

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10670 OF 2022

Sarveshwar Logistics Services Pvt. Ltd.,

A company registered under the
Companies Act, Through its Director Officer
having its registered office at The Great
Eastern Summit, B-Wing, Sector-15,
Plot No.66, CBD Belapur, New Mumbai.

...Petitioner

Versus

1. **Union of India,**
Through its Joint Secretary Ministry
of Law and Justice Branch Secretariate
at Mumbai, 242/C, Aayakar Bhavan
Marine Lines, Mumbai.
2. **The Joint Director (CRB),**
Ministry of Finance, Department of Revenue
Directorate General of Human Resources
Development, Indirect Taxes & Customs IRCO
Building, West Wing, Ground Floor Plot No.C-4,
New Delhi – 110 017.
3. **The Principal Commissioner of Customs (General)**
CFS Management Cell, Jawaharlal Nehru Custom
of House, Customs Zone (3) Uran, Raigad,
Maharashtra – 400 707.
4. **The Asstt./Deputy Commissioner of Customs,**
Customs Cargo Service Provider (CCSP) Cell
NS- General, Jawaharlal Nehru Customs
House Mumbai Zone – 3.
5. **The Asstt./Deputy Commissioner of Customs,**
CFS Management Cell, NS-General Jawaharlal

Nehru Customs House, Mumbai Zone – 3. ...Respondents

Mr. D. N. Salvi a/w. Mr. Sahil D. Salvi, Mr. Sagar Redkar and Mr. Narendra L. Kalpoth for the Petitioner.

Ms. Shehnaz V. Bharucha a/w. Mr. Dhananjay Deshmukh for Respondent (UoI).

CORAM : G. S. KULKARNI,
JITENDRA JAIN, J.J.

RESERVED ON : 17th JULY, 2023.

PRONOUNCED ON : 18th AUGUST, 2023

Oral Judgment (Per Jitendra Jain, J.)

1. This petition under Article 226 of the Constitution of India is filed praying for the following relief:-

“(a) This Hon’ble Court be pleased to issue an appropriate Writ, Order or direction in the nature of Certiorari and be pleased to direct the authority to modify the CRB Order No.5/2021, dated 25.02.2021 issued by the Respondent No.2 and direct the Respondents to grant exemption from payment of cost recovery charges effective from 01.04.2020.”

2. **Narrative of the relevant events:-**

(i) On 21st December 2015, Respondent No.1 approved a proposal of the Petitioner for setting up Container Freight

Station (CFS) at village Dighode, District Raigad, Maharashtra.

- (ii) On 6th December 2016, a notification was issued by Respondent No.3 being CFS Notification No.11/2016, notifying the CFS station of the Petitioner for 'unloading of imported goods and for loading of export goods'.
- (iii) On 21st August 2017, Respondent No.3 issued a further Notification No.10/2017 appointing the Petitioner to be a 'Custodian' of the imported goods received at the CFS of the Petitioner. The Petitioner was also approved as 'Customs Cargo Service Provider' under the said notification. The duration for which the Petitioner was appointed as 'Custodian' and as a 'Customs Cargo Service Provider' was for two years from the date of the notification dated 21st August 2017.
- (iv) On 7th November 2017, Respondent No.3 issued a public notice notifying the Petitioner as Customs Cargo Service Provider w.e.f. 7th November 2017.
- (v) On 16th January 2020, an application was made by the Petitioner to Respondent No.4 seeking exemption of Cost Recovery Charges in respect of CFS since the Petitioner completed two years of service (from 7th November 2017) and

the Petitioner had paid all dues with respect to cost recovery for the said two years. The said application was made pursuant to a Circular No.13/2009-Customs dated 23rd March 2009.

(vi) On 18th February 2020, Respondent No.3 informed the Petitioner that precondition for seeking exemption as per para 5.5 of Circular No.13/2009-Customs is that the CFS should be in existence for a consecutive period of two financial years and the financial year has been specified to be 'April to March', for grant of exemption. Respondent No.3, therefore, expressed his inability to process the application since the Petitioner's CFS had not completed its tenure of operation of consecutive period of two financial years.

(vii) On 19th February 2020, Respondent No.3 directed the Petitioner to deposit the Cost Recovery Charges for the period up to March 2020, so as to complete the tenure of operations for a consecutive period of two full financial years and further advised the Petitioner to resubmit after 31st March 2020, application for waiver from payment of cost recovery charges.

