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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH

CUSTOMS APPEAL NO. 74 of 2010-LB

(Arising out of Order-in-Original No. 06/Commr/SIIB/2009(V) CH dated 27.11.2009 passed by Commissioner of Customs, Ahmedabad)

M/s VRL Logistics Ltd **...Appellant**
Hubli, Karnataka

versus

Commissioner of Customs, Ahmedabad **...Respondent**

WITH

Customs Appeal No's.

75 of 2010	**76 of 2010**	**77 of 2010**	**78 of 2010**
79 of 2010	**80 of 2010**	**81 of 2010**	**82 of 2010**
83 of 2010	**114 of 2010**	**115 of 2010**	**116 of 2010**
117 of 2010	**118 of 2010**	**119 of 2010**	**120 of 2010**
21 of 2012	**22 of 2012**	**23 of 2012**	**28 of 2012**
415 of 2009	**57 of 2010**	and	**338 of 2009**

APPEARANCE:

Shri Tarun Gulati, Shri Prakash Shah, Shri J.C. Patel, Shri Kishore Kunal, Shri Manish Rastogi, Ms. Shweta Garge, Shri Anand D Mishra, Shri Rohit Lalwani, Dr. Jeetesh Nagori, Shri Ashish Agarwal and Shri S.J. Vyas, Advocate for the Appellants
Shri Anand Nainawati and Shri Manish Jain Counsel for the intervenor
Shri PRV Ramanan and Shri Ajay Jain, Special Counsel for the Respondent

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING: 10.06.2022
DATE OF DECISION: 08.08.2022

INTERM ORDER NO. 3-23; 17-18; 14/2022

JUSTICE DILIP GUPTA:

A division bench of this Tribunal, while hearing Customs Appeal No. 74 of 2010 filed by VRL Logistics Ltd.[1] and the connected Customs Appeals bearing No's. 75 of 2010, 76 of 2010, 77 of 2010, 78 of 2010, 79 of 2010, 80 of 2010, 81 of 2010, 82 of 2010, 83 of

1. **the appellant**

2010, 114 of 2010, 115 of 2010, 116 of 2010, 117 of 2010, 118 of 2010, 119 of 2010 and 120 of 2010, noticed that two contradictory views had been expressed by division benches of the Tribunal in **Commissioner of Customs, New Delhi** vs. **Sameer Gehlot**[2] and **King Rotors & Air Charter P. Ltd.** vs. **C.C. (ACC & Import), Mumbai**[3], for while in **Sameer Gehlot** the benefit of the exemption notification No. 61 of 2017 dated 03.05.2007[4] that amended the earlier exemption notification No. 21 of 2022 dated 01.03.2002 was held to be available to the importer of an aircraft that had been granted permit by the Director General of Civil Aviation[5] for operating non-scheduled (passenger) services, the benefit of the aforesaid exemption notification was denied in **King Rotors**. The division bench, accordingly referred the matter to a larger bench of the Tribunal to express its view as to which of the two views expressed by the division benches was the correct view.

2. When the remaining Customs Appeals, which also relate to the same issue as to whether the benefit of the aforesaid exemption notification should be available to such an importer of an aircraft, came up before division benches of the Tribunal orders were passed to connect them with Customs Appeal No. 74 of 2010. This is how all the aforesaid Customs Appeals have been placed before this larger bench. It needs to be stated that in Customs Appeal No. 338 of 2009, which is pending before the Principal Bench of the Tribunal at Delhi, submissions have been advanced as an intervenor.

3. The exemption notification dated 03.05.2007, on which revolves the entire controversy, grants 'nil' rate of duty on import of aircraft

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2. 2011 (263) E.L.T. 129 (Tri.-Del.)
3. 2011 (269) E.L.T. 343 (Tri.- Mumbai)
4. the exemption notification
5. DGCA

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:-
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> 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)
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:-
>
> 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."

4. 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

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6. MCA

(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.

5. The appellants hold permits provided by DGCA for non-scheduled (passenger) services. These permits have been renewed from time to time and have been endorsed for each additional aircraft/helicopter imported by the appellants. Such operations have been carried out by the appellants 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 appellants started availing the benefit of the said exemption. The customs authority, however, raised an issue that the operations carried out by the appellants were not covered by the permits that had been granted by the DGCA and, accordingly, show cause notices were issued to the appellants alleging inter alia that the aircraft was used for private use/charter services in complete violation of permits, and consequently in violation of the exemption notification.

6. It will be useful to first examine the views expressed by the division benches of the Tribunal on the availability of the aforesaid exemption notification to the importers of aircrafts who had been granted permits by DGCA for non-scheduled (passenger) services.

7. In **Sameer Gehlot,** that was decided on 12.11.2010, the benefit of the exemption notification was availed by the importer of an aircraft on the basis of a permit granted by DGCA to operate non-scheduled air transport (passenger) services. The department believed that the said permit would not enable the operator to carry out non-scheduled (charter) services and accordingly, a show cause notice was issued. The adjudicating authority dropped the

proceedings holding that the use of the aircraft by the operator was in terms of the permit that was granted by DGCA and the operator had not used the helicopter as a private aircraft. It is this order of the adjudicating authority that was challenged by the department before the Tribunal. The division bench of the Tribunal observed that it is for the civil aviation authorities to ensure that the aircraft is operated in terms of the permit issued by DGCA and the customs authorities cannot decide whether an operator has violated the permit granted by DGCA. The division bench found that since the civil aviation authority had not detected any violation by the operator and the permit was being regularly renewed, the customs authorities could not take any action on their own. The bench noticed that both the requirements of Condition No. 104 were pre-import conditions which had been fulfilled by the operator and the exemption notification does not contain separate post import conditions. The relevant paragraphs of the decision of the Tribunal are reproduced below:

> "10. **The impugned exemption under consideration before us has only pre-import Conditions and there is no separate post-import Condition.** The pre-import Conditions requiring an approval from DGCA and an undertaking to be furnished at the time of importation have already been fulfilled and thereafter, the exemption has been granted at the time of import. **The respondents, therefore, cannot be charged with violation of a pre-import Condition at a later point of time.** If the Government wanted that the customs authorities should monitor the subsequent use of the aircraft, then it would have provided a suitable post-import Condition in the exemption notification. Of course, the Department can proceed in terms of the undertaking executed for violation of the terms of the undertaking but that has not been done in this case. Rather a show-cause notice has been issued invoking Section 28 of the Customs Act, 1962 vide paragraphs 25 and 27 of the notice. It is settled law that Section 28 can be invoked only in the case

of short-levy, non-levy and erroneous refund. Where an exemption has been allowed after the importer has fulfilled the pre-import Conditions, such a case cannot be categorised either as a case of short-levy or as a case of non-levy. In the absence of any post-import Condition in the exemption notification, action cannot also be taken under Section 111(o) which, in any case, has not been invoked in the show-cause notice.

11. XXXXXXXXX. **We also find that the exemption notification exempts both kinds of aircrafts, those used for providing non-scheduled (passenger) services as well as those used for providing non-scheduled (charter) services. Hence, the plea raised in the appeal that the respondents were issued a permit for providing non-scheduled (passenger) services but the imported aircraft has been put to non-scheduled (charter) services and therefore, the exemption should be denied is without substance.** When exemption is available for use under either category, such an objection by the Department is without merit particularly when evidence has been provided by the respondents that **the Civil Aviation Requirements (CAR) permit such use vide DGCA's clarifications dated 22-8-2008 and dated 2-1-2009 and the DGCA authorities have not taken any action against such use.** In DGCA's clarification dated 20-7-2010, it has also been stated that as per amended CAR, a non-scheduled operator may carry passengers either as per seat basis or by way of chartering the whole aircraft.

12. **The exemption notification obviously keeps private aircrafts out of its scope by implication but there is no Condition or restriction built into the exemption notification that the exempted aircraft cannot be used on payment by the group companies to which the importing company belongs.** We are of the view that the adjudicating Commissioner after analyzing various legal provisions has taken a reasonable view in this regard and the same cannot be faulted especially in the absence of any restriction in the notification not to permit use of the aircraft by the importing company or its holding company on payment. If the Government finds such use not to be in line with the intended purpose of the exemption, it can always amend

> the notification specifically disallowing exemption for a particular kind of use such as use by Group Companies. However, as the exemption notification is worded, it would be discriminatory to object to use of the aircraft by the group companies on payment, whereas others are allowed such use.
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> 13. **As regards the requirement of published tariff for carrying out charter operations,** the respondents have stated that firstly, this point was not raised in the show-cause notice but only taken up at the appeal stage and secondly, **while defining non-scheduled (charter) services, 'published tariff' has been referred to as one of the characteristics of charter services and not as a Condition of the exemption notification and further, they have submitted that the respondents have obtained the exemption as a non-scheduled (passenger) service operator for which they have received the necessary permit from the Civil Aviation authorities and which requires no published tariff.** We are of the view that these submissions by the respondents have substance and in any case, the exemption obtained by them as an operator of non-scheduled (passenger) service, after receiving the necessary permit from the Civil Aviation authorities, does not require to be denied on account of not having a published tariff for the charter services undertaken by them. Moreover, this was also not a ground taken in the show-cause notice."
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> **(emphasis supplied)**

8. In **King Rotors,** that was decided on 17.06.2011, the division bench noticed that since the permit was issued for operating "non-scheduled (passenger) services, the operator could not have used the helicopter for non-scheduled (charter) services. The bench noticed that after import, the helicopter had been chartered/ hired by Heligo, which had subsequently entered into charter contracts with third party companies for transporting their personnel, as a result of which the helicopter operations were not open to the members of the public. Thus, the flight operations cannot be termed as non-scheduled

(passenger) services. The bench also found that when in terms of the undertaking the importer had undertaken to the customs department to use the imported goods for a specified purpose or in a specified manner, the customs department would have the right to monitor the post importation use of the goods and so they could proceed, in case of any breach, independently. The contention of the assessee that non-scheduled (passenger) services have a wider scope then non-scheduled (charter) services and so the latter would fall within the former category, was also repelled. The earlier decision of the division bench of the Tribunal in **Sameer Gehlot** was considered to be not a binding precedent for the reason that post-importation nature of the undertaking was not appreciated by the bench while taking the view that the requirement of undertaking to be furnished by the importer was only a pre-importation condition. According to the division bench, this was a mistake in the decision and, therefore, the decision was considered to be per-incuriam. The relevant paragraphs of the decision are reproduced:

> "24.2 There is no room for doubt as to the scope of the permit issued to the assessee by DGCA. The permit is for operating "non-scheduled air transport services (passenger)" with the helicopter mentioned in the list appended thereto (Appendix-1), for the period specified in Appendix-2, subject to observance of the Conditions specified in Appendix-3. "Non-Scheduled Air Transport Services (Passenger)" prominently figures in the caption of each of these appendices to the permit. Appendix-1 (list of aircraft) clearly provides:- "The following aircraft can be operated under this permit for Non-scheduled Air Transport Services (Passenger)". The permit per se is "subject to the compliance with the provisions of the Aircraft Act, the Aircraft Rules and any Orders, Directions or Requirements issued under the said Act and Rules...." One of the Requirements issued under Rule 133A of the Aircraft Rules is "Charter CAR", and clause (2.1) thereof

provides that "This CAR is applicable to Non-scheduled Air Transport Services (Charter Operations) using twin-engined aeroplane having maximum seating capacity not exceeding nine seats excluding crew seats." "Charter CAR" cannot be applicable to the appellants' twin-engined (vide Panchanama dated 11-9-2008) helicopter which is 13-seater (vide Annexure-1 to Permit No. 11/2006 dated 29-11-2006, "No Objection for Import" dated 13-3-2008 and clause (3.2) of "Charter-Hire Agreement" dated 14-4-2008). The applicable "CAR" is "Passenger CAR". DGCA's "No Objection for Import" itself indicates the "purpose for which aircraft is required", which is "Non-scheduled Air Transport (Passenger) Services". DGCA's covering letter dated 13-3-2008 says: "This office has No Objection to the import of One Bell-412 helicopter S.No. 36454 for Non-scheduled Air Transport (Passenger) Services". **Thus it is abundantly clear from the records that DGCA's permission to the assessee is only to operate non-scheduled passenger services with the helicopter imported by them.** If the parenthetic appearance of both the words 'passenger' and 'charter' ["(Passenger/Cargo/Charter)"] in the description of air transport services in the printed format of Permit No. 11/2006 created any doubt in the appellants' mind, it was enough for them to read the mind of the authority which issued the permit. The issuing authority's mind is reflected in the full text of the permit and connected documents. The permission is to operate non-scheduled passenger services with the imported helicopter, and not charter services.

