

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Custom Appeal No. 411 of 2011

(Arising out of Order-in-Original No. CC/RT/06/2011 Adj-ACC dated 26.03.2010 passed by the Commissioner of Customs (Import), ACC Mumbai)

Commissioner of Customs (Import),
Air Cargo Complex,
Andheri (E), Mumbai

.....Appellant

Vs.

M/s. Airmid Aviation Pvt Ltd
E-29, 1st Floor,
Cannaught Place, New Delhi

.....Respondent

APPEARANCE:

Ms P.V. Sekhar, Addl. Commissioner (AR) for the appellant
Shri Tarun Gulati, Advocate with Shri Kishore Kunal, Advocate for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
 Hon'ble Mr Ajay Sharma, Member (Judicial)

FINAL ORDER No: A/87028 / 2019

DATE OF HEARING : 14.03.2019
DATE OF DECISION : 11.09.2019

PER: C J MATHEW

The issue to be determined in this dispute is the entitlement for continuation of exemption from duties of customs that had been allowed on import of aircraft against undertaking to be compliant with

the condition of operating ‘non-scheduled (passenger) service’ even though the equipment was deployed on charter hire and, in addition, was allegedly nothing but ‘private aircraft’ that were ineligible for exemption. In the impugned order, the original authority has concluded that non-issue of tickets to paying employees of group companies, or even predominant use by group companies for their employees, did not, in the context of definition in Aircraft Rules, 1937, reduce the impugned goods to ‘private aircraft’ that required licence under the Foreign Trade Policy for importation and that offering of the imported aircraft on charter was not violative of the conditions for exemption accorded to non-scheduled (passenger) service’ operator. Those findings are contested by Revenue in these proceedings.

2. In thus dropping the demand for duty and relieving the imports from restrictions of licencing regime, the adjudicating authority did not, however, appear to be convinced by the claim of the noticee therein that customs authorities would be encroaching upon the jurisdictional competence of other statutory authorities in ascertaining the utilisation and deployment of aircraft after importation or that the obtention of permit from Directorate General of Civil Aviation for operating as non-scheduled (passenger) service’ sufficed to fulfil the obligation in the undertaking prescribed by the notification. Findings on these, not strangely, are not impugned in the appeal of Revenue and, in the absence of any memorandum of cross-objection from the respondent,

are beyond the scope of challenge in, or coverage by, our decision. Before adverting to the submissions of Learned Authorised Representative for confirming the recovery of duty and imposition of the detriments contemplated by section 111, 112, 114A and 114AA of Customs Act 1962, as proposed in the show cause notice, the factual contours of the dispute may be worth recalling.

3. M/s Airmid Aviation Services Pvt Ltd, a constituent of the India Bulls group of companies, imported one 'Challenger 604 (Serial no. 5425)' and one 'Cessna Citation 550 (Serial no. 5501076)' *vide* bills of entry no. 163/11.12.2007 and no. 134/07.02.2008 and, against intent to deploy these for 'non-scheduled air transport (passenger) service', sought exemption from basic customs duty under notification no. 21/2002-Cus dated 1st March 2002 (as amended) and from additional duties of customs under notification no. 6/2006-CE dated 1st March 2006 (as amended). The aircraft, after assessment to 'nil' duty on the strength of permit no. 4/2008 dated 30th January 2008 and upon undertaking, as prescribed in the exemption notification, to use for 'non-scheduled air transport (passenger) service', were registered as VT-IBR and VT-IBS on 19th December 2007 and 29th February 2008 and permit was endorsed for 'non-scheduled (passenger) service' *vide* letter dated 30th January 2008 and 17th March 2008 respectively. Admittedly, the permit was further renewed on 29th January 2010.

4. It would appear that, from a scrutiny of the records pertaining to utilisation of the imported aircraft, it was surmised by customs authorities that the undertaking furnished at the time of clearance had been breached by having transported employees of associated concerns at concessional rates and, quite often, without charge while on charter to these companies. Proceeding from this foundation to seize the aircraft in August 2008, it was alleged that the importer had suppressed their intention of operating as 'private aircraft' that was neither eligible for the exemption nor excluded from the pre-requisite of license under the Foreign Trade Policy. Accordingly, the show cause notice proposed recovery of duty under section 28 of Customs Act, 1962 and confiscation under section 111 of Customs Act, 1962 with penalties arising therefrom. The proceedings were premised on the assumption that though the definition of 'scheduled air transport service' has two distinct components, the exclusion thereof in Aircraft Rules, 1937 as the definitive boundary for inclusion as 'non-scheduled (passenger) service', entailing regular deployment between two or more cities and accessibility to the 'travelling public', was breached in totality by predominant usage for group employees that was the prerogative of 'non-scheduled (charter) service' operators with consequent default categorization as 'private aircraft.' From this, it would appear that the investigators presumed that Aircraft Rules, 1937 admitted only to categorization as 'scheduled passenger service' or 'private aircraft' and

the consequences of the latter could be avoided only by conforming to definition of ‘non-scheduled (passenger) service’ or ‘non-scheduled (charter) service’ by the grace of the exemption notification.

5. In their defence against the allegations in the show cause notice, the noticee therein, and respondents herein, sought to draw support from the Civil Aviation Requirement in section 3, Air Transport Services ‘C ‘ Part III dated 8 October 1999 (CAR-III), the corresponding provisions in Civil Aviation Requirement dated 17 May 2000 (CAR -V) amended on 1 June 2010 and the clarifications dated 22 August 2008, 15 July 2009 and 20 July 2010 issued by the Director General of Civil Aviation. Attention was also drawn to the ticketing restrictions contained in the guidelines issued by Ministry of Civil Aviation, that section 3, Air Transport Services ‘C’, part III dated 8 October 1999 (CAR-III) and Carriage by Air Act, 1972 had undergone substantial change in the corresponding provisions of Civil Aviation Requirement dated 17 May 2000 (CAR-V) as well as notification dated 30 March 1973 of Ministry of Tourism & Civil Aviation to exclude operators in the domestic territory from the mandates for international passage and that, in circumstances of the specific embargo on sale of individual tickets, the alternatives of invoices and boarding passes adopted by them should be accepted. It was also their submission that, if clause 9.7 of Civil Aviation Requirement of 1999 (CAR-III) continued to subsist, the compliance thereof, by furnishing of sample

ticket, would have been insisted upon by the Director General of Civil Aviation which it evidently did not. The noticee claimed that tickets were issued by airline operators only for wider dissemination of exclusions from liability, as covenanted by the Warsaw Convention, 1929 and the Montréal Convention, 1999, and was not to be construed as the distinguishing determinant of a passenger service operator, whether scheduled or non-scheduled.

