IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP No. 12678 of 2016
DATE OF DECISION :- June 30, 2016

Rajinder Arora and others **...Petitioners**
Versus
Union of India and others **...Respondents**

CORAM: HON'BLE MR.JUSTICE M.JEYAPAUL

HON'BLE MR. JUSTICE A.B. CHAUDHARI

Present:- Mr. Harshit Sethi, Advocate for the petitioners.

Mr. Shern Sethi, Senior Standing Counsel for respondents 2 and 3.

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M.JEYAPAUL, J.

1. Affidavit on behalf of respondent no. 2 filed and the same is taken on record.

Heard the elaborate submissions made by learned counsel appearing for the writ petitioners and learned counsel for respondents no. 2 and 3.

2. In this Writ Petition, the petitioners challenge is to the Show Cause Notice bearing No. DRI F.No. 856(20)LDH/2004/380 dated 13.3.2005 and the consequential proceedings including the Adjudication Order dated 25.6.2010. This challenge is centered on the premises that the said Notice is issued by Respondent No. 2 Additional Director General, Directorate of Revenue intelligence, Ludhiana, who is not a 'proper officer' in terms of Section 2(34) read with Section 17 and 28 of the Customs Act, 1962. They rely on judgment of the Hon'ble Supreme Court in "**Commissioner of Customs v. Sayed Ali, (2011) 3 SCC 537**" and also the recent judgment dated 3.5.2016 of the Delhi High Court **"M/s Pace**

International & another v. Union of India & others, 2016 SCC Online Del 2597" wherein show cause notices issued prior to 8.4.2011 inter alia by Additional Director General, Directorate of Revenue intellgence were quashed and set aside in Writ Jurisdiction.

3. The petitioners have pointed out that they had also preferred Appeal before the Tribunal in which there is also an issue of pre-deposit. On behalf of the petitioners it was submitted that they would withdraw the appeal, and the writ petition can be finally disposed of. Since the issue raised is of jurisdiction to issue the notice itself, as per the settled law, the alternative remedy is not a bar and thus we are inclined to exercise the writ jurisdiction.

4. That while interpreting the scope and ambit of Section 28 of Customs Act, 1962 (as it existed prior to its substitution on 8.4.2011), the Hon'ble Supreme Court in Sayed Ali's case (supra) after analyzing the relevant provisions of the Act including the definition of 'proper officer' under Section 2 (34) of the Act, observed as under :-

> "20. 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 reassessment 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 inasmuch as the test contemplated under Section 2 (34) of the Act is that of specific conferment of such functions.
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> 21. 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, inasmuch 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 reassessment, 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."
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> "..........We are convinced that Notification Nos. 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."

5. The Hon'ble Supreme Court rejected the contention of the Department that the source of power to act as 'proper officer' was Sections 4 and 5 of the Act and not sub-section (34) of Section 2 of the Act. The Hon'ble Supreme Court observed that Sections 4 and 5 merely authorize the Board to appoint officers of Customs and confer on them the powers and duties to be exercised/discharged by them, but for the purpose of Section 28 of the Act, an officer of Customs has to be designated as 'proper officer' by assigning the function of levy and collection of duty, by the Board or the Commissioner of Customs. The argument of the Revenue was rejected

accordingly.

6. Thereafter, on 8.4.2011, the Finance Act, 2011 received the assent of the President and was notified in the Official Gazette, which vide Clause 42 provided that for the earlier Section 28 of the Act the new Section 28 would be substituted. Explanation 2 to the said new Section 28 read as under :-

> "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."

7. Since a specific order or notification issued by the Board assigning the functions to the specific officers of the Customs to enable him to act as 'proper officer' for various purposes under the Act is required, instructions were issued on 15.4.2011 by the CBEC to all officers of the Customs (Preventive) and DRI, inter alia, as under :

> "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.

3. As for the cases which would be hit by limitation if notices are issued afresh now, necessary legal options are being explored.
4. Difficulty faced, if any, may be brought to the notice of the Board."

8. On 6.7.2011, Notification No. 44 of 2011-Customs was issued by the Central Board of Excise and Customs which thereby assigned the functions of the proper officer inter alia to the Additional Director Generals in the Directorate General of Revenue Intelligence for the purpose of Sections 17 and 28 of the Act in exercise of the powers conferred by Section 2(34) of the Act. Thus, after this date the Additional Director General of Revenue Intelligence could issue show cause notice under Section 28. However, the said power was not given with any retrospective effect.

9. On 2.8.2011 the Customs (Amendment and Validation) Act, 2011 was introduced in Parliament proposing to add another sub-section 11 after sub-section 10 of the said new Section 28 of the Act. The Statement of Objects and Reasons (SOR) referred to the judgment of the Hon'ble Supreme Court of India in Sayed Ali (supra) and the said notification dated 6th July, 2011 specifically declaring certain officers as proper officers for the purposes of Sections 17 and 28. It was sought to clarify that Show Cause Notices issued inter alia by Directorate General of Revenue Intelligence (DRI), 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. The Bill therefore, proposed 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.

10. Section 28 (11) was thereafter inserted after sub-section (10) in this new Section 28 of the Act and the same reads 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 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." ......(emphasis ours)

11. The non-obstante clause referring to "anything to the contrary contained in any judgment, decree or order of any Court of law, tribunal or other authority" reveals the legislative intent to overcome the judgment of the Supreme Court in Sayed Ali (supra), and the legislature intended the amendment to be retrospective and introduced the words "shall be deemed to have been and always had been the proper officers". The Statement of Objects and Reasons also makes it clear that the purpose was to amend the Act "retrospectively and to validate anything done or any action taken under the said Act" at all material times irrespective of issuance of any specific assignment on 6.7.2011. However, the retrospective application of Section 28 (11) is limited in time with use of the words "this section" read with the Explanation 2, which necessarily means reference only to the now existing Section 28 which was inserted w.e.f. 8.4.2011 after substitution of the earlier provision. Thus, retrospective applicability is only since 8.4.2011, not prior thereto.

