

No. AV. 26012/2/2008-TE
Government of India
Office of the Director General of Civil Aviation
Technical Centre, Opp. Safdarjung Airport
New Delhi – 110 003

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Dated the 5th March, 2010

**ORDER OF DIRECTOR GENERAL OF CIVIL AVIATION PURSUANT
TO ORDER OF THE KERALA HIGH COURT IN**

WP(C) 16551 of 2009(L)

1. A Writ Petition No. 16551 of 2009 was filed by the IATA Agents Association of India (IAAI) in the Hon'ble High Court of Kerala challenging the zero commission policy adopted by some international airlines in India. It was contended by the Petitioners that as per rule 135 (2) of the Aircraft Rules 1937, an airline has to fix the tariff in accordance with the rules and while fixing the tariff, the commission payable to the travel agents should also be taken into account and the price reflected in the ticket. It was further contended that barring some airlines, who had adopted a zero commission policy, the rule was being complied with by all airlines. The writ petition was directed against the airlines that were not following this rule. It was also stated by the petitioners in the writ petition that they had taken up the matter with the Government of India by way of representations (copies of which were attached with the petition as exhibits P3 and P4). In its judgment dated 13th July 2009, the Hon'ble High Court of Kerala directed the DGCA to look into the representations contained in exhibits P3 and P4 and take a decision in accordance with law.

2. In order to give a fair opportunity to both the parties before deciding the case, hearing was held in DGCA on 07/09/09 at which the representatives of the airlines following zero commission policy, as well as those belonging to IATA Agents Associations, were invited. Views of both sides were heard at length.

3. The main thrust of the arguments taken by the representatives of the airlines through hearing and their various letters to DGCA is that the IATA Resolutions 810i (10) and 824 (9) give complete flexibility to the airlines to fix any rate of commission and that they could fix even zero percent as the rate of commission as long as they communicated the same to the agents well in time. They also contend that this matter primarily fall under the realm of commercial dealings and they had full freedom to decide how they wanted to do their business. They also argued that the times have changed and the world was moving towards net fare (transaction fee) model and it would be advisable for India to follow suit. They further stated that the 'net fare model' has been in place in India for last 10 months and has been operating smoothly, as per their knowledge, without causing any problems to the agents. One airline representative opined that the net fare model was beneficial for the agents as they could charge from the customer any amount of their choice as transaction fee. The airline representatives accepted that they were still paying commissions in many countries, but insofar as India is concerned, they maintained that the transaction fee model was more suited for a market of the size obtaining in India. As regards the

legal provisions contained in the Aircraft Rules, 1937, the contention of the airlines is that the fares are deregulated in India and the principal objective of rule 135 is to bring transparency in display of fares. According to them, the definition of "tariff" provided in clause 54 A of rule 3 is merely a definition stating that tariff includes the commission, but the same cannot be construed as a mandate for payment of commission. One airline representative argued that DGCA should not intervene in this matter as the article on tariffs in the bilateral agreement between India and the concerned country has eliminated the requirement of tariff filing and approval. The same representative also referred to Paragraph 10.4.1 of IATA Resolution 810i and argued that since this Para starts with the words "Where commission is payable to an agent", it means that the airlines do have the option of not paying any commission. Finally, some airline representatives also opined that the introduction of the zero commission did not mean that they had eliminated commissions totally, as they were still paying commissions on the basis of productivity and that they believed that this was the right way to induce the agents to work hard and show higher degree of professionalism. It was also stated by some airlines that the airlines industry was facing financial problems due to the economic downturn and the zero commission system was serving them well in the current scenario.

4. The main contention of the IATA Travel Agents, as contained in the exhibits P3 and P4 annexed to the writ petition and also in the hearing held on 07/09/09, is that commission is the legitimate right of the travel agents under IATA Resolutions 810i (10) and 824(9), which clearly provide for payment of commission/ remuneration to agents for sale of the tickets on behalf of the principals (IATA member airlines). It is only the rate of commission that is left to be decided by the airline concerned depending upon commercial considerations. According to them, it is wrong on the part of the airlines to reduce the commission to zero and force them to recover a charge from the passenger in the form of a transaction fee, as the agency agreement is between the agent and the airline and the passenger is not a party to it. They also contend that besides the aforesaid IATA Resolutions, the payment of commission to the agents by airlines is also a statutory requirement in India as the same is provided in the Aircraft Rules, 1937. According to them, the definition of "tariff" given in clause 54A of rule 3 of the Aircraft Rules, 1937 makes commission an integral part of the tariff to be fixed by an airline in accordance with rule 135(1) of the Aircraft Rules, 1937. The Travel Agents Associations have laid considerable emphasis on the point that the zero commission policy of the airlines not only contravenes the relevant IATA Resolutions, but also runs counter to the provisions of the Aircraft Rules, 1937, and DGCA's intervention is called for to put an end to further contravention of the rules. They also argue that India should not be compared with USA and European countries as the conditions under which the agents had to work in India, particularly in small towns, were entirely different, and thousands of small agents would perish due to the zero commission dispensation being adopted by airlines. They further claim that the same airlines that are stressing on zero commission in India are paying commission in many other countries. They submitted a list of 84 countries where commission is still being paid to agents. Further, it was stated by the representatives of the agents that the IATA Resolutions provided for payment of 9% commission for interline sale i.e. an airline selling a seat of another airline is entitled to collect 9% commission from that airline and the airlines are showing no qualms in collecting this commission from each other. Finally, it was also pointed out by the Agents Associations that these airlines were following double standards and vitiating

the market by giving handsome commissions to certain selected agents in the name of productivity and these favoured agents were ruling the roost by striking deals with other agents at their sweet will.

5. The matter has been considered by DGCA in light of the provisions of the Aircraft Rules 1937 and the relevant IATA Resolutions. Due weightage has been given to the arguments of both sides as set out in the preceding paragraphs. It may be stated in the first instance that the interventions made on behalf of the airlines during the hearing held on 07/09/09 gave an indication that rule 135 of the Aircraft Rules 1937 is being interpreted by the airlines in a perverse way. It is, therefore, necessary first to clarify the import and purpose of the rule. The correct position is that this rule has two distinct sub-rules (parts). The first part lays down that the airlines shall establish a tariff and the second part relates to the display of such tariff. These two parts are mutually exclusive and operate in their respective areas independently. It is therefore wrong to say that the primary purpose of rule 135 is to ensure transparency in display. A careful reading of the rule will show that the rule is meant to serve two purposes, namely, establishment of tariff and display of tariff to ensure transparency. Both the purposes are equally important. The establishment of a tariff is a separate exercise to be carried out under sub-rule (1) of rule 135 and while establishing a tariff under that sub-rule, an airline has to bear in mind the definition of "tariff" as given in clause 54A of rule 3. On the other hand, for display and advertisement of the tariff under sub-rule (2) of rule 135, the definition of "tariff" has no role as this part only deals with the display of the established tariff in a particular manner to ensure transparency. In other words, the law contained in the first part of rule 135 (read with clause 54A of rule 3) mandates that at the time of establishing the tariff an airline shall include in it the commission payable to the agents, whereas the law as contained in the second part of rule 135 requires that the tariff so established shall be displayed in the manner prescribed under that part.

6. Having dwelt upon the purpose and scheme of rule 135 of the Aircraft Rules, 1937, it now needs to be determined as to whether it is lawful for an airline to establish a tariff under sub-rule (1) of rule 135 without including any commission payable to the agents. The answer to this limited question is affirmative, as the rule does not say that there shall be paid a commission to the agents. It only stipulates that the tariff shall include the commission payable to the agents. So, if there is no commission payable, the same will naturally not be included, and the tariff so established, without the commission, shall be displayed and advertised in accordance with sub-rule (2). However, it would be oversimplification of the issue if the enquiry were to be limited to that. The enquiry will remain incomplete unless the next logical question is also examined, that is, whether it is lawful for the airlines or the agents to charge from a customer a 'transaction fee' that is neither established under sub-rule (1) nor displayed under sub-rule (2). A bit of reflection on the rules will lead us to the conclusion that the answer to this question is negative. The reasons for this negative answer are twofold. Firstly, it has to be appreciated that a law reflects the policy of the Government on the concerned subject and the policy in the case of sub-rule (1) of rule 135 is that an airline should establish a tariff and that tariff should include the commission payable to the agents. Reducing the commission to zero percent and then levying a transaction fee that is not reflected anywhere in the relevant law is a colourable exercise that goes against the government's policy and violates the legal provisions contained in sub-rule (1) of rule 135 read with the

definition of "tariff" given in clause 54A of rule 3. Secondly, levying of transaction fee also contravenes sub-rule (2) of rule 135, as it is a charge over and above the consolidated fare to be displayed or advertised under that rule. The policy behind sub-rule (2) is consumer protection and it aims at providing complete transparency to a passenger regarding the cost of a ticket. Therefore, once a consolidated fare has been displayed on the website or in an advertisement in a newspaper, levying of any extra charge defeats the very purpose of transparency and thus cannot be supported in law. In brief, it may be stated that the zero commission system adopted by some airlines in India and levying transaction fees in lieu commission and which does not have any legal authorization makes it contrary to law. In other words, the 'net fare' or 'the transaction fee model' is not sustainable under the relevant law since charging of transaction fee, which is an integral part of this model, contravenes the relevant provisions of the Aircraft Rules, 1937.

7. During hearing, the issue of IATA resolution has been raised by both parties. Resolution 810i covering the Agency programme in India and the Resolution 824 dealing with the Agency agreements are relevant here. Section (10) of Resolution 810i provides that commission or amount of other remuneration paid to Agents shall be as may be authorized from time to time by the carrier provided that the Agent complies with the applicable rules governing sale of transportation. There is a parallel provision in Section (9) of Resolution 824, which says that for the sale of air transport and ancillary services by the agent the carrier shall remunerate the agent in a manner and amount as may be decided by the carrier and communicated to the agent. It also says that such remuneration shall constitute full compensation for the services rendered by the agent. When these two resolutions are read together, it becomes clear that under the IATA system, agents undertake the sale of air transportation on behalf of the carriers in accordance with the rules governing such sale and in lieu of this service rendered by the agents, the carriers are required to pay them commission or any other remuneration that will constitute full compensation for the services rendered by the agents. While it is true that the amount of commission or remuneration payable to the agents has not been quantified in these resolutions and the airlines are free to decide it from time to time and communicate the same to the agents, yet the basic principles stand out clearly, that is to say, the agents have to undertake the sale in accordance with rules and the airlines in turn have to pay them commission/remuneration and such remuneration shall constitute full compensation for the services rendered by the agents. Seen in this light, the stand of the airlines that these IATA Resolutions give them the freedom to reduce the commission to zero percent looks unjustifiable since if that contention is accepted, the agents would be left without any compensation for the services rendered by them to the airlines and the entire system may collapse. The explanation of the airlines to this objection is that they have given the agents the freedom to charge 'transaction fee' from the passenger, which constitutes a good compensation for them. Regrettably, this explanation does not carry weight as the IATA resolutions envisage that the compensation should flow from the airline to the agent and not from the passenger to the agent. Even the latest edition of the IATA Passenger Conference Resolutions Handbook (30th June 2009) shows these resolutions in the same way as before. It may also be worth adding here that IATA Resolution 780b provides for payment of 9% commission for interline sales i.e. the transporting carrier has to pay to the selling carrier 9% of the cost of transportation

as commission, and all carriers are following this resolution scrupulously without any fuss.

8. It is also considered necessary to deal with and dispose of the reference made by one airline representative to the bilateral air services agreement between India and the country of that airline. It is true that the article on tariffs in the bilateral agreement provides for deregulation of tariffs, which means that the designated airlines are not required to file tariffs with the aeronautical authorities, or obtain their approval for the same. But there is nothing so special about this provision as the national law of India on the subject, as contained in rule 135 of the Aircraft Rules 1937, also reflects the same policy. The airlines are neither required to file tariffs nor obtain approval of DGCA for the same. In other words, the quantum of a tariff is not to be looked into by DGCA. But it does not mean that there shall be no tariff established by the carriers. The same logic applies to the commission. The quantum of commission is not the concern of DGCA. But that does not mean that there shall be no commission. In this view of the matter, there appears to be no conflict between the tariff provision of the bilateral air services agreement and the national laws of India on the subject.

9. The examination of this subject will remain incomplete without giving due consideration to the impact of the zero commission system on the consumer interest. It appears that this system is detrimental to the consumer interest in more than one way. Firstly, since the zero commission system is loaded with a transaction fee, the consumer has to pay extra money in the form of transaction fee. Secondly, an unscrupulous agent can charge an exorbitant amount as transaction fee from the customer. Thirdly, this system is giving rise to market dominance by some big agents, who are paid hefty amounts by the airlines in the name of productivity. This phenomenon too is not in the interest of the consumer as it reduces competition among agents. Overall, it may be seen that the impact of the zero commission system does not help consumers. The zero commission system coupled with transaction fee (i.e. the net fare model) is not as per law and is devoid of merit from the consumer point of view.

ORDER

The IATA Agents Association of India (IAAI) in their application dated 23/2/2009 (Exhibit P₃) have requested to reinstate 5% commission on gross fare by taking remedial measures so that respondents foreign airlines reinstate Agency Commission. The IAAI has also requested to set up a regulatory Board for airline operators in India to ensure the working of airlines as per IATA resolution and also to mandate airlines to declare and file their airfares, taxes, surcharges, commission etc. to enable DGCA to monitor and control the same.

In Exhibit P₄ the IAAI have stated that airlines should comply with IATA resolutions and statutory provisions. They have requested that 14 named airlines be required to fix tariff as per the Aircraft Rules and pay commissions to them as per IATA resolution.

Hon'ble High Court of Kerala, vide their Order dated 13.07.2009 have directed DGCA to look into Exhibits.P₃ &P₄ and decide these in accordance with law. During examination of the matter as referred to DGCA in Exhibits P₃ &P₄, the issue of transaction fee has also come to the light, which is being charged by the Agents from the consumers at the behest of the airlines following the Zero Commission policy of these airlines. It may be clearly stated here that the existing rule 135 of Aircraft Rules, 1937 does not prescribe transaction fee as a part of tariff to be determined by airlines and also does not require consumers to pay the transaction fee as a part of air tariff. However, DGCA is not concerned with the transaction fee being charged by agents on account of services (other than air ticket) ,if any, being provided by them to their customers. The practice being enforced by the named airlines is not in accordance with Aircraft Rules, 1937.

Further, Rule 135(1) requires airlines to determine tariff which by definition includes commission. Rule 135 (2) has been amended recently by the Government vide Notification GSR No 254(E) dated 16.04.2009 to require airlines to display a `single consolidated fare' and give its break-up also for consumer's benefit. It is clear that the statutory position under rule 135 clearly requires airlines to determine tariff in accordance with law, including commission payable to agents. The existing law also requires airlines to display total fare & its components. In view of the foregoing, analysis and legal provisions, the named airlines are directed to ensure compliance of existing statutory provisions regarding determination of tariff as per rule 135(1) and display of the fare and the components as per rule 135(2) and (2A).

It may also be clarified that DGCA has also set up a monitoring mechanism in DGCA to ensure compliance of the provisions of rule 135 by the airlines. However, it is made very clear that as per rules DGCA cannot lay down quantum of commission payable by airlines to agents. It is entirely up to the airlines to take a decision in this regard in consultation with agents taking in to account various commercial factors such as the market conditions, the cost of the Agents' establishments, etc & statutory definition of `tariff'. But the commission cannot be replaced by transaction fees.

The application of IAAI dated 23/2/2009 and 28/05/2009 (P₃ & P₄) are disposed off accordingly.

Additionally, DGCA also prescribe the above directives for its general applicability to air transport operators.


(Dr. Nasim Zaidi)
Director General of Civil Aviation

Encl: List of Airlines