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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. C/507 /2009 - CU[DB]

Date **05/08/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S SAINI CONSULTANTS,
113-J, SARBHA NAGAR, LUDHIANA-141001.

M/S SAINI CONSULTANTS, Appellant

Vs

C.C. (PREVENTIVE) AMRITSAR Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/350/ 2011 CU[DB]** dated 03.08.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C. (PREVENTIVE) AMRITSAR
CUSTOM HOUSE, CENTRAL
REVENUE BUILDING, THE MALL,
AMRITSAR 143001.

2. Adv. / Consult
MR. RAJESH RAWAL,
249, LAWYER'S CHAMBERS,
DELHI HIGH COURT,
NEW DELHI.
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing : 1.6.2011
Date of Pronouncement: 03-08-11

Custom Appeal No. 507 of 2009

[Arising out of Order-in-Original No. 06/Cus/09 dated 31.3.2009 passed by the Commissioner of Customs (Preventive), Amritsar]

Coram:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Technical Member

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Saini Consultants — Appellant

Vs.

C.C., Amritsar — Respondent

Appearance:

Appeared for Appellant : Shri G.L. Rawal, Advocate with Shri Rajesh Rawal, Advocate

Appeared for Respondent : Shri S.R. Meena, SDR

Coram:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

Final Order No. C/350/11 dated 3.8.11

Per **Mathew John:**

The Appellant firm, whose proprietor is Shri R.S. Saini, was licenced to function as a Custom House Agents under Custom House Agents

Licensing Regulation 2004 ("CHALR" for short). Since the department noticed that the Appellant was not discharging its obligations under the regulation in a bonafide manner, its licence was initially suspended with effect from 2.12.2005. After that a notice for revocation was issued under Regulation 22 of CHALR and the notice was adjudicated by the impugned order. As per the impugned order passed on 31.3.2009, the licence granted to the Appellant has been revoked. Aggrieved by the order, the Appellant is before the Tribunal. The Appellant submits that its proprietor Shri R.S. Saini has been out of business in the last six years and this has caused undue hardship to him since he has not been able to earn his livelihood. The Appellant represents that if at all there was any lapse on its part the punishment of keeping it out of business during the last six years is more than adequate punishment and now at least the licence should be restored.

2. Opposing the appeal, the ld. DR submits that the Appellant was not acting in a bonafide manner. The Appellant had been subletting its licence by signing blank Bills of Entries and shipping bills and handing over to other parties, who filed documents in the name of the Appellant. Two such persons who had been using the name of the Appellant defrauded the Government to the tune of Rs. 6.50 crores and the persons concerned in fact forged entries showing debits under the DEPB scrips on Bills of Entries for payment of duty though they had collected

the duty amounts from the concerned importers. Therefore, the acts of commission and omission on the part of the Appellant is of very serious nature which caused substantial loss to revenue and there is no ground to restore the license and allow the appeal of the Appellant. To explain the offence committed by the Appellant, the ld. DR relies on para 3.1 of the impugned order which is as under :-

> "3.1 Shri Kapil Oberoi in his statement recorded under Section 108 of the Act on 28.11.05, 29.11.05, 30.11.05, 1.12.05, 4.12.05, 11.12.05 and 13.12.05, inter alia, stated that he along with Shri Ankush Khullar had established a clearing agency dealing in import of goods into India in the name and style of M/s Jai Bhole Impex Pvt. Ltd., 64, C-145A, Focal Point, Phase V, Ludhiana in Jan. 2005: that he was the Director of the said company and that prior to the establishment of the said company, he was working as manager in the firm working in the name and style of M/s Jai Bhole Overseas Company, 39, A-12, Ph. VI, Focal Point, Ludhiana and that he was authorised signatory dealing with all the matters; that the said firm (M/s Jai Bhole Overseas Company) was started in year 2003 as a proprietorship concern with Mr. Ankush Khullar being the proprietor; that the firm stopped the business activity in March 2005 and he started business in the name of new company i.e. M/s Jai Bhole Impex (P) Ltd., Ludhiana where he was one of the directors along with Shri Ankush Khullar; that they had liened with Mr. R.S. Saini who was holding CHA Licence No. 04/CHA/REG/ASR/99; that Shri R.S. Saini used to sign all their customs clearance documents; that after getting the import documents signed from Shri R.S. Saini, they were getting the import goods cleared from all the three customs freight stations at Ludhiana; that during the process of presenting the documents and clearance of goods, they resorted to forging the signatures of departmental officers posted for the registration of DEPB licence and debiting the customs duty therefrom i.e. by depicting fictitious debit particulars of the customs duty involved on the Bills of Entry in respect of import of goods; that the benefits of DEPB credit in the Customs duty were taken on the basis

of fictitious DEPB debit entries by forging the signatures of the departmental officers; that after applying the above mentioned mal-practice the documents namely Bills of Entry were submitted for concurrent audit; that the import goods were got cleared for home consumption; that customs duty involved was deposited later on through challans properly and only the customs duty deposited vide DEPB was fictitious. He further divulged another modus operandi being followed by them wherein fake TR-6 challans were presented covering all the custom duties payable along with the Bills of Entry; that the goods were got cleared on the basis of fake TR-6 challans showing fake entries of the banks; thereafter the fake challans were removed by them from the files and fictitious DEPB debit entries were made on the Bills of Entry by forging the signatures of the Govt. officers; that actual TR-6 challans showing the duty payment of CVD, Cess and education cess was also placed in the file of Bill of Entry by removing the fake TR-6 challans and the fake challans were destroyed; that the total amount towards duty was received from the importers and shown to have been paid in the bills of entry in respect of Customs duty by showing fictitious DEPB entries was shared by him and Shri Ankush Khullar. He was further confronted with the files along with their list and he stated that DEPB debit entries shown in the files shown to him were fraudulent and that none of the entries shown in the said files had been made by the customs officers and that he along with Shri Ankush Khullar had forged the signatures of the officers deputed for debiting the duty and the files in which duty paid through DEPB was forged were never submitted to the DEPB/licensing section for debiting; that the total amount of customs duty so debited by way of making fictitious debit entries was more than Rs.6.50 crores. He further stated that he had established two proprietary concerns in the names of M/s J.B. Enterprises and M/s H.K. Yarns for the purpose of using their bank accounts for receipt of payment of DEPB purchased from their clients/importers; that he along with Shri Ankush Khullar retained with themselves the above said amount which was meant for deposit of customs duty."

3. At this stage the Appellant submitted that as soon as the fraud was brought to his notice by the department he took necessary steps to

help the department to make good the revenue loss and consequently the amounts lost by the department has been substantially recovered. When this statement was made during hearing, the Appellant was asked to submit the details regarding the action taken by him for enabling recovery of the amount. Accordingly, the Appellant has filed an affidavit dated 2nd June 2011.

4. We have considered the offence committed by the Appellant and also the details submitted in his affidavit. We notice that as per the affidavit about Rs. 2.28 crores has been recovered from imports made by 12 out of the 14 importers involved. However, the record shows that this is not a case where the importers cheated the Government but the persons to whom the Appellant had given blank signed papers ~~as~~ cheated the Government. Therefore, it has not been surprising that bulk of the amount has been recovered once the fraud has been detected. This is a case where the Appellant signed blank documents and gave to others to operate in his name. When those persons committed fraud the Appellant is making alibis. Custom House Agents License is not an instrument to seek rental income for putting signatures on blank documents. During the relevant time itself the Appellant was not doing any active job of CHA except signing documents. There is no reason to give the Appellant another opportunity to seek such income exposing Revenue to huge risk.

5. In a similar case, where licence of CHA was revoked and was restored by the Tribunal after lapse of few years, Revenue had filed Appeal before the High Court of Hon'ble Andhra Pradesh and the High Court vide decision dated 30.3.2011 in the matter of **CCE Vs. H.B. Cargo Services** [2011 (268) ELT 448 (A.P)], held that such revocation is not warranted. Para 11 and 12 of the orders of the Hon'ble High Court is re-produced below :-

> "11 While issuance of signed blank shipping bills would, by itself, amount to negligence on the part of the CHA, their doing so for a consideration of Rs.150/- per shipping bill is an act of corruption. It is in this context that the proportionality of punishment imposed on the respondent, and the scope and amplitude of this doctrine, is required to be examined. "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality places in focus the true nature of the exercise-the elaboration of a rule of permissible priorities. "Proportionality" involves "balancing test" and "necessity test". While the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests, and a manifest imbalance of relevant considerations, the latter (necessity test) limits infringement of human rights to the least restrictive alternative. (Judicial Review of Administrative Action (1995), pp. 601-05, para 13.085; Wade & Forsyth: Administrative Law (2005), p. 366; *Mukul Kumar Choudhuri* - (2009) 15 SCC 620). What is otherwise within the discretionary domain and sole power of the decision maker to quantify the punishment, once the charge of misconduct stands proved, is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment, which is grossly in excess of the allegations, cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be

applied, while dealing with the question of quantum of punishment, would be: would any reasonable person have imposed such punishment in like circumstances? Obviously, a reasonable person is expected to take into consideration the measure, magnitude and degree of misconduct and all other relevant circumstances, and exclude irrelevant matters before imposing punishment. [*Mukul Kumar Choudhuri* - (2009) 15 SCC 620]. The CHALR enables both suspension and revocation of the license of a CHA for violation of any of the conditions specified therein. If any such ground exists, two courses are open to the Commissioner. One is to suspend the license and the other is to revoke it. Suspension would mean that the license would be inoperative for a particular period. An order of revocation would mean that the license is totally inoperative in future, it loses its currency irretrievably. Suspension/revocation, as the case may be, has to be directed looking to the gravity of the situation in the background of the facts. For minor infraction, or infractions which are not of a serious nature, an order of suspension may suffice. On the contrary, when revocation is directed it has to be only in cases where the infraction is of a serious nature warranting exemplary action on the part of the authorities for, otherwise, two types of actions would not have been provided for. Primarily it is for the Commissioner to decide as to which of the actions would be appropriate but, while choosing any one of the two modes, the Commissioner has to consider all relevant aspects, and draw a balance sheet of the gravity of the infraction and the mitigating circumstances. The difference in approach for consideration of cases warranting revocation or suspension has to be borne in mind while dealing with individual cases. The proportionality question is of great significance as action is under a fiscal statute, and may ultimately lead to a civil death. [*Falcon Air Cargo and Travels (P) Ltd.* - 2002 (140) ELT 8].

12 It should be borne in mind that, in disciplinary matters, the Commissioner is responsible for the happenings in the Customs area, and for the discipline to be maintained thereat. If he takes a decision necessary for that purpose, the CESTAT would, ordinarily, not interfere on the basis of its own notions of the difficulties likely to be faced by the CHA or their employees. The decision is best left to the disciplinary authority save in exceptional cases where the punishment imposed is shockingly disproportionate or

is malafide. [*Worldwide Cargo Movers-* 2010 (253) ELT 8]."

5. While giving the above decision, the High Court relied on the decision of Apex Court in **Sri Kamakshi Agency Vs. CCE** - 2002 (142) ELT A-87(SC). Considering the facts and circumstances of the case and also decision of the High Court of Madras and the Apex Court in similar cases, we do not find any reason to interfere with the impugned order. Accordingly, the Appeal filed by the Appellant is rejected.

(Pronounced in open Court on ..3/8/11......)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

RM