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24.6 **The question now to be considered is whether the assessee used the imported helicopter for the avowed purpose.** It is not in dispute that, under a "charter-hire agreement" dated 14-4-2008 with Heligo, the assessee allowed the helicopter to be used by Heligo for the purpose of mobilizing and demobilizing of personnel of third party companies and for movement of their freight and/or equipment. Under the agreement, Heligo would reimburse the actual costs incurred by the assessee in sourcing and acquiring spares for maintenance of the helicopter. The necessary infrastructure for maintenance of the helicopter would also be provided by

Heligo. The entire cost of insurance to cover all liabilities in respect of passengers, cargo, crew, helicopter and third party would be incurred by the assessee and reimbursed to them by Heligo. Heligo would also pay monthly remuneration to the pilots of the assessee. They would also bear the costs of maintenance of the helicopter and also the costs of fuel and comsumables required for its operation. On a perusal of the charter-hire agreement between the assessee and Heligo, we find that Heligo chartered/hired the helicopter for their exclusive use and they incurred the entire costs of operation and maintenance of the helicopter and even the cost of insurance to cover all liabilities. One significant term of the contract was that the "helicopter shall be utilized solely for the purpose of providing the services pursuant to the agreement and the contractor shall not utilize the helicopter for any other purpose without the prior consent of the company." Accordingly, the helicopter could not be used by the assessee (contractor) for any other purpose without the prior consent of Heligo (company). **It is evident that the agreement created an exclusive right in Heligo for use of the helicopter during its tenure. That Heligo exercised this right for the benefit of third party companies is, in turn, evident from the written submissions** dated 23-3-2011 filed by the appellants' advocates, which read thus:

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24.8 As Condition No. 104 itself refers to Rule 3 of the Aircraft Rules, 1937 in the context of defining the expression "non-scheduled (passenger) services", it is permissible to take aid of the said Rule in ascertaining the connotation of the word "passenger" used in the expression "non-scheduled (passenger) services". Rule 3(39) defines "passenger aircraft" as aircraft which effects public transport of passengers. "Public transport" is also seen defined under Rule 3(45). In the instant case, it is not the claim of the appellants that they used the helicopter for public transport of passengers. They only allowed Heligo to hire the aircraft for a remuneration and use it for transporting employees of Oil & Gas/allied companies between Vishakapatnam airport and offshore oil/gas fields under contracts awarded to Heligo by those companies. **The appellants were unable to use the**

copter (during the tenure of the agreement) for any other purpose without the prior consent of Heligo. They did not have any control over the manner in which the helicopter was used by Heligo (who professedly entered into charter contracts with "third party companies" in respect of the aircraft which was accordingly used for transporting the personnel of these companies) and the copter operations were not open to members of the public. Where the helicopter would not come within the meaning of "passenger aircraft", the flight operations cannot be called "non-scheduled (passenger) services".

24.9 **The learned counsel has argued to the effect that non-scheduled (passenger) services have wider scope than non-scheduled (charter) services and hence would encompass the latter category of services also. This argument is also unacceptable inasmuch as it is contrary to clause (ii)(a) of Condition No. 104,** which reads thus: "The said aircraft shall he used only for providing non-scheduled (passenger) services or non-scheduled (charter) services, as the case may be." This part of Condition No. 104 treats non-scheduled (passenger) services and non-scheduled (charter) services as two distinct and mutually exclusive categories of services, which position is clear from the expressions "only" and "as the case may be" used in the above text. The plea of inclusiveness of "non- scheduled (passenger) services" and "non-scheduled (charter) services" is anathema to anyone who would prudently like to go by the text of clause (ii)(a) of Condition No. 104 as per the established rule of strict interpretation of Exemption Notification."

(emphasis supplied)

9. The division bench of the Tribunal in **Dove Airlines Pvt. Ltd.** vs. **Commissioner of Customs (Prev.), New Delhi**[7] decided on 03.06.2011, also examined the aforesaid exemption notification. The bench, after noticing that the permit that was issued to the operator

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7. 2014 (313) E.L.T. 292 (Tri.- Del.)

was for operating non-scheduled (passengers) services, observed as follows:-

> "17. There is also the fact that the Directorate General of Civil Aviation was being kept informed through periodic reports about the use to which the aircraft was being put to. The Ministry of Civil Aviation which was part of the decision making process for granting the exemption, did not find the above company to be not satisfying the Conditions prescribed by them for import of the aircraft for Non-Scheduled (Charter) Services. Thus the matter is prima facie a case of divergence in perception between the stand of the Ministry of Civil Aviation and that of the Ministry of Finance. In the matter of Conditions regarding import, the stand of Ministry of Civil Aviation has to prevail over the stand of the Ministry of Finance."

10. This issue was again examined by a division bench of the Tribunal in **Global Vectra Helicorp Ltd.** vs. **Commissioner of Cus. (Import), Mumbai**[8] that was decided on 29.04.2015. The division bench examined whether the importer of helicopters had breached Condition No. 104 rendering them liable for payment of duty on the import of two helicopters since they had previously claimed exemption in terms of the exemption notification. The division bench noticed that the operator had been granted permit by the DGCA to import helicopter for providing non-scheduled (passengers) services and that the department alleged that the assessee had not used these helicopters for providing the aforesaid services but for exclusive charters services for certain companies and charged them on monthly fixed charges as well as on flying basis. The division bench found that there was no violation by the operator of the aircraft. The division bench distinguished the earlier decision rendered by the division bench in **King Rotors** for the reason that there was no surrender of

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8. 2015 (329) E.L.T. 235 (Tri. – Mumbai)

the helicopter in question, as was in the case of **King Rotors**, and all the activities were carried out by the operator itself. The relevant paragraphs of the decision are as follows:-

> "7. xxxxxxxxx. 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. We hold that offering the service to public at large includes entering into agreement for providing regular service to a few members of the public on a regular basis over a period of time.** The expression person includes the company under various tax laws. Further, company also forms part of the general public. The members of the public (company included) due to requirement of its business enters into the agreement with the service providers for providing of service over an extended period of time, may be weeks, months or years, it cannot be said that the service was not provided to public. Further, printing of ticket is not an essential element and such a requirement is not there, where the services are provided on the basis of published tariff or agreement wherein the hourly charges and flying charges along with other charges are mentioned for providing service for extended period of time. **Accordingly, we hold that the services provided by the importer are in the nature of non-scheduled passenger service.** Further relying on the ruling of the Apex Court in the case of Titan Medical

> (supra), we hold that in view of the clarification dated 8-8-2008, given by the licensing authority DGCA, while interpreting the importers permit, have clarified that the services offered by the appellant under its various contracts is within the scope of NSOP for passenger permit. **DGCA being the appropriate licensing authority, is the best judge to decide as to whether the activity of the importer comes within the ambit of the license issued to the appellant by it.**
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> 7.1 Further, we find that in the case of the appellant unlike in the case of King Rotors' case (supra), there is no surrender of the helicopter in question and all the activities as the service provider, such as maintenance/insurance, salaries to the Pilot, etc., have been carried out by the appellant-importer. **Thus, the facts in this case are clearly distinguishable from the facts in the King Rotors case** and as such, we hold that the learned Commissioner has erred in relying on the earlier ruling of the Tribunal in the case of King Rotors case (supra)."
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> **(emphasis supplied)**

11. A division bench of the Tribunal in **Reliance Transport & Travels Ltd.** vs. **Commr. of Customs, New Delhi**[9]**,** in its decision dated 15.10.2018, after referring to the earlier division bench decisions of the Tribunal in **Sameer Gehlot** and **Global Vectra Helicorp** held that the appellant had rightly availed the benefit of the exemption notification. The decision of the division bench in **King Rotors** was distinguished, and it was held that the appellant had not used the aircraft in contravention of the permitted granted by the DGCA and the permit had also been renewed from time to time. The use of the aircraft by the appellant mainly for charter operation was found to be permissible under the permit granted by DGCA to the appellant to operate non-scheduled (passenger) services. The relevant paragraphs of the decision are reproduced below:

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9. 2019 (369) E.L.T. 1317 (Tri. – Del.)

"13. Having considered the rival contentions, we find that so far as reference to the Larger Bench is concerned, the said order is a non-speaking order as it have neither considered the facts of the two cases and have summarily referred the matter to the Larger Bench, without even framing any questions to be decided by the Larger Bench. **Further, we find that the Coordinate Bench of this Tribunal in Global Vectra (supra)** by Final Order dated 29-4-2015, wherein one of us is the Member (Anil Choudhary, Member Judicial) **have distinguished the ruling in the case of King Rotors & Air Charter (supra)** observing that in the case of King Rotors & Air Charter the facts were that they had entered into an agreement with one Heligo Charter Pvt. Limited and under such agreement it parted with the possession of the helicopter/aircraft to Heligo Charter Pvt. Limited. The said Heligo Charter was taking care of maintenance, repair and operation, payment of salaries to the crew members, etc. etc. Further, on enquiry by Revenue the said King Rotors & Air Charter could not submit any documentary evidence of end use of the helicopter. Further, in the course of enquiry from the copies of passenger manifest, document evidencing payment of lease amount to the lessor-supplier of the helicopter, and copy of agreement with Heligo Charter, it was found that actually Heligo Charter was engaged in providing helicopter services to other company as NSOP, on a charter basis. The said Heligo Charter was maintaining log book, including approval from the DGCA, payment to the crew, paying for fuel bill, etc. Further, King Rotors could not furnish any letter from DGCA as to the compliance of the licensing Condition as a NSOP.

14. We find that such facts are not obtaining in the facts of the present case and the facts herein are at variance and as such the reference to the Larger Bench hereinabove has got no relevance for deciding the present appeal. Further, we note that Hon'ble Supreme Court in the case of Collector v. Alnoori Tobacco Products - 2004 (170) E.L.T. 135 (S.C.) have held that in respect of following precedent, have observed that circumstantial - one additional or different facts may make a world of difference between conclusion in two cases. Disposal of cases by following settled precedent decision, is not proper. We further find that the contention raised by the Ld. AR for Revenue that the said aircraft was mainly used

by the Directors, Executives and their close relatives, friends of RADAGPL is of no consequence as the CAR requirement under Section 3 of Air Transport Series Part III Issue II, dated 1-6-2010, which applies to the existing permit holder, clarifies in paras 2.4 and 2.5 as follows:

> "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. 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 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 charter 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".

15. **It is evident that the appellant have not used the said aircraft in contravention of the permit granted by the DGCA to operate as a NSOP. Admittedly, DGCA has not cancelled the permit and admittedly same stands renewed from time to time.** We further find that in the precedent order of this Tribunal in Global Vectra (supra) it has been held that issue of ticket is not an essential Condition, not required in case of charter operation. **Admittedly, appellant have operated their aircraft mainly for charter operation, which is permissible under the NSOP.**"

(emphasis supplied)

12. The aforesaid decision of the Tribunal was assailed by the department before the Supreme Court. The Civil Appeal **(Commissioner** vs. **Reliance Transport & Travels Ltd.)**[10] was dismissed by the Supreme Court on 08.01.2020 and the order is reproduced below:

> "Delay condoned.
> Having heard Learned Solicitor General appearing on behalf of the appellant and gone through the records of the case, we are of the considered opinion that the appeals, being devoid of any merit, are liable to be dismissed and, are dismissed accordingly."

13. A division bench of the Tribunal in **Commr. of Cus. (Import), ACC, Mumbai** vs. **Airmid Aviation Pvt. Ltd.**[11], that was decided on 11.09.2019, considered the entitlement of the aircraft operator for continuance of exemption from duties of customs that had been allowed on import of aircraft against the undertaking given by the operator for complying with the condition of operating non-scheduled (passenger) service, though the aircraft was deployed on charter hire and was considered to be a 'private aircraft' by the department. The adjudicating authority concluded that non issue of tickets to employees of group companies, or even pre dominant use by group companies for their employees did not reduce the aircraft to a 'private aircraft' and that offering of the imported aircraft on charter was not violative of the condition for exemption. The Tribunal, after noticing the earlier division bench decisions of the Tribunal in **Sameer Gehlot** and **Reliance Transport** on the one hand, and **King Rotors** on the other, dismissed the appeal filed by department and observed as follows:

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10. 2020 (372) E.L.T. A105 (S.C.)
11. 2019 (370)ELT1789 (Tri. - Mumbai

> "35. We take note that the impugned order has placed reliance on various clarifications issued by Director General of Civil Aviation. That these are in favour of the aircraft operators is not in dispute. The harmonious construct of the finding on obligation of performance, the lack of acceptability of the sole decision relied upon by Revenue, the consistent stand adopted by the Tribunal in all other decisions, the renewal of the permit to operate as 'non-scheduled passenger service' by the competent statutory authority and the clarifications issued by that authority, in general as well as to the Commissioner of Customs, leaves us with no option but to dismiss the appeal of Revenue."

