REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8378 OF 2018

DELHI INTERNATIONAL AIRPORT LTD. …Appellant

Versus

AIRPORT ECONOMIC REGULATORY AUTHORITY OF INDIA & ORS. …Respondents

With
CIVIL APPEAL No.10902/2018
CIVIL APPEAL No.6658-6659/2019
CIVIL APPEAL No.7331/2021
CIVIL APPEAL No.7334/2021
CIVIL APPEAL No.5401/2019
CIVIL APPEAL No.5738/2019
CIVIL APPEAL No.3675/2020
CIVIL APPEAL No.145/2021

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. The economic liberalisation of the 1990s brought in many regime changes. One of the sectors which required a re-look was civil aviation infrastructure. Modernisation of airports all over the world required India

to also step up in its efforts towards the development of international level airports. One can say with some pride that this modernisation effort has raised the status of the airports in India not only to an international level but has also resulted in them being rated as amongst the best in the world.

2. In furtherance of the modernisation effort, the Government of India introduced the Airport Infrastructure Policy in 1997 with the objective of augmenting India's airport infrastructure and with a view towards its modernisation, development and upgradation. The policy promoted private sector participation by way of Public Private Partnership Model and in furtherance of the same, the Airports Authority of India Act, 1994 (hereinafter referred to as the 'AAI Act') was amended with effect from 01.07.2004 to enable the setting up of private airports and leasing of existing airports to private operators.

3. A new policy on airport infrastructure was introduced in 2002. The Airports Authority of India (for short 'AAI') initiated a competitive bidding process, which culminated into the award for the operation, management and development of the Indira Gandhi International Airport

(for short ‘IGIA’) and Chhatrapati Shivaji Maharaj International Airport (for short ‘CSIA’) to consortiums led by GMR and GVK respectively.

4. A Joint Venture (for short ‘JV’) agreement was executed between the GMR Consortium and the AAI for Delhi International Airport Limited (for short ‘DIAL’), and on similar pattern between the GVK Consortium and the AAI for Mumbai International Airport Limited (for short ‘MIAL’). These agreements were executed simultaneously on the same date with the AAI holding 26 per cent shareholding in each of the JVs. DIAL and MIAL thereafter entered into the Operation, Management and Development Agreement (for short ‘OMDA’) dated 04.04.2006 with AAI and executed other project agreements including the State Support Agreement (for short ‘SSA’) dated 26.04.2006. The fee sharing was, however, different in view of economic logistics and, thus, DIAL was required to pay AAI an annual fee of 45.99 per cent of the revenue received by DIAL while MIAL was required to pay AAI an annual fee of 38.7 per cent of the revenue received by MIAL. An Airport Operator Agreement was signed on 01.05.2006 and in pursuance of the same, DIAL and MIAL were handed over management of the respective airports in Delhi and Mumbai and operations commenced on 03.05.2006.

For the purpose of this judgment, DIAL and MIAL shall collectively be referred to as "Airport Operators".

5. It was only after a hiatus period of about three years that the Airports Economic Regulatory Authority of India Act (hereinafter referred to 'said Act') came into force on 01.01.2009 with the exception of Chapters III and VI, which were made effective from 01.09.2009.

Contractual and Regulatory Framework:

6. In order to appreciate the controversy being dealt with by us, it is necessary to appreciate the contractual and regulatory framework. DIAL and MIAL both broadly earn their revenue from two sources, viz., Aeronautical and Non-aeronautical. While they are free to fix charges towards the latter, the former component is controlled by the Airports Economic Regulatory Authority of India (for short 'AERA/the Authority'), which regulates tariff and other charges for aeronautical services rendered at airports. Aeronautical services are defined in Section 2(a) of the said Act and are enumerated in Schedule 5 of the OMDA. The calculation of tariff was to be carried out in accordance with Section 13 of the said Act, which *inter alia* provided that the

determination of tariff had to be made in accordance with the concession offered by the Central Government in any agreement or Memorandum of Understanding. This was obviously with the objective of having continuity of process in protecting the terms on which the project began.

7. It is not in dispute that the SSA and the OMDA are in the nature of 'concessions' offered by the Central Government. As per Schedule I of the SSA, the AERA was required to observe certain principles in determining tariff, which include having regard to following an incentives based approach, adopting a consistent method of determination, and recognising the need for DIAL and MIAL to generate sufficient revenue and earn a reasonable return on their investment. Schedule I of the SSA also contained the tariff determination formula which was based on an Inflation - X Price Cap Model. The formula contained multiple components which pertained to various aspects of aeronautical assets and aeronautical services of DIAL and MIAL. From these components, an element 'S' has to be subtracted, which reflects 30 per cent of the gross revenue generated by the JVC from Revenue Share Assets (viz., non-aeronautical assets and assets required for provision of aeronautical related services). This is known as the 'shared till' or the

'hybrid till' model, as a portion of non-aeronautical revenue surplus is used to cross-subsidize aeronautical costs. The objective apparently was to ensure that at least a fixed percentage of the revenue would flow to the authorities before different calculations are made. This was in consideration for both land and other assets which were handed over to DIAL and MIAL. The algebraic formulation for calculating the Target Revenue (for short 'TR') as provided in Schedule 1 of the SSA is reproduced below:

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

where TR = target revenue

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

WACC = nominal post-tax weighted average cost of capital, calculated using the marginal rate of corporate tax

OM = efficient operation and maintenance cost pertaining to Aeronautical Services. It is clarified that penalties and Liquidated

Damages, if any, levied; as per provisions of "Provisions of the OMDA would not be allowed as part of operation and maintenance cost.

D = depreciation calculated in the manner as prescribed in Schedule XIV of the Indian Companies Act, 1956. In the event, the depreciation rates for certain assets are not available in the aforesaid Act, then the depreciation rates as provided in the Income Tax Act for such asset as converted to straight line method from the written down value method will be considered. In the event, such rates are not available in either of the Acts then depreciation rates as per generally accepted Indian accounting standards may be considered.

T = corporate taxes on earnings pertaining to Aeronautical Services.

S = 30% of the gross revenue generated by the NC from the “Revenue Share Assets”. lbe costs in relation to such revenue shall not be included while calculating Aeronautical Charges.

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.)

i = time period (year) i

$RB_i = RB_{i-l} - D_i + I_i$

Where: RB_0 for the first regulatory period would be the sum total of (i) the Book Value of the Aeronautical Assets in the books of the JVC and

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

I= investment undertaken in the period.

8. In a nutshell, AERA is required to compute the tariff using the formula and keeping in mind the principles listed in Schedule I. What appears to be only an algebraic formulation was and is obviously capable of generating controversy and interpretations which is what we face today.

History of the litigation:

9. The belief in the requirement of specialised authority and appellate tribunal gave rise to establishment of regulatory and judicial fora for determination of any dispute forming subject matter of the field in consonance with the said Act.

10. Although airport operations had commenced earlier, the First Control Period commenced from 01.04.2009 for a period of five years, i.e., up to 31.03.2014. AERA determined aeronautical tariffs for the First Control Period with respect to DIAL on 20.04.2012 and for MIAL on 15.01.2013 (referred to as the DIAL and MIAL Tariff Order respectively). DIAL was aggrieved and it filed AERA Appeal No.10 of 2012 under Section 18(2) of the said Act challenging various decisions

taken by AERA in the DIAL Tariff Order. MIAL preferred a similar appeal vide AERA Appeal No.4 of 2013. The history to these appeals is what ought not to have been. This is more so as the operations of the Airports were an important part of the economic agenda of governments past and present. Over a period of three years from 2012 to 2015 various benches of the erstwhile Airports Economic Regulatory Authority Appellate Tribunal (for short 'AERAAT'), constituted under the said Act considered various aspects but on account of the composition of the Tribunal changing from time to time it never worked out. Finally, a Notification was issued on 07.09.2015 whereby the Chairman and two members of the National Consumer Disputes Redressal Commission (for short 'NCDRC') were given additional charge to function as the AERAAT. Once again, when the process of hearing was on, a Notification was issued on 26.05.2017 by the Ministry of Finance notifying that Part XIV of Chapter VI of the Finance Act, 2017 had come into force and the Telecom Disputes Settlement and Appellate Tribunal (for short 'TDSAT') was designated as the appellate tribunal under the said Act. Thus, the grievances of the parties were aggravated as half a decade passed in this process. There was obviously an uncertainty

created by there being no quietus to the dispute. The scenario was such that tariff determination took place even for the Second Control Period without there being any finality to the First Control Period. This Court had to step in and pass order dated 03.07.2017 in Civil Appeal No.8394/2017 filed by Air India Limited pertaining to tariff determination for the Second Control Period, and the TDSAT was directed to conclude hearing for the appeals filed by DIAL relating to the First Control Period within two months from the date of the said order.

11. MIAL's endeavour for listing its appeal was not successful as the TDSAT refused its request and commenced hearing DIAL's appeal from August, 2017. This was predicated on the deadline of two months fixed by this Court. However, TDSAT gave liberty to MIAL to make submissions on important questions of law before concluding the hearing for DIAL's appeal.

12. The TDSAT made its order dated 23.04.2018 with respect to DIAL. There were four issues which survived and these were decided vide order dated 15.11.2018 in an appeal preferred by MIAL. The endeavour of MIAL to seek review for limited issue relating to

determination of Hypothetical Regulatory Asset Base was rejected on 17.01.2019. Apart from these, AERA Appeal No. 03 of 2013 and AERA Appeal No. 05 of 2013 were also filed before the TDSAT wherein imposition of Development Fee (for short 'DF') by DIAL and MIAL respectively were challenged. AERA had allowed the said imposition of DF and thus appeals were filed before the TDSAT. These came to be decided by the TDSAT *vide* order dated 20.03.2020 and 16.07.2020 (for short 'DF orders') respectively for DIAL and MIAL wherein the TDSAT agreed with the view taken by AERA. All these five orders passed by the TDSAT are impugned before us in these Civil Appeals.

13. In the aforesaid appeals, Federation of Indian Airlines (for short 'FIA'), Lufthansa German Airlines (for short 'Lufthansa') and AERA are also before this Court as respondents in appeals filed by DIAL and MIAL and there are appeals filed by FIA, Lufthansa and others on similar issues in respect of the said impugned orders.

<u>Appeals from Regulatory Authority</u>:

14. One may observe at this stage that in effect this Court has been made a court of second appeal in similar matters arising out of many such tribunals. This has resulted in a number of contentious matters requiring consideration by this Court. The scenario is different from the 'SLP jurisdiction' where no re-appreciation of evidence is really required unless extraordinary circumstances exist, while an appeal of this nature stands on a different footing and is a continuation of the original proceedings.[1]

15. This Court in ***Modern Dental College and Research Centre v. State of M.P.***[2] has eloquently summarised the onset of the modern regulatory era:

> "87. Regulatory mechanism, or what is called regulatory economics, is the order of the day. In the last 60-70 years, economic policy of this country has travelled from laissez faire to mixed economy to the present era of liberal economy with regulatory regime. With the advent of mixed economy, there was mushrooming of public sector and some of the key industries like aviation, insurance, railways, electricity/power, telecommunication, etc. were monopolized by the State. License/permit raj prevailed during this period with strict control of the Government even in respect of those industries

[1] Rajendra Diwan v. Pradeep Kumar Ranibala & Anr., (2019) 20 SCC 143 (Constitution Bench).
[2] (2016) 7 SCC 353.

