TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

Dated 4th March, 2020

AERA Appeal No.2 of 2014

GMR Hyderabad International Airport Ltd. ....Appellant

Vs.

AERA & Ors. ....Respondents

BEFORE:

HON'BLE MR.JUSTICE SHIVA KIRTI SINGH, CHAIRPERSON

For Appellant : Mr. Ramji Srinivasan, Sr. Advocate
Mr. Milanka Chaudhary, Advocate
Ms. Naina Dubey, Advocate
Ms. Chaitra Bhat, Advocate
Mr. Shikhar Singh, Advocate

For Respondents : Ms. Shweta Bharti, Advocate
Mr. J.K. Chaudhary, Advocate
Mr. Ankit Jain, Advocate

ORDER

By S.K. Singh, Chairperson – This appeal bearing AERA Appeal No.2/2014 was initially filed before the erstwhile Airports Economic Regulatory Authority Appellate Tribunal in 2014 under Section 18(2) of the Airports Economic Regulatory Authority of India Act 2008(the Act) against Order No.38/2013-14 dated 24.02.2014 whereby the Airports Economic Regulatory Authority (AERA) determined the tariff for various aeronautical services in respect of the Rajiv Gandhi International Airport, Hyderabad (Airport) for the First Control Period, April, 2011 to March, 2016. The appellant by virtue of a contractual arrangement with the Ministry of Civil Aviation, Union of India, is operating the Airport under Public Private Partnership (PPP) mode. The Concession Agreement in favour of the appellant is dated 20.12.2004.

2. The Appellate Tribunal at the relevant time could not take up the appeals because of vacancies in its composition and therefore, the appellant approached the Hon'ble High Court of Hyderabad through a writ petition bearing WP No.22474/2014 to challenge the impugned Tariff Order dated 24.02.2014 and also to seek its suspension/stay. The High Court issued notices and by an order passed on 26.11.2014 it also directed the Registry to requisition/call for the records of the present appeal. The Appellate Tribunal was also directed to send the records of

this appeal which was accordingly sent within time. It may be noted that the High Court did not transfer the appeal to itself but only requisitioned the records. When the Appellate Tribunal began to function, then in the presence of learned counsel for the appellant, vide order dated 26.11.2015, it held that since the Hon'ble High Court has decided to examine the correctness and validity of the impugned Tariff Order challenged in the present appeal, the appeal has been rendered infructuous. It was disposed of accordingly.

3. On 23.01.2020, this Tribunal as a successor of Airport Economic Regulatory Authority Appellate Tribunal in terms of provisions in the Finance Act 2017, received a communication from the Apex Court dated 04.01.2020 disclosing the order dated 17.12.2019 passed by the Apex Court in SLP(C) Nos.28786-28787 of 2019, arising out of a judgment and order dated 17.10.2019 passed by the High Court for the State of Telangana at Hyderabad in WP Nos.22474/2014 and 27390/2015. The SLPs had been dismissed with an observation that the court was not inclined to entertain the petitions except to state that the matter having been remitted to the Tribunal, the Tribunal will endeavour to decide it as expeditiously as possible. On receipt of the order in this Tribunal the matter was given a Diary Number for expeditious listing and listed on 27.01.2020. On that date, AERA appeared through counsels. They undertook and accordingly informed the other

side(the appellant). The other side also appeared when the matter was taken up again on 29.01.2019. On that date a copy of the order of Hon'ble High Court dated 17.10.2019 passed in the two connected writ petitions noted above was produced to show that both the writ petitions stood disposed of with a direction that the Appeal No.2/2014 is being remitted back to this Tribunal and the appellant could raise all the issues before this Tribunal. The High Court made it clear that the interim order passed by the High Court on 06.10.2015 would remain operative till disposed of this appeal by this Tribunal. The stand of AERA as noted in the order of 29.01.2020 is that the appeal be disposed of by simply remitting the unresolved issues so that the same may be considered again by AERA while passing the Tariff Order for the Second Control Period which has already begun since April 2016 and shall expire in March 2021. On the other hand, learned counsel for the appellant sought time to bring the subsequent developments since filing of the appeal in 2014 on record. The appellant was permitted to do so.

