

The not so 'proper officer'

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Cannon to the right of them,
Cannon to the left of them,
Cannon in front of them
Volleyed and thunder'd;
Boldly they rode and well,
Into the jaws of Death,
Into the mouth of Hell

WE

have been living with taxes for ages, but somehow the concept of 'proper officer' is ever so elusive, especially after the Supreme Court held that the mighty DRI officers were not **the** proper officers for issuing notices under the Customs Act. The celebrated **Canon** case - [2021-TIOL-123-SC-CUS-LB](#) had its ripples even in GST.

Who is the Proper Officer in GST?

As per Section 2(91) of the CGST Act,

(91) "proper officer" in relation to any function to be performed under this Act, means the **Commissioner** or the officer of the central tax who is assigned that function by the **Commissioner in the Board**.

As you must have observed, there are two Commissioners in the above provision - one normal Commissioner and another a **Commissioner in the Board**. Who is this **Commissioner in the Board**? The good babus ensured that Parliament defines the expression **Commissioner in the Board**. As per Section 2(25) of the CGST Act,

(25) "**Commissioner in the Board**" means the Commissioner referred to in section 168.

So, you have to go to Section 168 to find out who this **Commissioner in the Board** is. Section 168(2) states:

The Commissioner specified in clause (91) of section 2, shall mean a Commissioner or Joint Secretary posted in the Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said sections with the approval of the Board.

So, the proper officer is the Central Tax Officer who is assigned that function by the **Commissioner in the Board**, who is a Commissioner or Joint Secretary posted in the Board.

In its effort to create the all-powerful **proper officers**

to run the GST administration properly, the Board issued its first circular on proper officers - Circular No. [1/1/2017](#), dated the 26th June, 2017, which loftily stated

In exercise of the powers conferred by **Clause (91) of section 2** of the Central Goods and Services Tax [Act, 2017](#) (12 of 2017) (hereinafter referred to as the Act) read with Section 20 of the Integrated Goods and Services [Tax Act](#) (13 of 2017) and subject to sub-section (2) of section 5 of the said Act, **the Board, hereby assigns** the officers mentioned in Column (2) of the Table below, the functions as the proper officers

Remember, the power to assign the functions under Section 2(91) is with the **Commissioner in the Board** and not the Board itself. Actually this Section 2(91) does not confer any power on anybody; it just defines who the proper officer is.

The Board issued another Circular No. [3/3/2017 - GST](#), dated the 5th July, 2017, where also it assigned officers as proper officer.

In exercise of the powers conferred by clause (91) of section 2 of the Central Goods and Services Tax Act, 2017 (12 of 2017) read with Section 20 of the Integrated Goods and Services Tax Act (13 of 2017) and subject to sub-section (2) of section 5 of the Central Goods and Services Tax Act, 2017, **the Board, hereby assigns** the officers mentioned in Column (2) of the Table below, the functions as the proper officers

Yet another Circular [31/05/2018-GST](#); dated: February 09, 2018 was issued:

in pursuance of clause (91) of section 2 of the CGST Act read with section 20 of the IGST Act, the **Board hereby assigns** the officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to issue of show cause notices and orders

Is the Board competent to assign officers with the glorious title of 'proper officer'?

The issue reached the Orissa High Court in a writ challenging the circular dated 05.07.2017 assigning the officers to function as proper officers.

The submission of the counsel for the petitioner, Mr. Sujit Ghosh was that under Sub-section (2) of Section 168 of the Act, the Commissioner specified under clause 91 of Section 2 would be authorized to issue circular, which is the Commissioner or Joint Secretary posted in the Board, and such Commissioner or Joint Secretary shall exercise the powers specified in the said sections, with the approval of the Board. He submitted that the impugned circular dated 05. 07.2017 authorizing the Assistant Commissioner of Central Excise & Customs to function as proper officer under Section 54(5), (6), (7) & (10) of the Act has been issued by the Central Board of Excise & Customs, New Delhi, which is not contemplated under the provisions of the Act, as it is only the **Commissioner or Joint Secretary posted in the Board** which could issue circular.

It was thus submitted that the impugned show cause notice dated 05.02.2018, as well as the circular dated 05.07.2017, deserve to be quashed.

The High Court observed,

Considering the facts and circumstances of the case and keeping in view the submission of learned counsel for the petitioner, we are of the opinion that the petitioner has made out a prima facie case for grant of interim protection. It is thus directed that the proceedings pursuant to the show cause notice dated 05.02.2018 shall remain stayed till the next date of listing.

This case would have perhaps resulted in some interesting legal conclusion of the level of **Canon**, but ended in a rather anti-climax with the Department withdrawing the Show Cause Notice for some other reason and therefore the issue **whether the Board's circular assigning proper officer was valid or not**, could not be decided.

The issue of proper officer reached the Gujarat High Court - [2021-TIOL-1381-HC-AHM-GST](#)
. In this case the petitioner challenged the Summons issued under Section 70 of the CGST Act.

Advocate Mr. Abhishek Rastogi challenging the jurisdiction of the respondent in issuing the summons, submitted that the power to issue summons in terms of Section 70 of the CGST Act vests exclusively with the 'Proper Officer' as defined in Section 2(91) of the said Act.

Placing reliance on the decision of the Supreme Court in case of **Canon India Pvt. Ltd. Vs. Commissioner of Customs, reported in - 2021-TIOL-123-SC-CUS-LB**

, Mr. Rastogi submitted that the entrustment of functions is a vital ingredient in the proper exercise of the powers by an authority. The respondent No. 3, in the instant case, having wrongly assumed the jurisdiction by virtue of Circular dated 5.7.2017 to issue the summons the same is without jurisdiction.

Assailing the impugned Circular dated 5.7.2017, Mr. Rastogi submitted that Section 2(91) is merely a definition clause, which does not confer any powers to assign the functions.

The High Court observed,

At the outset, it may be noted that the submissions made by the learned Advocate Mr. Rastogi, though may appear or sound very attractive, the Court has not found any substance in the same.

So far as Section 2(91) is concerned, it pertains to the proper officer in relation to any function to be performed under the CGST Act to be the Commissioner or the officer of Central Tax, who is assigned that function by the Commissioner in the Board.

Vide the Circular dated 5.7.2017 the said

Board namely the Central Board of Excise and Customs in exercise of the powers conferred by Section 2(91) of the CGST Act read with Section 20 of the IGST Act and subject to Section 5(2) of the CGST Act has assigned the officers the functions as that of proper officers in relation to the various Sections of the CGST Act and the Rules made thereunder, and as such the Superintendent of Central Tax has been assigned the function of Section 70(1) of the CGST Act.

Well, this is the question. As per the Act, the assigning has to be done by the **Commissioner in the Board** and not the Board. This subtle point was lost sight of.

There was a case before the Telangana High Court recently.

Basic contention of the counsel Mr. Srinivas Chaturvedula for the petitioner was that it is the **sine qua non** that the officer who issues the show cause notice under Section 74(1) of CGST Act, has to be perform a 'proper officer'. He has referred to various provisions of the CGST Act and the documents annexed to the writ petition to contend that Additional Commissioner is not a 'proper officer' having jurisdiction to issue the impugned show cause notice. In support of his submissions, he also placed reliance on a recent decision of the Supreme Court in **CANON INDIA PRIVATE LIMITED**.

The High Court- [2022-TIOL-14-HC-TELANGANA-GST](#) observed,

As per Circular No.3/3/2017 - GST dated 05.07.2017 of the Board, which has been issued in exercise of powers conferred by clause (91) of Section 2 of the CGST Act, read with Section 20 of the IGST Act, and subject to sub-section (2) of Section 5 of the CGST Act, the Board has assigned the officers mentioned in column No.2 of the appended table, the functions of 'proper officer' in relation to various sections of the CGST Act.

The issue before the Supreme Court in Canon India Private Limited was completely different and distinct from what is being canvassed by learned counsel for the petitioner to support his contention that respondent No. 4 is not the 'proper officer' under Section 74(1) of the CGST Act.

There seems to be something terribly improper about the proper officer and if not rectified at the earliest, may turn into a Canon shooting in all directions. Propriety, if not law, requires that the assignment of the proper officer should be proper.

On that not so proper noteâ€¦.

Until Next Week