CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. III

Customs Appeal No. 404 of 2009 (DB)

[Arising out of common Order-in-Original No.03/Commr./JMS/2009 dated 27.02.2009 passed by the Commissioner of Customs (Preventive), New Customs House, Near IGI Airport, New Delhi]

Commissioner of Customs (Preventive) **Appellant**
New Customs House, Near IGI Airport,
New Delhi.

VERSUS

M/s.GMR Aviation Pvt. Ltd. **Respondent**
Skip House, 25/1, Museum Road,
Bangalore-560 025.

WITH

C/405/2009,	**C/406/2009,**	**C/407/2009,**
C/408/2009,	**C/409/2009**	**C/410/2009,**
C/411/2009,	**C/412/2009,**	**C/413/2009,**
C/414/2009,		

APPEARANCE:

Shri P.R.V. Ramanan, Special Counsel for the appellant/Department.
Shri B.L. Narasimhan, Advocate for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NOS.55833-55843/2024

DATE OF HEARING: 28.03.2024
DATE OF DECISION:29.05.2024

BINU TAMTA:

All the present appeals have been filed by the Revenue against the common Order-in-Original No.03/Commr./JMS/2009 dated 27.02.2009 whereby the Commissioner dropped the demand initiated under the show cause notice as the aircraft has been used in accordance with the undertaking given to the Customs as per Condition No.104 of the Notification No.21/2002-Cus dated 01.03.2002 as amended by Notification No.61/2007-Cus dated 01.03.2007 for providing non-Scheduled Operator (Passenger) services (NSOP).

2. Facts of the case are that the respondent (GMR) imported Dassault Falcon 2000 Ex Easy ('Aircraft') vide bill of entry no.220450 dated 21.06.2007 availing the exemption under notification no.21/2022-cus dated 01.03.2002, as amended by notification no.61/2007-Cus dated 03.05.2007. The Aircraft was imported under Permit No.6/2007 dated 07.08.2007 issued by the Directorate General Civil Aviation (DGCA), Govt. of India for non-scheduled operator permit [(Passenger) (NSOP) (Passenger)] and the same has been renewed from time to time by the DGCA.

3. On the basis of the investigation initiated by the Revenue, show cause notice dated 21.07.2008 was issued on the ground that the respondent violated Condition No.104 of the Notification No.21/2002 – as the Aircraft was used 'for private purpose' in the case of usage by the group companies and for charter purpose in case of used by other entities other than group companies. As the Aircraft has not been used for NSOP (Passenger), it was proposed, to confiscate the aircraft under Section 111(d) and (o) to demand differential duty under Section 28 of the Customs Act, 1962 along with penalty. On adjudication, the demand of differential duty was dropped observing that a non-scheduled operator can operate on per passenger basis (hiring a seat) or on charter basis

(hiring the full aircraft) and since all the flights were charter flights, it cannot be said that the Aircraft was used for private purpose. On reviewing the impugned order, Revenue has filed the present appeal before this Tribunal.

4. We have heard Shri P.R.V. Ramanan, learned Special Counsel for the Revenue and Shri B.L. Narasimhan, learned counsel for the respondent.

5. Learned Special Counsel submitted that the Permit was issued by the DGCA to the respondent for operating NSOP (Passenger) Services whereas they used it for providing charter services to its group companies and thereby violated the provisions of DGFT Notification. The undertaking given by GMR was only for providing NSOP (Passenger) services and not for non-scheduled (Charter) services and the same cannot be construed to cover the charter services and hence, GMR failed to satisfy the conditions applicable to the non-scheduled charter services. Learned Special Counsel heavily relied on the decision of the Delhi High Court in **M/s.East India Hotels Ltd. Vs. Commissioner of Customs, Customs, Central Excise and CGST, New Delhi** [1], where the High Court affirmed the view of the Tribunal that the appellant therein had not complied with the Condition No.104 of the Notification.

