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DECISION

In the Matter of:

Soche Tours and Travel Ltd
Hardelec House, Victoria Avenue
P.O. Box 2225
Blantyre
Malawi
(IATA Numeric Code: 61-2 0002)

Applicant,

vs.

Agency Administrator
International Air Transport Association
IATA Regional Office for Africa
Post Net Suite 167
Pvt. Bag X9916
Sandton – 2146
South Africa

Respondent.

Introduction

1. The Review giving rise to this decision has been made on the authority of IATA Resolution 820e, in which the powers and duties of the Travel Agency Commissioner are set out. The undersigned is the Agency Commissioner for Area Two, appointed in accordance with the provisions of Resolution 820d.

Parties

2. The Applicant is Soche Tours and Travel Ltd, an IATA Accredited Agent with registered office in Blantyre, Malawi and a branch office in Lilongwe. The current owners acquired the business in October 1999, by management buy-out, when it was privatized by the Malawi Development Corporation. Soche Tours and Travel Ltd has been an Accredited Agent since 1980.

3. The Respondent is the Agency Administrator of the International Air Transport Association ('IATA'), acting for Member airlines which have delegated certain functions to IATA. IATA exists by virtue of a Canadian Act of Parliament (Statutes of Canada 1945, Chap. 51, as amended in 1975) and is the worldwide association of airlines that operate internationally. It performs common services for its 265, or so, Members that include

administering the Agency Programme and managing the Billing and Settlement Plan ('BSP') in Southern Africa. The BSP is an industry centralised sales reporting and settlement system. The Agency Administrator has particular responsibility for the management of these activities.

4. IATA divides the world into Areas One, Two and Three. The Agency Administrator's main base in Area Two – Europe, Africa & the Middle East is Geneva, Switzerland. The area field office for Southern Africa, including Malawi, which exercises management responsibility for the Agency Programme throughout that territory, is in Johannesburg.

5. The Agency Programme consists principally of resolutions adopted by the IATA Passenger Agency Conference which lay down the rules and regulations governing business relations between IATA Accredited Agents and IATA Members.

6. The parties waived a hearing and, instead, the Travel Agency Commissioner was asked conduct the review and base his decision on the documentary evidence. That procedure is foreseen in Resolution 820e, §2.3. The undersigned concurred in the parties' wish.

Contractual Considerations

7. The Passenger Agency Conference is composed of all those IATA Members who appoint a delegate to it. Its Resolutions are binding on all Members that operate passenger services, whether or not they have appointed a delegate to the Conference. The IATA Secretariat is similarly bound and is not empowered to alter or overrule a Conference Resolution.

8. The contractual instrument in this matter is the Passenger Sales Agency Agreement (Resolution 824), signed by the Applicant. Under that agreement, IATA acts for those of its Members that appoint the travel agent signatory as their sales agent. Incorporated into that agreement by virtue of §2, is Resolution 814 – Passenger Sales Agency Rules, Resolution 800f – Agents Financial Evaluation and Resolution 832 – Reporting and Remitting Procedures. The above resolutions are published in the Travel Agent's Handbook, a progressively updated publication, to be furnished by IATA annually, to all IATA Accredited Agents. The January 2007 edition of that publication applies to the review proceeding giving rise to this decision.

9. When BSP was formally declared by IATA as having been fully implemented in Malawi in mid-2005, Resolution 814 was simultaneously implemented in that country, superseding and entirely replacing Resolution 800 that had operated up until that time. One of the effects of the succession was that it enabled the setting up of an Agency Programme Joint Council for Malawi, composed of airline and travel agent members, charged with certain decisions of a local nature with respect to the Agency Programme.

10. Resolution 814, at §1 creates such Agency Programme Joint Council ('APJC') in each country where that resolution is applied. The APJC-Malawi, acting on the authority of §1.1.2.2 has approved criteria in respect of Accredited Agent financial standing. Those criteria have in turn been endorsed by the Passenger Agency Conference and are set out at pp. 15-16 of the Resolution 814 edition of the Travel Agent's Handbook. The criteria are to be construed in conjunction with Resolution 800f.

11. In fact, it was in 2003 that IATA introduced a requirement for the provision by Malawian Agents of a bank guarantee, under Resolution 800 then in effect in Malawi. The

action of the APJC-Malawi in May 2005 was thus by way of confirmation of an earlier decision.

12. The provisions of Resolution 820e, - Reviews by the Travel Agency Commissioner, at §1.1.10, allow an Accredited Agent to seek review by the Travel Agency Commissioner on grounds that the Agency Administrator has allegedly not followed correct procedure as delegated by the Passenger Agency Conference, to that Agent's direct and serious detriment. The Applicant has relied on that provision to bring its request for review and the undersigned has accepted to conduct a review.

13. By virtue of §17 of the Passenger Sales Agency Agreement, the law applicable to the contract is that of the principal place of business of the Agent.

Rules Governing Review

14. Resolution 820 and the Travel Agency Commissioner's Rules of Practice & Procedure which are published on the website of the Travel Agency Commissioners apply to this review. The essence of this proceeding is its simplicity and its aim to seek a rapid and practical solution.

Facts

15. The facts are not in dispute but the conclusions to be drawn from them are. The Applicant went into default in March 2006 and shortly thereafter paid up all monies due, without calling in the bank guarantee then in place. However, the quantum of bank guarantee was thereupon increased from MWK26.36 to a little under MWK40.1 million.

