CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Customs Appeal No. 1084 of 2004

(Arising out of Order-in-Original No. 77/2003/CAC/CC/RJM dated 15.10.2003 passed by Commissioner of Customs (Adjudication), NCH, Mumbai)

Commissioner of Cus. (Imp.), ACC Mumbai **Appellant**
Air Cargo Complex, Sahar,
Mumbai 400 099.

Vs.

M/s. Big Vision Pvt. Ltd. **Respondent**
205, Jaywant Industrial Estate,
63, Tardeo Road,
Mumbai 400 034.

WITH

Customs Appeal No. 303 of 2005

(Arising out of Order-in-Original No. 77/2003/CAC/CC/RJM dated 15.10.2003 passed by Commissioner of Customs (Adjudication), NCH, Mumbai)

Commissioner of Cus. (Imp.), ACC Mumbai **Appellant**
Air Cargo Complex, Sahar,
Mumbai 400 099.

Vs.

Shri Santosh Nair **Respondent**
E-20, Walchand Complex,
60 Feet Road, Bhayander (W),
Thane

Appearance:

Shri Manoj Kumar, Assistant Commissioner, Authorised Representative, for the Appellant
Shri Jhamman Singh, Advocate, for M/s. Big Vision Pvt. Ltd.
Shri S.P. Sheth, Advocate, for Shri Santosh Nair (Respondents)

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/87165-87166/2019**

Date of Hearing: 23.10.2019
Date of Decision: 23.10.2019

PER: SANJIV SRIVASTAVA

These appeals have been filed by the revenue against the order in original No 77/2003/CAC/CC/RJM dated 15.10.2003 of the Commissioner Customs (Adjudication), New Custom House, Mumbai. By the impugned order Commissioner held as follows:-

"2. The Adjudicating Authority was informed on 27.05.2002 by the legal representative of Shri Shailesh Visaria M D of M/s Big Vision Pvt Ltd and of M/s Big Vision Pvt Ltd, that they were filing settlement applications in the Settlement Commission.

3. Vide Application No SC/WZ/CUS/22/23Big Vision/2002 filed by Shri Shailesh Visaria and M/s Big Vision Pvt Ltd., Settlement Commission has passed Final Order No 15/2003-Cus dated 08.04.2003, wherein liability is admitted for Rs 58,51,872/- (Rupees Fifty Eight Lakhs Fifty One Thousand Eight Hundred and Seventy Two only) and the same has been settled. The applicant(s) had already paid Rs 57,01,124/- during the course of investigation. The rest amount has also been reported to be paid on 22.04.2003. M/s Big Vision Pvt Ltd and Shri Shailesh Visaria M D., M/s Big Vision Pvt Ltd., have been granted full immunity from payment of fine, penalty and interest under the Customs Act, 1962. They were also granted full immunity from prosecution in terms of Section 127H of the Customs Act, 1962. In view of the said order, the Show Cause Notice No DRI/BZU/F/05/2000 dated 28.1.2002 cannot be sustained. Proceedings are, therefore, dropped against M/s Big Vision Pvt Ltd. And Shri Shailesh Visaria with regard to the levying of fine & imposition of penalty.

4. The Show Cause Notice further sought the imposition of penalty under Section 112(a) and/ or 112(b) of the Customs Act, 1962 on Shri Santosh Nair. From the materials available on records, it is evident that he was working for the suppliers, M/s Signtech USA Ltd., as Indian representative and he issued Proforma Invoice as instructed by his principal. From the contents of Show Cause Notice, it is evident that Shri Santosh

Nair did not play any role in the evasion of the customs duty by M/s Big Vision Pvt Ltd. The Show Cause Notice also does not allege the same. In his reply dated 19.02.2002, Shri Santosh Nair had stated that neither directly or indirectly, he had gained anything, both monetarily and otherwise by merely signing the Proforma invoice as per the direction of his superior, the Vice President of M/s Signtech USA. At the time of personal hearing on 23.09.2003, it was re-iterated by Shri Nair orally as well as in written submission that he had not contributed in any way in the evasion of duty and he had gained nothing out of it and also the Settlement Commission has not made any adverse comments against him. He further requested for a lenient view in the matter as others in this case had been granted immunity from penalty.

5. Taking all the above facts and observations into consideration, I hereby drop penal action against Shri Santosh Nair."

