TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

***Reserved on*: 22/12/2022**
***Pronounced on:* 13/01/2023**

AERA APPEAL/7/2021

WITH

(MISC APPLICATION/410/2021 & MISC APPLICATION/260/2022)

Delhi International Airport Ltd. .... Appellant (s)

Versus

1. Airport Economic Regulatory Authority Of India .... Respondent (s)
2. Celebi Delhi Cargo Terminal Management India Pvt. Ltd.
3. Delhi Cargo Service Center Pvt. Ltd.
4. M/s Bird Worldwide Flight Services (I) Pvt Ltd.,
5. Air India SATS Airport Services Pvt. Ltd.,
6. M/s. CELEBI Airport Services India Pvt. Ltd.
7. Federation of Indian Airlines
8. International Air Transport Association

WITH

AERA APPEAL/3/2021

WITH

(MISC APPLICATION/352/2021 & MISC APPLICATION/259/2022}

Mumbai International Airport Ltd ... Appellant (s)

Versus

1. Airport Economic Regulatory Authority Of India …Respondent(s)
2. Mumbai Cargo Service Center Airport Pvt Ltd.
3. Mumbai Cargo Service Center Cold Chain Solutions Pvt ltd.
4. Cargo Service Center India Pvt Ltd
5. Concor Air Limited
6. Celebi Nas Airport Services India Pvt. Ltd
7. Bird Worldwide Flight Service Mumbai Pvt. Ltd
8. AI Airport Services Ltd.
9. Federation of Indian Airlines
10. International Air Transport Association

BEFORE

HON'BLE MR. JUSTICE DHIRUBHAI NARANBHAI PATEL (CHAIRPERSON)
HON'BLE MR. SUBODH KUMAR GUPTA (MEMBER)

FOR APPELLANT(S)	FOR RESPONDENT(S)
(In AERA Appeal No. 3/2021) Mr. Sajan Poovayya, Sr. Advocate With Mr. Hemant Sahai, Ms. Amrita Narayan, Mr. Ashwin Rakesh, Mr. Saurobroto Dutta, Ms. Nikita Bhardwaj, Advocates	**AERA** Ms. Shweta Bharti, Mr. Avinash Singh, Ms. Yashodhara Burmon Roy
(In AERA Appeal No. 7/2021) Mr. Maninder Singh, Sr. Advocate with Mr. Milanka Chaudhury, Ms. Naina Dubey, Mr. Ravneet Singh, Ms. Swet Shikha Mr. Prabhas Bajaj, Advocates	**Bird Worldwide** Mr. Virender Mehta Mr. Tarak Saha
	IATA Mr. A P Singh, Ms. Akanksha Das Ms. Akshada Mujwar
	FIA Mr. Buddy Ranganadhan, Mr. Prantar Basu Choudhury Ms. Nishtha Kumar
	Celebi Mr. Sarul Jain

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ORDER

SUMMARIUM

***Per* D.N. PATEL, Chairperson**

1. This appeal has been preferred by Delhi International Airport Limited (hereinafter referred to as **'DIAL'**, for sake of brevity), under Section 18 (2) of the Airports Economic Regulatory Authority of India Act, 2008 (hereinafter referred to as '**AERA Act'**), challenging the communications issued by the Respondent No. 1-Airport Economic Regulatory Authority, (hereinafter referred to as '**AERA**', for the sake of brevity).
2. This appellant is challenging the communications issued by Respondent No. 1-AERA, dated 17.3.2021 (**Annexure A-1)** and communication dated 18.5.2021 (**Annexure A-2).**
3. For sake of brevity, respective parties and Annexures have been referred specifically from AERA Appeal No. 7 of 2021.
4. **Issue involved in this AERA Appeal**

4.1. This appellant has entered into a contract **with Airport Authority of India (AAI)** for Operation, Management and Development of **Indira Gandhi International Airport (IGI)**

as on **04.04.2006 (Annexure A-5)**. This agreement has been referred as **OMDA.**

4.2. Similarly, an agreement has been entered into by this appellant with Union of India on **26.4.2006 (Annexure A-6)** which is known as **'State Support Agreement' (SSA)** and by virtue of this agreement, Government of India has laid down principles for tariff fixation.

4.3. Under the **OMDA**, the Appellant, inter-alia, is required to provide Aeronautical Services and Non-Aeronautical services which are classified in Schedule 5 and Schedule 6 of the OMDA respectively.

4.4. For Non-Aeronautical services, as per Article 12.2 of OMDA, the appellant & its concessionaires are free to fix charges and can float a contract. However, as per Respondent No. 1- AERA, if **Ground Handling Services (GHS)** and **Cargo Handling Services (CHS)** are done by this appellant then it is Non-Aeronautical Services and the charges collected thereunder are known as Non-Aeronautical charges, whereas, if the aforesaid two services viz., **GHS and CHS,** if done through the contractor then these services are Aeronautical Services and the charges

collected or the revenue generated by these two services are known as Aeronautical Charges.

4.5. Thus, as per the impugned communications received vide letters dated **17.03.2021** and **18.05.2021,** the same service (viz.- **GHS** and **CHS**) will be Non-Aeronautical if they are rendered by this appellant, **but,** if these services are being rendered through Appellant's appointed contractor, they will be Aeronautical Services. Whereas, as per this appellant, **GHS** and **CHS** remains Non-Aeronautical services whether they are rendered by this appellant or by the agent/contractor of the appellant. On the basis of this understanding of Respondent No. 1- AERA, as reflected in two impugned communications dated 17.3.2021(Annexure A-1) and dated 18.5.2021 (Annexure A-2), direction has been given by AERA which is the main issue.

5. **STATUES, LEGAL AGREEMENT & ABBREVIATION INVOLVED: -**

ACT/RULE/AGREEMENT	SECTION/CLAUSE/ RULE/ARTICLE
THE AIRPORT ECONOMIC REGULATORY AUTHORITY OF INDIA ACT, 2008.	Sec. 13, 14, 15, 18 & 42
AIRPORT AUTHORITY OF INDIA ACT, 1994.	Sec. 12-A
THE CONSTITUTION OF INDIA, 1950.	Art. 141 & 142.

AIRCRAFT RULES, 1992	Rule 92
OPERATION, MANAGEMENT AND DEVELOPMENT AGREEMENT (OMDA) – Dated.04-04-2006	Article 2, Art.2.2.2, Art.8.5.7, Art. 12.1, Art. 12.1.2, Art. 12.2, Art. 20.3.10 & Schedule 6
STATE SUPPORT AGREEMENT Between DIAL & UOI [26.04.2006]	Refer Annexure A-6
CONCESSIONAL AGREEMENT B/W DIAL & RESPONDENT NO. 2,3,4,5,6. [Entered Separately] viz. Cargo Handling Service & Ground Handling Service.	Refer Annexure-A-7 and A-9
GROUND HANDLING REGULATIONS, 2010 and 2018	Regulation 3 (4) of 2018. Annexure A-8
CARGO FACILITY, GROUND HANDLING & SUPPLY OF FUEL TO THE AIRCRAFT GUIDELINES, 2011.	Refer Annexure-R-1 (Reply filed by AERA)

ABBREVIATION	FULL-FORM
OMDA	OPERATION, MANAGEMENT & DEVELOPMENT AGREEMENT
SSA	STATE SUPPORT AGREEMENT

UOI	UNION OF INDIA
AAI	AIRPORT AUTHORITY OF INDIA
DIAL	DELHI INTERNATIONAL AIRPORT LTD
MIAL	MUMBAI INTERNATIONAL AIRPORT LTD
ISP	INDEPENDENT SERVICE PROVIDER
JVC	JOINT VENTURE CONSORTIUM
CHS	CARGO HANDLING SERVICE
GHS	GROUND HANDLING SERVICE

6. **Factual Matrix**

- Airport Authority of India (AAI), in the interest of better management of Indira Gandhi International Airport, Delhi (I.G.I Airport) granted some of its functions being the function of Operating, Maintaining, Developing, Designing, constructing, upgrading, modernizing, financing and managing the IGI Airport to Delhi International Airport Limited **(DIAL) vide O.M.D.A dated 04.04.2006 [ANNEXURE A-5]**
- The **DIAL** is a joint venture, formed as a consortium between GMR Group (54%), Airports Authority of India (26%), and Fraport AG &

Eraman Malaysia (10% each). DIAL for all intents and purposes is a Special Purpose Vehicle.

- **DIAL** has entered into Operation, Management and Development Agreement **(OMDA)** with **AAI,** whereby, **AAI** granted **DIAL** the exclusive rights and authority to undertake certain functions of IGI Airport. This OMDA Agreement is dated **04.04.2006.**
- A State Support Agreement (SSA) was executed by the appellant with Government of India on 26.04.2006. [Annexure A-6]
- Respondent no. 2,3,4,5,6 were given contract of Cargo Handling Services and Ground Handling Services by **DIAL**- appellant on different dates.
- **As per Article 12.2 of OMDA, DIAL** has exclusive liberty to determine the charges for **Non-Aeronautical Services** and these Non-Aeronautical Services are outside the purview of regulatory domain of respondent no. 1- AERA.
- Under Schedule 6 of OMDA, 'Non-Aeronautical Services' have been enumerated. As per schedule 6 of OMDA, Cargo Handling Services **(CHS)** and Ground Handling Services **(GHS)** are **Non-Aeronautical Services.** Thus, Non-Aeronautical Services cannot be regulated by AERA-Respondent no. 1.

- Ministry of Civil Aviation has taken a policy decision under Section 42 (2) of the Airports Economic Regulatory Authority of India Act,2008 (AERA Act) directing the respondent to treat revenue from Cargo Handling Services **(CHS)** and Ground Handling Services (GHS) as Non-Aeronautical, regardless and irrespective of whether these services are provided by the airport operator (DIAL) itself or through concessionaires (Respondent No. 2,3,4,5,6).
- **AERA Act** came into force from 2009 and tariff determination process for first control period of five years (i.e 01.02.2009 to 31.03.2014) took place**,** which is known as "first tariff order" whereby it determined tariff for Indira Gandhi International Airport (IGI). Partly aggrieved by the order in respect of classification of Ground Handling Services and Cargo Handling Services, this order was challenged by **DIAL** in **AERA Appeal No. 10 of 2012** and this Tribunal has decided it on **23.4.2018**. Counsels for both the sides have persistently relied on this judgement in the present appeal.
- Further, on 17.03.2021, Respondent Nos. 2 to 6 were directed by Respondent No. 1 to continue with the existing practice of Multi Year Tariff Proposal submission and proposal of Tariffs by AERA as per the AERA Act and guidelines issued in this regard from time to time.

- The decision of this Tribunal dated 23.4.2018 in AERA Appeal No.6 of 2012 and in other AERA appeals were challenged before Hon'ble the Supreme Court of India being Civil Appeal No. 8378 of 2018, Civil Appeal No. 10902 of 2018, Civil Appeal No. 5401 of 2019, Civil Appeal No. 5738 of 2019, Civil Appeal No. 6658- 6659 of 2019, Civil Appeal No. 3675 of 2020, Civil Appeal No. 145 of 2021, Civil Appeal No. 7331 of 2021, Civil Appeal No. 7334 of 2021. These appeals have been decided by Hon'ble the Supreme Court of India by detailed judgement dated 11.7.2022 (2022 SCC Online SC 850). This judgement has also been rereferred by counsels for both the sides during the course of hearing of this appeal.
- This appellant has issued an email on 15.04.2021(Annexure A-15) to the Respondent No. 1 in reply to the letter dated 17.3.2021 **(Annexure A-1)** that the Respondent No. 1's decision is in violation of this Tribunal's judgment dated 23.4.2018(Annexure A-13) and Ministry of Civil Aviation's Policy Directions which are dated 09.03.2012 and 10.09.2022. **(Annexure A-10 and A-12 Respectively)**
- The Respondent No. 1 (AERA) has issued a letter on 18.5.2021 **(Annexure A-2),** reiterating its decision that the service providers

of Cargo Handling Services **(CHS)** and Ground Handling Services **(GHS)** shall levy and collect from users the charges within the ceiling as determined by AERA.

- As per the appellant, Cargo Handling Services and Ground Handling Services are Non-Aeronautical Services as per Schedule 6 of OMDA to be read with Article 12.2, to be read with Article 8.5.7, to be read with Article 2.1.1 of OMDA.
- Hence, they are not within the purview of AERA and AERA cannot fix the tariff for GHS and CHS and therefore both the aforesaid communications dated 17.03.2021 (**Annexure A-1)** and dated 18.05.2021 **(Annexure A-2)** issued by Respondent No. 1 (AERA) have been challenged by this appellant under Section 18 (2) of the **AERA Act** in the present appeal.