14. In **M/s. East India Hotels Ltd.** vs. **Commissioner of Customs Central Excise and Central GST, New Delhi[12],** which was decided on 14.01.2020, a division bench of the Tribunal examined whether the importer of aircraft who had been granted permit by DGCA for using the aircraft for non-scheduled (passenger) services had violated the conditions specified in the exemption notification while using the aircraft for private use and held that it had violated. The division bench denied the benefit of the exemption notification and the observations are as follows:

> "13A Thus we are of the opinion from the above discussion that scheduled as well as non scheduled air transport services firm (whether for passenger or charter) are open to use by the members of public and as such stands distinguished from what can be called as private use of the aircraft.
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> xxxxxxxxxxx
>
> 17. xxxxxxx. **In the present case we are also of the firm opinion that facts of the present case are different from the case of King Rotors & Air Charter (Supra) and that of Sameer Gehlot (Supra) because the main allegation qua the violation of undertaking was based on the fact that the undertaking was given for using the aircraft only for NSOP (passenger service) whereas the assessee therein**

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were found to use the same for NSOC (charter services). Both the cases are pre 2010 when there had been an amendment in this notification. With the introduction of new CAR issued by DGCA on 1.6.2010, it has been clarified that non scheduled air transport services can be the passenger as well as charter services simultaneously.

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19. xxxxxxxx. The issue in the earlier cases is as to whether undertaking for using the aircraft for non-scheduled operator services includes the use thereof for non-scheduled charter services. The amendment of CAR 2010 clarifies that both are inclusive. **The issue in the present case primarily is whether the undertaking for using the imported aircraft of non-scheduled passenger / charter services includes the use thereof only for private purposes or not.**

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21. xxxxxxxxxx. **It is definitely the Customs Department's duty to ensure continuous compliance of the undertaking as was furnished by the importer at the time of importing the aircraft.** As already discussed above, the usage of aircraft for NSOP/C services continuously against the published tariff the passengers who are none but the public will satisfy the continuous compliance of the said undertaking. Absence of any of these Conditions will make the usage different from NSOP/C services and the said variation will definitely amount to violation of the said undertaking and the benefit of exemption from payment of customs duty as was extended to the importer of aircraft at the time of import thereof shall not be allowed to continue to still be available to the importer.

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25. **In the present case, neither the Civil Aviation Rules nor Aircraft Rules empower DGCA to investigate about the compliance of the undertaking.** The undertaking is given in furtherance of the notification issued by the Customs Department in compliance of the Statutory Provisions of the Customs Act 1962. **The verification as to whether the benefit of exemption from payment of customs duty should continue or not is opined definitely to lie with Customs Department only.**

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> 28. The Department's circular that the benefit of notification is still available if the aircraft is providing NSOP/C certificate to the related or group company the same also doesn't hold good in the present case because there is no evidence about anyone else except the Oberoi Group to have used the impugned aircraft in the given circumstances that too without any tariff. **The usage, of the impugned aircraft post import is not for non scheduled passenger/ charter air transport services but only for private use.** The same amount to violation of the undertaking based upon which the exemption was granted to the appellant from paying the customs duty. Consequent to the said violation the appellant has made himself liable to pay the said customs duty as if he has failed to pay the same at the relevant point of time to the jurisdictional customs authority from any point of imagination cannot be ruled out. They are held to vest with the jurisdiction to demand the customs duty. Since the benefit of exemption has been claimed by giving an undertaking whereupon the appellant has failed to stand with the possibility of intent of the appellant to evade said duty at the time of import of the aircraft cannot be ruled out especially when there is no evidence produced on record by the appellant.
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> **(emphasis supplied)**

15. It needs to be noted that the Department had filed Civil Appeals before the Supreme Court against the decision rendered by the Tribunal on 12.11.2010 in **Sameer Gehlot**, the decision of the Tribunal rendered on 11.09.2019 in **Airmid Aviation** and the decision rendered by the Tribunal on 03.06.2011 in **Dove Airlines.** All these Civil Appeals were dismissed by the Supreme Court on 26.11.2021, but questions of law were left open to be adjudicated in an appropriate case. The order passed by the Supreme Court is reproduced below:

> "These appeals filed under Section 130-E of the Customs Act, 1962 are directed against the (1) judgment and final order No. C/170-174/10 dated 12.11.2010 passed by the Customs, Excise & Service Tax Appellate

> Tribunal, New Delhi in Appeal Nos. C/493 to 497/2009 and C/CO/212/2009; (2) final impugned No. A/87028/2019 dated 11.9.2019 passed by the Customs, Excise & Service Tax Appellate Tribunal, Mumbai, West Zonal Bench in Custom Appeal No.411 of 2011; and, (3) judgment and final order No. C/237-238/2011-CU(DB) dated 03.06.2011 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in Appeal No. C/260/2010-C261/2010-CU(DB).
>
> Delay of 282 days in filing Civil Appeal Diary No.17296 of 2020 is condoned.
>
> We have heard Mr. Sanjay Jain, learned Additional Solicitor General in support of the appeals and learned counsel appearing for the assessees.
>
> We have gone through the statement of case filed on behalf of the appellant and do not find that the issues raised come within the four corners of Section 130-E of the Customs Act, 1962.
>
> We, therefore, do not see any reason to entertain these appeals in our jurisdiction under Section 130-E of the Customs Act, 1962.
>
> The civil appeals are, therefore, dismissed leaving all questions of law open to be agitated in an appropriate case."

16. It is stated that the appeal filed by the department against the decision rendered by the Tribunal in **Global Vectra Helicorp** is still pending disposal before the Supreme Court.

17. It would be seen from the aforesaid that all the division benches of the Tribunal, except the division benches deciding **King Rotors** and **East India Hotels,** have followed the earlier decision of the Tribunal in **Sameer Gehlot** that held that the aircraft operator was entitled to the benefit of the exemption notification. The decision of the Tribunal in **Sameer Gehlot** was placed before the division benches deciding **King Rotors** and **East India Hotels**. In **King**

Rotors it was considered to be per incuriam and in **East India Hotels** it was found not to apply to the facts of the case.

18. The relevant portion of the decision in **King Rotors** is reproduced below:

> "In Sameer Gehlot's case (AASPL's case), the post-importation nature of the subjects of undertaking was not appreciated by the Bench while taking the view that the requirement of undertaking to be made by the importer was a pre- importation Condition. **The mistake vitiated the decision. This is the reason why, with great respect, we consider the decision in AASPL's case as having been rendered per incuriam."**
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> **(emphasis supplied)**

19. The relevant portion of the decision in **East India Hotels** is reproduced below:

> "17. In the present case we are also of the firm opinion that facts of the present case are different from the case of King Rotors & Air Charter (Supra) and that of Sameer Gehlot (Supra) because the main allegation qua the violation of undertaking was based on the fact that the undertaking was given for using the aircraft only for NSOP (passenger service) whereas the assessee therein were found to use the same for NSOC (charter services). Both the cases are pre 2010 when there had been an amendment in this notification. With the introduction of new CAR issued by DGCA on 1.6.2010, it has been clarified that non scheduled air transport services can be the passenger as well as charter services simultaneously."

20. This larger bench of the Tribunal by order dated 09.05.2022, framed questions of law and the order is reproduced below:

"During the course of hearing of this appeal it was pointed out by both the learned counsel appearing for the appellants as also the learned special counsel for the Department that specific questions of law have not been framed by the Division Bench while referring the matter to the President for constituting a Larger Bench. Accordingly, as agreed to the learned counsel for all the parties, the following questions of law are being framed:

(i) Whether the reference made to the Larger Bench of the Tribunal has become infructuous by applying the principles of doctrine of merger as was held in **Pernod Ricard India (P) Ltd.** vs. **C.C.**[13] in view of dismissal of the Civil Appeal filed by the Revenue against the order of this Tribunal in **Commissioner of Customs (Import & General)** vs. **Reliance Transport & Travel Ltd.** [14] ;

(ii) Whether the appellant has violated one of the Conditions mentioned at serial no. 104 of notification no. 21/2002-Cus dated 01.03.2002, as amended by notification no. 61/2007-Cus dated 03.05.2007, in a case where pre-defined locations between the two or more places have not been published nor operated according to a published time- table as well when the time and place of departure/arrival is uncertain;

(iii) Whether in terms of exemption notification, an Aircraft/Helicopter imported for non-scheduled operation passenger service can be used for non-scheduled charter service or vice versa and whether non publication of tariff, as prescribed in notification for non-scheduled charter services, can be said to be violative of Explanation (c) of Condition No. 104 of the notification dated 03.05.2007;

(iv) Whether the aircraft imported by the appellant can be classified as "private aircraft" in view of approval granted by the Director General of Civil Aviation to import the aircraft and further grant of renewal of the permission from time to time to use the said aircraft for providing "non-

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13. 2010 (256) ELT 161 (SC)

14. 2020 (372) ELT A105 (S.C); Civil Appeal No. 87-87 of 2020 decided on 08.01.2020 (S.C.)

schedule (passenger) services" or "non-scheduled (charter) services";

(v) Whether the Customs Authority can examine the validity of the permission granted by Director General of Civil Aviation in the absence of cancellation of the said approval and permission to use the imported aircraft for providing non-scheduled operation passenger service;

(vi) Whether it is mandatory for the importer to issue air-tickets for providing non-scheduled operation passenger service to comply with the Conditions of the non-scheduled operation passenger service;

(vii) Whether the "New Civil Aviation Requirement, 2010[15]" issued on 01.06.2010 has no retrospective operation as held in **King Rotors and Air Charter Pvt. Ltd. Vs. C.C. (ACC & Import), Mumbai** [16], notwithstanding paragraph 2.7 of the CAR, 2010; and

(viii) Whether the decision rendered in **King Rotors** is inapplicable in facts of the case in view of specific findings in **King Rotors** that the importer therein did not provide non-scheduled operation passenger service but a third party had provided the non-scheduled operation passenger service and whether the Tribunal in **King Rotors** was correct in holding the decision of the Tribunal in **C.C. New Delhi** vs. **Sameer Gehlot**[17], is per incuriam.

2. List the appeal for hearing on **June 08, 2022**. The parties may submit additional submissions in two weeks."

21. It would be useful, before adverting to the submissions advanced by the learned counsel appearing for the appellants and the intervenors, as also the learned special counsel appearing for the Department, to relate certain essential facts and the relevant legal provisions.

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15. CAR, 2010
16. 2011 (269) ELT 343 (T)
17. 2011 (263) ELT 129 (T)

22. 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 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)**

23. 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.

24. 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 (passenger) service and an undertaking by the importer to the customs authority that the aircraft would be used only for non-scheduled (passenger) 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.

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

> "(b) Air transport services other than scheduled (passenger) air transport services as defined in Rule 3 of the Aircraft Rules, 1937."

26. The aforesaid definition refers to 'air transport services' and 'scheduled (passenger) air transport services' as defined in rule 3 of the Aircraft Rules, 1937[18].

27. "Air transport services" is defined in rule 3(9) of the Aircraft Rules as under:

> "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,

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18. the Aircraft Rules

whether such service consists of a single flight or series of flights."

28. "Scheduled air transport service" is defined in rule 3(49) of the Aircraft Rules as under:

> "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 recognizably systematic series, each flight being open to use by members of the public."

29. The term 'scheduled (passenger) air transport services' has to be interpreted according to this definition, and applied to passenger travel in contradistinction to carriage of goods or mail.

30. Thus, if a service is covered by 'air transport service' defined in rule 3(9) of the Aircraft Rules and is other than 'scheduled (passenger) air transport service' defined in rule 3(49), it would be a non-scheduled (passenger) service within the meaning of clause (b) of the Explanation to Condition No. 104 of the exemption notification.

31. At the time when Condition No. 104 was inserted on 03.05.2007, Civil Aviation Requirement dated 08.10.1999[19] dealing with non-scheduled (passenger) services as well as Civil Aviation Requirement dated 17.05.2000[20], dealing with scheduled (passenger) services, which had been issued under rule 133A of the Aircraft Rules, were in force. The expression 'non-scheduled air transport services (passenger)' has been defined, both under the 1999 CAR as also the 2000 CAR, as follows:

> "Non-scheduled air transport services (passenger) means air transport services other than scheduled air transport services as defined in the rule 3 of the Aircraft Rules, 1937."

