CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH – COURT NO. 1

Application(s) Involved:

Customs/Stay/20334 of 2019
in Customs Appeal No. 20507 of 2019

[Arising out of Order-in-Original No. COC-CUSTOMS-000-COM-52/18-19 dated 20/02/2019 passed by the Commissioner of Customs , Cochin]

M/s. Miv Logistics Pvt. Ltd.,
Container Freight Station,
Opp: Ictt, Vallarpadam (PO),
Ernakulam – 682504,
Kerala

Appellant(s)

VERSUS

Commissioner of Customs,
Custom House,
Willingdon Island,
Cochin – 682009,
Kerala

Respondent(s)

APPEARANCE:

Ms. Sandhya Sarvode & Mr. Rohan Karia,
Advocate,
Lakshmi Kumaran & Sridharan,
World Trade Centre No.404-406,
4th Floor, South Wing Brigade Gateway
Campus No.26/1, Dr. Rajkumar Road,
Bangalore - 560 055,
Karnataka

For the Appellant

Mr. Madhup Sharan,
Asst. Commissioner (AR)

For the Respondent

Date of Hearing: 27th November 2019
Date of Decision: 18th February 2020

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20193/2020

Per : S.S GARG

The appellant has filed stay application. But with the consent of both the parties, we proceed to decide the appeal itself finally.

2. The present appeal is directed against the impugned order dated 25/02/2019 passed by the Commissioner of Customs, Cochin, whereby the Commissioner has directed the appellant to pay the pending dues of Cost Recovery Charges for the period from 01/01/2016 till 31/03/2018 along with applicable interest within three months from the date of the impugned order, failing which the appellant's appointment as Customs Cargo Service Provider (CCSP) would be cancelled without any further notice as per the provisions of Handling of Cargo in Customs Areas Regulations, 2009 (HCCAR) and also imposed a penalty of Rs.50,000/- (Rupees Fifty Thousand Only) on the appellant under Regulation 12(8) of the HCCAR, 2009 for contravention of the provisions of Regulation 5(1)(iii), 5(2), 5(3) and 13 of the HCCAR, 2009.

3. Briefly the facts of the present case are that the appellants are engaged in the activity of storage of containers and imported goods, de-stuffing of all FCL/LCL containers, Customs examination before clearance, storage, examination and stuffing of export cargo into containers and storage of export and import transshipment containers etc under Section 8(a) of the Customs Act, 1962. In terms of the Trade Facility No.02/2014, the appellants commenced its operations as

CCSP in the CFS with effect from 10/01/2014. The appellants vide letter dated 08/01/2014 to the Commissioner of Customs, Cochin sought permission on a temporary basis to outsource its functions as CFS to M/s. APM Terminals India Pvt. Ltd. (APMT). The Commissioner of Customs, Cochin vide letter dated 16/01/2014 granted permission for outsourcing the functions of CFS by the appellants to APMT. The appellants had sought such extension from time to time which was granted by the Commissioner of Customs, Cochin. CFS functions were outsourced to APMT for the period from January 2014 to December 2016. Further the appellants vide letter dated 11/01/2016 to the Commissioner of Customs, Cochin sought exemption/waiver from payment of Cost Recovery Charges in respect of their CFS in terms of the Board's Instructions vide letter No.F.No.A.11018/12/2008-Ad.IV dated 02/07/2008. The appellant has paid the Cost Recovery Charges for the Officers posted at their CFS on quarterly basis and discharged all their dues up to December, 2015 as per the guidelines and they were eligible for exemption from payment of Cost Recovery Charges from 04/12/2015 onwards. The Commissioner of Customs vide letter dated 16/02/2016 to the Additional Director General (I&W), Directorate General of Human Resource Development, New Delhi and the Under Secretary to the Ministry of Finance, Department of Revenue, CBEC, New Delhi while referring to the Board's Instruction dated 12/09/2005 informed that the appellants have achieved the bench mark in the year 2014-15 and 2015-16 and that the appellants have also remitted the Cost Recovery Charges up to 31/12/2015. The Commissioner of Customs vide their letter dated 20/06/2017 informed the Chief Commissioner of Central Excise, Customs & Service Tax, Cochin Zone, that the appellants have remitted the entire amount of Cost Recovery Charges for the period up to 31/12/2015 on account of Customs Officers posted at CFS Cochin and as per the Board's letter dated 12/09/2005, the appellants are entitled to the waiver of Cost Recovery Charges for the subsequent period. Subsequently, the

