CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 87375 of 2015

(Arising out of Order-in-Original No. 11-13/STC-III/SKD/15-16 dated 07.08.2015 passed by the Commissioner of Service Tax-III, Mumbai)

M/s. Cleartrip Travel Service Pvt. Ltd. **Appellant**
Unit No.1, Ground Floor, DTC Building,
Sitaram Compound, N.M. Joshi Marg,
Lower Parel (E), Mumbai 400 013

Vs.

Commissioner of Central Excise , Mumbai-III **Respondent**
3rd & 4th floor, Vardaan Centre, MIDC,
Wagle Industrial Estate, Thane (W), Mumbai 400 604.

Appearance:

Shri V. Sridharan, Senior Advocate, for the Appellant
Shri Nitin Ranjan, Deputy Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. **A/87027/2021**

Date of Hearing: 24.09.2021
Date of Decision: 29.10.2021

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 11-13/STC-III/SKD/15-16 dated 07.08.2015 of Commissioner Service Tax III, Mumbai. By the impugned order, the Commissioner has held as follows:

"ORDER

5.1 I, hold that the impugned activities of the Noticee is appropriately taxable under "Business Auxiliary Services" as defined under Sub Sections (19) read with Sub Section (105) (zzb) of the said Act read with Section 66 ibid.

5.2 In respect of show cause notice F. No. DGCEI/MZU/I & IS 'C' /12/4/4/2009/ Part 1/8609 dated 19.10.2011 –

5.2(a) 1, confirm the demand of Service Tax amounting to Rs. 2,51,89,781/- (Rupees Two Crores, Fifty one lakhs, Eighty Nine

Thousand, Seven Hundred and Eighty One only) (Inclusive of Education Cess and Secondary & Higher Education Cess) for the period from August 2007 to March 2011, under the category of "Business Auxiliary Services" service, under Section 73(2) of the Act.

5.2(b) I, order for payment of Interest under Section 75 of the Act, at the appropriate rates prevalent during the material period, on the delay in payment of service tax amounting to Rs.2,51,89,781/-(Rupees Two Crores, Fifty one Lakhs, Eighty Nine Thousand, Seven Hundred and Eighty One only) confirmed at 5.2(a) above.

5.2(c) I, impose a penalty of Rs.2,51,84,781/- (Rupees Two Crores, Fifty one Lakhs, Eighty Nine Thousand, Seven Hundred and Eighty One only)on the Noticee, under Section 78 of the Act. If the Noticee pays the Service tax confirmed, as mentioned in para 5.2(a) above, along with the Interest on delayed payment within 30 (thirty) days from the date of communication or this Order, the amount of penalty liable to be paid by the Noticee under Section 78 of the Act shall be twenty-five percent of the service tax payable/confirmed in para 5.3(a} above. However, the benefit o penalty under section 78 of the Act, shall be available only if the said Service tax confirmed, Interest and the Penalty, of twenty-five percent of the service tax payable/confirmed, so imposed under the aforesaid Order, is paid within the period of 30 (thirty) days from the date of communication of this Order.

5.2(d) I, refrain from imposing penalty under Section 76 of the Act, as I have imposed penalty under Section 78 of the Act at 5.2(c) above.

5.2(e) I, impose a penalty of Rs. 10,000/- (Rupees Ten thousand only) on the Noticee, under Section 77 of the Act.

5.3 In respect of show cause notice F. No. ST I/MUM/Div.III/Gr.X/DGCEI /CTSPL/01/2011/11052 dated 20.09.2012 –

5.3(a) I, confirm the demand of Service Tax amounting to Rs. 1,82,86,264/ (Rs. One Crore, Eighty Two Lakhs, Eighty Six Thousands, Two Hundred and Sixty Four only) (inclusive of

Education Cess and Secondary & Higher Education Cess), under the category of "Business Auxiliary Services" service, under Section 73(2) of the Act.

5.3(b) I, order for payment of Interest under Section 75 of the Act, at the appropriate rates prevalent during the material period, on the delay in payment of service tax amounting to Rs. 1,82,86,264/- (Rs. One Crore, Eighty Two Lakhs, Eighty Six Thousands Two Hundred and Sixty Four only), (inclusive of Education Cess and Secondary & Higher Education Cess), confirmed at 5.3(a} above.

5.3(c) I, impose a penalty under Section 76 of the Act on the Notice, which shall be Rs. 200/- (Rupees Two hundred only) for every day during which such failure to pay service tax continues or at the rate of two per cent (2%) of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the exceed the service tax payable by then, as confirmed at para 5.3 (a) above.

5.3(d) I, impose a penalty of Rs. 10,000/- (Rupees Ten thousand only) on the Noticee, under Section 77 of the Act.

5.4 In respect of show cause notice F. No. ST 1/MUM/Div.III/Gr.X/DGCEI CTSPL/01/2011/9030 dated 16.09.2013

5.4(a) 1, confirm the demand of Service Tax amounting to Rs. 51,42,432/- - (Rs. Fifty One Lakhs, Forty Two Thousands, Four Hundred and Thirty Two only) (inclusive of Education Cess and Secondary & Higher Education Cess), under the category of "Business Auxiliary Services" service, under Section 73(2) of the Act. 5.4(b) I, order for payment of Interest under Section 75 of the Act, at the appropriate rates prevalent during the material period, on the delay in payment of service tax amounting to Rs. 51,42,432/- (Rs. Fifty One Lakhs, Forty Two Thousands, Four Hundred and Thirty Two only), (inclusive of Education Cess and Secondary & Higher Education Cess), confirmed at 5.4(a) above.

5.4(c) I, impose a penalty under Section 76 of the Act on the Noticee, which shall be Rs. 200/- (Rupees Two hundred only) for every day during which such failure to pay service tax continues or at the rate of two per cent (2%) of such tax, per month, *whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax. The penalty shall, however, not exceed the service tax payable by them, as confirmed at para 5.4 (a) above.*

5.4(d) I, impose a penalty of Rs. 10,000/- (Rupees Ten thousand only) on the Noticee, under Section 77 of the Act."

2.1 Investigations undertaken against the Appellants by DGCEI, Mumbai Zonal Units, revealed that

- their major business relates to the sale of air tickets, for which they hold accreditation with International Air Transport Association (IATA) and function as air travel agent.
- By booking the air tickets for various segment on the CRS of M/s Abacus, appellants render assistance in promotion of business of M/s Abacus. Letter dated 01.04.2007 of M/s Abacus unambiguously stated that incentives, as spelt out therein would be payable to the Appellant, on the basis of segments booked by them on their CRS.
- The activities of appellants fall within the category of business auxiliary services, and the value of the taxable services provided by them under this category in terms of Section 67 of the Finance Act, 1994 will be the gross value of the taxable service charged by the service provider.
- Appellants had failed to declare and discharge the service tax on these services during the period August 2007 to March 2011.

