CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 635 of 2011

(Arising out of Order-in-Original No. CC-(RT) 10/2011 ACC (I) dated 05.05.2011 passed by the Commissioner of Customs (Import), Mumbai)

Raymond Ltd. **.... Appellant**
Mahindra Towers, B-Wing, 2nd Floor,
Pandurang Budhkar Marg,
Worli, Mumbai- 400 018.

Versus

Commissioner of Customs (ACC & Export), Mumbai **.... Respondent**
Air Cargo Complex, Sahar,
Andheri (East), Mumbai- 400 099.

WITH

Customs Appeal No. 636 of 2011

(Arising out of Order-in-Original No. CC-(RT) 10/2011 ACC (I) dated 05.05.2011 passed by the Commissioner of Customs (Import), Mumbai)

P.K. Ratta CEO **.... Appellant**
Raymond Limited,
Mahindra Towers, B-Wing, 2nd Floor,
Pandurang Budhkar Marg,
Worli, Mumbai- 400 018.

Versus

Commissioner of Customs (ACC & Export), Mumbai **.... Respondent**
Air Cargo Complex, Sahar,
Andheri (East), Mumbai- 400 099.

Appearance:

Shri Gopal Mundra a/w Ms Geenita Bodani, Advocates for the Appellant
Shri Ashwini Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87586-87587/2023

Date of Hearing: 07.12.2022
Date of Decision: 06.06.2023

Per: S.K. MOHANTY

The appellant in this case, is the holder of Non-Scheduled Air Transport Service (Passenger) Operator (for short, 'NSOP'), having Permit No. 08/1996 dated 29.01.1996 issued by the Director General of Civil Aviation (DGCA), Ministry of Civil Aviation. The appellant is engaged in providing non-scheduled air transport services for remuneration by using the aircrafts, for which DGCA has granted such NSOP permit. For servicing, maintenance and repair of aircrafts, the appellant had imported various parts, upon availing the benefit of exemption from payment of Customs duty provided under Serial No. 347C of Notification No. 21/2002–Customs dated 01.03.2007 as amended by Notification No. 61/2007–Customs dated 03.05.2007. Availment of the benefit of duty exemption claimed by the appellant was objected to by the department and accordingly, an enquiry was initiated by Delhi Customs (Preventive) Commissionerate, which has resulted in issuance of Show Cause Notice (SCN) dated 15.05.2009. In the said SCN, the department had proposed for confirmation of the duty demand along with interest and for imposition of penalty on the appellant. The matter arising out of the SCN dated 15.05.2009, was adjudicated by the learned Commissioner of Customs (Import), Air Cargo Complex (ACC), Mumbai vide Order-in-Original dated 05.05.2011(for short, referred to as 'the impugned order'), wherein the benefit of notification No.21/2002-Cus. dated 01.03.2012 claimed by the appellant was denied. Besides, the impugned order has also confirmed the differential duty demand along with interest, and also imposed penalty on the appellant, as proposed for in the SCN. The impugned order has also confiscated the aircraft parts under Section 111(o) of the Customs Act, 1962 and in lieu of such confiscation, has ordered for redeeming the same on payment of redemption fine. The impugned order has also imposed penalty on the other appellant Shri P.K.Ratta. Feeling aggrieved with the impugned order dated 05.05.2011, both the appellants have preferred these appeals before the Tribunal.

2. In support of confirmation of the adjudged demands in the impugned order, the learned adjudicating authority has based his findings on the following aspects:

> (i) that for 40% of the total flights constituting 29% of the aircraft flying hours, the aircrafts were not operated for providing service to members of public for remuneration;
>
> (ii) that the exemption notification for import of parts clearly prescribed that the import of parts was on the basis of an intended use i.e. for operating non-scheduled passenger service only;

(iii) since 40% of the flight and 29% of the flight hours of the aircraft were put to a non-remunerative use, akin to use of a private (individually or company) owned aircraft, it resulted in violation of the customs exemption notification, which specified the word "only", indicating exclusive use of the aircraft for operating non-scheduled passenger service.

(iv) the appellant's contention that the conditions in exemption notification are deemed to have been met on the basis of the NSOP permit renewed every year by DGCA, was not accepted, on the ground that the exemption notification does not link itself to the conditions set out by DGCA.

(v) that Para 2.5 of the Civil Aviation Requirements (CAR), Section 3 of the Air Transport Series C Part 3, Issue II dated 01.06.2010 which provides that an NSOP operator is allowed to operate revenue charter flights for its group companies, subsidiary companies, etc., are not applicable to the instant case, as it does not involve recovery of remuneration for the 40% of total flights and 29% of the aircraft flying hours.

3. Heard both sides and perused the case records.

4. On examination of the case records, we find that neither the SCN nor the impugned order have disputed the facts that the imported goods have been used by the appellant for servicing, repair or maintenance of the aircrafts; that the aircrafts hold an NSOP license, which is valid and subsisting till date; that the appellant has been filing the passenger manifest and monthly returns with DGCA as regards the aircrafts, in which the disputed parts are used; and that the aircraft is being used for providing services to the public at large, against a remuneration, as well as for limited corporate use in respect of which, the expenses are debited to the books of accounts maintained by the appellant.