Deputy Commissioner vide their letter dated 12/02/2018 directing the appellants to remit the total amount of Rs.2,18,47,100/- (Rupees Two Crore Eighteen Lakh Forty Seven Thousand and One Hundred only) as Cost Recovery Charges. The show-cause notice dated 11/06/2018 was issued to the appellants seeking action under Regulation 11 and 12 for suspension and revocation of approval of appointment of the CCSP for violation of Regulation 5(1)(iii), 5(2) and 5(3), of Handling of Cargo in Customs Area Regulation, 2009 and also to impose penalty under Regulation 12(8) of the said Regulation. The appellant filed the reply before the enquiry officers. The appellants have mentioned about the various letters written by them to the Commissioner that they were entitled to exemption as they had achieved the bench mark in the year 2015 itself. The Commissioner of Customs in the impugned order has admitted that the appellants have fulfilled the conditions of Regulation of 5(1)(iii) and 5(3) of HCCAR Regulation, 2009. The Commissioner of Customs has held that the appellant has violated the Regulation 5(2) by not paying the Cost Recovery Charges.

4. Heard both the parties and perused the records.

5. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. She further submitted that the impugned order is beyond the allegations levelled in the show-cause notice. She further submitted that in the impugned order the appellant has been directed to pay the pending dues of Cost Recovery Charges of Rs.2,18,47,100/- (Rupees Two Crore Eighteen Lakhs Forty Seven Thousand and One Hundred only) for the period from 01/01/2016 till 31/03/2018 along with applicable interest, failing which the appellant's appointment as CCSP would be cancelled without any further notice and also imposed a penalty of Rs.50,000/- (Rupees Fifty Thousand only) for contravention of provisions of Regulations

5(1)(iii), 5(2), 5(3) and 13 of the HCCAR, 2009. She further submitted that in the present case, show-cause notice was issued to the appellants for non-fulfillment of conditions as laid down in Regulations 5(1)(iii), 5(2), 5(3) of the HCCAR, 2009 and thereby proposing to take action under Regulation 11 and 12 of the HCCAR, 2009 for suspension and revocation of approval of appointment of the appellant as CCSP. She also submitted that in the impugned order the Commissioner has directed the appellant to pay the Cost Recovery Charges which was not proposed/raised in the show-cause notice and hence is beyond the show-cause notice and not sustainable in law. She also submitted that it is a settled law that show-cause notice is the foundation of the case and that the Department has to rest its case only on the basis of the allegations in the show-cause notice and cannot traverse beyond the allegations in the show-cause notice. For this submission, she relied upon the following decisions:

- ***CC vs. Toyo Engg India Ltd. Reported in 2006 (201) E.L.T. 513 (S.C.)***
- ***CCE VS. Gas Authority of India Ltd., reported in 2008 (232) E.L.T. 7 (S.C.)***
- ***CCE Vs. Ballarpur Industries Ltd., reported in 2007 (215) E.L.T. 489 (S.C.)***

5.1 She further submitted that the appellants are eligible for wavier of Cost Recovery Charges from January 2016 onwards as the appellants have fulfilled all the conditions as laid down in the Board's Instructions dated 12/09/2005 viz:

(i) The Appellants CFS was in operations for two consecutive years i.e. from 2014 onwards,

(ii) The Appellants achieved the performance benchmark consecutively for the past two years:

Workload of ICD/CFS	Performance bench mark	2014-15	2015 YTD
a. No. of Containers handled (TEUs)	1200 TEU p.a.	17623	33689
b. No. of documents processed (BOEs)	1200 BOEs p.a.	1788	4769

(iii) The appellants have sought waiver of Cost Recovery Charges for the prospective period i.e. for the period from 01/01/2016 onwards and not for the past period (2014 and 2015) wherein the appropriate Cost Recovery Charges were duly paid.

