

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

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 57 OF 2010

(Arising out of Order-in-Original No. 24/Commr./HKT/09 dated 20.11.2009 passed by Commissioner of Customs, (Preventive), New Customs House, IGI Airport, New Delhi-110037)

**M/s Taneja Aerospace and
Aviation Ltd**

...Appellant

VERSUS

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

...Respondent

APPEARANCE:

Shri Tarun Gulati, Senior Advocate, Shri Kishore Kunal, Shri Manish Rastogi and Ms. Kanak Grover, Advocates for the Appellant

Shri PRV Ramanan, Special Counsel for the Department

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

Date of Hearing/Decision: 22.09.2022

FINAL ORDER NO. 50929/2022

JUSTICE DILIP GUPTA:

M/s. Taneja Aerospace and Aviation Ltd.¹ has filed this appeal against for setting aside the order dated 20.11.2009 passed by the Commissioner of Customs (Preventive), New Customs House, New Delhi², holding that the appellant is not entitled to claim the benefit of the exemption notification no. 61 of 2007 dated 03.05.2007³ that amended the earlier exemption notification no. 21 of 2022 dated 01.03.2002 on the import of twine engine light weight Aircraft Type

-
1. the appellant
 2. the Commissioner
 3. the exemption notification

Cessna 525A Citation CJ2+, Registration No. VT-BRT, MSN-525A0373⁴ through Bill of Entry No. 226584 dated 17.12.2007.

2. The Commissioner has confirmed Customs Duty demand of Rs. 06,22,67,295/- along with a penalty of Rs. 03,00,00,000/- under section 112 of the Customs Act, 1962⁵. The Commissioner has also ordered for confiscation of the Aircraft BRT under section 111 (o) of the Customs Act with an option to redeem the same on payment of Rs. 6.5 crores under section 125 of the Customs Act.

3. The exemption notification dated 03.05.2007, on which revolves the entire controversy, grants 'nil' rate of duty on import of aircraft for non-scheduled (passenger) services as well as non-scheduled (charter) services subject to Condition No. 104 that is required to be fulfilled by an importer of the aircraft for availing the benefit of the exemption notification. The relevant portion of the said exemption notification is reproduced below:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002 which was published in the Gazette of India, Extraordinary, vide number G.S.R. 118(E) of the same date, namely: -

In the said notification, -

(A) In the Table, -

(i) xxxxxxxx

4. Aircraft BRT
5. the Customs Act

- (ii) after S. No. 347 and the entries relating thereto, the following S. Nos. and entries shall be inserted, namely: -

S. No.	Chapter or Heading No. or Sub-heading No.	Description of goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
347B	8802(except 8802 60 00)	All Goods	Nil	-	104

xxxxxxx

- (B) in the Annexure, after Condition No. 102 and the entries relating thereto, the following Conditions shall be inserted, namely: -

xxxxxxxxxx

104. (i) the aircraft are imported by an operator who has been granted approval by the competent authority in the Ministry of Civil Aviation to import aircraft for providing non-scheduled (passenger) services or non-scheduled (charter) services; and

(ii) the importer furnishes an undertaking to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, at the time of importation that: -

- a. the said aircraft shall be used only for providing non-scheduled (passenger) services or non-scheduled (charter) services, as the case may be; and
- b. he shall pay on demand, in the event of his failure to use the imported aircraft for the specified purpose, an amount equal to the duty payable on the said aircraft but for the exemption under this notification.

Explanation. – for the purposes of this entry, -

- (a) 'operator' means a person, organization, or enterprise engaged in or offering to engage in aircraft operation;

- (b) 'non-scheduled (passenger) services' means air transport services other than scheduled (passenger) air transport services as defined in rule 3 of the Aircraft Rules 1937.
- (c) 'non-scheduled (charter) services' means services provided by a 'non-scheduled (charter) air transport operator', for charter or hire of an aircraft to any person, with published tariff, and who is registered with and approved by Directorate General of Civil Aviation for such purposes, and who conforms to the civil aviation requirement under the provision of rule 133A of the Aircraft Rules 1937;

Provided that such air charter operator is a dedicated company or partnership firm for the above purposes."

