IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 12.09.2023

\+ **CUSAA 212/2019**

M/S SMS LOGISTICS .....Appellant

versus

COMMISSIONER OF CUSTOMS (GENERAL), NEW CUSTOMS HOUSE, NEW DELHI ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Pradeep Jain, Mr Aakarsh Srivastava and Mr Sambhav Jain, Advocates.

For the Respondent : Mr Anish Roy, SSC with Mr Dileep Singh Rajpurohit and Ms Hemlata Rao, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 130 of the Customs Act, 1962 (hereafter '**the Customs Act**') impugning an order (Final Order No.52861/2018 dated 24.08.2018 – hereafter '**the impugned order**') passed by the learned Customs Excise and Service Tax Appellate Tribunal (hereafter '**the CESTAT**') rejecting Appeal No. C/51898/2017.

2. The appellant had filed the said appeal against an Order-in-Original dated 15.11.2017 passed by the respondent revoking the appellant's Custom Broker License and further imposing a penalty of Rs.25,000/-.

Factual Matrix

3. The appellant is a custom broker holding a license to act as a Customs Broker (CB License No.R-37/DEL/CUS/2015 – hereafter '**the CB License**'), which was valid up to 25.04.2023. Proceedings under the Customs Brokers Licensing Regulation, 2013 (hereafter '**CBLR-2013**') were initiated against the appellant by the respondent on receipt of an offence report in the form of an Order-in-Original dated 15.03.2017 passed by the Additional Commissioner of Customs.

4. The controversy relates to clearance of goods imported under Bill of Entry No.8606801 dated 18.02.2017. The appellant had filed the said Bill of Entry on behalf of M/s Tim Delhi Airport Advertising Pvt. Ltd. (hereafter '**TDAAL'**) in respect of the clearance of goods declared as "71 pieces of Samsung 65 LED Monitor of Model No. LH65QMFPLGC/XL" (hereafter '**the goods**') declaring an assessable value of ₹1,50,59,101/-. TDAAL declared that the goods were purchased on High Sea Sales (HSS) basis from M/s Infosoft Digital Designs and Services Pvt. Ltd. (hereafter '**IDDSL**'). IDDSL had imported the goods from M/s Beetel Teletech Singapore Private Limited, Singapore (hereafter '**Beetel**'). TDAAL had purportedly

purchased the goods from IDDSL under a Commercial Invoice No.115 dated 16.02.2017 on HSS basis.

5. The goods were examined and there is no dispute that they confirmed to the declared description.

6. The appellant had filed the Bill of Entry on behalf of TDAAL and submitted a copy of the HSS Agreement notarized on 16.02.2017. The concerned authority had doubts in respect of the said HSS Agreement. The allegation being that it was notarized prior to dispatch of the shipment from the foreign country – Singapore. Part of the goods were dispatched from the Singapore Airport on 17.02.2017 and the remaining were dispatched on 18.02.2017. According to the concerned authority, a sale on HSS basis could be affected only after the goods had left the territory of Singapore and prior to their arrival in India. IDDSL claimed that it had sold the goods by means of an HSS Contract for lack of knowledge.

7. The total custom duty payable in respect of the goods imported under the Bill of Entry in question was ₹44,33,550/-. TDAAL attempted to pay a sum of ₹27,47,552/- by way of cash and the balance amount of ₹16,85,998/- by way of Served From India Scheme (SFIS) Scrip No. 0510397433 issued to it.

8. The offence report indicates that the concerned custom authority had held that the real importer of the goods was IDDSL and an attempt to evade the custom duty was made by misusing the SFIS

Scrips. The SFIS scrip was issued under Chapter 3 of the Foreign Trade Policy to TDAAL and in terms of the Custom Notification No. 91/2009, TDAAL was allowed to import goods and pay the duty through the SFIS Scrips, subject to the certain conditions.

