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THE DRI STORY

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THE high rates of customs duties, the penchant for foreign articles and the volatile nature of our country's border after its Independence has given rise to various smuggling operations and it was felt that a centralised agency is required to deal with such anti-smuggling efforts. A small beginning in this regard was made in 1953 by setting up Central Revenue Intelligence Bureau, under the Central Board of Revenue with a single Assistant Collector and two Superintendents, for the entire country. Initially the CRIB was focussing on various anti-corruption activities within the department and it also undertook various studies on the smuggling and the need for setting up a more strong unit at the national level, with presence throughout the country and that is how Directorate of Revenue Intelligence (DRI) was born on 4 th December 1957.

The stellar role performed by DRI ever since, in combatting smuggling of not only merchandise, but also arms and ammunition, narcotic drugs, etc. is phenomenal and can hardly be undermined. The elite agency engages itself with similar agencies across the world, collects and share information and executes their mission. The contribution of DRI in national security, be it economic or otherwise, is laudable. Though there may be certain incidents of over-reach, harassment, booking frivolous cases of astronomical value on interpretative issues, etc. those can hardly undermine the overall reputation of DRI. At zonal level, separate formations called Preventive Commissionerates are also functioning whose role is also to probe smuggling, customs evasion, etc.

For quite some time, DRI and the Preventive Commissionerates were undergoing an existential crisis, based on judicial interpretations.

Way back in 1999 when a doubt arose whether the officers of DRI can issue show cause notice for the cases investigated by them, it was clarified by the CBEC in its Circular No. **4/1999** Cus. Dt. 15.02.1999 that they can issue show cause notices but the adjudication would be undertaken by the jurisdictional customs officers.

Commissioner of Customs Vs Syed Ali - 2011-TIOL-20-SC-CUS Decided on 18.02.2011.

The issue before the Hon'ble Supreme Court in this case was whether the Commissioner of Customs (Preventive) was "proper officer" as defined in Section 2 (34) of the Customs Act, 1962, to issue show cause notice under Section 28 of the said Act. The core of the argument before the Apex Court was that all officers of customs are not ipso facto proper officers and use of these two expressions in different sections implies the difference between these terms. The Apex Court held,

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. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. 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.

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. Nothing has been brought on record to show that the Collector of Customs (Preventive), who had issued the show cause notices was assigned the functions

under Section 28 of the Act as "proper officer" either by the Board or the Collector/Commissioner of Customs. We are convinced that Notifications No. 250-Cus. and 251-Cus., both dated 27th August, 1983, issued by the Central Government in exercise of the powers conferred by sub-section (1) of the Section 4 of the Act, appointing Collector of Customs (Preventive) etc. to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra did not ipso facto confer jurisdiction on him to exercise power entrusted to the "proper officers" for the purpose of Section 28 of the Act.

Thus, the Hon'ble Supreme Court has held that the officers of preventive formations are not proper officers and hence cannot exercise the powers under Section 28 of the Act.

When the Budget for the year 2011-12 was presented on 28.02.2011, the catastrophic impact of the above decision of the Hon'ble Supreme Court had apparently not dawned on the budget making body. Section 28 of the Customs Act was proposed to be amended vide Finance Bill 2011, for some other reasons.

Prior to this proposed amendment, as per section 28 the time limit for issuing show cause notices in difference circumstances are as below.

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

(c) where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the period shall be within five years.

The Notes on Clauses and the Memorandum to Finance Bill, 2011 described the purpose of substitution of a new section 28, as below.

Notes on clauses : Clause 41 of the Bill seeks to substitute a new section for section 28 of the Customs Act relating to recovery of duties not levied or short levied or erroneously refunded so as to make the provisions more coherent and clear.

Memorandum : Section 28 is being substituted so as to make the provisions more coherent and clear as also to harmonize the demand period in normal cases to one year.

The new Section 28, as substituted by the Finance Bill, 2011 is reproduced below for ready reference and the Explanation 2 at the end may be noted specifically.

