CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. 2

Customs Appeal No. 87625 of 2017

(Arising out of Order-in-Original No.10/KVSS(09)ADG(ADJ.)/DRI, MUMBAI/2017-18 dated 26.05.2017 passed by the Additional Director General (Adjudication), Mumbai.].

Commissioner of Customs (Import-I) .... Appellant
New Custom House,
Ballard Estate,
Mumbai–400 001.

Versus

Navayuga Engineering Company Limited ....Respondent
No.48-9-17, Dwaraka Nagar
Visakhapatnam – 530 016.

WITH

Customs Appeal No. 87737 of 2017

(Arising out of Order-in-Original No.09/KVSS(09)ADG(ADJ.)/DRI, MUMBAI/2017-18 dated 26.05.2017 passed by the Additional Director General (Adjudication), Mumbai.].

Commissioner of Customs (Import-I) .... Appellant
New Custom House,
Ballard Estate,
Mumbai–400 001.

Versus

Navayuga Engineering Company Limited ....Respondent
No.48-9-17, Dwaraka Nagar
Visakhapatnam – 530 016.

Appearance:
Shri C.S. Pavan, Authorized Representative for the Appellant
Dr. C. Manickam, Advocate for the Respondent

AND

Customs Appeal No. 85202 of 2018

(Arising out of Order-in-Original No.09/KVSS(09)ADG(ADJ.)/DRI, MUMBAI/2017-18 dated 26.05.2017 passed by the Additional Director General (Adjudication), Mumbai.].

Navayuga Engineering Company Limited .... Appellant
No.48-9-17, Dwaraka Nagar
Visakhapatnam – 530 016.

Versus

Commissioner of Customs (Import-I) ....Respondent
New Custom House,
Ballard Estate,
Mumbai–400 001.

Appearance:
Dr. C. Manickam, Advocate for the Appellants
Shri C.S. Pavan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86168-86170/2026

Date of Hearing: 18.08.2026
Date of Decision: 22.09.2026

Per: M.M. PARTHIBAN

The appeals bearing No. C/87625/2017 and C/87737/2017 have been filed by Revenue in pursuance of Review Orders No.17-R/2017 dated 24.08.2017 & No.18-R/2017 dated 31.08.2017 of the Committee of Chief Commissioners of Customs, Mumbai assailing the Orders-in-Original No.9/KVSS(09)ADG(ADJ.)/DRI, MUMBAI/2017-18 dated 26.05.2017 (impugned order No. 9 dated 26.05.2017, for short) & No.10/KVSS(09) ADG(ADJ.)/DRI, MUMBAI/2017-18 dated 30.05.2017 (impugned order No. 10 dated 30.05.2017, for short), respectively, (herein after, referred together as "impugned orders" for short) passed by the Additional Director General (Adjudication), Mumbai in respect of imports undertaken by M/s Navayuga Engineering Company Limited, Visakhapatnam ("NECL", for short). The appellant importer M/s NECL has filed an appeal being No. C/85202/2018 assailing impugned order dated 26.05.2017.

2.1 The brief facts of the case leading to these appeals are that the appellant importer company M/s NECL is engaged in Development of mega infrastructure projects such as ports, highways, overbridges across the rivers, tunnels in the Himalayan sector, etc. M/s Krishnapatnam Port Company Limited, Visakhapatnam ("KPCL", for short), is one of the group company of the appellant importer. KPCL is engaged in development of modern, deepwater port having state of art infrastructure, mechanized handling systems, dedicated storage facilities for a modern, clean seaport, on a build, own, share and transfer basis at Krishnapatnam, Andhra Pradesh. The infrastructure project sites of the appellant company M/s NECL are located at hinterland and interior parts of the country, where a number of capital goods are required for setting up of such infrastructure facility. For the purposes of such business, the appellant company had imported machinery, capital goods, spare parts, consumables etc. At the time of clearance of imported goods through various Bills of Entries (B/Es) filed during the period of dispute before various jurisdictional customs authorities in lieu of payment of duty, the appellant had used four licenses issued to them by the Director General of Foreign Trade (DGFT) under the Export Promotion Capital Goods (EPCG) scheme by availing customs duty exemption under Notification No. 97/2004-Customs dated 17.09.2004, as amended.

2.2 Intelligence was gathered by the Directorate of Revenue Intelligence, Hyderabad Zonal Unit (DRI) that NECL have imported certain machinery/ capital goods and spare parts, consumables, parts of Helicopter etc., by wrongly using scrips/licenses issued under EPCG scheme, and failed to export declared products; that the appellant NECL have obtained Status Holder Incentive Scheme (SHIS)/Serve From India Scheme (SFIS) scrips by using the particulars of exports related to another company i.e., KPCL. Therefore, DRI had initiated detailed investigation including recording of statements from various persons concerned with such imports. In terms of such EPCG licenses issued to the appellant, the department had contended that the DGFT authorities have allowed the earnings through 'Port Handling Services for Export' for adjustment of Export Obligation (EO) fulfilment; wherein the appellant had utilized the earnings of KPCL through services rendered to import vessels. Therefore, the department had interpreted that importation of goods by the appellant in utilising EPCG authorization is improper, as they did not fulfil the export obligation, and the customs duty is liable to be recovered in terms of the notification dated 17.09.2004. Detailed investigation was conducted by the department in respect of such imports, and the capital goods imported through various ports against such EPCG licenses were seized vide Seizure Orders dated 16.09.2016 under proviso to Section 110(1) of the Customs Act, 1962.

2.3 Upon completion of such investigation, a Show Cause Notice (SCN) dated 30.09.2016 was issued demanding customs duty of Rs.17,03,84,103/- along with interest, besides proposing for confiscation of goods under Section 111(o) ibid and for imposition of penalty on the appellants under Sections 112(a), 114AA ibid. The said SCN dated

30.09.2016 was adjudicated by the learned Commissioner/ADG (Adjudication) as adjudicating authority after considering the submissions of the appellant importer and other notices, by passing the Order-in-Original No.10 dated 30.05.2017 in dropping the entire proceedings initiated vide SCN dated 30.09.2016 against the appellants companies and other notices. Being aggrieved with the impugned order No.10 dated 30.05.2017, Revenue has filed the appeal bearing No. C/87625/2017 before the Tribunal.

3.1 Similarly, the appellant company had imported capital goods, equipment, machinery like cranes, dumpers, earth movers, excavators, dredgers, Batching plants etc., and also spare parts of helicopter through Mumbai, Chennai, Kolkata, Hyderabad, Delhi and Krishnapatnam ports, by using SFIS/SHIS scrips issued to their group company KPCL, by availing customs duty exemption under Notification No. 91/2009-Customs dated 11.09.2009, as amended. The department objected to such importation of capital goods by using the SFIS or SHIS scrips/licenses of KPCL as being improper, and initiated detailed investigation in respect of such imports, and the capital goods imported through various ports against such SFIS/SHIS licenses were seized vide various Seizure Orders.

