

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 592 of 2009

(Arising out of Order-in-Original CAO No. 23/2009/CAC/CC/KS dated 19.02.2009 passed by the Commissioner of Customs (Adjudication), New Custom House, Mumbai)

**Commissioner of Customs, Air Special Cargo, Appellant
Mumbai-II**

6th Floor, Awas Corporate Point, Makwana Lane,
Andheri-Kurla Road, Andheri (E), Mumbai - 400093

Versus

1. Shri Deepak Dialani Respondents

303, "Brook Field", Lokhandwala Complex,
Andheri (W), Mumbai - 400053

2. Shri Prashant @ Parag Nahata

3/2, Patil Park, Opp. Vanasnt Market,
Lanada Corner, Nashik - 422053

3. Shri Joe Felix D'Souza

Suzan Periera House, House No. B-58,
Gouthan No. 2, Juhu, Mumbai - 400049

4. Shri Balasubramaniam,

13/31, Sangam, Road No. 4, Pestom Sagar,
Chembur, Mumbai - 400089

5. Ms. Veena Hiranandani

R. No. 177, Block No. C/48, Shiv Colony,
Ulhasnagar - 421003

6. M/s Zenith Computers Ltd.

Zenith House, 29, MIDC, Central Road,
Andheri (E), Mumbai - 400093

7. M/s Minicomp Ltd.

A-1, C-5, Udyog Sadan-3, MIDC,
Andheri (E), Mumbai - 400093

8. Shri Rajkumar Saraf,

220, Walkeshwar Road, Jaikishan Nivas,
Mumbai - 400006

9. Shri K.R. Seth,

Darshan, Friends Society,
15, JVPD Road, Mumbai 400052

10. Mr. D.U. Mirajkar (Advocate of Shri Deepak Dialani)

31/C, Sitaram Building-A, Dr. D.N. Road,
Mumbai - 400001

and

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 Mumbai – 400001

Appearance:

Shri A.K. Singh, Special Counsel for the Appellants

Shri Anil Balani, Advocate for the Respondents

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86759 – 86760/2023

Date of Hearing: 05.06.2023

Date of Decision: 04.10.2023

Per: M.M.PARTHIBAN

The brief facts of the case are that an investigation was conducted by the Directorate of Revenue Intelligence (DRI), Mumbai on the basis of an information received by them that one Shri Deepak Dialani along with several other persons is running a racket of smuggling computer parts, peripherals, and subsequent selling of such goods in the local market against bills/invoices of various companies. The ring of importers who used to smuggle computer parts, peripherals etc., have supplied these goods from Hong Kong by purchasing from one Shri Prakash Dialani (brother of Deepak Dialani) and brought in their personal luggage; that Prakash Dialani also used to courier such goods to Deepak Dialani, which was cleared by mis-declaration of the contents thereof and without payment of duty. The goods so smuggled were then supplied to various computer manufacturing companies under invoices/bills of 13 fictitious/bogus companies, that payment towards supply made under the bills/invoices of such companies were received by cheque, which were then encashed through cheques and payments deposited in accounts maintained by the fictitious companies and that cash was withdrawn from these accounts subsequently. On conclusion of the investigation, a show cause notice dated 21/28.12.1998 proposing demand of duty on computer parts and peripherals alleged to have been smuggled under Section 28 of the Customs Act, 1962 besides proposing imposition of penalty on Shri Deepak Dialani under Section 112(a) and (b) *ibid*, as the said goods were liable for confiscation and penalty on other persons involved in the case. The SCN was adjudicated by the Commissioner (Appeals) by confirmation of the adjudged demands and imposed penalties on Shri Deepak Dialani and 8 other co-noticees. Feeling aggrieved by this order, the various parties have appealed before the Tribunal, who had ordered vide Order No. A/633 to 637/WZB/2004/C-I dated 25.3.2004 as follows:

"9. In the light of the above discussion on non-supply of documents to Deepak Dialani and denial of the right of cross-examination we set aside

the impugned order and remand the case to the jurisdictional Commissioner of Customs for fresh decision after supply of documents relied upon against the Deepak Dialani in the impugned order and supply of 67 documents requested by him and after permitting cross-examination of 17 persons, as per the list given by him, referred to in para 39.1 of the impugned order. Fresh orders shall be passed after extending a reasonable opportunity of hearing to all the above named applicants."

Accordingly, the case was taken up for *denovo* adjudication by the learned Commissioner of Customs (Adjudication) as per the directions of the Tribunal, on the aspect of non-supply of documents and cross examination of witnesses and panchas, and he passed an order CAO No. 23/2009/CAC/CC/KS dated 19.02.2009 and CAO No. 20/2009/CAC/CC/KS dated 16.02.2009 (herein after, referred to as 'the impugned orders') dropping the proceedings initiated in the show cause notice. In review of the aforesaid impugned orders, the Committee of Chief Commissioners of Customs had preferred to file these appeals before the Tribunal.

2. Learned Authorised Representative for Revenue reiterated the grounds made in the appeal papers to state that it is a case of outright smuggling of computer parts and peripherals. Shri Deepak Dialani was the master mind in this case operating through carriers and courier companies for smuggling of goods and the depositions made by carriers, buyers, agents etc. have confirmed this. In view of this, he stated that demand of duty invoking extended period and imposition of penalty on Shri Deepak Dialani and other persons involved in this case are sustainable and the department's appeals may be allowed.

3. Learned Counsel appearing for the respondent Deepak Dialani have stated that department had not supplied to them with all the documents and failed to make all witnesses available (except four) for cross-examination during the *denovo* proceedings and thus the directions of the Tribunal in their case have been barely complied with by them. He further stated that various documents themselves had a material bearing on the falsity of the allegations against the respondents. The impugned orders cogently deal with the aspect of how the respondent Shri Deepak Dialani cannot be said to be the importer and therefore cannot be saddled with any liability to pay duty. They claim that there is no infirmity in the impugned orders and thus the appeals filed by the department are liable to be dismissed.

4. Heard both sides and perused the records of the case.

5. The brief issue for consideration before us, whether the impugned orders have complied with the remand directions given by this Tribunal in its order dated 25.3.2004 in adjudication of the cases and whether these are sustainable in law.

6. We find that learned Commissioner of Customs (Adjudication) while taking up the case in *denovo* adjudication had categorically mentioned about how he had gone ahead with ensuring provision of various documents sought by the parties from the department and cross examination of witnesses, keeping in view of the directions given by the Tribunal. He had recorded in the impugned order about the various documents provided by the DRI investigation to Shri Deepak Dialani through his advocate and few of the documents which could not be produced; he had also fixed up various dates for cross examination of all 17 witnesses, however could record the proceedings of cross examination conducted before him only in 4 cases, as others did not turn up. Thereafter, the learned Commissioner (Adjudication) has gone into the facts of the case, evidences available on record, and all the four cross examination record of the witnesses. He had also made clear that in view of the Hon'ble Supreme Court's judgement in the case of *Gopal Saran Vs. Satyanarayana* - (1989) 3 SCC, that evidences of those persons who were not made available for cross examination not being treated as evidences, as if such evidences simply does not exist, the statements and panchnamas of remaining persons whose cross examination could not be conducted before him, he had completely ignored and discarded those as evidence. Discussion of the learned Commissioner (Adjudication) in his order dated 19.02.2009 brings out clearly the facts of the case and evidences on record. Few extract of the same are given below:

"28. In the present show cause notice it is absolutely undeniable that stakes are certainly high, there are very complicated facts, the noticee Deepak Dialani pointed out several contradictions appearing ex facie the record of the statements. Therefore the criteria of the Hon'ble Supreme Court were fully satisfied. The Hon'ble Appellate Tribunal has also accepted this contention and has expressly directed that the persons whose cross examination is sought by the noticee Deepak Dialani should be made available for cross examination and thereafter the SCN should be decided....."

After the Appellate Tribunal's order passed in March, 2004 it has been noticed that Shri Deepak Dialani again wrote several letters to the concerned investigating agency (DRI Mumbai) asking for the copies of the documents, it is fairly stated by the noticee that some of the documents whose copies were

sought have been supplied but the grievance still persists that many other documents yet remain to be supplied. A period of more than 4 years has elapsed since order of the proceedings to drag on indefinitely till documents are supplied. This office has issued three letters of summons to persons connected with this case as witnesses either of fact or to various searches and seizures. It is matter on record of this office that over a period of 3 personal hearings granted for the appearance of such persons, only 4 of such persons appeared. Of the 17 persons summoned, only 4 persons subjected themselves to cross examination. The other 13 persons did not turn up nor was any sufficient cause to appear for cross examination presented to this forum... However, in the circumstances of the case and the law cited before it, this forum has no option but to follow the fiat of the Apex Court and to give full meaning to the order of the Appellate Tribunal remanding this matter. Any other course of action would result in rendering the order of the Appellate Tribunal totally meaningless and that would certainly be against judicial propriety and discipline.

30.1. Cross examination of 4 persons:

- i) Joe Dsouza: Cross examination has brought out that Joe Dsouza is not familiar with computer parts; that after December 1992 he has never travelled abroad; that between 1987 and 1992 he had not met the noticee's brother Prakash in HKG as Prakash was student in Mumbai. It was further brought on record that he had not opened posing as Jeff Norman Dsouza any account in the Vijaya Bank. No documents of these accounts were taken from his custody nor were specimen signature taken by the DRI. He has specifically denied bringing computer parts into India for the Noticee.
- ii) Prakash Toraskar: In cross examination he admitted that noticee never asked him to give any introduction and that he had not brokered any deal for the premises at the Adarsh Nagar.
- iii) Prakash Nihalani: On being shown the copies of the invoices, Airway Bill and Remittances he admitted that he had imported computer parts from the Dianacom International HKG which belongs to the Noticee's brother; he also gave the name of some trader to whom he was selling computer parts including Prashan Nahata and Rajesh Jain. As nature of guess work and that the Noticee's office had all the necessary office equipment in his own office.
- iv) G.Balasubramaniam: Cross examination has revealed that he never travelled abroad during the period 1994 to 1995; that he has never concerned with courier services clearance as his was desk job in his office...

The above cross examinations falsified the statements and thereafter destroys the credibility of the SCN which is contrary to their statements given under Section 108 of the Customs Act. Hence, after cross examination it is obvious that no credibility can be attached to the allegation in their statements and the related allegation in the SCN.

34. ... I find that the alleged offending goods in this case (Computer Parts) are not covered by any notification under Section 123 of the Customs Act or under Section 11B of the Customs Act, 1962 and therefore the burden of proving the goods sold or dealt with or not smuggled would not be on the noticees....

36.2. It is also not the case of the Department that Shri Deepak Dialani is the owner of the imported goods... In the instant case Shri Deepak Dialani is not the importer and hence he is not chargeable to duty as held in the Tribunal's decision cited supra.

36.3.... Thus, considering the facts and circumstances of the case the demand raised in the show cause notice does not sustain. Consequently, the show cause notice is liable to be withdrawn."

From the net result of the cross examination of 4 witnesses and the non-availability of other witnesses, documents that have been produced during the proceedings, the learned Commissioner (Adjudication) had arrived at the conclusion that all the allegations based on the statements of these witnesses recorded under Section 108 of the Customs Act have to be discarded and the show cause notice proceedings has to be discharged as liable to withdrawn or dropped. Similarly, he dropped the show-cause notice dated 12.09.1997 in his other order dated 16.02.2009.

7. On perusal of the impugned orders, we find that *denovo* proceedings have been conducted in accordance with the law, abiding by the principles of natural justice duly giving opportunity for personal hearings, opportunity for cross examination and submission of documents/evidences by both the parties to the dispute. Further, various legal provisions regarding demand of duty, imposition of penalty have been examined by the learned Commissioner (Adjudication) on the basis of evidences after examining the burden of proof under Section 123 *ibid* and on the basis of the decision of the Apex Court.

8. In view of the above discussions, we are of the considered opinion that the impugned orders do not require any interference. In the result, the appeals filed by the Revenue are dismissed.

(Order pronounced in open court on 04.10.2023)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)