28. Recovery of duties not levied or short levied or erroneously refunded. - (1)

Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-

- his own ascertainment of such duty; or
- the duty ascertained by the proper officer,

the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2)

(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, -

- (a) collusion; or
- (b) any wilful mis-statement; or
- (c) suppression of fact

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty-five per cent. of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion -

- (i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

- (ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then, the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8), -

- (a) within six months from the date of notice, where it is possible to do so, in respect of cases falling under clause (a) of subsection (1);
- (b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4).

(10) *Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.*

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

- (a) *in a case where duty is not levied, 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*

Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.

After the presentation of the Budget on 28.02.2011, the impact of the SC decision was felt like a thunderbolt and, therefore, the CBEC came out with a fire-fighting solution vide instruction bearing F.No. **437/143/2009** Dt. 15.04.2011, wherein it was directed that all future show cause notices for cases investigated by DRI and Customs Preventive Formations shall be issued by the jurisdictional customs officers.

To quote,

2. In view of Hon'ble Supreme Court order, while other alternative measures are being considered to address the matter, it has been decided by the Board that henceforth all Show Cause Notices under Section 28 of the Customs Act, 1962 in respect of cases investigated DRI/Customs Preventive formations are required to be issued by jurisdictional Commissioners from where imports have taken place. Board also desires the field formations to examine the pending show cause notices and wherever the cases are not hit by limitation, show cause notices may be got issued afresh by jurisdictional Commissionerates in supersession of the earlier show cause notices and in the light of the Hon'ble Supreme Court judgment in the matter.

Further, Notification **44/2011 Cus. N.T.** Dt. 06.07.2011 has been issued to assign the functions of proper officers for the purposes of section 17 and 28 of the Customs Act on DRI officers "in exercise of the powers conferred under Section 2 (34)". It may be noted that Section 2 (34) defines the term "proper officer". This, according to the Government, would take care of the fall out of Supreme Court judgement in Sayed Ali, prospectively. To protect the actions taken in the past, separate measures were taken, which we will see later.

At this stage Circular No. **44/2011 Cus.** Dt. 23.09.2011 may also be noted. The Board reiterated the position in this Circular that in view of the above legislative changes, DRI and Customs (Preventive) formations can now issue show cause notice, but shall not adjudicate them. The earlier instructions dated 15.04.2011 referred supra has also been withdrawn. It may be noted that though DRI officers are designated as "proper officers" for the purposes of entire Section 28, including adjudication under sub-section (8), adjudication was kept away from the DRI hands by way of administrative instructions thorough this Circular.

DRI was been given the adjudication powers also, in the year 2014. In this connection, reference can be made to CBEC's Circular No. **14/2014 Cus** . Dt. 11.12.2014. To quote from this Circular,

Attention is invited to Board Circular No. 44/2011-Cus., dated 23-9-2011 [2011 (272) E.L.T. (T22)] regarding adjudication of appraising related cases.

2. Para 5 of the Board Circular No. 44/2011-Cus., dated 23-9-2011 [2011 (272) E.L.T. (T22)] clarified that the officers of DRI and DGCEI shall not exercise authority in terms of section 28(8) of the Customs Act, 1962 even though they have been assigned the function of 'proper officers' for the purposes of section 17 and section 28 of the Customs Act 1962 vide notification No. 44/2011-Cus. (N.T.) dated 6-7-2011.

3. Pursuant to the Cadre structuring/reorganization of CBEC, new posts in the rank of Commissioners of Customs have been created in DRI and DGCEI for adjudication of cases relating to cases investigated by DRI and DGCEI.

4. In the light of the aforementioned development, Board has decided that henceforth, specified officers of DRI and DGCEI may attend to work relating to adjudication of case where show cause notices of short levy/non levy of customs duty have been issued under section 28 of the Customs Act 1962.

5. Board Circular No. 44/2011-Cus., dated 23-9-2011 stands modified to the above extent.

From that time onwards, DRI officers used to adjudicate the show cause notice issued by them. Additional Director General (Adjudication), who is of the rank of Commissioner came to be appointed for such adjudication purposes.

Notification **60/2015-Cus. N.T** . Dt. 04.06.2015 has been issued whereby the CBEC, in exercise of its powers under Section 152 (a) of the Customs Act, has delegated its power under Sections 4 and 5 of the Customs Act to the Principal Director General of DRI, to appoint the officers working under him for the purpose of adjudication of show cause notices issued by DRI. That is how the DRI officers came to adjudicate the show cause notices issued by them.