7. **Arguments canvassed by the Counsel of Appellant (DIAL): -**

7.1. Senior Advocate Mr. Maninder Singh submitted that two communications issued by the Respondent No. 1 (**AERA**) dated 17.03.2021 (**Annexure A-1**) and dated 18.05.2021 (**Annexure A-2**) are non-est and void as they are in violation of the detailed judgement and order passed by this Tribunal dated 23.4.2018 in

AERA Appeal No. 06 of 2012 and other connected appeals.

7.2. It is further submitted by the learned Senior counsel that the aforesaid decision of this Tribunal in AERA Appeal No. 06 of 2012 was challenged by Federation of Indian Airlines before Hon'ble the Supreme Court of India in **Civil Appeal No. 8378 of 2018** and the judgement of this Tribunal especially in regard to Ground Handling Services (GHS) and Cargo Handling Services (CHS) have been confirmed by Hon'ble the Supreme Court of India especially in paragraph No. 128,129,130 in the reported decision *2022 SCC OnLine SC 850.*

7.3. Thus, it is submitted by the learned Senior counsel for the appellant that the observations by this Tribunal in AERA appeal No. 06 of 2012 especially in paragraph No. 15,16,25,31,57,84 and 119 have been confirmed by Hon'ble the Supreme Court of India in paragraph No. 19,20,25,41,43,128,129,130 and 151 of the reported decision of Hon'ble the Supreme Court of India. Thus, the issues involved in this petition have already attained its finality and is no more res integra.

7.4. It is further submitted by the learned Senior counsel for the appellant that even if Ground Handling Services and Cargo Handling Services are being done through contractor, the nature of activity remains the same.

7.5. The Learned Senior counsel for the Appellant has further placed reliance upon **Section 11** of the Code of Civil Procedure, 1908 especially upon **Explanation IV** thereof and has submitted that as per principle of **Constructive Res Judicata**, the respondent No. 1- **AERA** cannot mention in the two impugned communications which are at Annexures A-1 and A-2, that, if CHS and GHS are done directly by this appellant, then they are Non-Aeronautical Services. However, if these two services are done through contractor engaged by this appellant, then these two services would become Aeronautical Services.

7.6. This type of argument cannot be raised by the respondent now because in AERA Appeal No. 06 of 2012, this issue has already been decided which is affirmed by Hon'ble the Supreme Court of India in Civil Appeal no. 8378 of 2018 vide judgment dated 11.7.2022 reported in *2022 SCC OnLine SC 850.*

7.7. Thus, it is submitted by the learned Senior counsel for the appellant that the issue involved in this appeal is already covered by the earlier decisions and the novice argument which is canvassed by the Respondent No. 1 is also covered by principle of constructive res-judicata as per **Section 11- explanation IV** of the Code of Civil Procedure, 1908.

7.8. It is further submitted by the learned Senior counsel for the appellant that the decision given by this Tribunal in AERA Appeal No. 10 of 2012 dated 23.4.2018 has **been accepted by AERA** (Respondent No. 1). AERA had **never preferred any appeal** before Hon'ble the Supreme Court against the decision given by this Tribunal in AERA Appeal No. 06 of 2012 dated 23.04.2018 and therefore, now they cannot raise any argument which has been pointed out in the two impugned communications which are at **Annexure A-1** and **A-2** to the memo of this appeal.

7.9. It is further submitted by the learned Senior counsel for the appellant that appeal was preferred by Federation of Indian Airlines before Hon'ble the Supreme Court of India being a Civil Appeal No. 8378 of 2018. The reply was filed by AERA before Hon'ble the Supreme Court of India. Stand taken by AERA in

Hon'ble the Supreme Court of India, in reply, is contrary to the stand now taken by AERA in the two impugned communications (Annexure A-1 and A-2). The learned Senior counsel has taken this Tribunal to the reply filed by AERA before Hon'ble the Supreme Court of India in Civil Appeal No. 8378 of 2018 especially upon para 4 and ground A onwards of the reply filed by AERA in Civil Appeal No. 8378 of 2018 before Hon'ble the Supreme Court of India.

7.10. Further perusing the reply filed by AERA before Hon'ble the Supreme Court of India and looking to two impugned communications by very same authority- AERA, learned Senior counsel for the appellant submitted that they are diagonally opposite to each other which cannot be permitted by this Tribunal.

7.11. It is further submitted by the counsel for the appellant that the Government of India has issued two communications:-

Communicated Dt.	Annexure
09.03.2012	Annexure-A-10 Page 718
10.09.2012	Annexure-A-12 Page 728

These two communications were issued by Government of India (G.O.I) to the Respondent No.1 – AERA & vide these two communications, Government of India had pointed out to **AERA** that Ground Handling Services and Cargo Handling Services, even if, done directly by the appellant or through the contractor remain Non-Aeronautical Services.

7.12. This guidance, as was given by the Government of India, was in consonance with the judgement of this Tribunal dated 23.04.2018 in AERA Appeal No. 10 of 2012 and also in consonance with the decision of Hon'ble the Supreme Court of India in Civil Appeal No. 8378 of 2018 dated 11.7.2022 (2022 SCC OnLine SC 850). Thus, the interpretation and the understanding of the Government of India which is reflected in their communications dated 09.03.2012 and 10.09.2012 are falling in line with the decision subsequently rendered by this Tribunal and by Hon'ble the Supreme Court of India. Learned Senior counsel appearing for the appellant has placed reliance upon **Section 42** of the Airports Economic Regulatory Authority of India Act, 2008 and has submitted that under Section 42

thereof, central government has power to issue directions to the authority (i.e. AERA).

7.13. It is further submitted by the learned Senior counsel for the appellant that the impugned communications at Annexure A-1 and A-2 are also in violation of the communications issued by Central Government (Govt. of India) to AERA dated 09.03.2012 (A-10) and communication dated 10.09.2012 (A-12) and hence deserves to be quashed and set aside.

7.14. The learned Senior counsel appearing for the appellant has submitted that **OMDA** has been entered into by this appellant with Airport Authority of India dated 04.04.2006 (Annexure-A 5) which will remain in force for 30 years (i.e- up to 2036). By virtue of OMDA, huge investment running into several hundreds of crores of rupees have been done by this appellant for the development of IGI airport. Counsel appearing for the appellant has placed reliance upon several clauses of OMDA including Article 2 of OMDA especially 2.1.1, Article 8.5.7, Article 12.1, Article 12.1.2, Article 12.2, Article 20.3.10 and Schedule 6 of OMDA.

7.15. On the basis of all the aforesaid clauses of OMDA, it is contended by the learned Senior counsel for the appellant that Cargo Handling Services **(CHS)** and Ground Handling Services **(GHS)** which are mentioned in Schedule 6 of OMDA are Non-Aeronautical Services, whereas the Respondent No. 1 has issued two impugned communications treating Cargo Handling Services (CHS) and Ground Handling Services (GHS) as Aeronautical Services. Hence, these two communications which are at Annexure A-1 and A-2 deserve to be quashed and set aside.

7.16. It is further submitted by the learned Senior counsel for the appellant that the Airports Economic Regulatory Authority of India Act, 2008 was notified in the year 2009 and there is no Section in the aforesaid Act of 2008 which takes away the crystalized rights of this appellant by virtue of OMDA dated 04.04.2006. Thus, by virtue of AERA Act, 2008, rights of this appellant and the obligations of the parties to OMDA remain intact as they are. The effect of OMDA has not been diluted at all by virtue of AERA Act, 2008. Thus, AERA Act, 2008 protects the contract- OMDA.

7.17. It is further submitted by the learned Senior counsel for the appellant that AERA Act, 2008 has not taken away the rights and liabilities of the parties to OMDA. These arguments by the appellant were fortified by relying upon the following decisions:-

FORUM	CITATION
Hon'ble Supreme Court	(1975) 2 SCC 414
Hon'ble Supreme Court	(2004) 3 SCC 488
Hon'ble Supreme Court	(2004) 12 SCC 645
Hon'ble Supreme Court	(2010) 13 SCC 158
Hon'ble Supreme Court	(2014) 1 SCC 554
Hon'ble Supreme Court	(2019) 10 SCC 606
Hon'ble T.D.S.A.T.	AERA Appeal no. 06 of 2012
Hon'ble High Court of P &H	1994 OnLine P&H 934

The learned Senior counsel appearing for the appellant submitted that in view of the aforesaid facts, reasons and cited judgments, the two impugned communications dated 17.3.2021 and 18.5.2021 which are at annexure A-1 and A-2 respectively, are in teeth of the judgement of this Tribunal dated 23.4.2018 in AERA Appeal No. 06 of 2012 and in teeth of judgment

delivered by Hon'ble the Supreme Court of India dated 11.7.2022 in Civil Appeal No. 8378 of 2018 (reported in 2022 SCC OnLine SC 850).

7.18. The two impugned communications contained in Annexure A-1 and A-2 are also in violation of the guidance given and direction issued by the Central Government vide their communications dated 09.03.2012 and 10.09.2012 which are at Annexure A-10 and A-12 to the memo of this appeal. These two communications of central government are to be read with Section 42 of the AERA Act, 2008. Hence, Annexure A-1 and A-2 deserves to be quashed and set aside.

Arguments canvassed by the counsel for the appellant in AERA appeal no. 3 of 2021-

Mumbai International Airport Limited (MIAL)

7.19. Senior Advocate Mr. Sajan Poovayya has submitted that the two impugned communications dated 17.03.2021 and 07.05.2021 **(Annexure–A/1(colly)** issued by AERA are in fact contemptuous because they are in gross violation of detailed judgement and order dated 23.04.2018 **(Annexure-A/3)** delivered by Telecom Disputes Settlement and Appellate Tribunal

(TDSAT) in AERA Appeal No. 06 of 2012 and other connected appeals.

7.20. The decision rendered by this tribunal was challenged by Federation of Indian Airlines in Civil Appeal No. 8378 of 2018, wherein, the aforementioned decision of this tribunal was upheld and affirmed by Hon'ble the Supreme Court of India. Thus, Ground Handling Services and Cargo Handling Services are Non-Aeronautical services irrespective of the fact that whether these services are rendered directly by this appellant or indirectly by contractor appointed by this appellant.

7.21. It is further submitted by learned Senior counsel Mr. Sajan Poovayya on behalf of **MIAL** that Ground Handling Services (GHS) and Cargo Handling Services (CHS), if done directly or indirectly by this appellant, the nature of services remain as it is. It cannot be non- aeronautical if they are rendered directly, and they cannot be aeronautical services if are done through contractor. This type of interpretation of **AERA** vide impugned communications are absurd in nature and is also contemptuous in nature looking to the earlier decision of **TDSAT** which is confirmed by Hon'ble the Supreme Court of India.

7.22. It is further submitted by the learned Senior counsel Mr. Sajan Poovayya that the Central Government has already formed an opinion that **GHS** and **CHS** are non-aeronautical services even if it is done by appellant directly or through the contractor. The Clarity which the Central Government is having is being reflected in the communications dated 03.03.2021, 10.09.2012 and 30.05.2011[Annexure-A/5(colly)] to the memo of AERA Appeal No. 3 of 2021).

7.23. Counsel for the appellant has also placed reliance upon **Section 42 of the AERA Act, 2008** and has submitted that the interpretation, understanding and the clarity which the Central Government is having is communicated as a direction to follow by AERA under Section 42 of AERA Act, 2008. However, AERA for some unknown reasons have not followed this clarity, understanding and direction of central government. Hence, the two impugned communications issued by AERA dated 17.03.2021 and 07.05.2021 which are at [Annexure-A/1(colly) to the memo of AERA Appeal No. 3 of 2021] deserves to be quashed and set aside.

7.24. Learned Senior counsel for the Appellant Mr. Sajan Poovayya has vehemently submitted that by virtue of AERA Act, 2008, OMDA has not been declared as void, the effect of OMDA remains intact as it is even after the enforcement of AERA Act, 2008. To substantiate this submission, reliance is placed upon the same decisions which are being relied upon by Delhi International Airport Limited in their AERA Appeal no. 7 of 2021. (Refer Para 7.17).

7.25. It is further submitted by Mr. Sajan Poovayya on behalf of MIAL that as per **Clause 8.5.7** any activity may be sub contracted by JVC (which is MIAL in the present case) provided that notwithstanding the subcontract, the JVC (which is MIAL in this appeal) retains overall management, responsibility, obligation and liability in relation to the subcontract airport service.

