IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 18.08.2023	**Pronounced on:** 26.02.2024

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.5058, 5067, 5069, 5071, 5418 & 5421 of 2020 and
W.P.(MD).Nos.4728, 4740, 5554 & 5575 of 2020
and
W.M.P.Nos.5979, 5980, 5981, 5986, 5987, 5988, 5989, 5990, 5991, 5992, 5993, 5995, 6348, 6349, 6353, 6352, 6340, 6339, 6342 & 6344 of 2020 and W.M.P(MD).Nos.4859, 4860, 4861, 4108, 4106, 4105, 4118, 4119, 4123, 4883, 4884 & 4887 of 2020

W.P.No.5058 of 2020:

MSC Mediterranean Shipping Company S.A.,
having address at
Chemin Rieu 12, 1208 Geneva, Switzerland and
rep. by its Constituted Attorney
Mr.Umai Balan Arunachalam, residing at
No.6, Shanmugham Road, Tambaram,
Chennai – 600 045. .. Petitioner

Vs.

1.Union of India, through Secretary,
Ministry of Finance, Department of Revenue,
North Block, New Delhi – 110 001.

2.The Commissioner of Customs, (Chennai IV),
60, Rajaji Salai, Cutom House,
Chennai – 600 001.

3.Special Secretary Logistics,
Department of Commerce,
Ministry of Commerce and Industry, Udyog Bhavan,
New Delhi – 110 107. .. Respondents

<u>Prayer in W.P.No.5058 of 2020</u>: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus to call for the records of the 2nd respondent in its proceedings in F.NoS.Misc 118/2018-Docks Admin, in respect of the Impugned Public Notice No.4/2020 dated January 17, 2020 and quash the Impugned Public Notice No.4/2020 dated January 17, 2020 issued by the 2nd respondent and further direct the respondents to continue the earlier procedure by permitting the petitioner's members to collect the Terminal Handling Charges to be paid to the ports.

<u>(In W.P.No.5058 of 2020)</u>:

For Petitioner	:	Mr.Vijay Narayan Senior Counsel for Mr.K.Harishankar Assisted by Mr.Prathamesh Kumar along with Mr.Shiv Iyer, Ms.Aditi Maheswari and Ms.Ankita Sen
For RR 1 & 2	:	Mr.Rajnish Pathiyil Senior Standing Counsel
For R3	:	Dr.D.Simon

COMMON ORDER

By this common order, all these writ petitions are being disposed off.

2. These petitioners have challenged the impugned communication issued by the Commissioners of Customs from different Commissionerates in the country.

3. In W.P.Nos.5058 of 2020, 5069 of 2020 & 5418 of 2020, the petitioners have challenged the Impugned Public Notice No.4 of 2020 dated 17.01.2020 issued by the 2nd respondent therein, the Commissioner –IV, Chennai.

4. In W.P.Nos.5067 of 2020, 5071 of 2020 & 5421 of 2020, the petitioners have challenged the Impugned Public Notice No.7 of 2020 dated 28.01.2020 issued by the Commissioner-IV, Chennai. Similarly, in W.P.(MD).Nos.4728 of 2020 & 5575 of 2020, the petitioners have challenged the Impugned Public Notice No.1 of 2020 dated 30.01.2020

issued by the Commissioner, Thoothukudi. Similarly, in W.P.(MD).Nos.4740 of 2020 & 5554 of 2020, the petitioners have challenged the Impugned Public Notice No.2 of 2020 dated 03.02.2020 issued by the Commissioner, Thoothukudi.

5. Details of impugned public notices and the corresponding Writ Petitions are detailed as under:-

Sl. No.	**W.P.No.**	**Date**	**Impunged Public Notice No.**	**Commissionerate**
1.	5058 of 2020	17.01.2020	4/2020	Chennai IV
2.	5067 of 2020	28.01.2020	7/2020	Chennai IV
3.	5069 of 2020	17.01.2020	4/2020	Chennai IV
4.	5071 of 2020	28.01.2020	7/2020	Chennai IV
5.	5418 of 2020	17.01.2020	4/2020	Chennai IV
6.	5421 of 2020	28.01.2020	7/2020	Chennai IV
7.	(MD).No.4728 of 2020	30.01.2020	1/2020	Thoothukudi
8.	(MD).No.4740 of 2020	03.02.2020	2/2020	Thoothukudi
9.	(MD).No.5554 of 2020	03.02.2020	2/2020	Thoothukudi
10.	(MD).No.5575 of 2020	30.01.2020	1/2020	Thoothukudi

6. The text of the Impugned Public Notice No.4 of 2020 dated

17.01.2020 is reproduced below:-

"OFFICE OF THE COMMISSIONER OF CUSTOMS (CHENNAI IV)

F.Nos.Misc 118/2018-Docks Admin
Date:17.01.2020

Public Notice No.04/2020

Sub: Terminal Handling Charges levied by Shipping Lines – Reg

Attention of all Importers, Custom Brokers, Shipping Lines/Agents, CFSs, Custodians, Port Terminal Operators, General Trade coming under the jurisdiction of Chennai Customs Zone and all other stakeholders is invited to the above captioned subject.

