

2020-TIOL-375-CESTAT-MUM

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI**

Customs Appeal No. 86403 of 2019

Arising out of Order-in-Original No: 59/CAC/CC(G)/RC/CBS(Adj), Dated: 28.03.2019
Passed by the Commissioner of Customs (General), Mumbai

**Date of Hearing: 21.11.2019
Date of Decision: 21.11.2019**

**SRINIVAS CLEARING AND SHIPPING INDIA PVT LTD
PALKIWALA BUILDING, 296 SHAHID BHAGAT SINGH ROAD
FORT, MUMBAI - 400001**

Vs

**COMMISSIONER OF CUSTOMS (GENERAL)
CUSTOMS BROKER SECTION, BALLARD ESTATE
MUMBAI - 400001**

Appellant Rep by: Ms Pooja Reddy, Adv.

Respondent Rep by: Shri Ramesh Kumar, AC (AR)

CORAM: C J Mathew, Member (T)
Suvendu Kumar Pati, Member (J)

Cus - The appellant is a Customs Broker - In the present appeal, the appellant assails an order directing revocation of license as per the CBLR 2013.

Held: It is settled law that though the time lines prescribed in the CBLR are directory and not mandatory, there is an implicit responsibility on part of the competent authority to adhere to the time lines with acceptable justification for delays, if any - This is more so when the assessee places on record that it was non-cooperation or intransigence on its part that caused delay - It is seen that the suspension though challenged successfully before the Tribunal and later withdrawn, a delay of 15 days was caused till the enquiry proceedings commenced - Thereafter, there is a lapse of more than six months in completion of enquiry and further a lapse of more than two months in revocation of the licence - Considering the nature and scope of investigations normally undertaken by the DGRI, whose report led to initiation of proceedings under the CBLR, the delay in commencement of proceedings for revocation of license does not command itself as indicating proper undertaking of responsibility - There is nothing on record to infer that the G-card holder who was investigated for his role in the conspiracy to smuggle red sanders outside of India, was concerned with the activities of which the appellant herein was licensed - The allegedly nefarious activities of such a pass-holder, although obtained through the licenced customs broker, cannot be visited upon the broker in the absence of a link between the two in the context of established misdemeanor - It is probable that the unwarranted delay in completion of proceedings arose from the lack of any such proximate participation in such incident - Hence the contined revocation of the license is not warranted: CESTAT

Appeal allowed

Case laws cited:

FINAL ORDER NO. A/87405/2019

Per: C J Mathew:

In disposing of this appeal of M/s Srinivas Clearing & Shipping (I) Pvt Ltd against order no. 59/CAC/CC(G)/RC/CBS(Adj) dated 28th March 2019 of Commissioner of Customs (General), Mumbai challenging revocation of licence under Customs Brokers Licensing Regulation, 2013, the submissions of Learned Counsel on the merit of their claim for restoration are required to be taken up for consideration only in the event that compliance with the timelines prescribed in the Regulation has been established in the context of the decision of the Hon'ble High Court of Bombay in *Principal Commissioner of Customs (General) v. Unison Clearing P Ltd [2018 (361) ELT 321 (Bom.)]* = [2018-TIOL-1826-HC-MUM-CUS](#)

2. Having heard Learned Counsel and Learned Authorised Representative at length on merit as well as compliance, or otherwise, with time lines, we find ourselves obliged to adopt this two step process as the detriment in regulation 14 of Customs Brokers Licensing Regulation, 2013 has implication on the living conditions and employment and the responsibility of such disciplinary authority cannot be distanced from responsiveness laid down as a pre-requisite.

3. The licence, suspended on 10th June 2016, was, following post-decisional hearing of 30th June 2016, confirmed on 13th July 2016. The order of suspension, challenged before the Tribunal, and, though set aside, was withdrawn only on 24th January 2018 after further recourse to the Tribunal for implementation.

4. The notice, prescribed in the Customs Brokers Licensing Regulation, 2013 for initiating inquiry, was issued on 14th May 2018 and, upon conclusion, report was furnished on 7th January 2019.

