



Lakshmikumaran
& Sridharan
attorneys

30
years



Aviation/ Aerospace Roundup

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I. REGULATIONS CHECK

A. SETTING UP OF GREENFIELD AIRPORTS IN INDIA

INTRODUCTION



The existing Greenfield Airport Policy was notified by the central government as it was realized then that India was embarking on a high economic growth trajectory. Also, the phenomenal growth in air traffic had put enormous pressure on airport infrastructure causing severe congestion at major airports and the airport services at non-metro airports were not geared for handling the increased flow of traffic. So, government had to deviate from the restrictive policy and adopt a liberalized approach towards setting up of greenfield airports with a view to bridging the growing deficit in airport infrastructure and lay down policy guidelines that would govern proposals for setting up greenfield airports. These guidelines that came in 2008 govern setting up of all airports, heliports and upgradation of airfields other than defence airports or airports set up for private use, i.e. use of the aerodrome for non-commercial purposes.

1. Legal framework

The Indian Constitution includes "aerodromes" in item 29 of the Union List, which implies that the central government alone has the legislative and executive powers relating to airports. The primary responsibility for development of airports rests with the central government. The Union alone has competence to legislate in respect of:

"Airways, aircraft and air navigation; provision of aerodromes; regulation and organization of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies"

The Aircraft Act, 1934 (the "**Aircraft Act**") and the Rules made thereunder govern the development, maintenance and operation of greenfield airports. Under the Aircraft Act, central government has the sole right to grant a license for setting an airport and the operations of the airport remains subject to its licensing conditions as provided under Rule 78 of the Aircraft Rules.


Under the Airports Authority Act (the "**AAI Act**"), all government airports are to be developed, financed, operated and maintained by Airport Authority of India ("**AAI**"). However, the AAI Act enables AAI to grant a concession to a private entity for financing, development, operation and maintenance of an airport being managed by AAI. Accordingly, greenfield airports could adopt the concession route if private participation is envisaged.

Airports other than those managed by AAI are governed by the provisions of the Aircraft Act and the Rules made thereunder. An entity other than AAI (hereinafter referred to as an "**Airport Company**") can set up an airport. The Airport Company must function under a license from Director General of Civil Aviation ("**DGCA**") to be issued under the Aircraft Act. Under Rule 79 of the Aircraft Rules, such a license can be granted only to the following:

- a. A citizen of India; or
- b. A company or a body corporate either in the central sector, state sector or the private sector registered under the Companies Act, 1956 subject to the following conditions:
 - i. It is registered and having its principal place of business in India
 - ii. It meets the equity holding criteria specified by the central government from time to time; or
- c. The central government or a state government or any company or any corporation owned or controlled by either of the said governments; or
- d. A society registered under the Societies Registration Act, 1860

Thus, an airport can be developed and operated either by AAI or by an Airport Company that has been given a license by DGCA as per its license conditions. The Rules also allow the central government or a state government to obtain a license.

2. Institutional structure



All proposals for setting up of airports in whichever category would be routed through the Steering Committee. The Steering Committee is chaired by Secretary (Civil Aviation) to coordinate and monitor the various clearances required for setting up of an airport and consists of 9 members, one each from Ministry of Home Affairs (“MHA”), Ministry of Defence (“MoD”), Department of Economic Affairs, Department of Revenue, Planning Commission, India Meteorological Department, AAI, DGCA and Ministry of Civil Aviation (“MCA”) as Convener. If applications for grant of licenses/clearances are pending, MCA convenes a meeting of the Steering Committee once every 3 months.

Though clearances are required from various Departments/Ministries of government but all proposals are required to be submitted to the Steering Committee only. MCA serves as the secretariat of the Steering Committee and remains responsible for processing proposals received by the Steering Committee, convening the meetings of the Steering Committee and coordinating with various stakeholders.

Currently, the following conditions are to be kept in view by DGCA while granting a license for greenfield airport: **(a)** No greenfield airport would be allowed within an aerial distance of 150 Km of an existing civilian airport; and **(b)** In case a greenfield airport is proposed to be set up within 150 Km of an existing civilian airport, the impact on the existing airport would be examined on a case to case basis.

3. Site Clearance granted by Steering Committee

The following steps are required to be undertaken for getting clearances/licenses for starting a greenfield airport in India.

Step 1: The applicant proposing to set up an airport needs making an application to the Steering Committee in the prescribed format, which is forwarded to the AAI/DGCA for their comments.