9. The custom authorities asked the concerned parties (TDAAL, IDDSL, and the appellant) to submit their explanation. In response to the same, IDDSL furnished a letter dated 28.02.2017, *inter alia*, stating as under:

> "As per your intimation the agreement is not valid and we have to clear the shipment in our name. Due to lack of our knowledge all this happen, kindly allow us to file bill of entry in our name and we request your goodselves not to impose any penalty/other changes. Kindly give us waiver of any additional charges."

10. In conformity with the above stand, TDAAL also sent a letter on 08.03.2017 confirming IDDSL would import the shipment and the Bill of Entry shall be issued in the name of IDDSL and it would pay the custom duty.

11. The appellant furnished a letter dated 08.03.2017, *inter alia*, stating as under:

> "As per the provision of custom manual on self assessment 2011, the HSS agreement in respect of BE 8606801 is found to be incorrect. So please allow us the BE by changing importer name to Infosoft Digital Design & Services pvt. ltd."

12. The concerned authority found that HSS Agreement was not in accordance with relevant statute and IDDSL should have filed the Bill

of Entry (and not TDAAL) and was therefore, liable to pay the duty. It was also held that IDDSL was not eligible for using the SFIS scrip in question as the same was issued to TDAAL and was not transferable. The aforesaid findings were in turn based on the findings that the goods were dispatched on 17.02.2017 and 18.02.2017, and the HSS Agreement was entered into prior to the said dispatch, that is, on 16.02.2017. On the aforesaid basis, the concerned authority, *inter alia*, imposed penalties on TDAAL as well as on the appellant.

13. The proceedings under the CBLR-2013 were initiated against the appellant. The Inquiry Officer submitted a report dated 18.08.2017, whereby it concluded that the appellant had violated various provisions of CBLR-2013. The respondent had held that the appellant had contravened the provisions of Regulation 11(d), 11(e) and 11(m) of CBLR-2013. The respondent, accordingly, revoked the appellant's CB License and also imposed a penalty of ₹25,000/-.

14. It was the appellant's case before the respondent that it had not violated any of its obligations under the CBLR-2013. The appellant stoutly disputed that HSS Agreement was invalid. The appellant submitted that the consignment of the goods was handed over to the airlines in Singapore for onward shipment to India on 16.02.2017. After the goods had been so handed over, the IDDSL and TDAAL entered into an HSS Agreement on the same date. The appellant contended that the goods had already moved beyond the control of Beetel or IDDSL at the material time, when the HSS Agreement was

signed by IDDSL and TDAAL. This contention was rejected. It was held that HSS is a sale made after the goods have crossed the territorial borders of the country of export but had not reached the destination. According to the respondent, it meant that the goods had left the port or airport origin but had not arrived at the port or airport of the destination. The facts in the present case indicated that the goods were dispatched on 17.02.2017 and 18.02.2017 but the HSS Agreement was executed earlier.

15. In addition, the letter sent by the appellant to the custom authorities admitting that the HSS Agreement is incorrect was also read against the appellant.

16. The learned CESTAT rejected the appellant's appeal. It did not consider the appellant's contention that the agreement between TDAAL and IDDSL for sale and purchase of the goods in question, was a valid transaction on HSS basis, on merits; the learned CESTAT found that the appellant had admitted that HSS Agreement was incorrect and what was admitted did not require to be proved.

Appellant's case

17. In the aforesaid backdrop, the appellant has projected the following questions for consideration:

> "a. Whether the CESTAT was justified in passing the impugned order and sustaining the order of revocation of Custom Broker License without

considering/ dealing with the specific submissions / grounds so raised by the appellant in its appeal?

b. Whether the CESTAT was justified in passing the impugned order solely on the basis of alleged letter of Appellant that HSS Agreement was found to be incorrect, without seeing the mens rea behind the letter?

c. Whether the CESTAT was justified in passing the impugned order which has caused revocation of the Custom Broker License despite the matter being Revenue Neutral in nature, where High Sea Sales lead to Custom Duty on an enhanced value of the goods by 2%.

d. Whether the CESTAT was justified in passing the impugned order by following Strict Interpretation of the term High Sea Sale, since revocation of Custom Broker License has caused loss of employment and livelihood to its many employees.

e. Whether, in the facts of the case and in law, the revocation of the Custom Broker license of the Appellants is commensurate with the alleged contravention of the CBLR, 2013."

