FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: **03/07/2015**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **ST/A/52076-52077/2015-CU[DB]** dated **12/06/2015**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Asstt. Registrar(CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	ST/718/2012	**Continental Airlines Inc** Cyber Green, Tower-c, 2nd Floor, Dlf Phase-iii, Gurgaon, Haryana.
2	ST/914/2012	**Commissioner of Service Tax-Service Tax - Delhi** MG MARG... IP ESTATE, 17-B... IAEA HOUSE...I P ESTATE, DELHI 110002
		Name and Address of Respondent
3		**Continental Airlines Inc** Cyber Green, Tower-c,2nd Floor, Dlf Phase-iii, Gurgaon, Haryana.,,
4		**C.S.T.-Delhi** 17-B, I.A.E.A.House,M.G.Road, I.P.Estate, New Delhi, Delhi-110002

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Other Appellants and Respondents as per Annexure

(P.T.O)

Copy To
5 Advocate(s) / Consultant(s):

Atul Kumar Gupta,CA
(Apra & Asso.)
APRA & ASSOCIATES,
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6 Additional Party's Name & Address :
7 Bar Association, CESTAT, Delhi
8 Director Publications, Customs, Excise. I.P. Estate, Delhi
9 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
10 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
11 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
12 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
13 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
14 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
15 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar(CUSTOMS Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELATE TRIBUNAL
R.K. PURAM, WEST BLOCK NO. 2, NEW DELHI-110066
COURT NO. II

Date of hearing: 12/6/2015
Date of pronouncement: 02.07.2015

Appeal No. ST/718 AND 914/2012-CU (BR)

[Arising out of order-in-original no. 58-60//GB/2012 dated 29.02.2012 passed by Commissioner of Service Tax, New Delhi]

1.	Whether Press Reporter may be allowed to see the Order for Publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Department Authorities?	

M/s. Continental Airlines Inc. **Appellant**

Vs.

Commissioner of Service Tax, New Delhi **Respondent**

Appearance: **Sh. Atul Kumar Gupta, CA and Shri Akhil Gupta, CA for the appellant.**
Shri Amresh Jain, DR for the respondent

Coram: **Hon'ble Shri Ashok Jindal, Member (Judicial)**
Hon'ble Shri R.K. Singh, Member (Technical)

Final Order No. 52076 - 52077/2015

Per: R.K. Singh

Assessee is in appeal against order-in-original number 58-60//GB/2012 dated 20/02/2012 in terms of which demands along with interest and penalties were confirmed under online information and database access or retrieval service under reverse charge mechanism on the service provided by Computer Reservation System (CRS)/Global Distribution System (GDS).

2. Revenue has also filed appeals against the same order-in-original for dropping the demand relating to the charges (collected by the appellant from the passengers) which relate to airport taxes and the pre-ponement/postponement of dates of journey.

3. Briefly stated the facts of the cases are as under:

The appellant-assessee is inter-alia providing service of transport of passengers by air embarking in India on international journey in any class other than economy class which is a taxable service specified under Section 65 (105) (zzzo) of Finance Act 1994. It was alleged that the appellant assessee had not paid service tax on-(i) the payments made to CRS/GDS service providers under reverse charge mechanism in terms of provisions of Section 66 A ibid. (ii) the airport taxes collected, (iii) charges for pre-ponement and postponement of journey dates, (iv) transport of import cargo. Vide impugned adjudication order the adjudicating authority confirmed the demand under reverse mechanism on the payments made in respect of CRS/GDS service providers but dropped the demand relating to amount collected for airport taxes, pre-ponement/postponement charges and transport of import cargo.

The appellant assessee has contended that no amount was paid by it to CRS/GDS service providers and they were paid by its parent company in the USA, and therefore no service tax is payable by the appellant under reverse mechanism. It added that the issue is covered in its favour by CESTAT in the case of **British Airways 2014 TIOL 979 CESTAT DEL**. The Revenue on the other hand contended that the service was received by the appellant assessee and the payment made by its headquarters in the USA was on its behalf and that the judgement in the case of British Airways is not applicable to the present case

6. Revenue with regard to its appeal stated that airport taxes were collected as part of the gross amount received for the service rendered, and therefore, the same are includible in the assessable value. It also stated that the preponement and postponement charges are nothing but amounts charged for providing service in relation to transport of passengers by air and therefore service tax was clearly leviable thereon. The appellant assessee on the other hand argued that airport taxes were merely collected on behalf of the airports and were remitted to them (i.e., the airports) and that the preponement and postponement charges were nothing but penalties for changing the date of travel and the penalties are not includible in the assessable value.

7. We have considered the contentions of both sides. We find that in the case of **British Airways (supra)** it has been clearly held (as a majority view) that British Airways India (the appellant in that case) has to be treated as a separate person vis-a-vis its parent company based abroad and in view of the admitted position that the contracts with CRS/GDS service providers were not with British Airways India but with British Airways UK, the present appellant (i.e., British Airways India) cannot be held to be recipient of the service so as to make it liable to pay service tax on reverse charge basis in terms of the provisions of Section 66 A ibid. Although the Ld. Departmental Representative contended that the said judgement in the case of **British Airways** is not applicable to the present appeal without elaborating as to how, we are unable to discern any such distinguishing facts and circumstances which would render the ratio of the said judgement inapplicable to the present case. Consequently, this component of the impugned demand is not sustainable in the wake of CESTAT judgment in the case of British Airways (Supra).

8. As regards, the airport taxes, we find that CESTAT in the following cases has clearly held that airport taxes were collected by the airlines on behalf of the airports and were paid to them and therefore are not includible in the assessable value for the purpose of levy of service tax:

1. **Turkish Airlines Vs. CST, Delhi [2013 (30) STR 367 (Tri-Del)]**

2. **Srilankan Airlines Ltd. Vs. CST, Chennai [2011 (21) STR 656 (T)]**

3. Lufthansa German Airlines VS. CST, Delhi [S. No. 55115/2014, dt. 2.12.2014]

Therefore, Revenue's appeal on this aspect (i.e., regarding service tax on airport taxes collected by the appellant assessee) is not sustainable.

9. As regards the preponement and postponement charges, the very nature of such charges shows that they are collected in connection of rendering the service in relation to providing transport of passengers by air service inasmuch as these charges are recovered for changing the dates of travel. Thus, the appellant's contention that these are mere penalties and hence not includible in the assessable value is not tenable. It is well-settled that it is the nature of charge and not its nomenclature which has to be considered. Merely, because an airline calls such charges penalties does not alter the nature of such charges which are clearly in relation to providing transport of passengers by air service because of service of change of journey dates is clearly in relation to transport of passengers by air service. It, however, needs to be appreciated that the very fact that the Commissioner dropped the demand relating to the preponement and postponement charges gives credence to the contention of the appellant that it was under bona fides belief that the service tax on such charges was not payable. Clearly, it is an interpretational issue and therefore the extended period in these circumstances is not invokable particularly when nothing concrete has been brought out in the show cause notice to show that there was any positive act of

wilful misstatement/ suppression on the part of the appellant-assessee. That the extended period as well as the mandatory penalty under Section 78 ibid are not invokable in such circumstances is in conformity with the Supreme Court's observations in the case of **Gopal Zarda Udyog 2005TIOL13-SC-CX-LB** and **Chemphar Drugs Liniments 2002-TIOL266-SC-CX.** Thus, the demand only for the normal period (of one year) is sustainable on the preponemnet and postponement charges and penalty under Section 78 ibid. is not impossible. However, penalty under section 76 ibid. is clearly attracted as that is not necessarily dependent upon the existence of wilful misstatement/suppression of facts as is evident from the wording of the said section.

10. In the light of the aforesaid discussion, we passed the following order:

(I) the appellant assessee's appeal number ST/718/2012 is allowed

(II) the Revenue's appeal No.ST/ 914/2012 is partially allowed only to the extent that the demand of service tax on the pre-ponement and postponement charges is confirmed for the normal period of one year along with interest (as per section 75 of the Finance act 1994) and penalty under section 76 Ibid.

(Ashok Jindal)
Member (Judicial)

(R.K. Singh)
Member (Technical)

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