CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 85803 of 2023

(Arising out of Order-in-Original CAO No. 07/CAC/PCC(G)/SJ/CBS/Adj. dated 04.05.2023 passed by the Pr. Commissioner of Customs (General), Mumbai Zone-I)

Protocol Logistics Private Limited **.... Appellant**
C.B. No.11/77 – 1502/A, 15th Floor, Universal Majestic
P.L. Lokhandwala Marg, Chembur, Mumbai – 400 071.

Versus

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

Appearance:

Shri S.D. Deshpande, Advocate for the Appellant

Shri Ram Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87059/2023

Date of Hearing: 03.07.2023

Date of Decision: 20.10.2023

Per: M.M. PARTHIBAN:

This is an appeal filed by M/s Protocol Logistics Private Limited, Mumbai (herein after, referred to as 'the appellants' for short) assailing the Order-in-Original CAO No. 07/CAC/PCC(G)/SJ/CBS/Adj. dated 04.05.2023 (herein after, referred to as 'the impugned order').

2. In the impugned order the learned Principal Commissioner of Customs (General), Mumbai in exercise of powers conferred upon him under Regulation 17 (7) of the Customs Brokers Licensing Regulations, 2018 (CBLR) had revoked the CB license issued to the appellants for acting as a Customs Broker under the above regulations, besides imposition of penalty and forfeiture of entire security deposit furnished by the appellants. Being aggrieved against the impugned order, the appellant had filed this appeal before the Tribunal.

3.1 The brief facts of the case are that under the Customs Broker (CB) license No. 11/17 that was issued by jurisdictional Principal Commissioner of Customs (General), Mumbai, the appellants CB were granted extension to operate their business as CB at Kolkata Customs Commissionerate under Regulation 7(3) *ibid*. An offence report in the form of Order-in-Original dated 31.03.2022 passed by Additional Commissioner of Customs, Kolkata Customs and Prohibition CB order No.11/2022 dated 15.07.2022 prohibiting the operation of appellants as CB at Kolkata Customs jurisdiction were received by the office of Principal Commissioner of Customs (General), Mumbai for initiating necessary action against the appellants under CBLR, 2018. In the said Order-in-Original dated 31.03.2022, the adjudicating authority had imposed penalty of Rs.5,00,000/- on the appellants under Section 112(a)(i) of the Customs Act, 1962 for their role as CB in clearance of certain imported consignment of 'Betel nuts' despite knowing that the same has been issued with a Non-conforming Certificate (Rejection Certificate) by Food Safety and Standards Authority of India (FSSAI) and thus treating the imported goods as prohibited goods. Based on the above, the jurisdictional Principal Commissioner of Customs (General), Mumbai had immediately suspended the appellants' CB license vide Order No. 38/2022-23 dated 04.11.2022. After giving post decisional hearing, the suspension of the CB license of the appellants was continued vide Order No.41/2022-23 dated 29.11.2022. Subsequently show cause notice No.30/2022-23 dated 28.12.2022 was issued for the act of omission and commission of CB, leading to contravention of Regulations 10(d), (e), (f), (m) and (q) of the CBLR, 2018. The enquiry report was submitted on 06.04.2023, concluding that all the charges having been found to be proved. Accordingly, the Commissioner of Customs (General), Mumbai had revoked the CB license, which had been issued to the appellants for acting as a Customs Broker under CBLR 2018, besides imposition of penalty and forfeiture of entire security deposit furnished by the appellants vide the impugned order dated 04.05.2023.

3.2 Learned Advocate appearing for the appellants submitted that on merits as well as on time limits, the impugned order does not sustain and pleaded that the same may be set aside. He also stated that appellants had already been imposed with a penalty of

Rs.5,00,000/- for the violations of CBLR, 2018 vide Order-in-Original dated 31.03.2012. Hence, they should not be penalized again for the same violations. Further, he stated that the offence report in their case was received by the appellants on 10.08.2022 and thus action initiated by issue of SCN dated 28.12.2022 is beyond the prescribed period of 90 days and on account of delay in initiating the proceedings under CBLR, the same cannot be sustained.

