CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 88653 of 2013

(Arising out of Order-in-Original No. 17-21/STC-I/SKS/13-14 dated 05.06.2013 passed by the Commissioner of Service Tax, Mumbai)

Cathay Pacific Airways Limited .... **Appellants**
2, Brady Gladys Plaza, 2nd Floor,
1/447, Senapati Bapat Marg,
Lower Parel, Mumbai - 400 001.

Versus

Commissioner of Service Tax-I, Mumbai .... **Respondent**
5th Floor, GST Bhawan,
115, Maharshi Karve Road,
Opp. Church gate Station
Mumbai – 400 020.

Appearance:

Shri Anil Kumar Makhija, Advocate for the Appellant

Shri Badhe Piyush Barasu, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85510/2025

Date of Hearing: 24.10.2024
Date of Decision: 03.04.2025

Per: M.M. PARTHIBAN

This appeal has been filed by M/s Cathay Pacific Airways Limited, Mumbai (herein after referred to as 'appellants', for short) assailing the Order-in-Original No. 17-21/STC-I/SKS/13-14 dated 05.06.2013 (referred to as 'impugned order') passed by the Commissioner of Service Tax, Mumbai.

2.1. Briefly stated, the facts of the case are that the appellants herein *inter alia*, are engaged in the business of transportation of passengers and goods by airplanes/aircrafts and has various branch offices across the world for the purpose of administrative and legal compliance in various countries where they operate. The appellants have their branch offices at Mumbai, Kolkata, Chennai and New Delhi. The appellant's company is incorporated in Hong Kong and their registered office is situated at 5th Floor, Swire House, 9 Connaught Road, Central Hong Kong i.e., outside India. The registered/head office of appellants international airline office undertakes business and management decisions. The head office of the appellants at Hong Kong had entered into an agreement dated 05.04.1990 with M/s Abacus Distribution Systems PTE Ltd., Singapore and similar service providers like Amadeus, Galileo, Sabre, Worldspan etc., who were providing Centralized Reservation System (CRS), Data Retrieval System (DRS), Global Distribution Systems (GDS) in connection with computerized reservation system for airline travel, comprehensive information on reservations, ticketing, communications, distribution and other travel related functions on behalf of the airline shareholders and participating carriers. The dispute in the present case is with reference to service tax liability of the appellants office in India for such services received by them, which in the department's view are taxable under the category of "Online Information and Data Base Access or Retrieval Service". The Revenue contended that the appellants in India had received such service from foreign based CRS/GDS Companies, and, therefore, liable to pay service tax under Reverse Charge Mechanism (RCM) contemplated under section 66A of the Finance Act, 1994. Therefore, show cause proceedings were initiated by the Directorate General of Central Excise Intelligence (DGCEI) and statements were recorded from the persons concerned. On conclusion of the investigation, the department had issued Show Cause Notice (SCN) dated 20.10.2008 proposing the demand of service tax and for imposition of penalty, covering the extended period from July, 2003 to March, 2008; further, for subsequent periods from April, 2008 to March, 2009; April, 2000 to March, 2010; April, 2010 to March, 2011; and April, 2011 to March, 2012 also four more SCNs were issued to the appellants demanding service tax and for imposition of penalties. In adjudication of the above SCNs, the Commissioner of Service Tax vide impugned order dated 05.06.2013, had confirmed the proposals made in the SCNs, except for dropping the demand of service tax for the period 01.04.2003 to 17.04.2006, on the ground that the provision of Section 66A *ibid* was introduced with effect from 18.04.2006 and therefore the demand of service tax would survive from that period onwards. Feeling aggrieved with the impugned order, the appellants had filed this appeal before the Tribunal bearing the appeal No. ST/88653 of 2013.

2.2 On hearing the appeal and on perusal of the case records, written submissions made by both parties, the Division Bench of this Tribunal, had expressed that they are not in agreement with the views expressed by the

Tribunal in *British Airways vs. Commissioner of Central Excise (Adjn.), Delhi* and, therefore, referred the following three issues to be decided by a larger bench of the Tribunal to be constituted by the Hon'ble President of the Tribunal:

> *"(a) What is true scope and interpretation of Section 66A of the Finance Act, 1994*
>
> *(b) Whether the tribunal has rightly decided in case of British Airways that branch office for the purpose of section 66A was distinct entity from the head office.*
>
> *(c) Whether the tribunal has rightly in case of British Airways held that the payments made by the Head Office against the service received by the branch office located in India, will make the Head Office the recipient of service, for the purpose of Section 66A of the Finance Act, 1994."*

2.3 The Larger Bench of the Tribunal vide Interim Order No.23/2024 dated 02.09.2024, after hearing both sides had decided on the issues referred to them and had forwarded those conclusive answers to the questions raised, back to the Regional Bench which had referred the case, for deciding the appeal on merits of the case. Therefore, the present appeal has been placed before this Bench for hearing and disposal on the merits of the case.

