

TTBA

DRI OFFICER IS NOT 'THE' PROPER OFFICER'

TAXTRU BUSINESS
ADVISORS LLP

01

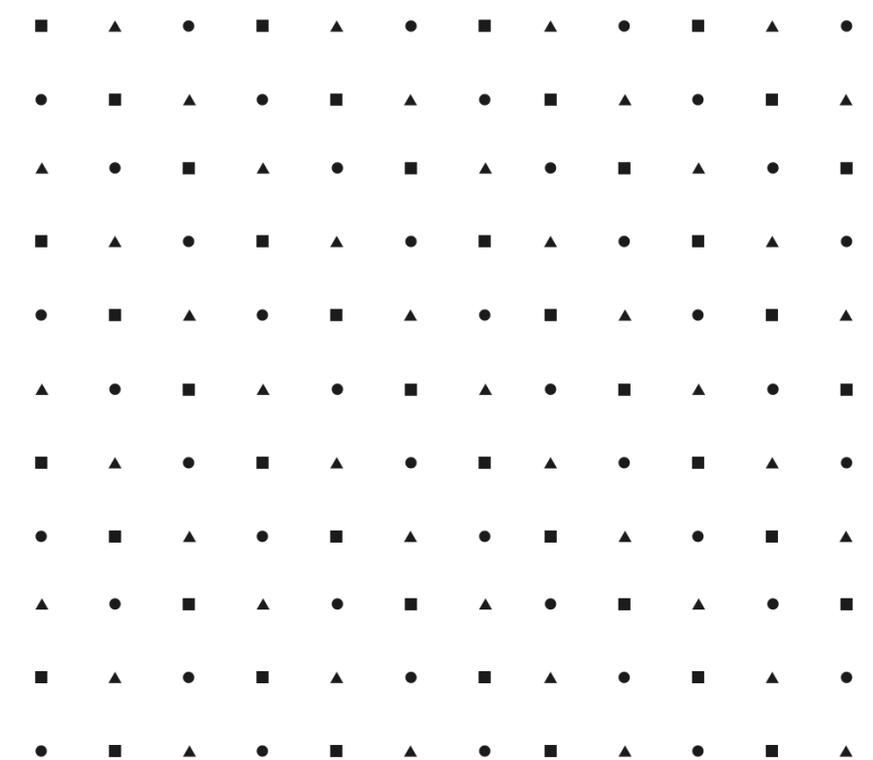
DRI!

- As the apex intelligence organization of Indian Customs, it is the prime responsibility of DRI to enforce the provisions of the Customs Act, 1962.
- The charter of duties of the DRI includes the collection, collation, analysis, and dissemination of intelligence relating to smuggling.
- It also, in cases having pan-India repercussions, works out such intelligence on its own.
- DRI has over the years, built up a formidable reputation as the premier agency in the field of anti-smuggling on account of its accumulated body of work. DRI has established a vast intelligence-gathering network that relies heavily on traditional human intelligence resources as well as contemporary intelligence gathering tools.

SC Judgement

- The 3-Judge Bench of the Supreme Court has held that Directorate of Revenue Intelligence ('DRI') has no authority in law to issue a show-cause notice under Section 28(4) of the Customs Act, 1962 for recovery of duties allegedly not levied or paid when the goods were cleared for import by a Deputy Commissioner of Customs who decided that the goods were exempted.
- Referring to the provisions of Section 28(4), the Court observed that the obvious intention of the legislature was to confer the power to recover such duties not on any proper officer but only on 'the proper officer'.
- It held that if the Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word 'any'.
- The Apex Court in its decision dated 9 March 2021 however clarified that the proper officer need not be the very officer who cleared the goods but maybe his successor in office or any other officer authorized to exercise the powers within the same office.

CA. Navjot Singh



04

TAXTRU BUSINESS ADVISORS LLP

Issue Involved

The issue considered by the Court in this case was 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. In this case, a show cause notice was issued under Section 28 (4) to Canon India Private Limited alleging that the Customs Authorities had been induced to clear the cameras by wilful mis-statement and suppression of facts about the cameras.