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19. 1999 CAR

20. 2000 CAR

32. 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 and the intervenors, as also the learned special counsel appearing for the Department have to be considered.

33. Shri Tarun Gulati, learned senior counsel (assisted by Shri Kishore Kunal and Shri Manish Rastogi) and Shri Prakash Shah, Shri S.J. Vyas, Shri J.C. Patel, Ms. Shweta Garg, Shri Anand D Mishra, Shri Rohit Lalwani, Dr. Jeetesh Nagori and Shri Ashish Agarwal appearing for appellants, and Shri Anand Nainawati and Shri Manish Jain, learned counsel appearing for the intervenor made the following submissions:

(i) The reference to the larger bench has been rendered infructuous in view of the doctrine of merger, as held by the Supreme Court in **Pernod Ricard India (P) Ltd.** vs. **Commr. of Cus., ICD, Tughlakabad**[21] and **Kunhayammed** vs. **State of Kerala**[22] for the reason that the Civil Appeal filed by the Department against the decision of Tribunal in **Reliance Transport** was dismissed by the Supreme Court;

(ii) The aircraft has been used by the appellants only for providing non-scheduled (passenger) service as defined in clause (b) of the Explanation contained in Condition No. 104 of the exemption notification;

(iii) There is no restriction or prohibition against providing air transport service by way of charter of aircraft while providing non-scheduled (passenger) services as defined in clause (b) of the Explanation contained in Condition No. 104 of the exemption notification;

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21. 2010 (256) E.L.T. 161 (S.C.)
22. 2001 (129) E.L.T. 11 (S.C.)

(iv) The contention of the respondent that carriage, for remuneration, of personnel of companies which are group companies of the appellant, does not constitute carriage of members of 'public', apart from being incorrect, is irrelevant;

(v) The decision of the Tribunal in **King Rotors** proceeds on a completely erroneous basis that if flight operations are not open to the public, the aircraft cannot be said to have been used for 'non-scheduled (passenger) service';

(vi) The decision of the Tribunal in **East India Hotels** proceeds on an incorrect premise that published tariff to the public is a mandatory requirement of 'non-scheduled (passenger) service' and if the tariff is not published, the use of the aircraft would be for 'private' use;

(vii) There is no requirement of issuance of tickets for non-scheduled (passenger) service;

(viii) The action of the customs authorities is without jurisdiction in view of the approval granted by the DGCA for import and renewal of permission from time to time for providing non-scheduled (passenger) services; and

(ix) Civil Aviation Requirement dated 01.06.2010[23] issued by the DGCA merely codify the earlier clarifications and the amended Explanation to the exemption notification and, therefore, has retrospective operation. In support of this contention reliance has been placed on the judgments of the Supreme Court in **Zile Singh** vs. **State of Haryana**[24], **Yogendra Nath Naskar** vs. **CIT**[25] and

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23. 2010 CAR
24. (2004) 8 SCC 1
25. (1969) 1 SCC 555

Sone Valley Portland Cement Co. Ltd. vs. **The General Mining Syndicate Pvt. Ltd.**[26].

34. Shri P.R.V. Ramanan and Shri Ajay Jain, learned special counsel appearing for the Department made the following submissions:

(i) Questions nos. (ii), (iv) and (vi) that have been framed by the larger bench are case specific and beyond the scope of the reference made to the larger bench;

(ii) The reference made to the larger bench has not been rendered infructuous as the doctrine of merger would not apply, in view of the decision of the larger bench of the Tribunal in **Kafila Hospitality & Travel Pvt. Ltd.** vs. **Commissioner of S.T., Delhi**[27];

(iii) The key expressions in clause (ii)(a) of Condition No. 104 of the exemption notification are 'only' and 'as the case may be'. The word 'as the case may be' is used when there is compulsion to opt for one entry/option out of two or more available entries/option and this phrase should be read with the word 'only' while interpreting the condition of the exemption notification. In any case an exemption notification has to be strictly construed in view of the judgment of the Supreme Court in **Commissioner of Customs (Imports), Mumbai** vs. **Dilip Kumar & Company**[28];

(iv) The contention of the appellants that an aircraft imported for non-scheduled (passenger) services can be used for non-scheduled (charter) service is not correct as non-scheduled (charter) service can be provided only

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26. (1976) 3 SCC 852
27. 2021 (47) G.S.T.L. 140 (Tri. – LB)
28. 2018 (361) E.L.T. 577 (S.C.)

if the aircraft is registered as such and is approved by the DGCA;

(v) Non-publication of the tariff for non-scheduled (charter) services would be violative of Explanation (c) of Condition No. 104 of the exemption notification;

(vi) The issue as to whether the use of the aircraft was as a 'private' aircraft will depend on the facts of the case and the provisions of the Aircraft Rules;

(vii) The language of the undertaking prescribed in the exemption notification clearly indicates that it is a continuing future obligation and in the event of the failure to use the aircraft for the declared purpose, an obligation is placed on the importer to pay the duty. Thus, the appellants are not justified in asserting that it contains only pre-import conditions;

(viii) The contention of the appellants that when the DGCA under the Aircraft Rules has not found the use of the aircraft by the appellants to be not in inconformity with the permits granted by the DGCA for non-scheduled (passenger) services and such permits have been renewed from time to time, the customs authorities cannot hold that the use of the aircraft was for a purpose other than that covered by the permit is not correct. In support of this contention reliance has been placed on the decisions of the larger bench of the Tribunal in **Bombay Hospital Trust** vs. **Commissioner of Customs, Sahar, Mumbai**[29], and the decisions of the Tribunal **Patel Engineering Ltd.** vs. **Commissioner of**

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29. 2005 (189) E.L.T. 374 (Tri.-LB)

Customs (Import), Mumbai[30] and **Sheshank Sea Foods Pvt. Ltd.** vs. **Union of India**[31];

(ix) 2010 CAR is prospective and does not have a retrospective operation; and

(x) The division bench in **King Rotors** was justified in holding that the earlier decision of the division bench in **Sameer Gehlot** was rendered per incuriam. In any view of the matter, the contention of the appellants that division bench in **King Rotors** should have referred the matter to the larger bench of the Tribunal, gets addressed as the matter is now before the larger bench.

35. The submissions advanced by the learned counsel for the appellants and the learned counsel for the intervenor, as also the learned special counsel for the Department have been considered.

DOCTRINE OF MERGER

36. Learned counsel for the appellants pointed out the division bench of the Tribunal in **Reliance Transport** had decided the issue in favour of the importer of aircraft holding that the earlier decisions of the Tribunal in **Sameer Gehlot** and **Global Vectra Helicorp** would apply and the decision of the Tribunal in **King Rotors** was distinguished. The submission advanced was that the dismissal of the Civil Appeal filed by the Department before the Supreme Court against the decision of the Tribunal in **Reliance Transport** would amount to a declaration of law by the Supreme Court since the order of the Tribunal merged in the order of the Supreme Court. In support of this submission, reliance was placed on the judgments of the Supreme Court in **Kunhayammed** and **Pernod Ricard India**.

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30. 2013 (295) E.L.T. 243 (Tri. – Mumbai)
31. 1996 (88) E.L.T. 626 (S.C.)

37. Learned special counsel appearing for the Department, however, refuted this contention and submitted that the reference would still be maintainable. In support of this submission learned special counsel placed reliance on the decision of the larger bench of the Tribunal in **Kafila Hospitality**.

38. To appreciate this submission, it would be necessary to again reproduce the order passed by the Supreme Court in the Civil Appeal filed by the Department against the decision of the Tribunal in **Reliance Transport** and the same is as follows:

> "Delay Condoned.
> Having heard Learned Solicitor General appearing on behalf of the appellant and gone through the records of the case, we are of the considered opinion that the appeals, being devoid of any merit, are liable to be dismissed and, are dismissed accordingly."

39. A perusal of the aforesaid decision of the Supreme Court would indicate that the Civil Appeal was dismissed as being devoid of any merit. The Supreme Court did not specifically deal with the various reasons given by the Tribunal for holding that the operator had not violated the conditions stipulated in the exemption notification.

40. To support the contention, learned counsel for the appellants placed reliance upon the decision of the Supreme Court in **Kunhayammed** and **Pernod Ricard India**.

41. In **Kunhayammed** a review petition was filed before the High Court after the Special Leave Petition against the order of the High Court had been dismissed by the Supreme Court. An objection was raised regarding the maintainability of the review petition contending that the order of the High Court stood merged in the order of the Supreme Court and, therefore, ceased to exist in the eye of law and that the order of the Supreme Court would amount to affirmation of

the order passed by the High Court. It was, therefore, contended that the High Court could not entertain a prayer for review of its order, much less disturb the order in exercise of the review jurisdiction. The High Court overruled the preliminary objection. It is against this order that a Special Leave Petition was filed. The Supreme Court examined the doctrine of merger and observed that where an appeal is provided before a superior forum and the superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision of the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law. The Supreme Court also observed that an order refusing Special Leave to Appeal does not attract the doctrine of merger, but if the order refusing Leave to Appeal is a speaking order, then the statement of law contained in the order of the Supreme Court is a declaration of law by the Supreme Court, which would be binding under article 141 of the Constitution. The Supreme Court also observed that on an appeal having been preferred or a petition seeking Leave to Appeal having been converted into an appeal, the jurisdiction of the High Court to entertain a review petition is lost.

42. It needs to be noted that Justice R. C. Lahoti (as His Lordship then was) had observed in **Kunhayammed,** which was decided on July 19, 2000, that the decision of the High Court or the Tribunal would merge in the order of the Supreme Court upon dismissal of the Civil Appeal, but subsequently in 2002, His Lordship in **S. Shanmugavel Nadar** vs. **State of Tamil Nadu and Another**[32] explained in detail what part of the order would actually merge in the

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32. (2002) Supp 8 SCC 361

order of the Supreme Court when an appeal is dismissed by the Supreme Court. It would, therefore, be apt to refer to this decision of the Supreme Court in **Nadar** at length. Incidentally, the issue of admissibility of a reference before the Full Bench of the High Court was in issue in **Nadar**. The constitutional validity of the Madras City Tenants Protection (Amendment) Act, 1994 (Act No. 2 of 1996) was assailed in several writ petitions before the Madras High Court. When the matter came up for hearing before a division bench of the High Court, reliance was placed by the respondents on an earlier division bench decision of the Madras High Court in **M. Vardaraja Pillai vs. Salem Municipal Council**[33], wherein the constitutional validity of the Madras City Tenants Protection (Amendment) Act, 1960 (Act No. 13 of 1960) was assailed. This division bench had upheld the validity of Act No. 13 of 1960 but against this decision, appeals by special leave were filed before the Supreme Court. The Supreme Court dismissed the appeals by an order dated September 10, 1986 and it is reproduced below :-

> **"The Constitutional validity of Act 13 of 1960 amending the Madras City Tenants' Protection Act, 1921 is under challenge in these appeals. The State of Tamil Nadu was not made a party before the Trial Court.** However, the State was impleaded as a supplemental respondent in appeal as per orders of the High Court. When the appellants lost the appeal, they sought leave to appeals to this Court. The State of Tamil Nadu was not made a party in the said leave petition. In the S.L.P. before this Court also the State of Tamil Nadu was not made a party. **A challenge to the constitutional validity of the Act cannot be considered or determined, in the absence of the concerned State. The learned counsel now prays for time to implead the State of Tamil Nadu. This appeal is of the year 1973. In our view it is neither**

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33. 85 Law Weekly 760

> **necessary nor proper to allow this prayer at this distance of time. No other point survives in these appeals. Therefore, we dismiss these appeals, but without any order as to costs."**
>
> **(emphasis supplied)**

43. The division bench of the High Court hearing the challenge to the constitutional validity of Act No. 2 of 1996 entertained doubts on the view taken by the earlier division bench of the High Court in **Pillai** and, therefore, referred the matter to a Full Bench of the High Court. When the Full Bench of the High Court took up the hearing of the writ petitions, the aforesaid order of the Supreme Court dated September 10, 1986 was brought to its notice. The Full Bench held that since the appeal against the decision of the division bench in **Pillai** was dismissed by the Supreme Court, the decision of the High Court merged in the order of the Supreme Court and so the Full Bench could not examine the correctness of the law laid down by the division bench in **Pillai**.