3.2 Upon completion of such investigation, a Show Cause Notice (SCN) dated 20.06.2016 was issued by the department demanding customs duty of Rs.68,98,10,261/- along with interest involved in respect of such imports through various ports of import and proposing for confiscation of goods under Section 111(d), 111(o) ibid and for imposition of penalty on the appellants under Sections 112(a), 114A, 114AA, 117 ibid. The said SCN dated 30.09.2016 was adjudicated by the learned Commissioner/ADG (Adjudication) as adjudicating authority after considering the submissions of the appellant importer and other notices, by passing the Order-in-Original No.09 dated 26.05.2017 in partly dropping the duty demands of Rs.62,96,23,584/- in respect of capital goods and in refraining from imposing penalty on the appellant company M/s NECL and other noticees. Further, in the said order, learned adjudicating authority had partly confirmed duty demand of Rs.6,01,86,677/- along with interest under Section 28(4) of the Customs Act, 1962. Besides, he confiscated the impugned goods in respect of import of parts of helicopters and allowed the same upon payment of redemption fine of Rs.3,00,00,000/-; imposed equal amount of duty as penalty under Section 114A ibid and a penalty of Rs.1,00,00,000/- on the appellant company under Section 114AA ibid; penalty of Rs.1,00,000/- and Rs.50,000/- on Shri P.B.G. Tilak, Senior General Manager of the appellant company under Sections 112(a) and 114AA ibid. Being aggrieved with the impugned order No.09 dated 26.05.2017 in dropping partly the duty demands, Revenue has filed the appeal bearing No. C/87737/2017 before the Tribunal. The appellant importer has filed an appeal assailing confirmation of adjudged demands on parts of helicopters under appeal bearing No. C/85202/2018 before the Tribunal.

3.3 Since all these appeals are arising from the common disputed issue of use of EPCG, SFIS/SHIS scrips of group company, utilization of exports made by group company for discharge of export obligation etc., with the consent of both sides, we take up all the aforesaid issues together for disposal of the appeals dealt herein.

4. Learned Authorized Representative (AR) for Revenue submitted that handling of imported goods into India by a port operator/KPCL does not constitute an export of service under the terms of specific license, regardless of the currency in which payments were settled. Therefore, he claimed that adjustment of Rs.109.64 crore generated by KPCL from foreign flagged import vessels to discharge the export obligation in respect of imports made by appellant company is improper and it is in violation of actual user condition as per para 3.12.7 of Foreign Trade Policy (FTP). He further stated that the expression 'group company' has been interpreted by the DGFT in an incorrect manner, and therefore the DGFT's administrative letter 22.02.2007, in allowing the benefits of export obligation to the appellant company cannot override statutory text of para 9.28 of FTP. Further, he stated that such interpretation is also contrary to the law laid down by the Hon'ble Delhi High Court, in the case of *Vacmet Packaging India Private Limited Vs. Union of India* - 2011 (265) E.L.T. 50 (Del.). He further stated that parts of helicopter, were actually used in helicopter which was used for private purpose and this also violated actual user condition of the license. Therefore, he pleaded that (i) the impugned Order-in-Original No.10 dated 30.05.2017 dropping all the proposals in the SCN viz., for demand of customs duty of Rs.17,03,84,103/- along with interest, confiscation of goods under Section 111(o) ibid and imposition of

penalty on the appellants under Sections 112(a), 114AA ibid, be set aside; (ii) the impugned Order-in-Original No.09 dated 26.05.2017 to the extent it had allowed exemption benefits under Notification No.91/2009-Customs dated 11.09.2009 for usage of SHIS scrips of KPCL by appellant importer for an amount of Rs.62,96,23,584/- and did not confiscate the impugned goods and failed to impose penalty on the appellants under Sections 112(a), 114A, 114AA, 107 ibid also be set aside and the appeal filed by Revenue by allowed. Further, he also pleaded that the appeal filed by the appellants against confirmation of adjudged demands on import of parts of helicopter may not be entertained.

5.1 Learned Advocate appearing for the appellants had submitted at the outset that the issue of availing the benefits of EPCG or SFIS/SHIS schemes by utilization of scrips of 'group company' for imports during the disputed period 2008-09 to 2014-15, by counting the exports of group company for export obligation was firstly raised when a Bill of Entry No.69/2011 dated 20.06.2011 was assessed by the departmental officials at Nellore Division and a reference was sent to the Zonal Joint Director General of Foreign Trade (JDGFT), Chennai seeking clarification with specific reference to the appellant company and its group company i.e., KPCL. The said issue was clarified by the JDGFT, Chennai vide their letter dated 18.06.2011 stating that nine authorisations/scrips issued to KPCL could be utilised by their group company; besides this JDGFT, Chennai also clarified vide letter dated 21.06.2011, that appellants companies NECL & KPCL are covered under the definition of Group Companies as per Para 9.28 of FTP. Further, the appellant also made a representation on the same issue to the DGFT, New Delhi vide their letter dated 08.03.2011 and followed it up when the matter was taken up for investigation by the department. As an outcome of such references, DGFT had finally issued a clarification dated 22.02.2027, by consulting with the Department of Legal Affairs, Ministry of Law & Justice to state that the appellant company M/s NECL and M/s KPCL are covered under the definition of 'Group companies', as provided under Paragraph 9.28 of FTP 2009-2014. Since, such a decision has been taken with the approval of DGFT, he submitted that such interpretation of any provision contained in FTP as given by DGFT shall be final and binding in terms of Paragraph 2.3 of the FTP. Further, he also submitted that the decision of the Hon'ble High Court of Delhi in the case of *Vacmet Packagings India Private Limited* (supra), the facts of that case was different from the present appeals here, inasmuch as the company-appellant 'Vacmet Packagings' and 'Ploypacks Industries', a partnership firm having three individual partners were compared for being treated as 'group company' by interpreting the word 'enterprise' used in definition clause/Para 9.28. Whereas in the present case, both the appellant company i.e., NECL and KPCL are incorporated companies having separate legal entity and the directors of the company NECL/KPCL represent their voting share as a part of the said company, having direct control over the affairs of the appellant company, and thus qualify for being treated as 'Group company'. Therefore, learned Advocate pleaded that the adjudicating authority had correctly dropped the demands proposed in the SCN.

5.2 With respect of importation of parts of helicopter, learned Advocate submitted that since the helicopter service is required as essential inputs/ capital goods for execution of infrastructure projects, relating to service sector business, such goods are permitted for clearance under SFIS/SHIS Scheme. Further, the deployment of helicopter was only for private purposes of the appellant company, as the infrastructure projects needed to be monitored by senior officers of the appellant company and occasionally inspected by senior officers of the Government, regulatory authorities including political executives. The helicopter service had not been used for the personal use of individual, or for carrying private passengers or used as a tour operators.