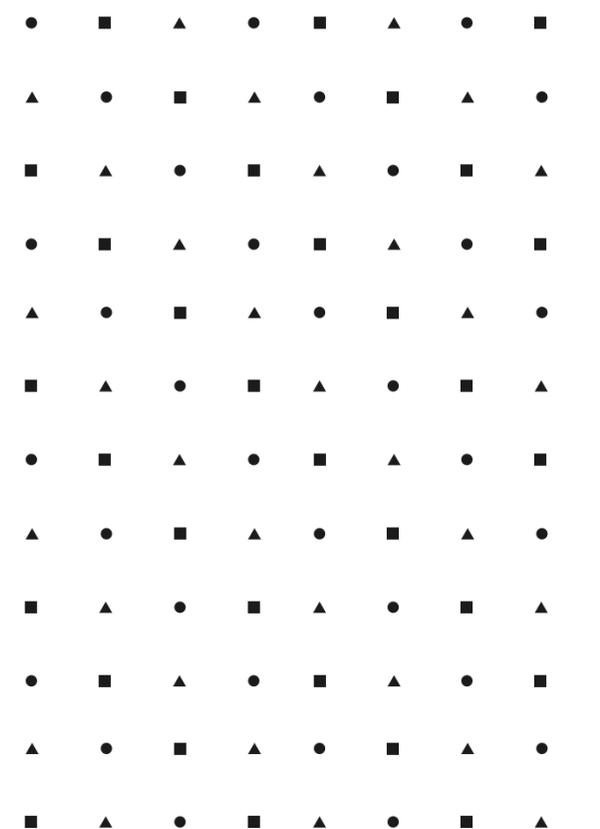
CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

Section 28(4)

Section 28 - Recovery of duties not levied or short-levied or erroneously refunded - Customs Act, 1962

- *Provided that where a notice under clause (a) of sub-section (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of sub-section (1) shall be deemed to be concluded*



SAYED ALI CASE

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

In the landmark case of Sayed Ali, earlier in 2011, the apex court had quashed the SCNs issued by Commissioner (preventive) stating that such officer is not a 'proper officer' to issue SCN.

Further, the SC had categorically mentioned that if the approach of department is accepted then it will lead to a situation where multiple officers would exercise jurisdiction over the same assessee, leading to utter chaos and confusion.

The verdict would have resolved legacy litigations pertaining to the powers of non-jurisdictional officers. However, realising the negative impact, the government took immediate step and made required amendments in the law as a corrective recourse.

IMPACT OF SAYED ALI CASE

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

Perhaps since the decision of the Supreme Court in the case of Sayed Ali upset the large number of pending or even concluded proceedings, the government introduced sub-section (11) to Section 28, which provides as under:

(11) Notwithstanding anything to the contrary contained in any judgment, 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 sixth 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.

Extract of the Circular dated 23-9-2011

2. Further, as a prospective remedial measure, in terms of Section 2(34) of the Act, 1962, the Board issued Notification No. 44/2011-Customs (N.T.): MANU/CUSN/0099/2011, dated 6-7-2011. By virtue of this notification, officers of Directorate General of Revenue Intelligence (DRI), Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates were assigned the functions of the 'proper officer' for the purposes of Sections 17 and 28 of the said Act.

Extract of the Circular dated 23-9-2011

2. Further, as a prospective remedial measure, in terms of Section 2(34) of the Act, 1962, the Board issued Notification No. 44/2011-Customs (N.T.): MANU/CUSN/0099/2011, dated 6-7-2011. By virtue of this notification, officers of Directorate General of Revenue Intelligence (DRI), Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates were assigned the functions of the 'proper officer' for the purposes of Sections 17 and 28 of the said Act.

4. Accordingly, as per the amended Section 28 of the Customs Act, 1962, show cause notices issued prior to 6-7-2011 by officers of Customs, which would include officers of Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence and similarly placed officers stand validated since these officers are retrospectively recognized as 'proper officers' for the purpose of Sections 17 and 28 of the said Act.

In this regard it may also be noted that in terms of **Notification No. 44/2011 - Customs (N.T.) : MANU/ CUSN/0099/2011, dated 6-7-2011** the officers of DRI and DGCEI are 'proper officers' for the purposes of Section 28. However, it is hereby directed by the Board that these officers shall not exercise authority in terms of clause (8) of Section 28 of the said Act. In other words, there shall be no change in the present practice, and officers of DRI and DGCEI shall not adjudicate the show cause notices issued under Section 28 of the said Act.

AMENDMENTS AFTER SAYED ALI CASE ARE VALID ?

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

- The amendment by which Section 28 (11) of the Act was introduced does not cure the defects pointed out in Sayed Ali Case.
- Relying on the decisions of the Supreme Court in **Delhi Cloth & General Mills Co. Limited v. State of Rajasthan (1996) 2 SCC 449** and the **State of Haryana v. Karnal Co-op Farmers Society Limited 1993 (2) SCC 363**,
- Section 28 of the Act confers such powers of the proper officer to multiple sets of customs officers without any territorial or pecuniary jurisdictional limit and for which reason the "utter chaos and confusion" envisaged by the Supreme Court in Sayed Ali case would still subsist.