5.2 She further submitted that the Commissioner of Customs vide letter dated 16/02/2016 informed the Additional Director General, regarding the achievement of bench mark by the appellant. She further submitted that the appellant has been repeatedly following up with the Department for considering their application for waiver of Cost Recovery Charges but did not get any response regarding the status of their application dated 11/01/2016. She further submitted that the delay by the Department in acting upon the appellant's letter dated 11/01/2016 to grant the applicable exemption cannot be used against the Appellants. The appellant also relied upon the decisions in the case of ***Adani Ports and Special Economic Zone Limited vs. Union of India reported in 2018 (11) G.S.T.L. 150 (Guj.)*** wherein an identical issue before the Hon'ble High Court was whether the exemption shall be effective from the date of order or from date of application with respect to exemption from payment of Cost Recovery Charges. The Hon'ble High Court has noted that the petitioner has fulfilled all the requirements and at no stage there was any communication from the Department that in view of the outstanding payment of Cost Recovery Charges, application of the petitioners would not be considered for such period. Further the High Court held that exemption from payment of Cost Recovery Charges would be available from the date of application. She further submitted that as per the Regulation 7 of the HCCAR, 2009, the Commissioner of Customs has the power to exempt CCSP from complying with the conditions prescribed under Regulation 5 when he is unable to comply with any of the conditions for reasons beyond his control. Learned counsel also submitted that Regulation HCCAR 2009 does not provide for any recovery mechanism for recovery of Cost Recovery Charges. She also submitted that Regulation 11 only provides for suspension or revocation of the approval granted to CCSP subject to the observance of procedure prescribed under Regulation 12 and 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. Similarly, Regulation 12 prescribes the procedure for suspension or revocation of approval and imposition of penalty. In this regard the appellants relied upon the decision in the case of ***Container Corporation of India Ltd. Vs. CC, Jodhpur reported in 2019 (366) E.L.T. 745 (Tri.-Del.)*** wherein the Tribunal held that the Regulation has no provision for recovery of unpaid cost recovery charge on account of non-fulfillment of criteria as laid down in the CBEC Circular. More so when the show-cause notice has invoked the provisions of Regulation 12 of HCCAR, 2009 which does not provide for realization of cost recovery charge but only revocation of license granted to CCSP. Learned counsel also submitted that interest and penalty cannot be imposed when the main recovery is not sustainable in law.

6. On the other hand, learned AR reiterated the findings in the impugned order. He further submitted that the appellants being an approved CCSP is legally responsible to comply with the conditions and responsibilities upon which they are given approval to operate as CCSP and are liable for action for non-compliance. He further submitted that the appellants had neither paid the Cost Recovery

Charges nor produced any exemption granted by the Government of India and abstained from making payment since January 2016. He further submitted that the provisions of the HCCAR 2009 are clear as it provides that unless specifically exempted by an order of the Government of India, the CCSP is bound to make payments on such rates in the manner prescribed and that after achieving the prescribed bench mark alone will not absolve the CCSP from their liability to pay the Cost Recovery Charges. In support of his submissions, he relied upon the following decisions:

- ***Mumbai International Airport Private Ltd vs. Union of India, 2014 (310) E.L.T. 3 (Bom.),***
- ***Thiru Rani Logistrics Pvt. Ltd., vs. Director General, DGHRD, C, & C.E., New Delhi, 2016 (340) E.L.T. 160 (Mad.)***
- ***Allied Icd Services Ltd., vs. Union of India 2018 (364) E.L.T. 59 (Del.)***

