TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Reserved on: 15.09.2023

Pronounced on: 06.10.2023

AERA APPEAL/2/2021

Mumbai International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;

2. Ministry of Civil Aviation;

3. Federation of India Airlines. …Respondent(s)

WITH

AERA APPEAL/9/2016

Mumbai International Airport Ltd. …Appellant

Versus

1. Airports Economic Regulatory Authority of India;

2. Ministry of Civil Aviation. …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.2/2021 For **MIAL** Mr. Sajan Poovayya, Senior Advocate Ms. Amrita Narayan, Mr. Ashwin Rakesh, Mr. Saurobroto Dutta, Ms. Nikita Bhardwaj, Mr. Abhishek Kakker, Mr. Palash Maheshwari; and Mr. Shreeyansh Lalit.	**In AERA Appeal No. 2/2021** For **AERA (R-1)** Mr. Meet Malhotra, Senior Advocate, Ms. Shweta Bharti, Ms. Yashodhara Burmon Roy Dr. Anand Kumar, Director Legal (AERA), Dr. Shreya Sharma, Bench Officer (AERA) For **MoCA (R-2)** None For **FIA (R-3)** Mr. Buddy Ranganadhan, Ms. Nishtha Kumar, and Mr. Prantar Basu Choudhury.
In AERA Appeal No.9/2016 For **MIAL** Mr. Sajan Poovayya, Senior Advocate Ms. Amrita Narayan, Mr. Ashwin Rakesh, Mr. Saurobroto Dutta, Ms. Nikita Bhardwaj, Mr. Abhishek Kakker, Mr. Palash Maheshwari; and Mr. Shreeyansh Lalit.	**In AERA Appeal No.9/2016** For **AERA (R-1)** Mr. Meet Malhotra, Senior Advocate, Mr. Kunal Tandon, Mr. Kumar Shashank Shekher, Mr. Ravi S S Chauhan, Ms. Pallak Singh, Ms. Aanchal Khanna, Mr. Yash Aggarwal, Dr. Anand Kumar, Director Legal, Dr. Shreya Sharma, Bench Officer, and Mr. Neeraj Sharma. For **MoCA (R-2)** None

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JUDGEMENT

Per Justice D.N. PATEL, Chairperson

SUMMARIUM

The present appeals revolve around the interpretation of operation, management, development, agreement (**OMDA**) and State Support Agreement (**SSA**) which are two major agreements entered into by this appellant with Airport Authority of India (**AAI**) and with the Govt. of India governing the functioning of Chhatrapati Shivaji Maharaj International Airport (**CSMIA**), Mumbai. This OMDA and SSA are at Annexure A-3 and A-4 of the memo of AERA Appeal No. 9 of 2016. Both the aforesaid agreements are to be interpreted in light of Airports Economic Regulatory Authority of India Act, 2008 and also in light of other supportive agreements like lease deed, escrow account agreement etc.

In the present appeals, the methodology of calculation of Target Revenue (**TR**) is involved:

"TR = RB x WACC + OM + D + T – S"

Target Revenue (TR), is an amount finalized by Respondent No. 1 – Airports Economic Regulatory Authority of India (**AERA**). Appellant is permitted to recover Target Revenue (TR) from different stakeholders and users of Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai during the period of second and third control periods. The aforesaid formula has been given in Schedule 1 of the State Support Agreement (SSA) which is at Annexure A-4 to the memo of AERA Appeal No.9 of 2016.

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 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, Art.11
Airports Economic Regulatory Authority of India Act, 2008	Sec. 13(1), Sec.18(2), Sec.31

Tariff Order No.13/2016-2017 in the matter of determination of Aeronautical Tariffs w.r.t CSMIA, Mumbai for the 2nd Control Period dated 23rd September, 2016	Annexure A-1 in Vol. II of AERA Appeal 9 of 2016
Tariff Order No. 64/2020-21 in the matter of determination of Aeronautical Tariffs w.r.t CSMIA, Mumbai for the 3rd Control Period dated 27th February, 2021	Annexure A-1 in Vol. II of AERA Appeal 2 of 2021
Operation, Management and Development Agreement (OMDA)	Annexure A-3 (Colly) of AERA Appeal 2 of 2021
State Support Agreement (SSA)	ANNEXURE A-3 (Colly) of AERA Appeal 2 of 2021
Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011	Separately filed by the Appellant on 11.08.2023 during course of arguments
Lease Deed	Annexure A-4 (Colly) of AERA Appeal 2 of 2021
Income Tax Act, 1961	Sec. 115JD

ABBREVIATIONS INVOLVED

Abbreviations	Expansion
AAI	Airports Authority of India
AAHL	Adani Airport Holdings Limited
ACI	Airports Council International
ADRM	Airport Development Reference Manual
AERA Act	Airports Economic Regulatory Authority of India Act, 2008
AERA	Airports Economic Regulatory Authority of India
AERAAT	Airport Economic Regulatory Authority Appellate Tribunal
AF	Annual Fee
AIC	Aeronautical Information Circular
AO	Airport Operator
AOC	Airlines Operators Committee
APAO	Association of Private Airport Operators
ARB	Aeronautical Revenue Base
ATC	Air Traffic Control
BAC	Base Airport Charges
BCAS	Bureau of Civil Aviation Security
BIAL	Bangalore International Airport Limited

CAGR	Compound Annual Growth Rate
CMP	Cash Management Process
CNS/ATM	Communication, Navigation and Surveillance and Air Traffic Management Services
CSR	Corporate Social Responsibility
CSMIA	Chhatrapati Shivaji Maharaj International Airport
CWIP	Capital Work in Progress
DE ratio	Debt: Equity ratio
DF	Development Fee
DGCA	Directorate General of Civil Aviation
DIAL	Delhi International Airport Limited
ECB	External Commercial Borrowing
FCP	First Control Period
FDR	Fixed Deposit Receipts
FIA	Federation of Indian Airlines
Forex Losses	Foreign Exchange Losses
FRoR	Fair Rate of Return
FTC	Fuel Throughput Charges
FICCI	Federation of Indian Chambers of Commerce
FY	Financial Year
GA Terminal	General Aviation Terminal

GHIAL	GMR Hyderabad International Airport Limited
HIAL	Hyderabad International Airport Limited
H-RAB	Hypothetical- Regulatory Asset Base
ICAI	The Institute of Chartered Accountants of India
IDC	Interest During Construction
IGIA	Indira Gandhi International Airport
IRS	Indian Register of Shipping
JVC	Joint Venture Company
MAT	Minimum Alternate Tax
MCLR	Marginal Cost of Funds based Lending
MIAL	Mumbai International Airport Limited
MoCA	Ministry of Civil Aviation
MYTP	Multi Year Tariff Proposal
OM	Operation and Maintenance Expenses
OMDA	Operation, Management and Development Agreement
PBT	Profit Before Tax
PCN	Pavement Classification Number
PNGRB	Petroleum and Natural Gas Regulatory Board
PPP	Public Private Partnership
PV	Present Value
R&S	Reserves and Surplus

RAB	Regulatory Asset Base
RED	Real Estate Deposit
RoI	Return on Investment
RSA	Revenue Share Assets
RSD	Refundable Security Deposit
RTL	Rupee Term Loan
SCP	Second Control Period
SGSA	State Government Support Agreement
SPV	Special Purpose Vehicle
SSA	State Support Agreement
TAMP	Tariff Authority for Major Ports
TCP	Third Control Period
TDSAT	Telecom Disputes Settlement and Appellate Tribunal
TR	Target Revenue
WACC	Weighted Average Cost of Capital

ISSUES INVOLVED

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

ISSUES PRESSED AS PART OF CP2 (FY 2014-19)

I. Whether the decision of AERA to consider Upfront Fee at Rs. 150 Crores as against Rs. 153.85 Crores as a part of Equity is correct, proper and justified? **(Common to CP-3)**

II. Whether the decision of Respondent No.1 not to protect the Reserves & Surplus and to reduce it on account of subsequent losses for the purpose of calculation of WACC is correct, proper and justified?

III. Whether the decision of AERA to exclude MAT credit while computing Reserves & Surplus (R&S) for the purpose of calculation of WACC is correct, proper and justified?

IV. Whether the decision of AERA to allow return on Refundable Security Deposit (RSD) at weighted average Cost of Debt is correct, proper and justified? **(Common to CP-3)**

V. Whether the decision of AERA to adjust balance Development Fee from RAB in the year in which international part of Terminal-2 is commissioned i.e. in the FY 2013-14 instead of proportionate adjustments in FY 2015-16 when the project got completed is correct, proper and justified?

VI. Whether the decision of AERA not to consider collection charges in respect of Development Fee as operating expense or pass through against DF collections is correct, proper and justified?

VII. Whether "Other Income" is to be treated as part of revenue from Revenue Share Assets? **(Common to CP-3)**

VIII. Whether the decision of AERA to consider Aeronautical Asset Allocation Ratio at 83.97% for FY 2013-14 and all years of 2nd Control Period and Allocation ratio at 85.57% for South East Pier of Terminal 2 is correct proper and justified?

IX. Whether the decision of AERA to issue methodology monitoring service quality for CSMIA, Mumbai in-spite of checks and balances inbuilt in the OMDA which adequately provides for both objective and subjective quality requirements and penalties for deficiencies in service level at CSMIA, Mumbai is correct, proper and justified?

ISSUES PRESSED AS PART OF CP3 (FY 2019-2024)

X. Whether the decision of AERA to apply average depreciation on Aeronautical Assets instead of actual depreciation on each of the aeronautical assets is correct, proper and justified?

XI. Whether the assumption and the methodology adopted by AERA on computing carrying cost on revenue gap (difference between Actual Revenue collected and Target Revenue) for FCP and SCP is correct, proper and justified?

XII. Whether the decision of AERA to deny inclusion of expenditure on recarpeting of runways/taxiways/apron amortized in RAB over a period of five years, thereby denying return on RAB on the unamortized portion of such expenditure is correct, proper and justified?

XIII. Whether the decision of AERA to not change the asset allocation ratio to the re-classification of Chhatrapati Shivaji Maharaj Statue ("Statue") from the non-aeronautical to aeronautical is correct, proper and justified?

XIV. Whether the decision of AERA not to include the Corporate Cost Allocation under the Operating Expense is correct, proper and justified?

XV. Whether the decision of AERA in disallowing Operation and Maintenance expenses towards interest of working capital, re-structuring expenses and insurance expenses is correct, proper and justified?

XVI. Whether the decision of AERA not to allow return on assets disposed of during the year based on actual usage in the year is correct, proper and justified?

XVII. Whether the decision of AERA of carrying out a 1% readjustment to Project Cost and applicable carrying cost in the Target Revenue at the time of determination of Tariff for fourth control period is correct, proper and justified?

XVIII. Whether the decision of AERA to cap the Cost of Debt at 10.30% while examining the Fair Rate of Return (FRoR) is correct, proper and justified?

XIX. Whether the decision of AERA to reduce the Hypothetical Regulatory Asset Base (HRAB) in respect of written down value attributable to old T-2 demolished is correct, proper and justified?

XX. Whether AERA has failed to consider the financial model as provided by the appellant and chosen to employ it selectively and arbitrarily?

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

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

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

AERA Appeal No. 9 of 2016 & AERA Appeal No. 2 of 2021

1. These appeals have been preferred under **Section 18(2) of The Airports Economic Regulatory Authority of India Act, 2008** against the order passed by Respondent- Airports Economic Regulatory Authority of India (hereinafter referred to as AERA, for the sake of brevity) bearing **No. 13/2016-17 dated 23.09.2016 (for 2nd Control Period)** and against an order passed by AERA bearing **No. 64/2020-21 dated 27.02.2021 (for 3rd Control Period).**

2. 2nd Control Period is from 01.04.2014 to 31.03.2019. **3rd Control Period is from 01.04.2019 to 31.03.2024**. These two orders are passed by AERA under Section 13(1)(a) of the AERA Act. These appeals are in respect of Chhatrapati Shivaji Maharaj International Airport, Mumbai (hereinafter referred to as CSMIA for the sake of brevity).

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. AERA passed an order for 1st Control Period (01.04.2009 to 31.03.2014) on 15.01.2013 vide Tariff Order No. 32/2012-13 which was challenged before this Tribunal in AERA Appeal No. 4 of 2013 and the same was decided by this Tribunal. The order passed by this Tribunal was challenged before Hon'ble the Supreme Court of India in Civil Appeal No. 5401 of 2019 under Section 31 of the AERA Act. This was in respect of Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai. This appeal was decided by Hon'ble the Supreme Court of India on 11.07.2022.

C. Thereafter, AERA passed an order dated 23.09.2016 for 2nd Control Period (01.04.2014 to 31.03.2019) being Order No.13/2016-17 which is challenged before this Tribunal in AERA Appeal No. 9 of 2016.

D. Thereafter, AERA passed an order for 3rd Control Period (01.04.2019 to 31.03.2024) being Order No. 64/2020-21 dated 27.02.2021. This is known as 3rd Tariff Order which is challenged by this appellant before this Tribunal in AERA Appeal No. 2 of 2021.

E. Mumbai International Airport Ltd. (MIAL) was awarded the contract for operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the CSMIA, Mumbai.

F. In 2004-2005, the Airports Authority of India (**AAI**) invited tenders from private participants competent to and desirous of operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the CSMIA, Mumbai.

G. Earlier a consortium led by the GVK Group was awarded the bid for operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the CSMIA, Mumbai.

H. Post selection of the private consortium, a special purpose vehicle, namely Mumbai International Airport Private Limited (MIAL/the Appellant herein), was incorporated on 02.03.2006 with AAI retaining 26% Equity stake and balance 74% Equity stake being acquired by members of private consortium. Private consortium comprised of GVK Airport Holding Pvt. Ltd., ACSA Global Limited and Bid Services Division (Mauritius) Ltd.

I. The Appellant entered into an Operation, Management and Development Agreement (**OMDA**) with AAI on 04.04.2006, whereby the AAI granted to the Appellant, 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, modernization, finance and management of the CSMIA, Mumbai and to perform services and activities constituting Aeronautical

Services and Non-Aeronautical Services (but excluding Reserved activities, defined in OMDA) at the CSMIA. The Appellant took over the operations of CSMIA, Mumbai on 03.05.2006.

J. Appellant also entered into the **State Support Agreement** (hereinafter referred to as **"SSA"** for the sake of brevity) dated 26.04.2006 with the President of India acting through Ministry of Civil Aviation, Govt. of India (hereinafter referred to as **"MoCA"** for the sake of brevity)

K. As per Section 13(1)(a) of the AERA Act, 2008, AERA is required to determine the tariff for "**Aeronautical Services"** to be levied at the CSMIA, Mumbai.

L. Multi-Year Tariff Proposal (herein after referred to as **"MYTP"** for the sake of brevity) was sent by this appellant to respondent no. 1-AERA on 26.12.2013 and subsequently, on 20.08.2014, this appellant sent the revised MYTP. This reference of MYTP was based upon audited financials for FY 2013-14.

M. Thereafter, this appellant sent revised MYTP dated 08.09.2015 on the availability of audited financials for FY 2014-15. In pursuance of the aforesaid MYTP dated 26.12.2013 and revised MYTPs dated 20.08.2014

as well as dated 08.09.2015, the respondent no. 1 reviewed the submissions made by this appellant and issued Consultation Paper No. 10/2015-16 dated 16.03.2016 inviting response/comments from all the stakeholders to the preliminary views set out in the consultation paper in relation to the various comments/heads for tariff determination for CSMIA, Mumbai.

N. Thereafter, AERA issued an impugned order determining the Aeronautical Tariff for CSMIA bearing No. 13/2016-17 dated 23.09.2016 issued on 29.09.2016 under Section 13(1)(a) of the AERA Act which is under challenge in AERA Appeal No. 9 of 2016.

O. Similarly, for the 3rd Control Period (01.04.2019 to 31.03.2024), the tariff determination process was started and MYTP was submitted by this appellant before AERA on 07.06.2019 and the revised MYTP was sent by this appellant on 19.03.2020, based on availability of audited financials for FY 2018-19. The respondent no. 1 reviewed the submissions made by this appellant and thereafter had issued Consultation Paper No. 35/2020-21 dated 21.09.2020 inviting response/comments from the various stakeholders to the preliminary views set out in the Consultation Paper in relation to various components/heads for tariff determination.

P. All the stakeholders including this appellant had filed their response and thereafter this appellant had submitted revised response on 03.12.2020 and on 09.12.2020 this appellant had filed its counter comments against the comments of other stakeholders.

Q. Thereafter AERA issued the impugned tariff order for the 3rd Control Period (01.04.2019 to 31.03.2024) bearing order No.64/2020-21 dated 27.02.2021. This Tariff Order for 3rd Control Period dated 27.02.2021 is under challenge in AERA Appeal No. 2 of 2021.

ARGUMENTS CANVASSED BY APPELLANT- MIAL

1. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing for the appellant that the AERA has calculated the Target Revenue by ignoring relevant factors which were pointed out by this appellant during the consultation process before the said authority. **Target Revenue is to be arrived at by AERA in pursuance of formula:**

"TR = RB x WACC + OM + D + T – S"

Target revenue is an amount which is permitted by AERA to be collected by appellant for running CSMIA, Mumbai. 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 the appellant to operate, manage, develop and administer the CSMIA, Mumbai. 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 CSMIA.

2. Learned Senior Advocate Mr. Sajan Poovayya on behalf of MIAL has submitted that there are several issues raised in AERA Appeal No. 9 of 2016 which is for 2nd Control Period (01.04.2014 to 31.03.2019). Out of several grounds raised in this memo of appeal, certain issues have already been decided and few issues are not pressed by this appellant in the present appeal.

3. Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant submitted that AERA has committed an error while computing the Weighted Average Cost on Capital (WACC). It is submitted by Learned Senior Advocate Mr. Sajan Poovayya on behalf of the appellant that the appellant is required to pay Upfront Fee to the Airports Authority of India (AAI). The appellant has paid Upfront Fee of Rs.150 Crores in the year 2005-06 at the time of taking over CSMIA, Mumbai from AAI. The appellant was further required to pay an amount of Rs.3.85 Crores for taking over certain carved out assets. This amount was paid by this appellant in the year 2009-10. Rs. 150 Crores have already been considered by AERA towards calculation of Weighted

Average Cost on Capital (WACC) but Rs. 3.85 Crores have not been considered by AERA in calculation of WACC.

Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant has placed reliance upon Order No.32/2012-13 dated 15.01.2013 (Tariff Order for the 1st Control Period) and Paragraph 14.2 of the said order, wherein it has been observed by AERA that as per MIAL's auditor, MIAL had paid upfront fee of Rs. 150 Crores to AAI in the financial year 2007 and Rs. 3.85 Crores in the financial year 2010. Moreover, this Tribunal in its judgment and order dated 15.11.2018 in MIAL Vs. AERA and Ors. (AERA Appeal No.4 of 2013) had directed AERA not to exclude the amount of upfront fee from the Equity Share Capital of MIAL while determining the WACC.

Learned Senior Advocate appearing on behalf of the appellant has placed reliance upon paragraph Nos. 36 and 38 of the aforesaid judgement and order of this Tribunal dated 15.11.2018 in AERA Appeal No. 4 of 2013.

Learned Senior Advocate appearing on behalf of the appellant has placed reliance upon judgement of this Tribunal dated 20.3.2020 in DIAL Vs. AERA and Ors. (AERA Appeal No. 7 of 2012) wherein this tribunal had set aside the decision of AERA to exclude Upfront Fee from the project cost. Learned Senior Advocate appearing on behalf of the

appellant has placed reliance upon paragraph 32 of the aforesaid decision.

4. It is also submitted by Learned Senior Advocate appearing on behalf of the appellant that once AERA has considered the amount of Rs.150 Crores in calculation of Weighted Average Cost on Capital (WACC), there is no justifiable reason for AERA not to consider an amount of Rs.3.85 Crores. This aspect of the matter has not been properly appreciated by AERA and hence the decision of AERA to exclude Rs.3.85 Crores in calculation of WACC deserves to be quashed and set aside.

It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that there are varieties of means of finance such as:

i. Equity Share Capital;
ii. Debts;
iii. Reserves and Surplus;
iv. Deposits; etc.

5. Respondent No.1 - AERA had computed WACC for the 2nd Control Period considering equity share capital, debt and RSD on average basis. Respondent No.1 – AERA had considered Reserves and Surplus as zero when the accumulative Reserves and Surplus became negative for any particular year. The respondent no. 1 – AERA had decided to protect the

paid-up equity share capital but not the net worth which was utilised for the project funding.

6. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA had decided not to protect Reserves and Surplus and to adjust it against subsequent losses for the purpose of determining WACC. This approach of AERA is not in accordance with OMDA, SSA and the Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 and AERA Act, 2008.

7. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that the reduction of Reserves and Surplus on account of subsequent losses is totally prejudicial to the interest of shareholders, who instead of taking out dividend from the company, decided to plough back all the profits for funding of the project, in the overall interest of the airport development. Therefore, it is important to note that the balance in the Profit and Loss Account cannot be taken out or reduced, once the same has been used for funding or development of the project.

8. It is further submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that the Appellant's book

losses are arising mainly from higher depreciation charge which has no impact on the availability of funds, past funding /reserves which have been utilised for project financing. Respondent No. 1/AERA has failed to appreciate that on one hand the Appellant is incurring losses in the business and on the other hand, its return on Regulatory Asset Base **("RAB")** gets further reduced due to reduced WACC on account of losses. Respondent No. 1/AERA has failed to abide by the guidelines and the approach adopted by Respondent No. 1/AERA is leading to a circular/dual loss to the Appellant.

9. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that Respondent No. 1/AERA has erred in denying the request of the Appellant to not only protect the Equity Share Capital but also the Reserves and Surplus of the Appellant in view of the fact that profits already utilized for project funding remain unchanged even if there are losses incurred in the subsequent years. There is no doubt that any subsequent losses will reduce the reserves and surplus as per books of accounts, but it shall not reduce the investment already made by the shareholders.

10. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of MIAL that the project is funded through a

combination of means of finance such as Equity Share capital, Reserves & Surplus, Debt, Deposits, etc. The Reserves and Surplus comprises of funds belonging to shareholders / equity investors and once deployed by them into the project, such funding should be protected in the same way as equity share capital is protected.

11. Thus, it is submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA had committed an error in not protecting the Reserves and Surplus while reducing the same on account of subsequent losses for the purpose of calculating WACC.

Learned Senior Advocate appearing on behalf of the appellant has further submitted that Reserves and Surplus earned over the past years (to the extent of Rs. 1167 Crores) have been utilised by MIAL in funding of Capital Expenditure (RAB).

12. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that appellant is not seeking a return on depreciation. It is, in fact seeking return on the Reserves and Surplus which have accrued by virtue of profit of the past years.

13. Learned Senior Advocate appearing on behalf of the appellant has placed reliance upon a table which reveals cash flow of MIAL for various activities for each of the year starting from FY 2007 till FY 2014. The

said cash flow of MIAL has been given in Annexure - 2 of Rejoinder Arguments on behalf of MIAL. This table is based upon the audited books of accounts already supplied to AERA during consultation process and the total investment in the fixed assets for the period starting from FY 2007 till FY 2014 is Rs. 9887 Crores out of which Rs. 1167 Crores is from Reserves and Surplus whereas other sources of funds are equity at Rs. 1200 Crores, debt at Rs. 6506 Crores and other internal accruals at Rs.1014 Crores. The total of these comes to Rs. 9887 Crores which is invested in fixed assets meaning thereby to the Reserves and Surplus ought to have been projected by AERA because this amount has been utilised for project funding. This aspect of the matter has not been properly appreciated by AERA, hence, the decision of AERA in the impugned order for 2nd Control Period so far as it does not protect the reserves and surplus in calculating WACC deserves to be quashed and set aside.

14. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that Minimum Alternate Tax (MAT) is levied under Section 115JD of the Income Tax Act, 1961 on a company whose income tax payable on the total income in respect of any year is less than such percentage of its book profits as prescribed from time to time. For the relevant year, it was 18.5%. As per Section 115JD of the Income Tax

Act, 1961, such a company would be allowed a credit for the excess MAT over the regular income tax payable for that year in any subsequent assessment year in which the regular income tax exceeds the MAT for that year. Thus, Minimum Alternate Tax is in the nature of advance payment of tax.

15. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA in its impugned order had decided that MAT credit will not be included for the computation of Reserves and Surplus.

16. AERA has excluded MAT credit on the ground that MAT credits are only provisions and MAT credit entitlement has not arisen at this stage.

17. This calculation of AERA, as per the appellant deserves to be quashed and set aside and is untenable in law.

18. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that MAT credit entitlement is an asset like any other asset of the company and thus it cannot be excluded from the Reserves and Surplus of the company for calculating WACC. It is adjusted from future tax liability when regular income tax is higher than MAT which in turn increases the profit of the company in the year in which it is adjusted. Therefore, it ought to be considered for the

purposes of calculating WACC. Further, higher profit has the effect of increasing the equity in the form of higher Reserves and Surplus.

19. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that as per the "Guidance Note on Accounting for Credit Available in respect of Minimum Alternative Tax under the Income Tax Act, 1961" quoted in the expert opinion by Mr. Y. H. Malegam dated 25.05.2016, it is stated that:

> "MAT paid in a year in respect of which the credit is allowed during the specified period under the Act is a resource controlled by the company as a result of past events, namely the payment of MAT. MAT credit has expected future economic benefits in the form of its adjustment against the discharge of the normal tax liability if the same arises during the specified period. Accordingly, MAT is an "asset"."

20. Learned Senior Advocate appearing on behalf of the appellant has submitted that out of total MAT credit, they have realised an amount of Rs. 82 Crores till 31.3.2016. Reference has been made to the excel sheet that shows MAT assets as per the balance sheet from FY 2010-2014. Cumulative MAT realisation is of Rs. 81.6 Crores.

21. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that the WACC for the 1st Control Period changes from 12.18% to 12.23% if MAT credit is considered as part of Reserves and Surplus.

22. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that as part of development of Non-Transfer Assets, the Appellant had proposed to collect interest free RSD from the developers. Accordingly, the Appellant in its MYTP had proposed to consider RSD as equity contribution for WACC calculation.

23. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that initially AERA was of the opinion that Refundable Security Deposit (RSD) was treated as a means of finance at zero cost, however, after the judgement of this Tribunal dated 23.04.2018 in AERA Appeal No. 10 of 2012, AERA has allowed the cost of debt as return of RSD. This is also an incorrect approach of AERA because the correct measure of **RSD would be a return on equity as against the cost of debt because RSD is a part of equity of the appellant.**

24. Learned Senior Advocate appearing on behalf of the appellant has placed reliance upon Rupee Term Loan (RTL) agreement dated

16.12.2014 which is at Annexure - 4 to the memo of rejoinder arguments on behalf of MIAL. On the basis of aforesaid documents, the financing plan was presented for getting debt.

25. In view of the aforesaid financing plan, it has been pointed out by Learned Senior Advocate appearing on behalf of the appellant that lenders have considered the Refundable Security Deposit (RSD) (Real Estate Deposit – RED) as equity for the purpose of calculation of debt: equity ratio (DE ratio).

26. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that amount collected by MIAL from Refundable Security Deposit (RSD) or a Real Estate Deposit (RED) was used for financing the project cost and the funds were utilised for financing the project cost, at least a fair rate of return i.e. opportunity cost needs to be provided. This aspect of the matter has not been properly appreciated at all by AERA.

27. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA vide its Order No. 29/2012-13 fixed the allowable project cost, considered the various means of finance and thereafter determined the Development Fee of Rs. 3,400 crores to meet the shortfall in the means of finance regarding the project cost. It had

further fixed the rate at which the Development Fee was to be levied on each embarking passenger.

28. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA, contrary to its previous Order No. 32/2012-13, has in the Impugned Order adjusted the remaining DF in the RAB in the FY 2013-14, even though only a part of new Terminal 2 was commissioned in FY 2013- 14, while other facilities and balance Terminal 2 has been commissioned only in FY 2015-16.

29. Learned Senior Advocate appearing on behalf of the appellant further submitted that Paragraph No. 8.64 of the 1st Control Period tariff order states that in the last year of the project completion, any remaining balance of development fee sanctioned by the authority would be adjusted in the RAB in that year.

30. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA has failed to take into consideration that only a part of the Terminal 2 was commissioned in the Financial Year 2013-14 and that does not imply completion of the project. The same can be seen in the certificate of the Independent Engineer submitted before AERA, which clearly stated that the project was completed in the Financial Year 2015-16 **(Annexure A-14 @Pg. 1643 – 1646 of the**

Appeal). Therefore, this would result in denial of returns to the airport operator on the assets that were funded through other means and thus the remaining DF should actually be adjusted proportionately towards RAB up to FY 2015-16 which is when the project was completed.

31. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that this appellant is required to pay collection charges of Rs. 5 per international passenger and Rs. 2.5 per domestic passenger to the airlines, for the calculation of development fee. The appellant was allowed to collect development fee of Rs. 876 Cores over the period of 23 months effective from 01.05.2012 and subsequently, AERA allowed the appellant to collect Rs. 3400 Crores vide its order No. 29/2012-13 dated 21.12.2012 and, therefore, this amount i.e. collection charges paid by this appellant to the airlines should be considered as Operating Expenses (OM). Denial of this consideration would tantamount to reduction of development fee for the appellant. This aspect of the matter has not been properly appreciated by AERA. AERA ought to have allowed collection charges payable by the appellant to the airlines in respect of development fee as Operating Expenses (OM) or pass-through against the development fee calculations.

32. Learned Senior Advocate appearing on behalf of the appellant submits that **"Other Income"** ground is already dealt with by this Tribunal in AERA Appeal No. 1 of 2021 in its decision dated 21.07.2023.

33. It is further submitted by Senior Advocate Sajan Poovayya, Learned Senior Advocate for MIAL 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 MIAL/its subsidiary companies, interest income from the surplus fund of MIAL and interest on delayed payments earned by MIAL 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 MIAL 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 MIAL. 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. 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 MIAL 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 MIAL 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.

34. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that AERA had sought advice from AAI in the past, both on the performance standards maintained by the Appellant during the First Control Period and on any liquidated damages levied by AAI on the Appellant. The Respondent No.1/AERA has still not received any such information from AAI. In absence of the same, the Respondent No. 1/AERA has noted media reports as well as ACI website,

which states that CSMIA, Mumbai has been consistently adjudged the second-best airport in the world for its service quality in its category.

35. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that AERA in the Impugned Order has decided to devise a methodology for collecting feedback on the service quality of various airports in the country and incorporating the same in its tariff determination process. The service quality at CSMIA, Mumbai will be monitored based on the above methodology, once the same is issued.

36. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that the decision of the Respondent No. 1/AERA to set the methodology for collecting feedback on the service quality through which it will monitor the service quality, is not within its requisite authority/power.

37. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that AERA, as per the provision of the Act, was only to monitor the set performance standards relating to quality, continuity, and reliability. Setting the methodology for collecting feedback on the service quality tantamount to setting performance standards which have already been set by OMDA.

38. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that AERA has erroneously applied the floor area ratio of 85.57% applicable only to the common assets, to the entire T2 cost. This approach adopted by the Respondent No.1/ AERA is incorrect and hence, unsustainable in the eyes of law.

39. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that as per the definition of Regulatory Base ("**RB**") given in Schedule 1 of the SSA, RB includes only the Aeronautical Assets which necessitates segregation and allocation of assets into Aeronautical and Non-Aeronautical Assets. Assets defined as Aeronautical Assets in OMDA and used for provision of Aeronautical Services (as listed in Schedule 5 of OMDA) are treated as aeronautical. For example, lifts, escalators and passenger conveyors are specifically included under Schedule 5 of OMDA and hence, included under Aeronautical Assets. Similarly, Assets used for provision of Non-Aeronautical Services (as listed in Schedule 6 of OMDA) are treated as Non-Aeronautical. Assets that cannot be identified as purely Aeronautical or Non-Aeronautical are classified as common assets.

40. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that Common Assets located in

Terminal Building are allocated to Aeronautical and Non-Aeronautical based on the ratio of floor area of Terminal Building allocated to Aeronautical and Non-Aeronautical activities. Respondent No.1/AERA while calculating asset allocation of 83.97% for FY 2013-2014 has considered the entire terminal building of Terminal T-2 as common asset without first excluding specific Aeronautical and Non-Aeronautical Assets identified by ICWAI-MARF, the auditors appointed by the Respondent No. 1/AERA itself for asset allocation exercise of MIAL.

41. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that a study by Indian Register of Shipping (IRS) which carried out an independent verification of areas built at new T2 and submitted that total Non-Aeronautical Services floor area is 14.43% of the total area of new T2 and 85.57% (100%-14.43%) area was being used for Aeronautical services. AERA ought to have used ratio of 85.57% instead of using 82.7% to allocate only the common assets between Aeronautical Assets and Non-Aeronautical Assets already identified by the ICWAI-MARF.

42. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that AERA has erroneously applied the floor area ratio of 85.57%, applicable only to the common assets, to the entire T2 cost. This approach adopted by the Respondent

No.1/AERA is incorrect and hence, unsustainable in the eyes of law. It is further submitted by Learned Senior Advocate Mr. Sajan Poovayya that this erroneous approach adopted by Respondent No.1/AERA has resulted in a lower percentage of Aeronautical Asset at T2 and for the overall airport thereby denying the Appellant the right to earn a reasonable return on its investment. On the basis of such incorrect approach, Respondent No.1/AERA has considered overall aeronautical asset allocation of 83.97% as on 31.03.2014.

43. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that as per the independent study on allocation of assets between aeronautical and non-aeronautical activities for Second Control Period conducted by Respondent No.1/AERA during tariff determination of Third Control Period, opening aeronautical asset allocation of Second Control Period as on 01.04.2014 is 89.59%. Opening Aeronautical asset allocation of Second Control Period should be same as Closing Aeronautical asset allocation of First Control Period and same should be considered as against considering 83.97% allocation considered by Respondent No.1/AERA for last year of First Control Period (FY13-14). Hence, the approach adopted by Respondent No.1/AERA is incorrect and not sustainable, and deserves to be corrected.

44. It is further submitted by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant in AERA Appeal No. 2 of 2021 that AERA has wrongly applied single ratio of depreciation for all the assets, instead of applying actual depreciation on each of the aeronautical assets.

45. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA should have taken year wise asset allocation for the purpose of calculation of aeronautical depreciation of that year. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that they had already provided individual item wise depreciation bifurcating aeronautical, non- aeronautical and common assets. Depreciation on common assets was further segregated into aeronautical and non- aeronautical based on the ratio of the terminal area. Learned Senior Advocate appearing on behalf of the appellant has taken this Tribunal to the details of the figures of this calculation.

46. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA has computed revenue gap with carrying cost for 1st Control Period and 2nd Control Period, considering entire year's carrying cost in which revenue gap originated instead of excluding that year in the computation of carrying cost.

47. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA ought to have maintained consistency in their approach because in the cases of Delhi International Airport Ltd. (DIAL) and Bangalore International Airport Ltd. (BIAL), AERA did not consider carrying cost for the year in which revenue gap originated. This appellant is seeking the same treatment for MIAL.

48. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA has committed an error in deciding to amortize the expenditure on re-carpeting of runway, taxiway, apron for five years without including the same in RAB.

49. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that this appellant needs to generate sufficient revenue to cover efficient operating cost, obtain the return of capital over its economic life and achieve a reasonable return on investments commensurate to the risk involved.

50. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that if AERA's approach of amortizing runway re-carpeting expenses in five years without inclusion of the same in RAB is followed, it will result into allowing much lower cost to airport operator than what is actually incurred. Learned Senior Advocate appearing on

behalf of the appellant has also given illustration of the aforesaid aspect in a tabular form as under:

	Year 1	Year 2	Year 3	Year 4	Year 5
Total cost of Runway Recarpeting	100				
Amortized cost as per AERA Approach	**20**	**20**	**20**	**20**	**20**
WACC (as determined by AERA)	12.81%	12.81%	12.81%	12.81%	12.81%
Year Number	1	2	3	4	5
Discounting factor	0.89	0.79	0.70	0.62	0.55
Discounted Value of Amortized Cost	**17.73**	**15.72**	**13.93**	**12.35**	**10.95**
Effective Cost allowed by AERA	70.67				

51. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that the circular/order No.35/2017-18 dated 12.01.2018 to be read with amendment No.1 dated 09.04.2018 nowhere forbids carry forward of the unamortized balance of re-carpeting expenses under the fixed assets or RAB.

52. It is further contended by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of the appellant that AERA ought to have allowed inclusion of expenditure on re-carpeting of runway/taxiway /apron amortized in regulatory asset base over a period of five years.

53. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA has committed an error in not changing asset allocation ratio due to reclassification of the Chhatrapati Shivaji Maharaj statue from non-aeronautical to aeronautical.

54. It is further submitted by Learned Senior Counsel appearing on behalf of the appellant that due to reclassification, the aeronautical RAB of the appellant has increased by Rs. 25 Crores. Denying return on the same would lead to significant loss to the appellant since the capital expenditure on the statue has already been incurred. Similarly, asset allocation ratio has been changed because of correction in area of Terminal–1 of CSMIA, Mumbai. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that appellant had provided details of area measuring 5510 Sq. Mt. which was found excluded. AERA has considered 97,621 Sq. Mts. whereas actual area of Terminal–1 is 1,03,131 Sq. Mts.

55. Learned Senior Advocate appearing on behalf of the appellant has placed reliance upon the following table during the course of his arguments:

	As per IR Class	Adjustment Required	Actual
Total Area (m^2)	97,621	5,510#	1,03,131
Commercial Area (m^2)	10,386	-	10,386
% of Non-Aeronautical Area	10.64%	-	10.07%

56. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA ought to have changed asset allocation ratio because General Aviation Terminal related capital expenditure should have been categorised as a common asset instead of non-aeronautical asset. General Aviation Assets cannot be classified purely as non-aeronautical assets. In fact, it is a common asset and, therefore, necessary correction ought to have been carried out in RAB on this account.

57. It is further contended by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of MIAL that the appellant is of the Adani Group which is the largest infrastructure player in India and has executed, operated and managed the assets of varied complexities. Its execution and management capabilities are ably backed by its corporate resources which provide Leadership & Governance, Business sustenance support and Functional & Managerial support to various group businesses. The cost pertaining to common resources of Adani Group,

which are utilized by all Adani Group companies, is required to be allocated on all such companies.

58. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that AERA has erred in deciding that the operating cost cannot be reimbursed because the same has not been incurred by the airport operator.

59. It is submitted by Learned Senior Advocate appearing for the appellant that AERA's decision is incorrect and untenable as in respect of corporate services, the appellant is expected to receive corporate support from the common resources available at the Adani Group, in respect to Human resource management, Administration, Treasury, Taxation, Fund Raising, Information technology, Master Data Migration, Management Audit and Assurance, Governance risk and compliance, Legal support, Corporate Communication, Crisis Management, Central Procurement etc. and even if these services were procured from external agencies/consultants, they will bill the charges for their services.

60. It is further submitted by Learned Senior Counsel appearing for the appellant that AERA has taken cognizance and approved the corporate cost allocation methodology followed by the Mangaluru International Airport Limited and the Ahmedabad International Airport Limited during the tariff determination. In view thereof, the Respondent No. 1/AERA

being a statutory regulator, ought to adopt a consistent approach and allow corporate cost for the appellant as well.

61. It is further submitted by Learned Senior Counsel appearing for the appellant that various professional services in areas such as legal, regulatory, fund raising, risk governance and compliance etc., are provided by Adani Airport Holdings Limited (AAHL) to the appellant and same has resulted in reduction in employee expenses for the appellant from Rs. 222.4 Crores in FY-2021 to Rs. 159.7 Crores in FY-2022 as many departments/services which were working exclusively for the appellant have now become part of common pool of employees to AAHL level.

62. In view of the aforesaid submissions, it is pointed out by learned Senior Advocate for the appellant that AERA has erred in not allowing the corporate cost projected to be incurred by the appellant as operating expenses.

63. It is submitted by Learned Senior Advocate appearing for the appellant that AERA ought to have allowed the operation and maintenance expenses on –

i. interest on working capital;
ii. restructuring expenses and;
iii. insurance.

64. It is submitted by Learned Senior Advocate appearing for the appellant that while submitting MYTP in the month of June, 2019, the work was going on in its regular course with a normal pace. The appellant was not expecting to avail working capital loan but subsequently because of outbreak of COVID -19 and its aftermath, there was a liquidity crunch of working capital facilities and the appellant had sought for working capital loan as a short-term facility to overcome the liquidity crunch which had arisen due to COVID-19 pandemic. Similarly, an effort was made to restructure the term loans and the financing charges were to be paid to the financial consultant for the restructuring. Similarly, AERA has not considered the increase in the insurance cost due to subsequent developments like change in insurance rates post submission of MYTP in June, 2019.

65. Thus, for the aforesaid reasons as per the submission by the counsel for the appellant, the aforesaid expenses towards interest on working capital, restructuring expenses and insurance should be allowed as operation and maintenance cost.

66. It is submitted by Learned Senior Advocate appearing for the appellant that AERA has erred in not allowing return on assets based on actual usage of assets disposed-off during the year. AERA has reduced the entire amount from total value of assets assuming that all the assets

are disposed-off on the first day of the year. This is incorrect and untenable approach of AERA.

67. It is submitted by Learned Senior Advocate appearing for the appellant that AERA has failed to adopt a consistent approach for determination of Return on RAB based on principles of tariff fixation since it has considered addition of assets in RAB during the year based on actual date of capitalization of these assets, but, the same principle of actual date of disposal was not applied for disposed-of assets.

68. It is further submitted by Learned Senior Advocate appearing for the appellant that decision of respondent no. 1 – AERA of carrying out 1% readjustment to project cost and applicable carrying cost in the target revenue at the time of determination of tariff for the 4th Control Period is incorrect and untenable in law mainly for the reason that there is no provision in AERA Act, 2008 for carrying out 1% readjustment to the project cost. In fact, delay in completion of the project may be due to various external factors. There may be a shortage of manpower, force majeure and other unforeseen and inevitable circumstances. There may be a situation where the project is completed by 90%, however, asset is yet to be capitalised, in such eventuality, imposition of 1% penalty would be totally unreasonable and unjustified. Certain capital expenditure was deferred to next control period keeping in view the

reduced passenger traffic due to impact of COVID-19 and unprecedented financial crunch.

69. It is submitted by Learned Senior Advocate appearing for the appellant that if 1% penalty is allowed in absence of any statutory provision, in that eventuality, it can be 1.5% also in the future. In the next control period, 1.5% penalty can be further increased up to 3%, so on and so forth. AERA has utilised the powers without any guidance and, therefore, it always gives birth to discrimination meaning thereby to in absence of any guidelines, two similarly situated persons may get different penalties. Hence, the direction of AERA in respect of carrying out 1% readjustment to project cost deserves to be quashed and set aside.

70. It is submitted by Learned Senior Advocate appearing for the appellant that the respondent has wrongly applied Cap to the cost of debt at 10.30% while examining the Fair Rate of Return (FRoR).

