CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

S.No.	Cause List/ *Suppl. List S.No.	Appeal	Appellant	Respondent	Arising out of impugned	Advocate
1.	3	C/113/ 2006	K.V.S Exports Pvt. Ltd.	CC Chennai	OIO No.4581/2006 dt. 30.12.2005 – by CC (Exp) Chennai	Shri S. Krishnanandh
2.	4	C/114/ 2006	K.B.S Manian & Brothers Pvt. Ltd.	-do-	-do-	-do-
3.	5	C/149/ 2006	S. Suresh	-do-	OIO No.3001/2004 dt. 30.9.2004- by CC (Imports), Chennai	-do-
4.	6	C/152/ 2006	KBS Manian & Brothers Pvt. Ltd	-do-	OIO No.4727/2006 dt. 22.2.2006 – by CC (Exp) Chennai	-do-
5.	7	C/153/ 2006	K.V.S Exports Pvt. Ltd.	-do-	OIO No.4727/2006 dt. 22.2.2006 – by CC (Exp) Chennai	-do-
6.	9	C/457/ 2006	Tuticorin Star Shipping Services Pvt. Ltd.	CC Tuticorin	OIO No.165/2006 dt. 28.7.2006 – by CC Tuticorin	-do-
7.	10	C/459/ 2006	Bharath Trading Corpn.	-do-	-do-	-do-
8.	16	C/Misc./ 40091/2017, C/Misc./ 40092/2017 & C/274/2007	Srinidhi Fabrics Pvt. Ltd.	-do-	OIO No.42/2007 dt. 15.6.2007 – by CC Tuticorin	Sai Srujam Tayi
9.	17	C/309/2007	CC Tuticorin	Srinidhi Fabrics Pvt. Ltd.	-do-	-do-
10.	18	C/412/2007	Raja Metal Corpn.	CC Chennai	OIO No.6874/2007 dt. 16.11.2007- by CCE (Adjn.) Chennai	Shri S.Krishnanandh
11.	45	C/4/2008	P. Srinivasan	CC Chennai	OIO No.6881/2007 dt. 16.11.2007- by CCE (Adjn.) Chennai	-do-

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12.	46	C/5/2008	Seenu Kargoways	CC Chennai	-do-	-do-
13.	47	C/120/2008	Visualan Technologies (P) Ltd.	CC Chennai	OIO No.7038/2008 dt. 8.1.2008 – by CCE (Adjn.) Chennai	G.Derrick Sam
14.	48	C/163/2008	Thameema Trading Corpn.	CC Chennai	OIO No.7452/2008 dt. 20.3.2008- by CCE (Adjn.) Chennai	S.Krishnanandh
15.	49	C/164/ 2008	South India Shipping and Export Co.	CC Chennai	-do-	-do-
16.	50	C/165/ 2008	Dr. T. Saleem Basha	-do-	-do-	S.Krishnanandh
17.	51	C/223/2008	Architectural Glazed Glass Co.	-do-	OIO No.7426/2008 dt. 20.3.2008 by CCE (Adjn.) Chennai	Ms. J. Ragni,
18.	52	C/224/2008	M.Madana gopal	-do-	-do-	-do-
19.	53	C/236/2008	Instant Clearing Services (India) Pvt. Ltd.	-do-	OIO No.7471/2008 dt. 25.3.2008- by CCE (Adjn.) Chennai	-do-
20.	54	C/245/2008	Liners India Ltd.	-do-	-do-	-DO-
21.	55	C/246/2008	K. Raghu	-do-	-do-	-do-
22.	56	C/247/2008	S.Ganesh	-do-	-do-	-do-
23.	*10	C/99/2008	Ravi Foods Pvt. Ltd.	-do-	OIO No.6981/2007 dt. 14.12.2007 by CCE (Adjn.) Chennai	Ms.Swarupa
24.	*11	C/100/2008	Disha Foods Pvt. Ltd.	-do-	OIO No.6982/2007 dt. 14.12.2007 by CCE (Adjn.) Chennai	-do-
25.	*12	C/125/2008	CC Chennai	Ravi Foods Pvt. Ltd.	OIO No.6981/2007 dt. 14.12.2007 by CCE (Adjn.) Chennai	-do-
26.	*13	C/126/2008	CC Chennai(Export -Seaport)	Disha Foods Pvt.Ltd.	OIO No.6982/2007 dt. 14.12.2007 by CCE (Adjn.) Chennai	-do-

