CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Misc. No. 60182 if 2024 in
Appeal No. 60166 of 2017

[Arising out of Order-in-Original No. DLI-SVTAX-004-COM-071-16-17 dated 30.11.2016 passed by the Commissioner –Central Tax, GST, Gurguram]

M/s Yatra Online Pvt Ltd **……Appellant**
1101-1103, 11th Floor, Tower B, Sector 39, Unitech Cyber Park, Gurgaon

VERSUS

Commissioner, CGST, Gurugram **……Respondent**
Plot No. 36-37, Sector 32, Gurugram 122001

WITH

Service Tax Appeal No. 60306 of 2019

[Arising out of Order-in-Original No. GST-GGM/Commissioner/Adj/YOPL/08/2018/16713 dated 29.11.2018 passed by the Commissioner –Central Tax, GST, Gurguram]

M/s Yatra Online Pvt Ltd **……Appellant**
1101-1103, 11th Floor, Tower B, Sector 39, Unitech Cyber Park, Gurgaon

VERSUS

Commissioner, CGST, Gurugram **……Respondent**
Plot No. 36-37, Sector 32, Gurugram 122001

APPEARANCE:

Present for the Appellant: Shri Arjun Raghavendera, Advocate

Present for the Respondent: Shri Rajpal Sharma, Authorized Representative

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60371-60372/2024

DATE OF HEARING: 21.03.2024
DATE OF DECISION: 26.06.2024

PER : P. ANJANI KUMAR

Brief facts of the case are that M/s Yatra Online Pvt Ltd (hereinafter referred to as 'Appellant') is engaged in the business of booking of air tickets for various domestic and international airlines and is registered with the service tax department vide STC No. AAACY2602DST001 under the category of "air travel agent". The appellantsbooks air tickets for the passengers to travel on airlines; in terms of the agreement with the airlines, the Appellant receives commission/ incentive from the airlines for facilitating the sale of air ticket for the airlines; the Appellant also receives a Convenience fee from the customer for booking the air ticket; in the event of a customer cancelling a booked ticket, the Appellant withholds a cancellation fee and refunds the remaining portion of the ticket price to the consumer. Two show cause notices 21.10.2015 and 06.03.2018 were issued to the appellants holding that the convenience fee and cancellation fee received or retained by the appellant was towards the consideration of 'Business Auxiliary Service" rendered by the appellant. The proposals in the SCNs were confirmed by the impugned orders dated 30.11.2016 by confirming Service Tax of Rs 24,06,95,410(Rs 13,68,31,521 on Convenience Fee for the period April 2010 to March 2015& Rs 13,68,31,521 on Cancellation Fee from 2010-11 to30.06.2012) and by order dated 29.11.2018 by confirming Tax of Rs 38,15,77,624 (for the period April 01, 2015 to June 30, 2017). Hence, these appeals.

1.1. In addition, the Department has also moved a miscellaneous application seeking change of name of Respondent from CCE, Delhi-IV to **Commissioner of Central Good & Service Tax, Gurugram**. Learned AR for the Department submits that the Central Board of

Indirect Taxes & Customs vide Notification No.02/2017-Central Tax dated 19.06.2017 specified that the appellant falls under the jurisdiction of CGST, Gurugram Commissionerate.

2. Shri Arjun Ragavendra, Counsel for the appellants, submits that the notice and impugned order are based on an erroneous understanding of taxing services offered in relation to booking of air travel tickets, displaying failureto understand the design of the law and its complete compliance by the Appellant; He submits that a combined reading of entry 65 (41) (l)Section 67 (k) of the Act leads to the conclusion that the air travel agent services are provided by the air travel agent to the customer and the consideration for provision of such service can be paid by the airline in the form of commission; this makes it abundantly clear that an entity 'A' can provide ATA service to a customer 'B' for which the consideration can be paid by the airline 'C' i.e., it is not necessary for the service recipient to pay for the service received; he relies on Hon'ble Madras High Court in Airlines Agents Association vs UOI 2006 3 STR 3. He further submits that as per the provisions of Section 67 of the Finance Act, 1994, the tax on the services provided by an Air Travel Agent was payable at the prevailing rate of Service tax under Section 66, on the gross amount of commission received by the agent from the airlines; however, sub-Rule (7) of Rule 6 of the Service Tax Rules, 1994 provided an option to the Air Travel Agents to pay Service Tax on the "basic fare" as defined in this sub-Rule, at the rate specified under that sub-Rule; the Air Travel Agent had the option to pay service tax either on the basis of actual commission received(Option 1: On actual commission) or to pay service tax at the specified percentage of base fare as

provided under Rule 6(7) (Option 2: On deemed commission); the option once exercised could not be changed during the financial year under any circumstances.

2.1. Learned Counsel for the appellants, submits, further, that vide Notification No. 22/1997-ST dated 26.06.1997 the amount received by the air travel agent, which is in excess of the commission received by him from the airline for the booking of passage for travel by air, was specifically made exempt from service tax; therefore, any amount, such as cancellation fee etc, was exempted from the levy of service tax.Hon'ble Tribunal held, in the case of Globe Forex and Travels Ltd vs CCE, Jaipur – I 2015 (37) S.T.R. 513 (Tri. - Del.), that cancellation fee paid to the Air Travel Agent in excess of the commission is exempt from the levy of service tax. He submits that in 2008, the definition of taxable service was amended by replacing the word 'to a customer' *with the words 'to any person'*, to make it abundantly clear that air travel agent services could be provided to both the customer and to the airline; after the introduction of negative list also, the option to discharge service tax , in relation to booking of passage for travel by air, on the deemed commission value continued vide Rule 6(7) of the Rules, continued.

3. Learned Counsel for the appellants, submits also that the impugned order does not reason why it holds the activity in question as BAS instead of ATAS; it merely reproduces the definition and upholds the classification of BAS; prior to 01.07.2012, taxable services are to be classified on the basis of – (i) Specific vs General description, (ii) Essential character, (iii) Order of precedence as prescribed in section 65A.

3.1. The convenience fee in the instant case is charged for booking air tickets online and cancellation fee is charged on cancellation of tickets already booked; both these are services offered to the customer who books on the website of the Appellantin relation to the booking of passage for travel by air; given this specific description under 65(105) (l), the general description of support or auxiliary services provided in relation to a client under 65(105)(zzb) is not applicable in the instant case; a bare perusal of the two categories makes it clear that business auxiliary service is a very general category, whereas the category of air travel agent service is a very specific one; more specific description should be preferred over a general description as held in CST, New Delhi Vs Globe Ground India Pvt Ltd [2015 (40) STR 417 (Del) and Premier Pest Control Pvt Ltd Vs CST2015 (38) STR 870 (Tri -Del)

3.2. Learned Counsel submits that notwithstanding the fact that the activities are clearly in relation to the booking of passage for travel by air"; if the activity is construed as a composite service where air ticket booking is held separate from the convenience of booking such air ticket online and the facility of cancellation of such air ticket, the essential nature of the composition of all the three activities is still one in relation to the booking of passage for travel by air; the convenience provided is exclusively for air ticket booking and so is the cancellation; therefore, even if the services are considered as composite services, by the essential character test, both the activities merit classification under the category of air travel agent services under 65(105)(l), rather than under the category of BAS under 65(105)(zzb).

