeholders like Lufthansa German Airlines (who is Respondent No.4 in AERA Appeal No. 1 of 2016), "other income" is a part of Revenue from Revenue Share Assets. Therefore, we have to see the definition of "**Revenue Share Assets**" given in the contract between the parties which is known as State Support Agreement (SSA) between this appellant and Union of India.

"Revenue Share Assets" as per Schedule 1 of SSA, shall mean (a) Non-Aeronautical assets; (b) Assets required for provision of aeronautical related services arising at the Airport and not considered in revenue from "non-aeronautical assets."

80. "Non-Aeronautical Assets" has been defined in **OMDA** as under:

"Non-Aeronautical Assets" shall mean:

1. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in **Part I of Schedule 6** and any other services mutually agreed to be added to the Schedule 6 hereof as located at the Airport irrespective of whether they are owned by the JVC or any third Entity); and

2. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in **Part II of Schedule 6** hereof as located at the Airport irrespective of whether they are owned by the JVC or any third Entity), to the extent such assets:

(a) are located within or form part of any terminal building;

(b) are conjoined to any other Aeronautical Assets, asset included in paragraph (1) above and such assets are incapable of independent access and independent existence; or

(c) are predominantly servicing/ catering any terminal complex/cargo complex

and shall specifically include all additional land (other than the Demised Premises), property and structures thereon acquired or leased during the Term, in relation to such Non-Aeronautical Assets."

(Emphasis Supplied)

81. Thus, to look at the non-aeronautical assets, we have to refer to Schedule-6 which is having Part I and Part II. So far as Part I is concerned, there is no other condition attached to treat those assets as Non-Aeronautical assets, **but,** so far as Part II of Schedule-6 is concerned, the conditions have been attached that these assets must have been located at the Airport (irrespective of whether they are owned by JVC-DIAL-Appellant or any 3rd Entity), to the extent such assets:

(a) are located within or form part of any terminal building;

(b) are conjoined to any other aeronautical assets, assets included in paragraph (i) above and such assets are incapable of independent access and independent existence; or

(c) are predominantly servicing/catering any terminal complex/cargo complex.

And shall specifically include all additional land (other than the Demised Premises) property and structures thereon acquired or leased during the term, in relation to such Non-Aeronautical Assets.

82. For the ready reference, **Schedule-6** appended with **OMDA**, reads as under:

"**SCHEDULE 6**

NON-AERONAUTICAL SERVICES

"Non-Aeronautical Services" shall mean the following facilities and services (including Part I and Part II):

Part I

1. Aircraft cleaning services

2. Airline Lounges

3. Cargo handling

4. Cargo terminals

5. General aviation services (other than those used for commercial air transport services ferrying passengers or cargo or a combination of both)

6. Ground handling services

7. Hangars

8. Heavy maintenance services for aircrafts

9. Observation terrace

Part II

10. Banks / ATM*

11. Bureaux de Change*

12. Business Centre*

13. Conference Centre*

14. Duty free sales

15. Flight catering services

16. Freight consolidators/forwarders or agents

17. General retail shops*

18. Hotels and Motels

19. Hotel reservation services

20. Line maintenance services

21. Locker rental

22. Logistic Centres*

23. Messenger services

24. Porter service

25. Restaurants, bars and other refreshment facilities

26. Special Assistance Services

27. Tourist information services

28. Travel agency

29. Vehicle fuelling services

30. Vehicle rental

31. Vehicle parking

32. Vending machines

33. Warehouses*

34. Welcoming services

35. Other activities related to passenger services at the Airport, if the same is a Non-Aeronautical Asset.

* These activities/ services can only be undertaken/ provided, if the same are located within the terminal complex/cargo complex and are primarily meant for catering the needs of passengers, air traffic services and air transport services."

(**Emphasis Supplied**)

83. Now, the question arises whether:

"dividend income" earned by this appellant on investments made by it in joint ventures/subsidiary companies providing aeronautical and non-aeronautical services at IGI Airport, Delhi;

"Interest income" which is earned by this appellant by investing surplus funds in treasury instruments and,

"Interest on Delayed Payments" which is levied by the DIAL to ensure timely recovery of receivables from concessionaires whether it is the "income" from the Revenue Share Assets or whether they are the income from the assets which are required to perform non-aeronautical services at the Airport as listed in Part I in Schedule-6 or whether listed in Part II of Schedule-6 as stated hereinabove.

84. Thus, we have to read the definition of: -

a. "**S**" given in SSA (Schedule 1);

b. "**Revenue Share Assets"** given in SSA (ANNEXURE A-4);

c. "**Non-aeronautical assets**" as defined in OMDA (ANNEXURE A-2); and

d. "**Non- Aeronautical Services**" as defined in Schedule-6 of OMDA, both Part I and Part II thereof.

85. Thus, upon conjoint reading of aforesaid definition of "S", definition of "Revenue Share Assets", definition of "Non-aeronautical assets" and definition of "Non-Aeronautical Services" as defined in Schedule-6 of OMDA and both part -I and part – II thereof, "Other income" is not an income or revenue obtained by this appellant by performing any non-aeronautical services, therefore, "other income" cannot be treated as part of Revenue from Revenue Share Assets. Moreover, DIAL generates revenue by performing Non-Aeronautical Services. Once the revenue is generated, it is upon DIAL to collect and manage the same and in the process, DIAL may earn some income in the nature of interest and dividend. Hence, once the revenue generated by performing Non-Aeronautical Services is taken as a

part of "S" for the cross subsidy as per SSA, further income if any, arising out of management of the said revenue cannot be taken into consideration as part of "S".

86. It ought to be kept in mind that the contractual terms, as stated hereinabove in OMDA as well as in SSA have been categorically, unambiguously and unequivocally defined. There are no two meanings attached with these definitions, especially of:

- "S" (of SSA);

- "Revenue Share Assets" (of SSA);

- "Non-Aeronautical Assets" (of OMDA);

- "Non-Aeronautical Services" as defined in Schedule 6 (Part I and Part II of OMDA)."

87. Looking to the impugned orders passed by AERA which is the 2nd Tariff Order and 3rd Tariff Order dated 08th December, 2015 and 30th December, 2020 for 2nd and 3rd Control Period respectively, has failed to appreciate the aforesaid clear provisions of the agreements (OMDA as well as SSA).

88. The contention raised for the counsel for Respondent No.1 to the effect that the income of "dividend" and "interest" are in fact from the

income derived by the respondent by performing aeronautical and non-aeronautical services and, therefore, "other income" has rightly been treated as part of revenue, from "Revenue Share Assets". It is also contended by the counsels for respondents that the "dividend income" as a part of other income is a part of 3rd Control Period because dividend income is earned by DIAL through joint ventures set up with other group entities of DIAL who are carrying non-aeronautical related services and other non-aeronautical services provided in OMDA which if carried out by DIAL itself, would have earned surplus non-aeronautical income. These contentions are not accepted by this Tribunal mainly for the reason that "other income" is not relatable to and generated from the provision of any service by this Appellant and, therefore, it cannot be considered for cross-subsidization of aeronautical charges (i.e. as a part of revenue from Revenue Share Assets).

89. Moreover, it has also been contended by counsels for respondents that interest income is derived by investing surplus funds which is primarily from aeronautical services and, therefore, interest income is a part of revenue from revenue share assets. This contention is also **not** accepted by this Tribunal mainly for the reason that "bank interest", "interest on

Fixed Deposit Receipts" (FDRs) are **not** included in Schedule-6 of OMDA, because, they are not arising out of Revenue Share Assets. Such type of income is to the appellant because of **Cash Management Process (CMP).** In fact, there is **no legal base** to treat "other income" as a part of revenue, from "Revenue Share Assets" for calculation of cross-subsidization (for calculation of "S" factor).

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

91. When the terms of contract (i.e. SSA & OMDA) are explicitly clear, nobody can presume any addition, deletion or modification of the terms of the agreement/contract.

92. Similar is the position with interest on delayed payment. This interest on delayed payment is levied by DIAL to ensure the efficient recovery. Interest on delayed payment is levied by DIAL to ensure timely recovery and fund carrying cost. In fact, this income is not relatable to rendition of any services by DIAL to its debtors, so that it can be included as revenue from non-aeronautical or aeronautical services and, therefore, interest on

delayed payment is outside the purview of the revenue from "Revenue Share Assets". Further, the approach of taking "Other income" as part of "S" will disincentivize DIAL to pursue for recovery of the outstanding amount due to DIAL and also from effectively investing the surplus funds in any manner, which will not be in the interest of any party.

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

unnecessary and unwarranted litigation needs to be curbed which can only happen when the regulator (AERA) strictly maintains consistency in its approach.

94. In the 2nd Control Period, "other income" has been treated as a part of revenue from revenue share assets, but, "dividend income" was **not** included. Now, in 3rd Control Period, even "dividend income" has also been treated as a part of revenue from Revenue Share Assets. Thus, in both the aforesaid Control Periods, there is inconsistency, in the approach of AERA.

95. In fact AERA, while truing up the under-recovery or over-recovery in the following next Control Periods considers the over-recovery or under-recovery amount, with time value or with carrying cost at the value of WACC arrived. Meaning thereby to, AERA has considered any potential interest on the surplus during the Control Period at the rate of WACC. Such interest relates to the investment which can be made from surplus amount at much higher rate as compared to actual rate of interest and also is considered 100% aeronautical in nature.

96. Moreover, looking to the impugned orders for 3rd Control Period, AERA has trued-up the surplus generated, in the 2nd CP has considered the time

value of surplus (e.g.- Rs.4339 Crores is converted into Rs.5721 Crores for true up in the 3rd Control Period). Thus, Rs.4339 Crores which is an original amount for true up has been appreciated as Rs.5721 Crores putting a time value in Rs.4339 Crores. The year wise carrying cost at the rate of 11.10% **has already been considered** by AERA in true up exercise done, which is reflected in Table No. 71 of the impugned order. The said table has been reproduced above in para number 62.

97. Thus, while truing up of the under-recovery or over-recovery in the immediately next Control Period, AERA has already considered the original value of under-collection or over-collection by adding "time value" or by adding "carrying cost" at the value of WACC. Thus, if the interest income is added as a part of revenue from Revenue Share Assets, it will tantamount to double consideration of "other income" in tariff.

98. Much has been argued out by counsel for Respondent No. 1 and Respondent No. 2 that "other income" is a function of Cash Flow Management earned through airport operations and, therefore, must be included as a part of revenue from revenue share assets. This contention is not accepted by this Tribunal mainly for the reasons that:-

a. "Other income" like interest, dividend income, interest on delayed payments etc. cannot be a part of revenue from revenue share assets because there is no legal base for such type of addition;

b. It is not an income from non-aeronautical services;

c. Such addition is "beyond bargain" (i.e. beyond the contract);

d. Under SSA to be read with OMDA, revenue from: (i) All assets required or necessary for the performance of non-aeronautical services at the airport as listed in Part I and Part II of Schedule-6 of OMDA and; (ii) Assets required for provision of aeronautical related services arising at the airport and not considered in revenue from non-aeronautical assets can be considered for cross-subsidization and as per the definition of "Revenue Share Assets", it is exhaustive in nature because the definition starts with the words "Revenue Share Assets shall mean…."and, therefore, no other assets, apart from the ones that expressly mentions in the definition can be classified as Revenue Share Assets.

e. "Other income" is not relatable to and generated from, the provision of any service by the JVC- appellant-DIAL.

f. The contractual obligation creates specific legal obligations and, therefore, no further legal obligation can be created by AERA so as to create more liability which curtails the right vested in other party.

g. There is inconsistency in the approach of AERA. In the 1st Control Period, "other income" was not treated as a part of revenue, from Revenue Share Assets. In the 2nd Control Period, other income has been treated as part of revenue, from Revenue Share Assets, except, "dividend income" and in the 3rd Control Period, even the "dividend income" is also added as other income and made part of revenue from revenue share assets.

h. AERA has added "time value" or "carrying cost" to the under-recovery or over-recovery for the following next Control Period. There is already addition of the time value or carrying cost, while truing up of under-recovery or over-recovery. Now if "other income" is treated as a part of revenue, from Revenue Share Assets, it will tantamount to double consideration. One such example has been given in table number 71 of the impugned order which is incorporated hereinabove. The over-recovery of Rs.4339 Crores during the period of 2nd Control Period (F.Y 2014-2019) has been converted into Rs.5721 Crores by addition of time value or carrying cost (addition is of approximately Rs.1400 Crores). The year wise carrying

cost which the AERA has considered at the rate of 11.10% and Rs.5721 Crores has been trued up in the 3rd Control Period;

i. Thus, truing up of over-recovery with time value or carrying cost takes in its sweep, "interest-income", "dividend-income" etc.

j. In fact, in the tariff order for the Second Control Period, it was AERA's categorical stand that since the assets of the joint ventures were not considered as a part of RAB boundary, the Dividend Income accruing to DIAL from such joint ventures should also **not** be considered towards cross subsidization. However, for the Third Control Period, AERA has not only departed from its decision in Second Control Period, but has also not provided any reason for doing so. AERA's decision is contrary to its own stand in the First and Second Tariff Order.

k. "Revenue Share Assets" is a pre-defined terminology as per Schedule-1 of SSA and does not encompass within its sphere, the "interest income", "dividend income" and "interest on delayed payments".

