

IN THE HIGH COURT OF SINDH AT KARACHI  
Special Customs Reference Application No. 69 of 2008

Present: Mr. Justice Munib Akhtar & Mr. Justice Zulfiqar Ahmad Khan

M/s Ally Brothers & Co. (Pakistan) Ltd. ... Applicant  
vs  
The Collector of Customs ... Respondent

Date of hearing: 23 December 2015

Date of Judgment:

Mr. Mazhar Jafri, Advocate for Applicant  
Mr. Muhammad Sarfraz Ali Metlo, Advocate for Respondent

**JUDGMENT**

1. **Zulfiqar Ahmad Khan, J:** This special reference arises out of the order of the Tribunal dated 24.01.2007 wherefrom the aggrieved Applicant has proposed the following questions of law for the opinion of the Court.
  - a. *Whether on the facts and in the circumstances of the case the impugned order of the Respondent and the learned Member (Judicial) of the Customs, Excise and Sales Tax Tribunal, Bench-III, Karachi are violative of the provisions of Section 13 of the Customs Act 1969 read with Rules 344 and 345 and the Customs Rules 2001?*
  - b. *Whether on the facts and in the circumstances of the case the Respondent was lawfully justified in taking action against the Applicant in ordering the cancellation of Private Bonded Warehouse license under Section 13(3) of the Customs Act, 1969, without having prior suspended the license under Section 13(4) of the Customs Act, 1969?*

c. Whether on the facts and in the circumstances of the case the Applicant's license of Private Bonded Warehouse, having expired with effect from 30.06.1990 and renewal thereof not having been applied for, the respondent was lawfully justified in ordering the cancellation of the said license, after issuance of Show Cause Notice dated 01.03.2005 after over 15 years of the said expiry date of the license?

2. Brief facts of the case are that the Applicant was granted private bonded warehouse license in the year 1977 which functioned up to the year 1990. The Applicant did not renew the license after 1990 and an intimation as to its non-functioning and non-renewal with effect from 01.07.1990 was given to the Respondent by through a letter dated 28.06.1990. The Applicant did not use the warehouse after the year 1990 and was listed in the Circular No.8/98 dated 08.10.1998 amongst the 112 bonded warehouses licenses in respect of which were notified to stand expired on account of their failure to apply for renewal. The said Circular went on to state that "the process of cancellation of these licenses has been initiated. In the meantime, all concerned are informed not to allow in bonding of consignment to these bonded warehouses", to which the Applicant did not object as its warehouse was already non-functional post 1990 upon failure to renew the license.
3. However it was only after a lapse of 15 years on 01.03.2005 when the Applicant was surprised to receive a show cause notice stating that the Applicant had neither applied for renewal of the license nor paid establishment charges of Rs.142,000 and requiring the Applicant to show cause as to why their license be not cancelled and the said amount of establishment charges not recovered from them under section 202 of the Customs Act, 1969. Following the said show cause notice, the Respondent proceeded ex-parte and passed an order-in-original against the Applicant, conveying cancellation of the Applicant's license and directing recovery of establishment charges of Rs.142,000 from the Applicant.
4. The Applicant preferred an appeal, which was dismissed in terms of the impugned order of the Tribunal, whereupon, the Applicant filed

this reference application, where the above referred questions of law are posed:

5. We have heard Mr. Mazhar Jafri, the learned counsel for the Applicant and Mr. Muhammad Sarfraz Ali Metlo, the learned counsel for the Respondent.
6. The learned counsel for the Applicant vehemently argued in favor of the Applicant's case: He urged that since 1990 the bonded warehouse was not functioning, therefore demand of payment of establishment charges in the sum of Rs.142,000 is imaginary, uncalled for and without any justification and such order passed by the department are to be set-aside. In support of his contention the learned counsel referred to the circular dated 08.10.1998 whereby license of subject bonded warehouse was shown expired as from 30.06.1990. He submitted that establishment charges under rule 348 are the charges to be levied and collected on annual basis from a licensee are required to be in relation to or on account of the charges incurred on the staff or equipment used for the purposes of the lawful functioning and operation of a warehouse. Since, the Applicant's license having expired on 30.06.1990 and no business operation or activity having taken place after the said expiry date, there could be no lawful basis or justification for imposition or levy of any establishment charges. The learned counsel also submitted that there were no guards or other personnel deployed at the warehouse post 1990 and since the warehouse was in the personal use of the applicant there was no requirement of having such personnel anyway since no goods were inbonded post 1990.
7. To the contrary, the learned counsel for the Respondent argued that the facts narrated by the Applicants that its warehouse is non-operative after 1990 are not supported. He drew court's attention to a departmental statement dated 13.12.2006 and Applicant's letters dated 20.7.1992 and 10.08.1993 addressed to the department for seeking renewal of bonded warehouse license and copy of a paid challan of Rs.25,000 for the payment of establishment charges for the year 1993-94 through pay order. He however admitted that there is nothing on record to show that after the year 1993 any effort to renew the license was made, nor there is any record of goods having