3.3. Learned Counsel submits that notwithstanding the classification arrived as above, even applying the residuary principle, the services provided by the Appellant would be classified under the category of air travel agent services, listed prior to BAS; the reliance on residuary principle has been upheld in Zenith Rollers Ltd vs CCE, Noida 2014 (33) STR 678 (Tri Del);CBIC vide Circular No. 178/10/2022-GST dated 03.08.2022 (copy of circular (though issued in GST regime) clarifies that cancellation fee is to be treated as part of Hotel service; on the same analogy, convenience fee and cancellation fee are to be treated as considerationfor air travel agent services; Tribunal held in the cases of CE, Goa Vs M/s Zuari Travel Corporation **(**Final Order No. A/1716/2013-WZB/CSTB) and by CESTAT, Mumbai and in Akbar Travels of India Pvt Ltd Vs CCE, Mumbai [(2019 (22) GSTL 427 (Tri. - Mumbai)] that the services rendered by air travel agents cannot be categorized under business auxiliary service.

4. Learned Counsel submits that the settled principle of law is that what is to be agitated and adjudicated in a case is limited to the allegations made in the show cause notice pertaining to the case.in the instant case, it is crucial to note that the show cause notice and impugned order wrongly classify the impugned activities as "Business Auxiliary Services" for the period before 01.07.2012; hence, the demand amounting to INR 5,31,97,849is liable to be set aside on this count alone. He relies on

- CCE, Nagpur Vs M/S Ballarpur Industries Ltd 2007 (215) ELT 489 (SC)
- Reckitt & Colman of India Ltd Vs CCE 1996 (88) ELT 641 (SC).
- Warner Hindustan Ltd Vs CCE, Hyderabad 1999 (113) ELT 24 (SC)
- M/s. Marubeni India Pvt Ltd Vs CST, New Delhi 2016 (45) STR 549(Tri. - Del.)

5. Learned Counsel would submit further that Services offered by the Appellant for which "convenience fee" is paid are "in relation to the services of booking of tickets for travel by air" post 01.07.2012 and the service tax on it is completely discharged by exercising the option under Rule 6 (7); the education guide issued by the Central Board of Indirect Taxes dated June 20, 2012 explains the importance of contractual reciprocity between the consideration and the activity for it to qualify as a service; therefore, in essence, for an activity to qualify as a service there has to be a contractual relationship where the service recipient desires the activity to be performed by the service provider and the service provider does so for a consideration; in the instant case there is an activity of booking of air tickets where the consideration in the form of commission is received from the airlines and further in relation to such booking of air tickets, a "convenience fee" is being paid; post 01.07.2012 also gives option to pay service tax at the rate prescribed under Section 66 / 66B on the gross amount received by the service provider or as at the rate prescribed under Rule 6(7) of the Service Tax Rules (at the rate of 0.618% and 1.236%) on the base fare; Thus, service tax once paid under Rule 6(7) of the Service Tax Rules, shall be considered as discharged of the service tax liability of the air travel agent; therefore, "convenience fee" is to be treated as "consideration" then the facilitating activity is to be treated to be in relation to the services of booking of tickets for travel by air; it cannot be classified as a separate service which stands distinct from the service of booking of air tickets.

6. Learned Counsel would submit further that the service for which convenience fee is charged, though considered as separate, would qualify to be bundled with the service of booking air tickets as per section 66F of the Act; the Education Guide, published by CBIC in 2012 explains the same by giving examples. He submits that the two activities mentioned in the impugned notice are mere elements of the service of booking of tickets for travel by air as one cannot buy an online air ticket without accessing the online booking facility; every air ticket booked online shall have convenience fee charged over and above the air ticket price and it is not possible in the natural course of business to avail the service of "booking of air tickets online" without having access to the "online booking facility"; once the activity for which "convenience fee" is received is noted to be bundled with booking of air tickets; CESTAT has taken a similar view in respect of educational services in the case of Mody Education Foundation VsCCE, Jodhpur(2023) 7 Centax 116 (Tri.-Del).

7. Learned Counsel submits thatthe finding in the impugned order that the Appellant did not include the convenience fee charged from the passenger in the base fare is incorrect as the law does not provide for such inclusion; Rule 6(7) clearly defines base fare as only that amount on which commission is paid by the airlines to the air travel agent; it is a well settled proposition of law that if the statute prescribed a thing to done in a particular manner, it should be done only in that manner and not in any other manner as held in Tata Chemicals v. CC (P) Jamnagar 2015 (320) ELT 45 (SC) and CC Chennai v. Avenue Impex2014 (306) ELT 69 (Mad.)

8. Learned Counsel submits that Rule 6(7) does not differentiate between revenue of air travel agent from airlines and revenue from passengers; Rule 6(7) is clear in stipulating that payment of service tax by air travel agent will be on the base fare; the Rule does not provide those other payments, if any, shall be considered for discharge of service tax liability; Hon'ble Tribunal in the case of Kafila Hospitality and Travels Ltd Vs CCE2015 (38) STR 184 (T)observed that as far as payment under Rule 6(7) is what is relevant is the part of air fare on which commission is paid to the air travel agents by the airlines; no other conditions can be read in to or added to Rule6(7);reading such distinction in the said provision is akin to adding condition in the statutory provision, which is not permissible as per the following decisions.

- UOI Vs InterContinental (India) 2008 (226) ELT 16 (SC)
- Tata Teleservices Ltd Vs CC 2006 (194) ELT 11 (SC)
- Sandur Micro Circuits Ltd Vs CCE, Belgaum 2008 (229) ELT641 (SC)
- Essel Mining & Industries Ltd Vs UOI 2011 (270) ELT308 (Bom)
- Allen Diesels India Pvt. Ltd Vs UOI 2016 (334) ELT 624 (Del)
- M.F. Rings & Bearing Races Ltd Vs CC 2016 (337) ELT 17 (Del)
- Bullion and Jewelers Association Vs UOI 2016 (335) ELT639 (Del)

8.1. He further submits that the language of this Rule 6(7) is clear; once the option to pay service tax under this Rule has been exercised, it shall apply in respect of all air bookings during the year and cannot be changed under any circumstances; air travel agents opting this option are liable to pay service tax only as a specified percentage of basic fare instead of paying service tax on actual income earned in terms of Section 66 /Section 66B of the Finance Act; in other words, there is no further choice with the air travel agent so as not to pay service tax under this Rule 6(7) in respect of

services to any person for whatever reason; finding in the Impugned Order is contrary to the mandate of the statutory provision and liable to be set aside; this option did not undergo any substantial change after the introduction of negative list regime; thus, the position remained same both under the pre-negative list and negative list regime; thus, as convenience fee was not part of base fare, the interpretation placed in the impugned order is erroneous anddemand for the period post 01.07.2022 amounting to Rs 18,74,97,561 is liable to be set aside in its entirety.

9. Learned Counsel submits also that Notwithstanding the submissions made *supra*, when a booked ticket is cancelled, there is no service provided to the customer; the fee charged as "cancellation fee" is only towards the administrative expenses incurred by the Appellant; the cancellation charges are in the nature of penal charges or liquidated damagesas the Appellant suffers loss on account of cancellation as they do not receive any commission amount from the airlines; hence, they are not liable to service tax; The Hon'ble Principal Bench of the Tribunal in the case of British Airways Plc India Branch Vs CST, Delhi2018 (10) G.S.T.L. 561 (Tri. - Del.) held, in an identical case, that the 'Refund Administration fee' charged on cancelled air tickets is not subject to service tax since no service is rendered to passengers who have not undertaken any travel on cancelled tickets.

10. Learned Counsel submits in addition that extended period of limitation is not invocable in the present case; demand, confirmed for the period till October 2013 is barred by limitation; there was no

fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Finance Act or the Rules made there under, with intent to evade payment of tax on the part of the Appellant. He submits that extended period cannot be invoked for the following reasons.