99. It has been held by Hon'ble the Supreme Court in Delhi International Airport Ltd. Vs. AERA reported in **(2022) SCC OnLine SC 850** in paragraph number 19 as under:-

"19. We may, however, add that in the given factual scenario in the dispute before us there is something more which is required to be addressed. Before the complete legislative structure was set in place, operations were proceeded on the understanding of the agreement between the parties and the legislative intent is also apparent. This provides for due honour and consideration being given to the aforesaid intent as per the provisions of Section 13 of the said Act. The objective is that all parties who have operated in what may be called a pioneering effort in the field of civil aviation in India should not be taken by surprise affecting their commercial viability as it would discourage private participation in such economic activities which have been perceived to be essential by the Government. To that extent, we are inclined to consider that some aspects of the agreements have pre-legislative features and, thus, there is a requirement to look into them. Section 13 of the said Act forming part of Chapter III deals with "Powers and Functions of the Authority" and reads as under:

"CHAPTER III

POWERS AND FUNCTIONS OF THE AUTHORITY

(1) The Authority shall perform the following functions in respect of major airports, namely:—

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

(i) the capital expenditure incurred and timely investment in improvement of airport facilities;

(ii) the service provided, its quality and other relevant factors;

(iii) the cost for improving efficiency;

(iv) economic and viable operation of major airports;

(v) revenue received from services other than the aeronautical services;

(vi) the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise;

(vii) any other factor which may be relevant for the purposes of this Act:

Provided that different tariff structures may be determined for different airports having regard to all or any of the above considerations specified at sub-clauses (i) to (vii);

(b) to determine the amount of the development fees in respect of major airports;

(c) to determine the amount of the passengers service fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act, 1934 (22 of 1934);

(d) to monitor the set performance standards relating to quality, continuity and reliability of service as may be specified by the Central Government or any authority authorised by it in this behalf;

(e) to call for such information as may be necessary to determine the tariff under clause (a);

(f) to perform such other functions relating to tariff, as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

(2) The Authority shall determine the tariff once in five years and may if so considered appropriate and in public interest, amend, from time to time during the said period of five years, the tariff so determined.

(3) While discharging its functions under sub-section (1) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia,-

(a) by holding due consultations with all stake-holders with the airport;

(b) by allowing all stake-holders to make their submissions to the authority; and

(c) by making all decisions of the authority fully documented and explained."

(Emphasis Supplied)

100. Thus, in view of the aforesaid decision, it has been observed by Hon'ble the Supreme Court of India that OMDA and SSA have pre-legislative features and AERA has to, duly honour and consider the same.

101. This Tribunal in its Judgment dated 22nd December, 2022 in Delhi International Airport Ltd. Vs. AERA in AERA Appeal No. 7 of 2021 has observed that AERA has to appreciate the concession given by Central Government. AERA has to appreciate the same under Section 13(1)(a)(vi) of AERA Act, 2008.

102. It has been held by Hon'ble the Supreme Court in P. Kasilingam Vs. PSG College of Technology reported in **(1995) Suppl.2 SCC 348** in para 19:

> **"19.** We will first deal with the contention urged by Shri Rao based on the provisions of the Act and the Rules. It is no doubt true that in view of clause (3) of Section 1 the Act applies to all private colleges. The expression 'college' is, however, not defined in the Act. The expression "private college" is defined in

clause (8) of Section 2 which can, in the absence of any indication of a contrary intention, cover all colleges including professional and technical colleges. An indication about such an intention is, however, given in the Rules wherein the expression 'college' has been defined in Rule 2(b) to mean and include Arts and Science College, Teachers' Training College, Physical Education College, Oriental College, School of Institute of Social Work and Music College. While enumerating the various types of colleges in Rule 2(b) the rule-making authority has deliberately refrained from including professional and technical colleges in the said definition. It has been urged that in Rule 2(b) the expression "means and includes" has been used which indicates that the definition is inclusive in nature and also covers categories which are not expressly mentioned therein. We are unable to agree. A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to

the expression than is put down in definition". (See : *Gough* v. *Gough* [(1891) 2 QB 665 : 60 LJ QB 726] ; *Punjab Land Development and Reclamation Corpn. Ltd.* v. *Presiding Officer, Labour Court* [(1990) 3 SCC 682, 717 : 1991 SCC (L&S) 71] .) The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions". (See: *Dilworth* v. *Commissioner of Stamps* [1899 AC 99, 105-106 : (1895-9) All ER Rep Ext 1576] (Lord Watson); *Mahalakshmi Oil Mills* v. *State of A.P.* [(1989) 1 SCC 164, 169 : 1989 SCC (Tax) 56] The use of the words "means and includes" in Rule 2(b) would, therefore, suggest that the definition of 'college' is intended to be exhaustive and not extensive and would cover only the educational institutions falling in the categories specified in Rule 2(b) and other

educational institutions are not comprehended. Insofar as engineering colleges are concerned, their exclusion may be for the reason that the opening and running of the private engineering colleges are controlled through the Board of Technical Education and Training and the Director of Technical Education in accordance with the directions issued by the AICTE from time to time. As noticed earlier the Grants-in-Aid Code contains provisions which, in many respects, cover the same field as is covered by the Act and the Rules. The Director of Technical Education has been entrusted with the functions of proper implementation of those provisions. There is nothing to show that the said arrangement was not working satisfactorily so as to be replaced by the system sought to be introduced by the Act and the Rules. Rule 2(d), on the other hand, gives an indication that there was no intention to disturb the existing arrangement regarding private engineering colleges because in that rule the expression 'Director' is defined to mean the Director of Collegiate Education. The Director of Technical Education is not included in the said definition indicating that

the institutions which are under the control of Directorate of College Education only are to be covered by the Act and the Rules and technical educational institutions in the State of Tamil Nadu which are controlled by the Director of Technical Education are not so covered."

(**Emphasis Supplied**)

103. In view of the aforesaid decision also, once the definition of "Revenue Share Assets" defines "shall mean" meaning thereby to that, it is an exhaustive definition. This definition is not extensive. It would cover only those assets which are defined as Revenue Share Assets. Thus, addition is not permissible. This aspect has not been properly appreciated by AERA while treating "other income" as part of revenue, generated from Revenue Share Assets. **We, therefore, quash and set aside the impugned orders in both the aforesaid AERA Appeals which are for 2nd and 3rd Control Periods so far as they are affecting other income as a part of revenue, from revenue share assets and consequently, true-up has to be given for the earlier Control Periods also.**

104. It is contended by the learned senior counsel for FIA that "other income" is a function of cash management earned through airport operations and, therefore, other income must be included in the revenue as it is generated from revenue share assets and has placed reliance upon paragraph number 57 of this Tribunal's judgment dated 23rd April, 2018 in AERA Appeal No. 06 of 2012 and contended that dividend income needs to be included as part of "S" factor even if services are provided through its servants and agents. **This contention is not accepted by this Tribunal mainly for the reason that** because in the case of Bangalore International Airport Ltd. (BIAL), the concession does not provide for a specific tariff calculation methodology which is mentioned in case of DIAL-the present Appellant in Schedule 1 of SSA where "S" factor is limited to the revenue from Revenue Share Assets. Moreover, looking to the definition of Revenue Share Assets, given in Schedule-1 of SSA (ANNEXURE A-4), the said term is a pre-defined terminology and it does not encompass within its sphere, the interest income and dividend income.

105. In view of the aforesaid reasons, **"other income"** cannot be a part of revenue, from revenue share assets and consequently, in calculation of "S" factor in target revenue formula which is TR= RB x WACC + OM + D +

T – S. To the aforesaid extent, the impugned orders which are under challenge in both the aforesaid AERA Appeals which are at ANNEXURE A-1 in both the aforesaid AERA appeals are hereby quashed and set aside.

Thus, in view of the aforesaid facts and reasons, Issue No. II is answered in negative. "Other income" cannot be treated as a part of revenue from Revenue Share Assets.

ISSUE No. III

INCLUSION OF 'ANNUAL FEE' IN DETERMINATION OF "S-FACTOR"

106. As per Clause 11.1.2, JVC-DIAL-Appellant has to pay to the Airport Authority of India (AAI) an Annual Fee (AF) for each Year during the term of the agreement i.e. OMDA (ANNEXURE A-3). Annual fee (AF) = 45.99% of project Revenue of the said year. As per DIAL, this Annual Fee payable to AAI is to be excluded from revenue collected from Revenue Share Assets for the purposes of determination of "S" factor in the formula of target revenue which is being opposed by the counsels for the respondents on the ground that looking to the definition of word 'Revenue' from OMDA and looking to definition of "S" given in Schedule-1 appended to SSA

(ANNEXURE A-4) to be read with Clause 3.1.1 of SSA. Amount of Annual fee cannot be excluded from calculation of "S" factor.

107. Therefore, we have to examine closely the definition of "S" factor which reads as under: -

> "S=30% of the gross revenue generated by JVC from the "Revenue Share Assets. The costs in relation to such revenue shall not be included while calculating aeronautical charges."

108. Thus, "S" factor, which is meant for cross-subsidization is an amount equal to 30% of gross revenue generated by JVC from the Revenue Share Assets. Here the question before this Tribunal, looking to the arguments canvased by both the sides is, the calculation of gross "revenue" generated from Revenue Share Assets.

> "Revenue Share Assets" shall mean (a) Non-Aeronautical Assets; and (b) assets required for provision of aeronautical related services arising at the Airport and not considered in revenues from Non-Aeronautical Assets (e.g. Public admission fee etc.)"

109. Counsel for the respondent has placed reliance upon the definition of word Revenue as given in OMDA (Annexure A-3). For ready reference, the definition of "**Revenue"** means as under**:-**

> "Revenue" means all pre-tax gross revenue of JVC, excluding the following: (a) payments made by JVC, if any, for the activities undertaken by Relevant Authorities or payments received by JVC for provision of electricity, water, sewerage, or analogous utilities to the extent of amounts paid for such utilities to third party service providers; (b) insurance proceeds except insurance indemnification for loss of revenue; (c) any amount that accrues to JVC from sale of any capital assets or items; (d) payments and/or monies collected by JVC for and on behalf of any governmental authorities under Applicable Law (e) any bad debts written off provided these pertain to past revenues on which annual fee has been paid to AAI. It is clarified that annual fee payable to AAI pursuant to Article 11 and Operational Support Cost payable to AAI shall not be deducted from Revenue."

110. On the basis of the aforementioned definition, it is vehemently submitted by the counsel for the respondents that Annual Fee payable to AAI ought not to be included in the revenue collected from "**Revenue Share Assets"**. The counsels for respondents have also placed reliance upon **Clause 3.1.1** of SSA which is reproduced herein below: **-**

> "Revenue Share Assets" shall mean (a) Non-Aeronautical Assets; and (b) assets required for provision of aeronautical related services arising at the Airport and not considered in revenues from Non-Aeronautical Assets (e.g. Public admission fee etc.)"

111. Counsel for the appellant has placed reliance upon the SSA Clause 1.1 especially the lines added after the definitions given in SSA and prior to Clause 1.2, these lines have been highlighted by the counsel for the appellant which reads as under: -

> **"Other Capitalized terms used herein (and not defined herein) but defined under the OMDA shall have the meaning ascribed to the term under the OMDA"**

112. We have perused the aforesaid definitions and the provisions of OMDA and SSA and it appears that what is defined under OMDA is Revenue, whereas in the definition of "S" given in SSA, the words used are 30% of gross revenue generated by JVC from the Revenue Share Assets. The cost in relation to such revenue shall not be included while calculating Aeronautical Charges.

113. The aforesaid position of words are to be read with clear and unequivocal term of the contract of SSA. "Other Capitalised terms used herein (and not defined herein) but defined under the OMDA shall have the meaning ascribed to the term under the OMDA."