7.26. Any such subcontracting shall not relieve MIAL from any of its obligations in respect of provisions of such airport services under OMDA. It was clarified as per Article 8.5.7 of OMDA that JVC (MIAL) shall remain liable and responsible for any acts, omissions or defaults of a subcontractor and shall indemnify AAI in respect thereof.

7.27. Thus, it is submitted by counsel for MIAL that looking to the provisions of AERA Act, 2008, OMDA has created legal obligations under the contract prior to the enforcement of AERA Act, 2008 which shall remain intact as it is. Thus, for understanding whether Cargo Handling Services and Ground Handling Services are Aeronautical or Non-Aeronautical Services, one has to refer to OMDA and not the AERA Act, 2008. The perusal of OMDA, especially Schedule 6 would indicate that Cargo Handling Services and Ground Handling Services are Non-Aeronautical Services and as per Clause 8.5.7 of OMDA, subcontract can always be given by MIAL, **but,** for the act of the agent the principals shall be responsible under the principle of vicarious liability which is being reflected in Clause 8.5.7 of OMDA.

7.28. Thus, it is submitted by the learned Senior counsel for the appellant that it makes no difference whether Cargo Handling Services and Ground Handling Services are done by MIAL or through contractor for verifying whether these services are aeronautical or not.

7.29. It is further submitted by the learned Senior counsel for the appellant – MIAL that it is absolutely absurd and arrogant to say

that if**, CHS** and **GHS** are done directly they are non-aeronautical services, **<u>but</u>**, if, **CHS** and **GHS** are done through contractor, they are aeronautical services. This interpretation of the respondent no. 1-AERA is in violation of-

A. Decision of the TDSAT in AERA Appeal No. 06 of 2012 and other connected appeals, judgement dated 23.04.2018
B. Judgement delivered by Hon'ble the Supreme Court of India in Civil Appeal No. 8378 of 2018 dated 11.07.2022;
C. Communications issued by Central Government dated 03.03.2021, 10.09.2012 and 30.05.2011 which is clarity & understanding of the Central Government and direction issued by Central Government as per Section 42 of AERA Act, 2008.
D. Several decisions rendered by Hon'ble the Supreme Court of India, which are already, pointed hereinabove, as argued by learned senior advocate Mr. Maninder Singh. [Refer Para 6.17]

E. OMDA dated 04.04.2006 to be read with SSA dated 26.04.2006 (Schedule 6 of OMDA to be read with Article 8.5.7, Article 12.2 to be read with Article 2 of OMDA).

7.30. It is submitted by the learned Senior counsel Mr. Sajan Poovayya on behalf of MIAL that the two impugned communications issued by AERA dated 17.03.2021 and 07.05.2021 are in fact contemptuous in nature and gross violations of the decision rendered by Hon'ble the Supreme Court of India reported in *2022 SCC OnLine SC 850* and contrary to the stand of AERA taken before Hon'ble the Supreme Court in Civil Appeal No. 8378 of 2018 and other allied civil appeals. AERA being respondent in afore-stated civil appeals, Mr. Sajan Poovayya has relied on the affidavit filed by AERA before Hon'ble the Supreme Court of India in the aforesaid civil appeal and has pointed out that AERA had taken one stand before Hon'ble the Supreme Court as pointed in the affidavit filed by them in Hon'ble the Supreme Court of India whereas AERA is taking diagonally opposite stand in the two impugned communications which are under challenge in this appeal.

7.31. In fact, the decision rendered by TDSAT dated 23.4.2018 in AERA Appeal No. 06 of 2012 and other connected appeals have been accepted by AERA and AERA has never preferred any appeal before Hon'ble the Supreme Court of India and therefore these two impugned communications dated 17.3.2021 and 07.5.2021 deserves to be quashed and set aside.

7.32. The learned Senior counsel for the appellant has adopted all the arguments canvassed by learned senior advocate Mr. Maninder Singh for AERA Appeal No. 7 of 2021.

8. ARGUMENTS CANVASSED BY RESPONDENT NO. 1 AERA

8.1. The counsel appearing for the Respondent No.1 submitted that **Cargo Handling Services (CHS)** and **Ground Handling Services (GHS)** are Aeronautical Services but the revenue generated therefrom is non-aeronautical Revenue. It is further submitted by the counsel for the Respondent No. 1 that as per **Section 2 of Airport Economic Regulatory Authority of India Act (AERA Act), 2008,** especially under Section 2 (a) (iv) and 2 (a) (v), both **GHS** and **CHS** are Aeronautical services and as per **Section 13 of the AERA Act, 2008**, Respondent No. 1 can

determine the tariff for Aeronautical Services. It is also submitted by the counsel for the Respondent No.1 that these two communications dated. **17.3.2021** & **18.05.2021** which are under challenge are neither any direction, decision nor an order of the Respondent No. 1 and hence this tribunal has no jurisdiction.

8.2. It is also submitted by the counsel for the Respondent No. 1 that both the aforesaid communications have been addressed to Independent Service Providers (ISPs) and they have to supply Multi Year Tariff Proposal for third control period. It is also submitted by the counsel for the Respondent No. 1 that there is no policy direction by the Central Government to the Respondent No. 1 under Section 42 of AERA Act, 2008.

8.3. Counsel for the Respondent No. 1 further submitted that as per **Operation Management and Development Agreement (OMDA), CHS** and **GHS** are non-aeronautical services, whereas, as per AERA Act 2008, **CHS** and **GHS** are Aeronautical services. The law shall prevail upon the contract and therefore these AERA appeals may not be entertained by this Tribunal. Counsel appearing for the Respondent No. 1 further submitted that there

are guidelines to fix the tariff for **CHS** and **GHS** and these guidelines are not under challenge.

8.4. It is also submitted by the counsel for the Respondent No. 1 that OMDA is not a statutory contract or at the highest OMDA has both elements, statutory as well as non-statutory. It is also submitted by the counsel for the Respondent No. 1 that this Tribunal is working under the AERA Act, 2008 and therefore this Tribunal cannot hold any provision of the AERA Act, 2008 as unconstitutional nor the law can be read down by this Tribunal.

8.5. Counsel for the Respondent No. 1 has taken this Tribunal to objects and reasons for enactment of the AERA Act, 2008. It is also submitted by the counsel for the Respondent No. 1 that if there is any discrepancy between the contract and law, the remedy is not before this Tribunal. It is also submitted by the counsel for the Respondent No.1 that the Respondent No. 1 is performing the statutory functions under the AERA Act, 2008. Counsel has also taken this Tribunal to Clause No. 12.2 of OMDA and has specifically emphasized on the phrase "subject to applicable law". On the basis of this Clause 12.2 of OMDA, it is pointed out by the counsel for the Respondent No. 1 that the law shall prevail upon OMDA.

8.6. Counsel for the Respondent No.1 has also referred to the report of the Public Accounts Committee dated 31.1.2014. It is also submitted by counsel for the Respondent No. 1 that for earlier tariff period, no objection has ever been raised by this appellant and hence there is an estoppel on DIAL and MIAL under Section 115 of the Indian Evidence Act. Tariff fixation of the past years have not been challenged by DIAL and MIAL and therefore now they are estopped in both the appeals. Counsel for the Respondent No. 1 has relied upon the following decisions to substantiate their arguments:

FORUM	CITATION
Hon'ble Supreme Court	(2000) 3 SCC 379
Hon'ble Supreme Court	(2000) 6 SCC 293
Hon'ble Supreme Court	(2022) 1 SCC 401
Hon'ble Supreme Court	(1975) 2 SCC 414
Hon'ble Supreme Court	(1997) 3 SCC 261
Hon'ble Supreme Court	AIR (1996) SC 1089
Hon'ble Supreme Court	1991 Supp. (1) SCC 518
Hon'ble Supreme Court	Civil Appeal No. 3902/06 of 2021
Hon'ble Supreme Court	(2011) 3 SCC 193

Hon'ble Supreme Court	(2003) 2 SCC 355
Hon'ble Delhi High Court	(2021) SCC OnLine Delhi 1336
Hon'ble High Court of Gujarat	(2015) SCC OnLine Gujarat 142

8.7. On the basis of the aforesaid decisions, it is further submitted by the counsel for Respondent No.1 that the issue involved in this AERA Appeal has already been decided by this Tribunal in AERA Appeal No. 10 of 2012 and other allied appeals in judgment dated 23.4.2018. Counsel for the Respondent No.1 has relied upon several paragraphs of the judgement of this Tribunal in AERA Appeal No. 10 of 2012 and other allied matters and hence it is submitted that these appeals may not be entertained by this Tribunal.

Arguments canvassed by counsel for the Respondent No. 2 (Celebi Delhi Cargo Terminal Management India Pvt. Ltd.) and Respondent No. 6 (M/s CELEBI Airport Services India Pvt. Ltd.)

8.8 Respondent No. 2 and 6 are the Independent Service Providers (ISPs) and they support the case of the appellants. Respondent No. 2 and 6 are generating 36% of the gross revenue of DIAL.

Airport Authority of India has 26% share in DIAL and therefore the two letters which are issued by the Respondent No. 1 have a direct effect upon these appellants. They have adopted the arguments canvassed by the Appellants.

8.9 It is submitted by the counsel for the Respondent No. 2 and 6 (AERA Appeal No. 7 of 2021) that CHS and GHS are non-Aeronautical because the revenue generated therefrom is Non-Aeronautical revenue and looking to Section 13 (1) (a) (vi), the concession offered by the Central Government shall be taken into consideration by the Respondent No. 1. The concession has already been given by OMDA looking to the Schedule V and VI of OMDA for CHS and GHS and this issue has already been decided earlier by this Tribunal in AERA Appeal No. 10 of 2012 and other allied matters vide judgement dated 23.4.2018 which is upheld by Hon'ble the Supreme Court of India by judgement dated 11.7.2022 in Civil Appeal No. 8378 of 2018 and other allied matters (reported as 2022 SCC OnLine SC 850).

8.10 Hence the two communications which are under challenge dated 17.3.2021 and 18.5.2021 at Annexure A-1 and A-2 to the memo of AERA Appeal No. 7 of 2021 deserves to be quashed and set aside.

Arguments canvassed by the counsel for the Respondent No. 4 (M/s Bird Worldwide Flight Services (I) Pvt. Ltd.)

8.11 Respondent No. 4 is an Independent Service Provider (ISP) and is providing **GHS** and it is submitted by the counsel for the Respondent No. 4 that **GHS** is Non-Aeronautical service and the revenue generated therefrom is also Non-Aeronautical Revenue as per OMDA and therefore Respondent No. 1 cannot decide tariff for **GHS** because the concession given by the central government through OMDA has to be respected by Respondent No. 1 as per Section 13 (1) (a) (vi). Counsel for the Respondent No. 4 has adopted the arguments canvassed by the counsel for the Respondent No. 2 and 6 of AERA Appeal No. 7 of 2021 and they are supporting the appellants.

Arguments Canvassed by the Respondent No. 7- Federation of Indian Airlines

8.12 It is submitted by counsel for the Respondent No. 7 that appellant type companies are monopolist companies and they have got a natural economic monopoly and therefore a regulator like Respondent No.1 is required. Counsel for the Respondent No. 7 has

relied upon Parliamentary Committee report and they have also relied upon GHS regulations. It is further submitted by the counsel for the Respondent No. 7 that **CHS** and **GHS** are Aeronautical Services and after amendment in the definition under the AERA Act, 2008, the law shall prevail upon an agreement. Under Sec. 13 of the AERA Act, 2008, Respondent No.1 can determine the tariff for Aeronautical services. The jurisdiction of this authority cannot be conferred nor can it be curtailed by a contract (OMDA). There is nothing in OMDA which states that the tariff will be decided by the licensee.

8.13 Counsel for the Respondent No. 7 has also placed reliance upon **Clause 12.2 of OMDA**. Counsel for the Respondent No. 7 has placed reliance upon **(2012) 4 SCC 463** and **(2006) 5 SCC 167** and counsel for the Respondent No. 7 has also placed reliance upon the earlier decisions of this Tribunal in AERA Appeal No. 10 of 2012 and other allied matters in judgement dated 23.04.2018 and has submitted that this judgement is not applicable in the facts of the present case. It is also submitted by counsel for the Respondent No. 7 that issue involved in the present appeal is entirely different than

that of AERA Appeal No. 10 of 2012, hence the same is not applicable in the present appeals.

8.14 It is also submitted by the counsel for the Respondent No. 7 that jurisdiction of the statutory authority should be decided as per law and not as per contract and has placed reliance upon (1974) 2 SCC 725. On the basis of the aforesaid decisions, it is further submitted by the counsel for the Respondent No. 7 that these appeals may not be entertained by this Tribunal.

Arguments canvassed by the counsel for the Respondent No. 8- International Air Transport Association

8.15 Counsel for Respondent No. 8 has adopted the arguments canvassed by the Respondent No. 1 and Respondent No. 7. It is submitted by the counsel for Respondent No. 8 that as per Section 13 (1) (a) (vi) of AERA Act, 2008, no concession has been given by the Central Government because the Central Government is not a party to the OMDA. After OMDA was entered into, the AERA Act, 2008 was brought in force and therefore AERA Act, 2008 shall prevail over OMDA.

8.16 Counsel for the Respondent No. 8 has also placed reliance upon Section 13 of the AERA Act and has submitted that Airport Operator

(joint venture), appellants herein, cannot decide tariff as the same has to be decided by an independent authority.

8.17 AERA was already contemplated under OMDA and similarly change was also contemplated under SSA and hence these appeals may not be entertained by this Tribunal.

Non-Appearance of Respondent No. 2, 3, 4, 5, 7 & 8 in AERA Appeal No. 3 of 2021 and Non-Appearance of Respondent No.3 & 5 in AERA Appeal No. 7 of 2021

8.18 That no one appears for Respondent No.2, 3, 4, 5, 7 & 8 in AERA Appeal No. 3 of 2021 and Respondent No.3 & 5 in AERA Appeal No. 7 of 2021, even though copy of past orders in the present Appeal have been supplied to them by the Registry of this tribunal through Speed Post.

REASONS AND ANALYSIS: -

9. Earlier Judgment of TDSAT Dated 23/04/2018 in AERA Appeal No. 06 of 2012 and other connected Appeals.

9.1 This appellant had entered into a contract with Airport Authority of India (AAI) for Operation, Management and Development of Indira Gandhi International Airport (IGI) on 04/04/2006. Similar is an agreement for MIAL also. This agreement has been referred to as

OMDA. A State Support Agreement (**SSA**) was also entered into between these appellants and Union of India.

9.2 Earlier, DIAL had preferred an Appeal being AERA Appeal No. 10 of 2012 and the decision has been rendered by this Tribunal dated 23.04.2018, wherein, the issue involved in this appeal has already been determined. The said determination was based on consideration of contents of OMDA, provisions of AERA Act, 2008, to be read with SSA and same is reflected especially in Paras 31, 57, 59, 84 & 119 aforementioned judgement of this tribunal. In view of the aforesaid observations, it appears that OMDA, SSA and AERA Act, 2008 were considered, while the aforesaid decision was rendered. For ready reference the aforesaid Para's read as under: -

> *"**31.** The issue, though a minor one, with respect to inter se precedence of OMDA and SSA, needs to be answered in a simple manner by pointing out that both the agreements are essentially parts and parcel of a composite whole aiming to secure a common purpose, viz., to attain the purpose of Policy on Airport Infrastructure and promote creation of world class infrastructure, at least at major airports of the country. Both the agreements clearly have*

the approval and concurrence of the Central Government either directly through the MOCA or through AAI, an instrumentality of the Government of India. ***Whatever concessions have been offered under these two agreements, they deserve consideration by AERA in a judicious, fair and transparent manner.*** *It does not really matter whether the power of such consideration flows from sub-clause (vi) or sub-clause (vii) of Section 13(1)(a) of the Act.* ***In exercise of this power, AERA is required to respect rights/concessions flowing from lawful agreements/instruments/directives of Central Government on policy matters.***

57. *On this issue, it is relevant to notice the definition of service provider in Section 2(n) of the Act – "unless the context otherwise requires, 'Service Provider' means any person who provides Aeronautical Service and is eligible to levy and charge User Development Fees from the embarking passengers at any airport and includes the Authority which manages the airport".* ***The definition is clearly not exclusive and does not rule out an entity authorized by the Authority or a Concessionaire having a right to manage the Airport, to act as service provider.*** *The submission noted above is not*

acceptable in view of the definition noted aboveand also on the touchstone of a basic principle that revenue from an Aeronautical Service has a definite connotation and purpose affecting the rights and interests of all the stakeholders. It cannot be permitted to be changed by a unilateral act of DIAL. Even if DIAL engages in providing an Aeronautical Service through its servants or agents, in essence the service must be deemed to be one provided by DIAL. ***In view of definition noted above, 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.***

59. *The aforesaid case laws have no application to a situation where an Aeronautical Service is outsourced to be performed by an agent or employee for a determined value or price.* ***Whether the earning is by DIAL as a service provider or it comes to DIAL through its agent would make no difference as indicated earlier.***

84*. Mr. Kapur also referred to some relevant provisions of SSA and OMDA. Hehas filed written notes on retrospectivity citing various judgements such as* ***Delta Engineers Vs. State of Goa - (2009) 12 SCC 110*** *and* ***Securities Exchange Board of India Vs. Alliance Finstock & Ors. - (2015) 16 SCC 731****. These judgments follow the earlier precedents and do not warrant a different view on the issue*

of alleged impermissible retrospectivity of the Tariff Order. In paragraph 19 of the latter judgment, it was rightly highlighted that ***"the rationale in not permitting retrospective operation of laws is only to ensure that subjects are not adversely affected by creation of legal liabilities and obligations for a period already bygone."*** *We have already held that the statutory provisions as well as the agreements required re-fixation of tariff and permitted the regulatory period to start from 01.04.2009. The discussions made earlier on this issue are reiterated. On the basis of various factors enumerated in Section 13(1)(a) and certain observations of a Parliamentary Standing Committee, it was argued that AERA should have opted for single TILL in place of shared TILL and ought to have treated the entire revenue whether received from Aero or Non-Aero services as one for determination of tariff. The argument is that provisions to the contrary in the SSA and OMDA deserved no respect in view of observations of the Parliamentary Standing Committee and Section 13(1)(a)(v) which spells out – "revenue received from services other than the Aeronautical Services" – to be one of the factors requiring consideration in the task of tariff formulation. On the other hand, it has been argued at length by Mr.Venugopal and also by others supporting the impugned tariff that unless there be explicit provision in a statute for taking away a vested contractual right or at least there be such provisions which necessarily*

require such rights to be voided, the vested contractual rights cannot be ignored. Hence, it has been submitted in reply that the adoption of shared TILL by AERA isfully in accordance with law and permitted by clause (vi) of Section 13(1)(a). It was submitted that for Delhi International Airport only 30% of Non-Aeronautical revenue could be taken into consideration as per the formula in the contract and the said view has rightly been followed because it creates a harmony between the contract and the statute. ***We find ourselves in agreement with this view. Hence, as per provisions in OMDA and SSA, particularly the formulae for Target Revenue etc., Cargo and Ground Handling charges have to be treated as Non-Aero Revenue****. There is enough flexibility in the definition clause of the Act contained in Section2 as noted earlier in paragraph 8, to permit this view in the light of context and the need to honour the rights/concessions under OMDA and SSA.*

119. *Some of the salient observations and directions on material issues are summarized hereinbelow for the purpose of easy reference so that these directions and observations are carried out and/or kept in mind by AERA at the time of tariff formulation for Aeronautical Services for the next control period that may be falling for consideration:*

(i) ***In exercise of powers under Section 13 of the Act, AERA is required to respect rights/concessions etc.***

(See Para 31).

(ii) ***Contractual rights can be voided only on the basis of explicit statutory provisions or implications from statutory provisions permitting no other option*** *(See Paras 34 and 36)*

(iii) *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. (See Paras 57 and 59)*

(iv) ***Revenue from Cargo and Ground Handling charges are required to be treated as non-Aero revenue*** *(See Para 84)*

(v) *For future, the exercise for Assets allocation has to be redone, if not redone already (See Para 86).*

(vi) *Levy and determination of User Development Fee (UDF) is lawful but its use and appropriation must also be transparent lawful and accounted for in the future exercise for tariff determination (See Para 96).*

(vii) *RSD of Rs.1471 crores cannot be a zero cost debt. Its cost needs to beascertained and made available to DIAL through appropriate fiscal exercise at the time of next tariff redetermination (See Para 106)*

(viii) Although rate of 16% as return on Equity not interfered with, AERA may redo the exercise through a scientific and objective approach, independently of any observations in the Third Control Period. (See Para 113)."

[Emphasis Supplied]

9.3 This decision was never challenged by AERA. Thus, the judgment delivered by TDSAT dated. 23.04.2018 was accepted by AERA. This judgment was challenged by DIAL & MIAL before Hon'ble the Supreme Court of India and the Hon'ble Supreme Court has decided Civil Appeal No. 8378/2018 and other allied matters vide judgment dated 11/07/2018 (Reported as 2022 SCC OnLine SC 850). The relevant Paragraphs being Para's **19, 20, 128, 130, 131, 151** of the aforementioned Judgement are reproduced below:-

*"**19.** We may, however, add that in the given factual scenario in the dispute before us there is something more which is required to be addressed. Before the complete legislative structure was set in place, operations were proceeded on the understanding of the agreement between the parties and the legislative intent is also apparent. **This provides for due honour and consideration being given to the aforesaid intent as per the provisions of Section 13 of the said Act. The objective is that all parties**

who have operated in what may be called a pioneering effort in the field of civil aviation in India should not be taken by surprise affecting their commercial viability as it would discourage private participation in such economic activities which have been perceived to be essential by the Government. *To that extent, we are inclined to consider that some aspects of the agreements have pre-legislative features and, thus, there is a requirement to look into them. Section 13 of the said Act forming part of Chapter III deals with "Powers and Functions of the Authority" and reads as under:*

"CHAPTER III: POWERS AND FUNCTIONS OF THE AUTHORITY

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

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

(i) the capital expenditure incurred and timely investment in improvement ofairport 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."

20. *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.

128. *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.

130. *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)*:*

131. *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.*

151. *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."

(Emphasis Supplied)

9.4 In view of the aforesaid decisions, it appears that CHS & GHS are generating Non-Aeronautical Revenue, the said determination is categorically observed in the Judgement Dated. 23-04-2018 passed by this Tribunal & has been affirmed by Hon'ble the Supreme Court of India.

10. Color of Revenue and Color of Services

10.1 It is contended by counsel for appellants that out of CHS & GHS, the revenue generated is **"Non-Aeronautical Revenue"** and therefore CHS and GHS are non-aeronautical services. This decision was given by TDSAT and by Hon'ble the Supreme Court of India after interpreting OMDA, SSA and AERA Act, 2008. As per Schedule 6 of OMDA, CHS and GHS are Non-Aeronautical services. For the ready reference, Schedule 6 of the OMDA states as follows:

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.

10.2 This agreement/OMDA was entered into between DIAL & AAI for Operation, Management and Development of IGI Airport as on 04/04/2006. Similar is an agreement between MIAL and AAI. SSA was entered into between these appellants and the UOI.

10.3 The UOI has thus given a concession for 2 types of services viz. GHS and CHS and that they shall be Non-Aeronautical services and therefore **revenue generated from these non-aeronautical services are non-aeronautical revenue**. Thus, under OMDA, CHS and GHS are Non-Aeronautical services and by virtue of the

judgments of TDSAT and by Hon'ble the Supreme Court of India, the revenue generated therefrom is Non-aeronautical revenue. Both these judgments were delivered after AERA Act, 2008 was brought into force.

10.4 As per Paragraph 130 of the judgment delivered by Hon'ble the Supreme Court of India, though this issue viz. that CHS & GHS are aeronautical services was available with respondents earlier, the same was never canvassed. Hence, it is rightly contended by the counsels for the appellants that under Explanation 4 to Sec.11 of CPC, this argument cannot be canvassed that though the revenue is non-aeronautical, the services are aeronautical for CHS and GHS.

10.5 It has been held by Hon'ble the Supreme Court of India that in **"Aneesh D. Lawande & Ors v. State of Goa & Ors",** reported in (2014) 1 SCC 554, in Paragraph Number 24 as under:

> *"24. It may not be out of place to state here that every public authority has a duty coupled with power. Before exercising the power one is required to understand the object of such power and the conditions in which the same is to be exercised. Similarly, when one performs public duty he has to remain alive to the legal position and not be oblivious of it. In this context, we may refer to the authority in Superintending Engineer, Public Health, U.T. Chandigarh and others v. Kuldeep Singh and others [5] wherein the Court has reproduced the observations of Farl*

Cairns L.C. in the House of Lords in Julius v. Lord Bishop of Oxford [6] which was quoted with approval by this Court in Commissioner of Police, Bombay v. Gordhandas Bhanji[7]. The succinctly stated passage reads thus: -

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." But, unfortunately, here the authorities of the State Government have felt courageous enough to play possum and proceeded to crucify the fate of the candidates who had been protected by the verdict of this Court. Such an action is absolutely impermissible. Thus analysed the letter dated 25.7.2013 deserves to be lancinated and we so do. The writ petitioners, who have been admitted on the basis of the NEET examination, shall be allowed to prosecute their studies.

(EMPHASIS SUPPLIED)

10.6 It has been held by Hon'ble the Supreme Court of India in "**Court Commr. Of Customs v. Indian Oil Corpn. Ltd**.", **(2004) 3 SCC 488**, especially in Paras 25 & 26, which reads as under: -

*"**25.** As is evident from Section 151-A, the Board is empowered to issue orders or instructions in order to ensure uniformity in the classification of goods or with respect to levy of duty. The need to issue such instructions arises when there is a doubt or ambiguity in relation to those matters. The possibility of varying views being taken by the customs*

officials while administering the Act may bring about uncertainty and confusion. In order to avoid this situation, Section 151-A has been enacted on the same lines as Section 37-A of the Central Excise Act. The apparent need to issue such circulars is felt when there is no authoritative pronouncement of the Court on the subject. Once the relevant issue is decided by the Court at the highest level, the very basis and substratum of the circular disappears. The law laid down by this Court will ensure uniformity in the decisions at all levels. By an express constitutional provision, the law declared by the Supreme Court is made binding on all the courts within the territory of India (vide Article 141). Proprio vigore the law is binding on all the tribunals and authorities. Can it be said that even after the law is declared by the Supreme Court the adjudicating authority should still give effect to the circular issued by the Board ignoring the legal position laid down by this Court? Even after the legal position is settled by the highest court of the land, should the Customs Authority continue to give primacy to the circular of the Board? Should Section 151-A be taken to such extremities? Was it enacted for such purpose? Does it not amount to transgression of constitutional mandate while adhering to a statutory mandate? Even after the reason and rationale underlying the circular disappears, is it obligatory to continue to follow the circular? These are the questions which puzzle me and these are the conclusions

which follow if the observations of this Court in the two cases of Dhiren Chemical Industries are taken to their logical conclusion.

26. *I am of the view that in a situation like this, the Customs Authority* ***should obey the constitutional mandate emanating from Article 141 read with Article 144 rather than adhering to the letter of a statutory provision like Section 151-A of the Customs Act.*** *The Customs Authority should act subservient to the decision of the highest constitutional court and not to the circular of the Board which is denuded of its rationale and substratum under the impact of the authoritative pronouncement of the highest court. Alternatively, Section 151-A has to be suitably read down so that the circulars issued would not come into conflict with the decision of this Court which the Customs Authorities are under a constitutional obligation to follow."*

(Emphasis Supplied)

10.7 It has been held & reiterated by the Hon'ble the Supreme Court of India in "**Palitana Sugar Mills (P) Ltd. v. State of Gujarat**", reported in **(2004) 12 SCC 645,** in Para 62, which reads as under:-

"62. *It is well settled that the judgments of this Court are binding on all the authorities under Article 141 of the Constitution and it is not open to any authority to ignore a binding judgment of this Court on the ground that the full facts had not been placed before this Court and/or the judgment of this Court in the earlier proceedings had only*

collaterally or incidentally decided the issues raised in the show-cause notices. Such an attempt to belittle the judgments and the orders of this Court, to say the least, is plainly perverse and amounts to gross contempt of this Court. We are pained to say that the then Deputy Collector has scant respect for the orders passed by the Apex Court."

(Emphasis Supplied)

10.8 Further the Hon'ble the Supreme Court of India in **"Omprakash Verma v. State of A.P."**, reported in **(2010) 13 SCC 158,** in para's 68, 69, 70, 75, 76, 77 has held as follows:-

*"**68.** The learned Attorney General submitted that a judgment rendered by this Court cannot be collaterally challenged as is sought to be done by the appellants in these appeals. For the said proposition, he relied on the following. In Hunter v. Chief Constable of West Midlands Police [1982 AC 529 : (1981) 3 WLR 906 : (1981) 3 All ER 727] Diplock, L.J. delivering his opinion in the House of Lords enunciated the doctrine of "collateral attack" on a judgment and observed thus : (AC p. 541 B-C)*

"The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full

opportunity of contesting the decision in the court by which it was made."

***69**. Quoting Halsbury, the learned Judge observed : (Hunter case [1982 AC 529 : (1981) 3 WLR 906 : (1981) 3 All ER 727] , AC p. 542 C-D)*

> *"... '... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.' [Ed. : As observed by Lord Halsbury, L.C. in Reichel v. Magrath, (1889) 14 AC 665 at p. 668.]*

***70.** This Court has approved this well-settled principle that a judgment of the Supreme Court cannot be collaterally challenged on the ground that certain points had not been considered. This Court in Anil Kumar Neotia v. Union of India [(1988) 2 SCC 587] held that it is not open to contend that certain points had not been urged or argued before the Supreme Court and thereby seek to reopen the issue. The relevant portion of the judgment is as follows : (SCC p. 600, paras 17-18)*

> *"17. ... This Court further observed that to contend that the conclusion therein applied only to the parties before this Court was to destroy the efficacy and integrity of the judgment and to make the mandate of Article 141 illusory. [Ed. : See the observations of this Court in*

Shenoy & Co. v. CTO, (1985) 2 SCC 512, p. 522, para 23 wherein reference was made to State of Karnataka v. Hansa Corpn., (1980) 4 SCC 697, p. 716, para 39.]

18. … It is also no longer open to the petitioners to contend that certain points had not been urged and the effect of the judgment cannot be collaterally challenged."

75. *As pointed out by the learned Attorney General, the matter can be looked at from another angle. The proceedings in the instant case are barred by the principle of constructive res judicata. The validity of the ULC Act was squarely in issue. The effect of allowing the State appeals in Audikesava Reddy case [(2002) 1 SCC 227] is that all contentions which parties might and ought to have litigated in the previous litigation cannot be permitted to be raised in subsequent litigations.*

76. *In Forward Construction Co. v. Prabhat Mandal [(1986) 1 SCC 100] this Court held that an adjudication is conclusive and binding not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided. The following portion of the judgment is relevant which reads as under : (SCC p. 112, para 20)*

"20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as

one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11 CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided."

77. *In Hoystead v. Taxation Commr. [1926 AC 155 : 1925 All ER Rep 56 (PC)] the Privy Council observed : (AC pp. 165-66)*

"… Parties are not permitted to begin fresh litigations because of new views that they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle."

(Emphasis Supplied)

10.9 There is no dispute that AERA itself has been treating the revenue from Cargo Handling Services & Ground Handling Services as Non-Aeronautical revenue. It is absurd to contend that revenues from Cargo Handling Services & Ground Handling Services are Non-Aeronautical revenues, but these services are Aeronautical services. This cannot be an acceptable proposition. For the revenue from these services to be Non-Aeronautical revenue, it is sine qua non that these services are also Non-Aeronautical in nature. Thus, we are of the considered view that AERA cannot contend that if the revenues from Cargo Handling Services & Ground Handling Services are Non-Aeronautical revenue, these services are Aeronautical services and AERA has jurisdiction to determine tariff for the same.

10.10 Thus, the impugned directions vide communications dated. 17.03.2021 (Annexure A-1) and 18.05.2021 (ANNEXURE A-2) are in teeth of judgments of this Tribunal and of Hon'ble the Supreme Court of India and hence they are non-est and void.

11. Impugned Decisions are directions under Sec.14(1)(a) to be read with Sec. 15 of AERA Act, 2008

11.1 As stated hereinabove, earlier the decisions have been rendered by this Tribunal and by Hon'ble the Supreme Court of India, looking to the communications dated 17.3.2021 & 18.5.2021 which have been issued by Respondent No. 1/AERA in furtherance of the relevant **Guidelines and Directives.**

11.2 Upon perusing the directions issued by AERA vide two communications (ANNEXURE A-1, A-2) as annexed to the AERA Appeal No. 7 of 2021, the directions have been issued to supply Multi Year Tariff Proposal (MYTP) for Third Control Period.

11.3 Looking to Para 2 & 3 of the communication dated 17.03.2021 and looking to Paras 1,2,3 & 4 of the impugned communications dated 18.05.2021, the same tantamount to qualify as directions issued by Respondent No. 1 and hence these appeals are tenable in law under Sec. 18 of the AERA Act, 2008.

11.4 Much has been argued by counsel for the Respondent No. 1/AERA, especially relying on the judgement of Hon'ble Supreme Court in the case of L. Chandra Kumar v. Union of India, reported in (1997) 3 SCC 261, that this tribunal does not have jurisdiction to read down the powers of AERA, under AERA Act, 2008, mainly because this tribunal draws its power & competence for adjudication of disputes from the AERA Act, 2008 & thus cannot read down the provisions of the aforesaid Act. We are unmoved by this submission of Respondent No.1/AERA mainly for the reason that:-

A. In the facts & circumstances of the present case there is no occasion before this tribunal to "Read Down" the provision of the AERA Act, 2008, nor this tribunal is curtailing the powers & functions of Respondent No. 1 AERA.

B. The germane issues as enunciated herein above relates to the duty of AERA to give credence & proper consideration to concessions given by the Central Government through a lawful contract in form of OMDA & SSA.

C. Thus, this tribunal is only exercising its interpretatory jurisdiction and is interpreting the provision of AERA Act, 2008 in its correct perspective without curtailing the powers of AERA.

This tribunal by virtue of Section 17 (b) AERA Act, 2008, has interpretatory & clarificatory jurisdiction, which are being invoked in the facts & circumstances of the present case.

D. Hence, the contention of Respondent No.1 in regard to this tribunal not possessing the jurisdiction to entertain the present dispute is not accepted by us.

12. No requirement of separate agreement with Respondent No. 2 to 6 classifying CHS & GHS as Non-Aeronautical Services

12.1 It has been contended by the counsel for Respondent No. 1 and Respondent No. 7 that Respondent No. 2 to 6 do not have any agreement like OMDA classifying CHS & GHS as Non-Aeronautical services and hence judgment dated 23.04.2018 delivered by this Tribunal in AERA Appeal Number 10 of 2012 is not applicable in their case and therefore Respondent No. 1 can decide the tariff for CHS & GHS for Respondent No. 2 to 6. This contention is not accepted by this Tribunal.

12.2 Right of Respondent No. 2 to 6 to provide CHS & GHS flows from OMDA. There is no need to mention by concessionaire to sub-concessionaires that CHS & GHS are non-aeronautical services. **In OMDA, Schedule 6 has categorically defined that CHS & GHS**

are non- aeronautical services. OMDA not only treats these services as Non-Aeronautical services,but,it allows the very same services to be sub-concessioned by the appellants. Even Government of India, Ministry of Civil Aviation in their communication to the Chairman, AERA dated **09.03.2012** (Annexure A-10) has mentioned in **Para 5**,**6 & 7,** which reads as under**: -**

" NO.A.V. 24032/4/2012-AD

Government of India

Ministry of Civil Aviation

******

B- Block Rajiv Gandhi Bhavan

New Delhi – 110003

9th March 2012

To

The Chairman

Airports Economic Regulatory Authority

AERA Building

Safdarjung Enclave

New Delhi

Sub: Determination of aeronautical traffic in respect of IGI

A Delhi Consultation Paper 32/2011 reg."

Sir,

.....

"5. It is seen that Cargo and Ground Handling services are being treated as aeronautical services as per Section 2 (a), of the AERA Act (Para- 42 of the Consultation Paper). However, as per the Provision of OMDA and SSA, cargo and "Ground handling services are categorized as no- aeronautical

and the revenues accruing from these services may be treated as non-aeronautical revenue.

6. AERA should adhere to the relevant provisions of the contractual agreement in the process of determination of tariff.

7. This issues with the approval of Hon'ble Minister of Civil Aviation.**"**

[Emphasis Supplied]

12.3 In view of the aforesaid communications, CHS & GHS are Non-Aeronautical Service and the revenue generated by them is also Non-Aeronautical Revenue. **These communications are in the form of directions issued U/s 42 of the AERA Act, 2008.**

12.4 Similarly, the Government of India through Ministry of Civil Aviation had also issued a communication dated. **10.09.2012**. (Annexure A-12). For the ready reference, the communication reads as under:

"F. No.AV.24032/04/2012-AD

Government of India

Ministry of Civil Aviation

AD Section

To

Shri Y.S. Bhave

Chairman

AERA, Administrative Block

AERA Building

Safdarjung Airport, New Delhi

Subject :- Treatment of Revenue from Cargo, and Ground Handling Services at CSI Airport, Mumbai.

Sir,

I am directed to refer to AERA's letter No. AERA/200010/MYTP/MTAL/2011-12/Vol.III/1342 dated 3/09/2012 on the above-mentioned subject and to say that the issue of treatment of revenues from Cargo and Ground Handling has been examined. It has been noted that basic contention of AERA is that revenue from these services would be treated as aeronautical revenue if these services are provided by the airport operator himself and they would be treated as non- aeronautical revenue if they are provided by a third party through outsourcing contract, licence etc. This argument of AERA is not supported either by AERA Act or by OMDA. As per Schedule-6 of OMDA of Mumbai Airport, these services are classified as non-aeronautical. Section 13(1)(a)(vi) of the AERA Act clearly states that concessions offered by the Central Government will have to be taken into consideration by AERA while determining the tariff.

2. This Ministry had already, in the context of IGI Airport, Delhi, clarified to AERA vide letter dated 9.3.2012 that revenues from Cargo and Ground Handling services accruing to the airport operator should be categorized as non-aeronautical revenues as provided under the OMDA. This categorization is regardless and irrespective of whether these services are provided by the airport operator himself or through concessionaires (including JV appointed by the airport operator). The same clarification holds good even for CSI Airport, Mumbai as OMDAs of both the airports are identical.

3. This issue with the approval of Minister of Civil Aviation."

[Emphasis Supplied]

12.5 OMDA permits MIAL to perform the obligations relating to Cargo Handling Services & Ground Handling Services either on its own or through third parties in the form of concessionaires, sub-licensees, etc. It is a common practice prevalent in many concessions offered by the Central Government for ports and other sectors.

12.6 It is a settled law that things which are not permissible done directly cannot be permitted done indirectly. Once AERA concedes that revenues from Cargo Handling Services & Ground Handling Services are Non-Aeronautical revenues, the things should rest there. Irrespective of whether Cargo Handling Services & Ground Handling Services are provided by MIAL or third-party concessionaires/ Independent Service Providers (ISPs), these are Non-Aeronautical services as classified in Clause 6 of OMDA.

12.7 In view of these two communications (which are directions under Sec. 42 of AERA Act, 2008), there is no need of separate agreement for Respondent No. 2 to 6 classifying CHS & GHS as Non-Aeronautical Services and therefore also the impugned directions issued by

Respondent No. 1 dated 17.03.2021 & 18.05.2021 (ANNEXURE No. A-1 & A-2) deserve to be quashed and set aside.

13. Relevance of Section 13 (1) (a) of AERA Act, 2008

13.1 Much has been argued out by the counsel for the Respondent No. 1 and Respondent No. 7 on the basis of Section 13 (1) (a) of the AERA Act, 2008 that respondent no.1 has a power to determine the tariff for aeronautical services and as per Section 2 (a) (iv) & Section 2 (a) (v) of the AERA Act, 2008, GHS and CHS are Aeronautical services and therefore Respondent No. 1 can determine the tariff for these two services. This contention is not accepted by this Tribunal especially for these two appellants looking to concession given by the Airport Authority of India who has entered into OMDA with appellant and supported by State Support Agreement (SSA) entered into between these appellants and Union of India.

13.2 As per OMDA which was entered into on 04/04/2006 and looking to State Support Agreement entered into in on 24/04/2006 to be read with Schedule 6 of the OMDA, a concession was given by the Union of India to the effect that CHS and GHS are non- Aeronautical Services. The revenue is also non-aeronautical revenue and therefore looking to **Section 13 (1) (a) (vi)**, the Respondent No. 1 cannot ignore the

concession offered by the Central Government. For the ready reference, Section 13 (1) (a) of AERA Act, 2008 reads as under:

> **Section 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 any timely investment of airports facilities;
>
> (ii) the services provided its quality and other relevant factors;
>
> (iii) the cost of improving efficiency;
>
> (iv) economic and viable operation of major airports;
>
> (v) revenue received from servicers other than the aeronautical services;
>
> **(vi) the concession offered by 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)

13.3 Thus, as per Section 13 (1) (a) (vi) requires Respondent no. 1/AERA to consider the concession offered by the Central Government and as

per Schedule 6 of OMDA, CHS and GHS are non-aeronautical services and therefore Para Number 98 & 99 of the judgment delivered by this Tribunal in AERA Appeal No. 6 of 2012 dated 23.04.2018, as affirmed, the aforesaid proposition of law that concession given by central government is a relevant factor while exercising powers under Section 13 by Respondent No. 1. For ready reference, Paragraph numbers 98 & 99 reads as under:

> *"98. All the above mentioned three letters are annexures to the counter affidavit of Union of India (MOCA) in Appeal No.6 of 2012. The letter of 30.05.2011 contains the opinion of Central Government as to whether various agreements such as OMDA, SSA etc. entered between concerned state organisations and the JVCs for restructuring and modernization of Delhi and Mumbai Airports should be considered as the "concession offered" by the Central Government and the answer in the letter is in the affirmative; those agreements have been approved by the Empowered Group of Ministers i.e. the Central Government and therefore, need to be considered as concession offered in terms of Section 13(1)(a)(vi) of the Act. This letter meets the attributes of a directive under Section 42 of the Act. The letter dated 09.03.2012 refers to the Consultation Paper in respect of determination of Aeronautical Tariff for IGI Airport, Delhi. It*

seeks to clarify the stand of the Central Government that although Cargo and Ground Handling Services are being treated as Aeronautical Services as per Section 2(a) of the Act but under the provisions of OMDA and SSA these are categorized as Non-Aeronautical and therefore, in view of Section 13(1)(a)(vi) of the Act due consideration needs to be given to the Concession Agreement and hence, the revenue from these services may be treated as Non-Aeronautical revenue. In Para 6 of that letter there is a clear direction that AERA should adhere to the relevant provisions of the contractual agreements in the process of determination of tariffs. This letter, although at some places appears to be clarificatory, but in its entirety and on complete reading appears to contain directions. Though it is signed by Under Secretary to the Government of India, in Para 7, it is mentioned that it has been issued with the approval of Hon'ble Minister of Civil Aviation. The construction of such a letter cannot depend on use of a word here or there. Even if the word selected is "request", a consideration of the document in its entirety discloses it to be really a direction and issued with that purpose in mind. The Central Government may have to disclose or assert that it is exercising its statutory powers to issue directives through such a letter, only if the Authority chooses to take a different view. It is always the contents and not the label which will determine the purpose and nature of such a communication between two statutory authorities. The last

letter dated 12.03.2012 relates to advice of M/s SBI CAPS on fair rate of return on equity. The MOCA has noted the relevant part of the report disclosing the range of 18.5% to 20.5% as reasonable for airport section in India and also the return recommended for quasi-equity that it should be above that of debt and below that of equity. However, in substance, as mentioned in paragraph 3, it only observes that the report may be considered in taking decision. The Act itself requires AERA to consider so many relevant materials and hence this letter, considered in its entirety, is clearly not a directive.

99. *While considering various issues, in the earlier part of this judgment, the submissions advanced by Mr.Dhir appearing for AERA have been kept in mind but before taking up issues having commercial significance that relate to the formula for determination of Targeted Revenue and other relevant factors for determination of Aeronautical Tariff, it is proper to have a relook at the stand of AERA as flowing from the submissions made by learned counsel. As per White Paper, AERA described only the SSA as a Concession Agreement. This was supported by referring to Section 13(1)(a)(vi) of the Act. No doubt it begins by describing the concession as one offered by the Central Government in any agreement or Memorandum of Understanding but at the end it also permits the concession offered by the Central Government to be expressed*

otherwise than in agreement or memorandum. The letter of MOCA noticed earlier clearly show that the Central Government had approved the agreements executed through other agencies and accepted the concessions to be one by the Central Government. Thus, all the agreements wherever they contain concessions relevant for determination of tariff for the Aeronautical Services, have to be treated as concession offered by the Central Government deserving due consideration under Section 13 of the Act."

[EMPHASIS SUPPLIED]

13.4 The aforesaid observations of this Tribunal have also been confirmed by Hon'ble the Supreme Court of India, in their decision as stated hereinabove especially in Para 130 & 138 of the judgment dated 11-07-2022 reported as 2022 SCC OnLine SC 850. If the submission of Respondent No. 1 & Respondent No. 7 are accepted, then it will make Section 13 (1) (a) (vi) redundant-which is not permissible. Hence, also both the communications which are at Annexure A-1 & A-2 (17.03.2021 & 18.05.2021) deserves to be quashed and set aside.

13.5 Furthermore, Section 13 (1) (a) (vi) of AERA Act, 2008 specifically provides that the Respondent AERA to consider "the concessions offered by Central Government", while determining Aeronautical Tariff. Cargo Handling Services & Ground Handling Services are

classified as Non-Aeronautical services under Schedule 6 of OMDA. The Hon'ble the Supreme Court of India in the judgment dated 11.07.2022 passed in C.A No. 8378 of 2018 and connected matters has categorically held as under:

> "20. Clause 6 of Sub-section (1) of the said Act clearly stipulates that in 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 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."

13.6 It has been contended by counsel for Respondent No. 1 & Respondent No.7 that there is no exception under Section 13(1)(a) of the AERA Act, 2008 and therefore Respondent No. 1 has power to decide the tariff for CHS & GHS. This contention is also not accepted by this Tribunal mainly for the reason that Section 13 (1) (a) has to be read as a whole. The Respondent No. 1 cannot dilute Section 13 (1) (a) (vi)- concession offered by the Central government. This aspect of the matter has already been pointed out by this Tribunal and by Hon'ble the Supreme Court of India as stated hereinabove.

14 - Clause 12 of OMDA

14.1 It is contended by counsel for the Respondent No.1 that Joint Venture Consortium (JVC), who are the appellant in both the aforesaid appeals, shall ensure that Aeronautical Charges levied at the airport shall be subject to applicable law as per Clause 12.2 of OMDA.

14.2 For the ready reference, **Clause 12 of OMDA** reads as under:

CHAPTER XII

TARIFF AND REGULATION

12.1 Tariff

12.1.1 For the purpose of this Agreement, the charges to be levied at the Airport by the JVC for the provision of Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets shall be referred to as **Aeronautical Charges**.

12.1.2 The JVC shall at all times ensure that the Aeronautical Charges levied at the Airport shall be as determined as per the provisions of the State Support Agreement. It is hereby expressly clarified that any penalties or damages payable by the JVC under any of the Project Agreements shall not form a part of the Aeronautical Charges and not be passed on to the users of the Airport.

12.2 Charges for Non-Aeronautical Services

Subject to Applicable Law, the JVC shall be free to fix the charges for Non- Aeronautical

Services, subject to the provisions of the existing contracts and other agreements.

12.3 ***Charges for Essential Services***

12.3.1 Notwithstanding the foregoing, those Aeronautical or Non-Aeronautical Services that are also Essential Services, shall be provided free of charge to passengers.

12.4 ***Passenger Service Fees***

12.4.1 The Passenger Service Fees shall be collected and disbursed in accordance with the provisions of the State Support Agreement.

14.3 On the basis of this clause, it is contended by Respondent No. 1 & Respondent No. 7 that AERA can determine the tariff for CHS & GHS. This contention is not accepted by this Tribunal mainly for the reason that the concession offered by the Central government is a relevant factor for determination of tariff as per Section 13 (1) (a) (vi) of the AERA Act, 2008.

14.4 The words used in Clause 12.2 of OMDA "subject to applicable law" may refer AERA Act, 2008, but, AERA Act, 2008 mandates R-1 to give due consideration to the Concession Agreement "as per Section 13 (1) (a) (vi).

14.5 Thus, OMDA was entered into between the parties coupled with SSA in the year 2006, but, AERA Act, 2008, which came into force later on

accepts the existence of agreements like OMDA and SSA by which Central Government offers concession. This acceptance of existence of concession agreement is under Section 13 (1) (a) (vi) of AERA Act, 2008.

14.6 Thus, looking to OMDA, SSA & Section13 (1) (a) (vi) of AERA Act, 2008, even if AERA Act, 2008 came into force, the existence of OMDA and the concession offered by Central Government through OMDA and SSA has been recognized.

14.7 This concession offered by central government in "Schedule 6 of OMDA" has not been diluted by the subsequent enactment i.e AERA Act, 2008.

