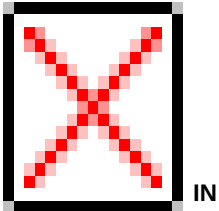


The saga of 'THE' Customs Officer

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the last couple of weeks, there has been ample discussion on the historic judgement pronounced by the Hon'ble Supreme Court of India (SC) in the case of **M/s Canon India Pvt. Ltd.** - [2021-TIOL-123-SC-CUS-LB](#)

. The SC held the entire proceedings initiated by the Additional Director General of the Directorate of Revenue Intelligence (DRI) as invalid on the ground that it was without any authority of law.

Brief facts of the case are below:

Brief Facts:

- Canon India Private Limited (Canon India) and four other assesseees had filed a Bill of Entry (BOE) for import of cameras along with a technical write-up on goods. Basis such write-up and on examination of goods, the Deputy Commissioner of Customs, Appraisal Group, Delhi Air Cargo allowed clearance of goods with an exemption from Customs duty under respective Notification.
- Subsequently, Canon India received a Show Cause Notice (SCN) issued u/s 28(4) of the Customs Act, 1962 (the Act) by the Additional Director General, DRI. The DRI alleged willful suppression and misstatement on Canon India with regards to the nature of imported goods and demanded duty on the same.
- Later, the CESTAT upheld the consequential confiscation of goods, demand of interest and imposition of penalty on the grounds that the imported goods did not qualify for exemption under the respective Notification. Thus, Canon India and others filed an appeal before the SC against the order of CESTAT.

Held

- While deciding, the SC held that Section 28(4) of the Act confers power to recover duty not paid, part paid or erroneously refunded by reason of collusion or any willful misstatement or suppression of facts only to the officer who had passed the original order for assessment or his successor.
- The SC deliberated on the fact that Section 28 uses the term '**the** proper officer' and not 'any proper officer'. Thus, basis the use of article 'the' the intention of the law is to give authority of reassessment to the same officer (who assessed the BOE in the first place) and not any officer.
- The SC held that for a DRI officer to be the proper officer, he should be appointed as a Custom officer under the Act and entrusted with the functions of proper officer as given in Section 6 of the Act.
- Moreover, the SC opined that the Notification no. 40/2012-Customs, dated 2 May 2012 which confers relevant powers to the DRI is ill-founded. This was held on the premise that the Notification was issued in exercise of power u/s 2(34) of the Act.

Section 2(34) is a definition section and does not grant any power to confer powers of Customs officer.

- The SC made references to various Notifications, precedents and provisions of law to arrive at the conclusion that DRI officers cannot be said to be 'the proper officer' and, therefore, do not have any authority to issue SCN in the present case.

Relevant legal provisions and judicial precedents

The relevant legal provisions are tabulated below:

Section	Particulars
Section 2	Defines proper officer as: 'proper officer in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs'.
Section 4	Requires the board to appoint proper officers
Section 6	Central Government may entrust functions of Customs officers on certain other officers of Customs under this Act
Section 17	Lays down rule regarding assessment of duty
Section 28	Lays down procedure of recovery of duties not levied or not paid or short levied or short paid or erroneously refunded

The issue at hand is not new; it has been mulled over in the past. There have been key judicial precedents, Notifications, Instructions etc. issued on the same.

To understand the timeline of events, we have briefly highlighted the key milestones below:

1. In the year 2011, the landmark ruling of the Apex Court in the case of **Commissioner of Customs v. Sayed Ali**, - [2011-TIOL-20-SC-CUS](#) was pronounced. In the said judgement, the SC quashed the demands and SCN issued by the Commissioner (Preventive) and held that such officer is not the 'proper officer' to issue the SCN. The SC opined that only a customs officer who has been assigned the function of assessment and reassessment of duty in a particular jurisdictional area by the Board or Commissioner of Custom is competent to issue a SCN in this regard.
2. This judgement made a far-reaching impact and forced the Government to amend the Customs Act, 1962 (the Act) retrospectively vide Finance Act, 2011. Vide such amendment, Section 28 was amended appointing various DRI officers as proper officers with retrospective effect, thus, overriding the judgement of Sayed Ali.
3. As an aftermath of Sayed Ali, the CBIC also issued a prospective Notification No. 44/2011-Customs, dated 6 July 2011 which empowered the non-jurisdictional officers (including DRI officers) to carry out the functions of 'the proper officer' as prescribed by Section 28 of the Act.

4. Subsequently, another Amendment Act i.e. Customs (Amendment and Validation) Act, 2011 (Validation Act) was passed by the Parliament for validating the SCNs issued prior to the 6 July 2011 by the DRI officers.

5. In 2012, Notification no. 40/2012-Customs dated, 2 May 2012 was issued by virtue of which, the CBIC assigned the officers of the rank of Asstt. Commissioners and above and officers of DRI, the functions of the proper officer u/s 28 of the Act.

6. In the case of **Sunil Gupta vs UOI** - [2014-TIOL-1949-HC-MUM-CUS](#)

, the Constitutional validity of Section 28(11) was upheld. Conversely, in the case of **Mangali Impex Ltd vs UOI** - [2016-TIOL-877-HC-DEL-CUS](#)

, it was held by the Court that even post amendment, the Act does not truly empower the DRI officers to issue SCN and adjudicate for the period prior to 2011. (This order has been stayed. Refer- [2016-TIOL-173-SC-Cus](#)

. It would be interesting to note the final verdict of this judgement post the Canon India case.

Author's view

The Canon judgement shall prove to be beneficial for the assesses. This is also apparent from the recent instruction issued by CBIC viz. Instruction no. 04/2021-Customs, dated 17 March 2021 wherein it has been clarified that until further directions, all SCNs issued by DRI may be kept pending. Further, it has been directed that all future SCNs are to be issued by the respective jurisdictional Commissionerates. Moreover, the assesseees can use this case law as a fresh ground of appeal in all pending litigations where the SCN was issued by DRI officers. Thus, the case law will prove to be a blessing for taxpayers.

Nonetheless, there are certain questions which lingers in one's mind on perusal of the ruling. One of them being that Section 17 of the Act has been amended to include self-assessment by the importer except for cases specified u/s 85 of the Act. Since, in most cases, now the importer himself assesses his Bill of Entry (BOE), there is no assessment order issued by any Customs officer.

Secondly, with the 'Turant Customs' initiative, the Custom department rolled out the faceless regime of assessment of BOE in India. Post this initiative, the Faceless Assessment Group will be formed wherein officers would carry out assessments for random bill of entry assigned to them by the Customs Automated Systems. In the era of faceless assessments where the officer from Bangalore can assess the BOE from Mumbai and vice-versa, how will this condition of 'proper officer who, in the first instance, assessed and cleared the goods has the power to re-assess' [quoting the Hon'ble SC] would be met is a question that remains unanswered.

One cannot ignore the fact that this tussle could spread its roots to the GST law as well where multiple powers are conferred upon 'proper officer' and investigations are carried out by Directorate General of Goods and Service Tax Intelligence.

The judgement truly is godsend for the taxpayers; however, the grounds for a review petition seem robust. It goes without saying that the revenue would appeal against this judgement considering the quantum of tax revenue involved. Moreover, the likelihood of such review petition being decided in favor of the revenue seem reasonably good.

Irrespective of the fallout of the review petition, a retrospective amendment (in all probabilities) can be anticipated; and a petition questioning the constitutionality of such amendment is certain. Thus, it is safe to say that this is not the end of road for the jurisdiction of DRI officers. There is a long battle ahead!

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