

(1) F.No.AERA/20010/MIAL-AC/2009-10
(2) F.No.AERA/20010/DIAL-AC/2009-10

Airports Economic Regulatory Authority Of India

Order No.03/2010-11

Rajiv Gandhi Bhawan
New Delhi – 110003

Date of Order: 20th May, 2010

Date of Issue: 21st May, 2010

- (1) In the matter of 10% increase in Aeronautical Charges requested by Mumbai International Airport (MIAL) with effect from 03.05.2009; and**
- (2) In the matter of 10% increase in Aeronautical Charges requested by Delhi International Airport (DIAL) with effect from 03.05.2009.**

1.1 The Ministry of Civil Aviation vide its letter no. AV.20036/014/2009-AD dated 06.10.2009, had forwarded a request received from the Mumbai International Airport Limited (MIAL) (letter ref. no. MIAL/PR/96 dated 28.07.2009), for a 10% increase in aeronautical charges at CSI Airport, Mumbai with effect from 03.05.2009 for the Authority's consideration. The aforesaid request was made by MIAL on the grounds that as per Schedule 6 of the State Support Agreement (SSA), entered in to between the Central Government and MIAL, the regulatory authority/Government of India, will set the aeronautical charges from the commencement of the 4th year from the effective date, i.e., 03.05.2006 and for every year thereafter subject always to the condition that, at least, nominal increase of 10% of base airport charges will be available to MIAL.

1.2 MIAL interpreted the above provisions to mean that the Authority/GoI are bound to permit an increase of 10% of the Base Airport Charges after the commencement of the 4th year and every year thereafter and, accordingly, approval was solicited to increase the airport charges by 10% w.e.f 03.05.2009.

1.3 MIAL did not otherwise justify its proposal. It is relevant to mention here that MIAL was permitted a 10% increase in airport charges w.e.f. 01.01.2009, by the Ministry, in terms of Clause 1 of the Schedule 6 after completion of two years.

1.4 Pending further examination of the matter, MIAL was advised vide letter no. AERA/20010/MIAL-AC/2009 dated 11.11.2009 to submit a well justified proposal for the consideration of the Authority in case they propose any increase in the tariff of aeronautical services, on merits. MIAL vide letter ref. no. MIAL/PR/233 dated 15.12.2009 and letter ref. no. MIAL/PR/309 dated 25.03.2010 reiterated its earlier position and requested for expeditious permission for 10% increase over the base aeronautical charges.



1.5 The Ministry of Civil Aviation vide its letter no. AV.20036/014/2009-AD dated 06.10.2009, had also forwarded a request received from the Delhi International Airport Limited (DIAL) (letter ref. no. DIAL/2009-10/COMM/0625 dated 10.07.2009), for a 10% increase in aeronautical charges at IGI Airport, New Delhi with effect from 03.05.2009 for the Authority's consideration. The aforesaid request was made by DIAL on the same grounds as MIAL, as indicated in paras 1.1 and 1.2 above.

1.6 DIAL also did not otherwise justify its proposal. It is relevant to mention here that DIAL was permitted a 10% increase in airport charges w.e.f. 16.02.2009, by the Ministry, in terms of Clause 1 of the Schedule 6 after completion of two years.

1.7 Pending further examination of the matter, DIAL was advised vide letter no. AERA/20010/DIAL-AC/2009 dated 10.11.2009 to submit a well justified proposal for the consideration of the Authority in case they propose any increase in the tariff of aeronautical services, on merits. DIAL vide letter ref. no. DIAL/AERA/2009-10/1665 dated 01.12.2009 reiterated its earlier position and requested for expeditious permission for 10% increase over the base aeronautical charges.

2.1 Pursuant to the aforesaid correspondence, the matter was examined.

2.2 In terms of Section 13(1)(a) of the Airports Economic Regulatory Authority of India Act, 2008 (the Act), the Authority is required to determine the tariff for aeronautical services, inter-alia, taking into consideration *"(vi) the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise."*

2.3 The relevant provisions of the respective SSAs are identical in case of MIAL and DIAL. For ease of reference Schedule 6 of the SSA, which has been relied upon by DIAL and MIAL in support their requests, is extracted below:-

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

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



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

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

2.4.1 Clause 2 of Schedule 6, of the SSA (being relied upon by MIAL and DIAL in support of their proposal) requires the Authority/GoI to set the aeronautical charges :-

- (i) in accordance with the clause 3.1.1 read with Schedule 1 appended to the SSA; and
- (ii) subject to the condition that, at least, a permitted nominal increase of 10% of the Base Airport Charges will be available to the JVC for the purpose of calculating aeronautical charges in any year after the commencement of the 4th year and for the remainder of the Term.

