FAX : 0532-2400149

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 10/11/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. C/A/71057/2016-CU[DB] dated 02/08/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 129-A(4) of the Customs Act, 1962.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	C/502/2007	PRAMOD AGENCIES OPP. GURUDWARA, S.N. ROAD, FIROZABAD, U.P.
		Name and Address of Respondent
2		-C.C.E. KANPUR 117/7, Sarvodaya Nagar, Kanpur 208005.

Copy To

3 Advocate(s) / Consultant(s): SH K.K.ANAND,ADV
A-103,DEFENCE COLONY
NEW DELHI-24

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhisim Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

23-11-16

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Appeal No.C/502/2007-CU[DB]

Arising out of O/A No.206-208/CE/APPL/KNP/2007 dated 31.05.2007 passed by Commissioner (Appeals), Customs & Central Excise, Kanpur.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether His Lordship wishes to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental Authorities? : Yes

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Pramod Agencies.

...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Kanpur

...RESPONDENT (S)

APPEARANCE

Ms. Surabhi Sinha & Shri Kumar Vikram, Advocates for the Appellant (s)
Shri M. K. Mall Asstt. Commissioner, (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

DATE OF HEARING & PRONUNCEMENT: 02.08.2016

FINAL ORDER NO. - 71057/2016

Per Mr. Anil Choudhary :

The appellant has preferred the present appeal against Order-in-Appeal dated 31.05.2007 passed by Commissioner (Appeals) Central Excise, Kanpur.

2. The brief facts are that a show cause notice was issued on 04.07.2006, under Section 28(1)(b) read with Section 124 of the Customs Act, alleging that the goods declared as 'lighting fixture' imported by the appellant, were mis-declared as to description and valuation of the goods. This show cause was issued after the Bill of entry, was passed and the goods have been cleared by the Custom Department. The show cause notice was issued by the Additional Director, Directorate of Revenue Intelligence, Lucknow Zonal Unit, Lucknow.

3. The show cause notice was adjudicated on contest and the demand of Rs.2,98,789/- was confirmed and the value declared in the Bill of entry, was re-determined at Rs.10,71,159.71/-. The goods in question which were seized post clearance, were held confiscated under Section 11(l)(m) & (d) of the Customs Act and the bank guarantee of Rs.2 lakhs submitted at the time of provisional release, was appropriated towards redemption fine of equal amount. A penalty of Rs.3 Lakhs was imposed on Pramod Agencies under Section 14(A) read with Section 112(a) of the Customs Act. Further, penalty of Rs.2 lakhs was imposed on Pramod Goel, proprietor of M/s Pramod Agencies and further

Rs.25,000/- imposed upon Shri Naveen Goswami of M/s Balaji Freight Movers.

4. Being aggrieved, the appellant had preferred appeal before Ld. Commissioner (Appeals), who vide the impugned order, was pleased to allow the appeal in part.

5. Being aggrieved, the appellant is in appeal before this Tribunal. The learned Counsel for the appellant urges that the show cause notice is bad as the Additional Director, Directorate of Revenue Intelligence was not the proper officer under Section 28 of the Customs Act, for issuing notice or show cause. It is further contended that the proper officer under Section 28 is an officer, who has investigated with the power of assessment/re-assessment under Section 17 of the Customs Act. Accordingly, the whole show cause notice is vitiated for want of jurisdiction. The learned Counsel relies on the ruling of Hon'ble Delhi High Court in the case of batch of writ petitions being Mangali Impex Ltd. Vs. Union of India & others pronounced on 03.05.2016 reported at 2016-TIOL-877-HC-DEL-CUS. wherein, the issue before the Hon'ble High Court, was as follows:-

> "1. The common question in this batch of matters pertains to the constitutional validity of Section 28(11) of the Customs Act, 1962 ('Act') which was inserted by the Customs (Amendement and Validation) Act, 2011 ('Validation Act, 2011') with effect from 16^{th} September, 2011. In terms of Section 28(11) of the Act, all persons appointed as Customs Officers under Section 4(1) of the Act prior to 6^{th} July 2011 "shall be deemed to have and always had the power of assessment under Section 17 and

shall be deemed to have been and always had been the proper officers......"

2. Section 28(11) of the Act states that the provision would take effect "notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority." However, this amendment adversely impacts the petitioners herein in that it seeks to validate the show-cause notices ('SCNs') issued prior to 6th July, 2011 by not only officers of the Customs but also officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence ('DRI'), Directorate General of Central Excise Intelligence and similar placed officers.

3. The subsidiary issue that arises is the possibility that on the strength of Section 28(11) of the Act, SCNs will now be issued by any of the above officers for the purpose of "opening of assessment" prior to 6th July, 2011.

6. Hon'ble High Court after considering the issue at length, have considered the effect of Section 28(11) of the Customs Act, introduced vide Customs (Amendment and Validation) Act, 2011 with effect from 08.04.2011. The Hon'ble High Court have observed as follows:-

"66. The mere fact that Section 28(11) has been given retrospective effect does not solve the essential problem pointed out by the Supreme Court in the Sayed Ali case, which is the absence of the assigning of functions to proper officers, under Section 2(34) of the Act. The even more serious problem is the impossibility of reconciling two contradictory provisions, viz., Explanation 2 to Section 28 and Section 28(11) of the Act.

