IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	04.02.2021
Pronounced On	02.06.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. Nos. 7937, 7938 & 8248 of 2013
and
M.P. No. 1 of 2013 & W.M.P.Nos. 6359 & 6360 of 2017

M/s.Sun Global Logistics Pvt. Ltd.,
Survey No.742, North Avenue Road,
SIPCOT Irungattukottai,
Sriperumbudur - 601 105. ... Petitioner

Vs

1.Union of India,
Represented by the Secretary,
Ministry of Finance,
Department of Revenue,
Government of India,
North Block, New Delhi - 110 001.

2.Central Board of Excise & Customs,
North Block, New Delhi - 110 001.

3.Commissioner of Customs (Sea export),
Customs House, No.60, Rajaji Salai,
Chennai - 600 001.

4.Deputy Commissioner of Customs (Enquiry),
Customs House, No.60, Rajaji Salai,
Chennai - 600 001.

5.Assistant Commissioner of
Customs (Appg.Docks-Admn),
Customs House, No.60, Rajaji Salai,
Chennai - 600 001. ... Respondents

Prayer in W.P.No.7937 of 2013: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the order dated 11.02.2013 of the 3rd and 5th respondents bearing F.No.S.Misc/117/2011-Appg Docks (PC) and consequential Recovery Notice dated 19.03.2013 on the file of the 5th respondent quashing the same, and directing the 1st respondent to call for the petitioners application dated 02.08.2010 from the 4th respondent and consider the same pass order for grant of waiver of Cost Recovery Charges with effect from August, 2010 in respect of the petitioner.

Prayer in W.P.No.7938 of 2013: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the 2nd respondent in para 2.10 of chapter 28 of the 2nd respondent Customs Manual dated 02-Feb-2012 and quashing the sentence "The waiver of Cost Recovery Charges would be prospective with no claim for past period" contained therein.

Prayer in W.P.No.8248 of 2013: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the 2nd respondent Instruction dated 12-Sep-2005 and quashing the sentence "The waiver of cost recovery charges would be prospective with no claim for past period" contained therein.

For Petitioner (In all W.Ps) : Mr.P.R.Renganath

For Respondents (In all W.Ps) : Ms.Hema Murali Krishnan Senior Standing Counsel

COMMON ORDER

By this common order, all the three writ petitions have beingdisposed.

2.In W.P.No.7937 of 2013, the petitioner has challenged the impugned communication dated 11.2.2013 of the Assistant Commissioner of Customs (Appraising Docks-Admin).

3.By the impugned communication dated 11.2.2013 the petitioner has been directed to pay a sum of Rs.1,24,23,213/- as arrears of amount payable towards Cost Recovery Charges (CRC) from the date of issue of Container Freight Licence issued to the petitioner till 31.3.2013.

4.The aforesaid demand in the impugned communication dated 11.2.2013 is the net of the gross demand of Rs.1,64,25,173/- after adjusting a sum of Rs.40,01,960/- paid by the petitioner.

5.In W.P.No.7938 of 2013, paragraph 2.10 from The Customs Manual dated 2.2.2012 has been challenged in so far as its seeks to impose the payment of arrears of cost recover charges as a condition precedent for waiver from cost recovery charges. Relevant portion from the Customs Manual impugned in the said writ petition reads as under:-

> 2.10.Cost Recovery Charges to be paid by ICD/CFS may waived if they fulfil laid down norms and are in existence for a consecutive period of two financial years. Accordingly, in respect of eligible ICD/CFSs specific orders in individual cases for grant of exemption from payment of cost recovery

charges are issued by Ad.IV Section of the Board. As per the existing instructions, the cost recovery post and ICD/CFS which have been in operation for two consecutive years with following performance benchmark for past two years will be considered for regularisation of cost recovery posts. The waiver of cost recovery charges would be prospective with no claim for past period. Criteria would be applicable on actual performance of ICDs/CFSs.

(i)No of container handled by ICD	7200 TEUs per annum
(ii)No of containers handled by CFS	1200 TEUs per annum
(iii)No of B/E process by ICDs/CFSs	7200 per annum for ICDs and 1204 CFS
(iv)Benchmark at (i) to (iii) shall be reduced by 50% for these ICSs/CFSs exclusively dealing with exports as per staffing norms	

[Refer instruction F.No. 434/17/2004-Cus-IV, dated 12.9.2005]

6.In W.P.No.8248 of 2011, the petitioner has challenged the instruction of the Central Board Excise and Customs dated 12.9.2005 bearing reference F No. 434/17/2004-Cus-iV in so far as it stipulates that waiver of Cost Recovery Charges (CRC) would be only prospective with no claim for the past.

7.A dispute has arisen due to the implementation of the VI Pay Commission as a result of which the salaries of the Central Government Employees were increased drastically. Since officers of the Customs Department were deployed in the Container Freight Station(CFS) of the petitioner on Cost Recovery Charge (CRC) basis, the petitioner was called upon to pay a sum of Rs.5,86,428/- [Rs.97,738 x 6] as the differential Cost Recovery Charges payable to the respondent on or before 31.12.2008 for the period between July 2008 to December 2008 by a communication dated 17.12.2008.

8.Apart from the above the petitioner was also called upon to pay a sum of Rs.2,60,275/- in advance towards monthly Cost Recovery Charges for the period commencing from January 2009 onwards.

9.Theabove amounts were demanded from the for deploying officerson CRC basis in its CFS as detailed below:-

S.No	Designation of the Officers deployed in the Petitioners	Old Amount per month	Area CRS of pursuant to implementation of VI Pay Commission	Rate
1.	Appraiser	50,345/-	30,239/-	80,583/-
2.	Examiner	43,401/-	25,639/-	69,040/-
3.	Preventive Officer	43,401/-	25,639/-	69,040/-
4.	Tax Asst.	25,390/-	16,222/-	41,612/-

10.According to the petitioner it was entitled to refund the amounts already paid during the period and was entitled for a waiver.