2.4.2 The Airports Authority of India (AAI) airport charges, on the date of the agreement, i.e. 26.04.2006, which are set out in Schedule 8, are treated as 'Base Airport Charges' as evident from Clause 1 of Schedule 6. Further, a nominal increase of 10% over the Base Airport Charges was to be allowed to MIAL & DIAL in the event they completed and commissioned the Mandatory Capital Projects (MCPs), as were required to be completed by them respectively, during the first two years from the effective date.

2.4.3 As indicated in para 2.4.2 above, 'Base Airport Charges' are the charges which were prevalent on 26.04.2006 (as set out in Schedule 8). A nominal increase of 10% has already been permitted by the GoI over the Base Airport Charges (BAC) in terms of Clause 1 of Schedule 6. Thus, this could be termed as "permitted nominal increase of 10%".

2.4.4 In terms of the second part of Clause 2 of Schedule 6, "a permitted nominal increase of ten (10) percent of Base Airport Charges will be available to the JVC for the purposes of calculating Aeronautical Chargers in any year after the commencement of the fourth year". Thus, on a cojoint reading of Clauses 1 & 2, it is evident that as per Clause (1) a nominal increase of 10% is to be permitted on completion of first two years, subject to certain conditions, and as per Clause (2), this permitted nominal increase of 10% will, at the least, be available to the



JVC for the purposes of calculating airport charges from fourth year onwards. Expressed differently, in terms of first part of Clause 2, the Authority/GOI are required to set aeronautical charges in accordance with Clause 3.1.1 read with the principles set out in Schedule 1 of SSA from 4th year onwards and by virtue of second part the nominal increase of 10% permitted (in terms of Clause 1) is saved.

2.4.5 It is also relevant to notice here that the request of MIAL & DIAL, at least in some part of their communications, appeared to be for an increase of 10% on the Airport Charges, which were prevalent on date. However, the second part of the Clause 2 of Schedule 6 mentions an increase of 10% on the BAC. As stated in paras 1.2, 1.6 and 2.4.3 above, this increase of 10% on the BAC has already been permitted by the GOI in terms of Clause 1 of Schedule 6.

2.4.6 In any case, if it is accepted that Clause 2 contemplates an year upon year increase of 10% from the commencement of 4th year onwards, it would mean that the GOI have agreed to a doubling of BAC in about 7 years time irrespective of the actual determination in terms of principles set out in Schedule 1. If the contention is that the aeronautical charges should increase, at the least, by 10% of the BAC every year from 4th year onwards, it would mean a doubling of charges every 10 years irrespective of the actual determination.

2.5 Thus, on a co-joint reading and harmonious construction of the provisions of Schedule 6 of SSA, the following scheme is revealed:-

- (i) The airport charges, as existing on 26.04.2006 (which are set out in Schedule 8) will continue for first two years from the effective date.
- (ii) In the event the JVC fully completes and commissions all the mandated facilities required to be completed during the first two years, it would be allowed a tariff increase of 10% in nominal terms from the beginning of 3rd year from the effective date, as an incentive.
- (iii) From the commencement of 4th year onwards, tariff will be set by the Authority/GOI as per principles set out in Schedule 1 subject to the condition that, at the least, the nominal increase of 10% permitted during the third year, as incentive, will, continue to be available to the JVC.

3. Briefly stated, it would appear that there is no warrant in Schedule 6 of SSA for an automatic year on year increase of 10% in airport charges from the commencement of fourth year onwards as contended by MIAL and DIAL.

4.1 As the concession in form of the subject SSA has been granted by the Central Government, the Authority also consulted the said Government in the matter.

4.2 As per the opinion furnished by the Ministry of Law & Justice, that was forwarded by the Ministry of Civil Aviation, the Authority was advised that in view of the enactment of the Airports Economic Regulatory Authority of India



Act, 2008 and specific assignment of powers to the Authority under Section 13(1)(a) of the Act, fixation of airport charges is the function of the Authority. The Authority being a statutory authority needs to consider the other aspects stipulated under the relevant section alongwith the provisions of SSA. Further, there is no warrant in Schedule 6 of the SSA for an automatic increase of 10% in the airport charges prevalent during the third year, upon commencement of the fourth year and every year thereafter.

