

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. IV

Customs Appeal No. 50033 of 2023

(Arising out of Order-in-Original No. 64/ZR/Policy/2022 dated 16.11.2022 passed by the Commissioner of Customs (Airport & General), New Delhi).

Shyam Singh

J-48, First Floor, May Field Gardens
Sector-51, Gurugram
Haryana-122101.

Appellant

VERSUS

Commissioner, Customs

(AIRPORT & GENERAL)
New Customs House, Near IGI Airport
New Delhi-110037.

Respondent

APPEARANCE:

Sh. B. L. Garg, Advocate for the appellant
Sh. Nagendra Yadav, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER No. 51151/2023

DATE OF HEARING: 14.08.2023
DATE OF DECISION: 01.09.2023

BINU TAMTA:

Challenge in this appeal is to the Order-in-Original No. 64/ZR/Policy/2022 dated 16.11.2022 whereby the Customs Broker License of the appellant was revoked, the security deposit was forfeited and penalty of Rs. 50,000/- was imposed.

2. The appellant has been issued Customs Broker License in the year, 2010 by the Commissioner of Customs (Airport & General), New Delhi, which is valid upto 22.11.2029. The letter dated 25.02.2022 was issued by the Additional Director, Directorate of Revenue Intelligence (DRI), Delhi Zonal Unit (DZU)

regarding violations committed by various Customs Brokers, namely M/s Sanjeev Kumar, M/s Expert Cargo Movers, M/s Anurag Tiwari, M/s Anubhav Cargo Movers, M/s Phenomenal Logistics and Shyam Singh, the appellant herein, in relation to gross mis-declaration and undervaluation in import of electronic goods by various importers, where the value of the imported goods declared before Customs was roughly 5% of the actual value of the goods. In fact, on many occasions, the declared value of the goods imported from Hong Kong was less than even the freight amount and it was admitted by the accused that the under-declared portion of the value of the goods including the prepaid freight was remitted abroad through hawala and non-banking channel.

3. The statement of various Proprietors of the Customs Broker was recorded under Section 108 of the Customs Act, 1962 (hereinafter referred to as the Act). Sh. Sanjeev Kumar in his voluntary statement dated 18.10.2021 accepted that the imported goods were highly undervalued and that he had used the Customs Broker Licenses of the above referred CHAs for clearing such undervalued and mis-declared import in the names of different proxy firm owned and controlled by one Zakir Khan. Sh. Sanjeev Kumar was arrested on 19.10.2021 and soon thereafter detention order dated 26.11.2021 was passed against him under COFEPOSA.

4. The statement of the appellant was also recorded under Section 108 of the Act on 15.12.2021, the relevant paras of the same are quoted below:-

Question-6	On going through the mobile phone and Whatsapp chats, it has been noticed that most of the Whatsapp chats, documents and images have been deleted.
Answer-6	I state that I received your office summons dated 06.12.2021 on 10.12.2021. Vide the said summons, import documents of M/s. A& O Exim, M/s. Alfa overseas, M/s. Meena Prints, M/s. R & J Overseas, M/s. R.K. Overseas, M/s. Vijay Overseas, M/s. Globle Enterprises, M/s. Goodluck Exports, M/s. S.M. International, M/s. Sanjay International, M/s. Sharma Overseas and M/s. Z.K. Overseas were sought. I state that the import related documents for customs clearance of goods imported in these firms are filed by Sh. Atul Kapoor (Mobile N.9810696222) only, therefore, I contacted Atul Kapoor on 10.12.2021 to inform him about DRI summons and to provide the import documents for these firms. Shri Atul Kapoor directed me to delete all my WhatsApp chats with him and all the documents shared between us in relation to import in above-mentioned firms. Therefore, on his directions, I deleted all the WhatsApp conversation between myself (Mobile No.9810440317) and Atul Kapoor (Mobile -9810696222) and other related documents and images. On his directions, I also deleted the WhatsApp conversation between myself and Shri Sanjeev Yadav (Mobile No.9810068863) other employees of Atul Kapoor namely, Sidharth Sharma (Mobile No.9582778283).
Question-7	Please inform how do you know Shri Atul Kapoor?
Answer-7	<p>I state that I came in contact with Shri Atul Kapoor aka Atul Kumar Kapoor in year 2014 as we both were working in Air Cargo Complex, Delhi. He informed me that he did not have customs broker licence and asked me to provide my customer broker licence to him for a monetary consideration. <u>I state that I provided my Customs broker licence to Shri Atul Kapoor, who initially used to pay Rs.25,000/- per month to me for using my license.</u> Worked with Atul Kapoor at his office till year 2019. I state that Shri Atul Kapoor used to file documents with Customs for import of goods in various firms, using my licence from the year 2014 to 2019. Thereafter, he stated using customs broker licence of M/s. Anubhav Cargo Movers, Noida (Prop. – shri Deepak Kumar). It is stated that sometimes Shri Deepak Kumar also used to visit the office of Shri Atul Kapoor, In October, 2021, Shri Atul Kapoor informed me that his business partner, Shri Sanjeev Kumar Yadav has been arrested by DRI.</p> <p>On being asked, I stated that I do not know his complete address but he resides in Krishna Park area near Vikaspuri, New Delhi.</p>
Question-9	Please inform about the Proprietors of the above mentioned firms. Please also inform whether KYC documents of the said firms were collected by you and physical verification was done by you.
Answer-9	<u>I state that I do not know anything about the firms- M/s. A & O Exim, M/s. Alfa Overseas, M/s. Meena Prints, M/s. R & J Overseas, M/s. R.K. Overseas, M/s. Vijay Overseas, M/s. Globle Enterprises, M/s. Goodluck Exports, M/s. S.M. International, M/s. Sanjay International, M/s. Sharma Overseas and M/s. Z.K. Overseas nor do I know anything about their proprietors. I state that I have not collected any KYC documents of these firms and have not physically verified the address of any of these firms. Shri Atul Kapoor (Mobile No.9810696222) used to file the documents.</u>
Question-10	Please inform how you know Zakir Khan and Jitender. Please also