4. It would be useful to reproduce the last two orders dated 29.01.2020 and 20.02.2020 to avoid unnecessary repetition. The two orders read as follows:

(i) Order dated 29.01.2020

"Today learned counsel for the respondent/AERA has produced for perusal a copy of order dated 17.10.2019 passed by Hon'ble High Court for the state of Telangana at Andhra Pradesh in Writ Petition

No. 22474 of 2014 and 27390 of 2016. Both the Writ Petitions have been disposed of by the High Court by directing that the Appeal No. 2 of 2014 is being remitted back to this Tribunal and the petitioner can raise all the issues before this Tribunal as was raised in Writ Petition No. 27390 of 2015. The simple prayer in the other Writ Petition is to declare the tariff order dated 24.2.2014 passed by AERA as illegal and arbitrary and for consequential reliefs which are in fact the subject matter of Appeal No. 2 of 2014. As a result of aforesaid order of the High Court which was subsequently affirmed by the Hon'ble Supreme Court, through this appeal all the issues can be raised by the petitioner before this Tribunal and till the disposal of the appeal the interim order passed by the High Court on 6.10.2015 whereby the tariff regime prevailing prior to the order dated 24.02.2014 is to continue, shall remain operative.

Learned counsel for the appellant seeks permission to file an affidavit to bring on record subsequent developments that have taken place after filing of the appeal in 2014 because, according to appellant those developments are relevant for deciding various issues. As prayed two weeks' time is granted for filing an affidavit for the aforesaid purpose.

It is recorded that learned counsel for the respondent/AERA has taken a stand that as a result of expiry of the first control period in 2016 and because of the tariff order dated 24.2.2014 not having seen the light of the day ever, the matter can be disposed of by simply remitting it back to AERA so that all the issues affecting the appellant may be considered while passing the tariff order for the second control period which shall expire in 2021. She submits that in the light of judgments rendered by this Tribunal in relation to some other tariff order the only practical remedy is to take note of the grievances of the appellant for the purpose of truing up the accounts and the tariff in the subsequent period and for this AERA is prepared. She further submits that the main issue raised in the appeal is against use of single till in place of shared till; AERA is prepared to concede this and truing up etc. shall be done on shared till basis.

In reply learned counsel for the appellant has highlighted three more issues: (i) how to treat the pre-control period losses (ii) treatment of cargo, ground handling and fuel through Put charges and (iii) Foreign Exchange Fluctuations for calculating losses for the purpose of RAB.

By pointing out the aforesaid issues, learned counsel for the appellant submits that it will be proper to consider the stand of the respondent seeking immediate disposal of the appeal on the lines suggested on the next date after the subsequent developments are brought on record.

It appears proper to hear the appeal on the next date keeping in light the subsequent developments which may be brought on record. It is expected that appellant shall come fully ready to meet the submissions raised on behalf of the AERA seeking immediate disposal of the appeal on the basis of certain concessions as indicated above.

Post the matter under the head "for Orders" on 19.02.2020.

On receipt of a communication from the Apex Court dated 04.01.2020 along with an order dated 17.12.2019 passed in SLP No. 28786 and 28787 of 2019 the office was directed to grant diary number for listing the matter. At that stage, Appeal No. 2 of 2014 was not appearing from the communication received from the Apex Court. Now when the appeal number is known, the direction to give a diary number is recalled. The diary number shall be treated as cancelled."

(ii) Order dated 20.02.2020

"Learned counsel for AERA has submitted on instructions that the appeal may be disposed of as infructuous because the first control period is over and whatever issues are left to be decided, can be decided during the course of passing of next tariff order.

Learned senior counsel for the appellant has submitted that even if the first control period is over, there are issues as indicated during the submissions which survive the passage of time and they should be decided by this Tribunal on merits so that AERA can act in future in accordance with law in respect of those issues.

