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

% Reserved on: 12th February, 2018
Date of Decision: 27th August, 2018

\+ **W.P.(C) 3912/2010**

THAR DRY PORT ..... Petitioner
Through Mr.K.K.Rai, Sr. Adv. with Mr.Gunjan Kumar and Mr.Anshul Rai, Advs.

versus

UOI AND ORS. ..... Respondents
Through Mr. Ruchir Mishra, Mr. Mukesh Kumar Tiwari and Mr. Abhishek Rana, Advs. for R-1/UOI.

\+ **W.P.(C) 6543/2010**

THAR DRY PORT ..... Petitioner
Through Mr.K.K.Rai, Sr. Adv. with Mr.Gunjan Kumar and Mr.Anshul Rai, Advs.

versus

UOI AND ORS. ..... Respondents
Through Mr. Ruchir Mishra, Mr. Mukesh Kumar Tiwari and Mr. Abhishek Rana, Advs. for R-1/UOI.
Ms. Monika Arora, CGSC with Mr. Harsh Ahuja, Mr. Vibhu Tripathi, Mr. Kushal Sharma, Advs. for R-1/ UOI.

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By:AMULYA

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+ **W.P.(C) 6392/2012**

JAIPUR GEMSTONE EXCHANGE ..... Petitioner

Through Mr.K.K.Rai, Sr. Adv. with Mr.Gunjan Kumar and Mr.Anshul Rai, Advs.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through Mr. Ruchir Mishra, Mr. Mukesh Kumar Tiwari and Mr. Abhishek Rana, Advs. for R-1/UOI.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

These writ petitions are dismissed.

For detailed judgment, please see judgment dated 27.08.2018 passed in W.P.(C) 13770/2009, ***Allied Icd Service Ltd. vs. Union of India and Ors.***

CHANDER SHEKHAR, J.

SANJIV KHANNA, J.

AUGUST 27, 2018/b

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

% Reserved on: 12th February, 2018
Date of Decision: 27th August, 2018

\+ **W.P.(C) 13770/2009**

ALLIED ICD SERVICES LTD. ..... Petitioner
Through Mr. K.K.Rai, Sr. Adv. with Mr.Gunjan Kumar and Mr. Anshul Rai, Advs.

versus

UOI AND ORS. .....Respondents
Through Mr.Ruchir Mishra, Mr.Mukesh Kumar Tiwari and Mr.Abhishek Rana, Advs. for R-1/UOI.
Mr.Harpreet Singh, Sr. Standing Counsel with Mr.Swesh Choudhary and Mr.Bhavya Dubey, Advs. for Deptt. of Customs.

\+ **W.P.(C) 3912/2010**

THAR DRY PORT ..... Petitioner
Through Mr.K.K.Rai, Sr. Adv. with Mr.Gunjan Kumar and Mr.Anshul Rai, Advs.

versus

UOI AND ORS. ..... Respondents
Through Mr. Ruchir Mishra, Mr. Mukesh Kumar Tiwari and Mr. Abhishek Rana, Advs. for R-1/UOI.

+ **W.P.(C) 6543/2010**

THAR DRY PORT ..... Petitioner

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UOI AND ORS. ..... Respondents

Through Mr. Ruchir Mishra, Mr. Mukesh Kumar Tiwari and Mr. Abhishek Rana, Advs. for R-1/UOI.
Ms. Monika Arora, CGSC with Mr. Harsh Ahuja, Mr. Vibhu Tripathi, Mr. Kushal Sharma, Advs. for R-1/ UOI.

+ **W.P.(C) 6392/2012**

JAIPUR GEMSTONE EXCHANGE ..... Petitioner

Through Mr.K.K.Rai, Sr. Adv. with Mr.Gunjan Kumar and Mr.Anshul Rai, Advs.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through Mr. Ruchir Mishra, Mr. Mukesh Kumar Tiwari and Mr. Abhishek Rana, Advs. for R-1/UOI.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

This common judgment will dispose of the aforestated four writ petitions filed by different petitioners seeking similar reliefs. Petitioners have prayed for a writ, order or direction to declare levy and collection of cost recovery charges for posting of and work performed by the custom officers and staff at the Inland Container Depots (ICDs)/Container Freight Stations (CFSs)/Air Cargo Complexes (ACCs)/Export Processing Zones (EPZs) of the petitioners at Durgapur, Jodhpur, Sanand and Jaipur respectively, as wholly illegal, unlawful, null and void. The petitioners seek direction that the respondents should refund all the charges collected from them since inception. Another prayer made is for quashing of the demands issued for recovery of cost of custom staff at the rate of 1.85 times the salary of the custom staff posted at the respective ICDs/CFSs/ACCs/EPZs. It is also prayed that the Union of India should frame a policy to appoint and post custom officers at the ICDs/CFSs/ACCs/EPZs of the petitioners on non-cost recovery basis.

Additionally prayer in W.P.(C) No. 13770/2009, W.P.(C) No. 3912/2010 and W.P.(C) No. 6543 of 2010 is for the quashing of Guideline No.10 of Circular No.128/95-Cus, dated 14th December, 1995 (hereinafter the "impugned Guideline") as being *ultra vires* to the provisions of Article 14 and Article 265 of the Constitution of India.