- The appellant is duly registered with the service tax department; has been discharging service tax liability on all the taxable services under Rule 6(7) of the Service Tax Rules; has been regularly filing service tax returns with the service tax authorities;
- They maintained all records required to be maintained by an assessee in the course of its business as well as per the legal provisions applicable, have been maintained by the Appellant; therefore, the department was well aware of the business of the Appellant since its inception;
- service tax department and DGCEI has been conducting investigations about the Appellant's business since 2010; audit of the Appellant was conducted in March and April 2010 for period 2006-07 to 2008-09; appellant duly replied to all the communications received from the authorities from time to time;
- various SCNs on different issues were also issued to the Appellant on basis of information supplied by them; therefore, extended period cannot be invoked against the appellant in subsequent Show Cause Notices.

- The appellant entertained a bona fide belief that once Service Tax is paid under Rule 6(7), they need nor pay service tax on other elements;
- The issue involved is of classification and interpretation of statutory provisions thereof and therefore extended period cannot be invoked.
- Essential conditions which need to be satisfied for invoking the extended period are not fulfilled. There was no positive act on the part of the appellant with intent to evade payment of duty.

10.1. Learned Counsel submits that therefore, impugned order is not -tenable and is liable to be set aside.Demand of service tax demand amounting to INR 12,08,83,904/- pertaining to the period April 01, 2010 to October 31, 2013 stands barred by limitation.He relies on the following.

- Hyderabad Polymers (P) Ltd Vs CCE 2004 (166) ELT 151(SC)
- ECE Industries Ltd Vs CCE 2004 (164) ELT 236 (SC)
- Maruti Udyog Ltd V CCE, 2002 (147) ELT 881 (T)
- ITO v LakhmaniMewal Das 1996 (103) ITR 437 (SC)
- Anand Nishikawa Co. Ltd Vs CCE (Appeal), Meerut2005 (188) ELT 149 (SC).
- CCE Vs Chemphar Drugs & Liniments2002-TIOL-266-SC-CX
- Continental Foundation Joint Venture Sholding, Nathpa H.P v. CCE, Chandigarh – I 2007-TIOL-152-SC-CX
- Smart Finance Vs CCE Jaipur
- Uniworth Textiles Ltd Vs CCE2013 (288) ELT 161(SC)
- Chamundi Die Cast P. Ltd Vs CCE2007 (215) ELT 169 (SC)
- Larson & Toubro Ltd Vs CCE**,** 2007 (211) ELT 513(SC)
- CCE Vs Bilag Industries Pvt. Ltd2011 (264) ELT195 (Guj)
- CCE Vs ITC Ltd**.,** 2010 (257) ELT 514 (Kar)
- Ispat Industries Ltd Vs CCE 2006 (199) ELT 509 (T)
- NIRC Ltd Vs CCE 2007 (209) ELT 22 (T)
- Chemicals & Fibres of India Ltd Vs CCE 1988 (33) ELT 551 (T)
- Caprihans India Ltd Vs CCE 2015 (324) ELT 8 (SC)
- CCEVs Coolade Beverages Ltd., 2004 (167) ELT A174 (SC)

- Hyderabad Polymers Pvt Ltd Vs CCE 2004 (166) ELT 151 (SC)
- CCE Vs OCP India Pvt. Ltd.,2005 (179) ELT A103 (SC)
- CCE Vs Jalani Enterprises 2001 (134) ELT 813(T)
- Jindal Vijayanagar Steel Ltd Vs C.C.E. 2005 (192) ELT415 (Tri. - Bang.)
- Kirloskar Oil Engines Ltd Vs CCE 2004 (178) ELT998 (T)
- Rolex Logistics Vs CST 2009 (13) STR 147 (Tri. - Bang.)

11. Learned Counsel submits that when the demand is not sustainable then there is no cause for consequential interestunder Section 75 of the Finance Act; the Appellant has not contravened any of the provisions of the Finance Act, thus, no penalty is imposable under Section 77; pre-requisites for invoking extended period of limitation not being in existence, there is no case for imposition of penalty under Section 78. He further submits that the conduct of the Appellant was totally *bona fide* and hence, penalty is not imposable; no penalty is imposable in cases involving interpretation of the statutory provisions;no penalty can be imposed as all the details about payment of service tax were reflected in the statutory returns. He relies on

- CCE Vs Sadashiv Casting (P) Ltd.2005 (187) ELT 381
- Hindustan Steel Ltd Vs State of Orissa1978 (2) ELT (J159) (SC)
- Cement Marketing Co of India Ltd Vs Assistant Commissioner of Sales Tax1980 (6) ELT295 (SC)
- Auro Textile Vs CCE, Chandigarh 2010 (253) ELT 35 (T)
- Hindustan Lever Ltd Vs CCE, Lucknow 2010 (250) ELT 251
- Prem Fabricators Vs CCE, 2010 (250) ELT260 (T)
- White line Chemicals Vs CCE, Surat, 2009 (229) ELT95 (T)
- Delphi Automotive systems Vs CCE 2004 (163) ELT47 (T)
- Flying man Air Courier (P) Ltd. Vs CCE, Jaipur 2004 (170) ELT 417 (T)
- Hindustan Steel Ltd Vs the State of Orissa 1969 (2) SCC 627.
- Bharat Wagon &Engg. Co Ltd Vs CCE, Patna, (146) ELT 118(Tri. – Kolkata)
- GoenkaWoollen Mills Ltd Vs CCE, Shillong, 2001 (135) ELT 873(Tri. – Kolkata).

- Bhilwara Spinners Ltd Vs Commissioner of Central Excise, Jaipur, 2001 (129) ELT458 (Tri. – Del.)

11.1. Learned Counsel submits also that as per erstwhile Section 80 Of the Finance Act (applicable till 14th May 2015), no penalty can be imposed upon an assessee under Section 77 or Section 78 thereof where there is a reasonable cause for the failure on account of which, such penalty is sought to be imposed upon the assessee. He places reliance on Zee Limited Vs CCE 2006(4) S.T.R. 349(T); ETA Engineering Ltd Vs CCE 2004 (174) ELT 19 (Tri-LB) and Ram Krishna Travels Pvt Ltd Vs CCE 2007 (6) STR 37.

12. Shri Rajpal Sharma, Learned Special Counsel, appearing on behalf of Revenue, argues opposing various grounds of appeal filed by the appellant. As regards the ground that services provided to airlines and to the passengers are air travel agents service, he submits that it is not denied by any departmental authority and accordingly no dispute was raised regarding service tax paid by them on the Air Travel Agent service under Rule 6(7) of STR; the dispute in the SCNs was relating to nonpayment of service tax on services, other than air travel agent service; adjudicating authorityhas held that services provided to the passengers for which convenience charges are received are over and above the booking of tickets and, therefore, not classifiable under air travel agent service; service tax liability of the appellant on convenience fees and cancellation of air tickets is not covered under service tax paid under Rule 6(7); the contention of the appellants (in appeal no. 66166/17) that the expressions ‘any service’, ‘any person’ and ‘in relation to’ used in the definition of air travel agent and taxable service, being of very wide

nature, it is clearly implied that any service in relation to booking of passage for air travel will be covered within the scope of taxable service of air travel agent, is incorrect; the appellant has conveniently ignored the inherent restriction placed in the definition of 'air travel agent' and'taxable service' thatany service to be within the ambit of air travel agent service should be connected with or should be in relation to the booking of the passage for travel by air; if the service is not connected or related to the booking of air ticket, it will not be covered in the definition of the taxable service of air travel agent'; reliance on the analogy of port service and case laws are of no avail as the definition of port service does not place any restriction of providing service connected with or in relation to booking of air ticket.