18. Although the appellant has projected several questions for consideration of this Court, Mr. Jain, learned counsel appearing for the appellant had confined the challenge to the punitive measures imposed on the appellant on two grounds. First, that the learned CESTAT had failed to consider the appellant's case that the HSS Agreement between TDAAL and IDDSL was valid, on merits. And second, that the punishment of revocation of the appellant's CB License was harsh and disproportionate.

19. He contended that once the goods had been handed over to the airlines, they were beyond the control of the importer. The sale made thereafter, while the goods are in transit, would be HSS as the goods were in possession of the shipper and not in control of the exporter or the importer. He submitted that even if such transaction is in respect of the goods that have not left the territorial waters of the country of export, however, in a broader perspective, the sale must be considered as the HSS as the goods are in transit and exporter had yielded control of the goods.

20. He submitted that in a case of transportation of goods by air, the time period between the goods leaves the shores of the country of export and arrive at the country of destination is very short and a strict interpretation of the HSS for the purposes of imposing a punitive measure was not justified.

21. In addition, he submitted that the punishment of revocation of license was too harsh and disproportionate as there was no loss to the Revenue. He also referred to the decision of the Division Bench of this Court in ***M/s Ashiana Cargo Services v. Commissioner of Customs (I&G)***[1]**.**

22. The learned counsel for the respondent countered the aforesaid submissions. He submitted that violation of CBLR-2013 on the part of the appellant, as alleged, was established and, therefore, the respondent's order to revoke the appellant's license under Regulation

[1] 2014 SCC OnLine Del 1161

18 of CBLR-2013 (corresponding to Regulation 14 of CBLR-2018) was within the statutory framework as such it warranted no interference. He contended that, thus, no question of law arises in the present appeal.

Reasons and Conclusion

23. The principal question that falls for consideration of this Court is whether in the given facts, the punishment of revocation of license is disproportionately excessive. The second question that arises is whether the appellant's contention that the learned CESTAT was required to consider the merit of the appellant's contention that the sale and purchase of goods between TDAAL and IDDSL on HSS basis was valid.

24. There is no credible dispute with regard to the material facts that had led the respondent to pass an order revoking the appellant's CB License. The appellant had filed the Bill of Entry on behalf of TDAAL on the basis that TDAAL had purchased the goods on HSS from IDDSL. The allegation in respect of the transaction as noted by the Adjudicating Authority in the offence report (Order-in-Original dated 15.03.2017), as relied upon by the respondent in the Order-in-Original dated 15.11.2017, is that the HSS was not in accordance with the provisions of the Sales Tax Act, 1956, Sales of Goods Act, 1930 read with Section 14 of the Customs Act, and in terms of the Customs Manual on Self-Assessment – 2011. It was alleged that the actual importer of goods was IDDSL and that it should have filed the Bill of

Entry instead of TDAAL. The relevant extract of the offence report as also noted in the Order-in-Original dated 15.11.2017 is set out below:

> "i. The High Sea Sale is not in accordance with the provisions of Central Sales Tax Act, 1956 and Sales of goods Act, 1930 read with section 14 of the Customs Act, 1962 and in terms of Customs Manual on Self-Assessment – 2011 available in Public Domain. The actual importer of the goods in this case is M/s IDDSL who should have filed the B/E under Section 46 of the Customs Act, 1962. Therefore, M/s Infosoft Digital Designs & Services (Pvt.) Ltd., 104-105, Suneja tower-1, District Centre, Janak Puri, Delhi, pin code-110058, is liable for payment of appropriate Customs Duty leviable under the provisions of The Customs Tariff Act, 1975.
>
> ii. M/s IDDSL is not eligible for the duty exemption by way of using the SFIS scrip, under Notification No. 91/2009-Customs dated 11.09.2009, which is not admissible for the goods imported vide Bill of Entry No. 8606801 dated 18.02.2017 and the goods are liable for levy of customs duties under the provisions of Section 12 of the Customs Act, 1962. However, the said provisions have not been adhered to in the instant case by the concerned parties.
>
> 11. From above, it transpires that:
>
> a. M/s TDAAL and M/s IDDSL had entered into High Sea Sale Agreement on 16th February, 2017. After completion of High Sea Sales Agreement between the parties, goods were dispatched on 17th February, 2017 and 18th February, 2017, respectively. The fact has been admitted by both the parties as well as their authorised representative. The High Sea Sale Agreement is for goods sold on High Seas i.e. sale by the consignee while the goods are yet on high seas or after their dispatch abroad and before their arrival in India. Therefore, High Sea Sale Agreement becomes nullified for the purpose of levy of duty. M/s Infosoft

> Digital Designs & Services (Pvt.) Ltd, New Delhi is the actual owner of the goods as per the Commercial Invoice No. 5070101744 dated 03.02.2017, Packing List, etc. issued by the foreign supplier M/s Beetel Teletech Singapore Private Limited, Singapore and airway bill mentioned in the instant Bill of Entry and they are liable for payment of appropriate duty."

25. The appellant had contested the said allegation. However, neither the Adjudicating Authority in offence report (Order-in-Original dated 15.03.2017) nor the Order-in-Original dated 15.11.2017 passed by the respondent indicates as to how the sale transaction is violative of the Central Sales Tax Act or the Sales of Goods Act. The only allegation is that it was contrary to the Customs Manual on Self-Assessment – 2011, which contains provisions for goods sold on high sea.

26. The Adjudicating Authority passing the offence report (Order-in-Original dated 15.03.2017) as well as the respondent relied on the definition of 'High Seas' as per the "Convention of High Seas done at Geneva on 29th April, 1958, United Nations, Treaty Series". The said convention defined 'High Seas' to mean "*all parts of the sea that are not included in the territorial sea or in the internal waters of a state*." Thus, according to the concerned authorities, HSS necessarily mean sale in respect of the goods that are outside the territorial waters of the country of export or the country of import. This is the foundation of the punitive measure imposed on the appellant. However, none of the authorities have discussed as to how the sale and purchase of the goods between IDDSL and TDAAL offended the Sales tax Act, as

according to the said authorities the said transaction was effected while the goods in question were still in Singapore.

27. The term 'High Sea Sales' has not been defined in the Customs Act or the Rules. The respondent's case is, essentially, based on the Customs Manual on Self Assessment – 2011 although the relevant extract of the said Manual has not been quoted in either of the concerned orders – the offence report, the orders passed by the respondent, and the impugned order.

28. The concerned authorities referred to HSS at Page 20 of the Customs Manual on Self-Assessment – 2011, which was reportedly available in Public Domain. The reference to HSS is in Article 14 of the said manual, which contains provisions for valuation of goods. Article 14 essentially contains provisions to ensure that the goods are correctly valued. Article 14 of the said Manual, as placed in public domain, is reproduced below for ready reference:

<table>
<tr><td rowspan="2">"14.</td><td colspan="2">For importers / exporters: Valuation of Goods
[For levy of correct duty / cess if levy is on ad valorem basis. Also, for grant of export benefits in case of exporters.]</td></tr>
<tr><td>(a) Do you know terms of your sale?
(b) When declaring transaction value, have you verified that the transaction is 'at arms length' at the place and time of importation? Also, whether true transaction value is in</td><td>(A) For valuation in normal commercial transactions between unrelated parties:

(i) Invoice, contract etc. evidencing transaction value and that sale does not involve abnormal discount /reduction or special discounts limited to exclusive agents.</td></tr>
</table>

	accordance with Section 14 of the Customs Act read with Customs Valuation (Determination of Value of Imported Goods) Rules, 2007? (c) Whether required declaration on valuation as per Rule 10 of Valuation Rules, 2007 has been made? (d) Whether Invoice no., value (FOB/CF/CIF) declared correctly? (e) If goods purchased from a 'related seller' have you reported this fact and assured that the value declared meets one of the related party tests in terms of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007? (f) Have you assured that all legally required cost, additional considerations flowing from buyer to seller or payments associated with the imported goods (commissions, indirect payments) are taken into account? (g) Have you verified that royalty paid to the seller is included in the value declared? Also have you verified that conditions of royalty have been fulfilled? (h) Have you avoided the following commonly	(ii) Declaration about relationship in GATT declaration form. (iii) Documents confirming goods are correctly declared in parameters such as description, quality, quantity, country of origin, year of manufacture or production, brand, grade, specifications that have relevance to value. (iv) Documents establishing Customs accepted value of identical / similar goods imported at or about the same time in comparable quantities incomparable commercial transactions. (v) Documents evidencing costs and services listed under Rule 10, if warranted. Examples are: commission, cost of containers, packing cost, freight etc. (vi) *For goods Sold on High Seas i.e. sale by the consignee while the goods are yet on high seas or after their dispatch abroad and before their arrival in India:* *(a) Actual high-seas-sale-contract price paid by the last buyer as evidence of the transaction value under Rule 3(1) of Customs Valuation Rules, 2007; and* *(b) In the absence of original invoice, high sea sale contract etc. valuation can be done as per the Valuation Rules. [Refer Circular No. 32/2004-Customs dated 11-5-2004.]* (vii) For sale / transfer of imported goods after warehousing: Into-Bond Bill of Entry showing the original transaction value since duty will be charged on the original transaction

	noticed invoicing errors? (i) Assuming commission, royalty or other charges against the goods are non-dutiable; these are omitted from the invoice. (ii) Goods are sold at a discount and invoice indicates the net price but fails to show the discount. (iii) Goods are sold at a delivered price but invoiced at a price f.o.b. place of shipment and subsequent charges are omitted. (iv) Invoice shows the importer is the purchaser, whereas he is either an agent receiving a commission for selling the goods or a party who will receive part of the proceeds of the sale of the goods sold for the joint account of the shipper and consignee. (v) Invoice descriptions are vague, listing only part of numbers, truncated or coded descriptions, or lumping various	value. [Refer Circular No. 11/2010-Customs dated 3-6-2010.] (viii) For second hand machinery /capital goods / cars: (a) Evidence of transaction value (b) In case of doubt regarding transaction value, evidence like Certificate issued by an independent Chartered Engineer or equivalent in the country of supply, invoice, year of manufacture, price when new, etc. [Refer Circular No.4/2008-Customs dated 12-2-2008]. (b) For valuation by straight line method of depreciation – evidence of original value to calculate value taking month of manufacture as December (if Chartered Engineer's certificate indicates only year of manufacture) and allowing full depreciation for a quarter even if goods are used for apart thereof. Also, depreciation is to be calculated up to date of dismantling or till date of shipment. Depreciation is not allowed for the period the machinery is not used at all. Further, depreciated value is calculated in foreign currency and then converted in Indian Currency at the current rate of exchange prevailing on date of presentation of B/E. (c) For reconditioned machinery – evidence of cost to be added before allowing depreciation. (d) All expenses connected with dismantling of old machinery and making it ready for being transported including inspection charges are includible.

	articles together as one when several distinct items are included.	(e) Depreciation has to be taken on the following scale subject to maximum of 70%: (i) for every quarter in 1st year:4% (ii) for every quarter in 2nd year: 3% (iii) for every quarter in 3rd year: 2.5% (iv) for every quarter in 4th and subsequent year: 2%. [Refer Circular No. 495/16/93-Cus dated 26-5-1993]. (B) For valuation of imports from related party: (i) Various agreements with supplier to the extent these affect valuation. (ii) Declaration about relationship in GATT declaration form. (iii) PD Circular No. if order for provisional assessment is given by a PD circular (iv) Completed Questionnaire given by SVB with required documents. Also, when SVB order is due for review after 3 years. In this case change in collaboration /agency / distribution/agreements/arrangements and method of invoicing or pricing should be declared. (v) Documents, if any, to demonstrate the arms length nature of transaction through examination of the circumstances of sale or by using the test value method. vi) SVB order (or its number), if any, after verifying business facts of transaction are unchanged."

29. The Order-in-Original dated 15.11.2017 as well as the impugned order does not indicate any issue regarding valuation of the goods imported. This Court had also pointedly asked the respondent

whether there was any question as to valuation of the goods or the quantum of duty payable on the said goods. The learned counsel fairly responded in the negative.

30. It was also not disputed that IDDSL could have sold its right to TDAAL at any time prior to the said goods leave the shores of Singapore. The learned counsel for the Revenue did not dispute that in such a case, TDAAL would be entitled to file the Bill of Entry and pay the duty on the assessable value of the goods.

31. It is thus material to consider whether any added advantage was derived by any of the parties at the cost of the revenue, in reflecting the sale of the goods in question as HSS – that is, on assumption that the goods had left the territories of Singapore but had not arrived in the territory of India – instead of reflecting them as a sale in Singapore. The answer to the same stated in negative. Concededly, both the transactions were revenue neutral. In other words, it made no difference for the purpose of the Customs Act whether the goods were sold by IDDSL to TDAAL in Singapore or the same were sold when the goods were in transit.

32. It is also material to note that there is a serious dispute whether the sale transaction between IDDSL and TDAAL was incorrectly reflected as HSS. According to the appellant, the goods had been handed over to the carrier and thus, were outside the control of the Beetel and IDDSL. Thus, even though the goods had not left the

shores of Singapore, the same would be in transit and therefore, their sale was correctly reflected as HSS.

33. The aforesaid contention was rejected by the learned CESTAT on the ground that the appellant had admitted in its letter dated 08.03.2017 that as per the provisions of Customs Manual on Self-Assessment – 2011, the HSS Agreement is found to be incorrect. The appellant had explained that the said letter was written with the view to assist the clients and resolve the impasse as the revenue was insisting that the import was required to be in IDDSL's name and not TDAAL. The appellant contends that he submitted the letter with a view to assist his clients to amend the Bill of Entry to reflect import by IDDSL.

34. The respondent as well as the learned CESTAT proceeded on the basis that since the petitioner had written the aforesaid letter, he had admitted his guilt as to his filing was incorrect Bill of Entry. Whilst it is correct that there is no requirement to prove a fact that is admitted, we do not consider it apposite that strict laws of pleading ought to have been applied in such a case. It was at the bare minimum necessary for the respondent or the learned CESTAT to examine whether the explanation provided by the appellant was plausible considering that his challenge was in respect of a harsh penalty imposed on him.

35. Since there is no statutory definition of the expression 'High Seas Sale' in the Customs Act, and the issue relates to imposition of a

heightened penalty that prevents the appellant from carrying on his business, the understanding of the concerned parties of a HSS, at the material time, would be relevant.

36. The allegation against the appellant is that he had contravened the Regulations 11(d), 11(e) and 11(m) of the CBLR-2013. The said Regulations are set out below:

> "11(d) 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, as the case may be;
>
> (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;
>
> (m) discharge his duties as a Customs Broker with utmost speed and efficiency and without any delay;"

37. Insofar as the violations of Regulation 11 of the CBLR-2013 is concerned, the respondent relies on the provisions of Customs Manual on Self-Assessment – 2011 to allege that the sale transaction between TDAAL and IDDSL was not a HSS and therefore, the Bill of Entry ought to have been filed in the name of IDDSL. Thus, according to the respondent, filing a Bill of Entry in the name of TDAAL had violated the provisions of the Act.

