Executive Summary

1. Background

With the opening of Indian airspace to private and international operators, the existing airport infrastructure in the country proved to be inadequate to cope with the unprecedented growth in traffic and cargo. The Ministry of Civil Aviation (MoCA) in 2006, projected a requirement of an additional ₹ 40,454 crore to augment and modernize existing airports as also to construct new greenfield airports. The revenue surplus generated by Airports Authority of India (AAI) was found to be grossly inadequate to meet this requirement.

In January 2000, the Cabinet approved the restructuring of airports through the long term leasing route. Later, however, in September 2003, the Cabinet approved the restructuring of Delhi and Mumbai airports through the Joint Venture mode. In pursuance of this decision, after selection of the JV partner, AAI incorporated a subsidiary company viz. M/S Delhi International Airport Pvt. Ltd (DIAL), and subsequently sold 74% of the shares of DIAL to the JV Consortium. On 4 April 2006, in the capacity of the state promoter, AAI signed an Operation Management Development Agreement (OMDA) with DIAL. The AAI handed over IGI airport, Delhi to DIAL on 3 May 2006 on 'as is where is' basis and granted DIAL the exclusive right to undertake functions of operations, maintenance, development, design, construction, modernization, finance and management of the Airport.

On 26 April 2006 Government of India signed another agreement with DIAL viz State Support Agreement (SSA). The agreement laid down conditions and nature of support to be provided by Government of India, along with the mutual responsibilities and obligations between Government and DIAL.

During the course of audit, Ministry of Civil Aviation informed Audit:

"The decision to restructure and modernize Delhi Airport is a policy decision of the highest body i.e. the Cabinet. The terms and conditions as well as the modalities of modernization/ restructuring as mentioned in the transaction documents were finalized and approved by the EGOM. It is further clarified that there has been no change in the finalized transaction documents. Several issues such as JV route, leasing of land /assets, Concession Period, Right of First Refusal (ROFR) etc. are policy decisions of the Cabinet based on expert inputs in formulation and inter-ministerial consultation. Hence these policy decisions should not be brought into question at this stage through audit observations."

Admittedly, the decision to adopt the joint venture route is a policy decision. Audit acknowledges the sole prerogative of the Government to take such policy decisions. This audit exercise, on the other hand, has been restricted to operationalization of the decision of the Joint Venture mode. The terms and conditions as agreed to in the transaction documents do not fall in the domain of the policies though they have been approved by the empowered group of ministers.

It is acknowledged in this report that there have been significant improvements in services at the airport for the travelling public. The new terminal T3 was completed within time for the Commonwealth Games. The airport has been adjudged as the second best in the world in the category of 25-40 million passengers per annum by Airports Council International.

As per the agreement relating to revenue share with AAI, DIAL is to pay 45.99 *per cent* of its gross revenue. Accordingly, DIAL paid ₹ 271.98 crore in 2006-2007, ₹ 402.72 crore in 2007-08, ₹ 445.63 crore in 2008-09, ₹ 538.92 crore in 2009-10 and ₹ 577.26 crore in 2010-2011 to AAI.

Our observations pertain to operationalization of the JV mode and implementation of the OMDA and SSA. In the course of audit, we have also tried to assess whether during the conceptualization and implementation phases, the interest of Government and the revenue accruing to it has been protected. The decision to enter into a joint venture to develop and manage Indira Gandhi International Airport is a first of its kind. The present audit report thus should be viewed in terms of lessons learnt for future guidance.

It is to be noted that at the time when OMDA and SSA were being considered and finalized, no regulator was in place. The SSA in fact records the intention of the Government to establish an independent Airport Economic Regulatory Authority (AERA). The AERA Act establishing such an authority was passed in December 2008. The Act came into force on 1 January 2009. The powers and functions of AERA, which are contained in Chapter III of the Act came into force on 1 September 2009.

2. Major highlights of the Report

2.1 Conflicts between OMDA and AERA Act in defining aeronautical and non aeronautical services

Audit noted conflicts between provisions in OMDA and SSA on one hand and the AERA Act on the other, which will have long term repercussions on the Regulator’s role on tariff fixation in Delhi and Mumbai airports. In terms of Section 13(2) of the AERA Act, one of the important functions of the Authority was to determine the tariff for the aeronautical services. However, definitions of aeronautical services differ substantially between OMDA and the AERA Act. Ground Handling Service, for example is a non-aeronautical service in accordance with OMDA but it is an aeronautical service in terms of AERA Act. Similarly, Cargo Handling Services defined as non-aeronautical services in OMDA have been defined as aeronautical services in AERA Act. **According to AERA, these services are less capital intensive and more profitable.**

