

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 639 OF 2010

(Arising out of Order-in-Original No. 23/Commr./HKC/2010 dated 31.08.2010 passed by Commissioner of Customs, (Preventive), New Customs House, IGI Airport, New Delhi-110037)

M/s Reliance Commercial Dealers Ltd. ...Appellant

VERSUS

**Commissioner of Customs, (Preventive) ...Respondent
New Customs House, Delhi**

With

CUSTOMS APPEAL NO. 641 OF 2010

(Arising out of Order-in-Original No. 23/Commr./HKC/2010 dated 31.08.2010 passed by Commissioner of Customs, (Preventive), New Customs House, IGI Airport, New Delhi-110037)

Sudhir Nayak ...Appellant

VERSUS

**Commissioner of Customs, (Preventive) ...Respondent
New Customs House, Delhi**

APPEARANCE:

Shri J.C. Patel, Shri Vipin Jain and Ms. Shilpa Balani, Advocates for the Appellant

Shri Shri PRV Ramanan, Special Counsel and Shri Rakesh Kumar Authorized Representative for the Department

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: 24.08.2022
Date of Decision: 08.09.2022**

FINAL ORDER NO. 50820-50821/2022

JUSTICE DILIP GUPTA:

Customs Appeal No. 639 of 2010 has been filed by M/s. Reliance Commercial Dealers Ltd.¹ to assail the order dated 31.08.2010 passed by the Commissioner of Customs (Preventive), New Customs House, IGI Airport, New Delhi² by which the aircraft has been confiscated under section 111(o) of the Customs Act 1962³ with an option to the appellant to redeem the same after payment of redemption fine. The order also seeks to confirm the demand of duty in terms of the undertaking given by the appellant at the time of importation of the aircraft but since the aircraft was released provisionally, the bank grantee furnished at the time of provisional release of the aircraft has been directed to be invoked. The order also imposes of penalty upon the appellant under section 112(a) of the Customs Act. The duty demand made against M/s. Reliance Industries Limited⁴ has, however, been dropped.

2. **Customs Appeal No. 641 of 2010** has been filed by Sudhir Nayak, Vice-President of the appellant to assail the aforesaid order dated 31.08.2010 passed by the Commissioner to the extent it imposes a penalty of Rs. 20,000,00/- upon the said appellant under section 112(a) read with section 140 of the Customs Act.

3. The appellant claims to be engaged in providing "non-scheduled air transport (passenger) service". Sudhir Nayak is the Vice President, Commercial of the appellant.

4. The issue involved in these appeals is whether the use of aircraft imported by the appellant with benefit of exemption from customs

1. the appellant
 2. the Commissioner
 3. the Customs Act
 4. RIL

duty under serial 347B of notification no. 21/2002-Cus dated 01.03.2002, as amended by notification no. 61 of 2017 dated 03.05.2007⁵, for providing passenger air transport service to its group company by carrying personnel of the group company for remuneration would amount to violation of Condition No.104 of the said exemption notification and whether it is open to Customs to contend that such use is not in accordance with the permit for non-scheduled (passenger) services granted by Director General of Civil Aviation⁶ when the DGCA has not found such use to be in violation of such permit and had renewed the permit from time to time.

5. In response to the application dated 14.11.2007 submitted by the appellant for permission to import "Falcon 900EX Easy aircraft"⁷ for operating non-scheduled air transport (passenger) service, the Director, Ministry of Civil Aviation, Government of India, by a letter dated 02.01.2008, granted such permission/No-objection Certificate to import the aircraft for non-scheduled operations. The appellant imported the aircraft and claimed, in respect of the said aircraft, exemption from customs duty under of the exemption notification. The said exemption is subject to Condition No. 104 contained in the said notification which is to the effect that the aircraft should be imported by an operator who has been granted approval for providing non-scheduled (passenger) services or non-scheduled (charter) services and the importer should furnish an undertaking that the aircraft shall be used only for providing the said services. The Bill of Entry filed by the appellant in respect of the said aircraft was duly assessed by the

5. the exemption notification
6. DGCA
7. the aircraft

proper officer of Customs and the said duty exemption was granted whereafter based on the assessed Bill of Entry, the appellant cleared the said aircraft. In terms of the No-objection Certificate dated 02.01.2008, the office of the DGCA also endorsed the said aircraft in the permit granted to the appellant for operation of non-scheduled air transport (passenger) services.