12.1. Learned Special Counsel submits that The appellant is an agent of the different airlines working on specific licence/ authorisation; appellants receive commission/incentives from the airlines for facilitating the sale of tickets of the airlines; all services and mainly booking of passage for air travel to the passenger are provided by the appellant to or on behalf of the airlines only; offering of booking platform and all the requisite information for booking of the ticket to the passengers is their primary duty and are provided on behalf of the airlines for which they get commission from the airlines; provision of the ticket booking service to the airlines and passenger is one and the same; consideration for the same, in the form of commission, is received by the appellant from airlines, which is ultimately recovered from the passenger; these activities are undeniably covered in the category of air travel agent service prior to 1.7.2012 and in taxable service thereafter; no separate service relating to or connected with

booking of the air tickets is provided by the appellant to the passengers to which the recovery of convenience fees can be attributed; 'Convenience fee' or 'service fee', in addition to commission from the airlines for providing air travel agent service, is recovered not for providing any booking related service but for providing various additional services after booking of the ticket such as issuing of boarding passes, providing information relating to time of the flight, rescheduling or cancellation and such other details which involves use of internet, staff and various administrative expenses; since these services are provided post booking of tickets, these are not covered in the definition of air travel agent service and are different from the services provided in relation to booking of passage for travel by air.

12.2. Learned Special Counsel submits further that this finding is fully supported by the Order dated 24.9.2013 of the Secretary of the Ministry of Civil Aviation, GOI, which has allowed the payment of remuneration like convenience fee, transaction fee to the travel agent for their services of booking the ticket on behalf of the airlines on the condition that such fees will be included in the tariff within the definition of tariff and no amount will be collected from the consumers over and above this; as separate convenience fees charged from the passengers is not included in the Air Tariff as defined in the Air Craft Rules, recovery of such fee is unauthorised and is not relating to air travel agent service; appellant's objection that the Order of the Secretary of the Ministry of Civil Aviation cannot be relied upon, as per decisions cited in the appeal (para 37 and 39) is totally misplaced as the said Order issued by the competent

authority and is neither borrowed nor applied to fill any statutory gap in the provisions of service tax; it is referred to in the impugned order to demonstrate what type of payments falls in the ambit of the remuneration of the air travel agents;appellant's argument that flow of consideration can be from two persons for an activity isnot relevant as the dispute is not because of or in relation to flow of consideration.

13. Learned Special Counsel submits further that the convenience fees/service fees charged from the passengers is not for providing air travel service but is rather received for providing post booking of air tickets services which are manifestly other than air travel agent service; since these services are provided to the passengers on behalf of the airlines as customer care services and to promote marketing of service of the airlines, who are the clients of the appellant, these services are covered under Section 65(19)(ii) and (iii) of the Finance Act,1994 i.e. "Business Auxiliary service". He submits that the claim of the appellant that the airlines have nothing to do with the services provided by the appellant and hence no service of the airlines is being promoted or marketed and no customer care service is being provided on behalf of the airlines is manifestly ridiculous; all services, including air travel agent service and post booking tickets services are being provided on behalf of the airlines only. He submits that it is a fact that the appellants receive commission from the airlines for facilitating the sale of tickets; the very name air travelagent clearly denotes that the appellant is an agent of the airlines; all activities relating to booking of the tickets and other customer care services are on behalf of the airlines only; passengers approachthe appellant because they are the agent of the airlines and not due to any of

theirstandalone services; it is evident from the sample copy of the agreement (para 3.3) between the appellant and indigo airlines stipulates that apart from booking of tickets, travel agent shall also carry out such other incidental and ancillary functions as may be required by indigo from time to time; para 4.3.c provides that the agent shall at all times ensure that the passenger is provided with accurate,authentic,correct and detailed information as regards Indigo's flight schedules,departure and arrival timings and such other information as may be relevant for the passenger's travel; these services are clearly postbooking of tickets and are provided on behalf of the airlines; the appellant's status as mere agent of the airlines is again clearly corroborated by paras 5.2 and 5.3 of the Master User Agreement. Which provides that the appellant acts as a booking agent and facilitator of services on behalf of third-party service provider and hence it shall not have any liabilityfor any aspect of the arrangements between the service provider and the user.

14. Learned Special Counsel submits that Section 65A (1) of the finance Act stipulates that classification of taxable service shall be determined according to the terms of the sub-clauses of clause (105) of section 65; Section 65A (2) shall come into picture only when there is some doubt; in the instant case there is no doubt regarding the classification of the services relating to booking of the tickets; the issue regardingpayment of service tax on other services which are provided after completion of booking and therefore, not covered in air travel agent service; these services manifestly fall under BAS for the reasons discussed above; when there is no doubt regarding

classification, invocation of different clauses of section 65A (2) of the Finance Act is completely unwarranted.

14.1. Learned Special Counsel would submit that Service tax paid by the appellant by exercising the option under Rule 6(7) of the STRs is undisputedly in relation to the air travel agent servicewhichends with booking of tickets; whereas the services provided by the appellant to the passengers after booking of the tickets for which convenience fees is charged from the passenger does not fall in the category of air travel agent service before and after 1.7.2012; hence, service tax paid by the appellant towards air travel agent service under Rule 6(7) cannot be considered as payment of service tax on other services which belong to different category. Learned Special Counsel submits that appellants reliance on notification 22/97 ST dated 26.6.97 (valid till 30.6.2012) is also misplaced as it exempts service tax only on that portion of the value which is in excess of the commission received by the air travel agent from airlines for booking of passage for travel by air; this notification is not applicable for the two reasons; one because the appellant did not pay tax on the value of air travel agent service as per section 67 of the Finance Act but opted for Rule 6(7); secondly the said notification exempted from service tax on a specified portion of the value of air travel agent service only and not in respect of any other service like BAS.

15. Learned Special Counsel submits that the appellant has not given any logic to support the claim that even cancellation of ticket is an activity related to booking of ticket and hence duty paid by them under Rule 6(7) of STRs covers duty leviable on ticket cancellation

charges also; it is evident from the word 'cancellation' that the activity is not a booking at all and instead it is related to nullification of the booking which is opposite of booking of the ticket. Learned Special counsel submits that there is an apparent contradiction in the claim of the appellant in as much as if it is a service relating to booking of ticket only, it is not known as to why cancellation charges are recovered from the passengersin addition to booking charges collected at the time of booking of the ticket; the appellants are paying Service tax on their own on cancellation charges w.e.f 1.7.2012, though they continued to pay service tax on airtravel agent service under Rule 6(7) only.

15.2. Learned Special Counsel submits that the appellant's averment that cancellation charges are in the nature of penal charges or liquidated damages and hence not liable to service tax is rightly rejected by the Commissioner; commissioner observed that the appellant did not have any right to levy any penal charges for cancellation; charges were received from the passengers for facilitating the cancellation of tickets and helping them to obtain refunds from the airlines; there are no agreements with the passengers for charging any penalty in the event of cancellation of ticket; master agreement does not have any clause regarding imposition of any such penalty; the passenger is already penalised by the airlines in the event of cancellation of ticket; since cancellation charges are not related to booking of the passage, it is not covered under air travel agent service; same is covered under customer care service falling in the broad category of the BAS.

16. Learned Special Counsel fairly concedes that the adjudicating authority allowed the same in OIO dated 29,11.2018 but did not deal with it in his Order dated 30.11.2016; this benefit cannot be denied. Learned Special Counsel submits that the plea of multiple assessments for the same period is not relevant; different notices cited are not the instances of assessments but are different proceedings initiated under section 73 of the finance Act for different reasons; Section 73 does not impose any restriction for issuing more than one notice for different reasons for recovery of non-paid/short paid tax; the appellant does not have a case that the department had issued any earlier SCN on the same issue; hence, none of the case laws relied upon by the appellant to support their argument on this point is relevant to the present proceeding; similarly, the argument that once department has invoked the extended period of limitation in a case, it cannot be invoked again in a subsequent notice is not supported by any legal provision or decision; even decisions relied upon by the appellant are applicable only where two SCNs are issued on the same issue and the second SCN was issued invoking extended period of limitation.