Treatment of services such as Ground handling, Cargo handling or parking as non aeronautical services in OMDA provided undue financial advantage to DIAL, as in terms of SSA, the Targeted Revenue for the purpose of tariff fixation takes into account only 30 per cent of the revenue generated from non-aeronautical services. **Following SSA, a significant part of the revenue generated by DIAL in the airport could not be included by AERA for determining the Targeted Revenue for the purpose of tariff fixation for IGI Airport.**

(Para 2.2 and Chapter 4)

2.2 Concession Period

In terms of Article 18.1(b), DIAL enjoys the unilateral right to extend the concession period for another 30 years "**on the identical terms and conditions"**, provided no JVC event default had taken place during the 20th and 25th year of the first concession period.

The decision to adopt the joint venture route was taken based on the Cabinet Note of September 2003. While seeking approval for restructuring of the Delhi and Mumbai Airports, this Cabinet Note specifically envisaged an initial concession period of 30 years which could be extended by another 30 years **subject to "mutual agreement and negotiation of terms"**. **However, in the draft OMDA which formed part of the bid documents, the important condition "subject to mutual agreement and negotiation of terms" was omitted. The OMDA, which was signed in April 2006, did not contain any provision of mutual agreement and fresh negotiations before extension of the concession period.** This is not only a violation of the commitment in the Cabinet Note but is also a unilateral and unfair advantage given to DIAL which is detrimental to Government interest as it does not provide the Government any scope for review of any of the conditions.

The four critical elements that determine a typical concessional agreement in any public private partnership of this type are: traffic volumes, tariffs, concession period and capital cost. In OMDA, the provisions of which regulate the development of the IGI airport, the concession period has no trigger indicating any linkage to any of the above four elements. Neither MOCA nor AAI could provide any evidence to indicate that these inputs were considered while fixing the concession period at 60 years.

The possibility of any JVC event default in the small window of 5 years between 20th and 25th year is remote. Such a sweeping provision, without any scope of review at any time during the currency of the concession period, has effectively granted DIAL the sole right to operate the airport for a period of sixty years with the terms and conditions frozen in the OMDA.

Audit could not find any infrastructure project, except Delhi and Mumbai Airports wherein the concession period is initially for 30 years and which can be extended for another 30 years at the sole option of the JVC and that too on identical terms and conditions.

According to the model concession agreement issued by the Committee on Infrastructure of Planning Commission, the concession period typically granted by Port Trusts are 30 years. Similarly, in the case of highways, the period is usually 20 years. In the case of Male airport and Istanbul airport, where GMR is a stakeholder, the concession period is 25 and 20 years respectively.

(Para 2.3)

2.3 Right of First Refusal in case of second airport

In addition to the unilateral right of DIAL to manage the IGIA for sixty years, the State Support Agreement (SSA) allows the Right of First Refusal (ROFR) to DIAL with regard to any second airport planned within 150 km radius of the IGIA. According to SSA, the second airport will be decided by following a competitive bidding process, in which DIAL can participate. In the event of DIAL being unsuccessful, it will be allowed to match its bid with the most competitive bid, if it is within 10 *per cent* of most competitive bid. This condition will be applicable for the first 30 years. The SSA does not elaborate on the competitive bidding process or the model that would be followed. This provision thwarts competition and provides DIAL with a natural advantage on the second airport.

(Para 2.4)

2.4 Misuse of the concept of Upfront Fee

Article 2.6.3 of OMDA states:

"with respect to land underlying the carved out assets,[1] the parties further agreed that if, at any time during the term, the JVC requires the said land for providing any aeronautical services or developing and/or constructing any aeronautical assets, the parties shall come together to negotiate ***in good faith*** the terms and conditions on which the AAI shall lease to the JVC and the JVC, shall take on lease from the AAI, the said land."

A onetime upfront fee of ₹ 150 crore was fixed for each of the Delhi and Mumbai Airports by MOCA. Upon an enquiry from Audit, MOCA explained that the amount in the concept of upfront fee has no relation to either the extent of land or the assets of the airport.

But when DIAL sought the lease of an additional 190.19 acres of land out of the carved out assets, to fix a lease rent for this land, AAI used the amount of upfront fee to arrive at a rate per acre and applied it to the additional land thereby fixing a onetime fee of ₹ 6.19 crore viz [(₹ 150 crore/4608.9 acres)*190.19 acres]

It is to be noted that OMDA allows DIAL to use 5 per cent of demised land for commercial exploitation. The current value of 9.50 acres (5 per cent of 190.19 acres) as per AERA's communication to Audit amounted to ₹ 950 crore. The

[1] Carved out asset is the land which remained with AAI after leasing out land to DIAL. The land leased out to DIAL is known as "demised premises".

earning potential for 58 years from 9.50 acres based on DIAL's own projections (₹ 681.63 crore per acre) is ₹ 6475 crore viz [₹ 681.63 * 9.50 acres].