38. As noted above, there is no impediment in IDDSL transferring its rights to TDAAL prior to the goods being dispatched. Thus, even if it is accepted that HSS Agreement was not a HSS Agreement, but is

treated as an agreement while the goods were still in Singapore (which is the only ground for not accepting the agreement between TDAAL and IDDSL as an HSS); filing the Bill of Entry in the name of TDAAL would not violate the Customs Act.

39. Thus, even though it is considered that reflecting the sale as HSS is incorrect; the error is not of material consequence. Assuming that reflecting the sale and purchase transaction of goods in question while they are in Singapore, as a HSS, was erroneous; we find it difficult to accept that the same would require a seller to file the Bill of Entry and not the purchaser. The Revenue and the respondent have proceeded on the basis that because the goods did not left the shore of Singapore, when the sale and purchase agreement was entered into, thus there was no sale at all. And, the HSS Agreement is void. We are unable to accept the same and the learned counsel for the Revenue had not referred to any statutory provision or any authority in support of the view that sale and purchase transaction of the goods in question is void on account of reflecting the same as sale and purchase on high seas.

40. Regulation 11(e) and 11(m) of CBLR-2013 requires the appellant to discharge its functions with diligence and efficiency. The principal question to be addressed is whether proceeding with the sale between IDDSL and TDAAL as a high sea sale instead of normal sale, sufficient and material to find the appellant as non-compliant with the

requirement of conducting the business with due diligence and efficiency.

41. It is relevant to bear in mind that the proceedings under CBLR are in essence disciplinary proceedings to ensure compliance with the statutory provisions. It is essential that the Customs Department has full confidence in the Customs Broker and can proceed on the basis that he has discharged his obligations faithfully and with due diligence. Therefore, the punitive measure imposed by the Department is normally not required to be interfered with. However, in cases where it is found that the measure imposed is disproportionately excessive, the order of punishment would require to be interfered with.

42. The Supreme Court has in a number of decisions interfered with the punitive measures on the ground of the same being disproportionate. In ***Management of the Federation of Indian Chambers of Commerce and Industry v. Their Workmen***[2], the Supreme Court considered a case where the services of an employee were terminated on the allegation that he had issued legal notices to the appellant and to the International Chamber of Commerce, which had allegedly brought discredit to the reputation of the appellant. In this context, the Supreme Court observed that "*the federation had made a mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation*". The Court upheld the decision of 'reinstating' the employees. Similarly, in ***Hind***

[2] AIR 1972 SC 763

Construction and Engineering Co. Ltd. v. Their Workmen[3], workmen were dismissed as the workmen were absent on a particularly date treating the same to be a holiday. The Court held that no reasonable employer would impose the extreme punishment of dismissal. In ***Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Association & Anr.***[4], the Supreme Court noted the earlier decisions and had observed that "*it is clear that our legal system also has accepted the doctrine of proportionality*". The court observed as under:

> "17...One of such modes of exercising power, known to law is the "doctrine of proportionality".
>
> 18. 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 thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.
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> 19. de Smith states that "proportionality" involves "balancing test" and "necessity test". Whereas 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) requires infringement of human rights to the least restrictive alternative. [Judicial Review of Administrative Action (1995), pp. 601-05, para 13.085; see also Wade & Forsyth: Administrative Law (2005), p. 366.]

[3] AIR 1965 SC 917
[4] (2007) 4 SCC 669

> 20. In Halsbury's Laws of England (4th Edn.), Reissue, Vol. 1(1), pp. 144-45, para 78, it is stated:
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> "The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness.""

43. It is relevant to note that CBLR-2013 provides for various punitive measures including levy of penalty under Regulation 22, if it is found that the custom broker has contravened the provisions of the said Regulations. Regulation 18 of the CBLR-2013 enables the Commissioner of Customs to revoke the custom broker's license and order forfeiture of the security (in part or in whole) or impose a penalty not exceeding ₹50,000/-. CBLR-2018, which has since replaced CBLR-2013 also contains similar provisions. There is a range of punishment that can be imposed by the Commissioner of Customs and it is not necessary that every contravention of the Regulations be visited with the extreme punishment or revocation of license, which in effect would deprive the custom broker of his livelihood.