5.3 With respect to confirmation of duty on import of helicopters vide SCN dated 20.06.2016 by invoking extended period of time, learned Advocate submitted that the dispute covers 19 B/Es filed during 12.01.2012 to 08.05.2015; the issue of availment of SFIS/SHIS benefit with respect to 'group company' involve no mis-declaration or mis-representation or suppression of facts and the department itself was aware of such aspects when it firstly raised the doubt on filing B/E dated 20.06.2011 and clarification was sought from Joint DGFT, Chennai, and the same was submitted to the customs authorities. Thus, he submitted that the department cannot claim that there was any material evidence to attract the specific ingredients of fraud, suppression of facts, willful mis-statement or any other violation of customs statute with an intention to evade import duty for confiscation of the imported goods. Further, the issue of availment of CENVAT credit on such import of goods was also discussed by the learned Commissioner, Guntur vide his Order-in-Original dated 31.10.2011 in dropping the duty demands. Therefore, learned Advocate pleaded that confirmation of the adjudged demands in respect of SCN dated 20.06.2016 on import of parts of helicopter does not legally hold good both on merits and on extended time limit, and thus requested to allow their appeal.

5.4 In support of their stand, learned Advocate referred to the Order passed by the Hon'ble High Court of Bombay vide W.P. No 237 of 2013 in the case of *Tata Teleservices Limited Vs. Union of India & Ors.* which was upheld by the Hon'ble Supreme Court, by dismissing the SLP(C) Nos. 23384-23385/2015 filed by the department in delivering the judgement dated 24.11.2025.

6. We have heard both sides, examined the case records and the additional submissions made during the course of hearing, written synopsis along with case law citations in the form of paper books submitted by both sides.

7. The issue involved herein is to decide the following:

(i) whether the impugned order No.9 dated 26.05.2017 passed by the learned Commissioner of Customs, confirming the adjudged demands in respect of import of parts of helicopter; and by dropping the duty demand and penalties proposed in SCN dated 20.06.2016 partly, in respect of import of capital goods by allowing the exemption benefit under Notification No.91/2009-Customs dated 11.09.2009; is legally sustainable or not, in terms of the Customs Act, 1962?

(ii) whether the impugned order No.10 dated 30.05.2017 passed by the learned Commissioner of Customs, in dropping the proceedings initiated vide SCN dated 30.09.2016, is legally sustainable or not, in terms of the Customs Act, 1962?

The period of dispute involved in the present case is from 2007-2008 to 2013-2014.

8. In the impugned order dated 26.05.2017, learned Commissioner of Customs had come to the conclusion that the benefit of notification No.91/2009-Customs dated 11.09.2009 is not eligible for import of parts of helicopters and consequently, he had partly confirmed the proposals made in the SCN dated 20.06.2016 on the basis of following findings:

"5.1.3 I find that it is an admitted position that NECL has not got any SFIS scrips issued in their name by the Regional Authority and that they have utilized SFIS scrips issued to KPCL for the said imports, claiming transfer of the said scrips permitted within the Group Company. As per Para 9.28 of Foreign Trade Policy, 2009-2014 Group Company means two or more enterprises which, directly or indirectly, are in a position to (a) exercise twenty-six percent or more of voting rights in other enterprise; or (b) appoint more than fifty percent of members of board of directors in the other enterprise. I further find that the Notices claimed themselves as Group companies, based on the fact that three individuals, who are the common directors in both NECL and KPCL, together hold, directly or indirectly, equity of more than 26% in both the companies. It is also on record that the said claim of the Noticees, are negated by DRI, in view of the fact that group of individuals cannot be considered as an enterprise for the purposes of interpreting the definition of "Group Company", as per the extant provisions.

5.1.4 I find that it is on record that the Notice No. 1 had made a reference to DGFT, Delhi on 8" March, 2011 seeking clarification on the subject issue. It is also on record that the Zonal Jt. DGFT Chennai allowed the benefits considering them as Group Companies on the basis of the CA Certificate submitted by the Noticees. However, the Joint Director General of Foreign Trade, Chennai, issued a Show Cause Notice dated 26.10.2015 under Section 13 and 14 of Foreign Trade (Development and Regulation) Act, 1992 to M/s. KPCL alleging mis-declaration. I notice that the aforesaid CA certificate certified "....that NEC is in position to exercise more than 26% voting power directly or indirectly in M/s KPCL and therefore M/s. NECL and M/s. KPCL are Group Companies as per the definition of Para 9.28 of Foreign Trade Policy." I find that DRI is of the view that if one enterprise has more than 26% equity in other enterprise then only the other enterprise can be said to be its group company. According to DRI, the common shareholding by individual partner or any other company in these enterprises has no relevance for considering them as Group Company under para 9.28 of the FTP (HBP). Based on these documentary evidences and observations of the PIC, DRI concluded that NECL cannot be treated as "group" company of KPCL inasmuch as NECL or KPCL do not have 26% holding, directly or indirectly and that thus no voting rights to the said extent of 26% as an enterprise in each other. DRI thus, concluded that utilization of SFIS scrips earned by KPCL are without any authority of law and are impugned order violations f the provisions of Foreign Trade Policy 2009-2014 read with the provisions of the Customs Act, 1962.

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5.1.6 I find that Para 2.3 of the Foreign Trade Policy which details with "Interpretation of Policy" and which are reproduced hereunder:

"If any question or doubt arises in respect of interpretation of any provision contained in FP, or classification of any item in ITC (HS) or HBP v2 or Schedule of DEPB Rates (including content, scope or issue of an authorization there under), said question or doubt shall be referred to DGFT whose decision thereon shall be final and binding."

5.1.7 I find that it is undoubtedly clear that DGFT is the final authority, in issuance of scrips or other export promotion benefits. It is a fact on record and remained undisputed throughout the proceedings, that the Notice No.1 utilized the scrips issued to Noticee No. 2, considering them or declaring themselves, as Group Company. It is also expressly clear that Para 2.3 of the Foreign Trade Policy which deals with "Interpretation of Policy" gave inherent power to seek the Advice of DGFT in case of any clarification or *dispute and the decision given by the DGFT is binding. It is on record that the Notices sought a clarification in the present issue of dispute i.e. whether NECL can be considered as a group company of KPC and DGFT vide the aforementioned clarification dated 22.02.2017 clarified that the companies M/s. KPL and M/s. NECL are covered under the definition of Group Companies as defined in Para 9.28 of the FTP 2009-14. Thus, it can be construed that the dispute of whether Noticee No. 1 & 2 are Group Companies has attained finality in view of the clarification issued by DGFT. I find that it is also a settled position that once a clarification has been issued by DGFT in terms of Para 2.3 of the Foreign Trade Policy, the same is binding on the Customs Authorities. Accordingly, the issue of dispute, i.e. whether the Noticee No. 1&2 can be treated as Group Companies, have attained finality and DGFT has issued a clarification that M/s. NECL and M/s. KPCL are covered under the definition of Group Companies as defined in para 9.28 of the FTP 2009-14. In support of my contention that once a clarification has been issued by DGFT, Customs Authorities have limited role to play, I also rely on the decision of A.G. Enterprise Vs. Commissioner of Customs (Preventive) reported in 2014) 51 taxmann.com 71 (Ahmedabad -CESTAT) wherein the Hon'ble Tribunal relying on the decision of Cine Land vs. Commissioner of Customs 1999(114) ELT 653 (Tri. Chennai) held that in the matters of FTP, DGFT clarification will be binding on the Customs Authorities. Accordingly, in view of the settled position by DGFT, I hold that the utilization of scrips issued to KPC by NECL, is legal and proper and well within the permissible limits of the extant provisions. Thus, the demand of duty raised by the DRI, alleging that the duo are not group companies and the SHIS scrips issued to KPCL cannot be utilized by NECL is unsustainable and untenable. Accordingly | refrain from demanding the Customs Duty from the Noticees M/s. NECL, as raised by the DRI in the impugned Show Cause Notice.*

5.2.0 Now, I proceed towards the 2.d issue of determination ie. whether the imported parts and spares of Helicopter of Bell Make claiming exemption under 91/2009-Cus. dated 11.09.2009 under SFIS scheme by the Noticees are legal and proper.