6. Learned Counsel for the respondent while reiterating the findings of the Commissioner submitted that the issue whether the Permit under

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[1] **2023 (2)TMI 47 – Delhi High Court**

NSOP (Passenger) can be used for charter purposes is no longer *res integra* and has been decided against the Revenue by the Larger Bench of the Tribunal in the case of **M/s. V.R.L. Logistics Ltd. Vs. Commissioner of Customs, Ahmedabad** [2], which has been affirmed by the Gujarat High Court vide order dated 04.04.2023. Referring to para 9.2 of Civil Aviation Requirement ('CAR'), 1999, it was submitted that it categorically provides that a non-schedule operator can conduct charter operations. Learned counsel emphasised that the non-scheduled (Passenger) permit holder can perform Air Transport Services either by selling individual seats or by hiring out the entire air craft for non-scheduled operations. Learned Counsel pointed out to the various clarifications issued by DGCA that NSOP (Passenger) holder can conduct charter operations and the same would fall within the non-scheduled (Passenger) permit holders. Referring to para-3 of CAR, 2000, the learned counsel submitted that the issuance of passenger ticket is not a requirement to fulfil the conditions of the exemption notification. While pointing out that the aircraft is not a private aircraft, it was submitted that the aircraft is available not only to group companies but also to other customers. Relying on the observations of the Larger Bench in **M/s.V.R.L. Logistics,** learned counsel has taken us to the statement made by the Hon'ble Finance Minister, on the basis whereof notification no.61/2007 was issued and therefore, exemption notification needs to be interpreted keeping in view the purpose for which it was introduced. Learned counsel for the respondent referred to series of decisions, which

[2] **2022 (8) TMI 720 – CESTAT Ahmedabad (LB)**

have been subsequently passed following the decision of the Larger Bench in **M/s.V.R.L. Logistics,** which are as under:-

- **(i)** **M/s.Reliance Commercial Dealers Ltd. Vs. Commissioner of Customs (Preventive), New Customs House, Delhi** [3] affirmed by the Hon'ble High Court [4]
- **(ii)** **M/s.Global Vectra Helicorp Limited Vs. Commissioner of Customs (Preventive), New Customs House** [5] affirmed by Hon'ble Delhi High Court [6]
- **(iii)** **M/s.Taneja Aerospace and Aviation Ltd. Vs. Commissioner of Customs (Preventive), New Customs House, Delhi** [7] affirmed by Hon'ble High Court [8]
- **(iv)** **M/s.Chimes Aviation Private Limited Vs. Commissioner of Customs, Delhi** [9]
- **(v)** **M/s. Ligare Aviation Limited Vs. Commissioner of Customs (Preventive)** [10]

7. Before adverting to the controversy as to whether the respondent had violated the conditions of the exemption notification i.e. though the permit was issued by the DGCA to import the aircraft for providing the NSOP (Passenger) services, it was utilised for providing non-scheduled charter services, it is necessary to quote the relevant portion of the exemption notification as under:-

No.	Chapter or Heading or sub-heading	Description of goods	Standard rate	Condition no.
347B	8802(except 8802 60 00	All goods	NIL	104

[3] 2022 (9) TMI 807 –CESTAT New Delhi
[4] 2023(3)TMI 595 – Delhi High Court
[5] 2022 (9) TMI 1300 – CESTAT New Delhi
[6] 2023 (4) TMI 514 –Delhi High Court
[7] 2022 (10) TMI 70-CESTAT New Delhi
[8] 2023 (3) TMI 304 (Delhi HC)
[9] 2023 (1) TMI 1056 – CESTAT New Delhi
[10] 2023 SCC Online CESTAT 163

Condition No.104:

(i).......

(ii) the importer furnishes an undertaking to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the cases 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

Explanation:- for the purposes of this entry,--

(a).......

(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' mean 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:"

8. We may also produce the relevant provisions of CAR, 1999 and CAR, 2000, which are as under:-

"Civil Aviation Requirements CAR, 1999[11]

"9.2 Non-scheduled operators can conduct charter/non-scheduled operations for transportation by air of persons, mail or goods. In such operations, the operators shall not publish their time schedules as the operations are of non-scheduled nature**."**

Civil Aviation Requirements, 2000[12]

"Definition

For the purpose of this CAR, the following definitions shall be followed:

Non-Scheduled air transport services (Passenger) means air transport services other than scheduled air

[11] CAR, 1999

[12] CAR, 2000

transport services as defined in the Rule 3 of the Aircraft Rules, 1937.

Charter Operation is an operation for hire and reward in which the departure time, departure location and arrival locations are specially negotiated with the customer or the customer's representative for entire aircraft no ticket is sold to individual passenger for such operation."

9. We agree with the submissions of the learned counsel for the respondent that the issue is no longer *res integra* and all the issues have been considered in depth by the Larger Bench of the Tribunal in **M/s.V.R.L. Logistics** and we do not find any reasons to differ from the same. Larger Bench had specifically framed the questions whether the conditions mentioned at Sl.No.104 of the notification no.21/2002, as amended by notification no.61/2007 was violated and whether the aircraft imported for non-scheduled operation (Passenger) service can be used for non-scheduled charter services or vice-a-versa and whether the aircraft imported can be classified as 'private aircraft'.

