

DECISION 2010-05-12**Travel Agency Commissioner Area 3**

Jo Foged
685 Remuera Rd
Remuera, Auckland
New Zealand

The Case:

Request for Review of Decision by the Agency Administrator in a letter of 09 December 2009 which placed the Agent on notice of termination if the Agent failed to submit the required financial guarantee within the time frame given. The Agent disputes the manner and method by which the Agency Administrator arrived at the requirement for a financial guarantee and has requested a Review.

Applicant:

Premier Tours and Travel (Chennai) Pvt. Ltd.,
486/579 Anna Selai,
Teynampet,
Chennai 600006,
India.

Represented by Mr Rama Chandran Iyer, Executive Director

Respondent:

Agency Administrator,
International Air Transport Association (IATA),
Geneva,
Switzerland.

Represented by Ms Siew Cheng Lim, Assistant Director, Accreditation -Asia Pacific,
Singapore

Background, formalities etc:

After a long and protracted series of events, by letter of 09 December 2009, IATA placed the Applicant on notice of termination of its accreditation on 31 January 2010 should it not provide the proscribed financial guarantee within the time frame given. The Applicant disagreed with the Respondent's application of financial criteria and disputed the manner and method by which it produced the need for a Bank Guarantee (BG) but faced with the prospect of losing its accreditation it provided the required BG three days prior to the termination date.

This case stems from the Applicant's notification to IATA on 09 June 2008 of its intention to transform the legal status of the entity from a Private Limited Company to a Public Limited Company with the same directors, management and share capital. The audited balance sheet for the period ending 31 March 2008 required by IATA and the subsequent application of the financial criteria by IATA forms the dispute which culminated in the Applicant's Request for Review.

Both parties have agreed to waive their rights for a formal hearing and have allowed the Travel Agency Commissioner (TAC) to base his decision on the documentation rendered.

The undersigned finds that the arguments of both sides are clear and an oral hearing can be dispensed with without jeopardising the process.

Authority for Review:

The terms of Resolution 820e – Reviews by the Travel Agency Commissioner – provides for an Accredited Agent to seek review by the TAC in circumstances described therein. In this case the most pertinent paragraph as seen from the Applicant’s perspective is 1.1.10 which states:-

“an Agent who considers that the Agency Administrator (as defined) has not followed correct procedure as delegated by the Passenger Agency Conference, to that Agent’s direct and serious detriment in order to determine whether the decision under review was made in accordance with applicable Resolutions and based on credible fact.”

Based on the documentation supplied I find that a credible case for Review exists and the circumstances inherent therein fall within my jurisdiction.

While the Agency Administrator’s (AA) Notice of Termination was dated 09 December 2009 for an effectiveness date of 31 January 2010 the consequent correspondence between the Applicant and the Respondent did not conclude until 24 January 2010. In fairness to the Applicant, having received the Request for Review on 22 February 2010, I find that it meets the timeline parameters shown in Resolution 820e.

The time gap between the receipt of the Request and the commencement of work on this Review was caused by an absence of three weeks overseas by the undersigned.

Schedule of Events:

1. The Applicant advised the IATA Agency Services Office (ASO-India) in Mumbai on 09 June 2008 of its intention to transform the legal status of the entity from a Private Limited Company to a Public Limited Company with no change to directors, management or share capital.
2. On 19 August 2008 the Applicant forwarded the relevant forms and documents to the ASO-India. From that date until mid 2009 there were a number of exchanges in which the ASO-India sought further information and the Applicant supplied same with lengthy time lapses between request and delivery. Some of these time gaps were beyond the control of the parties.
3. On 9 March 2009 the ASO-India requested the Applicant to forward an audited balance sheet for the period ending 31 March 2008 along with a statement of productivity for March 2008 until February 2009, all to be with the ASO-India by high noon 25 March 2009.

