CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 632 of 2008

[Arising out of Order-in-Original No.11/2008 dated 15/07/2008 passed by Commissioner of Customs, Bangalore]

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

Appellant(s)

VERSUS

KOUSHIK CARGO PVT LTD.,
NO.390, MORSEY MANOR, 3rd FLOOR,
AIRPORT EXIT ROAD, BANGALORE

Respondent(s)

AND

Customs Appeal No. 22876 of 2014

[Arising out of Order-in-Original No.BLR-CUSTM-000-COM-013-14-15 dt. 11/07/2014 passed by Commissioner of Customs, Bangalore]

KOUSHIK CARGO PVT LTD.,
NO.390, MORSEY MANOR, 3rd FLOOR,
AIRPORT EXIT ROAD, BANGALORE

Appellant(s)

VERSUS

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

Respondent(s)

Appearance:

Shri Ram Sharma Chandran, Advocate — For the CHA

Shri M.K. Davindran, Superintendent(AR) — For the Revenue

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

Date of Hearing: 12/03/2020
Date of Decision:16/06/2020

Final Order No. 20360-20361 /2020

Per : S.S GARG

Appeal No. C/632/2008 has been filed by the Department against the impugned order dated 15/07/2008 passed by the Commissioner of Customs, Bangalore whereby the Commissioner has dropped the proceedings initiated against M/s. Koushik Cargo Pvt. Ltd., Bangalore vide show-cause notice dt. 19/10/2006. Appeal No. C/22876/2014 has been filed by M/s. Koushik Cargo Pvt. Ltd. against the rejection of renewal of CHA licence. Since both the appeals are arising out of the same facts, both the appeals are taken up together for discussion and disposal. First, we take up the Department's appeal as the same pertains to the year 2008.

2.1. Briefly, the facts giving arise to the Department's appeal are that M/s. Lakshmi Traders had filed a Bill of Entry No.3353 dt. 16/04/2004 at ICD, Bangalore through their CHA M/s. Koushik Cargo Pvt. Ltd., Bangalore (hereinafter also referred to as CHA) for clearance of 21 MT of Sodium Sulphate valued at Rs.77,219/- imported from China. The goods were imported from M/s. Shenzhen Cereals Oils and Foodstuffs Co. Ltd., China vide Invoice No.SCOF4031 dt. 02/03/2004 which was filed along with the said Bill of Entry. The Bill of Lading No. HLCUSHAO0260412 and certificate of origin No.032004011 which were submitted along with the said Bill of Entry indicated that there were 700 bags of Sodium Sulphate. However, on physical examination of the cargo by the officers of the Customs Preventive, HQRS, Bangalore, it was found that there are 400 bags each weighing 15 kgs. (totally 6000 kgs.) containing some white fine powdery chemical and 300 bags each weighing 50 kgs. (totally 15000 kgs.) containing a whitish colored coarse chemical. These samples were not sodium sulphate as declared but also contained some other chemical which was being attempted to be smuggled into India by concealing in between the bags of Sodium Sulphate. The test report confirmed that the chemical contained in the 15 kgs. bags was a pesticide name 'Cartap Hydrochloride' and the chemical in the 50 kgs. bags was 'Sodium Sulphate'. The imported consignment was found to contain 15 MT of Sodium Sulphate and 6 MT of Cartap Hydrochloride, a pesticide, as against the misdeclared description and quantity of 21 MT of Sodium Sulphate.

2.2. Investigation was conducted and during the investigation, statements of various persons were recorded and there after a show-cause notice dt. 19/10/2006 was issued to the CHA requiring them to show-cause to the Deputy Commissioner of Customs, ICD, Bangalore, as to why their CHA licence should not be revoked and why the security furnished by them should not be forfeited under the Regulation 20 of the Customs House Agent Licence Regulations, 2004 (CHALR, for short). The Deputy commissioner, Customs, ICD, Bangalore in his report dt. 12/04/2007 after conducting the inquiry concluded that it was evident that CHA had failed to check the genuineness of the import of the goods and about the importing unit before filing the Bill of Entry. It also appeared that CHA might not have deliberate involvement in the imports and intention to mislead the department and the lapses on their part were mainly attributable to their negligence as they wholly relied upon the representative who handled the import. The circumstances might not warrant suspending/ revoking of their licence under Regulation 22 of the CHALR 2004 but the CHA might be imposed with minor punishment of their lapses. The said report was given to the CHA and they filed reply to the said Inquiry Report. After considering the submissions of the CHA and the documentary evidence on record, the learned Commissioner found that the Department has failed to prove the negligence on the part of the CHA and consequently dropped the proceedings. Aggrieved by the said finding, the Department has filed the present appeal. Department's appeal was rejected by the Tribunal vide its order dt. 15/10/2014. Thereafter the Department challenged the said decision before the Hon'ble High Court and the Hon'ble High Court vide its order dt. 04/12/2019 restored the appeal filed by the Department.

