TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. C/260 /2010-261 /2010 - CU[DB] Date **13/06/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To : 1. PRAMOD KUMAR FATEHPURIA
2. M/S. DOVE AIRLINES PRIVATE LIMITED
MANGAL KAILASH, 3RD FLOOR,
2A, SHAKESPEARE SARANI, KOLKATA 700071

M/S. DOVE AIRLINES PRIVATE LIMITED Appellant

Vs

C.C.(PREVENTIVE) Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/237-238/ 2011 CU|DB|** dated 03.06.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C.(PREVENTIVE)
NEW CUSTOM HOUSE, NEAR
I.G.I. AIRPORT, NEW DELHI
110037.

2. Adv. / Consult MR. SUMIT SHARMA, ADV.
K-57, OPP. PVR PLAZA, CONNAUGHT PLACE,
NEW DELHI.

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
Court No. II

C/Appeal Nos.260-261/10

(Arising out of order No.16/HKC/2010 dated 29.4.2010 passed by the Commissioner of Customs (Prev), New Delhi)

Order Reserved on : 10.2.2011
Order Pronounced on: 03.06.2011.

For Approval and signature:

Hon'ble Mr. D.N. Panda, Judicial Member
Hon'ble Mr. Mathew John, Technical Member

---

1. Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not?

3. Whether their lordships wish to see the fair copy of the order?

4. Whether order is to be circulated to the Department Authorities?

M/s Dove Airlines Pvt Ltd
Shri Pramod Kumar Fatehpuria
Appellants

Vs

Commissioner of Customs (Prev)
New Delhi
Respondent

Appeared for the Appellant: Shri Sumit Sharma, Advocate
Appeared for the Respondent: Shri A.K. Raha, Special Counsel

Coram: **Hon'ble Mr D.N. Panda, Member (Judicial)**
Hon'ble Mr. Mathew John, Member (Technical)

Final ORDER No. C/237-238/11

Per Mathew John:

The appellants had imported an aircraft vide Bill of Entry No. 218636 dated 8.5.2007 filed at Delhi Airport. At the time of import, they claimed exemption from customs duty under Notification No. 21/2002-Cus dated 1.3.2002 at Sl No.347B and Notification No. 6/2006-CE Sl. No.54E for exemption from countervailing duty. The aircraft was used substantially by the promoter companies of the appellant company. So the Revenue has made out a case that such use of aircraft was for private purpose and that aircraft imported for private use was liable to duty and that such duty has not been paid by the appellants.

2. A show cause notice was issued which was adjudicated by the impugned order which resulted in the following consequences as seen in the order portion of the impugned order reproduced below:-

"i) I confiscate the aircraft Cessna 525A Citation CJ2, registration No. VT-DOV valued at Rs. 24,29,30,978/- under Section 111(d) and (o) of the Customs Act, 1962. However, I given an option to M/s DAPL to redeem the same after paying Rs. 4 crores as redemption fine under Section 125 of the Customs Act, 1962.

ii) I confirm the demand of customs duty of Rs. 6,01,82,205/- in terms of the undertaking given by M/s DAPL at the time of importation read with Supreme Court's judgments in the case of Commissioner of Customs Vs Jagdish Cancer and Research reported in 2001 (132) ELT 257 (SC) and CC Vs CT Scan Research Centre (P) Ltd reported in 2003 (155) ELT 3 (SC).

iii) Since duty is not demandable under Section 28 of the Customs Act, 1962, as discussed in para 33, 34 and 35, I do not demand any interest under Section 28 AB of the act ibid.

iv) I impose a penalty of Rs. 3 crores upon M/s DAPL under Section 112 of the Customs Act, 1962.

v) I also impose penalty of Rs. 10 lakhs upon Shri Pramod Kumar Fatehpuria, Director of M/s DAPL under section 112 of the Customs Act, 1962 read with section 140 of the Act ibid.

vi) I do not impose any penalty on the other noticees of M/s DAPL and M/s Usha Martin Ltd., Kolkata and M/s Ujjal Udyog Ltd under Section 112 read with section 140 of the Act ibid in view of the findings discussed in para 46 above."