12. The petition also refers to further Circular issued on 23.9.2011

withdrawing the earlier instructions dated 15.4.2011 with immediate effect.

13. In the aforesaid legislative history, the batch of the writ petitions before the Hon'ble Delhi High Court were disposed of vide the aforesaid judgment dated 3.5.2016 in "M/s Pace International (supra). The Hon'ble Delhi High Court while setting aside the show cause notices issued prior to 8.4.2011 arrived at, inter alia, the following conclusions:-

> "47. ....In other words, the newly enacted Section 28 (11) would not empower the officers of the DRI and DGCEI to either proceed to adjudicate SCNs already issued by them for the period prior to 8th April 2011 or to issue SCNs for a period prior to 8th April 2011.
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> 62. There is merit in the contention that Section 28 (11) is overbroad in as much 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.
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> 65. The attempt by the Department to refer to the SOR to justify overlooking Explanation 2 in favour of Section 28(11) cannot be possibly countenanced. The statute has to be read for what it actually states. It is only where there is some ambiguity which requires clarification that a reference can be made to the SOR as an external aid of construction. However, there cannot be a presumption of validity by reference to such SOR. (See Gujarat **University, Ahmedabad v. Krishna Rangnath Mudholkar AIR 1963 SC 703** para 20).
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> 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.

67. ....The past actions of the officers of the DRI and DGCEI who are not designated as 'proper officer' in issuing SCNs for the period prior to 8th April 2011 have not been validated.

68. There is also merit in the contention of the Petitioners that Section 28(11) confers validity only on 'the proper officer'. As explained in Consolidated Coffee Ltd. v. Coffee Board (supra), the use of article 'the' as opposed to 'an' or 'any' is indeed significant. Only officers who have been assigned the functions of the 'proper officer' for the purposes of Section 17, i.e., assessment of the bills of entry can be considered as the proper officer for the purposes of Section 28(11) of the Act. As further explained in **Shri Ishar Alloys Steels Ltd. v. Jayaswals Neco Ltd.** (supra), the article 'the' always denotes a particular thing or person.

69. The Court also finds merit in the contention that if jurisdiction is exercised by one officer of the Customs or of the DRI or DGCEI, it should impliedly oust the jurisdiction of other officers over the same subject matter. The doctrine of comity of jurisdiction requires that for the proper administration of justice there should not be an overlapping of the exercise of powers and functions. The decision of the Punjab and Haryana High Court in Kenapo Textiles Pvt. Ltd. v. State of Haryana (supra) and the decision of the Supreme Court in India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. (supra) are relevant in this context. Conclusion on the effect and validity of Section 28 (11).

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.

70.2 Section 28(11) interpreted in the above terms would not suffer the vice of unconstitutionality. Else, it would grant wide powers of assessment and enforcement to a wide range of officers, not limited to customs officers, without any limits as to territorial and subject matter jurisdiction and in such event the provision would be vulnerable to being declared unconstitutional.

70.3 As regards the period subsequent to 8th April 2011, it is evident that if the administrative chaos as envisaged by the Supreme Court in Sayed Ali (supra) should not come about, there cannot be any duplicating and/or overlapping of jurisdiction of the officers. It would have to be ensured through proper co-ordination and administrative instructions issued by the CBEC that once a SCN is issued specifying the adjudicating officer to whom it is answerable, then that adjudication officer, subject to such officer being a 'proper officer' to whom the function of assessment has been assigned in terms of Section 2 (34) of the Act, will alone proceed to adjudicate the SCN to the exclusion of all other officers who may have the power in relation to that subject matter.

70.4 The question as to the constitutional validity and effect of Section 28 (11) of the Act is answered accordingly."

"95. In light of what has been held in the earlier part of the present judgment, it is clear that in relation to the events that took place prior to 8th April 2011 no SCN could have been issued to the Petitioner by the Commissioner of Customs (Preventive) who admittedly is not a "proper officer" in terms

> of the Section 2(34) of the Act. Section 28 (11) of the Act cannot be resorted to for validating the said SCN and proceedings pursuant thereto."

14. We completely agree with these findings of the Delhi High Court and find no reason whatsoever to take a different view. We are bound by the judgment of the Hon'ble Supreme Court in Sayed Ali (supra).

15. In the instant case, the impugned show cause notice was issued much prior to 8.4.2011. Thus, the findings recorded on this jurisdictional issue by the Hon'ble Supreme Court in Sayed Ali (supra) as also those recorded by the Hon'ble Delhi High Court in the aforesaid judgment dated 3.5.2016 in M/s Pace International (supra) are mutatis mutandis applicable to the case of the present petitioners. Therefore, the impugned show cause notice dated 13.3.2005, the adjudication order dated 25.6.2010 and consequential recovery proceedings, are rendered non est and void ab initio on the vice of jurisdiction and are as such quashed and set aside. Consequently, we also direct that the Respondents No.1 to 3 shall refund along with interest, the amount of ₹60 lacs taken from the petitioners on 23.6.2004 within two weeks.

16. The Writ Petition is accordingly allowed without any cost.

(M. JEYAPAUL)
JUDGE

(A.B. CHAUDHARI)
JUDGE

June 30, 2016
p.singh