

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
KOLKATA REGIONAL BENCH –
COURT NO.2**

Customs Appeal No.75015 of 2015

(Arising out of Order-in-Original No.Kol./Cus/Port/43/2014 dated 14.07.2014 passed by Commissioner of Customs (Port), Kolkata)

M/s Beriwal Impex Pvt. Ltd.

Appellant

No.D-108, Mansarover Garden,
1st Floor, New Delhi-110015

VERSUS

Commr. of Customs (Port), Kolkata

Respondent

15/1 Strand Road, Kolkata-700001

APPEARANCE:

S/Shri Sourabh Bagaria & Indranil Banerjee, both Advocates for the Appellant
Shri M.P.Toppo, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)

DATE OF E-HEARING : 18.01.2022

DATE OF ORDER : 23.02.2022

FINAL ORDER NO.75125/2022

PER: P. V. SUBBA RAO

M/s. Beriwal Impex¹ filed this appeal assailing Order-in-Original² dated 14.7.2014 passed by the Commissioner of Customs, Kolkata (Port), whereby he adjudicated upon the Show Cause Notice³ dated 3.4.2012 issued by the Additional Director General, Directorate of Revenue Intelligence⁴, Chennai, to the appellant in respect of the goods imported by it through Kolkata port, Chennai port and Inland Container Depot (ICD), Tughlakabad, Delhi. The

¹ **Appellant**

² **Impugned order**

³ **SCN**

⁴ **DRI**

appellant was asked to submit its replies to the respective jurisdictional Commissioners. Since the same issues have to be decided with respect to three different customs locations, the Central Board of Excise and Customs⁵ issued order dated 20.12.2013 from file No. 437/94/2013-Cus IV appointing Commissioner of Customs, Seaport- Import, Kolkata as the common adjudicating authority in the case. Therefore, the learned Commissioner has decided the case with respect to all the imports made through the three ports.

2. The appellant imported LDPE re-processed granules through Chennai and Kolkata ports and ICD Tughlakabad which were assessed by the proper officers and cleared for home consumption. DRI received information that the appellant had been resorting to undervaluation of the LDPE granules which resulted in short levy of duty and conducted searches, recorded statements and after completing investigation, came to the conclusion that the appellant had undervalued the imported goods. Additional Director General⁶, DRI issued the SCN proposing recovery of differential duty under section 28 along with interest, confiscation of the impugned goods and imposition of penalties. Adjudicating upon the SCN, the learned Commissioner has, by the impugned order, confirmed a demand of differential duty of Rs. 96,42,062 and imposed a penalty of equal amount under section 112.

3. The impugned order was contested on several grounds in this appeal. A miscellaneous application was filed seeking permission to

⁵ CBEC

⁶ ADG

raise an additional ground that the SCN was issued without authority because DRI officers were not proper officers to issue a demand under section 28 in view of the judgment of Hon'ble Supreme Court in the case **Canon India**⁷. The miscellaneous application was allowed.

4. Learned counsel for the appellant submitted that the impugned order needs to be set aside because it was passed in pursuance of SCN issued by the DRI demanding duty under section 28 and officers of DRI are not 'proper officers' to issue an SCN under that section as held by a three member bench of Hon'ble Supreme Court in the case of **Canon India**. He submits that this judgment was followed subsequently by Hon'ble Supreme Court, various High Courts and also various benches of this Tribunal and wherever the SCN demanding duty under section 28 was issued by DRI, all such orders were set aside on the ground of lack of jurisdiction. He prays that a similar decision may be taken and the impugned order may be set aside and their appeal may be allowed.

5. Learned Departmental Representative, on the other hand, submits that the judgment of Hon'ble Supreme Court in **Canon India** was that DRI officers were not proper officers as per section 2(34) of the Customs Act. However, there is another section- Section 28(11) according to which all Customs officers are proper officers for the purpose of assessment under section 17. Thus, there are two sections under which a Customs officer will be a proper officer- Section 2(34) and section 28(11)- which read as follows:

⁷ AIR 2021 SC 1699

Section 2 Definitions:.....

(34) "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 28 Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.

