CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Customs Appeal No. 55387 of 2013

(Arising out of Order–in-Original No. 16/RKB/CCE/NCH/2012 dated 25.10.2012 passed by the Commissioner of Customs (Adjudication), New Customs House, New Delhi)

M/s. Chimes Aviation Private Limited ....Appellant

VERSUS

Commissioner of Customs (Adjudication) ....Respondent
New Customs House, Delhi

With

Customs Miscellaneous Application No. 50087 of 2022
(filed on behalf of the respondent)

And

Customs Appeal No. 55388 of 2013

(Arising out of Order–in-Original No. 16/RKB/CCE/NCH/2012 dated 28.09.2012 passed by the Commissioner of Customs (Adjudication), New Customs House, New Delhi)

Uday Punj ....Appellant

VERSUS

Commissioner of Customs (Adjudication), ...Respondent
New Customs House, Delhi

With

Customs Miscellaneous Application No. 50088 of 2022
(filed on behalf of the respondent)

APPEARANCE:

Ms. Madhumita Singh and & Shri Sameer Sood, Advocates for the Appellant

Shri Satish Aggarwal, Special Counsel, Shri Rakesh Kumar and Shri Nagender Yadav, Authorized Representatives of the Department

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

Date of Hearing: 28.11.2022
Date of Decision: 20.01.2023

FINAL ORDER NO. _50058-50059/2023

JUSTICE DILIP GUPTA:

Customs Appeal No. 55387 of 2013 has been filed by M/s. Chimes Aviation Pvt. Ltd.[1] to assail the order dated 28.09.2012 passed by the Commissioner of Central Excise (Adjudication), New Delhi[2], confiscating eight CESSNA 172R Aircrafts under section 111(0) of the Customs Act, 1962[3] but permitting them to be redeemed on payment of redemption fine under section 125 of the Customs Act; ordering recovery of import duty amounting to Rs. 1,96,95,848/- forgone on the import of eight CESSNA Aircrafts with interest; ordering recovery of import duty amounting to Rs. 29,02,019/- forgone on imports of spare parts for maintenance of the said aircrafts with interest; imposing penalty of Rs. 1,96,95,848/- on the appellant for acts of omission and commission rendering the said Aircrafts and spare parts liable to confiscation under section 114 of the Customs Act; and ordering appropriation of bank guarantee of 3 crores executed by the appellant during the course of investigation and for adjustment towards the import duties forgone, redemption fines and personal penalty.

2. **Customs Appeal No. 55388 of 2013** has been filed by Uday Punj, Director of the appellant to assail the said order dated 28.09.2012 passed by the Commissioner in so far as it imposes a penalty of Rs. 1,96,95,848/- for acts of omission and commission which rendered the said Aircraft and the spare parts liable to confiscation under section 114 of the Customs Act.

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

3. Miscellaneous Application No. 50437 of 2022 was filed by the appellant in Customs Appeal No. 55387 of 2013 and Miscellaneous Application No. 50088 of 2022 was filed by the appellant in Customs Appeal No. 55388 of 2013 seeking permission of the Tribunal to introduce a new ground in the appeals, namely that the show cause notice issued by the Additional Director General, Director of Revenue Intelligence was without jurisdiction in the view of the decision of the Supreme Court in **Canon India Private Limited** vs. **Commissioner of Customs**[4]. These two Miscellaneous Application were allowed by order dated 28.09.2021 and the appellant was permitted to raise the ground at the time of hearing of the appeals.

4. The Department has filed Miscellaneous Application No. 50087 of 2022 in Customs Appeal No. 55387 of 2013 and Miscellaneous Application No. 50088 of 2022 in Customs Appeal No. 55388 of 2013 with a prayer that the hearing of the appeals may be adjourned for three months as review petitions had been filed by the Department before the Supreme Court for review of the judgment rendered in **Canon India**.

5. However, at the time of hearing of the appeals, Ms. Madhumita Singh learned counsel for the appellant stated that the appellant will not press the additional ground raised in the applications filed in the appeals and would argue the appeals on merits. In this view of the matter, the two Miscellaneous Applications filed by the Department have been rendered infructuous and are, accordingly, rejected.