(viii) On 28th April 2020, the Petitioner informed Respondent No.4 that they have made part payment of Rs.40,00,000/- towards the Cost Recovery Charges up to March 2020, for the

customs staff posted at CFS of the Petitioner. The Petitioner also requested Respondent No.4 to issue notification exempting the Petitioner from payment of cost recovery and it further records that the formal proposal is already submitted vide letter dated 16th January 2020.

- (ix) On 26th November 2020, the Petitioner informed Respondent No.2 that they have paid all dues for the 'Custom' staff posted at its CFS till March 2020. The Petitioner requested Respondent No.2 to expedite the process of processing exemption application pending with the Respondent No.2. The copy of the said letter was also marked to Respondent No.3.
- (x) Meanwhile, on 19th January 2021, Respondent No.1 issued Circular No.2/2021-Customs. The said circular records that various issues were brought to the notice of the Board through various representations including the issue of effective date of exemption from the Cost Recovery Charges, interest payable on delayed payments, etc. The said circular records the delay in getting the approval from the competent authority for the grant of exemption from payment of cost recovery charges in respect of eligible facilities. The said circular, therefore, lays down guidelines which subsumes various circulars/letters/instructions including Circular

No.13/2009-Customs dated 23rd March 2009. The said Circular No.2/2021-Customs revamps the whole norms and process with respect to posting of staff at customs area and collection of cost recovery charges. Para 8 of the said circular deals with eligibility for exemption for cost recovery charges. It states that the cost recovery post should have the Department of Expenditure's specific permission for continuation before seeking/claiming exemption in respect of any given customs facility. Para 8.2 provides for exemption from payment of cost recovery charges upon fulfilling the performance criteria given in the table therein. The period for meeting the criteria was two financial years or four financial years as the case may be. Para 8.5 of the said circular states that in respect of all the cases for which exemption from cost recovery charges have not yet been granted though, application for the same is received and all other cases for which application would be received hereafter shall be subject to the conditions specified therein. Para 8.6 lays down that regulation process and approval shall be completed within a period of three months in order to enable the exemption to be available from the beginning of the fourth month.

(xi) On 29th June 2021, Respondent No.3 issued a demand notice

to the Petitioner for payment of cost recovery charges for the period of 1st April 2020 to 18th April 2021. Alongwith said demand notice, Respondent No.3 enclosed exemption Notification No.5/2021 approving the exemption from payment of Cost Recovery Charges by the Petitioner w.e.f. 19th April 2021.

3. It is on this background that, the present petition is filed seeking direction from the Court that the exemption granted by the Respondents to the Petitioner should be effective from 1st April 2020 and not from 19th April 2021 as notified in CRB order No.5/2021 dated 25th February 2021.

4. **SUBMISSIONS OF THE PETITIONER:-** The Petitioner contended that vide letter dated 28th April 2020, it had requested Respondent No.4 to issue notification for cost recovery exemption since partly the dues up to March 2020 were paid. The Petitioner in the said letter requested Respondents to consider the application made on 16th January 2020 for granting exemption to the Petitioner from payment of Cost Recovery Charges. The Petitioner once again reiterated its request for considering the exemption application vide letter dated 26th November 2020 and in the said letter it was stated that all the dues are fully paid upto 30th March 2020. The Petitioner submitted that the exemption

order does not give any reason as to why the said notification was not made effective from 1st April 2020. The Petitioner further stated that Circular No.2/2021-Customs dated 19th January 2021 cannot be applied retrospectively to the application of the Petitioner which were filed prior to 19th January 2021 and same were pending on the date of the said circular for the reasons not attributable to the Petitioner. The Petitioner, therefore, submitted that the Respondents ought to have issued exemption order w.e.f. 1st April 2020 and not from 19th April 2021 and consequently the demand made ought not to have been raised for the period from 1st April 2020 to 18th April 2021.