	inform where you met them.
Answer-10	I state that I do not know Zakir Khan and Jitender.
Question-11	Please inform who filed the Bill of Entry on behalf of your customs broker license for imports in the firms M/s. A & O Exim, Md/s. Alfa Overseas, M/s. Meena Prints, M/s. R & J Overseas, M/s.RK Overseas, M/s. Vijay Overseas, M/s. Globle Enterprises, M/s. Goodluck Exports, M/s. S.M. International, M/s. Sanjay International, M/s. Sharma Overseas and M/s. Z.K. Overseas. Please also inform who possesses the dongles of your Customs broker firm, M/s. Shyam Singh for filing documents through ICEGATE.
Answer-11	<p>I state that two (2) dongles have been issued by Customs department in my customs broker firm, M/s Shyam Singh for filing customs documents through ICEGATE. One dongle has been issued in my name and other dongle has been issued in the name of Sh. Anil Kumar (Mob. No. 9999480444 and 9999067376). I state that presently Anil Kumar is an employee of Sh. Atul Kapoor.</p> <p>I further state that Sh. Atul Kapoor (Mob. No. 9810696222) filed the Bill of entry on my behalf in my customs broker license for imports in the firms M/s A&O Exim, M/s Alfa Overseas, M/s Meena Prints, M/s R&J Overseas, M/s R.K. Overseas, M/s Vijay Overseas, M/s Globle Enterprises, M/s Goodluck Exports, M/s S.M. International, M/s Sanjay International, M/s Sharma Overseas and M/s Z. K. Overseas.</p>
Question-12	Please inform which goods were imported by the above-mentioned firms.
Answer-12	<u>I state that I do not know anything about the goods imported in M/s. A & O Exim, M/s. Alfa Overseas, M/s. Meena Prints, M/s. R & J Overseas, M/s. R. K. Overseas, M/s. Vijay Overseas, M/s. Globle Enterprises, M/s. Goodluck Exports, M/s. S.M. International, M/s. Sanjay International, M/s. Sharma Overseas and M/s. Z.K. Overseas. The documents of the said firms are maintained and kept by Shri Atul Kapoor and he does not provide me any copy of the same.</u>
Question-13	Please inform why did you provide your Customs broker licence to Shri Atul Kapoor, for customs clearance of various import consignments.
Answer-13	<u>I state that I did not have much business in my Customs broker firm. Shri Atul Kapoor had contacts of various importers but he did not have F-Card. Therefore, I provided the Customs Broker Licence of my firm, M/s.Shyam Singh to Shri Atul Kapoor for monetary consideration. I state that I used to receive approx. Rs.50,000/- per month in cash from Shri Atul Kapoor for providing my customs broker license for affecting imports clearance. On being asked, I state that I charge approx.</u>
Question-14	Please inform how do you know Sanjeev Kumar alias Sanjeev Yadav.
Answer-14	<u>I state that I know Sanjeev Kumar alias Sanjeev Yadav since 2018. I was introduced to Sanjeev Kumar through Atul Kapoor. Shri Atul Kapoor informed me that Shri Sanjeev Kumar will also use my customs broker license for effecting imports in various firms and promised me a monetary consideration of approx.</u>

	<p><u>Rs.25,000/- per month.</u></p> <p>I state that I did not provide any separate dongle to Shri Sanjeev Kumar. I was informed that Sanjeev Kumar is a partner of Atul Kapoor. Shri Sanjeev Kumar used my dongle, which I had provided to Atul Kapoor for filing documents on ICEGATE.</p>
--	--

5. On the basis of the statement of the appellant, it was noticed that the Customs Broker has violated the various provisions of the Customs Broker Licensing Regulations, 2018 (CBLR) and observing that continuation of business transaction by the Customs Broker would be prejudicial to the interest of the Revenue and therefore, as a matter of immediate action, the Customs Broker License was suspended under Regulation 16(1) of CBLR vide order dated 25.03.2022. The order of suspension was subsequently confirmed under Regulation 16(2) by the Commissioner of Customs vide order dated 20.4.2022.

6. That vide show cause notice dated 27.5.2022 the appellant was called upon to show cause as to why they should not be held responsible for contravening the provisions of CBLR 2018, viz. Regulation 1(4), 10(a), 10(d), 10(e) and 10(n) and why Customs Broker License should not be revoked, the security deposit should not be forfeited under Regulation 14 read with Regulation 17 of CBLR and penalty should not be imposed on them under the provisions of Regulation 18 read with Regulation 17 of CBLR, 2018. The Assistant Commissioner (IGIA) Airport & General Commissionerate, New Delhi held the enquiry and submitted the report dated 22.08.2022 holding that the Customs Broker M/s Shyam Singh for undue monetary gain knowingly allowed filing of bills of entry by subletting his license to Sh. Atul Kapoor and Sh.

Sanjeev Kumar without obtaining the authorisation from the importer and therefore they have violated the provisions of Regulations 1(4), 10(a), 10(d) 10(e) and 10(n) of CBLR, 2018 and accordingly recommended that the Customs Broker License is liable to be revoked alongwith imposition of penalty and forfeiture of the security amount. The matter was adjudicated by the Commissioner of Customs and relying on the voluntary statement made by the appellant under Section 108 of the Act concluded that CB did not verify the value of the goods before filing the subject bills of entry, he aided the importer in the undervalued import and thereby led to the attempt to importation of mis-declared / overvalued goods and therefore fails to comply with the obligations cast upon him under the provisions of CBLR, 2018. The Adjudicating Authority specifically observed that the Customs Broker with malafide intention and knowingly abetted illegal import of the consignments involving gross mis-declaration and undervaluation. In view of the said finding, the Adjudicating Authority by the impugned order revoked the Customs Broker License of the appellant alongwith order of forfeiture of the security amount and also imposed a penalty of Rs. 50,000/- on the appeal before this Tribunal.

7. We have heard the learned Counsel for the appellant and also the learned Authorised Representative for the Revenue and have examined the case records including the various judgements cited at the bar. The learned Counsel for the appellant and also the Authorised Representative for the Revenue have filed detailed written submissions and also compilation of judgements. In view of

the submissions made by both sides following issues arise for our consideration:

(i) whether the statement recorded under section 108 of the Customs Act though retracted is binding on the appellant?

(ii) whether absence of cross examination of the witnesses who made confessional statements has led to violation of principles of natural justice?

(iii) whether the appellant has failed to discharge the obligation cast on him under the Regulations and thereby violated the provisions thereof ?

(iv) whether the charge of mis-declaration and undervaluation of the illegal imports against the appellant is maintainable?

(v) whether imposition of punishment on the appellant under the provisions of CBLR is proportionate to the charges proved against him?

8. The main allegation against the appellant is that they have sublet their Customs Broker License to Sh. Atul Kapoor and Sh. Sanjeev Kumar for clearing undervalued and mis-declared imports in the names of different proxy firm owned/ controlled by Zakir Khan and he has been roped in by virtue of the statement made by him under Section 108 of the Act.

9. The first and foremost contention of the appellant is that no reliance can be placed on the statement recorded under Section 108 of the Act for the simple reason that it was not voluntary and has been retracted subsequently. The appellant has stated that due to prolonged illness his health had deteriorated and he was not fit to make the statement as he was under medication for anti anxiety. Further, according to him the said statement dated 15.12.2021 was retracted vide letter dated 30.03.2022, inter-alia submitting that the delay in making the retraction was due to the reason that the copy of the said statement was not provided to him and it is only after the order of suspension dated 25.03.2022 was issued that he learnt about the same. We do not agree with the said contention of the appellant for the simple reason that if the appellant had bonafide reason that he was unable to make the statement he could have submitted his medical papers and sought some time to make the statement or else recorded the same while he signed the said statement. But he did not take any such action in that regard. On the other hand, we find that after the statement was recorded in question – answer form, he in his own handwriting had stated:-

“I have carefully read my above statement typed by DRI off. on my request. I found the above statement typed as per my say. This is my true correct & voluntary statement. I have tendered the above statement without any fear, force, coercion or inducement. This is my voluntary statement. I put my date signature on all pages in token of the correctness. Total 01 to 6 pages.”

So, therefore, to say that he was unaware of the statement which he made and learnt about it only after the order of suspension was issued is nothing but afterthought and does not call for any indulgence. The learned Authorised Representative has

referred to the decision in **Surjeet Singh Chhabra vs. Union of India 1997 (89) ELT 646 (SC)**, where the Apex Court reiterated the settled principle that Customs Officers are not Police Officers and therefore, the statement under Section 108 of the Customs Act, though retracted is an admission and is binding. The relevant para of the said decision is as under:-

"3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice." (Emphasis laid)

From the records of the case, we find that in response to the retraction letter dated 30.03.2022, the department immediately vide letter dated 31.03.2022 addressed to the appellant stated that the retraction is an afterthought based on legal tutoring. The relevant para of the letter dated 31.03.2022 reads as under:-

"4. Based on the investigation conducted by DRI, specific questions were asked to you and plenty of time was given to you to reply to the questions asked by the officer. Further, you have filed retraction of statement after passing of more than 3 months of recording of your statement, hence, it is evident that your letter dated 30.03.2023 is an afterthought based on legal tutoring, to derail the ongoing investigation."

Surprisingly, the appellant neither denied the same nor submitted any reply thereto. This conduct of the appellant speaks much against him. This answers the contention of the appellant and we, accordingly, reject this submission.

10. The learned Counsel for the appellant has next argued that there is violation of the principles of natural justice in as much as he has not been allowed to cross examine the witnesses namely, Sanjeev Kumar and Atul Kapoor who have been alleged to have made the statements under section 108 of the Act and which have been relied upon by the department. We find that the statement of the appellant himself is sufficient to establish the substantive allegation of subletting the licence and therefore nothing much would have turned by allowing him to cross examine Sanjeev Kumar and Atul Kapoor. There are catena of decisions on the point that failure to provide an opportunity to cross examine the witnesses when there is already a confessional statement by a party, there is no violation of principles of natural justice. Reference is invited to the decision of Apex Court in **Surjeet Singh Chabbra** (supra) as quoted above.

11. We would also like to refer to the decision of this Tribunal in **D. S. Cargo Agency vs. Commissioner of Customs, New Delhi, 2021 (376) ELT 724 (Tri. Del)** where observations have been made relying on the decision of the High Court of Delhi in **Jasjeet Singh Marwaha** as under:-

"No doubt, there is no document on record as provided by the Department, burden to prove otherwise rests upon the Department but it is settled principle of law that the appellants admission are the best proof which need no further proof. Hence, the burden need not to be discharged anymore by the Department in the cases of admissions by the concerned. It was observed by Hon'ble High Court of Delhi in the case of Jasjeet Singh Marwaha v. Union of India reported as [MANU/DE/1201/2009 = 2009 (239) ELT 407 (Del.)] that CHA's licence can be suspended based on confession made under Section 108 of Act, 1962 provided it is voluntary and statement is truthful and is not result of such inducement, threat or promise as mentioned in Section 24 of Indian Evidence Act, 1872. In the present case, there is no retraction by the appellant of the said statement

nor it is the submission before us. We have no reason to ignore the said admission”.

12. Similarly, referring to series of decisions of various Courts, this Tribunal in **M/s Mittal Impex vs. Principal Commissioner, Customs, (ICD, TKD) New Delhi 2022 (4) TMI 143 (Tri. Del.)** held that the adjudicating authority has not committed any error while denying the opportunity of cross examination of investigating officers and the panch witnesses. The Authorised representative for the revenue have also relied on the decision in the case of **Silicon Concepts International Pvt. Ltd., vs. Principal Commissioner of Customs ICD, TKD (Import) New Delhi 2019 (368) ELT 710 (Tri. Del)**, where again denial of permission to cross examine was upheld. The relevant para is set out hereunder:-

“8. Though the appellant have taken the plea that both the witnesses were compelled to give the initial statement of acknowledging the guilt but they had subsequently retracted. This controversy was cleared by Supreme Court *Bhagwan Singh v. State of Punjab* reported in AIR 1952 (S.C.) 214 holding that even if it is a retracted [confession], it must first be tested whether [confession] is voluntary and trivial inculcating the accused in the Commission of the crime, if affirmative findings, even retracted [confession] can be recorded. The Apex Court clarified that to prove that the statement was not voluntary and was obtained by threat or duress the burden lies upon the accused. We observe that there is nothing on record till date to satisfy the adjudicating authorities that the statement/confessions of the Directors of the Company were however made under threat or duress. Therefore, we are of the opinion that statements even if retracted can form the basis of conviction without examination of the persons making confessions in the manner as mentioned under Section 9D of Excise Act/138 of the Indian Evidence Act”.

13. The learned Authorised Representative has referred to a decision in **Kanishka Matta vs. Union of India -2020 (42) GSTL 52 (M.P.)**, by the High Court of Madhya Pradesh distinguishing the case where retracted confession has been used as a piece of corroborative evidence and not as evidence on the basis whereof

alone a judgement of conviction and sentence has been recorded.

The relevant para reads as under:-

"24. Learned Counsel for the petitioner has placed reliance upon a judgment delivered in the case of Vinod Solanki v. Union of India and Another reported in (2008) 16 SCC 537 = 2009 (233) ELT 157 (SC) = 2009 (13) STR 337 (SC). Heavy reliance has been placed in paragraph No. 22 and the same reads as under:-

"22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded. (See Pon Adithan v. Deputy Director, Narcotics Control Bureau, (1999) 6 SCC 1: 1999 SCC (Cri 1051)]"

The aforesaid case was a case under the Foreign Exchange Regulation Act, 1973 and the Hon'ble Apex Court has held that evidence brought on record by way of confession, which stood retracted must be substantially corroborated by other independent and cogent evidence, which would lend adequate assurance to the Court that it may seek to rely thereupon. In the present case, the authorities are at the stage of investigation. The evidence is being collected and therefore, at this stage, the judgment relied upon by Learned Counsel for the petitioner is of no help." (Emphasis laid)

14. The learned counsel for the appellant has referred to a latest decision of this Tribunal in Customs Appeal No. 75414 of 2022 titled as **Shri Balwant Raj Soni and Ors. vs. Commissioner of Customs, Preventive, Patna, Final Order No. 75455-75457 of 2023 dated 18th May 2023**, however, the same is distinguishable for the reason that the issue dealt therein was whether the retracted statements of the co-accused can be relied upon to establish the guilt of the appellants and the submission of the appellant was that only on the basis of the statement of the co-accused inference has been made about the smuggled nature of the gold bars which is unsustainable. There cannot be any doubt on the principle that the statement of the co-noticees unless corroborated by any

independent evidence do not constitute substantive evidence but in the present case apart from the confessional statement of the co-accused, the voluntary statement of the appellant is on record and though the same has been retracted by him, however for the reasons enumerated above the said statement is binding on the appellant.

15. Similarly, the decision of the Bombay High Court in **Kiran Nagindas Vora vs. Commissioner of Customs (Export), Nhava Sheva 2015 (322) ELT 97 (Bom.)** is distinguishable as the statements recorded were retracted at the first available opportunity by an affidavit in the presence of the Magistrate, which is not so in the present case.

16. In the present case, we find that it is not the stand of the appellant that his statement has been recorded by the department under threat, duress or coercion. In the absence of any such plea the statement made by him under section 108 of the Act are binding on him and the same cannot be discarded on the ground that the same has been retracted. We are, therefore of the opinion that there is no violation of the principles of natural justice in denying the appellant an opportunity to cross examine the two witnesses in view of the voluntary confessional statement made by him under section 108 of the Customs Act.

17. The other contention raised by the appellant relates to the violation of the Regulation 1(4) of CBLR, which requires that no license shall be sold or otherwise transferred. The submission is that

there was no documentary evidence pointing out to subletting of the license to Sh. Sanjeev Kumar and Sh. Atul Kapoor. According to him, he had only entrusted Sh. Anil Kumar and Sh. Atul Kapoor who were his employees being 'G-Card' and 'H-Card' holders, respectively to help him in performing his duties as Customs Broker. He had also submitted the copies of 'H-Card' and 'G-Card' issued to Sh. Atul Kapoor and Sh. Anil Kumar showing that 'previously' they were his employees. It is also submitted by him that the facilitation of unscrupulous import by Sh. Atul Kapoor and Sh. Anil Kumar have been committed without his knowledge or involvement and he learnt about the same only when the DRI has initiated the investigation of the imports made under CB License owned by him. In so far as Sh. Sanjeev Kumar is concerned, the appellant submitted that he never dealt with him directly. We also do not agree with the said submission of the appellant and relying on the statement made by the appellant under section 108 that since he did not have much business in his Customs Broker firm and Sh. Atul Kapoor had contacts with various importers but since he did not have the 'F-Card' therefore, he provided Customs Broker License to him for monetary consideration. This is sufficient to hold that the appellant had sublet his Customs Broker License for monetary gain and thereby violated the provisions of Regulation 1(4) of CBLR, 2018.

18. The other contention relates to the violation of the provisions of Regulation 10(a), 10(d), 10(e) and 10(n) of CBLR, 2018. Before considering the violation of the provisions of Regulation 10(a) and 10(n) of CBLR, 2018 the same are reproduced here:-

"10. Obligations of Customs Broker

A Customs Broker shall-

10(a) obtain an authorisation from each of the companies, firms or individuals by whom he is for the time being employed as a Customs Broker and produce such authorisation whenever required by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be."

10(n) "verify correctness of Importer Exporter Code (IEC) number, Goods and Service Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;"

Learned Counsel for the appellant has pointed out that the Adjudicating Authority has wrongly recorded that he had not obtained authorisation letter or KYC documents from the respective importers in view of the observations made in the enquiry report as:-

"18.5The noticee herein had obtained authorisation from all the importers mentioned in para 7 of the impugned show cause notice. The details of the Authorisation and KYC documents obtained by the noticee are detailed in Annexure 'A' to these submissions. In addition, copies of all those KYC documents are also enclosed herewith in Annexure 'B'.

18.6 I have examined the documents and KYC documents in respect of M/s Alfa Overseas,"

The aforesaid contents of the enquiry report dated 22.08.2022 has to be read in context with the statement dated 15.12.2021 wherein the appellant stated that import related documents are filed by Sh. Atul Kapoor and in response to Question No. 8 as to what documents he has brought, he stated:-

Question 8	Please inform which documents you have brought today with yourself as sought vide summons dated 06.12.2021.
Answer 8	I state that as sought by your summons dated 06.12.2021, I am submitting only the Bills of Entry filed by M/s Shyam Singh for below mentioned firms- i. M/s Sanjay International, 1238, Chuliyana, Rohtak, Haryana-124501. ii. M/s Goodluck Exports, Paju Kalan, Safidon, Haryana-126112; iii. M/s A & O Exim, E-229, Yadav Nagar, Delhi;

	<p>iv. M/s Globle Enterprises, 0, Pajju Kalan, Safidon, Haryana;</p> <p>v. M/s R. K. Overseas, 17, Gali No. 3, Raj Nagar, Panipat, Haryana-132103;</p> <p>vi. M/s R and J Overseas, H-38 A, Basement, Kalkaji, New Delhi-110019;</p> <p>vii. M/s SM International, H. No. 232, Raj Nagar, Gali No. 2, Panipat, Haryana;</p> <p>viii. M/s Sharma Overseas, Raj Nagar, Gali No. 3, Near Shiv Mandir, Panipat, Haryana;</p> <p>ix. M/s Vijay Overseas, 3328, First Floor, Bank Street, Karol Bagh, New Delhi.</p> <p>I state that I will submit the documents for these M/s Alfa Overseas, M/s Meena Prints and M/s Z. K. Overseas on a later date. I will also submit the other import documents viz. Invoice, packing list and AWB for the above firms later.</p>
--	--

19. The allegations under Regulation 10(a) and 10(n) are being considered together. From Question No. 8, it is clear that on the date when the appellant appeared to give his statement, he did not produce the relevant documents. We would like to point out the statement made by the appellant on issue No. 9 where he was asked about the KYC documents of the said firms and he categorically stated that he does not know anything either about the firms (importers) or their proprietors and also he had not collected any KYC documents of the firm and have also not physically verified the address of the firms. He also categorically stated that it is only Sh. Atul Kapoor who used to file documents. The fact that the appellant had sublet the Customs Broker License for monetary gain of Rs. 25,000/- or Rs. 50,000/- p.m., rest of the work was done entirely by Sh. Atul Kapoor and obviously the appellant would not have any knowledge either of the firms, their Proprietors or the KYC documents. Thus, violation of Regulation 10(a) and 10(n) are established.

20. In order to deal with the violation of Regulation 10(d) and 10(e) of CBLR, 2018, the provisions thereof are quoted below:-

10(d) advise his clients to comply with the provisions of Customs Act. In case of failure by his clients, it is the responsibility of a Customs Broker to immediately bring this non-compliance to the notice of Deputy/ Assistant Commissioner, as the case may be.

10(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."

21. The challenge to the violation of the aforesaid provisions by the appellant is that the Adjudicating Authority had not cited any evidence to demonstrate that the appellant had not advised the importers to comply with the provisions of the Act or other legal provisions or that he has not exercised due diligence to ascertain the correctness of the information which he has imparted to a client. The submissions made by the appellant needs to be rejected outrightly in view of his own admission that he did not know the proprietor, importer firm or had any KYC documents of the importers. In the absence of any knowledge, it is prima facie evident that there was no scope for the appellant to comply with these provisions, i.e. to advise his client to comply with the provisions and to exercise due diligence for ascertaining the correctness of the information.

22. Lastly, the submission of the appellant is that they could not be penalised for any violation committed by the importers without their knowledge and therefore they could not have detected or prevented the undervaluation of the imports. We find that the Adjudicating Authority without any material has observed that the Customs Broker played an active role in the scheme devised by various unscrupulous importers to defraud

the Revenue by evading the customs duty, that they with malafide intention and knowingly abetted illegal import of the consignments involving gross mis-declaration and undervaluation and therefore the role of accomplice played by the Customs Broker and their employees is clearly proved. We are constrained to say that the observations made are absolutely without any material on record and are infact premature as pointed out by the learned AR during the course of hearing and also stated in their additional submissions dated 14.08.2023 that they have enquired from DRI that investigation has not completed but is still going on as yet and therefore no show cause notice has been issued either to the importers or Zakir Khan. No material has been shown to us from the statement of the appellant to even remotely suggest that he was privy to the actual activity of facilitating the import. In this scenario, on what basis the adjudicating authority has arrived on the findings of mis-declaration and undervaluation against the appellant is missing. We are of the considered view that such findings are unsustainable in the absence of any material and therefore deserves to be set aside.

23. Coming to the question of imposition of penalty on the appellant for not discharging the obligations as per the Regulations and for their role in facilitating the import, in the light of the doctrine of proportionality as to whether it warrants the action of revocation of license. The principles to weigh the proportionality for invoking revocation of licence as enunciated in various decisions are:-

- i) To consider the gravity of the situation and the allegations of violation.

- ii) If the infraction is minor and not of very serious nature that would require exemplary action by the authorities, the order revoking the licence would not be justified.
- iii) The consequences of any action so as to arrive at a conclusion as to whether it should give rise to an action for suspension or revocation.
- iv) The effect of the action vis-a-vis right to carry on trade or profession in the background of Article 19 (1)(g) of the Constitution of India.
- v) The question of proportionality is of a great significance as the action is under a fiscal statute which may lead to a civil death.

24. As noted by the High Court of Delhi in **Falcon Air Cargo and Travels (P) Ltd., vs. Union of India - 2002 (140) ELT 8 (Del.)** that before choosing any of the two actions of suspension or revocation of licence under the regulations, it is necessary for the Commissioner /Tribunal to consider all relevant aspects and draw a balance sheet of gravity of infraction and mitigating circumstances. Keeping that in view we would now examine the facts of the present case. The main and substantial allegation against the appellant is that he had sublet his licence for monetary consideration. Having upheld the subletting of the licence by the appellant we have consequently upheld the other violations under regulation 10 (a), (n), (d) and (e) CBLR, 2018 as after submitting the licence the appellant was in no manner in control of the transaction and any actions thereof and therefore had no knowledge of either the importer firms or its Proprietor or the KYC documents and hence could not have discharged his further obligations under the Regulations. In that event he is not the main culprit rather as appears from the records, it is Sanjeev Kumar who is the main facilitator and accomplice in the imports in question and therefore he had been arrested and also detained under COFEPOSA. The

department has not produced any evidence to show active connivance of the appellant with the said Sanjeev Kumar. Similarly, Atul Kapoor who was earlier working with him was now working independently except that he used his license on payment of remuneration to the appellant. The statement of the appellant on which all the authorities relied and on that basis arrived at the conclusion that the appellant had violated the Regulations, only points out to the allegation of subletting of the licence for monetary gains. We can safely conclude that there was no active or passive role of the appellant and no aggravating circumstances have been pointed out by the department that would justify the infraction to be as grave. The imposition of the punishment of revocation of the licence in that situation is not justifiable as the gravity of the infractions alleged cannot be said to be so serious so as to warrant such a grave and harsh punishment which would mean that his licence will be permanently inoperative for all times to come. Repeatedly, it has been emphasised by the Tribunal as well as by superior Courts that penalty as that of revocation of license cannot be imposed upon the CHA in absence of any active or passive facilitation, which is not the case in so far as the appellant is concerned.

25. The jurisdictional High Court of Delhi in **Ashiana Cargo Services vs. Commissioner of Customs (I &G)- 2014 (302) ELT 161 (Del.)**, dealt with an identical situation where the CHA in his statement under section 108 of the Act admitted that he had received Rs. 15,000/- from one M/s V. K. International for granting

facility of 'G-Cards' to its employees. As the said employees indulged in illegal exports of narcotics and the CHA pleaded ignorance of the misuse, the learned Division Bench observed that-

"However, given the factual finding the CHA was not aware of the misuse of the G cards (and thus, also unaware of the contents being smuggled), no additional blame can be heaped upon the CHA on that count alone. Rather, the only proved infraction on record is of the issuance of 'G-cards' to non employees, as opposed to the active facilitation of any infraction, or any other violation of the CHA Regulations, whether gross or otherwise".

Further, the Court observed:-

"10. Beginning with the facts, there is virtually no dispute. There is a concurrent finding of fact by the Commissioner and the CESTAT that the appellant did not have knowledge that the illegal exports were effected using the G cards given to V.K.'s employees. There was no active or passive facilitation by the appellant in that sense. Undoubtedly, the provision of the G cards to non-employees itself violated the CHA Regulations. This is an admitted fact, but it is not the Revenue's argument (nor is it the reasoning adopted by the Commissioner or the CESTAT) that this violation in itself is sufficiently grave so as to justify the extreme measure of revocation. Not any and every infraction of the CHA Regulations, either under Regulation 13 ("Obligations of CHA") or elsewhere, leads to the revocation of license; rather, in line with a proportionality analysis, only grave and serious violations justify revocation. In other cases, suspension for an adequate period of time (resulting in loss of business and income) suffices, both as a punishment for the infraction and as a deterrent to future violations. For the punishment to be proportional to the violation, revocation of the license under Rule 20(1) can only be justified in the presence of aggravating factors that allow the infraction to be labeled grave. It would be inadvisable, even if possible, to provide an exhaustive list of such aggravating factors, but a review of case law throws some light on this aspect. In cases where revocation of license has been upheld (i.e. the cases relied upon by the Revenue), there has been an element of active facilitation of the infraction, i.e. a finding of *mens rea*, or a gross and flagrant violation of the CHA Regulations."

The decision of the Delhi High Court in **Ashiana Cargo Services** (supra) has been affirmed by the Apex Court in the order reported in **2015 (320) ELT A175 (SC)**.

26. We may also refer to the decision of the Andhra Pradesh High Court in **Commissioner of Customs & C Ex. HYD-II vs. H.B. Cargo Services 2011 (268) ELT 448 (A.P.)** which referred to "balancing test" and "necessity test" and in the context of doctrine of proportionality observed:-

"11. While issuance of signed blank shipping bills would, by itself, amount to negligence on the part of the CHA, their doing so for a consideration of Rs. 150/- per shipping bill is an act of corruption. It is in this context that the proportionality of punishment imposed on the respondent, and the scope and amplitude of this doctrine, is required to be examined. "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality places in focus the true nature of the exercise - the elaboration of a rule of permissible priorities. "Proportionality" involves "balancing test" and "necessity test". While the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests, and a manifest imbalance of relevant considerations, the latter (necessity test) limits infringement of human rights to the least restrictive alternative. [Judicial Review of Administrative Action (1995), pp. 601-05, para 13.085; Wade & Forsyth: Administrative Law (2005), p. 366; *Mukul Kumar Choudhuri* - (2009) 15 SCC 620]. What is otherwise within the discretionary domain and sole power of the decision maker to quantify the punishment, once the charge of misconduct stands proved, is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment, which is grossly in excess of the allegations, cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied, while dealing with the question of quantum of punishment, would be: would any reasonable person have imposed such punishment in like circumstances? Obviously, a reasonable person is expected to take into consideration the measure, magnitude and degree of misconduct and all other relevant circumstances, and exclude irrelevant matters before imposing punishment [*Mukul Kumar Choudhuri* - (2009) 15 SCC 620]. The CHALR enables both suspension and revocation of the license of a CHA for violation of any of the conditions specified therein. If any such ground exists, two courses are open to the Commissioner. One is to suspend the license and the other is to revoke it. Suspension would mean that the license would be inoperative for a particular period. An order of revocation would mean that the license is totally inoperative in future, it loses its currency irretrievably. Suspension/revocation, as the case may be, has to be directed looking to the gravity of the situation in the background of the facts. For minor infraction, or infractions which are not of a serious nature, an order of suspension may suffice. On the contrary, when revocation is directed it has to be only in cases where the infraction is of a serious nature warranting exemplary action on the part of the authorities for, otherwise, two types of actions would not have been provided for. Primarily it is for the Commissioner to decide as to which of the actions would be appropriate but, while choosing any one of the two modes, the Commissioner has to consider all relevant aspects, and draw a balance sheet of the gravity of the infraction and the mitigating circumstances. The difference in approach for consideration of cases warranting revocation or suspension has to be borne in mind while dealing with individual cases. The proportionality question is of great significance as action is under a fiscal statute, and may ultimately lead to a civil death. [*Falcon Air Cargo and Travels (P) Ltd.* - 2002 (140) E.L.T. 8]."

27. The adjudicating authority have neither referred to nor applied its mind on the doctrine of proportionality which has repeatedly been emphasised and interpreted in catena of judgements and therefore relying on the decision in **Ashiana Cargo**

(supra), where the High Court observed that the consequences of revocation being serious, the proportionality doctrine must inform the Commissioner analysis. Consequently, the impugned order deserves to be set aside on this ground alone.

