

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 50478 OF 2019

(Arising out of Order-in-Original No. 15/2018-Commissioner, Customs, Jaipur, dated 30.10.2018 passed by Commissioner of Customs (Preventive), Jodhpur)

M/s. Rajasthan Small Industries Corporation Ltd., **...Appellant**
Udyog Bhawan, Tilak Marg,
C-Scheme, Jaipur

VERSUS

Commissioner of Customs (Preventive), Jodhpur **...Respondent**
Hqrs. N.C.R. Building, Statue Circle,
C-Scheme, Jaipur – 302 005

WITH

CUSTOMS APPEAL NO. 50891 OF 2019

(Arising out of Order-in-Original No. 01/2019-Commissioner, Customs, Jaipur, dated 16.01.2019 passed by Commissioner of Customs (Preventive), Jodhpur)

M/s. Rajasthan Small Industries Corporation Ltd., **...Appellant**
Udyog Bhawan, Tilak Marg,
C-Scheme, Jaipur

VERSUS

Commissioner of Customs (Preventive), Jodhpur **...Respondent**
Hqrs. N.C.R. Building, Statue Circle,
C-Scheme, Jaipur – 302 005

AND

CUSTOMS APPEAL NO. 51724 OF 2019

(Arising out of Order-in-Original No. 10/2019-Commissioner, Customs, Jaipur, dated 29.04.2019 passed by Commissioner of Customs (Preventive), Jodhpur)

M/s. Rajasthan Small Industries Corporation Ltd., **...Appellant**
Udyog Bhawan, Tilak Marg,
C-Scheme, Jaipur

VERSUS

Commissioner of Customs (Preventive), Jodhpur **...Respondent**
Hqrs. N.C.R. Building, Statue Circle,
C-Scheme, Jaipur – 302 005

APPEARANCE:

Shri Arun Goyal, Advocate for the Appellant

Shri Rakesh Kumar, Authorized Representative for the Department

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 20.10.2022

Date of Decision: 21.11.2022

FINAL ORDER NO. 51086-51088/2022

JUSTICE DILIP GUPTA:

Customs Appeal No. 50478 of 2019 has been filed by M/s. Rajasthan Small Industries Corporation Ltd.¹ to assail the order dated 30.10.2018 passed by the Commissioner of Customs, Jodhpur² by which the demand for the period from 01.07.2012 to 21.12.2014 of the outstanding cost recovery charges against the appellant has been confirmed with penalty. However, the custodianship of the appellant has neither been revoked nor security has been forfeited.

2. **Customs Appeal No. 50891 of 2019** has been filed by the appellant to assail the order dated 17.01.2019 passed by the Commissioner by which the demand for the period from 01.01.2016 to 30.06.2016 of the outstanding cost recovery charges against the appellant has been confirmed with penalty. However, the custodianship of the appellant has neither been revoked nor security has been forfeited.

3. **Customs Appeal No. 51724 of 2019** has been filed by the appellant to assail the order dated 29.04.2019 passed by the Commissioner by which the demand for the period from 01.07.2016 to

1. the appellant
2. the Commissioner

31.03.2017 of the outstanding cost recovery charges against the appellant has been confirmed with penalty. However, the custodianship of the appellant has neither been revoked nor security has been forfeited.

4. As similar issues are involved in these three appeals, they are being decided by a common order.

5. The facility of customs clearance of goods for export/ import and for assessment, levy and collection of customs duty in hinterland in important cities with a view to decongest the Ports at Entry Points was started sometimes in 1995. For this purpose, help was sought from private/public sectors for providing premises suitable for customs officers and could be declared as "Customs Area" and "Customs Ports" as defined under the Customs Act 1962³. Such Container Freight Stations⁴, Air Cargo Complexes⁵ and Inland Container Depots were opened to facilitate imports and exports of goods. The goods to be exported are brought to the sites for examination by the customs officers and after completion of the custom formalities are allowed to be exported. Similarly, goods which are imported are also brought directly from the ship to the sites after unloading them in the specified ports for examination. For providing this facility, the Custodian is permitted to charge a certain amount per container from the exporter/ importer as handling charges. The appellant is a State Government Undertaking. It was appointed as custodian of Inland Container Depot, Basni-II Phase, Jodhpur⁶, under section 45(1) of the Act.