5. In view of the position discussed above, the Authority in its meeting held on 08.04.2010, tentatively decided to reject the request of MIAL and DIAL for a 10% increase in aeronautical charges at the CSI Airport, Mumbai, and IGI Airport New Delhi respectively, with effect from 03.05.2009.

6.1 The Authority also issued two separate Consultation Papers (No.01/2010-11 in respect of MIAL and No.02/2010-11 in respect of DIAL) on 12.04.2010, soliciting feedback, comments and suggestions from stakeholders on the proposal contained in para 5 above. The comments/submissions were to be furnished to the Authority, latest by Monday, the 26th April, 2010.

6.2. The Comments were received from the following stakeholders in respect of the Consultation Paper No.01/2010-11:

1. MIAL
2. Blue Dart
3. NACIL
4. Federation of Indian Export Organizations (FIEO)
5. Federation of Indian Airlines (FIA)
6. IATA
7. VOICE
8. Ministry of Civil Aviation

6.3 The comments were received from the following stakeholders in respect of Consultation Paper No.02/2010-11:

1. DIAL
2. Airline Operators Committee
3. Blue Dart
4. NACIL
5. Federation of Indian Export Organizations (FIEO)
6. Federation of Indian Airlines (FIA)
7. IATA
8. VOICE

6.4.1 The comments received from the stakeholders (except MIAL & DIAL), including that of the Ministry of Civil Aviation, justified the action proposed by the Authority in the matter. Their comments are summarized below:

(I) Consultation Paper No. 01/2010-11:

(a) **Ministry of Civil Aviation:** The Ministry, vide its letter No.21/13/2010-FI dated 30th April'2010, has justified the action proposed by the Authority in the matter.



- (b) **Blue Dart:** have vide their e-mail dated 26.04.10, concurred with the interpretation of the Authority on the subject issue and have confirmed and supported the decision to reject the request made by MIAL for a 10% increase in aeronautical charges w.e.f. 03.05.2009.
- (c) **NACIL -** have vide their letter ref. No. ED(IC)/10 dated 26.4.2010 stated that they agree with the interpretation of the Authority pertaining to aeronautical tariff as explained in the Consultation Paper and have expressed that the increase in charges as desired by MIAL would not be in the interest of growth of traffic as this will place burden on the airline operators.

NACIL have also stated as under:-

- Details of debt financing of MIAL should be made available in greater detail and need to establish the sources / acquisition of funds executed in a diligent manner and at the lowest cost of acquisition. Similarly, various possibilities of availing cheap line of credit through FCBs / NCBs was explored or not in view of the cheap source of funding available through GDR's etc. ought to be verified.
 - Further, they have also submitted that all airlines continue to be not financially viable and therefore, there should be no increase in the Airport Charges for at least another two years.
- (d) **Federation of Indian Export Organizations (FIEO):**
FIEO, vide their letter No. FIEO/Infra/ 3(7)/2010 dated 16.04.2010 have stated that they agree with the view of the Authority that an automatic increase of 10% in the airport charges prevalent during the 3rd year upon commencement of the 4th year and every year thereafter is not warranted as per the schedule 6 of the SSA and as such the proposal of MIAL may be rejected.
- (e) **Federation of Indian Airlines (FIA):**
FIA vide their letter no. nil dated 26.04.10 appreciated the stand put forth by the Authority.
- (f) **IATA:**
IATA, vide their letter dated 24.04.10, have stated that aeronautical charges have to be set in relation to the costs in line with ICAO's principle of cost-related charging. An automatic increase should not be allowed under any circumstances as that would imply a disregard for the cost considerations and would be a clear violation of ICAO's principle. Hence, IATA have also agreed with the proposal to reject the application by MIAL for a 10% increase in aeronautical charges with effect from 03.05.2009.
- (g) **VOICE:**
VOICE vide their letter no.V/L/288 dated 26.04.10 stated that they support the decision of the Authority to reject the request of MIAL as this would be anti-consumer and detrimental to traffic growth and industry



(II) Consultation Paper No. 2/2010-11

(a) **Airline Operators Committee:** -

AOC, vide letter reference Ss/AERA dated 26.04.2010, has stated that airlines community operating at Delhi Airport is of the opinion that any increase in aeronautical charges should not be automatic and must be decided upon after carrying out a consultation process on a regular basis under the auspices of the Authority.

