CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 85893 of 2020

(Arising out of Order-in-Original CAO No. 25/CAC/CC(G)/PS/CBS (Adj) dated 09.09.2020 passed by the Commissioner of Customs (General), Mumbai)

M/s Sunrich Logistics Pvt. Ltd. **.... Appellant**
124-B, Mittal Court, Nariman Point, Mumbai – 400021

Versus

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

Appearance:

Shri Anil Mishra, Advocate for the Appellant

Shri Ramesh Kumar, (AC) Auth. Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86106 / 2020

Date of Hearing: 10.12.2020

Date of Decision: 10.12.2020

Per: Dr. D.M. Misra

This is an appeal filed against Order-in-Original CAO No. 25/CAC/CC(G)/PS/CBS (Adj) dated 09.09.2020 passed by the Commissioner of Customs (General), Mumbai.

2. Briefly stated facts of the case are that the appellants are holder of Customs Broker License issued by the Commissioner of Customs (General), Mumbai under the Relevant Rules/ Regulations. They were issued with a show-cause notice dated

31.8.2018 under Rule 17 of the Customs Broker Licensing Regulations (CBLR), 2018 proposing certain action on alleged violation of Regulations 11(d), 11(e) and 11(f) of CBLR, 2013 (10(d), 10(e), and 10(f) of CBLR, 2018) in respect of mis-declaration of value of import of one unit of "used self propelled Tug 'KNK Disha'" with IMO No. 9773026 with Year of Built 2016 along with permanent equipment and accessories, store, spares and consumables under Bill of Entry No. 9479981 dated 27.4.2017 by the importer M/s KNK Ship Management. On the basis of various statements recorded during the course of investigation of alleged mis-declaration by the importer, it is alleged that the appellant, M/s Sunrich Logistics Pvt. Ltd., being the Customs Broker under CBLR, 2013 failed to intimate the relation between Shri Anil Vohra, Chartered Engineer and the Customs Broker, to the customs authorities at the time of inspection, valuation and assessment of the used Tug 'KNK Disha' and thereby contravened the provisions 11(d), 11(e) and 11(f) of CBLR, 2013. Also, in the show-cause notice it is proposed forfeiture of security deposit and revocation of the license under regulation 18 of the CBLR, 2013. An Inquiry Officer was appointed and necessary inquiry was conducted under the CBLR, 2013 by the Inquiry Officer. After a detailed inquiry, the Inquiry Officer arrived at the conclusion that violation of Regulations 11(d), 11(e) and 11(f) of CBLR, 2013 by the appellant are not proved. However, on adjudication, the learned Commissioner disagreed with the inquiry report and held that charges leveled against the appellant alleging violation of Regulations 11(d), 11(e) and 11(f) of the CBLR, 2013 are established and consequently directed forfeiture of security deposit, imposed penalty of Rs.50,000/- and also directed revocation of the license under Regulation 18 of the CBLR, 2013. Hence, the present appeal.

3. Elaborating the facts, learned Advocate Shri Anil Mishra for the appellant has submitted that on the basis of documents received from the importer M/s KNK Ship Management, the appellant had filed the Bill of Entry No. 9479981 dated 27.4.2017 for clearance of the used self propelled Tug "KNK Disha" declaring FOB value as US $ 53,00,000 and appointed Customs Empanelled Chartered Engineer Shri Anil Vohra for valuation of the said used imported Tug in accordance with CBIC Circular No. 25/2015-Cus dated 15.10.2015. It is his contention that the inquiry against the appellant was initiated pursuant to a show-cause notice dated 31.8.2018 issued under Section 124 of the Customs Act, 1962 to the importer M/s KNK Ship Management alleging undervaluation of the imported second hand Tug "KNK Disha". It was alleged in the said show-cause notice that there were two parallel purchase agreements of the importer with different value of the same vessel purchased from one M/s Poet Shipbuilding and Engineering Pvt. Ltd., Singapore. It is his contention that the appellant was not aware to the earlier agreement between the importer and the overseas supplier indicating higher value and they have filed the Bill of Entry on the basis of the information provided to them by the importer and at no point of time they were having knowledge about existence of any higher value agreement for the same

