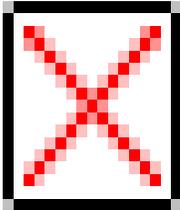


SC decision in Canon India - Powers of DRI to issue SCN - an analysis

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ON 9 March 2021, a three judge Bench of the Supreme Court has passed its judgment and order in **M/s. Canon India Pvt. Ltd. v. Commissioner of Customs 1**

allowing the appeals filed by the importers from a common CESTAT Order, holding the issuance of show cause notices by the Directorate of Revenue Intelligence (DRI) under section 28 of the Customs Act, 1962 (**Customs Act**), to be without jurisdiction.

The said question of jurisdiction of the DRI officers has been answered by the Supreme Court, by expounding upon the ambit of "**the proper officer**"

authorised to issue show cause notices under section 28 of the Customs Act, and on examining the legitimacy of source of power of the notification conferring on the DRI officers the functions of "**proper officer**" ² for the purposes of said section 28 of the Customs Act.

This article analyses the Supreme Court decision, including in context of the past legal developments on the issue, and comments on its impact in relation to the pending proceedings initiated by show cause notices issued by the DRI / DGCEI ³.

Milieu

The DRI ⁴

, being the apex investigative body on all matters relating to violation of Customs law, significant volume of post-clearance investigations, including investigations in complex cases (concerning valuation, transactions between related parties, classification of goods, eligibility to exemption notifications, benefits pursuant to the Foreign Trade Policy, etc.), cases involving significant revenue implications and cases involving imports/ exports through multiple Customs' jurisdictions, are conducted by it. These investigations, often culminate into issuance of show cause notices by the DRI officers.

The jurisdiction of DRI officers to issue show cause notices under the Customs Act has been the subject matter of challenge in different context, with some key developments in this regard, prior to the decision of the Supreme Court in **Canon India case (Supra)**, are as follows-

| Date | Key developments |
|------|------------------|
|------|------------------|

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|------------|---|
| 18.02.2011 | The said question of jurisdiction was first determined by the Supreme Court in Commissioner of Customs v. Sayed Ali ⁵ , wherein the Court declared that there has to be assignment of specific functions of assessment of duty in the jurisdictional area, for Customs officers to act as " proper officer " under section 2(34) and to issue show cause notice under section 28 of the Customs Act, absent which the show cause notices issued by the Customs officers would be without jurisdiction. |
| 8.04.2011 | On 8.04.2011, section 28 of the Customs Act was re-casted and Explanation 2 in section 28 stated that any non-levy, short-levy, etc. prior to the said amendment, would continue to be governed by section 28, as existed before such amendment. |
| 6.07.2011 | Considering the declaration of law in Sayed Ali case , Notification No. 44/2011-Cus. (NT) was issued under section 2(34) of the Customs Act, specifically assigning to various officers including officers of DRI, functions of proper officer inter alia for the purposes of sections 17 and 28 of the Customs Act. |
| 16.09.2011 | Further, sub-section (11) was inserted in section 28 so as to purportedly overcome the Supreme Court decision in Sayed Ali case (Supra) and to empower all persons appointed as officers of Customs before 6.07.2011 as proper officers for the purposes of sections 17 and 28 of the Customs Act. |
| 2.05.2012 | Similar to Notification No. 44/2011, Notification No. 40/2012 - Cus. (NT) was issued under section 2(34) of the Customs Act, assigning to various officers of Customs, the functions as proper officers in relation to various sections of the Customs Act. |
| 3.11.2014 | Bombay High Court, in Sunil Gupta v. Union of India ⁶ rejected the challenge as to the validity of section 28(11) of the Customs Act. |
| 3.05.2016 | However, the Delhi High Court, in Mangali Impex Ltd. v. Union of India ⁷ held that section 28(11) does not validate the show cause notices issued by DRI for the period prior to 8.04.2011, or empower DRI to issue show cause notices for the said period. SLP ⁸ from the said decision is pending, wherein vide Order dated 1.08.2016, the operation of Delhi High Court order has been stayed. - 2016-TIOL-173-SC-CUS |

Decision in Canon India Pvt. Ltd.

Exemption from Customs duty was claimed on import of certain type of cameras in March 2012. On submission of bill of entry, and pursuant to request of the importer for 'first check', the Customs authorities checked the goods and the Deputy Commissioner of Customs took a decision to clear the goods allowing the exemption. Subsequently, in August 2014, the Additional Director General, DRI issued show cause notice under section 28(4) of the Customs Act contesting the exemption claim, by invoking extended period of limitation on the premise that there was wilful mis-statement and suppression on part of the importer, which notice was challenged in the said proceedings. The Supreme Court has allowed the appeals filed by the importers from the CESTAT Order and set aside the show cause notices as being issued by the Additional Director General DRI without jurisdiction.

The gist of the findings of the Supreme Court is as follows -

- (i) Under section 28(4) of the Customs Act, the intention is to confer the power to recover duties on **"the"** proper officer and not on any proper officer. **"The"** is a definite article which points to a particular person or thing, and the use of the said article is to designate the proper officer who had assessed the goods at the time of clearance.
- (ii) The proper officer exercising the power under section 28(4), which is broadly a power to review the earlier assessment, must be the same proper officer (who had assessed and cleared the goods) or his successor in office or any other officer authorised to exercise the powers within the same office; and not another officer of another department, though of same rank.
- (iii) As the decision to clear the goods was taken by the Deputy Commissioner, Appraisal Group, Delhi Air Cargo, the Additional Director General DRI was not **"the proper officer"** authorised to issue show cause notice under section 28 (4) of the Customs Act.
- (iv) Further, the Notification No. 40/2012 purported to have been issued in exercise of powers under section 2(34) of the Customs Act is ill-founded, as this sub-section, which is part of the definition clause, does not confer any power on any authority to entrust any functions to the Customs officers. And that, the entrustment of the functions to officers of DRI should have been done by the Central Government in exercise of power under section 6 of the Customs Act.
- (v) Separately, in the facts of the case, it was held that there was no wilful mis-statement or suppression, and that the extended period of limitation under section 28(4) was not available to any authority.

"The" proper officer

Subject to qualification of DRI officers as **"proper officers"**

in terms of findings [referred at (iv) above] and the discussion herein later; the findings [referred at (i) to (iii)] on the ambit of **"the proper officer"** under section 28, to hold show cause notices issued by DRI officers to be without jurisdiction, could impact large number of proceedings initiated by the DRI by issuing show cause notices, including where - (a) the proceedings relate to imports which were assessed ⁹ / verified ¹⁰ by the proper officer under section 17 of the Customs Act, and (c) the proceedings relate to imports which are assessed pursuant to order / report ¹¹ issued by the Special Valuation Branch (SVB); in addition to cases where imports have been subject to 'first check' examination, as in the **Canon India** case.

The lack of source of power

Independent of other findings, the Court having rejected section 2(34) of the Customs Act as the legitimate source of power, and the CBEC as the relevant authority, for entrusting DRI officers functions of proper officers, would **per se** have far-reaching impact. With the DRI being turfed out of its functions under section 28 of the Customs Act ¹², the proceedings founded upon show cause notices issued by DRI, which may be pending at adjudication or appellate stages, could also arguably suffer from lack of jurisdiction.

Although the decision is correct to hold that the definition clause cannot be the source of power, the mechanism for conferment of functions of proper officer under relevant provisions of the Customs Act would merit consideration. With due respect, section 6 identified by the Court as the legitimate source of power, when seen in the context of section 2(34), and considering the appointment of DRI officers as Customs officers ¹³, seems to be intended for a different purpose than entrusting functions of proper officer to the DRI officers.

Further, before concluding lack of jurisdiction with the DRI officers, basis the findings [referred at (iv) above], with due respect, the author is of the view that the Supreme Court should also have considered the effect of section 28(11) in the present context, which provision it seems was not pointed out to, or otherwise considered by, the Court. Although the said sub-section had been inserted to purportedly overcome the decision in **Sayed Ali case (Supra)**) for the period prior to 6.07.2011, the provision empowered the Customs officers appointed before 6.07.2011 as proper officers for the purpose of section 28 of the Customs Act, and the effect of such empowerment for the period post 6.07.2011 would have warranted consideration.

If the Supreme Court decision in **Canon India** case (*Supra*), is to be seen in the context of the past legal developments, the findings in **Canon India** case rejecting the authority of DRI officers to issue show cause notices basis the afore-referred notifications being issued without legitimate source of power, would relate to the period covered by the said notifications, *i.e.* from 6.07.2011 onwards. However, in the proceedings pending consideration of the Supreme Court in SLP from Delhi High Court decision in **Mangali Impex** case (*Supra*), in examining the validity of section 28(11), although the effect of said provision is expected to be seen for the period prior to 8.04.2011, any findings as regards effect of said provision for the period subsequent to 8.04.2011 could have bearing on the issue decided by the Supreme Court in **Canon India** case (*Supra*).

Considering that the findings on lack of jurisdiction of the DRI officers are likely to impact pending proceedings and have significant revenue implications, it may be expected that the Government would examine carrying out corrective measures to support validity of the pending proceedings.

[The views expressed are strictly personal.]

¹In Civil Appeal Nos. 1827 of 2018, 1875 of 2018, 1832 of 2018 and 3213 of 2018 under section 130E of the Customs Act, 1962 from a common CESTAT Order dated 19 December 2017 (**CESTAT Order**), reported at [2021-TIOL-123-SC-CUS-LB](#)

²As per section 2(34) of the Customs Act - **"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;**

³In view of the relevant notifications issued under the Customs Act regarding appointing Directorate General of Central Excise Intelligence (**DGCEI**) officers as officers of Customs, and for entrusting to DGCEI officers functions as proper officer; the analysis in this article **qua** DRI would be equally applicable in respect of DGCEI.

⁴In terms of Notification No. 31/1997 - Cus. (NT) dated 7.07.1997 and Notification No. [17/2002 - Cus. \(NT\)](#) dated 7.03.2002, the officers of DRI have been appointed as officers of Customs and have been given jurisdiction over whole of India.

⁵[2011-TIOL-20-SC-CUS](#)

⁶[2014-TIOL-1949-HC-MUM-CUS](#)

⁷[2016-TIOL-877-HC-DEL-CUS](#)

⁸SLP (C) No. 20453 of 2016

⁹In terms of section 17 of the Customs Act (prior to substitution of new section 17 **w.e.f.** 8.04.2011) on filing of bill of entry, it was assessed by the proper officer.

¹⁰Subsequent to introduction of new section 17 of the Customs Act **w.e.f.** 8.04.2011, self-assessment mechanism was introduced, and the self-assessed bill of entry was selected by proper officer for verification, based on alert by the Risk Management System, or otherwise.

¹¹Prior to overhaul of SVB procedure by Circular No. [4/ 2016 - Customs](#) and Circular No. [5/ 2016 - Customs](#), both dated 9 February 2016, the SVB authorities would pass its order, basis which the jurisdictional Customs authorities would finalize the import assessments. Whereas, subsequent to change in SVB procedures, the SVB issues its report, to be considered by the jurisdictional Customs authorities in assessment of imports.

¹²Although, Notification No. 44/2011 was not pointed out to the Supreme Court, and the Supreme Court has held DRI to lack jurisdiction basis the findings [referred at (iv) above], the said findings would be equally applicable in respect of the said Notification No. 44/2011

¹³Notification No. 31/1997 - Cus. (NT) dated 7.07.1997 and Notification No. [17/2002 - Cus. \(NT\)](#) dated 7.03.2002.

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