10. The relevant observations of the Larger Bench, particularly with reference to the nature of services relating to non-scheduled (Passenger) services or (Charter) services, necessary for the present case also are set out below:-

"**Non-scheduled (Passenger) operator can carry out charter service"**

"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.

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.

70. This apart, a perusal of the definition of non-scheduled (passenger) services contained in the Explanation to Condition 104 would show that it includes within its scope all air transport services other than scheduled (passenger) air transport services. Therefore, all services which are not scheduled services are permitted non-scheduled (passenger) services. Thus, also non-scheduled (passenger) permit holders can perform air transport services either by selling individual seat or by hiring out the entire aircraft for non-scheduled operations.

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.

72. This issue can be examined from another aspect. A comparison of the definition of non-scheduled (passenger) services with non-scheduled (charter) services would show that while non-scheduled (passenger) services are of much wider category, non-scheduled (charter) services are of limited nature applicable only to small aircrafts and restricted to operators registered under the non-scheduled (charter) category. **What needs to be noticed is that the exemption is available to both non-scheduled (passenger) services and non-scheduled (charter) service and neither the exemption notification nor the Aircraft Rules or Civil Aviation Requirements excludes charter operations from the ambit of non-scheduled (passenger) services.”**

11. On the question of issuance of passenger tickets, the Larger Bench in **M/s.V.R.L. Logistics** considered the same and observed as under:-

> "**103.** In any event, non-issuance of passenger ticket has not been considered by the competent authority under Ministry of Civil Aviation, namely Director General of Civil Aviation to mean that the appellants had not used the aircraft for non-schedule passenger service in terms of the permit issued by the said authority.
> **104.** Under the Carriage by Air Act, 1972, the issuing of tickets is governed by the Second Schedule. Further, as per section 8 of the said Act, the Schedule will only be applicable to domestic carriage, once a notification is published applying the said provision to domestic carriage. In this regard, a notification dated 30.03.1973 was published in the Gazette, wherein Part I and II of Second Schedule dealing with the passenger tickets were not notified to apply to domestic carriage. Therefore, there is no requirement for issuing the tickets under the said Act for domestic carriage. In any event, in terms of paragraph 3 of the CAR 2000, no tickets are required to be sold for carrying out charter operations.
> **105.** This apart, even if air tickets are not issued to the passenger, it may only lead to non fulfilment of the liability. The consequence is itself mentioned in Rule 3(2) to the Second Schedule. Thus, there cannot be any violation of the conditions, if tickets are not issued."

12. Lastly, the submission of the learned counsel for the respondent that the aircraft is not a private aircraft, we find that the aircraft is available not only to the group companies but also to the other customers. In this regard, the observations made by the Larger Bench in **M/s.V.R.L. Logistics** that the definition of 'Private Aircraft' under Rule 3(4) of Aircraft Rules, 1937 does not warrant the view that if the tariff is not published, the use of the aircraft would be private. Further, the testing point enunciated was that if the aircraft is used for carriage of persons for remuneration, it is a public transport aircraft and not a private aircraft.

13. To ascertain whether the aircraft has been used for private use or is a private aircraft, we find that DGCA granted the requisite permission and also the permit to the respondent to operate non-scheduled air transport services - Passenger/Cargo/Charter on 7th August, 2007. After the import of the aircraft, the respondent entered into Time Sharing Agreement with all the 10 companies of GMR group and thereby allowed the aircraft to be used by the Chairman, Directors of various group companies, their VIP guests and relatives. In terms thereof, the respondent allowed fixed number of flying hours to each group companies, against certain fixed charges plus operating charges and for which, it raised supplementary invoice on monthly basis to each of its group companies. The aircraft was used not only to cater the requirement of GMR group of companies, but for charting the same to utilise spare capacity. The aircraft has been used for passenger or charter service to other companies like HPCL, Punj Lloyd, MICO depending on availability of the aircraft and its utilisation was not restricted to the group companies. Lately, the Time Share Agreement was done away with and the aircraft has been provided on first come first basis and is advertised on the web and other modes. All the flights are billed as the group companies are also charged as per the tariff on purely commercial terms which stands proved by the fact that the respondent have discharged the service tax on the value of services received from these companies. It is also relevant to take note of the observations of the Larger Bench that personnel of companies which are group companies of the appellant are also members of the public and therefore, the aircraft is based by the public. Thus there is no dispute that the aircraft was used

by the public at large and therefore, the aircraft was not a private aircraft and was never used for private purpose.