been bonded after 1993. The counsel however averred that even if the Appellant has not utilized the facility of bonded warehouse from 1990 or 1993 onwards, this fact alone will not absolve him from the payment of impugned charges as the due procedure for surrender of license or its cancellation/revocation by the Respondent was not followed by the Appellant.


8. Heard both the learned counsels at length. To commence our traverse to the factual controversy, we would like to examine the process of issuance, term and revival of a license in respect of bonded warehouse provided under the customs laws and regulations.
9. The Customs Act, 1969 defines the term warehouse to mean any place appointed or licensed under section 12 or section 13. Section 13 which deals with private warehouses empowers the Collector of Customs to issue license for private warehouses wherein dutiable goods may be deposited without payment of customs-duty. The section provides that a license granted may be cancelled for infringement of any condition laid down in the license or for any violation of any of the provisions of this Act or any rules made there under. Chapter XV of the Customs Rules 2001 contains warehousing rules. We note that the term is defined in rule 348 to mean *"Establishment charges at the rate as fixed by the Collector shall be payable by the licensee on annual basis for issuance, revival or revalidation of the license. Provided that no fee or establishment charges shall be payable for a manufacturing bond"*. Also, under rule 343 where conditions and requirements for the grant of licenses are provided, clause (i) requires the applicant seeking a license to provide a pay order in favour of the Collector equal to the establishment charges, if leviable under rule 349. Another mention of establishment charges could be found in rule 346. While dealing with the matter of revalidation or revival of license, the said rule provides the Collector to revalidate or revive a license (originally issued for a term of three years), inter alia, upon payment of establishment charges, if leviable under rule 349. It is interesting to note that notwithstanding the references made in rules 343 and 346; rule 349 is silent about the possibility of levying establishment charges. Further mention of the term is found in Appendix-II of the form of bond required for the

issuance of a warehouse license wherein the applicant undertakes that "the establishment charges, if payable under the rules, for the year will be deposited in advance at the time of renewal and will be subjected to review by the Collector from time to time".

10. It's worth mentioning that vide SRO 623(I)/2007 dated 18.06.07, mention of establishment charges in the above quoted rules 343 and 346 was omitted. As well as in terms of the said SRO, rule 348 was completely omitted.
11. To our mind, questions crystalizing from the above discussion could be summed up are following:
  - a. Whether it is compulsory for a private bonded warehouse license holder to renew the license under the Customs Act, 1969?
  - b. Whether the licensee is bound to pay establishment charges even if the license had expired, no in-bonding was done and no services of the Customs Authorities were enjoyed?
12. From a bare reading of the legal position encompassed in paragraph 9 above, where we have analyzed the statutory position with regards to issuance, term and revival of licenses, it is crystal clear that there are no mandatory provision under the Customs Act nor the Customs Rules under which a private warehouse licensee is bound to renew the license after it had expired or to pay the establishment charges even if the license had expired. The fact is that the establishment charges are always required to be paid in advance for the initial, and for any revived term of the license. There is no perpetuity in licensing fees, it can only be charged in respect of services performed and not otherwise. Once the licensee has not renewed the license, no goods can be inbonded and no services are to be provided by the Customs Authorities. Therefore if a person chooses not to revive or renew the license, establishment charges are not payable as no services of the Custom Authorities are to be enjoyed by the defunct licensee. Since there are no provision in the Customs Act or Customs Rules which empowers the Customs Authorities to determine the establishment charges at their own sweet will without seeking any approval from

the legislature, which apparently is not forthcoming from the very intent of the law, no demand for the payment of establishment charges could be validly made once a licensee has decided not to renew its license.

13. For the reasons recorded above, the questions referred to this court for opinion are answered in favor of the Applicant and against the Respondent.
14. The reference is allowed accordingly and the office is directed to send copy of this judgment under seal of this Court to the Tribunal in respect of the above reference application pursuant to section 196(5) of the Customs Act, 1969.

  
JUDGE

  
JUDGE

CUSTOMERS