11.Under these circumstances, the petitioner sent several representations to the Office of the Assistant Commissioner of Customs for waiver of Cost Recovery Charges. The petitioner vide reminder letter dated 05.08.2010 to the Deputy Commissioner of Customs – requested for waiver of Cost Recovery Charges (CRC) as the petitioner had completed two years of operation and had achieved the requisite benchmark.

12.The learned counsel for the petitioner placed reliance on the following decisions:-

i)Thiru Rani Logistics Pvt., Ltd., vs. DIR General, DGHRD,C.&C.E.,New Delhi, 2016 (340)E.L.T.160 (Mad.)

ii)D.R.Logistics (P) Ltd., vs. Union of India, 2017(356) E.L.T.205(Mad.)

iii)Commissioner of Customs, Ludhiana vs. Krishna Cargo Movers P.Ltd., 2020(371) E.L.T.633 (P & H)

iv)M/s.Overseas Warehousing Pvt.Ltd., vs. Union of India and Others, CWP-5079-2014(O&M)

v)M/s.Miv Logistics Pvt.Ltd vs. Commissioner of Customs, Kerala, 2020(2) TMI 876 - CESTAT Bangalore

vi).Kottayam Port and Container Terminal Services Pvt.Ltd., vs Union of India 2013 SCC Online Ker 19319

vii)Diamond and Gem Dev.Corporation vs. Union of India, 2016(342) E.L.T. 366(Guj.)

viii)Union of India and Others vs. A.K.Pandey, (2009) 10 SCC 552

ix)Indian Oil Corporation Ltd., vs Central Board of Excise and Customs (2020) 371 ELT 448

x)CIT vs B.C. Srinivasa Setty (1981) 2 SCC 460

13.On the other hand, it is the contention of the respondent Customs Department that the unless the petitioner cleared arrears of the CRC, the petitioner was not entitled to waiver as per the existing Circulars of the Central Board of Excise and Customs.

14.It is submitted that the respondents have borne the expenses by deploying officers of the Custom Department in the CFS of the Petitioner and therefore the respondents are entitled to insist on recovery of the amounts.

15.It is therefore prayed that the interim order granted by this Court on 03.04.2013 in W.P No7937 of 2013 and M.P.No.1 of 2013 was also liable to be vacated.

16.The learned counsel for the respondents customs department relied the following case laws:-

> i)Thiru Rani Logistics Pvt., Ltd vs DIR. General, DGHRD (2016) 340 ELT 160 (Mad.)
>
> ii)Allied ICD Services Ltd., vs Union of India(2018) 364 ELT 59 (Del)
>
> iii)Rajasthan Small Industries Corpn Ltd vs CCE, Jaipur (2019) 367 ELT 736 (Raj)
>
> iv)Hari CFS vs Union of India (2011) 267 ELT319 (Mad)

17.Heard the learned counsel for the petitioner and the learned counsel for the respondents. By an order dated 1.4.2013, the levy /collection of 50% of CRC from the petitioner was stayed/ injuncted by this Court in W.P No.7937 of 2013. Further, appeal by the petitioner and the respondents before the Division Bench were dismissed by an order dated 28.06.2018 in W.A.Nos.1167 of 2018 and 829 of 2013.

18.The petitioner has been providing service from its Container Freight Station(CFS) as a Custom Cargo Service Provider with effect from 11.7.2008. At its CFS, officers of the Customs Department were deployed on Cost Recovery Charges (CRC) basis as per the prevailing Circulars/ Notifications.

19.When the petitioner approved as Customs Cargo Service Provider Circular No. 52/97-Cus., dated 17-10-1997 of the Central Board of Excise & Customs, New Delhi was also in force. Text of Circular No.52/97- Cus., dated 17.10.1997 reads as under :-

CD/CFS — Posting of staff on cost recovery basis

Circular No. 52/97-Cus., dated 17-10-1997
[From F. No. 434/66/95-Cus. IV (Pt.)]
Government of India
Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Posting of staff in ICD/CFS - Collection of Cost recovery charges – Regarding.

I am directed to refer to the various ICDs/CFSs approved by IMSC/Board to facilitate import/export work from time to time. The staff is being sanctioned by Board to deal with customs work at such places. Staff for all the new ICD is being sanctioned on cost recovery basis. Government of India have approved norms for sanction of Customs Staff for ICD and CFS as under:-

(i)The ICDs notified under Section 7(aa) and approved for export only will have customs staff of 7 (Asstt. Commissioner - 1; Appraiser- 1 ; Examining Officer - 1; UDC - 1; LDC - 1; Sepoys - 2).

(ii)The ICDs notified under Section 7(aa) of the Customs Act, 1962 and approved both for Export and Import work will have customs staff of 13- (AC -1; Appraiser - 2; Examining Officer - 2; UDC - 2, LDC - 2; Sepoy - 4). The said sanction shall be obtained for all formations ab initio.

2.However the Custodian, in the initial stages of operations, may not need the full strength of the Officers in the cadres where more than one officer is sanctioned like Appraiser, Examining Officer, UDC and LDC. In such a situation, if, the Custodians request, the Commissioner of Customs may, after due consideration post the officers less than the sanctioned strength in the said formations though the sanction will be obtained for the full compliment.

Gradually when the business pick up at ICD, the full contingent of staff may be posted. The Commissioner of Customs also would accept the deposit of advance cost recovery charges for the number of staff which will be actually posted in the said formation. Advance deposit may be made for the staff for three months.

3.The necessary public notice to bring these changes to the notice of all concerned may kindly be issued.

4.Kindly acknowledge the receipt of this circular

20.Vide Circular No. 52/97-customs dated 17.10.1997, the Board directed that "the various ICDs /CFSs approved by IMSCC/Board to facilitate import/export work from time to time with staff sanctioned on Cost Recovery Charge basis.

