

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

CUSTOMS Appeal No. 10077 of 2021 - DB

(Arising out of OIO-AHM-CUSTOM-000-COM-001-20-21 dated 17/06/2020 passed by Commissioner of CUSTOMS-AHMEDABAD)

DIAMOND AND GEM DEVELOPMENT

.....Appellant

Sursez, Nr. Sachin Railway Station,
Module-II, Sachin
Surat, Gujarat

VERSUS

COMMISSIONER OF CUSTOMS –AHMEDABAD

.....Respondent

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

WITH

CUSTOMS Appeal No. 10617 of 2020 – DB

(Arising out of OIO-AHM-CUSTOM-000-COM-001-20-21 dated 17/06/2020 passed by Commissioner of CUSTOMS-AHMEDABAD)

COMMISSIONER OF CUSTOMS –AHMEDABAD

.....Appellant

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

VERSUS

**DIAMOND AND GEM DEVELOPMENT
CORPORATION LIMITED**

.....Respondent

Sursez, Nr. Sachin Railway Station,
Module-II, Sachin
Surat, Gujarat

APPEARANCE:

Shri Dhaval K Shah, Advocate for the Appellant- Assessee

Shri Rajesh R Kurup, Superintendent (AR) for the Respondent- Revenue

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

Final Order No. 11277-11278/2024

DATE OF HEARING: 05.03.2024

DATE OF DECISION: 12.06.2024

RAMESH NAIR

These appeals are directed against Order-In-Original No. AHM-CUSTOM-000-COM-001-20-21 dated 17.06.2020 where by Learned Principal Commissioner of Customs Ahmedabad ordered for recovery of cost

Recovery Charges of Rs. 1,56,79,663/- out of Rs. 1,79,27,123/- as proposed in the show cause notice. The balance amount was not confirmed on the account of various allowances such as Transport Allowance and House Rent Allowance, on the ground that the assessee have provided accommodation and transport to the departmental officer. Being aggrieved by the Order-In-Original the present appeals filed.

2. Shri Dhval K Shah Learned Counsel appearing on behalf of the appellant/Assessee reiterating the ground of appeals at the outset submits that the impugned order passed by Adjudicating Authority is illegal as the same is passed without any jurisdiction and without authority of law. He further submits that the Cost Recovery Charges was confirmed invoking provision of Regulation 6(1)(o) of Handling of Cargo in Customs Areas Regulations, 2009 (HCCAR, 2009). It is his submission that in said Regulation there is no mechanism provided to recover or to confirm demand of cost recovery charges from the custodial. The said Regulation only allow the commissioner of Customs to adjudicate the issue of violation of any of the regulation including non-payment of cost of recovery charges and consequently decide whether to suspend or to revoke the approval granted under the scheme. The adjudicating authority does not possess any authority to adjudicate and demand any amount from the license holder Custodian and to order for recovery of any amount despite which the adjudicating authority had confirmed the demand. Therefore the impugned order needs to be set aside on this ground alone,

2.1 He submits that the adjudicating authority has ordered to recover cost recovery charges and confirmed the amount of said charges for violation of Regulation 5 of (2) and Regulation 6(1)(o) HCCAR, 2009. He submits that both the regulation do not give any authority to the Commissioner of Customs to order to recover or confirm any amount of cost recovery chargers from the custodial. He submits that the Regulation 2 of HCCAR, 2009 provides to undertake to bear the cost of the Custom officers posted at custom area on cost recovery basis by the Commissioner and shall make payment at such rate in the manner prescribed unless specifically exempted an order of the Government of India and the Ministry of Finance. Therefore if the customs cargo service provider breeches

conditions prescribed under Sub-regulation (2) of Regulation 5 of HCCAR, 2009 the Commissioner of Customs can initiate proceeding with regard to license under Regulation 11 but there is no recovery provision in the regulation and therefore there is no authority to the adjudicating authority confirming the demand.

2.3 He further submits that the cost recovery charges are payable at rate specified by the Ministry. There is no rate has been prescribed by the Ministry under the regulation or any other mode subsequent to the regulation. In that circumstances cost recovery charges cannot be demanded from the Assessee. In support of his submission he placed reliance on the following judgments:-

- Polychem Ltd & Ors Vs. State of Maharashtra & Ors (1998) 6 SCC 196
- Container Corporation of India Ltd Vs. CC, Jodhpur 2019 (2) TMI 507-Cestat New Delhi
- M/s. MIV Logistics Pvt. Ltd Vs CC, Kerala 2020 (2) TMI 876-Cestat Bangalore
- Goodearth Maritime Limited Vs. CC, Kandla 2020 (3) TMI 494 - Cestat Ahmedabad
- M/s. The Thar Dry Port Vs. CCE & ST, Jaipur, M/s. Jaipur Gemstone Exchange Vs. CCE & ST, Jaipur Order No. 51174-51175/2019dated 26.07.2019
- GMR Hyderabad International Airport Limited Vs. CBEC, New Delhi
- Circular No. A-11018/9/01-Ad. IV Dated 1.5.1991
- Allied ICD Services Ltd. Vs. Union of India – 2018 (364) ELT 59 (Del.)
- Rajasthan Small Industries Corpn. Ltd. Vs. Commissioner of C. Ex. Jaipur-I- 2017 (357) ELT 236 (Tri.-Del.)

2.4 With regard to the Revenue's appeal, he submits that the adjudicating authority has dropped the demand of cost recovery charges representing the transport allowance and house rent allowance for the reason that both these amenities were provided by the assessee to the officers. Therefore the Commissioner has rightly not ordered for recovery of

cost recovery charges attributed the transport allowance and house rent allowance.

3. Shri Rajesh R Kurup, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order which relates to the confirmation of cost recovery charges and as regard the Revenue's appeal he reiterates the grounds of appeal.

4. On careful consideration of the submission made by both the sides and perusal of record, we find that the Adjudicating Authority has ordered for recovery of cost recovery charges under Handling of Cargo in Customs Areas Regulations, 2009. The relevant provisions invoked by the Principal Commissioner are reproduce below:-

"4. Retrospective Application.-

Any action taken or anything done in respect of appointment of Customs Cargo Service providers, immediately preceding the coming into force of these regulations, shall be deemed to have been done under the corresponding provisions of these regulations. Customs Cargo Service providers already approved on or before the date of coming into force of these regulations shall 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.

5. Conditions to be fulfilled by Customs Cargo Service provider

The Customs Cargo Service provider for custody of imported goods or export goods and for handling of such goods in a customs area shall fulfill the following conditions, namely:-

(1).....

(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;

6. Responsibilities of Customs 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;

11. Suspension or revocation of approval for appointment of a Customs Cargo Service provider:

(1) The Commissioner of Customs may, subject to the provisions of these regulations, suspend or revoke the approval granted to the Customs Cargo Service provider subject to the observance of procedure prescribed under regulation 12 and also order for forfeiture of security, if any, for failure to comply with any of the provisions of the Act and the rules, regulations, notifications and orders made thereunder;

(2) Notwithstanding anything contained in sub-regulation (1), the Commissioner of Customs may, in appropriate cases where immediate action is necessary, suspend the approval granted to a Customs Cargo Service provider where an enquiry against such Customs Cargo Service provider is pending or contemplated."

From the conjoin reading of the above Regulations, it is observed that though there is condition for payment of cost recovery charges by the custodian. However, there is no statutory mechanism to recover the cost recovery charges by the Commissioner. Therefore, in absence of any power to recover the cost recovery charges the Ld. Principal Commission in the present impugned order confirming the cost recovery charges is without jurisdiction and without authority of law. It is further observed that Regulation 6 (1)(o) clearly provides that recovery of cost should be at such rate in the manner specified by the Government of India and the Ministry of Finance. However, in the present case there is nothing on record to show that the rates were prescribed and the manner was specified by Government of India in the Ministry of Finance, for this reason also the provision of regulation 6(1)(o) of HCCAR, 2009 cannot be invoked. This has been held in the case of Commissioner of Customs Ludhiana Vs. Krishna Cargo Movers Pvt. Ltd. as under:-

"Tribunal has relied upon judgement of Hon'ble Supreme Court Larsen and Toubro Ltd. (supra) while holding that 'rates and manner' was not specified as required by 2009 Regulations. Clause (o) of Regulation 6(1) of Regulations casts obligation upon CFS to bear cost of officers posted by Commissioner. The same clause further provides that Government of India would specify rates and manner of charges and concededly, post 2009 Regulations, rates and manner of cost recovery charges are not specified. It was duty of Government of India to specify rate and manner and it is axiomatic in taxation law that in the absence of mechanism, no recovery can be made. Thus, we find substance in the findings recorded by Tribunal that no demand of cost of officers can be made in the absence of specified rates and manner".

In view of the above settled legal position, the order for confirmation of cost recovery charges is not sustainable.

4.1 The identical issue was considered by this Tribunal in the case of Goodearth Maritime Limited *supra* wherein this Tribunal passed the following order:-

"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/cast 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."

4.2 The Learned Counsel also heavily relied upon the judgment of the Principal bench in the case of M/s. The Thar Dry Port Vs. CCE & ST, Jaipur vide order No. 51174-51175/2019 dated 26.07.2019:-

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

18. The basic issue that arises for the consideration in both the Appeals is as to whether there is a procedure set out for recovery of the outstanding cost recovery charges for the posting of the Custom Officers at ICD/CSF/ACC under the 2009 Regulations. To appreciate the contentions, it will be appropriate to refer to the relevant provisions of the 2009 Regulations.

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

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

Any person who intends to be approved as a Customs Cargo Service provider for custody of imported goods or export goods and for handling of such goods, in a customs areas, hereinafter referred to as the applicant, shall fulfil the following conditions, namely:-

(1) -----

(2) the applicant shall undertake to bear the cost of the Customs officers posted, at such custom area, on cost recovery basis, by the Commissioner and shall make payment at such rates and in the manner prescribed, unless specifically exempted by an order of the Government of India in the Ministry of Finance."

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

"6. Responsibilities of Customs Cargo Service provider:

(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 payment at such rates and in the manner specified by the Government of India in the Ministry of Finance unless specifically exempted by an order of the said Ministry."

21. Regulation 11 deals with suspension or revocation of the approval for appointment of a Customs Cargo Service Provider, while Regulation 12 deals with procedure for suspension or revocation of the approval and imposition of penalty. The impugned orders rely upon Regulation 11(1) and 12(8). They are reproduced below:

"11(1) The Commissioner of Customs may, subject to the provisions of these regulations, suspend or revoke the approval granted to the Customs Cargo Service Provider subject to the observance of procedure prescribed under regulation 12 and also order for forfeiture of security, if any, for failure to comply with any of the provisions of the Act and the rules, regulations notifications and orders made thereunder.

12(1) The Commissioner of Customs shall issue a notice in writing to the Customs Cargo Service provider stating the grounds on which it is proposed to suspend or revoke the approval and requiring the said Customs Cargo Service provider to submit within such time as may be specified in the notice not being less than thirty days, to the Assistant Commissioner or Deputy Commissioner of Customs nominated by him, a written statement of defence and also to specify in the said statement whether the Customs Cargo Service provider desires to be heard in person by the Said Assistant Commissioner or Deputy Commissioner of Customs.

(8) If any Customs Cargo Service provider contravenes any of the provisions of these regulations, or abets such contravention or who fails to comply with any provision of the regulation with which it was his duty to comply, then, he shall be liable to a penalty which may extend to fifty thousand rupees."

22. It is seen that Regulation 5(2) provides that a person who intends to be approved as a Custom Cargo Service provider for custody of imported goods or export goods and for handling of such goods in a customs area, shall fulfill the conditions set out, including the condition set out in Regulation 5(2) that requires the applicant to undertake to bear the cost of the custom officers posted on cost recovery basis and shall make payments at such rates and in such a manner as prescribed, unless specifically exempted by an order of the Government of India in the Ministry of Finance. Regulations 6

deals with the responsibilities of Customs Cargo Service Provider and one of the responsibilities set out in Regulation 6(1)(o) is that the Customs Cargo Service Provider and shall bear the cost of the custom officers posted by the Commissioner of Customs on cost recovery basis and shall make payments at such rates and in the manner specified by the Government of India in the Ministry of Finance unless specifically exempted by an order of the said Ministry.

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

24. The issue that arises for consideration in this appeal is as to whether the recovery of cost recovery charges could have been confirmed by the Commissioner exercising powers under Regulations 5(2) and 6(1)(o) of the 2009 Regulations and whether penalty of Rs.5000/- could have been invoked.

25. As noticed above, the show cause notices dated 9 January, 2013 and 11 December, 2012 were issued to the Appellants under Regulation 12 of the 2009 Regulations. What was stated was that the Appellant has rendered themselves liable for suspension/ revocation of approval of the Custodianship in terms of the provisions contained in Regulation 11(1) of the 2009 Regulations and also forfeiture of security and imposition of penalty under Regulation 12(8) of the 2009 Regulations. The Commissioner under the impugned order did not either revoke the approval of the Custodianship or was the security forfeited. The Commissioner ordered that the outstanding cost recovery charges should be covered from the Appellant and the Regulations 5(2) and 6(1)(o) of the 2009 Regulations and also imposed penalty.

26. This about the issue as to whether the recovery of outstanding cost recovery charges could have been confirmed was examined by a Division Bench of the Tribunal in Container Corporation of India. The Tribunal after examining the various provisions of the regulation observed that the Adjudicating Authority could not have order for recovery of the outstanding cost recovery charges. In this connection, the Tribunal, particularly, noticed the provisions of the Regulation 5(2) and 6(1)(o) of the 2009 Regulations the order of the Tribunal is reproduced below:

"13. The issue involved in this case is regarding confirmation of cost recovery charge against the Appellant vide the impugned order. The learned Adjudicating Authority has confirmed the demand under the provision raised by the show cause notice dated 29 March, 2016. The show cause notice at para 16 (ii) has invoked the provisions of Regulations 5(2) and 6(1) (o) of HCCAR. However, the Commissioner has confirmed the demand without

invoking any of those regulations. For the better appreciation of the issue involved we would like to refer to Regulation 5(2), 6(1)(o) and 12 of the Regulation of HCCAR.

A perusal of the regulations reveals that the same is intended for levying of cost recovery charge and payment thereof. Similarly, the condition at 5(2) only states that custodian or CCSP will have to undertake to bear expenses of the Customs officers posted in the Customs area on cost recovery charge basis as per the manner prescribed unless and until the same is exempted by the Ministry of Finance. Therefore, Regulation 6(1)(o) of the Regulation (6) is not meant for recovery of default payment but only it says that the CCSP will have to bear the cost of officer deployed at their premises. Similarly, Regulation (12) of the CCAR does not prescribe for the recovery of defaulted cost recovery charge. But only states that the same is procedure for suspension or revocation of approval and imposition of penalty.

14. In view of above, we find that the learned Adjudicating Authority has not appreciated the legal provision as contained in HCR, referred above which do not indicate the machinery for realisation of cost recovery charge on account of being defaulted as is the case before us. In fact, we find that the show cause notice has invoked the provisions of Regulation 12 of HCCAR which does not provide for the realisation of the cost recovery charge but only revocation of the licence granted to CCSP on account of various breaches as contained therein. This regulation has no provisions for recovery of unpaid cost recovery charge on account of non-fulfilment of criteria as laid down in the CBEC circular. Thus, we find that the order passed by the learned Adjudicating Authority is beyond the scope of the provisions of HCCAR, 2009 more so when he has decided not to cancel the licence of the Appellant and only imposed penalty. Further, the learned Adjudicating Authority has also held that there is no provision of recovery of interest under the Regulation 2009. It is not appreciable that when he has held that there is no provision for imposition of interest under the Rule for the default made by the CCSP then how his attention escaped to notice that there is also no similar provision for recovery of default payment either under Regulations 5(2), 6(1)(o) of the Regulation. We also find that the Regulation 5(2) states 'undertaken to bear the cost of Custom Officer posted, at such Customs area, on cost recovery basis, by the Commissioner and shall make payment at such rate and in the manner prescribed unless specifically exempted by an order of the Government of India in the Ministry of Finance.'

[emphasis supplied]

27. Learned Authorised Representative for the Department, however, submitted that this decision would not come to the aid of the Appellants. This issue was specifically decided by the Tribunal in Container Corporation of India and, therefore, it is not possible to accept the contention of learned Authorised Representative of the

Department that the aforesaid decision would not be applicable to the facts of the case.

28. Learned Authorised Representative also placed reliance upon the decision of the Delhi High Court in Allied ICD Service Ltd. to contend that cost recovery charges can be recovered. The contention of the petitioner before the Delhi High Court was that Customs Officers are Government Officers who perform sovereign functions and duties in terms of the statutory mandate and, therefore, the petitioner should not be required to pay any charge for their posting. This contention was not accepted by the Delhi High Court.

29. In view of the aforesaid, decision of the Tribunal in Container Corporation of India, with which we have no reason to differ, it has to be held that the Commissioner, committed an illegality in ordering recovery of the cost recovery charges under the aforesaid provisions of the 2009 Regulations.

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

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

From the above decisions, it can be seen that the similar issue has been considered consistently by two division benches of this Tribunal, in view of the above in the present case also the demand of recovery of cost recovery charges is not sustainable.

4.3 Without prejudice to the above observation, we came across a recent judgment of Hon’ble Telangana High Court under Writ Appeal No.1321 of 2012 vide order dated 27.03.2024, dealing with the same HCCAR, 2009 regulation wherein it was held the provision of cost recovery charges as ultra virus on the ground that under Section 157 of Customs Act,1962 there is no power to make such rule for recovery of cost recovery charges. Hence in view of this judgment, there is no scope left for the revenue to recover cost recovery charges. The relevant portion of the said Hon’ble Telanga High Court judgment is reproduced below:-

"12. We have considered the submissions made on rival sides and have perused the record. The singular issue which arises for consideration in this intra Court Appeal is whether the impugned 2009 Regulations are ultra vires the Customs Act, 1962.

13. The principles of interpretation with regard to taxing statutes are well-settled. A Constitution Bench of the Supreme Court in *CST vs. Modi Sugar Mills Limited*⁵ held that the construction has to be made on express language used in the statute and there is no room for equitable consideration and presumption cannot apply.

14. A three-Judge Bench of the Supreme Court in *Bimal Chandra Banerjee vs. State of Madhya Pradesh*⁶ held that the State Government cannot impose tax when there is no special authorization to do the same by the taxing statute. In paragraphs 13 and 14, it was held as under:

"13. Neither Section 25 nor Section 26 nor Section 27 nor Section 62(1) or clauses (d) and (h) of Section 62(2) empower the rule-making authority viz. the State Government to levy tax on excisable articles which have not been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under Section 13 or manufactured in any distillery established or any distillery or brewery licensed under the Act. The Legislature has levied excise duty only on those articles which come within the scope of Section 25. The rule-making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of Section 25. Therefore it is not necessary to consider whether any such power can be conferred on that authority. Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to exercise a power which it did not possess.

14. No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rulemaking authority has no plenary power. It has to act within the limits of the power granted to it."

15. Another three-Judge Bench of the Supreme Court in *Ahmedabad Urban Development Authority vs. Sharadkumar Jayantikumar Pasawalla*⁷ held that no tax can be imposed by any rules or regulations unless the statute under which such subordinate legislation is made specifically authorized imposition of such tax. In the Regulations framed under the statute, levy of any tax or fee must be based on a specific statutory provision and not on any implied, incidental or ancillary authority. In paragraph 7, it has been held as under:

"7. After giving our anxious consideration to the contentions raised by Mr. Goswami, it appears to us that in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that

the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power. The facts and circumstances in the case of District Council of Jowai are entirely different. The exercise of powers by the Autonomous Jaintia Hills Districts are controlled by the constitutional provisions and in the special facts of the case, this Court has indicated that the realisation of just fee for a specific purpose by the autonomous District was justified and such power was implied. The said decision cannot be made applicable in the facts of this case or the same should not be held to have laid down any legal proposition that in matters of imposition of tax or fees, the question of necessary intendment may be looked into when there is no express provision for imposition of fee or tax. The other decision in Khargram Panchayat Samiti case [(1987) 3 SCC 82] also deals with the exercise of incidental and consequential power in the field of administrative law and the same does not deal with the power of imposing tax and fee."

16. The principles with regard to construction of taxing statute were summarized recently by a three-Judge Bench of the Supreme Court recently in *Modi Naturals Limited vs. Commissioner of Commercial Tax, Uttar Pradesh*⁸ and in paragraph 43, it was held as under:

"43. The passages extracted above, were quoted with approval by this court in at least two decisions being CIT v. Kasturi and Sons Limited ((1999) 237 ITR 24 (SC) : (1999) 3 SCC 346) and State of West Bengal v. Kesoram Industries Limited ((2004) 266 ITR 721 (SC) : (2004) 10 SCC 201) (hereinafter referred to as "Kesoram Industries case", for brevity). In the later decision, a Bench of five Judges, after citing the above passage from Justice G. P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute (pg.782):

"(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency; (ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of the Legislature's failure to express itself clearly."

17. On the touchstone of the aforesaid well settled legal principles, we may now take note of the relevant statutory provisions of the Customs Act, 1962. The Act has been enacted with the object to sternly and expeditiously deal with smuggled goods and curb the debts on the revenue thus caused. The Act *inter alia* provides for confiscation of goods and conveyance and

imposition of penalties when any goods which are imported contrary to any prohibition imposed by or under the Act or any other law for the time being in force. Chapter-XVII of the Customs Act, 1962 deals with Miscellaneous. Chapter-XVII of the Act contains Section 141 and Section 157. Section 141 of the Act deals with 'conveyances and goods in a customs area subject to control of officers of customs'. Section 141 is extracted below for the facility of the reference.

"141. Conveyances and goods in a customs area subject to control of officers of customs:- (1) All conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs.

- (2) The imported or export goods may be received, stored, delivered, despatched 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."*

18. It is evident that all the conveyances and goods in a customs area shall, for the purposes of enforcing the provisions of the Customs Act shall be subject to control of the officers of customs. Section 141 (2) of the Customs Act provides that the imported or export goods may be received, stored, delivered, despatched 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.

19. Section 157 of the Customs Act deals with General power to frame regulations. Section 157 of the Act, which is relevant for the purpose of controversy involved in this appeal, reads as under:

"157. General power to make regulations:- (1) Without prejudice to any power to make regulations contained elsewhere in this Act, the Board may make regulations consistent with this Act and the rules, generally to carry out the purposes of this Act.

- (3) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:--*

(a) the form and manner to deliver or present of a bill of entry, shipping bill, bill of export, arrival manifest or import manifest, import report, departure manifest or export manifest, export report, bill of transshipment, declaration for transshipment boat note and bill of coastal goods;

(ai) the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under clause (d) of sub-section (1) of section 26A;

(aii) the form and manner of making application for refund of duty under sub-section (2) of section 26A;

(aa) the form and manner in which an application for refund shall be made under section 27;

- (ab) the form, the particulars, the manner and the time of delivering the passenger and crew manifest for arrival and departure and passenger name record information and the penalty for delay in delivering such information under sections 30A and 41A;*
- (b) the conditions subject to which the transshipment of all or any goods under subsection (3) of section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;*
- (c) the conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65*
- (d) the time and manner of finalisation of provisional assessment;*
- (e) the manner of conducting pre-notice consultation;*
- (f) the circumstances under which, and the manner in which, supplementary notice may be issued;*
- (g) the form and manner in which an application for advance ruling or appeal shall be made, and the procedure for the Authority, under Chapter VB;*
- (h) the manner of clearance or removal of imported or export goods;*
- (i) the documents to be furnished in relation to imported goods;*
- (j) the conditions, restrictions and the manner of making deposits in electronic cash ledger, the utilisation and refund therefrom and the manner of maintaining such ledger;*
- (ja) the manner of maintaining electronic duty credit ledger, making payment from such ledger, transfer of duty credit from ledger of one person to the ledger of another and the conditions, restrictions and time limit relating thereto;*
- (k) the manner of conducting audit;*
- (ka) the manner of authentication and the time limit for such authentication, the document or information to be furnished and the manner of submitting such document or information and the time limit for such submission, the form and the manner of furnishing alternative means of identification and the time limit for furnishing such identification, person or class of persons to be exempted and conditions subject to which suspension may be made, under Chapter XIIB;*
- (l) the goods for controlled delivery and the manner thereof;*
- (m) the measures and separate procedure or documentation for a class of importers or exporters or categories of goods or on the basis of the modes of transport of goods.*

(n) the form and manner, the time limit and the restrictions and conditions for amendment of any document under section 149."

20. Thus, from a perusal of Section 157 of the Customs Act, it is evident that Section 157 does not enumerate any specific provision under which cost recovery charges i.e., the amount of salary payable to the officials of the Customs Department, who are deployed at the Airport who perform their statutory duties, can be recovered. The 2009 Regulations have been framed in exercise of the powers conferred under Section 141 and Section 157 of the Customs Act. From a close scrutiny of the aforesaid provisions of Sections 141 and 157, it is evident that there is no express statutory provision conferring authority on the appellants to levy cost recovery charges. In the absence of any special authorization to levy cost recovery charges, appellants have no authority to impose cost recovery charges by means of a Regulation. The inevitable conclusion is that the 2009 Regulations are ultra vires the Customs Act, 1962.

21. Now we may advert to the nature of levy. In *Gupta Modern Breweries (supra)*, after taking note of the decision in *CCE v. Chhata Sugar Company Limited*⁹, it was held as under:

"27. In CCE v. Chhata Sugar Co. Ltd., [(2004) 3 SCC 466], one of the issues was whether the State Government's administrative charges to collect a levy could be passed on to the person from whom the tax, fee or levy was collected. This Court categorically held that such an imposition would be a tax and not a fee and must be duly authorised since it is a tax (at para 14), it is held: (SCC p. 483)

"Hence, administrative charge under the U.P. Act is a tax and not a fee."

28. It is, thus, clear from the aforesaid decisions that imposition of administrative services (sic charges) is a tax and not a fee. Such imposition without backing of statutes is unreasonable and unfair."

22. Therefore, the officers of the Customs Department, who were employed at the Airport between the years 2008 and 2013, were deployed to perform their statutory duties. The levy of cost recovery charges, which is in fact salaries payable to the customs staff deployed at the Airport is in the nature of administrative charges and is a tax. It cannot be exacted from the respondent without any statutory provision. Therefore, the same is also violative of Article 265 of the Constitution of India. Even assuming that the said levy to be a fee, the same cannot be recovered from the respondent as no services are provided to it by deployment of additional staff at the Airport between the years 2008 and 2013.

23. We may take note of decision of Bombay High Court in *Mumbai International Airport Private Limited (supra)*. In the aforesaid decision, the validity of Regulation 5(2) of the 2009 Regulations was challenged on the ground that the same is ultra vires Sections 157 and 158 of the Customs Act as well as violative of Articles 14 and 19(1)(g) of the Constitution of India. The aforesaid ground of challenge was dealt by the Division Bench in paragraph 53, which reads as under:

"53. Mr. Jetly was, therefore, justified in urging that the Petitioners communication firstly requesting for grant of a status as a custodian

and thereafter seeking approval would bely their contentions and to the contrary. If some governmental functions have been now allowed to be performed and carried out by the private entities that will not make any difference. In that regard, Mr. Jetly's reliance on para-10 of the affidavit in reply and the annexures thereto, is well placed. Mr. Jetly also is justified in relying on section 141(2) and the language of section 157 of the Customs Act to support the validity and legality of the Regulations. By Act 18 of 2008, section 141 has been renumbered as sub section(1) and sub section (2). By sub section (1) what has been clarified is that all conveyances and goods in a customs area are subject to control of officers of customs. They are incharge of enforcing the provisions of this Act and duty bound to do so. It is in that regard and to enable them to enforce the provisions of the Customs Act properly and effectively that by sub section (2) the receipt, storage, delivery, dispatch or otherwise handling of the imported and exported goods in a customs area has to be regulated and controlled. Therefore, it is open to the authorities to make prescription by way of rules or regulations so that responsibilities of person engaged in all the above activities are fixed. Therefore, these regulations are traceable and safely to this legal provision."

Thus, it is evident that the Division Bench of Bombay High Court did not examine the ground of challenge whether in the absence of any specific provision to levy cost recovery charges, whether the same could be imposed under the Regulations. Similarly, the Division Bench of Delhi High Court in Allied ICD Services Limited (supra) has relied on the decision of the Bombay High Court. Therefore, the aforesaid decisions rendered by Bombay High Court as well as Delhi High Court are distinguishable.

24. So far as the contention that the Company at the time of application seeking appointment as Custodian has furnished an undertaking that it shall abide by the 2009 Regulations is concerned, suffice it to say that the Company subsequently on 06.05.2007 and 22.11.2007 had submitted applications seeking to waive the condition Nos.10 to 13 of Circular No.34/2002 dated 26.06.2002. Therefore, the undertaking furnished by the Company does not bind it in the facts of the case.

25. For the aforementioned reasons, we agree with the conclusion of the learned Single Judge that the impugned 2009 Regulations are ultra vires the Customs Act.

26. In the result, the Appeal fails and the same is hereby dismissed. No order as to costs.

Miscellaneous applications, pending if any, shall stand closed."

4.3 As regard the Revenue's appeal, since the recovery itself without jurisdiction, demand of cost recovery charges will not sustain. Moreover the Learned Commissioner drop the demand or not confirmed the cost recovery charges attributed to House Rent Allowance and Transport Allowance on the ground that the assessee have provided the accommodation and

transport facility to the officer. In this fact we do not find any error on the part of the Principal Commissioner for not confirming the demand of recovery charges also to this extent.

5. As a result Assessee’s appeal is allowed with consequential relief and Revenue’s appeal is dismissed.

(Pronounced in the open court on 12.06.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Raksha