IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 31.01.2023

\+ **CUSAA 5/2020**

EAST INDIA HOTELS LTD. ..... Appellant

Versus

COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND CENTRAL GST, NEW DELH ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. S. Ganesh, Sr. Adv. with Mr. Narendera M. Sharma, Mr. Ankur Sood, Mr. Kartik, Ms. Shubhangi Tiwari & Ms. Bhumi Goyal, Advs.

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

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

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The appellant (East India Hotels Limited) has filed the present appeal impugning an order dated 14.01.2020, being No. C/A/ 50094/ 2020 CU [DB] (hereafter '**the impugned order**'), passed by the Custom, Excise and Service Tax Appellate Tribunal (hereafter '**the Tribunal**'). By the impugned order, the learned Tribunal dismissed the

appellant's appeal assailing an order dated 27.07.2010, (order No. VII/Cus. Prev/Adj/Cmmr./12/ElH/08), passed by the Commissioner of Customs (Appeal), Central Excise and Central GST, New Delhi.

2. The learned Tribunal did not accept that the appellant had complied with the conditions for exemption as set out in the Customs Notification No.21/2002-CUS, as amended by Customs Notification 61/2007-CUS (hereafter **'the Notification**'). The learned Tribunal held that the aircraft imported by the appellant was used for private purposes and not for providing non-scheduled (passenger) services or non-scheduled (charter) services. Thus, the Condition no.104 of the Notification was violated.

3. There is no dispute that the aircraft imported by the appellant was used by its officials and the Board of Directors, for travelling to various destinations. According to the appellant, such use of the aircraft in question qualified as providing non-scheduled (passenger) services; therefore, the appellant met the condition for duty exemption under the Notification.

Question of Law

4. In the aforesaid context, the question that arises for consideration is whether the learned Tribunal had erred in misinterpreting the Notification and concluding that the appellant had not complied with the conditions for availing duty exemption under the Notification.

Factual Background

5. On 25.01.2006, the Director General of Civil Aviation (hereafter '**DGCA'**) issued a permit to the appellant to operate the aircraft for providing non-scheduled (passenger) services.

6. On 25.09.2006, the appellant was granted a No Objection Certificate (NOC) by the Ministry of Civil Aviation for importing Hawker 850 XP (hereafter '**the aircraft**'), as a replacement of an earlier aircraft Hawker- 700 (HS -125-700, VT-OBE) into India for a sum of ₹56.15 crores.

7. On 21.05.2007, the appellant, imported the aircraft and filed a Bill of Entry - Entry No. 21891.

8. In terms of Condition no.104 of the Notification, importers of aircrafts are required to furnish an undertaking to the Deputy Commissioner of Customs/Assistant Commissioner of Customs, committing that the aircraft shall be used only for providing non-scheduled (passenger) services or non-scheduled (charter) services. On failure to comply with the condition to use the aircraft for the afore-mentioned services, the importer would be required to pay an amount equivalent to the duty payable on the said aircraft.

9. In terms of the Notification, on 22.05.2007, the appellant submitted an undertaking to the Assistant Commissioner of Customs, stating that it would be using the aircraft only for providing non-scheduled (passenger) services and that, in the event of failure to do so,

it would be liable to pay the requisite duty amounting to approximately ₹13.92 crores.

10. On 31.05.2007, DGCA issued a certificate of registration for the aircraft in accordance with the Convention on International Civil Aviation dated 07.12.1994, read with the Aircraft Act, 1934 (hereafter '**the Aircraft Act**').

11. The respondent, issued a Show Cause Notice (SCN) dated 27.06.2008 to the appellant, *inter alia*, alleging that it had willfully misrepresented and suppressed facts, to import the aircraft for its own private use and thus, evaded payment of customs duty amounting to ₹13.92 crores. According to the SCN, the appellant was not compliant with the conditions mentioned in the Notification, read with the provisions of the Customs Act, 1962 (hereafter '**the Customs Act'**) and the Foreign Trade Policy.

12. The appellant responded to the SCN by letters dated 14.08.2008, 15.10.2008 and 19.10.2008. The appellant disputed the allegation that it had violated the conditions for exemption under the Notification or the provisions of the Customs Act. It claimed that NSOP permit had been granted to the appellant and no adverse action had been taken by DGCA against it.

13. On 27.07.2010, the respondent passed an order being No. VII/Cus. Prev/Adj/Cmmr. /12/ElH /08, whereby the respondent confiscated the aircraft under Section 111(o) of the Customs Act, on the ground that the appellant had violated the conditions of the undertaking

dated 22.05.2007 and the terms of the Notification, read with the provisions of the Customs Act.

