CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 279 OF 2010

[Arising out of Order-in-Original No: 175/2009/CAC/CC (G) SLM/CHA (Admn) dated 17th December 2009 passed by the Commissioner of Customs (General), Mumbai.]

Fast Forward
Mr. C Subba Reddy
D-312, 3rd Floor, Kailash Industrial Complex
Veer Savarkar Marg, Off LBS Marg, Vikhroli (West)
Mumbai - 400079 … ***Appellant***

versus

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

WITH

CUSTOMS APPEAL NO: 353 OF 2010

[Arising out of Order-in-Original No: 175/2009/CAC/CC (G) SLM/CHA (Admn) dated 17th December 2009 passed by the Commissioner of Customs (General), Mumbai.]

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

versus

Fast Forward
84B/4, Brindavan Society, Thane West - 400601 ***…Respondent***

APPEARANCE:

None for the CHA

Ms Trupti Chavan, Assistant Commissioner (AR) for the Revenue

CORAM:

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

FINAL ORDER NO: A/85868-85869/ 2020

DATE OF HEARING:	29/01/2020
DATE OF DECISION:	29/01/2020

PER: C J MATHEW

Impugned in these two appeals - of M/s Fast Forward and that of Commissioner of Customs (General), Mumbai on direction of the Committee of Chief Commissioners empowered under section 129D of Customs Act, 1962 - is order no. 175/2009/CAC/CC (G) SLM/CHA (Admn) dated 17th December 2009 of Commissioner of Customs (General), Mumbai, as licensing authority, under regulation 22 of Custom House Agents Licensing Regulation, 2004 (CHALR) forfeiting the security deposit collected under regulation 10 of the said Regulations and permitting continued operation of license upon deposit of fresh security as prescribed in the said Regulations.

2. Proceedings were initiated against the custom house agent, M/s Fast Forward, for having enabled the utilization of the license issued to them by another person for handling of a fraudulent export consignment and, on conclusion of the statutory prescriptions, the impugned order

held penalty of forfeiture as proportionate to the gravity of the offence. The licensee is in appeal against that detriment. The Committee of Chief Commissioners directed the licensing authority to appeal against its own order for enhancement of the penalty to permanent revocation of the license.

3. It may not be out of place to take note here that the licensee has since been operating for close to a decade and, if the customs authorities were convinced that exemplary punishment was warranted, application for ‘out of turn’ hearing should have been moved by the appellant-Commissioner before us.

4. The ‘custom house agent’ is in appeal before us on the submission that the charge against them had been framed for not obtaining letter of authority from the exporter which, according to them, does not constitute breach of obligation as ‘custom house agent’ as there is no mandate in the Regulations for obtaining such letter of authority for every instance of shipment.

5. Several grounds have been essayed in the appeal of the licensing authority for enhancement of the penalty to that of revocation of license. We have heard Learned Authorised Representative at length on the grounds of departmental appeal who also urged us to dismiss the appeal of the licencee.

6. The appeal of custom house agent has not advanced any plea of breach of the procedure laid down in Custom House Agents Licensing Regulations, 2003. Nor is there any submission that the principles of natural justice have been denied to them. There is a clear finding of the licensing authority that the 'custom house agent', though dealing with the exporter for a long time, had failed to maintain the authority letter which was required to be obtained for each job undertaken. In *Ashiana Cargo Services v. Commissioner of Customs (I & G) [2014 (302) ELT 161 (Del)]*, the Hon'ble High Court of Delhi has held that

> *'8. The issue before the Court is the proportionality of the penalty awarded in this case. The CHA Regulations prescribe two penalties: suspension of the license for a particular period of time, and revocation of the license, such that it irretrievably loses its currency. Once the Commissioner reaches a decision, the CESTAT, and this Court, would not ordinarily interfere with the award of punishment, denuding the disciplinary power of the designated authority. That said, the course of action taken by the Commissioner of Customs must depend on the gravity and nature of the infraction by the CHA, and thus, the punishment must be proportional to the violation. Given the civil consequences of revocation for the CHA, read in the background of its freedom under Article 19(1)(g), this principle of law is undisputed. Casting some clarity on the meaning of proportionality, especially at the second appellate stage, the Supreme Court in Management of Coimbatore District Central Co-operative Bank v. Secretary, Coimbatore District Central Co-operative Bank Employees Association and Anr., (2007) 4 SCC 669, held as under :*

> *"18. 'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise the elaboration of a rule of permissible priorities."*

In the context of revocation of a CHA license, this ordering or priorities, or the proportionality doctrine, was considered recently by the Andhra Pradesh High Court in Commissioner of Customs and Central Excise v. H.B. Cargo Services, 2011 (268) E.L.T. 448 (A.P.) in the following terms :

> *"12...............................For minor infraction, or infractions which are not of a serious nature, an order of suspension may suffice. On the contrary, when revocation is directed it has to be only in cases where the infraction is of a serious nature warranting exemplary action on the part of the authorities for, otherwise, two types of actions would not have been provided for. Primarily it is for the Commissioner to decide as to which of the actions would be appropriate but, while choosing any one of the two modes, the Commissioner has to consider all relevant aspects, and draw a balance sheet of the gravity of the infraction and the mitigating circumstances. The difference in approach for consideration of cases warranting revocation or suspension has to be borne in mind while dealing with individual cases. The proportionality question is of great significance as action is under a fiscal statute, and may ultimately lead to a civil death."'*

In the circumstances of the case and settled law on the extent to which the licencing authority may be second guessed by appellate authorities, we find no reason to accept the plea of the licencee for setting aside the penalty.

7. As far as the other appeal is concerned, the Tribunal, in *Commissioner of Customs (General), Mumbai v. Mukadam Freight Systems Pvt Ltd [2018 (359) ELT 612 (Tri-Mumbai)]*, having held that

'8. The Regulations vest the authority to bring into being, and erase out of existence, a customs house agent in Commissioner of Customs. No higher authority is envisaged for the discharge of any function in relation to customs house agents. Even the Regulation making authority, the Central Board of Excise & Customs (C.B.E. & C.), has not retained any role - supervisory, monitorial, or Regulatory - to itself in the scheme of administration of these agents. The Regulations empower the establishment of a distinctive appellate mechanism; however, the authority to frame the Regulations has, in its wisdom, empowered the Tribunal by reference to it in Regulation 23. The option to appeal is specifically permitted in the Regulations only to an aggrieved licensee. A harmonious reading of the penal and appellate provisions and the exclusion of any higher authority, even by mention, in the Regulations make legislative intent very clear : that if the progenitor of the licence, the author of its being, has decided to the detriment of a licensee, such aggrieved entity may file an appeal to the Tribunal and a decision to retain the licence carries with it a finality that does not admit of any intervention under the Regulations. The licensing authority is not envisaged as an appellant under the Regulations. The absurdity of the proposition of appealing against oneself canvassed on behalf of the appellant will be dealt with in due course.

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10. It is axiomatic that in all such proceedings, culminating in termination of such a relationship or is, in any other way, detrimental to the servant, the principles of natural justice require that the power to penalise vests with the author of its being, viz., the appointing authority, that there be a code of conduct which, when violated, brings retribution in the form of a penalty, that the entity who is sought to be proceeded against *is served with charges, and supporting evidence thereof, which is subject to an enquiry as a pre-requisite for imposition of penalties. There is no scope for insinuating any higher authority to exercise superintendence over the appointing authority.*

11. In terms of Customs House Agents Licensing Regulations, 1984 (which we are concerned with in the present instance), the power to license is vested in the Commissioner of Customs. That authority is, therefore, the 'master' to whom the agent owes its existence. It is the Commissioner of Customs who is responsible for the operation and functioning of the Customs House and any detriment to efficient functioning of the Customs House will ultimately reflect on that authority. There is no other authority more concerned with weeding out of unacceptable elements and, therefore, there is no cause for any other authority to sit in judgment on the decision of a Commissioner that continued operation of licensee is detrimental to the functioning of the Customs House.

12. It cannot be said that revenue collection stands on that very footing. Levy of duties and the intent of the law relating to collection of revenue flows from legislative authority. For the purposes of tax administration, officers are commissioned to assess duty liability and to effect, wherever not levied or short-levied, recovery of duties. A finality in tax matters is not, therefore, intended to be vested in an administrative authority because collection of the Legislated tax is for the benefit of the citizens of the country and in accordance with the power to tax having been invested by the citizenry on the sovereign Legislature. The adjudication and appellate orders are, for that reason, subject to scrutiny of the review authority established in the taxing statute itself as enacted by the sovereign Legislature. There is no such provision for review in

> *the Customs House Agents Licensing Regulations, 1984.*
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> *13. The consequential question that begs an answer is the scope of taking recourse to the general provision in Chapter XV of Customs Act, 1962 on the assumption that Regulation 23 of the Customs House Agents Licensing Regulations, 1984 is a special provision contemplating appeal only to aggrieved licensee and that Revenue authorities cannot be discriminated against. Such a proposition does not appear to be congruent with legislative intent as the special provision itself is not warranted if general provision in Section 129A of Customs Act, 1962 could have been resorted by an aggrieved licensee. On the contrary, legislative intent is abundantly clear in empowering the Regulation making authority to provide for an appellate mechanism distinct from that enacted by the sovereign Legislature in the Customs Act, 1962 and the Regulation-framing authority has, in accord with the wisdom of generations, entitled only the licensee to appeal. As the sovereign Legislature has specifically empowered a separate appellate structure, the intent to deny the replication of the normal appellate remedy to the disciplinary authority against its own order is emphatic. We cannot countenance reading down the general provisions of review and appeal to apply to dropping of disciplinary proceedings against customs house agents in the face of specific and deliberate non-inclusion of such contingency in Section 146 of Customs Act, 1962 and the Regulations framed thereunder.*

and having held, in *MD Sadrani v. Commissioner of Customs (General), Mumbai [2017 (358) ELT 602 (Tri-Mumbai)]*, that

> *'11. In exercise of this power, the Central Board of Excise & Customs has notified the respective Regulations. The*

Regulations provide for the manner of licensing, the obligations that devolve on the licensee, the consequences of disregard of these obligations and the remedies available to a licensee visited with detriment. These flow from the vesting of powers in the parent provision which, inter alia, designates the Regulations as the source of the appellate remedies available. Regulation 22 has, unambiguously, made available such remedies only to the agent/broker and none other. Therefore, unlike the appellate remedies prescribed in the Customs Act, 1962, in relation to collection of revenue and other attendant functions, that are available to the assessee as well as to Revenue, it is only the detriment that impacts an agent/broker that can be agitated before the designated appellate authority. No provision exists in the Regulations for an appeal by the other side. The challenge before us is, therefore, outside the ambit of the Regulations.

12. The question that would naturally arise in consequence is whether, in the absence of a special provision, the general mandate of the sovereign legislature can, as learned Authorised Representative appeared to suggest, be resorted to. If the existence of a special provision would erase the recourse to the general provision, as it does for custom house agent/custom broker, the deliberate exclusion of an appellate remedy in this special provision should also erase the scope for recourse to the general provision. This inference is derived from the conferment of the power upon the entity empowered to notify the Regulation by a specific mandate in Section 146 of Customs Act, 1962 to designate an appellate jurisdiction. If the sovereign legislature had intended that interchangeability of appellate provision between that in the Regulations and in Chapter XV of Customs Act, 1962 was not anathema and that a perceived void in the Regulations could be bridged by recourse to the general provisions, there would have been no *need to include the devising of an appellate scheme in the scope of the regulation framing powers. The Central Board of Excise & Customs has, in its wisdom, decided that there is no prejudice in deliberately withholding appellate remedies from any other than an aggrieved agent/broker. And what legislative intent does not allow directly may not be permitted in an indirect manner. In Jagir Singh v. Ranbir Singh & Another [AIR 1979 SC 381], it was held by the Hon'ble Supreme Court that*

> *'5. In order to cross the hurdle imposed by Section 397(3) it was suggested that the revision application before the High Court could be treated as an application directed against the order of the Sessions Judge instead of one directed against the order of the Magistrate. We do not think that it is permissible to do so. What may not be done directly cannot be allowed to be done indirectly, that would be an evasion of the statute. It is a "well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance" (per Abbott C.J. In Fox v. Bishop of Chester (1824) 2 B & C 635) "To carry out effectually the object of a Statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined" (Maxwell, 11th edition, page 109). When the Sessions Judge refused to interfere with the order of the Magistrate, the High Court's jurisdiction was invoked to avoid the order of the Magistrate and not that of the Sessions Judge. The bar of Section 397(3) was, therefore, effectively attracted and the bar could not be circumvented by the subterfuge of treating the revision application as directed against the Sessions Judge's order.'*

For us to permit recourse to the general provision in Section 129D of Customs Act, 1962 merely because of the absence of such a remedy in the Regulations and for convenience of some executive authority would be tantamount to proclaiming that our perspicacity is superior to that of the sovereign legislative organ - an overreach that we will not even deign to consider.