71. It is further submitted by Learned Senior Advocate appearing for the appellant that interest rate cannot remain constant. The rate of interest depends on marginal cost of funds-based lending rate and upon the spread i.e. the period during which a loan amount is to be returned i.e. five years or ten years or thirty years period. This aspect of the matter has not been properly appreciated by AERA. There cannot be one rate of

interest i.e. 10.30% for the whole control period of five years. The rate of interest also depends upon the rating of appellant by India Ratings from A+ to A-. The Cap of 10.30% on cost of debt has been provided without any cogent reason. This is also in violation of AERA Act, 2008.

72. It is further contended by Learned Senior Advocate Mr. Sajan Poovayya appearing on behalf of MIAL that AERA has no power, jurisdiction or authority to reduce the hypothetical RAB (H-RAB) even in case of demolition of any asset out of initial asset base or H-RAB.

73. It is further contended by Learned Senior Advocate appearing on behalf of the appellant that as per State Support Agreement (SSA), there is no provision for midway review of the H-RAB, in fact, the cost of terminal T-2 at Chhatrapati Shivaji Maharaj International Airport, Mumbai which is demolished should be added to the cost of new terminal T-2 and Apron as enabling cost or should have been permitted to recover it in tariff as operating expense.

74. Learned Senior Advocate appearing on behalf of the appellant has also taken to the formula of RB_0 as opening RAB. Neither in SSA nor in OMDA there is any provision for reduction of H-RAB.

75. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that cost of earlier Terminal-2 should have been treated as

enabling cost for the construction of new T-2 as a result of which there would be deduction as well as addition of similar amount to RAB.

76. It is further submitted by Learned Senior Advocate appearing on behalf of the appellant that construction work related to T-2 had to be undertaken by this appellant which was mandatory capital project as per OMDA, essential for passenger convenience and for expansion of airport to enhance the facility at the airport. New T-2 has been constructed as per the provisions of OMDA where master plan and major development plans were submitted to Ministry of Civil Aviation (MoCA) as well as Airport Authority of India (AAI). Old T-2 was constructed in the year 1979, similarly, T-1 was commissioned in the year 1961. In view of the aforesaid submissions, it is pointed out by the Learned Senior Advocate for the appellant that Hypothetical Regulatory Asset Base (H-RAB) cannot be reduced by written down value attributable to old T-2.

77. Ld. Senior Advocate 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 also and aeronautical related services. Accordingly, Annual Fee has to be deducted in terms of SSA. It is submitted by learned Senior Advocate for appellant that AERA has admitted in the impugned order that Annual Fee is not a cost. It is also submitted by learned Senior Advocate 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].

78. It is further submitted by the Learned Senior Advocate for the Appellant – MIAL that there should be exclusion of revenue generated from "existing assets" from the calculation of "S factor". It is further submitted by Learned Senior Advocate Sajan Poovayya 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 MIAL or any 3rd entity and, therefore, MIAL 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 MIAL. 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 Advocate 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 23rd September, 2016 for 2nd Control Period (FY 2014-2019) as well as order dated 27th February, 2021 for 3rd Control Period (FY 2019-2024) deserves to be

quashed and set aside so far as CSMIA, Mumbai is concerned and the true and correct target revenue may be finalized by this Tribunal on the basis of the aforesaid arguments.

79. Learned senior counsel for the appellant contended that AERA has not properly appreciated the aeronautical taxes figure while calculating "S" factor in the formula of target revenue. It is contended by 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". This 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 the 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 the 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.

80. Ld. Senior Advocate Sh. Sajjan Poovayya, appearing on behalf of MIAL, submitted that AERA arbitrarily rejected Appellant's request to share the financial model relied upon by AERA while passing the Impugned Order No. 64/ 2020-21 dated 27.02.2021 as a result of which the Appellant is not in a position to comprehend and examine the assumptions and basis used for calculation of various regulatory blocks.

81. Ld. Senior Advocate appearing on behalf of the appellant further submitted that AERA has failed to consider the impact of COVID while determining the tariff for the third Control Period. Ld. Senior Advocate appearing on behalf of the appellant placed reliance on the order of this Tribunal dated 24.05.2022 in M.A No. 210 of 2022 against which AERA had filed a Review Application No. 05 of 2022 before this tribunal.

ARGUMENTS CANVASSED BY RESPONDENT NO. 1 – AERA

82. Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA –R1, submitted that no error has been committed by AERA while passing the impugned order for 2nd Control Period (FY 2014- FY2019) bearing No. 13/2016-17 dated 23.09.2016.

83. It is submitted by Learned Senior Advocate appearing on behalf of AERA –R1 that as per OMDA, upfront fee is at Rs. 150 Crores. This figure cannot be altered unilaterally by this appellant. This amount of Rs. 150 Crores has already been considered while passing the order for 1st Control Period (FY2009 – FY2014). This appellant is demanding additional Rs. 3.85 Crores towards Upfront Fee.

84. It is submitted by Learned Senior Advocate appearing on behalf of AERA –R1 that as per Clause 11.1.1 of OMDA, the joint venture company – MIAL – Appellant was liable to make the payment of Rs.150 Cores to AAI towards Upfront Fee on or before the effective date. Rs.150 Crores has already been considered as an Upfront Fee. Rs. 3.85 Crores was not paid to AAI as **"Upfront Fee"**. It is also submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that MIAL has never given the details in respect of payment of this amount to AAI. Amount of Rs. 3.85 Crores was paid by MIAL in the FY 2010 and, therefore, it cannot be said to be towards **"Upfront Fee"**. The following table was submitted by MIAL to AERA:

	FY 07	**FY 08**	**FY 09**	**FY 10**	**FY 11**	**FY 12**
Upfront Fee paid to AAI- In Rs. Crore	150	-	-	3.85	-	-

85. In view of the aforesaid table, the Upfront Fee was already paid in FY 2007 to AAI whereas Rs. 3.85 Crores was paid in the FY 2010 and nowhere this appellant has submitted that the same has been paid to AAI as Upfront Fee and, therefore, no error has been committed by AERA while passing the impugned orders dated 23.09.2016 and 27.02.2021.

86. Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 submitted that AERA has decided to protect the paid-up equity rather than Net Worth and, therefore, has a right to decide not to reduce closing equity from the present level of paid-up equity. It is submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that the reserves and surplus are fluctuating components which determine the Operators' stake in the Venture and the Authority is not assured of whether the surplus is actually employed back into the project. It is further submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that AERA has decided to partially true up the WACC, inter-alia, to the extent of funds from the reserves and surplus on actuals, if positive, during the 2nd Control Period. This Paid-up Equity Share Capital cannot be clubbed with fluctuating figures and, therefore, the equity remains sacrosanct and, therefore, no error has been committed by AERA in reducing the Reserves and Surplus on account of

subsequent losses for the purpose of calculation of WACC in the formula of Target Revenue:

"TR = RB x WACC + OM + D + T – S"

87. It is submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 that Minimum Alternate Tax (MAT) is an advance tax deposited under Sec. 115JD of Income Tax Act, 1961.

88. Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 submitted that Minimum Alternate Tax (MAT) is an advance tax deposited under relevant law and is adjusted against the tax liability of current Financial Year and since it is on complete income of the entity, therefore, if any time the credit is set off against any tax liability of any airport operator, this will be on account of total income whereas, AERA is mandated to consider tax only on Aero income.

89. Learned Senior Advocate appearing on behalf of AERA – R1 submitted that MAT credit should be excluded from Reserves and Surplus because MAT credits are only provisions and MAT credit entitlement has not arisen at this stage, meaning thereby to, no amount has actually been given by Income Tax Department to the appellant. MAT credit is mere credit and not the actual amount which comes in the bank account of this appellant and, therefore, MAT credit cannot go into

the Reserves and Surplus and hence, no error has been committed by AERA in calculating WACC by excluding MAT credit from Reserves and Surplus.

90. It is submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 that Refundable Security Deposit (RSD) which is obtained by this appellant as a part of development of non-transfer assets was initially treated by AERA as a means of finance at zero cost. However, vide judgment dated 23.04.2018, this Tribunal in AERA Appeal No. 6 of 2012 decided that RSD, which has been treated as a means of finance, cannot be at zero cost and therefore, the matter was remanded for redetermination and, therefore, while passing the impugned order, AERA has treated RSD as a means of finance and the **"cost of debt"** has been allowed by AERA on the amount equal to RSD. It is further submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that by no stretch of imagination an amount of RSD can be treated as equity and hence, no return on equity on an amount equal to RSD can be given to this appellant.

91. It is submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that an independent study was carried out to give proper treatment to an amount equal to RSD and as per the said independent

study, AERA had allowed **"cost of debt"** as return on RSD based on recommendation of study and hence no error has been committed by AERA while passing the impugned orders dated 23.09.2016 and 27.02.2021 for both, 2nd Control Period as well as 3rd Control Period respectively.

92. It is further submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 that AERA, vide order No.29/2012-13, fixed the allowable project cost, considered the various means of finance and thereafter determined the development fee at Rs.3400 Crores to meet the shortfall in the means of finance regarding the project cost which can be collected from the embarking passengers. This development fee cannot be resorted first to breach the funding gap in the project. The development fee remains as a last resort towards the project funding gap.

93. Learned Senior Advocate appearing on behalf of AERA – R1 has pointed out that AERA has pointed out that out of Rs.3400 Crores, amount of Rs. 2515 Crores calculated as on 01.01.2013 and the said figure was re-casted to Rs.2604.63 Crores as admitted by AAI in their letter dated 09-06-2023. It is further submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that the amount of

development fee was to be collected by MIAL from the passengers during the period 01-01-2013 to 30-04-2021. Completion of the capital work was proposed to be completed upto the year 2015-16 and therefore MIAL ought to have securitized the entire development fee accordingly, in phases, up-to the year 2015-16 and should not have securitized the entire DF by FY 2013-14 as MIAL securitized the whole DF amount in FY 2013-14 and started collecting DF factoring in a rate of interest @11.25% and, therefore, it is considered that DF has been utilised by MIAL as means of finance as a first resort and not as last resort and, therefore, the amount of DF has been adjusted from RAB in FY 2013-14 i.e. the year in which international part of Terminal T-2 is commissioned, thus there is no error committed by AERA while passing the impugned order dated 23.09.2016.

94. It is further submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 that AERA has rightly not considered the collection charges in respect of development fee as Operating Expense (OM) or pass-through against the development fee collection. Learned Senior Advocate for the appellant has taken this Tribunal to the Circular issued by Directorate General of Civil Aviation (DGCA) being AIC No. 8/2012 dated 31.12.2012 especially on paragraph

3 therein. On the basis of the aforesaid Circular, it has been pointed out by the Learned Senior Advocate appearing on behalf of the AERA that the Development Fee which is to be collected by Joint Venture Corporation (JVC) – appellant is to be collected through the Airlines because the Development Fee has to be paid by the embarking passengers and, therefore, Airlines are collecting Rs.5 per international passenger and Rs.2.5 per domestic passenger as a collection charge. This collection charge shall not be allowed to pass on to the passengers in any manner. Thus, total amount of development fee remains intact and as it is, though the collection charges as stated hereinabove Rs. 5 and Rs.2.5 from international passenger and domestic passenger respectively is collected by Airlines. This collection charge cannot be added in the Development Fee otherwise the amount of development fee will be slightly more than what is permitted and hence, no error has been committed by AERA while passing the impugned order dated 23.09.2016 and AERA has rightly not treated collection charges in respect of development fee as Operating Expenses (OM) or as pass-through against DF collections.

95. It is further submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 that the primary function of

AERA is to monitor the set performance standards relating to quality, continuity and reliability of services as may be specified by Central Govt. or any Authority authorised by it in this behalf as per Section 13(1)(d) of the AERA Act, 2008.

96. It is further submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that in discharge of its function, AERA has started monitoring the standards already fixed and finalised by the Competent Authority. It is made clearer by Mr. Meet Malhotra, Learned Senior Advocate appearing on behalf of AERA that AERA is not determining the standards of performance of the Operator of the Airport – MIAL – the present appellant, but, AERA is monitoring the compliance of the standards already fixed by the Competent Authority and, therefore, AERA had sought advice from AAI on the performance standards maintained by MIAL during the 1st Control Period as well as on the point that any liquidated damages have been levied by AAI from MIAL. AERA has yet not received any such information from AAI. The performance standards have been laid down in OMDA and only those performance standards which have already been fixed by OMDA, SSA or by the Competent Authority shall be monitored by AERA.

97. Learned Senior Advocate appearing on behalf of the respondent has placed reliance upon the decision rendered by this Tribunal dated 16.12.2020 in case of Bangalore International Airport Ltd. (BIAL) Vs. Airports Economic Regulatory Authority of India (AERA) in AERA Appeal No.8 of 2018 especially upon paragraph 76 of this Judgement and therefore, has submitted that no error has been committed by AERA in monitoring the quality of services rendered by this appellant.

98. It is further submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that the appellant is choosing to selectively read this study. The said study was conducted during the 3rd Control Period for truing up the figures for 2nd Control Period. The Independent Study has duly noted that upon reconciliation of opening aeronautical asset as at 1st April, 2014, included in the opening gross block as at 1st April, 2014 comes to Rs. 9825.09 Crores. The said figure has been arrived at by the independent study on the basis of data submitted by MIAL itself, basis Fixed Asset Register [FAR] for FY 2015, maintained by MIAL.

99. It is further submitted by Learned Senior Advocate appearing on behalf of the respondent that on the basis of unsubstantiated figure of Aeronautical Asset Base of Rs. 9825.09 Crores, the appellant has chosen to derive the asset allocation ratio at 89.59% for aeronautical asset.

AERA has considered the overall aeronautical asset allocation of 83.97% as on 31.03.2014.

100. It is further submitted by Learned Senior Advocate appearing on behalf of the respondent that the arguments canvassed by the appellant that opening RAB for FY 2014-15 should be considered as closing RAB of FY 2013-14 and similarly, the closing RAB of 2013-14 should be the opening RAB of FY 2014-15. This contention of this appellant is not correct for the reason that the Opening RAB of FY 14-15 has been calculated to determine the average asset allocation ratio for the entire 2nd Control Period. 83.97% was applied to the entire period of 1st Control Period, during the truing up exercise conducted in the 2nd Control Period. Likewise, the independent study has calculated 82.58% as the asset allocation ratio for the 2nd Control Period. Hence, no error has been committed by AERA in considering aeronautical asset allocation at 83.97% for FY 2013-14.

101. It is further submitted by Learned Senior Advocate appearing on behalf of the 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". 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. 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.

102. It is further submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 that no error has been committed by AREA in allowing average depreciation on aeronautical asset instead of actual depreciation on item-wise aeronautical assets. Uniform asset allocation ratio of 82.58% was computed as on 31-03-2019 to the total depreciation of each of the earlier years of the 2nd

Control Period. Learned Senior Advocate appearing on behalf of AERA has submitted that respondent no. 1 has never utilised the methodology of having separate rates, but, has consistently followed the asset allocation based on a ratio for all assets together mainly for the reason that the appellant - Chhatrapati Shivaji Maharaj International Airport, Mumbai is a fully developed airport and there is no major change in overall lay out and usage pattern that would affect the segregation between aeronautical and non-aeronautical assets from one year to another.

103. It is further submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that MYTP submitted by the appellant has not refuted the Order No. 35/2017-18 and has provided its depreciation basis the useful life provided by the respondent no.1. It is also submitted by learned counsel for AERA that all the assets fall within the categories as provided in Order No. 35/2017-18 (Annexure – A-15 Colly) of AERA Appeal No. 2 of 2021.

104. Further, as per independent study report, copy of which was made available to the appellant at the stage of consultation process, has recommended a single rate for the entire control period and the same has been widely accepted by the appellant, hence, no error has been

committed by AERA in applying average depreciation on aeronautical assets instead of actual deprecation on each of the aeronautical assets vide impugned order dated 27.02.2021.

105. It is further submitted by Learned Senior Advocate appearing on behalf of AERA – R1 that no error has been committed by AERA while passing the impugned order whereby it has computed the carrying cost on the revenue gap assuming it to be originating at the very beginning of that year.

106. It is further submitted by Learned Senior Advocate appearing on behalf of AERA that the respondent no. 1 has not provided any different treatment to MIAL as compared to other airports. The computation of carrying cost on the revenue gap for the purpose of truing up the 1st Control Period and the 2nd Control Period as provided in the impugned order has been accepted by respondent no. 1 from the computation provided by the appellant in MYTP. Thus, MYTP is a presentation made by the appellant, which has been accepted by AERA, therefore, no error has been committed by AERA in computation of carrying cost on revenue gap for the 1st Control Period and 2nd Control Period.

107. Thus, it is submitted by learned senior advocate for the respondent no. 1 that the computations provided by the appellant has

been made part of the consultation paper and no change thereof was requested by the appellant at the time of filing of the comments/representation after publication of the consultation paper nor any further request was made by the appellant in the multiple revisions. Thus, the ground which is agitated during course of the hearing of this AERA appeal is merely an afterthought.

108. It is submitted by learned senior advocate appearing on behalf of AERA–R1 that no error has been committed by AERA in denying inclusion of expenditure on re-carpeting of runways, taxiways/apron amortized in Regulatory Asset Base (RAB) over the period of five years. It is further submitted by Learned Senior Advocate appearing on behalf of respondent no. 1 that expenditure of re-carpeting of runways, taxiways/apron for five years amortization, without including the same in RAB is absolutely just and proper and in consonance with OMDA and SSA. Learned Senior Advocate appearing on behalf of AERA has placed reliance upon order no. 35/2017-18 wherein principles have been set out for the requirement to amortize the amount spent on resurfacing of the runways over the period of five years [Annexure A-15 (Colly) to AERA Appeal 2 of 2021].

109. In fact, re-carpeting is only to bring back the wear and tear of the past years, therefore, it would be appropriate to write it off in the year of expenditure, however, for the purpose of tariff computations and for reducing the burden on the end users, the same is to be amortized over a span of five years. It is further submitted by learned senior advocate appearing on behalf of the appellant that re-carpeting is done to maintain the Pavement Classification Number (PCN Value) and/or to restore the original PCN Value. In this eventuality, the expenditure towards the re-carpeting is the revenue expenditure and, therefore, it is amortized over five years. It is only in the event of actual increase of PCN Value that the expenditure would be considered towards capital expenditure. Hence, no error has been committed by AERA in exclusion of expenditure on re-carpeting of runway amortized in regulatory asset base. Thus, return on RAB is denied on the unamortized portion of such expenditure.

110. It is submitted by Learned Senior Advocate appearing on behalf of AERA–R1 that AERA will consider the change in asset allocation ratio due to requalification of the Chhatrapati Shivaji Maharaj statue as the same has now been treated as aeronautical expense and the true up will

be given on actual basis in the next control period. It will be considered as RAB on actual basis.

111. It is submitted by Learned Senior Advocate appearing on behalf of AERA–R1 that with regard to the GA Terminal Services, it is pertinent to note that the same have been classified as non-aeronautical assets as per Schedule 6 Part I of the OMDA [V-VI @Page 674 of the Appeal Paper-book]. Furthermore, it is pertinent to note that the appellant itself as per its MYTP for the 2nd Control Period has included the GA Assets in the Non-Aeronautical assets and even in the multiple rounds in the Second Control Period or the extension in the Third Control Period, have provided any corrections or clarifications thereof.

112. It is submitted by Learned Senior Advocate appearing on behalf of AERA–R1 that to claim this in the appeal stage in a belated form is an afterthought and ought not to be given due credence. Furthermore, even if certain assets amongst the GA assets are to be considered common, the break-up or demarcation for the same and the allied computations have not been provided by the appellant either in the MYTP or in response to the Consultation Process stage. As such to claim the same before the Appellate forum is merely an afterthought and in the form of taking advantage of the transparency process.

113. With regard to the floor ratio it is submitted by Learned Senior Counsel Mr. Meet Malhotra appearing on behalf of the AERA –R1 that with regard to the floor ratio, the appellant has taken into consideration the revised report of IRCLASS and having taken the same into consideration, has arrived at the conclusion that the adjusted gross fixed asset ratio as on 31.03.2019 changes from 82.58% to 82.59% which has no significant impact on the ARR. How the appellant has derived the change from 82.58% to 82.79% is unclear and has no basis.

114. It is submitted by Learned Senior Advocate appearing on behalf of AERA–R1 that for allowing operating expenses towards insurance, working capital and financial charges, the same will be considered by AERA on actual incurrence, together with need, justification and evidence of the same. In fact, to seek assessment in advance despite being aware of the process of true up of the same as a part of the next control period, this ground agitated by the appellant may not be accepted by this Tribunal. Once the tariff process is completed, the variation in the same will be appreciated in the next control period during the true up process.

115. It is further submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA – R1 that R-1 has consistently

allowed proportionate depreciation on the basis of actual dates of additions/deletions even in the 2nd Control Period and the same principle was applied in the true up of 2nd Control Period in relation to RAB in the present control period.

116. It is fairly submitted by Learned Senior Counsel Mr. Meet Malhotra appearing on behalf of the AERA – R1 that as such, as and when the requisite details are provided to the R-1 and submissions/corrections made by the appellant, the true-up of the return on the disposed off assets, would be carried out proportionately in the subsequent control period.

117. It is fairly submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of the AERA – R1 that respondent no. 1 has all power, jurisdiction and authority in carrying out 1% readjustment to project cost and applicable carrying cost in the target revenue at the time of determination of tariff for the 4th control period.

118. So far as non-inclusion of corporate cost allocation under operating expenses is concerned, it is submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA that no dissimilar treatment has been done with Ahmedabad and Mangalore airports and in both these cases, the corporate cost has been allowed for the first time. That

even in the case of the appellant the corporate cost has been allowed, wherein services have been procured by the appellant from GVK as reflected in Para 6.6.15 of the Impugned Order [V-III @ Page 376 of the Appeal Paperbook]. That the R-1 cannot allow anything on the assumption of services that the appellant may receive from its current holding entity.

