CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87363 OF 2021

[Arising out of Order-in-Original No: 113/CAC/PCC(G)/SJ/CBS Adj dated 10th December 2021 passed by the Principal Commissioner of Customs (General), Mumbai.]

Shree Simandhar Shipping Service
410 Mezzanine Floor, Anna Bhavan, Devji Ratanshi Marg,
Masjid Bunder, Mumbai - 400009 …***Appellant***

versus

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

APPEARANCE:

Shri Prakash Shah, Advocate for the appellant

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

CORAM:

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

FINAL ORDER NO: A / 86054 /2022

DATE OF HEARING: 10/05/2022
DATE OF DECISION: 09/11/2022

PER: C J MATHEW

In this appeal of M/s Shree Simandhar Shipping Service, the issue for resolution is the scope for invoking regulation 13(d), 13(e)

and 13(n) of Customs House Agents Licensing Regulations (CHALR), 2004 in the factual circumstances of full disclosure in declaration followed by assessment - provisional and final - which was only subsequently called into question and statutory context of the specific imputations culminating in framing of charges for alleged breach of obligation devolving on customs brokers in the said Regulations. Impugned before us is order no. 113/CAC/PCC(G)/SJ/ CBS dated 10th December 2021 of Principal Commissioner of Customs (Gen), Mumbai, the designated licencing authority for the jurisdiction, revoking customs broker licence along with the forfeiture of security deposit and imposition of fiscal penalty upon the finding of breach of obligations while handling clearance of goods against bills of entry no. 6541438/14.04.2012 and no. 7375227/12.07.2012 filed on behalf of M/s Siddhivinayak Corporation.

2. Though proceedings were purportedly initiated under Customs House Agents Licensing Regulations (CHALR), 2004, the elapsed time since then coupled with supersession by two Regulations therefrom required the competent authority to take recourse to regulation 14 and regulation 18 of Customs Broker Licensing Regulations, 2018; the suspension of the licence on 21st October 2014 had been revoked *vide* order dated 5th January 2015 by the Tribunal. It would appear that the licensing authority invoked Customs House Agents Licensing Regulations (CHALR), 2004 despite Customs

Broker Licensing Regulations (CBLR), 2013 being operational by then as the events occurred during the erstwhile regulations. The said obligations were incorporated as regulation 11(d), (e) and (m) of Customs Broker Licensing Regulations (CBLR), 2013 and regulation 10(d), (e) and (m) of Customs Broker Licensing Regulation (CBLR), 2018. We find it necessary to place this on record as the relevant breaches have been variously referred to in the impugned order. It is our earnest advice to licencing authorities that, in rendering their decision, reference should be to the Regulations as prevailing at the time of the order to avoid any possibility of confusion; needless to state, it would also demonstrate proper application of mind. It is also on record that penal proceedings under Customs Act, 1962 commenced against the appellant herein, along with the importers concerned with the transaction herein, had been dropped by the adjudicating authority but is yet pending in the Tribunal consequent upon reversal by the first appellate authority.

3. The charges against the appellant are confined to failing in obligation to advise client to comply with provisions of Customs Act, 1962 attended upon with like disregard of obligation to bring non-compliance to notice of designated customs authority, to exercise due diligence in ascertainment of correctness of information imparted to a client with reference to clearance of cargo and to discharge responsibilities with speed and efficiency. Bills of entry for clearance

of goods imported by M/s Siddhivinayak Corporation claimed entitlement to avail notification no. 40/2006-Cus dated 1st May 2006 and no. 98/2009-Cus dated 11th September 2009 issued for implementing the 'duty free import authorisation (DFIA)' scheme in the Foreign Trade Policy (FTP) notified under Foreign Trade (Development & Regulation) Act, 1992. The triggering offence was the import of 'natural/ alkalized cocoa powder' against the authorizations, issued under the Foreign Trade Policy permitting import of 'maida atta/flour, sugar, liquid sugar etc.' as enumerated against product code E-5 in the 'standard input output norms (SION)' applicable to the scheme, in favour of M/s Parle Products Pvt Ltd and M/s Ravi Foods Pvt for having exported biscuits and transferred thereafter to the importer through an intermediary, M/s Global Exim. The details that inevitably accompany proceedings under Customs Act, 1962 need not detain us except to the extent of facts now stated.

4. It is not in dispute that imported consignments, valued at ₹ 63,33,447.40, were of 'cocoa powder' classifiable under heading 1805 of First Schedule to Customs Tariff Act, 1975, that the bills of entry had been provisionally assessed under section 18 of Customs Act, 1962 before being finalized subsequently foregoing duty of ₹ 11,39,777 based on an expert opinion as well as finding of Tribunal in a similar dispute pertaining to another importer of Mangalore. In the context of this factual matrix, the appellant has contested the

impugned order on merits as well as patent non-application of mind.

5. Not without reason, Learned Counsel for appellant also drew attention to the inordinate delay in concluding the inquiry proceedings, for reasons not attributable to the appellant, that should, of itself, be justification for setting aside the impugned order. According to him, the inquiry ordered on 12th January 2015 was concluded only on 27th July 2021 to be followed by revocation in order of 10th December 2021 and that, in confronting this legal hurdle, the licencing authority had failed to appreciate the spirit of the judgement of the Hon'ble High Court of Bombay in *Principal Commissioner of Customs (General), Mumbai v. Unison Clearing P Ltd [2018 (3610 ELT 321 (Bom)]* even while indulging in selective culling therefrom to obfuscate the absence of justification for the delay. Clearly, there is a breach of time lines without adequate explanation thereof to which we may advert after examining the issue on merit as submitted by Learned Counsel.

6. It was pointed out also that the excessive expectation on the part of the licencing authority, even to the extent of holding in the impugned order that

> *'6. It is clear….*
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> *(iv)….. Therefore, there is no ambiguity in interpretation of Wheat Flour and 'Coco Powder). The said Public Notice is very specific about the ingredients that can be imported under*

> *the DFIA scheme. The CB has filed the B/E No. 6541438 dated 14.04.2012 and 7375227 dated 12.07.2012 after issuance of the Public Notice No. 93 (RE-2010)/2009-14 dated 01.02.2012. In view of the above findings, I am of the view that the CB M/s Shree Simandhar Shipping Services (CB No. 11/1024) intentionally did not bring the said Public Notice to the Notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs.'*

is not only inconsistent with the prescribed obligations but also demonstrates the illogic for initiation of proceedings under the Regulations. According to Learned Counsel, that same attitude has jaundiced the sense of proportion that should inhere in such authorities to such extent as to be immoderate with detriments in an alleged offence invoking liability duty of ₹ 11,39,777 in two consignments taken together.

7. According to him, the allegations fail as the goods were not incorrectly declared and the eligibility for notifications having been carefully evaluated by customs authorities while finalizing provisional assessment. It was pointed out that even though 'cocoa powder' got included in the norms specifically by public notice no. 93 (RE 2009-2014) dated 1st February 2012 the coverage of 'cocoa powder' under 'flour' having been judicially approved earlier, and the cavil of customs authorities notwithstanding, no wrong had been committed by them. It was also pointed out that a connection between the intermediary for procurement of authorization and the appellant has

been latched on to conclude egregiousness in the entire transaction of import even though there is no whiff of allegation of any misdeclaration of description or valuation which alone suffices for assessment under section 17 or section 18 of Customs Act, 1962 or on the validity of the authorization and transfer to the importer.

8. Learned Authorized Representative took us through the facts and circumstances of unearthing of this gross misuse of scheme in the Foreign Trade Policy while urging us to accept the findings of the inquiry and justifiability of the resultant revocation and other detriments.

9. The imputations against appellant and the charges of breach of obligations rests solely upon the alleged wrongful claim of benefit of notification no. 40/2006-Cus dated 1st May 2006 and no. 98/2009-Cus dated 11th September 2009 for goods that were not included in the list of eligible imports in the impugned authorizations and on the finding by the licencing authority that ‘flour’ intended by the norms, and incorporated in the authorizations, was of commonly known products that excluded cocoa. It would, however, be improper on our part, in disposing off this challenge under Customs Broker Licencing Regulations, 2018, to venture upon eliciting a distinction that rightly lies within the scope of assessment to duties of customs under Customs Act, 1962. Neither does such empowerment vest in the

licencing authority and in revocation proceedings. It should suffice for our purposes that there is no allegation of misleading description, of tariff item or of incorrect declaration of value which entry under section 46 of Customs Act, 1962 is concerned with. The impugned entry has claimed the benefit of an exemption notification and it is upto the assessing authority to determine entitlement thereof. It is also on record that the assessing authority preferred to resort to provisional assessment under section 18 of Customs Act, 1962 which was finalized in accordance with the manner prescribed therein *sans* any proposal to disturb the claim of such benefits. There is nothing on record to indicate that the 'proper officer' has had his hands forced or his mind beguiled to permit such availment in deviation from the procedure laid down in law. In further proceedings initiated under section 28 of Customs Act, 1962 to deny the benefit of exemption and to recover differential duty, the 'proper officer' so empowered had discarded the proposal in the show cause notice and its reversal on appeal of Commissioner of Customs before the first appellate authority is pending before the Tribunal on challenge of the importer. It was within this factual matrix that the outcome of proceedings initiated under Customs House Agents Licensing Regulations, 2004 on the charges levelled against the appellant herein should have been decided. And that is the test to which the impugned order must be subjected.

10. Insofar as the first charge of having breached the obligation of advising M/s Siddhivinayak Corporation about compliance with the provisions of Customs Act, 1962 and, that too, restricted to claim of entitlement to exemption in the bills of entry is concerned, the licencing authority has taken exception to the defence of the appellant that the decision of the Hon'ble Supreme Court in *re Khushalchand & Co* did approve of 'cocoa powder' being entitled to the benefit and the dropping of proceedings in adjudication by original authority under Customs Act, 1962 does validate the recourse to the exemption sought in the bill of entry. In the impugned order, he has taken a rather vague stand on the latter by seeking to distinguish between the two proceedings even as the one before him had its origin in the very same incident and he himself had no compunctions in relying upon statements recorded under section 108 of Customs Act, 1962 that are primarily intended for adjudicating notices under section 124 and section 28 of Customs Act, 1962.

11. Furthermore, the construction that he has placed on the applicability of the decision in *re Khushalchand & Co* does not sit well with the hierarchical subordination of a quasi-judicial authority to higher appellate jurisdictions let alone the highest court of the land. In upbraiding the departmental authorities for non-acceptance of settled law without even a cursory attempt at challenge to the order of the Tribunal, the Hon'ble Supreme Court was merely willing to

concede some leeway, though not all of it, by employing the expression ‘at least’ which appears to have been conveniently overlooked in the findings of the licencing authority. It also appears odd that the licencing authority expects a ‘customs broker’, required to act in the best interests of its client, to take a restricted, or even constricted, view merely to conform to a view taken by him in an extra jurisdictional context. That certainly is not the stance that the statute requires a ‘customs broker’ to adopt and, more so, when the assessing authority as well as departmental adjudicating authority too did not feel compelled to contemplate otherwise. It is not the case of the respondent-Commissioner that the appellant herein had any alternative judgement to fall back on for advising the client not to seek the benefit of exemption. In such circumstances, there is also no scope for report to the Deputy/ Assistant Commissioner of Customs on any non-compliance. We also do hope that the respondent-Commissioner was not anything other than facetious in positing that it was, as noted by us *supra*, for the ‘customs broker’ to mentor customs officials through contemporary regulations. We, therefore, find no merit in the conclusion that the appellant had breached the obligation in regulation 10(d) of Customs Broker Licencing Regulations, 2018 in any manner whatsoever.

12. Turning to the next enumeration among the alleged breaches, *viz*., ascertainment of the correctness of information imparted to

client, the respondent-Commissioner has held that the order of the Tribunal, and the subject of the judgement of the Hon'ble Supreme Court referred to *supra*, was misinterpreted by the appellant. For an authority concerned with licencing regulations to take a view on an order issued in exercise of appellate jurisdiction arising from levy of duties of customs is to traverse beyond the permissible domain of operation. It is also strange that the 'so called' misconstruing was, according to him, the sole handiwork of the 'customs broker' even as the 'proper officer' under section 18 and under section 28 of Customs Act, 1962 chose to construe so. Therefore, by no stretch of logic or imagination can we approve of the finding that the 'customs broker' had not been diligent in ascertaining the correctness of information imparted to the client. The finding on breach of regulation 10(e) of Customs Broker Licencing Regulations, 2018 is also not sustainable on the given set of facts.

13. We find it no less of an oddity that the finding in the impugned order that the appellant had not discharged the duties of customs broker with utmost speed and efficiency and without any delay is based upon the same alleged misconstruing adopted to allege loss of revenue. The only ground for concluding that there has been loss of revenue is the reversal of the dropping of proceedings under Customs Act, 1962 by order of first appellate authority. Such appellate revision does not obfuscate non-leviability of duty opined by the assessing and

adjudicating authorities which impedes a final conclusion, as yet, on that score. Furthermore, everyone of the obligations are not designed to mutate a 'customs broker' into a subordinate tax official; these are incorporated to ensure adherence to the law – as legislated and as judicially determined – and to further the interests of the client. All too often, and mistakenly so, this particular obligation is, perversely, perceived as a peg to hang any proceedings against a 'customs broker' on without pausing to consider the intended purpose thereof. There is no allegation, let alone evidence, that the appellant did not demonstrate speed and efficiency or had wantonly delayed anything as far as the impugned goods are concerned. We find no reason to uphold the finding of the respondent-Commissioner that regulation 10(n) of Customs Broker Licencing Regulations, 2018 had been contravened.

14. Consequently, none of the charges remain. The revocation of licence and other detriments have no foundation on which they can be sustained. Accordingly, the impugned order is set aside and appeal allowed.

(Order pronounced in the open court on 09/11/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*