CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-II

Date of hearing/decision: 08.06.2017

Appeal No.C/4146/2012-SM

[Arising out of the Order-in-Appeal No. CC(A)CUS 423/2012 dated 10/10/2012, passed by the Commissioner of Customs, (Appeals),New Delhi.)

Rakesh Dhamilr Appellant

Vs.

CC. New Delhi … Respondent

Appearance:

Present Ms. Vidushi Shubham, Advocate for the appellant
Present Shri G.R. Singh, AR for the respondent

Coram: Hon'ble Mr.Ashok K. Arya, (Technical Member)

FINAL ORDER No. 54250/2017

Per Ashok K. Arya :

1. The appellant Shri Rakesh Dhamilr, Proprietor of M/S. Toshnek International & Forwarders is in appeal against Order in Appeal No. 421/2012 dated 05/07/2012 passed by Commissioner (Appeals) whereunder inter alia the penalty of Rs.8 Lakh on the appellant imposed under section 114 of the Customs Act, 1962 has been confirmed.

2. Brief facts are that:

i. The appellant along with others was issued show cause notice dated 02/08/2011 by Additional Commissioner, SIIB (Special Investigation Intelligence Branch), ICD, TKD, New Delhi on the subject of attempting export of rice whereas export documents declared the goods as sanitary ware. The Revenue seized the goods under section 110 of the Customs Act.

ii. The show cause notice was adjudicated by the Additional Commissioner ICB, TKD Delhi vide Order in Original No. 179/2012 dated 20/03/2012 whereunder inter alia the appellant was imposed a penalty of Rs. 8 lakh. The appellant went in appeal before Commissione (Appeals), who sustained the penalty imposed on the appellant.

iii. Therefore, the appellant is now in appeal before the Tribunal Against the said Order in Appeal.

3. Both sides represented by Ld. Counsels, Ms Vidhushi Shubham for the appellant and Shri G.R. Singh for the Revenue have been heard.

4. During the course of hearing, Ld. Advocate for the appellant made a mention that as per Hon'ble Delhi High Court's decision in case of Mangali Impex V/s Union of India 2016 (335) ELT 605 (Tri-Del.), the officers of SIIB are not empowered or assigned the function of a 'proper officer' under Section 2 (34) of Customs Act 1962 at the time of issue of show cause notice. Therefore, the observations of

Hon'ble Supreme Court in the case of *Commissioner of Customs V/s Sayed Ali* -2011 (265) 19 (SC) are applicable for the present facts.

4.1 Ld. DR. Shri G.R. Singh for the Revenue submits that as the matter is pending for the decision with in the Hon'ble Supreme Court and decision of the Hon'ble Delhi High Court in the case of *Mangali Impex V/s Union of India* -2016 (335) ELT 605 (Del.) has been stayed the matter may be kept pending.

4.2 The Ld. Advocate appearing for the appellant, however, says that presently the matter is covered by Tribunal's decisions in the cases of *Rahul Arora V/s CCE New Delhi* (Final Order No. 52151 /2017 and *M/s Global Alliance and other s V/s CC-ICD, New Delhi* -(Final Order No. 53346-53348/ 2007.

5. The facts of the case and submissions of both sides have been carefully considered.

5.1 It is to be noted that after the pronouncement of decision of Hon'ble Delhi High Court in case of *Sayed Ali* (supra) provisions of Customs Act 1962 were amended by the Finacne Act 2011 with effect from 8/4/2011.It is also to be noted that after the pronouncement of the Hon'ble Supreme Court decision in the case of *Sayed Ali* (supra), Notification No. 44/2011-Cus (NT), dated July 6, 2011 was issued by the Ministry of Finance assigning the functions of the 'proper officer' to various officers of the Department including the officers of Customs (Preventive) for the purposes of Sections 17 and 28 of the

Customs Act. Thus with effect from July 06, 2011 Commissioner/Additional Commissioner/Jr. Commissioner/ Dy/Assistant Commissioner of Preventive Wing has been appointed as 'Proper Officer' for the purposes of Section 28 of the Customs Act. Further by Customs (Amendment and Validation) Act, 2011 dated 16/09/2011 Sub-Section 11 was inserted in Section 28 of the Customs Act stating that all persons appointed as officers of customs under Section 4 (1) of Custom Act before 06/07/2011 shall be deemed to have and always had been the proper officers for the purposes of Section 28 of the Customs Act.

5.2 It appears that the matter is covered by the Tribunal's decision in the case of *Rahul Arora V/s CCE, Delhi* i.e. Final Order No. 52851/2012 (in Customs Appeal No. 53/6 dated 11/04/2017) and by Tribunal's decision in the case of *M/s Gobal Alliance and others V/s CCE (ICD)* New Delhi i.e. Final Order No. 53346-53348 2017 dated 21/04/2017 (in customs appeal no. 5419,54197 & 54200 of 2015) The Tribunal in the case of *Global Alliance* (supra) inter alia observes as under:

> *3. From the record, it appears that the preliminary issue emerges in the present appeal is regarding the jurisdiction of the DRI Officers to issue the show cause notice under the Customs Act. The assessee has taken a stand that in terms of the Hon'ble Apex Court decision in the case of* ***Commissioner of Customs vs. Sayed Ali – 2011 (265) 19 (SC)*** *the DRI officers were not proper officers in terms of section 2(34) of the Customs Act, 1962.*
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> *4. It is also seen that after the declaration of law by the Hon'ble Supreme Court in the above mentioned case, the provisions of*

Section 28 of the Customs Act, 1962 were amended with effect from 8.4.11 vide Finance Act, 2011.

5. It is also noticed that in order to overcome the situation created by the judgment of Hon'ble Supreme Court in the case of Sayed Ali (supra), Notification No. 44/2011-Cus (NT), dated July 6, 2011 was issued by the CBEC, 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 Act. Thus, w.e.f. July 6, 2011, the 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.

6. Subsequently sub-section 11 was inserted under section 28 of the Customs (Amendment and Valuation) Act, 2011 dated 16.09.2011, assigning the functions of proper officers to various DRI officers with retrospective effect.

7. Later on, i.e. for the period subsequent to the amendment, the issue of DRI officers having the 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 a 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 8.4.11. Thus it is seen that 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 stand stayed by the Hon'ble Supreme Court reported as* ***2016 (339) ELT A49 (SC)****.*

8. However, 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. 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] take 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 stand 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 authority 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. We have taken the same view in the case of Rahul Arora, vs. CC, New Delhi Cus. Appeal No. 52329 of 2016 (Final Order No. 52851/2017 dated 11.04.2017), by following our earlier decision we remand the matter to the original adjudicating authority to first decide the issue of jurisdiction, after the availability of Supreme Court decision in the case of Mangali Impex (supra).*
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> *11. In the result, the appeal filed by the assessee is allowed by way of remand.*

5.3 By following the observations of the Tribunal in the cases of *M/s Global Alliance (supra)* and *Rahul Arora* (supra) the impugned order is set aside and matter is remanded to the original adjudicating authority to first decide the issue of jurisdiction, after the availability of Supreme Court's decision in case of Mangli Impex (supra) and thereafter the merits of the case.

6. In the result, the appeal filed by the appellant *Shri Rakesh Dhamilr* is allowed by way of remand.

[Order dictated and pronounced in the open court]

(Ashok K. Arya)

Member (Technical)

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