Step 2: AAI/DGCA undertakes site visit based on which they submit their report to the Steering Committee. Site Clearance is granted by MCA based on the report submitted by the AAI/DGCA. In case the proposed project is located within the Restricted Air Space (Air Space under the jurisdiction of MoD) the approval of MoD is also solicited while granting site clearance.

Step 3: The Steering Committee conveys its recommendations regarding the Site Clearance within three months of the application being made to them.

Step 4: After obtaining the Site Clearance, the applicant would make an application to the Steering Committee in the prescribed format for getting the "in principle" approval for project. The Steering Committee monitors the progress of proposals granted "in principle" approval. If no significant progress is made in achieving specified milestones within a stipulated time period the Steering Committee may take the view to revoke the approval granted to the project.

Step 5: Applications for seeking clearances from MoD, MHA and Ministry of Finance is submitted only in the prescribed formats directly to these organizations under intimation to the Secretariat of the Steering Committee.

Step 6: After obtaining the "in principle" approval of the Steering Committee, the applicant has to make an application to the DGCA in the prescribed format for the grant of aerodrome License.

4. Regulation of Airports

The process to regulate the technical and safety standards of all airports are vested in DGCA under the provisions of the Aircraft Act. AAI airport as well as those owned by Airport Companies must, therefore, conform to the technical and safety standards laid down by DGCA under the Aircraft Act. Economic Regulation (*regulation of tariffs of aeronautical services, protection of reasonable interest of users, operation of efficient economic and viable airports*) of all airports is governed by Airport Economic Regulatory Authority.

5. Development and Financing of Greenfield Airports

i. AAI Airports

Greenfield airports to be set up by AAI is preferably constructed through Public Private Partnership (PPP) and such airports are financed substantially through PPP concessions. However, land for such airports are to be provided by AAI. Further, financing gaps, if any, are bridged through the viability gap funding scheme, which provides for a capital grant of up to 20% of the project cost. The concessions for development of greenfield airports is awarded through open competitive bidding based on model bidding documents. In the north eastern areas where it may not be feasible to follow the PPP route, AAI can set up greenfield airports by itself, as may be approved by the government on a case to case basis.

ii. Other Airports

Financing and development of any other airport is the responsibility of the Airport Company seeking the license. Land for this purpose may be acquired by the Airport Company either through direct purchase or through acquisition by the State Government as per extant policy. In case a state government wishes to promote the setting up of airports in the state, it can either:

- a. Apply to DGCA for a license itself, in which event the state government would be responsible for development and operation of the airport; or
- b. An entity of the state government could apply for a license to DGCA, in which event such entity would be responsible for development and operation of the airport; or
- c. The state government or its corporation may select a private entity and form a Joint Venture Company ("JVC") in the private sector and in such an event, the JVC would be responsible for development and operation of the airport under a license from DGCA; or
- d. Allot land to a private Airport Company for development and operation of an airport under a license from DGCA.

In case a state government wishes to facilitate setting up of the airport, it could provide the following incentives to an Airport Company: **(a)** Land, concessional or otherwise; **(b)** Real estate development rights in and around the airports; **(c)** Airport connectivity; rail, road; **(d)** Fiscal incentives by way of exemptions from state taxes; and **(e)** Any other assistance that the state government deem fit.

State governments can evolve their respective policies for providing any or all of the aforesaid incentives to an Airport Company. If the selection of a private entity or JVC partner is to be made by the state government or its entity, it shall be done through open competitive bidding. While granting land and other benefits, the state government may, if it deems fit, stipulate the rights and obligations of the Airport Company as conditions of such grant.

State governments cannot enter into any concession agreement with the Airport Company as they do not have the powers to grant airport concessions under the Constitution. As noted above, the powers to grant a license for operating an airport rests solely with the central government under the provisions of the Aircraft Act. However, the state governments can provide any or all of the incentives/assistance.

State governments can also provide land to AAI for development of greenfield airports through concessions to be granted to private entities in accordance with the provisions of the AAI Act. States may also provide any of the above concessions to AAI for facilitating the development of airports in their respective States. All such airports would be developed as PPP projects.



