

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED 08.12.2017**

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
24.11.2017	081217

CORAM:**THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM**

W.P.No.27359 of 2017
and
W.M.P.Nos.29244 & 29245 of 2017

M/s.Blessing Cargo Care Pvt. Ltd.,
Rep., by its Managing Director,
Shri.R.Ravichandran,
No.1, Ground Floor, 5th Main Road,
Nanganallur, Chennai – 600 061.

Presently at
Flat No.2, Ground Floor, Alpha Caramel Flats,
No.10/6, Dr.Ambedkar Street, Nanganallur,
Chennai – 600 061.

Vs.

..Petitioner

The Commissioner of Customs
Chennai VIII Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai – 600 001.

..Respondent

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records pertaining to the impugned order dated 12.10.2017, passed by the respondent in F.No.R-606/CBS and quash the same.

For Petitioner : Mr.C.Natarajan Sr., Counsel for
Mr.Hari Radhakrishnan

For Respondents : Mr.T.Pramod Kumar Chopda

ORDER

The petitioner has filed this Writ Petition challenging the order passed by the respondent, dated 12.10.2017, by which the respondent ordered for continuation of suspension of the Customs Broker Licence issued to the petitioner by exercising its power under Regulation 19(2) of the Customs Broker Licencing Regulation 2013 (CBLR).

2. The petitioner company was issued with a Customs Broker Licence by the respondent and are stated to be in the business for 17 years and have not come to adverse notice of the department earlier. The petitioner had filed bills of entry No.2094269, dated 14.06.2017, 2128764 & 2131930, both dated 17.06.2017, on behalf of the importer M/s.Benq India Pvt., Ltd., (Benq) for import of goods described as BenQ Computer LCD Monitor with LED backlight by classifying the same under tariff heading 8528 52. According to the petitioner, the said tariff heading covers monitors which are capable of directly connecting to and designed for use with an automatic data

processing machine (computer). According to the petitioner, they had adopted such classification at the instruction of the importer.

3. The Special Investigation and Intelligence Branch (SIIB) seized the imported goods under mahazars dated 30.06.2017, on the ground that the goods are not designed for use with an automatic data processing machine and the importer has wrongly availed the benefit of customs Notification NO.24/2005-Cus, dated 01.03.2005, (serial No.17). Subsequently, the petitioner moved this Court by way of Writ Petition for provisional release of the goods and the goods were released pursuant to direction issued in the said Writ Petition. After the goods were released by order dated 22.09.2017, the respondent exercised its power under Regulation 19(1) of the CBLR and ordered for suspension of the petitioner's licence with immediate effect as enquiry against the petitioner is contemplated. In terms of Regulation 19(2) of the CBLR, an opportunity of personal hearing was granted to the petitioner on 28.09.2017. The petitioner participated in the said hearing and requested for lifting the order of suspension. The respondent adjudicated the matter and passed the impugned order ordering for continuation of the suspension with the direction that proceedings under Regulation 20 of the CBLR will follow. The petitioner while admitting that as against the impugned order, they

have an effective remedy of an appeal before the Tribunal, challenges the same as the order has been passed by abusing and misusing the power conferred on the respondent and alternate remedy would not be efficacious and effective.

4. Mr.C.Natarajan, learned Senior counsel appearing for Mr.Hari Radhakrishnan, learned counsel for the petitioner referred to the Regulation (CBLR) and has drawn the attention of this Court to Regulation No.18. It is submitted that the said regulation provides for revocation of licence or imposition of penalty. That the Commissioner of Customs may subject to the provisions of the Regulation 20, revoke the licence of the customs broker and order for forfeiture of part or whole of security, or impose penalty not exceeding fifty thousand rupees on a customs broker on any of the grounds mentioned in clauses (a) to (f) being made out. It is submitted that clauses (c) to (f) of Regulation 18 would result in revocation of licence considering the reasons stated therein. However, clauses (a) & (b) being in the nature of failure to comply with the conditions of the bond or failure to comply with any of the provisions of the Regulation could be visited with a penalty of not exceeding Rupees fifty thousand and the allegation against the petitioner in the instant case is that they have contravened Regulation 11(d) & Regulation 11(e). In as much as the