vessel. This fact has been confirmed by the importer during the course of inquiry against the appellant. Assailing the impugned order, learned Advocate has submitted that the observation in the order of the adjudicating authority that the appellants in connivance with the importer, deliberately did not intimate about the conflict of interest with Chartered Marine Engineer Shri Anil Vohra, thereby violated the various regulations under CBLR, is incorrect without evidence and hence unsustainable in facts and law. It is not in dispute that the Chartered Engineer is a consultant of M/s Admiral Shipping Ltd., but it is also a fact that he has not transacted any customs business in respect of the subject import. Except rendering professional services in the matter, the Chartered Engineer has not derived any extra pecuniary benefit from the importers or the appellant. He has further submitted that it was the impression of the appellant that despite the Chartered Engineer being an independent consultant of another related company of the appellant, who is not an employee in the said company, hence there is no conflict of interest with the present importer and the consignment imported. Further, Shri Anil Vohra is an empanelled Chartered Engineer with the Mumbai Customs to examine and provide valuation report is thus a qualified neutral party for the job, hence no violation was committed by them. He has vehemently argued that the valuation report prepared by Shri Anil Vohra is not challenged by the Department alleging bias or incorrect.

4. He has submitted that the observation of the adjudicating authority that the F, G & H card holder employees of the

appellant have admitted to the breach of regulations by not intimating the conflict of interest as alleged in the show-cause notice is not correct inasmuch as during the course of cross-examination these employees have categorically denied to such admission before the adjudicating authority.

5. Further he has submitted that imposition of penalty under the Customs Act, 1962 is a different proceeding for breach of various regulations under CBLR, 2013. Therefore, penalty imposed by the adjudicating authority which is under challenge before higher forum cannot be the basis for taking action against the broker under CBLR, 2013 being a settled principle of law. He has further submitted that revocation of license deprived livelihood of various persons connected in such business, hence it is too harsh and untenable in law. In support, he referred to the judgment in the case of –

(a) *M/s Omkar Freight Forwarders Vs. Commissioner of Customs (Gen), Mumbai – 2020 (1) TMI 596-CESTAT-MUM.*
(b) *M/s Bruce Logistics Pvt. Ltd. Vs. Commissioner of Customs (Gen), Mumbai – 2019 (12) TMI 482-CESTAT-MUM.*
(c) *M/s KVS Cargo Vs. Vs. Commissioner of Customs (Gen), New Delhi – 2018 (1) TMI 1063-CESTAT-New Delhi.*
(d) *M/s Jetwing Freight Forwarders Vs. Commissioner of Customs, Bangalore – 2020 (6) TMI-316-CESTAT-Bangalore*

6. Further, the learned Advocate has submitted that the timeline for completion of various stages of inquiry proceeding against the appellant under CBLR, 2013 has not been adhered to. It is the contention that inquiry report was issued after 383

days and impugned order was passed after 295 days of inquiry report. He has submitted that the impugned order is liable to be set aside.

7. Per contra, the learned AR for the Revenue reiterating the findings of the learned Commissioner submitted that the appellant has violated the Regulations 11(d), 11(e) and 11(f) of CBLR, 2013 since they had failed to intimate the Department about the relation between the empanelled Chartered Engineer, Shri Anil Vohra and the appellant being consultant to one of their related company viz. M/s Admiral Shipping Ltd. Further, referring to the Circular No. 25/2015-Cus dated 15.10.2015, the learned AR has submitted that it is the responsibility of the Customs Broker to bring to the notice of the Department that the reports relating to the valuation of the second hand vessel is obtained from the qualified Chartered Engineer, who is a neutral party. In the present case, since there is a relation of Shri Anil Vohra, Chartered Engineer with the appellant Customs Broker, even though through another related company M/s Admiral Shipping Ltd., a fact not brought to the knowledge of the Department, therefore, the inquiry reports which observed that the charges of violations of regulations 11(d), 11(e) and 11(f) not proved, is not correct and rightly discarded by the adjudicating authority and consequently charges are held proved.

8. Heard both sides and perused the records.

9. The issue for consideration in the present appeal is whether the appellant – Customs Broker contravened the Regulations 11(d), 11(e) and 11(f) of CBLR, 2013. The facts not in dispute are that M.s KNK Ship Management imported one unit of used second hand self propelled Tug 'KNK Disha' against Bill of Entry No. 9479981 dated 27.4.2017. For clearance of the same, they have engaged the appellant to complete all the formalities with the Custom House including engaging empanelled Chartered Engineer Shri Anil Vohra to assess the value of the used self propelled Tug 'KNK Disha'. On the basis of the valuation report of the Chartered Engineer Shri Anil Vohra and the documents namely, purchase invoice, agreement etc. furnished by the importer M/s KNK Ship Management, the appellant submitted papers with the Customs authorities for clearance of the said used Tug 'KNK Disha'. Later it was alleged by the Customs authorities that the value declared by the importer to the Customs authorities is lower than the value declared in the documents submitted earlier to the Bank. Investigation was initiated and on completion of the same, show-cause notice was issued for enhancement of the value of the said second hand vessel. Consequently, a separate notice was also issued to the appellant alleging violation of Regulations 11(d), 11(e) and 11(f) of CBLR, 2013 with a proposal for revocation of license, forfeiture of security deposit and proposal for imposition of penalty. Inquiry Officer was appointed to ascertain the facts alleged in the show-cause notice, who in turn, reported that none of the charges alleged in the show-cause notice issued to the appellant are proved.

10. The Commissioner while adjudicating the show-cause notice, disagreed with the inquiry report and held that all the charges of violation of Regulations 11(d), 11(e) and 11(f) of CBLR, 2013 leveled in the show-cause notice are proved and consequently directed revocation of the license, forfeiture of the security deposit and imposed penalty of Rs.50,000/- on the appellant. In arriving at the said conclusion of breach of said regulations by the appellant, the learned Commissioner has reasoned that it is admitted during the course of investigation that even though the Chartered Engineer Shri Anil Vohra, empanelled with the Custom House for assessing the value of old and second hand machinery, but also rendered services to appellant's another related company, namely, M/s Admiral Shipping Ltd., as a consultant, and this fact was not disclosed by the appellant to the Department, resulting into contravention of the aforesaid regulations under CBLR, 2013.

11. It is the contention of the learned Advocate that even though it is the basis of the show-cause notice that the employees of the appellant in their statements before investigating authorities admitted to the relation between the empanelled Chartered Engineer Shri Anil Vohra and the appellant's another company as consultant was not disclosed to the Department, but they have not admitted that it was a lapse on their part in not intimating the said relation to the Customs authorities. This fact has been brought out during the course of cross-examination by the said witnesses. Also, it is submitted that by the Ld. Advocate that the adjudicating authority had mis-

interpreted the meaning of neutral party in Board's Circular and application of the same to the facts of the present case is out of context.

12. To analyze the arguments advanced, it is necessary to refer the Board's Circular No. 25/2015-Cus dated 15.10.2015, which provides guidelines for valuation of second hand machinery in suppression of earlier clarification issued by the Board. The relevant portion is reproduced as below: -

"Circular No. 25/2015-Cus., dated 15-10-2015

F.No. 450/2/2015 - Dir(Cus)(Pt)

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Valuation of second hand machinery - Regarding.

The Board has received representations from other Ministries, trade bodies and traders regarding issues arising from the interpretation of Board's Circular No. 4/2008-Cus., dated 12th February 2008 [2008 (222) E.L.T. (T15)]. The circular requires that field formations rely upon a chartered engineer's inspection report while valuing imports of second hand machinery and that inspection/ appraisement reports issued at the port of loading should be accepted. The circular also states that there is no need to specify the agencies whose certificates alone would be accepted. It has been ascertained from field formations that the present practice in this regard is that if an importer produces a chartered engineer's appraisement report issued at the load port, with the ingredients indicated in para 8 (a) of the Circular 4/2008-Cus., the same is being accepted by Custom Houses. Also, appraisement/inspection reports prepared by pre-shipment inspection agencies in India, which have been notified by DGFT, are also being accepted by the Custom Houses. However, if the report produced by the importer does not contain information mandated in the Circular 4/2008-Cus., dated 12th February 2008, the importer is advised to select any chartered engineer, empanelled by the Custom House, for inspection/appraisement of the second hand machinery. In this regard, consultations have also been held with DGFT, DIPP, Trade Associations (CII, FICCI, ASSOCHAM, BCHAA and others)

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9. Given the nature of challenges in computing the value of second hand machinery under Rule 9, and the need to ensure that the approach applied reflects commercial reality and results in a value which is fair, and is

arrived through uniform processes by ail custom houses, it is felt that it is necessary to obtain inspection/appraisement reports from qualified neutral parties.