> where private sectors were allowed to operate. However, Indian economy experienced major policy changes in early 90s on LPG Model, i.e. liberalization, privatization and globalization. With the onset of reforms to liberalize the Indian economy, in July 1991, a new chapter has dawned for India. This period of economic transition has had a tremendous impact on the overall economic development of almost all major sectors of the economy."
>
> ....
> 89. With the advent of globalization and liberalization, though the market economy is restored, at the same time, it is also felt that market economies should not exist in pure form. Some regulation of the various industries is required rather than allowing self-regulation by market forces. This intervention through regulatory bodies, particularly in pricing, is considered necessary for the welfare of the society and the economists point out that such regulatory economy does not rob the character of a market economy which still remains a market economy. Justification for regulatory bodies even in such industries managed by private sector lies in the welfare of people. Regulatory measures are felt necessary to promote basic wellbeing for individuals in need. It is because of this reason that we find regulatory bodies in all vital industries like, insurance, electricity and power, telecommunications, etc."

16. The contours of judicial review by this Court qua the decision of a regulatory body have evolved. In ***Akshay N. Patel v. Reserve Bank of India & Anr.***[3] a notification of the Reserve Bank of India prohibiting the export of PPE kits during the Covid-19 pandemic was assailed. It was observed therein that adelicate role is played by this Court in reviewing

[3] (2022) 3 SCC 694.

the actions of independent regulatory bodies:

> "64. .... In liberalized economies, regulatory mechanisms represent democratic interests of setting the terms of operation for private economic actors. This Court does not espouse shunning of judicial review when actions of regulatory bodies are questioned. Rather, it implores intelligent care in probing the bona fides of such action and nuanced deference to their expertise in formulating regulations. A casual invalidation of regulatory action in the garb of upholding fundamental rights and freedoms, without a careful evaluation of its objective of social and economic control, would harm the general interests of the public."

17. The liberalised era from 1990s has seen enunciation of limits of judicial intervention in such appeals from decision of regulators. A Constitution Bench of this Court in ***Shri Sitaram Sugar Company & Anr. v. Union of India & Ors.***[4] made some relevant observations to emphasise that what is required to be seen by this Court is that the readings are reasonably supported by evidence as judicial review is really not concerned with matters of economic policy and the endeavour certainly cannot be to substitute its view for that of the legislature or to supplant the view of the expert body. The relevant observations are reproduced hereunder:

> "56. The court has neither the means nor the knowledge to re-evaluate the factual basis of the impugned orders. The court, in

[4] (1990) 3 SCC 223.

exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence. In the words of Justice Frankfurter of the U.S. Supreme Court in *Railroad Commission of Texas v. Rowan & Nichols Oil Company* [311 US 570, 575 : 85 L ed 358, 362] :

> "Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen State authorities.... When we consider the limiting conditions of litigation — the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers — it is clear that the Due Process Clause does not require the feel of the expert to the supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses".

This observation is of even greater significance in the absence of a Due Process Clause.

57. Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in *Gupta Sugar Works* [1987 Supp SCC 476, 481] :

> "... the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."

58. Price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in *Mississippi Valley Barge Line Company v. United States of America* [292 US 282, 286-87 : 78 L ed 1260, 1265] :

> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form.... It is not the province of a court to absorb this function to itself.... The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

18. 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."

19. Clause (vi) of sub-section (1) of the said Act clearly stipulates that in the determination of tariff for the aeronautical services, one of the considerations, is the concession offered by the Central Government in any agreement or memorandum of understanding or otherwise. Thus, the principle that legislative intent must prevail over any prior agreement would not really apply in the present scenario as the legislative intent itself incorporates and requires the prior agreements to be taken into consideration albeit along with certain other parameters/requirements.

20. We would now like to turn to the different aspects of tariff fixation which have formed a debate before us and we consider it appropriate to deal with them as per the aspects raised, which are really common to the

appeals in a larger perspective.

Treatment of Fuel Throughput Charges:

21. The fuel supply chain at the airport begins from entry of Aviation Turbine Fuel (for short 'ATF') into the airport premises and extends up to fuelling the aircraft. Fuel Throughput Charge (for short 'FTC') is a fee collected by the airport operators from Oil Marketing Companies (for short 'OMCs') for providing fuel to the aircraft. If FTC is treated as an aeronautical revenue, it would be covered within the TR and in case it is treated as non-aeronautical revenue, only 30 per cent of the fee recovered from FTC will be covered in the TR. Thus, the controversy as it appears before this Court is whether FTC is a service or an access fee and if FTC is a service, whether FTC falls within the category of aeronautical services.

22. The opinion of the AERA, in the DIAL tariff order dated 20.04.2012 is that the FTC should be treated as aeronautical revenue as Section 2(a)(vi) of the said Act defines 'aeronautical service' to mean any service provided "for supplying fuel to the aircraft at an airport."

Further, Entry 17 of Schedule 5 of the OMDA mentions “common hydrant infrastructure for aircraft fuelling services by authorised providers” as an aeronautical service, whereas fuel supply finds no mention in Schedule 6 of the OMDA which lists non-aeronautical services. FTC was, thus, held to be a charge in respect of provision of an aeronautical service, namely, supply of fuel to the aircraft and washence considered an aeronautical charge, which is to be determined by the Authority under Section 13(1)(a) of the said Act.

23. Another aspect considered by AERA in the MIAL tariff order dated 15.01.2013 was that the mere establishment of common hydrant infrastructure alone does not comprise any service unless the concerned fuel hydrant infrastructure gets appropriate fuel into it. Since the entry of fuel into the CSI Airport, Mumbai is entirely in the control of MIAL, it was held that MIAL became a service provider in the chain of supply of fuel to the aircraft. There is nothing in Schedule 6 of OMDA to indicate that FTC is a non-aeronautical charge or revenue but on the other hand Schedule 5 of OMDA clearly provides for aircraft fuelling services. Entry 11 of Schedule 5 of OMDA states that “any other services deemed to be necessary for the safe and efficient operation of the airport” means

provision of an aeronautical service, and Entry 17 of the said schedule provides that the common hydrant infrastructure is an aeronautical service. Thus, merely labelling it as “fuel concession fee” or any other nomenclature does not change the nature of the aeronautical service and as this part is provided by the Airport Operator, the revenues arising from such aeronautical service in the hands of the Airport Operator are reckoned as aeronautical revenues. SSA and OMDA clearly indicate the intention of the Government to establish an independent regulator, so it could not be said that the bidders were unaware that tariff determination would be impacted in the future.

24. The relevant provisions to appreciate this reasoning read as under:

Section 2(a)(vi) of the AERA Act:

“2. Definitions.—In this Act, unless the context otherwise requires,—
(a) "aeronautical service" means any service provided—

xxxx xxxx xxxx xxxx xxxx

(vi) for supplying fuel to the aircraft at an airport; and”

....

OMDA:

“CHAPTER I

DEFINITIONS AND INTERPRETATION

1.1 Definitions
In this Agreement, unless the context otherwise requires:

“Aeronautical Services” shall have the meaning assigned hereto in Schedule 5 hereof.”

....

“SCHEDULE 5
AERONAUTICAL SERVICES

“Aeronautical Services” means the provision of the following facilities and services:

xxxx xxxx xxxx xxxx xxxx

11. any other services deemed to be necessary for the safe and efficient operation of the Airport.

xxxx xxxx xxxx xxxx xxxx

A more detailed list of the above facilities and services would include the following:

xxxx xxxx xxxx xxxx xxxx

17. Common hydrant infrastructure for aircraft fuelling services by authorised providers”

“SCHEDULE 6
NON-AERONAUTICAL SERVICES

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

Part I
1. Aircraft cleaning services
2. Airline Lounges

3. Cargo handling
4. Cargo terminals
5. General aviation services (other than those used for commercial air transport services ferrying passengers or cargo or a combination of both)
6. Ground handling services
7. Hangars
8. Heavy maintenance services for aircrafts
9. Observation terrace

Part II
10. Banks / ATM*
11. Bureaux de Change*
12. Business Centre*
13. Conference Centre*
14. Duty free sales
15. Flight catering services
16. Freight consolidators/forwarders or agents
17. General retail shops*
18. Hotels and Motels
19. Hotel reservation services
20. Line maintenance services
21. Locker rental
22. Logistic Centers*
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."

25. The aforesaid determination, not being favourable at all to DIAL or MIAL, was assailed before the TDSAT. Insofar as the DIAL tariff order dated 22.04.2018 is concerned, submissions of both DIAL and MIAL were appreciated. MIAL submitted that revenue from aeronautical services like cargo, ground handling and FTC must always be treated as non-aeronautical revenue. It was further submitted that if the service provider is DIAL, the revenue will be a fee for services but once it outsources an aeronautical service, the fee for such outsourcing should be treated as non-aeronautical revenue because in such a case, DIAL is not rendering any service. This plea did not find favour with the TDSAT, which held that even when the airport operator engages in providing an aeronautical service through its servants or agents, the service must be deemed to be one provided by the airport operator. The colour of revenue from aeronautical service cannot get changed to that of revenue from non-aeronautical service by an act of delegation or leasing out by the concessionaire. The TDSAT also dealt with the MIAL tariff

order dated 15.11.2018. One may say that there appears to be some conflict limited to the extent that while dealing with the MIAL order it was observed by the TDSAT that while they are alive to the contention made on behalf of MIAL, they had not taken a view or rendered a finding on the aspect of FTC in the DIAL order. We say this as the MIAL tariff order while observing so had recorded in para 4 that only four aspects were required to be examined. FTC was mentioned as one of the four aspects and, thus, did survive before the TDSAT despite its earlier opinion dated 12.04.2018, which had dealt with the aspect of FTC.

26. Be that as it may, turning to the opinion of the TDSAT in the MIAL tariff order, it was observed that in case of FTC, one monopoly (airport JVCs having monopoly over airport access) was granting a concession to another monopoly (of oil companies having monopoly over marketing of fuel). Since both monopolies had enough market power, the fact of one monopoly agreeing to pay a concession fee to another (without passing it on to the end consumer) would mean that it is providing some extra tangible or intangible ‘facilities’ or ‘services’. This was notwithstanding MIAL’s submission that it was willing to submit an undertaking that it will not increase FTC beyond a certain limit.

