CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II

Customs Appeal No.51072 of 2019

[Arising out of Order-in-Original No.08/MK/Policy/2019 dated 08.02.2019 passed by the Commissioner of Customs (Airport & General), New Delhi]

M/s. V.S. Bhagwati Shipping **Appellant**
C-I/399 D, Ist Floor, Palam Vihar,
Gurgaon-122 017.

Versus

Commissioner of Customs **Respondent**
(Airport & General),
IGI Airport, New Delhi.

APPEARANCE:

Shri G.S. Arora, Advocate for the appellant.
Shri Rakesh Kumar, Authorized Representative for the respondent.

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO.50705/2020

DATE OF HEARING:09.12.2019
DATE OF DECISION:29.06.2020

ANIL CHOUDHARY:

The issue in this appeal is whether the revocation of Customs Broker licence no.R-11/DEL/CUS/2009 (Valid upto 31.10.2022), is in accordance with law vide impugned order-in-original, alongwith order of forfeiture of security deposit of Rs.75,00,000/- and further penalty of Rs.50,000/-.

2. The brief facts are that the respondent commissioner received information from the Asstt. Commissioner, Customs, Customs Broker Section and NCH, Mumbai Division-I vide letter dated 21.05.2018, that a case of fraudulent import of Areca Nuts and Black Pepper, by mis-declaring

the country of origin and thereby mis-using 'Sri Lanka Free Trade Agreement (ISFTA)' and 'South Asian Free Trade Agreement' (SAFTA), for which a case has been booked against one Shri Sarfaraz Khan Pathan of Ahmedabad and three importers viz. R.M. International and M/s.T.G. Enterprises and M/s. M.M. Enterprises of Ahmedabad; that Areca Nuts and Black Pepper of Indonesian and Vietnam origin respectively were misdeclared as of Sri Lankan origin by the said importers in connivance with Shri S.K. Pathan and Shri Vinod Kumar Sharma –Customs Broker (V.S. Bhagwati Shipping), who had cleared the goods from customs at Nava Sheva Port. Further, inquiry in the matter had revealed that Indian importers other than aforesaid three, have adopted similar modus operandi , which has resulted in loss of customs duty to the tune of crores of rupees. The importers in India along with de facto owners and Custom Broker - Vinod Kumar Sharma has admitted their offence, stating that the Areca Nuts and Black Pepper imported into India by declaring the same as of Sri Lankan origin, was actually not of Sri Lankan origin. It further appeared that the appellant, Customs Broker, Vinod Kumar Sharma has facilitated the fraud of mis-declaration as to country of origin.

3. Inquiry was also conducted at Bangalore against M/s. Hamza Enterprises and M/s. Om Shiva Shakti Products Inc., both based at Bangalore. They had also allegedly imported Areca nuts of Indonesian origin by mis-declaring the same as of Sri Lankan origin. They have subsequently admitted the offence and voluntarily paid the differential duty of Rs.5.0 crores approximately on account of alleged mis-use of ISFTA/SAFTA.

4. It is further alleged in the show cause notice that the proprietor of the appellant Customs Broker – Vinod Kumar Sharma in his statement dated