- It was further submitted that the legislature, through its validating provision, has conferred arbitrary and unguided powers which cannot be conferred on a large number of customs officers without any limit.
- In the absence of any guidelines on how to exercise such power, it can become arbitrary and would be in violation of Article 14 of the Constitution.
- Reliance was placed on the decisions in **State of Punjab v. Khan Chand (1974) 1 SCC 549** and **Air India v. Nergesh Meerza (1981) 4 SCC 335** and also to the decision of the **Andhra Pradesh High Court in Sri Balaji Rice Company v. CTO (1984) 55 SCT 292 (AP)** and **Kerala High Court in Sivaramakrishnan v. State of Kerala 1995 (1) ILR 92 (Ker)**

Impact on the Past SCNs

- The Supreme Court in **Satchidananda Misra v. State of Orissa 2004 8 SCC 599**, it was submitted that the very purpose of a Validating Act is to remove the cause of ineffectiveness or invalidity.
- However, there is no specific provision in the Customs (Amendment and Validation) Act, 2011 which validates the past actions/SCNs.

Supreme Court's Observations in Canon India Case

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

Key Paras of the Judgement

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...

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 authorized to make the assessment. The nature of the power conferred by Section 28 (4) to recover duties that 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)].

Analysis of 'The'

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

The Constitutional bench of Supreme Court observed that
9.....This Court in Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore (1980 AIR 1468) 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.in**(Appeal (crl.) 219 of 2001) 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.”

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 3 (2001) 3 SCC 609 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 .

Proper Officer

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

- The concept of “the proper officer “is important in the CA–because only such a proper officer can discharge the functions assigned. The assignment of functions being done by either the Board or a senior functionary of the department.
- The Court has held that demand for duty can be done only by the proper officer – and such a proper officer can in terms of be only the officer who has done the original assessment or his successor in the same office.
- The Court has eloquently given a primer in English grammar and emphasized that the expression used is “the proper officer” which is a definite article which the Court has kindly pointed out is different from an indefinite article–like ‘a’ or ‘an’.
- Since the expression used is ‘the’ only the officer who has done the original assessment can also demand duty.

- Unfortunately, the provisions of Section 28(11) ibid which expressly states that all persons appointed as officers of customs under the CA 'shall be deemed to have and always had the powers of assessment and always had been the "proper officers"' does not appear to have been brought to the notice of the Court.
- This was an amendment introduced in the aftermath of an earlier SC decision (2011 3 SCC 537) which the Court has quoted with appreciation in the present order.
- Officers of the DRI have been notified in terms of section 2(34) ibid as "proper officers" for the purpose of section 28 ibid. According to the SC ", this section does not confer any powers or any authority to entrust any functions".
- It is a different matter that section 2(34) ibid or the notifications issued under it never use the word "entrust".

- The word used is “assigns” which is what the Board has done – it assigned to officers of the DRI specific powers under the Act.
- Further, the fact that all officers of the DRI have also been notified to be appointed as officers of customs under another section (section 4) ibid has also not been brought to the notice of the SC.
- The Hon’ble Court has consequently decided that a DRI officer can be considered the proper officer only if they were ‘entrusted with the function of the proper officer under section 6 ibid.
- Section 6 ibid states that the Central Government could by notification entrust either conditionally or unconditionally to any officer of the Centre or the State Government or a local authority any functions of the Board or any officer of customs under this Act.
- The very title of this section would suggest that the purpose of the section was to empower the Central Government to ‘entrust’ functions.

- Thus, the Central government has entrusted specific functions to paramilitary forces, like the Border Security Force, ITBP, CRPF, SSB apart from the Coast Guard and all State police officers' specific functions of the CA like search, seizure, arrest. This is a functional necessity to give the extent and spread of the problem of smuggling and the inability of the customs department to be present across the length and breadth of the country.
- The SC has, by concluding that officers of the DRI needed to be 'entrusted' specifically the functions, in effect held them to not be having any powers under the CA. This is the unkindest cut of all-for officers of the DRI who have been discharging customs functions since 1957.
- Some of the biggest seizures of narcotics, gold, silver, arms & ammunition, antiques, have been affected by the DRI, all without fear or favor - facing the bullets of smugglers, and in some cases laying down their lives for the Nation.

Additional Director General of DRI !