Shri K. Veerabhadra Reddy, JC (AR)
Shri A. Cletus, ADC (AR)
Appeared for the Revenue

CORAM :

Hon'ble Shri D.N. Panda, Judicial Member
Hon'ble Shri Madhu Mohan Damodhar, Technical Member

Date of hearing: 16.02.2017
Date of Pronouncement : 05-04-2017

FINAL ORDER No. 40553-40578/2017

Per Madhu Mohan Damodhar

Shri S. Krishnanandh, Advocate along with Shri Satish Sundar, Advocate on behalf of appellants appearing in Sl.Nos.3,4,5,6,7,9,10, 18,45,46,48,49 and 50 submitted that in all these appeals, show cause notices have been issued by the D.R.I prior to 08.04.2011. Officers of the D.R.I were not proper officers at the relevant point of time when notices were issued prior to 08.04.2011. Section 17 and 28 of the Customs Act, 1962 were amended by Finance Bill, 2011 which received the assent of the President on 8.4.2011. By such amendment, Section 28 was substituted by a new section. That new section has 10 sub-sections. While law earlier to that under section 28 had 5 sub-sections. Compilation of this law was submitted by the ld. counsel at pages 1 to 3 and the bill was amended on 8.4.2011 incorporating 10 sub-sections appearing at pages 4 to 6 of his paper. He further says that sub-section (11) was introduced to Section 28 w.e.f. 16.9.2011 and that sub-section was the bone of contention by Revenue to say that what that was not before the power of Customs officer became so with retrospective effect in respect of the persons who were appointed before 6.7.2011. *Explanation-2* all along was there before introduction of sub-section (11) which was introduced by Finance Act, enacted on 8.4.2011.

2. Ld. counsel submitted that *Explanation-2* made it clear that all actions intended by Section 28 to be carried out or stated to have been carried out under the provisions appearing before 8.4.2011. This *Explanation-2* does not enable the Revenue to understand that has cured the defect of Section 28 what that was existing before 8.4.2011.

3. On the introduction of sub-section (11), ld. counsel says that sub-section (11) was not in force before issuance of the SCN in all these appeals. Therefore, that cannot be read as a section enabling Customs officer to be proper officer when he has already issued notice before 8.4.2011 as a measure of curing his defect.

4. Proper officer is therefore who is defined by sub-section (2) of section 34 of the Customs Act, 1962 and was well analyzed by Apex Court in the case of *Commissioner of Customs Vs Sayed Ali* – 2011 (265) ELT 17 (SC). The proper officer may be customs officer but a customs officer may not be a proper officer what that is the ratio laid down by apex court in para-10 of the said judgement. He placed reliance on paras-10 to 16 of the judgement in *Sayed Ali* case to submit that a customs officer appointed under section 4 & 5 of the Customs Act, 1962 does not ipsofacto becomes 'proper officer' in

terms of Section 34 (2) of the said Act. Sections 4 & 5 are not power conferring sections. Unless DRI officers are notified to be 'proper officers' for the purpose of section 28 in terms of Section 34 (2), they are never proper officers to carry out duties under section 28 of the Customs Act, 1962. He specifically raised and emphasized on the principle laid down by the court that source of power is not from section 4 & 5 of the Customs Act but that emanates from section 34 (2) of the Customs Act, 1962. Both sections 4 & 5 enables to appoint a customer officers and confers them power. But a customs officer so appointed should be notified as a 'proper officer' under Section 34 (2) of the Act. That was lacking in the present case where DRI officers shall have no power under sub-section (2) of section 34 of the Act to be proper officer.

5. Explaining further, the emphasis of the counsel is the date of incidence besides consequence thereof on the basis of law as that was prevailing on that date. Therefore *Explanation-2* to section 28 of the Act very clearly says that what that was law before 8.4.2011 shall govern the cases where SCNs were issued prior to that date and sub-section (11) does not override the intention of *Explanation-2.*

6. Sub-section (11) read with *Explanation (2)* were under scrutiny by the Hon'ble High Court of Delhi in the case of *Mangli Impex Ltd. Vs UOI* reported in 2016 (335) ELT 605 (Del.). The court categorically stated that provisions contained in sub-section (11) is overrided by *Explanation-2* which is the provision to govern cases originated prior

to sub-section (11) came into force. No doubt, *Mangli Impex* judgement is in jeopardy before Apex Court due to admission of appeal of Revenue. But paras-37 to 39 of the judgement of Delhi High Court laid down the law.