3. At the relevant time, aircraft imported for providing Scheduled Air transport Service or Scheduled Air cargo service was exempted from customs duty at Sl No.101 of the Notification 21/2002-Cus. Aircrafts imported for Non-Scheduled (Passenger) Services or Non-Scheduled (Charter) Services were exempted from customs duty vide entry No. 347B of the said notification. Aircrafts imported for private use were not covered by the above exemptions and were liable to pay duty. The exemptions at Sl No. 347B of the Customs Notification 21/2002-Cus and at Sl No 54E of Central Excise Notification 06/2006 CE were subject to certain conditions. The conditions in both the notifications were aligned. For convenience, condition which was applicable for the customs exemption is reproduced below:

"104 If,-

(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 purpose 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' 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.

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

4. The Adjudicating Authority has examined in para 41 and 42 of the impugned order, the question whether the importer complied with the above conditions in the notification.

5. For understanding the dispute, it is necessary to take note of the fact that M/s Dove Airlines, the appellant, is a private limited company; that their paid up capital was of Rs. 1.73 crores as on 31st March, 2008; that out of this capital, Rs.86.05 lakhs each was borne by M/s Usha Martin Ltd. and M/s Ujjwal Udyog Ltd. In the order-in-original, it is mentioned that there is no doubt that the aircraft was used for charter services provided to the promoting companies as well as to other customers; that out of 60 flights during 1978-08, 32 flights were chartered to M/s Usha Martin Ltd and 6 number of flights were chartered to M/s Ujjwal Udyog Ltd. That out of 11 flights in 2008-09 upto 23.7.08, 7 flights were chartered by M/s Usha Martin Ltd and 1 flight was chartered by M/s Ujjwal Udyog Ltd. It is also pointed out in the show cause notice

that these flights were used for ferrying the Directors of the two companies and their relatives. It is against these background facts that the allegation, that the aircraft was used as a private aircraft, is made. Revenue is not denying the claim that the remaining flights were chartered by parties not related to the appellants. The main findings in paras 42.3 and 42.5 are as follows:-

> "42.3 From the above comparative definitions it is further observed that in addition to the differences pointed out in Para above there is a specific mention of "with published tariff" in the definition of Non-scheduled (Charter) Services given in Explanation (C) of Condition No. 104 of exemption notification No. 21102-Cus, as amended. The words "with published tariff" have special meaning in the definition given in the Customs notification. It means that every Non-scheduled (Charter) Service operator should have a published tariff at which any biological or legal person can hire it which conveys that an aircraft is available to all at competitive rates. Such a tariff could be constituting of one fixed rate or on lease basis but it should be available to all. In the present case, it has been admitted by the importer that they are providing charter services mostly to their own promoter/associate companies and there is long term charter arrangements with the promoter/associate companies for use of the aircraft for five hundred hours of flying at concessional rate.It means the aircraft cannot be chartered to any other person as the same is not available to others for hire or rewards at that rate as the same is not a part of published tariff. In view of this it cannot be said that Customs notification does not have any condition of its own. It may be perfectly legal and commercial to enter into a lease agreement with an associate company but it bars others from hiring the aircraft. In Para 15 of the SCN dated

09-02-2008 it has thus been rightly pointed out by investigation that M/s DAPL has resorted to a colorable device using dubious method and subterfuge by which the aircraft could be used only by the associate companies and at the same time no customs duty will be required to be paid under this arrangement."

