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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 25.01.2023*

+ **CUSAA 9/2022**

GREEN VIEW LOGISTICS

..... Appellant

Through: Mr. Mohd Faraz Anees, Adv.

Versus

COMMISSIONER OF CUSTOMS

..... Respondent

Through: Ms. Arunima Dwivedi, SSC with
Ms. Pinky Pawar & Mr. Aakash
Pathak, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant has filed the present appeal impugning an order dated 03.09.2021 (Final Order No. C/A/5179/2021-CU – hereafter ‘**the impugned order**’) passed by the Customs, Excise and Service Tax Appellate Tribunal (hereafter ‘the Tribunal’). The impugned order was rendered in an appeal preferred by the appellant assailing an order dated 11.06.2021, passed by the Commissioner of Customs (Airport & General), New Delhi under Section 129A of the Customs Act, 1962 (hereafter ‘the Customs Act’), whereby the Customs Broker License of the appellant was revoked and his security deposit was forfeited.

Additionally, the appellant was mulcted with a penalty of ₹50,000/-.

2. According to the respondent, the appellant is guilty of misconduct as he had permitted misdeclaration of goods by the exporter (M/s Balaji International) and attempted to facilitate export of goods otherwise restricted at the material time.

3. The appellant is a holder of CHA License No. AHPPJ4199PCH001 and had filed a Shipping Bill (being Shipping Bill no. 2867653 dated 28.05.2022) for export of consignment of 'Glucose Test Strips' classifying the same under CTH 90279090 of the Customs Tariff Act, 1975. According to the respondent, the said goods fell under classification of ITC HS code 38.22 and at the material time, the export of such goods was restricted by virtue of Notification No.59/2015-20 dated 04.04.2020.

4. A show cause notice dated 22.12.2020 was issued to the appellant by the Commissioner (Airport & General) alleging contravention of the provisions of Regulation 10 of the Customs Brokers Licensing Regulations, 2018 (hereafter 'the CBLR, 2018') and proposing revocation of the appellant's license and forfeiture of the security deposit under Regulation 14 of the CBLR, 2018.

5. Thereafter, an Inquiry Officer (hereafter 'IO') was appointed to inquire into the allegations. He submitted his report dated 22.03.2021. The IO found that the appellant had violated the provisions of Regulation 10(e) of the CBLR, 2018 read with erstwhile Regulation 11(e) of CBLR, 2013. He noted that both the importer as well as the

appellant had, in their statements, admitted that the goods in question ‘Glucose Test Strips’ contained a reagent and this was mentioned in the manual enclosed with the goods. Therefore, the goods in question fell under the classification CTH38220090. In its statement, the appellant had also stated that he was not clear, whether the goods in question (‘Glucose Test Strips’) fell under the category of diagnostic reagents, however, he conceded that he had processed the Shipping Bill without going into the specification of goods and therefore, the same had resulted in failure to classify the goods under the apposite CTH.

6. In view of the aforesaid findings, the IO concluded that the appellant was guilty of failing to exercise due diligence at the time of filing of Shipping Bill in question and had failed to advise the exporter to comply with the provisions of the Customs Act.

7. The IO’s report dated 22.03.2021 was accepted and the appellant’s license was revoked.

8. As noted above, the appellant filed the appeal (being Custom Appeal No. 50749/2021) before the learned Tribunal. A plain reading of the impugned order indicates that the principal arguments advanced by the appellant before the learned Tribunal were related to the jurisdiction of the Commissioner to pass the order revoking the license. The principal case run by the appellant before the learned Tribunal was that since his license was initially suspended and the suspension was revoked, the Commissioner had no jurisdiction to revoke the license under Regulation 14 of the CBLR, 2018.

9. However, the record indicates that the appellant had also raised various other issues which, *prima facie*, do not seem to have been discussed by the learned Tribunal.

