CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

CUSTOMS Appeal No. 51122 of 2019

(Arising out of Order–in-Original No. VIII(H) 10/02/Adj./2013/1106 dated 26.02.2019 passed by COMMISSIONER OF CUSTOMS- Jaipur)

M/s. The Thar Dry Port .... **Appellant**
B-1, Shastri Nagar, Near Shastri Circle,
Jodhpur, Rajasthan-342003

Versus

C.C.E. & S.T., Jaipur I .... **Respondent**
NCR Building, Statue Circle,
C-Scheme, Jaipur-302005

WITH

CUSTOMS Appeal No. 51280 of 2019

(Arising out of Order–in-Original No. VIII(H) 10/12/Adj./2016/1106 dated 31.03.2019 passed by COMMISSIONER OF CUSTOMS (PREV.)- Jaipur)

M/s. Jaipur Gemstone Exchange .... **Appellant**
Jaipur, 141, Atlanta,
14th Floor Nariman Point,
Mumbai- 400021

Versus

C.C.E. & S.T., Jaipur I .... **Respondent**
NCR Building, Statue Circle,
C-Scheme, Jaipur-302005

APPEARANCE:
Mr. Sanjeev Jain, Chartered Accountant, Mr. Anil Makhija, Mr. Dr. J. Arthur Prem, Advocate for the Appellant
Mr. Sunil Kumar, Mr. Rakesh Kumar Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/ Decision: **26 July, 2019**

FINAL ORDER No.: 51174-51175 / 2019

JUSTICE DILIP GUPTA

Custom Appeal No. 51122 of 2019 has been filed by **"The Thar Dry Port**[1]" for assailing that part of the order dated 26 February, 2019 passed by the Commissioner of Customs by which the demand of outstanding cost recovery charges against the Appellant has been confirmed and an order for its recovery has been passed. A penalty of Rs.5,000/- has also been imposed on the Appellant under Regulation 12(8) of the "Handling of Cargo in Customs Areas Regulations 2009[2]. It needs to be noted that the impugned order does not revoke the custodianship of Thar Port nor does it forfeit the security.

2. **Customs Appeal No. 51280 of 2019** has been filed by **M/s Jaipur Gemstone Exchange**[3] to assail that part of the order dated 29 March 2019 passed by the Commissioner by which the demand of outstanding cost recovery charges has been confirmed and an order has been passed for its recovery with penalty of Rs.5000/- under Regulation 12(8) of the 2009 Regulations. However, the custodianship of M/s Jaipur Gemstone Exchange has not been revoked nor the security has been forfeited.

3. It is, therefore, clear that similar issues are involved in these two appeals. They are, therefore, being decided by a common order.

4. The facility of customs clearance of goods for export/ import and for assessment, levy and collection of customs duty in

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1. Thar Port
2. the 2009 Regulations
3. Gemstone

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 1962[4]. Such Container Freight Stations[5], Air Cargo Complexes[6] and Inland Container Depots[7] (ICD) 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. Thar Port was appointed as Custodian of ICD and Gemstone was appointed as Custodian of ACC under section 45 of the Act.

5. The Circular dated 14 December 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

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

Custodians before they were appointed under section 45 of the Act. The undertaking to be given was also contained in another Circular dated 14 December, 1995. The undertaking, inter alia, provided that the Custodian should provide safe, secure and spacious premises for loading/unloading/storing of the cargo. The Customs Department had to provide sufficient modern handling equipments in operational condition for handling the containers and the cargo in the area. The Custodian had to bear the cost of the Customs Staff posted at ICD/CFS, but it was the Commissioner of Customs who had to decide the number of staff required to be posted considering the work load in the stations. The Custodian was also required to provide free furnished space to the Customs Department.

6. 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.

7. Thar Port (the first appellant) submitted an application on 25 October, 1998 to the Government of India, for setting up a Container Freight Station- ICD at Jodhpur in Rajasthan. The Ministry of Finance issued a letter of interest dated 23 March, 2000 informing Thar Port that the Government had approved the setting up of ICD at Jodhpur. The Commissioner of Customs by letter dated 17 January, 2001 allowed Thar Port to operate the Container Freight Station at Jodhpur and also issued a Public

Notice appointing it as Custodian of Imported goods and the goods to be Exported.

8. Gemstone (the second Appellant) was appointed as Custodian of ACC for Import and Export Cargo of diamond, precious and semi-precious stones by a Notification dated 24 April, 2007.

9. It needs to be noted that the aforesaid Circular dated14 December, 1995 was replaced by the Handling of Cargo in Customs Area Regulations 2009. The Ministry of Finance also issued a Notification dated 12 September 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 ICDs/CFSs : 7200 per annum for ICD 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(.)"

10. In terms of the aforesaid Notification, Thar Port submitted an application for waiver of Cost Recovery Charges but

as no decision was taken, it filed a Writ Petition in the Rajasthan High Court being Writ Petition 87157 of 2017 for wavier of the charges in terms of the Notification dated 12 September 2005 as it claimed to have achieved the requisite target. The said petition is said to be pending. Gemstone also wrote a letter to the Board seeking waiver as, according to it, the conditions set out in the Notification dated 12 September 2005 stood complied with.

11. However, show cause notices dated 9 January 2013 and 11 December 2012, were issued to both the Appellants respectively, purportedly under Regulation 12 of the 2009 Regulations. The notices mentioned that previously the procedure for appointment of Custodian as ICD/CSF was prescribed under the Board Circular dated 14 December 1995, but the procedure was now laid down under the 2009 Regulations. After referring to the various provisions of the 2009 Regulations, it was stated that the Appellants did not fulfil the conditions set out in Regulation 4, 5 and 6 of the 2009 Regulations and the Board Circular dated 14 December 1995 and, therefore, they rendered themselves 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 were filed by the two Appellants to the two show cause notices. It was stated that the Government of India had announced a policy for granting exemption/ waiver on the payment of cost recovery charges if ICD/CSF satisfied the

minimum workload criteria as provided for in the notification dated 12 September 2005 and since they satisfied the conditions, the cost recovery charges were required to be waived. It was also pointed out that the writ petition filed in the Rajasthan High Court for waiver of the cost recovery charges was pending disposal and so was the application before the Board.

13. The Commissioner, however, 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.5000 but the Custodianship of the two Appellants was not revoked nor the Security was forfeited.

14. It is against these two 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.

15. Learned Chartered Accountant appearing for the Appellant submitted that the provisions of Regulation 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]. Learned representative also submitted that the Appellants are clearly entitled to waiver of

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

the cost recovery charges in terms of the Notification dated 12 September 2005, which issue is pending before the Rajasthan High Court in Writ Petition 17850 of 2017 filed by Thar Port.

16. Learned Authorised Representative of the Department, however, supported the impugned orders. Learned Authorised Representative placed reliance upon the Circular dated 23 March 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 Authorised Representative also submitted that the 2009 Regulations require the Appellants to pay the cost recovery charges and so it was incumbent upon the Appellants to have paid the amount and if the amount is not paid, recovery can be resorted to under the 2009 Regulations. Learned Authorised Representative submitted that the 2009 Regulations do provide for recovery of the outstanding recovery charges in terms undertakings submitted by the Appellant for payment of such charges. Learned Authorised Representative also submitted that the decision of the Tribunal in **Container Corporation of India** is distinguishable.

17. We have considered the submissions advanced by the learned Chartered Accountant for the Appellants and the learned Authorised Representative of the Department.

18. The basic issue that arises for the consideration in both the Appeals is as to whether there is a procedure set out for

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

recovery of the outstanding cost recovery charges for the posting of the Custom Officers at ICD/CSF/ACC under the 2009 Regulations. To appreciate the contentions, it will be appropriate to refer to the relevant provisions of the 2009 Regulations.

19. **Regulation 5** deals with the conditions to be fulfilled by an applicant for custody and handling of imported goods or export goods in a customs area. The impugned order has placed reliance upon Regulations 5(2). It is reproduced below:

> "**5. Conditions to be fulfilled by an applicant for custody and handling of imported or export goods in a customs area.-**
>
> Any person who intends to be approved as a Customs Cargo Service provider for custody of imported goods or export goods and for handling of such goods, in a customs areas, hereinafter referred to as the applicant, shall fulfil the following conditions, namely:-
>
> (1) -------- -------- --------
>
> (2) the applicant shall undertake to bear the cost of the Customs officers posted, at such custom area, on cost recovery basis, by the Commissioner and shall make payment at such rates and in the manner prescribed, unless specifically exempted by an order of the Government of India in the Ministry of Finance."

20. **Regulation 6** deals with responsibilities of Customs Cargo Service provider. The impugned Orders rely upon Regulation 6(1)(o). It is reproduced below:

> "**6. Responsibilities of Customs Cargo Service provider:**
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> (1) The Customs Cargo Service provider shall:
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> (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."

21. **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 Regulation 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.
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> **-------- --------**
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> **(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."

22. 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 and shall bear the cost of the custom officers posted by the Commissioner of Customs 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.

23. The contention of the Appellants is that they were entitled to waiver of the cost of the Custom Officers posted by the Commissioner in terms of the Notification dated 12 September 2005 issued by the Board. It is stated that as no decision was taken on the said representation, Thar Port filed a Writ Petition in the Rajasthan High Court which is pending. Gemstone also sent a presentation to the Board in terms of the Circular for waiver of the recovery charges and for payment of merchant overtime charges. This representation is also stated to be pending.

24. The issue that arises for consideration in this appeal 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.

25. As noticed above, the show cause notices dated 9 January, 2013 and 11 December, 2012 were issued to the Appellants under Regulation 12 of the 2009 Regulations. What was stated was that the Appellant has rendered themselves 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) of the 2009 Regulations. The Commissioner under the impugned order did not either revoke the approval of the Custodianship or was the security forfeited. The Commissioner ordered that the outstanding cost recovery charges should be covered from the Appellant and the Regulations 5(2) and 6(1)(o) of the 2009 Regulations and also imposed penalty.

26. This about the 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 order for recovery of the outstanding cost recovery charges. In this connection, the Tribunal, particularly, noticed the provisions of the Regulation 5(2) and

6(1)(o) of the 2009 Regulations 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]

27. Learned Authorised Representative for the Department, however, submitted that this decision would not come to the aid of the Appellants. 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 Authorised Representative of the Department that the aforesaid decision would not be applicable to the facts of the case.

28. Learned Authorised 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.

29. In view of the aforesaid, decision of the Tribunal in **Container Corporation of India**, with which we have no reason to differ, it has to be held that the Commissioner, committed an

illegality in ordering recovery of the cost recovery charges under the aforesaid provisions of the 2009 Regulations.

30. The penalty is imposed under Section 12(8) of the 2009 Regulations if a Customs Cargo Service provider contravenes any of the provisions of the Regulation or fails to comply with any provision of the Regulation with which it was its duty to comply. As it was held that cost recovery charges could not have been recovered under the aforesaid provisions of the Regulations, the penalty also could not have been imposed as there is no contravention of the Regulations.

31. Thus, for all the reasons stated above the impugned orders dated 26 February 2019 and 29 March, 2019 passed by the Commissioner to the extent that the demand of outstanding cost recovery charges has been confirmed and penalty has also been imposed are liable to be set aside and are set aside. The two Appeals bearing nos. 51122 of 2019 and 51280 of 2019 are allowed.

(Dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

ARCHANA