5. Learned Authorised Representative drew attention to the decision of the Hon'ble Supreme Court in *Commissioner of Customs v. KM Ganatra & Co [2016 (332) ELT 15 (SC)]* = [2016-TIOL-13-SC-CUS](#) and of the Hon'ble High Court of Bombay in *Principal Commissioner of Customs (General) v. Unison Clearing P Ltd [2018 (361) ELT 321(Bom.)]* = [2018-TIOL-1826-HC-MUM-CUS](#). While in the first of the decisions, the Hon'ble Supreme Court held that

'15. In this regard, Ms. Mohana, learned senior counsel for the appellant, has placed reliance on the decision in Noble Agency v. Commissioner of Customs, Mumbai [2002 (142) E.L.T. 84 (Tri. - Mumbai)] wherein a Division Bench of the CEGAT, West Zonal Bench, Mumbai has observed:-

"The CHA occupies a very important position in the Customs House. The Customs procedures are complicated. The importers have to deal with a multiplicity of agencies viz. carriers, custodians like BPT as well as the Customs. The importer would find it impossible to clear his goods through these 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...."

We approve the aforesaid observations of the CEGAT, West Zonal Bench, Mumbai and unhesitatingly hold that this misconduct has to be seriously viewed.'

Hon'ble High Court of Bombay has held in the latter that

'14. Adherence to the time schedule prescribed in the Regulation 20 in a rigid way would lead to a situation where non-compliance with the time frame and even deviation by a single day would resultantly invalidate the entire action and the licence which is under suspension or which is revoked, is liable to be restored. The procedural formality as required to be complied within the time frame prescribed in the regulation, even if it is deviated for whatsoever reason beyond the control of the revenue or the Customs House Agent would result into consequences of declaring the entire action invalid if the provision is construed as mandatory. On the other hand, if the provision is construed as directory, the Customs House Agent would be deprived of his licence for considerable long time, if the time schedule is not adhered to the Revenue at its sweet choice would prolong the procedure and which is a likely situation, no attempts would be made to complete the inquiry within the stipulated period.

This is what has weighed in the mind of the High Courts while dealing with the said regulation and holding the same to be mandatory

The catena of judgments on which reliance has been placed to declare the provision as mandatory have referred to the extraordinary delay caused at the instance of the revenue in conducting inquiry against the Customs House Agent, depriving them of their means of livelihood and it was observed that the purpose of prescribed time limit was to safeguard the interest of the Customs Broker and smooth import and export of goods. By relying on a celebrated principle, when a statute prescribes a thing to be done in a particular manner, it must be performed in such a manner, the use of the word "shall" in the Regulation has been construed as mandatory.

*With due respect to the finding so recorded in the judgment of the Madras Court in case of Masterstroke Freight Forwarders P. Ltd. v. C.C.(I), Chennai-I, reported in 2016 (332) ELT 300 (Madras) = [2015-TIOL-2847-HC-MAD-CUS](#) delivered by the Learned Single Judge, the parameters of construing a provision as mandatory or directory, when it deals with a discharge of a public duty and a resultant consequence has not been specifically taken into consideration. The salutary principle, whether statute imposes a public duty and lays down the manner and time within which the duty shall be performed, the injustice or inconvenience resulting from a rigid adherence to the statutory prescription, is a relevant factor for holding such provision only as directory has been completely overlooked. As observed by Justice Denman in *Caldow v. Pixell*, (1877) 2 CPD 562, "in considering whether the statute is imperative, the balance may be struck between inconvenience or sometime rigidly adhered to, or sometime departure from this direction". In that case, it was held that where a public officer was directed by statute to perform a duty within a specific time the case is established that the provisions are only directory, as already discussed above. There might be reason why such time limits cannot be adhered to and these reasons may be at times attributable to the revenue and some time to the Customs house agent. Strict adherence to the said time limit and not making it even slightly flexible would warrant a situation where even one day deviation from the time line would be equally fatal as a delay of one year. This surely is not the intention in framing the Regulation. Undisputedly, the intention is to curb the delay in concluding the inquiries, however, it should not be stretched to an extent where it would defeat the very purpose of the Regulation, being to enforce a regime of discipline in the Customs arena and it would result in letting the miscreant set loose by taking benefit of deviation of the time schedule. The said CESTAT West Zonal Bench, Mumbai in *Unison Clearing Pvt. Ltd v. Commissioner of Customs (General), Mumbai (supra)* has in detail dealt with the Regulation 22 and has examined whether it has to be construed as mandatory or directory. Relying on catena of judgments delivered by the Hon'ble Apex Court, and specifically in *Delhi Air Take Services Pvt. Ltd. and Another v. State of West Bengal and Another*, CESTAT has concluded that while deciding whether the time period is directory or mandatory, it would be seen that the purpose of law prescribing it as mandatory and consequently the absence of provisions of consequences in case of non-compliance with the requirement would indicate that the provisions are directory irrespective of use of the word "shall". The CESTAT has concluded that if the time limits are construed as mandatory and the matter is put to an end, the purpose of Regulation would be defeated and so would be the intention behind framing such a Regulation. On the other hand, if there is no consequence stated in the regulation for non-adherence is a time period for conducting the inquiry, the time line cannot be proved to be fatal to the outcome of the inquiry. Based on these observations the Tribunal had held the Regulation is directory in nature. However, in the present judgment which is impugned before us, the CESTAT has taken a view contrary to its earlier view in *Unison Clearing Pvt. Ltd. (supra)* and after referring to certain precedents where a view was taken that the regulations are mandatory delivered by the Tribunal itself, the Tribunal was pleased to quash and set aside the impugned order being not sustainable and allowed the appeals. It is to be noted that the Member Judicial (Ramesh Nair) who is a party to the judgment delivered by the said CESTAT in *Unison Clearing Pvt. Ltd. v. Commissioner of Customs (General), Mumbai*.*

