IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.07.2022

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

C.M.A.Nos.1520 and 2790 of 2018
and
C.M.A.Nos.169, 171, 1367, 1369, 1503, 1541, 2071 and 2072 of 2019
and
C.M.P.Nos.12082 of 2018 & 4315, 4316 and 3826 of 2019

The Commissioner of Customs,
Chennai - II Commissionerate,
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001. .. Appellant in C.M.A.Nos.1520 and 2790 of 2018 and 169, 171, 1369, 1503, 2071 and 2072 of 2019

The Principal Commissioner of Customs,
(Airport & Air Cargo),
Air Cargo Complex,
Meenmbakkam, Chennai - 600 027.
.. Appellant in CMA.Nos.1367 & 1541 of 2019

Versus

M/s.Madras Fertilizer Ltd.,
Manali, Chennai - 600 068.
.. Respondent in CMA.No.1520 of 2018

M/s.Raja Metals Corporation,
239 New No.495, Mint Street,
Chennai - 600 003. .. Respondent in CMA.No.2790 of 2018

M/s. Otel International,
Commissioner of Customs,
153 Eldams Road,
Chennai - 600 018.
.. Respondent in CMA.Nos.169 & 171 of 2019

Aircel Cellular Ltd.,
Spencer Plaza, 5th Floor,
769, Anna Salai, Chennai - 600 002,
Tamilnadu. .. Respondent in CMA.No.1367 of 2019

Shri.Sauber Sadique .. Respondent in CMA.No.1369 of 2019

Shri.Manish Kumar Jain,
Proprietor, M/s. Parmar Exports,
210, Mint Street,
Chennai - 600 003, Tamil Nadu.
.. Respondent in CMA.No.1503 of 2019

Aircel Ltd., Spencer Plaza,
5th Floor, 769, Anna Salai,
Chennai - 600 002. Tamil Nadu.
.. Respondent in CMA.No.1541 of 2019

1. Shri Bawarlal Jain,
   Proprietor of M/s. Laxmi Exports,
   No.26, Rasappa Chetty Street,
   Chennai - 600 003.

2. Shri Sunder Singh,
   Former Proprietor of M/s.Laxmi Exports,
   No.26, Rasappa Chetty Street,
   Chennai - 600 003.

.. Respondents in CMA.Nos.2071 and 2072 of 2019

C.M.A.No.1520 of 2018:- Appeal filed under Section 130 of Customs Act, 1962 against the order dated 05.09.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.41970 of 2017.

C.M.A.No.2790 of 2018:- Appeal filed under Section 130 of Customs Act, 1962 against the order dated 17.08.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.41726 of 2017.

C.M.A.Nos.169 and 171 of 2019:- Appeals filed under Section 130 of Customs Act, 1962 against the common order dated 16.06.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order Nos.41031 and 41032 of 2017.

C.M.A.Nos.1367 and 1541 of 2019:- Appeals filed under Section 130 of Customs Act, 1962 against the common order dated 28.02.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order Nos.40527 and 40528 of 2017.

C.M.A.No.1369 of 2019:- Appeal filed under Section 130 of Customs Act, 1962 against the order dated 11.10.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42802 of 2017.

C.M.A.No.1503 of 2019:- Appeal filed under Section 130 of Customs Act, 1962 against the order dated 24.10.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42475 of 2017.

C.M.A.Nos.2071 and 2072 of 2019:- Appeals filed under Section 130 of Customs Act, 1962 against the common order dated 24.08.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order Nos.41787 and 41788 of 2017.

For Appellant	:	Mr.A.P.Srinivas in all CMAs
For Respondent	:	Mr.Joseph Prabakar in CMA.No.1520 of 2018 Mr.Satish Sundar in CMA.No.2790 of 2018

Mr.K.Govi Ganesan
in CMA.Nos.169 and 171 of 2019
Mr. Allwin Godwin
in CMA.Nos.1367 and 1541 of 2019
Mr.S.Jaikumar
in CMA.Nos.1503, 2071 and 2072 of 2019

COMMON JUDGMENT

(Judgment of the court was delivered by **R. MAHADEVAN, J.**)

Since the issues involved in all the Civil Miscellaneous Appeals are one and the same, they are taken up together for hearing and are disposed of by this common judgment.

2.All these Civil Miscellaneous Appeals are filed by the appellant / Revenue against the separate orders dated 16.06.2017, 17.08.2017, 24.08.2017, 05.09.2017, 11.10.2017, 24.10.2017 and 28.02.2018 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in Final Order Nos. 40527, 40528, 41031, 41032, 41726, 41787, 41788, 41970, 42475 and 42802 of 2017.