They have further stated that the increase in aeronautical charges needs to be examined in the light of various aeronautical and non-aeronautical charges that the member airlines shall be burdened with the commissioning of Terminal 3 and this will have detrimental effect on industry which mainly include exorbitant increase in the following:

- Increase in Levy of Caterers
- Increase in License Fee for Office Space
- Substantial increase in IT as well as communication charges
- Development Fee
- Increase requirement of Security Deposit/Bank Guarantees
- Large investment required in construction of New Offices especially with MEP charges borne by airlines.
- High costs of Office Move, including move of IT and Communication infrastructure.

Further, they have also stated that the increases are being justified on the pretext of expecting fair return on investment by the Airport Operators while the interest of the airlines cannot be totally disregarded.

(b) **Blue Dart:**

Blue Dart has stated that they support and confirm the decision of the Authority to reject the request made by DIAL for 10% increase in aeronautical charges. They concur with the interpretation that an automatic yearly increase of 10% aeronautical charges is not warranted and such arbitrary increases in charges would place undue financial burden on embattled airlines in the country.

(c) **NACIL:**

NACIL vide DO ref no. ED(IC)/10 dated 26.4.2010 has stated that they agree with the interpretation of the Authority of the AERA Act, 2008 pertaining to aeronautical tariff as explained in the Consultation Paper. In their view, the increase in charges as desired by DIAL/MIAL would not be in interest of the growth of traffic to India as this will place burden on the airline operators.



NACIL has also given further comments/observations as under:

- In spite of the delay of DIAL in the completion of the MCPs as per the agreed timelines, AAI had condoned it in February 2009 and approved a 10% increase in Airport Charges.
- Based on the Balance Sheet of DIAL, as appended to the papers forwarded, it is observed that the Shareholder' Funds went up from Rs.1336 crores in 2008 to Rs.2513 crores during 2009 viz., an increase of 88% of which Rs.1250 crores is the Share Application Money "pending allotment", as on 31st March, 2009. However, it is not clear if post these additions to the Shareholders' Funds, it has reached the ceiling vis-à-vis authorized Share Capital.
- Details of debt financing of DIAL / MIAL should be made available in greater detail and need to establish the sources / acquisition of funds executed in a diligent manner and at the lowest cost of acquisition. Similarly, various possibilities of availing cheap line of credit through FCBs / NCBs was explored or not in view of the cheap source of funding available through GDR's etc. ought to be verified.

(d) **Federation of Indian Export Organizations (FIEO):**

FIEO vide DO No. FIEO/Infra/3(7)/2010 dated 16.4.2010 agreed with the view of the Authority that an automatic increase of 10% in the airport charges prevalent during the 3rd year upon commencement of the 4th year and every year thereafter is not warranted as per the schedule 6 of the SSA and as such the proposal may be rejected.

(e) **Federation of Indian Airlines (FIA):**

FIA vide letter no. NIL dated 26.4.2010 have appreciated the stand put forth by the Authority in response to the 10% increase in aeronautical charges as requested by DIAL w.e.f. 03.05.2009.

(f) **IATA:**

IATA vide letter no. NIL dated 26.4.2010 has stated that the aeronautical charges have to be set in relation to the cost in line with ICAO's principle of cost-related charging. An automatic increase should not be allowed under any circumstances as that would imply a disregard for the cost considerations and would be a clear violation of ICAO's principle. As such, IATA agrees with the Authority's proposal to reject the proposal.

(g) **VOICE:**

VOICE vide letter no. V/L/288 dated 26.4.2010 has supported the decision of the Authority to reject the request of DIAL for increase in aeronautical charges as this would be anti-consumer and detrimental to traffic growth and industry.



