CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 89886 OF 2013

[Arising out of Order-in-Original No: 125/2013/CAC/CC-G-/PKA/CBS dated 28th October 2013 passed by the Commissioner of Customs (General), Mumbai.]

R S Khandalkar & Co
Sahaod, Ground Floor, Room No.5, 5 Mint Road
Mumbai - 400001 … ***Appellant***

versus

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

APPEARANCE:

Shri V M Doiphode, Advocate for the appellant

Shri Ram Kumar, 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 / 85304 /2023

DATE OF HEARING: 29/08/2022
DATE OF DECISION: 28/02/2023

PER: C J MATHEW

This appeal lies against order[1] of Commissioner of Customs (General), New Custom House, Mumbai by which proceedings

[1] [order no. 125/2013/CAC/CC-G-/PKA/CBS dated 28th October 2013]

initiated against M/s R S Kandalkar & Co, a customs broker, for revocation of licence and other detriments under regulation 18 and regulation 20 of Customs Broker Licensing Regulations, 2013 culminated in forfeiture, with consequent direction for replenishment, of security deposit.

2. Upon cent per cent examination and testing of three representative samples from a consignment of 5700 packages of 'refrigerant gas HFC-404A', for which bill of entry no. 567624/07.01.2012 had been filed on behalf of M/s Alpine Exports by appellant, it was concluded that the contents were 'refrigerant gas (HCFC R-22)' which, as 'ozone depleting substance(ODS)', was restricted under the Foreign Trade Policy (FTP).

3. The suspension of the 'customs broker' licence, based on the initial offence report, was revoked on appeal before the Tribunal. The enquiry report following initiation of proceedings thereafter, under Customs Brokers Licensing Regulations, 2013 for alleged breach of regulation 13(d), 13(e), 13(n) and 19(8) of Customs House Agents Licensing Regulation, 2004 as prevailing at the time of suspension, held all charges as proved and the impugned order, while disagreeing with the finding in one of the charges, found the breach of three of the Regulations to suffice for the forfeiture of security deposit.

4. According to Learned Counsel for the appellant, the

statements recorded during the investigation had established that mis-declaration in the bill of entry was not attributable to the appellant and, more particularly, as compliance with almost all the other regulatory pre-requisites had been documented before the goods were entered for home consumption. He further contended that the proceedings under Customs Act, 1962 initiated against the appellants herein were dropped at the adjudication stage itself. It is also pointed out that the entire case against the appellant in the proceedings leading to the impugned order was founded on statements recorded during the investigations which, he alleged, lacked credibility for not having been offered voluntarily.

5. According to Learned Authorised Representative, culpability of the ‘customs broker’ for breach of Customs Broker Licencing Regulations, 2013 has been categorically brought out in the impugned order and judicious application of mind is evident in restricting the final finding to only three of the four charges. It is also pointed out that the principal allegation against the appellant of not having rendered proper advice to the importer has been countered in the grounds of appeal with nothing other than mere denial and not warranting interference with the order.

6. As only three of the original four charges were sustained in the impugned order, we concern ourselves only with those. A valid

defence against the first finding of the appellant having failed to give proper advice to customer would have been reporting of non-adherence to customs authorities which is not an averment of the appellant. It is seen from the records that the licensing authority had taken note of the contention of the appellant that enquiry authority relied upon the statements of the importer, and the attribution of unreliability of that in submission of Learned Counsel notwithstanding, the appellant could not have been unaware that some 'refrigerant gases' are restricted for import owing to being 'ozone depleting substance (ODS)' which should have prompted caution, and reinforcing advice, on their part. It is not expected that, in such instances, a 'customs broker' remains an uninterested bystander pleading the excuse of innocence and non-involvement from attestation in statement of importer, as acceptable discharge of obligation to impress upon the importer, and forcefully so, the consequences of evasive declaration, however unintentional, of the contents of imported goods. The claim of having been led to satisfaction about the *bona fides* of the import from compliance of several regulatory stipulations does not appear to be acceptable as the appellant was bound to be no less than rigid in appreciating the purpose of restricting such imports. It has been pointed out in the impugned order that the failure on the part of the 'customs broker' to infer infirmity in the import does not sit well with the expectations of a normal ‘customs broker’ in, at least, enlightening their customers about the few exceptions in a trade regime that is characterized by ‘open general licence (OGL)’ as a norm. We, therefore, see no reason to interfere with the finding that regulation 13(d) of Customs House Agents Licencing Regulations, 2004 had been breached by the appellant.

7. The second charge of not having complied with the obligation of exercising due diligence in ascertaining correctness of the information imparted to client in the course of clearance of cargo has been held against the ‘customs broker’ on inference from failure to keep customers informed of the restrictions in import of ‘refrigerant gas’ of certain specifications. The demonstrated lack of interest in the contents of the consignment that closely resembles restricted goods is, naturally, bound to be reflected in non-ascertainment of the correctness of the advice given to customers. Though the finding on this charge by the licensing authority is bereft of detail, separate and distinct from that leading to confirmation of the first charge, we do not find that to be substantive lack as the two are mutually linked. It is, therefore, not inappropriate to conclude that the appellant had been in breach of regulation 13(e) of the Customs House Agents Licensing Regulations, 2004.

8. The third charge of having breached obligation to discharge

duties with utmost speed and efficiency and without avoidable delay is, according to Learned Counsel, too broadly articulated for any specific finding that could be established against the appellant in the matter in which impugned proceedings were initiated. The cavalier dismissal of the counter of the 'customs broker' in response to this charge, and in the absence of evidence demonstrating lack of speed and efficiency on the part of the appellant as also of any avoidable delay having occurred, cannot but lead to the conclusion of not being in agreement with the licensing authority on the finding that appellant had breached regulation 13(n) of the Customs House Agents Licensing Regulations, 2004. We also find that this obligation, intended to ensure best interests of the customer and, obviously, to be invoked in circumstances of grievance aired by customers, appears to have been alleged to have been breached without any thought to the manner in which it would be established in enquiry.

9. Of the four charges initially imputed and of the three that were confirmed by the licensing authority, two are upheld in this proceeding. The licensing authority has not taken recourse to the extreme penalty of revocation of licence but has limited himself to forfeiture of security deposit. Thus, even if one of the charges held as breached does not sustain, the gravity of the two that are sustained does not detract from the proportionality of the penalty finally imposed. There are no mitigating circumstances either to commend

further leniency.

10. We, therefore, find no reason to interfere with the order directing forfeiture of security deposit. The appeal is, accordingly, dismissed.

(Order pronounced in the open court on 28/02/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*