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

- The ADG, DRI can be considered to be a proper officer only if it is shown that he was a Customs officer under the Act and that he was entrusted with the functions of the proper officer under Section 6 of the Act.
- ADG, DRI has been appointed as Commissioner of Customs under Section 4(1) of the Customs Act, 1962, vide **Notification no. 17/2002 dated 7 March 2002**.
- As per **Notification no. 40/2012 dated 2 May 2012**, the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act.
- While notification no. 40/2012 is issued in exercise of the powers under section 2(34) which defines the term “proper officer”, it is Section 6 which provides for entrustment of functions of Customs officer on the other officers.

Impact of SC Judgement

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

33

Audit Wing !

- The SC decision in effect also means that the crucial Audit functions of the department where Audit is carried necessarily by officers other than the assessing officers, also become questionable. (**Practically!**)
- The logic of the SC order will also mean that officers of the Customs Preventive formations who man the sea frontiers and land borders and who also initiate investigations and issue notices will no longer have the powers.

34

Pending Cases !

- There are severe repercussions of the SC order. It would in effect jeopardize notices issued by the DRI pending decision in various fora, which on a conservative estimate would be having revenue implications in crores.
- It would mean the very closure of a premier intelligence and investigative agency.

35

DGGI !

- In view of the SC ruling, one may need to analyze the powers of the Directorate General of GST Intelligence (DGGI) under sections 73 and 74 of the Central Goods and Services Tax Act, 2017, which deals with the recovery of tax.

Recourse available to government ?

- Urgent action needs to be taken to file a review petition and request that the matter goes before a larger bench.
- In the interregnum, the Hon'ble Court can be requested to stay the operation of the order till the impact is examined.
- The government can examine if legislative intervention is required to make explicit what is de facto.



STEP TAKEN

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

INSTRUCTION NO. 04/2021-CUSTOMS

To avoid time-barring limitations of the SCNs on 18th march 2021 and the impending inability to proceed further due to the Apex Court ruling, the matter has been examined by CBIC.

- The Board has decided that for the present and until further directions, the said SCN may be kept pending.
- Further, all the fresh SCNs under Section 28 of the Customs Act, 1962 in respect of cases presently being investigated by DRI are required to be issued by jurisdictional Commissionerates from where imports have taken place.

Important Judgements

CA. Navjot Singh

TAXTRU BUSINESS
ADVISORS LLP

SUNDEEP MAHENDRAKUMAR SANGHAVI VERSUS UNION OF INDIA (GUJRAT HIGH COURT)

DRI Officers are 'Proper Officers' only and Empowered To Arrest Even On Suspicion Of Smuggling, Not Obligated To Cr. P. C. Norms For Making Arrest.

**RAZA TEXTILES LTD. V. INCOME-TAX OFFICER, RAMPUR
REPORTED IN MANU/SC/0333/1972 : (1973) 87 ITR 539**

When the jurisdictional fact is lacking the action of the authority of issuing notice and assuming jurisdiction would be rendered invalid

Bombay High Court in the case of **Commissioner of Customs (Import) v. Electron Textile Exports (P) Limited** and Another dated 14- 6-2006 confirmed the view of the Special Bench of the Tribunal. In the case of **Konia Trading Co. v. Commissioner of Customs, Jaipur reported in MANU/CE/0423/ 2004 : 2004 (170) E.L.T. 51**, the Tribunal had held that the DRI authorities would have jurisdiction to issue show cause notice and also adjudicate the proceedings under Section 28

MANGALI IMPEX LTD VS UNION OF INDIA AND ORS ON 3 MAY, 2016 ; W.P.(C) 441/2013 (STAYED BY SC)

149. In as much as the SCN was issued by the ADG, DRI who at the time of issuance of the said SCN had not been assigned functions by the CBEC of assessment or reassessment and, therefore, is not a „proper officer“ under Section 2(34) of the Act. The impugned SCN and all proceedings consequent thereto are hereby stand quashed.

**UNION OF INDIA V. RAM NARAIN BISHWANATH REPORTED IN
MANU/SC/1475/1998: 1997 (96) E.L.T. 224**

it is only the Customs Authority where the goods are imported would have jurisdiction to adjudicate on the issues connected thereof.

Please feel free to reach us

CA. Navjot Singh

Managing Partner

E : Navjot.singh@taxtru.in

P : +91 99533 57999

**TAXTRU BUSINESS
ADVISORS LLP**

#F-13 Kirti Nagar, Nearby Derawal Bhawan, Delhi – 110015