

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

REGIONAL BENCH

Customs Appeal No. 893 of 2012

(Arising out of Order-in-Original CAO No.31/2012/CAC/CC/BKS dated 31.05.2012 issued on 22.06.2012 passed by the Commissioner of Customs (Adjudication), Mumbai)

M/s. Dhiren Enterprise
102, Shalimar Apartment,
Sant Narshi Mehta Marg,
Ghatkopar, (West) Mumbai-400086

...Appellant

VERSUS

Commissioner of Customs (Adjudication),
New Customs House,
Mumbai-400 001

...Respondent

APPEARANCE:

Shri Anil Balani, Advocate for the Appellant
Shri Manoj Das, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 27.10. 2021
Date of Decision: 09.11.2021

FINAL ORDER NO. A/87107/2021

JUSTICE DILIP GUPTA:

This appeal has been filed by Dhiren Enterprise¹ to assail the order dated 31.05.2012 passed by the Commissioner of Customs (Adjudication), by which the demand raised in the show cause notice dated 30.01.2009 issued by the Additional Director General,

1. the appellant

Directorate of Revenue and Intelligence², Mumbai, under sections 28 and 124 of the Customs Act 1962³ has been confirmed.

2. It has been submitted by Shri Anil Balani, learned counsel appearing for the appellant that the Additional Director General, DRI did not have the jurisdiction to issue the show cause notice as he was not **the proper officer** under section 28 of the Customs Act to issue the notice and in support of this contention learned counsel placed reliance upon decisions of the Supreme Court in **Canon India Pvt. Ltd. vs. Commissioner of Customs**⁴ and **Commissioner of Customs, Kandla vs. M/s. Agarwal Metals and Alloys**⁵.

3. Shri Manoj Das, learned authorised representative appearing for the Department, however submitted that the Additional Director General, DRI had the jurisdiction to issue the show cause notice and also submitted that the Department has filed a review petition against the judgment of the Supreme Court in **Canon India** on 07.04.2021 and it is pending. Learned authorised representative, therefore, submitted that the hearing of this appeal may be deferred. Learned authorised representative also submitted that the notice has been issued both under sections 28 and 124 of the Customs Act and, therefore, even if the notice issued under section 28 is held to be without jurisdiction, the notice issued under section 124 of the Customs Act would still survive.

4. The submissions advanced by learned counsel for the parties have been considered.

2. **Additional Director General, DRI**
3. **the Customs Act**
4. **2021 (376) E.L.T. 3 (S.C.)**
5. **2021 (9) TMI 316- Supreme Court**

5. The first issue that arises for consideration is whether the Additional Director General, DRI had the jurisdiction to issue the notice. This precise issue was examined by the Supreme Court in **Canon India**. The Supreme Court observed that 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 a power that has been conferred to review the earlier decision for assessment. This power which has been conferred under section 28 of the Customs Act on **the proper officer**, must necessarily mean **the proper officer** who, in the first instance, assessed and cleared the goods. Thus, the Additional Director General, DRI did not have the jurisdiction to issue the show cause notice. The observations of the Supreme Court are as follows:

"12. The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. 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.

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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.

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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."

(emphasis supplied)

6. It would thus be seen that the Supreme Court in **Canon India** held that the entire proceedings initiated by the Additional Director General, DRI by issuance of a show cause notice was without any authority of law and was, therefore, liable to be set aside.

7. The aforesaid decision of the Supreme Court in **Canon India** was subsequently followed by the Supreme Court in **Agarwal Metals and Alloys** and the judgment is reproduced below:

"Delay condoned.

In view of decision dated 09.03.2021 of three judge Bench of this Court in **Civil Appeal No. 1827 of 2018 titled as "M/s. Canon India Private Ltd. vs. Commissioner of Customs" reported in 2021(3) SCALE 748**, these appeals must fail as the show cause notice(s) in the present cases was also issued by Additional Director General (ADG), Directorate of Revenue Intelligence (DRI), who is not a proper officer within the meaning of Section 28(4) read with Section 2(34) of the Customs Act, 1962.

Hence, these appeals stand dismissed.

However, dismissal of these appeals will not come in the way of the competent authority to proceed in the matter in accordance with law.

Pending application(s), if any, stand disposed of."

8. Apart from the aforesaid two decisions of the Supreme Court in **Canon India** and **Agarwal Metals and Alloys**, the High Courts have also set aside proceedings where show cause notices were issued by the Director of Revenue Intelligence.

9. The Bombay High Court in **Kitchen Essentials & Ors. vs. The Union of India & Ors.**⁶ observed as follows:

"10. Having gone through the decision of the Hon'ble Supreme Court in the case of M/s. Canon India Private Limited (supra), we find that the issue raised in the present writ petition is squarely covered by such decision. The show cause notice in

6. **2021 (10) TMI 1267-Bombay High Court**

the present case is also issued by the respondent No.2 - Joint Director, DRI, Mumbai, who is not a proper officer within the meaning of Section 28(4) read with Section 2 (34) of the said Act.

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12. In the light of the decisions of the Hon'ble Supreme Court referred to herein above, we have no hesitation in holding that the entire proceedings in the present case initiated by the respondent No. 2 - Joint Director, DRI, Mumbai, by issuing the show cause notice are invalid, without any authority of law and liable to be set aside and ensuing demands are also liable to be set aside."

10. The Madras High Court in **Quantum Coal Energy (P) Ltd. vs. The Commissioner, Office of the Commissioner of Customs, Custom House, Tuticorin**⁷ observed as follows:

"6. When the matter was taken up for hearing, the learned counsel appearing for the petitioner submitted that the issue is no longer res integra and that the Hon'ble Supreme Court in M/s. Canon India Private Limited V. Commissioner of Customs (2021-VIL-34-SC-CU) had held that the expression "the proper officer" occurring in Section 28 of the Customs Act will only refer to the assessing officer who passes the original order making assessment.

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7. In the case also, the show cause notice was issued by the Additional Director General of DRI. The Hon'ble Supreme Court had held that he cannot be termed as "the proper officer". Since the entire proceedings were initiated by an authority who lacked the jurisdiction, applying the aforesaid decision of the Hon'ble Supreme Court the order impugned in these writ petitions is quashed."

11. The Karnataka High Court in **Shri Mohan C. Suvarna Director (Finance and Admin) M/s Givaudan India Pvt. Ltd. vs. The Principal Commissioner of Customs, Additional Director General Directorate of Revenue Intelligence, Bangalore**⁸ did not accept the plea of the Department that since the review petition had been filed by the Department in **Canon India**, the hearing should be adjourned and in view of the decision of the Supreme Court in **Canon India**, set aside the order for the reason that the show cause notice had not been issued by **the proper officer**.

7. 2021 (3) TMI 1034- Madras High Court

8. 2021 (8) TMI 178- Karnataka High Court

12. The Punjab and Haryana High Court in **M/s. Steelman Industries vs. Union of India and Others**⁹ also, in view of the decision of the Supreme Court in **Canon India**, allowed the Writ Petition and set aside the entire proceedings arising from the show cause notice as the Additional Director General, DRI was not the **proper officer**.

13. Various Benches of the Tribunal have also set aside the orders for the reason that the show cause notices were not issued by **the proper officer**, since they were issued by the Department of Revenue and Intelligence. The decisions are:

- (i) **Principal Commissioner, Customs, Acc Import Commissionerate New Customs House vs. Dish TV India Limited, Rajeev Dalmia and Virender Targa (Vice-Versa)**¹⁰;
- (ii) **C. Magudapathy vs. Commissioner of Customs (Seaport-Export)**¹¹; and
- (iii) **M/s. Modern Insecticides Limited vs. Commissioner of Customs, Ludhiana**¹²

14. The show cause notice dated 30.01.2009 issued by the Additional Director General, DRI is, therefore, without jurisdiction as the said officer was not **the proper officer** and, therefore all proceedings undertaken by the Department on this show cause notice is, therefore, without jurisdiction. The order dated 31.05.2012 passed by the Commissioner of Customs (Adjudication), therefore, cannot be sustained.

15. The submission advanced by the learned authorised representative appearing for the Department that the hearing of this

9. 2021 (8) TMI 1236- Punjab and Haryana High Court
 10. 2021 (10) TMI 771- CESTAT New Delhi
 11. 2021 (9) TMI 636- CESTAT Chennai
 12. 2021 (10) TMI 598- CESTAT Chandigarh

appeal should be deferred till the review petition filed by the Department in **Canon India** is decided was considered by the Karnataka High Court in **Mohan C. Suvarna** and rejected.

16. Learned authorised representative appearing for the Department, however submitted that the notice was also issued under section 124 of the Customs Act for confiscation of the goods under section 111 and imposition of penalty under section 112 of the Customs Act and, therefore, the order to this extent is not bad in law.

17. Learned counsel appearing for the appellant, however placed reliance upon a decision of the Tribunal in **Bakeman's Home Products Pvt. Ltd. vs. Collector of Cus., Bombay**¹³ and contended that the proposal for confiscation of goods and imposition of penalty cannot be segregated from the duty demand and, therefore, if the duty demand fails as the show cause notice was not issued by **the proper officer**, the proceedings for confiscation and penalty cannot survive.

18. This submission advanced by learned counsel for the appellant deserves acceptance. In **Bakeman's Home Products**, the Tribunal held that the proposal for confiscation and penalty cannot be segregated from duty demand and, therefore, the proceedings for confiscation and imposition of penalty cannot be sustained. The relevant portion of the decision is reproduced below:

"13. Only four of the decisions cited before us are relevant in the context of the dispute before us. In Northern India Woollen Mills v. COC - [1991 \(53\) E.L.T. 81](#) (Tribunal), it was held that duty demand cannot be segregated from confiscation and penalty. In COC v. Poona Roller - [1997 \(89\) E.L.T. 604](#) (Tribunal) while purporting to recognize the theoretical possibility of notice under Section 124 surviving even after failure of demand of duty, it was observed that both aspects are so interlinked that segregating the issues may be neither

13. 1997 (95) E.L.T. 278 (Tribunal)

feasible nor desirable. In Manohar Bros. (Capacitors) - 1996 (15) RLT 581, it was held that when demand of differential duty fails, the proceeding cannot survive. The decision of the Supreme Court in COCE v. H.M.M. Ltd. - [1995 \(76\) E.L.T. 497](#) (S.C.) that the question of penalty would arise only if the Department is able to sustain the demand of duty has to be taken into consideration. In the cases at hand, demand was raised under the proviso to Section 28(1) of the Act on the allegation of mis-declaration of value and the demand is found to be without jurisdiction. Proposals for confiscation and imposition of penalty are also based on the framework of alleged mis-declaration of value. The demand of duty on allegation of mis-declaration of value cannot be segregated from action of confiscation and penalty based also on mis-declaration of value. Consequently since the demand of duty fails, action for confiscation and penalty cannot survive. We hold so on the weight of authority referred to above."

19. Thus, for all the reasons stated above, the order dated 31.05.2012 passed by the Commissioner of Customs (Adjudication) cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order Pronounced on **09.11.2021**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)