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

**C/91 & 92/2009**

(Arising out of Order-in-Appeal No.34/2008 dated 17.12.2008 passed by the Commissioner of Customs (Appeals), Chennai)

M/s. Geetha Timbers
M/s. Thulasilal Patel — Appellants

Vs.

Commissioner of Customs, Tuticorin — Respondent

**Appearance**

Dr. S. Krishnanand, Advocate for the Appellant
Shri K.P. Muralidharan, AC (AR) for the Respondent

**C/49 to 51/2008**

(Arising out of Order-in-Original No. 6877 and 6878/2007 dated 16.11.2007 passed by the Commissioner of Customs, Chennai)

M/s. Kawarlal & Co.
M/s. Kawarlal and Sons
Shri K. Parasmal Jain — Appellants

Vs.

Commissioner of Customs (Export), Chennai — Respondents

Appearance

Shri S. Murugappan, Advocate for the Appellant
Shri K. Veerabhadra Reddy, JC (AR) for the Respondent

**CORAM**

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **28.04.2017**

Final Order Nos. 40684-40688/2017

Customs, Excise & Service Tax Appellate Tribunal

**Per Bench**

Shri S. Krishnanandh, Advocate appearing for these appeals submits that 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. 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 submits that the Hon.Apex Court in their *Sayed Ali* judgement [2011 (265) ELT 17 (SC)] laid down the law holding who is the proper officer and only after *Sayed Ali* judgment. Revenue made an attempt to nullify the ratio of the judgment 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. He further points out that 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. Learned Advocate Shri Murugappan adopts the above arguments in respect of appellant in C/49 to 51/2008.

3. Revenue submits that *Mangli Impex* judgment which considered *Sayed Ali* judgment having been appealed to apex court, appellant cannot take the help of *Sayed Ali* judgment for allowing the appeals. Sub-section (11) when incorporated into the statute that is nullified notwithstanding anything to the contrary contained in any judgment, 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.

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

4.1 Apex Court in its judgment dated 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

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(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.

4.2 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).

4.3 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.
>
> ***Explanation 1.*** — For the purposes of this section, "relevant date" means,—
>
> (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;
>
> (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;
>
> (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.
>
> ***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."

4.4 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)

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mentioned in the notification, for the purposes of Section 28 of the 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.

5. Ld. Counsel has contended that in terms of the Hon'ble Apex Court decision in the case of ***Commissioner of Customs Vs. Sayed Ali, 2011 (265) ELT 17 (SC)],*** the DRI officers were not proper officers in terms of section 2(34) of the Customs Act, 1962. It is therefore intended to address this preliminary contention.

6. It is seen that after the declaration of law by the Hon'ble Supreme Court in the ***Sayed Ali*** case, the provisions of section 28 of the Customs Act, 1962 had been amended with effect from 8.4.2011 vide Finance Act, 2011, as discussed above.

7. Later on, that is, for the period subsequent to the amendment, the issue of DRI officers having proper jurisdiction to issue the SCN came up before the Hon'ble Delhi High Court in the case of ***Mangali Impex Vs. Union of India [2016 (335) ELT 605 (Del)],*** inter alia, laying down that even the new inserted section 28 (11) does not empower either the officers of DRI or the DGCEI to adjudicate the SCN issued by them for the period prior to 8.4.2011. Thus the said order of the Hon'ble Delhi High Court is in favour of the assessee and against the Revenue. However, the said decision of the Hon'ble Delhi High Court stands stayed by the Hon'ble Supreme Court as reported in ***2016 (339) ELT A49 (SC).***

8. It is further noticed that the said issue was also the subject matter of Hon'ble Mumbai High Court in the case of ***Sunil Gupta Vs.***

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***Union of India*** *[2015 (315) ELT 167 (Bom)]* as also of the Hon'ble High Court of Telangana and Andhra Pradesh in the case of ***Vuppalamritha Magnetic Components Ltd. Vs. DRI (Zonal Unit), Chennai*** *[2017 (345) ELT 161 AP]*, and both these Courts took a view contrary to the one taken by the Hon'ble Delhi High Court.

9. The above developments show that there are two views holding the field and the matter now stands before the Hon'ble Supreme Court. In an earlier case, the Hon'ble Supreme Court in the case of ***Chandna Impex Vs. CC Delhi*** *[2012 (26) STR 257 (SC)]* had remanded the matter to the Tribunal with a direction to examine the issue of jurisdiction afresh in the light of decision in ***Sayed Ali*** (supra). As already observed the entire issue is once again before the Hon'ble Apex Court, in view of the contrary decision of various High Courts. In these circumstances, we deem it fit to set aside the impugned orders and remand the matters to the original adjudicating authorities to first decide the issue of jurisdiction, after the availability of Supreme Court decision in the case of ***Mangali Impex*** (supra) and then the merits of the case.

10. In the result, the appeals filed by the assessee-Appellants are allowed by way of remand.

(Dictated and pronounced in open court)

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| **(MADHU MOHAN DAMODHAR)** | **(SULEKHA BEEVI C.S.)** |
| Member (Technical) | Member (Judicial) |

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सहायक पंजीकार / Asst. Registrar
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