Petitioner in W.P.(C) No.6392/2012, has sought quashing of Regulation 5(2) of the Handling of Cargo in Customs Areas Regulations 2009 (hereinafter the "impugned Regulation") and demand letter dated 29th June, 2012 as being *ultra vires* to the provisions of Article 14 and Article 265 of the Constitution of India. In W.P.(C) No.13770/2009, prayer has been

made to quash the demand letter dated 09th June, 2009 issued by the respondents.

2. The prayers are predicated primarily on the plea that custom officers are permanent employees of the Union of India and duties performed by the custom officials at the ICDs/CFSs/ACCs/EPZs being sovereign functions, no charge could be recovered by the Union of India from the petitioners. The charge is not backed by any statutory provision.

3. Brief facts common to these writ petitions are as follows:-

Pursuant to the policy decision taken vide Circular No. 128/95-Cus dated 14th December, 1994, operation of ICDs/CFSs/ACCs/EPZs was opened to private sector. This was done to involve private sector in infrastructure development and to overcome congestion at the gateway ports arising from growth in business on account of widespread industrialization and economic growth. In order to decongest existing ports and cities, ICDs/CFSs/ACCs/EPZs were to be opened in the interior parts of the country. Government wanted ICDs/CFSs/ACCs/EPZs to be established across length and breadth of the country to encourage foreign trade and exports by facilitating custom clearance of goods at multiple points. These stations were to offer all services including custom clearance like any other port. Intention was to bring import and export facilities to the doorstep of the business community right across the country.

3.2 Applications and proposals for setting up the ICDs/CFSs/ACCs/EPZs by private or public sector required clearance from Inter-Ministerial Committee, which was given on the basis of recommendations of the jurisdictional Commissioner, who would first examine applications/proposals received on parameters stated in the guidelines. On

clearance, letters of intent were issued and thereupon, the operator was required to set up infrastructure within the prescribed time. Jurisdictional Commissioner of Customs, on being satisfied that required infrastructure was in place, would then issue a notification under Section 8 of the Customs Act, 1962 (Act, for short), approving the concerned ICDs/CFSs/ACCs/EPZs. Operators of the said ICDs/CFSs/ACCs/EPZs were thereupon appointed as custodians under section 45 of the Act. Such appointment was conditional upon the operators furnishing an undertaking in terms of the Circular dated 14th December, 1995 for bearing the costs of the custom staff posted in the ICDs/CFCs/ACCs/EPZs.

3.3. Customs personnel posted at the ICDs/CFSs/ACCs/EPZs were responsible for customs clearance for exports and imports of goods through the ICDs/CFSs/ACCs/EPZs. The scheme envisaged that the petitioners as operators and custodians would pay for Customs personnel posted at ICDs/CFSs/ACCs/EPZs on cost recovery basis.

4. Circular No. 128/95-Cus dated 14th December, 1995, which is impugned, stipulates as under:-

> "(10) Custodian shall bear the cost of the Customs staff, posted for the ICD/CFS/EPZ. The Commissioner of Customs shall decide the number of staff which is required to be posted in the facility considering the workload in the station."
>
> Impugned Regulation 5(2) of Handling of Cargo in Customs Areas Regulations, 2009 reads:-
>
> **"5. Conditions to be fulfilled by an applicant for custody and handling of imported or export goods in a customs area.-**
>
> XXX

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

The impugned letter issued by the Ministry of Finance F.No. A/11018/9/91-AD IV dated 1st April, 1991 requires the operators of the ICDs/CFSs/ACCs/EPZs to pay costs at the rate of 1.85 times the total salary of the officers posted at ICDs/CFSs/ACCs/EPZs.

5. The contention of the petitioners is that customs officers being Government officers perform sovereign functions and duties in terms and as per the statutory mandate under the Act and other enactments. Customs officers do not render service to the petitioners, who act as custodian under the Act and as operators of ICDs/CFSs/ACCs/EPZs. The petitioners should not be burdened with tax or charge at the rate of 1.85 times the gross salary of the customs officers posted in the ICDs/CFSs/ACCs/EPZs. Indian Constitution does not permit levy of tax or fee for discharge of statutory functions sovereign in character. Therefore, recovery of costs plus charges from the petitioners was bad and contrary to Articles 14 and violates Article 265 of the Constitution.

6. In alternative, petitioners submit that fee and recovery @ 1.85 times the costs incurred, i.e. the salary paid, was grossly unreasonable and arbitrary. The amount recovered was unreasonably high and does not commensurate with the services rendered. Recovery at the rate of 1.85% of the salary was an act of unjust enrichment. Petitioners also question the additional burden and recoveries pursuant to implementation of the Sixth

Pay Commission in terms of Central Civil Services (Revised Pay) Rules, 2008 with retrospective effect from 1st January, 2006.

7. ***Per contra***, the respondents submit that payment of cost recovery charges for the salary of customs officers, posted at the ICDs/CFSs/ACCs/EPZs, was a condition for appointment of the petitioners as a custodian under Section 45(1) of the Act. Consequently, cost recovery charges at a specified rate were/are levied in terms of the statutory mandate. Levy of cost recovery charges from the custodians of concerned ICDs/CFSs/ACCs/EPZs, have statutory force for which reliance is placed on Section 45 of the Act.