6. The adjudicating authority, on examination of the exemption notification, Aircraft Rules, 1937, the several Civil Aviation Requirement of 1999 and 2000 with amendment of 2010 and the various clarifications of Director General of Civil Aviation, concluded that the charter operations, admittedly undertaken by the respondent herein, were legally permissible to ‘non-scheduled (passenger) service’ operators and, hence, was not a breach of the conditionality for continued eligibility to benefit from the exemption notification. Furthermore, the attempt in the show cause notice to pigeonhole the question as ‘private aircraft’, for having excluded accessibility to the public and by offering transportation without ticketing, did not find favour in the impugned order which relied upon the ‘non-commercial’ characteristic as essential to ‘private aircraft’, the definition in Aircraft Rules, 1937 and the express bar on ticketing while on charter to hold otherwise.

7. It was pointed out by Learned Authorised Representative that the appeal, following review of the impugned order by the designated Committee of Chief Commissioners in exercise of authority conferred by section 129D (1) of Customs Act, 1962, seeks contrary outcome as the judicial sanctification accorded to principle of strict construction of exemption notifications with no latitude for implied eligibility in the absence of express intent was alleged to have been overlooked. It was also contended that the original authority had erred in concluding that the ‘non-scheduled (passenger) service’ permit issued to the respondent had not been compromised by alternative deployment for charter as the notification, by employing the expression ‘*as the case may be*’, clearly intended these to be mutually exclusive activities and that sustaining of the findings of the original authority would defeat the separated eligibility and differing regulation embodied in Civil Aviation Requirement. It is also pointed out that the interchangeability, recognised only by the amendment in Finance Act, 2011, impliedly precluded eligibility prior to that. The discarding of the allegation of having operated as ‘private aircraft’ is questioned in the face of default categorization by exclusion from being provider of service to the public and the exclusion from ‘charter service’ by the absence of ‘published tariff.’ Learned Authorised Representative submitted that the conditions were incorporated in the scheme for exemption from duties, and exclusion from licencing, with intent to disbar corporate entities

from availing the exemptions on import of aircraft for their own use which the adjudicating authority appeared not to have concerned itself with.

8. The exemption notification is, thus, pivotal to the dispute. It is intended to cover

‘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 subject to furnishing of undertaking 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 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.’

with the expressions ‘operator’, ‘non-scheduled (passenger) services’ and ‘non-scheduled (charter) services’ defined therein but with reference, for the latter two, to separate provisions of Aircraft Rules, 1937. It would appear that the scheme of exemption is intended for deployment of imported aircraft for transport of, or on hire to, persons other than the importer. The exclusions apply to ‘private aircraft’ and ‘aerial aircraft. Likewise, the requirement of licence for import of aircraft is embodied in note 1 and note 2 of chapter 88 of ITC (HS) 2004-09 but is dispensed with for those effected by

‘(h) any person who has been granted permission by the Ministry of Civil Aviation, Government of India for operating scheduled or non-scheduled air transport services (including air taxi services) for import of aircraft or helicopters, subject to the condition that the import of the aircraft helicopter and their use is in accordance with that permission.’

9. While a person, organisation or enterprise engaged in or offering to engage in aircraft operation could be a scheduled or non-scheduled service for passengers, it is the latter, along with companies or firms that are permitted to carry out charter operators, who are eligible for the exemptions and continue to be while in that capacity. The status, and eligibility thereof, is contingent upon approval under rule 134A of Aircraft Rules, 1937, for passenger services, and, for charterers, the existence of published tariff besides registration and approval by the Director General of Civil Aviation, and conformity with Civil Aviation Requirement issued under rule 133A of Aircraft Rules, 1937.

10. The foundational inevitability of recourse to Aircraft Rules, 1937 for extending the benefit of a tax exemption assigns a critical, and inavoidable, significance to that statutory instrument. Doubtlessly, tax on import, or manufacture, of aircraft arises from the sovereign authority vested in Parliament and any exemption thereto, emanating from the statutory delegation to the Central Government, is the preserve of the Department of Revenue. However, imposition of tax, or forbearance therefrom, are not necessarily, and almost certainly not,

motivated by ways and means. Exemption, undoubtedly an element of tax policy, is unfailingly also an aspected manifestation of general and sectoral policies promulgated in furtherance of governmental business. The economy of a country is guided by the administration of the day through its fiscal, monetary and trade policies. The ways and means of public finance, most often, includes within it a tax policy that has the object of maximising revenue; these are patent in the tariff schedules appendant with the taxing statutes. However, any deviations, absolute or conditional and partial or entire, are exceptions to that objective of tax policy. Governance is not all about, or a limited to, tax collection; policies of the government formulated by the various departments in the discharge of their respective allocated functions may, at times, be implemented by tweaking the tax rates which, in effect, are the various exemption notifications. As pointed out by Learned Counsel appearing for the respondent, citing the budget speech of Hon'ble Finance Minister, the impugned notification was impelled by proposals from the Ministry of Civil Aviation. It is, therefore, inconceivable that the availment, or denial, of the exemption can be decided without reference to the regulatory mechanism enacted for control of the air transportation industry in India. The public interest imperative of expanding air traffic network, of upgrading infrastructure and of strengthening the fleet, was, perhaps, considered to be attainable with such incentives. This is an

inescapable inference from the reference in the exemption notification to the governing legislation with its regulatory objective.

11. Human, and animal, mobility does not admit to the need for any regulation. However, either, in conjunction with any designed contraption, poses hazards to free mobility, as well as life and limb, of humans and animals besides damage to property. This compulsion to 'rein in' such mechanical or electrical equipment that, necessarily, share vector space is translated as regulation. Thus we had the Hackney Carriage Act, 1879 (since repealed in 2017) and have the Motor Vehicles Act, 1988 which, along with erstwhile laws commencing with that of 1914, were intended for regulating road transportation and the Merchant Shipping Act, 1958, and its predecessor statute, governing movement of craft at sea while the Aircraft Act, 1934 does so for the airspace over the country. These statutes, definitive, exclusive, purposive and comprehensive, as they are, bear the legislative sanction for strict, and undeviating, enforcement in proportion to the unfavourable consequence of non-regulation. Policies are, therefore, tuned to be in accord with such regulation. In the context of such mirroring of policy, any statutory instruments must, in the absence of an inherent explanation, be calibrated with the statutes governing the sector. As far as air services are concerned, there is a detailed exposition on the genesis of the exemption in the decision of the Tribunal in *Dove Airlines Pvt Ltd v. Commissioner of Customs (Prev)*, New Delhi [2014

(313) *ELT 292 (Tri-Del)*] which serves to remind that policy-making in government is not subordinate to revenue maximization and that every exemption is not to be viewed through the prism of compensatory quantification.