4. A perusal of Condition No. 104 would show that at the stage of import, the importer should have an approval from the competent authority in the Ministry of Civil Aviation⁶ and the importer should, at the time of importation, also furnish an undertaking to the customs authority that the aircraft will be used for the specified services, namely non-scheduled (passenger) services or non-scheduled (charter) services. The undertaking should also state that the importer shall pay on demand, the duty payable, in the event of his failure to use the imported aircraft for the specified purpose.

5. The appellant is a public limited company incorporated under the Indian Companies Act, 1956 since the year 1988 and claims to be engaged since 1997 in the manufacture and operation of aircrafts for charter hire under valid permits given by the Director General of Civil Aviation⁷. The appellant is engaged in providing non-scheduled services of transportation of persons by air to various customers on

6. MCA
7. DGCA

remuneration basis since 1997. The appellant was issued a non-scheduled operators permit⁸ (passenger) on 07.11.1997, which permit has since been renewed from time to time. The appellant filed an application before the DGCA after import of Aircraft BRT and the required endorsement was made by the DGCA in the existing permit.

6. The appellant also claims to have been using the Aircraft BRT for carrying out non-scheduled (passenger) services and these services were provided by the appellant either to regular customers with whom it had entered into contracts or to other customers who had approached the appellant for providing air transport services on a case to case basis. In this connection, the appellant had entered into an agreement with ISMT Ltd. on 10.01.2008 for hiring the Aircraft BRT for a minimum of 20 hours per month on a non-exclusive basis for a fee of 20 lakhs per month. During the period of contract with ISMT Ltd., the appellant had also provided the said Aircraft BRT to other customers with whom the appellant did not have a contract. The said flights were also duly invoiced and the details of flights and charges were also mentioned.

7. The only issue which arises for consideration in the present appeal is whether there has been any violation of Condition No. 104 of the exemption notification. The relevant findings of the order passed by the Commissioner are as follows:

- (i) Charter services are not permissible under the NSOP issued by the DGCA inasmuch as charter services and passenger services are mutually exclusive;

- (ii) The exemption notification does not refer to Aircraft Rules or any Regulation framed by DGCA for the purpose of NSOP services;
- (iii) The undertaking given as per exemption notification is only to operate NSOP (passenger) services and for which the appellant has not been issuing 'tickets' to individuals;
- (iv) The operation of Aircraft BRT cannot qualify as charter services also in absence of 'a published tariff';
- (v) The Aircraft BRT was only used within the same group/associated companies under long term lease contract and the same was not publicly available to others for hire;
- (vi) Non-violation of NSOP permit issued by the DGCA by the appellant is irrelevant and the Department has jurisdiction to take action for violation of the undertaking given by the appellant at the time of import and which was for undertaking NSOP (passenger) services only; and
- (vii) In view of the undertaking given to the Department, section 28 of the Customs Act is not applicable and duty can be demanded without any limitation for violation of conditions of exemption notification. The authority to demand and recover Customs Duty is derived from the undertaking furnished by an importer.

8. A communication dated 22.09.2022 has been sent by Shri P.R.V Ramanan, learned special counsel for the Department stating therein that though the basic issue raised in this appeal was considered by the Larger Bench of the Tribunal in the order dated 08.08.2022, but

as the concerned Commissionerate has decided to file an appeal against the order of the Larger Bench of the Tribunal, the hearing of this appeal may be adjourned.

9. It would not be appropriate to adjourn the hearing of this appeal only for the reason that a decision has been taken by the Department to file an appeal against the order of the Larger Bench. It needs to be noted that the reference was made to the Larger Bench in this very appeal and once the reference has been answered, the appeal would have to be decided in terms of the order of the Larger Bench. The appeal has, accordingly, been heard.

