IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Cus.Appeal No.166 of 2012

(Arising out of Order-in-Appeal No.Kol./Cus/Airport/Admin/02/2012 dated 23.03.2012 passed by Commr. of Customs (Airport & Administration), Kolkata)

M/s Suman International
Vill. Muchipara
P.O. – G.I.P.Colony,
Dist.-Howrah,
Howrah-711112

Applicant

VERSUS

CC (Port), Kolkata
15/1, Strand Road,
Kolkata 700001

Respondent

Appearance:

Shri A.K.Das, Advocate for the Appellant
Shri S.K.Naskar, A.R. for the Respondent

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

DATE OF HEARING : 05.08.2019
DATE OF DECISION : 05.08.2019

FINAL ORDER NO.76418/2019

PER BIJAY KUMAR :

This appeal arises out of the remand order passed by the Hon'ble High Court of Calcutta vide its Order dated 17th July, 2019, wherein the order of this Tribunal vide Final Order No.FO/77346/2017 dated 11.07.2017, has been set aside with a direction to re-adjudicate the case within 3 (three) months from the date of receipt of the order.

2. Briefly stated, the facts of the case involved in this appeal are that M/s Sungrowth Exports Pvt. Ltd., had been alleged to have fraudulently exported the readymade garments under Duty

Entitlement Pass Book (DEPB) Scheme and the Appellant was arrayed in show-cause notice as co-noticee, on the ground that the consignment was cleared with their help as a Custom House Agent (CHA). Thereafter, another show-cause notice dated 22.06.2005 was also issued to the appellant for the alleged violation of Customs House Agents Licensing Regulations Act, 2004 (CHALR for short) in terms of Regulations 13 (d) and 13 (n) of CHALR. This show-cause notice was adjudicated by the Commissioner, who revoked the Appellant's CHA Licence and also forfeited the security deposit. The Appellant was working as a CHA for importation and exportation of goods at Kolkata Port. Shri Samar Goswami, who was "G" Card Holder of the Appellant Company, had played the entire mis-chief by forging/impersonating the signature of Shri S.Das, the partner of the Appellant and dealt with the export consignment on his own accord for the clearance of export cargo at Haldia Port, there was no entry whatsoever of the job in the Job Register of the Appellant and also no payment was received by the Appellant from the exporter.

3. On coming to know through summons issued by the Department about the mis-chief committed by Shri Goswami, "G" Card Holder, a Police Complaint was also made on behalf of the Appellant on 15.10.2003 and the same was intimated to the Customs and Port Authorities on 17.03.2003. Thereafter, he was terminated from his service on 28.10.2003. Therefore, it is the submission of the appellant that the action which has been taken by the Department against the appellant, is not as per the provisions of CHALR.

4. The Learned Advocate on behalf of the appellant, submitted that Shri Goswami commited the fraud beyond the scope of employment conditions with the appellant, for which, the Appellant could not be held responsible placing reliance on the decision of the Tribunal in the case of G.M.Exports Vs. CC : 2006 (198) ELT 354 (Tri.-Bang.). He also submitted that the Forensic Report, which has been relied upon by the Department, is not conclusive in nature and is merely an opinion for having similarities with the signature of the partner of the appellant. It is further submitted that the role of a CHA in the impugned consignment of export was only limited to the clearance of goods and it is not proved that the appellant had any knowledge about the fraud that had been committed by the exporter. Learned Advocate, has placed reliance on the decisions of the Tribunal in the cases of Arif I.Patel Vs. Commissioner of Customs (Prev.), Mumbai reported in 2014 (308) ELT 698 (Tri.-Mumbai) and Lohia Travels & Cargo Vs. Commissioner of Customs, New Delhi (Prev.) reported in 2015 (330) ELT 689 (Tri.-Del.), wherein it has been held that even penalty under Section 112 (a) of the Customs Act, 1962, is not imposable.

5. The Learned Advocate further submitted that in case of alleged fraudulent export made by M/s Sungrowth Exports Pvt. Ltd., two other CHAs were also involved, but their Licences have neither been suspended nor revoked and thus, the appellant has been discriminated against by the department.

6. The Learned Authorized Representative on behalf of the Revenue, supports the impugned order on the grounds contained therein.

7. We have heard the Leaned Advocate on behalf of the Appellant and the Learned Authorized Representative on behalf of Revenue and also perused the case record including Hon'ble High Court's order.

8. We find that in this case, this Tribunal has revoked the suspension of license vide its Final Order No.A-24/Kol/2006 dated 16.01.2006 and the relevant portion of the order is reproduced under:

> "2. The appellants' main contention is that the alleged offence i.e. export of consignment of sub-standard quality garments under drawback by one M/s Sungrowth Exports Pvt. Ltd. took place in the year 2001-2002 and the first statement of the exporter was recorded on 25.06.03. Thereafter, the statement of the partner of the CHA was also recorded on 9.7.03. In his subsequent statement recorded on 4.8.03, the exporter denied that the present CHA was engaged in the export of the goods. However, subsequently, the show-cause notice was also issued on 3.2.05, which was replied by the appellants on 14.3.05. In his scenario, suspension of the licence by the Commissioner vide his impugned order issued on 24.5.05, was not justified inasmuch as the same has no nexus with the alleged offence. For the above proposition, reliance was placed upon the Tribunal's decision in the case of Setwin Shipping Agency Vs. CC, Mumbai reported in 2004 (60) RLT 807 (CESTAT-Mum.) as also on another decision of the Tribunal in the case of G & K Shipping Pvt. Ltd. Vs. CC (General), Mumbai reported in 2005 (68) RLT 569 (CESTAT-Mum.).
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> 3. Apart from the arguments on the merits of the case, we find that the appeal can be disposed of on the above short point. Admittedly, the offence of alleged irregularisation took place in the year 2002 and the suspension order was issued almost after three years of filing the shipping bills. The Tribunal in the above referred decision has held that power of

> suspension has an immediate nexus in time with the event. The same has to be resorted only when it felt necessary to immediate stop functioning of a Customs House Agent in order to safeguard the interest of the Customs House. The appellant in the present case was allowed to continue to act as CHA for the period of three years in which the case, it can be safely concluded that his continuation was not a danger to the Customs House. As such, we are of the view that such suspension was not called for. We also note that the regular proceedings for cancellation of the licence has already been started by way of issuance of show-cause notice dated 22.06.05 under the provisions of CHALR and reply has already been filed by the appellant. As such, we find no reasons to continue the suspension of the licence. The same is accordingly set aside and the appeal is allowed."

9. In spite of the above order, the Commissioner again suspended the licence of the appellant on 16.02.2009 and also issued the notice for revocation of licence on 30.08.2010. It is evident from the record that the entire case against the appellant is based upon the fraudulent claim of Duty Draw back in the year 2001-2002 by the exporter. There had not only been undue delay in taking action by suspension and revocation of CHA licence of the appellant, but there had also been a clear disobedience of the order passed by this Tribunal as stated above. It is not evident from the impugned order that the appellant was not involved in the fraudulent export, which was done by "G" Card holder of the appellant without their knowledge.

10. It is pertinent to mention here that this order is in compliance of Hon'ble High Court's order dated 17.07.2019, wherein the order passed by this Tribunal dated 10.07.2019, has been set aside with the direction to re-adjudicate the case, without being influenced by the prescription of time line as prescribed in CHALR. The Hon'ble High Court has held that there is no provision of any time line under the

provisions of Customs Act, 1962 and Rules or Regulations framed thereunder. To hold that this kind of an effect would follow, would be a very adventurous and incorrect interpretation of the intention of the legislature. Therefore, we are accordingly considering the case ignoring the prescribed time limit under the CHLAR. The fact is that in this case the CHA Licenses was suspended to 24.05.2005 and thereafter the Show Cause Notice for revocation of the Licenses was issued on 22.06.2005. Thereafter, enquiry report was submitted to the Commissioner on 18.07.2005.

11. In the meanwhile, the appellant approached the Tribunal against the suspension order which was set aside by the order dated 19.01.2006 as extracted above. However, the Commissioner again suspended the licenses of CHA on 6.02.2019 in spite of having favorable order from the Tribunal.

12. The second Show Cause Notice was issued on 3.08.2010, which was followed by the inquiry report dated 30.11.2010. The CHA License was revoked thereafter on 23.03.2012. It is not apparent from the case filed as to why the Commissioner has suspended the licenses of CHA again when the earlier order was set aside by this Tribunal. In absence of any stay from the higher court, the commissioner should not have ventured to issue another notice for suspending the license in such a situation.

13. This itself is judicially incorrect and unacceptable. It would have been sufficient to set aside the order passed by the Commissioner, however we do not indeed to do so and proceed to decide the matter

on merits. We find that the “G” card holder of the appellant, Shri Samar Goswami, has undertaken the job of clearance of export consignment from M/s Sungrowth Exports Private Limited without the approval of the director of the appellant company. After having come to know about the mischief done by Shri Goswami, the appellant filed a police complaint on 15.10.2003, and intimated to the Customs on 17.03.2003. Thereafter, the service of Shri Goswami was also terminated by the Appellant. The department has also obtained the signature of the partner of the Appellant company, Shri S. Das, and sent for the forensic examination, so as to acertain as to whether the signature appearing on the export documents was by him or the same has been forged by the “G” Card holder, Shri Samar Goswami. The forensic report is only an opinion for the similarities, like straight nature of commencement of the initial oblique/of ‘S’, acute angularity in the middle, compressed nature of the bottom curve and ticked manner of execution of the terminal part of ‘S’ etc. (Page-143 of the Paper Book refers) This is an opinion only that was formed on the manner of making a sample signature, which may be very closely/similarly imitated by some other person (more so, if he has some idea about Forensic Science relating to identification of hand-writing). This opinion cannot change/belie the other circumstantial/corroborative facts/evidences on record. Therefore, it cannot be concluded that the signature that appeared on the export document was of Shri S.Das, the partner of the appellant company. Further, we find a lot of force in the submission made by the Learned

Advocate that the appellant was not in the knowledge of any mischief which has been committed by the importer.

14. We find that the similar issue has come up for consideration before this Tribunal in the case of G.M. export Vs. Commissioner of Customs Bangalore 2006/198 ELT 354 (Mumbai), wherein it is held as under :

> ***"C/431/04- M/s. Ganesh Shipping Agencies vs. CC Bangalore***
> *M/s. Ganesh Shipping Agencies were in charge of the clearance of impugned goods. No doubt, the three employees of the agency helped the appellant in producing the computer generated invoice. It is seen that the CHA have terminated the services of the three employees. That apart, there is no evidence to show that the CHA themselves were involved in the generation of invoices in the computer for helping the appellants. The various case laws cited by the learned consultant are very relevant. The employees appear to have committed the improper acts without the approval and blessings of the CHA. Considering the submission that the CHA had a good track record in different ports for about 25 years we feel that the penalty on the CHA imported in para 'm' of the order is not justified. The same is set aside."*

15. Further, we also find that similar findings have been recorded by the Tribunal in the case of M/s Arif I Patel vs. Commissioner of Customs preventive (Mumbai) 2014(304) ELT 698 (Tri.-Mumbai), wherein it is held that the appellant CHA had no knowledge of importers and therefore they should not be held liable for any misdeed

by the importer. The relevant paragraph of the order is reproduced as under:

> *"7. We have gone through the impugned order and the argument advanced by all the parties. The role of Shri Kashyap J. Badekha is limited by introducing importer to Shri Arif Patel for clearance of the goods and to help the importer to get IEC. He has nothing to do with the import of contraband goods. We further find that the role of Shri Arif Patel was only for the clearance of the goods and for the clearance of the earlier consignment, nothing has been proved against the appellant, that he was having no knowledge of the modus operandi of the importation of the contraband goods by replacing aluminium scrap. Further, in this case the container was intercepted at Bombay port itself and it was opened and the appellant came to know about the container with contraband goods only after examination. In these circumstances, the appellant was not having any knowledge of importation of contraband goods by the importer.*
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> *8. As per Section 112A of the Customs Act, 1962, the penalty can be imposed on the person who act of aiding and abetting the importation of contraband of contraband goods. As discussed above, there was no rule of the appellant in aiding and abetting the importation of contraband goods. Therefore, penalties under Section 112(a) of the Act are not imposable on the appellants."*

16. We also find that the order of the Tribunal in the case of Lohia Travels and Cargo Vs. Commissioner of Customs, New Delhi (Prev.) reported as 2015 (330) ELT 689 (Tri.-Del.), wherein it is held as under

> *"When there is no evidence to establish that the appellant had prior knowledge of the goods imported and also when there is no evidence to establish any wrongful intent on the part of the appellant then there is no reason to impose penalty. After finding that the appellant has become unknowingly party to fraudulent import, the imposition of penalty is unjustified."*

17. Considering the aforesaid decision of the Tribunal and in absence of any investigation regarding indulgence of the CHA in clearance of the export consignment, we find that the impugned order is not sustainable and the same is being set aside. The appeal filed by the appellant is allowed with consequential relief, if any.

(Operative part of the order was pronounced in the open court)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(Bijay Kumar)
Member (Technical)

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