2.2 A show cause notice dated 19.10.2011 was issued to the appellant by DGCEI, asking them to show cause as to why-

"13.1 The services provided by them in relation to booking of segments and thus assisting in marketing and promotion of the CRS of various companies should not be held to be classifiable under 'Business Auxiliary Services as defined under sub- section (19) read with sub- section (105) (zzb) of Section 65 of the said Act read with Section 66 Ibid.

13.2 Service Tax amounting to Rs 2,44,56,098/- ((Rupees Two Crores Forty Four Lakhs Fifty Six Thousand and Ninety Eight only). Education Cess amounting to Rs 4,89,122/- (Rupees Four Lakhs Eighty Nine Thousand One Hundred and Twenty Two Only) *and Sec. & Higher Education Cess amounting to As 2,44,561/- (Rupees Two Lakhs Forty Four Thousand Five Hundred and Sixty One Only) totally amounting to Rs 2,51,89,781/- (Rupees Two Crores Fifty One Lakhs Eighty Nine Thousand Seven Hundred and Eighty One Only) on the commission earned by them on the said services rendered by them to the CRS Companies, during the period from August 2007 to March 2011, as detailed in Annexure-A to this Notice, should not be demanded and recovered from them under the proviso to Section 73(1) of the said Act, read with the provisions of Section 68 ibid.*

13.3 Penalty under the provisions of Sections 76, 77 & 78 of Chapter V of the Finance Act, 1994, should not be imposed upon them..

13.4 Interest, at the appropriate rates & as applicable, in force, under section 75 of the said Act, should not be demanded and recovered from them on the Service Tax that would be determined to be payable by them."

2.3 Since even in the subsequent period appellant did not discharged service tax due on these services provided by them demand notices

- dated 20.09.2012 for period 2011-12, demanding service tax amounting to Rs 1,82,86,264/- (inclusive of education cess and Secondary & Higher Education Cess)
- dated 16.09.2013 for period 2012-13, demanding service tax amounting to Rs 51,42,432/- (inclusive of education cess and Secondary & Higher Education Cess) were issued to them.

2.4 The show cause notice and demand notices as above were adjudicated by the Commissioner, by the impugned order, referred in para 1.

2.5 Aggrieved by the impugned order, the Appellant have filed this appeal.

3.1 We have heard Shri V Sridharan, Sr Advocate for the Appellant and Shri Nitin Ranjan, Deputy Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned Counsel submits that

- issue involved in the appeal is no longer res-integra, and has been decided in the favour of appellants by the larger bench of CESTAT in case of Kafila Hospitality & Travels Pvt Ltd [2021 (47) GSTL 140 (T-LB)].

- in fact they had filed intervention application in the case of Kafila Hospitality, which was allowed by the larger bench, and they made their submissions in the matter before the larger bench.
- Following the decision of the CESTAT larger bench this appeal should be allowed in their favour.

3.3 Arguing for the revenue, learned authorized representative reiterated the findings recorded by the adjudicating authority, and sought time to check whether any appeal has been filed by the revenue against the order of CESTAT larger bench. However subsequently he submitted no appeal has been filed as per his knowledge.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments of appeal.

4.2 Commissioner has in para 4.1 to 4.4 of impugned order (reproduced below) adjudicated on the issue of taxability of the services provided by the appellant for which these notices have been issued.

"4.1 I have carefully gone through the case records of all the three SCNS dated 19.10.2011, 20.09.2012 and 16.09.2013, the written and oral submissions made by the Noticee. The point for decision in this is weather M/s Cleartrip Travel Services Private Limited is liable to pay service tax on the amount received as incentive from M/s Abacus under the category of 'Business Auxiliary Services'.

4.2 The airline companies enter into agreements with foreign based companies such as Amadeus Global SA Spain, Galileo International Partnership USA, Abacus Distribution System Pvt. Ltd. Singapore to avail information technology solutions and connectivity through Computerized Reservation System (CRS) and thereby distributing their products through a technology solution to travel agents.

4.3 The Noticee in their written submission mentioned above at para 2.20 (2.2) dated 27.03.2014, stated that 'Noticee agree to keep Abacus reservation system as Predominant GDS'. It is evident from this that Noticee have been observed to have *booked segments on the CRS of M/s Abacus thereby rendering assistance in the promotion of the business of M/s Abacus and consequentially are in receipt of sums of Toney for such activities. It therefore appears that the aforesaid activities undertaken by Noticee would fall within the category of Business Auxiliary Services' defined under the said Act, and they appear liable to ST on the amounts so received from M/s Abacus in the course of booking of segments on the CRS.*

4.4 ***Based on the above facts, it is clear that Noticee is the provider of 'Business Auxiliary services' to M/s Abacus and in turn receives the incentives from them."***

4.3 CESTAT, Larger Bench has in the case of Kafila Hospitality referred by learned Counsel for appellant observes as follows:

"10. At the time of hearing of the appeal before the Division Bench, the Learned Authorized Representative of the Department placed the decision rendered by a Division Bench of the Tribunal in D. Pauls. However, the Division Bench hearing this appeal expressed doubts on the proposition of law laid down in the earlier Division Bench decision of the Tribunal in D. Pauls and framed the following six issues to be decided by the Larger Bench :-

"(i) Whether the Incentive received by service receiver from service provider, on appreciable performance, can be subjected to service tax?

(ii) Whether a demand can be confirmed without specifying the sub clause of BAS under which the activities are covered?

(iii) Whether demand of service tax can be confirmed under the taxable category of BAS in absence of three parties - service provider, service receiver and targeted audience?

(iv) Whether in cases where value of service is fixed under an option provided under the Rules, such option having been exercised and not withdrawn, is it open for the authorities to demand service tax on other consideration or incentive received, be taxed under another category?

(v) Can service tax liability be fastened without specifying the consideration for service as provided under section 67 of the Chapter V of Finance Act, 1994 as amended up to date?

(vi) Can service tax liability be fastened in absence of the relationship of service provider and service receiver?"