6.4.2 MIAL, vide letter no. MIAL/PR/10 dated 19.04.10 requested the Authority to review its proposed decision and have reiterated their eligibility for the requested 10% increase for the following reasons :-

- (i) MIAL was not able to submit a well justified proposal to support the 10% increase in aeronautical charges due to the fact that no tariff guidelines have been finalized. Hence, they have requested for a minimum 10% increase as stipulated in Schedule 6 of the SSA.
- (ii) In Clause 3.1.2 of SSA, it is clearly stipulated that Aeronautical Charges for any year during the Term of the Agreement shall be calculated in accordance with Schedule 6 appended thereto.
- (iii) Schedule 6 vide Clause 2, states that at the least a permitted nominal increase of 10% of the Base Airport Charges will be available to the JVC for the purpose of calculating Aeronautical Charges in any year after the commencement of 4th year and thereafter for the Term, i.e., from 3rd May, 2009 onwards. Looking in to the project cost involved in the development of Airport, required increase will be higher than 10%. However, in absence of tariff fixation guidelines and conduct of business rules it was not possible for MIAL to file tariff application. Hence, the stipulated 'at the least, permitted nominal increase of 10% of the Base Airport Charges' may be approved.
- (iv) The contention of the Authority that if 10% increase is allowed as per MIAL interpretation it will result in doubling of airport charges in about seven years does not take into account the fact that huge capital investment may anyhow result in such levels being reached in less than seven years.
- (v) The Authority has cited the view of MoCA that increase is not automatic, which is correct only if guidelines and conduct of business rules were in place. Hence a minimum increase of 10% as stipulated in Schedule 6 needs to be sanctioned as there are no guidelines in place as on the date from when charges are to be increased.

6.4.3 DIAL, vide their letter no. Nil dated 26.04.2010, reiterated their request for the 10% revision in aeronautical charges under the SSA and forwarded an opinion obtained from M/s. Amarchand & Mangaldas & Suresh A Shroff & Co. (AMSS) stating that the final computation of the aeronautical charges are subject to a minimum nominal increase and the quantum of the minimum nominal increase is an amount equal to 10% Base Airport Charges (BAC) increase; and that the 10% BAC increase is to be applied in each year from the fourth year to the end of the Term. In their view, "based on the comprehensive and harmonious reading of Schedule 1 and Schedule 6, the following scheme for the determination of Aeronautical Charges in each year after the 4th year from the Effective Date, appears to emerge:



- (a) the Aeronautical Charges are to be determined by the AERA/GOI in each year after the 4th year from the Effective Date;
- (b) the first stage of this determination is to be undertaken in accordance with the formulae for calculating Target Revenue as set out in Schedule 1 of SSA;
- (c) the final computation of the Aeronautical Charges is based on Schedule 6 which prescribes minimum nominal increase;
- (d) the quantum of the minimum nominal increase is an amount equal to 10% BAC Increase;
- (e) the Aeronautical charges calculated as per Schedule 1 would be subject to a minimum increase of 10% BAC Increase. Where the increase calculated as per Schedule 1 is more than the nominal 10% BAC Increase, the 10% BAC Increase would be construed to have been availed. Where the increase in the Aeronautical Charges, calculated as per Schedule 1, are less than 10% BAC Increase, then the Aeronautical charges worked out as per schedule 1 shall be allowed an adjustment for a 10% BAC Increase. ”

6.5.1 The Authority vide its letter dated 6th May'2010 forwarded the feedback received from other stakeholders to MIAL and DIAL for their comments.

6.5.2 MIAL, vide letter No. MIAL/PR/29 dated 10.05.2010, reiterated their request for the 10% increase in aeronautical charges. It is their contention that the comments made by all the stakeholders were without substance and amount to simply taking position that MIAL should not get its due increase.

6.5.3 DIAL, vide letter No. DIAL/2010-11/fin-Acc/330 dated 11.05.2010 also reiterated their request for the 10% increase in aeronautical charges based upon the opinion of the legal expert M/s Amarchand & Mangaldas & Suresh A Shroff & Co.

7.1 The matter came up for final consideration in the meeting of the Authority held on 20.5.2010. The representatives of DIAL and MIAL were in attendance.

7.2 In the personal submissions, the representatives of MIAL reiterated their submissions made vide letter no. MIAL/PR/10 dated 19.04.10 and No. MIAL/PR/29 dated 10.05.2010 and requested the Authority to review its proposed decision. MIAL's interpretation of Schedule 6 of SSA, as submitted by them, during the course of the personal hearing is reproduced as under:

“AERA is first required to calculate applicable tariff for any particular year (from the 4th year onwards) as per Clause 3.1.1 read with Schedule 1 of SSA and the increase so arrived at for that particular year should then be compared with a tariff which should be derived by adding a minimum of 10% of Base Airport Charge (BAC) over the tariff of previous year.