119. It is further submitted by Learned Senior Counsel Mr. Meet Malhotra appearing on behalf of the AERA – R1 that on an ad hoc basis and pre-empting the costs that could be incurred, R-1 cannot in terms of tariff computation allow the corporate overheads to be included and in the next control period, basis the computations and updated financials, the same would always be trued-up. However, whilst already having allowed the cost paid by the appellant to its erstwhile conglomerate and further freshly consideration another corporate cost allocation, would be in the nature of unjust enrichment.

120. Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA has placed reliance on para 6.6.15 of the impugned order [V-III @ Page 376 of the Appeal Paperbook], wherein R-1 has further provided that the appellant has failed to provide a detailed breakup as to how management costs are being incurred by the appellant from the group

conglomerate, when the appellant actually avails the said services already from ACSA Global, a shareholder of the appellant and pays an airport operator fee to ACSA Global, which is further separately reimbursed to appellant.

121. It is submitted by Learned Senior Advocate appearing on behalf of AERA–R1 that AERA has all power, jurisdiction and authority in carrying out 1% readjustment to project cost and applicable carrying cost in the target revenue at the time of determination of tariff for the 4th control period.

122. It is further submitted by Learned Senior Advocate appearing on behalf of the AERA–R1 that such a readjustment is not in the form of penalty but merely a means to ensure efficiency standards are maintained by the Airport Operator and would disincentivise the Appellant from allowing the project getting delayed beyond the committed timelines for implementation of the project thereby ensuring efficiency in the cost incurrence. That this is a balancing exercise to ensure the commitment of the AOs to meet the schedules.

123. Learned Senior Counsel appearing on behalf of respondent no. 1 has placed reliance upon the decision rendered by TDSAT dated 16.12.2020 in case of Bangalore International Airports Ltd. (BIAL) Vs.

AERA in AERA Appeal No. 8 of 2018 while discussing the right and role of AERA in imposing penalty in light of delayed projects. Learned Senior Counsel has placed reliance upon paragraph 54 of the aforesaid decision rendered by this Tribunal. Thus, it is submitted by Learned Senior Counsel for respondent no. 1 that even as per the provisions of AERA Act, 2008 to be read with aforesaid decision rendered by this Tribunal AERA has all power in carrying out 1% adjustment to project cost and applicable carrying cost in the Target Revenue at the time of determination of Tariff for 4th Control Period.

124. Learned Senior Counsel Mr. Meet Malhotra appearing on behalf of the AERA –R1 submitted that no error has been committed by AERA in capping the cost of debt at 10.30% while computing fair rate of return.

125. Learned Senior Counsel Mr. Meet Malhotra appearing on behalf of the AERA –R1 has placed reliance upon a chart given to this Tribunal during the course of arguments which is a summary of the actual table supplied to this Tribunal and reads as under:

MIS- TARIFF ORDERS ISSUED SINCE 2020		
PPP Airports		
	SECOND CONTROL PERIOD (SCP)	THIRD CONTROL PERIOD (TCP)

Name of Airports	True up of SCP Under Recovery/ (Over Recovery)	Total Pax in (MPPA)	CAPEX(Cr.)	FROR/ WACC		
				COD	COE	FROR/ WACC
DIAL	(5721.23)	267.11	10897.45	***9.87%**	15.41%	12.75%
MIAL	(1462.58)	180.54	1930.42	***10.30%**	15.13%	12.81%
BIAL	(974.14)	174.88	7551.52	**7.85%**	15.05%	11.59%
HIAL	(441.6)	112.55	5518.00	**8.99%**	15.17%	12.20%
CHIAL**	344.62	12.63	103.03	-	14%	14%
CIAL	286.32	51.23	1275.18	**7.80%**	15.16%	11.63%
AHMEDABAD	292.68	68.10	3861.74	**9%**	15.18%	12.21%
LUCKNOW	196.33	31.51	2873.86	**9%**	15.18%	12.21%
MANGAURU*	248.91	11.02	577.94	**9%**	15.18%	12.21%

*True Up based on actual subject to a Ceiling of 50 bps on COD **(DIAL)**

*Ceiling of 10.30%, true up **(MIAL)**

*The total average COD of 9 PPP Airports is 8.98%

AAI Airports

Name of Airports	SECOND CONTROL PERIOD (SCP)	THIRD CONTROL PERIOD (TCP)				
	True up of SCP Under Recovery/ (Over Recovery)	Total Pax in (MPPA)	CAPEX(Cr.)	FROR/ WACC		
				COD	COE	FROR/ WACC
CHENNAI	(532.39)	108.60	2209.32	**6.21%**	14%	11.98%
KOLKATA	1585.27	112.46	854.76	**6.21%**	14%	13.38%
PUNE	92.08	43.49	512.27	**6.21%**	14%	11.68%
CALICUT	137.28	14.55	86.74	-	14%	14%
AMRITSAR*	-	10.88	284.82	-	14%	14%
VARANASI*	-	13.85	682.66	**8.03%**	14%	13.18%
RAIPUR*	-	11.44	54.28	-	14%	14%
TRICHY*	-	7.26	735.30	**8.03%**	14%	12.55%
AAI Goa	229.48	39.78	249.20	**6.21%**	14%	12.52%

*The total average COD of 6 AAI Airports is 6.82%

**= (2nd CP)

*= (1st CP)

It is submitted by Learned Senior Counsel appearing on behalf of the R1- AERA that 10.30% which is a cost of debt given to this appellant is the highest in all the Airports of this country whether they are PPP or AAI Airports.

126. It is further submitted by Learned Senior Counsel appearing on behalf of the appellant that, however, as a method of its true-up, the appellant has further provided that this is not complete restricted capping and the same shall be subject to true up at the time of determination of tariff for the subsequent control period subject to a capping of 10.30%. It is pertinent to note that the rate of Cost of debt of 10.30% for the appellant is significantly higher than compared to other PPP and AAI airports.

127. In view of these facts no error has been committed by AERA in capping the cost of debt at 10.30% while computing fair rate of return.

128. Mr. Meet Malhotra, Learned Senior Counsel appearing on behalf of the AERA –R1 submitted that no error has been committed by AERA in reducing the hypothetical RAB (H-RAB) value to the extent of written down value in respect of old Terminal-2 which is demolished.

129. It is further submitted by Learned Senior Counsel appearing on behalf of the AERA–R1 that appellant cannot be allowed to continue the benefit of enjoying a return on depreciation on the old demolished or non-existent assets as well as on new assets being built or commissioned out of the total H-RAB value of Rs.966.03 Crores. Old Terminal-2 which is demolished was assigned Rs.248.67 Crores. Written down value of such assets as on 31.3.2014 was Rs.194.74 Crores and, therefore, the depreciation on H-RAB and return on H-RAB from FY 2013-14 to FY 2018-19 along with carrying cost comes to Rs.258.83 Crores. Once the property is demolished which was in existence and when this appellant took over the possession of old airport the value whereof which is written down value of the property has to be deducted from H-RAB and, therefore, no error has been committed by AERA while passing the impugned order dated 27.02.2021.

130. It is submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of the AERA – R1 that the amount of annual fee which is payable at the rate of 45.99% of the gross revenue by MIAL 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.

131. It is submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of the AERA – R1 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. 1- AERA has submitted that principle of constructive res judicata is applicable in present 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.

132. Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of AERA submitted 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 CSMIA, Mumbai 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 MIAL and, therefore, the same may not be accepted by this Tribunal.

133. It is submitted by Learned Senior Counsel Mr. Meet Malhotra appearing on behalf of AERA – R1 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.

134. Learned Senior Counsel appearing on behalf of the AERA–R1 that no error has been committed by AERA in giving return on RSD amount treating it as cost of debt on the amount equal to Refundable Security Deposit (RSD). It is submitted by Mr. Meet Malhotra that if the amount equal to refundable security deposit would not have been available with this appellant, or in absence of availability of this amount, this appellant would have incurred it and, therefore, cost of debt is given by AERA on the amount equal to RSD. This concept is properly appreciated by AERA, and therefore, no error has been committed by AERA while passing the impugned orders dated 23.9.2016 and order dated 27.02.2021 for 2nd Control Period and 3rd Control Period respectively.

135. It is submitted by Learned Senior Counsel Mr. Meet Malhotra appearing on behalf of the AERA–R1 that upfront fee has been provided under OMDA is at Rs.150 Crores which was to be paid by this appellant to AAI in the year 2005-06 at the time of taking over CSMIA from AAI. In fact, nothing has been stated by this appellant that they have paid

additionally Rs.3.85 Crores towards upfront fee to AAI. The terms of OMDA cannot be altered unilaterally by this appellant and, therefore, upfront fee which was already fixed at Rs.150 Crores which has already been considered by AERA while passing the tariff order for 1st Control Period, therefore, an additional amount of Rs.3.85 Crores which is beyond the terms of OMDA cannot again be considered while passing the tariff orders for 2nd Control Period and 3rd Control Period. Hence, no error has been committed by AERA while rejecting the claim of this appellant for consideration of Rs.3.85 Crores as an upfront fee towards the equity share capital.

136. Learned Senior Counsel appearing on behalf of Respondent No. 1-AERA submitted that the Appellant has approached this Tribunal with unclean hands and has deliberately concealed material facts from this forum. The learned senior counsel further submitted that AERA has shared proforma Financial Model utilized by AERA for tariff fixation in contrast to the claim made by the appellant. The counsel for AERA submitted that AERA has aided the appellant-MIAL via supplying detailed computation, holding virtual meetings and sessions and even sharing the explanation qua computation/financial model, through virtual mode. Learned senior counsel for AERA further submitted that it is also

statutorily bound to adhere with the legislative policy guidance in discharge of its functions and that the legislative intent was never to disclose the entire methodology adopted by AERA. Learned senior counsel for AERA further submitted that the model ultimately employed by AERA is an amalgamation of various factors and not just one set Financial Model that could be placed on record. The learned senior counsel has placed reliance upon decisions reported as *(1993) 2 SCC 37 and 2017 SCC Online Del 10592* and in light of the same has submitted that the conduct of AERA qua transparency has been duly upheld.

137. Ld. Counsel appearing for Respondent No.1 has submitted on last day of arguments, in a sealed cover, a note which was received by Chairman of Respondent No.1 from CBI dated 30.08.2023. We have taken on record this note given in a sealed cover. We have opened it in presence of counsels for both the sides in open court. We have perused the note dated 30.08.2023, which is a photocopy of original one. Counsel appearing for respondent no. 1 submitted that in view of a note which is given in a sealed cover which was received by Chairman of AERA, this matter may not be decided till the CBI investigation is being concluded.

138. Learned Senior Counsel Mr. Buddy Ranganadhan, appearing on behalf of respondent No.3- Federation of Indian Airlines (FIA) has submitted that they are adopting the arguments canvassed by Mr. Meet Malhotra, Learned Senior Advocate appearing on behalf of the respondent no. 1 – AERA.

139. Nobody appears for the Respondent No.2- Ministry of Civil Aviation (MoCA) and they have nothing to submit in particular.

REASONS AND ANALYSIS

ISSUE NO. I

DECISION OF AERA TO CONSIDER UPFRONT FEE OF RS. 150 CRORES AS AGAINST RS. 153.85 CRORES

140. It is submitted by Learned Senior Advocate Mr. Sajan Poovayya for the appellant that AERA should consider the upfront fee paid by the appellant to AAI which is at Rs. 3.85 Crores towards Equity Share Capital of the appellant.

141. Before we go into detail about the upfront fee, it is worth noting that upfront fee has been defined under Operation, Management and Development Agreement (OMDA) as under: -

"Upfront Fee" shall mean the amount payable by JVC to AAI pursuant to Article 11.1.1.

For the ready reference, upfront fee as mentioned in Article 11.1.1 of OMDA which is at Annexure A-3 to the Memo of AERA Appeal No.9 of 2016 reads as under:

> **"11.1.1** Upfront Fee – The JVC shall pay to the AAI an upfront fee **(the "Upfront Fee")** of Rs.150 Crores (Rupees one hundred and fifty Crores only) on or before the Effective

Date. It is mutually agreed that this Upfront Fee is non-refundable (except on account of termination of this Agreement in accordance with Article 3.3 hereof) and payable only once during the Term of Agreement."

142. Appellant paid this upfront fee of Rs.150 Crores to AAI in the year 2005-06 at the time of taking over of Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai from Airport Authority of India (AAI). This amount of Rs.150 Crores has already been considered by AERA while passing an order of tariff in 2nd Control Period and this amount has been treated as Equity Share Capital of the appellant, but, they claim that they have also paid Rs.3.85 Crores additionally in the year 2009-10 as upfront fee to AAI. Hence, it is submitted by the Appellant that this additional amount of Rs.3.85 Crores should also be given the same treatment which was given to Rs.150 Crores. This contention is not accepted by this Tribunal mainly for the reasons that:

(i) As per OMDA, which is an agreement entered into by this appellant with AAI, an amount of Rs.150 Crores has been mentioned as upfront fee. This amount cannot be altered by this appellant and, therefore, only Rs.150 Crores has been treated as Equity Share Capital

by AERA for the calculation of Weighted Average Cost on Capital (WACC) in the formula of Target Revenue which reads as under: -

"TR = RB x WACC + OM + D + T – S"

This formula of target revenue has been given in State Support Agreement (SSA) which is at Annexure A-4, in which WACC has also been defined.

(ii) Target Revenue is an amount which will initially be proposed by the Airport Operator – MIAL – the present appellant, and thereafter it will be decided by AERA – respondent no. 1 after issuance of consultation paper and after receiving the comments or objections from all the stakeholders. The target revenue will be decided by AERA which shall be collected by appellant during the period of five years as per Section 13(2) of AERA Act, 2008. This period of five years is known as a **"Control Period"**. Addition to Upfront Fee has direct nexus with Target Revenue.

(iii) Upfront fee can be considered by AERA towards the calculation of WACC, but, the additional amount of Rs.3.85 Crores which has been paid by MIAL was not paid as an upfront fee to AAI.

(iv) MIAL has never given the details in respect of payment of this amount to AAI. The following table was presented by the counsel for the appellant during the course of arguments which is reproduced herein below:

	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12
Upfront Fee paid to AAI – In Rs. Crore	150	--	--	3.85	--	--

In view of the aforesaid table, it cannot be said that Rs.3.85 Crores was paid towards upfront fee. There is no evidence that this amount of Rs. 3.85 Crore was paid towards Upfront Fee to AAI.

143. In view of the aforesaid reasons which are given by AERA in the impugned order, an amount of Rs.3.85 Crores cannot be considered towards the Equity Share Capital of the appellant. No error has been committed by AERA in reducing the Equity Share Capital to the extent of Rs.3.85 Crores for the purpose of calculation of WACC.

144. Thus, Issue No. I is answered in affirmative i.e. the decision of AERA to consider Upfront Fee at Rs. 150 Crores as against Rs. 153.85 Crores as a part of Equity is correct and proper.

ISSUE NO. II

DECISION OF AERA TO REDUCE RESERVES AND SURPLUS ON ACCOUNT OF SUBSEQUENT LOSSES FOR THE PURPOSE OF CALCULATION OF WACC

145. Learned Senior Advocate appearing for the appellant has submitted that any new project is funded through a combination of means of finance such as:

i. Equity Share Capital;
ii. Debt;
iii. Reserves and Surplus and;
iv. Deposits etc.

The respondent no.1-AERA has computed WACC for the 2nd Control Period considering the Equity Share Capital, debt, and Reserves and Surplus on average basis. AERA has calculated reserves and surplus as zero when accumulative Reserves and Surplus becomes negative for any particular year. The respondent no.1 had decided to protect the paid-up Equity Share Capital. This decision is under challenge by the appellant.

146. AERA had decided not to protect reserves and surplus and to adjust the same against subsequent losses for the purpose of determining WACC. It is submitted by Learned Senior Advocate

appearing on behalf of AERA–R1 that AERA cannot club the paid-up Equity Share Capital with the fluctuating figures of profit and loss. The Reserves and Surplus can be adjusted towards subsequent years' losses. It is submitted by Learned Senior Advocate appearing on behalf of AERA–R1 that AERA has decided to protect the paid up Equity Share Capital rather than Net Worth which was utilised for the project funding.

147. We do not agree with the contention of the counsel for the respondent no.1 because reduction of Reserves and Surplus on account of subsequent losses is totally prejudicial to the interest of share-holders, who, instead of taking out dividend from the Joint Venture Company (JVC), which is the appellant in AERA Appeal No. 9 of 2016, have decided to invest or plough back all the profits for funding of the project in the overall interest of the Airport development, therefore, the balance in the profit and loss account cannot be reduced or taken out once the same has been used for funding or development of the project.

148. Secondly, the profit already utilised for project funding remains unchanged even if there are losses incurred in the subsequent years. It ought to be kept in mind that even if any subsequent losses which has a resultant effect of reduction in Reserves and Surplus as per books of

accounts, **it shall not reduce the investment already made by the shareholders.**

149. Learned Senior Advocate appearing on behalf of the appellant has taken this Tribunal to Annexure-2 to the memo of rejoinder arguments on behalf of MIAL in AERA Appeal No.9 of 2016. In this Annexure-2, the figures which have been given are about the cash flow of MIAL for various activities for each of the years starting from FY 2007 till FY 2014. This Annxure-2 is quite big in size but the same has been summarised as under:

"Note on Reserves and Surplus

Cash flows of MIAL for various activities for each of the years starting from FY07 till FY14 are shown in the table below:

Particulars (Rs Cr)		FY07	FY08	FY09	FY10	FY11	FY12	FY13	FY14	Till 31.03.2014
Cash flow from Profits (Reserves and Surplus	a	91	110	85	133	197	184	155	212	1,167
Cash flow from Other Operating Activities	b	84	7	121	248	327	21	762	358	1,928
Total Cash from Operating Activities	**c=a+b**	**175**	**117**	**206**	**381**	**524**	**205**	**917**	**570**	**3,095**
Paid Up Equity	d	200	-	200	200	200	400	-	-	1,200
Net Debt	e	273	586	340	714	981	1,263	1,884	465	6,506
Total Cash from Financing Activities	**f=d+e**	**473**	**586**	**540**	**914**	**1,181**	**1,663**	**1,884**	**465**	**7,706**
Investment in Fixed Assets	**g**	**(452)**	**(698)**	**(653)**	**(1,439)**	**(1,623)**	**(1,660)**	**(2,148)**	**(1,214)**	**(9,887)**
Net movement in Cash	h=c+f+g	196	5	93	(144)	82	207	654	(179)	
Closing Cash Balance		196	201	294	150	231	438	1,092	914	**914**

+ve number indicates cash inflows and -ve number indicates cash outflows.

As can be seen from the table above, total investment done by MIAL in purchase of fixed assets is Rs 9887 Cr till 31st March, 2014. Same is funded through various means like Paid Up Equity, Debt, Reserves and Surplus and Other internal accruals. Summary of the same is given below:

Particulars (Rs Cr)	
Deployment of Funds	
Investment in Fixed Assets	(9,887)
Sources of Funds	
Paid Up Equity	1,200
Debt	6,506
Profits (Reserves and Surplus)	1,167
Other Internal Accruals (net of cash)	1,014
Total	9,887

Above table shows **that Reserves and Surplus accrued over the past years (to the extent of Rs 1167 Cr) have been utilized by MIAL in funding of Capital Expenditure (RAB)"**

The aforesaid figures have been taken from audited books of accounts supplied to AERA during the consultation process, as has been submitted by learned Senior Advocate appearing on behalf of the appellant.

150. In view of this cash flow of MIAL, it appears that **Rs.1167 Crores which was a profit** and, therefore, shown in the Reserves and Surplus, was **actually utilised** as a source of funds and investment was made in the fixed assets. The profit of the earlier years is reflected

in "Reserves and Surplus" Account at **Rs.1167 Crores** was part and parcel of total investment in fixed assets worth Rs.9887 Crores.

151. Thus, profit of the earlier years was not taken away by the share-holders of this appellant (which is a Joint Venture Company) by way of dividend. This amount which is profit of the earlier years has been reflected in the Reserves and Surplus and as stated hereinabove, this profit which is reflected in the Reserves and Surplus account was at Rs.1167 Crores which has been utilised as a source of funds by this appellant for the investment in fixed assets and, therefore, AERA ought to have protected the Reserves and Surplus also to the extent to which the same has been utilised in deployment of funds for the investment in fixed assets while calculating WACC.

152. Thus, Rs. 1167 Crores have been utilised by MIAL out of Reserves and Surplus, earned over the past years, in funding of Capital Expenditure (RAB) and, therefore, once the Reserves and Surplus is invested in the project, the same cannot be taken out or reduced and no adjustment can be made after utilisation of the aforesaid fund even if there are losses in the subsequent years.

153. The return on RAB has to be given, if in funding of capital expenditure, Reserves and Surplus amount has been deployed.

154. And therefore, there will be a consequent change in calculation of WACC which is Weighted Average Cost on Capital (WACC). We, therefore, direct AERA to consider Rs.1167 Crores for the calculation of WACC in the formula of target revenue which has been deployed from Reserves and Surplus for investment in the fixed assets.

155. We, therefore, quash and set aside the decision of AERA dated 23.09.2016 to the extent that only paid up Equity Share Capital is protected without protecting the Reserves and Surplus. We also quash and set aside the decision of AERA of adjustment of Reserves and Surplus against the subsequent losses for the purpose of determining WACC. It ought to be kept in mind that once the amount from Reserves and Surplus is already utilised in the investment of fixed assets, thereafter, even if there is loss in a subsequent year, the investment in assets remains intact and as it is.

