

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

CUSTOMS APPEAL NO. 338 OF 2009

(Arising out of Order-in-Original No. CC-MJ/06/2009/Adj.ACC dated 16.03.2009 passed by the Commissioner of Customs (Import), Mumbai)

M/s United Helicharters Pvt. Ltd.

.... Appellant

Hanger No. C-2, Civil Aerodrom,
Airport Authority of India, Juhu, Santacruz,
Mumbai – 400 054.

Versus

Commissioner of Customs (Import), Mumbai

.... Respondent

Air Cargo Complex, Sahar, Andheri (East),
Mumbai – 400 099

Appearance:

Shri T. Vishwanathan a/w Shri Akhilesh Kangasia & Ms. Madhura Khandekar,
Advocates for the Appellant

Shri Shyam Raj Prasad, Special Counsel for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85696/2024

Date of Hearing: 20.03.2024

Date of Decision: 16.07.2024

PER: M.M. PARTHIBAN

This appeal has been filed by M/s United Helicharters Private Limited, Mumbai (herein referred to as 'appellants' for short) against Order-in-Original CAO No. CC-MJ/06/2009/Adj. ACC dated 16.03.2009 (referred to as 'impugned order') passed by the Commissioner of Customs (Import), Air Cargo Complex (ACC), Sahar, Andheri (East), Mumbai.

2.1. Briefly stated, the facts of the case are that the appellants herein had imported one Bell Helicopter (Model No.412-EP, Sr. No.36643 registered as VT-HGK) through the ACC, Mumbai by filing Bill of Entry (B/E) No.397583 dated 26.12.2007. The appellants have claimed classification of the imported helicopter under Customs Tariff Item (CTI) 8802 12 00 of the First Schedule to the Customs Tariff Act, 1975 and have availed exemption from

Basic Customs Duty (BCD) under Serial No. 347B of the Notification No.21/2002-Customs dated 01.03.2002 as amended; exemption from Additional Duty of Customs (CVD) vide Sl. No. 54E of Notification No. 06/2006-C.E. dated 01.03.2002 as amended and exemption from Special Additional Duty of Customs (SAD) under Sl. No.1 of Notification No. 20/2006-Customs dated 01.03.2006. In support of their claim for availing exemption from import duties, the appellants had produced a 'No Objection Certificate' (NOC) issued by the Director General of Civil Aviation dated 15.10.2007 with DGCA Permit No.01/2003 dated 02.09.2003 where under the appellants importer was authorized to import the said helicopter for the purpose of operating and providing for Non-Scheduled Air Transport Services (Passenger). The appellants importer also submitted an undertaking in accordance with the condition of exemption under Sl. No. 104 of Notification No.21/2002-Customs dated 01.03.2002 read with Notification No. 61/2007-Customs dated 03.05.2007, whereby they had undertaken that the said helicopter would be used for providing non-scheduled (passenger) services only and further to pay the duties due in case of their failure to comply with conditions attached to the said notification. Accordingly, the said imports under B/E No.397583 dated 26.12.2007 was assessed by the customs authorities at ACC, Mumbai by extending the benefit of exemption from all duties of import payable on the imported helicopter. The undertaking was cancelled by the Assistant Commissioner of Customs subsequently on the basis of the end use certification produced by the appellants.

2.2 On the basis of intelligence gathered that the helicopter imported by availing customs duty exemption is being misused by the appellants inasmuch as it is not being put to the intended use as claimed and as per the undertaking given by them, the officers of the Central Intelligence Unit (CIU) of the ACC, Mumbai had initiated an investigation against such imports. On completion of such investigation, the department had issued show cause notice dated 09.02.2009 denying the customs duty exemption and demanding the duty on the appellants under Section 28(1) of the Customs Act, 1962 besides proposing for confiscation of the imported helicopter, imposition of penalty on the appellants and Managing Director of the appellants. The said SCN was adjudicated by the learned Commissioner of Customs in the impugned order dated 16.03.2009 wherein the demand of duty was confirmed, along with confiscation of goods and allowing the same on payment of redemption fine of Rs.10,00,000/-; besides penalty of

Rs.2,50,000/- each was imposed on the appellants and on its Managing Director under Section 112 *ibid*. The appellants having been aggrieved by the impugned order passed by the learned Commissioner, have filed this appeal before the Tribunal.

3.1. Learned Advocate appearing for appellants submitted that the appellants is holding a valid permit for operating a 'Non-scheduled Air Transport Services (Passenger/Cargo/Charter) issued by the Directorate General of Civil Aviation and upon such basis have imported the helicopter covered under B/E No.397583 dated 26.12.2007 and deployed the same for carrying persons for remuneration and have not deployed it for private use. Accordingly, he submitted that the appellants have not violated the conditions of Sl. No. 104 of Notification No.21/2002-Customs dated 01.03.2002.

3.2. Learned Advocate further submitted that the issues covered in the present appeal is no more under dispute as these have been addressed by the Larger Bench of the Tribunal in the case of *VRL Logistics Limited Vs. Commissioner of Customs, Ahmedabad* - (2023) 3 Centax 168 (Tri.-LB), wherein the appellants have also represented as one of the intervenor. Miscellaneous application No.85078 of 2022 filed to this effect was allowed by the Larger Bench of the Tribunal in its Miscellaneous order dated 28.01.2022. He submitted that the Larger Bench had answered the issues in dispute in favour of the appellants/importer and held that the customs duty exemption will continue to be available to aircraft/helicopter imported by a Non- Scheduled Operator-Passenger (NSOP) permit holder for passenger services even when the same is used for providing charter services. Further, he stated that on the above basis, the respective Division Benches of the Tribunal have also decided the appeals in favour of the importers.

3.3 Without prejudice to the above, learned Advocate submitted that the entire demand of customs duty is barred by limitation, as the SCN was issued for demand of duty only in terms of Section 28(1) of the Customs Act, 1962 and not under extended period or by invoking the undertaking given with respect to the exemption. Even this undertaking given by the appellants importer had been cancelled by the customs Department. Hence, he stated that the invocation of non-existent undertaking for the demand of duty in the impugned order is incorrect and legally not sustainable.

3.4 Learned Advocate also submitted that the appellants were holding valid permit issued by the Directorate of Civil Aviation (DGCA) to operate NSOP service, and the same has not been suspended or cancelled by DGCA. Therefore, he stated that the imported helicopter is not liable for confiscation and no penalty is impossible on the appellants under the Customs Act. In the light of the above and on the basis of the orders of Larger Bench and respective Division Benches of the Tribunal, he submitted that the appeal filed by the appellants may be allowed with consequential relief.

3.5 In support of their stand, learned Advocate had relied upon the following decisions, in the respective cases mentioned below:

(i) *VRL Logistics Ltd. Vs. Commissioner of Customs, Ahmedabad* – (2023) 3 Centax 168 (Tri. – LB.)

(ii) *Reliance Commercial Dealers Ltd. Vs. Commissioner of Customs, (Preventive), New Custom House, Delhi* – 2022(9) TMI 1270 CESTAT NEW DELHI

(iii) *Reliance Commercial Dealers Ltd., Sudhir Nayak Vs. Commissioner of Customs, (Preventive)* – 2022 (9) TMI 807 CESTAT NEW DELHI

(iv) *Global Vectra Helicorp Limited Vs. Commissioner of Customs, (Preventive), New Custom House, Delhi* – 2022 (9) TMI 1300 CESTAT NEW DELHI

(v) *Taneja Aerospace and Aviation Ltd. Vs. – Commissioner of Customs, (Preventive), New Custom House, Delhi* – (2023) 4 Centax 404 (Tri.-Del)

(vi) *Commissioner of Customs (Import), ACC, Mumbai Vs. Airmid Aviation Private Limited* – 2019 (370) E.L.T. 1789 (Tri. -Mumbai)

4.1. Learned Special Counsel appearing for Revenue submitted that the appellants had entered into agreements with two companies for charter of the aircraft on long term basis for the exclusive use of these companies at their discretion and thus the helicopter charter service was not open for the public under NSOP services. Such agreement had created the exclusive rights for the hiring companies and inasmuch as the helicopter was used by just two users, the appellants having contravened the conditions that the imported helicopter is used only for NSOP purpose. Further, he stated that there was no published tariff available and no tickets were issued, by the appellants; the hirer companies were operating the helicopter by providing charter services to other parties and associated companies and the appellants had no control over the services. Hence he claimed that the appellants importer had not fulfilled the customs duty exemption conditions

as provided in the explanation in Sl. No.104, relevant to the entry at Sl. No. 347B of Notification No.21/2002-Customs dated 01.03.2022 and therefore the impugned order has rightly confirmed the duties and confiscated the goods besides imposition of penalty on the appellants.