6. On 24.01.2008, the appellant entered into an agreement with RIL whereby the appellant agreed to provide passenger air transport service by operation of the said aircraft to RIL and/or its nominees upon payment of charges as specified in the said agreement. Under the said agreement, RIL had the first right of refusal of availing passenger air transport service in respect of the said aircraft and RIL undertook to avail such passenger air transport service for a minimum of 400 hours per annum.

7. Pursuant to the said agreement, the appellant provided passenger air transport service to RIL and/or its nominees. According to the appellant, such provision of passenger air transport service is neither between the same two places, nor is it in accordance with a published time table and the same, therefore, does not satisfy the requirements of "scheduled air transport service" and is consequently non-scheduled air transport (passenger) service. The same would, therefore, be in accordance with the conditions of the said exemption notification.

8. RIL also claims to have paid the appellant, in accordance with the said agreement dated 24.01.2008, the remuneration/ charges in respect of the said non-scheduled (passenger) service provided by the appellant to RIL or the nominees.

9. In June 2008, the Office of the Commissioner of Customs (Preventive), New Delhi commenced investigations in respect of the import of the said aircraft, which culminated into issuance of a show cause notice dated 18.07.2008. By the said notice, it was contended that the use of the aircraft, pursuant to the said agreement with RIL, did not constitute public use and that the same amounted to private/personal use and so the appellant had not used the said aircraft for non-scheduled (passenger) service in accordance with the No-objection Certificate and permit granted to the appellant by the DGCA. The show cause notice was, accordingly, issued proposing to deny the said exemption. The show cause notice also proposed confiscation of the aircraft and imposition of penalty.

10. The aircraft was seized on 03.07.2008 and was thereafter provisionally released against Bond and Bank Guarantee.

11. The appellant filed a reply dated 13.09.2008 to the show cause notice inter alia submitting that the use of the aircraft for providing passenger air transport service for remuneration to a group company by carrying personnel of the group company is within the scope of non-scheduled air transport (passenger) service and does not make the use of the aircraft, as a private aircraft. The appellant also submitted that it is not open to Customs to contend that such use is not in accordance with the permit for non-scheduled air transport (passenger) services granted by DGCA, when the DGCA has not found such use to be in violation of such permit and renewed the permit from time to time.

12. The Commissioner of Customs (Preventive), New Delhi, passed an order dated 31.08.2010 holding:

- (i) That by entering into agreement dated 24.01.2008 with RIL, whereby the appellant agreed to provide passenger air transport service by operation of the said aircraft to RIL and/or its nominees upon payment by RIL charges as specified in the said agreement, the appellant had chartered out the aircraft to RIL which is not permissible where the aircraft is imported for non-scheduled (passenger) services;
- (ii) As a non-scheduled operator, the appellant was required to issue passenger tickets, which has not been done; and
- (iii) The use of the aircraft to carry personnel of group company amounts to personal/private use of aircraft.

13. On the basis of the said findings, the Commissioner denied the exemption and demanded duty with interest and held the aircraft to be liable to confiscation and imposed fine and penalty.

14. Shri J.C. Patel and Shri Vipin Jain, learned counsel for the appellant made the following submissions:

- (i) The findings of the Commissioner for denying the exemption are unsustainable in law in view of the order dated 08.08.2022 of a Larger Bench of the Tribunal in **M/s. VRL Logistics Ltd. vs. Commissioner of Customs, Ahmedabad**⁸;
- (ii) Chartering operations are permissible under non-scheduled (passenger) service;
- (iii) There is no dispute that the appellant is "operator" as defined in clause (a) of the Explanation. There is also no dispute that the appellant has been granted approval by

8. Reference answered in Customs Appeal No. 74 of 2010 on 08.08.2022

DGCA to import the aircraft for providing non-scheduled (passenger) service, as defined in clause (b) of the Explanation. The first requirement of Condition No. 104 is, therefore, satisfied. There is also no dispute that the appellant has furnished undertaking to Customs that the imported aircraft shall be used only for providing non-scheduled (passenger) services, as defined in clause (b) of the Explanation and in event of failure to so use the aircraft, to pay the duty. Therefore, the second requirement of Condition No. 104 is also fulfilled;

- (iv)** The appellant has used the aircraft only for providing non-scheduled (passenger) services, as defined in clause (b) of the Explanation;
- (v)** While providing non-scheduled (passenger) service, as defined clause (b) of the Explanation, there is no prohibition against providing the said service by way of charter of the aircraft;
- (vi)** There is no requirement of issue of passenger tickets by a non-scheduled (passenger) service operator;
- (vii)** The appellant has not used the aircraft as a private aircraft. The very fact that the DGCA has for the aircraft in question issued permits and renewed them from time to time under the classification of non-scheduled (passenger) service would mean that the said aircraft cannot be classified as private aircraft; and
- (viii)** It is open to Customs to contend that use of aircraft is not in accordance with the permit for non-scheduled (passenger) services granted by DGCA, when the DGCA

has not found the use to be in violation of such permit and renewed the permit from time to time.