4. The Applicant forwarded the requested information which arrived at the ASO-India on 23 March 2009, a fact recorded by the courier receipt stamped by the ASO-India on that date. Evidence of same is included in the Applicant's submission.
5. In a 22 April 2009 letter the ASO-India advised that due to non-receipt of the requested documents by the deadline date the Applicant was to furnish a Bank Guarantee (BG) for INR 200,000 to be valid from 1 June 2009 until 31 December 2009 with a claim period up to 31 March 2010, the deadline for the BG to reach the ASO-India being 21 May 2009.
6. On receipt of this advice on 9 May 2009 the Applicant highlighted the delivery of the required documentation on 23 March 2009 to the ASO-India who asked the Applicant to supply a further set which was duly accomplished. At that point the ASO-India did not remove the requirement for the INR 200,000 BG.
7. After the Applicant sought clarification on the status of the BG requirement in light of the impending delivery deadline the ASO-India, in a 1 June 2009 letter, advised that having concluded a financial evaluation of the Applicant there was no requirement for the Applicant to furnish a BG and their letter of 22 April 2009 should be ignored.
8. A 31 August 2009 ASO-India letter received by the Applicant advised that based on the financial documents submitted and the current financial criteria formula in use the financial evaluation conducted on the basis of international productivity required the furnishing of a BG of INR 150,000 by 12 noon on 30 September 2009. The BG should be valid up to 31 December 2009 with a claim grace period up to 31 March 2010. The letter did not advise of any sanctions should the deadline be missed by the Applicant.
9. The Applicant replied by referring to the Respondent's earlier request for a BG which was subsequently withdrawn and asked that the Respondent review the requirement and revert with advice.
10. The next event is a matter in dispute between the Applicant and the Respondent. The Applicant states in its submission that it received a phone call from an identified member of the ASO-India staff on or about 24 September 2009 during which, having consulted with a colleague, the ASO-India staff member confirmed that the requirement for a BG of INR 150,000 and the letter of 31 August 2009 may be ignored. Having being questioned by the undersigned on this matter the Respondent advised that the ASO-India staff member did not have any recollection of such a conversation with the Applicant.
11. The Applicant acknowledges that it has no written evidence of this conversation but states that it placed its faith in the verbal advice given and consequently did not make arrangements for the BG.
12. On 9 December 2009 the Agency Administrator wrote to the Applicant advising that it had failed to submit the BG required in connection with its change of legal status by the deadline given and consequently the Applicant no longer met the financial requirements for retention as an Accredited Agent. Therefore the Applicant was placed on notice of termination due to take place on 31 January 2010. However such action would not eventuate if the BG was in place prior to that date.

13. The Applicant faxed the Agency Administrator (represented by the Asst. Director-Agency Asia/Pacific in Singapore) on 17 December 2009 highlighting the situation detailed in 4. and 5. above and the inconsistency between the two financial evaluations. The difficulty in contacting key ASO-India staff either due to their absence or non response to telephone calls was also recorded. The consequences of accepting the ASO-India staff member's advice detailed in 10. and 11. above was referred to along with the Applicant's understanding on the application of the Financial Criteria published in the Travel Agents Handbook for India (elaboration on that matter will be made in the next section). The Applicant requested an urgent review with a view to withdrawal of the Notice of Termination. No reply was received from the AA to this fax.
14. A similar content e-mail was sent to the ASO-India on 24 December 2009. Their response was to advise that the financial assessment conducted in May 2009 was erroneous as the assessor had not considered the effect of a particular expense. This oversight was rectified in the subsequent evaluation conducted in July 2009 and the INR 150,000 BG emerged and the ASO-India reconfirmed the requirement for such BG to be put in place.
15. On 12 January 2010 the Applicant e-mailed the AA expressing its serious concern at the advice of an erroneous financial evaluation advised by the ASO-India. The thrust of the Applicant's concerns expressed in 13. above was repeated and an immediate withdrawal of the Notice of Termination requested.
16. In the absence of a reply the Applicant called the AA on 18 January 2010 and was asked by the AA to re-send its 12 January 2010 e-mail which was duly done.
17. On 21 January 2010 the AA e-mailed the Applicant to advise that the ASO-India was awaiting clarification from the Financial Assessor on the computation of long term working capital and the AA would revert once this advice had been received.
18. The same day the Applicant responded to the AA's message by disputing the inclusion of long term working capital in the evaluation as in the Applicant's opinion this was not a feature of the Financial Criteria for India. Concern at the lengthy time lapses between enquiry and response was also recorded.
19. In a 22 January 2010 e-mail the AA advised that a review of the Applicant's case had been made with the ASO-India and the Financial Assessor. After an explanation of how this evaluation was handled the AA re-affirmed the requirement for the furnishing of a BG and urged the Applicant to comply without delay. (The points covered in this message will be elaborated upon later in the Review.)
20. The Applicant responded to the AA same day with a detailed synopsis of the Applicant's views on the application of financial criteria (which will also be detailed later in the Review) and again requested an urgent review of the termination decision by 25 January 2010. The option of seeking redress through litigation was referred to.
21. This message was answered by the ASO-India on 24 January 2010 advising that a thorough review of the Applicant's case had been made and the decision related to the termination was a collective one. The reference to the possibility of legal recourse was noted but the decision would stand.

