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

APPEAL NOS: C/1126 to 1128/2009

[Arising out of Order-in-Original No: CC-MJ/32/2009 Adjudication.ACC dated 26th August 2009 passed by the Commissioner of Customs), ACC, Mumbai.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble 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?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
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

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Dinesh Shah
Atul Maru
Shemaroo Entertainment Pvt Ltd … ***Appellants***

versus

Commissioner of Customs (Import)
ACC, Mumbai ***…Respondent***

Appearance:

Shri T Viswanathan, Advocate for appellants

Shri Ahibaran, Additional Commissioner (AR) and Ms P Vinitha Sekhar, Joint Commissioner (AR) for respondent

CORAM:

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

Date of hearing:	**25/01/2019**
Date of decision:	**25/01/2019**

ORDER NO: A/ 85219-85221/2019

Per: C J Mathew

This appeal lies against order-in-original no. CC-MJ/32/2009 Adjudication.ACC dated 26th August 2009 of Commissioner of Customs), ACC, Mumbai which denied exemption of additional duties claimed against notification no. 6/2006-CE dated 1st March 2006 with consequent order to recover differential duty of ₹39,97,896/- and further recovery of ₹ 30,61,885/- on enhancement of assessable value that was allegedly mis-declared. Not unnaturally, the consequential detriments were also fastened on the appellant.

2. Proceedings were initiated on the basis of allegations that 'packaged software' had been wrongly declared as 'customized software' and of undervaluation by non-inclusion of the royalty paid to the foreign supplier of motion pictures.

3. In the instant case, we find that the show cause notice was issued by Additional Director General, Directorate of Revenue

Intelligence, Mumbai who, as per the *ratio* in the decision of Hon'ble High Court of Delhi in *Mangali Impex v. Union of India [2016 (335) ELT 605 Del.],* has been held to be not conferred with the authority to do so. Both sides also concur that the matter being *sub-judice* before the Hon'ble Supreme Court, should not be decided till the resolution of the dispute there.

4. We have heard both the parties at length and have gone through the material available on record. 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 off 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.*
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> *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.*
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> *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.

(Pronounced in Court)

(Dr Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

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