11. An application has been filed on behalf of M/s. Cleartrip Travel Service Pvt. Ltd., M/s. FCM Travel Solutions (I) Private Limited and M/s. SOTC Travel Limited with a prayer that they may be permitted to intervene in the hearing before the Larger Bench for the reason that appeals filed by them on the same issues are pending before the Mumbai and Chandigarh Benches of the Tribunal as also before the Principal Bench of the Tribunal at New Delhi. The details provided by the applicants are as follows :-

Sl. No.	Applicant	Impugned Order Number and Date	Pending Before
1.	M/s. Cleartrip Travel Service Private Limited	Order-in-Original No. 11-13/STC-III/SKD/15-16, dated 3-8-2015	CESTAT, Mumbai
2.	M/s. FCM Travel Solutions (I) Private Limited	Order-in-Original No. 98-2018-ST, dated 30-10-2018	CESTAT, Chandigarh
3.	M/s. SOTC Travel Limited	Order-in-Original No. 32-ST-D-I-2015, dated 30-9-2015	CESTAT, New Delhi

12. Another application had been filed by M/s. Riya Travels Tours (I) Pvt. Ltd. with a similar prayer stating that it proposes to file an appeal against the order dated February 10, 2021 passed by the Principal Commissioner, in which same issues are involved.

13. The intervention applications have been opposed by Shri Suresh Merogu Learned Authorized Representative of the Department at Mumbai and Shri Rajesh Rai and Shri Vijay Kumar Gupta, Learned Authorized Representatives of the Department at Chandigarh. They have submitted that only some of the issues referred to the Larger Bench arise for consideration in the pending appeals and in any view of the matter, the parties would have an opportunity to raise all the issues before the Division Benches at the time when these appeals are heard. Learned Authorized Representatives also pointed out that there is no procedure prescribed for intervention before a Larger Bench of the Tribunal and in support of this contention reliance has been placed upon the decision of a Larger Bench of the Tribunal in

Subhash Projects & Marketing Ltd. v. Commissioner of Customs, Cochin [2009 (239) E.L.T. 440 (Tri. - LB)].

14. Shri J.P. Singh, Shri Vivek Pandey and Shri R.K. Maji, Learned Authorized Representatives of the Department at Delhi have raised a preliminary objection regarding the admissibility of the reference to the Larger Bench. It has been pointed out that though the Division Bench hearing this appeal may have expressed doubts about the law laid down by the earlier Division Bench of the Tribunal in D. Pauls, but the records would indicate that not only had the appellant therein filed a Civil Appeal before the Supreme Court against the decision of the Tribunal, but the Supreme Court had also disposed of the Civil Appeal on February 12, 2018. The contention, therefore, is that all the issues decided by the Tribunal in D. Pauls have attained finality, except the issue relating to invocation of the extended period of limitation and since the order of the Tribunal in D. Pauls has merged with the order of the Supreme Court on disposal of the Civil Appeal, the reference is not maintainable. In support of this submission reliance has been placed on the following decisions :-

(i) Kunhayammed v. State of Kerala [2001 (129) E.L.T. 11 (S.C.)];

(ii) Khoday Distilleries Ltd. and Ors. v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. [(2019) 4 SCC 376]; and

(iii) S. Kumar's Ltd. v. Commissioner of the Central Excise, Indore [2003 (153) E.L.T. 217 (Tri. - LB)]

15. Shri Badri Narayan, Learned Counsel appearing for the interveners, however, submitted that the Larger Bench can proceed to decide the six issues that have been referred for the reason that merits of the decision of the Division Bench of the Tribunal in D. Pauls were not examined or decided by the Supreme Court and in this connection reliance has been placed upon the following decisions :-

(i) State of Kerala and Another v. Kondottyparamnanmoosa and Others [(2008) 8 SCC 65].

(ii) Commissioner of C. Ex., Mumbai-II v. Godrej & Boyce Mfg. Co. Ltd. [2010 (18) S.T.R. 682 (Bom.)]

(iii) Shasun Drugs & Chemicals v. CESTAT, Chennai [2006 (198) E.L.T. 179 (Mad.)].

16. These two issues relating to the intervention applications and the admissibility of the reference to the Larger Bench need to be decided first.

Intervention application

17. It is not in dispute that three appeals referred to in the intervention application are pending before Benches of the Tribunal at Mumbai and Chandigarh and also before Principal Bench of the Tribunal at New Delhi and that some of the issues referred to the Larger Bench also arise for consideration in these appeals. Any decision taken by the Larger Bench on these six issues that have been framed would necessarily have an impact on the appeals pending before the Division Benches. The submission made by Learned Authorized Representatives of the Department that only some of the issues referred to the Larger Bench may be involved in the appeal cannot be a ground to reject the intervention application. The Division Benches of the Tribunal would be bound by the decision of the Larger Bench on these issues. This will, therefore, not be a good reason to deny an opportunity to the applicants to make submissions before the Larger Bench.

18. The second objection raised by the Learned Authorized Representatives of the Department is that the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 do not provide for moving an intervention application. As noticed above, any decision taken by the Larger Bench on the issues referred to it would bind the Division Benches when the appeals filed by the applicants are heard. Rule 41 of the aforesaid 1982 Rules confers power on the Tribunal to make such orders or such direction as may be necessary to secure the ends of justice. Justice, in the present case, requires that the applicants be heard, otherwise they would have a complaint that the issues involved in their appeals have been decided by the Larger Bench of the Tribunal without hearing them.

19. The Larger Bench decision of the Tribunal in Subhash Projects & Marketing Ltd. will not help the Department. The applicants therein who had filed the intervention applications *were not parties in any appeal pending before the Tribunal. They were merely a manufacturer association of the domestic industry. The Larger Bench recorded a categorical finding that the applicants were not an aggrieved party since only an assessee who is a party to proceedings is an aggrieved party. In the present case, the applicants are appellants in the appeals pending before the Division Benches of the Tribunal. This decision would, therefore, not help the Department.*

20. This apart, as the Department has also raised an issue relating to the maintainability of the reference before the Larger Bench, the interveners would also get an opportunity to make submission on this aspect, for if it is held that the reference is not maintainable, the decision of the Tribunal in D. Pauls would come in the way of interveners when their appeals are heard.

21. The intervention application filed by the applicants, therefore, deserves to be allowed and is allowed."

4.4 Since larger bench has found the issues involved in the appeal before us to be the same as before them, they have allowed the intervention application filed by the appellants in this appeal. The order of larger bench notes down the impugned order before us while allowing the intervention application. Since larger bench has heard and decided the issues on leviability of service tax under the category of "business auxiliary service", in this appeal itself, the same cannot be considered by us again.

4.5 On the issue of taxability under the category of "business auxiliary service" larger bench has concluded as follows:

*"**Merits***

41.On a consideration of the entire matter it transpires that the following two main issues arise for determination :-

(a) Whether service tax can be levied under the category of 'business auxiliary service' on target based incentives paid to the travel agents by airlines by alleging that the travel agents are promoting and marketing the business of the airlines; and

(b) Whether the commission paid by CRS Companies to travel agents can be subjected to service tax under the category of

'business auxiliary service' by alleging that the travel agents are promoting and marketing the business of such companies.

