

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH, COURT NO. I

SERVICE TAX APPEAL NO. 51844 OF 2021

(Arising out of the Order-in-Original No. 09-11/2021-ST dated 29/07/2021 passed by Additional Director General (Adjudication), Directorate General of Goods & Service Tax Intelligence (Adjudication Cell), New Delhi.)

M/s Make My Trip (India) Private Limited

SP Infocity, 243, Ground, Fourth & Fifth Floor,
Tower-A, Udyog Vihar, Phase – I,
Gurugram, Haryana.

Appellant

Versus

**Additional Director General,
Directorate General of GST Intelligence,**

West Block – VIII, Wing – 6, 2nd Floor, R.K. Puram,
New Delhi – 110 066.

Respondent

WITH

SERVICE TAX APPEAL NO. 51845 OF 2021

[Arising out of the Order-in-Original No. 09-11/2021-ST dated 29/07/2021 passed by Additional Director General (Adjudication), Directorate General of Goods & Service Tax Intelligence (Adjudication Cell), New Delhi.]

Shri M.K. Pallai, Vice President (Finance)

M/s Makemy Trip (India) Private Limited

SP Infocity, 243, Ground, Fourth & Fifth Floor,
Tower-A, Udyog Vihar, Phase – I,
Gurugram, Haryana.

Appellant

versus

**Additional Director General,
Directorate General of GST Intelligence,**

West Block – VIII, Wing – 6, 2nd Floor, R.K. Puram,
New Delhi – 110 066.

Respondent

AND

SERVICE TAX APPEAL NO. 51846 OF 2021

[Arising out of the Order-in-Original No. 09-11/2021-ST dated 29/07/2021 passed by Additional Director General (Adjudication), Directorate General of Goods & Service Tax Intelligence (Adjudication Cell), New Delhi.]

**Shri Mohit Kabra, Group CFO & Director
M/s Makemy Trip (India) Private Limited**

SP Infocity, 243, Ground, Fourth & Fifth Floor,
Tower-A, Udyog Vihar, Phase – I,
Gurugram, Haryana.

Appellant

versus

**Additional Director General,
Directorate General of GST Intelligence,**
West Block – VIII, Wing – 6, 2nd Floor, R.K. Puram,
New Delhi – 110 066.

Respondent**Appearance**

Shri V. Lakshmikumaran, Ms. Poorvi Asati and Shri Manish Gaur, Advocates
for the appellants
Shri Mihir Ranjan, Special Counsel for the Department.

**CORAM: HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**DATE OF HEARING: 13.07.2023
DATE OF DECISION: 10.01.2024**

FINAL ORDER NO's. 50025-50027/2024

JUSTICE DILIP GUPTA:

Service Tax Appeal No. 51844 of 2021 has been filed by M/s Make My Trip (India) Private Limited¹ to assail the order dated 29.07.2021 passed by the Additional Director General² confirming a portion of the demand proposed in the show cause notice dated 17.10.2016 and the two Statement of Demands dated 22.10.2018 and 12.04.2019 issued under sections 73 and 73A of the Finance Act 1994³ with interest and penalty.

2. **Service Tax Appeal No. 51845 of 2021** and **Service Tax Appeal No. 51846 of 2021** have been filed by the Vice President (Finance) and Groups CFO, and the Director of the appellant to assail that part of the order dated 29.07.2021 that imposes penalties upon them.

3. The appellant, which is an Indian online travel company, owns an online platform named 'makemytrip.com' which allows the customers to book hotel rooms, flight bookings, train bookings and bus

**1 the appellant
2 the Adjudicating Authority
3 the Finance Act**

tickets through its website application. It registered itself with the Service Tax Department for provision of air travel agents services and tour operator services.

4. The online website/ mobile application of the appellant lists various hotels which provide hotel accommodation services. Rooms in these hotels can be booked by the customers on the website of the appellant. The booking process has been explained by the appellant in the following manner:

- (a) The customers access the appellant's website/mobile application⁴ and fill the requisite details such as the travel dates, place of visit, star ranking of the required hotels;
- (b) Basis this information, the search engine of the appellant shortlists the hotels in a particular area, along with the rates of the rooms which are available on the chosen dates. These details are shown on the website/mobile-app.
- (c) The customer can select the hotel accommodation depending upon the ranking, facilities, reviews and other information given on the website/mobile-app;
- (d) Once a hotel has been selected, a booking form is generated wherein the customer fills his/her personal details and confirms the booking. In some cases, the customer is required to pay on the website itself for its bookings;
- (e) Upon receiving the payment, a service tax invoice is generated by the appellant;
- (f) After confirmation of the booking of hotel, a 'hotel confirmation voucher' is issued by the appellant to the customer carrying the booking details along with the charges;
- (g) Simultaneously, a 'hotelier's voucher' is issued by the appellant to the hotel whose room has been booked by the customer; and

4. mobile-app

- (h) In the some cases, payment for the booking is made by the customer at the hotel directly. However, the rest of the aforesaid procedure remains the same.

5. The appellant has also stated that for each booking, three documents are issued by the appellant, which are as follows:

- (i) **Service Tax Invoice** is issued by the appellant at the time of check-in on booking of hotel rooms done by the customer. The appellant discharges its service tax liability on the basis of this invoice;
- (ii) **Hotel Confirmation Voucher** is issued to the customer when the booking is confirmed by the hotel. The voucher contains details like check-in and check-out dates, room type, number of guests, base amount, discount, hotel taxes, amount paid, other packages and cancellation policy; and
- (iii) **Hotelier's Voucher** is issued to the hotel. The voucher contains details of the customer, check-in and check-out dates, room type, number of guests, base amount, discount, hotel taxes and other packages.

6. The appellant has also stated that it entered into three types of agreements with hotels:

- (i) The appellant provides an interest-free deposit to the hotel, which is used by the appellant against each room booking made in the said hotel;
- (ii) A specific number of hotel rooms are allocated to appellant for booking through website; and
- (iii) Booking of hotel rooms on commission basis.

7. During the relevant period, the appellant discharged the service tax liability on the entire amount received from the customers (which is inclusive of taxes) under the category of 'tour operator services' by availing the benefit of abatement of 90 percent under notification

dated 01.03.2006 (till 30.06.2012) and under notification dated 20.06.2012 (w.e.f. 01.07.2012)⁵.

8. An investigation was carried out by the Directorate General of Central Excise Intelligence at the premises of the appellant and it was noticed that the appellant had wrongly claimed that it was rendering tour operator services to customers as it was providing short-term hotel accommodation services and was not discharging service tax liability under this category.

9. The show cause notice and the Statement of Demands were issued to the appellant primarily containing the following allegations against the appellant:

- (i)** The appellant is engaged in the provision of service of short term hotel accommodation and thus liable to pay service tax under the category of short-term accommodation service taxable under section 65(105)(zzzzw) of the Finance Act (pre-1.7.2012) and under section 66B of the Finance Act (post-1.7.2012);
- (ii)** The appellant is not a tour operator as it does not plan any tour for the standalone hotel room bookings and thus, not entitled to abatement of 90% under the Abatement Notifications;
- (iii)** The relationship between the hotel and the appellant is not a principal-agent relationship; and
- (iv)** The appellant has collected amount representing as service tax in excess of the service tax assessed and paid by it, but it has not paid the amount so collected to the credit of the Government. The

5. the Abatement Notifications

appellant should have paid such amount to Government instead of passing the same to the Hotels. Accordingly, the appellant is liable to pay the said collected amount under section 73A of the Finance Act. Further, in case of hotels having tariff less than Rs 1000/- per day and hotels in Jammu and Kashmir, the appellant collected the amount as service tax but same was not required to be collected. Thus, the appellant is liable to pay the said amount.

10. The appellant filed a detailed reply to the show cause notices primarily contending that:

- (i)** The appellant is not providing short term accommodation services but in fact was a booking agent of the hotel;
- (ii)** The appellant, being a tour operator, was entitled to 90% abatement under the Abatement Notifications. The tour operator is qua the person and not qua the transaction;
- (iii)** Section 73A of the Finance Act was incorrectly invoked by the department as the ingredients of section 73A of the Finance Act are not fulfilled; and
- (iv)** The demand, both under sections 73 and 73A of the Finance Act, was not sustainable.

11. The Adjudicating Authority did not accept the contentions of the appellant and recorded the following findings in the impugned order:

- (i)** Services provided by the appellant to the customers are in the nature of short-term accommodation service as the appellant has booked the entire

amount received from the customers as 'sales' and the amount paid to the hotel as 'purchases' in its books of account;

- (ii)** The appellant is not an intermediary since the hotels are not aware of the exact value of services. The appellant is not acting as an agent of the hotel and is not facilitating the provision of any service. The appellant has absolute control over charging of gross amount from the customers for hotel accommodation. Thus, the price at which the hotel room is sold to the customer by the appellant is fixed and decided by appellant on its own and not as per the express authorization of the hotels;
- (iii)** The appellant is not entitled to avail the abatement of 90% under the Abatement Notifications as tour operator as it does not plan or conduct any tours in respect of its standalone hotel bookings and has failed to submit any defense against paragraph 4.8 of the show cause notice, which specifies three conditions to be fulfilled for service to qualify as 'tour operator' service; and
- (iv)** The appellant has collected amount from the customers as representing service tax on hotel accommodation service and service tax assessment was done under tour operator service. Thus, the amount collected by the appellant is in excess of the service tax paid by it and thus, both the conditions stipulated under section 73A of the Finance Act have been satisfied.

12. To appreciate how the demands have been proposed under

sections 73 and 73A of the Finance Act, it would be useful to reproduce the conclusions drawn in the show cause notice dated 17.10.2016. It is as follows:

"CONCLUSIONS

14. From the foregoing, it appears that-

(i) during the period May, 2011 to June, 2012, MMT have been providing taxable services of renting of hotel rooms accommodation as defined under Section 65(105) (zzzzw) of the Finance Act, 1994 and appears to have evaded payment of appropriate amount of Service Tax by fraudulently claiming Service Tax exemption under Notification No.01/2006-ST dated 01.03.2006, as amended, as tour operators in the taxable services category of tour operators services as defined under Section 65(105) (n) of the Finance Act, 1994;

(ii) during the period July, 2012 to September, 2015, the services provided by MMT are liable to Service Tax under Section 66B of the Finance Act, 1994 and they appear to have evaded payment of appropriate amount of Service Tax by fraudulently claiming Service Tax exemption under Notification No.26/2012-ST dated 20.06.2012, as amended, as tour operators;

(iii) MMT have collected amount, totaling Rs.82,44,25,109/-, representing as Service Tax from their customers, in excess of the Service Tax assessed and paid by them, but has not paid the amount so collected to the credit of the Central Government;

(iv) MMT have collected amount, totaling Rs.73,94,424/-, representing as Service Tax from their customers, in excess of the Service Tax assessed and paid by them, though the hotels in which the customers were lodged were having declared tariff below Rs.1,000/- per day per unit and the amount so collected by MMT has not been paid to the credit of the Central Government;

(v) MMT have collected an amount of Rs.1,55,89,142/- representing as Service Tax from the customers for providing taxable services in the State of Jammu &

Kashmir (J&K) even though the same was not required to be collected in as much as the Finance Act, 1994 [Section 64(1)] is not applicable to the State of J&K, and the amount so collected has not been paid to the credit of the Central Government;

(vi) MMT's claim that they are in an agency relationship with the hotels does not appear to be acceptable in view of discussions made in para 8 to 13 above."

13. Clauses (i) and (ii) of the aforesaid paragraph 14 relate to the demand proposed under section 73 of the Finance Act and clauses (iii), (iv) and (v) relate to the demand proposed under section 73A of the Finance Act.

14. The following chart would demonstrate the demand confirmed under sections 73 and 73A of the Finance Act, and the demand dropped:

Show Cause Notice dated	Period Involved	Demand of Service Tax under				Demand dropped (if any)
		Section 73/ (in Rs.)	Section 73A /(in Rs.)			
			Except hotels located in J & K and of hotels having room tariff less than Rs. 1000/-	For hotels located in J&K	For hotels having tariff less than Rs. 1000/-	
17.10.2016	May 2011 to September 2015	143,83,73,710	82,44,25,109	1,55,89,142	73,94,424	
22.10.2018	October 2015 to March 2016	99,61,68,684	46,59,22,753	1,18,72,148	60,28,437	40,73,81,206 (abatement extended in respect of short-term accommodation service)
12.04.2019	April 2016 to June 2017	380,83,50,090	249,32,48,127	3,85,80,813	2,26,81,143	173,97,69,058 (abatement extended in respect of short-term accommodation service)
TOTAL		624,28,92,484	378,35,95,989	6,60,42,103	3,61,04,004	214,71,50,264

15. The following chart would give a summary of the demand proposed in the show cause notice, the demand confirmed by the Adjudicating Authority and the demand dropped by the Adjudicating Authority.

Demands	Proposed in SCN (in Rs.)	Confirmed by the Order (in Rs.)	Dropped by the Order (in Rs.)
Demand under Section 73	624,28,92,484	409,57,42,220	214,71,50,264
Demand under Section 73A	388,57,42,096	388,57,42,096	-
Total Demand	10,12,86,34,580	798,14,84,316	214,71,50,264

16. Shri V. Lakshmikumar, learned counsel for the appellant assisted by Ms. Poorvi Asati and Shri Manish Gaur made the following submissions:

- (i)** The appellant is not providing short term accommodation services. For any service to qualify as short term accommodation, it should be specifically provided by a hotel, inn, or a guest house. Neither the show cause notice nor the impugned order allege or hold that the appellant is in hotel or inn or a guest house business. In any view of the matter, even if what is alleged by the Department is correct, then too the same would not constitute service and no service tax on the same would be payable;
- (ii)** The appellant, being a tour operator, is entitled to 90% abatement under the Abatement Notifications;
- (iii)** Section 73A of the Finance Act could not have been invoked as the appellant collected the amount as "taxes and fees" on behalf of the hotel, which amount has been remitted to the hotels. The appellant did not collect any amount representing service tax;
- (iv)** The impugned order has confirmed the demand of service tax under section 73 of the Finance Act on the gross amount collected by the appellant from the

customers, which includes the amount remitted to the hotels as well. Thus, there is duplication of demand;

- (v)** Sections 73 and 73A (2) of the Finance Act cannot be invoked together in a particular transaction as both deal with two different situations and cannot be invoked together. One amount cannot be demanded under both the sections;
- (vi)** Section 73A of the Finance Act is not invocable with respect to the bookings made for the hotels located in Jammu and Kashmir since the provisions of Chapter V of the Finance Act were not applicable to the State of Jammu and Kashmir and section 73A of the Finance Act is contained in Chapter V;
- (vii)** Section 73A of the Finance Act is not invocable with respect to bookings made for hotels having a tariff of less than of Rs. 1000/-;
- (viii)** The extended period of limitation could not have been invoked in the facts and circumstances of the case;
- (ix)** Since the demand itself is not admissible, penalty and interest are not imposable; and
- (x)** Penalties could not have been imposed under section 78A of the Finance Act on the Vice President (Finance) and Groups CFO and Director of the appellant as mens rea cannot be alleged on their part.

17. Shri Mihir Ranjan, learned special counsel appearing for the department, however, supported the impugned order and made the following submissions:

- (i)** The appellant provided short-term accommodation to its customers in the rooms under its control. The appellant offers a list of hotels to its customers on the website and the customers pay the amount online to the appellant at the time of booking as per the price displayed. The appellant assures basic facilities in the hotel and the customer approaches the appellant for any deficiency the hotel. The customer does not pay the amount to the hotel and settles all account with the appellant;
- (ii)** As per the Agreement entered into by the appellant with the hotels, the appellant holds inventories of the hotels and the appellant sells these rooms to its customers on its terms and conditions. The appellant, in books of account, booked the whole amount paid to hotels as purchases and has shown the amount received from the customer as sales. It is, therefore, clear that it was the appellant and not the hotel, which was providing short-term accommodation;
- (iii)** The appellant was not a mere online booking agent and infact was providing short-term accommodation to its customers;
- (iv)** The appellant was not entitled to abatement under the Abatement Notifications as the appellant did not fulfil any of the three conditions stipulated in the Notifications while providing taxable service regarding standalone hotel bookings;
- (v)** The department was justified in invoking the provisions of section 73A of the Finance Act and

requiring the appellant to pay the taxes collected from the customer and passed on to the hotel as the appellant collected the amount from the customers as representing service tax on hotel accommodation service but discharged service tax liability as a tour operator;

- (vi)** The provisions of sections 73 and 73A of the Finance Act can be simultaneously invoked. Section 73 has been invoked to recover the service tax short levied as the appellant was discharging the service tax liability under 'tour operator' service, while it was providing short-terms accommodation service. The differential service tax under hotel accommodation service was sought to be recovered under section 73 of the Finance Act. The demand under section 73A relates to service tax collected by the appellant on hotel accommodation services from the customers and not deposited with the government. There is no bar on the department in invoking both the sections together;
- (vii)** The demand under section 73A(2) of the Finance Act has been invoked in respect of service tax collected from the customers from hotel accommodation service for the hotels located in the State of Jammu & Kashmir, while the demand under section 73 of the Finance Act has been raised in respect of hotels having a tariff below Rs. 1000/-;
- (viii)** The statement for the subsequent period can be issued under section 73A of the Finance Act;
- (ix)** The department was justified in invoking the

extended period of limitation under the proviso to section 73(1) of the Finance Act; and

- (x) The department was justified in imposing penalty on the appellant and its officials in the facts and circumstances of the case.

18. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the department have been considered.

19. The period involved in the present appeal is from May 2011 to June 2017.

20. The main issues involved in the appeals are:

- (i) Whether the appellant provided 'short-term accommodation' service made taxable under section 65(105) (zzzzw) of the Finance Act, or 'tour operator' service made taxable under section 65(105)(n) of the Finance Act;
- (ii) Whether the appellant was entitled, as a tour operator, to abatement of 90% on the gross amount charged under the Abatement Notifications in respect of service of a tour operator; and
- (iii) Whether the Department is justified in invoking section 73A of the Finance Act in requiring the appellant to pay the alleged taxes collected from the customers and passed on to the hotels for their payment of tax under hotel accommodation services.

Whether the appellant is providing short-term accommodation services

21. The contention of the department is that the appellant is providing short-term accommodation service and not tour operator

service and, therefore, the demand under section 73 of the Finance Act has been confirmed under this head. It has, therefore, to be determined whether the appellant is providing short-term accommodation or not.

22. To examine this issue, it would be appropriate to examine the relevant clauses of the **Privilege Partnership Agreement** between the appellant and the hotel and they are as follows:

"WHEREAS the Hotel is in the business of providing hotel accommodation and Hotel has represented to MMT that it is capable of providing hotel accommodation to MMT's customers as and when requested.

1. Scope of Services:

1.1 **Hotel acknowledges and agrees that bookings of the Hotel rooms will be purely at the choice of the customers.**

1.2 The bookings of MMT will be as per the user agreement at http://www.makemytrip.com/legal/user_agreement.html and the parties agree to deliver their obligations accordingly.

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1.5 The list of properties of the Hotel are more specifically set out in Annexure-A.

2. Deposit:

MMT agrees to pay an interest free deposit of Rs. 50,00,000/- (Fifty Lac Rupees) ("Deposit") to the Hotel as agreed upon. Hotel agrees and acknowledges that such Deposit shall be exploited by MMT against each booking made by MMT with the Hotel from time to time. MMT in its sole discretion will replenish the Deposit if it is exhausted during the term unless otherwise agreed by the parties. The Deposit will be of open-ended validity and MMT may utilize it as and when necessary.

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4. Hotels Representation and Warranty

4.1 **Hotel shall never offer cheaper selling price to other OTA for online bookings neither offer cheaper selling price directly to the customer via email, call or from hotels own website (selling price shall be the rate of the hotel inventory on MMT website, which are available for booking by the customer. The net rates made available to Hotel's offline selling agents shall be comparable to MMT net rates as offered by the Hotel and Hotel should not give undue selling advantage to its offline selling agent. Hotel shall not, during the term of this Agreement, allow other OTA's to do self funded marketing driven promotions and hotel shall within 6 hours of being intimated by MMT of such promotion shall instruct and ensure that such OTA withdraws the promotion of the Hotel.**

4.2 **Hotel shall never deny honoring MMT's bookings. In the event of any such occurrence, it shall offer an alternative equivalent accommodation. If Hotel fails to do so, Hotel agrees to refund the booking amount to MMT towards damages in addition to indemnifying MMT against any consumer complaint, unless it is due to an error on part of MMT and established with written confirmation from hotels email ID.**

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5. Rates and Commission:

5.1 Parties agree that the inventory rates, the blocking and releasing timelines for booking done shall be as agreed from time to time.

5.2 **A commissionable rate of 35% for the Financial Year 2012-13. The Commissions for each subsequent year shall be mutually agreed between the parties.**

6. Payment terms:

Hotel will deduct the payment for each booking from the Deposit amount less the commission and share a monthly reconciliation report for adjustments made and remaining Deposit to the

mentioned email ID of hotel.payment@mkemytrip.com. The said commission adjustment shall be exclusive of any taxes.

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8. Obligations of the Hotel:

8.1 The information about the facilities available at the Hotel, the vicinity details, star rating, extra adult/child policy etc. shall be as mentioned on the hotel website or shall be informed by email to MMT from time to time.

8.2 Hotel shall never deny honoring MMT bookings. In the event of any such occurrence, it shall offer an alternative equivalent accommodation. If hotel fails to do so, hotel agrees that this will be adjusted against the payments to be made to the hotels by MMT i.e. hotel shall not be allowed to deduct any amount from the deposit for such booking.

8.3 Even in case of confirmed bookings for overbooked dates, the hotel will still honor MMT's bookings by accommodating in its own facilities. In case accommodating in the same hotel can't be provided even on best effort basis, then the Hotel will provide the customer within an alternate hotel in same category or higher category hotel in the same or nearest locality at no extra cost, including transfers.

8.4 In case of failure by the Hotel to honor the commitment either partially or fully, the Hotel shall indemnify MMT against all claims, losses or damages incurred by MMT due to such failures.

8.5 Hotel shall provide services to the MMT customers as per best industry practice.

8.6 Hotel agrees to indemnify and hold MMT, its officers, directors, employees, successors and assigns harmless against all losses, damages, liabilities, costs or expenses of whatever form or nature, including, without limitation, attorney's fees and expenses and other costs of legal defense, whether direct or indirect, that they, or nay of them, may sustain or incur as a result of

may acts or omissions of the Hotel or any of its directors, officers, employees, or agents, including but not limited to (1) breach of any of the provisions/obligation of this Agreement (2) negligence or other tortuous conduct , or (3) representations or statements made by the Hotel herein. The Hotel further agrees to indemnify MMT its officers, directors, employees, successors, and assigns harmless against any claims arising out of any physical and personal injury suffered by MMT's customers or any damage or loss incurred by such customers while availing the services under this Agreement to the extent the same is not attributable to MMT.

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11. Limitation of Liability

11.1 MMT shall not be liable to the hotel for any direct, indirect, incidental, punitive, special or consequential damages or losses (including without limitation loss of profit or revenue etc), whether under contract or in tort, and even if the other party had been advised of the possibility of such damage or loss.

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14. General

14.3 Nothing in this Agreement shall be construed a to create the relationship of employer-employee, partners, collaborators, joint-venture or principal-agent between the parties hereto. The parties shall be independent contractors and neither party shall bind the other by its acts, deeds or omissions, other than to the extent set out in this Agreement."

(emphasis supplied)

23. The following relevant points emerge from the aforesaid Agreement:

- (a)** The Hotel is in the business of providing hotel accommodation services and has expressly represented to the appellant through the Agreement that the Hotel is capable of providing hotel accommodation to the customers;
- (b)** The hotel shall provide services to the customers as per best industry practice;

- (c)** The hotel pays consideration to the appellant in form of commission for the provision of services of concluding online booking of hotel rooms for the lodgers;
- (d)** The hotel has agreed to defend and indemnify the appellant against the claims, demands, suits/proceedings, liabilities, losses, damages etc. asserted against the appellant arising out of or in relation to:
- any consumer complaints arising out of hotel's services including but not limited to unavailability, deficiency and/or misbehaviors by the employees of the hotel;
 - breach of any applicable laws pertaining to the subject of this Agreement; and
 - breach of any of representations, warranties and obligations under this Agreement."

24. It is, therefore, evident from the aforesaid that by providing booking of hotel rooms service to the hotel/customers through the online portal, the appellant merely acted as a facilitator between the hotel and the customers, for which the appellant received commission and it cannot be urged that the appellant had rendered hotel accommodation service to the customers. In fact the appellant only provided access to an online platform to the customer for ease of booking hotel and charges commission on the hotel for the same and pays service tax on such commission. A customer accesses the appellant online portal and books the hotel room as per his preference and makes payment for the same along with a nominal convenience fee. Out of the total amount received by the appellant from the customer, the appellant retains only its commission and service fee (if any) and the balance amount is forwarded to the hotel. Thus, the amount charged by the appellant from the customer for providing access to the hotel option is only the commission and service fee.

25. This is evident from the 'User Agreement' entered between the appellant and the customer, wherein it has been mentioned that the appellant always acts as a facilitator between the customer (user) and the hotels and the liability of the appellant is restricted to providing confirmed booking through its online portal. The relevant clauses of the **User Agreement** are reproduced below:

"FORCE MAJURE CIRCUMSTANCES

The user agrees that there can be exceptional circumstances where the service operators like the airlines, hotels, the respective transportation providers or concerns may be unable to honor the confirmed bookings due to various reasons like climatic conditions, labor unrest, insolvency, business exigencies, government decisions, operational and technical issues, route and flight cancellations etc. If MMT is informed in advance of such situations where dishonor of bookings may happen, it will make its best efforts to provide similar alternative to its customers or refund the booking amount after reasonable service charges, if supported and refunded by that respective service operators. **The user agrees that MMT being an agent for facilitating the booking services shall not be responsible for any such circumstances and the customers have to contact that service provider directly for any further resolutions and refunds.**

...

RESPONSIBILITIES OF THE USER VIS-I-VIS THE AGREEMENT

The User expressly agrees that use of the services is at their sole risk. **To the extent MMT acts only as a booking agent on behalf of third party service providers, it shall not have any liability whatsoever for any aspect of the standards of services provided by the service providers.** In no circumstances shall MMT be liable for the services provided by the service provider. The services are provided on an "as is" and "as available" basis. MMT may change the features or functionality of the services

at any time, in their sole discretion, without notice. MMT expressly disclaims all warranties of any kind, whether express or implied, including, but not limited to the implied warranties of merchantability, fitness for a particular purpose and noninfringement. No advice or information, whether oral or written, which the User obtains from MMT or through the services shall create any warranty not expressly made herein or in the terms and conditions of the services. If the User does not agree with any of the terms above, they are advised not to read the material on any of the MMT pages or otherwise use any of the contents, pages, information or any other material provided by MMT. The sole and exclusive remedy of the User in case of disagreement, in whole or in part, of the user agreement, is to discontinue using the services after notifying MMT in writing."

(emphasis supplied)

26. Service tax on providing hotel accommodation is leviable under section 65(105)(zzzzw) of the Finance Act and it is reproduced:

"Section 65(105)(zzzzw): 'taxable service' means any service provided or to be provided **to any person by a hotel**, inn, guest house, club or campsite, by whatever name called, **for providing of accommodation** for a continuous period of less than three months."

(emphasis supplied)

27. A perusal of the aforesaid section indicates that service has to be provided to any person **by** a hotel for providing of accommodation for a continuous period for less than three months. It does not state that the service has to be provided to any person by any person.

28. This position becomes explicit when a comparison is made between section 65(105)(zzzzw) on the one hand, and sections 65(105)(zzb), 65(105)(zzq) or section 65(105)(zh) of the Finance Act on the other hand. In the last three sections, the word used are to any person, by any person. The last three sections are reproduced below:

"65(105) Any service provided or to be provided-

(zh) to any person, by any person, in relation to on-line information and database access or retrieval or both in electronic form through computer network, in any manner;

(zzb) to a client, by any person in relation to business auxiliary service;

(zzq) to any person, by any other person, in relation to commercial or industrial construction service;"

29. It is, therefore, clear that for any service to qualify as 'short-term accommodation' service, the service should be provided specifically by a hotel.

30. Learned counsel for the appellant also pointed out that the hotel industry is a regulated industry and hotels have to be registered with appropriate regulator and have to seek various approvals like:

- (i) Building permit,
- (ii) fire safety permit,
- (iii) police license,
- (iv) Health trade license or trade license,
- (v) bar license,
- (vi) FSSSAI food business license,
- (vii) service tax registration for the hotel
- (viii) VAT Registration

31. The contention of the learned counsel for the appellant is that the appellant cannot provide the service of short-term accommodation to the customers in the absence of requisite licenses, infrastructure and, therefore, the appellant cannot be said to be a hotel.

32. This submission of learned counsel for the appellant deserves to be accepted. Under section 65 (105)(zzzzw), it is necessary that the service provided or to be provided to any person has to be by a hotel and there is nothing on the record to indicate that the appellant is a

hotel. The show cause notice and the impugned order have placed reliance upon clauses of the Privilege Partnership Agreement entered into between the appellant and the hotels. The show cause notice nor the impugned order mention that the appellant is a hotel. The appellant is merely a booking agent and not an agent of the hotel, as is evident from Privilege Partnership Agreement and the User Agreement entered into between the appellant and the customers. It is the hotel that has provided the service of short-term accommodation to the customers, and the appellant has merely acted as a facilitator between the hotel and the customer for the provision of short-term accommodation service by the hotels to the customers. The appellant is thus not a hotel. The appellant cannot, therefore, be said to be the provider of short-term accommodation service to the customers.

Whether the appellant is entitled to, as a tour operator, ninety percent abatement under the Abatement Notifications

33. It is necessary to examine this issue because even if it is taken that the appellant is providing tour operator service, the contention of the department is that in respect of services relating to booking of accommodation only, the appellant would not be a tour operator.

34. The appellant is operating an online portal through which the services of booking of airline tickets, train tickets, bus tickets, hotel room bookings and tour packages are provided. It is for this reason that the appellant claims that it qualifies as a tour operator. The appellant is also registered with the Service Tax Department under the category of 'tour operator services', and discharged service tax liabilities under the said service.

35. 'Tour operator' has been defined under section 65(105)(115) of the Finance Act. For the period prior to 30.06.2012 it is as follows:

"65(105)(115): "tour operator" means **any person engaged in** the business of planning, scheduling, organising or arranging tours (**which may include arrangements for accommodation,** sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours in a tourist vehicle or a contract carriage by whatever name called, covered by a permit, other than a stage carriage permit, granted under the Motor Vehicles Act, 1988 or the rules made thereunder."

(emphasis supplied)

36. With effect from 01.07.2012, the definition of a 'tour operator' is in terms of the Notification No. 26/2012-ST dated 20.06.2012 which is as follows:

"2. For the purposes of this notification, unless the context otherwise requires, -

(a) *****

(b) *****

(c) "tour operator" means **any person engaged in** the business of planning, scheduling, organizing, arranging tours (which may include **arrangements for accommodation;** sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours."

(emphasis supplied)

37. It is clear that any person who is **engaged in the business of** planning, scheduling, organizing, **arranging tours, including accommodation,** would be a tour operator. The appellant is engaged in business of arranging tours, including accommodation through online portal. It would, therefore, qualify to be a tour operator.

38. It is, therefore, not possible to accept the contention of the learned special counsel for the department that the appellant does not satisfy the definition of a tour operator.

39. The Central Government, by a Notification dated 01.03.2006,

notified partial exemption for services provided by 'a tour operator' for the period upto 30.06.2012 and the relevant portion of the Notification is reproduced below:

Sl. No.	Description of taxable service	Percentage	Conditions
2.	(b) a tour, if the tour operator is providing service solely of arranging or booking accommodation for any person in relation to a tour	10	(b) The invoice, bill or challan issued indicates that it is towards the charges for such accommodation; and (ii) This exemption shall not apply in such cases where the invoice, bill or challan issued by the tour operator, in relation to a tour, only includes the service charges for arranging or booking accommodation for any person and does not include the cost of such accommodation.

40. For the period post 01.07.2012, the Government issued a Notification dated 20.06.2012 and the relevant portion of the Notification is reproduced below:

Sl. No.	Description of taxable service	Percentage	Conditions
11.	(ii) a tour, if the tour operator is providing service solely of arranging or booking accommodation for any person in relation to a tour	10	(I) CENVAT credit on inputs, capital goods and input services other than the input service of a tour operator, used for providing the taxable service, has not been taken under the provisions of the CENVAT credit Rules, 2004. (II) The invoice, bill or challan issued indicates that it is towards the charges for such accommodation. (III) This exemption shall not apply in such cases where the invoice, bill or challan issued by the tour operator, in relation to a tour, only includes the service charges for arranging or booking accommodation for any person and does not include the cost of such accommodation.

41. It would, therefore, be evident from the aforesaid two Abatement Notifications that they provide for abatement of 90 percent to a tour operator providing services solely of arranging or booking accommodation in relation to a tour. In other words, the service tax liability of the provider of tour operator service with respect to sole provision of service of arranging or booking of accommodation is limited to 10 percent of the gross taxable value, subject to fulfillment of certain conditions.

42. The Madurai Commissionerate, by a Circular dated 22.08.1997, while dealing with the scope of tour operator service clarified that a tour operator has to be seen qua the person and not qua the transaction and the relevant portion of the Circular is reproduced below:

"2.5 The service tax on services rendered by tour operators in relation to a tour shall be the gross amount charged by such operator from the client and shall include the charges for other services provided such as accommodation, food and other facilities in relation to such tour. In other words, it will be on the gross amount charged to the customer. However, in cases where the tour operator provides a package tour i.e. which necessarily includes accommodation for stay and may also include other facilities such as food, guide services etc., an abatement of 60% of the total amount charged may be given for the purposes of the service tax provided that the bill issued for this purpose clearly indicates that it is inclusive of such charges. In other words, service tax would be leviable on 40% of the total amount charged in cases where the tour operator provides a package tour and the price of which mandatorily includes charges for accommodation for stay provided during the course of the tour (Notification No. 39/97-S.T. refers). Further an abatement of 90% from the gross amount charged to the client has been provided where the tour operator provides the services solely of booking or arranging accommodation and the

bill issued for this purpose includes cost of such accommodation (Notification No. 40/97-S.T. refers). However, this abatement will not be allowed in case the bill issued does not include the cost of such accommodation.”

43. From the aforesaid it is clear that a tour operator can provide for a host of services, including booking of accommodation, transportation and food facility. However, when a person, otherwise is qualified as a tour operator but provides only booking of accommodation service, then such a tour operator would be entitled to ninety percent abatement. What is required is the qualification of a tour operator itself (qua the person), and not as the services rendered (qua transaction). It is, therefore, not possible to accept the contention of the learned special counsel for the department that each transaction relating to the service that is provided has to be examined. Thus, as the appellant is a tour operator it would be entitled to claim abatement under the Abatement Notifications.

Whether the demand proposed under section 73 can be confirmed

44. In view of the aforesaid discussion it clearly transpires that the appellant is providing tour operator service and is entitled to claim abatement of ninety percent. The demand under section 73 of the Finance Act has been confirmed holding that the appellant is providing short-term accommodation service. The demand that has been confirmed under section 73A of the Finance Act, therefore, deserves to set aside.

Whether the provisions of section 73A would be applicable

45. The show cause notice and the two Statement of Demands have also invoked section 73A of the Finance Act. It has been alleged that

the appellant has collected an amount representing service tax from the customers, in excess of the service tax assessed and paid by the appellant, but has not paid the amount so collected to the credit of the Central Government.

46. The relevant portion of section 73A of the Finance Act is reproduced below:

“Section 73A. Service tax collected from any person to be deposited with Central Government:-

(1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.”

47. It is evident that for the invocation of section 73A of the Finance Act, it is necessary that the amount collected has been collected as representing service tax. In the present case, the amount which has been collected by the appellant is termed as ‘taxes and fees’, which include all taxes collected on behalf of the hotel. This amount has also been remitted to the hotels. The contention of the appellant is that it is not collecting any amount representing as service tax and so the provisions of section 73A of the Finance Act could not have been invoked. It is also the contention of the learned counsel for the appellant that the amount of hotel taxes collected from the customer has duly been remitted to the hotels and no amount of tax has been

retained by the appellant.

48. To substantiate that the appellant collected taxes under the head 'hotel taxes and fees' and paid it to the hotel and no part of it has been retained by the appellant, the appellant has referred to a sample hotel confirmation voucher of Booking ID NH2115510482641 issued by the appellant to Mr. Jatinder Singh (customer). This sample voucher shows that the total amount charged by the appellant from the customer is Rs. 4751/- out of which the room charges/ base amount is Rs. 3821/- and the hotel taxes and fees is Rs. 930/-. The total amount paid by the customer to the appellant is Rs. 4751/-.

49. It also transpires from the Hotelier Voucher issued by the appellant to the hotel in reference to the aforesaid hotel booking, that the amount charged by the hotel for the room is Rs. 2960/- and the tax amount paid is Rs. 485.44/-. Thus, the appellant paid an amount of Rs. 3445.44/- to the hotel.

50. It also transpires from the service tax invoice that the appellant accounted Rs. 4685/- as the sale value and Rs. 66/- as the service tax. According to the appellant the service tax of Rs. 66/- has been deposited. Thus, according to the appellant, service tax liability was discharged on the entire amount.

51. The appellant has, explained the transaction in the following manner:

Particulars	Appellant's Sale Price to Customer	Amounts mentioned in Hotelier's Voucher	Appellant's Commission Income
Base Amount	3821	2960	861
Tax	485.44	485.44	-
Service Fee	378	-	-
Commission Amount	-	-	861
Net Paid to Hotel by Appellant	-	3445.44	-

Service tax collected and paid by the Appellant	66	-	-
Net Paid to Appellant by Customer	4751	-	-

52. It is, therefore, clear that the taxes collected by the appellant from customer has been paid to the hotel and the appellant has also discharged his service tax liability by paying service tax on the amount collected by him from the customer after availing the benefit of the Abatement Notifications as a tour operator. The appellant had not collected any amount, which was not required to be collected, from any person, in any manner as representing service tax. Section 73A of the Finance Act would, therefore, not be attracted.

53. Reliance can be placed on the judgment of the Supreme Court in **R.S. Joshi, Sales Tax Officer, Gujarat vs. Ajit Mills Limited and Another⁶**, wherein the Supreme Court held that the word 'collected' can only refer to cases where a person collects an amount from another with an intention to retain the said amount. The relevant portion of the judgment is as follows:

"Section 37 (1) uses the expressions, in relation to forfeiture, 'any sum collected by the person shall be forfeited'. What does 'collected' mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that "collected" means "collected and kept as his" by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return if eventually it was not taxable, it is not collected. "Collected", in an Australian Customs Tariff Act, was held by Griffith C.J., not 'to include money deposited under an agreement that if it was not legally

6. (1977) 4 SCC 98

payable it will be returned' (Words & Phrases p. 274). We therefore, semanticise 'Collected' not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer." (emphasis supplied)

In the present case, the DGCEI fails to make out even a prima facie case that some portion of the service tax collected by the Petitioners from the customers 'as representing service tax' or otherwise has been 'retained' by them. Without such prima facie conclusion, it cannot be inferred that the Petitioners have violated Section 73A (1) of the FA."

(emphasis supplied)

54. While interpreting a provision using the same words in the U.P. Sales Tax Act, 1948 the Supreme Court in **CST vs. Mool Chand Shyam Lal**⁷, observed as under:

"4. Therefore, it is necessary that realisation must be of the sales tax or purchase tax, secondly, that realisation must be in excess and thirdly the amount of tax should be legally payable under the Act. **The High Court has construed the expression 'as' in the beginning of the sub-clause as significant. Penalty is leviable for excess realisation of tax, therefore, realisation of the amount should be as tax and not in any other manner.** Then excess should be over and above the amount of tax legally payable. This expression obviously means tax payable under the Act, rules or notification. **Therefore, realisation by the assessee from customers should not be of only sales or purchases but it should be of the tax legally payable. If the purchaser realises more money that by itself will not attract the penal provisions.**

6. This is a method of realisation in case of indirect tax. Penalty can be levied or is leviable for realisation of excess of tax legally payable and not for contravention of Section 8-A(2)(b). Realisation of excess amount is not impermissible but what is not permissible is realisation of excess amount as tax.It has to be

7. **(1988) 4 SCC 486**

borne in mind that the imposition of a penalty under the Act is quasi-criminal and unless strictly proved the assessee is not liable for the same.”

(emphasis supplied)

55. Thus, the provisions of section 73A of the Finance Act could not have been resorted to by the department.

Whether the demand under section 73A can be confirmed

56. The aforesaid discussion leads to the conclusion that the demand under section 73A of the Finance Act could not have been proposed. The confirmation of demand, therefore, deserves to be set aside.

57. What is also important to notice is that the impugned order has confirmed the demand of service tax under section 73 of the Finance Act on the gross amount collected by the appellant from the customers, which included the amount remitted to the hotels as well. The impugned order has also confirmed the demand made under section 73A of the Finance Act on the same gross amount. There is, therefore, duplication of the demand.

58. In view of the aforesaid discussion, the confirmation of the demands proposed in the show cause notice and the two Statement of Demands cannot be sustained.

59. It would, therefore, not be necessary to examine the other contentions that have been raised by the learned counsel for the appellant for setting aside the impugned order.

60. The penalties imposed upon the Vice President and the Director of the appellant that have been assailed in Service Tax Appeal No. 51845 of 2021 and Service Tax Appeal No. 51846 of 2021, therefore, cannot also be sustained.

61. The impugned order dated 29.07.2021 passed by the

adjudicating authority is, therefore, set aside. Service Tax Appeal No. 51844 of 2021, Service Tax Appeal No. 51845 of 2021 and Service Tax Appeal No. 51846 of 2021 are, accordingly, allowed.

(Order Pronounced on **10.01.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Sb, Jyoti, Shreya