"42.5 In the light of above judgment of Supreme Court in the present case the notification demands that there should be a 'published tariff' but instead importer has tried to operate under a lease agreement, which may be a valid contract but it is not part of the published tariff and such an arrangement has dubiously helped them in using the aircraft only within the same group of companies which they are boldly defending as proper. Existence of the words 'published tariff' is not existing in the definition of Charter operation given in Para 3 of CAR 2000. Therefore, it can be easily said by the importers that such a clause is not existing in Civil Aviation Law and it does not make any difference whether a charter operator has got any published tariff or not or different tariffs exists for different class of clients. These findings are, therefore, another evidence to hold that interpretation given in various Rules and Regulations of Civil Aviation law cannot be made applicable to the interpretation of provisions of Customs Notification No. 21102-Cus, as amended when certain definitions have been differently defined in the Customs notification."

6. To satisfy the condition of 104 of the Notification, the following essential elements should have been satisfied.

a) There should be charter or hire of the aircraft;

b) There should be a published tariff;

c) The operator should be registered with the appropriate authority of the Ministry of Civil Aviation;

d) The operator should conform to Civil Aviation Requirement for charter services;

e) The operator should be dedicated company or partnership firm for the purpose of providing charter service.

7. There is a contention that the appellants did not satisfy the condition to have a published tariff. The contention of the appellant is that a tariff was put on their website. This claim is not negated in the adjudication order. There is also the argument that the appellants were providing chartered services mostly to their promoters and there was long term arrangement for use of the aircraft for 500 hours of flight at concessional rate by each of the promoter companies. So it is argued that the aircraft was not available to others and if at all available not at the same rate as the rate at which it is made available to the promoter companies and that the concessional rate was not part of a published tariff. The finding is that this long term agreement has resulted in private use of the aircraft and thus the appellants have resorted to a method by which the aircraft could be used only by associated companies and thus they avoided payment of customs duty due on aircrafts imported for private use. The Adjudicating Authority calls this arrangement to be a "subterfuge" relying upon the meaning of "subterfuge" as given in the short term Oxford Dictionary which is reproduced below:-

"Subterfuge –

1. *A statement an action resorted to in order to avoid blame or defeat*
2. *Justify an argument, etc;*
3. *A meaning of escape;*
4. *An evasion, an escape;*
5. *A thing which provides concealment"*

8. The appellants made their submissions.

8.1 The substance of their arguments is that they have complied with every bit of condition 104 of the notification subject to which the impugned exemption was granted. They submit that their company was formed in February 2006 and DGCA granted them license to operate chartered services. At the stage of issue of the license, the impugned exemptions from customs duties were not in operation. Therefore, it is argued that there is no basis for the allegation that the company is a colorable device and contrived just for availing the customs exemption.

8.2 The other submissions are that the adjudication order does not deal with the submissions forming part of written submissions given before the adjudicating authority and recorded in para 21 (ii) to (v) of the order-in-original. These are reproduced below:-

"(ii) The aircraft importer has chartered their aircraft to several independent parties in addition to M/s UKL and M/s UUL which include Govt of Jharkhand;

(iii) the tariff for hire of aircraft is published not only on their website but also is contained in their brochure issued;

(iv) as per their agreement with M/s UML and M/s UUL a fixed commitment charges of Rs. 5 crores is required to be paid by each to M/s Dove Airlines after which only reduced charter rates are provide to M/s UML and M/s UUL. However, if the reduced charter rates are taken along with the commitment charges realized from M/s UML and M/s UUL, then the charter rates recovered from M/s UML and M/s UUL become much more then charged from other charters.

(v) the charter flights used by charters other than M/s UML and M/s UUL is 48% of the total flight hours."

8.3 Further it is argued that Explanation (c) of condition 104 gives the freedom to charter the aircraft to "any person" and it is argued that their promoter companies will fall within the meaning of this expression.

8.4. Further it is argued that the conditions in the exemption notification should be interpreted strictly based on words used and there is no scope for intendment in interpreting the exemption notification. Certain case laws have been quoted in support of this argument. Some of these are,

(i) Asst. Commissioner (CT) LTU and Anr. Vs. Amara Raja Batteries Ltd.- (2009) 34 PHT 241 SC

(ii) Vadilal Chemicals Ltd. Vs. State of A.P and others – (2005) 6 SCC 292

(iii) CCE Hyderabad VS. Sunder Steels Ltd -2005 (181) ELT 154 SC.

