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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.04.2023

+ **CUSAA 35/2023, CAV 176/2023 & CM Nos.16208/2023 & 16209/2023**

**COMMISSIONER OF CUSTOMS (PREVENTIVE),
NEW CUSTOMS HOUSE, NEW DELHI** Appellant

Through: Mr. Harpreet Singh, SSC with Ms. Suhani Mathur & Mr. Jatin Kumar Gaur, Advs.

Versus

M/S. GLOBAL VECTRA HELICORP LTD. Respondent

Through: Mr. Kishore Kunal, Mr. Manish Rastogi & Ms. Runjhun Pave, Advs.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN**

VIBHU BAKHRU, J

1. We have heard the counsel for the parties.
2. The Revenue has filed the present appeal impugning an order dated 22.09.2022 (Final Order No.50920-50928/2022, hereafter the '**impugned order**') passed by the Customs, Excise & Service Tax Appellate Tribunal (hereafter the '**Tribunal**') in Customs Appeal No.415/2009 filed by the respondent.
3. The impugned order is a common order which also disposed of the Revenue's cross objections (Cross Objection No.212/2009) in

Customs Appeal No.415/2009 as well as eight other appeals filed by the Revenue.

4. The principal controversy involved in the present appeal relates to the compliance of Condition No.104 of the Exemption Notification No.21/202-Cus dated 01.03.2002 as amended by Notification No.61/07-Cus dated 03.05.2007 (hereafter the '**Exemption Notification**').

5. The Commissioner of Customs (Preventive) had issued a show cause notice dated 06.08.2008 in respect of three helicopters, which were imported by the respondent by availing the benefit of the Exemption Notification. It was, *inter alia*, alleged in the said show cause notice that the helicopters (Registration No.VT-AZV and Registration No.VT-AZU) were imported for 'non-scheduled air transport (passenger) service'; however, the said helicopters were not used for the said purpose. It was alleged that the respondent has not complied with the Civil Aviation Requirement, Section 3, Air Transport Service 'C', Part 3 dated 08.10.1999, which requires the non-scheduled operators to issue passenger tickets in accordance with the provisions of Carriage by Air Act, 1972. It was further alleged that the respondent had charged fixed monthly charges for the period August, 2007 to January, 2008 from M/s Vectra Aviation Pvt. Ltd. (hereafter '**Vectra**') – a group company of the respondent – therefore the helicopters were not used for non-scheduled (passenger) services. It was alleged that this was in violation of the Condition No.104 of the

Exemption Notification and thus the respondent was liable to pay duty.

6. In respect of another helicopter (Registration No.VT-AZX), it was, *inter alia*, alleged that the same was given on a long-term lease contract to M/s Dhillon Aviation Pvt. Ltd. and the same was in violation of the Exemption Notification as the permit obtained by the respondent was for non-scheduled (passenger) services.

7. In view of the allegations contained in the show cause notice, the respondent was called upon to show cause as to (a) why the helicopters should not be confiscated under Section III(d) and 111(o) of the Customs Act, 1962 (hereafter the '**Customs Act**'); (b) penalty under Sections 112 and 114A of the Customs Act not be imposed; (c) and an amount of ₹23,79,24,458/- along with interest be not recovered as customs duty in respect of the three aircrafts.

8. A tabular statement setting out the import details and the breakup of the customs duty demanded in respect of the three aircrafts is set out below:

"Bill of Entry No. & Date"	Name of Aircraft	Registration No.	Total Customs Duty
218552 dt. 30.04.2007	Helicopter EC 155 B1	VT-AZU	Rs.10,76,52,087/-
943814 dt. 26.03.2008	Helicopter AS 350 B3	VT-AZX	Rs.2,57,29,428/-
220447 dt. 29.06.2007	Helicopter EC 155 B1*	VT-AZV	Rs.10,45,42,943/-

* Sold on 19.03.2008"

9. Thereafter, by an order dated 27.04.2009 (Order-in-Original), the Adjudicating Authority confirmed the demand of ₹21,21,95,030/- along with penalty of ₹5,00,00,000/- under Section 112(a) of the

Customs Act in respect of the two helicopters bearing registration signs VT-AZU and VT-AZV. In addition, a redemption fine of ₹5,00,00,000/- was also imposed in respect of the helicopter bearing registration sign VT-AZU. However, the custom duty demand of ₹2,57,29,428/- in respect of the helicopter bearing registration sign VT-AZX was dropped.

10. The Adjudicating Authority found that the allegation that conditions of the Exemption Notification were not satisfied on account of private use by the group company of the respondent, was not sustainable. Further, non-issue of tickets was not a valid ground for alleging that the aircrafts were not used for providing non-scheduled (passenger) air transport services and non-filing of passenger manifest did not constitute violation of any of the provisions of the Customs Act.

11. In regard to the use of helicopter bearing Registration No.VT-AZX for operations by Oil and Natural Gas Corporation Limited (hereafter '**ONGC**'), the Adjudicating Authority held that the long term contracts would fall within the purview of Charter Operations and, accordingly, there was no violation of the Exemption Notification on account of the use of the said aircraft for operations by ONGC.

12. The respondent filed an appeal against the Adjudicating Authority to the extent that it confirmed the demand of custom duty in respect of helicopters bearing Registration Signs VT-AZU and VT-

AZV; imposed penalty of ₹5,00,00,000/-; and, levied a redemption fine of ₹5,00,00,000/- under Section 125 of the Customs Act.

13. The Revenue also filed an appeal in respect of the findings of the Adjudicating Authority, which were in favour of the respondent.

14. The Tribunal allowed the appeal filed by the respondent and rejected the cross-objection filed by the Revenue. The Tribunal also rejected the other appeals (which are not the subject matter of the present appeal) preferred by the Revenue by the common impugned order.

15. The principal question before the learned Tribunal was whether the respondent had violated the Condition No.104 of the Exemption Notification. The Tribunal found in favour of the respondent that it had not. The Tribunal held that since the helicopters were used for passenger services for remuneration, the same were compliant with the Condition No.104 of the Exemption Notification.

16. The Tribunal referred to the interim order dated 08.08.2022 passed by the Larger Bench of the Tribunal in Custom Appeal No.74/2010 captioned ***M/s VRL Laboratories Ltd. v. Commissioner of Customs, Ahmedabad*** and noted that the decision was dispositive of several issues raised in the appeal/cross objection.

17. It is relevant to mention that one of the grounds urged by the respondent for assailing the order passed by the Adjudicating Authority was that it had travelled beyond the allegations in the show

cause notice. It was, *inter alia*, alleged in the show cause notice that the two helicopters bearing registration signs VT-AZU and VT-AZV had been leased to a group company of the respondent and therefore, were not being used for non-scheduled (passenger) services. Although the Adjudicating Authority accepted that the helicopter was used for non-scheduled passenger services, nonetheless, it held that the conditions of the Exemption Notification were violated. This was premised on the finding that the conduct of the respondent amounted to transfer of his Non-Scheduled Operator Permit (hereafter the ‘NSOP’) to its group company Vectra, which was impermissible. The respondent claimed that there was no such allegation in the show cause notice and therefore, the Adjudicating Authority had travelled beyond the show cause notice.

18. The Tribunal accepted the aforesaid contention. The relevant extract of the impugned order reads as under:

- “20. The learned senior counsel for the appellant also submitted that the confirmation of demand in regard to the import of two Helicopters AZU and AZV for the reason that the appellant had transferred the NSOP (passenger) to a group company deserves to be set aside as such an allegation was not even raised in the show cause notice.
21. This submission deserves to be accepted for it is a fact that such an allegation was not made in the show cause notice. The show cause notice had been issued to the appellant alleging that the Helicopters were not being used for NSOP (passenger) purposes as the appellant had entered into various long-term contracts which amounted to a “lease”. These allegations were rebutted by the appellant by establishing that no Helicopter was hired exclusively to any one party. The Commissioner agreed with the contention of the appellant that the Helicopters were not leased out to any

party and, in any event, a wet lease was permitted. However, the demand was confirmed by the Commissioner on a completely new ground that the appellant had in fact transferred its NSOP to a group company, VAPL, who was not a NSOP holder. This demand is entirely beyond the allegations made in the show cause notice and has, therefore, to be set aside. Thus, the Commissioner could not have confirmed the aforesaid demand since the appellant had not been put to notice on this allegation in the show cause notice.

24. Thus, for the aforesaid reasons, the confirmation of demand by the Commissioner against the appellant for the two Helicopters AZU and AZV and for confiscation of Helicopter AZU with an option to redeem the same on payment of Rs. 5 crores under section 125 of the Customs Act cannot be sustained and is set aside.
25. Customs Appeal No. 415 of 2009 filed by the appellant, therefore, deserves to be allowed and is allowed. Cross-Objections filed by the Department deserve to be rejected and are rejected.
26. Customs Appeal No's. 571, 572, 574, 575, 576, 577, 578 and 579 of 2009 filed by the Department against the dropping of demand so far as Helicopter AZX is concerned and the dropping of penalties against the individual Directors of the companies for the reasons stated above, deserve to be dismissed and are dismissed."

19. In the aforesaid context, the Revenue has filed the present appeal and projected the following questions for consideration of this Court:

- i. Whether in the facts and circumstances of the case the Hon'ble Tribunal is right in holding that the Customs Authority cannot examine whether the appellants have fulfilled the condition of exemption notification.
- ii. Whether in the facts and circumstances of the case the Hon'ble Tribunal has misinterpreted the notification and concluded that the respondent company has

complied with the conditions for availing duty exemption under the notification.

- iii. Whether in the facts and circumstances of the case the Hon'ble Tribunal is right in holding that non-scheduled (passenger) operator can carry out charter service.
- iv. Whether in the facts and circumstances of the case the Hon'ble Tribunal is right in holding that there is no obligation on the part of the respondent company to issue tickets to the passengers."

20. It is relevant to note that neither ground has been raised in the present appeal nor any specific question is projected regarding the Tribunal's finding that the Adjudicating Authority had travelled beyond the scope of the show cause notice. The demands raised in respect of helicopters having Registration Nos.VT-AZU and VT-AZV was on the basis that the respondent had transferred the NSOP to its group company. The Tribunal found that there was no such allegation in the show cause notice and the order passed by the Adjudicating Authority was liable to be set aside. There is no challenge to the said conclusion in this appeal.

21. Insofar as the questions projected by the Revenue are concerned, the same are covered by an earlier decision of this Court in ***East India Hotels Ltd. v. Commissioner of Customs, Central Excise and Central GST, New Delhi: CUSAA 5/2020 decided on 31.01.2023.***

22. Question no. (i), as projected by the Revenue, relates to the following conclusion of the learned Tribunal, which in turn is based

on the order dated 08.08.2022 passed by the larger bench of the Tribunal:

“(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”

23. The aforesaid issue [question (i) as projected by the revenue] is covered in favour of the Revenue. In *East India Hotels Ltd (supra)*, this Court had held that it would be open for the Custom Authorities to examine whether the conditions of the Exemption Notification are satisfied. The Court further held that the Custom Authorities would not be bound by the decision of the Director General of Civil Aviation (DGCA) in this regard and it is not necessary that the permit granted to the operator be cancelled by the DGCA for the Custom Authorities to take any action for violation of the terms of the Exemption Notification. The Custom Authorities can independently examine whether the conditions of the Exemption Notification have been violated.

24. The other questions, as projected by the Revenue, are covered against the Revenue by the aforesaid decision in *East India Hotels Ltd.(supra)*.

25. In the present case, there is no dispute that the respondent had used the helicopters for air transport services as defined in sub-rule (9) of Rule 3 of the Aircraft Rules, 1937 (hereafter the ‘**Aircraft Rules**’).

Thus, the condition that the helicopters were used for non-scheduled (passenger) services/ non-scheduled (charter) services was satisfied.

26. Mr. Harpreet Singh, learned counsel appearing for the Revenue, submits that the present appeal also raises an additional question whether the helicopters imported for non-scheduled (passenger) services could be used for non-scheduled (charter) services. He submits that the said question was not covered by the decision in the case of *East India Hotels Ltd.* (*supra*).