67. The words 'this Section' in the newly inserted sub-section (11) of Section 28 obviously refers to Section 28 as enacted with effect from 8th April 2011 and not the Section 28 which existed prior to that date. The effect of Section 28(11) is to

treat all officers of the Customs to be 'proper officers only for the purposes of new Section 28 of the Act and not the earlier Section 28 of the Act. In particular, there is no validation of the SCNs issued prior to the amendment of Section 28 of the Act. As observed in Delhi Cloth & General Mills Co. Ltd. Vs. State of Rajasthan (Supra), a legal consequence cannot be deemed nor, therefrom, can the events that should have preceded it. The past actions of the officers of the DRI and DGCEI who are not designated as 'proper officer' in issuing SCNs for the period prior to 8th April 2011 have not been validated.

68. There is also merit in the contention of the Petitioners that Section 28(11) confers validity only on the proper officer. As explained in Consolidated Coffee Ltd. Vs. Coffee Board (Supra), the use of article 'the' as opposed to 'an' or 'any' is indeed significant. Only officers who have been assigned the functions of the 'proper officer' for the purposes of Section 17, i.e., assessment of the bills of entry can be considered as the proper officer for the purposes of Section 28(11) of the Act. As further explained in Shri Ishar Alloys Steels Ltd. Vs. Jayaswals Neco Ltd. (supra), the article 'the' always denotes a particular thing or person.

69. The Court also finds merit in the contention that if jurisdiction is exercised by one officer of the Customs or of the DRI or DGCEI, it should impliedly oust the jurisdiction of other officers over the same subject matter. The doctrine of comity of jurisdiction requires that for the proper administration of justice there should be not be an overlapping of the exercise of powers and functions. The decision of the Pujab and Haryana High Court in Kenapo Textiles Pvt. Ltd. Vs. State of Haryana (Supra) and the decision of the Supreme Court in India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd. (supra) are relevant in this context."

Thereafter, the Hon'ble High Court have concluded as follows:-

"70.1 The net result of the above discussion is that the Department cannot seek to rely upon Section 28(11) of the Act

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as authorizing the officers of the Customs, DRI, the DGCEI etc. to exercise powers in relation to non-levy, short-levy or erroneous refund for a period prior to 8th April 2011 if, in fact, there was no proper assigning of the functions of reassessment or assessment in favour of such officers who issued such SCNs since they were not 'proper officers' for the purposes of Section 2(34) of the Act and further because Explanation 2 to Section 28 as presently enacted makes it explicit that such non-levy, short-levy or erroneous refund prior to 8th April 2011 would continue to be governed only be Section 28 as it stood prior to that date and not the newly re-cast Section 28 of the Act.

70.2 Section 28(11) interpreted in the above terms would not suffer the vice of unconstitutionality. Else, it would grant wide powers of assessment and enforcement to a wide range of officers, not limited to customs officers, without any limits as to territorial and subject matter of jurisdiction and in such event the provision would be vulnerable to being declared unconstitutional.

70.3 As regards the period subsequent to 8th April 2011, it is evident that if the administrative chaos as envisaged by the Supreme Court in Sayed Ali (supra) should not come about, there cannot be any duplicating and/or overlapping of jurisdiction of the officers. It would have to be ensured through proper co-ordination and administrative instructions issued by the CBEC that once a SCN is issued specifying the adjudicating officer to whom it is answerable, then that adjudication officer, subject to such officer being a 'proper officer' to whom the function assessment has been assigned in terms of Section 2 (34) of the Act, will alone proceed to adjudicate the SCN to the exclusion of all other officers who may have the power in relation to that subject matter.

70.4 The question as to the constitutional validity and effect of Section 28(11) of the Act is answered accordingly."

7. Further, Hon'ble High Court considering the facts in the case of **Pace International & another W.P.(C) No.7383/2013,**

where the SCN was issued on 09.03.2011 by the Commissioner of Customs, (Preventive) pursuant to the putting on hold various consignments of woolen carpets sought to be exported by the writ petitioner, the Hon'ble High Court held that the adjudication order will not be given effect, further considering the facts in the writ petition of Godrej and Boyce Manufacturing Co. Ltd. W.P.(C) 4162/15 & CM 10559/2015, wherein SCN dated 02.04.2009, was issued by DRI, and for declaring Section 28(11) of the Act to be constitutionally invalid. The Hon'ble High observed that it is not in dispute that at the time of issuing of SCN, the DG, DRI or any other officer of the DRI was not specifically assigned the task of re-assessment and therefore, was not a 'proper officer' under Section 2(24) of the Act. Accordingly, the impugned SCN and all proceedings consequent thereto, were quashed by the Hon'ble High Court. Accordingly, the Ld. Counsel prays for allowing the appeal and setting aside the impugned order.

8. The Ld. A.R. for Revenue relies on the impugned order. He further states that in view of the amendment with retrospective effect in Section 28, by introduction of Sub-Section 11 in Section 28 with effect from 08.04.2011, the show cause notice and the impugned order in question are valid.

9. Having considered the rival contentions, following the Ruling of Hon'ble Delhi High Court in the case of Mangali Impex Ltd. & others (Supra), we hold that the show cause notice in the present case, which was issued prior to the amendment of

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Customs Act by Customs (Amd. & vali.) Act of 2011, with effect from 08.04.2011. We hold that the show cause notice issued by the Joint Director or Additional Director-DRI is without jurisdiction. Accordingly, we set aside the impugned Order-in-Appeal and Order-in-Original. Thus, the appeal is allowed with consequential benefits to the appellant.

Sd/-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Mishra

प्रमाणित प्रति / Certified True Copy
17.11
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001