

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 3**

CUSTOMS APPEAL NO. 50038 OF 2023

[Arising out of Order-in-Appeal No. CC (A) CUSTOMS/D-II/ICD/TKD/EXPORT/982-983/2022-23 dated 29/09/2022 passed by the Commissioner of Customs (Appeals) New Delhi]

M/S KVS CARGO,

2151/2A, First Floor,
New Patel Nagar,
New Delhi-110008

Appellant

Vs.

**COMMISSIONER, CUSTOMS (EXPORT)-
NEW DELHI**

Inland Container Depot,
Tughlakabad,
New Delhi-110020

Respondent

AND

CUSTOMS APPEAL NO. 51723 OF 2023

[Arising out of Order-in-Appeal No. CC(A)/CUSTOMS/D-II/ICD/TKD/EXPORT/982-983/2022-23 dated 29.09.2022 passed by the Commissioner of Customs (Appeals) New Delhi]

HIM LOGISTICS PVT LTD

2151/3D, New Patel Nagar,
New Delhi-110008

Appellant

Vs.

**COMMISSIONER, CUSTOMS (EXPORT)-
NEW DELHI**

Inland Container Depot,
Tughlakabad,
New Delhi-110020

Respondent

Appearance:

Ms. Anjali Gupta, Advocates for M/s KVS Cargo
Shri Devesh Tripathi, Advocate for the M/s Him Logistics

Sh. Gopi Raman, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

FINAL ORDER NOS. 50629-50630 /2023

Date of Hearing : 03/05/2023

Date of Decision: 10/05/2023

BINU TAMTA:

1. The appeals have been filed by M/s KVS Cargo and M/s Him Logistics Pvt Ltd. challenging the order-in-appeal no. CC (A) CUSTOMS/D-II/ICD/TKD/EXPORT/982-983/2022-23 dated 29/09/2022.
2. The facts leading to the present case are that the specific intelligence was gathered by the officers of Directorate of Revenue Intelligence, Delhi Zonal Unit that non-existent firm M/s Anand Enterprises, having Import Export Code (IEC) No. 0515055999 had filed 52 shipping bills for export of Ready Made Garments (RMG) at Inland Container Depot, Tughlakhabad, New Delhi to various countries under duty drawback scheme and an amount of Rs. 1,88,23,316/- was sanctioned to the firm towards duty drawback. Acting on the said intelligence, DRI requested to withhold the duty drawback pending to any to M/s Anand Enterprises.
3. On further investigation, it appeared that the dubious plan hatched by Shri Anand Sharma, (PAN No. FXNPS427E) proprietor of bogus firm M/s Anand Enterprises forged the documents of one Shri Anand Sharma by superimposing his own photograph on Election Card No. TVN1668904 which was

issued to real Shri Anand Sharma who was holder of PAN Card No. DLCPS7098Q. Having done so he obtained a bogus PAN card and on the basis thereof, IEC Code was obtained from DGFT, New Delhi and the bank account was opened in Punjab National Bank, New Rajender Nagar, New Delhi. The real Shri Anand Sharma PAN No. DLCPS7098Q appeared in DRI office and denied having any firm in the name of M/s Anand Enterprises, he also denied that he had ever exported any goods in any firm. During the course of investigation, no firm in the name of M/s Anand Enterprises was found existing on the declared address. It thus appeared that Shri Anand Sharma (PAN No. FXNPS4247E) had created the bogus firm with intention of availing the duty drawback of huge amount of Rs. 1,88,23,316/- of making fraudulent export of readymade garments.

4. Summons were issued to M/s Anand Enterprises which were received back by the postal authorities with remarks "no such firm existed". Search was also conducted at M/s KVS Cargo, CHA, appellant herein, however, no incriminating documents were recovered from his premises.

5. The department issued show cause notice dated 09.05.2018 to M/s Anand Enterprises, M/s KVS Cargo and M/s Him Logistics Pvt Ltd. calling upon them as to why:

(a) The exported Readymade Garments, covered under subject 52 shipping bills, of having a declared FOB value Rs. 21,31,04,795/- (Rupees Twenty One Crore Thirty One Lakh Four Thousand Seven Hundred

Ninety Five Only) which were exported with an intent to avail undue export Incentive under drawback scheme should not be confiscated under Section 113(1) of the Customs Act, 1962 read with Section 50 of the Customs Act, 1962 and Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993 and since the said goods are not available for confiscation, fine in lieu of confiscation should not be imposed on the aforesaid goods under Section 125 of the Customs Act, 1962;

(b) The drawback of Rs. 1,88,23,316/- (Rupees One Crore Eighty Eight Lakh Twenty Three Thousand Three Hundred Sixteen Only) already availed of by M/s Anand Enterprises should not be recovered under Rules 16A of the Customs and Central Excise Duties Drawback Rules, 1995.

(c) An amount of Rs. 2,13,853/- (Rupees Two Lakh Thirteen Thousand Eight Hundred Fifty Three Only) lying in current account no 0629002100146072 in Punjab National Bank, New Rajender Nagar Branch, New Delhi of M/s Anand Enterprises, Delhi should not be appropriated in the manner laid down in sub-section (1) of Section 142 of the Customs Act, 1962 read with Rules 16 and 16A of the Customs and Central Excise Duties Drawback Rules, 1995.

(d) Interest on such drawback amount should not be recovered under Section 75A (2) of the Customs Act, 1962, read with Section 28AA of the Customs Act, 1962;

(e) Penalty under Section 114 and/or 114AA of the Customs Act, 1962 should not be imposed on M/s Anand Enterprises as discussed in para supra above.

14. Penalty was also proposed under Section 114 and/or 114AA of the Customs Act, 1962 upon M/s KVS Cargo, 2151/2A, 1st Floor, New Patel Nagar, New Delhi(Customs Broker) and M/s HIM Logistics Pvt Ltd. 2151/3D, New Patel Nagar, ew Delhi (Customs Broker).

6. From the records it appears that M/s Anand Enterprises had not joined investigation, he neither filed any written submission nor attended the personal hearing.

7. After detailed examination of the factual position as well as the statutory provisions, the adjudicating authority vide Order-in-Original dated 12.10.2020 confirmed the demand as proposed in the show cause notice against M/s Anand Enterprises as well as the other two parties, i.e. M/s KVS Cargo and M/s Him Logistics.

8. Being aggrieved, separate appeals were filed by the two appellants before the Commissioner (Appeals), however, both the appeals were rejected and the penalty imposed was confirmed vide order dated 29.09.2022. Hence two separate appeals have been filed by M/s KVS Cargo & M/s Him Logistics Pvt Ltd. against the order of the Commissioner (Appeals) before this Tribunal.

9. I have heard learned counsels representing the two appellants, namely, KVS Cargo and also M/s Him Logistics and also the authorised representative for the Revenue.

10. The allegations against the two appellants is for violation of the provisions of regulation 11 (n) of the Customs Broker Licensing Regulation, 2013, (CBLR) which cast duty on the custom broker to verify the antecedents of the exporter and the KYC documents before facilitating clearance of goods. Regulation 11(n) reads as under;

“ 11(n) verify antecedent, correctness of Importer Exporter Code (IEC) number, identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;”

11. During the course of hearing, learned counsel for the appellant has brought to my notice, the annexures filed along with appeal which includes IEC, KYC form, election card, PAN card, electricity bill and the rent deed issued in favour of Shri Anand Sharma, which shows that the relevant documents required were obtained and to the best of the knowledge the same were verified and as noted in para 17.4 of the order-in-original:

"17.4 "M/s Him Logistics Pvt Ltd. has submitted that IEC No. 0515055999 of M/s Anand Enterprises is still valid as per the site of DGFT. It is contended that in view of facts and binding judgments of different Courts/Tribunal penalty cannot be imposed on them under Section 114 and/or 114AA of Customs Act, 1962."

12. There is no doubt that an obligation has been cast on the CHA / CB under the CBLR so as to ensure the documents as required for the purposes of enabling the export are forwarded to the Customs. Infact they are the link between the exporter and the Customs department, therefore has an important and responsible role to play while providing their services.

13. The evidence collected during investigation clearly shows that it was a case of well planned conspiracy by the exporter, to defraud the Government by wrongly taking the export benefits by creating a bogus firm. The manner in which he indulged in fraudulently fabricating the documents and on the basis thereof he managed to obtain bogus PAN card, IEC code

from DGFT and on that basis he opened a Bank Account. Neither the Income Tax Department verified the genuineness of the election voter card before issuing the PAN card nor DGFT while issuing the IEC code raised any objections on the authenticity of the documents. Even the Bank officials before opening the bank account did not verify the documents or the identity of Anand Sharma. In this scenario to attribute any responsibility on the CHA to have verified the authenticity of these documents or the identity of the exporter seems to be too much and unpractical. It is absolutely impossible to expect from a CHA to act with such diligence that he could ascertain the veracity of the documents which even the departmental authorities could not ascertain. In the present case, I find that a pre-planned modus operandi which the importer had adopted could not have been detected in the ordinary course. I would like to refer to the observations of the High Court of Delhi in the case of the appellant titled as **Commissioner of Customs (General) Vs. KVS Cargo [2019(365) ELT 395]** and it is as follows,

" Para 3. In this regard the Court notices that both the authorities - the Commissioner as well as well as CESTAT appeared to have imposed almost impossibly high standards upon the CB holder who is expected to not only verify the correctness of the documents with reference to the publicly available material what also carry out independent investigation. No doubt, the CB holder acts as an interface between the Customs Authorities and facilitates the task of a consignee / importer, yet to such an independent agent - who is not a public servant or in any way connected with the Customs Department to act as a public trustee, is beyond what is contemplated."

