IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 5562 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 5340 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6012 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6390 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6300 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6037 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6361 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6599 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6874 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6878 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6770 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6792 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6877 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6876 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6875 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6657 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6687 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 6828 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 10245 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 10336 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 10806 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 13417 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 15324 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 14889 of 2021

With
R/SPECIAL CIVIL APPLICATION NO. 13381 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 8465 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 14735 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 14774 of 2021
With
R/SPECIAL CIVIL APPLICATION NO. 1950 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE SONIA GOKANI

and
HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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MESSRS AZTEC FLUIDS AND MACHINERY PVT LTD
Versus
UNION OF INDIA

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Appearance:
MR PARESH M DAVE, AMAL PARESH DAVE, MS AMRITA THAKORE, MR. SHUBHAM JHAJHARIA, MR. NIRAV P. SHAH, MR. HARDIK MODH, MR. DK TRIVEDI, GUPTA LAW ASSOCIATES, MR. VIPUL B. SUNDESHA, MR. HASIT DAVE, MR. ANAND NAINAWATI, MR. HARSH N. PAREKH, for the respective Petitioner(s) No. 1,2
MR DEVANG VYAS,(2794) for the Respondent(s) No. 1,2,3,7
RULE SERVED for the Respondent(s) No. 6
MR. NIKUNT K RAVAL for the Respondent(s) No. 4,5

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CORAM:**HONOURABLE MS. JUSTICE SONIA GOKANI**
and

HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

Date : 01/04/2022

CAV JUDGMENT
(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. These are the group of petitions which are being disposed of by a common order for the reason that they all contain identical question of law and the facts are largely similar, however, they may differ.

2. The lead matter is Special Civil Application No. 5562 of 2021 and the facts are drawn from the said matter for the purpose of adjudication.

3. M/s. Aztec Fluids & Machinery Pvt. Ltd. - petitioner herein is a Private Limited Company engaged in the business of trading and manufacturing of goods like Inkjet Printers, Laser Printers and parts as well as accessories of such printers. The petitioner no.2 is the Managing Director and also a member of the petitioner. He is a citizen of this Country and is entitled to the constitutional guarantees enshrined under the Constitution of India.

3.1. The respondent no.1 is the Union of India whereas the respondent nos. 2 to 7 are the officers of the Union of India. The respondent nos. 2 and 3 are the officers of Customs

having jurisdiction over the imports made by the petitioner under Ahmedabad Customs Commissionerate including Ahmedabad Air Cargo Complex as well Khodiyar ICD. The respondent No.4 is the Commissioner of Customs in charge of Nhava Sheva Port where the petitioner has imported certain consignments of the goods. The respondent no.5 is the Additional Commissioner of Customs in charge of Air Cargo Complex at Sahar Customs Station where also the petitioner has imported certain consignments of the goods. The respondent no.6 is the Deputy Commissioner of Customs in charge of ACC, New Delhi and the respondent no.7 is the Additional Director General of Directorate of Revenue Intelligence, Chennai Zonal Unit which is an agency for conducting inquiry and investigation in respect of imports and exports made in the country and also for causing inquiry and investigation with regard to provisions of the Customs Act, 1962 for imports and exports made in the country.

3.2. The challenge is made to the action of the respondent no.7 which has initiated the proceedings and conducted inquiry/investigation for the imports made by the petitioner at various Customs Stations under jurisdiction of respondent nos. 2 to 6 and those proceedings are under challenge.

3.3. The petitioner is a Company registered and incorporated in year 2010 and thus, it is conducting trading business for last 11 years. The petitioner has been importing goods like Continuous Inkjet Printers (CIJ Printers), Laser Marking Machine, parts and accessories of CIJ Printer and such goods from foreign countries. They are being imported from China during the period from 2014 to 2021.

3.4. Chapter 84 of the Customs Tariff is for machinery and mechanical appliances and various goods like Nuclear Reactors, Boilers, machinery and mechanical appliances and parts thereof classified under Chapter 84 of the Customs Tariff. Under Heading 8443 of the Tariff, the goods covered are like Printing machinery used for printing by means of plates, cylinders and other printing components, other printers, copying machines and Facsimile machines, whether or not combined and parts and accessories thereof.

3.5. The Petitioner has declared classification of the goods imported by them under Customs Tariff Heading Nos. 84433250/40, 84433290, 84439951/59 and 84718000. All the consignments of the goods imported by the Petitioner at the Customs Stations under jurisdiction of Respondent Nos. 2 to 6 have been classified by the proper Customs Officers in charge

of such Custom Stations under the above referred classifications and the proper officers of Customs in charge of these Customs Stations have finally assessed the import documents like Bills of Entry and Airway Bills filed by the Petitioner for the imported goods under the said classifications. Custom duties leviable on the imported goods in accordance with the rates applicable under the above referred Customs Tariff Headings have also been finally assessed by such Customs Officers and the duties so assessed have been fully paid by the petitioner for the said period. In absence of any kind of dispute on such facts, the petitioner has chosen not to produce any documents in respect of such assessment and collection of such duties.

3.6. It is the case of the petitioner that this petition involves consignments which had been allowed to be cleared for home consumption which have been sold by the petitioner to their customers as the petitioner is engaged in trading business. The sales has been effected by following due procedure and appropriate taxes leviable on such trading business also have been paid.

3.7. Around February, 2020, the office of DRI, Chennai Zonal Unit came across the imports made by the petitioner and

thereupon, the respondent no.7 initiated investigation against the petitioner. The DRI Officers formed a belief that the goods imported by the petitioner were classifiable under CTH 84433910, 84433990 and 84439960 and the rate of custom duties on the goods under these classifications was higher than the rates applicable for the classifications declared by the petitioner. According to the DRI Officers, the petitioner had misclassified the CIJ Printers, parts of CIJ Printers and Laser Marking Machines for availing lower rate of duty or full exemption and on those notion, the investigation was conducted by respondent no.7 at all the Customs Stations under jurisdiction of respondent nos. 2 to 6. The representative of the petitioner's Customs House Agent and the 2nd petitioner were also called at Chennai Zonal Office of DRI and the statements were recorded by the DRI Officers in respect of the imports of the goods imported by the petitioner. It is also alleged that during the investigation, the petitioner was forced and pressurized to make monetary deposits towards the custom duties allegedly short paid on the imported goods and it is also further stated that the petitioner left with no alternative and has deposited Rs. 50 lakhs during investigation. Two TR-6 Challans bearing No.1846 dated 17.3.2020 and No.1 dated 20.4.2020 prepared for deposit of

such sum of Rs.50 lakhs and the 7th respondent has transferred the same to the credit of the Central Government at Ahmedabad in the account of the Principal Commissioner of Customs, Ahmedabad - respondent no.2 herein.

3.8. As a result of inquiry and investigation by the Additional Director General, DRI, Chennai, it has issued Show Cause Notice being F.No.DRI/CZU/VIII/26/17/2020 dated 24.02.2021 invoking the provisions of Section 28(4) of the Customs Act. The Additional Director General, DRI, Chennai, has proposed to reassess transactions of imports made by the petitioner at various Customs Stations and differential custom duties were also proposed to be demanded and recovered from the petitioner for the goods imported at such Customs Stations alleging that they have misclassified the imported goods and paid a reduced rate of duty or availed exemption from custom duties by resorting to the wrong classification for the goods in question.

3.9. The petitioner has to show cause to the respondent nos. 2 to 6 as to why the reassessment and recovery should not be made as proposed along with the interest, penalty and confiscation of the goods, etc. It is alleged by the petitioner that the proceedings initiated by the respondent no.7 are

wholly illegal and without jurisdiction because the DRI Officer is not the proper officer who can invoke Section 28 of the Customs Act and therefore, the notice issued by the respondent no.7 under Section 28 of the Customs Act is ex-facie illegal and without any authority or jurisdiction.

3.10. It has heavily relied upon the decision in case of M/s. Canon India Pvt. Ltd. vs. Commissioner of Customs [2021(3) SCALE 748].