petitioner did not advise their client to comply with the provisions of the Act and failed to exercise due diligence to ascertain the correctness of the information and even assuming ultimately, an order has been passed, it can at best be visited with levy of penalty of not exceeding Rupees fifty thousand and it is definitely not a case, where the suspension of licence is required to be made pending proceedings under Regulation 20 of the CBLR. It is further submitted that the classification of the goods was done based upon the materials, which were given by the client and there is no bar for claiming different classification, as each bill of entry is an independent transaction. In support of such contention, reliance was placed on the decisions in the case of **M.M.Ipoh & ors. vs. Commissioner of Income Tax** reported in **1968 (67) ITR 106** and **Khatema Fibres Ltd vs. State of U.P.** Reported in **(2001) 1 SCC 458**.

5. Further, it is submitted that *res judicata* does not apply in matters pertaining to tax for different assessment years, because *res judicata* applies to debar courts from entertaining issues on the same cause of action whereas the cause of cause for each year is distinct. In support of such proposition, learned counsel placed reliance on the decision in the case of **BSNL vs. UOI** reported in **(2006) 145 STC 91**

(SC) para 20. Further, it is submitted that the power under Regulation 19(1) is invokable, where immediate action is necessary to suspend a licence of customs broker. However, in the instant case, the licence was suspended after nearly three months after the seizure of goods and such suspension is not warranted. Further, it is submitted that show cause notice under Regulation 20 of the CBLR, dated 03.11.2017, has been issued and the petitioner is in the process of submitting their reply and the case may be directed to be adjudicated and pending disposal of the proceedings, the order of suspension may be revoked, so as to enable the petitioner to carry on the business operation, which has virtually come to a stand still.

6.Mr.T.Pramod Kumar Chopda, learned Senior Standing counsel appearing for the respondent submitted that the petitioner having already received the show cause notice, dated 03.11.2017, under Regulation 20 of the CBLR should submit their reply to the notice and participate in the proceedings before the respondent and a time frame could be fixed within which such proceedings can be concluded by the respondent. It is submitted that on account of the factual matrix, which has been brought out in a clear manner in the impugned order, suspension of the petitioner's customs broker licence is warranted and

the respondent has given sufficient reasons in the order dated 22.09.2017, as to why order of suspension was required to be passed under Section 19(1) of the CBLR and has given separate and adequate reasons in the impugned order dated 12.10.2017, as to why the order of suspension should continue. It is submitted that this Court will not go into the factual position and examined the sufficiency of the reasons for placing the petitioner's licence under suspension as the respondent has considered the factual situation, examine the conduct of the petitioner and after affording full and effective opportunity, has passed the impugned order and as such, there is no error in the same. Furthermore, the impugned order clearly states that the petitioner has not been absolved from all the charges made against them in the suspension order dated 22.09.2017 and proceedings under Regulation 20 of the CBLR will follow. It is further submitted that the interpretation given by the learned Senior counsel that at best only penalty not exceeding rupees fifty thousand alone can be imposed is not tenable, as the proceedings under Regulation 20 is in the show cause notice stage. Further, it is submitted that with regard to the decisions cited by the learned Senior counsel stating that there can be no *res judicata* in tax matters and the importer is entitled to adopt different classification for each bill of entry, it is submitted that the

Court should take into consideration the facts of the case, which has been dealt with by the respondent, while continuing the order of suspension and as to how the word "computer" was inserted in the bill of entry, thereby failing in their obligation contemplated under Regulation 9 of the CBLR. Furthermore, in respect of the identical product, the classification adopted by the very same importer, whose import was handled by the petitioner, was not accepted and the order was confirmed by the Commissioner of Appeals, dated 30.07.2017 and in spite of having knowledge of the said order, the petitioner has filed the bill of entry by adding the word 'computer' with a view to avail the unintended benefit of the notification and this has resulted in passing the impugned order. On the above submissions, the learned counsel prayed for sustaining the impugned order of suspension.

7. Heard the learned counsels appearing for the parties and perusing the materials placed on record.

8. In ***Commissioner of Customs vs. K.M.Ganatra & Company*** reported in ***(2016) 4 SCC 687***, the Hon'ble Supreme Court quoted the observation of CEGAT, West Zonal Bench, Mumbai, with regard to the role of a Customs House Agent like the petitioner.

It was pointed out that the Customs House Agent (CHA) occupies the very important position in the customs house. The customs procedures are complicated. The importers have to deal with a multiplicity of agencies namely carriers, custodians like BPT as well as the Customs. The importer would find it impossible to clear his goods through its agencies without wasting valuable energy and time. The CHA is supposed to safeguard the interests of both the importers and the customs. A lot of trust is kept in CHA by the importers/exporters as well as by the government agencies. To ensure appropriate discharge of such trust, the relevant regulations are framed. Regulation 14 of the CHA Licensing Regulations lists out obligations of the CHA. Any contravention of such obligations even without intent would be sufficient to invite upon the CHA, the punishment listed in the Regulations. This being the level of trust and confidence imposed on a customs broker, who has been issued a licence under the relevant Regulation, it has to be seen as to whether the impugned order of suspension under Regulation 19(2) of the Act, is sustainable or not. Regulation 19 of the CBLR, deals with suspension of licence. Regulation 19(1) states that notwithstanding anything contained in regulation 18, the Commissioner of Customs may, in appropriate cases where immediate action is necessary, suspend the licence of a

Customs Broker, where an enquiry against such agent is pending or contemplated. Regulation 19(2) states that where a licence is suspended under sub-regulation (1), the Commissioner of Customs shall, within fifteen days from the date of such suspension, give an opportunity of hearing to the Customs Broker whose licence is suspended and may pass such order as he deems fit either revoking the suspension or continuing it, as the case may be, within fifteen days from the date of hearing granted to the Customs Broker. Proviso in Regulation 19 states that provided that in case the Commissioner of Customs passes an order for continuing the suspension, the further procedure thereafter shall be as provided in regulation 20. In the instant case, the power under Regulation 19(1), was invoked as in the opinion of the Commissioner of Customs, it was found that it is an appropriate case, where immediate action is necessary. In terms of sub-Regulation (2) of Regulation 19, opportunity of hearing was granted to the petitioner which was availed and the Commissioner has passed the impugned order continuing the suspension and stating that proceedings will be initiated under Regulation 20. In accordance with the said observations, show cause notice dated 03.11.2017 has been issued and received by the petitioner.

9. Mr.C.Natarajan submitted that it is alleged that the petitioner has contravened Regulation 11A(d)(e). Both these alleged violations cannot visit the petitioner with the penalty of revocation of licence, which is clear from reading of regulation 18. It is submitted that the grounds mentioned in clauses (a) to (f) in Regulation 18 are the grounds for revocation of licence or imposing of penalty. It is a submission that if a Customs Broker has committed violations contemplated under clauses (c) to (f), it would undoubtedly result in an order of revocation whereas, if Customs Broker contravenes clauses (a) & (b) of Regulation 18, it would be a case for imposition of penalty, which cannot be more than Rupees Fifty Thousand and therefore, the petitioner's licence could not have been placed under suspension. The submission made on behalf of the petitioner cannot be countenanced, as Regulation 18 provides for the grounds of revocation of licence or imposition of penalty. It may be incorrect to read something which is not contained in the Regulation and to state that the violations of clauses (a) & (b) can invite only a penalty and violations of clauses (c) to (f) will definitely result in revocation. The manner in which Regulation is interpreted is incorrect, as it is the adjudicating authority, who has to take a decision in the matter as to what is the nature of

punishment to be imposed on the CHA. Therefore, this Court does not agree with the submissions made on behalf of the petitioner that assuming it is established that there is violation of clauses (a) & (b) of Regulation 18, the maximum that can happen to the petitioner is imposition of penalty and therefore, suspension should be revoked. If such interpretation given by the petitioner is to be accepted then Regulation 18 has to be reworded to state that violation of clauses (a) & (b) would be construed as a minor penalty warranting a minor punishment of fine and violation of clauses (c) to (f) would be a major penalty warranting revocation, as a major punishment. Such interpretation is impermissible and there is no room provided under the Regulation to accept such a stand.

10. There can be no dispute over the settled legal position that there is no *res judicata* in matters pertaining to tax for different assessment years. However, the facts of the present case, calls for a different approach. The allegation against the petitioner was that in the bill of entry, the word 'computer', was deliberately added to the item "description of goods", at the behest of the importer in violation of Section 46(4) of the Customs Act, with a view to claim duty exemption benefit. At the first blush, it appears the insertion of word

"computer", in the bill of entry, though alleged to be deliberate, cannot be construed as a serious matter. However, what is important to note is that the petitioner has been the Customs Broker for the importer for several years, they have been handling identical products for the very same importer and effecting clearances through Chennai Port. One such consignment covered in bill of entry dated 21.02.2011, was subject of check with regard to the classification adopted by the petitioner, the Customs Broker of the importer. As in the instant case, the classification was done as monitors of a kind solely or principally used in automatic data processing system under 8471. This classification was not accepted by the Department and an Order-in-Original, dated 18.01.2012, was passed, rejecting the petitioner's classification and classifying the goods under 85285900. The importer filed appeal before the Commissioner of Appeals, which was dismissed by order dated 30.07.2014. This order has attained a finality, as no appeal was preferred against the order within the permitted time. It appears that subsequently, the petitioner has been handling the very same consignments and effecting clearances for the very same importer through the Mumbai Port. After lapse of about two years, the present bill of entry has been filed. The petitioner does not plead ignorance or lack of knowledge of the order-in-original, dated

18.01.2012, confirmed in order-in-appeal, dated 30.07.2014, in respect of an identical consignment. In such circumstances, it has to be seen as to what is the duty cast upon a Customs Broker, as it has been held that he is supposed to safeguard the interest of both the importers and the Customs.

11. Regulation 11 lists out the obligations of a Customs Broker and one such obligation is to advise the 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 Customs or the Assistant Commissioner of Customs. Further, he is required to 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 backage. Thus, there was a duty on the part of the petitioner to advise his client that they would not be justified in adopting a different classification of the goods having failed in the earlier attempt resulting in an order which has attained finality. The explanation which was offered by the petitioner stating that they had adopted it, as it was an industry terminology and it was based on the catalogue /technical specification sheet. The officer, who investigated the matter, has recorded that the statement of the importer that they had

added the word "computer" based on the catalogue/technical specification sheet was found to be factually incorrect, as the catalogue/technical specification sheet produced by them along with the import documents through the petitioner before the customs do not portray the LED monitor as computer monitor. Thus, the respondent stated that the petitioner failed in his obligations contemplated under Regulation 11 by adding the word "computer", to the 'item description' without seeking proper explanation from the importer, thereby violating Section 46(4) of the Customs Act. In such circumstances, it cannot be stated that the respondent did not properly exercise its discretion, while suspending the petitioner's licence under Regulation 19(1), nor it can be stated that the interpretation given by the respondent was either perverse or arbitrary not to bring the petitioner's case within the ambit of "appropriate case in Regulation 19(1)".

12. It was further submitted that Regulation 19(1) could have been invoked only where immediate action is necessary and in the instant case, the order was passed on 22.09.2017, after nearly three months from the date of seizure of the consignment. The term "immediate" occurring in Regulation 19(1) should be interpreted in the

context of the CBLR and therefore, there would be no room for adopting dictionary meaning for the word "immediate" occurring in Regulation 19(1). The bills of entry were filed by the petitioner on 17.06.2017. The goods were seized on 30.06.2017, after which statement was recorded from the Managing Director of the petitioner on 17.07.2017, statement was recorded from the authorised representative of the importer on 18.07.2017 and the order of suspension was passed on 22.09.2017, invoking regulation 19(1). Thus, this Court finds that there is no inordinate or unexplained delay warranting the case to be taken out of the purview of a case for immediate suspension. Thus, considering the conduct of the petitioner and the facts, the first respondent has exercised his powers and found the petitioner's case to be an appropriate case for immediate suspension. After the petitioner was afforded an opportunity, he was given a hearing and the order of suspension has been directed to be continued and the reasons assigned in the impugned order are just and germane to the allegations made against the petitioner. However, the impugned proceedings is only an order of suspension and procedure under Regulation 20, is to follow for which already show cause notice has been issued.

13. Thus, for all the above reasons, the petitioner has not made out any case for interference with the impugned order. Accordingly, the Writ Petition fails and it is dismissed. The petitioner is directed to submit their reply to the show cause notice, dated 03.11.2017, within a period of 30 days from the date of receipt of a copy of this order and upon compliance of the directions contained in paragraph 15 of the show cause notice, the respondent shall adjudicate the show cause notice and pass final orders as expeditiously as possible, preferably within a period of two months from the date on which, the case is ready for adjudication. It is made clear that the show cause notice issued under Regulation 20 shall be adjudicated by the respondent without being in any manner influenced by the observations made by this Court in this order. No costs. Consequently, connected Miscellaneous Petitions are closed.

08.12.2017

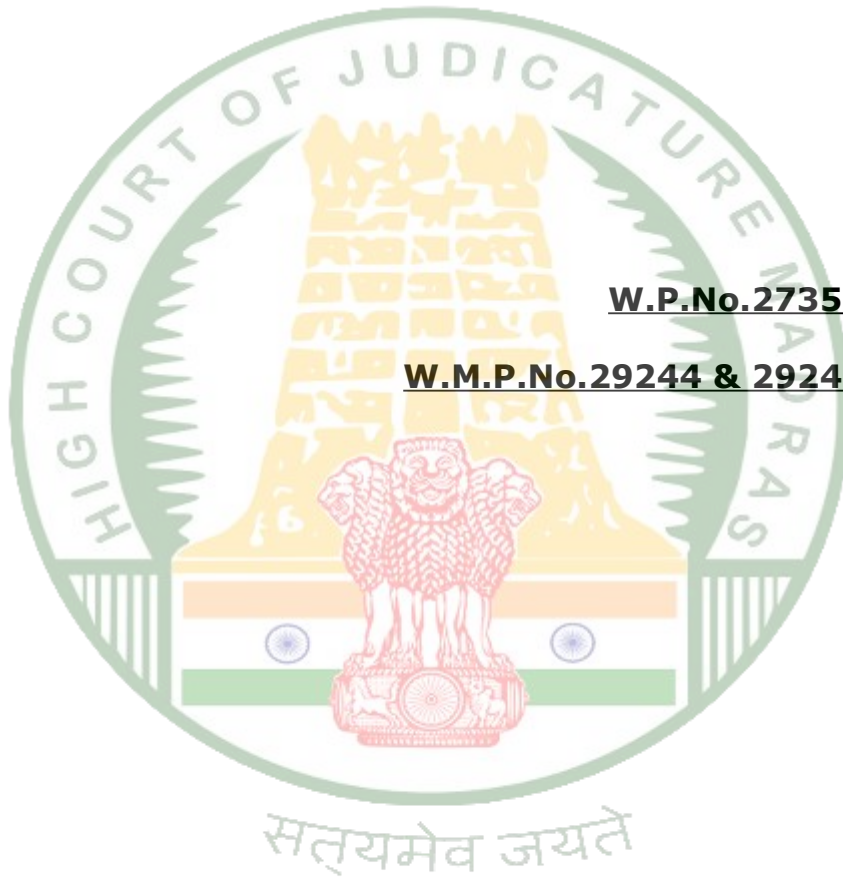
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To
The Commissioner of Customs
Chennai VIII Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai – 600 001.

T.S.SIVAGNANAM, J

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