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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: February 17/18,2016

Decision on: May 3, 2016

+ **W.P.(C) 441/2013**

MANGALI IMPEX LTD Petitioner
Through: Mr Naveen Malhotra, Advocate.

versus

UNION OF INDIA AND ORS Respondents
Through: Mr S.K. Dubey, Advocate for DRI.
Mr Satish Kumar, Senior Standing Counsel for
R3 and R4.
Mr Rahul Kaushik, Senior Standing Counsel
with Mr Bhavishya Sharma, Advocate for
Customs.

With

+ **W.P.(C) 8196/2013 & CM 17295/2013**

SONY INDIA PRIVATE LIMITED Petitioner
Through: Mr V. Lakshmi Kumaran, Advocate
with Mr Abhinav Jagnathan, Advocate.

versus

UNION OF INDIA Respondent
Through: Mr Sanjev Kumar Dubey, Advocate
with Mr Rajmangal Kumar, Mr Udit Malik,
Advocate and Mr Aman Singh Paras, Advocate
for DRI.
Mr Satish Kumar, Senior Standing Counsel for
R3.

With

+ **W.P.(C) 211/2014 & CM 389/2014**

K.S.TRADERS Petitioner

Through: Mr Naveen Malhotra, Advocate.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr Akshay Makjhija, CGSC with
Mr Vikas Bhadauria, Advocate for UOI.
Mr S.K. Dubey, Advocate with Mr Udit Malik,
and Mr Rajmangal Kumar, Advocate for DRI.
Ms Sonia Sharma, Senior Standing Counsel
with Mr C.P. Pandey, Advocate for R3.

With

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W.P.(C) 863/2014 & CM 1731/2014

SENNHEISER ELECTRONICS INDIA PVT LTD Petitioner

Through: Mr V. Lakshmi Kumaran and
Mr Abhinav Jaganathan, Advocates.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr Akshay Makhija, CGSC and
Mr Vikas Bhadauria, Advocate for UOI.
Mr Sanjev Kumar Dubey, Advocate with
Mr Rajmangal Kumar, Mr Udit Malik,
Advocate and Mr Aman Singh Paras, Advocate
for DRI.

With

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W.P.(C) 3803/2014 & CM 7658/2014

COMET IMPEX

..... Petitioner

Through: Mr C. Hari Shankar, Senior Advocate
with Mr S. Sunil and Mr P.K. Singh,
Advocates.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr Ripu Daman Bhardwaj, CGSC

with Mr T.P. Singh, Advocate for R1.
Mr S.K. Dubey, Advocate with Mr Udit
Malik and Mr Rajmangal Kumar, Advocate for
DRI.

Mr Sanjeev Kumar Dubey, Advocate with
Mr Rajmangal Kumar, Mr Udit Malik and Mr
Aman Singh Paras, Advocate for DRI.

With

+ **W.P.(C) 5262/2014**

RAJESH GUPTA Petitioner
Through: Mr Rajesh Mahana, Advocate.

versus

UNION OF INDIA AND ORS Respondent
Through: Mr Akshay Makhija, CGSC and
Mr Vikas Bhadauria, Advocate for UOI.
Mr Satish Aggarwala, Advocate with Mr Vineet
Sharma, Advocate for DRI.

With

+ **W.P.(C) 5877/2014 & CM 14409/2014**

DAIKIN AIRCONDITIONING INDIA
PRIVATE .LTD. Petitioner
Through: Mr V. Lakshmi Kumaran and
Mr Abhinav Jaganathan, Advocates.

Versus

UNION OF INDIA & ORS. Respondent
Through: Mr Akshay Makhija, CGSC with
Mr Vikas Bhadauria, Advocate for UOI.
Mr Sanjeev Kumar Dubey, Advocate with
Mr Rajmangal Kumar, Mr Udit Malik,
Advocate and Mr Aman Singh Paras, Advocate
for DRI.
Mr Satish Kumar, Senior Standing Counsel for

With

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W.P.(C) 4162/2015 & CM 10559/2015

GODREJ AND BOYCE MANUFACTURING
CO. LTD.

..... Petitioner

Through: Mr Arshad Hidyatullah, Senior
Advocate with Mr Rupesh Kumar, Mr Pravesh
Bhauguna, Mr Jitin Singhal and Mr Pratik
Raoka, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr Ajitesh Kumar, Advocate for
Mr Gaurav Sarin, Advocate for R1.
Mr Satish Aggarwala, Advocate with Mr Vineet
Sharma, Advocate for DRI.

With

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W.P.(C) 11285/2015

CORTEL INDIA

..... Petitioner

Through: Mr Naveen Malhotra, Advocate.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr Satish Aggarwala, Advocate with
Mr Vineet Sharma, Advocate for DRI.

Mr Sanjeev Kumar Dubey, Advocate with
Mr Rajmangal Kumar, Mr Udit Malik and
Mr Aman Singh Paras, Advocate for DRI.
Mr Umesh Sharma, Senior CGSC with Mr
Akshat Kumar, CGSC.

Mr Kamal Nijhawan, Senior Standing Counsel
for R-2.

With

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W.P.(C) 11853/2015 & CM 31504/2015

EASTRON OVERSEAS INC

..... Petitioner

Through: Mr Naveen Malhotra, Advocate.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr Ripu Daman Bhardwaj, CGSC
with Mr T.P. Singh, Advocate for R1.
Mr Kamal Nijhawan, Senior Standing
Counsel for R2.
Mr Sanjeev Kumar Dubey, Advocate for DRI.

With

+ **W.P.(C) 11854/2015 & CM 31506/2015**

DIVYA ELECTRONICS Petitioner
Through: Mr Naveen Malhotra, Advocate.

Versus

UNION OF INDIA & ORS Respondents
Through: Mr S.K. Dubey, Mr Udit Malik and
Mr Rajmangal Kumar, Advocates for DRI.
Mr Satish Aggarwala, Advocate with Mr Vineet
Sharma, Advocate for DRI.
Mr Kamal Nijhawan, Senior Standing Counsel
for R2.
Mr Ripu Daman Bhardwaj, CGSC with Mr
T.P. Singh, Advocate for R1.

And

+ **W.P.(C) 563/2016 & CM 2353/2016**

RAJESH TRIPATHI Petitioner
Through: Mr Naveen Malhotra, Advocate.

Versus

UNION OF INDIA & ORS. Respondents
Through: Mr Ajay Digpaul, CGSC for R1.
Mr S.K. Dubey, Advocate with Mr Udit
Malik and Mr Rajmangal Kumar, Advocates for
DRI.

Mr Satish Aggarwala, Advocate with Mr Vineet Sharma, Advocate for DRI.

Mr Kamal Nijhawan, Senior Standing Counsel for R-2.

Mr Raghvendra Singh and Mr Rahul Chaudhary, Advocates.

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W.P.(C) 1185/2013 & CM 2240/2013

M/S LAKSHMAN OVERSEAS AND ORS Petitioners
Through: Mr Akshay Chandra & Mr Raktim Gogoi, Advocates.

versus

UNION OF INDIA AND ORS Respondents
Through: Mr S.K. Dubey, Advocate with Mr Rajmangal Kumar and Mr Udit Malik, Advocates.
Mr Satish Kumar, Senior Standing Counsel for R2 and R4.

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W.P.(C) 7383/2013 & CM 15847/2013

M/S PACE INTERNATIONAL & ANR. Petitioners
Through: Mr Akshay Chandra & Mr Raktim Gogoi, Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr Arun Bhardwaj, CGSC/UOI.
Mr Rahul Kaushik, Senior Standing Counsel CBEC with Mr Bhavishya Sharma, Advocate for Customs.

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W.P.(C) 225/2014 & CM 416/2014

BHARAT SANCHAR NIGAM LIMITED Petitioner
Through: Mr R.K. Sanghi and Mr satyendra Kumar and Mr Palash, Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr S.K. Dubey, Advocate with Mr Rajmangal Kumar and Mr Udit Malik,

Advocate for DRI.
Mr Amit Mahajan, CGSC for UOI.

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W.P.(C) 4841/2015 & CM 8739/2015

SATYAM MARKETING THROUGH:
ITS PROPRIETOR

..... Petitioner

Through: Mr Prosenjit Mandal and Mr Umang
Srivastav, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr S.K. Dubey, Advocate with
Mr Rajmangal Kumar and Mr Udit Malik,
Advocate.

Mr Vivek Goyal, CGSC with
Mr Prabhakar Srivastav, Advocate for UOI/R1.
Mr Akshay Makhija, CGSC for UOI.
Mr Satish Kumar, Senior Standing Counsel for
R3.

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W.P.(C) 5191/2015 & CM 9414/2015, 9416/2015

MANOJ SABOO @ MANOJ MAHESHWARI

..... Petitioner

Through: Mr Pawan Shree Agarwal, Advocate
with Mr Ayush Sharma, Advocate.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr S.K. Dubey, Advocate with
Mr Rajmangal Kumar and Mr Udit Malik,
Advocate.

Ms Suparna Srivastava, Senior Standing
counsel for UOI with Mr Manu Dev Sharma,
Advocate.