7. Ld. counsel emphatically submitted that *Sayed Ali* judgement laid down the law holding, who is the proper officer and only after *Sayed Ali* judgement, Revenue made an attempt to nullify the ratio of the judgement incorporating sub-section (11) to Section 28. Therefore nullification was only to be applicable to the cases initiated after sub-section (11) came into force but not before that date. Apex Court having reiterated its principles laid down in *Sayed Ali* case while deciding the appeal in *Chandna Impex Pvt. Ltd. Vs CC New Delhi* – 2012 (26) STR 257 (SC), the principle laid down thereon still holds the field in so far as SCNs issued prior to 8.4.2011 in absence of any law to retrospectively conferring power on the Customs officers who was the proper officer. Therefore *Explanation-2* supports the stand of the appellant and is well covered by law as that was existing before sub-section (11) was enacted.

8. Appellant relied on para 25.1 of *Hem Chand Gupta & Sons Vs CC (ICD) New Delhi* - 2015 (330) ELT 161 (Tri.-Del.) to submit that said decision of the Tribunal has followed *Sayed Ali* judgement and elaborately explained the background of the law which was well known to department when they appealed to Supreme Court but they withdrew the appeal from Supreme Court mentioning that they shall

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approach the Delhi High Court and no review has been filed before Delhi High Court so far.

9. Reiterating his stand, it is the submission of ld. counsel that section 28 as that was in the statute book even before section 10 was incorporated. That law will only prevail over SCNs and that law has the legal infirmity of not empowering customs officers to be proper officer.

10. In short, it was explained that these appeals should be allowed without any remand or keeping it pending in Tribunal.

11. The arguments of Shri S.Krishnanandh, Advocate were adopted by the appellants in appeals against Sl.No.16 & 17, 47, 51 to 56 of the cause list and Sl.No.10 to 13 of supplementary list through their counsels appeared therein mentioned against each.

12. Rebutting all the arguments of the appellant, it was submitted by Revenue that *Mangli Impex* judgement which considered *Sayed Ali* judgement having been appealed to apex court, appellant cannot take the help of *Sayed Ali* judgement for allowing the appeals. Sub-section (11) when incorporated into the statute that is nullified notwithstanding anything to the contrary contained in any judgement, decree or order of any Court of law, tribunal or other authority and shall have retrospective effect empowering powers vested under Section 4 (1) of the Customs Act, 1962 before

6.7.2011. They shall always have the power of assessment under section 17 and shall be deemed to have been proper officer for the purpose of section 28. Revenue further submits that it made its stand before the Delhi High Court as recorded in parts 37 to 40 of the said judgement which are reproduced as under :

> **37.** On behalf of the Respondents, it was pointed out that with the Bombay High Court in *Sunil Gupta* v. *Union of India* - 2015 (315) E.L.T. 167 (Bom.) upholding the constitutional validity of Section 28(11) of the Act and accepting the plea of the Department that by virtue of insertion of Section 28(11), the SCNs issued prior to 8th April 2011 by the DRI, the notices issued by officers of the DRI, the DGCEI etc., i.e., officers who may not have been expressly assigned the functions of 'proper officers' under Section 2(34) of the Act, stood validated. It was submitted that although the said decision is a subject matter of a Special Leave Petition (Civil) in the Supreme Court, this Court should nevertheless follow the decision of the Bombay High Court.
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> **38.** Secondly it was submitted that in order to understand the scope of Section 28(11) of the Act, the SOR has to be referred to. It states that the said Amendment was meant to be retrospective i.e. to validate anything done in relation to the non-levy, short levy or erroneous refund prior to 8th April 2011. It is accordingly submitted that Section 28(11) would override the Explanation below sub-section 10 of Section 28 of the Act to the extent that the SCN was issued prior to 8th April 2011. As far as actions now taken, after the insertion of Section 28(11) of the Act, since it is a deeming provision, it empowers the officers of the DRI, DGCEI etc. to issue SCNs even for the period prior to 8th April 2011 subject to the time limits under Section 28(4) of the Act being adhered to.
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> **39.** It was submitted that in the normal course, the customs duty is only assessed by the jurisdictional custom officers of the Board. The officers of the Customs (Preventive) have been appointed for the purposes of investigating evasion of customs duty in their specified jurisdictions. The issuing and adjudication of SCNs under Section 28 of the Act usually is undertaken by the jurisdictional Customs officer.
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> **40.** According to the Respondents, it is a well-settled legal proposition that the legislature can make a retrospective legislation after curing the defects that led to their invalidation in the first place. A validation Act can be enacted to retrospectively negate the effect of the judgments and orders of competent Courts provided the validating legislation removes the cause of invalidity or the basis that had led to those decisions. It was submitted that inadvertent defects in statutes should be permitted to be corrected by the legislature through the device of 'small repairs'. There is no vested right in any of the Petitioners, as a result of the decision of the Supreme Court in *Sayed Ali* (supra). Reliance was placed on the following passage in *Craies on Statute Law (7th Edition)* where it is stated "If a statute is passed for the purpose of protecting a public against some evil or abuse, it may be allowed to operate retrospectively although by such operation, it will deprive some person or persons of a vested right. Thus, public interest at large is once

again relevant consideration in determining the constitutional validity of a retrospective legislation."

Relying on the above submissions before Delhi High Court, Revenue emphasized that when a retrospective amendment was made to section 28, even SCNs issued before 8.4.2011 are the proper SCNs and liable to be adjudicated. *Explanation-2* is to be read with sub-section (11) to hold that officers of customs were always proper officers and the date of their appointment before 6.7.2011 is relevant to be called as "proper officer". By virtue of incorporation of sub-section (11) *Explanation-2* appearing under section 28 of the Act has no relevance.

13. We have heard both sides and have gone through the facts of the matter.

14.1 Apex Court in its judgement dt. 18-02-2011 in *Sayed Ali* case held that only such a customs officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been effected, in terms of Section 2 (34) of the Act, is competent to issue notice under Section 28 of the Act. Accordingly, Commissioner of Customs (Preventive) was not a 'proper officer' under Section 2 (34), having no jurisdiction to issue a show cause notice under Section 28 of the Customs Act, 1962.

14.2 The review petition against *Sayed Ali*'s Judgment filed by the department was dismissed by the Apex Court "*on the ground of delay as well as merits*" as reported in *Commissioner Vs Sayed Ali* - 2011 (274) ELT A109 (SC).

14.3 Government amended Section 28 of the Customs Act, 1962 w.e.f. 08-04-2011 vide Finance Act, 2011. Subsequently, sub-section (11) was inserted in Section 28 by the Customs (Amendment and Validation) Act, 2011 dt. 16.09.2011 which reads as follows :

> **"SECTION 28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. —**
>
> ... .
>
> (11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section.
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> ***Explanation 1.*** — For the purposes of this section, "relevant date" means,—
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> (a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;
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> (b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;
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> (c) in a case where duty or interest has been erroneously refunded, the date of refund;
>
> (d) in any other case, the date of payment of duty or interest.
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> ***Explanation 2.*** — For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received."

14.4 Notification No.44/2011-Cus. (N.T), dated July 6,2011, was issued by the Government, assigning the functions of the proper officer to various officers (including Additional Director General, DRI) mentioned in the notification, for the purposes of Section 28 of the

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Act. Thus, w.e.f. July 6, 2011, Additional Director General, DRI was prospectively appointed as 'proper officer' for the purpose of Section 28 of the Customs Act. Hence from 06.07.2011 ADG-DRI has been empowered to issue demand notice under Section 28.

14.5 In the case of *Chandna Impex Pvt. Ltd. Vs CC New Delhi* – 2012 (26) STR 257 (SC) passed on 05-07-2011, the Hon'ble Supreme Court dealt with the case wherein SCN was issued by DRI and one of the questions of law that arose was whether Additional Director General, DRI is a 'proper officer' within the meaning of Section 28 of the Customs Act. The Hon'ble Supreme Court has remanded the matter back to the Tribunal with a direction to examine the matter afresh particularly in the light of the decision in *Sayed Ali* case.

