

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 50569 OF 2022

(Arising out of Order-in-Original No. 71/MK/POLICY/2021 dated 24.06.2021 passed by the Commissioner of Customs (Airport & General), New Delhi)

Shri Pardeep Kumar Seth

C-262, Preet Vihar,
Delhi – 110 092

.....Appellant

Versus

Commissioner of Customs, New Delhi

(Airport and General)
New Custom House,
Near IGI Airport, New Delhi-110037

....Respondent

APPEARANCE:

Shri C. L. Paul, Advocate, learned counsel for the Appellant
Ms. Jaya Kumari, authorized representative for the Department

CORAM:

HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

HON'BLE Ms. BINU TAMTA, MEMBER (JUDICIAL)

DATE OF HEARING: 14.02.2023

DATE OF DECISION: 27.02.2023

FINAL ORDER NO. 50218/2023

P. Venkata Subba Rao

We have heard Shri C L Paul, learned counsel for the appellant and Ms. Jaya Kumari, learned authorised representative for the Revenue and perused the records.

2. The appellant is a Customs Broker¹ whose licence was revoked by the impugned order under Customs Brokers Licensing Regulations², 2018 and the security deposits made by it was

¹ CB

² CBLR

forfeited and penalty was imposed on it on the ground that it had violated Regulation 10(n) of CBLR 2018.

3. The factual matrix leading up to the issue of the impugned order is that the Directorate General of Analytics and Risk Management³ of the Central Board of Indirect Taxes and Customs⁴ analysed the data and identified risky exporters involved in execution of frauds and felt that the some entities to which the GSTIN was issued were fictitious and did not exist at all. DGARM also found that exports by these entities were handled by certain Customs Brokers including the appellant herein and reported to the respective Commissionerates including the Respondent herein. While in a number of similar cases where investigations were conducted and orders were passed revoking the licences of the Customs Brokers, in most cases, of the total list of alleged non-existing exporters, physical verification was done in respect of two or three exporters only through the jurisdictional officers. Thereafter, with the email received from DGARM and the verification reports of the officers as Relied Upon Documents, Show Cause Notices⁵ were issued proposing to revoke the licences of the Customs Brokers.

4. Learned counsel for the appellant took us through the records of this case and submitted that in this case, the Commissioner issued the SCN to the appellant without any relied upon documents whatsoever. In other words, the SCN itself had no evidence to support it. An Inquiry officer was also appointed. After considering

³ **DGARM**

⁴ **CBIC**

⁵ **SCN**

the reply to the SCN and the inquiry report, the Commissioner passed impugned orders holding that the appellant had violated Regulation 10(n) of the CBLR.

5. In this case, we, therefore, need to examine

- a) the scope of the responsibility of the Customs Broker under Regulation 10(n);
- b) if it is established that the appellant had violated regulation 10(n); and
- c) if so, was the penalty proportionate to the alleged violation.

Scope of Regulation 10(n) of CBLR

6. This Regulation reads as follows:

10. Obligations of Customs Broker.—A Customs Broker shall-

...

(n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;

7. According to the learned counsel for the appellant, this responsibility is fulfilled if the Customs broker obtains at least two KYC documents and it is not the responsibility of the Customs Broker to physically inspect the premises of each of its clients to ensure that it is operating from that address. He submits that it is far too onerous for the Customs Broker to fulfil such a responsibility. He relies on the following decisions:

- a) Kunal Travels versus CC(I&G), IGI Airport, New Delhi⁶
- b) Commissioner of Customs versus Shiva Khurana⁷

⁶ 2017(354) ELT 447(Del)

⁷ 2019 (367)ELT 550 (Del)

8. According to the learned authorised representative for the Revenue, the Customs Broker is an agent of the Custom House and has to ensure that the interests of the importer/exporter as well as the Revenue are protected. It is not sufficient for the Customs broker to merely obtain two KYC documents. The Regulation also requires the Customs Broker to verify identity of his client and functioning of his client at the declared address. If the Customs Broker does not fulfil this responsibility, it will invite action under the CBLR, 2018. She relies on the following decisions:

- a) Commissioner of Customs versus K M Ganatra &Co⁸
- b) Baraskar Brothers versus Commissioner of Customs (General) Mumbai⁹
- c) Sky Sea Services versus Commissioner of Customs (General) Mumbai¹⁰
- d) Jasjeet Singh Marwah versus Union Of India and others¹¹

9. We have considered the submissions on both sides. Regulation 10(n) requires the Customs Broker to verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information. This obligation can be broken down as follows:

- a) Verify the correctness of IEC number
- b) Verify the correctness of GSTIN
- c) Verify the identity of the client using reliable, independent, authentic documents, data or information

⁸ **2016(332) ELT 15(SC)**

⁹ **2009(244) ELT 562(Tri-Mumbai)**

¹⁰ **2022(5) TMI 1050- CESTAT Mumbai**

¹¹ **2009(2)TMI 57-Delhi High Court**

- d) Verify the functioning of the client at the declared address using reliable, independent, authentic documents, data or information

10. Of the above, (a) and (b) require verification of the documents which are issued by the Government departments. The IEC number is issued by the Director General of Foreign Trade¹² and the GSTIN is issued by the GST officers under the CBIC or by officers of the Government of India or under the Governments of State or Union territory. The question which arises is whether the Customs broker is required to satisfy itself that these documents or their copies given by the client were, indeed issued by the concerned government officers OR is the Customs Broker also required to ensure that the officers have correctly issued these documents. In our considered view, Regulation 10(n) of CBLR cannot be read to mean the latter as it would imply treating the Customs Broker as one who is competent and responsible to oversee and ensure the correctness of the actions by the Government officers. It would also mean that actions by the Customs Broker under the CBLR prevail over the actions by officers under the Foreign Trade (Development and Regulation) Act, 1992 (under which the IEC is issued by DGFT) and the Central Goods and Services Tax Act (or state GST Act) (under which the GSTIN is issued by the GST officers). In our view this is not the correct construction of the legal provision. Therefore, verification of certificates part of the obligation under Regulation 10(n) on the Customs Broker is fully satisfied as long as it satisfies itself that the

¹² DGFT

IEC and the GSTIN were indeed, issued by the concerned officers. This can be done through online verification, comparing with the original documents, etc. and does not require an investigation into the documents by the Customs Broker. The presumption is that a certificate or registration issued by an officer or purported to have been issued by an officer was correctly issued. Section 79 of the Evidence Act, 1872 requires even Courts to presume that every certificate which is purported to be issued by the Government officer to be genuine. It reads as follows:

79. Presumption as to genuineness of certified copies. The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorized thereto by the Central Government.

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

11. The onus on the Customs Broker cannot, therefore, extend to verifying that the officers have issued the certificate or registration correctly. It has been held by the High Court of Delhi in **Kunal Travels** that "the CHA is not an inspector to weigh the genuineness of the transaction. It is a processing agent of documents with respect of clearance of goods through customs house and in that process only such authorized personnel of the CHA can enter the customs house area..... **It would be far too onerous to expect the CHA to inquire into and verify the genuineness of the IE code given to it by a client for each import/export transaction. When such code is mentioned, there is a**

presumption that an appropriate background check in this regard i.e., KYC, etc. would have been done by the customs authorities....." (emphasis supplied)." Of course, if the Customs Broker comes to know that its client had obtained these certificates through fraud or misrepresentation, nothing prevents it from bringing such details to the notice of Customs officers for their consideration and action as they deem fit. However, the Customs Broker cannot sit in judgment over the certificate or registration issued by a Government officer so long as it is valid. In this case, there is no doubt that the IEC and the GSTIN were issued by the officers.

12. The third obligation under Regulation 10(n) requires the Customs Broker to verify the identity of the client using reliable, independent, authentic documents, data or information. In other words, he should know who the client is and the client cannot be some fictitious person. As per the Regulation, this identity can be established by independent, reliable, authentic:

- a) documents;
- b) data; or
- c) information

13. Any of the three methods can be employed by the Customs Broker to verify the identity of its client. It is not necessary that it has to only conduct a physical verification or launch an investigation. So long as it can find some documents which are independent, reliable and authentic to establish the identity of his client, this obligation is fulfilled. If a document is issued by any other person not interested in the relationship of the client and the

Customs Broker, it would be independent. But it should also be reliable and authentic and not one issued by any Tom, Dick and Harry. Documents such as PAN card issued by the Income tax, driving licence issued by the RTO, Election voter card issued by the Election Commission, the passport issued by the Passport Officer, etc., certainly qualify as independent as none of these departments have any interest in the relationship between the client and the Customs Broker and these documents are presumed to be authentic and reliable having been issued by the Government officers. However, these are not the only documents the Customs Broker could obtain; documents issued by any other officer of the Government or even private parties (so long as they qualify as independent, reliable and authentic) could meet this requirement. While obtaining documents is probably the easiest way of fulfilling this obligation, the Customs broker can also, as an alternative, fulfil this obligation by obtaining data or information.

14. The fourth and the last obligation under Regulation 10(n) requires the Customs Broker to verify the functioning of the client at the declared address using reliable, independent, authentic documents, data or information. This responsibility, again, can be fulfilled using documents or data or information so long as they are reliable, independent and authentic. Nothing in this clause requires the Customs Broker to physically go to the premises of the client to ensure that they are functioning at the premises. By their nature, Customs formations are located only in a few places while exporters or importers could be from any part of the country and they hire the services of the Customs Brokers. Besides the fact that

no such obligation is in Regulation 10(n), it will be extremely difficult, if not, totally impossible, for the Customs Broker to physically visit the premises of each of its clients for verification. For instance, if an importer from a small town in, say, Madhya Pradesh imports goods through ICD Tughlakabad in Delhi, the Customs Broker operating in Delhi cannot be expected to leave his entire business and travel to that town to verify physically if the importer, indeed, is functioning from that address. If Regulation 10(n) is interpreted to burden the Customs Broker with such a responsibility, it will not only be far too onerous to the Customs Broker but it will also make it impossible for anyone in the country to import/export unless he/she can find a Customs Broker willing to travel to his/her town for physical verification. This Regulation cannot be read so as to cause such harassment to the Customs Brokers and to the importers/exporters. This Regulation, in fact, gives the option of verifying using documents, data or information. If there are authentic, independent and reliable documents or data or information to show that the client is functioning at the declared address, this part of the obligation of the Customs Broker is fulfilled. If there are documents issued by the Government officers which show that the client is functioning at the address, it would be reasonable for the Customs Broker to presume that the officer is not wrong and that the client is indeed, functioning at that address. In these cases, we find that the GSTIN issued by the officers of CBIC itself shows the address of the client and the authenticity of the GSTIN is not in doubt. In fact, the entire verification report is based on the GSTIN. Further, IECs issued by the DGFT also show

the address. There is nothing on record to show that either of these documents was fake or forged. Therefore, they are authentic and reliable and we have no reason to believe that the officers who issued them were not independent and neither has the Customs Broker any reason to believe that they were not independent.

15. We further note that the responsibility of the Customs Broker under Regulation 10(n) does not include keeping a continuous surveillance on the client to ensure that he continues to operate from that address and has not changed his operations. Therefore, once verification of the address is complete as discussed in the above paragraphs, if the client moves to a new premises and does not inform the authorities or does not get his documents amended, such act or omission of the client cannot be held against the Customs Broker. Of course, if the Customs Broker was aware that the client has moved and continued to file documents with the wrong address, it is a different matter.

Evidence in the case against the appellant

16. In this appeal, we find that there are no relied upon documents enclosed to the SCN. Therefore, there is no evidence against the appellant beyond the statement in the SCN. The only statement in the SCN is that the DGARM had sent an email conveying the details of several fictitious exporters in respect of some exporters (listed in the SCN), the Shipping Bills were filed by the appellant. Learned counsel for the appellant submits as follows:

- a) The SCN itself has not produced any evidence whatsoever to assert that the appellant had violated Regulation 10(n)

- b) The SCN does not even have any evidence to substantiate that the exporters whose exports the appellant handled did not exist apart from the reference to the letter by DGARM in the SCN itself; the email from DGARM itself was not enclosed to the SCN.
- c) No enquiry was conducted by anyone in pursuance of the suspicion raised in the email of DGARM at all. Therefore, there is not even an iota of evidence that the exporters whose exports the appellant handled did not exist;
- d) Based on the suspicion, the appellant's licence was initially suspended and then the suspension was revoked and thereafter this SCN for revocation of the licence was issued. Once the suspension of the licence was revoked, no SCN proposing revocation of licence can be issued;
- e) The appellant had obtained the KYC documents from all the exporters and produced them before the enquiry officer but in respect of two exporters it was not able to produce them because they were misplaced in its office which it has not recovered;
- f) Since the entire proceedings were relying only on the email of DGARM, it should be considered as the Offence Report for issuing the SCN and if so, the SCN was issued beyond 90 days from the offence report and hence the same is issued in violation of Regulation ...
- g) The email from DGARM itself can be considered as electronic evidence and it will be valid only in terms of Section 138C of the Customs Act and the conditions in this section were not fulfilled in this case
- h) Since the SCN was issued on the basis of the report of the officers, they should have been allowed to be cross-examined.

17. Learned counsel submits that for the above reasons, the appeal may be allowed and the impugned order may be set aside.

18. Learned authorised representative for the Revenue supports the impugned order.

19. We have considered the evidence in this case. We find that the SCN does not rely on anything but an email said to be sent by the DGARM indicating a list of suspicious exporters. While analysis

of data to identify suspicious exporters is a good method to begin investigations, but such suspicion, however strong, cannot be a substitute for evidence.

20. In this case, the SCN was issued without any further enquiry and without producing any evidence documentary or otherwise. It simply jumped to the conclusion that the appellant must have violated Regulation 10(n). The logic was rather simplistic. Since DGARM sent a list of suspicious exporters identified based on data analysis and since the exporters whose exports the appellant handled formed part of the list, such exporters do not exist and also did not exist at the time the exports were made and since they did not exist, the appellant must not have conducted the verification as obligated under Regulation 10(n) and therefore, must have violated it. Therefore, the appellant's Customs Broker licence is liable to be revoked and penalty is liable to be imposed on it.

21. We do not find it permissible to revoke the Customs Broker's licence of the appellant with nothing more than some suspicion. The suspicion can be ground to start an investigation and if evidence is found against the Customs Broker, action must be initiated but SCN issued without any evidence whatsoever is bad in law. The inquiry report and the impugned order based on such SCN cannot be sustained. We therefore, find that there is no evidence to support the allegation that the Customs Broker violated Regulation 10(n).

22. As we found that there is no evidence of violation of Regulation 10(n) by the appellant, the revocation of its licence, forfeiture of the Security deposit and imposition of penalty cannot be sustained. As we have found that there is no evidence against the appellant, the other technical issues raised by the learned counsel for the appellant need not be looked into. The impugned order revoking the Customs Brokers licence of the appellant, forfeiting their security deposit and further imposing penalty on the appellants cannot be sustained and needs to be set aside.

23. The impugned order is set aside and the appeal is allowed with consequential relief to the appellant.

(Order pronounced in open court on 27/02/2023.)

(P. Venkata Subba Rao)
Member (Technical)

(Binu Tamta)
Member (Judicial)