15. In view of the aforesaid discussion, the timelimit contained in Regulation 20 cannot be construed to be mandatory and is held to be directory. As it is already observed above that though the time line framed in the Regulation need to be rigidly applied, fairness would demand that when such time limit is crossed, the period subsequently consumed for completing the inquiry should be justified by giving reasons and the causes on account of which the timelimit was not adhered to. This would ensure that the inquiry proceedings which are initiated are completed expeditiously, are not prolonged and some checks and balances must be ensured. One step by which the unnecessary delays can be curbed is recording of reasons for the delay or non-adherence to this timelimit by the Officer conducting the inquiry and making him accountable for not adhering to the time schedule. These reasons can then be tested to derive a conclusion whether the deviation from the time line prescribed in the Regulation, is "reasonable". This is the only way by which the provisions contained in Regulation 20 can be effectively implemented in the interest of both parties, namely, the Revenue and the Customs House Agent.'

to argue that the acts of commission and omission should not go unpunished merely on grounds of delay.

6. From the above decisions it would appear that though time-lines prescribed in the Regulations have been held to be directory, and not mandatory, there is an implicit responsibility on the part of the competent authority to adhere to the time-lines with acceptable justification for delays, if any. This is more so when the appellant places on record that it was not non-cooperation or intransigence, on their part, that caused delay. It is seen that the suspension itself, though challenged successfully before the Tribunal, and withdrawn on 11th January 2017, another 15 days elapsed for the enquiry proceedings to commence. Thereafter, there is a lapse of more than six months in completion of enquiry and

further a lapse of more than two months in revocation of the licence. All of these delayed disengagements with the procedure laid down in the Customs Brokers Licensing Regulation, 2013 had its origin in an incident that occurred in November 2015. Considering the nature and scope of investigations normally undertaken by the Directorate General of Revenue Intelligence, whose report led to the initiation of proceedings under the Regulations, the delay in commencement of the proceedings for revocation of the licence does not command itself as indicative of proper undertaking of responsibility.

7. There is nothing on record to arrive that the 'G' card-holder, who was investigated for his key role in the conspiracy to smuggle 'red sanders' out of India, was concerned with the activities for which appellant herein was licenced. The allegedly nefarious activities of such a pass-holder, although obtained through the licenced customs broker, cannot be visited upon the broker in the absence of a link between the two in the context of established misdemeanor. Perhaps, the unwarranted delay in completion of the proceedings arose from the lack of any such proximate participation in the said incident.

8. We find that, in view of the above, the principles laid by down by the Hon'ble High Court in re Unison Clearing P Ltd does not merit continued revocation of the licence. Accordingly, the appeal is allowed and licence is ordered to be restored.

(Pronounced in open court)

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