CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87932 of 2019

[Arising out of Order-in-Original No: 45/2019-20 dated 26th September 2019 passed by the Commissioner of Customs (General), Mumbai.]

A S Vasan & Sons (Bombay)
610 Arenja Corner, Plot No. 71, Sector 17, Vashi
Navi Mumbai – 400 705 …***Appellant***

versus

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

APPEARANCE:

Shri Mihir Mehta, Advocate for the appellant

Shri KK Srivastava, Additional 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/85661 / 2020

DATE OF HEARING:	21/01/2020
DATE OF DECISION:	23/07/2020

PER: C J MATHEW

This appeal of M/s AS Vasan & Sons (Bombay), holder of custom broker license no. 11/483, lies against order no. 45/2019-20 dated 26th September 2019 of Principal Commissioner of Customs (General), Mumbai-I ordering continued suspension in exercise of powers under regulation no. 16(2) of Customs Brokers Licensing Regulations, 2018. Based on report that the appellant was involved in the over-valuation of 'rough diamonds/precious stones' imported by M/s Lush Exim Pvt Ltd *vide* bill of entry no. 6973016/27.06.2018, the license was suspended *vide* order no. 49/2019-20 dated 27th August 2019 subject to 'post-decisional hearing' which, upon confirmation by the impugned order, is now under challenge.

2. Before proceeding with the facts and the rival submissions, it would be appropriate for us to take note of

> '***Regulation 16. Suspension of license.*** *– (1) Notwithstanding anything contained in regulation 14, the Principal Commissioner or Commissioner of Customs may, in appropriate cases where immediate action is necessary, suspended the license of Customs Broker where an enquiry against such Customs Broker is pending or contemplated:*
>
> *Provided that where the Principal Commissioner or Commissioner of Customs made team fit for reasons to be recorded in writing, he may suspend the license for a specified number of Customs Stations.*
>
> *(2) Where license is suspended under sub- regulation (1), the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, shall, within fifteen days from*

> *the date of such suspension, given opportunity of hearing to the Customs Broker license is suspended and may pass such order as he deems fit either walking the suspension or continuing, as the case may be, within fifteen days from the date of hearing granted to the Customs Broker:*
>
> *Provided that in case the Principal Commissioner of Customs or Commissioner of Customs, as the case may be passes an order for continuing the suspension, further procedures thereafter shall be as provided in regulation 17.'*

of Customs Broker Licensing Regulations, 2018.

3. It would appear that the procedure laid down, in regulation 17, as a prerequisite for revoking of the license, or for imposing a penalty under regulation 14 of the said Regulations, are not mandated to be gone through before suspension. Nevertheless, five essential aspects must be complied with; an enquiry against the broker is pending or contemplated, immediate action is necessary, an opportunity to be heard to be granted within fifteen days from the date of such suspension, passing order of revocation, or continuation, of suspension within fifteen days from the date of hearing and, in the event of the latter, to be followed by initiation of proceedings under regulation no. 17 with adherence to all the timelines therein. We may also observe that, unlike recovery and penal proceedings under the main provisions of the Customs Act, 1962, licensees of private bonded warehouses, custodians of cargo, courier agencies and customs brokers are, by such proceedings, are faced with long-term

uncertainty in business as well as in the livelihood of their employees and others dependent on them. The business activities of an importer or exporter, against whom proceedings are initiated under Customs Act, 1962, are not jeopardised as it is only the impacted consignments that are interdicted. Any deviation from the procedures for suspension, revocation or penalising has to be approached with due responsibility and, owing to the unsupervised exercise of power, will have to be at the cost of the detriment being overruled.

4. Having said so, we must also state, in no uncertain terms, that statutory actions against customs broker, the hyphen that connects the importer/exporter with the customs authorities and, thereby, administratively accountable to the licensing authority, are to be interfered with only for colourable decisions, adjudged against prescriptions in the Regulations and proportionate deprivation by such authority. The temptation to take a stick to an underling for any real, or perceived, misdemeanour is as old as the master-servant institution and which the wheels of justice must, unhesitatingly, obliterate.

5. It, being clear, from a perusal of the relevant provisions of Customs Broker Licensing Regulations, that regulation no. 16, like a tributary, flows into regulation no. 17 and both being challengable in appeal, we are required to forbear from binding the licensing authority under the latter while deciding the challenge to the former. This is of

particular importance as non-resort to suspension, its non-continuance, or quashing of suspension does not stand in the way of proceedings for revocation of the license. Hence, even if the alleged misdemeanours leading to the suspension are sought to be disputed, we must, with deliberate intent, steer clear of rendering a finding thereto; those are to be established at the enquiry stage and for consideration by the licensing authority.

6. The filing of the said bill of entry by the appellant herein on behalf of M/s Lush Exim Pvt Ltd and that show cause notice proposing confiscation of the imported goods and imposition of various penalties on several persons, including the partner in the appellant-firm, has been issued on 8th July 2019 is common ground. It is on record that the initial order of suspension was issued within twenty days of the issue of this show cause notice and that the impugned order was the culmination of investigations commencing with interception and, upon re-examination of the goods, initially certified, and evaluated, by the domain expert as ‘pink tourmaline’, found by the Gemmological Institute of India to be ‘rough tourmaline’ with a chain of statements, from the original domain expert, an employee of the appellant-firm, partner in the appellant-firm and director of the importing company, recorded as evidence of connivance on the part of the said partner in the appellant-firm.