12. The notifications under the two indirect tax statutes, though differently worded in the perspective of the taxable event, is substantially of identical effect. As per Aircraft Rules, 1937, air transport service can be undertaken only by a ‘scheduled air transport service’ which, till 1994, was the exclusive monopoly of the two air corporations in the public sector but now including a number of erstwhile ‘air taxi operators’ permitted then under the ‘open sky policy’ and now, as per rule 134A of Aircraft Rules, 1937, to an Indian ‘air transport undertaking’ in possession of ‘non-scheduled operator’s permit’ issued by the Central Government. In rule 3 A ‘schedule air transport service’ is defined as

‘(49) an air transport service undertaken between the same two or more places and operated according to a published timetable or with flights so regular frequent that they constitute recognisably systematic series, each flight being open to use by members of the public’

and governed by Schedule XI of the said Rules while ‘air transport service’ is defined in rule 3 as

‘(9) a service for the transport by air of persons, mails, or any other thing, animate or inanimate, for any kind of remuneration whatsoever, whether such service consists of a single flight or series of flights;’

and ‘air transport undertaking’ as

‘(9A) an undertaking whose business includes the carriage by air of passengers or cargo for hire or reward;’

Transport by air for remuneration is, thus, permitted to air transport undertakings that are not ‘scheduled air transport services’ who obtain ‘non-scheduled operator’s permit.’ These undertakings need not exclusively operate for hire or reward but should be in business that includes transportation for hire or reward and, to the extent that service is rendered for remuneration, are to satisfy the obligations attached to such permit.

13. From the definition of ‘private aircraft’ as

‘(43) all aircraft other than aerial work aircraft or public transport aircraft;’

read with

‘(1B) “Aerial work aircraft” means an aircraft used for the aerial work;’

‘(1A) “Aerial work” means any aircraft operation undertaken for an industrial or commercial purpose or any other remunerative purpose, but does not include operation of an air transport service;’

‘(46) “Public transport aircraft” means aircraft which effects public transport;’

and

‘(45) “Public transport” means all carriage of persons or things effected by aircraft for remuneration of any nature whatsoever, and all carriage of persons or things effected by

aircraft without such enumeration if the carriage is effected by an air transport undertaking;'

in rule 3 of Aircraft Rules, 1937, the statutory categorisation of aircraft is restricted to private aircraft, public transport aircraft and aerial aircraft each having its clearly demarcated role in carriage of persons and goods or undertaking of assignment with remunerative work as the distinguishing feature of the latter two. As there is no allegation of carriage of persons in the impugned aircraft without remuneration, there can be no cavil on the finding of the original authority that these are not 'private aircraft' notwithstanding the plea in the grounds of appeal that conformity to 'ticketing requirements' and availability to the travelling public cannot but be the criteria that distinguishes 'private aircraft' from others. In our opinion, these elements may serve to sustain a claim by an operator but the absence thereof is not the disqualification argued by Learned Authorised Representative. 'Private aircraft', by their very definition, do not operate for remuneration and cannot issue tickets. Tickets are only the outward representation of a contract in which remuneration is at the core. As long as that is not in question, non-conformity with ticketing process cannot be perceived as operating for no remuneration. Moreover, the provisions of Carriage by Air Act, 1972, which were intended for regulating international transport, is not applicable to domestic travel and, as submitted by Learned Counsel, ticketing carries with it the privilege of limiting the

liability as carrier owing to which the exercise of option not to issue tickets may merely widen liability without compromising status. Carriage of employees of group companies does not alter the status of the aircraft as such employees are not excluded from the larger world of the travelling public. The attempt by Revenue to segregate people into classes that are neither recognised nor acknowledged either in the notification or by the statute governing air transportation is nothing but the imposition of a whimsical and prejudiced template to deny the exemption from duty and as the qualification for import is not compromised at the threshold, as alleged in the grounds of appeal, the requirement of licensing is not any longer an issue in dispute. We, therefore, do not intend to tarry further on that submission though we may advert to the characteristics at a later stage in the decision.

14. The other distinctions that recur in this dispute do not pertain to classification of aircraft which, as we have noted *supra*, are restricted to three - private aircraft, aerial aircraft and public transport aircraft - with appropriate scaling of regulatory intrusion over equipment, operations and passengers, if any, but to commercial deployment as 'public transport aircraft.' It must be noted that the Aircraft Rules, 1937 distinguishes between 'scheduled air transport service' and 'non-scheduled operators permit' for enabling the latter also to provide 'air transport service' with 'charter service', of any description, not acknowledged therein. The evolution of policy prescriptions on

operations are articulated in Civil Aviation Requirements (designated as CAR distinguished by Roman numerals serially appended) and amplifications enunciated in Carriage by Air Act, 1972. Charter operations were accorded separate recognition initially in the Civil Aviation Requirements Section 3 Air Transport Series 'C' Part V of 17th May 2000 but was merged with Part III by Issue II of 1st June 2010. Consequently, the cargo and passenger services were bisected into 'scheduled' and 'non-scheduled' admitting of no further subdivisions. The dispute, therefore, that requires resolution is thus confined to the alleged disqualification arising from charter operations prior to the merger of Civil Aviation Requirements.

15. We take note that, in the impugned order, the adjudicating authority has chosen to discard the decision of the Tribunal in *Commissioner of Customs, New Delhi v. Sameer Gehlot [2011 (263) ELT 129 (Tri-Del)]* rendered in the challenge mounted by Revenue to the dropping of proceedings initiated against the very respondent herein for alleged breach of the conditions in the very same exemption notification on import of a rotary wing aircraft with a casual and peremptory remark to the effect that

'150 C. The facts in... related to demand under section 28 alone, while the extracts from show cause notice in the previous paragraph make it clear that the present facts are different.....'

and referred to only in the limited context of the plea that section 28 of Customs Act, 1962 could not have been invoked. This, in our opinion, is tantamount to non-consideration of a decision that is a binding precedent to resolve the entirety of demand, and of detriment, in the show cause notice and, the lack of challenge to jurisdiction notwithstanding, must be considered by us at the appropriate stage.

16. With the narration *supra* and our observations thereon, we can now proceed to consider the submissions made by Learned Authorised Representative and the counter mounted by Learned Counsel for the respondents on the entitlement to continue with benefit of exemption. Besides elaborating upon the twin pillars in the memorandum of appeal, viz., that operation of charter flights by holder of permit for 'non-scheduled passenger service' is a breach of undertaking as the exemption scheme considers the two to be mutually exclusive and that, import of 'private aircraft' being the consequential effect of such non-compliance, the privilege of exclusion from possession of import licence is not available to the respondent herein, Learned Authorised Representative drew upon certain decisions that are claimed to cover the issue in dispute. Furthermore, in the grounds of appeal, particular emphasis is placed on the deployment of certain expressions in the notification to allege the breach of the undertaking to operate exclusively for passengers. The specific characteristic of 'private aircraft' has been examined by us *supra* to concur with the adjudicating

authority that there can be no inference from processes, conformed to or otherwise, to give a wider meaning to 'private aircraft' than intended by the Aircraft Rules, 1937. In consequence, we consider that issue to be closed.

17. We are not convinced that a challenge grounded on the claim of parallel and coordinate empowerment of the tax collector to decide on nature of air transport operations can find acceptance. From the qualifications prescribed for eligibility, at the threshold and even for continuance thereafter, it would appear that Aircraft Rules, 1937 cannot be alienated from such adjudgement. The critical role of this regulatory framework transcends the mundane, and even grubby, world over which Mammon presides and the administration of a statute that is intended to preserve human life and bodily health with its attendant 40cautionary and precautionary obligations attached to the several permissions therein cannot be dichotomised merely to satisfy the cravings, or pretensions, of an agent of the Exchequer. Notwithstanding the fast paced evolution of engineering, avionics and navigation systems in the aircraft industry, the statute and the statutory instruments issued thereunder have not lagged; the response to those imperatives are promptly accommodated in articulations of policy - promulgation as Civil Aviation Requirement and notification as Aeronautical Information Services - emanating from the regulator, the Director General of Civil Aviation. The scheme and intent of exemption

notification, having deployed expressions referred to, and defined in, the Aircraft Rules, 1937 as well as in the statutory instruments empowered by section 133A of Aircraft Rules, 1937, cannot, in the absence of meaning assigned to them within the exemption notification itself, be subject to interpretation *de hors* the said Rules; any other course of action would be weighed down by subjective bias motivated only by disinclination to allow the benefit.

18. ‘Charter operation’ is, undoubtedly, acknowledged as an independent permissible activity in the exemption notification but the Aircraft Rules, 1937 is devoid of a definition for that expression. Yet ‘charters’ were always allowed to operate, stringent though it be, as exceptions to the general policy under the Aircraft Rules, 1937. Under this law and, more particularly, during the monopoly of the State over commercial flights, ‘scheduled air transport service’ were accorded with default permission to operate aircraft marked by the regularity of approved timetables and tariff, and ‘charter service’ was the exception, an alternative necessitated by a combination of lack of ‘private aircraft’ and the desire to freed from the constraints of regularity that is the essence of public access, which required specific permission for each flight and barred from issuing individual passenger tickets; these were intended to ensure that permission to operate ‘charters’ were not misused for offering public access. With the dismantling of statutory air corporations and migration to ‘open sky policy’, ‘non-scheduled

passenger service', till then operated as restricted charter without the dignifying recognition of such nomenclature, was transformed as the alternative within the statute for eschewal of the outward manifestation that distinguished 'charter operation'. Ticketing was, thus, more of a mimicking of 'scheduled air transport service' than a statutory qualification of the new permits. In accordance with rule 133A of Aircraft Rules, 1937, regulation of 'non-scheduled passenger service' was put into place through Civil Aviation Requirements. Thus, the introduction of a class of 'non-scheduled service' in commercial aviation did not, except for the christening, materially alter the existing distinction between 'scheduled air transport service' and 'charter operations'; the offering rendered by 'non-scheduled passenger service' operator was, essentially, that of charter to passengers as individuals instead of groups. The separate recognition, *albeit* for a time, accorded to 'charter service' operators was not intended to fill any unoccupied space between that in rule 134 and 134A of Aircraft Rules, 1934 or for addressing a parallel commercial class but to accommodate a subset of travellers whose special needs could be met without burdening the regulator with micro-oversight of the passengers. The cross-utilisation, conceded by Revenue to be a flexibility embodied in the merged 'Civil Aviation Requirement,' does not, in any way, detract from the broad principle of structuring of the industry as 'air transport service', 'non-scheduled passenger service' and 'non-scheduled charter

service', with each a subordinate grouping of the preceding group, to constitute a separate class of 'non-scheduled operator.' It would, therefore, be safe to conclude that operation of 'charter service', being a dilution of 'non-scheduled passenger service', is also no less of compliance than deployment in the latter.

19. A corollary to be addressed is the enlargement of the frame of dispute by the present appeal: whether compliance with the notification is sufficed by deployment in consonance with the undertaking furnished or, conversely, proscribes alternative deployment. We would presume, in the light of the stipulation in the notification pertaining to 'charter operation', that it is not the submission of Revenue that the Central Government is not competent to permit such operations. It is also not the case of Revenue that the permit of the respondents herein has been endorsed for 'charter operations'; nor can we conceive that the regulated environment of 'physical control', to use a phrase that is easily perceptible to tax administration, would have countenanced operations not contemplated by the permit. Hence, the allegedly non-permissible 'charter operation' appears to have been an inference derived only from documents of the respondent herein. Whether those have to be accorded primacy over the unimpeded operations during the period of dispute does not have to be anybody's guess. Were 'charter operations' to be a separate commercial opportunity afforded by the Central Government and the respondent could not have undertaken that

without the permit described in the notification, the breach thereof would render the regulator complicit which is not alleged anywhere. Therein lies the fatal flaw in the trajectory of the proposition of the customs authorities – the *coup de grace* can be administered only if there be an offender and, naturally, on committing of an offence.

20. It is suggested in the grounds of appeal that, except for the categorisation, there is no difference between ‘scheduled air transport service’ and ‘non-scheduled (passenger) operator permit’ and that usage by employees of group companies makes manifest the want of regularity and accessibility intended by the air transport policy. We have, *supra*, come to the same conclusion of insignificant differences between the two from a perusal of the legal framework; we, however, are unable to concur that the proposition of Revenue is the logical consequence. It would be tantamount to suggesting that a ‘scheduled air transport service’ owned the Government of India is barred from affording paid passage to employees of the airline or of the Government. Moreover, we are apprehensive that dilating on this proposition would take us beyond the realm carved out as the jurisdictional frontier of the very statute that not only has established us but also created the appellant herein and, to our pointed query, Learned Authorized Representative sought to reassure us that, in *Commissioner of Customs, Hyderabad v. Pennar Industries Ltd [2015 (322) ELT 402 (SC)]*, the Hon’ble Supreme Court had, indeed, conferred such

jurisdiction when interests of revenue is likely to be compromised. It is seen that this decision has relied upon the judgement in *Sheshank Sea Foods Pvt Ltd v. Union of India* [1996 (88) ELT 626 (SC)] to hold that

‘16. The aforesaid Order-in-Original of DGFT was under the provisions of EXIM Policy. It is held by this court in Shesank Sea Foods Pvt. Ltd. (supra) that the same would not be binding on the customs authorities and as far as action taken under the Customs Act is concerned, the same is to be covered by the provisions of the Customs Act. The relevant decision thereupon takes note of the concerned provisions of the Act as well is reproduced below:

“6. Learned counsel placed reliance upon a communication to Collectors of Central Excise issued by the Central Board of Excise and Customs...