10. In the aforesaid context, the appellant had projected the following two questions for consideration of this Court.

- “(i) Whether, Hon'ble CESTAT is justified in sustaining the order revoking CB license, forfeiting of security deposit and imposing penalty when shipping bill was filed on the basis of documents provided by the exporter without conclusively establishing violation of regulation 10 (e) of the CBLR, 2018 not supported by cogent and tangible evidence.
- (ii) Contrary to view taken earlier by the Hon'ble that 'Glucose Testing Strips' falls under CTH 90, Whether, Hon'ble CESTAT is right and justified in sustaining the order of revocation of CB License without deciding the core issue that 'Glucose Testing Strips' is restricted goods covered by notification no. 59/2015 -20 dated 04.04.2020.”

11. The learned counsel appearing for the appellant fairly states that the question no.(ii), as noted above, does not arise for consideration as there is no dispute regarding classification of goods. He further submits that the question whether the learned Tribunal was justified in sustaining an order of revoking the CB license, forfeiting security and imposing penalty would survive as mens rea or any mala fide intent could not be imputed to the appellant. He submitted that at the material time, there was some confusion as to whether the goods in question would fall under classification CTH 90279090 or Chapter 38 of the

Customs Tariff Act, 1975. Though the goods were correctly described, the same were classified under CTH90279090.

12. The learned counsel for the appellant also referred to certain communications exchanged between the exporter and the Department which indicates that the exporter was proceeding on the basis that the restriction under notification dated 04.04.2020 (Notification No. 59/2015-20) was confined to testing kits relating to testing Covid-19. He submitted that the Department had thereafter, amended the Notification dated 04.04.2020 by a notification dated 10.06.2020, and confined the restricted items to only those items that were otherwise relevant for the testing of Covid-19, which was raging at the material time. He also submits that there has been no loss of revenue to the Department. The goods that have been exported were otherwise not meant to be restricted, as is apparent from the subsequent notification dated 10.06.2020. He also submits that the action taken against the appellant effectively deprives him of his livelihood and is highly disproportionate. He submits that although all of the said contentions were also advanced before the Tribunal, the same have not been considered.

13. In view of the above, this Court is of the view that the following question falls for consideration of this Court:

Whether, in the facts of this case, the learned Tribunal was justified in sustaining the order dated 11.06.2021 passed by the Commissioner of Customs revoking the appellant's Custom Broker License?

14. We have heard the learned counsels for the parties.

15. As noted above, the principal allegation against the appellant is that he had not exercised due diligence and facilitated filing of the Shipping Bills in relation to ‘Glucose Test Strips’ in classifying them as under CTH 90279090 instead of under CTH heading 38.22. At this stage, it would be relevant to refer to the said heading 90279090. Chapter 90 of CTH relates to “optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus, parts and accessories thereof”. The relevant entry 9027 90 90 reads as under:-

“9027 *INSTRUMENTS AND APPARATUS FOR PHYSICAL OR CHEMICAL ANALYSIS (FOR EXAMPLE, POLARIMETERS, REFRACTOMETERS, SPECTROMETERS, GAS OR SMOKE ANALYSIS APPARATUS); INSTRUMENTS AND APPARATUS FOR MEASURING OR CHECKING VISCOSITY, POROSITY, EXPANSION, SURFACE TENSION OR THE LIKE; INSTRUMENTS AND APPARATUS FOR MEASURING OR CHECKING QUANTITIES OF HEAT, SOUND OR LIGHT (INCLUDING EXPOSURE METERS); MICROTOMES*

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9027 90 90 --- Other”

16. It is also relevant to refer to the notification dated 04.04.2022, which has restricted the export of diagnostic kits. The relevant extract describing the goods restricted under the said notification reads as under:-

**“Notification No, 59/2015-2020
New Delhi, Dated: 04th April 2020**

Subject: - Amendment in Export Policy of Diagnostic Kits- reg.

S.O. (E) In exercise of powers conferred by Section 3 of the Foreign Trade (Development & Regulation) Act, 1992 (No. 22 of 1992), as amended, read with Para 1.02 and 2.01 of the Foreign Trade Policy, 2015-20, the Central Government hereby makes the following amendments in the schedule 2 of the ITCHS Export Policy related to export of Diagnostic Kits, with immediate effect:

Serial Number	ITCHS Codes	Description	Present Policy	Revised Policy
207 G	3822	Diagnostic Kits [Diagnostic or laboratory reagents on a backing, preparation Diagnostic or laboratory reagents whether or not on a backing, other than those of heading 3002 or 3006; certified reference materials]	Free	Restricted

2. The provisions under Para 1.05(b) of Foreign Trade Policy (FTP) 2015- 20 regarding transitional arrangement will not be applicable for this notification.”

17. It is clear from the above that the ‘Glucose Test Strips’ do not fall within the classification of 90279090. The said classification only relates to microtones, parts and accessories that are not classified under 90279010 or 90279020.

18. Thus, ‘the Glucose Test Strips’ said strips would clearly fall

within the restricted items under the Notification No.59/2015-20 dated 04.04.2020.

19. Having stated the above, it would also be relevant to refer to certain other facts, which are material in addressing the controversy raised in the present appeal. Prior to revocation of the appellant's Customs Broking License, the same was suspended by an order dated 01.10.2020.

20. The suspension of the said license was revoked by an order dated 19.10.2020. The relevant extract of the said order reads as under:-

“24. However, I also find that in terms of DGFT Notification No.09/2015-2020 dated 10.06.2020, the export policy of Diagnostic kits/ laboratory reagents is revised by mending the Notification No.59 dated 04.04.2020. Since, the goods covered under subject Shipping Bill No.2867653 dated 28.05.2020 are not restricted to export now in terms of DGFT Notification No.09/2015-2020 dated 10.06.2020 and therefore, the adjudicating authority i.e. the Additional Commissioner, Air Cargo Export vide Spot AO No.27/SKM/ADC/Shed(ACE)/2020-21 dated 24.07.2020, allowed for release of the goods for export subject to deposition of fine and penalties imposed upon the exporter and due amendment in the shipping bill with regard to CTH from 90279090 to 28220090. A penalty of Rs.30,000/- was also imposed on the Custom Broker M/s Green View Logistics which was said to be deposited by them.

25. Further, I find that continuation of suspension of C.B. license will not only deprive the noticee of its bread and butter but will also jeopardize the future of its employees, who also earn their livelihood from the

activities undertaken by the C.B. especially, during the current situation of COVID-19 pandemic & its adverse impact on global economy. I am inclined to take a lenient view in the matter by revoking the suspension, but this revocation should not be treated as conclusion of proceedings which shall follow in due course as I also note that C.B. did not exercise due diligence at the time of filing of Shipping Bill and also failed to advise the exporter to comply with the provisions of the Act.”

21. It is seen from the above that although the said order does not, in any manner, restrict the Commissioner from concluding the proceedings regarding revocation of license but it does indicate that the Commissioner at the material time had taken a view keeping in mind the proportionality of the punitive measures imposed on the appellant.

22. It is also material to state that the consignment of ‘Glucose Test Strips’ was held up at the material time on the ground that the items were restricted. In this regard the exporter and the Department had exchanged correspondence. It is not disputed that the consignment was finally cleared. Admittedly, the goods in question were correctly described as ‘Glucose Test Strips’ in the Shipping Bills and these goods were exported after the initial hold up. It is, thus, not difficult to accept that at the material time, there may have been some confusion as to the classification of the goods as has been contended by the appellant.

23. The allegation against the appellant is that he had failed to comply with his obligations as stipulated in Regulation 10(e) of CBLR 2018. The said regulation is set out below:

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

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(e) 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;”

24. According to the respondent, the appellant was remiss in not ascertaining the correct classification of the goods in question. However, it is seen that Regulation 10(e) relates to the failure to impart correct information to the client. In the present case, the exporter was fully aware of the issue regarding classification of the goods in question and had also corresponded to the department in this regard.

25. In *Kunal Travels (Cargo) v. CC (I & G), IGI Airport, New Delhi: 2017 (354) E.L.T. 447 (Del.)*, a Division Bench of this Court had in the context of Regulation 13(e) of the Customs House Agents Licensing Regulations, 2004 – which is *pari materia* to Regulation 10(e) of CBLR, 2018– observed as under:

“Regulation 13(e) of the CHALR 2004 requires the CHA 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 baggage” (emphasis supplied). The CHAs due diligence is for information that he may give to its client and not necessarily to do a background check of either the client or of the consignment. Documents prepared or filed by a CHA are on the basis of instructions/ documents received from its client/importer/exporter. Furnishing of wrong or incorrect information cannot be attributed to the CHA if it was innocently filed in the

belief and faith that its client has furnished correct information and veritable documents. The mis-declaration would be attributable to the client if wrong information were deliberately supplied to the CHA. Hence there could be no guilt, wrong, fault or penalty on the appellant apropos the contents of the shipping bills. Apropos any doubt about the issuance of the IE Code to M/s. H.S. Impex, it was for the respondents to take appropriate action. Furthermore, the inquiry report revealed that there was no delay in processing the documents by the appellant under Regulation 13(n).”

26. In the present case, the exporter had classified the goods in question under CTH 90279090. It is the exporter’s stand that the said classification was a correct one. The appellant had candidly stated that there was some confusion at the material time. In his statement, he had also candidly admitted that the shipping bill was filed during the period of lock down and that there was a mistake. He had also stated that he was not aware that the goods in question, namely, glucose tested strips contained reagents. He had also stated that they always took due care before filing shipping bill, but due to shortage of staff during the lock down period, a mistake had occurred.

27. In view of the aforesaid admission, it is apparent that the appellant had been remiss, however, the appellant’s candid admission must also be read along with his statement that he was not aware that the goods in question contained reagents. The question whether the revocation of license is justified in the facts of the case must be considered in the aforesaid facts.

28. Section 14 of the CBLR, 2018 relates to revocation of license and imposition of penalty. The said section is reproduced below: -

“14. Revocation of licence or imposition of penalty – The Principal Commissioner or Commissioner of Customs, may subject to the provisions of regulation 17, revoke the license of a Customs Broker and order for forfeiture of part or whole of security, on any of the following grounds, namely:-

(a) failure to comply with any of the conditions of the bond executed by him under regulation 8:

(b) failure to comply with any of the provisions of these regulations, within his jurisdiction or anywhere else:

(c) commits any misconduct, whether within his jurisdiction or anywhere else which in the opinion of the Principal Commissioner or Commissioner of Customs renders him unfit to transact any business in the Customs Station:

(d) adjudicated as an insolvent:

(e) of unsound mind; and

(f) convicted by a competent court for an offence involving moral turpitude or otherwise.”

29. It is apparent in the given facts that it cannot be held that the appellant had misconducted itself, thus, the only ground on which the appellant's licence is revoked was failure to comply with the regulations, which would follow in case there was a failure to comply with the obligations under regulation 10 of CBLR, 2018. However, it is also material to note that Regulation 14 confers a discretion on the Principal Commissioner whether to revoke the license and forfeit the security deposit.

30. In this case the exporter was fully aware of the issue regarding classification and, the exporter had also corresponded with the

department and had asserted that the goods in question were not restricted. Undisputedly, the goods in question were correctly described in the Shipping Bill as “glucose testing strips”. Further, the appellant had explained that there was confusion on his part and had candidly admitted his mistake.

31. In the given facts, any error on the part of the appellant to inform the exporter regarding the classification of the goods cannot be considered as sufficiently grave so as to forfeit the appellant’s license. We are of the view that the learned Tribunal had not examined the material facts of the present case to ascertain whether an action under Regulation 14 was justified.

32. In view of the above, the impugned order as well as the order dated 11.06.2021 passed by the Commissioner of Customs to the extent that it revokes the appellant’s license and forfeits the security deposit is set aside.

33. We may also note that the learned counsel for the appellant does not press the appellant’s challenge for the levy of penalty.

34. The appeal is partly allowed in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JANUARY 25, 2023
Ch