42. Shri Anil Sood Learned Counsel for the appellant made the following submissions :-

(i) Incentives are not taxable and in the support of this contention reliance has been placed upon a decision of this Tribunal in M/s. Rohan Motors Limited v. Commissioner of Central Excise, Dehradun [2020 (12) TMI 1014-CESTAT New Delhi];

(ii) Once an option under Rule 6(7) of the Service Tax Rules, 1994 [1994 Rules] is exercised, no further liability arises;

(iii) Any activity in relation to booking of passes by air travel agents would be covered under "air travel agency" services as defined under Section 65(4) of the Finance Act; and

(iv) The decision in D. Pauls did not render any finding as what would be the gross value of service charged from the CRS service provider and did not even specify the sub-category of BAS under which the demand was confirmed.

43. Shri Badri Narayan, Learned Counsel for the interveners made the following submissions :-

(i) The air travel agents are not promoting or marketing the services of airlines/CRS Companies;

(ii) The air travel agent is promoting its own business and not to business of the airlines. In support of this contention reliance has been placed upon the decision of the Madras High Court in Airlines Agents Association v. Union of India [2003-TIOL-143-HC-MAD-ST = 2006 (3) S.T.R. 3 (Mad.);

(iii) The air travel agent is not promoting the business of CRS Companies. In fact, the CRS portal used by the air travel agent is immaterial to the passengers. In this connection reliance has been placed upon the Circular dated April 16, 2010 issued by the Central Board of Excise and Customs, New Delhi;

(iv) The services rendered by air travel agents are more specifically classifiable under "air travel agents" services in view of the provision of Section 65A of the Finance Act;

(v) The incentives paid for achieving targets are not taxable. In this connection reliance has been placed upon the decision of Delhi High Court in Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India and Others [2012 (12) TMI 150-Delhi High Court = 2013 (29) S.T.R. 9 (Del.)] as affirmed by the Supreme Court as also the decision of the Federal Court of Australia in AP Group Limited v. Commissioner of Taxation [(2013) FCAFC 105];

(vi) Incentives are in the nature of discounts passed on to travel agents for encouraging better performance; and

(vii) The Commission paid by CRS Companies is in the nature of reverse premium.

44. Shri Vivek Pandey Learned Authorized Representative of the Department has made the following submissions :-

(i) Promotion of "Reservation Functionality" of particular CRS Company like Galileo, Abacus and Amadeus is not an activity which is connected to the booking of air ticket per se. Even though this functionality is used for booking of ticket, but in the contract, consideration received in the form of commission is not dependent on booking of ticket but dependent upon particular functionality of particular CRS Company which has been used to book the ticket. Hence, the service cannot fall under 'air travel agent' service. Rather, it being an activity of promotion of the functionality (service) provided by the CRS Companies, would fall within the definition of BAS under Section 65(19) read with Section 65(105)(zzb) of the Finance Act;

(ii) A perusal of the agreements would indicate that the transaction of booking of an air ticket is not the essential feature of the contract. The essential feature is an activity that happens before the booking of air tickets. This activity is the exercise of choice by the appellant to prefer a particular software system. In fact, the transaction of a single ticket for a particular passenger

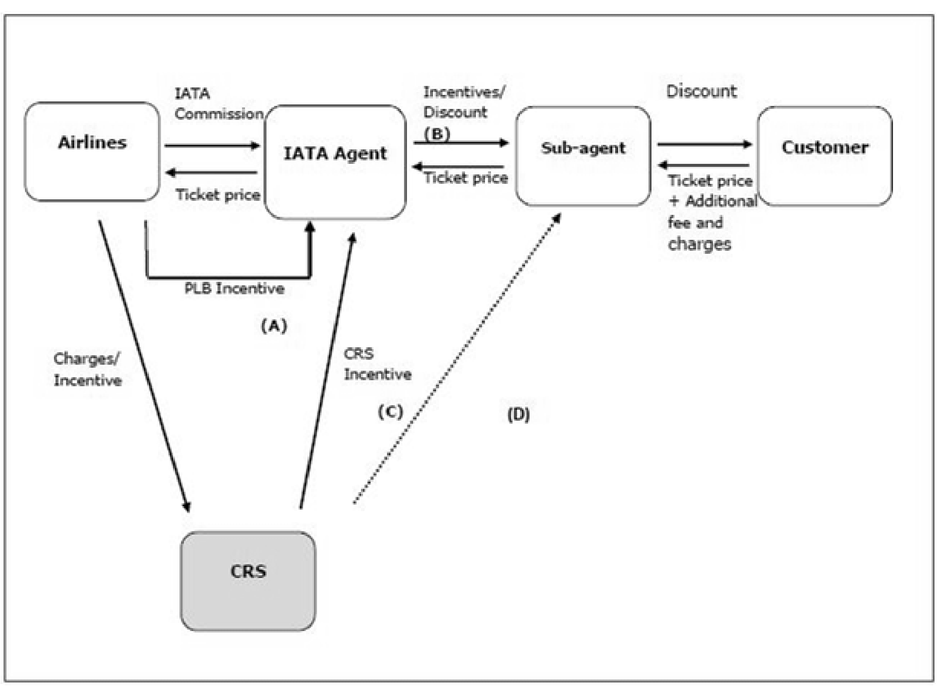
and for a particular airline, becomes an incidental activity to the main activity of subscribing and owing allegiance to a particular reservation functionally. This is promoting the business of CRS software companies and, therefore, classifiable under sub-clause (ii) of the definition or BAS; and

(iii) Rule 6(7) of the 1994 Rules is an option available only to an air travel agent. By the essential character test, the role of the appellant is not that of an air travel agent, but of a subscriber, who exercises his choice for a preferred software system. If the appellant is not acting as "air travel agent" under the contracts, then option of Rule 6(7) of the 1994 Rules is not available for this transaction.

45. The submissions advanced by the Learned Counsel for the appellant, Learned Counsel appearing for the interveners and the Learned Authorized Representative for the Department have been considered.

46.To appreciate the submissions advanced on behalf of the parties, it would be appropriate to reproduce a chart that has been enclosed by the interveners in their written submissions and it is as follows :-

CHART



47. A perusal of the aforesaid chart would show that for sale of tickets, the IATA agents, apart from the commission that they *receive from the airlines, also receive Performance Linked Bonus [PLB incentives], which is linked to guaranteed booking of a minimum number of airline tickets. This incentive is indicated at A in the aforesaid chart. In certain cases, the sub-agents also book airlines tickets through IATA agent and where sub-agents achieve a pre-determined target on booking through a particular IATA agent, the IATA agent also pays an incentive to the sub-agents. This incentive is indicated at B in the aforesaid chart. The CRS Companies also allow IATA agents to subscribe to their portal for booking tickets for the passengers/sub-agents. Earlier, the IATA agents were charged by the CRS Companies for access to their portal but due to increasing competition in the market, the CRS Companies stopped charging the agents and instead, in order to increase the flow of business, started to part with a portion of the commission paid to them by airlines to the IATA agents when the agents achieve a minimum quantum of bookings through the concerned CRS portal. These incentives are indicated at C and D in the aforesaid chart.*

48. The contention of the Department is that the target based incentives paid by airlines to IATA agents and the CRS incentives paid by the CRS Companies to IATA agents or the sub-agents are for promoting and marketing the business of the airlines and CRS companies respectively and so are leviable to service tax under the category of BAS.