2.1 This order was reviewed by the Board under erstwhile Section 129D(1) of the Customs Act, 1962, and appeal was directed to be filed to tribunal on following grounds:-

i) The Commissioner erred in finding that Shri Santosh Nair did not play any role in the evasion of the customs duty by M/s Big Vision Pvt Ltd. Shri Santosh Nair was working as Sales Representative of M/s Signtech USA in India and all negotiations including preparation of Proforma Invoice for the Import of the goods was handled by him and issued by him.

ii) The Commissioner ought to have considered the statement of Shri Santosh Nair and should have considered the facts that he was fully aware not only of the price list but also value of the same type of machines imported by other importer at US$ 305000/-.

iii) The Commissioner erred in not finding the involvement of the Indian agent of the supplier, Shri Santosh Nair despite the fact that he has issued the Proforma Invoice only for US$ 46000/- while knowing the actual price as US$

30500/-. This act of omission/ commission committed by Shri Santosh Nair has rendered the said goods liable for confiscation u/s 111 of Customs Act, 1962 and therefore he renders himself liable for penal action under section 112(a) ibid.

iv) *The Commissioner ought to have considered that so far as Shri Santosh Nair was concerned the Settlement Commission has not passed any order granting him immunity, and therefore, for his acts and omissions as stated in Show Cause Notice he was liable to penal action under Section 112(a) and/ or 112(b) of the Customs Act, 1962 and Commissioner ought to have held him liable to penalty.*

2.2 With the above ground Commissioner was directed to file the appeal to tribunal, to determine the following-

(a) Whether under the facts and circumstances of the case, the order passed by the Commissioner of Customs (Adj), Mumbai is legal and proper.

(b) Whether under the facts and circumstances of the case the adjudicating authority should have dropped the charges against Shri Santosh Nair, the Indian agent of the foreign supplier.

(c) Whether under the facts and circumstances of the case, the adjudicating authority ought to have proceeded against Shri Santosh Nair u/s 112(a) and/ or 112(b) of the Customs Act, 1962.

(d) Whether under the facts and circumstances of the case, the case be remanded back for considering afresh.

(e) Pass such an order as Hon'ble Tribunal may deem fit and proper.

2.3 On the basis of the above review order, revenue filed appeal No C/1084/2004, making M/s Big Vision Pvt Ltd as respondents.

2.4 Subsequently they filed another appeal No C/303/2005, along with application for application for condonation of delay making Shri Santosh Nair as respondent. The application for Condonation of Delay seeking condonation of delay of 88 days in filing this appeal which is supplementary appeal to the appeal filed earlier was allowed by the tribunal vide its Miscellaneous Order No M/85786-85787/2019 dated 04.09.2019.

3.1 We have heard Shri Manoj Kumar, Assistant Commissioner, Authorized Representative for the revenue and Shri Jhamman Singh, Advocate for M/s Big Vision Pvt Ltd (Respondent 1) and Shri S P Sheth Advocate, for Shri Santosh Nair (Respondent 2).

4.1 The matter in the case of Respondent 1 has been settled by the order of Settlement Commission as has been noted by the Commissioner in the impugned order. Even the review order and appeal filed do not urge anything in respect of the dropping of the proceedings against them in view of immunity granted by the Settlement Commission, we do not find any merits in the appeal and dismiss the same as infructuous.

5.1 The entire case against the respondent 2, is vis a vis the Proforma Invoice dated 16.11.1998, signed and issued by him offering the discounted value of US$ 46,000 plus air freight of US$ 6320 totalling to US$ 55320/- for the machine for which the declare list price was US$ 305,000/-. In his statement recorded under Section 108, while admitting that he had issued the said Proforma invoice, he clearly stated that the Proforma invoice was issued as per the directions of Shri Harry Gandy, Vice President (Sales) of the supplier M/s Signtech USA for whom he was working as Indian sales agent. The fact that Shri Santosh Nair has issued the Proforma invoice as directed by Vice President (Sales) of the supplier, has not been controverted by the revenue in the appeal filed. Also it is fact on record that the import documents i.e. Bill of Entry was filed on the basis of Commercial Invoice 328 32686 dated 28.12.1998 issued by the supplier M/s Signtech USA. Since the Proforma issued by the Shri Santosh Nair was not even the basis for filing the import documents the relevance of the same in the current proceedings for imposition of penalty is not understood. In fact said Proforma invoice was never the part of the import documentation, though it was part of negotiation documents between the foreign supplier and the Importer in India.

5.2 In view of above discussions we find that Shri Santosh Nair was acting in course of normal business as sales agent of foreign supplier and had offered the sale price of the machine as directed by the foreign supplier to the Indian importer. There is nothing on record to establish that he had abetted in the evasion of duty by mis-declaring the value, for purpose of imposition of penalty under section 112(a) and/ or 112(b) of the Customs Act, 1962.

6.1 In view of above we dismiss the Appeal No C/1084/2004 as being infructuous and Appeal No C/303/2005 on merits, upholding the impugned order.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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