4.2 Learned Special Counsel further submitted that the undertaking given by the appellants in respect of imported goods was valid at the time of importation and for availment of exemption notification, which was cancelled only after the appellant submitted the end user certificate as required under the law. However, on detailed investigation the said end use certificate was found unacceptable being fraudulently and wrongly submitted and the demand under Section 28 *ibid* was therefore raised by issue of SCN. Hence the demand is legally sustainable as decided by the learned Commissioner in the impugned order. He submitted that confiscation of helicopter is sustainable, since it has been found by the department that the import is without requisite license from DGCA as in this case use of helicopter is for other than NSOP services, which is in violation of the customs duty exemption benefits extended to them in terms of notification dated 01.03.20002.

4.3 Further, learned Special Counsel also stated that inasmuch as the helicopter was operated by a third party and not by the appellants, this aspect as decided in the case of *King Rotors & Air Charter P. Ltd. Vs. Commissioner of Customs (ACC & Import), Mumbai – 2011 (269) E.L.T. 343 (Tri.-Bom.)* would hold good, as the same has not been considered by Larger Bench in the case of VRL Logistics (*supra*) and such decision is not applicable to the present case. Further, in support of their stand, learned Special Counsel for Revenue submitted the following case laws:

(i) *King Rotors & Air Charter P. Ltd.Vs. Commissioner of Customs (ACC & Import), Mumbai – 2011 (269) E.L.T. 343 (Tri. – Bom.)*

(ii) *Global Vectra Helicorp Limited Vs. Commissioner of Customs, (Preventive), New Custom House, Delhi – 2022 (9) TMI 1300 CESTAT NEW DELHI*

(iii) *Commissioner of Customs, (Preventive), New Custom House, New Delhi Vs. Reliance Commercial Dealers Ltd. – 2023 (3) TMI 595 – Delhi High Court.*

5. The submissions advanced by learned Advocate appearing for the appellants and learned Special Counsel of the Department have been considered by us. We have also perused additional submissions made in the form of paper books and carefully perused the records of the case.

6. In the impugned order dated 16.03.2009, the learned Commissioner had recorded that the issue to be decided by him is whether the appellants is operating non-scheduled (passenger) services as envisaged in condition No. 104 of Notification No.21/2002-Customs. Upon examination of the various points raised in the SCN and the written submissions given by the appellants in their letter dated 25.02.2009, learned Commissioner had confirmed the demand of customs duty; confiscated the import goods and allowed it on payment of redemption fine of Rs.10,00,000/-; besides imposed penalty of Rs.2,50,000/- each on the appellants and on its Managing Director under Section 112 of the Customs Act, 1962 on the basis of following findings in the impugned order. The relevant paragraphs of the impugned order are extracted below:

"21. It is an accepted fact that the helicopter imported by UHPL is completely placed at the disposal of HCPL on charter-hire basis. There is no published tariff (refer Explanation under 104 of Notification 21/2002-Cus). The helicopter is not available for use by any other party. They are not issuing tickets (refer para 10.7 of CAR, Series C Part V).

22. Against the above facts, it is to be decided whether UHPL is operating non-scheduled (passenger) services as envisaged in condition No.104 of Notification 21/2002-Cus....

23. Indian Air Craft Rules, 1937 does not define 'Non-scheduled (passenger) services'. This expression is defined in the Civil Aviation Requirements for 'Non-scheduled (passenger) services. As per this definition, Non-scheduled (passenger) services means air transport services other than "scheduled passenger air transport services" as defined in Rule 3 of the Air Craft Rules, 1937. If this definition is interpreted to mean that any services which is not covered by the definition for scheduled passenger air transport services will qualify as Non-scheduled passenger services, services of private aircrafts and aircrafts transporting goods also will be covered. This will be a trivial interpretation. Therefore, I see force in the argument that it is only the scheduling part of the definition that is to be ignored for giving a proper meaning for the definition of Non-scheduled passenger services.

xxx xxx xxx xxx

24.5 Condition 104 of notification 21/2002-Cus makes reference to Civil Aviation Requirements only in respect of non-scheduled (charter) services and not in respect of non-scheduled (passenger) services. In the case of non-scheduled (charter) service the definition makes a deviation from the definition in CAR and has additional requirement that there should be a published tariff.

xxx xxx xxx xxx

26. Considering all the above, I agree with the argument that proper interpretation of "non-scheduled (passenger) service" is that it should be a service that satisfies all the elements of the definition of "scheduled(passenger) services" other than the element relating to scheduling. An interpretation that any service which does not satisfy any one of the elements of the definition for

scheduled (passenger) service would qualify as "non-scheduled passenger service" produces results meaningless to the context and accordingly I reject that interpretation canvassed, If the former interpretation is accepted it follows that if flights are not open to the public it is not a non-scheduled (passenger) service.

27. *Keeping all the questions of facts and law as explained above, I come to the conclusion that the operation that UHPL has been undertaking is not 'Non-scheduled (passenger) service' for which exemption was availed from customs duties.*

28. *However, I find that this is a matter of interpretation of Notification 21/2002-Cus. There is no collusion, willful mis-statement or suppression of facts on the part of UHPL or its Managing Director. Therefore, I do not consider it necessary to impose any penalty under section 114A of the Customs Act, 1962. But this finding does not ipso facto mean that the demand for duty is time barred. The duty is payable in terms of the Bond executed under Condition 104 of Notification 21/2002-Cus.*

xxx xxx xxx xxx

30. *Since there is contravention of the conditions of the exemption notification No. 21/2002-Cus the helicopter is liable to confiscation under section 111(o) of the Customs Act also.*

31. *Since the helicopter is liable to confiscation under section 111(d) and section 111(o) of the Customs Act, UHPL and its managing director are liable to penalty under section 112 of the Customs Act. However, since this is a matter of interpretation of the notification and there was lack of understanding among many as seen from the number of such cases that have been booked all over India, I consider that a nominal penalty is enough.*

32. *I do not find any willful mis-declaration or suppression on the part of UHPL or its Managing Director and I hold that there is no case for imposing penalty under section 114A of the Customs Act.*

33. *In view of the above facts and circumstances, I pass the following order:*

ORDER

- i) *I confirm the demand for duty amounting to Rs. Rs.8,63,53,254/- (Rupees Eight Crore Sixty Eight Lakhs Fifty Three Thousand Two Hundred Fifty Four only), along with appropriate interest in terms of the bond executed by UHPL with customs department.*
- ii) *The helicopter is confiscated under section. 111(d) and 111 (o) of the Customs Act, 1962. However, I give an option to redeem the same on payment of a fine of Rs. 10,00,000/-*
- iii) *I impose a penalty of Rs. 2,50,000/- on UHPL under section 112 of the Customs Act.*
- iv) *I impose a penalty of Rs. 2,50,000/- on Capt. Shri. Udey S. Gill under section 112 of the Customs Act.*

v) I do not impose any penalty on UHPL or Capt. Shri Uday S Gelli under section 114A of the Customs Act."

From the perusal of the above specific findings of the learned Commissioner, it can be seen that the customs duty exemption claimed by the appellants have been denied mainly on the grounds that the appellants have completely placed the imported helicopter at the disposal of the two companies which hired the same under a Helicopter Services agreement; there was no published tariff; no tickets have been issued and the NSOP part of the air services was not fulfilled by the appellants importer as required in the customs duty exemption and as provided in the explanation of condition No.104, relevant to the entry at Sl. No. 347B of Notification No.21/2002-Customs dated 01.03.2002, as amended.

7. We find that the issues for consideration before us is to determine the following:

(i) Whether, in the facts and circumstances of the present case, the import of helicopters by the appellants fulfill the conditions prescribed under Sl. No.104 relevant to exemption entry 347B of the Notification No.21/2002-Customs dated 01.03.2002, as amended by notification No.61/2007-Customs dated 03.05.2007?;

(i) Whether the import of helicopter by the appellants is eligible to be extended with customs duty exemption under Sl. No. 347B of Notification No.21/2002-Customs dated 01.03.2002, as amended by notification No.61/2007-Customs dated 03.05.2007?;and

(iii) Whether the imported helicopters are liable for confiscation and the appellants are liable for payment of penalty under Section 112 ibid as determined by learned Commissioner in the impugned order dated 16.03.2009?

8.1 In order to address the above issues, we would like to refer the relevant legal provisions contained in the Customs Act, 1962; Aircraft Act, 1934, Aircraft Rules, 1937 and relevant exemption entry in Notification No. 21/2002-Customs dated 01.03.2002, as amended by notification No.61/2007-Customs dated 03.05.2007, for consideration of the subject issues under dispute.