49. Section 65(19) of the Finance Act defines BAS and the relevant portion contained in clause (ii) is reproduced below :-

"business auxiliary service" means any 65(19) service in relation to :-

(i) xxxxxxxx

(ii) promoting or marketing of service provided by the client;

(iii) xxxxxxxx

to

(vii) xxxxxxxx

50. This is a taxable service under Section 65(105)(zzb) of the Finance Act and the relevant portion is quoted below :-

”taxable service” “65(105)(zzb) means any service provided or to be provided to a client, by any person in relation to business auxiliary service.”

51. ”Air travel agent” has been defined in Section 65(4) of the Finance Act and the relevant portion is reproduced below :-

“65(4)”air travel agent” means any person engaged in providing any service connected with the booking of passage for travel by air.”

52. It is taxable under Section 65(105)(l) of the Finance Act and it is reproduced below :-

“65(105)(l)”taxable service” means any service provided or to be provided to any person by an air travel agent in relation to the booking of passage for travel by air”

53. The issues shall now be considered separately.

Whether the air travel agent is promoting it own business and not the business of the airlines

54. According to the appellant/interveners, the air travel agents are rendering services to passengers by providing options relating to travel routes, accommodation, booking of tickets and so any increase in the number of bookings would automatically result in an increase in the business of the air travel agents. It is their submission that this may also incidentally result in the increase in the business of the airlines, but it cannot be treated as promotion and marketing services.

55. For an activity to be considered as promotional, it is necessary that a service provider must “promote” or “endorse” the service of the client. It has, therefore, to be seen whether in the present case the travel agent is encouraging a passenger to purchase a ticket of a particular airline. The facts reveal that the travel agent is only providing options to the passenger and it the passenger who determines the airline for travel. It is only when the target of having achieved the pre-determined number of bookings is achieved that the airline pays an incentive to the travel agent. It cannot, therefore, be said that the travel agent is *promoting the services of any airline. Incidentally, the airlines may benefit if more tickets are sold, but this would not mean that the travel agent is providing a service for promoting the airlines.*

56. In this connection it would be pertinent to refer to the decision of the Madras High Court in Airlines Agents Association. It was sought to be contented by the assessee that air travel agents were promoting the business of the airlines and in consideration of such services the airlines were paying commission to the air travel agents. It was also the contention that the commission received from the airlines had nothing to do with the services offered by the air travel agents to the passengers. The Madras High Court did not accept this contention advanced on behalf of the assessee and it was held that the air travel agents were rendering services to the passengers. The High Court, therefore, held that the commission paid to the air travel agents had a direct nexus to the "air travel agent" services rendered to the passengers, even if it indirectly benefited the business of the airlines. The High Court, therefore, held that "air travel agent" were not promoting or marketing the business of the airlines. The relevant portion of the judgment is reproduced below :-

"14.In the first place, it will have to be seen as to whether the argument regarding the factual position involved is correct. The Learned Senior Counsel appearing on behalf of the petitioners argues that the commission that the air travel agents earn from the airlines is not on account of the services that they give to the air-travellers but because they procure business for the airlines. This is the basic submission. Now, it is obvious that the airlines give the commission to the air travel agents and undoubtedly the air travel agents provide business for the airlines. However, it has to be noted that unless the air travel agents provide a service to the customers, there would be no question of their getting a commission from the airlines. It is not as if the air travel agents get a fixed commission or income from the airlines irrespective of the passages booked by them in favour of the customers in the nature of a "retainer fee" or "guarantee money", at least that is not the case pleaded before us.

Therefore, unless the air travel agents book the tickets and thereby unless they provide the services to the customers, they do not become entitled to any commission. Their commission is entirely depended on and connected with the passage they book for the customers. It cannot, therefore, be said that the commission that the air travel agents get from the airlines is independent of and distinct from the services that they provide to the air-travellers and are relatable to the business that they provide to the airlines. On the other hand, since there is no guarantee money given or no fixed commission given, which has no nexus with the bookings that an air travel agent achieves for the airlines, it has to be said that the air travel agent's commission is integrally connected with the booking that he makes and is the process the services that he gives to the customers. Once this hurdle is cleared, the very basis of the argument on behalf of the petitioner' case goes away. From the specific language of the provisions, particularly of Section 65(3) and Section 65(48)(1), the nature of the service, which is taxed, is absolutely clear. It in only on the basis of the service that is provided which is made taxable. In our opinion, therefore, the commission that the air travel agents get is on account of this service because in the absence of this service being given to the customers, an air travel agent is not to get anything. We may also say that the customer gets the service not for any extra charges. The air travel agents are not supposed to charge anything more than the value fixed for the passages by the airlines. Therefore, the commission that is earned by the air travel agent has a direct nexus with the booking that he makes for the air-travellers. If, in the process, the airlines is benefited and offers some commission that would not change the nature of the service provided by the air travel agent and it cannot be said that the service is provided only to the airlines and not to the air traveller. On the other hand, we may say that it is because the air travel agent gives services to the air-traveller that the airlines is benefited, the tax is intended and in reality is imposed as against the service provided by the air travel agent to the customer in the absence of which, there would be no question of any commission. The contention of the Learned Counsel that *because of Section 67(k), the nature of the tax itself changes is incorrect."*

(emphasis supplied)

57. The judgment rendered by the Kerala High Court in Commissioner of Central Excise v. Shabeer Travels [2011 (24) S.T.R. 171 (Kerala)] also needs to be referred to in this connection. A sub-agent was receiving commission for booking airlines ticket through IATA agent. The contention of the Department that the sub-agent was rendering BAS to IATA agent was not accepted by the High Court and it was held when an assessee is in the business of booking air tickets though another air travel agent, the assessee essentially renders "air travel agent" services to the main travel agent and would, therefore, not be liable to pay service tax under the category of BAS. The relevant portion of the judgment is reproduced below :-