3.11. It is urged that the entire proceedings of issuance of the show cause notice under Section 28 of the Customs Act is invalid and without authority of law since the DRI Officer is not the proper officer of the Customs and even the action taken is liable to be set aside when the proceedings itself is by DRI officer. It is also further the grievance of the petitioner that all concluded transactions are proposed to be reassessed for which the DRI Officer has initiated proceeding for recovery of duty allegedly not paid on the goods imported by the petitioner and such proceeding is initiated under Section 28(4) of the Customs Act however, such reassessment resulting in recovery of short paid customs duties could be initiated only by "the proper Officer" because only the proper officer has conferred power of review and reassessment under

Section 28 of the Act. The reassessment under Section 28 of the Act is permissible only by the Officer who has carried out the assessment in the first place and not by any officer who is not involved in the assessment when the goods were imported and allowed to be cleared for the home consumption.

3.12. As held by the Hon'ble Supreme Court in M/s. Canon India Pct. Ltd. (supra) the Additional Director General of DRI is not “the proper officer to exercise the power under Section 28(4). Therefore, a serious challenge is made to the said show cause notice dated 24.02.2021.

3.13. It is further the case of the petitioner that the amount of Rs. 50 lakhs deposited by the petitioner under pressure and force during the investigation is also required to be returned and the same is to be construed as only deposit and without following due procedure of assessment, such amount cannot be retained by the authority and the same is in violation of Article 265 of the Constitution of India. He has sought to rely on some of the decisions for the said purpose.

3.14. In the said premises, the following prayers are sought: -

> *(A) That Your Lordships may be pleased to issue a Writ of Prohibition or any other appropriate writ, direction of order completely and permanently prohibiting all the Respondents herein from taking any actions against the Petitioner pursuant to*

proceeding by way of Show Cause Notice F.No.DRI/CZU/VIII/26/17/2020 dated 24.02.2021(Annexure-"A");

(B) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction quashing and setting aside Show Cause Notice: F.No.DRI/CZU/VIII/26/17/2020 dated 24.02.2021 (Annexure "A") issued by the DRI Officer i.e. Additional Director General of DRI, with a direction in the Petitioner's favour to return, restitute and refund Rs.50 lakhs deposited by the Petitioner during investigation;

(C) Pending hearing and final disposal of the present petition. Your Lordships may be pleased to stay all actions including adjudication of Show Cause Notice F.No.DRI/CZU/VIII/26/17/2020 dated 24.02.2021 (Annexure "A");

(D) An ex-parte ad-interim relief in terms of para 20(C) above may be kindly be granted;

(E) Any other further relief as may be deemed fit in the facts and circumstances of the case may also please be granted."

4. This Court (Coram:- Mr. Vikram Nath, the Then Hon'ble The Chief Justice as his Lordship then was and Mr. Bhargav D. Karia, J.) admitted this matter and issued notice on 26.03.2021 with the following order: -

"Heard Shri Paresh M. Dave, learned counsel for the petitioner.

Admit. Issue Notice.

By means of this petition under Article 226 of the Constitution, the petitioner has prayed for quashing of a show cause notice dated 24.02.2021 issued by the Additional Director

General, Directorate of Revenue Intelligence, Chennai Zonal Unit, on the ground that the said officer cannot fall within the definition of a proper officer and as such could not have issued the notice under Sections 28 and 124 of the Customs Act, 1962. Reliance has been placed upon a recent judgment of the Supreme Court dated 09.03.2021 passed in Civil Appeal No.1827 of 2018, M/s.Canon India Private Limited vs. Commissioner of Customs, wherein it has been held that officers of Directorate of Revenue Intelligence would not fall within the domain of proper officer for initiating proceedings under Section 28 of the Customs Act, 1962. Prima facie case for interim relief is made out. As an interim measure, we provide that further proceedings pursuant to the impugned show cause notice shall remain stayed. However, any proper officer duly authorized may initiate appropriate proceedings, if deems fit and permissible in law."

4.1. The interim relief granted by the Court has continued till date.

5. In response to the said notice, learned Additional Solicitor General Mr. Devang Vyas has appeared and resisted these petitions strenuously.

5.1. The affidavit-in-reply is filed for and on behalf of respondent nos. 1,2, 3 and 7. The Additional Director General, Directorate of Revenue Intelligence, Chennai Zonal Unit has denied all the allegations and contentions. According to the respondents, the petition itself is not maintainable and deserves to be dismissed in limini.

5.2. It is further urged that the intelligence gathered indicated that the petitioners were importing CIJ printers, Laser Marking Machines, Parts and accessories of CIJ printers used for product marking and coding by misdeclaring them as Inkjet printers, Laser printers and parts and accessories of printing machinery and misclassifying them under 84433240/84433250 and 84433290/84439951/84439959 respectively of the Customs Tariff Act, 1975 and it wrongly availed exemption Notification No. 24/2005 SI No. 2E which pertains to goods of CTH 84433250 in order to evade and pay lower Basic Customs Duties (BCD) and other applicable duties. The investigation therefore was initiated under summons proceedings.

5.3. The statements were recorded of Shri Pulin Vaidhya, Managing Director on 20.02.2020. It is being revealed from the statement that they were classifying the CIJ printers under 84433250 since September, 2016. No reason was attributed for the same and they also frequently changing the ports and adopting different classification for parts of CIJ printers. They have changed the port of import from ICD Sabarmati once the classification issue was raised by Customs and the duty payment under protest was not informed to the

other ports.

5.4. In the statement of Shri Pratik Shukla, CHA, M/s. CNG Logistics Pvt. Ltd. on 03.11.2020 revealed that the importer informed that the imported product is classifiable under 84433250 by showing them the catalogue that they have claimed NIL rate of duty exemption under Notification No. 24/2005 SI. No. 2E and the Managing Director – petitioner no.2 had informed that his competitors were clearing similar products with NIL rate of duty by claiming Notification No.24/2004 SI. No. 2E as Inkjet Printers and hence, they started filing the documents by claiming the notification exemption and they were asked to clear parts under 84439959 but the customs did not allow the classification and hence, they started classifying the parts under 84439990, which the company also accepted.

5.5. According to the statement of the petitioner no.2 on 15.12.2020, these printers were used for coding and marking of details such as batch no., expiry date, QR code, logo and he along with his Custom House Agent arrived at the HSN based on the classification being adopted by other companies importing these printers, whereas the version of the CHA is that they were filing the BoE classifying the CIJ printers under

84433250 after getting approval from the company.

5.6. According to the respondents, the investigation further revealed that description of these machines is different in the website of the importer/brochure submitted by the importer as well as on the website of supplier than the description given in the invoices and bills of entry. This terms not only the misdeclaration of goods as “Inkjet Printer” in Bills of Entry in order to misclassify them and evade custom duty, but the petitioners have willfully misstated the facts to the department by wrongly classifying the subject goods under CTH 84433250 instead of actual classification under CTH 84433910.

5.7. According to the respondents, the declared classification for CIJ printers and Laser marking machines and their parts during the period from 01.02.2016 to 15.02.2020 under CTH Nos. 84433240 and 84433250 is wrong and liable for rejection. For Laser Making Machines re-classification under CTH No.84433990 for CIJ printers 84433910 and for parts of CIJ printers 84439960 would be necessary and thus, the duty short paid by the petitioner in respect of import of such goods during the period from 01.02.2016 to 15.02.2020 in respect of goods imported through Ahmedabad Air Cargo, Nhava Sheva

Port, Air Cargo Mumbai, ICD Khodiyar, Delhi Air Cargo, amounts to Rs. 2,58,79,376/- (Rupees two crore fifty eight lakhs seventy nine thousand three hundred and seventy six only) and the same is liable to be recovered in terms of Section 28 (4) of the Customs Act, 1962, along with applicable interest in terms of Section 28 (AA) and hence, the same was demanded by way of show cause notice.

5.8. It is denied that the power of issuance of show cause notice and the power of adjudication is not with the respondent no. 7 as he is not 'proper officer' under Section 28(4) of the Customs Act, 1962 as, as per the decision of M/s. Canon India Pvt. Ltd. (supra) the authorities appointed in the Directorate of Revenue Intelligence (DRI) are not the proper officer under Section 28(4) of the Customs Act and not empowered in law to issue and adjudicate Show cause notice under Section 28(4) of the Customs Act, 1962.

5.9. It is urged that 09.03.2021 order is not final and the review is filed on 07.04.2021 before the Apex Court, therefore the matter cannot be decided.