3. Heard both the parties and perused the records.

4. Learned AR for the Revenue submitted that the impugned order is not sustainable in law as the same has been passed without properly considering the facts and the law. He further submitted that the CHA was guilty of acts and omission and has connived with the importer in misdeclaration and undervaluation of the imported cargo. CHA was issued a show-cause notice dt. 21/10/2004 which was adjudicated by the Additional Commissioner of Customs vide Order-in-original dt. 31/01/2006 and imposed a penalty of Rs.75,000/- against the CHA as well as against its Director Shri T.S. Kishore under Section 112(a) and 112(b) of the Customs Act. On an appeal by the CHA, the Commissioner dropped the penalty on the Director and upheld the penalty on the CHA. There after the CHA filed an appeal before the CESTAT and CESTAT vide its Final Order No.385/2011 dt. 14/06/2011 dismissed the appeal filed by the CHA. He further submitted that once the CESTAT has dismissed the appeal, the proceedings against the CHA come to an end. He also submitted that against the CESTAT order, CHA filed an appeal before the Hon'ble High Court of Karnataka but subsequently the said appeal has been disposed of as withdrawn vide order dt. 21/03/2014 by the High Court of Karnataka and thereby the penalty imposed on the CHA has reached finality. He further submitted that the impugned order passed by the Commissioner is premature as at that time when the impugned order was passed, the appellant's appeal before the CESTAT bearing No.C/474/2006 was

pending disposal and the Commissioner should have waited the outcome of the said appeal before passing the impugned order.

5. On the other hand, the learned counsel for the CHA submitted that there is no infirmity in the impugned order passed by the Commissioner. He further submitted that Commissioner in the impugned order has given categorical finding that the Department has failed to prove any negligence on the part of the CHA and therefore the proceedings initiated against the CHA vide show-cause notice dt. 19/10/2006 was dropped. He further submitted that the Department has not challenged the findings on merits and has only taken the grounds in the appeal that the CHA's appeal under the Customs Act where he was imposed penalty of Rs.75,000/- was pending before the Tribunal and till the decision of that appeal, the Commissioner should have waited and not disposed of the appeal.

6.1. After considering the submissions of both the parties, we find that in the impugned order, the Commissioner of Customs, Bangalore has found nothing against the CHA. He has also considered the Inquiry Report of the Deputy Commissioner, ICD, Bangalore and other material on record and has returned categorical finding holding that the Department has failed to bring any evidence on record showing the negligence of the CHA. Further we find that the Department has not challenged the findings on merits and has only taken a technical ground that the impugned order is premature as the appeal of the CHA against the penalty of Rs.75,000/- was pending before the Tribunal. Further we find that when the appeal of the appellant was pending before the Tribunal against the imposition of penalty of Rs.75,000/-. In the meantime, the licence of the appellant was being renewed subject to the outcome of the appeal before the Tribunal from time to time. In view of these facts, we do not find any infirmity in the impugned order and therefore we dismiss the

Department's appeal being devoid of merits.

7. In the appeal C/22876/2014, the appellant has challenged the order passed by the Commissioner of Customs dt. 11/07/2014 rejecting the renewal of the licence.

7.1. Briefly the facts in this appeal is that the CHA filed an application dt. 06/06/2014 for renewal of licence. Licence of the appellant was not renewed and a show-cause notice dt. 26/06/2014 proposing for refusal to renew the licence in terms of Regulation 9(2) read with Regulation 5(e) of the CHLR 2013 was issued on the ground that penalty of Rs.75,000/- paid under Section 112(a) and (b) of the Customs Act attained finality after the withdrawal of the appeal by the CHA filed before the High Court of Karnataka and by resorting to Regulation 5(e) which is a bar on issuing a new licence on account of any misconduct on the part of the CHA. The Commissioner vide the impugned order dt. 11/07/2014 rejected the renewal of CHA licence and hence the present appeal has been filed by the CHA.

8. Heard both the parties and perused the records.

9. Learned counsel appearing for the appellant submitted that refusal to renew the lencence is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the Commissioner himself in para 7 of the impugned order has observed "for renewing the licence every 6 months even if the penalty paid by the appellant vide Final Order No.385/2011 attained finality, recorded a finding that in 2011 the matter was governed by CHALR 2004 which did not contain a provision corresponding to the provision made under Regulation 5(e) of CBLR 2013". He further submitted that the Commissioner himself in para 9 of the impugned order has also observed "as already brought hereinabove, the earlier proceedings which culminated in the Order-in-

original dt. 10/07/2008, was for revoking the licence under Regulation 20 of the CHALR 2004 whereas the present proceedings have been initiated for refusal to renew the lecence in terms of Regulation 9(2) read with Regulation 5(e) of CBLR 2013. He further submitted that the Commissioner has issued a second show-cause notice on the same set of facts which is not permissible under law since the proceedings already concluded in appellant's favour in the earlier show-cause notice. For this, he relied upon the decision in the case of ASA Enterprises Vs. CC, New Delhi [2017(358) ELT 788 (Tri. Del.)]. He further submitted that the penalty imposed on the Customs Broker under Regulation 112 of Customs Act, 1962 cannot be a ground for rejection of renewal of licence as the imposition of penalty does not amount to misconduct. He also submitted that appellant's licence was renewed after payment of penalty imposed under Section 112 of Customs Act, 1962. He also submitted that Regulation 5(e) of the CBLR 2013 is not applicable to the existing Customs Broker licence holders. For this submission, he relied upon the decision of the Tribunal in the case of Prashun Jain Vs. CC, New Delhi [2019(370) ELT 491 (Tri. Del.)]. He also referred to Section 159A of the Customs Act and submitted that in relation to renewal of appellant's licence, the Commissioner could not have invoked any provision that is not consistent with the earlier superseded regulations. He also submitted that he moved first renewal application on 06/12/2010 and renewal was granted for 6 months and such renewal for 6 months was granted 8 times. He also referred to Board instruction in F.No.502/6/2007-Cus. VI dt. 08/06/2007 wherein the Board has clearly directed that piecemeal renewals should not be done and renewal should be for 10 years period. But the said instruction was not considered by the Commissioner while refusing the renewal.

10. On the other hand, the learned AR reiterated the findings of the Commissioner.

11.1. After considering the submissions of both the parties, we find that there is no force in the contention of the learned AR in the Department's appeal which we have dismissed by upholding the decision of the Commissioner dropping the proceedings against the CHA. Further we find that when there was no evidence against the CHA for his involvement in the undervaluation, then his licence is not liable for revocation and it was rightly decided by the Commissioner while dropping the proceedings against them. Further we find that after the decision of the Tribunal upholding the penalty of Rs.75,000/- imposed on the CHA under Section 112(a) and (b) of the Customs Act, the CHA paid the penalty and there after the Department vide its letter dt. 23/12/2011 asked the CHA to pay the penalty amount of Rs.75,000/- which was subsequently paid by the CHA and his licence was renewed from time to time subject to the outcome of Department's appeal No.C/632/2008. Since we dismissed the Department's appeal by upholding the order of the Commissioner dropping the proceedings against the CHA and the fact that CHA's licence was renewed from time to time hence the refusal to renew the licence in terms of Regulation 9(2) read with Regulation 5(e) of CBLR is not sustainable in law. Further, we find that invocation of Regulation 5(e) of CBLR 2013 is not legally tenable because the CHA's matter is government by CHALR 2004 which did not contain a provision corresponding to the provision made under Regulation 5(e) of CBLR. For this, we rely upon the finding of the Tribunal in the case of Prashun Jain cited supra wherein it has been held in para 10 as under:-

> **10.** Having considered the rival contentions, we find that the appellant is not required to fulfil under Regulation 5 of CBLR, 2013, inasmuch [as] the appellant is not new 'applicant'. We further find that the Regulations 4, 5 and 7 is applicable to an applicant, who applies and undertakes examination conducted by Directorate General of Inspection of Customs & Central Excise, by inviting application by publication of notice in two leading national daily

> newspapers in English and Hindi and, subsequently grants licence to successful applicant(s). We further find that Regulation 9 uses the word 'licensee' for the existing Customs Brokers. We further find that the said affidavit has been filed in haste, as is evident from the fact that when Regulation 5 is not applicable to the appellant, there was no requirement to file any affidavit by the appellant. This gets further supported from the first letter dated 1-1-2017 filed by the appellant, to the department, wherein they have prayed to extend the validity of licence for five years i.e. for the period which was lost from the date of suspension i.e. 15-12-2010 till the date of original validity i.e. 15-12-2015. Accordingly, we set aside the impugned order and allow the appeal of the appellant with consequential relief. The C.B. license stands restored for the period of 10 years w.e.f. the date of this order. The respondent Commissioner is directed to give appeal effect immediately, within 10 days of receipt of this order.

11.2. By following the ratio of the above said decision, we are of the considered view that the impugned order refusing to renew the licence of the CHA is not sustainable in law and therefore we set aside the impugned order by allowing the appeal of the CHA.

12. In the result, Department's appeal C/632/2008 is dismissed and CHA's appeal C/22876/2014 is allowed.

(Order pronounced on 16/06/2020)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

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