8. Even otherwise, the State has the power to charge a fee relatable to the costs of the customs officials sanctioned deployed at the ICDs/CFSs/ACCs/EPZs in addition to the regular officers. Operation of ICDs/CFSs/ACCs was a commercial venture and enterprise, a business proposition for profit and gain. Central Government has sanctioned additional manpower to man and operate these ICDs/CFSs/ACCs/EPZs. Additional manpower was dedicated and posted at the ICDs/CFSs/ACCs/EPZs throughout the year. Collection of cost recovery charges has a *quid pro quo* and was not *ultra vires* Article 14 and Article 265 of the Constitution of India.

9. Respondents submit that the norms fixed by the Central Board of Excise and Customs for Cost Recovery Charges are in accordance with the Ministry of Finance's letter F. No.A/11018/9/91-AD IV dated 1st April, 1991. The petitioners being custodians of ICDs/CFSs/ACCs were required to pay charges at the rate of 1.85 times the salary of the officers posted at ICDs/CFSs/ACCs. The salary would include D.A., C.C.A., H.R.A. etc. Said

costs were to be recovered in advance from the custodians. The Integrated Finance Unit ('IFU') wing of the Ministry of Finance had given concurrence to this method of charging cost recovery charges vide their Dy. No.2/FA(F)/91 dated 01st January, 1991 with effect from 01st April, 1991. The cost recovery charges had been worked out by the Department of Revenue on the basis of general principles laid down in the General Financial Rules. Under Rules 112 and 113 of the General Financial Rules, recovery of expenditure of the services rendered to both government and non-government parties were to be classified as receipts and the entire cost would be recovered from the public or private body so that net cost to the Government was nil. If custodians fail to compensate the costs including the cost due to implementation of the 6th Pay Commission, then the government would suffer net loss and would tantamount to profiting by the private sector at the expense of the government.

10. Learned counsel for respondents further submitted that custodians had themselves undertaken to bear the costs of the customs staff posted at ICDs/CFSs/ACCs/EPZs as a pre-condition for being appointed as a custodian under Section 45 of the Act. This cost was liable to change, if the components constituting the cost such as the salary, D.A., CCA, HRA etc. change. Accordingly, costs were revised from time to time. After the implementation of the 6th Pay Commission, payment viz these components had increased and, consequently the cost recovery charges were also increased proportionally.

11. At the outset, we would like to mention here that most of the petitioners have not disputed the notifications and circulars relied upon by respondents. They have not challenged the bonds and the undertaking

executed by them to pay the cost recovery charges. Hence, what is primarily required to be decided and adjudicated is challenge to the validity of recovery of cost computed at the rate of 1.85 times the salary of the customs officers posted at the concerned ICDs/CFSs/ACCs/EPZs. While examining the said aspect, we would also consider the challenge to the constitutional *vires* etc.

12. We would first examine decisions elucidating jurisprudential differences between "tax" and "fee". The Supreme Court in ***The Chief Commissioner, Delhi and Anr. v. The Delhi Cloth and General Mills Co. Ltd. and Ors.***, AIR 1978 SC 1181, has held as under:

> *"3. The main point which arises for consideration in this case is as to whether or not the fee charged under the notification issued by the Chief Commissioner was a legal impost justified by the provisions of the Constitution. It is well settled that a fee in order to be a legal fee must satisfy two conditions:*
>
> *(i) there must be an element of quid pro quo that is to say, the authority levying the fee must render some service for the fee levied however remote the service may be;*
>
> *(ii) that the fee realised must be spent for the purposes of the imposition and should not form part of the general revenues of the State.*
>
> *4. .....*
>
> *Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes.*

The same view was reiterated in Ratilal Panachand Gandhi v. The State of Bombay and Ors. [1954] S.C.R.P. 1055."

13. Earlier in the matter of the ***Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.***, AIR 1954 SC 282, the Supreme Court had the opportunity to examine distinction between "tax" and "fee" and it was held as follows:

> *"44. The learned Attorney-General has argued in the first place that our Constitution makes a clear distinction between taxes and fees. It is true, as he has pointed out, that there are a number of entries in List I of the Seventh Schedule which relate to taxes and duties of various sorts; whereas the last entry, namely entry 96, speaks of "fees" in respect of any of the matters dealt with in the list. Exactly the same is with regard to entries 46 to 62 in List II all of which relate to taxes and here again the last entry deals only with "fees" leviable in respect of the different matters specified in the list. It appears that articles 110 and 119 of the Constitution which deal with "Money Bills" lay down expressly that a bill will not be deemed to be a "Money Bill" by reason only that it provides for the imposition of fines.... or for the demand or payment of fees for licences or fees for services rendered; whereas a bill dealing with imposition or regulation of a tax will always be a Money Bill. Article 277 also mentions taxes, cesses and fees separately. It is not clear, however, whether the word "tax" as used in article 265 has not been used in the wider sense as including all other impositions like cesses and fees; and that at least seems to be the implication of clause (28) of article 366 which defines taxation as including the imposition of any tax or impost, whether general, local or special. It seems to us that though levying of fees is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fees under a separate category for purposes of legislation and at the end of each one of the three legislative lists, it has given a power to the particular legislature to legislate on the imposition of fees in respect to every one of the items dealt with in the list itself.*

Some idea as to what fees are may be gathered from clause (2) of articles 110 and 119 referred to above which speak of fees for licences and for services rendered. The question for our consideration really is, what are the indices or special characteristics that distinguish a fee from a tax proper? On this point we have been referred to several authorities by the learned counsel appearing for the different parties including opinions expressed by writers of recognised treatises on public finance.

