(2011) 02 GUJ CK 0027

In the Gujarat High Court

Case No : Tax Appeal No''s. 4-5 of 2011 with O.J. Civil Application No''s. 3-4 and 99 of 2011 in Tax Appeal No. 4 of 2011

Commissioner of Customs APPELLANT

Vs

K.S. Chhaya and Co. RESPONDENT

Date of Decision : 17-02-2011

Acts Referred:

Customs Act, 1962 — Section 130

Customs House Agents Licensing Regulations, 2004 — Regulation 10, 13, 20, 20(2), 22

Citation : (2011) 272 ELT 180

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant; Paresh M. Dave, for the Respondent

Judgement

Harsha Devani, J.—In both these appeals u/s 130 of the Customs Act, 1962 (the Act), the appellant, Commissioner of Customs, Kandla has challenged the consolidated order dated 12-8-2010 2011 (265) ELT 65 made by the Customs, Excise & Service Tax Appellate Tribunal (the Tribunal) by proposing the following identically worded questions :

[a] Whether in the facts and circumstances of the case, the Tribunal is justified in setting aside the suspension of CHA licence No. CHA/KDL/4/ 90 issued to the respondent?

[b] Whether the impugned order of the Tribunal can be said to be an order in accordance with law?

2. The respondent is a Customs House Agent (CHA) based at Kandla. The Director General of Central Excise Intelligence, Ahmedabad, (hereinafter referred to as "the DGCEI") conducted investigations against the respondent CHA and allegedly found that the partner of the respondent firm, Shri Pravin Nagda and its employee Shri Ravindranath Nair had aided and abetted the importers in filing refund claims of 4% SAD in respect of wooden logs in terms of Notification No.

102/2007-Cus., dated 14-9-2007. During the course of search at the respondent CHA''s business premises, certain departmental files relating to such refund claims filed by the importers came to be found. Pursuant to the aforesaid investigation, the Commissioner vide order dated 1-4-2010 suspended the operation of the CHA licence in terms of Regulation 20(2) of the Customs Housing Agents Licensing Regulations, 2004 (the Regulations). Subsequently, after giving them post-decisional hearing, the Commissioner, vide his subsequent order dated 21-5-2010, confirmed the suspension. Being aggrieved, the respondent CHA preferred appeal before the Tribunal who by the impugned order, allowed the appeal and set aside the order passed by the Commissioner whereby he had suspended the licence of the CHA.

3. The Tribunal upon appreciation of the material on record was of the view that the act of the respondent CHA of helping another CHA in preparing the refund claims of their clients and filing the same would not amount to violation of the provisions of the Regulations. As regards the files having been found at the office premises of the CHA, the Tribunal took note of the fact that the respondent CHA had taken a plea that there was a practice in Customs House of supplying the files to CHA for various purposes of completion or typing etc. According to the Tribunal, the Commissioner was duty bound to verify the above fact and record the finding thereto. The Tribunal agreed with the learned Junior Departmental Representative that recovery of official files from the premises of CHA is serious offence. It, however, took note of the fact that no explanation was coming from the Customs House as to how the files reached the CHA''s office. The Tribunal observed that it was not the revenue''s case that the files were stolen from the office or that there was a theft and that if the files have been found in the CHA premises, that must be with the consent of the concerned officer. It was further noted that the Commissioner had not called for the explanation of any officer responsible for the safe custody of the said files so as to find out as to how the files travelled from the Custom House to the CHA''s office. The Tribunal, accordingly, held that if the proper officer himself is giving the files to the CHA, it cannot be said that the provisions of regulation 13(h) has been violated. The Tribunal, after considering the matter in detail was of the view that there was no justifiable reason to uphold the impugned order of suspension of licence and accordingly, set aside the same.

