CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

CUSTOMS APPEAL NO. 415 OF 2009

(Arising out of Order-in-Original No. 07/Commr./JMS/2009 dated 27.04.2009 passed by the Commissioner of Customs (Preventive), New Delhi)

M/s. Global Vectra Helicorp Limited **…… Appellant**

VERSUS

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

WITH

CROSS-OBJECTION NO. 212 of 2009

(Filed by the Department)

AND

C/571/2009	**C/572/2009**	**C/574/2009**	**C/575/2009**
C/576/2009	**C/577/2009**	**C/578/2009**	**C/579/2009**

(Filed by the Department)

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: September 22, 2022

FINAL ORDER NO. 50920-50928/2022

JUSTICE DILIP GUPTA:

M/s. Global Vectra Helicorp Ltd.[1] has filed this appeal for setting aside the order dated 27.04.2009 passed by the Commissioner of Customs (Preventive), New Customs House, New Delhi[2] holding that the appellant is not entitled to claim the benefit of the exemption notification no. 61 of 2007 dated 03.05.2007[3] that amended the earlier exemption notification no. 21 of 2022 dated 01.03.2002 on the import of the Helicopters into India.

2. 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

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

(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

xxxxxxxx

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

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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.”

3. 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 Aviation[4] 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.

4. The Appellant imported the following Helicopters into India after March, 2007 by availing the benefit of the exemption notification:

(a) Helicopter Type AS 350 B3, Registration No. VT-AZX, Aircraft Sr. No. 3524, Seating Capacity 05 (**“Helicopter AZX”**)

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4. MCA

(b) Helicopter Type EC 155B1, Registration No. VT-AZU, Aircraft Sr. No. 6759, Seating Capacity 12 (**"Helicopter AZU"**)

(c) Helicopter Type EC 155B1, Registration No. VT-AZV, Aircraft Sr. No. 6761, Seating Capacity 6 (**"Helicopter AZV"**)

5. The Commissioner has, in the order impugned, confirmed a demand of Rs.21,21,95,030/- along with a total penalty of Rs.5 crores against the appellant for violation of non-scheduled operators permit[5] (passenger) issued by the Director General of Civil Aviation[6] for Helicopters AZU and AZV and has also ordered for confiscation of Helicopter AZU with an option to redeem the same on payment of Rs. 5 crores under section 125 of the Customs Act, 1962[7]. The Commissioner, however, dropped the demand of differential customs duty raised with respect to the import of Helicopter AZX.

6. The appellant is a company providing helicopter services, inter alia, to the oil sector and operates approximately 23 helicopters. The appellant was incorporated in 1998 and was issued a NSOP (passenger) permit on 01.01.1999, which has since been renewed from time to time, and has been endorsed for each additional helicopter that was imported by the appellant. The appellant claims that its operations have been similar from 1998 till date and the NSOP (passenger) operations have been carried without any objection from either the DGCA, who has issued the permit to it, or from the

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5. NSOP
6. DGCA
7. the Act

Ministry of Civil Aviation[8] or from any other authority.

7. The appellant claims that it was using the Helicopters for carrying out non-scheduled (passenger) services which were provided 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. For this purpose, the appellant had entered into several agreements with various companies for carrying out air transportation of persons including for transporting crew of various oil exploration companies such as Oil & Natural Gas Corporation, Gujarat State Petroleum Corporation and British Gas Corp. Likewise, the appellant had contracted with Vectra Aviation Pvt. Ltd.[9] for Helicopters AZU and AZV for the period August, 2007 to November, 2007 and August, 2007 to December, 2007 respectively for monthly charges of 1,10,000 Euros for minimum commitment of 50 hours and 1100 Euros per hour thereafter for chartering the said Helicopters. The contract with VAPL was a transaction where the appellant earned an assured revenue and the appellant raised invoices for the aforesaid period. Thus, the appellant claims that the Helicopters were used for commercial purposes only.

8. The only issue which arises for consideration in the present appeal is whether there has been any violation of Condition 104 to the exemption notification. The relevant findings of the Commissioner on this issue are as follows: -

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8. **MCA**
9. **VAPL**

On jurisdiction

a. The Customs Department has the jurisdiction to decide the present matter in view of the judgment of the Supreme Court in **Shashank Sea Foods** vs. **Union of India**[10];

On private use

b. The allegation of 'private use' on the basis of use by group company cannot be sustained;

On issuance of tickets

c. Non-issuance of tickets is not a valid ground to allege that the aircraft was not used only for providing non-scheduled (passenger) air transport service;

d. Non-filing of passenger manifest constitutes violation of Civil Aviation Requirements[11] and it is not a violation under the Customs Act;

On charter

e. When the entire aircraft has been chartered, the designations or nature of the passengers travelling is not material and hence, the allegation of the Department with reference to the operations of Gujarat State Petroleum Corporation are not sustained;

f. Since the appellant had obtained non-scheduled

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10. 1996 (88) ELT 626
11. (CARs)

operators permit for operating passenger services, they are not barred from undertaking charter operations;

On long term contracts

g. Long term contracts come within the purview of charter operations and accordingly the allegations relating to the operations by Oil & Natural Gas Corporation and others are also disposed of;

h. The allegations of the department with reference to Helicopter AZX are not sustainable;

On transaction with VAPL

i. In terms of the DGCA clarifications, lease of the aircraft was permissible. However, a 'dry lease' of the aircraft would not be permissible and would amount to a violation of the permission granted by the DGCA;

j. In relation to the contracts with VAPL, the transactions were in the nature of 'dry lease';

k. For Helicopters AZU and AZV, since VAPL actually operated the Helicopters for their own clients and no passenger manifest has been filed for the relevant period, the operations amount to transfer of NSOP permit by the appellant to VAPL and hence the terms of the undertaking have been violated by the appellant. It was VAPL which had operated the Helicopters for passenger services and it was not shown that VAPL was in possession of a NSOP permit. Therefore, the allegation of the department relating to Helicopters AZU and AZV is sustainable;

On sale of Helicopter AZV

I. The condition of no sale is not mentioned in the exemption notification and therefore, the sale of Helicopter AZV does not amount to a violation.

9. Thus, while the allegations of violation of conditions of the exemption notification against the Helicopter AZX have been dropped, the Commissioner confirmed the allegations of violation of conditions of the exemption notification against Helicopters AZU and AZV by holding that the NSOP was transferred by the appellant to VAPL.

10. **Customs Appeal No. 415 of 2009** has been filed by the appellant against the demands confirmed in respect of Helicopters AZU and AZV. The department has filed Cross-Objection No. 212 of 2009 against the findings recorded by the Commissioner in favour of the appellant.

11. **Customs Appeal No's. 571, 572, 574, 575, 576, 577, 578** and **579 of 2009** have been filed by the Department against the dropping of demand against the Helicopter AZX and the dropping of the penalties against the individual Directors.

12. A communication dated September 22, 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 all these appeals

was considered by the Larger Bench of the Tribunal in the order dated August 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 these appeals may be adjourned.

13. It would not be appropriate to adjourn the hearing of these appeals 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 these very appeals and once the reference has been answered, the appeals would have to be decided in terms of the order of the Larger Bench. The appeals have, accordingly, been heard.

14. 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 August 08, 2022 in favour of the appellant;

(ii) In **M/s. Reliance Commercial Dealers Ltd.** vs. **Commissioner of Customs, (Preventive) New Customs House, Delhi**[12], a Division Bench of the Tribunal followed the order dated August 08, 2022 of the Larger Bench;

(iii) In so far as the import of two Helicopters AZU and AZV is concerned, the Commissioner has confirmed the demand on a ground that the appellant had transferred its NSOP to a group company VAPL, which was not an NSOP

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12. Customs Appeal No. 639 of 2010 decided on 08.09.2022

holder but this ground was not even raised in the show cause notice. The submission advanced is that the demand could not have been confirmed if the appellant was not put to notice and in support of this contention reliance has been placed on the judgments of the Supreme Court **Commissioner of Customs, Mumbai** vs. **Toyo Engineering India Limited**[13] and **SACI Allied Products Ltd.** vs. **Commissioner of C. Ex., Meerut**[14] and the decision of the Tribunal in **Nav Karnataka Steels** vs. **Commissioner of C. Ex., Belgaum**[15]; and

(iv) Even otherwise, the finding of the Commissioner that NSOP had been transferred by the appellant in favour of VAPL is factually incorrect as the appellant had not transferred its NSOP to any person and even during the period when the two Helicopters AZU and AZV were chartered out to VAPL, the appellant continued to be the operator which is evident from the fact that the crew who operated the helicopter belonged to the appellant and the appellant continued to hold the insurance of the Helicopters.

15. The submissions advanced by the learned senior counsel for the appellant deserve to be accepted as the issues raised in the appeals have been decided by the Larger Bench of the Tribunal in the order dated August 08, 2008. In fact, the reference was made to the Larger Bench in these appeals. What also needs to be noted is that the

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13. 2006 (201) ELT 513 (SC)
14. 2005 (183) ELT 225 (SC)
15. 2008 (225) ELT 454

Commissioner, in the order impugned in the present appeals, has also decided all the issues in favour of the appellant, except the issue in relation to contract with VAPL for the two Helicopters AZU and AZV.

16. The following issues were decided by the Larger Bench of the Tribunal in the order dated August 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.

17. It also needs to be noted that the appellant had sent a letter dated August 04, 2008 to DGCA in connection with the interpretation of NSOP permit by the Customs Authority. The relevant portion of the letter is reproduced below:

"Dear Sir,

1. Reference our letter dated 28th July, 2008 and further to our discussions dated 1st August, 2008.

2. Our company is operating under NSOP (Passenger) category. We offer our helicopters for the following purposes:-

a) Offshore Oil & Gas companies for carriage of their passengers. These are long term contracts.

b) Offering helicopters for carriage of passengers to the State Governments/ Individuals/Private & Public Sector companies on long/short term basis.

While operating such service, the contract, ownership and operations are entirely with us.

