



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.09.2021

CORAM

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P. (MD)Nos.8574, 8579 & 8581 of 2021

and

W.M.P. (MD)Nos.6456, 6457, 6459 & 6460 of 2021

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M/s.Target Lubricants Pvt. Ltd.,
Rep. by its Managing Director,
Abdul Majeed Salim,
No.186/4 Coimbatore Industrial Estate,
Kurichi, Coimbatore - 641 021. ... Petitioner in All Cases

Vs.

1.The Commissioner of Customs
Custom House,
Tuticorin - 628 004.

2.Additional Director General,
Directorate of Revenue Intelligence,
Chennai Zonal Unit, No.27, Adarsh Towers,
G.N (Chetty) Road, T.Nagar,
Chennai - 600 017. ... Respondents in All Cases

Common Prayer in W.P(MD)No.8574 & 8581 of 2021: Writ Petitions filed under Article 226 of Constitution of India, to issue Writs of Certiorari, calling for the records pertaining to the impugned show cause notices dated 06.12.2012 issued in F.No.VIII/48/21/2010 DRI-TTN issued by the 2nd respondent and quash the same.

Prayer in W.P(MD)No.8579 of 2021: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Mandamus, directing the 1st Respondent to return the Bank Guarantees Nos. LG No.7/2011 dated 07.02.2011 and LG No.8/2011 dated 21.02.2011 and refund the amount of Rs.66,08,292/- deposited with the 1st Respondent.

For Petitioner : Mr.G.Derrick Sam
For Respondents : Mr.R.Aravindan,
Senior Standing Counsel
[In all Writ Petitions]

COMMON ORDER

Since the issue raised in these writ petitions is one and the same, with the consent of the learned Counsel appearing for both sides, all these writ petitions were heard together and are disposed of by this common order.



2. For the sake of convenience, the facts as projected by the petitioner in W.P. (MD) No. 8574 of 2021 is traversed hereunder:

2.1. The Directorate of Revenue Intelligence, Regional Unit at Coimbatore had seized mineral oil contained in 25 barrels, which were imported vide Bill of Entry No. 2247161 dated 12.10.2010, by their operation on 21.10.2010, on the suspicion that it was base oil and not rubber processing oil as claimed by the petitioner.

2.2. In this regard, show cause notice was issued to the petitioner on 06.12.2012, by the Additional Director General, DRI, Zonal Unit, Chennai. That show cause notice, after adjudication, ended in an order-in-original of the respondent dated 20.02.2014.

2.3. Felt aggrieved over the said order-in-original, the petitioner preferred an appeal before the CESTAT, Chennai, which having considered the appeal of the petitioner allowed to the extent to set aside the order-in-original and remanded the matter back to the original authority to have a denovo enquiry and to pass orders.

2.4. Pursuant to which, denovo enquiry was conducted and after denovo, order-in-original was again passed by the respondent on 21.11.2014. Even this order once again was interjected by the petitioner by way of appeal preferred before the CESTAT. This time also, the CESTAT, of course, having considered the grounds raised by the petitioner that, the petitioner was not given the chance of cross-examining the witnesses or persons concerned, set aside the order-in-original ie., the order passed in denovo enquiry and once again remanded the matter back to the original authority.

2.5. In this regard, it is to be noted that, while the CESTAT passed orders on 03.01.2018, remanding the matter to the original authority, a direction was given that the adjudication can be conducted by the original authority after a decision is made by the Hon'ble Supreme Court in **Mangali Impex Ltd. & others Vs. Union of India**, which was pending before the Hon'ble Supreme Court.

3. It is to be noted that, after the 2011 amendment, under which, Section 28 of the Customs Act underwent an amendment, Sub-Section 11 of Section 28 was inserted by which, power has been vested with the DRI officials also to initiate adjudication proceedings by issuing show cause notice and when that was questioned; the Delhi High Court in **Mangali Impex Case** has taken a decision in favour of the noticees as that insertion of Sub-Section 11 of Section 28 would only have a prospective effect. Therefore, whatever proceedings initiated prior to the amendment ie., prior to 2011 should be governed only by the then existing provisions of Section 28. As against the said view taken by the Delhi High Court in **Mangali Impex Case**, the Revenue preferred an appeal before the



Hon'ble Supreme Court by way of Special Leave Petition and that was the case pending before the Hon'ble Supreme Court which was in fact referred by the CESTAT, while passing the order of remand dated 03.01.2018.