5. **SUBMISSIONS OF THE RESPONDENT :-**The Respondents in the reply have stated that final payment towards Cost Recovery Charges up to 31st March 2020 was paid on 20th July 2020 by the Petitioner and, thereafter, vide letter dated 4th August 2020, Respondent No.3 forwarded the application for exemption to Director General of Human Resource Department (DGHRD) for waiver of Cost Recovery Charges. The Respondents, therefore, contended that since there was a delay in making the payment, the application was not considered till July 2020. The Respondents also relied on an undertaking of the Petitioner dated 4th May 2020, wherein, they had undertaken to pay all the

arrears for the Cost Recovery Charges as per demand notice issued by customs. The Respondents relied upon Circular No.2/2021-Customs dated 19th January 2021 to justify the grant of exemption w.e.f. 19th April 2021.

6. **REJOINDER OF THE PETITIONER :-** In rejoinder, the Petitioner stated that Circular No.2/2021-Customs should be read to have application prospectively and not retrospectively. The Petitioner further contended that at no point of time, the Respondents intimated that the claim of exemption is not being considered on account of non-payment of dues and it is only in reply to the present petition that the said case is made out. The Petitioner stated that payment of Cost Recovery Charges (CRC) as a condition for granting exemption was introduced for the first time in Circular No.2/2021-Customs dated 19th January 2021 and same was not a condition in Circular No.13/2009-Customs dated 23rd March 2009 and in any case delay in payment would not amount to non-payment of dues.

7. We have heard learned counsel for the Petitioner and learned counsel for the Respondents. With their assistance, we have perused the record.

8. **ISSUE :-** The short issue which arises for consideration

in the present proceeding is whether the Respondents were justified in granting exemption to the Petitioner from payment of Cost Recovery Charges w.e.f. 19th April 2021, although, the application for exemption was made in April 2020.

9. **ANALYSIS AND CONCLUSION:-** The Petitioner's CFS completed two consecutive financial years successfully on 31st March 2020 which was the condition for grant of exemption. The Petitioner vide letter dated 20th April 2020 requested Respondent No.4 to consider the application for exemption which was already filed on 16th January 2020. Therefore, application for exemption was made immediately on completion of 2 years. On 26th November 2020, the Petitioner reminded Respondent No.2 to expedite the process for grant of exemption since the Petitioner had paid all the dues till 31st March 2020. A copy of the said letter dated 26th November 2020 was also marked to Respondent No.4. On the date, when the Petitioner had filed its request for grant of exemption i.e. on 20th April 2020 and 26th November 2020, the circular which held the field was Circular No.13/2009-Customs dated 23rd March 2009. The application of the Petitioner for exemption has to be considered based on the said circular of 2009 which was prevalent at the time of making an application. The delay on the part of the Respondents' to consider the Petitioner's exemption application cannot be attributable to the

Petitioner and, therefore, the Respondents cannot apply the Circular No.2/2021-Customs while granting exemption vide CRB Order No.5/2021 dated 25th February 2021 and apply the exemption from 19th April 2021. The exemption order dated 25th February 2021, addressed by the Government of India, Ministry of Finance to Respondent No.3 itself refers to a letter of Respondent No.3 to the Ministry of Finance dated 20th October 2020, for grant of exemption from payment of Cost Recovery Charges in respect of the Petitioner. Therefore, in our view, the Respondents were not justified in issuing exemption order w.e.f. 19th April 2021, when the application was made by the Petitioner in April 2020 and reiterated vide letter dated 26th November 2020 and the delay by the Respondent in processing the application is not attributable to the Petitioner.

10. It is settled position that the circulars cannot be given effect retrospectively unless expressly provided therein and if the law so permits. The circular dated 19th January 2021 revamps various circulars issued from time to time and a totally new set of guidelines are issued for dealing with Cost Recovery Charges, Exemption, etc. The eligibility condition as per Circular No.2/2021-Customs itself has changed drastically compared to the eligibility condition specified in Circular No.13/2009-Customs. The Circular No.2/2021-Customs specifies meeting of criteria I

and criteria II in preceding two financial years or anyone of the criteria in the preceding four financial years for being eligible to claim exemption. The criteria I and criteria II deals with volume/ value of cargo/flights and number of documents/passengers handled in a year. These criterias were not present in 2009 circular, therefore, in our view, Circular No.2/2021 could not be made applicable retrospectively to the application made by the Petitioner on April 2020 seeking exemption. In our view, para 8.5 of Circular No.2/2021-Customs which provides that the application pending on the date of the said circular would be subject to the condition specified therein is bad in law, inasmuch as that would amount to giving retrospective effect to the circular. The right of the Petitioner for being eligible for exemption got crystallised on 31st March 2020 when period of 2 consecutive financial year got over and, therefore, Circular No.13/2009 would be governing the Petitioner's case.

