

Customs Law: DRI officers do not constitute 'proper officer'; show cause notices issued by DRI being without authority of law, set aside

Canon India Private Limited v. Commissioner of Customs¹

In a significant judgement, the Supreme Court of India held that officers of the Directorate of Revenue Intelligence ('DRI') have no authority under the Customs law to initiate proceedings (issue show cause notice) to recover duty under Section 28(4) of the Customs Act, 1962 ('the Act'). Consequently, in the absence of necessary authority, the entire proceedings initiated by the DRI (by issuing show cause notices) were held to be invalid and set aside. The Supreme Court has in the context of the facts before it, yet again explained the law on limitation.

Facts of the case (in brief):

- The Appellant is an importer of a consignment of cameras. On March 15, 2012, at the time of import, the Appellant filed a bill of entry and a technical write-up on goods describing the specifications of cameras, which was verified by the Inspector and the Superintendent of Customs.
- The Appellant requested the Customs authorities for a first check of the goods by the Deputy Commissioner of Customs, which was eventually undertaken on March 24, 2012. The Customs authorities examined the goods and, based on the review of the write-up of goods, allowed clearance of the goods, with exemption from payment of

Customs duty in terms of Notification No. 15/2012 dated March 17, 2012.

- On August 19, 2014, a show cause notice was issued under Section 28(4) of the Act, alleging that Customs authorities were induced to clear the consignment of cameras by wilful misstatement and suppression of facts about the cameras.
- It is pertinent to note that the show cause notice came to be issued by the Additional Director General, DRI, while the decision to clear the goods was originally taken by Deputy Commissioner of Customs, Appraisal Group, Delhi Air Cargo.

The question of law examined by the Supreme Court:

- Whether the DRI can issue show cause notice under Section 28(4) of the Act, for duties not levied or short levied for goods which were previously assessed and allowed for clearance for import by the Deputy Commissioner of Customs.

The decision of the Supreme Court:

- The Apex Court, after meticulous examination and interpretation of the provisions under Section 28(4) of the Act held that Section 28(4) of the Act, confers the power to recover duty not paid, part paid or erroneously refunded by reason of collusion or any wilful mis-statement or

¹ Civil Appeal 1827/2018 dated March 9, 2021



suppression of facts only to and on “the proper officer” but officers of the DRI are not “the proper officer” for the recovery of duty. The relevant extract of Section 28(4) reads as:

“Section 28 (4) Where any duty has not been levied or not paid or has been short levied or short-paid or erroneously refunded, or interest payable has not been paid, part paid or erroneously refunded, by reason of, -

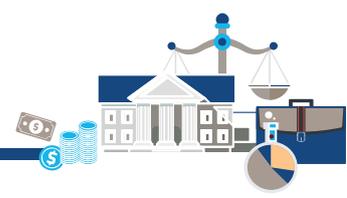
(a),

the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid”

- The crucial aspects of the judgement in concluding that the DRI had no authority under law to issue a show cause notice are:
 - The nature of power to recover duty not paid or short paid after goods have been assessed and cleared for import is broadly a power to review the earlier assessment. Such power is not inherent in any authority and it has been conferred by Section 28 specifically on “the proper officer” who in the first instance, assessed and cleared the goods. It was noted that there is no fiscal statute where power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than an officer of the rank of the officer who initially took the decision to assess the goods.
 - The power to issue show cause notice has been conferred to “the proper officer” and not to any proper officer. If the Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word “any” instead of the word “the”. In this context, it was noted that “the” is the definite article because it points out and refers to a particular person or thing, and not any other person or thing.
 - Two officers, who belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his power of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department. If such a situation is allowed, it would result into an anarchical and unruly operation of statute.
 - The nature of the power conferred by Section 28 (4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. Therefore, the Section must be

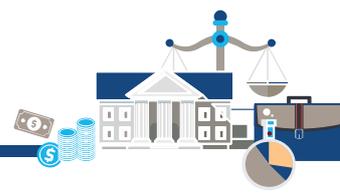
construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment.

- The Supreme Court held that the Notification No. 40/2012 dated May 2, 2012 (“Notification No. 40”), whereby, a Commissioner of Customs, Deputy Commissioner or Assistant Commissioner of Customs, have been entrusted with the functions under Section 28 is ill-founded as it has been issued by Central Board of Excise and Customs (‘CBEC’) who had no authority in terms of Section 2(34) of the Act. It was noted that firstly, Section 2(34) of the Act does not confer any powers on any authority to entrust any functions to officers. Further, it is only the Central Government which has the power and that too under Section 6 of the Act to entrust DRI (or any competent officers) with the functions of a customs officer – in the present case ‘ the proper officer’.
- In **CC v. Sayed Ali [2011 (265) E.L.T. 17 (S.C.)]** the Supreme Court had held that a show cause notice issued by an officer who is not a “proper officer” in terms of Section 2(34) of the Act is illegal and without the authority of law. A customs officer competent to issue notice under Section 28 of the Act, is the one who has been assigned the specific functions of assessment and re-assessment of duty, in the jurisdictional area where the import concerned has been affected. In the present decision the Supreme Court drew support from the **Sayed Ali case**.
- On the issue of (extended) limitation having being invoked by the DRI in this case, it was held that the extended period of limitation is not invocable in the present facts since there is, in fact, no suppression of fact or wil-full misstatement of facts by the appellants. It was observed that the appellants made adequate and correct disclosure of description of goods in their technical write-up furnished at the time of filing the bill of entry, and which was cleared by the Customs authorities, after first check.



Dhruva Comments:

- The Supreme Court declared the law that officers of DRI have no authority under the Customs law to initiate proceedings to recover duty under Section 28(4) of the Act. The judgement records that Notification No. 40 (issued under Section 2(34) of the Act), which entrusts *inter alia* all officers above the rank of Deputy Commissioner of customs, Assistant Commissioner of customs and central excise, with the functions under Section 28 is ill-founded as it has been issued by CBEC who did not have this authority. It further records that Section 2(34) of the Act does not confer any powers on any authority to entrust any functions to officers but, it is only the Central Government which has the power and that too under Section 6 of the Act to entrust DRI (or any competent officers) with the functions of a customs officer – in the present case ‘ the proper officer’. To clarify, as the DRI officers were not entrusted with the power of “the proper officer” by the Central Government under Section 6 of the Act, the demand of duty (by DRI in the present case) was held to be without authority of law. An un-addressed issue - open to debate – is whether all notifications under Section 2(34) of the Act, even concerning officers that are not part of the DRI formation, are invalid on the touchstone of this judgement; as a result all demands may be said to be infructuous.
 - The judgment did not delve into connected aspects:
 - The Supreme Court did not refer to and examine scope of sub-Section (11) of Section 28 of the Act introduced on September 16, 2011, through the Customs (Amendment and Validation) Act, 2011. The objective of the amendment was to overcome the judgment of the Hon’ble Supreme Court in **Sayed Ali Case** and retrospectively validate, *inter alia* the actions of DRI, including issuance of show cause notice. The relevant extract of sub-Section (11) of Section 28 is as under: “(11) *Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-Section (1) of Section 4 before the 6th day of 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 for the purposes of this Section.” This provision, *prima facie*, suggests that officers in*
- the DRI were entrusted with authority and function of a “proper officer”.
- In the context of this Amendment Act of 2011, the High Court of Delhi, in **Mangali Impex Ltd. and Ors. v. UOI [2016 (335) E.L.T. 605 (Del.)]**, noted that Section 28 has been completely re-cast with effect from April 8, 2011 (the date when the Finance Act, 2011 was notified in the Gazette). It was held that Section 28(11) of the Act which authorises the officers of the Customs, DRI, the DGCEI etc. to exercise powers in relation to non-levy, short-levy or erroneous refund cannot be relied upon for the period prior to April 8, 2011 (the date when the Finance Act, 2011 was notified in the Gazette). It was held that the effect of Section 28(11) is to treat all officers of the Customs to be “proper officers” only for the purposes of new Section 28 of the Act and not the earlier Section 28 of the Act. Operation of the decision in **Mangali Impex case** has been stayed by the Supreme Court from September 2, 2016, and the final view awaited.
 - Reference to Notification No.44/2011-Customs (N.T.) dated July 6, 2011, which too was issued under Section 2(34) of the Act to entrust DRI officers with the functions of the proper officer (for assessment) is absent in this judgment. On the same rationale that Notification No. 40 is declared “ill-founded” Notification No.44/2011-Customs (N.T.) dated July 06, 2011 may be construed as invalid.
- On the one hand, the Supreme Court in this judgment (at paragraph 19) records that Notification No. 40 issued under Section 2(34) is ill-founded as Section 2(34) of the Act does not confer any powers on any authority to entrust any functions to officers. It is only the Central Government which has the power under Section 6 of the Act to entrust DRI (or any competent officers) with the functions of a customs officer. On the other hand, the Supreme Court in Sayed Ali case (a judgement of a two judge bench) at paragraph 14, recorded that, customs officer who has been assigned the specific functions of assessment and re-assessment of duty by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act, is competent to issue notice under Section 28 of the Act, on a conjoint reading of Sections 2(34) and 28 of the Act.



- An impact of this judgement concerns validity of the proceedings initiated by DRI for recovery of duty under Section 28AAA of the Act, which section enables “the proper officer” to recover the duty relating to the utilization of instrument / scrip (for example SEIS scrip issued under the Foreign Trade Policy) obtained by an assessee. The proper officer for the purpose of Section 28AAA is also notified in terms of Section 2(34) of the Act under Notification No. 40, as amended by Notification No. 76/2012-Cus. (N.T.), dated August 27, 2012. Since the Supreme Court held that Notification No. 40 is ill-founded, proceedings by DRI officers under Section 28AAA of the Act are consequently thrown open to challenge.

- Provisions and proceedings under the relatively nascent GST law, which too embrace the term “the proper officer”, may require a closer examination in light of this judgement in **Canon India**. It is “the proper officer” under Section 73 or 74 of the Central Goods and Services Tax Act, 2017 (‘CGST Act’) and State GST Acts that shall demand and recover taxes. In all these proceedings, it will have to be ascertained whether the officer / authority that has instituted these proceedings is “the proper officer” duly notified and entrusted with these functions by the competent authority.





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