CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 52249 of 2019

(Arising out of Order-in-Original No.63/MK/Policy/2019 dated 10.05.2019 passed by the Commissioner of Customs (Import & General), New Custom House, New Delhi).

M/s HBS Logistics **Appellant**
Killa No. 19/4/2 & 19/5
Village Garh Shahjahanpura
Sonepat, Haryana-131001.

VERSUS

Commissioner of Customs **Respondent**
(Airport & General)
New Custom House, Near IGI Airport
New Delhi-110037.

APPEARANCE:

Ms. Priyanka Goel, Advocate for the appellant
Shri M.K. Shukla and Shri M.R. Dhania, Authorised Representatives for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.50030/2024

DATE OF HEARING: 17.10.2023
DATE OF DECISION: 09.01.2024

BINU TAMTA:

1. Challenge in the present appeal is to the order-in-original no.63/MK/Policy/2019 dated 10.05.2019 whereby the Commissioner Customs revoked, the Customs Brokers License, forfeited the security amount of Rs.5 lakh and imposed penalty of Rs.50,000/-.

2. The appellant is a firm of Customs Broker (CB) of which Shri Aman Jain and Smt. Seema Singh are partners. The work of import clearances were conducted by Shri Prashant Jain, H-Card

Holder. The present case relates to submission of forged/fabricated documents by the CB before the customs officer to avoid assessment of imported goods, namely iron nuts and iron bolts vide bill of entry no. 7447412 dated 31.07.2018, on behalf of the importer, M/s Supreme Enterprises.

3. The bill of entry was facilitated under RMS and the examination order was generated which reads as, "Assessment and Examination has not been prescribed for this B/E "which meant that the said B/E was marked for RMS facilitation for which assessment and examination was not to be conducted and the out of charge has to be given by the in-charge shed appraiser. The container was cleared on 13.08.2018.

4. While reviewing the clearance of the goods under RMS, it came to the notice of the department that, the system entry showed as, "Assessment and Examination has not been prescribed for this B/E" whereas it appeared that the CB produced the B/E for clearance at import shed with another examination instruction through forged entries where the first print page of the docket read as, "Examination has not been prescribed for this B/E" and he also added the name of two officers from appraising Group-4, which gave the impression that the B/E has been assessed by the group and no further examination is required.

5. The statement of Shri Prashant Jain was recorded on 20.08.2018, under section 108 of the Customs Act, 1962, where he

categorically stated that he submitted the forged documents to the customs authorities at the instance of Shri Aman Jain, partner in the CB firm for faster clearance of the goods at the declared value, and for which he was offered monetary consideration.

6. On the basis of the letter dated 23.08.2018, received from the Additional Commissioner of Customs, ICD, PPG Inquiry for violation under the provisions of Customs Broker Licensing Regulations, 2018, (CBLR 2018) was initiated against the appellant for producing forged/fabricated documents to customs authority for clearance of goods. The Customs Broker license was suspended on 28.08.2018 and the same was confirmed on 18.09.2018. Thereafter show cause notice dated 20.11.2018 was issued for contravention of the provisions of Regulation 10(j) and 13(12) of the CBLR, 2018. Under Regulation 17(1), Enquiry Officer was appointed on 12.12.2018, who submitted his report on 14.02.2019 to which the appellant submitted his representation on 14.3.2019. The show cause notice was adjudicated after granting personal hearing to the appellant and also issued notice to Shri Prashant Jain on the request made by the appellant for cross examination, however, despite reminders, Prashant Jain did not appear. The Adjudicating Authority after considering the Inquiry Report, perusing the statements recorded under Section 108 of the Customs Act, 1962 and the submissions made by the appellant held that the charges under Regulation 10(j) and 13(12) stands proved and accordingly imposed the punishment by revoking the customs broker license, ordered for forfeiture of the amount of security deposit and imposed penalty of

Rs.50,000/-. Against this said order, the custom broker is in appeal before this Tribunal.

7. Having heard the learned counsel for the appellant and also the Authorised Representative for the revenue, we need to consider whether the charges under the regulations are maintainable and the punishment imposed on the Customs Broker is justified.

8. The submissions of the appellant are to the effect that the act of fabrication of documents was done by Shri Prashant Jain and there was no instruction from the CB firm to manipulate the documents and they had no intimation of it. No monetary consideration was given to Shri Prashant Jain for speedy clearance of the goods. That as soon as the forgery was brought to the notice of the CB, he immediately coordinated with the department as well as the importer who paid the differential duty along with interest and penalty vide challan dated 23.08.2018. He denied that there has been any casual approach in supervising the employees and hence there is no violation of Regulation 13(12).

9. The learned Authorised Representative reiterated the findings of the Commissioner of Customs in the impugned order and clarified the implications of the fabrication of the document in the present case. He relied on the statement of Shri Prashant Jain where he accepted having forged the document for monetary consideration offered by Shri Aman Jain for faster clearance of the goods which is further corroborated by the statement of Shri Aman Jain. According to

him, it is a clear case where the CB had submitted forged/fabricated document before customs authority to avoid assessment of the imported goods vide subject bill of entry with intent to evade customs duty and therefore violated the provisions under Regulation 10(j) of CBLR 2018. In so far as compliance of Regulation 13(12) he submitted that the CB has not only failed to supervise his employee rather he actively connived in the forging of the documents.

10. We may first deal with the contravention of the provisions of Regulation 10(j) by the appellant, which provides:

> "**10.** Obligations of Customs Broker
>
> A Customs Broker shall -
>
> **(j)** not refuse, access to, conceal, remove, or destroy the whole, or any part of any book, paper, or other record, relating to his transactions as a Customs broker, which is sorted, or maybe sort by the principal, commissioner of customs, or commissioner of customs, as the case may be;"

There is no dispute that there is forging and fabrication of the document before the customs authorities. As per the statement of Prashant Jain, he indulged in this fabrication at the instance of Shri Aman Jain, partner of the appellant firm for which he has been paid monetary consideration and the reason stated by him was that Shri Aman Jain had insisted on fast clearance of the goods in question. We find from the statement of Shri Aman Jain recorded under Section 108 of the Act where he also admitted to the fact that he asked Prashant Jain for faster clearance of the goods. The requirement of faster clearance of the goods is further substantiated from the statement of Siri Rajneesh Kumar, the authorised signatory of the importer firm, M/s Supreme Enterprises. The relevant question put to him and his answer thereto is given below :

> **"Q.3 Have you pressurise CHA for fast clearance of this BOE?**
>
> Ans. Because this container took 45 days approximately transportation from Mundra to Patparganj and there were shortage of goods in our factory, therefore we asked the CHA for faster clearance."

Thus the reason for fabrication has been admitted by all three in their statements under section 108 of the Act and the same are admissible in evidence as per the settled law and needs no citation in this regard. The fact that Shri Aman Jain and Shri Rajneesh Kumar have accepted that there was a need for fast clearance of the goods, shows that Prashant Jain had acted as per the instructions of the appellant. The admission by the appellant thus connects him to the act of his employee and hence he is responsible for the contravention of the Regulations.

11. Having discussed that the actual fabrication was done by the CB representative to avoid the shed appraiser who keeps vigil over undervaluation cases in RMS and the fact that the goods in the bill of entry in question were found to be under-valued and in that view the importer had paid the differential duty with interest and penalty *suo-moto*, we are of the view, that the entire modus-operandi of fabricating and forging the document was at the behest of the Customs broker which was implemented by Prashant Jain being the H-Card Holder of the CB. Needless to say Shri Aman Jain is holding

90% share in the firm and therefore he is very much interested and affected by the efficient performance of the firm. The submission of the learned Counsel that there was no monetary gain or benefit to him by such act, we feel that the same analogy would apply to Prashant Jain also. Therefore, irrespective of whether any benefit had accrued to the appellant or not, he is guilty for such forgery/fabrication of the document thereby violating Regulation 10(j).

12. Regulation 13(12) of CBLR 2018 (erstwhile 17(9) of CBLR 2013) provides:

> "Customs Broker shall exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business and he shall be responsible for all acts or omissions of his employees."

It is an admitted position that the entire work of handling the import clearances was done by Shri Prashant Jain, the G-Card Holder of the appellant. The appellant cannot escape the liability by putting the entire burden on his employee and say that nothing was in his knowledge. Consequently, we hold that the appellant is vicariously liable and responsible for the conduct of Prashant Jain being his employee in fabricating the document. The provisions of the regulations cast special obligations on the Customs broker to ensure proper conduct of his employees. The appellant has miserably failed to supervise the working and the conduct of his employee in terms of Regulation 13(12) and is, therefore, liable for all the acts and omissions of his employee.

13. We may refer to the decision in **Bhaskar Logistic Services Pvt. Ltd. vs. Union of India - 2016 (340) ELT 17,** where the Patna High Court observed that clause 9 of Regulation 17 of CBLR. 2013, cast obligation on the Customs broker to exercise such supervision as may be necessary to ensure proper conduct of his employees in the transaction of business and he shall be held responsible for all acts or omissions of employees during their employment. Similarly, the Bombay High Court in the case of **CC (General) vs. Worldwide Cargo Movers - 2010 (253) ELT 190** while upholding the principle of liability of the CHA for the act of its employees observed as under:

> "**27.** Prior to passing of the order, dated 30.09.2015, the Commissioner of Customs (), Patna, vide impugned order dated 4.9.2015, had already held that the CHA had failed to supervise his employee, Executive Director, Sheikh Khursheed, and did not exercise due diligence to ascertain the correctness of the actual importer, and did not observe due diligence for proper classification and valuation of the imported goods."

14. The Revenue has relied on the decision of this Tribunal in **Skytrain Services Vs Commissioner of Customs, (Airport & General), New Delhi - 2019 (369) ELT 1739**, holding that the appellant is bound by the act of G-Card Holder even otherwise, without the knowledge of the Customs broker, the goods could not have been diverted and he is equally bound by the act of his authorised representative or agent.

15. The appellant has relied on several decisions, which are as under:-

(i) Zulash Clearing & Shipping Agency Vs. Commissioner of Customs (General), Mumbai – 2018 (9) TMI 766 –CESTAT-Mumbai

(ii) **M/s. A.B. Agencies Vs. Customs, Excise & Service Tax Appellate Tribunal and Commissioner of Customs – 2015 (8) TMI 143 – Kerala High Court.**

(iii) **M/s. Ashiana Cargo Services Vs. Commissioner of Customs (I&G) - 2014 (3) TMI 562 – Delhi High Court.**

(iv) **Transfreight Merine Services Private Limited Vs. Commissioner of Customs (Seaport-Import), Chennai – 2016 (2) TMI 438 – CESTAT Chennai.**

(v) **Shri Ganesh Shipping Agency Vs. Commissioner of Customs, Bangalore – 2011 (4) TMI 1172 – CESTAT, Bangalore.**

(vi) **Ark Logistics (P) Ltd. Vs. Commissioner of Central Excise, Hyderabad – 2009 (9) TMI 842 – CESTAT Bangalore.**

(vii) **Falcon Air Cargo & Travel (P) Ltd. Vs. Commissioner of Customs, New Delhi – 2001 (11) TMI 137 – CEGAT, New Delhi.**

15(i). In **Zulash Clearing** (supra), the distinguishing feature was that in proceeding to hold the Customs broker responsible for any acts of commission or omission of employees, the licensing authority did acknowledge that the Broker firm did not have knowledge of the forgery and also that due to lack of any finding in the order that the Customs Broker was aware, let alone, of conniving in the forgery , the revocation of the customs broker license as well as the forfeiture of the security deposit was set aside.

15(ii). Reliance on **M/s A.B. Agencies** (supra), is also of no help to the appellant, for the reasons observed by the Kerala High Court, as under:

> "**11.** In sofar as this case is concerned, admittedly, Shri Vipin Kumar was an employee of the appellant and he was also issued 'G' card, enabling him to transact the business of the appellant as a Customs House Agent. It was while working in that capacity that he was forged the signature of the proprietor of the appellant on the Bill of Entry, in the applications for issue of 'H' Cad and 'G' card and various other documents submitted to the Customs Department. He was enabled to do all the forgeries and derive the benefit thereof only because of his employment under the appellant and obviously on account of the failure of the appellant in effectively supervising the activities of his employees to ensure that they conduct themselves properly in the transaction of his business as a Customs House Agent. <u>Therefore, the appellant cannot be absolved of his lapse of supervision attracting Clause 19 of the Regulations warranting action against him under Regulation 20."</u>

(Emphasis laid)

On the issue of imposing the penalty, it was noted that the appellant therein did not have any role in what was done by Shri Vipin Kumar and his team and that the lapse found is supervisory lapse assumes importance and that is how the punishment of revocation of license was set aside and the forfeiture of security deposit was only confirmed. The present case is entirely different as discussed above.

15(iii). In **M/s Ashiana Cargo Services** (supra), the Delhi High Court observed that 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 and therefore the revocation of the license was set aside being dis-proportionate to the violation.

15(iv). The Chennai Bench in **Trans Freight Marine Services Private Ltd.** (supra), noted that the Adjudicating Authority had expressed that there is no involvement of the management/appellant in the act committed by the employee and in that view the revocation of license was held to be unsustainable.

15(v). Similarly, in **Sri Ganesh Shipping Agency** (supra), the Bangalore Bench following the decision in the case of **Ark Logistics (P) Ltd.** held that CHA could not be penalised invoking Regulation 19(8) of CHA Licensing Regulations, 2004 in the absence of any finding that the CHA had knowledge of the acts of commissions and ommissions on the part of its employee and hence the same has to be distinguished from the facts of the present case.

15(vi). In **Falcon Air Cargo and Travel (P) Ltd.** (supra), the first enquiry officer exonerated the appellant and the second enquiry officer observed that it cannot be said with certainty that they connived with them to append false declaration as alleged and therefore applying the principle of proportionality, it was observed that it is not a fit case for revoking the license as the charges are not so grave.

16. One aspect which requires to be considered is that Shri Aman Jain had asked for cross examination of Shri Prashant Jain but despite notice by the Commissioner Customs, he did not appear. Hence it is not a case of rejection of the request to cross-examine and therefore no fault can be found with the impugned order on that ground.

17. On the issue of imposing punishment under the Regulations we are of the opinion that such action of forging and fabricating public document has to be seriously viewed and does not warrant any kind

of leniency. The appellant being well educated (M.Tech) cannot plead ignorance as to what his employee was doing, more so when the said employee is not an old reliable employee but one who had joined the appellant firm only in November 2017. We are also guided by the decision of the Bombay High Court in Worldwide Cargo Movers (supra), where it has been held as :

> "**28……** Similarly, when one comes to the disciplinary measures, one must not lose sight of the fact that the appellant-Commissioner of Customs is responsible for happenings in the Customs area, and for the discipline to be maintained over there. If it takes a decision necessary for that purpose, the Tribunal is not expected to interfere on the basis of its own notions of the difficulties likely to be faced by the CHA or his employees. The decision is best to be left to the disciplinary authority save in exceptional cases where it is shockingly disproportionate or mala fide. This is not the case here"

18. The learned counsel for the appellant has referred to a recent decision of the Tribunal in **M/s Sameer Logistics Private Ltd., vs. Commissioner of Customs - Final Order No.40646/2023 dated 03.08.2023**, where the Tribunal set aside the punishment of revocation of Customs Broker License as too harsh a punishment as he was out of business for more than 6½ years. From the facts of the case, we find that the same is distinguishable as contravention related to Regulations 11(a), 11(b), 11(n), 11(e) of CBLR, 2013 whereas in the present case regulation 10(j) of CBLR, 2018 has been invoked for forging/ fabricating the document whereby the first print page of the docket showed, "Examination has not been prescribed for this B/E" and also added the name of two officers from appraising Group-4 which gives an impression that the B/E has already been assessed by the group and examination is not required. This was just

to avoid the shed appraiser who keeps vigil over undervaluation cases in RMS and the present B/E was found to be undervalued. On the contrary the system entry showed,"Assessment and Examination has not been prescribed for this B/E." In other words it amounts to fraud and the principle is that fraud vitiates all actions. In the circumstances no indulgence is required to set aside the order of revocation of Customs Broker License.

19. We would like to refer to the statement of Smt. Seema Singh, the other partner of the CB firm which was recorded on 15.09.2018 where she stated that she did not know Sh. Prashant Jain. Later Smt. Seema Singh retracted her statement to the effect that the said statement was made in the heat of time and under mental pressure and clarified that she knows him as employee. The belated retraction by her has no substance and as held by the Apex Court in **Surjeet Singh Chhabra vs Union of India 1997 (89) ELT 646**, the confession, though retracted is an admission and binds the petitioner. This conduct of Smt. Seema Singh raises doubt on her credibility and reflects that on being caught she also tried to escape from the responsibility.

20. The submission of the appellant that there is no mens-rea and hence the impugned order imposing the punishment for revocation of the license, forfeiture of security deposit and imposition of penalty needs to be set aside. We are of the view that in compliance of the obligations enunciated in the Regulations *mens-rea* is not a relevant criteria and the said principle has been approved by the Apex Court in **Commissioner of Customs vs K. M. Ganatra &**

Company – 2016 (332) ELT 15 (SC) which was observed by the Tribunal in **Noble Agency vs Commissioner of Customs, Mumbai- 2002 (142) ELT 84** in the following words :

> "Any contravention of such obligations, even without intent would be sufficient to invite upon the CHA the punishment listed in the Regulations."

21. We are, therefore, of the considered view that the punishment imposed in the present case by the impugned order does not call for any interference and is hereby upheld. The appeal, is accordingly dismissed.

(Pronounced on 9th Jan., 2024).

(Binu Tamta)
Member (Judicial)

(P. V. Subba Rao)
Member (Technical)

Ckp