# CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

**COURT-IV**

**Date of hearing: 23.08.2017**
**Date of Pronouncement:04.10.2017**

**Appeal No. C/51650-51651/2016-CU[SM]**
[Arising out of the Order-in-Appeal No. 21-SM-POLICY-2016 dated 13.04.2016, passed by the Commissioner of Central Excise, New Delhi]

M/s. ICS Cargo … Appellant

Vs.

C.C.E. New Delhi ... Respondent

Appearance:
Present Shri Prabhat Kumar & Shri S.S. Dabas, Advocate for the appellant
Present Shri K. Poddar, DR for the respondent

**Coram: Hon'ble Mr. Ashok Jindal, Judicial Member**

**FINAL ORDER No. 56950-56951/2017**

Per Ashok Jindal:

The appellant has filed these appeal against the impugned order wherein penalty of Rs.50,000/- under the Regulation 18 read with Regulation 20 & 22 of CABLR 2013 read with Regulation 20(1) read with Regulation 22 of CHALR 2014 has been imposed on the appellant in each case as facts and observations are almost identical, therefore, both the appeals are disposed of by a common order.

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2. The brief facts of the case are that the appellant is a customs broker and registered under Bombay, Ludhiana, Vishakhapatnam, Noida and Kandla under Regulation 9 CHALR 2004 presently Regulation 7 CBLR 2013. One M/s. Velocity

Impex having their office in Bombay filed a shipping bill no. 3297829 dated 14.06.2014 for export of 365.76 Sq. Mtrs of Granite slabs to Singapore per vessel M/s. Passat Spring. Intelligence received indicated that a gang of smugglers were attempting to export red sanders stuffed in two containers which were lying in the premises of M/s. Visakha Container Terminal Pvt. Ltd., Vishakhapatnam. In pursuance of the said intelligence, the officers of DRI identified the containers bearing number APZU3456821 in which read sanders was stuffed, and container number APZU3499572 in which the declared cargo i.e. Granite slabs was present. These containers were being attempted to be exported from M/s. Visakha Container under Shipping bill no. 329847 dated 14.06.2014 and 3297689 dated 14.06.2014 respectively both filed by M/s. Velocity Impex, Mumbai. The issue of illegal export of red sanders was being dealt separately and the present notices are limited to the issue of attempting illegal export of granite slabs by misuse of IEC, vide shipping bill no. 32987 dated 14.06.2017 and was stuffed in the container. The said container was detained for further examination.

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3. In pursuance to the intelligence, the gang of smugglers involved in smuggling of red sanders logs were also identified and the following persons were found to be the key players viz., Shri Pandiri Praveen Kumar, Director of M/s. Dattar Shipping and Logistics Pvt. Ltd., Vishakhapatnam, Noamaan Khan, James David Balraj, Sunil Chandrakanth, Mohd. Haroon,

Pydi Raju, K. Somasekhar, Deepak Naidu, M. Sudheer. The container lying in the yard was examined and it was found that there is a polished granite in one container which is a factory sealed container whereas name of the manufacturer was mentioned as M/s. Blue Rock Minerals. Further, investigation revealed that in another container with shipping bill no. 3298474 dated 14.06.2014 it was found red sanders. In these set of facts, proceedings under Customs Act were taken up separately.

4. But two proceedings were separate initiated against the appellant for revocation of Customs Broker License. The enquiry officers were appointed separately for each proceedings and after the report received from enquiry officer the matter was examined and no proceedings were initiated for revocation of CHA License and penalty in both the cases has been imposed on the appellant under provisions of Regulation 18 read with Regulation 20 and 22 of CBLR 2013. Aggrieved from the said orders, the appellant is before me.

5. The facts of the cases are not in dispute as narrated herein above.

6. The Ld. Counsel for the appellant submits that Shri Pandiri Praveen Kumar was a G Card holder of the appellant and granted CHA in the Customs area as shipment were being made by him without any knowledge of the appellant by misusing their Customs Broker License and that misusing his position as an employee of customs broker without any explicit authority for filing the appeal on behalf of customs broker and

it has also been observed that customs broker has not direct flow in the impugned shipment of M/s. Velocity Impex. In that circumstances, it says that there is no violation on behalf of the appellant and Customs Broker License Regulation 2013. Therefore, no penalty is to be imposed on the appellant. He further submits that during the course of proceedings, enquiry officers was appointed and who has clearly given the findings in his report that Shri Pandiri Praveen Kumar has acted in the capacity of Managing Director of Dattar Shipping and Logistics Pvt. Ltd. and as second employee of ICS Cargo i.e. the appellant. It was also found by the enquiry officer that there was no authorization given to Shri Pandiri Praveen Kumar by the appellant and the appellant has not played any specific role in the instant case. In these circumstances, penalty on the appellant is not imposable in the light of the decision of this Tribunal in the case of ***Buhariwala Logistics Vs. CC New Delhi 2016 (331) ELT 633 (Tri-Del).*** Therefore, impugned orders are to be set aside.

7. On the other hand, ld. AR supported the impugned order.

8. Heard both the sides. Considered the submissions.

9. On careful consideration of submissions made by both the sides and on perusal of records, I find that an enquiry officer was appointed for violation of the provisions under Regulation 11(a), 11(d), 11(e), 11(m), 11(n) and 19 of the CBLR 2013 and the enquiry officers gave his report as under:

> ***"Summary of Enquiry Report by Assistant Commissioner***

*It has been held by Ld. Enquiry in the Enquiry Report:-*

*i) That Shri Pandiri Praveen Kumar has used the CHA license of M/s. ICS Cargo for export of goods of M/s. Velocity Impex without their knowledge.*

*ii) That Shri Pandiri Praveen Kumar hasn't been issued with any G/H card by Customs Authorities at Vishakhapatnam.*

*iii) That Shri Pandiri Praveen Kumar was appointed as clerk by ICS Cargo in the year 2009.*

*iv) That involvement of Shri Pandiri Praveen Kumar in the instant case is without any authorization from ICS Cargo.*

*v) That ICS Cargo hasn't played any specific in the instant case.*

*vi) That the charge of violation of regulation 11(a), 11(d), 11(e), 11(m), 11(n) of the CBLR, 2013 by ICS cargo is not sustainable.*

*vii) That as per Form C Shri Pandiri Praveen Kumar is one of the employee of ICS Cargo, and that he was terminated on 08.05.2014 department hasn't been informed till date which means that he is still an employee of the ICS Cargo.*

*viii) That ICS Cargo has failed to exercise proper supervision on their said employee who acted in a mala fide manner.*

*ix) That Shri Pandiri Praveen Kumar has acted in two capacities – one as Managing Director of M/s. Dattar Shipping and Logistics, Vishakhapatnam and second as an employee of ICS Cargo.*

*x) That ICS Cargo is responsible for acts and omissions of his employee and as such has violated regulation 17(9) of the CBLR 2013 and are liable for penal action under the provisions of law in force."*

10. Further, in the impugned order, it is recorded by the Ld. Commissioner that Shri Pandiri Praveen Kumar in his statement dated 11.12.2014 has stated that he used the CHA license of the appellant for export of cargo of M/s. Velocity

Impex and the appellant did not know that the export is being made under exporters name . Therefore, he exonerated the appellant from the charges alleged under Regulation 11(a), 11(d), 11(e), 11(m), 11(n) but imposed penalty for violation of regulation no. 19 of CBLR 2013. In fact, Shri Pandiri Praveen Kumar was G card holder and he was not allowed to enter in the customs area by the appellant and activity of Shri Pandiri Praveen Kumar was not in knowledge of the appellant. Therefore, no penalty can be imposed in the light of the decision of this Tribunal in the case of ***Buhariwala Logistics*** wherein this Tribunal has observed as under:

*"5. We have considered the contentions of both sides. In this regard, we find that Mr. G.S. Prince admitted in his statement that he acted in his personal capacity and the appellant. CHA was not aware his activities in this regard. It is also seen that the appellant's statement was never recorded and there is no evidence to suggest that the appellant was aware of the activities of Mr. G.S. Prince. In this regard, we find that in respect of Appeal Nos. C/58871 & 60232/2013-Cus(DB), the CESTAT allowed the appellant's appeal vide Final Order Nos. 55023-55024, dated 17-12-2014 [2015 (326) E.L.T. 170 (Tribunal)] and set aside the penalties imposed upon it on similar grounds and on the basis of similar evidence. CESTAT in that order came to a finding that there was no evidence to prove the involvement of the appellant, that its employee had suo motu acted for his personal greed and beyond the scope of duty and therefore, the employer (i.e. the appellant) cannot be penalised. Para 12 of the said order is reproduced below :-*

*"12. We find that in the case of Appellant No. 1, no statement of the appellant was recorded. Moreover, during*

*the course of hearing, the appellant has submitted that Shri G.S. Prince is a G card holder and has acted in his own capacity to get the monetary benefits from the business dealings with Shri Sumit Walia and the appellant was not having any knowledge of such importation. We further find that in subsequent proceedings on the same investigation in other imports of car by the same persons on the request of the appellant, Shri G.S. Prince was made the party to the Show Cause Notice and in those cases, the adjudicating authority has observed as under :-*

*"(F) Coming on the question of penalty on noticee No. (vi) M/s. Buhariwala Logistics I observe that in the show cause notice MN/s. Buhariwala Logistics have been charged through their G-Card Holder G.S. Prince that by virtue of their action of facilitating the fraudulent imports in violations of the provisions of CHALR, 2004 they have made themselves liable for Penalty under Section 112 and Section 117 of the Customs Act, 1962 as applicable.*

*I find that in this case the show cause notice dated 24-4-2012 was earlier issued to M/s. Buhariwala Logistics through their G-Card Holder G.S. Prince. Subsequently through Addendum/ Corrigendum to the Show Cause Notice dated 8-10-2013 Shri G.S. Prince, G-card holder of the CHA, M/s. Buhariwala Logistics was specifically put to notice as to why penalty should not be imposed on him for various acts of omission and commission for facilitating Sh. Sumit Walia in fraudulent import of Aston Martin Rapide car in the name of Commercial Attache of the Embassy of Vietnam and mis-declaration/suppression of proper value of the said car.*

*I have gone through the written & oral submissions of M/s. Buhariwala Logistics that they were not involved in the said violation since, actually it was Shri G.S. Prince who facilitated and handled the clearance of the imported vehicle without the knowledge of the CHA M/s. Buhariwala Logistics. Even during the investigation stage, none of the* *persons involved had made any inculpatory statement regarding the role of M/s. Buhariwala Logistics. However, since Sh. G.S. Prince was acting on behalf of M/s. Buhariwala Logistics. Therefore, it appears that M/s. Buhariwala Logistics failed to perform their duty obligations under the CHALR, 2004 for which proceedings can be initiated under the said Rules. As far as violations under the Customs Act, 1962 are concerned, I do not find any role of M/s. Buhariwala Logistics in the present matter. In view of this fact, I refrain from imposing any penalty on M/s. Buhariwala Logistics in the present case."*

*Thereafter the penalty on the appellant has been dropped but the penalty on Shri G.S. Prince was imposed. Further we find that in the case of CC v. Vaz Forwarding Ltd. (supra), wherein the penalty was dropped on the CHA in absence of evidence of the knowledge of the CHA. Further, in the case of S.Y Ranade (supra), it was held that there is no evidence to prove the involvement of the CHA and an employee has suo motu acted for his personal greed and beyond the scope of his duty, therefore the employer, i.e., CHA cannot be penalised. In this case also, it is not in the knowledge of the appellant that Shri G.S. Prince is involved in illegal importer and Shri G.S. Prince acted in his personal capacity for monetary gains. We also find that in subsequent proceedings [agent] Shri G.S. Prince no penalty has been imposed on the appellant. Therefore, we hold that no penalty is imposable on the appellant consequently, we set aside the penalty imposed on the appellant."*

*As regards the judgment of Karnataka High Court cited by ld. Departmental Representative in the case of Clear Fast Services Pvt. Ltd. v. JCC, Bangalore (supra), we find that in that case the High Court merely held that there was no substantial question of law which arose for its examination. Thus, the judgment would not adversely hit the CESTAT Final Order cited above. As regards the judgment of Delhi*

*High Court in the case of Jasjeet Singh Marwaha v. Union of India (supra), we find that in para 6.2, the High Court observed as under :-*

*"6.2 Furthermore, if the owner or importer of goods acts through an agent, then, under Section 147, the owner or the importer shall be deemed to have not only knowledge but also presumed to have given his consent to any such thing done by an agent unless the contrary is proved for the purposes of proceeding under the Act, thus making the owner or importer being liable for any infraction of law the agent who is authorized, impliedly or expressly by the owner of exporter shall also be liable. Under the proviso to sub-section (3) of Section 147 as noticed hereinabove, insofar as, it is a case of duty not levied or short-levied or erroneously refunded then except where the such an eventuality had occurred on account of any wilful act, negligence or default of the agent it is provided that the duty shall not be recovered from the agents unless the concerned authority as indicated under the provision comes to the conclusion that the duty cannot be recovered from the owner or the importer."*

*As may be observed, the judgment stated that where the agent was authorised expressly or impliedly by the owner, the owner shall also be liable for the actions of agent. In the present case, no evidence has come on record that the appellant authorised Mr. G.S. Prince expressly or impliedly.*

*6. In view of the foregoing and following the precedent in the appellant's own case vide CESTAT Final Order dated 17-12-2014 [2015 (326) E.L.T. 170 (Tribunal)], we set aside the penalties imposed on the appellant and allow the appeals.*

11. I further find that in the case of ***Vikrant Gogia Vs. CC Delhi vide final order no. C/A/55264/2016 dated 17.11.2016*** also the penalty was dropped against the

customs broker in a situation where the customs authorities held that the revocation of the CHA license as proposed by the Revenue is not warranted. Admittedly in this case also, the Ld. Commissioner has held that the revocation of customs broker license is not warranted.

12. In that circumstances, penalties cannot be imposed on the appellant. Therefore, I set aside the impugned orders qua imposition of penalty on the appellant. Consequently, the appeals are allowed with consequential relief (if any).

[Order Pronounced in the open court on 04.10.2017]

**(Ashok Jindal)**
**Judicial Member**

Bhanu