IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No. C/1103/2009

(Arising out Order-in-Original No. 139/2009-CC(I) JNCH dated 09.09.2009 passed by the Commissioner of Customs (Imports), JNCH, Nhava Sheva)

For approval and signature:
Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Dr. Suvendu Kumar Pati, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

M/s. BILT Graphic Paper Products Ltd. — Appellant

Vs.

Commissioner of Customs, — Respondent

Appearance:

Shri T. Viswanathan, Advocate for the appellant
Shri Ahibaran, Addl.Comm. (AR) & Ms. P.V. Sekhar, Jt. Commissioner (AR) for the respondent

CORAM:
Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing : 24-01-2019
Date of decision : 24-01-2019

O R D E R No: **A/85236 / 2019**

Per: C J Mathew

The appeal lies against order-in-original no. 139/2009-CC(I) JNCH dated 9th September 2009 of Commissioner of Customs (Imports), JNCH, Nhava Sheva in which differential duty of Rs 89,83,155/-, demanded under section 28 of Customs Act, 1962, along with appropriate interest, and penalty imposed under section 114A of the Customs Act, 1962 are under challenge.

2. Learned Counsel for the appellant submits that the decision of the Hon'ble High Court of Delhi in *Mangali Impex v. Union of India [2016 (335) ELT 605 (Del)]* has held that officers of Directorate of Revenue Intelligence are not competent to issue notice under section 28 for the period covered by the retrospective grant of authority to do so.

3. Learned Authorised Representative contends that the matter is in appeal before the Hon'ble Supreme Court and that the Hon'ble High Court of Bombay in *Sunil Gupta v. Union of India [2016 (315) ELT 167 (Bom)]* has held that the officers of the said Directorate are empowered to issue these notices.

4. The constitutionality of retrospective validation of competence to issue notice was challenged in different High Courts and, in the light of the decision of the Hon'ble High Court of Delhi in *Mangali Impex v. Union of India [2016 (335) ELT 605 (Del)]*, stayed subsequently by the Hon'ble Supreme Court, and noting the diverging decisions of various High Courts the Hyderabad bench of this Tribunal, while disposing off the appeal in *Alumeco India Extrusion Ltd v. Commissioner of Central Excise, Customs & Service Tax, Hyderabad-I [2010 (249) ELT 577 (Tri.Bang.)]* has considered it appropriate not to dispose of matters in which this has been agitated. Subsequent decisions of the Tribunal have set aside impugned orders arising from such notices for remand back to the original authority till the competence or lack thereof is no longer in doubt.

5. The Hon'ble High Court of Bombay in *Sunil Gupta v. Union of India [2016 (315) ELT 167 (Bom)]* did uphold the power to do so but, after the decision of the Hon'ble High Court of Delhi in *re Mangali Impex*, has admitted a challenge to that very competence in *Sun Polytron Industries Ltd v. Union of India [2338/2016]* in customs appeal no 53/2016. The remand orders of the Tribunal are, therefore, not inconsistent to the views of the jurisdictional High Court.

6. Moreover, the decision of the Hon'ble High Court of Andhra Pradesh in *Vuppalamritha Magnetic Components Ltd v. DRI Zonal*

Unit, Chennai [2017 (345) ELT 161 (AP)], which held that

> *'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,'*

is a more compelling reason for us to reiterate our consistent stand on the fate of orders such as the one now impugned before us. The principle of finality of litigation may have the effect of sanctifying illegal proceedings if, ignoring the issue of jurisdiction, merit alone is considered before competence is decided by the Hon'ble Supreme Court. The inequity of a recovery upheld now with jurisdiction being nullified later is not particularly appealing to a judicial institution. Should it be held otherwise, there is no detriment to Revenue as the proceedings would then be reinstated.

7. Considering the criticality of competence to issue show cause notice, the ends of justice will be appropriately met if the impugned order is set aside and the matter remanded back to the adjudicating

authority to be decided afresh after the question of jurisdiction of officers of Directorate of Revenue Intelligence to issue notice for recovery of duty is settled.

(Operative part pronounced in Court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

//SR2901300131010402