21.The petitioner was appointed as a custodian of goods under Section 45 of the Customs Act, 1962. When the petitioner was issued with the above approval, the clarification of the Central Board of Excise & Customs, New Delhi was in force. It had clarified as under:-

F. No. 434/17/2004
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
Room No. 227B, North Block
New Delhi, 12th September, 2005

To,
All Chief Commissioner of Customs
All Chief Commissioner of Customs & Central Excise,
All Chief Commissioner of Central Excise.

Sir,

Subject : - Cost Recovery Posts in respect of Customs staff posted in ICDs/CFSs - Regarding.

(1)I am directed to bring your kind attention that it has been decided to consider regularization of those cost recovery posts at ICDs/CFSs which have been in operation for two consecutive years with following performance benchmark for past two years:-

(i)No. of containers handled by ICD : 7200 TEUs per annum

(ii)No. of containers handled by CFS : 1200 TEUs per annum

(iii)No. of BE or SB processed by ICDs/CFSs : 7200 per annum for ICDs and 1200 for CFSs.

(iv)Benchmark at (i) to (iii) shall be reduced by 50% for those ICDs/CFSs exclusively dealing with exports, as per staffing norms.

(2)The waiver of cost recovery charges would be prospective with no claims for past period. Criteria would be applicable on actual performance of ICDs/CFSs.

(3)Based on the performance of ICDs/CFSs in the Financial Year 2003-04 and 2004-05, you are requested to provide the information as per enclosure in respect of ICDs/CFSs for which regularization of posts are suggested, no cost recovery charges are under dispute or pending payment as on 31st August, 2005.

(4)Member (Customs) has desired that information should be submitted by 19-9-2005 by return FAX and by email at anupam.prakash@rediffmail.com(.)

Yours sincerely

(Anupam Prakash)
Under Secretary to the
Government of India.
Ph : 23094182, Fax-23092173
Enclosure : As Above

22.Between the July, 2008 to March, 2013, the Petitioner claims to have paid a sum of Rs.45,01,960/- to the Customs Department towards on cost recovery basis.

23.Before, Handling of Cargo in Customs Areas Regulations, 2009 in the 2009 come into force, the VI Pay Commission came to be implemented. The petitioner was therefore asked to pay the differential amount on account of implementation of the VI Pay Commission which the petitioner has resisted by agitating the issue.

24.In the year 2009, the Handling of Cargo in Customs Areas Regulations, 2009 was notified vide Notification No.26/2009-CE dated 17.3.2009. It was framed by the Central Board of Excise and Customs in the exercise of powers under Section 141 and 157 of the Customs Act, 1962. It came into force with retrospective effect.

25.As per Regulation 4 of the Handling of Cargo in Customs Areas Regulations, 2009, a Customs Cargo Service providers already approved on a before the date of coming into force of the aforesaid Regulation were to comply with the conditions of the new Regulations within a period 3 months or such period not exceeding one year as Commissioner of Customs may allow from the date of coming into force of the Handling of Cargo in Customs Areas Regulations, 2009.

26.Petitioner appears to have obtained approval to continue as a Customs Cargo Service Provider after Handling of Cargo in Customs Area Regulations, 2009 as notified by Notification No. 26/2009-Cus (N.T)' dated 17.3.2009 came into force. The petitioner thus governed by the aforesaid Regulation.

27.As per Regulation 5(2) of the aforesaid Handling of Cargo in Customs Area Regulations, 2009. Customs Cargo Service Provider is required to bear the Cost of the customs officers posted, on Cost Recovery Basis (CRC) that may levied by the Commissioner and shall make such payments at such rate in the manner prescribed, unless specifically exempted by an order of the Government of India in the Ministry of Finance.

28.As per Regulation 5(3) of the aforesaid Regulation, a Customs Cargo Service Provider is also required to execute a bond equal to the average amount of duty involved on imported goods and 10% of the value of the export goods likely to be stored in the Customs area during the period of 30 days and furnish a bank guarantee or a cash deposit equivalent to 10% of such duty.

29.Under regulation 6(o) of the Handling of Cargo in Customs Area Regulations, 2009, a Customs Cargo Service Provider is also required to bear the cost of the customs officers posted by the Commissioner of Customs on cost recovery basis and shall make payments “at such rates and in such manner” as may be specified by the Government of India in the Ministry of Finance, unless specifically exempted by an order of the said Ministry.

30.The Regulation also contemplates, suspension or revocation of the approval granted to a Customs Cargo Service Provider.

31.The concept of deputing officers of the Customs Department on Cost Recovery Charges Basis (CRC) is not new. The concept of charging fees has been in vouge for quite some .

32.Same practice which was adopted under Section 141(2) & 36 of the Act when ICD/CFS were allowed to operate as Customs Cargo Service Providers.

33.The power to levy and collect Cost Recovery Charges from a Customs Cargo Service Provider under the aforesaid Regulation is traceable to Section 157 and 158 of the Customs Act, 1962.

34.Under Section 157 of the Customs Act, 1962, the Board may for the purposes of carrying out the object of the Act make regulations consistent with the Act and the Rules made thereunder.

35.In particular, as per Section 157(2) of the Customs Act, 1962 and without prejudice to the generality, such regulations may provide for all or any of the following matters, namely:-

> (a)the form of a bill of entry, shipping bill, bill of export, import manifest, import report, export manifest, export report, [412] [bill of transshipment, declaration for transshipment], boat-note and bill of coastal goods;
> (ai)the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under

clause (d) of sub-section (1) of section 26A;]

(aii)the form and manner of making application for refund of duty under sub-section (2) of section 26A;]

(aa)the [form and manner] in which an application for refund shall be made under section 27;]

(b)the conditions subject to which the transshipment of all or any goods under sub-section (3) of section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;

(c)the conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65.