114. In view of the aforesaid position, it appears that Revenue in calculation of which annual fee payable to AAI cannot be deducted from Revenue. This has a direct nexus with calculation of "**Annual Fee"**. For ready reference, **Clause 11.1.2.1 of OMDA** (ANNEXURE A-3) reads as under:-

"**11.1.2 Annual Fee**

11.1.2.1 The JVC shall also pay to the AAI an annual fee ("AF") for each Year during the Term of this Agreement of the amount set forth below:

AF = 45.99 % of projected Revenue for the said Year

Where projected Revenue for each Year shall be as set forth in the Business Plan."

115. Thus, the definition of **"Revenue"** in calculation of which Annual Fee is not to be deducted or is to be included for the calculation of Annual Fee. Here we are concerned with "S"- Factor, where the word "revenue" has been utilised. Thus, we cannot read the definition of word "Revenue" from OMDA at the time of reading the definition of "S" in SSA.

116. Moreover, **"S"** is 30% of gross revenue generated by JVC from the Revenue Share Assets. In calculation of this "S" factor, the costs in relation to such revenue shall not be included while calculating "Aeronautical Charges". Thus, if any cost is incurred for realization of the revenue, the same cannot be included. Therefore, it is contended by the counsel for the respondent that annual fee being a cost, has to be included while calculating aeronautical charges.

117. We do not agree with the aforesaid contentions of the respondent. Annual Fee payable to Airport Authority of India (AAI) is not a cost, because the cost is an amount paid to acquire the revenue. Cost is that amount which the entrepreneur pays for procuring the revenue. The cost is an expenditure incurred by any company or firm to produce the goods or services for sale. The cost is an amount that is incurred to earn that revenue prior to such revenue is being earned. In the facts of the above case, if the aforesaid concept is applied, Annual Fee accrues to AAI after **"Revenue"** (as defined under OMDA) has been earned by DIAL. **This aspect of the matter has not been properly appreciated by AERA and hence the decision of AERA of inclusion of Annual Fee in determination of "S"-factor is hereby quashed and set aside.**

118. Further, the cost is such an amount which has to be incurred first and thereafter the revenue can be incurred, but, here in the facts of the present case, and looking to the provisions of OMDA & SSA, "Annual" Fee is not a prerequisite for earning Revenue. In fact, here Revenue is to be calculated first and thereafter 45.99% of revenue is to be calculated as Annual Fee. Thus, Annual Fee is not a cost at all for the purpose of calculation of "S" factor. Further, Clause 3.1.1 of SSA provides "GOI's

intention is to establish an independent Airport Economic Regulatory (the "**Economic Regulatory Authority"**), which will be responsible for certain aspects of regulation (including regulation of Aeronautical Charges) of certain airports in India. GOI agrees to use reasonable efforts to have the Economic Regulatory Authority established and operating within two years from the Effective Date. GOI further confirms that subject to applicable law, it shall make reasonable endeavours to procure that the Economic Regulatory shall regulate and set/re-set Aeronautical Charges, in accordance with the broad principles set out in Schedule 1 appended hereto. Provided however, the Upfront Fee and the **Annual Fee paid/payable by the JVC to AAI under the OMDA shall not be included as part of costs for provision of Aeronautical Services and no pass-through would be available in relation to the same", means Annual Fee is not a cost of provision of Aeronautical Service**, similarly by applying the same principle, Annual Fee on revenue from Revenue Share Assets also, is not a cost of provision of Non-Aeronautical Services or aeronautical related services arising at the Airport.

119. Much has been argued by counsels for respondent number 1 and 2 that looking at the Clause 3.1.1 of SSA (ANNEXURE A-4), for Annual Fee

under OMDA, no pass-through can be given, meaning thereby to, JVC cannot recover the amount of Annual Fee from anybody and, therefore, in calculation of "S" factor, the amount of annual fee ought to be included. We do not agree to this contention of the respondent no. 1 and respondent no. 2 mainly for the reason that it is not the case of DIAL that they want to pass-through an amount of Annual Fee to the airlines or to the customers who are utilising IGIA, Delhi and, therefore, there is no violation by this appellant of Clause 3.1.1 of SSA. It is not the case of this appellant that they want to recover the amount of annual fee or they want to pass-through an amount equal to annual fee to the airlines or to the consumers using IGI Airport, Delhi. In fact, here we are concerned with calculation of "S" factor which is equal to 30% of gross revenue generated by JVC from the Revenue Share Assets. Therefore, question arises that what is gross revenue.

120. Looking to the Escrow Account Agreement which is at **Schedule-13** to the OMDA, a separate account is to be opened known as **"Escrow Account"** which is having a sub-account as mentioned in Clause-2 of Schedule-13 to the OMDA. For the ready reference, the said **Clause-2** of **Escrow Account Agreement** which is at **Schedule-13** reads as under: -

"2. Establishment of Escrow Account and Declaration of Trust

2.1 Establishment of the Accounts

The Company and the Escrow Bank confirm that the Escrow Bank has established, in the name of the Company at the Escrow Bank's New Delhi branch, an account titled the "Escrow Account". The Escrow Account shall have the following sub accounts, maintained, controlled and operated by the Escrow Bank for the purposes of this Agreement, namely:

(a) a sub account maintained, controlled and operated by the Escrow Bank, titled the "Receivables Account";

(b) a sub account maintained, controlled and operated by the Escrow Bank, titled the "Proceeds Account" which shall have the following sub accounts:

(i) a sub-account maintained, controlled and operated by the Escrow

Bank, titled the "Statutory Dues Account;

(ii) a sub-account maintained, controlled and operated by the Escrow

Bank, titled the "AAI Fee Account; and

(iii) a sub-account maintained, controlled and operated by the Escrow

Bank, titled the "Surplus Account".”

As per Clause-3 thereof, it appears that revenue comes in the hands of the JVC only in the “Surplus Account”. Clause 3.2 of the Escrow Account Agreement makes it explicitly clear that the revenue meant for this appellant is in “Surplus Account”. Thus, out of total “gross revenue”, amount equal to Annual Fee never comes in the hands of or in the account meant for appellant and, therefore, while calculating gross revenue generated by JVC from the Revenue Share Assets, the amount of annual fee ought to be excluded.

121. Thus, looking to the aforesaid provisions of OMDA and “Escrow Account agreement”, Annual Fee automatically, gets deducted first from the receipts and is credited to AAI (as per waterfall mechanism under the escrow agreement between DIAL & AAI) and it is only the remaining amount left after the deduction that DIAL gets as revenue and, therefore, it is only this revenue which should be considered for cross-subsidy. AERA has wrongly presumed that deduction of Annual Fee for the purpose of calculation of revenue, from Revenue Share Assets, would be in

contravention of the terms of the OMDA and SSA, whereas, practically, the deduction of Annual Fee takes place even before the said amount is received in DIAL's account (surplus account), as its revenue.

122. It is also contended by counsel for the AERA and FIA who are respondent Nos. 1 and 2 that this appellant is raising this issue for the first time in the 3rd Control Period (F.Y 2019-2024).

In the earlier 1st and 2nd Control Period, this issue was never raised by the appellant and, therefore, they cannot raise this issue in the 3rd Control Period. We do not accept this contention of respondent Nos. 1 and 2 because the issue of exclusion of Annual Fee stems from interpretation of the provisions of OMDA and SSA. If any provision has not been correctly interpreted that does not debar the application of correct interpretation at the time when it comes to the knowledge of the party-DIAL. In fact, appellant is assisting AERA in its statutory function for determination of tariff by respecting the terms of concessions granted to it. In fact, earlier this issue was never raised and, therefore, never decided. Therefore, there is no bar in raising the correct interpretation of the provisions of OMDA and SSA even in the 3rd Control Period.

123. Counsels for respondent Nos. 1 and 2 have placed reliance upon decision of this Tribunal dated 15th November, 2018 in AERA Appeal Number 04 of 2013. We have perused the said decision of this Tribunal. This Tribunal has not given its judgment on Annual Fee to be a cost. In fact, this issue with the aforesaid details of different Clauses and Revenue and definition of "S"-factor to be read with provision of Clause 3.1.1 of SSA to be read with Escrow Account Agreement was never raised before this Tribunal and there is no statutory bar on the part of this appellant to raise the present issue for the 3rd Control Period. Learned Senior Counsel for FIA- Mr. Buddy Ranganadhan submitted that the amount of Annual Fee cannot be excluded in determination of "S" factor, we do not agree to this contention of the counsel mainly for the following reasons:

a. This definition of "Revenue" given in OMDA (ANNEXURE A-3) which clarifies that Annual Fee payable to AAI shall not be deducted from the Revenue. This definition of Revenue is for the purpose of calculation of "Annual Fee" as per Clause 11.1.2 of OMDA, and **not** for calculation of "S" factor, under SSA (ANNEXURE A-4);

b. As per Clause 3.1.1 of SSA (ANNEXURE A-4), Annual Fee paid to AAI under OMDA cannot be pass-through. It is not even the case of this

appellant that the JVC- DIAL wants to pass through or wants to recover the amount of annual fee from the airlines or from the users of IGI Airport, Delhi;

c. Annual Fee is not a cost. Cost refers to the amount of payment made, to acquire any goods or services or revenue to be generated therefrom. Cost in relation to a particular revenue is the cost incurred, to earn that revenue and is incurred **before** such revenue can be earned. In the facts of the present case, **"Annual Fee"** accrues to AAI **after** the revenue as defined under OMDA has been earned by DIAL. In view of this, the amount of Annual Fee should be excluded from the gross revenue generated by JVC from the Revenue Share Assets;

d. The word "**Revenue**" as defined in OMDA and **revenue** used in the definition of "S" under SSA are not inter-exchangeable because of Clause 1.1 of SSA which has used the following lines after the definitions which reads as under: -

> "Other Capitalised terms used herein (and not defined herein) but defined under the OMDA shall have the meaning ascribed to the term under the OMDA."

The aforesaid aspect has not been properly appreciated by AERA while passing the impugned order for the 3rd Control Period dated 30th December, 2020 in paragraph 2.6.33 thereof. For the ready reference, relevant part of Paragraph 2.6.33 of the impugned order for 3rd Control Period passed by AERA dated 30th December, 2020 reads as under: -

> "SSA defines S factor as 30% of the revenue generated from Revenue Share Assets and the definition of Revenue as per OMDA mentioned no deduction of Annual Fee. The only clear interpretation, if at all obtained from reading the provisions in the SSA and the OMDA, was that since Revenue should not carry any deduction with regards to Annual Fee. 30% of the Revenue from Revenue Share Assets defined as the S Factor should also not carry any deduction with respect to Annual Fee."

Here, AERA has interchanged the words "Revenue" instead of "revenue" which is an error on the part of AERA.

e. Also looking to the "**Escrow Account Agreement**" which is at **Schedule-13** to **OMDA**, Annual Fee automatically gets deducted first from the receipts and is credited to AAI (AAI Fee Account). This deduction

is automatic from the escrow account-Receivables Account. Thus, the remaining account after deduction of Annual Fee comes in the account of "Surplus Account" which can be utilised by this appellant. Thus, the deduction of Annual Fee takes place first **even before** the said amount is received in DIAL's account as its revenue and, therefore, while calculating "S" factor, Annual Fee should be excluded.

f. The present issue raised by this appellant is on the basis of interpretation of OMDA and SSA and, therefore, it can be raised even in the 3rd Control Period though it was not raised in the 1st and 2nd Control Period. There is no need to maintain consistency in wrong interpretation of OMDA and SSA.

g. In the earlier Judgement of this Tribunal dated 15th November, 2018 in AERA Appeal 06 of 2012, this issue has never been raised especially in light of Clause 3.1.1 of SSA to be read with definition of "S" factor from SSA to be read with definition of Revenue from OMDA to be read with Escrow Account Agreement as this issue was never raised, it was never decided by this Tribunal specifically. Hence, it can always be raised by this appellant in the 3rd Control Period.

For the aforesaid reasons, we do not agree with the contentions of the learned senior counsel for FIA for the aforesaid issue of inclusion of Annual Fee in determination of "S" factor.

124. We therefore, quash and set aside the decision of AERA to the extent it includes the Annual Fee in gross revenue generated by JVC from the Revenue Share Assets for calculation of "S" factor and we thereby hold that Annual Fee payable to AAI should be excluded from the revenue generated by JVC from the Revenue Share Assets for the calculation of "S" factor. And consequently, true-up has to be given for the earlier Control Periods also.