3. the Act
4. CFS
5. ACC
6. ICD

6. The Circular dated 14.12.1995 set out the guidelines for appointment of custodians of CFS, ACC and ICD. To ensure smooth working of all the facilities, a need was felt to draw up a standard set of undertakings to be given by the custodians before they were appointed under section 45 of the Act. The undertaking to be given was also contained in the Circular dated 14.12.1995. The undertaking, inter alia, provided that the custodian should provide safe, secure and spacious premises for loading/unloading/storing of the cargo; sufficient modern handling equipments in operational condition for handling the containers and the cargo in the area was required to be provided; the custodian had to bear the cost of the customs staff posted at ICD/CFS, but it was the Commissioner who had to decide the number of staff required to be posted considering the work load in the stations; and the custodian was also required to provide free furnished space to the Customs Department.

7. Thus, once an ICD/ACC was notified by the Commissioner of Customs under section 45 of the Act, the Government of India posted/appointed various customs officers at such notified ICD/ACC for assessment of customs duty and other allied activities.

8. The appellant was appointed as a custodian of ICD Jodhpur under section 45(1) of the Act by public notice dated 19.07.1995. The Ministry of Finance, Department of Revenue by letter 23.08.1995 conveyed the sanction accorded by the President for creation of twelve posts in ICD Jodhpur. It was stipulated in the said letter that these posts should be filled up only when the appellant deposits the entire cost of the said posts which was 1.85 times of the monthly average cost of the post in advanced. Accordingly, the Managing Director of the

appellant submitted an undertaking to the Customs Department that the custodian shall bear the cost of the staff.

9. It needs to be noted that the aforesaid Circular dated 14.12.1995 was replaced by the Handling of Cargo in Customs Area Regulations 2009⁷. The Ministry of Finance also issued a notification dated 12.09.2005 regarding cost recovery posts in respect of the customs staff posted in ICD/CFS/ACC and the same is reproduced below:

"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 : 7200 per annum for ICDs and 1200 for CFSs
- (iv) Benchmark at (1) to (3) shall be reduced by 50% for those ICDs/CFSs exclusively dealing with exports, as per staffing norms.

1. 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.
2. 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 ICDs/CFSs for which regularization of posts are suggested, no cost recovery charges are under dispute or pending payment as on 31 August 2005.
3. Member (Customs) has desired that information should be submitted by 19.09.2005 by return FAX and by email at [anupam.prakash@rediffmail.com\(.\)](mailto:anupam.prakash@rediffmail.com)"

7. the 2009 Regulations

10. According to the appellant it was operating the ICD by outsourcing certain activities to various operators and when the appellant appointed a new handling and transportation agent permission was sought from the Commissioner but since permission was not granted despite repeated reminders the appellant could not run its business and could not deposit the cost recovery charges of the custom staff.

11. Show cause notices dated 02.01.2018, 26.09.2018 and 22.11.2018 were issued to the appellant, purportedly under regulation 12 of the 2009 Regulations, mentioning therein that the appellant had contravened the provisions of regulations 5(2) and 5(5) and the obligation mentioned in regulation 6(1)(o) of the 2009 Regulations and, therefore, the appellant had rendered itself liable for suspension/revocation of approval of the custodianship in terms of the provisions contained in regulation 11(1) of the 2009 Regulations and also forfeiture of security and imposition of penalty under regulation 12(8).

12. Detailed replies filed by the appellant to the three show cause notices but the Commissioner passed orders confirming the demand of outstanding cost recovery charges under regulations 5(2) and 6(1)(o) of the 2009 Regulations and imposed penalty of Rs. 5,000/- but the custodianship of the appellant was not revoked nor security was forfeited.

13. It is against these three orders of the Commissioner, that the present appeals have been filed for quashing that part of the orders that confirmed the demand of outstanding cost recovery charges and imposed penalty.

14. Learned counsel appearing for the appellant submitted that the provisions of regulations 5(2) and 6(1)(o) of the 2009 Regulations do not provide for recovery of the cost recovery charges, nor penalty could have been imposed under regulation 12 (8) of the 2009 Regulations and in support of this contention, reliance has been placed on a Division Bench decision of the Tribunal in **Container Corporation of India vs. Commissioner of Customs, Jodhpur**⁸.

15. Learned authorized representative of the Department, however, supported the impugned orders. Learned authorized representative placed reliance upon the Circular dated 23.03.2009 issued in connection with the 2009 Regulations as also the judgment of the Delhi High Court in **Allied ICD Service Ltd vs. Union of India 2018**⁹. Learned authorized representative also submitted that the 2009 Regulations require the appellant to pay the cost recovery charges and so it was incumbent upon the appellant to have paid the amount and if the amount was not paid, recovery can be resorted to under the 2009 Regulations. Learned authorized representative submitted that the 2009 Regulations do provide for recovery of the outstanding recovery charges in terms of the undertaking submitted by the appellant for payment of such charges. Learned authorized representative also submitted that the decision of the Tribunal in **Container Corporation of India** is distinguishable.