8.5 He contests that the finding of the Commissioner that the Appellant is a colourable device for claiming tax exemption is againt the principles laid down by the Honourable Supreme Court in the case of UOI Vs. Azadi Bachavo Andolan -2004(1) SCC 1 and in Muthuram Agarwal Vs. Sate of Madhya Pradesh 1999 (8) SCC 667

8.6 Further it is argued that the licensing conditions for import of the aircraft was satisfied at the time of import and therefore there is no case for confiscating it under section 111(d) of the Customs Act. After import also they have been using the aircraft as per the terms and conditions of the notification and therefore there is no case for confiscation of the aircraft under section 111(o) of the Customs Act.

9. Learned Advocate for the Revenue on the other had made following arguments.

9.01 He denied that the appellants had a published tariff on their website. He argues that a website can easily be manipulated and the claim of publishing the tariff on the web site is not a bonafide claim. He points out that at the time of statement of Shri. Pramod Kumar Fatepuria, Director of the Appellant company recorded under section 108 of the Customs Act on 25-07-2008, there was no claim regarding publication of Tariff on the website. Therefore, this claim cannot be accepted. He also rebutted the claim that tariff was published through a brochure because the date on which the brochure was published is not given at all.

9.02 He points out that as per the statement under section 108 of the Customs Act, the company had not paid service tax for the services rendered for hiring aircraft to their parent company which clearly shows that such use was for themselves.

9.03 Thereafter, he explained the background for giving the exemption under the said notifications. He quoted from para 140 of the budget speech of the Finance Minister while presenting the budget of 2007-08 which reads as under:-

> *"140. Import of aircraft, including helicopters, by Government and scheduled airlines is, at present, exempt from all duties and that position will continue. However, there is no reason to allow the exemption to other private importers. Hence, I propose to levy an import duty of 3 per cent which is the WTO bound rate, on all private import of aircraft including helicopters. Such import will also attract countervailing duty and additional customs duty."*

9.04 He quoted also from para 56 of the post budget reply by the Finance Minister which reads as under:-

" 56. 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 instates 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."

9.05 He also quoted from a letter written by Joint Secretary, TRU to the Counsel explaining the intention of the exemption. Extracts from the letter are given below:-

"BRIEF ON EXEMPITON FROM CUSTOMS DUTY ON AIRCRAFT IMPORTED BY NON-SCHEDULED OEPRATORS

1. *Aeroplanes and helicopters are classifiable under sub heading 8802 of the First Schedule to the Customs Tariff act, 1975, attracting an effective rate of Basic Customs duty at 3%. The rate of duty on import of aircraft by any person was nil till 28.2.2007. However, in the Budget 2007-08, customs duty was levied on imports of aircraft for private use. This was achieved by retaining the full exemption only for aircraft imported by scheduled operators and Government. On other*

categories of import a total duty of approx. 26% ad valorem was prescribed (3% basic +16% CVD+ 4% SAD+ 3% Edu. Cess).

2. *Soon after the presentation of the budget 2007-08, the then Minister of State for civil Aviation (Independent Charge) vide his letter dated March 7, 2007 addressed to Finance Minister urged that imposition of customs duty on aircraft would seriously impact non-scheduled operators and chartered operators who provide connectivity to small towns and destinations that are widely used by foreign as well as Indian tourists. It was also stated that flying training institutes will also get adversely affected as imposition of import duty will add to the cost of aircraft imported for training purposes.*

3. *The matter was discussed with Hon'ble Finance Minister in the post budget discussions. It was felt that some relief needed to be given to the aircraft imported by non-scheduled operators till the sector gains some strength. Subsequently, it was decided with the approval of FM to provide full exemption from customs duty and excise duty/CV duty to aircraft falling under heading 8802 and their parts when imported/procured for operating non-scheduled (passenger) services or non-scheduled (charter) services. There was a concern, however, that unless suitable safeguards were built into the exemption, it may be misused by diversion for*

private use. As such, the following conditions were incorporated in the exemption entry:

(i) The importer has been granted approval by the competent authority in the Ministry of Civil Aviation to import/acquire aircraft for operating non-scheduled (passenger) services or non-scheduled (charter) services;

(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:-

- *The imported goods shall be used for providing non-scheduled (passenger) services or non-scheduled (charter) services;*
- *In the event of his failure to use the goods for the purpose specified, he shall pay an amount equal to the duty payable on the said imported goods but for the exemption.*
- *In the definition of non-scheduled charter services, provided in the 'Explanation" the words 'with published tariff' have been incorporated as a condition to guard against the possibility of misuse of the notification in the guise of charter services. With the same objective, a provision has been added to the said definition to make sure that the air charter*

operator is a dedicated company or partnership firm for the above purposes.

4. These conditions were put after due deliberations with the Finance Minister whose explicit approval was obtained for their inclusion in the notification. Formal approval of FM to the proposal to grant this exemption along with the conditions discussed above was obtained on 3rd May, 2007. Notification No. 61/2007-Customs dated May 3, 2007 amending notification No. 21/2002-Cus dated 1.3.2002 so as to insert the entry at Sl No. 347-B along with the condition No. 104 was issued to give effect to this exemption."

9.06 He also pointed out that clarification issued by DGCA is to the effect that non-revenue chartered flight will be treated as a private flight.

9.07 He relied judgments relating to import of medical equipment claiming exemption under Notification 64/88-Cus to contest that goods can be confiscated under section 111(o) if any violation of post import conditions is noticed. It will be sufficient to quote one case law in this respect which is that of CC (Import) Mumbai Vs. Jagdish Cancer and Research center- 2001 (132) ELT 257 SC. We are in agreement with the counsel for revenue on this issue in that case but we find that the said issue is not really relevant for deciding this case. So elaborate discussion in the matter is not being made.

9.08 He argued that even a single instance of violation of condition applicable for claiming exemption would vitiate the claim for exemption. Since the aircraft was being used by the parent companies for about 50% of the total flight hours, substantial misuse as a private aircraft is proved and therefore they are not eligible for exemption.

9.09 The counsel for Revenue quoted many case laws to buttress his argument that an exemption notification is to be interpreted strictly and the burden of proving eligibility for exemption is on the person claiming it. Some important case laws quoted in this regard are,-

(i) CCE Vs. Parle Exports-1988 (38) ELT 741

(ii) Novopan India Ltd Vs. CCE-1994 (73) ELT 769 SC

(iii) Bombay Oil Industries Ltd. Vs. UOI-1995 (77) ELT 32 SC

(iv) CCE Indore Vs. Parental Drugs (I) Ltd-2009(236) ELt 625 SC

(v) Liberty Oil Mills (P) Ltd Vs. CCE Mumbai-1995 (75) ELT 13 SC

9.10 He pointed out that in the impugned case an undertaking was given by the importer to use their aircraft as per the terms of the notification and since the aircraft has been used for private purposes, deviating from the terms of the undertaking, action taken as per the show cause notice and the order in original is justified.

9.11 He also brought to the notice of this Tribunal that this case is different from the case of CCE New Delhi Vs. Airmid Services Ltd and others in Appeal Nos. C/493 to 497/09 already decided by the Tribunal. He pointed out that in that order, the demand was made under Section 28 of the Customs Act without referring to the undertaking given by the importer at the time of import but in this case, the undertaking has been invoked.

9.12 He also pointed out that the bills issued to the parent company were not at the rates published in the published tariff and therefore, the published tariff was a sham.

