

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Appeal No. C/248/2009

(Arising out of the Order-in-Original No.08/CUS/CC(P)/WB/2009 dated 06.03.2009 passed by the Commissioner of Customs (Prev.), W.B. Kolkata)

Shri Bikash Saha

Applicant (s)/Appellant (s)

Vs.

Commissioner of Customs (Prev.), W.B., Kolkata

Respondent (s)

Appearance:

Ms. Debi Parbat, Advocate for the Appellant (s)

Shri S. N.Mitra, AC (AR). for the Revenue (s)

CORAM:

HON'BLE SHRI JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing / Decision : 01.05.2018

ORDER NO.FO/75980/2018

Per Justice (Dr.) Satish Chandra :

The appeal is filed against the Order-in-Original No.08/CUS/CC(P)/WB/2009 dated 06.03.2009 passed by the Commissioner of Customs (Prev.), W.B. Kolkata.

2. During the course of arguments, both the parties have agreed that in the instant cases on 24.11.2008, the notice was issued by Commissioner Preventive who is not the competent authority as per the ratio laid down by the Hon'ble Delhi High Court in the case of Mangali Impex Ltd. Vs. UOI dated 03/05/2016 [**2016 (335) E.L.T. 605 (Del.)**] .

3. From the record, it appears that identical issue has come up before the Tribunal in a number of cases including the decision of the Hon'ble Tribunal passed in connection with the show cause notices issued prior to September 16, 2011 in the batches of cases being Order No.FO/76612-76644/2017 dated August 21, 2017 passed in Customs Appeal Nos.10,11 etc. of 2009 to 70142-7059/2009 (Kunal International & Others Vs. Commissioner of Customs (Port), Kolkata & Others) and Order No.FO/76545-76574/2017 dated August 21, 2017 passed in Customs Appeal Nos. 101, 102 etc. o 2009 to 598-601/2009 (Pioneer International & Others Vs. Commr. of Customs, Central Excise & Service Tax, BBSR-I & others where it was observed that :

4. 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-Appellant had 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) 17 (S.C.)**], the DRI officers were not proper officers in terms of section 2(34) of the Customs Act, 1962.

5. It is also seen that after the declaration of law by the Hon'ble Supreme Court (Supra), the provisions of section 28 of the Customs Act, 1962 were amended with effect from 08.04.2011 vide Finance Act, 2011.

6. 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.

7. Subsequently, sub-Section (11) was inserted under Section 28 of the Customs (Amendment and Validation) Act, 2011 dated 16/09/2011,

assigning the functions of proper officers to various DRI officers with retrospective effect.

8. Later on, i.e. for the period subsequent to the amendment, the matter i.e. the DRI officers having the proper jurisdiction to issue the SCN or not had came up before the **Hon'ble Delhi High Court in the case of Mangali Impex Ltd. vs. Union of India [2016 (335) E.L.T. 605 (Del.)]**, and the High Court inter-alia, held that even the new inserted Section 28 (11) does not empower either the officers of DRI or the DGCEI to issue the SCN for the period prior to 08/04/2011. 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.

9. 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) E.L.T. 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) E.L.T. 161 (AP)]**, taking a view contrary to the one taken by the Hon'ble Delhi High Court.

10. Being conflicting decisions of various High Courts (Supra), finally the matter reached to Hon'ble Supreme Court who on 07/10/2016 granted the stay of operation of the judgment passed by the High Court of Delhi. Thus the issue is sub-judice before the Hon'ble Supreme Court **[2016-TIOL-173-SC-CUS / 2016 (339) ELT A 49 (SC)]**.

11. It may be mentioned that recently, the Hon'ble High Court of Delhi in the case of **BSNL Vs. UOI vide writ petition no. C/4438/2017 and CM No. 19387/2017** has dealt with the identical issue where the notice was also issued by DRI. The Hon'ble High Court of Delhi has considered the judgment in the case of **Mangali Impex Ltd. Vs. UOI** which is stayed by the Hon'ble Supreme Court reported as **2016 (339) E.L.T. A 49 (SC)**. Finally the Hon'ble High Court has granted liberty to the petitioner by observing that "*petitioner is permitted to review the challenge depending on the outcome of the appeals filed by the UOI in the Supreme Court against the judgment of the Court in the case of Mangali Impex Ltd.*"

12. By following the ratio laid down by the Hon'ble High Court of Delhi in the case of **BSNL (Supra)** as well as by considering totality of facts and circumstances, we set aside the impugned order and remand the matter to the original adjudicating authority to first decide the issue

of jurisdiction after the availability of Hon'ble Supreme Court decision in the case of **Mangali Impex Ltd.** and then on merits of the case but by providing an opportunity to the assessee of being heard. Till the final decision, the **status quo** will be maintained.

13. In the result, appeals filed by the assessee are allowed by way of remand".

4. In line with the above decision of the Tribunal, we remand the matter for fresh decision and all sides have agreed to it. Other issues, if any, may also be decided by the AO. Both parties have agreed to it.

5. In the result, appeal stand disposed of accordingly.

(Dictated and pronounced in the open court.)

S/d.

(Justice Dr. Satish Chandra)
President

S/d.
(V.Padmanabhan)

MEMBER (Technical)