15. Shri P.R.V. Ramanan, learned special counsel and Shri Rakesh Kumar, learned authorized representative appearing for the Department made the following submissions:

- (i) The Larger Bench of the Tribunal in **VRL Logistics** has not dealt with the issue as to whether the invoking of the terms of the undertaking to demand duty forgone at the time of import is correct or not. This issue has been examined by three Division Benches of the Tribunal in **Commissioner of Customs, New Delhi vs. Sameer Gehlot**⁹, **M/s. East India Hotels Ltd. vs. Commissioner of Customs Central Excise and Central GST, New Delhi**¹⁰ and **King Rotors & Air Charter P. Ltd. vs. C.C. (ACC & Import), Mumbai**¹¹;
- (ii) The statement of Sudhir Nayak recorded under section 108 of the Customs Act indicates that the terms of the exemption notification have been violated and the appellant is required to pay the duty;
- (iii) The aircraft was not used as per the terms and conditions of the undertaking submitted by the appellant and once the terms are breached, the appellant is liable to pay duty; and
- (iv) As far as the decision on the eligibility to customs duty exemption is concerned, the Customs authorities are the final authority and the DGCA has no say in the matter.

9. 2011 (263) E.L.T. 129 (Tri.-Del.)

10. 2020-TIOL-335-CESTAT-DEL

11. 2011 (269) E.L.T. 343 (Tri.-Mumbai)

16. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the Department as also the learned authorized representative appearing for the Department have been considered.

17. Aircrafts and helicopters are classified under Customs Tariff Heading 88 of the First Schedule to the Customs Tariff Act, 1975. The tariff rate of duty till 28.02.2007 on the import of aircraft was 3% / 12.5%. Subsequently, pursuant to the proposal made in the Finance Bill 2007, exemption notification no. 20/2009 dated 01.03.2007 was issued inserting Entry 346B and Condition No. 101 in the earlier exemption notification dated 01.03.2002, whereby, the effective rate of duty on import of aircraft for scheduled air transport service was made 'nil'. No exemption was, however, granted to non-scheduled air transport service and private category aircraft. However, with the issuance of the exemption notification dated 03.05.2007, the effective rate of duty on the import of aircraft for non-scheduled air transport service was made 'nil'. This exemption notification was as a consequence of the statement made by the Hon'ble Finance Minister in the Parliament and it is reproduced:

"Honourable Members are aware that I had proposed to levy customs duty, CVD and additional customs duty on import of aircraft excluding imports by Government and scheduled airlines. **Ministry of Civil Aviation has made a strong representation in favour of exemption for aircraft imported for training purposes by flying clubs and institutes and for non-scheduled point-to-point and non-scheduled charter operators under conditions of registration to be specified and recommended by that Ministry. Since civil aviation is a nascent and growing industry, it has been decided to accept this request and exempt these categories also from the duties."**

(emphasis supplied)

18. A perusal of the aforesaid statement makes it clear:

- (i) The exemption was granted on the basis of strong representation made by the Ministry of Civil Aviation;
- (ii) The exemption was subject to the conditions of registration to be specified by the Ministry of Civil Aviation; and
- (iii) The exemption was granted to give an incentive to the nascent and growing state of the aviation industry. The purpose of granting the exemption was, therefore, to encourage the import of aircraft, which could be used for non-scheduled operation.

19. The aforesaid exemption notification dated 03.05.2007 inserted Condition No. 104 which requires at the stage of import, an approval from MCA to import the aircraft for non-scheduled (passenger) service and an undertaking by the importer to the Customs authority that the aircraft would be used only for non-scheduled (passenger) services and that the operator would pay on demand, in the event of his failure to use the aircraft for the specified purpose, an amount equal to the duty payable on the said aircraft but for the exemption under the notification.

20. Explanation (b) to Condition No. 104 of the exemption notification defines non-scheduled (passenger) services as:

“(b) Air transport services other than scheduled (passenger) air transport services as defined in Rule 3 of the Aircraft Rules, 1937.”

21. The aforesaid definition refers to 'air transport services' and 'scheduled (passenger) air transport services' as defined in rule 3 of the Aircraft Rules, 1937¹².

22. "Air transport services" is defined in rule 3(9) of the Aircraft Rules as under:

"Air transport service" means a service for the transport by air of persons, mails or any other thing, animate or inanimate, for any kind of remuneration whatsoever, whether such service consists of a single flight or series of flights."

23. "Scheduled air transport service" is defined in rule 3(49) of the Aircraft Rules as under:

"Scheduled air transport service" means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public."

24. The term 'scheduled (passenger) air transport services' has to be interpreted according to this definition, and applied to passenger travel in contradistinction to carriage of goods or mail.

25. Thus, if a service is covered by 'air transport service' defined in rule 3(9) of the Aircraft Rules and is other than 'scheduled (passenger) air transport service' defined in rule 3(49), it would be a non-scheduled (passenger) service within the meaning of clause (b) of the Explanation to Condition No. 104 of the exemption notification.

26. At the time when Condition No. 104 was inserted on 03.05.2007, Civil Aviation Requirement dated 08.10.1999¹³ dealing with non-scheduled (passenger) services as well as Civil Aviation Requirement

12. the Aircraft Rules

13. 1999 CAR

dated 17.05.2000¹⁴, dealing with scheduled (passenger) services, which had been issued under rule 133A of the Aircraft Rules, were in force. The expression 'non-scheduled air transport services (passenger)' has been defined, both under the 1999 CAR as also the 2000 CAR, as follows:

"Non-scheduled air transport services (passenger) means air transport services other than scheduled air transport services as defined in the rule 3 of the Aircraft Rules, 1937."

27. It is not in dispute that the appellant had submitted an application for permission to import the aircraft for operating non-scheduled (passenger) services and a permit had been granted by the DGCA to import the aircraft for non-scheduled (passenger) services. The appellant imported the aircraft and claimed exemption from customs duty under the exemption notification. The said exemption is subject to Condition No.104 contained in the said notification which is to the effect that the aircraft should be imported by an operator who has been granted approval for providing non-scheduled (passenger) services or non-scheduled (charter) services and the importer should furnish an undertaking that the aircraft shall be used only for providing the said services. The undertaking submitted by the appellants is as follows:

"UNDERTAKING

To,
The President of India
Through
The Assistant Commissioner of Customs
New Customs House, New Delhi

Dated : 29th October, 2007

Dear Sir,

14. 2000 CAR

We, M/s. Reliance Commercial Dealers Private Limited hereby undertake that the aircraft Airbus A319-115CJ, Serial Number 283 shall be used for non-scheduled Transport Services (Passenger) only.

We further undertake to pay on demand, in event of failure to use the said imported aircraft for the specified purpose, an amount equal to the duty payable on the said aircraft but for the exemption under the notification no. 021/2002-Customs, serial number 347 condition 104."

28. The show cause notice issued to the appellant states that the use of the aircraft did not constitute public use and amounted to private/personal use as a result of which the appellant had not used the aircraft for non-scheduled (passenger) service in accordance with the permit granted to the appellant by the DGCA.

29. The Commissioner has held in the impugned order dated 31.08.2010 that the appellant, by entering into an agreement with RIL for providing passenger air transport service upon payment by RIL, had chartered the aircraft to RIL which is not permissible when an aircraft is imported for non-scheduled air transport (passenger) services. The order also holds that as a non-scheduled operator, the appellant was required to issue passenger tickets which had not been done and that the use of the aircraft to carry personnel of a group company amounts to private use of the aircraft.

30. The submission advanced by the learned counsel for the appellant is that each of these aspects have been considered and answered in favour of the appellant by the Larger Bench of the Tribunal in **VRL Logistic**. Learned Counsel pointed out that the Larger Bench held that chartering of aircraft is permissible under non-scheduled (passenger) service; that an operator of non-scheduled

(passenger) service is not required to issue passenger tickets; and that so long as the aircraft is used to provide air transport service for remuneration (as is in the present case), it would not be a private aircraft even if such service for remuneration is rendered to a group company. Learned counsel, therefore, contended that there has been no breach of the undertaking given by the appellant in terms of the notification that the aircraft shall be used for non-scheduled (passenger) services only.