17. Learned Special Counsel submits that the contention regarding time limitation of demand of service tax is entirely misplaced as there has been not only suppression of facts on the part of the appellant but also contravention of various legal provisions with intention to evade service tax on convenience fees and ticket cancellationcharges; the appellant never disclosed these services; suppressed its value in the periodical ST 3 Returns and above did not pay service tax; had there been a bona fide intention on their part, the appellant should

have sought clarification from some competent authority or a tax consultant in case they had any doubt regarding taxability of the above two services; they did not pay service tax even after receiving the SCN /OIO. Learned Special Counsel submits that the appellant's contention that department was fully aware of their activities as various SCNs on different issues were issued; audit of their records were conducted in 2010 for the period 2006-7 to 2008-9 does not carry any legal weight as no specific instance of audit para or SCN covering the current issue is mentioned in the appeal; the business of air travel agent being very complicated, it cannot be assumed just on the basis of few SCNs and one audit in 2010 that the department had known all activities of the appellant; it is all the more difficult because convenience fee or ticket cancellation fee h were not mentioned in the invoices or in the financial records; the appellant has also admitted that these were recovered under general heading 'Taxes, fees and surcharge'; the evasion has been detected by the DGCEI on the basis of intelligence; the appellant did not perform their legalobligation of declaring the above two services, its taxable value in the statutory returns ST-3and did not pay service tax payable thereon; the case law relied upon by appellant are not directly applicable to the present case as they lay down general principles regarding invocation of extended period; in the instant case, the elements of suppression of facts relating to the two taxable services and evasion of tax with ulterior motive are clearly demonstrated; hence the above case laws rather support the Revenue's case. He submits that the non-disclosure of income under two heads; one sided belief that they are not liable to pay tax and their not-seeking any clarification clearly betrays their predetermination, rather the bona-fide belief. He relies

on following decisions to claim that extended period was rightly invoked.

- Rachitech Engineering Pvt Ltd Vs CCE 2007(215) ELT A22 (SC)
- Usha Rectifier corporation Vs CCE- 2011 (263) ELT 655 (SC)
- Pashupati Spinning and Weaving Mills Ltd, 2015(318) ELT 623 (SC)
- Nizam Sugar Factory Vs CCE, Hyderabad, 1999(114) ELT 429 (Tri-LB)

17.1. Learned Special Counsel submits that as demands of Service Tax have been raised and confirmed by invoking extended period of limitation/ normal period,the case is fully covered under proviso to Section 73(1)/ Section 73(1), Section 75, Section 78 of the Finance Act, 1994 for demanding tax, interest and imposition of penalty.

18. Heard both sides and perused the records of the case. Brief issue that requires consideration of the Bench in these two appeals are as follows:

(i) Whether the convenience fee and cancellation charges collected by the appellant from their customers form part of the consideration towards the "Air Travel Agent Service" or they constitute the consideration for other service rendered by the appellants i.e. "Business Auxiliary Service" before 01.07.2012 and as a consideration towards taxable service after 01.07.2012?

(ii) Whether the appellants are liable to pay service tax on such convenience fee and cancellation charges under "Business Auxiliary Service" even though they have opted to pay duty under Rule 6 (7) of Service Tax Rules as a percentage of the base fare before 01.07.2012 and after 01.07.2012?

(iii) Whether the exemption contained under the Notification No.22/1997-ST dated 22.06.1997 is applicable to the appellants?

(iv) Whether in the facts and circumstances of the case, extended period is invokable?

(v) Whether the appellants have rendered themselves liable to pay penalty?

19. The appellants are registered for Air Travel Agent Service; they provide their website to various customer who book tickets from various airlines for passage through air; the appellants receive a commission from the airlines for the same; the appellants also collect a convenience fee from the passengers and in cases where tickets are cancelled, the appellants charged a cancellation fee from the customers. It is the case of the Revenue that the convenience fee and the cancellation charges are not part of the Air Travel Agent Service and are in the nature of consideration received by them towards the "Business Auxiliary Service" rendered by them to the airlines, before 01.07.2012 and as a consideration towards taxable service after 01.07.2012; the appellants being the agent of the airlines and being bound by the agreement with the airlines, any consideration paid to them or received by them is to be treated as amounts paid by the service recipient i.e. the airlines. It is the defence of the appellants that there are no different services and different considerations are being received by them for the very same service i.e. Air Travel Agent Service and that they are availing the option available under Rule 6(7) of Service Tax Rules; even if it is assumed that there are different services, by virtue of the principles of classification of

services, all of them require to be classified under the main service i.e. Air Travel Agent Service before 01.07.2012; even after 01.07.2012, the services need to be clubbed together as bundled services.

20. In the instant case, the question is as to whether the service for which "convenience fee" was received and the activity for which "cancellation fee" was charged is part and parcel of Air Travel Agent Services ("ATAS") (taxable vide section 65(105) (l)) or Business Auxiliary Services ("BAS") (taxable vide section 65(105) (zzb)). The relevant extracts are as follows.

20.1. We find that Air Travel Agents Service became taxable from 01.07.1997 and the entry therein under Section 65(41)(l) reads as follows:

> "Taxable service means any service provided, to a customer, by an air travel agent in relation to the booking of passage for travel by air"

20.2. The said definition has undergone a change in 2008 to read as under:

> "Taxable service means any service provided, to any person, by an air travel agent in relation to the booking of passage for travel by air".

20.3. Section 65 (105) (l) "taxable service" means any service provided or to be provided –

> *(l) to any person, by an air travel agent in relation to the booking of passage for travel by air;*

20.4. Business Auxiliary Services are defined as follows.

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

> *(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*

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

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

[Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

(v) production or processing of goods for, or on behalf of the client; or

(vi)provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management, or supervision, and includes services as a commission agent but does not include any activity that amounts to "manufacture" of excisable goods.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a)" commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944(1 of 1944);

(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944(1 of 1944).

20.5. Section 67(k) of Finance Act, 1994 provides that in relation to service provided by an air travel agent to a customer, shall be the gross amount charged by such agent from the customer for services in relation to the booking of passage for travel by air excluding the airfare but including the commission, if any, received from the airline in relation to such

booking.We find that sub-Rule 7 of Rule 6 of Service Tax Rules, 1994 provides an option to the air travel agents to pay service tax on the "basic fare" as defined in this sub-Rule, at the rate specified under the said sub-Rule.

> (7) The person liable for paying the service tax in relation to the services [of booking of tickets for travel by air] provided by an air travel agent, shall have the option, to pay an amount calculated at the rate of [given as s percentage]of the basic fare in the case of domestic bookings, and at the rate of [given as a percentage] of the basic fare in the case of international bookings, of passage for travel by air, during any calendar month or quarter, as the case may be, towards the discharge of his service tax liability instead of paying service tax [at the rate specified in section 66B of Chapter V of the Act] and the option, once exercised, shall apply uniformly in respect of all the bookings of passage for travel by air made by him and shall not be changed during a financial year under any circumstances.
>
> Explanation. - For the purposes of this sub-rule, the expression "basic fare" means that part of the air fare on which commission is normally paid to the air travel agent by the airline.