14. Aggrieved by the aforesaid order, the appellant filed an appeal being Customs Appeal No. 558 of 2010 before the learned Tribunal, impugning the order dated 27.07.2010, passed by the respondent. Thereafter, on 01.04.2011, the learned Tribunal passed a stay order being No. C/162/11 stating that the bank guarantee executed by the appellant on 05.07.2008 (hereafter '**the bank guarantee**') shall be treated as a pre-deposit under Section 129E of the Customs Act and shall remain valid till the disposal of the appeal. On 27.03.2015, the appellant furnished a fresh bank guarantee (CGANDH502515).

15. On 14.01.2020, the learned Tribunal dismissed the appeal filed by the appellant and held that the appellant had wrongly availed the exemption under the Notification by furnishing a false undertaking in order to evade customs duty and had used the NSOP aircraft for its private use. Aggrieved by the aforesaid order, the appellant has filed the present appeal.

Impugned Order

16. The learned Tribunal found that the appellant had not complied with the Condition no.104 of the Notification inasmuch as the appellant had not used the aircraft for providing non-scheduled (passenger) services or non-scheduled (charter) services. The learned Tribunal referred to the Civil Aviation Requirement Rules (CAR) and noted that a non-scheduled operator is required to clarify whether the aircraft

would be used for private operation or non-scheduled operations. Further, the learned Tribunal referred to air transport circular no. 998 dated 21.04.1998 and concluded that flights were also classified into various categories, and non-revenue passenger charter flights, which included private aircrafts owned by individual(s) and by companies/corporations, were considered as falling in a separate category than the aircrafts belonging to scheduled/non-scheduled operators. Additionally, the learned Tribunal referred to a letter dated 30.07.2010, issued by DGCA and observed that the same had clarified that a non-revenue charter flight would fall under the category of a private flight.

17. The learned Tribunal concluded that there are three categories of airport transport service operators as set out below:

> " a. Scheduled air transport services operators (SOP)
> b. Non scheduled air transport services operators (passenger or charter) (NSOP/C)
> c. Private Operators."

18. According to the learned Tribunal, the exemption under the Notification was not available for private operators.

19. The learned Tribunal held that the only difference between scheduled air transport service operators and non-scheduled air transport service operators was that, whilst the former were required to operate flight service on the basis of a time schedule, the latter operate flights without any time schedule. However, both scheduled as well as non-scheduled air transport service operators were required to make

available air transport service to public and this feature distinguished the said operators from private operators. The learned Tribunal also held that scheduled air transport service or non-scheduled service were required to publish their tariff/hire charges/remuneration for use of the aircraft by public.

20. In view of its conclusion, the learned Tribunal dismissed the appellant's appeal.

Submissions

21. Mr. Ganesh, learned senior counsel appearing for the appellant, submitted that the controversy involved in the appeal was covered by the decision of the learned Tribunal in ***Reliance Transport v. Commissioner of Customs: Custom Appeal No.497/2010*** decided on 15.10.2018. He submitted that the appeal preferred against the said judgment was dismissed by the Supreme Court by an order dated 08.01.2020. He submitted that the aircraft was registered with DGCA for non-scheduled air transport service under passenger category (NSOP permit) and that DGCA had not raised any issue regarding the use of the aircraft being inconsistent with the NSOP permit. He submitted that it was not open for the customs authorities to question whether the aircraft was used for non-scheduled air transport service, as that question was required to be addressed only by the DGCA. He submitted that the Customs Department was not empowered to examine the validity of any permissions granted by the DGCA. Since the DGCA had not found any irregularity in the use of the aircraft the benefit of the Notification could not be denied to the appellant.

22. He also submitted that the learned Tribunal had erred in relying on the ruling in the case of ***King Rotors & Air Charter P. Ltd. v. C.C*** in **Appeal No.C/363 & 369-2009** decided on 17.06.2011, as the said case related to the use of a thirteen-seater helicopter; and the CAR, for operating helicopters, was materially different from those applicable in respect of aircrafts.

23. Lastly, he submitted that the Notification recognises only two categories of air transport services – scheduled (passenger) air transport services and air transport services other than scheduled (passenger) air transport services; it did not recognise any third category of passenger air transport services for private use and the learned Tribunal's conclusion in this regard is erroneous.

Analysis

24. As noted above, the principal controversy involved in the present case is whether the appellant is entitled to exemption under the Notification. According to the respondent, the appellant violated the Condition no.104 of the Notification and therefore, is not entitled to exemption of customs duty.

25. The Condition 104 of the Notification reads as under:-

> "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."

26. The aircraft was used by the Chairman and the officials of the appellant, who frequently travelled to various destinations. Admittedly, the flights operated by the appellant were non-revenue flights. According to the appellant, such non-revenue flights – that is, flights operated without generating revenue – were also covered under the broad definition of non-scheduled (passenger) services.