2. Terminal Handling Charges are levied by the Port Terminals to the Shipping Lines and the Shipping Lines in turn collect these charges from the importers or the Customs Brokers as the case may be. Many importers have represented to the Customs Department that the Shipping lines are collecting terminal handling charges and other charges such as SSR (Special Service Request), Demurrage charges, Reefer Monitoring Charges, Special Handling Charges etc., which are at variance with what the Shipping Lines have paid to the port terminals. This results in lack of transparency in collection of these charges.

3. In order to bring transparency, augment 'Ease of Doing Business' and to reduce the logistics costs, it is decided that the importers having AEO status availing DPD facility for containerized cargo may be allowed the facility of paying terminal handling *charges and the other charges of the port terminal directly to the terminal operators instead of paying through the Shipping Lines. Therefore, all such eligible importers who have already opened P.D account with the terminal operators may pay the terminal charges directly to the respective terminals. The eligible importers who do not have P.D accounts may open P.D accounts with the concerned ports/terminals and pay terminal charges directly to the concerned ports/terminals. Ports/terminals are also requested to raise invoices for terminal charges directly to the eligible and willing importers.*

4. Difficulties faced, if any, may be brought immediately to the notice of the undersigned at commr4-cuschn@nic.in "

7. A similar case was filed before the Kerala High Court by the petitioners in W.P.No.5058 of 2020, W.P.(MD).No.4728 of 2020 & W.P.(MD).No.4740 of 2020 on 10.03.2020.There, the petitioners had challenged Public Notice No.5/2020 dated 03.02.2020. Public Notice No.5/2020 dated 03.02.2020 is a verbatim reproduction of impugned public notices which are under challenge in these Writ Petitions.

8. Details of the petitioners there and the petitioners before this Court are shown in this tabulation:-

Sl.No.	Name of the Petitioner in Kerala High Court Judgment	Petitioner before this Court
1	The Container Shipping Lines Association (India) A Society registered under the Societies Registration Act, 1860, Having its Registered Address at Mackinnon Macknenzie Building, Ballard Estate, Mumbai – 400 001. Represented by its Chief Executive Officer, Mr.Sunil Vaswani	W.P.Nos.5069 of 2021, 5071 of 2020&W.P.(MD).Nos.4728 of 2020& 4740 of 2020
2	CMA CGM Agencies (India) Ltd., Having Address at Office No.219, 2nd Floor, Metro House, Opp. PMTC, Off Wadia College, Mangaldas Road, Pune – 411 001, Maharashtra, India, Represented by its Branch Manager, Mr.Shyam sunder N.	W.P.Nos.5418 of 2020, 5421 of 2020, W.P.(MD).Nos.5554 of 2020 &W.P.(MD).No.5575 of 2020.
3	MSC Agency India Pvt. Ltd., Having Address at MSC House, Andheri Kurla Road, Andheri East, Mumbai – 400 059, Represented by its Branch Manager Jacob George, by ADVS. Sri.V.M.Syam Kumar, Smt.Kripa Elizabeth Mathews Smt.P.F.Rosy.	W.P.No.5058 of 2020 & W.P.No.5067 of 2020

9. W.P.No.5058 of 2020 was dismissedby the Kerala High Court at the time of admission on 11.03.2020 with the following observations:-

"In my view, the petitioners do not have any cause

of action in laying challenge to Ext. P1. There was already a written contract between them and the client and obviously the apprehension expressed of deviation is at far-fetched. It will not curtail or take away their right to recover the handing charges as per the terms and conditions of the contract. Be that as it may, while hearing the aforementioned case, a specific query in this regard was put. In order to answer the query, the reliance was laid to the judgment of the Hon'ble High Court of Bombay.In the reported judgment cited supra, the petitioner was an importer,who assailed the facility notice providing a mail based procedure for monitoring the movement of imported containers from Port to the container freight station. It was held that all the charges have already been included in the original bill of lading duly discharged payment of terminal and other charges. The Bombay High Court after considering the argument did not accept the contention by holding that the facility notices were issued with the object of facilitating and enabling the importer to have an efficient movement of container for early clearing

of the goods. At the best, it can be a dispute arising out of the contract or money between the shipping line and the importer or the exporter.For the reasons aforementioned, I do not find any justification warranting any interference under Article 226 of the Constitution of India, to bring the case under the realm of judicial review.
The writ petition is accordingly dismissed."

10. A perusal of the above would indicate that these Petitioners except the petitioners in W.P.(MD).Nos.5554 of 2020 & 5575 of 2020

had invoked the extraordinary jurisdiction of the Hon'ble High Court of Kerala as well as this Hon'ble High Court on the same cause of action.

11. Aggrieved by the dismissal order of the High Court of Kerala on 11.03.2020, W.A. No. 333 of 2021 has been filed before the Hon'ble Division Bench of the High Court of Kerala and the same is said to be pending as on date. There are no records to indicate any stay of the Order dated 11.03.2020 of the High Court of Kerala in W.P.(C). No.7435 of 2020(D). These writ petitions are therefore liable to be dismissed on the grounds of resjudicata and for forum shopping.