14. In view of the principle enunciated by the High Court of Delhi, I have no hesitation in arriving at a conclusion that in the facts of the present case no violation can be attributed on the appellant being a Custom House Agent. The allegations that the appellant did not verify the KYC documents of M/s Anand Enterprises which was a bogus firm created with forged documents and that he abetted the export of readymade garments are unsustainable in as much as the allegations of forging the documents is solely on Anand Sharma and no connivance of the appellant in that regard has been pointed out by the Department. The statement of Shri Bal Kishan Bhalla Chief Manager, Punjab National Bank under section 108 of Customs Act, wherein he specifically stated that Anand Sharma, the proprietor of M/s Anand Enterprises submitted self attested copies of PAN card, Voters card, Form C issued by Department of Labor, Service Tax Registration and that he had verified the said documents submitted by him from originals produced by him. If the Bank officials despite verification are not able to detect the fraudulent nature of the documents, how can one expect from CHA who is not even a public official to unearth the dubious plan of the exporter.

15. In view of the discussion above, I am of the opinion that no penalty can be imposed on M/s KVS Cargo and, therefore, the impugned order is hereby set aside.

16. From the facts of the case of M/s Him Logistics, it appears that he is otherwise a Custom House Agent but their

license was under suspension and therefore when Anand Sharma came to their office for his export consignments of ready-made garment, as per the statement of Ms Rajni Kapoor, Sr. Executive of M/ Him Logistics, Shri Anand Sharma was explained about the necessary documents which were required to be filed before the Customs Authorities for export of goods. He later visited their office with those documents and since their license was under suspension, the documents were forwarded to KVS Cargo. The documents of M/s Anand Enterprises were not presented by M/s Him Logistics to the Customs authorities. In other words he never acted as a CHA for the export in question and therefore no liability can be attributed on them under the provisions of CBLR. From the records of the case, I do not find that any allegations of abetment are substantiated as it is not the case of the department that they were aware of the fraud or were beneficiary of the fraud. As pointed out above, the fraud played by Anand Sharma was not even ascertained even by public officials then how is it possible for a non official entity to identify the veracity of the documents. M/s Him Logistics was merely a facilitator in forwarding Anand Sharma to KVS Cargo, hence they cannot be roped in for any violation of the provisions of CBLR and therefore the penalty imposed on M/s Him Logistics by the impugned order is untenable.

17. During the hearing of the appeal, both the appellants have referred to the earlier decisions in their own matters. This

Tribunal in Final Order No. 51601-51610/2018 vide order dated 24.04.2018 in the case of M/s Him Logistics Pvt Ltd. and Ors vs. Commissioner of Customs (Prev), New Delhi, wherein similar allegations were made that the appellants did not verify the antecedents of the said firm & facilitated imports in the name of bogus firms, set aside the penalty imposed under Section 112 or 114 of the Customs Act. Similarly, in the case of M/s Him Logistics Pvt Ltd. vs. CC, New Delhi, the Tribunal vide Final Order No. 53248-53250/2018 dated 06.11.2018, dealt with identical situation where M/s Him Logistics was neither the CHA nor the importer and has merely referred the importer to M/s KVS Cargo since their licence was under suspension. Though in that case the allegation was that the appellant paid the customs duty on behalf of the importer, however, the Tribunal held that they have not done any act of omission or commission attracting penalty under section 112 of Customs Act.

18. I may now refer to the two decisions of the Delhi High Court in case of M/s KVS Cargo dated 09.10.2018 in Customs Appeal No. 159/2018, where the learned Division Bench allowed the appeal, inter alia holding as follows:

“The court is of the opinion that there is some merit as far as the appellant’s argument is concerned. In this case the Customs Authorities have not held that any clandestine material was brought or that the goods were mis-declared or the contraband was the subject matter of the Bill of Entry in question. The role of the appellant was merely one of a facilitator. There is no material on record to show that the KYC documents were fraudulent or incorrect or in any

manner irregular. In these circumstances, to expect the CB holder to carry out further investigations and independent inquiry not only about the existence of importing firm but also about its real owner is beyond the mandate of the law.”

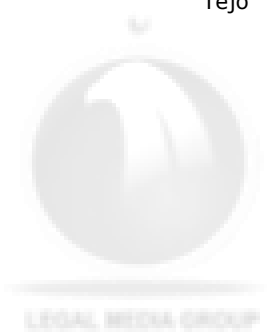
19. The other decision in the case of KVS Cargo (supra) has been referred to above.

20. In view of my findings above, the impugned orders are set aside and consequently both the appeals are allowed.

[Order pronounced on **10.05.2023**]

(BINU TAMTA)
MEMBER(JUDICIAL)

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