4. When that was the position, since the **Mangali Impex Case** was still pending before the Hon'ble Supreme Court, the original authority either has to decide the issue after the **Mangali Impex Case** is decided or can prefer an appeal against the order passed by the CESTAT.

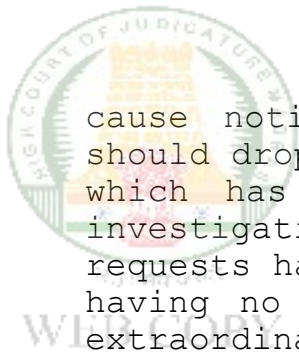
5. In this context, it is to be noted that, as projected by the revenue side that, as against the order passed by the CESTAT dated 03.01.2018, though belatedly, appeal was filed in C.M.A. Sr.No.17943 of 2019 and that is at the condone delay stage and the said appeal is pending before this Court.

6. Be that as it may, subsequently, the issue had once again been considered as to whether the DRI officials can be treated as proper officials within the meaning of Section 28(1) and 28(4) of the Customs Act, in the case of **M/s.Canon India Pvt. Ltd., Vs. Commissioner of Customs** reported in **2021 SCC Online SC 200**, where the Hon'ble Supreme Court by order dated 09.03.2021 has held that, the DRI officials are not proper officers within the meaning of Section 21 and therefore, whatever proceedings initiated by way of show cause notice towards adjudication are vitiated on that ground itself.

7. In view of the law having been declared so by the Hon'ble Supreme Court in the **Canon India case**, the petitioner has given representations on 17.03.2021 and 25.03.2021 to the respondent/Revenue to take the law declared by the Hon'ble Supreme Court in **Canon India case** and accordingly, drop the proceedings at the show cause notice stage and consequently, refund the amount and bank guarantee deposited during the investigation, to the petitioner.

8. Since those requests made by the petitioner dated 17.03.2021 and 25.03.2021 have not been considered, the petitioner was triggered to file these writ petitions with the respective prayers.

9. Stating all these aforesaid findings, learned counsel appearing for the petitioner would submit that, after 03.01.2018 CESTAT order, the respondent/Revenue has to wait for the decision to be made by the Hon'ble Supreme Court in **Mangali Impex Case**. But the fact remains that the said case is still pending before the Supreme Court. However in the meanwhile, the issue has been given a quietus and the law has been declared in **Canon India case** by order dated 09.03.2021. By virtue of that, the entire proceedings issued by the DRI officials against the petitioner by issuance of show



cause notice dated 06.12.2021, got vitiated and therefore, they should drop the proceedings and refund the amount and bank guarantee which has been deposited or paid by the petitioner during the investigation and when these requests have been made, since the said requests have not been considered by the respondents, the petitioner having no other option has approached this Court by invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution.

10. In this context, learned Counsel for the petitioner would submit that, the law declared by the Hon'ble Supreme Court in **Canon India case** has been followed in number of cases throughout the country and in this regard, atleast two orders have been passed by this Court in the writ jurisdiction and one more order has been passed by the High Court of Karnataka, of course, strictly following the Supreme Court in **Canon India case**. Learned Counsel appearing for the petitioner would seek indulgence of this Court to pass necessary orders quashing the impugned show cause notice dated 06.12.2012, on the ground of want of jurisdiction and consequently, direct the respondent to refund the amount deposited by the petitioner during investigation.

11. Per contra, Mr.R.Aravindan, learned Standing Counsel appearing for the respondent/Revenue, on instructions would submit that, as against the order of remand passed by the CESTAT dated 03.01.2018, appeal has been filed, of course with condone delay petition in C.M.A. Sr.No.17943 of 2019 and on that stage, it is still pending before this Court. After having suffered with an order-in-original, the petitioner had already approached the CESTAT and first time, though got a remand order, a denovo order-in-original has been passed, as against which, once again the petitioner preferred an appeal before the CESTAT, where though he was able to get an order in his favour, he cannot now turn around and state that the show cause notice dated 06.12.2012 is vitiated for want of jurisdiction.

12. In this context, learned Standing Counsel would further contend that, the law declared in **Canon India case** dated 09.03.2021 may not be applicable to the facts of the present case, as the petitioner having accepted the show cause notice had responded to the same and after adjudication, suffered with order-in-original twice, of course, which are subject matter before the CESTAT and both time, the petitioner was able to succeed before the CESTAT, to get a remand order. Therefore, at this eleventh hour, the benefit accrued on the basis of the law declared by the Hon'ble Supreme Court in **Canon India case** cannot be enjoyed by the petitioner as that ruling would apply to cases where the respective noticees challenge the order-in-original or show cause notice without going for regular appeal, to set aside the same, on the ground of want of jurisdiction. Since, such a situation is not available to the



petitioner, the **Canon India case** cannot be availed by the petitioner and therefore, on that ground, these writ petitions cannot be entertained by this Court.

13.Learned Standing Counsel would also submit that the validity of the order passed by the CESTAT dated 03.01.2018 itself is in question in the regular appeal in C.M.A. Sr.No.17943 of 2019, before this Court. At this stage, nullifying all these proceedings, the petitioner cannot seek for quashment of the impugned show cause notice dated 06.12.2012, as the said show cause notice having been accepted and acted upon. Therefore, learned Standing Counsel for the respondents would submit that, the petitioner cannot have a successful challenge of the show cause notice dated 06.12.2012, at this stage in the present writ petition. Consequently, they are not entitled to get back the amount and bank guarantee. Therefore, the prayers in these writ petitions are liable to be dismissed.

14.I have considered the submissions made by the learned Counsel appearing for the parties and have perused the materials placed before this Court.

15.Now the only controversy arising in these cases is that, whether the principle laid down by the Hon'ble Supreme Court or the law declared by the Supreme Court in **Canon India case** dated 09.03.2021 can be made applicable to the petitioner's case and accordingly, the prayers sought for in these writ petitions can be allowed or not.

16.The judgment of the Supreme Court in **Canon India case** has already been considered by this Court two times. In earlier occasion, a learned Judge of this Court in W.P.(MD)No.10186 and 10187 of 2014, in the case of Quantum Coal Energy (P) Ltd., vs. the Commissioner, office of the Commissioner of Customs, Tuticorin, by its order dated 16.03.2021 has considered the import of **Canon India case**, and allowed those writ petitions. Thereafter, when similar writ petitions came up before me in W.P.(MD)Nos.4032 to 4034 of 2018, I had an occasion to consider all these aspects, including the import of the law declared by the **Canon India case**, where, by order dated 08.09.2021, having exhaustively considered these aspects, I passed the following orders:

"15. I have considered all these rival submissions made by the learned counsel appearing for both sides and have perused the materials placed before this Court.

16. Section 28(1) of the Customs Act, after it underwent amendment in 2011, reads thus:

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,



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 (two years) 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.

(PROVIDED that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed.)

(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:

(PROVIDED) that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.

17. The word "The proper officer" has been mentioned in Section 28(1) (a) of the Act, under which, only the proper officer shall initiate the proceedings by issuing Show Cause Notice. Here in the case in hand, the Additional Director General Directorate of Revenue Intelligence, Chennai admittedly had issued Show Cause Notice dated 17.03.2009 which ultimately culminated in the order-in-original dated 28.08.2014. Therefore, the fact remains that, the initiation of the proceedings under Section 28(1) of the Act is only by the Directorate of Revenue Intelligence official.

18. If the Directorate of Revenue Intelligence official initiated proceedings under Section 28(1) of the Customs Act, whether that would stand in the legal scrutiny or get vitiated was the prime question posed before the Hon'ble Supreme Court in Canon India case.

19. While considering the said issue, the Hon'ble Supreme Court has held as follows:



9. The question that arises is whether the Directorate 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 wilful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention 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, Bangalore** 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 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." In **Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd.** 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."

1. 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'.

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



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

21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

23. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set aside and the ensuing demands are also set aside.

20. After having analyzed the fact whether the Directorate of Revenue Intelligence officials are



proper officers under the provisions of the Customs Act especially in the context of Section 28, the Hon'ble Supreme Court has held that, the proceedings in the said case initiated by the Additional Director General Directorate of Revenue Intelligence, by issuing the Show Cause Notice was invalid and without any authority of law and the same therefore was liable to be set aside.

21. The subtle difference in this case is only the provision. Here, the Show Cause Notice was issued under Section 28(1) of the Customs Act and in that case, since in 2011 Section 28 of the Customs Act underwent amendment under which Sub-section(4) was inserted by which extended limitation has been made and therefore in that case, under Sub Section (4) of Section 28 such notice was issued. However, in the present case in hand, since it was in the year 2009 i.e pre-amendment, notice was issued under Section 28 (1) of the Act itself under the unamended sub section (1) of Section 28. Otherwise, the issue is one and the same and factually the petitioners' case as well as the Canon India case are similarly placed.

21. However when this decision of Canon India case was brought to the notice of the learned Judge, who dealt with the batch of cases in Sri Sathya Jewellery cited supra, the learned Judge in paragraph No.6 of the judgment has taken the following view:

6.The respective learned Senior Standing Counsels appearing on behalf of the respondents objected the said contentions by stating that the respondents have already filed review petitions in Review Petition (Diary) Nos.9580, 9584, 9587, 9591 of 2021 before the Hon'ble Supreme Court of India on 07.04.2021. Their contention is that, certain notifications issued were not brought to the notice of the Hon'ble Supreme Court of India and further, it is a regular appeal filed after exhausting the statutory remedies provided under the Act, and the writ petitioners cannot rely on the said judgment in view of the fact that the petitioners have not exhausted the statutory appellate remedy provided under Sections 128 and 129 of the Customs Act. The case before the Hon'ble Supreme Court of India was decided in regular appeal, and thus, the appellants had exhausted the appellate remedy provided under the Act, whereas, the petitioners in these writ petitions have not exhausted the alternate remedy and they have filed the writ petitions in order to avoid



the Pre-Deposit as contemplated under the Statute. Therefore, the petitioners are not entitled for any relief.

22. In fact this view expressed by the learned Judge in Sathya Jewellery case, has been heavily relied upon by the learned Standing Counsel appearing for the respondent Customs.

23. The learned Judge in the said order has taken the view that, in Canon India case the petitioner/Appellants after having exhausted the appeal remedy had gone to the Supreme Court by way of Special Leave Petition. However in the case in hand before the learned Judge in Sathya Jewellery case, the petitioners had come to the High Court as against the order-in-original directly, therefore, the parties could be relegated to approach the appellate authorities.

24. However, the learned counsel for the petitioner in this context has relied upon a judgment of the Karnataka High Court which is a recent one dated 14.07.2021 in the matter of **Sri Mohan C.Suvarna** referred to above. In the said case extensive consideration have been made by the learned Judge of the Karnataka High Court, where, under the heading "'applicability of judgment in M/s.Canon India case'" the learned Judge has discussed the following:

5) Applicability of judgment in M/s.Canon India Private Limited: (i) It is to be noticed that the starting point of the present proceedings relates to the show cause notice dated 07.01.2008 which relates to the period prior to 2011. Certain amendments were made to the Customs Act, 1962 in 2011. Under Section 28 of the Customs Act as was applicable during the relevant period of time, the power is vested in 'the proper officer' to take action where duty has not been levied or has been short-levied or erroneously refunded and such proceedings was to be taken by 'the proper officer.' Subsequent to the amendment of Section 28, 'the proper officer' still retains jurisdiction, though there are certain procedural modifications.

(ii) The aspect of who is 'the proper officer' as regards to Section 28 of the Customs Act prior to the amendment was considered by the Apex Court in the case of Commissioner of Customs v. Sayed Ali and Another in (2011) 265 ELT . Subsequent to the



judgment of Apex Court in Sayed Ali's case (supra), certain amendments were effected to the Customs Act, including the introduction of Section 28(11) inserted by the Customs (Amendment and Validation Act) 2011 with effect from 16.09.2011 to the effect that "..... all persons appointed as officers of Customs under sub-section (1) of Section 4shall be deemed to have been and always had been the proper officers for the purposes of this Section." The effect of such amendments was considered by High Court of Delhi in the case of Mangali Impex Ltd. v. Union of India reported in 2016 (335) E.L.T. 605 (Del.), which once again reiterated that the amendment does not in any way alter the position insofar as the law laid down in Sayed Ali's case (supra). The judgment of the Delhi High Court, it is stated is pending consideration before the Apex Court in S.L.P.(C) No.20453/2016, wherein the judgment in Mangali's case has been stayed, by the Apex Court.