12. By the impugned Public Notices, collection of Terminal Handling Charges ("THC") by Shipping Lines has been discouraged. Importers having AEO status availing DPD facility for containerized cargo, have been allowed the facility of paying Terminal Handling Charges ("THC") and the other charges of the port terminal directly to the Terminal Operators instead of paying it to the Shipping Lines. This has allegedly impinged the rights of the petitioners and thus they are up in arm before this Court once again having tasted failure.

13. As per the impugned Public Notices, all eligible importers who have opened P.D account with the Terminal Operators have been given the option to pay such Terminal Charges directly to the respective Terminals and those eligible importers who do not have P.D accounts have been asked to open P.D accounts with the concerned Ports / Terminals and pay such Terminal Handling Charges ("THC")directly to the concerned Ports / Terminals.

14. The learned Senior Counsel for the petitioners would submit that the nature of business carried on by the petitioners, its members who are liners involve a bundle of services to their customers and one of the services provided to their customers namely Importers, CHAs and others includes services at the terminal for which Terminal Handling Charges are collected.

15. These charges which are collected by the liners of which some of the petitioners, who are members of association and / or liners themselves cannot be curtailed by pressing Section 143AA of the Customs Act, 1962.

16. Explaining further, thelearned Senior Counsel for the petitioners would submit that the business carried out by shipping lines, include levy of Terminal Handling Charges("THC"). It is the case of the petitioner that upon being approached by an importer/exporter with a query, the shipping line provides a quotation (i.e.freight and local charges including THC) for the requested carriage. Notably, the shipping line charges are also available on their website. Generally, the importer/exporter can request for any one of the carriage service.

17. The Impugned Public Notice of the Commissioner of Customs is challenged primarily on the ground that they have been issued contrary to the provisions of the Customs Act, 1962. Specifically, it is submitted that the manner in which power has been exercised by the Commissioners of different Commissionerate is contrary to the letter and spirit of Section 143AA of the Customs Act, 1962.

18. It is submitted that the Impugned Public Notices do not refer to any order of the Board as is contemplated under Section 143AA of the Customs Act, 1962.It is submitted that even otherwise there is also no delegation of power in terms of Section 152 of the Customs Act, 1962 by

the Central Government to any of the Commissioners.

19. Specifically, it is submitted that even if there was a delegation, there was delegation only to the Principle Chief Commissioner of Customs and to / or Chief Commissioner of Customs who alone are empowered in this behalf by the Central Government, whereas the impugned Public Notice has been issued by the Commissioner's of the respective Commissionerate. Hence, it is submitted that the Impugned Public Notices are unsustainable.

20. It is submitted that Section 2(30-AA) of the Customs Act defines ‘notification’ as follows:-

> “”*notification” means notification published in the Official Gazette and the expression “notify” with its cognate meaning and grammatical variation shall be construed accordingly.”*

21. It is submitted that no notification has been either published or issued in the official gazette of the Central Board of Indirect Taxes and

Customs (CBIC). It is submitted that CBIC has also not delegated its powers under Section 143AA to 2nd respondent to enable 2nd respondent to issue the Impugned Public Notice.

22. It is submitted that an application was filed under the Right to Information Act, 2005. The documents received pursuant to the said Application show that there is no gazette notification that was issued by which Central Board of Indirect Taxes and Customs (CBIC) has delegated its powers (in respect of levy of Terminal Handling Charges allegedly under Section 143AA) to any other entity. The said Application and documents received pursuant thereto have been annexed in the Additional Typed set of W.P.(MD).No.4728 of 2020.

23. It is submitted that during the course of hearing before this Court, multiple opportunities were provided to respondents to produce any gazette notification authorizing 2nd respondent to issue the Impugned Public Notice. However, the respondents have failed to produce the same.

24. Thus, it is submitted that no gazette notification of Central Board of Indirect Taxes and Customs (CBIC) delegating powers has been issued. It is submitted that during the course of oral arguments, a query also fell from this Court as to why the Impugned Public Notice cannot be sustained taking recourse to Section 151A of the Customs Act, 1962.

25. It was further submitted that Section 151A of the Customs Act, 1962 empowers Central Board of Indirect Taxes and Customs (CBIC) to issue orders, instructions, directions to officers of Customs for implementation of provisions of the Customs Act, 1962 in relation to the procedure for import or export.

26. This would not empower CBIC to direct/instruct/order Respondent No. 2 to issue the Impugned Public Notice as "the procedure for import/export" has to be read in the context of the purpose of the Customs Act, this cannot be extended to cover contractual rights between shipping lines and its customers.

27. Furthermore, considering that Section 152 of the Customs Act lays down a particular procedure for delegation of CBIC's powers,

Section 151A cannot be read in a manner to render the said procedure (under Section 152) otiose. Section 151A does not permit delegation of CBIC's powers.