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5.2.3 I find that in terms of the said Notification read with Para 3.12.6 of Foreign Trade Policy (FTP-2009-2014), the duty credit scrip may be used for import of any capital goods including spares, office equipment and professional equipment, office furniture and consumables; that are otherwise freely importable and / or restricted under ITC (HS); Imports shall relate to any service sector business of applicant; Utilization of Duty Credit scrip earned shall not be permitted for payment of duty in case of import of vehicles, even if such vehicles are freely importable under ITC (HS).I further notice that the issue of utilization of scrip by the group company stands settled in my findings in the preceding paras, and now focus needs to be only casted on the additional allegation i.e. eligibility of the Noticees to claim exemption benefits under the said Notification.

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5.2.6 It find that it is an undisputed fact on record that NECL is engaged in construction of ports, Bridges, Roads etc. It is also an acceptable position that they are in need of transporting personnel from different cities, to deploy their services at different locations. It is also an accepted fact that the availability of exemption benefits are to be strictly interpreted in pursuance of the express wordings of the Notification. I find that Notification No. 91/2009-Cus. dated 11.09.2009, explicitly mentioned that "in the case *of service provider other than hotel or stand alone restaurant or golf resort having catering facility, capital goods including spares, office equipment, professional equipment, office furniture and consumables, related to its service sector business, but excluding the items not permitted to be imported in terms of Appendix 37B of the Hand Book of Procedure, volume I. I further notice that DRI has denied the exemption benefits to the Noticees, by claiming it as a Vehicle. The Notices have strongly contested on this issue by claiming that the Helicopter is Capital goods and is mostly procured under EPCG licence in the service industry. To claim exemption under the relevant provisions of the Customs Act, issuance of related notifications act into force and the express wordings of the Notification, prima facie, act as an important criterion in deciding the eligibility. I notice that the express wordings of the Notification exempts Capital goods but on a specific eligibility/limitation that the goods should be related to their service sector business. It has already come on record that the disputed goods i.e. Helicopter was imported for private use by NECL in terms of DCA's letter dated 06.08.2010 read with DGFT's letter 03.09.2010. Once, the records reveal that the purpose of import of the impugned goods are for personal use, as per the Noticees' declaration and the passengers' manifest which shows that the Helicopter ferried family members of the personnels, the same cannot be interpreted as an item which acts as a determining agent in the business area of the Noticee and hence cannot be related to capital goods for its service sector business, by any stretch of imagination. Similarly, the impugned item cannot also be termed as professional equipment too, for the reason that in normal parlance, a professional equipment is the instrument or tool or goods, which are utilized in the normal course of business activity of any organization. Undoubtedly, the functioning of the Noticee is not for ferrying personnels but rather are reportedly or evidently engaged in various infrastructural portfolios like Roads, Bridges, Marine development and Turnkey projects. Accordingly, it is my considered opinion, that once, it has come on record that the impugned goods are imported for personal purpose and also there are evidences which reveal that the same is utilized for personal use, the claim of the Noticees that they have rightly availed the exemption benefits by declaring it as Capital goods is flawed untenable and bad in law.*

5.2.7… Once it is on record that the impugned goods are imported for private purpose, the same automatically gets debarred from the boundary of the Notification, which permits only those capital goods related to the service sector business. Even at the cost of repetition, it is again reiterated that the service sector of the Noticee is not for ferrrying passengers but are evidently engaged into the construction of roads, bridges, etc. and therefore the exemption benefit provided for the import of capital goods related to the service sector business, cannot, in any manner, be co-related (correlated) to the import of Helicopter which is exclusively used for private purpose. Accordingly, the term "vehicle" or "capital goods" is immaterial, when the documentary evidences speak volumes of the fact that the impugned goods are imported and utilized for personal use, and not in core service area of the Noticee….. Accordingly, in view of the foregoing discussions, I hold that the noticees are ineligible for the exemption benefits under Notification No.91/ 2009 Customs dated 11.09.2009 under SFIS scheme and hence the duty amounting to Rs.6,01,86,677/- on import of said parts and spares of Helicopter is recoverable from them. Once duty is held to be recoverable, the provisions for recovery of interest automatically comes into picture. Accordingly, I hold that the interest on the duty element may be recovered under Section 28AA of the Customs Act, 1962.

5.3 EXTENDED PERIOD INVOKABLE:

5.3.1 I find that the impugned Show Cause Notice has invoked the provisions of extended period under Section 28(4) of the Customs Act, 1962. I notice that the act of the Noticees in claiming ineligible exemption benefits by declaring the impugned goods as "capital goods", even though the same were evidently imported for their personal use, attracts the provisions of recovery of duty under the extended period of limitation under Section 28(4) of the Customs Act, 1962.

5.4 CONFISCATION OF GOODS:

5.4.2 …..I find that confiscation was proposed by DRI, taking into account the acts of omission and commission in violating the prevailing FTP and the extant provisions in force, by declaring the Noticees M/s NECL and M/s KECL as group companies and gaining ineligible benefits. However, as elaborately dealt by me in the preceding paragraphs, the issue of mis-declaration of the Noticees on the count of group companies, have been settled, in view of the clarification issued by the DGFT. Accordingly, the goods are not liable for confiscation on this count.

