

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

Regional Bench COURT-2

Customs Appeal No. 20068 of 2024

[Arising out of the Order-in-Original No.COC-CUSTOMS-000-COM-13/2023-24 dated 08.01.2024 passed by the Commissioner of Customs, Cochin.]

M/s. Ajay Overseas Shipping,

Door No. XI/3007-B Pallichal Road,
Near UCO Bank, Cosmos Road,
Pyari Junction, Thoppumpady,
Kochi, Ernakulam,
Kerala – 682 005

.....Appellant

VERSUS

Commissioner of Customs,

Customs House Willingdon
Island, Cochin,
Kerala – 682 009

..... Respondent

Appearance:

Mr. M.S. Sanjeev Kumar, Advocate Appeared for Appellant

Mr. Maneesh Akhoury, Authorized Representative for Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

FINAL ORDER No. 20326 of 2024

Date of Hearing: 01.03.2024

Date of Decision: 30.04.2024

Per: P.A. Augustian

M/s. Ajay Overseas Shipping, appellant in the present appeal is challenging the order of revocation of the Customs Broker (CB) license. Appellant was holding Customs Broker license issued by the Respondent. Alleging that some cargo

companies in collusion with the Appellant and other customs brokers were misusing the Transfer of Residence (TR) facility extended to NRIs, proceedings were initiated. As part of the investigation, consignment brought in the name of few passengers were examined and found that it contained goods such as toy car, soap, milk powder., etc. and the consignment includes the goods belonging to other NRIs. Thereafter alleging that the Appellant is actively involved in release of such goods, premises of the Appellant was searched on 13.02.2019 and several incriminating documents regarding clearance of non bonafide baggage were recovered. Thereafter, show cause notice was issued and on conclusion of the proceedings, Adjudication authority as per the impugned order revoked the Customs Broker license of the Appellant and also ordered for forfeiture of the security deposit of Rs. 75,000/-. In addition to that, Adjudication authority also imposed penalty of Rs.50,000 under Regulation 18(1) of Customs Broker Licensing Regulation, 2018. Aggrieved by said order, present appeal is filed. Considering the revocation of the license, petition for early hearing was allowed.

2. When the appeal came up for hearing, Learned Counsel for the Appellant submits that the proceedings initiated against the Appellant are prima facie illegal and unsustainable. The Adjudication authority relied on a large number of documents to substantiate the allegations and the documents relied by the Adjudication authority are not in compliance with Section 138C of the Customs Act, 1962, which mandates certification in terms of sub-section 4 of Section 138C of the Customs Act, 1962. The

Learned Counsel also drew our attention to Section 65B of the Indian Evidence Act, 1882, which mandates certification of the documents to admit it as admissible evidence. Learned Counsel for the Appellant further submits that the proceedings were initiated without complying with the Regulation and no opportunity was extended for cross-examination as sought by the Appellant.

3. Regarding the issue on merit, Learned Counsel draw our attention to the 10(d) of the Customs Broker Licensing Regulation, 2018, where Appellant is obliged to advice his client to comply with the provisions of Act and in case of noncompliance, Customs broker shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs. Learned Counsel submits that none of the notices have deposed that Appellant herein has not advised them about the provision of law. Further Ld. Counsel submits that when Appellant had reason to believe that some of the consignments are imported in violation of the provision of law, it was brought to the notice of the Deputy Commissioner of Customs vide letter dated 12.09.2019. However, no proceedings were initiated by the respondent. The Learned Counsel for the Appellant also submits that the alleged violation of section 10(e) of the Customs Broker Licensing Regulation, 2018 is also unsustainable, since the Appellant had exercised due diligence to ascertain the correctness of the information furnished by the importer. In support the Learned Counsel for the Appellant also brought our attention to the Baggage Declaration made by the

passengers who are allegedly involved in import of non-bonafide goods. The declaration made by the passenger furnishing details of goods and certificate to the effect that all goods belong to them. As regarding recovery of the packing list allegedly from the computer of the Appellant, during investigation, statements were recorded from the Managing Partner under Section 108 of the Customs Act, 1962 and the Managing Partner of Appellant, who is involved in day to day activities clearly deposed that he is ignorant about such a packing list and Email communication. The operations of the computer and email communications were handled by one of the staff Smt. Shiny Vinu and Smt. Bincy. To find out the truth, the Appellant requested for cross-examination of the said staff, who left the organization immediately on commencement of the investigation. However, the Inquiry officer and the Adjudication authority refused to extend the opportunity for cross examination though they have relied on the statement recorded from Smt. Shiny Vinu and Smt. Bincy who were exclusively handling the computer system of the Appellant. The Adjudication authority also relied on the statement of Shri. K.K, Sathish, Shri. Mohammad Kutty Manjadikkal. However, the copies of the statement were not furnished as part of the relied upon documents and when cross-examination sought under Regulation 17(4) CBLR, 2018, it was also denied.

4. The Learned Counsel further submits that though the allegations were made regarding illegal import made by few NRIs, the consignees on whose name the goods were imported were not summoned in any of the proceedings. Further there is

no allegation that the Appellant had any undue financial benefit by abetting such illegal import of goods. Moreover, the Appellant has complied with KYC norms as per the instructions issued by the respondent from time to time. Regarding due diligence, the Appellant have no opportunity to verify the contents in the imported goods before conducting examination of the same by Customs officer. In the absence of any provision allowing Customs broker to physically examine the goods before filing Bill of Entry or Baggage Declaration, no allegation can be made that the Appellant was aware about the contents in the baggage. Moreover, even after examination, there is no prohibited or restricted goods imported by the passengers to allege involvement of the Appellant and to invoke the harsh provisions of revocation of Customs Broker Licence and forfeiture of security deposit.

5. The Learned Counsel further submits that though an allegation was made that the goods do not belongs to the passengers on whose name the goods were imported, it was subject to spot adjudication and goods were allowed to be released on payment of customs duty, fine and penalty to the very same passenger on whose name it was imported. If the Respondent have reason to believe that the goods belong to others, ought to have proceeded with adjudication proceedings by issuing notice to all the person on whose name or who has brought the goods in passenger's name and should have release the goods to its actual owners.

6. Regarding forfeiture of deposit, Learned Counsel for the appellant submits that there is no proposal in the SCN for forfeiture of deposit. Learned Counsel draw our attention to SCN where it is stated that :-

"20. Therefore, M/s Ajay Overseas Shipping holders of Customs Broker License bearing No. 222 (PAN - AAJFA5489L) is required to show cause to Commissioner of Customs, Custom House, Willington Island, Cochin-682 009 as to why

i. The Customs Broker License should not be revoked under Regulation 14 of the CBLR, 2018, as per the procedures under Regulation 17 ibid, on account of violation of Regulation 10 (d) and 10€ of the CBLR, 2018 and,

ii. Penalty should not be imposed on them under Regulation 18 of CBLR, 2018 on the grounds mentioned above."

7. The Learned Counsel also relied ON following decisions in support of the submission regarding admissibility of the document relied by the Adjudicating authority, the unsustainability of the finding if the finding is relied on the statements recorded from others and if no opportunity extended for their cross-examination, etc.

i. Advent Shipping Agency Vs. Principal Commissioner of Customs (A& A), Kolkata reported in (2023) 2 Centax 157 (Tri.Cal)

- ii. M.K Shah and Co. Vs. Commissioner of Customs (Airport & ACC), Kolkata (2023) 2 Centax 34 (Tri.Cal)
- iii. Perfect Cargo & Logistics Vs. C.C (Airport & General), New Delhi 2021 (376) E.L.T. 649 (Tri.-Del)
- iv. Jeen Bhavani International Vs. Commissioner of Customs, Nhava-Sheva-III (2023) 6 Centax 11 (Tri. Mumbai)
- v. Commissioner of Customs, Nhava Sheva-III Vs. Jeen Bhavani International (2023) 6 Centax 14 (SC)
- vi. M/s. R.P Cargo Handling Services Vs. Commissioner of Customs (Airport & General) in Customs Appeal No.50490 of 2019
- vii. Habib UZ Zaman Vs. Commissioner of Customs, New Delhi reported in 2021 (376) ELT 666 (Tri.Del)
- viii. Assistant Collector of Customs, (Prev), Bombay Vs. Ahmed Abdul Karim 2009 (247) ELT 97 (Bom)
- ix. Sourabh Aggarwal Vs. Commissioner of Customs, New Delhi 2020 (373) ELT 676 (Tri.Del)
- x. Naman Gupta Vs. Commissioner of Customs (Airport & General) (2024) 15 Centax 329 (Tri.Del)
- xi. Andaman Timber Industries Vs. Commissioner of C.Ex., Kolkatta-II 2015 (324) ELT 641 (SC)
- xii. Mayank Agarwal Vs. Commissioner of Customs Preventive, Lucknow (2023) 12 Centax 296 (Tri.All)
- xiii. KVS Cargo Vs. Commissioner of Customs (General) NCH, New Delhi MANU/DE/4911/2018