XXXX

9. We do not find in the provisions of the Import and Export Policy or the Handbook of Procedures issued by the Ministry of Commerce, Government of India, anything that even remotely suggests that the aforesaid power of the Customs authorities had been taken away or abridged or that an investigation into such alleged breach could be conducted only by the licensing authority. That the licensing authority is empowered to conduct such an investigation does not by itself preclude the Customs authorities from doing so.’

17. The decision in the aforesaid case, which is of the Coordinate Bench, binds us.’

However, the applicability of those decisions to the present situation is not as apparent as pressed upon us by Revenue. In those disputes, the Export Import Policy, and its successor Foreign Trade Policy, accorded exemptions from duties of customs to incentivise exports which were, in effect implemented through the Customs Act, 1962 and the fulfilment of obligation is contingent upon compliance with the procedure prescribed in Customs Act, 1962 that was in the exclusive jurisdiction, and domain expertise, of officers of customs. Those circumstances justifying, and indeed obligating, autonomous action by customs authorities does not extend to evaluation of matters pertaining to statutory regulation of air space which is not the domain of the appellant herein.

21. Drawing inspiration from the review order, Learned Counsel argued that the concatenation of the expression ‘as the case may be’ with the separate definitions of the two sub-classes, viz., ‘non-scheduled (passenger) service’ and ‘non-scheduled (charter) service’, in the context of compliance mandated in the exemption notification, can be construed only as intending the two to be mutually exclusive. Learned Counsel for the respondent has placed reliance on the decision of the Hon’ble Supreme Court in *Sulochana Amma v. Narayanan Nair* [1995 (77) ELT 785 (SC)] to submit that an *Explanation* should be interpreted in harmony with the main provision and canvassed for the interpretation accorded to this very expression by the Hon’ble Supreme

Court in *Subramaniam Shanmugam v. ML Rajendran and Others* [(1987) 4 SCC 215]; we do not think that the decision in *re Subramaniam Shanmugam* would render us unique assistance in favouring or disfavours, as the case may be, that ground of appeal. This particular argument of Revenue is, in our opinion, an overemphasis on an ordinary, commonplace phrase incorporated by the author of the notification and is adopted, almost instinctively, in enumeration of events or contingencies without, in any way, intending to accord a meaning to the entire sentence. In the conventionally approved usage of the English language, it acquires relevance only if each of the separate contingencies led to separate and independent outcomes and, in the present situation of either of the activities sufficing to qualify for the same exemption, is of no consequence. This is particularly so when the two options for post-importation compliance are separated by the disjunctive ‘or’; if the intent of deployment of ‘as the case may be’ was as proposed by Revenue, the conjunctive ‘and’ should have been utilised to suggest the mutual exclusivity of the options for outcomes that converge. In other words, with the undisputed availability of two modes of consummating the mandate in the notification, the expression ‘as the case may be’ itself is stultified and the precautionary superfluity resorted to, by the drafter, is devoid of argumentative weightage. It could, *per contra*, be posited that this distinguishment is inevitable in the hierarchical context of regulation of

civilian airline sector that has always denied a cross-over from aircraft hire to individual passenger hire while enabling the reverse. As renewal was afforded by Director General of Civil Aviation in the present circumstances, and as the implication of such renewal is the continued approval for operations, it is no longer open to suspicion that the respondents have rendered ineligible operations. In construct, from industry practice and by regulatory approval, it can be gleaned that the expression 'as the case may be' is of no significance in implementation of the exemption.

22. A travesty in this submission should not be allowed to pass unnoticed as the deployment of this very expression with reference to the jurisdictional customs authority, unambiguously implying the two to be interchangeable, has been conveniently overlooked to impress upon us a contrarian implication of two modes of compliance with the condition. Authorities entrusted by legislative mantle to review of adjudication, or appellate orders, are obliged to ascertain legality and propriety within the fundamental injunction in Article 265 of the Constitution and not to harvest tax whenever and wherever and by whatever means. We do not dilate further on this and leave it to the appropriate authority to draw wholesome wisdom from the statutory provisions, the scale of governance and the role of the tax collector in the administrative framework.

23. It has also not escaped our attention that the show cause notice, and the reviewing authority, appeared to have been overwhelmingly influenced by the generally accepted features of 'scheduled' air travel as essential identifiers of 'non-scheduled' operation also without comprehending that 'non-scheduled' is intended as permit for others to operate in tandem with, though not as, 'scheduled air transportation service.' Over the years, many that were 'charter operators', classed initially as 'air taxi operators' and subsequently within the statutorily recognised 'non-scheduled' operators, went on to become 'scheduled air transport services'; the notification itself acknowledges the distinction by defining 'non-scheduled (passenger) service operator' as that which 'scheduled air transportation service', defined in Aircraft Rules, 1937, is not. Thus, a 'non-scheduled (passenger) operator' is an 'air transport undertaking' which is not 'scheduled air transport service' holding a permit' to offer 'air transport service.' Therefore, to suggest that non-conformity with the tradition of publishing a timetable of flights and of placing tickets on public sale is a fatal breach of obligations under the statute is to insinuate conditions that are not contemplated in the notification besides displaying deliberate disregard of contemporary reality. Timetables are nothing but a mode of dissemination of schedules born out of commercial necessity; a smaller operation, comprising few aircraft with few seats, many not require such extensive information outflow. In the era of real-time, online data

transfer, insistence on timetables is a regression to the 'horse and buggy' days. Even in the more widely used railway network, Bradshaw and zonal publications of train schedules are no longer in vogue. The dynamics of air fare determination does not detract either from existence as 'scheduled air transport services' and can hardly be considered a determinative of status. We find no evidence on record that there was lack of regularity in the deployment of the aircraft or that any paying passenger was turned away for any reason. In the absence of such, carriage of certain passengers at a rate less than that in the tariff cannot be held against the respondent.

24. Another approach to the same objective of validating the interpretation posited by tax administrators was to lay emphasis on the principle of strict interpretation in affording the benefit of exemption notifications for which Learned Authorized Representative relied upon the decisions of the Hon'ble Supreme Court in *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company* [2018 (361) ELT 577 (SC)] and in *Novopan India Ltd v. Collector of Central Excise and Customs, Hyderabad* [1994 (73) ELT 769 (SC)]. The letter and spirit of these judgements have not gone unnoticed by us. It is axiomatic that a judgement is an authority for what it actually decides and not for what may seem to logically follow from it (*Lord Halsbury*) and it is the *ratio decidendi* that should be of concern. In the present dispute, that adjurement is to be taken to heart if there was some ambiguity in the

exemption notification. An ambiguity is noticeable only if the view of the appellant on the distinction between ‘non-scheduled passenger operation’ and ‘non-scheduled charter operation’ – that of carrying employees - is not facile. We do not, for reasons cited *supra*, consider the tax administrator to be the arbiter of airspace control regulation and in the light of the framework established in the Aircraft Rules, 1937, as well its subordinate instruments, are convinced of the lack of ambiguity therein. In concurring with the finding of the original authority on the cross-over flexibility available to the ‘non-scheduled (passenger) operation permit’, we do not need to insinuate intent absent in the notification.

