CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 50401 OF 2019

[Arising out of Order-in-Original No. DLI/CUS-PREV/OPD/PR.Commr/05/2018 7.06.2018 passed by the Principal Commissioner (Preventive) Customs, New Delhi]

Mr. Ajit Singh **Appellant**
F-159/1, Rajouri Garden
New Delhi 110027

Versus

The Pr. Commissioner of Customs (Prev) **Respondent**
New Custom House, Near IGI Airport
New Delhi

APPEARANCE:

Shri Akash Deep, Advocate for the Appellant
Shri Sunil Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 06.01.2022
Date of Decision: 06.01.2022

FINAL ORDER NO. 50075/2022

P.V. Subba Rao:

1. This appeal is filed by Ajit Singh[1] assailing Order in original dated 7.6.2018[2] passed by the Principal Commissioner (Customs Preventive) New Delhi whereby he rejected the declared assessable value of the goods in respect of 11 Bills of Entry and re-determined the value and confirmed an additional duty of Rs. 18,19,448/- under Section 28(4) of the Customs Act, 1962[3] from the importer M/s M C Overseas along with interest under section 28AA. He also confiscated the goods

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1. Appellant
2. Impugned order
3. the Act

imported under the 11 Bills of Entry under section 111(m) of the Act for mis-declaring the value and allowed their redemption on payment of fine. He also imposed penalties on various persons including the appellant. The operative part of the order relevant to the appellant is as follows:

> "(vii) I impose under section 112(a) of the Customs Act, 1962, a penalty of Rs. 20,00,000/- (Rupees twenty lakh only) on Shri Ajit Singh which should be recovered from him forthwith."

2. The background to this appeal is that officers of the Commissionerate of Customs (Prev), New Delhi received information that M/s. M C Overseas was mis-declaring the Retail Sale Price of the air conditioners which it was importing to evade Customs duty. Acting on it, they searched various premises, made seizures and recorded statements of various persons and concluded that M C Overseas had, indeed, mis-declared the value of the goods imported under 11 Bills of Entry. A Show Cause Notice dated 13.09.2012 was issued to M/s. M C Overseas and others including the appellant herein proposing to reject the declared value, reassess the value of the goods, recover differential duty under section 28(4) of the Act along with interest, confiscate goods and impose penalties. The SCN was adjudicated by the Commissioner (Adjudication) New Custom House, New Delhi by an order dated 31.12.2013. On appeal by four appellants, this Tribunal, by Final Order No. 58374-68377/2017 dated 15.12.2017, remanded the matter to the original authority directing him to decide the matter afresh after providing the appellants therein to present their side of the case. On this remand order, the impugned order is passed.

3. Aggrieved, the appellant filed this appeal which was dismissed by Order dated 11 February 2019 for the reason that he had not made the

mandatory pre-deposit. On 1 April 2019, the appellant filed an application seeking recall of the order dated 11 February 2019 on the ground that he had not received the communication from the Registry. This application dated 1 April 2019 was listed on several dates and order dated 1 October 2019 was passed stating that there was no good reason to recall the order dated 11 February 2019. The appellant filed Customs Appeal CUSAA 13/2021 before Delhi High Court. The High Court after confirmation by the appellant of having made the pre-deposit, by order dated 6.8.2021, restored the appeal to its original number and directed the Tribunal to decide the appeal on merits, in accordance with law, as expeditiously uninfluenced by any observation in that order.

4. We have heard Shri Akash Deep, learned Advocate for the appellant and Shri Sunil Kumar, learned Authorised Representative for the Revenue and perused the records.

5. The Show Cause Notice in this case demanding differential duty under Section 28(4) of the Act was issued by the Commissioner of Customs (Preventive) on the ground that the value was mis-declared in the 11 Bills of Entry. The declared values were proposed to be rejected and the duty re-assessed at a higher value and the differential duty recovered under Section 28(4) of the Act. The proposal for confiscation under section 111(m) of the Act is on the ground of mis-declaration of value. The penalties flow from the proposal for confiscation. Thus, the entire case is built on the demand under section 28(4) of the Act. We first proceed to examine the sustainability of the SCN.

6. In the case of **Commissioner vs. Sayed Ali**[4], the Supreme Court dealt with two sets of orders passed by this Tribunal – one set in which it was held the Collector of Customs (Preventive) Mumbai was not the 'proper officer' to issue a notice under section 28 and another set in which a contrary view was taken. The Supreme Court held that Collector of Customs (Preventive) Mumbai was not the proper officer because he was not assigned the functions of assessment under section 17 either by the Board or by the Commissioner of Customs and only the officer who is the proper officer for assessment under section 17 can issue a demand under section 28 of the Act. Relevant paragraphs of the judgment are as follows:

> "13. Section 2(34) of the Act defines a "proper officer", thus:
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> "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;
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> 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) of 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".
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> 14. 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 re-assessment 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.
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> Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test

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4. 2011(265) ELT 17(SC)

> contemplated under Section 2(34) of the Act is that of specific conferment of such functions.
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> Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers". In our view therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act."

7. The judgment in **Sayed Ali** rendered all the SCNs issued demanding duty under section 28 by officers of Customs (Preventive) or DRI unsustainable.

8. Thereafter, section 28 of the Act was amended retrospectively in 2011 by inserting section 28(11) of the Act which reads as follows:

> "(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."

9. This retrospective legislation was explained by the Finance Minister while introducing the Bill in the Lok Sabha in the Statement of Objects and Reasons as follows:

> **"STATEMENT OF OBJECTS AND REASONS**

The Customs Act, 1962 consolidates and amends the law relating to customs. Clause (34) of section 2 of the said Act defines the expression "proper officer" in relation to the functions under the said Act to mean the officer of customs who is assigned those functions by the Central Board of Excise and Customs or the Commissioner of Customs. Recently, a question has arisen as to whether the Commissioner of Customs (Preventive) is competent to exercise and discharge the powers of a proper officer for issue of a notice for the demand of duty. **The Hon'ble Supreme Court of India in Commissioner of Customs versus Sayed Ali and Anr. (Civil Appeal Nos. 4294-4295 of 2002) held that only a customs officer who has been specifically assigned the duties of assessment and re-assessment in the jurisdiction area is competent to issue a notice for the demand of duty as a proper officer.** As such the Commissioner of Customs (Preventive) who has not been assigned the function of a "proper officer" for the purposes of assessment or re-assessment of duty and issue of show cause Notice to demand Customs duty under Section 17 read with Section 28 of the Act in respect of goods entered for home consumption is not competent to function as a proper officer which has not been the legislative intent.

2. In view of the above the Show Cause Notices issued over the time by the Customs officers such as those of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence and others, who were not specifically assigned the functions of assessment and re-assessment of customs duty may be construed as invalid. The result would be huge loss of revenue to the exchequer and disruption in the revenue already mobilized in cases already adjudicated. However, having regard to the urgency of the matter, the Government issued notification on 6th July, 2011 specifically declaring certain officers as proper officers for the aforesaid purposes.

3. In the circumstances, it has become necessary to clarify the true legislative intent that Show Cause Notices issued by Customs officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. **It is, therefore, purposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any specific assignment on 6th July, 2011.**

4. The Bill seeks to achieve the above objects."

10. The constitutional validity of section 28(11) of the Act was challenged before the High Court of Delhi in the case of **Mangali Impex**[5]. The High Court held that the section is constitutionally valid but set aside its retrospective application. Revenue appealed to the Supreme Court and the operation of this judgment and order of the Delhi High Court was stayed by the Supreme Court[6]**.**

11. Sub-section (11) of section 28 of the Act has not been set aside by any High Court or Supreme Court and hence it continues to be in force till date. In fact, its constitutional validity has been examined and upheld by the High Court of Delhi in **Mangali Impex.** Thus, after the amendment, there are several 'proper officers' under section 17 with respect to the same type of goods imported through the same port/ airport/land customs station such as the assessing officer of the Appraising Group (appraiser or Assistant Commissioner or Deputy Commissioner) of the Custom House, the officers of the preventive Commissionerates who have jurisdiction over the area, the central excise officers who may have been notified as customs officers in the area, officers of Directorate of Revenue Intelligence who have jurisdiction over the area, etc.

12. In **Cannon India** vs. **Commissioner of Customs**[7]**,** the Supreme Court held as follows:

> 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**

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5. 2016 (335) ELT 605 (Del)
6. 2017 (349) ELT A 98 (SC)
7. 2021(3) TMI 384- Supreme Court

> **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.**
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> 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)].**
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> 15. It is obvious that the re-assessment and recovery of duties i.e. contemplated by Section 28(4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.

13. Thus, the decision of Supreme Court in **Cannon India** is not only that officers of DRI were not proper officers under Section 2(34) of the Act, but the power of issuing a notice under Section 28 of the Act is conferred on '**the proper officer'** and not a proper officer or

any proper officer. The proper officer for this purpose is held to be the officer of the appraising group who has assessed the Bill of Entry in the first place or his successor in office. This is because the notice under section 28 of the Act is a power of re-opening an assessment which is not inherent and is specially conferred on the assessing officer who alone can exercise it.

14. **Cannon India** has since been followed by the Supreme Court, various High Courts and this Tribunal in several cases, a few of which are as follows:

Supreme Court

1. Commissioner of Customs vs **Agarwal Metals and Alloys**[8] **Madras High Court- Madurai bench;**
2. **Quantum Coal Energy Pvt. Ltd** vs Commissioner of Customs[9];

Karnataka High Court

3. **Givaudan India Pvt. Ltd.** vs Commissioner of Customs[10] **Punjab and Haryana High Court;**
4. **Godrej & Boyce Manufacturing Co. Ltd.** vs UOI[11];

Tribunal

5. Principal Commissioner, Customs, ACC Import vs **Dish TV India Limited, Rajeev Dalmia and Virender Kumar Tagra**[12]**;** and
6. **Evershine Customs (C&F) Pvt. Ltd** vs Commissioner of Customs[13]

15. Learned authorised representative of the department fairly concedes that the assessment of the Bills of Entry in this case was not done by the Commissioner of Customs (Preventive), New Delhi, who issued the SCN.

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8. 2021(9) TMI316- Supreme Court
9. 2021 (3) TMI 1034- Madras High Court
10. 2021(8) TMI 178- Karnataka High Court
11. Punjab & Haryana High Court Order dated 19.4.2021 in Civil Writ Petition No. 19871 of 2020
12. 2021 (10) TMI 771- CESTAT, New Delhi
13. 2021(8) TMI 906- CESTAT, New Delhi

16. As the SCN itself has been issued in this case by a person not competent to issue a demand under section 28 of the Act, the demand cannot be sustained. Neither can the proposals for confiscation and imposition of penalties which follow the confirmation of such demand. The impugned order confirming such a demand cannot be sustained and needs to be set aside and we do so.

17. The appeal is allowed and the impugned order is set aside with consequential relief, if any, to the appellant.

JUSTICE DILIP GUPTA
PRESIDENT

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)