CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.
PRINCIPAL BENCH - COURT NO.III

Service Tax Appeal No.51758 of 2018 (DB)

(Arising out of Order-in-Appeal No.176(SM)ST/JPR/2018 dated 13.03.2018 passed by the Commissioner (Appeals), Central Excise and Central Goods and Service Tax, Jaipur]

M/s. Akbar Travels of India (P)Ltd. **Appellant**
7, Katewa Bhawan, Opposite Ganpati Plaza,
M.I.Road,
Jaipur –Rajasthan.

VERSUS

Commissioner of Central Goods and Service Tax, **Respondent**
NCRB, Statue Circle,
Jaipur.

APPEARANCE:

Shri Manoj Chouhan, Chartered Accountant for the appellant
Shri Manoj Kumar , Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO.50116/2024

DATE OF HEARING: 15.01.2024
DATE OF DECISION: 23.01.2024

BINU TAMTA:

1. The appellant is assailing the Order-in-Appeal No.176(SM)ST/JPR/2018 dated 13.03.2018, whereby the Commissioner (Appeals) confirmed the demand towards service tax as proposed in the show cause notice and affirmed by the Adjudicating Authority.

2. The appellant is engaged in providing "Air Travel Agent Service" and are holding the service tax registration. The appellant was discharging the service tax under Rule 6(7) of Service Tax Rules, 1994 and were paying service tax at the rate of (0.6%) or (1.2%) of the base fare in case of

Domestic Booking and International Booking, respectively for the services taxable under the category of Air Travel Agent Services.

3. On the basis of the intelligence gathered, the Department found that the appellant had deliberately manipulated their books of account and not reflected the actual income earned as commission amount received from General Sales Agent (GSA) and and also the incentives received from the airlines. Accordingly, show cause notice dated 18.10.2011 was issued to the appellant for demand of service tax amounting to Rs.32,02,972/- under "Business Auxiliary Services" (BAS) along with interest under Section 75 and penalty under Section 76, 77 and 78 of the Finance Act, 1994. The Adjudicating Authority vide order dated 30.03.2013 confirmed the demand of Rs.29,06,914/- under Section 73(1) and amount of Rs.2,96,057/- received in the name of Ticket Cancellation Charges, Voiding Charges, Refund Administrative Fee (RAF) and Air Transaction Fee was dropped. The appeal filed by the appellant was dismissed by the impugned order and hence the present appeal has been filed challenging the same before this Tribunal.

4. The learned Counsel for the appellant has challenged the confirmation of demand of service tax under the category of BAS on the following income:

> "**6.1** **<u>Amount received from Airlines</u>**
> (a) Airline Incentive
> (b) PLB Productivity Linnked Bonus
> (c) Boarding Incentives received from Airline
>
> **6.2** **<u>Commission received from other than Airlines</u>**
> (a) Commission received from other air travel agents/GST.
> (b) Commission received from appellant's own branch."

5. To appreciate whether the aforesaid amounts received can be taxed under Section 65(4) as "Air Transport Agent" as claimed by the appellant or

under Section 65(19) as "Business Auxiliary Service" as per the Revenue, the relevant provisions are quoted below:-

> **"Section 65(4) "Air Travel Agent"** means any person engaged in providing any service connected with the booking of passage for travel by air."
>
> **Section 65(105)(l), "Taxable Service"** means any service provided or to be provided to any person by an air travel agent in relation to the booking of passage for travel by air.
>
> **Section 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;
>
> **(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.]"
>
> **Section 65(105)(zzb)"Taxable Service"** means any service provided or to be provided to a client, by any person in relation to business auxiliary service.**"**