28. As far as the above communication dated 13.01.2020 of the Chairman of the CBIC is concerned, it is submitted that the said communication does not aid the validity of the Impugned Public Notice for the following reasons:-

(i) The Letter issued by the Chairman, CBIC neither appears to be a decision taken by CBIC, nor does it refer to any decision taken by CBIC (as sought to be argued by Respondent Nos. 1 and 2). The Letter is a correspondence issued by the Chairman (in his personal capacity) and does not qualify as measure taken by CBIC under Section 143AA of the Customs Act (or otherwise). The Letter only appears to forward representations against shipping lines from members of EXIM trade, which is akin to forwarding grievance of members of EXIM trade, rather than an action under Section 143AA.

(ii) The Letter has been issued to all Principal Chief Commissioner of Customs and Chief Commissioner of Customs. The Letter has not been issued to Respondent No.2, i.e. the Chief Commissioner of Customs. This is contrary to Respondents' stand in their Affidavit in Reply, wherein they have stated that the Chairman, CBIC has issued mandatory directions to all

Commissioners to issue Trade notice / Public notices and to place the same before the Board.

(iii) In any event the Letter dated 13.01.2020, cannot be considered to be a delegation of CBIC's powers under Section 152 since it does not follow the procedure laid down in the said provision (as statcd above). Furthermore,the Letter dated 13.01.2020, is issued only by the Chairman, CBIC and not by CBIC as required under Section 151A.

29. It is submitted that the Letter dated 13.01.2023, merely considers representations from members of EXIM Trade and directs initiation of action. It is submitted that neither the interest of shipping lines nor the nature of their transactions, or the impact on their contractual relations with importers/exporters have been considered by the Chairman of CBIC. As the Letter has been issued in teeth of Article 14 of the Constitution, it is void *ab initio*, *non est* and can confer no right on any party, let alone 2nd respondent.

30. It is submitted that theLetter materially affects the rights of shipping lines with whom importers/exporters have contractual relations (based on their own choices), in respect of Terminal Handling Charges. Therefore, it was an obligation on the part of the Chairman to have consultations with members of shipping lines and to factor in their

interest before issuing the Letter. Since the members of shipping lines have not been heard and their interest has not been considered, issuance of the Letter is clearly in violation of principles of natural justice.

31. For the reasons aforesaid, the Letter dated 13.01.2020, is void under Article 13 of the Constitution of India.

32. It is submitted that theCustoms Act is a taxing statute, which is not aimed at regulating private contracts, pertaining to vessels/shipping lines or the Port/Terminals.The Statements of Objects and Reasons of the Customs Act clarifies that the purport of the Customs Act is to regulate the laws relating to Sea Custom and Land Customs.There is no scope for regulating Terminal Handling Charges and / or contracts pertaining to vessels / shipping lines or Ports / Terminals, under the Customs Act.

33. It is further submitted that theImpugned Public Notice ought to be in conformity with the powers contemplated under the Customs Act. Pertinently, even a delegated legislation or a subordinate legislation has to be in conformity with the parent Act and cannot travel beyond its

scope and authority. The Impugned Public Notice which is an administrative direction, must, most certainly be in conformity with the powers under the Customs Act. The Impugned Public Notice cannot travel beyond the Customs Act and contemplate creation of rights in favour of Respondent No.2 which the statute itself does not contemplate.

34. It is submitted that pursuant to the Impugned Public Notices, the Special Secretary to the Logistics, Department of Commerce has also issued an E-Mail communication to various departments including the Commissioner to comply with the requirement of the above mentioned Public Notices in the respective Commissionerates.

35. It is submitted that the impugned Public Notices is nothing but a colourable exercise of power.

36. The case was heard on 26.07.2023 and adjourned to 03.08.2023 under the caption 'for orders' to facilitate the respondents to file a copy of any order issued by the Central Board of Indirect Taxes and Customs based on which the impugned Public Notices are purported to have been issued.

37. On 03.08.2023, the learned counsel for the respondents filed a copy of a letter dated 13.01.2020 signed by Dr.John Joseph, Chairman of Central Board of Indirect Taxes & Customs, New Delhi [Board for short]. It reads as under:-

> *Kindly refer to the enclosed representations. It appears that shipping lines are charging excessive charges as terminal handling charges than what the terminals are charging for clearance of containers. Currently, the Terminal Handling Charges are collected by the shipping lines.*
>
> *2. This should immediately be changed to facilitate 'Ease of Doing Business'. This will actually save almost Rs.5000/- to 10,000/- per container as can be seen from the complaints received in my office. Since India is having a traffic of almost one crore containers, this will be a substantial gain to the industry are trade. As an immediate measure trade notice/public notice may be issued in all Customs Houses under your charge to see that DPD clients and AEO clients are permitted to pay terminal charges directly to the terminals and should be followed in letter and spirit.*
>
> *3. The public notice /trade notice issued in this regard may please be sent to me by Friday, 17th January 2020 positively.*

38. The respondents have defended the impugned Public Notices under the specific. Heads. I shall try to capture the same.