27. The key question to be addressed is whether non-revenue flights, operated by a company for transporting its officials, would fall within the scope of providing non-scheduled (passenger) services or non-scheduled (charter) services within the meaning of those terms under the Notification. In terms of explanation (b) to Condition no. 104 of the Notification, the term non-scheduled (passenger) services is defined to mean air transport service other than 'scheduled (passenger) air transport service' as defined in Rule 3 of the Aircraft Rules, 1937 (hereinafter '**the Aircraft Rules**'). It is, thus, necessary to refer to the Aircraft Rules.

28. Rule 3(49) of the Aircraft Rules defines the scheduled air transport service and is set out below:-

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

29. In terms of explanation (b) to Condition no.104 of the Notification, 'non-scheduled (passenger) services' would mean '*air transport service'* other than the air transport service falling within the aforementioned definition. However, it is essential that the aircraft is used for 'air transport service.'

30. The term 'air transport service' is defined under sub-rule (9) of Rule 3 of the Aircraft Rules 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;"

31. A plain reading of Rule 3(9) of the Air Craft Rules, indicates that the term 'air transport service' is defined in wide terms and would cover transport by air of humans, animals, mails or any other things, animate or inanimate. However, it is necessary that the said service be provided for 'remuneration'. The said definition also clarifies that the service may be for any kind of remuneration. 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. Clearly, flight service for no remuneration at all would not qualify to be considered as air transport service within the meaning of sub-rule (9) of Rule 3 of the Aircraft Rules.

32. In the facts of the present case, the appellant has used the aircraft for its own use without any remuneration whatsoever, either from the

passengers transported by it or from any other person. In the circumstances, it would be difficult to accept that the appellant has used the aircraft for providing 'air transport service' within the meaning of Rule 3(9) of the Aircraft Rules.

33. The learned Tribunal had also referred to Civil Aviation Requirement (CAR), Section 3, Air Transport Series 'C' Part-III issue-II, dated 01.06.2010 issued by the DGCA. The opening paragraph of the said CAR clarifies that it was issued to specify the minimum airworthiness and the operational requirements as well as procedural requirements for grant of Non-Scheduled Operators Permit (NSOP). Paragraph 2.4 and 2.5 of the said CAR (Section 3, Air Transport Series, dated 01.06.2010) are relevant and read as under:

> "2.4 The carriage of passengers by a non-scheduled operator's permit holder may be 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. A plain reading of paragraph 2.5 also indicates that its contents are in conformity with the definition of the term 'non-scheduled air transport service', which entails air transport service, for any kind of remuneration. It is clear from paragraph 2.5 that a Non-Scheduled Operator is also allowed to operate revenue charter flights for related entities, its own employees or employees of a group company including Chairman and members of the Board of Directors and their family members. However, it is necessary that such service be provided for remuneration.

35. The learned Tribunal had proceeded to hold that it is essential that 'non-scheduled (passenger) services' be open to public and for a published tariff. We do not find that the said requirement can be read into the meaning of the expression "non-scheduled (passenger) services" as defined under explanation (b) of Condition 104 of the Notification.

36. Rule 135 of the Aircraft Rules requires every 'air transport undertaking' operating in accordance with sub-rule (1) or sub-rule (2) of Rule 134 to publish tariff, having regard to all relevant factors including cost of operation, characteristic of service, reasonable profit, and the general prevailing tariff. In terms of sub-rule (2) of Rule 135, every 'air transport undertaking' is required to publish the tariff established in terms of sub-rule (1) on its website and two daily newspapers. Sub-rule (1) and (2) of Rule 134, relate to provision of

scheduled air transport service and not non-scheduled air passenger service.

37. Although we do not agree with the view of learned Tribunal that it was necessary for the appellant to publish the tariff for use of the aircraft and make available the services to public, we concur that the conditions of exemption under the Notification have not been complied with as the appellant has not used the aircraft for rendering any 'air transport service' within the meaning of Rule 3(9) of the Aircraft Rules.

38. We are inclined to accept Mr. Ganesh's contention that the question whether the appellant has complied with the conditions of the exemption under the Notification is required to be determined with reference to the Notification alone. However, we find that the use of the aircraft by the assessee does not amount to using the aircraft "*only for providing non-scheduled (passenger) services*" within the meaning of Condition 104(i) of the Notification.

39. The contention that it would not be open for the Customs Authorities to question the use of the aircraft as the DGCA has not raised any allegation that the appellant has violated the terms of its permit, is unmerited. The Customs Authorities are required to examine whether the conditions for availing exemption under the Notification are satisfied. In terms of the Notification, the appellant has also furnished an undertaking as required under clause (ii) of Condition no.104 of the Notification. This undertaking has been furnished to the Customs Authorities and we are unable to accept that the Authorities

are not entitled to examine whether the said undertaking has been complied with. The Customs Authorities are not required to examine whether the conditions of the permit (NSOP) issued by DGCA have been violated and if so, the consequences of such violation under the Aircraft Act or the Aircraft Rules, as that question would be required to be examined only by the DGCA. But that does not mean that they are disabled in any manner in examining whether the conditions for availing the benefit under the Notification are satisfied.

40. It is also not necessary for this Court to examine the question whether the use of the aircraft by the appellant for transporting its senior officials and directors without charging any remuneration violates the terms of the permit issued by the DGCA. It is possible that the permit issued by the DGCA to the appellant entitles the appellant to use the aircraft for the aforesaid purposes. The only question that this Court is concerned with is whether the appellant has complied with the conditions as set out in the Notification and is entitled to duty exemption in terms of the Notification in respect of the import of the aircraft. And, as stated above, we find that the appellant has not complied with the condition of using the aircraft solely for providing non-scheduled (passenger) services.

41. We are unable to agree that the controversy involved in the present appeal is covered in favour of the appellant by the decisions of Tribunal in ***Reliance Transport v. Commissioner of Customs*** (*supra*) and ***Global Vectra Helicorp Ltd. and Ors. v. Commissioner of Customs (Import) and Ors: (2015) 329 ELT 235.***

42. The facts obtaining in the case of ***Reliance Transport v. Commissioner of Customs*** (*supra*) are materially different. In that case the appellant had entered into the agreement with its group company (Reliance ADA Group Pvt. Ltd.) for use of the aircraft in question. In terms of the said agreement, the appellant was entitled to reimbursement of the cost of dry lease (which the appellant was required to pay to the lessor in quarterly installments); payment of maintenance; and payment of operational expenses. In addition, the appellant was entitled to receive 5% as service fee on such aggregate amount. The learned Tribunal had also noted that the appellant had further charged ₹7.5 lacs per hour for domestic journey and ₹10 lacs per hour for journey other than domestic journey.

43. It is clear that whilst the appellant in that case had used the aircraft for transporting senior officials of the related entity and their family members, it had done so for remuneration. Thus, the appellant had complied with the requirement of providing 'air transport service' within the meaning of Rule 3(9) of the Aircraft Rules. Indisputably, the air transport service provided by Reliance Transport were not covered under the definition of scheduled air transport service as defined under Rule 3(49) of the Aircraft Rules and thus, were covered within the definition of non-scheduled (passenger) services within the meaning of clause (b) of Explanation II of Condition no.104 of the Notification.

44. The decision rendered by the learned Tribunal in ***Global Vectra Helicorp Ltd. and Ors. v. Commissioner of Customs (Import) and Ors.*** (*supra*) does not support the case of the appellant. In that case the

learned Tribunal had noted that non-scheduled (passenger) services must entail transport of persons or things for remuneration. The relevant extract of paragraph 7 of the said decision is set out below:

> "7. Having considered the rival contentions, we find that there is no violation by the importer-appellant to the post import condition No. 104 of Notification No. 21/07, as amended. Accordingly, under the undertaking given by the importer, it was required to offer only non-scheduled passenger service. Such service has been defined in Explanation (b) of the said Notification as 'Air Transport Service other than a Scheduled Air Transport (Passenger) Service' with reference to Rule 3 of the Aircraft Rules, 1937. Hence, the one and only source of definition and strictly interpreting the exemption Notification, reliance has to be placed on the said Rule 3, and no other material. On reading the definition of Air Transport Service under Rule 3(9) with the definition of Scheduled Air Transport Service under Rule 3(49), it is evident that in order to classify as the 'non-scheduled passenger service', the service must be for transportation of persons or things for remuneration, operating to a single flight or a series of flight which must be opened to the members of the public and must not operate as per the published schedule or time table and/or with regular and systematic flight. On the detailed scrutiny of the clause of the agreement with respective companies, as well as the vouchers or the invoices, etc. raised for the services provided, we find that the appellant importer meets the requirement as per the definition of non-scheduled passenger service. The finding of the Revenue that the service provided was not a passenger service as the appellant did not print passenger ticket nor the flights were opened to public is erroneous..."

45. In the present case, the appellant has not used the aircraft for providing air transport service for remuneration of any kind.

46. In view of the above, even though we are not in agreement with the learned Tribunal that the provision of non-scheduled (passenger) services as defined under clause (b) of explanation to Condition no.104 of the Notification, entails providing air transport services to public at large on payment of published tariff; we agree with the conclusion that the appellant has not complied with the Condition no.104 of the Notification. The question as framed in paragraph no.4 above is answered in the negative, with the aforesaid qualification.

47. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JANUARY 31, 2023
RK