44. As noted above, the Commissioner has discretion in imposing an appropriate measure of punishment. Coupled with this power is a duty to exercise this discretion to ensure that the punishment imposed is commensurate with the custom broker's contravention of his obligations.

45. It is also well settled that the Court in exercise of judicial review would normally not interfere with the quantum of punishment and do so only if it is found that it shocks one's conscience (See: ***State of U.P v. Sheo Shanker Lal Srivastava & Others***[5]).It is also trite law that Article 14 of the Constitution of India strikes at the arbitrariness because an action, that is, arbitrary must necessarily involve negation of equality (See: ***Andhra Pradesh Dairy Development Corporation Federation v. B. Narasimha Reddy & Others***[6]).

46. In the oft quoted decision in ***Associated Provincial Picture Houses v. Wednesbury Corporation***[7], the Court had observed as under:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the. word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to

[5] (2006) 3 SCC 276
[6] (2011) 9 SCC 286
[7] [1948] 1 KB 223

> the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably.""

47. In ***Indian Railway Construction Co. Ltd. v. Ajay Kumar***[8], the Supreme Court had referred to the decision of ***Wednesbury Corporation*** (*supra*) and held has under:-

> "18. Therefore, to arrive at a decision on "reasonableness" the court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one."

48. Whilst, it was conceded that there was no loss of revenue and whether the goods in question were imported by TDAAL or by IDDSL, the matter was revenue neutral. It was contended on behalf of the Revenue that the question whether the issue was revenue neutral or not was not material as the appellant had contravened the provisions of the CBLR by filing an incorrect Bill of Entry. Thus, according to the learned counsel for the Revenue, the fact that the transaction was revenue neutral was of no consequence. We are unable to agree with the aforesaid contention. The revocation of license and imposition of penalty are punitive measures, it would be necessary to examine the harm and potential harm caused by the infraction in respect of which

[8] (2003) 4 SCC 579

the punitive measure is imposed. The question whether there was any loss of revenue as a consequence of actions of the appellant is a material factor for consideration by the respondent while determining the punitive measure to be inflicted on the appellant. It is also a settled law that failure to take into account the relevant factors in the decision making process render the decision arbitrary and thus, amenable to challenge as offending the equal protection clause.

49. In ***M/s Ashiana Cargo Services v. Commissioner of Customs (I&G)***[9]**,** the Co-ordinate Bench of this Court had, in case of concerning revocation of Custom House Agent license, observed as under:

> "9. The consequence of revocation being serious, the proportionality doctrine must inform the Commissioner's analysis. This is also the exercise the Court must undertake, though with a measure of deference towards the Commissioner's conclusions."

50. On the anvil of the aforesaid standard, we find that the punishment imposed was not justified. The learned CESTAT had failed to consider whether the punishment imposed was disproportionately high, as contended by the appellant. We are of the view that the punishment of revocation of appellant's CB License, is disproportionately excessive.

51. We were inclined to remit the matter to the learned CESTAT for examining the appellant's contention whether it has violated any

[9] 2014 SCC OnLine Del 1161

provisions of the Customs Act or Rules in filing the Bill of Entry on the basis of the HSS Agreement between TDAAL and IDDSL. However, considering that Mr. Jain, learned counsel appearing for the appellant has submitted that the appellant would accept the levy of penalty and confine the relief to assailing the revocation of its CB License, we consider it apposite to confine the relief in the present petition to the aforesaid extent.

52. The appellant's CB License was valid till 25.04.2023 and thus in any event would have expired. However, the learned counsel appearing for the respondent do not controvert the appellant's contention that in normal course, the appellant would be entitled to seek renewal of CB License. In view of the above, we set aside the impugned order revoking the appellant's CB License and direct that in the event the appellant seeks renewal of the CB License or applies afresh, the same would be considered in accordance with law.

53. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

SEPTEMBER 12, 2023
RK