
(2014) 08 CESTAT CK 0006

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 207 Of 2012

? M/s Austrian Airways

APPELLANT

Vs

Commissioner (Adjn) Central Excise Delhi

RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Finance Act, 1994 — Section 65(36), 65(105), 65(105)(zh), 65(75), 66A, 66A(1), 66A(1)(b), 66A(2), 68, 73, 73(1), 75, 76, 77, 78, 83, 86(7)

Central Excise Act, 1994 — Section 11A(1), 14, 35D(1)

Service Tax Rules, 1994 — Rule 2(1)(d)(iv)

Export of Service Rules, 2005 — Rule 4

Provisions of service Rules, 2012 — Rule 3

Taxation of Services (Provided From Outside India And Received In India) Rules, 2006 — Rule 3(iii)

Customs Act, 1962 — Section 129C(5)

Citation : (2014) 08 CESTAT CK 0006

Hon'ble Judges : D.N. Panda, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : R. P. Puri, Amresh Jain

Final Decision : Allowed

Judgement

1. This appeal arose out of order of adjudication dated 15.11.2011 giving rise to the question as to whether â??Online Database Access or retrieval

Serviceâ? was received by the appellant from CRS service provider abroad and liable to service tax in terms of section 66A of the Finance Act, 1994

(herein after referred to as â??the Actâ?) w.e.f. 18.4.2006 on reverse charge mechanism basis. The said adjudication order relating to the period

form 18 April 2006 to April 2008 gave rise to following consequence:

(i) levy of service tax of Rs.1,68,33,425/-including Education Cess and Higher Education Cess under the first proviso to Sub-section (1) of

Section 73 of the Act, along with interest.

(ii) imposition of Penalty of Rs.1,68,33,425/- u/s 78 of the Act.

(iii) penalty of Rs.5,000/- imposed under Section 77 of the Act.

While challenging above levy, it was also challenged that extended period of limitation prescribed by proviso to sub-section (1) of Section 73 of the Act

was not invocable on the ground that the appellant was not liable to service tax under section 66A of the Act.

2. At the outset Sri Puri learned Chartered Accountant appearing for the appellant submitted that the material facts of the present appeal being similar

to the case argued in the case of M/s Thai Airways, he adopts those arguments for the present appeal.

BACK GROUND OF THE CASE, INVESTIGATION RESULT AND ADJUDICATION FINDINGS

3.1 When it came to knowledge of Revenue that certain Airlines operating in India were availing "Online information and data base access or

retrieval service" from foreign based CRS service providers and were liable to service tax as recipient of service, but no service tax due were

deposited by them, investigation was made. It was revealed that those Airlines in terms of certain agreements with foreign based companies viz

M/s. Galileo International Partnership USA, M/s. Abacus Distribution System Pvt. Ltd. Singapore, M/s. Amadeus Marketing, S.A.

Spain, M/s. Sabre Travels Information Network, USA and others, facilitated reservation and ticket availability position to the Air Travel Agents

in India through online computer system, commonly known as "Computer Reservation System" (CRS)/Global Distribution System (GDS)

maintained by the above companies.

3.2 Airlines have worldwide operations in terms of agreements entered into by them with CRS/GDS companies as well as Travel Agents. They make

payments to CRS/GDS companies towards consideration on the basis of ticket value for the "Online information and database access or retrieval

services" they avail.

3.3 The CRS and GDS facility providing companies maintain data base and structured data relating to ticket reservation and seat availability, fair

structure, flight timings sectors etc information supplied to them by Airlines from time to time with right of access and retrieval of data by Airlines and

Air Travel Agents from Master Computer maintained by above CRS companies through on-line computer system facility provided by such companies.

There was quid pro quo between Airlines and CRS/GDS companies to meet the needs of each other.

3.4 Revenue examined agreements entered into by Airlines with the CRS companies at great length which defined their object in clear terms.

Structuring of data base and sharing thereof accessing and retrieving through networking on real time basis was object of the contract. The CRS

companies provided computer terminals and printers to Air Travel Agents with on line interconnectivity subject to certain conditions.

3.5 Data received from the Airlines were processed in master computer maintained by CRS/GDS companies and data structure formed for access

and retrieval thereto. Useful information in relation to ticket reservations, seat availability as well as other facility is derived therefrom for ticket

booking for passengers according to availability and preparation of passengers manifest as well as check-in- service documents etc. No payments

were made by the travelers or the Travel Agents to the CRS companies. But payments were made by service recipient Airlines.

3.6 It was found that the Appellant Airline was making payment to the CRS Companies for each booking, cancellation, etc made by the

Travel Agents as per terms agreed between the parties to the agreement. Airline specific CRS software was in use and data base was maintained

by CRS companies for easy access and use by the Airlines as well as Travel Agents for ultimate benefit of each other so as to facilitate sale of

products and services of Airlines. Airline appellant in consideration of the receipt of online data base access and retrieval thereof was paying agreed

charges to the CRS companies

3.7 Enquiry was made to ascertain whether the CRS companies viz. M/s Amadeus Marketing S.A.R.L. France, M/s Abacus Distribution system Pvt.

Ltd, Singapore, M/s Galileo International Partnership, USA and M/s Sabre-American airlines Inc, USA, had any office in India to determine the

person liable to pay such service tax. It was revealed that Indian companies with similar names viz. M/s Galileo (India) Pvt. Ltd, M/s Abacus

Distribution systems (India) Pvt. Ltd and M/s Amadeus (India) Pvt. Ltd, were functioning in India as separate legal entities. M/s Abacus Distribution

System (I) P. Ltd and M/s Galileo India P Ltd function as National Marketing Companies entrusted with the work of Marketing the Abacus and

Galileo CRS to travel agents in India. Such fact was confirmed from the statements recorded from Shri Ankur Bhatia of M/s Amadeus India (P) Ltd.

and Shri V. Kesavan, General Manager, M/s Galileo India P Ltd in their statements dated 06.01.2006, under Section 14 of Central Excise Act, 1994

read with section 83 of the Finance Act, 1994. Similar was the status of other CRS companies.

3.8 On the basis of result of enquiry, it came to light of Revenue that:

(i) details of available seats, flight schedules and fare applicable to different journey of different dates and sectors were obtained by the CRS

companies from Airlines to create data base and store the same in master computer so as to make that available/displayed online on real time basis for

access or retrieval of the data by Air Travel Agents to enable them to book air tickets or others facilities as well as respond to travel related queries of

passengers.

(ii) Queries relating to booking or cancellation information sought by Air Travel Agents go to Master Computer of CRS companies through CRS for

interacting with data base of Airlines maintained in master computer to get response on line for booking and cancellation of tickets/facilities.

(iii) Access and/or retrieval to data through the Main Computer System of CRS was in electronic form to enable the Airlines and Travel agents to

access and interact with each other so as to generate useful travel related data/information for booking tickets/facility or replying to queries of

passengers.

(iv) CRS companies made available of their service to the Airlines to cater to the need of the Travel Agents through CRS.

3.9 Revenue ascertained that CRS companies were getting their consideration by way of commissions from appellant and value of ticket sold/service

provided was basis of such consideration. Entire service provided was commercial and under contractual obligations of the parties resulting in carrying

out of economic activity. Appellant's reliance on the clarification of Board circular F. No 137/57/2006-CX.4 dated 18.05.2007 was not acceptable

to Revenue.

3.10 Revenue on the basis of aforesaid common features of the service of

aforesaid description provided by CRS companies and availed by Airlines

held that section 65(105)(zh) read with section 65(75) of Chapter-V of the Act was applicable to levy service tax for provision of service prescribed

by clause 3(iii) of the Taxation of Services (Provided from outside India and received in India) Rules 2006 received by the Airlines operating in India

through their permanent establishment in India.

3.11 Examining section 65(105)(zh) of the Act, learned Adjudicating Authority opined that it was not necessary that the data/information should be

provided to a customer personally or that the computer network should be owned by the service provider as service being accessible or retrievable

online in respect of data or information through the computer network as vehicle online.

3.12 Contention of the appellant that the impugned service was provided outside India as the CRS company and their parent company were situated

outside India for which there cannot be tax liability of appellant was considered by Id. Adjudicating Authority. But he discarded such plea finding that

the CRS companies even if situated outside India were providing service to Appellant having establishment in India which enabled Travel Agents of

the appellant to achieve its object. Appellant may not be privy to the contract between CRS/GDS companies, but its parent company entered into

contract with CRS/GDS companies to achieve object of the appellant operating in India under RBI permission and service was provided to the

Appellant in India. Revenue accordingly viewed that the appellant was ultimate service recipient in India from CRS companies under the

Act.

3.13 Reliance placed on Section 66A(2) by appellant was held by Revenue to be devoid of merit for the reason that appellant was separate

establishment in India as a service recipient and payment was made by it to CRS companies proving nexus of service received by appellant and

service of the aforesaid description provided by CRS companies. Appellantsâ?? plea that the service provider has an establishment in India made no

sense to Revenue as such establishment was operating in India as different entity under Reserve Bank of India permission.

3.14 On the aforesaid circumstances it was held that appellant was recipient of â??Online data base access or retrieval serviceâ?? from foreign based

service CRS/GDS providers and was liable to pay Service Tax with effect from 18.4.2006 when section 66A of the Act came into force. On the basis of details of consideration paid by the Appellant to CRS companies as exhibited by Page 12 and 13 of show cause notice (SCN) dated 24.10.2008 read with the Table appearing at Page 37 of Order in Original under appeal became basis for levy of service tax. The appellant having failed to deposit the Service Tax liability and failed to file the returns under law for the impugned period suppressing the value of taxable service evading service tax liability under the Act causing prejudice to Revenue, was subjected to adjudication not time barred and penal consequence of law followed.

ARGUMENTS ON BEHALF OF APPELLANT

4. It was argued on behalf of the appellant as under:

(A). That the CRS companies abroad provided service to head Office of the Appellant abroad and the CRS Company's server was connected to the server of the head office of the appellant for updating and interacting to serve the travel Agents through IATA approved software. Travel Agents in turn were serving the passengers for which the travel agents were liable to service tax. Consequently head office of the appellant was getting service of CRS companies abroad allowing the latter to exhibit data of the former to travel agents. Accordingly appellant not being recipient of service u/s 65(105)(zh) read with section 65(75) of the Act is not liable to service tax nor penalty.

(B). Section 66A(2) of Finance Act, 1994 was applicable to immune the appellant from levy of service tax. Head office of the appellant entered into similar agreement with various CRS service providers. One of such service provider was AMADUES. That company had entered into agreement with this appellant in similar terms as that was entered into with M/s Thai Airways. There was no agreement between CRS companies and Travel Agents. Revenue had no evidence of agreement between CRS companies and IATA. The Appellant has suffered tax for providing passenger service. So also Travel Agents have suffered tax serving the passengers. Proceeding before Tribunal is pending in respect of the service provided by CRS companies to Travel Agents. Therefore the appellant cannot be called upon to pay tax for the same service.

(C). If the appellant is required to pay tax as a service recipient, it would be eligible to avail Cenvat credit thereof and no revenue gain shall be made

by the Government by adjudication exercise.

(D). Appellant relying on the Circular dated 19.06.2012 and Para 71.1 of the decision of the Tribunal (reference order of third member in reference)

in the case of Paul Merchants reported in 2012-TIOL-1877-CESTATDEL submitted that the service recipient is the person on whose

instructions/orders the service is provided, who is obliged to make payment for the same and whose need is satisfied by the provision of service. A

service is an activity carried out by a person for another for some consideration and in case of provision of service; it is recipient of the service who is

obliged to pay for the service to the service provider. Accordingly foreign principal of the appellant being recipient of service provided by the CRS

companies, the appellant was not service recipient.

(E). Appellant is registered under law for which no adverse inference can be drawn to impose penalty as well as tax.

(F). Proceeding was time barred for which neither tax nor penalty is leviable. Show Cause Notice was issued belatedly on 24/10/2008. The appellant

bonafide believed that it had not incurred tax liability for which extended period is not invocable. Investigation was made in 2005 and during the course

of investigation, entire activities carried out by the appellant were made known to the investigation. When the investigation was well aware of the

facts, there was no scope to issue Show Cause Notice.

(G). There was no suppression of fact nor there do any deliberate intention to evade tax.

ARGUMENTS ON BEHALF OF REVENUE

5. Per Contra submissions of Revenue were as under:

5.1 The Appellant created confusion while the matter in controversy is plain and simple. The head office of the appellant opening an office in India

took permission of Reserve Bank of India vide letter No. CO.FID(I)/2348/10-I-06-06(2455)ACT/97/98 dated 9/5/1977 under FEMA to carry out

existing Airline activities, viz., operation of air services in or through India subject to various conditions. It operated in India to achieve the object of

Airline business getting service from CRS companies abroad.

5.2 Section 65(105)(zh) read with section 65(75) is applicable to the appellant as recipient of the service described by that section and without such service being received in India, travel agents in India shall fail to achieve their object. Learned adjudicating authority on proper interpretation of the said sections as well as the rules framed under the Act brought the appellant to the purview of section 66A of the Act and levied the demand which is sustainable. Section 66A(2) of the Act is not applicable to the case of the appellant.

5.3 The appellant as a business entity was supposed to be covered by Part XI of Companies Act, 1956 which prescribes rules regarding companies incorporated outside India and governed by mandatory requirement of Accounting Standard 17 for segment reporting by the appellant and was also governed by mandatory requirement of Accounting Standard 18 i.e., making related party disclosure. Therefore it was covered by section 66A(1) without being covered by section 66A(2) of the Act read with the Taxation of Services (Provided from outside India and Received in India) Rules, 2006 and liable to service tax.

5.4 The appellant being recognized as an entity in India by Reserve Bank of India at the approved address was recipient of service from CRS companies abroad to make that available to its Travel Agents and others for booking tickets etc., and was making payment to CRS companies through regulatory measures of RBI under FEMA by settlement of its account with its head office and clear the debits made to its accounts for tickets booked in India. Therefore it cannot plead its innocence of no liability under service tax law.

5.5 Inviting attention to the reply of the Appellant to the Show Cause Notice, it was submitted that learned Adjudicating Authority in upon consideration of the nature of service received by appellant to promote its Airlines business, appropriately held that the appellant was recipient of service from CRS companies from abroad which it was liable to service tax. The appellant being in similar footing is also liable to service tax. The stay order vide No. ST/SO/860/2012 dated 23.08.2012 passed by Tribunal in the case of Continental Airlines Vs. CST indicates incurrence of liability by Airlines u/s 65(105)(zh) read with section 65(75) of the Act.

5.6 When the Appellant ought to have been registered under the Act, but failed

to do so and file its returns under law, there cannot be any waiver of penalties imposed in adjudication.

5.7 There is nothing on record to show that the appellant had no connectivity with CRS companies to respond to its Travel Agents in India for booking tickets for the appellant's Airline.

5.8 Entire exercise of head office of the appellant was to carry out business in India through Appellant to achieve its object for which it took RBI permission.

5.9 If appellant's argument that travel agents make remittance to IATA is accepted then there was no necessity for the appellant to operate in

India taking RBI permission. Entire pleading of the appellant is to confuse the Tribunal for a misplaced sympathy when appellant has caused prejudice

to the interest of Revenue.

5.10 When remittances made by the appellant came to record, there cannot be any plea that such remittances were for no cause while remittances

made by appellant was to make its revenue contribution against the extent of service provided by CRS/GDS companies to serve Indian Travel Agents.

Therefore no service provided by CRS/GDS companies to appellant is misconceived by appellant. Taxation of passenger service is a different subject

by a separate taxing entry and taxation of service received or provided by travel agents does not exonerate appellant from its liability when its event of

levy of the appellant arose under law.

5.11 Para 3.1, 3.2, 3.3, 3.4 and 4 of the Show Cause Notice are significant paragraphs depicting the basis of allegation bringing home the appellant to

charges and that could not be defended by the appellant for which no interference to adjudication is desirable. Adjudication should be sustained

without any concession on time bar plea. Tax and Penalty imposed by the learned Adjudicating Authority should remain untouched by Tribunal.

FINDING AND CONCLUSION OF TRIBUNAL

6. Learned Adjudicating Authority considering role of the appellant and operating in India under RBI permission at the place of business establishment

in India having its head office and availing on-line information and data base access and retrieval service provided by CRS companies abroad

for booking air tickets by its Air Travel Agents in India for the appellant making

use of the service of master computer of the CRS company and also examining the considerations paid by the appellant to avail above service during the period 18/04/2006 to April 2008 held that the appellant as a service recipient of taxable service u/s 65(105)(zh) of the Act was liable to service tax under section 66A of the Act. Accordingly, he raised demands as set out at the outset. Section 65(105)(zh) of the Act which is the taxing entry reads as under:

“Section 65(105) taxable service” means any service provided or to be provided, -

xx xx

(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; [Emphasis supplied]

7. The expression “on-line information and data base access and retrieval” has been defined by section 65(75) of the Act reading as under:

Section 65(75) “on-line information and database access or retrieval” means providing data or information, retrievable or otherwise,

[to any person], in electronic form through a computer network; [Emphasis supplied]

8. The appellant pleaded before learned Adjudicating Authority that it was branch of its head office abroad. Permission issued to the appellant by

Reserve Bank of India exhibited that it was allowed to carry on existing airline activities of air services in or through India. As an organ of its foreign

principal, it operated in India under Reserve Bank of India (RBI) permission at the approved address in India to promote Airways transport service. It

had accordingly place of business in India in terms of section 66A(1)(b) of the Act during the impugned period.

9. As a “participant” to the CRS agreement, the appellant was coordinator of information relating to computer reservations under the terms of the

agreement for storage by CRS companies so as to make that available to the subscribers of the said companies. While doing so, its object was to

ensure storage of accurate and error free information relating to passenger service, schedules, space availability, fares and fare information in the

CRS system of the CRS companies so that its objects of promotion of air transport business was not defeated by Air Travel Agents in India.

10. In the course of hearing attention was invited to the terms of the agreement entered into by the head office of the appellant with AMADEUS

MARKETING S.A.R.L in France. Similar such agreements were also entered into with different CRS service providers. According to that

agreement, Amadeus group, as defined under Article 1 thereof had developed a fully automated reservations and distribution system for and on

behalf of its founding Airlines and partners known as Global Travel Distribution System (GDS) to perform comprehensive information search,

communication, reservations, ticketing, distribution and related functions on worldwide. Meaning of the participating carrier was defined by the

agreement to mean "any carrier that has entered into a participating carrier agreement with Amadeus". Appellant was one of the

participating carriers and defined as Participant in the agreement.

11. The agreement aimed to facilitate dissemination of information supplied by Amadeus affiliates and participating carriers including the participating

appellant, for the promotion of its products and services. An Amadeus subscriber i.e. IATA and affiliate were allowed under a contract

arrangement with the Amadeus system to obtain information, make reservations and issue documents involving travel related service.

12. The term AMADEUS Subscriber was defined by Article 1 of the agreement means "any person other than an Amadeus affiliate or

participating carrier, using under a contract or other arrangement the AMADEUS system to obtain information, make reservations and

issue documents involving travel related services". They were user of on line data service provided by CRS Company to achieve the object of

the appellant.

13. Responsibilities and rights of the participants was defined by the Article 2 of the above agreement and relevant part thereof reads as under:

Article 2 RESPONSIBILITIES AND RIGHTS OF THE PARTICIPANT

A) Services provided

1. The PARTICIPANT shall, at its own cost, coordinate its information and reservations services with AMADEUS and shall take such other steps as

may be required to provide all AMADEUS subscribers, ATOs and CTOs with information and reservations services as advantageous as those

provided to any subscriber of any other computerised reservation and ticketing

system. Such services shall include, but will not be limited to, passenger information, schedule, space availability fares and fare information and procedures.

2. The PARTICIPANT shall offer AMADEUS Subscribers, ATOs and CTOs, any improvements enhancements or additional functions to its

system's information and reservation services, on non-discriminatory terms, subject to technical feasibility.

3. The PARTICIPANT will ensure that any CRS in its control provides to all its subscribers display and booking facilities for all services of

AMADEUS Affiliates on a level equal to the level it provides to any other carrier, including affiliated carriers, subject to technical feasibility.

The PARTICIPANT will also make its best efforts to ensure that any CRS with which it is affiliated provides this level of display and booking

facilities in respect of AMADEUS Affiliates, subject to technical feasibility.

The list of AMADEUS Affiliates is shown in Attachment D of the Agreement. AMADEUS will notify the PARTICIPANT of any changes to the

list. The PARTICIPANT's obligations under this Agreement will automatically apply to any entity that becomes an AMADEUS Affiliate.

4. The PARTICIPANT will provide AMADEUS, as rapidly as possible with all revisions to its information services provided to passengers, including

but not limited to interim schedule change data, fare and fare quotations.

5. If the PARTICIPANT elects to provide pricing, or any other type of assistance on all or any of the routes as it may designate, it will provide such

assistance to all AMADEUS Subscribers, ATOs, and CTOs, on the same terms.

If the Participant elects to provide such assistance, the Participant will install AMADEUS System terminals in one or more of its offices. Such

installations of AMADEUS System equipment will be subject to a separate agreement that will cover the equipment lease or purchase, the connection

and communication costs.

6. At the PARTICIPANT's option, AMADEUS will take all reasonable steps necessary to provide to AMADEUS Subscribers, ATOs and CTOs

Direct Access to the PARTICIPANT's system to obtain flight information and last seat availability. This option, and the conditions hereof, are

described in Schedule 2 of the present Agreement.

B) Compliance with applicable formats

1. If the PARTICIPANT elects to supply its schedule and fare information directly to AMADEUS, the PARTICIPANT will be responsible for

compliance with the SSIM or ATPCO formats used by AMADEUS.

2. The PARTICIPANT will ensure that the PARTICIPANT's system fully complies with the interline reservation policies, procedures and

message-formats set forth in AIRIMP and amendments thereto.

C) Seat availability

PARTICIPANT's seat availability status on each flight will be recorded under the terms expressed in ATTACHMENT B (Schedule Loading and

Sales Facility) to this agreement.

D) Issuance of tickets

1. The PARTICIPANT will take all necessary steps to authorise AMADEUS Subscribers to issue tickets for the PARTICIPANT, as expressed in

Schedule 7 to this agreement and subject to technical feasibility.

2. PARTICIPANT will authorise AMADEUS to receive credit card authorisations for the issuance of tickets where the PARTICIPANT is the

validating carrier.

3. Before AMADEUS Global Core is equipped with a fully integrated ticketing system, ticket issuance for the PARTICIPANT will be subcontracted

by AMADEUS to a third party system.

14. Above article 2 brought out relation of the CRS Company (AMADEUS) with the appellant and its head office as well as its Air Travel Agents in

India defining their role and relation confining the terms of the agreement to themselves without allowing a third party to be user of the facility. The

participant i.e., the Appellant and its head office had responsibility to coordinate its information and reservation services with AMADEUS and was

required to provide all AMADEUS Subscribers, ATOs and CTOs with information and reservations services as advantageous as those provided to

any subscriber of any other computerized reservation and ticketing system. Such services included passenger information, schedule, space availability,

fares and fare information and procedure. Thus AMADEUS was a data processor through its master computer to serve the appellant for booking its

tickets by Indian Air Travel Agents.

15. Agreement between the parties did not prohibit the appellant to have access to the data base maintained by the CRS companies in their system at

any time to protect its interest. So also there was no bar on the appellant in that regard while only prohibition for the appellant was to provide no

access to a third party through its own system to the CRS system of CRS companies under Article 2(H) of the agreement. This establishes that online

data base access and retrieval of the data by the appellant from CRS companies was its absolute right being an inevitable necessity to make it

litigation free ensuring storage of error free information in the CRS by CRS companies for use of Air travel Agents to promote its business.

16. Understanding of the parties also did not reveal forgoing of the right of access by the appellant to the data base maintained by CRS Companies for

the obvious reason that reservation data/information was its property and liability of the CRS Companies to the appellant was limited only to the extent

of booking fees paid by the appellant in the event of damages arising out of the performance or breach of the agreement between the parties. It may

be appreciated that no one would prefer to cause prejudice to himself surrendering his right of self-protection. The Appellant was not an exception to

that. Thus existence of right of appellant to access data base on line including retrieval thereof by appellant is undeniable.

17. Article 4 of the agreement dealing with consideration payable by service recipient exhibit that the participant shall pay AMADEUS a booking fee

for each participant net booking through the Amadeus system, including booking made by ATOs and CTOs. ATO means "Airport Ticket

Offices" and CTO means "City Ticket Offices".

18. Article 5 of the agreement dealt with periodical payments to be made by appellant participant which reads as under:

ARTICLE 5 PAYMENTS

AMADEUS shall submit a monthly invoice to the PARTICIPANT for all charges and fee due to AMADEUS under attachment A to this agreement

and incurred during the preceding month. The PARTICIPANT will settle the invoice by paying the amounts due to AMADEUS or any entity

AMADEUS may designate, within thirty (30) days.

19. The appellant in consideration of availing aforesaid service has also paid charges as has been found by learned adjudicating authority. For the

service so availed, consideration paid directly or indirectly by the appellant or paid on its behalf in discharge of its liability or settlement by any mode,

made no difference to law as theory of equivalence determines value of taxable service through its in built provisions embedded to the rules of

valuation in the Finance Act, 1994.

20. Amongst others, responsibilities and Rights of AMADEUS to the extent that is relevant as defined in Article 3 of the agreement reads as under:

Article 3 RESPONSIBILITIES AND RIGHTS OF AMADEUS

A) Non-discriminatory services

1. AMADEUS will comply with all applicable regulations concerning display of information.

2. AMADEUS will offer neutral display to all AMADEUS Subscribers. The AMADEUS Neutral Display will conform to the EEC-Code of Conduct.

A number of display options will available to meet the requests of customer.

3. In the neutral display provided to AMADEUS Subscribers, referred to in Article 3.A.2 above, subject to subscriber's input parameters,

AMADEUS shall display the PARTICIPANT's direct and connecting flights in a non-discriminatory manner on the same level as the direct non-

stop, other direct and connecting flights or other transportation services, respectively, of any other participating carrier.

4. In the neutral display provided to AMADEUS Subscribers, referred to in Article 3.A.2 above, subject to the editing rules, which are available for

inspection at the AMADEUS principal office, AMADEUS will accept for storage in its database a maximum of 60 single routings and 60 double

routings per city pair, which will all be eligible for display according to the above mentioned input parameters and editing rules.

5. AMADEUS will provided the PARTICIPANT with any enhancements to the AMADEUS system information and reservations services on non-

discriminatory terms, subject to technical feasibility. If, however, because of technical or resource limitations, it is not practical or feasible for

AMADEUS to implement an enhancement or modification at the same time for all Participating Carriers, then AMADEUS will determine the order

of implementation.

B) Modifications

AMADEUS shall have the right to make any adjustments, modifications and changes to its programme and services it consider necessary from time to time. AMADEUS will notify the PARTICIPANT of any significant change.

C) Flight Availability

AMADEUS will store PARTICIPANT flight availability status coded in accordance with the relevant provisions of Attachment B (Schedule Loading and Sales Facility) to this Agreement, and in accordance with AIRIMP formats.

D) Rejected messages

AMADEUS will review rejected messages it receives from the PARTICIPANT and will investigate and implement measures to reduce such rejects where volume so justified.

E) Loading of schedules and routing requests

AMADEUS will load the PARTICIPANTS schedules in the AMADEUS Global core in accordance with the options expressed in Attachment B.

(Schedule Loading and Sales Facility)

F) Interruption of service

AMADEUS will take all reasonable steps to ensure that service is not interrupted. However, AMADEUS has the right to interrupt the operation of its global Core System or its communication network for technical or operational reasons.

G) Compliance with rules and regulations

AMADEUS will comply at all times with the rules or regulations imposed by Civil Aviation regulatory authorities or any other legal authority which may affect the operation of AMADEUS.

21. Fiction was created by the appellant bringing so many jargons and terminology and illusory concept of entities to raise confusions while the matter was plain and simple to understand modus operandi and arrangement of the appellant. Ticket reservations were done by Air Travel Agent for the appellant making use of the services received by the appellant as an organ of its foreign head office having approved place of business in India under RBI permission. It was recipient of the impugned service in India from CRS Companies located abroad through computer network online.

22. Section 66A read with section 65(105)(zh) and section 65(75) of the Act which brought the appellant to the fold of law at the material period read

as under:

SECTION [66A. Charge of service tax on services received from outside India-.

(1) Where any service specified in clause (105) of section

65 is, -

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be

provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place

of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the

recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply :

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any

business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the

establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the

service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country

other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. - A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in

that country.

Explanation 2. - Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.]

23. The appellant having its place of business in India was recipient of online data base access and retrieval thereof to promote its business in India

ensuring error free information to the travel agents in India. Storage of such data in the computer of CRS companies for use thereof was an inevitable

necessity of the appellant since liability of the subscribers to the appellant was limited to the service charge paid by it in respect of each service of ticket booking. Therefore the appellant did not remain silent without exercise of its right of access to such data base and/or retrieval thereof to ensure that that it becomes litigation free. The appellant having right of access to the data base and for such service of access, it had made payments to the CRS Companies. Appellant's plea that service was provided to the head office is of no merit when the appellant was also user of data base access and retrieval thereof online from the systems of CRS companies and failed to establish its no connectivity to that system. Revenue's arguments that appellant's remittances came to notice of investigation proved quid pro quo is well founded. So also when the appellant failed to prove that it had not enjoyed any connectivity to the CRS system of CRS companies to respond to travel agents in India, it failed to succeed in adjudication. This rules out appellant's plea that its head office was only recipient of service but not the appellant.

24. When the appellant falls u/s 66A(1)(b) of the Act as recipient of the description of service charged to tax by section 65(105)(zh) read with section 65(75) of the Act, its plea that it is immune from service tax in India is ill founded. Appellant in India has its existence under RBI permission. Section 66A(2) of the Act recognizes only different situs under law but the said sub-section does not grant immunity from taxation in India once incidence to tax arises in India. Appellant's operation in India was to achieve its object of serving Air Travel Agents in India. To do so, it had reserved its right of access to data base of CRS companies to ensure that those travel agents do not frustrate its object and the appellant operates in India competing with other airlines.

25. Each economic activity being distinct and separate, appellant providing passenger service in India and suffering service tax cannot be a consolation to Revenue to grant immunity to appellant taxation of the aforesaid service on reverse charge mechanism provided u/s 66A of the Act incidence to tax arises u/s taxing entry 65(105)(zh) read with section 65(75) of the Act read with the relevant rules made under the Act. Legislature have wide latitude in the matter of taxation to pick and choose event of levy, nature of services and different aspect of services in a series or cluster of services. So also

pendency of appeal in Tribunal in respect of service provided by CRS companies to Travel Agents or taxation of passenger service provided by the

appellant does not alter the taxability of service received by the appellant under reverse charge mechanism u/s 66A of the Act.

26. Appellant's plea that it shall get Cenvat credit of service tax levied by the adjudication order does not exonerate it from the liability it has

incurred under the law. Grant of Cenvat credit arises only if service tax is paid by the appellant and such grant not otherwise disallowed by law.

Without undergoing scrutiny of law as to admissibility of Cenvat credit, appellants hypothetical argument has no sense in the eyes of law.

27. Appellant's reliance on Paul Merchants case (supra) is of no use to it as the issue involved therein was whether there was an export of

service made by Paul Merchants from India. Present case of appellant is not export of service from India but an import of service into India by virtue

of right of access of the appellant to the online data base and retrieval thereof. Nor also reliance on the Board Circular (supra) has any force as

circular cannot override the law. Appellant has thus misplaced the cited decision.

28. When the appellant failed to be registered under the Act and file returns periodically, its plea of bonafide belief does not arise sine it escaped

scrutiny of law. There was deliberate breach of law to cause evasion. Had there been no investigation, appellant's liability would not have been

unearthed. Breach of law is neither eroded by lapse of time nor defiance thereof unpunishable. Bonafide should be patent from conduct and a mere

plea of bonafide does not make the believer riskless in fiscal administration. Adjudication was not time barred when suppression of fact and intention

to evade was detected by investigation. Liability of the appellant arose under law. Had the appellant sought registration and filed nil returns with notes

appended to that explaining its belief, it would have provided foundation for its belief to be bonafide. But the appellant had not done so. An assessee

either may voluntarily come to record seeking registration or may be brought to record by process of law or investigation. Upon investigation, when

liability of the appellant was determined, learned adjudicating authority was right to invoke extended period of limitation and levy the tax and penalty

followed by interest under law. It cannot claim immunity from taxation.

29. For the aforesaid reasons, Revenue's contentions have force and

adjudication findings are well founded on facts as well as law. It can thus irresistibly be concluded that the appellant was recipient of online data base access and retrieval service from the service provider abroad and falls under section 66A of the Act and was liable to the consequence of adjudication rightly made by learned adjudicating authority. Appeal of the appellant thus fails for which that is dismissed.

(Pronounced in the open court on____.)

(RAKESH KUMAR) ^ ^ ^ ^ ^ (D. N. PANDA)

TECHNICAL MEMBER JUDICIAL MEMBER

Anita

30. I have gone through the order prepared by my Learned Brother which was received on 09.05.2013. Since I do not agree with his conclusions, I am recording a separate order. However before the coming to the issues involved in these appeals, it would be worthwhile having a brief look once again at the basic facts of this case.

31. The appellant M/s. Austrian Airline, E-11-12, Mariane Arcade, Outer Circle, Connaught Place, New Delhi. are a branch office in India of

Austrian Airlines, Office Park 2- Post Box -100 A-1300, Viena Airport Austria (hereinafter referred to as Austrian Airlines). They are engaged in

providing the services of air transportation of passengers and cargo. Austrian Airlines have obtained the permission of the Reserve Bank of India for

setting up branch offices in India. The appellant have obtained service tax registration at New Delhi in respect of service of transportation of goods by

air and transportation of passengers by air provided by all the branches in India. The appellant have appointed IATA authorized travel agents in India

for selling of tickets of Austrian Airlines. The tickets are sold by the IATA agents on behalf of Appellant. The IATA Agents after selling the tickets

of the Airlines remit the money after retaining their agreed commission, to the appellant through Billing Statement Plan (BSP) and the appellant, in

turn, remit the money to their Head Office at Viena. The appellant, accordingly pay service tax in respect of services of transportation of goods by air

and passenger transportation by air, being provided by them in India. IATA Agents pay the service tax on the commission earned by them for the

services of air tickets booking being provided by them. To facilitate the selling of

air tickets, the Appellants head office at Austria has entered into agreements with several computerized reservation system companies (hereinafter referred to as CRS Companies). Some of the CRS Companies with whom Austrian Airlines have entered into the agreement, are: M/s Galilio International Partnership, U.S.A.; M/s. Abacus Distribution System Pte. Ltd. Singapore; M/s Amadeus Marketing, S.A., Spain, and M/s. Sabre Travel Information Network, U.S.A. In term the agreements of Austrian Airlines with the CRS Companies, the head office of Austrian Airlines has computer connectivity with the computer systems of the CRS Companies, who, in turn, have to provide linkage to IATA Agents and all the information regarding flight schedules, fares, seat availability on flights etc. in respect of the flights of Austrian Airlines is transferred to the computer system of CRS Companies, who, in turn, make this information available on real time basis to the IATA Agents and thereby facilitate the booking of air tickets of Austrian Airlines by the IATA agents. For providing these services to Austrian Airlines, the CRS Companies receive remuneration as specified in the agreements, which is based on the number of tickets sold by the IATA agents, using the Data Base maintained by the CRS Companies. No amount is charged by the CRS Companies from IATA agents. There is no dispute that all the CRS Companies are based abroad and do not have any office in India and entire payment for the services being provided by them has been made outside India by Austrian Airlines, Viena i.e. the head office of the Appellant and as such no payment for the services being provided by CRS Companies has been made by the appellant who are the Branch Office of Austrian Airlines in India. The department was of the view that the service being provided by the CRS Companies are Online Database access and/or retrieval taxable under section 65(105)(zh) read with Section 65(75) and Section 65(36) of the Finance Act, 1994 and since the same has been used by the IATA Agents in India for selling of tickets of Austrian Airlines, the remuneration received by the CRS Companies abroad from the Airlines, Viena, would attract service tax from the Appellant in India under reverse charge mechanism of section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, as according to Department, the services have been consumed in India by the Appellant. On this basis, four Show Cause Notices dtd. 24.10.08 was issued to the

appellant for demand of service tax including education cess amounting to Rs.2,70,29,310/-, in respect of period from 01.04.2003 to 31.03.2008 along with interest on it under section 75 of the Finance Act, 1994 and also for imposition of penalties on the appellant under section 76, 77 & 78 of the Finance Act, 1994.

31.1 This Show Cause Notices was adjudicate vide order No.31-ST/PKJ/CCE/ADJ/20 dtd.15.11.2011 by which the service tax demand along with education cess totaling Rs.1,68,33,425/- was confirmed against the appellant under section 73 of Finance Act, 1994 along with interest on it under section 75 ibid. Besides this, while penalty of Rs. 5,000/- was imposed on the appellant under section 77 ibid, and another penalty of Rs.1,68,33,425/- was imposed on the appellant under section 78 of the Finance Act, 1994. Against this order of the Commissioner, this appeal has been filed.

32. Since the arguments made on behalf of the appellant and on behalf of the Revenue have been recorded in the order prepared by my learned brother, I am not repeating the same in this order.

33. I have considered the submissions from both the sides and perused the records. While the case of the Department against the appellant is that the CRS Companies located abroad are providing services of online data base access and/or retrieval taxable under section 65(105)(zh) read with section 65(75) and Section 65(36) of the Finance Act, 1994 and the same has been received by the appellant in India and, therefore, the Appellant would be liable to pay service tax in respect of the same in terms of Provisions of Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the service tax Rule 1994, the main contentions of the appellant are thatÂ firstly no service has been received by the appellant, who are a branch office of the Austrian Airlines in India, as the entire transaction is between their Head Office at Viena and the CRS Companies located abroad and in terms of the Provisions of sub-section (2) of 66A, the branch office of Austrian Airlines in India has to be treated as a person separate and distinct from the head office and, therefore, in respect of the service transactions between the CRS Companies located abroad and Austrian Airlines, Viena, the Appellant can not be treated as the service recipient, and secondly the service being provided by the CRS Companies is not covered by the definition of online information and data base access and/or retrieval service as defined in

Section 65(105)(zh) read with Section 65(75) and Section 65(36) of the Finance Act, 1994 and hence the same is not taxable.

33.1 There is no dispute that:-

(a) the service providers i.e. the CRS Companies are located abroad and they do not have any office in India ;

(b) the agreements for providing service are between the Appellants head office at Viena, Austria and the CRS Companies; and

(c) the payments for the services rendered by the CRS Companies have been received by them directly from Austrian Airlines, Viena and as such the

entire payments for the services, in question, have been made outside India [Para 21 of the impugned order]. The dispute is only on the point as to

whether the Appellant- the branch office of Austrian Airlines, Viena in India, can be treated as the recipient of the service provided by the CRS

Companies and on this basis subject to service tax under reverse charge mechanism of Section 66A.

34. Coming first to the question of classification of the service, the activity of the CRS Companies is maintaining online information on real time basis

about the flight schedule, fare, seat availability etc. of the flights being operated by Austrian Airlines all over the world, for which CRS Companies

have linkage with the computer system of Austrian Airlines, Viena and providing access in respect of this information to the IATA agents appointed

by the Airlines which is used by them for selling of air tickets of the Airlines. I agree with the findings of my learned brother that this activity of the

CRS Companies is covered by the definition of Online Database access and/or retrieval service, as given in Section 65(75) read with Section 65(75) of

the Finance Act, 1994 and this service, if provided or deemed to be provided in India, would attract service tax under section 65(105)(zh) *ibid*. In this

regard, I do not accept the Appellants contention that the activity of CRS Companies is e-commerce and therefore, not taxable, as there is no sale of

tickets by the CRS Companies. The Tickets of Austrian Airlines are sold through IATA agents by using the information/database maintained by the

CRS Companies and it is the IATA agents who collect payments from the passengers. Another plea of the Appellant that for taxing a service under

section 65(105)(zh) read with section 65(75), as Online Database access and/or retrieval service, the data stored in computer system to which access

is provided, must belong to the service provider and since in this case, the data belongs to Austrian Airlines, not to the CRS Companies, the activity of

CRS Companies is not covered by Section 65(105)(zh) read with Section 65(75), is also not acceptable, as there is no such requirement in Section

65(105)(zh), Section 65(75) or section 65(36) of the Finance Act, 1994.

35. Next comes the main point of dispute in this case whether the Appellant, who are a branch office in India of Viena based Austrian Airlines, can be

treated as recipient of the service provided by the CRS Companies located abroad or whether Austrian Airlines, Viena is to be treated as the services

recipient. Before coming to this question, it is necessary to have a look at certain basic features of the service tax in India, which, in brief, are as

under:-

(1) while the term service is not defined in the Finance Act, 1994, assuming that a service transaction is akin to a transaction of sale of goods, it can

be treated as an activity carried out by a person (service provider) for another person for some consideration -the consideration can be in cash or

other than cash, whether paid directly or indirectly. Just as in case of a sale transaction, the buyer is the one who is obliged to make the payment or

makes the payment for the goods purchased and is legally entitled to receive the goods, in case of a service transaction, the service recipient would be

the person on whose instructions the service is provided, who is legally entitled to receive the service and is liable to make the payment or makes the

payment and whose need is satisfied by the Provision of the service i.e. who consumes the services, or in other words, is the buyer of the service.

Thus, for existence of a service transaction between two persons. A (Service provider), and B (Service recipient) not only there must be an activity

performed by A for B, but there must also be flow of consideration, cash or other than cash, direct or indirect from B to A and the provision of

Services must satisfy some need of B, which may be his personal need, the need of his business or need to discharge some legal obligation regarding

provision of some services to another person C. Thus When a manufacture A, who has sold some goods manufactured by him to B and is under

obligation to provide free repair services to B during warranty period and engages C to provide the service of free repairs to B for which he pays to C,

the recipient of the service provided by C is A, not B. The B is only the

beneficiary of the service provided by C. However when there is no legal obligation of A to provide any service to C and still on his instructions B provides service to C for which B receives payment from A and circumstance indicate that A has acted merely as facilitator or agent for C and has made payment on behalf of C, flow of consideration from C to the service provider B can be presumed and it is C who will be treated as the recipient of the service.

(2) Services mentioned in various clauses of Section 65(105) of the Finance Act, 1994 attract service tax under section 66 *ibid*. However:-

(a) When the service provider as well as the service recipient, both, are located in India (except the state of Jammu & Kashmir), the service tax is

charged from the service provider, except for the services notified under section 68 for reverse charge, where the service tax is charged from the service recipient;

(b) When there is export of service, as defined in Rule 3 of Export of Service Rules 2005 i.e. while the service provider is located in India , the service

is received abroad, no service tax is chargeable from the service provider in India (Rule 4 of the Export of Service Rules), 2005;and

(c) When the service provider is located abroad, that is, he is a person having a business or fixed establishment from where the service is provided or

his permanent address or usual place of residence, outside India and the service recipient is located in India i.e. is a person having his place of

business, fixed establishment, permanent address or usual place of residence in India, in term of the Provisions of Section 66A(1) read with Rule 2(1)

(d)(iv) of the Service Tax Rules, 1994, the service recipient in India is deemed to have provided the service in India and he is treated as the person

liable to pay service tax and the service tax is recovered from him. For this purpose, in case of a body corporate, the place where it is incorporated or

is ""otherwise legally constituted is treated as its usual place of residence [explanation 2 to Sec. 66A] and a person carrying on a business through a

branch or agency in any country, is to be treated as having permanent establishment in that country. Under section 66A(2), when a person carries on

a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent

establishments shall be treated as separate person for the purpose of this

section. Thus for the purpose of section 66A, the Head Office of a multinational company incorporated or legally constituting in a Country A and its branches in Countries B,C and D would be treated as separate persons. In term of 1st Proviso to Section 66A(1) the provisions of this sub-section are not applicable to an individual in respect of service received by him from abroad unless the service is for use in any business or commerce. Another important Provision of Section 66A is that when the service provider has his business establishment in more than one country, say A and B, the service recipient located in country C will be treated as having received the service from that establishment of the service provider which is directly concerned with the Provision of service [2nd Proviso to Section 66A(1)]. In my view, the underlying principle behind this Proviso will also be applicable for determining as who is the service recipient, when a service provider A located abroad, has provided service to a Company having head office outside India and a branch office in India and in such a situation, it will be reasonable to treat the establishment most directly concerned with the use of the service provided as the recipient of the service provided by A.

(3) Thus irrespective of the location of service provider- whether in India or outside India, service tax is charged in India if the service recipient is located in India i.e. the service has been received and, hence, consumed in India, and if service recipient is located abroad i.e. the service has been received and, hence, consumed abroad, there is no liability of the service provider in India to pay the service tax. This is in accordance with the principle of equivalence mentioned in the Apex Courts judgment in the case of All India Federation of Tax Practitioner reported in 2007 TIOL-149-

SC-ST and Association of Leasing and Financial Service Companies reported in 2010 (20) STR-417 (SC), wherein it was held that

- (a) there is no difference between the production or manufacture of saleable goods and production of marketable/ saleable services in form of an activity undertaken by the service provide for consideration, which stands consumed by the service receiver;
- (b) consumption of goods and consumption of service is similar as the both satisfy human needs;
- (c) service tax is a value added tax, which, in turn is a destination based

consumption tax on the service that is levied on commercial activities and is not a charge on business, but is a charge on the consumer of the service; and

(d) It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994.

The implication of the above ruling would be that service provided by a service provider located abroad, not having any branch or business

establishment in India, would be taxable in India only if the consumer of the service, who is the same as the recipient of the service, is located in India.

Here it may also be clarified that unlike a transaction of sale of goods, in a transaction of provision of service, the receipt and consumption goes

together, as the provision of service satisfies the need of the service recipient and, thus, stands consumed by him. In other words in case of a service

transaction, the service recipient is also the person who has consumed the service.

(4) Conceptually the Export of Service Rules, 2005 together with Taxation of Services (Provided from outside India and received in India) Rules,

2006, are basically the Rules for determining the place of service recipient/ service consumer, and for this reason only, in the budget of 2012-13, these

Rules have been replaced by Place of Provisions of service Rules, 2012, the Rule 3 of which states that the place of Provisions of a service shall be

the location of the service recipient (who is the service consumer).

(5) Export of Service Rules, 2005 and Taxation of Service (Provided from outside India and received in India) Rules, 2006 , put together, for the

purpose of determination of the location of service recipient, divide the service into three categories and prescribe different criteria in this regard for

each category. In respect of services in relation to an immovable property, as enumerated in these rules, the same are treated as having been received

at the location where the immovable property is located. In respect of performance based services, as enumerated in these rules, the same are treated

as having been received at the place where the same have been performed and in case a service is partly performed at one place and completed at

another place, it is treated as performed at the place of completion [for the purpose of export of a performance based service, service partly

performed outside India is treated as performed outside India and for the purpose of import of performance based service, the service partly

performed in India is to be treated as performed in India]. In case of the service availed for use in relation to business or commerce, the same are

deemed to have been received at the place where the recipient using the service in his business is located. Thus, when the service provider is located

in India and the service recipient is located outside India, there will be export of service and there would be no taxation in India and if service provider

is located outside India and service recipient is located in India, there will be import of service in respect of which the service recipient in India would

be liable to pay the tax. If, however, the service provider is located outside India and the person receiving the service of category (iii) for use in his

business is also located outside India, there would not be any import of service into India and therefore no taxation.

35.1 The question as to whether the service provided by CRS Companies located abroad can be treated as having been received by the Appellant in

India has to be decided keeping in view the above features and legal Provisions of taxation of service in India.

36. In this case, by virtue of sub section (2) of Section 66A, the Appellant who is a branch office of Austrian Airlines, Vienna (its head office), is to be

treated as a person separate from the head office and they can not be treated as part of the head office for the purpose of Section 66A. In this case,

there is no dispute that-

(a) agreements are between Austrian Airlines, Vienna and the CRS Companies (located outside India and not having any branch or business

establishment in India); and

(b) the entire payments to the CRS Companies have been made directly by the head office located outside India and no part of payment has been

made by the branch office (Appellant).

36.1 As held in para 34 above, the service provided by the CRS Companies is Online Database access and/or retrieval service taxable under Section

65(105)(zh), read with Section 65(75) and Section 65(36) of the Finance Act, 1994 and this service is covered by Rule 3(iii) of the Taxation of

Services (Provided from outside India and received in India) Rules, 2006. This service provided from outside India, would be treated as received in

India, only if it has been received by a recipient located in India for use in relation to business or Commerce. The dispute is as to whether the

Appellant, the branch office of Austrian Airlines in India is the recipient, as contended by the Department, or as pleaded by the Appellant, their head office at Viena, who has entered into agreements with the CRS Companies for Provisions of Service and has made payment for the service provided, is recipient of the service. However for deciding this question, in view of the Provisions of Section 66A(2), the branch office and the head office are to be treated as two separate persons. The Revenues plea is that as the service provided by the CRS Companies has been used by the IATA agents in India appointed by the Appellant for sale of the Airlines Tickets, it is the Appellant who have to be treated as the service recipient, not there head office in Thailand.

36.2 I am of the view that the Revenues stand that it is the Appellant, the branch office of Austrian Airlines, Viena, who are the recipient of the service provided by the CRS Companies, is totally incorrect for the following reasons.

(1) During the period of dispute, there was no definition of service recipient in the Finance Act, 1994 or in the Rules made there under. Even in negative list based regime of service tax in force since 2012, there is no definition of service recipient, though there is definition of service. Therefore, the meaning of Service and Service Recipient during the period of dispute has to be ascertained from the nature of the service transaction. As discussed in para 35(i) above, a service transaction is akin to a sale transaction. Just as sale of goods, which attracts sales tax, is transfer of property in goods by a person (seller) to another person (buyer) for some consideration, a service transaction, generally, is carrying out of an activity by a person (service provider) for another person for some consideration, which may be cash or other than in cash, direct or indirect. Just as in case of sale of goods, it is the buyer who is obliged to pay or pays for the goods and is entitled for delivery of the goods to him or his intended beneficiary, in case of Provision of Service, it is the recipient who would be the person obliged to make the payment or pays for the service and would be entitled for Provision of service to him or his intended beneficiary. However unlike a transaction of sale of goods where a person may buy the goods for further sale, in case of service, the recipient consumes the services simultaneously and, hence, the recipient and the consumer of the service are the same

person with the performance of the service. Thus, the recipient of a service is the person who is legally entitled for Provision of service, is the person

obliged to make the payment or pays for the same and the person whose need is satisfied by the Provision of service, the need, as discussed above,

may be his personal need, the need of his business or the need to discharge some legal obligation for provision to service of another person. Thus in of

service by A to B, there would always be flow of consideration from B to A, which, as mentioned above, can be in cash, or other than in cash or

direct or indirect. Therefore, for existence of service transaction between A and B, along with Provision of service by A to B, there must be Provision

for flow of consideration from B to A and only then the B can be treated as service recipient. The consideration in some cases can be indirect. For

example, if on the instructions of a person A located outside India, a person B, also located outside India, provides a performance based service to a

person C located in India and it is A who makes payment to B for the service, the A will be treated as service recipient only if A has a legal obligation

to get the service provided to C. But if there is no such obligation and A had acted only as a facilitator or agent of C, A can be treated as having made

the payment on behalf of C and indirect flow of consideration from C to B can be presumed and C will have to be treated as the service recipient.

Applying the above criteria, in respect of the service provided by CRS Companies, the Appellant can be treated as the recipient only if the service

provided by the CRS Companies is meant for the Appellant and their Head Office had acted only as facilitator and there is flow of consideration,

direct or indirect from the Appellant to CRS Companies. In this case, as discussed in the next paragraphs, neither the Appellant can be treated as the

recipient of the service provided by the CRS Companies, nor there is any flow of consideration, direct or indirect from the Appellant to CRS

Companies.

(2) In this case, from the agreements between the Appellants Head Office at Australia, Viena and the CRS Companies, it is clear that the CRS

Companies were not providing any Indian branch specific service. It is the Head Office at Viena which, in order to facilitate the booking of air tickets

though IATA agents all over the world, had negotiated with the CRS Companies and had entered into contacts with them for storage of updated data

on real time basis regarding their flight schedules, fare, seat availability etc. and making the same accessible to their IATA agents. The Appellants job

is only appointing the IATA agents in India, collection of sale proceeds of tickets sold by IATA agents and remitting the same to Head Office and as

such they are not involved in taking key business decisions. Therefore, applying the underlying principle of 2nd proviso of Section 66A(1) discussed in

para 35(2) above, it is the Head Office which has to be treated as the recipient of the Service provided by the CRS Companies, as it is the Head

Office which is most directly concerned with the use of the Service provided by the CRS Companies as the Head Office has used the service

provided by the CRS Companies for promoting the sales of the Airlines tickets all over the world and it can not be said that only the India branch

(Appellant) has benefited from the Service provided by the CRS Companies. Besides this, from the agreements also, it is clear that this is not a case

where the Head Office can be said to have acted only as a facilitator to negotiate the agreements with CRS Companies on behalf of branches for

provisions of service to them. When it is the Head Office which has received the service and it is Head Office which is liable to pay for the service

and has actually made payment for the same, it is the Head Office which has to be treated as the recipient of the service provided by the CRS

companies.

(3) When neither any service has been received by the Appellant nor there is any evidence or even any allegation that any payment was made directly

or indirectly by the Appellant to CRS Companies nor any presumption in this regard can be made, the Appellant can not be treated as recipient of the

service provided by the CRS Companies.

(4) Merely because the IATA agents appointed by the Appellant in India used the Services provided by the CRS Companies from abroad, the

Appellant do not become the recipient of the Service. For being treated as recipient, a person, in addition to being user of the service to satisfy his

need, must also be the person legally liable to receive the service and the person liable to make the payment/person making the payment for the

service. In this case, there is neither evidence, nor even allegation of the Department that the Appellant is the person liable to make payment to CRS

Companies for there services or have made payment to them directly or

indirectly.

(5) When the service has been received by the Head Office of the Appellant at Viena against its agreements with CRS Companies and as accepted

in the impugned order, entire payment has been made abroad by the Head Office directly to CRS Companies and when in view of the provisions of

Section 66A(2), the Appellant (Indian branch of Austrian Airlines) and their Head Office at Austria, Viena are to be treated as separate persons, the

entire transaction of provision of Service has to be treated as having taken place outside India and the service received by the Head Office at Viena

can not be treated as received by the Appellant, in India.

(6) In my view, the only situation where in respect of the service provided by a service provider A located outside India against an agreement/contract

with Head Office of a company 'A', incorporated outside India i.e. located outside India, the service tax can be charged from the branch office

'B' of the Company in India, when-

(a) the Headquarter of the Company 'A' has entered into a framework agreement/contract with the service provider A by the way of

centralized sourcing of service for Provision of service at various branches located in different countries including India; and

(b) the service has been provided at the branch in India and the role of the Headquarter is only as a facilitator.

In such a situation service tax can be charged from the branch office in India by treating it as service recipient even if the payment for the service

received was made by the head office, as in such a situation, the branch office can be treated as having made the payment indirectly. But in this case,

as discussed above, from the agreements of Austrian Airlines, Viena with CRS Companies, it is seen that there is nothing in these agreement from

which it can be inferred that the CRS Companies were required to provide location specific service to the branches of the Airlines, all over the world.

There is neither allegation nor evidence that Austrian Airlines, Viena have charged any amount from the Appellant either directly or indirectly by the

way of debit/credit notes, account adjustment or by other indirect mean, for the services provided by the CRS Companies.

36.3 In view of the above discussion, the Appellant, the branch office in India of Austrian Airlines, Viena, can not be treated as recipient of the

service provided by the CRS Companies, in pursuance of their agreements with the Appellants Head Office at Viena and, therefore, no service tax can be charged from the Appellant.

37. As regards the question of longer limitation period under Proviso to Section 73(1) of the Finance Act, 1944, the same would not be available to the

Department, as no intention to contravene the Provisions of Finance Act, 1994 and of the rules made there under can be attributed to the Appellant for

the reason that even if they are required to pay service tax on the service, in question, provided by CRS Companies, the entire service tax paid would

be immediately available to them as Cenvat Credit and collection of service tax from the Appellant would be a revenue neutral exercise. A Larger

Bench of the Tribunal in case of Jay Yushin Ltd. reported in 2000(119) ELT 718, has held that in such circumstances where revenue neutral situation

comes about in relation to the credit available to the assessee himself of the duty paid by him and not by the way of availability of credit to the buyer

of the assessee's manufactured goods [para 13(b) of the judgment], longer limitation period under Proviso to section 11A(1) of Central Excise Act,

1994 would not be applicable. The ratio of this judgment is squarely applicable to the facts of this case, as the Provisions of Section 11A(1) of Central

Excise Act, 1944 are in pari-materia with the Provisions of section 73(1) of the Finance Act, 1994. Since in this case, intention to evade the tax is

absent, the penalty under section 78 of Finance Act, 1994 would not be attracted.

38. In view of the above discussion, the impugned orders are not sustainable. The same are set aside. The appeals are allowed.

(Rakesh Kumar)

Member (Technical)

39. Since there is difference of opinion between Member (Judicial) and Member (Technical), the Registry is directed to place this matter before

Honble President in accordance with the Provisions of Section 129C(5) of Customs Act, 1962, as made applicable to service tax matters by section

35D(1) of Central Excise Act, 1944 read with section 86(7) of the Finance Act, 1994, for constituting a bench for deciding the following points of

difference.

1. Whether on the facts and in the circumstances of the case, the appellant permitted by Reserve Bank of India (RBI) to carry out air

transport activity in India was a branch in India and was recipient of online Database Access or retrieval Service from CRS service provider

abroad and liable to service tax in terms of section 65(105)(zh) read with section 65(75) of Finance Act, 1994 on reverse charge mechanism

basis u/s 66A of the said Act w.e.f.18.4.2006 or exempt in terms of section 66A(2) thereof??.

2. ??If service tax is payable by the appellant in respect of the service provided by the CRS companies, whether longer limitation period

under provision to section 73(1) finance Act, 1994 would be available to the Department for recovery of tax and whether penalty on the

appellant u/s 78 ibid would be attracted?â??

(Pronounced in the open court on 27/6/2013)

(Rakesh Kumar) Â Â Â Â Â Â Â Â Â (D. N. Panda)

Technical Member Judicial Member

S. Kaur

Per Archana Wadhwa

All the difference of opinion are being disposed of by a common order as the facts in each case are identical and the point of difference referred to

third Member are more or less the same. However for better appreciation, the difference of opinion in different orders are being reproduced below:

1 M/s. Austrian Airlines (Service Tax Appeal No. 207/2012) (Interim Order No.337/13 dt 27.6.13)

1. ??Whether on the facts and in the circumstances of the case, the appellant permitted by Reserve Bank of India (RBI) to carry out air

transport activity in India was a branch in India and was recipient of online Database Access or retrieval Service from CRS Service provider

abroad and liable to service tax in terms of section 65(105)(zh) read with section 65(75) of Finance Act, 1994 on reverse charge mechanism

basis u/s 66A of the said Act w.e.f. 18.04.2006 or exempt in terms of section 66A(2) thereof??.

2. ??If service tax is payable by the appellant in respect of the service provided by the CRS companies, whether longer limitation period

under provision to section 73(1) finance Act, 1994 would be available to the Department for recovery of tax and whether penalty on the

appellant u/s 78 ibid would be attracted?â??

Thai Airways International Public Company Ltd. Service Tax Appeal No. 330/2012, 3777-3780/2012 (Interim Order No.337/13 dt

27.6.13

1. â??Whether on the facts and in the circumstances of the case, the appellant permitted by Reserve Bank of India (RBI) to carry out air

transport activity in India was a branch in India and was recipient of online Database Access or retrieval Service from CRS Service provider

abroad and liable to service tax in terms of section 65(105)(zh) read with section 65(75) of Finance Act, 1994 on reverse charge mechanism

basis u/s 66A of the said Act w.e.f. 18.04.2006 or exempt in terms of section 66A(2) thereofâ??.

2. â??If service tax is payable by the appellant in respect of the service provided by the CRS companies, whether longer limitation period

under provision to section 73(1) finance Act, 1994 would be available to the Department for recovery of tax and whether penalty on the

appellant u/s 78 ibid would be attracted?â??

2. I have heard the representatives of the appellants as also the Revenues representative. The short issue involved in all the differences is as to

whether the appellants who have their Branch offices in India for providing airline services, were liable to pay the service tax in respect of services

provided by various CRS or GDS companies to their head offices. The said services were being received in respect of various computer reservation

system from various CRS companies like M/s. Galilio International Partnership, USA; M/s. Abacus Distribution System Pvt. Ltd. Singapore, M/s.

Amadeus Marketing SA Spain, and M/s. Sabre Travel Information Network etc. Said services were being provided by M/s. CRS or GDS Company

to the head office of the air lines in terms of agreement entered between them and their head office.

3. Whereas the learned Member (Judicial) has held that the appellants are required to pay service tax in terms of section 66 of Finance Act, 1994,

learned Member (Technical) has held that there is no such liability arising on the Indian Branches of Airlines inasmuch as there is no direct receipt of

any service by the said Branch offices. Further there is difference of opinion on the point of limitation.

4. Without going into the detailed factual aspects and the detailed arguments advanced by both the sides, I find that the above matters were heard by the undersigned as Third Member along with difference of opinion in the matter of British Airways (Appeals No. 166/2012).

5. After considering the arguments of both the sides as also the reasoning adopted by both the Members in support of their decision, the undersigned, as a third Member agreed with Member (Technical) on merits as also on limitation. Inasmuch as the issue involved in the present appeals is identical to the issue involved in British Airways and matters were also heard along with the difference of opinion in the case of British Airways, I by adopting the final decision of British Airways vide my Order dated 16.5.2014, agree with learned Member (Technical) on merits as also on the point of limitation. Accordingly I agree that the impugned orders are required to be set aside and the appeals are required to be allowed with consequential relief to the appellants.

Â [Pronounced in the open court on 11.7.2014]

(Archana Wadhwa)

Member(Judicial)

The files are sent to original Bench for recording of majority Final order.

MAJORITY ORDER In view of agreement with the decision of Id. Technical Member by the third Member by a common order the appeals of M/s.

Austrian Airways is allowed.

[Pronounced in the open Court on 08.08.2014]