21. A perusal of the statutory provisions makes it clear that theprovisions do acknowledge the fact that in case of the Air Travel Agent services though provided to the Customers who book tickets on line, the renumeration is paid by the Airlines. This understanding is given by Hon'ble Madras High Court in the case of Airlines Agents Association vs Union of India Madras High Court (Supra) wherein it was held that

> *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 in the process the services that he gives to the customers. [.....] 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 service 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.

22. Learned Authorised Representative attempts to read the above judgement to suit the assertion by Revenue that the Convenience fee collected by the appellants is for the Business Auxiliary Service provided by them to the Airlines as part of the agreement

notwithstanding the fact that the consideration is received from the customers. Even if such an argument is taken, the service is rendered in the capacity of being an Air Travel Agent and the same has no independent existence on its own. The maintenance of the website to help the customers in booking tickets is not separable from the main activity of booking tickets by the appellants.

23. Further, the facility given to the appellants, under sub-rule (7) of Rule 6 of the Service Tax Rules, 1994, to pay the service tax as a percentage of basic fare and the exemption given vide Notification No. 22/1997-ST dated 26.06.1997 to the amount received by the air travel agent, in excess of the commission, gives an understanding that the law makers accept the practice in the trade that the Air Travel Agents Receive amounts over and above or in addition to the commission. That being the statutory position, any effort to artificially segregate the different considerations received by the Air Travel agents to be for different services provided defeats the very purpose of the Statute. Therefore, it can not be said that the "Convenience fee'' and "cancellation fees" are towards the 'Business Auxiliary Service' rendered by the appellant to the Airlines.

24. The Show-Cause Notice issued to the appellants cites the order dated 24.09.2013 of the Secretary, Ministry of Civil Aviation and concludes that the appellant did not have proper reasons for charge of convenience fee or service fee for booking air ticket, re-issue, re-booking/ amendment fee of air ticket, when they were already earning commissions for the same from airlines; the

reasoning given by the appellants that they are providing convenience to the passengers for online ticket, is not plausible; it appears that they are earning commission for the services provided to the airlines and the passengers; nobody charges any amount without providing any service and nobody charges fees for the same service from two persons i.e. one from airlines and another from passengers; it appears that the appellants are charging convenience fee/ service fee from the passengers for some other services not in relation to booking of passage for travel by air; in case, the appellants charges these fees for issuing tickets on behalf of airlines, they were required to form part of air tariff i.e. basic fare and service tax would have been paid on the same; as both have not paid service tax on convenience fee/ service fee, the same is not in relation to or connected with the booking of passage travel by air; the appellants have started paying service tax on the cancellation fee from 01.07.2012 and the same is also charged not in connection with Air Travel Service.

25. We find that the above averment which is not elaborated in the impugned order is without any rhyme or reason. If the appellants are charging any fee or amount over and above, the limit prescribed by the concerned Ministry, it is not understood as to how the same constitutes a consideration towards any other service. If the appellants have violated any conditions of the Circular issued by the Ministry, it is for the concerned Ministry to take action against the appellants; for this reason, the amount charged by the appellants does not become a consideration for any other service. Ironically, the SCN does not specify what is the service rendered by the appellants

to the airlines in addition to the service in relation to booking of tickets for passage through air. The argument that the convenience fee/ cancellation fee if permitted by the airlines should form part of the basic fare defies logic. Even if it is assumed that the same should form part of the basic fare, the Department was free to allege that the basic fare on which service tax being paid was being suppressed to that extent. However, the tenor of the SCN is that firstly, it identifies that the appellants are recovering certain charges form the customers; secondly, it says it is not a consideration for the Air Travel Agents Service; thirdly, it says this is a consideration for some service and lastly it assumes that 'some service' is 'Business Auxiliary Service'. The show cause notice is without any logic as the specific service or the specific sub-heading under the "Business Auxiliary Service" has not been cited and has not been explained either. Such an approach as far as the demand of service tax is concerned, is not legally tenable. We find that learned Adjudicating Authority simply refers to the definition of "Business Auxiliary Service" and accepts the contention of the SCN that the charges collected by the appellant are towards "Business Auxiliary Service" provided by the appellants but collected from the customers. The argument proposed in the SCN and accepted by the Adjudicating Authority would have made some sense if there was a tripartite arrangement or understanding between the airlines, the appellant and the customers. No such argument has been proposed in the SCN leave alone with evidence. It is a fallacy on the part of the Department to see every amount or payment received by the assessee is necessarily for and towards a consideration for provision of some service or the other.

26. We find that Tribunal has been consistent in holding that the charge of provision of "Business Auxiliary Service" cannot be slapped without identifying a particular sub-clause thereof. It may be argued that once the word "Business Auxiliary Service" is mentioned, the appellant is put to notice on the purport of the SCN and thereby an opportunity to defend himself is given. However, as seen above, the SCN, considers the charges collected by the appellant to be remuneration, at times to be for "some service" and at times to be for "Business Auxiliary Service". Tribunal in the case ofM/s. Marubeni India Pvt Ltd (Supra).

> *6. Admittedly, the show cause notice proposed demand of duty under Business Auxiliary service and it is only during adjudication by considering the appellants stand that the demand may fall under the category of "Information technology Software Services" stand confirmed. As per declaration of law in the above decisions, allegations are required to be made by the Revenue very clearly in the show cause notice and adoption of classification of service under the heading different than the one proposed in the show cause notice amounts to passing the order beyond the scope of show cause notice which is not permissible and the impugned order is required to be quashed on the said ground itself. We order accordingly.*

27. On going through various clauses of the agreement, we find that there is no condition that the appellants are required to promote or help or work as agents to further the business of the Airlines in other than booking the tickets. In terms of the agreement, the appellants are required to make arrangements, which include maintenance of their website for booking tickets with Indigo. Learned Counsel for the appellants submits that the agreements are similar with other airlines; the convenience fee is collected towards the access given to

the customers to their website in the course of booking of tickets; therefore, by charging the convenience fee, the appellants are not rendering any separate service to the airlines and receiving the consideration thereof from the customers who book airline tickets.The cancellation fee is also collected when the tickets are cancelled by the customers; the charges are in the nature of recovery of administrative expenses involved in booking and cancellation of tickets for passage through air. Therefore, we find that the "convenience fee" and "cancellation fee" are recovered in the course of the provision of the service related to booking of tickets for passage through air and not in connection to any business promotion. Para No.3 of the agreement between the appellants and Interglobe Aviation Limited specifies that:

> "Travel Agent shall have the right to either directly book on Indigo using the Booking Functionality Services or extend the Booking Functionally Services to the customers for the sole purpose of making the bookings. Travel Agent shall also carry out such other incidental and ancillary functions as may be required by Indigo from time to time.

28. We find that the issue of cancellation charges came for discussion before tribunal in the case of Globe Forex and Travels Ltd (Supra) and the bench held that cancellation fee paid to the Air Travel Agent in excess of the commission is exempt from the levy of service tax. Bench held that

> *8. As regards the service tax demand on the cancellation charges, these charges are collected from the persons booking the air ticket and this is not the amount received from the appellant's client - the airlines. It is not disputed that inrespect of cancelled tickets, the airlines do not give any commission whatsoever to the appellant. In view of this, we hold that noservice tax would be payable under Section 65(105) (l) of the Finance Act, 1994 on the cancellation charges which*

are a part ofthe airfare received by the appellant from the persons booking the air ticket who, subsequently, had cancelled the same.Moreover, in any case, in terms of exemption Notification No. 22/97-S.T., dated 26-6-1997 the amount received by the air travelagent, which is in excess of the commission received by him from the airline for the booking of passage for travel by air, wasexempt from service tax and in terms of this exemption notification no service tax would be leviable on the cancellation charges.