13. We have already premised a creator-creature relationship between the licensing authority and the licensee. It is an established principle that detrimental consequence to *the creature can be set in motion only by the author of its being. The license is issued by the Commissioner of Customs. It is the sole prerogative of the licensor to terminate the license and erase the license out of existence. That prerogative cannot be usurped by any other authority, howsoever well-placed it may be. Insofar as creatures are concerned, the creator is 'the be-all and end-all', 'the Alpha and the Omega'. There can be no doubt that, with the operation of agent/broker being limited to functioning within the custom house, it is the Commissioner of Customs who has the highest stakes in its effective and efficient functioning; no Commissioner of Customs would consider that objective to have been achieved with the continued tolerance of a delinquent agent/broker. It is, therefore, inconceivable that the licensing authority is so bias as to forfeit the high reputation of the organisation that is presided over warranting intervention by another authority howsoever eminent. It, therefore, does not behove upon a collegial body/individual, not acknowledged in the Regulations, to take upon itself the mantle of supervision and thus insinuate itself into a process not contemplated either in Section 146 of Customs Act, 1962 or by the Regulations framed thereunder.*

14. This brings us to the contradistinction with disputes relating to collection of revenue. The power to legislate taxes is vested in the sovereign legislative body as a consequence of the evolution of governance systems from absolute monarchy through feudal oligarchy to democratic rule. The collection mechanism has been devised to vest designated tax collectors with authority to act in accordance with the commission enacted by the sovereign legislature. The final authority to determine the rights and wrongs on the part of a tax collector is the State. Consequently, the legality and propriety of an order of recovery of tax must be subject to confirmation or concurrence by an entity that is clothed with more *responsibility than the tax collector. Hence the institution of review and conferment of powers of review upon superior levels in the hierarchy designated by the statute. A licensing system, concerned with the functioning of a facilitation mechanism is, not to be equated with the power to collect tax. Therefore, conferment of legality upon the institution of custom house agent/custom broker by a specific provision in the Customs Act, 1962 does not render it subject to the general provisions of the said statute when the intention of legislative authority is very clearly articulated in the framework of regulation framing power vested in the Central Board of Excise & Customs. For this reason, the provisions of Section 129E is not intended to apply to the appellant-Commissioner.*

15. This context would also showcase the absurdity that is perpetrated by this review and consequent appeal. By recourse to the general provisions of review, the competent authority was transformed from quasi-judicial functionary under the Regulations to that of a subordinate executive for filing an appeal on the directive of an entity that does not exist in the Regulation. The Commissioner entrusted with the task of filing an appeal would appear to be disputing his own original, and final, authority to determine the destiny of a license. That is, patently, an absurdity that is beyond the pale of the rational. There is no soundness or logic to this appeal before us.'

scope for review of order of the licensing authority does not exist.

8. Furthermore, from a reading of section 146 of Customs Act, 1962 that enables notification of regulations for governing the operation of custom house agents and in which the scope and extent of such regulations to encompass, specifically, appeals are enumerated while

limiting such appeals only to

> *'(f) the appeals, if any, against an order of suspension or revocation of a license, and the period within which such appeals shall be filed.'*

makes legislative intent abundantly clear,

9. Had the general provision of appellate jurisdiction in Customs Act, 1962 sufficed, this specific enablement would not have been necessary. By enabling appellate jurisdiction through the power to frame regulations under section 146 of Customs Act, 1962, which is conspicuously absent in the general power to frame rules and regulations under section 156 and 157 of Customs Act, 1962, not only is a separate framework contemplated but also limited the recourse only to the licensee.

10. In view of the above, the appeal filed by the licensing-Commissioner does not sustain and is dismissed. The appeal of M/s Fast Forward is also dismissed.

(Pronounced in open court)

(Dr. Suvendu Kumar Pati)	**(C J Mathew)**
Member (Judicial)	***Member (Technical)***

**/as*