3.3. Learned Advocate stated that it is not under dispute that the clearance of imported goods covered under B/E No.5052617 dated 25.09.2019 was done through Customs SWIFT system integrated with FSSAI; and as per FSSAI circular dated 10.01.2014, NOC for clearance of food product is directly sent by them to Customs authorities if the sample is conforming to the tested parameters; even if the food is not conforming to the requirements of law, then too such non-conforming report is sent to Customs. Accordingly, Customs officers have cleared the imported goods by giving out of charge on 20.03.2020; the Customs officers have mentioned while clearing the imported goods that 'they checked NOC from FSSAI and PQ in system also checked COO – CFT'. Further, the appellants came to know about the rejection report of FSSAI much later after ten months of clearing the imported goods, only on 14.01.2021. Thus, they were not even aware of any irregularity in clearance of impugned goods.

3.4. Learned Advocate denied allegations of violations of regulations 10(d), (e), (f), (m) and (q) of CBLR citing that after checking NOC for imported goods, Customs had cleared the goods; non-conformity certificate was generated on 01.01.2021 and there is no evidence or documents to support any of these allegations and hence prayed for setting aside the impugned order. In this regard, he relied upon the following case laws: -

(a) *Leo Cargo Services Vs. Commissioner of Customs, Airport & General New Delhi – 2022 (382) E.L.T.30 (Del.)*

(b) *Bruce Logistics Pvt. Ltd. Vs. Commissioner of Customs (General), Mumbai – Final Order No. A/87290-87291/2019 passed by CESTAT, Mumbai*

4. Learned Authorised Representative (AR) appearing for the Revenue reiterated the findings recorded in the impugned order. He further stated that the importer M/s Aakam Exim Private Limited, Chennai in connivance with the CB had cleared the consignment which is not fit for human consumption without obtaining NOC from

FSSAI and sold the goods in the domestic market instead of bringing the consignment to customs bonded area for destruction/re-export purpose. Thus, he prayed that the appeal filed by the appellants may be dismissed.

5. Heard both sides and perused the records of the case. We have also considered the additional written submissions given in the form of paper book by learned Advocate for the appellants as well as Authorised Representatives for the Revenue.

6. On perusal of the records, it transpires that the appellants holding regular CB license No. 11/17 issued by jurisdictional Mumbai Customs authorities, had intended to transact business at Kolkata Customs and hence got themselves necessary permission to operate their business as CB at Kolkata Customs Commissionerate under Regulation 7(3) *ibid.* FSSAI authorities vide letter in File No. AO/ Customs/FSSAI-ER-2021 dated 14.01.2021 had requested the Commissioner of Customs (Port), Custom House, Kolkata to take suitable action against the importer and CB due to non-compliance of FSS Act, 2006 and Rules and Regulations made there under, in import of 'Dried peeled whole Betel Nut' by the importer-trader M/s Aakam Exim Private Limited, Chennai. On this basis, SIIB Customs, Kolkata had initiated investigation and issue show cause proceedings vide SCN No. S2-06/2021 SIB (Port) dated 28.07.2021, which culminated in issue of Order-in-Original No. KOL/CUS/ADC/PORT/Gr.I/26/2022 dated 31.03.2022 by confiscating the imported goods in B/E No.5052617 dated 25.09.2019 with redemption fine of Rs.6,00,000/- and imposed penalty of Rs.5,00,000/- each on the importer and on the appellants CB for the violations of Regulations 10(d), (e), (f), (m) and (q) of CBLR, 2018 under Section 112(a)(i) of the Customs Act, 1962. Subsequently, in terms of CBEC Circular No.09/2010-Customs dated 08.04.2010, Commissioner of Customs at Kolkata being the authority who had authorised the appellants to operate on 'C' form intimation within its jurisdiction, had informed the details of violations to the Principal Commissioner of Customs (General), Mumbai being the jurisdictional authority, from where the CB license was issued originally for the appellants, so that necessary action for suspension or revocation of CB license, could be initiated by him. As a result of

this, upon conduct of regular inquiry proceedings under Regulation 17 ibid, the impugned order dated 04.05.2023 was issued in this case.