156. Thus, Issue No. II is answered in negative i.e. the decision of Respondent No.1 not to protect the Reserves and Surplus and to reduce it on account of subsequent losses for the purpose of calculation of WACC is incorrect, improper and not justified.

ISSUE NO. III

DECISION OF AERA TO EXCLUDE MAT CREDIT WHILE COMPUTING RESERVES & SURPLUS FOR THE PURPOSE OF CALCULATION OF WACC

157. Much has been argued out by the Learned Senior Counsel appearing on behalf of MIAL about the Fair Rate of Return (FroR) to be given upon the MAT Credit because it is an asset as any other asset of the company and, therefore, the same cannot be excluded from Reserves and Surplus of the company for calculating WACC.

158. This contention of the learned counsel for the appellant is not accepted by this Tribunal mainly for the reason that **Minimum Alternate Tax (MAT)** credit is mere entitlement and in fact no amount is coming to this appellant for investment in the Joint Venture.

159. Minimum Alternate Tax (MAT) is levied on a company whose income tax payable on the total income is less than such percentage of its book profits as prescribed from time to time (18.5% for the relevant year). As per **Section 115 JD** of the **Income Tax Act, 1961**, such company would be allowed a credit for the excess MAT over the regular Income Tax payable for that year, in any subsequent assessment year in which the regular income tax exceeds the MAT for that year.

160. Thus, Minimum Alternate Tax is of the nature of "**advance payment of tax".**

161. Thus, the amount paid on account of MAT is not available with the Airport Operator -MIAL for investing into the business and, therefore, no error has been committed by AERA in excluding the amount equal to MAT for the purpose of calculating WACC.

162. Thus, in view of the aforesaid facts and reasons, MAT credit is never available with the Joint Venture - Airport Operator- MIAL for any investment in the business.

163. It is also ought to be kept in mind that income tax department never returns this amount to the company who has paid MAT, even if there is a credit given in Reserves and Surplus Account. As and when the income tax liability of such company is exceeding amount of MAT, the credit will be given of the MAT amount or set off will be given of the MAT amount to such company, but, the fact remains that once the amount of MAT is paid to income tax department, such amount never returns to the company and hence, there is no question whatsoever that arises of investment of MAT credit in the business of Airport Operator and, therefore, no return, much less, fair rate of return or WACC can be provided to the Airport Operator upon MAT credit. This aspect of the

matter has been properly appreciated by AERA while passing the impugned order dated 23.09.2016 for 2nd Control Period (2014-2019).

164. Thus, Issue No. III is decided in affirmative. We hereby uphold the decision of AERA, excluding the amount equal to MAT credit while calculating Reserves and Surplus for the purpose of calculating WACC.

ISSUE NO. IV

DECISION OF AERA TO CONSIDER REFUNDABLE SECURITY DEPOSIT RAISED BY MIAL AT WEIGHTED AVERAGE COST OF DEBT

165. Having heard the counsels for both the sides and looking to the facts and circumstances of the case, this appellant had proposed to collect interest free Refundable Security Deposit (RSD) for development of Non-Transfer Assets.

166. This appellant has to develop the Non-transfer Assets and therefore, they are giving contract to the developer of those assets and they are getting "Refundable Security Deposit" and this amount is being brought **as an equity** by this appellant for financing the project cost

and, therefore, this appellant has demanded that in calculation of WACC, the amount of RSD should be considered as a part of equity and not as part of debt and, therefore, the return on equity should be given instead of return on cost of debt.

167. Counsel for the appellant submitted that while entering into the Rupee Term Loan agreement dated 16.12.2014, the financial plan submitted by this appellant to point out total equity available with this appellant (which is at Rs.4320 Crores) which includes RSD of Rs.1000 Crores which was mentioned as Real Estate Deposit (RED) in the financial plan provided by this appellant to the financer for entering into Term Loan Agreement and in the debt equity ratio of 1.99:1.

168. It is submitted by Learned Senior Advocate appearing on behalf of the respondent that if the Refundable Security Deposit was not available with the appellant, they would have to take debt and, therefore, return on debt has been considered for RSD and not the return on equity has been provided for the RSD amount.

169. This contention of the Learned Senior Advocate appearing on behalf of respondent no.1 is not accepted by this Tribunal because the amount accumulated with this appellant from **RSD** has been used for

financing the project cost i.e. the said amount of **RSD** has been utilised for the purpose of OMDA and SSA.

170. Initially, AERA **during the 1st Control Period** had treated **RSD** amount as a means of finance at zero cost. This decision was challenged before this Tribunal in AERA Appeal No. 10 of 2012 and vide judgment dated 23.04.2018, it has been held that **RSD** cannot be treated as means of finance at zero cost and, therefore, the matter was remanded to re-determine the return on RSD amount, but, before this judgement was delivered on 23.04.2018, tariff order for 2nd Control Period (2014-2019) was already passed on 29.09.2016 which is under challenge in AERA Appeal No.9 of 2016 and therefore, direction given by this Tribunal could not be implemented while passing tariff order for 2nd Control Period ,but, while passing tariff order for 3rd Control Period (2019-2024), order dated 27.02.2021, which is under challenge in AERA Appeal No. 2 of 2021, AERA has allowed return on cost of debt on the amount equal to RSD. The issue before this Tribunal is whether to allow **return on cost of debt** on the amount equal to RSD or to allow **return on cost of equity**, upon an amount equal to RSD.

171. Looking to the facts and circumstances of the case, it appears that the amount of **RSD** which has been received by this appellant from the

developers of the non-transfer assets has been shown as equity while getting the debt from the financers in the ratio of 1.99:1. For the ready reference, financing plan presented by this appellant reads as under:

(B) FINANCING PLAN

Particulars	**Amount (Rs crore)**
Equity (E)	1200
Internal Accruals (IA)	1073
Concessionaire Deposit (CD)	240
Airport Development Fee (ADF)	811
Real Estate Deposit (RED)	**1000**
Sub-total (a)	***4324***
RTL I	4231
ADF Debt *(as on December 31,2013)*	2589
RTL II	1800
Sub-total (b)	***8620***
Total (a) + (b)	***12944***
Debt Equity Ratio (DER) (a) / (b)	1.99:1

172. Thus, even while getting the debt from the financial companies, this appellant had mentioned **RSD** as equity. Moreover, this amount has been utilised to fund the capex, which is expected to have risk, inherent to that associated with equity, hence opportunity cost equivalent **to cost of equity** should be considered for this appellant.

173. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that other infrastructure sector regulators such as **Petroleum and Natural Gas Regulatory Board (PNGRB)** and **Tariff Authority for Major Ports (TAMP)** where the tariff is regulated have allowed return on capital employed. These regulators do not provide return on the basis of source and associated cost of funds. Hence, we are of the considered opinion that once RSD has been utilised for meeting the capital expenditure, it should be treated as a part of Equity Share Capital invested by the appellant in the business and, therefore, this appellant is entitled to reasonable rate of return treating RSD as equity.

174. Moreover, RSD raised by the appellant has been deployed for meeting the project cost of the Chhatrapati Shivaji Maharaj International Airport, Mumbai. If this fund is not available with this appellant, they would have been compelled to infuse same amount of **equity** for the project of Chhatrapati Shivaji Maharaj International Airport, Mumbai.

175. It is presumed by AERA that if the amount of RSD would not have been available, the appellant would have incurred a debt and, therefore, AERA has given return on debt on an amount equal to RSD. This is an error on the part of AERA, in fact, if the amount of RSD would not have

been available with this appellant, this amount equal to RSD would have been brought by this appellant through equity infusion.

176. Looking to the facts of the present case, there is no need of presumption by AERA that had there been no amount of RSD with this appellant, they would have incurred debt. This appellant is already having amount of RSD on their hands which has been utilised for the project of Chhatrapati Shivaji Maharaj International Airport, Mumbai and hence, return on amount equal to RSD should be given treating an amount of RSD as equity and to that extent impugned orders passed by AERA dated 29.09.2016 as well as impugned order dated 27.02.2021 for 2nd Control Period and for 3rd Control Period respectively are hereby quashed and set aside.

177. Thus, Issue No. IV is answered in negative i.e. the decision of AERA to allow return on Refundable Security Deposit (RSD) at weighted average Cost of Debt is incorrect and not justified.

ISSUE NO. V

ADJUSTING THE BALANCE DEVELOPMENT FEE FROM REGULATORY ASSET BASE FOR TERMINAL – 2

178. AERA has passed Order No.29/2012-13 dated 21.12.2012 and has determined the Development Fee (**DF**) of Rs.3400 Crores to meet the shortfall in the means of finance regarding the project cost. If the aforesaid amount or part of the aforesaid amount is utilised towards capex, such capex amount will be considered in calculation of RAB.

As per auditor's certificate on assets funded through Development Fee during the FY 2009-2010 to FY 2013-2014 reads as under:

a. Assets funded through Development Fee

Rs. in Million

Particulars	**As at 31 Mar.10**	**As at 31 Mar.11**	**As at 31 Mar.12**	**As at 31 Mar.13**	**As at 31 Mar.14**
Assets funded through Development Fee	**269**	**729**	**771**	**1,264**	**30,389**

Source: Audited financial statements

b. Depreciation on Assets funded through Development Fee

No Depreciation has been charged on assets funded through development fee in financial statements. However, the probable depreciation on those assets would be as follows:

Rs. in Million

Particulars	FY 2009-10	FY 2010-11	FY 2011-12	FY 2012-13	FY 2013-14
Depreciation on assets funded through Development Fee	**1**	**31**	**34**	**50**	**393**

179. In view of the aforesaid tables provided by the auditors, it appears that out of Rs.3400 Crores, only Rs.3038.9 Crores was invested towards capex. Thus, full amount of Rs.3400 Crores was never invested in the FY 2013-2014. New Terminal-2 was commissioned in FY 2013-2014 while other facilities and balance of Terminal-2 was commissioned only in the FY 2015-2016.

180. This appellant had attached this certificate from an independent engineer confirming that the project was completed in FY 2015-2016.

181. In contradiction to the methodology adopted by AERA while determining tariff for 1st Control Period vide Order No.32/2012-13 dated 15.01.2013, AERA adjusted the balance DF in the RAB in FY 2013-2014 **whereas,** it had decided that the same will be adjusted in the year when the project is completed.

182. For the ready reference, para 8.64 of the tariff order for the 1st Control Period dated 15.01.2013 reads as under:

"8.64…It is further clarified that in the last year of the project completion any remaining balance of DF sanctioned by the Authority would be adjusted in the RAB in that year."

183. It is submitted by the Learned Senior Advocate appearing on behalf of respondent no.1 that this appellant had securitised the entire DF in the year 2013-2014, therefore, they have adjusted the balance DF in RAB in the year in which international part of Termianl-2 is commissioned i.e. FY 2013-2014 as per paragraph 5.b of the impugned order dated 23.09.2016 which is a tariff order for the 2nd Control Period.

184. This conclusion of AERA in their paragraph 5.b in the impugned order dated 23.09.2016 (for 2nd Control Period) is running against the tariff order of 1st Control Period bearing No.32/2012-13 dated 15.01.2013 especially keeping in mind paragraph no. 8.64 of the tariff order for the 1st Control Period, as quoted hereinabove.

185. We, therefore, direct AERA to adjust the Development Fee in RAB based on actual amount of assets funded through Development Fee, as per the Auditor's Certificate/Annual Accounts till FY 2015-2016 when the project got completed because other facilities and balance Terminal-2 was commissioned only in FY 2015-2016.

186. Thus, Issue No. V is answered in negative and suitable direction has been given to AERA as stated hereinabove.

ISSUE No. VI

CONSIDERATION OF COLLECTION CHARGES IN RESPECT OF DEVELOPMENT FEE AS OPERATING EXPENSES

187. It is submitted by the Learned Senior Advocate appearing on behalf of the appellant that appellant has to pay collection charges of Rs.5 per international passenger and Rs.2.5 per domestic passenger to the airlines. This collection charge should be considered towards the Operating Expenses in the formula of target revenue which is as under:

"TR = RB x WACC + OM + D + T – S"

This contention of the appellant was rightly rejected by AERA because of Circular issued by Directorate General of Civil Aviation (DGCA). As per the said circular, the appellant was required to pay the collection charges of Rs.5 per international passenger and Rs.2.5 per domestic passenger to the airlines.

188. There is consistency on the part of AERA and while passing the tariff order for 1st Control Period also, this collection charge was not

considered as Operating Expense and same decision has been continued in the 2nd Control Period while determining the tariff for the 2nd Control Period.

189. Paragraph 3 of AIC No.8/2012 dated 31.12.2012 issued by DGCA reads as under: -

> "3. In order to obviate inconvenience to passengers and for smooth and orderly air transport/airport operators, it has been decided that all the airlines shall collect the Development Fee (DF) from passengers at the time of issue of air ticket and remit the same to Mumbai International Airport Pvt. Ltd. (MIAL) in line with the system/procedure in vogue in respect of collection of PSF/DF. For this, collection charges not exceeding Rs. 5/- per international passenger and Rs. 2.50/- per domestic passenger shall be receivable by the airline from MIAL, **which shall not be passed on to the passengers in any manner**."

190. In view of the aforesaid circular, Collection Charge cannot pass on in any manner. Hence, no error has been committed by AERA in excluding the amount of Collection Charges from Operation and Maintenance Expenditure.

191. Thus, Issue No.VI is answered in affirmative i.e. the decision of AERA not to consider Collection Charges in respect

of Development Fee (DF) as operating expense or pass-through against DF collections is correct, proper and justified.

ISSUE No. VII

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

192. In order to calculate the target revenue that is allowed to be recovered by the appellant has been specified in Schedule-1 of SSA (ANNEXURE A-4) 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 appellant - MIAL from the **"REVENUE SHARE ASSETS".**

193. Revenue Share Assets has been defined as-

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).

194. As a result, 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.

195. During the 1st Control Period (F.Y 2009-2014), AERA 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 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.

196. The appellant in the present appeals has challenged inclusion of "Other Income" of this appellant as part of revenue share assets for 2nd Control Period as well as for 3rd Control Period in AERA Appeal No. 9 of 2016 and AERA Appeal No. 2 of 2021. Thus, the inclusion of "other income" as part of 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).

197. "**Other Income**" includes:

a. Dividend income (dividend earned by MIAL from investments made by it in a joint ventures or in subsidiary companies providing services at CSMIA, Mumbai).

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

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

198. Learned senior counsel for the appellant submitted that initially the stand taken by AERA for the 1st Control Period (F.Y 2009-2014) was absolutely correct because as per the terms of contract, "S" is equal to 30% of gross revenue generated by MIAL from the Revenue Share Assets. During the 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.

199. Other stakeholders have altered their stand 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

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.

200. As a result, 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, MoCA), "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."

201. The definition of **"Non-Aeronautical Assets"** can be found 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)

202. Therefore, Schedule-6 must be referred to look at non-aeronautical assets 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 MIAL-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.

203. <u>Schedul-6 appended with OMDA</u> reads as under:

"**SCHEDULE 6**

NON-AERONAUTICAL SERVICES

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

<u>Part I</u>

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**)

204. The question that arises at this stage is whether:

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

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

"Interest on Delayed Payments" which is levied by MIAL 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.

205. Therefore, the following definitions are required to be referred: -

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

b. "**Revenue Share Assets"** given in SSA (ANNEXURE A-3(Colly));

c. "**Non-aeronautical assets**" as defined in OMDA (ANNEXURE A-3(Colly)); and

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

206. Therefore, upon collective reading of the 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, MIAL generates revenue by performing Non-Aeronautical Services. Once the revenue is generated, it is upon MIAL to collect and manage the same and in the process, MIAL 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".

207. It is highly appurtenant to keep 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)."

208. The orders passed by AERA (i.e. impugned orders in the present appeals) which are the 2nd Tariff Order and 3rd Tariff Order dated 29th September, 2016 and 27th February, 2021 for 2nd and 3rd Control Period respectively, have failed to appreciate the aforesaid clear provisions of the agreements (OMDA as well as SSA).

209. Respondent No.1 has raised the contention 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 MIAL through joint ventures set up with other group entities of MIAL who are carrying non-aeronautical related services and other non-aeronautical services provided in OMDA which if carried out by MIAL 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).

210. Learned Senior Counsel for the respondent has further contended 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).

211. This kind 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).

212. In a situation where 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.

213. The position is similar in case of interest on delayed payment. This interest on delayed payment is levied by MIAL to ensure efficient timely recovery and fund carrying cost. In fact, this income is not relatable to rendition of any services by MIAL 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 MIAL to pursue for recovery of the outstanding amount due to MIAL and also from effectively investing the surplus funds in any manner, which will not be in the interest of any party.

214. AERA is required to maintain consistency in their approach. During First Control Period, "other income" of the appellant was not treated as part of revenue from "Revenue Share Assets" and no reasons have been given by AERA for departure from the principles adopted in First Control Period and thus, there is a violation of Section 13(4) of AERA Act, 2008. Unjustifiably inconsistent interpretations of the rules of the game are more problematic, in so far as they create severe uncertainty and unpredictability in the making of investments and for national regulatory choice. AERA cannot take different view in different Control Periods.

Certainty of regulatory philosophy is key to create a predictable environment for clarity to all the stakeholders. If different approaches are adopted for different Control Periods, it will lead to uncertainty which will ultimately lead to unwarranted increase in litigation. As a result, it will be the end consumer who would be at sufferance. We are of the opinion that such unnecessary and unwarranted litigation needs to be curbed which can only happen when the regulator (AERA) strictly maintains consistency in its approach.

215. "Other income" has been treated as a part of revenue from revenue share assets in the 2nd Control Period, 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.

216. It is important to note here that 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.

217. Furthermore, looking to the impugned orders for 3rd Control Period, AERA has trued-up the surplus generated in the 2nd CP and has considered the time value of surplus. The year wise carrying cost at the rate of 11.80% **has already been considered** by AERA in true up exercise done.

218. Therefore, at the time of 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.

219. Learned Senior Counsel for the respondent has argued out the matter at length and submitted 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 appellant-MIAL.

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;

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 MIAL 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".

220. It has been held by Hon'ble the Supreme Court of India 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)

221. Therefore, in light of the aforesaid decision of the apex court, 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.

222. In its judgment dated 22nd December, 2022, this tribunal 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.

223. Hon'ble the Supreme Court of India in its judgment of P. Kasilingam Vs. PSG College of Technology reported as **(1995) Suppl.2 SCC 348** in para 19 of the judgment has observed that:

> **"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**)

224. In light of the aforementioned decision of Hon'ble the Supreme Court of India, once the definition of "Revenue Share Assets" states "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. We, therefore, direct AERA to give true-up for 2nd and 3rd Control Periods for "Other Income" as stated hereinabove.**

225. Learned senior counsel for the respondent has further argued 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 MIAL-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-3(Colly)), the said term is a pre-defined terminology and it does not encompass within its sphere, the interest income and dividend income.

226. In light of the aforesaid, **"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.

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

ISSUE NO. VIII

CONSIDERED AERONAUTICAL ASSET ALLOCATION AT 83.97%

FOR FY 2013-14

228. Regulatory Base has been defined in Schedule-1 of SSA (Annexure A-4 of the memo of AERA Appeal No.9 of 2016). This includes only aeronautical assets, therefore, aeronautical assets and non-aeronautical assets must be separated to arrive at target revenue as per the following formula:

"TR = RB x WACC + OM + D + T – S"

229. As per Schedule-5 of OMDA (Annexure A-3(Colly) to the memo of AERA Appeal No. 9 of 2016), aeronautical services have been enlisted. Therefore, assets which have been defined as aeronautical assets in OMDA and used for aeronautical services are treated as aeronautical for e.g. lifts, escalators, passenger conveyers etc. have been included in Schedule – 5 of OMDA and hence, they are included under the aeronautical assets.

230. Similarly, assets used for the provision of non-aeronautical services which are enumerated in Schedule-6 of OMDA are treated as non-aeronautical assets.

231. Now, under this heading of dispute we are concerned with assets that cannot be identified purely as aeronautical or as non-aeronautical and they are classified as **"common assets".** Common assets located in terminal building are allocated to Aeronautical and Non-aeronautical based on the ratio of floor area of Terminal Building allocated to Aeronautical and Non-aeronautical activities.

232. Initially, AERA applied 85.6% ratio for the FY 2013-2014 for bifurcating Aeronautical and Non-aeronautical assets for the entire terminal building of Terminal-2. In fact, Aeronautical, Non-aeronautical and Common Assets should have been bifurcated and thereafter the ratio should have been made applicable to the common assets only. This error was pointed out by the appellant to AERA.

233. As regards allocation of Terminal-2 cost, AERA had appointed a consultant ICWAI – MARF. This consultant appointed by AERA had identified specifically Aeronautical and Non-aeronautical assets as per Schedule 5 and 6 of OMDA. Some of the assets within the terminal building were treated as common assets. Thus, the exercise carried out by ICWAI -MARF, which is a consultant appointed by AERA, has first of all bifurcated –

(i) Aeronautical assets (as per schedule-5 of OMDA);

(ii) Non-aeronautical assets (as per schedule-6 of OMDA);

(iii) Common assets

234. Initially, ICWAI-MARF had applied ratio of common assets which was prevailing at Teriminal-3 Delhi Airport. This ratio of bifurcation of the common assets into Aeronautical and Non-aeronautical assets was applied to new terminal-2 of CSMIA, Mumbai. The ratio used by ICWAI-MARF was 82.7%:17.3%. This temporary bifurcation was made on the basis of terminal T-3 of Delhi Airport ratio which was applied to new Terminal T-2 building of CSMIA, Mumbai because certain details were to be given by this appellant and pending the receipt of details from the appellant, this ratio of 82.7%:17.3% was borrowed from Terminal T-3 building of Delhi Airport and was tentatively applied to new Terminal T-2 building of CSMIA, Mumbai.

235. Now, subsequently the appellant commissioned a study by Indian Register of Shipping (IRS). This IRS carried out an independent verification of areas built at New Terminal T-2 building. As per IRS report, total Non-aeronautical services' floor area is 14.43% of the total area of new Terminal T-2 building and 85.57% area was used for aeronautical services. It is, therefore, contended by the appellant that

AERA ought to have used area of 85.57%:14.43% instead of 82.7%:17.3%.

236. Now, AERA accepted the ratio of 85.57%:14.43%, but, this ratio was meant for only the common assets because, in this ratio the common assets were to be identified as aeronautical and non-aeronautical from common assets. In fact, even ICWAI-MARF (a consultant who was appointed by AERA) had initially identified Aeronautical assets and thereafter had identified Non-aeronautical assets and thereafter had identified common assets (which are having mixed use as Aeronautical and Non-aeronautical).

237. Under this heading of asset allocation ratio, we are only concerned with the bifurcation of identification of the common assets in the Aeronautical and Non-aeronautical assets and therefore, the ratio of asset allocation is to be applied only to the common assets. This aspect of the matter has not been properly appreciated by AERA and the ratio of 85.57%:14.43% has been made applicable to all the assets. This is not permissible in the eyes of law.

238. Asset allocation ratio as per Indian Register of Shipping which is 85.57%:14.43% should have been applied to the common assets and not to the whole of Terminal T-2 at CSMIA, Mumbai.

239. At Terminal T-2 at CSMIA, Mumbai, firstly aeronautical assets should have been bifurcated thereafter non-aeronautical assets should have been bifurcated as per provisions of Schedule 5 and Schedule 6 of OMDA and there are few assets which are common assets that are used for aeronautical services as well as for non-aeronautical services and, therefore, there is a need to apply, asset allocation ratio, to the common assets only. AERA has applied the common asset ratio of 85.57%:14.43% to the whole of Terminal T-2 of CSMIA, Mumbai which is an error on the part of AERA.

240. Moreover, as per respondent no.1, opening aeronautical asset allocation for 2nd Control Period as on 01.04.2014 is 89.59% and thereafter it is submitted by the counsel for the appellant that whatever may be opening asset allocation for 2nd Control Period, the same must be the allocation ratio for closing of 1st Control Period. The respondent had treated the closing asset allocation ratio for the FY 2013-2014 as 83.97% **whereas** the opening asset allocation ratio for the FY 2014-2015 is 89.59%. This is also an error on the part of AERA.

241. The calculation of closing RAB for the FY 2013-2014 and calculation of opening RAB of FY 2014-2015 reads as under:

Particulars (Rs. Cr)		Calculation of Closing RAB of FY13-14	Calculation of Opening RAB of FY14-15
Gross Block	a	10967	10967
Asset Allocation Ratio	b	83.97%	89.59%
Aero Gross Block	c=axb	9209	9825 **(*)**
DF Assets	d	3400	3400
Assets Disallowed by AERA	e	46	
Aero Gross Block (net of DF and disallowed assets)	f=c-d-e	5763	6425
Accumulated Depreciation	g	564	1226 **(**)**
Closing RAB of FY13-14	H=f-g	5198.7 **(***)**	5198.7 **(****)**

(*) Vol- II, Pg. 219-220 of the TCP Appeal; Internal Pg. 89-90 of the Impugned Order [Para 3.4.61 Table 51: Opening Aero Gross Block of assets as on 1st April 2014]

(**) **Vol- II, Pg. 219-220 of the TCP Appeal; Internal Pg. 89-90 of the Impugned Order** [Opening Aeronautical Gross Block of assets as on 1st April 2014 (after netting off Development Fee)]

(***) Vol-II, Pg. 127 & 129 of the SCP Appeal; Internal Pg. 46-47 of the Impugned Order [Para 3.41, Table 9 row D]

(****) Vol-II, Pg.219-220 of the TCP Appeal; Internal Pg. 89-90 of the Impugned Order [Table 51: Opening RAB as on 1st April 2014]

242. Learned Senior Advocate appearing on behalf of respondent no.1 submitted that the respondent has calculated the asset allocation ratio on the opening aeronautical assets at Rs.9825.09 Crores for the FY 2014-2015 and AERA is unable to reconcile the difference in absence of necessary information because at the time of closing of FY 2013-2014, the figure was Rs.9209 Crores. This contention is not accepted by this Tribunal mainly for the reason that while passing the 3rd Control Period order, AERA has in their Tariff Order No.64/2020-21 for the 3rd Control Period dated 27.02.2021 (which is challenged in AERA Appeal No. 2 of 2021) mentioned in table no.51 in paragraph 3.4.61 accepted the figure of 9825.09 Crores as opening aero assets as on 01.04.2014.

243. In view of the aforesaid facts and reasons, the contention of the learned senior advocate for respondent no.1 that the figure reads at Rs.9209 Crores is not accepted.

244. For the ready reference, calculation of allocation of asset ratio of 84.52% calculated by ICWAI-MARF (consultant appointed by AERA for computation of asset allocation) in consultation paper reads as under:

Allocation of 84.52% as calculated by ICWAI MARF in Consultation Paper (consultant appointed by AERA for computation of asset allocation)

Asset Allocation as per ICWAI MARF Study		Total Assets	Asset Allocation	Aero Assets
Terminal 2 Assets				
Aero	a	1578	100%	1578
Non-Aero	b	30	0%	0
Common	c	4583	82.7%*	3790
Other Assets				
Aero	a1	3583	100%	3583
Non-Aero	b1	814	0%	0
Common	c1	377	84.1%	317
Total Assets				
Aero	A=a+a1	5161		5161
Non-Aero	B=b+b1	845		0
Common	C=c+c1	4960		4107
Total	A+B+C	10966		9268
Asset Allocation				84.52%

*82.7% allocation is based on Delhi Airport

245. The report of Indian Register of Shipping (IRS) (Consultant appointed by MIAL) which reveals allocation ratio for common asset as 85.6% gives the following resultant effects:

Asset Allocation as per MIAL		Total Assets	Asset Allocation	Aero Assets
Terminal 2 Assets				
Aero	a	1578	100%	1578
Non-Aero	b	30	0%	0
Common	c	4583	85.6%**	3922
Other Assets				
Aero	a1	3583	100%	3583
Non-Aero	b1	814	0%	0
Common	c1	377	84.1%	317
Total Assets				
Aero	A=a+a1	5161		5211*
Non-Aero	B=b+b1	845		0
Common	C=c+c1	4960		4239
Total	A+B+C	10966		9450
Asset Allocation				86.17%

** Additional 49.8 Cr asset reclassified by AERA to aeronautical classified as non-aero in ICWAI MARF study*
*** As per IRS study*

246. Now, 85.6% of asset allocation ratio given by IRS has been accepted by AERA, but, AERA has committed an error in applying this ratio to the whole of Terminal T-2 of CSMIA, Mumbai. If this ratio of 85.6% is applied to the whole of Terminal T-2 of CSMIA, Mumbai, which in fact was to be applied to common assets only, the whole calculation will be changed and the overall percentage of the asset allocation ratio comes to only 83.97%. The calculation as per AERA's application of 86.5% of asset allocation ratio to the whole area of T-2 Terminal of CSMIA, Mumbai reads as under:

Allocation of 83.97% as calculated by AERA by wrongly considering 85.6% terminal area on total cost of T2

Asset Allocation as per AERA		Total Assets	Asset Allocation	Aero Assets
Terminal 2 Assets				
Aero	a	1578	85.6%	1351
Non-Aero	b	30	85.6%	26
Common	c	4583	85.6%	3923
Other Assets				
Aero	a1	3583	100%	3583
Non-Aero	b1	814	0%	0
Common	c1	377	84.1%	317
Total Assets				
Aero	A=a+a1	5161		4984*
Non-Aero	B=b+b1	845		26
Common	C=c+c1	4960		4240
Total	A+B+C	11016		9250
Asset Allocation				83.97%

* Additional Rs 49.8 Cr asset reclassified by AERA to aeronautical classified as non-aero in ICWAI MARF study.

AERA mistakenly has added Rs 49.8 Cr to aero assets, but inadvertently has not reduced it from non-aero assets, increasing total assets from Rs 10966 Cr to Rs 11016.

247. In view of these facts and reasons, we hereby quash and set aside the aeronautical asset allocation ratio fixed by AERA.

248. Nowhere AERA has ever pointed out that the report given by Indian Register of Shipping (IRS) which is annexed as Annexure A-11 to the memo of AERA Appeal No.9 of 2016 was fraudulently obtained or was erroneous. On the contrary, the ratio fixed by IRS consultant which is 85.57%:14.43% has been accepted by AERA, but, it has been wrongly applied to the whole of new T-2 terminal building at CSMIA, Mumbai. In fact, this ratio has to be applied to the common assets only. **Thus, out of the total assets, firstly aeronautical assets should have been bifurcated. Simultaneously, Non-aeronautical assets should have been bifurcated. Consequently, Common Assets (which are both aero and non-aero assets) shall be identified. "Asset Allocation Ratio" should be applied to Common Assets so as to bifurcate aeronautical assets and non-aeronautical assets out of Common Assets. We, therefore, direct AERA to follow 85.57%:14.43% ratio for the Common Assets of T-2 only, which will result into overall aeronautical assets ratio of 86.17%.**

249. Thus, Issue No. VIII is answered in negative i.e. the decision of AERA to consider Aeronautical Asset Allocation Ratio at 83.97% for FY 2013-14 and all years of 2nd Control Period and Allocation ratio at 85.57% for South East Pier of Terminal 2 is incorrect, improper and not justified and suitable directions have already been given as stated hereinabove.

ISSUE NO. IX

METHODOLOGY FOR MONITORING QUALITY OF SERVICE

250. Learned Senior Advocate Mr. Sajan Poovayya for the appellant submitted that AERA cannot lay down new standards for the quality of service. Learned Senior Advocate appearing on behalf of the appellant submitted that it is beyond the power, jurisdiction and authority of AERA to lay down standards of quality of services. Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of respondent no.1 submitted that AERA has not laid down any standards of services as maintained by the service provider-appellant. AERA is only intending to monitor the performance of standards relating to quality, continuity and reliability of the standards of services which are fixed by the competent authorities. AERA never fixes the standards of services for this appellant, but, if the

competent authority has already prescribed the standards of services to be performed by this appellant, only those standards shall be monitored by AERA.

251. In view of these submissions by Learned Senior Advocate for respondent no.1 that no new standards for services to be rendered by the appellant is going to be prescribed by AERA, **counsel for appellant is not pressing this issue at this stage because as and when AERA prescribes any new standards of services to be performed by this appellant, the same shall be challenged by the appellant in accordance with law before the appropriate forum. Thus, Issue No. IX is answered as per above observations.**

ISSUE NO. X

AVERAGE DEPRECIATION ON AERONAUTICAL ASSETS INSTEAD OF ACTUAL DEPRECIATION ON EACH OF THE AERONAUTICAL ASSETS

252. Learned Senior Advocate Mr. Sajan Poovayya appearing for MIAL submits that AERA has committed an error in applying average depreciation on Aeronautical Assets instead of actual depreciation on

each of the Aeronautical Assets. Learned Senior Advocate appearing for the appellant also submits that assets ought to have been verified by AERA and asset wise depreciation should have been calculated and, therefore, the decision of AERA to apply average depreciation on aeronautical assets deserves to be quashed and set aside.

253. This contention of the counsel for the appellant is not accepted by this Tribunal mainly for the reasons that:

i. Appellant has not objected in time, to the approach adopted by respondent no.1-AERA, during consultation process.

ii. Respondent No.1 has been consistently following the asset allocation based on a single ratio, for all the assets together, instead of a detailed asset by asset summation for the purpose of consistency, simplicity and calculation.

iii. The same methodology has been adopted for 1st Control Period (2009-2014) as well as for 2nd Control Period (2014-2019). Mainly for the reason that CSMIA, Mumbai is fully developed and matured airport and, therefore, there is no major change in overall layout and usage pattern which affects the segregation between aero and non-aero assets from one year to another.

iv. An independent study was also conducted and the report of the said independent study was accepted and adopted by AERA. This report was relied upon for determination of asset allocation and the same was made part and parcel of Consultation Paper. This appellant was given enough time for submission of multi-year tariff proposal for CSMIA. Consultation paper was published on 21.09.2020 and the extension of the time was granted by AERA to appellant for submissions in response to the Consultation Paper till 20.11.2020.

254. In view of the aforesaid reasons, no error has been committed by AERA in applying average depreciation on aeronautical assets as this methodology has already been pointed out in the Consultation Paper published on 21.09.2020 and even up to the extended time limit of 20.11.2020, the objection which is raised in the present appeal was never raised before AERA.

255. It is contended by Learned Senior Advocate for the appellant that they had submitted objection in the month of December, 2020 which is much prior to the passing of the order about the average depreciation applied by AERA to the aeronautical asset. **This contention is not accepted by this Tribunal mainly for the reason that this**

appellant has failed to submit the responses to the Consultation Paper on the aforesaid point within the extended time limit, therefore, no error has been committed by AERA in applying average depreciation to the aeronautical assets which was already followed in 1st Control Period as well as in 2nd Control Period.

256. Thus, Issue No. X is answered in affirmative i.e. the decision of AERA to apply average depreciation on Aeronautical Assets instead of actual depreciation on each of the aeronautical assets is correct, proper and justified.

ISSUE NO. XI

COMPUTING CARRYING COST ON REVENUE GAP (DIFFERENCE BETWEEN ACTUAL REVENUE COLLECTED AND TARGET REVENUE) FOR FIRST CONTROL PERIOD (FY 2009-14) AND SECOND CONTROL PERIOD (FY 2014-19)

257. Learned Senior Advocate for the appellant submitted that AERA has computed carrying cost on the revenue gap assuming it to be originating at the very beginning of that year. In fact, AERA should have

calculated carrying cost on the revenue gap, excluding that year in computation of carrying cost. This contention of MIAL-Appellant, is not accepted by this Tribunal mainly for the reason that respondent no.1 has not made any changes to discount factor used in MYTP submitted by the appellant themselves. The same methodology has been applied in 1st Control Period and in 2nd Control Period which is consistent, even by appellant's own admission in their averments and in accordance with Schedule – 1 of the State Support Agreement. Moreover, appellant had not made this request in its response to the Consultation Paper nor in revised responses filed by this appellant to the Consultation Paper. It is further pertinent to note that difference in the methodology for the computation of carrying cost on revenue gap between Delhi International Airport Limited and that of the appellant is merely an assumption, as in both cases, consistency has been maintained by the Respondent No. 1, by way of following the norms of true up of the previous control period, in consonance with the State Support Agreement in Schedule 1 and in adherence with the formulae for Target Revenue that takes into consideration the component "i" which denotes the year in which investment/expenditure has occurred.

258. In view of the aforesaid reasons, no error has been committed by AERA in computation of carrying cost on revenue gap for 1st Control Period as well as over recovery into consideration from the year when such under recovery or over recovery occurred and necessary true-up shall be made accordingly.

259. Thus, Issue No. XI is answered in affirmative i.e. no error has been committed by AERA in computing carrying cost on average gap for 1st and 2nd control periods.

ISSUE NO. XII

DECISION OF AERA TO EXCLUDE THE EXPENDITURE ON RE-CARPETING OF RUNWAY, TAXIWAYS, APRON FOR FIVE YEARS, THEREBY DENYING RETURN ON RAB ON THE UNAMORTISED PORTION OF SUCH EXPENDITURE

260. It is submitted by Learned Senior Advocate Mr. Meet Malhotra appearing on behalf of the AERA that amortization over five years period is to ensure that the expenditure does not affect the tariff in a single year and, therefore, it is evenly spread across the period of five years,

but, the appellant is losing the earning on return on the unamortised portion of the expenditure over the re-carpeting of the runway.

261. AERA has decided that the expenditure incurred by the appellant over re-carpeting of runway should be divided over a period of five years or should be spread over a period of five years so that in one year, if the whole amount allowed to be recovered is a part and parcel of target revenue, the heavy burden will be on the stakeholders in a particular year i.e. the year in which the expenditure is incurred for re-carpeting the runway.

262. Thus, in view of the approach adopted by AERA, if Rs.100 Crores is for re-carpeting the runway then AERA has proposed to recover Rs.20 Crores in each of the FYs during one Control Period meaning thereby to, every FY the appellant will be permitted to collect Rs.20 Crores from the stakeholders as Operation and Management cost (OM in the formula of target revenue) is as under:

"TR = RB x WACC + OM + D + T – S"

263. Learned Senior Advocate appearing on behalf of respondent no.1 has placed upon order no.35/2017-18 dated 12.01.2018 and has submitted that if the appellant is restoring the original PCN value

(pavement classification number) then the amount of expenditure will be amortized over the period of five years whereas if the PCN value is increased of the runway then expenditure will be treated as capital expenditure.

264. Having heard the counsels appearing for both the sides and looking to the contentions raised by counsels for both the sides, it appears that the appellant does not have much objection for amortization of expenditure incurred by the appellant for re-carpeting runways, but, the treatment which is given by AERA that amortized amount is permitted to be recovered without any carrying cost is the bone of contention under this issue.

265. Consistently AERA had followed the calculation of carrying cost. The formula for calculation of carrying cost remains the same because the methodology remains the same across all the airports.

266. AERA has treated the expenses towards re-carpeting runway as Operating Expenses **(OM).**

267. The State Support Agreement (SSA) provides for the computation of **X factor** in order to smooth out the effect over the period of five years.

268. Order No.35/2017-18 of AERA requires amortization of the amount spent on resurfacing the runway over a period of five years which is a standardised norm for tariff purposes, but, the same is not derived from accounting principles.

269. Amortization of expenditure over a period of five years is not a matter of dispute, but, the unamortized portion of such expenditure should be treated with carrying cost as per accounting norms and principles and carrying cost upon unamortised expenditure is not given to this appellant or is not allowed to be retained by this appellant as per aforesaid target revenue formula then the appellant will recover lesser amount than the actual expenditure incurred by appellant in re-carpeting runways.

270. Learned Senior Advocate appearing on behalf of respondent no.1 submitted that as per Order No.35/2017-18 dated 12.01.2018, AERA has amortized the amount of expenditure and, therefore, no carrying cost can be given or no return on RAB on unamortized portion of such expenditure can be given to the appellant. This contention of the counsel for respondent no.1 is not accepted by this Tribunal mainly for the reasons that:

a) The expenditure incurred for re-carpeting of runway is an expenditure towards operation and management and, therefore, will be treated as OM in the following formula of target revenue: -

"TR = RB x WACC + OM + D + T – S"

b) Operation and management cost is allowed to be recovered as per aforesaid target revenue formula by the airport operator – appellant in the very same year, but, because of Order No. 35/2017-18 dated 12.01.2018, the expenditure for re-carpeting is to be amortized for over a period of five years.

c) The return ought to be given to the appellant on RAB of the unamortized portion of such expenditure otherwise the following situation will emerge i.e. if total cost of runway re-carpeting is Rs.100 Crores, effectively, the appellant will be able to recover only Rs.70.67 Crores at the end of the fifth year of the Control Period if Order No. 35/2017-18 dated 12.01.2018 is mechanically followed as is explained in the following figure:

	Year 1	Year 2	Year 3	Year 4	Year 5
Total Cost of Runway Recarpeting	100				
Amortized Cost as per AERA Approach	20	20	20	20	20
WACC (as determined by AERA)	12.81%	12.81%	12.81%	12.81%	12.81%
Year Number	1	2	3	4	5
Discounting Factor	0.89	0.79	0.70	0.62	0.55
Discounted Value of Amortized Cost	17.73	15.72	13.93	12.35	10.95
Effective Cost allowed by AERA	70.67				

d) In view of the aforesaid illustration, if there is amortization simplicitor, though Airport Operator (AO - MIAL) incurred expenditure of Rs.100 Crores, effective recovery at the end of five years for the control period billing will be at Rs.70.67 Crores, therefore, on the unamortized portion of such expenditure, return on RAB shall be calculated by AERA in the aforesaid formula of target revenue.

e) Thus, if out of Rs.100 Crores, Rs.20 Crores is permitted to be recovered by this appellant upon the remaining Rs.80 Crores, carrying cost should have been allowed by AERA or return on RAB on Rs.80 Crores should have been allowed by AERA.

271. This aspect of the matter has not been properly appreciated by AERA and hence, we hereby quash and set aside the decision of AERA of exclusion of expenditure on re-

carpeting of runways, taxiways, apron amortized in a regulatory asset base over the period of five years and thereby denying return on RAB on the unamortized portion of such expenditure. We, therefore, direct AERA to allow the airport operator (appellant) the return on RAB on the unamortized portion of expenditure on re-carpeting of runways/ taxiways/ apron. By no stretch of imagination it can be said that there has been violation of Order No. 35/2017-18 dated 12.01.2018 because this order is not renovating the basic standards of norms and principles of accounting. It ought to be kept in mind that carrying cost upon unamortized portion of expenditure towards re-carpeting of the runways should have been allowed by AERA. Denying return on Regulatory Asset Base on unamortized portion of such expenditure is not permissible, otherwise as stated hereinabove simply, if Rs.100 Crores is divided by 5 (Rs.100 Crores ÷ 5), then every year Rs.20 Crores is permitted to be recovered, in that eventuality only Rs.70.67 Crores will be effectively recovered by airport operator against the expenditure of Rs.100 Crores and, therefore, even if Order No. 35/2017-18 dated 12.01.2018 is applied for amortization of expenditure over a period of five years, there is no ban or bar

which puts prohibition on the part of AERA to allow carrying cost on unamortized portion of such expenditure or allowing return on RAB on the unamortized portion of such expenditure.

272. Thus, Issue No. XII is answered in negative i.e. the decision of AERA to deny, inclusion of expenditure on re-carpeting of runways/taxiways/apron amortized in RAB over a period of five years is incorrect, improper and not justified and we have given suitable directions to AERA as stated hereinabove.

ISSUE NO. XIII

DECISION OF RESPONDENT NO.1 AERA TO NOT CHANGE ASSET ALLOCATION RATIO DUE TO (I) RE-CLASSIFICATION OF THE CHHATRAPATI SHIVAJI MAHARAJ STATUTE; (II) CORRECTION IN AREA OF TERMINAL T-1; AND (III) CATEGORISED GENERAL AVIATION TERMINAL RELATED CAPEX AS NON-AERONAUTICAL ASSET INSTEAD OF COMMON ASSET

273. Learned Senior Advocate appearing on behalf of the appellant submitted that asset allocation ratio should be changed because of re-classification of Chhatrapati Shivaji Maharaj Statute, Mumbai (CSM statute). The expenditure of shifting of CSM Statue was considered as aeronautical expenditure because it necessitates for the aeronautical services and, therefore, it is fairly submitted by Learned Senior Advocate appearing on behalf of respondent no.1-AERA that consequential change required in asset allocation ratio on account of re-classification of CSM statute, but, it has only a fraction of 0.17% change in ratio which is having insignificant impact on the final tariff computation. Nonetheless it is fairly submitted by Learned Senior Advocate for AERA that AERA will consider it as an aeronautical expense and will true up in the next Control Period. It will be considered as RAB, thus, the expenditure towards shifting of CSM statue will be considered as RAB and necessary true -up shall be given in the next 4th Control Period. As per the appellant, aeronautical RAB of the appellant has increased by Rs.25 Crores. We, therefore, direct AERA to treat the expenditure for shifting CSM statue as RAB and necessary true-up shall be given in 4th Control Period.

274. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that they have provided comments during the Consultation process that area admeasuring 5510 sq.mt. which was found excluded should be added in Terminal-1 and, therefore, instead of 97621 sq.mt. it should have been 103131 sq.mt. (97621+5510).

275. Learned Senior Advocate appearing on behalf of respondent no.1 submitted that this will have insignificant effect upon the asset allocation ratio. As per respondent, asset allocation ratio will change from 82.58% to 82.59%, whereas as per the appellant the asset allocation ratio will be changed from 82.58% to 82.79%.

276. The addition of 5510 sq.mt area which was excluded, if added in an area of Terminal-1 at CSMIA, Mumbai, the calculation will be as under:

	As per IR Class	Adjustment Required	Actual
Total Area (m^2)	97,621	5,510#	1,03,131
Commercial Area (m^2)	10,386	-	10,386
% of Non-Aeronautical Area	10.64%	-	10.07%

#comprising of Arrival Forecourt of 2236 m^2 and T1 utility area of 3274 m^2.

277. Learned Senior Advocate appearing on behalf of the appellant submitted that under the aforesaid heading, the asset allocation ratio requires to be reappreciated by AERA on three different grounds and cumulative effect will be substantial one upon asset allocation ratio.

278. In view of these effects, we hereby quash and set aside the decision of AERA ignoring the change of asset allocation ratio because of addition of 5510 sq.mt. of area in the area of Terminal -1 of Mumbai Airport. We hereby direct AERA to recalculate the asset allocation ratio after inclusion of 5510 sq.mt. area in the area of Terminal-1 at Mumbai Airport. Initially, AERA has considered 97,621 sq.mt. and by addition of 5510 sq.mt. area the total area will come to 1,03,101 sq.mt. On this basis, we hereby direct AERA to recalculate the asset allocation ratio and necessary true up shall be given in the next Control Period.

279. It is submitted by Learned Senior Advocate appearing on behalf of the respondent that General Aviation Asset shall be treated as nonaeronautical asset by AERA. The general aviation asset is basically meant for private aircrafts as per Part-I of Schedule-6 of OMDA. General aviation services is a non-aeronautical services and, therefore, AERA has submitted that there will be no change in asset allocation ratio in general aviation.

280. In fact, general aviation is meant for private aircrafts but they are also using runways which is purely aeronautical asset and other purely aeronautical assets and, therefore, in fact general aviation assets should be treated as **"common assets".** Passengers of private planes are also using aeronautical assets before reaching and using their private planes or aircrafts and, therefore, general aviation assets ought to have been treated as common assets. The landing and parking charges for the private aircrafts are considered as aeronautical in nature. Even in terminal area there are certain portions for non-aeronautical activities.

281. Learned Senior Advocate appearing on behalf of the appellant submitted that general aviation terminal assets have been classified in Fixed Assets Register (FAR) as common assets by respondent no.1 in calculation of weighted average aeronautical area of all terminals (T-1, T-2 and GA).

282. Moreover, this ratio has been applied by AERA on common assets of airport for calculation of their aeronautical cost, but, while doing asset classification, AERA has treated general aviation assets as non-aeronautical. This is the inconsistent approach of AERA. **We, therefore, direct AERA to treat general aviation asset as common asset because private aircrafts are using runways, their parking place**

is also utilised by these private aircrafts which are all aeronautical assets. Thus, necessary asset allocation ratio will be calculated by AERA in 4th Control Period on actual basis.

283. Thus, Issue No. XIII is answered accordingly and we have given suitable directions as stated hereinabove.

ISSUE No. XIV

NON-INCLUSION OF CORPORATE COST ALLOCATION UNDER OPERATING EXPENSES

284. It is submitted by Learned Senior Advocate appearing on behalf of the appellant that the Adani Group is one of the largest infrastructure player in India and has executed, operated and managed the assets of varied complexities. Its execution and management capabilities are ably backed by its corporate resources which provide Leadership & Governance, Business Sustenance support and Functional & Managerial support to various group businesses. The cost pertaining to common resources of Adani Group, which are utilized by all Adani Group companies, is required to be allocated on all such companies.

285. Learned Senior Advocate appearing on behalf of AERA has submitted that corporate cost projected has to be incurred by this appellant under the operating expense. If the operating cost is paid by the appellant, then only it can be included in the operation and management expenses as OM in the target revenue formula. AERA's decision is incorrect and untenable for the following reasons:

> (i.) In respect of corporate services, the Appellant is expected to receive corporate support from the common resources available at the Adani Group, in respect to Human resource management, Administration, Treasury, Taxation, Fund Raising, Information Technology, Master Data Migration, Management Audit and Assurance, Governance Risk and Compliance, Legal Support, Corporate Communication, Crisis Management, Central Procurement, etc. and even if these services were procured from external agencies/consultants, they will bill the charges for their services.
>
> (ii.) These expenses are genuine and are necessary to carry out the day-to-day business operations & functions. The payments for these services are against the invoices raised by respective Group companies who provide their expertise. Therefore, these expenses are regular business expenses and ought not to be disallowed merely because these are termed 'corporate expenses', being the expenses incurred by the Appellant in utilizing the services and resources of its Parent/Group companies.

(iii.) Cost Allocation process is prevalent and a common practice across all the industries operated by big business houses including private airport entities and AAI. The Respondent No.1/AERA has been consistently allowing the allocated corporate expenses for various airport entities including DIAL and AAI.

286. AERA has considered corporate cost allocation methodology for Mangaluru International Airport Ltd. and also for Ahmedabad International Airport Ltd. during the tariff determination process. AERA should have consistent approach to allow the corporate cost for the appellant for the reasons stated hereinabove. **We, therefore, quash and set aside the decision of AERA not to include the corporate cost under the operating expenses. We, therefore, direct AERA that it shall include corporate cost under operating expenses, on actual basis for 3rd Control Period (2019-2024) and necessary true up shall be given in 4th Control Period.**

287. Thus, Issue No. XIV is answered in negative i.e. the decision of AERA not to include the Corporate Cost Allocation under the Operating Expense is incorrect, improper and not justified.

ISSUE No. XV

DECISION OF AERA TO DISALLOW THE OPERATION AND MAINTENANCE EXPENSES TOWARDS INTEREST OF WORKING CAPITAL, RE-STRUCTURING EXPENSES AND INSURANCE EXPENSES

288. Learned Senior Advocate appearing on behalf of the appellant has submitted that when MYTP (Multi-Year Tariff Proposal) was sent by the appellant on 07.06.2019, the activities were going on regularly and therefore, appellant was not expecting to avail the working capital loan (because of outbreak of Covid-19, a worldwide pandemic and its aftermath). As a result of liquidity crunch, working capital loan was necessitated and, therefore, though working capital loan was not highlighted in MYTP during consultation process, this aspect of the matter was pointed out by AERA. Similarly, financing charges were also not appreciated by AERA during 3rd Control Period. This was also highlighted during consultation process before AERA because of restructuring of loans and the financing charges paid to the financial consultants for restructuring. This amount ought to have been allowed as operation and maintenance expenses as **OM** in target formula.

289. Similarly, insurance expense incurred by this appellant has also not been treated as operation and maintenance expense. Paragraph 45 and 48 of the written submission filed by respondent no. 1 in AERA Appeal No.2 of 2021 reads as under: -

> "45. Reliance is placed on [**V-III @ Para 6.2.25 @ Page 352**] wherein the Respondent No. 1 categorically notes that no working capital interest calculation was proposed and as and when the same is required, it would be reviewed in the next control period, based on the actual incurrence, together with necessary need justification and evidence of the same.
>
> 48. Furthermore, it is reiterated, that these issues and the true-up of the O&M Expenses would be computed in the next control period on actuals and the Respondent No. 1, cannot be expected to do the adjustments in a pre-emptive and ad hoc manner, in the middle of tariff year, at the cost of the other stakeholders."

290. Having heard the Learned Senior Advocates appearing for both the sides and looking to the facts and circumstances of the case, it appears that working capital loan was necessitated because of outbreak of COVID -19 worldwide and because of its aftermath. The interest on this working capital loan ought to have been treated as operation and maintenance expenses (OM). Even if it is not mentioned in multi-year tariff proposal, but, when this aspect of the matter was highlighted during consultation process, the same ought to have been appreciated

by AERA on actual basis. Now, we have already reached at the end of 3rd Control Period and we, therefore, direct AERA to consider interest on working actual loan taken by this appellant as operations and maintenance cost in 4th Control Period and necessary true-up shall be provided by AERA for this OM incurred by this appellant during 3rd Control Period.

291. Similarly, the financing charges, actually paid by this appellant to the financial consultant for restructuring of the loan should also be treated as operation and maintenance expenses. The restructuring of loan was a necessary expenditure for running Chhatrapati Shivaji Maharaj International Airport, Mumbai (CSMIA) efficiently. This aspect of the matter was also highlighted during the consultation process by the present appellant though it was not a part of MYTP. We, therefore, direct AERA to consider financing charges incurred by this appellant during 3rd Control Period as a true-up in 4th Control Period on actual basis.

292. Similarly, insurance expense has not been considered by AERA. There is an increase in the insurance cost due to subsequent developments like change in insurance rates, post submissions of MYTP after 07.06.2019. This insurance expense is also required and necessary

to be incurred by this appellant for efficient operation and management of CSMIA, Mumbai. As we have already reached the end of year 2023 and consequently at the end of 3rd Control Period, we, hereby, direct AERA to consider insurance expenses incurred by this appellant during the 3rd Control Period as true up in 4th Control Period on actual proof of such expenditure laid before AERA i.e. on actual basis.

293. Thus, Issue No. XV is answered in negative i.e. the decision of AERA in disallowing the operation and maintenance expenses towards interest on working capital, restructuring expenses and insurance expenses is incorrect, improper and not justified. We have given suitable directions under this issue as stated hereinabove.

ISSUE No. XVI

DECISION OF AERA TO DISALLOW RETURN ON ASSETS DISPOSED OF DURING THE YEAR, BASED ON ACTUAL USAGE IN THE YEAR

294. AERA has not allowed the return on assets based on actual usage of assets which are disposed of during the year meaning thereby to if

any asset has been disposed of (i.e. in the month of December), the entire amount on the said disposed of property will be reduced from the total value of assets assuming the same has been disposed of on 1st day of April.

295. It is contended by learned senior advocate for the appellant that if there is any addition of the assets in RAB during the FY, then on actual date of capitalisation of these assets, AERA is calculating RAB but when any asset is disposed of in the month of December, the approach of AERA is inconsistent and AERA is treating such disposal as if it is a disposal on 1st of April for the concerned FY.

296. Learned Senior Advocate for AERA submitted that airport operator had proposed a preventive approach despite the fact that the airport operator has not supplied actual figures to AERA.

297. It is further submitted by learned senior advocate for respondent no.1 that AERA has consistently allowed proportionate depreciation on the basis of actual dates even in 2nd Control Period and the same principle was applied in true up of 2nd Control Period in relation to RAB in the 3rd Control Period and, therefore, as and when the necessary details shall be supplied by the appellant to AERA, true up of the return

on disposed of assets would be carried out proportionately in the subsequent control period.

298. In view of these limited submissions, we hereby direct AERA to appreciate return on assets disposed of during the year based on actual usage in the year meaning thereby to we hereby direct AERA if the asset is disposed of e.g. on first day of December of any FY the same will be treated as disposed of w.e.f. the very same date and not from the first of April of the FY. Thus, return will be allowed by AERA on assets disposed of during the year, based on actual usage in that very FY. Appellant shall supply the necessary data and figures which will be verified on actual basis the aforesaid return on assets, disposed of during the year shall be allowed by AERA based on the actual usage in that very FY. This exercise will be done as a true up in the next Control Period as we have already reached the month of September, 2023 and the next control period i.e. 4th Control Period will start w.e.f. 1.4.2024 to 31.3.2029.

299. Thus, Issue No. XVI is answered in negative and we have given suitable directions under this issue as stated hereinabove.

ISSUE No. XVII

DECISION OF AERA TO CARRY OUT 1% READJUSTMENT TO PROJECT COST AND APPLICABLE CARRYING COST IN THE TARGET REVENUE AT THE TIME OF DETERMINATION OF TARIFF IN THE 4TH CONTROL PERIOD

300. It is submitted by Learned Senior Advocate Sajan Poovayya appearing on behalf of appellant that AERA has no power, jurisdiction and authority to impose penalty of 1% of the project cost for the delay in investment. Neither the same has been provided under OMDA nor under SSA nor under the provisions of AERA Act, 2008. If the intention was to impose a penalty for delay, SSA would have mentioned it explicitly where it has stated about incentives. Thus, there is a provision for providing incentives in SSA, but, there is no provision of penalty mainly for the reason that the amount recovered by the airport operator – appellant and if it is not used in a project, to that extent, the value of RAB will be reduced in the formula of target revenue which is:

"TR = RB x WACC + OM + D + T – S"

301. Thus, it is submitted by learned senior advocate for the appellant that the value of RB will be reduced, moreover, the amount which is not

spent for construction can always be trued up in the next control period along with carrying cost. The counsel for the appellant has taken this Tribunal to a table by giving details as to how the amount recovered, but, not utilised for the project can be adjusted as a true up in the next control period. It is submitted by counsel for the appellant that in case of Bangalore International Airport Ltd., there is a provision in Concession Agreement dated 05.07.2004 for the Bangalore International Airport Limited (BIAL) which at **Clause 9.2.9**, categorically states that "From the date the IRA has power to review, monitor and set standards **and penalties and regulate** any such related activities at the Airport, BIAL shall be required, instead of the provisions of Articles 9.2.1 to 9.2.7, to comply with all such regulations framed by IRA", but, in the case of Chhatrapati Shivaji Maharaj International Airport, Mumbai, there is no provision of penalty under OMDA, therefore, the judgement upon which the respondent is relying upon is not applicable.

302. Learned Senior Advocate for the respondent submitted that in the decision of this Tribunal in AERA Appeal No.8 of 2018 judgment dated 16.12.2020 in case of Bangalore International Airport Ltd. Vs. AERA, it has been observed in para 14 that AERA has all power to impose penalty. In view of this decision, no error has been committed by AERA

in imposing 1% penalty of the project cost because the appellant though has recovered the amount, but has not started the project and completed the same within time bound schedule. Having heard the counsels for both the sides and looking to the facts and circumstances of the case, it appears that because of outbreak of COVID -19 prevailing situations and its aftermath, the project has been delayed. This aspect of the matter has not been appreciated by AERA. Time and again lock down type of situation was prevailing. No labourers were available and no work could progress because of administrative orders by the State Govt., moreover, there is no provision under OMDA nor SSA nor under the AERA Act, 2008 stating that the respondent can impose penalty of 1% of the project cost in the next control period.

303. Learned senior advocate for the respondent has placed heavy reliance upon the decision rendered by this Tribunal in AERA Appeal No.8 of 2018 dated 16.12.2020 in case of Bangalore International Airports Ltd. Looking to the facts and circumstances of the case, the Clause of penalty was prevailing in Article 9.2.9 of Concession Agreement of BIAL dated 05.07.2004 **whereas** there is no such provision of penalty in OMDA entered into between this appellant and AAI.

304. Moreover, if any project has not been started or completed within a time bound schedule by the appellant, then to that extent, the value of RB will be reduced and it will result in loss to the appellant as per the aforesaid formula of target revenue.

305. Moreover, target revenue which is already recovered and if the project has not been started or completed within time bound schedule, the amount so recovered by the appellant can always be trued up along with carrying cost in the next control period. For ready reference, the calculation of revenue clawed back at the end of control period has been calculated on the basis of Rs.100 Crores as under: -

"ISSUE NO. B11: IMPACT OF NON-COMPLETION OF PROJECTS WITHIN THE TIMES STIPULATED BY THE RESPONDENT NO.1/AERA

Working of Capex of Rs 100 Cr (capitalized in First Year of Control Period) with average depreciation rate of 5%							
Particulars (Rs Cr)		Year 1	Year 2	Year 3	Year 4	Year 5	**Total**
RAB	a	100	95	90	85	80	
WACC allowed by AERA in TCP	b	12.81%	12.81%	12.81%	12.81%	12.81%	
Return on RAB	c=axb	13	12	12	11	10	**58**
Depreciation	d=5%	5	5	5	5	5	**25**
Target Revenue allowed by AERA	e=c+d	18	17	17	16	15	**83**
Discounting Factor	f=(1+WACC)^n	1.8	1.6	1.4	1.3	1.1	
Revenue clawed back at end of control period	g=exf	33	28	24	20	17	**121**
**n denoted numbers of years between current year and end of control period"*							

306. In view of the aforesaid table which is given as illustration, it appears that target revenue allowed by AERA was Rs.83 Crores, but, for want of completion of construction work in time, the said amount is trued up in next control period and total amount trued up will be Rs.121 Crores. Thus, the revenue clawed back at the end of control period is calculated on the basis of Airport Economic Regulatory Authority of India (Terms and Conditions for the determination of Tariff for Airport Operators) Guidelines, 2011 dated 28.02.2011.

307. As stated hereinabove, against Rs.83 Crores, Rs.121 Crores shall be taken away from the appellant in the next control period. This is the methodology of true up under OMDA to be read with SSA to be read with Airport Economic Regulatory Authority of India (Terms and Conditions for determination of Tariff for Airport Operators), Guidelines, 2011 dated 28.02.2011.

308. Moreover, in absence of any provision for penalty under OMDA or SSA or AERA Act, 2008, **no such penalty can be imposed**, otherwise highly discriminatory position will prevail because today 1% of project cost penalty is imposed and subsequently it may be increased to 1.5%. If 1% penalty is allowed then 1.5% penalty would also have to be allowed then in forth coming years, as there are unguided powers, the

penalty might be 3% also and, thereafter it can be 5% or more also. There will be no end to penalty in absence of any provision under OMDA, SSA and AERA Act, 2008. It ought to be kept in mind that unguided and uncontrolled power always leads to discrimination. In case of one airport operator penalty imposed will be 1% and in case of another airport operator it can be 2% because there is no law, there is no contract, there is no provision and there are no guidelines. The balance has already been created under OMDA and SSA in the methodology of true up in next control period and as stated hereinabove, as per the said methodology, excess amount recovered shall be trued up with carrying cost in next control period. Therefore, in the aforesaid example, if Rs.83 Crores has been recovered, the true up amount in the next control period, if the project is not commenced or completed within the time bound schedule, would be at Rs.121 Crores which is in fact more than sufficient revenue clawed back from the airport operator and perhaps for this very reason no powers have been given to AERA for imposing penalty. **Hence, we hereby quash and set aside the decision of AERA of carrying out 1% of readjustment to project cost and applicable carrying cost in the target revenue at the time of determination of tariff for next control period.**

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

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

ISSUE No. XVIII

DECISION OF AERA TO CAP THE COST OF DEBT AT 10.30% WHILE EXAMINING FAIR RATE OF RETURN (FROR)

311. It is submitted by the learned senior counsel for the appellant that the rate of return cannot be fixed but it depends upon such variable components as:

i. Marginal cost of funds-based lending rate; and;

ii. The spread

iii. Inflation, which is determined by market forces, is one of the factors which affects the marginal cost of funds based lending rates. Increase in inflation leads to increase in marginal cost of funds-based lending rates and the spread depends upon the credit profile of the entity. If there is down grade of rating of any entity, spread will increase which leads to increased interest rates.

312. AERA has put a cap of 10.30% on the cost of debt for the entire 3rd control period. Counsel appearing for respondent no.1 submitted that this is the highest rate of cost of debt given to this appellant than what is given to rest of the airport operators and, therefore, the decision of AERA of putting a cap of 10.30% to cost of debt for 3rd Control Period may not be interfered with.