(d) The manner of conducting audit of the assessment of duty of the imported or export goods at the office of the proper officer or the premises of the importer or exporter , as the case may be.]

(e) the manner of conducting pre-notice consultation;

(f) the circumstances under which, and the manner in which, supplementary notice may be issued;

(g) the form and manner in which an application for advance ruling or Appeal shall be made, and the procedure for the Authority, under Chapter VB

(h) the manner of clearance or removal of imported or export goods;

(i) the documents to be furnished in relation to imported goods;

(j) the conditions, restrictions and the manner of making deposits in electronic cash ledger, the utilisation and refund therefrom and the manner of maintaining such ledger;

(k) the manner of conducting audit;

(l) the goods for controlled delivery and the manner thereof;

(m) the measures and separate procedure or documentation for a classification.

36.As per Section 158(1) of the Customs Act, 1962, all rules and regulations made under this Act shall be published in the Official Gazette.

37.As per Section 158(2), "Any rule or regulation which the Central Government or the Board is empowered to make under this Act may provide-

> (i) for the levy of fees in respect of applications, amendment of documents, furnishing of duplicates of documents, issue of certificates, and supply of statistics, and for rendering of any services by officers of customs under this Act;
>
> [(ii)that any person who contravenes any provision of a rule or regulation or abets such contravention or who fails to comply with any provision of a rule or regulation with which it was his duty to comply, shall be liable to a penalty which may extend to fifty thousand rupees."

38.Thus, there is amble power vested with the Central Government and the Central Board of Excise and Customs as the case may be to make regulations for levying fees in respect of applications, amendment of documents, furnishing of duplicates of documents, issue of certificates, and supply of statistics, and for rendering of any services.

39.Therefore, there is no difficulty in arriving at a conclusion that both the Central Government and the Central Board of Excise and Customs have power to make a regulation Handling of Cargo in Customs Areas Regulations, 2009 and to levy Cost Recovery Charges from service providers to whom it deputes its officer.

40.After Handling of Cargo in Customs Areas Regulations, 2009 came into force, the Central Board of Excise & Customs, New Delhi Vide M.F. (D.R.) Circular No. 13/2009-Cus., dated 23-3-2009 in F.No. 450/55/2008-Cus.IV clarified as follows: :-

> 5.5.As regards ICDs/CFSs, Government had taken a decision to waive the requirement of cost recovery charges to be paid by ICD/CFS, if they fulfill the laid down norms and are in existence for a consecutive period of two financial years. These norms include parameters such as the total number of import or export containers handled, the customs declarations filed for import or export, etc. Board's instructions vide D.O. Letter F.No. A.11018/12/2008-Ad.IV dated 2-7-2008 refer in

this regard. Accordingly, the eligible ICDs/CFSs which fulfill the laid down criteria are being considered for exemption from payment of cost recovery charges and specific orders in individual cases are issued by Ad.IV Section. These orders are being referred to as the orders issued by the Ministry of Finance under the Regulation 5(2).

41.According to the Petitioner but for the implementation of the VI Pay Commission, it would have complied with the requirement for waiver of cost recovery charges as it has met the target fixed by various circulars of CBEC.

42.The decision of the Andhra Pradesh High Court in GMR Hyderabad International Airport Ltd. Vs Central Board of Excise and Customs, New Delhi 2014 (299)STR 320 cited by the learned counsel for the petitioner has a reaching consequence. In the said case, the petitioner GMR Hyderabad International Airport Ltd., had not challenged the vires of the Handling of Cargo in Customs Areas Regulations, 2009.

43.There the challenge was confined to condition Nos. 10-13 of Circular No. 34/2002-Cus, dated 26.6.2002 on the ground that similar charges were not collected from operators in New Delhi, Mumbai, Chennai, Trivandrum, Cochin and Ahemadabad.

44.Therefore, the conclusion on the 19 of the said judgement cannot be applied to the facts and circumstances the present case.

45.In particular, there was no challenge to Regulation 5 (2) of the Handling of Cargo in Customs Areas Regulations, 2009. Neither the petitioner therein nor the petitioner herein have challenged the vires of the power of the respondents to levy charges under 5(2) of the Handling of Cargo in Customs Areas Regulations, 2009. Therefore, the said decision cannot be applied to the facts and circumstances of the present case.

46.The observation in paragraph18 of the said judgement though appeals to the conscience of the Court, yet it cannot be applied to the facts of the present case for the reasons stated above.

47.As mentioned above, even prior to approval were being to Container Freight Station and Internal Container Depots, (ICDS), the practice of collection of Cost Recover Charges and Merchant overtime Fees (MOT) were in vogue.

48.Section 36 of Customs Act, 1962 provides for payment of prescribed fees for loading or unloading of the goods for Export /Import on any conveyance on any Sunday or any holiday observed by the Customs Department or any other day after the working hours, except after giving the prescribed notice.

49.Similarly under Section 141(2) of the Customs Act, 1962 any imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a "customs area" in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.

50.Earlier, Customs (Fees for Rendering Services by Customs Officers) Regulations, 1968 was in force. It was replaced by Customs (Fees for Rendering Services by Customs Officers) Regulations, 1998 vide Notification No. 69/98-Cus (NT) dated 5.9.1998.

51.It was framed for collecting Overtime Fees for services rendered by the Customs Officers to the Trade beyond the normal working hours on holidays and/or outside normal place of work. If services were rendered by such officers of the Department at a place which was not their normal place of work or at a place beyond the customs area, over time fee was levied and collected. This was payable even when such services are rendered during normal working hours.

52.Vide Boards instruction dated 16.2.2017 bearing reference F.No. 450/11/2003- Cust, The Customs (Fees for Rendering Services by Customs Officers) Regulations, 1998 was amended to the effect that no fee i.e Merchant Over Time Fee (MOT) shall be collected in lieu of services rendered by the Customs Officers in case of customs, ports and airports where services are provided 24 x 7.