10. In further reply to the points raised by the learned Counsel Revenue, the Counsel for the appellants pointed out that service tax in respect of the services rendered by the parent company has in fact been paid later. He also argued that the notification does not stipulate the manner of publication of tariff. He points out that the statement given under section 108 of the Customs Act does not bring out the fact that the aircraft was given on hire to other unrelated clients and so it is very clear that the statement does not record the true facts and it has been recorded by the officers just to suit the case which they wanted to make out. In the matter of billing for hire to the parent companies, it was explained that the

parent companies had made a commitment to pay certain fixed cost on yearly basis and therefore, the cost at which the aircraft was made available to them was different from the published tariff. If both the charges (fixed commitment charges and charges levied for individual flights) are taken together, it can be seen that the charges to the parent companies are in fact higher than the charges levied from other users. He also wanted to make it clear that in the work sheets submitted by the appellants indicating payment against flights, against some entries dashes have been put in the column for payments. He explained that this is because the payment was consolidated for a few flights taken together and therefore cheque number and amount were indicated against the first flight listed for that set of flights and therefore dashes are put in the columns relating to other connected flights. He contested that none of the flights was operated free of cost for the parent company. And the argument that the appellant gave the aircraft on charter for a non-revenue chartered flight for the parent company is not correct at all.

11. We have considered the submissions of both the sides and perused records.

12.1 Record reveals that the initial permission for import was granted by DGCA on 1.11.2006 followed by subsequent permission granted on 28.12.06 (Ref: page 81 of Volume I of paper book) and import of aircraft was made on 11.5.2007 (Ref: page 340 at para 5.5 of Volume I of paper book). Terms of permit was known to the

Customs authorities since the exemption notification No. 61/07-cus came on 3.5.07 i.e. 8 days before import of the aircraft in question. Final permit was issued on 8.6.07 vide No. 04/07 and that appears at page 238 of Volume II of paper book. Such permit was for operating non-scheduled (passenger/cargo/chartered) air transport service and that was renewed on two occasions upto 7.6.09 as appearing at page 239 of Volume II of paper book.

12.2 In the course of hearing, it was seen that page 239 in vol.2 of Paper Book containing Appendix I to permit No. 4/2007 discloses that the aircraft was to be operated for Non-scheduled Air Transport Services (Passenger). However entire case proceeded on the fact that the aircraft was used for charter service (Ref: para 1 of the impugned order) and the authority below has not questioned such discrepancy between the permit at page 238 and Appendix 1 and at 239 of Vol. 2 of paper book.

12.3 The show cause notice at page 214 of Volume II of paper book was issued on the fact that the aircraft was used for charter purposes and training purposes. In absence of cogent evidence on record, it appears that no purpose contrary to the purpose permitted by civil aviation permit was carried out. Relying on para 7 of the order passed in Appeal No C-493-497/2009 in the case of Airmid Aviation and others disposed of on 12.11.2010 vide Final Order No. C/170-174/10, the Counsel for appellant submitted that power by Customs authorities is exercisable if there is violation of any of the two pre-import conditions of exemption notification. First such condition is that permission of Civil Aviation Authority is *sine qua non* while second one is that the appellant has to furnish undertaking at the time of import. The appellant, having satisfied both the conditions, cannot be deprived of the relief that was granted in the above said case. In the present appeal also, Revenue could not bring out violation of any of the import conditions imposed by the notification in specific terms. Therefore, in absence of any post import condition, when approval given by DGCA authority was renewed twice, there appears to be no violation of condition of exemption notification. So also Appellants' contention is that Tribunal having already observed in para 10 of the order in aforesaid case that unless the undertaking furnished is violated, there shall be no initiation of proceeding under section 28 of the Customs Act, 1962, present proceeding is also governed by the said ruling for no violation coming to record.

12.4 The tariff that was known to public was shown in the course of hearing as appearing at page 143, 145 and 150 of Volume I of paper book. Learned Counsel submitted that when there was a statement recorded from the appellants on 25th July, 2008, it was specifically answered to the query made by the investigating authority stating that there were corporate/tourist chartered/government and administration use of the aircraft and also miscellaneous use thereof in emergency medical services for issue of permit by DGCA. The appellant did not suppress any fact because the use of the chartered flight was made known to the DGC authority while granting permission. Such an important statement recorded under section 108 of the Customs Act, 1962 was ignored by the authority below.

