

SC Review Petition: DRI officers are proper officers empowered to issue SCN under Customs Act, 1962

1. Introduction

The recent Supreme Court ruling in the review petition of *Commissioner of Customs vs. Canon India Private Limited*¹ (“*Canon India 2024*”) has garnered huge attention and how! At its core, this judgement addresses whether officers of ‘Directorate of Revenue Intelligence’ (“*DRI*”) are the “proper officer” for undertaking assessments or reassessment under the Customs Act, 1962 (“*Customs Act*”). The Hon’ble Supreme Court exercised its review jurisdiction to set aside its earlier judgement in the case of *Canon India Private Limited vs. Union of India*² (“*Canon India 2021*”), thereby holding that DRI officers are ‘proper officers’ for the purposes of Section 28 of the Customs Act and have the power of issuing show cause notices.

This long-standing controversy now comes to a close. This Newsalert provides a summary of the Canon India 2024 ruling and analyses the impact of the same to stakeholders at large.

2. Recap of the Apex Court Canon India 2021 Ruling

- 2.1 **Key question of law:** The key question is whether officers of DRI are the “proper officers” for the purposes of Section 28 of the Customs Act?
- 2.2 **Summary of the order:** Apex Court in Canon India 2021 ruling quashed the show cause notices (“*SCN*”) issued by DRI and held that DRI officers have no power to issue SCNs under the Customs Act. The three judge bench of the Apex Court followed its earlier decision in *Commissioner of Customs vs. Sayed Ali*³ (“*Sayed Ali*”) and held that an officer of the DRI is not a “proper officer” to issue SCN.

Aggrieved by the said order, the Commissioner of Customs approached the Hon’ble Supreme Court for a review petition. It is pertinent to note that the Canon India 2021 judgment was relied upon and followed by the Hon’ble Supreme Court, itself and also other High Courts. At the very least, the Canon India 2024 judgment will have a direct ripple effect on all the pending litigations where the 2021 judgment was followed.

¹ Review Petition No. 400 of 2021 in Civil Appeal No. 1827 of 2018

² TS- 75-SC-2021-CUST

³ (2011) SCC 537 - The SC in this case ruled that the Commissioner of Customs (Preventive) is not a "proper officer" under Section 2(34) of the Customs Act and, therefore, did not have jurisdiction to issue SCN under Section 28. The SC stressed that only officers who were specifically assigned the function of assessment/ reassessment working under the jurisdictional collectorate within whose jurisdiction the bill of entry has been filed and consignment had been cleared for home consumption, would have the jurisdiction to issue SCN under Section 28 or else it would lead to a situation of utter chaos and confusion.

3. Summary of Arguments Advanced in Canon India 2024

3.1 Submissions on behalf of the Petitioner

- Review petition is maintainable in the case of Canon India 2021 as there is an error apparent on record.
- The Hon'ble Supreme Court in Canon India 2021 incorrectly assumed that officers from the DRI are not "Customs officers" unless specifically empowered under Section 6⁴ of the Customs Act. While Sections 3⁵, Section 4⁶ and Section 5⁷ of the Customs Act classify DRI officers as Customs officers; rendering empowerment under Section 6 is unwarranted. The Department submitted that Section 6 would come into play for such officers of the Central Government, State Government or local authority, who are not a class of officers of customs under Section 3 appointed in accordance with Section 4.
- The judgment of the Hon'ble Supreme Court in Sayed Ali requires reconsideration. The observation in Sayed Ali on the inter linkage required between Section 17⁸ and Section 28⁹ of the Customs Act is grossly erred and would directly undermine the power of search, seizure and investigation of the DRI officers under the Customs Act along with the assignment of functions as proper officers to issue SCNs post such search and investigation.
- The judgment in *Mangali Impex vs. Union of India*¹⁰ ("*Mangali Impex*") ought to be overruled and the decision rendered in *Sunil Gupta vs. Union of India*¹¹ ("*Sunil Gupta*") should be upheld.

3.2 Submissions on behalf of the Respondents

- That the decision in the case of Mangali Impex and Canon India 2021 are correct and do not require any interference. They also submitted that the power of review is limited and circumscribed.
- That the scheme of the Customs Act indicates a linkage between Section 17, Section 46, Section 47 and Section 28 and is interdependent. They further submitted that these provisions involve a sequential flow of events to be processed by a single officer.
- Further, Canon India 2021 is correct in holding that DRI officers should be entrusted with the functions under Section 6 of the Customs Act and since the Central Government has not done so, they cannot be assigned functions of proper officer.

⁴ Entrustment of functions of Board and customs officers on certain other officers

⁵ Classes of officers of Customs

⁶ Appointment of Officers of Customs: The Board may appoint such persons as it thinks fit to be officers of Customs.....

⁷ Power of the officers of Customs

⁸ Assessment of Duty

⁹ Recovery of duties not levied or short-levied or erroneously refunded

¹⁰ (2016) SCC Online Del 2597

¹¹ (2014) SCC Online Bom 1742 - Bombay High Court upheld the validity of Section 28 (11). Section 28(11) was introduced *vide* the Customs (Amendment and Validation) Act, 2011 ("Validation Act 2011") to retroactively validate actions by previously appointed customs officers.

- Section 97 of the Finance Act, 2022 (“*Finance Act*”) is liable to be struck down as manifestly arbitrary and thus violative of Article 14 of the Constitution of India.

4. Key aspects considered by the Hon’ble Supreme Court in the case of Canon India 2024

4.1 Review Jurisdiction

- Error apparent on the record and overlooking legal provisions are some of the important reasons why a review jurisdiction is invoked.
- The Hon’ble Supreme Court relying on earlier judicial precedents observed that various important provisions of the Customs Act were not considered in Canon India 2021 thereby resulting in an incorrect finding that DRI officers are not entrusted with the functions of a proper officer for the purposes of Section 28 of the Customs Act.

4.2 Incorrect reliance of Sayed Ali in Canon India 2021

- The decision in Sayed Ali proceeds on the assumption that for the “proper officer” to exercise functions under Section 28, such officer must necessarily possess the power of assessment and reassessment under Section 17 of the Customs Act.
- The Hon’ble Supreme Court in the case of Canon India 2021 should not have relied on Sayed Ali, as the said judgment could not have been applied for the period after April 8, 2011, owing to the fact that Section 17 of the Customs Act has undergone significant amendments.

4.3 Canon India 2021 misinterpreted the article “the” in “the proper officer” to mean that the same officer handling assessment/re-assessment under Section 17 of the Customs Act, must issue the notices under Section 28 of the Customs Act. The court clarified that “the” has been used before “proper officer” with a view to limit the exercise of powers under Section 28 by a specific proper officer and not any proper officer.

4.4 Scheme of Sections 17 and Section 28 of the Customs Act

- The proceedings under Section 28 are subsequently undertaken to the completion of the process set out in Section 17. Section 17 deals with the assessment and re-assessment of goods being imported or exported. The procedure envisaged under Section 28 is in the nature of quasi-judicial proceedings. It was also pointed out that in the case of DRI, the proceedings under Section 28 start only after an investigation has been undertaken. Thus, the nature of review under Section 28 and Section 17 are significantly different from each other.
- Thus, the Court disagreed to the views taken in *Sayed Ali* and in *Canon India 2021*, which holds that the vesting of the functions of assessment and reassessment under Section 17 is a threshold, mandatory condition for a proper officer to perform functions under Section 28. It further observed that the parameters under Section 28 cannot be reduced to the administrative review of assessment/reassessment done under Section 17.

- The Court also observed that the introduction of Section 110AA¹² *vide* Finance Act, does not alter the statutory scheme of Section 17 and Section 28 as it stood prior to the introduction of the said section.

4.5 Analysis of various other provisions of the Customs Act

- The Hon'ble Supreme Court upon going through the provisions in detail holds that entrustment of functions under Section 6 of the Customs Act and assignment of functions of proper officers in Section 2(34) operate differently. View taken in Canon India 2021, that no entrustment of functions under Section 6 was done in favour of the DRI officers is held to be a 'glaring misapplication' of Section 6.
- It is only an officer of customs appointed under Section 4(1) of the Customs Act, who can be designated as the proper officer as defined under Section 2(34) of the Customs Act by a notification.
- The notification issued under Section 2(34) and Section 4(1) are internal arrangement for the purpose of allocation of work among the officers of customs and have to be read in conjunction with each other. It was also clarified that by way of notification 40/2012 Customs NT dated May 02, 2012,¹³ the Board appointed several persons including the officers of DRI as proper officers under Section 2(34) of the Customs Act.

4.6 The Hon'ble Supreme Court upheld the constitutional validity of Section 97 of the Finance Act, which retrospectively validated SCNs issued under Section 28 of the Customs Act.

5. Conclusion

The Hon'ble Supreme Court allowed the review petition to the extent that it pertained to the jurisdiction of DRI officers to issue show cause notices. Further, the Court set aside the decision of the High Court of Delhi in Mangali Impex and upheld the view taken by the High Court of Bombay in Sunil Gupta. The court also upheld the constitutional validity of Section 97 of the Finance Act, which retrospectively validated all show cause notices issued under Section 28 of the Customs Act.

By designating DRI officers as "proper officers" with the authority to issue show-cause notices, the ruling may lead to overlapping jurisdictions among customs authorities. This could result in multiple agencies initiating proceedings on the same matter, causing administrative inefficiencies and legal uncertainties for businesses.

This ruling validates all past SCN's issued by the DRI officers, which had been under challenge based on the earlier judgment of the Hon'ble Supreme Court and thus, will now go into adjudication on merits.

¹² Section 110AA introduced *vide* Finance Act 2022, stipulates that a show cause notice under Section 28 of the Finance Act can only be issued by that "proper officer" who has been conferred with the jurisdiction, by an assignment of functions under Section 5 of the Customs Act to conduct assessment under Section 17 in respect of such duty.

¹³ Customs Notification No. 40/2012-Customs (N.T.), issued on May 2, 2012, by the Central Board of Excise and Customs (CBEC), designates specific officers as "proper officers" under various sections of the Customs Act, 1962. This assignment is made under the authority of Section 2(34) of the Customs Act, which defines a "proper officer" as the officer of customs who is assigned specific functions by the Board or the Commissioner of Customs.

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Date: 6 December 2024

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