27. The said contention is not merited. Although Mr Singh is correct that the said question did not arise in *East India Hotels Ltd.*(*supra*), the interpretation of Condition No.104 of the Exemption Notification and the Aircraft Rules, 1937, as accepted by the Court in the said decision, would answer question no. (iii) as well. This is briefly explained hereafter.

28. It is relevant to refer to Condition No.104 of the Exemption Notification and the same is set out below:

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

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

29. It is clear from a plain reading of the aforesaid Condition of the Exemption Notification that the exemption from custom duties would be available in respect of an aircraft used for providing non-scheduled (passenger) services or non-scheduled (charter) services. Accordingly, if the aircraft is used for either of the aforesaid purposes, the Condition No.104 of the Exemption Notification would be satisfied.

30. The expression ‘non-scheduled (passenger) services’ is defined to mean ‘air transport services other than the scheduled (passenger) air transport services’.

31. The expression ‘air transport services’ is defined under sub-rule (9) of Rule 3 of the Aircraft Rules, which reads as under:

“(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;”

32. In *East India Hotels Ltd.* (*supra*), this Court had noted that the term ‘air transport service’ is defined in wide terms and would cover transport by air of humans, animals, mails or any other thing, animate or inanimate. However, for a service to fall within the meaning of air transport service as defined in Rule 3(9) of the Aircraft Rules, it is essential that the same is provided for some kind of remuneration.

33. This Court had also referred to paragraphs 2.4 and 2.5 of the Civil Aviation Requirement (CAR), Section 3, Air Transport Series ‘C’ Part-III issue-II, dated 01.06.2010 issued by the DGCA. The said paragraphs are set out below:

“2.4 The carriage of passengers by a non-scheduled operator’s permit holder maybe performed on per seat basis or by way of chartering the whole aircraft on per flight basis, or both. There is no bar on the same aircraft being used for either purpose as per the requirement of customers from time to time. The operator is also free to operate a series of flights on any sector within India by selling individual seats but will not be permitted to publish time table for such flights. Operation of revenue charters to points outside India may also be undertaken as per paragraph 9.2.

2.5 A non-Scheduled Operator is also allowed to operate revenue charter flights for a company within its group companies, subsidiary companies, sister concern, associated companies, own employees, including Chairman and members of the Board of

Directors of the company and their family members, provided it is operated for remuneration, whether such service consists of a single flight or series of flights over any period of time.”

34. It is apparent from a plain reading of paragraph 2.5 aforesaid that a non-scheduled operator is also allowed to operate revenue charter flights for related entities.

35. Mr. Harpreet Singh’s contention that the respondent was not permitted to use the helicopters for non-scheduled (passenger) services as it had imported the aircrafts for non-scheduled (charter) services is insubstantial. Condition No.104 of the Exemption Notification would be satisfied even if the aircraft imported is used for non-scheduled (passenger) services. It is further relevant to note that non-scheduled (passenger) services would also include non-scheduled (charter) services if provided for passengers.

36. It is also material to note that the Exemption Notification was further amended by Notification No.21/2011-Cus dated 01.03.2011 and the following explanation has been added to Condition No.104 of the Exemption Notification:

“2. For the purposes of this exemption, use of such imported aircraft by a non-scheduled (passenger) operator for non-scheduled (charter) services or by a non-scheduled (charter) operator for non-scheduled (passenger) services, shall not be construed to be a violation of the conditions of import at concessional rate of duty.”

37. Although, the requirements of Condition No.104 of the Exemption Notification are unambiguous but the aforesaid

explanation inserted by way of amendment of Condition No.104 of the Exemption Notification amply clarifies that the exemption condition would be satisfied if the aircraft imported is used for non-scheduled (passenger) services or non-scheduled (charter) services.

38. In view of the above, no substantial question of law arises in the present appeal.

39. The impugned order, to the extent that it holds that 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, is set aside.

40. The appeal is partly allowed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

APRIL 06, 2023

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