12.5 It was also specifically replied to the show cause notice at page 341 and 342 of Vol.2 of paper book stating that the chartered agreement was entered into on 26.3.2007 for use of the chartered flight and the tariff was made public in website. In para 6.1 of the reply to show cause notice, it was averred by the appellant that notification does not debar use of the chartered flight on '**hire**' basis since Explanation (c) to condition No. 104 to the notification permits such hire '**to any person'** with public tariff. It appears that DGCA permit norms were not violated for which exemption benefit to the appellant is undeniable.

12.6 In the course of hearing averments of the appellant were examined. It appears cogent evidence to the contrary has not been brought to record by Revenue except allegation of subterfuge to Revenue. But such allegation did not find its basis to sustain without malafide being brought to record. It was noticed from the order passed by the Tribunal in the case of Airmid Aviations vide Appeal Nos. C-493-497/2009 that like conditions in the present appeal were subject to certain observations of Tribunal calling for appropriate measure by Government and that has been provided by budget of 2011.

13. The issue to be determined in this case is whether the aircraft is being used not in conformity with condition 104 of Notification 21/2002-Cus but is being used as a private aircraft when it is hired by the two companies holding shares of the appellant company.

Legally, these three companies are distinct and engaged in their own distinct businesses. Therefore, prima facie it is not possible to conclude that when the aircraft is hired by the parent companies, the use is as a private aircraft. The adjudicating authority has come to this conclusion based on the argument that the appellant company was constituted by the other two companies only for the purpose of availing the customs exemption and therefore, corporate veil has to be lifted. The order-in-original is defective to some extent because of the fact that it has ignored to deal with the claims by the appellants as mentioned in para 8.2 above where it has been clearly mentioned that the aircraft has been leased out to totally unrelated parties for about 50% of flight time. This claim is ignored in the Order-in-Original but is affirmed by the Counsel for the Appellants. In the circumstances we take this claim as true. Since the aircraft has been given on charter to many other parties other than the promoters it is clear that the appellant company is not just an entity contrived to import an aircraft just for the use of the two shareholders. This claim has also a bearing on the argument that the appellant company did not have a published tariff. The fact that the aircraft was taken on charter by many different entities would mean that there was adequate publicity about availability of the aircraft for chartered services and the tariff applicable. Since the clients who may take an aircraft on charter is very limited there is no need to advertise this service as in the case of service provided by a mobile phone company or a company providing DTH service or similar service. It is enough that the publication reaches the limited targeted audience. The fact that many persons availed of the services of the company is evidence that such audience were aware of the services being offered by the Appellant company. During the initial stage of any new business of providing service, such ventures can succeed only if there is an assured market for the service in question to reach break-even levels. Since the promoter companies were requiring the services of chartered aircrafts, they thought of setting up a company for providing such service and bringing in money and commitment by way of assured market. This cannot lead to a conclusion that the parent companies were not different from the appellant company and the use of the aircraft by the parent company was private use of the aircraft. So we are not in agreement with the argument that the Appellant company was a colorable device contrived just to claim the customs exemption. We are unable to see any subterfuge in the matter either.

14. The contention that the impugned aircraft has been given on charter to the promoter companies at a rate lower than what is charged from other customers is refuted by the Appellants. At any rate, this fact is not relevant to decide the dispute in hand because it is very common in any business of products or services to give services at different rates to different customers. Actual sales, quite often, happen at rates lower than published tariff. This is part of any business. Nothing in the impugned notification prohibits charging of different rates from different customers and this fact of

lower tariff to parent companies, even if proved to be true, cannot help to decide the main issue in this appeal in favor of the respondents.

