CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 60 OF 2010

(Arising out of Order-in-Original No. 23/Commr/HKT/09 dated 20.11.2009 passed by the Commissioner of Customs, New Delhi-110037)

Bharat Hotels **...Appellant**

VERSUS

Commissioner of Customs (Preventive) **...Respondent**
New Delhi

WITH

CUSTOMS APPEAL NO. 61 OF 2010

(Arising out of Order-in-Original No. 23/Commr/HKT/09 dated 20.11.2009 passed by the Commissioner of Customs, New Delhi-110037)

Ms. Jyotsna Suri **...Appellant**

VERSUS

Commissioner of Customs (Preventive) **...Respondent**
New Delhi

AND

CUSTOMS APPEAL NO. 62 OF 2010

(Arising out of Order-in-Original No. 23/Commr/HKT/09 dated 20.11.2009 passed by the Commissioner of Customs, New Delhi-110037)

Mr. Madhav Sikka **...Appellant**

VERSUS

Commissioner of Customs (Preventive) **...Respondent**
New Delhi

APPEARANCE

Shri V. Lakshmikumaran, advocate, Shri Rachit Jain, Advocate Ms. Jyoti Pal and Shri Ashwani Bhatia, Advocate for the appellant.

Shri P.V.R. Ramanan, Special Counsel and Shri Rakesh Kumar, Authorized Representative for the Department

CORAM: **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 17.11.2022
Date of Decision: 19.01.2023

FINAL ORDER NO. 50046-50048 /2023

JUSTICE DILIP GUPTA:

Customs Appeal No. 60 of 2010 has been filed by Bharat Hotels Pvt. Ltd.[1] to assail the order dated 20.11.2009 passed by the Commissioner of Customs (Preventive)[2], by which the aircraft imported by the appellant against the Bill of Entry dated 16.05.2007 on the basis of a non-scheduled operator permit (charter) issued by the Directorate General of Civil Aviation[3] has been confiscated under section 111(0) of the Customs Act 1962[4] with an option to redeem the same. The order also seeks to confirm the customs duty in terms of the undertaking given by the appellant at the time of importation and also imposes penalty under section 112 of the Customs Act.

2. **Customs Appeal No. 61 of 2010** has been filed by the Jyotsna Suri, Chairman and Managing Director of the appellant to assail the penalty of Rs. 25 lakhs imposed upon her under section 112 of the Customs Act.

3. **Customs Appeal No. 62 of 2010** has been filed by the Madhav Sikka, Senior Vice President of the appellant to assail the imposition of penalty of Rs. 5 lakhs imposed upon him under section 112 of the Customs Act.

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1. **the appellant**
2. **the Commissioner**
3. **DGCA**
4. **the Customs Act**

4. The appellant had imported the aircraft claiming customs duty exemption under Notification No. 61 of 2017 dated 03.05.2007[5] that amended the earlier Exemption Notification No. 21 of 2002 dated 01.03.2002. Prior to importing the aircraft, the appellant had obtained the no objection certificate from DGCA on 08.02.2007 to operate the aircraft for non scheduled air transport (charter) services. It needs to be noted that the appellant had earlier also imported an aircraft after obtaining a permit on 06.02.2004 from the DGCA to operate non scheduled air transport (charter) services. After importing the second aircraft through the Bill of Entry dated 16.05.2007, the appellant requested the DGCA for inclusion of the newly imported aircraft in the earlier permit dated 06.02.2004 and on being satisfied that the appellant fulfilled the requirements, the DGCA, by a letter dated 04.10.2007, endorsed the newly imported aircraft in the earlier permit.

5. The appellant claims that during the intermittent period from May 2007 to October 2007 it could not use the newly imported aircraft for charter services since the endorsement had not been made by the DGCA in the permit and so the aircraft was used by the Chairperson and Managing Director of the appellant and other employees of the appellant for business purposes only. In other words, the aircraft was used for non revenue flights. The appellant also claims that when the endorsement was made in the permit on 04.10.2007, the newly imported aircraft was used of charter services. Time taken by DGCA for renewal of the permit has also been stated to be a reason for use of this aircraft for non-revenue purposes for

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5. the exemption notification

the period from 06.02.2008 to 18.06.2008. The appellant has also stated that for subsequent period there has been no utilization of flights for non-revenue purposes by the Chairman/Director/ employees.

6. The appellant had submitted a chart to the Commissioner giving details of the hourly breakup of the time the aircraft was flown and the relevant portion is reproduced below:

Sr. No.	**Period**	**Revenue /Non-Revenue**	**Total Hours Flown**	**No. of Landings**	**Total Bills Raised**	**No. of Passenger Manifest**
i	ii	iii	vi	vii	ix	x
1.	07.07.07 to 03.10.07	Non-Revenue	50:30:30	43	0	33
2.	04.10.07 to 05.02.08	Revenue	83:45:00	61	26	61
3.	06.02.08 to 18.06.08	Non-Revenue	121:05:00	107	0	59
4.	19.06.08 to 31.03.09	Revenue	313:00:00	207	73	190
			Total	**418**	**99**	**343**

7. According to the department, the appellant had used the aircraft for charter purposes only for fifty hours out of the total 244.9 flown hours and, therefore, the appellant had violated Condition No. 104 of the exemption notification. A show cause notice dated 18.07.2018 was, therefore, issued to the appellant. The appellant filed a reply dated 01.09.2008. The submissions made by the appellant in the reply were not accepted by the Commissioner and an order dated 20.11.2009 was passed, which order has been assailed in these appeals.

8. The exemption notification dated 03.05.2007, on which revolves the entire controversy, grants 'nil' rate of duty on import of aircraft for non-scheduled (passenger) services as well as non-scheduled (charter) services subject to Condition No. 104 that is required to be fulfilled by an importer of the aircraft for availing the benefit of the exemption notification. The relevant portion of the said exemption notification is reproduced below:

> "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,-
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> (i) xxxxxxxx
>
> (ii) after S. No. 347 and the entries relating thereto, the following S. Nos. and entries shall be inserted, namely:-

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)
347B	8802(except 8802 60 00)	All Goods	Nil	-	104

> xxxxxxxx
>
> **(B)** in the Annexure, after Condition No. 102 and the entries relating thereto, the following Conditions shall be inserted, namely:-
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> xxxxxxxxxx

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 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."

9. A perusal of Condition No. 104 would show that at the stage of import, the importer should have an approval from the competent

authority in the Ministry of Civil Aviation[6] and the importer should, at the time of importation, also furnish an undertaking to the customs authority that the aircraft will be used for the specified services, namely non-scheduled (passenger) services or non-scheduled (charter) services. The undertaking should also state that the importer shall pay on demand, the duty payable, in the event of his failure to use the imported aircraft for the specified purpose.

10. The appellant hold permits provided by DGCA for non-scheduled (charter) services. The permit has been renewed from time to time and has been endorsed for the additional aircraft imported by the appellant. Such operations have been carried out by the appellant without any objection from either the DGCA, which had issued the permit or from the MCA. After 03.05.2007, when the conditional exemption notification was issued, the appellant started availing the benefit of the said exemption. The customs authority, however, raised an issue that the operations carried out by the appellant were not covered by the permit that had been granted by the DGCA and, accordingly, a show cause notice was issued to the appellant alleging inter alia that the aircraft was used in violation of the permit, and consequently in violation of the exemption notification.

11. The only issue that arises for consideration in the present appeal is whether there has been any violation of Condition No. 104 of the exemption notification. The relevant findings of the Commissioner on this issue are as follows:

> "16. It is seen from the arguments of the aircraft importer made in these proceedings that they are trying to defend themselves only on the basis of Rules &

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6. MCA

Regulations made for the implementation of Civil Aviation requirements. Though department has reservation about non-violation of the condition of NSOP but **if on this issue the opinion of DGCA is different then Customs department can not force DGCA to take a particular opinion. However, in these proceedings action is not being taken to cancel NSOP permit given by the DGCA but action is being taken to recover Customs duty & other related issues.**

17. So far as demand of duty and taking other actions under the customs law the provision of exemption notification No. 21/02-cus as amended, are required to be implemented by the Customs department. **Any non-compliance of the conditions, as brought out clearly in para 3 & 4 of the Show Cause Notice, gives customs department the jurisdiction to take action.**

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19. It is clear from para 18 (ii) above that "the aircraft should have been used only for non-scheduled (charter) services. **Argument of the aircraft importer is acceptable only to the extent that non-revenue flights for training of pilots/co-pilots and to keep aircraft airworthy will have to be allowed looking to the security of aircraft etc. However, such a meaning cannot be given to even those non-revenue flights undertaken by the aircraft carrying Chairman & other employees of the aircraft importer.** For which no charter bills are raised as per a published tariff. **Such private flights or non-revenue flights for the Chairman and employees of the aircraft importer may be permissible under the Civil Aviation Law but the same cannot be interpreted to be also permissible under the provisions of Notification No. 21/02-cus as amended.** The provision of Air Craft Rules & Regulations cannot be applied to the interpretation of the provision of Customs Notification when no linking clause has been provided in the language of the Notification No. 21/02-cus as amended.

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20. **In view of the above there is a non-compliance of the post importation conditions as per**

the provisions of exemption notification No. 21/02-cus, as amended, read with the undertaking given by the aircraft importer at the time of importation. Duty demand of Rs. 6,67,18,387/- is, therefore, required to be confirmed and recovered from the aircraft importer by virtue of the undertaking given under condition No. 104 of the exemption notification No. 21/02-cus as amended. xxxxxxxxxxxx

21. **The act of non-compliance of the conditions of exemption notification makes the aircraft Beechcraft** King Air B 300 (350), imported vide B/E NO. 219892 dated16.05.07, **liable to confiscation under Section 111(o) of the Customs Act, 1962 and also makes the aircraft importer M/s Bharat Hotels Ltd, are liable to penal action under Section 112 of the Customs Act, 1962.**

22. So far as imposition of penalty upon Sh. Madhav Sikka is concerned it is seen that he was aware of the fact that the aircraft was being used by the Chairperson & other officials of aircraft importer without any payment. By his acts Sh. Madhav Sikka has made himself liable to penal action under Section 112 of the Customs Act, 1962.

23. Mrs. Jyotsna Suri Chairperson & MD of aircraft importer company vide her letter dated 20.06.08 submitted that Sh. D.V. Batra & Sh. Lalit Bhasin are non working Director & were not involved in the day to day working of the company and she has authorized Sh. Madhav Sikka Senior vice-president of the company to defend the company in the matter. It is further observed that Smt. Jyotsna Suri has signed the undertaking also under the exemption notification filed at the time of importation wherein it has been undertaken that the aircraft will be used for non- scheduled (charter) services only. In spite of giving such an undertaking she kept on using the aircraft for herself & other officials without the aircraft being taken on charter. She is liable to penalty under Section 112 of the Customs Act, 1962."

(emphasis supplied)

12. Shri V. Lakshmikumaran, learned counsel appearing for the appellant made the following submissions:

(i) The appellant had correctly availed the benefit under the exemption notification dated 03.05.2007. In support of this contention reliance has been placed on the decision of the Tribunal in **M/s. VRL Logistics Ltd.** vs. **Commissioner of Customs, Ahmedabad**[7];

(ii) The customs authority can take action on the basis of the undertaking submitted by the importer only when the authority under the DGCA holds that the conditions have been violated. In the present case, no proceedings have been initiated till date by the DGCA against the appellant and the permits were renewed from time to time. Therefore, the impugned order confirming the demand is liable to be set aside;

(iii) The aircraft is not a private aircraft and flights undertaken by the Chairman/Managing Director are not restricted in terms of the exemption notification and/or under Civil Aviation Laws;

(iv) Duty is not liable to be confirmed by virtue of undertaking given under Condition No. 104 of the exemption notification;

(v) The demand under section 28 of the Customs Act has been raised without any authority of law;

(vi) The dropping of the demand under section 28 of the Customs Act and at the same time confirming the

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7. Customs Appeal No. 74 of 2010 decided on 08.08.2022 (Ahmedabad)

demand as per the Undertaking is beyond the scope of the show cause notice and in any case could not have been rectified by the impugned order;

(vii) The 'principal of comity' is applicable to the present notification since the DGCA has concurrent jurisdiction and the customs authority cannot initiate proceedings to invoke the undertaking;

(viii) The exemption notification must be interpreted keeping in mind the very purpose for which it was introduced i.e. to encourage the import of aircrafts which could be used for non-scheduled operations;

(ix) 'Public transport' means 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. Carriage of persons without remuneration by an air transport undertaking is also considered as 'public transport'. Thus, carriage of Chairman, employees, etc. by the appellant would be considered as 'public transport'. In any case, the remuneration to be charged by the operator can be of any nature, including remuneration in kind and it need not be in cash. Therefore, the consideration for providing air transport service to the employees, including Chairman, Director, etc. is the service they provided to the company in turn; and

(x) Once the appellant falls under 'Public Transport Aircraft' category, the question of aircraft being

Private Aircraft does not arise as "Private aircraft" means all aircraft other than aerial work aircraft or public transport aircraft.

13. Shri P.R.V. Ramanan, learned special counsel for the Department assisted by Shri Rakesh Kumar, learned authorized representative appearing for the Department made the following submissions:

(i) The decision of the Larger Bench of the Tribunal in **VRL Logistics** is clearly distinguishable;

(ii) In the present case, the appellant was granted approval to import the impugned aircraft only for providing 'non-scheduled (charter) services' whereas in the case of **VRL Logistics**, the importers has been granted approval for providing 'non-scheduled (passenger) services;

(iii) The appellant had used the aircraft for flying the Directors, employees on private trips which were non-revenue in nature;

(iv) The competent authority of MCA has no role to play on deciding whether the importer has complied with the conditions prescribed in the impugned notification;

(v) Liability to customs duty flows from section 12 of the Customs Act and the sovereign power to recover any duty that ought to have been paid is of the customs authority. The satisfaction of the concerned customs authority flows from the Undertaking submitted by the appellant; and

(vi) Civil Aviation Requirement dated 01.06.2010[8] would not be applicable as the show cause notice was issued on 21.07.2008 and the impugned order was passed on 20.11.2019.

14. The submissions advanced by the learned counsel for the appellant and the learned special counsel for the Department have been considered.

15. It would be useful, before adverting to the submissions to relate certain essential facts and the relevant legal provisions.

16. 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 28.02.2007 on the import of aircraft was 3%/12.5%. Subsequently, pursuant to the proposal made in the Finance Bill 2007, exemption notification no. 20/2009 dated 01.03.2007 was issued inserting Entry 346B and Condition No. 101 in the earlier exemption notification dated 01.03.2002, 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 03.05.2007, 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

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8. 2010 CAR

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)

17. 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.

18. The aforesaid exemption notification dated 03.05.2007 inserted Condition No. 104 which requires at the stage of import, an approval from MCA to import the aircraft for non-scheduled (charter) service and an undertaking by the importer to the customs authority that the aircraft would be used only for non-scheduled (charter) 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.

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

> '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."

20. At the time when Condition No. 104 was inserted on 03.05.2007, Civil Aviation Requirement dated 08.10.1999[9] as well as Civil Aviation Requirement dated 17.05.2000[10], which had been issued under rule 133A of the Aircraft Rules, were in force.

21. It is keeping in mind the aforesaid factual position and the provisions of law that the submissions advanced by the learned counsel for the appellants, as also the learned special counsel appearing for the Department have to be considered.

22. The impugned order records a finding that if the opinion of DGCA is different from customs authority regarding non-violation of condition of the exemption notification, then customs authority cannot force the DGCA to take a particular opinion but customs authority can take action to recover the duties. The impugned order also holds that private non-revenue flights undertaken by the aircraft for the Chairman and other employees are private flights and though such flight may be permissible under the Civil Aviation Law but the same cannot be interpreted to be also permissible under the provisions of the exemption notification. The impugned order also

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9. 1999 CAR
10. 2000 CAR

holds that duty has been confirmed by virtue of an Undertaking given under Condition No. 104 of the exemption notification.

23. The issue as to whether DGCA is the final authority and the customs authorities are bound by the views expressed by the DGCA has been considered by the Larger Bench of the Tribunal in **VRL Logistics**. In the paragraphs 91, 92, 93, 95 and 99 of the decision it has been held that customs authority can take action on the basis of the Undertaking submitted by the importer only when the authority under the DGCA holds that the conditions have been violated. The relevant paragraphs are reproduced below:

> **"Whether the customs authorities have the jurisdiction to decide violation of the exemption notification**
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> 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 01.03.2007, entry no. 346B and Condition No. 101 was introduced in the exemption notification dated 01.03.2002 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 03.05.2007 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.** vs. **Commissioner of C. Ex. & Customs [2007 (210) E.L.T. 648 (S.C.)], Titan Medical Systems Pvt. Ltd.** vs. **Collector of Customs, New Delhi [2003 (151) E.L.T. 254 (S.C.)]** and **Vadilal Chemicals Ltd.** vs. **State of Andhra Pradesh [2005 (192) E.L.T. 33 (S.C.)]**.

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95. In **Titan Medical Systems,** by an exemption notification, certain goods which were imported into India against an advanced licence for the purpose of manufacture were exempted from duty of customs. A show cause notice was, however, issued by the customs to show cause as to why penalty should not be imposed for not having complied with the conditions of the exemption notification. The Supreme Court found that the licencing

authority had not taken steps to cancel the licence, and infact the licencing authority did not even claim that there was any misrepresentation. Thus, when an advanced licence had been issued and not questioned by the licencing authority, the customs authorities could not refuse exemption on an allegation that there was a misrepresentation and even if there was any misrepresentation, it was for the licencing authority to take steps. The relevant portion of the judgment of the Supreme Court is reproduced below:

> "13. As regards the contention that the appellants were not entitled to the benefit of the exemption notification as they had misrepresented to the licensing authority, it was fairly admitted that there was no requirement, for issuance of a licence, that an applicant set out the quantity or value of the indigenous components which would be used in the manufacture. Undoubtedly, while applying for a licence, the appellants set out the components they would use and their value. However, the value was only an estimate. It is not the respondents' case that the components were not used. The only case is that the value which had been indicated in the application was very large whereas what was actually spent was a paltry amount. **To be noted that the licensing authority having taken no steps to cancel the licence. The licensing authority have not claimed that there was any misrepresentation. Once an advance licence was issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an allegation that there was misrepresentation.** If there was any misrepresentation, it was for the licensing authority to take steps in that behalf."
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> **(emphasis supplied)**

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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)

24. The aforesaid view was relied upon and followed by the Tribunal in **Reliance Commercial Dealers Ltd.** vs. **Commissioner of Customs (Preventive), New Customs House, Delhi**[11] and the relevant portion is reproduced below:

> "35. …… 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."

25. Learned special counsel appearing for the Department, however, made an attempt to distinguish the decision of the Larger Bench in **VRL Logistics** on the ground that the facts in the present case are different. It is not possible to accept this contention. The facts may be different in the sense that in the case of **VRL Logistics**, the aircraft was to be used for non-scheduled (passenger) services, while in the present case the aircraft is to be used for providing non-scheduled (charter) services but this would not make any difference as it is the law laid down by the Larger Bench that has to be examined and followed.

26. Thus, in view of the aforesaid decisions of the Tribunal, it has to be held that the customs authority cannot demand duty in the absence of proceedings initiated by DGCA. In the present case, proceedings have not been initiated by DGCA against the appellant and in fact the permits have been renewed time to time.

27. The impugned order also holds that non-revenue flights undertaken by the aircraft carrying Chairman and other employees

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11. Customs Appeal No. 640 of 2010 decided on 08.09.2022

are private flights and though such flights may be permissible under the Civil Aviation Law but the same cannot be interpreted to be also permissible under the exemption notification.

28. It needs to be noted that Condition No. 104 of the exemption notification refers to Aircraft Rules 1937 and thus compliance or non-compliance of Condition No. 104 is required to be examined in the light of the clarification provided by DGCA and not in isolation. The approvals given by the DGCA has necessarily to be examined.

29. The Larger Bench of the Tribunal in **VRL Logistics** also dealt with scope of 'private flights' and 'flights without remuneration' in the following manner:

> "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 air craft 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.**
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> *****
>
> 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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> **(emphasis supplied)**

30. As would be seen, the Larger Bench held that even if it is assumed that some flights had been conducted for carriage or persons without remuneration, it would still be a public transport aircraft and not a private transport aircraft and that personnel of companies which are group companies of the appellant would also be members of public. Thus, the aircraft is available for use by the public. In the same manner, the use of the aircraft by the Chairman/Managing Director for non-revenue purpose would not make the aircraft a private aircraft.

31. This apart, as would be seen from the flight details, the aircraft was primarily used for revenue purposes.

32. There is also no restriction on use of aircraft by Chairman/Managing Director under Aircraft Rules and Regulations or under the exemption notification. The Larger Bench of the Tribunal in **VRL Logistics** also held that:

> "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."

33. The impugned order also holds that duty is liable to be confirmed in view of the Undertaking given by the appellant under Condition No. 104 of the exemption notification.

34. The duty could not have been confirmed merely on the basis of the Undertaking. This is what was held by the Tribunal in **Reliance Commercial**, after relying upon the decision of the Larger Bench of the Tribunal in **VRL Logistics**, and the relevant paragraph 35 is reproduced below:

> "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."

35. Thus a demand can be made under the Undertaking only when DGCA finds that the use of the aircraft is not in accordance with the permit granted by the DGCA. In the present case, DGCA has not initiated any proceedings against the appellant and in fact has renewed the permit from time to time.

36. Such being in the position, it would not be necessary to examine the other contentions raised by the learned counsel for the appellant for setting aside impugned order.

37. Once it is held that the demand could not have been confirmed, the penalties imposed upon the Chairman/Managing Director and the Vice President of the appellant cannot also be sustained.

38. In view of the aforesaid discussion, the impugned order dated 20.11.2009 passed by the Commissioner cannot be sustained and is set aside. Accordingly, Customs Appeal No. 60 of 2010, Customs Appeal No. 61 of 2010 and Customs Appeal No. 62 of 2010 are allowed with consequential benefit(s).

(Order Pronounced on **19.01.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

JB, Shreya