10. Shri Tarun Gulati, learned senior counsel assisted by Shri Kishore Kunal, Shri Manish Rastogi and Ms. Kanak Grover made the following submissions on behalf of the appellant:

- (i) The issues arising from the order passed by the Commissioner have already been decided by the Larger Bench of the Tribunal in the order dated 08.08.2022 in favour of the appellant;
- (ii) In **M/s. Reliance Commercial Dealers Ltd. vs. Commissioner of Customs, (Preventive) New Customs House, Delhi⁹**, a Division Bench of the Tribunal followed the order dated 08.08.2022 of the Larger Bench; and
- (iii) Even on the basis of undisputed facts noted in the order passed by the Commissioner, it is clear that the Aircraft BRT has been strictly used in terms of the permit granted by the DGCA and the said Aircraft was used for remuneration purposes only.

9. **Customs Appeal No. 639 of 2010 decided on 08.09.2022**

11. The submissions advanced by the learned senior counsel for the appellant deserve to be accepted as the issues raised in this appeal has been decided by the Larger Bench of the Tribunal in the order dated 08.08.2008. In fact, the reference was made to the Larger Bench in this appeal.

12. The following issues were decided by the Larger Bench of the Tribunal in the order dated 08.08.2022:

- (i) In terms of Condition 104 of the exemption notification, 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 NSOP (passenger) services within the meaning of clause (b) of the Explanation to Condition No. 104 of the exemption notification. These two conditions are satisfied by the importers, inasmuch as: -

 - a. 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;
 - b. There is no stipulation or restriction or a condition in the 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;
- (ii) There is no requirement of having a published tariff and Condition 104 (c) to the exemption notification cannot be

said to be violated on this ground;

(iii) Aircraft imported for non-scheduled (passenger) services can be used for non-scheduled (charter) services and there is no restriction on the same. The exemption notification or the CAR do not prohibit a non-scheduled (passenger) service permit holder to use the aircraft for charter operations. This is for the reason that:

(a) NSOP (passenger) is a much wider category and specifically includes charter operations in which the entire aircraft is given for hire or reward by charging remuneration from the hirer;

(b) Where the regulatory requirements under the CARs itself permit the NSOP (passenger) holder to carry out charter operations, it would not be correct on the part of the department to contend that NSOP (passenger) holder cannot carry out charter operations and that these services are mutually exclusive;

(c) DGCA has unequivocally clarified that charter operations are permissible. It is the DGCA which is empowered to issue CARs under rule 133A of the Aircraft Rules. Thus, NSOP (passenger) permit holder can carry out charter operations.

(iv) Only because some flights are conducted without remuneration, it would not classify the aircraft imported as a private aircraft. Personnel of companies which are group companies of the importers are also members of public. The aircraft is, therefore, available for use by the public. Even otherwise, this cannot be a reason to hold that the air transport service provided would fall outside the scope of non-scheduled (passenger) service;

- (v) The Customs Authority cannot examine the validity of the permission granted by the DGCA in absence of cancellation of the permit by the DGCA and it is the DGCA alone that can monitor the compliance of the conditions imposed;
- (vi) The Customs Authorities can take action on the basis of the undertaking submitted by the importer only when the DGCA holds that the conditions of the permit issued by them have been violated; and
- (vii) It is not mandatory for the importer to issue air tickets for providing NSOP services.

13. It is clear that the Aircraft BRT has been strictly used in terms of the permit granted by the DGCA and the said Aircraft was used for remuneration purposes only.

14. Thus, for the aforesaid reasons, the confirmation of demand by the Commissioner against the appellant for confiscation of the Aircraft BRT with an option to redeem the same on payment of Rs. 6.5 crores under section 125 of the Customs Act cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order dictated and pronounced in open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)