IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Appeal No.77086 of 2017

(Arising out of Order-in-Original No.KOL/CUS/AIRPORT/ADMN/19/2017 dated 21 September 2017 passed by Commissioner of Customs, Kolkata.)

M/s. Merico Logistics Private Limited
(64A, Hemanta Basu Sarani, 2[ND] Floor,
Kolkata-700001.)

...Appellant

VERSUS

Commissioner of Customs (Airport & Administration), Kolkata
.....Respondent
(15/1, Strand Road, Custom House,
Kolkata-700001)

APPEARANCE
Shri Arnab Chakraborty (Advocate) for the Appellant (s)

Shri A.K.Singh, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING: 9 August, 2019
DATE OF DECISION: 26 November 2019

FINAL ORDER NO: 76732/2019

BIJAY KUMAR :

The appellant, M/s. Merico Logistics Private Limited, Kolkata has filed present appeal being aggrieved by the order of Commissioner of Customs (Airport & Administration), Custom House, Kolkata vide which the CHA licence of the appellant has been revoked under the provisions of Regulation 18 of Customs Broker's Licensing Regulation (CBLR), 2013. The Commissioner has also ordered forfeiture of security deposit furnished by the appellant under the same Regulation. Being aggrieved by the order, the appellant is before us in appeal.

2. The facts of the case is that the appellant is a Customs Broker having licence No.M-56 (PAN No.AAHCM5826C) issued by the Commissioner of Customs, Custom House, Kolkata under Regulation 9(1) of CHALR, 2004 (now Regulation 7(1) of CBLR, 2013) to transact customs clearance work within the jurisdiction of Kolkata Customs Commissionerate. The validity of licence is up to 27.07.2022.

3. On the basis of an offence report dated 26.12.2006 from Directorate of Revenue Intelligence, Kolkata against the appellant received on 27.12.2016 in the office of Commissioner of Customs, Kolkata regarding old and used worn out clothing imported by different importers based in Panipat, Amritsar, Ludhiana and Delhi, which were handled by the appellant as Customs Broker, were found to be mis-declared in terms of weight resulting into evasion of substantial amount of Customs duty. The officers of DRI, Kolkata conducted searches at the various premises belonging to the appellant and transporters, which resulted into resumption of incriminating documents regarding mis-declaration of weight in respect of imported consignments of old and used garments. During investigation weight of seven live consignment of old and used imported cloth in 13 containers were physically verified by the officers of DRI Kolkata in presence of Customs Officer and representative of appellant and officials of custodian, CONCOR, CFS, under Panchnama proceeding, which confirmed that infact there were manipulation of weight in respect of imported consignment. The

investigation also revealed that Weigh Bridge of CONCOR, CFS, was out of order during 2015-2016 and they had issued manipulated weighment slips reflecting lesser weight which was based on declaration filed by the importer. It is the allegation of the Revenue that the appellant had acted in collusion with importer so as to evade the Customs Duty. The searches, which were conducted at the appellant's premises on 03.09.2016, revealed that the job files pertaining to clearance of imported consignment were not having weighment certificate. The statements of Shri Subhasish Bhattachariya, Director of the appellant company was recorded under Section 108 of Customs Act, 1962 (in short Customs Act) on 03.09.2016, 05.09.2016 and 11.11.2016 wherein he admitted that there were mis-declaration in weight of import consignment of old and used clothing handled by them which resulted into loss of Customs Duty. He also agreed that their employee used to manipulate the weight of imported consignments as per Bill of Lading and Import General Manifest and used to issue weighment slips matching with the declared weight. He also agreed that after examination by the customs, the weighment slips were being destroyed by the appellant.

4. Shri Marinmoy Das, another Director of appellant in his statement dated 15.09.2016 recorded under section 108 of Customs Act agreed to the fact that no weighment slips were found in the job files seized from their office by the officers of DRI and the same were destroyed as per the instruction of importers as the weight of the consignment were not as per declaration in the import documents. He further deposed that

Shri Subhasish Bhattachariya, another Director looked after the job and would be able to explain the discrepancies noticed during investigation. He also submitted that Shri Abhijit Ghosh, Shri Debasish Bhattachariya and Shri Chandan Chatterjee, all G. Card holders of the appellant had got the consignment cleared through customs and agreed that there were difference in actual weight and the descleared weight of the Cargo, that resulted into evasionof Customs duty, which is to be paid by the importer along with redemption fine and personal penalty. The duty of Rs.55.50 Lacs was also paid by the appellant towards the duty alleged to be evaded by the importer.

