CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA EASTERN ZONAL BENCH

KOLKATA REGIONAL BENCH - COURT NO.2

Customs Appeal No.75409 of 2014

(Arising out of Order-in-Original No. KOL/CUS/PORT/07/2014 dated 17.1.2014 passed by the Commissioner of Customs (Port) Kolkata)

M/s. Agarwal Graphic Machinery Pvt. Limited Appellant
108, Patparganj Industrial Area,
Machinery Pvt Ltd.
New Delhi 11092

VERSUS

Commissioner of Customs (Port), Kolkata Respondent
15/1, Strand Road
Kolkata

Appearance:

Present for the Appellant: Ms. Reena Rout, Advocate

Present for the Respondent: Shri M.P. Toppo, Authorized Representative

With

Customs Appeal No.75406 of 2014

Smt. Sangeeta Bansal Appellant
Director, M/s. Agarwal Graphic Machinery Pvt. Ltd.
D-138, II Floor, Anand Bihar,
New Delhi 110092

VERSUS

Commissioner of Customs (Port), Kolkata Respondent
15/1, Strand Road
Kolkata

Appearance:

Present for the Appellant: Ms. Reena Rout, Advocate

Present for the Respondent: Shri M.P. Toppo, Authorized Representative

and

Customs Appeal No.75407 of 2014

Shri Sanjay Bansal Appellant
Director, M/s. Agarwal Graphic Machinery Pvt. Ltd.
D-138, II Floor, Anand Bihar,
New Delhi 110092

VERSUS

Commissioner of Customs (Port), Kolkata **Respondent**
15/1, Strand Road
Kolkata

Appearance:
Present for the Appellant: Ms. Reena Rout, Advocate

Present for the Respondent: Shri M.P. Toppo, Authorized Representative

and

Customs Appeal No.75408 of 2014

Shri Manoj Bansal **Appellant**
Director, M/s. Agarwal Graphic Machinery Pvt. Ltd.
D-138, II Floor, Anand Bihar,
New Delhi 110092

VERSUS

Commissioner of Customs (Port), Kolkata **Respondent**
15/1, Strand Road
Kolkata

Appearance:
Present for the Appellant: Ms. Reena Rout, Advocate

Present for the Respondent: Shri M.P. Toppo, Authorized Representative

and

Customs Appeal No.75459 of 2014

Shri Saikat Konar **Appellant**
Radhanagar, South Road,
Burdwan-713101

VERSUS

Commissioner of Customs (Port), Kolkata **Respondent**
15/1, Strand Road
Kolkata

Appearance:
Present for the Appellant: Shri Sudhir Mehta, Advocate

Present for the Respondent: Shri M.P. Toppo, Authorized Representative

and

Customs Appeal No.75460 of 2014

Shri Manoj Kumar Sarkar **Appellant**
107/H, Hazra Road
Kolkata 700026

VERSUS

Commissioner of Customs (Port), Kolkata **Respondent**
15/1, Strand Road
Kolkata

Appearance:

Present for the Appellant: Shri Sudhir Mehta, Advocate

Present for the Respondent: Shri M.P. Toppo, Authorized Representative

DATE OF HEARING: 19 January 2022

DATE OF ORDER: 23.02.2022

FINAL ORDER NOs.75131-75136/2022

P.V. SUBBA RAO

All these appeals are filed assailing the same order in original[1] dated 17.1.2014 passed by the Commissioner of Customs (Port) Kolkata and hence are being disposed of together. M/s Agarwal Graphic Machinery Pvt. Ltd. [2] (appellant in appeal C/75409/2014) is aggrieved by the rejection of the declared value of the imported goods, demand of differential duty along with interest and imposition of penalty on it. Smt. Sangeeta Bansal[3] (appellant in appeal C/75406/2014), Shri Sanjay Bansal[4] (appellant in appeal C/75407/2014) and Shri Manoj Bansal[5] (appellant in appeal C/75408/2014) are Directors of the importer. They are aggrieved by the personal penalties imposed on them. Shri Saikat Konar[6] (appellant in appeal C/75459/2014) and Shri Manoj Kumar Sarkar [7] (appellant in appeal C/75460/2014) are Chartered

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[1] **Impugned order**
[2] **Importer**
[3] **Sangeeta**
[4] **Sanjay**
[5] **Manoj**
[6] **Konar**
[7] **Sarkar**

Engineers who estimated the value of the imported goods. They are aggrieved by the personal penalties imposed on them.

2. The importer imported used 4-colour and 5-colour offset printers and cleared them through the Kolkata port. Officers of Directorate of Revenue Intelligence[8] received intelligence that the importer had grossly undervalued these printers and thereby evaded paying the Customs duty and searched the godown-cum-office premises of the importer in Delhi and recovered several documents and a computer. They conducted some other searches and recorded statements of persons involved and their investigation showed that the importer had imported the goods at mis-declared prices and sent the remaining of the foreign exchange to the suppliers separately. Accordingly a Show Cause Notice[9] dated 22.5.2012 was issued by the Additional Director General[10] of DRI answerable to the Commissioner of Customs (Port) Kolkata proposing to reject the declared assessable value, re-assess the duty leviable and recover the differential duty under section 28 from the importer along with interest and further proposing to impose penalties upon the importer, the Directors of the importer and the two Chartered Engineers. Adjudicating the SCN, the Commissioner passed the impugned order confirming the demand of duty, interest and imposing penalties as proposed in the SCN issued by the DRI.

3. Learned counsel representing the appellants Konar and Sarkar sought an adjournment which was not accepted by us

[8] **DRI**
[9] **SCN**
[10] **ADG**

because it was a batch matter and other appellants were all represented and were ready to argue their cases. Learned Counsel representing the importer, Sangeeta, Sanjay and Manoj submitted that while they had appealed on several grounds, those grounds need not be gone into because the SCN was issued under section 28 by ADG DRI. It has been held by a three-member bench of Hon'ble Supreme Court in **Canon India**[11] that DRI officers are not 'proper officers' to issue an SCN under section 28 of the Customs Act and the proceedings were quashed on that ground itself. This judgment of Hon'ble Supreme Court was followed in several judgments by the Supreme Court, various High Courts as well as various benches of this Tribunal and wherever the SCN was issued by DRI demanding duty under section 28, the orders adjudicating such SCNs were quashed. She prays that on this ground itself, the impugned order may be set aside with consequential relief to the appellants.

4. Learned Departmental Representative supported the impugned order. He submitted that although officers of DRI were held to be NOT proper officers under section 2(34) of the Customs Act by Hon'ble Supreme Court in **Canon India,** it noted in that very judgment that officers of DRI were appointed as Customs officers under section 4(1) by a notification. All persons appointed as Customs officers under sub-section (1) of Section 4 before 6th July 2011 are deemed to be proper officers for assessment under section 17 of the Customs Act as well as the proper officers under section 28 as per Section 28(11). He submits that Section 28(11)

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[11] **AIR 2021 SC 1699**

was introduced through a retrospective amendment by the Parliament and its validity was upheld fully by Hon'ble High Court of Bombay in **Sunil Gupta Vs. Union of India**[12] and was upheld prospectively by Hon'ble High Court of Delhi in **Mangáli Impex**[13]. The retrospective application of section 28(11) was held to be not valid by Hon'ble High Court of Delhi and on appeal by the Revenue, **Hon'ble Supreme Court stayed**[14] the judgment and order of Hon'ble Delhi High Court. Thus, as on today, section 28(11) is valid and as per this section, DRI officers are proper officers to issue the notice. The validity of Section 28(11) was not considered by Hon'ble Supreme Court in **Canon India.** Therefore, the impugned order may be upheld.

5. We have considered the arguments on both sides with respect to competence of ADG DRI to issue the SCN which culminated in the impugned order. Learned Counsel was correct in pointing out that in **Canon India** Hon'ble Supreme Court had held that officers of DRI are not proper officers to issue the SCN demanding duty under section 28 as per section 2(34). Learned departmental representative was correct in pointing out that under consideration in **Canon India** was the question whether DRI officers were 'proper officers' under section 2(34) and not whether they were proper officers under section 28(11). As per section 28(11), all persons appointed as Customs officers under section 4(1) prior to 6th July 2011 were proper officers for assessment under section 17 and proper officers under section 28. This

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[12] **2014-TIOL-1949-HC-MUM-CUS**
[13] **2016 (335) ELT 605 (Del)**
[14] **2017 (349) ELT A 98 (SC)**

provision was not in question in **Canon India** but it was upheld in **Mangali Impex** (prospectively) and **Sunil Gupta** (fully). We are not aware of any other judgment of any High Court or Supreme Court setting aside the validity of Section 28(11). Thus, section 28(11) is valid and is on the statute book.

6. However, a careful reading of **Canon India** shows that as far as the officers of DRI are concerned, it was held as follows:

> **a) Officers of DRI as well as Customs officers are appointed by the Government. Unless functions under the Customs Act were entrusted by the Government to DRI under section 6, they cannot perform such functions.**
>
> **b) DRI officers are not proper officers under section 2(34) because the notification issued by the CBEC was held to have been issued without the power to do so.**
>
> **c) Whenever, more than one officer has a concurrent jurisdiction over an area and a subject all of them cannot simultaneously exercise jurisdiction in the same case. If one is exercising the jurisdiction, others cannot. The power to issue a notice under section 28 is a power to reopen an assessment already done under section 17 and such a power is not inherent in anyone but is specially conferred by section 28 on ´the proper officer'. Use of definite article 'the' shows that only one officer is competent to issue a notice in a case and that**

officer has to be the officer who did the assessment in the first place or his successor in office.

7. Undisputedly, in this case, since the assessment was done by the assessing officers in the Custom House, such officer who did the assessment or his successor in office is **the proper officer** and ADG DRI cannot be the proper officer and has no jurisdiction to issue the SCN demanding duty under section 28. Other person appointed as Customs officers under section 4(1) **may be a proper officer** by virtue of Section 28(11) but he/she **must also be 'the proper officer'**, i.e., he/she must have had done the original assessment under section 17 in that case to be competent to issue an SCN under section 28.

8. Secondly, as far as DRI officers is concerned, since the Government has not entrusted any functions under section 6 of the Customs Act, they could not have performed such functions. Therefore, all the functions of the officers of DRI under the Customs Act in this case which culminated in the issue of the SCN viz., searches, summons, recording of statements under the Customs Act are also vitiated. Therefore, neither those activities of officers of DRI under the Customs Act nor the SCN into which they culminated can be upheld. It was clarified by Hon'ble Supreme Court in **Commissioner of Customs Ahmedabad vs M/s. Suncity Strips and Tubes Pvt Ltd. [Dy. No. 7802/2020] that in the absence of entrustment of functions under section 6 by the Government, officers of DRI will not have jurisdiction to exercise the functions under the Customs Act**. The relevant portion of this judgment is as follows:

> " In **Canon India Pvt. Ltd. vs Commissioner of Customs, AIR 2021 SC 1699,** a three-judge bench of this court has held that in the absence of an entrustment under section 6 of the Customs Act, 1962, **an officer of the Directorate of Revenue Intelligence will not have jurisdiction to exercise the functions entrusted to Customs officers under various provisions of the Act**. As a consequence of the above elucidation, the court held that the **entire proceeding which was initiated by the Additional Director General, Directorate of Revenue Intelligence by issuing Show Cause Notices was invalid**."
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> **(emphasis supplied)**

9. The ratio of **Canon India** was followed by the Supreme Court, several High Courts and several benches of this Tribunal a few of which are as follows:

Supreme Court

1. Commissioner of Customs vs **Agarwal Metals and Alloys**[15]

Madras High Court- Madurai bench

2. **Quantum Coal Energy Pvt. Ltd** vs Commissioner of Customs[16]

Karnataka High Court

3. **Givaudan India Pvt. Ltd.** vs Commissioner of Customs[17]

Punjab and Haryana High Court

4. **Godrej & Boyce Manufacturing Co. Ltd.** vs UOI[18]

Tribunal

5. Principal Commissioner, Customs, ACC Import vs **Dish TV India Limited, Rajeev Dalmia and Virender Kumar Tagra**[19]
6. **Evershine Customs (C&F) Pvt. Ltd** vs Commissioner of Customs[20]

10. In view of the above, the impugned order cannot be sustained because it is issued adjudicating the SCN dated 22.5.2014 issued by ADG, DRI who is not competent to issue the SCN as per **Canon India.** Further, the SCN itself was the culmination of investigations

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[15] **2021(9) TMI316- Supreme Court**
[16] **2021 (3) TMI 1034- Madras High Court**
[17] **2021(8) TMI 178- Karnataka High Court**
[18] **Punjab & Haryana High Court Order dated 19.4.2021 in Civil Writ Petition No. 19871 of 2020**
[19] **2021 (10) TMI 771- CESTAT, New Delhi**
[20] **2021(8) TMI 906- CESTAT, New Delhi**

including searches, seizures, and recording of statements under the Customs Act by the DRI officers and DRI officers have no jurisdiction to perform any functions under the Customs Act **Canon India.**

11. The impugned order is set aside and all appeals are allowed with consequential relief to the appellants.

(Order pronounced on **23.02.2022**)

Sd/

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(P.V. SUBBA RAO)
MEMBER (TECHNICAL)