5.10. Reliance is placed on the decision of Calcutta High Court in case of of Directorate of Revenue vs. Navneet Kumar [(2020) 371 ELT 270] that the Directorate of Revenue

Intelligence is only an arm of the Customs department and not alien to the Customs department. It has further explained that the DRI was set up under the Notification dated 04.12.1957 issued by the Ministry of Finance. Various Notifications were issued from time to time under Section 2(34) read with Section 4 of the Customs Act, 1962, according to the respondents, have not been placed before the Apex Court which resulted into the order dated 09.03.2021. They have tabulated the notifications right from 1990 to 2015.

5.11. It is further contended that the Apex Court in case of Commissioner of Customs vs. Sayed Ali [265 ELT 17] vide judgment dated 18.02.2011 held that unless and until the officers are appointed as proper officer under Section 2(34) read with Section 4 & 5 of the Customs Act 1962, assigning the function of adjudication under Section 28, it is not possible to conclude that the officers are empowered to discharge the function of issuing Show Cause Notice. Thereafter, the Finance Act, 2011 inserted sub-section (11) in Section 28 of the Act and also simultaneously issued Notification No.44/2011-Cus. (N.T.) dated 06.07.2011 under Section 2(34) of the Customs Act, 1962 assigning the function of proper officer under Section 17 & 28 of the Customs Act, 1962 to the DRI officers. This amendment in the Act in light of

Apex Court decision in Sayed Ali (supra), a bill was placed before the Parliament of India and it was clarified that true legislative intent is that the show cause notices issued by Customs Officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate 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 was therefore urged that the Parliament has validated the true legislative intent for empowering DRI officers in addition for investigating cases of short levy, non levy and erroneous refunds.

5.12. It is further the say of the respondent that the decision of the Supreme Court has to be read in light of the facts and provision of the Act which came into consideration. The Apex Court, upon arguments placed by the petitioner in case of M/s. Canon India Pvt. Ltd. (supra) has held that there is no entrustment of powers on officers of DRI for issuing show cause notice under section 6 of the Customs when in fact a very officer of the DRI notified as proper officer under Section 2(34) of the Customs Act and is assigned the functions of

adjudication under Section 17 and 28 of the Act, the plea raised by the petitioner loses significance. Moreover, when the Apex Court in case of Sayed Ali (supra) held that the Government had to issue notification under Section 2(34) of the Customs Act, 1962 by specifically assigning the functions specified for adjudication which has been done in the Notification No.44/2011-Cus (N.T) on 06.07.2011.

5.13. It is further argued that the Apex Court in the case of Sayed Ali (supra) has stated that the source of power to act as a "proper officer" is Section 2(34) of the Customs Act and not Sections 4 and 5 of the Customs Act. Sections 4 & 5 of the Customs Act, 1962 merely authorizes the Board to appoint officers of Customs and confer on them the powers and duties to be exercised for the purpose of Section 28 of the Act. An officer of customs has to be designated as "proper officer" under Section 2(34) of the Act by assigning the function of levy and collection of duty by the Board or the Commissioner of Customs.

5.14. It is also contended by the respondents that in light of the judgment of the Apex Court in case of Sayed Ali (supra) the notifications as tabulated in the said affidavit-in-reply were issued by the Central Government under Sections 4 & 5

read with Section 2(34) of the Customs Act appointing the DRI officers as proper officers. It is emphasized that the Apex Court in M/s. Canon India Pvt. Ltd. (supra) observed that unless the authorities are notified as proper officers under Section 6 (which applies to officers of other department appointed as customs officers) they are not considered as "proper officers". The attention of the Apex Court in the case of Canon India had not been invited to the Notifications referred to in the table in para 12 of the said affidavit and also to the decisions of the Division Benches of various High Courts detailed in para 15 of the affidavit.

5.15. It is urged that the attention of the Apex Court was not invited to the amendment made to Section 28 of Finance Act, 2011 and when the Notifications and decisions are not considered while passing the order, then such decision is only persuasive. In such circumstances, it is urged that the Court may consider this notifications.

5.16. It is further stated that as against the order of the Canon India dated 09.03.2021 the department had filed review petitions on 07.04.2021 and the same are pending. The mention was made on 06.07.2021 through video conference and request was made to Hon’ble the Chief Justice by learned

Solicitor General of India and the matters are still pending so also the Canon India decision is not final which is contested by the department in view of the difference of reasoning rendered in Sayed Ali and various notifications tabulated in the affidavit.

5.17. Reliance is placed on the decision of Madras High Court in the case of Sri Sathya Jewellery vs. the Principal Commissioner of Customs [WP. No.3144 of 2016 and allied matters, decided on 15.04.2021], where the Court declined to apply the said decision of the Canon India and relegated the petitioners to appellate remedy since the facts were to be investigated and the Canon India was a decision which was a Civil Appeal against the order of the High Court and the said decision was not accepted and not final in view of the review petition filed.

5.18. The respondents have also replied on the decisions of Karnataka High Court in case of The Commissioner of Customs vs. M/s. Rajesh Exports Ltd. [CSTA 04/2009, decided on 25.08.2021] and The Commissioner of Customs Vs M/s. Bank of Nova Scotia [CSTA 5/2009], wherein the hearing of the appeal was deferred and the parties were given liberty to mention the matters as and when the proceedings in review

petition is concluded before the Supreme Court.

5.19. It is further urged that various High Courts have considered the contentions and either stayed the adjudication of the show cause notice where the adjudication is pending till the outcome of the review petition filed in the Apex Court or directed the adjudicating authority to decide the issue of jurisdiction in accordance with law or directed to exhaust the remedies available under the law where already an adjudication order had been passed.

5.20. The High Court of Bombay in WP No. 1088/2021 disposed of the matter with a direction to the adjudicating authority to decide the issue of jurisdiction in accordance with law. Likewise, Delhi High Court in WP(C) No. 6044/2021 also did the same. The Calcutta High Court in WPO No. 592/2021 also firstly directed the adjudication on the jurisdictional issue and pass the final order. High Court of Madras in WP No. 12502/2021 directed the parties to approach the appellate authority whereas the Telangana High Court at Hyderabad in IA No. 01/2021 in WP No. 8460/2021 gave interim stay.

5.21. According to the respondent, the review application is submitted under Section 27 of the Customs Act, therefore, the refund of duty of Rs. 50 Lakhs is a process to be followed. It is

further urged that the Court may not consider the demand of the petitioner for refund of duty as there is an alternative remedy available to the petitioner.

5.22. The respondent has attempted to further highlight the issue which fall for consideration before the Apex Court at para 4 of the decision. The framing of the issue by the Apex Court in para 6, 9 and 12 also have been heavily relied upon. It is further submitted by the respondents that the Finance Act, 2011 (Act No.08 of 2011) dated 08.04.2011 has introduced the concept "Self Assessment of Customs" duty with effect from 08.04.2011 and the Central Board of Excise and Customs has issued Circular No.17/2011- Customs dated 08.04.2011 regarding implementation of Self Assessment in Customs which states that "the responsibility for assessment would be shifted to the importer / exporter, the Customs officers would have the power to verify such assessments and make re-assessment where warranted. The importer or exporter at the time of self assessment will ensure that he declares the correct classification, applicable rate of duty, value, and benefit of exemption notifications claimed, if any, in respect of the imported/export goods while presenting Bill of Entry or Shipping Bill."

5.23. According to the respondents, in the present case, the investigation was brought to light the misclassification of import products resorted to by the petitioner for evasion of appropriate customs duty. Thus, it is urged to dismiss the petition as the same is not maintainable.

6. The written submissions given by the respondent reiterates what has been contended in the affidavit-in-reply. It also tries to emphasize that certain statutory provisions such as Section 28(11), as also, applicable notifications have skipped the attention of the Apex Court which was crucial statutory provision and which can be said to be distinguishing factor so far as M/s. Canon India judgment is concerned. It is further urged that Section 28(11) begins with non-obstantive clause and it refers to 'proper officer' as also use of word 'officers'. Such use of plural indicates that the parliament was conscious with regard to the scheme of the Act and exercise of powers by various officers as proper officers under different sections. No infirmity is found in appointment of DRI Officers to act as Customs Officers under Notification No. 17/2002 dated 07.03.2002. It is further submitted that in the Canon India, the Apex Court has relied on Section 6 which is for entrustment of functions of the officers of Customs on certain other officers which are any officers of Central of State

Government or of a local body. It is therefore urged that by conjoint reading of Section 4, notifications issued and Section 6, it becomes clear that Section 6 is only for the purposes of those officers who are not specifically appointed under Section 4. It is further submitted that subsequent notifications entrusting specific functions being assigned to officers of DRI to function as proper officers, is a consequence of Sections 4 and 5 and the appointments made thereunder. The law is clear so far as the powers of review are concerned and even at the stage of Section 28, the proper officer does not exercise the powers of review. However, the proper officers exercise independent powers as proper officers subject to provisions and conditions laid in Section 28. Therefore, "in that view of the matter also it cannot be said that the show cause notices will have to be issued by the same officer who has done assessment or reassessment of the duties under Section 17."