14.6 The validity of this newly enacted Section 28 (11) of Customs Act was further challenged in a number of cases.

14.7 The Hon'ble Mumbai High Court in the judgement in the case of *Sunil Gupta Vs UOI* decided on 03-01-2014, reported in 2015 (315) ELT 167 (Bom.), distinguished the Apex Court judgment in *Sayed Ali* case, noting that provisions of Customs Act have undergone a change after the said judgment. The Hon'ble Mumbai High Court rejected the challenge to the new sub-section (11) of Section 28 ibid. The relevant portion of the Mumbai High Court's judgment is reproduced as under :

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23. We have found that Section 28(11) was inserted by Act 14 of 2011 w.e.f. 16th September, 2011. That alters the basis of the Judgments, which have been delivered by any Court of law, Tribunal or other authority. Once this section says that all persons appointed as officers of Customs under Section 1(4) before 6th July, 2011 shall be deemed to have been and always to be the proper officers for the purpose of this section, then, the Notifications, which are referred by us above at page 369 and 373 of the paper book are specifically saved and validated. They have been given a retrospective effect. These Notifications were holding the field and were not quashed or set aside. In the teeth of such Notifications, the legislature stepped in to clarify the position that if the functions of the Customs officer can be entrusted or assigned by the Central Government or the Board in terms of Section 6 of the Customs Act, 1962, then, all such Notifications, have been validly issued and enforced. They enable the Parliament to clarify that the officers mentioned therein shall be deemed to be the proper officers for the purposes of Section 17 and 28 of the Act. Precisely, that has been done in the instant case.

24. If that has been done, then, no assistance can be derived from the Judgment of the Hon'ble Supreme Court in the case of *Sayed Ali* (supra). There, for want of jurisdiction or competence in the Collector of Customs (Preventive), the show cause notice was quashed by the Tribunal and that order was upheld by the Supreme Court. Before us, the issue is not whether any Collector of Customs (Preventive) could be said to be on par with the officers mentioned in the earlier Notification dated 26th April, 1990. The assignment of functions to these officers, who were earlier carrying on preventive work came w.e.f. 6th July, 2011. That Notification was not, at the relevant time, given retrospective effect. It is in such circumstances that the Hon'ble Supreme Court held that in terms of the Notifications, which were issued and holding the field, not designating the Collector of Customs (Preventive) as a proper officer for the purpose of Section 28 as it then stood, he was not competent to issue show cause notice (see para 24 of *Sayed Ali's* Judgment). This position has now undergone a change and from 6th July, 2011, admittedly, they have been assigned these functions and of the Custom officers. They are therefore competent and the Notification in that behalf at page 373 of the paper book has been given a retrospective effect. It is not the argument of Mr. Singh that the law cannot be amended retrospectively. It is also not his argument that the validating Act does not validate anything which may be or is invalid. In the circumstances and the Parliament being competent to make such a law, we find no force in the arguments canvassed before us. Once the above view is taken, then, no reference is required to be made to the other Judgments cited by both Mr. Singh and Mr. Jetly.

25. As a result of the above discussion and finding that *Explanation* 2 has not been dealing with the case, which was specifically dealt with by sub-section (11) of Section 28 of the Act, that we are of the opinion that the challenge in the Writ Petition is without any merit. The *Explanation* removes the doubts and states that even those cases which are governed by Section 28 and whether initiated prior to the Finance Bill, 2011 receiving the assent of the President shall continue to be governed by Section 28, as it stood immediately before the date on which such assent is received. The reference to Finance Bill therein denotes the bill by the section itself was substituted by Act 8 of 2011 w.e.f. 8th April, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and Section 28 was resorted to by the authorities. The *Explanation* 2 clarifies that they will proceed in terms of the un-amended provision. The position dealt with by insertion of Section 28(11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of Section 28 un-amended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail.

14.8 However, a contrary view was taken by the Hon'ble Delhi High Court in *Mangali Impex* Ltd. Vs UOI - 2016 (335) EL 605 (Del.), *inter alia,* holding that newly inserted Section 28 (11) does not empower officers of DRI and DGCEI to either proceed to adjudicate SCNs already issued by them for period prior to 08-04-2011 or to issue SCNs for period prior to 08-04-2011. The Delhi High Court placed reliance on *Sayed Ali* case (supra). The relevant portion of the Delhi High Court's order is reproduced below :-

"Conclusion on the effect and validity of Section 28(11)

70.1 The net result of the above discussion is that the Department cannot seek to rely upon Section 28(11) of the Act as authorising the officers of the Customs, DRI, the DGCEI etc. to exercise powers in relation to non-levy, short-levy or erroneous refund for a period prior to 8th April 2011 if, in fact, there was no proper assigning of the functions of reassessment or assessment in favour of such officers who issued such SCNs since they were not 'proper officers' for the purposes of Section 2(34) of the Act and further because Explanation 2 to Section 28 as presently enacted makes it explicit that such non-levy, short-levy or erroneous refund prior to 8th April 2011 would continue to be governed only by Section 28 as it stood prior to that date and not the newly re-cast Section 28 of the Act.

70.2 Section 28(11) interpreted in the above terms would not suffer the vice of unconstitutionality. Else, it would grant wide powers of assessment and enforcement to a wide range of officers, not limited to customs officers, without any limits as to territorial and subject matter jurisdiction and in such event the provision would be vulnerable to being declared unconstitutional.

70.3 As regards the period subsequent to 8th April 2011, it is evident that if the administrative chaos as envisaged by the Supreme Court in *Sayed Ali* (supra) should not come about, there cannot be any duplicating and/or overlapping of jurisdiction of the officers. It would have to be ensured through proper co-ordination and administrative instructions issued by the C.B.E. & C. that once a SCN is issued specifying the adjudicating officer to whom it is answerable, then that adjudication officer, subject to such officer being a 'proper officer' to whom the function of assessment has been assigned in terms of Section 2(34) of the

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Act, will alone proceed to adjudicate the SCN to the exclusion of all other officers who may have the power in relation to that subject matter.

70.4 The question as to the constitutional validity and effect of Section 28(11) of the Act is answered accordingly."

14.9 In yet another judgement, the High Court of Telangana and Andhra Pradesh, decided on 26-10-2016, in the case of *Vuppalamritha Magnetic Components Ltd. Vs DRI (Zonal Unit), Chennai,* reported in 2017 (345) ELT 161 (AP), dissented from the *Mangali Impex* Judgement of Delhi High Court and took a contrary view *inter alia* as under :

"**10.** At the outset, we are of the considered view that the writ petition is not maintainable. The show cause notice dated 30-7-2009, which is under challenge in the present writ petition, is no longer in force. The show cause notice has already culminated in a order of adjudication and the order of adjudication has also been confirmed by the Tribunal, the High Court and the Supreme Court. The doctrine of merger has come into play and the show cause notice is not available any more for the petitioner to challenge.

11. Heavily reliance is placed by Mr. P. Vikram, learned counsel for the petitioner on two things viz., (1) the judgment of the Delhi High Court in *Mangali Impex Ltd.*, (supra); and (2) the judgment of a Division Bench of the Punjab & Haryana High Court in *Rajinder Arora and Others* v. *Union of India and Others* [2016 (339) E.L.T. 370 (P & H)]. In *Mangali Impex Ltd.*, (supra), the Division Bench of the Delhi High Court set aside even the show cause notices, despite the fact that the show cause notices had already culminated in orders of finality. In *Rajinder Arora and Others* v. *Union of India and others* (1 supra), a Division Bench of the Punjab & Haryana High Court also dealt with a case where the show cause notice had culminated in a order of adjudication, but it was the subject matter of an appeal before the Tribunal. The Punjab & Haryana High Court held that in the light of the decision of the Supreme Court in *Sayed Ali* and in the light of the decision of the Delhi High Court in *Mangali Impex Ltd.*, the show cause notice, the adjudication order as well as the consequential recovery proceedings were *non est* and *void ab initio.*

12. But unfortunately, the Delhi High Court as well as the Punjab & Haryana High Court have not considered the issue from the point of view of merger. It is needless to point out that the doctrine of merger is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. The underlying principle behind the doctrine of merger is that there cannot be more than one decree.

13. The issue can be looked at from another aspect also. Today, the effect of our allowing the writ petition and setting aside the show cause notice would be to set at naught, the order of adjudication, the judgment of CESTAT, the judgment of this Court and the order of Supreme Court. What cannot be achieved by the petitioner directly cannot be achieved by them indirectly.