53.Therefore, the practice of levy and payment of Cost Recovery Charges (CRC) from Custom Cargo Service Providers such as Container Freight Stations (CFS) and Internal Container Depots, (ICDS) is to be viewed from the historical perspective. Private participants were encouraged to develop them near the ports to relieve the congestion at ports for proper storage and Faster clearance of the import and export goods.

54.Globally, the concept of a CFS is known as 'Off Dock Container Yard' (CY), which acts as an extended arm of the port to facilitate the clearance of the goods to reduce the congestion and delay in the Ports.

55.Container Freight Stations(CFS) or Internal Container Depots(ICD) were allowed to be set up with the view to ease the congestions and the delay at the ports which were traditionally the custom area where the assessments were to be carried out.

56.Earlier, the imported goods had to be first assessed and thereafter cleared from such port of import after their import either into the Domestic Tariff Area or for being warehoused by filing in bond bill of entry. There was no question of CRC being recovered by Department from the AIR Port Authority of India or Port Trust merely because the Customs also had its officers stationed there.

57.The Central Board of Excise and Customs from time to time has been sanctioning officers for being deployed at ICD/

CFS on Cost Recovery Charges (CRC) basis.

58.The Central Board of Excise and Customs framed these Rules in exercise of the powers conferred by section 157 and Section 158 of the Customs Act, 1962.

59.As per the definition, a “customs area” means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities.

60.The reasons for asking Customs Cargo Service Providers to bear cost of salaries has been explained in circular dated 23.6.2014 in F.No. 8/B/12/HRD (EMC)/2014 of the Directorate of Human Resource Development of the Customs and Central Excise, New Delhi.

61.The said circular also deals with the issues relating to waiver of payment/exemption from Cost Recovery Charges sponsored by Joint Secretary

62.The history behind creation and deployment of officer in various facilities on cost recovery basis has been also discussed in letter dated 22.08.2019 bearing Reference F.No.8/B/85/HRD(EMC)/CRB/2015 Pt./6127 F. No. Government of India, Ministry of Finance, Department of Revenue, Directorate General of Human Resource Development Customs & Central Excise (Expenditure Management Wing) C-4 (West Wing), IRCON Building, District Centre, Saket, New Delhi- 110 017. It reiterates the clarification issued on 10.08.2018 in its communication bearing reference F.No.8/3/85/HRD(EMC)/2015 Pt./6127. They are reproduced below:-

(Circular bearing Reg..F.No.8/B/85 /HGRD/(EMC)/CRB 2015 Pt.6127 dated 22.08.2019 and circularbearing Reg.F.No.8/B/85/HRD/(EMC)/CRB/2015 No.10.08.2018 to be inserted)

F. No. 8/B/7/HRD(EMC)/CRB/201 7
Directorate General of Human Resource Development
Customs & Central Excise
(Expenditure Management Wing)
C-4 (West Wing), IRCON Building,
District Centre, Saket,
New Delhi- 110 017

Date: 01 .03.2017

To
The Chief Commissioner of Customs (Prev.),
Tiruchirapalli Zone,
No. 1, Williams Road, Cantonment,
Tiruchirapalli- 600 001

Sub: - Waiver from the payment of cost recovery charges granted on One Time Basis- Annual Review of Cost Recovery Charges waiver permission- reg.

Sir,
Please refer to your office letter C. No. V11148/91/2015- CCP TRICI-IY dated 25.01.2017 seeking continuation of waiver from the payment of cost recovery charges in respect of following CFSs falling
under Tuticorin Custom House: -
(i) Diamond CFS, Tuticorin
(ii) Vilson CFS, Tuticorin
(iii) SICAL CFS, Tuticorin
(iv) Nhavasheva CFS, Tuticorin
(v) Chola CFS, Tuticorin

2. In this connection, it is requested to clarify as to whether the posts that were not sanctioned but were diverted to the above cited CFSs on cost recovery basis, have been subsumed in the Department's existing cadre strength (as prescribed vide para - 8(a) of the Office Memorandum F. No. 296/03/2015- CX.9 dated 26.06.2015) (Annexure). If so, a copy of the order (for subsuming of posts) may be sent to DGHRD.

3.Kindly note that proposal for waiver/ continuation of waiver from the payment of cost recovery charges can be considered only in respect of those facilities for which posts have been sanctioned vide the above cited Order dated 26.06.20 15.

4. In case the posts have not been subsumed, further waiver of Cost Recovery charges may not be permissible. A consolidated position about all the five facilities may kindly be informed by 31.03.2017.

End: Annexure

Yours faithfully,

(Meenu Kumarr)

Additional Director (EMW/CRB)
'(Z'i1-
Phone:-011-29561870,29561522
Email: - dghrdcrbcgmail.com

F.N0.296/03/ 2015-CX.9
Government of India
Ministry of Finance
Department of Revenue,
Board of Excise & Customs
New Delhi, dated the 26th of June, 2015

OFFICE MEMORANDUM

The minutes of the Board meeting held on June 18, 2015 in respect of BMB No.5/2015 are enclosed herewith for favour of information and necessary action.

2. The same are issued with the approval of Chairman, CBEC.

Encl. a/a

(Hemambika R. Priya)
Commissioner (Coord) / Secretary (CBEC)

1. Chairman, CBEC
2. Member (Budget)
3. Member (Cus)
4. Member (ST)
5. Member (CX)
6. Member (P&V)
7. Member(L&J)
8. DG(HRD)/AII CCs of Customs Zone
9. JS(Cus)
10. Guard file

Copy for kind information to:
PS to FM / PS to MOS (R) / PPS to Revenue Secretary

58.In the Minutes of the board meeting held on 15th June 2015 in respect of BMB No.05/2015 BMB No.05/2015 the issue was discussed.

> Issue in brief: Waiver of Payment/exemption of cost recovery charges – Sponsored by Joint Secretary (Customs)
>
> Joint secretary (Customs) briefed the Board on the issues relating to the grant of exemption of payment of cost recovery charges for Customs staff posted at inland container depots (ICDs), container freight stations (CFSs), seaports, airports, courier terminates and diamond plazas, which have been pending finalization and have adversely impacted the functioning of the facilities concerned. He informed that these issues have been discussed with IFU and the D/o Expenditure and a solution is now being proposed.
>
> 2.Giving the background to the scheme of posting of Customs officers on cost recovery charges borne by the custodians, it was explained that the process begins with the sanction of posts as per prescribed staffing norms; staffing norms were fixed vide Circular No.52/97-Cus., dated 17-10-1997 for ICDs and CFSs and vide Circular No.16/2013-Cus., dated 10-4-2013 for seaports, Air Cargo Complexes, Airports, courier Terminates and Diamond Plazas. The next step is the grant of

exemption from payment of cost recovery charges when the facility meets the specified performance norms for two consecutive financial years (Ref: F.No.434/17/2004-Cus.IV, dated 12-0-2005 and Circular No.16/2013-Cus., dated 10-4-2013. The exemption is always prospective. Simultaneously, the sanction of the posts are regularized. For the Department, the implication of the sanction of the posts on cost recovery basis is the promotion on ad-hoc basis of the officers from within the sanctioned strength to replace the officers who are deployed on cost recovery basis. The implication of the grant of exemption and regularization of the posts is that the custodian no longer pays the cost recovery charges and the regularized posts get ex-cadred in the permanent strength of the Department. It was informed that when considering cases for grant of exemption from cost recovery charges, IFU/D/o Expenditure observed that in some cases the posts were not sanctioned in the first place. This gave rise to the following issues for decision:

i. Whether the sanction of posts could be done ex post facto?

ii. Whether the exemption from payment of cost recovery charges could be granted to eligible facilities even if the posts were not initially sanctioned?

iii. Whether the grant of exemption from payment of cost recovery chartes is to be restricted to the number of Customs officers indicated in the staffing norms or could it be granted for the total number of Customs officers actually deployed? This issue is in respect of few facilities that were functioning prior to fixing of norms for staffing and grant of exemption in April, 2013 and wherein the number of Customs officers already working on cost recovery basis was found to be in excess of the norms.

3. In regard to the outstanding issues mentioned at para 2 above, the D/o expenditure has responded as follows:

i. No comments are offered on the issue of waiver of CR charges and this may be done by DoR as per norms.

ii. DoE cannot sanction posts ex post facto. Such posts may be subsumed in the posts created during the cadre restricting of CBEC.

iii. Proposals for prospective sanction of posts may be referred to DoE for approval.

4. DG(HRD), CBEC has examined the comments of D/o Expenditure and have furnished following comments:

i. Based upon DoE's stipulation that posts cannot be sanctioned ex post facto, the diverted posts may be treated as absorbed in the existing cadre strength. As per HRD, CBEC, there are a total of 1,630 posts which would be subsumed within the existing cadre strength. HRD, CBEC has justified this on the ground that the Commissionerate concerned have handled their work load with the existing staff strength for post many years thereby confirming that additional manpower was not required. Moreover, 16,047 posts in the respective cadres were created in the recent cadre restricting exercise, a significant portion of which have not been filled up till date.

ii. Though the posts were not initially sanctioned, exemption from the payment of cost recovery charges may be granted to the facilities that fulfill the specified performance norms. HRD, CBFC has informed that the annual financial implication of such exemption is Rs.149 cr. This cannot be viewed as financial loss as such since it is Government policy to exempt the cost recovery charges when the facility fulfills the performance norms.

iii. The exemption from the payment of cost recovery charges is presently done by the D/o Expenditure, which also sanctions the posts. In the instant case, the posts were not sanctioned so the grant of exemption as per norms may be untrusted to Chief Commissioners concerned for which DG(HRD) would issue suitable directions, including for subsuming of the related posts in the cadre strength. This would be a one-time measure since in future no facilities can begin operations without the posts being sanctioned on cost recovery basis.

iv. Exemption of cost recovery charges in case the sanctioned posts (for which CR charges were recovered) exceed the staffing norms must be for the total number of such sanctioned posts. This situation has arisen only in a few past cases because the posts were sanctioned prior to the fixing of the staffing norms. It is unlikely arise again as now facilities can operate only after sanction of posts as per the staffing norms.

5.The Board was informed that further, this matter had been discussed with Member (P&V) and DG(HRD) in the meeting chaired by Chairman (CBEC) on 06.05.2015. The consensus arrived was as under:-

i.1,630 diverted posts that were not sanctioned may be subsumed in existing cadre strength.

ii. Denial of exemption from cost recovery charges to eligible facilities would be against Government policy. Moreover, non-sanction of posts is a matter internal to Government and facilities cannot be penalized. Thus, eligible facilities may be exempted from cost recovery charges. As opined by D/o. Expenditure, this may be done by D/o Revenue (CBEC).

iii Exemption from cost recovery charges must be for the total number of sanctioned posts for which cost recovery charges were taken. To restrict the exemption to the number of staff indicated. In the subsequently prescribed staffing norms when the deployment of staff and recovery of cost recovery charges was for more staff (as per sanction) would be against Government policy.

6. On the basis of above, following proposals were placed before Board for consideration:

i.Allow, as a one-time measure, Chief Commissioner of Customs to exempt as per norms, cost recovery charges for eligible facilities for which posts were not sanctioned, DG(HRD), CBEC would monitor the action; and

ii.Exempt cost recovery charges for the entire staff sanctioned for which cost recovery charges were taken for eligible facilities even if it is in excess of the 2013 norms, D/o. Expenditure would deal with these cases.

7. The Board deliberated the issues and

observed that the Commissionerates concerned had facilitated the functioning of these facilities by diverting staff to them on the cost recovery basis without obtaining sanction, though there is no implication for revenue as cost recovery charges were recovered. Also, the practice of provision of staff has not been uniformly followed. Some of the Commissioners posted staff in excess of the prescribed staffing norms and in a few other cases the sanctioned strength exceeded the staffing norms. It was also observed that many facilities were paying cost recovery charges on the basis of the sanctioned strength and not actual development which was not as per the guidelines issued in this regard.

8. During the detailed discussion that ensured, the Board observed that on the one hand the D/o Expenditure has not approved the regularization of these posts, whereas, the facility operators and trade are facing problems and additional burden on account of payment of cost recovery charges, which ought to have been waived off in due course as per Government policy. It was also noted that due to recent cadre review, a number of posts have been created and many posts at all levels are yet to be filled up. This has thrown up an opportunity to find a viable solution to address the problem of waiver of cost recovery charges. Thus, the Board decided that:

a.1,630 diverted posts that were not sanctioned but were diverted to various facilities on cost recovery basis would be subsumed in the Department's existing cadre strength.

b.As a one-time measure, Chief Commissioner of Customs concerned may be authorized to exempt as per prescribed norms, cost recovery charges for eligible facilities for which posts were not sanctioned. DG(HRD), CBEC would monitor the action and report to the Board.

c.Grand of exemption of cost recovery charges for eligible facilities at which the posts were sanctioned by D/o Expenditure would be dealt by that Department as per established practice. The exemption for eligible facilities shall be for the entire staff sanctioned (for which cost recovery charges were taken) even if it is in excess of the staffing norms fixed subsequently, in 2013.

d.Decisions at (b) & (c) above are subject to obtaining approval from the Hon'ble Finance Minister.

e.At eligible facilities having both sanctioned and non-sanctioned posts, the exemption of cost recovery charges for the non-sanctioned posts would be dealt as per decision at (b) above and for sanctioned posts, the exemption would be dealt with as per decision at (c) above.

f.The exemption of cost recovery charges for eligible facilities would be for the entire staff deployed provided this number does not exceed the number as per the staffing norms. Staff deployed on cost recovery basis in excess of the staffing norms without sanction would be withdrawn. There should, however, be no dislocation of day-to-day working in the facilities due to such withdrawal for which suitable arrangement should be made.

g.For purposes of uniformity DG(HRD) would reiterate to the Chief Commissioners of Customs / Central Excise the instruction that cost recovery charges should be recovered for the staff actually deployed, which should not exceed the staffing norms, and that requisite sanction must invariably be obtained before operationalizing a facility.

59.The above clarification of the Central Board of Excise and Customs has highlighted problems with the deployment of staff and amounts charged on Cost Recovery Charges(CRC) basis in these facilities. Paragraph 8 of the above clarification has also given the solutions for the problems pointed. It has been observed that in many facilities cost recovery charges were being levied on the basis of the sanctioned strength and not on the actual deployment which was not as per the guidelines issued in this regard. The case of the petitioner is also that some of the staffs were overseeing the operations of two or more such facilities in the location and therefore the cost should have been proportionately reduced. Instead, not only the respondent were collecting the amounts without having regard to the fact that many of the staff were overseeing two or more such facilities, but also in excess. Paragraph 8 of the above literature has given the guidelines to be followed granting exemptions. Therefore, Chief

Commissioner of Custom have been enjoined to not to recover amounts in excess of the staffing norms and have asked to obtain sanction before operationalizing a facility.

60.That apart, it is to be noted that the reasons & justification for collecting Cost Recovery Charges (CRC) is to compensate the department where staffs are paid additional amounts to perform duties beyond the office hours or outside the location and therefore to reimburse the amounts paid to these officers who are deployed, Over Time Charges/Cost Recovery Charges were collected. Under the scheme of Constitution of India in Part XIV, there is no scope for recovering salaries payable to Government Employees from Private Parties.

61.There is no question of the Customs Department deploying any person who is not an employee of the Customs Department or was already in the Public Service of the Union. Though, section 158(2) of the Customs Act, 1962 permits the Central Government or the Central Board of Excise and Customs to frame Rules for rendering of any services by officers of the Customs, under the provisions of the Customs Act, 1962, it cannot permit recovery of the entire salary to be paid to the such amounts are payable by the Central Government. Cost Recovery Charges (CRC) can be only in proportion to the excess amount that may be required to be paid to officers on being deployed in such facilities on special occasions. Where such officers are required to be present all through the period in the facility outside the Custom House or the Port, question of recovering the entire salary from such facilities cannot be permitted except for such travel allowances and extra amounts that are paid. Therefore, unless there is an appropriate amendment to the provisions and the Customs Act,1962 and the Rules made thereunder which fall within the four corners of Part XIV of the Constitution of India Cost Recovery Charges equivalent to the Salaries packs paid to such officials of the Customs Department cannot be justified.

62.Since such officers deployed continue to be officers of the Customs Department and report to their jurisdictional superiors within the jurisdiction of the Custom House of their Chief Commissioner of Customs or Commissioner of Customs of the Custom House, there is neither a Legal basis nor any justification collecting the entire salary payable to such officer from Customs Cargo Service Providers.

63.Cost Recovery Charges can be only compensatory and such amounts may be charged for the excess amount paid/payable to the employees of the Customs Department by way of reimbursement of expenses. Merely because the VI Pay Commission was implemented by itself did not entitle the Customs Department to recover the entire amount separately from the Container Freight Stations(CFS) or Internal Container Depots(ICD). This was contrary to the statutory scheme of the Customs Act, 1962 and Constitution of India.

64.Container Freight Stations(CFS) or Internal Container Depots(ICD) were allowed to be set up with the view to ease the congestions and the delay at the ports which were traditionally the custom area where the assessments were to be carried out.

65.Earlier, the imported goods had to be first assessed and thereafter cleared from such port of import after their import either into the Domestic Tariff Area or for being warehoused by filing in bond bill of entry. There was no question of CRC being recovered by Department from the AIR Port Authority of India or Port Trust merely because the Customs also had its officers stationed there.

66.It is further noticed that Handling Of Cargo In Customs Area Regulations, 2009 contemplates payment of costs towards the cost of customs officers posted at the customs area on Cost Recovery Basis at such rates and in such manner unless specifically exempted by an order of the Government of India in the Ministry of Finance.

67.After the above Regulation, 2009 came into force, there should have been a proper notification specifying the manner in which such payments were to be levied and collected from the Customs Cargo Service Providers.

68.No order of the Government of India has been brought to the attention of the court which has specified and fixed the amounts to be paid and collected on Cost Recovery Charges for the purpose of the aforesaid Rules.

69.In absence of any direct notification/government order specifying the rates to be levied towards Cost Recovery Charges under the aforesaid Regulation for deploying its officers the collection of Charges on Cost Recovery basis from the petitioner has been made contrary to the above Regulation.

70.A Division Bench of this Court in EternetEverest Ltd vs Union of India 1997 (89) ELT Madras 28 has held that demand under section 11D of the Central Excise And Salt Act, 1944 as it stood then was unsustainable in absence of a proper machinery. Same reasoning is applicable to the facts of the present case.

71.Since the petitioner has reportedly paid an amount Rs.45,01,960/- in the past amounting. Neither the aforesaid amount nor the excess amount that was demanded would have been payable by the petitioner had a proper notification/order been issued. The amount collected also cannot be directed to be refunded back to the petitioner as the petitioner would have passed on incidence of such amount to the customer who had availed of services of the petitioner. Therefore, there can be no order for refunding of the amount. Therefore, only way out is to regularize the amounts already paid & collected in the past.

72.Since the petitioner has also demonstrated that it had fulfilled the criteria/benchmark for exemption from payment of Cost Recovery Charges during the first two years of approval and operation, the case of the petitioner deserves to be considered for waiver/exemption from payment of Cost Recovery Charges in terms of the guidelines of the Central Board of Excise and Customs in its meeting held on 18 June 2015 in respect of BMB No 5/2015, content of which has been extracted above in this order.

73.There cannot be any discrimination between different approved "Customs cargo service provider" under the provisions of the Handling of Cargo in Customs Areas Regulations,2009. It has to be also underlined that there is no direct provision under the Handling of Cargo in Customs Areas Regulations,2009 for granting waiver from payment of Cost Recovery Charges payable by an approved "Customs Cargo Service Provider". Power to grant such waiver/exemption has been exercised right from 1997 through circular and the practice has been continued by issuing circulars by the Central Board of Excise and Customs even after the above Regulation came into force.

74.These, circulars which have been issued at best can be said to have been issued in aid of Regulation 7 of the Handling of Cargo in Customs Areas Regulations,2009 as per which powers have been vested with the Commissioner of customs to relax a "Customs Cargo Service Provider" from operation of Regulation 5. There is no other provisions under which these circulars/clarification granting exemption can be legitimized.

75.There is no connect between the provisions of the above Regulation as it stands today and the practice that is being followed by the Department for levying and exempting a Customs Cargo Service Providers from payment of Cost Recovery Charges. Therefore, while disposing these writ petitions in favour of the petitioner by directing the respondents to regularize the payments already made by the petitioner and by directing the respondents to grant waiver to the petitioner for the period after the petitioner has achieved the required benchmark/criteria as per the CBEC Circular dated 12.09.20-5 bearing Reference F.No.434/17/2004, I direct the Central Board of Excise And Customs to issue :-

> i.issue appropriate notifications for the benefit of Trade and Public within a period of 6 months specifying the rates / charges payable by a "Customs Cargo Service Providers" on Cost Recovery Charges(CRC) basis operating under the Provisions of the Handling of Cargo in Customs Areas Regulations, 2009 in consonance with the provisions of the Customs Act, 1962 and the Constitution of India;

ii.suitably amend the Provisions of the Handling of Cargo in Customs Areas Regulations, 2009 incorporating provisions for grant of waiver/exemption from payment of amounts on Cost Recovery Charges (CRC) basis payable under the aforesaid provisions.

76. I also direct the jurisdictional Commissioner/Chief Commissioner to regularize the case of the petitioner by granting waiver/exemption to the petitioner by an order with effect from the date on which the petitioner achieved the benchmark as per the CBEC Circular dated 12.09.2005 bearing Reference F.No.434/17/2004.

77. These writ petition stands disposed with the above observation. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

arb/jas

To:

1.The Secretary,
Government of India,
Ministry of Finance,
Department of Revenue,
Government of India,
North Block,
New Delhi - 110 001.

2.Central Board of Excise & Customs,
North Block,
New Delhi - 110 001.

3.Commissioner of Customs (Sea export),
Customs House, No.60,
Rajaji Salai, Chennai - 600 001.

4.Deputy Commissioner of Customs (Enquiry),
Customs House, No.60, Rajaji Salai,
Chennai - 600 001.

5.Assistant Commissioner of
Customs (Appg.Docks-Admn),
Customs House, No.60, Rajaji Salai,
Chennai - 600 001.

6.The Chief Commissioner,
Customs House, No.60, Rajaji Salai,
Chennai - 600 001.

+1cc to Ms.Hema Muralikrishna, Advocate, S.R.No. 27375
+1cc to Mr.N.Murali, Advocate, S.R.No. 27372

W.P. Nos.7937, 7938 & 8248 of 2013
and
M.P. No. 1 of 2013 & W.M.P.Nos.
6359 & 6360 of 2017

UM(CO)
GN(20/07/2021)