11. The Respondents have not alleged that the Petitioner is not eligible for grant of exemption as per Circular No.13/2009. Para 5.5 of Circular No.13/2009 deals with eligibility for grant of exemption, namely the CFS is in existence for a consecutive period of two financial years and parameters such as total number of import or export containers handled, customs

declaration filed for import or export, etc. are satisfied. The Respondents have not averred that any of the conditions specified in para 5.5 of Circular No.13/2009 is not complied by the Petitioner. The delay in payment of Cost Recovery Charges also does not form as a precondition for non-eligibility of exemption from 1st April 2020 and in any case delay in payment would not amount to non-payment of dues.

12. It is also worth noting that the Respondents have not shown us any document which states that if there is a delay in clearing dues the exemption would not be granted for the period of delay and, therefore, the contention of the Respondent on this account does not survive. Even otherwise, admittedly all the dues were cleared before Circular No.2/2021 was issued and even application was made much before the said circular and, therefore, even on this account Respondents' contention fails on this account.

13. Circular No.13/2009 does not specify delay in payment as a condition for exemption not to be granted during the period of delay. Circular No.16/2013 dated 10th April 2013 only provides for non-outstanding of cost recovery charges as a condition for exemption and not delay in payment of such charges. The condition of exemption shall be prospective in the said circular

would not mean that the period for which delay is not attributable to the applicant should come in the way of exemption not being applicable for such period. The letter of DGHRD dated 10th August 2018 specifying check list for exemption provides that all the payment should have been paid till the date of waiver. In the instant case, the Petitioner has made all the payments upto March 2020 albeit delayed.

14. Para 13 of Circular No.2/2021 states that earlier circular to the extent of its inconsistency with Circular No.2/2021 would continue to apply. This shows that Circular No.2/2021 is not retrospective in its application.

15. It is also to be noted that when application was made in January 2020, there was no outstanding dues since the Petitioner had paid all the dues upto December 2019, which is not disputed by the Respondents. The undertaking given on 24th December 2019 by the Petitioner that they will pay all dues was on the premises that they will get exemption from January 2020 when first time application was made and when in fact as stated above there was no outstanding or demand notice.

16. The view which we have taken above is supported by the decision of the Gujarat High Court in case of *Adani Ports and*

Special Economic Zone Limited & Anr. Vs. Union of India & Ors.

in Special Civil Application No.4083 of 2016 dated 4th December 2017. The issue before the Gujarat High Court was identical to the issue which is posed for our consideration in the present petition. The Petitioners before the Gujarat High Court applied to the Commissioner of Customs under letter dated 12th April 2013 for grant of exemption from payment of cost recovery charges in terms of circular dated 10th April 2013. On 30th April 2013, the Commissioner of Customs wrote to the Director General of Human Resources Development forwarding the documents of the Petitioners for grant of exemption from payment of cost of recovery charges. On 15th December 2015, the Chief Commissioner conveyed to the petitioners that it has been decided to exempt the cost recovery charges w.e.f. 15th December 2015. However, the Chief Commissioner observed that for the period between 12th April 2013 when the Petitioners applied for such exemption till 15th December 2015 when the order was passed, the Petitioners would be liable to pay the same. The issue arose before the Gujarat High Court as to whether the Revenue was justified in granting exemption from 15th December 2015 and not from the date of the application made by the Petitioners. The Gujarat High Court after analysing the scheme came to the conclusion that the exemption ought to have been

granted from the date of the application and not from the date when the Chief Commissioner decided to grant exemption. The relevant paragraphs read as under :-

“17. In this context, the conditions be laid down in clauses (b) and (c) of para 5 would have to be examined. Clause (b) of para 5 does provide that such exemption from cost recovery charges would be prospective and clause (c) provides that no cost recovery charges should be outstanding. These two clauses are pressed in service by the department for denying exemption to the petitioners from the date of application. Since these two conditions in some sense overlap, we may examine the applicability and fulfillment of these conditions by the petitioners simultaneously.