*5.4.2 I also notice that the impugned parts of Helicopters were imported against the extant provisions in force and the duty amounting to Rs. 6,01,86,677/- plus interest is recoverable from the Noticees, as the Noticees are ineligible for the exemption benefits. Thus, on account of mis-declaration and ineligibility of exemption, the goods are liable for confiscation under Section 111(d) and Section 111(o) of the Customs Act, 1962. I notice that DRI had seized the impugned goods valued at Rs.26,49,63,787/-, during the investigation. It has also come on record that the seized goods were provisionally released on execution of bond. Hence, I am of the considered opinion that Redemption Fine is imposable on the said goods an
d also the differential duty liability is recoverable from the noticees by encashing the Bond. Accordingly, I held that the impugned seized goods valued at Rs.26,49,63,787/-, are liable to confiscation under Section 111(d) and (m) of the Customs Act and can be redeemed on payment of requisite Redemption Fine."*

9. Further, in the impugned orders dated 26.05.2017 and 30.05.2017, learned Commissioner of Customs had come to the conclusion that the benefit of notification No.91/2009-Customs dated 11.09.2009 is available for usage of DEPB or SFIS/SHIS scrips in respect of capital goods imported by the appellant under the definition of 'group company' in terms of para 9.28 of FTP and consequently dropped the entire proceedings in SCN dated 30.05.2017 and partly the proposals made in the SCN dated 20.06.2016. Such findings of impugned order dated 26.05.2017 are provided in preceding paragraph 8, and the other findings in the impugned order dated 30.05.2017 are as follows:

"5.0.5 I find that the issue for determination can be divided into two fold i.e. i) Whether the Notice No.1 is entitled to adjust the "Port Handling

Services" of M/s. KPCL claiming it as group company, and ii) whether the "port handling services" rendered by M/s. KPC for import vessels can be adjusted towards export obligation by M/s. NECL, when DGFT while issuing the amendment sheet specifically mentioned that port handling services with respect to exports only can be adjusted towards export obligation. As the issue for determination has been segregated by me, now proceed towards examining the main issue i.e. whether the Noticees Nos. 1&2 are group companies and the earnings through Port Handling services by Notice No. 2 can be adjusted towards export obligations for import under the four EPC Licences allotted to Noticee No. 1, i.e. NECL.

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5.1.6 I find that the Noticee Nos 1 & 2, on the other hand, are of the opinion that the shareholding pattern of the Promoters clearly establishes the fact that more than 26% of the voting rights can be exercised by M/s. Krishnapatnam Port Company Ltd. on M/s. Navayuga Engineering Company Limited. According to them, by virtue of the shareholding pattern and through the Board of Directors M/s. KPCL are capable of exercising 26% or more of the voting rights in each other and hence are also eligible to appoint more than 50% of Members of Board of Directors in NECL. Based on these observations, the Noticees claim to be qualified to be called as "Group Company" in terms of para 9.28 of the Foreign Trade Policy. I notice that records reveal, that taking these vital elements into consideration, M/s. PCL also had submitted a Representation to the DGFT, New Delhi, dated 24.08.2015 vide Diary No.2015/R&|(VK)/DG/1751 alongwith relevant documents and sought a clarification as to whether the two entities are Group Companies. Subsequently, upon consideration of the Representation of M/s. KPCL, the DGFT had issued a Clarification dated 22.02.2017, vide F.No.01/61/180/150/AM 16-PC-3, and clarified that M/s. KPCL and M/s. NECL are Group Companies. The said clarification dated 22.02.2017 was issued by the DGFT in consultation with the Department of Legal Affairs, Ministry of Law, Government of India, New Delhi. The Noticees averred that the Clarification issued by the DGFT finally resolved the issue and confirms the understanding of the Noticee.

5.1.7 I find that Para 2.3 of the Foreign Trade Policy which details with "Interpretation of Policy" and which are reproduced hereunder:

> ***"If any question or doubt arises in respect of interpretation of any provision contained in FTP, or classification of any item in ITC (HS) or HBP v2 or Schedule of DEPB Rates (including content, scope or issue of an authorization there under), said question or doubt shall be referred to DFT whose decision thereon shall be final and binding."***

5.1.8 I find that it is undoubtedly clear that DGFT is the final authority, in issuance of scrips or other export promotion benefits. It is a fact on record and remained undisputed throughout the proceedings, that the Noticee No.1 adjusted the earnings of Noticee No. 2, considering them or declaring themselves, as Group Company. It is also expressly clear that Para 2.3 of the Foreign Trade Policy which deals with "Interpretation of Policy" gave inherent power to seek the Advice of DGFT in case of any clarification or dispute and the decision given by the DGFT is binding. It is on record that the Noticees sought a clarification in the present issue of dispute i.e. whether NECL can be considered as a group company of KPCL and DGFT vide the aforementioned clarification dated 22.02.2017 clarified that the companies M/s. KPCL and M/s. NECL are covered under the definition of Group Companies as defined in Para 9.28 of the FTP 2009-14. Thus, it can be *construed that the dispute of whether Noticee No. 1 & 2 are Group Companies has attained finality in view of the clarification issued by DGFT. find that it is also a settled position that once a clarification has been issued by DGFT in terms of Para 2.3 of the Foreign Trade Policy, the same is binding on the Customs Authorities. Accordingly, the issue of dispute, i.e. whether the Noticee No. 1& 2 can be treated as Group Companies, have attained finality and DGFT has issued a clarification that M/s. NECL and M/s. PCL are covered under the definition of Group Companies as defined in para 9.28 of the FTP 2009-14. In support of my contention that once a clarification has been issued by DGFT, Customs Authorities have limited role to play, also rely on the decision of AG. Enterprise Vs. Commissioner of Customs (Preventive) reported in 2014) 51 taxmann.com 71 (Ahmedabad - CESTAT) wherein the Hon'ble Tribunal relying on the decision of Cine Land vs. Commissioner of Customs 1999(114) ELT 653 (Tri. Chennai) held that in the matters of FTP, DGFT clarification will be binding on the Customs Authorities. Accordingly, in view of the settled position by DGFT, I hold that the earnings of the group company can undoubtedly be utilized. Therefore, adjustment of earnings of M/s. KPCL to fulfil the export obligation undertaken by M/s. NECL for imports carried out under the impugned EPCG Licences, are legal and proper.*

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5.2.4 Now the only issue for examination is with respect to whether the earnings by rendering maritime services for import vessels by M/s. KPCL can be adjusted as "port handling services" for export towards export obligation fulfilment against EPC Licenses by NECL. I find that the specification or rather comments given by DGFT while amending the Licence, thereby permitting to adjust only the "port handling services" for export towards export obligation fulfilment is the sole basis of allegation and the issue of determination, in the instant case. Further, Para 9.53 (iv) of the Foreign Trade Policy which underlines the definition of "Service Provider" specified that Supply of a 'service' in India relating to exports paid in free foreign exchange or in India Rupees which are otherwise considered as having being paid for in free foreign exchange by RBI. I find that the term "exports" are inclusive of exports of goods and exports of services. It is inevitably clear that the "exports" in the instant case is with respect to services to import vessels, and can undoubtedly, be termed as export of services. It is also on record that "Port Handling Services rendered by KPL are inclusive of i) Earnings by marine services rendered to foreign vessels which called KP Port for discharge of Import Cargo ii) Marine Services rendered to foreign vessels which called KP Port for loading of Export Cargo and iii) Handling of cargo rendered to foreign vessels which called KP Port for handling of Export cargo. I find that the dispute in the present case is with respect to rendering maritime services to foreign vessels for import cargo. It is also undoubtedly clear that there is no dispute about earnings by cargo handling services by export cargo and marine services to foreign vessels for export cargo towards meeting export obligation. It is on record and was never a matter of dispute that an amount of Rs. 109.64 crores, which was received by M/s. PCL with respect to earnings from services to import vessels was adjusted towards export obligation. It is also unequivobly (unequivocally) clear that for the port handling services, earning is in foreign exchange, even though it might have been received in Indian Rupees.