44. It is against the aforesaid decision of the Full Bench that appeals were filed by Special Leave before the Supreme Court. The Supreme Court noted that the earlier order dated September 10, 1986 of the Supreme Court did not go into the question of constitutional validity of Act No. 13 of 1960 nor did the Supreme Court apply its mind to the correctness or otherwise of the view taken by the High Court in **Pillai**. The Supreme Court also noted that the appeals had been dismissed as not properly constituted and hence incompetent as the State of Tamil Nadu, which was a necessary party, had not been impleaded. The appeals were, therefore, disposed of without adjudication on merits. The Supreme Court then explained in detail the doctrine of merger and observed that the earlier order

dated September 10, 1986 of the Supreme Court can be said to be a declaration of law only on two points, namely that in a petition involving an issue concerning the constitutional validity of any State Legislation, the State is a necessary party and in its absence the issue cannot be gone into and that a belated prayer for impleading a necessary party may be declined. The Supreme Court also observed that by no stretch of imagination can it be said that the reasoning or the law contained in the decision of the division bench of the Madras High Court in **Pillai** stood merged in the order of the Supreme Court in a sense so as to amount to a declaration of law under article 141 of the Constitution by the Supreme Court or that the order of the Supreme Court had affirmed the statement of law contained in the decision of the High Court. The Supreme Court, therefore, held that upon the dismissal of the appeals on September 10, 1986, the operative part of the order of the division bench stood merged in the decision of the Supreme Court, but the remaining part of the order of the division bench of the High Court cannot be said to have merged in the order of the Supreme Court nor did the Supreme Court make any declaration of law within the meaning of article 141 of the Constitution, either expressly or by the necessary implication. The Supreme Court further made it clear that since neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down therein had been gone into in the earlier order, the statement of law contained in the division bench judgment of the High Court in **Pillai** would continue to remain the decision of the High Court, binding as a precedent on subsequent Benches of coordinate or lesser strength but open to reconsideration by any Bench of the same High Court with a coram of judges more than two. The Supreme

Court, it needs to be noted, also observed that the Full Bench of the High Court was not hearing a prayer for **review** of the order passed by the division bench in **Pillai**. Thus, a clear distinction had been drawn by the Supreme Court in cases when a larger bench is hearing a reference and when it is hearing a review petition after the dismissal of an Appeal by the Supreme Court. A review petition would not be maintainable before the High Court after the dismissal of the Appeal by the Supreme Court, but the decision can be reconsidered by a larger bench of the High Court if the Supreme Court had not adjudicated on the merits of the order of the High Court. The Supreme Court, therefore, set aside the order of the Full Bench of the High Court and restored the appeal before the Full Bench to be heard and decided in accordance with law. The relevant portions of the judgment of the Supreme Court is reproduced below :-

> "10. **Firstly, the doctrine of merger.** Though loosely an expression merger of judgment, order or decision of a court or forum into the judgment, order or decision of a superior forum is often employed, **as a general rule the judgment or order having been dealt with by a superior forum and having resulted in confirmation, reversal or modification, what merges is the operative part, i.e. the mandate or decree issued by the Court which may have been expressed in positive or negative forum.** For example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons different from the one assigned by the subordinate forum what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the subordinate forum; otherwise there would be an apparent contradiction. **However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of**

the reasoning, incorporated in the judgment or order of the subordinate forum.

11. **Secondly, the doctrine of merger has a limited application.** In State of U.P. v. Mohammad Nooh. AIR (1958) SC 86 the Constitution Bench by its majority speaking through S.R. Das. CJ so expressed itself. **"while it is true that a decree of a court of first instance may be said to merge in the decree passed on appeal there from or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree".** A three-Judge Bench in State of Madras v. Madurai Mills Co. Ltd., AIR (1967) SC 681 held, "the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two order irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. (emphasis supplied). Recently a three-Judge Bench of this Court had an occasion to deal with doctrine of merger in Kunhayammed and Ors. v. State of Kerala and Anr., [2000] 6 SCC 359 and this Court reiterated that the doctrine of merger is not of universal or unlimited application; the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid, shall have to be kept in view, (emphasis supplied). **In this view of the law, it cannot be said that the decision of this Court dated 10.9.1986 had the effect of resulting in merger into the order of this Court as regard the statement of law or the reasons recorded by the Division Bench of the High Court in its impugned order. The contents of the order of this Court clearly reveal that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor they could have been gone into.**

12. **Thirdly,** as we have already indicated, in the present round of litigation, the decision in Varadaraja Pillai's case was cited only as a precedent and not as res judicata. **The issue ought to have been examined by the Full Bench in the light of Article 141 of the Constitution and not by applying the doctrine of merger. Article 141** speaks of declaration of law by the Supreme Court. **For a declaration of law there should be a speech, i.e., a speaking order.** In Krishen Kumar v. Union of India and Ors., [1990] 4 SCC 207, this Court has held that the doctrine of precedents, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. In State of U.P. and Anr. v. Synthetics and Chemicals U.P. and Anr., [1991] 4 SCC 139, R.M. Sahai, J. (vide para 41) dealt with the issue in the light of the rule of sub-silentio. The question posed was: can the decision of an Appellate Court be treated as a binding decision of the Appellate Court on a conclusion of law which was neither raised nor preceded by any consideration or in other words can such conclusions be considered as declaration of law? His Lordship held that the rule of sub-silentio, is an exception to the rule of precedents. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." A court is not bound by an earlier decision if it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. A decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues, cannot be deemed to be a law declared, to have a binding effect as is contemplated by Article 141. His Lordship quoted the observation from B. Shama Rao v. The Union Territory of Pondicherry, [1967] 2 SCR 650 "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". His Lordship tendered an advice of wisdom -"restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

M/s. Rup Diamonds and Ors. v. Union of India and Ors., AIR (1989) SC 674 is an authority for the proposition that apart altogether from the merits of the grounds for

rejection, the mere rejection by a superior forum, resulting in refusal of exercise of its jurisdiction which was invoked, could not by itself be construed as the imprimatur of the superior forum on the correctness of the decisions sought to be appealed against. In Supreme Court Employees Welfare Association v. Union of India and Ors. AIR (1990) SC 334 this Court observed that a summary dismissal, without laying down any law, is not a declaration of law envisaged by Article 141 of the Constitution. **When reasons are given, the decision of the Supreme Court becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. When no reason are given, a dismissal simpliciter is not a declaration of law by the Supreme Court under Article 141 of the Constitution.** In Indian Oil Corporation Ltd. v. State of Bihar and Ors., AIR (1986) SC 1780 this Court observed that the questions which can be said to have been decided by this Court expressly, implicitly or even constructively, cannot be re-opened in subsequent proceedings; but neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court bar the trial of identical issue in separate proceedings merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication.

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14. It follows from a review of several decisions of this Court that it is the speech, express or necessarily implied, which only is the declaration of law by this Court within the meaning of Article 141 of the Constitution.

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16**. In the present case, the order dated 10.9.1986 passed by this Court can be said to be declaration of law limited only to two points - (i) that in a petition putting in issue the constitutional validity of any State Legislation the State is a necessary party and in its absence the issue cannot be gone into, and (ii) that a belated prayer for impleading a necessary party may be declined by**

this Court exercising its jurisdiction under Article 136 of the Constitution if the granting of the prayer is considered by the Court neither necessary nor proper to allow at the given distance of time. **By no stretch of imagination can it be said that the reasoning or view of the law contained in the decision of the Division of the High Court in M. Varadaraja Pillai 's case had stood merged in the order of this court dated 10.9.1986 in such sense as to amount to declaration of law under Article 141 by this Court or that the order of this Court had affirmed the statement of law contained in the decision of High Court.**

17. **We are clearly of the opinion that in spite of the dismissal of the appeals on 10.9.1986 by this Court on the ground of non-joinder of necessary party, though the operative part of the order of the Division Bench stood merged in the decision of this Court, the remaining part of the order of Division Bench of the High Court cannot be said to have merged in the order of this Court dated 10.9.1986 nor did the order of this Court make any declaration of law within the meaning of Article 141 of the Constitution either expressly or by necessary implication. The statement of law as contained in the Division Bench decision of the High Court in M. Varadaraja Pillai's case would therefore continue to remain the decision of the High Court, binding as a precedent on subsequent benches of coordinate or lesser strength but open to reconsideration by any bench of the same High Court with a coram of judges more than two.**

18. **The Full Bench was not dealing with a prayer for review of the earlier decision of the Division Bench in M. Varadaraja Pillai's case and for setting it aside. Had it been so, a different question would have arisen, namely, whether another Division Bench or a Full Bench had jurisdiction or competence to review an earlier Division Bench decision of that particular Court and whether it could be treated as affirmed, for whatsoever reasons, by the Supreme Court on a plea that in view of the decision having been dealt with by the Supreme Court the decision of the High Court was**

> **no longer available to be reviewed.** We need not here go into the question, whether it was a case of review, or whether the review application should have been filed in the High Court or Supreme Court. Such a question is not arising before us.
>
> 19**. Under Article 141 of the Constitution, it is the law declared by the Supreme Court, which is binding on all Courts within the territory of India. Inasmuch as no law was declared by this Court, the Full Bench was not precluded from going into the question of law arising for decision before it and in that context entering into and examining the correctness or otherwise of the law stated by the Division Bench in M. Varadaraja Pillai's case and either affirming or overruling the view of law taken therein leaving the operative part untouched so as to remain binding on parties thereto.**
>
> 20. Inasmuch as in the impugned judgment, the Full Bench has not adjudicated upon the issues for decision before it, we do not deem it proper to enter into the merits of the controversy for the first time in exercise of the jurisdiction of this Court under Article 136 of the Constitution. We must have the benefit of the opinion of the Full Bench of the High Court as to the vires of the State legislation involved."
>
> 21. For the foregoing reasons, the appeals are allowed. The impugned judgment of the High Court is set aside. All the appeals shall stand restored before the Full Bench of the High Court and shall be heard and decided in accordance with law.
>
> **(emphasis supplied)**

45. The aforesaid decision of the Supreme Court in **Nadar** was followed by the Supreme Court in **Collector of Central Excise** vs. **Technoweld Industries**[34] and the relevant paragraph is reproduced below :-

> "5. Reliance was placed upon the authority of this Court in the case of S. Shanmugavel Nadar vs. State of

34. (2003) 11 SCC 798

> T.N. It was submitted that all the civil appeals had been dismissed by non-speaking orders. It was submitted that it is open to this Court to consider whether or not the impugned decisions of the Tribunal are correct. There can be no dispute with this proposition. We have, therefore, heard the learned counsel at length."

46. In **State of Kerala and another** vs. **Kondottyparambanmoosa and Others**[35], the Supreme Court also examined the doctrine of merger. The decision of the Taluk Land Board was assailed in a revision before the High Court. The revision was dismissed as the delay condonation application was rejected. The Board subsequently reopened the case, but the respondent filed a revision before the High Court to challenge the order of the Board reopening the case. The main ground for challenge was that the earlier order of the Board had merged with the revisional order of the High Court. The High Court allowed the revision holding that the earlier order of the Board had merged in the order of the High Court. This reasoning of the High Court was not accepted by the Supreme Court and it was held that the order of the Board had not merged in the order of the High Court since the revision was dismissed on the ground of rejection of the application filed for condonation of delay and not on merits. The observation are as follows :-

> "20. It is clear that the Board vide its order dated 13-6-1985 held that the respondents were not liable to surrender any land. **However, it cannot be said that the aforesaid order has merged with the order of the High Court dismissing the Revision petition of the appellant State as the same was dismissed on the ground of rejection of the application for condonation of delay and not on merits.**

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35. (2008) 8 SCC 65

21. In this connection, the decision of this Court in S. Kalawati vs. Durga Prasad[36] may be strongly relied upon. In paragraph 7 of the said decision, this Court observed as follows: (SSC p. 699).

"7. The principle behind the majority of the decisions is thus to the effect that where an appeal is dismissed on the preliminary ground that it was not competent or for non- prosecution or for any other reason the appeal is not entertained, the decision cannot be said to be a 'decision on appeal' nor of affirmance. **It is only where the appeal is heard and the judgment delivered thereafter the judgment can be said to be a judgment of affirmance."**

24. Keeping these principles as enunciated by this Court in the aforesaid three decisions in mind and applying the said principles in the facts of this case, we have no hesitation in our mind to conclude that the High Court in the impugned order did not at all consider that in the earlier revision order of the High Court, revisional application was rejected not on merits but only on the ground of delay. **Therefore, it must be held that since earlier revision application was not rejected on merits, the said order rejecting the same on the ground of delay cannot be said to be the order of affirmance and that being the position, we must hold that since the earlier revision petition was not decided on merits, the doctrine of merger cannot be applied to the facts and circumstances of the present case.** In this connection an observation made by this Court in Chandi Prasad and Others Vs. Jagdish Prasad[37] needs to be reproduced which is as under:-

> "28. …..when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply."

25. **In this view of the matter, we are, therefore, of the opinion that the doctrine of merger would only apply in a case when a higher forum entertains an appeal or revision and passes an order on merit and not when the appeal or revision is dismissed on**

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36. (1976) 1 SCC 696
37. (2004) 8 SCC 724

> **the ground that delay in filing the same is not condoned.** In our view, mere rejection of the revision petition on the ground of delay cannot be allowed to take away the jurisdiction of the Board, whose order forms a subject-matter of petition and Section 85(9) of the Act confers powers on the Board to reopen the case if such grounds for reopening the case are shown to exist."
>
> **(emphasis supplied)**

47. It is seen that **Kunhayammed** was considered by the Supreme Court in the aforesaid judgment in **Nadar**.

48. Learned counsel for the appellants also relied upon the decision of the Supreme Court in **Perond Ricard**. This decision followed the earlier decision of the Supreme Court in **Kunhayammed** and the observations are as follows:

> "In our opinion, once a statutory right of appeal is invoked, dismissal of appeal by the Supreme Court, whether by a speaking order or non speaking order, the doctrine of merger does apply, unlike in the case of dismissal of special leave to appeal under Article 136 of the Constitution by a non-speaking order."

49. It needs to be noted that while deciding the Civil Appeal filed by the Department against the decision of the Tribunal **Reliance Transport**, the Supreme Court had not expressed any view on the reasons given by the Tribunal as it merely observed that the appeal, being devoid of any merit, has to be dismissed. As noticed above, the Supreme Court in **Nadar** had explained what part of the order would merge in the order of the Supreme Court. The Supreme Court pointed out that since the reasons recorded by the High Court nor the law laid down had been dealt with by the Supreme Court, the statement of law contained in the division bench judgment of the High Court would continue to remain the decision of the High Court. Only the operative part of the order of the division bench stood merged in the decision of

the Supreme Court and the remaining part of the order of the division bench of the High Court cannot be said to have merged in the order of the Supreme Court nor did the Supreme Court make any declaration of law within the meaning of article of 141 of the Constitution, either expressly or by necessary implications. In the present case also, the Supreme Court has not dealt with the reasons recorded by the Tribunal or the statement of law. It cannot, therefore, be contended that a declaration of law under article 141 of the Constitution had been made by the Supreme Court upon dismissal of the Civil Appeal by order dated 08.01.2020.

50. Thus, it is not possible to accept the contention of the learned counsel for the appellants that the reference to the larger bench has been rendered infructuous for the reason that the Civil Appeal filed by the Department against the decision of the Tribunal in **Reliance Transport** was dismissed by the Supreme Court.

Preliminary objections by revenue

51. Learned special counsel appearing for the department raised objections to question nos. (ii), (iv) and (vi) that have been framed for the reason that these three questions are case specific and entertaining them would be beyond the scope of the reference made to the Larger Bench. The submission is that these were not the issues where there was a difference of opinion in the cases referred to by the division bench.

52. As noticed above, the division bench after noticing the two contradictory views expressed by the earlier two division benches in **Sameer Gehlot** and **King Rotors,** referred the matter to the Larger Bench. When objections were raised by the parties that specific questions of law have not been framed by the division bench, the

larger bench, in its order dated 09.05.2022, framed eight questions in consultation with the learned counsel for all the parties. These issues, on which objections have been raised by learned special counsel for the department, have been considered by other division benches of the Tribunal which have referred to **Sameer Gehlot** and **King Rotors**. It is for this reason that these issues were framed by the Larger Bench. It is, therefore, not possible to accept this objection raised by the learned special counsel for the department.

Use of Aircraft for only non-scheduled (passenger) services

53. It needs to be examined, as has been contended on behalf of the appellants, whether the aircraft was used by the appellants only for providing non-scheduled (passenger) services as defined in clause (b) of the Explanation to Condition No. 104 of the exemption notification.

54. Non-scheduled (passenger) services has been defined in the aforesaid clause (b) to mean **air transport services** other than **scheduled (passenger) air transport services** as defined in rule 3 of the Aircraft Rules. Thus, what has to be seen is whether the use of the aircraft satisfies the following two requirements of clause (b):

(i) the use should be for air transport service; and
(ii) such air transport service should be other than scheduled (passenger) air transport service as defined in rule 3 of the Aircraft Rules.

55. 'Air transport service' has been defined in rule 3 (9) of the Aircraft Rules to mean service for transport by air of persons for any kind of remuneration whatsoever. There is no dispute that the appellants have used the aircraft for the transport of persons for remuneration. There is no stipulation or restriction or a condition in

the said definition that a tariff should be published or that such service should be rendered only on per-seat basis and not by chartering or about the category or class of persons to be transported. Thus, the contention of the department that the appellants have rendered 'air transport service' to their group companies by carrying personnel of their group companies is not of any relevance as there is no prohibition in the said definition against any kind of persons to be transported.

56. Rule 3 (49) of the Aircraft Rules defines 'scheduled air transport service' to mean an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute a recognizably systematic series, each flight being open to use by members of the public. Thus, for an 'air transport service' to qualify as 'scheduled air transport service', it must satisfy all the following three conditions:

(i) It must be undertaken between the same two or more places;
(ii) It must be operated according to a published time table or the flights must constitute a recognizable systematic series; and
(iii) Each flight must be open to use by members of the public.

57. If any of the aforesaid three conditions is not satisfied in respect of a passenger air transport service, the same cannot be termed as 'scheduled air transport service' and, therefore, would be a non-scheduled (passenger) service as defined in clause (b) of the Explanation to Condition No. 104 of the exemption notification. In the present case, the aforesaid conditions are not satisfied and, therefore,

the air transport service rendered by the appellants would be other than scheduled (passenger) air transport service.

58. Thus, both the requirements of clause (b) of the Explanation are satisfied. It is also not in dispute that the appellants have been granted non-scheduled operator permits, which permits have been renewed from time to time without any objection from the DGCA.

59. It has now to be seen whether the appellants have used the aircraft for providing non-scheduled (charter) services as defined in clause (c) of Condition No. 104 of the Explanation to the exemption notification.

60. Non-scheduled (charter) services have been defined in clause (c) to mean services provided by a non-scheduled (charter) air transport operator, for charter or hire of an aircraft to any person, with a published tariff, and who is registered with and approved by DGCA for such purposes and who confirms to the Civil Aviation Requirements. An aircraft operator can be said to provide non-scheduled (charter) service only if the service satisfies the requirements of clause (c). The appellants are not registered and approved with DGCA as non-scheduled (charter) air transport operator and in some cases there is no published tariff. The appellants, therefore, cannot be said to have provided non-scheduled (charter) services as defined in clause (c).

61. The appellants have, therefore, provided non-scheduled (passenger) services, as defined in clause (b) of the Explanation to the exemption notification.

Non-scheduled (passenger) operator can carry out charter service

62. It would now have to be seen whether there is any restriction or prohibition against providing air transport service by way of charter of aircraft, while providing non-scheduled (passenger) services.

63. As noticed above, the definitions of air transport service and non-scheduled (passenger) service do not stipulate any restriction or impose a condition that such service should be rendered only on per-seat basis and not by chartering nor is there any stipulation in CAR 1999 issued by DGCA for grant of permits to operate non-scheduled air transport (passenger) services. In fact paragraph 9.2 of CAR 1999, which deals with non-scheduled air transport (passenger) services, categorically provides that a non-scheduled operator can conduct charter operations.

64. The submission advanced by learned special counsel appearing for the department is that an operator who has been granted a permit by the DGCA to operate non-scheduled (passenger) service cannot be permitted to carry out charter services for the reason that this would be in violation of the terms of the exemption notification and the undertaking given by the operator. Learned special counsel pointed out that non-scheduled (charter) services means services provided by a non-scheduled (charter) air transport operator who is registered with and approved by DGCA for such purpose. Thus, an operator who is not registered with and approved by the DGCA for operating charter services cannot be permitted to operate charter services. Learned special counsel further pointed out that reliance placed on clause 9.2 of CAR 1999, by which a non-scheduled (passenger) operator can also use the aircraft for charter services, was not accepted by the division bench of the Tribunal in **King Rotors** for the reason that the two categories namely, non-scheduled (passenger)

services and non-scheduled (charter) services are distinct services. Learned special counsel also submitted that an exemption notification has to be strictly construed as was pointed out by the Supreme Court in **Dilip Kumar**.

65. What needs to be noticed is that the exemption notification does not prohibit a non-scheduled (passenger) service permit holder to use the aircraft for charter operations. A conjoint reading of the definitions contained in the Aircraft Rules, as have been adopted in the definition in clause (b) of the Explanation to Condition No. 104 of the exemption notification, makes the following position quite clear:

(a) The expression "air transport service" covers service for the transport by air of person for any kind of remuneration whatsoever. The service may be individually for each seat or by chartering the entire aircraft and the remuneration may be of any kind whatsoever, such as seat-wise or daily or weekly or monthly or annual basis. There is no restriction on the mode and manner of fixing or charging the remuneration either in the exemption notification or in the Aircraft Rules;

(b) "Scheduled (passenger) air transport service" only means that air transport service which has the essential features mentioned in the definition in rule 3 (49) of Aircraft Rules, namely, it must be undertaken between the same two or more places, operated according to a time table or with flights so regular or frequent that they constitute a recognizable systematic series, each flight being open to use by the 'members of the public'; and

(c) If a service is covered by "air transport service" defined in rule 3(9) and is other than "scheduled (passenger) air transport service" defined in rule 3(49), it is a "non-scheduled (passenger) service" within the meaning of clause (b) of the Explanation to the exemption notification.

66. It needs to be noticed that Condition No. 104 specifically refers to the definitions contained in the Aircraft Rules as also Civil Aviation Requirements issued under the provisions of rule 133A of the Aircraft Rules. Both, CAR 1999 that deals with non-scheduled (passenger) services operator and CAR 2000 that deals with non-scheduled (charter) services operator define a non-scheduled air transport services (passenger) in the same manner as defined in clause (b) of the Explanation to Condition No. 104.

67. CAR 1999 contains the following relevant provisions:

(a) There will be no restriction on the type and seating capacity of the aircraft to be importer/acquired by the applicant.

(b) Non-scheduled operators can conduct charter/non-scheduled operations for transportation by air of persons, mail or goods. In such operations, the operators shall not publish their time schedules as the operations are of non-scheduled nature.

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

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

70. This apart, a perusal of the definition of non-scheduled (passenger) services contained in the Explanation to Condition No.

104 would show that it includes within its scope all air transport services other than scheduled (passenger) air transport services. Therefore, all services which are not scheduled services are permitted non-scheduled (passenger) services. Thus, also non-scheduled (passenger) permit holders can perform air transport services either by selling individual seat or by hiring out the entire aircraft for non-scheduled operations.

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

72. This issue can be examined from another aspect. A comparison of the definition of non-scheduled (passenger) services with non-scheduled (charter) services would show that while non-scheduled (passenger) services are of much wider category, non-scheduled (charter) services are of limited nature applicable only to small aircrafts and restricted to operators registered under the non-scheduled (charter) category. What needs to be noticed is that the exemption is available to both non-scheduled (passenger) services and non-scheduled (charter) service and neither the exemption notification nor the Aircraft Rules or Civil Aviation Requirements excludes charter operations from the ambit of non-scheduled (passenger) services.

73. The provisions of CAR 1999 and CAR 2000 do indicate that CAR 2000 was issued for charter operation only so as to provide some relaxation to smaller aircrafts. Pre-dominantly, the two contain identical provisions with the exception that the CAR 2000 contains

some relaxed provisions meant for smaller aircraft, as can be noticed while comparing the provisions of the two Civil Aviation Requirements:-

Particulars	Non-scheduled (passenger) service	Non-scheduled (charter) service
Applicability and Scope	Applies to all aircraft without restriction on the type and seating capacity of the aircraft. (paragraph 5.1)	Restricted to small aircraft not exceeding sitting capacity of 9 seats. (Paragraph 2 and Paragraph 6)
Definition Clause	Non-scheduled (passenger) service is defined as air transport services other than scheduled air transport services as defined in rule 3 of the Aircraft Rules. (Paragraph 2)	Apart from defining non-scheduled (passenger) service, the CAR also defines charter operations to include an operation for hire and reward for which departure time, departure location and arrival location is specifically negotiated with the customer for the entire aircraft. Further, it is required that an aircraft operating for charter operations is not required to issue tickets. (Paragraph 3)
Aircraft and airworthiness requirements	There is no restriction on the basis of seating capacity. (Paragraph 5)	Nine Seats (Paragraph 6)
Eligibility requirement	Requirement of Aircraft Maintenance Engineer is mandatory. (Paragraph 3.2(c))	No such requirement. (Paragraph 4.3.2)
Grant of initial NOC.	Fee prescribed is Rs. 50,000/- (paragraph 4.1.1)	Fee prescribed is Rs. 35,000/- (Paragraph 5.1.1)
Fee for renewal	Rs. 30,000/-(Paragraph 8.1)	Rs. 15,000/- (Paragraph 9.1.1)

74. It is apparent from the aforementioned table that the category of non-scheduled (passenger) services is a much wider category and

specifically includes charter operations in which the entire aircraft is given for hire or reward by charging remuneration from the hirer. A category of charter operations was created in CAR 2000 only to provide for certain relaxation to small aircrafts and there was no intention to create a separate category. Therefore, where the regulatory requirement under the Civil Aviation Requirements itself permits the non-scheduled (passenger) operator to carry out charter operations, it would not be correct on the part of the department to contend that a non-scheduled (passenger) operator cannot carry out charter operations and that the non-scheduled (passenger) services and charter services are mutually exclusive.

75. Emphasis has been placed by the learned special counsel for the department on the expressions "only" and "as the case may be" used in clause (ii)(a) of Condition No. 104 of the exemption notification. The use of the term "only" signifies that the use of the aircraft is restricted to non-scheduled (passenger) services or non-scheduled (charter) services and the use for any other purpose would not be permissible for the claiming exemption. As a non-scheduled (charter) permit holder cannot carry out "passenger operations", the expression "as the case may be" has been used and it would not mean that a non-scheduled (passenger) permit holder cannot carry out charter operations.

76. In this connection, it would be pertinent to refer to the clarifications issued by DGCA for non-scheduled (passenger) services operator. The letter dated 08.08.2008 issued by DGCA states that a non-scheduled (passenger) permit holder can conduct charter operations and such operations would be within the purview of the

non-scheduled (passenger) services permit holders. The relevant portion of the clarification is as under:

> **"The non-scheduled operators permit entitles the permit holder to use the aircraft for hire and reward i.e. for commercial activity. This may include per seat hiring of the aircraft or a full aircraft charter.**
> The NSOP holder may also enter into a long or short term lease contract to provide aircraft to a client including its operations, maintenance and other associated services."
>
> **(emphasis supplied)**

77. In regard to a specific query dated 16.08.2008 raised by the Commissioner of Customs, Mumbai, the DGCA interpreted the position of law in the following manner:

> "The matter has been examined in this office in light of the provisions of the Civil Aviation Requirements Section (CAR) 3 Series C Part III and Part V (copies enclosed).
>
> **Paragraph 9.2 of the CAR (Part III), which relates to Non-Scheduled Operator's Permit (Passenger), clearly provides that Non-Scheduled Operators can conduct both charter as well as Non-Scheduled operations for transportation by air of persons, mail or goods.** While there is no express provision regarding entering into long term arrangements for charter operations, yet this office feels that if the permit holder chooses to give such aircraft on long term lease along with crew (wet lease) for charter operations on behalf of the client, such operations will also fall under the category of charter operations. It is only the form of the operation, which undergoes a change under such arrangements, but the substance remains the same.
>
> **As regards the observations in your letter regarding two distinct categories of permits i.e. the Non-Scheduled (Passenger) and Non-Scheduled (Charter) services, it may be stated that the intention behind issuing a separate CAR for charter operations was to encourage small aircraft not**

> **exceeding the seating capacity of 9 to be used for charter operation.** It may also be added that Non-Scheduled (Charter) Permit holders is expected to use his aircraft only for charter services, whereas Non- Scheduled (Passenger) Permit holder is free to use his aircraft for both charter and passenger services."
>
> **(emphasis supplied)**

78. A communication dated 15.12.2009 was also sent by DGCA to M/s. International Aircharter Operations India Pvt. Ltd clarifying that an operator having non-scheduled (passenger) services can also conduct charter operations in view of provisions of paragraph 9.2 of CAR 1999. Similar letter dated 15.07.2009 was also sent by DGCA to the Commissioner of Customs, New Delhi.

79. DGCA has, therefore, unequivocally clarified that a non-scheduled (passenger) permit holder can conduct charter operations. It is the DGCA which is empowered to issue Civil Aviation Requirements under rule 133A of the Aircraft Rules. Thus, charter operations can be carried out by a permit holder of non-scheduled (passenger) services.

80. Learned counsel for the appellants have also submitted that in fact DGCA has amalgamated CAR 1999 and CAR 2000 into CAR 2010. This CAR 2010 has restated and codified the earlier position stated by DGCA through clarifications and is explanatory in nature. It is, therefore, the submission that for this reason also a non-scheduled (passenger) service operator can carry out charter operations.

81. A perusal of paragraph 1 dealing with "introduction" does indicate that the CAR 1999 and CAR 2000 have been amalgamated and a uniform code for operation non-scheduled air transport services has been laid down. The relevant paragraphs of CAR 2010 are reproduced below:

"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.

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2.7 This CAR applies to all Non-Scheduled Operator's Permit holders including to those, who have obtained their permits prior to the coming into force of this CAR. However, they shall comply with the requirements of Para 4.2 (b) of this CAR, within 06 months of the date of effectivity of the CAR.

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3.1 '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;

3.2 '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;

3.3 'Non-Scheduled air transport service' means an air transport service, other than a scheduled air transport service as defined in para 3.2 above, being operated for

> carriage of passengers, mail and goods, and includes charter operations.
>
> 3.4 "Charter operation" means an operation for hire and reward in which the departure time, departure location and arrival locations are specially negotiated and agreed with the customer or the customer's representative for entire aircraft. No ticket is sold to individual passenger for such operation."

82. It is, therefore, clear that CAR 2010 amalgamates the earlier two Civil Aviation Regulations and absorbs the clarification issued by DGCA from time to time and is explanatory in nature. The aid of CAR 2010 can, therefore, be taken to understand the CAR 1999 and CAR 2010.

Whether, non publication of tariff is violative of Explanation (c) of Condition No. 104

83. Learned special counsel for the department placed reliance on the definition of 'non-scheduled (charter) services' contained in Explanation (c) of Condition No. 104 to the exemption notification to contend that the condition of the exemption notification has not been fulfilled by the appellant.

84. Learned counsel appearing for the appellants submitted that it is only while defining 'non-scheduled (charter) services' that reference has been made to published tariff and, therefore, it cannot be termed as a condition to the exemption notification. The submission is that while defining 'non-scheduled (passenger) services' in clause (b) of the Explanation, there is no requirement of having a published tariff.

85. The submission advanced by learned counsel for the appellants deserves to be accepted. Merely because the appellants can also conduct charter operations would not mean that the appellant would

becomes a non-scheduled (charter) permit holder and consequently required to have a published tariff. The definition of non-scheduled (passenger) service given in clause (b) of the Explanation, as analyzed above, does not require the publication of tariff. It is also seen that under rule 135 of the Aircraft Rules, 1937, it is only the air transport undertaking offering scheduled air transport services in accordance with rules 134(1) and 134(2) that are required to publish their tariff.

Whether the aircraft can be used by members of public

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.

87. Even otherwise, the purpose of having a published tariff is to apprise the public of the rates at which the aircraft would be available. The appellants hire the aircrafts to customers pursuant to tenders/negotiations. The purpose of having a published tariff is, therefore, substantially complied with.

88. Learned special counsel for the appearing for the department submitted that the aircraft is being provided for private use and is not available to use by the public.

89. Learned counsel for the appellants submitted that the aircraft is available not only to group companies but also to other customers.

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.

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**[38]**, Titan Medical Systems Pvt. Ltd.** vs. **Collector of Customs, New Delhi**[39] and **Vadilal Chemicals Ltd.** vs. **State of Andhra Pradesh**[40].

94. Learned special counsel appearing for the department has however placed reliance upon the decision of a larger bench of the Tribunal in **Bombay Hospital Trust** vs. **Commissioner of Customs, Sahar, Mumbai**[41], and also division bench decision of the Tribunal in **Patel Engineering Ltd.** vs. **Commissioner of Customs (Import), Mumbai**[42]. Learned special counsel for the department also placed reliance upon the decision of the Supreme Court in **Sheshank Sea Foods Pvt. Ltd.** vs. **Union of India**[43].

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

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38. 2007 (210) E.L.T. 648 (S.C.)
39. 2003 (151) E.L.T. 254 (S.C.)
40. 2005 (192) E.L.T. 33 (S.C.)
41. 2005 (188) E.L.T. 374 (Tri.-LB)
42. 2013 (295) E.L.T. 243 (Tri.- Mumbai)
43. 1996 (88) E.L.T. 626 (S.C.)

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)**

96. Learned special counsel for the department has, however, placed reliance upon the decision of a larger bench of the Tribunal in

Bombay Hospital Trust. The conditional notification in issue provided that the importer of the Hospital Equipment must provide free treatment to 40% of the outdoor patients and reserve 10% beds for free treatment of patients with family income of less than Rs.500/-. Examination of compliance with the said condition was purely one of verification of the fact of free treatment and it was held that customs had jurisdiction to verify the same. Such verification did not involve any interpretation of the provisions of another enactment. Nor was it a case of difference of opinion between the interpretation of any such provision on the part of customs on the one hand and the Director General of Health Services on the other. This decision, therefore, does not help the respondents. It also needs to be noted that the decision of the larger bench of the Tribunal was delivered by a learned Member who had also delivered the decision of the Tribunal in **Sameer Gehlot**. The learned Member was, therefore, aware of the difference between the nature of conditions involved in the two cases.

97. In **Patel Engineering Ltd.,** the undertaking was that the machinery shall be used exclusively for construction of roads and shall not be sold or disposed of in any manner for a period of five years from the date of import. The allegation was that the importer had diverted the machine to other entities before completion of the said period of five years. The verification of compliance of the undertaking was one purely of fact, namely whether the machine had been disposed of before expiry of five years. It was held that the customs had jurisdiction to verify the same. Such verification did not involve any interpretation of the provisions of another enactment. The said decision, therefore, would also not help the respondents.

98. In **Sheshank Sea Foods Pvt. Ltd.,** the condition of the Customs Notification which was in issue was that the exempted goods shall not be sold, loaned, transferred or disposed of in any manner. The Supreme Court held that customs had jurisdiction to investigate whether said condition was violated. Verification of compliance with the said condition was one purely of fact, namely whether the goods had been sold or otherwise transferred, and did not involve any interpretation of the provisions of another enactment. This decision will also, therefore, not help the respondents.

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.

Requirement of issuing air-tickets

100. The definitions of 'air transport service' and 'non-scheduled (passenger) service' do not stipulate any restriction or condition that such service should be rendered only on per-seat basis. Nor is there any stipulation in the said definitions for issuance of passenger tickets. The **Policy Guidelines for Starting Scheduled/ Non-Scheduled Air Transport Services** issued by the Ministry of Civil Aviation clearly state that non-scheduled operation means an air transport service other than scheduled air transport service and that it may be on charter basis and/or non-scheduled basis and that such operator is **not permitted to publish time schedule and issue tickets to passengers.** A operator of non-scheduled passenger service is, therefore, not required to issue tickets to passengers.

101. Learned special counsel for the department has, however, placed reliance upon paragraph 9.7 of CAR 1999 to contend that non-issue of passenger tickets would amount to not rendering non-scheduled (passenger) service.

102. This contention cannot not be accepted. Paragraph 9.7 of CAR 1999 provides that non-scheduled operators shall issue passenger tickets in accordance with the provisions of the Carriage By Air Act 1972 **and any other requirements which may be prescribed by DGCA**. As noticed above, the Policy Guidelines for starting scheduled/non-scheduled air transport services issued by Ministry of Civil Aviation provide that non-scheduled operator is not permitted to publish time schedule and issue tickets to passengers. There is, therefore, no obligation on the part of the appellants to issue tickets to passengers.