10. For this purpose, the Board has decided that Inspection/ Appraisement Reports issued by Chartered Engineers, or their equivalent, based in the country of sale of the second hand machinery *shall be accepted* by all Custom Houses. For the purposes of uniformity, the format in which inspection/ appraisement reports shall be prepared by the Chartered Engineer is annexed to this circular. In the event that an importer does not produce an inspection/ appraisement report in the prescribed format from the country of sale, he shall be free to engage the services of inspection agencies notified as per HBoP 2015-20. In case the agencies notified in the HBoP not being at the port of import, the importers will be free to select any Chartered Engineer from those empanelled by the Custom House of the port of import.

11. No Custom House shall require any importer to have an inspection/appraisement report of second hand machinery from a particular Chartered Engineer The importer shall be free to select any chartered engineer, empanelled by the Custom House for the respective class of goods, if so required."

....

13. The first paragraph of the said Circular clearly explains the objects for laying down revised guidelines in suppression of old one; the purposes was to bring uniformity in the method of valuation/assessment of second had machinery imported adopted at different Customs Houses.

14. It seems that the adjudicating authority in the impugned order merely carried away by the use of the expression 'neutral party' mentioned in para 9 of the said Circular but not examined its contextual use by reading the circular as a whole. A plain reading of para 9 of the Circular dated 15.10.2015, makes it crystal clear that the procedure for computing the value of second hand machinery should reflect the commercial reality resulting into a fair value and needs to be arrived through uniform practice by all custom houses. To achieve such

uniformity, it has been emphasized that inspection/ appraisement report should be from a qualified neutral party. Further reading it along with subsequent paras 10 and 11, it would be more clear that the certificate issued by the Chartered Engineer, shall in all circumstances whether given by Port of Loading or in India be accepted and no Customs house should insist that inspection/ appraisement report should be obtained from a particular Chartered Engineer. Keeping in mind the above guidelines and applying the same to present case, we find that Shri Anil Vohra is an empanelled Chartered Engineer by the customs authorities to determine the value of second hand imported machinery in the Mumbai Custom House. It is submitted at bar that at the relevant time he is the only empanelled Chartered Engineer for the said job. Therefore, appointing Shri Anil Vohra to determine the value of the second hand used Tug KNK Disha by the appellant, in the present case is perfectly in line with the procedure normally would have been adopted by any Customs Broker for the purpose of assessment of the second hand machinery imported. The adjudicating authority confirmed the charges against the appellant-Customs Broker observing that since Chartered Engineer Shri Anil Vohra is also a consultant to one of their related company, therefore, not a neutral party to the transaction of import. In our view the said interpretation is fallacious. In our considered opinion inspection/appraisement of the second hand machinery to ascertain its value by a neutral party definitely refers to a person, who is not connected with the importer or the seller of the imported goods, precisely with the transaction of the imported goods whose value he is asked to determine. It cannot be read to mean a person employed and remotely connected to the Customs Broker, who appoints the Chartered Engineer on behalf of the importer to assess the value, in absence of appraisal report at the load port, be said to be not a neutral person for the said job. Besides, we do not find any allegation in the notice nor any finding in this regard on the correctness of the value determined by the Chartered Engineer alleging bias on his part. Nor any second opinion/report obtained by the Revenue reflecting a higher or different value of the imported goods than determined by shri Anil Vohra. In these circumstances, in our view the observation of the learned Commissioner that charges under regulations 11(d), 11(e) and 11(f) of CBLR, 2013 stands proved against the appellant cannot be sustained.

15. In the result, the impugned order is liable to be set aside and accordingly the same is set aside and appeal is allowed with consequential relief, if any, as per law.

(Operative portion of the order pronounced in open court)

(C.J. Mathew)
Member (Technical)

(Dr. D.M. Misra)
Member (Judicial)

Sinha