27. The TDSAT turned to Section 2(a) of the said Act, which defined "aeronautical service" to mean "any service" thereby providing for a wide range of functions, which also included supply of fuel to aircraft at the airport. Thus, there was no reason to give a restrictive view to what constitutes a "service", but rather the same should be given the widest import. To support this conclusion, it was opined that this has to be read along with the object of the said Act, which as per the Preamble of the Act is "to provide for the establishment of an Airports Economic Regulatory Authority to regulate tariff and other charges for the aeronautical services rendered to airports and to monitor performance standards of airports and for matters connected therewith or incidental thereto".

In view of the aforesaid Preamble, it was observed that the meaning of "service" should be read as an economic activity pertaining to specified functions of significant import, irrespective of label, source, nature or history.

28. The appellate authority took note of the submissions of AERA that the International Civil Aviation Organisation (for short 'ICAO')

guidelines specifically give examples of aviation fuel supply services as having an “aeronautical character”, whereas MIAL had relied upon “Glossary of Terms” of ICAO Documents to treat “concessions granted to Oil companies to supply aviation fuel and lubricants…” as non-aeronautical revenue. It was held that first reliance must be placed on the said Act and agreements as reflected in SSA and OMDA rather than on the ICAO guidelines and no reason was found to interfere with the AERA’s decision on treatment of FTC for purposes of Target Revenue formula wherein AERA had relied upon Schedules 5 & 6 of the OMDA.

Submissions on the aforesaid aspects before the Supreme Court:

29. The Airport Operators sought to urge that the FTC was an access/concession fee and that they were not providing any serviceof any nature for supplying fuel to an aircraft nor were the OMCs selling or marketing or providing any service to the airlines. There was also no delegation or leasing out of any service as OMCs sell fuel which the Airport Operators are not authorised to sell. The definition of “aeronautical services” in Section 2(a)(vi) of the said Act would not include FTC. The word “means” limits the scope of the definition and provides an exhaustive list of services that are to be treated as

aeronautical services.

30. It was urged that the FTC was not relatable to any Aeronautical Services or Non-Aeronautical Services under Schedule 5 or 6 of the OMDA. The reliance placed by AERA on Entry 17 of Schedule 5 of the OMDA was untenable as FTC was independent of the facilities or services provided by third parties by use of the common hydrant infrastructure, charges for which are already regulated by the AERA. Entry 11 of Schedule 5 was urged to be read with in conjunction with Entries 1 to 10, which also do not refer to any fuelling activities. An additional plea was that the FTC had been discontinued by the Ministry of Civil Aviation (for short 'MOCA') pursuant to a direction dated 08.01.2020. Thus, it was urged that this was not a service necessary for safe and efficient operation of the airport as required by Entry 11, and the subsequent interpretation should be read for the purposes of the past as to how FTC should be construed. The two services related to supply of fuel, i.e., the charge of the company that owns the common hydrant infrastructure at IGIA under Entry 17 of Schedule 5 of OMDA, and the charges of "into-plane" fuel service providers who transfer fuel from the common hydrant infrastructure to the aircraft, were regulated by AERA.

31. The character of FTC was pleaded to be relatable to Revenue Share Assets which are assets required for provision of aeronautical related services and are not considered in revenues from Non-Aeronautical Services. As an illustration, “public admission fee” is a fee for the right given to a person to enter into the airport. This is considered as revenue from aeronautical related services as per the definition of Revenue Share Assets as it has a correlation with the usage of Aeronautical Assets by virtue of gaining access to the airport building. An analogy was sought to be drawn to the fee in the form of FTC, which is charged by the Airport Operators to the oil companies for the privilege of access to the IGIA.

32. An important aspect sought to be emphasised was that the bidders had made their bids based on FTC not being an Aeronautical Charge as per the clarification given by the AAI in response to pre-bid queries. The AAI had only stated that the OMCs had in principle agreed to pay FTC but the exact quantum was not decided and, thus, the Airport Operators would have the freedom to negotiate with the fuel companies. The FTC was in the nature of pre-existing charges and not part of aeronautical

charges. Airport Operators' obligation in Clause 5.2(b) of OMDA to novate all existing contracts entered into by the AAI with third parties and to get the same transferred to the name of the Airport Operators has resulted in them continuing to levy FTC and the same was not done as an obligation to perform aeronautical or non-aeronautical services. The FTC was, thus, perceived to be a pre-existing charge and not a part of aeronautical charge as defined in Schedule 1 of the SSA. The Airport Operators also turned to the ICAO documents to submit that FTC is a non-aeronautical activity and revenue therefrom is non-aeronautical revenue.

33. It was submitted by the Airport Operators that for instance, FTC features under the heading above para 4.18 of ICAO Doc 9562, which expressly states 'Revenue from non-aeronautical activities'. Similarly, para 5.34 falls under the chapter titled "Development and Management of Non-Aeronautical Activities' and provides under subheading 'D', i.e. 'Setting Fees and charges for Non-Aeronautical Activities', that where FTC is imposed, it should be recognized by airport entities as being concession charges of an aeronautical nature. Paras 5.4 and 5.5, under subheading B of Chapter 5 titled "Non-Aeronautical Activities- Types

and Operational Responsibilities", which is further categorized under types of concessions and rentals, clearly provide that concession fee by aviation fuel suppliers is revenue from non-aeronautical activities.

34. On the other hand, AERA urged that if fuel throughput service is a complete service in itself and the Airport Operators are merely delegating the service to OMCs and taking a concession fee. The commercial arrangement between the Airport Operators and the OMCs does not change the colour of the revenue. It was urged that the fuel throughput service is an aeronautical service as it is a service for providing fuel to the aircraft on tarmac through common hydrant infrastructure and into-plane agents. It would thus fall under Schedule 5 of OMDA. A reading of Schedule 5 of OMDA dealing with "aeronautical services" would mean the provision of "facilities" and "services". It was urged that the word "facilities" is *ejusdem generis* with the word "services." The Schedule provided a more detailed list of facilities and services such as 'Airfield', 'airfield lightning', 'Air Taxi Services', 'Air Taxi Services', 'Airside and land access roads and forecourts including writing, traffic signals, signage and monitoring" and "common hydrant infrastructure for aircraft fuelling services by authorised providers". Thus, there were

ample elements of facilities used by fuel suppliers that could be attributed to the FTC. There is no mention of any service pertaining to fuel supply in Schedule 6 of the OMDA and FTC was completely disconnected to the services mentioned therein.

35. On the aspect of giving meaningful construction to the said Act in the context of prior OMDA and SSA, it was urged that there was nothing in the agreements to indicate that FTC was a non-aeronautical service but the same was clearly mentioned in Entry 17 of Schedule 5 of the OMDA. Thus, it was urged that FTC was clearly covered under Section 2(a)[5](ii)[6], (iv)[7]&(vi)[8] of the AERA Act.

36. The consequence arising from a contrary view, it was urged, would be a tendency to charge a higher fee as concession, which the OMCs would simply pass on to the Airlines and only 30 per cent of FTC would be covered in the TR. This would result in huge benefits for the Airport Operators at the cost of several stakeholders. The subsidy offered in the calculation of Target Revenue to the tune of 30% of non-aeronautical

[5] Section 2(a) of the AERA Act defines "aeronautical service".
[6] Service provided for the landing, housing or parking of an aircraft or any other ground facility offered in connection with aircraft operations at an airport.
[7] Service provided for ground handling services relating to aircraft, passengers and cargo at an airport.
[8] Service provided for supplying fuel to the aircraft at an airport.

revenue is already a concession offered to the Airport Operators.

37. A reference was also made to the Parliamentary Standing Committee on Airport Economic Regulatory Authority Bill, 2007, which had recommended that the non-aeronautical services be also brought under the ambit of the then proposed regulator, along with the fuel supply infrastructure..

38. The international scenario was also referred to in the context of the Australian Competition and Consumer Commission having held that imposition of a fuel throughput levy is an ‘abuse of market power’ and that there was a strong case that such airports have market power in the market for refuelling service. It was further held that contractual agreements are not a valid reason to justify introduction of such levies.

39. Lastly it was urged that in principle even the ICAO had held that fuel throughput service is an aeronautical service. The ICAO guidelines were referred to in this behalf to contend that the Airport Operators were cherry-picking certain lines and paragraphs from them out of context to suit their own interests. The ICAO had indicated that FTC was a non-aeronautical revenue only for accounting purposes.

40. FIA supported the submissions of AERA and urged that the question of FTC being aeronautical in nature was settled by AERA by its Order No.7/2010 dated 04.11.2010, which was never challenged by DIAL and was also upheld by the TDSAT in its order dated 15.11.2018.

Our Rationale:

41. We have examined this controversy carefully and find no reason to interfere with the concurrent views taken by the AERA and the appellate tribunal. The principles we have enunciated at the threshold *qua* the contours of judicial review towards the decision of regulatory bodies squarely come into play [***Modern Dental College and Research Centre***[9]***; Akshay N. Patel***[10]***; Shri Sitaram Sugar Company & Anr***[11]].

42. The mere fact that the FTC has been discontinued subsequently from 2020 would not give rise to an interpretation that it was a non-essential service and was thus also a non-aeronautical service. The AERA is right in its submissions that all that has been done is that the Airport Operators are delegating the service to provide fuel to the OMCs

[9] (supra)
[10] (supra)
[11] (supra)

and are taking a concession fee and pocketing the same. The significance of supply of fuel to be provided to the aircraft on tarmac cannot be lost sight of. Obviously, the aircraft does not work without fuel. It is being provided through a common hydrant. There is no mention of FTC in Schedule 6 of OMDA and thus, there is a complete lack of connection between FTC and services mentioned therein as non-aeronautical services. Once we accept this proposition then it is easy to find connect between some of the aspects mentioned as aeronautical services with the aspect of FTC.

43. We are not confronted with a situation where there is conflict between the OMDA/SSA and the said Act, requiring recourse to Section 13(1)(a)(vi). A reading of the OMDA/SSA does not give rise to any view that the FTC is a non-aeronautical service. It is clearly mentioned in Entry 17 of Schedule 5 of OMDA.

44. There is also substance in the contention of AERA that the methodology of Airport Operators would amount to a manner of subterfuge to somehow pass on the FTC to the airlines with only 30 per

cent of it being covered in the TR. Forget the aspect of advantage to the Airport Operators, the issue is one also of a number of other stakeholders being adversely affected. The airlines are bound to pass this charge on to the passengers. It would thus have a cascading effect.. If one may say, the Australian Competition and Consumer Commission also looks into this aspect as has been noted by the AERA in the MIAL Tariff Order and, in fact, categorises it with stronger words as "abuse of market power." One cannot use the ICAO documents selectively in different contexts to derive the conclusion as was sought to be done on behalf of the Airport Operators.

45. We thus have no hesitation in upholding the view taken by the AERA and the TDSAT opining that the FTC was a part of the "Aeronautical Service."