313. This contention of respondent no.1 is not accepted by this Tribunal mainly for the reason that there cannot be a fixed cost of debt for the entire 3rd Control Period of five years which is from 2019-2024. The cost of debt which is actually incurred by the appellant should have been considered by AERA. The cost of debt depends upon marginal cost of funds based lending rate and the time period within which the loan is to

be repaid. Inflation is one of the most important factor for determination of market forces for further determination of MCLR rates. Moreover, the spread for the time within which loan is to be repaid depends upon the credit profile of the entity.

314. In a consultation paper, AERA had proposed to true up the cost of debt for the 3rd Control period as subject to an additional 50 bps on the existing rates. Meaning thereby to, from the current level of 10.30% of ceiling to 10.80% for the 3rd Control Period, the cost of debt was permissible, but, vide impugned order dated 27.02.2021 AERA has kept cost of debt at 10.30% without providing any cogent reason.

315. Moreover, 10.30% p.a. if payable monthly, implies that effective annualised cost of interest would come to 10.80%:

Particulars		
Interest Rate		10.30%
Monthly Interest Rate	b=a/12	0.86%
Effective Annualized Interest Rate	c=(1+b)^12-1	10.80%

316. Much has been argued out by learned senior counsel appearing for respondent no.1 that wherever airport operator is incurring debt, it must be efficient in nature and, therefore, if any debt is incurred with a higher cost of debt than 10.30%, in a target revenue, only 10.30% cost of debt will be appreciated. This contention is not accepted by this Tribunal

mainly for the reason that the debt which has been incurred by this appellant has been pointed out by learned senior counsel appearing for the appellant as under:

Project Term Loan Sanctioned Limit (Rs Cr)

Name of the Bank	Proportion
SBI	51%
Union Bank	6%
Indian Bank	3%
Exim Bank	4%
PNB	12%
Canara Bank	5%
Central Bank	5%
Vijaya Bank	8%
Bank of India	7%

317. In view of the aforesaid borrowings by the airport operator - MIAL – appellant, it appears that the debt of Rs. 6141 Crores was availed from the reputed lenders and therefore, the rate of interest which has been prevailing, is being demanded by this appellant instead of a cap of 10.30% as cost of debt. Meaning thereby to that AERA ought to have allowed actual cost of debt incurred by this appellant for 3rd Control Period because all the debt has been taken from reputed lenders.

318. Moreover, it ought to be kept in mind that repo rate has a direct nexus with the cost of debt i.e. more the repo rate, more the cost of operating (repo rate means lending rate by one bank to another bank).

Counsel for the appellant had submitted the following table of debt of MIAL:

Actual cost of debt for MIAL since 2009-10 is as follows:

FCP		**SCP**		**TCP**	
FY 09-10	10.2%	**FY 14-15**	11.6%	**FY 19-20**	10.3%
FY 10-11	9.8%	**FY 15-16**	11.2%	**FY 20-21**	10.30%
FY 11-12	10.1%	**FY 16-17**	10.9%	**FY 21-22**	11%
FY 12-13	10.8%	**FY 17-18**	10.0%	**FY 22-23**	11%
FY 13-14	11.0%	**FY 18-19**	9.7%	**FY 23-24**	11%

319. Repo rate is fixed by Reserve Bank of India. In the facts of the present case, as submitted by the counsel for the appellant, repo rate has been increased during the period of 3rd Control Period i.e. 2019 - 2024. During 3rd Control Period i.e. 2019-2024, RBI Repo Rate increased by 2.5% from August, 2021 to July, 2023.

320. In view of this, actual cost of debt shall be allowed by AERA for 3rd Control Period especially looking to the provisions of **Section 13(1)(a)(i)** of the **AERA Act, 2008**. For the ready reference, Section 13(1) of AERA Act, 2008 reads as under: -

"POWERS AND FUNCTIONS OF THE AUTHORITY

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)

321. In view of the aforesaid provision, AERA ought to have allowed actual cost of debt incurred by the appellant especially looking to the fact that debt availed by this appellant is from reputed lenders. Putting a cap upon cost of debt is uncalled for,

as AERA has in fact, allowed actual interest rate for First Control Period and Second Control Period and therefore the same methodology should be applied for Third Control Period as well. We therefore direct AERA to consider actual cost of debt and necessary true up shall be done accordingly.

Further, this action of AERA is also in violation of provisions of AERA Act, 2008 especially Sec. 13 thereof because the expenditure incurred ought to be allowed to be recovered as per formula of Target Revenue given in SSA.

322. Thus, Issue No. XVIII is answered in negative i.e. the decision of AERA to cap the Cost of Debt at 10.30% while examining the Fair Rate of Return (FRoR) is incorrect, improper and not justified.

ISSUE No. XIX

DECISION OF AERA TO REDUCE HRAB WRITTEN DOWN VALUE IN RESPECT OF OLD DEMOLISHED TERMINAL-2

323. As per impugned order dated 27.02.2021 for 3rd Control Period, AERA has decided to reduce the value of HRAB in respect of old

Terminal -2 building since the same was demolished. This decision is under challenge.

324. Counsel for respondent no. 1 submitted that once the building is demolished, it cannot get a return on this asset nor any depreciation and, therefore, no error has been committed by AERA in reducing the value of HRAB in respect of old Terminal -2 building at CSMIA, Mumbai. It is further submitted by counsel for AERA that if both the returns on the assets and the depreciation is to be allowed, then the appellant would get double benefit both on the non-existent asset and the new asset which is rebuilt and therefore, the value of HRAB ought to be reduced to the extent of cost of old Terminal -2 building.

325. This contention of the counsel for respondent no.1 is not accepted by this Tribunal mainly for the reason that as per the provisions of SSA, RB_0 is the opening RAB. When a return of WACC and depreciation is to be allowed on RB_0, it implies that HRAB has also taken colour of RAB, meaning thereby to that any treatment that is meted out to RAB has to be extended to HRAB. Therefore, if in case demolition of any asset is out of the existing initial assets of the airport (from HRAB), the same has to be allowed as enabling cost of construction of the new asset.

326. Moreover, as per OMDA and SSA, once the HRAB is fixed, it cannot be reviewed meaning thereby to, on the basis of existing constructions, the airport operator took charge of the airport, RB has been calculated as RB_0 and it is known as a Hypothetical RAB. HRAB should be given the same treatment as of RAB under SSA and OMDA and, therefore, once the said amount is fixed (HRAB), the same cannot be reduced even in case of demolition.

327. The SSA does not restrict to the actual existence of assets for the purpose of computation of HRAB and, therefore, it is known as a Hypothetical asset base while arriving regulatory base meaning thereby to the value of HRAB remains the same even if the property does not exist after some passage of time.

328. While determining tariff and while determining target revenue the following formula of target revenue is to be followed:

"TR = RB x WACC + OM + D + T – S"

329. Once the HRAB is fixed, it remains as it is even if the property is demolished because sometimes demolition of the property is by the virtue of agreement or by some necessity for the reconstruction of the new one. In the facts of the present case, old T-2 was in a dilapidated

condition. In the facts of the present case, T-2 was to be demolished by the airport operator and new one was to be constructed and, therefore, the value of old T-2 was calculated by arriving at the value of RB_0 which is known as Hypothetical RAB. HRAB cannot be increased or decreased once it is fixed.

330. Thus, if AERA wanted to reduce the value of HRAB, in that eventuality, the cost of existing T-2 building should have been added into the value of new T-2 building or the value of old T-2 should be allowed to be added as enabling cost into the cost of new T-2 building. AERA has failed to consider OMDA and SSA by attempting mid-way to review the HRAB which is bad in law. The SSA does not restrict to actual existence of assets for the purposes of computation of HRAB which is also evident from the language employed in the SSA of using the words "Hypothetical Asset Base while arriving to Regulatory Base".

331. When HRAB was computed by AERA, no reference was made to value of any asset, either book value or market value. Computation of HRAB was based on revenue and expenses for FY 2008-2009, hence discarding any asset does not trigger reduction of HRAB, if any attempt is made to do so, it would be against the provisions of SSA, since there

are no provisions regarding such reduction from HRAB, neither in SSA nor in OMDA.

332. It is to be noted that opening HRAB as on 01.04.2009 has to be determined based on the specific formula provided under the SSA. Once opening HRAB is determined, that figure is sacrosanct and it cannot be changed, as it is only determined for the first year of the First Control Period. The whole purpose of HRAB is to provide the Hypothetical base for the first year. The actual asset additions are to be added to HRAB arrived at, for the purpose of computation of RAB.

333. It further appears from the arguments canvassed by the counsels for both the sides that in Sur-Rejoinder arguments, AERA has agreed that as per accounting policy, the loss on scrap of asset is to be treated as Operation and Management Cost.

334. As per Accounting Standards, if any asset is scrapped, the same is reduced from the asset base and any loss or profit arising from its sale is charged to Profit and Loss account. AERA has failed to comply with the Accounting Standards in its entirety and further failed to consider the fact that the residual amount (difference between Written down value and value realised on scrapping of the asset) will go to the Profit and

Loss account, if the asset being scrapped is reduced from the asset base.

335. AERA while doing the true up for 2nd Control Period (2014-2019), allowed the loss incurred by the appellant to the tune of Rs.248.30 Crores because of disposal or scrapping of the assets, as operation and maintenance expenses (OM) while doing tariff determination of 3rd Control Period. This treatment can also be given by AERA for demolition of building of T-2.

336. AERA has agreed that loss on scrapping of asset to be provided as Operation and Maintenance (OM) cost which it has rightfully provided for scrapping of additions/modifications/refurbishment of asset of Rs. 248.30 Crores, which are actual investments made by appellant and later on scrapped and necessary treatment was provided in the books of accounts as per accounting policies. However, AERA has not provided loss on scrapping of old terminal T-2 value included in HRAB, which is a hypothetical value as per SSA and it is not actually recognized in the books of account and hence scrapping of the same is not to be reflected in the books of accounts.

337. If AERA is hypothetically applying accounting policies by reducing the hypothetical value of HRAB (which is not in books of accounts), then

AERA need to apply accounting policy fully and provide the Hypothetical **"Operating and Maintenance Cost"** as it has agreed that the accounting policies are to be adhered.

338. As per OMDA, the construction work related to T-2 building had to be undertaken by this appellant and it was mandatory capital project and, therefore, construction of new T-2 building has resulted in demolition of the old T-2 building and, therefore, the value of the old T-2 building would be considered as enabling cost for the construction of new T-2 building. Thus, there will be a reduction of the value of old T-2 building and it would be considered as enabling cost for the construction of new T-2 building, thus, there will be a reduction of the value of old T-2 building and there will be addition of the very same value in the cost of new T-2 building and hence RAB will be the same.

339. The new T2 has been constructed as per provisions of OMDA, where Master Plan and Major Development Plans were submitted to Ministry of Civil Aviation and Airports Authority of India. The assertion of the Respondent No.1/AERA of unjust enrichment is without any justification and it is evident that it has failed to appreciate the construction work to be undertaken by the Appellant, which is essential for the passengers and for expansion of the airport to enhance the

functionality at the airport. The methodology adopted failed to consider that the condition of the equipment which existed at CSMIA at the time of hand over to the Appellant had become obsolete/outlived their useful life or might have even been discarded. Accordingly, for the purpose of removing the attributable value of Old T2 from HRAB, the corresponding value of such equipment would also have to be considered by the Respondent No.1/AERA, which is not a practicable approach. Hence, the approach adopted by Respondent No.1/AERA to arrive at the decision is incorrect and flawed.

340. It should be kept in mind by AERA that the value of HRAB will remain as it is and intact even if those existing properties, which were existing at the time of taking over of the possession of the airport might have fallen down automatically or demolished. In the facts of the present case, old T-2A and old T-2B were commissioned in the year 1979 and T-1 was commissioned in the year 1961. They were more than 30 years old buildings. They outlived their lives and, therefore, even if the same is demolished for construction of a new one, the value of HRAB will remain instant and as it is. Thus, HRAB cannot be reduced even if the property is demolished or falls down.

341. We, therefore, quash and set aside the decision of AERA of reducing the HRAB written down value in respect of old T-2 building which is demolished.

342. Thus, Issue No. XIX is answered in negative i.e. the decision of AERA to reduce Hypothetical Regulatory Asset Base (HRAB) in respect of written down value attributable to old T-2 demolished is incorrect, improper and not justified.

ISSUE No. XX

NOT TO PROVIDE THE FINANCIAL MODEL BY AERA

343. Counsel appearing for the appellant has submitted that respondent no.1 has not provided the financial model despite the order passed by this Tribunal in M.A. No. 210 of 2022, order dated 24.05.2022. Counsel for the respondent no.1- AERA submitted that they do not have any specific financial model. During consultation process at length, the discussion has taken place and while dealing with all the representations/objections raised by all the stakeholders and after gathering all the necessary data after publication of consultation paper, the impugned order for 2nd Control Period and the 3rd Control Period

have been passed through video conferencing also on several occasions with stakeholders the discussion has taken place and ultimately on the basis of consultation paper issued by AERA and on the basis of representations from all the stakeholders, including this present appellant and on the basis of the facts and figures supplied by this appellant and other stakeholders, the impugned orders have been passed. Thus, there is no specific financial model with AERA but on the basis of facts, law, the Airports Economic Regulatory Authority of India (Terms and Conditions of determination of Tariff for Airport Operators) Guidelines, 2011 and the accounting principles propounded by ICAI, the impugned tariff orders have been passed.

344. In view of the these facts and circumstances of the case, AERA has initially published consultation paper and thereafter invited representations from all the stakeholders including the present appellant and on the basis of the facts and figures supplied by this appellant and other stakeholders and on the basis of AERA Act, 2008 and on the basis of Airports Economic Regulatory Authority of India (Terms and Conditions' of determination of Tariff for Airport Operators) Guidelines, 2011 and on the basis of accounting norms published by ICAI the AERA has calculated target revenue based upon the following formula:

"TR = RB x WACC + OM + D + T – S"

The aforesaid calculation is also based upon OMDA and SSA which are at pivotal position in calculation of the tariff. The impugned orders have been passed and no error has been committed by AERA in not supplying separate financial model because the same is not in existence as per AERA.

345. Thus, R.A. No.05 OF 2020 in M.A. No.210 of 2022 preferred by AERA in AERA Appeal No.2 of 2021 is hereby allowed and we recall our order in MA. No.210 of 2022 dated 24.05.2022 because there is no separate, distinguished, identifiable financial model available with AERA and hence, no question whatsoever arises for supplying the same. Thus, R.A.No.05 of 2022 is hereby allowed and M.A No.210 of 2022 stands disposed of.

346. Thus, Issue No. XX is answered accordingly.

ISSUE No. XXI

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

347. MIAL has to pay to the Airport Authority of India (AAI) an Annual Fee (AF) for each Year according to Clause 11.1.2, during the term of the agreement i.e. OMDA (ANNEXURE A-3). Annual fee (AF) = 38.70% of project Revenue of the said year. As per MIAL, 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.

348. As a result, 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."

349. As a result, "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.)"

350. Learned senior counsel appearing on behalf of AERA 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."

351. In light of the definition mentioned above, 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.)"

352. Learned Senior Counsel appearing on behalf of MIAL 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"

353. We have exhaustively analysed 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.

354. The aforementioned structure 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."

355. In light of the aforementioned 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 = 38.70% of projected Revenue for the said Year
>
> Where projected Revenue for each Year shall be as set forth in the Business Plan."

356. Therefore, 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.

357. Furthermore, **"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.

358. 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 MIAL. **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.**

359. Moreover, 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 38.70% 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 Authority (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.

360. Learned senior counsels for respondent number 1 and 3 have argued out at length 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. 3 mainly for the reason that it is not the case of MIAL that they want to pass-through an amount of Annual Fee to the airlines or to the customers who are utilising CSMIA, Mumbai 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 CSMIA, Mumbai. 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.

361. In light of 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.

362. Therefore, 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 MIAL & AAI) and it is only the remaining amount left after the deduction that MIAL 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 MIAL's account (surplus account), as its revenue.

363. Learned senior counsels for AERA and FIA who are respondent Nos. 1 and 3 have further argued 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 3 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-MIAL. 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.

364. Learned Senior counsels appearing on behalf of respondent Nos. 1 and 3 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- MIAL wants to pass through or wants to recover the amount of annual fee from the airlines or from the users of CSMIA, Mumbai;

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 MIAL. 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 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 MIAL'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 04 of 2013, 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.

365. In light of the aforesaid facts and circumstances, we hereby 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.

366. Hon'ble the Supreme Court of India in Nabha Power Ltd. v. Punjab SPCL, **(2018) 11 SCC 508** in para 49 thereof has held 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)

367. Hon'ble the Supreme Court of India in Adani Power (Mundra) Ltd. v. Gujarat ERC, (**2019) 19 SCC 9** in para 21 has held 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)

368. 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 has held 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."

369. In light of the aforesaid decisions cited, 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.

370. Thus, in view of the aforesaid facts and reasons, Issue No. XXI 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. XXII

EXCLUSION OF REVENUE FROM EXISTING ASSETS/DEMISED PREMISES

371. Sh. Sajan Poovayya, learned senior counsel appearing on behalf of MIAL has argued 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 MIAL 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. 2 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 MIAL dated 26th April, 2006 which is at **Annexure A-4 (Colly)** to the Memo of AERA Appeal No. 2 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.).

372. In light of the definitions stated above, it is submitted by counsel appearing for respondent nos. 1 and 3 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.

373. Non-Aeronautical Services are the services which 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 MIAL. 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 MIAL, **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 of **"S factor"** or it cannot be considered for cross subsidization.

374. It is appurtenant to note that demised premises have been expressly excluded from the Third Category of **"Non-Aeronautical Assets".**

375. In light of 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.

376. If it becomes clear that 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".

377. Learned senior counsel appearing on behalf of respondent no. 1 submitted 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-MIAL-Appellant took over the CSMIA, Mumbai 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.

378. AERA has erred 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 MIAL 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, Lease 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 could not be raised in earlier control periods. No estoppel is created thereby.

379. We, therefore, quash and set aside the decision of AERA bearing No. 64/2020-21 dated 27.02.2021 (for 3rd Control Period) of inclusion of revenue from existing assets/demised premised in the calculation of "S"-factor.

380. In light of the aforesaid facts and circumstances, 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.**

381. Thus, in view of the aforesaid facts and reasons, Issue No. XXII 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. XXIII

CONSIDERATION OF "S-FACTOR" AS PART OF AERONAUTICAL REVENUE BASE FOR COMPUTATION OF TAXES

382. As per the combined reading of 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-MIAL 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-3.

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.

383. In light of the aforementioned 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.

384. In light of 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-MIAL.

385. Upon reading 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.

386. The learned senior counsel for the appellant submitted 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.

387. In light of the impugned order in the present appeal 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.

388. We fully agree 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 CSMIA, Mumbai, 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.

389. In light of 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.

390. We do not agree with the aforesaid reasons by AERA mainly for the reason that because the target revenue as per the aforesaid formula is determined, based on aeronautical building block post cross subsidy of 30% revenue from Revenue Share Assets and, therefore, out of total target revenue, 30% has been recovered from the revenue generated by JVC from Revenue Share Assets. In view of this formula of Target Revenue, it is abundantly clear that in a recovery of Target Revenue for aeronautical services, **"S-factor"** is one of the mechanism of calculation in the formula of TR thus, the amount of **"S-factor"** partakes the character of aeronautical revenue and, therefore, once the part of aeronautical revenue has been recovered from 30% of revenue from

Revenue Share Assets, the effect of "S-factor" should also be given in "T" (i.e. corporate tax pertaining to aeronautical services).

391. This Tribunal in the Judgment dated 15th November, 2018 in AERA Appeal No.4 of 2013 in Para 15 has observed that:

> **"15.** This leaves 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."

392. Hon'ble the Supreme Court of India 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.

393. Contention of AERA 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 MIAL 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'.

394. Observation of AERA 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.

395. As a result, in view of the aforesaid facts and reasons, in the formula of Target Revenue, amount equal to "S factor" also partakes the colour 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.

396. 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).

397. We are not in consonance 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.

398. It is highly appurtenant to keep 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 MIAL is not likely to pay income tax on the revenue earned during the 3rd Control Period is devoid of any merit. It has been further observed by AERA in the impugned order that as and when MIAL will pay the Income Tax for the 3rd Control Period in the true up process in the next control period, the said amount of tax will be taken into consideration. This observation is also devoid of any merit for the reason that in the formula of target revenue as stated

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

399. Thus, in view of the aforesaid facts and reasons, Issue No. XXIII 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.

400. The contention of counsel for respondent no.1 to stay further proceedings of the present AERA Appeals till the CBI investigation is being concluded by the competent criminal court, on the basis of a note which was tendered in a sealed cover is not accepted by this tribunal mainly for the reason that we have perused the said note (which is a photocopy of original one) given by CBI to the Chairman of AERA dated 30.08.2023, by opening the seal, in the open court and looking to the contents of the said note of CBI to the Chairman of AERA, at the highest after the conclusion of trial, if the allegations of prosecution are found to be true and any civil liability is arising out of it of the present appellant, necessary true up can be given in the next control period in accordance with the direction of the competent final appellate court, in accordance with OMDA, SSA and in accordance with the provisions of AERA Act, 2008. Here, we are concerned with the correctness of the orders passed by AERA for 2nd Control Period and 3rd Control Period and not with the

criminal liability. Civil liability can always be adjusted in next Control Period which is known as True Up in next control period. Hence, we see no reason to withhold hearing and deciding these AERA Appeals.

401. As a cumulative effect of aforesaid facts, reasons and law, both the AERA Appeals 9 of 2016 and 2 of 2021 are partly allowed and disposed of. All the pending miscellaneous applications in both the aforesaid AERA Appeals are also hereby disposed of in view of the final order passed in both the aforesaid AERA Appeals.

(JUSTICE D.N. PATEL)

CHAIRPERSON

(SUBODH KUMAR GUPTA)

MEMBER

/NS/