25. Learned Authorized Representative further submits that the appeal of Revenue against the decision of the Tribunal in *Global Vectra Helicorp Ltd v. Commissioner of Customs (Import), Mumbai [2015 (329) ELT 235 (Tri-Mumbai)]* has been admitted and is no longer binding precedent as the jeopardy arising therefrom is laid down thus

‘14. Article 136 of the Constitution of India confers a special power upon this Court in terms where of an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal permitted the correctness or otherwise of the judgement of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law.

In such an event the correctness of the judgement is in jeopardy.

15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executive will only when the same is finally disposed of by the Court of Appeal.'

by the Hon'ble Supreme Court in *Union of India v. West Coast Paper Mills Ltd* [2004 (164) ELT 375 (SC)]. In our opinion, this is a misreading of the decision in *re West Coast Paper Mills Ltd*. The appellant herein, and before the Hon'ble Supreme Court in *re Global Vectra Helicorp Ltd*, is Revenue challenging non-taxability, and erasure of consequential detriments, decided upon by the original, and appellate, authority or by the appellate authority in favour of an importer. Two issues were before the Hon'ble Supreme Court in *re West Coast Paper Mills Ltd* – that the order impugned therein originated from a Tribunal whose decisions were not only not subject to appeal under the relevant statute but also required a separate suit for consequential relief and that absence of stay of such order rendered that to be the relevant date for reckoning the period of limitation under Limitation Act, 1963 for instituting recovery. It was on that specific issue of determination of the period of exclusion that the Hon'ble Supreme Court was called upon to take notice of its interim order, arising from proceedings under Article 136, with the implication of reasoning that inheres in the mutation to civil appeal and to hold that

'41. Grant of stay of operation of the judgement may not be of much relevance once the Court grants special leave and decides to hear the merit.'

The appeal, under Customs Act, 1962, from decisions of the Tribunal are a statutory remedy which, by admittance, does not carry with it the same presumption. The pendency of the appeal in *re Global Vectra Helicorp Ltd* cannot, by admittance, be equated with the jeopardy in which the decision in *re West Coast Paper Mills Ltd* was held to be. That decision in *re Global Vectra Helicorp Ltd* yet has value as a precedent.

26. Casting aside all other facets, it is important to note that legal issues resolved in the Tribunal are, and as happens most often, carried to the constitutional courts and the consequence of acceptance of the submission of Learned Authorised Representative would require independent finding in each and every disposal by the Tribunal, if necessary by repetition, even on identical facts. Judicial discipline would be consigned to the rubbish heap in a Tribunal that functions through various benches situated at different locations and under the jurisdictions of several High Courts. Therefore, the relevance of the decision in *re Global Vectra Helicorp Ltd*, as well as the others handed down by the Tribunal, cannot be wished away with a sweep of the magic wand of jeopardy.

27. Learned Authorised Representative canvassed that the decision of the Tribunal in *King Rotors & Air Charter P. Ltd. vs. Commissioner of Customs (ACC & Import), Mumbai [2011 (269) ELT 343 (Tri. Mum)]* should be followed while urging us to discountenance the reliance placed by respondents upon the decision of the Tribunal in *re Sameer Gehlot*, declared to be *per incuriam* in the former.

28. Discipline and binding precedent are articles of faith in the discharge of judicial function. This is especially so in the working of appellate authorities. The Tribunal is, undoubtedly, the last fact-finding authority but is no less of a court entrusted with interpretation of law. We have, earlier on, referred to Lord Halsbury on this very principle. Therefore, binding nature or precedent in decisions cannot be claimed as an rule in every case; it varies from the absolute, in circumstances of the same disputants involved in an identical dispute for a different period to the *ratio decidendi* that may be inferred in accord with the doctrine of *stare decisis*.

29. That a number of similar imports had been subject to the test of being legal and proper before the Tribunal is apparent from the numerous decisions cited by Learned Authorised Representative and Learned Counsel for the respondent. In the latest in the series, viz., *Reliance Transport and Travels Ltd v. Commissioner of Customs, New*

Delhi [2018-TIOL-3620-CESTAT-DEL], the submission of Learned Authorised Representative therein that

‘12..... only the persons of RADAGPL or their nominees have used and/or travelled in the said aircraft. Further, issue of ticket is a pre-condition for operating as NSOP. The appellants have misuse (sic) the exemption notification as the appellant company is the subsidiary of RADAGPL and M/s Swan Sorority Finance (P) Limited, which are companies under the management of ‘Reliance Anil Dhirubhai Ambani Group’. It is further stated that the tariff for operating as NSOP is not published and as such the duty is demanded for violation of post import condition No (ii) (a) of the said Notification No. 21/2002-Cus as amended. Ld AR further states that similar issue arose in the case of VRL Logistics Ltd vs. CC, Ahmedabad-2015 (316) ELT 494 (Tri. Ahmd) have been referred to Larger Bench, vide an interim order dated 22. 10. 2014 by the Ahmedabad Bench of this Tribunal. As such, the matter may be kept in abeyance until the receipt of the opinion of the Larger Bench. The co-ordinate Bench has taken note that in the precedent ruling of this Tribunal particularly in the case of Sameer Gehlot (supra) the Tribunal has taken a view that benefit of the said notification is available to the assessee/importer whereas another coordinate bench in the case of King Rotors & Air Charter P. Ltd. vs. CC (ACC & Import), Mumbai-2011 (269) ELT 343 (Tri. Mum) = 2011-TIOL-1785-CESTAT-MU and has taken a diagonally opposite view and denied the benefit of exemption notification.’

and of Learned Counsel therein that

‘11.10 it is further urged that the facts of the present case are fully covered by the precedent ruling of this Tribunal in favour of the appellant in the case of CC, New Delhi vs. Sameer Gehlot-2011 (263) ELT 129 (Tri. Del.) and Global Vectra Helicorp Ltd. vs. CC (Import), Mumbai-2015 (329) ELT 235 (Tri. Mumbai) = 2015-TIOL-968-CESTAT-MU. Accordingly, ld. Counsel for the appellant prays for allowing their appeal by setting aside the impugned order and for return of their Bank Guarantee, duly discharged.’