Calculation of Hypothetical Regulatory Asset Base (HRAB):

46. The two airports were not set up *de novo*. Existing airports were taken over. The IGIA was a brownfield airport before it had been taken over by DIAL and, thus, assets as reflected in the books of accounts would record depreciation. This created its own difficulties in arriving at

a value of the regulatory base for the first year of the first control period. Another problem faced by the AAI was that it had a common book of assets for several airports across India. Thus, SSA provided a hypothetical regulatory asset base to be derived by working backwards. The calculations to be made would have a cascading effect for successive years and, thus, base calculation for RB_0 would have an impact on the calculation of RB_1 and for further years.

47. The object of calculation of HRAB was to determine RB_0, which was the sum total of:

i. the Book Value of the Aeronautical Assets in the books of the JVC; and

ii. the hypothetical regulatory base computed using the then prevailing tariff and the revenues, operation and maintenance cost, corporate tax pertaining to aeronautical services at the airport, during the financial year preceding the date of such computation.

48. The effect of the aforesaid is that HRAB was to be computed as a value for the financial year 2008-2009 (i.e., the first year of the First Control Period). The controversy in relation to computation of HRAB before this Court was limited to two aspects:

A. Whether the expression “pertaining to aeronautical services” will be applicable to all the components of RBo, i.e. **prevailing tariff and the revenues, operation and maintenance cost, corporate tax** ?

B. Whether permitting AERA to include cost of DIAL manpower in addition to the contractually mandated AAI manpower artificially inflates the operation & maintenance cost, thereby distorting the value of HRAB?

Issue A

49. The AERA opined that the components relating to aeronautical services had to be reckoned. It was the view of AERA in the MIAL tariff order that MIAL had erroneously calculated HRAB by relying upon the Target Revenue as the base and then calculated upwards to reach the value of HRAB instead of relying upon the components given in the formula for calculating RB_0. On the other hand, MIAL contended before the TDSAT that the absence of a comma after the term “corporate tax” in the definition means that it is only the corporate tax that pertains to aeronautical services and not the other elements. This contention was

rejected by the TDSAT vide its order dated 15.11.2018 in MIAL's appeal wherein it was observed that it would be useful to test both the contesting interpretations on the ground of consistency and logical meaning. There are three commas and three elements in the sentence, namely "prevailing tariff and revenues", "operation and maintenance costs" and "corporate tax". In terms of consistency TDSAT noticed no problem with treating all terms as pertaining to "aeronautical services at the airport". It was noticed that if the argument of MIAL was to be accepted then only corporate tax is qualified as pertaining to aeronautical services. This means that the other two elements can be pertaining to either aeronautical or non-aeronautical services or both. Admittedly, "operation and maintenance costs" are meant to be those pertaining only to aeronautical services. MIAL's contention was that the remaining first element "prevailing tariff and revenues" should be treated as aeronautical plus partial non-aeronautical or as aeronautical plus non-aeronautical. The TDSAT in this regard observed that it is obvious that this would be inconsistent and illogical to read from the construction of the sentence. Thus, the only consistent and logical way to read this sentence is to treat all the three elements as pertaining to aeronautical services. A reference

was also made to the fact that operation and maintenance cost in the formula to calculateRB_0 is an independent and express provision. It was observed that in the pre-control period of FY 2008-2009, the provisions of fixing tariff were different than the approaches during the later years of the control period when 'S' is treated as a cross-subsidy for aeronautical revenue.

50. Airport Operators urged before us that the expression "pertaining to aeronautical services" applies only to "operation & maintenance cost" and "corporate tax". In this regard it was submitted that in the formula for TR, operation and maintenance cost pertaining to aeronautical services is reckoned. Similarly, as defined, corporate tax is also only in terms of earnings pertaining to aeronautical services for the said purpose.

51. It was contended by the Airport Operators that all through the SSA and other documents, "pertaining to aeronautical services" has only been used in the context of operation & maintenance costs and taxation. It was further contended that "prevailing tariffs" is also a defined term relating to aeronautical services and therefore, it would be absurd for "revenues" to also relate to aeronautical services. It will only make sense

if “revenues” relates to non-aeronautical services.

52. On the accounting principle it was contended that the prevailing tariff and the revenues represent the receipts of income whereas operation and maintenance cost and corporate tax refer to outflow. With respect to corporate tax, this has to be linked only to aeronautical services. All revenues arising out of aeronautical and non-aeronautical services were shared in full to compute the aeronautical charges prior to 01.01.2009. Thus, as per the provisions of Schedule I of SSA, the hypothetical regulatory base will be computed based on the entire revenue from the period between 01.04.2008 and 31.03.2009, i.e., aeronautical and non-aeronautical income so as to calculate the value of the regulatory base. The expression ‘regulatory base’ means the assets which are required to earn revenues by the regulatory entity.

53. Mr. Datar sought to rely on the judicial pronouncement in ***Nabha Power Ltd. (NPL) v. Punjab State Power Corporation Ltd. (PSPCL) & Anr.***[12] for the purposes of rules of interpretation of contracts and how courts should read implied terms into the contract. More specifically he relied on the *Reddendo Singula Singulis principle*, which states that

[12] (2018) 11 SCC 508.

"Where a complex sentence has more than one subject, and more than one object, it may be the right construction to render each to each, by reading the provision distributively and applying each object to its appropriate subject. A similar principle applies to verbs and their subjects, and to other parts of speech."

It was, thus, urged that this principle should be applied to interpret the disputed clause at hand.

54. AERA contended that "prevailing tariff" and "revenue" are not two different phrases. Prevailing tariff results in the computation of revenue and by itself the prevailing tariff cannot be used as a component to determine RB_0. The expression "pertaining to aeronautical services" should be applied to either all the components of HRAB or none at all. On accounting formulation, it was urged that *Prevailing Tariff x No. of Users = Revenue* and, thus, there could be no bifurcation.

55. Mr. Buddy Ranganathan learned counsel for FIA sought to contend that the definition of TR formula as well as the Regulatory Base and the Hypothetical Regulatory Base made it clear that they all pertain to aeronautical services and assets. He urged that adding the component of

non-aeronautical revenue by trying to bifurcate "prevailing tariff and revenue" is unwarranted and is contrary to the SSA. It was also contended that MIAL also understood this in the same manner and while arguing on 23.11.2011 before AERA for calculation of HRAB, it had taken 30 per cent of non-aeronautical revenue whereas before this Court it has suggested that 100 per cent of non-aeronautical revenues be taken in the definition of HRAB. AAI's letter dated 18.06.2018 talks about traffic revenue and non-traffic revenue which was completely different from tariff revenue and bears no relation to HRAB.

Our Rationale:

56. If we analyse the aforesaid aspect, it is an issue of plain construction of the contract as it reads. There is no reason why explicit grammatical connotation should not be applied to a contract unless it results in some absurdity. The contract was negotiated by experts and they are expected to know all the ramifications of the language they use. The sentence reads as under:

> "ii. the hypothetical regulatory base computed using the then **prevailing tariff and the revenues, operation and maintenance cost, corporate tax pertaining to aeronautical services at the**

airport, during the financial year preceding the date of such computation." (emphasis supplied)

57. The question, which arises is whether prevailing tariff and revenue is one expression itself followed by a comma, which refers to operation and maintenance cost and another comma followed by corporate tax. Thus, the three expressions have been used whereafter it is added that it pertains to aeronautical services at the airport. To our mind, it is quite clear that all the three phrases are qualified by them pertaining to aeronautical services at the airport. An alternative plea was raised (a lesser one at that) to distinguish prevailing tariff and revenue as two different terms. This was to make aeronautical services not applicable, at least, to prevailing tariffs and revenue by seeking to bifurcate these two expressions. The result sought to be achieved was that as an alternative, the aeronautical services would apply to operations and maintenance on one hand and corporate tax on the other while seeking to exclude tariff and revenue. If one may say, in order to achieve a particular result, a reverse engineering process was sought to be applied to contend that the term revenue would include both aeronautical and non-aeronautical services.

58. We are unable to appreciate how the principle of interpretation of *Reddendo Singula Singulis principle* as discussed in ***Nabha Power Ltd. (NPL)***[13] case would be applicable in the present case. The principle is clear in its terms. It is when a complex sentence has more than one subject and more than one object that a construction may be required to render each to each by reading the provision distributively. Firstly, we do not find it a complex sentence. Secondly, there is no requirement to read one part with one particular aspect by excluding the other part of the sentence. The sentence reads clearly where the three concepts are qualified by aeronautical services.

59. The endeavour should not be to somehow achieve an objective of increasing the financial inflow of the Airport Operators by one method or the other. It is not a contract drawn by laymen but by specialists. To somehow strain the aspect of construction to achieve a particular objective cannot be a method of constructing this clause. We do find that the argument is specious, innovative as it may be.

60. We have, thus, no hesitation in agreeing with the view adopted by

[13] (supra).

AERA and the TDSAT.

Issue B

61. The DIAL tariff order passed by AERA records that training is an integral part of efficient operation and hence costs incurred in this activity cannot be ignored only on account of alleged overlap. The cost admittedly pertained to aeronautical services. AERA disallowed separation of operation and maintenance costs into “efficient costs” and “non-efficient costs” and took into account only efficient costs while calculating HRAB especially when SSA makes no such distinction.

62. The aforesaid conclusion was upheld by TDSAT in the appeal, wherein repelling the plea of DIAL to exclude the cost of an extra set of employees for the initial year for calculating HRAB had been rightly negatived in the light of the provisions in OMDA and other relevant facts. It was observed that no good ground was made out to overlook the costs actually incurred.

63. Dr. A.M. Singhvi and Mr. Krishnan Venugopal, learned senior counsels appearing for DIAL sought to contend before us that the AAI

manpower was contractually imposed upon DIAL pursuant to Article 6.1.1 of OMDA. Thus, only the cost of such manpower should have been included as part of operation and management cost which would allow efficient costs to be recovered through pricing being the relevant cost for operating the airport as mandated by the Economic Efficiency principle in the SSA. Thus, the cost of DIAL's employees should not be considered for calculation of HRAB as the same was required in the transition phase and not in normal course of business. Thus, as per the SSA, HRAB should be calculated considering profit in normal course of business for the year immediately before the first control period (i.e., FY 2008-2009). The inclusion of the cost of DIAL manpower in addition to the contractually mandated AAI manpower in the operation and management cost artificially inflated the operation and management cost, thereby distorting the value of HRAB which was in violation of Section 13(1)(a)(vi) of the said Act. It was the plea that AERA had not gone into the issue of duplication of work and, therefore, the issue cannot be raised by the respondents at this stage.

64. On the other hand, this plea was stoutly resisted by both AERA and FIA predicating that training was an integral part of efficient

operation and, therefore, costs incurred in this activity, which is an aeronautical activity, could not be ignored. It was not the case of DIAL that the cost of AAI staff was not incurred for any aeronautical service or that the AAI staff functioning at the airport was unnecessary for the smooth operations of IGIA during FY 2008-2009. It was only a non-recurring cost and not a non-efficient cost contrary to DIAL's plea this cost was a non-efficient cost and therefore could not have been taken into account. The AAI employees and the employees appointed by DIAL worked as an integrated unit to run the airport and as and when AAI team was weaned away, DIAL had added new employees to take their place.

65. We find little merit in this contention. The principle of economic efficiency incorporated in SSA only means that there should be no extra cost included which does not affect the efficiency of the system. It can hardly be said that the system could have worked in the relevant year without the AAI manpower. No doubt it was a transition phase which required both sets of manpower to work in tandem towards the efficiency levels. The relevant aspect is that as and when AAI started pulling out their manpower, DIAL supplemented the manpower. That manpower supplemented may be less or more is not relevant. In the year in

question, the presence of both sets of manpower was necessary for the efficient functioning and the manpower of DIAL was in the learning process. This learning curve cannot be excluded on the ground of not being relatable to economic efficiency. It can hardly be called duplication of work even though it may in some sense add to the value of HRAB but that is a natural corollary. The parties to the contract were quite conscious of this ramification as they knew the methodology which would be adopted for the takeover of the airport. Now to contend that this should be excluded to somehow increase the profit margins of DIAL is, in our view, completely unsustainable and, thus, we reject this contention.

Application of CPI-X methodology for calculation of tariff:

66. A mathematical controversy has arisen with respect to the algebraic formulation arising from the methodology adopted by AERA. AERA calculated tariff by applying Consumer Price Index (for short 'CPI') and then determining the 'X factor', which would be subtracted out of CPI. This X factor has to be calculated as per the SSA. We will have to appreciate the background scenario to determine the issue. The operation of the airports is monopolistic in character. The endeavour is

that this monopolistic character should not be misused and, thus, in a way revenue returns are sought to be controlled. The CPI is determined by the Government from a basket of pricing factors. From this CPI, the X factor is to be subtracted. This is how AERA seeks to apply the formula. The view of DIAL is that step one is calculation of TR and thereafter at the second stage the CPI should be subtracted. Finally, X factor in applied. On the other hand, as far as AERA is concerned they have made it a two-stage process by which target revenue is calculated first and CPI and X factor are calculated together at the second stage.

67. We now come to the issue of X factor as per Schedule 1 of the SSA. The X factor is calculated by determining what equates the present value over the regulatory period of the target revenue with the present value that results from applying the forecast traffic volume with a price path based on the initial average aeronautical charge, increased by CPI minus X for each year. Accordingly, the following equation has been provided:

$$\sum_{i=1}^{n} \frac{RB_i \times WACC_i + OM_i + D_i + T_i - S_i}{(1 + WACC_i)^i} = \sum_{i=1}^{n} \sum_{j=1}^{m} \frac{AC_{ij} \times T_{ij}}{(1 + WACC_i)^i}$$

where AC_{ij} = average aeronautical charge for the j^{th} category of aeronautical revenue in the i^{th} year

T_{ij} = volume of the j^{th} category of aeronautical traffic in the i^{th} year

X = escalation factor
n= number of years considered in the regulatory period
m = number of categories of aeronautical revenue e.g. landing charges, parking charges, housing charges, Facilitation Component etc.

The maximum average aeronautical charge (price cap)' in a particular year 'i' for a particular category of aeronautical revenue 'j', is then calculated according to the following formula:

$$AC_i = AC_i\text{-}1 \times (1+CPI-X)$$

where CPI = average annual inflation rate as measured by change in the All India Consumer Price Index (Industrial Workers) over the regulatory period.

68. It is apparent from the reading of the aforesaid equation that X factor does not directly figure in the equation but the SSA provides the following formula to calculate the maximum average aeronautical charge (price cap) in a particular year ‘i’ for a particular category of aeronautical revenue ‘j’:

$$AC_i = AC_i\text{-}1 \times (1+CPI-X)$$

69. It is the plea of DIAL that in the CPI-X methodology of tariff determination as envisaged in the SSA, the CPI is tariff add-on to cover

inflation. It was thus suggested that in this methodology, the efficient way is to determine the X factor without considering inflationary increases and only considering real increases in costs, which would provide an unadulterated 'X factor', bereft of inflation. Thereafter, the CPI inflation coverage on actual year on year basis in rate card is provided to ensure transparency and ease of computation. Hence, DIAL requested AERA that it should first arrive at AC_i without inflations and thereafter apply the CPI inflation separately.

70. AERA in DIAL Tariff Order that if this submission was to be implemented, it would result in the following equation:

$$AC_i = AC_{i-1} \times (1 - X) \times (1 + CPI)$$

71. Regrouping the terms, the aforesaid formula would effectively result in the following:

$$AC_i = AC_{i-1} \times (1 + CPI - X) - AC_{i-1} \times CPI \times X$$

72. AERA thus held that this formula contains an additional term "-AC_{i-1} x CPI x X" in the determination of aeronautical charge, when compared to the formulation in the SSA. It was observed that for a negative X factor, this additional term would result in a net increase in

the aeronautical charge. AERA decided that the treatment suggested by DIAL is not envisaged in the SSA.

73. The subsequent MIAL Tariff Order opined that in the illustration provided in Schedule 1 of the SSA, X factor is determined together with inflation. AERA had proposed to follow the formulation specified in the SSA and to calculate the X factor by solving the system of equations mentioned therein. In light of no comments by stakeholders or MIAL in respect of AERA's position, AERA decided to continue with this position.

74. The TDSAT in terms of its order dated 23.04.2018 opined that the formula for aeronautical charges is based on the shared till inflation-X price cap model. The equation suggested by DIAL is different from what is provided in the SSA and hence is unacceptable. Such anomaly arises when an interpretation is sought where none is warranted in the SSA. The TDSAT vide its subsequent order dated 15.11.2018 while dealing with the MIAL appeal did not delve into the CPI-X methodology, and the issue has not been appealed by MIAL before the Supreme Court.

75. In the submissions before us, DIAL sought to contend that each step in CPI-X methodology needs to be applied sequentially as

combining all steps would lead to an incorrect result. The three steps

referred to in the beginning would be:

Step 1 is to apply the tariff formula to determine the target revenue.

Step 2 requires the calculation of the X factor expressed as a percentage that would need to be applied to the existing tariff rate card to equate the existing tariffs to the target revenue. The X factor is required to be determined without considering inflation which would provide an unadulterated X factor bereft of inflation. Thereafter, the existing tariffs may need to be increased or decreased and hence the X-factor may either be an escalation/reduction factor.

Step 3 is to apply the formula set out in Schedule 1 of the SSA to factor inflation into the tariffs along with the X factor. This would require that the existing tariffs be increased or decreased by the sum of the X factor and the CPI expressed as a percentage.

The use of the word ‘then’ in the formula for maximum average aeronautical charge in step 2 and before step 3 shows that X is to be calculated and applied first, and thereafter increased by CPI. The

approach adopted by AERA calculates X along with CPI, where CPI gets subsumed in X. However, target revenue escalated by X including CPI can never be equal to aeronautical charges because that would amount to giving the benefit of CPI on one hand and taking it away on the other hand.

76. DIAL also sought to contend that CPI must be applied to all five building blocks. AERA had applied the CPI to only two blocks and not to the remaining three building blocks, i.e. return on RAB, depreciation, and taxes. AERA had not provided any logical basis or explanation for this partial application of CPI, due to which the value of tariff increase had reduced. However, there was no mandate in the SSA to apply the CPI only to operation and maintenance costs, and non-aeronautical revenues, and not to the other building blocks in SSA. DIAL sought to produce an expert opinion of Prof. Martin Cave[14] to canvas that AERA's consultation paper had misunderstood the purpose of CPI. The approach had focussed on cost and revenue of the regulated business, whereas the focus should have been on overall potential for profits. Thus, neither AERA, nor any of the stakeholders have been able to produce any expert evidence to the

[14] Former Deputy Chairman of erstwhile UK Competition Commission and currently a visiting Professor at Imperial College Business School in regulatory economics.

contrary, or even rebut Prof. Cave's critique of the manner in which AERA had applied the CPI-X methodology in Schedule 1 of the SSA.

77. The AERA, on the other hand, sought to rebut the approach canvassed by DIAL. The plea based on selective treatment of two building blocks was sought to be repelled as incorrect as even though AERA had applied the CPI factor to each "jth category of aeronautical revenue", all five blocks were taken into consideration for calculating the Target Revenue for aeronautical service by using the formula of Target Revenue set out in Schedule 1 of the SSA.

78. The concept and purpose of the CPI-X factor is to equalize the Net Present Value of the Target Revenue determined as per formula for determining the Target Revenue in Schedule 1 of the SSA which is based on building blocks and is a cost-based formula, to the Net Present Value of the actual/projected revenue determined using the forecast traffic volume, which is a revenue-based formula. This was so as the Net Present Value of the TR determined as per the formula in the SSA would be different from the actual/projected revenue determined by the Net Present Value of the actual/projected revenue based on traffic volume.

79. Thus, it is the say of the AERA that if “X factor” is equalised before CPI is factored, the Net Present Value of Target Revenue will get equated with the Net Present Value of the actual/projected revenue, and will thereafter be enhanced using 1+CPI, making the Net Present Value of the actual/projected revenue always higher than the Net Present Value of Target Revenue.

80. FIA sought to support the stand of AERA by emphasising that DIAL had willingly entered into the SSA and it was not open to DIAL to seek revision of its terms and rescind from the agreement entered into or cause violence to the algebraic formula. DIAL was thus seeking to alter the agreement and such alteration of the terms would be impermissible and detrimental to the stakeholders. It was further submitted that DIAL had not provided the detailed business plans and the computation based on which X-Factor had been determined. The expert opinion without citing any authority alluded to the “orthodox method” for calculation of the formula, and no reliance ought to be placed of the same due to of lack of substantiation. AERA had duly factored for inflation where applicable and required with regard to other components, such as return on RAB,

depreciation and tax. A reading of the AERA guidelines and the SSA left no doubt that the return on RAB is to be calculated on a nominal basis, i.e. after considering inflation. Depreciation is not cash incurred and as such the question of considering inflationary index for the same does not arise. Lastly corporate tax is a derivative of aeronautical revenues and aeronautical expenses, which are components that have been duly adjusted for inflation as per the formula for Target Revenue provided for in the SSA, and, hence, did not require any further adjustment for inflation.

Our Rationale:

81. On the consideration of the plea it is obvious to us that the endeavour of DIAL was to lower the 'X-factor', which in turn will result in a higher tariff. The objective is, thus, how the tariff can be made higher rather than staying true to how the agreement reads. A reverse engineering process again!

82. We must keep in mind that a specialised authority has gone into this aspect and also the Tribunal. The controversy revolves around a formula. This formula in turn would have been determined after due

deliberations. It is an algebraic formula and has to be solved by the principles of algebra. We can only remind ourselves that the BODMAS principle would have to apply to the formula in the SSA, which is what the AERA has done. What DIAL wants to do is to re-write the formula and then apply BODMAS. This, in fact, causes complete violence to the formula itself. If the manner of calculation of DIAL was to be the basis, then the SSA would have provided that formula. Now DIAL seeks to re-write/remodel the formula based on the so-called expert opinion, which is self-serving in character.

83. DIAL sought to lay a lot of emphasis on the wordings prior to the setting out of the formula. In that process the use of the word “then” was sought to be used as a rationale for re-working the formula. In our view, all that the sentence states is that the maximum average aeronautical charge (price cap) in a particular year ‘i’ for a particular category of aeronautical revenue ‘j’ is “then” calculated according to the formula. The fact that these have to be worked within the formula is emphasised and the earlier three aspects are factors which have to be included in the formula in the manner so provided.

84. We cannot accept such a self-serving argument by DIAL to somehow enhance their revenue and that possibly is the reason that MIAL did not even consider worth its while to emphasise it before the Tribunal or come up in appeal on that aspect before us. We have, thus, no hesitation in rejecting this plea of DIAL and affirming the manner of calculation as per formula by the AERA.

Revenue from Disallowed Area:

85. In the determination of development fee, while approving the project cost, AERA disallowed an area of 8652 sq. mtrs. of Food and Beverages area. The said area consisted of non-aeronautical assets built within IGIA's terminal area. AERA determined the same to be excessive construction and not required.

86. AERA in the DIAL Tariff Order opined that the mere fact of disallowance does not impact the real asset allocation on the ground. In paras 7.8 to 7.11 of the DIAL Tariff Order, AERA observed that in its Development Fee Order, assets for which the costs were disallowed were not required to be built and were over and above the requirement in respect of the airport project. However, even though AERA had

disallowed costs incurred in creation/construction of such assets from the allowable project cost, these assets had been created, were being used by the airport operator, and were also accounted for in the final asset allocation mix. AERA had neither prohibited the airport operator from utilizing such assets nor was the airport operator asked to decommission them.

87. The question of whether the cost of construction of a particular area providing non-aeronautical services was to be considered as part of the total project cost in determining the development fee was not relevant to the present consideration. In para 21.4.5 of the DIAL Tariff Order, AERA observed that it had taken the decision while determining the development fee under Section 13(1)(b) of the said Act, read with Section 22A of the AAI Act. However, the present exercise pertained only to fixation of aeronautical tariff in terms of Section 13(1)(a) of the said Act, which only required determination of aeronautical RAB. It was decided that though an area of 8652 sq.mtrs. was disallowed in the Development Fee Order, the total non-aeronautical revenue would be reckoned towards the determination of aeronautical tariff without the exclusion proposed by DIAL.

88. Interestingly MIAL did not think it worth its while to raise such a plea either before the AERA or the TDSAT. The TDSAT's order dated 23.11.2018 relating to the appeal by DIAL had also not modified the DIAL Tariff Order in any manner. DIAL still sought to contend that the view adopted by AERA was fallacious and sought to rely on the definition of "non-aeronautical assets" in the OMDA. As per article 1.1 of the OMDA, non-aeronautical assets are defined as under:

> "all assets required or necessary for the performance of non-aeronautical services at the airport."

89. It was thus urged that the disallowed area would fall outside the ambit of non-aeronautical assets. Therefore, they were also outside the ambit of Revenue Share Assets as defined under the SSA. Hence, the revenue generated from the disallowed area could not be considered as part of revenue from Revenue Share Assets.

90. DIAL urged that AERA's approach was not only discriminatory but also inconsistent and contrary to its own tariff philosophy and guidelines. As per para (g) of 5.2.1 of AERA's Guidelines on Tariff Determination for Airport Operators 2011 - where an asset is excluded

from RAB, the corresponding revenues and expenditures are also to be excluded from the TR. Similarly, the revenue from the disallowed area should not form part of the revenue from Revenue Share Assets and accordingly 30 per cent of such revenue should not be considered for purposes of the cross-subsidy. Considering the revenue from disallowed area for cross-subsidizing the tariff would amount to penalizing DIAL twice; by disallowing the cost of the subject area, and then by including the revenue generated therefrom in reducing the TR of DIAL.

91. DIAL contended that AERA had violated Section 13(4)(c) of the said Act, which required that its decisions be fully documented and explained. The AERA's approach was stated to be inconsistent with the expert opinion of Prof. Martin Cave. Prof. Cave had opined that AERA should exempt the excluded area from which DIAL had already been prevented from recovering its proper economic costs from the pool of Revenue Share Assets. AERA simply re-emphasised the reasoning contained in the DIAL Tariff Order. FIA supported the same and emphasised that the determination of the allowable project cost and determination of aeronautical tariff are wholly separate issues under the provisions of the said Act. The project cost was determined under

Section 13(1)(b) of the said Act read with Section 22(a) of the AAI Act. However, the question that fell for determination of AERA in the DIAL Tariff Order related to Section 13(1)(a) of the said Act for tariff fixation, which only required determination of aeronautical RAB. Whether a particular area was considered for project costs or not was of no relevance as the same was not a pass-through.

Our Rationale:

92. It would suffice for us to say that the present controversy is limited to whether the revenue from disallowed area must be considered while fixing aeronautical tariff under the said Act. The airport operators were not asked to decommission the assets in the disallowed area. The said assets had already been created and were being used by the airport operator. Hence, the revenue from the disallowed area had to be included in the tariff.

93. The aspect relating to disallowance of the project cost for the disallowed area was not urged by FIA and hence, we are not commenting on the same.

Calculation of tax for determining the Target Revenue:

94. The TR is to be calculated as per formula provided in Schedule 1 of the SSA. The 'T' (tax) element in the formula contemplates the inclusion of "corporate taxes on earnings pertaining to Aeronautical Services". AERA has opined qua both Airport Operators that the calculation of corporate taxes should be done after deducting all costs, which would include the revenue share or the Annual Fee paid by them to the AAI.

The 'T' element in the DIAL and MIAL Tariff Orders

95. DIAL had computed the 'T' element by separately calculating aeronautical earnings and determining the corresponding taxes paid on the same. This manner of calculation excluded earnings from non-aeronautical sources and the tax on such earnings. In essence, DIAL proposed to treat aeronautical earnings as a separate 'block' or a standalone entity. It was contended before AERA that this was in line with the SSA, and was a worldwide practice followed across all regulatory regimes in all industries.

96. AERA vide the DIAL Tariff Order disagreed with DIAL's calculation and noted that in financial years 2009-10 and 2010-11, the

actual tax paid by DIAL was nil. For 2011-12, the forecast for tax required to be paid was also nil. For 2012-13 and 2013-14, AERA was able to make certain forecasts. AERA also noted that the tax was a statutory payment due to the Government and was being expensed as a cost in the target revenue computation. Thus, if actual tax paid in any of the years was lower than the forecast amount, it would lead to a situation wherein DIAL would be unjustly enriched. Thus, only the actual tax paid could be taken into account in the 'T' element for the years 2009-10, 2010-11, and 2011-12.

97. Insofar as MIAL is concerned, a similar manner of calculation was adopted. However, AERA vide the MIAL Tariff Order noted that there was a significant difference between the actual tax paid by MIAL in respective years as a company and the tax towards aeronautical revenue calculated by MIAL. This difference was due to the latter calculation not accounting for the Annual Fee paid by MIAL to AAI.

98. AERA adopted the view that the total tax paid by MIAL consisted of its operations as a whole and the total cost associated with the same. In its company account, MIAL had taken the revenue share paid to AAI

as a cost and there was no separation into aeronautical or non-aeronautical. Thus, it was held that the tax paid by MIAL should be taken on actuals for the years 2009-10, 2010-11, 2011-12, and a similar method was to be followed for 2012-13 and 2013-14. AERA observed that MIAL ought not to benefit from the difference between tax calculated in its regulatory account and the tax actually paid by it. This was notwithstanding the fact that considering the actuals of tax paid would lower the TR.

99. The TDSAT has actually just affirmed the view taken by AERA for DIAL. The TDSAT in the appeal by MIAL had also reached a similar result although with greater explication. MIAL had relied on hypothetical examples which showed that the 'T' element in the tariff formula would always be zero if the Annual Fee were to be expensed as a cost. The TDSAT disagreed and found that the outcome would not be zero simply if the assumptions taken in the hypothetical examples were to change. The 'T' element could only be said to be rendered otiose if the result of 'T' was zero in all circumstances, which could not be said to be the case here.

100. MIAL did seek to contend that they were given a commitment that the revenue share payable to AAI would not be treated as an element of cost. The AERA negated this contention on the ground that there was nothing to evince the same. The illustrative example contained in Schedule I to the SSA, in which the 'T' element was a positive numerical figure, would not be indicative of such a commitment. The example was certainly useful but could not be said to be exhaustive in terms of facts or assumptions. The TDSAT found that the AERA was following a consistent and reasonable methodology, which was:

First, AERA had proposed to consider the actual tax paid by MIAL as the component 'T'.

Second, AERA would review the actual corporate tax on aeronautical services paid by MIAL.

Third, AERA would true-up the difference between corporate tax paid after separating aeronautical activities and the actual tax paid as considered by AERA.

101. The TDSAT found that AERA's methodology was also consistent with Article 3.1.1 of the SSA. The said provision provided that the Annual Fee "…shall not be included as part of costs for provision of aero services and no pass-through will be available…" It was observed that

this provision mandated that the Annual Fee would not be made part of Operation & Maintenance or any other cost so that it does not have a 'pass-through' effect. However, this could not be a ground for MIAL to argue that the Annual Fee was not a 'cost' for taxation purposes. In fact, a 'pass-through' effect would occur if the Annual Fee was not deducted as a cost. If not deducted, it would have an upward effect on the value of T, thereby increasing the value of TR.

102. It was held that 'T' was "corporate tax on earnings pertaining to aeronautical services" (emphasis supplied). Earnings were nothing other than the balance of revenue after deducting costs and expenses. Annual Fee was nothing more than a cost and had to be deducted as well.

103. Mr. Arvind Datar, learned senior counsel led the battle both on behalf of DIAL and MIAL on this aspect.

104. His emphasis was on the express language of the definition of 'T' in Schedule 1 of the SSA which indicates that a determination has to be made of "corporate taxes on earnings pertaining to Aeronautical Services". Thus, 'T' had to be computed based solely on the regulatory accounts prepared by AERA for the TR formula by excluding the Annual

Fee. A contrary view would amount to alteration of the definition, which would then read as corporate taxes 'paid' on Aeronautical Services or corporate taxes 'on' Aeronautical Services. He strenuously invoked the principle of business efficacy to read a term in the agreement to achieve the results intended by the parties acting as prudent businesspeople.[15]

105. It was his submission that if AERA's method were to be followed, there would never be a profit on aeronautical services. The total of Operation & Maintenance, depreciation, and interest, taken together with the Annual Fee would always exceed total aeronautical revenues. 'T' would thus always be zero and the component would be rendered otiose. Various hypothetical examples were adduced in this regard. To fortify the argument, it was submitted that the given value of 'T' was positive in the numerical illustration appended to the Tariff Determination formula in Schedule I to the SSA.

106. Mr. Datar then turned to Article 3.1.1 of the SSA which mandates that the Annual Fee shall not be considered as a cost in relation to provision of Aeronautical Services. The decision in ***Nabha Power Ltd.***[16]

[15] Nabha Power Ltd. (NPL) (supra).
[16] (supra).

was cited to the effect that a multi-clause contract must always be interpreted in a manner that any view on a particular clause of the contract should not do violence to another part of the contract. The Airport Operators would effectively be victims of 'double jeopardy' if AERA's methods were followed. The Annual Fee paid by them was not a constituent of the TR Formula and could not be recovered by them. However, they would also be unable to fully recover the corporate tax component, i.e., 'T', due to the Annual Fee getting deducted as a cost from aeronautical revenue.

107. AERA and FIA had common ground while endorsing the impugned order. The actual tax paid was the substratum of their argument. The Airport Operators, it was pleaded, could not be permitted to unjustly enrich themselves and create an additional burden for other stakeholders if their actual taxes paid were lesser than forecast taxes. The established regulatory practice was stated to consider corporate tax paid on actuals and not on a notional basis.

108. It was submitted that the Airport Operators' reliance on Article 3.1.1 of the SSA was misplaced. The clause provided that there shall be

no pass-through available in relation to Annual Fee. However, a pass-through would certainly occur if the Annual Fee was not deducted as a cost from Aeronautical Revenue. The burden for bearing the same would instead shift onto the stakeholders, which is contrary to the object of the aforementioned provision. DIAL and MIAL had voluntarily submitted to pay 45.99 per cent and 38.7 per cent of their total revenue as Annual Fee respectively. Thus, even assuming that a deduction of the Annual Fee would lead to 'T' remaining zero, the same would only be a result of choices made by the Airport Operators with respect to their commitment towards Annual Fee percentage.

109. FIA and AERA urged that the treatment of corporate tax under 'T' could be contrasted with the formula for Weighted Average Cost of Capital (for short 'WACC'), which is another separate component of the TR formula. The definition for WACC notes that the "marginal rate of corporate tax" must be taken. Thus, in the context of 'T', had the intention of the drafters been to compute only the notional tax and not the actual tax liability, they would have clearly specified as they did in the case of WACC.

Our Rationale:

110. Our thought process on the aforesaid plea has given rise to a conundrum – whether we should adopt the course taken in respect of the other issues where we lay emphasis on the view adopted by AERA and the Tribunal, or whether we should follow the principle enunciated in ***Nabha Power*** to read the contract strictly in its terms.[17]

111. No doubt, it is a principle of taxation that it is the actual tax which is paid and which has to be taken into account. This is what the AERA and the TDSAT have done ostensibly on the premise that there should not be any undue enrichment of the Airport Operators. However, to our mind, the more important factor is to look at what the contract says and whether some other construction would be required to be given to the contract.

112. If we turn to the express language of 'T' in Schedule 1 of the SSA the wordings are clear and unequivocal. The determination has to be made of "corporate taxes on earnings pertaining to Aeronautical Services" (emphasis supplied). 'T' is part of a formula. No doubt it refers to taxation, but how it would apply to the formula has to be

[17] (supra).

determined from the definition of ‘T’ and not from how generally ‘tax’ is understood. These are complex formulas settled by experts and various factors weigh in arriving at them.

113. In the overall scenario, it is the TR which is crucial where ‘T’ is only a component. No one is saying that a different methodology and not the common practice has to be followed for payment of tax. It is for the component ‘T’ to be calculated in the formula for TR that ‘T’ has been defined. ‘T’ has to be computed based solely on regulatory accounts prepared by AERA for the TR formula. If the Annual Fee is the component which is taken out of aeronautical services, the definition of ‘T' would have to be read completely differently.

114. The focus of all stakeholders has resulted in a particular formula in with various components whereby aeronautical services are controlled. Non-aeronautical services are more revenue generating aspects. In order to balance the interest of the other stakeholders with the Airport Operators, 30 per cent of the non-aeronautical revenue is subtracted from the aeronautical revenue. In this larger philosophy, it would be imprudent and contrary to the express terms of the contract to seek to re-

define any component other than the manner in which it is specifically mentioned. To that limited extent, Mr. Datar was right in invoking the principle of business efficacy as that was the result intended by the parties.

115. Article 3.1.1 of the SSA mandates that Annual Fee shall not be considered as a cost in relation to provision of Aeronautical Services. The question thus arises is that if it is so, then how can tax be computed any differently. In our view, the clause has to be read as a whole. It forms part of a proviso, which reads as under:

> "3.1.1 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 (2) years from the Effective Date. GOI further confirms that, subject to Applicable Law, it shall make reasonable endeavours to procure that the Economic Regulatory Authority shall regulate and set/ re-set Aeronautical Charges, in accordance with the broad principles set out in Schedule 1 appended hereto. Provided however, the 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." (emphasis supplied).

116. The first part of the proviso is clear in its terms that upfront fee

and the Annual Fee paid/payable by the Airport Operators to AAI under the OMDA shall not be included as part of costs for provision of Aeronautical Services. There is no doubt a second part to it which states that "no pass-through would be available in relation to the same". It is the latter part which is sought to be emphasised in the decision-making process of the AERA. This is because if the first part is implemented there will be an element of pass-through. However, if we were to accept the view of the AERA, it would be in a sense amount to nullifying the first part of the proviso. No construction should be given to a contract where the first part itself is nullified by a reading of the latter part. This clause is more general in its terms. Pass-through would not be permitted in normal circumstances as per the clause. However, insofar as the tax element is concerned, there appears to be an exception because of the manner in which the 'T' in the formula itself has been derived. Qua the Annual Fee, the SSA does not contemplate a subtraction from the expenses. There is also no direct extraction from other stakeholders qua the annual fee and thus there is no pass-through. This would also be harmonious construction of the clauses of the contract so that one part of it does not do violence to the other.

117. Thus, the aforesaid is the only aspect on which we are inclined to interfere with the impugned orders and find merit in the contention of the Airport Operators that the Annual Fee paid by them should not be deducted from expenses pertaining to aeronautical services before calculating the 'T' element in the formula.

118. We now come to remaining issues raised in the appeals filed by FIA and Lufthansa.

Development Fee:

119. The Development Fee (for short 'DF') concept does not form part of OMDA or SSA, neither did it form part of the Act initially. The cost of development of the airport overshot the estimated budgets. Vide its order dated 09.02.2009, the Central Government had permitted DIAL to collect DF at Rs. 200 per departing domestic passenger and Rs. 1300 per departing international passenger, inclusive of applicable taxes, in terms of Section 22A of the AAI Act. This was on an ad-hoc basis for a period of 36 months with effect from 01.03.2009. The aforesaid order mentioned two milestones upon which this approval was to be reviewed at a subsequent stage by AERA. A similar order of the Central

Government was made with respect to MIAL on 27.02.2009 although with different amounts of DF.

120. These orders were the subject of challenge in Civil Appeal Nos. 3611/2011, 3612/2011, 3613/2011, and 3614/2011 before this Court. It was held in ***Consumer Online Foundation & Ors. v. Union of India & Ors.*** that the order dated 09.02.2009 was ultra vires the AAI Act.[18] Further, it was noted that no DF could be levied or collected from embarking passengers at major airports under Section 22A of the AAI Act unless the AERA had determined the rate of such DF. AERA vide Order No. 28/2011-12 dated 08.11.2011 issued on 14.11.2011 determined the DF as Rs. 200 per embarking domestic passenger and Rs. 1300 per embarking international passenger commencing from 01.12.2011 for a period of 18 months.

121. In the case of MIAL, AERA determined the DF at Rs. 100 per embarking domestic passenger and Rs. 600 per embarking international passenger with effect from 01.01.2013 until April 2021. The TDSAT vide the impugned orders dated 20.03.2020 and 16.07.2020 chose not to interfere with either of the AERA orders.

[18] (2011) 5 SCC 360.

122. The DF has been subsequently discontinued by DIAL with effect from 30.04.2016. Thus, the dispute pertains to only that particular window.

123. The said Act initially did not contain any reference to this aspect. However, in terms of Act 27 of 2019 vide S.O. No.3445(E) dated 19.09.2019, sub-section (1A) was incorporated in Section 13 of the said Act with effect from 26.09.2019. Section 13 of the said Act deals with the functions of authority and falls in Chapter III, i.e. "Powers and Functions of the Authority". The inserted sub-section (1A) reads as under:

> "[(1A) Notwithstanding anything contained in sub-sections (1) and
>
> (2), the Authority shall not determine the tariff or tariff structures or the amount of development fees in respect of an airport or part thereof, if such tariff or tariff structures or the amount of development fees has been incorporated in the bidding document, which is the basis for award of operatorship of that airport:
>
> Provided that the Authority shall be consulted in advance regarding the tariff, tariff structures or the amount of development fees which is proposed to be incorporated in the said bidding document and such tariff, tariff structures or the amount of development fees shall be notified in the Official Gazette.]"

124. Mr. Buddy Ranganathan learned counsel for FIA, however, did not press this issue insofar as imposition of DF is concerned *per se*.

Cargo and Ground Handling Services:

125. FIA was aggrieved by the TDSAT's treatment of Cargo and Ground Handling Services as non-aeronautical in nature. It was contended that the AERA in the DIAL Tariff Order had treated such revenue as aeronautical for the period from 01.04.2009 to 24.11.2009 as DIAL was performing these services by itself. For the remainder of the First Control Period, this was held to be non-aeronautical. The TDSAT vide impugned order dated 23.04.2018 had held that these revenues would be non-aeronautical in nature irrespective of whether such services were performed by DIAL itself or through its delegates. In the case of MIAL, the TDSAT vide order dated 15.11.2018 noted that the treatment of Cargo and Ground Handling Services had already been conclusively decided in its previous order dated 23.04.2018 and was not an issue that survived for determination.

126. FIA submitted that Cargo and Ground Handling Services were contemplated to be aeronautical in nature, and referred to the definition

under Section 2(a) of the said Act and Schedules 5 & 6 of OMDA. FIA also sought to rely on the Parliamentary Standing Committee Report on the AERA Bill 2007 to fortify its stand.

127. However, on the pointed query of the Court as to whether these contentions had been urged by the FIA before the TDSAT in the same manner, learned counsel for FIA candidly confessed that they were not. This particular line of argument had never been advanced before the AERA and the appellate authority and that closes this issue.

Levy of User Development Fee (UDF):

128. AERA in the MIAL and DIAL Tariff Orders had allowed UDF to be charged on embarking as well as disembarking passengers. This finding was affirmed by the TDSAT in its order dated 23.04.2018. Lufthansa in the present appeal contended that such levy was not contemplated in the said Act. The AERA and the TDSAT had erroneously traced the source of this levy to Section 13(1)(b) of the said Act, which referred only to AERA's power to determine the DF. This was to be differentiated from the levy of the UDF, which was a separate fee. The plea was that the DF having been determined under the

aforesaid provision, there could not be subsequent determination of another UDF.

129. We may say that not a very serious argument was made in this behalf other than the aspect of two different nomenclatures. We agree with AERA's reasoning that the expression 'UDF' is mentioned in the Aircraft Rules, 1937, and is different from Section 13(1)(b) of the said Act which contemplates 'DF' only. Thus, the AERA had been mandated to determine the UDF. Nothing more is really required to be discussed on these aspects.

Conduct of AERA:

130. One of the last-minute arguments sought to be advanced by Lufthansa was on the aspect of AERA failing to discharge its duty as per the mandate of the said Act by not determining the tariff in a reasonable and efficient manner. The grievance can be summarized as under:

a. AERA had simply adopted DIAL's submissions and proposals in its tariff order without considering objections by stakeholders.

b. AERA granted meetings to DIAL on 13.12.2011, 29.12.2011, 30.12.2011 and 02.01.2012. However, other stakeholders were

granted only one meeting. This was not consonant with the due consultation process envisaged in Section 13(4) of the said Act.

c. Figures presented by DIAL were not independently verified by AERA due to paucity of time. There were also no independent studies carried out by AERA and instead, things were left to be trued-up as a matter of course.

131. We are unable to appreciate this contention for the reason that all stakeholders were heard. The orders of the AERA and the TDSAT are more than exhaustive on all aspects and the authorities had endeavored to perform their roles. We may say that the very aspect which we have not appreciated in favour of the Airport Operators, i.e., their attempt to somehow reduce their liability equally applies to Lufthansa which somehow wants to reduce their outflow on different aspects. AERA had recognized that their determination was in the nature of an initial pioneering flight based on the material available, and fine-tuning could always be done in the future. We do appreciate that the aviation industry is competitive in nature but that holds both for the airline and the Airport Operators. It is a delicate balancing role which has to be performed by

the authorities. That role having been performed, the general grievances really do not survive.

Project Cost:

132. An aspect seriously debated before us was with respect to Project Cost, which kept on escalating from the original estimate. The Project Cost is taken as the base figure for determination of the Regulatory Asset Base. Thus, an increase in the Project Cost leads to a higher tariff determination by AERA. FIA has raised the issue of Project Cost, which is a ground for challenge in CA Nos.10902/2018 and 6658-6659/2019 i.e., appeals qua the challenge to the DIAL and MIAL Tariff Orders, as well as in CA Nos.3675/2020 and 145/2021, i.e., appeals qua the challenge on DF and fixation of Project Cost. The findings sought to be assailed by FIA are primarily as contained in the TDSAT order dated 20.03.2020 at paragraph 88 in respect of the first set of appeals and the TDSAT order dated 23.04.2018 passed in DIAL's appeal.

133. On analysis of the AERA order dated 08.11.2011, what emerges is that the issue of DF was dealt with on account of the increase in costs, the proposal of DIAL to levy DF was accepted to bridge the gap. The

upward revision of Project Cost was accepted by AERA to be Rs.12,502.66 crores. AERA relied upon the reports of KPMG and Engineers India Limited (EIL) and expressed its inability to explore the matter further on grounds of the auditors themselves having not been able to further identify losses in monetary terms. Thus, it is this figure of Rs.12,502.66 crore, which has been used for determination of aeronautical tariff at IGIA.

134. FIA contended that even if the Project Cost of Rs.8,975 crore (projected by DIAL to MOCA as reflected in the Central Government's letter dated 09.02.2009) is accepted as proper and final, its further increase to Rs.12,503 crore should have been discarded by AERA. A 43 per cent increase had been claimed by DIAL in the 4th year of operation of the IGIA. Reliance was placed on the Development Fee order dated 08.11.2011 to comment that while the Project Cost in that order had been accepted as Rs.12,502.86 crores only as a tentative estimate, the same figure has been accepted almost as final in the impugned tariff order.

135. AERA sought to rebut these contentions before the TDSAT. It was contended that the avowed task of determining the Project Cost could

only be looked at from a narrow hole – i.e. in order to examine the incurred cost as per available records and verify whether it relates to the approved and essential parts of the Airport. This in turn had to be taken on the basis of accounts bearing certificates granted or approved by the Chartered Accountant. It was vehemently argued that such cost cannot be re-examined on the yardstick of efficient cost but has to be taken as the incurred cost only, as appearing in the duly certified books of accounts. The aforesaid plea of the AERA found favour with the TDSAT and was accepted.

136. If we turn to the TDSAT's order dated 20.03.2020, this aspect has been dealt with in paras 22, 23 & 24. It was held that the AERA could not have had much latitude in dealing with rising Project Costs as it had little or no scope to do so within its limited statutory role under the said Act. The TDSAT found that AERA had referred to the reports of the two experts and had consulted with all stakeholders, who had been given sufficient opportunity to make their submissions. This would meet the requirement of Section 13(4) of the said Act which requires AERA to ensure transparency in exercising its powers and discharging its functions. The only caveat put by the TDSAT was that the exclusions

mandated by AERA from DIAL's project cost to the tune of Rs. 354.14 crores should be allowed. The TDSAT's order dated 16.07.2020 with respect to MIAL's Project Cost held that no new grounds had been raised and the issue stood settled in DIAL's case.

137. Both FIA and Lufthansa argued on the same lines before us by contending that while determining the figures of Project Cost, AERA selectively chose comments from the auditors reports (KPMG and EIL) relating to specific cost adjustments, but failed to take cognizance of DIAL's overall failure of cost control and monitoring. AERA had failed to recognize that a higher project cost would lead to a higher regulated asset base and which would consequently lead to higher tariff. Thus, AERA had performed the role of merely approving the books of accounts on the basis of cost incurred.

138. Qua the CSIA, Project Cost increased from Rs. 6130 crores in July 2006 to Rs. 12,380 in 2011. It was contended by FIA that this gap was sought to be met by levying DF. Thus, DF amounted to 3.9 times of promoter's equity contribution and the end users are ultimately bearing the burden. MIAL had acted contrary to Article 13.1 of OMDA, which

explicitly provided that the airport operator was solely responsible for financing of the airport. Reliance was also placed on audit reports indicating that escalation in the project cost was attributable to the casual approach of MIAL towards management and monitoring of the project.

139. In the aforesaid context, arguments were also advanced on the aspect of role of AERA as a regulator in determining Project Cost. Section 14(1)(a) and (b) of the said Act provide for engaging professionals or AERA's own staff to enquire and assess the performance of service providers, which included the Airport Operators. No independent study was conducted by AERA even though the same is a statutory obligation under the said Act. Escalated Project Costs had been allowed without conducting thorough prudence checks as mandated under the aforesaid provisions. Similarly, it was urged that the TDSAT failed to appreciate that AERA had derelicted from its duty as a regulator, and private concessionaires were being rewarded at the cost of the common man.

140. On the other hand, the Airport Operators contended that Section 13(1)(a)(i) of the said Act deals with capital expenditure while Section

13(1)(a)(iii) deals with the cost of improving efficiency. The said provisions read as under:

> "13 Functions of Authority. —
>
> (1) The Authority shall perform the following functions in respect of major airports, namely:—
>
> (a) to determine the tariff for the aeronautical services taking into consideration—
>
> (i) the capital expenditure incurred and timely investment in improvement of airport facilities;
>
> xxxx xxxx xxxx xxxx xxxx
>
> (iii) the cost for improving efficiency;"

The cost for improving efficiency as used in sub-clause (iii) was submitted to be very different from efficient cost in respect of capital expenditure and, thus, elements of (iii) could be read into (i). There is no test of efficiency laid out in the said Act in terms of capital expenditure and thus AERA only had a limited role qua determining the Project Costs.

141. It was sought to be emphasized that this was a pioneering effort and the Commonwealth Games 2010 were round the corner. The initial

timeline of 48 months to develop the IGIA was reduced to 37 months due to pending litigation. This in return played a critical role in cost escalation and into what has been flagged by auditors as process issues.

Our Rationale:

142. On examination of rival submissions, we believe that what has to be kept in mind is that we are the third tier of scrutiny. The concerned authority and the appellate authority were also dealing with a scenario which was the introduction of public-private partnership mechanism for operation of airports for the first time. Any pioneering effort thus require multiple creases to be ironed out. There was no past experience in that sense. Everyone puts their best foot forward. It would thus not be fair to examine these aspects under the microscope.

143. Different aspects towards determination of Project Cost have been examined by AERA, and AERA has carried out its responsibility while granting a little leeway for the pioneering effort in an untested field in the country. The auditors too had not been able to quantify or identify the losses due to increased Project Cost in monetary terms. How can one expect AERA to take on such a task in light of the functions ascribed to it

under the said Act.

144. There is also substance in the contention that the whole project was running against strict timelines on account of litigations relating to projects, a common phenomenon in our country. This was more so in the context of the Commonwealth Games being around the corner. Additionally, there is also some substance in what is contended by the Airport Operators that the terminology in Sections 13(1)(a)(i) and 13(1)(a)(iii) of the said Act cannot be read into each other. The manner of reading of the provision by FIA is to combine sub-para (iii) with sub-para (i) while determining tariff.

145. In our view, the provisions have been separately made because the concept of Section 13(1)(a)(i) requires AERA to determine the tariff by including capital expenditure incurred and timely investment in improvement of airport facilities. One of the other distinct factors to be considered is the cost of improving efficiency as under Section 13(1)(a)(iii). These aspects have no doubt been examined by the authority concerned, although not necessarily in the manner FIA seeks them to. Does it really lie with us to superimpose a view which has not been

found feasible in the given conspectus of the large number of reports and documents before the AERA as well as the TDSAT. We thus reject the contention.

146. In the end, we do believe that the matter having traversed from the AERA to the appellate authority to this Court, the parties and the counsel may have become fully aware of the nitty-gritties of the various matters and thus sought to embark on canvassing the case almost as we are some kind of first authority on these aspects. We are unwilling to do so. We have analysed all the contentions in a broad perspective, keeping in mind that the authority has performed its task and so has the appellate authority. Despite the course of action followed by counsel, we have still analysed the matter in such depth as was required to be done by this Court in rejecting all aspects in these appeals and cross-appeals except one aspect which arose from terminology and its definition.

Conclusion:

147. In view of the aforesaid, all appeals are dismissed, except on the issue relating to corporate tax pertaining to aeronautical services, where for the reasons recorded aforesaid we have accepted the contention on

behalf of the Airport Operators that the Annual Fee paid by them should not be deducted from expenses pertaining to aeronautical services before calculating the ‘T’ element in the formula. It is only to that extent that the impugned order stands modified.

148. We are not imposing costs in this matter as both sides have taken time to argue the matter before us and there is no point in burdening them with costs.

149. The appeals stand allowed limited to the aforesaid extent while on all other aspects the appeals and cross-appeals are dismissed.

……J.
[Sanjay Kishan Kaul]

....……J.
[M.M. Sundresh]

New Delhi.
July 11, 2022.