18. When clause (b) of para 5 of the circular provides that the exemption from cost recovery charges would be prospective, in our opinion, it never aims to make such exemption available only from the date of order and not from the period anterior to the date of the order. This is for variety of reasons. Firstly, upon issuance of the circular, the Commissioner in terms of para 6 would undertake an exercise to review the facilities and the cargo handling data of a particular seaport and make a recommendation within 60 days. Any such report of the Commissioner would have to be processed minutely by the concerned departments and this would take a reasonable time. The circular never intended that during all this while even if a particular entity is entitled to exemption, such exemption would be denied for the period during which the authorities i.e. the Commissioner and the concerned department take time to process the data and come to a definite conclusion. Further, para 6 itself provides that similar exercise would be undertaken in April of every year. Even otherwise, no such exercise can be undertaken prior to month of April since it is the cargo handing over the last two years a sea port for the purpose of clause (2) of immediately preceding year which would decide its eligibility for grant of exemption. The data for such period would be available only after 31 st March of a particular year. The question of grant or non-grant of exemption from payment of cargo handling charges would relate to a beginning of the financial year and can be examined only after the end of the previous financial year. No intention appears from the circular that

year after year every port would lose the exemption from the period during which such exercise is undertaken and completed. The purpose of mentioning that the exemption shall be prospective was to ensure that no entity can claim such exemption for a period prior to the date of the circular or for a period prior to the application for such period i.e. the period under review for exemption.

19. The reference to no cost recovery charges shall be outstanding also has a bearing on this aspect of the matter. If on one hand, the Government of India expects that the custodian should pay up the charges and not be in arrears of such charges, when the application for exemption is being processed, the contention that such exemption even if later on granted, would only be prospective, would be incongruent. On one hand, the custodian would have to, pending finalization of the application for exemption, go on depositing the recurring charges with the Government of India, failing which, he would be stated to be breaching condition contained in clause (c) of para 5 of the circular, and on the other hand when such application is granted, the custodian would be told that no refund can be granted for such charges already deposited since the exemption is always prospective. Grant of exemption from the date of the application, if the application is in order and no delay can be attributed to the petitioners in either making the application or supplying necessary information to the department, cannot be stated to be retrospective operation of the order of exemption.

20. It is possible to take one view that pending such application for exemption, the custodian cannot discontinue depositing the charges with the Government. In a given case, it may happen that the application is ultimately rejected for valid reasons. It is possible to argue that in such circumstances, the Government of India, cannot be left uncovered for the period during which such application was made and was pending with the authorities. It is perhaps therefore correct on the part of the Government of India to insist that pending such application for exemption, the petitioners should have gone on depositing the recurring cost recovery charges. However, in the present case, non-payment of the charges cannot be the base for rejecting the grant of exemption from the date of the application. This is so because admittedly all the while when such application was pending, the petitioners were never conveyed that such application shall not be processed, entertained or granted since the current charges are not paid. It is part of the record that once the petitioners through show cause notice

were called upon to make such payments, the same were made without delay. If the stand of the department therefore was that even for the period during which the petitioners had applied for exemption, till such exemption is not granted, the petitioners must go on depositing the charges as scheduled, the department should have conveyed the same to the petitioners. One way of looking at condition contained in clause (c) of para 5 is that at the time of making of the application, no past charges should be pending. If the stand of the Government of India was and a stand which may even be plausible, that awaiting outcome for application of exemption, the custodian should continue to deposit such amount with the Government, it should have specified the stand with the petitioners.

22. In the result, petition is allowed. The condition of grant of exemption under impugned order dated 15.12.2015 of the exemption being available from the date of the order is struck down. It is provided that such exemption for payment of cost recovery charges would be available from the date of application i.e. 12.04.2013.

23. Petition is disposed of.”

17. In our view, the fact of the present petition being similar to that before the Gujarat High Court, the analysis done by us would require us to come to a conclusion that the Respondents were not justified in granting exemption w.e.f. 19th April 2021 when the application was made in April 2020.

18. In view of above, the CRB order No.5/2021(Exemption) dated 25th April 2021 would be effective from 1st April 2020 and not from 19th April 2021 and, therefore, the Respondents are directed to modify the exemption order granting exemption from payment of Costs Recovery Charges from 1st April 2020 making

the Petitioner eligible for exemption from said date that is 1st April, 2020.

19. Petition is allowed in the above terms. No order as to costs.

[JITENDRA JAIN, J.]

[G. S. KULKARNI, J.]