14.8 On the contrary, subsequent legislation, that is AERA Act, 2008, gives full respect and recognition to the concessions offered by Central Government through existing agreements like OMDA (Schedule 6 to be read with SSA). Therefore, we are in full agreement that arguments by the counsel of the appellant that in the fact of the present case, OMDA to be read with SSA shall be harmoniously construed with the subsequent enactment- AERA Act, 2008 because the law itself has accepted the existence and continuation of concession offered by the Central Government.

14.9 Thus, AERA is wrong to contend if Cargo Handling Service & Ground Handling Services are provided by MIAL, these are Non-Aeronautical Services and if such services are provided by third-party concessionaires/Independent Service Providers (ISPs) it becomes Aeronautical Services. AERA is insisting to read something which is not supported either by OMDA, SSA or AERA Act, 2008 itself.

14.10 Counsel for the Appellant has relied upon the decisions rendered by the Delhi High Court, Hon'ble the Supreme Court of India and the judgment rendered by this Tribunal on the point that law protects the lawful contract. For ready reference, paragraph number 32 of the judgment title as "**Mahanagar Telecom Nigam Ltd. Vs. TRAI & Ors**" reported in **2000 SCC OnLine Del 19** especially para 32 thereof reads as under:

> *"**32.** In this behalf, it is very pertinent to note that even though S. 11 starts with a non obstante clause which provides that the functions are to be exercised "Notwithstanding anything contained in the Indian Telegraph Act, 1885" the section nowhere provides that the functions are to be exercised notwithstanding "any contract or any decrees or orders of Courts." It is well settled law that when the legislature intends to confer on a body the power to vary contracts or licenses, no such power can be*

presumed or assumed. This is the law as laid down by the Supreme Court in the case of Indian Aluminum Company v. Kerala State Electricity Board, reported in AIR 1975 SC 1967."

(Emphasis Supplied)

14.11 Further it has been held by Hon'ble the Supreme Court of India in **"Indian Aluminum Company Vs. Kerala State Electricity Board Ltd"** reported in **(1975) 2 SCC 414** especially in para 18 thereof as under:

"18. We then turn to consider the argument based on Section 59. That section provides that the Board shall not, as far as practicable and after taking credit for any subventions from the State Government under Section 63, carry on its operations under the Act at a loss, and shall adjust its charges accordingly from time to time. The contention of the Board was that since it was operating at a loss, it was bound under Section 59 to readjust its charges in order to avoid the loss and hence it was within its power to enhance the charges, notwithstanding the stipulations con- tained in the agreements. This contention, plausible though it may seem at first flush, is, on closer scrutiny, not well founded. It ignores the true object and purpose of the enactment of Section 59 and fails to give due effect to the words "as far as practicable". The marginal note to Sec- tion

59 reads "General Principles for Board's Finance". It is true that the marginal note cannot afford any legitimate aid to a construction of a section, but it can certainly be relied upon as indicating the drift of the section, or, to use the words of Collins, M. R. in Bushell v. Hammond' "to show what the section was dealing with". It is apparent from the marginal note that Section 59 is intended to do no more than lay down general principles for the finance of the Board. It merely enunciates certain guidelines which the Board must follow in managing its finance. The Board is directed, as far as practicable, not to carry on its opera- tions at a loss and to adjust its charges accordingly from time to time. The Legislature has deliberately and advisedly used the words "as far as practicable" as the Legislature was well aware that since the Board is a statutory authority charged with the general duty of promoting the co- ordinated development of generation, supply and distribution of electricity within the State with particular reference to such development in areas not for the time being served or adequately served by any licensee, it might run into loss in carrying on its operations and it might not always be possible for it to avoid carrying on its operations at a loss. Sometimes the Board might have to give special tariffs to consumers in undeveloped or sparsely developed areas and sometimes special tariffs might have to be given to industrial consumers with a view to accelerating the rate of industrial growth and development in the State, even though such

special tariffs might not be sufficient to meet the cost of generation, supply and distribution of electricity. The Legislature, therefore, did not issue a rigid directive to the Board that it shall on no account carry on its operations at a loss, and if there is a loss for any reason whatsoever, it shall adjust its charges so as to wipe off such loss. But it merely administered a caution to the Board that as far as practicable' it shall not carry on its operations at a loss, that is, if it is 'practicable' for it to avoid operating at a loss by adjusting its charges, it should try to do so. That is why this Court pointed out in Maharashtra State Electricity Board v. Kalyan Borough Municipality that "cost... is not the sole or only criterion for fixing the tariff". Now, obviously, where, by a stipulation validly made under sub-section (3) of Section 49, the Board is under a contractual obliga- tion not to charge anything more than a specified tariff, it would not be practicable for it to enhance its charges, even if it finds that it is incur- ring operational loss. To do something contrary to law in violation of a contractual obligation can never be regarded as 'practicable'. Section 59 does not give a charter to the Board to enhance its charges in breach of a contractual stipulation. The Board can adjust its charges under the section only in so far as the law permits it to do so. If there is a contractual obligation which binds the Board not to charge anything more than a certain tariff, the Board cannot claim to override it under Section 59. It is significant to note the difference in language between Section 59 on

the one hand and Section 57 read with clause (1) of the Sixth Schedule on the other. Section 57 clearly and in so many terms provides that the provisions of "any other law, agreement or instrument applicable to the licensee" shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of the Sixth Schedule and clause (1) of the Sixth Schedule provides that the licensee shall so adjust its charges for the sale of electricity, whether by enhancing or reducing them, that its clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return. The licensee can, therefore, notwithstanding any agreement entered into with the consumer, enhance the charges for sale of electricity in order to earn the amount of reasonable return by way of clear profit. But no such language is to be found in Section 59 and, on the contrary, the words there used are "as far as practicable". We do not, therefore, think that Section 59 confers any power on the Board to enhance the charges for supply of electricity in disregard of a contractual stipulation entered into by it under sub-section (3) of Section 49."

(Emphasis Supplied)

14.12 Thus, in view of the aforesaid decisions, in the facts of this case, AERA Act, 2008 respects, recognizes and mandates Respondent No. 1 to consider the concession offered by the Central Government

which is Schedule 6 of OMDA to be read with SSA in the facts of the present case and therefore pre-existing contract (OMDA & SSA) is binding on the parties to the agreements even after AERA Act, 2008 has been brought into force.

15- FIXED CHARGES ARE TO BE DETERMINED AS PER OMDA AND SSA BY AIRPORT OPERATORS

15.1 It is contended by counsel for Respondent No. 1 & Respondent No. 7, that airport operators cannot fix airport charges especially for CHS & GHS. This contention is not accepted by this Tribunal mainly for the reason that OMDA and SSA have already drawn the demarcating lines as per Schedule 5 & 6 of OMDA. OMDA has to be respected by Respondent No. 1 as per Section 13(1)(a)(vi) of AERA Act, 2008. The CHS & GHS are Non-Aeronautical Services as per Schedule 6 of OMDA. Thus, Respondent No. 1 cannot determine the tariff for Non-Aeronautical Services. As per OMDA to be read with SSA, airport operators-appellant can always decide the charges to be levied for CHS & GHS because they are Non-Aeronautical Charges as per OMDA and this concession offered by Central Government has already been respected and recognized by AERA Act, 2008 in Section 13 (1) (a) (vi).

15.2 It ought to be kept in mind that looking to OMDA & SSA if read conjointly, it was a mature decision of Union of India to offer concession to Airport Operators. This decision was not taken overnight by the Union of India. This concession was offered by the Central Government after a long drawn consultative process and after protracted negotiations. This concession was not offered by a clerk or a head clerk of the central government, but it was by the conscious decision and a mature decision by the central government itself which is being rightly protected by the subsequently enacted law- AERA Act, 2008 through Sec. 13(1)(a)(vi) thereof.

15.3 In fact, at the relevant time (April 2006), AERA Act,2008 was not in force but OMDA & SSA have been entered into as per Section 12-A of the Airports Authority of India Act, 1994.

15.4 Thus, the concession offered by the central government was absolutely in accordance with law at the relevant time and as stated hereinabove, this concession offered by the Central Government has been fully recognized and respected by the subsequent enactment- AERA Act, 2008 and therefore it cannot be said that by virtue of AERA Act, 2008, part of OMDA & SSA are redundant, it also cannot be said that the concessions given by the central government to the airport

operators that stipulates CHS & GHS as Non-Aeronautical Services have subsequently been taken away by the provisions of the AERA Act, 2008.

15.5 Respondent No. 1 has not properly appreciated the provision of AERA Act, 2008 nor has appreciated the judgment delivered by this Tribunal dated 23.04.2018 in AERA Appeal No. 10 of 2012 and other allied matters and the judgment delivered by the Hon'ble the Supreme Court of India reported in 2022 SCC OnLine SC 850.

15.6 By no stretch of imagination, it can be contended that few provisions of OMDA to be read with SSA have been evaporated, diluted or made redundant or have been changed or altered by AERA Act, 2008. On the contrary, if the AERA Act, 2008 is read and understood correctly, the concession offered by highest sovereign body of this country-the Central Government has been respected and recognized under Section 13(1)(a)(vi) of AERA Act, 2008. Varieties of factors must have been appreciated before offering the concession by Central Government which may include:

A. Investment by the airport operator.

B. Concession has been offered for 30 years and therefore there is a set calculation in the minds of airport operators on how to

invest initially and how to gain subsequently by operating airports.

C. It may happen that when concession offered by Central Government is for 30 years, initially few hundred crores of rupees may be invested by the airport operators keeping in mind the revenue to be generated from the OMDA & SSA in the subsequent years and therefore abruptly after few years or more particularly, after huge investment is being done by the airport operators, concession cannot be withdrawn. Keeping in mind this principle, Section13(1)(a)(vi) of AERA Act, 2008 has been enacted.

D. If the argument of Respondent No. 1 (AERA) is accepted, then after investment of huge sum of money by airport operators on the basis of concession offered by Central Government for a particular period, the concession can be withdrawn, despite the fact that the other side has moved themselves adversely. But this is not permissible. A promise on the basis of which, huge investment is being attracted and after such investment, the concession granted cannot be withdrawn. The Central Government being an ideal personality and very fair personality,

the concession given by the way of contract shall always be respected even after the enactment of AERA Act, 2008. In this background, Section 13(1)(a)(vi) of AERA Act, 2008 has to be interpreted.

E. In other words, the law respects the lawful agreement entered into by the Central Government through which concession has been offered. We therefore disagree with the contention of the Respondent No. 1 & Respondent No. 7 that by virtue of AERA Act, 2008, the concession offered by Central Government (through Schedule 6 of OMDA) has been withdrawn or given go-by.

F. In fact, the OMDA & SSA were entered into by the highest sovereign body of this country. Central Government has all power, jurisdiction and authority to give concession. Looking to **section 12-A of Airport Authority Act, 1994**, which empowers the central government to enter into **OMDA & SSA** for the ready reference **Section 12-A of the Airport Authority Act, 1994** reads as under:

"**Section 12A. Lease by the Authority**.—

(1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit: Provided that such lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves. 1. Ins. by Act of 43 of 2003, s. 6 (w.e.f. 1-7-2004). 8

(2) No lease under sub-section (1) shall be made without the previous approval of the Central Government.

(3) Any money, payable by the lessee in terms of the lease made under sub-section (1), shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24.

(4) The lessee, who has been assigned any function of the Authority under sub-section (1), shall have all the powers of the Authority necessary for the performance of such function in terms of the lease.**"**

15.7 Therefore, we have no hesitation to come to the conclusion that Cargo Handling Services & Ground Handling Services are Non-Aeronautical services irrespective of whether the same are provided by MIAL or

third party concessionaires/Independent Service Providers (ISPs). Consequently, the said communications dated 17.03.2021 and 18.05.2021 are bad in law and thus cannot be sustained. We hold that AERA has no jurisdiction to determine tariff of Cargo Handling Services & Ground Handling Services provided by MIAL or third-party concessionaires/ Independent Service Providers (ISPs). MIAL shall be entitled to determine the tariff/charges for Cargo Handling Services & Ground Handling Services provided at Mumbai Airport by itself or through third party concessionaires/Independent Service Providers (ISPs).

15.8 In view of the aforesaid provision of the AERA Act, 2008, AAI Act, 1994, OMDA & SSA were entered into by Central Government with airport operators- these appellants. **These agreements have never been diluted by the AERA Act, 2008. On the contrary, AERA Act, 2008 fully respects and recognizes the concession offered by the Central Government by the virtue of agreements (like OMDA & SSA).** Under the OMDA & SSA, once the CHS & GHS are non-aeronautical even after AERA Act, 2008 came into force, appellants have power to determine the charges for CHS & GHS.