6.1. It is emphasized that Section 28(11) refers to the proper officer and officers in plural is very significant as it clearly reflects the legislative intent to recover the duty short paid, not paid or erroneously refunded by assigning powers under Section 28 to multiple officers. "By not noticing this difference of singular word 'officer' in Section 17(4) and plural word 'officers' in Section 28(11) as apparent from the order dated

09.03.2021, this crucial aspect has been lost sight of and has caused the fatal error therein. Without striking 28(11) of the statute, the Hon'ble Court cannot take away the powers vested in officers other than the assessing officer and his successor in office."

6.2. In short, it has questioned the decision of the Apex Court by stating that "there is an error apparent on the face of the record in para 21 as Hon'ble Supreme Court has held that officers of DRI should have been entrusted with functions of customs officers under Section 6 of the Customs Act by the Central Government. This error has crept in as DRI has been considered as a separate department in this order dated 09.03.2021, which it is not. The administrative structure of CBIC, under which DRI has been assigned the enforcement function under the Customs Act, has not been considered by the Hon'ble Supreme Court. Entrustment under Section 6 is done only to those officers of Central Government, State Government and Local Bodies who are not the officers of Customs and who are not under the administrative control of CBIC."

6.3. The heading of Section 6 itself specifies that it is meant for "entrustment of functions of Board and Customs Officers

to certain other officers." DRI officers are fully under the administrative control of CBIC and have been appointed as officers of Customs under Section 4(1) of the Act, as mentioned in the Act.

6.4. It is therefore urged that the Court may decide these matters on their independent individual facts instead of merely relying on the decision of Canon India.

7. The petitioners have also submitted their written submissions which urges that it is impermissible for a subordinate Court to independently consider an issue that has been finally decided by the Apex Court and even though certain provisions of law were not considered by the Apex Court, a subordinate Court cannot examine the same issue again on the basis that the relevant provisions were not brought to the notice of the Court.

7.1. The reliance is placed on the decision of Apex Court in case of Ambica Prasad Mishra [AIR 1980 SC 1762] and the decision of the Full Bench of this Court in case of Sarjubhaiya Mathurbhaiya Kahar [1984 GHL 198].

7.2. It is urged that since it is conclusively held by the Apex Court in case of M/s. Canon India that a DRI officer is not a

proper officer of Customs for initiating recovery proceedings under Section 24(4) of the Customs Act and proceedings initiated by a DRI officer by issuing show cause notices is invalid, without any authority of law and liable to be set aside along with ensuing demands.

7.3. This Court in case of CMR Chiho Industries India Pvt. Ltd. vs. Union of India [SCA 10521/2020, decided on 06.04.2021] has also rejected the review application rendered on 10.08.2021, therefore, the Court cannot take any other decision than that. Moreover, the final orders in cases like Commissioner vs. Agarwal Metals & Alloys also has been passed after the decision of Canon India. Therefore, in the instant case, the Court needs to hold that the reassessment cannot be undertaken by the DRI.

8. We have also heard extensively learned advocates appearing for both the sides.

9. Learned advocates appearing for the petitioners have relied upon following authorities in support of their arguments: -

(i) Judgment of Hon’ble Supreme Court in case of M/s. Canon India Pvt. Ltd. vs. Commissioner of Customs [2021 (3) SCALE 748];

(ii) Copy of the status of Review Application filed in Commissioner of Customs vs. Sony India Pvt. Ltd. [Diary No. 9584/2021];

(iii) Judgment of Hon'ble Supreme Court in case of Commissioner of Customs, Kandla vs. M/s. Agarwal Metals and Alloys [Civil Appeal No. 3411/2020, dated 31.08.2021];

(iv) Judgment of this Court in case of M/s. CMR CHIHO Industries India Pvt. Ltd. vs. Union of India [SCA 10521/2020, dated 06.04.2021];

(v) Judgment of Madras High Court in case of M/s. Quantum Coal Energy (P) Ltd. vs. the Commissioner of Customs [W.P.(MD) Nos. 10186 & 10187/2014 and M.P. (MD) Nos. 1&1 of 2014, dated 16.03.2021];

(vi) Judgment of Madras High Court in case of Deepak Gopaldas Bajaj vs. The Commissioner of Customs [W.P. (MD) Nos. 4032 to 4034/2018, dated 08.09.2021];

(vii) Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association CSI Cinod Secretariat, Madras [(1992) 3 SCC 1];

(viii) Notification No. 96/2009- Cus. dated 11.09.2009;

(ix) Notification No. 64/2008- Cus. dated 09.05.2008;

(x) Notification No. 102/2009-Cus. Dated 11.09.2009;

(xi) Collector of Customs, Calcutta vs. Tin Plate Co.of India Ltd. [1996(87) ELT 589(S.C.)];

(xii) Metal Forgings vs. Union of India [2002 (146) ELT 241 (S.C.)];

(xiii) Assistant Collector, CE, Bombay vs. The Elphinstone Spinning and Weaving Mills Co.Ltd. [1978(2) ELT (J399) (S.C.)];

(xiv) Collector of C.Ex., Calcutta vs. Pradyumna Steel Ltd. [1996(82) ELT 441 (S.C.)];

(xv) CCE, Vadodara vs. Gujarat Container Ltd. [2016(43) str 90 (Guj.)].

10. Learned advocates appearing for the respondents have relied upon following decisions in support of their arguments:

(i) Judgment of Calcutta High Court in case of of Directorate of Revenue vs. Navneet Kumar [(2020) 371

ELT 270];

(ii) Judgment of Apex Court in case of Commissioner of Customs vs. Sayed Ali [265 ELT 17];

(iii) Judgment of Madras High Court in the case of Sri Sathya Jewellery vs. the Principal Commissioner of Customs [WP. No.3144 of 2016 and allied matters, decided on 15.04.2021];

(iv) Judgment of Karnataka High Court in case of The Commissioner of Customs vs. M/s. Rajesh Exports Ltd. [CSTA 04/2009, decided on 25.08.2021];

(v) Judgment of Karnataka High Court in case of The Commissioner of Customs Vs M/s. Bank of Nova Scotia [CSTA 5/2009];

(vi) Order of the Apex Court in case of Union of India vs. Godrej and Boyce Manufacturing Co. Ltd. [Special Leave to Appeal No. 1513/2022, dated 11.02.2022];

(viii) Order of Delhi High Court in the case of Shri Rajesh Vedprakash Gupta and Others vs. Additional Director General (Adj.) and Others [W.P. (C) No. 6044/2021, dated 8.07.2021];

(ix) Order of Bombay High Court in the case of Om Drishian International Ltd. vs. Additional Director, Directorate of Revenue Intelligence and Anr. [W.P. No. 1088/2021, dated 24.09.2021];

(x) Judgment of Madras High Court in the case of M/s. R.K.K.R. Steel vs. The Central Board of Excise and Customs [W.P. Nos. 10276 to 10281/2011, dated 09.07.2021];

(xi) Order of Bombay High Court in case of Coastal Energy Pvt. Ltd. and another vs. Union of India [WP (L) No. 10206/2021, dated 230.09.2021];

(xii) Order of Punjab and Haryana High Court in case of Gautam Spinners vs. Deputy Director, Directorate of Revenue Intelligence [WP 16799/2021, dated 15.11.2021];

(xiii) Judgment of this Court in case of Swari Menthol and Allied Chem. Ltd. vs. Jt. DIR, DRI [(2014) 304 ELT 21].

11. This Court at the outset needs to consider the decision of the Apex Court rendered in case of **M/s. Canon India Pvt.**

Ltd.