45. A neat definition of what "tax" means has been given by Latham C.J. of the High Court of Australia in Matthews v. Chicory Marketing Board (60 C.L.R. 263, 276.).

"A tax", according to the learned Chief Justice, "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered" not payment for services rendered.

This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it.

It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law (Vide Lower Mainland Dairy v. Orystal Dairy Ltd. 1933 AC 168).

The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected form part of the public revenues of the State. 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 (See Findlay Shirras on "Science of Public Finance", Vol. p. 203.). Another feature of 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.

46. 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, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay (Vide Lutz on "Public Finance" p. 215.).

These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

47. As regards the distinction between a tax and a fee, it is argued in the first place on behalf of the respondent that a fee is something voluntary which a person has got to pay if he wants certain services from the Government, but there is no obligation on his part to seek such services and if he does not want the services, he can avoid the obligation. The example given is of a licence fee. If a man wants a licence that is entirely his own choice and then only he has to pay the fees, but not otherwise. We think that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees. It is difficult, we think, to conceive of a tax except, it be something like a poll tax, the incidence of which falls on all person within a State. The house tax has to be paid only by those who own houses, the land tax by those who possess lands, municipal taxes or rates will fall on those who have properties within a municipality. Persons, who do not have houses, lands or properties within municipalities, would not have to pay these taxes, but nevertheless these impositions come within the category of taxes and nobody can say that it is a choice of these people to own lands or houses or specified kinds of properties, so that there is no compulsion on them to pay taxes at all.

Compulsion lies in the fact that payment is enforceable by law against a man in spite of his unwillingness or want of consent; and this element is present in taxes as well as in fees. Of course, in some cases whether a man would come within the category of a service receiver may be a matter of his choice, but that by itself would not constitute a major test which can be taken as the criterion of this species of imposition. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege.

Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest (Vide Findlay Shirras on "Science of Public Finance" Vol. II, p. 202.). Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action (Vide Seligman's Essays on Taxation, p. 408.).

48. If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services.

As indicated in Article 110 of the Constitution, ordinarily there are two classes of cases where Government imposes 'fees' upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either heavy or moderate from that person in return for the privilege that is conferred. A most common illustration of this type of cases is furnished by the licence fees for motor vehicles. Here the costs incurred by the Government in maintaining an office or bureau for the granting of licences may be very small and the amount of imposition that is levied is

based really not upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, according to all the writers on public finance, the tax element is predominant (Vide Seligman's Essays on Taxation, p. 409.), and if the money paid by licence holders goes for the upkeep of roads and other matters of general public utility, the licence fee cannot but be regarded as a tax.

49. In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and as said by Seligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes (Ibid, p. 406.).

50. Our Constitution has, for legislative purposes, made a distinction between a tax and a fee and while there are various entries in the legislative lists with regard to various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of any of the matters that is included in it. The implication seems to be that fees have special reference to governmental action undertaken in respect to any of these matters."

The aforesaid decision holds that it was not clear whether the word "tax" used in Article 265 has been or has not been used in the wider sense to include cesses and fees, but by implication of clause (28) of Article 366, taxation includes imposition of any tax or impost, whether general, local or special. Levy of fees is a form of exercise of taxing power of the State, albeit our Constitution has placed fees under a separate category for purposes of legislation and at the end of each one of the three legislative lists

empowering the particular legislature to legislate on imposition of fees in respect of the one of the items dealt with in the list itself. Fee is something voluntary which a person has to pay if he wants certain services or special benefit which the individual receives from the government. Conversely, there is no obligation if a person does not want the services and thereby he can avoid the obligation to pay fee. Nevertheless, there could be an element of compulsion and coercion of different degree, even when fee is imposed and payable to the government. Compulsion lies in the fact that payment is enforceable by law in-spite of the persons unwillingness and want of consent to make the payment. This would not be the sole and material criteria to distinguish "tax" from "fee". The principle difference between "tax" and "fee" is that a "tax" is levied as a part of a common burden, while "fee" is a payment for a special benefit or privilege. Therefore, "fee" is regarded as a sort of return for services rendered. The decision does state that if the money paid is set apart and appropriated specifically for performance of specific work and is not merged in the public revenue for the benefit of the general public, it is a "fee" and not a "tax". Therefore, distinction between "tax" and "fee" may be drawn if money is paid for performance of work and not merged in the public revenue. Nevertheless, the primary distinction remains and is the element of *quid pro quo,* that is to say, the authority levying the "fee" must render some service for the fee levied, however remote the service may be. ***Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt. (supra)*** also cautions and states that there is really no generic difference between "tax" and "fee" as taxation power of the State may manifest itself in different ways.

