CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86336 of 2019

[Arising out of Order-in-Original COA No: 47/CAC/CC(G)/RC/CBS(Admn.) dated 28th December 2019 passed by the Commissioner of Customs (General), Mumbai.]

Omkar Freight Forwarders Pvt Ltd … ***Appellant***
101, Bharat Chamber, Baroda Street, Masjid East,
Mumbai – 400009

versus

Commissioner of Customs (General) ***…Respondent***
New Custom House, Ballard Estate, Mumbai – 400001

APPEARANCE:

Shri Sanjeev Nair, Advocate for the appellant

Shri Bhushan Kamble, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/87212 / 2019

DATE OF HEARING: 26/08/2019
DATE OF DECISION: 26/08/2019

PER: C J MATHEW

This appeal has been filed by M/s Omkar Freight Forwarders Pvt Ltd who had been issued with a licence under the erstwhile regulation

7(1) of Customs Brokers Licensing Regulations, 2013 and had handled a single consignment, out of the total of seven, imported by M/s Asia Impex, whose import of electronic goods was found to have been undervalued with consequent differential duty liability of ₹ 20,32,002. The licensing authority, Commissioner of Customs (General), Mumbai Zone – I, *vide* COA No: 47/CAC/CC(G)/RC/CBS(Admn.) dated 28th December 2019 revoked the licence under regulation 14, read with regulation 17(7), of Customs Brokers Licensing Regulation, 2018 besides forfeiting the entire security deposit.

2. It was pointed out Learned Counsel appearing for the appellant that out of the seven bills of entry filed by the importer, the one handled by them, no. 900280/05.09.2007, involved differential duty of a mere ₹1,70,485/-. It is also contended by him that, though the statement of their Director, Shri Chandrakant Waykar, was recorded on 22nd February 2010 before issue of show cause notice, neither the appellant nor the Director were made noticees in the proceedings under Customs Act, 1962. It is also pointed out that the incident, allegedly of 2007, was finally taken up for proceedings under the Regulations only in February 2018 indicating lack of any evidence against them.

3. On the proceedings, it is the contention of the Learned Counsel that the charges brought against them were limited to regulation 11(d) of Customs Brokers Licensing Regulations, 2013 and 11(n) of the said

Regulations. The first of these requires advice to comply with the provisions of the Act and, in the event of non-compliance, to bring such incidents to the notice of the Deputy/Assistant Commissioner of Customs. The second of the regulation mandates the broker to verify the correctness and antecedence of the clients. These charges held to have been proved against the appellant by placing reliance on the statement of the Director in which he had confirmed that verification had not been carried out and that, even though the said Director had resigned from the licensed entity in May 2017, the new Director who replaced him had not been informed.

4. We have heard Learned Authorised Representative.

5. We find that the penalty of revocation imposed against the appellant is disproportionately harsh in the context of the alleged quantum of undervaluation. The delay on the part of the licensing authority in proceeding against the licensee for more than 10 years and, that too, for this minor dereliction, if any, does not appear warranted. The allegation against the importer was that of undervaluation. There is no allegation of the appellant having been involved in the process of negotiations, or dealings, with the shipper. A custom broker deals with the cargo intended for presentment and with the documents required for clearance. It is virtually impossible to deduce undervaluation from either the physical verification or documentary scrutiny implicit in this

role and the difference between the declared value and the finally assessed value is barely 15%. It is, therefore, not determinable that the appellant had failed to advice the client to comply with the provisions of Customs Act, 1962. There is no evidence, except the statement said to have been recorded from a former Director of the appellant-company, that the antecedents were not verified. While the Director would not have been concerned with such verification, there is no evidence on record that such obligation under regulation 11(n) of Customs Broker Licensing Regulations, 2013 had not been undertaken by an employee of the licensee. We gather strength for this proposition from the non-issue of notice under Customs Act, 1962 to the customs broker or to the Director. Therefore, the role of the appellant in the alleged undervaluation is not evident. In these circumstances, the findings of the enquiry officer do not appear to have any basis. The conclusion arrived at by the licensing authority that verification of antecedents would have led to detection of the undervaluation does not appear to be founded on logic.

6. Reliance placed by the Learned Counsel on the decision of the Hon'ble High Court of Delhi in *Kunal Travels (Cargo) v. Commissioner of Customs (I&G), IGI Airport, New Delhi [2017 (354) ELT 447 (Del.)]* that

> *12. Clause (e) of the aforesaid Regulation requires exercise of due diligence by the CHA regarding such information which*

he may give to his client with reference to any work related to clearance of cargo. Clause (l) requires that all documents submitted, such as bills of entry and shipping bills delivered etc. reflect the name of the importer/exporter and the name of the CHA prominently at the top of such documents. The aforesaid clauses do not obligate the CHA to look into such information which may be made available to it from the exporter/importer. The CHA is not an inspector to weigh the genuineness of the transaction. It is a processing agent of documents with respect to clearance of goods through customs house and in that process only such authorized personnel of the CHA can enter the customs house area. What is noteworthy is that the IE Code of the exporter M/s. H.M. Impex was mentioned in the shipping bills, this itself reflects that before the grant of said IE Code, the background check of the said importer/exporter had been undertaken by the customs authorities, therefore, there was no doubt about the identity of the said exporter. It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE Code given to it by a client for each import/export transaction. When such code is mentioned, there is a presumption that an appropriate background check in this regard i.e. KYC etc. would have been done by the customs authorities. There is nothing on record to show that the appellant had knowledge that the goods mentioned in the shipping bills did not reflect the truth of the consignment sought to be exported. In the absence of such knowledge, there cannot be any mens rea attributed to the appellant or its proprietor. Whatever may be the value of the goods, in the present case, simply because upon inspection of the goods they did not corroborate with what was declared in the shipping bills, cannot be deemed as misdeclaration by the CHA because the said document was filed on the basis of information provided to it by M/s. H.M. Impex, which had already been granted an IE Code by the

DGFT. The grant of the IE Code presupposes a verification of facts etc. made in such application with respect to the concern or entity. If the grant of such IE Code to a non-existent entity at the address WZ-156, Madipur, New Delhi - 63 is in doubt, then for such erroneous grant of the IE Code, the appellant cannot be faulted. The IE Code is the proof of locus standi of the exporter. The CHA is not expected to do a background check of the exporter/client who approaches it for facilitation services in export and imports. Regulation 13(e) of the CHALR, 2004 requires the CHA to : "exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage" (emphasis supplied). The CHAs due diligence is for information that he may give to its client and not necessarily to do a background check of either the client or of the consignment. Documents prepared or filed by a CHA are on the basis of instructions/documents received from its client/importer/exporter. Furnishing of wrong or incorrect information cannot be attributed to the CHA if it was innocently filed in the belief and faith that its client has furnished correct information and veritable documents. The misdeclaration would be attributable to the client if wrong information were deliberately supplied to the CHA. Hence there could be no guilt, wrong, fault or penalty on the appellant apropos the contents of the shipping bills. Apropos any doubt about the issuance of the IE Code to M/s. H.S. Impex, it was for the respondents to take appropriate action. Furthermore, the inquiry report revealed that there was no delay in processing the documents by the appellant under Regulation 13(n).

13. This Court in Ashiana Cargo Services v. Commissioner of Customs (I&G) - 2014 (302) ELT 161 (Del.) has inter alia held :

"…… 10. Beginning with the facts, there is virtually no dispute. There is a concurrent finding of fact by the Commissioner and the CESTAT that the appellant did not have knowledge that the illegal exports were effected using the G cards given to VK's employees. There was no active or passive facilitation by the appellant in that sense. Undoubtedly, the provision of the G cards to non-employees itself violated the CHA Regulations. This is an admitted fact, but it is not the Revenue's argument (nor is it the reasoning adopted by the Commissioner or the CESTAT) that this violation in itself is sufficiently grave so as to justify the extreme measure of revocation. Not any and every infraction of the CHA Regulations, either under Regulation 13 ("Obligations of CHA") or elsewhere, leads to the revocation of license; rather, in line with a proportionality analysis, only grave and serious violations justify revocation. In other cases, suspension for an adequate period of time (resulting in loss of business and income) suffices, both as a punishment for the infraction and as a deterrent to future violations. For the punishment to be proportional to the violation, revocation of the license under Rule 20(1) can only be justified in the presence of aggravating factors that allow the infraction to be labelled grave. It would be inadvisable, even if possible, to provide an exhaustive list of such aggravating factors, but a review of case law throws some light on this aspect. In cases where revocation of license has been upheld (i.e. the cases relied upon by the Revenue), there has been an element of active facilitation of the infraction, i.e. a finding of mens rea, or a gross and flagrant violation of the CHA Regulations. In Sri Kamakshi Agency (supra), the licensee stopped working the license, but rather, for remuneration, permitted his Power of Attorney to work the license, thus in effect transferring the license for money. As the CESTAT noted, "9…… [a]pplicant instead of discharging his functions as a Custom House Agent in accordance with the Regulations, in flagrant violation of those Regulations went to the extent of encashing the facilities made available to him as a CHA by selling it for a price". Moreover, the Power of Attorney was - as a matter of fact - "actively involved in the fraudulent act in connivance with the importers and others and that as per the Power of Attorney Bond executed by Sri K. Natarajan, all acts, deeds and things done by Sri D. Sukumaran were to be construed as if they were done by himself. Therefore CUSAA 1-2016 & 12-2016 Page 11 of 15 virtually all the fraudulent activities carried out by the Power of Attorney of Thiru Natarajan were to be treated as having been carried out by Thiru K. Natarajan himself", i.e. the licensee. In OTA Kandla, too,

mens rea (i.e. knowledge) of the licensee was established. By a statement of the petitioner under Section 108, Customs Act, followed by the inquiry, it was clear that the licensee was aware that the consignment contained gypseous alabaster, a prohibited substance, but nonetheless, participated in its release from the Kandla Port. In CUS.A.A. 24/2012 Page 10 Santon Shipping (supra), the adjudicating authority came 'to the conclusion that the fraud in this case has been committed in so many consignments over a long period of time and the same could not have happened without the connivance of the CHA". The revocation of the license was again informed by the fact of connivance (i.e. mens rea as to the infraction) of the CHA. In Eagle Transport (supra), the CHA transferred the license altogether. As the CESTAT noted, '... the activities of the appellant firm were controlled day to day, not by Shrimankar but by employees of Amol Shipping Agency. We do not see how this does not amount to transfer of the licence in all but name. Hence, we must hold that the first and second articles of charge have been rightly held as proved." Moreover, more than 100 blank shipping bill forms were sent to a third-party. Following these aggravating factors, the penalty of revocation was justified by the CESTAT. Similarly, in HB Cargo (supra), relied upon by the majority of the CESTAT, the case did not concern any ordinary infraction of the CHA Regulations, but "an act of corruption", where blank shipping bills were issued by the partner and authorized representative of the CHA for a consideration of ` 150 per shipping bill.

11 Viewing these cases, in the background of the proportionality doctrine, it becomes clear that the presence of an aggravating factor is important to justify the penalty of revocation. While matters of discipline lie with the Commissioner, whose best judgment should not second-guessed, any administrative order must demonstrate an CUS.A.A. 24/2012 Page 11 ordering of priorities, or an appreciation of the aggravating (or mitigating) circumstances. In this case, the Commissioner and the CESTAT (majority) hold that "there is no finding nor any allegation to the effect that the appellant was aware of the misuse if the said G cards", but do not give adequate, if any weight, to this crucial factor. There is no finding of any mala fide on the part of the appellant, such that the trust operating between a CHA and the Customs Authorities (as a matter of law, and of fact) can be said to have been violated, or be irretrievably lost for the future operation of the license. In *effect, thus, the proportionality doctrine has escaped the analysis.*

12. Learned Senior Standing Counsel for the Customs has stressed that the infraction in this case is not a routine matter, but rather, illegal smuggling of narcotics by the G card users. However, given the factual finding that the CHA was not aware of the misuse of the G cards (and thus, also unaware of the contents being smuggled), no additional blame can be heaped upon the CHA on that count alone. Rather, the 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, whether gross or otherwise. Neither have any such allegations been raised as to the past conduct of the appellant, from the time the license was granted in January, 1996. Equally, it is important to note that the appellant has - as of today - been unable to work the license for 8 years, and thus been penalized in this manner. This is not to say that CUS.A.A. 24/2012 Page 12 the trust operating between the Customs Authorities and the CHA is to be taken lightly, or that violations of the CHA Regulations should not be dealt with sternly. A penalty must be imposed. At the same time, the penalty must - as in any ordered system - be proportional to the violation. Just as the law abhors impunity for infractions, it cautions against a disproportionate penalty. Neither extreme is to be encouraged. In this case, in view of the absence of any mens rea, the violation concerns the provision of G cards to two individuals and that alone. A penalty of revocation of license for this contravention of the CHA Regulations unjustly restricts the appellant's ability to engage in the business of the CHA for his entire lifetime. As importantly, it skews the proportionality doctrine, substantially lowering the bar for revocation as a permissible penalty, especially given the dire civil consequences that follow. On the other hand, the minority Opinion of the CESTAT, delivered by the Judicial Member, correctly appreciates the balance of relevant factors, i.e. knowledge/mens rea, gravity of the infraction, the stringency of the penalty of revocation, the fact that the appellant has already been unable to work his license for a period of 6 years (now 8 years), and accordingly sets aside the order of the Commissioner dated 24-1-2005..."

14. Any act to defraud presupposes the intention to obtain something fraudulently. In the present case, the appellant (through its proprietor) has all along contended that the

> *documents were filed unauthorizedly by a person incompetent to do so; it has not defended the action of Mr. Lalit Katoch; it claims ignorance and innocence of the contents of the consignment; it objects to the very filing of the two shipping bills by either Mr. Katoch or any person authorised on its behalf, hence there cannot be a presumption of its deliberate act/intention to defraud. There is no evidence of active facilitation of clearance of the consignment through customs by the appellant, hence, no mens rea can be inferred to defraud the government for obtaining duty drawback through a fraudulent transaction. Consequently, the appellant cannot be faulted or punished in the manner it has been.*

would appear to fit the facts of the present dispute.

7. For the above reasons, we find that the impugned order must be set aside and the appeal allowed.

(Pronounced in open court)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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