

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH COURT NO.II

Customs Appeal No. 51825/2021

[Arising out of Order-in-Appeal No. 13/MK/POLICY/2020 dated 30.01.2020 passed by the Commissioner of Customs (Airport & General), New Customs House, New Delhi]

SHYAM SINGH

J-48, First Floor, May Field Gardens
Sector 51, Gurgaon,
Haryana-122101.

APPELLANT

Vs.

COMMISSIONER, CUSTOMS

(Airport & General)
New Customs House
New Delhi

RESPONDENT

APPEARANCE:

Shri B L Garg, Advocate for the Appellant
Shri Mahesh Bhardwaj, Authorised for the Department
Representative

CORAM:

HON'BLE DR. MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: JANUARY 06, 2022

DATE OF DECISION: 28.04.2022

FINAL ORDER No. 50378 /2022

PER DR. RACHNA GUPTA

The appellants herein are the authorised Customs Broker, of importer M/s. Guru Kripa Overseas, West Patel Nagar, Delhi holder of CB licence No. R-09/DEL/Cus/2010 valid upto 22.2.2020. Later filed Bill of Entry No. 3590163 dated 12.10.2017 through the appellants for clearance of goods imported by them from overseas suppliers M/s. Hongkong My Call

Technology Co. Ltd. under MAWB No. 78427064446 dated 8.10.2017 valuing at USD 4337.04 (FOB). The said Bill of Entry during first check was reassessed by loading 100% value for each item declared by the importer. DRI accordingly put the consignment covered under the said Bill of Entry on hold on 12.10.2017. The goods were later examined by the officers of DRI under the examination report of the even date. Based upon the further investigation, search and the statements recorded during investigation and from the documents recovered, the Department alleged that importer (M/s Guru Kripa) by making incorrect declaration of the quantity, non declaration of some of the items and value of imported goods in the Bill of Entry No. 3590163 dated 12.10.2017 have contravened the provisions of section 46 of Customs Act, 1962 read with Rule 11 of Foreign Trade (Regulation), Rules, 1993 have rendered the goods covered under the impugned Bill of Entry liable for confiscation. The importer was also alleged to have suppressed information from the Customs authorities with the intent to evade applicable Customs duty by filing incorrect quantity, description and value of goods in Bill of Entry No. 3590163 dated 12.10.2017 and thus have rendered themselves liable for penal action.

Based upon these observations vide the Show Cause Notice No. 03/2018-19 dated 24.4.2018 that the differential duty on determined assessable value was demanded from the importer along with interest and the proportionate penalty. The penalty under section 112 and 114AA of the Customs Act, 1962 was proposed to be imposed upon the appellants, the Customs Broker of the importer, alleging valuation of Regulation 11A and 11N of Customs Broker Licence Regulation, 2013. This proposal was confirmed vide Order-in-Original No. 10/2019-20 dated 23.04.2019. This order was communicated to Commissioner of Customs (Airport & General), NCH, New Delhi. Based upon the said information that Show Cause Notice No. 18/MK/2019 dated

14.08.2019 was served upon the appellants proposing the revocation of his Customs Broker Licence for forfeiture of part or whole of the security deposit as was submitted at the time of issuance of said licence in terms of Regulation 14 read with Regulation 17 of CBLR, 2018, for failure to comply with the provisions of Regulation 10 and Regulation 11 of CBLR, 2013. Penalty was also proposed to be imposed. The said proposal was confirmed vide Order-in-Original No. 13/2020 dated 30.1.2020. Being aggrieved of the revocation of the license that the present appeal has been filed.

2. I have heard Shri B L Garg, learned Counsel appearing for the Appellant and Shri Mahesh Bhardwaj, learned Authorised Representative appearing for the Department.

3. The order under challenge is mainly being challenged on the ground that the time lines as prescribed under Regulation 17 of CBLR, 2018 (Regulation 22 of CBLR, 2013) has not been followed. The Commissioner of Customs has failed to follow the time line of 90 days from the date of the order confirming the violation of Regulation 10 and 11 of CBLR, 2018 by the appellant. Learned Counsel has relied upon the definition of evidence reported in Regulation 17 of CBLR, 2018.

4. Learned Counsel for the appellant has relied on the following decision:

1. **Manjunath Cargo Pvt Ltd. Vs Commissioner of Customs, Bangalore [2021 (375) ELT 245 (Tri-Bangalore)];**
2. **HSN Shipping Pvt. Ltd. Vs. Commissioner of Customs, Chennai [2020 (372) ELT 689 (Mad)].**

5. While submitting on merits, it is mentioned that there was no violation of Regulation 10A and 11E of CBLR, 2018 as has been confirmed by the Adjudicating Authority. The said violation has been held only for want of the authorisation in favour of the appellant from the importer. It is submitted that written

authorisation is not at all required. There is no evidence to prove that the Customs Broker has otherwise failed to advise the importer. Findings to this effect are prayed to be set aside. Learned Counsel has relied upon the following decision:

1. **Parvath Shipping Agency vs CC, (Gen) Mumbai 2017 (357) ELT 296 (Tri-Mumbai)**

6. With respect to the allegation under Regulation 11E, it is submitted that there is no evidence to prove that the appellants imparted any incorrect information to the importer. It is submitted that findings are based upon the submissions of Shri Vishal Matlotia, and Shri Vijay Kumar Matlotia, the persons authorised for M/s. Guru Kripa, importer. None of them has alleged any fault of the appellant. They rather had alleged that a person named Sonu is the master mind but the Department has failed to examine the said Sonu. Finally, it is submitted that there is no evidence of any knowledge of the appellant for the mis-declaration in the impugned consignment. Question of imposition of penalty does not at all arises. Learned Counsel has accordingly, prayed that the order under challenge to be set aside and that the appeal be allowed.

7. While rebutting the submissions, the learned Departmental Representative has submitted that there is no violation of timeline in issuing the Show Cause Notice to the appellant proposing the revocation of his license. It is submitted that Commissioner of Customs acquired knowledge of the impugned mis-declaration from the Order-in-Original dated 23.4.2019, i.e. the order which was treated as offence report and based whereupon the show cause notice dated 16.8.2019 was served upon the appellant. It is submitted that period of 90 days under the Regulation 22 of CBLR, 2013 / Regulation 17 of CBLR 2018 has to reckon from the date of receipt of offence report. Learned Departmental Representative has submitted that the said order

was received by Commissioner of Customs on 23.5.2019. Accordingly, the Show Cause Notice to the appellant was well within time. With respect to the merits of the case, it is submitted that the findings in para 17, 18, 19, 35 and 36 of the Order under challenge have clearly appreciated the evidence against the appellant. Impressing upon no infirmity in the order and based upon this finding, the appeal is prayed to be dismissed.

8. After hearing the rival contentions and perusing the record and case law referred, it is observed and held as follows:-

Since the proceedings under challenge had been alleged violative of time line prescribed under statute, the foremost findings are with respect to the said time line. The order under challenge has revoked the licence granted to the appellant. The conditions and procedure for the same are contemplated under Regulation 20 and 22 of CBLR, 2013/ Regulation 17 of CBLR, 2018. The provisions reads as follows:

“Regulation 20. Procedure for revoking licence or imposing penalty. - (1) The Commissioner of Customs shall issue a notice in writing to the Customs Broker within a period of ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the licence or impose penalty requiring the said Customs Broker to submit within thirty 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 Customs Broker desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs.”

9. Upon perusal of the above regulation, it can be seen that an independent right is issued to the Commissioner to initiate action *de hors* the enquiry under other regulations and the Customs Act. The regulations does not only contemplate action against the erring Brokers, but also contemplates timely action. The Hon’ble Madras High Court in the case of **Kamakhshi Agency vs Commissioner** reported as [2001 (129) ELT 29 Mad] has held

that no doubt that action is to be initiated against the erring brokers but the same has to be in strict compliance with the provisions. It was held that the law of limitation is common to both the parties. The provision not only enables the respondent to levy penalty, but also empowers the respondent to revoke the license, which is an extreme step curtailing the right to carry on any trade or profession as guaranteed by the Constitution of India. The object behind such a provision can only imply the following : (a) the truth must be culled out at the earliest point in the interest of not only the Customs Broker or for that matter of the department also, (b) that such unlawful activities must be curbed at the earliest point by revoking the license, (c) unless a time limit is prescribed, action would not be initiated.

10. Thus it can be seen that the purpose, for which such time limit has been prescribed, is to curb the smuggling of goods and in the result to cancel the licenses of the brokers if they are involved and to impose penalty. The interpretation of a statute must always be to give a logical meaning to the object of the legislation and the aim must be to implement the provisions rather than to defeat it. As laid down by the Apex Court in the judgments relied upon by the learned counsel for the petitioners, when a statute prescribes a thing to be done in a particular manner, it must be performed in such a manner. Also, the use of the language "shall" in the regulation cannot be termed as "directory" as one of the consequence of the action is the revocation of the licence and it would also pave way for inaction by the officials breeding corruption.

11. In light of above discussion, it has to be seen as to whether the impugned Show Cause Notice is been barred by limitation as per the time line prescribed under 20(1) of CBLR, 13 and as to whether the said time line is mandatory or directory. The Hon'ble Apex Court way back in the year 1952 vide case law in Dattatraya

Moreshwar vs The State of Bombay and others reported in AIR 1952 SC 181 has observed as under:

"It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provision of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done."

12. Subsequently the Constitution Bench of Hon'ble Supreme Court in the year 1965 while setting aside the case of **Raza Buland Sugar Co. Ltd. v. The Municipal Board** reported as **[AIR 1965 SC 895]**, held that the question whether a particular provision is mandatory or directory, cannot be resolved by laying down any general rule and that it would depend upon the facts of each case. The Court has to consider the purpose for which the provision had been made, its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting therefrom when the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject as well as other considerations which may arise on the facts of a particular case, including the language of the provision. The said decision of the Constitution Bench was followed in **Salem Advocate Bar v. Union of India** reported as **[2005 (6) SCC 344]**. While doing so, the Supreme Court pointed out therein that our laws on procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decision should not be reached behind their back, that proceedings that affect their lives and properties should not continue in their absence and that they should not be precluded from participating in them.

13. In **Sharif-Ud-Din v. Abdul Gani Lone** reported as **[AIR 1980 SC 303]**, the Hon'ble Supreme Court indicated that the question whether a provision of law is mandatory or not depends upon its language, the context in which it is enacted and its object. The Court made an important observation, which will resolve the problem for us and hence it is extracted as follows :-

"In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one."

14. Another simple test to determine whether a time limit stipulated in a rule is directory or mandatory, is to see whether there is any indication in the Rule itself about the consequences of non-compliance with the same. If a statutory provision contains a prescription and also stipulates the consequences of non-compliance with the condition, it would normally be taken to be mandatory. If the consequences of non-compliance are not indicated, then, the provision has to be seen only as directory."

15. In the case of **Mohan Singh v. IAAI**), reported as **[1997 9 SCC 132]** the Hon'ble Apex Court has held thus :-

"If the object of the enactment is defeated by holding the same directory, it should be construed as mandatory whereas if by holding it mandatory serious general inconvenience will be created to innocent persons of general public without much furthering the object of the enactment, the same should be considered as directory."

16. Later in the case of **Sharif-Ud-Din v. Abdul Gani Lone**, reported as [(1980) 1 SCC 403] the Hon'ble Supreme Court, has held thus :-

"The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter, substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one."

17. To my considered opinion, outcome of the above decisions is that if the CHA prima facie appears to be innocent and honest and there is inordinate and unreasonable delay on the part of the department while investigating the matter and issuing the Show Cause Notice to said CHA, the word "shall" in Regulation 20(1) has to be treated as mandatory. Per contra when prima facie there is allegation of fraud /mis-representation / suppression or any such omission which has resulted into the alleged offence and the delay beyond 90 days was for the reasons beyond the control of the department that the said word "shall" has to be treated as directory in nature.

18. Reverting back to the facts of the present case, the time check is observed to be as follows:

S.No.	Event	Date
1.	Bill of Entry filed by the appellant for M/s Guru Kripa	12.10.2017
2.	Consignment put on hold by DRI	16.10.2017
3.	100% examination of the consignment	26.10.2017
4.	Panchnama prepared at Customs	09.11.2017

	Bonded warehouse	
5.	Statement of Vijay Kumar, authorized representative of the importer	18.11.2017
6.	Panchnama for valuation purpose	04.12.2017
7.	Show cause notice issued to the importer demanding differential Customs duty and proposed confiscation of the consignment issued by Additional Commissioner SIIB	24.4.2018
8.	Additional order for the said Show Cause Notice	23.04.2019
9.	Information whereof was given to the Commissioner of Customs (Airport and General)	24.4.2019
10.	Order was received by Commissioner of Customs (Airport and General)	23.5.2019
11.	Show cause notice to Customs Broker preceding revocation	16.8.2019
12.	Order confirming the said proposal/ order under challenge	30.01.2020

19. From the above time chart, it is observed that the Show Cause Notice as has been issued under Regulation 20(1) of CBLR 2013 is the one dated 16.8.2019 which has been issued by Commissioner of Customs (Airport & General) after receiving the report in the form of Order-in-Original dated 23.4.2019. Commissioner (Airport) of Customs is the officer under Regulation 20 CBLR, 2013/2018 by virtue of Notification C.No. CCCU(DZ)/Admn/59/2017/8638 Public Notice No. 05/2018 dated 30.03.2018. As already quoted above, period of 90 days in terms of Regulation 20 of CBLR is to recoken from the date of knowledge of Commissioner of Customs. From the time chart

above, it is clearly apparent that the date of knowledge of Commissioner of Customs (Airport & General) about the first report of impugned violations against the appellant was received by him on 23.5.2019. The show cause notice issued by him on 16.8.2019 is well within the said Notification period of 90 days. Once the Show cause Notice is well within the period of 90 days, it is held that learned Counsel has unnecessarily engaged himself arguing about the time being mandatory instead of being directory. The arguments of the appellant on the ground of limitation are therefore not sustainable. The case law relied upon by him on this issue is held not applicable to the facts of the present case.

20. Coming to another aspect of Violation of Regulation 10A, 10D, 10E, 10N of CBLR, 2018 (Erstwhile Regulation 11 of CBLR, 2013, as has been confirmed. It is observed that violation of Regulation 10A/11A of CBLR, 2018/2017 has been alleged on the ground of failure of appellant to produce or submit at the investigation stage, the requisite authorization in his favour by the importer in his favour. However, it is apparent that the authorization was produced before the Inquiry Officer. In view of the said observation, the findings that the later submission of the authorization shall not absolve the Customs Broker of his wrong doing are not held sustainable. It is held that submitting the authorization was a mere procedural formality. It admittedly was submitted before the impugned order was passed. It is held that violation of Regulation 10A has wrongly been alleged upon the appellant.

21. Coming to the regulation 10D and 10E of CBLR 2018, the same reads as follows:

Regulation 10(d) of CBLR, 2018 prescribes the following-

"A Customs Broker shall advise his client to comply with the provisions of the Act and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Assistant Commissioner of Customs, as the case may be."

Regulation 11(e) of CBLR, 2018 stipulates that

"A Customs Broker shall exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage."

22. The allegations have been confirmed based upon the statement of Vishal Matlotia. He had stated for him to be authorised person that too to just for taking care of the business of M/s Guru Kripa, the proprietor whereof was his own son. It is also coming apparent from his statement that father son duo were being advised by one another person namely Sonu. It is also coming from their statement that said Sonu only used to handover the papers to the appellant. There is nothing in their statement alleging any fault on part of the appellant. Since there is no other evidence than the said statement, I am unable to hold that the appellant had any knowledge about the consignment to have been mis-declared. The registered address of the importer has been mithai shop but the same cannot be alleged to have been fault of the Customs Broker. Otherwise also, it is not the case that none for the importer was found at the said registered address. The appellant no doubt has filed Bill of Entry in the present case. But the same has been filed on the basis of material given to him by his client. He has expressed his bonafide and denied in-correctness of those documents. Merely because there is evidence on record to falsify the said statement, Customs Broker cannot be held liable for the penal action. Otherwise also, he is held not responsible for verifying the

contents of his clients. I draw my support from the decision of Mumbai Bench of this Tribunal in the case of **Baraskar Brothers vs Commissioner of Customs (General), Mumbai** reported as **[2013 (294) ELT 415 (Tri-Mumbai)]**. The appellant has acted on the instruction of importer. The said fact has not been disowned by the importer himself. Hence Mistake cannot be fastened upon the CHA. I draw my support from the decision of **Transocean Discoverer 534 LLC vs. Commr. of Cus., Visakhapatnam-II** reported as **[2009 (236) E.L.T. 56 (Tri. - Bang.)]** and the decision of Tribunal Mumbai in the case of **P.D. Manjrekar vs. Commissioner of Customs, Mumbai** reported as **[2007 (213) E.L.T. 405 (Tri. - Mumbai)]** wherein it was held that once the Bill of Entry filed were given to CHA by their clients and the importer owns up to their mistake, they have also discharged the duty liability with interest. CHA cannot be considered instrumental in any mis-declaration.

23. Based upon these finding I am of opinion that there is no cogent evidence produced by the Department to prove the alleged failure on part of the CHA, the appellant. The penalties under section 112 and 114 AA of Customs Act, 1962 are therefore, held to have wrongly been imposed upon him. Order under challenge is accordingly, hereby set aside. Resultant thereto, and irrespective of the findings for the impugned show cause notice being well in time, the appeal in hand is hereby allowed.

(Pronounced in the open Court on 28.04.2022)

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

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