Mr Satish Aggarwala, Advocate for
DRI.

Mr Satish Kumar, Senior Standing Counsel for
R3.

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W.P.(C) 9379/2015 & CM 21818/2015

HANSRAJ BHATIA & CO. THROUGH:

ITS PROPRIETOR SHRI SANJEEV BHATIA

..... Petitioner

Through: Mr Piyush Kumar and Ms Reena
Rawat, Advocates.

versus
UNION OF INDIA & ORS. Respondents
Through: Mr S.K. Dubey, Advocate with
Mr Rajmangal Kumar and Mr Udit Malik,
Advocate.
Mr Kamal Nijhawan, Advocate with
Mr Sumit Gaur, Advocate for R3.
Mr Satish Aggarwala, Advocate for DRI.
Mr Anurag Ahluwalia, CGSC with Mr Prashant
Ghai, Advocate for UOI.

+ **W.P.(C) 11041/2015 & CM 28502/2015**

M/S. J.R. INTERNATIONAL Petitioner
Through: Mr Prem Ranjan Kumar, Advocate.

versus
UNION OF INDIA & ORS. Respondents
Through: Mr S.K. Dubey, Advocate with
Mr Rajmangal Kumar and Mr Udit Malik,
Advocate for DRI.
Mr Satish Kumar, Senior Standing Counsel for
R3.

+ **W.P.(C) 11806/2015 & CM 31354/2015**

BHAGWATI COMPONENTS MFG.CO.
THROUGH: ITS DIRECTOR
MR. SURJIT SINGH Petitioner
Through: Mr Rupender Sinhman, Advocate
with Ms Rubal Maini, Advocate.

versus
UNION OF INDIA & ORS. Respondents
Through: Mr S.K. Dubey, Advocate with
Mr Rajmangal Kumar and Mr Udit Malik,
Advocate for DRI.
Ms Sonia Sharma, Senior Standing Counsel
with Mr C.P. Pandey, Advocate for R3.
Mr Satish Aggarwala, Advocate for DRI.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T
03.05.2016

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Dr. S. Muralidhar, J.:

Introduction

1. The common question in this batch of matters pertains to the constitutional validity of Section 28 (11) of the Customs Act, 1962 ('Act') which was inserted by the Customs (Amendment and Validation) Act, 2011 ('Validation Act, 2011') with effect from 16th September 2011. In terms of Section 28 (11) of the Act, all persons appointed as Customs Officers under Section 4 (1) of the Act prior to 6th 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....."

2. Section 28(11) of the Act states that the provision would take effect "notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority." However, this amendment adversely impacts the Petitioners herein in that it seeks to validate the show-cause notices ('SCNs') issued prior to 6th July 2011 by not only officers of the Customs but also officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence ('DRI'), Directorate General of Central Excise Intelligence and similar placed officers.

3. The subsidiary issue that arises is the possibility that on the strength of Section 28 (11) of the Act, SCNs will now be issued by any of the above officers for the purpose of "opening of assessment" prior to 6th July 2011.

4. The principal submission on behalf of the Petitioners is that although the insertion of Section 28 (11) is by the Validation Act, 2011 which was meant to cure the defects pointed out in Section 28 of the Act by the Supreme Court in *Commissioner of Customs v. Sayed Ali (2011) 3 SCC 537*, in fact, it does not do so. The further submission is that for the period prior to 6th July 2011 the decision of the Supreme Court in *Sayed Ali (supra)* would still apply and even in terms of Section 28 (11) of the Act the offices of the Commissionerates of Customs (Preventive), DRI, DGCEI would not have jurisdiction to continue proceedings in relation to the SCNs already issued or issue fresh SCNs for the period prior to 6th July 2011.

5. This is then the conspectus of the main issue in these batch of petitions.

Relevant provisions of the Act

6. In order to appreciate the above central issue that arises, it is necessary to first examine the background of the provisions of the Act. Under the Act as it stood prior to the Validation Act 2011, the relevant provisions read as follows.

7. Under Section 2 (34) of the Act, the ‘proper officer’ is defined as under:

“2 (34) “proper officer”, in relation to any functions to be performed under this Act, means the Officer of Customs who is assigned those functions by the Board or the Commissioner of Customs.”

8. Section 4 of the Act talks of appointment of officers of customs. It states that the Central Board of Excise and Customs “may appoint such persons as it thinks fit to be officers of customs”. The concept of ‘proper officer’ becomes relevant for the purpose of assessment of duty under

Section 17, provisional assessment of duty under Section 18, the exercise of the power to issue SCN under Section 28 where there has been non-levy, short-levy or erroneous refund of customs duty or where any interest payable has not been paid or part-paid or erroneously refunded. It is only a proper officer who can exercise jurisdiction under the above provisions and certain other provisions which explicitly state that the powers therein are to be exercised only by a proper officer.

9. In order to determine which of the officers of the customs are 'proper officers' one has to necessarily examine, in terms of Section 2 (34) of the Act, whether such 'proper officer' has been assigned those functions by the CBEC or the Commissioner of Customs. Section 28 of the Act as it stood prior to the recasting of the entire Section 28 by the Validation Act, 2011, reads as under:

“28. Notice for payment of duties, interest, etc. (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(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,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part 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:

Provided that where any duty has 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 provisions of this sub-section shall have effect as if

for the words "one year" and "six months", the words "five years" were substituted.

Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him:

Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served except with the prior approval of the Chief Commissioner of Customs.

Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(2A) Where any notice has been served on a person under sub-section (1), the proper officer –

(1) in case any duty has not been levied or has been short-levied, or the interest has not been paid 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, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and

(2) in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months,

from the date of service of the notice on the person under sub-section (1).

(2B) 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, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:

Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.

(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.

(3) For the purposes of sub-section (1), the expression "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 the goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

(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."

10. Sub-section (2A) and (2B) to Section 28 of the Act were inserted with effect from 11th May 2001 by the Finance Act, 2001. Two Notifications bearing Nos. 250-Cus and 251-Cus were issued on 27th August 1983 by the Central Government in exercise of the powers conferred under Section 4 (1) of the Act, appointing Collector of Customs (Preventive), to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra.

The decision in Sayed Ali

11. At this stage, it is necessary to examine in some detail the decision of the Supreme Court in ***Sayed Ali*** (*supra*). The facts of the case were that Respondent No. 1 was a partner of Respondent No. 2 firm, M/s. Handloom Carpet, which was engaged in the business of carpet manufacture and export. The firm was charged with having misused the Export Passbook Scheme by selling goods cleared duty free in the open market or selling the passbook on premium in violation of the ITC restriction imposed on such sale. The investigations in the matter were conducted by the Marine and Preventive Wing of the Customs.

12. On 28th August 1991, the Assistant Collector of Customs (Preventive), Mumbai issued to Respondent No. 2 firm as well as Respondent No. 1, Sayed Ali alleging violation of the provisions of Section 111 (d) of the Act. This was followed by an adjudication order being passed on 3rd February 1993 by the same Officer who issued the SCN, i.e., Assistant Collector of Customs (Preventive), confirming the demands raised in the SCN. Aggrieved by the above order, the Respondents preferred an appeal before the Collector of Customs (Appeals). By an order dated 14th December 1993 the Collector of Customs (Appeals) allowed the appeal of the Respondents by holding that

since the subject matter involved a demand of duty beyond a period of six months, the SCN was required to be issued by the Collector, and not by the Assistant Collector. Nevertheless, the Collector (Appeals) granted liberty to the Customs Department to re-adjudicate the case by issuing a proper SCN.

13. Consequently, on 16th April 1994, the Collector of Customs (Preventive) issued SCN calling upon the Respondents to show cause as to why the goods under seizure valued at Rs. 1,04,118.52 should not be confiscated, and customs duty in the sum of Rs. 5,07,274 should not be levied in terms of Section 28 (1) of the Act by involving the extended period of limitation. Penalties under Sections 112 (a) and 112 (b) (i) and (ii) of the Act were also proposed.

14. In reply to the said SCN, the Respondents questioned the jurisdiction of the Collector of Customs (Preventive) on the ground that the jurisdiction thereof vested in the Commissioner by virtue of Notification No. 251/83 which was more specific and limited in nature. It was accordingly contended that the said notification will prevail over Notification No. 250/83 which was broad in nature. These objections were rejected by the Collector of Customs (Preventive) by an order dated 19th August 1996. It was observed *inter alia* as under:

“The goods imported and cleared duty free were thus rendered liable for confiscation under the provisions of Customs Act, 1962 and the Customs (Preventive) Commissionerate created for the purpose of prevention of smuggling and detention of cases or smuggling including commercial frauds is thus (sic) competent to investigate and adjudicate the case.”