6. Reserved activities

On any greenfield airport to be developed under these guidelines, activities relating to Air Traffic Services ("ATS"), security, customs and immigration would be reserved for central government agencies. Provision of these services would be governed by the policy to be laid down by the central government from time to time. Prior to grant of license, an applicant for license shall procure the following clearances:

a. Defence clearance

An applicant seeking a license would need prior clearance from the MoD. An application for setting up of greenfield airport would be processed based on the following considerations:

- i. The location of the proposed site;
- ii. Is the site within the Restricted Airspace (Airspace under the jurisdiction of IAF);
- iii. The envisaged type of operation from/to the proposed airport, e.g. commercial operations, cargo traffic or private use etc. As also IFR/ VFR operations;
- iv. The likely impact of such operations on military aviation;
- v. Security and Intelligence implications;
- vi. Site (place and region) specific issues would be taken into consideration while the case is processed depending on IAF's strategic and tactical roles in a given region.

b. ATS

Functions related to ATS are being discharged by AAI. The applicant will have to enter into a CNS/ ATM agreement with AAI for the provision of ATS services at the proposed airport. ATS would be provided on a cost recovery basis and AAI would publish a standard agreement for this purpose. The Airport Company would also provide the required infrastructure to AAI free of cost for provision of ATS.

c. Security

The applicant will have to enter into an agreement for provision of security by the concerned authority. The cost of providing security will have to be borne by the Airport Company. Guidelines for this purpose would be issued by the MCA from time to time.

d. Customs

In case of an international airport, the applicant will obtain clearance from the Department of Revenue for provision of custom services. The cost of providing these services will have to be borne by the Airport Company. Ministry of Finance would issue the necessary guidelines from time to time.

e. MHA Clearance

The applicant seeking a license would need prior clearance from the MHA regarding location of the airport, acquisition and installation of security equipment and verification of credentials of the developers.

f. Immigration

In case of an international airport, the applicant will procure clearance from the MHA for provision of immigration services. The cost of providing these services will have to be borne by the Airport Company. MHA would issue the necessary guidelines from time to time.

g. BCAS Clearance

The applicant seeking a license would need prior clearance from BCAS regarding location of the airport and acquisition and installation of security equipment.

h. Airport Meteorological Services

The applicant will have to enter into a CNS/ATN agreement with IMD for provision of meteorological services at the proposed airport to be provided by India Meteorological Department ("IMD"). The meteorological services would be provided on a cost recovery basis and IMD would publish a standard agreement for this purpose. The Airport Company would also provide the required infrastructure to IMD free of cost for provision of meteorological services.

A memorandum of understanding would be entered into between the Airport Company and each government agency/department providing the following Reserved Activities, setting out the terms and conditions on which the said services shall be provided by the relevant government agencies/departments: **(i)** Customs Control; **(ii)** Immigration Services; **(iii)** Health Services; **(iv)** Plant Quarantine Services; and **(v)** Animal Quarantine Services. The memorandum of understanding would be issued and revised from time to time by the MCA.

7. Conditions of license

As conditions of license, the licensee would be required to:

- a. Make available its airport services, free of charge and to the extent necessary, for meeting exigencies such as war, natural disaster/calamities, internal disturbances etc. in accordance with the provisions of the Union War Book;
- b. Provide uninterrupted landing and parking facilities for defence and other para-military aircrafts, free of landing and parking charges, and also provide the infrastructure facilities and equipment required for defence operations;
- c. Make available to the security agencies access to the airport for periodic and surprise inspections;
- d. Obtain approval of the relevant agencies for hiring of foreign nationals for senior decision making positions in the management of the private airports;

- e. Adhere to the security measures laid down by the BCAS and DGCA;
- f. Obtain prior verification of the credentials of foreign firms to be engaged for construction, ground handling or other important activities at the airport;
- g. Obtain clearance relating to the FDI limits in the construction/development of private airports from relevant authorities. Any change in the control or ownership shall be subject to security clearance from national security angle;
- h. Ensure the requisite infrastructure for handling international passengers and crew who must pass through immigration and customs; and ensure appropriate arrangements for health services and plant quarantine at international airports.



8. The recent policy changes and new opportunities

Under the existing FDI policy, please note that 100% FDI is permitted for greenfield airport projects under the automatic route and up to 74% FDI is permitted for existing airport projects under the automatic route, above 74% and up to 100% permitted under government approval route. Apart from the FDI relaxation, the Union Budget last year also proposed a lot of new schemes re airport development in India –

- a. Greenfield airports under PPP at Navi Mumbai and Mopa (Goa).
- b. The development of new airports – the AAI aims to bring around 250 airports under operation across the country by 2020.
- c. The North-east region – the AAI plans to develop Guwahati as an inter-regional hub and Agartala, Imphal and Dibrugarh as intra-regional hubs.
- d. The AAI plans to spend USD 1.3 Billion on non-metro projects between 2013 and 2017, focusing on the modernisation and up-gradation of airports.
- e. Indian airports are emulating the SEZ Aerotropolis model to enhance revenues, focus on revenues from retail, advertising and vehicle parking, security equipment and services.