Coming back to the shockwaves generated by the Hon'ble Supreme Court in Sayed Ali case, in order to protect the actions taken by DRI and Customs Preventive formations prior to 06.07.2011 (prior to issue of Notification 44/2011), Customs (Amendment and Validation) Bill 2011 was introduced, which, after the assent of the President on 16.09.2011, gazetted on 20.09.2011. Through this amendment, a new sub-section (11) was introduced in Section 28. The State of Objects and Reasons for this Bill explained the purpose of the amendment as,

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.*

The newly introduced sub-section (11) of Section 28 read as below.

(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 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.

Thus, according to the Government, the unfavourable decision of the Hon'ble Supreme Court in Syed Ali case has been successfully overcome, both for the past and future.

The issue of DRI's power to issue show cause notice and adjudicate them has come up again before the Hon'ble Bombay High Court in the case of Sunil Gupta Vs Union of India - **2014-TIOL-1949-HC-MUM-CUS**. It was argued that even after insertion of sub-section (11) to section 28 of the Customs Act, vide Customs (Amendment and Validation) Act 2011, after the Hon'ble Apex Court judgement in Sayed Ali case, as per Explanation 2 under sub-section (10), which was introduced through Finance Act, 2011, any show cause notices issued prior to the date on which the Finance Bill 2011 receives the assent of the President shall be dealt with only under unamended Section 28. It may be noted that the said Explanation 2 was introduced in the context of amendments made vide Finance Act, 2011.

The Bombay High Court was not impressed with these arguments. In the decision rendered on 03.11.2014, the Bombay High Court has held that sub-section (11) of Section 28 was inserted specifically to overcome the effect of the Hon'ble SC judgement in Syed Ali case; DRI officers are appointed as Customs officers by notification 19/90; and Explanation 2 inserted vide Finance Act, 2011 has got no relevance to sub-section (11) of Section 28. To quote from the decision,

25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which was specifically dealt with by sub-section (11) of Section 28 of the Act, that we are of the opinion that the challenge in the Writ Petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by Section 28 and whether initiated prior to the Finance Bill, 2011 receiving the assent of the President shall continue to be governed by Section 28, as it stood immediately before the date on which such assent is received. The reference to Finance Bill therein denotes the bill by the section itself was substituted by Act 8 of 2011 w.e.f. 8th April, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and Section 28 was resorted to by the authorities. The Explanation

2 clarifies that they will proceed in terms of the un-amended provision. The position dealt with by insertion of Section 28(11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of Section 28 un-amended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail.

The Special Leave Petition filed against this judgement was dismissed by the Hon'ble Supreme Court on the ground of delay, as reported in 2017 (354) ELT A162 SC.

The same issue was also pending before the Hon'ble High Court of Delhi which came to be decided on 03.05.2016 in Mangali Impex Ltd. & Ors. VS UOI - **2016-TIOL-877-HC-DEL-CUS** .

Hon'ble Delhi High Court has observed that sub-section (11) of Section 28 is a non obstante provision only insofar as judgements, orders, etc. and not with reference to any other provisions of the Customs Act and hence Explanation 2 could not be ignored; the Bombay High Court, in Sunil Gupta has not considered the apparent conflict between Section 28 (11) and Explanation 2; if all the officers of customs appointed as such prior to 06.07.2011 are deemed to be proper officers then the administrative chaos that is likely to result, as pointed out in Syed Ali, would persist.

To quote from the judgement,

61. Keeping the above principles in mind when Section 28 has been re-casted by Act 8 of 2011 with effect from 8th April 2011 read with Section 28(11) which was introduced by the Customs (Amendment and Validation) Act, 2011 with effect from 16th September 2011, the position that emerges is as under:

(i) Section 28(11) states that all persons appointed as Customs Officers prior to 6th July 2011 will be deemed to always have had the power of assessment under Section 17 and shall be deemed to always have been 'proper officers'. Further, this is notwithstanding anything to the contrary in any judgment, decree or order of any Court of law. While the said provision is intended to overcome the defect pointed out in the decision of the Supreme Court in the Sayed Ali case, Section 28(11) of the Act does not state that it would operate notwithstanding anything contained either in the Act or any other Act for the time being in force. In other words, the legislature has not made it explicit that Section 28(11) would prevail notwithstanding anything contained in Explanation 2 to Section 28 of the Act.