15. The Collector of Customs (Preventive) confirmed the demand of duty in the sum of Rs. 5,07,274 under Section 28 (1) of the Act. The Collector

also ordered confiscation of two consignments of dyes, sulphur blue and sulphur blue green. Aggrieved by the above order, the Respondents went in appeal before the Customs, Excise and Gold (Control) Appellate Tribunal ('CEGAT'). A preliminary objection was raised before the CEGAT by the Respondents regarding jurisdiction of the Collector of Customs (Preventive). In this regard the CEGAT in the said impugned order observed as under:

"It is very clear that the Commissioner of Customs (Preventive) does not have jurisdiction to issue the impugned show-cause notice and in view thereof he could not have the jurisdiction to adjudicate the matter when imports have taken place at Bombay Customs House."

16. Aggrieved by the above order of the CEGAT, the Customs Department went in appeal before the Supreme Court. The plea of the Department before the Supreme Court was that once the Commissioner (Preventive) had been appointed as Collector of Customs (Preventive), Bombay by virtue of Notifications Nos. 250/83 and 251/83, issued by the Central Government under Section 4 of the Act, the Commissioner (Preventive) became 'proper officer' in terms of Section 2 (34) of the Act and was, therefore, competent to issue an SCN under Section 28 of the Act since the goods were cleared for home consumption in Bombay. *Inter alia* reliance was placed on the decision of the Supreme Court in ***Union of India v. Ram Narain Bishwanath* (1998) 9 SCC 285** and the larger bench of the Tribunal in ***Konia Trading Co. v. Commissioner of Customs* (2004) 170 ELT 51 (Tri.)** and another decision of the Tribunal ***Manohar Bros. (Capacitors) v. Collector of Customs-II, Bombay* 1998 (98) ELT 821 (Tri)**, which attained finality by the dismissal of the Revenue's appeal by the Supreme Court in ***CCE & Customs v. Manohar Bros. (Capacitors)* (2011) 3 SCC 580**.

17. The Supreme Court, after analysing the relevant provisions of the Act including the definition of 'proper officer' under Section 2 (34) of the Act, observed as under:

"It is clear from a mere look at the provision that only such officers of Customs who have been assigned specific functions would be "proper officers" in terms of Section 2 (34) of the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an "officer of Customs" is the "proper officer".

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.

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."

18. The Supreme Court observed that nothing has been brought on record to show that the Collector of Customs (Preventive) who had issued SCN was assigned the functions under Section 28 of the Act as ‘proper officer’ either by the Board or the Collector/Commissioner of Customs. It was accordingly observed as under:

“We are convinced that Notifications 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.”

19. The 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 Supreme Court observed that Sections 4 and 5 “merely authorise 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 is rejected accordingly.”

20. The Supreme Court also distinguished the earlier decision in **Ram Narain Bishwanath** (*supra*) stating that none of the statutory provisions were considered in that case and that “the issue arising for consideration in the present appeals was not the subject matter therein. Thus, the said decision is of no avail to the Revenue.”

21. With **Sayed Ali** (*supra*) making it clear that there has to be 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, it became necessary for the central government to clarify the legal position.

CBEC Instruction

22. Immediately after the decision of the Supreme Court in **Sayed Ali** (*supra*) on 18th February 2011, instructions were issued on 15th April 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 notice of the Board.”

Section 28 amended by Finance Act 2011

23. On 8th April 2011, the Finance Act, 2011 was notified in the Official Gazette. It proposed to make series of amendments to the Act one of which was recasting of Section 28 of the Act. Clause 42 of the Finance Act stipulated that for the earlier Section 28 of the Act the following sections would be substituted:

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,-

- (i) his own ascertainment of such duty; or
- (ii) 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 facts,

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 in respect of cases falling under clause (a) of sub-section (1);
- (b) within one year from the date of notice 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;

(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.”

24. The Explanatory Memorandum accompanying the Finance Bill, 2011 stated that “Section 28 is being substituted so as to make provisions more coherent and clear as also to harmonize the demand period in normal cases to one year.” What is important as far as Section 28 is concerned is that the power of reopening the assessment is still to be exercised by ‘proper officer’. There is no distinction carved out vis-a-vis the two types of assessment or the time period when the reassessment is to be made. Where the reason for reopening is other than “collusion or any wilful mis-

statement or suppression of facts” reopening has to be done within one year from the ‘relevant date’. Where it falls within the categories demarcated in terms of Section 28 (4) as amended, the time period is ‘five years’.

25. The concept of ‘relevant date’ has been elaborated in Explanation 1. This is more or less conforms to the erstwhile Section 28 (3) of the Act. What is new as far as the recasting of Section 28 is concerned, is that Explanation 2 begins with the expression ‘For the removal of doubts’. It categorically states that for any non-levy, short-levy or erroneous refund prior to the date on which the Finance Bill, 2011 receives assent of the President, it should continue to be governed by the provisions of Section 28 as it stood immediately prior to the date on which such assent is received. In other words any non-levy, short-levy or erroneous refund prior to 6th July 2011 would be governed by the un-amended Section 28.

The 6th July 2011 Notification

26. On 6th July 2011 itself, Notification No. 44 of 2011-Customs was issued which purportedly designates ‘proper officer’ for the purpose of Sections 17 and 28 of the Act. The said notification reads as under:

“In Exercise or the powers conferred by sub-Section (34 of Section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of Section 17 and 28 of the said Act, namely:

Table

Sl.No.	Designation of the officers
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(1)	(2)
1.	Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.
2.	Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).
3.	Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.
4.	Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.

The Validation Act 2011

27. The above Notification did not clarify the status of SCNs already issued prior to 6th July 2011. On 2nd August 2011 the Customs (Amendment and Validation), Act, 2011 was introduced in Parliament proposing to add another sub-section 11 after sub-section 10 of Section 28 of the Act.

28. The Statement of Objects and Reasons ('SOR') appended to the said Bill explained the rationale behind insertion of Section 28 (11), as under:

“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."

29. Section 28 (11) of the Act 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.”

30. The fact that sub-section (11) of Section 28 opens with a 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*). The second aspect is that 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 SOR 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 6th July 2011.

The Circular dated 23rd September 2011

31. Soon after the above insertion of Section 28 (11), another Circular was issued on 23rd September 2011 withdrawing the earlier instructions dated 15th April 2011 with immediate effect. According to the said Circular, Notification No. 44/2011-Customs (N.T.) dated 6th July 2011 whereby the officers of the DRI, DGCEI, Commissionerate of Customs (Preventive) and Central Excise Commissionerates were assigned the functions of the ‘proper officer’ and the amendment to Section 28 of the Act settled the issue of validity of SCNs issued by them. The only additional clarification was that the said officers would not exercise

authority in terms of Section 28 (8) of the Act. It was clarified that “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.”

Petitions in this Court

32. Two things happened after the issuance of the above instructions. One was that the adjudication proceedings in terms of the SCNs already issued prior to 6th July 2011, even by the DRI, and DGCEI continued on the strength of the above amendment. Consequently, as in the case of Sony India Private Limited [Writ Petition (Civil) No. 8196 of 2013], for instance, an SCN came to be issued on 12th/15th April 2013 by the DRI in respect of the period even prior to 6th July 2011, i.e., from 1st April 2008 onwards. In Writ Petition (Civil) No. 441 of 2013 (Mangali Impex Limited) the Court passed the following order on 28th January 2013:

“The main issue sought to be raised in this writ petition is that the show cause notice dated 31st October 2003 issued under Section 28 of the Customs Act, 1962 has been issued by the Assistant Commissioner of Customs (SIIB), Special Intelligence & Investigation Branch who, according to the Petitioner, was not the proper officer in terms of the said Act and in particular the provisions of Section 2 (34) of the said Act. It has also been contended by the learned counsel for the Petitioner that Explanation 2 after sub-section 11 of Section 28 of the said Act makes it clear that the provisions of the said sub-section would be applicable only on and from the date the Finance Bill, 2011 received the assent of the President and that insofar as show cause notices issued prior to that date are concerned, the provisions of Section 28 as they stood immediately before that date would continue to operate. In the present case, the show cause notice was issued way back in 2003, at which point of time sub-section (11) of Section 28 was not in the statute book.

There is some confusion to when Explanation 2 was introduced in the statute book and as to whether Explanation 2 has at all been passed by Parliament or not.

The learned counsel for the Respondents wishes to take instructions in this regard.

Renotify on 4th February 2013.”

33. On the next date of hearing, i.e., 4th February 2013, while directing to issue notice in the said writ petition, the Court passed the following interim order:

“We notice that sub-section (11) of Section 28 of the Customs Act, 1962 was introduced through the Customs (Amendment and Validation) Act, 2011 on 16th September 2011. Previously, the provisions of Section 28, which were introduced by the Finance Act, 2011, which came into effect on 1st April 2011, did not contain sub-section (11). However, it did contain Explanation 2 after sub-section (10) of Section 28 of the said Act. *Prima facie*, there appears to be an apparent conflict between Explanation 2 and sub-section (11) which was introduced subsequently. The conflict arises because sub-section (11) is a non-obstante provision, but is non-obstante in relation to any judgment, decree or order of any court of law, tribunal or other authority and not in relation to the other provisions of the Act which includes Explanation 2 of Section 28 which had come into force earlier. It is for this reason that we are issuing notice.

Notice is accepted by the learned counsel appearing for Respondent No. 2. Notice is also accepted by the learned counsel appearing for Respondent No. 1. Notice shall be sent to Respondent Nos. 3 and 4. The counter affidavits be filed within four weeks and rejoinder affidavits, if any, be filed within two weeks thereafter.

List on 9th April 2013.

In the meanwhile, the proceedings may go on and the adjudication order may be passed by the adjudicating

authority. However, that order shall not be given effect to until further directions from this Court.”

34. Similar interim orders permitting the proceedings to go on but that the adjudication shall not be given effect to, were passed in each of the writ petitions.

35. On behalf of the Petitioners, arguments have been addressed by Mr. V. Lakshmi Kumaran, learned counsel, Mr. C. Hari Shankar and Mr. Arshad Hidayatullah, learned Senior counsel, Mr. Rajesh Mahna and Mr. Naveen Malhotra, learned counsel. On behalf of the Respondents, Mr. S.K. Dubey, learned counsel for the DRI, Mr. Satish Kumar and Mr. Rahul Kaushik, learned counsel for the Customs have addressed arguments.

Submissions of counsel for the Petitioners

36. The submissions on behalf of the Petitioners could be summarized as under:

(i) The amendment by which Section 28 (11) of the Act was introduced does not cure the defects pointed out in *Sayed Ali* (supra). Relying on the decisions of the Supreme Court in *Delhi Cloth & General Mills Co. Limited v. State of Rajasthan* (1996) 2 SCC 449 and *State of Haryana v. Karnal Co-op Farmers Society Limited* 1993 (2) SCC 363, it was submitted that 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* (supra) 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 custom officers without any

limit.

(ii) 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) .

(iii) Section 28 (11) would be applicable only in respect of short-levy or non-levy or erroneous refund arising on or after 8th April 2011. It is submitted that the new Section 28 substitutes the previous Section 28 of the Act with effect from 8th April 2011. Therefore, Section 28 (11) would also be taken to have been inserted with effect from 8th April 2011. The newly inserted Section 28 (11) provides that all officers of customs prior to 6th July 2011 shall be deemed to have been and always had been proper officers for the purposes of 'this section'. It is further submitted that the phrase 'this section' in Section 28 (11) refers to the new Section (inserted with effect from 8th April 2011) and not to the old Section 28, as it existed prior to 8th April 2011. Explanation 2 to Section 28 provides that any non-levy or short-levy prior to 8th April 2011 would continue to be governed by the provisions of Section 28 as it stood immediately prior to 8th April 2011.

(iv) Mere deeming of all the officers of the customs to be 'prior officers' without validating the SCNs issued prior to 8th April 2011 would not validate such SCNs by merely the amending Section 28 of the Act.

Relying on the decision of 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.

(v) The impugned SCNs purport to empower the DRI, DGCEI to issue SCNs even for the period prior to 8th April 2011 and therefore, those SCNs were without jurisdiction and void *ab initio*. Section 28 of the Act confers authority on ‘the proper officer’ and not ‘a proper officer’ or ‘any proper officer’. Relying on the decisions in ***Consolidated Coffee Limited v. Coffee Board* (1980) 3 SCC 358** and ***Shri Ishar Alloys Steels Limited v. Jayaswals Neco Limited* (2001) 3 SCC 609**, it was submitted that the use of the definite article ‘the’ is very significant as opposed to ‘an’ or ‘any’. Only those officers who have been assigned the functions of ‘the proper officer’ for the purposes of Section 17 (Assessment of bill of entry) will be considered as ‘the’ proper officer for Section 28 of the Act.

(vi) Without prejudice to the above submissions, it was contended that once a particular officer exercises jurisdiction, it would exclude the jurisdiction of all the other officers. Reliance was placed on the decisions in ***India Household and Healthcare Limited v. LG Household and Healthcare Limited* (2007) 5 SCC 510** and ***Kenapo Textiles Pvt. Ltd. v. State of Haryana* (1992) 84 STC 88 (P&H)**.

Submissions of counsel for the Respondents

37. On behalf of the Respondents, it was pointed out that with the Bombay High Court in ***Sunil Gupta v. Union of India 2015 (315) ELT 167 (Bom.)*** upholding the constitutional validity of Section 28 (11) of the Act and accepting the plea of the Department that by virtue of insertion of Section 28 (11), the SCNs issued prior to 8th April 2011 by the DRI, the notices issued by officers of the DRI, the DGCEI etc., i.e., officers who may not have been expressly assigned the functions of ‘proper officers’ under Section 2 (34) of the Act, stood validated. It was submitted that although the said decision is a subject matter of a Special Leave Petition (Civil) in the Supreme Court, this Court should nevertheless follow the decision of the Bombay High Court.

38. Secondly it was submitted that in order to understand the scope of Section 28 (11) of the Act, the SOR has to be referred to. It states that the said Amendment was meant to be retrospective i.e. to validate anything done in relation to the non-levy, short levy or erroneous refund prior to 8th April 2011. It is accordingly submitted that Section 28 (11) would override the Explanation below sub-section 10 of Section 28 of the Act to the extent that the SCN was issued prior to 8th April 2011. As far as actions now taken, after the insertion of Section 28 (11) of the Act, since it is a deeming provision, it empowers the officers of the DRI, DGCEI etc. to issue SCNs even for the period prior to 8th April 2011 subject to the time limits under Section 28 (4) of the Act being adhered to.

39. It was submitted that in the normal course, the customs duty is only assessed by the jurisdictional custom officers of the Board. The officers of the Customs (Preventive) have been appointed for the purposes of investigating evasion of customs duty in their specified jurisdictions. The

issuing and adjudication of SCNs under Section 28 of the Act usually is undertaken by the jurisdictional Customs officer.

40. According to the Respondents, it is a well-settled legal proposition that the legislature can make a retrospective legislation after curing the defects that led to their invalidation in the first place. A validation Act can be enacted to retrospectively negate the effect of the judgments and orders of competent courts provided the validating legislation removes the cause of invalidity or the basis that had led to those decisions. It was submitted that inadvertent defects in statutes should be permitted to be corrected by the legislature through the device of 'small repairs'. There is no vested right in any of the Petitioners, as a result of the decision of the Supreme Court in *Sayed Ali (supra)*. Reliance was placed on the following passage in *Craies on Statue Law (7th Edition)* where it is stated "If a statue is passed for the purpose of protecting a public against some evil or abuse, it may be allowed to operate retrospectively although by such operation, it will deprive some person or persons of a vested right. Thus, public interest at large is once again relevant consideration in determining the constitutional validity of a retrospective legislation."

41. It is submitted by the Respondents that a combined reading of Explanation 2 to Section 28 of the Act and the retrospective amendment brought about by Validation Act, 2011 would reveal that all the past cases where the SCN had been issued under Section 28 of the Act by any officer appointed as officer of Customs, prior to 6th July 2011 stands validated. The plea of conflict between Explanation 2 to Section 28 and Section 28 (11) of the Act is untenable, unjustified and misconceived. Reliance was placed on the decision in *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality (1969) 2 SCC 283* and *Sulochana Amma*

v. Narayanan Nair (1994) 2 SCC 14.

42. A distinction is sought to be drawn between the specific functions of a Customs Officer under Section 6 of the Act and the power to appoint an officer of the Customs under Section 4 of the Act. It is submitted that the functions under Section 6 of the Act are totally different from assigning the power of issuing an SCN to a Customs Officer under Section 4 of the Act.

Analysis of Section 28 (11) of the Act

43. The first issue is to be considered whether Section 28 (11) cures the defects pointed out by the Supreme Court in *Sayed Ali* (supra). In examining this issue, the Court would like to examine whether the decision of the Division Bench of the Bombay High Court in *Sunil Gupta* (supra) is required to be followed by the Court.

44. A perusal of Explanation 2 to Section 28 of the Act reveals that it opens with the words 'For removal of doubts.' This Explanation is supposed to be a clarification by the legislature itself. It is categorically stated that any non-levy, short-levy or erroneous refund prior to 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. Explanation 2 remains in the statute even after the insertion of Section 28 (11) of the Act which seeks to deal with the very same period, i.e., the period prior to the date on which the Finance Act, 2011 receives the assent of the President i.e., 8th April 2011. Although what is intended to be done by the legislature, as is evident from the SOR appended to the Validation Act, 2011, is to validate the notices issued prior to 8th April 2011, the opening words of sub-section (11) of Section 28 is a non-

obstante clause only in a limited sphere. It makes sub-section (11) apply notwithstanding anything contained in any " judgment, decree or order of the Court". It does not make it apply notwithstanding anything contained elsewhere in the same statute or in any other law for the time being in force.

45. There could be different kinds of non-obstante or clarificatory provisions that can be enacted. For e.g., Section 18 (1) of the Act opens with the words 'notwithstanding anything contained...'. Section 12 of the Act opens with the words "except as otherwise provided in this Act, or any other law for the time being in force, duties of customs ..." Section 28A opens with the words "notwithstanding anything contained in this Act". As far as Section 28AA is concerned, it begins with a non-obstante clause that encompasses not only any judgment, decree, order, or direction but "in any provision of this Act or the rules thereunder". It is therefore, conscious that the decision taken by the legislature was to overcome the defects pointed out in a judgment.