7. In order to examine the above issues, along with the factual details submitted, and divergent stand taken by both the parties, we would like to firstly examine the facts contained in the SIIB investigation proceedings of Kolkata Customs Commissionerate and the allegations specifically framed against the appellants for having violated the CBLR *ibid* by Mumbai Customs Commissionerate.

8. The factual records indicate that the appellants had filed the Bill of Entry No.5052617 dated 25.09.2019 for home consumption at Kolkata Customs, in respect of import of 'Dried peeled whole Betel Nut' by the importer-trader M/s Aakam Exim Private Limited, Chennai. For the importer, it was their first import through the appellants at Kolkata port; though the importer is situated in Chennai, owing to the reason that their ultimate buyer M/s S.K. Enterprises, being situated in West Bengal, they had obtained the imported goods through Kolkata port. The imported cargo was initially landed at Kolkata port during September, 2019; but due to alerts for verification of country of origin/ISFTA certificate of origin, such cargo was kept under Section 49 of the Customs Act, 1962 for temporary storage. However, as more than 7 months have passed since its import, the importer had sought for early clearance from FSSAI and the samples were drawn by FSSAI on 13.03.2020 and the approved laboratory analysed the sample on 14.03.2020 enabling issue of NOC by FSSAI and the imported goods were finally cleared by Customs on 20.03.2020.

9. From the perusal of the records, we further find that the appellants have filed the Bill of Entry in respect of imported goods as per the documents given by the importer on 25.09.2019 and the Customs appraising group had assessed the said B/E with the examination order "*Pl. follow the RMS/CCR instructions. Also check and endorse COO CFT*." Accordingly, the appellants after ascertaining from the importer, who had visited FSSAI office and informed them that FSSAI had issued NOC, ensured payment of applicable customs duty on 05.03.2020 and produced documents to the Customs authorities on 06.03.2020. Upon issue of 'out pass' from Customs on

19.03.2020, the appellants cleared the imported goods from Balmer Lawrie CFS on 20.03.2020.

10. We further find that instructions issued by CBEC circular No.58/2001-Customs dated 25.10.2001 in respect of application of Prevention of Food Adulteration Act, 1954/Food Safety and Standards Act, 2006 provide for referring all food products to the PHOs/FSSAI for testing and clearance shall be allowed by Customs only after receipt of the test report. The relevant paragraph of the above CBEC circular is extracted below:

> *"2. The matter has been examined by the Board. Considering the difficulties being faced by the trade, the following decisions have been taken for clearance of food articles.*
>
> *2.1 The Customs shall undertake the following general checks in addition to testing of samples in terms of subparagraph 2.2 or 2.3 and paragraph 3 prior to clearance of food items, and if the product does not satisfy these requirements, clearance shall not be allowed:-*
>
> > *(a) The condition of the hold in which the products were transported should be checked to see whether they meet the requirements of storage, as per the nature of the product, and does not in any way cause deterioration or contamination of the products.*
> >
> > *(b) Physical/ visual appearance in terms of possible damage - whether it is swollen or bulged in appearance; and also for rodent/insect contamination or presence of filth, dirt etc. - should be checked.*
> >
> > *(c) The product should meet the labelling requirements under the Prevention of Food Adulteration Rules and the Packaged Commodities Rules. This includes ensuring that the label is written not only in any foreign language, but also in English. The details of ingredients in descending order, date of manufacture, batch no., best before date etc. are mandatory requirements. All products will also have to indicate details of best before on all food packages. (Reference Ministry of Health notification No. GSR 537(E) dated 13th June 2000)."*
>
> *2.2 All the consignments of edible/food products imported through ports, airports, ICDs, CFSs, Land Customs Stations shall be referred to PHOs for testing and clearance shall be allowed only after receipt of the test report. Pending receipt of test report, such consignments may be allowed to be stored in warehouses under section 49 of the Customs Act, 1962. If the product fails the test, the Customs authorities will ensure that the goods are re-exported out of the country by following the usual adjudication procedure or destroyed as required under the relevant rules.*

Further, the relevant provisions of the Food Safety and Standards Act, 2006 (FSS) and the general guidelines issued by FSSAI in circular No. 1-595/ FSSAI//Imports/2013 dated 10.01.2014 in implementation of FSS Act, Rules and Regulations provide for issue of No Objection Certificate (NOC), Non-issue of NOC and Non Conforming Certificate/ Report (NCC) as follows:

> *"2. Definitions.- (1) In these regulations unless the context otherwise requires,-*
>
> *(a) "Act" means the Food Safety and Standards Act, 2006 (34 of 2006);*

(b) "Authorised Officer" means a person appointed as such by the Chief Executive Officer of the Food Safety and Standards Authority of India by an order for the purpose of performing functions under section 25 of the Act;
(l) "Food Importer" means a Food Business Operator importing or desirous of importing article of food into Indian territory, who is duly licensed as Importer under the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011 made under the Act;

Chapter – II
Licensing of Food Importers

3. (1) No person shall import any article of food without an import license from the Central Licensing Authority in accordance with the provisions of the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011.
(2) For the purposes of sub-regulation (1), the Food Importer shall register himself with the Directorate General of Foreign Trade and possess valid Import-Export Code."

*"**E. Issue/ Non-issue of NOC/NCC***

29. Authorized Officers (AOs) to forward the 'system generated NOC only' to the Customs Authorities if the sample is conforming to the tested parameters. In case the food article does not conform to the tested parameters, forward the system generated non-conforming report along with laboratory test report to the Customs Authorities.

30. All stake-holders are advised to follow FSS Act, Rules/Regulations made there under, Guidelines and Advisories issued from time-to-time. To facilitate review the documents, a user ID and Password has been provided to a senior official of the Customs Department nominated by the Commissioner of Customs at the sea/airports for accessing relevant information in the FICS.

31. In case the NOC is necessarily required to be issued manually except in case of consignments covered by paras 6 to 8 above, prior approval of the FSSAI HQ is required. A copy of this approval shall be sent along with the NOC to the Customs authorities."

From the plain reading of the above legal provisions and the circular/ guidelines issued for implementation of FSS Act and the implementation guidelines, it is seen that primarily it is the importer M/s Aakam Exim Private Limited, who is responsible for compliance with the legal requirements of food safety license in import of 'Dried peeled whole Betel Nut' and is accountable for any omission and commission which had led to import of food product which is not in conformity with the tested parameters and thus such imports are in violation of the Customs Act, 1962 read with relevant Rules and Regulations. We also find that separate show cause proceedings have been initiated for the role played by the importers in the above clearance of imported goods as well as the appellants in facilitating such clearance of imported goods. However, in the findings of the said proceedings the Original authority has concluded that the appellants have failed in their obligations under Regulations 10(d), (e), (f), (m) and (q) of CBLR, for initiating action under CBLR, 2018; and on that conclusion, imposed penalty of Rs.5,00,000/- on the appellants CB, besides imposition of penalty of Rs.5,00,000/- on importer under Section 112(a)(i) of the Customs Act, 1962 vide Order-in-Original dated 31.03.2022.

11. Further, there is no possible explanation that when the CBEC instructions and FSSAI guidelines provide for the Customs authorities to check the issue of NOC by FSSAI before clearance of imported goods, how in this case, the Customs authorities at Kolkata allowed the imported goods, which is purported to have not fulfilled the requisite test parameters in terms of non conformity certificate. It is not the case of the Revenue that there was any collusion by the appellants with FSSAI or Customs authorities; or that the appellants CB or importer fabricated the NOC, particularly when such NOC/ certificate is required to be issued as 'system generated' and the manual certificates are exceptional and after obtaining permission from FSSAI HQ. In view of the above factual details, we are of the considered view that under no circumstances, particularly when the imported goods have been duly permitted by the Customs authorities for FSSAI clearance/NOC, the appellants CB could be held responsible for taking action under CBLR. Thus, we are of the view that the impugned order is not sustainable as it has ignored the above facts.

12. On the aspect of time limits prescribed under CBLR, the very first action under Regulation 17(1) ibid, is for issue of notice in writing stating the grounds on which it is proposed to revoke the license or impose penalty, which is required to be issued within 90 days from the date of receipt of intelligence/offence report from investigation authority. As the SCN was issued in this case on 28.12.2022, after having received the prohibition order dated 15.07.2022 and Order-in-Original dated 31.03.2022 in SIIB investigation, obviously this requirement of CBLR has not been fulfilled in this case. There is no reasonable explanation given for the delay in initiating action under CBLR in the impugned order. Hence on this count also, the impugned order confirming the revocation of the customs broker's license on the basis of the enquiry report against the show cause notice dated 28.12.2022 is not sustainable.

13. We further find that in respect of delay in suspension proceedings of customs broker license, the Hon'ble High Court of Bombay in the case of *Principal Commissioner of Customs (General),*

Mumbai Vs. Unison Clearing P. Ltd., reported in 2012 (361) E.L.T. 321 (BOM – HC) have elaborately discussed the issue and came to a conclusion that the only way to effectively implement the provisions in the interest of both the parties is that the reasons for delay can then be tested to derive a conclusion whether the deviation from the time line prescribed in the Regulation, is "reasonable" or 'not'. The relevant paragraph of the judgement is extracted below:

> *"15. In view of the aforesaid discussion, the time-limit contained in Regulation 20 cannot be construed to be mandatory and is held to be directory. As it is already observed above that though the time line framed in the Regulation need to be rigidly applied, fairness would demand that when such time limit is crossed, the period subsequently consumed for completing the inquiry should be justified by giving reasons and the causes on account of which the time-limit was not adhered to. This would ensure that the inquiry proceedings which are initiated are completed expeditiously, are not prolonged and some checks and balances must be ensured. One step by which the unnecessary delays can be curbed is recording of reasons for the delay or non-adherence to this time-limit by the Officer conducting the inquiry and making him accountable for not adhering to the time schedule. These reasons can then be tested to derive a conclusion whether the deviation from the time line prescribed in the Regulation, is "reasonable". This is the only way by which the provisions contained in Regulation 20 can be effectively implemented in the interest of both parties, namely, the Revenue and the Customs House Agent."*

14. From the records of the case, we find that there is definitely delay in adjudication and that for the import transaction in September 2019, the order of revocation of appellant's customs broker license has been passed on 04.05.2023. Revenue is unable to explain why there was such a long delay in taking action against appellants, when the information about confirmation of penalties for improper import through SIIB investigation was received vide Order dated 31.03.2022. There is no mention of when the offence report was received from Kolkata Customs though it is shown that based on adjudication order of SIIB investigation, prohibition order of Commissioner of Customs, Kolkata, the Mumbai Customs authorities have initiated action under CBLR, 2018. There are no reasons recorded in detail justifying the delay in passing the impugned order by the learned Principal Commissioner. It appears that the reasons having been not quoted and if such reasons exist, the same being not specified and not explained for undue delay cannot be accepted as reasonable grounds in terms of the test laid down by the Hon'ble High Court of Bombay.

15. In view of the above and on the basis of various decisions taken by the coordinate benches of the Tribunal and higher judicial forums on the adherence to time limits prescribed under CBLR, 2018, and for

the opportunity to be given for cross examination of witness whose statements were relied upon for action to be taken under CBLR, we find that there is no basis for sustaining the impugned order of the learned Principal Commissioner.

16. In order to examine the specific Regulations of CBLR, 2018 which are alleged to have been violated by the appellants, we would also like to examine these on the basis of factual matrix of the case. The relevant part of the CBLR, 2018 dealing with the obligations of the Customs Broker is extracted below:

"Regulation 10. Obligations of Customs Broker: -

A Customs Broker shall -

xxx xxx xxx xxx

(d) advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;

(e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;

(f) not withhold information contained in any order, instruction or public notice relating to clearance of cargo or baggage issued by the Customs authorities, as the case may be, from a client who is entitled to such information;

(m) discharge his duties as a Customs Broker with utmost speed and efficiency and without any delay;

(q) co-operate with the Customs authorities and shall join investigations promptly in the event of an inquiry against them or their employees;"

17. In respect of the Regulation 10(d) and 10(e), in the impugned order the Principal Commissioner had concluded that the appellants have violated the said Regulation, as they failed to bring the rejection report of FSSAI to the knowledge of Customs authorities and did not conduct due diligence and advise the importer properly. The records of the case indicate that the Non-compliance certificate/rejection report which was supposed to have generated on 17.03.2020, was communicated to the importer and the appellants by FSSAI vide their letter dated 14.01.2021 only on 14.01.2021 as attachment to the mail. The two e-mail dated 01.01.2021 and 14.01.2021 originating from Deputy Director (Eastern Region) of the FSSAI addressed to appellants and importer have been issued beyond the date of clearance of imported goods by Customs on 20.03.2020, and thus the appellants could not have either advised the importer or brought this to the knowledge of Customs. Further, when the CBEC circular and FSSAI guidelines specifically provide that the Customs authorities should check on the issue of NOC before clearance of imported goods, the responsibility for exercise of due diligence or bringing this to the

knowledge of Customs does not lie on the part of the appellants and for the same, responsibility cannot be fastened on the appellants. Thus, we find that there is no evidence to indicate any violation of Regulations 10(d) or 10(e) ibid, by the appellants.

18. We further find that in respect of Regulation 10(f), 10(m) and 10(q) ibid, there is no factual evidence to show that the appellants had withheld any information, or was there any delay or inefficiency or non-cooperation to join the investigation by the appellants. The factual records indicate that the appellants were not aware of the non-conformity certificate issued to the importer and they were informed by the importer about the NOC having been issued based on the follow-up visit of the importer to the office of FSSAI. There is no evidence to show any inefficiency or undue delay on the part of appellants in clearance of the imported goods. In fact, the B/E was filed on 25.09.2019 and it is due to inaction on the part of the Customs, the entire clearance of goods was delayed. Further, on obtaining Customs ‘out pass’ on 19.03.2020, the appellants cleared the imported goods on 20.03.2020. Thus, the allegation of violation of delay is contrary to the factual position. The appellants have duly participated in the SIIB investigation and had given voluntary statement before the Customs SIIB investigation authorities as early as 17.02.2021. On the contrary, the request of the appellants for cross-examination of Customs Appraiser Smt. Marcelina Kisku & Shri Prodyut Ghosh, Customs Examining officer (EO) who were in-charge at the Balmer Lawrie CFS, Kokata in giving clearance of imported goods on 20.03.2020 and FSSAI Officers who had issued the rejection report/ Non Conformity Certificate has not been acceded to. Thus, the show cause proceedings have not duly observed the principles of natural justice in giving reasonable opportunity to the appellants to properly place their case before the appropriate authorities. Thus, we find that there is no evidence to indicate any violation of Regulations 10(f), 10(m) or 10(q) ibid, by the appellants.

19. It is factually incorrect to state that the appellants had colluded with the importer in clearance of imported goods contrary to the FSSAI rejection certificate. Thus, we find that the conclusions arrived at by the Principal Commissioner in the impugned order is contrary to the factual position and thus it is not legally sustainable.

20. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the learned Principal Commissioner of Customs (General), Mumbai in revoking the license of the appellants, as well as in imposition of penalty against them and for forfeiture of security deposit. Therefore, by setting aside the impugned order, we allow the appeal in favour of the appellants.

(Order pronounced in open court on 20.10.2023)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha