

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 51320 of 2019

[Arising out of Order-in-Appeal No.CC(A) CUS/D-II/ICD/IMP/TKD/13-14/2019-20 dated 08.04.2019 passed by the Commissioner of Customs (Appeals) & Delhi]

EVERSHINE CUSTOMS (C & F) PVT LTD. ... APPELLANT
B-13, Masoodpur, Near Post Office,
Vasant Kunj
New Delhi

VERSUS

COMMISSIONER OF CUSTOMS ... RESPONDENT
New Customs House, Near IGI Airport
New Delhi 110037.

WITH

CUSTOMS APPEAL NO. 51586 of 2019

[Arising out of Order-in-Appeal No.CC(A) CUS/D-II/ICD/IMP/TKD/13-14/2019-20 dated 08.04.2019 passed by the Commissioner of Customs (Appeals) & Delhi]

THE TWO STEP TRADING CO. ... APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS ... RESPONDENT
New Customs House, Near IGI Airport
New Delhi 110037.

APPEARANCE

Shri Arjit Chakeravarty and Shekhar Vyas, Advocates for the Appellant
Shri Rakesh Kumar and Shri Sunil Kumar, Authorised Representatives for the Department

CORAM:

HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : MARCH 10, 2021

DATE OF DECISION : 16-08-2021

FINAL ORDER NO. 51748-51749 / 2021**PER MS. RACHNA GUPTA**

Present order disposes off two appeals detailed as follows:

Sl. No.	Appeal No.& Appellant	Show cause notice	Order-in - Original	Order-in-Appeal
1	C/51320/2019 Evershine Cusoms (C & F) Pvt Ltd	DRI/LRU- NOIDA/CI/26/IN T-O/ENQ- 10/2014 dated 07.04.2015	20/2016/JC/RR /EXP/ICD TKD Dated 31/03/2016	CC(A)/CUS/D- II/ICD/IMP/TKD/1 3-14/2019-20 Dated 12.04.2019
2.	C/51586/2019 The Two Step Trading Co.	DRI/LRU- NOIDA/CI/26/IN T-O/ENQ- 10/2014 dated 07.04.2015	20/2016/JC/RR /EXP/ICD TKD Dated 31/03/2- 016	CC(A)/CUS/D- II/ICD/IMP/TKD/1 3-14/2019-20 Dated 12.04.2019

2. The factual matrix relevant for the disposal of these two appeals against the impugned order is as follows:

3. Directorate of Revenue Intelligence (DRI) got a specific information that the appellants, M/s. Two Step Trading Co.¹ imported shoes by mis-declaring them with an intent to evade customs duty. Based upon the said information, the container No. OOLU-8441988 covered by Bill of Entry No. 677535 dated 16.9.2014 was examined on 9 October, 2014 in presence of Customs Broker M/s. Evershine Customs (C&F) Pvt. Ltd.² On examination, it was found to be stuffed with cartons of different sizes wrapped with HDPE bags. Inventory of the goods was prepared in the form of Panchnama. It was observed that on most of the shoes, MRP was not affixed and they were bearing brand names as that of Adidas, Nike and Calidad, etc. In the Bill of Entry 435 cartons were declared but the actual number of cartons was short by 14 but the actual number of shoes was more than declared. The CB could not provide any details/ explanation for the

¹ importer

² CB

said discrepancy. The goods were found to have been grossly mis-declared in terms of quantity, quality, description and value and were accordingly detained on 9.10.2014 itself by Customs officers at Inland Container Depot³, Tughlakabad⁴. The Special Intelligence and Investigation Branch (SIIB) of ICD TKD investigated the matter further, searched the shop of the importer at Karol Bagh on 10.10.14 and seized another stock of shoes under a Panchnama.

4. The statement of the proprietor of M/s. Two Steps Trading Company, Shri Laxmipat Begwani, was recorded in which he admitted the guilt and deposited the differential duty of Rs.4.5 lakh. In his subsequent statement dated 20.3.2015, he explained the *modus operandi* of committing the offence, mis-declaration and under valuation. DRI took over the investigation, and after completing the investigation, issued a show cause notice dated 20.03.2015 proposing:

a) Confiscation of the seized 8160 pairs of counterfeit shoes under section 111(d) of Customs Act;

b) Confiscation of 2346 pairs of shoes seized in the shop of the importer under section 111(l) and 111(m) of the Act.