(ii) On the contrary, Explanation 2 which, as it presently stands, appears after Section 28(11) of the Act as already stood enacted with effect from 8th April 2011 opens with the words 'for the removal of doubts'. It is made clear that non-levy, short-levy or erroneous refund prior to 8th April 2011 would be governed by Section 28 "as it stood immediately before the date on which such assent is received".

(iii) Section 28(11), as it presently stands, was not in the statute book prior to 8th April 2011. Therefore, no reference can be made to Section 28(11) of the Act for determining not only the procedure but the very basis on which a non-levy, short-levy or erroneous refund occurring prior to 8th April 2011 should be dealt with.

(iv) Prior to 8th April 2011 and even subsequent thereto, only a 'proper officer' who has been 'assigned' specific functions by the C.B.E. & C. or the Commissioner as amended by Section 2(34) of the Act could undertake the task of non-levy, short-levy or erroneous refund. Therefore, for any non-levy, short-levy or erroneous refund prior to 8th April 2011, an officer of the Customs who has not been specifically assigned such function in terms of the Act cannot exercise such power.

(v) Section 28(11) therefore, does not validate the show cause notices issued by the DRI, DGCEI Officers who are not 'proper officers' for the purposes of Section 2(34) of the Act if it amounted to undertaking any assessment or re-assessment of a non-levy, short-levy or erroneous refund prior to 8th April 2011.

(vi) It is only for a period between 8th April 2011 and 6th July 2011 that such deemed 'proper officer' can be said to have been given retrospective power to deal with non-levy, short-levy or erroneous refund for any period subsequent to 8th April 2011, i.e., the date on which Section 28(11) read with Explanation 2 could be said to have come into force.

62. There is merit in the contention that Section 28(11) is overbroad inasmuch as it confers jurisdiction on a plurality of officers on the same subject matter which would result in chaos, harassment, contrary and conflicting decisions. Such untrammelled power would indeed be arbitrary and violative of Article 14 of the Constitution

66. The mere fact that Section 28(11) has been given retrospective effect does not solve the essential problem pointed out by the Supreme Court in the Sayed Ali case, which is the absence of the assigning of functions to 'proper officers' under Section 2(34) of the Act. The even more serious problem is the impossibility of reconciling two contradictory provisions, viz., Explanation 2 to Section 28 and Section 28(11) of the Act.

70.1 The net result of the above discussion is that the Department cannot seek to rely upon Section 28(11) of the Act as authorising the officers of the Customs, DRI, the DGCEI etc. to exercise powers in relation to non-levy, short-levy or erroneous refund for a period prior to 8th April 2011 if, in fact, there was no proper assigning of the functions of reassessment or assessment in favour of such officers who issued such SCNs since they were not 'proper officers' for the purposes of Section 2(34) of the Act and further because Explanation 2 to Section 28 as presently enacted makes it explicit that such non-levy,

short-levy or erroneous refund prior to 8th April 2011 would continue to be governed only by Section 28 as it stood prior to that date and not the newly re-cast Section 28 of the Act.

As expected, the Department took the matter in SLP to the Supreme Court.

In one of the SLPs, the Supreme Court on 7.10.2016, stayed the Delhi High Court Order. The Supreme Court ordered,

Delay condoned. Leave granted. There shall be a stay of operation of the impugned judgment and order passed by the High Court of Delhi. -

2016-TIOL-173-SC-CUS

It is at this stage, on 09.03.2021 a three judge bench of the Hon'ble Supreme Court has rendered its judgement in Canon India Pvt. Ltd. Vs Commissioner -

2021-TIOL-123-SC-CUS-LB

In this case, the original assessment by the Assistant Commissioner of Customs was questioned by the DRI and notice was issued and the demand was confirmed by DRI. One of the finding of the Hon'ble Supreme Court is,

15. It is obvious that the reassessment 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.

Then the Hon'ble Supreme Court went on to decide whether the DRI officers are "proper officers".