3. Heard both sides and perused the records of the case. We have also considered the paper book containing submissions made in writing by the learned Advocate appearing for the appellants and the learned Authorized Representative of the Department.

4. We find that the dispute in this case lies in the narrow compass of deciding whether service tax is liable to be paid or not, in respect of the Online Information and Database Access or Retrieval (OIDAR) services contracted by the overseas head office of the appellants with Computer Reservation System (CRS)/Global Distribution System (GDS) companies to be supplied to them, under the Finance Act, 1994 and the Rules made there under; and whether the Indian branch office of the appellants would be liable to pay service tax on reverse charge basis for such services under Section 66A *ibid* during the period 18.04.2006 to 30.06.2012.

5.1 During the disputed period covering 18.04.2006 to 30.06.2012, the levy of service tax under the Finance Act, 1994 was governed by the provision of Section 66 *ibid* by imposing such tax on selective services defined as 'taxable service' under Section 65(105) *ibid*. The relevant provisions are as under:

"Definitions.
Section 65. *In this Chapter, unless the context otherwise requires,—*
…
(105) "taxable service" means any service provided or to be provided,—
…
(zh) to any person, by any person, in relation to on-line information and database access or retrieval or both in electronic form through computer network, in any manner;

Charge of service tax.
Section 66. *There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (a), (d), (e), ……. (z), (za), (zb), (zc), (zh), (zi), (zzzzv) and (zzzzw) of clause (105) of section 65 and collected in such manner as may be prescribed:*
Provided *that the provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.*

Charge of service tax on services received from outside India.
Section 66A. *(1) Where any service specified in clause (105) of section 65 is,—*

> *(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and*
>
> *(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,*

such service shall, for the purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided *that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:*

Provided further *that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.*

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.
Explanation 1.—A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.
Explanation 2.—Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

(3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint."

From plain reading of the above legal provisions, it transpires that during the period prior to negative list regime, for the purpose of charging service tax on any service, the service provided by one person to another shall be covered under the scope and ambit of 'taxable service' as defined under Section 65(105) *ibid*, and there shall be a levy on such taxable service in terms of Section 66 *ibid*. Once these two provisions are fulfilled, then such taxable service on which service tax is payable at 12% *advalorem*, may in situations explained in Section 66A *ibid* shall be paid under reverse charge basis. Subsequent to the introduction of negative list regime of service tax w.e.f. 01.07.2012, levy of service tax was provided under Section 66B *ibid*. Since the disputed period covered in the present case is up to 30.06.2012, legal provisions as existed prior to the negative list regime is relevant, in the present case.

5.2 In the present factual matrix of the case, the OIDAR service has been provided by M/s Abacus Distribution Systems PTE Ltd., Singapore to the appellant's head office situated in Hong Kong, in terms of agreement dated 05.04.1990; and such services provided by a person situated in Singapore to another person situated in Hong Kong are not covered under the scope of levy of service tax under Section 66 ibid. It also transpires on simple reading of the legal provisions under Section 66A *ibid*, that only in respect of taxable services received by a person in India, on which service tax levy has been imposed under Section 66 *ibid*, the deeming provision of treating the recipient of service, as though he had himself provided such service in India for the purpose of paying service tax would apply. In the absence of statutory levy of service tax on the OIDAR services in the present case, the appellants cannot be brought under the scope and ambit of Section 66A *ibid*, in order to confirm the demands of service tax as proposed in the SCNs.

5.3. In the impugned order, learned adjudicating authority had held that the appellants having an office in India is used for marketing of their business and they are the beneficiary of OIDAR service, for which payment is made by them through their head office and in terms of Section 66A *ibid* read with Rule 2 (d)(iv) of Service Tax Rules, 1994, the appellant's office in India are liable to pay service tax for the period from 18.04.2006 onwards.

5.4 The above issues discussed by the learned adjudicating authority and conclusions arrived at by him in the impugned order for demand of service tax during the disputed period, have been dealt with in detail by the Larger Bench of the Tribunal in the Interim Order dated 03.09.2024 *(supra)* by relying on the judgement of the Hon'ble Supreme Court in the case of *Formula One World Championship Ltd. vs. CIT, International Taxation-3, Delhi & Anr - (2017) 394 ITR 80*. The relevant paragraphs of the said order are extracted and given below:

> *"28. As seen above, the CRS/GDS companies enter into an agreement with the head office of the Airline. The head office of Airline is required to provide data pertaining to passenger information, schedules, space availability, fares to the CRS/GDS companies for display thereon. The head office maintains and updates the server with relevant data which is connected to the master server of the CRS/GDS companies. All the rights to access and update the server located at the head office rests with the head office. Thus, in case a contractual agreement exists between the CRS/GDS companies and the head office of the Airline, then the head office of the Airline is the establishment most directly concerned with the receipt of services provided by CRS/GDS companies.*
>
> *29. The India branch office of the Airline does not provide any data to the CRS/GDS companies. The India branch office has no connectivity or accessibility to the CRS/GDS system and there is no flow of information either to or from the India branch office of the Airline. It is only the system and servers of the head office of the Airline, located outside India, which are connected to the CRS/GDS platform. Even if the India branch office of the Airline makes any reservations/ticket bookings, it does so on the system of the head office and not through the system of the CRS/GDS companies. The India branch office of Airline cannot, therefore, be considered as the establishment most directly concerned with the receipt of services provided by CRS/GDS companies.*
>
> *30. It is, therefore, not possible to accept the contention of the learned authorized representative appearing for the department that the head office provides a bundle of services, including services to the branch office, and in return receives a lump-sum amount regularly. As noticed above, the head office does not provide any service to the India branch office. The amount remitted by the India branch office to the head office is towards the tickets sold in India through the travel agents, which amount has been received by the branch office through the International Air Transport Association, after deducting the local expenses incurred in India. The said amount is not remitted by the India branch office for any alleged services rendered by the head office.*
>
> *31. It is also not possible to accept the contention of the learned authorized representative appearing for the department that the ultimate beneficiary of engaging CRS companies is the appellant. From the facts on record, it is clear that the appellant in India has not utilized any service of the CRS companies, for it is the head office that avails the services of CRS companies and makes payment to them…*
>
> *xxx xxx xxx xxx*
>
> *37. The Supreme Court, thereafter, concluded:*
>
> > ***"76) We are of the opinion that the test laid down by the Andhra Pradesh High Court in Visakhapatnam Port Trust case fully stands satisfied. Not only the Buddh International Circuit is a fixed place where the commercial/economic activity of***

conducting F-1 Championship was carried out, one could clearly discern that it was a virtual projection of the foreign enterprise, namely, Formula-1 (i.e. FOWC) on the soil of this country. It is already noted above that as per Philip Baker27, a PE must have three characteristics: stability, productivity and dependence. All characteristics are present in this case. Fixed place of business in the form of physical location, i.e. Buddh International Circuit, was at the disposal of FOWC through which it conducted business. Aesthetics of law and taxation jurisprudence leave no doubt in our mind that taxable event has taken place in India and non-resident FOWC is liable to pay tax in India on the income it has earned on this soil."

(emphasis supplied)

38. The appellant does not dispute that it has a place of business in India. What the appellant disputes is that the place of business in India is not the recipient of service.

39. The aforesaid discussion would lead to the inevitable conclusion that the branch office in India is not the recipient of OIDAR services provided by CRS companies. It is the head office which is contractually entitled to receive the services rendered by the CRS/GDS companies and it is the head office which is contractually obligated to make payment for the services rendered by the CRS/GDS companies.

40. The reference would, accordingly, have to be answered in the following manner:

'(A) For the purpose of levy of service tax under reverse charge under section 66A of the Finance Act, the services should have been received in India by the recipient from the service provider who does not have any permanent establishment in India. The appellant, in the present case, is not the recipient of service and it is the head office located in Hong Kong that is the recipient of service. As the appellant has not received any service, it cannot be held liable to pay service tax in respect of the services rendered by the foreign CRS/GDS companies to the head office located outside India;

(B) In the present case, the Commissioner has recorded a finding of fact that the branch office and the head office are two separate persons. This issue would, therefore, not arise for consideration. In any case, it has been found as fact that the branch office and the head office are two separate persons; and

(C) The issue that arose for consideration in British Airways was whether the branch office was the recipient of service or not. The issue, therefore, that has been referred is beyond the dispute decided in British Airways. In any view of the matter, the branch office has not received any service from foreign CRS/GDS companies and it is the head office alone which has received the services and made payment. The appellant, which is the branch office, cannot be held liable to pay service tax under reverse charge under section 66A of the Finance Act.'

41. The papers may now be placed before the division bench for deciding the appeal on merits."

5.5 It is an undisputed fact on record that the appellants head office situated at Hong Kong had entered into contracts with the CRS/GDS service providers under specific arrangement involving computer systems and other equipment owned by the appellant's head office for booking of airlines tickets and related information through the service provider's system by laying down in specific terms and conditions, the details of responsibilities of each side. From the above, it transpires that the agreement/arrangement by which the appellants had given their equipment for providing OIDAR service is restricted only to those two persons and does not involve the appellants situated in India. Therefore, such services involved between two persons situated outside India, cannot be classified as supply of OIDAR services for the purpose of levy of service tax in terms of Section 65 (105) (zh) of Finance Act, 1994.

6. In view of the above discussions, we are of the considered view, that both on the facts of the case and on the interpretation of legal provisions of the Finance Act, 1994 as determined by the Larger Bench of the Tribunal in Interim Order No.23/2024 dated 02.09.2024, the demand of service tax on OIDAR services under clause (zh) of sub-section (105) of Section 65 *ibid* read with Section 66A *ibid* is not legally sustainable.

7. In view of the above, the appeal filed by the appellants is allowed by setting aside the impugned order dated 05.06.2013, with consequential relief, if any, as per law.

(Order pronounced in open court on 03.04.2025)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha