CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85322 OF 2022

[Arising out of Order-in-Original CAO No: 112/CAC/PCC(G)/SJ/CBS Adj dated 13th December 2021 passed by the Principal Commissioner of Customs (General), Mumbai.]

Absolute Clearing
257-265 Narshi Natha Street, New Anant Bhawan
B-113, 1st Floor, Masjid Bunder (W), Mumbai - 400009 …***Appellant***

versus

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

APPEARANCE:

Shri Ashwani Kumar Prabhakar, Advocate for the appellant

Shri Manoj Kumar, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 86024 /2023

DATE OF HEARING: 03/01/2023
DATE OF DECISION: 28/06/2023

PER: C J MATHEW

Aggrieved by revocation of 'customs broker' licence no. 11/2520, along with forfeiture of security deposit, under regulation 14

of Customs Broker Licencing Regulations, 2018 and imposition of penalty of ₹ 50,000 under regulation 18 of Customs Broker Licencing Regulations, 2018 which, considering the misconduct on the part of M/s Absolute Clearing that contributed to the impugned attempt to smuggle 'red sanders' out of the country, washeld to be warranted, this appeal has been preferred impugning order[1] of Principal Commissioner of Customs (General), New Customs House, Mumbai.

2. Shipping bill no. 3098423/10.6.2020 for export of 'Indian fresh onions' to Dubai by M/s Jhanvi Trading Co was filed on their behalf by the appellant and it appears that the entire work was handled by their power-of-attorney holder, Shri Janak Dhanji Danani, from whom the proprietor of M/s Absolute Clearing, Shri Varun Vipul Lapasia, came to know that container no. TRLU-1644026 had 13.01 MT of 'red sanders (*Pterocarpus Santalinus*)' concealed among the declared goods. Owing to this, the licence was suspended on 28th January 2021 and continued, in accordance with regulation 16 of Customs Broker Licencing Regulations, 2018 after 'post-decisional hearing', by order of 2nd March 2021. Proceedings were initiated under regulation 17 of Customs Broker Licencing Regulations, 2018 *vide* show cause notice dated 31st March 2021 alleging breach of regulation 10(a), 10(b), 10(d), 10(e) and 10(n) of Customs Broker Licencing Regulations, 2018.

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[1][order no. 112/CAC/PCC(G)/SJ/CBS Adj dated 13th December 2021]

3. The charges rest, principally, on the transactional engagement, or the lack, of the appellant with the ostensible exporter in the handling of the contracted shipment owing to which the prescribed authorization was not obtained, business was not transacted personally or through authorized employee, the client could not have been advised to comply with statutory requirements or discarding of advice reported, due diligence in ascertaining correctness of information imparted to client could not be demonstrated, could not discharge duties with speed and efficiency and failed to verify correctness of details and identity of client. According to the notice, it had been admitted by both the proprietor and the 'power-of-attorney' holder that they had neither met the client nor undertook any of the processes mandated for export from the country. It was also admitted by the 'customs broker' that all activities were undertaken by an unauthorized person.

4. The statement of Shri Nityanand Suresh Pujari established that documentary formalities for his usual export trade was handled by M/s Absolute Cargo through one Shri Mehul Bhanushali and that physical aspects of clearance were handled by himself. Insofar as the impugned goods were concerned, the usual export *modus operandi* was resorted to on advice and planning by some other persons for which he was to be recompensed. The goods in the container, stuffed at his premises, had not been subjected to any supervision there or any

check before clearance. The inquiry authority held all the charges to be proved which was followed by the detriments in the impugned order.

5. It was contended by Learned Counsel for the appellant that the adjudicating authority responsible for show cause notice, in initiating action against the goods, the exporter and other persons, including the power-of-attorney holder, under Customs Act, 1962, did not find sufficient reason to charge them with penalty implying that nothing adverse was noticed about their role. Further drawing our attention to the authority letter, 'know your customer (KYC)' form, certificate of 'importer-exporter code (IEC)', registration-cum-membership card of APEDA and other identification records, Learned Counsel intimated that the licencing authority had incorrectly concluded that the appellant had not complied with obligation as customs broker.

6. Reliance was placed on the decision of the Tribunal in *Manjunatha Cargo Pvt Ltd v. Commissioner of Customs, Bangalore [2021 (375) ELT 245 (Tri-Bang)]* holding that

> *'6.2 Further we find that in the impugned order, the Commissioner has held that the appellant has not directly interacted with the IEC holders and is guilty of violation of Regulation 17(d) of CBLR, 2013. This finding is factually incorrect because in the statements of Mr. Mohammad Yusuf Siddique, G-Card holder and Power of Attorney of the appellant at Mumbai, he has stated in his statement dated 25-*

5-2017 that he had interacted with the IEC holders. Further we find that as per the Commissioner, the appellant has not brought to the knowledge of the Department that IEC holders have lent their IECs to other persons. We find that there is no evidence on record brought by the Department to show that the appellant had knowledge regarding the lending of IEC. Further we find that the lending of IEC is not an offence under the Customs Act, 1962 as held in various decisions cited supra. As far as allegation against the appellant that he had not verified the antecedents of IEC holders, we find that as per Regulation, the Customs Broker is to verify the correctness of IEC number, identity of client and functioning of them at the declared address using reliable, independent, authentic documents, data or information. Further physical inspection of the premises of the importer or exporter is not required under the law as well as under the Board's Circular No. 9/2010-Cus., dated 8-4-2010. In the present case, the appellant had obtained copies of PAN card, Aadhaar Card, GST registration certificate, IEC certificate from all the three exporters concerned. Further we find that in the case of G.N.D. Cargo Movers cited supra, the Division Bench of the Tribunal had held in paras 5 & 6 as under :-

> *5. We further note that Regulation 11(e) requires the Customs House Agent to exercise due diligence to ascertain the correctness of any information which he imparts to clients with reference to work relating to clearance of cargo/baggage. Merely because the importer have accepted their mistake of misdeclaration of brand and quantity and have shown their willingness to pay differential duty, fine and penalty, it cannot be concluded that Customs Broker did not exercise due diligence to ascertain correctness of the information. If the said fact only is relevant for holding against the Customs Broker, then in each and every case of misdeclaration by the importer, it can be concluded that Customs Broker did not suitably informed his clients. There has to be some evidence on record to show that either the Customs Broker was aware of such misdeclaration and suppressed the same with a mala fide mind or he has taken efforts to get the goods cleared from the Customs on the*

> *basis of wrong declaration made by him or has connived with the importer so as to aid and abet the wrong declaration.*
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> *6. Similarly, for the violation of Regulation 11(n), the adjudicating authority has observed that the Customs broker did not verify the antecedents, correctness of the IEC number, identity of his client and the declared address etc. We again find no merit in the charge of the Revenue inasmuch as that IEC number has been found to be correct as also the address of the importer. Further, all the importers have joined in the investigations and have given their statements. In such a scenario, it cannot be said that the Customs Broker has not adhered to KYC norms.'*

and on the decisions of the Hon'ble High Court of Delhi in *Commissioner of Customs v. Shiva Khurana [2019 (367) ELT 550 (Del)]* holding that

> *'7. This Court is of the opinion that the impugned order is justified in the facts and circumstances of the case. The reference to the verification of "antecedents and correctness of Importer Exporter Code (IEC) Number" and the identity of the concerned exporter/importer, in the opinion of this Court is to be read in the context of the CHA's duty as a mere agent rather than as a Revenue official who is empowered to investigate and enquire into the veracity of the statement made orally or in a document. If one interprets Regulation 13(o) reasonably in the light of what the CHA is expected to do, in the normal course, the duty cast is merely to satisfy itself as to whether the importer or exporter in fact is reflected in the list of the authorized exporters or importers and possesses the Importer Exporter Code (IEC) Number. As to whether in reality, such exporters in the given case exist or have shifted or are irregular in their dealings in any manner (in relation to the particular transaction of export), can hardly be the subject matter of "due diligence" expected of such agent unless there are any factors which ought to have*

> *alerted it to make further inquiry. There is nothing in the Regulations nor in the Customs Act which can cast such a higher responsibility as are sought to be urged by the Revenue. In other words, in the absence of any indication that the CHA concerned was complicit in the facts of a particular case, it cannot ordinarily be held liable.'*

and in *KVS Cargo v. Commissioner of Customs (General), NCH, New Delhi [2019 (365) ELT 392 (Del)]* holding that

> *'4. The Court is of the opinion that there is some merits as far as the appellant's argument is concerned. In this case the Customs Authorities have not held that any clandestine material was brought or that the goods were misdeclared or the contraband was the subject matter of the Bill of Entry in question. The role of the appellant was merely one of a facilitator. There is no material on record to show that the KYC documents were fraudulent or incorrect or in any manner irregular. In these circumstances, to expect the CB holder to carry out further investigations and independent inquiry not only about the existence of importing firm but also about its real owner is beyond the mandate of the law.'*

7. Reliance was placed by Learned Counsel on the decision of the Tribunal in *Cargo Concept (Bombay) Pvt Ltd v. Commissioner of Customs (General), Mumbai [2016 (344) ELT 954 (Tri-Mumbai)]* which held, in near identical circumstances, that

> *'6. We find that in the present case the offence on the part of exporter is that they misdeclared the goods inasmuch as readymade garment made of 100% cotton falling under Chapter Heading 6109.01 was misdeclared under Tariff Item*

No. 6109.03 thus drawback, instead of 6.7% it was claimed @ 7.8%. The difference of the quality could be known only after the samples were got tested by the Customs authority from Textile Committee. This itself shows that anybody from eye estimation cannot know, even Customs authority could not know that the garment is made of 100% cotton or otherwise. Appellant being CHA acted as a CHA of the exporter on the basis of documents submitted to him. As per the document description declared was not incorrect i.e., readymade garment/T-shirt therefore, we do not see any involvement of the appellant and even there was no reason to doubt the nature of goods. Therefore, we are very clear that appellant was not involved in whatsoever misdeclaration made by the exporter. It is also observed that as regard the Customs proceedings whereunder the appellant was also implicated and penalty of Rs. 15 lacs was imposed by the adjudicating authority, the same was dropped by the Commissioner (Appeals) on the ground that appellant was not involved in any misdeclaration made by the exporter. We also found that the appellant were paid Rs. 500/- per document for their clearance in respect of exports of the impugned goods, there is nothing on record to show that the appellant have benefited extraneously over and above the actual CHA fees i.e., Rs. 500/- per document. In view of this position there is no doubt that appellant CHA was nowhere involved in any misdeclaration of the goods made by the exporter. As regard the authorization letter, we find that the said charge was made by the Commissioner only on the basis of statement of one Shri T. Dongre, who said to have stated that they did not possess the authority letter from their client, M/s. Cosmos Enterprises. In this regard, we find that appellant during the proceedings indeed submitted the authorization letter before the Commissioner, though said letter was in respect of earlier eight shipping bills. We are of

the view that once the exporter gave the authority letter and thereafter the business is continuing, the same authority letter will be sufficient for carrying out the business in future also therefore, we do not see that in each and every consignment or each and every shipping bill separate authorization is required. Once the authorization was given by the exporter it is sufficient compliance of Regulation 13(a) of CHARL, 2004. As regard the allegation by the ld. Commissioner that signature on the authority letter was not tallying. We find that the ld. Commissioner has not made any efforts to investigate in the matter of signature therefore, it was not conclusively proved that authority letter is not genuine. Ld. Commissioner in one hand contended that the signature on the letter is not tallying and on the other hand said that authority letter is in respect of earlier exports this itself contradicts his stands. We further observed that when the shipping bill was filed by the CHA and it has been accepted by the exporter, this fact itself shows that appellant has been duly authorized by the exporter for carrying out clearance work of exports consignments. As regard the violation of the Regulation 13(d) and (n), we find that ld. Commissioner held that there is violation under Regulation 13(d), contending that appellant was given CHA work not directly by the exporter but through one shipping line, therefore, appellant have never met to the exporter, accordingly appellant have not advised the exporter. In this regard, we find that this is general practice in the CHA business that CHA work is brought by the various intermediary but ultimately it is CHA and importer or exporter which are under contract regarding the CHA clearance as well as payment term. Therefore, merely because some shipping line brought client to the appellant does not lead to any conclusion that there was no relation between appellant and exporter. As regard the charge on the appellant that they have not advised to the exporter, we do

> *not find any substance in this charge for the reason that in the present case as regard the documents there was no discrepancy. Even after detection different nature of the goods the description of the goods remained same. Therefore, there was no occasion for CHA to advise client, hence this charge is not sustainable. As regard the charge of delay and deficiency in the performance by the CHA, we find that the appellant have performed their clearance work of export consignment in usual course and nothing brought on record that appellant as CHA have delayed in the clearance work or there is any deficiency in the performance of clearance work on the part of the appellant. Therefore, this charge under Regulation 13(n) does not establish. We have gone through the judgments cited by the rivals and considered the same, however we do not need to discuss each judgment as every case of revocation of CHA licence is based on fact of individual case. As per our above discussion, we are of the considered view that the impugned order is not sustainable, hence the same is set aside. Appeal is allowed.'*

and, insofar as receipt of authorization is concerned, in *Natraj Shipping Agency v. Commissioner of Customs (General), Mumbai [2014 (308) ELT 103 (Tri-Mumbai)]* thus

> *'7. On perusal of the impugned order, we find that the learned Commissioner has held that the importer has filed blank papers and give ICE to some other person to import and he was not having any knowledge of the importation of the goods. On the contrary, the learned Commissioner has not given any findings on the production of the original authorization issued by the real importer and he has not doubted the signatures on the documents. In these circumstances, we hold that the appellant was having proper*

> *authorization for clearance of the impugned consignments. As the charge under Regulation 13(a) is not proved consequently, the charges under Regulation 13(d) and 13(n) are also not proved. Therefore, we set aside the impugned order and allow the appeal by restoring the operation of CHA licence No. 11/617.'*

8. According to Learned Authorized Representative, the findings in the impugned order has clearly elaborated on the role of the 'customs broker' but for whose manner of handling the transaction, the attempt to smuggle 'red sanders' would have been a non-starter. It was contended that such 'customs brokers', by desisting in functioning in the manner in which they were obliged to, had forfeited their claim to continue in the business. It was further argued that the breach of obligations was so brazen as to come to no conclusion other than the detriments visited on the customs broker.

9. The appellant has furnished the authorization received by them and its provenance is not in dispute. The obligation in regulation 10(a) prescribes obtaining of authorization which is, undeniably, with them. From this, there can be no doubt that beach of regulation 10(a) of Customs Broker Licencing Regulations, 2018 has been incorrectly attributed to them.

10. It has been held that the appellant had, in fact, been aware of the breach insofar as client is concerned from transacting the business through non-authorized person with whom an arrangement for sharing

of ‘spoils’, so to speak, had been devised. On the bare facts made available to us, mere deployment of an unauthorized person does not, *ipso facto*, constitute breach of obligations in regulation 10(b) of Customs Broker Licencing Regulations, 2018. The requirement to permit authorized persons is restricted to customs station. The presence of such person to handle off-location stuffing is not an offence and presence in a customs station cannot but be implied permission owing to regulatory stipulations of entry into such places. Therefore, it cannot be said that appellant had utilized unauthorized persons in discharge of its obligations in a customs station. There is no evidence that the appellant did not intimate the intermediary that provisions of Customs Act, 1962 were to be complied with. Regulation 10(c), 10(d), 10(e), 10(f) and 10(g) of Customs Broker Licencing Regulations, 2018, and symptomatic of the causal approach to crafting of such a critical delegated legislation, introduce ‘client’ without any reference to the identity of the person intended by such description and, to the extent that it is not specific to an exporter or importer, as the case may be, could well be read as expanding the scope of the Regulations to infer that it was not intended to be restricted to exporter or importer. A business model may not traverse the same contours as a law and it would not be proper to hold, save where the law is explicit, that it should. The client could be an intermediary and there is no allegation that such client was not

satisfied in the manner intended by the Regulations. Hence, the sustaining of these charges does not meet the test of law.

11. Insofar as regulation 10(n) of Customs Broker Licencing Regulations, 2018 is concerned, it is not alleged that the said ascertainment had not been done but that, in the absence of contractual engagement with exporter, the appellant could not have carried out the necessary verifications. This argument is not tenable as the appellant could yet have not been relieved of that responsibility which should have been discharged on the basis of data availability. There is, indeed, no finding that the premises did not exist or that the exporter was not associated with the address; it is only by such ascertainment that it could have been established that the appellant had not conducted the verification or, had the verification been carried out, that the jurisdictional officers would have unearthed the scheme to defraud the exchequer. That is not the finding here. The impugned order has not dealt with this conundrum at length and, thus, the conclusions not enough to obtain acceptance.

12. In the circumstances, nothing remains except for us to find that disposal of the show cause notice should have arrived at a conclusion as determined from the law. In failing to acknowledge so in the finding on the doubt *supra*, required to be complied therein, the same cannot be said to exist through alternative Regulations.

13. Appeal is accordingly disposed off by way of remand, and directing that the matter be taken up for disposal restricted only to alleged breach of regulation 10(n) of Customs Broker Licencing Regulations, 2018.

(Order pronounced in the open court on 28/06/2023)

(S.K. MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*