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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CUSAA 16/2018**

Date of Decision: 23rd May, 2018

COMMISSIONER OF CUSTOMS ..... Appellant
Through: Mr. Harpreet Singh, Sr. Standing Counsel for Customs

versus

ARIF KHICHI ..... Respondent
Through: Mr. Kunal Prakash, Advocate

CUSAA 17/2018

COMMISSIONER OF CUSTOMS ..... Appellant
Through: Mr. Harpreet Singh, Sr. Standing Counsel for Customs

versus

NORTH INDIA ALLIANCE ..... Respondent
Through: Mr. Kunal Prakash, Advocate

CUSAA 18/2018

COMMISSIONER OF CUSTOMS ..... Appellant
Through: Mr. Harpreet Singh, Sr. Standing Counsel for Customs

versus

LAL MOHAMMAD ..... Respondent
Through: Mr. Kunal Prakash, Advocate

CUSAA 19/2018

COMMISSIONER OF CUSTOMS ..... Appellant

Through: Mr. Harpreet Singh, Sr. Standing Counsel for Customs

versus

ARICENT RUBBER ..... Respondent

Through: Mr. Kunal Prakash, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

In spite of second call, none have appeared for the respondents.

2. By order dated 16th April, 2018, the following common substantial question of law was framed:-

> "Whether the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') was justified and correct in law in passing an order of remand to the original adjudicating authority to first decide the issue of jurisdiction, after decision of the Supreme court in Civil Appeal preferred against the decision of Delhi High court in ***Mangali Impex Limited v. Union of India***, 2016 (335) ELT 605 (Del.)?"

3. In view of the limited controversy involved we are not required to narrate facts and issues in detail. We would only state necessary facts to decide the afore-stated common question of law. The undisputed position is that that show cause notices were issued by the Additional Director General, Directorate of Revenue Intelligence ('DRI' for short) to the respondents and thereupon original adjudication orders were passed by the Office of the Principal Commissioner of Customs (Import), Inland Container Depot,

Tughlakabad, New Delhi. These original adjudication orders were challenged and set aside by the Customs, Excise and Service Tax Appellate Tribunal ('Tribunal' for short) in view of its earlier decision in Final order No.53941-53942/2017, ***Doaba Stud & Agriculture Farm versus Commissioner of Customs (I&G)*** decided on 12th June, 2017. The decision of the Tribunal in ***Doaba Stud & Agriculture Farm*** (supra) reads as under:-

> "2. During the course of arguments, the appellant's counsel has raised the preliminary plea that the show cause notice in the instant case was issued by the Directorate of Revenue Intelligence (DRI). The Hon'ble High Court of Delhi in the case of Mangali lmpex Ltd. Vs. UOl dated 03.05.2016 has observed that the DRI is not competent to issue the show cause notices. Hence, the request is being made to set aside the present proceedings where the notice was issued by the DRI.
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> 3. On the other hand, learned Counsel for the Department has justified the notice issued by DRI and made a request to decide the matter on merit.
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> 4. We have heard both the parties at length and gone through the material available on record.
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> 5. 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.

6. 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.

7. 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.

8. Subsequently, sub-Section (11) was inserted under Section 28 of the Customs (Amendment and Validation) Act, 2011 dated 14/09/2011, assigning the functions of proper officers to various DRI officers with retrospective effect.

9. 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.

10. 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.

11. 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)].

12. 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."
>
> 13. 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.
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> 14. In the result, appeals filed by the assessee are allowed by way of remand".

4. In order to appreciate the controversy, we may note that the Delhi High court in the case of ***Mangali Impex Limited versus Union of India***, 2016 (335) ELT 605 (Del) has held that DRI was not competent to issue show cause notice and hence the order-in-original passed thereafter would be void and illegal. Reference was made to the legislative amendments post the decision of the Supreme Court in ***Commissioner of Customs versus Sayed Ali***, 2011 (265) ELT 19 (SC), wherein it was held that DRI were not proper officers under Section 2(34) of the Customs Act, 1962. Post the judgment in ***Sayed Ali*** (supra), notification no. 44/2011- CUS (NT) dated 6th July, 2011 was issued by the CBEC, assigning functions to various officers

including Additional Director General, DRI for the purposes of Section 28 of the Customs Act. It is the case of the appellant that therefore from 6th July, 2011, officers of DRI were empowered to issue notice under Section 28 of the Customs Act. Thereafter, sub-Section (11) was inserted under Section 28 of the Customs Act vide the Customs (Amendment and Validation) Act, 2011 with effect from 16th September, 2011, assigning the function of proper officers to various DRI officers with retrospective effect. A division bench of this High Court in the case of ***Mangali Impex*** (supra) has held that the newly inserted sub-Section 11 to Section 28 of the Customs Act would not empower the officers of DRI or the DGCEI to issue show cause notice for the period prior to 8th April, 2011 i.e. period prior to the date on which the Finance Act, 2011 had received assent of the President.

5. However, we may note that the decision and ratio in ***Mangali Impex*** (supra) has been stayed by the Supreme Court vide order dated 7th October, 2016, (reported as ***Union of India versus Mangali Impex Limited***, 2016 (339) ELT A 49 (SC).)

6. Bombay High Court in ***Sunil Gupta versus Union of India***, 2015 (315) ELT 167 (Bom) and High Court for the State of Telangana and the State of Andhra Pradesh in ***Vuppalamritha Magnetic Components Ltd. versus DRI (Zonal Unit) Chennai***, 2017 (345) ELT 161 (AP) have taken a contrary view to the one expressed by the Delhi High Court in ***Mangali Impex*** (supra).

7. In view of the aforesaid position, the question whether or not officers of the DRI could have issued show cause notice and its effect

on the final order is an issue which has to be examined and considered by the Tribunal. The Tribunal, instead of deciding the said issue on merits, has passed an order setting aside the order-in-original to await the decision of the Supreme Court in the appeal preferred in the case of ***Mangali Impex*** (supra). In other words, without adjudication and decision on the legal position, the orders-in-original have been quashed and set aside and restored to the authorities to pass fresh orders-in-original. We do not think the said procedure is correct and proper. Tribunal should decide the issue on merits. Once an order-in-original is set aside, it would mean that the entire adjudication proceedings may have to be undergone again. This would be true even if ratio in ***Mangali Impex*** (supra) is not accepted. This we think would cause harassment to the assessee as well as inconvenience to the department.

8. We have, in the aforesaid circumstances, passed several orders, including order dated 20^{th} November, 2017 in CUSAA 57/2017, ***Vipul Overseas Pvt. Ltd. versus Commissioner of Customs & Ors***., with consent of the parties allowing the appeals and remanding the case to the Tribunal for fresh decision and option has been given to the Tribunal to decide the issue on merit including the question of jurisdiction of the officer of DRI to issue show cause notice without being influenced by the decision of the Delhi High Court in the ***Mangali Impex*** (supra) or to await the judgment of the Supreme Court.

9. At this stage, while the order was being dictated, Mr. Kunal Prakash, Advocate has entered appearance on behalf of the respondent and his appearance is accordingly directed to be noted. He did not address us on merits.

10. The question of law is accordingly answered in favour of the Revenue and against the assessee with an order of the remand to the Tribunal. We clarify that we have not made any comments on merits.

11. To cut short delay, parties are directed to appear before the Tribunal on 23rd July, 2018.

12. No costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

MAY 23, 2018
MR