BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.03.2022

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.(MD).No.7744 of 2021
and
W.M.P.(MD).No.5890 of 2021

M/s.Pearl Ports and Warehousing Private Limited,
Represented by its Chairman-cum-Managing Director,
Shri Ramilshah Icd.No.53, Sipcot Industrial Complex, Phase-1,
Hosur, Tamil Nadu. ... Petitioner

Vs.

1.Union of India,
Represented by Secretary
to Government of India,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi - 110001.

2.The Chairman,
Central Board of Indirect Taxes and Customs,
Department of Revenue,
Ministry of Finance,
North Block,
New Delhi - 110001.

3.The Commissioner of Central Excise,
Chennai-III commissionerate,
26-1, Mahatma Gandhi Road,
Chennai - 600 034.

4.The Assistant Commissioner of Central Excise,
Inland Container Depot,
Plot No.53,
SIPCOT-1, Hosur - 635 126.

5.The Commissioner of Customs(Preventive),
No.1, Williams Road,
Cantonment,
Tiruchirappalli - 620 001.

6.The Assistant Commissioner of Customs,
Inland Container Depot,
Plot No.53,

SIPCOT-1,
Hosur - 635 126. ...Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for records relating to the impugned demand notice dated 06.07.2020 of the sixth respondent in file C.No.VIII/48/04/2018-CR and quash the same and to direct the fifth respondent to demand cost recovery charges in respect of the customs officers actually deployed to the petitioner Inland Container Depot from 26.06.2015 to 31.03.2020 within a time frame as may be decided by this Court.

For Petitioner	:	Mr.M.Karthikeyan
For R1	:	Mrs.S.Ragaventhre Junior Standing Counsel
For R2 to R6	:	Mr.R.Aravindan Senior Standing Counsel

ORDER

The writ petition has been filed for a writ of Certiorarified Mandamus to call for the records of the impugned demand notice, dated 06.07.2020 of the sixth respondent Assistant Commissioner of Customs, Inland Container Depot, SIPCOT at Hosur-26, demanding a sum of Rs.2,14,31,618/- from the petitioner.

2. The above amount has been demanded from the petitioner over and above the amount already paid by the petitioner towards cost recovery charges for deputing officers of the customs in the petitioner's Inland Container Depot (ICD), Hosur. The case of the petitioner appears to be that the petitioner was appointed as a Customs Cargo Service Provider for its ICD in Hosur in the year 2014. They commenced its commercial operations in 2015. Being governed by the provisions of the Handling of Cargo in Customs Area Regulation 2009, the petitioner was required to bear the cost borne by the Customs, Department towards the salary payable to the Customs Officer posted in the aforesaid ICD of the petitioner on cost recovery basis.

3. It is the specific case of the petitioner that after the petitioner paid the initial amount of Rs.43,96,401/- for the period between April 2017 and March 2019 after adjusting the amount of Rs.21,45,330/- and further sum of Rs.3,62,234/- for a period between April 2019 and August 2019. It is submitted that the petitioner had filed an application for grant of waiver from the Cost Recovery Charges in terms of Circular dated 12.09.2005 inasmuch as the petitioner has been handling more than 7,200 TEUs containers at ICD, Hosur per annum from September 2017 onwards.

4. The learned counsel for the petitioner submits that though the Department has been continuously demanding the payment of Cost Recovery Charges from 2015 onwards for the entire post of officers approved though none were posted till 2017 and only few/part of the approved strength of officers were posted from April 2017 onwards. It is submitted that in the impugned order of the sixth respondent, dated 06.07.2020, demanding Cost Recovery Charges from the date of inspection i.e., from 25.06.2015 to June 2020 for the entire strength of posts approved without such staff being deputed is unwarranted.

5. The learned counsel for the petitioner relied on the following judgments:

(i) Kottayam Port and Container Terminal Services Private Limited Vs union of India in W.P.(C) No.12088 of 2013, dated 11.10.2013.

(ii) M/s.Allied ICD Services Limited Vs Union of India and others, dated 27.08.2018.

6. Opposing the prayer, the learned counsel for the respondents submits that the writ petition is misconceived. It is submitted that for customs clearance customs staff are provided at the Inland Container Depot (ICD)/Central Freight Station (CFS) on cost recovery basis and the sanction for posting of officers was issued by the Administrative wing of Central Board of Excise and Customs(CBEC). The petitioner as a custodian and licensee was required to pay 185% of total salary of officers actually posted at its ICD.

7. The Cost Recovery Charges for the period commencing from June 2017 to March 2017 for the services rendered to the petitioner, are as under:

(A)	Pending Cost Recovery Charges for Period from 25.06.2015 to 31.03.2020	3,40,53,147
Payment-1	Advance/Initial Amount paid vide TR6 challan dated 06.03.2015	21,45,330
Payment-2	Amount paid vide TR6 Challan 04/2019 dated 15.03.2019	43,96,401
Payment-3	Amount paid vide TR6 Challan 28/2019 dated 01.11.2019 for the period April 19 to 31.08.2019	3,62,234
(B)	Total Amount Paid	**69,03,965**
	A-B Balance to be paid	2,71,49,182

8. The Government had taken a decision to waive requirement of cost recovery charges to be paid by ICD/CFS, if they fulfilled the conditions laid down and were in existence for a consecutive period of two financial years with certain performance bench marks. Waiver of Cost Recovery Charges would be prospective no claim for past period was to be entertained. The norms include parameters such as the total number of imports or exports containers handled, customs declaration filed for export or import etc. Waiver in respect of Cost Recovery Charges at ICD can be considered only as per the norms laid down in its circular, dated 25.06.2015, bearing reference F.No.434/17/2004 -customs IV. It is submitted that since the petitioner fails to pay the arrears, question of granting waiver does not arise.

9. The learned counsel for the respondents further submits that when the Superintendent, Inspector and Head Havildar were posted permanently and were working for the petitioner and they have not been assigned any other job other than the work for the petitioner at ICD, therefore the claim of the petitioner were not posted exclusively for the petitioner is not correct. It is submitted that for the rank of Assistant Commissioner only 33% of the cost recovery charges were demanded since the work undertaken for the petitioner was on additional charge basis. The learned counsel for the respondents submits that required man power were posted at the request of the petitioner and therefore the petitioner cannot claim for waiver.

10. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondents.

11. The issue relating to the payment of cost recovery charges was elaborately considered in **Sun Global Logistics Private Limited Vs Union of India**, in W.P.Nos.7937, 7938 and 8248 of 2013 vide order, dated 02.06.2021. After examining the existing circulars and the decisions that were available, it was concluded as follows:

> *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 as 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 on 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. The petitioner has reportedly paid an amount Rs.45,01,960/- in the past. 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.

12. Thus, I do not find any merits in the contention of the respondents in the impugned order. Therefore, the writ petition stands allowed with the above observations. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (AS)

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Sub Assistant Registrar(CS)

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W.P.(MD).No.7744 of 2021
10.03.2022

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