5.2.5 Now, I find that the hinge of the case is also with respect to the provisions in para 9.53(iv) of the Foreign Trade Policy, which states that "supply of a service in India relating to exports paid in free foreign exchange or in Indian Rupees which are otherwise considered as having being paid for *in free foreign exchange by RBI." It is also a matter of fact that DGFT vide clarification dated 8 June 2005 specified that words "relating to exports" actually meant "relating to exports of services by service provider under the GATT Agreement". The circular also clarified that services rendered within India can be considered as exported and that the only way that a provider of services rendered within India could export his services would be by earning free foreign exchange as provided in paragraph 9.53(iv) of the FTP. The said clarification, made it explicitly clear that the only way a service provider could export his services would be by earning free foreign exchange or in India rupees which are otherwise considered as having been paid for in free foreign exchange by RBI.*

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5.2.7 I notice that it is a matter of fact that services rendered to foreign vessels are treated as services to foreigners and service charges are earned either in Indian Currency or in Foreign Currency. It is a matter of fact that in terms of Policy Circular No. 24(RE 08)/2004-09 dated 04.08.2008, DGFT clarified that aircraft landing and parking charges, from foreign airlines are eligible for Export Obligation discharge under EPCG. Thus, it can be construed that rendering services to foreign vessels are recognized as rendering of services to foreigners and payment received in free foreign exchange/Indian Rupees by a service provider for Export Obligation fulfilment under EPCG scheme is permitted. The aspect has further been clarified by RBl as mentioned above, by specifying that for any services rendered, when payments which have been received in foreign exchange would be deemed to be earned in foreign exchange.

5.2.8 Thus, in view of foregoing discussions, I form a considered opinion that the maritime services for import vessels constitute an earning in foreign exchange and thus, are inevitably eligible for the discharge of export obligation liability. Accordingly, since the issue of "Group Company" has already been settled in view of the clarification issued by the DGFT, M/s. Navyuga Engineering Company Ltd, are undoubtedly eligible to discharge their export obligation liability by adjusting the earnings through "port handling services" earned by M/s. KPCL, their group company."

10.1 On perusal of case file, certain undisputed facts as highlighted by the learned Advocate for the appellants and not disputed by AR for the Revenue are summarised herein below:

(i) the appellant company M/s Navayuga Engineering Company Limited (NECL), was issued with valid EPCG licenses viz., No. 0330014523 dated 29.12.2006; No. 0330015182 dated 23.02.2007; No. 0330015609 dated 28.03.2007; and No. 0330016961 dated 31.07.2007 by the DGFT authorities. The export obligation in respect of such EPCG licenses were duly discharged by the appellant using the export earnings through port handling services of group company M/s Krishnapatnam Port Company Limited (KPCL). Similarly, more than 30 numbers of valid SFIS/SHIS duty credit scrips have been issued to M/s KPCL by the DGFT involving total duty credit grant of Rs.146,18,18705/- during the years 2007-2008 to 2013-2014.

(ii) imported capital goods by the appellants were cleared by the Customs officers at various ports across the country extending the customs duty exemption benefits under EPCG/SFIS/SHIS, and it is only on the basis of DRI investigation, the alleged mis-declaration with respect to 'group company' and evasion of duty on certain capital goods was proposed through show cause proceedings.

(iii) Almost four years before initiation of DRI investigation, by issue of summons by DRI to the appellant company on 18.06.2015, during assessment of B/E No.69/2011 by the Assistant Commissioner of Customs, Nellore Division, Vijayawada Customs Commissionerate, on the basis of appellant's letter dated 08.03.2011, the Zonal Joint DGFT, Chennai in their letter dated 21.06.2011 had clarified that M/s Krishnapatnam Port Company Limited and M/s Navayuga Engineering Company Limited come under the classification of 'group companies' as per Para 9.28 of Foreign Trade Policy.

(iv) S/Shri C.V. Rao, C. Sridhar and C. Sasidhar, Directors combinedly hold 64.30% of shareholding in M/s Navayuga Engineering Company Limited and 36.96% of shareholding in M/s Krishnapatnam Port Company Limited; and definition of 'group company' has been provided in Paragraph 9.28 of the FTP 2009-2014.

(v) DGFT, Ministry of Commerce & Industry, Government of India vide F. No. 01/61/180/150/AM16-PC-3 dated 22.02.2017 had clarified to KPCL that the companies M/s KPCL and M/s NECL are covered under the definition of Group Companies as defined in Para 9.28 of the FTP 2009-14.

Since the above facts/documents have been relied upon in the impugned order, in support of the findings for partly confirming the demand in respect of import of parts of helicopter as well as for dropping the duty demands on the basis of coverage under the definition of 'group company' under FTP, it will be important for us to see whether the same can be held as valid evidences for coming to a conclusion on the disputed issues.

10.2 Firstly in order to address the above issue of coverage under 'group company', we would like to refer the relevant legal provisions contained in Foreign Trade Policy (FTP) framed under Foreign Trade (Development and Regulation) Act, 1992 ('FTDR Act' for short) as it is the relevant statute for the purpose of EPCG/SFIS/SHIS scrips; and as no such definition is provided under the Customs Act, 1962. The extract of the same is given below:

<u>Foreign Trade (Development and Regulation) Act, 1992.</u>

"Section 5. Foreign Trade Policy.

The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy:

Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette."

<u>Foreign Trade Policy</u>
27th August 2009 – 31st March 2014

"Interpretation of Policy

2.3 If any question or doubt arises in respect of interpretation of any provision contained in FTP, or classification of any item in ITC (HS) or HBP v1 or HBP v2, or Schedule of DEPB Rates (including content, scope or issue of an authorization there under) said question or doubt shall be referred to DGFT whose decision thereon shall be final and binding.

Procedure

2.4 DGFT may, specify procedure to be followed for an exporter or importer or by any licensing or any other competent authority for purpose of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and FTP. Such procedures shall be published by means of a Public Notice, and may, in like manner, be amended from time to time.

Exemption from Policy / Procedure

2.5 DGFT may pass such orders or grant such relaxation or relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade.

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REWARD / INCENTIVE SCHEMES IN DGFT

3.12 ***SERVED FROM INDIA SCHEME (SFIS)***

Objective

3.12.1 Objective is to accelerate growth in export of services so as to create a powerful and unique 'Served From India' brand, instantly recognized and respected world over.

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Imports Allowed

3.12.6 Duty Credit scrip may be used for import of any capital goods including spares, office equipment and professional equipment, office furniture and consumables; that are otherwise freely importable and / or restricted under ITC (HS). Imports shall relate to any service sector business of applicant.

Utilization of Duty Credit scrip earned shall be permitted for payment of duty in case of import of only those vehicles, which are in the nature of professional equipment to the service provider. In case of hotels; clubs having residential facility of minimum 30 rooms, golf resorts and stand-alone restaurants having catering facilities, Duty Credit scrip may also be used for import of consumables including food items and alcoholic beverages.