16. We have considered the submissions advanced by the learned counsel for the appellant and the learned authorized representative of the Department.

8. 2019 (366) E.L.T. 745 (Tri.-Del)

9. (364) E.L.T. (59) (Tri.-Del)

- (o) shall bear the cost of the customs officers posted by the Commissioner of Customs on cost recovery basis and shall make payment at such rates and in the manner specified by the Government of India in the Ministry of Finance unless specifically exempted by an order of the said Ministry."

20. **Regulation 11** deals with suspension or revocation of the approval for appointment of a Customs Cargo Service Provider, while **regulation 12** deals with procedure for suspension or revocation of the approval and imposition of penalty. The impugned orders rely upon regulations 11(1) and 12(8). They are reproduced below:

"11(1) The Commissioner of Customs may, subject to the provisions of these regulations, suspend or revoke the approval granted to the Customs Cargo Service Provider subject to the observance of procedure prescribed under regulation 12 and also order for forfeiture of security, if any, for failure to comply with any of the provisions of the Act and the rules, regulations notifications and orders made thereunder.

12(1) The Commissioner of Customs shall issue a notice in writing to the Customs Cargo Service provider stating the grounds on which it is proposed to suspend or revoke the approval and requiring the said Customs Cargo Service provider to submit within such time as may be specified in the notice not being less than thirty days, to the Assistant Commissioner or Deputy Commissioner of Customs nominated by him, a written statement of defence and also to specify in the said statement whether the Customs Cargo Service provider desires to be heard in person by the Said Assistant Commissioner or Deputy Commissioner of Customs.

(8) If any Customs Cargo Service provider contravenes any of the provisions of these regulations, or abets such contravention or who fails to comply with any provision of the regulation with which it was his duty to comply, then, he shall be liable to a penalty which may extend to fifty thousand rupees."

21. It is seen that regulation 5(2) provides that a person who intends to be approved as a Custom Cargo Service provider for custody of imported goods or export goods and for handling of such goods in a customs area, shall fulfill the conditions set out, including the condition set out in regulation 5(2) that requires the applicant to undertake to bear the cost of the custom officers posted on cost recovery basis and shall make payments at such rates and in such a manner as prescribed, unless specifically exempted by an order of the Government of India in the Ministry of Finance. Regulations 6 deals with the responsibilities of Customs Cargo Service Provider and one of the responsibilities set out in regulation 6(1)(o) is that the Customs Cargo Service Provider shall bear the cost of the custom officers posted by the Commissioner on cost recovery basis and shall make payments at such rates and in the manner specified by the Government of India in the Ministry of Finance unless specifically exempted by an order of the said Ministry.

22. The issue that arises for consideration in these appeals is as to whether the recovery of cost recovery charges could have been confirmed by the Commissioner exercising powers under regulations 5(2) and 6(1)(o) of the 2009 Regulations and whether penalty of Rs.5000/- could have been invoked.

23. As noticed above, the show cause notices dated 02.01.2018, 26.09.2018 and 22.11.2018 were issued to the appellant under regulation 12 of the 2009 Regulations. What was stated was that the appellant has rendered itself liable for suspension/revocation of approval of the custodianship in terms of the provisions contained in regulation 11(1) of the 2009 Regulations and also for forfeiture of

security and imposition of penalty under regulation 12(8) of the 2009 Regulations. The Commissioner, under the impugned orders, did not revoke the approval of the custodianship nor was the security forfeited. The Commissioner ordered that the outstanding cost recovery charges should be recovered from the appellant under regulations 5(2) and 6(1)(o) of the 2009 Regulations and also imposed penalty.

