

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

CUSTOMS Appeal No. 10940 of 2019

[Arising out of Order-in-Original No OIO-KND-CUSTOM-000-COM-17-2018-19 dated 19.03.2019 passed by Commissioner of Customs, Kandla]

Goodearth Maritime Limited

.... Appellant

M/s Jakhau Salt Company Pvt Ltd, Salt Field, Jakhau,
Taluka Abdasa, KACHCHH, GUJARAT

VERSUS

Commissioner of Customs, Kandla

.... Respondent

Custom House, Near Balaji Temple,
Kandala, Gujarat

APPEARANCE :

Shri Naresh Satwani, Consultant for the Appellant
Shri S.N. Gohil, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

FINAL ORDER NO. A/10788 / 2020

DATE OF HEARING : 21.11.2019

DATE OF DECISION : 12.03.2020

RAMESH NAIR :

The Private Jetty of M/s. Goodearth Maritime Limited a Sub-Licensee of M/s. Well Brines Chemicals Limited (now M/s. Jakhau Salt Company Pvt. Limited), the original Licensee, situated at Salt Field, Jakhau Taluka Abdasa, Kutch, was declared as a Landing Place under Section 8(a) of Customs Act, 1962, by the Commissioner of Customs, Ahmedabad, vide Notification No. 08/2002/CC dated 23.04.2002 and M/s. Goodearth Maritime Limited was appointed as Custodian of the goods meant for loading of salt for export/import and costal movement under Section 45(1) of the Customs Act, 1962 vide Notification No. 09/2002/CC dated 23.04.2002, subject to fulfilment of various conditions mentioned therein.

2. A letter bearing F. No. VIII/48-06/CUST(T)/2001-02 dated 05.05.2003 was issued by the Assistant Commissioner of Customs, Bhuj Division, Kandla, to M/s. Goodearth Maritime Limited, Jakhau, allowing them to operate / continue their jetty on payment of Merchant Over Time (MOT) charges as per Customs (Fee for Rendering Services of /Customs officers) Regulations, 1998 whenever they require services of /Customs officers of their jetty till separate posting of Customs staff has been made on Cost Recovery Basis. On the basis of the aforesaid letter, M/s. Goodearth Maritime Limited, Jakhau, was paying MOT charges for the services rendered by the Customs officers at their jetty.

3. A show cause notice bearing No. S/20-18/08-Appg (Gen) dated 20.03.2018 and its corrigendum/addendum dated 26.02.2019 were issued to the appellant M/s. Goodearth Maritime Limited, Jakhau, who are Customs Cargo Service Provider" (*herein after referred to as 'the CCSP' for the sake of brevity*). In the notice, it was contended that as per Regulation 2(b) of the Handling of Cargo in Customs Areas Regulations, 2009 (*herein after referred to as 'HCCAR', 2009*) in terms of Notification No. 26/2009-Cus (NT) dated 17.03.2009, as amended, they are responsible for receipt, storage, delivery, dispatch or otherwise handling of imported goods and export goods. Further, as per Regulation 4 of the HCCAR, 2009, any action taken or anything done in respect of appointment of the CCSP, immediately preceding the coming into force of these Regulations shall be deemed to have been done under the corresponding provisions of these Regulations. The CCSP already approved on or before the date of coming into force of these regulations shall also comply with the conditions of these regulations within a period of three months or such period not exceeding a period of one year

as the Commissioner of Customs may allow from the date of coming into force of these Regulations.

4. In terms of Regulations 5(2) of the HCCAR, 2009 the CCSP has undertaken to bear the cost of the Customs officers posted, at their jetty, on cost recovery basis by the Commissioner of Customs and to 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. This condition was already in existence as per S. No, 13 of Notification No, 09/2002/CC dated 23.04.2002 issued under Section 45 of the Customs Act, 1962. Further, as per Regulation 6(1)(o) of the HCCAR, 2009, it is the responsibility of the CCSP to bear the cost of the Customs officers posted by the Commissioner of Customs on cost recovery basis and shall make payments at such rates and in the manner as specified by the Government of India in the Ministry of Finance, unless specifically exempted by an order of the said Ministry.

5. Further, in pursuance of the above facts as also narrated in the letter F. No. VIII/20-20/Amend/Cus(T)/2014-15 dated 08.05.2015, addressed to the CCSP, the Superintendent (Tech.) Customs Division, Bhuj, requested them to pay Cost Recovery Charges with effect from 17.03.2009 i.e. after introduction of HCCAR, 2009 vide Notification No. 26/2009-Cus (NT) dated 17.03.2009.

6. The CCSP started to pay establishment charges on Cost Recovery basis from April, 2015 onwards and have paid the Cost Recovery charges upto December, 2017. However, till date they have not paid Cost Recovery Charges for the work handled by the Customs officers/staffs posted, during

the period 17.03.2009 to 31.03.2015 amounting to Rs. 1,42,81,265/- as per the provisions of the HCCAR, 2009. However, the CCSP has paid charges amounting to Rs. 18,41,005/- on MOT basis during the period 17.03.2009 to 31.03.2015.

7. In view of the above contention, it was alleged that the CCSP have not paid the cost recovery charges for the Customs staff posted at their private jetty, during the period 17.03.2009 to 31.03.2015, and hence, the CCSP being Custodian has contravened the provisions/conditions of the Notification No. 09/2002 dated 23.04.2002 read with Regulation 6(1)(o) of HCCAR, 2009, by not paying the Cost Recovery charges for the Customs Staff posted at the said jetty and thus their Custodianship is found liable to suspension / revocation. Further, the CCSP is also found liable to penalty in terms of Regulation 12 (8) of HCCAR, 2009. The Adjudicating Authority vide impugned order dated 19.03.2019 confirmed charges raised in the show cause notice and passed the following order:-

(i) I hereby order for recovery of Cost Recovery Charges of Rs. 1,45,55,246/- (Rupees One Crore Forty Five Lakh Fifty Five Thousand Two Hundred Forty Six) for the period 17.03.2009 to 31.03.2015 from M/s. Goodearth Maritime Limited. As the custodian has paid MOT of Rs. 18,41,005/- (Rupees Eighteen Lakh Forty One Thousand Five only) during the same period, I order to appropriate the said amount against total demand of CR charges.

(ii) I impose penalty of Rs. 20,000/- (Rupees Twenty Thousand only) on M/s. Goodearth Maritime Limited under Regulation 12(8) of Handling of Cargo in Customs Areas Regulations, 2009.

(iii) If M/s. Goodearth Maritime Limited failed to pay the above confirmed demand along with penalty at Sr. No. (i) & (ii) before

30.06.2019, the operations stand suspended on 01.07.2019 till they deposit the above confirmed demand along with penalty in terms of Regulation (11(i) of HCCAR, 2009.

Therefore, the present appeal filed by the appellant.

8. Shri Naresh Satwani, learned Consultant appearing on behalf of the appellant submits that the Adjudicating Authority's conclusion that after introduction of HCCAR, 2009, the appellant fall under the ambit of HCCAR, 2009 in terms of Regulation 4 and required to pay Cost Recovery Charges, is erroneous. As the appellant was appointed as Custodian and the goods meant for loading of salt for export/import and costal movement under Section 45(1) of the Customs Act, 1962 vide Notification No. 9/2002/CC dated 23.04.2002 issued by Commissioner of Customs, Gujarat Ahmedabad subject to fulfillment of various conditions as mentioned therein. Apart from other condition, the condition No. 13 states that "*The custodian shall bear the establishment charges for the Custom Staff posted for the said Jetty. The Deputy Commissioner Customs, Bhuj shall decide the staff to be posted at jetty considering the workload at Jetty.*" He submits that instead of posting separate staff for our Jetty, Assistant Commissioner of Customs, Bhuj Division vide letter F.No. VIII/48-06/CUS (T)/2001-02 dated 05.05.2003 allowed the appellant to operate/ continue appellant's jetty on payment of MOT charges as per Customs (Fees for Rendering Services of Customs officers) Regulations, 1998 till separate posting has been made on cost recovery basis by the office of Assistant Commissioner of Customs, Bhuj Division. It is his submission that HCCAR, 2009 is applicable only when dedicated staff is posted at Jetty. In the present case, it is admitted fact that no dedicated staff was posted. Therefore, the order issued by Assistant Commissioner Customs dated 05.05.2003 was in force and according to

which the appellant was liable to pay only MOT charges and not Cost Recovery charges. The appellant have regularly paid the MOT charges which is not disputed. He submits that cost recovery charges at a specified rate are levied for the postings of customs officials additionally sanctioned over and above regular posts. In the present case, no posting of Customs official additionally sanctioned over and above regular posts were made. Therefore, on this ground, the appellant is not required to pay cost recovery charges. He further submits that since the appellant was notified as custodian under Section 45 of the Customs Act on 23.04.2002, i.e. prior to dated 26.06.2002, therefore guidelines under Regulations, 2009 is not applicable in the light of Board Circular No. 04/2011-Cus dated 10.01.2011. Accordingly, the appellant had correctly paid MOT charges under intimation to the department during the period 17.03.2009 to 31.03.2014. He further submits that even the appellant had requested the department to furnish a list of officers exclusively for Customs House, Jakhau but the department failed to provide the same. In view of this, it is clear that no dedicated posting of officer was made on the appellant's Jetty. He further submits that appellant was regularly paying the MOT charges and the same has been accepted by the department. It is only first time when on 08.05.2015, the Superintendent (Technical) Customs, Bhuj Division vide his letter dated 08.05.2015 directed to pay cost recovery charges with effect from 17.03.2019 in accordance with the Regulations HCCAR 2009. Therefore, demand on account of cost recovery charges before 17.03.2019 is, in any case not sustainable. He further submit that though there is no time-limit provided for cost recovery, however, parent act, which is Customs Act, 1962 which provide time-limit of two years under Section 28 of Customs Act, for the reason that demand of duty in case whether any duty has not been levied or short levied or short paid or erroneously refunded or any interest

payable has not been paid, part paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts. In the present case, payment of MOT charges is well within the knowledge of the department. Therefore, any demand could be raised only for the normal period of two years. However, in the present case, the demand of cost recovery charges is for the period 17.03.2009 to 31.03.2015 and the show cause notice was issued to the appellant on 23.03.2018. Therefore, entire demand is time barred. In support of his submission, he placed reliance on the following judgments:-

- (a) Shree Pipes Limited vs. UOI – 1995 (79) ELT 405 (Raj)
- (b) GMR Hyderabad International Airport Limited vs. CBE&C, New Delhi – 2014 (299) ELT 320 (A.P.)
- (c) CCE vs. Chemphar Drugs & Liniments – 1998 (40) ELT 276 (SC) and Padmini Products vs. CCE - 1989 (43) ELT 195 (SC)
- (d) Continental Foundation JT Venture vs. CCE, Chandigarh – 2007 (216) ELT 177 (SC)
- (e) Jaiprakash Industries Limited vs. CCE, Chandigarh – 2002 (146) ELT 481 (SC)

9. Shri S.N. Gohil, learned Superintendent (Authorised Representative) appearing on behalf of the Revenue reiterated the findings of the impugned order. He submits that by introduction of Handling of Cargo in Customs Area Regulations, 2009, the appellant is required to pay cost recovery charges and there is no option for the appellant for deviating from payment of cost recovery charges except by virtue of Regulation 4 of HCCAR, 2009 which has given retrospective effect of this regulation. Therefore, for the past period also, in terms of Regulation 5(2) read with Regulation 6(o), the appellant is required to pay cost recovery charges. He submits that due to

retrospective effect of HCCAR, 2009 all the reliance made by the appellant on the earlier circulars and clarifications will be of no help to the appellant.

He placed reliance on the following judgments:-

- (a) 2018 (364) ELT 59 (Del) — Allied ICD Services Limited vs. Union of India
- (b) 2017 (357) ELT 236 (Tri-Del) — Rajasthan Small Industries Corpn Limited vs. CCE, Jaipur-I
- (c) 2017 (358) ELT 1131 (Tri-Mum) - Savita Polymers Limited vs. CCE, Raigad
- (d) 201A (310) ELT 3 (Bom) - Mumbai International Airport P. Limited vs. Union of India
- (e) 2011 (267) ELT 319 (Mad) - Hari CFS vs. Union of India

10. We have heard both sides and perused the record. The limited issue to be decided is whether the appellant is required to pay cost recovery charges in terms of HCCAR 2009 or payment of MOT charges made by the appellant is correct. In the present case, the fact is not in dispute that the appellant was allowed to pay MOT charges as per Customs (Fee for Rendering Services of /Customs officers) Regulations, 1998 till separate posting of customs officials has been made for cost recovery basis by the office of the Assistant Commissioner, Customs Bhuj Division. This clearly shows that there was no posting of separate staff for the appellant's Jetty. This is because of this reason, the department accepting the fact that no separate posting was made, the appellant was allowed to pay MOT charges. It is the claim of the appellant that even subsequent to the letter of Customs Division Bhuj dated 05.05.2003, no separate officer was posted to supervise the work at appellant's Jetty. Even if the Regulation of HCCAR 2009 is applicable, the same could be operative for the appellant only if separate

officer is posted. In this regard, we would like to refer to relevant regulation of HCCAR 2009 as under:-

- **Regulation 5- Conditions to be fulfilled by Customs Cargo Service provider-** The Customs Cargo Service Provider for custody of imported goods of export goods and for handling of such goods in a customs area shall fulfill the following conditions, namely:-

(2) 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;
- **Regulation 6- Responsibilities of Cargo Service provider:-** (1) The Customs cargo Service provider shall-

(o) shall bear the cost of the customs 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;

From the plain reading of above regulation, we find that it is clearly provided that the cost of Customs Officer shall be borne by CCSP only when Custom Officer is posted for the Jetty of the appellant. In the present case, there is no evidence adduced by the department that any of separate officer was posted by an order of competent authority for supervising the operations at appellant's Jetty. Therefore, it is not under dispute as per the record that no separate officer was posted for the work at appellant's Jetty. Therefore Rule 5(2) and Rule 6(o) is not applicable in case of the appellant. Moreover, the appellant have been paying MOT charges as per the authority of the department i.e. letter dated 05.05.2009 issued by the Assistant Commissioner, Customs Bhuj Division.

11. As regard the Contention of the Adjudicating Authority that CCAR is having retrospective effect, we find that on careful reading of Rule 4 which

gives retrospective effect, we find that the said provision is only to regularize the appointment of Customs Cargo service providers which have been given license prior to issue of this Regulation HCCAR 2009. Therefore, this regulation cannot be applied retrospectively for cost recovery charges, particularly when no separate officer was posted. Moreover, as discussed above, even by any stretch of imagination, HCCAR 2009 in respect of cost recovery charges is made applicable retrospectively, even than cost recovery charges cannot be recovered in terms of rule 5(2) read with Rule 6(o) unless separate officer is posted. Therefore, under any circumstances, in the facts of the present case, the demand of cost recovery charges is not sustainable.

12. In the case of Shree Pipes Limited (supra), the Hon'ble Rajasthan High Court has held that fees/cost recovery/cost of establishment payable to department only on hourly basis and not for whole year when no whole time staff is posted by the department. In the said judgment, the Hon'ble High Court however, held that no whole time posting by department to supervise the Customs bonded warehouse, charges recovered by the department on hourly basis from some licensee and for full year from others, is violative to Article 14 of Constitution of India.

13. In an identical case, in the case of GMR Hyderabad International Airport Limited (supra), the Hon'ble Andhra Pradesh High Court dealing with Handling of Cargo Customs Areas Regulation, 2009, passed the following order:-

8. Section 7 of the Act conferred power on the Board to appoint and notify such ports and airports which alone shall be customs ports or customs airports for purpose of unloading of imported goods and the loading of export meant goods. It is therefore clear that, not all ports or airports in India are customs ports or airports. It is only at the notified customs ports, customs clearance is undertaken by the officers of the Customs.

Once the Board exercises this power, thereafter in accordance with Section 8 of the Act, it is the Commissioner of Customs who would approve proper places in such customs ports or customs airports for unloading and loading of goods. Sections 33 and 34 regulate the operations of loading and unloading of goods at such specified places and that too under the supervision of the proper officer of the customs. Further, Section 13 of the Act makes it clear that an importer shall not be liable to pay the duty on pilfered goods unless such pilfered goods are restored to him. Thus, the entire scheme of the statute unmistakably conveys the necessity and primacy for integrity, for safety and security of the places meant for loading and unloading at customs ports and airports. This was warranted to ensure that the state's revenue does not escape through porous premises at the customs port or customs airport. As a part of this well devised and designed activity and to fasten the custodial responsibility of the not yet cleared cargo, both imported and meant for export, provision is created under Section 45 for appointment of custodians. This measure would ensure the integrity of the cargo and also the collection of proper duty thereon. Appointment of an airport under Section 7 as a customs airport and appointment under Section 45 of a person as a custodian, both are obviously a one-time affair. Since the very nature of appointment partakes with it, the power to regulate subsequently any such appointment as customs airport or entrustment of the custodial services can also be recalled at any time later on for valid reasons. Therefore, it could be legitimate to expect the appointee under Section 7 and as well as the custodian under Section 45 to pay for a fees prescribed for appointment as such. A look at Section 141 of the Act in no uncertain terms makes the position clear that all conveyances and goods in a customs area shall be subject to the control of the officers of the customs for purposes of enforcing the provisions of the Act. Otherwise, it might possibly lead to easy evasion of the levy liable to be applied on them. Sub-section (2) of Section 141 makes it explicitly clear that 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. The expression "prescribed" was defined in Section 2(32) as meaning those as prescribed by the regulations made under the Act. Even if Sections 7, 45 and 141 are read together, what emerges is that, all goods imported or meant for export can be brought to the customs airport and thereafter they shall remain in the custody of the custodian until they are cleared for home consumption or are warehoused or are transshipped in accordance with the provisions contained in Chapter VIII of the Act. But however, any such physical custody of the cargo by the custodian is subject to the control of the officers of the customs, till they are properly cleared. Therefore, to my mind, Section 141(2) can only give scope for framing the regulations prescribing the responsibilities of the customs airport operators and more importantly of the persons engaged in storing, delivering, dispatching or otherwise handling the imported or export meant goods in a customs area (In a given case, the customs airport operator need not necessarily be the custodian appointed under Section 45 of the Act). Hence, this provision does not lay down any policy guideline for cost recovery of the salary and allowances payable to the customs officers under whose overall control the aforementioned operations are to be handled in a customs area.

9. Let us also have a closer scrutiny of the provision contained in Section 157 of the Act. Sub-section (1) thereof conferred power on the Central Board of Excise and Customs to frame regulations which can be consistent with the rest of the provisions contained in the Act and the rules, if any, framed by the Central Government and that too, such regulations can be made for carrying out the purposes of the Act. Sub-section (2) of Section 157, without prejudice to the generality of the provision contained under sub-section (1) listed out the matters which can be the subject matter of regulations to be framed. It is significant to notice that, powers exercisable in terms of Sections 7, 8 and 45 of the Act are not one of those subject matters which are enumerated under sub-section (2) of Section 157. Therefore going by the generality of the power conferred by sub-section (1) of Section 157 on the Central Board of Excise and Customs to make regulations, the limitation that has got to be kept in mind is that, such regulations can only be made for such purposes which are intended to be carried out under the Act and not otherwise.

10. Then, it takes us to understand the general purposes for which this special piece of legislation was enacted. It is not merely intended for purposes of garnering revenue to the State by levying duty on imports and exports. The invisible roots of this legislation lie in the State's primary obligation to nurture and protect the indigenous industrial sector from facing or measuring up to international standards and unhealthy competition. Further, India cannot be a "free for all dumping yard". Otherwise giant multinational corporations would not allow sun to shine on our local corporations and consequently continue to exploit the local conditions and turn them in their favour. More importantly the natural resources of this nation move away across its borders, for the good and welfare of others and they will scarcely become available for securing the wellbeing of our countrymen. The very foundations upon which this nation won its freedom would have been quickly weakened, otherwise.

11. Regulation 5(2) of Regulations, 2009 undoubtedly prescribed the custodian to bear the costs of the customs officers posted at such customs area on cost recovery basis. Now the question that is to be resolved is whether this falls within the general power of making regulations or not? Payment of one-time fee for appointment as a customs airport or for recognizing a person as a custodian of goods in a customs area is different from obligating such a person to pay regularly for the costs of the customs officers posted at the customs port or customs airport. Both are not the same.

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.

13. A modern welfare state is obliged to provide for various services and beneficial measures to its citizens. Hence, a welfare state is entitled to make a levy even against the will of the people who are sought to be benefited in the process. In the matter of imposition of such levies, there is no role for the consent of the targeted group or the consent of the beneficiary. It is, hence, implicit that no levy can be imposed except through clear and unambiguous words. No one can be taxed by implication. It is, therefore, imperative that if a person had not been brought within the ambit of the charging provision by clear words, he cannot be taxed at all. What is of utmost significance is that, only through clear import of the language used alone, a levy can be imposed and consequently no attempt can be made to enlarge the scope of the charging provision so as to embrace matters not specifically provided for therein. It is therefore one of the fundamental principles evolved that a Court cannot read words which are not there in a charging statute or exclude the words which are already there [See *Collector of Estate Duty v. R. Kanakasibai* (AIR 1973 SC 1214)]. The language employed in a taxation statute therefore cannot be obscure for purposes of justifying the levy which is not intended or provided for in the statute. But at the same time, it is a settled principle in the matter of determination of liability, that the Court must have regard to the substance rather than the form. The rationale behind this concept has been explained by Lord Sumner in *Levene v. Inland Revenue Commissioners* [1928 Appeal Cases 217 at 227] in the following illustrious words :

"It is trite law that his Majesty's subjects are free, if they can, to make their own arrangements so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties and, strictly speaking, no moral censure if, having considered the lines drawn by the Legislature for the imposition of taxes, they make it their business to walk outside them."