14. We may now examine whether the test laid down by the Larger Bench in **M/s.V.R.L. Logistics** for the use of the aircraft as non-scheduled (Passenger) service is satisfied, i.e. :

> "**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."

Noticing the facts of the case, there is no dispute that the respondent had used the aircraft for the transport of persons for remuneration as there is no prohibition in the definition of 'Air Transport Service' as defined under Rule 3(9) of Aircraft Rules for transporting the employees/personnel of the group companies.

Applying the analogy of the Larger Bench, we find that in terms of the definition of 'Scheduled Air Transport Service' in Rule 3(4), the respondent does not satisfy the conditions enumerated in the definition that :-

> **"(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."

Therefore, the services rendered were other than scheduled (Passenger) air transport service and therefore, *ipso facto* were non-scheduled (Passenger) service as defined in clause (b) of the explanation to Condition No.104 of the exemption notification.

15. We have also perused the clarification made by DGCA in their letter dated 22.09.2009 that there have no objection to an Operator having non-scheduled Operator's Permit (Passenger) undertaking charter operations as per para 9.2 of CAR, Section 3, Series C, Part-III dated 08.10.1999. The learned Counsel for the appellant has submitted that similar letters have been issued by DGCA to other companies, such as **M/s.Global Vectra, M/s. Reliance Aviation Ltd**., which have been placed on record in their compilation and the same have been taken note of by the Tribunal in the case of **M/s. Global Vectra,** to be within the Privileges of the NSOP (Passenger) granted to the appellant. Taking similar clarification issued by DGCA, the Larger Bench in **M/s.V.R.L. Logistics ,** specifically noted –

> **"**DGCA has, therefore, unequivocally clarified that a non-scheduled (Passenger) Permit holder can conduct charter operations.**"**

16. We may deal with the decision cited by the learned Special Counsel for the Revenue in the case of **M/s. East India Hotels Ltd.,** where the key question before the High Court was whether non-revenue flight operated by the companies for transporting its official would fall within the scope of providing non-scheduled (Passenger) service or non-scheduled charter service in terms of the notification in question. Referring to the Aircraft Rules, specially Rule 3(4) defining "Scheduled Air Transport Services" and Rule 3(9) defining "Air Transport Service", the Court observed as under:-

> **"31.** A plain reading of Rule 3(9) of the Air Craft Rules, indicates that the term 'air transport service' is defined in wide terms and would cover transport by air of humans, animals, mails or any other things, animate or inanimate. However, it is necessary that the said service be provided for 'remuneration'. The said definition also clarifies that the service may be for any kind of remuneration. **However, for a service to fall within the meaning of 'air transport service' as defined in Rule 3(9) of the Aircraft Rules, it is essential that the same is provided for some kind of remuneration. Clearly, flight service for no remuneration at all would not qualify to be considered as air transport service within the meaning of sub-rule (9) of Rule 3 of the Aircraft Rules.**
> **32.** In the facts of the present case, **the appellant has used the aircraft for its own use without any remuneration whatsoever, either from the passengers transported by it or from any other person.** In the circumstances, it would be difficult to accept that the appellant has used the aircraft for providing 'air transport service' within the meaning of Rule 3(9) of the Aircraft Rules.**"**

Thus, the determinative factor noticed by the High Court in the case of **M/s. East India Hotels Ltd.** was evidently the factor of remuneration and in view thereof concluded that the conditions of exemption notification were not complied with as the appellant therein had not used the aircraft for rendering any 'Air Transport Service' within the meaning of Rule 3(9) of the Aircraft Rules. We are, therefore, of the view that the decision of the Delhi High Court in the case of **M/s. East India Hotels** is distinguishable and is not applicable in the facts of the present case.

17. Without multiplying the decisions referred to by the learned Counsel for the respondent, we are of the view that the controversy has been settled by the decision of the **M/s.V.R.L. Logistics** and following the

same, we do not find any reason to interfere with the impugned order.

18. In view of the judicial pronouncements and the statutory provisions discussed above, we are of the view that the aircraft was used only for providing non-scheduled (Passenger) services as defined in Clause (b) of the Explanation to Condition No.104 of the exemption notification and consequently there is no violation thereof. The issue of confiscation, interest and penalty, accordingly do not survive.

19. The impugned order is affirmed. All the appeals are, accordingly, dismissed.

[Order pronounced on 29th May, 2024]

(Binu Tamta)
Member (Judicial)

(P. V. Subba Rao)
Member (Technical)

Ckp