
(2016) 10 AP CK 0035

In the Andhra Pradesh High Court

Case No : Writ Petition No. 25594 of 2016

Vuppalamritha Magnetic Components Limited

APPELLANT

Vs

Directorate of Revenue, Intelligence

RESPONDENT

Date of Decision : 26-10-2016

Acts Referred:

Citation : (2017) 1 AndhLD 395 : (2017) 345 ELT 161

Hon'ble Judges : Mr. V. Ramasubramanian and Mrs. Anis, JJ.

Bench : Division Bench

Advocate : Sri Pooserala Vikram, Advocate, for the Petitioner; Mrs P. Sarada, K.G. Krishna Murthy, Senior Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. V. Ramasubramanian, J. - The petitioner, who suffered an Order-in-Original, which was also confirmed by Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (CESTAT) and later by this Court, has come up with the present writ petition, challenging the very initiation of proceedings with the issuance of a show cause notice.

2. Heard Sri P. Vikram, learned counsel for the petitioner and Sri K.G. Krishna Murthy, learned senior counsel representing the learned standing counsel for the respondent.

3. The petitioner was issued with a show cause notice dated 30-07-2009, calling upon them to show cause as to why the blank C.Ds imported by them under three bills of entry dated 07-01-2009, classifying them under Ch.Sh. No. 85238020 should not be classified under Ch.Sh. No. 85234090 and the benefit of exemption claimed under Notification No.6/2016-CE, dated 01-03-2016 should not be denied and for various consequential actions such as provisional assessment, imposition of duty and penalty etc., should not be taken.

4. The petitioner submitted its reply after which an Order-in- Original dated 17-02-2012 was passed by the Commissioner of Customs, confirming the

proposals. Aggrieved by the said order, the petitioner filed an appeal before CESTAT, but the same was dismissed on 28-01-2015, for non-compliance with the conditional order for pre-deposit. As against the orders dated 03-09-2014 and 27-10-2014 passed by the CESTAT, refusing to grant a total waiver of pre-deposit condition, but granting only an extension of time for making the deposit, the petitioner filed further appeals before this Court. Those appeals were dismissed by this Court by an order dated 10-03-2016. The petitioner then filed Special Leave Petitions in S.L.P.(Civil) Nos.15781 to 15786 of 2016. But those SLPs were also dismissed. The result is that the show cause notice 30-07-2009 has already worked itself out and the Order-in-Original passed by the Commissioner confirming the proposals has already attained finality.

5. But it appears that in a batch of writ petitions filed during the years 2013, 2014 and 2015 before the Delhi High Court, a Division Bench of the Delhi High Court passed a judgment dated 03- 05-2016 in *Mangali Impex Ltd., v. Union of India* holding that prior to 08-04-2011, it was only a "proper officer" who has been assigned specific functions, could undertake the task of non-levy, short-levy or erroneous refund and that if any officer other than the proper officer had undertaken these tasks, they would not be valid. Therefore, taking advantage of the said decision of the Division Bench of the Delhi High Court, the petitioner has now come up with the present writ petition, challenging the very show cause notice issued by the Additional Director General, on the short ground that he was not a proper officer.

6. It is seen from para-1 of the decision of the Division Bench of the Delhi High Court in *Mangali Impex Ltd.*, that the question that arose before the High Court was about the constitutional validity of Section 28 (11) of the Customs Act, 1962 inserted by the Customs (Amendment and Validation) Act, 2011 with effect from 16-09-2011. Under this amended provision, all persons appointed as Customs Officers under Section 4 (1) of the Act prior to 6th July, 2011 shall be deemed to have and always had the power of assessment under Section 17 and shall be deemed to have been and always had been the proper officers.

7. It is relevant to note at this juncture that the 2011 Amendment itself was necessitated by a decision of the Supreme Court in *Commissioner of Customs v. Sayed Ali* (2011 (3) SCC 537) It was held in the said decision that unless a person has been specifically assigned the functions of a proper officer, he could not invoke the powers conferred upon proper officers. It was this decision of the Supreme Court that led to the amendment to Section 28, by Finance Act, 2011. On the question as to whether Section 28 (11) inserted by the Validation Act, 2011 was constitutionally valid or not, the Delhi High Court held as follows:

"Conclusion on the effect and validity of Section 28 (11)

70.1 The net result of the above discussion is that the Department cannot seek to rely upon Section 28(11) of the Act as authorising the officers of the Customs, DRI, the DGCEI etc. to exercise powers in relation to non- levy, short-levy or

erroneous refund for a period prior to 8th April 2011 if, in fact, there was no proper assigning of the functions of reassessment or assessment in favour of such officers who issued such SCNs since they were not 'proper officers' for the purposes of Section 2(34) of the Act and further because Explanation 2 to Section 28 as presently enacted makes it explicit that such non-levy, short-levy or erroneous refund prior to 8th April 2011 would continue to be governed only by Section 28 as it stood prior to that date and not the newly re-cast Section 28 of the Act.

70.2 Section 28 (11) interpreted in the above terms would not suffer the vice of unconstitutionality. Else, it would grant wide powers of assessment and enforcement to a wide range of officers, not limited to customs officers, without any limits as to territorial and subject matter jurisdiction and in such event the provision would be vulnerable to being declared unconstitutional."

8. Therefore, the sum and substance of the case of the petitioner is that the whole proceedings initiated by the Additional Director General were vitiated and are liable to be set aside, despite the fact that the show cause notice has already culminated in an Order-in-Original and the same has also been confirmed up to the Supreme Court. It is argued that once the very initiation of proceedings is without jurisdiction, the consequent events would also be without jurisdiction. Once the foundation goes, the entire edifice has to come down.

9. We have carefully considered the above submissions.

10. At the outset, we are of the considered view that the writ petition is not maintainable. The show cause notice dated 30-07- 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.

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 TIOL 1257 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 (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 08-04- 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.

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.

In view of the above, the writ petition is devoid of merits. Hence, it is dismissed. There will be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the writ petition shall stand closed.