According to MIAL, following three scenarios are likely to emerge for tariff fixation for any year from fourth year onwards on the assumption that the BAC in the third year was Rs. 100 and actual tariff was Rs. 110:

Scenario 1: Where actual increase in tariff calculated by AERA over previous year is in excess of 10%, actual increase as determined by AERA is to be allowed.

Example: Tariff determined by AERA for the fourth year is say Rs. 123. Since increase in tariff is Rs.13 over third year, which is higher than Rs.10 (i.e. 10 % of BAC), MIAL should be allowed an increase of Rs.13 and therefore the final tariff should be Rs. 123 (Rs.110 + Rs. 13) for the fourth year.

Scenario 2: Where actual increase in tariff calculated by AERA over previous year is below 10%, tariff for that year is to be increased by 10% (i.e. 10 % of BAC) from previous year tariff.

Example: Tariff determined by AERA for the fourth year is say Rs. 117. Since increase in tariff is Rs.7 over third year, which is lower than Rs.10, MIAL should be allowed an increase of Rs.10 and therefore the final tariff should be Rs. 120 (Rs.110 + Rs.10) for the fourth year.

Scenario 3: Where there is a decrease in tariff as calculated by AERA over previous year, the decrease in tariff for that year will be net-off of 10% nominal increase of BAC in that year.

Example: Tariff determined by AERA for the fourth year is say Rs. 97. Since decrease in tariff is Rs.13 over third year, MIAL is required to decrease the tariff by Rs.3 (Rs. 13 - Rs. 10) from third year and therefore the final tariff should be Rs. 107 (Rs.110 - Rs.3) for the fourth year."

7.3 Representatives of DIAL made following submissions in person:

" The submissions made in our letter dated 26th April, 2010, together with the enclosed opinion of M/s Amarchand & Mangaldas & Suresh A. Shroff & Co. are reiterated. In addition, we would like to submit that any interpretation of paragraph 2 of Schedule 6 of the SSA needs to be such as to take into account the last four lines of the said paragraph and does not render the same superfluous. Any interpretation which leads to the conclusion that the last four lines of said paragraph are redundant as the benefit sought to be bestowed by the said lines are already covered in either paragraph 1 of Schedule 6 or in Schedule 1 would be against the principles of interpretation of contract, as parties to the SSA would not have agreed to insert a provision that had no meaning."

8.1 The matter has been further examined by the Authority in light of the stakeholder comments and the personal submissions made by the parties.

8.2 All stakeholders, except MIAL and DIAL, have supported the decision to reject the request made by the JVCs.



8.3 The Ministry of Civil Aviation (i.e., the Central Government) has found the proposed action of rejecting the request justified. Thus, one of the parties to the SSA, i.e., the Central Government is in agreement with the Authority's proposed position in the matter.

8.4 As indicated in para 2.5 above, the scheme of Schedule 6 of the SSA as read by the Authority is as under:

- (i) The airport charges, as existing on 26.04.2006 (which are set out in Schedule 8) will continue for first two years from the effective date.
- (ii) In the event the JVC fully completes and commissions all the mandated facilities required to be completed during the first two years, it would be allowed a tariff increase of 10% in nominal terms from the beginning of 3rd year from the effective date, as an incentive.
- (iii) From the commencement of 4th year onwards, tariff will be set by the Authority/GOI as per principles set out in Schedule 1 subject to the condition that, at the least, the nominal increase of 10% permitted during the third year, as incentive, will, continue to be available to the JVC.

Whereas as per the legal opinion forwarded by DIAL the scheme of Schedule 6 is as under:

- (a) the Aeronautical charges are to be determined by the AERA/GOI in each year after the fourth year from the effective date.
- (b) the first stage of this determination is to be undertaken in accordance with the formulae for calculating Target Revenue as set out in Schedule 1 of SSA;
- (c) the final computation of the Aeronautical Charges is based on Schedule 6 which prescribes minimum nominal increase;
- (d) the quantum of the minimum nominal increase is an amount equal to 10% BAC increase;
- (e) the Aeronautical charges calculated as per Schedule 1 would be subject to a minimum increase of 10% BAC increase. Where the increase calculated as per Schedule 1 is more than the nominal 10% BAC Increase, the 10% BAC Increase would be construed to have been availed. Where the increase in the Aeronautical charges, calculated as per Schedule 1, are less than 10% BAC Increase, then the Aeronautical charges worked out as per Schedule 1 shall be allowed an adjustment for a 10% BAC Increase.