- xiv. Total Clearance Vs. Principal Commissioner of Customs (General) (2023) 10 Centax 161 (Tri.Bom)
- xv. Commissioner of Customs (Airport & General) Vs. ICS Cargo (2023) 13 Centax 20 (Tri.Del)
- xvi. Aakash Thakkar Vs. Commissioner of Customs (Import) (2024) 15 Centax 407 (Tri.Bom)
- xvii. Vinayak Shipping Services Vs. Commissioner of Customs (General) Appeal No.C/89009/2014
- xviii. Kunal Travels (Cargo) Vs. Commissioner of Customs (Import & General) MANU/DE/0860/2017
- xix. Management of Coimbatore District General Co-operative Bank Vs. Secretary Coimbatore District General Co-operative Bank Employees Association & others MANU/SC/2117/2007.

8. Learned Authorised Representative (AR) for the Revenue reiterated the finding in the impugned order and submits that the evidence available on record clearly shows that the Appellant was aware about the illegality committed by the overseas agencies, who had imported non-bonafide baggage in the name of passengers. Regarding compliance of Section 138C of Customs Act, 1962, Learned AR submits that the documents were retrieved from the computer belonging to the appellant, downloaded by appellant's staff and duly signed by them. Since there is no doubt about the correctness genuineness of the information given by the appellant and his staff in the printout from their own computers, it can be admitted as admissible

evidence, without compliance with the provision of section 138C of Customs Act, 1962.

9. Regarding not allowing the request for cross-examination, the Adjudicating authority concluded that the list of witnesses was prepared indiscriminately for cross examination, which even included witnesses like Shri. Akhil and Smt. Bincy who have not at all rendered any statement. Further Shri. Mansoor Ali, an importer, who had imported the goods was also listed for cross examination. Moreover, Appellant himself admits that they had not given any inculpatory statement. The adjudication authority also relied the decision of Hon'ble Supreme Court the matter of Narindrapal Singh Shargil Vs CC (2010 (259) E.L.T A19 (S.C), where it is held that when confronted with the request of cross-examination of 14 persons, it suggests that disposal of matter is intended to be delayed. Thus, Adjudication authority also accepted the finding of the Inquiry officer that there is enough material on record to hold that Appellant had failed to fulfil the requirement of regulation 10(d) and Regulation 10(e) of CBLR, 2018.

10. On merit, Learned AR submits that the appellant had pre-knowledge regarding the illegality of importing non-bonafide fide baggage. Regarding violation of regulation 10(d) of CBLR 2018, the Learned AR submits that though the appellant claims that none of the importer or passengers, who had filed baggage declaration have deposed that appellant has not advised them about provision of law, Section 10(d) of CBLR 2018 casts specific responsibility on the appellant that the information regarding Act

or Rules and consequence of non-compliance should have been advised to the importer. Moreover, statement recorded from passenger Mr. Riyab Basher nowhere said that the appellant had briefed him about provision of the Act and allied rules and regulations. Regarding information furnished by appellant vide Letter dated 12.02.2009, it is only an after-thought to mitigate the doubt about the appellant. Regarding violation of 10(d) of CBLR 2018, It is admitted that as per section 10(d) CBLR 2018, duty is cast on the Customs Broker to advise his clients to comply with the provision of law and in case client fails to comply with the provision, it should have been brought to the notice of the Customs Authority. Learned AR submits that while recording statements from the passengers, nowhere it came out that appellant has briefed the passengers about the provisions of Act or other allied Act Rules and Regulations on non-compliance. The Learned AR also drawn our attention to the statement of Shri. K.K. Satheesh and submits that from the foregoing evidence it is clear that Customs Broker has not fulfilled the responsibility under regulation 10(d) CBLR, 2018.

11. Regarding violation of Regulation 10(e) of CBLR, 2018, Learned AR submits that there is no evidence that the appellant had imparted any information to their clients with reference to documents which were submitted by the passengers. Regarding cross examination Learned AR reiterated the finding given by Adjudication Authority and submits that finding in the impugned order are sufficient to justify the reason for not extending the opportunity for cross examination. Thus, the imposition of

penalty, forfeiture of security deposit and revocation of the Custom Broker License is sustainable. Further, the learned AR relied on the following decisions:-

1. Laxmi Enterprises -2018 (361) E.L.T. 1054 (Tri.-Del)
2. Kishan Manjibhai Gadhesariya-(2023) 2 CENTAX 63 (Guj.)
3. Marico Logistics Pvt. Ltd-(2023) 2 Centax 129 (Cal.).
4. Stalin Joseph -2021(377) E.L.T. 13(Mad.).
5. Harindrapal Singh Shergil-2010 (259). E.L.T. A19 (S.C).
6. Rajendra Prakash Pawar -2020 (374) E.L.T. 10(Kar).

12. Heard both sides, we have gone through the submissions and finding in the impugned order. As per the impugned order, the Adjudication authority concluded that email communication relied in the Show cause Notice is admissible evidence even in the absence of the certification under the provisions of Section 138C of the Customs Act, 1962. Such finding is given on the ground that proceedings under CBLR, 2018 are quasi-judicial proceedings and in quasi-judicial proceedings, the evidence is appreciated on the principles of preponderance of probability and quasi-judicial authority does not have to prove things beyond doubt as in the case of criminal proceedings and for this reason, adjudication authority held that the rigors of provisions of the Indian Evidence Act, 1882 are not applicable to quasi-judicial proceedings as held by Supreme Court in the matter of CC Vs M/s Orient Enterprise -1997 (92) E.L.T A069 (S.C).

13. Regarding cross examination, appellant sought cross examination as per Regulation 17(4) CBLR, 2018. As per the law laid down by Hon'ble Supreme Court in the matter of M/s Andaman Timber Industries Vs. Commissioner of C. Excise, Kolkata-II (reported in 2017 (50) STR 93(SC))

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the

appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

14. Further in the matter of M/s Basudev Garg Vs. Commissioner of Customs - 2013 (294) E.L.T 353 (Del), it is held that;

"14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi-judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances

exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. The Division Bench also observed as under: -

"29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi-judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi-judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi-judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."

15. As regarding non-compliance with the provisions of Section 138C of the Customs Act, 1962, unless the requirement of Section 65B of the Evidence Act is satisfied, such evidence cannot be admitted in any proceeding. Since Section 138C of the Customs Act is *pari materia* to Section 65B of the Evidence Act, the evidence in the form of computer printouts, etc., recovered during the course of investigation can be admitted only subject to the satisfaction of the sub-section (2) of Section 138C. This refers to the certificate from a responsible person in relation to the operation of the relevant laptop/computer. In the absence of such certificate, in view of the unambiguous language in the judgment of the Hon'ble Supreme Court, the said electronic documents cannot be relied upon by the Revenue for any Quasi-Judicial proceedings.

16. Regarding reliance on the decision of Laxmi Enterprises (Supra) on Section 138C of the Customs Act, 1962, the Tribunal admitted the statement on the ground that proprietor had admitted that the printout was taken from the laptop and also admitted correct valuation of the goods. Whereas in the present case, the Managing Director of Appellant in his statement under section 108 Of the Customs Act, 1962 categorically denied knowledge regarding presence of goods belongs to others or any other illegality in import. Regarding the email communication retrieved through the computer of the appellant, he had categorically stated that the computer was managed by his staff Smt. Shiny Vinod. In her statement also she categorically stated that the email belongs to appellant is handled by her and by

another staff Ms. Bency who left office of the appellant during investigation. There is no admission made by Managing Director of the firm regarding his knowledge about the alleged illegal activity and even, if the documents were retrieved from the computer managed by staff Smt. Shiny Vinod and Ms. Bency, in spite of giving specific request for cross examination, no opportunity was extended by Adjudication Authority. There is no reason forth coming in the impugned order specifying the reason for rejecting request of cross examination of these two employees, who had given statements as well as furnished documents retracted from the computer belongs to Appellant which are relied by Adjudication Authority to give finding against the appellant. Such documents cannot be considered as admissible evidence specially in the absence of certification as per Section 138C of Customs Act, 1962 and when no opportunity extended for cross examination as per Section 17 of CBLR 2018.

17. Regarding violation of section 10(d) of CBLR 2018, as per section 10 (d), Customs Broker shall advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be; Thus a duty is cast on the Customs Broker to advise his clients to comply with the provision of law and in case the client failed to comply with the provision, it should have been brought to the notice of the Customs Authority. Learned AR submits that while recording statements from the passengers, nowhere it came out

that appellant has briefed the passengers about the provisions of Act or other allied Act Rules and Regulations on non-compliance. The said provision doesn't cast a responsibility on the Customs broker to impart each and every importer/passenger regarding provision of Customs Act or other allied Rules and Regulation. The responsibility of Customs Broker is only to advise the importer regarding concerned provisions only when it is brought to the notice of the Customs broker that the goods imported by the passenger or importer is imported or being exported in violation of any provision of law. In the present case, there is no way for the Customs broker to find out whether the baggage brought by the passenger belongs to them or any other person. It is revealed only at the time of inspection. If the overseas agency had induced the passenger to carry the goods belongs to other NRIs though unaccompanied baggage of a passenger by offering any amount, in the absence of any knowledge regarding such offer till the filing of baggage declaration, the proceedings initiated against the appellant is unsustainable. Thus, the finding regarding alleged violation of the provision of Regulation of 10(d) of the CBLR 2018 is unsustainable.

18. Regarding violation of section 10(e) of CBLR 2018, as per section 10 (e), 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. In the present case, while submitting baggage declaration, the customs broker has prepared the list of items as informed by the passenger and obtained his signature and

endorsement in baggage declaration that the "above all items are belongs to me". This also mentioned that the passenger had handed over or connected documents to appellant for clearance. Customs Broker is not expected to analyze various parameters including appearance of passenger to find out whether he can afford to ship a 40 feet container from his or her income as submitted by Learned AR. If no such information is forth coming from the statement recorded from the Managing partner of the firm, no presumption can be drawn that the appellant failed in scrutinize the documents and failed to due diligence as submitted by Learned AR. However, from the facts of the present case, the list of persons on whose behalf the goods were exported by the overseas agency is available in the official mail of the Appellant and there is no categorical denial on behalf of appellant to that effect that there is no such e-mail available in the g-mail account of the Appellant. Though the document retrieved from the email communication of the appellant cannot be considered as admissible evidence in the absence of compliance with 138C of the customs Act, 1962, in the absence of the categorical denial regarding presence of such document in email of the appellant, only presumption can be drawn that though the appellant was not knowing about the content of the mail/communication made on behalf of the appellant, there is an omission on the part of appellant in proper supervision of the activities of its staff, which amount to non exercise of due diligence as contemplated under section 10(e) of CBLR 2018. However, harsh provisions of CBLR,2018 cannot be invoked for

such omission and appropriate penalty under the provisions of Section 18(1) is sufficient in such case. Thus, the revocation of the Customs Broker license and forfeiture of Security deposit under section 14 of the CBLR, 2018 are unsustainable.

19. Regarding penalty under Regulation 18(1) of the CBLR, 2018 considering the suspension of the Customs Broker license since January, 2024, a lenient view can be taken regarding penalty. Thus, the penalty imposed on the appellant under Regulation 18(1) of the CBLR, 2018 is reduced to Rs. 40,000/-.

20. In the result the impugned order is modified and appeal is partially allowed by setting aside revocation of the Customs Broker license and forfeiture of security deposit under section 14 of the CBLR, 2018. The penalty imposed on the appellant under Regulation 18(1) of the CBLR is reduced to Rs. 40,000/- (Forty Thousand Rupees only).

(Order Pronounced in Open court on 30.04.2024)

(P.A. Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Sasidhar