2. The order under challenge is one issued by CESTAT holding that the respondent is engaged in travel agency business, which was brought under service tax net with effect from 10-9-2004. The respondent can be assessed for the service charges under the category, travel agency service. However according to the appellant, the respondent is engaged in business auxiliary service falling under Section 65(105)(zzb) of the Finance Act, 1994 with effect from 1-7-2005 and so much so, demand of tax under this head is tenable. We are unable to uphold the appellant's contention, because, admittedly, the respondent is engaged in booking tickets and making arrangements for travel of passengers under agreement with a well-known travel agency, M/s. Akbar Travels. For services rendered, respondent is paid commission, mainly by Akbar Travels. The Tribunal on facts, found that the service rendered by the respondent is essentially travel agency service as agents of the main travel agency, M/s. Akbar Travels. In the eye of the Tribunal, the respondent assessee is engaged in travel agency business. We do not think that the respondent could be assessed under business auxiliary service. Counsel for the respondent also submitted that the respondent has taken the issues for payment of tax for the travel agency service and in fact, excess tax paid is refunded by *the Department. In the circumstances, we do not find any merit in the appeal by the Department against the order of the CESTAT. Consequently, we dismiss the appeal. However, it is for the appellant to assess and levy tax for the travel agency service carried on by the respondent as well as by M/s. Akbar Travels. However, the Standing Counsel submitted that there is nothing on record to prove the claim of the respondent. Neither the respondent has taken any registration nor remitting any tax. It is only the failure on the part of the appellant because, the Tribunal had given freedom to the appellant to recover tax from the respondent for the travel agency service.*

(emphasis supplied)

58. Thus, by rendering of services connected to travel by air, a travel agent would render "air travel agent" services, which services cannot be said to be for 'promotion or marketing' for the airlines.

Whether the air travel agent is promoting the business of CRS companies

59. As noticed above, the CRS Companies provide online portal through which the travel agents book the tickets of various airlines for the passengers. The contention of the appellant/interveners is that the use of CRS software is to enhance the business of the travel agents, while that of the Department is that the travel agents promote the services of the CRS Companies.

60. It is seen that the CRS commission is paid to a travel agent if he is able to attain an agreed level of segments to be booked. A passenger is not aware of the CRS Company being utilized by the travel agent for booking the segment nor can a passenger influence a travel agent to avail the services of a particular CRS Company. What is important to notice is that for an activity to qualify as "promotional", the person before whom the promotional activity is undertaken should be able to use the services. The passenger cannot directly use the CRS software provided by the Company to book an airline ticket. It cannot, *therefore, be said that a travel agent is promoting any activity before the passenger.*

61. The matter can be examined from another aspect. For booking a ticket, a travel agent would require a system to book the tickets. A travel agent is free to choose any CRS system. A passenger would never request a travel agent to book his ticket only through Amadeus/Galileo/Abacus system. Can it, therefore, be said that the travel agent is engaged in the promotion of a particular CRS system.

62. In this connection reliance has been placed by the Learned Counsel for the appellant/interveners upon a Circular dated April 16, 2010 issued by Central Board of Excise and Customs relating to service tax on reinsurance commission. The relevant portion of the Circular is reproduced below :-

"In terms of Section 101A (Part IV-A) of the Insurance Act, 1938, every insurer dealing in insurance business is required to reinsure a specified percentage of sum assured with another insurance Company.

2. The Insurance Company pays premium to the reinsuring Company for this service. However, a part of such premium is deducted and kept by the insurance Company for meeting the administrative expenditure. In other words, the insurance Company and the reinsurance Company jointly bear the expenses for running the insurance/reinsurance business. This shared expense is commonly known as 'commission' though strictly it is not in the nature of a commission. It may be pertinent to mention that the customer/beneficiary deals only with the insurance Company and may not even be aware of the role of reinsurer and the backroom operations between the insurance Company and the reinsurer.

3. As per the provision of the Finance Act, 1994, insurance as well as reinsurance are subject to service tax. The Board has received representations that notices have been issued demanding service tax on the amounts deducted by the insurance Company (in other words paid by the reinsurance Company) on the ground that it is the consideration for the *insurance Company providing business auxiliary service (BAS) to the reinsuring Company. The notices alleged that the insurance Companies are promoting the business of reinsurers thereby providing them the BAS.*

4. The issue has been examined. As explained in para 2 above, the arrangement between the insurance Company and the reinsurer is only sharing of expenses and there is no service provided by the insurance Company to the reinsurer for a consideration. Since the policy holder may not even be aware of the operations of the reinsurer, it cannot be said that the payment made by the reinsurer to the insurance Company is for its business promotion or a service on behalf of the reinsuring Company (i.e. Business Auxiliary Service). In fact, it is the reinsurer which provides insurance service to the insurance Company. As both the insurance Company and reinsurer pay service tax on the entire amount of premium charged by them, the question of charging service tax under any other taxable service does not arise."

(emphasis supplied)

63. It is seen from the aforesaid Circular that the commission deducted by the insurance Company was being subjected to tax alleging that the insurance Company was providing BAS to the reinsurance Company by promoting the business of the reinsurance Company. The Board clarified that such an arrangement between the insurance Company and the reinsurer Company was for sharing of expenses only and no BAS was rendered as the customer of the insurance Company was only unaware of the role of the reinsurer. The Circular, therefore, reinforces that if the audience of an alleged promotional service is unaware of the service of the client, no "promotional or marketing services" can be said to have been provided.

64. Learned Authorized Representative of the Department, however, submitted that the promotion of "reservation functionality" of a particular CRS Company is not an activity which is connected to the booking of air ticket per se, because the consideration received in the form of commission is not

dependent on booking of ticket but dependent upon particular functionality of a particular CRS Company which has been used to book the ticket. Thus, the service cannot fall under "air travel agent" service but would be an activity of promotion of the services provided by CRS Company. The contention, therefore, of the Learned Authorized Representative is that an air travel agent has an option to choose amongst the various CRS Companies and the exercise of such choice is the occurrence of the event of promotion.

65. Mere selection of software or exercising of a choice would not result in any promotional activity. The Department has not pointed out at any 'activity' undertaken by an air travel agent that promotes the business of the CRS Company.

66. The Department has also contended that in the present case, the demand under BAS is justified as three parties are identifiable, namely, the CRS Company, travel agent and a passenger.

67. The passenger cannot be deemed to be an audience for promotion of the business of CRS Companies, for the passenger can neither book directly through a CRS Company nor can a passenger be influenced by any travel agent to book through a particular CRS Company.

Section 65A of the Finance Act

68. In the alternative, Learned Counsel for the appellant and the Learned Counsel for the interveners placed reliance upon Section 65A of the Finance Act to contend that even if it is assumed that the air travel agents are incidentally rendering promotional services to the airlines/CRS Companies, then too, in the view of the provisions of Section 65A of the Finance Act, the service would be more appropriately classifiable under "air travel agent" service.

69. To appreciate this contention, it would be necessary to examine Section 65A of the Finance Act and it is reproduced below :-

"65A (1) For the purposes of this chapter, classification of taxable services shall be determined according to the terms of the sub-clauses (105) of section 65.

(2) When for any reason, a taxable service is prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merits consideration."

(emphasis supplied)

70. The two competing entries are "air travel agent" service and "BAS". It would be seen from the definition of "air travel agent" that it includes all services connected with or in relation to the booking of passage for travel by air. The services in question are booking of airlines tickets and for achieving a pre-determined target, the air travel agent also receives an additional amount in the form of incentives/commission from the airlines or the CRS Companies. The receipt of incentives/commission would not change the nature of the services rendered by the travel agent.

71. This apart, the definition of BAS would also reveal that the service provider must promote or market the service of a client. As noticed above, it is not a case where the air travel agent is promoting the service of airlines/CRS Companies. The air travel agent is, by sale of airlines ticket, ensuring the promotion of its own business even though this may lead to incidental promotion of the business of the airlines/CRS Companies. Thus, in terms of *the provision of Section 65A(2)(a) of the Finance Act, the classification of the service would fall under “air travel agent” services and not BAS.*

Whether incentives paid for achieving targets are taxable?

72. The contention advanced by Learned Counsel of the interveners is that incentives cannot be construed as “consideration” and if it is so, no service tax can be levied on this amount because under Section 67 of the Finance Act, service tax is leviable on “consideration”, which is the gross amount charged by the service provider for rendering a particular taxable service.

73. It would, therefore, be appropriate to examine the scope of the term “incentives”. Incentives are generally given to encourage performance of a party. The factual position described above, reveals that incentives have been paid by the airlines or CRS Companies to travel agents when they achieve a pre-determined target of sales.

74. The relevant portion of Section 67 of the Finance Act, on which reliance has been placed by Learned Counsel for the appellant, is reproduced below :-

“67. (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.”

(emphasis supplied)

75. Section 67 of the Act deals with valuation of taxable services for charging service tax. Sub-section (1) of Section 67 provides that where service tax is chargeable on any taxable service with reference to its value, then such value shall, where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by the service provider. It is, therefore, clear that only such amount is subject to service tax which represents consideration for provision of service and any other amount which is not a consideration for provision of service cannot be subjected to service tax.

76. In this connection, it would be appropriate to refer to the decision of the Supreme Court in Union of India v. Intercontinental Consultancy and Technocrats [2018 (10) G.S.T.L. 401 (S.C.)]. The Supreme Court observed that service tax is on the "value of taxable services" and, therefore, it is the value of the services which are actually rendered which has to be ascertained for the purpose of calculating the service tax. It is for this reason that the expression "such" occurring in Section 67 of the Act assumes importance. The Supreme Court, therefore, observed that the authority has to find what is the gross amount charged for providing "such" taxable services and so any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as the amount is not calculated for providing "such taxable service." This, according to the Supreme Court, is the plain meaning attached to Section 67, either prior to its amendment on 1 May, 2006 or after this amendment.

77. Consideration, which is taxable under Section 67 of the Finance Act, should be transaction specific. Incentives, on the other hand, are based on general performance of the service provider and are not to be related to any particular transaction of service. It needs to be noted that commission, on the other hand, is dependent on each booking and not on the target. If the air travel agent does not achieve the predetermined target, incentives will not be paid to the travel agents.

78. In this connection it will be appropriate to take note of the decision of the Federal Court of Australia AP Group. The Federal Court of Australia held that in order to levy tax, the payment must be attributable to a particular supply and not to supplies in general and so the target incentives paid by a motor vehicle manufacturer to a dealer would not qualify as consideration as the incentives would be in relation to all supplies and not in relation to a particular supply. The relevant portion of the decision of the Federal Court is reproduced below :-

"17.Insofar as the Ford "retail target incentive" payments are concerned, Ford agreed with its dealers to pay certain sums of money to dealers which achieved monthly and quarterly sales targets that Ford set based on the dealer's size and past performance. Targets were based on the number of cars sold to eligible customers in the qualifying period, not the value of the cars sold. Once a car was sold and delivered to an eligible customer the details would be entered into the vehicle information system and, in about the middle of the following month, based on the information so entered Ford would issue the dealer with a tax invoice for the incentive payment plus 10% GST and shortly thereafter pay that amount to the dealer.

30. The Tribunal reached a different view about the Ford "retail target incentive" payments. It reasoned as follows at [I06]-[I08]:

The last remaining payment type is Ford's I06. retail target incentive payment. It is clear from the "Drive for Success" program that the payment is triggered at the time, and by reason, of the Applicant's recording of a level of new sales for a relevant period of eligible vehicles to eligible customers in excess of a specified target set by Ford. Significantly, though, and unlike the fleet rebates and the run-out model support payments, the target incentive payment has no nexus with any one particular supply. It is a payment made in connection with supplies generally, or perhaps more accurately, it is a payment made in connection with the making of supplies generally.

53.On analysis, the so-called supplies for consideration identified by the Commissioner are nothing more than the encouragement of an overall business relationship between the manufacture and the dealer to the mutual benefit of both. The relationship involves a whole raft of obligation from one to the other all, presumably, with the ultimate objective of maximizing their respective commercial positions. As the AP Group put it, the overall relationship contemplates a continuing dialogue between wholesaler and retailer in which promises are routinely exchanged, but to characterize this dialogue as involving supply after supply is unrealistic and impractical. To characterize the payment of the incentives intended to encourage the overall relationship to operate efficiently as involving supplies for consideration equally unpersuasive. A dealer will always wish to sell as many cars as practicable and to move old stock to make way for new stock. So too a dealer will always wish its ordering arrangements to be the most efficient and economically beneficial to it. The manufacture will have the same objectives. It is this context which underpins the Tribunal's conclusion that the payments are not for the supply of anything by the dealer. As the Tribunal said at [86] the dealer (which must be inferred to act in an economically rational manner in the ordinary course) will always want to run the business in this way. The fact that the dealer receives a payment as an incentive when certain thresholds associated with running the business in this way does not mean that the dealer is supplying a service to the manufacturer for consideration. If the incentive payment were not available there is no basis to infer that the dealer would not behave in the same way for free. For these reasons there cannot be said to be any supply for consideration in these arrangements."

(emphasis supplied)

79. Reference can also be made to the decision of this Tribunal in Rohan Motors Limited v. Commissioner of Central Excise, Dehradun [2020 (12) TMI 1014-CESTAT NEW DELHI]. The Tribunal held that incentives are not leviable to service tax. The relevant paragraph is reproduced below :-

9. The first issue that arises for consideration is whether service tax would be leviable on incentives prior to July, 2012.

10. As noticed above, the appellant purchases vehicles from MUL and sells the same to the buyers. It is clear from the agreement that the appellant works on a principal to principal basis and not as an agent of MUL. This is for the reason that the agreement itself provides that the appellant has to undertake certain sales promotion activities as well. The carrying out of such activities by the appellant is for the mutual benefit of the business of the appellant as well as the business of MUL. The amount of incentives received on such account cannot, therefore, be treated as consideration for any service. The incentives received by the appellant cannot, therefore, be leviable to service tax.

(emphasis supplied)

80. It, therefore, clearly transpires from the aforesaid decisions that incentives paid for achieving targets cannot termed as "consideration" and, therefore, are not leviable to service tax under Section 67 of the Finance Act.

81. The reference to this Larger Bench has arisen for the reason that the Division Bench hearing this appeal expressed doubts about the view taken by the Division Bench in D. Pauls. The appellant therein was a travel agent who had used the CRS system of Galileo, Amadeus and Abacus which had paid incentives to the appellant for the period from October 1, 2003 to December 21, 2008. The lower authorities had observed that the services provided by the appellant fell under the category of "tour operator" services as defined under Section 65(11)(o) of the Finance Act. In the appeal before the Tribunal, the Learned Authorized Representative of the Department had submitted that the services were covered under "BAS". The Division Bench hearing the appeal observed that the services provided by the appellant were rightly covered under that heading of "BAS" as defined in Section 65(19) of the Finance Act. The relevant portion of the decision is reproduced below :-

"2. The brief facts of the case are that, the assessee-appellants are registered under the category of "Air Travel Agent's

Services" and they have been issuing air tickets of various airlines and paying Service Tax on the amount of basic fare. For the purpose, the assessee-appellants used Computer Reservation System (CRS) of M/s. Galileo India, Amadeus India and Calleo Distribution to encourage their business, for which they have been paying the incentives against the segment booked by the assessee-appellants during the disputed period from 1st October, 2003 to 31st December, 2008. The lower authorities has observed that the services provided by the assessee-appellants fall under the category of "Tour Operator's Services" as defined under Section 65(11)(o) of the Act. Being aggrieved, the assessee-appellants have filed the present appeal.

3. xxxxxxxxxx

4. xxxxxxxxxx

5. After hearing the rival submissions and on perusal of record, it appears that the assessee-appellants are travel agent and providing the tickets for air as well as railways. They also act as the "Rail Travel Agent's Service" which is covered under Section 65(87) of the Finance Act, 1994 and liable to pay the Service Tax. Regarding the commission/incentive received from GDS/CRS, it may be stated that the said GDS/CRS companies are providing adequate free of cost computers with essential accessories and software to the travel agents at their premises. These computers are connected worldwide to the GDS/CRS, which linked to ticket sales offices of various airlines, hotels and car rental agencies spread across the world. They are by using these GDS/CRS for booking tickets, receiving incentives from the said companies for every segment booked by them. Hence, the service provided by the assessee-appellants has rightly been covered under the heading "Business Auxiliary Service" as defined under Section 65(19) of the Finance Act, 1994. Thus, we are of the view that the assessee-appellants being providing "Tour Operator's Service", the commission received by them is for "Business Auxiliary Service" under Section 73(1) of the Finance Act, 1994. The case law cited by the Learned Counsel for the assessee-appellants is not applicable in the instant case as *the same was dealing with the advertising agencies. So, on the facts, the ratio laid down in the said case is not applicable to the present case is not applicable to the present case."*

(emphasis supplied)

82. A perusal of the aforesaid decision would indicate that though in paragraph 2 of the decision, the Division Bench noted that the lower authorities had categorized the services rendered by the appellant as "tour operator", but in paragraph 5 of the decision the Division Bench observed that the services provided by the appellant were rightly covered under "BAS". In fact, the Division Bench also observed that since the appellant was providing "tour operator" services, the commission received by them is for "BAS" under Section 73(1) of the Finance Act. There is no discussion in the decision as to why the commission received would fall under "BAS". The decision also does not specify the particular sub-clause of Section 65(19) of the Finance Act that defines ""BAS". It also needs to be noted that on behalf of the appellant it was contented that no marketing or promotion was conducted by the appellant since it is the choice of the appellant to choose a particular CRS Company and that the customer also does not even know under which CRS system the ticket was booked, but there is no discussion on this aspect nor is there any discussion on the submission of the appellant that the amount received from the CRS Companies cannot be treated as deemed commission since it was merely an incentive and did not attract service tax.

83. These contentions as to whether the air travel agent is promoting the business of the airlines or the CRS Companies have been dealt with in the earlier portion of this order. The order also discusses whether the classification of service would fall under "air travel agents" services or under "BAS" and whether incentives paid for achieving the targets are taxable.

84. The inevitable conclusion, therefore, that follows from the above discussion is as follows :-

(i) the air travel agent is promoting its own business and is not promoting the business of the airlines;

(ii) the air travel agent is not promoting the business of the CRS Companies;

(iii) in any view of the matter, the classification of the service would fall under "air travel agent" service and not "BAS" in terms of the provisions of Section 65A of the Finance Act; and

(iv) the incentives paid for achieving the targets are not leviable to service tax.

85. In this view of the matter, it would not been necessary to decide that once the IATA agent has discharged his service tax liability in terms of Section 67 of the Finance Act or Rule 6(7) of the 1994 Rules, no further service tax could be demanded on the amount paid to or passed on by the IATA agent.

86. In the light of the aforesaid discussion and findings, the answers to the six issues that have been referred to the Larger Bench are as follows :-

First issue : The incentives received by a service recipient from a service provider cannot be subjected to levy of service tax.

Second issue : This issue does not arise for consideration in this appeal as the show cause notice and the adjudicating order had confirmed the demand under Section 65(19)(ii) of the Finance Act;

Third issue : A passenger cannot be deemed to be an audience for the promotion of the business of CRS Companies; and

Fourth, Fifth and Sixth issues : In view of the discussion and findings these issues do not arise for consideration and are, therefore, not being answered.

87. The papers may now be placed before the Division Bench for deciding the appeal."

4.6 Since on the issue of the leviability of the service tax, under the category of 'business auxiliary services", on the incentives received by the appellant in this appeal have been considered and decided by the larger bench, in favour of appellant holding against the leviability, this bench will be barred from reconsidering the same issue. We also find that once the issue of leviability under the category of "business auxiliary services" is decided in favour of the appellant, the demand of service tax fails and consequently the demand for interest and penalties too will fail.

5.0 In view of above, the appeal is allowed and the impugned order set aside.

(Order pronounced in the open court on 29.10.2021)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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