29. Moreover, in the instant case, as far as the 'Convenience fee' and 'cancellation charges' are concerned, there is reciprocity and flow of consideration between the customer and the appellants and the airlines is not involved, notwithstanding the fact that they collect the fare and cancellation charges for the booking of ticket for passage through air. The Show Cause Notice did not bring about any evidence so as to assert that the airlines have some interest in relation to the charges collected by the appellant. We find that the service or tolerance of loss, if any, flows from the appellant to the customer, who pays the consideration. This being the position, it cannot be said that the 'Convenience fee' and 'cancellation charges' received by the appellants are part of consideration received by them towards the Business Auxiliary Services rendered by the appellants to the airlines.

30. Learned Counsel for the appellants submits further that even if assuming there are more than one services involved, they have to be categorised as per the Principles of Classification under Section 65(A). The appellant is providing Air Travel Agent Service and all other activities if any seen separately are but incidental to the Air Travel Agents Service being provided in the pursuit of the same service. When specific description of the service is available under

65(105) (l), the general description of Business Support or Business Auxiliary Services under 65(105) (zzb) are not applicable in the instant case. We find merit in this contention. The considerations received by the appellant in the form of 'Convenience Fees' and 'Cancellation Fees' are in the course of rendering of Air Travel Agents Service. If there is no booking of Air Tickets by the customers, there is no way the said charges would have been collected by the appellant. The activities cannot independently exist.

31. It is not the case of the Revenue that the appellants are receiving this consideration unconnected to the service. It is not denied that the appellants are helping the business of the Airlines but for the same reason the services cannot be categorized as Business Auxiliary Service. In such a case, any service received by a commercial concern has a potential to be viewed to be in furtherance of one Business Interest or the other. For example, if a business house gets the house constructed, the service provider cannot be said to be rendering 'Business Auxiliary Service'. Such a view would definitely defeat the scheme of service tax. We are of the considered opinion that when the activity or service has a specific characteristic of a particular service, the same can not be classified under a general category. We are of the considered opinion that the service that the appellants are rendering, is classifiable as Air Travel Agents Service.

32. We find that the larger Bench of the Tribunal in the case of Kafila Hospitality and Travels Pvt. Ltd. (supra) held that:

> *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.*

33. We find that there is merit in the argument of the appellants that the activities are 'in relation to the booking of passage for travel by air, and even if the activity is construed as a composite service where air ticket booking is held separate from the convenience of booking such air ticket online and the facility of cancellation of such air ticket, the essential nature of the composition of all the three activities is still one in relation to the booking of passage for travel by air. The convenience provided is exclusively for air ticket booking and so is the cancellation; even if the services are considered as composite services, both the activities merit classification under the category of 'Air Travel Agent Services' rather than under the category of 'Business Auxiliary Service' by the essential character test. We find that even applying the residuary principle, the services provided by the Appellant would be classified under the category of air travel agent services which comes prior to BAS in the list under 65(105).

34. We find that the clarification offered by CBIC in GST regime, vide Circular No. 178/10/2022-GST, dated 03.08.2022, in respect of

hotel booking and cancellation are in the line of the contention of the appellant. The circular says that

Cancellation charges

> *11. A supply contracted for, such as booking of hotel accommodation, an entertainment event or a journey, may be cancelled by a customer or may not proceed as intended due to his failure to show up for availing the same at the designated place and time. The supplier may allow cancelation of supply by the customer within a certain specified time period on payment of cancellation fee as per commercial terms of the contract. In case the customer does not show up for availing the service, the supplier may retain or forfeit part of the consideration or security deposit or earnest money paid by the customer for the intended supply.*
>
> *11.1. It is a common business practice for suppliers of services such as hotel accommodation, tour and travel, transportation etc. to provide the facility of cancellation of the intended supplies within a certain time period on payment of cancellation fee. Cancellation fee can be considered as the charges for the costs involved in making arrangements for the intended supply and the costs involved in cancellation of the supply, such as in cancellation of reserved tickets by the Indian Railways.*
>
> *11.2. Services such as transportation travel and tour constitute a bundle of services. The transportation service, for instance, starts with booking of the ticket for travel and lasts at least till exit of the passenger from the destination terminal. All services such as making available an online portal or convenient booking counters with basic facilities at the transportation terminal or in the city, to reserve the seats and issue tickets for reserved seats much in advance of the travel, giving preferred seats with or without extra cost, lounge and waiting room facilities at airports, railway stations and bus terminals, provision of basic necessities such as soap and other toiletries in the wash rooms, clean drinking water in the waiting area etc. form part and parcel of the transportation service; they constitute the various elements of passenger transportation service, a composite supply. The facilitation*

service of allowing cancellation against payment of cancellation charges is also a natural part of this bundle. It is invariably supplied by all suppliers of passenger transportation service as naturally bundled and in conjunction with the principal supply of transportation in the ordinary course of business.

11.3 Therefore, facilitation supply of allowing cancellation of an intended supply against payment of cancellation fee or retention or forfeiture of a part or whole of the consideration or security deposit in such cases should be assessed as the principal supply. For example, cancellation charges of railway tickets for a class would attract GST at the same rate as applicable to the class of travel (i.e., 5% GST on first class or air-conditioned coach ticket and nil for other classes such as second sleeper class). Same is the case for air travel.

11.4 Accordingly, the amount forfeited in the case of non-refundable ticket for air travel or security deposit or earnest money forfeited in case of the customer failing to avail the travel, tour operator or hotel accommodation service or such other intended supplies should be assessed at the same rate as applicable to the service contract, say air transport or tour operator service, or other such services.

35. We find that the Revenue has picked up some charges collected by the appellants; assume that they are consideration for some service rendered and assume the same to be 'Business Auxiliary Service',in a convenient manner. One has to see the nature of the service in totality. Segmenting the series of actions involved in the provision of a particular service, would result in ridiculous propositions. The Department has not viewed the service rendered by the appellants in a holistic manner, ignoring the very fact that the service rendered by the appellant as an Air Travel Agentis not complete just by booking of the Tickets from an airline, in fact it goes beyond before and after. In fact, the "taxable service" is also defined

to mean any service provided or to be provided to any person (any customer before amendment), by an air travel agent in relation to the booking of passage for travel by air.

36. It is pertinent to note that the definition does not define the service to be just booking ticket but a service provided or to be provided by an Air Travel Agent in relation to the booking of passage for travel by air. Even going by the definition, it can not be said that the activities are not in relation to the service as an air travel agent. After analysing the facts of the case, statutory provisions, judicial pronouncements, as discussed above, we are of the considered opinion, that the 'Convenience fee' and 'Cancellation Charges' collected by the appellants are towards the service rendered by them as an Air Travel Agent only and no other service is rendered by the appellant either to the customer or the airlines. The liability to Service Tax having been discharged, as a percentage of base fare under Rule 6(7) of Service tax Rules, no additional liability can be fastened to the appellant before 01-07-2012 i.e. before the negative list regime has been put in place. We also find that the Notification No.22/1997-ST dated 22.06.1997 is applicable to the appellants as the amounts received are nothing but consideration received in the rendering of the service as Air Travel Agent.

37. Coming to the period after the introduction of negative list from 01.07.2012, learned counsel for the appellants submits that for an activity to qualify as a service there has to be a contractual relationship where the service recipient desires the activity to be performed by the service provider and the service provider does so

for a consideration. Post 01.07.2012, Section 65B (44) defines "service" as below.