which, though taken on record, did not prevent the Tribunal from holding that the particular difficulties, impeding the referral Bench in rendering a decision, warranting recourse to Larger Bench is not apparent in the reference order and, noting that the facts relating to the dispute in *re King Rotors & Air Charter P Ltd* which, taking a stance contrary to that of the earlier decision in *re Sameer Gehlot* and thereby cited, in *re VRL Logistics Limited*, as the impediment to resolution, are seen to have been distinguished in *re Global Vectra Helicorp Ltd*. It would appear that the decision in *re King Rotors & Air Charter P Ltd* chose to disregard the binding precedent of the decision in *re Sameer Gehlot* by opting to declare the latter as *per incuriam*. Had that assessment of the earlier decision found approval of the referral Bench in *re VRL Logistics Limited*, there would have been no difficulty in following the decision in *re King Rotors & Air Charter P. Ltd* to the exclusion of the earlier decision as bad law. Apparently, the referral

bench did not think so and appeared to have been conflicted by the apparent contrariness of the two. Therefore, to our mind, the decision in *re King Rotors & Air Charter P Ltd* lacks the pre-eminence canvassed by Learned Authorised Representative. Indeed, while deciding upon the application for waiver of pre-deposit in *Punj Lloyd Aviation Ltd v. Commissioner of Customs (Preventive), New Delhi [2014 (302) ELT 553 Tri-Del]*, the Tribunal noted that

‘3. On this very issue there is a conflict of precedents. A Division Bench of the Tribunal in C.C., New Delhi v. Sameer Gehlot-2011 (263) ELT 129 (Tri-Del) in substantially similar factual circumstances ruled that the exemption Notification incorporates only pre-import conditions and no separate post-import condition is enumerated; the post-import conditions requiring and approval from DGCA and undertaking to be furnished at the time of importation have already been fulfilled and the exemption was granted at the time of import; in the circumstances, the importers cannot be charged with violation of pre-import conditions on the basis of circumstances arising after the import. Another reason recorded by the Tribunal for holding in favour of the assessee and against the Revenue was that since the exemption Notification exempts both types of aircrafts, those used for non-scheduled passenger services and those used for non-scheduled charter services and the exemption is available for use in either category, there was no violation.

4. *The above decision was referred to with the approval in the Final Order No. See/237-238/2011, dated 3-6-2011 in Dove Airlines Pvt Ltd v. C.C. (Prev.), New Delhi.*

5. *A contrary view is however recorded by another Division Bench of this Tribunal in King Rotors & Air Charter P. Ltd. C.C. (ACC & Import), Mumbai-2011 (269) ELT 343 (Tri-Mumbai). After referring to the earlier decision in Sameer Gehlot, the Tribunal in King Rotors & Air Charter, at paragraphs 24.18 and 24.19 of the order proceeded on any independent interpretation of Notification No. 61/2007-Cus and concluded that though the fact of undertaking takes place at the time of importation, the subjects of undertaking at things of the future. The undertaking requires that the imported aircraft shall be used only for providing non-scheduled passenger services and not for non-scheduled charter services. The second condition of the undertaking is that the duty of customs should be paid on demand by the importer in the event of failure to use the aircraft before the specified purpose. In King Rotors & Air Charter violation of the conditions of import to place post-import. The tribunal concluded that this crucial aspect did not receive attention in the Sameer Gehlot case when it view that the condition was only a pre-importation condition. According to the Tribunal in the later decision, the post importation nature of the subjects of undertaking was not appreciated by the Bench (in Sameer Gehlot), while taking the view that the requirement of undertaking to be made by the importer was a pre-importation condition.'*

and placed on record that

'6. At this stage of the proceedings, we are not required to go into the issue whether, the interpretation of the Customs Notifications in Sameer Gehlot or the contrary interpretation in the latter King Rotors, is the correct view. The issue is whether King Rotors is right in characterising the interpretation of the Notification by the Bench in Sameer Gehlot, as per incuriam. In our considered view where the Court applies its mind to a particular statute or instrument, its conclusion even if erroneous cannot be characterised as per incuriam. 'Incuria' literally means 'carelessness' in practice, per incuriam means per ignorantium. Accordingly, the quotable in law is avoided and ignored if it is rendered in ignorantium of a statute or a binding authority-vide State of U.P. v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139. In Sameer Gehlot, this Tribunal had clearly noticed provisions of exemption Notification No. 21/2002-Cus. dated 1-3-2002 but has also reproduced condition No. (4) thereof. The judgement also noticed provisions of the DGFT Notification No. 2 (RE-2006)/2004-2009, dated 7-4-2006 and thereafter the scope of the exemption Notification. In the circumstances, the interpretation of the exemption Notification in Sameer Gehlot could not be characterised per incuriam. For the nonce, suffice it to observe, prima facie, on established principles of per incuriam, that the decision in Sameer Gehlot was not per incuriam.'

30. As observed therein, notwithstanding the premise on which the later decision of the Tribunal in *re King Rotors & Air Charter P Ltd* assumed the privilege of discarding earlier decision in *re Sameer*

Gehlot, the recognition of a conflict in diametrically opposed opinions on the denial of exemption notification cannot be wished away. In the circumstances, we are called upon to ascertain the feasibility of discarding one or the other of these and, thus unfettered, to proceed with deciding the present dispute. While noting, with full respect, the views of the Tribunal in *re King Rotors & Air Charter P Ltd*, we are of the opinion that it does not constitute a binding precedent for the reasons that shall, presently, be adduced.

31. Our analysis *supra* of the superfluity of the substitution of the *Explanation* in the exemption notification that erased the expression ‘as the case may be’ and, ostensibly, obliterated the distinction between ‘non-scheduled passenger service’ and ‘non-scheduled charter service’ distinguishes a key finding in *re King Rotors & Air Charter P Ltd* but for which, the outcome therein may, in all probability, have been consistent with the various other decisions of the Tribunal. Again *supra*, we have drawn upon the wisdom of the Tribunal in concluding that the decision in *re King Rotors & Air Charter P Ltd* had erroneously declared the earlier decision to be *per incuriam* which would restore the decision in *re Sameer Gehlot* as a binding precedent. Moreover, in ignoring the decision in *re Sameer Gehlot*, the validation conferred by the approval of Hon’ble Supreme Court and, thereby, the binding precedent thereof was, obviously, not available to the Tribunal while deciding in *re King Rotors & Charters P Ltd*. We would be committing

an act of judicial indiscipline if we were to ignore that approval merely because the decision impugned before the Hon'ble Supreme Court is in conflict with a later decision of the Tribunal. Furthermore, in *re Global Vectra Helicorp Ltd*, the Tribunal has rendered the finding that the factual circumstances therein and, thereby, herein, are distinct and thus not acceptable as binding precedent. The decisions of the Tribunal in *re Dove Airlines Pvt Ltd*, in *re Global Vectra Helicorp Ltd* and in *re Reliance Transport and Travels Ltd* are, *vis-à-vis* the decision in *re King Rotors & Charters P Ltd*, numerically in favour of the importers. There can be no doubt as to where the binding precedent lies.

32. Besides the inappropriateness inherent in, and insensitivity displayed by, suggesting that the principle of binding precedent would permit us no course of action other than to follow this one out of the many decisions of coordinate benches that differed from all others, and that too from not having been made aware of the existence of previous decisions on similar disputes, and, thereby, insinuating a 'hostage corollary' to disturb the rule, the facts, and issues, in *re King Rotors & Air Charter P Ltd*, noted thus

'24.3 In any case, the appellants have not produced any clarification of DGCA to the contra. They claim to have requested the said authority by letter dated 17-2-2009 for a clarification on the point, but they are yet to obtain any. Any clarification issued by DGCA to third parties on the particular facts of their cases cannot be pressed into service in the appellants' case. We have also seen assertive averments in the assessee's appeal to the effect that the

Customs authorities themselves received DGCA's clarification in the appellant's favour on the scope of the subject permit. But these assertions are yet to be substantiated. They remain ipse dixit. Nobody has stood in the way of the appellants themselves obtaining similar clarification from DGCA or in the way of their gathering information from DGCA under the Right to Information Act regarding the clarification which is said to have been given to Customs authorities. The onus to prove that DGCA has clarified in favour of the appellants is on them and none else as per the maxim: affirmanti non neganti incumbit probatio.

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24.6 The question now to be considered is whether the assessee used the imported helicopter for the avowed purpose. It is not in dispute that, under a "charter-hire agreement" dated 14-4-2008 with Heligo, the assessee allowed the helicopter to be used by Heligo for the purpose of mobilizing and demobilizing of personnel of third party companies and for movement of their freight and/or equipment. Under the agreement, Heligo would reimburse the actual costs incurred by the assessee in sourcing and acquiring spares for maintenance of the helicopter. The necessary infrastructure for maintenance of the helicopter would also be provided by Heligo. The entire cost of insurance to cover all liabilities in respect of passengers, cargo, crew, helicopter and third party would be incurred by the assessee and reimbursed to them by Heligo. Heligo would also pay monthly remuneration to the pilots of the assessee. They would also bear the costs of maintenance of the helicopter and also the costs of fuel and consumables required for its operation. On a perusal of the charter-hire agreement between the assessee and Heligo, we find that Heligo chartered/hired the helicopter for their exclusive use and they incurred the entire costs of operation and maintenance of the helicopter and even the cost of insurance to cover all liabilities. One significant term of the contract was that the "helicopter shall be utilized solely for the purpose of providing the services pursuant to the agreement and the contractor shall not utilize the helicopter for

any other purpose without the prior consent of the company.” Accordingly, the helicopter could not be used by the assessee (contractor) for any other purpose without the prior consent of Heligo (company). It is evident that the agreement created an exclusive right in Heligo for use of the helicopter during its tenure.

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24.8 In the instant case, it is not the claim of the appellants that they used the helicopter for public transport of passengers. They only allowed Heligo to hire the aircraft for a remuneration and use it for transporting employees of Oil & Gas/allied companies between Vishakapatnam airport and offshore oil/gas fields under contracts awarded to Heligo by those companies. The appellants were unable to use the copter (during the tenure of the agreement) for any other purpose without the prior consent of Heligo. They did not have any control over the manner in which the helicopter was used by Heligo (who professedly entered into charter contracts with “third party companies” in respect of the aircraft which was accordingly used for transporting the personnel of these companies) and the copter operations were not open to members of the public. Where the helicopter would not come within the meaning of “passenger aircraft”, the flight operations cannot be called “non-scheduled (passenger) services”.’

are substantially different with consequences to compliance.

33. The distinction between ‘scheduled’ and ‘non-scheduled’ posited in

‘24.7 ... Any such dissection of the definition of “scheduled air transport service” as attempted by the counsel is not warranted to obtain the meaning of “non-scheduled air transport service”. This is because requirement (b) mentioned by him is not determinative of whether the air transport service is “scheduled” or “non-scheduled”. To our mind, the only difference between the two types of air transport service lies in the simple fact that one is

“scheduled” while the other is “non-scheduled”, which would mean that “scheduled” air transport services involve flight services operated on the basis of a schedule of time whereas “non-scheduled” air transport services are without any time schedule for the flights. [This view is fortified by clause (9.2) of “Passenger CAR”, which deals with non-scheduled operators and their operations and says: In such operations, the operators shall not publish their time schedules as the operations are of non-scheduled nature.] Other features are common for both scheduled and non-scheduled services. It would follow that, like scheduled air transport service (passenger), non-scheduled air transport service (passenger) also should be open to use by members of the public. As the flight operations in this case were not open to the public, the helicopter cannot be held to have been used for “non-scheduled (passenger) services”.’

and raised as a contention in the grounds of appeal, as well as the show cause notice, does not appear to hold true. The appellation of ‘scheduled’ and its *contra* have naught to do with schedules, or timetables, but with the class to which ‘air transport services’ are assigned. The former has a permanent, and the highest, status under Aircraft Rules, 1937 with privileges accorded by international conventions on freedoms of the air while the latter is a status arising from not being ‘scheduled’ but by permit. That is all the more reason to discard the decision as distinguishable on facts and findings.

34. Though we concur with the Learned Authorised Representative that import of aircraft by corporate entities for their own use is not the intent of the exemption notification, we are not entirely convinced that peripheral circumstances such as the absence of published tariff, non-

issue of tickets and carriage of employees of associated companies, can be construed as intention for own use. The respondent herein is a person recognised in law as distinct from the associated companies and we perceive no restriction in the notification on carriage of employees of importer, employees of connected undertakings or any other person as travelling public; there is no allegation of free passage to anyone or that the respondent herein was made to bear the cost of such travel. That alone would be amenable to the conclusion of the aircraft having been imported for own use. Both scheduled and non-scheduled air transport services are clearly not intended for own use but to contend that the aircraft have been so used merely owing to evaluation of usage through the prism of revenue maximising would have consequences for all airlines and other air services operating in the country. It is the conditions of the exemption notification, and not a purported intent, that should be complied with and it is those conditions alone that can be tested for compliance. Our independent findings on merit are not controverted by the grounds of appeal or oral submissions, either on fact or by case law, and stand reinforced.

35. We take note that the impugned order has placed reliance on various clarifications issued by Director General of Civil Aviation. That these are in favour of the aircraft operators is not in dispute. The harmonious construct of the finding on obligation of performance, the lack of acceptability of the sole decision relied upon by Revenue, the

consistent stand adopted by the Tribunal in all other decisions, the renewal of the permit to operate as ‘non-scheduled passenger service’ by the competent statutory authority and the clarifications issued by that authority, in general as well as to the Commissioner of Customs, leaves us with no option but to dismiss the appeal of Revenue.

(Order pronounced in open court on 11.09.2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)