

East India Hotels Ltd vs Commissioner Of Customs, Central ... on 28 February, 2023

Author: Vibhu Bakhru

Bench: Vibhu Bakhru

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CUSAA 5/2020

EAST INDIA HOTELS LTD. Appellant
Through: Mr. S. Ganesh and Mr. Tarun
Gulati, Senior Advocates with
Mr. Narendra M. Sharma, Mr.
Kartik Sarsoonina, Mr. Ankur
Sood and Mr. Shankar, Advs.

Versus

COMMISSIONER OF CUSTOMS,
CENTRAL EXCISE AND CENTRAL
GST, NEW DELHI Respondents
Through: Mr. Harpreet Singh, Senior
Standing Counsel with Mr.
Vinod Bhati and Ms. Suhani
Mathur, Advs.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN
ORDER

% 28.02.2023

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

REVIEW PET. 57/2023 and CM Nos. 9647/2023 & 9648/2023

3. The appellant (review petitioner) has filed the present petition seeking review of the judgment and order dated 31.01.2023 passed by this Court, whereby the appeal against the judgment and order of Customs Excise and Service Tax Appellate Tribunal (hereafter 'CESTAT') dated 14.01.2020, was rejected.

4. The review petitioner has founded the present petition on the basis that the reasons for which its appeal was rejected are "alien to and not to be found either in the order of CESTAT or in the Show Cause Notice". It is contended that the order passed by this Court suffers from an error apparent on the face of the record as it has travelled outside the scope of the impugned order and the Show Cause Notice.

5. Mr Ganesh, learned senior counsel appearing for the review petitioner also submitted that after this Court had heard the arguments and reserved orders in the above-captioned appeal, the learned CESTAT had passed a judgment dated 19.01.2023 in a batch of appeals [Custom Appeal No.60/2010 captioned Bharat Hotels v. Commissioner of Customs (Preventive) and Other Connected Appeals] involving the same issue. And, the learned CESTAT had taken a view, which is contrary to its order dated 14.01.2020, which was impugned in the above appeal. He submitted that this Court did not have the benefit of the said order, which was of immense persuasive value.

6. We are unable to accept that there are any grounds to review the judgment and order dated 31.01.2023. The contention that the reasons in the impugned order are alien to the subject matter of the Show Cause Notice and that of the order of the learned CESTAT, impugned in the appeal, is unmerited.

7. This Court had found that the appellant was not entitled to the benefit of the Notification (Custom Notification No.21/2002-CUS as amended by the Custom Notification No.612007-CUS) as the Condition No.104 of the said Notification was not complied with and the same was necessary for availing the duty exemption. This Court had held that in terms of the Condition No.104 of the Notification, the appellant was required to use the aircraft imported by it for providing non-scheduled (passenger) services or non-scheduled (charter) services. In terms of the Explanation (b) to the Condition No.104 of the Notification, 'non-scheduled (passenger) services' is defined to mean "air transport services other than scheduled (passenger) air transport services as defined in Rule 3 of the Aircraft Rule 1937".

8. The question that whether the appellant had used the aircraft for non-scheduled (passenger) services within the meaning of Clause (b) of the Explanation was central to the controversy involved in the appeal.

9. In the Show Cause Notice, it was alleged that the use of the aircraft for private purposes would disentitle the appellant from the benefit of the Notification as the same was not compliant with the conditions of using the aircraft for non-scheduled (passenger) services.

10. It is relevant to note that in response to the Show Cause Notice, the appellant had submitted its reply clearly articulating its understanding as to the allegations contained in the Show Cause Notice. Paragraph 4 of the Reply dated 14.08.2008 reads as under:

"4. The aforesaid violation in the show cause notice is in turn based upon the following allegations:

i) That the Noticee has not used the aircraft for the purpose for which it is imported, namely, non-scheduled (passenger) flight and the same has been used for the personal use of the Company or for promoting its business and for which no invoices have been issued.;

(ii) The use of subject aircraft is not in accordance with the permission granted by Ministry of Civil Aviation."

11. Thus, the question whether the review petitioner had used the aircraft for non-scheduled (passenger) services was the principal controversy.

12. It is also material to note that the learned CESTAT had examined the question as to whether the review petitioner had used the aircraft for providing non-scheduled (passenger) services. The learned CESTAT had also noted that the 'air transport services' was defined under Aircraft Rules, 1937 (hereafter 'the Rules') to mean "all carriage of persons effected by aircraft for a remuneration of any nature whatsoever, and all carriage of persons or things effected by such aircraft with such remuneration if the carriage is effected by an air transport undertaking;"

13. The learned CESTAT had further observed that both the scheduled and non-scheduled (passenger) services involved the words 'passenger' and 'air transport services' and had found that the appellant was not providing the said services but was using the same for private purpose.

14. In the aforesaid view, we find no merit in the contention that the question whether the appellant had used the aircrafts for providing 'air transport service' as defined under the Rules was alien to the controversy before this Court.

15. It is also relevant to refer to grounds (R), (S) and (T) of the appeal. The same are set out below:

"(R) Condition No. 104 of the Customs Notification No. 21/2002 creates and recognizes only two categories

- "Non-Scheduled Passenger Services" and "Non-

Scheduled Charter Services". Condition No. 104 is extracted below for reference:

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

(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 scheduled (charter) services; and b. He shall pay on demand, in the event of his failure to use the imported aircraft for the specified purposes, an amount equal to the duty payable on notification the said aircraft but for the exemption under this notification.

Explanation.-for the purposes of this entry-

(a) Operator means a person, organization, or enterprise engaged in or offering to engage in aircraft operation;

(b) Non-scheduled (passenger) services means air transport services other than Scheduled (passenger) air transport services as defined in Rule 3 of the Aircraft Rules, 1937.

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

Provided such Air Charter operator is a dedicated company or partnership firm, for the above purposes."(Emphasis supplied) (S) Explanation (b) of the Notification defines non-

scheduled (passenger) services as air transport services other than scheduled (passenger) air transport services as defined in Rule 3 of the Aircraft Rules, 1937 (Rules). Rules 3(9) and 3(49) define the terms "Air Transport Service" and "Scheduled Air Transport Service":

3(9) "Air transport service" means a service for the transport by air of persons, mails or any other thing, animate or inanimate, for any kind of remuneration whatsoever, whether such service consists of a single flight or series of flights;

3(49) "Scheduled air transport service" means an air transport service undertaken between the same two or more places and operated according to a published time table or with flights so regular or frequent that they constitute recognisably systematic series, each flight being open to use by members of the public;

(T) In terms of Explanation (b) the Custom Notification, any air transport service that does not qualify as "scheduled (passenger) air transport" is "non-scheduled (passenger) services". Admittedly, the Appellant has used the aircraft for the transport by air of persons and therefore, it is air transport service in terms of Rule 3(9). Moreover, since the service is not between the same places and is not provided regularly as per a published time schedule so as to constitute a recognizably systematic series, it does not constitute "scheduled (passenger) air transport". Hence,

the use of the aircraft by the Appellant falls squarely in the category of "non-scheduled (passenger) services".

16. A plain reading of the said grounds clearly indicates that the issue whether the appellant had provided 'air transport services' in terms of Rules 3(9) of the Rules was squarely a subject matter of controversy in the appeal.

17. The aforesaid question has been answered in favour of the Revenue and against the appellant.

18. It is also relevant to refer to ground (U) of the appeal, which reads as under:

"(U) Moreover, the CAR, Section 3, Air Transport Series part-III Issue-II dated 01.06.2010 issued by the DGCA lay down the "Minimum Requirements for Grant Permit to Operate Non-Scheduled Air Transport Services" inter alia provide that:

"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.

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 recognizably systematic series, each flight being open to use by members of the public;

3.5 '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 operate for carriage of passengers, mail and goods, and includes charter operations."

19. The same also clearly indicates that whether the review petitioner had used the aircraft for air 'transport services', was the heart of the controversy in the present appeal.

20. Insofar as the reliance placed by Mr Ganesh on the decision of the learned CESTAT in *Bharat Hotels v. Commissioner of Customs (Preventive) and Other Connected Appeals (supra)* is concerned, we are unable to accept that the decision of this Court is required to be reviewed on the basis that the learned CESTAT has rendered a contrary decision.

21. Mr Harpreet Singh, who appears for the respondent, states that he has already received instructions to file an appeal against the decision of the learned CESTAT in *Bharat Hotels v. Commissioner of Customs (Preventive) and Other Connected Appeals (supra)*.

22. We find no grounds to review the judgment and order dated 31.01.2023. The present review petition is, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J AMIT MAHAJAN, J FEBRUARY 28, 2023 RK