14. However the limits of the right of the public authority to impose taxes lies with the Legislature, as taxation is the very prerogative of the Legislature. Hence the right to impose taxes and to determine the circumstances under which these will be done is the very privilege of the legislative power while mere administration of such a taxation

statute is the responsibility of the executive power of the State. It is a common legislative practice to prescribe for the legislative policy broadly in the statute and then leave the guidelines for working out the details effectively behind the said legislative policy by delegating the power to frame rules or regulations, as the case may be. This practice of empowering the executive to make supporting Legislation strictly within the prescribed sphere has been evolved due to the practical necessities and pragmatic needs of the modern state as the Legislatures, by the very nature of the limitations upon them to conceive all possible circumstances and contingencies at one go and also because of the extremely limited time factor. The Legislatures can hardly work out all the necessary details by themselves. While the Legislature puts in place the life line, the muscular support is supplied through ancillary legislation known as subordinate/delegated legislation, in the form of Rules or Regulations. However, without there being a clear and unambiguous charging provision, by way of ancillary legislation, no taxes can be imposed. In the instant case, the survey of the provisions of the Act have not contemplated for taxing either the appointee or the custodian. Therefore, by making a Regulation, a tax could not have been levied on such appointees of customs airports or the custodians of the uncleared cargo.

15. Assuming that what is levied is not a tax but a fee, it would be imperative to notice that a fee is a charge for special services rendered to individuals or organizations by some governmental agency or the other and such a charge has an element of *quid pro quo* ingrained into it. It is true, that there is no grave distinction between a tax and a fee since both are compulsory exactions of money by public authorities. However, it will be appropriate to bear in mind that a tax is imposed as part of the scheme to garner revenue by the State or public authority for purposes of expending it to achieve and implement public purposes. Consequently, a tax is seldom supported by any considerations. In juxtaposition thereto, a fee is essentially levied for services commensurately rendered and hence there is a direct element of consideration or *quid pro quo* between the fee payer and the public authority which imposes it. Right at this stage, I consider it appropriate to be profited from the crisp statement of the legal principle enunciated by Justice P.B. Gajendragadkar (as the learned CJI was then) speaking on behalf of the majority of the Judges of the Constitution Bench of the Supreme Court, in *The Hingir-Rampur Coal Co. Ltd. and Others v. The State of Orissa and Others* [AIR 1961 SC 459], while dealing with the validity of Orissa Mining Areas Development Fund Act, 1952 :

“9.The neat and terse definition of tax which has been given by Latham, C. J., in *Matthews v. Chicory Marketing Board* (1) is often cited as a classic on this subject. “A tax”, said Latham, C. J., “is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered”. In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money. By public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of *quid pro quo* between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the Consolidated Fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the Consolidated Fund. It is earmarked and set apart for the purpose of services for which it is levied. There

is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. *Though there is an element of quid pro quo between the tax-payer and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax: and in the case of such a colourable exercise of legislative power courts would have to scrutinize the scheme of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the levy is either not co-related with service or is levied to such an excessive extent as to be a presence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognised by the Constitution. Several Entries in the Three Lists empower the appropriate Legislatures to levy taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters covered in the said List excluding of course the fees taken in any Court."*

(Emphasis is generated by me)

It is, therefore, required of the Courts to hold a strict vigil over those to whom the Legislature has entrusted vast powers and take care that no injury is caused by an extravagant assertion of such powers and confine their activity in strict conformity of the terms of their derived authority.

16. It was, therefore, appropriate to decipher as to whether any service either special or even ordinary can be said to be rendered by the respondents to the petitioner for them to justify the levy. With the expansion or advent of quality infrastructural inputs such as roads, highways network, etc., rapid industrialization and manifold increase of commercial activities can be expected as the most inevitable corollary. Industrialization and increased commercial activities can lead to increase of import and export activity. Both imports and exports of goods are subject to levy of duty. Thus, in the process, the State's revenue gets augmented, apart from increased economic activity and development of human resources. The increase in the quantum of imports and exports therefore has a direct proportionate impact upon the revenue garnering and overall development. As was already noticed supra, appointment of a custodian of the customs space identified under Section 8 of the Act is only for ensuring the integrity of such a place so that no revenue loss and duty evasion occurs there. Beyond that, a custodian has no other role. He is a facilitator by providing for foolproof or tamper proof premises so that goods do not leave the premises before they are cleared by the customs and correspondingly the necessary duty/revenue is collected smoothly by the State. It is purely incidental, that the custodian may in turn earn some revenue for himself by charging the importer or exporter for facilities provided by him for smooth and eventual clearance of goods by the customs. That is of least importance in the matter of collection of customs duty by the State. I am therefore clearly of the view that, no services are being specially provided by the customs officials to the custodians at a customs port or customs airport, to enable them to collect any fee, from such a custodian. "Cost Recovery" of the salaries and allowances paid to the customs officials is only a dignified form of collection of a fee. Since, no services are specially or generally provided to the custodian, no such fees is liable to be charged.

17. There is no mistaking the respondents; they clearly hinted in their counter affidavit that what is demanded from the petitioner is a fee, by making the following statement :

“(2) In reply to *Para 2*, it is submitted that the Constitutional Bench of the Hon’ble Supreme Court in the case of *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, reported as (1954) SCR 1005 (at 1040, 1041 and 1044) has held that “*a fee could be charged by the state for the service rendered by some governmental agency as long as it is not arbitrary.*” The Hon’ble Supreme Court has made the distinction between tax and fee and held “*As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the taxpayer and the public authority. Another feature of the taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay. Coming now to fees, a “fee” is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service.*” This judgment has been referred to by the Hon’ble Supreme Court in the case of *Gupta Modern Breweries v. State of Jammu and Kashmir* [(2007) 6 SCC 317].”

18. There is one other reason why a fee cannot be collected from the custodian clearing the goods which are either imported or meant for export. Clearing the international passengers or goods, imported or meant for export is a sovereign function of the State. For purposes of effective and efficient discharge of these functions, the custodian is required to provide the necessary infrastructural facilities. Sans such facilities, the customs clearance duties become imminently impaired. Therefore, while a demand for making available standard infrastructural facilities for facilitating efficient discharge of customs clearance functions is legitimate, but however, demand of reimbursement of cost recovery is totally unjust. There is yet another reason while preparing the appropriation estimates of revenue, adequate provision is always made towards the “Head of salaries and allowances” payable to the Government servants functioning under various Ministries/Departments. Such appropriations are placed for consideration and approval of the Parliament/Legislature of the State as the case may be. Once the salaries and allowances and other benefits such as pensions are thus already provided for, the question of seeking their reimbursement separately would not arise. Out of the overall collection of revenue, a certain percentage is thus set apart towards the concomitant expenditure liable to be incurred for raising such revenue. Salaries and allowances, pensions and other terminal benefits payable to the Government servants are integral part of this element of expenditure. When the State directly pays to its employees, the State in turn expects absolute integrity and loyalty from such employees. In the case of employment between the State and its servants, it is appropriate to bear in mind that it is not regulated purely by contractual terms or by general conditions which are otherwise part of any master and servant relationship. There is a status conferred by the State upon its employees. By virtue of this status, it undertakes to protect them from undeserved and undesirable wants. Therefore, a provision is made in the budgetary proposals annually towards the head of their salaries and pensions.

19. Therefore, I am of the opinion that, Regulation 5(2) of Regulations, 2009 has no legal substratum to survive and accordingly the consequential levy made on the petitioner by the respondents towards cost recovery charges is wholly unsustainable.

20. The writ petition, accordingly, stands allowed. Costs easy.

14. From the above judgments, we find that Hon'ble High Court not only set-aside the demand of Cost Recovery charges but even held that Regulation 5(2) of Regulation 2009 is illegal. Therefore, considering the entire facts and circumstances of case and settled legal proposition cited above, we hold that demand of Cost Recovery charges will not sustain. Hence the impugned order is set-aside and appeal is allowed with consequential relief if any arise in accordance with law.

(Pronounced in the open court on 12.03.2020)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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