8.5 It is observed that, in terms of clause (1) of the Schedule 6, a nominal increase of 10% over the BAC is to be permitted for the purposes of calculating the charges for the duration of third year after the effective date subject to certain



conditions, whereas as per clause (2) the Authority will set the aeronautical charges in accordance with clause 3.1.1. read with Schedule 1 of SSA subject always to the condition that, at the least, a **permitted** (emphasis supplied) nominal increase of 10% over base airport charges will be available for the purposes of calculating aeronautical charges in any year after the commencement of the fourth year and for the remainder of the term. It is clear that clause (2) is saving the "permitted nominal increase of 10% of the Base Airport Charges". As stated above, the nominal increase of 10% of the base airport charges is to be permitted in terms of the clause (1) of Schedule 6 for the duration of third year subject to certain conditions. Thus, the effect of the word "permitted" is that what is saved is the nominal increase which is already permitted. The legal opinion forwarded by DIAL appears to have overlooked this aspect.

8.6 In other words, by use of the word "permitted", it has been explicitly brought out that only the increase which has been permitted would continue to remain available. This view is further strengthened by the fact that it is the nominal increase over BAC which is to remain available. Since in the third year a 10% increase has already been effected over the BAC, it would make no sense to allow 10% increase again over the base airport charges in the fourth year and every year thereafter.

8.7 From a plain reading of clause (1) of the Schedule 6 of the SSA, it is clear that the nominal increase of 10% over the BAC permitted during the third year is an "incentive" for timely completion of the Mandatory Capital Projects. It is only natural that the "incentive" so allowed/permitted is being saved by virtue of clause 2. The interpretation put forward by DIAL & MIAL would imply that they are entitled to an equivalent "incentive" year on year, over and above the incentive allowed during the third year.

8.8 In Authority's views the effect of the provisions of the SSA, on the tariff during the 4th year or any year thereafter is that:

- (i) Presuming that the Base Airport Charges is Rs. 100/- over which an increase of 10% (i.e., Rs. 10/-) has been permitted as an incentive during the third year, such increase of Rs. 10/- would, at the least, continue to be available to DIAL and MIAL for the purposes of calculating aeronautical charges in any year after the commencement of the fourth year and for the remainder of the Term.
- (ii) Therefore where the tariff determined by the Authority in the fourth year or any year thereafter is more than BAC by an amount of 10% of BAC or above, the tariff so determined shall be applicable.
- (iii) On the other hand, where the tariff so determined is more than BAC but by a figure lesser than 10% of BAC, the permitted nominal increase of 10% during the third year would continue to remain available. Thus, following the illustration in (i) above, the tariff will be Rs. 110/-.



- (iv) Where the tariff determined as per the principles in Schedule 1 is less than the BAC (say Rs. 97), the permitted nominal increase of 10% during the third year would again remain available. Thus, the tariff will be Rs. 107/-.

8.9 Clause 2 of the relevant provision speaks of a permitted nominal increase of 10% of the BAC to be available to the JVC in any year after the commencement of the fourth year. The wordings used refer to 'a permitted nominal increase' and do not have any connotation of this increase being granted over any previous year of tariff determination. Hence, if in any year after the commencement of the fourth year, the aeronautical charges as determined in accordance with Clause 3.1.1 read with Schedule 1 appended to the SSA happen to be less than the sum of the Base Airport Charge (BAC) and 10% of BAC (or so to say less than 1.1 times BAC), then the JVC would, as per the SSA, be eligible to avail protection of an increase (over the BAC) in aeronautical charges by an amount equal to 10% of BAC.

