CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85084 OF 2024

[Arising out of Order-in-Original CAO No: 43/CAC/PCC(G)/SJ/CBS-Adj dated 18th October 2023 passed by the Principal Commissioner of Customs (General), Mumbai.]

Harikrishnan M K Nambiar
B-502, Prime Avenue, SV Road, Vile Parle (West)
Mumbai – 400058 … ***Appellant***

versus

Principal Commissioner of Customs (General)
New Custom House, Ballard Estate, Mumbai-400 001 ***…Respondent***

APPEARANCE:

Shri Anil Balani and Ms Priyasha Pawar, Advocates for the appellant

Shri Ranjan Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 85798/2025

DATE OF HEARING: 06/11/2024
DATE OF DECISION: 05/05/2025

PER: C J MATHEW

M/s Harikrishanan M K Nambiar, holder of customs broker licence[1], was proceeded against under Customs Broker Licensing

[1] [no. 11/1732]

Regulations, 2018 for having breached obligation set out in regulation 1(4), regulation 10(a), 10(b), 10(d), 10(e), 10(m), and 10(n) of Customs Broker Licensing Regulations, 2018 in connection with six shipping bills filed on behalf of M/s Pentalex Enterprises for shipment of 'readymade garments' that were allegedly overvalued to avail ineligible drawback. The enquiry authority held the charges as not prove despite which impugned order[2] of Principal Commissioner of Customs (General), Mumbai, the licensing authority, revoked the licence and forfeited security deposit under regulation 18 of Customs Broker Licensing Regulations, 2018 while imposing penalty of ₹ 50,000 under regulation 14 Customs Broker Licensing Regulations, 2018.

2. It is on record that, consequent upon the report of the enquiry authority dated 11th July 2023, disagreement memo dated 28th April 2023 was issued by the licensing authority, as prelude to the detriment and penalty set out *supra,* on the revised findings thereof.

3. We have heard Learned Counsel for the appellant and Learned Authorized Representative.

4. In addition to their contention on merit, it has been submitted by Learned Counsel that not only had the disagreement memo, having been issued only on 28th April 2023, taken more than three months

[2] [order-in-original CAO No: 43/CAC/PCC(G)/SJ/CBS-Adj dated 18th October 2023]

after receipt of enquiry report to be finalized but also the impugned order which took another six months. Learned Counsel submitted that no justification was offered for such delay of fifteen months from date of inquiry report in issuing the impugned order.

5. It is seen that the enquiry report was submitted on the 11th July 2023 consequent upon the show cause notice dated 6th September 2021. The impugned order has drawn attention to the ‘midstream’ change in enquiry authority consequent upon transfer of the first enumerated officer which serves to justify the delay that occurred at the first stage. The enquiry report held the charges to be not proved and it took the licensing authority over nine months to conclude that he was not in agreement with the exoneration by the enquiry authority. Even thereafter, another six months elapsed before the impugned order concluded that the most severe of the detriments was deserving in the matter. It is on record that the appellant herein represented at the personal hearing on 14th September 2023, following submission of the written response to the disagreement memo, that there wass no elaboration of the events that occurred between date of disagreement memo and the date of personal hearing to justify the delay. At all events, the decision to disregard the enquiry report was made manifest only nine months after the enquiry report which is in breach of the stipulations prescribed in Customs Broker Licensing Regulations, 2018.

6. On perusal of the impugned order, there is no finding that the acts, omission or commission on the part of the customs broker was cause of one or more of the delays. The Hon'ble High Court of Bombay, in *Principal Commissioner of Customs (General), Mumbai v. Unison Clearing P Ltd [2018 (361) ELT 321 (Bom)],* has held that

> *'10. The question, therefore, is whether the provision contained in Regulation 20 is mandatory or directory. The use of the word "shall" in normal parameters be construed as mandatory and the word "shall" would be required to be read as "must" unless and until it was essentially read as "may" to achieve the legislative intention and to be construed in accordance with its use in the provision. However, it cannot be laid down as an universal rule that whenever the word "shall" is used in a statute, it would only mean to be of mandatory nature, whereas the word "may", would be indicative of being directory. However, use of such word is not the sole test or criteria, but the said word shall be construed by taking into consideration the nature, design and the consequences, which would flow from construing it one or the other way.*
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> *xxxxx*
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> *13. The Learned Counsel appearing for the licensee, by relying on the said judgments would argue that the said Hon'ble High Courts have granted benefit to the Customs Brokers on account of non-adherence to the time limit. Reliance is also placed on the judgment of the said CESTAT West Zonal Bench, Mumbai delivered in Appeal No. C/87322/15 [2017 (357) ELT 1017 (Tribunal)] in case of M/s. Maakrupa Forwarders Pvt. Ltd v. Commissioner of Customs,*

Mumbai, dated 18 October, 2016. Perusal of the said judgment, would reveal that Revenue had taken 1221 days to complete the inquiry for which a period of 270 days is prescribed in CBLR, 2013 and in this backdrop, the Tribunal observed that due to inordinate delay of exceptional nature in completing the proceedings, fundamental right of work is being denied to the appellant and it was also observed that the Customs Brokers who are unscrupulous, get the advantage of the delay and people who are not guilty would continue to suffer the suspension and revocation on account of delay by revenues due to lack of responsibility.

The said judgment of the CESTAT reflects a extreme situation and the data which was placed before the Tribunal revealed that inquiries had been pending for more than five years and in this backdrop, the Tribunal commented about the inordinate delay. This is what precisely is to be avoided. The order passed by the CESTAT cannot be said to be erroneous by taking into consideration the enormous delay, reflecting the attitude of the Revenue, which had failed to discharge its duty, causing serious inconvenience to the Customs House Agent, which in any cannot be justified. However, the said principle cannot be accepted as an absolute principle where the delay of 15 days has also been held to be inordinate and the licence came to be restored. We do not propose to deal with these two extremities since we are of the considered view that the midline has to be drawn where the time line may not be construed as so rigid, inflexible and a reasonable deviation is permissible where delay is accounted for and the Revenue would be made accountable in discharge of its statutory duty.

The principle, which is to be applied to construe whether the Regulation is directory or mandatory, is to be tested by *examining the consequences of the Regulation being treated either way in the context of the aim and object of the provision.*

14. Adherence to the time schedule prescribed in the Regulation 20 in a rigid way would lead to a situation where non-compliance with the time frame and even deviation by a single day would resultantly invalidate the entire action and the licence which is under suspension or which is revoked, is liable to be restored. The procedural formality as required to be complied within the time frame prescribed in the regulation, even if it is deviated for whatsoever reason beyond the control of the revenue or the Customs House Agent would result into consequences of declaring the entire action invalid if the provision is construed as mandatory. On the other hand, if the provision the construed as directory, the Customs House Agent would be deprived of his licence for considerable long time, if the time schedule is not adhered to the Revenue at its sweet choice would prolong the procedure and which is a likely situation, no attempts would be made to complete the inquiry within the stipulated period.

This is what has weighed in the mind of the High Courts while dealing with the said regulation and holding the same to be mandatory

The catena of judgments on which reliance has been placed to declare the provision as mandatory have referred to the extraordinary delay caused at the instance of the revenue in conducting inquiry against the Customs House Agent, depriving them of their means of livelihood and it was observed that the purpose of prescribed time limit was to safeguard the interest of the Customs Broker and smooth import and export of goods. By relying on a celebrated principle, when a statute prescribes a thing to be done in a *particular manner, it must be performed in such a manner, the use of the word "shall" in the Regulation has been construed as mandatory.*

With due respect to the finding so recorded in the judgment of the Madras Court in case of Masterstroke Freight Forwarders P. Ltd. v. C.C.(I), Chennai-I, reported in 2016 (332) ELT 300 (Madras) delivered by the Learned Single Judge, the parameters of construing a provision as mandatory or directory, when it deals with a discharge of a public duty and a resultant consequence has not been specifically taken into consideration. The salutary principle, whether statute imposes a public duty and lays down the manner and time within which the duty shall be performed, the injustice or inconvenience resulting from a rigid adherence to the statutory prescription, is a relevant factor for holding such provision only as directory has been completely overlooked. As observed by Justice Denman in Caldow v. Pixell, (1877) 2 CPD 562, "in considering whether the statute is imperative, the balance may be struck between inconvenience or sometime rigidly adhered to, or sometime departure from this direction". In that case, it was held that where a public officer was directed by statute to perform a duty within a specific time the case is established that the provisions are only directory, as already discussed above. There might be reason why such time limits cannot be adhered to and these reasons may be at times attributable to the revenue and some time to the Customs house agent. Strict adherence to the said time limit and not making it even slightly flexible would warrant a situation where even one day deviation from the time line would be equally fatal as a delay of one year. This surely is not the intention in framing the Regulation. Undisputedly, the intention is to curb the delay in concluding the inquiries, however, it should not be *stretched to an extent where it would defeat the very purpose of the Regulation, being to enforce a regime of discipline in the Customs arena and it would result in letting the miscreant set loose by taking benefit of deviation of the time schedule. The said CESTAT West Zonal Bench, Mumbai in Unison Clearing Pvt. Ltd v. Commissioner of Customs (General), Mumbai (supra) has in detail dealt with the Regulation 22 and has examined whether it has to be construed as mandatory or directory. Relying on catena of judgments delivered by the Hon'ble Apex Court, and specifically in Delhi Air Take Services Pvt. Ltd. and Another v. State of West Bengal and Another, CESTAT has concluded that while deciding whether the time period is directory or mandatory, it would be seen that the purpose of law prescribing it as mandatory and consequently the absence of provisions of consequences in case of non-compliance with the requirement would indicate that the provisions are directory irrespective of use of the word "shall". The CESTAT has concluded that if the time limits are construed as mandatory and the matter is put to an end, the purpose of Regulation would be defeated and so would be the intention behind framing such a Regulation. On the other hand, if there is no consequence stated in the regulation for non-adherence is a time period for conducting the inquiry, the time line cannot be proved to be fatal to the outcome of the inquiry. Based on these observations the Tribunal had held the Regulation is directory in nature. However, in the present judgment which is impugned before us, the CESTAT has taken a view contrary to its earlier view in Unison Clearing Pvt. Ltd. (supra) and after referring to certain precedents where a view was taken that the regulations are mandatory delivered by the Tribunal itself, the Tribunal was pleased to quash and set aside the impugned order being not sustainable and allowed the appeals. It is to be noted that the Member Judicial (Ramesh*

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

setting the tone for, and measure of, evaluating the circumstances in which the timelines are benchmark as directory or mandatory.

7. Following this, by order[3], disposing off appeal[4] against order[5] of Principal Commissioner of Customs (General), Mumbai, the

[3] [final order no. A/85907/2023 dated 2nd June 2023]
[4] [customs appeal no. 86451 of 2022]
[5] [order-in- original no. 11/CAC/PCC(G)/SJ/SBS Adj. dated 13th May 2022]

Tribunal, in *AB Paul & Company v. Principal Commissioner of Customs (General), Mumbai*, held that

> *'14. Though the said decision has categorically held that time-lines in the Regulations are to be deemed as 'directory', the context is not without significance. It was held that setting aside of revocation, at the appellate level, by resort to ascertainment of conformity with time-lines, would defeat the intent of Regulations that is substantively elaborate in enacting framework for supervisory oversight of customs brokers. Nonetheless, the Hon'ble High Court of Bombay also noted that, without justification for delay in completion of proceedings demonstrated by findings on the contributory negligence of the notice-broker, the licencing authority is not permitted to take shelter behind 'directory' nature of the time-lines. Impliedly, the time-lines are deemed to be directory at the appellate stage and an order of detriment under the authority of Regulations is, in circumstances of non-adherence to times lines, not tenable in the absence of justification for delay.*
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> *15. The impugned order is clearly bereft of such finding. Learned Authorised Representative has contended that the delay occurred owing to insistence on notice insisting upon cross-examination of their employee; an assertion of right to defence in proceedings is, of itself, not dilatory and, especially, in the light of our finding that no justifiable cause for rejection of cross-examination is available on record. In such circumstances, the decision of the Hon'ble High Court of Bombay in re Unison Clearing Pvt Ltd does not come to the assistance of the licencing authority. It is clear that the time-lines specified in regulation 17 of Customs House Broker Licensing Regulations, 2018 had not been adhered to. Consequently, no purpose would be served by directing cross-examination now because that will only approve non-adherence to timelines; we cannot condone that which is not*

> *condonable. We also do not find it necessary to delve further into the deviation from the specificity, warranted in show cause notice, by the arrangement of obligations in regulation 10 of Customs Broker Licencing Regulations, 2018.'*

8. In addition to the circumstances of failure to suggest that delays were occasioned by dereliction on the part of the customs broker, there is no explanation whatsoever in the impugned order that delay was either from unavoidable circumstances or beyond human control. That is irresponsible discharge of responsibility fastened on the licencing authority in the Regulations and certainly not in accordance with the leeway afforded by the Hon'ble High Court of Bombay in *re Unison Clearing Pvt Ltd.*

9. In the absence of any finding that the appellant herein was responsible for the delay in concluding the proceedings after submission of the enquiry report, the stipulations in the Customs Broker Licensing Regulations, 2018 are to be treated as mandatory as set out *supra*. The deadlines not having been adhered to, the findings and consequence in the impugned order stand invalidated. Accordingly, the impugned order is set aside and appeal allowed.

(Order pronounced in the open court on 05/05/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*