6. The learned Counsel submitted that the demand under challenge stands decided in their favour by the Larger Bench in **Kafila Hospitality & Travels Pvt. Ltd.- 2021 (3) TMI 773 – CESTAT – New Delhi (LB),** where this Tribunal has held that the activity in question is not taxable under the head, "Business Auxiliary Service" but is covered under the category of "Air Travel Agent" service. On the commissions received from other than the airlines, i.e., from other travel agency or GSA. The Tribunal has already held that commission received for Booking of ticket from other agents is not taxable under BAS and relied on the order passed in their own case titled as **M/s Akbar Travels of India Pvt. Ltd. - 2019 (22) GSTL 427** relying on the decision in **M/s Zuari Travel Corporation - 2013 (7) TMI 911 – CESTAT-Mumbai**. Similarly, for the commission received from other branches, the learned counsel submitted that the transaction here does not involve two separate entities in terms of definition of taxable service which requires existence of a service provider and a service receiver whereas the appellant and the branches are one and the same entity. On the contrary, the learned Authorised Representative for the Revenue reiterated the findings of the authorities below to say that the services in question are covered under the category of Business Auxiliary Service and the appellant is liable to pay the service tax thereon.

7. Having heard both the sides and perused the records, we are of the considered opinion that the issues raised with regard to the classification of the services under the category of Air Travel Agent service is no longer res-integra and has been decided in favour of the appellant and against the revenue. We find that the contention of the Revenue that the amount received as airline incentive, productivity linked bonus (PLB) and Boarding incentives received by the appellant from the airlines are in the nature of

promotion of the activities of the airlines and would therefore be taxable under the heading Business Auxiliary Service deserves to be rejected in view of the law settled by the Larger Bench in **Kafila Hospitality & Travels Pvt. Ltd. (supra)** where the Tribunal considered the issue as to whether the amounts received by the appellant as incentives were towards promotion of their business and not the business of the airlines so as to be taxable under the category of 'Business Auxiliary Service'. The observations of the Tribunal are as under: -

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

8. Reference was made by the Larger Bench to the decision in **Airlines Agents Association vs Union of India - 2006 (3) STR 3**, where the Madras High Court held that the commission paid to the Air Travel agents had a direct nexus to the "air travel agent" services rendered to the passengers even if it indirectly benefited the business of the airlines. It was, therefore, concluded that "air travel agent" were not promoting or marketing the business of the airlines. Similarly, in the case of **Commissioner of Central Excise versus Shabeer Travels - 2011 (24) STR 171,** the Kerala High Court rejected the contention of the department that the sub-agent was rendering BAS to IATA agent and held that when an assessee is in the business of booking air tickets through another air travel agent, the

assessee essentially renders Air Travel Agent services to the main travel agent, and would, therefore, not be liable to pay service tax under the category of BAS. The Larger Bench, accordingly held that by rendering services connected to travel by air, a travel agent would render "Air Travel Agent" services and which services cannot be said to be for promotion or marketing for the airlines. The Larger Bench then considered the issue whether the travel agent is promoting the business of CRS Companies. Referring to the circular dated 16.04.2010, issued by Central Board of Excise and Customs relating to service tax on re-insurance commission, it was held that the passenger cannot be deemed to be an audience for promotion of the business of CRS companies, for the passenger can neither book directly through a CRS company nor can a passenger be influenced by any travel agent to book through a particular CRS company. Whereas the definition of BAS reveals that the service provider must promote or market the service of a client. Hence, the classification of the service would fall under the "Air Travel Agent Services" and not BAS. The Larger Bench at the same time concluded that the incentives received by service recipient from a service provider cannot be subjected to levy of service tax inter-alia observing :-

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

9. Thus having considered the decision of the Larger Bench at length we are of the considered view that no service tax can be levied on the appellant under the category of "Business Auxiliary Service". We may also refer to the

later decision of the **Tribunal in SOTC Travels Services Pvt. Ltd vs Principal Commissioner, Central Excise Delhi - 2022(7) TMI 293- CESTAT NEW DELHI** where once again the liability to pay service tax under the heading Business Auxiliary Service on receipt of commission or incentive from CRS companies and on performance linked bonus from the airlines was decided against the revenue following the decision of the Larger Bench in **Kafila Hospitality (supra)** and the appeal filed by the revenue was dismissed by the Apex Court – **2023 (7) TMI 439 (SC)** observing as :

> " After hearing the learned Additional Solicitor General, appearing on behalf of the appellant and noticing his statement that the relied upon judgement in Kafila Hospitality & Travels Pvt Ltd versus Commissioner, Service Tax, Delhi has not been challenged, we see no merit in appeal. Hence, the civil appeal will stand dismissed".

10. The Revenue having not challenged the order of the Larger Bench has accepted the same and law as settled therein is binding on us.

11. The learned Counsel for the appellant has brought to our notice an order passed by the Commissioner (Appeals) dated 10.10.2014 in the case of the appellant covering the present issue holding that service tax cannot be levied on the amount received by the appellant in the form of incentive from the airlines as any such attempt would tantamount to double taxation which is not permissible in law. In fact, the clear observation was that once the appellant has opted to pay service tax at 1.2% of the basic fare under Rule 6(7) of the rules instead of paying service tax on the gross amount, receipt from airlines, commission or otherwise at normal rate of tax 10% or 12% as the case maybe, there could be no reason to levy service tax on any amount received by the appellant from airlines in addition to commission in the form of incentive. The appellant has stated that the department has not challenged the said order and the same has been accepted.

12. We now come to the second issue of receiving commissions from other than the airlines. The reliance placed by the learned Counsel for the appellant on the decision in **M/s. Zuari Travel Corporation (supra)** squarely covers the said issue. The Tribunal dealt with the question as to whether the sub-agent of an IATA Agent who books the tickets of air for customers and get commission from IATA Agent is rendering services under the category of "Business Auxiliary Services" or the category of "Air Travel Agent" and held as under:-

> **"5.4** In our considered view, the question before us is also identical. The activity undertaken by respondent herein, who is a sub-agent of the IATA agent comes under 'Air Travel Agents Services' or 'Business Auxiliary Services'. The ratio of the decision of the Hon'ble High Court of madras in the case of Airlines Agents Association (supra) would squarely apply to the facts of the present case. If the services rendered by the IATA agent is 'Air Travel Agents Services', the services rendered by a sub-agent is also the same and it cannot be different from that if 'Air Travel Agents Services'."

13. We also find that the decision in **M/s Zuari Travel Corporation** was followed in the case of the appellant itself as reported in **2018 (2) TMI 82 - CESTAT - MUMBAI** and the impugned order classifying the service under "Business Auxiliary Service" was held to be unsustainable. Following the said orders, we are of the considered opinion that demand raised by the revenue in this regard under the category of "Business Auxiliary Service" deserves to be rejected.

14. Lastly, with regard to the demand pertaining to the commission received from their own branches, we agree with the contention of the learned counsel for the appellant that though the appellant and the branches are having separate service tax registration numbers but they are one and the same person and the transaction does not involve two separate entities. The branch has been set up for serving the appellant companies customers

in and around Jaipur and the commission received by Jaipur office from other branch office is not for any taxable services rendered. The said commission is not received from any other person but by the appellant himself, which in essence is only on account of transfer of tickets from the branch to the appellant. The said issue has also been considered in **Riya Travel & Tours (I) Pvt. Ltd. – 2020 (40) GSTL 321,** where the Tribunal held that the commission received by the head office from the branch office of the same entity is not taxable as both cannot be treated as separate entity, observing as :

> " With regard to the appeal filed by Revenue, it is an admitted fact on record that the head office and the branch offices of the appellant run their business under one umbrella, i.e., the appellant's company incorporated under Companies Act, 1956. The head office and the branch offices of one corporate entity cannot be termed as separate persons, one as the service provider and the other as the service receiver. Thus, in the absence of any provider – receiver of service relationship, the commission amount shared by the branch office is with the head office cannot be subjected to tax under such category of service".

15. We have no hesitation in concluding that the demand raised by the revenue under the category of "Business Auxiliary Service" is unsustainable in light of the consistent view taken earlier which we have discussed above. Consequently, the impugned order is set aside and the appeal is allowed.

[Order pronounced on 23rd January, 2024]

(Binu Tamta)
Member (Judicial)

(Hemambika R.Priya)
Member (Technical)

Ckp.