



# LITIGATION



## ELP Tax Litigation: Update



### HON'BLE DELHI HIGH COURT DECISION IN PETITIONS FILED BY IMPORTERS/EXPORTERS SEEKING WAIVER OF PENAL DEMURRAGE CHARGES AND DETENTION CHARGES DURING THE PERIOD OF LOCKDOWN DUE TO COVID 19

**Polytech Trade Foundation v/s Union of India and others.**

#### FACTS

- Consequent to COVID-2019 pandemic, the Central Government announced a nationwide lockdown in March 2020. The same caused considerable disruption in the movement of goods. To an extent, this also affected the movement of cargo. Services provided by a Container Freight station (CFS) were declared as an essential service by the Central Government during the Lockdown. Various instructions, advisories and circulars were issued by Ministry of Shipping (MOS), Directorate General of Shipping (DGS) and Central Board of Indirect Taxes and Customs (CBIC), respectively wherein CFSs, ICDs and Shipping lines were directed/advised to waive the penal detention charges and ground rent, for the period of lockdown imposed due to COVID-19.
- Various petitions were filed pan India seeking implementation of circulars issued by the MOS/DGS and CBIC and directions against the CFSs, ICDs and Shipping lines to not charge any ground rent or detention charges. The matter was ultimately heard by the Supreme Court and all petitions pending pan India were transferred to Delhi High court for final hearing.

#### ISSUE BEFORE THE HON'BLE HIGH COURT

- Whether the petitioners, were entitled for waiver of penal demurrage charges and detention charges which were due as per the contract between the parties i.e Petitioners and CFSs, ICDs, Shipping lines as the case may be, by virtue of instructions, contained in Office Orders and Circulars issued by MOS,DGS and CBIC?
- Whether the instructions, office orders, circulars issued by the MOS, DGS and CBIC entitle all importers and exporters to amnesty as sought, across the board?

## FINDINGS OF THE HON'BLE HIGH COURT

The Hon'ble High Court while dismissing the Petitions filed by the Petitioners gave various key findings on whether the MOS, DGS or CBIC, as the case may be, have powers under the Disaster Management Act, Merchant Shipping Act, Major Port Trust Act or the Customs Act have powers to interfere in contractual matters and direct one party to not charge/levy charges that it is entitled to charge under a contract. Some key findings are summarized herein below:

- Placing reliance on law laid down by the Hon'ble Supreme Court in case of **Small Scale Industrial Manufacturers Association**<sup>1</sup> and **Indian School**<sup>2</sup> in relation to Disaster Management Act, 2005 (Disaster Management Act), the Disaster Management Authorities, or the Government, cannot issue directions in respect of economic aspects of legitimate subsisting contracts or transactions between two private individuals with which the State has no direct causal relationship, especially when the determination of compensation/cost is the prerogative of the supplier or manufacturer of the goods or provider of services. The Disaster Management Act is not a panacea for all difficulties, much less difficulties which are not directly concerned with disaster management as such.
- Neither does the Board of Trustees, nor does the Tariff Authority for Major Ports (**TAMP**), possess the power or authority to regulate, or interdict, the collection of charges by ICDs, CFSs or shipping lines, against storage of goods or failure to return the goods within the free period. The fixation of rates by the TAMP does not include, as a sequitur, the power to regulate collection of charges at such prefixed rates.
- Section 111 of the Major Port Trusts Act, 1963 empowers the Central Government to issue directives to the Board or to the TAMP. Such directives cannot, however, require the Board or the TAMP to perform any act which, by law, it is not authorized to perform. The jurisdiction vested by Section 111 is strictly delimited to issuance of directions to the Board of a Major Port or to the TAMP and the same cannot be invoked to issue directions to CFSs, ICDs or shipping lines.
- Section 7 of the Merchant Shipping Act, 1958 empowers the DGS to exercise the power, authority or jurisdiction vested in the Central Government under the said Act. Merchant shipping Act does not provide for powers to interfere with the levy or collection of charges, penal or otherwise, by CFSs or ICDs, for storage of the goods of importers or exporters in their premises.
- Neither the provisions of Customs Act, 1972 nor Handling of Cargo in Customs Area Regulations, 2009, regulate charging of detention charges or any other charges by the Customs Cargo Service provider from its customers, except to the extent of Regulation 6(1)(l), which prohibits charging of rent or demurrage by the Customs Cargo Service provider on goods which are seized, detained or confiscated which provision is not under consideration in the present Petitions.

## JUDGEMENT

- Given the above, the Hon'ble High Court dismissed the Petitions filed by the Petitioners seeking waiver from detention charges and demurrage charges basis the various orders/advisory issued by MOS, DGS and CBIC during the lockdown period.

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<sup>1</sup> 2021 SCC OnLine SC 246

<sup>2</sup> 2021 SCC OnLine SC 359

## ANALYSIS AND CONCLUSION

- The decision of Hon'ble High Court will have far reaching implications especially in cases where Petition is filed for private dispute basis some government direction/instruction. The said decision will apply to cases where writ petitions are filed seeking reliefs against private parties in guise of seeking mandamus/direction against a government authority.
- The said decision of Hon'ble High Court is in line with the decision of Hon'ble Supreme Court in the case of Indian School (supra) and further reaffirms the proposition that Government, cannot issue directions in respect of economic aspects of legitimate subsisting contracts or transactions between two private individuals with which the State has no direct causal relationship, especially when the determination of compensation/cost is the prerogative of the supplier or manufacturer of the goods or provider of services.
- Furthermore, the Hon'ble High Court vide the said decision has made it clear that directions issued without authority of law cannot be implemented by way of Mandamus.
- The Disaster Management Act cannot be invoked as a panacea or cure for all difficulties, much less difficulties which are not directly concerned with disaster management as such.

We hope you have found this information useful. For any queries/clarifications please write to us at [insights@elp-in.com](mailto:insights@elp-in.com) or write to our authors. We would like to thank the following people for their valuable contribution:

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