24. This issue as to whether the recovery of outstanding cost recovery charges could have been confirmed was examined by a Division Bench of the Tribunal in **Container Corporation of India**. The Tribunal, after examining the various provisions of the regulation, observed that the adjudicating authority could not have ordered for recovery of the outstanding cost recovery charges. In this connection, the Tribunal, particularly, noticed the provisions of the regulations 5(2) and 6(1)(o) of the 2009 Regulations and the order of the Tribunal is reproduced below:

"13. The issue involved in this case is regarding confirmation of cost recovery charge against the Appellant vide the impugned order. The learned Adjudicating Authority has confirmed the demand under the provision raised by the show cause notice dated 29 March, 2016. The show cause notice at para 16 (ii) has invoked the provisions of Regulations 5(2) and 6(1) (o) of HCCAR. However, the Commissioner has confirmed the demand without invoking any of those regulations. For the better appreciation of the issue involved we would like to refer to Regulation 5(2), 6(1)(o) and 12 of the Regulation of HCCAR.

A perusal of the regulations reveals that the same is intended for levying of cost recovery charge and payment thereof. Similarly, the condition at 5(2) only states that custodian or CCSP will have to undertake to

bear expenses of the Customs officers posted in the Customs area on cost recovery charge basis as per the manner prescribed unless and until the same is exempted by the Ministry of Finance. Therefore, Regulation 6(1)(o) of the Regulation (6) is not meant for recovery of default payment but only it says that the CCSP will have to bear the cost of officer deployed at their premises. Similarly, Regulation (12) of the CCAR does not prescribe for the recovery of defaulted cost recovery charge. But only states that the same is procedure for suspension or revocation of approval and imposition of penalty.

14. In view of above, we find that the learned Adjudicating Authority has not appreciated the legal provision as contained in HCR, referred above which do not indicate the machinery for realisation of cost recovery charge on account of being defaulted as is the case before us. In fact, we find that the show cause notice has invoked the provisions of Regulation 12 of HCCAR which does not provide for the realisation of the cost recovery charge but only revocation of the licence granted to CCSP on account of various breaches as contained therein. This regulation has no provisions for recovery of unpaid cost recovery charge on account of non-fulfilment of criteria as laid down in the CBEC circular. **Thus, we find that the order passed by the learned Adjudicating Authority is beyond the scope of the provisions of HCCAR, 2009 more so when he has decided not to cancel the licence of the Appellant and only imposed penalty.** Further, the learned Adjudicating Authority has also held that there is no provision of recovery of interest under the Regulation 2009. It is not appreciable that when he has held that there is no provision for imposition of interest under the Rule for the default made by the CCSP then how his attention escaped to notice that there is also no similar provision for recovery of default payment either under Regulations 5(2), 6(1)(o) of the Regulation. We also find that the Regulation 5(2) states 'undertaken to bear the cost of Custom Officer posted, at such Customs area, on cost recovery basis, by the Commissioner and shall make payment at such rate and in the manner prescribed unless specifically exempted by an order of the Government of India in the Ministry of Finance.'

(emphasis supplied)

25. Learned authorized representative for the Department, however, submitted that this decision would not come to the aid of the appellant. This issue was specifically decided by the Tribunal in **Container Corporation of India** and, therefore, it is not possible to accept the contention of learned authorized representative of the Department that the aforesaid decision would not be applicable to the facts of these appeals.

26. Learned authorized representative also placed reliance upon the decision of the Delhi High Court in **Allied ICD Service Ltd.** to contend that cost recovery charges can be recovered. The contention of the petitioner before the Delhi High Court was that customs officers are Government Officers who perform sovereign functions and duties in terms of the statutory mandate and, therefore, the petitioner should not be required to pay any charge for their posting. This contention was not accepted by the Delhi High Court. This decision would, therefore, not help the Department.

27. This issue was also examined at length by the Division Bench of the Tribunal in **M/s. The Thar Dry Port vs. C.C.E. & S.T., Jaipur I**¹⁰ and it was held that the Commissioner could not have ordered for cost recovery charges under the aforesaid provisions of regulations 5(2) and 6(1)(o) of the 2009 Regulations. The penalty that was imposed under regulation 12(8) was also set aside.

28. It has, therefore, to be held that the Commissioner committed an illegality in ordering recovery the cost recovery charges under the

10. Customs Appeal No. 51122 of 2019 decided on 26.07.2019

aforesaid provisions of the 2009 Regulations. The penalty that has been imposed is also liable to be set aside.

29. Thus, for all the reasons stated above, the impugned orders dated 30.10.2018, 17.01.2019 and 29.04.2019 passed by the Commissioner to the extent that the demand of outstanding cost recovery charges have been confirmed and penalty has also been imposed are liable to be set aside and are set aside. The three appeals bearing nos. 50478 of 2019, 50891 of 2019 and 51724 of 2019 are, accordingly, allowed to the extent indicated above.

(Order Pronounced on 21.11.2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)