Customs Act, 1962

"Section 2. Definitions-

In this Act, unless the context otherwise requires,

(1A) "aircraft" has the same meaning as in the Aircraft Act, 1934 (22 of 1934);"

The Aircraft Act, 1934

"2. Definitions.- *In this Act, unless there is anything repugnant in the subject or context,-*

(1) "aircraft" means any machine which can derive support in the atmosphere from reactions of the air, ^a[other than reactions of the air against the earth's surface and includes balloons, whether fixed or free, airships, kites, gliders and flying machines;

(2C) "Directorate General of Civil Aviation" means the Directorate General of Civil Aviation constituted under section 4A;

4A. (1) The Central Government may constitute a body to be known as the Directorate General of Civil Aviation, which shall be headed by an officer designated as the Director General of Civil Aviation to be appointed in this behalf by the Central Government by notification in the Official Gazette.

(2) The Directorate General of Civil Aviation shall be responsible for carrying out the safety oversight and regulatory functions in respect of matters specified in this Act or the rules made thereunder.

(3) The administration of the Directorate General of Civil Aviation shall vest in the Director General of Civil Aviation."

The Aircraft Rules, 1937

"3. Definitions and Interpretation - *In these rules, unless there is anything repugnant in the subject or context -*

(7) "Aircraft" means any machine which can derive support in the atmosphere from reactions of the air other than reactions of the air against the earth's surface and includes balloons whether fixed or free, airships, kites, gliders and flying machines;

(9) "Air transport service" means 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;

(9A) "Air Transport Undertaking" means an undertaking whose business includes the carriage by air of passengers or cargo for hire or reward;

(38) "Operator" means a person, organisation or enterprise engaged in or offering to engage in aircraft operation;

(43) "Private aircraft" means all aircraft other than aerial work aircraft or public transport aircraft;

(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 an aircraft which effects public transport;

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

3A. Delegation of Powers - (1) Any power or duty conferred or imposed by these rules on the Central Government may be exercised or discharged by the Central Government or by any person authorised by it in that behalf;

(2) Any power or duty conferred or imposed by these rules on the Director-General may be exercised or discharged by the Director-General or by any other person authorised by the Central Government in that behalf:”

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 17/2001-Customs, dated the 1st March, 2001, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading or sub-heading of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India:-

- (a) **from so much of the duty of customs** leviable thereon under the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table;
- (b) **from so much of the additional duty** leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act, as is in excess of the rate specified in the corresponding entry in column (5) of the said Table;

subject to any of the conditions, specified in the Annexure to this notification, the condition No. of which is mentioned in the corresponding entry in column (6) of the said Table :

XXX

Explanation. - For the purposes of this notification, the rate specified in column (4) or column (5) is ad valorem rate, unless otherwise specified.

S. No.	Chapter or Heading No. or sub-heading No.	Description of goods	Standard rate	Additional duty rate	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
1.	1	Cows, heifers, bulls, goats, sheep, pigs, angora rabbits, ducklings and pureline poultry stock	5%	-	-

XXXXXXXXXXXXX					
346.	88	Aeroplanes, gliders, helicopters or simulators of aeroplanes	Nil	-	-
347.	88 or any Chapter	Parts of aeroplanes, gliders, helicopters or simulators of aircraft (excluding rubber tyres and tubes for aeroplanes or gliders)	Nil	Nil	67

ANNEXURE	
Condition No.	Conditions
67.	If the parts are required for manufacture or servicing of aeroplanes, gliders, helicopters or simulators of aircraft. Explanation.- "Parts of aeroplanes, gliders, helicopters or simulators of aircraft" shall include engines, engine parts, wireless transmission apparatus, wireless receivers, iron and steel washers and screws, ball and roller bearings and other parts."

Notification No. 61/2007-Customs dated 03.05.2007

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

In the said notification,-

(A) in the Table,-

- (i) against S. No. 187, for the entry in column (4), the entry "Nil" shall be substituted;
- (ii) after S. No. 347 and the entries relating thereto, the following S. Nos. and entries shall be inserted, namely :-

347A.	8802 (except 8802 60 00)	All goods	Nil	-	103
347B.	8802 (except 8802 60 00)	All goods	Nil	-	104
347C.	Any Chapter	Parts (other than rubber tyres or tubes) of aircraft of heading 8802	Nil	-	105

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

Condition No.	Conditions
104.	(i) the aircraft are imported by an operator who has been granted approval by the competent authority in the Ministry of Civil Aviation to import aircraft for providing non-scheduled (passenger) services or non-scheduled (charter) services; and (ii) the importer furnishes an undertaking to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, at the time of importation that :- a. the said aircraft shall be used only for providing non-scheduled (passenger) services or non-scheduled (charter) services, as the case may be; and b. he shall pay on demand, in the event of his failure to use the imported aircraft for the specified purpose, an amount equal to the duty payable on the said aircraft but for the exemption under this notification. Explanation. - for the purposes of this entry,- (a) 'operator' means a person, organization, or enterprise engaged in or offering to engage in aircraft operation; (b) 'non-scheduled (passenger) services' means air transport services other than Scheduled (passenger) air transport services as defined in rule 3 of the Aircraft Rules 1937. (c) 'non-scheduled (charter) services' means services provided by a 'non-scheduled (charter) air transport operator', for charter or hire of an aircraft to any person, with published tariff, and who is registered with and approved by Directorate

	<i>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."</i>

8.2 On perusal of the records of the case, it is seen that the appellants had firstly applied to the Government of India, Ministry of Civil Aviation, Directorate General of Civil Aviation (DGCA), who being the competent authority under the Aircraft Act, 1934 and the rules made thereunder had issued Permit No.1/2003 dated 02.09.1993 i.e., Permit to Operate Non-Scheduled Air Transport Services (Passenger) to the importer appellants for a number of aircrafts which included the specific helicopter viz., Bell Helicopter aircraft of model No.412-EP, manufacturer's serial No.36643 registered as VT-HGK having seating capacity of 13 imported by the appellants in this case. This permit was subsequently renewed by the DGCA and was valid during the relevant time of dispute.

8.3. It is fact on record as per paragraph 8 of the SCN and paragraph 10.1 of the impugned order that the agreement entered into by the appellants with the two companies viz., Western Geco International Ltd., Mumbai and Heligo Charters Pvt. Limited, Mumbai were for providing helicopters for hire. In the agreement dated 13.06.2008 under clause 3 specify the services to be provided by the appellants as follows:

"3.0 SERVICES TO BE PROVIDED

3.1 The CONTRACTOR (M/s United Helicharters Pvt. Limited) shall provide Helicopter services during daylight hours from Visakhapatnam Airport or from any such mutually agreed yeah report within to the offshore and return as required by the COMPANY, inter alia for the purpose of mobilizing and demobilizing of personnel and movement of freight and/or equipment of the COMPANY (M/s Heligo Charters Pvt. Limited) and its clients.

3.2 The Helicopter type shall be Bell 412EP. The Bell 412 type helicopters shall consist of a Twin Engine with the capacity for thirteen (13) passenger + (2) pilots (subject to temperature & distance) and shall be provided for daylight and the option of the COMPANY and night flights for emergencies.

3.5 It is agreed by the COMPANY that the helicopter utilization of a minimum of 40 (Forty) Hours per month (during daylight hours) will be available by the COMPANY as long as to whether operation is on.

3.6 If in a particular month the utilization, is less than 40 Hrs. even with the two-vessel operation, and the underutilization is not due to non-availability, of the helicopter due to technical reasons, then the CONTRACTOR shall be paid for a minimum of 40 Hrs.

5.0 INVOICING

The CONTRACTOR shall be invoice COMPANY every month for 40 Hrs. utilization, at the end of the month. The COMPANY shall release all payment within 30 days from the date of receipt of such invoice from the CONTRACTOR. For any flying beyond 40 Hrs. in the month, a subsequent variable re-joinder invoice detailing the cumulative value of SERVICES achieved beyond 40 Hrs. and any other charges payable as per the agreement will be submitted to the COMPANY by the CONTRACTOR...

The rates mentioned vide Appendix 'A' are valid for a period of one year from effective date and shall be mutually negotiated year on year....