3. The common substantial questions of law raised in all these appeals:-

"*(i) When jurisdictional High Court Judgments are available upholding the competency of the DRI to issue show cause notice under Section 28 of the Customs Act 1962, whether the CESTAT is correct in remanding the appeal.*

(ii) Whether Tribunal is empowered to remand the case without deciding the issues raised therein on the ground that jurisdiction of the officer to issue show cause notice is under dispute."

4.The respondent(s) herein approached the CESTAT, by filing appeals as against the orders passed by the Appellate authority viz., Commissioner of Customs (Seaport-Import), Chennai, questioning the jurisdiction of the officials of the DRI, who have not been designated as proper officers under the Customs Act, 1962 during the relevant point of time, to issue show cause notices. According to the respondent(s), the show cause notices have been issued by the officials of DRI, who lack jurisdiction to do so. Therefore, they raised preliminary objection regarding the legality of the proceedings issued by such authority.

5.The CESTAT, by the orders impugned herein, allowed the appeals filed by the assessee and remanded the matters to the original authority. The relevant portion of the same is usefully extracted below:

" During the course of arguments, the importer's counsel has raised the preliminary plea that the show-cause notice in these cases was issued by the DRI. The Hon'ble High Court of Delhi in the case of ***Mangali Impex vs. UOI dated 03.05.2016*** *has observed that the officers of DRI is not competent as proper officers to initiate demand action under Customs Act, 1962. Hence, the request is being made to set*

aside the present proceedings where the notice was issued by the DRI.

On the other hand, Authorised Representative for the Department has justified the order passed by Commissioner of Customs and made a request to decide the matter on merit.

We have heard both the parties and gone through the material available on record.

From the record, it appears that the preliminary issue which emerges in the present appeals is regarding the jurisdiction of the DRI officers to issue notice under the Customs Act. The assessee-Respondent 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 (SC)****, the DRI officers were not proper officers in terms of Section 2 (34) of the Customs Act, 1962.*

It is also seen that after the declaration of law by the Honourable 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.

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 (surpa),*** *notification No.4/2011-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.*

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.

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 vs. Union of India (2016 335 ELT 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 or adjudicate for the period prior to 8.4.11. 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.

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) ELT 167 (Bom)*** *as also of the Hon'ble High Court of Telangana and Andhra Pradesh in the case of* ***Vuppalamritha Magnetic Components Limited vs. DRI (Zonal Unit), Chennai (2017 (345) ELT 161 AP)*** *taking a view contrary to the one taken by the Hon'ble Delhi High Court.*

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 subjudice before the Hon'ble Supreme Court ***(2016-TIOL-173-SC-CUS/2016 (339) ELT A 49 (SC).***

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 vs. UOI*** *which is stayed by the Hon'ble Supreme Court reported as* ***2016 (339) ELT 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 Limited."***

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*** *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.*

In the result, both the appeals are allowed by way of remand."

Aggrieved over the same, the Revenue is before this court with these Civil Miscellaneous Appeals.

6.Heard both sides and perused the materials placed before this court.

7.Earlier, the issues involved herein have been considered and decided by a Co-ordinate Bench of this Court, in the case of ***The Commissioner of Customs v. M/s. Box Corrugators and Offset Printers, [2020 (5) TMI 475(Mds)],*** wherein, it was held as under:

*"2.Since the issue relating to jurisdiction of DRI officials to issue show cause notice to the Assessee in such cases is said to be pending before the Hon'ble Supreme Court in the case of **Mangali Impex vs. Union of India**, in which the Hon'ble Supreme Court has granted stay order, as reported in **2016(335) ELT 605 (Del.)]**, and the said Special Leave Petition is stated to be pending before the Hon'ble Supreme Court; that status having been checked up by us on the official website of the Hon'ble Supreme Court today and further, in view of the fact that the learned Tribunal has clearly protected the interest of both the Revenue as well as the Assessee by directing the Assessing Authority to keep the matter pending and maintain status quo till the Hon'ble Supreme Court decides the appeal of the Revenue in the case of **Mangali Impex**, filed against the decision of the Delhi High Court, we do not find any reason to interfere with the decision of the Tribunal, as in our opinion, no question of law arises for consideration in this*

appeal. Accordingly, we dispose of the appeal, with no order as to costs."

8.However, in the subsequent decision in the case of ***Commissioner of Customs, Tuticorin v. Sanket Praful Tolia***, decided on 04.06.2021 in CMA.(MD)Nos.433 to 437 & 439 to 455 of 2021, wherein, the orders impugned are identical to that of the present cases, it was held by this court as follows:

"5. The Revenue is before us contending that the Tribunal ought not to have remanded the matter to the adjudicating Authority and it should have taken a decision on the merits of the matter. The Revenue would further contend that Section 28(11) of the Act envisages that all persons appointed as officers of Customs under sub-section (1) of Section 4 of the Act before the sixth day of July, 2011 shall be deemed to have and always had the power of assessment under Section 17 of the Act and shall be deemed to have been and always had been the proper officers for the purpose of the said Section. In our view, this question cannot be decided at this juncture as the same is now pending before the Hon'ble Supreme Court. However, we do not agree with the order passed by the Tribunal in setting aside the order passed by the Appellate Authority and remanding the matter to the Adjudicating Authority.

6. In the case of the Commissioner of Customs, Tuticorin v. The Customs, Excise & Service Tax Appellate Tribunal and others [CMA.(MD)Nos.375 to 379 of 2018] [2019 (31) G.S.T.L.33 (Mad.)], a Division Bench of this Court, to which one of us (T.S.Sivagnanam, J.) was a party, had an occasion to test the correctness of an identical order passed by the Tribunal and by a common Judgment, dated 4-10-2019, set aside the order of the Tribunal and restored the appeals to the file of the Tribunal to be kept pending and await the decision of the Hon'ble Supreme Court. It was also made clear that the appellant - Department shall not initiate any coercive action against the respondents/assessees. The operative portion of the *said Judgment reads as follows:*

> *"3. In these appeals, the Revenue has raised the following substantial questions of law,*
>
> *(i) as to whether the Tribunal was right in allowing the appeals on the ground that the jurisdiction issue has to be decided by the Hon'ble Supreme Court in the appeal filed against the decision of the High Court of Delhi, in the case of* ***Mangali Impex vs. Union of India*** *reported in 2016(335)E.L.T.605(Del.);*
>
> *(ii) The next question is as to whether the Tribunal was right in allowing the appeals and simultaneously directing status quo to be maintained till a final decision is arrived at.*
>
> *4. Identical orders were tested for its correctness in the Principal Bench to which one of us (T.S.S., J,) is a party. After elaborate arguments, the Court held that the Tribunal was not justified in allowing the appeal and consequently directing status quo till the final decision of the Hon'ble Supreme Court and the appropriate procedure that should have been adopted is to keep the appeals pending and await the decision of the Hon'ble Supreme Court in the appeals filed against the decision in Mangali Impex. Therefore, we are inclined to take similar view in these appeals as well. Accordingly, the appeals filed by the Revenue are allowed and the order passed by the Tribunal is set aside and the appeals are restored to file of the Tribunal and the Tribunal shall keep the appeals pending and await the decision of the Hon'ble Supreme Court. It is made clear that the Department shall not initiate any coercive action against the respondents assessees and await final decision in the appeals, which have been restored to file of the Tribunal. No costs."*

7. We find that the above decision can be fully made applicable to the facts of the present case as the orders impugned in these appeals are identical to that of the orders impugned in CMA.(MD) Nos.375 to 379 of 2018."

9.Following the latest decision in ***Sanket Praful Tolia*'s** case (supra), which is squarely covered by the issues involved herein, all these Civil Miscellaneous Appeals are allowed by setting aside the orders impugned herein and the matters are remanded to the Tribunal with a direction to keep the same pending and await the decision of the Hon'ble Supreme Court in the appeals filed against the decision in ***Mangali Impex***. However, it is made clear that the appellants shall not initiate any coercive action against the respondent(s)/assessee(s) and await the final decision in the appeals, which have been restored to the file of the Tribunal. Consequently, the substantial questions of law are left open. No costs. Connected Miscellaneous Petitions are closed.

[**R.M.D.,J.**] [**M.S.Q.,J.**]
08.07.2022

Index : Yes/no
Internet:Yes/no
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R. MAHADEVAN, J.
and
MOHAMMED SHAFFIQ, J.

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To

1. The Customs, Excise and Service Tax Appellate Tribunal,
   South Zonal Bench, Chennai.

2. The Commissioner of Customs,
   Chennai - II Commissionerate,
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   No.60, Rajaji Salai,
   Chennai - 600 001.

CMA No. 1520 of 2018 etc. batch

08.07.2022