IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO.45 OF 2013

Commissioner of Customs (Export),)
having office at Jawaharlal Nehru Customs House,)
Nhava Sheva, District – Raigad) ....Appellant

V/s.

Reliance Industries Limited)
having office at Maker Chamber – IV, 3rd Floor,)
Nariman Point, Mumbai – 400 021) ....Respondent

Ms. P.S. Cardozo a/w. Ms. Maya Majumdar for appellant.
Mr. Rafique Dada, Senior Advocate a/w. Mr. Jaydeep Patel, Mr. Zubair Dada, Ms. Shilpa Balani and Ms. Parnari Shingala i/b. A.S. Dayal and Associates for respondent.

CORAM : K.R. SHRIRAM & AMIT B. BORKAR, JJ.
RESERVED ON : 9th DECEMBER 2021
PRONOUNCED ON : 20th DECEMBER 2021

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 On 25th June 2014 this appeal was admitted and the following substantial questions of law were framed :

> *(i) Whether in the facts and circumstances of the case and in law the Tribunal is justified in holding that the catalyst is different from consumable and therefore denial of benefit to the Respondent is not sustainable?*
>
> *(ii) Whether in the facts and circumstances of the case and in law the Tribunal is justified in holding that the policy will prevail over the customs notification when the Ministry of Finance, Govt. of India has every authority to regulate the customs duty benefit?*
>
> *(iii) Whether in the facts and circumstances of the case and in law the Tribunal is justified in holding that the extended period of limitation is not available despite the fact that the benefit of notification was availed by willfully mis-declaring the goods?"*

2 On 4th December 2021, the following order came to be passed :

> *1. Mr. Dada submits that in view of the judgments contained in the*

compilation tendered on 29th November 2021 and in particular judgment of the Apex Court in Canon India Private Limited V/s. Commissioner of Customs 1 and order dated 26th October 2021 in Kitchen Essentials and Ors. V/s. The Union of India and Ors. in Writ Petition No.5154 of 2021 nothing would survive in the appeals filed by the Customs department. Ms. Cardozo disagrees with Mr. Dada.

2. Therefore, the appeals be listed for hearing on 9th December 2021.

3 Ms. Cardozo submitted that where any duty has not been levied or not paid or has been short levied or short paid or erroneously refunded, or any interest payable has not been paid or part paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts, the proper officer shall, within the time prescribed from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid 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.

Ms. Cardozo further submitted that under sub Section 34 of Section 2 of the Customs Act, 1962 (the said Act), the proper officer, in relation to any function to be performed under the said Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs.

Ms. Cardozo submitted that by a Notification No.31/97-Cus. (N.T.) dated 7th July 1997, the Central Government has appointed all officers of the Directorate of Revenue Intelligence to be the officers of

Customs. The notification, for ease of reference, is scanned and reproduced hereinbelow :

Instavat

(1) Adv Cardozo 9/12/21

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THE CUSTOMS TARIFF ACT 1975 (Notification)
1964-2013

Notification No. 31/97-Cus. (N.T.), dated 7th July, 1997

In exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 38/63-Customs, dated 1st February, 1963 the Central Government hereby appoints the following persons to be the Officers of Customs, namely :-

1. Appraisers, Examiners, Superintendent Customs (Preventive), Preventive Officers, Women Searchers, Ministerial Officers and Class IV Officers in the Customs Department in any place in India.

2. Superintendents, Inspectors, Women Searchers, Ministerial staff and Class IV staff of Central Excise Department, who are for the time being posted to a Customs port, Customs airport, Land-Customs station, Coastal port, Customs preventive post, Customs Intelligence post or a Customs warehouse.

3. Superintendents, and Inspectors of Central Excise Department in any place in India.

4. All Officers of the Directorate of Revenue Intelligence.

5. All Officers of the Narcotics Control Bureau.

6. All Assistant Directors of the Central Economic Intelligence Bureau.

Ms. Cardozo also relied upon a Notification No.17/2002-Customs (N.T.) dated 7th March 2002 to submit that Additional Directors or Joint Directors of Directorate of Revenue Intelligence posted at Headquarters and

Zonal or regional units have also been appointed by the Central Government as Additional Commissioners or Joint Commissioners of Customs. The notification, for ease of reference, is scanned and reproduced hereinbelow :

Ms. P S Cardozo (1)

[illegible]

7th March, 2002

Notification No.17/2002-Customs (N.T.)

In exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962) and in supersession of notification of the Government of India in the Ministry of Finance (Department of Revenue) No.19/90- Customs (N.T.), dated the 26th April, 1990, the Central Government appoints the officers mentioned in Column (2) of the Table below to be the Commissioner of Customs, the officers mentioned in column (3) thereof to be the Additional Commissioners or Joint Commissioners of Customs and Officers mentioned in column (4) thereof to be the Deputy Commissioners or Assistant Commissioners of Customs for the areas mentioned in the corresponding entry in column (1) of the said Table with effect from the date to be notified by the Central Government in the Official Gazette:

Table

Area of Jurisdiction	Designation of the officers		
(1)	(2)	(3)	(4)
Whole of India	Additional Director General, Directorate General of Revenue Intelligence posted at Headquarters and Zonal/regional units.	Additional Directors, or Joint Directors, of Directorate of Revenue Intelligence posted at Headquarters and Zonal/regional units.	Deputy Directors, or Assistant Directors, of Directorate of Revenue Intelligence posted at Headquarters and Zonal/regional units.

D.S. Garbyal
Under Secretary to the Government of India

F.No.437/8/2001-Cus.IV

Ms. Cardozo further submitted that by another Notification No.44/2011-Customs (N.T.) dated 6th July 2011, the Central Board of Excise and Customs has assigned the functions of the proper officer to Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence for the purposes of Section 17 and Section 28 of the said Act. The notification, for ease of reference, is scanned and reproduced hereinbelow :

Ms. P. S. Gadre[illegible]

GST | Customs | Central Excise | Service Tax | [illegible]

Central Board of Indirect Taxes & Customs

Department of Revenue, Ministry of Finance, Government of India

[illegible] A Scholarship (Data Analytics) Programme of SungKyunKwan University (SKKU), Seoul, Republic of Korea under WCO Scholarship [illegible] Click here || [illegible]

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- Departmental Officers

Home / Customs / Notifications / [illegible]

[To be published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii)]

Government of India
Ministry of Finance
(Department of Revenue)

Notification No.44/2011-Customs (N.T.)

New Delhi, dated the 6th July, 2011

S.O. [illegible] (E).- In exercise of 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 section 28 of the said Act, namely:-

Table

Sl. No.	Designation of the officers
(1)	(2)
1.	Additional Director General, Additional Director or Joint Director, Deputy Director or Assistant Director in the Directorate General of Revenue Intelligence.
2.	Commissioner of Customs (Preventive), Additional Commissioner or Joint Commissioner of Customs (Preventive), Deputy Commissioner or Assistant Commissioner of Customs (Preventive).
3.	Additional Director General, Additional Director or Joint Director, Deputy Director or Assistant Director 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.

[F.No. 437/143/2009-Cus.IV]

(Vikas)
Under Secretary to the Government of India

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Ms. Cardozo further relied on a Circular No.44/2011-Customs dated 23rd September 2011 issued by the Central Board of Excise and Customs to submit that sub Section 11 in Section 28 of the said Act was brought in as an amendment with effect from 16th September 2011 and accordingly, show cause notices issued prior to 6th July 2011 by officers of Customs, which would include officers of Directorate General of Revenue

Intelligence (DRI), stand validated since these officers are retrospectively recognized as proper officers for the purpose of Section 17 and Section 28 of the said Act. The said circular, for ease of reference, is scanned and reproduced hereinbelow :

Circular No. 44 /2011- Customs

F. No.437/143/2009-Cus.IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs

229 A, North Block
New Delhi, dated 23rd September, 2011.

To

All Chief Commissioners of Customs / Customs (Prev.).
All Chief Commissioners of Customs & Central Excise.
All Commissioners of Customs / Customs (Prev.).
All Commissioners of Customs & Central Excise.
Director General of Revenue Intelligence.
Director General of Central Excise Intelligence.
All Directors General

Subject: Adjudication of appraising related Show Cause Notices- regarding

Sir / Madam,

Consequent to the judgement of Hon'ble Supreme Court dated 18.02.2011, in Civil Appeals Nos. 4294-4295 of 2002 and Nos. 4603-4604 of 2005 (commonly referred to as Sayed Ali case), Board issued an instruction F.No.437/143/2009-Cus.IV(pt) dated 15.04.2011 directing the field formations to examine pending Show Cause Notices and wherever these are not hit by time limitation to get these issued afresh by the jurisdictional Commissionerates.

2. Further, as a prospective remedial measure, in terms of Section 2(34) of the Customs Act, 1962, the Board issued Notification No.44/2011-Customs (N.T.), dated 06.07.2011. By virtue of this Notification, officers of Directorate General of Revenue Intelligence (DRI), Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates were assigned the functions of the 'proper officer' for the purposes of Sections 17 and 28 of the said Act.

3. To address the issue of validity of Show Cause Notices issued prior to 06.07.2011, which was likely to be adversely impacted by the said judgment of the Hon'ble Supreme Court, a suitable legislative change was proposed. In this regard, the President has given assent to the Customs (Amendment and Validation) Bill, 2011 on 16.09.2011 and the corresponding Act has been published in the Gazette of India dated 20.09.2011 as Act No.14 of 2011. Thus, the amendment to Section 28 has come into force w.e.f. 16.09.2011. The said Act amends Section 28 of the Customs Act, 1962 by inserting clause (11), which reads as follows:

"(11) *Notwithstanding anything to the contrary contained in any judgement, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the sixth day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section.*"

4. Accordingly, as per the amended Section 28 of the Customs Act, 1962 Show Cause Notices issued prior to 06.07.2011 by officers of Customs, which would include officers of Commissionerates of Customs

(Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence and similarly placed officers stand validated since these officers are retrospectively recognized as 'proper officers' for the purpose of Sections 17 and 28 of the said Act.

5. In this regard it may also be noted that in terms of Notification No.44/2011-Customs (N.T.), dated 06.07.2011 the officers of DRI and DGCEI are 'proper officers' for the purposes of Section 28. However, it is hereby directed by the Board that these officers shall not exercise authority in terms of clause (8) of Section 28 of the said Act. In other words, there shall be no change in the present practice and officers of DRI and DGCEI shall NOT adjudicate the Show Cause Notices issued under Section 28 of the said Act.

6. Since the matter pertaining to validity of Show Cause Notice stands settled in terms of Notification No.44/2011-Customs (N.T.), dated 06.07.2011 and amended Section 28 of the Customs Act, 1962, the Instruction F.No.437/143/2009-Cus.IV(pt) dated 15.04.2011 is no longer necessary. Hence, the said Instruction dated 15.04.2011 stands withdrawn with immediate effect.

7. Pending Show Cause Notices and cases before adjudicating authorities and before appellate and judicial authorities may be dealt with on the basis of the legal position explained above. Difficulty faced, if any, may be immediately brought to notice of the Board.

Yours faithfully,

(Subodh Singh)
OSD (Customs), Tariff Unit
Fax: 011-23092173

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4 Ms. Cardozo submitted that, therefore, the Additional Director General of DRI was a proper officer under Section 28 of the said Act and the notice was issued by a proper officer and there was nothing wrong with the notice and contested the submission of Mr. Dada as recorded in the order dated 4th December 2021 reproduced above. Ms. Cardozo submitted that

the Department has filed a Review Petition on 13th May 2021 in the matter of ***Canon India Private Limited V/s. Commissioner of Customs***[1] because in the said judgment, except the Notification bearing no.17/2002-Customs (N.T.) dated 7th May 2002, the other notifications reproduced above have not been considered and the Apex Court has also not considered the effect of sub-Section 11 in Section 28 of the said Act and, therefore, the jurisdictional issue raised by Mr. Dada is not correct.

5 Mr. Dada relied upon *Canon India Private Limited* (Supra) to submit that Additional Director General of DRI, who had issued the notice in this case, was not 'the' proper officer. Mr. Dada submitted that even if one goes alongwith Ms. Cardozo for a moment that the Additional Director General of DRI also was a proper officer under Section 28 of the said Act, still he was not 'the' proper officer because the clearance of the imported goods under concessional rate of duty was granted by the Apprising Officer of Air Cargo Complex and not the Additional Director General of DRI. Therefore, for the case at hand, 'the' proper officer will be the Apprising Officer of Air Cargo Complex or anyone authorised from the Appraisal Group and not the Additional Director General of DRI and only the Apprising Officer of Customs or someone from the Appraisal Group so authorised could have issued the show cause notice under Section 28 of the said Act. Mr. Dada submitted that in effect by issuing the show cause notice under Section 28 of the said Act, the proper officer is exercising broadly

1. (2021) SCC Online SC 200

power to review the earlier decision of assessment and such power can be exercised only by the same officer or his successor and not by another officer of another department though he may be designated to be officer of the same rank.

6 Mr. Dada submitted that even if the Supreme Court in the review petition would hold that the Additional Director General of DRI was a proper officer empowered to issue recovery notice under Section 28(4) of the said Act, still he would not be 'the' officer, who had in the first instance assessed and cleared the goods and, therefore, in the facts and circumstances of this case, can never be stated to be 'the' proper officer. Mr. Dada further submitted that the Apex Court in ***Commissioner of Customs, Kandla V/s. Agarwal Metals and Alloys***[2] and the Division Bench of this Court in ***Kitchen Essentials and Ors. V/s. The Union of India and Ors.***[3] have held that the Additional Director General of DRI is not a proper officer within the meaning of Section 28(4) read with Section 2(34) of the said Act.

7 We have considered the judgment of the Apex Court in *Canon India Private Limited* (Supra) where paragraphs 9 to 16 read as under :

> *9. The question that arises is whether the Director of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute, i.e., under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention*

2. 2021-TIOL-233-SC-CUS-LB
3. Writ Petition No.5154 of 2021 dated 26.10.2021

is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore2 has held:-

> *"14. ...Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any 2 (1980) 3 SCC 358 agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."*

10. In Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd.3 has held:-

> *"9. ...'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."*

11. There are only two articles 'a (or an)' and 'the'. `A (or an)' is known as the Indefinite Article because it does not specifically refer to a particular person or thing. On the other hand, 'the' is called the Definite Article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28 (4), it could have used the word 'any'.

12. Parliament has employed the article "the" not accidently but with the intention to designate the proper officer who had assessed the goods at the time of 3 (2001) 3 SCC 609 clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2 (2) (c) of the Customs Act, 1962.

13. The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods, i.e., the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.

> *14. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.*
>
> *15. It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28 (4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28 (4)].*
>
> *16. It is obvious that the re-assessment and recovery of duties, i.e., contemplated by Section 28(4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.*

The proper officer, therefore, need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office and in this case, anyone authorised from the appraisal group.

The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decisions of assessment. Such power is not inherent in any authority. Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute. It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. It is impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28 (4) of the said Act to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake re-assessment which is involved in

Section 28 (4) of the said Act.

8 Therefore, the proper officer, to whom power is conferred by Section 28 of the said Act and other related provisions would necessarily mean the proper officer, who in the first instance, assessed and cleared the goods, i.e., Apprising Officer of Air Cargo Complex. Therefore, the Additional Director General of DRI, cannot be the proper officer in the facts and circumstances of the case.

9 On the submissions of Ms. Cardozo that the Supreme Court has not considered all the circulars and provisions of sub-Section 11 in Section 28 of the said Act in *Canon India Private Limited* (Supra) and we would agree with her still, even if the Supreme Court reviews the judgment of *Canon India Private Limited* (Supra), the review petition having been filed, and holds the Additional Director General of DRI was also the proper officer conferred with powers of Section 28 of the said Act, in the facts and circumstances of this case, the Additional Director General of DRI not having, in the first instance, assessed and cleared the goods, he will not be 'the' proper officer for issuance of show cause notice under Section 28(1) of the said Act. The appeal has to fail because the show cause notice originally issued itself would be termed *non-est*. The entire proceeding in the present case initiated by the Additional Director General of DRI by issuing show cause notice is invalid without any authority of law and is liable to be set aside.

10 In the circumstances, we do not think it is necessary to answer the substantial questions of law as framed by this Court in its order dated 25th June 2014.

11 Appeal disposed accordingly.

(AMIT B. BORKAR, J.) **(K.R. SHRIRAM, J.)**