46. Section 28 (11) of the Act opens with a non-obstante clause which overrides 'anything to the contrary contained in any judgment, decree or order of any court' but does not override any other provisions of the Act or any other Act for the time being in force. In other words Section 28 (11) neither explicitly or implicitly seeks to overcome the legal position brought about by Explanation 2 which states that non-levy, short-levy or erroneous refunded prior to 8th April 2011 will continue to be governed by the unamended Section 28 of the Act as it stood prior to 8th April 2011, notwithstanding enactment of Section 28 (11) of the Act. Considering that Explanation 2 opens the words 'For the removal of doubts' the Court cannot presume a legislative intent to the contrary.

47. Although it was repeatedly stressed by learned counsel for the Respondents that Section 28 (11) and Explanation 2 to Section 28 can be harmonized and that for that purpose the SOR appended to the Validation Act, 2011 must be referred to, the Court is unable to undertake that exercise without doing violence to the express language of the Explanation 2 to Section 28 of the Act. In the first instance, it requires to be noticed that the SOR appended to the Validation Act, 2011 makes no reference to Explanation 2 to Section 28 at all. It is not for the Court to undertake a task that the legislature itself did not undertake, viz., rewrite Section 28 (11) to make it override Explanation 2 to Section 28 of the Act. The words 'this section' appearing in Section 28 (11) can only mean Section 28 as newly enacted. However, it does not in any manner affect Explanation 2 to Section 28 of the Act as far as the period prior to 8th April 2011 is concerned. 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.

The judgment of the Bombay High Court

48. In *Sunil Gupta v. Union of India* (*supra*) the Petitioner was served with an SCN dated 5th February 2009 by the DRI on the ground that the electronic goods imported had been mis-declared. The challenge to the SCN and the consequent adjudication was on the basis that the DRI was not competent to issue the notice. A reference was made to an earlier Notification No. 19/90-Cus. (NT) dated 26th April 1990 which dealt with appointment of officials of the DRI as Customs Officers for the area mentioned in column 1 of the Notification which referred to the different states in India or to the whole of India. On the basis of the above

Notification and the subsequent Notification dated 6th July 2011, the Bombay High Court negated the plea that the Central Government and the CBEC have not “entrusted or assigned the functions of the proper officer to the Additional Director of DRI”. It held that the Notification dated 6th July 2011 refers to Section 17 and 28 of the Act and therefore there was no force in the argument that DRI was not competent to issue the SCN.

49. The judgment in *Sunil Gupta v. Union of India* (*supra*), proceeds on the basis of the effect of Section 28(11) of the Act and that it has been given retrospective effect. The judgment does not consider the apparent conflict between Section 28 (11) of the Act on the one hand and Explanation 2 to Section 28 of the Act on the other hand. It proceeds on the basis that Section 28 (11) validates all actions taken prior to 8th April 2011 and that Section 28 (11) is a valid exercise of legislative power.

50. In dealing with Explanation 2, the Bombay High Court observed: “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”. There was no attempt made at reconciling the contradictory positions emerging from Explanation 2 to Section 28 and Section 28(11) of the Act. In the considered view of the Court, the decision of the Bombay High Court fails to address the essential problem in allowing Explanation 2 to Section 28 to remain in the statute book even while Section 28(11) was inserted.

The concept of a 'proper officer'

51. It was urged by Mr. Dubey that while Section 28(11) talks of the officers who are competent to deal with the questions of the powers of assessment under Section 17, Explanation 2 to Section 28 did not. It

merely talks about the subject matter namely non-levy, short levy or erroneous refund. According to him, for determining which officer is competent to undertake the exercise in such a situation, reference has to be made necessarily only to Section 28(11) which opens with a non-obstante clause. It talks of persons appointed as Customs Officers even prior to 6th July 2011. Therefore, even the issue of non-levy, short levy or erroneous refund which arose prior to 8th April 2011 would be governed by Section 28 of the Act as it stood prior to that date. It would not affect the competence of the officers of the DRI or the DGCEI whose competence has been recognised by Section 28(11) of the Act. According to him, therefore, the two provisions were reconcilable.

52. There is merit in the contention of the Petitioners regarding assigning of functions to an officer of the Customs for the purposes of designating him as a 'proper officer'. Section 2(34) specifically talks of an officer of Customs being assigned functions by the CBEC or by the Commissioner of Customs. If all officers of the Customs appointed as such prior to 6th July 2011 are deemed to be 'proper officers', then the administrative chaos that is likely to result, as was pointed out in the *Sayed Ali* case, would persist. The powers conferred would be overbroad since it would be without any territorial or pecuniary jurisdictional limit. This type of a validation, therefore, does not remove the defect pointed out in the *Sayed Ali* case.

53. There are two specific assignments of functions in the present context. One is the assignment of the functions under Section 17 and the other is the power of reassessment under Section 28 of the Act. The mere empowering of officers as 'proper officers' will not tantamount to "assigning them any specific function of every assessment or

reassessment” even if it is taken that because the power of assessment under Section 17 has been mentioned there should have been a ‘deemed assignment of that power. Clearly, such power of assessment has to be in relation to a territorial or pecuniary jurisdictional limit.

The scope of the Validation Act

54. In this context a brief discussion of what a validation legislation is expected to do is required to be examined. It is perfectly possible and valid for the legislature to remove the defect pointed out by the Court which examines and pronounces on the constitutional validity of a statute. In ***The Assistant Commissioner of Urban Land Tax v. The Buckingham and Carnatic Co. Ltd. 1969 (2) SCC 55***, a Constitution Bench of the Supreme Court explained that in order to remove the defects pointed out, the legislature can make what has been called ‘small repairs’. The Court pointed out that giving retrospective effect to such curing of the defect “outweighs the individual’s interest in benefitting from the defect”. In that case, the imposition of tax retrospectively by enacting the Madras Urban Land Tax Act, 1966 after removing the defect pointed out while striking down an earlier version of the Act was held to be not unreasonable.

55. However, what is essential is that the defect pointed out must be totally removed. In ***Krishnamurthi and Co. v. State of Madras (1973) 1 SCC 75*** it was explained as under:

“It is axiomatic that the Government needs revenue to carry on the administration and fulfil its obligation to the citizens. For that purpose it resorts to taxation. The total amount needed is apportioned under different heads. The fiscal enactments brought on the statute book in that connection are sometimes challenged by the tax payer in courts of law. The courts then scrutinise the legal provision to decide whether the levy of tax is legally

valid or suffers from some infirmity. In case the court comes to the conclusion that the levy of tax is not valid as the legal provision enacted for this purpose does not warrant the levy of tax imposed because of some defect in phraseology or other infirmity, the Legislature quite often passes an amending and validating Act. The object of such an enactment is to remove and rectify the defect in phraseology or lacuna of other nature and also to validate the proceedings, including realisation of tax, which have taken place in pursuance of the infirmity. Such an amending and validating Act in the very nature of things has a retrospective operation. Its aim is to effectuate and carry out the object for which the earlier principal Act had been enacted. Such an amending and validating Act to make “small repairs” is a permissible mode of legislation and is frequently resorted to in fiscal enactments.”

56. In *Vijay Mills Company Limited v. State of Gujarat* (1993) 1 SCC 345, the above principles were reiterated in the following passage:

“[T]here are different modes of validating the provisions of the Act retrospectively, depending upon the intention of the legislature in that behalf. Where the Legislature intends that the provisions of the Act themselves should be deemed to have been in existence from a particular date in the past and thus to validate the actions taken in the past as if the provisions concerned were in existence from the earlier date, the Legislature makes the said intention clear by the specific language of the validating Act. It is open for the Legislature to change the very basis of the provisions retrospectively and to validate the actions on the changed basis.”

57. In *Bakhtawar Trust v. M.D. Narayan* (2003) 5 SCC 298, the Court explained the device of enacting a validation statute in the following words:

“14. ...It is well settled that Parliament and State Legislatures have plenary powers of legislation within the fields assigned to them and subject to some

constitutional limitations, can legislate prospectively as well as retrospectively. This power to make retrospective legislation enables the legislature to validate prior executive and legislative Acts retrospectively after curing the defects that led to their invalidation and thus makes ineffective judgments of competent courts declaring the invalidity. It is also well settled that a validating Act may even make ineffective judgments and orders of competent courts provided it, by retrospective legislation, removes the cause of invalidity or the basis that had led to those decisions.”

...

“25. ...[I]t is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict. In other words, the very premise of the earlier judgment should be uprooted, thereby resulting in a fundamental change of the circumstances upon which it was founded.”

58. In *Virender Singh Hooda v. State of Haryana (2004) 12 SCC 588*, the above principles were reiterated and it was further emphasised that “public interest at large is one of the relevant considerations in determining the constitutional validity of a retrospective legislation”.

59. In *Commissioner of Income Tax v. Hindustan Bulk Carriers (2003) 3 SCC 57*, emphasis was laid on harmonising two seemingly conflicting provisions in order to avoid any inconsistency or repugnancy either within a section or between two different sections of the same statute. This was a further development of the principles of harmonising the two conflicting provisions explained in *Sultana Begum v. Prem Chand Jain AIR 1997 SC 1006* as under:

"(1) It is the duty of the Courts to avoid a head on clash between two Sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.

(2) The provisions of one Section of a statute cannot be used to defeat the other provisions unless the Court, in spite of its efforts, finds it impossible to effect reconciliation between them.

(3) It has to be borne in mind by all the Courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, is possible, effect should be given to both. This is the essence of the rule of “harmonious construction”.

(4) The Courts have also to keep in mind that an interpretation which reduces one of the provisions as a “dead letter” or “useless lumber” is not harmonious construction.

(5) To harmonise is not to destroy any statutory provision or to render it otiose”.

60. In *State of Tamil Nadu v. Thirumagal Mills Ltd. (1972) 1 SCC 176*, it was explained as under:

“The principle which has been laid down clearly is that validation of tax which has been declared to be illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is achieved by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. The Legislature can give its own meaning and interpretation of the law under which the tax was collected and by legislative that makes the new meaning binding upon the Courts. None of these methods has been adopted in the present case. See *Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*”.

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 CBEC 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.

Section 28 (11) gives untrammelled power

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.

63. A reference requires to be made at this stage to the decision in ***Sri Balaji Rice Company v. Commercial Tax Officer*** (*supra*). In that case, the challenge was to the validity of a government order issued by the Government of Andhra Pradesh whereby Assistant Commissioners and Commercial Tax Officers (Intelligence) were empowered to exercise powers of assessment over the entire State of Andhra Pradesh. In other words, the powers are not restrictive to serve local areas in respect of which under Section 4 of the Andhra Pradesh General Sales Tax Act, 1957, they could exercise powers. It was in the above context the Andhra Pradesh High Court observed that “If plurality of officers are invested with the powers of assessing the same dealer, it will result in great hardship and inconvenience to the dealers in travelling to the offices of different officers and producing accounts before different officers and will greatly handicap the dealers in making their representations and it will also lead to conflicting and contradictory orders of assessment”. Accordingly, the Notification allocating jurisdiction to the Assistant Commissioners and Commercial Tax Officers (Intelligence) over the entire State of Andhra Pradesh were held to be *ultra vires* the power of the Commissioner.

64. In ***Sivaramakrishnan v. State of Kerala*** (*supra*), it was observed as under:

“34. The existence of a multiplicity of officers of the same status exercising power over the same area can lead to chaos and confusion and conflicting orders. It may even lead to multiplicity of proceedings regarding the same subject matter causing hardship and inconvenience to dealers. Questions may also arise as to who should be the revisional or appellate authority in relation to a

particular proceeding. Section 3(2) has therefore advisedly limited the area of operation of any particular officer to certain local limits, and not unlimited throughout the State. The conferment of such power throughout the State is not therefore in consonance with Section 3(2) and is ultra vires the said provision.

35. A provision similar to Section 3(2), namely Section 4 of the Andhra Pradesh General Sales Tax Act, 1957 was considered by a Division Bench of the Andhra Pradesh High Court (Ramachandra Rao and Jagannadha Rao, JJ.) in *Sri Balaji Rice Company v. Commercial Tax Officer* and it was held at page 304 that any fixation of the territorial jurisdiction of an officer which is not limited to local limits but extends to the whole of the State of Andhra Pradesh was clearly ultra vires the powers conferred on Government under Section 4. Reliance was placed on the observations of Beaumont, C. J. speaking for the Bench in *Dayaldas Kushiram v. Commissioner of Income Tax* which was a case under Section 4 of the Income Tax Act, 1992. The Bench also held that the conferment of concurrent jurisdiction on several officers in respect of the same area was likely to result in discriminatory consequences, resulting in violation of Article 14. I am in agreement with this reasoning.”

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)

Effect of Section 28 (11)

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 words 'this Section' in the newly inserted sub-section (11) of Section 28 obviously refers to Section 28 as enacted with effect from 8th April 2011 and not the Section 28 which existed prior to that date. The effect of Section 28(11) is to treat all officers of the Customs to be ‘proper officers’ only for the purposes of new Section 28 of the Act and not the earlier Section 28 of the Act. In particular, there is no validation of the SCNs issued prior to the amendment of Section 28 of the Act. As observed in *Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan* (*supra*), a legal consequence cannot be deemed nor, therefrom, can the events that should have preceded it. 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.

71. The Court next turns to the individual cases.

Sony India Pvt. Ltd.

72. Writ Petition (C) No. 8196/2013 by Sony India Private Limited is against ten SCNs issued by the Additional Director General, DRI, Bangalore on 12th and 15th April 2013 in respect of alleged non-levy, short-levy or erroneous refund for period beginning with 1st April 2008 and bearing the following numbers: DRI F.No.S/IV/32/2011/NDLS, DRI F.No.S/IV/32/2011/Nhava Sheva, DRI F.No.S/IV/32/2011/ACC Mumbai, DRI F.No.S/IV/32/2011/ACC Chennai, DRI F.No.S/IV/32/2011/Chennai Sea, DRI F.No.S/IV/32/2011/ACC Kolkata, DRI F.No.S/IV/32/2011/Kolkata Sea, DRI F.No.S/IV/32/2011/Kochi, DRI F.No.S/IV/32/2011/Dadri and DRI F.No.S/IV/32/2011/ACC B'lore.

73. The SCNs state the names of the Commissionerates to which the SCNs are answerable. These were the corresponding Commissionerates of the various places where imports took place which are the sea ports of

Chennai, Kolkata and Bengal. This also included the ports at Nhava Sheva, the Chennai sea port, the sea port at Kolkata and ICD at Dadri. Subsequently however a common adjudicating authority was appointed viz., the Commissionerate of Customs (Imports), New Delhi.

74. In light of the law explained hereinbefore, insofar as any of the above SCNs relate to the period prior to 8th April 2011 they are clearly without jurisdiction since the ADG, DRI could not have exercised such power for a period prior to 8th April 2011. Further in terms of Explanation 2 to Section 28 as has presently been enacted with effect from 8th April 2011, for the period prior to 8th April 2011, Section 28 of the Act as it stood prior to that date will apply and not the new Section 28 of the Act.

75. That being the position, the proceedings pursuant to the above SCNs issued by the ADG, DRI regarding non-levy, short-levy or erroneous refund prior to 8th April 2011, cannot be legally sustained and are hereby quashed. All proceedings consequent thereto are also hereby quashed. However, insofar as the SCNs cover the period subsequent to 8th April 2011, the adjudication proceedings shall go on in accordance with law.

76. Writ Petition (C) No. 8196/2013 and the pending application, if any, are accordingly disposed of.

Mangali Impex Ltd.

77. The prayer in W.P. (C) No. 441 of 2013 by Mangali Impex Ltd. is for quashing of the SCN dated 31st October 2003 issued under Section 28/124 of the Act.

78. The petition has a long history beginning with samples having been drawn from 27 consignments of Calcium Stearate that were exported by

the Petitioner as well as J.K. Impex between November 1998 and January 1999. The Special Intelligence and Investigation Branch ('SIIB'), which is a unit of the Customs Department, raided the premises of the Petitioner and the residence of its Director on 9th August 2000 on the basis that the export consignment was of Calcium Carbonate and not Calcium Stearate. The Director of the Petitioner was taken into custody and series of investigations and criminal cases ensued. Later on 3rd February 2006, a closure report filed by the Central Bureau of Investigation ('CBI') was accepted by the concerned Court.

79. As far as the SCN issued to the Petitioner by the Assistant Commissioner of Customs, SIIB was concerned, a petition being Writ Petition (C) No. 4167/2011 was filed in this Court challenging it. One of the main grounds urged therein was that the officer who issued the SCN was not properly authorised to do so. The said writ petition was disposed of by recording statement of learned counsel for the Petitioner that he has no objection if the assessment proceedings are taken to their logical conclusion.

80. It is stated in the present writ petition that the Petitioner was given the liberty to challenge the constitutional validity of Section 28(11) of the Act. Indeed, in the order dated 19th May 2012, the Court noted that the Petitioner had contended that Section 28(11) of the Act is unconstitutional and observed "it is open to the Petitioner to challenge constitutional validity of the said sub-section in accordance with law. In view of the narration of Section 11 to Section 28 of the Act, the present writ petition to this extent is infructuous". It is pursuant to the above observation that the present writ petition was filed in which notice was issued on 28th January 2013.

81. The orders passed by the Court on 28th January 2013 and 4th February 2013 have already been adverted to. It was made clear by the Court that the adjudicating authority may pass an adjudication order but such order will not be given effect to. The difference between this petition and the one by Sony India Private Limited is that the impugned SCN in the present case has been issued by the Assistant Commissioner of Customs, SIIB under Section 124 of the Act. The fact, however, remains that the Assistant Commissioner, SIIB was not empowered or assigned the function of a 'proper officer' under Section 2(34) of the Act at the time he issued the SCN. Consequently, the observations of the Supreme Court in the *Sayed Ali (supra)* case will clearly apply to the case at hand.

82. In view of the aforesaid discussion in the main portion of the judgment, the Department cannot seek to rely on Section 28(11) of the Act to validate the SCN issued by the Assistant Commissioner of Customs, SIIB to the Petitioner on 31st October 2003. As has already been held by the Court, Section 28 (11) of the Act cannot validate SCNs or proceedings pursuant thereto in relation to non-levy, short-levy or erroneous refund for a period prior to 8th April 2011 if such SCNs have been issued or proceedings conducted by officers of the Customs, DRI or DGCEI or as in the present case by the SIIB, who are not 'proper officers' within the meaning of Section 2 (34) of the Act. In that view of the matter, the SCN issued to the Petitioner on 31st October 2003 and all proceedings pursuant thereto are hereby quashed.

83. W.P. (C) No. 441 of 2013 and the pending application, if any, are disposed of in the above terms.

M/s. Lakshman Overseas

84. The challenge in Writ Petition (C) No. 1185/2013 by M/s. Lakshman Overseas, M/s V-4 Manufacturing Co., M/s Everest Exports and Mr. Ashwani Aggarwal is to an impugned SCN dated 30th April 2010 issued to the Petitioner by the ADG, DRI, Delhi pursuant to a search conducted at the residential premises of Petitioner No.4 Mr. Ashwani Aggarwal on 8th September 2005.

85. In the petition there is also a challenge to a subsequent notice issued to Petitioner No. 4 on 12th February 2013 asking him to attend the hearing pursuant to the above SCN. The challenge to the SCN is essentially on the ground that Respondent No. 3 was not authorised to issue such SCN as he was not a 'proper officer' within the meaning of Section 2(34) of the Act.

86. By the order dated 22nd February 2013 while issuing notice in the present petition, the Court directed that the adjudication order will not be given effect to.

87. A counter affidavit has been filed in the present writ petition where it is denied that at the time when the SCN was issued i.e. 30th April 2010, the ADG, DRI was not assigned the function of assessment under Section 17 and reassessment under Section 28 of the Act and was, therefore, not a 'proper officer' for the purposes of Section 2(34) of the Act.

88. For the reasons already explained, the recourse to Section 28(11) of the Act as introduced with effect from 8th July 2011 cannot be had to validate the impugned SCN particularly in view of Explanation 2 to Section 28 as it presently stands.

89. Consequently, the Court quashes the impugned SCN dated 18th April

2010, and SCN dated 12th February 2013 and all proceedings consequent thereto. Writ Petition (C) No. 1185/2013 and the pending application, if any, are disposed of in the above terms.

Pace International

90. The challenge in Writ Petition (C) No. 7383/2013 by Pace International is to a SCN dated 9th March 2011 issued by the Commissioner of Customs (Preventive) to the Petitioner pursuant to the putting on hold various consignments of woollen carpets sought to be exported by the Petitioner on 10th November 2010 at the ICD, Patparganj, New Delhi. The challenge is also to the Circular dated 29th September 2011 issued pursuant to the insertion of sub-section 11 to Section 28.

91. It is stated that the said SCN was initially adjudicated upon by the Commissioner of Customs (Preventive) who by an order dated 3rd October 2012 sustained the demand raised against the Petitioner.

92. The appeal filed by the Petitioner against the said order was allowed by the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') by an order dated 29th July 2013 applying the decision of the Supreme Court in the *Sayed Ali* (*supra*) case.

93. Thereafter, on enactment of Section 28(11) of the Act, a Circular dated 23rd September 2011 was issued seeking to validate the actions prior to 6th July 2011. A fresh SCN was issued under Section 124 of the Act on 9th March 2011 by the Commissioner of Customs (Preventive).

94. While directing notice to be issued in the present petition, the Court directed that the adjudication order will not be given effect to.

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.

96. Consequently, the Court quashes the impugned SCN dated 9th March 2011 and the subsequent Circular dated 23rd September 2011 issued by the Department consequent upon the enactment of Section 28 (11) of the Act. Writ Petition (C) No. 7383/2013 and the pending application, if any, are disposed of in the above terms.

K.S. Traders

97. The challenge in Writ Petition (C) No. 211/2014 by M/s. K.S. Traders is to a SCN dated 30th January 2004 issued by the ADG, DRI to the Petitioner alleging over invoicing and recovery of draw back under Rules 16 and 16-A of the Customs & Central Excise Duty Draw Back Rules, 1995 read with Sections 75(1), 76(1) (b) and 75-A(2) of the Act.

98. This was in relation to export of readymade garments made by the Petitioner to Russia in the period between June 1999 and June 2002. It is not in dispute that at the time impugned SCN was issued, the ADG, DRI who issued it, was not a 'proper officer' in terms of Section 2(34) of the Act as well as for the purposes of Section 28 of the Act.

99. For the aforementioned reasons, the Court quashes impugned SCN dated 30th January 2004 and all proceedings consequent thereto. Writ Petition (C) No. 211/2014 and the pending application, if any, are disposed of in the above terms.

Bharat Sanchar Nigam Limited

100. The challenge in Writ Petition (C) No. 225/2014 by Bharat Sanchar Nigam Ltd. (BSNL) is to a SCN dated 3rd April 2013 issued by the DRI, Delhi to BSNL as well as an order dated 23rd May 2013 passed by the Central Board of Excise and Customs (CBEC) under Section 4 of the Act assigning several cases including the case on hand to the Commissioner of Customs (Import & General) for the purposes of adjudication under Section 4 of the Act and consequent order dated 16th December 2013 passed by the Commissioner of Customs (Import & General).

101. The brief facts are that BSNL invited tenders for planning, engineering, supply, installation, testing and commissioning etc. of 2G/3G Combo Network (Phase V) under tender dated 22nd March 2006. Ericsson India Private Limited ('EIPL') was declared as the successful bidder and an advance purchase order was issued by BSNL. Purchase orders were placed by the BSNL in each of the circles on the basis of requirements etc. BSNL filed bills of entry for deposit of customs duty.

102. Suspecting that there was collusion between BSNL and EIPL by suppressing the fact of importing the software required for the hardware thereby suppressing the true value of the hardware and evading the customs duty payable on the software relatable to hardware, a search was conducted in the premises of EIPL which led to issuance of the SCN dated 3rd April 2013.

103. Pursuant to the notice issued in the present petition, a counter affidavit was filed by the DRI. There is no denial of the fact that at the time when the SCN was issued to the Petitioner by the DRI there was no assignment of the functions of assessment or reassessment under the Act

in favour of the DRI in so far as it pertains to events that occurred prior to 8th April 2011.

104. For the reasons explained hereinbefore, Section 28(11) of the Act cannot be relied upon to validate the SCN issued in relation to non-levy, short-levy or erroneous refund for a period prior to 8th April 2011 by officers of the DRI even subsequent to the deeming fiction brought about by Section 28(11) of the Act.

105. Consequently, the Court quashes the impugned SCN dated 3rd April 2013 and all proceedings consequent thereto including the impugned orders dated 23rd May 2013 and 16th December 2013.

106. Writ Petition (C) No. 225/2014 and the pending application, if any, are disposed of in the above terms.

Sennheiser Electronics India Pvt. Ltd.

107. The SCN under challenge in Writ Petition (C) No. 863/2014 by Sennheiser Electronics India Pvt. Ltd. is dated 24th December 2011 and was issued by the ADG, DRI in relation to alleged short levy of customs duty for the period 28th January 2011 to 28th February 2013.

108. For the reasons already mentioned, the said SCN and all the proceedings consequent thereto for the period from 28th January 2011 up to 8th April 2011 cannot be sustained in law and are hereby quashed. The adjudication proceedings as regards further period beyond 8th April 2011 will proceed in accordance with law.

109. Writ Petition (C) No. 863/2014 and the pending application, if any, are disposed of in the above terms.

Comet Impex

110. The challenge in Writ Petition (C) No. 3803/2014 by M/s. Comet Impex is to an impugned SCN dated 31st October 2008 issued by the ADG, DRI, Delhi to the Petitioner in relation to reassessment of imported goods during the period prior to 8th April 2011. The challenge is also to the impugned Circular No. 44/2011-Cus dated 23rd September 2011 issued consequent upon the insertion of Section 28(11) of the Act.

111. Admittedly, the case pertains to a period prior to 8th April 2011. Further it is not in dispute that at the time when the SCN was issued, the ADG, DRI was not assigned the functions of reassessment under Section 28 of the Act and, therefore, was not a 'proper officer' for the purposes of Section 2(34) of the Act.

112. For the reasons already discussed, the impugned SCN dated 31st October 2008 and the Circular dated 23rd September 2011 are hereby quashed.

113. Writ Petition (C) No. 3803/2014 and the pending application, if any, are disposed of in the above terms.

Rajesh Gupta

114. The challenge in Writ Petition (C) No. 5262/2014 by Rajesh Gupta is to the SCN dated 14th March 2011 issued by the ADG, DRI in relation to alleged imports made through the ICD, Tughlakabad during the period prior thereto.