APPENDIX 'A'

PRICE SCHEDULE FOR HELICOPTER SERVICES

1. Bell 412 Helicopter:

*Minimum Guarantee of 40 Hrs. @ US \$ 180,000/- per month
(Minimum Guarantee @ US Dollars One Hundred & Eighty Thousand Per Month)*

*FLYING HOURLY CHARGES US \$2,400/- per hour
(41st Hour onwards per month)"*

From the above agreement, it transpires that this a contractual arrangement between the appellants and the company for providing the facility of helicopter services to them by making available the specified aircraft(s) owned by them and for which they had obtained Non-Scheduled Air Transport Services (Passenger) permit. Further, the undertaking given by the company is for use of aircraft for a minimum of 40 hours per month is a kind of assurance of business given to the appellants as a favourable/regular customer. In respect of the agreement dated 19.09.2006, it transpires that this is another agreement of similar nature wherein the services of hiring helicopter was provided to one another company. The essence of the above contracts/agreements indicate that the appellants have agreed to undertake to provide helicopter services for undertaking a specific journey or voyage as requisitioned by the companies for transporting its executives, personnel and its nominees. In specific, the contract is for providing Non-Scheduled Air Transport Services as per the permit granted by DGCA, for transportation of persons from one place of origin to another place of destination.

8.4 In terms of the notification No. 21/2002-Customs dated 01.03.2002 as amended by notification No. 61/2007-Customs dated 03.05.2007, it is provided that import of goods falling under chapter heading 8802 (except 8802 60 00) are exempt from basic customs duty subject to fulfillment of

the condition No. 104. Helicopters being classifiable under Customs Tariff Item 8802 1100, 8802 1200 are covered under the above exemption entry and hence the goods under dispute in this case are eligible for exemption by the main entry under Serial No. 347B of the notification dated 03.05.2007. In respect of the condition No. 104, it is seen that there are basically three conditions viz., (i) import of helicopter is by an operator who has been granted approval by the competent authority in the Ministry of Civil Aviation i.e., DGCA for providing Non-Scheduled (Passenger) Service or Non-Scheduled (Charter) Service; (ii) importer furnishes an undertaking to the AC/DC of Customs for providing Non-Scheduled (Passenger) Service or Non-Scheduled (Charter) Service, as the case may be; and (iii) in the event of the importer's failure to use the imported aircraft for the specified purpose, then they shall pay an amount equal to the duty payable on the said aircraft, but for the said exemption provided under this notification. In the present case, as the appellants have held a valid Permit No.1/2003 dated 02.09.1993, being the Permit issued by the DGCA to operate Non-Scheduled Air Transport Services (Passenger), we find that the appellants fulfill conditions (i) and (ii) discussed above. It is a fact on record in the SCN dated 09.02.2009 that the appellants importer had duly executed an undertaking as required in the above notification and on the basis of end use certification submitted by them, such undertaking was cancelled by the Assistance Commissioner of Customs. Hence, the appellants had also fulfilled the condition (iii) to the extent of execution of requisite undertaking which have been subsequently cancelled by the customs authorities themselves. Therefore, on the basis of the above factual matrix of the import goods fulfilling all the conditions and covered by the exemption entry, by description and coverage of the customs tariff sub-heading, in our prima facie view, the import of helicopter by the appellants would be covered by the exemption entry under Serial No. 347B of the notification dated 03.05.2007.

9.1 Since, the impugned order had denied the customs duty exemption mainly on the grounds that the appellants have placed the imported helicopter at the disposal of the two companies; there was no published tariff; no tickets have been issued and the NSOP part of the air services was not fulfilled by the appellants, we would like to examine these aspects also in greater detail in the following paragraphs.

9.2 The explanation provided under condition No.104 state that for the purpose of exemption entry, the meaning of 'operator', 'non-scheduled (passenger) services' and 'non-scheduled (charter) services' shall be construed as provided therein. We have compared the explanation as given in the notification with respect to the definition of similar phrases given in the Rule 3 of Aircraft Rules, 1937 read with Civil Aviation Requirement (CAR) issued under Rule 134A *ibid*, and provided the same for ease of reference as below:

***Explanation in Notification No.61/2007-Customs dated
03.05.2007***

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

Explanation (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.

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

Definition under Aircraft Rules, 1937

"Rule 3(38) "Operator" means a person, organisation or enterprise engaged in or offering to engage in aircraft operation;

Rule 3(49) "Scheduled air transport service" means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognisably systematic series, each flight being open to use by members of the public;"

"CIVIL AVIATION REQUIREMENTS (CAR) issued under Sub-rule (2) of Rule 134A of the Aircraft Rules, 1937 specifies that no air transport service, other than a scheduled air transport service, shall be operated by an Indian air transport undertaking unless it holds a Non-Scheduled Operator's Permit granted by the Central Government. The power, in this regard, is delegated to the Director General and to the Joint Director General of Civil Aviation, based on which the permission is given by way of issuing a Non-scheduled Operator's Permit (NSOP). This Civil Aviation Requirement contains the minimum airworthiness and operational requirements and also the procedural requirements for grant of an NSOP. In this issue of the CAR, the requirements for grant of NSOP (Passenger) and NSOP (Charter) have been amalgamated and a uniform code for operation of non-scheduled air transport services has been laid down. This CAR is issued under provisions of Rule 133A and Rule 134A of the Aircraft Rules, 1937 and the requirements contained here are complementary to the requirements of ICAO Annex 6 Part I, as applicable to non-scheduled operations.

3. DEFINITIONS

3.1 'Air transport service' means 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;

3.2 'Scheduled air transport service' means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public;

3.3 '**Non-Scheduled air transport service**' means an air transport service, other than a scheduled air transport service as defined in para 3.2 above, being operated for carriage of passengers, mail and goods, and includes charter operations.

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

3.5 'Non-Scheduled Operator's Permit' means a permit authorizing an operator to carry out non-scheduled air transport services subject to conditions as may be specified in the permit."

We also note that Civil Aviation Requirement (CAR) is issued under Rule 134A *ibid*, and CAR 1999 deals with non-scheduled (passenger) services operator and CAR 2000 deals with non-scheduled (charter) services operator; predominantly both contain identical provisions with the exception that CAR 2000 contain some relaxed provisions meant for smaller aircraft. DGCA as amalgamated both these CAR and have issued CAR 2010 by incorporating various clarification issued by it, in the form of revised code. It is therefore to be understood that CAR 2010 can be taken as a basis to comprehend the CAR 1999 and CAR 2000. In terms of the definition of non-scheduled air transport service under CAR, this is other than the scheduled air transport service. Thus, we are of the considered view that this definition provides a meaning that the requirement of publishing a timetable; providing a pattern of regular frequency of flight services in a systematic manner; and the such services being kept open for public, is not required to be followed for non-scheduled air transport service. In view of such a definition provided under CAR/Aircraft Rules, 1937, we come to the conclusion that the findings arrived at in the impugned order for denying the exemption benefit under Serial No. 347B of the notification dated 03.05.2007, only on the basis of explanation under condition No.104 is not legally sustainable.

9.3 We also find that in terms of CAR, non-scheduled operators can conduct Charter/non-scheduled operations on transportation by air of persons, mail or goods, in such operations, and the operator shall not publish their time schedules as operations are of non-scheduled nature. Further, Charter operation is defined under CAR as an operation for hire and reward in which the departure time, departure location and arrival locations are specifically negotiated with the customer or the customer's representative for entire aircraft and no ticket is sold to individual passenger for such operation. Thus in our considered view, the grounds of not issuing tickets for passengers, destination and the persons to be boarded in the aircraft being decided by the companies hiring the aircraft, published tariff not being issued by the appellants are not valid grounds to deny the benefit of customs duty exemption as Non-Scheduled Air Transport Services (Passenger). Therefore, in our prima facie view, on the basis of the above legal provisions, the duty exemption benefit under Serial No. 347B of the notification dated 03.05.2007 cannot be denied to the appellants in the present factual matrix of the case.

9.4 We further note that the DGCA had issued a clarification dated 28.05.2005 that in case of a difference between the definitions contained in the International Civil Aviation Organization (ICAO) Convention & its Annexes and the Aircraft Act, Aircraft Rules or the CARs, the definitions contained in the Aircraft Act, Aircraft Rules or the CARs would prevail. The above clarification issued by the competent authority under the Ministry of Civil Aviation in the Government of India, being the highest policy-making body for civil aviation, aircraft, air services etc., a different interpretation, for the purpose of duty exemption alone, cannot be taken as a basis to deny the exemption benefit in the present case. In our view this is the proper way of interpretation of the explanation provided in the notification inasmuch as the said notification especially states that the explanation given therein is in terms of the approval given by DGCA and CAR provided by it and that the importer shall conform to the Civil Aviation Requirement under the provision of rule 133A of the Aircraft Rules, 1937.

9.5 Our above views also find support in the policy pronouncement made in the Parliament by the Union Minister for Finance in the Union Budget for the financial year 2007-2008 which is extracted below:

"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."

The above aspect of import duty introduced only with respect to private import of aircraft has also been clarified in the instructions issued by the Tax Research Unit of the Ministry of Finance in implementation of the budget changes for the year 2007-2008, as follows:

"86.1 Exemption from Customs duty has been withdrawn on Aircraft, and parts thereof imported for private use or by non-scheduled operators (S.No.346 & S.No.347 of notification No.21/2002-Customs as amended by notification No. 20/2007-customs refers). However, exemption is available under notification No. 39/96-Customs to Aircraft imported by Government of India, State Governments, Public Sector Undertakings of the Central Government or the State Governments."

Accordingly, vide exemption entry at Sl. No. 346B of Notification 21/2002-Customs as amended by Notification No. 20/2007-Customs dated 01.03.2007, exemption from basic customs duty was provided to import of all aircrafts of sub-heading 8802 (except 8802 6000) subject to fulfillment of condition No.101, and import of helicopters for private use was provided with effective rate of 3% BCD under entry at Sl. No. 346C of the said notification. Thus, helicopter imported by an operator for operating scheduled air transport service or scheduled air cargo service, and such aircraft when used for operating the scheduled air transport service or the scheduled air cargo service, as the case may be, alone was provided with duty exemption. However, subsequent to this in the post-budget changes brought in by the Government on the basis of the recommendations made by the Ministry of Civil Aviation for exemption of aircraft imported for non-scheduled point-to-point and non-scheduled charter operators under conditions of registration to be specified by them, the basic customs duty was exempted by issue of notification No.61/2007-Customs dated 03.05.2007. As in the import of helicopter in the present case is covered by B/E No.397583 dated 26.12.2007, the customs duty exemption entry relevant to the dispute is the Sl. No. 347B of the notification No.21/2002-Customs as amended by notification No.61/2007-Customs dated 03.05.2007.

9.6 We further note that inasmuch as the meaning of "Private aircraft" under Rule 3(43) of Aircraft Rules, 1937 cover all aircraft other than aerial

work aircraft or public transport aircraft; and the present case of import of helicopters issued with a permit of Non-Scheduled Air Transport Services (Passenger) being covered under the definition of 'public transport aircraft', the impugned imported helicopter cannot be equated to private aircraft or import of aircraft for private use in order to deny the customs duty exemption in terms of Serial No. 347B of the notification dated 03.05.2007.

10.1 We also find that the above issues of dispute have been discussed at length in a number of orders issued by the Tribunal and the Hon'ble High Court of Delhi and Hon'ble Supreme Court in the following cases. In the case of *Reliance Commercial Dealers Ltd., Sudhir Nayak (supra)*, the Tribunal relying on the Larger Bench decision in the case of *VRL Logistics (supra)* has held that notwithstanding that the published tariff has not been issued, the condition No.104 of customs duty exemption has been complied with by the importer appellant. The relevant paragraphs of the said order are extracted below:

"17. *Aircrafts and helicopters are classified under Customs Tariff Heading 88 of the First Schedule to the Customs Tariff Act, 1975. The tariff rate of duty till 28-2-2007 on the import of aircraft was 3%/12.5%. Subsequently, pursuant to the proposal made in the Finance Bill, 2007, exemption notification no. 20/2007 dated 1-3-2007 was issued inserting Entry 346B and Condition No. 101 in the earlier exemption notification dated 1-3-2002, whereby, the effective rate of duty on import of aircraft for scheduled air transport service was made 'nil'. No exemption was, however, granted to non-scheduled air transport service and private category aircraft. However, with the issuance of the exemption notification dated 3-5-2007, the effective rate of duty on the import of aircraft for non-scheduled air transport service was made 'nil'. This exemption notification was as a consequence of the statement made by the Hon'ble Finance Minister in the Parliament and it is reproduced:*

"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 institutes 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."

(Emphasis Supplied)

18. *A perusal of the aforesaid statement makes it clear:*

- (i) The exemption was granted on the basis of strong representation made by the Ministry of Civil Aviation;*
- (ii) The exemption was subject to the conditions of registration to be specified by the Ministry of Civil Aviation; and*
- (iii) The exemption was granted to give an incentive to the nascent and growing state of the aviation industry. The purpose of granting the exemption was, therefore, to encourage the import of aircraft, which could be used for non-scheduled operation.*

19. *The aforesaid exemption notification dated 3-5-2007 inserted Condition No. 104 which requires at the stage of import, an approval from*

MCA to import the aircraft for non-scheduled (passenger) service and an undertaking by the importer to the Customs authority that the aircraft would be used only for non-scheduled (passenger) services and that the operator would pay on demand, in the event of his failure to use the aircraft for the specified purpose, an amount equal to the duty payable on the said aircraft but for the exemption under the notification.

20. Explanation (b) to Condition No. 104 of the exemption notification defines non-scheduled (passenger) services as:

"(b) Air transport services other than scheduled (passenger) air transport services as defined in Rule 3 of the Aircraft Rules, 1937."

21. The aforesaid definition refers to 'air transport services' and 'scheduled (passenger) air transport services' as defined in rule 3 of the Aircraft Rules, 1937⁸.

22. "Air transport services" is defined in rule 3(9) of the Aircraft Rules as under:

"Air transport service" means 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."

23. "Scheduled air transport service" is defined in rule 3(49) of the Aircraft Rules as under:

"Scheduled air transport service" means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public."

24. The term 'scheduled (passenger) air transport services' has to be interpreted according to this definition, and applied to passenger travel in contradistinction to carriage of goods or mail.

25. Thus, if a service is covered by 'air transport service' defined in rule 3(9) of the Aircraft Rules and is other than 'scheduled (passenger) air transport service' defined in rule 3(49), it would be a non-scheduled (passenger) service within the meaning of clause (b) of the Explanation to Condition No. 104 of the exemption notification.

26. At the time when Condition No. 104 was inserted on 3-5-2007, Civil Aviation Requirement dated 8-10-1999⁹ dealing with non-scheduled (passenger) services as well as Civil Aviation Requirement dated 17-5-2000 ¹⁰, dealing with scheduled (passenger) services, which had been issued under rule 133A of the Aircraft Rules, were in force. The expression 'non-scheduled air transport services (passenger)' has been defined, both under the 1999 CAR as also the 2000 CAR, as follows:

"Non-scheduled air transport services (passenger) means air transport services other than scheduled air transport services as defined in the rule 3 of the Aircraft Rules, 1937."

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33. The findings on these of issues by the Larger Bench of the Tribunal are as follows:

Use of Aircraft for only non-scheduled (passenger) services

"53. It needs to be examined, as has been contended on behalf of the appellants, whether the aircraft was used by the appellants only for providing non-scheduled (passenger) services as defined in clause (b) of the Explanation to Condition No. 104 of the exemption notification.

54. Non-scheduled (passenger) services has been defined in the aforesaid clause (b) to mean air transport services other than scheduled (passenger) air transport

services as defined in rule 3 of the Aircraft Rules. Thus, what has to be seen is whether the use of the aircraft satisfies the following two requirements of clause (b):

- (i) The use should be for air transport service; and
- (ii) Such air transport service should be other than scheduled (passenger) air transport service as defined in rule 3 of the Aircraft Rules.

55. 'Air transport service' has been defined in rule 3(9) of the Aircraft Rules to mean service for transport by air of persons for any kind of remuneration whatsoever. There is no dispute that the appellants have used the aircraft for the transport of persons for remuneration. There is no stipulation or restriction or a condition in the said definition that a tariff should be published or that such service should be rendered only on per-seat basis and not by chartering or about the category or class of persons to be transported. Thus, the contention of the department that the appellants have rendered 'air transport service' to their group companies by carrying personnel of their group companies is not of any relevance as there is no prohibition in the said definition against any kind of persons to be transported.

56. Rule 3 (49) of the Aircraft Rules defines 'scheduled air transport service' to mean an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public. Thus, for an 'air transport service' to qualify as 'scheduled air transport service', it must satisfy all the following three conditions:

- (i) It must be undertaken between the same two or more places;
- (ii) It must be operated according to a published time table or the flights must constitute a recognizable systematic series; and
- (iii) Each flight must be open to use by members of the public.

57. If any of the aforesaid three conditions is not satisfied in respect of a passenger air transport service, the same cannot be termed as 'scheduled air transport service' and, therefore, would be a non-scheduled (passenger) service as defined in clause (b) of the Explanation to Condition No. 104 of the exemption notification. In the present case, the aforesaid conditions are not satisfied and, therefore, the air transport service rendered by the appellants would be other than scheduled (passenger) air transport service.

58. Thus, both the requirements of clause (b) of the Explanation are satisfied. It is also not in dispute that the appellants have been granted non-scheduled operator permits, which permits have been renewed from time to time without any objection from the DGCA.

59. It has now to be seen whether the appellants have used the aircraft for providing non-scheduled (charter) services as defined in clause (c) of Condition No. 104 of the Explanation to the exemption notification.

60. Non-scheduled (charter) services have been defined in clause (c) to mean services provided by a non-scheduled (charter) air transport operator, for charter or hire of an aircraft to any person, with a published tariff, and who is registered with and approved by DGCA for such purposes and who confirms to the Civil Aviation Requirements. An aircraft operator can be said to provide non-scheduled (charter) service only if the service satisfies the requirements of clause (c). The appellants are not registered and approved with DGCA as non-scheduled (charter) air transport operator and in some cases there is no published tariff. The appellants, therefore, cannot be said to have provided non-scheduled (charter) services as defined in clause (c).

61. The appellants have, therefore, provided non-scheduled (passenger) services, as defined in clause (b) of the Explanation to the exemption notification. Non-scheduled (passenger) operator can carry out charter service

62. It would now have to be seen whether there is any restriction or prohibition against providing air transport service by way of charter of aircraft, while providing non-scheduled (passenger) services.

63. As noticed above, the definitions of air transport service and non-scheduled (passenger) service do not stipulate any restriction or impose a condition that such service should be rendered only on per-seat basis and not by chartering nor is there any stipulation in CAR 1999 issued by DGCA for grant of permits to operate non-scheduled air transport (passenger) services. In fact paragraph 9.2 of CAR 1999, which deals with non-scheduled air transport (passenger) services, categorically provides that a non-scheduled operator can conduct charter operations.

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65. What needs to be noticed is that the exemption notification does not prohibit a non-scheduled (passenger) service permit holder to use the aircraft for charter operations. A conjoint reading of the definitions contained in the Aircraft Rules, as have been adopted in the definition in clause (b) of the Explanation to Condition No. 104 of the exemption notification, makes the following position quite clear:

- (a) The expression "air transport service" covers service for the transport by air of person for any kind of remuneration whatsoever. The service may be individually for each seat or by chartering the entire aircraft and the remuneration may be of any kind whatsoever, such as seat-wise or daily or weekly or monthly or annual basis. There is no restriction on the mode and manner of fixing or charging the remuneration either in the exemption notification or in the Aircraft Rules;
- (b) "Scheduled (passenger) air transport service" only means that air transport service which has the essential features mentioned in the definition in rule 3(49) of Aircraft Rules, namely, it must be undertaken between the same two or more places, operated according to a time table or with flights so regular or frequent that they constitute a recognizable systematic series, each flight being open to use by the 'members of the public'; and
- (c) If a service is covered by "air transport service" defined in rule 3(9) and is other than "scheduled (passenger) air transport service" defined in rule 3(49), it is a "non-scheduled (passenger) service" within the meaning of clause (b) of the Explanation to the exemption notification.

66. It needs to be noticed that Condition No. 104 specifically refers to the definitions contained in the Aircraft Rules as also Civil Aviation Requirements issued under the provisions of rule 133A of the Aircraft Rules. Both, CAR 1999 that deals with non-scheduled (passenger) services operator and CAR 2000 that deals with non-scheduled (charter) services operator define a non-scheduled air transport services (passenger) in the same manner as defined in clause (b) of the Explanation to Condition No. 104.

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68. It is, therefore, clear that an operator providing non-scheduled (passenger) services can always provide such services either on individual seat basis or by chartering the entire aircraft and such a restriction is not contained either in Condition No. 104 or Aircraft Rules or the Civil Aviation Requirements.

69. It also needs to be remembered that charter is one way in which passenger services can be rendered; the only difference is that instead of individual seats, all the seats of an aircraft are hired out to one person. It is, therefore, difficult to conceive that by chartering the aircraft, non-scheduled (passenger) services would not be rendered as even in such a case an operator transport passengers.

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71. In this view of the matter, the contention of the learned special counsel for the department that a charter permit is required for carrying out charter operations cannot be accepted. In fact, the prohibition is on a non-scheduled (charter) holder to carry out (passenger) operations.

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Whether the aircraft can be used by members of public

86. The definition of "private aircraft" under rule 3(43) of Aircraft Rules, does not warrant the view that if tariff is not published, the use of aircraft would be private. In terms of rule 3(43), private aircraft is other than public transport aircraft. Public transport aircraft is defined in rule 3(46) as aircraft which effects public transport and public transport is defined in rule 3(45) to mean all carriage of persons or things effected by aircraft for a remuneration of any nature whatsoever, and all carriage of persons or things effected by aircraft without such remuneration if the carriage is effected by an air transport undertaking. Air transport undertaking

is defined in rule 3(9A) to mean an undertaking whose business includes the carriage by air of passengers or cargo for hire or reward. It would follow from the aforesaid definitions that where the aircraft is used for carriage of persons for a remuneration it is a public transport aircraft and not a private aircraft. There is no stipulation in the said definitions that if tariff is not published, the use of aircraft would be as a private aircraft. Admittedly, in the present case, the appellants have used the aircraft for carriage of persons for remuneration. Further, where the business of an undertaking includes carriage by air of persons it would be an air transport undertaking and if such an undertaking also uses the aircraft to effect carriage of persons without remuneration, it would still be public transport aircraft and not a private aircraft. Therefore, even assuming that some flights are conducted for carriage of persons without remuneration, it would be still be a public transport aircraft and not a private transport aircraft.

87. Even otherwise, the purpose of having a published tariff is to apprise the public of the rates at which the aircraft would be available. The appellants hire the aircrafts to customers pursuant to tenders/negotiations. The purpose of having a published tariff is, therefore, substantially complied with.

88. Learned special counsel for the appearing for the department submitted that the aircraft is being provided for private use and is not available to use by the public.

89. Learned counsel for the appellants submitted that the aircraft is available not only to group companies but also to other customers.

90. In the first instance, personnel of companies which are group companies of the appellant are also members of public. The aircraft is, therefore, available for used by the public. Even otherwise, this cannot be a reason to hold that the air transport service provided by the appellants would fall outside the scope of non-scheduled (passenger) service.

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Requirement of issuing air-tickets

"100. The definitions of 'air transport service' and 'non-scheduled (passenger) service' do not stipulate any restriction or condition that such service should be rendered only on per-seat basis. Nor is there any stipulation in the said definitions for issuance of passenger tickets. The Policy Guidelines for Starting Scheduled/Non-Scheduled Air Transport Services issued by the Ministry of Civil Aviation clearly state that non-scheduled operation means an air transport service other than scheduled air transport service and that it may be on charter basis and/or non-scheduled basis and that such operator is not permitted to publish time schedule and issue tickets to passengers. A operator of non-scheduled passenger service is, therefore, not required to issue tickets to passengers.

101. Learned special counsel for the department has, however, placed reliance upon paragraph 9.7 of CAR 1999 to contend that non-issue of passenger tickets would amount to not rendering non-scheduled (passenger) service.

102. This contention cannot not be accepted. Paragraph 9.7 of CAR 1999 provides that non-scheduled operators shall issue passenger tickets in accordance with the provisions of the Carriage By Air Act, 1972 and any other requirements which may be prescribed by DGCA. As noticed above, the Policy Guidelines for starting scheduled/non-scheduled air transport services issued by Ministry of Civil Aviation provide that non-scheduled operator is not permitted to publish time schedule and issue tickets to passengers. There is, therefore, no obligation on the part of the appellants to issue tickets to passengers.

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(Emphasis Supplied)

34. It is also not possible to accept the contention of the Department that Larger Bench did not examine the issue of demand of duty in terms of the undertaking. This issue was examined at length by the Larger Bench and the findings are as follows:

Whether the customs authorities have the jurisdiction to decide violation of the exemption notification

"91. A perusal of the exemption notification clearly shows that it merely requires the conditions set out by the DGCA and the conditions imposed by the Civil Aviation Ministry be complied with for the operations of the non-scheduled operators. It, therefore, follows that it should be the jurisdictional authorities under the Civil Aviation Ministry which alone can monitor the compliance. As stated above initially by exemption notification dated 1-3-2007, entry no. 346B and Condition No. 101 was introduced in the exemption notification dated 1-3-2002 whereby the effective rate of duty on import of aircraft for scheduled air transport service was made 'nil'. As no exemption was granted to non-scheduled air transport service and private category aircraft, the Ministry of Civil Aviation made a strong representation for granting exemption for non-scheduled (passenger) service and non-scheduled (charter) services under conditions to be specified and recommended by the Civil Aviation Ministry. It is for this reason, as would be apparent from the statement made by the Hon'ble Finance Minister in the Parliament, that the exemption notification dated 3-5-2007 was issued granting 'nil' rate of duty on import of aircraft for non-scheduled (passenger) service as well as non-scheduled (charter) services subject to Condition No. 104.