14. Referring to the element of *quid pro quo,* whether imposition was and is in accordance with the constitutional mandate and whether levy of fee was/is legal, the Bombay High Court in ***Mumbai International Airport Private Ltd. v. The Union of India***, 2014 (310) ELT 3 had observed:

> *"62. Alternatively, we find substance in the argument of Mr. Jetly that the cost recovery charges are in the nature of fee for the services rendered by Customs Officers to the custodian of the Port Terminal. These are officers posted on additional sanctioned posts than the regular strength. The details have been provided in the affidavit in reply. In that regard, we find that Mr. Jetly has rightly relied upon paras 32 to 37 of the affidavit in reply, wherein it has been pointed out as to how additional cost has to be incurred for providing the services of the staff and posting them at the disposal of the station. It is in these circumstances that though it is denied that this is in the nature of a tax or a fee but the recovery is supported assuming to be a fee by co-relating it with these services provided. There is, therefore, quid pro quo. There is no element of tax therein."*

15. The ICDs/CFSs/ACCs/EPZs located in the hinterland are operated by the custodians for their private commercial gains and profits. Government facilitates the operation of the ICDs/CFSs/ACCs/EPZs by providing the required services by posting customs officials at these stations. The affidavit in reply to the present writ petitions sets out and states additional costs have been incurred by the government for the services of the staff and posted them at the ICDs/CFSs/ACCs/EPZs, to show co-relation between the services provided and cost recovery charges, to establish *quid pro quo.* Figures and increase in customs officers and staff has been explained with data and details in the counter affidavit. This cannot be controverted and denied.

16. The petitioners-companies charge certain amount per container from the exporter/importer. In this manner cost recovery charge paid to the government was recouped and passed on to the importer/exporter. It was added to the expense or cost. It was treated as element and part of service rendered to the importer/exporter. Hence, the petitioners, in turn, would be bound to make payment as cost recovery charge for the posting of the custom officers at the said ICDs/CFSs/ACCs/EPZs. The cost recovery charges were intended to cover the expense of the government in deputing Customs personnel to the ICDs/CFSs/ACCs/EPZs. Quid pro quo is established and cannot be doubted.

17. Section 45 of the Act reads as under:-

> ***SECTION 45. Restrictions on custody and removal of imported goods.*** *– (1) Save as otherwise provided in any law for the time being in force, all imported goods, unloaded in a customs area shall remain in the custody of such person as may be approved by the Commissioner of Customs until they are cleared for home consumption or are warehoused or are transshipped in accordance with the provisions of Chapter VIII.*
>
> *(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force, –*
>
> *(a) shall keep a record of such goods and send a copy thereof to the proper officer;*
>
> *(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer.*
>
> *(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilfered after unloading thereof in a customs area while in the custody of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an import manifest or, as the case may be,*

an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.

As per the said provision, all imported goods unloaded in a customs area have to remain in the custody of such person as may be approved by the Commissioner of Customs till they are cleared for home consumption or are warehoused or transshipped. The section is subject to any other law. In exercise of power conferred by Section 45 of the Act, the petitioners have been appointed as custodian of imported goods unloaded in the ICDs/CFCs/EPZs. Section 45 permits and allows any other law to be enacted or framed for custody of imported goods till they are cleared etc. Thus cost recovery, it is apparent, is associated with services provided by the Union of India to a private organization like the petitioners. Costs incurred are to be recovered from the custodians. Pertinently, as noticed below the petitioners had undertaken to bear the costs of customs officers posted at the ICDs/CFSs/ACCs/EPZs as a pre-condition for appointment as a custodian under Section 45(1) of the Act.

18. Cost recovery charges are also payable in terms of Regulation 5 (2) of Handling of Cargo in Customs Area Regulations, 2009. The said regulations have been made in terms of Section 157 and 158 of the Act. Relevant portions of Regulation 5 are as under.

> "***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 area, hereinafter referred to as the applicant, shall fulfill the following conditions, namely:-*

(1) The applicant shall provide the following to the satisfaction of the Commissioner of Customs, namely:

xxxx

(j) adequate air-conditioned space and power back up, hardware, networking and other equipment for secure connectivity with the Customs Automated system; and for exchange of information between Customs Community partners;

xxxx

(m) security and access control to prohibit unauthorized access into the premises; and

(n) such other facilities as the Commissioner of Customs may specify having regard to the custody and handling of imported or export goods in a customs area;

xxxx

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

xxxx

(5) The applicant shall undertake to comply with the provisions and abide by all the provisions of the Act and the rules, regulations, notifications and orders issued thereunder;"

19. Appointment of the custodians of ICDs/CFSs/ACCs/EPZs is governed by various provisions of the Act, and the fact is that the payment of cost recovery charges for the customs officers, who were posted for manning such additional facilities, was one of the conditions of appointment as a custodian in terms of Notification issued under Section 45(1) of the Act. The Government has laid down a standard set of undertaking to be given by the

custodians before they are so appointed under Section 45 of the Act, wherein one of the conditions/undertaking is that the custodian shall bear the cost of customs staff posted at the ICDs/CFSs/ACCs/EPZs.

20. The petitioners had obtained the necessary permissions from the respondent No.2 for establishment of the ICDs/CFSs/ACCs/EPZs and thereafter, the petitioners were appointed as custodians of goods meant for import/export. Areas within ICDs/CFSs/ACCs/EPZs, were declared as Customs area for the purpose of the Act. The petitioners were required to comply and had accepted that they would comply with the provisions of the Act applicable to the ICDs/CFSs/ACCs/EPZs. They had executed a bond together with bank guarantees in favour of the respondent No.3. The bonds together with appropriate bank guarantees were executed, primarily to ensure the compliance with the provisions of the Act and for indemnifying the customs authorities for any loss of duty suffered due to any negligence on the part of the petitioners-companies. Accordingly, and in terms of Section 45 of the Act and Regulation 5 (2) of Handling of Cargo in Customs Area Regulations, 2009, that the circular dated 14th December, 1995 and the impugned letter of the Ministry of Finance dated 1st April, 1991 have been issued.

21. Petitioners as a pre-condition for becoming custodians of the respective ICDs/CFSs/ACCs/EPZs had willingly undertaken to bear the costs of the Customs staff posted at the ICDs/CFSs/ACCs/EPZs. Thus, the payment of cost recovery charges has sanction and authority of law to back the levy and imposition. Further, the cost recovery charges so levied are against expenses incurred by the government for rendering the services at the ICDs/CFSs/ACCs/EPZs. Therefore, in view of the case law above

discussed, provisions of the Act and the documents on record, it is established that cost recovery charges are in the nature of "fee" for services rendered by the customs officers at the concerned ICDs/CFSs/ACCs/EPZs.

22. On the issue and question of quantum and whether the government can levy the cost recovery charges at the rate of 1.85 times the salary of the customs officers, we would observe, the actual cost cannot be restricted and confined to salary paid. There are hidden and other expenses involved. It would be unfair and wrong to compute cost by merely adding the wage or salary actually paid to the custom staff deployed. This is not the actual cost incurred and the cost to the government. The cost factor was worked out on the basis of principles under the General Financial Rules. This assertion and contention of the respondents remains undisputed and unchallenged. On the said aspect and question reference can be made to ***Hari CFS v. Union of India***, 2011 (267) ELT 319 (Mad.), wherein a similar issue was rejected, holding that the petitioners therein were liable to pay fee for the deployment of customs officers. Relevant paragraphs of the judgment read as under:-

> *"7. The contention of the petitioners were that the Officers of the Customs department are performing their statutory duties under the Customs Act. Their function is a sovereign function. No fee can be levied for the discharge of statutory or sovereign function. The Government is empowered to levy Customs Duty under Section 12 of the Customs Act. Therefore, further cost recovery is void ab initio and violative of Articles 14 and 265 of the Constitution of India. The cost recovery made by the respondents is nothing but a fee. Charging at the rate of 185% of total salary of the Customs Officers is extravagant and exorbitant. Even in other ports, writ petitions have been filed questioning the recovery of charges for payment to the Customs Officers. Any revision of pay scale by the Central Government will apply to payment of salary by the Union Government to its employees. If any retrospective effect were to give on such*

revision of scales of pay, that cannot be passed on to the handlers of Export and Import. It is also stated that the Kerala High Court in similar circumstances had upheld the case of the petitioners.

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9. At the CFS and ICDs, the Customs personnel are provided on a cost recovery basis. The sanction of postings of officers will be issued by the administrative wing of the Central Board of Excise and Customs. The custodians are required to pay 185% of total salary of the officers actually posted at the CFS. Normally one CFS will have 13 officers of various ranks. As per the guideline, dated 14.12.1995, more particularly guideline No.10, it is the Custodian who shall bear the cost of the Customs personnel posted for various duties at ICD/CFS/EPZ. Further by a notification No.26/2009, the Government by the exercise of its power under Section 141(2) of the Customs Act had issued new regulations known as Handling of Cargo in Customs Areas Regulations, 2009. Regulation 3 has made its regulations to come into effect with retrospective operations. Under Regulation 5, it is clearly stipulated that the Custodian shall bear the cost of Customs staff posted in the station. The Commissioner of Customs shall decide the number of staff required to be posted in the facility. It is also provided under condition No.(o) that the Customs Cargo provider shall bear the cost of customs officers posted at the Commissioner of Customs on cost recovery basis and in the manner specified by the Government of India, Ministry of Finance unless specifically exempted by an order of the Ministry.

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12. ....In normal circumstances, the officers of the Customs department perform their duty only in the Customs House located in the Gateway Port and they discharge different functions. When ICD and CFS are running by Custodians for their own commercial gains and located in the hinterland, the cost recovery charges will have to be paid for the posting of

customs officials who are additionally sanctioned for these ICDs and CFS over and above the regular posts. Running an ICD or CFS is a commercial proposition. The Government cannot bear the costs of additional manpower sanction. The services of the Customs officials are required throughout year during working hours. The cost recovery charges are in the nature of fees. The recovery at the rate of 1.85% of total salary is directly relatable to the additional creation of posts. Apart from the normal salaries, additional dearness allowance and notional HRA will have to be paid. Therefore, 1.85 times of the monthly average are collected as per the Government of India's letter, dated 1.4.1991. This 1.85% times was worked out by the Department of Revenue on the basis of principles laid down under the General Financial Rules. In terms of Rules 112 and 113 of the Financial Rules, recoveries of expenditures of the services rendered to both Government and Non Government parties are to be classified as receipts and the entire cost shall be recovered from the public or private bodies so that net expenditure of the Government is nil. Further, while calculating the cost recovery charges, apart from the cost of the staff includes the component of pay and allowances, contribution of pension will have to be recovered from their salaries. Therefore, there was no exorbitant claim in demanding 1.85 times. The obligations of Custodians are not merely flowing from the bonds executed by them but the requirements of Customs Act will have to be followed. The judgment of Kerala High Court may not have any relevance, as it did not decide the issue relating to cost recovery charges to be met by the Custodians."