31. The contention of learned special counsel appearing for the Department is that the Larger Bench of the Tribunal has not considered the issue of invoking the undertaking.

32. It is not possible to accept the contention advanced by the learned special counsel for the Department. The Larger Bench of the Tribunal noted that furnishing of undertaking to Customs that the aircraft shall be used only for non-scheduled air transport (passenger) services is a condition of the notification and that Condition No. 104 of the notification requires furnishing of the said undertaking that the aircraft would be used only for non-scheduled (passenger) services and in the event of failure to use the aircraft for the specified purpose, the operator would on demand pay the duty. The Larger Bench, thereafter, examined the scope of the expression non-scheduled air transport (passenger) service and also whether chartering of the aircraft and use of the aircraft to provide air transport service for remuneration to personnel of group companies and non-issuance of passenger tickets, is outside the scope of or constitutes contravention of non-scheduled air transport (passenger) service.

33. The findings on these of issues by the Larger Bench of the Tribunal are as follows:

Use of Aircraft for only non-scheduled (passenger) services

“53. **It needs to be examined**, as has been contended on behalf of the appellants, **whether the aircraft was used by the appellants only for providing non-scheduled (passenger) services as defined in clause (b) of the Explanation to Condition No. 104 of the exemption notification.**

54. Non-scheduled (passenger) services has been defined in the aforesaid clause (b) to mean **air transport services** other than **scheduled (passenger) air transport services** as defined in rule 3 of the Aircraft Rules. Thus, what has to be seen is whether the use of the aircraft satisfies the following two requirements of clause (b):

- (i) The use should be for air transport service; and
- (ii) Such air transport service should be other than scheduled (passenger) air transport service as defined in rule 3 of the Aircraft Rules.

55. ‘Air transport service’ has been defined in rule 3 (9) of the Aircraft Rules to mean service for transport by air of persons for any kind of remuneration whatsoever. There is no dispute that the appellants have used the aircraft for the transport of persons for remuneration. There is no stipulation or restriction or a condition in the said definition that a tariff should be published or that such service should be rendered only on per-seat basis and not by chartering or about the category or class of persons to be transported. **Thus, the contention of the department that the appellants have rendered ‘air transport service’ to their group companies by carrying personnel of their group companies is not of any relevance as there is no prohibition in the said definition against any kind of persons to be transported.**

56. Rule 3 (49) of the Aircraft Rules defines ‘scheduled air transport service’ to mean an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent

that they constitute a recognizably systematic series, each flight being open to use by members of the public. **Thus, for an 'air transport service' to qualify as 'scheduled air transport service', it must satisfy all the following three conditions:**

- (i) It must be undertaken between the same two or more places;
- (ii) It must be operated according to a published time table or the flights must constitute a recognizable systematic series; and
- (iii) Each flight must be open to use by members of the public.

57. If any of the aforesaid three conditions is not satisfied in respect of a passenger air transport service, the same cannot be termed as 'scheduled air transport service' and, therefore, would be a non-scheduled (passenger) service as defined in clause (b) of the Explanation to Condition No. 104 of the exemption notification. **In the present case, the aforesaid conditions are not satisfied and, therefore, the air transport service rendered by the appellants would be other than scheduled (passenger) air transport service.**

58. **Thus, both the requirements of clause (b) of the Explanation are satisfied. It is also not in dispute that the appellants have been granted non-scheduled operator permits, which permits have been renewed from time to time without any objection from the DGCA.**

59. **It has now to be seen whether the appellants have used the aircraft for providing non-scheduled (charter) services as defined in clause (c) of Condition No. 104 of the Explanation to the exemption notification.**

60. Non-scheduled (charter) services have been defined in clause (c) to mean services provided by a non-scheduled (charter) air transport operator, for charter or hire of an aircraft to any person, with a published tariff, and who is registered with and approved by DGCA for such purposes and who confirms to the Civil Aviation Requirements. An aircraft operator can be said to provide non-scheduled (charter) service only if the service satisfies the requirements of clause (c). The appellants are not registered and approved with DGCA as non-scheduled (charter) air transport operator and in some cases there is no published tariff. **The appellants, therefore,**

cannot be said to have provided non-scheduled (charter) services as defined in clause (c).

61. The appellants have, therefore, provided non-scheduled (passenger) services, as defined in clause (b) of the Explanation to the exemption notification.

Non-scheduled (passenger) operator can carry out charter service

62. It would now have to be seen whether there is any restriction or prohibition against providing air transport service by way of charter of aircraft, while providing non-scheduled (passenger) services.

63. As noticed above, the definitions of air transport service and non-scheduled (passenger) service do not stipulate any restriction or impose a condition that such service should be rendered only on per-seat basis and not by chartering nor is there any stipulation in CAR 1999 issued by DGCA for grant of permits to operate non-scheduled air transport (passenger) services. In fact paragraph 9.2 of CAR 1999, which deals with non-scheduled air transport (passenger) services, categorically provides that a non-scheduled operator can conduct charter operations.

65. What needs to be noticed is that the exemption notification does not prohibit a non-scheduled (passenger) service permit holder to use the aircraft for charter operations. A conjoint reading of the definitions contained in the Aircraft Rules, as have been adopted in the definition in clause (b) of the Explanation to Condition No. 104 of the exemption notification, makes the following position quite clear:

- (a) The expression "air transport service" covers service for the transport by air of person for any kind of remuneration whatsoever. The service may be individually for each seat or by chartering the entire aircraft and the remuneration may be of any kind whatsoever, such as seat-wise or daily or weekly or monthly or annual basis. There is no restriction on the mode and manner of fixing or charging the remuneration either in the exemption notification or in the Aircraft Rules;
- (b) "Scheduled (passenger) air transport service" only means that air transport service which has the essential features mentioned in the definition in rule 3 (49) of Aircraft Rules, namely, it must be undertaken between

the same two or more places, operated according to a time table or with flights so regular or frequent that they constitute a recognizable systematic series, each flight being open to use by the 'members of the public'; and

- (c) If a service is covered by "air transport service" defined in rule 3(9) and is other than "scheduled (passenger) air transport service" defined in rule 3(49), it is a "non-scheduled (passenger) service" within the meaning of clause (b) of the Explanation to the exemption notification.

66. It needs to be noticed that Condition No. 104 specifically refers to the definitions contained in the Aircraft Rules as also Civil Aviation Requirements issued under the provisions of rule 133A of the Aircraft Rules. Both, CAR 1999 that deals with non-scheduled (passenger) services operator and CAR 2000 that deals with non-scheduled (charter) services operator define a non-scheduled air transport services (passenger) in the same manner as defined in clause (b) of the Explanation to Condition No. 104.

68. **It is, therefore, clear that an operator providing non-scheduled (passenger) services can always provide such services either on individual seat basis or by chartering the entire aircraft and such a restriction is not contained either in Condition No. 104 or Aircraft Rules or the Civil Aviation Requirements.**

69. It also needs to be remembered that charter is one way in which passenger services can be rendered; the only difference is that instead of individual seats, all the seats of an aircraft are hired out to one person. It is, therefore, difficult to conceive that by chartering the aircraft, non-scheduled (passenger) services would not be rendered as even in such a case an operator transport passengers.

71. In this view of the matter, the contention of the learned special counsel for the department that a charter permit is required for carrying out charter operations cannot be accepted. In fact, the prohibition is on a non-scheduled (charter) holder to carry out (passenger) operations.

Whether the aircraft can be used by members of public

86. **The definition of “private aircraft” under rule 3(43) of Aircraft Rules, does not warrant the view that if tariff is not published, the use of aircraft would be private.** In terms of rule 3(43), private aircraft is other than public transport aircraft. Public transport aircraft is defined in rule 3 (46) as aircraft which effects public transport and public transport is defined in rule 3(45) to mean all carriage of persons or things effected by aircraft for a remuneration of any nature whatsoever, and all carriage of persons or things effected by aircraft without such remuneration if the carriage is effected by an air transport undertaking. Air transport undertaking is defined in rule 3(9A) to mean an undertaking whose business includes the carriage by air of passengers or cargo for hire or reward. **It would follow from the aforesaid definitions that where the aircraft is used for carriage of persons for a remuneration it is a public transport aircraft and not a private aircraft. There is no stipulation in the said definitions that if tariff is not published, the use of aircraft would be as a private aircraft. Admittedly, in the present case, the appellants have used the aircraft for carriage of persons for remuneration.** Further, where the business of an undertaking includes carriage by air of persons it would be an air transport undertaking and if such an undertaking also uses the aircraft to effect carriage of persons without remuneration, it would still be public transport aircraft and not a private aircraft. Therefore, even assuming that some flights are conducted for carriage of persons without remuneration, it would be still be a public transport aircraft and not a private transport aircraft.

87. Even otherwise, the purpose of having a published tariff is to apprise the public of the rates at which the aircraft would be available. The appellants hire the aircrafts to customers pursuant to tenders/negotiations. The purpose of having a published tariff is, therefore, substantially complied with.

88. Learned special counsel for the appearing for the department submitted that the aircraft is being provided for private use and is not available to use by the public.

89. Learned counsel for the appellants submitted that the aircraft is available not only to group companies but also to other customers.

90. In the first instance, personnel of companies which are group companies of the appellant are also members of public. The aircraft is, therefore, available for used by the public. Even otherwise, this cannot be a reason to hold that the air transport service provided by the appellants would fall outside the scope of non-scheduled (passenger) service.

Requirement of issuing air-tickets

"100. The definitions of 'air transport service' and 'non-scheduled (passenger) service' do not stipulate any restriction or condition that such service should be rendered only on per-seat basis. Nor is there any stipulation in the said definitions for issuance of passenger tickets. The **Policy Guidelines for Starting Scheduled/ Non-Scheduled Air Transport Services** issued by the Ministry of Civil Aviation clearly state that non-scheduled operation means an air transport service other than scheduled air transport service and that it may be on charter basis and/or non-scheduled basis and that such operator is **not permitted to publish time schedule and issue tickets to passengers**. A operator of non-scheduled passenger service is, therefore, not required to issue tickets to passengers.

101. Learned special counsel for the department has, however, placed reliance upon paragraph 9.7 of CAR 1999 to contend that non-issue of passenger tickets would amount to not rendering non-scheduled (passenger) service.

102. This contention cannot not be accepted. Paragraph 9.7 of CAR 1999 provides that non-scheduled operators shall issue passenger tickets in accordance with the provisions of the Carriage By Air Act 1972 **and any other requirements which may be prescribed by DGCA**. As noticed above, the Policy Guidelines for starting scheduled/non-scheduled air transport services issued by Ministry of Civil Aviation provide that non-scheduled operator is not permitted to publish time schedule and issue tickets to passengers. **There is, therefore, no obligation on the part of the appellants to issue tickets to passengers.**

*****"

(emphasis supplied)

34. It is also not possible to accept the contention of the Department that Larger Bench did not examine the issue of demand of duty in terms of the undertaking. This issue was examined at length by the Larger Bench and the findings are as follows:

Whether the customs authorities have the jurisdiction to decide violation of the exemption notification

"91. **A perusal of the exemption notification clearly shows that it merely requires the conditions set out by the DGCA and the conditions imposed by the Civil Aviation Ministry be complied with for the operations of the non-scheduled operators. It, therefore, follows that it should be the jurisdictional authorities under the Civil Aviation Ministry which alone can monitor the compliance.** As stated above initially by exemption notification dated 01.03.2007, entry no. 346B and Condition No. 101 was introduced in the exemption notification dated 01.03.2002 whereby the effective rate of duty on import of aircraft for scheduled air transport service was made 'nil'. As no exemption was granted to non-scheduled air transport service and private category aircraft, the Ministry of Civil Aviation made a strong representation for granting exemption for non-scheduled (passenger) service and non-scheduled (charter) services under conditions to be specified and recommended by the Civil Aviation Ministry. It is for this reason, as would be apparent from the statement made by the Hon'ble Finance Minister in the Parliament, that the exemption notification dated 03.05.2007 was issued granting 'nil' rate of duty on import of aircraft for non-scheduled (passenger) service as well as non-scheduled (charter) services subject to Condition No. 104.

92. **The alleged misuse of the aircraft, as suggested by the customs authority, has repeatedly been clarified by DGCA and the Civil Aviation Requirements relating to non-scheduled (passenger) services.** It is the DGCA which is empowered to issue the Civil Aviation Requirements under rule 133A of the Aircraft Rules. **The DGCA has not complained of any violation by the non-scheduled (passenger) services operator and in fact has been renewing the permits from time to time. It is only when the competent authority under the Director General of**

Civil Aviation Ministry finds as a fact that the permit holders have violated the conditions that it would be open to the customs authorities, in terms of the undertaking given by the permit holders, to require payment of the duty, which otherwise was exempted by the notification.

93. Learned counsel for the appellants have submitted that whenever a fiscal benefit is granted on the basis of a certificate issued by another statutory authority, it is only that statutory authority which is empowered to monitor compliance of the conditions of the certificate and to initiate action, in case of non compliance. In this connection learned counsel have placed reliance upon the decisions of the Supreme Court in **Zuari Industries Ltd. vs. Commissioner of C. Ex. & Customs¹⁵**, **Titan Medical Systems Pvt. Ltd. vs. Collector of Customs, New Delhi¹⁶** and **Vadilal Chemicals Ltd. vs. State of Andhra Pradesh¹⁷**.

99. **It, therefore, follows that it is the jurisdictional authorities under the Civil Aviation Ministry that alone can monitor the compliance of the conditions imposed and the Customs Authorities can take action on the basis of the undertaking submitted by the importer only when the authority under the Civil Aviation Ministry holds that the conditions have been violated.**

(emphasis supplied)

35. It is seen that the Larger Bench held that the undertaking to use the aircraft for non-scheduled (passenger) service can be said to have been violated only when the DGCA finds that the use of the aircraft is not in accordance with the permit granted by DGCA for non-scheduled (passenger) service and only in that event the Customs authority can demand duty in terms of undertaking. In the present case, the DGCA has not found the use of the aircraft by appellant to be in violation of permit for non-scheduled (passenger) service and in fact has renewed

15. 2007 (210) E.L.T. 648 (S.C.)
 16. 2003 (151) E.L.T. 254 (S.C.)
 17. 2005 (192) E.L.T. 33 (S.C.)

the permit year after year. There is, therefore, no violation of the undertaking and, therefore, Customs cannot demand duty in terms of the undertaking.

36. It also needs to be noted that the Larger Bench of the Tribunal specifically held that the decision of the Division Bench of the Tribunal in **East India Hotels** which holds that it is the Customs department that has to ensure compliance of the undertaking is not correct. The Larger Bench also held that the decision of the Division Bench in **King Rotors** does not lay down the correct position of law.

"Analysis of the division bench decisions

119. The division bench of the Tribunal in **King Rotors** held that since the flight operations are not open to the public, the aircraft would not be considered to have been used for non-scheduled (passenger) services. This view, as discussed above, proceeds on an incorrect appreciation of the definition of non-scheduled (passenger) services.

120. The division bench of the Tribunal in **East India Hotels** held that published tariff to the public is a mandatory requirement of a non-scheduled (passenger) service and so if the tariff is not published, the use of the aircraft would be as a private aircraft. It was also held that it is the customs department that has to ensure compliance of the undertaking. These views, for the reasons stated above, are not correct views.

121. This apart, both **Sameer Gehlot** and **King Rotors** have been distinguished by the division bench in **East India Hotels** for the reason that both these cases were covered by the earlier CAR 1999, whereas the case before the division bench was covered by CAR 2010.

*****"

37. The use of the aircraft has, therefore, been in accordance with the scope of non-scheduled (passenger) services and there is no

violation of the undertaking to use the aircraft for non-scheduled (passenger) services.

38. It is, therefore, for all the reasons stated above, not possible to sustain the impugned order dated 31.08.2010 passed by the Commissioner in so far as it concerns the appellant. For these reasons, the penalty imposed upon Sudhir Nayak cannot also be sustained.

39. The impugned order dated 31.08.2010 is, accordingly, set aside and Customs Appeals No. 639 of 2010 and Customs Appeal No. 641 of 2010 are allowed.

(Order Pronounced on 08.09.2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Shreya

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 639 OF 2010

M/s Reliance Commercial Dealers Ltd. ...Appellant

VERSUS

**Commissioner of Customs, (Preventive) ...Respondent
New Customs House, Delhi**

With

CUSTOMS APPEAL NO. 641 OF 2010

Sudhir Nayak ...Appellant

VERSUS

**Commissioner of Customs, (Preventive) ...Respondent
New Customs House, Delhi**

APPEARANCE:

Shri J.C. Patel, Shri Vipin Jain and Ms. Shilpa Balani, Advocates for the Appellant

Shri Shri PRV Ramanan, Special Counsel and Shri Rakesh Kumar Authorized Representative for the Department

**CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)**

**Date of Hearing: 24.08.2022
Date of Decision: 08.09.2022**

ORDER

Order Pronounced.

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(C.J. MATHEW)
MEMBER (TECHNICAL)**