16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the proper officer under Section 6 of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act.

The Hon'ble SC has observed that DRI officers are appointed as Customs officers through Notification 17/2002 Cus. N.T. Dt. 07.03.2002. Then it proceeded to determine whether they are "proper officers" for the purposes of Section 28. In this connection Notification 40/2012 Cus. N.T. Dt. 02.05.2012 was referred to, whereby only Assistant Commissioner of Customs and Deputy Commissioner of Customs were made proper officers, for the purpose of Section 28. But, the Hon'ble SC has held that the said Notification is ill-founded in as much as the same has been issued in exercise of powers conferred under Section 2 (34) which is merely a definition clause and any such notification should have been issued under Section 6 of the Act. Though Notification 44/2011 Cus. N.T. Dt. 06.07.2011, appointing DRI officers as proper officers for the purposes of Section 28 was not cited before the Hon'ble Supreme Court, the same would have had similar fate, as the said notification was also issued under Section 2 (34) only. Accordingly, the Hon'ble Supreme Court has held that DRI officers are not "proper officers" and, hence, they cannot issue show cause notices and pass adjudication orders.

This decision came as a second bombshell. Lot of appeals involving similar pleas were disposed of by various High Courts and Tribunal, by relying on this SC decision in Canon India Pvt. Ltd.

At this stage, with due respect, the author wishes to point out that section 6 of the Customs Act deals with - Entrustment of functions of Board and Customs Officers on "certain other officers" and once DRI officers are appointed as Customs Officers, Section 6 is not relevant for making them proper officers. Section 6 has normally been used to give powers under the Customs Act, to Police Officers etc.

Obviously, the Government could not take the decision lightly and they indeed did what they were supposed to.

The Finance Bill, 2022 presented on 1 st February 2022 proposes a comprehensive review of various provisions of the Customs Act, to overcome the effect of the above judgement of the Hon'ble Supreme Court.

- - Vide clause 85, in the definition of "proper officer" under Section 2 (34), reference to Section 5 is being made, for the purpose of assignment of functions.
- Vide clause 86, a new Section 3 is being substituted and DRI officers and officers of Preventive formations are made as Customs Officers as this section itself.

- - Clause 87 seeks to amend section 5 of the Customs Act relating to the powers of the officers of customs. It is proposed to insert a new sub-section (1A) in the said section so as to empower the Board to assign by notification, such functions as he may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.
- - It is further proposed to insert a new sub-section (1B) in the said section so as to empower the Principal Commissioner of Customs or Commissioner of Customs within their jurisdiction to assign by order such functions as he may deem fit to an officer of customs, who shall be the proper officer in relation to such functions.
- - It is also proposed to insert a new sub-section (4) in said section so as to provide the criteria which the Board may consider while specifying the conditions and limitations imposed under sub-section (1) and assigning functions under sub-section (1A) to an officer of customs.
- - It is also proposed to insert a new sub-section (5) in the said section so as to empower the Board in certain cases to specify by notification two or more officers of customs, whether or not of the same class, to have concurrent power and functions under the said Act.
- - Vide clause 96, the effect of the decision of the Hon'ble Supreme Court in Canon case is sought to be overcome. The amended provisions of Section 2 (34), 3 and 5 are given retrospective effect and any past action is deemed to have been undertaken under these amended provisions.

Another major amendment is proposed now through clause 93 of the Finance Bill, 2022, whereby a new Section 110 AA is being introduced. As per this new provision, any demands arising out of audits (Chapter XIIA) and search, seizure and arrest (Chapter XIII), the officers of audit or any other investigative agencies (DRI, Preventive formations, etc) have to transfer the relevant documents along with a report in writing to the jurisdictional Customs Officer and it is only the jurisdictional Customs Officer who is empowered to issue show cause notice and adjudicate the same.

So, while DRI can be happy that their past actions are saved, they might be sad that their power to issue show cause notice(s) and adjudicate them are clipped prospectively.

Thus ends the action packed story of DRI

[The views expressed are strictly personal.]