92. The alleged misuse of the aircraft, as suggested by the customs authority, has repeatedly been clarified by DGCA and the Civil Aviation Requirements relating to non-scheduled (passenger) services. It is the DGCA which is empowered to issue the Civil Aviation Requirements under rule 133A of the Aircraft Rules. The DGCA has not complained of any violation by the non-scheduled (passenger) services operator and in fact has been renewing the permits from time to time. It is only when the competent authority under the Director General of Civil Aviation Ministry finds as a fact that the permit holders have violated the conditions that it would be open to the customs authorities, in terms of the undertaking given by the permit holders, to require payment of the duty, which otherwise was exempted by the notification.

93. Learned counsel for the appellants have submitted that whenever a fiscal benefit is granted on the basis of a certificate issued by another statutory authority, it is only that statutory authority which is empowered to monitor compliance of the conditions of the certificate and to initiate action, in case of non-compliance. In this connection learned counsel have placed reliance upon the decisions of the Supreme Court in *Zuari Industries Ltd. v. Commissioner of C. Ex. & Customs* [2007 \(210\) E.L.T. 648 \(S.C.\)](#), *Titan Medical Systems Pvt. Ltd. v. Collector of Customs, New Delhi* [2003 \(151\) E.L.T. 254 \(S.C.\)](#) and *Vadilal Chemicals Ltd. v. State of Andhra Pradesh* [2005 \(192\) E.L.T. 33 \(S.C.\)](#).

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99. It, therefore, follows that it is the jurisdictional authorities under the Civil Aviation Ministry that alone can monitor the compliance of the conditions imposed and the Customs Authorities can take action on the basis of the undertaking submitted by the importer only when the authority under the Civil Aviation Ministry holds that the conditions have been violated.

(Emphasis Supplied)

35. It is seen that the Larger Bench held that the undertaking to use the aircraft for non-scheduled (passenger) service can be said to have been violated only when the DGCA finds that the use of the aircraft is not in accordance with the permit granted by DGCA for non-scheduled (passenger) service and only in that event the Customs authority can demand duty in terms of undertaking. In the present case, the DGCA has not found the use of the aircraft by appellant to be in violation of permit for non-scheduled (passenger) service and in fact has renewed the permit year after year. There is, therefore, no violation of the undertaking and, therefore, Customs cannot demand duty in terms of the undertaking.

36. It also needs to be noted that the Larger Bench of the Tribunal specifically held that the decision of the Division Bench of the Tribunal in *East India Hotels* which holds that it is the Customs

department that has to ensure compliance of the undertaking is not correct. The Larger Bench also held that the decision of the Division Bench in King Rotors does not lay down the correct position of law.

Analysis of the division bench decisions

119. The division bench of the Tribunal in King Rotors held that since the flight operations are not open to the public, the aircraft would not be considered to have been used for non-scheduled (passenger) services. This view, as discussed above, proceeds on an incorrect appreciation of the definition of non-scheduled (passenger) services.

120. The division bench of the Tribunal in East India Hotels held that published tariff to the public is a mandatory requirement of a non-scheduled (passenger) service and so if the tariff is not published, the use of the aircraft would be as a private aircraft. It was also held that it is the customs department that has to ensure compliance of the undertaking. These views, for the reasons stated above, are not correct views.

121. This apart, both Sameer Gehlot and King Rotors have been distinguished by the division bench in East India Hotels for the reason that both these cases were covered by the earlier CAR 1999, whereas the case before the division bench was covered by CAR 2010.

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37. *The use of the aircraft has, therefore, been in accordance with the scope of non-scheduled (passenger) services and there is no violation of the undertaking to use the aircraft for non-scheduled (passenger) services."*

10.2 The aforesaid order of the Tribunal was appealed before the Hon'ble High Court of Delhi by the Revenue in CUSAA 11 of 2023. In the judgement dated 01.03.2023, it was held by the Hon'ble High Court of Delhi that the importer has fulfilled the condition No.104 of customs duty exemption notification, inasmuch as the aircraft has been used for remuneration. The relevant paragraphs of the above judgement are extracted and given below:

"6. The other questions relate to whether the respondent had complied with the Condition No.104 of the Notification and had used the aircraft for providing non-scheduled (passenger) services. The said question is also covered by the decision in East India Hotels Ltd. v. Commissioner of Customs, Central Excise and Central GST, New Delhi (supra).

7. It is not disputed that the respondent has provided the said services for remuneration. In the aforesaid view, notwithstanding that the respondent has not published its tariff for providing the said services, it has nonetheless complied with the conditions of providing non-scheduled (passenger) services as defined in the Explanation to the Condition No.104 of the Notification in question.

8. In view of the above, the question no.(i), as projected by the Revenue, is decided in its favour and the impugned order to the said extent is set aside. Insofar as the question whether the respondent has complied with the Condition No.104 of the Notification is concerned, the said question is answered in favour of the respondent in view of the decision of this Court in East India Hotels Ltd. v. Commissioner of Customs, Central Excise and Central GST, New Delhi (supra)."

10.3 We further find that Special Counsel for Revenue had argued that the order of the Tribunal in the case of Global Vectra Helicop Ltd., (supra) is not applicable to the present case, as the facts of the present case are different from the above referred case and it is distinguishable. In this regard we find that the Larger Bench of the Tribunal in its Miscellaneous Order No. M/85082/2022 dated 28.01.2022 had allowed the appellant in Customs Appeal No.338 of 2009 i.e., the appellants in this case, to intervene in the matter pending before them in VRL Logistics Ltd. (supra) Further, in the Interim Order No.3-23; 17-18; 14/2022 dated 08.08.2022, the Tribunal had specifically stated in paragraph about the appellants having been allowed as intervenor and the answers to the issues referred therein. The relevant paragraphs of the said order are extracted and given below:

"2. ... It needs to be stated that in Customs Appeal No. 338 of 2009, which is pending before the Principal Bench of the Tribunal at Delhi, submissions have been advanced as an intervenor.

xxx xxx xxx xxx

124. Thus, for the reasons stated above, the answers to the reference are as follows:

(i) The reference made to the larger bench has not been rendered infructuous on dismissal of the Civil Appeal filed by the department against the order of the Tribunal in Reliance Transport;

(ii) The appellants have not violated condition (b) of the Explanation contained in the exemption notification;

(iii) The aircraft imported for non-scheduled (passenger) services can be used for non-scheduled (charter) services;

(iv) Aircraft imported by the appellants cannot be classified as private aircraft;

(v) The customs authority cannot examine the validity of the permission granted by the DGCA, in the absence of cancellation of the permit by the DGCA;

(vi) It is not mandatory for the importer to issue air tickets for providing non-scheduled (passenger) service;

(vii) CAR 2010 merely amalgamates CAR 1999 and CAR 2000 to provide a uniform code for operation of non-scheduled air transport services. It has restated and codified the position stated earlier by the DGCA through various clarifications and is explanatory in nature; and

(viii) The division bench in King Rotors was not correct in holding that the decision of the Tribunal in Sameer Gehlot was rendered per incuriam.

125. The appeals may now be listed before the regular division bench for hearing."

Hence, we do not find merits in the argument advanced by the Special Counsel decision of the Larger Bench has no relevant to this case.

10.4 Further, we also find that the charter hiring of the helicopter by the companies for their exclusive use, does not impact or change the role of appellants as non-scheduled (passenger) service operator who have been given specific permit by the DGCA to operate the specific imported helicopter and that the appellants alone are required to fulfil the basic conditions as an importer in availing the duty exemption in terms of notification No. 61/2007-Customs dated 03.05.2007. We have also independently examined the issues in dispute and in specific the fulfilment of exemption conditions by the appellants in respect of the impugned goods in our discussion at paragraphs 8.2 to 9.6 above, by examining the merits of the case. Further, we also find that the conclusions arrived at by the Larger Bench in the above case at paragraph 124(ii) (iii), (iv), (vi) and (vii), also supports the conclusion arrived by us independently on merits of this case. Thus, we find that the argument of the special Counsel to ignore the Larger Bench decision in VRL Logistics is inappropriate.