(iii) It ought to be noted that the present judgment of Apex Court in the case of M/s.Canon India Private Limited (supra) passed in Civil Appeal No.1827/2018 and connected matters is a judgment by a Bench consisting of Three Judges and has referred to the judgment in Sayed Ali's case (supra) in approval.

(iv) The Apex Court in the case of M/s.Canon India Private Limited (supra) has specifically raised the question at para-9 of its decision, which reads as follows:-

"9. The question that arises is whether the Directorate 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 wilful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention 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. v. Coffee Board, Bangalore² has held:-

¹⁴ Secondly, and more importantly, the user of the
<https://hcservices.ecourts.gov.in/hcservices>



definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any 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."

The Apex Court while referring to 'the proper officer' found in Section 28 has specifically recorded a finding that it is only 'the proper officer', and 'that proper officer' alone can adjudicate the matter.

Further Apex Court has clarified at para 15 as follows:

"15. 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)]."

Accordingly, the Apex Court has held that 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 the re-assessment [which is involved in Section 28(4)].

(v) The Apex Court has also considered the aspect as to whether the Additional Director General of DRI who has been appointed as an Officer of Customs has been entrusted with the functions under Section 28 as 'the proper officer' under the Customs Act. The Court, after referring to the notification dated 02.05.2012 at paras-19 and 20 has concluded that the notification issued by the Central Board of Excise and Customs in exercise of power under Section 2(34) of the Customs Act would not be sufficient, as the said Section does not confer any power on the Authority to entrust any



functions of officer, and that Section 2(34) merely defines who 'the proper officer' is.

(vi) The Apex Court has specifically observed that it is only Section 6 of the Customs Act which provides for entrustment of functions of Customs Officer on other officers of the Central or the State Government or local authority. At para-21 of the decision, it is specifically observed that the Central Government ought to have passed necessary orders under Section 6, if it was intended that officers of the Directorate of Revenue Intelligence were to be entrusted with the functions of Customs Officer.

(vii) The Apex Court has further clarified that the notification which purports to entrust the functions as 'proper officer' issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2(34) of the Customs Act is invalid as also having been issued by the Authority which has no power to do so.

(viii) Finally, the Apex Court after referring to the observations in the case of Commissioner of Customs v. Sayed Ali and Another reported in (2011) 3 SCC 537 has concluded at para-24 as follows:-

"24. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set-aside and the ensuing demands are also set-aside".

(ix) In the present case, applying the law laid down in the case of M/s.Canon India Private Limited (supra) clearly, the proceedings that have been initiated by issuance of a show cause notice dated 07.01.2008 by the Additional Director General, DRI is also liable to be set aside in light of the law laid down by the Apex Court as referred to above.

23. While judgment of High Court of Madras in the case of Commissioner of Customs (Air) vs. M/s. Premier Tours & Travels (Chennai) Pvt. Ltd. and another, in C.M.A. No.2746/2009 and M.P. No.1/2009 dated 04.02.2021 where identical contentions were raised and the consideration of such aspect has been relegated to be decided in the appeal, however this Court does not find any reason to take the same view, in light of the clear findings in the case of M/s.Canon India Private Limited (supra) which does not leave any scope for



further adjudication and the law laid down by the Apex Court ought to enure to the benefit of the petitioners.

24. It needs to be noted that the High Court of Madras (Madurai Bench) by order dated 16.03.2021 in the case of Quantum Coal Energy Pvt. Ltd. vs. The Commissioner of Customs in W.P.(MD) Nos.10186 & 10187 of 2014 and M.P.(MD) Nos.1 & 1 of 2014 has taken a different stand by setting aside the proceedings initiated by the Customs Authority where the show cause notice was issued by the Additional Director General of DRI while referring to the judgment in the case of M/s.Canon India Private Limited (supra) and this Court finds that, that would be the only logical conclusion to be arrived at and to take any other stand would only result in overreaching the decision of Apex Court, which is plainly impermissible.

25. It is the submission made by learned Additional Solicitor General that Review Petition has been filed which was the stand taken by the authorities in their statement of objections filed on 07.04.2021. As the matter was posted on numerous occasions thereafter, there has been no further development in the review proceedings and it is submitted that the matter is still pending consideration. Needless to state that there has to be finality once the law is laid down by a judgment of the Apex Court and any further deferment may not be justified. Further, if the Review Petition is disposed, the legal consequences would enure to the benefit of the parties involved.

26. Accordingly, the writ petitions are allowed. The Order-in-original Sl.No.BLR-CUSTM-AIR-003/16-17 dated 27.02.2017 at Annexure-G in both the writ petitions are set aside while holding specifically that the show cause notice at Annexure-B dated 07.01.2008 is one that is not issued by 'the proper officer'. The Authorities are at liberty to take out fresh proceedings as per law, in light of the discussion as above.

27. The oral request made by learned counsel appearing for respondent No.2 to keep the order in abeyance is refused, as the Court has passed the order on the basis of the judgment of Apex Court in the case of M/s.Canon India Private Limited vs. Commissioner of Customs reported in 2021 SCC Online SC 200, which is the law as on date.



25. In the said decision, all the queries/objections raised by the learned Standing Counsel appearing for the respondent Customs herein, including that, as against Canon India judgment, review has been field and by virtue of the amendment made in Section 28 by inserting Sub Section (11) the Customs Authorities have every right to issue Show Cause Notice by any official, who can be treated as a proper officer, have been considered and answered.

26. I am in respectful agreement with the view taken by the learned Judge of the Karnataka High Court in the said case in Sri Mohan C.Suvarna cited supra.

27. It is a settled preposition of law that, normally in tax matters, as against the order-in-original the writ petition would not be entertained unless the appeal remedy is exhausted and the tax payer/assessee has to approach the High Court only through proper channel by filing an appeal against the order passed by the appellate authority. However, there are exceptions to the general rule, where, under three circumstances the writ petitions are entertained. In the first category, if the principle of natural justice is violated and in the second category if there is any statutory violation and in third category if for want of jurisdiction the order passed by the authorities concerned is vitiated.

28. Here in the case in hand, though the said plea of want of jurisdiction was raised there was no ground at the time of filing the writ petitions in the year 2018, however during the pendency of the writ petition law has developed and the Canon India judgment has come in March 2021. After Canon India's judgment atleast two decisions of this Court as well as the Karnataka High Court on the same point by the respective writ courts had been rendered, where, in the judgment of the Karnata High Court referred to above, this issue has been extensively discussed and by applying the ratio of Canon India judgment the learned Judge allowed the writ petition stating that the proceedings initiated under Section 28 of the Customs Act by any other officer other than a proper officer shall be vitiated, therefore, the entire proceedings was interfered with and set aside.



29. Therefore in this context, even though the learned Standing Counsel appearing for the respondent has raised the vehement contention that the ground of want of jurisdiction now canvassed by the petitioner in view of Canon India judgment was not available to the petitioner either at the time of issuing Show Cause Notice or at the time of adjudication or passing of order-in-original even at the time of filing writ petition in 2018, cannot have a legal backing as the law declared by the Supreme Court in Canon India case is only reiterating the law which is already available in statute under Section 28 of the Customs Act long back.

30. More over the view expressed by the learned Judge in Sathya Jewellery's case cited supra is concerned, whether it is a direct writ petition against order-in-original or writ petition or appeal proceedings before this court after exhausting the appellate remedy, would not make a difference. The want of jurisdiction ground can very well be taken at any stage either at the first instance directly before this Court against the order-in-original or at final stage after exhausting the appeal remedy. Therefore, such distinction which was trying to be made by the learned Judge in Sri Sathya Jewellery case in my considered view, may not be available if we applying the principles laid down by the Supreme Court in Canon case. In this regard, the view expressed by the Karnataka High Court in the said case of Shri Mohan C.Suvarna cited supra can very well be pressed into service in order to meet these circumstances.

31. Therefore, looking from any angle, since admittedly the Show Cause Notice dated 17.03.2009 was issued by the Additional Director General of Directorate of Revenue Intelligence, Chennai which culminated in the impuged order-in-original dated 28.08.2014, the said proceedings would not stand in the legal scrutiny and therefore, it is liable to be interfered with.

32. In the result, this Court is inclined to order these writ petitions with the following directions:

The respective impugned orders and the consequential impugned order, in all these writ petitions are quashed. In view of the same, it is open to the respondents to act upon in the manner known to law, especially under the provisions of Customs Act by



taking into account the law laid down by the Hon'ble Supreme Court in *Canon India* case cited supra.

33. In fine, these writ petitions are ordered accordingly. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed."

17. Though a plea was raised by the Revenue side, that even in Deepak Gopaldas Bajaj batch case cited supra, as against the **Canon India case** dated 09.03.2021, the Revenue has filed review, that aspect also has been considered by the learned Judge of the Karnataka High Court in the judgment which has been taken note of in my order dated 08.09.2021. Also, it is to be noted that, subsequent to **Canon India case** dated 09.03.2021, a similar issue came up before the Hon'ble Supreme Court in the case of **Commissioner of Customs, Kandla Vs. M/s. Agarwal Metals and Alloys** in Civil Appeal No.3411 of 2020, where the Hon'ble Supreme Court by order dated 31.08.2021, has passed the following order:

"Delay condoned.

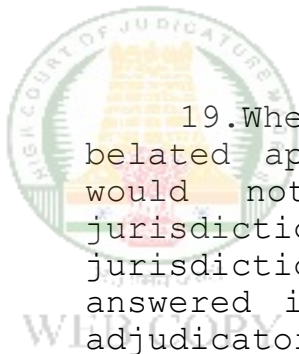
In view of decision dated 09.03.2021 of three judge Bench of this Court in Civil Appeal No.1827 of 2018 titled as "M/s.Canon India Private Ltd. Vs Commissioner of Customs" reported in 2021 (3) SCALE 748, these appeals must fail as the show cause notice (s) in the present cases was also issued by Additional Director General (ADG), Directorate of Revenue Intelligence (DRI), who is not a proper officer within the meaning of section 28(4) read with section 2(34) of the Customs Act, 1962.

Hence, these appeals stand dismissed.

However, dismissal of these appeals will not come in the way of the competent authority to proceed in the matter in accordance with law.

Pending application(s), if any, stand disposed of."

18. Therefore, by the very latest order dated 31.08.2021, the principle laid down by the Hon'ble Supreme Court in **Canon India case** has once again been taken note of and followed, based on which the appeal filed by the Customs was rejected in the said Civil Appeal. Therefore, the consistent view taken by the Hon'ble Supreme Court insofar as the law having been declared in **Canon India case** makes it very clear that, as on date, insofar as the proceedings initiated by any other officer other than the proper officer is vitiated, especially, if those proceedings were initiated prior to 2011 ie., pre-amendment of Section 28.



19. When that being so, merely because the Revenue had filed belated appeal as against the CESTAT order dated 03.01.2018, it would not preclude the petitioner to raise the point of want of jurisdiction, as it goes to the root of matter, when the jurisdiction itself is questioned and the said point is to be answered in favour of the noticee, the question of deciding the adjudicatory process on merits does not arise. Therefore, the said objection as projected by the learned Standing Counsel for the Customs stating that the appeal filed by it since is pending in SR stage, the petitioner cannot file these writ petitions, taking the ground of want of jurisdiction, cannot be countenanced.

20. In view of the aforesaid decisions and the reasons stated, this Court has no hesitation to hold that the petitioner is entitled to succeed in these writ petitions.

21. In the result, the following orders are passed in these writ petitions:

"The impugned show cause notice dated 06.12.2012 is quashed. As a sequel, the petitioner would be entitled to get back the amount and the bank guarantee, if any deposited during the investigation. However, it is made clear that the quashment of the show cause notice dated 06.12.2012, will not preclude the respondents to act in accordance with law, if they are advised to do so."

22. With the above observations and directions, these writ petitions are allowed to the terms indicated above. However there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

MR

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



To

1.The Commissioner of Customs
Custom House,
Tuticorin 628 004.

2.The Additional Director General,
Directorate of Revenue Intelligence,
Chennai Zonal Unit, No.27, Adarsh Towers,
G.N. (Chetty) Road,
T.Nagar, Chennai-600 017.

Common Order made in
W.P. (MD)Nos.8574, 8579 & 8581 of 2021

Dated:
30.09.2021

SE (CO)

GC (21.12.2021) 19P 3C