> *"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
>
> *(a) an activity which constitutes merely, —*
>
> *i. a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
>
> *ii. such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or*
>
> *iii. a transaction in money or actionable claim;*
>
> *(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*
>
> *(c) fees taken in any Court or tribunal established under any law for the time being in force*

37.1. Further, the Education Guide, dated June 20,2012, published by CBIC, explains the importance of contractual reciprocity between the consideration and the activity for it to qualify as a service. The relevant extract reads as follows –

> *2.3 Activity for a consideration*
>
> *The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship i.e. without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity.*

38. On going through the above, we find that thematically, there is no difference in the exigibility of an activity to service tax before or after 01.07.2012. Prior to 01.07.2012, before slapping a demand of Service Tax,three things i.e. the service provider, service recipient and the consideration needed to be identified. Post 01.07.2012, there

should be an express or implied reciprocity and a consideration for the same. In the instant case, as far as the 'Convenience fee' and ' cancellation charges' are concerned, there is reciprocity and flow of consideration between the customer and the appellants and the airlines is not involved, notwithstanding the fact that they collect the fare and cancellation charges for the booking of ticket for passage through air; airlines have nothing to do with the charges collected by the appellant; service or tolerance, if any, flows from the appellant to the customer, who pays the consideration. Post 1.7.2012 also an option has been given to the appellants to pay service tax at the rate prescribed under Section 66 / 66B of the Act on the value of services as determined in terms of Section 67 of the Finance Act read with Service Tax (Determination of Value) Rules, 2006 ("Valuation Rules') or as a percentage of Basic fare under Rule 6(7) of the Service Tax Rules.

39. We are in agreement with the contention of the appellants that if "convenience fee" is to be treated as "consideration" then the activity for which it is to be treated so is the activity of facilitating the online booking of air tickets; this facilitating activity is in relation to the services of booking of tickets for travel by air; it cannot be classified as a separate service which stands distinct from the service of booking of air tickets. We find that once the appellant has discharged the service tax liability on the basic fare as per Rule 6(7) of the Service Tax Rules, no service tax liability can be fastened to them for any other consideration received by them for the activity performed by them.

40. Learned counsel for the appellants further submits that even if the 'convenience fee' has to be considered separate as upheld in the impugned order, it would still qualify as an element which is naturally bundled with the service of booking of air tickets according to section 66F of the Act. We find that as per Section 66 F(3)(a) of Finance Act, 1994 if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character. Both the activities are bundled in the natural course of business. In the instant case, even if the activity is bifurcated to be booking of ticket and allowing access to website for on line booking are two different activities, we find force in the submission of the appellants that one cannot buy an online air ticket without accessing the online booking facility; every air ticket booked online shall have convenience fee charged over and above the air ticket price; it is not possible in the natural course of business to avail the service of "booking of air tickets online" without having access to the "online booking facility".

41. We find that Education Guide, dated June 20,2012, published by CBIC, while explaining the concept of bundled service clarifies inter alia that whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate; the perception of the consumer or the service receiver, if large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business; for example service of stay in a hotel is often combined with a service or

laundering of 3-4 items of clothing free of cost per day; such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business. We find in view of the above, the activities undertaken by the appellant are treated as separate services can be bundled together and be classified as Air Travel Agent Service. We find that Tribunal in the case of Mody Education Foundation (Supra)held that Hostel services and education services provided by boarding school are naturally bundled in ordinary course of business; education service gives essential character to such bundle. We are in agreement with the appellants claim that the principle is squarely applicable in the instant case since service of online booking for which convenience fee is charged is naturally bundled with service of booking tickets and the service of booking tickets gives essential character to such bundle. Therefore, the benefit of Rule 6(7) which is available to service of booking tickets is also available to the service of online booking.

42. It is the contention of the department that the convenience fee is not added to the basic fare. We find that Rule 6(7) of the Service Tax Rules does not provide for such inclusion. In view of our finding as above, it is not the case of the Show Cause Notice that the value of Basic fare was suppressed. It is all about the Business Auxiliary Service/ taxable service alleged to have been rendered by the appellant in lieu of the consideration received under the heads 'Convenience Fee' and 'Cancellation Fee'. Therefore, any discussion on non-inclusion of these charges in the basic fare would be beyond the scope of the Show Cause Notice and would be reading the non-

existent additional provisions in the statute which is not permissible as per the case law relied upon by the appellant. In view of the above discussion, we hold that no additional liability of Service Tax can be fastened to the appellant on account of 'Convenience Fee' and 'Cancellation Fee' even after 01-07-2012.

43. In addition the appellants further plead that when a booked ticket is cancelled, there is no service provided to the customer; the fee charged as "cancellation fee" is only towards the administrative expenses incurred by the Appellant; the Cancellation charges are in the nature of penal charges or liquidated damages akin to a penalty as the Appellant suffers loss on account of cancellation as they do not receive any commission amount from the airlines when air ticket is cancelled by the customer. We find that this issue has been decided by the Principal Bench of the Tribunal in the case of British Airways Plc India (Supra) holding that as far as cancellation fee is concerned the 'Refund Administration fee' charged on cancelled air tickets is not subject to service tax since no service is rendered to passengers who have not undertaken any travel on cancelled tickets.

44. Revenue takes the plea that the appellants have started paying Service Tax on cancellation fee from 01.07.2012 and the act indicates that they have accepted the contents of the Notice. We find that there is no *estoppel* in taxation matters and it applies to the appellants with the same force as it applies to the Revenue. Payment of Service Tax for a certain period for whatever reasons including the mistaken notion of Law, does not take away the right of the appellant to agitate the issue. Our conclusion that the cancellation charges are not exigible to service Tax is further fortified by the judgment of the

Principal Bench of the Tribunal in the case of British Airways Plc India (Supra).

45. We have gone through the submissions of Revenue and the case law relied upon by them. In view of the discussion as above, we do not find any force in the submissions on behalf of the Revenue. We are of the considered opinion that the 'Convenience Fee' and 'Cancellation Fee' are not relatable to any other service provided by the appellant and the Service Tax being discharged in terms of Rule 6(7) of Service Tax Rules, 2006, no additional liability of Service Tax can be fastened to the appellant on account of 'Convenience Fee' and 'Cancellation Fee' either before or after 01-07-2012. The appeals succeed squarely on merits.

46. Learned Counsel for the appellants also based his submissions on limitation. He submits that in the past the Department has been invoking extended period in the notices, the SCN issued in the present case which is a subsequent Show-Cause Notice, extended period of limitation cannot be invoked at all; there was no fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Finance Act or the Rules made there under, with intent to evade payment of tax on the part of the Appellant and therefore, extended period is not invokable in respect of Appeal No. ST/0060166/2017. We find force in the submissions of the appellant that Department conducted audit of the Appellant in March and April 2010 for period 2006-07 to 2008-09 as mentioned in SCN dated 07.06.2012; the Appellant duly replied to all the communications received from the authorities from time to time; various SCNs on different issues were also issued to the Appellant on

basis of information supplied by them. We also find that except for bald allegation of suppression of facts etc, no evidence showing the intent to evade payment of duty has been shown in the impugned order. Also looking in to the fact that issue being not free of doubt and being the subject matter of litigation all over, the appellants are entitled to entertain a belief that the 'Convenience Fee' and 'Cancellation Fee' are not chargeable to Service Tax. In view of the same, we hold that extended period is not invokable in the facts and circumstances of the case. When the appellant succeeds on merits, there is no question of imposing any penalty.

47. In the result, we allow both the appeals i.e. No. ST/0060166/2017 and ST/0060306/2019, with consequential relief, if any, as per law.

47.1 The miscellaneous application, seeking change the name and address of Respondent, is allowed consequentially, the respondent shall be known as **"Commissioner of Central Good & Service Tax, Gurugram."**

(Order pronounced in the open court on 26.06.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

PK/Kailash