103. In any event, non-issuance of passenger ticket has not been considered by the competent authority under Ministry of Civil Aviation, namely Director General of Civil Aviation to mean that the appellants had not used the aircraft for non-schedule passenger service in terms of the permit issued by the said authority.

104. Under the Carriage by Air Act, 1972, the issuing of tickets is governed by the Second Schedule. Further, as per section 8 of the said Act, the Schedule will only be applicable to domestic carriage, once a notification is published applying the said provision to domestic carriage. In this regard, a notification dated 30.03.1973 was published in the Gazette, wherein Part I and II of Second Schedule dealing with the passenger tickets were not notified to apply to domestic carriage. Therefore, there is no requirement for issuing the tickets under the said Act for domestic carriage. In any event, in

terms of paragraph 3 of the CAR 2000, no tickets are required to be sold for carrying out charter operations.

105. This apart, even if air tickets are not issued to the passenger, it may only lead to non fulfillment of the liability. The consequence is itself mentioned in rule 3(2) to the Second Schedule. Thus, there cannot be any violation of the conditions, if tickets are not issued.

Per incuriam.

106. This issue has arisen because of the view taken by the division bench in **King Rotors** that the earlier decision of the division bench in **Sameer Gehlot** was per incuriam. The relevant paragraphs of the decision of the division bench in **King Rotors** on this issue are reproduced below:

> "24.19 With great respect, we have to say that we are unable to persuade ourselves to follow *Sameer Gehlot* (supra) as a binding precedent, for the following reasons:-
>
> > (a) The decision in that case holding the importer (AASPL) to be eligible for exemption from payment of duty of customs on the helicopter under Notification 21/2002-Cus. (serial No. 347B) as amended by Notification 61/2007-Cus. is based inter alia on the premise that the second part [i.e., clause (ii)] of condition No. 104 is also a pre-importation condition. This part of the condition is to the effect that the importer should furnish, at the time of importation, an undertaking to the Deputy Commissioner of Customs or the Assistant Commissioner of Customs that (a) the imported aircraft shall be used only for providing non-scheduled (passenger) services or non-scheduled (charter) services, as the case may be, and (b) that he shall 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 aircraft but for the exemption under the Notification. To our mind, this condition relating to undertaking has two aspects viz. the factum of undertaking and the subject of undertaking. **The view taken by the Bench that this**

> **condition is a pre-importation condition overlooks the fact that the subjects of undertaking are post-importation.** Though the factum of undertaking takes place at the time of importation, the subjects of undertaking are things of the future. One of the two subjects of undertaking is that the aircraft shall be used for the avowed purpose only. The second subject of undertaking is that the duty of customs should be paid, on demand, by the importer in the event of his failure to use the aircraft for the avowed purpose. Both are things to happen post-importation. **This crucial aspect did not receive the attention of the Hon'ble Bench when it took the view that the condition was only a pre-importation condition. xxxxxxxxxxxxx**

> **In Sameer Gehlot's case (AASPL's case), the post-importation nature of the subjects of undertaking was not appreciated by the Bench while taking the view that the requirement of undertaking to be made by the importer was a pre- importation condition. The mistake vitiated the decision. This is the reason why, with great respect, we consider the decision in AASPL's case as having been rendered per incuriam."**

(emphasis supplied)

107. It is, therefore, clear that the division bench examined Condition No. 104 of the exemption notification and proceeded to take a view which was at variance with the view taken by the earlier division bench in **Sameer Gehlot**. The division bench held that post importation nature of the subjects of undertaking 'was not appreciated by the bench while taking of the view that the requirement of undertaking to be made by the importer was pre-importation condition'. According to the division bench this 'mistake vitiated the decision' and, therefore, was rendered per incuriam.

108. It is not possible to accept this reasoning given by the division bench for holding that the earlier division bench decision in **Sameer Gehlot** was rendered per incuriam.

109. The principle of per incuriam has been developed in relaxation to the rule of stare decisis. While referring to exception to the rule of stare decisis, it has been observed in 'Precedent in England Law' by Rupert Cross, 1961 Edition:

> "No doubt any court would decline to follow a case decided by itself or any other court (even one of superior jurisdiction), if the judgment erroneously assumed the existence or non-existence of a statute, and that assumption formed the basis of the decision. This exception to the rule of stare decisis is probably best regarded as an aspect of a broader qualification of the rule, namely, the courts are not bound to follow decisions reached per incuriam."

110. In **State of U.P.** vs. **Synthetics and Chemicals Ltd**[44], the Supreme Court observed:

> "40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young vs. Bristol Aeroplane Co. Ltd[45]) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

111. The maxim 'per incuriam' is derived from the latin expression that means 'through inadvertence'. The literal meaning of the expression 'per incuriam' is 'through want of care'. In Black's Law Dictionary, 5th Edition, it has been defined as "through inadvertence". In Halsbury's Law of England Fourth Edition, Volume 26, it has been stated:

> "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it

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44. (1991) 4 SCC 139
45. (1944) 2 All ER 293 (CA)

has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statue or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some consistent statue or binding authority. Even if a decision of the Court Appeal must follow its previous decision and leave the House of Lords of rectify the mistake."

112. In **Babu Parasu Kaikadi (Dead) by Lrs.** vs. **Babu (Dead) Through Lrs.[46],** the Supreme Court observed:

"14. Having given our anxious thought, we are of the opinion that for the reasons stated hereinbefore, the decision of this Court in Dhondiram Tatoba Kadam having not noticed the earlier binding precedent of a coordinate Bench and having not considered the mandatory provisions as contained in Section 15 and 29 of the Act had been rendered per incuriam. It, therefore, does not constitute a binding precedent."

113. In **Yeshbai** vs. **Ganpat Irappa Jangam[47]**, a Division Bench of the Bombay High Court observed:

"27. Now, a precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. The rule apparently applies even though the earlier court knew of the statute in question. If it did not refer to and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuriam as to vitiate the decision. These are the commonest illustrations of decision being given per incuriam. In order that a case can be decided per incuriam, it is not enough that it was inadequately argued. It must have been decided in ignorance of a rule of law binding

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46. (2004) 1 Supreme Court Cases 681
47. AIR 1975 Bom 20: (1974) 76 BOMLR 278

on the court, such as a statute. (See the observations in 'Salmond on Jurisprudence" Twelfth Edition, pages 150 and 169)."

114. It, therefore, follows that the principle of per incuriam can be applied for such decisions which have been given in ignorance of some statutory provision or some authority that is binding.

115. The earlier decision may have appeared to be incorrect by a bench of co-ordinate jurisdiction on the ground that a possible aspect of the matter was not considered or more aspects should have been considered. This cannot be a reason to hold that the earlier decision by a co-ordinate bench was rendered per incuriam. The earlier judgment may seem to be not correct, but it would still have a binding effect on a bench of co-ordinate jurisdiction.

116. This is what was expressed by the Supreme Court in **State of Bihar** vs. **Kalika Kuer Alias Kalika Singh and Ors.**[48] and the observations are as follows:

> "10. **Looking at the matter, in view of what has been held to mean by per incuriam, we find that such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature, is not the reason indicated by the Full Bench in the impugned judgment, while saying that decision in the case of Ramkrit Singh (supra) was rendered per incuriam. On the other hand, it was observed that in the case of Ramkrit Singh (supra) the Court did not consider the question as to whether the consolidation authorities are courts of limited jurisdiction or not. In connection with this observation, we would like to say that an earlier decision may seems to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the Court or more aspects should have been gone into by the Court**

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48. (2003) 5 SCC 448

> **deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later bench of coordinate jurisdiction.** Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits. Though hardly necessary, we may however, refer to a few decisions on the above proposition."
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> **(emphasis supplied)**

117. This position was reiterated by the Supreme Court in **Central Board of Dawoodi Bohra Community** vs. **State of Maharashtra**[49], **Amrit Lakshmi Machine Works** vs. **CC (Import)**[50], **State of UP & Anr.** vs. **Synthetic and Chemicals Ltd. & Anr.**[51] and **Hyder Consulting (UK) Ltd.** vs. **Governor State of Orrisa**[52].

118. There is, therefore, no difficulty in holding that the division bench in **King Rotors** was not justified in holding that the decision of the earlier division bench in **Sameer Gehlot** had been rendered per incuriam as neither it was pointed out that provisions of a Statue or a judicial authority of binding nature had been ignored. Infact, as noticed above, all that the division bench in **King Rotors** observed was that 'the post importation nature of the subjects of undertakings was not appreciated by the bench'.

Analysis of the division bench decisions

119. The division bench of the Tribunal in **King Rotors** held that since the flight operations are not open to the public, the aircraft

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49. 2010 (254) ELT 196 (SC)
50. 2014 (303) ELT 161 (Bom.)
51. (1991) 4 SCC 139
52. (2015) 2 SCC 189

would not be considered to have been used for non-scheduled (passenger) services. This view, as discussed above, proceeds on an incorrect appreciation of the definition of non-scheduled (passenger) services.

120. The division bench of the Tribunal in **East India Hotels** held that published tariff to the public is a mandatory requirement of a non-scheduled (passenger) service and so if the tariff is not published, the use of the aircraft would be as a private aircraft. It was also held that it is the customs department that has to ensure compliance of the undertaking. These views, for the reasons stated above, are not correct views.

121. This apart, both **Sameer Gehlot** and **King Rotors** have been distinguished by the division bench in **East India Hotels** for the reason that both these cases were covered by the earlier CAR 1999, whereas the case before the division bench was covered by CAR 2010. This is clear from the portion of the order reproduced below:

> **"In the present case we are also of the firm opinion that facts of the present case are different from the case of King Rotors & Air Charter (Supra) and that of Sameer Gehlot (Supra)** because the main allegation qua the violation of undertaking was based on the fact that the undertaking was given for using the aircraft only for NSOP (passenger service) whereas the assessee therein were found to use the same for NSOC (charter services). **Both the cases are pre 2010 when there** had been an amendment in this notification. With the introduction of new CAR issued by DGCA on 1.6.2010, it has been clarified that non scheduled air transport services can be the passenger as well as charter services simultaneously.
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> *******
>
> 19. ******** Hence we are of the opinion that irrespective of pendency of issue related to this notification before the Hon"ble Apex Court, **the facts of these other cases are very much different from the facts of the present case, the earlier cases being prior the amendment of year**

> **2010 and the present one being post amendment in CAR.** The issue in the earlier cases is as to whether undertaking for using the aircraft for non-scheduled operator services includes the use thereof for non-scheduled charter services. The amendment of CAR 2010 clarifies that both are inclusive. The issue in the present case primarily is whether the undertaking for using the imported aircraft of non-scheduled passenger / charter services includes the use thereof only for private purposes or not."
>
> **(emphasis supplied)**

122. A perusal of the order passed in **East India Hotels** would indicate that the aircraft had been purchased by East India Hotels on 21.05.2007 and the show cause notice alleging violation of the conditions of the exemption notification was issued on 27.06.2008. This show cause notice was, however, adjudicated upon by order dated 27.07.2010. Thus, it would be the CAR 1999 that would be applicable and not CAR 2010. The two decisions in **Sameer Gehlot** and **King Rotors** could not, therefore, have been distinguished for the reason that CAR 2010 would apply and not CAR 1999.

123. The conclusion, therefore, that emerges is that **King Rotors** does not lay down the correct position of law.

124. Thus, for the reasons stated above, the answers to the reference are as follows:

(i) The reference made to the larger bench has not been rendered infructuous on dismissal of the Civil Appeal filed by the department against the order of the Tribunal in **Reliance Transport**;

(ii) The appellants have not violated condition (b) of the Explanation contained in the exemption notification;

(iii) The aircraft imported for non-scheduled (passenger) services can be used for non-scheduled (charter) services;

(iv) Aircraft imported by the appellants cannot be classified as private aircraft;

(v) The customs authority cannot examine the validity of the permission granted by the DGCA, in the absence of cancellation of the permit by the DGCA;

(vi) It is not mandatory for the importer to issue air tickets for providing non-scheduled (passenger) service;

(vii) CAR 2010 merely amalgamates CAR 1999 and CAR 2000 to provide a uniform code for operation of non-scheduled air transport services. It has restated and codified the position stated earlier by the DGCA through various clarifications and is explanatory in nature; and

(viii) The division bench in **King Rotors** was not correct in holding that the deicision of the Tribunal in **Sameer Gehlot** was rendered per incuriam.

125. The appeals may now be listed before the regular division bench for hearing.

(Order pronounced on **08.08.2022**)

(Justice Dilip Gupta)
President

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

JB/Shreya