28.09.2017 and 22.11.2017 has, inter alia, confessed that the various importers including the aforementioned three of Ahmedabad were mis-using the ISFTA/SAFTA notification for import of Areca nuts at concessional rate of duty through one Anish Bhai of Colombo. It was in his knowledge that Areca nuts and Black pepper were first exported from Indonesia/Singapore and Vietnam to Sri Lanka, where the documents of Sri Lankan origin were prepared and thereafter, areca nuts /black pepper were exported to India showing that of Sri Lankan origin with intent to avail benefit of concessional rate of duty. Mr. Vinod Sharma further admitted that he used to advise the importers not to show the country of origin other than that of Sri Lanka and that he also advised them also not to disclose or talk over phone as to from where and when shipment of areca nuts came to Sri Lanka etc. On being shown the documentary evidence in the form of whatsapp chat, Mr. Sharma confirmed the same as true; that Shri S.K. Pathan was interacting with him with regard to import of betal nuts and black pepper by M/s. R.M. International, M/s.T.G. Enterprises and M/s.M.M. Enterprises of Ahmedabad. That the KYC documents of the said three firms were given to him by Shri S.K. Pathan; that the documents such as customer information sheet, undertaking regarding truthfulness and authenticity of SAFTA Certificate and Authority letter to the Customs relating to consignment of black pepper imported in the name of M/s. T.G. Enterprises were not signed by the proprietor of M/s.T.G. Enterprises, Ahmedabad; that the signature on the said documents were different from the signature on the Pan Card; that the same was prepared and signed by their staff in the name of S.K. Pathan, as being person interacting with him and his staff for the purpose of getting the goods of the aforementioned firms of Ahmedabad cleared from the Customs. Further, that he did not meet the proprietors of the above mentioned firms, that this fact was also confirmed by the importers of R.M. International, M/s.T.G. Enterprises and M/s.M.M. Enterprises of Ahmedabad in their respective statements recorded under Section 108 of the Act. That all the correspondences/interactions in respect of the import of Areca nuts and black pepper were made with S.K. Pathan; that in the whatsapp conversation, on being asked by Shri S.K. Pathan, he replied that country of origin as Sri Lanka must be written on the P.P. bags for availing the country of origin; that S.K. Pathan used to send him the payment towards customs duty and other shipping charges through RTGS from the bank account of the aforementioned three firms of Ahmedabad; that he charged about Rs.3500 per container from S.K. Pathan for clearance of Areca nuts and black papper and thus he facilitated Shri S.K. Pathan in mis-use of the duty benefit in import of Areca nuts and black pepper under ISFTA/SAFTA agreement. Thus, it appears that V.K. Sharma, appellant –CHA not only violated the Regulations of CBLR, 2013 but also colluded and abetted with others in violating the provisions of Customs Act in availing inadmissible benefit of concessional duty.

5. On the basis of aforementioned facts of the Prohibition Order No.19/2017-18 dated 16.05.2018, issued prohibiting the appellant from working in all sections of the Mumbai Customs Zones with immediate effect to prevent any further mis-use of the Customs Broker licence. Subsequently, the Customs Broker licence was suspended by order dated 31.05.2018 issued by the Respondent Commissioner and post hearing, the suspension was confirmed by order dated 27.06.2018.

6. It appeared to Revenue that the appellant – Customs Broker has violated the various provisions of Customs Act and as well as the Regulations of CBLR 2018 /2013, particularly, Regulation 10(a) – requiring to obtain an authorisation from the client, for whom the Customs Broker is

employed as customs broker. It appeared that appellant Customs Broker has not met the proprietors of the three firms of Ahmedabad and all the correspondences, interactions in respect of the import by these firms were made with Mr. S.K. Pathan.

7. Further, Shri V.K. Sharma – F Card Holder in his statement dated 22.11.2017 had, inter alia, stated that they have not taken KYC details from the importers and such details were submitted through S.K. Pathan and further he did not meet the proprietors of the three firms personally.

8. Further, it appeared that there is violation of Regulation 10 (d) & (e) of CBLR' 18, which requires the customs broker to advise his client to comply with the provisions of the Act, other allied Acts and the Rules and Regulations etc. But admittedly in the facts of this case, Shri V.K. Sharma F-Card Holder of Customs Broker Firm has admitted, he knew that Arnica nuts imported by Shri S.K. Pathan were of Indonasia origin and not of Shri Lankan origin. Thus, Shri S.K. Pathan, instead of advising his client to comply with the provisions of the Act and for failure to bring it to the notice of the Customs Authorities and rather connived with the importer to wrongly avail the benefit of concessional duty under ISFTA /SAFTA agreements.

9. Further, under Regulation 10(n) of CBLR' 18 , the appellant was required to verify the correctness of the Importer Exporter Code (IEC) No. and 'Goods and Service Tax Identification No.' (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information. Whereas in the course of investigation, it became evident that that Shri V.K. Sharma in his statement, inter alia, stated that the documents such as customs information sheet, undertaking and authenticity of SAFTA certificate and Authority letter to Customs in the name of T.G. Enterprises were not signed

by the proprietor of T.G. Enterprises, whose signatures on the said documents were different from the signatures on the PAN Card, as submitted by the proprietor. Evidently Shri V.K. Sharma failed to verify the KYC information and correctness of the IEC No, GSTIN, identity of his clients, the declared address and thus, they contravened the Regulation 10 (a) of CBLR 2018. Accordingly, the appellant was required to show cause as to why not for the alleged violations under Rule 10 (a), (d), (e) & (n) of CBLR read with Rules 11 (a) (d) (e) and (n) of erstwhile CBLR 2013, the CB licence should not be revoked and should not be imposed with penalty , as well as forfeiture of part or whole of security deposit of the appellant.

9. It is also alleged that the fraudulent import of these items led to evasion of Customs duty as the importing parties paid concessional duties while they were not eligible for the same. The basis of this allegation is that these items were not of Sri Lankan origin and concerned certificates were fabricated or obtained fraudulently allegedly from Sri Lankan authorities.

10. That the appellant attended inquiry proceedings before the Inquiry Officer, who after hearing the appellants, submitted inquiry report along with prayer of appellant for cross examination including his retractions made before the court of ACJM, Ahmadabad, in the Bail application filed by Shri V.K. Sharma. The Inquiry officer was pleased to confirm the charges as proved. The ld. Commissioner read with the report of the Inquiry Officer and without extending the benefit of cross examination, nor considering the retractions made by the appellant, was pleased to pass the impugned order of revocation with penalty and seizure of whole security deposit, on the following findings:-

"10.1 The Customs Broker had not obtained authorizations from the proprietors of M/s. R.M. International, M/S. T.G. Enterprise, Ahmedabad and M/S. M.M. Enterprise, all three of Ahmedabad, to work as Customs Broker. He did not meet the proprietor of these firm(s), and all the correspondence / interaction in respect of the import of Areca nuts and Black Pepper were made with Shri Sarfaraz Khan Pathan. The CB had taken KYC details in respect of the above three firms from one Shri Sarfaraz Khan Pathan; and did not meet the proprietors of these firms. Thus, it has been concluded by the adjudicating authority that CB had not obtained due authorization from any of the importers required under provisions of Regulation 10(a) of CBLR, 2018 read with erstwhile Regulation 11(a) of CBLR, 2013.

10.2 Learned adjudicating authority has relied upon statement dated 22.11.2017 of Sh. V. K. Sharma, the Proprietor of the CB firm M/S V.S. Bhagwati Shipping, wherein he has admitted that he knew that areca nuts imported by Shri Sarfaraz Khan Pathan were of Indonesian origin, shipped from Indonesia to Singapore and from Singapore to Shri Lanka. Further, it has been admitted that these goods were de-stuffed at Sri Lanka, re-packed and sent to India as Sri Lankan product. Thus, the CB instead of advising his clients to comply with the provisions of the Customs Act, 1962 and on non-compliance failed in bringing the matter to the notice of the Customs authority. Thus, has connived with the importer to wrongly avail benefit of ISAFTA/SAFTA schemes benefits. Therefore, it was further concluded that the Customs Broker has grossly violated the provisions of Regulation 10(d) and 10(e) of CBLR,2018 [erstwhile Regulation 11(d) and 11(e) of 2013].

10.3 Learned adjudicating authority has rejected the argument of appellant that department has not been able to prove that the COO Certificate have been proved to be non genuine. In this regard learned Commissioner has again relied upon the statement dated 22.11.2017 of Sh. V.K. Sharma, Proprietor of the CB firm in which he has confessed that impugned goods are not of Sri Lankan origin. Thus it has been concluded in the impugned order that the goods were mis-declared as of Sri Lanka origin by the CB in connivance with importers and Shri Sarfaraz Khan Pathan, whereas he was required to advise his clients to submit genuine documents and on failure to bring the matter before the customs authorities. Thus learned Commissioner has held that CB has violated the Regulation 10 (d) and I0(e) of CBLR, 2018 read with, I1(d) and I1(e) of erstwhile CBLR, 2013, as amended."

11. Ld. Counsel for the appellant contended that the impugned order is cryptic and non-speaking, as the ld. Commissioner has recorded in his findings the various submissions made by the appellant in a mechanical way. That no finding has been given as regards the prayer of the appellant for providing relevant documents and RUDs. Further, there is no relied upon documents in the show cause notice . It was further alleged that even the Adjudicating Authority was not in possession of the relevant documents, if any, including the relied upon documents referred to in the show cause notice. Failure to provide the relied upon documents by the ld. Commissioner has resulted in violation of the principles of Natural Justice, and thus impugned order is in the teeth of the Ruling of the Hon'ble Supreme Court

in the case of **Dhakeshwari Mills Ltd. Vs. CIT – 1955 27 ITR 126 (SC) = 1955 SCR (1) 941.**

12. It was further submitted that there is no requirement in law for a Customs Broker to meet an importer in person and obtain KYC documents in person. Further, there is no charge made in the show cause notice that appellant was required to meet an importer in person and obtain KYC in person nor is there any finding in the impugned order as to if any of the COO's has been found false or forged. Ld. Counsel further urged that, the Tribunal had called for the adjudication file of the Commissioner and on perusal of the same, it is revealed that the Adjudicating Authority did not have the benefit of seeing the relied upon evidences, including the documents, etc., nor even the alleged confessional statements of V.K. Sharma. Thus, the adjudicating authority has simply relied upon the text of the Prohibition Order dated 16.05.2018 issued by the Principal Commissioner of Customs (General) NCH Division-I, which in turn has relied upon the report dated 12.01.2018 issued by ADG, DRI, Ahmedabad Zonal Unit. Even the prohibition order referred above, did not have any documentary evidence against the appellant Custom Broker. Thus, the impugned order was passed in a mechanical way by total denial of Natural Justice to the appellant, is fit to be set aside. Thus, as none of the evidence discussed in the impugned adjudication order was before the respondent Commissioner, thus, violating the impugned order.

13. Further it was pointed out by the learned advocate for the appellant that thought the SCN dated 16.08.2018 relies upon report of the Ahmedabad DRI office, some of the corroborating evidence in the impugned order, has been adopted from investigations and evidence collected by the Bangalore DRI office, in respect of imports made at Nhava Sheva by

importers based in Bangalore. No evidence or even reference number of report of Bangalore DRI finds mention in the SCN, which has resulted in the cryptic impugned order. No documents or even the investigation report has been supplied to the CB with respect to the said Bangalore based importers. Thus there has been gross violation of principles of Natural Justice, as CB has not been given copy of evidence against which he is to defend himself.

14. Ld. Counsel for the appellant has placed before us the documents like copy of the bail application of V.K. Sharma, etc. which shows that the appellant CB as well as the Ahmedabad based importer had retracted their statements made before the DRI officials during investigation, which fact has been ignored by the respondent Commissioner. Accordingly, the ld. Counsel prays for allowing their appeal, setting aside the impugned order with consequential benefit.

15. The ld. Authorised Representative for the Department supports the impugned order. He further read out various paragraphs from the show cause notice No.DRI/EZU/GI-ENQ-38/2013 dated 11.09.2018 issued under Customs Act by DRI, Ahmedabad Zonal Unit and Show cause notice issued under no.DRI/AZU/SCN/54/2018 dated 29.11.2018 DRI, Bangalore Zonal Unit, wherein the appellant is a co-noticee along with the importers. In support of the allegation that the appellant Custom Broker was the master mind in the fraudulent import of areca nuts and black pepper, by mis-declaring the same as of Sri Lankan origin and thus, facilitated the mis-use of ISFTA/SAFTA Agreement. The appellant CHA is the common CHA for the parties at Ahmedabad and Bangalore. Further, reliance is placed on the confession made by Shri V.K. Sharma during investigation, and it is urged that admitted facts need not be proved.

16. Rebutting the contentions of the Revenue, Counsel for the appellant points out that the submissions of the ld. DR are based on the show cause notice in different proceedings under the Customs Act, which has been issued after issue of the show cause notice in these proceedings. Further, none of these subsequent show cause notice were made available before the Adjudicating Authority. These have been brought on record by the appellant in appeal paper book, in support of their contention.

17. Having considered the rival contentions and on perusal of the records, we find that the respondent commissioner passed the impugned order of revocation and penalty without examining any evidence, and without ensuring that the appellant CHA/CB is given proper opportunity of hearing to meet the allegations in the show cause notice. Neither the evidence were seen by the Adjudicating Authority, nor a copy of the same was provided to the appellant, CB. This error is glaring, particularly in respect of the investigation by the DRI, Bangalore, as no report for the same is even cited in the show cause notice or suspension order.

18. It is further evident that when the Adjudicating Authority himself did not have the relied upon documents, etc., there is no question of the same being made available to the appellant-CHA, resulting in gross violation of the process of the court, and the principles of Natural Justice. Mere reliance on the Suspension Order and the allegations in the show cause notice by the ld. Commissioner in passing the impugned order, has vitiated the impugned order, leading to mis-carriage of justice.

19. We further observe that the main allegation against the appellant CB is connivance in production of false certificate of 'country of origin', submitted at the time of clearance along with the bills of entry. The only evidence in this case appears to be the confessional statement of the authorised person

of appellant, Mr. V.K. Sharma. There is no report from the Appropriate Authority of Sri Lanka disputing the certificate of origin, who are the competent persons to give evidence in the matter. There is no whisper of any verification made by the Customs Authority during investigation from Sri Lankan Authority. Further, as contended by the appellant, we find that there is violation of the provisions of Section 138 (B) and (C) of the Customs Act, as the evidence being statement of other persons relied upon in the adjudication proceedings, has not been examined nor made available for cross examination. Further, there is no certificate as provided under Section 138 (C) of the Customs Act, in support of the electronic record relied in the show cause notice like email, whatsapp conversation, etc.

20. We are conscious of the fact that two of the importers have filed application before Settlement Commission in respect of imports made by them, as informed by the learned Counsel for the appellant. We are informed that these importers were under investigation by the Bangalore DRI. The Suspension order and the SCN do not provide the detail of the said imports. Further, the SCN to those importers was issued after the issue of SCN to the appellant CB, thus cannot be read in evidence, unless the facts were incorporated in the SCN.

21. Further, we take notice as submitted by the counsel for the appellant that the show cause notice issued by the DRI, Ahmedabad Zonal Unit and DRI, Bangalore Zonal Unit, is still pending adjudication, which is confirmed by the ld. DR. We further take notice that revocation of the CB licence of the appellant directly effects to their Right to Livelihood. It is further found that the respondent commissioner has passed the impugned order in a mechanical way, in violation of the principles of natural justice.

22. Accordingly, for the reasons and observations recorded above, we set aside the impugned order-in-original and remand the matter to the Respondent Commissioner for de novo adjudication after providing RUD's, giving opportunity to cross-examine the witness of Revenue, in accordance with law. Such re-adjudication is directed to be completed expeditiously, preferably within four months from the date of receipt /service of this order.

23. Thus, the appeal is allowed by way of remand.

[Order pronounced on 29.06.2020.]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(C.L. MAHAR)
MEMBER (TECHNICAL)

Ckp.