

Microsoft Licensing Gp vs Commissioner Of Customs Import New ... on 7 April, 2025

Author: Prathiba M. Singh

Bench: Prathiba M. Singh

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision:

+ CUSAA 62/2025

M/S MICROSOFT LICENSING GP

.....Appell

Through: Ms. Nisha Bagchi, Sr. Ad. with Ms

Pooja Sharma & Mr. Tarun Kumar

Sobti, Advs.

versus

COMMISSIONER OF CUSTOMS IMPORT

NEW DELHI

.....Respond

Through: Mr. Gibran Naushad, Senior Standi

Counsel with Mr. Harsh Singhal,

Suraj Shekhar Singh, Advocates.

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AND

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CUSAA 63/2025

M/S MICROSOFT LICENSING GP

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CORAM:

JUSTICE PRATHIBA M. SINGH

JUSTICE RAJNEESH KUMAR GUPTA

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through hybrid mode. CM APPL. 20446/2025 (for exemption) in CUSAA 62/2025 CM APPL. 20592/2025 (for exemption) in CUSAA 63/2025

2. Allowed, subject to all just exceptions. Applications are disposed of.

CM APPL. 20445/2025 (for delay) in CUSAA 62/2025 CM APPL. 20591/2025 (for delay) in CUSAA 63/2025

3. These two applications are filed by the Appellant - M/S Microsoft Licensing GP seeking condonation of delay in filing the appeals.
4. In view of the unique facts of these cases, delay of 2626 days and 1873 days in filing the appeals being CUSAA 62/2025 and CUSAA 63/2025 respectively, is condoned. Applications are disposed of.
5. These are two appeals filed by the Appellant - M/s Microsoft Licensing GP seeking restoration of the two appeals filed by the Customs Department being Customs Appeal No.C/52942/2015 in CUSAA 62/2025 and Customs Appeal No.C/52578/2015 in CUSAA 63/2025 respectively before the Customs, Excise & Service Tax Appellate Tribunal (hereinafter, 'CESTAT'), New Delhi.
6. Both these matters have a long drawn history. Certain Show Cause Notices were issued to various parties in respect of import of software kits from the U.S.A.
7. The noticees to such Show Cause Notices were various Original Equipment Manufacturers ('OEMs') and other importers as well. The said Show Cause Notice bearing DRI F. No.23/13/2009-DZU/HCL dated 03rd March, 2011 in CUSAA 62/2025 and Show Cause Notice bearing DRI F.No. 23/13/2009-DZU/WIPRO/7039 dated 03rd March, 2011 in CUSAA 63/2025 were issued by the Directorate of Revenue Intelligence (hereinafter, DRI), officials.
8. The said Show Cause Notices were adjudicated by the Adjudicating Authority and Order-in-Original dated 24th April, 2015 was passed in Show Cause Notice DRI F. No. 23/13/2009-DZU/HCL and Order-in-Original dated 01st April, 2015 was passed in Show Cause Notice DRI F.No.23/13/2009- DZU/WIPRO/7039.
9. The Department had challenged the above stated Orders-in-Original before the Customs Excise & Service Tax Appellate Tribunal (hereinafter, CESTAT) being Customs Appeal No. C/52942/2015 in CUSAA 62/2025 and Customs Appeal No.C/52578/2015 in CUSAA 63/2025 respectively (hereinafter, the subject Appeals).
10. In the meantime, the decision in Mangli Impex Limited vs. Union of India 2016 (335) ELT 605 (Del.) was rendered by this Court, wherein it was held that officers of DRI were not proper officers under the Customs Act, 1962.
11. This legal issue was then pending for adjudication before the Supreme Court. In the meantime, the CESTAT, in Customs Appeal No.C/52942/2015 on 30th June, 2017 and in Customs Appeal No.C/52578/2015 on 03rd July, 2017, set aside the entire decision in the subject Appeals in view of the decision in Mangli Impex Limited (supra).
12. The matter was then remanded to the Adjudicating Authority by CESTAT vide the above stated orders for deciding the issue of jurisdiction and to adjudicate the same on merits. Similar orders also came to be passed in a large number of other appeals filed by Microsoft and other OEMs replicators etc., as well.

13. Subsequently, against the orders of remand passed by the CESTAT, the Customs Department came in appeal in CUSAA 38/2018 titled Commissioner of Customs (General) v. WIPRO Ltd. and CUSAA 31/2018 titled Commissioner of Customs (General) v. HCL Infosystems Ltd., wherein the Co-ordinate Benches of this Court, vide Orders dated 2nd April, 2018 and 17th July, 2018, respectively have observed as under:-

Order dated 2nd April 2018 in CUSAA 38/2018 "With the consent of the counsel for the parties, the following substantial question of law is 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 Mangli Impex Limited v. Union of India 2016 (335) ELT 605 (Del.)?"

Counsel for the respondent states that the impugned order may be quashed and the matter may be remanded to the Tribunal for fresh decision without expressing any opinion on merits. Counsel for the parties rely on orders dated 20th November, 2017 passed in CUSAA 57/2017, Vipul Overseas Private Limited versus Commissioner of Customs and Others and CUSAA 58/2017, Shri. Surender Garg versus Commissioner of Customs and Others and order dated 13th December, 2017 passed in CUSAA 67/2017, Forech India Private Limited versus Commissioner of Customs Inland Container Depot, Tughlakabad, New Delhi.

Accordingly, the impugned order challenged in these appeals, remanding the matter to the adjudicating authority to await the judgement of the Supreme Court in the appeal preferred against the decision in Mangli Impex Limited v. Union of India 2016 (335) ELT 605 (Del) is set aside.

The appeals preferred before the Tribunal are restored to their original position. The Tribunal would decide the appeals on merits including the question of jurisdiction of the officer of the Directorate of Revenue Intelligence who had issued show cause notices. The said issue would be examined by the Tribunal without being influenced by the decision of the Delhi High Court in the case of Mangli Impex Limited (supra). We clarify that we have not expressed any opinion on merits of the appeals or on the procedure that the Tribunal should adopt and follow.

Question of law is accordingly answered. The appeals are disposed of in the aforesaid terms. There would be no order as to costs."

Order dated 17th July 2018 in CUSAA 31/2018 In these appeal the Revenue's grievance is that the Customs, Excise and Service Tax Appellate Tribunal (hereafter "CESTAT") remanded the issue for reconsideration by the concerned Commissioner in view of the previous judgment of this Court in Mangli Impex Limited v. Union of India 2016 (35 ELT 605 (Del.). This was on account of a dichotomy of judicial opinion with respect to the competence and jurisdiction under the amended Section 28 of the Custom Act, 1962 - one view holding that no jurisdiction laid with the Directorate of Revenue Intelligence (hereafter "DRI") and the other view endorsed in a subsequent judgment of

this Court in Vipul Overseas Pvt. Ltd. & Ors. V. Commissioner of Custom & Ors. (Cus. A.A. No. 57 & 58 of 2017 dated 20.11.2017). Given that all the issues are pending for consideration before the Supreme Court, this Court in another order [Forech India Pvt. Ltd. Commissioner of Customs, Inland Container Depot, Tughlakabad, New Delhi (Cus. A.A. No. 67/2017 dated 13.12.2017)] disposed of the appeals in the following term :

'3. It was recorded in the said order that the respondent-Revenue had no objection if the remand order passed by the Tribunal was set aside with a request to the Tribunal to decide the issue on merit without taking into consideration the decision of the Delhi High Court in Mangli Impex Limited Vs. Union of India 2016 (335) ELT 605 (Del.) which has been stayed by the Supreme Court.

4. For the reasons set out and slated in the said order, we answer the question of law in favour of the appellant with a direction to the Tribunal to decide the appeal on merits including the question of imposition of penalty and the rights of Directorate of Revenue Intelligence who issued show cause notices

5. The said adjudication would be without being influenced by the judgment in the case of Mangli Impex Limited (supra).

6. In other words, the Tribunal would independently apply its mind on the question of jurisdiction."

Having considered the submission of the parties and also the materials on record, this Court is of the opinion that an identical approach is necessary in these cases. Accordingly, following the order in Forech India (supra), these appeals are allowed partly and the CESTAT would independently apply its mind to the question of jurisdiction and also decide the appeal on merits - including the aspect of imposition of penalty if any.

The appeals are allowed in part in the above terms. Pending application also stands disposed of."

14. A similar order was also passed by this Court in CUSAA 170/2022 titled Commissioner of Customs vs. Microsoft Corporation Pvt. Ltd. on 9th December, 2022.

15. As a result of the said orders passed by this Court, HCL Infosystem's appeal got restored before the CESTAT and similar appeals for restoration were also to be sought by the Customs Department in respect of the other matters. However, the Customs Department did not prefer any appeals.

16. The prayer in the present appeals, therefore, is that the two appeals filed by the Customs Department being Customs Appeal No.C/52942/2015 in CUSAA 62/2025 and Customs Appeal No.C/52578/2015 in CUSAA 63/2025, respectively, be restored before the CESTAT so that the same can be heard and adjudicated comprehensively.

17. Ms. Bagchi, Id. Senior Counsel for the Appellant submits that the Appellant has been compelled to file these appeals because the Customs Department did not get their appeals restored before the CESTAT.

18. As per Id. Sr. Counsel, in the order dated 09th December, 2022, passed by this Court in CUSAA 170/2022 titled Commissioner of Customs v. Microsoft Corporation Pvt. Ltd. it was recorded that the Department would prefer appeals and get the said matters also restored. The said stand of the Department is set out below:

"5. The learned counsel for the respondent points out that the show cause notice in the present case also included other noticees. Mr. Harpreet Singh, learned standing counsel appearing for the appellant states that the department shall ascertain the status of cases against other noticees and move appropriate appeals to seek similar orders in their cases as well."

19. Mr. Naushad, Id. Senior Standing Counsel appearing for the Respondent submits that now the issue of jurisdiction of DRI officials stands decided by the Supreme Court in Review Petition No. 400/2021 titled Commissioner of Customs v. M/s Canon India Private Limited (hereinafter "Canon - II").

20. Heard the Id. Counsels for the parties. The question as to jurisdiction of DRI officials now stands resolved in the Canon II decision of the Supreme Court. The relevant portions of the said decision are set out below:-

"168. In view of the aforesaid discussion, we conclude that: [...]

(iv) The Delhi High Court in Mangali Impex (supra) observed that Section 28(11) could not be said to have cured the defect pointed out in Sayed Ali (supra) as the possibility of chaos and confusion would continue to subsist despite the introduction of the said section with retrospective effect. In view of this, the High Court declined to give retrospective operation to Section 28(11) for the period prior to 08.04.2011 by harmoniously construing it with Explanation 2 to Section 28 of the Act, 1962. We are of the considered view that the decision in Mangali Impex (supra) failed to take into account the policy being followed by the Customs department since 1999 which provides for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued. It could be said that this policy provides a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee under Section 28 of the Act, 1962. Further, the High Court could not have applied the doctrine of harmonious construction to harmonise Section 28(11) with Explanation 2 because Section 28(11) and Explanation 2 operate in two distinct fields and no inherent contradiction can be said to exist between the two.

Therefore, we set aside the decision in Mangali Impex (supra) and approve the view taken by the High Court of Bombay in the case of Sunil Gupta (supra).

(v) Section 97 of the Finance Act, 2022 which, inter-alia, retrospectively validated all show cause notices issued under Section 28 of the Act, 1962 cannot be said to be unconstitutional. It cannot be said that Section 97 fails to cure the defect pointed out in Canon India (supra) nor is it manifestly arbitrary, disproportionate and overbroad, for the reasons recorded in the foregoing parts of this judgment. We clarify that the findings in respect of the vires of the Finance Act, 2022 is confined only to the questions raised in the petition seeking review of the judgment in Canon India (supra). The challenge to the Finance Act, 2022 on grounds other than those dealt with herein, if any, are kept open.

(vi) Subject to the observations made in this judgment, the officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and other similarly situated officers are proper officers for the purposes of Section 28 and are competent to issue show cause notice thereunder. Therefore, any challenge made to the maintainability of such show cause notices issued by this particular class of officers, on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums, shall now be dealt with in the following manner:

a. Where the show cause notices issued under Section 28 of the Act, 1962 have been challenged before the High Courts directly by way of a writ petition, the respective High Court shall dispose of such writ petitions in accordance with the observations made in this judgment and restore such notices for adjudication by the proper officer under Section 28.

[...]

169. In view of the aforesaid, we allow the Review Petition No. 400/2021 titled Commissioner of Customs v. M/s Canon India Pvt. Ltd. and the connected Review Petition Nos. 401/2021, 402/2021 and 403/2021 insofar as the issue of jurisdiction of the proper officer to issue show cause notice under Section 28 is concerned. As discussed, the findings of this Court in Canon India (supra) in respect of the show cause notices having been issued beyond the limitation period remain undisturbed."

21. Since the said issue now no longer remains res integra, CESTAT would have to decide the appeals of the Customs Department on merits, in terms of the orders passed in similar matters. Accordingly, Customs Appeal No. C/52942/2015 in CUSAA 62/2025 and Customs Appeal No. C/52578/2015 in CUSAA 63/2025 respectively, are restored before the CESTAT.

22. CESTAT shall now proceed to adjudicate these appeals along with all the connected appeals in a comprehensive manner. The appeals are allowed in these terms.

23. The appeals are disposed of. Pending application(s), if any, also stand disposed of.

PRATHIBA M. SINGH JUDGE RAJNEESH KUMAR GUPTA JUDGE APRIL 7, 2025/nd/ss