15. We have given due consideration to the budget speech and the post budget speech of the Finance Minister. These speeches do not reveal any intention to deny the exemption in the type of situation being discussed. We have also considered the letter written by the Joint Secretary (TRU) in Ministry of Finance to the Counsel representing Revenue in this Tribunal. This is not a public document. This letter brings out the fact that the Government had a concern that the exemption might be mis-used and the Government wanted to prevent such possible mis-use by putting in the Notification conditions regarding "published tariff" and that the import should be made by a company solely dedicated for providing air transport service. In this case there is no reason to conclude that these conditions were not satisfied. The matter has to be seen also from the point of view of the public to whom the exemption is announced through the Notification No.21/2002-Cus S. No. 347B. Nothing in the notification would indicate that the use of the aircraft by a parent company would amount to private use of the aircraft.

16. Commonly exemptions from customs duties are given to targeted products, raw materials used in targeted products, for materials for a targeted end-use, a targeted type of importers etc which the Government considers necessary in public interest. To

ensure that such an exemption is not availed by other groups, policing clauses are incorporated in such notifications. It is possible that this is a case where the policing clauses have not served the purpose of limiting the exemption to the targeted types of persons and end-use. But the policing clauses, incorporated in the notification cannot be interpreted to give it a meaning beyond the words used in the Notification to convey the policy of the government to the public. This is not a case where strict interpretation of the words, as canvassed by revenue can lead to the result that the Revenue is praying for. This is case where an interpretation beyond the words used is canvassed for achieving the "intention of the government" as is now being explained.

17. There is also the fact that the Directorate General of Civil Aviation was being kept informed through periodic reports about the use to which the aircraft was being put to. The Ministry of Civil Aviation which was part of the decision making process for granting the exemption, did not find the above company to be not satisfying the conditions prescribed by them for import of the aircraft for Non-Scheduled (Charter) Services. Thus the matter is prima facie a case of divergence in perception between the stand of the Ministry of Civil Aviation and that of the Ministry of Finance. In the matter of conditions regarding import, the stand of Ministry of Civil Aviation has to prevail over the stand of the Ministry of Finance. This being the case it is not clear why the aircraft is confiscated under section 111(d) of the Customs Act.

18. In such a situation, the meaning of the Notification has to be understood by the plain meaning of what is expressed in the notification. We are not able to see any condition expressly stated to have been violated by the appellant company. So we are not able to appreciate how the aircraft is liable to confiscation under section 111(o) of the Customs Act.

19. We have analyzed the various case laws quoted by the Counsel for revenue of which the important ones are listed in para 10.09 above. In these cases the Courts have examined the scope of the words used in the notification and gave a restricted interpretation canvassed by the Revenue. None of these cases is an example where the department canvassed for reading intendment of the notification other than through the words used in the notification and hence these case laws do not help revenue in the facts and circumstances of the case. In fact one of the case laws quoted i.e the case of Hemraj Gordhandas Vs. ACCE (1978 (2) ELT J 350 SC) where extra words were canvassed to be read into the notification was decided against Revenue. However one observation that could be of little help to revenue is seen in para 11 in the case of Parle Exports (P) Ltd. This reads as under:

> **"It is well settled principle of Interpretation that courts in construing a statue or notification will give much weight to the interpretation put on it at the time of**

enactment or issue, and since by those who have to construe, execute and apply the said enactments."

But this observation also was about the meaning of words used in the notification and not about reading any extra words into the notification. That is to say the dispute at hand is about what constitutes a "private aircraft". These words are not used in the impugned notification at all. So we are constrained to go by the test whether the importer satisfies the conditions laid down within the ordinary meaning of the words used. After a detailed study of the case laws quoted our answer to the question is in the affirmative.

20. In the facts and circumstances and findings as above, we find that the contentions of the appellants that they have complied with the conditions of the notification and they have not violated any condition of the notification, are valid and there is no reason to deny impugned exemptions to the appellants or to confiscate the aircraft.

21. In view of the above findings, the appeals of the appellants are allowed with consequential reliefs.

(Order pronounced in the open Court on 03/06/2011.)

(D.N. PANDA)
Member (Judicial)

(MATHEW JOHN)
Technical Member

MPS*