

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86938 OF 2023

[Arising out of Order-in-Original No: 119/2023-24/Commr/NS-Gen/CAC/CCCSP/
JNCH dated 10th August 2023 passed by the Commissioner of Customs (General),
Jawaharlal Nehru Custom House (JNCH), Nhava Sheva.]

APM Terminals India Pvt Ltd – (Annex) CFS

CFS Division Block – 5-18, Sector-6
Dronagiri Warehouse Complex, Navi Mumbai 400 707.

... Appellant

versus

Commissioner of Customs (General)

Jawaharlal Nehru Custom House, Nhava Sheva,
Tal: Uran, Dist. Raigad 400 707

...Respondent

WITH

CUSTOMS APPEAL NO: 86939 OF 2023

[Arising out of Order-in-Original No: 118/2023-24/Commr/NS-Gen/CAC/CCCSP/
JNCH dated 10th August 2023 passed by the Commissioner of Customs (General),
Jawaharlal Nehru Custom House (JNCH), Nhava Sheva.]

APM Terminals India Pvt Ltd – Main

CFS Division Block – 5-18, Sector-6
Dronagiri Warehouse Complex, Navi Mumbai 400 707.

... Appellant

versus

Commissioner of Customs (General)

Jawaharlal Nehru Custom House, Nhava Sheva,
Tal: Uran, Dist. Raigad 400 707

...Respondent

APPEARANCE:

Shri Rahul Narichania, Senior Advocate with S/Shri Vishal Sheth and Bimal
Rajsekhar, Advocates for the appellants

Shri Ram Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

**HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

FINAL ORDER NO: 85524-85525/2024

DATE OF HEARING: 30/11/2023
DATE OF DECISION: 17/05/2024

PER: C J MATHEW

M/s APM Terminals India Pvt Ltd operates two ‘container freight station (CFS)’, designated as ‘Annexe’ and as ‘Main’, at Dronagiri Warehouse Complex, Navi Mumbai and, duly grandfathered as ‘custodian’ of ‘imported goods’ in terms of section 45(1) of Customs Act, 1962 by Commissioner of Customs, was also accorded approval under Handling of Cargo in Customs Areas Regulations, 2009 as ‘customs cargo service provider (CCSP)’ that was being renewed every five years with the latest effective from 15th March 2020. They are aggrieved by restriction on their operations, imposed in separate orders^{1,2} order of Commissioner of Customs (General), Nhava Sheva, that, in addition to imposition of identical penalties of ₹ 50,000 and ₹ 4,00,000 under regulation 12(8) of Handling of Cargo in Customs Areas Regulations, 2009 and section 117 of Customs Act, 1962, has directed that the cargo handling undertakings, permitted *vide*

‘.....Public Notice No. 102/2020 dated 17.08.2020 for operator as CCSP will stand suspended till regularization of permission for handling and storage of hazardous cargo...’

¹ [order-in-original no. 119/2023-24/Commr/NS-Gen/CAC/CCCSP/JNCH dated 10th August 2023]

² [order-in-original no. 118/2023-24/Commr/NS-Gen/CAC/CCCSP/JNCH dated 10th August 2023]

for the CFS (Annex) and

‘..... Public Notice No. 110/2020 dated 07.09.2020 for operator as CCSP will stand suspended till regularization of permission for handling and storage of hazardous cargo...’

for the CFS (Annex) respectively, in the event of failure to

‘fulfil responsibilities as mandated under regulation 6 of HCCAR-2009 and regularize the permission...for handling and storage of hazardous cargo within one month....’