6. The appellant imported eleven Aircrafts in 2008 for 'flying training' purposes at its training academy at Dhana, District Sagar in the State of Madhya Pradesh. These Aircrafts were cleared under the Exemption

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4. Civil Appeal No. 1827 of 2018 decided on 09.03.2021

Notification dated 01.03.2002, as amended by Notification dated 03.05.2007[5], under serial no. 347A read with Condition No. 103. Out of these eleven Aircrafts that were imported one Aircraft was completely damaged due to an accident on 06.04.2009 and one was sold to M/s. Chetak Aviation on 30.07.2008. According to appellant, one Aircraft was never operated. The appellant has further stated that to overcome financial constraints and to have funds for maintenance of the Aircrafts, the appellant sought approval from the Director General of Civil Aviation[6] to permit the operation of the Aircrafts for non-scheduled (charter) services. This category of import is also exempted from payment of customs duty in the same manner as Aircrafts for 'flying training' purposes. The permission was initially granted by the DGCA for ten Aircrafts, but it was subsequently reduced to five Aircrafts after an amendment was made in the Civil Aviation Requirement dated 01.06.2010[7].

7. The appellant claims that from the time of import i.e. 27.02.2008 till 31.03.2012, the appellant used the Aircrafts belonging to the appellant for a total time of 17,808:30 hours. Further, out of the total flying of 17,808:30 hours, the Aircrafts were used for non-scheduled (charter) services for only 217:05 hours i.e. 1.21% of the total flying hours. Thus, even after getting the permission for using the said Aircrafts for both training and charter services, the usage for non-scheduled (charter) service operations was very minimal i.e. 1.21% and the main activity continued to be 'flying training' using 98.79% of the flying hours.

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5. the exemption notification
6. DGCA
7. 2010 CAR

8. Apart from the import of the said Aircrafts, the appellant had also imported aircraft parts for maintenance of the said Aircrafts, after availing the benefit of duty exemption under Serial No. 347C of the exemption notification. During the period of 2008-11, the appellant imported various spare parts and cleared it by filling Bill of Entries from Air Cargo, New Delhi, ICD, Tuglakabad, New Delhi and Air Cargo, Kolkata.

9. As per Serial No. 347C of the exemption notification, the aircraft parts are entitled to nil rate of customs duty subject to the Condition No. 105 of the exemption notification. Condition No. 105, inter alia, stipulates that parts of aircrafts shall be used for repair and maintenance service of an aircraft used for operating flying training purpose or non-scheduled (charter) service and for the said purpose, the importer has to furnish an Undertaking that if the importer fails to use the imported parts for the specified purpose, an equal amount of duty shall be paid on demand on the said goods but for the exemption under the exemption notification.

10. The licenses granted by DGCA both for training as well as non-scheduled (charter) service were renewed from time to time.

11. To appreciate the issues involved in this appeal it would be appropriate, at this stage, to give the sequence of the events date wise:

S. No.	Date	Sequence of events
1.	21.04.2008	Approval granted by DGCA for starting Flying Training Institute at Sagar, MP for a period of 1 year w.e.f. 21.04.2008 to 21.04.2009
2.	29.04.2008	Approval granted by Ministry of Civil Aviation to import of additional Aircrafts
3.	29.04.2008	No objection from DGCA for Import/procurement of Aircraft/Helicopters for Flying Training purpose
4.	27.11.2008	Undertaking given before Customs Authorities at the time

		of clearance of aircrafts
5.	15.04.2009	Approval of renewal of Flying Training License by DGCA for another period of two months i.e. 22.04.2009 to 21.06.2009
6.	23.04.2009	Application submitted to Ministry of Civil Aviation for grant of NOC to operate non-scheduled air transport services (charter operations).
7.	15.06.2009	Approval granted by Ministry Civil Aviation to use aircrafts for non-scheduled (charter) services as well as flying training purposes.
8.	20.07.2009	Approval of renewal of Flying Training License by DGCA for period of one year i.e. 22.04.2009 to 21.04.2010
9.	28.07.2009	Endorsement of nine Aircraft in non-scheduled (charter) services Permit No. 16/2009 by DGCA
10.	12.04.2010	Approval of renewal of Flying Training License by DGCA for period of one month i.e. 22.04.2010 to 21.05.2010
11.	28.04.2010	Renewal of non-schedules (charter) service Permit No. 16/2009 from 17.04.2010 to 16.04.2011 by DGCA
12.	18.05.2010	Approval of renewal of Flying Training License by DGCA for one month i.e., 22.05.2010 to 21.06.2010.
13.	11.06.2010	Approval of renewal of Flying Training License by DGCA for 15 days i.e., 22nd June to 6th July 2010
14.	29.07.2010	Approval of renewal of Flying Training License by DGCA for 1 year i.e., 07.07.2010 to 06.07.2011
15.	21.04.2011	Renewal of non-scheduled (charter) service Permit No. 16/2009 from 17.04.2011 to 16.04.2013 by DGCA
16.	05.07.2011	Approval of renewal of Flying Training License by DGCA for a period of 3 months i.e., 07.07.2011 to 06.10.2011
17.	07.10.2011	Approval of renewal of Flying Training License by DGCA for a period of 3 months i.e., 07.10.2011 to 06.01.2012
18.	06.12.2011	Approval of renewal of Flying Training License by DGCA for a period of 6 months i.e., 07.01.2012 to 31.07.2012

12. A show cause notice dated 24.01.2012 was issued to the appellant stating therein that the appellant had imported the Aircrafts for the Flying Training Institute at nil rate of duty by claiming exemption under a notification and by specifying and undertaking the end use as 'flying training' but the Aircrafts were also being used for 'charter service' in violation of the said exemption notification. Besides, the appellant had also imported various spare parts for the maintenance of the imported eleven Aircrafts and availed the benefit of duty under the exemption

notification. The relevant portion the show cause notice is reproduced below:

> "16. In view of the above, it appears that the importer imported 11 Cessna 172-R aircrafts in 2008 from USA for their flying training institute CAA located at Dhana, M.P; that out of the said 11 aircrafts, one aircraft was sold to another flying training institute, M/s Chetak Aviation, Aligarh; that another aircraft was completely destroyed in a crash and a third aircraft remained non-operational due to certain technical problems its import. **Thereafter, CAA was awarded NSOP in May 2009 by the DGCA. Since then,. the remaining eight Cessna 172-R aircrafts as detailed in para 2 above had been used by CAA for the purpose of charter and other non-flying training services as well.** However, DGCA later on linked the number of aircrafts to be used for charter purpose with the paid up capital of the concerned company and accordingly, the number of aircrafts to be used for charter purposes was reduced to five by the DGCA. Hence, during the subsequent period, only five aircrafts bearing registration No. VT-AET (Piper Seneca 4PA-34), VT-CAD, VT-CAF, VT-CAG, and VT-CAK were being used by CAA for charter purposes. It is pertinent to mention that the aircraft, bearing registration No. VT-AET (Piper Seneca 4PA-34) has been procured indigenously by the importer and hence, it is not covered in the present Show Cause Notice.
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> 16.1 **As aforesaid, the said eight Cessna 172-R aircrafts had been imported duty free by declaring their intended purpose as flying training whereas CAA had been using them for charter and other non-flying training purposes in violation of the provisions of the Notification No. 21/2002-Cus dated 01.03.2002,** as amended by notification No. 61/2007-Cus dated 03.05.2007 and 06/2006-CE dated 01.03.2006 as amended by notification No. 24/2007-CE dated 03.05.2007. **The importer appears to have suppressed the end-use of the aircraft inasmuch as they willingly and intentionally did not disclose the fact before the Customs that the said eight aircrafts** (Cessna 172-R) were to be used / **were being used for charter purpose also after getting NSOP form the**

DGCA in May 2009. Further, the Importer appears to have deliberately suppressed the end-use of the spare parts inasmuch as they willingly and intentionally did not disclose the fact before the Customs that the spare parts as detailed in para 4.1 above were being used for maintenance of the aircrafts the end-use of which had been altered to include charter and other non-training services as well. As discussed above, the suppression of facts in this regard continued unabated even after May 2009 and well into 2010 and 2011 even when the importer was fully aware of the violation of end-use. Accordingly, the undertakings executed by the importer were wrong and misleading. Thus, by their above acts of omission and commission, the importer appears to have rendered the said eight aircrafts valued at Rs. 8,00,00,000/- (declared value) liable for confiscation under Section 111 (0) of the Customs Act, 1962. Further, by their above acts of omission and commission, the importer appears to have rendered the said imported spare parts valued at Rs. 1,15,81,061/- (Assessable Value) liable for confiscation under Section 111 (o) of the Customs Act, 1962.

17. **In view of the above, the importer has also rendered themselves liable for penal action under Section 112 (a) / 114A of the Customs Act, 1962.**

18, **Shri Uday Punj, Director of the importing firm admitted that at before the Customs that the aircrafts would be used for Flying Training only. He admitted that they were aware of the fact that the said aircrafts were imported for flying training only and as per the undertaking; the use of the said aircrafts for other purpose would attract payment of Customs duty payable on the said aircrafts. However, after getting the permission from the DGCA, they started charter services for the places like Nagpur, Kanha,** Bandhavgarh etc. He further admitted that they did not take any action to intimate the Customs Authorities that the aircrafts were being used for an additional purpose of Charter Services besides the undertaken flying training purpose. He further admitted that the use of the charter services for the places like Nagpur, Kanha, Bandhavgarh etc. He further admitted

that they did not take any action to intimate the Customs Authorities that the aircrafts were being used for an additional purpose of Charter Services besides the undertaken flying training purpose. He further admitted that the use of the aircrafts other than flying training is not in compliance of the undertaking given at the time of import of the said aircrafts. **Thus, Shri Punj, Director of the importing firm willingly and intentionally caused the wrong undertaking to be filed before the Customs leading to wrong availment of exemption notifications, as aforesaid. It, thus, appears that Shri Uday Punj, Director of Chimes has rendered himself liable for penal action under Section 112(a) / 114A of the Customs Act, 1962."**

(emphasis supplied)

13. The appellant filed a reply to aforesaid show cause notice and denied the allegations made therein but an order was passed by the Commissioner on 28.09.2012. The relevant portion of the said order passed by the Commissioner is reproduced below:

"40. **Condition No.103 relates to the duty free import of aircrafts for 'FLYING TRAINING' purposes by the DGCA approved Flying Training Institute. Condition No.104 relates to the duty free import of aircrafts for Non-Scheduled (Passenger) Services or Non-Scheduled (Charter) Services by the DGCA approved OPERATOR for carrying out Non Scheduled Passenger/Charter Services.**

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42. It is pertinent to note that on the date of importation and at the time of filing of Bill of Entry seeking exemption from payment of Customs duty, the importer is required to have first fulfilled the conditions mentioned therein for being eligible for the benefit of exemption **The noticee company in this case, M/s. Chimes Aviation Pvt. Ltd. filed the Bill of Entry and claimed exemption from payment of Customs duty under Condition No. 103 and furnished the necessary undertaking to the effect that they shall use the aircraft for specified**

> **purposes i.e. Flying Training Purposes only. This makes abundantly clear that despite the fact that they being aware of another Condition No. 104, they did not claim the benefit of exemption for transportation of passengers under Condition No. 104. *****
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> *****
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> 45. **Against the charge of willful violation of the terms and conditions of the exemption notification and their own undertaking** as the noticees neither informed the Customs Department to whom the undertaking was furnished at the time of clearance of goods nor did they inform the DGCA regarding their having furnished and existence of such an undertaking, **argument is raised that they were under a bonafide belief that they were not bound to intimate to Customs for use of the aircrafts for transportation of passengers; that Customs are not entitled to monitor the post importation conditions and that non-intimation to the Customs Department is a mere procedural lapse. I find that the argument totally misplaced and misconstrued.**
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> **(emphasis supplied)**

14. Ms. Madhumita Singh assisted by Shri Sameer Sood, learned counsel for the appellant, submitted that the Commissioner was not justified in demanding customs duty for the reason that the appellant had violated the conditions of the exemption notification since it is only when the competent authority under the DGCA finds 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 duty which otherwise was exempted by the notification. In support of this contention, learned counsel placed reliance upon the decision of the Larger Bench of the Tribunal in **M/s. VRL**

Logistics Ltd. vs. **Commissioner of Customs, Ahmedabad**[8] and also the decisions of the Division Bench of the Tribunal in **Reliance Commercial Dealers Ltd.** vs. **Commissioner of Customs (Preventive), New Customs House, Delhi** [9] and **M/s. Taneja Aerospace and Aviation Ltd.** vs. **Commissioner of Customs (Preventive), New Customs House, Delhi**[10].

15. Shri Satish Aggarwal, learned special counsel appearing for the Department assisted by Shri Rakesh Kumar and Shri Nagender Yadav, submitted that the decisions relied upon by learned counsel for the appellant are clearly distinguishable and that the Commissioner was justified in confirming the demand of customs duty for the reason that the appellant had violated the conditions set out in the exemption notification.

16. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the Department as also the learned authorized representative appearing for the Department have been considered.

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 28.02.2007 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

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8. Customs Appeal No. 74 of 2010 decided on 08.08.2022 (Ahmedabad)
9. Customs Appeal No. 640 of 2010 decided on 08.09.2022 (Delhi)
10. Customs Appeal No. 57 of 2010 decided on 22.09.2022 (Delhi)

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 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 dispute in the present appeals relates to violation of the conditions of the exemption notification dated 03.05.2007 which grants nil rate of duty to a flying training institute approved by the competent authority in the Ministry of Civil Aviation or to aircraft 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 or to parts imported for servicing, repair or maintenance of aircraft, which are used for flying training purposes or for operating non-scheduled (passenger) service or non-scheduled (charter) services. The relevant portion of the 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,-
>
> (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)
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

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

103. If, -

(a) the aircraft is imported by:-

(i) the Aero Club of India, New Delhi, recognized as a National Sports Federation by Ministry of Youth Affairs and Sports, Government of India; or

(ii) A Flying Training Institute approved by the competent authority in the Ministry of Civil Aviation; and

(b) the importer has been granted approval by the competent authority in the Ministry of Civil Aviation to import aircraft for use in imparting training; and

(c) 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 for the specified purpose only and 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;

b the aircraft imported under this concession shall not be sold/transferred to an entity other than a flying training institute approved by the Directorate General of Civil Aviation.

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..

105. If,-

(i) imported for servicing, repair or maintenance of aircraft imported or procured by Aero Club of India; or

(ii) imported for servicing, repair or maintenance of aircraft, which are used for flying training purposes or for

operating non-scheduled (passenger) service or non-scheduled (charter) services;

(iii) the importer furnishes an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs, as the case may be, at the time of importation that:-

a. the imported goods shall be used for the specified purpose only; and

b. he shall pay on demand, in the event of his failure to use the imported goods for the specified purpose, an amount equal to the duty payable on the said goods but for the exemption under this notification.

Explanation:- The expressions, "Aero Club of India", "operator", "non-scheduled (passenger) services" and "non-scheduled (charter) services" shall have the meanings."

20. A perusal of Condition Numbers 103 and 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[11] 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 and 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. A perusal of Condition No. 105 would show that at the stage of import, the importer should furnish an undertaking that the imported goods shall be used for the specified purposes namely, for servicing, repair or maintenance of aircraft which are used for flying training purposes or for operating non-scheduled (passenger) services or non-scheduled (charter) services and that the importer shall pay on demand, the duty payable, in the event of his failure to use the imported goods for the specified purpose.

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11. MCA

21. In the present case, as noticed above, the appellant had initially imported Aircrafts for flying training purpose and had given such an undertaking to the customs authorities. The DGCA had also granted permits to the appellant. It is subsequently on 23.04.2009 that the appellant submitted an application before the MCA for grant of a No Objection Certificate to operate non-scheduled (charter) services, which certificate was granted by the MCA on 15.06.2009 and on 28.07.2009 an endorsement was made in the permit. The show cause notice alleges that the earlier undertaking submitted by the appellant before the customs authorities was to the effect that the Aircrafts would be used only for flying training purpose but subsequently the appellant changed the purpose and started using the Aircrafts for non-scheduled air transport (charter) services without submitting any further undertaking, though a permit may have been granted by the DGCA to operate the Aircrafts for non-scheduled air transport (charter) services. The show cause notice, therefore, alleges them the appellant had violated the terms of conditions of the exemption notification as a result of which the customs duty was required to be paid by the appellant in terms of the undertaking.

22. The issue as to whether the customs authorities would have the jurisdiction to decide violation of the exemption notification was examined at length by a Larger Bench of the Tribunal in **VRL Logistics** and the relevant paragraphs are reproduced below:

> **"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 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."
>
> **(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)**

23. This decision of the Larger Bench was subsequently relied upon and followed by a Division Bench of the Tribunal in **Reliance Commercial Dealers** and **Taneja Aerospace**.

24. It is not possible to accept the contention of the learned special counsel appearing for the Department that the decision of the Larger Bench of the Tribunal distinguishable on facts.

25. Learned special counsel for the Department, however, relied upon the decision of the Delhi High Court in **M/s. Interglobe Enterprises Ltd.** vs. **Union of India & ors**[12] to contend that the customs authorities could determine violation of the exemption notification. In this case, the Directorate of Revenue Intelligence seized three luxury cars imported by the writ petitioner under the 'export promotion capital goods scheme' under which capital goods could be imported at concessional customs duty, subject to an export obligation equivalent to five times of CIF value of such good to be fulfilled by the importer over a period of 8 years reckoned from the date of the issue of the import license. The cars were

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12. 2006 (203) E.L.T. 202

seized for the reason that the export obligation had not been properly fulfilled. According to the petitioner, the **initiation of the investigation** was incompetent as a certificate had been issued by the Directorate General of Foreign Trade[13] certifying that the obligation in regard to two of the seized cars had been fulfilled. What was sought to be contended on behalf of the writ petitioner was that if the competent authority under the Scheme had interpreted or understood the Scheme in a particular fashion and certified due compliance with the conditions subject to which the imports were made, it was no longer open any other agency of the government to sit in judgment by placing a different interpretation of the Scheme. It is in this context, that the Delhi High Court observed as follows:

> "12. Two interpretations are thus being offered by the parties to the terms of the policy. The one offered by the petitioner if accepted would mean that once the capital goods are harnessed into the establishment, it is not necessary that the export obligation should be fulfilled only from out of the earning of the said goods. Foreign exchange earned generally by the importer can be used for satisfying the export obligation as had been done in the instant case. The other view is that export obligation could in the case of the cars imported by the travel agent be satisfied only by use of the cars and not otherwise. The importer has, therefore, not only to utilize the goods but, satisfy the export obligation from out of foreign exchange earned by such use. **The true position appears to us to be that while capital goods may or may not be capable of generating convertible foreign exchange by their independent use as is the position in the case of the lift in a hotel or the cars imported by the travel agent, the least that the importer must demonstrate is that the goods were put to use for the business activity for which the same were imported.** The scheme does not in our view envisage

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13. DGFT

> imports where the goods are not meant for use in the business activity of the importer nor can the goods be diverted for some other use without violating the conditions of actual user which is fundamental to the Scheme. **The on-going investigations would, therefore, unravel whether the imported capital goods i.e. the cars in question were ever inducted into the business of the importer.** That assumes importance because, according to the respondents, the cars were not even registered for the commercial activity for which the same were imported as was mandatory under Section 39 of the Motor Vehicles Act. There was, according to them an unauthorised diversion of goods contrary to the spirit of the Scheme, which could be investigated and made a basis for further action against the importer. **The investigation instituted by the Directorate of Revenue Intelligence officers may in that above backdrop lead to the discovery of the true facts which would eventually lead to the issue of a show cause notice to which the petitioner can respond appropriately. Expression of any opinion by this Court at this stage would** in that view be premature and would amount to pre-judging the issue which may arise at the appropriate stage in the context of the facts established in the course of the investigation."
>
> **(emphasis supplied)**

26. It would be seen that the Court did not express any opinion on merits as the writ petition was directed against the initiation of the investigation and it would only be when the true facts are discovered that a show cause notice could be issued.

27. The Larger Bench of the Tribunal in **VRL Logistics** had arrived at the conclusion after placing reliance upon the decision of the Supreme Court in **Titan Medical Systems Pvt. Ltd.** vs. **Collector of Customs, New Delhi**[14].

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14. 2003 (151) E.L.T. 254 (S.C.)

28. It has, therefore, to be held that the customs authorities could have proceeded to recover the duty on the basis of the undertaking only when the competent authority in the DGCA found as a fact that the appellant had violated the conditions of the permit. In the present case, such a finding has not been recorded and on the other hand, the permits have been renewed from time to time. Customs Appeal No. 55387 of 2013, therefore, deserves to be allowed.

29. Customs Appeal No. 55388 of 2013 has been filed by the Director of the appellant to assail the same order dated 28.09.2012 in so far as it imposes penalty upon the said appellant. As the order on merits is being set aside, no penalty can be imposed upon the Director.

30. Thus, for the reasons stated above, it is not possible to sustain the order dated 25.10.2012. Customs Appeal No. 55387 of 2013 and Customs Appeal No. 55388 of 2013 are, accordingly, allowed.

(Order Pronounced on **20.01.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

JB/Shreya