125. It has been held by Hon'ble the Supreme Court of India in Nabha Power Ltd. v. Punjab SPCL, **(2018) 11 SCC 508** in para 49 thereof as under**:**

> **"49.** We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of *The Moorcock* [*The Moorcock*, (1889) LR 14 PD 64 (CA)] test

of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. The development of law saw the "five condition test" for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious Bystander Test" [*Shirlaw* v. *Southern Foundries (1926) Ltd.* [*Shirlaw* v. *Southern Foundries (1926) Ltd.*, (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in *B.P. Refinery (Westernport) Proprietary Ltd.* v. *Shire of Hastings* [*B.P. Refinery (Westernport) Proprietary Ltd.* v. *Shire of Hastings*, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (*1*) reasonable and equitable; (*2*) necessary to give business efficacy to the contract; (*3*) it goes without saying i.e. the Officious Bystander Test; (*4*) capable of clear expression; and (*5*) must not contradict any express term of the contract. The same penta-principles find reference also in *Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society* [*Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society*,

(1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and *Attorney General of Belize* v. *Belize Telecom Ltd.* [*Attorney General of Belize* v. *Belize Telecom Ltd.*, (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

(Emphasis Supplied)

126. It has been held by Hon'ble the Supreme Court of India in Adani Power (Mundra) Ltd. v. Gujarat ERC, (**2019) 19 SCC 9** in para 21 as under:

"21. Recently, this Court had an occasion to consider the issue with regard to interpretation of certain clauses of PPA, in *Nabha*

Power Ltd. v. *Punjab SPCL* [*Nabha Power Ltd.* v. *Punjab SPCL*, (2018) 11 SCC 508 : (2018) 5 SCC (Civ) 1]. The Court referred to various English and Australian judgments as well as the judgments by this Court on the issue. We do not wish to burden this judgment with all the English and Australian judgments reproduced in the said judgment. However, it will be relevant to refer to the following passage of the decision of the Privy Council in *Attorney General of Belize* v. *Belize Telecom Ltd.* [*Attorney General of Belize* v. *Belize Telecom Ltd.*, (2009) 1 WLR 1988 : 2009 Bus LR 1316 (PC)] : reproduced in *Nabha Power Ltd.* [*Nabha Power Ltd.* v. *Punjab SPCL*, (2018) 11 SCC 508 : (2018) 5 SCC (Civ) 1] (at SCC p. 535, para 45):

> "*45*. … '*17*. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate

undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.' [As observed in *Attorney General of Belize* v. *Belize Telecom Ltd.*, (2009) 1 WLR 1988, p. 1993, para 17]**"**

(Emphasis Supplied)

127. It has been held by Hon'ble the Supreme Court of India in the case of Cellular Operators Assn. of India v. TRAI, reported as **(2016) 7 SCC 703** in para 40, 41, & 80 as under:

"40. Under Clause 28 it is a condition that the licensee shall ensure the quality of service as prescribed by the licensor or TRAI, and shall adhere to such standards as are provided. Another important thing to notice is that under Clause 28.2 the licensee has to keep a record of the number of faults and rectification reports in respect of its service, which will be produced before the licensor/TRAI as and when desired. This being the case, it is clear that the impugned Regulation cannot be said to fall under Section 11(1)(b)(i) at all inasmuch as it does not seek to enforce any term or condition of the licence between the service provider and the consumer. Coming to

sub-clause (v) of Section 11(1)(b), the impugned Regulation would again have no reference to the said paragraph, inasmuch as it does not lay down any standard of quality of service to be provided by the service provider. In order that sub-clause (v) be attracted, not only do standards of quality of service to be provided by the service providers have to be laid down, but standards have to be adhered to by the service providers so as to protect the interests of the consumers.

41. We find that the impugned Regulation is not referable to Sections 11(1)(b)(i) and (v) of the Act inasmuch as it has not been made to ensure compliance with the terms and conditions of the licence nor has it been made to lay down any standard of quality of service that needs compliance. This being the case, the impugned Regulation is dehors Section 11 but cannot be said to be inconsistent with Section 11 of the Act. This Court has categorically held in *BSNL* [*BSNL* v. *Telecom Regulatory Authority of India*, (2014) 3 SCC 222] judgment that the power under Section 36 is not trammelled by Section 11. This being so, the impugned Regulation cannot be said to be inconsistent

with Section 11 of the Act. However, what has also to be seen is whether the said Regulation carries out the purpose of the Act which, as has been pointed out hereinabove, under the amended Preamble to the Act, is to protect the interests of service providers as well as consumers of the telecom sector so as to promote and ensure orderly growth of the telecom sector. Under Section 36, not only does the Authority have to make regulations consistent with the Act and the Rules made thereunder, but it also has to carry out the purposes of the Act, as can be discerned from the Preamble to the Act. If, far from carrying out the purposes of the Act, a regulation is made contrary to such purposes, such regulation cannot be said to be consistent with the Act, for it must be consistent with both the letter of the Act and the purposes for which the Act has been enacted. In attempting to protect the interest of the consumer of the telecom sector at the cost of the interest of a service provider who complies with the leeway of an average of 2% of call drops per month given to it by another Regulation, framed under Section 11(1)(b)(v), the balance that is sought to be

achieved by the Act for the orderly growth of the telecom sector has been violated. Therefore, we hold that the impugned Regulation does not carry out the purpose of the Act and must be held to be ultra vires the Act on this score.

80. Section 11(4) of the Act requires that the Authority shall ensure transparency while exercising its powers and discharging its functions. "Transparency" has not been defined anywhere in the Act. However, we find, in a later parliamentary enactment, namely, the Airports Economic Regulatory Authority of India Act, 2008, that Section 13 deals with the functions of the Airports Economic Regulatory Authority (which is an Authority which has legislative and administrative functions). "Transparency" is defined, by sub-section (4), as follows:

The Airports Economic Regulatory Authority of India Act, 2008

"**13. Functions of Authority**.-

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia—

(a) by holding due consultations with all stakeholders with the airport;

(*b*) by allowing all stakeholders to make their submissions to the authority; and

(*c*) by making all decisions of the authority fully documented and explained."

128. In view of the aforesaid decisions, AERA cannot re-write SSA nor can it ignore the terms of the SSA especially the two lines mentioned in Clause 1.1 of SSA after the definitions given in SSA. Similarly, AERA cannot ignore the "waterfall mechanism" mentioned in Escrow Account Agreement which is at Schedule-13 to the OMDA.

Thus, in view of the aforesaid facts and reasons, Issue No. III is answered in negative. Amount equal to Annual Fee cannot be included in revenue from Revenue Share Assets, in determining "S-factor". Amount equal to Annual Fee is to be excluded from revenue from "Revenue Share Assets" in determining "S-factor".

ISSUE No. IV

CONSIDERATION OF "S-FACTOR" AS PART OF AERONAUTICAL REVENUE BASE FOR COMPUTATION OF TAXES FOR THE SECOND AND THIRD CONTROL PERIOD

129. Under OMDA and SSA to be read with the Provisions of AERA Act, the aeronautical charges are to be determined by AERA. Target Revenue is a methodology for calculating the aeronautical charges in the shared till inflation - X price cap model**.** The very purpose of AERA has been mentioned in Clause 3.1.1 and Clause 3.1.2 of SSA (ANNEXURE A-4). The formula for the target revenue (TR) as per Schedule-1 to the SSA is as under: -

$$TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i$$

This target revenue is an amount which can be collected by the JVC-Appellant-DIAL where "S" is equal to 30% of gross revenue generated by JVC from the Revenue Share Assets.

"Revenue Share Assets" shall mean (a) non aeronautical assets; and b…

Non-aeronautical assets have not been defined in SSA and, therefore, the definition of non-aeronautical assets has to be read from OMDA which is at ANNEXURE A-2.

Non-Aeronautical assets mean all assets required or necessary for the performance of Non-Aeronautical services at the Airport as listed in Part-I of Schedule-6 ……. and all the assets required or necessary for the performance of non-aeronautical services at the Airport as listed in Part-II of Schedule-6 hereof as located at the Airport.

130. Looking to the aforesaid definition of Revenue Share Assets to be read with definition of non-aeronautical assets for the calculation of "S-factor" it is 30% of gross revenue generated by JVC from revenue share assets. This will be the component of "S-factor" which is also referred by the counsel for the appellant as well as respondents as the amount for cross-subsidization. Meaning thereby to, in calculation of target revenue (TR), there will be deduction from the total amount which is equal to 30% of the revenue collection from the Non-Aeronautical services.

131. Looking to the provisions of AERA Act, OMDA and SSA, only aeronautical charges are being controlled whereas non-aeronautical

charges for non-aeronautical services and the tariff for non-aeronautical services is not controlled by AERA. Tariff for non-aeronautical charges and for non-aeronautical services can be fixed by the JVC-Appellant-DIAL.

132. Looking to the formula of target revenue, it further appears that while calculating the target revenue by AERA, they are deducting 30% of gross revenue generated from non-aeronautical services. Now the question here is the calculation of amount of tax.

133. It is contended by the counsel for the appellant that on the amount of 30% of gross revenue generated by JVC from non-aeronautical services, the tax ought to be calculated which is being denied by AERA in both the aforesaid AERA Appeals (i.e. for the 2nd Control Period as well as for the 3rd Control Period).

134. Looking to the impugned order passed by AERA, it appears that AERA has calculated tax on the amount = **RB x WACC + OM + D**, out of:

$$\mathbf{TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i}$$

Thus, upon the aforesaid encircled amount, the AERA has permitted the addition of amount equal to tax, whereas, this appellant's contention is that the amount of tax upon "S" should also be calculated.

135. We are in full agreement with the contention of this appellant mainly for the reason that:

a. The basic function of AERA under the AERA Act to be read with SSA and OMDA is to control and guide and determine the tariff for aeronautical services. Non-aeronautical services, non-aeronautical charges and non-aeronautical tariffs like tariff of the hotel, rent of the shops, entry fee for the visitors at IGI Airport, Delhi, vehicle parking charges etc. which are referred in Schedule-6 appended with OMDA is in the control of the JVC.

b. Looking to the formula of target revenue $TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i$, it is to be kept in mind that by addition of various components as stated hereinabove in the formula what is arrived at is the target revenue for aeronautical services.

c. Once the amount of "S-factor" which is 30% of the gross revenue generated from Revenue Share Asset becomes part and parcel of the target revenue, it also having a color of aeronautical revenue and, therefore, tax-T ought to be calculated even upon amount equal to "S" factor.

136. Looking to the impugned order for 3rd Control Period (F.Y 2019-2024) which is at ANNEXURE A-1, it has been observed in paragraph 2.5.7 and 2.5.8 by AERA that in pursuance of the order passed by this Tribunal for Mumbai International Airport Ltd. (MIAL) dated 15th November, 2018 in AERA Appeal No. 04 of 2013, the matter was remanded upon the issue of "S-factor" for being considered as a part of aeronautical revenue and it has been decided by AERA that the amount equal to "S-factor" is not aeronautical revenue base for computation of aeronautical taxes for 1st Control Period. As per paragraph 8.5.1 of the Impugned Order for 3rd Control Period (ANNEXURE A-1), it has been decided by AERA that since "S-factor" does not find place in aeronautical services earning pertaining to Aeronautical Services should not include "S-factor" and addition of tax in target revenue upon an amount of S-factor would result in undeserved enrichment to the airport operator effectively reducing the cross-subsidy benefit.

137. We do not agree with the aforesaid reasons by AERA mainly for the reason that because the target revenue as per the aforesaid formula is determined, based on aeronautical building block post cross subsidy of 30% revenue from Revenue Share Assets and, therefore, out of total

target revenue, 30% has been recovered from the revenue generated by JVC from Revenue Share Assets. In view of this formula of Target Revenue, it is abundantly clear that in a recovery of Target Revenue for aeronautical services, **"S-factor"** is one of the mechanism of calculation in the formula of TR thus, the amount of **"S-factor"** partakes the character of aeronautical revenue and, therefore, once the part of aeronautical revenue has been recovered from 30% of revenue from Revenue Share Assets, the effect of "S-factor" should also be given in "T" (i.e. corporate tax pertaining to aeronautical services).

138. It has been observed by this Tribunal in the Judgment dated 15th November, 2018 in AERA Appeal No.4 of 2013 in Para 15:

> **"15.** This leave us with the issue of 'S' in the calculation of 'T' to deal with. In support of his contention that 'S' should be added as aero revenue in the calculations of 'T', Mr. Venugopal uses the definition of 'T' as given in SSA. As per SSA, 'T' is defined as corporate taxes on "earnings pertaining to Aeronautical Services" and not on the target revenue. Since it is mandated in the agreement as cross-subsidy to the aero services, it is as real and actual part of the aero revenue as any

other aero revenue for the purpose of calculating 'T' in respect of earnings pertaining to aero services. Mr. Venugopal further contends that even under the Income Tax Act, a subsidy is treated as part of taxable income and also cites some judgments in support (Sahney Steel v. CIT, (1977) 7 SCC 764 and CIT v. Ponni Sugars, (2008) 9 SCC 337). We have noted above that earnings in most simplistic terms are balance of revenues after costs and expenses are deducted and that by the provision in the Agreement, Annual Fee is a cost and must be deducted. Similarly, by the provision in the Agreement, 'S' is an element of revenue on aero side and by the same yardstick must be added while calculating the 'T'. We find some merit in these arguments. However, we find no discussion and examination by AERA in the impugned order on how 'S' is to be treated. The analysis presented before us indicates that inclusion of 'S' in aero revenue will have comparatively significant effect and in that sense it is not a routine or insignificant issue. It is also not a case of being so obvious or self-evident that no explanation is warranted. Therefore, we

feel that pertinent questions raised by MIAL and other stakeholders on this issue should have been addressed before coming to a decision. We further notice that in the decision no. XV.a of the impugned order, there is a mention of annual fee as element of cost but there is no mention of 'S' in the decision. However, from the submissions of AERA and the calculations done, it is apparent that AERA has not taken 'S' as revenue for calculation of 'T'. It thus appears to be a case of decision by default and calculations without explanations in respect of this point. Therefore, we are of the opinion that it will be appropriate if this limited question is remanded back to AERA for a fresh consideration through consultative process."

139. The Hon'ble Supreme Court in Delhi International Airport Ltd. v. Airport Economic Regulatory Authority of India, **2022 SCC OnLine SC 850** has rejected AERA's methodology of calculating 'T' by basing it on the Corporate Tax paid by DIAL and held that 'T' must be calculated based on regulatory accounts prepared for arriving at TR as defined in the SSA and not from how generally 'tax' is understood.

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.

142. Thus, in view of the aforesaid facts and reasons, in the formula of Target Revenue, amount equal to "S factor" also partakes the color of aeronautical revenue and looking to the definition of **"T"** in SSA which is a corporate taxes on earnings pertaining to aeronautical services and it is not

on target revenue thus, upon an amount equal to S-factor also, an amount equal to corporate tax should be calculated.

143. We therefore quash and set aside the decision of AERA which is 2nd and 3rd Tariff Order which are impugned orders in these AERA Appeals to the extent that "S-factor" is excluded as a part of aeronautical revenue base while determining aeronautical taxes (i.e. T). We hereby hold that "S"-factor is a part of aeronautical revenue base while determining aeronautical taxes (i.e. T).

144. We do not agree with the contention of FIA that this appellant had not raised this issue in the 1st Control Period and, therefore, the appellant cannot raise this issue in the 2nd Control Period and 3rd Control Period. The present issue is based upon the correct interpretation of SSA and OMDA to be read with AERA Act, 2008 and, therefore, even if this appellant has not raised this issue in the 1st Control Period, for the 2nd Control Period and 3rd Control Period this issue can always be raised by this appellant. There is no need to maintain consistency for wrong interpretation by the appellant.

145. It ought to be kept in mind that in the formula of Target Revenue ($TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i$), 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**, <u>but,</u>** 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 DIAL 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 DIAL 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. 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 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.

ISSUE No. V

EXCLUSION OF REVENUE FROM EXISTING ASSETS/DEMISED PREMISES

146. The major contention raised by the learned senior counsel Shri Ramji Srinivasan, on behalf of DIAL that the Non-Aeronautical revenue derived by this appellant from Existing Assets could not be considered as part of revenue from Revenue Share Assets because these assets were owned by AAI and not by DIAL or by any other "Third entity". This appellant has also sought for exclusion of revenue from Existing Assets to be true up for the 1st Control Period. AERA has not accepted this contention and has held that the revenue generated from existing assets/demised premises by this appellant cannot be excluded in calculation of "S", for 3rd Control Period and consequently has also disallowed any adjustment pursuant to the proposed exclusion of "revenue from existing assets", for the 1st and 2nd Control Period which is under challenge in AERA Appeal No. 1 of 2021 by

the appellant. Counsels for both the sides have taken this Tribunal to the definitions of "Aeronautical Assets", "Existing Assets", "Non-Aeronautical Assets" and "Non-Transfer Assets" as well as the definition of "Demised Premises". Counsels for both the sides have also taken this Tribunal to the definition of "Revenue Share Assets" and the definition of "entity" and definition of "third party". The aforesaid definitions have a direct nexus with the present issue. For the ready reference, these definitions are as under: -

(a) Aeronautical Assets (as per OMDA) – "Aeronautical Assets" shall mean those assets, which are necessary or required for the performance of Aeronautical Services at the Airport and such other assets as JVC procures in accordance with the provisions of the Project Agreements (or otherwise on the written directions of the GOI / AAI) for or in relation to, provision of any Reserved Activities and shall specifically include all land (including Excluded Premises), property and structures thereon acquired or leased during the Term in relation to such Aeronautical Assets.

(b) Existing Assets (as per OMDA) - "Existing Assets" means the physical, tangible, intangible and other assets of whatsoever nature

existing at the Airport Site as on the date hereof except working capital assets other than inventory, stores and spares.

(c) Non-Aeronautical Assets (as per OMDA) - "Non-Aeronautical Assets" shall mean:

1. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in Part I of Schedule 6 and any other services mutually agreed to be added to the Schedule 6 hereof as located at the Airport (irrespective of whether they are owned by the JVC or any third Entity); and
2. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in Part II of Schedule 6 hereof as located at the Airport (irrespective of whether they are owned by the JVC or any third Entity), to the extent such assets (a) are located within or form part of any terminal building; (b) are conjoined to any other Aeronautical Assets, asset included in paragraph (i) above and such assets are incapable of independent access and independent existence; or (c) are predominantly servicing/ catering any terminal complex/cargo complex and shall specifically include all additional land (other than the Demised

Premises), property and structures thereon acquired or leased during the Term, in relation to such Non-Aeronautical Assets.

(d) Non-Transfer Assets (as per OMDA) – "Non-Transfer Assets" shall mean all assets required or necessary for the performance of Non-Aeronautical Services as listed in Part II of Schedule 6 hereof as located at the Airport Site (irrespective of whether they are owned by the JVC or any third Entity), provided the same are not Non-Aeronautical Assets.

(e) Demised Premises (as per Lease Deed) – Demised Premises as per Article 2.1 and 2.1.1 of the lease-deed between AAI and DIAL dated 25th April, 2006 which is at **Annexure A-5 (Colly)** to the Memo of AERA Appeal No. 1 of 2021 is as follows:

"2.1.1 In consideration of the Lease Rental, OMDA and the covenants and warranties on the part of the lessee therein and herein, the Lesser, in accordance with the AAI Act and the terms and conditions set forth herein, hereby, demise to the lessee commencing from the effective date, all the land (along with any buildings, constructions or immovable assets, if any, thereon) which is described, delineated and shown in the Schedule 1 hereto, other than (i) any lands (along with any buildings, constructions or

immovable assets, if any thereon) granted to any third party under any Existing Lease(s) constituting the airport on the date hereof; and (ii) any and all of the carved out assets and the underlaying land together with the buildings, constructions or immovable assets thereon, on an "as is where basis" together with all encumbrances thereto, (hereinafter "**Demised Premises**") to hold the said demised premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said demised premises, heredetaments or premises or any part thereof belonging to or in any way appurtenant thereto or enjoyed therewith, for the duration of the Term for the sole purpose of the Project, and for such other purposes as are permitted under this Lease Deed.

(g) 'Entity' (as per OMDA) means any person, body corporate, trust, partnership firm or other association of persons/individuals whether registered or not.

(h) 'Third Party' (as per Lease Deed) means any Entity other than the Parties to this Lease Deed

(g) Revenue Share Assets (as per SSA) shall mean- a. Non-Aeronautical Assets; & b. Assets required for provision of aeronautical related services arising at the airport and not considered in revenues from Non-Aeronautical Assets (e.g. Public Admission fee etc.).

147. In view of the aforesaid definitions, it is submitted by counsel appearing for respondent nos. 1 and 2 that revenue earned by this appellant from existing assets/demised premises should be treated as "Revenue Share Assets" and 30% of the gross revenue generated by this JVC-Appellant will be calculated towards the calculation of "S" factor. This contention is not accepted by this Tribunal because looking to the definition of "Revenue Share Assets", as stated hereinabove it shall mean a Non-Aeronautical Assets and the assets required for provision of aeronautical related services arising at the Airport and not considered in revenues from Non-Aeronautical Assets. Looking to the definition of Non-Aeronautical Assets, all the assets required or necessary for the performance of Non-Aeronautical Assets at the Airport as listed in Part-I of Schedule – 6 of OMDA as located at the Airport irrespective of whether they are owned by JVC or any third party to the extent such assets are located within or form part of any terminal building or are conjoined to any

other Aeronautical assets, asset including in Paragraph (i) above , and such assets are incapable of independent access and independent existence or are prominently serving/catering any terminal complex/categorically complex and shall specifically include all the additional land (other than demised premises), property and structures thereupon acquired or leased during the Term in relation to such non-aeronautical assets.

148. Non-Aeronautical Services means such services as are listed in Part- I and Part-II of Schedule – 6 of OMDA. In view of the aforesaid definition of Revenue Share Assets, Non-Aeronautical Assets and Non-Aeronautical Services, it is explicitly clear that Non-Aeronautical Revenue accruing from exiting premises/ demised premises could not be considered as part of revenue from "Revenue Share Assets" and consequently it cannot be used for cross subsidization.

Looking to the definition of **"Third Party"** as per lease agreement it appears that Third Party means an entity other than party to the leased agreement meaning thereby to Third Party means a party which is **neither** the AAI **nor** the DIAL. The word "entity" has also been defined as per OMDA means any Person, Body Corporation, Trust, Partnership Firm or other Association of persons/individuals whether registered or not. Upon

conjoint reading of the definition of "Entity" (from OMDA), of "Third Party" (as per Lease agreement) and definition of "Revenue Share Assets", it is explicitly clear that the "Third Party" as mentioned in the definition of "Non-Aeronautical Assets" cannot include AAI. Meaning thereby to, any asset which is owned by AAI and is leased to DIAL, **but**, not categorised as "Aeronautical Assets" or "Non-Aeronautical Assets", cannot be considered as "Non-Aeronautical Assets". As a resultant effect, the revenue accrued from such asset cannot be considered towards calculation **"S factor"** or it cannot be considered for cross subsidization.

149. In fact, demised premises have been expressly excluded from the Third Category of **"Non-Aeronautical Assets".**

150. Looking to the definition of "Revenue Share Assets" as stated hereinabove, it is an exhaustive definition. It starts with the term "Non-Aeronautical Assets" shall mean.....meaning thereby to, no other assets, than those which are expressly mentioned in the definition of "Non-Aeronautical Assets" can be classified as "Non-Aeronautical Assets". The terms of the agreement cannot be modified unilaterally and much less, it can be presumed to have been modified.

151. Once the definition of "Revenue Share Assets" is exhaustive, unequivocal, and unambiguous and is not having more than one meaning then no new type of assets can be added in the list of "Non-Aeronautical Assets". AERA has, therefore, committed an error in considering "Non-Aeronautical Revenue" accruing from existing assets as part of revenue from "Revenue Share Assets".

152. It is submitted by the counsel for the respondent no. 1 that existing assets/demised premises do not share a mutually exclusive relationship with aeronautical or non-aeronautical assets. The narration of existing assets is only for demarcating and only for identity of those assets which were already in existence prior to the JVC-DIAL-Appellant took over the IGI Airport, Delhi and, therefore, from existing assets/demised premises also, if any revenue is generated by the JVC by the performance of non-aeronautical services or aeronautical services, the revenue so generated can always be considered while calculating "S-factor". This contention of respondent - AERA is not accepted by this Tribunal mainly for the reason that if the approach suggested by AERA is to be adopted, perhaps there would be no requirement of defining, "**Revenue Share Assets"** and in the State Support Agreement they could have mentioned 30% of all

revenue from non-aeronautical assets for the calculation of "S-factor". The definition of Revenue Share Assets has to be given a meaning which is being defined in SSA and the Non-Aeronautical Assets as defined in OMDA has also a very specific meaning. Non-Aeronautical Assets does not mean that any non-aeronautical assets which is required or necessary for the performance of non-aeronautical services. Once the definition of Revenue Share Assets to be read with definition of Non-Aeronautical Assets to be read with Schedule-6, Part -I and Part-II thereof are clearly defined then in those circumstances, there cannot be any addition of existing assets/demised premises is permissible in the aforesaid definitions.

153. AERA has also committed an error in dismissing the appellant's contention regarding revenue from the existing assets should be excluded from the calculation of "S-factor" for 3rd Control Period and consequent true up merely on the ground that the DIAL has not raised this issue in the previous Control Periods. This reasoning of AERA is erroneous mainly for the reason that the issue which is raised by this appellant involves interpretation of the complex agreements like OMDA, SSA, Leased Agreement etc. which are first of its kind. Failure of appellant to raise this issue was not deliberate. As stated hereinabove there is no need to

maintain consistency by the appellant in wrong interpretation of the terms of the contract. Correct interpretation of the contracts involves in the present proceedings in both the aforesaid AERA Appeals can always be done even if such issues cannot be raised in earlier control periods. No estoppel is created thereby.

154. We, therefore, quash and set aside the decision of AERA bearing No. 57/2020-21 dated 30th December, 2020 (for 3rd Control Period) of inclusion of revenue from existing assets/demised premised in the calculation of "S"-factor.

155. We hereby hold that looking to the provisions of OMDA to be read with the provisions of SSA and of the definitions as stated in this point, we hereby hold that revenue accrued from the existing assets/demised premises by the appellant cannot be considered as part of revenue from **"Revenue Share Assets"** for the calculation of "S" factor and consequently, **true up has to be given for the earlier Control Periods also.**

Thus, in view of the aforesaid facts and reasons, Issue No. V is answered in negative. As stated hereinabove, we hold that

revenue accrued from the existing assets/demised premises cannot be considered as a part of revenue from "Revenue Share Assets".

ISSUE No. VI

THE CAPITAL EXPENDITURE UNDERTAKEN BY JVC-APPELLANT-DIAL FOR PHASE 3A EXPANSION OF IGIA, DELHI

156. It is submitted by Learned Senior Counsel Shri Ramji Srinivasan appearing on behalf of the appellant that this appellant has undertaken the work of Phase 3A expansion project, the expansion of IGIA, Delhi. After getting approval from Ministry of Civil Aviation (MoCA), the bidding process had been started and a competitive bidding price which the lowest number-1 had quoted and on that basis the tariff proposal requested by DIAL for allowing Rs.9782.15 Crores as Capital Expenditure (Capex) as part of Regulatory Asset Base (RAB). The respondent no.1- AERA has allowed only Rs.9126.42 Crores as an efficient cost which is under challenge under the aforesaid heading by the Appellant.

157. It is contended by the counsel for the respondent that AERA has to arrive at an efficient cost and, therefore, out of Rs.9782.15 Crores, Rs.9126.42 Crores was decided to consider towards the cost of phase 3A expansion. Counsel for Respondent no. 1 has also pointed out that AERA took the opinion which is known as Consultant's Report who had given the efficient cost in which AERA had added amount of GST credit and the impact of inflation and, therefore, it is contended by counsel for Respondent No.1 that the decision of AERA may not be interfered with.

Table 78: Phase 3A Expansion cost as recommended by the Independent Study

Package	Capex for Expansion (Rs. Cr)	Recommended cost based on independent study
1	Expansion of Terminal 1	2,431.00
1, 2 & 4	Airfield works including 4th Runway, Aprons & eastern parallel cross taxiways	4,318.45
3	Landside/ connectivity works	366.17
5	Modification of Terminal 3	166.98
	Total	7,282.60
	Others	686.60
	Grand Total	7,968.60

Table 79: Comparison of Capex Estimates between Independent Study and DIAL's submission

Capex for Expansion (Rs. Cr)	Categorization	Cost estimate as per Independent Study^	Cost estimate as submitted by DIAL
Package 1			
Terminal 1C	Common	299.25	352.60
Pier, Node & Balance Part	Common	2,360.74	2,781.65
Apron Phase 1	Aero	385.67	486.47
Apron Phase 2	Aero	246.03	310.34
Apron Phase 3	Aero	173.11	218.36
Package 2			
Runway 1 1L/29R	Aero	279.08	456.38
North side – Parallel Taxiways	Aero	150.84	150.90
North side – Echo-2 Taxiways	Aero	330.84	187.40
North side – Runway-09	Aero	92.44	276.23
Other Taxiways & airside Works	Aero	1,938.02	2,228.46
Package 3			
Landside work	Aero	400.66	817.82
Package 4			
Eastern cross taxiway	Aero	1,129.20	1,364.23
Package 5			

Terminal 3 works	Common	182.71	151.32
Total		7,968.60	9,782.15*

**doesn't include the Rs. 12 Cr already capitalised as part of asset additions in the Second Control Period pertaining to preliminary and relocation work*

^ for the purpose of comparison with the cost estimate submitted by DIAL, the Other Item of Rs. 686 Cr as shown under Table 78 has been proportionally allocated to all the individual items under the above table.

Table 81: Phase 3 A Cost Comparisons amongst cost as per independent study, cost as per DIAL submission, cost proposed to be considered by AERA

Phase 3 A Expansion Cost (Rs. Cr.)	Cost estimated as per Independent Study	Cost estimated as per DIAL submission	Cost proposed to be considered by AERA*
Package 1			
Terminal 1C	299.25	352.60	342.73
Pier, Node & Balance Part	2,360.74	2,781.65	2,703.75
Apron Phase 1	385.67	486.47	441.70
Apron Phase 2	246.03	310.34	281.78
Apron Phase 3	173.11	218.36	198.27
Package 2			

Runway 1 1L/29R	279.08	456.38	319.63
North Side- Parallel Taxiways	150.84	150.90	172.75
North Side- Echo-2 Taxiways	330.84	187.40	378.90
North Side- Runway-09	92.44	276.23	105.87
Other Taxiways & airside Works	1,938.02	2,228.46	2,219.61
Package 3			
Landside Work	400.66	817.82	458.88
Package 4			
Eastern cross taxiway	1,129.20	1,364.23	1,293.27
Package 5			
Terminal 3 works	182.71	151.32	209.26
Total	7,968.60	9,782.15	9,126.42

**has been arrived at by proportionately allocating the Inflationary Impact and the Impact of GST on the Cost estimated by the Independent Study.*

158. Having heard counsels for both the sides and looking to the facts and circumstances of the case, that Phase 3A expansion project of IGI Airport, Delhi has been approved by MoCA, thereafter global bids were invited and the competitive price is being given by the bidders and the lowest no. 1 had offered the cost for Phase 3A expansion at Rs. 9782.15 Crores.

159. Moreover, as per the provisions of Section 13(1), the AERA has to keep in mind that **capital expenditure incurred** for determination of tariff for the aeronautical services. For the ready reference, Section 13(1) of AERA Act, 2008 reads as under:

> "Sec.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 investment in improvement of airport facilities;
>
> (ii) the service provided, its quality and other relevant factors;
>
> (iii) the cost for improving efficiency;
>
> (iv) economic and viable operation of major airports;
>
> (v) revenue received from services other than the aeronautical services;
>
> (vi) the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise;
>
> (vii) any other factor which may be relevant for the purposes of this Act:

Provided that different tariff structures may be determined for different airports having regard to all or any of the above considerations specified at sub-clauses *(i)* to *(vii)*;

(b) to determine the amount of the development fees in respect of major airports;

(c) to determine the amount of the passengers service fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act, 1934 (22 of 1934);

(d) to monitor the set performance standards relating to quality, continuity and reliability of service as may be specified by the Central Government or any authority authorised by it in this behalf;

(e) to call for such information as may be necessary to determine the tariff under clause *(a)*;

(f) to perform such other functions relating to tariff, as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act."

(Emphasis Supplied)

160. In view of the aforesaid provisions of Section 13(1), AERA has to appreciate actual capital expenditure incurred by the Appellant. As per respondent no.1, the cost which is arrived at by the global bidding process is not an efficient cost and, therefore, AERA has arrived at efficient cost seeking Consultant's Report and thereafter they have considered the GST credit and the impact of inflation amount and has arrived at a new figure which is Rs. 9126.42 Crores which was allowed as a capital expenditure as a part of RAB. The contention of the respondent no. 1 as well as respondent no. 2 that on the basis of efficient cost to be arrived at by AERA, they have reduced the amount of capital expenditure as suggested by DIAL. This contention is not accepted by this Tribunal mainly for the reason that Phase 3A expansion was principally and technically allowed by MoCA.

161. The global bidding process was followed by this Appellant in which the lowest no.1 has quoted the minimum amount for Phase 3A expansion of IGIA, Delhi. This amount has to be paid by the appellant by cheque or through bank transactions. There are no allegations by respondent no. 1 and much less by respondent no. 2 that the global bidding process was followed by this appellant was mala-fide or capricious or was bearing loan

or there was any procedural lapse or there was any fraud. Thus, in absence of such allegations by the respondents, the global bidding process followed by this appellant was transparent bidding process.

162. Moreover, looking to the global bidding process followed by this appellant and the price offered by lowest no. 1 is in fact **"Market Discovered Price"** arrived at through competitive bidding process.

163. Moreover, a written contract has been entered into by JVC-Appellant-DIAL with the lowest no. 1 who is the successful bidder and a contract has been entered into between this appellant and the lowest no.1. Thus, in absence of any allegation of procedural lapse, fraud or mala-fide intention, the capital expenditure for the Phase 3A expansion of IGIA, Delhi, through a separate contract cannot be interfered with by AERA. AERA cannot re-write the contract which is a legal and a valid one between JVC and the lowest no.1 who is a successful bidder and, therefore, also the contention of the counsels for respondent no.1 and respondent no. 2 for disallowance of part of the capital expenditure undertaken by DIAL for Phase 3A expansion of IGIA, Delhi is **not** accepted by this Tribunal.

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 report,

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.

ISSUE No. VII

DIS-ALLOWANCE OF CSR EXPENSES AS PART OF OPERATING EXPENSES

167. As per **Section 135(5) of Companies Act, 2013**, the company has to use **2%** of Average Net Profit for the activities enumerated in

Schedule VII of the Companies Act, 2013, this amount is known as Corporate Social Responsibility (CSR) amount. The expenditure of the CSR is must for the appellant. In the formula of the target revenue operating expenses has been referred as O.M. For the ready reference the said formula reads as under: -

$$TR_i = RB_i \times WACC_i + OM_i + D_i + T_i - S_i$$

OM=efficient operation and maintenance cost pertaining to aeronautical services. It is submitted by counsel appearing for respondent no. 1 that CSR expenses are not the operating expenses, pertaining to aeronautical services, therefore, CSR expanses could not be recovered by the appellant. AERA has decided not to include CSR expanses as part of Operating Expenses for the First, Second and Third Control Periods. This contention of the learned senior counsel for respondent no. 1 has not accepted by this Tribunal because it has already been decided by this Tribunal in AERA Appeal No. 8 of 2018 judgment dated 16th December, 2020 in paragraph nos. 77 to 81, in case of Bangalore International Airport Ltd. (BIAL) Vs. Airport Economic Regulatory Authority (AERA). It has been held by this Tribunal that expenditure on **CSR** will be a part of operating expenses and

CSR amount was allowed as a cost of pass-through. For the ready reference, these paragraphs read as under: -

"**Issue of expenditure on Corporate Social Responsibility (CSR)**

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

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

that these expenditures are not to be considered as part of Business Expenditure in the computation of Business Income for the purpose of income tax.

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

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

the case of general corporate entities who do not operate in a regulated regime.

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

issue is, therefore, set aside. The Authority shall pass consequential orders so that no loss due to reduction in determined fair return is caused to the equity holders on account of expenditure on CSR. Necessary truing-up exercise shall be done by the Authority accordingly."

168. The aforesaid decision is binding upon AERA. **We are in full agreement with the respondent given hereinabove in AERA Appeal No. 8 of 2018 for quashing and setting aside the decision of AERA for disallowing CSR expenses as part of operating expenses. Necessary true up shall be given of the CSR expenses which have already been incurred by the appellant.**

Thus, in view of the aforesaid facts and reasons, Issue No. VII is answered in affirmative. Amount equal to CSR ought to be considered as part of operating expenses.

ISSUE No. VIII

FOREIGN EXCHANGE LOSS

169. The JVC-Appellant-Dial as per their cost optimization strategies had taken foreign currency loans in the F.Y 2010 and 2014. As the rate of interest was much lower than that was prevailing in India. Foreign currency loans lower the cost which is to be passed on to the passengers in the form of lower tariff. However, such loans are subjected to the foreign currency fluctuations and, therefore, the JVC-Appellant-Dial has proposed to AERA that the losses accrued on account of foreign exchange fluctuations must be considered as Operating Expenses and has further proposed to keep the refinancing costs outside the purview for determination of efficient foreign exchange losses and to be allowed separately as Operating Expenses. This proposal of the JVC-Appellant-Dial was not accepted by AERA as a part of Operational Expenditure for the True Up exercise for the first control period. AERA has allowed refinance charges while calculating effective cost of debt for the 2nd Control Period for the purpose of calculating efficient foreign exchange losses that has to be allowed as part of efficient operating expenditure.

170. DIAL has only taken **an Interest Rate Swap** and not **Foreign Currency Swap** during the 1st Control Period thus, the hedging was done only for interest and not for the fluctuations in the foreign currency rates. AERA has held that such losses were incurred on account of the hedging principles adopted by DIAL, which cannot be considered as efficient cost which would nullify the benefits of lower cost passed on to the users. Thus, it appears that the costs incurred by DIAL towards hedging had already been considered under the cost of debt and the losses incurred by DIAL would not be considered as pass-through under Operating Expenses. The reasoning given by AERA is sound reasoning and we see no reason to interfere with the decision of AERA for the 1st Control Period mainly for the reason that the operator-Appellant had taken only Interest Rate Swap and not Foreign Currency Swap for its foreign currency liability and the losses on account of the same cannot be passed on to the Airport users.

171. The DIAL has also requested that since the forex losses were allowed in the 2nd Control Period to the extent of cost of Rupee Term Loan, the same cost must be allowed in the 1st Control Period. Further, it has been contended by DIAL that the cost of debt may not true up for the 1st Control

Period and if the same were to be true up, then the cost pertaining to the forex losses have to be allowed in the 1st Control Period true up exercise.

172. Thus, it appears that the AERA in case of 2nd Control Period has considered the cost of debt allowed by Authority in its order No. 40/2015-2016 as efficient and accordingly allowed forex loss and refinancing cost to that extent in the 2nd Control Period. For the ready reference, relevant part of the order No.40/2015-2016 reads as under: -

> "While the Authority is inclined to consider foreign exchange rate fluctuations, it is not persuaded to consider the approach of making adjustments in RAB. Normally, fluctuations incurred by the operator on account of fluctuations in foreign exchange are expensed out while determining tariff for the operator. The Authority is of the view that in case it were to consider foreign exchange rate fluctuations by expensing out actual/asses on this account, it would also true up the WACC (including actual interest rates on domestic term loan). The Authority had communicated to DIAL to consider foreign exchange losses along with true-up of WACC. However, DIAL did not exercise any option. It seems that DIAL would like to be reimbursed for foreign exchange losses and also retain the savings they have made on account of lower interest rates. The Authority does no/find this acceptable."

173. On the basis of the aforesaid, it is the contention of the appellant that in a similar way AERA should consider allowance of forex losses for the 1st Control Period to the cost of Rupee Term Loan (RTL) allowed by AERA in Order No. 3/2011-12 (i.e. 12.17%).

174. In the consultation paper published by AERA No.15/2020-21 at **paragraph no. 3.5.12**, it has been stated as under:

> "The Authority is of the view that the Airport Operators effective cost of debt shouldn't exceed at least the cost of borrowing in the local currency which was determined as 11.38 % as per the tariff order for the Second Control Period. The Authority hence proposes to allow only forex losses to the extent that the effective cost, including the allowed forex losses, don't exceed 11.38%. Authority is of the view that only to this extent the forex losses incurred by the operator can be considered as efficient Costs."

175. TDSAT in its judgment dated 20th March, 2020 in the matter of DIAL in AERA Appeal No. 7 of 2012 in DIAL vs. AERA has decided as under with respect to upfront fee.

> "the impugned order of AERA for excluding the upfront fee of Rs. 150 crores from the Project cost is found to be not sustainable either on the facts or in law. Hence, exclusion of the aforesaid amount of Rs. 150 crores

of upfront fee from the Project cost is set aside. However, it is clarified that this amount shall not be a part of the RAB but will be treated as equity share capital of DIAL while determining WACC."

176. DIAL had also filed an Appeal No. 10 of 2012 against the AERA Order No.3/2011-12. One of the contentions of the appeal was that the Authority while calculating WACC considered Refundable Security Deposit (RSD) as debt at the rate of 0%. TDSAT in its order dated 23rd April, 2018 at per 106 for DIAL Appeal No. 10 of 2012 provided that the return on **RSD cannot be zero** and it is eligible for some return. The relevant part of the order reads as under: -

"That return cannot be less than the cost which DIAL has to bear, or it has borne by making available the amount of RSD (Rs.1471 Crores) for investment in the airport project. Clearly, in our opinion, this money has wrongly been treated as debt at zero cost. The well accepted commercial practices and norms need to be respected by the Authority and therefore, return on RSD amount should be re-determined by it for the reasons indicated above. Instead of interfering with the impugned tariff determination we direct that the amount due to DIAL under this head should be worked out and made available to DIAL through appropriate fiscal exercises which should be undertaken when the exercise of

redetermination of tariff for IGI Airport, Delhi is next undertaken in due course."

177. Thus, in view of the aforesaid judgment of TDSAT in DIAL's appeal No. 10 of 2012, the WACC for the 1st Control Period should be true up only to the extent of the order pronounced by the TDSAT. The authority, vide order number 40/2015-16, for 2nd Control Period has mentioned that it will allow the forex as expense in case the WACC has been true up or considered on actual. For the ready reference, **paragraph 8.25** of Order No.40/2015-16 reads as under:

"While the Authority is inclined to consider foreign exchange rate fluctuations, it is not persuaded to consider the approach of making adjustments in RAB. Normally, actual losses incurred by the operator on account of fluctuations in foreign exchange are expensed out while determining tariff for the operator. The Authority is of the view that in case it were to consider foreign exchange rate fluctuations by expensing out actual losses on this account, it would also true up the WACC (including actual interest rates on domestic term loan."

178. Thus, it appears that the Authority has rightly stated that it can true up WACC if actual forex losses were to be considered and not vice versa, implying WACC has to be true up only if forex losses were considered. The

authority had also communicated to DIAL to consider foreign exchange fluctuations along with true up of WACC, but, DIAL had not requested for true up of WACC for 1st Control Period considering the actual lower interest rates, during tariff determination for both 2nd Control Period and 3rd Control Period and thus it is rightly decided by AERA that airport user do not have to bear the foreign currency losses because of inefficient decision making by the airport operator which in the present case is "…the absence of currency swap for the ECB loan which has led to foreign currency losses in the first place. As the pricing regulation should encourage economic efficiency as one of the founding principles of the tariff determination as per the SSA, the same has to be adhered to by the Authority. Clearly, as per DIAL's own submission, currency swap was not considered because of the natural hedge available and hence it was conscious decision-making by DIAL at that time to pass on the cost of forex losses to the airport user where the airport operator had on their own foregone the hedge option based on their assessment leading to forex losses in the first place would be deemed unfair on the airport users."

179. So far as DIAL's submission regarding true up of operating expenses for the 2nd Control Period treating refinancing cost and forex losses as part

of operating expenses looking to the submissions made by both the sides and also looking to the 2nd Tariff Order and 3rd Tariff Order and also looking to the DIAL's submission and also looking to the refinancing cost, it appears that the cost of debt has been decreased from 1st Control Period to 2nd Control Period because of the refinancing exercise carried out by DIAL. The refinance charges have been considered by AERA while calculating effective cost of debt for the 2nd Control Period for the purpose of calculating efficient foreign exchange losses that has to be allowed as part of efficient operating expenditure. AERA has allowed, for the 2nd Control Period, the forex losses only to the extent that the same was considered efficient which is considered as the cost of debt for Rupee Term Loan (RTL) facility.

180. The Authority formed the view that while refinancing cost incurred by DIAL can be considered as part of efficient costs, as the same would incentivize the operator to look at cheaper sources of funding which would eventually lead to lower cost of debt and reduction in tariffs, considering forex losses also would defeat the entire purpose of efficient costs being allowed through tariff as these items would lead to a cost of debt much higher that the originally considered cost of debt. The Authority noted that

the weighted average cost of debt considered at the time of tariff determination for the Second Control Period was 10.19% (Table 31) and the cost of debt Rupee Term Loan was 11.38%.

The Authority formed the view that the Airport Operator's effective cost of debt shouldn't exceed at the least the cost of the borrowing in the local currency which was determined as 11.38% as per the Tariff Order for the Second Control Period. The Authority hence proposed to allow only forex losses to the extent the effective cost, including the allowed forex losses, don't exceed 11.38%. Authority took the view that only to this extent the forex losses incurred by the operator can be considered as efficient cost.

181. We are in full agreement with the reasons given by AERA for the 2nd Control Period that the foreign exchange losses to the extent of the cost of RTL which was kept at 11.38%. Thus, we do not agree with the learned counsel appearing for the appellant that foreign exchange losses should be allowed as a part of operational expenditure for the true up exercise for the 1st Control Period. Similarly, we are not accepting the contention of the appellant to keep the refinancing cost outside the purview for determination of efficient foreign exchange losses and to be allowed separately as operating expenses. **We hereby uphold the decision of**

AERA in both the impugned orders dated 08th December, 2015 (for 2nd Control Period) as well as impugned order dated 30.th December, 2020 (3rd Control Period) which are impugned orders in AERA Appeal No.1 of 2021 and AERA Appeal No.1 of 2016 respectively so far as foreign exchange loss issue is concerned.

Thus, in view of the aforesaid facts and reasons, Issue No. VIII is answered in negative. No error has been committed by AERA in deciding the issue of consideration of foreign exchange losses as a part of operational expenditure.

ISSUE No. IX

CONSIDERATION OF ONLY INTEREST DURING CONSTRUCTION INSTEAD OF FINANCING ALLOWANCE

182. Learned Senior Counsel for the appellant Shri Ramji Srinivasan has submitted that appellant's proposal was for considering financing assistance should be considered and not only the interest during construction as part of RAB. The financing allowance had been calculated by DIAL considering a return equivalent to cost of debt during the

gestation period of the assets which were still under Capital Work In Progress (CWIP) irrespective of whether the same was funded by debt or equity.

183. The contention by appellant is not accepted by this Tribunal because the definition of RB as per SSA is as under:

> "RB = regulatory base pertaining to Aeronautical Assets and any investments made for the performance of Reserved Activities etc. which are owned by the JVC, after incorporating efficient capital expenditure but does not include capital work in progress to the extent not capitalized in fixed assets. It is further clarified that working capital shall not be included as part of regulatory base. It is further clarified that penalties and Liquidated Damages, if any, levied as per the provisions of the OMDA would not be allowed for capitalization in the regulatory base. It is further clarified that the Upfront Fee and any pre-operative expenses incurred by the Successful Bidder towards bid preparation will not be allowed to be capitalized in the regulatory base."

(Emphasis Supplied)

184. Thus, as per SSA, DIAL should be given a return to the extent of efficient capital expenditure that has been capitalized. A financing allowance is a notional allowance and is different from the actual investment incurred by DIAL, and will include only Interest during Construction (IDC) amongst other costs. Only IDC that gets capitalized can be considered as part of RAB.

185. Thus, in view of SSA and the definition of Revenue Asset Base as stated hereinabove, the authority had only considered IDC as part of the aeronautical RAB for airport operators (appellant) whose tariff determination methodology was prescribed as per the SSA.

186. It is rightly contended by learned senior counsel Mr. Meet Malhotra on behalf of AERA that there is a consistent approach on the part of AERA of considering only interest during construction instead of financing allowance from 1st Control Period onwards. The tariff order for the 1st Control Period has not been contested by the airport operator-DIAL. This issue of allowing financing allowance has been raised for the first time in AERA Appeal No.1 of 2021 in which 3rd Tariff Order is under challenge.

187. Thus, we see no reason to interfere with the reasoning given by AERA and the decision of AERA that SSA allows only **RAB** capitalized as per books of accounts of JVC.

188. In view of these provisions of SSA, no error has been committed by AERA in consideration of only Interest During Construction (IDC) instead of financing allowance. Thus, return can be obtained on capital only upon completion of project.

189. As per SSA, RAB pertaining to aeronautical assets and any investments made for the performance of reserved activities etc. which are owned by JVC (DIAL) after incorporating efficient capital expenditure, but does not include capital work in progress, to the extent, not capitalized in fixed assets.

190. Therefore, no error has been committed by AERA in considering only interest during construction instead of financing allowance incurred on account of financing expansion Capex during the 3rd Control Period based on prudent means of finance for funding Capex (Table No.91 of the impugned order) which would be true up based on actuals subject to

justifications provided at the time of tariff determination for the 4th Control Period. **Table No. 91** of the impugned order reads as under:

Table 91: IDC decided to be considered by the Authority for Third Control Period

FY ending March 31 (Rs. Cr)	2022	2023	2024	Total
Total debt drawn towards funding Phase 3 A Capex	892.26	2,687.05	1,064.15	4,643.46
Cumulative debt drawn towards Phase 3 A Capex	892.26	3,579.31	4,643.46	
Cumulative Debt utilized towards capitalized assets	214.74	2,292.71	4,643.46	
Cumulative Debt utilized towards CWIP	677.52	1,286.60	-	
Interest Rate	9.92%	9.95%	10.00%	
IDC pertaining to assets capitalized in the year	10.65	103.42	181.87	295.94

IDC pertaining to CWIP	33.60	97.76	-	131.36
Total IDC	**44.26**	**201.18**	**181.87**	**427.31**

191. Counsel for the appellant has submitted that they are relying upon the tariff orders of Bangalore International Airport Limited (BIAL) and GMR Hyderabad International Airport (GHIAL). It is contended by the counsel for the respondent no.1 that BIAL and GHIAL are green field airports and equity gets locked during the construction period without any return as there are no operations and consequently no revenues to service the equity, whereas, in case of DIAL and MIAL, the airport operator has been earning revenues from the date on which the airport asset was transferred under the OMDA to them. In these circumstances, the financing allowance was allowed for BIAL and GHIAL in terms of AERA Tariff Guidelines. In our view, AERA is right in its submissions that financing allowance was allowed to BIAL and GHIAL in terms of the AERA Tariff Guidelines and the same is not allowed to DIAL as there is no such provision in the SSA.

192. The economic viability of the airport is not impacted on account of disallowance of financing allowance as the airport operator will bear the

cost of depreciation, interest and other economic costs only post the capitalization of asset. In view of these facts and provisions of SSA and the definition of Revenue Asset Base (RAB), no error has been committed by AERA in disallowing financing allowance during work in progress. **Thus, to the aforesaid extent, AERA Appeal No.1 of 2021 is hereby dismissed and the order passed by AERA dated 30th December, 2020 for 3rd Control Period to the aforesaid extent is hereby upheld.**

Thus, in view of the aforesaid facts and reasons, Issue No. IX is answered in negative. No error has been committed by AERA in the impugned orders in considering only interest during construction, instead of financing allowance.

ISSUE No. X

AVERAGE REGULATORY ASSET BASE

193. It is submitted by learned senior counsel on behalf of the appellant Mr. Ramji Sreenivasan that the Regulatory Base should have been determined by AERA as an average of Opening and Closing RAB for the

particular year. This challenge is in AERA Appeal No.1 of 2021 wherein 3rd Tariff Order is under challenge. Counsel for appellant has taken this Tribunal to the definition of **revenue base** as given in SSA:

"$RB_i = RB_{i-I} - D_i + I_i$

Where: RB_Q for the first regulatory period would be the sum total of

(i) the Book Value of the Aeronautical Assets in the books of the NC and;

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

I = investment undertaken in the period"

Depreciation calculated in the manner as prescribed in Schedule XIV of the Companies Act, 1956. Here, 'D' is without any qualification as submitted by the learned senior counsel for the appellant. 'I' is equal to investment undertaken in the period.

It is submitted by the learned counsel for the appellant that D can be proportionate but not the investment therefore, 'I' may be added irrespective of any debt (i.e. 10th of April or 30th March) and therefore **'D'**-depreciation can be pro rata but not **'I'** (i.e. investment cannot be pro rata). Counsel for appellant has explained the formula and calculation of RB as per AERA's Tariff Guidelines, 2011 and has submitted that AERA has changed the formula for calculation of RB and has submitted that AERA has neither followed the SSA nor the Tariff guidelines and has invented a completely new formula that is pro rata adjustment of investments undertaken in the period, which is not contemplated in the SSA. Counsel for the appellant has also given a numerical example.

194. Looking to the impugned order for 3rd Tariff Order dated 30th December, 2020 which is under challenge in AERA Appeal No.1 of 2021, it appears that AERA at the time of tariff determination for the 2nd Control Period had decided that the investment every year shall be on pro rata basis. It also appears from the impugned order that DIAL had submitted in Multi Year Tariff Proposal (MYTP) for 3rd Control Period, RAB for return on the basis of the provisions of SSA and now in the AERA appeal, DIAL has requested for a change in the methodology of calculation of RAB for return.

195. Moreover, looking to the provisions of SSA for the past Control Periods (i.e. 1st and 2nd Control Periods) when the actual dated of capitalization is available for Capex which is already mentioned, the principle of calculating average RAB cannot be applied. Moreover, as per State Support Agreement (SSA), Revenue Asset Base (RAB) must be post-asset addition and post deduction of depreciation for a specific year in a Control Period.

196. The Authority had also decided to true up the Regulatory Asset Base and Return on RAB for the Second Control Period at the time of determination of aeronautical tariff for the Third Control Period based on actual additions to RAB and actual depreciation during the Second Control Period as per the actual date of capitalization of the assets on a pro rata basis.

197. There is a consistent approach by AERA with the decision taken for the 1st Control Period regarding the formula for calculating RAB in this Tariff Order. AERA has followed formula of RB defined in Schedule 1 of SSA for calculating RAB for 2nd Control Period which is as under:

"$RB_i = RB_{i-I} - D_i + I_i$

Where: RB_Q for the first regulatory period would be the sum total of

(i) the Book Value of the Aeronautical Assets in the books of the NC and;

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

I = investment undertaken in the period"

In view of the formula, RAB has been so calculated, considering the investment made in a year on a pro rata basis which is consistent with the principles of SSA and the methodology adopted in 1st Tariff Order and 2nd Tariff Order. As per Table number 27 from the impugned order dated 30th December, 2020 which is the 3rd tariff order, the RAB considered for the 2nd Control Period with actual pro rata additions each year reads as under:

The calculation of RAB is done as per Schedule 1 of SSA for the 2nd Control Period.

"Table 27: Aeronautical RAB proposed to be considered by Authority for Second Control Period

FY ending March 31 (Rs. Cr)	**2015**	**2016**	**2017**	**2018**	**2019**
Opening Pro Rata Aeronautical RAB (A)	6,919.27	6,424.07	5,965.94	5.560.96	5,131.06
Pro Rata addition for the current year (B)[$]	16.26	20.52	30.75	20.43	252.14*
Pro Rata addition for the previous year (C)[$]	15.18[#]	28.06	79.67	77.65	35.76
Deletions (D)	22.26	1.15	2.05	9.15	2.51

Depreciation and Amortization towards aeronautical RAB (E)	504.38	505.55	513.37	518.82	526.68
Assets funded out of DF (F)	-	-	-	-	117.95*
Pro Rata Aeronautical RAB for the Second Control Period (ARAB=A+B+C-D-E-F)	6,424.07	5,965.94	5.560.96	5,131.06	4,771.83
Opening Hypothetical Regulatory Asset Base	357.38	329.54	301.83	274.00	246.09

Depreciation Pertaining to Hypothetical Regulatory Base (DHRAB)	27.84	27.71	27.83	27.91	27.25
Closing Hypothetical Regulatory Asset Base	329.54	301.83	274.00	246.09	218.84
Average HRAB (HRAB)	343.46	315.69	287.92	260.05	232.47
RAB considered for the Second Control Period (ARAB+HRAB)	**6,767.53**	**6,281.63**	**5,848.87**	**5,391.11**	**5,004.30**
Depreciation	**532.22**	**533.26**	**541.20**	**546.73**	**553.93**

pertaining to RAB (E+DHRAB)					

** pro rata adjustment in additions for the FY20219 had been carried out with the balance carried forward to FY 2020. The balance pertaining to B i.e. Pro Rata addition is Rs. 393.20 Cr which was arrived at by deducting Rs.252.14 Cr from Rs.645.46 Cr mentioned in Table 26 for the FY 2019 while the balance pertaining to F i.e. asset funded out of DF is Rs. 232.05 Cr which was arrived at by deducting Rs 117.95 Cr from Rs. 250 Cr which was the DF pertaining to ATC Tower. The balances shall be adjusted in the first year of Third Control Period at the time of RAB determination.*

 # pro rata adjustment as considered by Authority in the Second Control Period Tariff Order.

$ The asset addition for each year as per table 26 was split on a pro rata basis between current year and the next year. For

eg: the asset addition of Rs. 44.32 Cr in FY 2015 was split into Rs. 16.26 Cr in FY 2015 under (B) and Rs. 28.06 Cr in FY 2016 under (C).”

198. Looking to the impugned order, the aeronautical RAB decided to be considered by AERA for 3rd Control Period has been reproduced in **Table No. 96** of the impugned order, for the ready reference **Table No. 96** is reproduced as under:

“Table 96: Aeronautical RAB decided to be considered by Authority for Third Control Period

FY ending March 31 (Rs. Cr)	2020	2021	2022	2023	2024	Total
Opening RAB (A)	4,771.83	4,640.92	4,452.16	5,907.96	9,485,38	
Addition Considered (B)	613.50*	260.46	1,898.76	4,141.76	3,982.98	10,897.45
Deletions (C)	15.62	-	-	-	-	15.62
DF adjustment on pro rata basis on account of ATC	232.05	-	-	-	-	232.05

capitalisation (D)						
Depreciation (E)	496.74	449.22	442.96	564.33	728.88	2,682.14
Closing RAB (F=A+B-C-D-E)	4,640.92	4,452.16	5,907.96	9,485.38	12,739.48	
Average RAB (ARAB = (A+F)/2)	**4,706.37**	**4,546.54**	**5,180.06**	**7,696.67**	**11,112.43**	**33,242.09**
HRAB						
Opening HRAB	218.84	194.27	172.56	153.31	134.16	
Depreciation HRAB (DHRAB)	24.57	21.71	19.25	19.15	19.09	103.77
Closing HRAB	194.27	172.56	153.31	134.16	115.07	
Average HRAB (AHRAB)	206.56	183.42	162.94	143.74	124.62	821.26
Total RAB Considered for Tariff (ARAB+AHRAB)	4,912.93	4,729.96	5,342.99	7,840.41	11,237.05	34,063.35

** The figure of Rs. 613.50 Cr in FY2020 has been arrived at by considering the pro rata balance of Rs. 392.32 Cr from FY 2019*

and the general Capex additions of Rs. 220.18 Cr in FY 2020. Deducting the Rs 393.32 Cr from 10,987.45 Cr would lead to Rs. 10,504,13 Cr which is the actual asset addition pertaining to Phase 3A Capex and General Capex.

199. <u>Paragraph 4.5.24</u> of the impugned order passed by AERA dated 30th December, 2020 which is under challenge in AERA Appeal No.1 of 2021 reads as under:

"4.5.24 Based on the above, Authority has decided to consider RAB for tariff determination for Third Control Period by considering the Average RAB for each year of the Control Period. Authority has also decided to consider RAB, **<u>based on actual pro-rata additions during true up</u>** for Third Control 'Period (for which data is currently available only for the first year of the Third Control Period) while determining tariff for the Fourth Control Period, similar to the treatment carried out in the First and Second Control Period, subject to DIAL providing adequate justifications for any escalation in

cost beyond the efficient cost considered by Authority for Phase 3A Expansion and General Capex."

(Emphasis Supplied)

200. Thus, no error has been committed by AERA in following SSA and in calculating Average RAB for the tariff determination for the 3rd Control Period keeping in mind the investment on pro-rata basis. AERA has rightly considered Average RAB for future Control Periods while truing up the RAB based on actual date of capitalization at the time of truing up for the past Control Period in terms of SSA.

201. Hence, in view of the aforesaid effects and looking to the impugned decision of AERA, **we hereby uphold the decision of AERA dated 30th December, 2020 that is the 3rd Tariff Order on the point of Average Regulatory Asset Base (RAB) and appeal of appellant bearing AERA Appeal No.1 of 2021 is dismissed on the point of Average Regulatory Asset Base (RAB).**

Thus, in view of the aforesaid facts and reasons, Issue No. X is answered in affirmative. No error has been committed by AERA in considering Average RAB of Opening and Closing RAB based on actual pro-rata additions during the true-up.

202. Thus, AERA Appeal No.1 of 2016 and AERA Appeal No.1 of 2021 are partly allowed to the aforesaid extent and disposed of.

(JUSTICE D.N. PATEL)
CHAIRPERSON

(SUBODH KUMAR GUPTA)
MEMBER

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