IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2022

CORAM :

THE HON'BLE MR.JUSTICE R.MAHADEVAN
AND
THE HON'BLE MR.JUSTICE J.SATHYA NARAYANA PRASAD

C.M.A.NOS.1628, 1632, 1629, 1631, 1630 & 2050 OF 2018
AND
C.M.A.NOS.1968, 1970, 2019, 2025, 2027, 2020, 2021, 2022, 2048, 2049, 2076 & 2080 OF 2019
AND
C.M.P.NOS.12932, 12931, 12927, 12929, 12930 & 12928 OF 2018
AND C.M.P.NOS.6980 & 7708 OF 2019

THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CHENNAI VII COMMISSIONERATE,
AIR CARGO COMPLEX,
MEENAMBAKKAM, CHENNAI - 600 027.
... Appellant in CMA.Nos.1628, 1632, 1629, 1631 & 1630 of 2018

THE COMMISSIONER OF CUSTOMS,
CHENNAI-II COMMISSIONERATE,
CUSTOMS HOUSE,
NO.60, RAJAJI SALAI, CHENNAI - 600 001.
... Appellant in CMA Nos.2050 of 2018, 1968, 1970, 2048, 2049, 2076 and 2080 of 2019

THE PRINCIPAL COMMISSIONER OF CUSTOMS,
CHENNAI AIRPORT,
AIR CARGO COMPLEX,
MEENAMBAKKAM, CHENNAI - 600 027
... Appellant in CMA Nos.2019, 2025, 2027, 2020, 2021 & 2022 of 2019

Vs.

M/s.ITI LTD.,
DOORAVANI NAGAR,
BANGALORE - 560 008.
... RESPONDENT in CMA No.1628 of 2018

ASHEESH CHATTERJEE
MOSER BAER INDIA LIMITED (MBIL)
23, SHAH INDUSTRIAL ESTATE 2ND FLOOR,
OFF: VEERA DESAI,
ANDHERI WEST, MUMBAI-400 053.
... RESPONDENT in CMA Nos.1632 of 2018, 1631 of 2018

M/s.BHARAT INDUSTRIAL ENTERPRISES
BP-109, PITAMPURA, DELHI - 110034.
NEW DELHI.
... RESPONDENT in CMA No.1629 of 2018

M/s.SUNSTAR OVERSEAS LTD.,
24-B ALIPUR ROAD OPP.OLD SECTT,
CIVIL LINES, NEW DELHI 110 054.
... RESPONDENT in CMA No.1630 of 2018

M/s.UPLUS BATTERIES PVT. LTD.,
NO.5, 3RD FLOOR, LAKSHMI COMPLEX,
10TH CROSS ROAD, RMV EXTENSION,
BANGALORE, KARNATAKA 560 080.
... RESPONDENT in CMA No.2050 of 2018

M/s.STICKWELL I PVT. LTD.,
NO.4, CHOWRINGHEE LANE, BLOCK 1 AND 2,
DIAMOND CHAMBERS, SUITE NO.51,
KOLKATA - 700 016, WEST BENGAL.
... RESPONDENT in CMA No.1968 of 2019

M/s.SAJAL IMPEX PVT. LTD.,
NO.4, CHOWRINGHEE LANE, BLOCK 1 AND 2,
DIAMOND CHAMBERS, SUITE NO.51,
KOLKATA - 700 016, WEST BENGAL.
... RESPONDENT in CMA No.1970 of 2019

SMT.SUJATA K.MEHTA
A-I, 54, AVILLION GREENFIELDS,
MAHAKALI CAVER ROAD, ANDHERI EAST,
MUMBAI - 400 093, MAHARASTRA.
... RESPONDENT in CMA No.2019 of 2019

SHRI K.N.PAREKH,
A-504, POONAM SAGAR, POONAM NAGAR,
M.C.ROAD, ANDHERI EAST,
MUMBAI - 400 093, MAHARASTRA.
... RESPONDENT in CMA No.2025 of 2019

SMT.NEEPA SHAH
PROP. M/S. NEEPAN EXPORTS,
NEW NO.66, OLD NO.15, CASA MAJOR ROAD,
2ND FLOOR, EGMORE,
CHENNAI – 600 008.
... RESPONDENT in CMA No.2027 of 2019

SMT.SUJATA K.MEHTA
A-I, 54, AVILLION GREENFIELDS,
MAHAKALI CAVER ROAD, ANDHERI EAST,
MUMBAI – 400 093, MAHARASTRA.
... RESPONDENT in CMA No.2020 of 2019