8.10 The net effect of the position explained in preceding paras 8.8 and 8.9 can be illustrated, in five different scenarios worked out for a sample year four, as under:

Particulars	Y0	Y1	Y2	Y3	Y4				
Base Airport Charges	100	100	100	100	100	100	100	100	100
Airport Charges calculated as per Schedule 1	-	-	-	-	97	100	108	118	123
Increase over Base Airport Charges	-	-	-	-	-3	0	8	18	23
Permitted nominal increase to be available at the least, as per Schedule 6 of SSA	-	-	-	10	10	10	10	10	10
Final Tariff as per AERA	100	100	100	110	107	110	110	118	123

8.11 The Authority has been established under the provisions of the AERA Act, 2008. In terms of S.13(1)(a) of the Act, the Authority is required to determine the tariff for aeronautical services taking into consideration several factors listed therein – "the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise" is one of these factors. Therefore, the Authority cannot be expected to determine the tariff solely based upon the provisions of the SSA. In other words, presuming without admitting that the SSA warrants a 10% year on year increase over BAC from 4th year onwards, such a provisions of the SSA cannot be the sole basis for effecting the aforesaid increase.

8.12 In terms of S.13(2) of the Act, the Authority is required to determine the tariff once in five years. Tariff so determined can be amended during the said period of five years if so considered appropriate and in public interest. Therefore, presuming without admitting that the SSA warrants that "the Aeronautical Charges are to be determined by the AERA/GOI in each year after the 4th year from the Effective Date" and "the 10% BAC Increase is to be applied in each year



from the fourth year to the end of the Term”, such provisions of SSA cannot be implemented by the Authority being contrary to the express provisions of S.13(2) of the Act.

8.13 The AERA Act, 2008 has been enacted subsequent to the SSA. The SSA contemplates the eventuality of “Change in Law” under clause 10 thereof. The JVC, (i.e., MIAL & DIAL) is eligible for monetary compensation for loss due to change in law. However, the clause 1.1 of the SSA so defines ‘Change in Law’ that the law concerning “the creation or introduction of a Regulatory Authority (including the framing of rules and regulations in relation thereto or thereunder) having jurisdiction over the Airport shall not constitute a Change in Law.”

8.14 The Authority is in the process of finalizing Guidelines for tariff determination through a consultative process. All stakeholders, including MIAL and DIAL, have been participating in this process. The matter has long term implications. Therefore, while all efforts are made by the Authority to finalise it with due despatch the process cannot be expedited beyond a point. In fact, it has to be pointed out that keeping in view the complex nature of issues involved and long term implications thereof several stakeholders including the Central Government and Association of Private Airport Operators (APAO – representative body of private airports including MIAL and DIAL) have requested for extension of time at various stages of consultative process.

8.15 IATA has pointed out that the interpretation sought to be put by MIAL & DIAL on the provisions of Schedule 6 of SSA would imply a disregard for the principle of “cost relatedness” laid down by the ICAO. India is a member of ICAO. Therefore, any agreement entered into by the Government of India should be so interpreted so as to avoid a conflict with the ICAO policies.

9. To summarize, the Authority is of the opinion that:

- (i) It is required to determine the tariff for aeronautical services in terms of the relevant provisions of the Act.
- (ii) As per S.13 (1)(a) of the Act, the tariff for aeronautical services has to be determined taking into consideration several factors – One of these factors being the concessions offered by the Central Government. Thus, the aeronautical charges cannot be decided solely based upon the provisions of SSA.
- (iii) In terms of S.13(2) of the Act, the Authority is required to determine the tariff on quinquennial basis. Any provision of SSA which runs contrary to the express provisions of the Act cannot be implemented by the Authority.
- (iv) Notwithstanding the position at (ii) & (iii) above, there is no warrant in the provisions of Schedule 6 of the SSA for an automatic increase equivalent to 10% of BAC from the commencement of fourth year after the Effective Date and for every year thereafter.

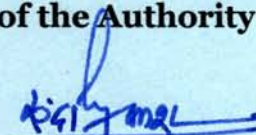


10. Having considered the submissions made by the stakeholders and upon due consideration of all the facts and circumstances the Authority passes the following Order.

ORDER:

11. The requests made by MIAL and DIAL for a 10% increase in aeronautical charges at the CSI Airport, Mumbai, and IGI Airport, New Delhi, respectively with effect from 03.05.2009, are hereby rejected.

By the Order of and in the
Name of the Authority


(Sandeep Prakash)
Secretary

1. ✓ **Mumbai International Airport Ltd.,
CSI Airport,
Mumbai
(Through: Shri G.V. Sanjay Reddy, Managing Director)**
2. **Delhi International Airport Ltd.,
IGI Airport,
New Delhi
(Through: Shri Kiran Kumar Grandhi, Managing Director)**

भा.वि.आ.वि.प्रा.
AERA