Non Transferability

3.12.7 Entitlement / goods (imported / procured) shall be non transferable (except within group company and managed hotels) and be subject to Actual User condition.

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3.14 Status Holders Incentive Scrip (SHIS)

3.14.1 Objective

(a) Objective of SHIS is to promote investment in upgradation of technology.
(b) Status Holders of sectors specified in Para 3.16.4 below, shall be entitled to a Duty Credit Scrip @1% of FOB value of exports made during 2009-10 ,2010-11,2011-12 and 2012-13.
(c) Status Holders of additional sectors listed in Para 3.10.8 of HBPv1 2009-14 (RE-2010) shall also be eligible for this Status Holders Incentive Scrip on exports made during 2010-11, 2011-12 and 2012-13.
(d) This shall be over and above any Duty Credit Scrip claimed/availed under this chapter.

3.17.5
Imports Allowed/ Domestic Procurement

(a) Duty Credit Scrip may be used for import of inputs or goods including capital goods, provided same is freely importable and / or restricted under ITC (HS). However, import of items listed in Appendix 37B of HBPv1 shall not be permitted to be debited.
(b) Duty Credit Scrip under Chapter 3 of FTP can also be utilized for payment of duty against imports under EPCG scheme, provided the item is importable against the Scrip.
(c) Duty Credit Scrip can also be utilised for payment of Excise Duty on domestic procurement of such items as permitted to be imported under respective scheme.

CHAPTER 9
DEFINITIONS

9.1 For purpose of FTP, unless context otherwise requires, following words and expressions shall have the following meanings attached to them.

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> *9.12 "Capital Goods" means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. It also includes packaging machinery and equipment, refractories for initial lining, refrigeration equipment, power generating sets, machine tools, catalysts for initial charge, equipment and instruments for testing, research and development, quality and pollution control.*
>
> *Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in services sector.*
>
> *9.13 "Competent Authority" means an authority competent to exercise any power or to discharge any duty or function under the Act or the Rules and Orders made thereunder or under FTP.*
>
> xxx xxx xxx xxx
>
> *9.28 "Group Company" means two or more enterprises which, directly or indirectly, are in a position to —*
>
> *(i) exercise twenty-six per cent, or more of voting rights in other enterprise; or*
>
> *(ii) appoint more than fifty percent, of members of board of directors in the other enterprise.*
>
> *For group companies to claim benefits or have their exports counted for benefits to be claimed by another member of group, the group company should have been in existence at least 2 years prior to date of application under any of export promotion schemes notified in FTP."*

10.3 From plain reading of the above legal provisions under FTP, it transpires that in order to determine whether a particular category of imports are allowed under a specific export promotion scheme, in order to allow consequential customs duty exemption benefits under the relevant notification for such scheme, it would depend upon the specific policies framed thereunder. Further, it also transpires that in order to carry out the purpose of FTP and to provide relaxation on the grounds of genuine hardship and adverse impact on trade and in public interest, DGFT is authorised to pass such orders for granting requisite relaxation or relief. Furthermore, in case of any question of doubt in respect of interpretation of any provision of FTP etc., the decision of DGFT thereon shall be final and binding.

10.4 The main ground on which the investigation had interpreted that the appellant company and KPCL do not come under the definition of group company is that NECL had no shareholding in KPCL and vice versa; and the fact that certain individuals/common directors holding shares directly or indirectly through other companies in both NECL and KPCL, was not relevant to decide the status of group company, as defined under Para 9.28 of FTP. In this regard, we find that on plain reading of the definition of 'group company' in Para 9.28 of FTP, it transpires that the said definition refers to (i) 'two or more enterprises' and (ii) 'exercise of voting rights in other enterprise, to the extent of 26% or more' or 'appoint more than 50% of members of board as directors in the other enterprise', as the twin criteria for bringing such enterprises under the scope of the phrase 'group company'. In the present case, both NECL and KPCL is a 'company' form of business entity incorporated under the Companies Act, 1956/2013 and as such they qualify the term 'enterprise'. It is not the case here, that there is any 'partnership firm' or 'sole proprietorship firm' is involved, whose partners holding requisite shareholding may be treated as representing themselves in their individual capacity. On the other hand, in the company form of organisation, the individuals have represented as 'Directors of the Company' in exercising voting rights and not as individual persons with the status of partner/sole proprietor which is 'person' specific. It is also an undisputed fact the shareholding of common directors combinedly is 64.30% in M/s Navayuga Engineering Company Limited and 36.96% in M/s Krishnapatnam Port Company Limited. Considering that these twin criteria are met in the present case, we are of the considered view that the aforesaid two companies are covered by the definition of 'group company' as has been provided in Paragraph 9.28 of the FTP 2009-2014. Besides this, the competent authority i.e., DGFT has in consultation with the Department of Legal Affairs in the Ministry of Law & Justice had clarified vide letter F. No. 01/61/180/150/ AM16-PC-3 dated 22.02.2017 that M/s KPCL and M/s NECL are group companies duly covered by the definition of 'group company' as per Para 9.28 of the FTP 2009-14. In terms of Government of India (Allocation of Business) Rules, 1961, the business of the Government of India shall be transacted in the Ministries, Departments, Secretariats and Offices specified in the First Schedule to those rules (all of which are hereinafter referred to as "departments"). In terms of Rule 3 of the said Rules of 1961, the distribution of subjects among the departments are specified in the Second Schedule. In terms of such distribution "All matters relating to foreign trade" are covered under item Serial No. 5 of Part II under the Department of Commerce. Therefore, we find that the insistence of the DRI-customs field formation in the Central Board of Indirect Taxes & Customs under the Department of Revenue, Ministry of Finance in not treating the M/s KPCL and M/s NECL as group company through show cause proceedings does not have any legal basis, as the matter has been finally clarified by the administrative department i.e., Department of Commerce, Ministry of Commerce & Industry.

10.5 We find that the Hon'ble High Court of Delhi in the case of *Vacmet Packagings (India) Pvt. Ltd. (supra)* has held that the meaning of 'enterprise' cannot be stretched to cover individual partners of a firm. Since the facts of the present case does not involve partnership firm, we find that the aforesaid case law is not applicable to the present case. Further, we also find that in the case of *Tata Teleservices Limited Vs. Union of India & Ors. and Tata Teleservices (Maharashtra) Limited Vs. Union of India & Ors.* in Writ Petitions No.233 and 237 of 2013, respectively, the Hon'ble High Court of Bombay vide its judgement dated 20.12.2014 has held that through indirect control i.e., Tata Sons Ltd. holding 21% equity in Tata Teleservices (Maharashtra) Ltd., and 74% equity in Tata Consultancy Services; and further Tata Sons Ltd. holding 36% equity in Tata Teleservices Ltd. and such Tata Teleservices Ltd. holding 38% equity in Tata Teleservices (Maharashtra) Ltd., are group companies; and the benefit as contemplated to both petitioners shall be extended in terms of FTP. In the appeal filed by the department against the aforesaid judgement in Special Leave to Appeal (C) Nos. 23384-23385/2015, vide judgement dated 24.11.2015, the Hon'ble Supreme Court had dismissed the SLP filed by the department by upholding the above judgement of the Hon'ble High Court of Bombay. In view of the settled position of law, as held by the Hon'ble Supreme Court in *Tata Teleservices Limited* (supra), we find that the issue with respect to coverage under the definition of 'group company' in terms of Paragraph 9.28 of FTP is no more *res integra.*