22. On 28 January 2010 the Applicant provided ASO-India with a BG for INR 150,000 and thus avoided the termination action.
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The Applicant's Arguments in Summary:

1. The Applicant has been an IATA Accredited Agent for more than 24 years and during that time has had an unblemished record. It has a very large paid up capital relative to its current average international productivity.
2. Having delivered the requested audited balance sheet up to 31 March 2008 within the timeframe requested, with proof of receipt by the ASO-India, the Respondent was wrong in requiring a BG for INR 200,000 on the basis of non-receipt of same.
3. Receiving proof of on time delivery the ASO-India requested a further set of documents which were forwarded by the Applicant at which stage the BG requirement should have been withdrawn by the Respondent however this did not occur at that point.
4. Ten days after the BG delivery deadline the ASO-India advised that having completed a financial evaluation there was no requirement for a BG and its 22 April 2009 letter should be ignored. The lack of timely advice, which should have occurred prior to the deadline, caused the Applicant great anxiety.
5. The subsequent financial evaluation conducted in July 2009 which initiated the ASO-India's 31 August 2009 letter requiring a BG of INR150,000 before high noon 30 September 2009 was wrong on the following counts:-
 - (a) it is not based solely on the Local Criteria for the Approval and Retention of Agents published in the Travel Agents Handbook-India but also uses elements of Resolution 800f which should only be applied when there are no existing local criteria.
 - (b) the financial evaluation on which the requirement for a BG of INR 150,000 is devoid of very important adjustments or correct computation of amount at risk and amount of BG required
 - (c) although not enshrined in any Resolution an Assessor who carried out the erroneous original assessment may not conduct another evaluation of the same Agent within a short period in conformity with normal business ethics. Consequently the BG requirement for INR 150,000 is invalid
 - (d) the ASO-India 31 August 2009 letter requiring the BG did not mention any sanctions should the Agent not comply
 - (e) the same ASO-India letter does not refer to the erroneous May 2009 financial evaluation and does not indicate whether or not the same Assessor was involved with the July 2009 assessment
 - (f) the Applicant was not given the option of submitting audited Financial Statements in lieu of a BG or Insurance Cover (almost verbatim from the Applicant's submission). The Respondent failed to offer the Applicant the opportunity to increase the entity's paid up capital before demanding a BG.

6. The Applicant believes that the Asst Director Agency Accreditation Services-Asia/Pacific, Singapore (hereinafter AA) has applied a number of erroneous procedures as detailed below both prior to and after the issuance of the 9 December 2009 Notice of Termination to the direct detriment of the Applicant. They are as follows:-
- (a) the AA has not verified the correctness, applicability and validity of the 31 August 2009 letter from the ASO-India to the Applicant
 - (b) the AA has not verified the mandatory action required of the ASO-India in the event the Applicant failed to furnish the requested BG by the due time
 - (c) the AA has not questioned why the ASO-India did not offer the Applicant the option of increasing its paid up capital before demanding a BG
 - (d) the AA has not referred to the ASO-India's 31 August 2009 letter's lack of detailing the sanctions involved should the BG not be in place by the deadline date.
 - (e) the tardy responses to the Applicant's queries and statements by the Respondent in the lead up to the termination date added further pressure to an already critical situation
 - (f) the AA has incorrectly applied the provisions of Resolution 800f-Agents' Financial Evaluation Criteria instead of the existing Local Criteria for the Approval and Retention of Agents only as published in the Travel Agents Handbook-India
 - (g) the AA has applied the condition that "the financial evaluation of the Financial Assessor is final". This is only true if the provisions of the Local Criteria for the Approval and Retention of Agents is applied NOT if other provisions from Resolution 800f are included
 - (h) the situation described in (g) above is curious when the Respondent advised that the financial evaluation of May 2009 was erroneous and was consequently treated as being invalid
 - (i) the AA has agreed totally with the actions of the ASO-India without delving into the application of the relevant conditions independently
 - (j) the AA has not responded to the question whether or not the two financial evaluations were completed by the same Assessor