28. We are conscious of the fact as laid down by the Andhra Pradesh High Court in **H.B. Cargo Services** (supra) that while the punishment imposed on the CHA has to commensurate with the gravity of the proved acts of misconduct as on revocation of his licence, the CHA would suffer, it must not be lost sight of that and though it is the right of a citizen to carry on his business or profession it is subject to reasonable restrictions and conditions which in the present case are stipulated under the CHALR. Here the order of suspension of licence under Regulation 16 of CBLR, 2018 was issued on 25.03.2022 and since then the appellant is without any livelihood and therefore it would be extremely harsh if the order of revocation is continued further, moreover when he is no more a young man to start another source of income. We may also like to reiterate that the allegations of mis-declaration and under-valuation of goods, made by the department against the appellant does not survive for the reasons stated above and therefore revocation of licence being a grave punishment is not justifiable. We also find support from the decision cited by the Revenue in **Service Bureau vs. Commissioner of Customs, New Delhi – 2018 (363) ELT 949 (Tri. –Del)**, where the contravention of Regulation 11(a), (d), (e) and (n) and Regulation 17(a) of Regulation, 2004 was held to

have been established against the Customs Broker, however, this Tribunal observed:-

"9. Keeping in view the Principle of Proportionality, in the peculiar facts and circumstances of this case, we are of the view that revocation of CB licence is too harsh a penalty to be imposed on the appellant. In our view, the ends of justice will be met by ordering forfeiture of the whole amount of security deposit of Rs. 75,000/- furnished by them. In addition, we also impose a penalty of Rs. 50,000/- on the appellant."

29. In the light of all that have been discussed above, we are of the view that punishment has to commensurate with the misconduct and the charges against the appellant are not so grave that extreme punishment of revocation of license is called for. Thus, the impugned order in so far it has ordered for revocation of the licence of the appellant deserves to be set aside, however the forfeiture of the security deposit and penalty of Rs. 50,000/- imposed under Regulation 18 of CBLR, 2018 needs to be maintained.

30. There is one aspect which needs our attention as regards the provisions of Regulation 17(1) whereunder a notice is required to be issued to the Customs Broker within 90 days from the date of receipt of the offence report and the Explanation attached thereto provides that 'offence report' under this regulation means a summary of investigation and prima facie framing of charges into the allegation of acts of commission or omission of the Customs Broker etc. During the course of hearing we enquired from the learned Authorised Representative for such offence report in the present case and surprisingly he referred to the letter dated 25.02.2022 as the offence report, the said letter reads as:-

"The Commissioner of Customs,
Airport & General

New Customs House, Near IGI Airport
New Delhi-110037
E-Mail: ccgen-delhi@gov.in
Sir/Madam,

Subject: Violations committed by various customs brokers, M/s Sanjeev Kumar, M/s Expert Cargo Movers, M/s Anurag Tiwari,, M/s Anubhav Cargo, M/s Phenomenal Logistics and M/s Shyam Singh in relation to gross mis-declaration and under-valuation in import of electronic goods – reg.

Please refer to this office letter of even number dated 07.12.2021 and your office reply letter F. No. VIII(H)13/212/DRI-Corr/2021 dated 24.12.2021 on the above mentioned subject. Also refer to this office letter of even number 9355 dated 17.02.2022 on the above-mentioned subject (copies of aforesaid correspondences enclosed).

2. Vide this office letter dated 17.02.2022, it was informed that this office had moved a proposal for detention of Sh. Sanjeev Kumar under COFEPOSA before the Joint Secretary, COFEPOSA, CEIB, New Delhi and the same was pending before the advisory board. In this regard, it is informed that the COFEPOSA advisory board has opined that these exist sufficient grounds for the detention of Sh. Sanjeev Kumar alias Sanjeev Kumar Yadav. Accordingly, vide order dated 21.02.2022 (copy enclosed), the Central Government has confirmed the detention order of Sh. Sanjeev Kumar and ordered him to be detained for a period of one year from the date of his detention i.e. from 27.11.2021.

3. This is for your information and necessary action please.

Encl: (as above)

Sd/-
(Deepak Kumar)
Additional Director"

From the perusal of the said letter, we are unable to foresee as to whether the same can be treated as an offence report as defined in the Explanation to Regulation 17. Except for referring to the names of various importers in the 'Subject', nothing more has been stated about the summary of investigation and the framing of charges relating to the allegations against the Customs Broker. So the present case has been initiated by the Department without complying with the mandatory requirement of furnishing the offence report as defined under the Regulations. This is one more reason which restrain us from upholding the punishment of revocation of licence of the Customs Broker.

CONCLUSION

31. We therefore, modify the impugned order as under:-
- i) Order under Regulation 14 read with Regulation 17, CBLR revoking the Customs Broker Licence by the impugned order is set aside.
 - ii) Order in terms of Regulation 14 read with Regulation 17, CBLR forfeiting the security amount deposited by the appellant is confirmed.
 - iii) Penalty under Regulation 18 of CBLR of Rs. 50,000/- imposed on the appellant is affirmed.
32. Accordingly, the appeal is partly allowed.

(Order pronounced on 1st Sept., 2023).

(Binu Tamta)
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)