6. After considering the submissions of both the parties and perusal of the material on record, we find that the appellant is an approved Customs Cargo Service Provider under the HCCAR, 2009. Further, we find that the appellants for the last two years have paid the Cost Recovery Charges of Rs.42,11,029/-(Rupees Forty Two Lakh Eleven Thousand and Twenty Nine only) [01/01/2014 to 31/12/2014] and Rs.58,23,776/- (Rupees Fifty Eight Lakhs Twenty Three Thousand Seven Hundred and Seventy Six only) [01/01/2015 to 31/12/2015] and the appellants were eligible for exemption from payment of Cost Recovery Charges from 04/12/2015 in terms of Boards Instructions dated 12/09/2005. Further, we find that the appellants vide letter dated 11/01/2016 to the Commissioner of Customs sought exemption/waiver from payment of Cost Recovery and the

Commissioner of Customs vide its letter dated 16/02/2016 to Additional Director General and Under Secretary to the Ministry of Finance, Department of Revenue informed that the appellants have achieved the bench mark in the year 2014-15 and 2015-16 and that the appellants have also remitted the Cost Recovery Charges up to 31/12/2015. Further, we find that the Commissioner of Customs vide letter dated 20/06/2017 informed the Chief Commissioner of Customs, Excise and Service Tax, Cochin Zone and that the appellants have remitted the entire amount of Cost Recovery Charges for the period up to 31/12/2015 and have fulfilled the conditions as prescribed in Board's letter dated 12/09/2005. In spite of recommendation by the Commissioner that the appellants are entitled to exemption, no decision was taken on his application seeking exemption from payment of Cost Recovery Charges it is not that the appellant was not eligible but he has not been granted exemption in writing by the Department in spite of the fulfillment of conditions in terms of Board's Instructions dated 12/09/2005. The appellant has been following up with the Department and has also filed an application under RTI and in reply to the RTI application, the Department has informed the appellant that no approval for Cost Recovery Charges received so far by this office and no decision has been taken on his application seeking exemption from payment of Cost Recovery Charges. Further, we find that in the show-cause notice the allegations against the appellant was that they have violated the Regulations 5(1)(iii) relating to Insurance Policy and Regulations 5(2) relating to non-payment of cost recovery charges and Regulation 5(3) relating to Bank Guarantee. Out of these three charges, the Commissioner has held that the appellant has complied with the Regulation 5(1)(iii) and 5(3) and has confirmed the demand under Regulation 5(2). Further, we find that the impugned order directing the appellant to pay Cost Recovery Charges of Rs.2,18, 47,100/- (Rupees Two Crore Eighteen Lakh Forty Seven Thousand and One Hundred only) is beyond the show-cause notice because in the show-cause notice the only allegation is that the appellant has not fulfilled the conditions as laid down in Regulations 5 (1) (iii), 5(2) and 5(3). Therefore, the payment of recovery in the impugned order is beyond the show-cause notice and is not sustainable in view of the judgments relied upon by the appellant cited supra. Further, we find that there is no fault of the appellants once he has applied to the Commissioner seeking exemption of Cost Recovery Charges on fulfillment of conditions in terms of Board's Circular dated 12/09/2005. We also find that in HCCAR, 2009, no recovery mechanism for recovery of Cost Recovery Charges has been provided and this has been considered by the Tribunal in the case of ***Container Corporation of India Ltd. Vs. CC, Jodhpur reported in 2019 (366) E.L.T. 745 (Tri.-Del.)*** and it has been held by the Tribunal that if the Regulation has no provisions for recovery of unpaid Cost Recovery Charges then the recovery cannot be effected in law.

8. In view of our discussions above, we are of the considered view that the impugned order directing the appellant to pay the pending dues of Cost Recovery Charges for the period from 01/01/2016 till 31/03/2018 along with interest is premature and cannot be given effect to unless the application of the appellant dated 11/01/2016 to the Commissioner of Customs seeking exemption/waiver from payment of Cost Recovery Charges is decided by the respondent. We find that the claim of the appellant for exemption has been recommended by the Commissioner from time to time but no action was taken by the concerned authority. Further the claim of the appellant was not

even rejected by the Department. Hence we set aside the impugned order and direct the Department to decide his pending claim regarding his eligibility of exemption from payment of Cost Recovery Charges and thereafter take appropriate action in accordance with law. Appeal is accordingly disposed of on above terms. Stay petition also accordingly disposed of.

(Order was pronounced in Open Court on 18/02/2020)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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