CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87202 OF 2019

[Arising out of Order-in- Original CAO No: 15/CAC/CC(G)/RC/CBS(Adj.) dated 10th May 2019 passed by the Commissioner of Customs (General), Mumbai.]

Simon Brothers Pvt Ltd
A-207 Western Tower, Western Express Highway
Andheri (E), Mumbai - 400099 … ***Appellant***

versus

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

APPEARANCE:

Shri Sunil Khanna, Advocate for the appellant

Shri Manoj Das, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86987 /2021

DATE OF HEARING:	18/08/2021
DATE OF DECISION:	13/10/2021

PER: C J MATHEW

The appellant, M/s Simon Brothers Pvt Ltd, holder of customs broker licence no. 11/457, is before us challenging its revocation under Customs Broker Licensing Regulations, 2018 and the forfeiture of the security deposit furnished by them as condition for operation under the Regulations. Regulation 19of Customs Broker Licencing Regulations, 2013 was invoked upon commencement of investigations into imports of mobile phones against bill of entry no. 7815137/14.12.2016 by their client, M/s Creative Sales and Marketing, that was found to be in excess of quantity declared and lacking in mandatory BIS marks. The clearance had been handled by one Hitesh Ajmera, claiming to represent the appellant herein and the statement of Fredrick D'Souza, Director of the appellant-company, affirmed him to be their 'G' card holder working for them since 2010 till surrender of the card in February 2017. Hitesh Ajmera had, in his deposition, admitted to making upfront payment of ₹ 21,00,000/- besides assuring monthly payment of ₹ 30,000/- from out of the regular earnings from the operation of the licence.

2. The suspension of the licence, ordered on 19th January 2018, was, upon compliance with procedural requirements, continued *vide* order dated 2nd February 2018 pending completion of prescriptions contemplated in regulation 20 of Customs Brokers Licensing Regulations, 2013 (as in force then) that was, thereafter, initiated *vide* notice dated 15th May 2018 for inquiry into the grounds for which the detriments were proposed, *viz.*, breach of regulation 10, regulation 11(d), 11(e), 11(f), 11(m) and 11(n), and 17(9) of Customs Broker

Licensing Regulations, 2013 (that were incorporated as regulation 1(4), 10(d), 10(e), 10(f), 10(m) and 10(n) in addition to 13(12) of Customs Broker Licencing Regulations, 2018 notified on 14th May 2018). The report of inquiry authority dated 16th January 2019 held all the charges as proved and, after grant of personal hearing, the revocation, forfeiture and penalty followed in order no. 15/CAC/CC(G)/RC/CBS(Adj.) dated 10th May 2019 of Commissioner of Customs (General), New Customs House, Mumbai.

3. Of these several charges, breach of obligations devolving on customs brokers in regulation 11 has been cited for five while the allegation of breach of regulation 10 by transfer of licence and of regulation 17 for failure to exercise supervision over employees for proper conduct in transaction of business with consequent responsibility for acts of omission and commission of employees has been the basis of the other two.

4. According to Learned Counsel for the appellant, the parallel proceedings in show cause notice issued on 7th December 2017 under section 124 of Customs Act, 1962, arising from the same investigations, culminated in dropping of penalty under section 112 of Customs Act, 1962 at the adjudication stage and quashing of penalty under section 117 of Customs Act, 1962 at the appellate stage in order dated 11th July 2019 thus unsettling the foundations of the impugned

order. It is also pointed out by Learned Counsel that the finding that

> *‘26. I find that the in the instant case of fraudulent import of undeclared goods concealed among declared Chinese Mobile Phones, by the importer M/s. Creative Sales & Marketing (IEC No. 0516953451), Shri Hitesh Ajmera, representative of the CB has played a major role in abetting the importer in the said fraudulent import of Chinese phones, and rendered himself liable for penal action under Section 112(a) & 114AA of the Customs Act, 1962.*
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> *26.1 I find that the DRI's SCN dated 07.12.2017, has been adjudicated by the Addl. Commissioner of Customs, NS-II, JNCH, Nhava Sheva, vide OIO No. 720/2018-19/ADC/NS-II/CAC/JNCH dated 07.09.2018, issued vide F.No. S/l 0-446/17-18/ADC/NS-II/CAC/JNCH.*
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> *26.2 Having perused the said OIO, I find that a Penalty of Rs. 1,00,000/- (Rupees One Lakh only) has been imposed under Section 117 of the Customs Act, 1962; on the Customs Broker M/s. Simon Brothers (CB No. 11/457). Also, I find that penalty of Rs. 3,00,000/- (Rupees Three Lakhs only) under Section 112(a) of the Customs Act, 1962 and penalty of Rs. 5,00,000/-(Rupees Five Lakhs only) under Section 114AA of the Customs Act, 1962 have been imposed on Shri Hitesh Ajmera.*
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> *27. In his statement dated 21.11.2017, recorded under Section 108 of the Customs Act, 1962, Shri Fredrick Peter D'Souza, Director of the CB Company, interalia submitted that the subject import had been handled by Shri Hitesh Ajmera; that Shri Hitesh Ajmera approached him (Fredrick) in 2010 and informed of having an experience in Customs clearance and therefore requested to hire him as an employee; that Shri Hitesh Ajmera gave him (Fredrick) Rs.*

> *21,00,000/- an initial amount and promised to pay him Rs. 30,000/- per month for allowing him to use his CB licence; that; he allowed Shri Hitesh Ajmera to use his CB licence; that Shri Hitesh.'*

in the impugned order stands invalidated in consequence. In the appeal, it is further contended that the lapse of time between submission of enquiry report and the completion of proceedings also compromises its legality for having contravened the time-lines prescribed in the Regulations. It is also submitted that the several issues, such as mutual exclusivity of the charges, pleaded during the proceedings and no less valid now, raised for discrediting the finding on breach of regulation 10 and of regulation 13 of Customs Broker Licensing Regulations remained unanswered in the proceedings. Further, it is also contended that the alleged transfer of licence was presumed against the broker without having been taken to a logical conclusion during investigations. Furthermore, it is contended that their submission of the payment to Frederick D'Souza having been a personal loan and denying the agreement for monthly payment also compromises the credibility of the impugned proceedings by having been overlooked. It was also contended that their submission that Hitesh Ajmera had misused the licence must be accepted in the absence of any evidence to demonstrate otherwise.

5. According to Learned Authorised Representative, the proceedings flow from detailed investigations which had examined

several facets of impropriety on the part of the licencee for demonstrating their lack of diligence in compliance with their obligations. It was pointed out by him that, but for the active role of the customs broker in handling of the import consignment, the conspiracy to violate customs, and other, laws applicable to imports would not have been possible. He submits that the licence had been revoked after following due procedures which clearly established facts evincing the breach.

6. On perusal of the enquiry report and the impugned order, we find that the allegations pertaining to breach of obligations and lack of proper supervisory control over employees has been held as proved along with the allegation that the licence had been transferred to Hitesh Ajmera who, admittedly, had been handling of not only the consignments involved in the said investigations but of many other imports and exports for several years. The embargo, in Customs Brokers Licensing Regulations 2018, on transfer of licence and the vicarious responsibilities for acts of omission and commission by employees are intentionally segregated from the obligations that are the essence binding the licensor and licencee vis-à-vis clients in the scheme of Customs Brokers Licensing Regulations, 2018. On the finding of the licence having been transferred, the appellant should not have been held accountable for compliance with obligations that devolve on a licencee in the handling of clients. Nor can the licensee

on record be proceeded against for acts of employees as the alteration of employee-employer relationship erases the existence of expectation as far as employees are concerned. This contradiction highlighted by the appellant is not to be easily disregarded; neither the enquiry authority nor the licensing authority can, in exercise of their empowerment, come to a conclusion that such mutually exclusive provisions can exist simultaneously. This is tantamount to hedging of outcomes reflecting inability, or unwillingness, to arrive at a conclusion of misconduct that can meet the test of rigour.

7. The substantial reliance placed by the licencing authority on the findings of the adjudicating authority in proceedings under the Customs Act, 1962 not only weakens the conclusion in the light of subsequent developments but is also inconsistent with the principles of natural justice that mandates independent appraisal of the charges framed under the Customs Brokers Licensing Regulations, 2018 on the findings evinced in the enquiry proceedings.

8. In these circumstances, and especially in the light of the submissions made by the customs broker on alleged misuse of the licence coupled with the absence of the Director, Frederick D'Souza, from day-to-day functions, the sustainability of the charges requires a fresh determination. Accordingly, by setting aside the impugned order, the matter is remanded back to the licensing authority to cause

a fresh enquiry to be conducted and for decision on the proposed revocation and forfeiture to be taken thereafter.

(Order pronounced in the open court on 13/10/2021)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*