On the other hand, AAI leased out 7.60 acres of land to Director General of Civil Aviation and Bureau of Civil Aviation Security at a license fee of ₹ 2.41 crore **per annum**. Application of this licence fee with the same escalation clause for 190.19 acres of land would amount to ₹ 4534 crore for a period of 27 years.

Ministry has not been able to provide a convincing reply as to why a private operator should be levied a fee which is much lower than that fixed by Government as payable by its own departments.

(Para 2.5)

2.5 Commercial exploitation of land

Out of a total land area of 5106 acres of IGIA, AAI initially leased out 4608.9 acres for development of the airport. An additional 190.19 acres of land was leased to DIAL, thus bringing the total demised premises at 4799.09 acres. The demised premises were leased out at ₹ one hundred annually to DIAL. For 190.19 acres a one time fee of ₹ 6.19 crore was also levied on DIAL.

Article 2.2.4 of OMDA permits DIAL to utilize 5 per cent of the total land area of 4799.09 acres of demised premises for commercial exploitation. This would work out to 239.95 acres.

The projected earning capacity of this land in terms of license fee over the concession period of 58 years was indicated by DIAL itself as ₹ 681.63 crore per acre in a letter to the Joint Secretary, MOCA. Thus for the entire area of 239.95 acres, the potential earning from the land, according to the calculations worked out by DIAL itself, amounts to ₹ 1,63,557 crore. **Audit would like to draw attention to the fact that this area is part of the entire area of land that has been handed over to DIAL at the lease rent of ₹ 100 per annum**.

It has been ascertained from AERA that the current valuation of the land made by M/S Merrill Lynch in the report of 26th August, 2011 has been worked out at the rate of ₹ 100 crore per acre. **Thus even in terms of this conservative estimate, the total current value of the land available to DIAL for commercial exploitation, would amount to approximately ₹ 24,000 crore.**

Audit is constrained to observe that against the aforementioned calculations, MoCA allowed DIAL to use 239.95 acres of land for commercial exploitation at a consideration for one time payment of ₹ 31 lakh (5 percent of ₹ 6.19 crore) and an annual payment of ₹ One hundred only.

(Para 2.6)

2.6 Development Fees (DF)

Article 13.1 of OMDA specifically provides that the :

"JVC shall arrange the financing and/or meeting all financing requirements through suitable debt and equity contributions in order to comply with its obligations including development of airport pursuant to the master plan and the major development plans".

However, MOCA vide their order dated 9th February 2009, allowed DIAL to levy a development fee (DF) at Indira Gandhi International Airport for the purpose of funding or financing the cost of up-gradation, expansion or development of the Airport. This was clearly in contravention of the provisions of Article 13.1 of OMDA, provisions in the AAI Act and in AERA Act as later confirmed by Delhi High Court.

This decision to levy DF after the effective date, has vitiated the sanctity of the bidding process, as the draft OMDA, which was part of the bid documents, does not mention about funding of the project cost of the Airport through levy of development fees. In case the JV was to have been permitted to levy DF to finance the project after signing of the OMDA, this important condition should have been known upfront to all the bidders at the time of bidding.

Approval of Ministry and later of AERA for levy of DF by DIAL (to bridge the funding gap) was a post contractual benefit provided to DIAL which was neither envisaged in the RFP nor included under any provision of OMDA or in the SSA. This led to undue benefit to DIAL at the cost of passengers who were taxed for using Delhi Airport through levy of DF amounting to ₹ 3415.35 crore.

(Para 2.7)

2.7 Highly concessional lease rent

IGI airport has a total area of 5106 acres. As per provisions of OMDA, 4608.9 acres of land out of this (along with buildings, constructions or immovable assets) was leased to DIAL on "as is where is basis" as per the term of the agreement, on a highly concessional annual lease rent of ₹ 100 (Rupees One hundred only) for the entire stretch. If the rate applicable to DGCA and BCAS as shown in Para 2.4 had been made applicable, DIAL would have had to pay ₹ 1461 crore.

(Para 2.9)

2.8 Deficient Land records at IGI Airport.

As per the records of Directorate of Land of the AAI, as on 9 February 2011, the total land available at IGI Airport was 5106 acres of which 4799.09 acres was Demised Premises and 306.91 acres was Carved out Assets. Audit, however, was not able to verify the same as the details of khasara number, land award orders issued by Land Acquisition Collector etc. were not available with AAI. A proper physical survey should be conducted to earmark exact area of airport land, hospitality land, demised premises and carved out area so that future disputes are avoided.