The cavil here is that the prescribing of such condition for purported ‘regularization’, contingent upon which the restricted operations have already been brought into play, is in the realm of the impossible unless prefaced by finding of irregularity under Handling of Cargo in Customs Areas Regulations, 2009 which is the sole enabler of oversight by Commissioner of Customs and from absolute silence in the ‘speaking order’ about the purported lack which needs to be regularized in the ‘hazardous cargo’ facility in both their operations. More so, as the consequence of the impugned orders is not only to the purportedly offending storage for ‘hazardous cargo’ but has, in effect, terminated their operations as ‘custodian’ of goods in the respective ‘container freight stations (CFS)’ even as the renewed approval is still in force and unoffending insofar as other storage is concerned. The plea, in short, is that the respondent-Commissioner has been actuated, by reasons other than public interest and in excess of jurisdiction, to insinuate conditions

that were not legislatively envisaged in Handling of Cargo in Customs Areas Regulations, 2009 to cause impediment to their commercial activities and, therefore, has traversed the bounds of the law which, with section 3 therein as the author its being, limits authority to the confines of Customs Act, 1962. If, indeed, that be so, the *gravitas* of such illicit appropriation of authority without legislative empowerment must have consequences from which the entire customs administration may distance themselves only on peril of having been complicit as silent spectators in massacre of rule of law. We are constrained to place this on record at the outset, and before dwelling on the merit of their contentions, as, even though the appellant has set out such as the framework of appellate recourse, the remit of the Tribunal, not extending to scrutiny of individual actions save in the context of penal detriment contemplated under law, does not permit us to go beyond determination of an impugned detriment as legal and proper leaving it to institutional oversight to amend that which may, in themselves, appear deficient.

2. It would appear that the factual core of the dispute is the alleged deliberate disregard of purported quantitative stipulation on both the ‘pass through’ of specified chemicals during a calendar year as well as the ‘peak’ for every calendar month; at least, that is our comprehension of the mind of the adjudicating Commissioner from the portrayal of the issue and laying out of statistical information in show cause notice; and,

ironically enough, frequent reference to ‘threshold’ only confuses the context more than it clarifies. The consequential breach of

‘(i) be responsible for the safety and security of the imported and exported goods under its custody;’

and

‘(q) abide by all the provisions of the Act and the rules, regulations, notifications and orders issued thereunder.’

in regulation 6(1) of Handling of Cargo in Customs Areas Regulations, 2009, vesting obligations on ‘customs cargo service provider (CCSP)’, during the validity of approval to continue as such, which, though not requiring such refined conformity as set out in the litany of allegations, has been drawn upon, if only for its generality, to penalize non-adherence to

‘The Custodian M/s APM Terminals India Pvt. Ltd. -..., is approved as Customs Cargo Services Provider for the said CFS and shall abide by all the provisions of The Customs Act, 1962 and the rules of the Handling of Cargo in Customs Areas Regulations, 2009 (“HCCAR, 2009”), other regulations, notifications, orders issued there under.’

incorporated in the public notice that transfigured the appellant from ‘custodian’ to ‘customs cargo service provider (CCSP)’ and subjected, thereby, to impugned regulatory framework. That framework has, understandably, been strained by stretching of the obligation in impugned Regulations, which is not only contextual but also limited by

the nature of the instrument, over the statistical depiction of ‘hazardous cargo’ handled. From this, it would appear that the challenge to the impugned orders is that the Commissioner of Customs was hard put to fit the factual matrix on the statutory instrument of empowerment under which the public notice *supra* was issued and has erroneously assumed that the purported consequence of ‘threshold’ attainment was his to insist upon merely from a portion of the area approved under the regulatory authority of Commissioner of Customs having been dedicated for ‘hazardous chemicals’ to be handled.

3. Specifically, it has been held that the appellant, as operator of CFS (Annex), had, by handling of 445.74 tons, 1265.68 tons, 55.51 tons, 1325.59 tons and 1445.31 tons of ‘ammonia’, ‘bromine’, ‘propylene oxide’, ‘diphenyl methane di-isocyanate’ and ‘toulene di-isocyanate’ respectively during January-December 2021 and of 445.74 tons in December 2021, 244.65 tons in September 2021, 36.94 tons in September 2021, 35.92 tons in April 2021 and 64.56 tons on some unknown day of the particular month, breached the obligation to get transactions, exceeding the ‘threshold’ of 60 tons, 50 tons, 5 tons, 20 tons and 10 tons for rule 4,5,7,8,9,13,14 and 15 of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 and of 600 tons, 500 tons, 50 tons, 200 tons and 100 tons for rule 10 to 12 of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989, ‘regularized’ in the manner stipulated therein and that similarly, as

operator of CFS (Main), had, by handling of 2174.93 tons of ‘diphenyl methane di-isocyanate’ during January-December 2021 and of 180 tons in June 2021, breached the obligation to get transactions, exceeding the ‘threshold’ of 20 tons for rule 4,5,7,8,9,13,14 and 15 of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 and of 200 tons for rule 10 to 12 of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989, ‘regularized’ in the manner stipulated.

4. It would appear from the narrated litany in the show cause notice that the appellant, as operator of CFS (Annex), had been permitted, by letter of 5th February 2015, to handle, store, receive or despatch ‘hazardous cargo’ for import or export which had been renewed on 29th August 2019 for two years with validity till 17th May 2021 following which request dated 30th April 2019 for further renewal had been kept pending purportedly for alleged non-compliance. Likewise, the appellant had, as operator of CFS (Main), been permitted, by letter of 7th May 2015, to handle, store, receive or despatch ‘hazardous cargo’ for import or export which was renewed on 18th May 2017 for two years with validity till 17th May 2019 following which request dated 18th April 2019 for further renewal had been kept pending purportedly for alleged irregularity. The stage was, thus, set for issuing notice of intention to suspend the operation as ‘customs cargo service provider (CCSP)’, during the period of validity, by recourse to empowerment in

the regulatory framework for non-compliance with purported stipulations attending on the separate approval for handling of ‘hazardous goods’ that, in contrast, was renewable every two years. It is the context of that ‘approval within approval’ which circumscribes the resolution of the dispute before us.

5. Handling of ‘hazardous goods’, including the impugned ‘chemicals’, is regulated by Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989. This, therefore, brings us to the scope and intent of

‘141. Conveyances and goods in a customs area subject to control of officers of customs

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The imported or export goods may be received, stored, delivered, dispatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.’

of Customs Act, 1962, and the authority under which Regulations were notified for uniformity of privilege and obligation encompassing the gamut of logistics providers, including ‘container freight stations (CFS)’ such as those of the appellant, as empowering competence to enforce obligations in Rules notified under the authority of other laws by drawing upon the generality of supervisory oversight requiring permission for each, and several, of the activities undertaken by

‘customs cargo service provider (CCSP)’ under the said Regulations. Thus, three different legislative devices enacted, or notified, over a span of close to five decades, have been brought to bear as authority conferred transitively on the jurisdictional Commissioner of Customs to initiate the impugned suspension and penal detriment on the appellant in the narrated circumstances. The dovetailing of these deserves some attention.

6. It is common ground that the appellant, as ‘custodian’, is engaged with customs authorities in terms of section 45 of Customs Act, 1962. In contrast with the predecessor Sea Customs Act, 1878, which saddled customs authorities with custodianship, Customs Act, 1962 introduced ‘third party’ custodianship which, for the most part and for long, had been confined to ‘port trusts’ established under Major Port Trusts Act, 1963. It is also common ground that the code of ‘give and take’, notified as Handling of Cargo in Customs Areas Regulations, 2009 under the authority of amended section 141 of Customs Act, 1962 - intended for overarching control over conveyances and goods in ‘customs areas’ and for operationalizing chapter III of Customs Act, 1962 – specifically, brings ‘custodians’ too within its fold. Exponential growth in international trade made for altering the contours of handling of cargo and enlarging the statutory framework of custodianship beyond that of port administration and, adapting to evolution of logistic specialization, the amendment in Customs Act, 1962 by Finance Act,

2008 envisaged assurance of national uniformity to every handler of cargo through Handling of Cargo in Customs Areas Regulations, 2009. Neither the specifics of facts impugned in the proceedings as determinant of breach of obligations *supra* nor the responsibility for adherence to prescriptions under any other statutory instrument is discernible in Handling of Cargo in Customs Areas Regulations, 2009 even by reference. Nonetheless,

‘The authorization is subject to strict compliance of conditions as laid down in HCCAR-2009 as amended, Public Notice 08/20211 dated 04.02.2011, CBEC Circular No. 40/2016 dated 26.08.2016, and various Rules, Acts mentioned therein and any other amendments done to them from time to time.’

and

‘The authorization is subject to strict compliance of conditions as laid down in HCCAR-2009 as amended, Public Notice 08/20211 dated 04.02.2011, CBEC Circular No. 40/2016 dated 26.08.2016, and various Rules, Acts mentioned therein and any other amendments done to them from time to time.’

in the latest of renewals of authorization in relation to ‘hazardous chemicals’ dated 29th August 2019 and 18th May 2017 respectively, cited in the impugned orders as the source of authority, indubitably, has all the seemliness of ‘escape velocity’ for transcending both section 45 of Customs Act, 1962 and Handling of Cargo in Customs Areas Regulations, 2009.

7. Though ‘suspension’ as ‘customs cargo service provider (CCSP)’, a contingency that could be resisted only for a month except by submission to the dictates of Commissioner of Customs, is the detriment in the impugned orders, it is the purported reluctance to get handling and storage of ‘hazardous chemicals’ ‘regularized’ by the Commissioner that triggered the contingency. Their application for renewal was, admittedly, pending since 30th April 2021 and 18th April 2019 respectively and yet that did not prevent the notice, as well as the impugned order, from drawing upon the authority of public notice no. 129/20 dated 7th October 2020 as setting the compliance requirements; clearly, an application of 2019 could not, reasonably, have been kept pending to await an official communication yet to be contemplated.

8. There is no substitute for clarity in thought as the only sure foundation for erecting solidity of legal consequence. Confusion in laying out of the charges and chaos of blurred jurisdiction is certain to be manifest as metaphorical ‘improvised explosive device’ which is abundantly demonstrated in the rambling narrative preceding peremptory conclusions, that have nothing to do with the statute, rules or regulations, in the impugned orders. Of particular significance is

‘19. The facts of the case are that the premises of the CFS, M/s. APM Terminals India Pvt. Ltd. -Main CFS has been duly notified by the Customs as a Customs area & declared as Custodian of CFS vide Notification No. 07/2008 dated 07.10.2008. The noticee M/s. APM Terminals India Pvt. Ltd. -

Main CFS is declared as CCSP under Regulation 10 of HCCAR, 2009 vide Notification No 20/2010 dated 15.03.2010 & later renewed time to time & latest vide Public Notice No. 110/2020 dated 07.09.2020. The renewal of authorization for handling and storage of hazardous cargo was granted to CCSP vide this Office letter dated 18.05.2017 for period of 02 Years w.e.f 18.05.2017. The CCSP was also granted authorization for handling, storing, receipt or dispatch of Hazardous DPD containers at the CFS, vide this office letter dated 14.09.2018 for the period valid for the two years from date of issue. I, therefore, proceed on the basis of all available documents in the record. The issues before me are,

- i. Whether the CCSP has erred in performing their responsibilities entrusted with them by the Regulations 6 (1) (i) and 6 (1) (q) under HCCAR, 2009?*
- ii. If yes, what should be the quantum of punishment?*

20. With regard to the first issue above, I find that, the responsibilities of the CCSP have been clearly enumerated in the Regulations 6 (1) (i) & 6 (1)(q) of the HCCAR, 2009. Circular No.04/2011-Cus dated 10.01.2021 stipulates the guidelines for safety and security of premises storing and handling hazardous goods and the same was communicated vide JNCH Public Notice No. 129/2020 dated 07.10.2020; which have to be necessarily complied with by every CFSs storing and handling hazardous chemicals and said CFS comes under the ambit of same. CCSP has exceeded the threshold limit of storage of hazardous cargo against the chemicals stated in Sr. No 26 of MSIHCR, 1989 for the Year 2021, thereby violating the Regulations 6 (1) (i) and 6 (1) (q) of HCCAR, 2009 read with the conditions prescribed in the

Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989.

21. *The CCSP has submitted copy of Consent No. Format 1.0/RO/UAN No.0000145805/CR/2210000633 issued on 11.10.2022 valid till 31.08.2032 from MPCB. Vide the said consent MPCB has clearly mentioned that "This consent is granted subject to condition that as no time threshold quantities should be exceeded the limit prescribed under MSIHC Rules 1989..."*

22. *MPCB vide their e-mail letter dated 01.07.2022 have informed this office that they have issued SCN to CFS for the issue regarding exceeded threshold limit of Hazardous Cargo and accordingly issued interim directions to submit the following:*

- I. Bank guarantee of Rs. 10 lakh and out of BG of Rs. 10 lakh, BG of Rs. 5 lakh shall be forfeited for non-compliance of consent conditions;*
- II. Submission of undertaking to the board that they will not store or handle the hazardous chemical beyond threshold limit in the future, mentioned in schedule-II of MISHC Rules, 1989;*
- III. submission of Disaster Management plan to the Authorities and MPCB Board.*

23. *It is also the responsibility of the CCSP to comply/ follow the guidelines prescribed for handling/storage of HAZ Cargo as per Circular No. 04/2011-Cus dated 10.01.2021 & JNCH Public Notice No. 129/2020 as well as other law & regulations. Further, CCSP's claim that the nature of the cargo dealt by any CFS is beyond the scope of the Customs Act, 1962 is not sustainable as Section 141 (2) read with Section 157 of*

Customs Act, 1962, empowers Customs to make rules/ regulation regarding goods to be received, stored, delivered, despatched or otherwise handled in a customs area. I also reiterate that the SCN is not issued under Rule 2(b), 3 and Schedule-5 of MSIHC, 1989. It is also confirmed from the Safety Audit Report that CCSP has exceeded the threshold limit for the hazardous cargo from Jan 2020 to Dec 2020 & from Jan 2021 to Dec 2021 and continued to store Hazardous good without the permission from the Jurisdictional Commissioner and hence has violated Regulation 6 (1)(i) and 6 (1)(q) of the Handling of Cargo in Customs Areas Regulations, 2009.

24. *Condition under Regulation 5 of HCCAR, 2009, which concerns overall safety and security of the premises may not be subjected to exemption by any authority. Para 5 of Circular No. 04/2011-Cus dated 10.01.2021, also reiterates that "it has been decided that no relaxation or exemption from requirements on safety and security of premises shall be allowed by Commissioners of Customs to the Custodians or Cargo Service Providers in terms of provisions of Regulation 7 of the Handling of Cargo in Customs Areas Regulations, 2009. Also, keeping in view the paramount importance of overall safety and security of imported / export goods, detailed guidelines are being prescribed in order to ensure that all concerned persons ensure that suitable arrangements are put in place for safety and security of premises relating to imported or export goods. These guidelines are annexed as per annexure A to this Circular. Commissioners of Customs are required to ensure that provisions pertaining to safety and security of premises are complied with strictly at the time of appointment of CCSP and monitored thereafter...". If CFS wish to handle hazardous Cargo, exceeding threshold quantity under Schedule 2 of MSIHC Rules, 1989, they should get a permission from MPCB. However, they have not submitted*

MPCB consent for exceeded handling of threshold quantity of Hazardous chemical under Schedule 2 of MSIHC Rules, 1989. Also, exceeding the threshold limit, the CCSP has put the life of the personnel working in the CCSP & safety of the goods in danger as lapses may cause untoward incidents of any kind which such cargo is potentially capable of.'

We could be pardoned for wondering at the assertion of authority under Handling of Cargo in Customs Area Regulations, 2009 by Commissioner of Customs to insist upon compliance with 'regularization' which, in the same breath, is spoken of as being dependent on action initiated by the Maharashtra Pollution Control Board, purportedly under some authority of its own, as pre-condition for continuity of permission – to handle 'hazardous chemicals', with limited impact, or of all goods which distinction the Commissioner of Customs appears impervious to – as 'custodian' of uncleared cargo. The Maharashtra Pollution Control Board happens to be vested with authority to enforce several environmental protection laws, and not the least of which are Water (Prevention & Control of Pollution) Act, 1974 and Air (Prevention & Control) Act, 1981 that are referred to in communication dated 6th July 2022 to the appellant, and the said show cause notice dated 28th February 2022, which, incidentally, appears to have been at the instance of the customs administration, also refers only to those very statutes having nothing to do with the parent legislation for prescribing the 'threshold' in the Rules alleged to have been the infringed by the appellant. The finding that life of personnel were endangered and that

safety of goods were compromised is also bereft of any logical determination and has all the appearances of emotional outrage that has no place in an adjudicatory proceedings intended to deprive the noticee of approval to undertake commercial activities.

9. We gather that the ‘abomination’ prompting the indefinite ‘suspension’ till the appellant fell in line with some purported mandatory requirement – not under Customs Act, 1962, not the Rules or Regulations framed thereunder and not under any other law empowering customs officers to enforce some provision therein – enjoined upon ‘customs cargo service provider (CCSP)’ by public notice no. 129/20 dated 7th October 2020 which, it appears, recalls the instructions of close to a decade earlier from Central Board of Excise & Customs (CBEC) pertaining to handling of ‘hazardous chemicals’ that was contained in circular no. 4/2011-Cus dated 10th January 2011 and, in particular, enjoining regular safety audits in accordance with rule 10 of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989. There is nothing original in the *minutiae* as, for no particular or palpable reason, the old circular has been reiterated. The circular itself consolidates several aspects of control over ‘customs cargo service provider (CCSP)’ that, owing to amendments in Handling of Cargo in Customs Area Regulations, 2009, happened to come under scrutiny of the Parliamentary Committee on Subordinate Legislation which was concerned that the safety mandates therein could, in the

discretion of Commissioner of Customs, be diluted in the same manner as others therein. It was to communicate, *inter alia*, the direction that dilution of the safety mandates was not within such discretion of Commissioner of Customs that the circular of Central Board of Excise & Customs (CBEC) came to be issued. There is, again, nothing original in the contents of Annexure A to the circular which summarized the requirements of several enactments and statutory instruments for edification and compliance by ‘customs cargo service providers (CCSP)’ and, not surprisingly either, as it was not within the domain competence of the tax administration but, nonetheless, an important aspect of oversight that its field formations needed to be reminded about.

10. Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) predates both the statutory enablement, under section 141 of Customs Act, 1962, to frame Regulations for codifying supervision over goods in ‘customs areas’ as well as the Handling of Cargo in Customs Area Regulations, 2009, which has been relied upon by the respondent-Commissioner as the authority to suspend the operations of the appellant as ‘customs cargo service provider (CCSP)’ for alleged infringement of mandate upon crossing of threshold prescribed in schedule 2 of the said Rules. Notwithstanding that chronological significance, the Handling of Cargo in Customs Area Regulations, 2009 has no reference to Manufacture, Storage and Import

of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) despite the seeming gravity of non-adherence thereto on the part of the appellant having prompted the Commissioner of Customs to bring down the metaphorical sledgehammer with full force of empowerment to alienate custodianship under Customs Act, 1962. Moreover, ‘custodianship’, even *de hors* the regulatory framework enabled by later enactment in the statute, existed before both Manufacture Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) and its parent Environment Protection Act, 1986 which, owing to its non-discriminatory applicability, governed ‘custodians’ – whether of the statutory class, *i.e.*, ‘port trusts’ or the approved class. It must, therefore, be presumed to have been obligatory for ‘container freight stations’ to be compliant with the said Rules even before 2009 and the onset of familiarity of Commissioners of Customs with the mandate on ‘hazardous chemicals’ for ‘customs cargo service providers (CCSP)’ by the circular *supra*. Hence, we would not be in error to hold that the mandate of Manufacture Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) operated independently of oversight under the Handling of Cargo in Customs Area Regulations, 2009 and any determination by empowered authority of infraction thereto required Commissioner of Customs to ensure closure of ‘hazardous chemicals’ storage facility. The question that arises is the existence of such determination.

11. It is in the light of this exposition, made necessary by the lack of clarity in the show cause notice and impugned order, that the primary challenge of the appellant must be evaluated before proceeding to examine compliance with the mandate of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989. For if the Commissioner of Customs is without jurisdiction to initiate action for breach of the Rules by reason of explicit lack of acknowledgement therein and/or by lack of domain competence to ascertain compliance, we, too, lack such jurisdiction. Accordingly, we have heard Learned Senior Counsel for the appellants and Learned Authorized Representative at length.