11.1. In case of M/s. Canon India Pvt. Ltd. on 19.08.2014, a show cause notice was issued under Section 28(4) of the Customs Act, 1962 alleging that the Customs Authorities had been induced to clear the cameras by willful misstatement and suppression of facts about the cameras. While the decision to clear the goods for import because they were exempted from customs duties under notification was taken by the Deputy Commissioner, Appraisal Group, Delhi Air Cargo, a show cause notice has been issued by the Additional Director General, Directorate of Revenue Intelligence.

11.2. The question that arose was whether the Directorate of Revenue Intelligence had authority in law to issue show cause notice under Section 28(4) for recovery of duties allegedly not levied or paid when the goods have been cleared for import by the Deputy Commissioner of Customs who decided that the goods are exempted. According to the Apex Court, the redressal of the same was to look into the powers conferred under Section 28(4) of the Act. The Court held that the section empowers the recovery of duties not paid, part paid or erroneously refunded by collusion or any willful misstatement and conferred the power of recovery of proper officer. So who

can be called the proper officer? The Court also said that the statute where conferred the said power to perform an act on different officers, the two officers specifically when they belong to different departments, cannot exercise their powers under same case. When one officer exercised his powers of assessment, the power to order reassessment must be exercised by the same officer or his successor officer and not by any officer in any department as designated to be an officer of the same rank.

11.3. While analyzing Section 28A(4) of the Customs Act, the Apex Court held that the provision must be construed as conferring the power of such review on the same officer or his successor who has been assigned the function of assessment. An officer who did the assessment could only undertake reassessment and after extensive analysis, the Court held that the entire proceeding initiated by the Additional Director, General of DRI by issuing show cause notices in all the matters are invalid, without any authority of law and liable to be set aside and accordingly, ensuing demands also have been set aside.

11.4. Apt would be to reproduce the relevant finding, discussion and the ratio: -

"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, Bangalore2 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 'any 2 (1980) 3 SCC 358 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.3 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 accidently but with the intention to designate the proper officer who had assessed the goods at the time of 3 (2001) 3 SCC 609 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, 1962 4.

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 4 Section 2. Definitions – In this Act, unless the context otherwise requires, -

... (2) "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act , 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to –

(a) ...

(b) ...

(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force; 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.

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)].

15. It is obvious that the re-assessment and recovery of duties i.e. contemplated by Section 28(4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. It is,

therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.

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.

18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7.3.2002, has been entrusted with the functions under Section 28 as a proper officer under the Customs Act. In support of the contention that he has been so entrusted with the functions of a proper officer under Section 28 of the Customs Act, Shri Sanjay Jain, learned Additional Solicitor General relied on a Notification No.40/2012 dated 2.5.2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the Customs Act on officers referred to in Column (2). The relevant part of the notification reads as follows:-

"[To be published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii)] Government of India Ministry of Finance (Department of Revenue) Notification No.40/2012-Customs (N.T.) New Delhi, dated the 2nd May, 2012 S.O. (E). – In exercise of the powers conferred by sub-section (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs, hereby assigns the officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Customs Act, 1962, given in the corresponding entry in Column (3) of the said Table: -

Sl. No.	Designation of the officers	Functions under Section of the Customs Act, 1962
(1)	(2)	(3)
1.	Commissioner of Customs	(i) Section 33
2.	Additional Commissioner or Joint Commissioner of Customs	(i)Sub-section (5) or of section 46; and (ii) Section 149
3.	Deputy Commissioner or Assistant Commissioner of Customs and Central Excise	(i) ..... (ii) ..... (iii) ..... (iv) ..... (v) ..... (vi) Section 28; .....

19. It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No.3 above. By reason of the fact that the functions are assigned to officers referred to in

Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-Section (34) of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows:-
"2. Definitions – In this Act, unless the context otherwise requires, -

... (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]. "

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 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.

22. In the above context, it would be useful to refer to the decision of this Court in the case of Commissioner of Customs vs. Sayed Ali and Another5 wherein the proper officer in respect of the jurisdictional area was considered. The consideration made is as hereunder:-

"16. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports), Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed undertaking the obligation of export. The learned counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance, etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).

17. Before adverting to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that:

"28. Notice for payment of duties, interest, etc. – (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest

payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research 5 (2011) 3 SCC 537 or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-

levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words 'one year' and 'six months', the words 'five years' were substituted."

18. It is plain from the provision that the 'proper officer' being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the 'proper officer'.

19. Section 2(34) of the Act defines a 'proper officer', thus:

'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 Commissioner of Customs;' It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be 'proper officers' in terms of Section 2(34) the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an 'officer of customs' is the 'proper officer'.*
>
> *20. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer 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, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice undersection 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions."*
>
> *23. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set-aside and the ensuing demands are also set- aside."*

11.5. It is noteworthy that before the Apex Court, it also examined the issue of limitation by considering the fact that a show cause notice under Section 28(4) could be issued within 5 years from the relevant date which means the date on which the goods were assessed and cleared in case the duty was not paid, short paid or erroneously refunded by reason of

collusion or any misstatement or suppression of facts. On having found that the importer had not made any willful misstatement or suppression of facts, the Court therefore held that extended period of limitation of 5 years was not available to any authority to reopen under Section 28(4) as it was difficult to hold that there was any willful misstatement on facts.

12. In case of **Commissioner of Customs, Kandla vs. M/s. Agarwal Metals and Alloys [Civil Appeal No. 3411/2020, decided on 31.08.2021],** the identical issue had arisen and the Apex Court in wake of the decision of Three Judges Bench of the Apex Court in M/s. Canon India Pvt. Ltd. (supra) had dismissed the appeals as the show cause notice was also issued by the Additional Director General, Directorate of Intelligence who is held to be not the proper officer within the meaning of Section 28(4) read with Section 2(34) of the Customs Act.

> *"Delay condoned.*
>
> *The appeals are dismissed in terms of the signed order. Pending applications, if any, stand disposed of."*

13. This Court in case of **CMR Chiho Industries India Pvt. Ltd.(supra),** was considering the question as to whether the

search carried out by the officials of the DRI at the warehouse/factory premises of M/s. CMR Chiho Industries India Pvt. Ltd., Mehsana, where it was permissible in wake of the decision of the Apex Court in case of M/s. Canon India. It was alleged by the department that the petitioner had misdeclared the product as "discarded and non-serviceable semi-broken/broken motor" by mentioning CTH 7204 49 00 under the Other Ferrous Waste and scrap. This Court relying on the decision of the Apex Court rendered in case of M/s. Canon India Pvt. Ltd., in case of seizure of goods under Section 110, followed the ration of M/s. Canon India decision.

> *"28. As can be noticed from the detailed submissions and the ratio laid down in Cannon India Pvt. Ltd. (supra) in the instant case also, the importer has filed bills of Entry at Thar Dry Port, ICD Customs, Sanand and declared the description of the product as "Discarded and Non—serviceable semi broken Motor Scrap" classifying the same under the Custom Tariff Act 7204 49 00 under the heading of other Ferrous Waste and Scrap. The benefit of concessional rate of 2.5% had been availed by the petitioner vide serial No.368 of Notification No.50/2017:CUS dated 30.06.2017. The said serial No.368 is notified for "melting scrap of iron or steel (other than stainless steel)" for chapter 7204 in the said Notification.*
>
> *29. It is alleged in the show cause notice and in the affidavit in reply that, the importer was aware that the scrap contained 10% of Copper, which is evident from the certificate of analysis and Form 9 furnished by the petitioner to the authority. Therefore, it was the DRI, which formed the "reasonable belief" that the importer took undue*

benefit of concessional rate of duty of 2.5% instead of the paying the effective rate of 5%, resulting into short payment of custom duty to the Government.Therefore, the DRI placed under detention the imported motor scrap (raw material) of 59,45,032 kilo grams of imported motor scrap, nondismantled and 9,39,619 kgs of dismantled and segregated scrap of various types.

30. Thus, the estimated value of scrap of Rs.5,83,62,131 were placed under detention by DRI on 29.07.2020 and the same had been handedover to Shri Naveen Sharma, Operation Manager, M/s.CMR Chiho Industries India Pvt. Ltd. petitioner herein, under proper Suparat Nama dated 29.07.2020 for safe custody. These goods were further placed under seizure on 03.08.2020 as they were liable for confiscation according to the authority under Section 111 of the Act. According to the respondents, the entire matter is currently under investigation of DRI, the Deputy Director, DRI Zonal Unit has given 'no objection' to the provisional release to the seized goods on 11.08.2020 since, the importerpetitioner requested for release of the seized goods vide letter dated 05.08.2020. It is quite obvious that at the time of import of the goods, the petitioner had declared the description of the product as "Discarded in nonserviceable motor scrap under Customs Tariff Heading 7204 49 00 under "other ferrous waste" and because of that 2.5% of rate of concessional duty had been made available under Notification 50/2017:CUS dated 30.06.2017. What is not being disputed is that the certificate of analysis and Form9 as also other relevant materials had been placed before the Custom Authority which examined the same and cleared the goods of import. It was later on that the DRI with a "reasonable belief" that there was an undue benefit of the concessional rate of duty taken which resulted into the short payment of custom duty, placed the goods under detention and they were subjected to confiscation. It is quite obvious that the officer, who had permitted the import of the goods is not the one who had formed a reasonable belief of the

petitioner having taken undue benefit of the concessional rate of duty. It is the officer of the DRI, who was not anywhere in the picture when the import took place, had acted and detained the goods and later on also confiscated the same. A very serious challenge in the instant case is also to the action of the DRI officer of detention and seizure dated 29.07.2020 and 03.08.2020 so also of the confiscation dated 11.08.2020 along with the challenge to the very action of show cause notice on the part of the respondent.

31. What is vital for the Court to regard is the factual details of the case on hand before applying the judgment of the Cannon India Pvt.Ltd. (supra) while exercising powers of detention, the DRI alleges that the custom authorities had been induced by the petitioner to clear the goods which had been imported by alleged willful misstatement and suppression of the facts and this action according to the DRI had led to the wrongful availment of the concessional rate of duty. This misdeclaration of the product along with the concessional rate of duty resulted into the short payment of custom duty and therefore, it chose to not only exercise the powers of detention, but also of seizure on 11.08.2020. The provisional release order was also passed on receipt of certain securities from the petitioner.

32. The relevant permissions in connection with the detention and seizure if are briefly noticed, Section 111 lays down that if the proper officer has a reason to believe that any goods are liable of confiscation under the customs act, he may seize such goods.

32.1. Section 110A of the Act is an attaching section where the provisional release of seized goods pending adjudication is contained, which says that any goods, documents or things seized or bank account provisionally attached under Section 110 of the Act, may, pending the order of the adjudicating officer, be released to the owner or the bank account holder on taking a bond from him in

the proper form with such security and conditions as the adjudicating authority may require.

32.2. Section 110(2) of the Customs Act also provides that where any goods are seized under subsection (1) and no notice in respect of the same is given within six months under clause (a) of section 124, the goods shall be returned to the person from whose possession they were seized.

32.3. It is also further provided that not only the principles of natural justice shall have to be adhered to. It is obvious that there has to be a show cause notice before confiscation of the goods within six months after once the seizure of the goods takes place under Section 110 (1) of the Act.

32.4. Section 124 of the Act provides for issuance of show cause notice before the confiscation of the goods and states that no order of confiscation or imposing of any penalty on any person shall be made under this chapter unless the owner of the goods or such person (a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty; (b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and (c) is given a reasonable opportunity of being heard in the matter, Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may at the request of the person concerned be oral. Provided further that notwithstanding the issuance of notice under this section, the proper officer may issue a supplementary notice under such the circumstances
and in such manner as may be prescribed.

32.5. It also appears that under Section 125 of the Customs Act, there is an option to pay the fine in lieu of confiscation as the said

provision provides that "whenever confiscation of any goods is authorized by this Act, the officer adjudging it may, in case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit".

33. Thus, after once the officer concerned forms a reasonable belief in relation to the goods imported, firstly what happened was the detention and thereafter, the seizure of the goods.

33.1. Such goods had been periodically released but before undertaking the process of confiscation, opportunity of payment of fine also can be given and there is a detailed procedure mandated before actually confiscation takes place.

33.2. Since the availing of due opportunity for following of principles of natural justice is an integral part of the scheme of these provisions, issuance of show cause notice is by way of following the prescribed procedure.

33.3. And yet, what would be vital to examine is whether the exercise of forming reasonable belief in wake of noticeable material before the authority could be held justifiable and whether the issuance of notice by the officer concerned of DRI, in wake of the latest decision, would warrant interference on the ground of the same being non est without any authority.

34. The Deputy Director, DRI respondent No.3 herein in his affidavitinreply has alleged that there is already improper declaration of description of imported goods and consequential claim and thereby, availment of undue benefit of concessional rate of custom duty at the rate of 2.5% instead of

5%. The goods imported are not melting scrap of Iron and Steel, but also contained Copper scrap and Aluminum scrap. According to the Department, the petitioners were aware that the imported products were labeled as "Discarded and nonserviceable semibroken motor scrap" and they simply cannot be termed as melting scrap of Iron or Steel (other than stainless steel) falling under Customs Heading 72044900. They have admitted that they are importing the motor scrap consisting Iron Scrap 85%, Copper Scrap 10% and Aluminum Scrap 5% in approximate. They are alleged of intentionally not declaring their products properly in the bills of Entry at the time of import under Section 46 of the Act in terms of Section 17 of the Customs Act. Section 17 provides that an importer entering any imported goods under Section 46 or an exporter entering any export goods under Section 50 of the Act shall save as otherwise provided in Section 85, self assess the duty, if any, leviable on such goods.

35. Admittedly, the description in the Bill of Entry "Discarded and nonserviceable semibroken motor scrap" even on inspection of the goods were found exactly as entered into the Bill of Entry i.e. discarded and nonserviceable broken motor scrap. The only reason after having allowed the import for not allowing the benefit of reduced rate of duty is because the Copper scrap and the Aluminum scrap in the material imported to the extent of 10% and 5% respectively and approximately could be taken out eventually from these broken motors. That essentially appears to be the reason for disallowing of the exemption. As is apparent from the material in the certificate of analysis produced at the time of clearance of the goods itself, the existence
of the Copper scrap is also disclosed. It is not disputed by the respondent No.3 that such certificate of analysis had been produced. The same has also finds a specific mention in the panchnama dated 03.08.2020 and in the letter dated 03.08.2020 addressed to the petitioner by the Assistant Commissioner, ICD, Sanand.

35.1. It is in the beginning of this communication referred to "during the course of post clearance audit of the Bills of Entry filed by you in respect of clearance of goods viz.,"Discarded and nonserviceable semibroken motor scrap". It has been noticed that the documents like bill of lading, PSIC and certificate of analysis indicate that the imported scrap consisted of (i) Copper scrap, Barley/Birch (ii) Aluminum scrap (iii) Iron scrap (HMS).

35.2. The petitioner is absolutely right in pointing out that if the exemption was not available to the petitioner on the basis of the documents, which had been produced at the time of import, the Assessing Officer of the Customs could have denied the same and with the full knowledge, he had permitted assessment of the goods under the Customs Tariff Heading 7204 49 00 as Iron and Steel scrap and permitted the exemption available under Notification 50/2017:CUS dated 30.06.2017 under serial No.368.

36. It can be noticed that from the disclosure made by the petitioner that it had claimed the classification and exemption by bringing to the notice of the department all relevant details and therefore, to term this as a misdeclaration and to arrive at a subjective satisfaction for not allowing the benefit of Notification on the ground of existence of the Copper in the scrap motors, by the DRI Officer surely in wake of the decision of ***Canon India Pvt. Ltd (supra)*** *shall need to be interfered with. The assessment once when is done by the concerned officer of the Custom Department, the reassessment by the DRI Officer, who invoked the powers, not being the proper officer as per the decision of Canon India Pvt. Ltd. (supra) would warrant indulgence. And, hence, his reasonable belief would also have no bearing when otherwise the authority concerned had allowed the import on the basis of the material which had been already made available by the petitioner. Thus, on the count of the DRI officer not being a proper officer under the law as*

the action on the part of the officer of DRI is not to be sustained. Again, assuming that he would have powers to reassess the very fact that entire material was with the assessing officer, it was for him to assess otherwise. Besides, vide notification issued by the Central Board of Excise & Customs, that is, notification no. 40/2012 – customs (NT) dated 2.5.2012 and more particularly, item no.6 whereby, the Intelligence Officer in the Director General of Revenue Intelligence and Directorate General of Central Excise Intelligence, have been assigned the powers of various sections including the powers under subsection (1) and (2) of section 110 of the Act, which notification has been considered by the Apex Court with reference to assigning the powers of section 28 of the Act and has been held to be invalid. The learned counsel for the Union, could not dispute the said proposition as well as the applicability of the judgment to the facts of the present case, therefore, applying the principles enunciated in the case of Canon India Private Ltd (supra) the petition deserves to be allowed.

37. The decision of the Apex Court rendered in case of ***Commissioner of Customs, Calcutta vs. G.C.Jain****, reported in* ***2011 (269) E.L.T. 307*** *shall also need to be referred to at this stage where dispute was whether Butyl Acrylate Monomer (BAM) can be said to be an adhesive for the purpose of allowing the duty free clearances against advance license issued under the DEEC scheme.*

"24.It is also observed that the demand is hit by the bar of limitation inasmuch as the appellant had cleared the goods in question after declaring the same in the bills of entries and giving correct classification of the same. Availing of benefit of a notification, which the Revenue subsequently formed an opinion was not available, cannot lead to the charge of misdeclaration or misstatement, etc. And even if an importer has wrongly claimed his benefit of the exemption, it is for the department to find out the correct legal position and to allow or disallow the same. In the instant case the

appellant had declared the goods as Butyl Acrylate Monomer with correct classification of the same and the word 'adhesive' was added in the exbond bill as per the appellant's understanding that BAM is an adhesive. In these circumstances it was for the Revenue to check whether BAM was covered by the expression adhesive or not and if even after drawing of samples they have allowed the clearances to be effective as an adhesives appellant cannot be held responsible for the same and subsequently, if the Revenue has changed their opinion as regards the adhesive character of BAM, extended period cannot be invoked against them. As such we are of the view that the demand of duty in respect of 14 consignments is also barred by limitation."

37.1. It is of course for the department to find out the correct legal position as to the classification and if the department has permitted the clearance, and subsequently changed its opinion, to hold the petitioner liable and responsible and alleged him of misdeclaration since is impermissible.

38. Here is the case where the petitioner has filed Electronic Bill of Entry in the EDI system, where it can claim a particular exemption or a particular classification. On subsequently having noticed that the Copper and Aluminum elements would not permit the exemption under the Notification at the rate of 2.5% by itself would not make the import of the goods as clandestinely having been done, the least that could have been done was to term the same as mala fide when otherwise the relevant material had been already placed with the department.

38.1. As mentioned hereinabove, the communication dated 03.08.2020 in post clearance audit of Bill of Entry was on the basis of various documents including the certificate of analysis, when it was realized by the department that the product consists of the Copper scrap also

to the extent of around 10%. The DRI has firstly detained the goods, which later on had been seized. Assuming that the stage of adjudication of show cause notice is yet to come, this Court has no intent to go into the issue of classification at all as it would be for the proper officer to workout the same on following the due procedure and on requisite scrutiny however, noticing that the order of detention and seizure by the DRI itself is unsustainable, we allow the petition by quashing and setting aside the seizure and the panchnama.

38.2 Resultantly, this Petition is allowed, quashing and setting aside the detention and seizure dated 29.07.2020 (AnnexureH), dated 03.08.2020 (AnnexureL & M) & 11.08.2020 (AnnexureW).”

13.1. It is given to understand that this decision has not been challenged by the respondent and thus, respondent – Union of India has accepted the same.

14. This Court since has followed the ratio laid down by the Apex Court in case of M/s. Canon India Private Limited (supra), there is no reason as to why in all these matters where the show cause notices have been issued by the respondent after knowing fully well the decision of M/s. Canon India, should not follow the very ratio as has been done in case of CMR Chiho Industries India Pvt. Ltd.(supra).

15. As noted hereinabove, the arguments advanced of there being no infirmity in appointment of the DRI officers as Customs Officers under Notification No. 17/2002 dated

07.03.2002 and the discussion on Section 6 for the entrustment of the functions of the officers of the customs on certain other officers which are the officers of the Central or State Government or a Local Body, by emphasizing on a conjoint reading of Sections 4 and 6 will surely not be within the purview of this Court. It also amounts to being wiser than the highest Court of the Country and is simply impermissible to even allow such arguments to be advanced before this Court when not only the review has not been so far decided, but, subsequently another Bench of three judges in case of Commissioner of Customs, Kandla vs. M/s. Agarwal Metals & Alloys [Civil Appeal No. 3411/2020, decided on 31.08.2021] has also followed the decision of M/s. Canon India Private Limited. There has been no review also sought of this decision where the appeal has been dismissed of the Commissioner of Customs, Kandla relying on the decision of M/s. Canon India Private Limited.

16. Apt would be to remind the respondent of the decision of the Constitutional Bench rendered in case of Ambika Prasad Mishra vs. State of U.P. [1980 (3) SCC 719] where the Court has held that, it is wise to remember that fatal flaws silenced by earlier rulings cannot survive after death because a decision does not lose its authority "merely because it was

badly argued, inadequately considered and fallaciously reasoned". And none of these misfortunes can be imputed to Bharati's case [AIR 1973 SC 1461].

17. The Full Bench of this Court in case of Sarjubhaiya Mathurbhai Kahar vs. Commissioner of Police, Vadodara [1984 (1) GLR 538] had come heavily when despite the decision of the High Court in a subsequent case, the party proceeded to deal with the question before it as if the decision would not be applicable and the justification drown was that relevant provision was not brought to the notice of the Supreme Court.

18. The Apex Court in a decision of **B.M.Lakhani vs. Malkapur Municipality [AIR 1970 SC 1002]** held that the decision was binding on the High Court and the High Court could not ignore it because it thought that the relevant provisions were not brought to the notice of the Court. The Court has emphatically held that “a new ground of challenge even on the basis of approach made in the later decision of the Supreme Court may not be available before the Court to the petitioner in a matter before it.” Apt would be to refer to the said decision:-

> *“3. Two questions fall to be determined in this appeal (I) whether a suit for refund of tax paid to the*

Municipality is maintainable; and (2) if the suit is maintainable, whether the levy of tax by the Municipality was valid in law.

4. The first question is concluded by the judgment of this Court in Bharat Kala Bhandar's case, 1965-3 SCR 499 = . That case arose under the C.F. & Berar Municipalities Act, 1922. The right of a Municipality governed by that Act to levy under Section 66(1)(b) a tax on bales of cotton ginned at the prescribed rate was challenged by a taxpayer. This Court held that levy of tax on cotton ginned by the taxpayer in excess of the amount prescribed by Article 276 of the Constitution was invalid, and since the Municipality had no authority to levy the tax in excess of the rate permitted by the Constitution, the assessment proceedings levying tax in excess of the permissible limit were invalid, and a suit for refund of tax in excess of the amount permitted by Article 276 was maintainable. The decision was binding on the High Court and the High Court could not ignore it because they thought that "relevant provisions were not brought to the notice of the Court".

5. We may also observe that the judgment in Firm Seth Radha Kishan v. Administrator Municipal Committee, Ludhiana 1964-2 SCR 273 : on which reliance was placed by the High Court has no relevance. In that case under the Rules of the Municipality of Ludhiana tax on common salt imported within the Municipal limits could be levied at a certain rate, and on all other kinds of salts at a higher rate. On the Sambhur salt imported by the appellants duty was levied at the higher rate. The appellants then filed a suit for decree for refund of excess tax levied, contending that Sambhur salt was common salt. This Court held that the Civil Court had no jurisdiction to entertain the suit, for the liability to pay terminal tax was created by the Act and a remedy was also provided against improper enforcement of the Act. In a case where the Municipality has undoubted power to levy a tax under a provision of the Act, in respect of any article, and it levies tax under another provision of the Act not applicable to it, the Municipality merely commits an error in collecting the tax at the rate collected, and no

question of jurisdiction arises, the party aggrieved must seek remedy in the manner prescribed by the Act. In the present case, however, there is a bar against levy in excess of the amount specified in the Constitution, and not a mere question of levy of tax under an inapplicable entry.

6.Again it was implicit in the judgment of the Full Bench that the suit was maintainable. If the suit was not maintainable the question whether to the claim made under Section 48 of the Act had application could not arise. Section 48 lays down the conditions subject to which the suit may be filed. Whether Section 48 of the C.P. & Berar Municipalities Act is not applicable, because the tax contravened Section 142-A of the Government of India Act, 1935, or Article 276 of the Constitution, could only fall to be determined if a suit for refund lay. The High Court was, in our judgment, in error in setting aside the decree passed by the District Court on the ground that a suit for refund of tax was not maintainable.

7. On the second question the argument of the Municipality has also not much substance. The Municipality was constituted in 1905 under Section 41(1)(a)(b) of the Berar Municipal Act, 1888, a tax called "the Bale and Boja tax" was levied by the Municipality with effect from October 1, 1912, on cotton ginned and pressed in Ginning and. Pressing Factories at the rate of 8 pies per bale of 10 maunds, and 10 pies per bale of 14 maunds. On October 2, 1989, the Municipality resolved to revise the rates and by notification dated January 2, 1940, under Section 87(5) of the C.P. & Berar Municipalities Act, 1922, tax was permitted to be levied at the rate of four annas per bale with effect from October, 1, 1939.

8. The Berar Municipal Act was promulgated by the Viceroy & Governor-General, Berar being then not a. part of British India. By a notification of the. 'Governor-General dated June 22, 1924, under the Indian (Foreign Jurisdiction) Order in Council the Berar Municipal Act was repealed, and the Central Provinces Municipalities Act 2 of 1922 was applied to the Berar Area. After the Government of India Act, 1935, the Berar Laws (Provincial) Act, 1941 was

enacted, and Berar was under Section 47 of the Government of India Act to be administered together with the Central Provinces as one of the Provinces under that Act. Various Acts" including the Central Provinces Municipalities Act 2 of 1922 were extended to the Berar with certain modifications under the Central. Provinces and Berar Act 15 of 1941. By that Act the title of Act 2 of 1922 was altered: it read "Central Provinces and Berar Municipalities Act"., By Section 8 of the Act it was provided that the Central Provinces Municipalities Act, 1922, which had been applied to Berar by order under the Indian (Foreign Jurisdiction) Order in Council, 1902, shall cease to have effect "provided that all appointments, delegations, notifications, orders, byelaws, rules and regulations which have been made or issued, or deemed to have been made or issued and all other things done or deemed to have been done under, or in pursuance" of, any provision of any of the said Order m Council, and which are in force at the commencement of this Act, shall be deemed to have been made or issued or done under or in pursuance of the corresponding provision of that Act as now extended to, and in force in, Berar."

Notifications issued under the Berar Municipal Act and the Central "Provinces Municipalities Act in force at the commencement of Act 15 of 1941 applied to the Municipalities in the former Berar area. In the meanwhile S. 142-A was incorporated in the Government of India Act, 1935, by India & Burma (Miscellaneous Amendment) Act, 194.0, 8 & 4, Geo. 6, Ch. 5, as from April 1,1939, imposing limit upon taxes, professions, trades and callings. But by the proviso to Sub-section (2) of Section 142-A levy by the Provinces or Municipal bodies of tax on profession, trade, calling or employment, at rates exceeding the rates prescribed by the Government of India Act were to remain in operation until provision to the contrary was made by the Parliament. To give effect to the limitation imposed by Section 142-A the Parliament enacted the Professions Tax Limitation Act XX of 1941. The relevant provisions of Act 20 of 1941 are as follows:

Section 2 - Notwithstanding the provisions of any law for the time being in force, any taxes payable in

respect of any one person to a Province., or to any one municipality, district board, local board? or other local authority in any Province, by way of tax on professions, trades, callings or employments, shall from and after the commencement of this Act cease to be levied to the extent in which such taxes exceed fifty rupees per annum.

Section 3- The provisions of Section 2 shall not apply to any tax specified in the Schedule.

The Schedule is as follows:

THE SCHEDULE Taxes to which Section 2 does not apply.

1.The tax on professions, trades and callings, imposed through fees for annual licences, under Chapter XII of the Calcutta Municipal Act, 1928.

2. The tax on trades, professions and callings, imposed under Clause (f) of Sub-sections (1) of Section 123 of the Bengal Municipal Act, 1932.

3. The tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on, municipal services, imposed under Clause (ii) of Sub-section (1) of Section 128 of the United Provinces Municipalities Act, 1916.

4. The tax on persons exercising any profession or art, or carrying on any trade or calling, within the limits of the Municipality, imposed under Clause (b) of Section (1) of Section 66 of the Central Provinces Municipalities Act, 1922.

5, The tax on companies, imposed under Section 110 of the Madras City Municipal Act, 1919.

9. The Professions Tax Limitation Act, 1941, was repealed by the Adaptation of Laws Order, 1950, and limitations on the tax on professions, trades, callings and employment were continued by Article 278 of the Constitution after the repeal of the Government of India Act.

10. It may be recalled that the notification enhancing the rate of "Bale and Boja tax" was issued after

Section 142-A of the Government of India Act, 1935, was incorporated. The only notification In force was the notification issued in 1912. The notification of 1940 was not saved by the proviso to Section 142-A of the Government of India Act, 1935. But the Municipality collected tax at rates set out in the notification of .1940. It is clear, however, that if the notification of 1940 was ineffective under the Government of India Act, it could not be revived under the Constitution Article 276(2) proviso. The notification relied upon by the Municipality was brought into operation after the Constitutional prohibition under Section 142-A of the Government of India Act became effective on April 1, 1939. The modification of rates was plainly ineffective, for the rates prescribed thereby were not in operation in the financial year ending March 31, 1939.

11. No claim to recover the tax could therefore, be founded on that notification. But it was urged that the earlier notification of 1912 was in any case effective in the financial year ending March 31, 1939, and tax could be levied under that notification which was indisputably in operation in the financial year. This Court has however held in Municipal Committee, Akot v. Manilal Manekji Pvt Ltd. 1967-2 SCR 100 : ; on interpretation of Sections 2 and 3 and Item 4 of the Schedule to the Professions Tax Limitation Act 20 of 1941 that the rate fixed by the earlier notification was also not saved from the operation of Section 2. This Court was of the view that by virtue of Item 4 of the Schedule only the tax on persons, exercising professions imposed under Clause (b) of Sub-section (1) of Section 66 of the Central Provinces Municipalities Act, 1922, was saved from the operation of Section. 2 of Act 20 of 1941 and not the tax under Section 66 of the Central Provinces & Berar Municipalities Act, 1922, and the tax levied by the respondent Municipality was levied under the latter Act. That decision is binding upon us. It must therefore be held that the rate of tax prescribed by the notification of 1912 alone could be enforced, subject to the limit prescribed by Article 276(2) of the Constitution. The Municipality was therefore

incompetent to levy a tax at a rate exceeding Rs, 250/- for the whole year.

12. The appeal is allowed and the decree passed by the Trial Court is restored. The Municipality will pay the costs in this Court and in the High Court."

19. Thus, not only the binding decision of the Apex Court in case of Canon India (supra) will govern the fate of each matter where the issuance of show cause notice is by the DRI and in contravention of the ratio laid down, it is also for this Court to ignore such ratio by holding that this issue also could be approached in different ways. Nor would it make permissible to defend the action of the State on the ground of cause expounded in the show cause notice when the very authority as per the decision lacked authority to issue the same. This Court much awaited for the outcome of review which is pending. However, as agreed to by both the sides, there is no certainty of its finalization and again, all the appeals are finalized subject to the outcome of reply.

20. The amendment in the act has been brought on the statute and whether it can have effect retrospectively when in case of all these matters, show cause notices have been issued prior to the amendment having come into force is not the question to be deliberated upon as argued by both the sides.

21. Resultantly, all these petitions are ***Allowed.*** Show cause notice issued in each case by the DRI is quashed on the basis of the ratio laid down in M/s. Canon India (Supra) without entering into the merits of individual case. This would be subject to the outcome of review pending before the Apex Court in Commissioner of Customs Vs. M/s. Canon India Pvt. Ltd. [Review Petition (Civil) No. 400/2021 (Diary No. 9580/2021) filed on 07.04.2021]. Furthermore, this quashment shall not in any manner preclude the Revenue to initiate action on merit, if permissible under the law, by proper authority.

(SONIA GOKANI, J)

(RAJENDRA M. SAREEN,J)

Bhoomi