The Respondent's Arguments in Summary:

- 1. The Respondent states that the following sections of the Travel Agents Handbook-India (TAH) read jointly deal with the Financial Criteria for the Accreditation and Retention of Agents:-
 - (a) Local Criteria for Approval and Retention of Agents in India
 - (b) Resolution 800f-Agents' Financial Evaluation Criteria
 - (c) Resolution 810i Section 3-Qualifications for Accreditation and Retention
- 2. This manner of applying these rules is derived from the following background:-
 - (a) when Resolution 810i was implemented in 2000 the local Agency Programme Joint Council (APJC) was tasked with developing a Financial Criteria for

- Approval and Retention of Agents in India. These negotiations finally concluded in 2009 and the APJC-recommended financial criteria was agreed by PAConf in that year for effectiveness from 1 June 2010
- (b) in the interim the financial criteria applied by AIP9 which operated under the authority of Resolution 800 until 2000 was to be used as the “guiding principle”. This was documented under the authority of PAConf.
 - (c) in 2006 PAConf transformed Resolution 800f from being a framework for development of financial criteria to one that is mandated to be applied for establishment and/or review of local financial criteria.
3. The ASO-India 1 June 2009 letter advising the Applicant that no BG was required is erroneous as the Assessor had not considered the preliminary and pre-operating expense of INR 21609004 reflected in the balance sheet.
 4. The 31 August 2009 letter to the Applicant arose from a second financial evaluation under the current financial criteria and a requirement for a BG of INR 150,000 was determined.
 5. The AA advises that having reviewed the Applicant’s case with the Financial Assessor the Applicant may be under a mistaken impression. The Resolutions governing Financial Criteria for accreditation and retention of Agents in general, read with the Local Financial Criteria for India, fully support the basis upon which the financial assessment was completed and the BG demanded. In order to determine the long term working capital of any company, the Financial Assessor must examine the Agent’s financial statements. All fictitious assets such as preliminary expenses, pre-operative expenses, discount on issue of shares etc must be deducted. This method of arriving at long term working capital is consistent with the Indian Accounting Principles.
 6. The AA states that the Applicant’s September 2009 phone conversation with an ASO-India staff member that gave the impression that no BG was required was a mistaken one and that misperception is no grounds for waiving the BG requirement. The assessment of the Financial Assessor is final and binding.
 7. The Applicant did not contact the ASO-India for the latest financial criteria but appears to have made its own assumptions on what they should be.
 8. Since the introduction of Resolution 810i which features the stewardship of the APJC the criteria documented in the TAH is clearly:-
 - (a) a guiding principle
 - (b) subject to the Passenger Sales Agency Rules and other PAConf Resolutions
Hence the precept of “the amount of the guarantee required being reduced by the excess of liquid current assets over current liabilities in the financial statements of the relevant legal entity” cannot be ignored.
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Considerations Leading to Conclusions:

There is a great deal of detail associated with this Review along with a protracted sequence of events stretching from June 2008 until the present date. The undersigned

intends to deal with the core issue first and then make some general comments regarding the interaction between the Respondent and the Applicant.

The prime issue is whether or not the Respondent has applied Financial Criteria in conformity with the intentions of PAConf when Resolution 810i-Passenger Sales Agency Rules-India was introduced in 2000. From that time, until the APJC settled on a new standard, the TAH-India advises as follows:-

“In the interim period, the criteria followed by AIP9 for the past several years will be the guiding principle. The AIP9 criteria while computing the quantum of additional financial support to be provided by any IATA Accredited Agent in India is as follows:-

- (a) Paid up Capital plus Reserves and Surplus less net Fixed Assets
- (b) Resulting figure is weighed against average four weeks sales productivity and any shortfall is recommended to be covered **either** by the increase in paid up capital **or** by submission of a bank guarantee.