POWER TO ISSUE THE IMPUGNED PUBLIC NOTICES:

39. The impugned public notices have been issued to implement the instructions of the board vide letter dated 13.01.2020. In order to determine the power under which the public notices have been issued and the legality of the same,it is necessary to look into the purpose of Sec. 143 AA and the issuance of letter dated 13.01.2020.

POWERS OF THE BOARD UNDER SEC. 143AA OF THE CUSTOMS ACT, 1962:-

40. A perusal of Sec. 143AA of the Customs Act, 1962 (extracted at Pg no.6 of this Written Submissions) would indicate that the said provision is a nonobstante provision. The said provision empowers the Board to take measures or prescribe procedures in order to reduce transaction cost of import and export activity.

41. It is submitted that one of the objectives is to enable "Ease of Doing Business Policy" and therefore the impugned public notices were issued in order to reduce transaction cost of import and export activity.

42. It is therefore submitted the CIBC is empowered to take measures or prescribe procedures for a class of importers or exporters or for categories of goods or on the basis of the modes of transport of goods in order to reduce the transaction cost of clearance of importing or exporting goods and exercising such powers the Board had issued the instructions dated 13.01.2020 (which has been issued thru the Chaiman, CBIC) and based on the said instructions the impugned public notices have been issued.

43. Based on the above, in order to implement the objective of Sec. 143AAof the Customs Act, 1962, the Chairman of the Board had issued such instructions. The letter dated 13.01.2020 outlines the objectives of Sec. 143 AA of the Customs Act, 1962 which is to take measures or prescribe procedures in order to reduce transaction cost of

import and export activity by issuing directions/instructions to the field to issue Public Notices.

44. It is further submitted that the CBIC vide D.O.No.CH(IC)/02/2020 dated 13.01.2020 has directed that in order to facilitate 'Ease of Doing Business' Trade Notice/Public Notice may be issued to see that DPD (Direct Port Delivery) clients and AEO (Authorized Economic Operators) clients are permitted to pay terminal charges directly to the port terminals.

45. This would show that an option was extended to specified class of importers/Exporters and it is left to the choice of the exporters and the port terminals of avail of this facility. The impugned Public Notice clearly sets out that they are "requested" which means it was never intended to be a compulsory measure.

46. It is submitted that a reading of Sec. 151-A of the Customs Act, 1962 would show that the Board is empowered to issue such orders, instructions and directions for implementation of provisions of this Act and the instructions issued by the Chairman, CBIC is one such

instruction and the same does not require any delegation under Sec. 152and therefore the public notices issued are legal and it is not as if the 2nd Respondent has acted without any such powers or beyond the scope of its powers.

NO REQUIREMENT TO ADDRESS THE LETTER DATED 13.01.2020 TO THE 2ND RESPONDENT:-

47. A perusal of the letter dated 13.01.2020 would show that the same is addressed to "All Pr. Chief Commissioners/Chief Commissioners of Customs for similar action" which would go on to further show that the same is meant to be circulated to all the Commissionerates for pan India action.

48. It is therefore submitted that the 2nd Respondent would fall under one of the respective Commissionerates to which the direction has been issued. It is a standard practice of the CBIC to write DO letters addressed to one of the senior most Chief Commissioners by name and then mark copies to all the other Chief Commissioners as the issue is of general importance and concerns issue ease of doing business. Based on the same, the impugned public notices have been issued by the concerned

Commissionerates.

LETTER DATED 13.01.2020 IS NOT VIOLATIVE OF ART. 14 OF THE CONSTITUTION OF INDIA:-

49. The letter dated 13.01.2020 is not violative of Article 14 of the Constitution of India as the same does not restrict the rights of the shipping lines nor is it arbitrary/discriminatory to the business of the shipping lines. The letter dated 13.01.2020 was issued keeping in mind the industry friendly policy decision of the Government of India and the Board based on which the impugned Public Notices has been issued and the same is well within the mandate prescribed for ease of doing business.

REASON FOR ISSUANCE OF THE LETTER DATED 13.01.2020 AND THE SUBSEQUENT IMPUGNED PUBLIC NOTICES:-

50. It was found that the shipping lines were charging excessive charges as terminal handling charges than what was being charged for clearance of the containers. These costs impacted the overall cost of import/export and inputs and the same would in turn affect the import-

export trade as cost competitiveness would then be at risk. Therefore, the impugned public notices are merely advisory in nature for AEO and DPD clients who want to avail the facility and therefore the rights of the shipping lines are in no way affected by the impugned public notices.

51. It is also pertinent to mention that the impugned public notice merely provides an option to the exporter to pay the terminal charges directly to the port terminals. Therefore, it is not as if the rights of the shipping lines have not been taken into consideration. Moreover, the impugned public notices do not attempt to regulate the conditions, documents or charges imposed by the shipping lines.

52. The impugned public notice merely attempts to facilitates trade in pursuance of the government policy of ease of doing business by aiding the EXIM members by extending an option to exporters who are willing to directly pay the terminal charges. Therefore, the public notices do not have any adverse effects on the rights and interests of the shipping lines.