3. The Aircraft Act, 1934, Sec 5 & 5A, entrusts DGCA with the authority and regulations of all operators under the NSOP granted to us. You are, therefore, requested to confirm if our utilization of helicopters, as mentioned at Para 2 above, for hire and reward is compliant of NSOP granted to us."

18. In response to the aforesaid letter sent by the appellant, the DGCA sent a reply dated August 08, 2008 mentioning therein that since the activities mentioned in paragraph 2 of the letter sent by the appellant are for lease/charter of aircraft, including its operations, and not merely a financial lease, the activities shall be within the privilege of the non-scheduled operators permit (passenger) granted to the appellant. The relevant portion of the letter is reproduced below:

> "Subject: Interpretation of NSOP (Passenger operation)
>
> Sir,
>
> Reference is made to your letter No.GVHL/DGCA/02/08 dated 04 August, 2008 on the above subject.
>
> The Non-Scheduled Operator's Permit entitles the Permit holder to use the aircraft endorsed on the Permit for hire and reward, i.e., for commercial activity. This may include per seat hiring of the capacity of the aircraft or a full aircraft charter.
>
> The NSOP holder may also enter into a long or short term lease contract to provide aircraft to a client, including its operation, maintenance and other associated services.
>
> Since the activities mentioned in paragraph 2 of your above referred letter are for lease/charter of aircraft including its operation etc., and not merely a financial lease, the activities are considered to be within the privileges of Non-Scheduled Operators' Permit granted to you."

19. It, therefore, transpires that even the DGCA in its communication dated August 08, 2008, which was sent in response to the communication dated August 04, 2008 sent by the appellant to DGCA, clarified that the activities of offering Helicopters to offshore oil and gas companies for carriage of their passengers and offering

Helicopters for carriage of passengers to the State Governments/ individuals/ private and public sector companies on long/short term basis would be within the privileges of the NSOP (passenger) granted to the appellant.

20. The learned senior counsel for the appellant also submitted that the confirmation of demand in regard to the import of two Helicopters AZU and AZV for the reason that the appellant had transferred the NSOP (passenger) to a group company deserves to be set aside as such an allegation was not even raised in the show cause notice.

21. This submission deserves to be accepted for it is a fact that such an allegation was not made in the show cause notice. The show cause notice had been issued to the appellant alleging that the Helicopters were not being used for NSOP (passenger) purposes as the appellant had entered into various long-term contracts which amounted to a "lease". These allegations were rebutted by the appellant by establishing that no Helicopter was hired exclusively to any one party. The Commissioner agreed with the contention of the appellant that the Helicopters were not leased out to any party and, in any event, a wet lease was permitted. However, the demand was confirmed by the Commissioner on a completely new ground that the appellant had in fact transferred its NSOP to a group company, VAPL, who was not a NSOP holder. This demand is entirely beyond the allegations made in the show cause notice and has, therefore, to be set aside. Thus, the Commissioner could not have confirmed the aforesaid demand since the appellant had not been put to notice on this allegation in the show cause notice.

22. In this connection reference can be made to the decision of the

Supreme Court in **SACI Aillied**, wherein it was observed:

> "17. ******It was argued that the first proviso to Section 4(1)(a) of the Act was never invoked by the Department either in the show cause notice or in the impugned order and it was for the first time that the appellate Tribunal in the impugned order has sought to sustain the impugned order by invoking the first proviso to Section 4(1)(a) of the Act. It is thus seen that the Tribunal has gone totally beyond the show cause notice and the order of the Collector, which is impermissible. **The appellate Tribunal cannot sustain the case of the Revenue against the appellants on a ground not raised by the Revenue either in the show cause notice or in the order.**
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> 18. In this context, we may usefully refer to the judgment of this Court in the case of *Reckitt & Colman of India Ltd*. v. *CCE*, 1996 (88) E.L.T. 641 (S.C.). This Court held that it is beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet.
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> 19. **The impugned order of the Tribunal which had gone beyond the show cause notice and the order of the respondent-Collector is, therefore, liable to be set aside."**
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> **(emphasis supplied)**

23. The Supreme Court in **Toyo Engineering** also observed as follows:

> "16. ***** These grounds did not find mention in the show cause notice as well. **The Department cannot be travel beyond the show cause notice.** Even in the grounds of appeals these points have not been taken."
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> **(emphasis supplied)**

24. Thus, for the aforesaid reasons, the confirmation of demand by the Commissioner against the appellant for the two Helicopters AZU and AZV and for confiscation of Helicopter AZU with an option to

redeem the same on payment of Rs. 5 crores under section 125 of the Customs Act cannot be sustained and is set aside.

25. Customs Appeal No. 415 of 2009 filed by the appellant, therefore, deserves to be allowed and is allowed. Cross-Objections filed by the Department deserve to be rejected and are rejected.

26. Customs Appeal No's. 571, 572, 574, 575, 576, 577, 578 and 579 of 2009 filed by the Department against the dropping of demand so far as Helicopter AZX is concerned and the dropping of penalties against the individual Directors of the companies for the reasons stated above, deserve to be dismissed and are dismissed.

(Order dictated and pronounced in open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

Archana, Shreya