16. In October 2006, the Applicant went into default for a second time and later paid up all the monies outstanding, again, without calling in the bank guarantee. Following that belated settlement, the Applicant's independently prepared accounts for 2006 were reviewed by the Respondent. By letter of May 2007, the Respondent informed the Applicant that quantum of bank guarantee would remain at MKW40.1 million and that reinstatement would ensue. It did not but on 12th June, the Respondent wrote to the Applicant stating that the quantum of bank guarantee had been raised to MWK55 million because "... sales were erroneously omitted whilst evaluating the bank guarantee. There were also several months in which your agency was not trading."

17. The 12th June letter also set out a revised calculation for the bank guarantee, based on the Applicant's sales reported to BSP for the five months October 2005 through January 2006, plus September 2006. That calculation thus omitted the Applicant's direct sales to airlines during the time it was on a cash basis.

18. The Applicant has pointed out that it has never ceased either to trade or to be an Accredited Agent during the time it has been on a cash basis. It asserts that its 2006 cash sales reflect its performance for purposes of assessing the quantum of bank guarantee.

19. The Applicant has in the meantime sought to have its cash sale claims authenticated by the BSP Airlines concerned, with some degree of success.

Considerations

20. The review of the Applicant's financial situation has taken time, resulting in it operating on a cash basis for almost a year. That delay is less attributable to the Applicant than to the system to which it is subjected.
21. Working on a cash basis imposes drawbacks, not least of which is the inability to ticket over the counter and the withholding of credit by the airlines. One is likely to sell fewer rather than more tickets whilst trading on a cash basis.
22. Resolution 800f, Section 3.1, applicable to Accredited Agents under review makes the Agent's 'business of the previous calendar year' the basis for the bank guarantee. Similarly, Question 2 in Resolution 800a requires a candidate for IATA accreditation to provide an estimate of his first calendar year's sales which is then applied, per Resolution 800f, Section 2.2 as the basis for calculating the initial bank guarantee.
23. It appears that, although subject to Resolution 814, the BSP operating in Malawi is unable at this time, for computer programming reasons, to offer the facility foreseen in that resolution of allowing an individual Agent to elect to remit more frequently than the national BSP norm. That is possibly because the BSP Southern Africa predates the introduction of Resolution 814 in Africa. The advantage to an Agent of electing the more frequent remitting option is that it results in a proportionately reduced bank guarantee requirement.
24. Had the BSP Southern Africa's software been capable of handling the elective increased remittance frequency option described above, the present dispute might have been resolved far earlier.
25. Resolution 814 has been applicable in Malawi for more than two years. However, the Travel Agent's Handbook – Resolution 814 edition is ambiguous in its reference to Malawi and omits the APJC-Malawi financial criteria. Furthermore, the Resolution 800 edition continues to lay down conditions specific to Malawi, which compounds the ambiguity.

Findings

26. The Applicant did not cease to trade during the period under consideration and remains an Accredited Agent notwithstanding being on a cash basis.
27. The fair and correct procedure would be to use the Applicant's sales figures for the complete calendar year 2006, to arrive at the quantum of bank guarantee for 2007. That includes both BSP figures and those of sales made for airlines during the seven months the Applicant was on a cash basis in 2006. Those figures are authentically set out in Applicant's audited 2006 accounts and elsewhere.
28. The Respondent's failure to publish to Agents in Malawi the correct edition of the Travel Agent's Handbook is a moot point in the present proceeding. The Applicant's managing director is a member of the APJC-Malawi and was present at the meeting of that body that agreed the financial criteria. In any event, the Applicant does not contest their applicability.
29. The Applicant has always paid up in full. That payment has twice been late is attributable to slow paying government departments whose willingness and ability to meet their

commitments is not, however, in doubt. The Applicant has taken advice from the Respondent and believes that it can now manage that situation.

Decision

30. With the bank guarantee for MKW40.910.000,00 in place, the Respondent shall immediately reinstate the Applicant to full credit standing, reintegrated into the BSP.

31. The Respondent shall simultaneously inform BSP Airlines and the GDS concerned of this action.

32. The Respondent shall thereafter confirm in writing to the Applicant either the continuing validity of the above quantum of bank guarantee or, if the calculation based on the figures described in paragraph 27 above, gives rise to a different quantum, the Respondent shall communicate the revised figure to the Applicant, in writing, with copy to the undersigned, and allow not less than thirty days for the Applicant to act on the revised requirement.

33. The Respondent remains at liberty to monitor the Applicant's BSP sales figures, to ascertain that they remain commensurate with the quantum of bank guarantee described in the previous paragraph. In the event that the BSP average monthly sales of the Applicant, for any three consecutive months, should exceed by 20% the Applicant's average monthly sales figure for the year 2006, the Respondent shall be entitled to call for adjustment of the quantum of financial guarantee, *pro rata*, at thirty days notice, in writing, with copy to the undersigned.

34. This decision is without prejudice to the Respondent's ongoing programme of annual financial reviews, conducted in the framework of the Agency Programme, to ascertain the state of the Applicant's and, indeed, of any other Accredited Agent's financial standing and to take the requisite measures arising from that action.

35. Under the provisions of Resolution 820e, Section 4.1, if the Applicant feels itself aggrieved of this decision, it has the right to have the decision reviewed by arbitration, per the procedures set out in Resolution 814, Section 12.

36. No charge or fee is payable to the undersigned by the parties for this decision.

37. The undersigned reserves the right to oversee the application of this decision, to respond to questions the parties might raise on how that is to be done and to rule on any disagreement that may arise in the execution of this decision.

DECIDED, this 7th day of October 2007, in Geneva.

Brian Barrow

NOTE: With a view to achieving immediate action, this decision has been sent electronically to the parties. The original signed copies follow by registered air mail.