N.B: *Financial evaluation by the financial Assessor of IATA will be final.”*

An associated key issue is the manner in which ASO-India has applied the provisions of Resolution 800f, a brief description of which reveals that with effect from 1 November 2003 Resolution 800f-Framework for the Development of Agents’ Financial Evaluation Criteria was introduced globally as a recommended template for those APJCs wanting to introduce or update a financial standard.

From 1 January 2007 Resolution 800f was transformed from being a permissive set of conditions to being a mandatory test for the establishment and/or review of the local financial criteria in all markets, subject to any local conditions that may apply.

The Respondent has interpreted the transformation of Reso 800f into a mandatory set of conditions as being an overlay to the Local Criteria for the Approval and Retention of Agents described above and in so doing has allowed the Financial Assessor to use elements of both when evaluating the financial status of an Agent.

The Minutes of PAConf 29 convened in 2006 which details the discussion on this transformation read as follows:-

“AGENDA ITEM R11 – APPLICATION OF RESOLUTION 800f

M/68 Conference approved, with XX abstaining, a proposal supported by PSG that the criteria laid down in Resolution 800f be mandated for all countries **that have not yet developed their own criteria.** (emphasis added) The consequential amendments to Resolution 800f were adopted.”

Furthermore when the APJC-India’s new financial criteria were adopted at last year’s PAConf the manner in which the amendment was recorded in Conference documentation was the deletion of the wording in the TAH-India describing the Local Criteria for the

Approval and Retention of Agents with no reference being made to the terms and conditions of Resolution 800f.

Finally the preamble to Resolution 800f states the following:-

“It is RESOLVED that the following Agent financial evaluation criteria be applied as the baseline for establishment and/or review of the local financial criteria in all markets, **subject to any local conditions that may apply.** (emphasis added)”

From this the undersigned has concluded that while the airline and agent members of the APJC were negotiating a new set of financial criteria the **existing** formula described under Local Criteria for the Approval and Retention of Agents published in the Travel Agents Handbook-India was the sole test to be applied.

To some parties the length of time that it took for the APJC to agree on a new formula must have been frustrating and the motivation to augment what is a rather simple formula must have been very strong however that non-mandated action was in error.

The undersigned finds that the financial criteria for India as applied by the Respondent lacks transparency and there is no easily accessed information for Agents on the elements applied by the Financial Assessor when evaluating an Agent’s financial status.

As far as the undersigned can determine an Agent who approaches the ASO-India to obtain the latest criteria is advised that the formula consists of the Local Conditions, Resolution 800f and the provisions of Resolution 810i the combined features of which would be confusing to a layman.

With regard to the documented interaction between the Applicant and Respondent the undersigned is concerned at the length of time taken by the Respondent to reply to important questions from the Applicant which had a critical impact on the latter’s ability to conduct its business. For example it took that office 10 days beyond the deadline for the provision of a BG to advise the Agent that none was required. I also find that the classification of a financial evaluation as being “erroneous” displays a lack of professional application to the information being examined.

It is also concerning to note that the ASO-India was unable to subsequently locate the Applicant’s balance sheet when delivered to its office on 23 March 2009. To then further compound the situation by issuing a requirement for a BG through non-receipt of same demonstrates a somewhat autocratic attitude.

The omission by the Respondent to clearly describe the sanctions that would be applied to the Applicant should the Respondent’s requirements not be met within the timeframe given is also noted.

There are other matters of a “no-record” nature raised in this Review along with a number of side issues that I will not comment on.

Decision:

While the information requested from the Applicant by the Respondent is now somewhat dated it is a fundamental element of this Review and I therefore require that the Respondent promptly conducts a financial evaluation of that documentation applying only the formula described under Local Criteria for the Approval and Retention of Agents as published in the current Travel Agents Handbook for India. Any consequent outcome of that evaluation is to be dealt with in accordance with that criteria and any remedial action is to be handled without delay.

Decided this 12th May 2010 in Auckland:

Jorgen Foged
Travel Agency Commissioner Area 3

Note:

The Respondent may, if considered aggrieved by this decision, seek review by arbitration in accordance with the provisions of Resolution 820e Section 4 Paragraph 4.3 and as detailed in Resolution 810i Section 13.