* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 10.09.2020
Pronounced on: 24.09.2020

\+ **W. P.(C.) 5581/2016**

APEEJAY INFRA-LOGISTICS
PRIVATE LIMITED ...Petitioner

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Ashish Verma, Mr. Manish Srivastava and Mr. Hardik Vashisht, Advocates.

versus

UNION OF INDIA & ORS. ...Respondents

Through: Mr. Rakesh Kumar, CGSC with Mr. Ruchir Mishra, Mr. Ramneek Mishra, Advocates for Respondents No.1 & 2.
Mr. Amit Bansal, Senior Standing Counsel with Mr. Aman Rewaria and Ms. Vipasha Mishra, Advocates for Respondents No.3 & 4.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.

1. The Petitioner, a private Container Freight Station [*hereinafter referred to as* **'CFS'**] at Haldia, West Bengal, challenges Regulation 5(2) of the *Handling of Cargo in Customs Areas Regulations, 2009* and also impugns Revenue's demand for Cost Recovery Charges [*hereinafter referred to as* **'CRC'**] towards cost of the Customs staff posted at the station. Insofar as

the challenge to the Regulations is concerned, the same does not survive, in view of authoritative decision of this court in ***Allied ICD Services Ltd. Vs. Union of India and Ors.,*** 2018 SCC OnLine Del 10816:(2018) 364 ELT 59, wherein the impugned provision has been upheld. The said judgment is now pending challenge by way of a Special Leave Petition before the Supreme Court, however there is no stay against the same. The only remaining prayer in the present petition that merits consideration is the one that has been made in the alternative, impugning the demand raised by the respondents for recovery of CRC of customs employees posted at the Petitioner's station.

Brief facts:

2. The factual background giving rise to the present petition is that pursuant to a policy decision taken *vide* Circular No.128/95-Cus dated 14.12.1995, the appointment of custodians of ICDs/CFSs/ACCs/EPZs was opened to the private sector and standard guidelines were issued in this regard, with the aim to de-congest ports and establish custom clearance facility in the interior parts of the country. The ICDs/CFSs/ACCs/EPZs so established were to function akin any other port and their operators were appointed as custodians under Section 45 of the Customs Act, 1962.The above-referred 1995 Circular provided, *inter alia,* that custodians of the ICDs/CFSs/ACCs/EPZs premises (such as the Petitioner herein) were responsible to pay for the Customs personnel posted at such premises, and had to furnish an undertaking to this effect, agreeing to bear the costs of such staff. The relevant stipulation is extracted as follows:

> *"(10). Custodian shall bear the cost of the Customs staff, posted for the ICD/CFS/EPZ. The Commissioner of Customs shall decide the number of staff which is required to be posted in the facility considering the workload in the station. "*

3. Thereafter, on 17.10.1997, Respondent No.1 issued a Circular No.52/97-Cus, wherein the number of customs staff sanctioned to be posted at ICD/CFS was given. It was also provided therein that Customs staff for all new ICDs/CFSs was being sanctioned on a cost recovery basis.

4. Later, on 12.09.2005, a Circular No.F.No.434/17/2004–Cus. IV [*hereinafter referred to as* '**Exemption Circular'**] was issued for regularization of costs recovery posts at ICDs/CFSs that had completed two years of operation and achieved the performance benchmark. The said Circular reads as under:

"F.No.434/17/2004-Cus.IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs

Room No.227B, North Block,
New Delhi, 12th September, 2005

To,

All Chief Commissioners of Customs
All Chief Commissioners of Customs & Central Excise
All Chief Commissioners of Central Excise

Sir,

Subject: Cost recovery posts in respect of Customs staff posted in ICDs/CFs regarding.

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 purchased by ICUs / CFSs* : *7200 per annum for ICDs and 1200 for CFSs.*

(iv) *Bench mark at (1) to (3) shall be reduced by 50% for those ICDs/CFSs exclusively dealing with exports, as per staffing norms.*

2. The waiver of cost recovery charges would be prospective with no claim for post period Criteria would be applicable on actual performance of ICDs/CFSs.

3. Based on the performance of ICDs/CFSs in the Financial Year2003-04 and 2004-05, you are requested to provide the information as per enclosure in respect ICDs/CFSs falling under your. It may also be ensured that in respect of ICD/CFS for which regularization of posts are suggested, no cost recovery charges are under dispute or pending payment as on 31st August, 2005.

4. xxxx

Yours sincerely,

Enclosure: as above.

Sd/-
(Anupam Prakash)
Under Secretary to the Government of India"

5. On 17.03.2009, the Department of Revenue notified the *Handling of Cargo in Customs Areas Regulations, 2009*. Regulation 5(2) of the same reads as under:

*"5.**Conditions to be fulfilled by an applicant for custody and handling of imported or export goods in a customs area**. –*

(1) X X X X

(2) The applicant shall undertake to bear the cost of the Customs officers posted, at such customs area, on cost recovery basis, by the Commissioner and shall make payments at such rates

and in the manner prescribed, unless specifically exempted by an order of the Government of India in the Ministry of Finance;"

6. This was followed by a Circular dated 23.03.2009 through which the *Handling of Cargo in Customs Areas Regulations, 2009*were brought into effect. The said Circular, *inter alia,* stated that the charges in respect of Customs employees deployed at customs clearance facility would be exempted if the laid down norms are satisfied. The relevant portion of the said circular read as under:

"5. 3. The charges in respect of the Customs officers deployed at the customs clearance facility (ICD/CFS/port/airport etc.)are required to be paid by the Custodian, unless these have been exempted for an individual custodian by an order issued by the Ministry of Finance or by a circular or instructions issued by the Ministry of Finance [Regulation 5(2)].Payment of cost recovery charges in respect of ports and airports has been exempted for three categories of custodians specified in Circular No.27/2004-Customs dated 6. 4. 2004.It is clarified that these specified categories of custodians at ports / airports would continue to be exempt from the payment of charges for the customs officers deployed therein.

5. 4. X X X X

5. 5. ***As regards ICDs / CFSs, Government had taken a decision to waive the requirement of cost recovery charges to be paid by ICD / CFS, if they fulfil the laid down norms and are in existence for a consecutive period of two financial years. These norms include parameters such as the total number of import or export containers handled, the customs declarations filed for import or export, etc. Board's instructions vide D. O. letter F.No.A.11018/12/2008-Ad. IV dated 2. 7. 2008 refer in this regard. Accordingly, the eligible ICDs / CFSs which fulfil the laid down criteria are being considered for exemption from payment of cost recovery charges and specific orders in individual cases are issued by Ad. IV Section. These orders are being referred to as the orders issued by the Ministry of Finance under the Regulation 5(2)***."

(emphasis supplied)

7. On 13.08.2012, the Petitioner was granted approval to operate as a CFS at Haldia, West Bengal for two years *vide* Public Notice No.34/2012. During the period of 14.11.2012 to 31.12.2014, petitioner paid a sum of INR 1,83,82,420/- as CRC to the Revenue. Subsequently, the approval granted to the petitioner was renewed for five years *vide* Public Notice No.24/2014 dated 04.09.2014.

8. On 21.09.2015, the petitioner issued a letter to the Chief Commissioner of Customs, claiming eligibility for waiver from payment of CRC from 01.04.2015 onwards. On 03.11.2015, a communication was issued by the DGHRD whereby, as a one-time measure, waiver of CRC was granted to eligible facilities under certain circumstances as specified therein, and the Directorate General of Human Resource Development [*hereinafter referred to as* '**DGHRD'**] was authorized to deal with the request for waiver of CRC. It also provided that the conditions for grant of waiver shall be the same as provided in the Exemption Circular. The said communication dated 03.11.2015 read as under:

> *"Directorate General of Human Resource Development*
> *Customs & Central Excise*
> *Expenditure Management Wing*
> *C-4, Ircon Building, District Centre, Saket, New Delhi 110017*
>
> *F.No.8/B/28/HRD(EMC)/CRB/2014 pt.* *Date: 03. 11. 2015*
>
> *To*
>
> *The Chief Commissioner of Central Excise (All)*
> *The Chief Commissioner of Customs (All), and*
> *The Chief Commissioner of Customs (Preventive) (All)*

Sub:- Waiver from the payment of cost recovery charge in respect of ICDs/CFSs, Seaports, Air Cargo Complexes, Courier Terminals, Diamond Plazas, etc.- reg.

Madam/Sir,

Issue of waiver from payment of cost recovery charge in respect of ICDs/ CFSs, Seaports, Air Cargo Complexes, Courier Terminals, Diamond Plazas, etc. was under consideration of the Board for some time. The matter was examined by the Board and with the approval of the competent authority, it has been decided that as a onetime measure, the Chief Commissioner of Customs/Central Excise concerned are authorized:-

(i) To exempt cost recovery charges for eligible facilities for posts that were not sanctioned. The exemption shall be for staff deployed. Excess staff, if any, deployed over and above the staffing norms, shall be withdrawn but without causing dislocation in work;

(ii) exemption from cost recovery charges for eligible facilities for which posts were sanctioned would be for the entire staff sanctioned (for which cost recovery charges were taken) even if it is in excess of the staffing norms fixed subsequently, in2013; and

(iii) at eligible facilities having both sanctioned and non-sanctioned posts, the exemption of cost recovery charges for non-sanctioned posts would be dealt with as per decision at (i)above and for sanctioned posts, it would be as per decision at(ii) above.

2. ***The performance benchmark and conditions for grant of waiver from the payment of cost recovery charges shall be same as provided in Board's letter F.No.434 / 17 /2004-Cus. IV dated 12.09.2005 (for ICDs/CFSs) and Board's Circular No. 16/2013-Cus dated 10.04.2013 (for Seaports, Air Cargo Complexes, Courier Terminals, Diamond Plazas, etc).***

3. It is reiterated that the above categories at para -1 is only a onetime measure. Regular requests for waiver of cost recovery

charges would be processed by this Directorate as per extant provisions.

4. Information on grant of waiver of cost recovery charges in respect of above three categories (as stated in para-I) may also be sent in the following proforma, to this Directorate latest by 31.12.2015. It is also requested to send soft copy of aforesaid information (in MS Excel format) by email [xxxxxxxx].

S. No.	*Facilities granted waiver of cost recovery charges in category (i)*		*Facilities granted waiver of cost recovery charges in category (ii)*		*Facilities granted waiver of cost recovery charges in category (iii)*	
	Name of facility	*Date of grant of waiver*	*Name of facility*	*Date of grant of waiver*	*Name of facility*	*Date of grant of waiver*

5. This issues with the approval of DG, HRD.

Yours faithfully,
Sd/-
(Rakesh K. Mathur)
Assistant Director"

9. *Vide* letter dated 18.02.2016 [*hereinafter referred to as* **'the impugned letter'**], the Additional Commissioner of Customs rejected petitioner's request for waiver, on the ground that the petitioner did not meet the eligibility criteria, in terms of the Exemption Circular. The letter dated 18.02.2016 is quoted below:

"Government of India
Office of the Chief Commissioner of Customs,
Kolkata Zone

15/1, Strand Road, Customs House, Kolkata-700001
Telephone No. (033) 2242-1173, Fax No.(033) 2231-3289,
E-mail: xxxxxxxx

F. No. I(16)-05/CCC/KOL/2016/3322
Date:18/02/2016

To,

M/s. Apeejay Infralogistics Pvt. Ltd.,
Xxxx
Xxxx

Sir,

Subject: Waiver from the payment of cost recovery charge in respect of ICDs/CFSs-reg.

In pursuance of DGHRD, New Delhi's letter under F.No.8/B/28/HRD(EMC)/CRB/2014 pt. dated 03.11.2015, this office has initiated a process for waiver from the payment of cost recovery charge in respect of eligible ICD/CFSs.

As per records, the year wise workload handled by you is asunder:

Financial year	***No.of TEUs***	***No.of BE/SB processed***
2013-14	*5709*	*612*
2014-15	*5218*	*602*
2015-16 (upto November'15)	*3126*	*284*

It appears that, you have not fulfilled the performance benchmark in terms of CBEC's letter F.No. 434/17/2001-Cus. IV dated 12.09.2005 and liable for rejection for waiver from the payment of cost recovery charges.

Your views, if any, may please be intimated to the undersigned in writing within 3 (three) days to enable this office for further necessary action.

Yours faithfully,
Sd/-
Additional Commissioner of Customs (CCO & CCA)"

10. In response to the above, the petitioner sent a communication dated 22.02.2016 to the respondentsNo.3 and 4 seeking details with respect to the

provision under which petitioner's claim for exemption had been rejected. Shortly thereafter, on 04.04.2016, the Deputy Commissioner of Customs raised a demand of CRC upon the petitioner for the period 01.01.2015 to 31.03.2016 amounting to INR 1,18,24,175/-.Aggrieved with the aforesaid demand, the petitioner filed the instant petition challenging the decisions dated 18.02.2016 and 04.04.2016 of the respondents No.3 and 4.

Proceedings in the present petition:

11. On 03.06.2016, when the present petition came up for hearing, this Court directed that no coercive action be taken against the petitioner. Subsequently, vide order dated 21.01.2019, the said interim order was made absolute.

12. During the pendency of the present proceedings, the Assistant Commissioner of Customs issued further demands for CRC. One such letter was issued on 25.10.2017, raising a demand of INR 3,93,01,017/- for the period from 01.01.2015 to 31.12.2017. This, according to the petitioner, was inclusive of the previously demanded sum of INR 1,18,24,175/- for the period 01.01.2015 to 31.03.2016, which is already the subject matter of the earlier demand dated 04.04.2016.

13. Thereafter, from 29.05.2018 onwards, the parties exchanged several communications whereby the departments ought deposits of CRC from the petitioner, and in turn, the petitioner sought complete waiver of CRC for its CFS at Haldia. This has also prompted the petitioner to file further writ petitions challenging the demands raised for the period subsequent to 31.03.2016.

14. In the interregnum, this Court delivered the judgment dated 27.08.2018 in ***Allied ICD Services Ltd. Vs. Union of India and Ors.*** *(supra)* upholding Regulation 5(2) and the legality of levy and collection of CRC for customs officers.

15. Relying upon the aforesaid decision, Mr. Bansal, learned Senior Standing Counsel for respondents No.3 and 4 submitted before the court that now, only the Prayer '*D' : "In the alternative and without prejudice, issue writ in the nature of certiorari or any other form as considered proper by this Hon'ble Court, quashing the letter dated 18.02.2016, whereby the Respondent has refused to waive cost recovery of custom staff posted at CFS Haldia, West Bengal contrary to letter dated 03.11.2015 issued by Director General of Human Resource Development read with circular dated letter dated 12.09.2005 issued Respondent No. 1* " (sic) required consideration. This contention was recorded in the proceedings dated 21.01.2019.

16. Later, when the present petition came up for final hearing, a question arose regarding interpretation of one of the clauses of the Exemption Circular that stipulated that the waiver was a one-time measure. Petitioner contended that the waiver of CRC was being granted to the eligible entities, till date. Mr. Bansal, learned Senior Standing Counsel for the Revenue, upon instructions from Respondents 3 and 4, clarified, that the Exemption Circular and the letter dated 03.11.2015, issued by the DGHRD for grant of waiver from payment of CRC, continue to apply, subject to fulfilment of performance benchmark, to seek waiver on a year-to-year basis. This was recorded in the proceedings dated 28.08.2020.

The Controversy:

17. In view of the above-noted stand of the parties, the controversy in the present petition is now substantially narrowed down. The challenge on the *vires* of the Regulations, as noted above, is no longer subsisting. We have to now only examine the merits of the remaining prayer in the petition, challenging the revenue's demand of CRC. On this issue, respondents contend that the petitioner has not met the performance benchmark stipulated in the exemption Circular. From the record, it emerges that concededly the petitioner has fulfilled only one of the criteria stipulated *i.e*. handing the number of TEUs, and has patently not fulfilled the other criterion in respect of the number of Bill of Entry /Shipping Bill [*hereinafter referred to as* **'BoE/SB'**] processed for the years 2013-14 and 2014-15, as per the Impugned Letter dated 18.02.2016. The petitioner however contends that notwithstanding the above status, it is still entitled to the benefit of the Exemption Circular. The bedrock of Petitioner's contention revolves around the construction and interpretation of the conditions specified in the Exemption Circular. According to the petitioner, meeting the benchmark criteria of Handling TEUs [*under Clause 1(ii) of the Exemption Circular*] is sufficient for claiming benefit under the Circular. The other benchmark of processing of BoE/SB [*under Clause 1(iii) of the Exemption Circular*] is to be construed disjunctively and would not apply. Thus, the principal issue before us is whether Petitioner fulfils the eligibility criteria for availing the benefit of exemption or waiver of CRC in terms of the Circulars issued by the Revenue.

Contentions of the Parties:

18. Mr. Dayan Krishnan, learned Senior Advocate appearing on behalf of the petitioner, argued that the petitioner is entitled to exemption, having achieved the performance benchmark of handing 1200 TEUs in the given Financial Year as required in clause 1(ii) of the Exemption Circular. He argued that the petitioner's request for waiver has been rejected on a totally misconceived interpretation of the benchmark specifications prescribed in the Exemption Circular. He contended that Respondent's insistence on simultaneous satisfaction of both the preconditions as mentioned in clause 1(ii) and (iii) is contrary to the object of the exemption circular. The Exemption Circular was issued to ensure that after the initial period of two years, the petitioner would get a waiver of CRC (incurred on account of the customs staff) on the basis of the performance benchmark prescribed in Clause 1(ii). The petitioner had accomplished the said requirement, and handled TEUs > 1200, consistently for all the years from 2013 to 2020. To validate this claim, Mr. Krishnan relied upon the figures tabulated below:

Financial Year	***Criteria in terms of Regulation***	***Actual TEUs handled by the Petitioner***
2013-2014	*1200 TEUs*	*5621 TEUs*
2014-2015	*1200 TEUs*	*5218 TEUs*
2015-2016	*1200 TEUs*	*4203 TEUs*
2016-2017	*1200 TEUs*	*3219 TEUs*
2017-2018	*1200 TEUs*	*2368 TEUs*
2018-2019	*1200 TEUs*	*2355 TEUs*
2019-2020	*1200 TEUs*	*3497 TEUs*
2020-2021 (April & May 2020)	*1200 TEUs*	*1892 TEUs*

19. Mr. Krishnan contended that since the regulatory criterion of handling of >1200 TEUs for each Financial Year, as prescribed in the Exemption Circular, had been duly met, the Petitioner should get the waiver of CRC, irrespective of its failure to attain the benchmark figure prescribed in Clause 1(iii) for processing of BoE/SB. Mr. Krishnan submitted that a plain and ordinary meaning of the benchmarks should be adopted. There was nothing in the Exemption Circular to indicate that the petitioner was required to satisfy more than one of the benchmarks prescribed in it. He relied upon Clause 5.5 of the Circular dated 23.03.2009 and placed emphasis on the punctuation mark (,) appearing in the second sentence of the said Clause, to state that the comma between the norms indicated that same was disjunctive and not conjunctive, and thus ought not to be read together. The second sentence is replicated below for quick referral:

> "*5.5. (…) These norms include parameters such as the total number of import or export containers handled, the customs declarations filed for import or export, etc.(…)"*

20. Mr. Krishnan further argued that the Respondents' interpretation of simultaneous satisfaction of both benchmarks, as discernible from the stand taken in the Impugned Letter dated 18.02.2016, was irrational and would render Clause 1(ii) of the Exemption Circular meaningless. To support his postulation, he relied upon the workload data available in the records of the Respondents. By referring the said data, he endeavoured to demonstrate that one BoE/SB usually pertains to more than one TEU and exhibits a ratio of 1:4 between the TEUs and BoE/SB. Applying this ratio, he submitted, would mean that processing 1200 BoE/SB would correspond to 4800 TEUs. On that proportionate basis, he argued that if the aforesaid condition is viewed

as imperative, then the requirement of 1200 TEUs as prescribed in Clause 1(ii) would be rendered meaningless. He thus contended that Clause 1(iii) [pertaining to processing of 1200 BoE/SB] cannot be construed to be a mandatory condition. He submitted that endeavour should be made to construe provisions harmoniously and the interpretation given by the respondents ought not to be accepted.

21. Per contra, Mr. Amit Bansal, Learned Senior Standing Counsel appearing on behalf of the respondent argued that the petitioner's request for waiver of payment of CRC has been rightly rejected in light of the benchmark stipulated in Clause 1(iii) of the Exemption Circular issued by the Central Board of Excise and Customs. He submitted that it is clear from the reading of the two conditions in Clause 1 that not just one, but both the conditions have to be satisfied concurrently, in order to be eligible to claim waiver. He claimed that the petitioner was well aware of these conditions before they applied for setting up of the CFS. Since the workload data exhibits that petitioner had fulfilled only one of the criterion i. e. the required number of TEUs, it is not eligible for grant of exemption. Mr. Bansal also referred to a certain file noting of the Ministry of Finance [*hereinafter referred to as* '**MoF'**] submitted before this Court *vide* affidavit dated 22.07.2019 which records the discussion on the said Circular. He submitted that the said file noting clearly suggests that the conditions regarding number of containers and number of documents have to be satisfied simultaneously. Besides, he also submitted that the exemption circulars have to be strictly construed in order to claim benefit thereunder. Petitioner's proposition is contrary to the settled position in law relating to interpretation of exemption notifications.

22. In rejoinder thereto, Mr. Krishnan rebutted the contentions of Mr. Bansal and submitted that the Exemption Circular does not state that all conditions / benchmarks have to be simultaneously satisfied, in the absence whereof, endeavour should be made to construe the provisions of exemption circular harmoniously so that the intent is not frustrated. With respect to the file noting relied upon by respondent No.3, Mr. Krishnan submitted that the said file noting was of a date subsequent to the Exemption Circular, and despite specific orders of the Court, the Respondents have been unable to produce any file noting of a date prior to the Exemption Circular, which would contain deliberations or reasons for the incorporation of such benchmarks in the Exemption Circular. He thus argued that an adverse intent should be drawn against the respondent in this regard. In support of its contentions, the Petitioner has cited ***Chhattisgarh State Co-operative Bank Maryadit v. Zila Sahkari Kendriya Bank Maryadit,*** 2020 SCC Online SC 278, ***J.K. Cotton Shipping and Weaving Mills Co.Ltd. v. State of Uttar Pradesh and Ors***, AIR 1961 SC 1170, ***Ajeet Singh Singhvi v. State of Rajasthan***, 1991 Supp (1) SCC 343, ***Kantaru Rajeevaru v Indian Young Lawyers Association***, 2020 SCC OnLine SC 692, and ***Mohd. Shabir vs State of Maharashtra***, (1979) 1 SCC 568.

Analysis:

23. The cost recovery charges in the present case are in the nature of fee incurred by the government for the services rendered by Customs staff to the custodian of the ICDs/CFSs. [See ***Mumbai International Airport Private Ltd. v. The Union of India***, 2014 (310) ELT 3, and ***Allied ICD Services*** (*supra*)]. The concept of 'Cost Recovery' has been elaborated upon by the

Andhra Pradesh High Court in the case of ***GMR Hyderabad International Airport Limited vs. CBEC, New Delhi***, 2014 (299) ELT 320 (A.P.), while dealing with Handling of Cargo Customs Areas Regulation, 2009, as follows:

> "12.*The concept of cost recovery is generally associated with the service rendered by a person or a set of persons or a public organization to another, which service is not otherwise liable to be provided*."

24. The levy or quantum of CRC is not in question here. The controversy in the present case surrounds the interpretation of the Exemption Circular. This is to be read alongwith letter of the DGHRD dated 03.11.2015 whereby waiver is offered upon satisfaction of the benchmark performance criteria laid out in the Exemption Circular. There is also a Circular dated 23.03.2009 where again the issue of exemption from recovery of CRC has been dealt with in clauses 5.3 and 5.5 (*extracted supra*). These three documents form the core of the issue in the present case.

25. A bare reading of the Exemption Circular makes it amply clear that in order to avail the benefit of exemption/waiver from payment of CRC, the CFS has to fulfil certain conditions laid down therein, which are based on achievement of prescribed performance benchmark. These conditions along with benchmarks are enumerated as under:

(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 purchased by ICUs / CFSs	**:**	*7200 per annum for ICDs and 1200 for CFSs.*

(iv) Bench mark at (1) to (3) shall be reduced by 50% for those ICDs/CFSs exclusively dealing with exports, as per staffing norms.

26. The evaluation of the performance of the Petitioner is based primarily upon two criteria: firstly, on the number of containers/TEUs handled by CFS as given in Clause 1 (ii), and secondly, on the number of BoE/SB processed by CFS as given in Clause 1 (iii).The simple question that hinges before us is whether these criteria at Clauses 1 (ii) and 1 (iii) were to be satisfied simultaneously, or whether the satisfaction of any one of the Clauses would suffice, in order to make the Petitioner eligible for waiver of CRC.

27. As stated previously, the petitioner contends that the conditions enumerated above should be read disjunctively, and that a contrary interpretation would be irrational and render Clause 1(ii) meaningless. To support this argument, the petitioner had relied upon work load data available with the respondents, qua the petitioner, as indicated in the Impugned Letter dated 18.02.2016. Relevant portion from the impugned letter is reproduced below:

Financial Year	**No. of TEUs**	**No. of BoE/SB processed**
2013-14	*5709*	*612*
2014-15	*5218*	*602*

28. This data reflects that, for instance, in the year 2014-15, while the petitioner had processed 5218 TEUs, in contrast, it had only processed 602 BoE/SBs. Upon analysis of the data given, the petitioner has computed that for one BoE/SB, there were 9 TEUs i.e. to say, a ratio of 1:9. On this basis, it is implied by the petitioner that one BoE/SB pertains to more than one TEU. To buttress this contention, the petitioner also relied upon data from Kolkata

Port Trust which indicates a ratio of 1:4 i.e. for one BoE/SB there are minimum of 4 TEUs. On the strength of the aforesaid workload data, it was argued before us that, even if the lower ratio of 1:4 was applied to the present factual matrix, a minimum requirement of 1200 BoE/SB would translate into 4800 TEUs. By this analysis, it was argued by the petitioner that if the requirement of 1200 BoE/SB is fulfilled by a custodian, then requirement of 1200 TEUs as prescribed in Clause 1(ii) would be rendered meaningless as it would automatically stand fulfilled.

29. This, in our view, is an incorrect and distorted way to look at and interpret the exemption criteria laid down in the said Circular. The purpose behind the exemption clauses is that those ICD/CFS which achieve the necessary performance benchmark are not burdened with CRC. In the absence of the conjunction 'or' between the conditions, it cannot be suggested that the aforesaid criteria have to be applied in the alternative, as sought to be presented by the petitioner. Further, the benchmark at Clause 1 (iv) makes it clear without any ambiguity that the benchmark at Clauses 1(ii) and (iii) have to be taken into consideration cumulatively in order to be eligible to claim exemption or waiver of CRC. In our view, the benchmarking is evaluated both on the basis of number of containers handled by ICD/CFS, as well as the number of BoE/SB processed, and both these conditions need to be satisfied simultaneously and not just one of them in order to be eligible to claim waiver from the payment of CRC.

30. Both criteria envisage different parameters of performance by an ICD/CFS operator. Clause 1 (ii) envisaged number of and volume of goods handled (container/TEUs), whereas, Clause 1 (iii) envisaged the number of

documents and volume of business handled. As pointed out by Mr. Bansal, there can be a situation where a document (BoE/SB) may contain goods that require more than one container, but conversely, there can also be an eventuality where a container may contain goods that are subject matter of more than one document. This would largely depend on the nature of goods. Thus, there can be a situation when there would be no correlation between the two. Mr. Bansal has further explained that a container is provided by the shipping line and it is for them to determine how to extract them. He submits that for less bulky goods, there might be more than one BoE/SB container. This situation, as portrayed by Mr. Bansal, cannot be ignored. There can be circumstances where there may be more than one BoE/SB per container. It is for this reason that the benchmarking criteria has been prescribed in such a manner that the performance can be evaluated on dual parameters for deciding the eligibility for exemption from CRC. The same is also evident on the basis of the file noting which have been placed on record by the respondent, a perusal of which throws light upon the rationale behind the issuance of the Exemption Circular. The relevant portion from file noting/ official records *F.No.434/17/2004-Cus. IV* of the CBEC, with the Subject: *'Waiver of cost recovery charges for customs staff posted in ICD/ CPS'* is extracted as follows:

> *"(iii) Benchmark criteria on actuals:*
>
> *The benchmark criteria would be applied on the actual performance of the ICD/CFS during the period 2003-04 and 2004-05 in terms of the no. of containers handled and no. of customs documents processed, details of which is to be verified by the jurisdictional Commissioner concerned and certify the same. As the projected or estimated performance is made by an ICD/CFS for different purpose i. e., to obtain approval for its establishing at the*

Initial stage before start of the operations, this is not relevant for the purpose of regularization of cost recovery posts.

31. Also for the Subject '*Norms study of Inland Container Deports (ICD) and Container Freight stations (CFS) – Regarding*', the noting is extracted as follows:

"4.In order to prescribe benchmark criteria, a sub-group was formed. The sub-group inter alia took into account the instructions contained in Circulars No.128/95-Cus dated 14.12.1995, Circular No.52/95-Cus dated 17.10.1997. The sub-group observed that quantum of revenue would not have much impact on the workload of ICDs/CFS and thus the requirement of staff should be worked out based on the workload i.e. the container traffic and the documents processed. Considering all factors, the sub-group recommended the following criteria of workload for regularization of cost recovery posts in ICDs/CFS:

(v)	*No. of containers handled by ICD*	**:**	*7200 TEUs per annum.*
(vi)	*No. of containers handled by CFS*	**:**	*1200 TEUs per annum.*
(vii)	*No. of BE or SB purchased by ICUs / CFSs*	**:**	*7200 per annum for ICDs and 1200 for CFSs.*
viii)	*Bench mark at (1) to (3) shall be reduced by 50% for those ICDs/CFSs exclusively dealing with exports, as per staffing norms.*		

5. <u>The sub-group expressed that number of containers handled by ICSs/CFS and the documents processed should be simultaneously satisfied to justify the regularization of posts.</u>"

32. According to the petitioner's written rejoinder submissions, the rationale behind such incentivization was to promote the import/export of goods, to encourage business efficacy by targeting increase in actual business of

importing/exporting of TEUs, and not the quantum of paper-work required for the same. Firstly, we must point out that this is an inference of the Petitioner which lacks material foundation. Secondly, this argument is wholly misconceived and self-contradictory. We cannot interpret business efficacy in the manner that the Petitioner contends. We also cannot agree with the Petitioner's rationale that actual business is only TEUs, and not the documents i.e. BoE/SB, or that efficacy will always be achieved when more TEUs are imported/exported in one BoE/SB, and not when the same TEU is imported/exported through multiple BoEs/SBs. If we accept this contention, it would mean that those CFS which have higher volume of paper-work should be deemed as inefficient and be denied the exemption, which cannot be correct. Clause 1 (iii) of the Exemption Circularis not to be rendered dead letter or meaningless. In our opinion, the quantum of documentation *vis-a-vis* TEUs would be driven by the requirements of each business, and it is not for the court to construe a provision merely on the perceived understanding of some data analysis. Both conditions foresee different parameters of evaluating the performance of CFS. The statistical ratio cannot be used to interpret the provision. A converse situation can also occur when one document may relate to multiple containers. Thus, criteria (ii) and (iii) of clause 1 are independent of each other and are to be met independently. It is not for the court to side with an interpretation on the ground that it makes more business sense.This Court cannot sit in judgment over the commercial or business prudence of a governmental decision, unless the decision is in clear violation of any statutory provisions or perverse or for extraneous considerations or improper motives. It is not the prerogative of this court to intervene in whether the requirement of 1200 BoE/SB renders the

requirement of 1200 TEUs toothless or is commercially unsound. The threshold for seeking exemption is not met in the present factual matrix. The benchmarking parameters are to be applied cumulatively and not disjunctively.

33. The petitioner has contended that the plain and ordinary meaning of the benchmark shows that each benchmark is a separate criterion and there is nothing in the Exemption Circular to indicate that the petitioner was required to simultaneously satisfy more than one benchmark prescribed. On the basis of the above discussion, we are unable to agree with this interpretation of the petitioner. Furthermore, in our opinion, this viewpoint is flawed because we cannot read something that does not emerge from a plain reading of the exemption circular. The bare reading of the provision leads to a conclusion that the conditions or the performance benchmarks are required to be fulfilled simultaneously. We cannot read any requirement to the contrary. On first principles, the court would interpret the provision as it manifests on a plain reading. Only if there is some ambiguity, vagueness or absurdity, would the occasion arise for interpretation for the court. In the present case, we find that the threshold requirement for venturing into the arena of interpretation by applying the suggested principle of harmonious construction is not met.

34. We also find the emphasis on the comma punctuation mark (,) used in Clause 5.5 of the Circular dated 23.03.2009 to be misdirected. The stress given to this separator is entirely out of context. The surrounding words both preceding andsucceeding the comma have to be read together to give a

complete meaning. The complete sentence reads as-*"These norms include parameters such as the total number of import or export containers handled, the customs declarations filed for import or export, etc"* The sentence expressly uses the expression "such as", and then mentions some of the parameters by way of illustration or example, separated with the use of a comma, and followed by the word 'etc'. This makes it clear that the comma has been merely used to separate the descriptive parameters, which are being mentioned inclusively. It is also obvious that these are a few of the parameters, which have been illustrated, and there may be more. All of the above makes it abundantly clear that the sentence cannot be construed to mean that the parameters, as separated by the comma, are to be read disjunctively to imply satisfaction of individual parameter separate from the rest.

35. We would also like to note that on a query by this Court, Mr. Bansal has confirmed that these parameters have been consistently applied by the respondent across the board for granting waiver from CRC. The petitioner does not contradict this statement and nothing has been placed on record to show that there has been any pick-and-choose policy adopted by the respondents for granting exemption form CRC.

36. Lastly, we also do not find any merit in the contention of the Petitioner that file noting dated 04.08.2006, cannot be used to explain the rationale behind the language used in the Exemption Circular, on account of the noting being made after the date of issue of the Exemption Circular. The file noting was prepared pursuant to certain queries raised by the Finance Minister, minuted in the noting as "*(1) Will the cost recovery be prospective,*

i.e. after date of issue or orders? (ii) Is it ensured that no claim for past period (i.e. from date of establishment of ICD/CFS) will be made or entertained? (iii) Is It correct to infer that the benchmark will apply to actuals and not on the basis of projections made at the time of establishment of ICD/CFS?". The noting reiterates the rationale behind the concept of exemption. Therefore, in our opinion, the noting, though subsequent to the Exemption Circular, is still relevant in order to gauge the intent of the Exemption Circular.

37. At this juncture, we would also like to refer to the verdict given by the Supreme Court relating to tax exemptions in the case of ***Commissioner of Customs (Import), Mumbai vs. Dilip Kumar and Company & Ors.,*** (2018) 9 SCC 1, wherein, the Supreme Court examined several precedents cited therein and held that the charging, computation or exemption clause in matters of every tax statute involving dispute as to interpretation, at the threshold stage, have to be interpreted strictly. The dispute in the said case concerned the classification of goods under the Customs Tariff Act, 1975. The respondent therein contended that they were eligible for concessional rate of duty on the basis of wider interpretation given to the description of goods specified therein. The revenue however controverted the claim and contended that the concession claim was incorrect and imported product was not covered under the notification. The Supreme Court also had the occasion to examine its earlier decision in the case of ***Sun Exports Corporation vs. The Collector of Customs Bombay*** (1997) 6 SCC 564. It was observed that the afore-noted decision rendered in the 1997 case was in conflict with the position of law and was therefore, overruled. The Court then held that: *"exemption notification should be interpreted strictly; the burden of proving*

applicability would be on the assessee to show that his case comes within the parameters of the exemption Clause or exemption notification". The Court further observed that in the case of ambiguity in taxing liability statute, the benefit should go to the subject/assessee, but the situation would be different while interpreting tax exemptions, in the following words: *"thus we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/ assessee. But, **in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue***." The case law cited by the Petitioner is distinguishable on facts and also has no relevance to the present case. Keeping the aforesaid principles in mind, we have no hesitation to hold that the petitioner had failed to satisfy all the conditions for becoming eligible for the exemptions.

38. In view of the above, there is no merit in the present petition in respect of the surviving prayers made in the petition, noted hereinabove. Dismissed. The interim order dated 3rd June, 2016, as confirmed *vide* order dated 21st January 2019, stands vacated.

SANJEEV NARULA, J

MANMOHAN, J

SEPTEMBER 24, 2020
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