The alternative stand of the AERA is that if the appeal has to be heard on merits, it should be heard expeditiously at an early date because of interim stay due to which an Ad-hoc tariff order of 2010 is still holding the field.

The request of AERA for disposal of the appeal as noted above, deserves to be considered on merits. Hence order is reserved."

5. An additional affidavit was filed on behalf of the appellant on 11.02.2020 to bring on record the subsequent developments. Both the parties were heard in details on the plea raised by AERA for final disposal by way of remit of the surviving issues, if any. This order is to decide the said plea.

6. An important development, not in dispute, is in respect of one of the issues initially raised in this appeal that the Regulator should have adopted the "shared till" approach in place of "single till" approach for determination of the tariff for the aeronautical services. This issue attracted intervention by the Ministry of Civil Aviation which in exercise of powers under Section 42(2) of the Act issued a letter dated 10.06.2015 directing AERA to adopt the "shared till" approach. The appellant wanted immediate revision of the tariff in the light of letter dated 10.06.2015 and for this purpose it had filed WP No.27390/2015 which has also

been finally disposed of by the High court through the order dated 17.10.2019 that has been affirmed by the Apex Court on 17.12.2019.

7. By virtue of an interim order of the Hon'ble High Court dated 06.10.2015 the Airport charges admittedly stand restored to what was prevailing prior to the impugned Tariff Order dated 24.02.20214. In other words, the ad hoc rates fixed in 2010 are prevailing as on date on account of interim orders.

8. AERA has admittedly issued a Consultation Paper dated 19.12.2017 for determination of tariff for the Airport for the Second Control Period which is also to end on 31.03.2021. In view of stand of the Central Government, in this Consultation Paper AERA has itself proposed to adopt the "shared till" mode and do the true-ups also accordingly. The appellant filed a third writ petition bearing WP No.3780/2018 before the High Court of Hyderabad against the said Consultation Paper. The Hon'ble High Court granted an interim order in favour of the appellant on 07.02.2018. As an effect of the interim order, the Regulator (AERA) cannot give effect to any tariff order with respect to Second Control Period until the issues raised with respect to First Control Period are finally adjudicated in WP No.22474 of 2014 and Appeal No.2/2014. The third writ petition was also finally disposed of by a learned single bench of the Hon'ble High

Court by a separate order dated 17.10.2019 granting liberty to the appellant to raise all the contentions before this Tribunal by preferring an appeal. The interim order of 07.04.2018 was allowed to continue for a period of eight weeks. It is claimed that the order in the third writ petition was also challenged by AERA but the SLP was dismissed. The appellant, however, filed a review petition in WP No.3780 of 2018 on the ground that an appeal could be filed before this Tribunal only against an order and not against the Consultation Paper issued by AERA. The High Court dismissed the review petition on 19.12.2019 and extended time for filing an appeal before this Tribunal till 18.01.2020. The appellant has preferred a writ appeal bearing WA No.40/2020 against the order passed in review petition. In the appeal, the High Court has passed an interim order on 21.01.2020 directing AERA and the Union of India not to take any action on the basis of the Consultation Paper of 19.12.2017. The operation of the Consultation Paper has been stayed.

9. In Para 19 of the additional affidavit, the appellant has pleaded that without prejudice to the issues raised in the third writ petition, the appellant has decided to withdraw the prayer of stay in third writ petition while reserving all its rights and contentions. A copy of the application seeking withdrawal has been annexed as Annexure A-14. That application dated 17.02.2020 narrates the relevant facts upto interim stay order dated 21.01.2020 in WA No.40/2020. Thereafter in Para 5 of

the order, it has been submitted that considering the earlier facts and the aspect that the Third Control Period is approaching, the petitioner, without prejudice to its rights and contentions raised or to be raised in future is desiring to withdraw the WP No.3780/2018 with liberty to keep all its legal remedies open. Till hearing of this matter, admittedly no order had been passed on the aforesaid application of the appellant to withdraw the third writ petition.