7. With this factual matrix, and the statutory constraints, we now turn to the submissions offered on behalf of the appellant. According to Learned Counsel for the appellant, the principle of immediacy that should dictate recourse to regulation no. 16 of the Customs Broker Licensing Regulations, 2018 does not find justification in the impugned order or in the stated facts. It is further claimed that, though their access to the EDI system was blocked, the order of suspension issued on 27th August 2019 was emailed to them only on 9th September 2019 giving them barely 48 hours to respond. The contentions pertaining to the diligence with which their obligations had been undertaken, as well as decisions to support the argument, should, in accordance with our observations *supra*, be ignored at this stage to avoid prejudice to the proceedings under regulation no. 17 of Customs Broker Licensing Regulations, 2018.

8. Reliance was placed by Learned Counsel on the decision of the Hon'ble High Court of Bombay in *Babaji Shivram Clearing & Carriers Pvt Ltd v. Union of India [2011 (269) ELT 222 (Bom)]* in which, among other reasons, it was held that

> *'9. Apart from the above suspension of a CHA license under Regulation 20 (2) of the 2004 Regulation can be ordered where immediate action is necessary. In the present case, the customs authorities in the middle of January, 2011 were aware of the fact that the documents submitted by the petitioners were fabricated, however the impugned order has*

> *been passed belatedly on 28th March 2011.'*

and on the observation that

> *'2....... In other words, it cannot be said that this is a case where it falls within Regulation 20 (2). The order of suspension is to be used in emergency situation where no further time can be wasted. This was not such a case...'*

in *Commissioner of Customs (General) v. SA Dalal & Co [2008 (221) ELT 488 (Bom)]* while upholding the decision of the Tribunal in *SA Dalal & Co v. Commissioner of Customs (General), Mumbai [2007 (219) ELT 708 (Tri-Mumbai)]*. In addition, reliance is placed on the decision of Hon'ble High Court of Bombay in *Commissioner of Customs v. National Shipping Agency [2008 (226) ELT 46 (Bom)]* holding that

> *'2. The power of suspension is pursuant to the powers conferred under Regulation 20 (2) of the CHALR, 2004. As we have noted in the earlier judgements, this is an emergent power to be used in those cases where it is required that the CHA license be immediately suspended. The very fact that alleged violation is of the year 2005, as the import had taken place in September, 2005 and the order suspension was issued on 30-10-2006 itself would indicate that there is no emergency which required that the license be suspended....'*

9. Our attention was also drawn to the decisions of the Tribunal in *Venus Shipping Agencies v. Commissioner of Customs, Chennai [2009 (237) ELT 549 (Tri-Chennai)]* and in *Setwin Shipping Agency*

v. Commissioner of Customs (General), Mumbai [2010 (250) ELT 141 (Tri-Mumbai)] on similar lines.

10. On his part, Learned Authorised Representative argued that the suspension had been ordered immediately after the incident was brought to the notice of the licensing authority and that there is no evidence of non-dispatch of the initial suspension order within reasonable time. It is his contention that all the requirements prescribed in regulation no. 16 of Customs Broker Licensing Regulations, 2008 had been complied with. Moreover, according to him, the gravity of the attempt to smuggle goods and the conspiracy involving the appellant warranted immediate suspension; for us to consider this submission would be premature as, in addition to proceedings under these Regulations, the adjudication proceedings in the show cause notice for confiscation and imposition of penalty are, as yet, pending and any finding on our part may prejudice the decision therein.

11. For lapses in import and export in which breach of the obligations prescribed in Customs Broker Licensing Regulations, 2018, the licensing authority is empowered, under regulation no. 14 of Customs Broker Licensing Regulations, 2018, to revoke the license and/or to impose appropriate penalties, subject to compliance with procedure laid down in regulation no. 17 of Customs Broker

Licensing Regulations, 2018. This process could take as long as six months, as per prescribed timelines, for investigations, issue of notice comprising specific charges of violation, conduct of enquiry in hearing, furnishing of a report of enquiry, response of the broker and culminating in issue of speaking order by the licensing authority. In the meanwhile, the continued validity of the licence would entitle the broker to carry on normal activities which may, in specific circumstances, be prejudicial to public interest and, regulation no. 16 of Customs Broker Licensing Regulations, 2018 permits temporary validation subject to certain basic procedural prescriptions. In the present instance, the gap of more than a year since the alleged overvaluation was attempted, and the continued operation of the appellant as a customs broker since then, does indeed raise doubts about the urgency for suspension. We find that the impugned order has not recorded any justification for curtailing the broking operations of the appellant at this stage. The Regulations do not into envisage suspension to be retribution for alleged wrongdoing for which separate provisions exist and which should already have been initiated if the licensing authority is serious about compliance with the timelines prescribed therein.

12. After having awaited the issue of show cause notice by the investigating agency, elapse of further time, which, in any case, would be less than the demonstrated gap between the commencement of

investigations and issue of show cause notice, cannot be claimed to be detrimental to public interest. This has been the consistent view of the Hon'ble High Court of Bombay and of the Tribunal, as narrated *supra*, and we find no justifiable reason to deviate from such. Accordingly, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 23/07/2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/as*