(Para 2.10)

2.9 DIAL's financing of the project

Out of the total capital expenditure of ₹ 12857 crore (AERA has admitted ₹12502.86 crore for levy of DF), the promoter's equity has been ₹ 2450 crore out of which 26 per cent (i.e. ₹ 637 crore) was contributed by AAI and 74 per cent (i.e. ₹ 1813 crore) was contributed by the other JV partners. Out of the capital expenditure of ₹ 12502 crore as accepted by AERA, only 19 *per cent* has been promoters' contribution. ₹ 5266 crore (42 *per cent*) have come from loans and ₹ 1471 crore (12 *per cent*) has come from Security Deposits. While, only ₹ 50 Crore has come from internal accruals, ₹ 3415.35 crore (27 *per cent*) have come from Airport Development Fees charged on the passengers.

The internal accrual of ₹ 50 crore is in sharp contrast to Mumbai airport, where the internal accrual has been ₹ 1999 crore.

Thus, with an equity contribution of ₹2450 crore out of which the private consortium's share was ₹ 1813 crore, DIAL has got a brownfield airport for sixty years and in addition, commercial rights of land valued at ₹ 24000 crore with a potential earning capacity, according to it's own estimates, of ₹ 163557 crore.

(Para 2.8)

2.10 Change in Major Development Plan and increase in Ground Floor Area

Against the area of 470,179 square metres indicated in the Major Development Plans, DIAL actually constructed 553,887 square metres of area at IGI Airport, Delhi. Thus the actual built up ground floor area exceeded the Major Development Plan by nearly 83,708 square metres (17.80 *per cent*). The financial auditors (M/S KPMG Advisory Services Private Limited) appointed by AAI to verify the final project cost submitted by DIAL, reported (15 October 2010) that the ground floor area for peak hour passenger at T3 was higher than most of the leading airports in the Asia Pacific Region. M/S Engineers India Limited, the technical auditor, appointed by AAI also opined in August 2010 that "due to this increase in area, all other items of the project have increased proportionately."

Neither MOCA nor AAI took any action for such gross violation of the Master Plan and the consequent increase in the project cost.

(Para 3.1)

2.11 Actual Project Cost vis-a-vis Original Project Cost

As per the Business Plan, the original project cost approved by DIAL and communicated to AAI on 18 January 2008 was ₹ 8975 crore. Actual project cost as on 20 July 2010, as claimed by DIAL, was ₹ 12857 crore. However, the final project cost adopted by Airports Economic Regulatory Authority (AERA) for arriving at the Regulatory Asset Base (RAB) was ₹ 12502.86 crore[2] . The variation between the

[2] Including the ₹701 crore incurred after 31.03.2010 for ATC ₹350 crore, Delhi Jal Board ₹54 crore and Provision ₹297 crore

approved project cost and the final project cost was ₹ 3882 crore, i.e., 43.25 per *cent* higher than the original project cost.

As per the original estimates the entire funding was proposed to be through equity, debt, security deposits and internal accruals. However, this was reduced to 72.68 *per cent* of the total fund requirements of the actual project cost. This financial gap was mainly met by levy of DF which constitutes 27.32 *per cent* of the total capital outlay. **OMDA did not envisage the funding of project cost through levy of DF from passengers since the entire funding was to be through debt and equity only.**

(Para 3.2)

2.12 Mandatory Capital Projects (MCPs)

Audit noticed that out of 15 MCPs to be completed by 3 April 2008, 11 MCPs were delayed for periods ranging from 87 days to 236 days. As per the clause 1 of Schedule 6 of SSA, DIAL was not entitled for any incentive in respect of base airport charges as 11 MCPs were not completed as per schedule. However, MoCA approved (February 2009), 10 per *cent* increase in the aeronautical charges including landing, parking, passenger service fee (facilitation component only), X-Ray Baggage and Housing Charges at IGI Airport, New Delhi w.e.f 16 February 2009, as incentive to DIAL. Therefore, the permission to increase 10 *per cent* charges as incentive for base airport charges was against the provisions of SSA and was an undue favour to DIAL.

(Para 3.3)

2.13 Aeronautical/ non- aeronautical airport charges

As per existing airport business operations, there are two systems in vogue for levying of aeronautical and non-aeronautical charges termed as Single Till or Dual Till. Under Single Till system, all the revenue and cost are put together in respect of all aeronautical and non-aeronautical airport services and in case of Dual Till System, revenues are distributed between aeronautical and non-aeronautical services separately.

AERA has recorded that non-aeronautical services are less capital intensive and are considered to be more profitable. Using OMDA's provisions, DIAL has outsourced most of the non aeronautical services through the mechanism of JVs. While OMDA allowed DIAL to sub contract any service, this has an impact on the revenue to be shared with AAI.

The provision of Dual Till taking into account only 30 per cent of the revenue generated by non aeronautical services gives unfair advantage to the DIAL at the cost of the Government/passengers. Outsourcing of these services through JVs, has put additional burden on passengers in the form of DF on one hand and has deprived AAI of the revenue, on the other.

Many of these services outsourced were "non aeronautical" as per OMDA but as per AERA Act, these are aeronautical services.

(Para 4.1)

2.14 Sharing of revenue from existing leases with DIAL resulted in loss of ₹ 23.15 crore

Audit had pointed out a loss of ₹ 23.15 crore (March 2011) to AAI, due to lease rent in respect of existing leases being collected by DIAL in contravention of Article 2.6 of OMDA, read with Article 2. 1.1 of the Lease Deed with DIAL. According to the provisions of OMDA/Lease Deed, the lease rent from existing leases was receivable by AAI till the expiry of respective lease periods.

MoCA stated (March 2012) that as there was difference in the interpretation of the provisions of OMDA and Lease Deed, legal opinion of Ministry of Law has been sought on the treatment of Revenue accruing from existing leases at both MIAL and DIAL.

(Para 4.2)

2.15 Operation Support (Human Resource)

Audit had pointed out in 2010-11 that against a claim of ₹ 250.88 crore towards retirement compensation in terms of provisions of Chapter VI of OMDA, DIAL had paid only ₹ 80 crore. This resulted in loss of interest of ₹ 19.73 crore (June 2010) due to delay in payment of the balance amount of ₹170.88 crore towards Retirement Compensation. Release of the balance amount was delayed by DIAL on the plea that there was no specific provision in OMDA as to the timing of payment of Retirement Compensation to AAI.

MoCA directed AAI to recover the retirement compensation **without** penal interest from DIAL by March 2010. The MoCA also intimated (May 2010) that any payment due after 01 April 2010 automatically attracted the penal interest on State Bank of India Prime Lending Rate plus 10 *per cent*. **Against this, the AAI allowed DIAL to pay the said amount as monthly installments spread over a period of 10 years without any contractual obligations.**

Thus the decision of the AAI was against the directions of MoCA resulting in loss of interest amounting to ₹ 58.57 crore calculated at 8 *per cent* per annum.

(Para 5.1)

2.16 Funds diverted from PSF (Security Component) Escrow Account for purchase of Security Equipments by DIAL.

As per clause 3.3.5 of SSA, DIAL was to procure and maintain, **at its own cost,** all security systems and equipments. However, in contravention of the provisions of SSA, MoCA vide its order dated 16 April 2010, directed that the entire cost incurred on purchase of security equipments could be met from PSF (SC).

This resulted in undue favour to DIAL which led to loss of ₹ 239.69 crore during 2006-11 to the public exchequer.

In addition to the above, DIAL also debited ₹ 4.34 crore (up to the year 2009-11) towards insurance charges to PSF (SC) Account in accordance with Standard Operating Procedure issued (January 2009) by MoCA, which was otherwise to be borne by the DIAL as per Article 8.5.6 (i) of OMDA and SOP.

(Para 6.1 and Para 6.3)

2.17 Irregular withdrawal from PSF (SC) Escrow Account

MoCA clarified during January 2010 and April 2010 that the security related expenses permitted under PSF (SC) should not include expenditure on any other security staff or other administrative set-up created/ engaged by the airport operators. Subsequently, considering the request of The Association of Private Airport Operators (APAO), MoCA clarified (5 July 2010) that the guidelines dated 16 April 2010 have only prospective application. Accordingly, DIAL under the cover of this clarification, debited all the expenditure incurred during 2006-10 towards private security agencies including consultant fees to PSF (SC). This undue favour to the private operator i.e. DIAL, resulted in irregular withdrawal of ₹ 26.05 crore (up to March 2010) from PSF (SC) Escrow Account.

(Para 6.2)

The observations contained in the paras 2.1, 2.4, 2.5, 2.6, 2.7, 2.12, 2.14, 2.16, 2.17 etc would indicate that whenever DIAL has raised an issue regarding revenue to accrue to it or expenditure to be debited to Government, in contravention of the provisions of OMDA, the Ministry and AAI have always ruled in favour of the operators and against the interest of the Government.