(1).....(10)

(11) Notwithstanding anything to the contrary contained in any judgement, 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.**

6. He submits that while as per Section 2(34), an officer has to be notified to be a proper officer, section 28(11), itself defines that all persons appointed as officers of Customs under sub-section (1) of Section 4 before 6th July 2011, as proper officers and are deemed to have always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers under section 28. Thus, no notification is required in respect of the officers covered under section 28(11). Officers of DRI were appointed as Customs officers under sub-section (1) of Section 4 by Notification No.17/2002 - Customs (NT) dated 7.3.2002 as has been noted in **Canon India**. The relevant extract of the judgment is as follows:

16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the proper officer under Section 6 of the Customs Act. **The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act.**

17. Shri Sanjay Jain, learned Additional Solicitor General, relied on a Notification No.17/2002 - Customs (NT) dated 7.3.2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the relevant time, the Central Government was the appropriate authority to issue such a

notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.

(emphasis supplied)

7. Learned Departmental Representative submits that it is undisputed that DRI officers were appointed as Customs officers under section 4(1) prior to 6th July 2011. After the notification dated 7.3.2002 appointing DRI officers as Customs officers, another Notification No.40/2012-Customs (N.T.) New Delhi, dated the 2nd May, 2012 was issued by the Central Board of Excise and Customs under section 2(34), assigning various functions including functions under section 28 to officers of and above certain ranks. This notification has been struck down in **Canon India** as having been issued without authority.

8. He submits that from the judgment of Hon'ble Supreme Court in **Canon India**, it does not appear that section 28(11) was either under consideration or has been struck down by Hon'ble Supreme Court. Nor has this section been struck down by any High Court till date. Explaining the background to insertion of section 28(11) and its legislative intent, he submits that Hon'ble Supreme Court had, in **Commissioner vs. Sayed Ali**⁸, held that officers of Customs (Preventive) were not proper officers to issue SCN under section 28. Thereafter, Parliament amended section 28 retrospectively inserting section 28(11) as above. The Statement of objects and reasons presented by the Hon'ble Finance Minister while introducing the bill clarifies the legislative intent of section 28(11). It reads as follows:

STATEMENT OF OBJECTS AND REASONS

⁸ 2011(265) ELT 17(SC)

The Customs Act, 1962 consolidates and amends the law relating to customs. Clause (34) of section 2 of the said Act defines the expression "proper officer" in relation to the functions under the said Act to mean the officer of customs who is assigned those functions by the Central Board of Excise and Customs or the Commissioner of Customs. Recently, a question has arisen as to whether the Commissioner of Customs (Preventive) is competent to exercise and discharge the powers of a proper officer for issue of a notice for the demand of duty. **The Hon'ble Supreme Court of India in Commissioner of Customs versus Sayed Ali and Anr. (Civil Appeal Nos. 4294-4295 of 2002) held that only a customs officer who has been specifically assigned the duties of assessment and re-assessment in the jurisdiction area is competent to issue a notice for the demand of duty as a proper officer.** As such the Commissioner of Customs (Preventive) who has not been assigned the function of a "proper officer" for the purposes of assessment or re-assessment of duty and issue of show cause Notice to demand Customs duty under Section 17 read with Section 28 of the Act in respect of goods entered for home consumption is not competent to function as a proper officer which has not been the legislative intent.

2. In view of the above the Show Cause Notices issued over the time by the Customs officers such as those of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence and others, who were not specifically assigned the functions of assessment and re-assessment of customs duty may be construed as invalid. The result would be huge loss of revenue to the exchequer and disruption in the revenue already mobilized in cases already adjudicated. However, having regard to the urgency of the matter, the Government issued notification on 6th July, 2011 specifically declaring certain officers as proper officers for the aforesaid purposes.

3. In the circumstances, it has become necessary to clarify the true legislative intent that Show Cause Notices issued by Customs officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. **It is, therefore, purposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any specific assignment on 6th July, 2011.**

4. The Bill seeks to achieve the above objects.

9. He submits that the constitutional validity of section 28(11) was challenged before the Hon'ble High Court of Delhi in the case of **Mangáli Impex**⁹. The High Court held that the section is constitutionally valid but set aside its retrospective application. On an appeal by revenue, Hon'ble Supreme Court stayed¹⁰ the operation of this judgment and order of Hon'ble Delhi High Court. The validity of Section 28(11) was also upheld by the Hon'ble High Court of Bombay in the case of **Sunil Gupta Vs. Union of India**¹¹. **Thus, section 28(11) is operative in its full force, according to which, any person appointed as Customs officer under section 4(1) prior to 6th July 2011 is a proper officer both under section 17 and also under section 28.** Any notification under section 2(34) in respect of such officers assigning functions under section 17 or section 28 is redundant because the section itself designates them as proper officers.

10. He, therefore, submits that DRI officers, being proper officers both under section 17 and under section 28, the SCN issued in this case is valid and cannot be struck down.

11. We have considered the submissions made and case laws relied upon by both sides. Learned counsel for the appellant was correct in his assertion that DRI officers were held to be NOT proper officers under in **Canon India** and hence the order issued in pursuance of an SCN issued by DRI demanding duty was set aside. The ratio of **Canon India** was followed in the following cases and

⁹ 2016 (335) ELT 605 (Del)

¹⁰ 2017 (349) ELT A 98 (SC)

¹¹ 2014-TIOL-1949-HC-MUM-CUS

the orders confirming demands in pursuance of SCN issued by DRI were set aside.

Supreme Court

1. Commissioner of Customs vs **Agarwal Metals and Alloys**¹²

Madras High Court- Madurai bench

2. **Quantum Coal Energy Pvt. Ltd** vs Commissioner of Customs¹³

Karnataka High Court

3. **Givaudan India Pvt. Ltd.** vs Commissioner of Customs¹⁴

Punjab and Haryana High Court

4. **Godrej & Boyce Manufacturing Co. Ltd.** vs UOI¹⁵

Tribunal

5. Principal Commissioner, Customs, ACC Import vs **Dish TV India Limited, Rajeev Dalmia and Virender Kumar Tagra**¹⁶
6. **Evershine Customs (C&F) Pvt. Ltd** vs Commissioner of Customs¹⁷

12. Learned Departmental Representative is correct in his submission that Section 28(11) itself defines all persons appointed as Customs officers under section 4(1) prior to 6th July 2011 as proper officers both for assessment under section 17 and for issuing demands under section 28 and Section 28(11) was not under consideration in **Canon India**. He is also correct in his submission that since officers of DRI were appointed as Customs officers under section 4(1) prior to 6th July 2011, as noted in **Canon India**, they are covered by section 28(11). He is also correct in his submission that the constitutional validity of section

¹² **2021(9) TMI316- Supreme Court**

¹³ **2021 (3) TMI 1034- Madras High Court**

¹⁴ **2021(8) TMI 178- Karnataka High Court**

¹⁵ **Punjab & Haryana High Court Order dated 19.4.2021 in Civil Writ Petition No. 19871 of 2020**

¹⁶ **2021 (10) TMI 771- CESTAT, New Delhi**

¹⁷ **2021(8) TMI 906- CESTAT, New Delhi**

28(11) was upheld except to the extent of its retrospective application by Hon'ble High Court of Delhi in **Mangali Impex** and its validity was fully upheld by Hon'ble High Court of Bombay in **Sunil Gupta**. The judgment of Hon'ble High Court of Delhi setting aside the retrospective application of section 28(11) in **Mangali Impex** was stayed by the Hon'ble Supreme Court. There does not appear to be any judgment of Hon'ble Supreme Court or any High Court whereby Section 28(11) was held to be invalid. **Thus, section 28(11) is on the statute book and is valid. The case laws cited by both sides are binding on us and we proceed to examine and decide this case accordingly.** We proceed to discuss this issue in depth and examining all dimensions of the issue.

14. The Directorate of Revenue Intelligence was created by a notification by the Government of India dated 4 December 1957. Later, Customs Act, 1962 was enacted replacing its predecessor Customs laws such as Sea Customs Act, 1878. Section 3 of the Customs Act, 1962 defines various classes of officers of Customs which does NOT include DRI officers till date. Section 4 states that the Board may appoint such persons as it thinks fit to be officers of customs. Officers of DRI are not officers of Customs as per Section 3 itself but they were appointed through a notification under section 4. The Customs Act also does not mention DRI or Revenue Intelligence anywhere nor does it confer any powers on such officers. **Thus, officers of DRI and Customs officers were treated as distinct and separate by the legislature under the Customs Act.**

15. A perusal of some other enactments also shows that DRI and Customs officers were treated as separate by legislature. As per the Narcotic Drugs and Psychotropic Substances Act, 1985¹⁸ the government can empower officers of various departments to conduct search, seizures and make arrests. It clearly mentions Customs officers and officers of Revenue Intelligence separately. Section 42 of this Act reads as follows:

42. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the **departments of central excise, narcotics, customs, revenue intelligence** or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, may between sunrise and sunset:

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act.....”

16. If officers of Revenue Intelligence were also Customs officers, there would have been no need to mention them separately in section 42 of the NDPS Act.

17. The Right to Information Act, 2005 provided an exemption to certain organisations. Section 24 and Second Schedule of this Act read as follows:

24. (1) Nothing contained in this Act **shall apply to the intelligence and security organisations specified in the Second Schedule**, being

¹⁸ NDPS Act

organisations established by the Central Government or any information furnished by such organisations to that Government:

.....

THE SECOND SCHEDULE (See section 24)

Intelligence and security organisation established by the Central Government

1. Intelligence Bureau.
2. Research and Analysis Wing of the Cabinet Secretariat.
- 3. Directorate of Revenue Intelligence.**
4. Central Economic Intelligence Bureau.
5. Directorate of Enforcement.
6. Narcotics Control Bureau.
7. Aviation Research Centre.
8. Special Frontier Force.
9. Border Security Force.
10. Central Reserve Police Force.
11. Indo-Tibetan Border Police.
12. Central Industrial Security Force.
13. National Security Guards.
14. Assam Rifles.
15. Special Service Bureau
16. Special Branch (CID), Andaman and Nicobar.
17. The Crime Branch-C.I.D.-CB, Dadra and Nagar Haveli.
18. Special Branch, Lakshadweep Police.

18. It is evident from the RTI Act that DRI was treated by the legislature as **an intelligence and security organisation created by the Government and hence was granted immunity** under section 24. Such immunity was not given to the Customs officers. Like Customs Act and NDPS Act, RTI Act also treats officers of DRI as separate and distinct from the Customs officers. The nature of DRI also becomes clearer from its functions which, according to the website of DRI are as follows¹⁹:

- Collection of intelligence about smuggling of contraband goods, narcotics, under-invoicing etc. through sources of India and abroad, including secret sources.
- Analysis and dissemination of such intelligence to the field formations for action and working on such intelligence, where necessary.
- Keeping watch over important seizures and investigation cases. Associating or taking over the investigations which warrant specialized handling by the Directorate.
- Guiding important investigation/prosecution cases. Keeping liaison with foreign countries, Indian Missions and

¹⁹<https://dri.nic.in/main/charter> accessed on 15 February 2022

Enforcement agencies abroad on anti-smuggling matters.

- To keep liaison with C.B.I. and through them with the INTERPOL. To refer cases registered under the Customs Act to the Income Tax Department for action under the Income Tax Act.
- To keep statistics of seizures and prices/rates etc. for watching trends of smuggling and supply required material to the ministry of Finance and other Ministries.
- To study and suggest remedies for loopholes in law and procedures to combat smuggling.

19. Assessment of Bills of Entry or Shipping Bills or their re-assessment and demanding or recovering duty not levied, not paid, short levied, short paid or erroneously refunded under section 28 do not appear in the above listed functions of DRI.

20. In **Canon India**, Hon'ble Supreme Court noted that DRI officers were appointed as Customs officers by the Board under section 4(1). However, the notification issued by the Board under section 2(34) assigning functions was struck down. It was further held that both the officers of DRI (created by the notification dated 4 December 1957) and the Customs officers are appointed by the Government of India and functions under the Customs Act can be entrusted to other officers only by the Government under section 6. Thus, Hon'ble Supreme Court treated DRI officers as distinct from Customs officers as did the legislature in Customs Act, NDPS Act and RTI Act. The relevant portion of the judgment is as follows:

20. Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:

"6. Entrustment of functions of Board and customs officers on certain other officers – *The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any 13 functions of the Board or any officer of customs under this Act."*

21. **If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government.** The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

21. After we had concluded hearing in this case, learned counsel for the appellant submitted another case law which removes any doubt about the law laid down in **Canon India**. It was held by the Hon'ble Supreme Court in **Commissioner of Customs Ahmedabad vs M/s. Suncity Strips and Tubes Pvt Ltd. [Dy. No. 7802/2020]** that in the absence of entrustment of functions under section 6 by the Government, officers of DRI will not have jurisdiction to exercise the functions under the Customs Act. The relevant portion of this judgment is as follows:

" In Canon India Pvt. Ltd. vs Commissioner of Customs, AIR 2021 SC 1699, a three-judge bench of this court has held that in the absence of an entrustment under section 6 of the Customs Act, 1962, an officer of the Directorate of Revenue Intelligence will not have jurisdiction to exercise the functions entrusted to Customs officers under various provisions of the Act. As a consequence of the above elucidation, the court held that the entire proceeding which was initiated by the Additional Director General, Directorate of Revenue Intelligence by issuing Show Cause Notices was invalid."

(emphasis supplied)

22. Another important issue decided in **Canon India** is that the Show Cause Notice under section 28 can be issued only by **'the proper officer', i.e., the officer who had done the assessment in the first place and not by any other officer** who may have concurrent jurisdiction in the matter. The relevant extract of the judgment is as follows:

9. The question that arises is whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute i.e. under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in **Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore**²⁰ has held:-

"14. ...Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'an agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."

In **Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd.**²¹ has held:-

"9. ...'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."

10. There are only two articles 'a (or an)' and 'the'. 'A (or an)' is known as the Indefinite Article because it does not specifically refer to a particular person or thing. On the other hand, 'the' is called the Definite Article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28 (4), it could have used the word 'any'.

11. Parliament has employed the article "the" not accidentally but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2 (2) (c) of the Customs Act, 19624 .

12. The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. **The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group.** Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.

²⁰ 2 (1980) 3 SCC 358

²¹ 3 (2001) 3 SCC 609 6

13. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers 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 though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

14. It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. **We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. 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. The section must therefore 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. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28 (4)]**

[emphasis supplied]

23. Thus, the law laid down in **Canon India** is that:

- a) **DRI is an organisation created by a notification by the Government of India 4 December 1957. Both officers of DRI and Customs officers are appointed by the Government of India.**
- b) The officers of DRI have been appointed as Customs officers under Section 4(1).
- c) The notification dated 7th May 2012 issued by the Board under section 2(34) is not valid.
- d) **Officers of DRI can only exercise the functions of Customs officers under various provisions of the Customs Act only if they are entrusted with such functions by the Government under section 6. In the absence of such entrustment, they cannot exercise functions under the Customs Act.**
- e) The use of article 'the' has a particularizing effect and 'the proper officer' means only a particular officer and not any officer who may have jurisdiction. **A demand under section 28 can be issued by only that officer who has done the assessment in the first place, i.e., the officer of the Appraising Group or his successor in office and not by any other officer.**

24. Thus, even if there are more than one proper officer by virtue of section 28(11), the demand can be raised only by 'the proper officer' i.e., one who assessed the Bills of Entry in the first place or his successor in office and not by any other proper officer. In this case, since the Bills of Entry were not assessed by the officers of DRI, the SCN issued under Section 28 is without authority even if

section 28(11) is considered. Thus section 28(11) does not carry the case of Revenue any further. Further, the law laid down in **Canon India** further followed in **Suncity Strips (supra)** is that **in the absence of entrustment of functions to DRI by the Government under Section 6, not only the Show Cause Notices issued by DRI but also any functions performed by the DRI officers under the Customs Act are vitiated.** Thus, any other functions under the Act (for example, searches, seizures, arrests, recording of statements) by the officers of DRI also get vitiated because no functions have been entrusted to them under Section 6 by the Government. Evidently, in this case, the SCN itself is the culmination of investigation which involved several functions by the DRI under the Customs Act. Even on this ground, the impugned order cannot be sustained.

25. We note that after we concluded hearing in this case and reserved the order, Hon'ble Finance Minister presented the Finance Bill 2022 which proposed some retrospective amendments to the Customs Act. Although these are not yet enacted, if enacted as proposed in the bill, the proposed retrospective application may affect past cases. Among these are proposed amendments to section 2(34) [clause 85 of the Bill] and section 5 [clause 87] to empower the Board to assign functions to officers, substituting section 3 [clause 86] to include officers of DRI and audit as officers of Customs under the Act and a new Section 110AA [clause 93] providing that after investigation, the case should be transferred to the officer who had taken the original decision in the matter.

Retrospective application is proposed by clause 96. These clauses in the Finance Bill 2022 are as follows:

85. In the Customs Act, 1962 (hereinafter referred to as the Customs Act), in section 2, in clause (34), after the words "Principal Commissioner of Customs or Commissioner of Customs", the words and figure "under section 5" shall be inserted.

86. For section 3 of the Customs Act, the following section shall be substituted, namely:--

"3. There shall be the following classes of officers of customs, namely:--

(a) Principal Chief Commissioner of Customs or Principal Chief Commissioner of Customs (Preventive) or Principal Director General of Revenue Intelligence;

(b) Chief Commissioner of Customs or Chief Commissioner of Customs (Preventive) or Director General of Revenue Intelligence;

(c) Principal Commissioner of Customs or Principal Commissioner of Customs (Preventive) or Principal Additional Director General of Revenue Intelligence or Principal Commissioner of Customs (Audit);

(d) Commissioner of Customs or Commissioner of Customs (Preventive) or Additional Director General of Revenue Intelligence or Commissioner of Customs (Audit);

(e) Principal Commissioner of Customs (Appeals);

(f) Commissioner of Customs (Appeals);

(g) Additional Commissioner of Customs or Additional Commissioner of Customs (Preventive) or Additional Director of Revenue Intelligence or Additional Commissioner of Customs (Audit);

(h) Joint Commissioner of Customs or Joint Commissioner of Customs (Preventive) or Joint Director of Revenue Intelligence or Joint Commissioner of Customs (Audit);

(i) Deputy Commissioner of Customs or Deputy Commissioner of Customs (Preventive) or Deputy Director of Revenue Intelligence or Deputy Commissioner of Customs (Audit);

(j) Assistant Commissioner of Customs or Assistant Commissioner of Customs (Preventive) or Assistant Director of Revenue Intelligence or Assistant Commissioner of Customs (Audit);

(k) such other class of officers of customs as may be appointed for the purposes of this Act."

87. In section 5 of the Customs Act,-- (a) after sub-section (1), the following sub-sections shall be inserted, namely:--

"(1A) Without prejudice to the provisions contained in sub-section (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.

(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an

officer of customs, who shall be the proper officer in relation to such functions.”;

(b) after sub-section (3), the following sub-sections shall be inserted, namely:--

“(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to--

- (a) territorial jurisdiction;
- (b) persons or class of persons;
- (c) goods or class of goods;
- (d) cases or class of cases;
- (e) computer assigned random assignment;
- (f) any other criterion as the Board may, by notification, specify.

(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act.”.

93. After section 110A of the Customs Act, the following section shall be inserted, namely:-- Action subsequent to inquiry, investigation or audit or any other specified purpose.

“110AA. Where in pursuance of any proceeding, in accordance with Chapter XIIA or this Chapter, if an officer of customs has reasons to believe that--

- (a) any duty has been short-levied, not levied, short paid or not paid in a case where assessment has already been made;
- (b) any duty has been erroneously refunded;
- (c) any drawback has been erroneously allowed; or
- (d) any interest has been short-levied, not levied, short-paid or not paid, or erroneously refunded,

then such officer of customs shall, after causing inquiry, investigation, or as the case may be, audit, transfer the relevant documents, along with a report in writing--

(a) to the proper officer having jurisdiction, as assigned under section 5 in respect of assessment of such duty, or to the officer who allowed such refund or drawback; or

(b) in case of multiple jurisdictions, to an officer of customs to whom such matter is assigned by the Board, in exercise of the powers conferred under section 5, and thereupon, power exercisable under sections 28, 28AAA or Chapter X, shall be exercised by such proper officer or by an officer to whom the proper officer is subordinate in accordance with sub-section (2) of section 5.”.

96. Notwithstanding anything contained in any judgment, decree or order of any court, tribunal, or other authority, or in the provisions of the Customs Act, 1962 (hereinafter referred to as the Customs Act),-- 52 of 1962.

(i) anything done or any duty performed or any action taken or purported to have been taken or done under Chapters V, VAA, VI, IX, X, XI, XII, XIIA, XIII, XIV, XVI and XVII of the Customs Act, as it stood prior to its amendment by this Act, shall be deemed to have been validly done or performed or taken;

(ii) any notification issued under the Customs Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of section 6;

(iii) for the purposes of this section, sections 2, 3 and 5 of the Customs Act, as amended by this Act, shall have and shall always be deemed to have effect for all purposes as if the provisions of the Customs Act, as amended by this Act, had been in force at all material times.

Explanation.-- For the purposes of this section, it is hereby clarified that any proceeding arising out of any action taken under this section and pending on the date of commencement of this Act shall be disposed of in accordance with the provisions of the Customs Act, as amended by this Act.

26. If the Finance Bill becomes the Act, DRI officers will be at par with Customs officers under the Customs Act by virtue of the substitution of section 3 and their various actions such as searches, seizures, arrests may not become void because of non-entrustment of those functions by the Government under Section 6. However, there is no proposal to amend section 28 and hence SCNs can be issued even after this Bill becomes the Act only **by 'the proper officer', i.e., the officer who has done the assessment in the first place.** In fact, this specific legal position as held by the Supreme Court in **Canon India** is likely to be reaffirmed by insertion of section 110AA in the Act. It would not be out of place to mention that the nature of powers under section 11A of the Central Excise Act and Section 73 of the Finance Act, 1994 are similar to the power under Section 28 of the Customs Act. However, this power has been conferred on **'the proper officer'** under the Customs Act and on **'the Central Excise officer'** in the other two Acts and this dissimilarity implies that the Central Excise officer need not be 'proper officer' but the similarity lies in the use of the definite article 'the' instead of 'a' or 'any' or 'any of the', etc. The meaning of the definite article 'the' when used in any law was

explained by the Supreme Court in **Consolidated Coffee Ltd. and others vs Coffee Board, Bangalore**²² and it was held as follows:

“14. Secondly, and more importantly, **the use of the definite article ‘the’ before the word ‘agreement’ is, in our view, very significant.** Parliament has not said ‘an agreement’ or ‘any agreement’ for or in relation to such export and in the context the expression **‘the agreement’ would refer to that agreement which is implicit in the sale occasioning the export.**”

6. The scope of the article ‘the’ was again examined by the Supreme Court in **Shri Ishar Alloy Steels Ltd. vs Jayaswals Neco Ltd.**²³ and it was held as follows:

“9. ‘The’ is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of ‘a’ or ‘an’. It determines what particular thing is meant; that is, what a particular thing we are to assume to be meant. **‘The’ is always mentioned to denote particular thing or a person.**”

27. Thus, the settled legal position is that when the legislature uses the definite article ‘the’ it refers to a particular thing or particular person. This brings certitude as to who can issue a Show Cause Notice to demand duty or tax not levied short levied, not paid, short paid, etc. in all these three Acts viz., Customs Act, Central Excise Act, and the Finance Act, 1994. We also find legislature has also used definite article in subsequent enactments. In the Central Goods and Services Tax Act, 2017 (CGST Act) section 73 deals with demands other than cases of fraud, wilful mis-statement or suppression of facts while section 74 deals with cases where these elements are present. In both sections, the notice can be issued by ‘the proper officer’. These provisions of CGST Act, 2017 are also made applicable to Inter-state Goods and Services Tax Act. Similar provisions are also there in the State Goods and Services Tax Acts of various states. Section 156 of the Income Tax Act, 1961 also gives the power of issuing notice of

²² (1980) 3 SCC 358

²³ (2001) 3 SCC 609

demand on **the assessing officer**. **What is common in these provisions of various enactments is that the power to issue notice demanding tax or duty is always conferred on a particular officer which legislative intent is clarified by using definite article 'the' instead of 'a' or 'any' or 'any of the'**. The proposed Section 110AA in the Finance Bill 2022 is also consistent with the legislature conferring the powers of raising a demand on only one officer.

28. To sum up, section 28(11) of the Customs Act cannot sustain the SCN issued in this case by DRI officers because:

- a) DRI officers have not been entrusted the functions under the Customs Act by the Government under section 6 and hence cannot perform such functions.
- b) The SCN in this case was not issued by 'the proper officer', i.e., the officer who had assessed the Bills of Entry in the first place.

29. For all these reasons, the impugned order emanating from an SCN issued by DRI demanding duty under section 28 cannot be sustained. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant.

(Order pronounced on **23 February 2022**)

**Sd/
(P. K. Choudhary)
Member (Judicial)**

**Sd/
(P. V. Subba Rao)
Member (Technical)**