5. We find that the impugned order has interpreted the condition No.105 attached to the Notification No. 21/2002-Customs dated 01.03.2002 to mean that the expression 'specified use' is for the aircrafts and not of the impugned imported goods used for servicing, repair and maintenance of the aircrafts. On reading of the said condition attached to notification dated 01.03.2002, it transpires that the following conditions should be cumulatively fulfilled to avail the exemption from payment of customs duty:

> (i) the aircraft parts should be imported for servicing, repair or maintenance of aircraft;
>
> (ii) the aircraft should be used for operating non-scheduled (passenger) service or non-scheduled (charter) services;
>
> (iii) the importer should furnish an undertaking that the imported goods shall be used for the specified purpose only and in the event of failure to use the parts for the specified purpose, the importer would be liable to discharge the differential Customs duty.

6. The phrase 'specified use' provided in Condition No.105 (supra) refers to the usage of the imported parts of the aircraft; and as long as the imported parts are used for servicing, repair or maintenance of aircraft, holding an NSOP license, the conditions provided therein would stand fulfilled. In other words, the said condition No.105 does not impose any stipulation about the usage of the aircraft only for NSOP (Passenger) or only for NSOP (Charter) basis, in which the imported parts have been used.

7. From the records of the case and the submissions made by the appellant, it transpires that hiring and usage of aircraft is for a remuneration or such charges are being duly accounted in the books of accounts, whenever such hire or usage is by the appellant's company. Thus, the appellant is fulfilling the Civil Aviation Requirements, 2010 (CAR). Even assuming that the appellant is not charging any amount for usage of the aircrafts for their own use, but the restrictions provided in the CAR shall not be applicable to the case in hand inasmuch as the said provisions came into effect only from 01.06.2010 and hence, is prospective in operation and cannot be applied retrospectively.

8. We find that with regard to availment of the benefit of duty exemption provided under Notification No. 21/2002–Customs dated 01.03.2002 as amended by Notification No. 61/2007–Customs dated 03.05.2007, there were conflicting views expressed by the Co-ordinate Benches of the Tribunal. In the case of *Commissioner of Customs, New Delhi Vs. Sameer Ghelot – 2011 (263) E.L.T. 129 (Tri.- Del.),* the Tribunal has held that the benefit of exemption provided under Notification dated 03.05.2007 (supra), which has amended the earlier notification dated 01.03.2002 (supra) should be

available to the importer of an aircraft, which had been granted with the permission by the DGCA for operating NSOP. However, in the case *of King Rotors & Air Charter P. Limited Vs. Commissioner of Customs (ACC & Import), Mumbai* – 2011 (269) E.L.T. 343 (Tri. Mumbai), the Tribunal has expressed a different view and has held that the exemption provided under the aforesaid notification should not be available. Considering the different views expressed by Co-ordinate Benches of the Tribunal, the Ahmedabad Bench of the Tribunal, in the case of *VRL Logistics Limited Vs. Commissioner of Customs, Ahmedabad (in Customs Appeal No.74 of 2010),* has referred the matter to the Larger Bench for resolution of the dispute. The Larger Bench vide interim order No. 3-23; 17-18; 14/2022 dated 08.08.2022, has dealt with the questions framed by the Referral Bench and answered in the following manner:

"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.

xxx xxx xxx

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.

67. CAR 1999 contains the following relevant provisions:

> *(a) There will be no restriction on the type and seating capacity of the aircraft to be importer/acquired by the applicant.*
>
> *(b) Non-scheduled operators can conduct charter/non-scheduled operations for transportation by air of persons, mail or goods. In such operations, the operators shall not publish their time schedules as the operations are of non-scheduled nature.*

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

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

70. This apart, a perusal of the definition of non-scheduled (passenger) services contained in the Explanation to Condition No. 104 would show that it includes within its scope all air transport services other than scheduled (passenger) air transport services. Therefore, all services which are not scheduled services are permitted non-scheduled (passenger) services. Thus, also non-scheduled (passenger) permit holders can perform air transport services either by selling individual seat or by hiring out the entire aircraft for non-scheduled operations.

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

xxx xxx xxx"

9. Upon dealing with the subject matter of dispute referred to by the referral Bench, the Larger Bench of the Tribunal in the Interim Order dated 08.08.2022 (supra) had held that the order in *King Rotor* does not lay down the correct position of law. The correct legal position, relevant for consideration of the issues in hand, were answered by the Larger Bench at paragraph 124, which are as under:

"124……

(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;…" .

10. In view of the settled position of law as decided by the Larger Bench (supra), we are of the firm opinion that the impugned order, confirming the adjudged demands on both the appellants cannot be sustained on merits. Therefore, the impugned order dated 05.05.2011 is set aside and the appeals are allowed in favour of the appellants.

(Order pronounced in open court on 06.06.2023)

(C J Mathew)
Member (Technical)

(S.K. Mohanty)
Member (Judicial)

SM