11.1 In view of the above discussions and analysis, we are of the considered view that the (i) impugned order dated 30.05.2017 in dropping the entire proceedings initiated vide SCN dated 30.09.2016; and (ii) impugned order dated 26.05.2017 in allowing the exemption benefits under Notification No.91/2009-Customs dated 11.09.2019 and dropping the duty demand of Rs. 62,96,23,584/- raised under Section 28(4) of the Customs Act, 1962 and refraining from confiscation of goods under Section 111(d), 111(o) ibid and imposition of penalties on the appellants under Sections 114A, 114AA and 117 ibid, do not require any interference.

11.2 As regards the issue of eligibility of exemption benefits under Notification No.91/2009-Customs dated 11.09.2019 to import of parts of helicopter, it is not in dispute that the said goods are used for helicopters which are used by the appellants. Further, it is also undoubtedly evident from the nature of operations of the appellants that the helicopters are used to transport personnel of the appellant company working in connection with various infrastructure projects like roads, bridges, marine development, turnkey projects situated in far remote areas; and for transportation of other persons who are related to monitoring of such infrastructure projects. Therefore, the limited question is whether such goods are covered by the scope of the definition 'capital goods' and whether the SFIS/SHIS scrips permit import of such goods.

11.3 On plain reading of the definition of 'capital goods' provided under paragraph 9.12 of FTP, it transpires that it covers wide variety of plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services. In the present case, the impugned goods are used in helicopter, which are thus in the nature of parts or accessories for the functioning of helicopters. In terms of the permission granted by the Director General of Civil Aviation (DGCA) for operating the aircraft for 'private use' is to be understood in the context that it is for compliance with Civil Aviation Requirements (CAR) for ensuring minimum airworthiness, operational and other general requirements for grant of Air Operator Permit for operating air transport services. DGCA has issued certain guidelines for regulating the operation of private chartered jets/planes/air crafts. Civil Aviation Requirements (CAR), Section 3, Series C, Part III covers non-scheduled air transport services and Section 8, Series O, Part II on Commercial Air Transport Operation which includes non-scheduled operation. Further, CAR Section 8, Series O, Part III is on General Aviation which includes private plane operation. Therefore, the letter of DGCA dated 06.08.2010 is issued to the appellants for obtaining necessary regulatory license for import of helicopter for use from the DGFT authorities. The mention of 'private use' does not mean that it is for 'personal use', as the air operations are generally permitted by DGCA under the category of 'Scheduled passenger operator' service; and, 'Non-scheduled passenger operator' and includes private plane operation. In terms of CAR issued by DGCA, 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. In view of the above statutory provisions relating to air transport operation of passengers, we are of the view that the appellants use of helicopters in relation to their infrastructure projects, can be considered as 'capital goods' under the definition provided under FTP and paragraph 3.12.6 of the FTP applicable for SFIS imports and 3.17.5 of the FTP applicable for SHIS imports.

11.4 The use of SFIS/SHIS scrips of KPCL validly issued by the DGFT for availing customs duty exemption under Notification No. 91/2009-Customs dated 11.09.2009 for import of parts of helicopters, as capital goods is therefore, in our considered view, well within the provisions of FTP.

12.1 Further, we also find that in the show cause proceedings initiated vide SCN dated 20.06.2016, for a total duty demand of Rs.6,01,86,677/- relating to 19 B/Es covered for the period 12.01.2012 to 08.05.2015, the duty demands concerning ten B/Es viz., Nos.5714444 dated 12.01.2012; 5871555 dated 31.01.2012; 5914613 dated 04.02.2012; 6031408 dated 17.02.2012; 6039082 dated 18.02.2012; 6180412 dated 06.03.2012; 6393785 dated 29.03.2012; 6544035 dated 16.04.2012; 6808795 dated 14.05.2012 and 3026262 dated 19.08.2013 are relating to imports prior to 19.06.2014 and thus for such demand the SCN has been issued beyond the normal period of two years. In the factual matrix of the present case, where the issue of eligibility of capital goods by the appellant under the category of 'group company' having been clarified by the Zonal Joint DGFT, Chennai in their letter dated 21.06.2011 being known to the department, more specifically to the jurisdictional Assistant Commissioner of Customs, Nellore Division, Vijayawada Customs Commissionerate, there is no case made out by DRI for suppression of facts or wilful mis-statement with an intention to evade duty for invoking extended period of limitation under Section 28(4) of the Act of 1962.

12.2 In this regard, we find that the Hon'ble Supreme Court in the case of *Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay* - 1995 (78) E.L.T. 401 (S.C.), has held that there should be some deliberate act on the part of the assessee to claim the ingredients of fraud, collusion of wilful default. The relevant paragraph is extracted below:

> *"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

12.3 In the present case, the appellants themselves had referred the issue in which the department had raised the doubt to the DGFT authorities and had also obtained necessary clarification and furnished the same to the department. Besides, the appellants had also obtained requisite permits and licenses for import, use, operation of the helicopter from the competent authorities. Therefore, we are of the view that there is no case made out by the department for invocation of extended period of limitation, and the demand of duty is not proper on this account also and it does not stand the legal scrutiny.

12.4 Further, we have examined the issue of demand of duty on parts of helicopters on the merits of the case in detail in the preceding paragraphs, and have come to the conclusion that these are eligible for extending the customs duty exemption benefits under Notification No. 91/2009-Customs dated 11.09.2009. Thus, we are of the considered view that the impugned order dated 26.05.2017 to the extent it had confirmed the duty demands on parts of helicopter is not legally sustainable.

13. In view of the foregoing discussions and analysis, and on the basis of the settled position of law, we are of the view that confirmation of adjudged demands, confiscation of goods, consequent imposition of redemption fine; and imposition of penalties on the appellants in respect of import of parts of helicopter does not stand the scrutiny of law. Therefore, the impugned order No. 9 dated 26.05.2017 to the extent it had confirmed the adjudged demands is set aside. Further, dropping of the proceedings initiated in the SCN dated 20.06.2016 and 30.09.2016 vide impugned orders No. 9 dated 26.05.2017 and No. 10 dated 30.05.2017, respectively, are sustained.

14. In the result, the impugned order No. 9 dated 26.05.2017 to the extent it is challenged before us by the appellant-assessee is set aside, and the appeal filed by them is allowed in their favour, with consequential relief, if any, as per law. The appeals filed by Revenue to the extent they are challenged before us are dismissed.

(Order pronounced in open court on 22.09.2026)

(AJAY SHARMA)
MEMBER (JUDICIAL)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha