CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Custom Appeal No. 86128 of 2013

(Arising out of Order-in-Appeal No. 697 & 698 (Adj/Import)/2012 (JNCH)/IMP-588 & 589 dated 26.11.2012 passed by the Commissioner of Customs (Appeals), Mumbai II)

M/s. Western Refrigeration Pvt Ltd. **…..Appellant**
7B, Pannalal Silk Mill Compound,
LBS Marg, Bhandup (W),
Mumbai

Vs.

Commissioner of Customs(Import), Nhava Sheva **…..Respondent**
JNCH Post, Uran Dist.
Raigad

With

Custom Appeal No. 86129 of 2013

(Arising out of Order-in-Appeal No. 697 & 698 (Adj/Import)/2012 (JNCH)/IMP-588 & 589 dated 26.11.2012 passed by the Commissioner of Customs (Appeals), Mumbai II)

Shri Bhupinder Singh Machre **…..Appellant**
Chairman, c/o M/s. Western Refrigeration Pvt Ltd,
7B, Pannalal Silk Mill Compound,
LBS Marg, Bhandup (W),
Mumbai

Vs.

Commissioner of Customs(Import), Nhava Sheva **…..Respondent**
JNCH Post, Uran Dist.

Raigad

APPEARANCE:

Shri Lakshmi Menon, Advocate for the appellant
Shri Chatru Singh, AC (AR) for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Mr P Dinesha, Member (Judicial)

FINAL ORDER No: A/88530-88531 / 2018

DATE OF HEARING : 02.05.2018
DATE OF DECISION : 02.05.2018

PER: C J MATHEW

These appeals of M/s. Western Refrigeration Pvt Ltd and its Chairman, Shri Bhupinder Singh Machre, pertain to the eligibility for the benefit of notification no. 19/2000-Cus (NT) dated 1st March 2000, read with notification no. 26/2000-Cus dated 1st March 2000, intended for implementation of the Indo Sri Lanka Free Trade Agreement for import of 1423 nos. of 'visicoolers/ refrigerated display cabinets', valued at ₹202,12,154/-, in 23 containers against 14 bills of entry filed between 2nd June 2009 and 15th July 2009. Aggrieved by the findings which confirmed the allegation levelled against the appellant in the show cause notice, present appeals are before us. The primary allegation is that the said goods, after import by appellant, had been shipped to M/s Haikawa Industries P Ltd, Sri Lanka for reimport thereafter to circumvent the condition in notification to avail exemption. The identical classification under sub heading no. 8418 9900 of the First Schedule of Customs Tariff Act, 1975 in the shipping bills and bills of entry, cited by the adjudicating authority as the justification for this conclusion after discarding the claim of appellant that such inclusion in the shipping documents was patently nothing but an error as the description therein, *viz.*, ‘raw material for manufacture of ‘visicooler’ being apt should suffice as proof of production having been undertaken in Sri Lanka. The claim of appellant that the imported goods were assembled in full and was ready to use, save for the attachment of doors, was not accepted as it was found to be at variance with the statements that the goods, upon re-import, had been subject to the same process as the material procured domestically for indigenous production. It was, therefore, held that rule 7(d) of the Customs Tariff (Determination of Origin of Goods under the Free Trade Agreement between The Democratic Socialistic Republic of Sri Lanka and The Republic of India), Rules, 2000 disentitles them from eligibility for exemption.

2. Learned Counsel for appellant has raised the issue of want of jurisdiction for officers of Directorate of Revenue Intelligence to issue show cause notice which, under section 28 of Customs Act, 1962, lies within the exclusive purview of ‘proper officer’. The Hon'ble High Court of Delhi had, in *Mangali Impex v. Union of India [2016 (335) ELT 605 (Del)]*, invalidated show cause notices issued by officers of

Directorate of Revenue Intelligence. However, Learned Authorised Representative contends that the judgement of Hon'ble High Court of Delhi has since been stayed by the Hon'ble Supreme Court pending disposal of appeal of Revenue. It was also argued that the Hon'ble High Court of Bombay had, in *Sunil Gupta v. Union of India [2015 (315) ELT 167 (Bom)],* upheld the competence of officers of Directorate of Revenue Intelligence to initiate proceedings under Customs Act, 1962 and that this challenge to jurisdiction had neither been included in the original grounds of appeal nor raised before the lower authorities. The decision of Hon'ble High Court of Bombay in *Dinkar Y Ghanekar v. Commissioner of Customs (Import) [2017-TIOL-2658-HC-MUM-CUS]* was also cited.

3. There is no doubt that operation of the judgment of Hon'ble High Court of Delhi in *re Mangali Impex* has been stayed by the Hon'ble Supreme Court pending disposal of the appeal. Nevertheless, the pendency of appeal against the said decision of Hon'ble High Court of Delhi is not sufficient to disallow the plea of jurisdiction raised before us.

4. The decision of Hon'ble High Court of Bombay in *re Sunil Gupta,* undoubtedly, dismissed the petition of the assessee challenging such jurisdiction arising from amendment to section 28(11) of Customs Act, 1962, effected by Customs (Amendment and

Validation) Act, 2011 on 20th September 2011 to overcome the fallout of the decision of the Hon'ble Supreme Court in *Commissioner of Customs v. Sayed Ali [2011 (265) ELT 17 (SC)]*. However as can been seen from the decision in *re Dinkar Y Ghanekar,* which referred to admission of the same question of competence raised in customs appeal no. 53 of 2016 *(Laxmi Trading Co.),* in order dated 21st August 2017 as well as the order in writ petition no. 2338 of 2016 filed by *Sun Polytron Industries Ltd & Ors v. Union of India & Ors,* the conclusiveness, claimed by Learned Authorised Representative, is not absolute. Faced, as we are, by these crosscurrents in judicial consideration and by the lack of a finality therefrom with the potential of detriment to the 'non-state' stakeholder, we cannot but avoid reflecting on the irreparable consequences of relying upon the decision in *re Sunil Gupta,* not considered as absolute by the Hon'ble High Court itself, should the final outcome in *re Mangali Impex* decide against the authority of officers of Directorate of Revenue Intelligence to invoke section 28 of Customs Act, 1962.

5. In this context, 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)]*, though against the assessee therein, assumes significance. Justifying its disinclination to re-open the matter settled earlier in that dispute against the assessee therein even though a contrary principle was enunciated by the

Hon'ble Supreme Court subsequently, the consequence of such reopening was elaborated thus

> *'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.'*

with permanent detriment arising from premature conclusion.

6. A disposition of the issue on merit against the applicant without touching upon the issue of jurisdiction which, if ultimately decided

against Revenue, would saddle them with a detriment that should never have been. On the other hand, postponement of decision on merit is not to the detriment of Revenue. Owing to this distinction of consequences, the Tribunal has been deferring the determination of such disputes, on merit, by remanding the matter back to the original authority for awaiting a finality on jurisdiction. We believe that this would best serve the ends of justice.

7. In view of the above factual matrix combined with precarious tilt of balance that may otherwise occur, we set aside the impugned order and remand the matter back to the original authority to decide upon its jurisdiction to adjudicate the show cause notice. Appeal is disposed off in the above terms.

(Operative part pronounced in Court)

(C J Mathew)
Member (Technical)

(P Dinesha)
Member (Judicial)

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