CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

REGIONAL BENCH COURT NO.1

Application(s) Involved:

C/Stay/20456/2019 in C/20794/2019-DB

Appeal(s) Involved:

C/20794/2019-DB

[Arising out of No. BLR-CUSTM-000-COM-005-19-20 dated 14/08/2019 passed by Commissioner of Customs , Bangalore]

Delta Infralogistics (Worldwide) Pvt. Ltd.
Unit No 407 Barton Centre No 84 M G Road
BENGALURU
KARNATAKA
560001

Appellant(s)

Versus

C.C-Bangalore-cus
C.R. BUILDING,QUEENS ROAD,
P.B.NO. 5400,
BANGALORE
KARNATAKA
560001

Respondent(s)

Appearance:

Shri G.B.ESWARAPPA, Advocate
#1711/1712
5TH MAIN ROAD, JUDICIAL LAYOUT,
OPP.JAKKUR AERODROME,
ADJACENT:G.K.V.K(UAS)
BENGALURU
KARNATAKA
560065

For the Appellant

Shri Rama Holla, Superintendent(AR) — For the Respondent

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20821 / 2019

Date of Hearing: 16/09/2019
Date of Decision: 25/09/2019

Per : S.S. GARG

The present appeal is directed against the impugned order dt. 14/08/2019 passed by the Commissioner of Customs whereby the Commissioner has ordered revocation of Customs Broker License issued to the appellant under Customs Broker License Regulation, 2018 (CBLR, 2018 for short) and also ordered for the forfeiture of security furnished by the appellant under Regulation 14 read with Regulation 17 of CBLR, 2018 and also imposed penalty of Rs.50,000/- under Regulation 18 of CBLR, 2018.

2. Briefly the facts of the present case are that the appellants are working as a Customs House Agent (CHA). Appellants were approached by one Mr.Alexander Nathan alias Alex, employee/agent of the importer M/s. M and I Company. The said Mr. Alexander handed over the necessary authorization and KYC documents of the importer to the appellant and the appellant carried out verification as required and attended customs clearance activities of the importer. The imported goods were cleared from the Customs and handed over to the said Mr. Alexander. Later on, DRI Chennai conducted city seizure on 29/12/2017 and seized gold concealed in vehicle AC compressors pertaining to the importer M/s. M and I Company. Thereafter investigation was conducted by the DRI which revealed that one Mr. N. Francis of Chennai with his contacts in Malaysia got the intercepted vehicle AC compressors in which gold was concealed. His brother Mr. N. Prabhu Doss and his relative Mr. D. Velkumar, both residents of Chennai were the accomplices. Later on statement of Shri N. Francis under Section 108 of the Customs Act was recorded and gold weighing 10.459 kgs. valuated at Rs.3,07,28,542/- was seized and proceedings were initiated under COFEPOSA. DRI, Bengaluru searched the premises of the appellant and found no incriminating documents resulting in NIL mahazar and statement of Shri V. Devadas, Senior Manager of the appellant was also recorded. The Commissioner of Customs suspended the Customs Broker License of the appellant vide

Suspension Order dt. 03/12/2018 and on representation by the appellant, the Commissioner reviewed the suspension order and revoked the suspension w.e.f. 28/12/2018 except for Bengaluru branch of the Customs Broker. Thereafter, a show-cause notice was issued and Inquiry Officer was appointed and after the inquiry, the Inquiry Officer submitted his report dt. 16/05/2019 to the Commissioner of Customs making the findings to the effect that:

i. The allegation of violation of Regulation 10(a) of the CBLR, 2018, of not obtaining authorization from the importer is sustainable.
ii. The allegation of violation of Regulation 10(d) of the CBLR, 2018 of not advising his client is sustainable.
iii. The allegation of violation of Regulation 10(e) of the CBLR of not complying with due diligence is not sustainable;
iv. The allegation of violation of Regulation 10(n) of the CBLR, of not verifying the IEC number, and functioning of his client at the declared address by using reliable, independent, authentic documents, data/information is not sustainable.

The said Inquiry Report was communicated to the appellant who filed his defence reply dt. 30/07/2019. Thereafter the Commissioner of Customs passed the impugned order vide which the Customs Broker Licence was revoked and security was forfeited and penalty of Rs.50,000/- was imposed. Aggrieved by the said order, appellant filed the present appeal.

3. Heard both sides and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same is contradictory in nature and has been passed without properly appreciating the facts and the law and the binding judicial precedents. He further submitted

that the impugned order has concurred with the findings of the Inquiry Officer insofar as it relates to Regulation 10(e) (due diligence) and Regulation 10(n) relating to verification and antecedents and accepted the Inquiry Report to the fact that the allegations are not sustainable as they have been complied with by the appellant. He further submitted that M/s. Alexander Nathan is receiving the salary from the importer as stated by him in his statement dt. 18/01/2018 and therefore, he represented the importer and the appellant presumed that authorization and documents given by him to the appellant were in fact from the importer. He further submitted that once the Inquiry officer has exonerated the appellant under Regulation 10(e) and Regulation 10(n), the effect of the same would be that the appellant has been authorized properly by the employee of the importer by handing over the required document which were verified by the appellant before undertaking the clearance work. He further submitted that when the allegation under Regulation 10(e) and Regulation 10(n) failed to sustain, it natural corollary that Regulation 10(a) and 10(d) are also complied with. He further submitted that the impugned order failed to bring out as to what should have been advised by the appellant to the importer but was not advised under Regulation 10(d). He further submitted that the Commissioner has merely resorted to Regulation 10(d) without pointing out as to the lapse on the part of the appellant. further the adjudicating authority in the impugned order has, on presumption and assumption, concluded that the regulations contemplated a general advice and not a specific advice. He further submitted that the appellant has been in the profession for two decades with unblemished records and the impugned order has adversely affected the business of the appellant who is out of business for more than a month. He further submitted that the Commissioner has not considered the various decisions cited before him on the plea of proportionality of punishment. In support of his submissions, he relied upon the following decisions:-

i. Ashiana Cargo Services Vs. CC(I&G) [2014(302) ELT 161 (Del.)].
ii. Commissioner Vs. Ashiana Cargo Services [2015(320) ELT A175 (SC)]
iii. Marks Logistics Vs. CC, cochin [2016(344) ELT 519 (Tri. Bang.)]
iv. Kunal Travels (Cargo) Vs. CC(I&G), IGI Airport, New Delhi [2017(354) ELT 447 (Del.)]
v. Yogesh Kumar Vs. CC, New Delhi (Import &General) [2016(344) ELT 586 (Tri. Del.)]
vi. Transport Logistics Vs. CESTAT, Chennai [2016(338) ELT 380 (Mad.)]
vii. JM Baxi & Co. Vs. CC, Kandla [2016(337) ELT 268 (Tri. Ahmd.)]
viii. Baraskar Brothers Vs. CC(General), Mumbai [2013(294) ELT 415 (Tri. Mumbai)]
ix. Setwin Shipping Agency Vs. CC(General), Mumbai [2010(250) ELT 141 (Tri. Mumbai)]
x. HB Cargo Services Vs. CC, Hyderabad [2010(261) ELT 540 (Tri. Bang.)]
xi. Nanda International Vs. CC, Chennai [2004(176) ELT 524 (Tri. Chennai)]
xii. HIM Logistics Pvt. Ltd. Vs. CC, New Delhi [2016(338) ELT 725 (Tri. Del.)]
xiii. CC Vs. HIM Logistics Pvt. Ltd. [2017(348) ELT 625 (Del.)]

5. On the other hand, the learned AR defended the impugned order and submitted that the appellants have not complied with the CBLR 10(a) and 10(d) and therefore the licence ha been rightly revoked by the Commissioner.

6.1. After considering the submissions of both the parties and perusal of the material on record, we find that out of the 4 violations alleged against the appellant, the Inquiry Officer has exonerated the appellant under Regulation 10(e) and 10(n) and has only found the appellant violating Regulations 10(a) and 10(d) which pertains to not obtaining authorization from the importer and not advising his client properly. Further we find that as far as verification of the documents are concerned, the appellant has been exonerated and we find that the appellant was approached by one Mr. Alexander Nathan who is alleged to be the employee of the importer as per his own statement which remained unrebutted till today shows that the appellant has been properly authorized by Mr. Alexander Nathan by handing over the necessary authorization and KYC documents which were properly verified by the appellant. Further in view of the various decisions relied upon by the appellant, it is not necessary that the Customs Broker should personally verify the premises of the importer. Once the Customs Broker has been approached by the employee of the importer and he has verified the necessary documents, then there cannot be any allegation of violations against the CHA. Further the impugned order says that the appellant has not advised the importer without specifying as to what advice was required to be given by the appellant and the same was not given by the appellant to the importer. Further we find that in the case of HIM Logistics Pvt. Ltd. cited supra, the Division Bench of this Tribunal in para 9 and 10 has held as under:-

> ***9.*** *We find that the impugned order did not make out a sustainable case for revocation of licence. In the case of Setwin Shipping Agency v. CC (General), Mumbai - 2010 (250) E.L.T. 141 (Tri.-Mumbai), the Tribunal held that there is no requirement for the CHA to verify physically the premises of importer/exporter. The Tribunal also observed that it is a settled law that the punishment has to be commensurate and proportionate to the offence committed. In the present case, we notice that the punishment of revocation is not justifiable even if it is to be admitted that physical verification of the importer's premises could have avoided the filing of the bill of entry by the appellant. Even in such a situation, the violation in respect of the cargo viz. the non-declaration of the RSP on the auto parts, a debatable point of interpretation, cannot be held against the appellant to result in the revocation of their licence. Here, it is to be noted that the bill of entry was filed after the detention of the goods for inquiry by the DRI Officers and request for physical verification of the cargo before assessment has been made in the form of first check bill of entry.*

We find that the impugned order passed on dis-agreement with the inquiry report has not brought out clear sustainable ground for such extreme action of revocation of licence. Violation of CBLR, 2013 has not been brought out as all the points have been elaborately discussed in the inquiry report and no sustainable ground for differing with the same could be made out.

10.*Considering the above analysis and discussion, we find the present impugned order could not be sustained and accordingly, we set aside the same.*

6.2. This decision of the Tribunal has been upheld by the High court of Delhi as reported in 2017(348) ELT 625 (Del.). Further in the case of Ashiana Cargo Services cited supra, on the question of proportionality of punishment, the Delhi High Court in paras 11 & 12 has observed as under:-

11. *Viewing these cases, in the background of the proportionality doctrine, it becomes clear that the presence of an aggravating factor is important to justify the penalty of revocation. While matters of discipline lie with the Commissioner, whose best judgment should not second-guessed, any administrative order must demonstrate an ordering of priorities, or an appreciation of the aggravating (or mitigating) circumstances. In this case, the Commissioner and the CESTAT (majority) hold that "there is no finding nor any allegation to the effect that the appellant was aware of the misuse of the said G cards", but do not give adequate, if any weight, to this crucial factor. There is no finding of any mala fide on the part of the appellant, such that the trust operating between a CHA and the Customs Authorities (as a matter of law, and of fact) can be said to have been violated, or be irretrievably lost for the future operation of the license. In effect, thus, the proportionality doctrine has escaped the analysis.*

12.*Learned Senior Standing Counsel for the Customs has stressed that the infraction in this case is not a routine matter, but rather, illegal smuggling of narcotics by the G card users. However, given the factual finding that the CHA was not aware of the misuse of the G cards (and thus, also unaware of the contents being smuggled), no additional blame can be heaped upon the CHA on that count alone. Rather, the only proved infraction on record is of the issuance of G cards to non-employees, as opposed to the active facilitation of any infraction, or any other violation of the CHA Regulations, whether gross or otherwise. Neither have any such allegations been raised as to the past conduct of the appellant, from the time the license was granted in January, 1996. Equally, it is important to note that the appellant has - as of today - been unable to work the license for 8 years, and thus been penalized in this manner. This is not to say that the trust operating between the Customs Authorities and the CHA is to be taken lightly, or that violations of the CHA Regulations should not be dealt with sternly. A penalty must be imposed. At the same time, the penalty must - as in any ordered system - be proportional to the violation. Just as the law abhors impunity for infractions, it cautions against a disproportionate penalty. Neither extreme is to be encouraged. In this case,* *in view of the absence of any mens rea, the violation concerns the provision of G cards to two individuals and that alone. A penalty of revocation of license for this contravention of the CHA Regulations unjustly restricts the appellant's ability to engage in the business of the CHA for his entire lifetime. As importantly, it skews the proportionality doctrine, substantially lowering the bar for revocation as a permissible penalty, especially given the dire civil consequences that follow. On the other hand, the minority Opinion of the CESTAT, delivered by the Judicial Member, correctly appreciates the balance of relevant factors, i.e. knowledge/mens rea, gravity of the infraction, the stringency of the penalty of revocation, the fact that the appellant has already been unable to work his license for a period of 6 years (now 8 years), and accordingly sets aside the order of the Commissioner dated 24-1-2005*

The ratios of the above said decisions are squarely applicable to the facts of the present case.

7. In view of our discussion above, we are of the considered opinion that the impugned order is not sustainable in law and therefore we set aside the same by allowing the appeal of the appellant. Stay petition also stands disposed of.

(Order was pronounced
in Open Court on **25/09/2019**)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

Raja...