14. The contention that all proceedings founded upon a show cause notice that was inherently lacking in jurisdiction, would be *non est*, null and void, is perhaps right as a simple statement of a proposition of law. But it is not without exceptions. If this theory of nullity and voidity is accepted, all proceedings initiated before 8-4-2011, which have already culminated in orders of adjudication and pursuant to which recoveries have been made, are also to be deemed as *non est*. Therefore, the Commissionerates of Excise throughout the country can today be flooded with applications for refund of the duty paid in pursuance of the orders of adjudication passed on the basis of such show cause notices. The theory of nullity and voidity cannot be extended to such an extent as to lead to such disastrous consequences.

15. There is also one more aspect. It is not the case of the petitioner that they challenged either the impugned show cause notice or the Order-in-Original at the relevant point of time on the ground that the show cause notice was issued by a person not assigned the role of a proper officer. The petitioner had challenged the show cause notice and the order of adjudication on other grounds, which stand rejected up to Supreme Court. Therefore, the principle of finality to litigation would put a seal on the present attempt on the part of the petitioner to reopen the issue all over again."

15.1 Discernably, conflicting views have emerged from the Judgments of different High Courts on this issue.

15.2 Hon'ble Supreme Court has ordered stay of operation of the *Mangali Impex* judgement (supra) vide its order dt.01-08-2016 as reported in 2016 (339) ELT A49 (SC) reading, is as follows :

"The Supreme Court Bench comprising Hon'ble Mr. Justice Madan B. Lokur and Hon'ble Mr. Justice R.K. Agrawal on 1-8-2016 **issued notice** in the Petition for Special Leave to Appeal (C) No. 20453 of 2016 filed by Union of India against the Judgment and Order dated 3-5-2016 of Delhi High Court in W.P. (C) No. 441 of 2013 as reported in **2016 (335) E.L.T. 605 (Del.)** *(Mangali Impex Ltd.* v. *Union of India)*. While issuing the notice in the petition, the Supreme Court passed the following order :

"Exemption from filing c/c of the impugned judgment and permission to file synopsis and list of dates granted.

Issue notice.

In the meanwhile, there shall be a stay of operation of the impugned judgment and order passed by the High Court of Delhi."

The Delhi High Court in its impugned order had held that department cannot seek to rely upon amended provisions of Section 28(11) of Customs Act, 1962 as authorising the officers of the Customs, DRI, the DGCEI, etc., to exercise powers in relation to non-levy, short-levy or erroneous refund for a period prior to 8th April, 2011 if, there was no proper assigning of the functions of reassessment or assessment in favour of such officers who issued such SCNs since they were not 'proper officers' for the purposes of Section 2(34) of the Act and further because Explanation 2 to Section 28 as presently enacted makes it explicit that such non-levy, short-levy or erroneous refund prior to 8th April, 2011 would continue to be governed only by Section 28 as it stood prior to that date and not the newly re-cast Section 28 of the Act."

15.3 The incontrovertible fact that emerges from the above discussions is that the *Mangali Impex* judgment has been stayed by the Supreme Court. It is well settled principle of law by Hon'ble Apex Court in *UOI Vs West Coast Paper Mills Ltd.* -2004 (164) ELT 375 (SC) that once the appeal been filed against a Judgment of lower court and entertained by the Supreme Court as well as operation thereof stayed, the judgment of lower court is in jeopardy. Relevant portions of that judgement are reproduced below :

"**14.** Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal.

... .

38. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit."

15.4 In view of the above legal position, it would be proper to wait for decision of the Apex Court on the aforesaid jurisdiction issue.

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Therefore, all these appeals are remanded back to the concerned adjudicating authorities without keeping that pending in Tribunal to pass appropriate orders on the basis of the outcome of the Supreme Court in the *Mangali Impex* case (supra) following course of natural justice and granting reasonable opportunity of hearing to these appellants to plead both on fact and law.

16. In the result, all the appeals are disposed of with the above directions. MAs filed also stand disposed of.

(Order pronounced in court on 05-04-2017)

05/04/2017

4.4.2017

(Madhu Mohan Damodhar)
Technical Member

(D.N. Panda)
Judicial Member

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Customs, Excise & Service Tax Appellate Tribunal

प्रमाणित प्रति/Certified True Copy

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