

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 88030 of 2019

[Arising out of Order-in-OriginalNo: AIR/CUS/50/CIC/305/2011 PT-II dated 19th August 2019 and 30th September 2019 passed by the Commissioner of Customs – II, Airport Special Cargo, Mumbai.]

Aramex India Pvt Ltd
210-212 Ascot Centre, Sahar Road, Andheri East,
Mumbai – 400 099

...Appellant

versus

Commissioner of Customs- II
Airport Special Cargo, Sahar, Andheri (East)
Mumbai– 400099

...Respondent

APPEARANCE:

Shri Prakash Shah with Shri Mihir Mehta, Advocates for the appellant
Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

INTERIM ORDER NO: 10/2020
FINAL ORDER NO: A/85061/2022

DATE OF HEARING:	09/01/2020
DATE OF DECISION:	11/09/2020

PER: C J MATHEW

M/s Aramex India Pvt Ltd, an 'authorised courier' operating in
the jurisdiction of Airport Special Cargo Commissionerate, Mumbai,

had, in anticipation of the expiry of their current registration valid for two years from 20th June 2017, applied on 12th April 2019 to the competent authority for further renewal. In communication dated 30th September 2019, the Deputy Commissioner of Customs, Courier Cell, acknowledging that

‘2. In this regard, it is to inform you that the application for renewal of registration as an authorised courier was considered in terms of sub-regulation (8) of Regulation (10) the Courier Imports & Exports (Electronic Declaration and Processing) Regulations, 2010.

3. Regulation (10), sub-regulation (8) prescribes that, The Commissioner may renew the registration if the performance of the authorised courier is found to be satisfactory with reference to the absence of any complaints of misconduct including non-compliance of any of the obligations specified in Regulation 12.’

intimated that the competent authority, taking note of the several cases decided, and pending, against the applicant at Courier Terminal, Mumbai, as well as the several instances, enumerated therein, of penalties having been imposed on them under Customs Act, 1962 and the pendency of two other investigations, was of the view that

‘8. It is evident that, said courier has not discharged its obligations as prescribed in clauses (i), (iii), (iv), (v) & (x) of sub-regulation (1) of Regulation 12 as per the cases decided above, where all such decisions have become final as no appeal appears to be pending as on date.’

with the outcome of

‘11. Hence, application for renewal of registration of M/s Aramex India Pvt Ltd has not been allowed.’

2. Interestingly, this detailed missive had been preceded by communication dated 19th August 2019 which, citing regulation no. 10(8) in response to their application, informed that

‘..... it has been observed that number of cases have been booked against M/s Aramex India Pvt. Ltd and penalty was imposed on them at different judicial levels. In view of the same it appears that the authorised Courier has failed to comply with the obligations as laid down in clauses (i), (iii), (iv), (v) & (x) of sub-regulation (1) of regulation 12 of Courier Regulation 2010.

Accordingly, the request of M/s Aramex India Pvt Ltd for the renewal of registration as an authorised Courier has been rejected by the competent authority.’

Aggrieved by the rejection, M/s Aramex India Pvt Ltd is now before us.

3. From a perusal of the appeal memo, it would appear that, notwithstanding rejection of their application for renewal, their operations were not barred, even on expiry of the validity of the registration on 20th June 2019 till the original, and brief, rejection was intimated. Though the said communication did not inform the remedies available against such rejection, the appellant appears to

have preferred a representation to the Chief Commissioner of Customs, Mumbai Zone-III who, after several meetings, directed them to approach the registering authority once again and it would appear that the later, and somewhat more elaborate, communication was the consequence thereof.

4. Before considering the preliminary submissions of the Learned Authorised Representative, which merit detailed attention for no less profound a reason than the obscuring of arbitrariness with the cloak of law, we may usefully tarry awhile for an enunciation of the special laws embedded in Customs Act, 1962 and, in our opinion, the appropriate approach to be adopted in appellate proceedings. The statute itself has been enacted in furtherance of the constitutional stipulation that no levy is enforceable without authority of law. As the duties of customs are collected at the territorial frontiers, it is administratively convenient and economically practicable for other laws regulating cross-border trade to be vested for enforcement as an agency function. The wherewithal for prevention of smuggling - evasion of prohibitions and evasion of duty – attaches as a critical adjunct to the provisions for levy, assessment and recovery of duties and, with control over goods, until cleared from customs area, secured through procedural prescriptions, constitute the fundamental framework and mechanism for tax collection. The hierarchy of officers appointed for, and entrusted with, the assessment, collection

and recovery of tax, and enforcement of detriment, are answerable, continually, to statutory review and accountable, ultimately, under parliamentary oversight.

5. Special provisions for regulation of conveyances and the persons-in-charge thereof, warehouses, customs brokers, and custodians of cargo are also incorporated in the statute but, being ancillary and facilitative, are licenced by officers of customs at a level not higher than that of Principal Commissioner specified for the purpose. Unlike the transient relationship between the customs administration and importer/exporter that is specific, and limited, to a consignment tenured compact is characteristic of the relationship with these ancillaries. As these activities are, in themselves, business and profession and with the livelihood of their employees dependent on permanency of the compact, authority for monitoring good conduct and diligent performance should also vest in such officer. The operations are governed by statutory instruments notified under specific provisions of Customs Act, 1962 that delegate, to a larger or lesser extent, such empowerment. The Regulations pertaining to couriers are notified under the general power vested in Central Board of Excise & Customs (as it then was). The procedure, prescribed therein for entry into and, by periodical renewals thereon combined with deterrence of exclusion, the continued existence in the business or profession, set out limitations on the exercise of power over these

licencees. At the same time, it cannot but be acknowledged that compliance with proper conduct on the part of the ancillaries, upon which harmonious administration of tax collection rests, should not be encumbered by the straitjacketed oversight of the tax collection under Customs Act, 1962. The appellate jurisdiction has, therefore, to walk the balance between these two antipodal compulsions. Generally, we restrict ourselves to ascertainment of compliance with the procedure prescribed in the respective Regulations and of conformity with the principles of natural justice without interference in the assessment of misconduct, or appropriateness of detriment imposed, in valid proceedings. Strict adherence to this demarcation alone can ensure that the ancillaries function in public interest and without the uncertainty engendered by whimsicality, proclivity, preference, prejudice or personal agenda. That brings us to the structure of appellate jurisdiction.

6. Learned Authorised Representative submits that the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 does not envisage any supervisory intervention in decisions of the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, as registering authority and of any authority, other than Principal Chief Commissioner or Chief Commissioner of Customs, against decisions of the Principal Commissioner of Customs or Commissioner of Customs, as the case

may be, as disciplinary authority and that the present appeal challenging non-renewal of registration is not maintainable. The contention that exclusive appellate jurisdiction of Chief Commissioner against revocation, conferred by the Regulations, precludes intervention by the Tribunal, which is empowered to sit in judgment only over decisions of Principal Commissioners or Commissioners, stands negated by the decision of the Tribunal in *Bombino Express Pvt Ltd v. Commissioner of Customs, Mumbai* [2016-TIOL-3375-CESTAT-MUM] that was approved by the Hon'ble High Court of Bombay in *Principal Commissioner of Customs v. Bombino Express Pvt Ltd* [2018 (13) GSTL 52 (Bom)]. In his efforts to discountenance the applicability of that decision which endorsed recourse to the general provisions, pertaining to appeal, under section 129A of Customs Act, 1962, for approach to the Tribunal, he sought to distinguish renewals from revocation as not proceeding from exercise of adjudicatory function for which he places reliance on the decisions of the Tribunal in *Tass Clearing Services P Ltd v. Commissioner of Customs & Central Excise, Hyderabad-II* [2009 (238) ELT 671 (Tri-Bang)] and in *Poonia & Bros v. Commissioner of Customs (Preventive), Jodhpur* [2018 (363) ELT 134 (Tri-Del)] as well as that of the Hon'ble High Court of Bombay in *DHL Express (I) Pvt Ltd v. Commissioner of Customs (General), Customs Brokerage Section* [2018 (360) ELT 63 (Bom)], in *SR Sale & Co v. Commissioner of Customs (General), Mumbai* [2013 (295) ELT 653

(Bom)] and in *Commissioner of Customs (General) v. Cannon Shipping Co Pvt Ltd* [2010 (250) ELT 347 (Bom)]. Admittedly, these decisions resolved disputes arising from detriments visited on ‘customs house agents’ (as they were then designated) and not on ‘authorised couriers’; nevertheless, we intend to examine the principles, if any, derived from these that may be applicable to the resolution of jurisdiction.

7. Learned Counsel for the appellant hearkens our attention to the decision of the Tribunal in *reBombino Express Pvt Ltd* and the approval thereof by the Hon’ble High Court of Bombay referred to *supra* and the decision of the Tribunal in *Aramex India Pvt Ltd v. Commissioner of Customs (Airport), Mumbai* [2017 (357) ELT 420 (Tri-Mumbai)] challenging the revocation of the registration of the present appellant themselves. He explained that, in both these appeals, the proposition that the special law, providing for representation to Chief Commissioner, extinguished the general law for challenging detriment imposed under the special law was argued on behalf of the Commissioner of Customs without any telling effect. It was also submitted that the scope of ‘adjudicating authority’ was, upon examination by the Hon’ble High Court of Gujarat in *Commissioner of Central Excise v. Girish B Mishra* [2016 (339) ELT 67 (Guj.)], determined to be

‘7..... It is thus, clear that the compounding authority

exercises its discretionary power and decides an application filed by the appellant for compounding the offence. By no stretch of imagination, it can be stated that any such order either allowing rejecting the application for compounding is not an order passed by the Commissioner as adjudicating authority as defined under Section 2(a) of the Act. Any such order would certainly be an order passed under the Act. The words “any order a decision under the Act” used in Section 2(a) of the Central Excise Act, 1944, defining the term, “Adjudicating authority”, must take in its fold any order deciding the lis of a party and would not include merely an administrative order....’

to demarcate the boundary of an administrative order as one which does not decide upon the *lis* of a party.

8. The decisions in *re Bombino Express Pvt Ltd* and in *re Aramex India Pvt Ltd*, in which the jurisdictional exclusivity of alternative remedy was argued, have held that such representations before the Chief Commissioner of Customs cannot be legally construed as an appeal under Customs Act, 1962 for the doctrine of merger to come into play to abnegate the jurisdiction of the Tribunal which lies only against the order of Commissioner of Customs. In the present dispute, relating to non-renewal of the ‘registration’, even that argument, judicially negated, of availability of alternative remedy cannot be advanced. It surely cannot be the proposition of Learned Authorized Representative that non-renewal of registration does not decide upon the *lis* of ‘authorised courier’, even as it, admittedly, impacts the very

existence of a business and livelihood of persons, or that absolute, and unquestionable, discretion vests in the Principal Commissioner or Commissioner of Customs, as the case may be. A Regulation, birthed from a statute, cannot be claimed as having reposed absolute powers in a statutory authority. In our opinion, the absence of deliberate award of jurisdiction has aught to do with legislative intent to deny remedy but with implied existence of legal remedy.

9. From the submission of non-maintainability for which reliance is placed on the several decisions, though pertaining only to ‘customs house agents’, cited by Learned Authorised Representative, it would appear that, contrary to the compulsions of judicial discipline, customs officials are unwilling to accept that judicial pronouncement, on the applicability of general law where the special law is silent, settles the law of land till set aside by higher constitutional authority. That a similar obduracy compelled the Hon’ble High Court of Bombay to observe that

‘12..... We do not think that the Tribunal, in the facts and circumstances of the case, has acted perversely in entertaining the appeal. More so, when the attempt of Revenue was to question its jurisdiction on more than one occasion...’

in *Principal Commissioner of Customs v. Bombino Express Pvt Ltd* [2018 (13) GSTL 52 (Bom)] does not surprise us in the least.

10. In considering the decisions cited by Learned Authorised Representative, we must strike a note of caution. The appellate jurisdiction, in relation to ‘customs house agents’ (now designated as ‘customs brokers’), arises from the Regulations issued under authority of section 146 of Customs Act, 1962 which encompasses within itself every aspect, including appellate, of operation of licenses and, to the extent that the cited decisions have held that no appellate remedy outside the said Regulations are extendable to the disputes arising from those Regulations, the present claim of non-maintainability cannot find support from the decision of the Hon’ble High Court of Gujarat in *re Girish B Mishra*. In *re Tass Clearing Services P Ltd*, the permission for assumption of operation as ‘custom house agent’ was held as not constituting *lis* between two parties. The Hon’ble High Court of Bombay in *re DHL Express (I) Pvt Ltd* and relying upon the decision in *SR Sale & Co v. Commissioner of Customs (General), Mumbai [2013 (295) ELT 653 (Bom)]* to the effect that section 146 of Customs Act, 1962, a complete code in itself, had not intended the delegate of the legislature to provide for appeal in every circumstance and such circumstances do not entitle availment of the general provisions for appeal, categorically held that the distinction between licensing and administration cannot but decide on jurisdiction. In *re Poonia & Brothers*, the Tribunal adopted much the same distinction but, nevertheless, went on to approve of the non-renewal by the Commissioner of Customs solely by discarding the

plea of the appellant therein that ‘double vexation’ of suspension that was revoked subsequently and non-renewal should not be allowed to occur from the same cause of action. It would, therefore, appear that, considering the judicial acknowledgment of the special law in section 146 of Customs Act, 1962, this decision of the Tribunal is not binding precedent for non-maintainability in matters arising from operation of regulations governing courier operations.

11. The Tribunal and the Hon’ble High Court of Bombay, by the decisions *supra*, have settled the jurisdiction of the Tribunal after examining the legal issues involved. It is the field formations of the Central Board of Indirect Taxes & Customs that appear to be unwilling to accept this judicial reality. Such repeated pleas, time and again reiterated, on identical grounds does no credit to these formations who are expected to abide by the law of the land and we can be emphatic that the law of the land does not turn on the opinion of the respondent herein. Regrettably, it appears that the burden of instructing every succeeding incumbent in executive office with an exposition of the law befalls the Tribunal.

12. No parallel can be drawn with the appellate framework set out for ‘customs brokers’ which is a self-contained, comprehensive and clearly formulated special law within the scheme of Customs Act, 1962. This is but natural as the institution of ‘customs brokers’ has been in existence for long and, section 202 of the predecessor Sea

Customs Act, 1878 regulated such agencies; Parliament, with deliberate intent, carried forward that institutional scheme with additional features while commercial ‘courier’ operations lack the vintage that entitled such special legislative attention in 1962. That the executive organ of government chose to ensconce the newly emerged institution within the general power to frame regulations, instead of seeking legislative sanction for special law, carries with it the implied jurisdiction of all aspects of the general law.

13. Considering earlier discussions *ibid* on the purposiveness of regulatory framework and necessity of adherence to the limiting boundaries by the delegate authority, there can be no doubt that decisions under the statute, or subordinate legislation, cannot be orphaned without remedial recourse. The distinction between regulations, birthed from section 146 of Customs Act, 1962 and the general power to frame regulations under section 157 of Customs Act, 1962, is the specific absence of delegation in the latter to provide for preferment of appeals and disposal thereof. The prescription of representation against revocation of registration under regulation no. 13(2) of Courier Imports and Experts (Electronic Declaration and Processing) Regulations, 2010, instead of ‘appeal’, is not only an acknowledgment of that lack but also robs it of the sanctity that is accorded to appellate jurisdiction. It remains an executive remedy that cannot restrain recourse to statutory appellate remedies. The

compartmentalised legal existence that has found judicial approval, insofar as ‘customs brokers’ are concerned, does not extend to withholding the jurisdiction of the general appellate provisions from those aggrieved by enforcement of any other regulation. The restricted jurisdiction, erected upon the authority conferred on the empowered delegate under section 146 of Customs Act, 1962, cannot be claimed to extend, either by similarity or from lack of articulation, to regulations pertaining to other ancillary functions. Therefore, in the absence of delegated power to prescribe restrictions or deliberate exclusion of jurisdiction by the general law, all decisions of the registering authority, viz., Commissioner of Customs, are liable to be challenged under section 129A of Customs Act, 1962. We, therefore, do not accept the urging of Learned Authorised Representative to dismiss this appeal as non-maintainable.

14. Besides the decision of the Hon’ble High Court of Gujarat in *re Girish B Mishra* which examined the scope of definition of adjudicating authority in section 2(o) of Customs Act, 1962, it must also be stated that an empowerment under a Regulation which has the effect of depriving livelihood parented by that very ‘creator authority’ cannot be exercised in isolation of the circumstances prescribed therein. Undoubtedly, the provisions for revocation are manifestly clear about the requisite procedure including the issue of notice. However, the lack of such express prescription does not erase the

necessity of such when the outcome is a deterrent. A provision for renewal presumes that renewal will be granted except where the provision bars such outcome. This is well articulated in regulation 10 of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 by the benchmark for measurement of satisfactory performance. It was incumbent on the competent authority to place the applicant for renewal on notice of these deviation from the prescribed standards. In the absence of such, the application for renewal cannot be held to have been disposed off in accordance with the Regulations as that is the *lis* between the two.

15. Section 129A of Customs Act, 1962 confer jurisdiction to the Tribunal to hear any person argued by a decision or order passed by the Commissioner of Customs as an adjudicating authority. The issue here, therefore, is not whether the renewal or rejection of application for renewal of ‘authorization’ is in adjudication but whether there is a decision or order and whether such decision or order emanates from an adjudicating authority. That rejection of application for renewal cannot but be a decision is not in doubt. ‘Adjudicating authority’ has been defined in section 2 of Customs Act, 1962 to mean

‘(o) any authority competent to pass any order or decision under this Act.’

With the competence to decide on rejection of application for renewal emanating from regulations empowered under section 157 of Customs

Act, 1962, it is a decision under the Act is also not in doubt. Hence the distinction between renewal and revocation urged by Learned Authorised Representative will not deprive the Tribunal of resolution in the present dispute.

16. We do believe that no opprobrium, unlike that engendered by tedious narration of superfluous chronicling, attaches to a discussion of the evolution of regulatory mechanism for the ‘express delivery industry’ as it is known. Before the assent of the President of India to Finance Act, 1995 on 26th May 1995, courier imports were not differentiated from baggage in chapter 98 of First Schedule to Customs Tariff Act, 1975 and were, nearly always, effected through ‘on board couriers’ who were responsible for the packages which consisted, almost exclusively, of low-volume and high value, or sensitive, goods and documents requiring simple assessment and clearance procedure. In acknowledgement of the growing popularity of this logistic medium, exclusion from the amorphous ‘baggage’ and adoption of ‘merit’ assessment prompted the commencement of a separate regulatory framework, viz., Courier Import (Clearance) Regulations, 1995 instituting ‘authorised couriers’ for handling of customs procedures and clearances in relation to courier consignments carried by ‘on board couriers’ in aircraft. A new statutory framework, viz., Courier Import and Export (Clearance) Regulations, 1998 replaced the original, *vide* notification no. 87/98-Customs (NT) dated

9th November 1998, for, *inter alia*, accommodating exports and unaccompanied packages and enhancing the validity of registration to three year terms. The several changes, including the provisions for suspension pending enquiry and for representation to Chief Commissioner, as well as review of order of Commissioner, were elaborated in circular no. 85/98-Customs dated 13th November 1998 of Central Board of Excise & Customs. A series of amendments, some minor, including notification no. 9/2007-Cus (NT) dated 7th February 2007 to validate registrations, under regulation 10 of Courier Imports and Exports (Clearance) Regulations, 1990, for ten years from the initial approval with renewals at intervals of ten years thereafter, followed until the notification of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 which dichotomised, while substantially mirroring, manual and electronic modes of clearance of courier packages. The consequential notification no. 75/2010-Cus (NT) dated 12th August 2010 effected substantive changes in Courier Import and Export (Clearance) Regulations, 1998, particularly in the filing of courier bills of entry which was, henceforth, in the domain of persons qualified in examinations referred to in regulation no. 8 or regulation no. 19 of the Custom House Agents Licensing Regulations, 2004 in compliance with prerequisites for proxy clearance prescribed in section 146 of Customs Act, 1962. It is mystifying, at least to us, that two parallel Regulations, with inevitable cross-over by most 'authorised courier',

were found necessary especially as amendments were effected in the existing framework to align with the new. It appears that we are not alone as the second communication of non-renewal impugned before us relies upon the later of the two Regulations.

17. In accordance with the our discussions above on our emphatic disinclination to intervene in the regulation of the ancillary entities, acknowledged within Customs Act, 1962, except to ensure that the competent executive authority is guided solely by public interest, demonstrated by adherence to the limitations imposed by the Regulations and absence of taint by colourable exercise of authority, or even discretion, we do not propose to go into the acceptability of the several instances of deviation from the obligations prescribed in regulation no. 12 of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 as supportive of the decision to reject renewal of the registration. On the contrary, we propose, and solely because the second communication of rejection makes explicit reference while the first communication contains extracts without citation of its provenance, to examine the provisions pertaining to renewal of registrations in regulation no. 10 of the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 which prescribes that

‘(8) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, on

application made before the expiry of the validity of the registration under sub-regulation (2) or sub-regulation (5), the revenue the registration for a period of ten years from the date of expiration of the original registration or the last renewal of such registration, as the case may be, if the performance of the Authorised Courier is found to be satisfactory with reference to the absence of any complaints of misconduct including non-compliance of any of the obligations specified in regulation 12.

(9) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, for reasons to be recorded in writing, by order, review the registration granted under sub-regulation (1) or sub-regulation (3) before the expiry of 10 years.'

18. The procedure, in regulation no. 10 of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010, for disposing off the application for registration is sequentially ordered after the provision for making such application, in regulation no.7, for submission of evidence of financial viability, in regulation no. 8, and for making enquiries, in regulation no. 9, which need not detain us, as we note from records that, on the notification of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010, the appellant was already registered under the existing Courier Imports and Exports (Clearance) Regulations, 1998 and, therefore, governed by regulation no. 10(3), requiring compliance with regulation no. 8, for applicability of regulation no. 10(5). On juxtaposing the two Regulations, we surmise that the later instrument

is intended to control ‘authorised couriers’ desiring to operate in the electronic environment and that registrants under the earlier instrument, intended for the existing manual environment, are not required to seek fresh registration but, by conforming to just one of the conditions prescribed in regulation no. 8 of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010, obtain registration for ten years.

19. The process culminating in the communications of non-renewal of the registration of the appellant commenced with their application dated 8th April 2019 and, seeking renewal for a period of ten years, with effect from 21 June 2019, in accordance with regulation no. 10 (1), (2) and (3) of Courier Imports and Exports (Clearance) Regulations, 1998 read with Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010, enclosed the applications prescribed as Form A in the former and Form I in the latter. Once again, juxtaposing the two Regulations, and, on this occasion, only the provisions pertaining to grant of registration and renewal, we observe that the later instrument contains six additional sub-clauses of which three pertain to acknowledgement of the registration under the earlier Regulation while the other three, pertaining to disqualification for having been convicted by a court of law or pendency of criminal proceedings, entitlement of the registrant to transact business at other ‘customs airports’ and review of

registrations at any time prior to expiry of the validity of ten years, are applicable to new and existing registrants. From this, and the apparent cause of rejection of renewal, citing only the later Regulation, we are unable to unravel the extent of detriment and if, despite the lack of such a rejection under the former Regulation, the appellant is deprived of registration as ‘authorised courier’ by implication. Simply put, our question is whether non-response to an application for renewal suffices to erase the registration especially as the last registration of the appellant was allowed to subsist even after expiry till the rejection was communicated. Doubtlessly, neither of the Regulations specify that the registrant is required to be informed of the failure of application for renewal; nevertheless, it inheres in the exercise of discretion that such communication is mandated. The defect in the impugned communication is a glaring lapse.

20. After the renewal, effective from 1st November 2002 for three years, and a stretch of short-term renewals till October 2009, the biennial renewal thereafter, valid upto October 2011, was followed by annual renewals for the next two years. The last, biennial, and valid, renewal from 21st June 2017, was, on expiry, not renewed for reasons communicated in the two missives impugned before us. Learned Counsel submits that the Commissioner of Customs had, based on those instances of imposition of penalty in the past as well as the investigations pending currently and unwarrantedly so, concluded that

the appellant was not fit to be retained as ‘authorised courier’ even though those factors did not hinder its continued existence thus far. He informs that the appellant is a constituent of a transnational conglomerate, operating in India since 1996, with an annual turnover of over ₹ 300 crores and an employee strength of over a thousand. With the information that, during the last decade, over one million consignments, inbound and outbound, had been handled by them annually with close to five million during the immediate preceding three years, he points out that the statistical insignificance of the amount involved in, as well as the number of, the errant consignments was not appreciated by the Commissioner of Customs leading to disproportionately harsh consequence. He places reliance on the decisions of the Tribunal in *S Mahaveerchand v. Collector of Central Excise, Bangalore* [1988 (35) ELT 592 (Tribunal)], in *G Subramaniam v. Collector of Central Excise* [1989 (41) ELT 255 (Tribunal)] and in *Jyothy Jewellery v. Collector of Central Excise, Cochin* [1988 (34) ELT 682 (Tribunal)] to sustain this submission.

21. Even if we were not to be impressed by the scale of operations as portrayed for us by Learned Counsel, the nature of ‘courier’ business cannot be ignored. They are not cross-border traders and, having undertaken custodianship of packages, that are sensitive to delay, for transfer from sender to receiver, are the sole visible intermediaries to either as well as to border agencies. As the catalyst

for ‘place utility’ of management theory, the descriptive dullness of which has been glamorised in modern marketing discourse as ‘logistics’ provider, they are likely to be as cognizant of the transacted contents as the master of a vessel or the commander of a flight. As the custodian of ‘cargo in transit’ and contracted, directly or vicariously, by the consignor, they, normally, do not have a commercial relationship with the consignee and the statutorily imposed assignation as agency of the addressee, a fictional forging devised for disassociating the assessment mechanism, concerned only with the receiver, from regulatory burden, does not create privity of contract. Consequential detriment, wrought by this statutory fiction, may, more often than not, go undisputed in circumstances of fiscal unviability which cannot be presumed to be evidence of complicity. Though the decisions cited by Learned Counsel pertains to the archived, and antiquated, Gold Control (Licensing of Dealers) Rules, 1969, we may usefully be guided by the observation of the Tribunal, in *Collector of Customs (Preventive), Bombay v. Manoharlal Ghanshyamdass Jewellers* [1988 (12) ETR 308], that

‘41... To carry on any business is a fundamental right conferred on a citizen under Article 19 (1) (i) (g) of the Constitution. The renewal of license prevents the licensee from carrying on the business. Therefore, for trivial breaches of contraventions of the provisions of the Gold (Control) Act or the Rules, the licensing authority should not refuse to renew the license even if the breaches or the contraventions

were ultimately upheld by the Appellate Tribunal in appeal. The refusal to renew the license should be confined to serious and persistent contraventions.'

and, having been similarly acknowledged as of assistance to the Tribunal for resolving the dispute in *re G Subramaniam*, we commend this as the touchstone for disposal of such applications by competent authorities.

22. We would be failing our responsibility, as appellate authority, in overlooking two further aspects of the communications impugned before us. As pointed out by Learned Counsel, the Commissioner of Customs appears to have cast unfavourable light on instances of penalty imposed on the appellant over a period of time that precedes the subject of the issue before him, viz., extension of validity of a license that was renewed two years prior to the impugned application. The registration had been continuously renewed despite the pendency, or outcome thereof, of those very proceedings and we find no justification for the incumbent Commissioner of Customs to be influenced by incidents that his predecessors in office did not consider to be relevant. On the contrary, the implied moralising is not consistent with executive functioning in a polity governed by rule of law. Supplanting of rule of law by rule of a person is anathema and we need not indulge in speculation when the predecessors have, instinctively or deliberately, chosen to subordinate themselves to the

sentiments articulated by the Tribunal in *re Manoharlal Ghanshyamdass Jewellers*. We are also constrained to take note of

‘9. The Competent Authority observed that the behaviour of this courier has not mended and the current set of cases relating to smuggling of prohibited narcotics and submission of false invoices to evidence value and multiple invoices for the same consignments show that the performance of the courier is far from satisfactory.’

in the second communication of the Commissioner of Customs which, in our view, is arrogation of authority that does not devolve statutorily upon that office. It is not within the assignment of the Commissioner of Customs to adjudge culpability even as the alleged offence is, admittedly, pending for investigation. Nor can the statutory power of denying access to livelihood be ordination for patronising reformative transformation that is more suited to the pulpit and confession box in a house of worship. These are insinuations of personal values which are not in conformity with consistency, equity and equal protection of laws that are said to characterize discharge of duties of public office.

23. With that discountenancing of the repugnant, it remains to be seen if the conclusion that

‘10. The performance of this authorised courier is not found to be satisfactory as there are confirmed cases of misconduct as described above and so also non-compliance of the obligations specified in Regulation 12 as narrated above.’

in the second communication impugned before us sufficed to reject the application for renewal of registration as ‘authorised courier’ under the authority of

‘(8) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, on application made before the expiry of the validity of the registration under sub-regulation (2) or sub-regulation (5), renew the registration for a period of ten years from the date of expiration of the original registration or the last renewal of such registration, as the case may be, if the performance of the Authorised Courier is found to be satisfactory with reference to the absence of any complaints of misconduct including non-compliance of any of the obligations specified in Regulation 12.’

24. This is an exercise undertaken on the urging by Learned Authorised Representative that the decision in *re Poonia & Brothers v. Commissioner of Customs (Preventive), Jodhpur [2018 (363) ELT 134 (Tri-Del)]* reinforces the discretion, independent of other action that may be taken against ‘authorised courier’, vested in the Commissioner of Customs for renewal of registration. There, the upholding of non-renewal of the license of ‘customs broker’ was found on the circumstances of facts being distinguishable from that in the two decisions on behalf of the appellant therein. Hence, the decision in *re Poonia & Brothers* is not a precedent for resolution of the present appeal. Nevertheless, we examine the scope of regulation no. 10(8) of Courier Imports and Exports (Electronic Declaration and

Processing) Regulations, 2010 which, not coincidentally, corresponds to regulation no. 10(3) of Courier Imports and Exports (Clearance) Regulations, 1998.

25. The later Regulation concerns itself with two categories of registrations: those seeking the status for the first time and approved for initial validity of two years or functioning under the earlier, and extant, Regulations, who having , in accordance with regulation no. 8 of the later Regulations, evidenced the prescribed financial viability and furnished the undertaking, are accorded validity for ten years. Both are eligible for renewal, under regulation no. 10(8) of the later Regulations, if applied for before expiry of the validity and performance has been satisfactory. It is on a plain reading of the provision, and from the deployment of the expression '*may*' therein, that the unfettered discretion to dispose of application for renewal by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, is urged by Learned Authorised Representative. This assumption militates against the discharge of public responsibility by public authority as any delegate of statutory power is mandated to exercise its authority only in accordance with law and, to the extent that the law is silent, in accordance with principles of natural justice. The expression '*may*' is, thus, not intended to confer authority without accountability contrasting with '*shall*' but in contrast with the expression '*can*' denoting the sensory capability of

the public authority as a human being. As two prescriptions are necessary pre-requisites for approval, and every approval is to be presumed as having fulfilled both, the expression '*may*' should be read as '*may not*' if either, or both, are not. Impliedly, approval does not warrant the justification that denial does.

26. Failure to apply for renewal within the prescribed limit, being an issue of fact and an option available to 'authorised courier', erases the registration. However, the second prescription pertaining to '*satisfactory performance*' is an adjudgement on the part of the Commissioner of Customs and, therefore, mandates evidence. We also insert a note of caution that '*satisfactory performance*' is not of limitless latitude as the scope of this expression has been qualified by the deployment of '*with reference to*' and '*absence of complaints of misconduct including non-compliance of any of the obligations*' implying that '*satisfactory performance*' is not to be determined by any other benchmark. As the '*obligations*' are enumerated within the Regulations, non-compliance thereof, which is one of the two elements of reference, is, standing on its own, easily comprehended. However, the absence of any definition for 'complaint of misconduct', severally and in unison, and insertion of the expression 'including' before '*non-compliance of any of the obligations*' points to certain restrictions that are of deliberate intent.

27. The application for renewal is not the sole opportunity for

surgical excision of the unfit and the unsatisfactory. Regulation no. 8(9) of the later Regulations enables the competent authority to review the registration at any time during its validity and it is reasonable to presume that such review should have a culmination which, in the event of dissatisfaction, must lead to detriment in accordance with regulation no. 13 of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010. The detriment of suspension, and revocation, is a permissible consequence of failure to comply with conditions of bond, failure to comply with the Regulations or misconduct which renders the ‘authorised courier’ unfit to transact any business in the airport and is subject to the procedure laid down in regulation no. 13A of the Regulations. With the statutory empowerment to revoke on grounds of ‘*misconduct*’, established in accordance with the prescribed procedure during the validity of the registration, an identical justification for refusal of application for renewal of registration appears to be at cross-purposes. Succumbing to the temptation to hold that revocation and non-renewal may flow from such misconduct would confer judicial approval to bypassing of the stringency prescribed for revocation during validity to permit non-renewal for the same reason, albeit, upon expiry of the validity. Such a course of action of indirect detriment, not being in public interest, cannot have been the intent of the Regulations. Neither would it be an equitable exercise of authority insofar as the livelihood and right to business of the ‘authorised courier’ and right to livelihood

of the employees are concerned. That these two are not overlapping instruments, to be availed of at the convenience of the competent authority, is reinforced by the qualification of '*misconduct*' with the expression '*complaints of*'; in the circumstances of two mutually exclusive circumstances, the imperative of compliance with the procedure laid down in law and '*misconduct*' being only one of the three justifications for revocation without the other two being grounds for non-renewal, the deployment of the phrase '*complaints of*' to complete the context would lead to the conclusion that this is neither legislative superfluity nor legislative emphasis. On the contrary, we see it as a limitation of the circumstances in which '*renewal*' can be denied.

28. '*Complaint*', by its very nature, implies an inability to remedy the perceived wrong except through intervention of the authority vested with the power to remedy. The law enforced by the competent authority enables it to act on alleged irregularities or breaches, whether of conditions of bond, of prescribed obligations or misconduct and investigation undertaken by customs authorities are not '*complaints*.' Hence, incorporation of the expression to qualify '*misconduct*' is intended to restrict the scope of detriment only to '*complaints*' received from customers. Even such of these complaints that can be acted upon are required to be taken to its logical conclusion of revocation by the competent authority in public interest.

This, then, distinguishes the operability of the option to refuse renewal, under regulation no. 10(8) of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010, specifically on the existence of '*complaints of misconduct*' and not proven '*misconduct*' warranting revocation. As to the exemplification of '*misconduct*', we are no nearer to a solution than that which we began with. In any case, that may not be of much relevance as the denial of renewal has not been based on '*misconduct*' but on the second element of the justifiable cause of action, viz., '*non-compliance of obligation*', in regulation no. 10(8) of the Regulations. From regulation no. 13 which enumerates '*misconduct*' and '*failure to comply with obligation*' as independent cause of action, it is apparent that these are intended to be mutually exclusive and the appending of '*non-compliance of obligations*' to '*complaints of misconduct*' with '*including*' to conjunct the two in regulation no. 10(8), is intended to expand the scope of '*complaints of*' to '*non-compliance of obligations*' for the limited purpose of ascertaining entitlement for renewal of registration. The instances cited by the competent authority are not '*complaints of misconduct including non-compliance of obligations*' and, in the absence of record to indicate existence of any, let alone credible, complaints, the denial of renewal of registration is colourable exercise of authority.

29. The last issue, though, by no means, any less significant than

the preceding ones that we were required to address, is the lack of consistency in the duration for which renewals were effected. The existence of the appellant, as 'authorised courier', stretches back in time without let or hindrance to renewals which, under the Regulations as it evolved, were prescribed at annual intervals in the original Regulations of 1995, at triennial intervals with substituting Regulations of 1998 as well as under the parallel Regulations of 2000 till it was altered to decennial intervals by notification no. 9/2007-Cus (NT) dated 7th February 2007 to amend the regulation no. 10 therein. Nonetheless, even as their existing registration, absorbed within the ambit of the parallel Courier Import and Export (Electronic Declaration and Processing) Regulations, 2010, upon application for renewal, was accorded revalidation without fail, as per record, since 2002 but, not unlike a seesaw, for varying intervals that never ever exceeded three years and, that too, on only one occasion from 1st November 2000. On perusal of the Regulations, we find no provision, either in the triennial, or in the decennial, periodicity of renewal, that confers discretion to curtail the prescribed validity or any peculiar circumstances of compliance with transitional conditions permitting resort to shorter durations. Even the latest renewal, effective from 21st June 2017, has been limited to two years. We are surprised that such patent deviation from the letter of the law has gone unnoticed, unchecked and unquestioned on the several occasions of renewals granted under regulation no. 10 of either of the Regulations. In the

absence of discretion to renew validity for less than the prescribed tenures, the legality of the impugned proceedings for renewal is, of itself, in doubt. The last renewal makes no reference to the period of validity of the registration immediately preceding but it is informed that registration, valid for one year, was granted on 30th April 2013 owing to which, even though, under the Regulations, it required renewal only on 29th April 2023 (a few years hence), the appellant was compelled to seek the ‘discretionary patronage’ of the registering authority by application of 31st January 1994. Not only was this denied, implying its apparent lapse thereof on 29th April 2014, but proceedings, initiated by notice of 3rd March 2016, culminated in order dated 6th June 2016 for revocation of an ‘apparently non-existent’ registration. Unless the registering authority had, by now, acknowledged the legal validity of the period of renewal, there can be no worse example of exercise in superfluity. No less bizarre is the grant of a registration, thereafter, on 20th June 2017 with validity of two years and the non-renewal of which is the *lis* before us.

30. Before we evaluate this strange sequence of events, we must observe that the patent irregularity in which the registering authority, holding office as Commissioner of Customs, has been complicit, does not concern the appellate jurisdiction. We are concerned enough to disclaim any acknowledgement of those several breaches as having our seal of approval or the mantle of regularity merely because we

dispose off the dispute on the latest registration of 21st June 2017 which, though by the dictates of law should have been valid till 20th June 2027, was refused continuance by order of 19th August 2019 without resort to procedure for revocation which, alone, can legally extinguish registration during its validity. Considering the factual matrix laid out before us, we can only speculate that the curtailed validity, under regulation 10(2) of Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010 accorded to a fresh application, had been pressed into service by the Commissioner of Customs. Such registration is a disposal of an application under regulation no. 7 of the said Regulations that is subject to scrutiny prescribed by regulation no. 9 thereof. It is patently not in public interest to grant fresh registration under regulation no. 10 of the said Regulations to an applicant whose registration was revoked under procedure laid down by law. To borrow, and to paraphrase, from one among the most quoted lines of the Bard of Avon speaking through Marcellus,

‘something is rotten in the state of’

31. We need not speculate further as the decision of the Tribunal in *re Aramex India Pvt Ltd*, arising from revoking of the registration immediately preceding the one that was denied renewal is before us. The decision of the Commissioner of Customs, impugned before the Tribunal in that appeal, was set aside with the specific direction for

restoration of registration. It would appear that the order of the Tribunal was not implemented and, instead, a fresh registration under regulation 10(2) of Courier Import and Export (Electronic Declaration and Processing) Regulations, 2010 was issued. The appellant, therein and herein, was allowed to continue business but, not from the rendering of justice through appellate remedy, by patronage of the Commissioner of Customs. This is reprehensible as, in the normal course, application for fresh registration of debarred courier would have been rejected in limine solely by reason of the circumstances in which the registration was revoked. The 'backdoor' registration would have been justified by the erasure of misconduct implicit in the order of the Tribunal which is patently in error as the Tribunal retained the penalty while restoring the licence on the merit of the pleadings therein. In the order of restoration, cognizant, as the Tribunal is presumed to have been, of the details of the registration and the aborting of the renewal process by the revocation proceedings, there can be no importation, or regularization, of breach of the law on the part of the registering authority to limit the registration therein to the unauthorized curtailment of the registration of 30th April 2013 to one year. An authority may decide wrongly but there is a presumption that no illegality taints such order save to the extent of being held so by higher authority. The restoration ordered by the Tribunal clothes the registration with full legality and, in its restored status, is stripped of terms and conditions in the 'registration' that are not compliant with

the Regulations. By an appellate order, sanctified by law, that restored registration stood validated by law, if not in the certificate of renewal, till the expiry of ten years on 29th April 2023 unless revoked earlier in accordance with procedure established by law. The restored registration, being valid on 19th August 2019 and even now, renders the application of 12th April 2019 to be *non est* and the denial of renewal to be void.

32. It is apparent that the findings of the Tribunal and the restoration thereof rankled but, rather than face the consequences of indulging in outright defiance of judicial direction, insinuated fresh registration to forestall, at least for the moment, scrutiny of the Tribunal over the implementation. Had any impediments to orderly restoration been the motive, and not infantile petulance, the Commissioner of Customs should have sought clarification from the Tribunal. It was not public interest, but private pique, that guided the issuance of fresh registration. The inherent contradiction in assuming that the order, erasing the past, enabled protection against violation of regulatory mandate to subject fresh applications to scrutiny while unwilling to be subordinated to the direction in that order does not appear to have been considered. No surprise can be evinced that, in these circumstances of rampant chaos and arbitrariness that appears to prevail in administration of couriers, the appellant preferred pragmatism, and optimism about the future, than antagonize the

administration by resort to miscellaneous applications before the Tribunal. None of this redeems the blatant defiance and perverse implementation of the order of the Tribunal by the incumbent in office then.

33. The indecorous ingenuity, eloquently demonstrated by the failure to restore the registration and, in effecting fresh registration with effect from 21st June 2017, could, in the present opportunity for renewal, have been redeemed by proper appreciation of the events leading to the application. The continued indecorousness is apparent in the ability, and willingness, to recall anecdotal evidence of past penalties but yet unable to see the ‘mote in the eye’ that the irregular registration was. These attempts at by-passing judicial determination, by ostensible, and immediate, compliance for extinction of registration in the impending future, in which the incumbents, then and now, are complicit is neither a measure of their genius nor cause for celebration in a credible, and reliable, servant of the law. And it has lowered itself further by the unprecedented attempt to have the hearing, even after it was concluded by us, reopened through a miscellaneous application which, though claiming to place additional facts for justifying non-renewal, was, probably, intended to muddy the waters even further to preclude an incisive examination of the perpetuated wrongdoing. We refrain from harsher, though deserving, admonition or venturing to inflict monetary detriment.

34. Before according closure to this appeal, we express our hope that this is an exceptional occurrence in the monitorial supervision of 'authorised couriers' but from the several facets of perverse application of the law observed by us *supra*, we would be surprised if it were. We, therefore, advise the Chief Commissioner of Customs, with jurisdiction over the courier administration, to take steps for ascertainment of the extent to which the legal provisions are being defiantly flouted and to implement appropriate corrections so that rule of law prevails and the consistency expected from a public authority is not diluted at the cost of the Republic.

35. That the jurisdiction of the Tribunal to hear appeals of an aggrieved 'authorized courier', governed by the Regulations notified under the general power to frame regulations in section 157 of Customs Act, 1962, stems from recourse to general law in Customs Act, 1962 and that the representation, envisaged in the Regulations, does not substitute for appeal as the general empowerment to frame Regulations does not extend to establishing appellate jurisdiction unlike the empowerment under section 146 of Customs Act, 1962 delegated to the Regulation framing authority by statutory enactment has been upheld by the Hon'ble High Court of Bombay in relation to revocation of registrations. The principles thus enunciated, viz., that special law, such as section 146 of Customs Act, 1962, is not controlled by an provision of the general law except by adoption in

the offspring instrument to the extent permitted by the special law, that section 157 of Customs Act, 1962 is a component of the general law bound by all the machinery provisions of the statute none of which cannot be deemed to have been excluded by lack of specific provision in the offspring instrument and that executive remedies do not supplant the statutory remedies, will thus apply to all grievances arising from exercise of powers under the general law and its offspring instruments.

36. We find the impugned order to be flawed for its silence on the eligibility for renewal of registration under Courier Imports and Exports (Clearance) Regulations, 2008, for being in violation of principles of natural justice by not affording an opportunity for the ‘authorised courier’ to defend itself on the grounds upon which renewal was refused and demonstrative of lack of application of mind for being influenced by of a few instances of penalty that pale into insignificance beside the volume handled by them. We also find colourable exercise of power in reliance on anecdotal evidence pertaining to previous periods of validity that were, then, not found to suffice for denial of application, for preferring to be influenced by a few cases of imposition of penalties and pending investigations instead of anecdotal evidence of complaints of misconduct prescribed for ascertaining eligibility for renewal and in subjecting the licence to procedure of renewal prematurely. We also find the competent

authority to be complicit in direct defiance of the order of the Tribunal that had restored the licence to validity sanctioned by law. Above all else, to the exclusion of any of our findings, judicial institutions exist for rendering justice and to intervene when that is patently breached; Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982 envisages that it may

'41.make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice.'

37. The appeal is, therefore, allowed and, in exercise of rule 41 of the Customs Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982, direct the registration is restored for a period of ten years from the date on which the registration, that was restored by the Tribunal in order dated 29th December 2016, came into effect.

(Order pronounced in the open court on 11/09/2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/as*

(C J Mathew)
Member (Technical)

Per: Dr. Suvendu Kumar Pati

38. I have the occasion to go through the draft order prepared by my Learned Brother touching upon each issue involved in this appeal

but I have a slightly different opinion on the maintainability of this appeal in this Tribunal.

39. To start with, in the appeal memo appellant has made inconsistent pleadings. First, it is not sure as to which forum would be appropriate for him for redressal of its grievances concerning refusal of the Commissioner of Cargo Cell, Mumbai to renew his licence after the same was expired on 23rd June 2017 on the ground that there were 5 cases instituted against the appellant out of which penalties were confirmed even at the CESTAT level in 3 cases under Section 117, under Section 158(2)(ii) and under Section 114(i) of the Customs Act, 1962 respectively and penalties were also confirmed by the adjudicating authority, in respect of other two cases in which allegations ranging from smuggling precious metal and narcotics were substantiated. In para-11 of the appeal memo, appellant has pleaded that against non-renewal of licence to operate as an authorized courier, it had filed representation before the Chief Commissioner of Customs, Mumbai Zone-III that would substantiate that it had invoked the jurisdiction of the Chief Commissioner under Regulation 13 of Courier Import and Export Regulation, 2010, that is meant for initiating a proceeding against revocation/suspension of courier licence, without furnishing proof thereof and the outcome of such petition. On the contrary, it had twisted the entire thing to argue that they met the Chief Commissioner in person to protest against passing

of a non-speaking order and not referring to the details of cases instituted against the appellant, as reveals from the written submission filed during the course of hearing of this appeal for which apparently the Deputy Commissioner had to pass another order on 30th September 2009 subsequent to the first order communicated on 19th August 2009,. Interestingly enough, appellant had not sought for renewal of its licence but only prayed for setting aside the order passed by the Deputy Commissioner not renewing the licence on the ground that it is violative of Article 14 of the Constitution of India that endangered appellant and its employees right to livelihood for which, to my consider view, a writ petition is an appropriate remedy.

40. From the 5 case laws submitted by the Learned Authorised Representative, as discussed *supra*, it is crystal clear that rejection by the licencing authority to renew Customs Brokers licence is not appealable under Section 129(1)(a) of the Customs Act, 1962. It is needless to mention here that Customs Brokers Licencing Regulations and Courier Imports and Exports Regulations are drafted in similar terms and both enumerated from Section 146 of the Customs Act, 1962 that authorized the Board to exercise its power under Section 157 of the Customs Act, 1962 to govern such licencing procedures. An indirect reference also be drawn to the fact, as discussed by my Learned Brother at para 13 of this order, that courier imports were not differentiated from baggage in Chapter 98 of the first schedule to

Customs Tariff Act, 1965 before Finance Act, 1995 received the assent of the President of India on 26th May 1995 and going by Section 129A, it is abundantly clear that no appeals shall lie to the Appellate Tribunal and Appellate Tribunal shall not have jurisdiction to decide any appeal concerning goods imported and exported as baggage for which an inference can be made to the non-inclusion of an appeal procedure against renewal/refusal of licence under Courier Import and Export Regulation, 2010. I am therefore, of the firm opinion that CESTAT is not the appropriate forum for seeking relief against the order of the Deputy Commissioner of Customs refusing renewal of courier licence to the appellant.

41. It is equally necessary to touch upon the point that appellant had not placed on record or sought any relief basing on the outcome of its previously decided Appeal except annexing photo copy of the order of the CESTAT, Mumbai passed in appeal No. C/86300/2016 on 29th December 2016 to the appeal memo allowing the appeal filed against revocation of courier registration of the present appellant. Since no relief is sought by the appellant on the basis of the said order passed by the CESTAT, Mumbai that would have vested certain rights which appellants did not prefer to enjoy not even by filing a petition therein for implementation of orders, I cannot concur with the findings of my Learned Brother that going by the said order appellant would have a valid registration up to 29th December 2026 and extend

the same to the appellant, which could at best be upto 29th April, 2022 being normal 10 years tenure against last renewal dated 30.04.2012.

42. Barring the dispute concerning our authority and jurisdiction to deal with the issue under dispute and the maximum period of renewal as discussed above, I have no hesitation to go with my learned brother in respect of the other issues dealt by him, if jurisdiction issue is settled by a Larger Bench.

43. In view of my observations as discussed above, I find it is a fit case which is required to be dismissed as not maintainable in its present form.

(Order pronounced in the open court on __/__/2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

sanjay

44. In view of difference of opinion between Member (Technical) and Member (Judicial) on the findings pertaining to maintainability of appeals against non-renewal of registration of 'authorized courier' before the Tribunal and the direction, by taking cognizance of the earlier order of the Tribunal, for implementation thereof, while concurring on others, Registry is directed to place the matter before

the Hon'ble President, in accordance with section 129C(5) of Customs Act, 1962, for resolution of the following points of difference:

POINTS OF DIFFERENCE

- i) Whether the conclusion of Member (Judicial), in paragraph 40, that it is the order of Deputy Commissioner that is impugned

OR

that the order impugned order is that of the Commissioner of Customs, the authority competent under the Regulations, though communicated by the Deputy Commissioner of Customs as concluded by Member (Technical)

is the correct appreciation of facts?

- ii) Whether, if as held by Member (Judicial) the impugned order is that of the Deputy Commissioner of Customs, the non-maintainability should have been restricted to appellate jurisdiction of Commissioner of Customs (Appeals)

OR

the premise of Member (Technical) that the order is that of the Commissioner suffice to preclude the jurisdiction of Commissioner of Customs (Appeals)

is the correct conclusion on facts?

- iii) Whether the conclusion of the Member (Judicial), in paragraph 40, that the Courier Imports and Exports (Clearance) Regulations, 1998 are also enumerated from section 146 of Customs Act, 1962 that authorised the Central Board of Excise & Customs to issue regulation for governing customs brokers, as held by Member (Judicial)

OR

that the Courier Imports and Exports (Clearance) Regulations, 1998 are not derived from section 146 of Customs Act, 1962, which empowers the Central Board of Excise and Customs specifically within its provision to frame appropriate regulations for ‘customs broker’, but under section 157 of Customs Act, 1962 conferring general power to frame regulations, as held by Member (Technical)

is the correct appreciation of facts?

- iv) Whether, in the light of appellate remedies, from the departmental level to the Hon’ble Supreme Court, enacted as chapter XV in Customs Act, 1962 and, in particular, the stipulations prescribed in section 129A(6) of Customs Act, 1962, the mandatory ousting of jurisdiction by first *proviso* to

section 129A(1) of Customs Act, 1962 and the specific circumstances of discretion enumerated in second *proviso* therein,

the Tribunal cannot, in any other circumstance, deny admittance of appeals as held by Member (Technical)

OR

the Tribunal is empowered to deny admittance of appeal in other circumstances, including non-maintainability, as held by Member (Judicial);

- v) Whether, in the light of section 129B(1) of Customs Act, 1962 that limits outcome of appeals before the Tribunal to confirming, modifying or annulling of the order or decision appealed against,

non-maintainability can be raised by respondents to appeal and accepted as disposing of the appeal, with or without going into merits, as held by Member (Judicial)

OR

non-maintainability, even if raised, is, unless in breach of the jurisdiction ousted specifically in the statute, not relevant to

disposal of the appeal on merits as held by Member (Technical);

- vi) Whether, in the light of exceptions carved out by the Hon'ble Supreme Court in *Seth Chand Ratan v. Pandit Durga Prasad* [2003 5 SCC 399], and reiterated by the Hon'ble Supreme Court in *Rajkumar Shivhare v. Assistant Director, Directorate of Enforcement & Anr* [(2010) 4 SCC 772] despite appellate hierarchy enacted by statute

the issue of maintainability should be decided by the Tribunal to reject an appeal without considering the merits as held by Member (Judicial)

OR

the appeal can be decided on merits, with maintainability to be raised only through the prerogative writ jurisdiction in the Constitution, bypassing the issue of maintainability as held by Member (Technical);

- vii) Whether, in the light of the decision of the Hon'ble High Court of Bombay in *Commissioner of Customs (Import) v. SS Offshore Pvt Ltd* [2018 (361) ELT 51 (Bom.)] on the scope of 'adjudicating authority' in section 129A(1) of Customs Act, 1962 for maintainability of appeals before the Tribunal

there is no decision or order of Commissioner under Customs Act, 1962, except those ousted specifically by section 129A, that is not appealable to the Tribunal by the person aggrieved, as held by Member (Technical)

OR

there are decisions or orders of Commissioner of Customs under the Regulations, such as renewal of registration of 'authorised courier', that are not maintainable before the Tribunal, as held by Member (Judicial);

- viii) Whether, in the light of provision in Regulation empowering non-renewal of registration of 'authorised courier' only in the specific circumstances therein and which has the effect of permanent disbarment from practice of trade

there is no scope for *lis* between the courier and the competent authority in the disposal of application for renewal as held by Member (Judicial)

OR

whether the *lis* of wrongful disposal of the application suffices for the order of non-renewal to bring the dispute within section 129A of Customs Act, 1962 as held by Member (Technical);

- ix) Whether, in the light of the decision of the Tribunal in *Aramex India Pvt Ltd v. Commissioner of Customs (Airport), Mumbai [2017 (357) ELT 420 (Tri-Mumbai)]*, pertaining to revocation of registration the same authorized courier, following the order of Hon'ble High Court of Bombay in *Principal Commissioner of Customs v. Bombino Express Pvt Ltd [2018 (13) GSTL 52 (Bom)]* endorsing the jurisdiction of the Tribunal despite the absence of explicit appellate provision in the Regulations which is notified under general power conferred by Customs Act, 1962 to frame regulations,

the decision to deny renewal, having the same effect as revocation, is subject to appellate oversight of the Tribunal just as revocation is, as held by Member (Technical)

OR

the lack of prescription similar to procedure for revocation in deciding on application for renewal excludes such appellate oversight as held by Member (Judicial)

and

- x) Whether, upon the Tribunal being made aware, in the course of submissions in the proceedings, that the earlier order restoring the very same registration had not been fully implemented and

that full implementation would have obviated the present dispute,

the Tribunal is competent, in exercise of rule 41 of Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982, to give effect to that order and render the impugned proceedings *non est* as held by Member (Technical)

OR

the Tribunal is required to restrict itself, in these circumstances also, only to the relief sought by the aggrieved party as held by Member (Judicial).;

(Order pronounced in the open court on __/__/2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

45. If Oliver Wendell Holmes – not the honourable judge but the venerable physician – had lived in post-Freudian times, he may well have written of *id* being all that stands betwixt *dissent* and the *dissident*. The orthodoxy of dissent in any system inheres from the contribution of dissonance to decision-making. Among the three organs of government, nowhere is it more manifest than in the judicial branch; in the executive, it is subsumed within hierarchical subordination and the legislative branch relegates it to a statistic overwhelmed by numerical superiority.

46. The reasons are only too apparent. Articulated individual opinion, elaborating upon law and precedent and logically culminating in a decision, is the epitome of distilled mature thought that resonates strikingly with a process that is, almost entirely, conducted in the full glare of public exposure. Dissent in judicial outcomes serves to enrich forensic resources, may induce legislative re-design and, above all, assures citizenry that law is not mechanically applied; oftentimes, the tedium of consensus is relieved by episodic occurrence of dissent.

47. The urge for fairness in the blending of contrarian submissions within weave of judgements feeds upon the assurance of rules and conventions of engagement having been adhered to. Though proceedings in the courtroom may warrant little of it beyond the decorum appropriate in the adversarial representatives at the bar, more is expected of the *interregnum* between conclusion of hearing and pronouncement of the verdict particularly when consensus plays truant in the even balance of

opinions necessitating intervention of another for deciding reference on points of divergence to culminate in majority opinion.

48. Just as the initiation with the lead yielded the dissent, it is the proposition of reference that yields deliberated consensus of its adequacy, or lack, in enabling a valid judgement. The very absence of proprietorial inclination for the lead opinion that afforded a fresh outlook in the dissent must necessarily preclude the proposition of reference as accompaniment of the dissent. Dissent having had the privilege of cognizance of the lead opinion, proposition of reference in continuation of the dissent denies the converse privilege. Exhaustiveness of the reference does little to impede resolution of the difference while abridgement may well be inimical to the fairness of a conclusion. A contest on this brings no honour.

49. As the adequacy of the proposition of reference is not for me to judge, any suggested addition was certain to be incorporated. However, in proposing an alternative, and briefer, reference – of content and in expression – for the resolving mechanism, my colleague on the bench, Hon'ble Member (Judicial), appears unwilling to concede the prerogative for proposition of reference and oppugns the wisdom of enumerating questions of both fact and law that appeared to have deflected consensus.

50. In normal times, plentiful opportunity for personal discussions does offer the potential for persuasion. In the constraining milieu of the pandemic, frailties of age and health, as compromisers of infection, are an impediment to such constructive engagement. Time flies too even as the

hope for imminence of normalcy fades. It has also been recently brought to my notice that Hon'ble Member (Judicial) has preferred to place his opinion and his proposition of reference in the public domain. It is, thus, beyond retraction and would lie unattended, with justice thereby delayed, unless proceeded with in accordance with the statutory prescription for resolution of difference of opinion.

51. It is in that bind and with no purpose served in awaiting of opportunity to jointly deliberate on the adequacy and sufficiency of the reference proposed by me that Registry is directed to place the material records before the Hon'ble President for further proceedings envisaged in section 129C (5) of Customs Act, 1962.

23rd July 2021

(C J Mathew)
Member (Technical)

Date of Hearing : 07.10.2021
Date of Pronouncement : 13.10.2021

Order Per : Sulekha Beevi, Member (Judicial)

I have perused the order passed by both the Members and also heard the parties in detail on 07.10.2021. It would be better to give a simple brief narration of the facts and also to notice relevant provisions in order to equip myself to resolve the difference of opinion between the two members.

2. The appellant is a company registered as an authorized courier under the Courier Imports and Exports (Clearance) Regulations 1998 (hereinafter referred to as Courier Regulations) and also Courier Imports and Exports (Electronic Declaration and Processing) Regulations 2010 (hereinafter referred to as Regulations 2010) and has registrations at Mumbai and other places. Their registration / license was renewed on adhoc basis for a period of one year / two years upto 30.04.2014. Their registration got initially suspended and subsequently revoked on 01.05.2014. Against such revocation of license, the appellant approached the Tribunal and vide order dated 29.12.2016, the Tribunal set aside the revocation. Pursuant to the order of the Tribunal, the courier licence was renewed for a period of 2 years from 21.06.2017 to 20.06.2019.

3. As the above license was due to expire in June 2019, the appellant made an application for renewal on 08.04.2019. They furnished documents on 6th May and 4th June 2019. On 18.06.2019, they once again made request to renew the courier licence. The impugned order was passed on 19.08.2019 wherein the application for renewal of the

licence was rejected observing that a number of cases have been booked against the appellants and that penalty was imposed. The appellant made representations before the Chief Commissioner of Customs. A further order dt. 30.09.2019 was issued giving clarification of the earlier order so as to specify the cases in respect of which proceedings are either pending against the appellant or cases in which penalty has been imposed on the appellant. Being aggrieved by the order dated 19.08.2019 and clarificatory order dated 30.09.2019 the appellant has preferred the present appeal before the Tribunal.

4. On perusal of the order of Member (Technical) as well as the Member (Judicial), I find that there is concurrence of both the Members on the issue on merits that the registration / license has to be renewed. The difference of opinion is on technicalities only. Although several points of difference from (i) to (x) have been recorded and also pages 45-51 have been recorded thereof, the crux of the difference of opinion is firstly as to whether the appeal is maintainable before the Tribunal and secondly, whether the invocation of Rule 41 of CESTAT Procedure Rules, 1982 so as to restore the licence for a period of 10 years with effect from the earlier Tribunal order dated 29.12.2016 is legally correct or otherwise. Para-42 of the order recorded by the Member (Judicial) is clear in these aspects.

5. I first address the difference of opinion with regard to the issue whether the appeal is maintainable before the Tribunal. There are two limbs to this difference of opinion recorded by my brother Member (Judicial). Firstly, that as there is no provision in the Regulations to file an appeal against the orders rejecting the request for renewal of license, the

appeal is not maintainable. Secondly, that the impugned order having been passed by the Deputy Commissioner, the appeal if any would lie only before Commissioner (Appeals) and not before the Tribunal. I would like to take up both these points together.

6. The preamble of the Regulations 2010 was adverted to and emphasized by both sides and the same is noticed is as under:

**COURIER IMPORTS AND EXPORTS (ELECTRONIC DECLARATION AND PROCESSING)
REGULATIONS, 2010**

[Notification No.36/2010. (N.T), dated 5-5-2010 as amended]

“In exercise of the powers conferred by section 157 read with section 84 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby makes the following regulations, namely :-

REGULATION 1. Short title and commencement. - (1) these regulations may be called the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010.

(2) They shall come into force on the date of their publication in the Official Gazette.”

7. The Regulations 2010 provides for registration of an ‘authorized courier’. The relevant provisions are noticed below :-

“REGULATION 7. Application for registration of Authorised Courier. -

(1) Every person intending to operate as an Authorised Courier shall make an application in the Form-I to the Principal Commissioner of Customs or Commissioner of Customs, as the case may be having jurisdiction over the Customs airport where the goods are to be imported or exported, for registration in this behalf.

(2) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be may dispose of the application under sub-regulation (1) within forty five days of the receipt of the application.

REGULATION 8. Conditions to be fulfilled by the applicant. - (1) The person applying for registration as an Authorised Courier shall disclose to the satisfaction of the Principal Commissioner of Customs or Commissioner of Customs, as the case may be that he is financially viable and in support thereof he shall produce to the said Principal Commissioner of Customs or Commissioner of Customs, as the case may be a certificate issued by a scheduled bank or such other proof acceptable to the Principal Commissioner of Customs or Commissioner of Customs, as the case may be evidencing possession of assets of a value not less than twenty five lakh rupees.

(2) The electronic declaration for clearance of imported or export goods shall be

made by the persons who has passed the examination referred to in regulation 8 or regulation 19 of the Customs Brokers licensing Regulations, 2013 :

Provided that a transition period upto 31st December, 2011 shall be allowed for fulfilment of the condition mentioned in sub-regulation (2) by an Authorised Courier in so far as it relates to examination referred to in regulation 8 of the Customs Brokers licensing Regulations, 2013.

(3) The applicant shall undertake to comply with the provisions and abide by all the provisions of the Act and rules, regulations, notifications and orders issued thereunder.

REGULATION 9. Scrutiny of application. - On receipt of application for registration under regulation 7, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may make enquiries for verification of the particulars set out in the application and also such other enquiries as the Principal Commissioner of Customs or Commissioner of Customs, as the case may be may deem necessary for such registration including enquiries about the identity, *bona fides* and reputation of the applicant.

REGULATION 10. Registration. - (1) If on scrutiny of the application filed by a person under regulation 7, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be is satisfied that the applicant fulfils the requirements of the registration, the said applicant may be registered as an Authorised Courier.

(2) The registration granted under sub-regulation (1) shall be valid for an initial period of two years, but may be renewed from time to time, in accordance with the procedure provided in sub-regulation 8.

(3) An Authorised Courier who is already registered under Courier Imports and Exports (Clearance) Regulations, 1998 on or before the date of coming into force of these regulations in a Customs airport, shall be considered as an Authorised Courier registered for the purpose of these regulations only on compliance of the conditions stipulated in regulation 8.

(4) The Authorised Courier referred to in sub-regulation (3) shall comply with the conditions within a period which shall not exceed a period of three months :

Provided that the Principal Commissioner of Customs or Commissioner of Customs, as the case may be may extend the said period which shall not exceed a period of nine months :

Provided further that nothing contained in this sub-regulation shall apply in respect of condition prescribed under sub-regulation (2) of regulation 8.

(5) The registration granted under sub-regulation (3) shall be valid for a period of ten years.

(6) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be may, if he finds that the applicant has been convicted in any court of law, or any criminal proceedings are pending before any court of law against the applicant, reject an application filed for registration of Authorised Courier.

(7) The Authorised Courier, who is registered under sub-regulation (1) or sub-regulation (3), shall transact business in other Customs airports within the country subject to an intimation, as specified in Form - J, to the Principal Commissioner of Customs or Commissioner of Customs, as the case may be having Jurisdiction over the Customs airport where he intends to transact business.

(8) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be may, on application made before the expiry of the validity of the registration under sub-regulation (2) or sub-regulation (5), renew the registration for a period of ten years from the date of expiration of the original registration or the last renewal of such registration, as the case may be, if the performance of the Authorised Courier is found to be satisfactory with reference to the absence of any complaints of misconduct including non-compliance of any of the obligations specified in regulation 12.

(9) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be may, for reasons to be recorded in writing, by order, review the registration granted under sub-regulation (1) or sub-regulation (3) before the expiry of the ten years”.

8. Regulation 13 provides for suspension or revocation of registration of authorized courier and Regulation 13A provides for the procedure to be adopted for revoking the registration. Though these regulations are not relevant for the issue before me, sub-section (1) of these sections are reproduced as under :

“REGULATION 13. Suspension or revocation of registration of authorised courier. - (1) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be may revoke the registration of an Authorised Courier and also pass an order for forfeiture of security on any of the following grounds namely :-

- (a) failure of the Authorised Courier to comply with any of the conditions of the bond executed by him under regulation 11;
- (b) failure of the Authorised Courier to comply with any of the provisions of these regulations;
- (c) misconduct on the part of Authorised Courier whether within the jurisdiction of the said Principal Commissioner or Commissioner or anywhere else, which in the opinion of the Principal Commissioner or Commissioner renders him unfit to transact any business in the Customs airport :

Provided that, in case the Principal Commissioner of Customs or Commissioner of Customs, as the case may be considers that any of such grounds against an Authorised courier shall not be established *prima facie* without an inquiry in the matter, he may conduct an inquiry to determine the ground and in the meanwhile pending the completion of such inquiry, may suspend the registration of the Authorised Courier”

“REGULATION 13A. Procedure for revoking registration under regulation 13. - (1) The Principal Commissioner of Customs or Commissioner of Customs, as the case may be shall issue a notice in writing to the Authorised Courier stating the grounds on which it is proposed to revoke the registration and requiring the said Authorised Courier to submit, within such time as may be specified in the notice, not being less than forty-five days, to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him, a written statement of defence and also to specify in the said statement whether the Authorised Courier desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be.”

9. The impugned order dated 19.08.2019 reads as under :

‘F.No. AIR/CUS/50/CIC/305/2011 PT-II

Date : 19.08.2019

To
The Manager
M/s Aramex India Pvt. Ltd.,
821, Solitaire Corporate Park,
Andheri Ghatkopar Link Road,
Chakala, Andheri (East), Mumbai 400 093

Gentlemen,

Sub : Renewal of Courier Authorisation License – Reg.

Please refer to your application dated 12.04.2019 for renewal of License for authorised Courier in Mumbai and subsequent letters on the above mentioned subject.

As per regulation 10, sub-regulation 08 *“The Commissioner of Customs may, an application made before the expiry of the validity of the registration under sub-regulation (2) or sub-regulation (5), renew the registration for a period of ten years from the date of expiration of the original registration or the last renewal of such registration, as the case may be, if the performance of the Authorised Courier is found to be satisfactory with reference to the absence of any complaints of misconduct including non-compliance of any of the obligations specified in Regulation 12.”*

From the available records it has been observed that number of cases have been booked against M/s Aramex India Pvt. Ltd. and penalty was imposed on them at different judicial levels. In view of the same, it appears that the authorized Courier has failed to comply with the obligations as laid down in clause (i), (iii), (iv), (v) & (x) of sub-regulation (1) regulation 12 of Courier Regulation 2010.

Accordingly, the request of M/s.Aramex India Pvt. Ltd. for the renewal of registration as an authorized courier has been rejected by the **competent authority**.

Yours faithfully,

Sd/-
Dy. Commissioner of Customs,
Courier Cell, Mumbai-III''

[emphasis supplied]

The Appellant

10. The Learned Counsel Shri Prakash Shah, appeared for the appellant and submitted that the impugned order though signed by the Deputy Commissioner of Customs is an order by the Principal Commissioner of Customs and it is only communicated through the Deputy Commissioner. He adverted to para-40 of the order recorded by Member (Judicial) wherein the view is expressed that appeal is not maintainable before the Tribunal in terms of Section 129 (1) (a) of the Customs Act, 1962; that it is also opined in the said para that the Tribunal does not have jurisdiction in respect of subject matter as the issue is in the nature of courier akin to baggage as per Chapter 98 of the First Schedule to the Customs Tariff Act, 1975. In the last sentence of the said para, Member (Judicial) has held that CESTAT is not an appropriate forum for seeking relief against the order of the Deputy Commissioner refusing renewal of courier license

to the appellant. Ld. Counsel adverted to Section 129A of the Customs Act, 1962 which reads as under:

“Appeals to the Appellate Tribunal. SECTION 129A. — (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

- (a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;
- (b) an order passed by the Commissioner (Appeals) under section 128A;
- (c) an order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;
- (d) an order passed by the Board or the Principal Commissioner of Customs or Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day :

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

- (a) any goods imported or exported as baggage;
- (b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;
- (c) payment of drawback as provided in Chapter X, and the rules made thereunder :

As per sub-section (1) of Section 129A, any person aggrieved by any of the orders specified in clauses (a) to (d) may prefer an appeal to the Appellate Tribunal. The impugned order is a decision passed by the Commissioner of Customs as an adjudicating authority. Though in the form of a letter, it is a decision communicated to the appellant informing the appellant that their request for renewal of courier license has been rejected. The order having been passed as an adjudicating authority, the appellant has rightly preferred appeal before the Tribunal. The definition of “adjudicating authority” was referred to by the Ld. Counsel which is noticed as hereunder :

“adjudicating authority” means any authority competent to pass any order or decision under this Act, but does not include the Board, Commissioner (Appeals) or Appellate Tribunal;

11. As per the above definition, any authority who is competent to pass any order or decision under the Act is an ‘adjudicating authority’. Referring to the preamble of the Regulations 2010 [Courier Regulations], the Learned Counsel submitted that these regulations have been made in exercise of the powers conferred under Section 157 read with Section 84 of the Customs Act, 1962. Section 157, Section 158 and Section 159 read as under :

“SECTION 157. General power to make regulations. — Without prejudice to any power to make regulations contained elsewhere in (1) this Act, the Board may make regulations consistent with this Act and the rules, generally to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :-

(a) the form and manner to deliver or present of a bill of entry, shipping bill, bill of export, arrival manifest or import manifest, import report, departure manifest or export manifest, export report, bill of transshipment, declaration for transshipment boat note and bill of coastal goods;

(ai) the manner of export of goods, relinquishment of title to the goods and abandoning them to customs and destruction or rendering of goods commercially valueless in the presence of the proper officer under clause (d) of sub-section (1) of section 26A;

(a ii) the form and manner of making application for refund of duty under sub-section (2) of section 26A;

(aa) the form and manner in which an application for refund shall be made under section 27;

(ab) the form, the particulars, the manner and the time of delivering the passenger and crew manifest for arrival and departure and passenger name record information and the penalty for delay in delivering such information under sections 30A and 41A;

(b) the conditions subject to which the transshipment of all or any goods under sub-section (3) of section 54, the transportation of all or any goods under section 56 and the removal of warehoused goods from one warehouse to another under section 67, may be allowed without payment of duty;

(c) the conditions subject to which any manufacturing process or other operations may be carried on in a warehouse under section 65.

(d) the time and manner of finalisation of provisional assessment;

(e) the manner of conducting pre-notice consultation;

- (f) the circumstances under which, and the manner in which, supplementary notice may be issued;
- (g) the form and manner in which an application for advance ruling or appeal shall be made, and the procedure for the Authority, under Chapter VB;
- (h) the manner of clearance or removal of imported or export goods;
- (i) the documents to be furnished in relation to imported goods;
- (j) the conditions, restrictions and the manner of making deposits in electronic cash ledger, the utilisation and refund therefrom and the manner of maintaining such ledger;
- (ja) the manner of maintaining electronic duty credit ledger, making payment from such ledger, transfer of duty credit from ledger of one person to the ledger of another and the conditions, restrictions and time limit relating thereto;
- (k) the manner of conducting audit;
- (ka) the manner of authentication and the time limit for such authentication, the document or information to be furnished and the manner of submitting such document or information and the time limit for such submission, the form and the manner of furnishing alternative means of identification and the time limit for furnishing such identification, person or class of persons to be exempted and conditions subject to which suspension may be made, under Chapter XIIB;
- (l) the goods for controlled delivery and the manner thereof;
- (m) the measures and separate procedure or documentation for a class of importers or exporters or categories of goods or on the basis of the modes of transport of goods.”

“SECTION 158. Provisions with respect to rules and regulations. All rules and regulations made under this Act shall be — (1) published in the Official Gazette.

(2) Any rule or regulation which the Central Government or the Board is empowered to make under this Act may provide -

- (i) for the levy of fees in respect of applications, amendment of documents, furnishing of duplicates of documents, issue of certificates, and supply of statistics, and for rendering of any services by officers of customs under this Act;
- (ii) that any person who contravenes any provision of a rule or regulation or abets such contravention or who fails to comply with any provision of a rule or regulation with which it was his duty to comply, shall be liable to a penalty which may extend to two lakh rupees.”

“SECTION 159. Rules, certain notifications and orders to be laid before Parliament. — Every rule or regulation made under this Act, every notification issued under sections 11, 11B, 11H, 11-I, 11K, 11N, 14, 25, 28A, 43, 66, 69, 70,

74, 75, 76, 98, 98A, 101 and 123 and every order made under sub-section (2) of section 25, other than an order relating to goods of strategic, secret, individual or personal nature, shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or notification or order, or both Houses agree that the rule or regulation should not be made or notification or order should not be issued or made, the rule or regulation or notification or order shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification or order”.

“SECTION 84. Regulations regarding goods imported or to be exported by post or courier.— The Board may make regulations providing for -

- (a) the form and manner in which an entry may be made in respect of goods imported or to be exported by post or courier;
- (b) the examination, assessment to duty, and clearance of goods imported or to be exported by post or courier;
- (c) the transit or transhipment of goods imported by post or courier, from one customs station to another or to a place outside India.”

12. The Ld. Counsel argued that as seen from the above provisions, the regulations are made consistent with the Act and Rules and are also required to be laid before each House of the Parliament. The Courier Regulations 2010 have been made in exercise of powers conferred under Section 157 and Section 84 of the Customs Act. Even though in the Courier Regulations 2010 there is no specific regulation to file appeal against an order of rejection for renewal of registration of courier license, the impugned order being a decision passed by the Commissioner of Customs as an ‘adjudicating authority’ is appealable before the Tribunal under Section 129A (1) (a) of the Customs Act, 1962. He also submitted that though the issue is with respect to renewal of license of courier agency, it has no connection or relevancy with

provisions of baggage in the Customs Act and therefore the Tribunal's jurisdiction is not ousted with regard to subject matter of the appeal.

13. Similarly, Section 146 of the Customs Act, provides for framing Custom Broker Regulations. As per Section 146, such Regulations are to be framed for filing appeal against order of suspension and revocation. When Section 157 does not provide for framing regulations even for filing appeal even against suspension and revocation, appeals can be filed before the Tribunal for the reason that it is a decision passed by the authority as an adjudicating authority under the Customs Act, 1962. The Courier Regulations and Customs Broker Regulations are independent of each other. That when Section 146 of the Customs Act, 1962 restricts the filing of appeals only against suspension and revocation, there is no such restriction under Section 157 of the Act, *ibid*. That therefore the appeal provisions as stated in Chapter XV of the Act (from Section 128 to 133C) would apply to matters pertaining to Courier Regulations. That any order or decision issued under Courier Regulations, is appealable before the Tribunal as these are decisions passed under the Customs Act, 1962.

14. A look at Section 146 is worthwhile and noticed as under :

“SECTION 146. Licence for customs brokers.— (1) No person shall carry on business as a customs broker relating to the entry or departure of a conveyance or the import or export of goods at any customs station unless such person holds a licence granted in this behalf in accordance with the regulations.

(2) The Board may make regulations for the purpose of carrying out the provisions of this section and, in particular, such regulations may provide for —

(a) the authority by which a licence may be granted under this section and the period of validity of such licence;

- (b) the form of the licence and the fees payable therefor;
- (c) the qualifications of persons who may apply for a licence and the qualifications of persons to be employed by a licensee to assist him in his work as a customs broker;
- (d) the manner of conducting the examination;
- (e) the restrictions and conditions (including the furnishing of security by the licensee) subject to which a licence may be granted;
- (f) the circumstances in which a licence may be suspended or revoked; and
- (g) the appeals, if any, against an order of suspension or revocation of a licence, and the period within which such appeal may be filed.”**

15. The Ld. Counsel for appellant explained that the CHA/Customs Brokers Licensing Regulations are made in exercise of the powers conferred under sub-section (2) of Section 146 of the Customs Act, 1962. Clause (g) of sub-section (2) of Section 146 specifically provides for making regulations in respect of appeals against an order of suspension or revocation of Customs Broker License. Accordingly, the Customs Broker Licensing Regulations 2018 has been issued wherein Regulation 19 provides for filing an appeal before Tribunal by a customs broker who is aggrieved by an order of suspending or revoking the license. When the remedy of appeal is not expressly stated in Section 157 to make Regulation for filing an appeal, then the aggrieved person can resort to provisions of the Customs Act, under Section 129A (1) (a) to file appeal before the Tribunal for the simple reason that the Regulations are framed by deriving powers under Section 157 read with Section 84 of the Customs Act, 1962.

16. Learned Counsel argued that even though remedy of appeal is not provided against an order of suspension or revocation in the Courier Regulations 2010, such order being an order / decision passed by adjudicating authority, the Courts have repeatedly held that appeal is maintainable before Tribunal under Section 129A (1) (a). He referred to the following decisions to support his argument. The case of *Principal Commissioner of Customs Vs Bombino Express Pvt. Ltd.* - 2018 (13) G.S.T.L 52 (Bom.) was relied by the appellant to argue that in paras-10 to 12 of the said decision, the Hon'ble High Court held that eventually everything is traceable to the Customs Act, 1962 and once the said Act provides for an appeal and when that appeal would lie to the Tribunal against the OIO, then, merely because a representation or remedy of making appeal is provided by the Regulations, does not displace the appellate authority of the Tribunal. The relevant paras of the said decision are reproduced as under :

“10. We do not think that we should entertain such an argument by the Revenue and at this belated stage. The Tribunal has found that throughout, the matter was contested on merits. Further, the issue of maintainability was also dealt with at an earlier stage. The argument was once the Chief Commissioner acted as an appellate authority, he would scrutinise the legality and validity of the order-in-original, then, all the more against this order, no appeal would lie.

11. We have found from a reading of the regulations that they are traceable to the power conferred in the authorities vide the Customs Act, 1962 and several notifications issued thereunder. The regulations apply for assessment and clearance of goods carried by the authorised courier on incoming or outgoing flights or any other mode of transport. Thus, these are the clearances through courier mode. For that purpose, the authorised courier can be engaged and the term “authorised courier” is defined in Regulation 3 clause (a) of the regulations. Word “documents” is also defined in Regulation 3(b). Then, by Regulation 4, packing of goods to be imported or exported by courier is dealt with. Clearance of import goods is permissible if the procedure set out in Regulation 5 is followed. Similar is the position with regard to export goods and they can be cleared by Regulation 6. As far as registration of authorised courier is concerned, that aspect is dealt with by Regulation 8. There is scrutiny of applications by the Commissioner of

Customs in terms of Regulation 9 and then, the registration is granted in exercise of powers of registration under Regulation 10. There are compliances to be made and particularly of execution of bond and furnishing of security. By Regulation 12, it is stated that a courier, who is registered under Regulation 10 or had intimated in form 'A' to the Commissioner of Customs having jurisdiction over the Customs Station from where he has to transact the business, shall furnish a bond and security as specified in Regulation 11 for each Customs Station. The obligation of authorised courier is set out in Regulation 13 and then, there is a power of de-registration. That power is conferred in the Commissioner of Customs. By sub-regulation (2) of Regulation 14, the aggrieved authorised courier and whose authorisation is revoked or he is de-registered, may, if aggrieved by the order of the Commissioner, represent to the Chief Commissioner of Customs in writing against such order of the competent authority and thereafter it is permissible for the Chief Commissioner to dispose of the representation.

12. The Tribunal found that even this mechanism is in place. Eventually, everything is traceable to the Customs Act, 1962 and once the said Act provides for an appeal and that appeal would lie to this Tribunal against the order-in-original, then, merely because a representation or a remedy of making a representation is provided by the Regulations, that does not displace the appellate authority of the Tribunal. We do not think that the Tribunal, in the facts and circumstances of the case, has acted perversely in entertaining the appeal. More so, when the attempt of the Revenue was to question its jurisdiction on more than one occasion. Additionally, we have found that the Tribunal, if approached and it is regularly done in the cases of the Customs House Authorisation Regulations by the aggrieved agent, then, against the orders of the Tribunal restoring the licences or authorisation, the Revenue has brought appeals under the Customs Act, 1962 before this Court. Therefore, one opportunity being provided in the scheme of the law to the aggrieved courier does not cause serious prejudice to the Revenue. More so, when it can always approach this Court against the orders of the Tribunal."

17. The decision in the case of *Commr. Of Cus.(II), Airport Special Cargo Vs Lynx Express Pvt. Ltd.* - 2020 (372) ELT 696 (Bom.) was referred to by the Ld.Counsel to argue that after relying upon the judgment in the case of *Bombino Express Pvt. Ltd.* (supra) it was observed by the Hon'ble High Court of Bombay that the Division Bench held that what is provided in Regulation 14(2) is a representation and ultimately the remedy of appeal is available under the Customs Act, 1962 and rejection or otherwise of such representation will not take away the jurisdiction of the Tribunal to entertain the appeal arising from Order-in-Original.

The relevant part of the decision of Hon'ble High Court of Bombay is reproduced as under :

“The Division Bench held that what is provided in the Regulation 14(2) is a representation and ultimately the remedy of appeal is available under the Customs Act, 1962 and rejection or otherwise of such representation will not take away the jurisdiction of the Tribunal to entertain the appeal from Order-in-Original. In the present case the appellant has withdrawn the appeal but if there is no merger and what is decided is only a representation, then withdrawal of the appeal will also fall within the ambit of the view taken by this Court in *Principal Commissioner of Customs v. Bombino Express Pvt. Ltd.* In view of the dicta of the Court in the case of *Principal Commissioner of Customs v. Bombino Express Pvt. Ltd.*, we cannot accept the argument advanced by the appellant that the Tribunal had no jurisdiction to entertain the appeal.”

18. The decision in the case of *Commissioner of Customs (II) Vs Poonam Courier Pvt. Ltd.*- 2021 (376) ELT 60 (Bom.) was relied by Learned Counsel. The relevant part is as under :

“18. We may also examine this issue from another angle. Remedy of appeal to the CESTAT is provided under Section 129A of the Customs Act i.e., by the parent enactment. This right of appeal is a substantive right of an aggrieved person. It is not a matter of procedure but is a vested right conferred by the statute. Being a statutory right, it can only be circumscribed by the conditions of the statute granting it. On the other hand, an additional remedy of making representation to the higher authority is provided under Regulation 14(2) of the Regulations, which as we have noted is a subordinate legislation. Such a remedy cannot supplant or curtail the remedy of appeal granted by the empowering statute; at best it can be construed as a supplementary remedy. As has been provided in Section 157, the Regulations have to be read in a manner which is consistent with the provisions of the Customs Act and not in derogation of it. Therefore, for non-availing of the additional or supplementary remedy provided by the subordinate legislation, an aggrieved person cannot be non-suited in appeal, a statutory remedy provided by the parent enactment.”

19. It is also submitted that in appellant's own case, wherein the department revoked the license of the appellant by an earlier order dated 01.05.2014, the appellant preferred an appeal before the Tribunal and final order was passed dated 29.12.2016 wherein the revocation was set aside as reported in 2017 (357) ELT 420 (Tri-Mum.)

20. The decision in the case of *G. Subramanian Vs Collector of C.Ex.* - 1989 (41) ELT 255 (Tribunal) was relied upon by Ld. Counsel to argue that in the case of non-renewal of Gold dealer's license under the erstwhile Gold Control Act read with Gold Control (Licensing of Dealers) Rules 1969, the appeal before the Tribunal against rejection of application for renewal of license was held to be maintainable.

21. He submitted that similar view was taken in the case of rejection of renewal of gold control dealers' license in the case of *S. Mahaveerchand Vs CCE, Bangalore* - 1988 (38) ELT 592 (Tribunal).

22. The decision of Hon'ble Apex Court in the case of *Raj Kumar Shivhare Vs Asst. Director of Enforcement and others* - 2010 SCC Online SC 459 was relied to argue that the word "any" should be understood as "all".

23. The decision of the Apex Court in the case of *Commissioner of Income Tax Vs Ashok Engineering Co. and others* - 1992 (1) TMI 4-SUPREME COURT was relied by Learned Counsel to argue that right to appeal has to be construed in a liberal manner.

24. The decision in the case of *Commissioner of Customs Vs S.S. Offshore Pvt. Ltd.* - 2018 (361) ELT 51 (Bom.) was referred to argue that a letter allowing provisional release of seized goods is an order / decision passed by the officer as an adjudicating authority and is appealable before the Tribunal.

25. Ld. Counsel submitted that in the decision of *CCE Vs Girish B.Mishra* - 2016 (339) ELT 67 (Guj.) the issue was whether rejecting the application for compounding is an appealable order. It was held that such order is not an administrative order.

26. The second point of difference of opinion is with regard to the order passed by Member (Technical) directing that registration is to be restored for a period of 10 years from the date on which registration was restored by the Tribunal vide Final Order dated 29.12.2016. It is argued by the Learned Counsel that Rule 41 of CESTAT (Procedure) Rules, 1982 provides for inherent powers of the Tribunal; that this provision allows the Tribunal to give effect to its orders. Since both the Members having concurred on merits that the rejection of application for renewal is not legal and proper, consequently, the appellant is entitled to get registration of license restored from its earlier date 29.12.2016. Learned counsel stressed that appellant has sought a relief in the appeal memo that their license may be renewed as per law; that Learned Member (Judicial) has correctly invoked Rule 41 of CESTAT (Procedure) Rules, 1982 to extend the benefit of restoring the registration / license.

Revenue

27. Shri Karan Prithviraj Adik, Senior Panel Counsel, assisted by Ms. Maya Mazumdar, Advocate and Shri Ramesh Kumar, AC (AR) appeared for Revenue. Learned Senior Panel Counsel argued for Revenue and supported the findings recorded by the Member (Judicial) with regard to

the points of difference referred to in respect of maintainability of appeal as well as invocation of Rule 41 of CESTAT (Procedure) Rules, 1982.

28. He referred to the provisions contained in Courier Regulations 2010 and submitted that said Regulations do not provide remedy of preferring an appeal before the Tribunal. The right to appeal is a creature of a statute and it is not an inherent right. When the Regulation does not provide for a remedy of appeal against order of rejection of renewal of license/registration, the appeal filed by the appellant is not maintainable. That they have to take recourse of filing suit or by way of filing writ petition before the High Court.

29. The Ld. Special Panel Counsel explained that in Customs Broker Regulations, 2018 it is expressly provided that an appeal can be preferred before the Tribunal under Section 129A (1) of the Customs Act, 1962. There is no provision in Courier Regulations 2010 for filing of appeal and then the appellant cannot take recourse to Section 129A (1) to file the appeal before the Tribunal. He referred to the preamble of the Courier Regulations, 2010 and submitted that these regulations are made in exercise of powers conferred by section 157 read with section 84 of the Customs Act. Neither does Section 157 nor Section 84 lay down that regulation can be framed for filing of appeal. When the Act or the Regulations does not provide a remedy of filing an appeal against the order of rejection of application to renew the courier license, the appeal is not maintainable. The Learned Senior Panel Counsel stressed that revocation of license and rejection of application for renewal of license are entirely different. In the present case there is only rejection of application for renewal of licence. He submitted that the decisions relied

by the learned counsel for appellant are instances where appeals were filed against revocation of license, and therefore not applicable to the facts of this case.

30. It is submitted by him that under Section 146 of the Customs Act, sub-section (2) (g) provides that regulations can be framed for filing an appeal against the orders passed for suspension and revocation of Customs Broker license. However, Section 157 does not provide any such provision for filing an appeal.

31. It is submitted by the learned authorized representative for Revenue that impugned order is not an order passed by the Deputy Commissioner as an adjudicating authority. The decision passed under Courier Regulation 10 for granting registration / rejecting the registration / granting renewal of registration / rejecting the request for renewal of registration is an administrative decision and not a *quasi-judicial* decision. No appeal can be filed against an administrative decision before the Tribunal. The order is only an administrative reasoned order and not an order passed by *quasi-judicial* authority. There is no process of adjudication in issuing registration or rejecting an application of registration. It is purely an administrative decision communicated to the appellant and totally different in nature from an order of suspension / revocation of license.

32. Learned Authorized Representative drew support from the decision in the case of *Intercontinental Cargo Services Vs CC New Delhi* - 2012 (279) ELT 524 (Tri.-LB). In that case, the question considered was rejection of application for renewal of licence of CHA. The Tribunal held

that renewal is continuation of licence which has been granted earlier. The CHA can make an application requesting for a new license, if the license has expired without preferring an application for renewal. Against the order issued by Commissioner rejecting the grant of new license, the aggrieved person can approach the Chief Commissioner. On such score, the renewal of license and grant of fresh license stand on the same platform as the consequences of the action in both the cases are the same. The rejection of renewal of license as well as refusal to grant a new license has the same remedy in law which is to challenge the said order before the Chief Commissioner in terms of Regulation 9 (5) of CHALR 2013. The Tribunal held that no appeal lies under Section 129A of the Customs Act, 1962 against an order of rejection of renewal of the license by the Commissioner.

33. In the case of *Tass Clearing Services Pvt. Ltd. Vs CC & CE Hyderabad* - 2009 (238) ELT 671 (Tri.-Bang.), Similar question as to refusal to grant CHA license came up for consideration before the Tribunal and the Tribunal held that the decision permitting CHA to resume operations as well as the denial is not appealable before Tribunal.

34. In the case of *DHL Express (I) Pvt. Ltd. Vs CC (General), C. Brokerage Section* - 2018 (360) ELT 63 (Bom.), the issue was considered with respect to rejection of an application to renew license. The Tribunal held that appeal is not maintainable before the Tribunal as there is no remedy by way of appeal against such decisions / order in the Customs Broker Regulations.

35. Similar view was taken by the Tribunal in the case of *Poonia & Brothers Vs CC (Preventive) Jodhpur* - 2018 (363) ELT 134 (Tri-Del.). The Tribunal emphasized that non-renewal and revocation are separate things under two distinct provisions of the regulation. The decision passed by Commissioner of Customs denying to renew the license was held to be not appealable before the Tribunal.

36. In the case of *S.R. Sale & Co. Vs CC (General) Mumbai* - 2013 (295) ELT 653 (Bom.), the Hon'ble Bombay High Court held that against an order of prohibition passed under Regulation 21 of CBLR 2004, there is no remedy of appeal provided in the regulations. The High Court held that Tribunal is justified in holding that appeal is not maintainable against an order of prohibition passed under Regulation 21 of Regulations 2010.

37. In the case of *CCE (Export) Vs Aren Shipping Agent* - 2016 (341) ELT 585 (Mad.), the Hon'ble Madras High Court held that order granting or rejecting renewal of license is administrative in nature and that no adjudication is required while considering renewal application and that such order is not appealable before the Tribunal.

38. The Tribunal in the case of *Naresh Jaisingh Vs CC (G) Mumbai* - 2016 (332) ELT 147 (Tri.-Mumbai) had an occasion to consider the issue as to whether the order of rejection of application for renewal of license is an adjudication order so as to prefer appeal before the Tribunal. It was held that under Regulation 21 of the Customs Brokers Licensing Regulations, 2013 or Regulation 22 (8) of the erstwhile CHA Licensing Regulations, 2004, there is no provision to file appeal before the Tribunal; that specific regulations framed in exercise of powers under Section 146

of the Customs Act, 1962 would prevail over general provisions under Section 129A of Customs Act, 1962; that the only remedy available to the appellant is to approach the High Court under Article 226 of the Constitution of India.

39. On the second point of difference of opinion as to invocation of Rule 41 of CESTAT (Procedure) Rules, 1982 so as to order for restoration of appellant's license from 29.12.2016, Ld. A.R submitted that Tribunal does not have any powers for issuing such directions. Further, there is no prayer made in the appeal to grant restoration of the license with effect from 29.12.2016. The appellant has not filed any application for including additional grounds in the appeal. For these reasons, the department would be prejudiced now as they are not put to notice to defend the same. It is also stated by him that the appellant's request for registration is only for 2 years whereas the Member (Technical) has allowed restoration for 10 years which is not correct.

40. Heard both sides.

41. The first difference of opinion is with regard to the question of maintainability of the appeal before the Tribunal. As seen from the Courier Regulations 2010, there is no provision for filing an appeal against an order rejecting grant of license or order rejecting the request for renewal of license. For that matter, there is no remedy of filing appeal even against an order of suspension or revocation of license. The regulations say that a further representation has to be made to the Principal Commissioner / Commissioner of Customs. The right of appeal is always conferred by a statute. There is no inherent right for appeal.

Hence unless there is remedy of appeal provided in law, the appeal cannot be entertained. The Ld. Counsel for appellant has been at pains to argue that although there is no remedy of appeal provided in the Courier Regulations 2010, the Regulations being framed under Section 157 of the Act any order passed under the Regulation would be appealable before the Tribunal if the same is passed by the officer / authority as an adjudicating authority. The High Court of Madras in the case of *CCE (Export) Vs Aren Shipping Agent* - 2016 (341) ELT 585 (Mad.) had occasion to consider a question as to whether an order of rejecting the request to grant CHA license is appealable before the Tribunal. The Hon'ble High Court held that while granting license or while rejecting the request for renewal of license, there is no process of adjudication and it is purely administrative in nature; that such an order is not appealable before the Tribunal. Though the decision is rendered in the case of CHA license being *pari materia* is applicable to the facts of the case. The relevant discussions is as under :

“34. Renewal of licence is as good as granting a new licence, granted under the provisions of an Act. It has the effect of continuation of licence already granted. In *Gajraj Singh v. State Transport Appellate Tribunal* reported in (1997) 1 SCC 650, the Hon'ble Supreme Court considered a case for renewal of licence, under the Motor Vehicles Act, 1988 and held that renewal of licence means a new licence, granted by way of renewal. The Hon'ble Apex Court held that while considering an application for renewal, all the conditions required to be complied with, under the statutory provisions, rules or regulations, as the case may be, for grant of fresh licence and any other conditions, imposing performance of the conditions of licensee, have to be complied with. Procedure set out in CHALR, 2004, does not provide for any adjudication, either for grant of fresh licence or renewal.

35. In the case on hand, while considering the renewal application, the licencing authority has acted as an adjudicating authority. The need, according to him, was, whether the licensee, who had not renewed the licence, issued at Vizag, is entitled to get the licence issued by the Chennai Commissionerate, renewed? If there was any such pre-condition, in our view, he should be answered the issue administratively, but in the case on hand, the licencing authority, seemed to have taken a decision that the abovesaid question requires adjudication. In the light of *Gajraj Singh's* case (cited supra), it is our considered opinion that adjudication is not required, while considering a renewal application. Grant or renewal of licence, is

administrative in nature. Scheme of Regulations, 1984 or 2004, as the case may be, does not envisage an adjudicatory process. If the argument of the appellant is accepted, then, even granting licence should be held as adjudicatory, which is not the intent.

36. Section 129 of the Customs Act, 1962, provides for an appeal. Bare reading of the abovesaid Section may indicate that any decision or order passed by the adjudicating authority, can be appealed to the Tribunal. The Regulations dealing with grant of licence for renewal should be harmoniously read with the provisions of the Customs Act, 1962 and should be given the effect, in conformity with the legislative intent.

37. Provisions of the Customs Act, cannot be read in isolation and the same have to be read harmoniously with the Regulations framed thereunder. Thus, on the principle of harmonious construction and going through the entire Regulations, we are of the considered view that an order, rejecting an application for renewal, is administrative in nature.

38. Perusal of the order of CESTAT, Chennai, dated 14-7-2009, shows that by following the orders, extracted supra, the Tribunal has held that the appeal filed against the order, on the application to renew the licence issued to the Customs House Agent, under the CHALR, 1984 or 2004, as the case may be, is not maintainable. In the light of our discussion and decisions, stated supra, we are not inclined to interfere with the order of the Tribunal. Accordingly, we answer the substantial questions of law, as against the Revenue.

39. Hence, the civil miscellaneous appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.”

42. The Hon’ble jurisdictional High Court in the case of *DHL Express (I) Pvt. Ltd. Vs CC (General), C. Brokerage Section* – 2018 (360) ELT 63 (Bom.) had occasion to consider a similar issue as to whether an appeal is maintainable against an order rejecting an application for grant of Customs Broker license. The Hon’ble High Court held that while rejecting such application, the authority acted in the capacity of licensing authority under Customs Broker Licensing Regulations, 2013 and not as an adjudicating authority as contemplated in Section 129A (1) (a) of the Customs Act, 1962; that an appeal is not maintainable against such order. The relevant paragraph is as under :

“7. An argument was canvassed that in view of clause (a) of sub-section (1) of Section 129 of the said Act, an Appeal lies before the Appellate Tribunal against the decision or order passed by the Commissioner of Customs as an Adjudicating Authority. An argument was canvassed that as order of prohibition has been passed by the Commissioner as an Adjudicating Authority, an Appeal would be maintainable under clause (a) of sub-section (1) of Section 129. Under clause 8 of Regulation 22, an appeal by Custom House Agent was maintainable before the Appellate Tribunal, only against the order passed under Regulation 20 or sub-Regulation (7) of Regulation 22. It was submitted that notwithstanding the Regulation 22 of the said Regulation of 2004, an appeal would be maintainable under clause (a) of sub-section (1) of Section 129A. Paragraph 15 of the said decision reads thus :

“15. Section 129A provides an appeal to the Tribunal by a person aggrieved by orders of the nature provided in clauses (a) to (c). Clause (a) is a decision or order passed by the Commissioner of Customs as an adjudicating authority. The Appellant relied upon the definition of the expression “adjudicating authority” in Section 2 as meaning any authority competent to pass an order or decision under the Act. A decision taken by an authority under subordinate legislation is as a matter of statutory interpretation, regarded as a decision under the Act. This principle has been enunciated in the judgment of the Supreme Court in *Indramani Pyarelal Gupta v. W.R. Natu* [(1963) 1 SCR 721 at para 15]. This, however, would not be dispositive of the issue which arises in this case because essentially what the Court has to consider is whether the general appellate provisions that are contained in Section 129A would apply to action which is initiated against a CHA under the Regulation of 2004. Section 146 provides for the licensing of an agent for carrying on business within a customs station involving import or export of goods or entry or departure of a conveyance. The entire subject matter of the licensing of CHAs which commences from invitation of applications and covers qualifications of eligibility, the holding of examinations, award of licences, obligations of CHAs and disciplinary control are governed by the Regulation. Section 146(2) contemplates that the Regulation is intended to fulfill the purpose of carrying out of the provisions of the section. That the Regulation may also govern the remedies which are available to a CHA against an order passed in the disciplinary jurisdiction is made abundantly clear by clause (f) of Section 146(2). Section 146(2)(f) clarifies by way of illustration that the Regulation can govern the appeals, if any, against orders of suspension or revocation. If recourse to the general power of an appeal under Section 129A was intended by Parliament to be available in disciplinary matters involving CHAs, there was no necessity of including a provision such as that which is contained in Section 146(2) (f). The provisions of Section 129A have to be harmoniously construed with those of Section 146. There is no question, in our view, of there being any inconsistency between the two statutory provisions. Similarly, there is no repugnancy between the provisions of Regulation 22(8) and Section 129A. Section 146 operates in a field different from Section 129A. Section 146 governs the licensing of CHAs and contemplates the making of Regulation governing all aspects of the licensing of CHAs including disciplinary control. Remedies against orders passed in the disciplinary jurisdiction are to be provided in the Regulation. The Regulation constitute a self-contained code relating to the licensing of CHAs. The Regulation provide for disciplinary control over CHAs and have provided an appellate remedy against orders of revocation or suspension. An

order of prohibition under Regulation 21, preventing a CHA from operating within one or more sections of a customs station is not subject to an appeal under the Regulation. The subordinate legislation has considered that such an order does not possess the consequences of either a revocation of a licence or for that matter, the suspension of a licence pending enquiry since such an order prohibits a CHA from operating in one or more sections of a customs station. The wisdom of the delegate of the legislature in not providing an appeal in such a case does not fall for re-evaluation by the Court. It is trite law that there is no inherent right of appeal. An appeal is creation of a statute or, as in the present case, the creation of statutory provision (Section 146) read together with the Regulation. A CHA is, however, not without remedy against an order of prohibition which is amenable to the jurisdiction of the High Court under Article 226 of the Constitution.”

(underline supplied)

43. In the case of *Tass Clearing Services Pvt. Ltd. Vs CC & CE Hyderabad* - 2009 (238) ELT 671 (Tri.-Bang.), similar view was taken.

Relevant para of the order is reproduced as under :

“A careful reading of Section 129A reveals that only a decision or order passed by the Commissioner of Customs as an adjudicating authority is appealable to the Tribunal. Here, the letter of the Additional Commissioner merely conveys a decision of the Commissioner. The Commissioner performs not only the function of adjudication but various other executive functions. In the capacity of the Executive Officer, the Commissioner issues various orders. All these orders are not appealable to the CESTAT in terms of Section 129A of the Customs Act. It is only a decision or order passed by him as an Adjudicating Authority. It has been held by the Tribunal in the case of *G.P. Jaiswal v. C.C.E, Lucknow* - [2008 \(226\) E.L.T. 707](#) (Tri.-Del.) that an order amounts to adjudication if it decides some dispute between two sides. In other words, there must be a ‘lis’ between two parties which is to be decided by the prescribed authority. An order granting/refusing license or allowing/rejecting of renewal application, or the like, cannot be said to be an order or decision in the nature of adjudication, and where the Commissioner passes such an order, it cannot be said that he passed the order as an adjudicating authority. Therefore, the appeal against the said letter is not maintainable under Section 129A(a) of the Customs Act. Therefore, the appeal is rejected as not maintainable.”

44. In the case of *S.R. Sale & Co. Vs CC (General) Mumbai* – 2013 (295) ELT 653 (Bom.), the High Court considered the issue whether an order of prohibition passed against a Custom House Agent under

Regulation 21 of CHALR 2004 is appealable before the Tribunal. The Hon'ble High Court observed that since the regulation does not provide for an appeal remedy before the Tribunal, such appeal is not maintainable.

The relevant paragraph is as under :

“15. Section 129A provides an appeal to the Tribunal by a person aggrieved by orders of the nature provided in clauses (a) to (c). Clause (a) is a decision or order passed by the Commissioner of Customs as an adjudicating authority. The Appellant relied upon the definition of the expression “adjudicating authority” in Section 2 as meaning any authority competent to pass an order or decision under the Act. A decision taken by an authority under subordinate legislation is as a matter of statutory interpretation, regarded as a decision taken under the Act. This principle has been enunciated in the judgment of the Supreme Court in *IndramaniPyarelal Gupta v. W.R. Natu*[(1963) 1 SCR 721 at para 15]. This, however, would not be dispositive of the issue which arises in this case because essentially what the Court has to consider is whether the general appellate provisions that are contained in Section 129A would apply to action which is initiated against a CHA under the Regulations of 2004. Section 146 provides for the licensing of an agent for carrying on business within a customs station involving import or export of goods or entry or departure of a conveyance. The entire subject matter of the licensing of CHAs which commences from invitation of applications and covers qualifications of eligibility, the holding of examinations, award of licences, obligations of CHAs and disciplinary control are governed by the regulations. Section 146(2) contemplates that the Regulations are intended to fulfill the purpose of carrying out of the provisions of the section. That the Regulations may also govern the remedies which are available to a CHA against an order passed in the disciplinary jurisdiction is made abundantly clear by clause (f) of Section 146(2). Section 146(2)(f) clarifies by way of illustration that the Regulations can govern the appeals, if any, against orders of suspension or revocation. If recourse to the general power of an appeal under Section 129A was intended by Parliament to be available in disciplinary matters involving CHAs, there was no necessity of including a provision such as that which is contained in Section 146(2)(f). The provisions of Section 129A have to be harmoniously construed with those of Section 146. There is no question, in our view, of there being any inconsistency between the two statutory provisions. Similarly there is no repugnancy between the provisions of Regulation 22(8) and Section 129A. Section 146 operates in a field different from Section 129A. Section 146 governs the licensing of CHAs and contemplates the making of regulations governing all aspects of the licensing of CHAs including disciplinary control. Remedies against orders passed in the disciplinary jurisdiction are to be provided in the regulations. The Regulations constitute a self-contained code relating to the licensing of CHAs. The Regulations provide for disciplinary control over CHAs and have provided an appellate remedy against orders of revocation or suspension. An order of prohibition under Regulation 21, preventing a CHA from operating within one or more sections of a customs station is not subject to an appeal under the Regulations. The subordinate legislation has considered that such an order does not possess the consequence of either a revocation of a licence or for that matter, the suspension of a licence pending

enquiry since such an order prohibits a CHA from operating in one or more sections of a customs station. The wisdom of the delegate of the legislature in not providing an appeal in such a case does not fall for re-evaluation by the Court. It is trite law that there is no inherent right of appeal. An appeal is a creation of a statute or, as in the present case, the creation of a statutory provision (Section 146) read together with the regulations. A CHA is, however, not without remedy against an order of prohibition which is amenable to the jurisdiction of the High Court under Article 226 of the Constitution.

16. For these reasons, we have come to the conclusion that the Tribunal is justified in holding that an appeal is not maintainable against an order of prohibition under Regulation 21 of the Regulations of 2004. In view of this decision, we answer Question (a) in the affirmative and Questions (b) and (c) in the negative. The appeal shall accordingly stand disposed of in the aforesaid terms. There shall be no order as to costs.”

45. The position of law enunciated in the case of *DHL Express (I) Ltd.* (supra) and *Aren Shipping Agent* (supra) is that when an authority scrutinizes an application for grant of license and allows or rejects the same, he does not act as an adjudicating authority and acts merely as a licensing authority. That issuing or rejecting a license is only an administrative function. The other decisions of the Tribunal also have held that issuing a license or rejecting a license is different from suspension or revocation of license. When the former is an administrative order, the latter is an order passed as an adjudicating authority. These decisions though in the realm of Customs Broker / CHA Regulations apply to Courier Regulations also. In the case of *Bombina Express* (supra) which has been followed in *Poonam Courier Pvt. Ltd.* (supra) and relied by the appellant, the order under challenge was an order of revocation of the Courier license. In the present case, it is not an order of revocation of license. Similar is the case with other decisions relied by the appellant as these decisions relate to revocation of license and not rejection of request for renewal of license and certain other decisions are not relevant to the facts of this case.

The other decisions relied by the Ld. Counsel for appellant are not relevant to the facts of the case.

46. From the above, I agree with the view of the Member (Judicial) in holding that this appeal is not maintainable before the Tribunal. There is yet another limb to this difference of opinion which is regarding the fact that the impugned order is signed by the Deputy Commissioner of Customs. This point of difference arises out of appreciation of fact wherein brother Member (T) has held that though the order is signed by the Deputy Commissioner, it is passed by the Commissioner. Against this, Brother Member (J) has held that the impugned order is passed by Deputy Commissioner. On going through the Regulations, it can be seen that Principal Commissioner of Customs or Commissioner of Customs is the authority to pass order granting registration or rejecting the application for registration. The Revenue has not submitted any argument in this regard and has opted to be silent conveniently. In my view, an order is passed by the person who has signed it. Apart from saying that it is passed by competent authority there is nothing on the face of the impugned order to show that it is passed by the Commissioner. Since I have agreed with the view of brother Member (J) that the appeal is not maintainable, this limb of the difference of opinion is of no further consequence. The contention of Ld. Counsel that there is also a point of difference that the issue being of courier license is akin to provisions relating to baggage as recorded by the Member (J) is, according to me, misplaced and not relevant.

47. The second point of difference is with regard to the view taken by Member (Technical) for invocation of Rule 41 of CESTAT (Procedure) Rules, 1982 so as to restore the registration of the appellant with effect from 26.12.2016. It has to be stated that there is no provision in the Customs Act, 1962 or CESTAT Procedure Rules which grants powers to the Tribunal to act as a court of execution. The powers that are derived from the parent Act is only as an appellate authority. When the Act or the Rule does not expressly provide for powers as an execution court nothing can be implied or read into Rule 41 to exercise such powers of an execution court. Rule 41 is intended only to facilitate the Tribunal to exercise some inherent powers to deal with situations where it has to give effect to its own orders and also to prevent abuse of process of law.

48. It needs to be mentioned that there is no specific prayer made in the appeal by the appellant to grant such a relief. The prayer in the appeal memorandum in Column 23 of Form C.A.-3 reads as under :

23.	Relief claimed in the appeal	i. Order bearing F.No.AIR/CUS/50/CIC/305/2011 PT-II dated 19.08.2019 and Clarificatory Order bearing F.No. Air/Cus/50/CIC/305/2011 (Part-II) dated 30.09.2019 be set aside; ii. The Appellant's license for authorized Courier be renewed as per the law ; and iii. For such further and other reliefs as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.
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The appellant has not filed any application seeking incorporation of additional grounds / relief. Under such circumstances, entertaining a plea which is not canvassed in the appeal, would prejudice the opposite party as they will not be able to defend the same.

49. Rule 41 of CESTAT (Procedure) Rules, 1982 reads as under :

“RULE 41.Orders and directions in certain cases.— The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice.”

The Ld. Counsel for appellant relied upon the decision of the Tribunal in the case of *Vidarbha Vineer Industries Vs Assistant Collector of C.Ex.* - 1991 (55) ELT 167 (Bom.), *CC (Import) Mumbai Vs Pride Foramer*, 2006 (204) ELT 381 (Bom.), *Komalarani Ray Vs UOI*, 2016 (337) ELT 350 (Ori.) and other decisions. In all the above cases, applications were filed under Rule 41 to implement the order of Tribunal. However, in the present case, at the time of passing the Final order itself, Rule 41 is invoked so as to extend the relief. Further, the earlier appeal by the appellant herein was filed against the order of revocation of courier licence passed under Regulation 13/13A. In the present case, the issue is rejection of license under Regulation 10. The opposite party in any litigation has to be given a chance and sufficient time to comply with the Final order, in case they do not intend to prefer an appeal. The Tribunal at the time of disposing the appeal itself cannot take away this chance by *suo motu* invoking Rule 41 and giving direction that the Registration is to be renewed w.e.f. 26.12.2016. I agree with the view of brother Member (Judicial) that the Tribunal has to restrict itself to the reliefs sought by the aggrieved party.

50. With regard to the differences of opinion referred as point No. (vi), I hold that when issue of jurisdiction is raised, the Tribunal is to decide the said issue and also decide the appeal on merits. However, in case of lack of jurisdiction the appeal would then get dismissed as being without jurisdiction.

51. The issues referred before me are answered as above. The matter may be placed before the referral Division Bench for recording the majority / final orders.

(pronounced in court on 13.10.2021)

Sd/-
(SULEKHA BEEVI C.S)
MEMBER (JUDICIAL)

gs

MAJORITY ORDER

52. In view of the majority order, appeal is not maintainable before the Tribunal.

(Pronounced in open court on 27th January 2022)

(C J Mathew)
Member (Technical)

(S.K. Mohanty)
Member (Judicial)