Another Show Cause Notice dated 07.04.2015 was also issued proposing:

c) Differential Customs duty amounting to Rs.1,73,174/- involved on seized 2346 pairs in 81 cartons (valued at Rs.5,81,738/-) under section 28(4) along with interest under section 28AA of the Act and Customs duty already deposited to be appropriated against the demand.

d) Confiscation of 211 pairs of counterfeit shoes (valued at Rs.1,04,902/-) under section 111 (d) of the said Act;

e) Confiscation of 733 shoes (valued at Rs.2,31,505-) under section 111(l) and 111(m) of the said Act.;

³ ICD

⁴ TKD

f) Customs duty demand amounting to Rs.65,253/- involved on seizure of 733 pairs was demanded under section 28(4) along with interest under section 28AA of the Act.

g) Penalty under section 114A/112 of the Act.

This Show Cause Notice also proposed imposition of a **penalty under section 112(a) upon the Customs Broker for failing to discharge their obligations under the Customs Brokers Licensing Regulations (CBLR).**

5. The Ld. Adjudicating Authority passed the Order-in-Original No. 20/2016 dated 31.03.2016, the operative part of which is as follows:

“35. In view of above, I pass the following order:-

- i) The declared value of Rs. 13,13,371/-declared in the Bill of Entry No. 6773535 dated 16.09.2014 is rejected under Rule 12 of the CVR 2007 and the values of the impugned goods are re-determined under Rule 7 of the CVR-2007 and the value also determined in respect of goods seized at shop of the Importer as under:-
 - a) Value of 8160 pairs of counterfeit shoes seized at ICD Tughlakabad, New Delhi is determined as Rs.49,44,630/-;
 - b) Value of 211 pairs of counterfeit shoes seized at shop of the Importer is determined as Rs.1,04,902/-;
 - c) Value of 2346 pairs of shoes seized at ICD Tughlakabad, New Delhi is re-determined as Rs.5,81,738/-;
 - d) Value of 733 pairs of shoes seized at shop of the Importer is determined as Rs.2,31,505/-.
- ii) The seized 8160 pairs of counterfeit shoes at ICD Tughlakabad, New Delhi having determined value of

Rs.49,44,630/- are confiscated absolutely under Section 111(d) of the Customs Act, 1962;

- iii) The seized 211 pairs of counterfeit shoes seized at shop of the Importer having determined value of Rs.1,04,902/- are confiscated absolutely under section 111(d) of the Customs Act, 1962.
- iv) The seized 2346 pairs of shoes seized at ICD, Tughlakabad and having re-determined value of Rs.5,81,738/- are confiscated under Section 111(l) and (m) of the Customs Act, 1962. However, in terms of Section 125(l) of the Customs Act, 1962, I give option to the importer to redeem the said goods on payment of redemption fine of Rs.50,000/-. On redeeming the goods, the importer shall in addition, be liable to any duty and charges payable in respect of such goods;
- v) The seized 733 pairs of shoes seized at the shop of the importer and having determined value of Rs.2,31,505/- are confiscated under Section 111(l) & (m) of the Customs Act, 1962. However, in terms of Section 125 (l) of the Customs Act, 1962, I give option to the importer to redeem the said goods on payment of redemption fine of Rs.25,000/-. On redeeming the goods, the importer shall in addition, be liable to any duty and charges payable in respect of such goods;
- vi) Customs duty of Rs. 65,253/- payable on the seized 733 pairs of shoes seized at the shop (valued at Rs.2,31,505/-) is demanded from the Importer under Section 28(8) of the Customs Act, 1962 along with interest payable under Section 28AA of the Customs Act, 1962 and the Customs duty already deposited is ordered to be appropriated against the demand;

- vii) Penalty of Rs.65,253/- is imposed on the Importer under Section 114 A of the Customs Act, 1962 with reference to seizure of 733 pairs of shoes seized at shop of the importer;
- viii) Penalty of Rs.10,00,000/- is imposed on the Importer under Section 112 (a) of the Customs Act, 1962 with reference to seizure of 2346 pairs of shoes seized at ICD, Tughlakabad, New Delhi having re-determined value of Rs. 5,81,738/- ;
- ix) Penalty of Rs.25,000/- is imposed on M/s. Evershine Customs (C&F) Pvt. Ltd. under section 112(a) of the Customs Act, 1962 for the various acts of omission and commission. ”

6. Aggrieved, the appellants filed an appeal before the Commissioner (Appeals) who passed the Order-in-Appeal dated 12.4.2019⁵ dismissing the appeals and upholding the order of the adjudicating authority.

7. Being aggrieved, the importer as well as CB filed the instant appeals.

8. We have heard Shri Arjit Chakeravarty and Shekhar Vyas, learned Counsel for the Appellants and Shri Rakesh Kumar and Shri Sunil Kumar, learned Authorised Representatives for the Department.

9. It is submitted on behalf of the appellants that order under challenge has violated the principles of natural justice as no opportunity of being heard was given to either of the appellants. It is submitted that none of the notices as mentioned in para 4.1 of the impugned order were ever received either by the appellant or by their Advocate despite that the communication address of their lawyer was also given to the department. The order is absolutely

⁵ Impugned order

silent about the service of this notice upon the appellants. Order is impressed upon to be liable to be set aside on this score itself.

10. Further, it is submitted that show cause notice dated 07.04.2015 issued by the Additional Director, DRI, NOIDA is not valid in terms of judgement of Hon'ble Supreme Court in the case of **Canon India Pvt. Ltd. vs. Commissioner of Customs in Civil Appeal No. 1827/2018 dated 9.3.2021**⁶ wherein it was held that ADG of DRI is not the proper officer to issue the show cause notice and that DRI has no authority to issue the same under section 28(4) of Customs Act for recovery of duty as this would amount review the earlier decision of assessment. It is submitted that findings are liable to be set aside on this score as well.

11. On merits, it is submitted by the appellants that the consignment having the shoes of brands like Adidas and Nike were actually sent by mistake by the supplier. The Importer /appellant had placed order only for unbranded male-synthetic shoes and female- synthetic shoes and slippers with their supplier in China. Purchase order dated 29.06.2014 is relied upon wherein names of local brands only were mentioned. It is only at the time of examination of the container that the importer got the knowledge about the mistake committed by the supplier about which he immediately informed the supplier via e-mail dated 12.10.2014. Through their email dated 29.5.2016, the supplier acknowledged the mistake on his part for sending the wrong goods and in wrong quantity. Impressing upon that the present is the case of genuine mistake, it is prayed that appellant may not be held responsible for the same. Allegations of under valuation of goods have also been rebutted on behalf of the importer. It is impressed upon that customs has adopted the highest price of Rs. 942/- per pair for all the shoes despite the fact that value of shoes was within the range of Rs.426/- to Rs. 942/-. The allegation of under-valuation is also

⁶ Canon India

prayed to be set aside. It is submitted that penalty has also been imposed.

12. On behalf of CB, it was submitted that they cannot be held liable for mis-declaration, if any, committed by the importer as the CB was responsible only for the clearance of consignment. The CB was not the beneficiary of the imports. The CB is not required to examine the nature of goods before filing the Bill of Entry. There is nothing brought on record by the Department to prove involvement of the appellant CB. The penalty as also been imposed upon the CB only on the ground of failing to discharge obligations under CBLR 2013 which is an incorrect allegation. Even if there is a violation of the obligations, no penalty can be imposed under section 112 for the purpose. There are provisions in the CBLR itself for imposing penalty for not discharging the obligations. The penalty is accordingly prayed to be set aside.

13. Rebutting these arguments, learned Departmental Representatives submitted that it is a case of import where importer mis-declared the quantity as well as quality of shoes in the Bill of Entry No. 677535 dated 16.9.2014 filed by the CB on behalf of the importer. The declaration made thereunder was for unbranded shoes whereas on examination, branded shoes were found. There were 14 fewer cartons than declared but the number of shoes was much more than declared. Description and value of shoes was also found to be mis-declared. On being pointed out, the importer deposited the differential duty. Hence, the demand of duty and order of confiscating the goods, imposing penalties has rightly been passed against the importer.