11.1 We also find that the order of the Tribunal the case of Airmid Aviation Pvt. Limited (supra), had dealt the genesis of the issue, distinction between definitions provided under the Aircraft Rules and explanation and the interpretation of statutes and exemption notification in detail. Upon such examination the Tribunal has held that exemption is eligible to non-scheduled (passenger) service operator as the peripheral circumstances such as absence of published tariff, non-issue of tickets and carriage of employees of companies, not to be construed as intention for own user by harmoniously interpreting the exemption notification and Aircraft Rules and CAR. The relevant paragraphs of the above order is extracted and given below:

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 \(313\) E.L.T. 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 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 3A 'scheduled 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 [of] 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.

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 40 cautionary 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 Rules 134 and 134A of Aircraft Rules, 1937 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, prescribes 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.

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 = 2019 (369) E.L.T. 1367 (Tri. - 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. v. CC, Ahmedabad* - [2015 \(316\) E.L.T. 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. v. CC (ACC & Import), Mumbai* - [2011 \(269\) E.L.T. 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 v. Sameer Gehlot* - [2011 \(263\) E.L.T. 129](#) (Tri. - Del.) and *Global Vectra Helicorp Ltd. v. CC (Import), Mumbai* - [2015 \(329\) E.L.T. 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* [[2015 \(316\) E.L.T. 494](#) (Tribunal)], 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 \(302\) E.L.T. 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 \(263\) E.L.T. 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. v. C.C. (ACC & Import)*, Mumbai - [2011 \(269\) E.L.T. 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 judgment also noticed provisions of the D.G.F.T. 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-a-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 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 Visakhapatnam 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."*

11.2 We also find that the Hon'ble Supreme Court in the Civil Appeal filed by the department against the above order of the Tribunal in the case of *Airmid Aviation Services (P) Ltd., (supra)* have dismissed the appeal by holding that that they did not find that issues raised by the Revenue is covered under its jurisdiction in terms of Section 130 E of the Customs Act, 1962 to entertain such appeal and thus they had dismissed

the appeal by keeping all the issues of law as open. The relevant paragraphs in the said order is extracted below:

"4. We have gone through the statement of case filed on behalf of the appellant and do not find that the issues raised come within the four corners of Section 130E of the Customs Act, 1962.

5. We, therefore, do not see any reason to entertain these appeals in our jurisdiction under Section 130E of the Customs Act, 1962.

6. The civil appeals are, therefore, dismissed leaving all questions of law open to be agitated in an appropriate case."

"26. The following conditions have to be satisfied pre-negative list for a service to qualify as a GTA service :

- (i) There should be an activity in relation to transport of goods by road;
- (ii) Issuance of consignment note by the GTA;
- (iii) Activity is performed by a GTA for another; and
- (iv) Activity is performed for consideration.

27. It cannot be doubted that the first condition with regard to both pre-negative list and the post-negative list is satisfied since RMC has been transported by the appellant using transit mixers of the appellant by road. The second condition relating to issuance of consignment note by GTA in the pre-negative list period and the post-negative list period is also satisfied as the appellant had issued the consignment notes. The third condition in the post-negative list period is that the activity should be performed by the GTA for another. It cannot be doubted that the appellant has undertaken the transportation of RMC for the mine owners. The fourth condition of the post-negative period is that the activity should be performed for a consideration. It cannot also be doubted that the appellant is receiving consideration from the service recipient as is clear from the invoices raised by the appellant to the service recipient.

28. Thus, the appellant has been rendering GTA service by transporting RMC from one place to another as per the directions of the service recipient. The finding to the contrary recorded in the impugned order by the Commissioner that the appellant was not performing GTA service but was performing STG service cannot be sustained.

6. From the above decision of the principal Bench of this Tribunal, it can be seen that the facts such as transportation of RMC by similar vehicles for M/s. Ultratech Cement Limited for transportation from M/s. Ultratech Cement Limited plant to the customer's site of M/s. Ultratech Cement Limited, it was held that appellant in that case are rendering GTA service by transportation RMC from one place to another as per the direction of the service recipient. Therefore, the same is not classifiable under supply of Tangible Goods for Use service."

11.3 We also find that the Co-ordinate Bench of the Tribunal in the case of *Taneja Aerospace and Aviation Ltd., (supra)* have held that when the aircraft is used in terms of the permit issued by DGCA and when used for remuneration purposes only, the confirmation of demand by denying the customs duty exemption under Serial No.347B under Notification No. 61/2007-Customs dated 03.05.2007 and imposition of redemption fine upon confiscation with penalty on the importer cannot

be sustained. The relevant paragraphs in the above said order is extracted below:

"11. *The submissions advanced by the learned senior counsel for the appellant deserve to be accepted as the issues raised in this appeal has been decided by the Larger Bench of the Tribunal in the order dated 8-8-2008. In fact, the reference was made to the Larger Bench in this appeal.*

12. *The following issues were decided by the Larger Bench of the Tribunal in the order dated 8-8-2022:*

- (i) *In terms of Condition 104 of the exemption notification, if a service is covered by "air transport service" defined in rule 3(9) of the Aircraft Rules and is other than scheduled (passenger) air transport service defined in rule 3(49), it would be a NSOP (passenger) services within the meaning of clause (b) of the Explanation to Condition No. 104 of the exemption notification. These two conditions are satisfied by the importers, inasmuch as: -*
 - a. *The contention of the department that the appellants have rendered "air transport service" to their group companies by carrying personnel of their group companies is not of any relevance as there is no prohibition in the said definition against any kind of persons to be transported;*
 - b. *There is no stipulation or restriction or a condition in the definition that a tariff should be published or that such service should be rendered only on per-seat basis and not by chartering or about the category or class of persons to be transported;*
- (ii) *There is no requirement of having a published tariff and Condition 104 (c) to the exemption notification cannot be said to be violated on this ground;*
- (iii) *Aircraft imported for non-scheduled (passenger) services can be used for non-scheduled (charter) services and there is no restriction on the same. The exemption notification or the CAR do not prohibit a non-scheduled (passenger) service permit holder to use the aircraft for charter operations. This is for the reason that:*
 - (a) *NSOP (passenger) is a much wider category and specifically includes charter operations in which the entire aircraft is given for hire or reward by charging remuneration from the hirer;*
 - (b) *Where the regulatory requirements under the CARs itself permit the NSOP (passenger) holder to carry out charter operations, it would not be correct on the part of the department to contend that NSOP (passenger) holder cannot carry out charter operations and that these services are mutually exclusive;*
 - (c) *DGCA has unequivocally clarified that charter operations are permissible. It is the DGCA which is empowered to issue CARs under rule 133A of the Aircraft Rules. Thus, NSOP (passenger) permit holder can carry out charter operations.*
- (iv) *Only because some flights are conducted without remuneration, it would not classify the aircraft imported as a private aircraft. Personnel of companies which are group companies of the importers are also members of public. The aircraft is, therefore, available for use by the public. Even otherwise, this cannot be a reason to hold that the air transport service provided would fall outside the scope of non-scheduled (passenger) service;*
- (v) *The Customs Authority cannot examine the validity of the permission granted by the DGCA in absence of cancellation of the permit by the DGCA and it is the DGCA alone that can monitor the compliance of the conditions imposed*
- (vi) *The Customs Authorities can take action on the basis of the undertaking submitted by the importer only when the DGCA holds that the conditions of the permit issued by them have been violated; and*

(vii) It is not mandatory for the importer to issue air tickets for providing NSOP services

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

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

It is also significant to note that the learned Commissioner in the impugned order has held that he did not find any wilful mis-declaration or suppression on the part of the appellants and had confirmed the demand only as per the undertaking given by them and not under Section 28 *ibid*. Thus, on the basis above decision of the higher appellate forum and based on such findings given in the impugned order, both confiscation and imposition of penalty is not sustainable.

12. In view of the above analysis of the legal provisions and on the basis of the orders passed by the Tribunal, the Hon'ble High Court of Delhi and the Hon'ble Supreme Court, we are of the considered view that the import of Bell Helicopter (Model No.412-EP, Sr. No.36643 registered as VT-HGK) by the appellants vide B/E No.397583 dated 26.12.2007 is eligible for grant of exemption from the whole of the import duties of customs under Serial No. 347B of the Notification No.21/2002-Customs dated 01.03.2002 as amended by Notification No. 61/2007-Customs dated 03.05.2007.

13. Therefore, we do not find any merits in the impugned order, in so far as it has confirmed the demand of customs duty and confiscated the imported goods offering the same on redemption fine and imposed penalties on the appellants. Therefore, by setting aside the impugned order dated 16.03.2009, the appeal is allowed in favour of the appellants.

(Pronounced in open court on 16.07.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)