10. Having taken care of relevant subsequent developments pleaded in the additional affidavit of the appellant, it is useful to revert back to the stand of learned counsel for the AERA that since the impugned Tariff Order for the First Control Period was made inoperative due to order of stay passed by the Hon'ble High Court for the entire First Control Period which is already over in March, 2016, no further relief against that order can be or need be granted to the appellant and hence the appeal is virtually infructuous. According to learned counsel, the plea of the appellant for "shared till" stands resolved in its favour. The other issues highlighted, i.e., (i) consideration of the alleged losses of pre-control period, (ii) the claim on account of fluctuations in foreign exchange rates; and (iii) the claim to treat Cargo, Ground Handling and Fueling (CGF) as non-aeronautical services may require reconsideration if this Tribunal finds some substance in those claims. According to learned counsel for AERA the issue of pre-control period losses from

23.02.2008 to 01.09.2009 was never claimed or raised by the appellant throughout the period of consultation etc. and therefore, it is without substance, only an afterthought. The foreign exchange fluctuation losses cannot be certain and these are therefore ordinary business risks to be borne by the appellant. Lastly, it was submitted that even the issue relating to CGF is without any substance in view of definition of these services as aeronautical services in the Act and there being nothing in the contract which may require a different meaning.

11. However, the final stand of AERA is that if required the aforesaid unresolved issues may be remitted back to AERA so that they may be resolved after hearing the appellant in accordance with law while determining tariff for the relevant control period. It is also the stand of AERA that the judgment of this Tribunal in the case of challenge by Delhi International Airports Ltd.(DIAL) to their First Tariff Order clearly indicates that framing of tariff is a continuous regulatory process and it is more appropriate that even where an error in approach is found, the task of taking remedial action by way of true-up is best left to AERA when the exercise for the next control period will take place. On that principle it has been submitted that keeping the appeal pending for deciding the aforesaid issues will defeat the purpose of periodic determination of tariff as provided in the

Act and will also be against the interest of justice when no material relief can be granted to the appellant because of expiry of the entire First Control Period.

12. Learned counsel for AERA has pointed out that the ad hoc rates as per order of 26.10.2010 permitted User Development Fee(UDF) to be charged by the appellant at the rate of Rs.430/- per domestic passenger and Rs.1700/- per international passenger. This ad hoc rate, according to learned counsel, took care of the pre-control period losses as available on record and this rate was to yield to rate of UDF in the 2014 order which provide zero rate for UDF, of course, by adopting "single till" mode and hence that may require revisit. According to learned counsel, the ad hoc rate was meant to take care of difficulties at that point of time and was not supposed to continue after the determination of tariff for the First Control Period which was actually done in 2014.

13. In a query as to why an order withdrawing the impugned Tariff Order cannot be issued by AERA so as to enable it to proceed with the determination of tariff for the subsequent control period, learned counsel, on instructions, submitted that this would create a vacuum for the purposes of calculation etc. and more importantly there is no provision in the Act enabling the Regulator to withdraw a Tariff Order, more so after the expiry of the control period for which it was issued.

14. In reply to the plea of the AERA that the appeal be finally disposed of by holding that no relief can be given to the appellant at this stage because of First Control Period having expired and for remitting the surviving issues for reconsideration by AERA, learned Senior Counsel for the appellant has submitted that this Tribunal in exercise of appellate jurisdiction has to decide an appeal and all the issues raised therein on merits after full adjudication. Secondly, he submitted that the impugned Tariff Order has led to certain issues, which according to learned counsel for AERA may lack merits but yet unless those are finally adjudicated, it will be impermissible in law to treat the appeal as infructuous. A decision on the surviving issues noted above may itself amount to relief to the appellant even though the control period is over and even if material reliefs may not be possible to be worked out for the said control period. Hence, according to him this Tribunal must perform its duty of deciding the surviving issues instead of remitting those issues to AERA for fresh determination.

15. Having considered the rival contentions, it is found that once the relevant control period noted in March 2016 and the impugned Tariff Order meant only for that period remained suspended because of interim order of the Hon'ble High Court, the impugned Tariff Order has lost its usefulness in the sense that it cannot

adversely affect the appellant's rights as the Airport operator during the First Control Period which has expired. No doubt certain issues other than the issue of "single till" or "shared till" remain unresolved, but such academic exercise, in the considered view of this Tribunal should not come in the way of the Regulator in proceeding with the determination of tariff for the next relevant control period in accordance with law. This statutory duty will be hampered throughout the period this appeal remains pending because of certain circumstances already noted. Hence, it will be in the larger interest of justice and in the interest of all the parties and the stakeholders such as the general public who ultimately pays the UDF charges that the appeal be disposed of finally for the twin reasons that the First Control Period has already expired and the impugned order cannot actually govern that period anymore because of the stay order passed by the Hon'ble High Court. Unresolved issues raised on behalf of the appellant, whatever be their worth, deserve to be reconsidered by AERA expeditiously after giving an opportunity of further hearing or of making representation in the matter, to the appellant. This procedure would cause no loss to the appellant and shall provide justice to all stakeholders by ensuring that the ad hoc rate of 2010 do not continue for unnecessary longer period on account of pendency of this appeal before this Tribunal.

16. The appeal is accordingly disposed of finally because it can no longer be substantively implemented against the appellant due to expiry of the First Control Period and the parties shall not suffer any irreversible loss even in future because the surviving issues are remitted back to AERA for reconsideration on merits. It goes without saying that if the issues are not resolved by AERA to the liking of the appellant it will have the right to challenge even the fresh Tariff determination in accordance with law.

17. So far as the duty and obligation of this Appellate Tribunal to decide all issues is concerned, the submissions on behalf of the appellant fail to take note of Sections 18(4) and (6) of the Act. The Appellate Tribunal has more responsibilities as an expert Tribunal than the ordinary civil court. It is not bound by the procedure laid down by the Code of Civil Procedure, rather it is to be guided by the principles of natural justice. After hearing the parties, as per Section 18(4) it may pass such orders on an application or an appeal, as it thinks fit. Judicial orders in regulatory jurisdiction must promote justice for all the parties and all the stakeholders including the public. The Tribunal also has the responsibility under Section 18(6) to dispose of an application or appeal finally as expeditiously as possible and efforts should be to do it within 90 days. Reasons for non-disposal within that time should be recorded in writing. It may be usefully indicated here

that this Tribunal is presently having a pendency of large number of hearing matters. There are number of important matters requiring expeditious disposal in the overall interest of the stakeholders and the public. Therefore, it would not be in the interest of justice to keep the appeal pending for hearing the unresolved issues for an uncertain length of time. It would be a just and better course of action to remit the limited number of surviving issues for fresh consideration and adjudication by AERA, which is directed to act accordingly.

18. Before parting with the appeal it is deemed useful to remember that work of Regulatory Authority is almost continuous in nature and Consultation Paper is issued only to invite the comments and responses of the stakeholders. Such papers cannot be treated in law as the final stand of the Regulator because Consultation Paper by itself cannot have any adverse effect upon the rights of the Airport operator or the other stakeholders including the Airlines. It is for this reason that Appellate Tribunal has to ensure that the expertise of the Regulator is not hindered unnecessarily due to interim interventions. The above order, in the considered view of this Tribunal, will facilitate the Regulator (AERA) in carrying out its statutory task with expedition in a more effective and meaningful manner. While deciding the remitted issues AERA should keep its views open so that the issues

are decided fairly and in accordance with law without any prejudice on account of the earlier litigation or this judgment and order.

19. The appeal is disposed of accordingly without any order as to costs. As a result the interim orders will stand vacated. Of course it will be open for AERA to issue interim/ad hoc orders or directions for the purpose of regulating UDF as an interim measure till another Tariff Order is issued in regular course with due expedition and in accordance with law.

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(S.K. Singh)
Chairperson

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