12. The first step in determination of authority lies within the scope of breach, envisaged in Handling of Cargo in Customs Area Regulations, 2009 designed for oversight of 'customs cargo service provider (CCSP)' including 'custodians such as the appellant and prescribes obligations in regulation 6 therein, that may be visited with impugned detriment under the authority of regulation 11 therein. The authority under which Central Board of Excise & Customs (CBEC) has framed this Regulation also circumscribes its scope. Section 141 of Customs Act, 1962 has been enacted, in the context of imported goods, to keep them unaltered, and available, for concluding the process in section 47 of Customs Act, 1962 that duty liability may not be compromised in any manner. To that end, the indemnification in the said Regulations suffices reasonably; in any case, had the regimen of

the Rules framed under the Environment Protection Act, 1986 been essential for such purpose, referential inclusion would obviously have been considered in the Regulations issued under Customs Act, 1962. Consequently, while infringement of any law, as determined by the authority empowered therein, which jeopardizes the existence of the undertaking as ‘customs cargo service provider (CCSP)’ could well have the consequence of suspension of approval under Handling of Cargo in Customs Area Regulations, 2009, the absence of such ‘trigger’ and the limited, as well as contextual, scope of ‘safe’ in regulation 6(1)(i) therein precludes the Commissioner of Customs from invoking of the Rules framed under another law.

13. Furthermore, regulation 6(1)(q) of Handling of Cargo in Customs Area Regulations, 2009, by being limited to provisions of Customs Act, 1962 and rules, regulations, notifications and orders issued thereunder, precludes recourse to another law, including Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989), for detriment under the impugned Regulations. We have also examined *supra* the chronology of the regulatory oversight under Environmental Protection Act, 1986 over facilities such as ‘container freight stations (CFS)’ even before the authority to frame Regulations under section 141 of Customs Act, 1962 was vested in the Central Board of Excise & Customs (CBEC) on 10th May 2008. Consequently, the oversight under the authority of Manufacture,

Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) existed, and exists, independent of any authority created by or acknowledged in Customs Act, 1962, including Central Board of Excise & Customs (CBEC), and from earliest of times without any contemplation to confer parallel authority either in the subsequent incorporation in section 141 of Customs Act, 1962 or in Handling of Cargo in Customs Area Regulations, 2009. That this restriction was fully acknowledged is apparent from disinclination on the part of Central Board of Excise & Customs (CBEC) to extend the Regulations and, instead, preferring to communicate the importance of compliance with Rules framed under Environment Protection Act, 1986 through the impugned circular. That presumable lack of authority in either Central Board of Excise & Customs (CBEC) or the Government of India in the Department of Revenue to absorb, and to delegate, authority under the fief of the Government of India in the Ministry of Environment could not have been overcome by the Commissioner of Customs. Most significantly, the authorities enumerated in schedule V of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) do not include customs agencies for any purpose therein and it may well be anathema to Rules of Business for such authority to be arrogated.

14. It has been argued by Learned Authorized Representative that the circular and public notice have force of law owing to reach of section

151A of Customs Act, 1962 but we are constrained to note that neither of those – impugned in these proceedings – have taken shelter under the said empowerment. Furthermore, the empowerment in section 151A of Customs Act, 1962 is limited to, insofar as other laws of concern may require, prohibition, restriction or procedure for import or export of goods; even a cursory perusal of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) leaves no room for doubt that it does not contemplate prohibition or restriction on goods but is related to regulation of rendering of service of storage or of attached storage, as the case may be, that has only peripherally to do with goods that are imported or exported. The provisions of ‘threshold’ is intended for goods in the territory of India and even the related provisions therein excludes any empowerment of customs officers. Thus, the empowerment to issue instructions cannot be stretched to cover the contents of the impugned circular within the sanctity accorded to ‘instructions’ by section 151A of Customs Act, 1962. A ‘public notice’ has no legal standing under Customs Act, 1962 and may, at best, be considered to be a medium for dissemination of information to commercial interests. Indeed, for a time, such intimation and communications emanating from customs house were designated as ‘facility’ and we are unable to trace the reasons for reverting to the erstwhile nomenclature. Thus, neither the impugned circular nor the impugned public notice may be deemed to have incorporated the

mandate, and even for such purposive extent as impugned proceedings has, into the Handling of Cargo in Customs Area Regulations, 2009. There was, thus, no instrument that the Commissioner of Customs could have drawn upon to sustain the proceedings initiated in the show cause notice and concluded by the impugned order.

15. The scheme of Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) envisages four aspects of handling of chemicals for instituting obligation therein in connection with ‘industrial activity’; while there is no whiff of ‘industrial activity’ in the operations of the appellant, the inclusion afforded to ‘isolated storage’ confers the status of ‘occupier’ on them. The four aspects are ‘major accident’, ‘approval and notification of sites’, ‘safety audit’ and ‘import’; ‘threshold’ – so lavishly scattered in the show cause notice and impugned order – engages ‘occupiers’ who are in excess thereof which, in the context of the impugned proceedings, is relevant to approval by the competent authority under rule 7 therein as well as stipulation of consent on alteration from the terms for approvals obtained initially. That the appellant was indeed required to obtain approval is not in dispute and there is no allegation that these had not been obtained initially. The crossing of ‘threshold’ is the sole trigger and schedule 2 of the Rules does not prescribe ‘threshold’ beyond ‘threshold’; once within coverage of obligation under rule 7 therein, the engagement is for all time. Significantly, reverting to the competent

authority is warranted only when another chemical, with its own enumerated threshold, is proposed to be stored or the stipulated threshold is altered by law. The Commissioner of Customs has erred in assigning another context to ‘threshold’, and, indeed, one not conceived for the impugned Rules, which we suspect is that of loss of consent when storage at, any point in time, slips below the threshold; that does not appeal to common sense and nor does it appear, from literal reading of the provisions, to be intended so either. A perusal of the documentation prescribed in the schedules makes it, and unarguably, clear that ‘maximum’ is with reference to ‘dangerous substance’ which has no meaning assigned to it under the Rules; understandably, crossing of that ‘maximum’ is a change requiring further approval of designated authority but there is no finding that the ‘chemicals’ in the impugned notice are, indeed, ‘dangerous substance’ requiring further consent.

16. As far as safety audit under rule 10 of the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989) is concerned, there is no dispute over it having been conducted for 2020 and 2021; there is no allegation that it was not conducted in the subsequent years. The reporting channel for the outcome of the audits is also set out in the Rules and there is no allegation that any proceedings for failure to conduct safety audits is underway. Indeed, all that the impugned order has to go on are the notices purportedly issued by Maharashtra Pollution Control Board, the designated authority for

other purposes, that have nothing to do with the Rules impugned in the appeal. That the notices were issued with not uninfluenced application of mind is evident from the correspondence on record; it would appear that, in the circumstances, the Maharashtra Pollution Control Board preferred to avoid instituting proceedings that could well come up for independent scrutiny of measurable offence. The reliance placed by the Commissioner of Customs on these unrelated proceedings to confirm the detriment to the appellants has most severely jeopardized the legality of the outcome in the impugned order. That those proceedings before the Maharashtra Pollution Control Board are not connected to the impugned Rules is further evident from scattered reference to such notice in the documents and submissions; the impugned Rules make no room for issue of notice save in instances of deficiency in documentation and the notices, that seem to have weighed with the Commissioner of Customs, could have no bearing on the continued operation of the appellants as ‘customs cargo service provider (CCSP)’ considering the tutelary and capacity building intent of the Rules. Thus, the legal foundation of the impugned order is seriously unsettled.

17. It can be seen that the legislative framework does not envisage the tax administration – patently lacking in domain competence and domain exposure to address and enforce environmental concerns – to undertake oversight of compliance with Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 (MSIHCR, 1989). That is

best left to the designated authorities under the relevant laws instead of claiming overarching authority merely from control of customs areas. The lack of jurisdiction and of domain competence precludes such inappropriate institution of proceedings. On this ground alone, the impugned order fails. Appeals are, accordingly, allowed.

(Order pronounced in the open court on 17/05/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*