

DRI 'cannoned'! Union Cabinet alone can do the rescue work!

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By Shailendra Kumar, Founder Editor

ON 25th March the Union Finance Minister rose in the Lower House, to move a few amendments to the Finance Bill 2021. Unlike most fiscally-keen eyeballs I was making a good use of *pranayama*

-related tips profusely shared by Baba Ramdev, and held my breath for one specific amendment in the Customs Act, 1962! My lonesome expectation was to see the legislative festoonery to 'cannon' the Canon India decision of the Supreme Court given on 9th March ([2021-TIOL-123-SC-CUS-LB](#))

! But, the edifice of my elevated hope collapsed to 'death' as soon as I realised that the Union of India has committed a tactical blue, oof! - *Aik sunahara avasar sarkar ne kho di!*

Why was this providential opportunity forfeited, perhaps voluntarily? Did the clock straitjacket the North Block from easing the choking points for the senior functionary of the Directorate of Revenue Intelligence (DRI) which has been rendered **not 'the proper officer'** under the Customs Act? Was the radioactive implication of this judgement brought to the notice of the Union Finance Minister in time? Or, the Government deliberately deferred the decision because it is more comfortable with the Ordinance route

? Or, the North Block is keener to completely recast some of the disputed Sub-sections of the Sec 28 to overcome the spooky legal points raised through several decisions, not Canon alone? With the Supreme Court shifting the goalpost **a la** the Sayed Ali case ([2011-TIOL-20-SC-CUS](#)) and now the Canon India

, one realistic presumption could be that the CBIC is perhaps pondering not only to recast Section 28 provisions but to also to break the present mould of DRI and design a new dice? Or, the Government is contemplating a Review Petition to be filed as soon as the CJI retires this month?

Let me examine these likely propositions? In the Syed Ali case, the Apex Court had held that the Collector of Customs (Preventive), another 'department' like the DRI officers, **not being 'the proper officer'**

within the meaning of Sec 2(34), was not competent to issue show cause notice for re-assessment u/s 28 of the Act. A goalpost was set and the CBIC had swung into a flurry of actions and issued Notification Nos [44/2011-Cus \(NT\)](#) and [40/2012-Cus\(NT\)](#) to overcome the legislative fetters by inserting Sub-section 11 in Sec 28. The Bombay High Court did not find any legal infirmities in Sec 28(11) in the case of Sunil Gupta Vs Uoi ([2014-TIOL-1949-HC-MUM-CUS](#)). However, the Delhi HC in the case of Mangali Impex ([2016-TIOL-877-HC-DEL-CUS](#))

partly scuppered the amendment! Albeit the HC validated the notices issued by the DRI w.e.f. April 8, 2011 but also took a harsh view that the notices issued by the DRI prior to April 8 were not valid. The Revenue obviously rushed to the Apex Court where it was stayed ([2016-TIOL-173-SC-Cus](#)) but the 'cannonade' did not cease!

Here comes the Canon India case before the Larger Bench. Aha! Reference to Mangali Impex is conspicuously missing! Why? When the expression 'the proper officer' sits in the nuclei of the 'storm', it is puzzling to find it amiss.

When the counsel for both the parties were aware of its pendency, it was logical for them to bring it to the attention of the Bench. As the officers of the court, they were ethically bound to assist and plead the attention of the Bench to the pending case of Mangali Impex which should have been tagged with the Canon India case.

It is true that in Mangali Impex, imports in dispute were prior to Finance Act 2011, getting enacted on April 8, 2011 and in the Canon case, imports were post the insertion of Sec 28(11). However, an organically wholesome interpretation would have been possible if both the matters could have been heard together!

Anyway, I am personally pretty sure that the counsel must have muscled in the reference of Sec 28(11) amidst their arguments as it seemingly appears to be coming out of the observation of the Bench which noted that the Section 2(34) does not confer any powers on any authority to entrust any functions to officers. It merely defines a proper officer. And since Sec 28(11) is organically integrated to Sec 2(34) which gives no powers to the CBIC to issue the notification **a la**

Canon case, the Bench turned its crosshairs to Sec 6 which is resorted to for assigning functions of Customs officer by the Central

Government, **not the CBIC**. In the past Section 6 has been instrumental in notifying non-Revenue Departments such as BSF, ED & NCB to perform the function of Customs officer but it was indeed a new revelation that even the agencies of CBIC like the DRI and the DGCEI are also to be notified under this Section for the limited purpose. Thus emerges a new goalpost on the horizon for the CBIC. Since a fortnight was perhaps not found to be sufficient time to do an intensive and comprehensive homework, a view might have been taken not to spill the ketchup again and recast all the ultra-loose provisions! Secondly, since the Customs is bracing up to fully implement the Faceless Assessment Scheme 'Turant' - a notch above the self-assessment u/s 17, it needs to be closely studied - how to recast the relevant provisions with no gaping holes to be detected later!

Such an inference logically comes to the fore if one reckons the Board's recent [Instruction](#) dated 17th March where it has directed the jurisdictional Commissioners to issue SCNs in cases investigated by the DRI and notices issued by the DRI to be kept on the back burner. The Board is honest in stating that it is examining the volcanic effects of the Canon India decision and will soon decide the next course for the 'horse'! Whatever course is decided by the CBIC, the twin 'canons' of wisdom must be kept in mind to avoid taking another shot in the foot! The first point is to declutter what has been described in the Canon case as "unruly operation of a statute which is not contemplated by any canon of construction of statute".

A clear-eyed provision for administrative review of escaped assessment ought to be put in place to unthread the extant cobweb of agencies and provisions!

Also See - [DRI 'Founding Day' - Govt needs to 'reconstruct' its Past Glory!Â](#)

And the second one is - The choice before the Government is irksomely narrow if the DRI is to be pulled out of dire straits! DRI is an internationally-acclaimed premier revenue intelligence-gathering agency with a glorious past. It has hard-earned its reputation for sharing time-sensitive actionable intelligence with globally putative agencies and they have openly acknowledged its contribution ([See Cob\(Web\) - 374](#)). At some point down the time lane, the CBIC mandarins began to dilute its intelligence-gathering prowess and started treating it as a revenue-gathering institution - that is why one may see palpably bone-crushing pressure on most Zonal heads to meet their revenue targets and, in the course, they also committed legal goof-ups! Posting of key human resources was also politicised with the DG finding his hands handcuffed in most issues ([See Cob\(Web\) - 282](#)).

DRI, the jewel in the crown of CBIC, does not deserve a smack in its face. It has been thoughtlessly forced into investigation, adjudication and prosecution business which have turned it into a soft underbelly agency! It is certainly not called for. The epic battle in Canon case apparently dishes out on a platter a mega opportunity for the Government to restore its '**original skin**' so that it could avoid the same being peeled off in hardcore legal disputes relating to nitty-gritty of sub-sections and explanations!

The Union Finance Minister should quickly set up a high-powered committee with a time-frame of 45 days, to bring back to life the *dramatis personae* in this case! Reform of revenue intelligence agencies ought to be a key component of hefty economic reform package ([See Cob\(Web\)-222](#))

! And if the Govt decides to promulgate an Ordinance to set things right as the revenue involved in hundreds of DRI cases is huge, it should also not forget to lend a fresh window for deposit of tax in cases where SVLDR-3 has been issued in service tax and Central Excise legacy dispute cases.

Also See - [Dear FM, it's time now to make 'revenue intelligence reform' a part of overall Economic Reform Package!Â](#)

[DRI: The Tale of Political Patronage & 'Unmaking' of An Intelligence Agency!Â](#)