SHRI K.N.PAREKH,
A.504, POONAM SAGAR, POONAM NAGAR,
M.C.ROAD, ANDHERI EAST,
MUMBAI – 400 093, MAHARASTRA.
... RESPONDENT in CMA No.2021 of 2019

SMT.NEEPA SHAH,
PROP. M/S.NEEPAN EXPORTS,
NEW.NO.66, OLD.NO.15,
CASA MAJOR ROAD, 2ND FLOOR,
EGMORE, CHENNAI – 600 008.
... RESPONDENT in CMA No.2022 of 2019

R.SUNDAR
PROPRIETOR M/s.DNR SHIPPING SERVICES,
NO.23, LINGHICHETTY STREET,
CHENNAI 600 001.
... RESPONDENT in CMA Nos.2048 of 2019 & 2049 of 2019

SHRI N.C.ALEXANDER
NO.8, SRINIVASAN STREET,
CHETPET, CHENNAI-600 031.
... RESPONDENT in CMA No.2076 of 2019

M/S.EM PEE BEE INTERNATIONAL,
T.D.NO.117, ANNA WHOLE SALE FRUIT MARKET,
KOYEMBEDU, CHENNAI-600 092.
... RESPONDENT in CMA No.2080 of 2019

Prayer in C.M.A.No.1628 of 2018:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the common order dated 14.07.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.41240 of 2017.

Prayer in C.M.A.No.1632 of 2018:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 09.11.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42904 of 2017.

Prayer in C.M.A.No.1629 of 2018:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 14.09.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42088 of 2017.

Prayer in C.M.A.No.1631 of 2018:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 09.11.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42903 of 2017.

Prayer in C.M.A.No.1630 of 2018:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 14.09.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42089 of 2017.

Prayer in C.M.A.No.2050 of 2018:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 25.09.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42476 of 2017.

Prayer in C.M.A.No.1968 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 02.11.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42585 of 2017.

Prayer in C.M.A.No.1970 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 02.11.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42586 of 2017.

Prayer in C.M.A.No.2019 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 15.03.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.40825 of 2018.

Prayer in C.M.A.No.2025 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 15.03.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.40824 of 2018.

Prayer in C.M.A.No.2027 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 15.03.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.40827 of 2018.

Prayer in C.M.A.No.2020 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 15.03.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.40826 of 2018.

Prayer in C.M.A.No.2021 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 15.03.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.40823 of 2018.

Prayer in C.M.A.No.2022 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 15.03.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.40828 of 2018.

Prayer in C.M.A.No.2048 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 03.10.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42254 of 2017.

Prayer in C.M.A.No.2049 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 03.10.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.42255 of 2017.

Prayer in C.M.A.No.2076 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 24.08.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.41786 of 2017.

Prayer in C.M.A.No.2080 of 2019:-

Civil Miscellaneous Appeal has been filed under Section 130 of Customs Act, 1962 against the order dated 24.08.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.41785 of 2017.

For Appellant in all CMAs	:	Mr.A.P.Srinivas Senior Standing Counsel
For Respondent in CMA.Nos.2048 & 2049 of 2019	:	Mr.S.Venkatachalam

COMMON JUDGMENT

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

The appellant has come up with these Civil Miscellaneous Appeals against the orders passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), in and by which, the appeals filed by the respondent(s)/assessee(s) were allowed by way of remand, after following the decision of the Delhi High Court in the case of BSNL v. Union of India in WP.No.C/4438/2017 and CM No.19387/2017. For better understanding, the relevant passage of the order dated 01.02.2018 passed by the CESTAT, impugned in the first case viz., CMA.No.1628 of 2018, is extracted below:

> "5. 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.

6. 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.

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 (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.

8. 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.

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 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.

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) 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.

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 subjudice 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 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."

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 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.

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

2.Now, the common issues involved in all the appeals are as follows:

"(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."

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

4.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."

5.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."

6.Following the latest decision in Sanket Praful Tolia's case (supra), which are squarely covered by the issue 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 appellant 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.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

gba/msr

To

The Customs,
Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai - 600 006.

+6ccs to Mr.A.P.Srinivas, Advocate, S.R.Nos.29645, 29646, 29652, 29651, 29650, 29653

+1cc to Mr.S.Venkatachalam, Advocate, S.R.No.28774

C.M.A.Nos.1628, 1632, 1629, 1631,
1630 & 2050 of 2018
and
C.M.A.Nos.1968, 1970, 2019, 2025, 2027,
2020, 2021, 2022, 2048, 2049,
2076 & 2080 of 2019
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C.M.P.Nos.12932, 12931, 12927, 12929, 12930
& 12928 of 2018
and C.M.P.Nos.6980 & 7708 of 2019

PA(CO)
RLP(24/05/2022)