115. In light of the above discussion, with the ADG, DRI not being the 'proper officer' under Section 2(34) of the Act at the time when the SCN was issued, Section 28(11) of the Act cannot be referred to for validating

the acts and the SCN issued by the ADG, DRI. Since it pertains to a period prior to 8th April 2011 it is governed entirely by Section 28 as it originally stood, i.e., prior to 8th April 2011.

116. In that view of the matter, the Court quashes the impugned SCN dated 14th March 2011 issued by the ADG, DRI and all proceedings pursuant thereto.

117. Writ Petition (C) No. 5262/2014 and the pending application, if any, are disposed of in the above terms.

Daikin Airconditioning India Private Ltd.

118. The challenge in Writ Petition (C) No. 5877/2014 by Daikin Airconditioning India Pvt. Ltd. is to one consolidated SCN dated 29th May 2014 was issued to the Petitioner for alleged short levy during the period 27th May 2009 to July 2013.

119. There are three separate Commissionerates at Nhava Sheva, Chennai and Kolkata to which the Petitioner has been made answerable in terms of the said SCN.

120. As far as the period involved covers the period 27th May 2009 to 8th April 2011, it cannot be sustained in law since during the said period the ADG, DRI had no power of assessment or reassessment. To that extent the impugned SCN and all proceedings pursuant thereto for the period prior to 8th April 2011 are hereby quashed. However, for the period subsequent to 8th April 2011 the proceedings may go on in accordance with law.

121. Writ Petition (C) No. 5877/2014 and the pending application, if any, are disposed of in the above terms.

Godrej and Boyce Manufacturing Co. Ltd.

122. The prayer in Writ Petition (C) No. 4162/2015 filed by Godrej and Boyce Manufacturing Co. Ltd. is *inter alia* to the SCN dated 2nd April 2009 issued by the DRI and for declaring Section 28(11) of the Act to be constitutionally invalid. Reference is made to the decision of the Supreme Court in *Sayed Ali* (*supra*).

123. It is not in dispute that at the time the SCN was issued, the DG, DRI or any other officer of the DRI was not specifically assigned the task of reassessment and, therefore, was not a 'proper officer' under Section 2(24) of the Act. Accordingly, the impugned SCN and all proceedings consequent thereto are hereby quashed.

124. Writ Petition (C) No. 4162/2015 and the pending application, if any, are hereby quashed.

Satyam Marketing Through: Its Proprietor

125. The challenge in Writ Petition (C) No. 4841/2015 by M/s. Satyam Marketing is to an SCN dated 2nd December 2013 issued by the ADG, DRI to the Petitioner in relation to 190 bills of entry for the period prior to 8th April 2011. A list of the bills of entry for the period prior to 8th April 2011 has been appended to as Annexure B to the SCN. The ADG, DRI who issued the SCN was admittedly not a 'proper officer' for the purposes of Section 2(34) of the Act.

126. Consequently, the impugned SCN dated 2nd December 2013 and all proceedings consequent thereto to the extent they pertain to the period prior to 8th April 2011 are hereby quashed. The proceedings for the subsequent period may go on in accordance with law.

127. Writ Petition (C) No. 4841/2015 and the pending application, if any, are disposed of in the above terms.

Manoj Saboo @ Manoj Maheshwari

128. In light of the decision in *Satyam Marketing v. Union of India* (W.P. (C) No. 4841/2015), the SCN dated 2nd December 2013 issued by the ADG, DRI to the Petitioner Manoj Saboo and all proceedings pursuant thereto, which have been challenged in the present Writ Petition (C) No. 5191/2015 are hereby quashed to the extent they pertain to the period prior to 8th April 2011. The proceedings for the subsequent period may go on in accordance with law.

129. Writ Petition (C) No. 5191/2015 and the pending application, if any, are disposed of in the above terms.

Hansraj Bhatia & Co. through its Proprietor Shri Sanjeev Bhatia

130. The challenge in Writ Petition (C) No. 9379/2015 by Hansraj Bhatia & Co. is to the SCN dated 12th March 2014 issued by the ADG, DRI in relation to imports made for the period 24th June 2009 to 8th April 2011. While 8 bills of entry pertain to ICD, Tughlakabad, 6 pertain to Mumbai Port and 2 pertain to ICD, Mulund in Bombay.

131. For the reasons already explained, the said SCN is unsustainable in law and the said SCN and all proceedings pursuant thereto are hereby quashed.

132. Writ Petition (C) No. 9379/2015 and the pending application, if any, are disposed of in the above terms.

M/s. J. R. International

133. The SCN impugned in the present petition Writ Petition (C) No. 11041/2015 by M/s. J. R. International is dated 7th November 2013 issued by the ADG, DRI. This, however, pertains to bills of entry in relation to imports of 'Narrow Woven Fabrics' from China during the period 8th November 2008 to 30th November 2010, i.e., a period prior to 8th April 2011.

134. For the reasons already discussed, the said SCN dated 7th November 2013 and all proceedings consequent thereto are hereby quashed.

135. Writ Petition (C) No. 11041/2015 and the pending application, if any, are disposed of in the above terms.

Cortel India

136. The challenge in this Writ Petition (C) No. 11285/2015 by Cortel India is to a SCN dated 9th June 2014 issued by the ADG, DRI invoking Section 124 of the Act and Section 28 read with Section 9A of the Customs Tariff Act, 1975 in relation to the imports of Color Picture Tubes made through the ICD, Tughlakabad as well as ICD, Dadri for the period May 2009 to January 2011.

137. For the reasons already mentioned, the said impugned SCN and all proceedings pursuant thereto are unsustainable in law and are hereby quashed.

138. Writ Petition (C) No. 11285/2015 and the pending application, if any, are disposed of in the above terms.

Bhagwati Components Manufacturing Co. through its Director Mr. Surjit Singh

139. The challenge in this Writ Petition (C) No. 11806/2015 by Bhagwati

Components Manufacturing Co. is to an SCN dated 10th September 2004 issued by the ADG, DRI in relation to the alleged mis-declaration of value of export of Alloy Steel Forgings (Machined) from ICD, Tughlakabad and CFS, Patparganj by the Petitioner for the purpose of availing higher DEPB credit for the period prior to 8th April 2011; Adjudication Order dated 18th December 2009 passed by Commissioner of Customs (Adjudication) and order dated 4th September 2015 by the CESTAT consequent thereto.

140. For the reasons already mentioned, the impugned SCN and all proceedings consequent thereto stand hereby quashed.

141. Writ Petition (C) No. 11806/2015 and the pending application, if any, are disposed of in the above terms.

Eastron Overseas Inc.

142. The challenge in this Writ Petition (C) No. 11853/2015 by Eastron Overseas Inc. is to a SCN bearing F. No. 23/17/2011-DZU(Eastron)/5951 (Show cause notice No. 50/2014) dated 20th November 2014 issued by the ADG, DRI under Section 124 of the Customs Act read with Section 9A of the Customs Tariff Act, 1975 in relation to import of Color Picture Tubes in the year 2010.

143. For the reasons already mentioned, the impugned SCN and all proceedings consequent thereto are unsustainable in law and hereby set aside.

144. Writ Petition (C) No. 11853/2015 and the pending application, if any, are disposed of in the above terms.

Divya Electronics

145. The challenge in this Writ Petition (C) No. 11854/2015 by Divya Electronics is to a SCN bearing F. No. 23/17/2011-DZU(Anju & Divya)/4805 (Show cause notice No. 47/2014) dated 23rd September 2014 issued to the Petitioner by the ADG, DRI in relation to Color Picture Tubes imported from January 2009 to February 2011.

146. For the reasons already mentioned, the impugned SCN and all proceedings consequent thereto are unsustainable in law and hereby set aside.

147. Writ Petition (C) No. 11854/2015 and the pending application, if any, are disposed of in the above terms.

Rajesh Tripathi

148. The facts of this Writ Petition (C) No. 563/2016 are that searches were conducted in the residential premises of the Petitioner Rajesh Tripathi who is the publisher/owner/controller of Ghaziabad Samasya, Bharat Samasya and Aaj Ki Roshni all newsprint and Light Weight Coated ('LCW') paper on 28th December 2005 on intelligence that the said parties were evading customs duty by allegedly mis-declaring and undervaluing the import in connivance with the various Registrars of Newspapers in India. Consequent thereto, a SCN bearing DRI F No. 23/118/2005-DZU-Ghaziabad Samasya was issued on 17th December 2007 by the DRI to be adjudicated by the Commissioner of Customs. This resulted in an adjudication order passed by the Commissioner of Customs confirming the demand. The appeal filed before the CESTAT against the said order is still pending and the CESTAT has required the Petitioner to deposit the 10% duty amount as a pre-deposit.

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.

150. Writ Petition (C) No. 563/2016 and the pending application, if any, are disposed of in the above terms.

MAY 3, 2016
Rm

S.MURALIDHAR, J

VIBHU BAKHRU, J