23. In ***Sanco Trans Limited v. Union of India***, 2011 (185) ECR 21 (Madras), the Madras High Court applying the *ratio decidendi* of ***Hari CFS*** (supra), had dismissed the writ petitions.

24. In ***Mumbai International Airport Private Ltd.*** (supra), the Bombay High Court upheld imposition and levy of cost recovery charges with the following observations:-

"53. If that was not be the position, the Petitioners would not have furnished a bond as required by the authorities. It is in these circumstances that we are unable to agree with the Petitioners as they do not have any absolute exemption as claimed by them. The Petitioners have understood the law and its applicability to mean stepping into the shoes of a Authority like AAI does not mean automatic exemption. All custodians on which the status is claimed have to be complied with unless exempted. The staff of the Customs Department is deployed to enable the movement of goods from the notified Customs Area. That movement is possible only after the proper officer permits it. That proper officer is from the Department and if he is posted with a specific subject and purpose, then, charges of such posting will have to be borne by the Petitioners.

54. There is justification for the argument of the Respondents that even if there was a certain exemption in favour of their predecessor in title or the Airport Authority of India that is specific and qua the premises. That could be qua part or whole of the premises transferred. The Respondents have clarified that custodianship for part of the Air Cargo Complex was transferred to Air India by the Airport Authority of India. That is why the exemption enjoyed by these two entities and claimed by the Petitioners is restricted to the area. The Perishable Cargo Complex is a facility which has been developed and with the participation of another entity. That was not covered as original premises and under the Notification issued on 19th October, 2002. Therefore, as regards this Perishable Cargo Terminal, there cannot be any exemption. Similarly, the argument of the Respondents that in the backdrop of the Circulars and Notifications referred by us above, it is apparent that none of the functions under the Customs Act could be discharged and carried out nor the power exercised in that behalf, except by the officers functioning under the Customs Act is accurate. The 'Customs staff is under control of the Commissioner of Customs. It is in these circumstances that it is fallacious to argue that the staff of this Customs Department reports to other entities much less the Petitioners. None can displace them or take over their duties and functions which are statutory. Even if that is not the position in law still it would be

open for the authorities under the Customs Act to call upon parties like the Petitioner to pay the costs and charges in respect of the staff of the customs department posted at the terminal or in the area which is a notified Customs area. If this staff is posted to work there at and since the area or premises are claimed by the Petitioners, then, all the more, by their understanding and agreement itself, they have to pay the charges.

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57. We find that reliance by Mr. Jetly on Exhibit 7 to the affidavit in reply is, thus, well placed. There the Perishable Cargo Terminal permission refers to the Handling of Cargo in Customs Area Regulations, 2009. As per para 4 (XXIII) thereof, the Petitioners have to bear the charges of the Customs staff posted at the Perishable Cargo Terminal by the Commissioner of Customs, Air Cargo Complex, Mumbai on cost recovery basis. The Petitioners would not have been permitted to outsource the function of handling of Cargo within this terminal premises unless the Regulation 6(2) of these Regulations had permitted them to do so. Further, they could not have been appointed as custodian and within the meaning of the said term and as contemplated section 45 of the Customs Act, 1962, unless, they subjected themselves to these provisions. That they did so voluntarily does not mean that they can pick and choose favourable or beneficial terms and conditions and leave our or omit the so called onerous one's. Therefore, "shall remain in custody of such person" are the relevant words and to understand the concept. The permission to set up a Perishable Cargo Terminal for exports was sought by the Petitioners. That the facility was constructed by the Cargo Service Centre India (P) Ltd. on a Build, Operate and Transfer basis is clear from Exhibit '7' to the affidavit in reply. That entity is also designated as "Customs Cargo Service Provider" is further clear. The function of Cargo is outsourced but the Petitioners appointment as custodian under the Customs Act is not disturbed and remains untouched. Therefore, conditional approval contained in Exhibit '7' binds the Petitioners or else the approval would fall. Once the permissions have been sought

and from the various authorities under the Customs Act, then, it is not proper to urge that the conditions imposed by such authorities will not be binding.

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59. For these reasons, we do not find any substance in this Writ Petition. Rule is discharged in both of them.

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61. We do not decide any larger controversy. As far as the judgment of the Andhra Pradesh High Court is concerned, we find that there as well, the learned Single Judge has without in any manner appreciating the position of the Customs Officers and their authorities under the Act held that Regulation 5(2) purports to levy a tax. We are of the opinion that cost recovery charges are not being recovered from the importer/exporter. It is because the Petitioners under a specific document sought the approval firstly, to set up a Perishable Cargo Terminal and for exports. That was granted and in that terminal, services of the Customs staff had to be provided so as to enable the goods exported being cleared therefrom. For the purposes of clearance of imported and exported goods, and making of entries in relation thereto, by the proper Officer before a importation and equally for home consumption and payment of import duty, enabling recovery thereof in accordance with law that the customs staff alone would be in a position to take the requisite steps. They alone are competent to administer and implement the Act. That their services are utilized is clear and therefore the reimbursement of the charges incurred on them is undertaken to be made by the Petitioners. Such a payment and of cost recovery charges does not come within the ambit of the controversy dealt with by the Hon'ble Supreme Court. It is in these circumstances that this is a payment and more particularly by way of reimbursement of the costs in relation to such staff. That staff is deployed by the department of Customs and particularly the Commissioner. In such circumstances, and with great respect, we are unable to agree with the learned Single Judge of the Andhra Pradesh High Court. We find much substance in the contentions of Mr. Jetly that these matters

cannot be looked at from the angle and in the manner approached by the Petitioners."

25. It is a fact that the cost recovery charges have been worked out and were/are payable by the Department of Revenue on the basis of general principles laid down in the General Financial Rules. As a condition for being appointed as a custodian, the petitioners had undertaken to bear the cost of the customs staff posted at the ICDs/CFSs/ACCs/EPZs. Cost was/is liable to change if the different components of this cost, such as, the salary, D.A., CCA, HRA, pay allowance and pension contribution at the rates in force from time to time etc. were/are changed. After the implementation of the recommendations of the 6th Pay Commission, these components had undergone a change and as a result, the cost of the staff as worked out and was payable. Similar would be the position on implementation of the 7th pay Commission report.

26. In view of the Rules 112 and 113 of the General Financial Rules, recoveries of expenditure of the services rendered to both the government and non-government parties are to be classified as receipts and the entire cost shall be recovered from the public or private body so that the net cost to the government is nil. If the revision in cost due to implementation of the 6th Pay Commission was not carried out, then the government would had suffered a net loss and would have tantamounted and resulted in profiting of the private sector at the expense of the government. Cost recovery @ 185% of the total salary of staff actually posted at ICDs/CFSs/ACCs/EPZs of the petitioners was being done as per the Board's instructions issued under F. No.434/12/92/-CUS dated 05.06.1992, Circular Nos.128/95-CUS dated

14.12.1995, 133/95-CUS dated 22.12.1995, 52/97 dated 17.10.1997 and 80/98-CUS dated 20.10.1998.

27. Customs officers may perform statutory or sovereign functions, however, the sovereign is not liable to provide service and permit setting up ICDs/CFSs/ACCs/EPZs. Additional posts are created/sanctioned for the ICDs/CFSs/ACCs/EPZ for which the developer undertakes to bear the cost of the staff posted. The payment is in the nature of fee for the services rendered. Further, payment of cost recovery charges for the customs officers who are posted for manning such additional facilities is one of the conditions of appointment as a custodian in terms of Notification under Section 45(1) of the Act and Regulation 5(2) of the impugned Regulation. In this regard, necessary undertakings were given by the petitioners before they were so appointed as custodian under Section 45 of the Act. They are therefore bound to bear the cost of the customs staff, posted for the ICDs/CFSs/ACCs/EPZs. The payment of cost recovery charges by the custodian of ICDs/CFSs/ACCs/EPZs has the statutory force of law and is within the jurisdiction of the respondents.

28. As mentioned earlier, as per the norms of Central Board of Excise and Customs for Cost Recovery Charges in accordance with the Ministry of Finance's letter F. No.A/11018/9/91-AD IV dated 1st April, 1991, custodians of ICDs/CFSs/ACCs/EPZs are required to pay 1.85 times the total salary of the officers posted at the ICDs/CFSs/ACCs/EPZs. The IFU wing of the Ministry of Finance, had given concurrence to this method of charging Cost Recovery charges vide their Dy. No.2/FA(F)/91 dated 01st January, 1991 with effect from 01st April, 1991.

29. The judgment relied upon by the petitioner in ***Union of India v. National Tyre & Rubber (I) Ltd.*** (W.A. No.891/2005) is not applicable to the facts and circumstances of the present case. In the said judgment, the Kerala High Court has not unsettled the principle of payment of cost recovery charges by the custodian. As regards the judgment relied upon by the learned counsel for the petitioner in ***GMR Hyderabad International Airport Ltd. v. Central Board of Excise & Customs***, 2012 (193) ECR 188 (AP), the Bombay High Court has patently distinguished the same in its subsequent judgment in the case of ***Mumbai International Airport Private Ltd.*** (supra) in para 61 thereof and has expressed its dissent with the decision of the Single Judge of the Andhra Pradesh High Court.

30. In view of the aforesaid discussions, we are of the opinion that no case is made out for the grant of the reliefs as prayed for in the writ petitions. All the four writ petitions are accordingly dismissed, with no order as to costs.

CHANDER SHEKHAR, J.

SANJIV KHANNA, J.

AUGUST 27, 2018/b