

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Customs Appeal No.41803 of 2015

(Arising out of Order-in-Original No. 38827/2015 dated 29.5.2015 passed by the Commissioner of Customs, Chennai – II)

M/s. Sree Krishna Enterprises

Plot No. 96, Seshachala Cooperative Society
1st Floor, East Maredpally, Secunderabad – 500 026.

Appellant

Vs.

Commissioner of Customs

Chennai II Commissionerate
Custom House
60, Rajaji Salai
Chennai – 600 001.

Respondent

Customs Appeal No.42416 of 2015

(Arising out of Order-in-Original No. 41404/2015 dated 31.8.2015 passed by the Commissioner of Customs, Chennai – II)

Shri S. Raghavendra, Proprietor

of M/s. Sree Krishna Enterprises
Plot No. 96, Seshachala Cooperative Society
1st Floor, East Maredpally, Secunderabad – 500 026.

Appellant

Vs.

Commissioner of Customs

Chennai II Commissionerate
Custom House
60, Rajaji Salai
Chennai – 600 001.

Respondent

Customs Appeal No.42417 of 2015

(Arising out of Order-in-Original No. 41404/2015 dated 31.8.2015 passed by the Commissioner of Customs, Chennai – II)

M/s. Mining & Machinery Services

216, C-Block, Karan Trade Centre
S.D.Road, Secunderabad – 500 003.

Appellant

Vs.

Commissioner of Customs

Chennai II Commissionerate
Custom House
60, Rajaji Salai
Chennai – 600 001.

Respondent

APPEARANCE:

Shri B.V. Kumar, Advocate for the Appellant No. 1
 Shri Y. Sreenivasa Reddy, Advocate for Appellants No. 2 & 3
 Shri R. Rajaraman, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Anjani Kumar, Member (Technical)

Final Order Nos. **40002-40004 / 2022**

Date of Hearing : 24.1.2022
 Date of Pronouncement: 27.1.2022

Per Ms. Sulekha Beevi C.S.

Brief facts are that M/s. Sree Krishna Enterprises is a proprietary firm of which Shri S. Raghavendra is the Proprietor. They are importers of Tungsten Carbide Tips and TC Rock Drill Bits from China. On specific intelligence gathered by the Directorate of Revenue Intelligence (DRI), Hyderabad Regional Unit that M/s. Sree Krishna Enterprises was resorting to gross undervaluation of the goods and thereby evading payment of appropriate duties of customs, simultaneous, searches were conducted by the officers on 15.5.2013, at the office premises of M/s. Sree Krishna Enterprises and Mining and Machinery Services (appellant in C/42417/2015). Certain documents were recovered and statements were recorded. After investigations, Show Cause Notice dated 20.2.2014 was issued by the DRI. After due process of law, the adjudicating authority passed an order rejecting the assessable value and confirmed the demand of duty after reassessment. Besides this, inter alia, there was order of confiscation of goods, imposition of redemption fine as well as penalties. Aggrieved by such order, the appellants are now before the Tribunal.

2. On behalf of M/s. Sree Krishna Enterprises, learned counsel Shri B.V. Kumar appeared and argued the matter. He submitted that the Show Cause Notice having been issued by DRI, the order passed cannot sustain in terms of the decision of the Hon'ble Supreme Court in the case of Canon India Pvt. Ltd. Vs. Commissioner of Customs reported in 2021 (376) ELT 3 (SC). In the said case, it was held by the Hon'ble Supreme Court that the entire proceedings initiated by the ADG, DRI by issuing Show Cause Notices are invalid and without any authority of law. He submitted that Notification No. 44/2011-Cus (NT) dated 6.7.2011 as amended by Notification No. 53/2012 (NT) dated 21.6.2012 and 43/2019-Cus (NT) dated 18.6.2019 was issued under which the Addl. Directors General, Addl. Directors of Joint Directors, Deputy Directors or Assistant Directors in the DRI were assigned the function of the 'Proper Officer' under sec. 17, 28 and 28AAA and second proviso of section 124 of the Customs Act, 1962. This notification was issued by the CBEC under section 2(34) of the Customs Act, 1962 and not by Central Government under sec. 6 *ibid*. Therefore, the Show Cause Notice in the present case is *ab initio* void and any proceedings emanating from such Show Cause Notice are also without authority of law as held by the Hon'ble Supreme Court in the case of Canon India Pvt. Ltd. (*supra*).

3. He argued that the above three Judges Bench judgment was followed by the Hon'ble Supreme Court in the case of CC, Kandla Vs. Agarwal Metals and Alloys reported in 2021 (376) ELT 7 (SC). The Hon'ble jurisdictional High Court has followed the same in Quantum Coal Energy P. Ltd. Vs. CC, Tuticorin reported in 2021 (377) ELT 488 (Mad.). The Hon'ble High Court of Delhi in a writ petition filed by Rani

Enterprises Vs. Principal Commissioner of Customs, Patparganj in W.P. (C) No. 11721/2021 decided on 12.10.2021 observed that the decision of the Hon'ble Supreme Court has to be followed. He prayed that the appeal may be allowed. No arguments on merits were advanced by the counsel for the appellant.

4. The learned counsel Shri Y. Sreenivasa Reddy appeared in the appeals filed by Shri S. Raghavendra as well as M/s. Mining Machinery Service. Separate Show Cause Notice dated 30.7.2014 was issued to M/s. Mining Machinery Service consequent to the very same investigations carried out. Searches were carried out in the office premises of M/s. Mining Machinery Service as well as the residential premises of late T.V. Srinivasan, Proprietor of M/s. Mining Machinery Service. He submitted that the proprietor is no more and therefore the appeal filed by him stands abated in terms of Rule 22 of CESTAT (Procedure) Rules, 1982. He adopted the arguments advanced by learned counsel Shri B.V. Kumar in respect of the issue with regard to application of the judgment of the Hon'ble Supreme Court in Canon India Pvt. Ltd. (supra). He argued that the Show Cause Notice issued by the DRI is not sustainable and therefore the impugned orders are to be set aside on this sole ground itself. No arguments were advanced on merits of the case.

5. Heard both sides.

6. The main argument advanced by the learned counsels is that the Show Cause Notice having been issued by DRI is not sustainable in law in terms of the decision of the Hon'ble Supreme Court in the case of Canon India Pvt. Ltd. (supra). The Hon'ble Supreme Court in the said case held as under:-

“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 4-12-1957 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 v. Sayed Ali and Another [(2011) 3 SCC 537 = [2011 \(265\) E.L.T. 17](#) (S.C.)] 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 advertng 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 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 misstatement 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 reassessment 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 under section 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."

7. The learned counsel has placed the decision of the Hon'ble High Court of Delhi in the case of Rani Enterprises reported in 2021 TIOL 2257. The Hon'ble High Court while granting interim relief has observed as under:-

“8. It is rather unfortunate that despite a clear enunciation and pronouncement of the law on the aspect of ‘Proper Officer’ under section 110 of the Customs Act, 1962, the concerned officials of the Respondents are repeatedly seizing goods without having the authority and jurisdiction to do so. Perhaps, the judgment in Canon India (supra) has not been either read by the concerned officials or has not been understood in the correct perspective. As a result, this Court is flooded with litigation on the same issue and we cannot help but observe that it is the action of the Respondents in not applying the binding dicta of the Hon'ble Supreme Court, which is breeding unnecessary litigation.

9. We, therefore, direct the Registry of this court to send a copy of the judgment dated 9.3.2021 passed by the Hon'ble Supreme Court in Canon India (supra) to the Respondents herein, through electronic mode, so that corrective measures and steps are taken, in accordance with the judgment and citizens are not put to mental and financial harassment by filing petitions before this Court.

10. We also direct Respondent No. 1 herein / Principal Commissioner of customs, ICD, Patparganj, to circular a copy of the aforesaid judgment, to all the concerned officials in the department for information and compliance, as there can hardly be a doubt that the judgments of the Courts are binding not only on the private parties but also on the Government officials dealing with matters in their official capacity.

11. We also expect from Respondents No. 1 and 2 that they will convene a meeting with the concerned officers in order to sensitize them with regard to implementation of the observations and directions of the Hon'ble Supreme Court in Canon India (supra), in letter and spirit as also in general on the implementation of judgments of the courts and their binding effects.”

8. The Hon'ble jurisdictional High Court in the case of Quantum Coal Energy P. Ltd. (supra) has applied the decision of the Hon'ble Supreme Court to hold that the Show Cause Notice issued by DRI is invalid and the proceedings initiated cannot sustain. The Tribunal in the case of Nitin Jatania vs. Commissioner of Customs (Adjudication), Mumbai reported in 2022-TIOL-61-CESTAT-MUM had occasion to analyse the very same issue as to whether DRI has jurisdiction to issue Show Cause Notice. Applying the decision of the Hon'ble Supreme Court in Canon India Pvt. Ltd. (supra), the Tribunal held that the Show Cause Notice issued by DRI is invalid. In the recent decision of Arun Kumar Agarwal

Vs. Principal Commissioner of Customs (Import), New Delhi reported in 2022-TIOL-65-CESTAT-DEL similar view was taken.

9. With regard to the appeal filed by M/s. Mining Machinery Service, the learned counsel for the appellant has submitted that the proprietor of the firm is no more and produced the death certificate dated 17th July 2020. Therefore, the appeal filed stands abated in terms of Rule 22 of the CESTAT (Procedure) Rules, 1982.

10. Be that as it may, following the above decisions discussed above, we hold that the Show Cause Notice having been issued by DRI are *ab initio void*. The impugned orders cannot sustain and requires to be set aside.

11. In the result, the impugned orders are set aside. The appeals are allowed with consequential relief, if any.

(Pronounced in open court on 27.1.2022)

(SULEKHA BEEVI C.S.)
Member (Judicial)

(P. ANJANI KUMAR)
Member (Technical)