CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85232 OF 2020

[Arising out of Order-in-Original No: 68/CAC/PCC(G)/RM/CBS (Adj) dated 27th November 2019 passed by the Commissioner of Customs (General), Mumbai.]

Varun Freight Forwarders
Sushila Bhavan, 1st Floor,
24 Adimarzban Path, Mumbai - 400038 … ***Appellant***

versus

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

APPEARANCE:

Shri N D George, Advocate for the appellant

Shri Ramesh 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: A / 86084 /2022

DATE OF HEARING: 17/05/2022
DATE OF DECISION: 17/11/2022

PER: C J MATHEW

The appellant, a customs broker licenced under Customs House

Agents Licencing Regulations (CHALR), 1984, upon completion of investigation into alleged misdeclaration of 'MPEG cards or mounted PCB for set top box' as 'PCB cards for VCD players' in imports effected by three clients, purportedly owned by the brother of the employee of the licencee retained for managing operations at Goa but under the alleged control of the brother-in-law of the proprietor of the agency, between 2002 and 2004 in connection with which the statement had been recorded as far back as April 2004 and January 2005, found its operations in jeopardy with suspension of the same in September 2008, only to have it reinstated in June 2009 even as proceedings for revocation under regulation 20 of Customs House Agents Licensing Regulations, 2004 were initiated.

2. Three charges were framed in the notice issued to them to be inquired into by authority appointed on 21st January 2009 which, however, remained inconclusive till 14th August 2018 upon another officer being appointed for the purpose. The report of 7th June 2019 held the charges to be proved and the proceedings culminated in revocation of licence by Principal Commissioner of Customs (General), New Custom House, Mumbai in order no. 68/CAC/PCC(G)/RM/CBS (Adj) dated 27th November 2019 which is impugned before us.

3. Learned Counsel for the appellant enumerated the charges

framed for alleged breach of regulation 13(d), 13(k) and 19(8) of the erstwhile Customs House Agents Licencing Regulations (CHALR), 2004 (corresponding to regulation 10(d), 10(k) and 13(12) of the Customs Broker Licencing Regulations (CBLR), 2018 that had since replaced it) as requiring the broker to advise clients to comply with the statute and non-compliance brought to the notice of designated authority, to maintain records of documents and correspondence as well as of financial transactions in the manner specified by designated authority and to exercise supervision over the conduct of employees in transaction of business. It was pointed out that the licencing authority had erroneously accorded legitimacy to the incorrect findings of the inquiry authority in the impugned proceedings triggered by alleged evasion of ₹ 5,46,75,693 as duties of customs by their clients, M/s Krishna Impex, M/s Damodar Industries and M/s Navdurga Industries, at Mumbai and Goa. It is contended by him that the timelines prescribed in the Regulations of then, and now, had been observed in its breach, that the findings were based on statements claimed to be inculpatory even as adjudication proceedings in show cause notice of 21st July 2006 had been concluded in order of 7th November 2008 without any adverse finding against them and that the licence held by them could not have been cancelled by extra jurisdictional authority.

4. According to Learned Authorized Representative, the

admissions in the several statements unravels the material linkage of the *persona* and the trail of illicit imports bearing the hallmarks of the appellant's involvement which can be ignored only at the cost of insistence on the professional obligations expected from a customs broker. Contending that the statements were sufficiently demonstrative of the correctness of the allegations with which the appellant had been charged, he urged that there were no mitigating circumstances for reduction of the detriment visited on the appellant. It was also pointed out that the delay has had no bearing on the operations of the appellant.

5. We find that the licence of the appellant had been suspended and then revoked with an interlude of operability. It is also on record that the adjudication proceedings did not find it appropriate to penalize the appellant herein. We take note that there is no evidence on record that the alleged non-compliance, as enumerated, was either at the initiative of the appellant or could have been forestalled by awareness of the alleged misdeclaration. Even the Directorate of Revenue Intelligence (DRI) was able to deduce a conspiracy only in 2008; it is moot if blood, or marital relationship, suffices to infer the cognizance of the appellant about intent to misdeclare the contents of the consignment. The limit of evidence and extent of conjecture is evident from

> *'9.3 It is evident that the goods imported in the name of the said firms were actually ordered by Shri Nagpal and even the payment for the same to the supplier, transporter, even duty payment etc were arranged by him and even the delivery of the same was taken by him only at Delhi or at Chennai and hence, these imported goods were actually belonging to him only. But the IEC is not transferable for any import and therefore, these facts should have been immediately brought to the notice to the Department by the CB, but the CB failed to do so, even though they were aware that the IEC was non-transferable, CB M/s Varun Freight Forwarders, CHA No.11/391 should have therefore, advised their clients to comply with the provisions of the CHALR 2004. I agree with the finding of IL wherein he has proved the article of Charge-I leveled against the said CB. Hence, I find that the said CB had violated Regulation 13(d) of CHALR 2004 (now Regulation 10(d) of CBLR, 2018).'*

in the impugned order.

6. The licencing authority has placed reliance on the decision of the Hon'ble High Court of Delhi in *Jaspreet Singh Marwaha v. Union of India [2009 (239) ELT 407 (Del)]* which arose from challenge to suspension of licence with the claim therein that statements had been inappropriately relied upon and it was observed that

> *'5.6 …….. Given the findings both in the adjudication order and that those returned by the Commissioner (Appeals), it seems that the Tribunal will have to deal with this issue, amongst others, as to what would be the impact of statement under Section 108 of the Customs Act made by the importer, as well as, the appellant herein. In the circumstances, that the*

appeals are pending before the Tribunal any observation by us, would in our view impact the merits of the matter. However, we may state that in law, there is no bar to a statement made under Section 108 being admitted as evidence by the Tribunal. In this regard see the observations of the Supreme Court in the case of Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd & Ors. - 2000 (120) ELT 280 (SC) = (2000) 7 SCC 53 in paragraph 11, 12 and 17 at pages 58 and 59 and in the case of K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin - 1997 (90) ELT 241 (SC) = (1997) 3 SCC 721 in paras 19, 20, 21, 25 and 31 at pages 739-741, 742 and 745-746.

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6.15 ……. It is in these circumstances, that the Tribunal observed that since the statements of the two passengers had not been subjected to cross-examination by the appellant/CHA i.e., Vijay Thakkar and given the fact that Vijay Thakkar himself had retracted his own statement under Section 108, the statements could not be relied upon. In our view, the Tribunal did not understand the law to be that statements made by a CHA under Section 108 cannot be used against him in proceedings under the CHALR, 1984. The same position would obtain viz-a-viz CHALR, 2004. This is quite clear upon reading paragraphs 11 and 12 of the decision of the Tribunal. In our view the Tribunal in the subsequent decisions in the case of Varma & Sons (supra) and Smita International (supra) had misconstrued the ratio of the decision in the case of Thakkar Shipping Agency (supra). In our view a statement recorded under Section 108 of the Customs Act, 1962 of the CHA by the Customs authorities is admissible in evidence and can form the sole basis for

> *suspending the CHA's licence, however, subject to the usual safeguards that it is voluntarily and truthful. Where the statement under Section 108 of the Act is retracted it can only be relied upon if on examination of evidence one arrives at a conclusion, that the, retracted statement is true and voluntary. Therefore, in the instant case the Tribunal will have to determine as to whether the statement of the appellant i.e., Jasjeet Singh Marwaha passes the safeguards adumbrated in the judgment of the Supreme Court in the case of K.I. Pavunny (supra) and Duncan Agro Industries Ltd. (supra).'*

7. It is apparent that a general, and tentative, articulation in *re Jaspreet Singh Marwaha* has been appropriated as enabling the drawal of conclusions from depositions under section 108 of Customs Act, 1962 to the exclusion of any other corroborative, or even peripheral, evidence. Such derivation does not find support either in the facts pertaining to the relied upon decision or the decisions that influenced such observation in *re Jaspreet Singh Marwaha.* Furthermore, the issue before the Hon'ble High Court was the challenge to statements having been relied upon for ordering suspension of licence with decisions in which statements that were disregarded was held as sufficient to establish complicity of the delinquent agent.

8. The judgment of the Hon'ble Supreme Court in *Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd [(2000) 7 SCC 53*] and in *KI Pavunny v. Assistant Collector (HQ),*

Central Excise Collectorate, Cochin [(1997) 3 SCC 721] had considered the correctness of statements, recorded without the preliminaries enshrined in section 164 of Criminal Procedure Code, being relied upon for evidence in trial proceedings under Central Excise Act. 1944 and Customs Act, 1962. The direction of the Hon'ble High Court was specific to the submissions made therein and upon the decisions cited by the rival sides in that proceeding.

9. The licencing authority should have borne in mind that the law that was espoused in arguments on validity of statements recorded by officers of central excise and officers of customs, in *re Duncan Agro Industries Ltd* and in *re KI Pavunny*, had undergone substantial transformation in Finance Act, 1988 by incorporation of section 138B in Customs Act, 1962. Hence, the absence of evidence sufficient enough to corroborate statements that was the foundation for depriving a customs broker of his livelihood, and of others employed by him, prejudices the sustainability of revocation.

10. We also find that there has been substantial delay between the issuance of charge-sheet under the extant Regulations and the culmination in revocation. There is no justification offered for the delay; nor do we find from the records that the appellant, by acts of omission and commission, had contributed to the delay. On the other hand, it appears that the first inquiry authority had failed to take up the

task assigned to him till his retirement and licencing authority did permit that state of affairs to continue without monitorial oversight. Learned Authorized Representative contended that, as the licence continued to be in operation, delay in concluding of proceedings was inconsequential and that the Hon'ble High Court of Bombay has, in *Principal Commissioner of Customs (General) v. Unison Clearing P Ltd [2018 (361) ELT 321 (Bom)*], held the timelines to be directory and not mandatory. Doubtlessly, it has been ruled so but the appeals decided thereon arose from the setting aside of revocations solely on non-adherence to timelines compelling the Hon'ble High Court to observe that

> *'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.

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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.'*

and the highlighting by Learned Authorized Representative has preferred to ignore the succeeding observation that

> *'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.'*

Casual disregard of timelines is not to be encouraged as it would only lead to stealthy dilution of timelines that the Central Board of Indirect Taxes and Customs (CBIC) has considered appropriate to bind authorities subordinate to it with.

11. It is also incorrect on the part of Learned Authorized Representative to contend that pending proceedings was no detriment as far as appellant is concerned. Not *only* is it demonstrative of breach of public duty but also prolongs sysiphean agony that bordering on sadism. We would be failing in our charge if a salutary message on the consequences of disregard of directory provisions of law, without justification or cause, is not emphasized.

12. We do so by setting aside the impugned order and allowing the appeal.

(Order pronounced in the open court on 17/11/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*