The Indian Aviation Industry has shown remarkable growth potential both in terms of volume as well as in quality of services. The recent changes in FDI policy and the make in India policy can ensure that the avenues is further widened. More foreign players are coming to India to avail the benefits offered for the sector. The aviation sector saw in its first phase the increase in air traffic due to the plying of a lot of budget airlines and impending subsequent leap would be to extend the air connectivity to tier II and III cities and this idea seems more plausible now than ever.

B. INTERNATIONAL AIRLINES OPERATING IN INDIA – INCOME TAX IMPLICATIONS!!

Taxation of international airlines operating in India has always been surrounded with complexities. Initially it was a challenge to ascertain as to how much of the revenue should be apportioned to India operations considering the fact that the journey largely takes place in countries other than (a) country of incorporation/tax-residency as well as (b) country of operation (India). To resolve this, section 44BBA was introduced in the Income tax Act, 1961. This section provides for presumptive basis of taxation for non-resident airline operators earning income from India. Under this provision, 5% of the taxable gross receipts will be deemed to be "Profits & Gains of Business or Profession" and a plain reading of the provision indicates that even if a non-resident airline incurs losses, the tax liability on 5% of taxable gross receipts does arise. Negating this belief, recently Delhi HC in case of Royal Jordanian Airlines [TS-709-HC-2015(DEL)] ruled that Sec 44BBA cannot be applied to taxpayer's income on presumptive basis where assessee had incurred losses.

In a detailed article available at (www.taxsutra.com/experts/column?sid=552#head), the author has analyzed the Delhi HC ruling in Royal Jordanian Airlines and opines that though it comes as a relief for the Airlines industry, the ruling may come up for Supreme Court's scrutiny. The author cautions that planning tax outflow based on Delhi HC ruling may make assessee vulnerable to interest levy in case the said ruling is overruled. Further there may be initiated penal proceedings though the same can be defended when one proceeds based on a High Court decision. In conclusion the author highlights that Airlines protected by tax treaties should alternatively evaluate the scope of non-discrimination clause of the relevant treaty so as to achieve same result without exposing oneself to the aforementioned risk.

Author

Mr. Sumeet Khurana
Director, L&S

II. LATEST NOTIFICATIONS/CIRCULARS

- 1. Public Notice (F. No. 11-690/Sec2/E-VIII/2012) dated February 3, 2016 issued by the office of DGCA** extended the Applicability of CAR Section 2 Series E Part VIII considering the difficulties expressed by the AME training organisations to comply with the proposed CAR within short span of time. Now the applicability of the existing CAR has been extended up to 31st July, 2019 to facilitate institutes to complete training course for batches of students inducted up to July 2016. Accordingly, students inducted during July 2016 will be the last batch under existing CAR. It has also been decided that no application for issue/ extension of scope of approval under the existing CAR will be considered. The proposed new CAR on approval of training institutes for imparting ab-initio training based on requirements prescribed in CAR 66 is under preparation and shall be applicable for institutes seeking approval after issue of the said CAR. The pending applications for renewal of approval of AME Training Organisations may be considered provided the institute has fully complied with the CAR Section 2 Series E part VIII. This supersedes Public Notice dated 1st July 2015 issued on the subject.
- 2. Public Notice (AV.14027/AAC/2012-AT.I) dated January 11, 2016 issued by the office of DGCA** – brought to the notice of public the following regarding the import of aircrafts –

 - a. Section 5 of the Aircraft Act empowers the central government to make rules regulating the export/import of an aircraft for securing the safety of operation. The requirements for import of aircraft are laid down by Director General of Foreign Trade, Ministry of Commerce, in this regard from time to time.
 - b. As per the order issued by MCA, the DGCA shall issue permissions for import/acquisition of aircraft by Scheduled, Regional Scheduled, Non-Scheduled Operator, Flying Training Institute and will recommend to DGFT for issue of import license for private use.
 - c. All aircraft other than Private Category aircraft shall be imported without the need to obtain an import license from DGFT.
 - d. Accordingly, DGCA has issued an Air Transport Circular No. 01/2016 laying down the procedure for obtaining import/acquisition of aircraft. Consequently, the CAR Section 3 Series C Part XI on requirement for permission to import/acquisition of aircraft stands withdrawn with immediate effect. However, the fee for issuance of such permissions shall be charged as approved by the MCA.
- 3. DGCA Operations Circular No. 1 OF 2016 dated 1st February, 2016 (File No AV 22024/15/2015-FSD) was issued on the issue of oversight of overseas training facilities and instructors.** In accordance with ICAO Annex 1 and 6, ICAO Doc 9841 oversight of training programme leading to issue of type ratings needs to be done by the licensing authority. CARs issued under Section 7 Series B, Section 8 Series A Part II and procedures in CAP 8200 deal with issue of type ratings, approval and oversight of training programmes. The variety of aircraft and requirement of type ratings and recurrent training in India are in excess of the facilities and instructors/examiners available in India, and hence it has been permitted to carry out training at overseas locations with licenses being issued by DGCA India. However, the oversight of facilities and instructors remains the obligation of DGCA, and this requires formulation of procedures that bridge the obligation requirements and growth of civil aviation in the country till adequate facilities are available within India. This OC lays down procedure for oversight of training facilities and instructors.

This OC lays down the procedures for oversight of overseas ATOs /TRTOs and Instructors used by Indian pilots for aircraft type endorsement / recurrent training.

Scheduled operators undertaking type rating and recurrent training for their pilots at foreign locations are permitted to continue training in TRTOs/ATOs approved by ICAO Contracting States till 30th April 2016. Training beyond this date will be permitted subject to the following;

- a. Simulator evaluation by FOI.
- b. Ground training and examination for type rating to be done in India.
- c. Standardization check of TRTO/ATO simulator instructors by DE.
- d. Skill tests and IR/PPC carried out by DE.

Non-scheduled operators, general aviation, aerial work, and self-sponsored pilots undertaking type rating and recurrent training for their pilots at foreign locations are permitted to continue training in TRTOs/ATOs approved by ICAO Contracting States as per the provisions of applicable CAR.

Operator's DEs are permitted to carry out initial proficiency checks of TRIs and SFIs as well as standardization check of instructors in Indian and overseas ATOs in addition to responsibility given to DGCA FOIs as per CAR Section 7 Series I Part I and II. The Post-holder Training of the operator will intimate FSD, DGCA at least 2 weeks in advance of such checks in India and 4 weeks in advance of checks at foreign ATOs. The Post-holder Training will be responsible to intimate FSD, DGCA at least a week in advance of any change in the check schedule. DGCA FOIs will carry out spot surveillance/monitoring of the checks carried out by the DE which will be in addition to the annual DE standardization check required as per CAR Section 7 Series I Part I. DGCA will hold Post-holder Training and concerned DE responsible to maintain standards in the operator's instructor proficiency/standardization checks. The operator will submit a quarterly report on the standardization checks as per Appendix A.

In order to comply with Para 3.1 (c) above, scheduled operators will ensure that training is only carried out by instructors who –

- a. Are engaged by the operator;
- b. Have completed the indoctrination training as per operators OM Part D (minimum 8 hours);
- c. Have undergone a standardization check carried out by the operator's DE or DGCA FOI within the preceding 2 years.

Author

Neeraj Dubey
Joint Partner, L&S



**Lakshmikumaran
& Sridharan**
attorneys

NEW DELHI

5 Link Road, Jangpura Extension,
New Delhi 110014

B-6/10, Safdarjung Enclave
New Delhi - 110 029
Phone : +91-11-4129 9811
E-mail : lsdel@lakshmisri.com

MUMBAI

2nd Floor, CNERGY IT Park,
Old Standard Mill,
Appa Saheb Marathe Marg,
Prabhadevi,
Mumbai - 400 025
Phone : +91-22-2439 2500
E-mail : lsomb@lakshmisri.com

CHENNAI

2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU

World Trade Center,
No. 404-406, 4th Floor, South Wing,
Brigade Gateway Campus,
No. 26/1 Dr. Rajkumar Road,
Malleswaram West,
Bengaluru - 560 055
Phone : +91-80-49331800
E-mail : lsblr@lakshmisri.com

HYDERABAD

'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

EUROPE

Lakshmikumaran & Sridharan SARL
Avenue Giuseppe-Motta 35-37
1202 Geneva
Phone: +41 22 919 04 30
Fax : +41 22 919 04 31
E-mail : lsgeneva@lakshmisri.com

AHMEDABAD

B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE

607-609, Nucleus
1 Church Road, Camp
Pune - 411 001
Phone : +91-20-66801900
E-mail : lspune@lakshmisri.com

KOLKATA

2nd Floor, Kanak Building
41, Chowringhee Road
Kolkata - 700071
Phone : +91-33-40055570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH

SCO No. 59, 1st Floor,
Sector 26, Madhya Marg,
Chandigarh - 160 026
Phone : +91-172-4921700
E-mail : lschd@lakshmisri.com

GURGAON

OS2 & OS3, 5th floor,
Corporate Office Tower,
AMBIENCE Island, Sector 25-A,
Gurgaon- 122001
Phone : +91-0124-477 1300
E-mail : lsgurgaon@lakshmisri.com



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