14. It is submitted that the CB could not provide any valid explanation for the alleged mis-declaration which makes it abundantly clear that he has failed to discharge his liability under CBLR 2013. As no MRP was fixed on the goods seized, it was definitely due to his absence of due diligence. The CB has failed to properly examine the goods and has also failed to bring the matter

to the notice of the Deputy Commissioner of Customs. He also had failed to advise his client to act ethically in terms of law. Hence, there is no infirmity in the order under challenge when penalty on the CB has been imposed. The order is accordingly, prayed to be upheld and both the appeals are prayed to be dismissed.

15. Learned Departmental Representative also relied on the decision of the Hon'ble High Court of Andhra Pradesh in the case of **Commissioner of Customs and Central Excise vs. H B Cargo Services** reported as [MANU/AP/0060/2011] wherein it was held by that in disciplinary matters, Commissioner is responsible for happenings in Customs area, and for discipline to be maintained, if he takes a decision necessary for that purpose, CESTAT would, ordinarily, not interfere on the basis of its own notions of the difficulties like to be faced by the CHA or their employees. Decision is best left to the disciplinary authority save in exceptional cases where punishment imposed is shockingly disproportionate or is malafide. Interference with punishment imposed would be justified only when it shocks the conscience of CESTAT. No indulgence can be shown to persons indulging in acts of corruption. Punishment imposed on Respondent, by Commissioner of Customs, of revocation of their license, when viewed in light of grave and serious acts of misconduct held established, was held justified.

16. After hearing the parties and examining the records of the case, we find that the following issues are to be decided:

- a) Was there a mis-declaration of the goods in the Bill of Entry filed by the CB on behalf of the importer in terms of nature of goods, quantity and value, etc.?
- b) Can the importer's argument that they had placed an order for some other goods and the overseas supplier had sent the wrong goods and therefore, they have no liability, be accepted?

- c) Can a differential duty can be demanded under section 28(4) on the goods even before the goods have been cleared for home consumption?
- d) Can differential duty be demanded on under section 28(4) on goods which were seized from the shop of the importer, i.e., those goods which had been imported in the past?
- e) Is DRI competent to issue the SCN in this case in the light of the judgment of the Hon'ble Apex Court in the case of Cannon India?
- f) Is the confiscation of the seized goods valid?
- g) Is the imposition of penalty under sections 114-A on the importer is valid?
- h) Is the imposition of penalty under section 112 (a) upon the CB valid?
- i) Have the principles of natural justice been violated?

17. On the first question identified, it is undisputed that on receiving specific information, the imported goods were examined and were found to be of a different quality and quantity than what was declared in the Bill of Entry. The Bill of Entry was prepared by the CB based on the papers given by the importer. The goods were examined in the presence of the CB under a panchnama and it is a matter of record that the goods were mis-declared in terms of quality as well as quantity.

18. When asked, the CB, who filed the Bill of Entry on the basis of papers given to him by the importer, could not explain the discrepancy. There is nothing on record to show that the CB had knowledge of the true nature of the goods or that the CB had any interest in the mis-declaration. The CB is expected to discharge his obligations under CBLR, 2013 which does not include having knowledge of what goods were actually imported or examining the imported goods before filing the Bill of Entry. On the other hand, the importer is expected to know what he has imported. Saying that my overseas supplier sent me wrong goods cannot be an

excuse. If such an argument is accepted, anything including prohibited goods such as drugs, explosives can be imported into India by anyone as long as they don't show them in their purchase orders. When caught, all they have to say is that it was a mistake of the overseas seller who is anyway outsider the jurisdiction of the Customs Act, 1962. The importer in India is expected to know what he has imported and make an honest declaration. Section 46 of the Act requires the importer to make a declaration confirming the correctness of the declaration. It reads as follows:

SECTION 46. Entry of goods on importation. - (1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically on the customs automated system, allow an entry to be presented in any other manner:

Provided further that **if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof:**

(a) to examine the goods in the presence of an officer of customs, or

(b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) The importer shall present the bill of entry under sub-section (1) before the end of the day (including holidays) preceding the day on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing:

Provided that the Board may, in such cases as it may deem fit, prescribe different time limits for presentation of the bill of entry, which shall not be later than the end of the day of such arrival: a bill of entry may be presented at any time not exceeding thirty days prior to] the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

Provided also that where the bill of entry is not presented within

the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed.

(4A) The importer who presents a bill of entry shall ensure the following, namely:—

- (a) the accuracy and completeness of the information given therein;**
- (b) the authenticity and validity of any document supporting it; and**
- (c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.**

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

19. The responsibility therefore, rests entirely on the importer and without such a provision, the Customs law cannot function. Sub-section (1) of section 46 requires the importer make an entry of the goods imported. Sub-section (4) requires him to make a declaration confirming the truth of the contents of the Bill of Entry. Sub-section(4A) requires him to ensure completeness, correctness and authenticity of the information.

20. It is possible that in some cases, the importer does not have the complete details required to file the information or he is not sure about what goods actually arrived so that he can file a correct Bill of Entry. As per the second proviso to sub-section (1) of section 46, if the importer does not have the complete information and particulars of the imported consignment, before filing the Bill of Entry he can ask to 'examine the goods' and or to 'deposit them in the warehouse'. It may also happen that after examining the goods before filing the Bill of Entry, the importer may find that what were

sent by the overseas supplier were not as per his order. If so, the importer can relinquish his title to the goods and does not have to pay any duty on them as per sub-section (2) of section 23 which reads as follows:

SECTION 23. Remission of duty on lost, destroyed or abandoned goods.- (1) Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods.

(2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon;

Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

21. Thus, the importer cannot escape his responsibility of making a true and accurate and complete declaration of the imported goods in the Bill of Entry. If the importer has any doubts about the goods, there are sufficient safeguards which enable him to examine the goods before filing the Bill of Entry, request for the goods to be deposited in the warehouse or even relinquish his title to the goods and thereby escape his liability to pay Customs duties. Merely saying that I have a purchase order which says X but my supplier sent me Y cannot be an excuse as the only person in India who has knowledge about the imported consignment is the importer. If he has doubts, there are sufficient safeguards in the Act itself.

22. This answers to questions (b) and (h) above are therefore, that the importer's assertion that the overseas supplier has sent

different goods cannot be accepted. On the other hand, as far as the CB is concerned, he filed the Bill of Entry as per the documents provided by the importer. There is nothing on record to show that any act or omission on his part has rendered the goods liable for confiscation under section 111. In fact, the only allegation in the SCN is that he failed to discharge his obligations under the CBLR 2013 and such a failure, even if correct, does not attract penalty under section 112. CBLR 2013 is a self contained set of regulations which provides for penalties for not fulfilling the obligations.

23. This takes us to the next question (c) as to whether any demand can be made under section 28(4) even before the proper officer has made an order clearing the goods for home consumption. Customs duty is paid on goods everyday on the imported goods after assessment under section 17. If the self-assessment of duty by the importer is not correct, the 'proper officer' (the Assistant Commissioner/Deputy Commissioner of the Appraising Group in the Custom House) can reassess the duty. This assessment is usually done before the goods are examined on the basis of the declarations made. The goods are thereafter examined and this examination and testing, etc. are also part of the assessment. If the examining officer in the shed finds any discrepancy, he writes his examination report and sends it back to the 'proper officer' doing the assessment and at times it may result in again re-assessing the duty (for instance, if the quantity of goods is more than what is declared). It is still a process of assessment/re-assessment under Section 17. Similarly, if it is found that the imported goods are prohibited and cannot be imported or can be imported only a licence or NOC, etc. and such documents are not available, the examining officer refers the matter back to the Assessing Officer. Once the assessment is complete, the importer will have to pay the duty. If the duty as assessed is paid and if the goods are not prohibited goods, an order permitting clearance of goods for home consumption is issued under section

47 by the proper officer who is usually called as 'out of charge' officer.

24. Once the order permitting clearance of goods for home consumption is issued under section 47, it results in the following:

- a) The goods cease to be imported goods⁷;
- b) The person who imported them ceases to be the importer⁸
- c) The imported goods cease to be dutiable goods⁹
- d) Thereafter, there is no need for a Bill of Entry to be filed nor any assessment of duty under section 17 because assessment under section is for duty on imported goods and if they are no longer imported goods, no duty can be assessed.

25. The proper officer who assessed the duty on the imported goods becomes *functus officio* and he cannot change his assessment order which is a quasi-judicial order and if aggrieved by it, either the importer or the Revenue can be assail it before the Commissioner (Appeals). However, in taxation, it sometimes happens that excess duty is paid or duty is short paid.

26. If duty is paid in excess of what is due, the importer can file an application for refund under section 27. The question which arises is if the duty is wrongly assessed to more than what is due by the assessing officer, can the importer claim a refund or does he have to assail the assessment order before the Commissioner (Appeals) first. It has been held in the case of **Priya Blue Industries Ltd. vs. Commissioner of Customs Preventive** reported in **2004 (172) ELT 145 (SC)]**, and **Collector of Central Excise, Kanpur vs. Flock (India) Pvt. Ltd.** reported in **[2000 (120) ELT 285 (SC)]** by the **Hon'ble Supreme Court** that duty refund can only be sanctioned as per the assessment order and the

⁷ Section 2(25) "imported goods" means any goods brought into India from a place outside India **but does not include goods which have been cleared for home consumption**

⁸ Section 2 (26) "importer", in relation to any goods at any time **between their importation and the time when they are cleared for home consumption**, includes any owner, beneficial owner or any person holding himself out to be the importer;

⁹ Section 2 (14) "dutiable goods" means any goods which are **chargeable to duty and on which duty has not been paid**;

officer cannot modify the assessment order and if the importer wishes to challenge the assessment, he will have to file an appeal before the Commissioner (Appeals). Thus, when refund of excess duty paid is a mere arithmetical exercise. This position was upheld by the larger bench of Hon'ble Supreme Court in the case of **ITC Ltd vs Commissioner of Central Excise, Kolkata-IV** reported in **[2019 (368) ELT 216 (SC)]**

27. However, if duty is not levied, short levied, not paid, short paid or erroneously refunded such duty can be demanded under section 28 by issuing a Show Cause Notice. There is no need to assail the original assessment order in this case. In other words, if there is excess payment due to assessment, the claimant of refund will have to first challenge the assessment but if there is short payment, short levy, etc., a demand can be raised without first challenging the assessment.

28. The nature of this power under section 28 has been explained by the Hon'ble Supreme Court in the case of **Commissioner of Customs vs. Sayed Ali** reported in **[2011 (265) ELT 17 (SC)]** as follows:

*16. In the present cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on importers executing bond, undertaking the obligation of export, in our opinion, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of [Section 2\(34\)](#) of the Act, **was not competent to issue show cause notice for re-assessment under [Section 28](#) of the Act.***

29. It was further explained by the Hon'ble Supreme Court in **Canon India Ltd.** 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 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. the Deputy Commissioner Appraisal Group. Relevant extract of this judgment is as follows:

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, Bangalore¹⁰ 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 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.¹¹ 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

¹⁰ (1980) 3 SCC 358

¹¹ (2001) 3 SCC 609

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 accidentally but with the intention to designate the proper officer who had assessed the goods at the time of 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.

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. 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.

30. Thus, the legal position settled by the Hon'ble Supreme Court in the above case laws is that the power under Section 28 is a power of review which has been specially conferred on the proper officer who has done the assessment or his successor in office. Only he can issue the SCN for the purpose.

31. It is also evident from the '**Relevant date**' for calculating the limitation of time for issuing a notice under Section 28. It is the defined in the explanation to Section 28 as follows:

Explanation 1- For the purposes of this section, "relevant date" means,-

(a) in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, **the date on which the proper officer makes an order for the clearance of goods;**

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.

32. Evidently, if the order clearing the goods for home consumption was not issued, the assessment is still open and the goods are still imported goods assessable to duty under section 17.

There cannot be any demand under section 28. In the present case, the goods were not yet cleared. The importer (or his CB) filed a Bill of Entry self assessing the duty which has been found to be erroneous. The duty has to be reassessed and a speaking order has to be passed by the proper officer. If the officer of DRI is also the proper officer [under Section 28(11) or otherwise] and has done the reassessment, he must pass a speaking order. Any SCN under Section 28 can only arise after the goods have been cleared for Home Consumption and not before. This is because a demand under section 28 is in the nature of review of the assessment already done under section 17 by the proper officer. **Without the assessment under section 17 being completed, there cannot be review under section 28 and the relevant date under section 28 for reckoning the time limit has not yet arisen. For this reason, the demand under section 28 in respect of the goods which have not yet been cleared for home consumption cannot be sustained and the answer to the question (c) which we raised is 'No demand under section 28 can be issued unless the goods have been cleared for home consumption and hence the demand does not sustain'.**

33. The question (d) raised by us is regarding whether a demand under section 28 can be raised in respect of goods seized from the shop of the importer. These goods have evidently been cleared for home consumption and hence a demand can be raised under section 28. This, however, leads to the related question as to whether DRI can issue a SCN under Section 28.

34. The decision of Hon'ble Apex Court in the case of **Canon India Ltd. vs. Commissioner of Customs in Civil Appeal No. 1827/2018** as decided on **09.03.2021** has been brought to our notice. Perusal of the order shows that the question that has been considered by the Hon'ble Apex Court 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. While answering the question, the Hon'ble Apex Court has perused Section 28(4) of the Customs Act, and has held that 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". The Hon'ble Court has referred to the specific finding in this respect in the case of **Consolidated Coffee Ltd. And Anr. .. vs Coffee Board, Bangalore [1980 (3) SCC 358]** which has held as under:

"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 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.

Hon'ble Apex Court 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."

.....

" 11. Parliament has employed the article "the" not accidentally but with the intention to designate the proper officer who had assessed the goods at the time of 3 (2001) 3 SCC 609 6 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, 1962⁴ ."

35. It is further observed that in **Canon India Ltd.** case Hon'ble Supreme Court has held as follows:

“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)].”

36. It was held that Additional Director General of Revenue Intelligence was not the ‘proper officer’ to examine the power conferred under section 28(4) and accordingly the initiation of recovery proceedings in the case of the appellant were held to be without any jurisdiction and were accordingly set aside. It has also been clarified in the decision that ADG of DRI can be considered as a proper officer only it is shown that he is Customs Officer under Customs Act.

37. In the present case, we observe that the Show cause notice was issued by an officer of Director of Revenue Intelligence and not by the assessing officer under section 17 who had the assessment of the Bill of Entry in respect of the goods seized from the shop for the importer. We note that it was held by the Hon’ble Supreme Court in the case of **Sayed Ali** (supra) with respect to officers of Customs (Preventive) Commissionerate in Mumbai that they were not proper officers under section 17 and could not therefore, issue an SCN under section 28. Thereafter, Section 28 was amended and

sub-section 11 was introduced with retrospective effect. It reads as follows:

“Section 28:

....

(11) Notwithstanding anything to the contrary contained in any judgement, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of 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 for the purposes of this section.”

38. Sub-section 11 was specifically brought in to overrule the decision of the Hon’ble Apex Court in the case of **Syed Ali** (Supra) wherein it was held that officers of Commissioner of Customs (Preventive) Mumbai were not proper officers under section 17 and hence no demand under section 28 can be issued by them. It is noteworthy that the power of issuing the SCN under Section 28 has not been extended to officers other than to proper officers under section 17. The amendment only notified several other officers (including officers of DRI) as proper officers under section 17. Thus, now there are several ‘proper officers’ having jurisdiction over the same type of goods in the same area. Firstly, there is the AC/DC of the Appraising Group of the Custom House. Then there are officers of DRI, Customs Preventive, etc. who usually have a large territorial jurisdiction which overlaps with that of the Custom Houses. The validity of this amendment was under challenge in the case of **Mangli Impex Ltd. vs. Union of India** reported in **[2016 (335) ELT 605 (Del)]** before the Hon’ble High Court of Delhi and it has been held that the retrospective application of this sub-section is ultra vires. The judgment and order of the Hon’ble High Court of Delhi was stayed by the Hon’ble Supreme Court in **Union of India vs. Mangali Impex Ltd.** reported in **[2016 (339) ELT A 49 (SC)]**. Thus, as on date, the Section 28(11) is still on the statute book and is valid. This sub-section was not brought to the

attention of the Hon'ble Supreme Court in the case of **M/s. Canon India (supra)**. However, even if it is considered that the officers of DRI are 'proper officers' under Section 17, an SCN under Section 28 can be issued only by **the proper officer and not a proper officer, i.e., the officer who has done the assessment under section 17 or his successor in office.**

39. Accordingly, **even if section 28(11) is considered, the SCN demanding duty under section 28 issued by the officer of DRI is invalid** as per the decision of Hon'ble Apex Court in the case of **M/s. Canon India Pvt Ltd.** (supra) because there is nothing on record to show that the officer of DRI or his predecessor in office had done the assessment of the Bill of Entry in respect of the goods which were seized from the shop of the importer.

40. We now take up the questions (f), (g), (h) and (i) raised by us. Before any order of confiscation of goods under section 111 and any penalties under sections 112, 114A, etc. is issued, a notice has to be issued under section 124 which reads as follows:

SECTION 124. Issue of show cause notice before confiscation of goods, etc. - No order confiscating any goods or imposing 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 issue of notice under this section, the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed.

41. This section does not require the proper officer under section 17 to issue a notice. This is in the nature of anti-smuggling function of the department and notices can be issued by officers of DRI and so far, we are not aware of any judicial decisions holding otherwise. Needless to say that the SCN must be accompanied by the Relied Upon Documents(RUDs) as it did in this case. These RUDs included several statements recorded by the officers during the course of investigation. Such statements are relevant for either prosecutions or for other proceedings (such as quasi-judicial proceedings) under the Act subject to some conditions under section 138B which reads as follows:

SECTION 138B. Relevancy of statements under certain circumstances. - (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,

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(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.

42. As far as the penalty under section 112(a) on the CB is concerned, the allegation is that he has not fulfilled his obligations under the CBLR 2013 and no penalty can be imposed under section 112 for failure to fulfil obligations even if they are found to be true. Therefore, the penalty needs to be set aside and we do so. As far as the confiscation of goods and imposition of penalties on others is

concerned, we find that there is nothing in the impugned order or the order of the original authority to show that the procedure prescribed under section 138B has been followed with respect to the statements relied upon. We find it necessary to remand it to the original authority to complete the procedure under section 138B with respect to each of the statements which has been relied upon in the SCN and decide afresh on the confiscations and penalties.

43. Resultantly, both appeals are disposed of as below:

- a) The penalty under section 112 on the Customs Broker is set aside because even if the allegation that the CB has not fulfilled his obligations under CBLR 2013 is proven, no penalty can be imposed on this ground under section 112 of the Customs Act, 1962.
- b) The demand of duty under section 28(4) in respect of the goods which were not yet cleared for home consumption is pre-mature and cannot be sustained. It also cannot be sustained because officers of DRI are not proper officer for issuing a demand under section 28 as laid down by the Hon'ble Supreme Court in the case of Cannon India.
- c) The demand of duty under section 28(4) on the goods which were seized from the shop (and hence already cleared for home consumption) cannot be sustained because only the proper officer, i.e., the officer who did the assessment under section 17 or his successor in office can issue a demand and not officers of DRI as laid down by Supreme Court in Canon India.
- d) Insofar as the confiscation of goods and imposition of penalties on the importer is concerned, the matter is remanded to the original authority to follow the procedure prescribed under section 138B in respect of each of the statements being relied upon and pass a reasoned order after following principles of natural justice. This remand is only with respect to the confiscation and penalties on the importer

and not regarding the demands of duty from the importer and the penalty on the Customs Broker both of which we have set aside.

(Pronounced in the open Court on 16-08-2021)

**(P V SUBBA RAO)
MEMBER (TECHNICAL)**

**(RACHNA GUPTA)
MEMBER (JUDICIAL)**

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