16- AERA Bill & Parliamentary Standing Committee Report

16.1 Much has been argued by the counsel for the Respondent No. 1 about the AERA Bill, 2007 Parliamentary Standing Committee Report to substantiate the contention that by the virtue of AERA Act, 2008, CHS and GHS are now Aeroautical Services and therefore AERA has power to determine the tariff. This contention is not accepted by this Tribunal mainly for the reason that the subsequently enacted law that is AERA Act, 2008 has given full respect and regard to the concessions offered by Central Government through agreements.

16.2 The subsequently enacted Act of year 2008 has not converted CHS & GHS as Aeronautical services for which Central Government has given concession by agreements. In fact, by virtue of this subsequently enacted law (i.e- AERA Act, 2008) maintains the concession given by the Central Government through the agreements as per Sec.13(1)(a)(vi) of AERA Act, 2008 therefore CHS & GHS which are Non-Aeronautical Services as per concession offered by Central Government by virtue of Schedule 6 of the OMDA remains as it is.

16.3 By virtue of AERA Act, 2008, the CHS & GHS have never converted into Aero-Nautical Services. On the contrary in the facts of present cases, the pre-existing contract by which concessions have been

offered by Central Government has been maintained. Therefore, CHS & GHS, in the facts of the present case because of OMDA & SSA are, Non-Aeronautical Services as per Schedule 6 of OMDA.

16.4 It is pertinent to keep in mind the true intent of the AERA Act, 2008, which was enacted to bring rationality in tariff structure prevailing in airport management sector. For the aforesaid purpose, AERA was designated as competent authority to fix tariff for particular control period after taking into account various suggestions of stakeholders through a consultative process.

16.5 **The AERA Act,2008 was never intended to usurp the earlier legally binding contractual agreements**, which were entered into AAI & DIAL through OMDA & supported by Central Government through SSA, **hence, the concession accorded by the Central Government has to be taken into account by AERA, which is clearly a duty incumbent upon it as per the contents of Section 13 (1) (a) (vi) of AERA Act, 2008**

16.6 Further, one should not lose sight of the fact that operation & management of large airports is a cumbersome process both logistically and financially. The operators on reasonable supposition made by A.A.I. through OMDA, had projected and forecasted certain

financial models, which would in due course allow them to make the project undertaken by them financially viable.

16.7 If the said financial models, which were earlier agreed to, was unilaterally altered by taking recourse to new legislation, albeit through unappreciative and faulty reading of the provision of the Act, it will create uncertainty in operation and management and future investment in this sector, which was never the intent of the AERA Act, 2008.

17- Ground Handling Regulations 2010 & 2018

17.1 It is contended by counsel for Respondent No. 1 that Ground Handling Regulations of 2010 & 2018, are not under challenge in these two AERA Appeals & therefore, CHS & GHS fixation Tariff also cannot be challenged by these appellants.

17.2 This contention is not accepted by this tribunal, mainly for the reason that, as stated herein above, OMDA as well as SSA, were entered into between these Appellants and Airport Authority of India and also Government of India in month the of April 2006, whereas AERA Act came into force from 2008 onwards.

17.3 Further, looking to Section 13 (1) (a) (vi) of AERA Act, 2008, it is explicitly clear that AERA Act, 2008 has never intended to brush aside

or to wipe out the effect of or to take away the effect of the earlier concessions granted by the central government by the way of earlier agreements.

17.4 Looking to this provision of the AERA Act, 2008, even if these appellants have not challenged Ground Handling Regulations, 2010 & 2018, it makes no difference to them because the earlier agreement entered into, has been protected and preserved by Section 13 (1) (a) (vi) & therefore there is no need to challenge these regulations of 2010 and 2018.

18. Clause 8.5.7 of OMDA

18.1 Sub-concessionaires have been given contract of CHS & GHS by the airport operators (appellants) as per Clause 8.5.7 of the OMDA to be read with definition of "Airport Services" therefore OMDA will have to be harmoniously construed with the provisions of the AERA Act, 2008. For ready Reference, Clause 8.5.7 of OMDA is reproduced herein below: -

"8.5.7 Contracts, Leases and Licenses

(i) **Sub-Contracting, Sub-leasing and Licensing**

(a) Any activity may be sub-contracted by the JVC, provided always that notwithstanding the sub-contract, the JVC retains overall management, responsibility, obligation and liability in relation to the sub-contracted Airport Service. Any such subcontracting shall not relieve the JVC from

any of its obligations in respect of the provision of such Airport Services under this Agreement. It is clarified that JVC shall remain liable and responsible for any acts, omissions or defaults of any sub-contractor, and shall indemnify AAI in respect thereof. Provided however that any sub-contract involving foreign manpower or materials shall be subject to the political sensitivities of GOI.

(b) AAI hereby recognizes the right of JVC to sub-lease and license any part (but not whole) of the Airport Site to third parties for the purpose of performance of its obligations hereunder.

(c) Before entering into contracts or granting any sub-lease or license, the JVC will:

(aa) comply with Applicable Laws including without limitation (where applicable) the procedures for competitive bidding in the field of public works concessions and in any case for every contract whose value exceeds Rs. 50,00,00,000/- (Rupees Fifty Crores Only) the JVC shall ensure that the selection of the counter party is by way of a competitive
bidding procedure; and

(bb) inform AAI of the counter-party or parties to every contract, sub-lessee or licensee (as the case may be) and their shareholding pattern.

(d) Without prejudice to the foregoing, every contract entered into by the JVC shall be on an arms-length basis (and comply with contracting procedures set forth in Schedule 12) and shall contain an express provision allowing the transfer of the rights and obligations of the JVC under such contract to the AAI in the event of termination or expiry hereof. Every contract (including any sublease or license arrangement) entered into by the JVC shall contain an

express provision recognising the right of the AAI to acquire the Transfer Assets and the Non-Transfer Assets (including reversion of underlying land) in the manner provided herein, and contain an undertaking by the counter-party (ies), licensee/ sub-lessees, or owners of the relevant asset, as the case may be to transfer the relevant Transfer Asset and/ or the Non-Transfer Asset (including the reversion of the underlying land), as the case may be, upon the exercise of such right by AAI. JVC shall further procure that any contracts entered into by any counter-party (ies), licensees/ sublessees, as the case may be and relatable to any Transfer Asset and/ or the Non-Transfer Asset shall also recognise the right of the AAI to acquire the Transfer Assets and the Non-Transfer Assets in the manner provided herein, and contain an undertaking by the counter-party (ies), sub-licensee, sub-sub-lessees, as the case may be to transfer the relevant Transfer Asset and/ or the Non-Transfer Asset, as the case may be, upon the exercise of such right by AAI.

(e) JVC shall ensure that any sub-contract, license or sub-lease granted in relation to the Airport expires on the thirtieth (30th) anniversary of Effective Date. JVC shall further procure that any contracts entered into by any counter-party (ies), licensees/ sub-lessees, as the case may be and relatable to the Airport shall also expire on the thirtieth (30th) anniversary of Effective Date.

(f) The JVC shall prior to entering into or modifying any contract with a Group Entity of the JVC or any of its shareholders (other than AAI), inform AAI about the key terms of such contract and disclose the draft contract to the AAI. In relation to such contracts, AAI shall have the right to object to any key terms that it can reasonably demonstrate are not equitable, are inconsistent with or contrary to the letter or spirit of this Agreement or not on armslength, and the JVC shall address the reasonable concerns of AAI prior to execution of such

contracts. The JVC shall further ensure that any contract with a Group Entity of the JVC or any of its shareholders (other than AAI) shall only be entered into after the board of directors of the JVC (the "**Board**") duly approves such contract itself and the same is not approved by any sub-committee of the Board or by delegation to any person whatsoever. The Board shall have the right to consider and comment on the terms and conditions of such contracts and suggest modifications thereto. The Board shall be entitled to seek a report on the terms of contracts from the Independent Engineer. The Board shall approve any such contract only if it is satisfied that the terms thereof are no less favourable to the JVC than those which could have been obtained from bona fide non-Group Entities/ non-shareholders on arms length commercial basis. The rights and obligations of the Board hereunder shall be incorporated into the Articles of Association of the JVC prior to Effective Date.

(ii) **Management and Control**

(a) Notwithstanding anything contained in Article 8.5.7 (i) above, under no circumstances shall the JVC sub-contract the overall operation and management of the Airport and the JVC shall at all times exercise and be responsible for overall management control and supervision of the Airport through its senior management staff, irrespective of any sub-contracting of activities and/or services.

The JVC shall further under no circumstance sub-lease or license the whole Airport Site.

(b) The JVC shall establish fair, reasonable and objective criteria for the grant of sub-contracts. In granting, and in determining whether or not to grant, any sub-contract to any Entity, and in determining whether to amend, waive, terminate or extend any such rights, the JVC shall consistently comply with and apply such criteria.

(c) (i) Without prejudice to the generality of the other provisions hereof, the JVC shall ensure that, within six (6) months from Effective Date, at least two unrelated (non-Group) Entities (of which one may be the JVC) are responsible for provision of cargo handling services at the Airport so as not to create a monopoly, or monopolistic arrangements and one sub-contractor is not unfairly discriminated against in comparison with any another sub-contractor. Until such time this arrangement for cargo handling services is put in place, JVC shall ensure that the then applicable charges for cargo as levied by AAI shall be charged at the Airport.

(ii) The JVC shall be responsible for the provision of ground handling services as per Applicable Law.

(d) Neither the JVC nor any sub-contractor shall:

(i) adopt, in relation to any activities carried on by it at the Airport, any trade practice, or any pricing policy, which unreasonably discriminates against any class of users of the Airport or any particular user or which unfairly exploits its bargaining position relative to users of the Airport generally or which directly causes the adoption by any other Entity of
a practice which has a similar effect.
(ii) adopt, in relation to the granting of any sub-contracts, any practice which:

(aa) unreasonably discriminates against Entities granted
any class of such rights, or any particular grantee of such a right, or unfairly exploits its bargaining

position relative to the grantees of such rights generally; or

(bb) unreasonably discriminates against any class of Entities applying for such rights or any particular applicant, or unreasonably limits the number of such rights that are granted in the case of any particular services or facilities or which directly causes the adoption by any other Entity of a practice, which has a similar effect.

It is hereby expressly acknowledged and agreed that the provisions of this sub-clause (d) shall in no way be used or construed to limit or adversely affect the ability of the JVC to offer discounts or customized packages for high-volume users and other valued customers, or other incentive packages as are normal and customary in the ordinary course of business of maintaining, managing and operating the Airport and/or providing any other Airport Services hereunder.

18.2 Thus, even if CHS & GHS is done by an Independent contractor , the nature of activity remains the same (i.e- CHS & GHS even if it is done through contractor, the nature of these activities namely CHS & GHS remains Non-Aeronautical Services and therefore also the directions given by AERA through two impugned communications dated 17.03.2021 (Annexure A-1) & 18.05.2021 (Annexure A-2) deserves to be quashed and set aside.

18.3 An interesting development has been brought to our attention, this tribunal vide Order Dated 08-11-2021, we have observed that till the next date, no precipitate action shall be taken by the respondent AERA. This Order was extended from time to time. The appeals were admitted on 23-12-2021 & vide Order Dt. 01-04-2022, it was observed that the interim order granted by this tribunal on 08-11-2021, shall continue to be operative during the pendency of these AERA Appeals.

18.4 However, we were informed that Respondent AERA has passed tariff order in the case of one of the third-party concessionaires/ Independent Services Providers (ISPs). However, we have been informed that the tariff petition itself will be subject to the outcome of the present appeal. Thus, any such order passed by AERA during the pendency of the instant appeal has become inoperative and unenforceable, being passed without jurisdiction.

18.5 Therefore, taking into account the aforesaid facts, law, legally binding contractual agreements and judicial pronouncements, both these communications dated 17.03.2021 & 18.05.2021 issued by the Respondent No. 1 are hereby quashed and set aside. These appeals are allowed and disposed of.

18.6 In view of the above, M.A/410/2021 & MA/260/2022 in AERA Appeal No. 07 of 2021 & M.A/352/2021 & M.A/259/2022 in AERA Appeal No. 03 of 2021 are hereby disposed of.

.....
(JUSTICE D. N. PATEL)
CHAIRPERSON

.....
(SUBODH KUMAR GUPTA)
MEMBER

/HV/