4. Mr. R.J. Oza, learned Senior Standing Counsel appearing on behalf of the appellant vehemently assailed the impugned order of the Tribunal, submitting that the Tribunal has grossly erred in setting aside the suspension order. It was submitted that the impugned order of the Tribunal is based on irrelevant and extraneous considerations, such as, the approach of the department towards the officers who had sanctioned the claims for refund on the basis of bogus and fraudulent documents presented by the respondent CHA through its employee. It was submitted that the inquiry on the issue of action taken by the department against the department is irrelevant. According to the learned counsel, the Commissioner of Customs had passed the order suspending licence of the

respondent CHA on the basis of the evidence and material collected in course of inquiry and investigation by the DGCEI, Ahmedabad which was sufficient for the purpose of exercising powers by the Commissioner of Customs under Regulation 20(2) of the Regulations and as such, the Tribunal was not justified in interfering with the same.

5. Referring to the order passed by the Commissioner and more particularly, to the statements of the employee Shri Ravindranath Nair as well as the partner, it was submitted that it was an admitted position that the files had been brought to the office of the respondent by the said employee and as such, the misconduct of the respondent is apparent on the face of the record. It was argued that the act of the respondent CHA of taking the official files to his office amounts to gross misconduct on its part and as such, the Commissioner was justified in confirming the suspension order. It was submitted that large amounts of refund had been obtained by the importers of timber logs by submitting fraudulent refund claims through the respondent CHA and that the respondent having actively connived with the said importers, the Commissioner was justified in suspending the licence. It was submitted that at the stage of passing the order of suspension, the inquiry which is required to be made is limited and that the Commissioner had placed reliance upon the investigation carried out by the DGCEI and has passed the impugned order accordingly. In the circumstances, the Tribunal was not justified in holding that no detailed inquiry had been made and that there was nothing on record to indicate as to whether the importers had been issued notices for recovery of sanctioned refund claims, as all these facts were irrelevant for the purpose of considering the validity of the order suspending the licence of the respondent.

6. Inviting attention to the provisions of Regulation 20 of the Regulations, it was submitted that the Commissioner of Customs is empowered to revoke the licence of the Customs House Agent and order forfeiture of part or whole of the security in connection with any of the grounds stated therein. Referring to sub-regulation (2) thereof, it was pointed out that under the said provision, the Commissioner of Customs is empowered in appropriate cases where immediate action is necessary, to suspend the licence of a Customs House Agent, where an inquiry against such agent is pending or contemplated and that in the facts of the present case, the Commissioner of Customs was fully justified in suspending the licence. It was submitted that the Tribunal had exceeded its jurisdiction while setting aside the order of suspension inasmuch as, all that the Tribunal could have gone into was as to whether there was any procedural irregularity and as to whether there was any breach of the principles of natural justice on the part of the Commissioner while passing the order of suspension. That in the facts of the present case, there is nothing to indicate from the order impugned before the Tribunal to the effect that there was any breach of the principles of natural justice and as such, the Tribunal was not justified in interfering with the order of suspension made by the Commissioner of Customs. Great emphasis was laid on the fact that on commencement of investigation, which was initially conducted by

the Custom House, Kandla, all seven importers whose files were found from the premises of the respondent CHA had voluntarily deposited part-amount(s) of refund paid to them, to submit that this gives all the more reason to believe at this preliminary stage of investigation itself that the said claimants were involved in filing fraudulent refund claims.

7. The appeal was vehemently opposed by Mr. Paresh Dave, learned advocate appearing on behalf of the respondent CHA. Dealing with the contention that the Tribunal was not justified in interfering in the matter inasmuch as, there was no breach of the principles of natural justice on the part of the Commissioner of Customs, attention was invited to the impugned order dated 20-5-2010 passed by the Commissioner, more particularly to the operative part thereof, to demonstrate that the Commissioner had after passing the impugned order, directed that the respondent be provided with copies of panchnama dated 18-1-2010, statements dated 22-1-2010 and 8-3-2010 of Shri Ravindranath Nair, employee and statement dated 8-3-2010 of Shri Pravin Nagda, Partner, along with the order. It was submitted that on the face of the order, it is apparent that there was a breach of principles of natural justice inasmuch as, the respondent was not provided with copies of the panchnama, statement of the employee and statement of the partner, which were taken into consideration by the Commissioner while passing the impugned order of suspension against the respondent. Adverting to the merits of the case, it was pointed out that except for vague allegations that the respondent had submitted fraudulent documents for the purpose of aiding the timber importers in filing the refund claims, nothing specific is stated anywhere either in the first order of suspension or in the second order confirming the earlier order of suspension. Inviting attention to paragraph 6.3 of the order dated 20-5-2010 it was pointed out that the only details given therein are the refund file numbers and the names of claimants without specifying as to in respect of which refund claims fraudulent documents had been submitted; the nature of the fraudulent documents submitted; the amounts of the claims sanctioned; and as to how the employee of the respondent had assisted the timber merchants and the amounts of refund sanctioned in respect thereof. It was submitted that insofar as the files which were found in the premises of the respondents are concerned, it is a routine practice for the employees of the CHA to bring the files to their office for documentation work like preparing/taking printouts of note-sheets, draft orders etc., with the full knowledge of the concerned officers of the Customs department.

8. Drawing the attention of the Court to the fact that the order of suspension has been passed against the respondent under clause 13(d) and clause 13(h) of the regulation 13 of the Regulations, it was submitted that neither of the two clauses would be applicable in the facts of the present case. Attention was invited to the provisions of regulation 13, which deals with obligations of Customs House Agent, to contend that there is no contravention of either of the aforesaid two clauses on the part of the respondent and as such, the Tribunal has rightly set aside the order of suspension passed against the respondent. Inviting attention

to the provisions of regulation 22 of the Regulations, which provides for the procedure for suspending or revoking licence under regulation 20 of the Regulations, it was submitted that no procedure as contemplated under the said regulation has been followed in the present case and as such, it cannot be said that the principles of natural justice have been followed by the Commissioner prior to passing the order of suspension. It was, accordingly, urged that the impugned order of the Tribunal is just, legal and proper and does not warrant any interference by this Court.

9. As can be seen from the order dated 1-4-2010 passed by the Commissioner whereby he has suspended the operation of the CHA licence of the respondent with immediate effect, the same has been passed in exercise of powers conferred under regulation 20(2) of the Regulations for contravention of clauses 13(d) and 13(h) of regulation 13 of the Regulations; for failure to observe the requirements of regulation 19(8) of the Regulations; as well as for failure as envisaged under regulation 20(1)(a), (b) and (c) of the Regulations.

10. A perusal of the orders dated 1-4-2010 and 20-5-2010 passed by the Commissioner, indicates that the allegation against the respondent is that the investigations were carried out by the DGCEI, Ahmedabad, in relation to inadmissible refunds sanctioned by the refund section of the Customs House, Kandla, on the basis of fraudulent documents submitted by the importers and the CHA firms. According to the department, the respondent CHA along with various importers/claimants of refund had played a vital role in getting such inadmissible refunds sanctioned. Investigations revealed that Shri Ravindranath Nair, employee of the respondent CHA firm, was actively involved in preparing fraudulent refund claims and had also colluded with the importer/claimants of refund claim, which has resulted in granting of huge refund amounts to the importers claimed on the basis of incorrect, improper and fraudulent documents. The other allegation is that seven files of the department pertaining to refund claims were found in the office of the respondent during the search operation carried out by the department.

11. On reading both the orders of suspension in their entirety, there is nothing to indicate the nature of the fraudulent documents submitted by the employee of the respondent on behalf of the importer or as to in respect of which refund claims such documents had been submitted. Except for a vague statement that refund claims have been sanctioned on the basis of fraudulent documents submitted by the importer with the help of the respondent CHA firm, there is nothing to indicate as to what is the nature of the fraudulent documents, nor are any details stated therein. There is no specific reference as to which are the refund claims that have been sanctioned as a result of submission of fraudulent documents. As regards the seven files which were found in the premises of the respondent CHA, a perusal of the order dated 20-5-2010 shows that the respondent in its written submissions had inter alia stated that "it is a matter of common knowledge that the Customs officers/authorities of Kandla suffer from

inadequate resources, for which it is a regular practice followed by the Customs officers to take the aid of employees of various CHAs for preparing/taking printouts of note-sheets, draft orders etc. It is also a generally followed practice at Kandla that either drafts are asked to be typed out by CHAs or these drafts of various note-sheets, orders, etc. are asked to be delivered in a pen drive/CDs or in hard copy so as to expedite and facilitate the work of the Department. For this purpose, the possibility of the CHAs being given files by the concerned officers cannot be ruled out. In the present case also, seven files of refund claims found at their premises on 18-1-2010 were given to their employee for completing such work by the Custom Officers. The same was also explained to the DGCEI authorities that these files were given to their employee by the officers posted in Refund Section of the Custom House for taking printout/typing of note-sheets, etc., manually draft by Custom Officer." Shri Ravindranath Nair, the employee of the respondent in his statement recorded on 22-1-2010 had inter alia stated that files found from their office were brought to their office for documentation work like preparation of note-sheets and orders, which was a matter of routine practice. His statement recorded on 8-3-2010, is also to a similar effect. The Commissioner in his order dated 20-5-2010 has brushed aside the aforesaid defence of the respondent by recording that there is no evidence to substantiate the same. However, despite it having been the specific case of the respondent CHA right from the inception that the files had been given to their employee by the concerned officers of the refund section for the above referred purpose, there is nothing on record to indicate any inquiry having been made in this regard. Besides, despite the fact that seven files of the department were found from the premises of the respondent, no case of theft has been lodged against the respondent by the department.

12. As noted hereinabove, the allegations against the respondent are for the alleged contravention of regulations 13(d) and 13(h) of the Regulations. Regulation 13(d) of the Regulations, which provides for obligations of the CHA, lays down that a CHA 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 Customs or Assistant Commissioner of Customs. In respect of this allegation, there is nothing in either of the orders of suspension to indicate as to how the respondent has failed to comply with this provision, as to what was the non-compliance which was not brought to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, by the respondent firm. Neither is the learned counsel for the appellant, in a position to point out as to how the said provision has been contravened. In the circumstances, prima facie, there does not appear to be any material on record to substantiate the allegation of contravention of the provisions of clause (d) of regulation 13 of the Regulations.

13. Regulation 13(h) of the Regulations lays down that the CHA shall not procure or attempt to procure directly or indirectly, information from the Government records or other Government sources of any kind to which access is not granted

by the proper officer. In the opinion of the Court, any practice of the department that permits the CHAs to take the files from the office premises of the department, requires to be deprecated. However, though an unhealthy practice, if as contended on behalf of the respondent such a practice does exist, the blame cannot be laid at the door of the respondent. In any case, it cannot be stated that there is any breach of the provisions of regulation 13(h) of the Regulations. As noticed hereinabove, it is the specific case of the respondent that the files had been handed over to the respondent by the proper officer for the purpose of preparing refund claims to assist the officers of the department in sanctioning the refund claims. It is also the case of the respondent that this is a routine practice which is of common knowledge. Despite this being the specific case of the respondent, no inquiry appears to have been made in this regard nor is there anything in the order passed by the Commissioner to indicate that the files had in fact not been handed over to the respondent by the proper officer. In the circumstances, prima facie it cannot be said that the respondent has contravened the provisions of regulation 13(h) of the Regulations.

14. As regards the breach of the provisions of clause 19(8) of the Regulations, the same only lays down that the Customs House Agent shall exercise such supervision as may be necessary to ensure that proper conduct of any such employees in the transaction of business as agents and be held responsible for all acts or omissions of his employees in regard to their employment. In the present case, the department has not been in a position to establish any act or omission on the part of the employee of the CHA in respect of which the CHA is required to be held liable.

15. Insofar as the provisions of clauses (a), (b) and (c) of sub-regulation (1) of regulation 20 of the Regulations are concerned, prima facie upon considering the material on record, none of the said clauses would be attracted in the present case inasmuch as, the learned counsel for the appellant is not in a position to indicate the nature of the failure on the part of the CHA to comply with any of the conditions of the bond executed by him under regulation 10 as contemplated under clause (a); nor is he in a position to indicate any failure on the part of the respondent to comply with any of the provisions of the regulations, within the jurisdiction of the said Commissioner of Customs or anywhere else as contemplated in clause (b). Insofar as clause (c) is concerned, the misconduct alleged is that fraudulent documents have been submitted and that the files of the department have been taken to the premises of the CHA, which as noted hereinabove, prima facie have not been established by the department. In the circumstances, the appellant has not been able to establish any of the charges which have been levelled against the respondent CHA. The Tribunal was, therefore, justified in setting aside the order of suspension passed by the respondent Commissioner.

16. Another aspect of the matter which requires to be considered is that regulation 22 of the Regulations provides for the procedure for suspending or

revoking licence under regulation 22. The said regulation provides for issuance of a notice by the Commissioner of Customs to the Customs House Agent, in writing, stating the grounds on which it is proposed to suspend or revoke the licence and requiring the said CHA to submit, within the period specified therein a written statement of defence etc. Upon receipt of the written statement from the CHA, the Commissioner of Customs is required to direct the Deputy Commissioner of Customs or the Assistant Commissioner of Customs to inquire into the grounds which are not admitted by the CHA. The Deputy Commissioner of Customs or Assistant Commissioner of Customs, in the course of inquiry, is obliged to consider such documentary evidence and take such oral evidence as may be relevant or material to the inquiry in regard to the grounds forming the basis of the proceedings, and he may also put any question to any person tendering evidence for or against the CHA, for the purpose of ascertaining the correct position. The CHA is also entitled to cross-examine the persons examined in support of the grounds forming the basis of the proceedings, and in case the Deputy Commissioner of Customs or Assistant Commissioner of Customs declines to examine any person on the grounds that his evidence is not relevant or material, he shall record his reasons in writing for doing so. Upon conclusion of the inquiry, the Deputy Commissioner of Customs or Assistant Commissioner of Customs is required to prepare a report of the inquiry recording his findings. The Commissioner of Customs is thereafter required to furnish to the Customs House Agent a copy of the report of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, and require the Customs House Agent to submit any representation that he may wish to make against the findings of the Deputy Commissioner of Customs or Assistant Commissioner of Customs. The Commissioner of Customs, thereafter, after considering the report of the inquiry and the representation thereof, if any, made by the CHA, is empowered to pass such an order as he deems fit.

17. In the facts of the present case, it is an admitted position that no such procedure as contemplated under regulation 22 of the Regulations has been carried out by the Commissioner. Had such a procedure been followed by the Commissioner, the Deputy Commissioner of Customs or Assistant Commissioner of Customs while conducting the inquiry as contemplated under sub-regulation (2) of regulation 22 of the Regulations would be required to inquire into all facts which were not admitted by the CHA, which in the present case would be the routine practice of the department of permitting the employees of the CHAs to take the files of the department to the office premises of the CHA for the purpose of further processing. In the present case, no such inquiry has been caused to be made by the Deputy Commissioner of Customs or Assistant Commissioner of Customs as contemplated under regulation 22 of the Regulations, causing immense prejudice to the respondent CHA.

18. In the light of the aforesaid discussion, it is not possible to state that the Tribunal has committed any legal error so as to give rise to any question of law, much less, a substantial question to law. The appeals, being devoid of merit, are

therefore, dismissed.

19. In the light of the order passed in the main appeals, the civil applications seeking stay of the order of the Tribunal have become infructuous and are disposed of accordingly.