IMPUGNED PUBLIC NOTICES ARE NOT IN VIOLATION OF

ARTICLE 14 OF THE CONSTITUTION OF INDIA : -

53. The impugned public notices are based on the instructions of the Board vide its letter dated 13.01.2020. The Hon'ble Supreme Court has laid down the principles the Court can interfere in policy decisions and as to how law relating to economic activities should be viewed with greater latitude.

54. It is therefore submitted that the Court can interfere only if the policy decision is patently arbitrary, discriminatory or malafide and based on the above the Court has to deal with contentions of Petitioners. It is further submitted that the petitioners have not alleged any of the above principles such a patent arbitrariness and malafide for challenging the same.

THE IMPUGNED PUBLIC NOTICES DO NOT AFFECT THE CONTRACTUAL RELATIONSHIPS OF SHIPPING LINES:-

55. The impugned public notice does not in any way affect the contractual relation of the shipping lines as the same is not mandatory in

nature. The impugned public notice merely gives an option to the exporters to opt to pay the Terminal Handling Charges directly to the port terminals. The exporters are always at the option to choose or to be bound by their contractual obligation.

56. In light of the above, there is no infirmity in the letter and there is no requirement to have any consultations with members of the shipping lines Therefore, there are no violation of principles of natural justice as the public notice does not make it mandatory on the part of the exporters to pay the Terminal Handling Charges directly to port terminals.

57. Therefore, the letter dated 13.01.2020 merely furthers the objectives listed in Sec. 143AA which has been carried out by the impugned Public Notices which have been issued as a trade facilitation measure. Though the Covid pandemic was at its fore it was found necessary in Public Interest and therefore, the said letter is not void but valid in law with Paramount Public Interest in Mind.

THE IMPUGNED PUBLIC NOTICES ONLY PROVIDE AN OPTION TO THE EXPORTER:-

58. The Public Notices impugned in the Writ Petitions merely provide an option to the exporter to pay the Terminal Handling Charges directly to the Port Terminals. It does not make it compulsory or mandatory for any party to do so. Therefore, the exporters are free to act as per their contractual obligations and impugned public notices in no way interfere in the private contract between the Shipping Lines and the exporter/importer.

59. I have considered the arguments advanced by the learned Senior Counsel for the petitions and the learned counsel for the respondents. I have also perused the provisions of the Customs Act,1962 and the decisions cited by the learned Senior Counsel for the petitioners.

60. Section 143AA was inserted into the Customs Act,1962 with a view to bring transparency in the documentation and the procedures involved in the import and export of goods and to reduce the cost involved in the clearance of import and export of goods.Section 143AA of the Customs Act, 1962 is a trade facilitation. Section 143AA to the Custom Act, 1962 reads as follows:-

> ***Section 143AA.-Power to simplify or provide different procedure, etc., to facilitate trade. —***
>
> *Notwithstanding anything contained in any other provision of this Act, the Board may, for the purposes of facilitation of trade, take such measures or prescribe separate procedure or documentation for a class of importers or exporters or for categories of goods or on the basis of the modes of transport of goods, in order to,—*
>
> > *a) maintain transparency in the import and export documentation; or*
> > *b) expedite clearance or release of goods entered for import or export; or*
> > *c) reduce the transaction cost of clearance of importing or exporting goods; or*
> > *d) maintain balance between customs control and facilitation of legitimate trade.".*

61. Section 143AA to the Customs Act, 1962 was inserted into the Customs Act, 1962 with effect from 1.4.2018 vide Section 97 of the Finance Act, 2018.The amendment to the Customs Act, 1962 saw amendments to the provisions to the provisions of the Central Boards of Revenue Act, 1963.

62. Clause 95 of the Finance Bill, 2018 sets out the reasons for insertion of Section 143AA to the Customs Act, 1962.Clause 95 of the

Bill states that a new section 143AA in the Customs Act, 1962 was being inserted so as to empower the Board to take measures and to specify separate procedure or documentation for a class of importers or exporters or categories of goods or on the basis of modes of transport to facilitate trade. As mentioned above Section 143AA to the Customs Act, 1962 is a trade facilitation.

63. A bare reading of the Section 143 AA of the Customs Act, 1962 would indicate that the Board may take such measures or prescribe separate procedures for fulfilling the conditions prescribed under Section 143AA of the Customs Act, 1962. Section 143AA of the Customs Act, 1962,it empowers the Board to:-

(i)	take such measures; or	for	a class of importers or exporters; or	for the purpose of	**(a)maintenance of transparency in import and export documentation and procedure;** or
(ii)	prescribe separate procedure or;		categories of goods; or		(b) expeditious clearance or release of goods entered for import or export; or
(iii)	prescribe documentation;		on the basis of the modes of transport of goods;		(c) **reduction in the transaction cost of clearance of importing or exporting goods;** or
					(d)maintenance of balance between customs control and facilitation of legitimate trade.”

64. The letter dated 13.01.2020 bearing reference: D.O.No.CH(IC)/02/2020as set out that above indicates that decision of the Board to implement the object of Section 143AA of the Customs Act, 1962.

65. To implement Section 143AA of the Customs Act, 1962, there is no necessity for issuance of any circular. To implement the object of the Section 143AA of the Customs Act, 1962, neither the machinery under Section 151 A of the Customs Act, 1962 nor under Section 152 of the Customs Act, 1962 is required.

66. To implement Section 143AA of the Customs Act, 1962 delegation under Section 152 of the Customs Act, 1962 is not required, although the Central Government can also to delegate the power to officers under Sec. 152 of the Customs Act, 1962. Section 143AA of the Customs Act, 1962 is an independent provision and confers independent power.

67. Under Section 151-A of the Customs Act, 1962 Board also has power to issue instructions to its officers of the Customs under Section 151-A of the Customs Act, 1962. It is similar to the power vested with the Board under Section 37 A of the Central Excise Act, 1944.Section 151A and 152 of the Customs Act, 1962 reads as under:-

Section 151A	***Section 152***
151-A. Instructions to officers of customs. The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon or for the implementation of any other	**152.Delegation of powers.** The Central Government may, by notification in the Official Gazette, direct that subject to such conditions, if any, as may be specified in the notification- (a) any power exercisable by the

Section 151A	***Section 152***
provisions of this Act or of any other law for the time being in force, insofar as they relate to any prohibition, restriction or procedure for import or export of goods, issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board: Provided that no such order, instructions or directions shall be issued- (a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or (b) so as to interfere with the discretion of the Principal Commissioner of Customs or Commissioner of Customs (Appeals) in the exercise of his appellate functions.	Board under this Act shall be exercisable also by 623[a principal Commissioner of Customs or a Commissioner of Customs] empowered in this behalf by the Central Government; (b) any power exercisable by a Principal Commissioner of Customs or Commissioner of Customs under this Act may be exercisable also by a Deputy Commissioner of Customs or an Assistant Commissioner of Customs empowered in this behalf by the Central Government; (c) any power exercisable by a Deputy Commissioner of Customs under this Act may be exercisable also by an Assistant Commissioner of Customs empowered in this behalf by the Central Government; (d) any power exercisable by an Assistant Commissioner of Customs under this Act may be exercisable also by a gazetted officer of customs empowered in this behalf by the Board.

68. Under Section 151-A of the Customs Act, 1962, the Board

may, if it considers it necessary or expedient so to do for the purpose of;

> (a) uniformity in the classification of goods; or
> (b) with respect to the levy of duty thereon; or
> (c) implementation of any other provisions of this Act or of any other law for the time being in force,

insofar as they relate to any prohibition, restriction or procedure for import or export of goods, issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board.

69. Any decision of the Board has to be in consonance with the Rules under Section 4(1) of the Central Board of Revenue Act,1963. As per Section 4(1) of the Central Board of Revenue Act,1963, the Central Government has to make Rules for the purpose of regulating the business of the Board and every order made or act done in accordance with the such rules by the Board shall be deemed to be order or act, as the case may be of the Board.

70. Therefore, there is no requirement for delegation of powers

as the Commissioners are merely carrying out the instructions of the Board to implement the policy decision of 'ease of doing business.

71. As per Section 4(2) of the Central Board of Revenue Act, 1963, every Rule made under it shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however, that any modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

72. Section 4(1) and 4(2) of the Central Board of Revenue Act, 1963 reads as under:-

Section 4(1)	***Section 4(2)***
(1) The Central Government may make rules for the purpose of regulating the transaction of business by each Board and	(2) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while

Section 4(1)	***Section 4(2)***
every order made or act done in accordance with such rules shall be deemed to be the order or act, as the case may be, of the Board.	it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however, that any modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

73. The Board cannot function independently. It has to strictly act in accordance with the Rules of Transaction as is contemplated under Section 4(1) of the Central Board of Revenue Act, 1963.

74. As a matter of fact, the Cabinet Secretariat has issued Government of India (Allocation of Business) Rules, 1961. Department Of Revenue is specifically vested with the Central Board of Indirect Taxes and Customs and with the Central Board of Direct Taxes.

75. Letter dated 13.01.2020 of the Chairman of the Board bearing reference D.O.No.CH(IC)/02/2020 is merely an instruction/direction to all the Commissionerates to carry out the objectives and implementation of Section 143AA of the Customs Act, 1962. This can be a communication bearing reference: D.O.No.CH(IC)/02/2020.

76. The language of each of the Impugned Public Notices are identical. The uniformity in the language adopted in the impugned Public notices indicate that they flow from the same source i.e from the decision of the Board vide communication dated 13.02.2020 bearing reference: D.O.No.CH(IC)/02/2020 signed by the Chairman of the Central Board of Indirect Taxes and Customs, Ministry of Finance, Department of Revenue.

77. The above communication dated 13.01.2020 bearing reference: D.O.No.CH(IC)/02/2020 is signed by the Chairman to the Principal Commissioner of Customs, Mumbai Zone-II, pursuant to which the Impugned Public Notices have been issued.

78. The above communication dated 13.01.2020 bearing reference: D.O.No.CH(IC)/02/2020 have been sent to Principal Chief Commissioners, Mumbai, Zone-II / Chief Commissioners of Customs and to all Principal Chief Commissioners and Commissioners of Customs. Said communication dated 13.01.2020 bearing reference: D.O.No.CH(IC)/02/2020 is a response of the Chairman of the Board in a demi official format.

79. Letter dated 13.01.2020 bearing reference:D.O.No.CH(IC)/02/2020 does not seek to delegate the power under Section 143 AA of the Customs Act, 1962. Letter dated 13.01.2020 bearing reference: D.O.No.CH(IC)/02/2020 seeks to nudge the Commissionerates to implement Section 143AA of the Customs Act, 1962.

80. The above communication dated 13.02.2020 has been drafted by the Chairman of the Board, content of which has been extracted above indicates that it has been sent to the Principal Chief Commissioner of Customs, Mumbai Zone II, Nava Shava, District Raigad, Maharashtra

with a copy marked to the all the Principal Chief Commissioners of Customs all over India for similar action.

81. The impugned Public Notices have been issued in public interest. The impugned Public Notices merely extends the facility/option to importers and exporters. They are not bound to avail the said option.

82. The impugned Public Notices has been issued in view of the Government's avowed policy decision for facilitating "Ease of Doing Business" in the country. The impugned Public Notices motivated with the object to implement Section 143AA of the Customs Act, 1962.

83. It is not as if the impugned Public Notices make it compulsory for the importer or exporter to per force pay the Terminal Handling Charges directly to the Port Terminals. It is only an option.

84. The purpose for which the Impugned Public Notice were issued is in line with the purpose for which the Section 143AA was inserted into the Customs Act,1962.

85. The Boardhas to merely follow the Rules of Business while issuingany order or Circulars or communication for it to be circulated uniformly by all the Commissionerate.

86. The impugned Public Notices flows directly from the Letter dated 13.02.2020 bearing reference D.O.No.CH(IC)/02/2020 of the Chairman of the Central Board of Indirect Taxes and Customs, Ministry of Finance, Department of Revenue.

87. The impugned Public Notices flows indicates that it is in response to a representation which was sent to the Chairman of the Board indicating excessive amount being collected towards handling charges by shipping lines than what is being currently charged at the terminal for clearance of containers.

88. The argument that there has been no delegation of power by the Central Government to the Commissioners under Section 152 of the Customs Act, 1962 is not relevant. Such an argumentcannot be countenanced as the impugned public notices directly flow from the

communication dated 13.02.2020 of the Chairman of the Board and is addressed to all the Commissioners in different Commissionerate in the country.

89. At best there could be a procedural infraction while issuing the above communication dated 13.01.2020 for any violation of Government of India (Allocation of Business) Rules, 1961 and any other Rule framed under Section 4(1) of the Central Board of Revenue Act, 1963.

90. However, it has not been demonstrated that the above communication dated 13.01.2020 bearing reference D.O.No.CH(IC)/02/2020 of Chairman of the Board was issued in violation of the Government of India (Allocation of Business) Rules, 1961 or any other Rule framed under Section 4(1) of the Central Board of Revenue Act, 1963.

91. The decision of the Board has been implemented uniformly by All the Commissionrates in unison. The purposes for which the impugned public notices have been issued are in line with the object of section 143AA of the Customs Act, 1962. Therefore, the impugned

Public Notices is / are not arbitrary.

92. Unless, the Amendment to Customs Act, 1962 vide section 97 of the Finance Act, 2018 is itself struck down as ultra vires either the Constitution or any of the other provisions of the Customs Act, 1962, the impugned public notices cannot be struck down on the grounds raised in these writ petitions even if there was a minor infraction of the procedure under the Government of India (Allocation of Business) Rules, 1961. In my view, there are no merits in these Writ Petitions.

93. That apart, having filed W.P.(C).No.7435 of 2020 (D) before the High Court of Kerala on the same cause of action and having failed and having filed W.A.No.333 of 2021 before the Hon’ble Division Bench of the Kerala High Court, these Writ Petitions have to fail. The filing of Writ Petitions before this Hon'ble High Court and the High Court of Kerala on the very same cause of action would amount to forum shopping. It is not proper. Therefore, on the ground of shopping also these batch of Writ Petitions are liable to be dismissed as the challenge before both the High Courts are very same.

94. These writ petitions have to therefore fail and are liable to be dismissed. Therefore, these writ petitions are dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

26.02.2024

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Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No

<u>To</u>

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

2.The Commissioner of Customs, (Chennai IV),
60, Rajaji Salai, Cutom House,
Chennai – 600 001.

3.Special Secretary Logistics,
Department of Commerce,
Ministry of Commerce and Industry, Udyog Bhavan,
New Delhi – 110 107.

C.SARAVANAN, J.

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