5. Shri Ratan Baidya, Weigh Bridge Operator in his statement recorded under section 108 of the Customs Act on 05.09.2016 and 07.09.2016 agreed to the fact that with the representative of the appellant he has manipulated the actual weight of containers and entered weight of cargo in the weighment slip as per the weight declared by the importer in invoice and bill of lading. He also stated that manipulated weighment slips were handed over to the representative of the Custom Broker and the actual weight of those containers were available in the computer installed at the Weigh Bridge. He also submitted that the manipulation in weight was being done for a small monetary consideration which was agreed by Shri Subhasish Bhattachariya, Director of the Appellant and Shri Debasish Bhattachariya and Shri Chandan Chatterjee also the employee of the appellant.

6. The enquiry conducted at the premises of transport revealed that the transported consignment of old and used clothing always used to be in between 25-26 M.T. on an average, but the declared weight was always lesser.

7. During investigation, the DRI also summoned the various importers, however, the summons returned undelivered with remark 'not found/not existed', which as per the department indicated that the importers were non-existent firm which was not informed by the appellant to the Customs department. Further the appellant has also paid an amount of Rs.65.40 Lakhs towards the differential duty on behalf of importer till the issuance of show cause notice.

8. On the basis of aforesaid investigation, it was concluded that appellant has violated the provisions of Customs Broker's License Regulation (CBLR).

9. The department suspended the licence of the appellant on 03.01.2017 under the provisions of Regulation 19(1) of CBLR and enquiry was ordered to be conducted. After the enquiry proceeding the charge levelled on the appellant was held to be proved by the enquiry officer for violation of provisions of Regulation 11(d), 11(e), 11(m) and 17(9) of the CBLR. The enquiry report was submitted to the Commissioner, who after giving opportunity of personal hearing held that the appellant has violated the provisions of Regulation 11(d) and 17(9) of CBLR, however dropped the charge for violation of provisions of 11(e) and 11(m) of CBLR.

10. Learned Advocate on behalf of the appellant submits that offence report was submitted to the Commissioner on 26.12.2016 which resulted in suspension of the appellant's licence on 03.01.2017, and that was confirmed on 11.01.2017. Thereafter a show cause notice was issued on 10.03.2017 asking them as to why their CHA should not be revoked. The enquiry officer submitted her report on 05.06.2017 and the impugned order had been passed on 21.09.2017. This clearly shows that the entire proceeding has been completed beyond the prescribed time limit under the CBLR. More so, the impugned order has been passed on September 21, 2017 even though the enquiry report was submitted on May 31, 2017 under cover of letter which was filed on June 2, 2017 thus the same is beyond the prescribed time limit of 90(Ninety) days and therefore the order is *ex facie illegal and void ab initio*.

11. It is further submitted by the learned Advocate that the impugned order is full of contradictions regarding weight of the imported consignment of old and used cloth. Shri Ratan Baidya based on whose statement the entire investigation hinges has sometime stated that the employee of the appellant company would be interacting with him regarding manipulation of the weight while on other occasion the name of Shri Subhasish Bhattachariya was mentioned by him. Further, Shri Ratan Baidya also categorically submitted in his statement that the Weigh Bridge remains non-functional most of the time during 2015-2016 and therefore it would not have been possible for the Weight Bridge Operator to take the correct weight on computerized Weigh

Bridge. In his statement dated September 5, 2016 Shri Baidya informed that another Weigh Bridge Operator was also there at the CONCOR CFS by name Shri Rahul Kumar and that the weighment slips would have be issued by either him or Shri Rahul Kumar, whoever was present at the relevant time, but his statement was not recorded by the DRI was recorded. In the circumstances it would not be possible to arrive at the conclusion as to who have issued weighment slips in absence of their signature. Five weighment slips which have been relied upon by the department bears no signature of the Weigh Bridge Operator. It is also on record that department has not produced remaining weighment slips other than the five enclosed with the show cause notice, but in fact these original weighment slips have been resumed from Shri Ratan Baidya, which is acknowledged by the Director of the appellant Shri Subhasish Bhattachariya. Non-supply of remaining weighment slips have made the proceeding invalid, illegal and bad in law and the show cause notice is therefore required to be set aside on the basis of which the impugned order has been passed.

12. It is also submission of learned Advocate that the various statements which have been recorded from the Weigh Bridge Operator, Director of the Company are contradictory to each other and thus required to be ignored in the proceeding. For instance, vide statement dated September 7, 2016 Shri Ratan Baidya in response to Question No.4 alleged that the Director of the appellant, Shri Subhashsh Bhattachariya has asked him to manipulate the net weight of the imported consignment, however in the other statement dated

November 11, 2016 Shri Bhattachariya has specifically denied the same. Shri Subhashish Bhattachariya in his statement also stated that he was not aware of the fact that Weigh Bridge was not in working condition. The statement of Shri Ratan Baidya is also not consistent to the extent that he in his statement dated 05.09.2016 he deposed that he had manipulated the weight of 100 containers handled by the appellant from March 2016, but at the same time in reply to Question No.1 of his statement dated 07.09.2016, he has said that the computer system at the Weight Bridge was not in order from July 2016. There is no confession of manipulation of weighment slips on the part of the appellant as alleged, which is evident from the statement dated November 11, 2016, of Shri Subhasish Bhattachariya wherein he deposed that he was not aware of the Weigh Bridge at CONCOR CFS being out of order during the said period. Further, in his statement dated 05.09.2016 in reply to Question No.3 Shri Subhasish Bhattachariya has agreed to accept the responsibility on behalf of the importer only if such mis-declaration is apparent from the weighment slip resumed by the DRI. All these facts have not been considered by the learned Commissioner.

13. Learned Advocate again impressed upon that the Commissioner has wrongly concluded in the impugned order that the appellant was *de facto* importer without having any evidence to suggest this in the case. The concerned importer has filed Bill of Entry with all details including IEC codes. In the circumstances it will be incorrect to hold that the appellant was *de facto* importer. Merely because return of the summons

with remark that importer concerned does not exist is not sufficient to arrive at the conclusion that the appellant has himself imported the consignment.

14. Learned Advocate has further relied upon the following case laws in support of the submission made hereinabove.

(a) Mehul & Co. v. CC(General), Mum
[2017 (357) E.L.T. 644 (Tri.-Mumbai)]

(b) RSR Forwarders v. CCE, Delhi
[2018 (364) E.L.T. 541 (Tri.-Del.)]

(c) CC(General) v. KVS Cargo
[2019 (365) E.L.T. 395 (Del.)]

(d) Principal CC (General), Mum v. Unison Clearing (P) Ltd.
[2018 (361) E.L.T. 321 (Bom.)]

(e) Pragati Overseas Agency v. CC, Kolkata
[2018 (363) E.L.T. 169 (Tri.-Kolkata)]

15. Learned Authorized Representative for the department, however, supports the impugned order and contends that appellant was involved in the manipulation of weight of the imported consignment in order to defraud the Customs Revenue. Accordingly the appellant has failed in discharging their duty as per CBLR.

16. We have considered the rival submissions and have perused the case record.

17. The issue involved in this appeal is regarding cancellation of CHA licence of the Appellant. It is the contention of the Revenue that the appellant was himself involved in the manipulation of weight of the imported consignment in connivance with the importers, which is based on the investigation conducted by DRI and weighment of detained

consignments in respect of live Bills of Entry. No doubt there is a variation in the declared weight of the imported consignment and the actual weight thereof as contended by Revenue. When the weighment slips are not signed by the employee of the Weigh Bridge Operator, Shri Ratan Baidya, who has mainly been responsible for the weighment of the import cargo and has given inconsistent statements on various occasions regarding as to who, from the appellant side, has instructed him to manipulate the weight of imported consignments. Initially, he stated that it was the employee of the appellant company, while on other occasion, he submitted that it was the Director of the company. Shri Ratan Baidya in his statement stated that there was another operator, who was working at the Weigh Bridge. The department have not taken any statement from him as to whether the wrights of the imported consignment were being manipulated by the CHA on behalf of importer. The Director of the appellant company has contradicted the statement of Shri Ratan Baidya regarding collusion for suppression of weight of the imported consignments. Further, we find that Shri Ratan Baidya in his statement stated and tendered 63 weighment slips, however only five weighment slips were relied upon by the DRI for the purpose of investigation. No explanation is contained for that, in the revocation order regarding mis-declaration of net weight declared in the documents pertaining to the imported consignment. The statement dated 05.09.2016 of Shri Ratan Baidya is further contradictory when he stated that from Marcdh 2016 till date he has manipulated weight of more than 100 containers of old and used garment handled by the appellant company. However, in his statement dated 07.09.2016 he has admitted and stated that the weight was being manipulated since last 3-4 months. This indicates that at the earliest he would have issued manipulated slips from May/June 2016 and not March 2016 as alleged. We also find from the statement of Shri Ratan Baidya that computer system at CONCOR CFS contains the weighment slips and which could have been retrieved from the computer system. This would not have been possible unless the Weigh Bridge was in operation. So there are plethora of contradiction in the statement of Shri Ratan Baidya so as to conform the manipulation in the weight conclusively. We also find that inspite of having connived with the appellant company as stated in the investigation, the department has not initiated any action against Shri Ratan Baidya. In view of the above, and corroborative evidences on record other than statements recorded under Section 108 of the Customs Act, it would be too a harsh penalty on the appellant by revocation of their CHA licence as has been held in case of **Mehul & Co. v. CC(General), Mumbai [2017 (357) ELT 644 (Tri.-Mum.)]**. The relevant paragraph is reproduced as under:-

> "**5.**One of the contentions of the appellant is that the proceedings were initiated and concluded without any substantive reliance on credible evidence. We do note that there are a number of surmises in the inquiry report and in the findings of the adjudicating Commissioner. Much reliance has been placed on statements recorded under Section 108 of Customs Act, 1962. Its evidentiary value in proceedings initiated in connection with investigation into smuggling has its worth. However, Section 108, which reads thus
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> > **'108.Power to summon persons to give evidence and produce documents. -** Any gazetted officer of customs (1) duly empowered by the Central Government in this behalf, shall have power to summon any person whose attendance he considers necessary

> either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.
>
> (2)xxxxx
>
> (3)xxxxx
>
> (4)Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).'
>
> incorporated in the statute for carrying out an inquiry under the Customs Act, 1962 is pertinent only for the intended purpose. Proceedings under the Customs Broker Licencing Regulations, 2013 are in pursuance regulations framed by the Central Board of Excise & Customs under Section 146 of Customs Act, 1962. It is a self-contained provision that empowers issue, operations, suspension and revocation of broker licences. It also needs noting that, where the statute intends to cover subordinate legislation, there is a specific incorporation of the expression 'and the rules framed thereunder.' Such qualifying is conspicuously absent in Section 108. That is not entirely surprising as proceedings under the Customs Act, 1962, that may resort to inquiry under Section 108 may result only in fiscal detriment while proceedings under the Customs Brokers Licencing Regulations, 2013 could lead to deprivation of livelihood. Conformity to process and evidence beyond statements are a pre-requisite for acts that are detrimental to of the livelihood of an licencee. The inquiry report has accorded overwhelming relevance to the contents of the statements recorded under Section 108. While these could be relied upon for the narration, as it were, of the allegations, they are not sufficient to establish the charge of contravening of the Regulations whose prescriptions lack the specificity of Section 111 and 113 of Customs Act, 1962. The lack of acceptable, credible evidence to sustain the allegations is a taint on the proceedings."

18. Similarly we find that the Commissioner has not considered any other penalty and resorted to the extreme penalty, by revocation of CHA licence. From the order of the Commissioner we find that the submissions made by the appellant were not duly considered and the penalty of revocation was imposed without considering any alternate

penalty. By revocation of licence of the appellant, there is denial of livelihood of appellant along with their employees. We also find that due to inherent contradiction among the statements recorded by the various persons, the revocation of CHA licence, which is harshest should not have been imposed by the impugned order as it would be disproportionate to the offence committed by the appellant even if it is held so. The Appellant has not been avoiding the investigation, but cooperated and also made a payment of Rs.65.00 Lakhs to Customs so as to make good the loss to the Revenue. This in itself proves the *bona fide* of the appellant to sincerely attempt for the loss of revenue to be compensated. The charge against appellant is only regarding violation of Regulation 18(d) and 17(a) of CBLR. Regulation 11(d) and CBLR 13 is not established conclusively, which says “Customs Broker shall advice his client to comply with provision of the act and in case of non-compliance bring the matter to the notice of Deputy Commissioner or the Assistant Commissioner of Customs as the case may be”. Since the investigation was not carried out in respect of all consignments of import of old and used garments, for which weighment slips were made available it cannot be established beyond doubt that offence has been committed for all as held in the impugned order. Further, we find that the penalty that has been imposed against the appellant in the impugned order is disproportionate to the penalty imposed. While holding so, we refer and rely on the decision of Hon’ble Delhi High Court’s decision in the case of **R S R Forwarders vs. Commissioner**

of Customs, Delhi [2018 (364) ELT 541 (Tri.-Del.)], wherein it is held as under:-

> **"** 10. The role of the CHA in the Customs procedure is significant. The CHA is expected to safeguard the interest of exporter of the goods as well as the Customs. The adjudicating authority, in his detailed findings, have concluded that the appellant is guilty of violation of various regulations of CBLR, 2013. But, in the facts and circumstances of the case, we are of the view that even though the appellant is guilty, the violations are not so grave as to justify the revocation of the customs licence. We are of the view that ends of justice will be met with the forfeiture of security deposit of Rs. 75,000/- and in addition imposition of penalty of Rs. 50,000/-
> 11. In the result, the impugned order is modified, as above appeal is partially allowed."

19. The appellant has suffered from the date of suspension of his licence till now which in our opinion is itself sufficient considering the gravity of offence committed by the appellant. In the circumstances we are of the considered opinion that the impugned order is not sustainable and liable to be set aside and accordingly we do so. In result, the appeal is allowed.

(Order pronounced in the open court on 26 November 2019.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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